Citation: *R. v. Beilstein*, 2023 YKTC 51

Date: 20230425
Docket: 21-00320
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Wyant

REX

v.

HAYLEA REBECCA BEILSTEIN

Appearances:
Kimberly Eldred — Counsel for the Crown
Amy Steele — Counsel for the Defence

REASONS FOR JUDGMENT

[1] WYANT T.C.J. (Oral): Haylea Rebecca Beilstein is charged with failing to provide a sample of her breath on a roadside alert contrary to s. 320.15(1) of the *Criminal Code*. This charge arose as a result of a traffic stop made by Cst. Eric Parent of the Yukon Territory Traffic Unit of the RCMP on July 11 and 12, 2021.

[2] The facts of this particular case are not substantially in dispute. As a result of a licence plate check made on a vehicle driven by the accused, Ms. Beilstein, Cst. Parent determined that the vehicle driven by the accused was not properly insured, had no decal on its licence plate, and that, in fact, the plate on the Chevrolet truck that the accused was operating belonged to a different Ford truck. As a result, Cst. Parent

activated his emergency lights and began recording the incident (at 11:23 p.m. on the evening of July 11, 2021) that brings Ms. Beilstein to court.

[3] After pulling over the accused, Cst. Parent informed her, at the side of her truck, that the vehicle was not insured, something that the accused has never disputed. It appears, according to Ms. Beilstein, that she purchased the vehicle either on that day or on a previous day but drove the vehicle back to Whitehorse on that day, July 11, 2021, which was a Sunday. Ms. Beilstein intended to insure the vehicle the next day but could not do it on the day in question because her insurance office was closed, being that it was a Sunday.

[4] It is very clear that the vehicle was not insured and that it should have been insured, that the licence plate on it was not properly transferred to this vehicle, nor did the vehicle carry any valid insurance. As a result, the traffic stop by Cst. Parent was valid.

[5] It appears clear throughout the interaction with Cst. Parent that Ms. Beilstein, while admitting that the vehicle was not insured, felt frustrated by not knowing how else she could have transported the vehicle to Whitehorse to get insurance on a day when no insurance office was open. That issue is not before me today, though it is pretty clear to me that Ms. Beilstein continually failed to grasp the legitimate alternatives that were available to her as opposed to driving the vehicle on the day in question uninsured. It is also clear to me that her frustration at being stopped as a result was often the main fuel feeding her angst and frustration. That became clearly evident many times during the subsequent encounter with Cst. Parent, notwithstanding his patient and

calm attempts to inform Ms. Beilstein of the proper procedures with respect to registering a motor vehicle.

[6] In any event, after a short interaction at the side of the accused's vehicle, Cst. Parent, suspecting the accused had consumed alcohol and was driving a motor vehicle, made the demand for a roadside screening sample, an ASD. He made his first demand for that roadside screening sample at 11:27 p.m., about four minutes after he had started recording the incident. When he made the demand for the sample, he read the demand formally from his notebook.

[7] It should be noted that Cst. Parent began recording this incident on his WatchGuard Video system that was located inside his RCMP vehicle. This WatchGuard Video system had two cameras and also recorded all audio that occurred during this particular stop, both from the time that Cst. Parent attended to the driver side of Ms. Beilstein's vehicle until the end of the encounter. Portions of the WatchGuard video were played in court, both from the front and rear camera, which had the effect of recording, both visually and orally, all of the relevant interaction between Cst. Parent and Ms. Beilstein.

[8] In addition, a transcript of the recording was prepared to aid the Court but was not submitted as evidence, given the fact that the most accurate evidence was the WatchGuard video itself.

[9] It should be further noted, parenthetically, that Ms. Beilstein did not have her driver's licence present on her but identified herself through her identification and there is no doubt as to who she was on the evening in question.

[10] In making the demand, Cst. Parent said the following: "I have reasonable grounds to suspect that you have, within the past three hours, operated a motor vehicle with alcohol in your body. I demand that you immediately provide a sample of your breath suitable for analysis in a pre-screening device and that you accompany me for this purpose. Do you understand?"

[11] Ms. Beilstein replied, "What does that mean?"

[12] Cst. Parent then replied, "So it means you need to step out of the vehicle, follow me at the back, get the roadside sample, and, uh, that's — that's what I'm asking you; right?"

[13] The answer was "Okay" from Ms. Beilstein.

[14] Cst. Parent then said, "Do you want me to read it again; K? I'm going to read it again; K? Just so — I'm going to go slow; okay?"

[15] Ms. Beilstein answered, "I don't know what that means."

[16] Cst. Parent then said, "Yeah, it's all fancy legal words and stuff. I have reasonable grounds to suspect that you have, within the past three hours, operated a motor vehicle — which is this; right? —" and at that point in time he is seen to tap the side of the vehicle on the driver side where Ms. Beilstein was sitting right beside where he is standing, with her in the driver seat, and he continued, "— with alcohol in your body because I can smell it when you're talking."

[17] Ms. Beilstein then interrupts him, and he continues — and I'm quoting now from the WatchGuard video: "Just hear me out. I demand that you immediately provide a sample of your breath suitable of analysis in a pre-screening device and that you accompany me for this purpose. It's a roadside tester, right, the pre-screening device, and that you accompany me for this purpose which is at the back. Do you understand?"

[18] The answer was "Okay."

[19] Cst. Parent continues, "So you have to step out of your vehicle to give me a roadside sample. It's very easy to understand."

[20] The accused answered, "What is that?"

[21] He replies, "Yes? So please step out of the vehicle. You're being detained for impaired driving. Can you please step out of your vehicle?"

[22] "Uh-huh."

[23] "Just gonna be going to the left side of my vehicle there; okay?"

[24] "Yeah."

[25] "So, I'm going to just open the back door. You don't have to sit. I'm just going to have you stand by it."

[26] "Yes."

[27] "If you want to sit — you can sit, if you want to."

[28] "Okay."

[29] Cst. Parent then asked if Ms. Beilstein had had anything to drink in the previous 15 minutes and explained that the reason he asked that is because if she had had something to drink in the previous 15 minutes, it could show a higher reading than it should in the screening device and that they would have to wait a while before getting it done. So, he asked her if she had anything to drink in the last 15 minutes, and she said she had a beer but that was at lunch and dinner.

[30] Cst. Parent asked again, “When was your last drink with alcohol?”

[31] Ms. Beilstein said, “About 20 minutes ago, just having a beer at Whiskey Jacks with a couple of friends.”

[32] Cst. Parent confirmed with Ms. Beilstein it was about 20 minutes ago, and as a result, he then shows her a brand-new mouthpiece. At this point in time, the following conversation ensues between Ms. Beilstein and the officer, who has just shown her the brand-new mouthpiece, while Ms. Beilstein is standing by the RCMP vehicle as Cst. Parent had instructed.

[33] Ms. Beilstein then says, “Well, technically, I do not have to take that.”

[34] He replies, “Just hear me out. We’re just going to go through a process; okay? So, what the law requires — just hear me out — is to —” and she interrupts, saying, “Well, the law technically —” and he says, “No, no, just — just —” and she says, “— doesn’t require that.” So, the two of them are sort of talking over each other at the same time.

[35] Cst. Parent replies, “Yes, so, okay, just hear me out. I’m going to explain it. You have to provide a roadside sample.”

[36] Ms. Beilstein’s answer is, “No, I do not.”

[37] Cst. Parent says, “Just hear me out. Hear me out. If you do not, which is against — just hear me out — if you do not, it is against the law and it’s a different offence; right?”

[38] “Yeah” is what she responds.

[39] Cst. Parent says, “Yes so I can’t tell you not to provide a breath sample, because the law says you have to.”

[40] Her response is, “Well, technically, no, because my whole family is filled with lawyers.”

[41] “Uh, okay.”

[42] “But I technically do not have to provide you with a fucking roadside sample.”

[43] Cst. Parent says, “Okay. I still have — but because” — and he says, “You hear me out, because I read you the demand, I still have to provide you.”

[44] She says, “No, technically, you do not.”

[45] Cst. Parent says, “Okay. So I’m gonna ask you take a deep breath in, make a tight seal on the straw.”

[46] Ms. Beilstein says, “No, I am not gonna take a roadside test.”.

[47] Cst. Parent continues saying, “And keep on blowing until I tell you to stop; okay?”

[48] Ms. Beilstein responds by saying, “I’d rather talk to a lawyer.”

[49] Cst. Parent then says, “So I’m holding the mouthpiece in front of your mouth, okay, so you’re able to provide me with a breath sample right now; okay? So I’m just telling you, it’s against the law not to comply with a demand.”

[50] Ms. Beilstein’s response is, “Well, technically, it’s not against the law because my whole family is apparently fucking lawyers.”

[51] He responds, “Okay.”

[52] Ms. Beilstein says, “And, technically, I do not have to fucking take a roadside test.”

[53] Cst. Parent says, “Okay.”

[54] She says, “And, technically, what you’re doing is fucking wrong.”

[55] Cst. Parent says, “Okay. Okay, so if you don’t provide me with a breath sample —”

[56] Ms. Beilstein interrupts and says, “I’d rather go —” and he is saying — they are talking both at the same time — “Yeah, yeah, just hear me out” — she continues, “— go to fucking jail in this because I can fight it in fucking jail. And two,” she says, “I can fight this 12 hours because 12 hours alcohol fucking passes out of your body; and two —”

[57] Cst. Parent stops her and says, “Okay. So, I still have to tell you, right, that if you don’t provide me with a sample, you’re gonna get —”

[58] She interrupts, “I’d rather go to fucking jail.”

[59] Cst. Parent says, “No, you’re not going to go to jail, but I’m just letting you know it’s an offence.”

[60] Ms. Beilstein responds, “Yeah, I know it’s an offence.”

[61] Cst. Parent says, “It’s called failed to comply with a demand. It carries a bigger fine then an impaired driving actually.”

[62] She said, “Yeah.”

[63] “So —”

[64] Ms. Beilstein responds, “I know that.”

[65] “So you understand what it means, though, like, you’re gonna get charged for failing to comply with the demand, and you may pass this test; right?”

[66] She says, “Well, technically, I don’t have to fucking comply with anything.”

[67] Cst. Parent says, “Okay. Well, this is bad, because then you’re breaking — you’re breaking the law; right?”

[68] Ms. Beilstein responds, “I’m not breaking the law, and you’re telling me my rights.”

[69] Cst. Parent says, “Well, you’re failing to comply with a demand, which is an offence; right?”

[70] Ms. Beilstein says, “No, trust me, I’m calling so many fucking lawyers on fucking TikTok it’s not even funny.”

[71] Cst. Parent says, “So, are you going to provide me with a roadside breath sample?”

[72] Her answer is “No.”

[73] So, at this point in time with this back and forth, Cst. Parent then says, “Okay. You’re being detained for failing to comply with the demand. I’m going to ask you sit in the car. There’s going to be some documents I’m going to have to fill out.”

[74] Ms. Beilstein responds, “Yeah, fine, okay. Can I shut off my vehicle?”

[75] He responds, “Yeah, I’ll go shut it off.”

[76] “Okay.”

[77] “Can you sit in the back?”

[78] Ms. Beilstein responds, “That’s fine.”

[79] There are some further comments by Ms. Beilstein at this point in time that she knows her rights, and that it is not against the law. Then subsequently, Cst. Parent says that he is detaining her for failing to comply with the demand, to which she replies, “Okay, okay, I have my rights, and too bad we aren’t in the fucking States.”

[80] Cst. Parent says, “Sorry?”

[81] She says, “Too bad we’re not in the States.”

[82] Cst. Parent says, “Okay, but do you understand what that means? I’m arresting you. I’m detaining you for failing to comply with the demand.”

[83] She replies, “Yeah, absolutely. Because I would invoke the 5th. You know my sister’s a cop; right?”

[84] Cst. Parent then says, “You have the right to retain and instruct a lawyer without delay. You may call any —”

[85] She said, “No, that’s fine.”

[86] He continues, “You may call any lawyer that you wish.”

[87] At this point in time, and there was no dispute about this, the demand has been validly made, and it is clear that Ms. Beilstein, despite efforts made by Cst. Parent to persuade her otherwise, has now refused to provide a roadside sample and failed to comply with the demand made by Cst. Parent in spite of his efforts many times to try to convince her to blow into the ASD.

[88] At this point in time, after these multiple attempts to persuade her to comply, Cst. Parent charges her. This is about nine minutes or so after the first interaction that he has had with her. Cst. Parent tells Ms. Beilstein she is being detained for failing to comply with the demand and that he will have documents for her. He then arranges for the vehicle to be towed. Cst. Parent formally charges her with the refusal offence. He

attempts to facilitate a call with counsel for her and he waits for assistance and a tow truck to arrive while he completes the paperwork.

[89] What happens at this point in time, while Ms. Beilstein is in the back of the cruiser car, is a lengthy conversation from Ms. Beilstein related to her frustration about the insurance issue again. As the interaction progresses, it is clear she becomes more angst and more agitated, but at all times Cst. Parent maintains his composure and his calm approach with Ms. Beilstein. At one point in time, she tells Cst. Parent, "The charge isn't going anywhere and will be thrown out of court, guaranteed" and she says, "I'm pretty smart not to be an idiot and I'm not drunk. I'm just not taking your test." This is long after she has already been charged with refusal to comply with the demand.

[90] Attempts by Cst. Parent then subsequently to assist Ms. Beilstein in reaching her counsel, were unsuccessfully made.

[91] While Cst. Parent goes about the business of preparing the documents that he is going to serve on her, it is clear that Ms. Beilstein had a conversation with an unknown person who appears to go by the name of Morgan. During this conversation, Ms. Beilstein is clearly getting more upset as time goes on. Around the 40-minute mark of the recording, she repeats that she does not have to take the test even though it is clear that the person she is speaking to is trying to calm her down and perhaps talk her into a different course of action. Ms. Beilstein says, for example, that, "I won't give them a sobriety test, which I could give them, but I'm not going to because it's not my fucking obligation to give them a fucking sobriety test."

[92] Finally, 52 minutes after the first part of the interaction with Ms. Beilstein and after the demand has been given, the officer says to Ms. Beilstein, who is still sitting in the back of the cruiser car, of course, that he has documents that he has prepared, including a ticket for no insurance and driving an unregistered motor vehicle. As well, Cst. Parent informs Ms. Beilstein of a 24-hour suspension of her right to drive, and he informs her that after two weeks she will be suspended from driving for 90 days. In addition, he gives her a notice to seek greater punishment but explains that that is only because he does not have her driver's licence and has no way of checking if she has a related record, so it is a precaution in case she has a previous conviction for impaired driving. As well, Cst. Parent provides her with her court appearance and papers related to the fact that her vehicle is being towed.

[93] Eventually, Ms. Beilstein refused to sign any of the documents and again, as she had earlier repeated, says she had no obligation to take a test.

[94] As soon as Cst. Parent says he is done with her documents, she then says, "Would you like a breathalyzer test cause I'll fucking give you one."

[95] Cst. Parent says, "Well, it's too late now."

[96] She says, "Oh, fuck, why is it too late now?"

[97] Cst. Parent replies, "Because you already — it's already been half an hour." In actual fact, as I will get to in a moment, it was longer than that. He continues, "Yeah, you already failed to comply with the demand, which is as soon as practical."

[98] Ms. Beilstein says, “Why, because I didn’t want to give you a fucking breathalyzer test?” Again, 52 minutes after being stopped and then subsequently after being given the demand, Ms. Beilstein then says she will take the breathalyzer test.

[99] I think it is arguable, and Crown counsel argued, that this was an angry offhand comment and was not made with any genuine or sincere intent. For the purpose of this decision, I am going to give the benefit of the doubt to Ms. Beilstein and conclude that she wished at that point to provide a sample.

[100] After Cst. Parent says it is too late to provide a sample, Ms. Beilstein then really gets quite upset and becomes even angrier, more abusive, and more vulgar as a result.

[101] Ms. Steele, counsel for the accused, says that there are three issues. She argues that this whole interaction is a continuing transaction and, as such, until Cst. Parent has driven Ms. Beilstein home, Ms. Beilstein has the right to change her mind and should have been given a second chance. Ms. Steele admitted that a significant period of time had passed since the initial demand and refusal but says the Court could still consider this to be one transaction and therefore not an unequivocal refusal.

[102] In making this argument, counsel relies significantly on the case of *R. v. Cunningham*, 1989 ABCA 163, a 1989 decision from the Alberta Court of Appeal that dealt with refusing to comply with a breathalyzer demand, not a roadside alert. In that case, the Alberta Court of Appeal ruled that the accused’s refusal on the breathalyzer formed part of one continuous sequence of events and a single transaction. In that case, the accused changed their mind within six minutes of a second refusal and, as a

result, the Court of Appeal said the change of mind formed part of one continuous sequence of circumstances.

[103] Counsel also referred this Court to an Ontario Court of Justice case in *R. v. Arutunian*, 2022 ONCJ 172, at page 172. In that case, the accused was charged with failing to provide a breath sample into an ASD as a result of being stopped as part of a RIDE program. Ms. Arutunian attempted to blow into the ASD with insufficient volume on six attempts, and on a seventh, she just refused. The first attempt occurred at 2:37 a.m. and the final refusal five minutes later at 2:42 a.m., and then she was placed under arrest for refusal and read her right to counsel. She then spoke to a lawyer, and after speaking to the lawyer, she said she wanted to blow. The officer did not acquiesce to her request. The Ontario Court of Justice said that though the police acted in a responsible manner, the last chance request was genuine and that they should have accepted her request to provide a breath sample.

[104] Citing these decisions, and particularly relying on *Cunningham*, Ms. Steele argues that, notwithstanding the great length of time from the refusal to the comment from the accused that she would provide a breathalyzer, the Court could view this as one transaction and that the accused should have been allowed to blow.

[105] In *Arutunian*, 19 minutes had elapsed from the time that the accused changed her mind. The provincial court judge, in that case, said that that time — that is, 19 minutes — was “at the utmost outer limit” of what may be allowed, in their opinion.

[106] This Court notes that the *Cunningham* case is of some date and also deals with a change of heart relating to a breathalyzer, not a roadside alert, the test for which is entirely different because it is not forthwith but, rather, as soon as practical.

[107] *R. v. Arutunian*, a decision of the Ontario Court of Justice, is not binding. Even in that case, 19 minutes was found to be at the "utmost limit". This Court finds *Arutunian* to be an outlier when it is measured against the leading cases in Canada.

[108] At the time this case was heard before me, the leading case in Canada was that of *R. v. Woods*, 2005 SCC 42, at page 205, from the Supreme Court of Canada, decided subsequent to *Cunningham*. The facts of that case are that the police stopped a vehicle driven by the accused. They detected a strong odour of alcohol and made an ASD demand, which the accused refused. He was then arrested and charged. At the police station, about an hour after his arrest and after speaking to counsel on the phone, the accused changed his mind. The police gave him, an hour later, the opportunity to provide a roadside sample After seven unsuccessful attempts to provide a roadside sample, he was told he would then be charged. He then, finally, after the seven unsuccessful attempts, provided an appropriate sample which resulted in a fail. That fail led the police to then demand the breathalyzer, which ultimately — because he failed and blew over 0.08 — led to a charge of having blood alcohol in excess of 0.08.

[109] After initially being convicted, the Manitoba Court of Appeal and then the Supreme Court of Canada, who affirmed the Court of Appeal decision, acquitted the accused. They held that there were no reasonable or probable grounds to demand a breathalyzer as the ASD demand itself was invalid because it was not taken forthwith.

In other words, because the police acquiesced an hour after the refusal, gave the accused the ASD, which he then failed, the breathalyzer readings which were the fruit of that failure, were inadmissible. The ASD demand was invalid because it was not taken forthwith. It was taken too long after the initial stop.

[110] The Supreme Court of Canada held that — and I am now paraphrasing paras. 43 to 45 — that the forthwith requirement in these cases connotes a prompt demand by a police officer and an immediate response by the person to whom the demand is addressed; therefore, drivers to whom ASD demands are made must comply immediately and not later at a time of their choosing. The Supreme Court of Canada continued:

> 44 To accept as compliance "forthwith" the furnishing of a breath sample [an ASD sample] more than [one] hour after being arrested for [failing] to comply is ... a semantic stretch beyond [the] literal bounds and constitutional limits.

In other words, in that case, because the police acceded in *Woods* to allowing the accused to provide an ASD sample over an hour after it was first demanded of him and he was allowed to change his mind, the ASD was not lawful and everything that followed from the demand — which, in that case, were the breathalyzer readings — were not admissible. There were no reasonable and probable grounds to demand the breathalyzer because the ASD had not been given forthwith.

[111] That is exactly the situation that would have existed in the case before me had a change of heart been acceded to by Cst. Parent and an ASD been given some 50 minutes after the demand and subsequent refusal. If that had happened and if, for

example, Ms. Beilstein had failed the ASD — which would then have led the police to have reasonable and probable grounds to demand a breath sample — any subsequent readings that might have been obtained would have been inadmissible. It cannot surely be the case that someone could refuse the ASD demand for an extended period of time, such as the case before me, then have a late change of mind, and ultimately, as a result of that, have breathalyzer tests ruled inadmissible. It would have the effect of defeating the entire scheme and purpose behind the roadside screening device.

[112] As the Supreme Court of Canada noted in *Woods*:

> 29 The "forthwith" requirement of s. 254(2) of the *Criminal Code* is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the *Charter*. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's choice of language, but also Parliament's intention to strike a balance in the *Code* between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.

"Forthwith," the Supreme Court of Canada says, means "immediately" and "without delay." An ASD sample, to be legally obtained, must be given forthwith and compliance is only found when there is an immediate response.

[113] The Supreme Court of Canada acknowledged in paras. 43, 44, and 45 of their decision in *Woods* that while there might be a brief but unavoidable delay of perhaps 15 minutes because of exigencies in preparing the equipment, for example, in order to obtain a reliable sample — and they cited *R. v. Bernshaw*, [1995] 1 S.C.R. 254 — other than perhaps delay because of exigencies, the Supreme Court of Canada stated, in

effect, drivers must comply immediately and not at a later time of their choosing once they have decided to stop refusing. The *Bernshaw* case was a situation where there was a 15-minute delay for the police to get the equipment in order to obtain a reliable sample. The Supreme Court of Canada said, in those situations, it is an acceptable delay.

[114] *Woods* has been cited in many other lower court decisions. I note that *Woods*, as I said, was decided long after *Cunningham* and that *Woods*, in fact, dealt directly with the issue before me, an ASD.

[115] For example, in *R. v. Hiebert*, 2013 MBQB 240, at page 359, a driver was stopped for speeding and an odour of alcohol was detected. The driver was given the demand for an ASD and refused, and the refusal notice was read, and the consequences of the refusal were explained several times, but the driver still refused. After 11 minutes of this, the police were satisfied that there was a clear and unequivocal refusal and charged the accused with refusing the ASD. Five minutes later, after another officer arrived at the scene and had a brief conversation with the accused, the accused then changed his mind.

[116] The Manitoba Court of Queen's Bench, in that case, noted that there was no bright line which determines when "...a change of heart can be neatly severed from the unequivocal refusal,..." and said that a court must assess the totality of the factors to determine if an accused is fully and properly informed to the point where it can be reasonably and objectively concluded that the accused understands the refusal constitutes a crime. In assessing the totality of factors, the Court must consider the time

involved, the reasonableness of the police in explaining the nature of the demand, and the degree of understanding on the part of the accused and must do so objectively. It is not what is in the mind of the accused subjectively that is the test. Once the Court is satisfied that the person is fully and properly informed, appears to understand, and gives an unequivocal refusal, the crime is complete.

[117] In the *Hiebert* case, there was no manipulation by the police nor did they attempt to pounce on the first utterance of refusal by the accused. They did not rush or jump to conclusions. The Court in that case held that the accused was guilty of refusal. That was a case where there was a recanting that occurred fairly shortly after the refusal, and the Court rejected it. Justice Rempel, in *Hiebert*, noted that *Woods* had changed the legal landscape as to what constitutes a refusal, and I agree.

[118] Another example of that same reasoning being applied occurred in *R. v. Carloni*, 2012 MBQB 313, at page 428. Like *Hiebert*, this was also a case decided after *Woods*. In that particular case, the accused was seen by police to proceed through a stop sign without coming to a full stop and was pulled over. The officer noted an odour of liquor, a slight speech impediment, and watery eyes, and he made a roadside demand. Eighteen minutes after he was arrested for refusing to provide a sample, the accused said he wanted to provide one, which the police did not allow.

[119] The trial judge in that case, Justice Spivak, (now of the Manitoba Court of Appeal), referred to *Woods* and acknowledged that there are circumstances where an initial refusal followed by an offer to blow could be considered part of the same single transaction, and that there is no predetermined and unswerving bright line, but it

depends on the circumstances. In that particular case, the time period from when the initial demand was made to when the accused offered to blow after refusing was about 10 minutes. Again, as in *Hiebert*, the justice found the police were not overzealous; they did not pounce on the first negative reply. The judge found in those circumstances, 10 minutes later, that the change in mind could not be viewed as almost simultaneous or comprising part of a single transaction. A refusing to blow having been made, and the subsequent change of heart just a few minutes later, could not be considered part of the same transaction.

[120] Now, this Court recognizes that, as Justices Rempel and Spivak said, there is no bright line as to when an accused person might be allowed to change their mind, and that everything is fact specific. The change of heart must be short and quick, and quick enough that the Court can conclude that the change of heart was part of a single transaction. These types of cases, by their very nature, would be limited and exceptional, and perhaps even rare; otherwise, the Supreme Court of Canada's emphasis that samples be taken forthwith would be rendered meaningless.

[121] In the case before me, there is no doubt in the Court's mind that it would be an error to consider what happened in this case as composing one single transaction. The accused refused, having had the demand read more than once. I am satisfied the accused understood. As I said before, when Cst. Parent said, "It's called failing to comply with the demand. It carries a bigger fine than impaired driving, actually." The accused answered, "Yeah, I know that."

[122] It was quite a long time later that Ms. Beilstein, in the case before me, offered to take a breathalyzer, and this was long after the refusal charge had been read, after attempts had been made to call counsel, and after all of the documentation had been completed by the officer. The record shows that the demand was made at 11:27 p.m. and that the accused refused at 11:37 p.m., with the refusal notice following. The accused's comment to take the breathalyzer was made at 12:19 a.m., 52 minutes after the demand was made and somewhere between 44 and 48 minutes from the time of first refusal to where the refusal notice and charge was read. That is far too long for a change of heart to be considered and included as one transaction in these circumstances.

[123] To rule, in my opinion, that somehow this is part of a single transaction would render the ASD, the demand, and the requirement that an accused comply forthwith meaningless, and the whole impaired driving regime in the *Criminal Code* could be undermined. One can easily see the mischief that could arise by people simply refusing the ASD and then, at the last minute, agreeing to blow and then of subsequently being able to circumvent a charge of driving over 0.08 because there were no reasonable and probable grounds to give the breathalyzer demand because the ASD demand was not given forthwith.

[124] Cst. Parent, in this case, was reasonable in explaining the demand and the accused understood. She just felt she did not have to take the test. As in the cases cited, Cst. Parent was not overzealous, nor did he pounce on Ms. Beilstein's first negative reply. In fact, he tried to talk her out of it several times.

[125] If there were any doubts as to the intention of the Supreme Court of Canada in *Woods* that an ASD sample must be given forthwith, they would have been eradicated in the just-released judgment of the Supreme Court of Canada in *R. v. Breault*, 2023 SCC 9.

[126] The facts of that case are slightly different, in that an ASD demand was made which the accused refused, but the police did not have an ASD on the scene. The initial conviction for refusing to comply with a demand was overturned by the Quebec Court of Appeal and that acquittal was upheld in the Supreme Court of Canada. The Supreme Court of Canada said, in effect, that the word "forthwith" must be given an interpretation that reflects its ordinary meaning, having regard to the context and purposes of the provisions in the *Criminal Code*. It further stated:

> According to the grammatical and ordinary meaning of the words "provide" and "forthwith"...the driver must "supply" a breath sample to the peace officer "immediately" or "without delay".

Further, the Supreme Court of Canada stated that drivers are not free to provide a sample when they see fit. While there may be some operational time, as in *Bernshaw*, implicit in the word "forthwith" because the police officer has to ready the equipment and instruct the suspect on what to do, operational time, while acceptable, was different to the situation where the police did not have the ASD on the scene at all. The Supreme Court of Canada found, as did the Quebec Court of Appeal, that because the police did not have the ASD, the sample could not be given forthwith and therefore could not be refused.

[127] While the facts are different in *Breault*, the Supreme Court of Canada again reiterated what it had said in *Woods*, that a detained driver must provide a sample forthwith and may not consult counsel before doing so.

[128] The Supreme Court of Canada stated that "forthwith" is consistent with its ordinary meaning because it implicitly limits the right to counsel under s. 10(b) of the *Charter*, and that limitation is acceptable because the detention is to be of a very brief duration. The purpose of the procedure, again, is to combat the menace of impaired driving, and in the pursuit of that purpose, the Supreme Court of Canada noted, Parliament again had sought to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual rights. The Supreme Court of Canada noted it was settling a jurisprudential debate over the interpretation of the immediacy requirement, and said that, only in unusual circumstances, may the word "forthwith" be given a more flexible interpretation than its ordinary meaning, and again referred to para. 43, as I have, in *Woods* in enunciating what unusual circumstances were, none of which related to a change of heart as in the particular case before me.

[129] So, in essence, what the Supreme Court of Canada has said in *Breault* is that "forthwith" qualifies a demand that drivers must obey, and means immediate, and that drivers are not free to provide a sample when they see fit. Without question, the Supreme Court of Canada makes it clear that Ms. Beilstein's argument in this case must fail.

[130] Defence counsel advanced two other arguments in addition to the argument about one continuous transaction. One related to s. 10(b) of *Charter*. Defence counsel

rightfully acknowledged that s. 10(b) and the right to counsel does not exist in these types of cases, and the Supreme Court of Canada has clearly articulated why.

[131] Notwithstanding that, defence counsel states that, in considering the totality of the circumstances, the Court should know that after Ms. Beilstein was charged with a refusal, attempts to contact counsel were made. In the absence of that, Ms. Beilstein did speak to another person, who, as I said, appears to be identified by the name of Morgan, and only after speaking to that individual did the request come from her to take a breathalyzer test. Defence counsel acknowledges that Cst. Parent attempted to get a hold of counsel, on behalf of Ms. Beilstein, after the charge of refusal was raised, and says that the Court should also consider it relevant because it is possible that if Ms. Beilstein was to have been able to speak to a lawyer before she spoke to Morgan and received some legal advice, she might have actually changed her mind more quickly than she did and that, defence counsel says, is evidenced by the fact that she changed her mind after speaking to Morgan.

[132] In my view, this argument must fail for two reasons.

[133] First, counsel is trying to get through the back door what they cannot legally get through the front door, and that is the right to counsel. There is no right to counsel in ASD cases. While it is true that Ms. Beilstein might have changed her mind after speaking to counsel, it is of no moment because it never happened. By the time that would have occurred, had it occurred, the refusal would have been completed in any event. The fact that she may have changed her mind quite a bit later, after speaking to another individual, does not change that fact.

[134] Secondly, the Court cannot speculate what might have happened. In any event, if the Court were to say that an accused may have changed their mind after speaking to counsel, it really means what the Court would be saying is that the accused has the right to counsel, which they do not. It is a completely circular argument and one that may not be given any weight by the Court whatsoever. Once the refusal happens, it happens. What might have happened in terms of someone giving advice later is completely irrelevant. The argument that this relates to an unequivocal refusal is completely rejected by the Court.

[135] With respect to the last argument, it deals with the fact that the accused had testified that she suffers from attention deficit hyperactivity disorder ("ADHD"). Ms. Beilstein advised that she used to be on medication for ADHD, had not been on medication for at least a couple of years prior to the interaction with Cst. Parent, and is still not on medication, at least at the time that she testified. In her testimony, she said that the ADHD had a great bearing on the way that she interacted with Cst. Parent on the night in question.

[136] Defence counsel asked me to consider that Ms. Beilstein's personal traumatic circumstances, as well as her ADHD, could have affected her behaviour in the entire transaction and could have impacted her initial refusal and then her change of heart and asked me to find that I have to look subjectively into what Ms. Beilstein's state of mind was at that time in terms of her intent.

[137] The Supreme Court of Canada is very clear on this issue. The Court, as I said before, has to view the actions of the accused objectively and not subjectively. Again, I

note, as I did before, the fact that *Woods* stated it is an objective test. It is clear in this case that Ms. Beilstein unequivocally refused to take the test on more than one occasion and continued to say that she was refusing.

[138] It is not the law, as I said at the time of this hearing, that someone can have diminished capacity in Canada. While the Court has sympathy for a medical condition (even though there was no medical evidence provided that either substantiated what Ms. Beilstein said or any expert evidence that could assist the Court on how the illness might have impacted an individual) nonetheless, I can say that it does not affect the operating mind in this case. It does not make the refusal any less a refusal. Ms. Beilstein may not have known the law, but ignorance of the law is no excuse and does not affect *mens rea*. She thought she was smarter than everyone else. She knew from TikTok lawyers that she did not have to provide a sample. She was wrong.

[139] The fact that she was wrong and the fact that her behaviour may have been influenced by her ADHD is of no moment. It does not affect whether the refusal was clear and unequivocal, which it was in this particular case. Her ADHD may have affected her emotional state, but that is no defence to refusal in this case. Her emotional state might equally be explained by the acknowledged consumption of alcohol, but, again, it does not matter. Ms. Beilstein was clearly capable of understanding what went on that night and what was asked of her. She acknowledged as such in her testimony.

[140] In the sober light of day and upon reflection, I have no doubt that Ms. Beilstein now regrets the way she talked to the officer, the way she interacted, and how she dealt

with the demand to begin with, and now appreciates that she should have complied. Relying on an emotional state at the time to say somehow that that is an excuse for refusal would be an error in law, and to consider that somehow her mental or emotional state at the time gives the Court the right to judge her change of heart in some expanded way would also be wrong, in my respectful view. There is no question that the accused operated in ignorance of the law and thought she knew better, but there is equally no question that she had the appropriate *mens rea* and refused this test.

Two Final Observations

[141] First, I want to comment on how having the WatchGuard video was so critical in this case. Oftentimes, the Court is presented with competing versions of an interaction that occurred and is forced to rely on the memory perspectives of the individuals involved. In this particular case, the presence of the WatchGuard video was the best evidence possible. There is no grey area. There is no decision the Court has to make about competing versions or recollections. The WatchGuard video says it all, and it is the best evidence in these particular cases. It was extremely helpful to the Court.

[142] Second, I want to comment on Cst. Parent. I appreciated Ms. Beilstein acknowledging that her behaviour was wrong. I appreciated Ms. Steele acknowledging that as well on behalf of her client. Cst. Parent at all times was patient, calm, and professional with Ms. Beilstein even in the face of some rather troubling comments from her and her increasing anger and vulgarity. Cst. Parent's demeanour never waivered, and he is to be commended for that. His patience in dealing with Ms. Beilstein was

commendable. It is clear that there was an unequivocal refusal, but Cst. Parent wanted to try and avoid that.

[143] Despite the fact that the words and actions of Ms. Beilstein were clearly a refusal, Cst. Parent patiently gave her numerous opportunities to change her mind. Even when she said she did not have to take the test, he asked her to listen and explained it to her. Even when she says the law says she did not have to provide it, he tells her she did. He asked her to hear him out. Even after she says that she did not have to because her family is filled with lawyers, he gives her another opportunity. Even after that, he starts to explain the use of the device and she says she is not going to take the test, and he continues to explain that she has to keep blowing. Even when she says she does not want to, again, he tells her it is against the law. Again, when she says she does not have to, he tries talking about the consequences and he says: "Look, you can pass, and that you are breaking the law". It does not matter. Nothing changes her mind. As Crown counsel points out, at that point in time, the offence is made and the charge lies crystal clear.

[144] I acknowledge that there is no criminal offence of failing an ASD. It is strictly an investigative tool. Had Ms. Beilstein taken the ASD and passed that night, nothing further would have happened. If she had failed, it would only have given the police reasonable and probable grounds to then demand a breathalyzer, which she also may have passed. The fact is she was given multiple explanations, multiple chances, and said, in effect, that she knew better. Even though there is no bright line, and each fact situation is different, in the circumstances before me there is no question that there is an unequivocal refusal. Ms. Beilstein's comment, after all the paperwork was done, that

she would take a breathalyzer, just as she is about to get a ride home, is clearly way beyond any grace period that could be considered.

[145] In the end, the Crown has more than proven its case beyond a reasonable doubt and a conviction must be entered.

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WYANT T.C.J.