S.C.C. File No. 34349

IN THE SUPREME COURT OF CANADA
(On appeal from the Nova Scotia Court of Appeal)

B E T W E E N:

BRENDAN DAVID AUCOIN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO

Intervener

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B E T W E E N:

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PART I

STATEMENT OF FACTS

Introduction

1. Thousands of times a day, police across this country engage with members of the public at the roadside. While most of these exchanges are brief and cordial, they are also unpredictable. The execution of police duties in this context carries a real risk of danger. Even those who appear to be law-abiding members of the public, who might be expected to be calm and compliant, can turn out to be violent. Police continue to be injured and killed in these exchanges.[1] In Canada, 16% of police homicides between 1961 and 2009 occurred in circumstances in which police had made a traffic stop, were investigating a traffic violation, or had stopped a suspicious person or vehicle.[2] It is the position of the Attorney General for Ontario that it is critical for this Court to approach the issues raised in this appeal with a genuine appreciation of the fact that, day in and day out, police officers are expected to execute their important duties in dynamic, challenging, and dangerous circumstances.

2. Narrowly viewed, this case invites the Court to consider two issues. The first issue is whether the police are permitted to ask a person to whom a statutory ticket is to be issued to wait in the police vehicle while that process is completed. The second issue is whether the police may conduct a protective pat-down search of the person to be detained in the police vehicle.

3. More generally, this case requires the Court to consider the scope of police powers during a statutory offence detention while an officer completes his or her duty of issuing a ticket. Police

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[1] There are a host of examples of police officers having been injured or killed in what should have been innocuous roadside encounters. See, for example: The killing of York Regional Police Officer Garrett Styles on June 28, 2011, where the 15 year old driver faces a murder charge. The officer stopped the vehicle for speeding and while he was beside the van investigating, the driver is alleged to have accelerated and dragged the officer 300 metres before losing control and rolling the van, pinning the officer underneath and killing him; *R. v. Lawes,*[1996] A.J. No. 891 (C.A.); aff'd [1997] 3 S.C.R. 694 in which a police officer was fatally shot during a routine traffic stop; *R. v. Romeo,*[1991] 1 S.C.R. 86 and [1991] N.B.J. No. 728 (Q.B.) in which a highway patrol officer was shot and killed after stopping an individual for speeding; *R. v. Bowen,* [1988] A.J. No. 1063 (Q.B.) in which an officer pursued a vehicle initially suspected of theft, but was confirmed just to be speeding. While the officer radioed that he would be stopping the truck, he was shot and killed during the exchange; *R. v. Fitzgerald; R. v. Schoenberger* (1982), 37 O.R. (2d) 750 (C.A.) in which an O.P.P. officer pulled over a vehicle that had no visible red tail light and was shot and injured by the driver; *R. v. Miller,* [1977] 2 S.C.R 680 in which two individuals drew themselves to the attention of the police. When the vehicle was stopped by police, one of them fatally shot the officer.

[2] *Police officers murdered in the line of duty 1961-2009,* Statistics Canada, Catalogue 85-002-X,

need to be able to accomplish their statutory obligations in an efficient manner so that the person detained may proceed on his or her way. They need to have some discretion in how they go about doing so. And, they need to be aware of the inherent risks in these exchanges, and mindful of their safety and the safety of the public. While the appellant suggests that this case concerns the application of *R. v. Mann*[3], the Attorney General for Ontario views the context in this case as qualitatively different from the sort of investigative detention described in *Mann* and, accordingly, suggests that different considerations are relevant. That said, it bears noting that any articulation by this Court of the scope of police powers in this context may have an impact on the scope of police powers in the investigative detention context.

4. The Attorney General for the Province of Ontario, takes no position on the facts of this case.

PART II

INTERVENER'S POSITION WITH RESPECT TO APPELLANT'S QUESTIONS

5. This appeal proceeds to this Court as of right on the basis of the dissenting judgment of Justice Beveridge. The appellant has framed the issue in the following terms:

> Did the majority of the Nova Scotia Court of Appeal err in law by agreeing with the trial judge that there was no breach of s. 8 of the *Charter of Rights* such that evidence obtained as a result of a search of the appellant's person should not be excluded from evidence pursuant to s. 24(2) of the *Charter* and the conviction upheld?

6. The appellant then says that the appeal raises three issues:

1) Were there lawful grounds to detain the appellant in the back seat of the police car?

2) If so, were there lawful grounds to search the appellant prior to placing him in the back seat of the police car? and

3) If so, was the search of the appellant reasonably carried out?

7. The intervener takes no position on the result in this case and no position on the answers to the questions as framed by the appellant. Rather, the intervener will make submissions in relation to the first two issues: the scope of police authority during the process of issuing a statutory offence ticket and the police power to conduct a pat-down search in this context prior to asking a detainee to wait in the police cruiser.

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[3] [2004] 3 S.C.R. 59

PART III

ARGUMENT

A. The scope of police powers while issuing a statutory offence ticket

8. Police who are empowered to investigate statutory offences and issue tickets have the authority, pursuant to both the common law and various provincial statutes, to detain and investigate drivers. In order to complete their duties, the police may continue to detain drivers up until the point that a ticket is properly issued[4]. As the appellant points out, this is both "eminently sensible and abundantly reasonable". A wealth of authorities affirms the police power to detain individuals for such a purpose. For example, in *R. v. Hufsky*[5] this Court considered the constitutionality of random "spot checks" carried out by police for a broad range of purposes.[6] While LeDain J., writing for the Court, held that such a random stop is an arbitrary detention, it is justified under s.1 of the *Charter*. Similarly, in *R. v. Ladouceur*[7], the majority of this Court held that a random routine traffic stop under the *Highway Traffic Act* constitutes an arbitrary detention, but is justified under s. 1. One can envision many other examples of the police exercising their power to detain in order to conduct and complete statutory offence investigations.[8] At the same time, the Court has made clear that continued detention in this context is only justified "if the police act within the limited highway related purposes for which the powers were conferred".[9]

9. In Ontario, many police officers routinely detain and investigate motorists. In 2010 alone, the Ontario Provincial Police laid 455,672 *Highway Traffic Act* charges and 13, 987 *Criminal Code* traffic charges[10]. That same year, Ontario's largest municipal police force, the Toronto Police Service, laid 520,615 *Highway Traffic Act* charges and 2,689 *Criminal Code* traffic charges[11].

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[4] See: *R. v. Humphrey*, [2011] O.J. No. 2412 (S.C.J.) at ¶ 121 in which Justice Code appears to accept that it is entirely legitimate for the police to detain, for the period necessary to complete the investigation and write up the ticket, a driver who has been stopped for a traffic violation under the provincial *Highway Traffic Act*.

[5] [1988] 1 S.C.R. 621

[6] These purposes included sobriety checks as well as checks of the driver's license and insurance, and the mechanical fitness of the vehicle.

[7] [1990] 1 S.C.R. 1257; See also *R. v. Wilson*, [1990] 1 S.C.R. 1291

[8] See, for example, *R. v. Amofa*, [2011] O.J. No. 2095 (C.A.) which held that police were entitled to detain and question two men whom they suspected were loitering in the subway, contrary to the *Trespass to Property Act*.

[9] See *R. v. Nolet*, [2010] 1 S.C.R. 851 at ¶ 22

[10] *Ontario Provincial Police, 2010 Annual Report*, published July, 2011, p. 75, Table 4-2

[11] *Toronto Police Service, 2010 Annual Statistical Report,* pages 30-31

Police officers at the roadside need considerable flexibility both in investigating statutory offences and in issuing tickets so as to ensure that drivers who are detained are efficiently investigated, inconvenienced as little as possible, and able to go on their way. Assuming that they have legitimately detained an individual, officers should not be required to later justify, explain, and account for each and every word spoken or direction given to the detained individual over the time it takes to complete the detention and issue the ticket. Rather, the question to ask is whether the police conduct, viewed in all of the circumstances, was reasonable. As long as police officers make reasonable decisions and requests during these exchanges, they are acting within the scope of their authority. Whether police conduct was reasonable in a particular case depends upon the circumstances, bearing in mind that there may well be more than one reasonable manner in which to complete these sorts of investigations.

10. One of the legitimate avenues police can consider in this context is whether to request that a detainee wait in the back of the police cruiser while the ticket is issued. The police decision to do so in this case is not a matter about which the intervener takes any position. It is noteworthy, however, that this Court has had no concerns about similar requests in this context. For instance, in *Ladouceur*, one of the officers asked the appellant for his driver's license, ownership and vehicle insurance documents. He then asked the appellant to accompany him to the police car, and the appellant agreed. There, the appellant admitted knowing that his license was suspended. In concluding that the routine check impairs the right against arbitrary detention as little as possible, Cory J. noted that:

> The driver generally is questioned in his or her own vehicle or, at worst, when there is an infraction, in the police cruiser.[12]

This Court recognized, therefore, that not only is it minimally intrusive for a detainee to be asked to sit in a police cruiser in this context, but that where a statutory offence infraction has occurred, it may be appropriate and reasonable to do so.

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[12] *Ladouceur, supra*, note 7 at ¶¶ 18 and 59. This Court's decision in *R. v. Belnavis,* [1997] 3 S.C.R. 341 at ¶ 2 provides another example of an officer asking an individual who was detained for a speeding ticket and was unable to produce the required documentation, to accompany the officer to the police vehicle during the investigation.

11. Similarly, in *R. v. Strilec*[13], the British Columbia Court of Appeal accepted the legitimacy of the police decision to direct that a detainee, stopped pursuant to the *Motor Vehicle Act* for operating a dirt bike that was not equipped with headlights or taillights, sit in the back of the police car. Indeed, the court was of the view that this decision "made sense" in light of the fact that the road was narrow, busy with traffic and it was getting dark.[14]

12. Additionally, in the course of a criminal investigation, there is a widely accepted police practice of asking individuals detained after a demand is made for a roadside screening test to sit in the rear of a police car while that test is performed. While the *Criminal Code* provides that a detainee may have to accompany an officer to provide a breath sample[15], the practice of doing so in the rear of the police cruiser appears to be accepted as an efficient, practical and reasonable manner for police to carry out their duties[16]. Indeed, in this case, it is noteworthy that the appellant complied with the officer's request for him to sit in the back seat of the police cruiser while he performed the screening test.[17] In the same way that a roadside screening test may reasonably be given in the police vehicle to facilitate the timely and efficient completion of criminal investigations so, too, may roadside screening tests be given in the police vehicle to investigate statutory offences.

13. Whether or not a decision to ask a detainee to sit in the back of a police car is reasonable in the non-criminal context depends on the circumstances. Police need considerable flexibility to make this determination and their decisions should not be lightly second-guessed. While not exhaustive, the factors that could be reasonably considered include:

- the officer's perception of whether the detainee poses a flight risk;
- whether there is a need to remove the detainee from the vehicle so that it can be towed;
- whether there is a need to prevent the detainee from continuing to operate or have care and control of the vehicle;
- the location of the interaction and the safety issues posed for individuals on the roadside;
- the weather conditions;

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[13] (2010) C.C.C. (3d) 403 (B.C.C.A.)

[14] *Strilec, supra* note 13 at ¶ 30

[15] See s. 254(2)(b) of the *Criminal Code.*

[16] See, for example, *Hufsky, supra*, note 5 at ¶ 3; *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3 at ¶ 15

[17] See: Reasons for judgment of Hamilton J.A., for the majority at ¶ 4

- the lighting conditions;
- the length of time the officer anticipates the detention will take;
- the presence or absence of back-up police;
- the presence or absence of other people in the immediate vicinity; and
- safety issues related to the detainee remaining in the vehicle.

B. The police authority to search a detainee before placing him in a police vehicle during a statutory offence detention

14. In *Mann*, this Court permitted police to conduct an investigative detention on a threshold of "reasonable grounds to suspect" a nexus between the individual and a recent criminal offence. In considering the standard for police to conduct a protective pat-down safety search during an investigative detention, Iacobucci J., writing for the Court, appeared to acknowledge the wisdom of the United States Supreme Court which, in *Terry v. Ohio*, permitted a protective search on a standard lower than that required for arrest:

> ...there must be a narrowly drawn authority to permit ***a reasonable search*** for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, ***regardless of whether he has probable cause to arrest*** the individual for a crime.[18]

Justice Iacobucci then held that the police power to conduct a protective pat-down search incident to investigative detention is limited to circumstances in which the officer has "reasonable grounds to believe" that his or her own safety, or the safety of others, is at risk.[19]

15. Subsequently, in *R. v. Clayton*[20], Justice Abella justified the continued detention and search of the occupants of the vehicle on the basis of the police having "reasonable suspicion" that they could be in possession of handguns. In *R v. Kang-Brown*[21], the Court adopted a standard of "reasonable suspicion" for police to exercise their common law power to search using sniffer dogs. Indeed, Binnie J. clarified that this was the standard the Court had adopted in these earlier cases, commenting that:

> ...the Court ought not, in my respectful view, to waver unpredictably between the willingness of the Court to explore adjustments in the ***common law detention or search and seizure based on reasonable suspicion***, as in the recent cases of *R. v. Mann* [citations omitted] (investigative detention), and *R. v. Clayton* [citations

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[18] *Terry* v. *Ohio*, 392 U.S. 1 (1968) at p. 27 cited in *Mann*, *supra* note 3 at ¶ 41
[19] *Mann*, *supra,* note 3 at ¶¶ 40 and 45
[20] [2007] 2 S.C.R. 725 at ¶¶ 46 and 48
[21] [2008] 1 S.C.R. 456

> omitted] (detention, search and seizure) and the "hands off" or "leave it to Parliament" attitude my colleague advocates...[emphasis added][22]

16. In the arrest context, this Court has made clear that one of the main purposes of search incident to arrest is to ensure the safety of the officer and the public. The standard imposed on police is that they have a "reasonable basis" for such a search. In other words, the police may search an arrested person for a weapon if, under the circumstances, it seems reasonable to check whether that person might be armed.[23] Clearly, a variety of possible thresholds to conduct a protective search could be considered in the context of this case. The question is whether to permit police to conduct a protective pat-down search where there is a "reasonable basis" for doing so, or, whether there is some reason to justify a higher standard that is more difficult for police to apply such as "reasonable grounds to suspect" there is a safety issue or, indeed, as was articulated in *Mann*, "reasonable grounds to believe" that there are safety issues.

17. It is the intervener's position that officers should not be required to weigh safety concerns to a nicety. If officer safety justifies a protective search on arrest on the "reasonable basis" standard, so, too, should it justify such a search in the detention context, where an officer's safety concerns are identical and do not rise to the level of justifying an arrest for a weapons offence. Such a standard means that police must advert to why they are conducting the pat-down search, but need not measure with exactitude the level of proof to which their safety concerns rise in the dynamic situations that they face. Accordingly, it is the intervener's position that when police legitimately detain an individual for the purpose of carrying out a statutory offence investigation, including issuing a statutory offence ticket, a protective pat-down search of the detainee may be conducted if the officer has a reasonable basis for doing so. This standard makes sense. If an officer has "reasonable grounds to believe" that his or her safety is at risk because the detainee may possess a

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[22] *Supra*, note 21 at ¶22. See also: *R. v. A.M.*, [2008] 1 S.C.R. 569 at ¶ 42. Interestingly, some commentators have noted that the higher standard discussed in *Mann* makes little sense and that the lower standard identified in *Clayton* (and since) may have been intended to correct this and impose the more sensible "reasonable grounds to suspect" standard for protective searches. See: Scott Latimer, "The expanded scope of search incident to investigative detention", (2007), 48 C.R. (6th) 201; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*", (2007), 52 C.L.Q. 299 at p. 311

[23] *R. v. Caslake,* [1998] 1 S.C.R. 51 at ¶¶ 19-20; See also: *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.); leave dismissed [1997] S.C.C.A. 571

weapon, he is entitled to arrest the person and conduct a search incident to that arrest. There would be no need to resort to a protective pat-down search. If it seems reasonable for the officer to check whether the person might be armed, that officer should be able to conduct a protective pat-down search.

18. It is crucial for police officers to be accorded significant discretion when assessing safety issues. As Justice Cromwell wrote, on behalf of the unanimous Court in *R. v. Cornell*[24], albeit in a slightly different context:

> I respectfully agree with Slatter J.A. when he said in the present case that "[s]ection 8 of the *Charter* does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present"...
> ...after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

19. Similarly, Justice Moldaver, writing for a unanimous Court of Appeal for Ontario in *R. v. White*[25], wrote that when seizing the cell phone in issue, the officer:

> .....found himself in a dangerous and potentially volatile situation. ***In the circumstances, he had little time to reflect. He had to make a split second decision; a moment's hesitation could have put his life and that of his partner in peril. Courts should keep this in mind when assessing the conduct of officers in the field. When it comes to officer safety and preserving the integrity of their investigation, police officers should be given a good deal of leeway and second guessing should be avoided.*** [emphasis added]

20. In any situation in which a person is detained by police at the roadside, safety concerns may arise for the police as they go about completing their duties. In many cases, statutory offence tickets are issued without the person detained getting out of his or her car and without any officer safety concerns arising. In other cases, police may decide that it is reasonable for the individual to exit his or her car. In still other circumstances, police may decide it is reasonable for the person detained

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[24] [2010] 2 S.C.R. 142 at ¶¶ 22, 24

[25] [2007] O.J. No. 1605 (C.A.) at ¶ 54. See also: *R. v. Crocker* (2009) 247 C.C.C. (3d) 193 (B.C.C.A.) at ¶¶ 63-66; *R. v. Duong*, [2006] B.C.J. No. 1452 (C.A.) at ¶ 54; *R. v. Willis* (2003) 174 C.C.C. (3d) 406 (M.B.C.A.) at ¶ 36

to sit in the back of the police cruiser while the police duties are completed. It is for the police, whose safety is at risk, to decide whether to conduct a frisk search, which this Court has characterized as a "relatively non-intrusive procedure"[26] at any point in this sort of detention, including before asking someone to get into the back of the police car.

21. When a police officer anticipates sitting in the front seat of a police cruiser while a detainee is in the back, that officer will always have a reasonable basis to conduct a protective pat-down search. This need not be justified by any particular characteristic of the person detained or by the nature of the offence for which the person has been detained. Rather, the safety concern flows from the inherent risk to the officer of being in a contained space with an unknown, detained person to whom the officer will be turning his or her back. Police should not have to put their lives and safety on the line in these situations, even if the risk of danger is relatively low. That said, just because the police have the power to conduct a search, they do not have a duty to do so in all cases and may exercise their discretion not to conduct a pat-down search if they are of the view that their duties may be completed safely without one [27].

22. The following factors justify the police power to conduct a pat-down search of anyone who is to be placed in the rear of a police cruiser while the officer sits in the front:

- the fact that the officer intends to sit in the front of the vehicle while the individual is in the back thus leaving the two of them in a contained space;
- the risk to the officer inherent in having his or her back to the person detained;
- the broad range of items that could cause injury to an officer if possessed by the person being put in the back of the police cruiser, including guns, knives and needles[28]; and
- the need to ensure that potentially dangerous and contraband items are not deposited into or hidden in the back of a police vehicle.

23. The intervener acknowledges the obvious: officer safety concerns cannot be used as a pretext to search for evidence. Nor can police place a person in the back of the cruiser merely because the risk of harm posed by doing so will justify them conducting a pat-down search. However, if it is

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[26] *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at ¶ 58; cited with approval in *Mann*, supra note 3 at ¶ 43. See also: *R. v. Debot*, [1989] 2 S.C.R. 1140 *per* Wilson J. at p. 1175 in which she characterized this sort of search as "probably the least intrusive means of searching someone's physical person."

[27] *Cloutier, supra* note 24 at ¶ 60

[28] *R. v. Cooper*, (2005), 195 C.C.C. (3d) 162 (N.S.C.A.) at ¶¶ 58-59

reasonable in all of the circumstances for an officer to detain a person in the police car while his or her duties are completed, given the broad range of safety concerns that arise in these detentions, and the minimally intrusive nature of a pat-down weapons search, such a protective pat-down will be appropriate.

PART IV

SUBMISSIONS RESPECTING COSTS

24. The Intervener makes no submissions as to costs.

PART V

NATURE OF ORDER SOUGHT

25. The Intervener makes no submissions as to the outcome of this appeal.

26. The Intervener requests that an Order be made permitting it to present 10 minutes of oral argument at the hearing of the appeal.

ALL of which is respectfully submitted.

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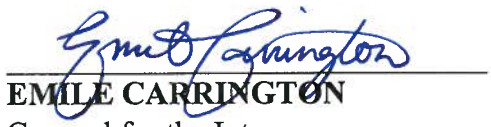

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PART VI

TABLE OF AUTHORITIES

PART VII

LEGISLATIVE PROVISIONS

Charter of Rights and Freedoms, ss. 8, 24

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

***Criminal Code*, s. 254(2)(b)**

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.

Contrôle pour vérifier la présence d'alcool ou de drogue

(2) L'agent de la paix qui a des motifs raisonnables de soupçonner qu'une personne a dans son organisme de l'alcool ou de la drogue et que, dans les trois heures précédentes, elle a conduit un véhicule — véhicule à moteur, bateau, aéronef ou matériel ferroviaire — ou en a eu la garde ou le contrôle ou que, s'agissant d'un aéronef ou de matériel ferroviaire, elle a aidé à le conduire, le véhicule ayant été en mouvement ou non, peut lui ordonner de se soumettre aux mesures prévues à l'alinéa *a*), dans le cas où il soupçonne la présence de drogue, ou aux mesures prévues à l'un ou l'autre des alinéas *a*) et *b*), ou aux deux, dans le cas où il soupçonne la présence d'alcool, et, au besoin, de le suivre à cette fin :

> a) subir immédiatement les épreuves de coordination des mouvements prévues par règlement afin que l'agent puisse décider s'il y a lieu de donner l'ordre prévu aux paragraphes (3) ou (3.1);
>
> *b*) fournir immédiatement l'échantillon d'haleine que celui-ci estime nécessaire à la réalisation d'une analyse convenable à l'aide d'un appareil de détection approuvé.