IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1639

Date: 20111130
Docket: S112179
Registry: Vancouver

Between:

Aman Preet Sivia

Petitioner

And

British Columbia (Superintendent of Motor Vehicles) and The Attorney General of British Columbia

Respondents

- and -

Docket: 104900
Registry: Victoria

Between:

Carol Marion Beam

Petitioner

And

British Columbia (Superintendent of Motor Vehicles

Respondent

- and -

Docket: 104902
Registry: Victoria

Between:

Jamie Allen Chisholm

Petitioner

And

British Columbia (Superintendent of Motor Vehicles)

Respondent

- and -

Docket: 105189
Registry: Victoria

Between:

Scott Roberts

Petitioner

And

British Columbia (Superintendent of Motor Vehicles)

Respondent

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

In Chambers

Counsel for the Petitioner, Aman Sivia:	H.A. Mickelson, Q.C. J. Zeljkovich J. Whysall P. Riddell
Counsel for the Petitioners, Carol Marion Beam, Jamie Allen Chisholm, and Scott Roberts:	A. Beraldin
Counsel for the Respondents in all actions:	G.H. Copley, Q.C. R. Mullett
Place and Date of Hearing:	Vancouver, B.C. May 2-5, 2011
Place and Date of Judgment:	Vancouver, B.C. November 30, 2011

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A. INTRODUCTION AND ISSUES

[1] The death and injury caused by drinking and driving is of great concern in our society, and reducing it is an indisputably important goal. This litigation involves a challenge to certain legislative measures taken by the British Columbia government in pursuit of that goal. The challenge requires determining whether the legislative measures are within the Province's constitutional jurisdiction and whether they are consistent with the rights of individuals protected in the *Canadian Charter of Rights and Freedoms* [*Charter*]. Such an assessment occurs in the context of tension between individual rights and societal objectives.

[2] Although I am fully satisfied of the importance of the objective of reducing the harms caused by impaired driving, I have found that the challenge succeeds in part, because in one respect the impugned legislation infringes the rights of individuals to be free from unreasonable search and seizure.

[3] The challenged legislation was enacted by the Legislature of British Columbia on September 20, 2010, through amendments to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*]. These amendments introduced ss. 215.41 to 215.51, which the petitioners refer to as the "automatic roadside prohibition" regime (ARP regime). The Province refers to these provisions as authorizing an "immediate roadside prohibition" (IRP). For the sake of consistency, I have adopted the former of the two labels for the purposes of this decision.

[4] These amendments essentially provide for an automatic 90-day driving suspension when a driver registers a "fail" (over 0.08 blood-alcohol) on a roadside screening device, and for shorter suspensions of 3, 7, or 30 days if the driver registers a "warn" on the screening device (between 0.05 and 0.08). In addition to the 90-day automatic suspension for a driver over 0.08, the regime imposes monetary penalties and mandatory programs that could cost the suspended driver over $4,000. The most costly of these are enrolment in the responsible driver program and the use of an ignition interlock device for one year, which together total over $2,600.

[5] The petitioners have each received 90-day automatic roadside prohibitions after either allegedly registering a “fail” on a roadside screening device, or refusing to provide a sample of breath. They challenge the validity of these new amendments establishing the ARP regime on two bases: first, that the amendments constitute criminal law and are beyond the legislative jurisdiction of the Provincial Government; and second, that the amendments violate the petitioners’ rights under the *Charter*, in particular those in ss. 8, 10(b) and 11(d).

[6] Legislation similar to the ARP regime has withstood constitutional scrutiny in British Columbia in the past. In an earlier challenge to provincial legislation in *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114, the Court of Appeal ruled that the provisions of the *MVA* that imposed an administrative driving prohibition (“ADP”) of 90 days based on an officer’s reasonable and probable grounds to believe a driver had over 0.08 alcohol in his system were a valid exercise of provincial jurisdiction over roads and highways, and not a colourable attempt to intrude on the federal jurisdiction over criminal law. The Court of Appeal also decided in *Buhlers* that the ADP regime did not infringe the liberty interest protected by s. 7 of the *Charter*, as the right to drive did not fall within the scope of that liberty. In *Buhlers*, at trial, the judge dismissed additional challenges under ss. 8-11 of the *Charter* and those issues were not advanced on appeal.

[7] However, the petitioners contend that the ARP regime goes further than its predecessor (the regime addressed in *Buhlers*) in that the ARP regime is essentially criminal law invalidly enacted by the Province. The petitioners also point out that, unlike the regime in *Buhlers*, the ARP regime creates an “offence” with a process that violates the presumption of innocence and relies on an unreasonable search power.

[8] One difference between the ADP regime and the new ARP regime is that the ARP regime provides for suspensions when a screening device shows blood-alcohol readings in the 0.05-0.08 or “warn” range. Although extending driving prohibitions to that lower range is not the focus of the petitioners’ attack on the division of powers ground, it is part of their challenge on *Charter* grounds.

[9] The petitioners say that the ARP regime differs from the ADP regime upheld in *Buhlers* in significant ways:

(a) in the case of drivers allegedly over 0.08, at least for first-time offenders where there is no bodily injury or property damage, the ARP regime substitutes, rather than operating alongside, the criminal law process, but the protections of the criminal law process for an accused are absent from the ARP regime;

(b) the ARP regime imposes severe financial penalties that were not imposed under the ADP system;

(c) the breath sample taken at roadside with an approved screening device is no longer simply for screening purposes to elevate a peace officer's credibly based suspicion to the reasonable belief required to demand a breath sample by an approved instrument, it is now the evidence upon which the driving prohibition is based;

(d) there is no longer a meaningful review process in place to challenge the ARP prohibition based on the screening device, and the reviewer has almost no jurisdiction to review the automatic roadside prohibition;

(e) the ARP regime differs from automatic suspension programs across Canada; particularly in Ontario and Alberta where the suspension follows a failed test by an approved instrument at the police station, not by a screening device at the roadside.

[10] The petitioners say that the ARP regime:

- is in its pith and substance criminal law that is *ultra vires* the Province;
- creates an offence that infringes s. 11(d) of the *Charter* in that it presumes guilt, offends the presumption of innocence and does not provide for a fair hearing ;
- infringes s. 8 of the *Charter* by authorizing an unreasonable search and seizure; and
- denies a driver the right to counsel contrary to s. 10(b) of the *Charter*.

[11] The Province says that the ARP regime:

- is within provincial jurisdiction with respect to the licensing of drivers and the regulation of safety of persons using highways in the province;
- does not create an "offence" as that term is used in s. 11(d) of the *Charter*;
- does not create a search power, but simply uses information produced by a lawful search pursuant to the *Criminal Code* for an administrative or regulatory purpose; and
- if there is a search, does not infringe any reasonable expectation of privacy, and drivers are taken to agree to reasonable breath tests as a condition of driving.

The Province takes the position that if any violation of the *Charter* is established, it is justified under s. 1 because roadside screening under the ARP regime is being used in an administrative or regulatory context where the objective is to keep impaired drivers off the road.

Issues

[12] The petitioners' challenges give rise to the following issues.

1. Division of Powers - is the ARP regime criminal law in its pith and substance and therefore *ultra vires* the Province, or is it within the Province's jurisdiction to legislate

with respect to regulation of the licensing of drivers and highway safety?

2. Does the ARP regime violate the *Charter* in any of the following ways:

   a. Does the regime violate the presumption of innocence guaranteed in s. 11(d) of the *Charter* by creating an "offence" that presumes guilt of the driver and fails to provide a fair hearing?

   b. Is the regime a law that infringes s. 8 of the *Charter* by authorizing an unreasonable search and seizure?

   c. Does the regime deny the right to counsel upon detention in violation of s. 10(b) of the *Charter*?

3. If there are violations of any of ss. 8, 10(b) or 11(d) of the *Charter*, have they been demonstrably justified by the Province as reasonable limits in accordance with s. 1 of the *Charter*?

Summary of Decision

[13] After carefully considering the evidence and submissions of the parties, I have concluded that the ARP regime is validly enacted provincial legislation from a division of powers perspective. Although it is closer to criminal law than any of its predecessors, the pith and substance of the legislation relates to the licensing of drivers and the enhancement of highway traffic safety, and is not properly characterized as criminal law.

[14] Likewise, because it does not cross the threshold of creating an "offence", I find that the ARP regime does not violate s. 11(d) of the *Charter*. It is neither an offence "by nature" nor does it impose "true penal consequences".

[15] Further, I find that although the legislation (like its predecessor provincial impaired driving regimes) *prima facie* violates the s. 10(b) right to counsel at the roadside screening stage, it is saved by s. 1 as it is a limit which is demonstrably justified in a free and democratic society.

[16] However, I find the ARP legislation infringes s. 8 of the *Charter* in the limited circumstance where, on the basis of a search of breath by an approved roadside screening device, a 90-day license suspension as well as significant penalties and costs are imposed on motorists who allegedly blow over 0.08, without those persons being able to meaningfully challenge the results of the search. I also find that the infringement is not saved under s. 1 of the *Charter*. The Province has failed to demonstrate that it constitutes a reasonable limit on the right to be free from unreasonable search and seizure.

[17] Insofar as the regime operates with respect to motorists who allegedly blow between 0.05 and 0.08, I find that the ARP regime does not infringe s. 8 of the *Charter*.

[18] In the course of this decision I will deal first with the division of powers arguments, and then I will proceed to address the *Charter* challenges to the legislation. However, by way of background I will first describe in more detail the challenged ARP regime, discuss briefly the administrative challenges advanced by the petitioners that have been placed on hold pending the determination of the constitutionality of the ARP regime, review the history of drinking and driving prohibitions in British Columbia, and introduce some of the background and social science evidence concerning the problem of drinking and driving and the purpose and the effect of this challenged legislation.

B. THE CHALLENGED ARP REGIME

The ARP Regime

[19] The ARP regime provides for a mandatory driving prohibition when a motorist's ability to drive is affected by alcohol, as evidenced by an analysis of breath by means of an "approved screening device" (ASD) that registers either a "warn" (over 50 milligrams of alcohol in 100 millilitres of blood - 0.05 or over) or "fail" (over 80 milligrams of alcohol in 100 millilitres of blood - 0.08 or over) (s. 215.41(2)). A prohibition is also issued if a driver fails or refuses to comply with a demand made under the *Criminal Code* to provide a breath sample for analysis (s. 215.41(4)).

[20] Sections 215.41(3) and (4) of the *MVA* provide:

> (3) If, at any time or place on a highway or industrial road,
>
> (a) a peace officer makes a demand to a driver under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and
>
> (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,
>
> the peace officer, or another peace officer, must,
>
> (c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and
>
> (d) serve on the driver a notice of driving prohibition.
>
> (4) If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device, the peace officer, or another peace officer, must take those actions described in subsection (3) (c) and (d).

[21] As alluded to in s. 215.41 of the *MVA*, the authority to request a breath sample on a highway or industrial road comes from s. 254(2) of the *Criminal Code*. Section 254(2) of the *Criminal Code* states:

> (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 ... the peace officer may, by demand, require the person to comply with paragraph ... (b), in the case of alcohol:
>
> ...
>
> (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.

[22] For the purposes of a criminal investigation, the sample provided under s. 254(2) of the *Criminal Code* does not provide the evidence for a subsequent criminal charge. Rather, it may provide the reasonable and probable grounds for a further analysis under s. 254(3). The test under s. 254(3) is conducted with an approved instrument (breathalyser) rather than an approved screening device and provides evidence that may be relied upon by the Crown if criminal charges are filed.

[23] The duration of the driving prohibition under the ARP regime varies based on whether the driver has registered a "warn", a "fail", or has refused to blow. Registering a "fail" on an ASD automatically leads to 90-day driving prohibition (s. 215.43(2)). Refusing to provide a breath sample also results in a 90-day driving prohibition (s. 215.43(2)). Registering a "warn" leads to a 3-day suspension for a first prohibition, 7 days for a second prohibition, or 30 days for a subsequent prohibition (s. 215.43(1)). The number of prohibitions a driver has been subject to in the previous five years determines whether it is a first, second or subsequent prohibition (s. 215.43(4)).

[24] The ARP regime also provides for a range of "additional consequences" that apply in certain circumstances. Which of these additional consequences apply is determined by the length of the prohibition.

[25] All persons that are issued a notice of driving prohibition are liable to pay a monetary penalty. The current amounts are prescribed by the *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09, as follows:

> (a) in the case of a 3-day driving prohibition, $200;
>
> (b) in the case of a 7-day driving prohibition, $300;
>
> (c) in the case of a 30-day driving prohibition, $400;
>
> (d) in the case of a 90-day driving prohibition, $500.

[26] Section 215.45 of the *MVA* states that all drivers who are issued a 30-day or 90-day driving prohibition are required to register in and attend any remedial program required by the Superintendent under s. 25.1 of the *Act*. The driver must pay the cost of this remedial program, which is set by the *Motor Vehicle Act Regulations*, B.C. Reg. 26/58 s. 46.01 at $880.

[27] Drivers that are issued a 30-day or 90-day driving prohibition are also subject to a mandatory impoundment of their vehicle under s. 215.46(2) of the *MVA*. The period of impoundment is 30 days (s. 253(7)). When a peace officer issues a 3-day or 7-day driving prohibition, the peace officer has discretion to order impoundment where it is "necessary to prevent the person from driving or operating the motor vehicle before the prohibition expires" (s. 215.46(1)). If the vehicle is ordered impounded the period of impoundment is equal to the period the driver is prohibited from driving (s. 253(6)).

[28] A driver whose vehicle has been impounded is liable for the costs of towing and storage and those costs constitute a lien on the motor vehicle (s. 255(2)). These costs are set by the *Lien on Impounded Motor Vehicle Regulation*, B.C. Reg. 262/2010. The current fee for storage is $19.55 per day within the Lower Mainland and Victoria, and $16.10 per day in the rest of the province. The towing fees (for an average car) are $78.89 for the first 6.0 kilometre, with per kilometre charges for any additional distance.

[29] Certain consequences also attach to the ARP regime that are common to other driving prohibitions. One is the requirement to pay a mandatory fee of $250 to have a driver's licence reinstated (s. 97.2). Another is the possible requirement that the driver use an ignition interlock program specified by the Superintendent under s. 25.1. This is a discretionary decision the Superintendent may make if, in the Superintendent's opinion, the driver's driving record is unsatisfactory or that it is in the public interest for the person to participate in the program. Section 25.1 of the *MVA* provides:

> 25.1(1) This section applies if a person has a driving record that in the opinion of the superintendent is unsatisfactory or the superintendent considers that, with respect to the person's driving skills, fitness or ability to drive and operate a motor vehicle, it is in the public interest for the person to attend or participate in one or more of the following:
>
> (a) a driver training course specified by the superintendent;
>
> (b) a remedial program or a component of it specified by the superintendent;
>
> (c) an ignition interlock program specified by the superintendent.

[30] However, although a discretionary decision, the unrefuted evidence on this hearing is that for a "fail" reading this penalty is imposed as a matter of course. The prescribed fee for the ignition interlock program is $150 and the cost of installing the ignition interlock device is estimated at $1,500.

[31] The *Summary Table of Consequences and Costs* published by the Ministry of Public Safety and Solicitor General describes the administrative consequences of a reading in the "fail" range as an "Immediate 90 day Administrative Driving Prohibition" and an "Estimated Total Cost", exclusive of legal costs, of $4.060.

[32] A person who has been issued a driving prohibition under s. 215.41 may apply for a review of the driving prohibition within seven days of being served under s. 215.48(1) of the *Act*.

[33] This review is limited in scope. There is only an oral hearing (for the longer 30 or 90 day prohibitions) if it is requested by the driver (s. 215.48(5)), and if there is an oral hearing no person may be cross-examined (s. 215.49(2)).

[34] The adjudicator may also proceed with the hearing even if all of the documents the peace officer is required to submit under s. 215.47 have not yet been received (s. 215.49(3)).

[35] Where the driver has allegedly blown a "fail" or a "warn" on the roadside screening device, the adjudicator's jurisdiction is limited to being satisfied on two issues: whether the driver was a "driver" within the meaning of s. 215.41(1), and whether the ASD actually registered a "warn" or "fail" (or the driver refused to provide a breath sample) (s. 215.5(1)). The nature of the approved screening device is such that it provides no permanent record of what it is indicated when used. The only available evidence as to what the ASD indicated is the observation of the peace officer, which may be put before the adjudicator in the form of an unsworn statement.

Administrative Challenges

[36] In addition to the constitutional challenges to the legislation, each of the petitioners has also challenged the reviews of their ARPs on a range of administrative law grounds. The parties have agreed to adjourn these aspects of the petitions pending my determination of the constitutionality of the ARP regime.

C. HISTORY OF ROADSIDE AND OTHER SUSPENSIONS

[37] Various aspects of drinking and driving have long been the subject of regulation by both the federal criminal law and provincial regulatory law. There is also a lengthy history of constitutional challenges to the validity of such provincial legislation, originally on division of powers grounds and later on *Charter* grounds.

[38] The challenges to British Columbia's impaired driving legislation have historically been unsuccessful. It is well-established that the province may regulate drinking and driving as an aspect of its s. 92(13) legislative power over property and civil rights; particularly with respect to the suspension of licenses to drive a motor vehicle.

License Suspension upon Criminal Conviction

[39] The most basic form provincial legislation dealing with impaired driving is that which simply allows for or requires the suspension of a driver's licence upon conviction of an impaired driving offence under the *Criminal Code*. The constitutionality of such legislation enacted by Prince

Edward Island was challenged in 1941 as an intrusion into the federal jurisdiction over criminal law in *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396 [*Egan*]. In *Egan*, the Supreme Court of Canada agreed that such provincial legislation was within the constitutional jurisdiction of the provincial legislature as a matter of property and civil rights, and a matter of a merely local and private nature. This was expressed by Chief Justice Rinfret (at 415):

> The right of building highways and of operating them within a province, whether under direct authority of the Government, or by means of independent companies or municipalities, is wholly within the purview of the province... and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Such is, amongst others, the provincial aspect of section 84 of the Highway Traffic Act. It has nothing to do with the Dominion aspect of the creation of a crime and its punishment. And it cannot be said that the Dominion, while constituting the criminal offence of driving while intoxicated and providing for certain penalties therefore, has invaded the whole field in such a way as to exclude all provincial jurisdiction.

[40] Chief Justice Rinfret noted the aspects that differentiated punishment under the *Criminal Code* from the suspension of a license under the provincial legislation (at 415-416):

> The offender found guilty under the *Criminal Code*, as already pointed out, may be prohibited from driving a motor vehicle or automobile anywhere in Canada during the period mentioned in the Code. The order, if made by the convicting magistrate, will operate quite independently of any licence granted by the Provincial authority. In that sense, it would be allowed to supersede the Provincial legislation. But section 84 of *The Highway Traffic Act* of Prince Edward Island, dealing with the case of its own licensees upon the territory of its own province, provides that a person convicted of driving while intoxicated loses his provincial licence, either for a time or forever (in the case of a third offence). <u>It does not create an offence; it does not add to or vary the punishment already declared by the *Criminal Code*; it does not change or vary the procedure to be followed in the enforcement of any provision of the *Criminal Code*.</u> It deals purely and simply with certain civil rights in the Province of Prince Edward Island. Such legislation can rely upon the decision, in this Court, of *Bédard v. Dawson and the Attorney-General for Quebec ...* As pointed out in that case by the present Chief Justice,
>
> > The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.
> >
> > [emphasis added]

[41] The above excerpt identifies particular areas where Mr. Mickelson, counsel for the petitioners, argues the impugned legislation is unconstitutional. He says the ARP regime does create an “offence” and that it “varies the procedure” in the enforcement of the *Criminal Code*.

[42] In British Columbia, the current manifestation of the same type of regulation which was

analysed in *Egan* is found in s. 99 of the *MVA*, which provides for a 12-month driving prohibition upon conviction of any of a number of offences under the *MVA* and/or *Criminal Code*.

[43] Section 99's predecessor, s. 92(2) of the *Motor Vehicle Act*, R.S.B.C. 1979 c. 288, which provided for an automatic six month suspension for a motor-vehicle related *Criminal Code* offence, was challenged unsuccessfully on division of powers and *Charter* grounds in *Rennie v. British Columbia (Superintendent of Motor Vehicles)* (1986), 7 B.C.L.R. (2d) 261 (S.C.). With regard to the division of powers issue, Mr. Justice Macdonell found that (at 264):

> The only difference between s. 92(2) of the Motor Vehicle Act and the Prince Edward Island Highway Traffic Act is that the Prince Edward Island Act provides for suspension on conviction, and the Motor Vehicle Act provides for prohibition from driving. The use of the word "prohibition" does not change the nature of the exercise, in my view, nor is it an incursion into the criminal law. By calling it prohibition, it does not become a criminal sanction. Section 82 of the Motor Vehicle Act provides that any prohibition includes a suspension, so the purpose of controlling highways does not change.

24 Hour Roadside Suspension

[44] The next form of provincial regulation concerning impaired driving in the *MVA* is the roadside licence suspension that is currently provided for in s. 215.

[45] Section 215 of the *MVA* provides a peace officer with discretion to issue a 24-hour roadside suspension, if he or she has reasonable and probable grounds to believe a driver's ability to drive a motor vehicle is affected by alcohol.

[46] A prior incarnation of the roadside suspension was challenged in *R. v. Wolff* (1979), 9 B.C.L.R. 390 (C.A.). As was later the case in *Rennie*, the Court of Appeal found that *Egan* was indistinguishable (at 396):

> In my opinion, the legislation in this particular case is within the powers of a provincial legislature. It is legislation enacted with regard to the use of a highway in the province of British Columbia and the safe use of the highway. I cannot see why the *Egan* case should be distinguished merely because the provincial legislature provided that the action with regard to the licence would be taken after a conviction under the *Criminal Code*. If the legislation is within the competence of the provincial legislature, it is valid whether the powers be exercisable before or after a conviction under the *Criminal Code*.

Administrative Driving Prohibition (ADP)

[47] The immediate predecessor to the ARP regime is the administrative driving prohibition, or ADP regime, which came into force in 1997 as ss. 94.1 to 94.6 of the *MVA*. The ADP regime creates a mandatory 90-day driving prohibition that, unlike the prohibition in s. 99, does not depend upon a criminal conviction.

[48] Instead, the ADP regime provides that if a peace officer has reasonable and probable

grounds to believe that the driver of a motor vehicle is, on the basis of "an analysis of … breath or blood", over 0.08 at the time of driving or that the driver refused to comply with a demand for a breath sample pursuant to s. 254 of the *Criminal Code*, the peace officer must issue a notice of driving prohibition (s. 94.1). This notice states that upon the expiration of 21 days from the date of its service the driving prohibition will take effect for a period of 90 days.

[49] Shortly after the ADP regime came into force, its constitutionality was challenged on both division of powers and *Charter* grounds in *Buhlers*. The legislation withstood constitutional scrutiny. The ADP regime was found to be *intra vires* the provincial legislature, as its pith and substance was not criminal law in nature. The s. 7 *Charter* challenge was also unsuccessful as Mr. Justice Hinds found that "the right or privilege to drive a motor vehicle on a public highway is not a liberty protected by s. 7" (at para. 110).

[50] The petitioners in the case at bar have not attempted to make a s. 7 *Charter* challenge, but focus their *Charter* arguments on other *Charter* rights, that were not the subject of the case at the appellate level in *Buhlers*.

Differences between the ADP and the challenged ARP Regime.

[51] The 24-hour roadside suspension, suspension upon criminal conviction for a motor-vehicle related offence, and ADP regime have all survived constitutional scrutiny. The present basis of the attack is that the new legislation has crossed the line. It is argued to be a distinct shift by the Province into a criminal law regime, which uses search powers without constitutional protection and establishes an offence without the protection of the presumption of innocence.

[52] It is by comparison with the ADP regime that the petitioners aim to expose the constitutional frailty of the ARP regime. The key differences between the two regimes identified by the petitioners include the process by which a prohibition is issued, the consequences that arise from a prohibition, and the limited review process by which the ARP may be challenged. The combined effect of these differences, in the petitioners' submission, is that the ARP regime has an impact on the petitioners equivalent to criminal law sanctions, without any of the required *Charter* protections.

[53] The legislation in the ADP regime provides that if a peace officer has reasonable and probable grounds to believe by reason of an analysis of breath that a driver exceeded 0.08 within three hours of driving, the peace officer must serve a notice of driving prohibition. The ARP legislation refers to a demand under the *Criminal Code* for a driver to provide a sample of breath for analysis by means of an approved screening device. If the ASD registers "warn" or "fail", and (based on this analysis) an officer has reasonable grounds to believe the driver's ability to drive is affected by alcohol, he or she must serve a notice of driving prohibition.

[54] The ARP regime is triggered after “analysis by means of an approved screening device”. This is a roadside test taken on a simpler device than an approved instrument (breathalyser) which does not provide a numerical blood-alcohol-concentration reading when the results are at the level of “warn” or “fail”,

[55] Based on the evidence at the hearing it appears that, in practice, the ADP prohibition arises from the breath analysis by an approved instrument at the police station, but from the decision in *Buhlers* it appears that in some circumstances the ADP follows the use of the ASD at the roadside. Although the suspension under the ADP and ARP regimes is the same length for a “fail” (over 0.08) reading, other consequences associated with each regime differ significantly.

[56] Where the driver has a blood-alcohol reading over 0.08, the consequences of an ADP are limited to the driving prohibition itself and standard consequences that arise upon any driving prohibition (e.g. the $250 reinstatement fee required under s. 97.2). The consequences of the ARP regime are greater. A driver issued an ARP for blowing a “fail” or refusing to blow, for example, is, in addition to the 90 day suspension, exposed to penalties and cost consequences totalling over $4,000.

[57] Finally, the ADP regime provides for a different and broader review than the ARP regime. Under s. 94.6, on the review of an ADP the Superintendent may consider whether, in fact, a driver was “over 0.08” while operating a motor vehicle. In contrast to the above review process, upon review of an ARP under s. 215.5, the Superintendent is required to uphold the suspension simply if satisfied that the person was a driver and that the approved screening device registered a “warn” or “fail”.

[58] The ARP arises after a test by an ASD which, according to the evidence, provides no physical record whatsoever and on review is confirmed by the unsworn evidence of the peace officer who administered the test. Conversely, when the ADP arises after an analysis by approved instrument (breathalyser) under the *Criminal Code*, which is the usual course, there is a certificate of analysis.

[59] For practical purposes the enactment of the ARP regime appears to have rendered the ADP regime superfluous; however, the law concerning the ADP regime remains in force.

D. LEGISLATIVE CONTEXT

[60] There is no dispute that removing impaired drivers from the road and highway safety are important objects of this legislation.

[61] As Mr. Justice Cory said in an oft-cited quote from *R. v. Bernshaw*, [1995] 1 S.C.R. 254 (at para. 16):

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

[62] He went on to say (at para. 19):

> These dry figures are mute but shocking testimony demonstrating the tragic effects and devastating consequences of drinking and driving. The social cost of the crime, great as it is, fades in comparison to the personal loss suffered by the victims of this crime through the death and injury of their loved ones. The gravity of the problem and its impact on Canadian society has been so great that *Criminal Code* amendments were enacted aimed at eliminating or, at least, reducing the problem.

[63] I also refer to the comments of the Minister of Public Safety and Solicitor General when the amendments to the *MVA* introducing the ARP regime received second reading on May 17-18, 2010. He said :

> This bill, of course, deals with a number of amendments to the Motor Vehicle Act designed to increase and enhance road safety. They can be categorized probably into two or three general areas.
>
> Firstly, there is the stated desire and objective here to reduce the growing number of deaths and injuries resulting from alcohol and drug-related crashes and also to reduce the disproportionate number of accidents and deaths that accrue to motorcyclists. There is a desire by virtue of these amendments to improve existing driver fitness and vehicle impoundment programs.
>
> [British Columbia Legislative Assembly, *Hansard* Vol. 17 No. 7, (17 May 2010) at 5416 (Hon. M. de Jong)]

[64] The Minister addressed the first general area, to reduce the growing number of deaths and injuries resulting from alcohol and drug-related motor vehicle crashes, and said:

> I think it is fair to say that the objectives being sought in this legislation enjoy fairly widespread support, ...
>
> Most people, though they understand and deplore the carnage that accrues as a result of drinking and driving, probably do not think of it in these terms, and that is that impaired driving remains the number one criminal cause of death in Canada. I will emphasize that. It is the number one criminal cause of death. Hundreds of Canadians are killed every year, and thousands are injured, in accidents that I think we could say would be preventable had one or more of the drivers not been consuming alcohol or drugs.
>
> [British Columbia Legislative Assembly, *Hansard* Vol. 17 No. 7, (17 May 2010) at 5416 (Hon. M. de Jong)]

[65] The opposition expressed their support for this legislation and the Honourable Mike Farnworth said:

> ... the bottom line is that far too many people in British Columbia are still killed in a terrible roadside carnage due to people who drink and drive. It is unacceptable in today's society

> that that continues to take place, and it is unacceptable that too many people still don't get the message, that too many people think that it's okay, that it's not really in the same league as some other aspects of the Criminal Code.

[66] The petitioners do not deny that removing impaired drivers from the road is a valid and worthwhile objective of legislation. Although this objective is not disputed, the petitioners argue that the legislation's dominant purpose is most appropriately characterized as criminal law, not the regulation of highway safety.

[67] Moreover, there are two areas where there is some dispute over the background evidence and what can properly be considered in determining the constitutionality of this legislation. One area is on the question of the division of powers. The petitioners assert, but the Province disagrees, that the Province, as evidenced by the purpose and effect of the ARP regime, has entered into the area of criminal law. The petitioners maintain that the punitive and deterrent aspects of this legislation, and the intended creation of an alternative model to the federal criminal law process, further evidence this point.

[68] Secondly, although counsel for the petitioners acknowledges that aggressive steps should be taken to remove repeat offenders from the highway, he argues that injuries and deaths from alcohol-related accidents have not been shown to be on the increase, and thus this legislation, which imposes a provincial criminal law system on first-time offenders without the protections of due process, is not justified.

E. DIVISION OF POWERS

Is the ARP Regime in its Pith & Substance Criminal Law and Outside of the Legislative Competence of the Provincial Government?

Parties' Positions

[69] Under s. 91(27) the Federal Government is given exclusive power to enact criminal law and procedure. The petitioners say that the ARP regime is, at its core, criminal law and thus *ultra vires* the legislative jurisdiction of the province. They submit that the ARP regime gives the police the power to impose automatic severe penalties on an assertion of a "fail" reading from a roadside screening device.

[70] According to the petitioners the law is criminal in nature, and is concerned with punishment and deterrence, not the licensing of drivers or regulation of safety on highways. The ARP regime imposes penalties that are not subject to proper review, do not require sworn evidence and do not allow cross-examination. They argue that the intention and effect of the ARP regime is not to operate within provincial jurisdiction parallel with the existing criminal law for impaired driving, but to substitute a different regime for first-time offenders with apparent blood-alcohol readings over 0.08.

[71] The petitioners say that the ARP regime uses the screening device to prosecute, not merely as a tool in the criminal law investigative process to establish reasonable grounds for a search by way of a breathalyser test.

[72] The Province disagrees. Counsel for the Province says that the pith and substance of the impugned legislation is no different than the legislation upheld in *Buhlers*, that is, the licensing of drivers and the enhancement of highway safety. The purpose, he submits, is to provide a process for removal of drivers from the road who have been shown to be a danger to themselves and others because of their decision to drive a motor vehicle having consumed a sufficient quantity of alcohol to put them over the "warn" threshold.

[73] The Province argues that they have exclusive jurisdiction to legislate with respect to matters described in s. 92(13) (property and civil rights), which necessarily encompasses safety on provincial highways. The Province argues that legislation incorporating a finding from a criminal investigation does not make the law criminal, and is nothing new, having gone on for 70 years since it was endorsed in the *Egan* decision. Counsel for the Province says the consequences are not intended to punish, but rather to deter, and even if the consequences are greater than under the *Criminal Code*, the ARP regime is nevertheless properly enacted provincial legislation. The respondents say that criminal law is not the pith and substance of the regime, and note that validly enacted provincial legislation can have incidental effects in the area of criminal law.

Analysis

[74] For the reasons that I will now describe, I find that the ARP regime, from a division of powers perspective, is validly enacted provincial legislation because its pith and substance is the licensing of drivers, the enhancement of highway traffic safety, and the deterrence of persons from driving on highways when their ability is impaired by alcohol.

[75] The process of determining whether impugned legislation is properly characterized as federal or provincial involves ascertaining the "pith and substance" of the legislation, and on that basis assigning it to one of the "classes of subjects" in respect of which federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*: *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

[76] The pith and substance analysis is done by looking closely at the legislation establishing the ARP regime and determining "the matter" in relation to which the law was enacted. The analysis should consider as well whether the legislation is "colourable," that is, whether the law in form, appears to address something within the legislature's jurisdiction, but in substance, deals with a matter outside that jurisdiction. As noted in *Morgentaler* (at para. 24):

> There is no single test for a law's pith and substance. The approach must be flexible and a

> technical, formalistic approach is to be avoided. ... While both the purpose and effect of the law are relevant considerations in the process of characterization ... it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity.

[77] As stated in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 the question to ask when deciding whether legislation is within a province's power is (at para. 16):

> What is the essence of what the law does and how does it do it?

[78] *Saputo Inc. v. Canada (Attorney General)*, 2011 FCA 69, referring to the Supreme Court of Canada decision in *Ward v. Canada (A.G.)*, 2002 SCC 17, [2002] 1 S.C.R. 569, provides a good summary of the approach to be taken to determine the essential character of the law and whether it is in substance legislation outside the jurisdiction of the provincial government to enact (at para. 13):

> In determining the essential character of the impugned Regulations, what must be determined is their true meaning or dominant feature. This is resolved by looking at their purpose and legal effect. In *Ward* ... the Supreme Court of Canada proposed that the following considerations be taken into acount:
>
> > ... The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law.

[79] This was the approach taken by the Court of Appeal in *Buhlers* in determining that the pith and substance of the ADP regime was within provincial legislative jurisdiction. Mr. Justice Hinds, after referring to the decision in *Morgentaler*, said with respect to the ADP legislation (at paras. 27 and 60) :

> It is clear that the impugned legislation must therefore be scrutinized carefully in order to determine its purpose and effect and, ultimately, its pith and substance. Moreover, a court is also entitled to consider "relevant and not inherently unreliable" extrinsic evidence of the sort referred to by Sopinka J. in Morgentaler.
>
> ...
>
> In my view, the purpose and effect of the Legislation was to deal with the licensing of drivers and was to enhance the safety of persons using public highways. Both the purpose and effect of the Legislation were within the jurisdiction of the province. The doctrine of colourability was not offended.

[80] However, with respect to the pith and substance of provincial legislation that suspends drivers' licenses on the happening of certain events, Hinds J.A. commented on the possibility of legislation transgressing into the federal field (at para. 32):

> It must be recognized, however, that the authority of a provincial legislature to issue, suspend or cancel a licence to drive upon the happening of certain conditions or events does not necessarily lead to the conclusion that provincial legislation is constitutionally

valid. It may, or may not, transgress into the field of federal legislation.

[emphasis added]

Relevant Evidence

[81] As noted in *Morgentaler*, the analysis of pith and substance starts with looking at the legislation itself to determine its legal effect (para. 25). However, the pith and substance analysis is not restricted to the four corners of the legislation, and as the Court set out (at para. 26):

> ...the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve", its background and the circumstances surrounding its enactment ... and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation.

[82] In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable (*Mogentaler* at para. 27). Here, as in *Buhlers*, there is a substantial amount of extrinsic evidence concerning the purpose and effect of the legislation.

[83] Extensive evidence was filed concerning the continuing problem of impaired drivers, and the devastation and personal costs resulting from alcohol-related injuries and deaths.

[84] This evidence was not challenged by the petitioners, and in fact, the petitioners acknowledged that impaired driving remains a serious problem. I have referred above to the passages from Justice Cory's judgment in *Bernshaw*. The concerns he expressed in that case clearly still exist today. The evidence filed in the case at bar shows that there is a legitimate, substantial and pressing reason for the Province to regulate highway safety and the licensing of drivers to remove impaired drivers from the roads, and that the federal government is justified in legislating criminal sanctions in relation to impaired driving. I will further discuss some of the underlying evidence of the harms associated with impaired driving and the nature of the problem when I consider s. 1 of the *Charter.*

Context for Determination of Pith and Substance

[85] The issue in this case is whether the legislation has, as the petitioners suggest, crossed the line between what is properly federal and what is properly provincial legislative jurisdiction. When considering the pith and substance of legislation, it must be recognized that this line is not a bright line.

[86] In *Chatterjee* the Supreme Court of Canada looked at the issue of division of powers in the criminal law context. At para. 29 the Court posed the question, "at what point does a provincial measure designed to "suppress" crime become itself 'criminal law'?". The view of the Court was that provincial legislation could "incidentally" intrude into the sphere of the federal criminal law

power as long as the “dominant feature” of the provincial law fell under a recognized provincial head of power (see paras. 29, 30 and 36).

[87] The Court pointed out that, “[t]here will often be a degree of overlap between measures enacted pursuant to the provincial power (property and civil rights) and measures taken pursuant to the federal power (criminal law and procedure)” (at para. 29). Mr. Justice Binnie expanded on this point at para. 40 of the decision:

> The Constitution permits a province to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not compromise the proper functioning of the *Criminal Code*. ...There is no general bar to a province's enacting civil consequences to criminal acts provided the province does so for its own purposes in relation to provincial heads of legislative power.
>
> [emphasis added]

[88] When looking at what a court will consider to be “incidental” effects, it is helpful to refer to Supreme Court’s definition of “incidental” in *Canadian Western Bank v. Alberta*, 2007 SCC 22 (at para. 28).

> By "incidental" is meant effects that may be of significant practical importance but are corollary and secondary to the mandate of the enacting legislature: see British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 28.
>
> [emphasis added]

[89] Because the petitioners assert that the pith and substance of the ARP regime is criminal law, it is also useful to consider what constitutes criminal law for the purpose of a division of powers analysis. In *Reference re Assisted Human Reproduction Act,* 2010 SCC 61, Chief Justice McLachlin explained (at para. 35):

> Having characterized the matter to which the Act relates, the next question is whether it comes within the scope of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. In order to answer this question, we must consider whether the matter satisfies the three requirements of valid criminal law: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("*Firearms Reference*"), at para. 27.

[90] In *Buhlers*, the Court rejected the argument that the pith and substance of the ADP regime was criminal law. More recently, the Alberta Court of Appeal likewise found that the suspension of an individual’s driver’s licence in the absence of a conviction for a criminal offense was not sufficient to bring provincial legislation under the federal criminal law power. In upholding the “Administrative License Suspension” provisions of the *Traffic Safety Act*, S.A. 1999, c. T-6.4, the Court in *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256, found that the objective of the legislation was public safety (at para. 26). In *Thomson*, the impugned provisions of the *Act* provided for a 90 day licence suspension by a peace officer having reasonable and

probable grounds to believe that a driver drove a motor vehicle while his or her ability to do so was impaired by alcohol at or above the criminal level of 0.08. On the issue of overlapping provincial and federal measures the Court remarked (at para. 29):

> The primary concern of provincial legislatures is one of public safety as distinct from deterring or punishing criminal behaviour. Where the province perceives that more can be done to increase highway and public safety in general, it is entitled to act accordingly. The objectives of the criminal law, as distinct from civil law, include deterring and sanctioning criminal behaviour. Criminal consequences are penal and may result in a deprivation of a liberty. Thus, criminal law aims to strike a careful balance of the individual's rights and interest and broader societal goals. Where, as here, the consequences of the behaviour are civil in nature, the stringent procedural safeguards required under the criminal law are of less significance and the balance shifts somewhat in favour of the societal goal of deterrence and safety.
>
> [emphasis added]

[91] At this stage, the petitioners argue that the evidence shows that the ARP regime goes beyond highway safety regulation and driver licensing, and into the arena of criminal law. They assert that the ARP regime is properly characterized as criminal law because it intended purpose and effect is to establish a substitute criminal law process for first time offenders who “blow in the fail range”.

[92] The petitioners’ argument identifies a number of ways in which the provincial ARP regime problematically permeates the criminal law.

[93] In this respect, the petitioners make arguments which are reiterated during the *Charter* challenges. They submit that it is problematic that the ARP is issued on the basis of a roadside screening device. This is because under the criminal regime the information gleaned from the roadside screening device can only be used to elevate an officer’s reasonable suspicion that a driver has been consuming alcohol to reasonable grounds to demand a breathalyser test, whereas under the provincial ARP regime, the results of the screening device are final and form the basis for the driving prohibition and associated penalties and costs. In addition, the petitioners point out that the ARP is issued immediately, before a driver is taken to the police station and given his or her *Charter* rights.

[94] The essence of the petitioners’ argument on this point is that the use of a roadside screening device on reasonable suspicion of drinking is constitutionally permissible only because it cannot be used to support a criminal conviction, and because the breathalyser (which can be) is administered at the police station after the accused receives his or her full panoply of rights, including the right to counsel. The petitioners assert that under the ARP regime, there is essentially a reverse onus on the driver with a very limited right of review to set aside the driving prohibition.

[95] The petitioners argue that what makes the ARP regime criminal is its “dominant purpose ...

to create a made in BC regime to automatically sanction and punish impaired drivers who fail a roadside screening device in British Columbia". They argue that the imposition of "costly and stigmatising" penalties on motorists evidences a departure from a focus on licensing.

[96] The petitioners' point is that unlike the regime in *Buhlers*, which was held to relate to licensing in its pith and substance, the ARP regime relates to punishment. The petitioners state that "It is difficult not to characterize the ARP legislation as prescribing penalties for the offence of impaired driving in British Columbia". The petitioners maintain that the decision in *Buhlers* does not justify what is effectively a substitute criminal law system that, although efficient from the Province's perspective, invades the federal government's criminal law jurisdiction but deprives an individual of all normal procedural protections.

[97] The petitioners point to certain excerpts from Hansard and the press release and accompanying material in April 2010 to support their argument that the ARP regime was intended to create a new criminal law regime for impaired driving.

[98] I refer to the press release by the Provincial Government dated April 27, 2010, the day the legislation was introduced in the legislature. The press release reads, in part:

> B.C. INTRODUCES CANADA'S TOUGHEST IMPAIRED DRIVING LAWS
>
> VICTORIA – The Province is introducing Canada's most immediate and severe impaired driving penalties to save lives, curb repeat offenders and give police more enforcement tools, Solicitor General Michael de Jong, QC, announced today.
>
> ...
>
> The new, roadside-issued, 90-day bans mean officers will no longer need to take drivers to the station for a full breath analysis in order to impose a driving ban longer than 24 hours.

[99] The accompanying backgrounder issued by the Ministry of Public Safety and Solicitor General on the same day sets out the expected effect of the changes to the *MVA*. The backgrounder calls the changes to the *MVA* "[m]ajor amendments", and emphasises the immediacy and severity of the penalties. With respect to the intended effect on enforcement the backgrounder states:

> B.C.'S IMPAIRED DRIVING LAW TO CHANGE
>
> Focusing charges on impaired drivers with a previous conviction or ban for impaired driving, or who cause serious harm or death, will also support more effective enforcement. It takes more than four days of a police officer's time, on average, to gather evidence, prepare reports for Crown counsel and appear in court to support an impaired driving charge.

[100] The petitioners also introduced a transcript of evidence given by Gary Moritz who testified in the trial of *R. v. James David Spelay* (Salmon Arm Registry No. 20426-1 November 19, 2010). Moritz, a retired 35 year member of the RCMP who was at the time of the trial a member of the

Reserve Constable Program, testified that since September 20, 2010, in the case of first time offenders with a screening device reading in the “fail” (over 0.08) range, no one from his office including himself had referred any “fail” reading cases on for criminal prosecutions.

[101] The evidence suggests that although the investigation at the roadside begins as a criminal investigation, in the event that a roadside screening device records a fail reading over 0.08, in the absence of property damage or personal injury, the practice for first time offences appears to be that the driver receives an ARP but is not criminally prosecuted.

[102] In this respect, the petitioners submitted an excerpt from the Crown Counsel Policy Manual dated May 20, 2011. I quote at length from this document. In this document, what I have referred to in these reasons as the ARP is referred to as an Immediate Roadside Prohibition (IRP):

> ... there will often be significant public interest factors in favour of proceeding with the prosecution of an impaired driving offence where the evidentiary test is met under the Branch policy on Charge Assessment Guidelines – CHA 1, subject to the considerations outlined below concerning the Immediate Roadside Prohibition (IRP).
>
> Immediate Roadside Prohibition (IRP)
>
> On September 20, 2010, the Province of British Columbia brought into force the Immediate Roadside Prohibition (IRP) scheme under sections 215.41 to 215.51 of the *Motor Vehicle Act*. This legislation provides an administrative scheme with new and significant consequences for a driver who registers a fail on an approved screening device, or fails or refuses to provide a breath sample for analysis. ... The consequences described above are relevant to charge assessment on a Report to Crown Counsel recommending a charge for a *Criminal Code* impaired driving offence.
>
> ..."where there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch". Policy CHA 1 states that "this could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service". These alternatives include consequences under provincial legislation. Accordingly, prosecution for a *Criminal Code* impaired driving offence under section 253(1)(a) impaired driving, 253(1)(b) drive over .08 or 254(5) failing or refusing to comply with a demand under section 254 (which do not include offences of causing, or resulting in, bodily harm or death) will not generally be in the public interest where the accused has been the subject of a 90 day IRP and related consequences, unless there are aggravating factors...

[103] In response, the Province argues that what the police decide to do with the enforcement of any federal or provincial legislation does not determine its pith and substance. Mr. Copley argues that a police officer’s common law duties include the preservation of the peace, the prevention of crime, and the protection of life and property; including the duty to control traffic on the public roads (*R. v. Dedman*, [1985] 2 S.C.R. 2). He argues that these duties can only be changed or modified by statute. He further argues that there is nothing in the ARP regime that suggests that these duties have been modified and that the fact that the police enforce the provincial law in some circumstances and the criminal law in others does not determine the pith and substance of the

provincial law.

Characterization of the ARP Regime

[104] The pith and substance of the challenged law is first considered by examining "the four corners of the legislation". The ARP regime provides that where an officer administers a roadside screening device and the driver has a breath reading in the "warn" or "fail" zone, the officer must serve the driver with an immediate roadside driving prohibition for 3, 7, or 30 days in the case of a "warn" result, and 90 days in the case of a "fail" result. Under the regime, administrative penalties, license reinstatement fees, obligations to participate in responsible driver programs, and ignition interlock requirements are imposed.

[105] Primarily, the ARP legislation provides for a license suspension and incidental penalties and costs on the happening of an event: a peace officer, based on an approved screening device showing a "fail" or "warn", believes that a driver's ability to drive is affected by alcohol, and imposes a prohibition and related consequences accordingly.

[106] Traditionally, provincial licensing regimes aimed at highway safety but dependent on criminal convictions have been held to be *intra vires* provincial legislatures despite relying incidentally on the results of criminal law prosecutions (*Egan*, *Ross*). Likewise, provincial licensing regimes aimed at highway safety which are not dependent on criminal convictions but that nonetheless rely incidentally on *Criminal Code* provisions to be triggered, have been held valid exercises of provincial legislative competence (*Buhlers*, *Thomson*, *Horsefield v Ontario (Registrar of Motor Vehicles)* (1999), 172 D.L.R. (4th) 43 (Ont. CA)). I note, in particular, that in *Buhlers* the automatic driving prohibition not only did not rely on a criminal conviction, but it was actually held to be valid even in the absence of a successful prosecution.

[107] The key to these decisions upholding provincial legislation has always been that the essential character of the legislation had to do with licensing and road safety, and not criminal sanctioning.

[108] The petitioners list three main criminal law indicia which they say places the ARP regime squarely within the criminal law, they are: the extent of the penalties that accompany a suspension; the use of a search power under the *Criminal Code* to gather the evidence for the suspension; and the fact that the ARP regime is used as an alternative to prosecution for first-time criminal offenders.

[109] I will now deal with each of these points.

[110] First, how the police choose to enforce an interlocking scheme of federal and provincial statutes does not determine the constitutional validity of the statutes enforced, and this is so even if

the outcome of a preference for enforcement of one Act over another is anticipated by a particular level of government when enacting legislation. However, the fact that the police and the prosecution tend to enforce the provincial law in some circumstances rather than resorting to the criminal law, is a consideration in determining the purpose and actual effect of the impugned law. This is but one factor to consider in determining the pith and substance of the legislation.

[111] Second, the fact the ARP regime relies on or authorizes the use of a *Criminal Code* search power to trigger application of the legislation does not mean that the legislation is criminal itself. As discussed in this judgment, the intersection of provincial and federal regimes to combat impaired driving is to be expected. Furthermore, the courts have consistently held that reliance on aspects of the *Criminal Code* (such as criminal convictions or searches) for application of provincial legislation regulating impaired driving does not itself determine the *vires* of the legislation (see: *Egan*, *Ross*, *Buhlers*).

[112] Apart from the review process available to a driver upon receiving a driving prohibition, a significant difference between the ARP regime and impaired driving regimes (such as the ADP regime) that have come before it, has to do with the imposition of the monetary penalties and costs which I have described above. How does this affect the characterization of the dominant purpose of the legislation?

[113] In *Chatterjee*, the Court considered whether the forfeiture provisions in the *Civil Remedies Act* were unconstitutional as encroaching upon the federal criminal law power. There, the police had searched the accused incidental to arrest and found cash and items associated with the drug trade. Although Mr. Chatterjee was never criminally charged, the Attorney General succeeded on a motion to seize the money as proceeds of unlawful activity under the provisions of the *Civil Remedies Act*.

[114] The Supreme Court of Canada held that the *Civil Remedies Act* was valid provincial legislation. Before determining the pith and substance, Binnie J. noted (at para. 15):

> Crime imposes significant costs at every level of government: federal, provincial and municipal. Impaired driving is a *Criminal Code* offence but carnage on the roads touches numerous matters within provincial jurisdiction including health, highways, automobile insurance and property damage. ... Each level of government bears a portion of the costs of criminality and each level of government therefore has an interest in its suppression.
>
> [emphasis added]

[115] Although there is clearly some overlap between federal and provincial measures enacted to combat impaired driving, in my view, the ARP legislation in its pith and substance was enacted in relation to property and civil rights, not criminal law.

[116] Justice Binnie, in *Chatterjee*, referred to the decisions in *Egan* and *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, and said that the Constitution permits a province to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not compromise the proper functioning of the *Criminal Code* including the sentencing provisions. Justice Binnie went on to state (at para. 41):

> In *Egan* and *Ross*, the provincial laws were clearly aimed at deterring impaired driving, notwithstanding its status as a federal offence, and with good reason. Drunk drivers create public safety hazards on provincial highways and their accidents impose costs by way of examples on the provincial health system and provincial police and highway services. Similarly, the fact the *CRA* aims to deter *federal* offences as well as provincial offences and indeed offences committed outside Canada, is not fatal to its validity. On the contrary, its very generality shows that the province is concerned about the *effects* of crime as a generic source of social ill and provincial expense, and not with supplementing federal criminal law as part of the sentencing process.

[117] Does the imposition of financial penalties and cost implications for the driver upon license suspensions take the ARP regime outside proper provincial law into criminal law?

[118] In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, the Supreme Court pointed out that (at para. 25):

> Section 92(15) of the *Constitution Act, 1867* allows the provincial legislatures to impose fines or other punishments as a means of enforcing valid provincial law, and the provinces have enacted countless punishable offences within their legislative spheres. Motor vehicle offences are the classic example, and they have been declared constitutionally valid in, *inter alia*, *O'Grady v. Sparling*, [1960] S.C.R. 804 (careless driving); and *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5 (provincial licence suspension upon conviction for *Criminal Code* impaired driving offence). The mere presence of a prohibition and a penalty does not invalidate an otherwise acceptable use of provincial legislative power.

[119] Moreover, in *Chatterjee*, Binnie J. confirmed that deterrence can be a proper purpose of provincial law (at para. 3):

> It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it.

Conclusion

[120] I conclude that the pith and substance of the ARP regime is the licensing of drivers, the enhancement of highway traffic safety, and the deterrence of persons from driving on highways when their ability is impaired by alcohol; all of which are valid areas of provincial jurisdiction.

[121] In determining the pith and substance of the ARP legislation, I have taken into consideration the language of the legislative provisions, the background to the legislation as well as the evidence I have referred to of its purpose and effect, and the imposition of additional monetary penalties and related costs to the driver.

[122] While the investigation that results in a criminal prosecution or a suspension under the ARP regime starts in the same way - a criminal law investigation under the powers given by the *Criminal Code* - the ARP regime does not lead to a conviction and does not purport to supplement or alter the criminal process. Although there are penalties and cost consequences, there is no resulting criminal conviction under the ARP regime.

[123] The decision to rely on provincial suspensions rather than prosecuting under the *Criminal Code* does *not*, in my view, alter the dominant purpose of the legislation, which in this case is a proper provincial purpose. As the Province noted, if the police decide to concentrate on using one tool of the law in certain situations and another tool of the law in other situations, that is a choice open to them in performing their common law duty. Although this is a factor to consider in the characterization analysis, it is not determinative of whether the law is within the provincial jurisdiction.

[124] The provincial power to legislate with respect to the licensing of drivers and safety on highways is clear. I recognize that provincial legislation touching on the regulation of drinking and driving may have incidental effects in the federal sphere but in the case at bar, the pith and substance of the legislation is within the Province's legislative competence.

[125] Provincial legislative authorization of driving prohibitions triggered by the happening of an event such as a criminal conviction or a "fail" result on an ASD has consistently been held not to transgress into the federal field of criminal law, and in this respect the ARP regime is no different. The fact that the event that triggers application of the legislation - the result of the roadside screening device - occurs under a provision of the *Criminal Code* does not make the regime criminal. Moreover, the monetary penalties and costs are properly seen as deterrents in relation to enforcing a head of provincial competence rather than punishment, and therefore they do not take the legislation into the realm of criminal law.

[126] As in *Egan* and *Ross*, where the Supreme Court held that the provincial laws were "clearly aimed at deterring impaired driving" (*Chatterjee* at para. 41), in my view, the penalties and possible cost consequences under the ARP regime are deterrents used as part of a comprehensive scheme to regulate the licensing of drivers and prohibit impaired drivers from being on the highway.

[127] As I have found that the pith and substance of the legislation falls squarely within provincial legislative jurisdiction, I reject the argument that the ARP regime supplants the crime of impaired driving in B.C. with a "made in B.C. offence".

[128] While the presence of monetary penalties and related cost consequences and a general practice of not criminally prosecuting first-time offenders for impaired driving arguably brings the

provincial ARP closer to the line between federal and provincial jurisdiction than any of its legislative predecessors, I find that on all the evidence the pith and substance of the ARP regime is the regulation of licensing of drivers and safety on the highways including the removal of impaired drivers from the highway.

[129] Accordingly, I find that on the division of powers question the ARP regime is valid provincial legislation.

F. SECTION 11(d)

[130] The next arguments of the petitioners are *Charter* challenges to the ARP legislation.

[131] The petitioners say that even if the ARP legislation is properly provincial law on a division of powers analysis, it creates an "offence" as that term is used in section 11 of the *Charter* and violates 11(d), in particular, by denying affected drivers the presumption of innocence to which they are entitled.

[132] Section 11(d) of the *Charter* states:

> 11. Any person charged with an offence has the right
>
> > (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[133] The petitioners say that through the roadside screening device, the automatic prohibition and the limited review process, the ARP regime violates s. 11(d) by imposing significant monetary and stigmatizing penalties on a driver while presuming guilt. They submit that the regime does not allow the result of a screening device to be challenged by cross-examination, does not require sworn evidence from the officer to support the prohibition upon review, and places the persuasive burden on the driver to disprove a crucial element of the offence; whether or not the screening device showed that the driver's blood-alcohol concentration was greater than 0.05 or 0.08.

[134] Rather than presuming innocence until guilt is proven the ARP regime, the petitioners say, reverses the burden, places it on the driver, and fails to provide the driver with an opportunity to make full answer and defence. The petitioners say that they would be entitled to *Charter* protections for minor motor vehicle offences under other provisions of the *MVA*, and therefore, there is no principled basis to deny them those same protections here.

[135] In order to establish that the ARP legislation is subject to section 11(d) of the *Charter*, the petitioners must first establish that the ARP regime creates an "offence" as contemplated by s. 11.

[136] The Province does not suggest that the ARP regime, if it creates an "offence", complies with s. 11(d) of the *Charter*, but simply responds to the petitioners' argument by saying that the ARP

regime does not create an “offence” as contemplated by s. 11 of the *Charter* and therefore, s. 11(d) does not apply.

[137] For reasons that follow, I find that the ARP regime does not create an “offence” as that term is used in s. 11(d) of the *Charter,* and as such this ground of attack must fail.

Does the ARP Regime Create an Offence?

[138] Section 11 of the *Charter* provides a person charged with an “offence” with a number of different rights, including the right in ss. 11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[139] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 is the leading case on what constitutes an “offence” for the purposes of s. 11 of the *Charter*. Madam Justice Wilson described generally the scope of s. 11 at para. 16:

> The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.

[140] In *Wigglesworth* (recently endorsed by the Supreme Court of Canada in *R. v. Rodgers*, 2006 SCC 15), the Supreme Court set out a two-pronged test for what constitutes an “offence” for the purposes of s. 11. The test is commonly referred to as the “by nature’ and “true penal consequences” test. At para. 21 the Court remarked:

> The phrase "criminal and penal matters" which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.
>
> [emphasis added]

[141] In *Sigurdson v. British Columbia*, 2003 BCCA 535, the Court of Appeal held that s. 11 did not apply to the administrative procedures involved in the cancellation of a driver’s licence following a number of roadside suspensions. The appellant argued that he was entitled to the right to a fair hearing and that the decisions of the Superintendent revoking his driving privileges, and eventually his license, were unreasonable in the absence of an inquiry into the factual basis for each of the roadside suspensions. Mr. Justice Low responded to this assertion by finding (at para. 17):

> Section 11(d) of the *Charter* does not apply because s. 215 of the *Motor Vehicle Act* and the administrative procedures involved in the consideration of whether to suspend or cancel a driver's licence do not involve the charging of an offence. There is no potential for loss of liberty or any other penal consequence: see *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

[142] However, the petitioners say that the ARP regime is significantly different than other license suspension regimes. I will now deal with the question of whether the ARP regime creates an

offence either “by nature” or by imposing “true penal consequences.”

“By Nature”

[143] Is the ARP regime (ss. 215.41 - 215.51) “by its very nature” a criminal proceeding?

[144] Under the first prong of the *Wigglesworth* test, the Court suggested that matters of a “public nature, intended to promote public order and welfare within a public sphere of activity”, are matters that fall under s. 11 by their very nature (at para. 23). The Court went on to highlight certain types of offenses that by their nature will always fall under s. 11 (at para. 23) :

> ... all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

[145] However the Court drew a distinction between those matters described above and proceedings to maintain or obtain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, or where proceedings are of an administrative nature instituted for the protection of the public, s. 11 will not apply “by nature” (*Wigglesworth* at para. 23).

[146] In *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, the Court considered whether proceedings under the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) created an “offence”. There, a customs officer had requested that the appellant pay $315,458, submitting that this was the amount of goods the appellant had allegedly attempted to export by making false statements. Mr. Justice Fish reiterated Wilson J’s comment in *Wigglesworth* that the expression "person charged with an offence" in s. 11 was limited to "public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences". He referred to the two-prong test for what is an “offence” and went on to consider s. 124 of the *Customs Act* in light of that test.

[147] Commenting generally as to whether proceedings will be characterized as criminal in nature Fish J. said (at para. 30):

> As stated by McLachlin J. (as she then was) in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves". (emphasis added in *Martineau*).

[148] He went on to more precisely identify the kinds of proceedings caught by s. 11 (at paras. 21-24):

> When a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls, by its very nature, within s. 11 of the *Charter*. This is clearly true of federal prosecutions under the *Criminal Code*, R.S.C. 1985, c. C-46, and of prosecutions of quasi-criminal offences under provincial legislation.

> By contrast, proceedings of an administrative -- private, internal or disciplinary -- nature instituted for the protection of the public in accordance with the policy of a statute are not penal in nature (*Wigglesworth*, *supra*, at p. 560).
>
> A distinction must therefore be drawn between penal proceedings on the one hand and administrative proceedings on the other. Only penal proceedings attract the application of s. 11 of the *Charter*.
>
> To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the CA and of s. 124 thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

[149] After applying the above criteria, Fish J. ultimately rejected the contention that the proceedings under the *Customs Act,* by their nature, gave rise to an offence.

[150] In *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, the Federal Court of Appeal had to decide whether s. 40 of the *Investment Canada Act*, R.S.C. 1985 c. 28 (1st Supp.) constituted an "offence" so as to bring the proceedings under the protection of s. 11 of the *Charter*. Section 40 provided that the Minister could apply for an order directing United Steel to comply with its undertakings, and further provided that the Minister could impose a $10,000 a day fine until such undertakings were complied with. In concluding that the proceedings undertaken by the Minister were not "by their very nature" criminal proceedings, the Court considered *Martineau* and remarked (at paras. 59-60):

> ... section 40 sanctions lack the indicia of penal proceedings. In this, they resemble more the sanction that Fish J. dealt with in *Martineau* and which he described as follows at paragraph 45:
>
> > [45] This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.
>
> Like the sanction in *Martineau*, the section 40 sanction herein does not involve the laying of charges, arrest powers, courts of criminal jurisdiction or a criminal record. Consequently, this suggests against the applicability of subsection 11(d).

[151] The petitioners argue, and I recognise, that the Court in *Wigglesworth* emphasized the fact that no matter how small the fine/penalty, quasi-criminal proceedings initiated by the province will nevertheless fall under s. 11 "by nature". The Court referred to the case of *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. HCJ), to make this point (at para. 22). In *McCutcheon* the applicant had received summonses to Court on account of several parking tickets she had received. The Court found that s. 11 was triggered by the proceedings respecting these tickets and remarked (at 205):

> This provision of the *Charter* is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against her.
>
> ...
>
> There can be no question that parking infractions are "offences" as that word is used in s. 11 of the *Charter*. The respondents contend that these are not the types of transgressions against society s. 11 of the *Charter* is directed at, since there is virtually no stigma attached to a parking ticket. In my view, however, the degree of stigma is of no significance.

[152] The Court in *Wigglesworth* agreed with this result. *McCutcheon* shows that even in cases involving only small monetary fines, s. 11 of the *Charter* might nevertheless be triggered by the nature of the proceeding.

[153] Following the automatic roadside prohibition, the proceedings which are available under s. 215.48 - 215.50 of the *MVA* mandate the Superintendent of Motor Vehicles to make determinations which will either confirm, substitute or revoke a driving prohibition. In addition, depending on the length of the prohibition, the Superintendent automatically imposes monetary penalties and in some circumstances vehicle impoundment and corresponding fees. Is this “by nature” a criminal or quasi-criminal proceeding? I do not think so.

[154] In the case at bar, there is no summons issued to the driver, and in fact, it is the driver himself who initiates the proceedings. The proceedings are not by their nature a prosecution. The prohibition is automatic at the roadside, and after being issued an ARP the driver is not compelled to answer. The ARP regime does not give rise to a criminal record or allow a driver to be arrested.

[155] Considering that the primary function of the legislation is to provide for the suspension of a person’s driver’s license, the nature of the proceeding has to do with “fitness to maintain a license” and therefore, in my view, does not trigger application of s. 11 by reason of the “by nature” branch of the *Wigglesworth* test.

[156] However, there are the additional monetary penalties and costs that are automatically applied in addition to the ARP, particularly in the case of a “fail” reading, and they must be considered. They are described by the petitioners as significant monetary and stigmatizing penalties that are quantitatively and qualitatively different from the penalties under the ADP regime.

[157] The petitioners say that in the context of a working family a $4,000 consequence in addition to a 90-day driving prohibition, vehicle impoundment, stigma of the interlock device, and predictable loss of employment are designed and touted by the Solicitor General to be severe. This suggests, the petitioners say, that the driver committed a very serious (criminal) societal wrong. The

petitioners say the ARP regime and its consequences must be assessed having regard to the persons who would be subject to it.

[158] The petitioners argue that a measure of the severity of the penalties under the ARP regime is the fact that the RCMP in many parts of the province find the ARP to be a satisfactory alternative to a criminal investigation of impaired driving.

[159] Therefore, I will next address whether the ARP regime is subject to s. 11(d) of the *Charter* because it imposes "true penal consequences."

"True Penal Consequences"

[160] If a proceeding does not, by its nature, fall under s. 11, then it could nonetheless fall under s. 11 because of the imposition of a "true penal consequence". In *Wigglesworth,* the Court commented (at para. 24):

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.
>
> [emphasis added]

[161] The Court in *Rodgers* explained that (at para. 61):

> Under the second branch of the test, a proceeding that is *not* criminal or quasi-criminal in nature but attracts a "true penal consequence" (such as imprisonment or a fine of a certain magnitude) will be equated to a criminal or quasi-criminal proceeding for s. 11 purposes.

Imprisonment

[162] First, it is important to note that there is no possibility under the ARP regime that a person will be at risk to lose his or her liberty. The petitioners do not suggest that there is any potential for imprisonment, and so the first branch of the "true penal consequences" test is not met.

Other Consequences

[163] In *Martineau*, the Court considered whether in the absence of imprisonment, the ascertained forfeiture of $315,458 under the *Customs Act* was a "fine that, by its magnitude, [was] imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements" (emphasis in original at para. 60). The Court concluded that the $315,458 fine was not aimed at redressing wrong to society due to the *in rem* character of the forfeiture proceeding, and because "the principles of criminal liability and sentencing [were] totally irrelevant when fixing the amount to be demanded" (at para. 65).

[164] The petitioners emphasize that the consequences of a "fail" reading under the ARP regime

are so significant that they amount to “true penal consequences”. They argue that the consequences of the ARP regime are much more severe than consequences found in other sections of the *MVA* to which s. 11 of the *Charter* clearly applies. The petitioners point out that when disputing a speeding ticket, a ticket for violating a yellow light and a ticket for excessive speeding, affected persons are clearly afforded s. 11 protection. The petitioners argue that there is no principled basis upon which to deny persons subject to the ARP regime the same *Charter* protection afforded to the above noted persons.

[165] However, while it may be that s. 11 applies to the above noted proceedings under the *MVA*, it is my view that s. 11 applies to those proceedings because they are “by their very nature” criminal proceedings, not because they impose “true penal consequences”. Because the ARP regime does not “by its nature” create an offence, a comparison of the proceedings under the *MVA* listed above is not helpful in this analysis.

[166] The impugned provisions of the *MVA* that create the ARP regime provide for the suspension of an individual’s license, and for the imposition of monetary penalties and other costs. These sanctions are different from the sanctions under the ADP regime (which has not been repealed). They are significant, and in the case of a “fail” reading on a roadside screening device include: a $500 penalty; an immediate 90 day administrative driving prohibition; vehicle impoundment for 30 days; estimated towing and storage costs of $700; a driver’s license reinstatement fee of $250; the possible cost for a responsible driver program of $880; and, an interlock ignition device at an annual cost of $1,730. According to the Solicitor General, the approximate total cost is $4,060.

[167] In order to determine if these penalties and costs amount to “true penal consequences” I must look at the consequences of the ARP regime as a whole, but I will start by discussing the individual aspects of the consequences.

[168] What of the prohibition itself? I refer to *Thomson* (discussed above - leave to appeal to the SCC denied) which dealt with the Administrative License Suspension Program under Alberta’s *Traffic Safety Act*. In that case, the Alberta Court of Appeal’s ultimate decision to dismiss the s. 11 argument relied on the notion that driving was a privilege, and therefore the removal of the right to drive could not be seen as a “punitive” measure. On this topic Madam Justice Paperny stated (at para. 37):

> Section 11(d) does not apply to a hearing before the Board. A driver subject to a suspension under the ALS program is not charged with a criminal or quasi-criminal offence; a driver faces a withdrawal of a privilege, not a punitive sanction; cannot be compelled to give evidence; and is not, at the end of the day, found guilty of an offence.
>
> [emphasis added]

[169] Notwithstanding that I accept that in some circumstances the removal of this privilege of

driving may have serious consequences and may impose a stigma, I agree that the removal of the privilege to drive as part of this regulatory regime is not a true penal consequence.

[170] Are the estimated towing and storage costs, the cost of the driver's license reinstatement, the responsible driver's program, and the interlock ignition program true penal consequences? The nature of these penalties has to do with removing an impaired driver from the road, and keeping him or her from driving until he or she has complied with measures intended to ensure that he or she will not drive while impaired in the future. As in the case of the driving prohibition, I think these penalties are administrative consequences for a driver having registered a reading in the "fail" range on an approved screening device. They are aimed at prevention of harm, and are not imposed, in my view, for the purposes of redressing wrong done to society at large.

[171] What about the automatic monetary penalty? The penalty is in a prescribed amount and dependent on the length of the prohibition. In *Martineau*, the Court addressed the argument that the $315,458 fine was so high (six times greater than the maximum fine that could be imposed under a summary conviction), that it ought to be considered a true penal consequence. As discussed above, Fish J. rejected this argument on the basis that "the principles of criminal liability and sentencing [were] totally irrelevant when fixing the amount to be demanded" (at para. 65).

[172] Similarly, in *Lavers v. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307 (C.A.), Mr. Justice Wallace considered whether certain assessments and penalties imposed by the Minister of National Revenue were true penal consequences. He noted that the penalties that could be imposed following the assessments by the Minister pursuant to s. 23(1) of the British Columbia *Income Tax Act* and s. 163(2) of the Federal *Income Tax Act* did not carry with them any threat of imprisonment, nor did they give a discretionary range of punishment. He observed that they were restricted in amount to 25% of the tax sought to be evaded, and in the case of a wilful attempt to evade the payment of taxes, to 50% of such tax.

[173] Justice Wallace concluded that the penalties assessed under the *Acts* did not come within s. 11(h) of the *Charter* in that they were not criminal or quasi-criminal by nature, nor could they be equated with true penal consequences. He said (at 338-339):

> In my view, the distinction in the severity of the respective penalties indicates that Parliament intended that the imposition of the statutory penalty following assessments by the Minister would reflect a sufficiently significant monetary punishment to deter taxpayers from failing to comply with the Income Tax Acts and would thereby achieve the objective of this administrative procedure. It is also an incentive to diligence for those who might be grossly negligent but not truly criminal. ... In summary, therefore, the penalty assessment, while not trivial, is not so severe as to amount to a "true penal consequence".

[174] The Federal Court of Appeal in *United States Steel Corp*. also commented on how the magnitude of the fine related to the concept of true penal consequences. After addressing the

question of whether s. 40 of the *Investments Act* violated s. 11 because the proceedings it allowed for were “by nature” criminal, Justice Nadon explained why the $10,000 a day penalty did not amount to a “true penal consequence.” He stated (at para. 74):

> ... even if section 40 proceedings are not criminal by their very nature, section 11 of the *Charter* will still apply to them if they lead to "true penal consequences"... With respect to monetary penalties, sheer magnitude is not determinative. The case law has consistently drawn a distinction between penalties that aim to punish or denounce (penal) and penalties that aim to deter (non-penal) ... in general, administrative penalties do not aim to punish. Rather, they aim to deter.
>
> [emphasis added]

[175] Although the magnitude of the penalty was a factor in *United States Steel Corp*., it was by no means determinative. This conclusion was also reached in *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 (leave to appeal to the SCC denied), where the Alberta Court of Appeal considered whether potential penalties of up to one million dollars constituted “true penal consequences” so as to bring the securities legislation in question under the application of s. 11. In deciding that s. 11 did not apply, Justice Paperny stated (at para. 23):

> The chambers judge ... [emphasised] the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the *Securities Act*, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of *Brost*, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the *Securities Act* and that s. 11 of the *Charter* is, accordingly, not engaged here. I agree.
>
> [emphasis added]

[176] Prior to coming to the above conclusion the Court in *Lavallee* mentioned the decision of the B.C. Court of Appeal in *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46. In *Thow*, the Court dealt with the question of retrospectivity of legislative amendments. In considering whether an amendment could be applied retrospectively the Court embarked upon an analysis of whether a six million dollar penalty was “punitive”. Ultimately the Court found that the penalty was “punitive,” and stated (at para. 49):

> Here, the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.
>
> [emphasis added]

[177] In distinguishing “punitive” penalties from penalties aimed at general or specific deterrence the Court referred to the Supreme Court of Canada’s decisions in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 and *Cartaway Resources Corp.*, 2004 SCC 26 and commented (at paras. 38-39):

> In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.
>
> *Asbestos* and *Cartaway*, then, are cases about the proper role of administrative tribunals in administering regulatory regimes. They concern the limits of proper administrative sanctions. In defining those limits, the Supreme Court of Canada distinguished between penal orders that function to punish an offender and those that attempt to protect society.
> [emphasis added]

[178] The significance of this discussion in *Thow* is that although the context was the proper jurisdiction of administrative tribunals, the Court recognized implicitly that penalties aimed at deterrence, and therefore protection of the public, are not punitive or penal because they are not designed to punish so much as to protect.

[179] The Court in *Lavallee* nevertheless declined to follow the reasoning in *Thow* insofar as it was authority for what constituted a true penal consequence. On the issue of the application of the reasoning of the Court in *Thow*, Paperny J. concluded (at para. 25):

> The appellants urge us to apply this same reasoning to the question of whether the sanctions set out in ss. 198 and 199 of the *Securities Act* amount to "true penal consequences" for purposes of the s. 11 analysis. I prefer the reasoning of LeBel J. in *Cartaway Resources Corp.*, 2004 SCC 26, ... where he found that general deterrence is "an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative". He agreed with Ryan J.A., the dissenting judge in the appeal court in that case, when she wrote that "[t]he notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others". As the Supreme Court concluded in *Cartaway*, general deterrence is a relevant factor when the Commission imposes sanctions designed to carry out the public protection purposes of securities regulation. To the extent that *Thow* reaches a different conclusion, I decline to follow it.

[180] As evidenced by the above excerpts from *Thow* and *Lavallee* the respective Courts were actually in agreement on this point in that they both agreed that penalties, even significant penalties, in an administrative scheme which are aimed at general deterrence are not “punitive” or “penal,” but instead are imposed for the purpose of protecting the public.

[181] In my view, the ARP regime does not impose true penal consequences. Taking into account all of the consequences, including the automatic monetary penalty and additional possible costs to the driver, I find that the administrative consequences, while not insignificant , are not true penal consequences as that term has been interpreted in the authorities.

[182] Suspension of a driver's license is the withdrawal of a privilege, and not a punitive sanction. Penalties which are not based on redressing wrong to society at large are not "true penal consequences". Elements of deterrence that are apparent in the cost consequences, particularly at the "fail" range, do not make the sanction penal in nature. Penalties that are imposed to deter behaviour cannot strictly be said to be "true penal consequences". This is particularly so in the case of a reading in the "warn" range where the penalties and cost consequences are less significant.

[183] I note in the context of the ARP regime that the penalty in terms of dollars is fixed based on the length of the prohibition, and the liberty of the driver is not at stake. The costs focus on quantifiable economic grounds that relate to the regulatory regime. The analysis must focus on the purpose of the sanction, as well as its magnitude. The magnitude of the penalty and other financial consequences are not sufficient in the circumstances to constitute "true penal consequences".

[184] Accordingly, I find that the petitioner has not established that the ARP regime creates an "offence" that is subject to s. 11 of the *Charter* and therefore it has not established that the ARP regime violates of s. 11(d) of the *Charter*.

G SECTION 8 - UNREASONABLE SEARCH AND SEIZURE

[185] The petitioners next argue that the impugned law violates s. 8 of the *Charter* in that it provides for an unreasonable search and seizure.

[186] Section 8 of the *Charter* states:

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

Parties' Positions

[187] Neither side brought to my attention any case in which the s. 8 issue was decided in connection with an ASD search that resulted in a provincial driving prohibition. Although a s. 8 argument was made by the petitioner at the trial level in *Buhlers* where the ADP regime was challenged, the trial judge later dismissed that ground and the point was not taken on appeal.

[188] The petitioners submit that the ARP regime, which incorporates the use of the results of an approved roadside screening device, is in substance a law that authorizes an unreasonable search and therefore violates s. 8 of the *Charter*. They further suggest that the violation is not saved by s. 1. The petitioners argue that the ARP regime search invades a driver's reasonable expectation of privacy on a constitutionally deficient basis, obtains evidence by compulsion of law without use-immunity, fails to provide the procedural and substantive safeguards of the criminal law search power used in the regime, and provides an incomplete and inadequate forum for the driver to

contest the validity and results of the search.

[189] The petitioners argue that the law generally presumes a warrantless search to be unreasonable, and that the only way to rebut this presumption is to show that: (1) the search is authorized by law; (2) the law is reasonable; and (3) the manner in which the search is conducted is reasonable. However, they say that the ARP regime does not satisfy the above test.

[190] For a search to be reasonable, the petitioners say, the search must not only be authorized by a specific rule or law, but it must also be carried out in accordance with the procedural and substantive requirements of that law. The petitioners say that procedural and substantive protections are part of the investigation and procedure under the *Criminal Code* but are absent in the ARP regime.

[191] The petitioners say that the search powers under s. 254(2) of the *Criminal Code* have a specific and limited purpose and limited evidentiary use in a criminal investigation, and that these limitations allow the search under the *Criminal Code* to pass constitutional muster. However, they point out that under the ARP regime the same powers are used by the Province without incorporating these safeguards. Under the ARP regime, the petitioners say, individuals are compelled to submit to a search which, unlike under the criminal regime, is used to establish the basis for the imposed consequences.

[192] The petitioners argue that rather than using the screening device to provide reasonable and probable grounds for a demand for a search by an approved instrument, the use of the screening device in this provincial legislation is now the source of a new power that the police have -- the power and obligation to issue an ARP without the procedural and substantive safeguards under the *Criminal Code*.

[193] The nub of the argument is that the ARP regime involves a search and seizure which is not authorized by a reasonable law.

[194] In response, the Province submits that the petitioners are attacking the wrong law. The Province says that any search that takes place happens prior to the application of the ARP provisions and is authorized and carried out according to the *Criminal Code* as part of a criminal investigation into impaired driving. In connection with the ARP regime, the Province says that s. 8 has no application because the police in administering the ARP regime are not conducting a search but are simply using pre-existing information for an administrative or regulatory purpose.

[195] Even if the challenged law authorizes a search, the Province says that there is no breach of s. 8 because the search is done in a regulatory context in which drivers lack a reasonable expectation of privacy. The Province's position is that a driver has no reasonable expectation of

privacy in the breath sample that is utilized by the ASD because information of this sort must be provided to the Superintendent of Motor Vehicles or his or her agents if the driver wishes to maintain a license to drive on the highway. Because of the implicit lack of privacy in this context, the Province asserts that the Superintendent's use of the information obtained under an ASD demand cannot give rise to a breach of s. 8.

[196] The Province further argues that given that the nature of the activity -- the licensing of drivers -- is regulatory rather than criminal, and given the important public safety objectives of the ARP legislation, if the ARP regime is found to authorize a search, the search is nonetheless a reasonable one.

[197] The Province contends that s. 8 would not be violated even if the Province, rather than relying on the s. 254(2) *Criminal Code* search power, directly passed a law authorizing roadside screening of a driver's breath on reasonable suspicion of drinking as part of the ARP regime. The rationale for this, the Province says, is the same as articulated above; namely, that motorists lack a reasonable expectation of privacy with respect to verification of their sobriety at roadside.

[198] Because of the Province's position concerning the diminished or complete lack of a reasonable expectation of privacy, counsel for the Province took the position that he did not have to address the petitioners' arguments concerning whether the alleged searches were carried out within the procedural and substantive requirements of the law; including arguments relating to use-immunity, and whether the ARP regime provides "an inadequate forum to preserve the s. 8 guarantee".

Issues

[199] Section 8 of the *Charter* guarantees the right to be secure against unreasonable search and seizure. Often, a s. 8 issue relates to the admissibility of evidence at trial. Here, it is a challenge to the law itself - s. 215.41-215.51 of the *MVA* which constitutes the ARP regime.

[200] There are two central questions in this particular analysis. Does the ARP legislation create or authorize a search or seizure to which s. 8 might apply, and if so, is the ARP regime, in creating this power to search or seize, an unreasonable law which infringes s. 8? Under the second question, two further issues must be addressed: the content of the reasonable expectation of privacy of drivers under this regime; and the overall reasonableness of the law within the meaning of the *Charter* guarantee.

Does the ARP Regime Authorize a Search or Seizure Within the Meaning of s. 8 of the *Charter*?

[201] In *Constitutional law of Canada,* Peter W. Hogg , discusses the meaning of the words

“search” and “seizure” [Peter Hogg, *Constitutional law of Canada,* 5th ed loose-leaf (Vol. 2 Ch. 48) (Toronto: Thomson Reuters, 2007) at 48-4]

> A search is an examination, by the agents of the state, of a person's person or property in order to look for evidence. A seizure is the actual taking away, by the agents of the state, of things [footnote omitted] that could be used as evidence.[footnote omitted]
>
> The word "seizure" in s. 8 takes its colour from its association with the word "search". A seizure within the meaning of s. 8 is a seizure of property for investigatory or evidentiary purposes.[footnote omitted]

[202] Mr. Justice La Forest in *R. v. Dyment*, [1988] 2 S.C.R. 417, discussed what constitutes a search or seizure under s. 8 of the *Charter* and articulated the following definition (at 257):

> As I see it, the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person’s consent**.**

[203] Under the *Criminal Code* there are two main instruments used for taking breath samples; an approved screening device (ASD), and an approved instrument (better known as the breathalyser). For the purposes of a criminal investigation, the authorities to which I now refer show that it is clear that the taking of a breath sample by either of these devices constitutes a search and seizure to which s. 8 applies.

[204] In *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.), where the grounds for using the approved screening device were not at issue, the Court considered whether s. 8 applied to a non-consensual breathalyser examination by an approved instrument when the peace officer did not have reasonable and probable grounds to believe the motorist was over the legal limit. At para. 39, Mr. Justice Doherty for the Ontario Court of Appeal stated in connection with the approved instrument (at 540):

> Given the personal privacy interests which underlie s. 8 of the Charter, I see no reason to differentiate between the taking of a person's breath and the taking of a person's blood or urine, in so far as the applicability of s. 8 is concerned. <u>The state capture, for investigative purposes, of the very breath one breathes constitutes a significant state intrusion into one's personal privacy. Section 8 concerns are clearly engaged by such conduct</u>.
>
> [emphasis added]

[205] In *R. v. Stromberg* (1991), 123 A.R. 394 (P.C.), Judge Bensler of the Alberta Provincial Court found that breath samples given specifically under s. 254(2) of the *Criminal Code* were seizures:

> I have considered these cases and I can not differentiate between a sample of breath provided for analysis in an "approved instrument" pursuant to s. 254(3) of the *Criminal Code* and a sample of breath provided for analysis in an "approved screening device" pursuant to s. 254(2) of the Criminal Code. <u>Accordingly, I accept the proposition that the taking of a breath sample pursuant to s. 254(2) of the *Criminal Code* constitutes a "search or seizure" within the meaning of s. 8 of the *Charter*.</u>
>
> [emphasis added]

[206] In *R. v. Wood*, 2005 SCC 42, Fish J. noted that Parliament had created, in s. 254 of the *Criminal Code*, a two-step detection and enforcement procedure to curb impaired driving. He articulated that the first step, set out in s. 254(2), provides for screening tests at or near the roadside immediately after the interception of a motor vehicle, and that the second step, set out in s. 254(3), provides for a breathalyser test, which is normally performed at a police station. He stated (at para. 15):

> Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster.
>
> [emphasis added]

[207] Although a breath sample taken by an ASD or by an approved instrument (breathalyser) in a criminal investigation constitutes a search, the more difficult question is whether the use of the results from the ASD to form the basis for provincial roadside prohibitions under the ARP regime qualifies as a search or seizure. Put another way, is the ARP regime, which refers to and incorporates the search under s. 254(2) of the *Criminal Code,* a law which authorizes a search and/or seizure? If it does, the question shifts to focus on the constitutional validity of the law.

[208] I was not referred to any authority that holds that a provincial law that utilizes a criminal law search power, or the results thereof, itself creates a search or seizure. In *Rhys v. British Columbia (Superintendent of Motor Vehicles)* 2005 BCSC 58, Madam Justice Allan discussed ASD test results and their use in regulatory proceedings. The issue in that case was whether a police officer could use the results of the ASD to find reasonable and probable grounds to believe that the driver's ability to drive a vehicle was affected by alcohol. Justice Allan found that the authorities indicated that police officers could use the results of either co-ordination tests or ASD tests to form reasonable and probable grounds to issue a driving prohibition. No issue under s. 8 was raised in that case.

[209] If the Superintendent of Motor Vehicles simply relies on pre-existing information as a basis to impose a prohibition, such reliance may not constitute a search or seizure. However that is not the context in which this issue arises. Here the relevant statute makes specific reference to the ASD demand under the *Criminal Code* and authorizes the results of the ASD to be used immediately to determine whether there must be a driving prohibition.

[210] For convenience, I reproduce the relevant provision of the ARP regime, s. 215.41, which states the conditions under which a peace officer must serve a notice of driving prohibition:

> (3) If, at any time or place on a highway or industrial road,
>
> (a) a peace officer makes a demand to a driver under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device and the

approved screening device registers a warn or a fail, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, must,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) serve on the driver a notice of driving prohibition.

[211] The question of whether the ARP regime authorizes a search and seizure must be determined by looking at the provincial legislation together with the relevant provision of the *Criminal Code*. The interaction and overlap of federal criminal law concerning impaired driving and provincial law regulating the licensing of drivers and safety of highways has existed for many years. Both must be looked at here to determine whether ARP regime authorizes a search.

[212] Recently in *R. v. Orbanski; R v. Elias*, 2005 SCC 37 [*Orbanski*], the Supreme Court commented on the dual federal-provincial nature of impaired driving legislation. In *Orbanski*, the Court dealt with the issue of whether a right to counsel exists when police stop individual motorists to check for sobriety. The two accused in the case were independently stopped and assessed (one via physical coordination tests, and the other via use of an ASD) for sobriety, and ended up being arrested. In her analysis of the context of the right to counsel in these circumstances, Madam Justice Charron made some general comments concerning the intersection of provincial and federal legislation in the area of impaired driving (at para. 27):

> ... it is important to recognize that the need for regulation and control is achieved through an interlocking scheme of federal and provincial legislation. The provincial legislative scheme includes driver licensing, vehicle safety and highway traffic rules. At the federal level, the primary interest lies in deterring and punishing the commission of criminal offences involving motor vehicles. Control of drinking and driving is not confined exclusively to the laying of criminal charges after a criminal offence has been committed. Roadside screening techniques contemplated by provincial legislation provide a mechanism for combating the continuing danger presented by the drinking driver, even if the driver may not ultimately be found to have reached a criminal level of impairment. Examples of such provisions in the Manitoba *Highway Traffic Act* applicable at the roadside include s. 263.1(1), which permits a peace officer to suspend a driver's licence if the officer has reason to believe that the driver's blood alcohol level exceeds 80 milligrams of alcohol in 100 millilitres of blood or if the driver refuses to comply with a demand for a breath or blood sample made under s. 254 of the *Criminal Code*. Hence, although the issues on these appeals arise in the context of criminal trials, their resolution must nonetheless take into account both federal and provincial legislative schemes. The Court must carefully balance the *Charter* rights of motorists against the policy concerns of both Parliament and the provincial legislatures.
>
> [emphasis added]

[213] The tension between the individual rights of motorists and the policy concerns of both

Parliament and the provincial legislature permeates the particular s. 8 analysis that must be undertaken where, as in the case at bar, a motorist's *Charter* rights may be affected by a federal criminal law power which is adopted or used by the Province to impose a provincial driving prohibition for a regulatory purpose.

Conclusion

[214] Looking at the ARP regime as a whole, it is my view that it authorizes a search. The ARP is imposed on the basis of the results of the ASD. The automatic driving prohibition is not only imposed under the ARP regime if a driver gives a breath sample above the "criminal level" of over 0.08, but as well if the breath sample tests are in the "warn" range between 0.05-0.08. This range has consequences under the ARP regime but not under the criminal law. This suggests that the search is authorized by law for other than purely *Criminal Code* purposes.

[215] The provincial legislation does not itself explicitly authorize the administering of the ASD (the basis of the Province's argument that it does not authorize a search or seizure), but the legislation does permit a second test at the request of the motorist. Additionally, the provincial driving prohibition is imposed if a driver does not provide the requested breath sample into an ASD. These observations provide some further support for the position that the ARP regime, by its reference to the use and results of the ASD, is a law that authorizes a search.

[216] Accordingly, I conclude that the ARP legislation, by referring to the ASD and using the results of the ASD for the purpose of issuing driving prohibitions under the provisions of the *MVA* is a law that authorizes a search and seizure.

[217] The next question is whether the law authorizing the search and seizure triggers the application of s. 8 of the *Charter*, and if it does, whether the law is unreasonable and infringes s. 8.

Is the Law authorizing the Search or Seizure an Unreasonable Infringement of s. 8?

Reasonable Expectation of Privacy

[218] As explained by Wilson J. in *Thomson Newspapers Ltd. V. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 S.C.R. 425 [*Thomson Newspapers*] (at para. 95):

> Not all seizures violate s. 8 of the Charter; only unreasonable ones. Put another way, an individual is accorded only a reasonable expectation of privacy.

[219] The threshold question in every analysis under s. 8 is whether there exists in the circumstances a reasonable expectation of privacy. Because s. 8 protects privacy interests, if there is no reasonable expectation of privacy, then that is a full answer to the question and the search or

seizure will not be unreasonable. In *The Law of Search and Seizure in Canada* [James A. Fontana, *The Law of Search and Seizure in Canada*, 7th ed, (Markham: LexisNexis, 2007)], James A. Fontana describes the threshold question of a reasonable expectation of privacy (at 11-12):

> "Reasonable expectation of privacy" has therefore emerged as the cornerstone test of the search and seizure process. Its importance may be seen in this way: conduct by agents of the state may, in practical terms, amount to a search and seizure, but it will not be viewed as conduct subject to constitutional scrutiny under s. 8 of the Charter unless a reasonable expectation of privacy has been violated.

[220] As noted in *R. v Tessling*, [2004] 3 S.C.R. 432 (at para. 19):

> ... the Court early on established a purposive approach to s. 8 in which privacy became the dominant organizing principle. "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation": *Hunter v. Southam, ...* The principled approach was carried forward in *R. v. Edwards*, ... where Cory J., referring to the need to consider "the totality of the circumstances", laid particular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation.
>
> [emphasis in original]

[221] Under the circumstances in the case at bar, is there a reasonable expectation of privacy in the compelled breath sample and the results of the ASD, or is there, as counsel for the Province argues, a significantly reduced or complete lack of an expectation of privacy?

[222] Mr. Justice La Forest emphasised in *Dyment,* that (at 431-32):

> ... the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity.

[223] For the reasons I describe below, my conclusion is that motorists have a reduced expectation of privacy with respect to the compulsion of breath samples at roadside. The authorities show that a driver has a lower expectation of privacy even when the roadside search is for a criminal law purpose. The expectation of privacy I think is also reduced when the purpose of the legislation is to test sobriety and to impose driving prohibitions under a regulatory scheme. Nevertheless, I find that a motorist has *some* expectation of privacy when asked for a breath sample at roadside.

Criminal Context

[224] Even in the context of a criminal investigation, there is a reduced expectation of privacy for roadside breath tests to verify sobriety.

[225] As noted by Cory J. in *Bernshaw*, the requirement to submit to reasonable roadside breath testing should be regarded in terms of complying with a reasonable request for the privilege of driving (at para. 33):

> One of the prime responsibilities of a driver is to see that reasonable care is exercised in the operation of the motor vehicle, and specifically, that it is driven in a manner which does not endanger members of the public. That duty or responsibility cannot be fulfilled by an impaired driver who, by definition, endangers others. In furtherance of the duty not to endanger others, there exists an obligation to comply with a police officer's reasonable request to supply a breath sample. Complying with a reasonable request to take an ALERT test is a very small price to pay for the privilege of driving.
>
> [emphasis added]

[226] Similarly, Madame Justice L'Heureux Dube, in a concurring judgment in *Bernshaw*, discussed the scope of the reasonable expectation of privacy in the driving context. She articulated the view, which I find persuasive, that a lower reasonable expectation of privacy is appropriate in the driving context (at paras. 100-101):

> What is the nature of the reasonable expectation of privacy in relation to the monitored activity in question (in this case, roadside assessments of drivers' sobriety)? As was the case in *Simmons, supra*, I believe that this activity is one in which the reasonable expectation of privacy is lower due both to the nature of the activity and to the nature of the means available to regulate it. ALERT tests, spot checks, and other such measures all regulate conduct arising in the particular context of driving and with the particular goal of curtailing a particular subset of that activity -- impaired driving. When individuals obtain a driver's licence, they accept the many responsibilities that come with that privilege and, most importantly, undertake a responsibility to others to conduct themselves safely on the nation's roadways
>
> ...
>
> In my view, motorists have a lesser reasonable expectation of privacy with respect to verification of their sobriety than they do with respect to other, unrelated offences. This expectation is a function of both the nature of the activity engaged in and the threat that roadside sobriety tests are intended to address.
>
> [emphasis added]

Regulatory Context

[227] The content and level of a reasonable expectation of privacy in a regulatory regime may differ significantly from that in a criminal investigation.

[228] In considering the s. 8 issue it is significant that I have found that although the ARP regime comes closer to criminal law than its predecessor the ADP regime, the ARP regime is nevertheless a provincial regulatory regime.

[229] What is a driver's expectation of privacy in this regulatory context? As was pointed out by Justice Wilson in *R. v McKinlay Transport*, [1990] 1 S.C.R. 627, "[s]ince individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful" (at para. 27).

[230] In *Thomson Newspapers*, after commenting that only unreasonable searches and seizures violate s. 8, and that an individual is accorded only a reasonable expectation of privacy, Wilson J. (in dissent) remarked (at para. 95):

> At some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed. However, the state interest only becomes paramount when care is taken to infringe the privacy interest of the individual as little as possible. ... What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*. This having been said, however, it would be my view that the more akin to traditional criminal law the legislation is, the less likely it is that departures from the *Hunter* criteria will be countenanced.
>
> [emphasis added]

[231] In *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, the Court again highlighted the differing privacy expectations that can arise in different contexts (at para. 20):

> Of course, expectations of privacy must necessarily depend on more than just the nature of the thing being searched and its connection with the person claiming a s. 8 right. As La Forest J. stated in *Thomson Newspapers* ... "the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state". This was what was meant by La Forest J. in *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, and by Wilson J. in R*. v. McKinlay Transport Ltd*., [1990] 1 S.C.R. 627, when they stated that the content of the reasonable expectation of privacy depended on "context". In both of these cases, the Court dealt with the difference between searches and seizures conducted to ensure compliance with regulatory regimes and those conducted for the purpose of enforcing the criminal law.

[232] However, although the above authorities point to the possibility of a lower expectation of privacy in regulatory contexts, they do not stand for the proposition that there is no expectation of privacy in these contexts. As La Forest J., pointed out in *Thomson Newspapers* (at para. 139):

> To recapitulate, the relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail, and is not intended to entail, the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional "real" or "true" crimes. It follows that investigation for purposes of the Act does not cast the kind of suspicion that can affect one's standing in the community and that, as was explained above, entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities. This does not, of course, mean that those subject to investigation under the Act have no, or no significant, expectation of privacy in respect of such investigations. The decision of this Court in *Hunter v. Southam Inc., supra*, makes clear that they do. But it does suggest that the degree of privacy that can reasonably be expected within the investigative scope of the Act is akin to that which can be expected by those subject to other administrative and regulatory legislation, rather than to that which can legitimately be expected by those subject to police investigation for what I have called "real" or "true" crimes.
>
> [emphasis added]

[233] As mentioned in the above quotation from *Schreiber*, “the degree of privacy the citizen can

reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state". Whether reduced or not, the compulsion of a breath sample at roadside engages a motorist's privacy interests. As discussed above, Doherty J.A. for the Ontario Court of Appeal made this point in *Wills* when he suggested that an individual's privacy interest would clearly be engaged by the compulsion of "the very breath one breathes" (at para. 39).

[234] In this case, a search power from the criminal law is used for a regulatory purpose. Although a driver has a reasonable expectation of privacy in his or her expelled breath, I conclude that this privacy interest is reduced in the highly regulated context of driving. However, while I accept that this interest is reduced I do not conclude, as counsel for the Province suggests, that there is no expectation of privacy. Counsel for the Province did not bring to my attention any authority indicating that a driver had no reasonable expectation of privacy in a breath sample given at roadside as part of a regulatory search.

[235] Having found that a reasonable expectation of privacy exists, the next step is to look at the more complicated issue of the reasonableness of the ARP regime insofar as it authorizes the search and seizure of a motorist's breath sample.

Reasonableness of the Law authorizing the Search

Generally

[236] I will now discuss whether the petitioners have established an infringement of s. 8 with respect to the ARP legislation.

[237] With some exceptions such as searches incidental to arrest (*R. v Stillman*, [1997] 1 S.C.R. 607), and certain school searches (*R. v. M. (A.)* (2006), 79 O.R. (3d) 481), all warrantless searches are presumptively unreasonable (*Canada (Combines Investigation Acts, Director of Investigation and Research*) *v. Southam Inc*., [1984] 2 S.C.R. 145 [*Hunter*]).

[238] In *Hunter,* Dickson J. (as he then was), discussed the content and scope of the protection under s. 8, and set out the procedure for reconciling the values of an individual's privacy with the need for effective law enforcement. According to *Hunter*, the balancing between individual privacy and state interests requires prior authorization, where feasible, as a precondition for a valid search and seizure. *Hunter* held that the party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.

[239] In order for a search to be reasonable, it must comply with the criteria articulated in *R. v Collins*, [1987] 1 S.C.R. 265: first, the search must be authorized by law; second, the law authorizing the search must be reasonable; and third, the manner of the search must be carried out reasonably.

[240] Under the *Collins* criteria, I find that the first requirement is met. The search authorized by the ARP legislation is "authorized by law". The ARP regime incorporates the request for a breath sample into an ASD under s. 254(2) of the *Criminal Code* and on the basis of that search imposes the provincial driving prohibitions. In effect, the intersection of the ARP regime and the *Criminal Code* (the reference in the ARP legislation to the use of the ASD results) is the "law" that authorizes the search in the case at bar.

[241] I turn to the second criterion from *Collins*: is the law reasonable?

Criminal Context

[242] Before turning to the ARP regime, let me refer specifically to s. 254(2) and how it works in a *Criminal Code* investigation. This is significant because of the balance it achieves in the context of a criminal investigation. The petitioners' submission is that it passes constitutional muster there but not when it is used as part of this provincial ARP regime.

[243] The balance achieved in the criminal law, the petitioners say, is because of the limited use that may be made of the results of the ASD search in a criminal investigation. When contrasted with the use that the Superintendent of Motor Vehicles makes of the ASD search results under the ARP regime, the petitioners say, the ARP regime search is made on a constitutionally deficient standard.

[244] The two-step process for the search of breath samples that is authorized under the *Criminal Code* is summarized by Fontana in *The Law of Search and Seizure in Canada, supra* (at 713):

> Section 254 of the *Criminal Code* provides a two-step detection and enforcement procedure with respect to the operation of a motor vehicle while impaired. The first step, set out in s. 254(2), authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an approved screening device ("ASD") at or near the roadside immediately after the interception of a motor vehicle. These screening tests determine whether more conclusive testing is warranted. A driver who fails an Alcohol Level Evaluation Roadside Tester test is not subject to criminal liability.
>
> The second step, set out in s. 254(3), provides for a breathalyzer test, which is normally performed at a police station. Breathalyzers determine precisely the alcohol concentration in a person's blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the limit prescribed by law.
>
> The roadside screening step necessarily interferes with rights and freedoms guaranteed by the Charter, but only in a manner that is reasonably necessary to protect the public's interest in keeping impaired drivers off the road. At the second stage of the statutory scheme, the Charter requirements must be respected and enforced.
>
> [emphasis added]

[245] Mr. Mickelson's colleague Mr. Whysall asserts that ordinarily a search on grounds of suspicion would not be lawful. However, he argues that in a criminal investigation the fact that a

breath sample may be required on the basis of a “reasonable suspicion” of drinking rather than the usual requirement for a search in a criminal investigation of “reasonable belief” does not offend s. 8 of the *Charter* because the result of the roadside screening device is only used to possibly elevate an officer’s “suspicion” to reasonable grounds to believe that the driver has blood-alcohol over 0.08 (thus justifying a demand for a breathalyser sample). The other reason Mr. Whysall suggests the search by way of a screening device on reasonable suspicion passes constitutional muster in a criminal investigation is because the evidence from the ASD (and the questioning in relation thereto) is not admissible in the criminal prosecution: *R. v. Milne* (1996), 28 O.R. (3d) 577 (CA); *R. v. Weintz*, 2008 BCCA 233; *R. v. Schultz*, 2009 BCSC 1521.

[246] However, under the ARP regime the results of the ASD can be used, and in fact form the basis of the prohibition.

[247] The petitioners say that it is clear that in a criminal investigation a law that would allow the results of an ASD to be used as evidence to support a conviction, or would allow a breathalyser test to be demanded on reasonable suspicion, would not be a reasonable law compliant with s. 8 of the *Charter*. The petitioners argue that it is clear, therefore, that the ARP law is unreasonable and infringes s. 8 because the results of the screening device form the basis of the prohibition. In short the ASD provides the evidence for the mandatory prohibition, whether based on a “fail” or a “warn” result.

[248] But if the use of the results of an ASD to support a criminal conviction would be an unreasonable law in a criminal context, does it necessarily follow that the ARP regime infringes s. 8 in this regulatory context?

Regulatory Context

[249] As I will explain, the analysis for whether there is an infringement of s. 8 is different when the law authorizing the search is part of a regulatory regime rather than part of a criminal investigation. As with questions concerning the reasonable expectation of privacy, questions having to do with the reasonableness of a law authorizing a search involve a contextual analysis.

[250] Constitutional standards developed in a criminal law context cannot automatically be applied to state action and legislation in the regulatory field. In other words, a law authorizing a search which might be unreasonable in a criminal law context, might nevertheless be reasonable where authorizing a search as part of a regulatory regime. There are different considerations in the balancing of relevant interests.

[251] As is clear from *Thomson*, *McKinlay* and the authorities quoted above, when a law authorizing a search is part of a regulatory regime, the standard of reasonableness depends on the

context of the search. In *The Law of Search and Seizure in Canada, supra*, Fontana discusses the idea of context under s. 8 (at 544- 545):

> The question of whether a particular piece of legislation is regulatory as opposed to criminal or quasi-criminal assumes additional importance in light of appellate court recognition that the standard of reasonableness will vary from the *Hunter v. Southam Inc.* [footnote omitted] position, depending upon the character of the legislation. In *Johnson v. Ontario (Minister of Revenue)*, Arbour J.A. said:
>
> > It is clear from ... recent decisions that the standard of reasonableness imposed by the Supreme Court in *Hunter v. Southam Inc.* to satisfy the s. 8 constitutional requirements is not necessarily the standard of reasonableness that will apply to every search and seizure authorized by legislation. Wilson J. at pp. 644-45 S.C.R. in *McKinlay* spoke of the need for a flexible standard of review of what is "reasonable" in a given context in order for that standard to be realistic and meaningful.
>
> The departure from the *Hunter v. Southam Inc.* principles was premised, in both *Thomson* and *McKinlay*, on a determination that the provisions under consideration were regulatory, rather than criminal, and that the stringent standards of reasonableness imposed in *Hunter* were properly reserved for investigations of a criminal nature.
>
> [emphasis added]

[252] In *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 [*B.C. Securities*], the majority said with respect to s. 8 (at para. 52):

> Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: per La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.
>
> [emphasis added]

[253] The Nova Scotia Court of Appeal discussed the difference between criminal and regulatory matters in the context of *Charter* protections in the case of *R. v. Wilcox*, 2001 NSCA 45. Mr. Justice Cromwell (as he then was) remarked (at paras. 107, 108 and 110):

> ... the Supreme Court has frequently considered the distinction between "regulatory" and "criminal" legislation to be an important element of the contextual analysis ... This distinction is not always easy to make and will not necessarily be the controlling factor. However, in general somewhat less exacting *Charter* protections will be applied in regulatory, as opposed to truly criminal, proceedings.
>
> The essence of criminal law is moral blameworthiness; the essence of regulation is that those engaging in regulated activities maintain a certain minimum standard of care ... Criminal offences reinforce crucial social values, the violation of which merits disapprobation and punishment ... Regulatory offences, by contrast, are not primarily concerned with values, but with results: "the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner"... What is central to the

> distinction are "... the nature of the conduct addressed by the legislation and the purposes for which it is designed to regulate that Conduct."
>
> ...
>
> I conclude that this case concerns regulatory offences in a highly regulated industry. This factor supports the view that the requirements of ss. 7 and 8 of the *Charter,* as developed in the context of criminal law, should be applied more flexibly in this regulatory context.
>
> [emphasis added]

[254] The ARP regime, as I have described, is part of a highly regulated activity; the licensing of drivers and regulation of safety on public highways. It does not create an "offence" as that term is used in s. 11 of the *Charter* nor does it invade criminal law on a division of powers basis. Although the petitioners made compelling submissions on both of those points, I ultimately found against them and concluded that the penalties and costs that are imposed as part of the ARP regime do not result in an offence under s. 11 of the *Charter.* Although in practice in some circumstances the roadside prohibitions have taken the place of criminal prosecutions, I have held that the ARP regime is not criminal law in pith and substance.

[255] Therefore, the more flexible standard appropriate to the question of reasonableness of the law authorizing the regulatory searches is to be applied.

Considerations

[256] There are, I think, a number of factors that go into the balance in determining, from a *Charter* perspective, the reasonableness of a law that authorizes a search in a regulatory context.

[257] The exercise of determining whether the ARP regime is a reasonable law for the purposes of s. 8 involves an examination of a number of different considerations. One formulation of this balancing exercise was stated in the following way: "... the key question would still be the reasonableness of the law, and the answer to that question turns on the balance between an individual's privacy interest and the state interest in that context" [Lisa M. Austin, "Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the *Charter"* (2007) 57 Univ. of Toronto L.J. 499 at 520 (QL)].

[258] The assessment of the reasonableness of a law authorizing a search has many facets which courts have attempted to articulate in various contexts involving different searches and seizures. Mr. Justice Strayer of the Federal Court of Appeal in *Del Zotto v. Canada* (1997), 147 D.L.R. (4th) 457 (F.C.A.) (whose dissenting reasons were adopted by the Supreme Court of Canada, [1999] 1 S.C.R. 3), listed several factors relevant to a consideration of the reasonableness of a search and seizure (at para. 13):

> It appears to me from the jurisprudence that the "context" in which these matters must be judged involves a number of factors: the nature and the purpose of the legislative scheme

> whose administration or enforcement is in question; the mechanism for discovery or mandatory production employed and the degree of its potential intrusiveness; and the availability of judicial supervision. One must consider all of these factors in determining whether a seizure, real or potential, would be unreasonable within the meaning of section 8.

[259] Some of the relevant considerations in determining whether the ARP law is a reasonable law under s. 8 include: the nature and purpose of the law, which, as discussed earlier, is the removal of impaired drivers from the highway; the fact that the regime concerns the licensing of driving, a highly regulated provincial activity; the fact that although a driver has an expectation of privacy, the search is minimally intrusive; the fact that driving is a privilege rather than a right; and the fact that a driver has a diminished expectation of privacy in a breath sample compelled at roadside for assessing sobriety.

[260] However, countervailing considerations exist as well. First, the search by the screening device, which has limited use in a criminal investigation, forms the basis of the prohibition in this regulatory regime. Second, the search by the state is carried out on the basis of reasonable suspicion, rather than reasonable belief that the driver has been drinking. Third, the ARP regime, although not part of the criminal law, is not far removed. Fourth, the penalties and consequences flowing directly from the search, particularly at the level of a "fail" reading, are not inconsequential. Fifth, the driver under this regime has a very limited ability to challenge the grounds for the prohibition, penalty and costs.

[261] In summary, in order to determine whether the impugned law is reasonable and complies with s. 8, I have to consider all the factors and balance the state interest in road and personal safety with the privacy interests of individual drivers. What follows is a discussion of the various factors that I have considered in coming to my conclusion regarding whether the ARP regime infringes s. 8 of the *Charter*.

Intrusiveness of the Search

[262] I begin with the level of intrusiveness of the search by way of an ASD. I have discussed this aspect above. Although some searches of parts of the body or for bodily substances are highly intrusive, searches under the provisions of the *Criminal Code* pertaining to breath samples have been held not to be. The point was made by Justice Cory in *Stillman* (at paras. 88-90):

> ... [t]here is little likelihood of maintaining any semblance of dignity where, without consent and in the absence of any statutory authorization, intrusive procedures are employed to take bodily substances.
>
> ... any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual to the particular bodily intrusion or interference required for the purpose of the particular procedure the police wish to undertake.
>
> ... it is apparent that a particular procedure may be so unintrusive and so routinely

> performed that it is accepted without question by society. Such procedures may come under the rare exception for merely technical or minimal violations referred to earlier. ... [s]imilarly, the Criminal Code provisions pertaining to breath samples are both minimally intrusive and essential to control the tragic chaos caused by drinking and driving.
>
> [emphasis added]

[263] In the circumstances, I find that, consistent with the authorities, the requirement in the ARP legislation that a driver provide a breath sample into a roadside screening device is fairly characterised as minimally intrusive.

The Nature and Purpose of the Law

[264] Next, the nature of the law. This is a very important consideration in determining whether the law authorizing the search is reasonable. In *BC Securities*, which involved a s. 8 challenge to a provision of B.C.'s *Securities Act*, S.B.C. 1985, c. 83, the Court referred to the important social purpose that was served by the impugned law, and the fact that the *Securities Act* justified what the Court viewed as the minimal intrusion into individual's privacy rights (at para. 61):

> In this case, the outstanding issue is whether the law is reasonable ... As we have indicated above, the *Securities Act* serves an important social purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The law in question, is therefore, reasonable.
>
> [emphasis added]

[265] The ARP is part of a legislative regime in the *MVA* that, I have no doubt, has enormous social utility in removing impaired drivers from the road and thereby reducing death, injury, and the financial and emotional costs that flow from alcohol-related accidents. The search by way of ASD is a necessary part of the ARP regime because it is used at roadside to assess sobriety and is effective in removing impaired drivers expeditiously. A search via the ASD takes place in the context of a regime that not only has as its purpose the removal of impaired drivers from the road, but as well, the deterrence of such behaviour and the prohibition of driving by repeat and more serious offenders.

[266] Part of the rationale of the Province in creating the ARP regime is to achieve the goal of reducing alcohol-impaired driving fatalities by 35% by the end of 2013. In order to accomplish this goal, the Province has expanded the scope of administrative driving prohibitions from the ADP regime, to encompass drivers with blood-alcohol concentrations in ranges lower than under the *Criminal Code.*

[267] Under the ARP regime, drivers are removed promptly from the road when they are over the level of impairment prescribed by the *Criminal Code* (0.08), and also when they are in the 0.05 - 0.08 range; a range which, although under the criminal limit, still, according to the evidence,

significantly affects a driver's ability to drive safely.

[268] The efficacy of this approach finds support in the opinion evidence of Robert E. Mann, an associate professor and specialist in addiction and mental health. He has written on the subject of impairment of driving by alcohol, drugs and other factors. Mr. Mann provided a number of opinions on drinking and driving-related issues that support the objective of this law. In particular he noted that: police officers have difficulty detecting impaired drivers; administrative suspensions are consistent with reducing recidivism, collisions and injury; and evidence supports that driving-related skills are significantly impaired at a 0.05 blood-alcohol level.

[269] Although counsel for the petitioners argues that there is no evidence justifying the necessity of the ARP regime to go beyond the scope of the ADP regime, Mr. Mann's evidence clearly shows that by extending to drivers whose blood-alcohol concentration is in the "warn" range (0.05 - 0.08), this law helps to remove drivers from the highway who, although not necessarily at the criminal level of impairment, may nonetheless be a significant risk to themselves and others.

[270] I refer to the comments in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 where the Court said (at para. 48), "[t]he studies on this subject have been well publicized over recent years … the evidence is overwhelming in its confirmation of the relationship between serious accidents and driving under the influence of alcohol or other drugs".

[271] In balancing individual driver's privacy interests against the interests of society in reducing injury and death from impaired driving, I am mindful of the scourge caused to society by impaired drivers and the social utility of law that has the effect of removing these persons (whether in the "fail" or "warn" range) from public roadways. The problem of drinking and driving is a serious one.

[272] It is apparent from the evidence that prevention of injury and death from alcohol-related accidents is a pressing societal and government concern underlying this law.

Regulation of Driving

[273] As discussed previously in this judgment, whether in a criminal or regulatory context, a driver has a diminished expectation of privacy in his or her expelled breath when checked for sobriety at roadside. Although a reasonable expectation of privacy is generally considered a threshold question relating to whether the application of s. 8 is even triggered, the level of expectation of privacy is also a consideration in assessing whether the law infringes s. 8 of the *Charter*.

[274] The Province argues that the fact that a breath sample is taken at roadside from a licensed driver who is participating in a heavily regulated activity supports the reasonableness of the law. Mr. Copley argues that a driver must reasonably be taken to have accepted the obligation to provide information relevant to the exercise of his licence to drive, and thus, a driver in these

circumstances has no reasonable expectation of privacy.

[275] In support of the submission that a driver essentially consents to a reasonable demand for a roadside sobriety test, the Province refers to *R. v. Hufsky*, [1988] 1 S.C.R. 621 and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154. In *Hufsky* the appellant argued that the compelled production of his driver's licence and insurance was a search within s. 8. The Court said (at para. 23):

> In my opinion the demand by the police officer, pursuant to the above legislative provisions, that the appellant surrender his driver's licence and insurance card for inspection did not constitute a search within the meaning of s. 8 because it did not constitute an intrusion on a reasonable expectation of privacy. ... There is no such intrusion where a person is required to produce a licence or permit or other documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.

[276] The Province says that the concept that there is a requirement to produce evidence of compliance with a legal requirement extends to the provision of breath samples at the roadside. The Province, by way of analogy, relies on *Fitzpatrick*, where the Court considered a charge of overfishing against a captain of a vessel in the licensed groundfish industry. Counsel for the Province argues that in *Fitzpatrick,* the principle against self-incrimination was not engaged because the accused chose to participate in commercial fishing knowing of the reporting requirements. In the s. 8 context he argues that, similarly, a driver cannot expect to have a license if he or she keeps from the Superintendent, and his or her agents, the information necessary for them to carry out the function of protecting the public.

[277] While neither *Fitzpatrick* nor *Hufsky* is directly on point, there are parallels in the driving context in that drivers must respond to reasonable demands that allow the Superintendent of Motor Vehicles and his agents to protect the public. This is a contextual factor in assessing the reasonableness of the law and supports the Province's position.

[278] In considering this aspect I am also mindful of the fact that the British Columbia Court of Appeal in *Buhlers* has held that driving is a privilege and not a liberty protected under s. 7.

Criminal Law Elements of the ARP Regime

[279] Earlier in this judgment I described my conclusion that the provincial ARP regime in its pith and substance is not criminal law. The s. 8 argument of the petitioners is that a law authorizing a search here must have the same constitutional protections as if it were part of a criminal investigation. That argument cannot succeed because, as I have set out, the test of reasonableness under s. 8 in this case is not that which applies where the law authorizing the search is part of a criminal investigative process.

[280] Nevertheless, in the balancing of interests I must be mindful of the proximity of the ARP

regime to a criminal law regime. This is a relevant consideration in determining the reasonableness of the law. In *Thomson Newspapers,* Wilson J. made the point that although a different assessment of reasonableness takes place in the regulatory context, "the more akin to traditional criminal law the legislation is, the less likely it is that departures from the Hunter criteria will be countenanced" (at para. 95).

[281] What are some of the similarities between the ARP regime and a criminal investigation? First, the authorized mode of search in the ARP regime comes from the criminal law. Second, one basis for a driving prohibition under the ARP regime is having a blood-alcohol level over 0.08, the well-known breathalyser standard of impairment for a *Criminal Code* conviction. Third, in the case of a "fail" reading on an ASD, the driving prohibition is lengthy and the penalty and costs that a driver incurs are not insubstantial. In essence, although I have concluded that the provincial legislation in its pith and substance within the Province's legislative jurisdiction and is not criminal law for the purposes of the division of powers analysis, it is fair to say that it is not far removed as a matter of practice.

[282] In considering the reasonableness of the law one might ask this question: is it reasonable that the use of the ASD results may result in consequences somewhat similar to a criminal prosecution (a lengthy prohibition and penalty and costs) but without the limitations and constitutional protections in place for a driver subject to a criminal investigation? Although the ARP regime does not lead to a criminal conviction, this question is still a relevant consideration when assessing the nature of the search and the reasonableness of the law.

[283] Another factor to be considered is the type of search in the particular regulatory regime. In many of the authorities which have discussed the different s. 8 analyses under regulatory versus criminal regimes, the search has been one for documents in the possession of a person, rather than for a breath sample as under the ARP regime.

[284] It is also a consideration that the search under the ARP regime provides that the results of the ASD themselves are the evidence for the suspension; it is not a regulatory regime that merely requires the production of a document/evidence that may be introduced in a later regulatory proceeding.

The ASD and reliability

[285] There was some evidence on this hearing concerning the possibility of error in the operation of ASDs.

[286] The petitioners filed affidavits from Wayne Jeffery, a toxicologist and former head of the RCMP toxicology lab in Vancouver. Mr. Jeffery provided opinion evidence on the current system of

breath testing for alcohol under the ARP regime. He deposed that the ARP regime relies on ASD's and not "approved instruments" as those terms are used in the *Criminal Code.* He deposed that as such, the procedural safeguard of taking two samples of breath 15 minutes apart and ensuring both samples are within 20mg% of each other does not exist under the ARP regime. This means that the accuracy of the ASD reading could be affected by residual mouth alcohol from recent consumption of alcohol, recent use of mouthwash or recent regurgitation.

[287] Further, Mr. Jeffery points out that the ASD does not provide a numerical blood-alcohol reading when the results are a "warn" or a "fail". He deposed that unlike the approved instrument, the ASD does not have an internal safeguard to notify that residual mouth alcohol may be impacting the testing. He points out that there is no second ASD test unless an individual requests it. In support of his position on the reliability of the breathalyser as opposed to the screening device, he said in a separate affidavit that the approved instrument (breathalyser) can only be conducted by a qualified technician and that when the required steps are followed it will give a reliable result.

[288] There was also evidence from Daffydd Hermann filed on behalf of the Province. He is a retired police officer who, until April 2011, worked for the Abbotsford Police on a project in conjunction with the RCMP involving the legislation challenged in this case. He is trained as an operator of an ASD. He explained that an ASD works by trapping a cubic centimetre of air in its chamber, and reacting with the fuel cell to produce electricity if alcohol is present. He described the training of police officers to make sure that a suitable breath sample is taken; a sample of deep lung air. He expressed the opinion that ASD readings of breath samples are always lower than the driver's actual blood-alcohol concentration.

[289] Mr. Hermann also said that some of the procedural safeguards present with respect to an approved instrument are not practical for use in relation to ASD's. These include the requirement that the officer note the last drink consumed by the driver to ensure that mouth alcohol is not interfering with the results.

[290] Mr. Hermann said that officers are trained not to operate ASD's outside their recommended temperature range, and that officers are instructed to follow all protocols and practices with respect to receiving proper breath samples into the ASD.

[291] Mr. Hermann refers to a decision made by the BC Association of Chiefs of Police Traffic Safety Committee to reset the ASD from a threshold of 49mg% to 59mg% to ensure that no drivers would be given an ARP for a warn if they were under 59mg%. He said that they did not reset the fail threshold as all ASD's are set to register a fail when the breath sample registers 0.10. He said that officers are trained to offer to the driver a second test if the driver registers a "warn" or a "fail".

[292] The utility of this evidence, for the purposes of determining whether the petitioners have established an infringement of s. 8, is that it shows that that in some circumstances there can be serious issues concerning whether an ASD accurately reflects blood-alcohol readings. The evidence shows that this problem does not exist, at least to the same extent, when an approved instrument (breathalyser) is used at the police station.

The Reviewability of the ARP and Possibility of an Unjust Result

[293] In assessing the reasonableness of the ARP regime I must consider not only the state and public interest, but also the impact of the law on the driver.

[294] In this case, the ARP regime has an obvious impact; it provides for an immediate roadside suspension as well as penalties and other costs. The search provides the evidence that forms the basis of the immediate suspension. However, under the ARP regime the driver's ability to challenge the result of the search or the basis for the search is very limited, notwithstanding the possible non-trivial consequences resulting from the search.

[295] The reviewability of the basis for, or results of, a search and seizure can be a factor that affects the reasonableness of the law under s. 8. For example, in *Thomson Newspapers*, La Forest J. (in the majority on this issue) commented on the importance of the ability to challenge the use of s. 17 of the *Combines Investigation Act* to compel information (at para. 169):

> In my opinion, s. 17 of the *Combines Investigation Act* does not, having regard to the low expectation of privacy which those subject to its operation can be said to have in regard to the documents that fall within its scope and the important and difficult task of law enforcement in which it assists, countenance the making of unreasonable seizures within the meaning of s. 8 of the *Charter*. The opportunity to challenge, by way of judicial review, the relevancy of any particular use of s. 17 to matters in respect of which the Director or Commission can conduct inquiries, provides adequate guarantee against potential abuse of the power s. 17 confers. No evidence of any such abuse is apparent in the case before this Court.
>
> [emphasis added]

[296] Because the ARP regime involves immediate suspensions at roadside, the *Hunter* standard of pre-authorization for a search is not applicable. Pre-authorization to search in this context is unreasonable and impractical, and would defeat the purpose and efficacy of immediate roadside testing to get impaired drivers off the highway.

[297] In my view, however, a particularly relevant consideration in determining whether the law authorizing the search is reasonable is the opportunity of the driver to challenge the prohibition and costs flowing from the authorized search. In other words, a factor in assessing the reasonableness of the law is whether the search is subject to review after the fact. The nature and efficacy of that review are relevant considerations.

[298] The ARP regime has a review mechanism, albeit one that the petitioners say is woefully inadequate and unfair. A driver who is subject to a prohibition based on a "fail" or "warn" result on the roadside screening device may, under s. 215.48, apply to the Superintendent of Motor Vehicles for a review of the driving prohibition. Under s. 215.49, the Superintendent must consider any written statement or evidence by the applicant, the report (unsworn) of the peace officer, a copy of the Notice of Driving Prohibition, and any information forwarded to the Superintendent by the peace officer who served the prohibition.

[299] However, under s. 215.5 there are only two available grounds for review and they are set out in 215.5(1) as follows:

> 215.5(1) If, after considering an application for review under section 215.48, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and,
>
> (a) ...
>
> (i) an approved screening device registered a warn,
>
> (b) ...
>
> (i) an approved screening device registered a fail, or
>
> (ii) the person failed or refused, without reasonable excuse, to comply with a demand made on the person as described in section 215.41 (4),
>
> the superintendent must confirm the driving prohibition, the monetary penalty for which the person is liable under section 215.44 and the impoundment.
>
> [emphasis added]

[300] As can be seen, the review of the prohibition is extremely limited. If satisfied that the individual has met the above limited criteria, the Superintendent must confirm the driving prohibitions as well as the monetary penalty and impoundment costs.

[301] There are really only two issues to be decided under the statutory review: was the applicant a "driver", and did the screening device register a "warn" or "fail" (or did the motorist refuse to blow) as the case may be? The statutory review does not permit the driver to attempt to demonstrate that he or she did not have a blood-alcohol reading over 0.08 or to challenge the accuracy or functioning of the ASD. Moreover, the review does not allow the driver to attempt to challenge whether the demand for a breath sample was capricious, cross-examine the officer, or raise the issue of whether the driver was advised of the possibility of giving a second sample.

[302] The most important of these concerns however is that the review process does not allow the driver to challenge the apparent result of the ASD.

[303] The review process under the ARP regime can be contrasted with the ADP review process (the review process in place when the ADP regime was challenged in *Buhlers*). Under the ADP

regime, a driver is given a 90-day suspension on the basis that a peace officer has reasonable and probable grounds to believe that the driver's blood-alcohol reading is over 0.08. On the evidence, it appears that the practice is that if the result of a breath search by an ASD is in the 0.08 range or higher, a driver's blood-alcohol reading is confirmed by a second test of breath at the police station by a breathalyser. I refer to the evidence of Stephen Martin, Superintendent of Motor Vehicles, in this respect, who stated that:

> Where the device registers a "fail", the officer will make a second demand for a reading on an "approved instrument" (as defined in the *Criminal Code*) and will require the driver to attend at the police station where two "approved instrument" (e.g. breathalyzer) tests are administered.

[304] Under the ADP regime, any certificate of analysis resulting from an administered breathalyser test is considered by the reviewer. Also, whether a driver was "over 0.08" at the time of the prohibition is specifically an issue for the adjudicator to consider. If the Superintendent is satisfied that a driver was not over 0.08 at the time of the prohibition, the prohibition must be revoked.

[305] Under the ARP regime a driver's blood-alcohol level at the time of the prohibition is not a ground of review. It appears that the issue of review, apart from whether the applicant was the driver, rests *solely* on whether an ASD showed a "fail" or a "warn" (of which it appears there is no record other than the observation of the officer in the unsworn report). The result of the limited scope of review is that if a driver did not have a blood-alcohol level over 0.08 or 0.05 at the time of the prohibition, he or she still cannot challenge the suspension based on the roadside screening device.

Conclusion

[306] Having reviewed the relevant aspects of the ARP regime which authorizes the search and seizure of breath, the issue is whether the petitioners have demonstrated a breach of s. 8 of the *Charter.*

[307] As is apparent from my review of the ARP legislation, there are two distinct branches of the ARP regime which impose driving prohibitions and cost consequences to drivers, they are: driving prohibitions and associated penalties and costs for drivers in the "fail" range, and; driving prohibitions and associated penalties and costs for drivers in the "warn" range. The prohibitions for drivers in the "fail" range are more substantial, being 90 days and related penalties and costs totalling upward of $4000. The prohibitions, penalties and costs for drivers in the "warn" range are less substantial. The prohibitions are much shorter at 3, 7, and 30 days (depending on the number of occurrences) and the cost implications are lower.

[308] I will deal with each branch of the ARP regime in turn.

[309] The pressing government objective and the social utility of removing impaired drivers promptly from the road are important with respect to prohibitions, penalties and costs in both categories.

[310] In assessing whether the law that authorizes a search in a regulatory regime is reasonable for the purposes of s. 8 of the *Charter* I have considered the various factors discussed above which include two crucial factors: first, that the search by the screening device is part of a regulatory scheme focused on extremely important government objectives, and second, that drivers subject to the search under the ARP regime have a diminished expectation of privacy in their breath.

[311] I intend to discuss the "fail" and the "warn" categories separately because I have reached separate conclusions about them.

[312] With respect to the "fail" (over 0.08) branch of the regime, there are particular considerations that I think are significant in the s. 8 analysis. It is fair to say that this part of the ARP regime approaches the realm of criminal law in terms of the impact on the driver and the nature of the regime. The search power that is central to the regime is derived from a power given to the police under the *Criminal Code* as part of a criminal investigation, the suspensions that are imposed are lengthy and the costs that follow automatically from a prohibition are significant.

[313] Under the criminal law a driver has a number of protections to ensure only properly compelled evidence can support a conviction, however under this provincial regime, the same protections do not exist. The search under the ARP regime in this case results in consequences similar to those arising out of a criminal investigation, but provides a far less meaningful basis upon which to challenge the legitimacy of those consequences. I conclude that this is a significant issue in terms of the reasonableness of the law.

[314] Although the consequences to the driver are particularly significant in the event of a reading in the "fail" range, the driver does not have the opportunity, even after the prohibition comes into force, to challenge whether he or she was in fact over 0.08 or whether there were problems with the ASD that may have lead to an inaccurate reading. The societal interest underlying the objective of removing impaired drivers from the roadway has been accomplished by the immediate prohibition, but the ARP legislation nevertheless provides an extremely limited review, particularly on the important question of whether the driver was in fact over 0.08 at the time the prohibition was issued. The prohibition and significant consequences are based on a search of the driver but the driver has extremely limited grounds to challenge the accuracy of the results of the search.

[315] A reasonable review regime in a regulatory setting such as this is a relevant consideration in

balancing the state interest against the interest of individual motorists.

[316] The balancing of an individual's privacy interests and the state interest in the safety of highways involves consideration of all of the factors that I have set out. In summary, I have considered: the minimal intrusiveness of the search; the lower expectation of privacy in a compelled breath sample at roadside; the fact that driving is a highly regulated activity and a privilege; and that I have found the objective of the legislation, to remove impaired drivers from the highway, to be a very compelling state purpose.

[317] I have also considered, under the "fail" aspect of the regime: the closeness of the ARP regime to criminal law; the impact on the driver through the severity of the penalties and costs and the length of the prohibition; the fact that the search is based on suspicion rather than reasonable belief; and the extremely limited basis for the driver to challenge the prohibition.

[318] As I have described earlier, I have concluded that s. 8 of the *Charter* applies to the ARP legislation. Upon a consideration of all the factors I have discussed in connection with the prohibitions arising from the "fail" aspect of the ARP regime, I find that the ARP regime infringes s. 8 of the *Charter*, as it has been demonstrated to be an unreasonable law.

[319] A key reason for my conclusion is the fact that while the consequences from the search are substantial and approach criminal law sanctions, there is no way under the impugned law for the driver to challenge the validity of the results. As evidenced by the review process already in place under the ADP regime, it is possible to allow for a more meaningful review to be put in place without in any material way affecting the government's objective of removing impaired drivers promptly and effectively from the road. In my view, it is not reasonable to preclude a driver a more meaningful review of the grounds for a lengthy suspension, penalty and costs in the "fail" (over 0.08) part of the ARP regime.

[320] This deficiency is not corrected by the administrative challenges available to the petitioners on judicial review because those challenges will not be able to address the concerns about the validity of the search results.

[321] I recognize the pressing nature and importance of removing impaired drivers from the highway. However, that government objective can be fully and efficiently realized while respecting the rights of the individual driver as well. The ARP regime that imposes prohibitions for drivers who "fail" at the roadside does not appropriately balance the rights of individuals and society at large. Relying on a search power derived from the criminal law that allows for a breath demand on suspicion but does not meaningfully allow the driver to challenge the suspension after the fact is not, in the entire context, reasonable. I therefore find that there is an infringement of s. 8.

[322] Let me turn to the branch of the ARP regime that deals with prohibitions, penalties and costs when the driver has a reading in the "warn" range upon a search by an ASD. The question again is whether the law that authorizes the search with respect to the "warn" aspects of the ARP regime is reasonable with respect to s. 8 of the *Charter* or whether it infringes s. 8.

[323] In considering and balancing all of the factors that I have described, I reach a different conclusion than I have reached with respect to the "fail" provisions of the ARP regime.

[324] The petitioners have not established that the branch of the ARP regime dealing with ASD readings in the "warn" range is unreasonable.

[325] To analyze this, I have considered the ARP regime in the "warn" range as if it were a stand-alone and separate legislative regime.

[326] The government objective of removing impaired drivers from the road is a significant factor that applies to this aspect of the ARP regime as well as all aspects of the regime.

[327] In connection with suspensions arising from the screening device registering in the "warn" range, the penalties for a driver are lighter and the suspensions are far shorter; starting at 3 and 7 days and increasing only as much as 30 days in the case of repeat offenders. In the *Summary of Consequences and Costs* published by the Ministry of Public Safety and Solicitor General, the administrative consequences in the "warn range' are described as starting with a 3 day suspension and costs totalling $600 made up of towing costs, the administrative penalty and the licence reinstatement fee. Accordingly, with respect to prohibition length and associated costs, the ARP regime, in the case of a "warn" reading, does not approach criminal law in anywhere near the same manner as in the case of a "fail" reading. Moreover, it is also significant that the area of concern for prohibitions in the "warn" range (between 0.05 and 0.08) is not in an area typically the subject of criminal law; that is, suspensions for driving *over* 0.08.

[328] While recognizing the weakness of the statutory review process as it applies to the "warn" branch of the ARP, after considering and balancing all of the factors, I am not persuaded that the ARP law that authorizes a search resulting in consequences for persons who blow in the "warn" range is unreasonable. Put another way, I am satisfied that in the case of prohibitions and related penalties and costs that are imposed on a driver in the "warn" range, the pressing government objective justifies the intrusion into personal privacy.

[329] In connection with this part of the ARP regime, the petitioners have not established an infringement of s. 8 of the *Charter*. Accordingly, had the ARP regime been restricted to the consequences associated with a driver registering a "warn" on the ASD, I would not have found an infringement of s. 8 of the *Charter.*

[330] Nevertheless, and to the extent that I have described above, I find that the petitioners have established a breach of s. 8. I will discuss below whether the infringement is saved by s. 1.

H. SECTION 10(B)

[331] The petitioners argue that the ARP legislation infringes s. 10(b) of the *Charter* because it involves a detention without a corresponding opportunity to contact counsel. It is the petitioners' position that when a peace officer stops a motorist and investigates possible impairment, the motorist has been detained and the right to counsel is triggered.

[332] Section 10(b) of the *Charter* states:

> Everyone has the right on arrest or detention
>
> ...(*b*) to retain and instruct counsel without delay and to be informed of that right;

[333] As was the case with the allegation of a s. 8 breach, the Province says that the petitioners are challenging the wrong law. They argue that because the ARP legislation does not authorize any arrest or detention, it is not an impediment to retaining and instructing counsel without delay. Counsel for the Province asserts that detention in the case at bar arises as a result of peace officers fulfilling their duty to investigate driving offenses by checking drivers for sobriety and vehicles for safety. Counsel further points out that the Supreme Court has consistently held that this kind of detention is a reasonable limit on a motorist's right to counsel.

[334] In *Orbanski,* the Supreme Court commented on the ability of the police to stop a motorist and check for sobriety (at para. 41):

> It is also settled law that the police have the authority to check the sobriety of drivers. This authority was found to exist at common law in *Dedman*. More pertinently, it was also found in statute in *Ladouceur*, where this Court held that checking the sobriety of drivers was one of the purposes underlying the general statutory vehicle stop powers.

[335] In analysing whether the police physically stopping a person and asking him questions constituted a detention under s. 9 of the *Charter*, the Supreme Court, in *R. v Grant* 2009 SCC 32, discussed the circumstance of the police stopping a motorist and requesting a roadside breath sample. The Court found that this latter circumstance met the definition of detention. Chief Justice McLachlin and Justice Charron commented (at para. 34):

> Similarly, a legal obligation to comply with a police demand or direction, such as a breath sample demand at the roadside, clearly denotes s. 9 detention. As Le Dain J. observed in *Therens*, "[i]t is not realistic to speak of a person who is liable to arrest and prosecution for refusal to comply with a demand which a peace officer is empowered by statute to make as being free to refuse to comply" (p. 643).
>
> [emphasis added]

[336] In *R. v. Thomsen* [1988] 1 S.C.R. 640, the Supreme Court explained why the 10(b) right was infringed in the case of a stop and sobriety check. Justice Le Dain commented that (at para. 13):

> In my opinion the s. 234.1(1) demand by the police officer to the appellant to accompany him to his car and to provide a sample of breath into a roadside screening device fell within the above criteria. The demand by which the officer assumed control over the movement of the appellant was one which might have significant legal consequence because, although the evidence provided by the roadside screening device could not be introduced against the appellant, it might provide the basis for a s. 235(1) breathalyzer demand. For this reason, and given the criminal liability under s. 234.1(2) for refusal, without reasonable excuse, to comply with the demand, the situation was one in which a person might reasonably require the assistance of counsel.
>
> [emphasis added]

[337] Section 254(2) of the *Criminal Code* provides for the compelling of a breath sample at roadside. According to *Orbanksi,* the police's ability to stop motorists to check for sobriety comes either from provincial legislation or common law. In *Orbanski* the Court held that the limit on the s. 10(b) right of drivers was a limit "prescribed by law". At para. 52 the Court referred to their earlier decision in *Thomsen* and affirmed the holding in that case that the roadside request for a breath sample, which triggered and infringed the right to counsel, was a prescribed limit in that a right to counsel in that circumstance was incompatible with the "operational requirements" of police officers checking for sobriety of drivers (at para. 52):

> In *Thomsen*, this Court held that the exercise of the right to counsel was incompatible with the operational requirements underlying the demand for a sample for analysis in a roadside screening device made pursuant to s. 234.1(1) of the *Criminal Code* (now s. 254(2)). In determining that there was an implicit limitation on the right to counsel prescribed by s. 234.1(1), the Court adopted the reasoning of Finlayson J.A. in *R. v. Seo* (1986), 25 C.C.C. (3d) 385 (Ont. C.A.), and concluded as follows, at p. 653:
>
> > That there is to be no opportunity for contact with counsel prior to compliance with a s. 234.1(1) demand is, in my opinion, an implication of the terms of s. 234.1(1) when viewed in the context of the breath testing provisions of the *Criminal Code* as a whole. A s. 234.1(1) roadside screening device test is to be administered at roadside, at such time and place as the motorist is stopped, and as quickly as possible, having regard to the outside operating limit of two hours for the breathalyzer test which it may be found to be necessary to administer pursuant to s. 235(1) of the *Code*.
>
> In my view, it logically follows from *Thomsen* that a limit on the right to counsel is also prescribed during the roadside screening techniques utilized in these cases. If a limit on the right to counsel is prescribed *during* compliance with a s. 254(2) demand for a sample for analysis in the roadside screening device, then the limit must necessarily be prescribed during the screening measures *preceding* the demand, conducted with the very objective of determining whether there is a reasonable suspicion justifying the demand. Similarly, the limit must necessarily be prescribed during the screening measure that is the functional equivalent to the roadside screening device, namely, a technique conducted with the very objective of determining whether there are reasonable and probable grounds justifying a s. 254(3) demand for a breath or blood sample.
>
> [emphasis added]

[338] I find that when a driver is stopped and a request is made for a breath sample under s. 254(2) of the *Criminal Code*, and when that request may lead to a further criminal investigation and/or result in an automatic roadside suspension, the driver is detained within the meaning of s. 10(b) of the *Charter*. Because a driver in this situation is not offered counsel upon detention, s. 10(b) has *prima facie* been infringed.

[339] The authorities that deal with roadside stops have held that although these stops result in a violation of the s. 9 right not to be arbitrarily detained and the s. 10(b) right to counsel, these violations nevertheless represent reasonable limits on these rights under s. 1 of the *Charter*.

[340] This is the conclusion that the Province says I should reach in this case if I find, as I have, that the operation of the ARP regime results in a detention which triggers a detained driver's s. 10(b) rights.

[341] Is this infringement of s. 10(b) saved by s. 1? For the reasons outlined below, I conclude that it is.

Parties' Positions

[342] The Province says that if any of the rights under the *Charter* are infringed or denied by the legislation creating the ARP regime, the legislation is nevertheless saved under s.1 because it is a reasonable limit which is demonstrably justified in a free and democratic society.

[343] They refer to a number of cases decided by the Supreme Court of Canada on this issue, although it is noteworthy that none of these cases dealt with the precise circumstances in the case at bar.

[344] First, the Province refers to *Hufsky,* where the Court held that random stopping of motorists by police officers to check for driver's licenses, proof of insurance, and sobriety was a violation of s. 9 of the *Charter,* but was saved under s. 1.

[345] The Province argues that in coming to their decision, the Court in *Hufsky* gave great weight to the evidence of the gravity of the problem of motor vehicle accidents and resulting deaths and injuries. Indeed, the Court in *Hufsky* did rely on this evidence as shown by the remarks of Justice Le Dain (at para. 19):

> The above material reinforces the impression of the gravity of the problem of motor vehicle accidents in terms of the resulting deaths, personal injury and property damage, and the overriding importance of the effective enforcement of the motor vehicle laws and regulations in the interests of highway safety. The charts or tables prepared by the respondent from the statistical data in the government reports stress the following points: the relative importance of licence suspension and the effective enforcement of it; the relatively higher proportion of unlicensed and uninsured drivers, by comparison with the proportion of licensed and insured drivers, involved in motor vehicle accidents resulting in

> death or personal injury; and the relative importance of the motor vehicle offences, including driving without a licence or while under licence suspension or without insurance, which cannot be detected by observation of the driving. Again, a random stop authority is said to be justified by increasing the perceived risk of the detection of such offences.

[346] After concluding that the evidence in the case clearly demonstrated the serious problems associated with impaired driving, Le Dain J commented on the justifiability of the impugned provision of Ontario's *Highway Traffic Act* (at par. 20):

> In view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving, I am of the opinion that the limit imposed by s. 189a(1) of the *Highway Traffic Act* on the right not to be arbitrarily detained guaranteed by s. 9 of the *Charter* is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and control in the interests of safety, is proportionate to the purpose to be served.

[347] The Province points out that the Court in *Ladouceur* came to a similar conclusion on this issue (at para. 44):

> The evidence also reveals a more specific pressing and substantial concern pertaining to particular and precise aspects of driving a motor vehicle. These statistics relate to areas where the probability of accidents can be reduced. They are therefore directly pertinent to the question of random stopping. The mechanical fitness of the vehicle, the possession of a valid licence and proper insurance, and the sobriety of the driver are the three primary and specific areas of concern. Each of the three represents a significant component of the aggregate accident figures. These factors, which are pre-requisites to the safe operation of a motor vehicle, can be readily identified and, if they can be controlled, then accidents causing death and injury will be reduced. It is therefore a very legitimate goal to strive by legislation to control and eradicate those dangerous factors thereby reducing the terrible toll of highway accidents.

[348] The Province further points out that, after considering a number of contextual factors including the heavily regulated nature of driving and the necessity of efficient roadside screening, the Court in *Orbanski* concluded that (at para. 27):

> Roadside screening techniques contemplated by provincial legislation provide a mechanism for combating the continuing danger presented by the drinking driver, even if the driver may not ultimately be found to have reached a criminal level of impairment.

[349] Counsel for the Province argues that under the ARP regime the roadside screening information is not used in the circumstance where an individual's liberty is at stake; the legislation is part of a licensing regime which does not criminally punish a person or subject him or her to criminal prosecution. This is the context in which the Province says the justification of this infringement should be assessed.

[350] The petitioners say that the circumstances that resulted in the *Charter* infringements being justified in *Hufsky, Ladouceur,* and *Orbanski* are not present in the case at bar. They argue that under the ARP regime, unlike in a criminal prosecution where *Charter* protections are in place, the use of the screening device has serious and tangible consequences, as it is the entirety of the evidence which is used to support the prohibitions and penalties against the driver.

[351] The petitioners say that it is clear from the jurisprudence concerning s.10(b) that justifications for the limitation on the right to counsel are quite specific and include the following: (1) that an opportunity to contact counsel exists before the breath tests of consequence take place; (2) that there is a use-immunity with respect to the evidence gathered before the right to counsel is exercised; and (3) that contacting counsel, historically, was practically difficult and of minimal utility at the roadside. They argue that none of these justifications exist with respect to the ARP regime, and that the infringement of the right to counsel is therefore not justifiable under s. 1.

I. SECTION 1

Section 10(b)

[352] The petitioners have shown that the provincial legislation, as it operates with the common law and federal legislation, infringes s. 10(b) of the *Charter*. However, the right to counsel in 10(b) is not absolute. Has the Province shown that the infringement of the s. 10(b) right is nevertheless justified?

[353] Section 1 of the *Charter* provides:

> 1**.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[354] The Province has the burden of justifying the impugned legislation under s. 1 of the *Charter* in accordance with the test set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, to assess the proportionality of legislation which *prima facie* violates *Charter* rights. The *Oakes* test was summarized in *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 (at para. 33):

> This engages what in law is known as the proportionality analysis. Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. ... This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality — first, the law must serve an important purpose, and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects. As Dickson C.J. stated in *Oakes*, at p. 139:
>
> > There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in

> question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis deleted.]

[355] Although the "prescribed by law" aspect was not put at issue by the petitioners, I think that in the case at bar there is a limit on the right to counsel upon detention that is "prescribed by law", and that limit arises from the operating requirements of the provincial and federal statutes that establish the roadside screening and corresponding driving prohibitions.

[356] The petitioners argue that the balance of the *Oakes* test has not been satisfied.

[357] The first part of the *Oakes* test is that the object of the law is pressing and substantial or, as described above, that it must serve an important purpose. To this aspect of the test, I do not think there can be any serious challenge. The objective of the challenged legislation, I find, is to remove impaired drivers from the highway and keep them off the highway. Counsel for the Province emphasised the discussion of legislative objective in *Hufsky, Ladouceur, Bernshaw* and *Orbanski* in support of his position that the legislative objective of the ARP regime is both pressing and substantial. I need only refer to para. 55 of *Orbanski* to summarize the position of the Supreme Court of Canada on this issue:

> There is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective.

[358] I have no doubt that the above objective is also the objective of the ARP legislative regime, and that it is a compelling and important objective.

[359] Let me turn to the proportionality analysis under the *Oakes* test and its three aspects. The petitioners say that the Province has not satisfied any of the three aspects of the proportionality analysis. The first part is that there must be a rational connection between the impugned legislation and the legislative objective. Although counsel for the petitioners acknowledges that there is some connection between the ARP regime and the legislative objective, he says that it does not meet the rational connection test.

[360] I respectfully disagree. I accept the Province's submission that the connection between the legislation, which imposes automatic prohibitions from driving on the basis of roadside screening, and the objective of reducing death and injury caused by impaired driving, exists as a matter of common sense. The evidence indicates that effective roadside screening removes drivers from the road who have a blood-alcohol concentration not only above 0.08, but also below 0.08 when drinking is affecting their ability to drive. The evidence also indicates that roadside screening

assists in identifying drivers who are impaired; something that the evidence suggests is not an easy task for a police officer.

[361] On this aspect of the *Oakes* test I refer to *Orbanski* where Charron J. said (at para. 56):

> As discussed earlier, because of the nature of the activity, it is necessary that the police be empowered to use effective roadside screening methods to assess the level of impairment of drivers so as to ensure the safety of all users of the highways. Hence the use of reasonable screening methods within the scope that we have discussed, and the implicit abridgment of the right to counsel, are rationally connected to the state objective.

[362] Those comments apply equally to the legislation currently being challenged, and I find that the rational connection test has been satisfied.

[363] Probably the most contentious aspect of the s. 1 analysis in this case is the second part of the proportionality test, and that is whether the impugned ARP legislation satisfies the minimal impairment test. Here the parties disagree on whether it does, and also disagree as to the proper formulation of the test.

[364] The petitioners say that the Province must demonstrate that the legislation was the least intrusive method to achieve the Province's legislative objective. The petitioners say this is an onerous hurdle for the Province to get over.

[365] The Province disagrees with the proposition that it has to prove the legislation represents the least restrictive means of achieving the objective, and refers to *Constitutional Law of Canada, supra,* where Hogg referred to the jurisprudence on this topic and commented (at 38-43):

> ...the Court was willing to defer to the legislative choice on the basis that the choice was within a margin of appreciation, a zone of discretion in which reasonable legislators could disagree while still respecting the Charter right.

[366] Professor Hogg listed some of the factors invoked by the cases in support of a degree of deference to legislative choice on the topic of minimal impairment. Hogg suggested that in circumstances where a law is enacted to protect a vulnerable group; premised on complex social-science evidence; dealing with a complex social issue; reconciling the interests of competing groups; and/or allocating scarce resources, a degree of deference to the legislature will be appropriate in the minimal impairment analysis.

[367] The Province describes the issue of minimal impairment in its submission as follows:

> In this case at least two or three of those indicia are present. The evidence of Professor Mann reveals that the problem of the drinking driver is a social issue of great complexity and its study is the focus of a great deal of social science research. The other users of the roads and highways are the innocent and vulnerable victims of drinking drivers when the risk of collision involving death and serious injury becomes not merely a theoretical construct but a stark and sobering reality. This is a case when a considerable margin of

appreciation is warranted in the interests of safety on the highways.

[368] I do not think that this is a case where the issue of minimal impairment should be resolved as a matter of deference. In the case at bar the question is whether the measures chosen by the legislature impair the right to counsel as little as possible. In *Orbanski,* which was a criminal prosecution for impaired driving offences, Charron J. dealt with the minimal impairment issue as follows (at para. 57):

> The infringement on the right to counsel is also no more than necessary to meet the objective. As described earlier, the scope of authorized police measures is carefully limited to what is reasonably necessary to achieve the purpose of screening drivers for impaired driving. Further, the limitation on the right to counsel has strict temporal limits -- there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the *Charter* right to counsel.

[369] I conclude that the infringement on the right to counsel under the ARP regime is no more than necessary to meet the Province's serious objective. The Province, in pursuit of its legislative objective, is entitled to use screening devices expeditiously and to impose driving prohibitions immediately at the scene for drivers in the "warn' or "fail" zone based on the results of the screening device. In the event that a police officer, after administering an ASD, decides to proceed with a criminal investigation and request a breath or blood sample at the police station, then, as noted in *Orbanski*, the motorist is "entitled to full protection of the *Charter* right to counsel" (at para. 57).

[370] I turn to the final aspect of the *Oakes* test which is whether there is proportionality between the effects of the legislation responsible for limiting the *Charter* right, and the legislative objective. The requirement here is that "the deleterious effects of the measures must be proportionate to the harm that the legislation is designed to address, and the requirement that the salutary effects of the legislation must outweigh its deleterious effects" (*British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 at para. 52). As stated by Dickson C.J.C. in *Oakes* (at para. 71):

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. <u>The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society</u>.
>
> [emphasis added]

[371] In *Orbanski* this final aspect of the proportionality assessment was dealt with by emphasising both the importance of measures designed to combat impaired driving, and the limited nature of the infringement on the right to counsel (at para. 60):

> For these reasons, I conclude that while both Elias and Orbanski were detained for the

> purpose of s. 10(*b*), hence triggering the right to counsel, the operational requirements of the statutory regimes in place in Manitoba prescribed a limitation of the right to counsel. This limitation is justifiable in a free and democratic society given the importance of detecting and deterring drunk driving, the highly regulated nature of driving on public roads, the limits placed by the common law on the types of screening that can be conducted at the roadside, and the limited use that can be made of the compelled evidence collected during the screening process.

[372] The beneficial effect of similar legislation that reduces the number of impaired drivers on the highway has been discussed in many of the cases referred to in this judgment including *Bernshaw* and *Ladouceur.* The ARP legislation, through the use of the screening device, permits the removal of a driver from the highway immediately when the driver's ability to drive is impaired by a blood-alcohol concentration between 0.05 and 0.08, and above. The suspensions are effective immediately and operate as future deterrents to impaired drivers and other licensed drivers.

[373] The limitation on a driver's right to counsel upon being stopped at roadside for a sobriety check should be assessed in light of the fact that driving a motor vehicle is a licensed activity and a privilege rather than a constitutionally guaranteed right. I am mindful that driving is a highly regulated activity, and that detecting and deterring impaired driving is an important legislative goal.

[374] Accordingly, I am satisfied that the lack of access to counsel at the roadside screening stage of the investigation is proportional to the overall legislative objective of expeditiously removing impaired drivers from the road. The salutary effects of the ARP regime exceed its deleterious effects insofar as a lack of counsel at the roadside screening stage is concerned.

[375] I conclude that even though the ARP regime breaches s. 10(b), it is saved by s. 1 of the *Charter*.

Section 8

[376] Earlier in this judgment I found that the provisions of the ARP regime dealing with the prohibitions, penalties and costs in the "fail" zone infringe s. 8 of the *Charter.* I now turn to the question of whether these provisions are saved by s. 1.

[377] Once again, this requires a consideration of the *Oakes* test, set out in para. 354 above.

[378] I concluded earlier that the above provisions of the ARP regime infringe s. 8 of the *Charter* because they authorize a search by a screening device on the basis of reasonable suspicion and impose lengthy prohibitions and significant costs and penalties on motorists, without providing motorists with any meaningful basis to challenge the validity of the search results.

[379] Although the ARP legislation satisfies part of the *Oakes* test in that it is rationally connected to the pressing legislative objective, when earlier I found that the law was not "reasonable" for the

purposes of s. 8, I touched upon the idea that the law, insofar as it deals with “fail” readings, does not *minimally impair* the right of a driver to be free of unreasonable search and seizure.

[380] In my view, because of the significant prohibition, penalty and cost implications of a “fail” reading, the Province could easily have provided in the legislation a reasonable and meaningful review process where a driver subject to a lengthy automatic roadside prohibition could challenge the results of the screening device. This is particularly so considering the Province has legislated to base the consequences of a “fail” reading entirely on the results of the screening device.

[381] Accordingly, I conclude that the aspect of the ARP regime, in its current form, that imposes prohibitions, costs and penalties in the “fail” range violates s. 8 and is not saved by s. 1.

J. SUMMARY OF DECISION

[382] My decision is as follows:

(a) The ARP legislation is not *ultra vires* the Province on a division of powers basis. The impugned legislation is within the Province’s jurisdiction to legislate with respect to the licensing of drivers and the enhancement of highway traffic safety.

(b) The ARP legislation does not create an “offence” as that term is used in section 11(d) of the *Charter*. Therefore, the legislation does not trigger the application of s. 11(d) of the *Charter* and it is not necessary to address whether the ARP regime violates the presumption of innocence.

(c) The ARP legislation infringes s. 10(b) of the *Charter* but the infringement is saved by s. 1 as it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society.

(d) The ARP legislation infringes s. 8 of the *Charter* insofar as it concerns the prohibition, penalty and costs arising from the screening device registering a “fail” reading over 0.08. This infringement is not a reasonable limit which is demonstrably justified in a free and democratic society.

(e) The ARP legislation does not infringe s. 8 of the *Charter* insofar as it concerns the prohibition, penalty and cost consequences arising from the screening device registering a reading in the “warn” range of between 0.05 and 0.08.

K. REMEDY

[383] Given my conclusion that aspects of this legislation infringe s. 8 of the *Charter*, I ask that counsel arrange with the Court Registry to appear before me as soon as is practicable to make submissions on the appropriate declaration or form of order that should be made.

“J.S. Sigurdson J.”

The Honourable Mr. Justice J.S. Sigurdson