



SUPREME COURT OF CANADA

CITATION: R. v. Breault, 2023
SCC 9

APPEAL HEARD: September 14,
2022

JUDGMENT RENDERED: April
13, 2023

DOCKET: 39680

BETWEEN:

His Majesty The King
Appellant

and

Pascal Breault
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Association
québécoise des avocats et avocates de la défense and Association des avocats
de la défense de Montréal-Laval-Longueuil**
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer,
Jamal and O’Bonsawin JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 69)

Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin,
Kasirer, Jamal and O’Bonsawin JJ. concurring)

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* Brown J. did not participate in the final disposition of the judgment.

His Majesty The King

Appellant

v.

Pascal Breault

Respondent

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**Attorney General of Canada,
Attorney General of Ontario,
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Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal
and O’Bonsawin JJ.

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ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Impaired driving — Testing for presence of alcohol or drug — Demand to provide breath sample forthwith — Failure or refusal to comply with demand — Individual stopped by police officers after being observed driving all-terrain vehicle while intoxicated — Police officer demanding that individual provide breath sample forthwith even though officers did not have approved screening device in their possession — Individual repeatedly refusing to provide requested sample — Individual arrested for refusing to comply with police officer's demand — Whether validity of demand made by police officer requires that officer have immediate access to approved screening device at time demand is made — Criminal Code, R.S.C. 1985, c. C-46, ss. 254(2)(b), 254(5).

On April 2, 2017, two police officers were informed by forest trail patrollers that an individual who was intoxicated was driving an all-terrain vehicle (“ATV”). At about 1:35 p.m., the police officers arrived at the scene, saw B and stopped him as he was about to leave the scene on foot. One of the officers noticed that B’s eyes were bloodshot and that his breath smelled strongly of alcohol. At 1:41 p.m., that officer radioed for an approved screening device (“ASD”) to be brought to him, since the officers did not have one in their possession. Once he had requested an ASD, the officer demanded that B provide forthwith a breath sample pursuant to s. 254(2)(b) of the *Criminal Code*. Starting at 1:45 p.m., B refused three times to provide the requested sample on the ground that he had not been driving the ATV in question. He was arrested

for refusing to comply with a demand to provide a breath sample contrary to s. 254(5) *Cr. C.*

The Municipal Court judge held that the validity of the demand made by the police officer did not depend on the presence of an ASD at the scene. He convicted B of the offence of refusing to comply with a demand made under s. 254(2) *Cr. C.*, contrary to ss. 254(5) and 255(1) *Cr. C.* B's appeal to the Superior Court was dismissed, but his subsequent appeal to the Court of Appeal was allowed. The Court of Appeal found that, in order for a demand to be valid, the peace officer must be in a position to demand that the driver provide a breath sample forthwith, which means that the officer must have immediate access to an ASD. The court was of the view that the demand made to B by the police officer was invalid due to the absence of an ASD. It reversed the lower courts' judgments and directed that a judgment of acquittal be entered.

Held: The appeal should be dismissed.

The Crown has not shown that there was any unusual circumstance that would account for the absence of an ASD at the scene and thereby justify a flexible interpretation of the immediacy requirement. The demand made by the police officer was therefore invalid. Accordingly, B's refusal did not attract criminal liability, and the acquittal entered by the Court of Appeal must be upheld.

The word “forthwith” in s. 254(2)(b) *Cr. C.* must be given an interpretation that reflects its ordinary meaning, having regard to the text, context and purpose of this provision. According to the grammatical and ordinary meaning of the words “provide” and “forthwith” found in this provision, the driver must “supply” a breath sample to the peace officer “immediately” or “without delay”. The word “forthwith” qualifies the demand under s. 254(2)(b) *Cr. C.* that stopped drivers must obey. Such drivers are not free to provide a sample when they see fit. It is true that operational time is implicit in the word “forthwith”, because the police officer has to ready the equipment and instruct the suspect on what to do; however, operational time is different from the time needed for a device to be delivered to the scene.

The constitutionality of s. 254(2)(b) *Cr. C.* depends on an interpretation of the word “forthwith” that is consistent with its ordinary meaning, because this word implicitly limits the right to counsel guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms*. Since a detained driver must provide a breath sample forthwith, the driver may not consult counsel before doing so. This limit is justified under s. 1 of the *Charter* precisely because the detention is of very brief duration. The purpose of the detection procedure of which s. 254(2)(b) *Cr. C.* forms a part is to combat the menace of impaired driving. In the pursuit of this purpose, Parliament sought to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights. This balance must be kept in mind when interpreting s. 254(2)(b) *Cr. C.*

The existence of unusual circumstances may justify a flexible interpretation of the immediacy requirement. While it is neither necessary nor desirable to identify in the abstract, and in an exhaustive manner, the circumstances that may be characterized as unusual, given that it is preferable for those circumstances to be identified on a case-by-case basis in light of the facts of each matter, it is nonetheless important to provide some guidelines to assist lower courts in this inquiry. First, the burden of establishing the existence of unusual circumstances rests on the Crown. Second, the unusual circumstances must be identified in light of the text of the provision in order to preserve the provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith". Section 254(2)(b) *Cr. C.* specifies that the sample collected must enable a proper analysis to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result. Circumstances involving urgency in ensuring the safety of the public or of police officers might also be recognized as unusual. Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency, because allocating a limited budget is the daily reality of any government. Fourth, the absence of an ASD at the scene at the time the demand is made is not in itself an unusual circumstance.

A demand made under s. 254(2)(b) *Cr. C.* cannot be presumed to be valid in the absence of an ASD at the scene. Nothing in this provision indicates that Parliament intended to create such a presumption of validity. A person cannot be

criminally liable for refusing to comply with a demand with which it was not actually possible to comply because of the absence of an ASD at the time the demand was made. Finally, the validity of a demand cannot be conditional on the time needed for an ASD to be delivered to the scene, because such an approach would create intolerable uncertainty for drivers. When a detained driver has to respond to a demand to provide a breath sample, the driver must be able to know whether the demand is valid and whether refusing will result in criminal liability. In a context where the driver is unable to retain and instruct counsel, it cannot be expected that the driver will agree in advance to comply and will then be capable of determining when the delay in the delivery of an ASD justifies a refusal.

Cases Cited

Overruled: *R. v. Degiorgio*, 2011 ONCA 527, 275 C.C.C. (3d) 1; **applied:** *R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205; *R. v. Bernshaw*, [1995] 1 S.C.R. 254; *R. v. Thomsen*, [1988] 1 S.C.R. 640; *R. v. Grant*, [1991] 3 S.C.R. 139; **considered:** *R. v. Côté* (1992), 6 O.R. (3d) 667; **referred to:** *R. v. Quansah*, 2012 ONCA 123, 286 C.C.C. (3d) 307; *R. v. Piazza*, 2018 QCCA 948; *R. v. Petit*, 2005 QCCA 687, 200 C.C.C. (3d) 514; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. J.D.*, 2022 SCC 15; *MediaQMI inc. v. Kamel*, 2021 SCC 23; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Kelly*, [1992] 2 S.C.R. 170; *R. v. Levkovic*, 2013 SCC 25, [2013] 2

S.C.R. 204; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725; *R. v. Pierman* (1994), 19 O.R. (3d) 704, aff'd in part [1996] 1 S.C.R. 68; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *R. v. Danychuk* (2004), 70 O.R. (3d) 215; *R. v. Talbourdet* (1984), 9 D.L.R. (4th) 406; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *Leclerc v. R.*, 2022 QCCA 365.

Statutes and Regulations Cited

Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, S.C. 2018, c. 21.

Canadian Charter of Rights and Freedoms, ss. 1, 8, 9, 10(b).

Criminal Code, R.S.C. 1985, c. C-46, ss. 249 to 261 [rep. 2018, c. 21, s. 14], 320.11 to 320.4.

Interpretation Act, R.S.C. 1985, c. I-21, s. 45(3), (4).

Authors Cited

Canadian Oxford Dictionary, 2nd ed. by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, “provide”.

APPEAL from a judgment of the Quebec Court of Appeal (Doyon, Vaclair, Hogue, Ruel and Rancourt JJ.A.), 2021 QCCA 505, 485 C.R.R. (2d) 221, 75 M.V.R. (7th) 4, [2021] AZ-51754605, [2021] Q.J. No. 2793 (QL), 2021 CarswellQue 3771 (WL), setting aside a decision of Pronovost J., 2020 QCCS 1597, [2020]

AZ-51688048, [2020] J.Q. n° 3168 (QL), 2020 CarswellQue 4458 (WL), affirming the conviction entered by Simard Mun. Ct. J., 2019 QCCM 114, [2019] AZ-51612277, [2019] J.Q. n° 6044 (QL). Appeal dismissed.

Nicolas Abran, Gabriel Bervin and Isabelle Cardinal, for the appellant.

Félix-Antoine T. Doyon and Kamy Pelletier-Khamphinith, for the respondent.

Sean Gaudet and Julie Laborde, for the intervener the Attorney General of Canada.

James V. Palangio and Nicolas de Montigny, for the intervener the Attorney General of Ontario.

Marie-Pier Boulet, for the intervener Association québécoise des avocats et avocates de la défense.

Jean-Philippe Marcoux and Vincent R. Paquet, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

English version of the judgment of the Court delivered by

CÔTÉ J. —

I. Introduction

[1] This appeal concerns the interpretation of the immediacy requirement in what was, at the relevant time, s. 254(2)(b) (now s. 320.27(1)(b))¹ of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”). According to this provision, if a peace officer has reasonable grounds to suspect that a driver has alcohol in their body, the peace officer may, by demand, require the driver “to provide forthwith a sample of breath that, in the peace officer’s opinion, will enable a proper analysis to be made” through an approved screening device (“ASD”).

[2] The immediacy requirement arising from this provision has both an implicit component and an explicit component. It is “implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample ‘forthwith’” (*R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205, at para. 14). This case deals with the latter component.

[3] Under s. 254(5) *Cr. C.*, any person who, without reasonable excuse, fails or refuses to comply with such a demand commits an offence.

[4] The central issue in this case relates to the time within which a peace officer must enable a driver who is stopped for this purpose to provide the breath sample

¹ Section 254 was repealed in 2018 by the *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21. It was replaced by s. 320.27, which is nearly identical.

required for a proper analysis to be made by means of an ASD. Specifically, this Court must determine whether the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* requires that the officer have immediate access to an ASD at the time the demand is made.

[5] This Court therefore has an opportunity to settle a jurisprudential debate over the interpretation of the immediacy requirement. This debate is illustrated by the approaches adopted, on the one hand, by the Ontario Court of Appeal in *R. v. Degiorgio*, 2011 ONCA 527, 275 C.C.C. (3d) 1, and *R. v. Quansah*, 2012 ONCA 123, 286 C.C.C. (3d) 307, and, on the other, by the Quebec Court of Appeal in the judgment under appeal. After interpreting s. 254(2)(b) *Cr. C.* in a manner consistent with the text, context and purpose of this provision, I conclude that the Quebec Court of Appeal's approach is substantially correct.

[6] Stops to provide breath samples are meant to be brief. Drivers stopped for this purpose are then being detained. This Court's jurisprudence allows a limit on the right to counsel guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms* during such detention. This limit is justified under s. 1 of the *Charter*, because s. 254(2)(b) *Cr. C.* reflects the balance struck by Parliament between the safeguarding of drivers' constitutional rights and the public interest in eradicating impaired driving (*Woods*, at para. 29). It is essential to this balance that the word "forthwith" be interpreted in a manner generally consistent with its usual or ordinary meaning.

[7] Exceptionally, unusual circumstances may justify giving the word “forthwith” a more flexible interpretation than its usual or ordinary meaning demands (*Woods*, at para. 43, citing *R. v. Bernshaw*, [1995] 1 S.C.R. 254). However, those circumstances must be just that: unusual. They cannot arise from utilitarian considerations or considerations of administrative convenience. Moreover, the determination of what constitutes unusual circumstances must be grounded primarily in the text of s. 254(2)(b) *Cr. C.*

[8] The Quebec Court of Appeal was correct in law in stating that the wording of the provision allows for a flexible interpretation of the word “forthwith” where there are unusual circumstances related to, among other things, the use of the device or the reliability of the result that will be generated, because the text of the provision indicates that the sample taken must enable a “proper analysis” to be made.

[9] It is neither necessary nor desirable to set out an exhaustive list of the circumstances that may be characterized as unusual. For the purposes of this case, it will suffice to say that the absence of an ASD at the scene at the time the demand is made is not *in itself* such an unusual circumstance. I would therefore dismiss the appeal.

II. Factual Background

[10] On April 2, 2017, Constables Dale Atkins and Jean-Michel Côté-Lemieux were informed by forest trail patrollers that an individual who was intoxicated was

driving an all-terrain vehicle (“ATV”) in Val-Bélair. While en route, they learned that the individual had parked his vehicle and was about to leave the scene on foot.

[11] The constables arrived at the scene at about 1:35 p.m. They saw the respondent and stopped him. Constable Atkins noticed that the respondent’s eyes were bloodshot and that his breath smelled strongly of alcohol. The respondent identified himself through his driver’s licence as Mr. Pascal Breault. When questioned by Constable Atkins, he admitted drinking one beer but denied driving the ATV. Constable Côté-Lemieux spoke with the patrollers, who confirmed that the respondent had been driving the vehicle; he conveyed that information to his colleague. At that point, the constables believed that they were indeed talking to the individual referred to by the patrollers.

[12] At 1:41 p.m., Constable Atkins radioed for an ASD to be brought to him, since the constables did not have one in their possession. Constable Côté-Lemieux later testified that he did not know why he and Constable Atkins did not have an ASD: [TRANSLATION] “. . . I can’t tell you whether we didn’t take one that day or whether there were no more available . . .” (A.R., vol. II, at p. 81). A colleague patrolling the Charlesbourg area responded that he had an ASD and that he was on his way. Constable Atkins estimated that Charlesbourg was about 10 minutes from his location, although a 15-minute delay was not impossible.

[13] Once he had radioed for an ASD, Constable Atkins demanded that the respondent provide forthwith a breath sample, pursuant to s. 254(2)(b) *Cr. C.* Neither

he nor Constable Côté-Lemieux told the respondent that there was no ASD at the scene. Starting at 1:45 p.m., the respondent refused not once but three times to provide the requested sample. Following the respondent's first refusal, Constable Atkins informed him of the consequences he faced. The respondent then reiterated his refusal twice. During that interaction, he said that he wished to retain and instruct counsel, a request that Constable Atkins denied. The reason given by the respondent for each of the three refusals was that he had not been driving the ATV in question. The respondent was therefore arrested for refusing to comply with a demand to provide a breath sample contrary to s. 254(5) *Cr. C.*

[14] At about 2:00 p.m., there was still no ASD at the scene. In view of the respondent's refusal, the constables cancelled their radioed request that an ASD be brought to them. They seized the respondent's ATV and released him.

III. Decisions Below

A. *Municipal Court of Ville de Québec, 2019 QCCM 114 (Judge Simard)*

[15] Relying on the Ontario Court of Appeal's decision in *Degiorgio*, Judge Simard held that the validity of the demand made by Constable Atkins did not depend on the presence of an ASD at the scene. The judge also noted that the respondent had been unaware of the absence of an ASD and had immediately refused to blow three times for an entirely different reason. As well, in Judge Simard's view, police cars do not all have to be equipped with an ASD. In the end, he held that the

prosecution had proved the essential elements of the offence. Indeed, the demand made by Constable Atkins had been clear, and the respondent had been duly informed of the consequences of his refusal and had provided no reasonable excuse to justify it. The respondent was convicted of the offence of refusing to comply with a demand made under s. 254(2) *Cr. C.*, contrary to ss. 254(5) and 255(1) *Cr. C.*

B. *Quebec Superior Court, 2020 QCCS 1597 (Pronovost J.)*

[16] In the Superior Court, counsel for the respondent acknowledged that Judge Simard’s analysis was legally sound in light of the *ratio decidendi* of *R. v. Piazza*, 2018 QCCA 948, and *R. v. Petit*, 2005 QCCA 687, 200 C.C.C. (3d) 514. Relying on Vauclair J.A.’s *obiter dictum* in *Piazza*, he announced his intention of asking the Quebec Court of Appeal to overturn *Petit*. Pronovost J. dismissed the appeal.

C. *Quebec Court of Appeal, 2021 QCCA 505, 75 M.V.R. (7th) 4 (Doyon, Vauclair, Hogue, Ruel and Rancourt JJ.A.)*

[17] In unanimous reasons written by Doyon J.A., the Court of Appeal allowed the appeal. In doing so, it relied heavily on Vauclair J.A.’s review of the jurisprudence in *Piazza*. It concluded from that review that, in order for a demand to be valid, the peace officer must be in a position to demand that the driver [TRANSLATION] “provide a breath sample forthwith, before the [driver] even has the time, realistically speaking, to contact counsel”, despite being detained. It also concluded that this means the peace officer must have immediate access to an ASD (C.A. reasons, at para. 42). The word

“forthwith” in s. 254(2)(b) *Cr. C.* must therefore be given an interpretation consistent with its ordinary meaning. However, departing from this meaning is justifiable where the delay is due to unusual circumstances related to, among other things, the use of the device or the reliability of the result that will be generated.

[18] The Court of Appeal considered it illogical for a driver to face criminal liability for refusing to comply forthwith with a demand with which it was, in any event, not actually possible to comply forthwith. The court also found it undesirable for the validity of a demand to be assessed after the fact based on how long it took for an ASD to become available; this creates uncertainty and leads to inconsistent results. A driver who refuses right away to comply with a demand to provide forthwith a breath sample when an ASD is not available at the scene might be convicted of the offence, whereas this would not be the case if the driver agreed but later changed their mind after “too” long a delay.

[19] The court was therefore of the view that the demand made by Constable Atkins in this case was invalid due to the absence of an ASD. As a result, the respondent was not criminally liable for refusing to comply. The court reversed the lower courts’ judgments, directed that a judgment of acquittal be entered and declared that *Petit*, which allowed a 10-minute delay for the delivery of an ASD, no longer had precedential value.

IV. Issue

[20] The resolution of this case lies in the answer to the following question: Does the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* require that the officer have immediate access to an ASD at the time the demand is made?

V. Positions of the Parties

[21] The Crown, appealing the judgment of the Court of Appeal, submits that this question must be answered in the negative. First, the appellant argues that the word “forthwith” should not be given an interpretation that reflects its ordinary meaning because this would lead to results contrary to what Parliament intended when it created the offence set out in s. 254(5) *Cr. C.*, namely to adopt a deterrent measure for the purpose of convincing drivers who are pulled over to provide a breath sample. In the Crown’s opinion, a flexible interpretation of the word “forthwith” is needed to combat the problem of drinking and driving and deter impaired individuals from driving. Relying on *Quansah*, the appellant submits that a short delay that is reasonable and necessary in light of all the circumstances must be permitted, including a delay due to the time required to bring an ASD to an officer who needs one. Adopting a flexible approach would also prevent problems in the performance of the work of police officers, who do not always have such a device with them or who, for a variety of practical reasons, cannot take a breath sample immediately. Second, the Crown argues that possession of an ASD at the time the demand is made is not an essential element of the offence under s. 254(5) *Cr. C.* The Crown contends that if Parliament had intended to make possession of an ASD a requirement, it would have said so clearly,

as it does in the current s. 320.27(2) *Cr. C.* Nonetheless, the Crown acknowledges that if this Court finds that the demand made by Constable Atkins was invalid because of the absence of an ASD, the respondent's acquittal entered by the Court of Appeal must be upheld.

[22] The respondent argues that, unless there are unusual circumstances, the word "forthwith" must be given an interpretation consistent with its ordinary meaning, because a driver who is stopped for a breath sample is being detained without the right to counsel. In the respondent's view, the Court of Appeal did not exhaustively define the unusual circumstances that may justify a more flexible interpretation of the word "forthwith", but it did correctly find that a shortfall in the number of ASDs for budgetary or administrative reasons is not such a circumstance. Because the Crown has not shown that there were unusual circumstances, the demand made by Constable Atkins was invalid and the acquittal entered by the Court of Appeal must be affirmed.

VI. Analysis

[23] It is important to begin by reproducing s. 254(2)(b) and s. 254(5) as they read at the relevant time:

254 . . .

Testing for presence of alcohol or a drug

(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, operated or assisted in the

operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, 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:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(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.

...

Failure or refusal to comply with demand

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

[24] At the end of a statutory interpretation exercise, I am of the view that the Court of Appeal was correct in law in holding that, as a general rule, the word “forthwith” must be given an interpretation that reflects its ordinary meaning. This interpretation is consistent with the text, context and purpose of s. 254(2)(b) *Cr. C.* It is also in keeping with the decisions of this Court, from *R. v. Thomsen*, [1988] 1 S.C.R. 640, to *Woods*, in which the word “forthwith” has been interpreted in a manner consistent with its ordinary meaning, except in unusual circumstances.

A. *Applicable Principles of Statutory Interpretation*

[25] Every statutory interpretation exercise involves reading the words of a provision “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; see also *R. v. J.D.*, 2022 SCC 15, at para. 21).

[26] Courts therefore have to interpret the “text through which the legislature seeks to achieve [its] objective”, because “the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective, not to achieve the objective ‘at all costs’” (*MediaQMI inc. v. Kamel*, 2021 SCC 23, at para. 39, quoting *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174). Consequently, as laudable and important as the fight against impaired driving may be, it is not permissible, in the pursuit of that objective, to distort the meaning to be given to the text of s. 254(2)(b) *Cr. C.* in the statutory interpretation exercise.

[27] Finally, in interpreting a criminal law provision like s. 254(2)(b), courts must be careful not to create uncertainty, for “[i]t is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act” (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14; see also *R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203; *R. v. Levkovic*,

2013 SCC 25, [2013] 2 S.C.R. 204, at para. 1; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1155).

[28] I turn now to the interpretation of s. 254(2)(b) *Cr. C.*

B. *Section 254(2)(b) Cr. C.*

(1) Text

[29] It is important to consider the meaning of two words found in this provision: “provide” and “forthwith”. “Provide” means to “supply” something to someone (*Canadian Oxford Dictionary* (2nd ed. 2004), at p. 1245). “Forthwith” means “immediately” or “without delay” (*Woods*, at para. 13, quoting *Canadian Oxford Dictionary*, at p. 585; see also *R. v. Grant*, [1991] 3 S.C.R. 139, at p. 150).

[30] According to the grammatical and ordinary meaning of these words, a driver detained under s. 254(2)(b) *Cr. C.* must “supply” a breath sample to the peace officer “immediately” or “without delay”. In addition, the provision states that the sample “will enable a proper analysis to be made” by means of an ASD.

[31] Therefore, and contrary to what the Crown argues, the word “forthwith” qualifies the demand that drivers must obey. Stopped drivers “are bound by s. 254(2) to comply immediately” (*Woods*, at para. 45). They are not free to provide a sample when they see fit.

[32] It is true that operational time is implicit in the word “forthwith”, because the officer “has to ready the equipment and instruct the suspect on what to do” (*Bernshaw*, at para. 64). However, what is in issue in this case is not operational time, but rather the time needed for a device to be delivered to the scene.

(2) Context

[33] The power conferred by s. 254(2)(b) *Cr. C.* relates to an investigative procedure. It is the first step in a two-step detection and enforcement procedure, the second being the breathalyzer test that is generally administered at the police station and that requires the peace officer to have reasonable grounds to believe that the driver’s blood alcohol level exceeds the legal limit (*Woods*, at para. 6).

[34] The constitutionality of s. 254(2)(b) *Cr. C.* depends on an interpretation of the word “forthwith” that is consistent with its ordinary meaning:

Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster. That requirement cannot be expanded to cover the nature and extent of the delay that occurred here.

(*Woods*, at para. 15)

[35] Although a stopped driver is being detained at the first step of the detection procedure, the driver has no right to counsel; this right exists only at the second step

(*Woods*, at para. 31). This is the case because the word “forthwith” implicitly limits the right to counsel guaranteed by s. 10(b) of the *Charter*. This is a condition for the application of s. 254(2)(b) *Cr. C.*; since the detained driver must provide a breath sample forthwith, the driver may not consult counsel before doing so. The Court has recognized that this limit on s. 10(b) of the *Charter* is justified under s. 1 (*Thomsen*, at p. 653; *Woods*, at para. 30) precisely because the detention is of very brief duration (*Bernshaw*, at para. 23). The more flexibly the word “forthwith” is interpreted, the less the recognized justification for limiting the right to counsel holds up.

[36] Furthermore, as I said above, a driver who refuses or fails to comply with a demand is subject to criminal sanctions under s. 254(5) *Cr. C.* It is therefore not an offence to express an intention to refuse *once the ASD arrives at the scene*; refusing without reasonable excuse to *provide forthwith* a sample is what constitutes the offence (*Woods*, at paras. 14 and 45). This suggests that compliance must actually be physically possible.

[37] Finally, in both its written and its oral submissions, the Crown invited this Court to interpret s. 254(2)(b) *Cr. C.* in light of the new scheme that came into force in 2018. I would decline the invitation, for the following reasons.

(a) *New Impaired Driving Detection Scheme*

[38] On June 21, 2018, the *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21,

received royal assent. Through that Act, Parliament repealed ss. 249 to 261 of the *Criminal Code* and introduced ss. 320.11 to 320.4, which came into force on December 18, 2018.

[39] The wording of s. 320.27(1)(b) *Cr. C.* is substantially similar to that of s. 254(2)(b) *Cr. C.* Section 320.27(1)(b) *Cr. C.* provides that if a peace officer has reasonable grounds to suspect that a person has alcohol in their body and that the person has operated a conveyance within the preceding three hours, the peace officer may, by demand, require the person to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an ASD. Under s. 320.15(1) *Cr. C.*, everyone who fails or refuses to comply, without reasonable excuse, with such a demand is subject to criminal sanctions.

[40] One of the distinctions between the new scheme and the former one is s. 320.27(2) *Cr. C.*, which authorizes the random screening of drivers by peace officers who have an ASD in their possession and who are acting in the course of the lawful exercise of their powers, even if there are no reasonable grounds to suspect that a stopped driver has alcohol in their body.

[41] According to the Crown's argument, because s. 254(2)(b) *Cr. C.* does not expressly require peace officers to have an ASD in their possession when they make a demand, the word "forthwith" must not be interpreted as creating such an obligation in practice. At the hearing of the appeal, the appellant urged the Court to see in the new scheme an "indication" that Parliament took notice of and did not wish to repudiate the

jurisprudence of certain appellate courts in this country allowing delays of several minutes. In my view, this argument must be rejected, for two reasons.

[42] First, subsequent legislative history, that is, the amendments made to the version of a provision in force at the relevant time, “can cast no light on the intention of the enacting Parliament or Legislature” with respect to that version predating the amendments (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 45; see also *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 78). As stated by s. 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, “[t]he repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.” In the same vein, s. 45(4) of the *Interpretation Act* adds that “[a] re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.”

[43] Even if the retention of the word “*immédiatement*” in the French version of s. 320.27(1) *Cr. C.* (“forthwith” has been replaced by “immediately” in the English version) could be seen as confirmation of the interpretation given to this word by the courts (which Parliament is presumed to know), that body of jurisprudence consists primarily of this Court’s decisions in *Thomsen*, *Grant*, *Bernshaw* and *Woods*, in which this word was interpreted in a manner consistent with its ordinary meaning, except in unusual circumstances (C.A. reasons, at para. 67 *in fine*). As Doyon J.A. properly noted

in his reasons, if Parliament had wished to depart from that interpretation, it was free to use other words — such as [TRANSLATION] “as soon as reasonably possible” or “as soon as practicable” (para. 68). Yet it did not do so.

[44] Second, and more importantly, there is a conceptual difference between the possession requirement in s. 320.27(2) *Cr. C.* and the immediacy requirement, which relates to temporality. Indeed, the word “immediately” is also used in s. 320.27(2) *Cr. C.* It follows that the guidance provided by this judgment on the interpretation of the immediacy requirement in s. 254(2)(b) *Cr. C.* applies to the interpretation of the word “immediately” in s. 320.27(1)(b) *Cr. C.*

(3) Purpose

[45] The detection procedure of which s. 254(2)(b) *Cr. C.* forms a part has a purpose with both a preventive aspect and a remedial aspect, namely to combat the menace of impaired driving. First, with regard to the preventive aspect, the procedure increases the risk of detection in the minds of impaired drivers, with a view to deterring them from getting behind the wheel. Then, with regard to the remedial aspect, the procedure is intended to detect dangerous drivers quickly and get them off the road (*Woods*, at paras. 6 and 30; *Thomsen*, at p. 655).

[46] In the pursuit of this purpose, Parliament also sought to strike a balance “between the public interest in eradicating driver impairment and the need to safeguard

individual *Charter* rights” (*Woods*, at para. 29). The Court must keep this balance in mind when interpreting s. 254(2)(b) *Cr. C.*

(4) Conclusion on the Interpretation of Section 254(2)(b) *Cr. C.*

[47] The ordinary meaning of the word “forthwith” is in keeping with the purpose of s. 254(2)(b) *Cr. C.* and the context of this provision. Moreover, our Court has consistently interpreted this word by giving it this specific meaning, subject to unusual circumstances. For example, in *Grant*, this Court refused to interpret the word “forthwith” as allowing for a 30-minute delay for the delivery of an ASD to the scene (see also *Thomsen*, at pp. 653-55; *Woods*, at paras. 13 and 43-44).

[48] It was in *Bernshaw* that this Court opened the door to a flexible interpretation of the immediacy requirement. In that case, a driver was pulled over and a police officer smelled alcohol on his breath. In reply to a question by the police officer, the driver admitted that he had been drinking. The officer then demanded that the driver take a screening test using an ASD, which he failed. The reliability of the result was challenged because of the possible presence of alcohol in the driver’s mouth less than 15 minutes before the test, which could have falsely elevated the reading on the ASD. This Court held that the word “forthwith” allowed for a 15-minute waiting period in order to collect a reliable sample. To reach that conclusion, it relied on the wording of the provision in force at the time, which stated that the sample obtained had to be *necessary* to enable a proper *analysis* to be made by means of an ASD. The provision thus included requirements relating to the use of the ASD in order to ensure

that a proper analysis could be made, which justified a flexible interpretation of the immediacy requirement. Nevertheless, such a delay is not acceptable in every case, but only where the officer has information suggesting that a sample collected without waiting would not be reliable (*Bernshaw*, at paras. 71-73, citing *R. v. Pierman* (1994), 19 O.R. (3d) 704 (C.A.), aff'd in part [1996] 1 S.C.R. 68).

[49] This Court drew on *Bernshaw* in *Woods*. In that case, a driver was stopped by two police officers. Detecting a strong odour of alcohol in the driver's car, the officers demanded that he provide a breath sample pursuant to what was then s. 254(2) *Cr. C.* The driver refused and was arrested under s. 254(5) *Cr. C.* and taken to the police station, where he arrived about an hour after his arrest. At the station, the police demanded a second time that the driver provide a breath sample. The driver agreed. After several attempts, he provided a valid sample, which was a fail. He was therefore required to provide a breathalyzer sample. Based on the breathalyzer reading, the driver was charged with and later convicted of operating a vehicle with a blood alcohol level exceeding the legal limit.

[50] This Court, per Fish J., held that the breath sample was inadmissible in evidence because it had been provided approximately 1 hour and 20 minutes after the demand and not "forthwith" as required by s. 254(2) *Cr. C.* Citing *Bernshaw*, Fish J. stated that the word "forthwith" may in unusual circumstances "be given a more flexible interpretation than its ordinary meaning strictly suggests" (*Woods*, at para. 43). However, the Court noted that the immediacy requirement must generally be

interpreted in accordance with the usual meaning of the word “forthwith”, referring in particular to *R. v. Côté* (1992), 6 O.R. (3d) 667 (C.A.), in which Arbour J.A., as she then was, had found that a 14-minute delay due to the absence of an ASD at the scene did not satisfy the immediacy requirement:

Speaking for a unanimous court, Arbour J.A. (as she then was) cited the passage I have reproduced from *Grant*, and explained:

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; p. 285.]

It is for these reasons that we are prohibited on constitutional grounds from expanding the meaning of “forthwith” in s. 254(2) to cover the delays that occurred in this case.

(*Woods*, at paras. 35-36)

Therefore, the relevant time period for the explicit immediacy requirement is the period between the making of the demand and the moment when the breath sample can be provided (C.A. reasons, at para. 42). The above passage from *Woods* echoes the idea, originally stated in *Thomsen*, that a limit on the right to counsel results by implication from the language of s. 254(2)(b) *Cr. C.*, and specifically from the word “forthwith”.

Indeed, but for the immediacy requirement, the provision “would not pass constitutional muster” (*Woods*, at para. 15). The immediacy requirement is, of course, usually discussed in relation to the right to counsel guaranteed by s. 10(b) of the *Charter*. However, this is not the only constitutional right that may be engaged by this requirement; this may also be the case for the rights under ss. 8 and 9 of the *Charter*, which guarantee protection against, respectively, unreasonable search or seizure and arbitrary detention or imprisonment (*Woods*, at para. 15).

[51] It follows that the approach adopted by the Ontario Court of Appeal in *Quansah* needs to be qualified. It is true that the immediacy requirement is not met where the length of the detention was such that the stopped driver could realistically have consulted counsel. It is also true that, in the reverse case, the analysis is not at an end, because there are situations in which the immediacy requirement is not met *even though* there was not enough time to consult counsel (*Quansah*, at paras. 34-35). However, with respect, the Ontario Court of Appeal broadened the immediacy requirement unduly by finding that it must allow for the time “reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)” (*Quansah*, at para. 47). “Forthwith” is not synonymous with “time reasonably necessary”; this word must be given an interpretation consistent with its ordinary meaning, except in the unusual circumstances referred to by Fish J. at para. 43 of *Woods*.

[52] That being so, what must be determined is whether the absence of an ASD at the scene at the time a demand is made under s. 254(2)(b) *Cr. C.* is an unusual circumstance that justifies a more flexible interpretation of the word “forthwith”.

C. *Unusual Circumstances That Allow for a Flexible Interpretation of the Word “Forthwith”*

[53] The Quebec Court of Appeal was correct in law in stating that unusual circumstances related to the use of the ASD or the reliability of the result that will be generated may justify a flexible interpretation of the word “forthwith” found in s. 254(2)(b) *Cr. C.*

[54] As I mentioned above, it is neither necessary nor desirable for the purposes of this appeal to identify in the abstract, and in an exhaustive manner, the circumstances that may be characterized as unusual and may justify a flexible interpretation of the immediacy requirement. It is preferable for those circumstances to be identified on a case-by-case basis in light of the facts of each matter. However, it is important to provide some guidelines to assist lower courts in this inquiry.

[55] First, the burden of establishing the existence of unusual circumstances rests on the Crown.

[56] Second, as in *Bernshaw*, the unusual circumstances must be identified in light of the text of the provision (*Piazza*, at para. 81 (CanLII)). This preserves the

provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith".

[57] Like the provision at issue in *Bernshaw*, s. 254(2)(b) *Cr. C.* specifies that the sample collected must enable a "proper analysis" to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result.

[58] That being said, courts might recognize unusual circumstances other than those directly related to the use of the ASD or the reliability of the result that will be generated. For example, insofar as the primary purpose of the impaired driving detection procedure is to ensure everyone's safety, circumstances involving urgency in ensuring the safety of the public or of peace officers might be recognized.

[59] Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency. A flexible interpretation of the immediacy requirement cannot be justified by the magnitude of the public funding required to supply police forces with ASDs or by the time needed to train officers to use them. There is nothing unusual about such utilitarian considerations. Allocating a limited budget is the daily reality of any government (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153).

[60] Fourth, the absence of an ASD at the scene at the time the demand is made is not *in itself* an unusual circumstance.

D. *A Demand Made in the Absence of an ASD Is Not Presumed To Be Valid*

[61] In oral argument, counsel for the Crown contended that a demand made in the absence of an ASD is presumed to be valid. According to counsel, a detained driver must therefore agree to provide the requested sample even though it is impossible for the driver to provide it given the absence of a device. Only if the device arrives too late (an expression that, I might add, is not clearly defined) can the driver then refuse to provide the breath sample and be shielded from any criminal liability; the presumed validity of the demand would, so to speak, lapse. On the other hand, again according to the Crown, if the driver from the outset expresses an intention to refuse to provide a sample, then the driver commits the offence provided for in s. 254(5) *Cr. C.*, despite the physical impossibility of complying with the demand made.

[62] The Ontario Court of Appeal adopted this reasoning in *Degiorgio*. The case involved a driver who refused three times to provide a breath sample when the officer had no ASD with him. The Court of Appeal, which upheld the guilty verdict, found that immediacy does not define the substance of the offence. Where a driver immediately refuses to comply, the prosecution is thus not required to show that, had it not been for the refusal, the police could have administered the test in accordance with the immediacy requirement (*Degiorgio*, at paras. 57-58, quoting with approval *R. v. Danychuk* (2004), 70 O.R. (3d) 215 (C.A.)).

[63] With respect, I do not agree. As I have already explained, the word “forthwith” qualifies the demand to provide a breath sample. It is refusing to obey that demand to *provide forthwith* a sample that constitutes a criminal offence, not stating in advance that one will refuse to comply with the demand once an ASD is available at the scene. Moreover, and as Doyon J.A. properly noted at paras. 49-50 and 55 of the Court of Appeal’s judgment, how can a person be criminally liable for refusing to comply with a demand — that is, a demand to provide a breath sample — with which it was not actually possible to comply because of the absence of an ASD at the time the demand was made? To ask the question is to answer it.

[64] More fundamentally, a demand cannot be both valid and invalid. In other words, to reiterate what the Court of Appeal in essence said, the validity of a demand cannot be conditional on the time needed for an ASD to be delivered to the scene (C.A. reasons, at paras. 51-61). This would be the situation if the approach of the Crown and the Ontario Court of Appeal were accepted.

[65] Such an approach creates intolerable uncertainty for drivers. It is a basic legal principle that ignorance of the law is no excuse. It must therefore be possible for people to know in advance, before committing an act, whether the act constitutes a crime (*Mabior*, at para. 14). When a detained driver has to respond to a demand to provide a breath sample, the driver must be able to know whether the demand is valid and whether refusing will result in criminal liability (C.A. reasons, at para. 51). In a context where the driver is unable to retain and instruct counsel, it cannot legitimately

and realistically be expected that the driver will agree in advance to comply and will then be capable of determining when the delay in the delivery of an ASD justifies a refusal. This also shows why a restrained approach must be taken in identifying what may constitute an “unusual circumstance” allowing for a flexible interpretation of the word “forthwith”. The more flexibly the word is interpreted, thereby turning immediacy into a variable requirement, the more necessary it becomes for drivers to retain and instruct counsel (*R. v. Talbourdet* (1984), 9 D.L.R. (4th) 406 (Sask. C.A.), at pp. 414-15, *a contrario*). Indeed, this was the wish expressed by the respondent after he first refused to provide a breath sample.

[66] Nothing in s. 254(2)(b) *Cr. C.* indicates that Parliament intended to create the presumption of validity proposed by the Crown. That being said, peace officers who have no ASD with them when they stop a driver who is suspected of having alcohol in their body are not entirely without options. They can require the driver to perform coordination tests, as permitted by the current s. 320.27(1)(a) *Cr. C.* These officers also have common law powers to check for sobriety. Where doing so is reasonable and necessary, they can, among other things, question a driver who is lawfully stopped about prior alcohol consumption or ask the driver to perform physical tests other than those provided for in the *Criminal Code* (*R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at paras. 43-49; *Leclerc v. R.*, 2022 QCCA 365, at paras. 45-48 (CanLII)).

[67] Finally, I should address the Crown’s argument that the respondent cannot rely on the absence of an ASD at the scene to justify his refusal because he was unaware

of that absence while stopped by the police. With respect, I disagree. Accepting this argument could encourage peace officers not to be transparent, because when they stop a driver, they are normally the only ones to know whether or not they are in possession of an ASD. This would mean that peace officers could, at their sole discretion and in an arbitrary manner, make valid a demand that otherwise would have been invalid if the driver had been informed of the absence of an ASD at the scene at the time the driver was stopped.

E. *Application to the Facts of the Case*

[68] The Crown has not shown that there was any unusual circumstance that would account for the absence of an ASD at the scene and thereby justify a flexible interpretation of the immediacy requirement. In fact, the appellant is unable to explain why Constables Atkins and Côté-Lemieux did not have an ASD in their possession. The demand made by Constable Atkins was therefore invalid. Accordingly, the respondent's refusal did not attract criminal liability, and the acquittal entered by the Quebec Court of Appeal must be upheld.

VII. Disposition

[69] For these reasons, the appeal is dismissed.

Appeal dismissed.

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