



SUPREME COURT OF CANADA

CITATION: Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46 **DATE:** 20151016
DOCKET: 35864

BETWEEN:

Richard James Goodwin

Appellant

and

British Columbia (Superintendent of Motor Vehicles) and

Attorney General of British Columbia

Respondents

AND BETWEEN:

British Columbia (Superintendent of Motor Vehicles) and

Attorney General of British Columbia

Appellants

and

Jamie Allen Chisholm

Respondent

AND BETWEEN:

British Columbia (Superintendent of Motor Vehicles) and

Attorney General of British Columbia

Appellants

and

Scott Roberts

Respondent

AND BETWEEN:

British Columbia (Superintendent of Motor Vehicles) and

Attorney General of British Columbia

Appellants

and

Carol Marion Beam

Respondent

AND BETWEEN:

British Columbia (Superintendent of Motor Vehicles) and

Attorney General of British Columbia

Appellants

and

Richard James Goodwin

Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of
Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan,
Attorney General of Alberta, British Columbia Civil Liberties Association,
Insurance Bureau of Canada, Criminal Trial Lawyers' Association (Alberta),
Criminal Defence Lawyers Association (Calgary), Criminal Lawyers'
Association of Ontario, Alberta Registrar of Motor Vehicle Services and
Mothers Against Drunk Driving Canada**
Interveners

CORAM: McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon
and Côté JJ.

REASONS FOR JUDGMENT: Karakatsanis J. (Cromwell, Moldaver, Wagner, Gascon and
(paras. 1 to 90) Côté JJ. concurring)

REASONS DISSENTING IN PART: McLachlin C.J.
(paras. 91 to 110)

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GOODWIN v. B.C. (SUPERINTENDENT OF MOTOR VEHICLES)

Richard James Goodwin

Appellant

v.

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

Respondents

- and -

**British Columbia (Superintendent of Motor Vehicles) and
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v.

Jamie Allen Chisholm

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- and -

**British Columbia (Superintendent of Motor Vehicles) and
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v.

Scott Roberts

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- and -

**British Columbia (Superintendent of Motor Vehicles) and
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v.

Carol Marion Beam

Respondent

- and -

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

Appellants

v.

Richard James Goodwin

Respondent

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General for Saskatchewan,
Attorney General of Alberta,
British Columbia Civil Liberties Association,
Insurance Bureau of Canada,
Criminal Trial Lawyers' Association (Alberta),
Criminal Defence Lawyers Association (Calgary),
Criminal Lawyers' Association of Ontario,**

**Alberta Registrar of Motor Vehicle Services and
Mothers Against Drunk Driving Canada**

Intervenors

Indexed as: Goodwin v. British Columbia (Superintendent of Motor Vehicles)

2015 SCC 46

File No.: 35864.

2015: May 19; 2015: October 16.

Present: McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon
and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law — Division of powers — Criminal law — Property
and civil rights — Highways — Impaired driving — Provincial legislation creating
automatic license suspensions, penalties and remedial programs following roadside
analysis using approved screening device — Whether automatic roadside prohibition
scheme ultra vires the province as being exclusively within federal government's
criminal law power — Constitution Act, 1867, ss. 91(27), 92(13) — Motor Vehicle
Act, R.S.B.C. 1996, c. 318.*

*Constitutional law — Charter of Rights — Presumption of innocence —
Search and seizure — Impaired driving — Provincial legislation creating automatic*

license suspensions, penalties and remedial programs following roadside analysis using approved screening device — Whether automatic roadside prohibition regime creates an offence within meaning of s. 11 of Charter and infringes the presumption of innocence — Whether automatic roadside prohibition scheme infringes right to be secure against unreasonable search or seizure — If so, whether infringement can be justified — Canadian Charter of Rights and Freedoms, ss. 1, 8 and 11(d) — Motor Vehicle Act, R.S.B.C. 1996, c. 318.

In 2010, British Columbia created the Automatic Roadside Prohibition (ARP) scheme. It marked a continuation of British Columbia's longstanding efforts to remove impaired drivers from the province's roads through the use of license suspensions, penalties and remedial programs. The scheme calls for roadside analysis of drivers' breath samples using an approved screening device (ASD). A "fail" reading and a driver's refusal or failure to provide a sample both result in a 90-day licence suspension. A "warn" reading results in a shorter suspension of between 3 and 30 days. There is a process for review of suspensions, but it only permits the Superintendent of Motor Vehicles to consider whether the applicant was a "driver" and whether the ASD registered a "fail", "warn", or the driver refused to provide a sample.

These appeals ask whether the ARP scheme oversteps the bounds of provincial legislative competence and invades the federal government's exclusive jurisdiction over criminal law. They also ask whether the provincial regime engages

and ultimately infringes two *Charter* rights: the protection against unreasonable search and seizure found in s. 8, and the presumption of innocence guaranteed by s. 11(d). The chambers judge found that the ARP scheme is *intra vires* the province and that s. 11(d) of the *Charter* is not engaged. However, he concluded that the ARP scheme violates s. 8 when the screening device registers a “fail”, though not when a driver refuses to provide a breath sample. His decision was upheld on appeal.

Held (McLachlin C.J. dissenting in part): The appeals should be dismissed.

Per Cromwell, Moldaver, **Karakatsanis**, Wagner, Gascon and Côté JJ.: The province’s purpose in enacting the ARP scheme was not to oust the criminal law, but rather to prevent death and serious injury on public roads by removing drunk drivers and deterring impaired driving. The pith and substance of the ARP scheme is the licensing of drivers, the enhancement of traffic safety and the deterrence of persons from driving while impaired by alcohol. Provinces have an important role in ensuring highway safety, which includes regulating who is able to drive and removing dangerous drivers from the roads. Provincial drunk driving programs and the criminal law will often be inter-related. A provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the *Criminal Code*. Deterrence can be a purpose of provincial law. There can be no doubt that the matter falls within the provincial power over property

and civil rights in the province. Thus, from a division of powers standpoint, the legislation is valid.

The ARP scheme does not create an “offence” within the meaning of s. 11(d) of the *Charter*. The scheme is not concerned with addressing harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on *Criminal Code* seizure powers and is administered by police, the scheme is more accurately characterized as a proceeding of an administrative nature. Furthermore, the ARP scheme does not impose true penal consequences. While a 90-day suspension is a meaningful consequence for a licensing violation, and the approximately \$4,000 in possible costs and penalties are significant, they are not sufficient to engage the fair-trial rights embodied by s. 11. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. The protections of s. 11 are not engaged in this case.

The demand to breathe into an approved screening device (ASD) constitutes a seizure that infringes on an individual’s reasonable expectation of privacy and engages the protection of s. 8 of the *Charter*. Although the province relies on the *Criminal Code* to authorize the breath demand, the purpose and consequences of the seizure are established in the ARP scheme, in the *Motor Vehicles Act*. It is the ARP scheme that authorizes the seizure of the breath sample, and is thus

subject to *Charter* scrutiny on this basis. The breath demand is a critical component of the province's efforts to protect British Columbians from death and serious injuries caused by impaired drivers. This compelling purpose weighs heavily in favour of the reasonableness of the breath seizure. Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced. This reality, combined with the scheme's location within a broader regulatory framework targeting driving and highway safety, supports characterizing the regime as regulatory and applying a more flexible standard in assessing its reasonableness. However, while the breath seizure occurs for a regulatory purpose, it nonetheless has certain criminal-like features, such as its administration by a police officer pursuant to *Criminal Code* authorization. The consequences that follow a "fail" reading or the failure to provide a sample are not criminal, but they are immediate and serious, and arise without a further test using a more reliable breathalyser. In this case, the mechanism for determining whether a driver's blood alcohol concentration exceeds the relevant limits is a roadside test using an ASD. The chambers judge found that in some circumstances there can be serious issues concerning whether an ASD accurately reflects blood-alcohol readings. The use of an ASD to obtain a breath sample raises concerns that undermine the reasonableness of the seizure, specifically regarding the reliability of the test results.

The scope and availability of review is part of the analysis under s. 8. A driver's ability to challenge the accuracy of the ASD result is critical to the reasonableness of the ARP regime. Here, the process for review of the ARP

suspensions only permits the Superintendent of Motor Vehicles to consider whether the applicant was a “driver” and whether the ASD registered a “fail”, “warn”, or the driver refused to provide a sample. The absence of meaningful review of the accuracy of the result of the seizure, in light of the unreliability of the test, raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress. The serious consequences of a driver registering a “fail”, combined with an inability to challenge the basis on which these consequences are imposed, render the ARP scheme unreasonable.

The objective of the scheme, reducing death and injury caused by impaired driving, is pressing and substantial, and the automatic prohibitions are rationally connected to that objective. However, the ARP scheme does not minimally impair the right of a driver to be free of unreasonable search and seizure. Subsequent amendments to the ARP scheme enhancing the scope for review of roadside screenings and prohibitions demonstrate that there are less impairing measures that can feasibly be put into place without undermining the province’s objective. Therefore, the “fail” branch of the ARP scheme is not saved under s. 1. There is no need to determine whether the same result follows where the “warn” scheme is concerned.

Per McLachlin C.J. (dissenting in part): There is agreement with the majority on the constitutional issue and on the s. 11(d) of the *Charter* issue, but not on the s. 8 issue. The province's roadside suspension scheme does not violate the constitutional requirement that searches and seizures be reasonable. The provincial scheme in this case relies on the *Criminal Code* provisions that allow a police officer to compel a driver to give a sample of his breath. This is clearly a seizure of a bodily substance, which means that it must not be unreasonable under s. 8 of the *Charter*. To determine whether a search or seizure is reasonable, the court should examine three requirements: (1) the state has an important purpose grounded in the broader public interest for doing the search and/or seizure; (2) the intrusion goes no further than reasonably necessary to achieve the state purpose; and (3) the intrusion is subject to judicial supervision to guard against abusive state action. Whether a search or seizure is reasonable is sometimes determined by asking whether the state action represents an appropriate balance between the state purpose and the individual's privacy interest. However, to view the s. 8 analysis simply as a matter of balancing the state interest against the individual's privacy interest may fail to capture what is required to establish that a search or seizure is reasonable. Even where the state purpose is of great importance, the state must not intrude upon the individual's protected sphere more than reasonably justified by that purpose, nor do so in a way that lacks appropriate safeguards capable of judicial review. As for the privacy interest, it should be understood in the sense of what falls within the private sphere of the individual within which the individual reasonably expects to be free from state intrusion absent a higher state purpose and legal safeguards.

All three requirements of a reasonable search and seizure are met in this case. First, the state's purpose – to prevent death and serious injury on the highway from impaired driving – is important and capable of justifying intrusion into the private sphere of the individual's bodily substances. Second, the seizure does not go further than reasonably necessary to achieve the state purpose. The regime here is regulatory and not criminal and the activity of driving on highways is highly regulated and common in road enforcement. The third requirement – the availability of judicial supervision – presents the greatest difficulty, however, the driver can request a second test on a different device at the roadside. Further, the driver may apply to have a suspension reviewed by the Superintendent of Motor Vehicles and present statements and evidence in support of the application. The Superintendent's decision is also subject to judicial supervision by way of judicial review. The administrative nature of the scheme and the nature of the driver's interests at play justify the administrative nature of the review, as do the less stringent provisions to ensure accuracy of the sample. In this case, the review provisions of the roadside suspension scheme offers reasonable protection against abusive exercise of the state power to intrude on the individual's private sphere, having regard to the nature of the scheme and the privacy interests at stake.

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By Karakatsanis J.

Applied: *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; **referred to:** *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1; *Buhlers v. Superintendent of Motor Vehicles (B.C.)*, 1999 BCCA 0114, 119 B.C.A.C. 207; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *Validity of Section 92(4) of The Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Gonzalez v. Driver Control Board (Alta.)*, 2003 ABCA 256, 330 A.R. 262; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Guindon v. Canada*, 2015 SCC 41; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Lavallee v. Alberta*

Securities Commission, 2010 ABCA 48, 474 A.R. 295; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Del Zotto v. Canada*, [1997] 3 F.C. 40, rev'd [1999] 1 S.C.R. 3; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. Lindsay*, 134 C.C.C. (3d) 159; *R. v. Butchko*, 2004 SKCA 159, [2005] 11 W.W.R. 95; *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

By McLachlin C.J. (dissenting in part)

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Written submissions only by *Brigitte Bussières, Alain Gingras* and *Gilles Laporte,* for the intervener the Attorney General of Quebec.

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Michael Lacy, Joanna Baron and Andrew Burgess, for the intervener the Criminal Lawyers' Association of Ontario.

Sean McDonough, for the intervener the Alberta Registrar of Motor Vehicle Services.

Bryant Mackey, Guy Régimbald and Matthew Estabrooks, for the intervener Mothers Against Drunk Driving Canada.

The judgment of Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system. The federal and provincial governments have all acted in response to this pressing danger. The federal government has made both impaired driving and driving with a blood alcohol concentration above 0.08 offences contrary to the *Criminal Code*, R.S.C. 1985, c. C-46. Across Canada, provincial governments have also addressed this concern through provincial legislation governing driver licensing.

[2] In 2010, British Columbia created the automatic roadside prohibition (ARP) scheme. It marked a continuation of British Columbia's longstanding efforts to remove impaired drivers from the province's roads through the use of licence suspensions, penalties and remedial programs.

[3] In the first appeal, Richard Goodwin, who was issued a driving prohibition pursuant to this new ARP scheme, asks this Court to decide whether it oversteps the bounds of provincial legislative competence and invades the federal

government's exclusive jurisdiction over criminal law (the Goodwin appeal). Mr. Goodwin further asks for a determination of whether the provincial regime engages and violates the presumption of innocence guaranteed by s. 11 of the *Canadian Charter of Rights and Freedoms*. The second appeal was brought by British Columbia (Superintendent of Motor Vehicles) and the Attorney General of British Columbia (collectively the Province) and questions whether the ARP regime engages and violates the protection against unreasonable search and seizure found in s. 8 (the Province appeal).

[4] As I will explain, I agree with the courts below. The ARP scheme is valid provincial legislation. Moreover, s. 11 of the *Charter* is not engaged as the provincial regime does not create an "offence". However, I would uphold the chambers judge's finding that the scheme as it was constituted from September 2010 to June 2012 violated the s. 8 rights of drivers subject to a roadside breath demand who subsequently registered a "fail" on the approved screening device (ASD), and is not saved by s. 1.

II. Judicial History

[5] Each of the drivers in the Province appeal received prohibitions under the ARP scheme in British Columbia. Jamie Chisholm, Carol Beam and Scott Roberts provided a breath sample into an ASD and registered a "fail". Mr. Goodwin failed to provide an adequate breath sample. Each of the drivers was prohibited from driving for 90 days, had his or her vehicle impounded for 30 days, and was required to pay

monetary penalties and fees. Three of the drivers were also referred to remedial programs, which the chambers judge found was a routine consequence imposed for blowing a “fail”.¹

[6] Before the Supreme Court of British Columbia, the petitioners argued that the ARP scheme (1) was *ultra vires* the province; (2) violated s. 11(d) of the *Charter*; (3) infringed s. 8 of the *Charter*; (4) violated s. 10(b) of the *Charter*; and (5) such violations were not justified under s. 1 of the *Charter*.

[7] The chambers judge, Sigurdson J., found that the ARP scheme is *intra vires* — within the legislative competence of — the province and that ss. 11(d) and 10(b) are not ultimately infringed. However, he concluded that the ARP scheme violates s. 8 of the *Charter*. He subsequently clarified that the s. 8 infringement arises only from the screening device registering a “fail” reading over 0.08, and not from a refusal to provide a breath sample. The chambers judge declared the infringing part of the ARP scheme invalid, and suspended the declaration until June 30, 2012: 2011 BCSC 1783, 249 C.R.R. (2d) 368. His decision was upheld on appeal to the British Columbia Court of Appeal: *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1.

III. The Provincial Legislative Scheme

¹ R.F. (B.C.), at para. 27; 2011 BCSC 1639, 27 B.C.L.R. (5th) 229 (“chambers judge reasons”).

[8] British Columbia has had an administrative driving prohibition (ADP) scheme since 1997, as ss. 94.1 to 94.6 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (*MVA*). Under this earlier regime, which remains in force, police officers are required to serve a notice of driving prohibition where they have reasonable and probable grounds, on the basis of a breath or blood analysis, to believe that the driver of a motor vehicle has a blood alcohol concentration of more than 80 milligrams of alcohol in 100 millilitres of blood: *MVA*, s. 94.1(1). In practice, the grounds for serving a notice of prohibition under the ADP arise from breath analysis by an approved instrument (also known as a breathalyser) conducted at a police station: chambers judge's reasons, at para. 55. A notice of driving prohibition served under this scheme takes effect 21 days later, for a duration of 90 days: *MVA*, s. 94.2(1). The same consequences follow where a driver fails or refuses, without reasonable excuse, to provide a breath sample: *MVA*, s. 94.1(1)(b).

[9] This scheme is similar to other provincial schemes across the country.² It was upheld as constitutional, as regards both division of powers and s. 7 of the *Charter*, in *Buhlers v. Superintendent of Motor Vehicles (B.C.)*, 1999 BCCA 0114, 119 B.C.A.C. 207.

[10] The introduction of the new ARP scheme in 2010 marked a shift in British Columbia's approach to the regulation of drunk driving. Instead of relying on the use of breathalyser tests at the police station, driving prohibitions would now be

² See *Highway Traffic Act*, R.S.P.E.I. 1988, c. H-5, ss. 277.2 et seq., and *Highway Safety Code*, CQLR, c. C-24.2, ss. 202.4 et seq.

issued following a roadside analysis, using an ASD. While a “fail” reading captures the same blood alcohol concentration that triggers a prohibition under the ADP scheme, a concentration of 0.05 to 0.08, detected through a “warn” reading, would now also result in the issuing of a roadside suspension, although for a shorter duration. Similar to the earlier scheme, a “fail” reading and a driver’s refusal or failure to provide a sample both result in a 90-day suspension: *MVA*, s. 215.43(2). A “warn” reading results in a shorter suspension of between 3 and 30 days, depending on whether the driver has previously been served with a prohibition: *MVA*, s. 215.43(1). All prohibitions take effect immediately upon being served on a driver: *MVA*, ss. 215.41(6) and 215.43(3).

[11] Unlike the earlier ADP, the ARP scheme imposes additional consequences beyond the normal costs associated with the prohibition itself, such as a reinstatement fee. The chambers judge found that a driver who registers a “fail” or fails to provide a sample faces penalties and costs totalling over \$4,000, in addition to the 90-day suspension: para. 56. Drivers subject to a 30 or 90 day suspension also face mandatory vehicle impoundment: *MVA*, s. 215.46(2).

[12] The ARP scheme as enacted in 2010 also differs from the predecessor regime with respect to the scope of available review. The ADP scheme would permit the Superintendent of Motor Vehicles to consider whether a driver’s blood alcohol concentration was in fact above 0.08, whereas the ARP scheme limited the grounds of review to whether the applicant was a driver, whether (in the case of a “warn”) the

prohibition was in fact a subsequent prohibition, and, whether the approved screening device registered a “warn” or a “fail”, or alternatively, whether the driver failed or refused, without reasonable excuse, to provide a breath sample: chambers judge’s reasons, at para. 57; *MVA*, s. 215.5.

[13] The scheme was amended in 2012 subsequent to the chamber judge’s decision, and now requires that a police officer inform a driver of her right to request and be provided a second ASD test, and, where two samples are provided, the lower of the two results is the basis for a driving prohibition: *MVA*, ss. 215.42. It also expands the grounds on which a driver may challenge a prohibition: *MVA*, s. 215.5. Under the amended ARP scheme, the police officer’s report to the Superintendent must be sworn, and police must now provide the Superintendent with information relating to the calibration of the ASD: *MVA*, s. 215.47. These amendments are not challenged in these appeals.

IV. Issues

[14] The appeals raise four constitutional issues. The first is a matter of the division of powers between the federal and provincial governments: Is the ARP scheme as enacted in 2010 *ultra vires* British Columbia as being exclusively within the federal government’s criminal law power under s. 91(27) of the *Constitution Act, 1867*?

[15] If the ARP scheme is within British Columbia's legislative competence, the remaining issues concern its compliance with ss. 8 and 11(d) of the *Charter*.³ If the legislative scheme infringes either of these *Charter* rights, this Court must also determine whether the infringement is a reasonable limit justified under s. 1.

V. Analysis

A. *Is the ARP Scheme Ultra Vires the Province?*

[16] Under the *Constitution Act, 1867*, the federal government exercises exclusive jurisdiction over the criminal law and procedure (s. 91(27)), while each province exercises exclusive jurisdiction over property and civil rights in the province (s. 92(13)).

[17] Mr. Goodwin argues that the ARP scheme is *ultra vires* the Province of British Columbia, as its pith and substance is to replace the *Criminal Code*'s impaired driving provisions with a regime of automatic and severe penalties. He asserts that the purpose of the scheme is punitive, as it seeks to reduce enforcement costs by removing procedural rights. Its practical effect, he submits, is to oust the criminal law.

[18] The Province counters that the ARP scheme is a valid exercise of the Province's jurisdiction to legislate in the area of property and civil rights under

³ The s. 10(b) issue was not appealed.

s. 92(13) of the *Constitution Act, 1867*. In the Province's view, *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, and this Court's other decisions confirming the validity of provincial impaired driving regimes provide a complete answer to the drivers' claim that the ARP scheme is *ultra vires*.

[19] Mr. Goodwin says that this case should be distinguished from *Egan* and other decisions upholding provincial regimes. Those regimes, he says, were intended to create a parallel scheme of licensing, not to impact the application and enforcement of the *Criminal Code*. By contrast, the ARP scheme creates both the penalties and the means to investigate who should be penalized, effectively removing the more onerous and protective processes associated with criminal investigations and prosecutions: chambers judge's reasons, at paras. 69-73.

[20] This argument was rejected in the courts below. For the reasons that follow, I agree. Mr. Goodwin misapprehends the nature of the division of power analysis. While purpose and effect are relevant considerations, neither is determinative. A proper analysis considers both purpose and effect in order to determine first what the "matter" of the legislation is, and second whether the "matter" falls within a head of provincial power.

[21] The "matter" of a law is its true character — that is, its pith and substance: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 481. The law's purpose and its legal and practical effects can help identify the matter: *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29;

Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 63-64; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 20.

[22] The core of Mr. Goodwin's submission is that the ARP scheme is nothing more than crime control dressed up as licensing. In his view, the Province's purpose in enacting this scheme was to provide a criminal law response to drunk driving without engaging the *Charter* and its attendant procedural protections: A.F. (Goodwin), at paras. 74-78.

[23] This is essentially an argument that the ARP scheme is a colourable attempt at invading the federal criminal law. Of course, it is the substance and not the form of the law that defines its true character. As this Court emphasized in *Quebec (Attorney General) v. Canada (Attorney General)*, courts must take care "not to endorse a 'colourable' statute, that is, one that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence": para. 31; see also P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 15-19; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

[24] However, whether or not an impugned law is alleged to be colourable, the fundamental pith and substance analysis remains the same. The impact of provincial legislation on *Charter* rights may be relevant to this analysis, but it is not determinative. This Court has cautioned that the purpose of legislation cannot be

confused with the means chosen to carry out the purpose: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25. The fact that the means used to achieve a provincial purpose may engage different, or fewer, *Charter* protections than the means used to achieve a related federal purpose does not necessarily imply that the provincial *purpose* was to avoid or undermine *Charter* protections.

[25] I agree with the chambers judge that the Province's purpose in enacting the ARP scheme was not to oust the criminal law, but rather to prevent death and serious injury on public roads by removing drunk drivers and deterring impaired driving. The ARP scheme is part of the *MVA*, which establishes a regulatory regime setting the terms and conditions of driver licensing in British Columbia. It continues British Columbia's ongoing efforts to stem the tide of drunk-driving related incidents in the province. The ARP scheme was introduced "as a means of reducing the body count on B.C.'s highways" in the face of an increase in drunk-driving accidents and deaths: British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, no. 1, 2nd Sess., 39th Parl., April 27, 2010, at p. 4871, per Hon. M. de Jong. Although Mr. Goodwin argues that such statements conceal the scheme's true purpose of removing drivers' procedural rights, both the legislative history and the statutory scheme support finding that the ARP scheme was enacted to enhance highway safety.

[26] Mr. Goodwin also challenges the ARP scheme on the basis that its legal and practical effects go beyond British Columbia's constitutional powers. In Mr. Goodwin's view, the penalties under the ARP scheme are the "toughest" in Canada, thus giving the scheme a punitive character, one properly associated with the criminal law. However, the imposition of significant financial penalties and the loss of important privileges do not necessarily make legislation punitive. The legal effects can act as a deterrent to serve the goal of highway safety. Both are compatible with a regulatory licensing regime.

[27] In terms of practical effects, Mr. Goodwin submits that the ARP scheme ousts the criminal law. Noting this Court's admonition at para. 40 of *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, that the province can legislate "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*", he relies on evidence suggesting that, since the introduction of the ARP regime, the police have chosen to enforce the provincial ARP scheme instead of the federal criminal law sanctions against impaired driving. This, he argues, differentiates those provincial schemes that complement the criminal provisions from the ARP scheme, which supplants the criminal provisions.

[28] As the chambers judge noted, the fact that the police have tended to enforce the provincial ARP scheme rather than the criminal law is certainly a factor to consider in the pith and substance analysis. However, it is not determinative. As this

Court noted in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, the common law duties of police include the protection of life and property and “the duty to control traffic on the public roads”: p. 12. Police officers have responsibility both for enforcing the criminal law and for seeking to maintain safety on the roads through the enforcement of provincial highway safety laws. The fact that they exercise their discretion to enforce one of these laws rather than another is consistent with police discretion generally. Such discretion is essential, allowing officers to apply the law to real world situations in a fair manner: *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 3. A provincial enactment that allows police to make a discretionary decision about whether to enforce the *Criminal Code* or the *MVA* in particular circumstances is not one that “compromise[s] the proper functioning of the *Criminal Code*”: see *Chatterjee*, at para. 40.

[29] At the end of the day, the purposes and effects of a law must be considered together, rather than in isolation, to determine its pith and substance. No doubt the ARP scheme has incidental impacts on criminal law. No doubt it targets, in part, specific criminal activity and imposes serious consequences, without the protections attendant on criminal investigations and prosecutions. However, the consequences relate to the regulation of driving privileges. In my view, the chambers judge was correct in characterizing the pith and substance of the ARP scheme as “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”: chambers judge’s reasons, at para. 74.

[30] Once the matter has been identified, the next step consists of classifying the legislation or provision in relation to the division of legislative power in the Constitution. This will establish whether it is within the legislative competence of the enacting level of government.

[31] A long line of jurisprudence establishes the scope of provincial legislative power regarding the regulation of highway traffic. Since *Egan*, this Court has recognized that provinces may legislate regarding drunk driving pursuant to s. 92 of the *Constitution Act, 1867*: see, e.g., *Validity of Section 92(4) of The Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5. As this Court underlined in *Chatterjee*, “[d]runk 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”: para. 41. Provinces thus have an important role in ensuring highway safety, which includes regulating who is able to drive and removing dangerous drivers from the roads.

[32] Provincial drunk-driving programs and the criminal law will often be interrelated. Some provincial schemes have relied incidentally on criminal convictions: see *Egan* and *Ross*. A number of provincial courts of appeal have also upheld schemes that are not dependent on criminal convictions but rely incidentally on *Criminal Code* provisions: *Buhlers*; *Gongalez v. Driver Control Board (Alta.)*, 2003 ABCA 256, 330 A.R. 262; *Horsefield v. Ontario (Registrar of Motor Vehicles)*

(1999), 44 O.R. (3d) 73 (C.A.). This jurisprudence makes clear that a provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the *Criminal Code*.

[33] This is consistent with the modern approach to federalism, which recognizes that areas of overlapping powers are unavoidable: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 42. As this Court has noted, courts should favour “the ordinary operation of statutes enacted by *both* levels of government” where it is possible to do so: *ibid.*, at para. 37 (emphasis in original). It is also of some import that the Attorney General of Canada intervenes to argue that this law is within provincial legislative authority: *I.F.*, at para. 12. Where an Attorney General has intervened to support the exercise of jurisdiction of another legislature, this “invite[s] the Court to exercise caution before it finds that the impugned provisions of the Act are *ultra vires* the province”: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 73; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20.

[34] The chambers judge reviewed the evidence and concluded 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”: chambers judge’s reasons, at para. 84. I agree. The chambers judge concluded that the pith and substance of the ARP scheme is the licensing of drivers, the enhancement of traffic

safety and the deterrence of persons from driving while impaired by alcohol. Again, I agree. While the ARP scheme represents a more aggressive approach by the Province than the ADP scheme, it nonetheless retains its character. As this Court noted in *Chatterjee*, deterrence can be a purpose of provincial law: para. 3. There can be no doubt that the matter falls within the provincial power over property and civil rights in the province. From a division of powers standpoint, the legislation is valid.

B. *Does the ARP Scheme Create an “Offence” Within the Meaning of Section 11 of the Charter?*

[35] Section 11 of the *Charter* guarantees certain procedural protections to individuals charged with an offence. Section 11(*d*) provides:

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;

[36] The chambers judge concluded that the ARP scheme does not create an offence within the meaning of s. 11(*d*). The Court of Appeal upheld that decision.

[37] Mr. Goodwin submits that the ARP scheme both engages and infringes his rights under s. 11(*d*) of the *Charter*. He argues that the test for an “offence” under s. 11 must be purposive; the form of proceedings should not be given undue weight;

and the analysis should focus on whether the law's effects engage the public interest in suppressing crime and promoting public order and welfare: A.F., at paras. 88 and 91. In his view, the lower courts applied the analytical guide set out by this Court in *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, in a formalistic way. Properly understood, Mr. Goodwin argues, the purpose of crime suppression engages s. 11 in hybrid regimes like the ARP scheme. He argues that the cumulative impact of the penalties demonstrates that the ARP scheme creates an offence.

[38] For its part, the Province submits that this Court's decision in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, has already established that "proceedings undertaken to determine fitness to obtain or maintain a licence" are not offences under s. 11: p. 560. In its view, this is dispositive of the s. 11 issue. The ARP scheme is not by nature a penal or criminal proceeding and does not impose true penal consequences.

[39] I would not give effect to this ground of appeal. I agree with the courts below that the ARP scheme does not create an "offence" within the meaning of s. 11 of the *Charter*.

[40] This Court recently reviewed and reaffirmed the s. 11 analytical framework developed in *Wigglesworth* and *Martineau*: see *Guindon v. Canada*, 2015 SCC 41. In *Wigglesworth*, this Court concluded that s. 11 protections only apply 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”: p. 554. Writing for the majority, Wilson J. stated that a matter falls within s. 11 where “by its very nature it is a criminal proceeding” or where a conviction “may lead to a true penal consequence”: p. 559. By contrast, administrative matters “instituted for the protection of the public in accordance with the policy of a statute” do not attract s. 11 protections: p. 560.

[41] While administrative and criminal proceedings both have public purposes, they are fundamentally different. Administrative regimes “are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity”: *Wigglesworth*, at p. 560. Criminal matters, on the other hand, are public in nature, and aim to redress the wrong done to society by applying the principles of retribution and denunciation in an open courtroom. In *Martineau*, Fish J. set out three factors to consider when determining whether a proceeding is criminal in nature:

To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the [legislation]; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction. [para. 24]

[42] In my view, the chambers judge properly applied the *Wigglesworth* and *Martineau* considerations. While I agree that an offence is defined by both procedural and substantive elements, I cannot view the proceedings under the ARP as “by its very nature . . . a criminal proceeding”.

[43] The ARP scheme imposes a driving prohibition coupled with a monetary penalty. It is not concerned with addressing the harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on *Criminal Code* seizure powers and is administered by police, the scheme is more accurately characterized as a proceeding of an administrative nature. As the chambers judge noted, the proceedings arising under the ARP scheme do not take the form of prosecutions. No criminal records result. The proceedings are initiated by the drivers themselves. It is evident that the process is not criminal in the manner contemplated in *Martineau*: para. 45; see also *Guindon*, at paras. 63-65.

[44] Administrative regimes do not attract s. 11 protections: *Martineau*, at paras. 22 and 23. “This Court has often cautioned against the direct application of criminal justice standards in the administrative law area”: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 88.

[45] Nor are the consequences truly penal. While a 90-day suspension is a meaningful consequence for a licensing violation, and the approximately \$4,000 in possible costs and penalties are significant, they are not sufficient to engage the fair-trial rights embodied by s. 11 — rights that, after all, are some of the most fundamental in our legal system. I note that financial penalties considerably more

severe than those at issue here have been found to not constitute true penal consequences: see, e.g., *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295.

[46] Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds: *MVA*, ss. 262 and 263. The fine is capped at \$500: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09. The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme's objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.

[47] In summary, the ARP scheme does not create an "offence" within the meaning of s. 11 of the *Charter*. Thus, the protections of s. 11 are not engaged in this case.

C. *Does the ARP Scheme Infringe Section 8 of the Charter?*

[48] Section 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search or seizure.” This right is engaged where the state conducts a search or seizure that interferes with an individual’s reasonable expectation of privacy. The expectation of privacy is a normative concept, reflecting the level of privacy that we, as a society, should reasonably expect in a given circumstance: *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 44; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. It is not merely a function of how much privacy a person may expect or enjoy with respect to their person, space or belongings. Where a search or seizure engages the protection of s. 8, a reviewing court must determine whether the search or seizure is reasonable. In this regard, (1) the search or seizure must be authorized by law, (2) the law itself must be reasonable, and (3) the search or seizure must be carried out in a reasonable manner: *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10; *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278. It is argued that neither of the first two requirements is met in this case.

(1) Is Section 8 Engaged?

[49] Section 215.41(3) of the *MVA* provided at the relevant time:

(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 . . . take possession of the driver's licence, permit ... if the driver has it in his or her possession, and

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

[50] It is undisputed before this Court that the roadside breath demand constitutes a seizure within the meaning of s. 8 of the *Charter*.⁴

[51] It is also undisputed before this Court that drivers of vehicles have some expectation of privacy in their breath, even if a diminished one. The factors identified by this Court as “helpful markers” in *Tessling*, at paras. 43-62, support this conclusion. The seizure occurs in a vehicle (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 111 and 113); in the highly regulated context of driving on a public highway (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 647-48); and is relatively non-intrusive (*Grant*, at para. 111). While these factors support a diminished expectation of privacy, they do not eliminate any residual privacy interest in one's breath. Thus the demand to breathe into a roadside screening device constitutes a seizure that infringes on an individual's reasonable expectation of privacy. The protection of s. 8 is engaged.

(2) Is the Seizure Authorized by the Provincial Law?

⁴ The respondents Chisholm et al. characterize the ARP scheme as a coupled search and seizure power: see R.F., at para. 39.

[52] The Province argues that it is not the impugned provisions of the *MVA* that engage a driver's s. 8 rights because the ARP scheme does not itself authorize a seizure. Instead, the regime relies on s. 254(2) of the *Criminal Code* to authorize a roadside breath demand. In the Province's view, a challenge to the *Charter* compliance of the breath demand must therefore attack s. 254(2) of the *Criminal Code*, and not s. 215.41(3)(a) of the provincial *MVA*.

[53] I do not agree. Such a narrow understanding of whether the seizure is "authorized by law" would insulate the province from s. 8 scrutiny over any use of a *Criminal Code* search power. It would also be inconsistent with the flexible and purposive interpretation, focused on protecting people and not places, that s. 8 demands: *McKinlay Transport Ltd.*, at p. 647, per Wilson J.; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 158-59. The analysis of a search or seizure under s. 8 is a contextual inquiry: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 26. It requires regard to the purpose for which the seizure occurs, and to the statutory provisions that set out the grounds, means and consequences of the seizure. A search or seizure can be valid for one purpose and not for another.

[54] Although the Province relies on the *Criminal Code* to authorize the breath demand, the purpose and consequences of the seizure are established in the ARP scheme, in the *MVA*. The seizure thus takes its colour from the provincial legislation, and cannot be read in isolation from that scheme. For the purposes of s. 8, it is the

ARP scheme that authorizes the seizure of the breath sample, and it is thus subject to *Charter* scrutiny on this basis.

(3) Is the Seizure in the ARP Scheme Reasonable?

[55] As Dickson J. wrote for a unanimous court in *Hunter*, at pp. 159-60, assessing whether the law authorizing a search or seizure is reasonable requires determining

whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

The protection s. 8 provides for an individual's privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. At the same time, s. 8 permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in *Hunter* between the competing individual and state interests, and the adequacy of the safeguards provided, remain foundational to this analysis.

[56] Searches or seizures conducted without a warrant — such as the seizure underpinning the ARP scheme — are presumptively unreasonable: *Hunter*, at p. 161. The burden of establishing reasonableness thus rests with the state.

[57] This Court has generally declined to set out a “hard and fast” test of reasonableness: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 495. In my view, this flexible approach remains compelling. This Court has nonetheless identified certain considerations that may be helpful in the reasonableness analysis, including “the nature and the purpose of the legislative scheme . . . , the mechanism . . . employed and the degree of its potential intrusiveness, and the availability of judicial supervision”: *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.), per Strayer J.A., in dissenting reasons adopted by this Court in [1999] 1 S.C.R. 3.

(a) *Purpose of the ARP Scheme*

[58] The objective of removing impaired drivers from the roads is compelling. As the intervener Mothers Against Drunk Driving argues, impaired driving is responsible for a devastating number of injuries and deaths annually in Canada, a burden of risk that falls disproportionately to young people.⁵ The ARP scheme was

⁵ I.F., at para. 1, citing to S. Pitel and R. Solomon, “Estimating the Number and Cost of Impairment-Related Traffic Crashes in Canada: 1999 to 2010” (April 2013).

introduced as part of the Province's objective of reducing driving fatalities caused by alcohol by 35 percent by the end of 2013.⁶

[59] The seizure of a driver's breath through a roadside ASD analysis is the first step in the Province's regulatory response to impaired driving, one that permits the Province to both identify and suspend the licences of drivers whose blood alcohol concentration exceeds 0.05. The breath demand is a critical component of the Province's efforts to protect British Columbians from impaired drivers by suspending the privilege of driving for those who drive while impaired. This compelling purpose of preventing death and serious injuries on public highways weighs heavily in favour of the reasonableness of the breath seizure.

(b) *Nature of the ARP Scheme*

[60] This Court has recognized from its earliest s. 8 jurisprudence that the characterization of a search or seizure as either criminal or regulatory is relevant in assessing its reasonableness. Where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards: see *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 52; *McKinlay*, at p. 647, per Wilson J.; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757. As noted above, the proper characterization of the ARP scheme and the seizure of a driver's breath were hotly contested throughout these proceedings.

⁶ Chambers judge's reasons, at para. 266.

[61] The chambers judge identified a number of similarities between the ARP scheme and the criminal law, and concluded that although the scheme “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”: para. 281. He also noted that, unlike many of the regulatory searches or seizures considered in the case law, the ARP scheme involves a seizure of a breath sample rather than a search or seizure of documents, and that the results of the seizure are not simply evidence that may be used at a subsequent proceeding, but are instead determinative of the resulting consequences, some of which are quite severe: paras. 281-84. These are all relevant considerations.

[62] The ASD test is the sole basis for the penalties and suspensions provided for in the ARP scheme. This is markedly different from the criminal context, in which the ASD test is only the first part in the *Criminal Code*’s two-step process for investigating drunk-driving offences. At this first stage, an officer need only have a reasonable suspicion that the driver has alcohol in their body: *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (Ont. C.A.); *R. v. Butchko*, 2004 SKCA 159, [2005] 11 W.W.R. 95. However, these reduced protections for drivers at the roadside screening stage are counterbalanced by limitations on the use to which a potentially unreliable ASD result can be put. It has the limited role of constituting the grounds for a further breath demand, conducted using a breathalyser at a police station, and cannot alone establish an offence under the *Criminal Code*: s. 254(3).

[63] Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced. This reality, combined with the scheme's location within a broader regulatory framework targeting driving and highway safety, supports characterizing the regime as regulatory and applying a more flexible standard in assessing its reasonableness. However, other features of the scheme suggest that closer scrutiny is required to ensure the state does not unreasonably interfere with a driver's privacy interest. First, while the breath seizure occurs for a regulatory purpose, it nonetheless has certain criminal-like features, such as its administration by a police officer pursuant to *Criminal Code* authorization. Second, while the consequences that follow a "fail" reading or the failure to provide a sample are not criminal, they are immediate and serious, and arise without a further test using a (more reliable) breathalyser.

(c) *The Mechanism of Seizure: The ASD Test*

[64] The mechanism for determining whether a driver's blood alcohol concentration exceeds the relevant limits is a roadside test using an ASD. The specific features of the ASD test are relevant to the reasonableness analysis in two respects.

[65] The first is the degree of intrusiveness of the ASD test on a driver's bodily integrity and privacy interests. More intrusive than a demand for documents, a breath demand clearly amounts to what La Forest J. described as "the use of a person's body without his consent to obtain information about him" by which the

state “invades an area of personal privacy essential to the maintenance of his human dignity”: *R. v. Dymment*, [1988] 2 S.C.R. 417, at pp. 431-32. However, a roadside ASD test is far less intrusive than many other searches or seizures that may be performed for law enforcement purposes, such as the blood sample at issue in *Dymment*, or a DNA swab, which contains deeply personal information: *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at para. 48. The roadside breath demand authorized by the *Criminal Code* has a much less significant impact on an individual’s bodily integrity and privacy interests: *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 90. This minimally intrusive character supports the reasonableness of the ASD seizure.

[66] However, the use of an ASD to obtain a breath sample also raises concerns that undermine the reasonableness of the seizure, specifically regarding the reliability of test results. The chambers judge concluded, based upon the evidence, that owing to an ASD’s inability to account for the presence of mouth alcohol, “in some circumstances there can be serious issues concerning whether an ASD accurately reflects blood-alcohol readings”: paras. 286-92.

[67] The reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself: *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 48. As noted in *Chehil*, “[a] method of searching that captures an inordinate number of innocent individuals cannot be reasonable”: para. 51. By contrast, a high degree of accuracy has been crucial to endorsing sniffer-dog searches

on a lower standard of reasonable suspicion: *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at para. 11; see also *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456.

[68] While the ARP scheme as enacted in 2010 allowed a driver to obtain a second analysis with a different ASD upon request, it placed no obligation on the police officer to advise the driver of this right: *MVA*, s. 215.42(1) and (2). The ARP scheme also required that the second analysis would govern, regardless of whether it was higher or lower than the initial reading: s. 215.42(3). While a second test with a second device may significantly help resolve the reliability concerns raised by roadside ASD testing, the availability of this safeguard could prove illusory where a driver is unaware of its existence, particularly where there is no guarantee that the lower result will prevail. Absent meaningful safeguards to ensure reliability, this factor raises serious concerns about the reasonableness of the law authorizing the seizure.

(d) *Availability of Judicial Oversight*

[69] Much of the disagreement between the parties hinges on the availability of judicial oversight, and on the significance of the availability of review in the s. 8 analysis. The drivers argue, and the chambers judge agreed, that the inability of a driver to meaningfully challenge both the basis for and, more importantly, the accuracy of the ASD test renders the roadside breath demand an unreasonable seizure. The Province counters that including such procedural considerations in the s.

8 analysis distorts the scope of s. 8, and that these considerations should instead be addressed under either s. 7 or administrative law principles.

[70] This is not the first time this Court has considered the significance of procedural safeguards in a s. 8 analysis. Although the adequacy of such safeguards will often be challenged under s. 7, this Court recognized in *R. v. Mills*, [1999] 3 S.C.R. 668, that the right to full answer and defence is a relevant consideration when assessing the reasonableness of a search or seizure: para. 88; see also *S.A.B.*, at para. 35. In *Hunter*, Dickson J. concluded that an unreviewable, discretionary power of search and seizure would be contrary to s. 8: p. 166. More recently, in *Chehil*, the “reasonable suspicion” standard for sniffer-dog searches was held to respect the s. 8 balance because of subsequent judicial oversight “that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis” for the privacy interference: para. 25.

[71] Although both *Hunter* and *Chehil* concern review of the lawfulness of a search, rather than the use or reliability of its findings, in my view similar considerations apply, especially where the consequences of the seizure follow automatically and immediately. The nature of the review required will of course vary with the circumstances, including the nature of the scheme. On the other hand, the availability of oversight is particularly important where, as here, a search or seizure occurs without prior authorization: *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 84. While less exacting review may be sufficient in a regulatory context, the

availability and adequacy of review is nonetheless relevant to reasonableness under s. 8.

[72] In my view, the chambers judge was correct to consider the scope and availability of review as part of his analysis under s. 8. While s. 8 is not primarily concerned with issues of procedural fairness and safeguards, the restrictive review of the basis and consequences of the breath demand was a central feature of the ARP scheme, particularly given the concerns about the reliability of the ASD, the lack of an intermediate step between the ASD analysis and the roadside suspension, and the immediacy of the penalties that ensue. A driver's ability to challenge the accuracy of the ASD result is thus critical to the reasonableness of the ARP scheme.

[73] It is common ground that the ARP scheme permits a driver to apply to the Superintendent for review of a driving prohibition, and that the Superintendent's decision is subject to judicial review. However, the process for review of suspensions under the ARP regime only permits the Superintendent to consider two issues: whether the applicant was a "driver" and whether the ASD registered a "fail", "warn", or the applicant refused to provide a sample. If both criteria are met, the Superintendent is required to confirm the suspension: s. 215.5(1). The chambers judge concluded that "[t]he 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": para. 305.

[74] The Chief Justice raises the possibility that the Superintendent could hear challenges to the reasonableness of the manner in which a search or seizure is conducted under s. 8 of the *Charter*. These reasons should not be taken as expressing an opinion on this point. However, this case is not about the reasonableness of a police officer's behaviour in conducting a particular seizure. It concerns a more fundamental issue: whether the law authorizing the seizure is itself reasonable. The fact that a driver may be able to challenge the conduct of a particular seizure does not resolve whether the ARP scheme itself complies with s. 8.

[75] While I agree with the Chief Justice that the administrative nature of the scheme justifies the administrative nature of the review, this does not, in my view, resolve the issue of whether the scope of such review is adequate in the circumstances. I agree with the chambers judge's conclusion that the absence of meaningful review of the accuracy of the result of the seizure, in light of the unreliability of the test, raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress.

(4) Conclusion on Section 8

[76] The chambers judge found that the serious consequences of a driver registering a "fail", combined with an inability to challenge the basis on which these consequences are imposed, rendered the ARP scheme unreasonable. I agree.

[77] The ARP scheme as enacted in 2010 depends entirely on the results from a test conducted using an ASD, a device known to produce false positives where mouth alcohol is present. Despite this defect regarding ASD reliability, the scheme provides no meaningful opportunity to challenge a licence suspension issued under this scheme on the basis that the result is unreliable. In the particular circumstances of these appeals, in which a “fail” result automatically triggers serious consequences for a driver without the possibility of review, the scheme fails to provide adequate safeguards. Thus, despite the pressing objective and minimal intrusiveness of the seizure, the ARP scheme fails to strike a reasonable balance between the interests of the state against those of individual motorists, and infringes drivers’ s. 8 rights.

[78] I need not determine whether the same result follows where the “warn” scheme is concerned. The chambers judge’s finding of the s. 8 breach related only to the “fail” branch. In some aspects, he drew a distinction between the two branches. There was no cross-appeal in the Court of Appeal or before us regarding his finding that the “warn” branch of the regime did not infringe s. 8 of the *Charter*. As a result, it is not properly before us. In these circumstances, I prefer not to address the issue. I note that to the extent that the legislative amendments addressed both the “warn” and “fail” aspects of the programme, this issue is moot.

D. *Is the Seizure in the ARP Scheme Saved Under Section 1?*

[79] The Province bears the burden of justifying the violation of s. 8 under s. 1 of the *Charter*. To do so, it must demonstrate, on a balance of probabilities, that the

ARP scheme has a pressing and substantial objective and that the means chosen to achieve that objective are proportionate. The proportionality test comprises three inquiries: (1) whether the means adopted are rationally connected to the objective, (2) whether the law is minimally impairing of the violated right, and (3) whether the deleterious and salutary effects of the law are proportionate to each other; see *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 111; *R. v. Oakes*, [1986] 1 S.C.R. 103.

[80] I agree with the chambers judge that the objective of the scheme is “to remove impaired drivers from the highway and keep them off the highway”: para. 357. The parties do not dispute that this objective is pressing and substantial.

[81] Further, I agree with the chambers judge that the automatic prohibitions from driving based on roadside screening are rationally connected to the “objective of reducing death and injury caused by impaired driving”: para. 360.

[82] At the second stage of the proportionality test, the Province must establish that the ARP scheme minimally impairs the s. 8 right in pursuit of its objective. This inquiry does not require the government to adopt the least impairing measure, but rather one “that falls within a range of reasonable alternatives”: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 149.

[83] I recognize the Province's concern that certain alternatives requiring police to take drivers back to the police station would be more intrusive on the privacy interests of drivers and would reduce the time that the police could spend conducting roadside screenings. However, as the chambers judge noted, "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": para. 319.

[84] Indeed, subsequent amendments to the ARP scheme enhancing the scope for review of roadside screenings and prohibitions demonstrate that such measures can feasibly be put into place without undermining the Province's objective. The 2012 amendments empower the Superintendent, on review, to determine the weight to be given to any evidence, including any information or document not sworn: *MVA*, s. 215.49(4). Most significantly, the amendments also require the Superintendent to be satisfied that the driver was advised of the right to request a second analysis, that the second analysis was performed with a different ASD, that the prohibition was issued on the basis of the lower of the two results, and that the result of the ASD analysis was reliable: *MVA*, ss. 215.42(1), 215.5(1)(a)(i), (ii) and (iv).

[85] The constitutionality of the amended ARP scheme is not before this Court. However, the enhanced review measures in the amended scheme speak to the less-impairing legislative options available to the Province. In the circumstances, I agree with the chambers judge that the ARP scheme as it existed "does not minimally

impair the right of a driver to be free of unreasonable search and seizure”: para. 379 (emphasis deleted). I conclude that the former “fail” branch of the ARP scheme is not saved under s. 1.

VI. Disposition

[86] I would dismiss the motion to strike. The published articles fall within the scope of “articles and texts” permitted in books of authorities filed with this Court: *Rules of the Supreme Court of Canada*, SOR/2002-156, rr. 2 “authorities” and 36(2)(a)(i); see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 774-77.

[87] I would dismiss both the Goodwin appeal and the Province appeal and uphold the chambers judge’s declaration that the “fail” provisions of the ARP scheme infringe s. 8 of the *Charter* and are not saved by s. 1.

VII. Costs

[88] In the Province appeal, the respondents are the successful parties and are entitled to their costs throughout.

[89] In the Goodwin appeal, Mr. Goodwin seeks costs below and costs of this appeal, even if unsuccessful. He argues that this is justified by the public interest of

this constitutional litigation. The Province does not seek costs, and asks that none be awarded against it.

[90] Unsuccessful litigants may be awarded costs in highly exceptional cases involving matters of public importance: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 30; see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 166. It is not enough that a matter be of public interest or importance; to warrant costs in any event of the cause, the case must be “highly exceptional”. In my view, this case is not highly exceptional. Accordingly, there will be no costs order on the Goodwin appeal.

The following are the reasons delivered by

THE CHIEF JUSTICE —

[91] I have read the reasons of Justice Karakatsanis. While I agree with much of them, I take a different view on the issue of whether the province's roadside suspension scheme violates the constitutional requirement that searches and seizures be reasonable. In my view it does not.

[92] I will suggest that it is not sufficient under s. 8 of the *Canadian Charter of Rights and Freedoms* to simply balance the competing state and private interests;

rather, the courts should examine three requirements for a reasonable search or seizure: (1) a state objective capable of overriding individual private interests, (2) restraint of the incursion on the private interest to what is reasonably necessary to achieve the object, and (3) the availability of judicial supervision.

Whether Section 8 of the *Charter* Applies

[93] A preliminary issue is whether the scheme, which does not itself authorize a seizure of breath, is subject to s. 8 of the *Charter*. The provincial scheme relies on the *Criminal Code* provisions that allow a police officer to compel a driver to give a sample of his breath: R.S.C. 1985, c. C-46, s. 254(2). This is clearly a seizure of a bodily substance, which means that it must not be “unreasonable” under s. 8 of the *Charter*. The argument that the seizure is authorized by the *Criminal Code*, and that therefore there is no seizure under the provincial scheme, is artificial. The fact is that the police officer in cases such as this is seizing the breath for purposes of the provincial scheme: the *Criminal Code* authorization is expressly contemplated by that provincial scheme. The seizure is the plank upon which the whole provincial scheme rests. The seizure, although authorized by a different enactment, is part and parcel of the provincial scheme.

Is the Seizure Reasonable?

[94] This brings us to the main question: Is the seizure under the provincial scheme “reasonable” and hence compliant with s. 8 of the *Charter*, which protects individuals against unreasonable search and seizure?

[95] The purpose and effect of s. 8 is to protect individuals against unreasonable state incursions into their private life. The common law has for centuries protected privacy. The protection that began as security against trespass (Lord Coke’s dictum, “A man’s home is his castle”: see *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 157-58; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 426-29) has been elaborated under s. 8 to encompass three dimensions of privacy: personal, informational and territorial (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35; *Tessling*, at paras. 20-24).

[96] As with other *Charter* interests such as expression and liberty, the privacy interest is essentially about the fundamental tension in a constitutional democracy between the individual and the state: *Dyment*, at pp. 427-29. Generally speaking, the state may intrude on the privacy interest of the individual if authorized by a reasonable law and executed in a reasonable manner. This will be the case where: (1) the state has an important purpose grounded in the broader public interest for doing the search and/or seizure, (2) the intrusion goes no further than reasonably necessary to achieve the state purpose, and (3) the intrusion is subject to judicial supervision to guard against abusive state action.

[97] The first requirement is that the state purpose be important enough to override the individual privacy interests at stake. This requirement explains why as a general rule a search or seizure requires reasonable grounds to believe the item sought will be found: without such grounds, the state purpose does not justify the intrusion upon the protected sphere of the individual. In some circumstances however — notably roadside breath tests to combat drunk driving — the importance of the state purpose and the difficulty of achieving it may justify a search or seizure even in the absence of reasonable grounds.

[98] The second requirement — that the intrusion on the private interest go no further than reasonably necessary to achieve the state object — confines the intrusion to what is justified by the circumstances. These circumstances notably include the nature of the regime, and this Court has recognized that if the purpose of a scheme is regulatory and not criminal, it may be subject to less stringent standards: *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, per Wilson J.; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, per Sopinka and Iacobucci JJ.; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757.

[99] The third requirement, the availability of judicial review, insists on a mechanism to ensure that searches and seizures conform to the rule of law and protect against abuse of those powers by the state. The common law has long insisted on judicial supervision of state intrusions into the private sphere. This concern explains the general requirement of prior judicial authorization for a criminal search, failing

which the search is *prima facie* unreasonable: *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 277-78; *Hunter v. Southam Inc.*, at p. 161. It also explains the requirement that in some circumstances the authorities must keep detailed notes as to what was searched and why: *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 4 and 82; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 101. Where searches without warrant are permitted, it is especially important that they be subject to scrutiny on judicial review: *Fearon*, at paras. 82 and 87.

[100] While different cases have formulated the test in different ways, at heart, the three requirements just discussed — important state purpose, restraint of the intrusion to what is reasonably necessary, and the availability of judicial review — determine whether a search is reasonable under s. 8 of the *Charter*.

[101] It is sometimes said that whether a search or seizure is reasonable is determined by asking whether the state action represents an appropriate balance between the state purpose (the first requirement) and the individual's privacy interest: see for example *Tessling*, at paras. 17-18. The balancing metaphor is best understood as a gloss on the requirements for reasonable search or seizure under s. 8. Without suggesting that balancing necessarily produces the wrong result, to view the s. 8 analysis simply as a matter of balancing the state interest against the individual's privacy interest may fail to capture what is required to establish that a search or seizure is reasonable.

[102] One concern is that a balancing approach may suggest that if the state's purpose is sufficiently compelling, it may dispense with restraint and procedures that permit judicial review. In my view this cannot be so. Even where the state purpose (as in this case) is of great importance, the state must not intrude upon the individual's protected sphere more than reasonably justified by that purpose, nor do so in a way that lacks appropriate safeguards capable of judicial review. Once again, what constitutes appropriate judicial supervision may vary with the nature of the scheme and other circumstances. In some circumstances warrants are not required. And an administrative appeal mechanism, subject to judicial review, may suffice for regulatory regimes: see, e.g., *McKinlay Transport and Branch*.

[103] Another concern with the balancing approach is that it may focus unduly on the seriousness of the intrusion of the search or seizure on the individual's privacy interest, conceived in terms of how "secret" or closeted the thing searched for or seized is. As a result, search and seizure of something that is not secret may be more easily justified, on the ground that the "privacy" expectation is low and so the state intrusion is minimal. The privacy interest should not be understood in the narrow sense of secrecy or what is unknown to others. It should rather be understood in the sense of what falls within the private sphere of the individual within which the individual reasonably expects to be free from state intrusion absent a higher state purpose and legal safeguards: see, e.g., *Dyment*, at pp. 427-29 and 431-35. As already mentioned, this private sphere has three dimensions: personal, informational (including anonymity, see *Spencer*, at paras. 35 and 38), and territorial.

[104] In this case, the claimants attack the law that authorizes the search and seizure as constitutionally unreasonable within the meaning of s. 8. I cannot agree.

[105] In my view, all three requirements of a reasonable search and seizure are met in this case. The state's purpose — to prevent death and serious injury on the highway from impaired driving — is important and capable of justifying intrusion into the private sphere of the individual's bodily substances. At this stage, the biggest challenge to the state is that the scheme takes breath samples without reasonable grounds or even suspicion to believe the driver is impaired to the point of affecting driving. However, the Province has produced compelling evidence that requiring such grounds would subvert the goal of preventing death and injury caused by impaired driving, and that routine tests are required to achieve the administrative scheme's purpose.

[106] The second requirement is also met. The seizure does not go further than reasonably necessary to achieve the state's purpose. In *McKinlay Transport*, the Court, per Wilson J., held that compelled production of records was minimally intrusive of privacy rights because the securities regime at issue was regulatory, not criminal, and because the securities sector was highly regulated, reducing the expectation of privacy of the individual engaged in it. The same may be said here. The regime is regulatory and not criminal. And the activity of driving on highways is highly regulated and common in road enforcement. Moreover, obtaining a roadside

breath sample is less intrusive than alternatives, such as compelling a driver to provide a breath sample at a police station or taking a blood sample.

[107] The third element presents the greatest difficulty. The question is whether judicial supervision is available. It is argued that the review is inadequate because the scheme does not provide the *Criminal Code* protections to ensure readings are accurate — namely a subsequent test with a more accurate device at the police station — and that it may be difficult for an individual to contest an inaccurate reading by the roadside testing device. However, the driver can request a second test on a different device at the roadside: *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, s. 215.42(1) and (2). The driver may apply to have a suspension reviewed by the Superintendent of Motor Vehicles and present statements and evidence in support of her application: *ibid*, s. 215.48 and 215.49. The Superintendent's decision is subject to judicial supervision by way of judicial review. Furthermore, despite a failed test, if the officer lacks reasonable grounds to believe the driver is impaired, he does not impose sanctions: *ibid*, s. 215.41(3). This could be the case, for example, if he doubts the accuracy, reliability or functioning of the device or any other aspect of the analysis process: *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, at para. 29.

[108] Although the manner of the search was not challenged in this case, it of course is also subject to constitutional scrutiny. At the review stage, the driver can challenge the reasonableness of the search under s. 8 and the Superintendent can, if

warranted, exclude the evidence under s. 24(2): see *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765.

[109] In the end, the differences between the provisions for judicial review under the *Criminal Code* on the one hand, and the provincial roadside suspension scheme here at issue, reflect the fact that the *Criminal Code* provisions are penal, while the roadside suspension provisions are regulatory. The administrative nature of the scheme and the nature of the driver's interests at play justify the administrative nature of the review, as do the less stringent provisions to ensure accuracy of the sample. (If sanctions under an administrative scheme were more severe, for example if the deprivation itself engaged a *Charter* right, more direct judicial supervision may be required under s. 8. However, that is not before us.) The ultimate question is whether the review provisions of the roadside suspension scheme offer reasonable protection against abusive exercise of the state power to intrude on the individual's private sphere, having regard to the nature of the scheme and the privacy interests at stake. In my view, the answer to this question is yes.

[110] I would therefore allow the appeal of the British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia.

Appeals dismissed, MCLACHLIN C.J. dissenting in part.

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