SCC File No. 39680

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

PASCAL BREAULT

Respondent
(Appellant)

- and -

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PARTS I & II: OVERVIEW AND STATEMENT OF POSITION

1. This appeal raises the question of whether the "immediacy" requirement is met when an officer making a breath demand does not have an Approved Screening Device ("ASD") in his or her possession.

2. Ontario is in general agreement with the position of the Appellant and the intervener, the Attorney General of Canada. Specifically, Ontario endorses the approach of the Ontario Court of Appeal in its decisions in *Degiorgio*,[1] *Danychuk*[2] and *Quansah*[3] to the issues raised in this case. In particular, this case offers this Court an opportunity to consider *Quansah* and its interpretation of the "forthwith" requirement. Ontario is proposing two modifications to that framework.

3. Ontario intervenes to propose an approach to the "immediacy" requirement that more appropriately balances the rights of cleared motorists to be permitted to continue on their way with the need to remove impaired drivers from the road. To achieve this balance, Ontario suggests a flexible and contextual approach to the "immediacy" analysis. The analysis should focus on whether the detention is reasonably necessary in the circumstances for police officer to fulfil their common law and statutory duties. In conducting that analysis, (1) assessing the "immediacy" requirement should not depend upon whether the detainee had a "reasonable opportunity to consult counsel"; and (2) the immediacy requirement should consider the entire screening transaction, bearing in mind that the officer may be conducting more than one type of highway safety investigation at the same time.

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[1] *R. v. Degiorgio,* 2011 ONCA 527
[2] *R. v. Danychuk*, [2004] O.J. No 615 (C.A.)
[3] *R. v. Quansah,* 2012 ONCA 123

PART III: ARGUMENT

i. The Interpretation of "Immediacy" is Contextual and Requires Flexibility

4. The forthwith analysis "must always be done contextually" considering all of the circumstances, including the lapse of time and the reason for it, bearing in mind that the right to counsel is suspended while the motorist is detained.[4] This Court has recognized that flexibility is required in interpreting the "immediacy" requirement.[5]

5. Ontario's proposed framework accords with this contextual analysis. Under this approach, delayed ASD administration can meet the "immediacy" requirement if the entire interaction is no longer than reasonably necessary in the circumstances for the police to fulfil their common law and statutory duties. The analysis should focus on whether the ASD was administered "promptly"[6] having regard to all the circumstances, including:

- Whether the motorist is detained prior to the making of a demand.[7]
- If detained, the purpose of the detention, and whether any other offences are being investigated.[8]
- Whether a delay is necessary to ensure an accurate result. [9]
- Whether there are safety concerns.[10]
- Whether a device can be brought to the scene expeditiously.[11]

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[4] *R. v. Quansah,* 2012 ONCA 123 at paras. 45, 48; *R. v. Janzen*, 2006 SKCA 111 at paras. 4-5

[5] *R. v. Woods,* 2005 SCC 42 at para. 43; *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at para. 45; *R. v. Bernshaw,* [1995] 1 S.C.R. 254

[6] *R. v. Woods,* 2005 SCC 42 at para. 44

[7] The forthwith requirement is only engaged when the motorist is detained. If not detained, the right to counsel is not engaged: *R. v. Thomsen*, [1988] 1 S.C.R. 640 at para. 14

[8] *R. v. Barzan*, 2021 ONSC 5201 at para. 41; *R. v. Lubieniecki*, [2019] O.J. No 5673 (C.J.) [forthwith window "collapsing" because accused was under arrest for stunt driving]. *R. v. Commisso,* 2020 ONSC 957 at paras. 36-37 [accused under arrest for other offences before ASD demand made]

[9] *R. v. Bernshaw,* [1995] 1 S.C.R. 254

[10] *R. v. Quansah*, 2012 ONCA 123 at para. 48; *R. v. Kerr*, 2010 ONCJ 189, aff'd [2011] O.J. No. 6142 (S.C.J.) at para. 22

[11] *R. v. Quansah,*, 2012 ONCA 123at para. 48; *R. v. Ritchie*, 2004 SKCA 9 at paras. 12-22*; R. v. Kubacsek*, 2021 ONSC 5081 at paras. 50-52; *R. v. Hussein*, 2018 ONCJ 790 at para. 54

- Whether other investigative steps are involved, such as securing a collision scene, tending to injured parties, asking further questions, or checking licences and insurance.[12]

6. This approach considers that there may be several competing priorities facing officers conducting a traffic stop or responding to collision scene. Since the *Thomsen* rationale for the "forthwith" requirement is to quickly screen detained motorists so that cleared motorists can continue on their way, it follows that where that rationale is absent, then longer delays will be tolerable.[13] Examples of the latter circumstance include motorists whose vehicles have been damaged in a collision and are not roadworthy, where the motorist may be required to complete a motor vehicle collision report, or where upon investigation, the police determine that the motorist's driver's licence is suspended.

7. The contextual analysis described in *Quansah* (at paras. 45, 47-48) provides a workable legal framework for determining whether a breath demand complies with the "immediacy" requirement. Ontario endorses this framework and asks that this Court adopt it, subject to the two following modifications, addressed in more detail below: (1) decoupling the "reasonable opportunity to consult counsel" from the "immediacy" analysis [para. 49, *Quansah*]; and (2) considering the entire roadside interaction instead of parsing the transaction and measuring its individual elements against an "immediacy" requirement.

8. For the past 30 years, courts have assessed the "immediacy" requirement by linking it primarily – if not exclusively – to whether the delay involved was long enough for a person to consult counsel.[14] Despite calling for a flexible, contextual approach, *Quansah* itself held that if there is a

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[12] *R. v. Cheng*, 2020 ONSC 6881 at para. 19; *R. v. MacMillan,* 2013 ONCA 109 at paras. 4-12, 29-35

[13] *R. v. MacMillan,* 2013 ONCA 109 at paras. 24-35

[14] *R. v. Latour,* [1997] O.J. No 2445 (C.A.) at paras. 24-25; *R. v. Quansah,* 2012 ONCA 123 at paras. 33-42.

reasonable opportunity to consult counsel, then the forthwith requirement has not been met.[15] This rather categorical approach may have made sense in an era that pre-dated 24-hour duty counsel services, the ubiquity of cell phones, and the availability of online directories. These societal and technological developments have made it easier – in theory – to consult counsel from the roadside, thus shortening the "immediacy" window if the opportunity to consult counsel is the determinative metric by which that window is measured.[16]

9. There are several issues with this approach. First, accommodating rights to counsel at roadside remains impracticable despite the technological advances mentioned above. It is also antithetical to the required brevity of the roadside interaction, particularly in vehicle stop cases. Issues that can arise in implementing rights to counsel at the roadside include[17]:

- the inability to afford privacy
- the lack of a secure phone
- the lack of reliable cell phone coverage, particularly in remote areas
- the challenges inherent in trying to locate contact information for counsel of choice
- waiting for duty counsel or counsel of choice to call back

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[15] *R. v. Quansah,,* 2012 ONCA 123 at para. 49

[16] *R. v. Najm*, [2006] O.J. No. 2348 (C.A.), rev'g [2005] O.J. No. 3816 (S.C.J.), aff'g [2005] O.J. No. 6095 (C.J.) [six minutes sufficient time to consult counsel]; *R. v. George* (2004), 189 O.A.C. 161 at paras. 54-58 [availability of a cell phone is a consideration].

[17] *R. v. Virk*, 2021 ONSC 3750 at paras. 60, 65-67 [inability to provide privacy and secure phone]; *R. v. Commisso*, 2020 ONSC 957 at paras. 9, 56, 67 [officers on bicycles could not afford privacy and were confronted by a hostile and volatile crowd; privacy could not be afforded in police van either]; *R. v. Thomsen*, [1988] 1 RSC 640 at paras. 18, 21 [incidents of impaired driving and most effective time for law enforcement is late in the evening and early morning when realistic probability of reaching a lawyer is very low]; *R. v. Torsney*, 2007 ONCA 67 at para. 12 [attempt to consult counsel from the roadside in in early morning hours in the space of six or seven minutes would have been futile].

- distractions caused by traffic, weather conditions, unruly crowds or other ambient noises or distractions
- the fact that many traffic stops occur on evenings and weekends
- the challenges in securing an interpreter from the roadside if one is required

10. Given the impracticability of accommodating the right to counsel at roadside, Ontario submits that using "a reasonable opportunity to consult counsel" as the metric by which to measure the forthwith window should be rejected. Instead, Ontario submits that a flexible and contextual approach in which all the circumstances are considered is the appropriate metric – one on which the facts of the case can be balanced with the rights of the motorist on the one hand, and the interests of the state in effectively deterring and apprehending impaired drivers on the other.

11. Second, the reasonable opportunity to consult counsel criterion may result in inequities. A well-connected individual may be able to locate and consult a lawyer relatively quickly. A motorist with a lawyer on speed dial could refuse, while a motorist without a cell phone or without cell coverage could not.[18] Our law should not condone such disparities.

12. Third, the reasonable opportunity to consult counsel as a test for measuring the forthwith window results in circular reasoning. The right to counsel is suspended during a lawful demand. Yet, the test for whether the demand was lawful is whether the accused could have consulted counsel. All that means is that the right to counsel is suspended unless it is not. Police have no guidance on how long they can wait before rights to counsel must be provided but providing rights to counsel will not cure a "forthwith" issue.

13. There is no injustice in suspending the right to counsel during screening measures provided

[18] For example, in *R. v. Westerman*, 2012 ONCJ 9 at paras. 9-13, defence counsel attempted to rely on the accused's privileged status to argue for a shorter immediacy window.

the screening measure is carried out expeditiously, particularly where the full panoply of rights under the *Charter* is engaged upon arrest. Driving is a highly regulated, fully licenced, and inherently dangerous activity. Persons engaged in that activity may be stopped and subjected to lawful screening demands intended to remove motorists from the road that pose a risk to other road users. The objective of quickly removing impaired drivers from the road, on the one hand, and permitting non-impaired drivers to continue on their way, on the other, can be achieved by decoupling the determination of whether the "forthwith" requirement has been met from the question of whether there was a reasonable opportunity to consult counsel.

ii. **The Immediacy Requirement Should Consider the Entire Screening Transaction**

14. The requirement for a "prompt demand" and "prompt collection" of the ASD sample has led to a bifurcation of the "forthwith" requirement into two distinct timeframes, such that a delay in making the ASD demand can result in a breach, even if the overall screening measure is carried out promptly. The debate in the lower courts regarding whether two such distinct timeframes existed was settled by *Quansah*, which held that the officer must make the ASD demand "promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body".[19]

15. Regrettably, it is frequently argued that this holding means that the screening demand must be made virtually instantaneously upon the officer suspecting the motorist has alcohol in their body, even if the officer is conducting other duties related to the traffic stop such as checking the driver's licence, and even if the overall screening interaction was carried out "forthwith".[20] While it is true

[19] *R. v. Quansah,,* 2012 ONCA 123 at paras. 25-30, 46

[20] See for example, *R. v. Tosun*, 2021 ONSC 2895 at paras. 33-44; *R. v. Sisson*, 2019 ONCJ 641 at paras. 33-34; *R. v. Megahy*, 2008 ABCA 207 at paras. 11, 16-17; *R. v. Mathebharan*, 2019 ONCJ 20 at paras. 9-13; *R. v. Steele*, 2014 ONCJ 583 at paras. 10-11; *R. v. Cheng*, 2020 ONSC 6881 at paras. 5, 17-19; *R. v. Kubacsek*, 2021 ONSC 5081 at paras. 53-55; *R. v. Martens*, 2008 ABQB 223

that Arbour JA (as she then was) in partial dissent in *Pierman;Dewald*, said that "it is implicit that the demand must be made by the police officer as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body", she also said, that "I do not think that it matters whether the officer postpones making the demand or postpones administering the test after having made the demand".[21] When *Dewald*[22] came before this Court on further appeal, the Court agreed with Arbour J.A.'s conclusion that the unwarranted 15-minute delay in that case was not "forthwith" citing its reasons in *Bernshaw*.[23]

16. However, there is no express reference to the timing of the demand in the majority's reasons in *Bernshaw*. Indeed, while this Court in *Woods*[24] held that an ASD demand must be made "promptly", this Court does not appear to have ever held that an ASD demand must be made immediately *upon the reasonable suspicion being formed* as a distinct stand-alone constitutional requirement.[25] Moreover, in *Orbanski; Elias*,[26] this Court held that if the right to counsel is prescribed during *compliance* with an ASD demand, then that right must also necessarily be prescribed during screening measures which have the very objective of assisting the officer in determining *whether* a screening demand can be made.

17. It should be remembered that screening measures are not always a necessary step in the investigation of a possible impaired driver. Screening measures are useful in cases where impairment of the ability to drive is not apparent. Screening measures are not necessary if an

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at paras. 16-18, 20-29, 62-64, leave to appeal dismissed, 2008 ABCA 283, leave to appeal dismissed, 2008 CanLII 67845 (SCC); *R. v. Davloor*, 2018 ONSC 1023 at para. 11

[21] *R. v. Pierman; R. v. Dewald,* 1994 CanLII 1139 (Ont. C.A.)

[22] *R. v. Dewald,* [1996] 1 S.C.R. 68

[23] *R. v. Bernshaw,* [1995] 1 S.C.R. 254

[24] *R. v. Woods,* 2005 SCC 42 at para. 44

[25] *R. v. Martens*, 2008 ABQB 223 at paras. 20-29, leave to appeal dismissed, 2008 ABCA 283, leave to appeal dismissed, 2008 CanLII 67845 (SCC)

[26] *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at para. 52

officer forms grounds to believe that a motorist is impaired through their own observations.[27] In such a case, the officer may proceed directly to an arrest and an evidentiary breath demand under s. 254(3) [now s. 320.28(1)]. An officer may even suspect a motorist is impaired before pulling the vehicle over and soon thereafter determine that the motorist has alcohol in their body. But the officer will want to investigate further to determine whether screening measures are even necessary. The officer may also want to check the driver's licence, insurance, and ownership at the same time.[28] This an officer should be permitted to do without having to immediately make a screening demand.[29]

18. Given the frequency with which the argument is made that a screening demand must be made immediately upon formation of the necessary reasonable suspicion, it ought to be made clear that a screening demand should be made promptly after the officer has both formed the required reasonable suspicion **and** determined that screening is necessary to determine whether the motorist is committing an offence.[30] This may be accomplished by emphasizing that the delays inherent in the overall traffic stop should be no more than reasonably necessary to enable the officer to carry out their traffic safety duties.[31] Those duties may include more than simply checking a driver's sobriety, and extend to checking licence, ownership, and insurance and associated duties during which the right to counsel remains suspended. The overall interaction must therefore be brief and undertaken with dispatch. The *Thomsen* rationale for suspending the right to counsel during traffic stops is not undermined by taking a flexible and contextual approach to the entire traffic stop, rather

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[27] *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at paras. 47, 56; *R. v. Smith*, 1996 CanLII 1074 (Ont. C.A.)
[28] *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at paras. 40-41
[29] *R. v. Smith*, 1996 CanLII 1074 (Ont. C.A.)
[30] *R. v. Fildan*, 2009 CanLII 45315 (Ont. S.C.J.) at paras. 39-40; *R. v. Megahy*, 2008 ABCA 207 at para. 18
[31] *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at para. 49; *R. v. Oduneye*, 1995 ABCA 295 at paras. 31-32

than focusing on whether the screening demand itself was made "forthwith", to the exclusion of all other considerations.

Conclusion

19. Ontario's proposed framework focuses on the reasonableness of the entire detention given all of the circumstances and balances the desire to permit cleared motorists to continue on their way with the pressing objective of removing impaired drivers from the road. Where the delay is simply too long in the circumstances, the "immediacy" requirement has not been complied with, and a demand – valid when made – will expire. If the motorist refuses to comply *at that point*, then no offence is committed. If they nonetheless comply, they may advance a *Charter* argument at trial. Where the necessarily brief delay is reasonable having regard to all of the circumstances, then screening measures will be lawful.

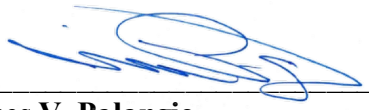
PARTS IV & V: SUBMISSIONS ON COSTS & TIME FOR ORAL ARGUMENT

20. Ontario does not seek costs and has been granted five minutes for oral argument.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

21. Ontario makes no submissions on case sensitivity.

ALL OF WHICH is respectfully submitted by,



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DATED at Toronto this 16th day of May 2022.

PART VII: TABLE OF AUTHORITIES

Canadian Cases	Paragraph Reference in Factum
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R. v. Smith, 1996 CanLII 1074 (Ont. C.A.)	**17**
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Code criminel, LRC (1985), ch C-46	320.28(1)	320.28(1)	**17**