COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2014 BCCA 79

Date: 20140303
Docket Nos.: CA039638; CA039999; CA040000; CA040120; CA040121; CA040122

Docket: CA039638

Between:

Aman Preet Sivia

Appellant
(Petitioner)

And

Superintendent of Motor Vehicles and The Attorney General of British Columbia

Respondents
(Respondents)

And

British Columbia Civil Liberties Association

Intervenor

- and -

Docket: CA039999

Between:

Richard James Goodwin

Appellant
(Petitioner)

And

Superintendent of Motor Vehicles and Attorney General of British Columbia

Respondents
(Defendants)

And

British Columbia Civil Liberties Association

Intervenor

- and -

Docket: CA040000

Between:

Kenneth Thorne

Appellant
(Petitioner)

And

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

Respondents
(Defendants)

And

British Columbia Civil Liberties Association

Intervenor

- and -

Docket: CA040120

Between:

Scott Roberts

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

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

Respondents/
Appellants on Cross Appeal
(Respondents)

And

British Columbia Civil Liberties Association

Intervenor

- and -

Docket: CA040121

Between:

Carol Marion Beam

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

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

Respondents/
Appellants on Cross Appeal
(Respondents)

And

British Columbia Civil Liberties Association

Intervenor

- and -

Docket: CA040122

Between:

Jamie Allen Chisholm

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

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

Respondents/
Appellants on Cross Appeal
(Respondents)

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Hinkson
The Honourable Madam Justice MacKenzie

On appeal from: Orders of the Supreme Court of British Columbia, dated December 23, 2011 and July 12. 2012 (*Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1783 and 2012 BCSC 1030, Vancouver Docket No. S112179).

On appeal from: Orders of the Supreme Court of British Columbia, dated May 25, 2012 (*Goodwin v. British Columbia (Superintendent of Motor Vehicles))* and *(Thorne v. British Columbia (Superintendent of Motor Vehicles))*, Victoria Registry Nos. S-121095 and S-120178).

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Place and Date of Hearing:	Vancouver, British Columbia March 18, 19, 20 and 27, 2013
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2014

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Mr. Justice Hinkson
The Honourable Madam Justice MacKenzie

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Summary:

Motorists who received 90-day automatic roadside driving prohibitions under the Motor Vehicle Act of British Columbia challenged the constitutional validity of ss. 215.41-215.51 of the Act. The Chambers judge upheld the legislation as within the legislative jurisdiction of the Province. He also dismissed the Charter challenges based on ss. 10(b), 11(d) and 8 with the exception of penalties resulting from a "fail" reading, which were held to violate s. 8 and were not saved by s. 1.

The motorists appeal the finding of the Chambers judge with respect to the division of powers and s. 11(d) of the Charter, the Province cross appeals with respect to s. 8.

Held: appeals dismissed, cross appeals dismissed. The legislation does not supplant the Criminal Code, its purpose and effect is to regulate highways and enhance public safety. The legislation does not create a criminal or quasi-criminal proceeding nor does it lead to true penal consequences and therefore, does not create an "offence" within the meaning of s. 11(d). The legislation authorizes a search that is unreasonable when a "fail" reading is obtained due to the limited grounds available to challenge the results of the search. This violation of s. 8 is not saved by s. 1.

Reasons for Judgment of the Honourable Madam Justice Ryan:

I INTRODUCTION

[1] Six motorists, who had received 90-day roadside driving prohibitions under ss. 215.41 to 215.51 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*Act*] challenged the constitutional validity of the legislation by way of petitions to the British Columbia Supreme Court. The motorists had each been given driving prohibitions by peace officers after they had either refused to supply a sample of breath, or having supplied a sample, registered a "fail" on an "approved screening device, ("ASD") as described in the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*] and the *Motor Vehicle Act.* The notice of prohibition (Form 7) served on the motorists refers to the prohibition as an "immediate roadside prohibition" or IRP. However, in these reasons I have adopted, as did the Chambers judge, the appellants' compendious reference to ss. 215.41 to 215.51 as the "automatic roadside prohibition regime" or the "ARP regime". I have done this to maintain consistency with the reasons of the Chambers judge.[1] For purposes of these reasons, the nomenclature should be taken as interchangeable.

[2] Mr. Justice Sigurdson heard the petitions of Aman Sivia, Carol Beam, Jamie Chisholm, and Scott Roberts together. The petitioners maintained that the amendments to the *Motor Vehicle Act* that established the ARP regime constitute criminal law and are beyond the legislative competence of the provincial government; they also argued that the challenged provisions violated their rights under the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [*Charter*], in particular those in ss. 8, 10(b) and 11(d).

[3] In reasons for judgment released November 30, 2011 Mr. Justice Sigurdson found the challenged legislation to be constitutionally sound except for the prohibitions and penalties resulting from a "fail" reading on an ASD. The Chambers

[1] I note that the head note to s. 43.09 of B.C. Reg. 26/58, which sets out the monetary penalties for the various driving prohibitions, describes the prohibition as an "automatic roadside driving prohibition."

judge found that this part of the provincial legislation violated s. 8 of the *Charter* and was not saved by s. 1. The reasons for judgment of Mr. Justice Sigurdson are indexed as *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1639 [*Sivia #1*].

[4] After a further hearing, Sigurdson J. issued reasons for judgment on December 23, 2011, in which he confirmed that his finding of an infringement of s. 8 for a "fail" reading did not apply to a case involving a refusal. Mr. Justice Sigurdson ordered that his declaration of invalidity be stayed to June 30, 2012, and adjourned the hearing to allow further submissions with respect to remedies (*Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1783 [*Sivia #2*]).

[5] Bill 46, the *Motor Vehicle Amendment Act*, 2012 S.B.C., c. 26 [*Amendment Act*], came into force on June 15, 2012. The *Amendment Act* is intended to correct the constitutional defect in the legislation identified by Mr. Justice Sigurdson. This Court can make no comment as to whether the amendments have succeeded in addressing the concerns of the Chambers judge as that legislation is not before us on this appeal. The Court can, and has, commented on the prior legislation as it is the subject of cross appeals which I will refer to presently.

[6] The petitions of Robert Goodwin and Kenneth Thorne, who had been prohibited from driving for failing to provide breath samples into an ASD, were heard separately by Mr. Justice Dley who dismissed both their petitions on May 25, 2012. In dismissing their petitions Mr. Justice Dley relied on the reasons given by Mr. Justice Sigurdson in Mr. Sivia's case. (*Goodwin v. British Columbia (Superintendent of Motor Vehicles and the Attorney General of British Columbia*), Victoria Registry No. S-121095; *Kenneth Thorne v. British Columbia (Superintendent of Motor Vehicles and the Attorney General for British Columbia*), Victoria Registry No. S-120178).

[7] As a result of the decisions of Mr. Justice Sigurdson and Mr. Justice Dley, Mr. Sivia, Mr. Thorne and Mr. Goodwin lost their cases. On the other hand, Ms. Beam, Mr. Chisholm and Mr. Roberts were successful in obtaining an order that

the part of the legislation upon which their prohibitions were based was of no force and effect. This meant that their applications for "personal and monetary remedies", which they sought in their petitions and which had been adjourned, needed to be dealt with.

[8] On July 12, 2012 Mr. Justice Sigurdson heard and dismissed the applications of Ms. Beam, Mr. Chisholm and Mr. Roberts for personal and monetary remedies (*Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1030 [*Sivia #3*]).

[9] The six petitioners appealed to this Court on different grounds, some of which were common to all appeals in one way or another. The Attorney General and the Superintendent of Motor Vehicles (whom I will refer to together as "the Province" or "the respondents") filed cross appeals with respect to the part of the legislation that had been declared of no force and effect.

[10] For the reasons that follow I am of the view that these appeals and cross appeals must be dismissed.

II PREVIOUS LEGISLATION

[11] Before examining the issues raised by these appeals and cross appeals it is important to note at the outset that the issues I am about to discuss do not relate to ss. 94.1 to 94.6 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 which were the subject of an appeal to this Court in *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114 [*Buhlers*]. Those sections of the *Motor Vehicle Act*, which are still in force, provide for a prohibition against driving for a period of 90 days when a driver provides a sample in compliance with a demand for breath or a sample of blood under the *Criminal Code* and obtains a result of "over .08", or, if the driver refuses, without a reasonable excuse, to provide a sample of breath or blood. The resulting 90-day driving prohibition is not immediate in that it does not come into effect for a period of 21 days after the prohibition is served. The motorist has an opportunity to file a challenge to prohibition to the office of the Superintendent of

Motor Vehicles within seven days of service. The Court in *Buhlers* upheld the constitutionality of those provisions of the *Motor Vehicle Act.*

[12] Some time was spent in the Supreme Court, and in argument in this Court distinguishing the features of the provisions at issue in *Buhlers* from those at issue in this Court. I have chosen not to engage in that endeavour as the challenged legislation in the appeals before us will either stand or fall on its own.

III PROCEDURAL DIFFICULTIES

[13] The issues in these appeals, as brought forward by the appellants, lend themselves nicely to a reference under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, but that route was unavailable to them as a reference can only be placed before the court by the Lieutenant Governor in Council.[2] Thus, in order to bring together all of the issues with respect to the constitutional validity of the challenged legislation, counsel gathered several litigants, all who had driving prohibitions imposed for various reasons. This was sensible at the trial level, but once there was divided success in that Court, bringing them together in this Court posed more of a problem.

[14] One of the problems was that several orders had been generated in the Supreme Court. The first was the order of December 23, 2011 which should have reflected what Mr. Justice Sigurdson had ordered in his reasons of November 30, 2011. Unfortunately it did not fully express what he had ordered. After hearing submissions from all the petitioners the Chambers judge made the same order for all of them. For the purposes of these appeals this included Mr. Sivia, Ms. Beam, Mr. Chisholm and Mr. Roberts. After the recitals it states:

> THIS COURT ORDERS AND DECLARES that s. 215.41(3)(a), s. 215.42(1), s. 215.43(2)(a) and s. 215.5(1)(b)(i) of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318, insofar as they apply to a situation where an approved screening device registers a fail reading over 0.08, unjustifiably infringe s. 8 of the *Charter of Rights and Freedoms* and are to that extent invalid, and of no force or effect;

[2] Section 1 provides: The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it.

> THIS COURT FURTHER ORDERS AND DECLARES that the declaration of invalidity is suspended until 30 June, 2012; and
>
> THIS COURT FURTHER ORDERS that the claim of the Petitioners for personal remedies is adjourned pending further argument.

[15] Nowhere does the order state that Mr. Sivia's petition is dismissed. Rather, the order deals with matters irrelevant to Mr. Sivia's petition. However, as Mr. Sivia has now abandoned his appeal, this particular problem is no longer important.

[16] The May 25, 2012 orders of Mr. Justice Dley with respect to Mr. Goodwin and Mr. Thorne state simply:

> THE COURT ORDERS that:
>
> 1. The petition is dismissed.

[17] Each of the July 12, 2012 orders of Mr. Justice Sigurdson made in relation to Ms. Beam, Mr. Chisholm and Mr. Roberts read:

> ON THE APPLICATION of the Petitioner, [Carol Beam, Jamie Chisholm, Scott Roberts] for "personal and monetary remedies" ….
>
> THIS COURT ORDERS that:
>
> 1. The Petitioner's Application is dismissed; and
>
> 2. The parties may arrange to appear before Mr. Justice Sigurdson to discuss the issue of costs, or if they agree, they may file written submissions on that issue.

[18] As for the notices of appeal in this Court: Mr. Sivia appealed the December 23, 2011 order of Mr. Justice Sigurdson; Mr. Goodwin and Mr. Thorne appealed the May 25, 2012 order of Mr. Justice Dley; and Ms. Beam, Mr. Chisholm and Mr. Roberts appealed the July 12, 2012 order of Mr. Justice Sigurdson.

[19] On January 14, 2013 , the parties filed a consent order which served to permit a number of things:

1. An extension of time for Ms. Beam, Mr. Chisholm and Mr. Roberts to amend their notices of appeal to include an appeal of the order of December 23, 2012.

2. An extension of time for the respondents to file and serve notices of cross appeal with respect to the appellants' appeal of the December 23, 2012 order.

3. That the six appeals be "heard at the same time".

4. That the appeal record, appeal books and factum in the Sivia appeal form the record and argument for all appeals.

5. That the "remedy issues" raised in the appeals of Ms. Beam, Mr. Chisholm and Mr. Roberts not be heard until the constitutional arguments were dealt with.

6. That the intervenor be permitted to participate on the same terms as required by an earlier order made in Mr. Sivia's appeal.

7. That there be a common style of proceedings.

[20] By the time the appeals were ready for hearing, Mr. Sivia had decided to abandon his appeal. Mr. Thorne had died and his appeal was about to be dismissed as abated. The remaining four appellants, Mr. Goodwin, Ms. Beam, Mr. Chisholm and Mr. Roberts were prepared to continue with their appeals.

[21] The problem was this: The appellants were unsuccessful before Mr. Justice Sigurdson and Mr. Justice Dley for different reasons. Mr. Goodwin lost on all grounds. But Ms. Beam, Mr. Chisholm and Mr. Roberts, though successful in arguing that the sections of the *Motor Vehicle Act* under which they had been prohibited from driving should be declared of no force and effect, nonetheless failed to obtain the remedy they sought – a return of funds they had been obliged to pay for such things as storage on impoundment, towing fees and a monetary penalty. Even though Ms. Beam, Mr. Chisholm and Mr. Roberts filed appeals against the December 23, 2011 order, nothing in that order gave them grounds to appeal. They had been successful in having the legislation by which they had been prohibited from driving declared of no force and effect. If the three appellants had nothing to

appeal, then the Province had nothing to cross appeal. The Province ought to have simply appealed the order allowing the petitions of Ms. Beam, Mr. Chisholm and Mr. Roberts.

[22] Furthermore, the remedy-related parts of the petitions, for Ms. Beam, Mr. Chisholm and Mr. Roberts, were dealt with by Mr. Justice Sigurdson at a different time and by a different order although they were really a part of the same proceeding. On these appeals counsel decided to contest the constitutional structure of the legislation, and if it came to it, wanted to deal with the appeals relating to the individual remedies at another time.

[23] In any event, at the end of the day a number of appeals with largely the same grounds of appeal were ordered heard at the same time. However, once this happened counsel seemed to take the approach that what was before the court was one appeal in which all the issues could be argued at large. From my perspective they lost sight of the fact that each appellant had been prohibited from driving under different sections of the *Motor Vehicle Act*, and had sought individual and personal remedies. In some ways the situation brings to mind the words of Esson, J.A. who, in refusing to consolidate several appeals, did so on the ground that it would "create an intolerable confusion of issues" (*Eisbrenner v. Law Society of British Columbia*, 2004 BCCA 127 at para. 11). (See, also his comments in *R. v. Noyes*, [1986] B.C.J. No. 659 (C.A.) at paras 6 and 7 regarding splitting appeals.)

[24] Part of the tangle also included the order that the factum in Sivia be used as the factum on all the appeals even though Mr. Sivia was no longer before the Court. As it turned out, the factum was used for its legal arguments, but the adjudicative facts with respect to the constitutional arguments were taken from all appeals, a matter which was not objected to by the Province.

[25] On the first day these appeals were set to be heard, faced with this bit of confusion, the Court adjourned to discuss the procedural issues in Chambers. In the end the Court accepted that the central arguments would be found in the Sivia factum, and that the Beam, Chisholm and Roberts "personal and monetary remedy"

grounds would be argued separately, before a different division of the Court if necessary. The Province would argue its appeals on the Beam, Chisholm and Roberts matters at the conclusion of the main appeal and it would be understood that the last three appellants would be taken as supporting Mr. Goodwin's grounds because if they lost the cross appeal, they could succeed if Mr. Goodwin was successful on any of his grounds.

IV THE CHALLENGED LEGISLATION

[26] The challenged legislation, ss. 215.41 to 215.51 of the *Motor Vehicle Act*, was enacted on September 20, 2010. The full text of these sections may be found in Appendix A of these reasons. What follows is a summary of the provisions relevant to this appeal.

A. The ARP Regime Essentials

[27] The ARP regime applies to a person who has the care or control of a motor vehicle. Section 215.41 (1) states:

> In this section, "driver" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion.

[28] A driving prohibition will result when subsection (3) or (4) of s. 215.41 of the *Motor Vehicle Act* is engaged. These sections provide:

> 215.41 (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).

[29] Thus the ARP regime is founded on an impaired driving investigation initiated under the *Criminal Code*. Section 254(2) of the *Criminal Code* allows a peace officer who has reasonable grounds to suspect that a driver has alcohol in their body to demand a sample of breath into an "approved screening device".

[30] The relevant portions of s. 254(2) of the *Code* provide:

> 254 (2) If a peace officer has reasonable grounds to suspect that a person has alcohol… in their body and that the person has, within the preceding three hours, operated a motor vehicle….or had the care or control of a motor vehicle…whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph … (b):
>
> …
>
> (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.

[31] An "approved screening device" is defined in the *Code* but for purposes of the *Motor Vehicle Act* it is defined in s. 215.41(2) as:

> "approved screening device" means a device prescribed by the Lieutenant Governor in Council for the purposes of this section;

[32] The regulations to the *Motor Vehicle Act* list approved screening devices by name (B.C. Reg. 590/2004). It is enough, for purposes of this appeal to say that they seem to be the same as used by peace officers when making a demand under s. 254(2) of the *Code.*

[33] As noted earlier, s. 215.41(3) of the *Motor Vehicle Act* requires a peace officer to prohibit a motorist from driving if he or she registers a "warn" or "fail" on an ASD and has reasonable grounds to believe, as a result of the analysis, that the

driver's ability to drive is affected by alcohol. Section 215.41(2) defines "warn" and "fail" in this way:

> "fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood;
>
> "warn" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

[34] A prohibition is also issued if a driver fails or refuses, without reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a breath sample for analysis (s. 215.41(4)).

[35] As recognized by the Chambers judge, the breath sample provided under s. 254(2) of the *Criminal Code* does not provide evidence for a subsequent criminal charge. It cannot be used as such in a criminal trial. Rather, it may provide the reasonable grounds for a further analysis under s. 254(3) of the *Code*. 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. (*R. v. Orbanski; R. v Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3).

[36] 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 into the ASD. Registering a "fail" on an ASD automatically leads to a 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)).

[37] All persons who 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.

[38] Section 215.45 of the *Motor Vehicle Act* 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. The prohibited driver may also be required to use an ignition interlock program specified by the Superintendent under the same section of the *Act.* 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. Mr. Justice Sigurdson found that although a discretionary decision, "the unrefuted evidence on this hearing is that for a 'fail' reading this last requirement 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.

[39] Drivers who 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 *Motor Vehicle Act*. 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)).

[40] 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 kilometres, with per kilometre charges for any additional distance.

[41] Finally, the driver must also pay a mandatory fee for the reinstatement of his or her licence.

[42] 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.

[43] A person who has been issued a driving prohibition under s. 215.41 of the *Act* may apply for a review of the prohibition under s. 215.48(1) within seven days of being served. The adjudicator has very limited grounds in which to reverse the prohibition. I will return to this aspect of the ARP regime later in these reasons when I discuss the challenge under s. 11(d) of the *Charter*.

V FACTUAL BACKGROUND

[44] As I mentioned earlier, the facts leading to the appellants' driving suspensions were placed before this Court, along with those of Mr. Sivia, with consent of the respondents.

[45] It is not necessary here to review the facts of Mr. Sivia's prohibition as those of the four before the Court are sufficient to provide a background to the issues.

A. Ms. Beam

[46] In the evening of October 7, 2010 Ms. Beam was seated in the driver's seat of a vehicle in a parking lot outside a restaurant near Shawnigan Lake with the engine

running when a police officer approached her car and tapped on the window. The officer's report says he observed Ms. Beam to have glassy eyes and a strong odor of liquor on her breath. In response to a demand, Ms. Beam provided a breath sample into an ASD which registered a "fail". As a consequence of s. 215.41(3), the officer served Ms. Beam with a notice of driving prohibition for a period of 90 days.

[47] As a result of the driving prohibition Ms. Beam was required to pay $500 as a "monetary penalty", and her vehicle was impounded for 30 days. Ms. Beam paid for towing fees and for the storage of her vehicle while impounded. After her driving prohibition ended she was required, under s. 25.1 of the *Motor Vehicle Act,* to participate in the Ignition Interlock Program and the Responsible Driver Program. She had to pay for a new driver's licence which showed that she was restricted to driving only vehicles equipped with the ignition interlock device.

[48] Ms. Beam sought a review of her driving prohibition to the office of the Superintendent of Motor Vehicles. The review took place by way of written submissions. Ms. Beam's driving prohibition was confirmed on October 27, 2010.

[49] Ms. Beam filed her petition in Supreme Court in the spring of 2011. Her petition was eventually amended and heard together with *Sivia et al*.

B. Mr. Chisholm

[50] On October 15, 2010 Mr. Chisholm was stopped by the police as he drove on Stewart Avenue in Nanaimo sometime after 11 at night. A police officer stated in his report that he observed the usual signs of impairment, made the demand for breath and obtained a "fail" reading on the ASD.

[51] Mr. Chisholm received the same penalties as Ms. Beam. He filed a review of his driving prohibition with the office of the Superintendent of Motor Vehicles. The prohibition was confirmed by an adjudicator on November 5, 2010. He then filed a petition to the Supreme Court which was heard with *Sivia et al.*

C. Mr. Roberts

[52] Mr. Roberts was involved in an accident on Metchosin Road in Metchosin at 5:45 p.m. on October 7, 2010. He had been driving too fast, lost control of his vehicle and hit the rear driver's side of an on-coming vehicle. When given the demand to provide a breath sample Mr. Roberts registered a "fail" on the ASD. Mr. Roberts took a second breath test on a different ASD and registered a "fail" on that instrument as well. He too received a 90-day driving prohibition; a $500 monetary penalty; and a 30-day motor vehicle impoundment.

[53] Mr. Roberts (as did Ms. Beam and Mr. Chisholm) paid $100 for an unsuccessful review to the Superintendent of his driving prohibition. Mr. Roberts deposed that he could not afford the cost of the 30-day vehicle impoundment and so consented to the disposal of his vehicle which cost him $476.00. He paid $985.60 for the cost of the Responsible Driver Program. Mr. Roberts earned his living as a truck driver and as a result of his driving prohibition says he lost $18,666.66 in wages. He paid $1730 for the cost of the mandatory installation and servicing of the interlock devices. He also paid an unspecified amount for towing and impoundment fees.

[54] Mr. Roberts' petition to the Supreme Court was heard with *Sivia et al*.

D. Mr. Goodwin

[55] On January 9, 2011, Mr. Goodwin was seen by a peace office to make an abrupt lane change that almost caused a collision with another motorist. The officer stopped Mr. Goodwin and observed him to have glassy eyes and slurred speech. Mr. Goodwin admitted that he had consumed one beer. The officer demanded he provide a breath sample into an ASD.

[56] Mr. Goodwin did not provide a suitable sample. On the first two opportunities, the officer observed Mr. Goodwin to be sucking in, and on the third, Mr. Goodwin filled his cheeks with air but did not blow into the instrument. Acting under the

authority of s. 215.41(4) of the *Motor Vehicle Act*, the peace officer issued a driving prohibition for 90 days and had Mr. Goodwin's vehicle impounded for 30 days.

[57] Mr. Goodwin applied to the Superintendent of Motor Vehicles for a review of his driving prohibition in accordance with s. 215.48 of the *Act.* In a decision issued on January 28, 2011, the Superintendent's adjudicator dismissed the application and confirmed the 90-day driving prohibition.

[58] Mr. Goodwin filed a petition for judicial review of the adjudicator's decision alleging administrative grounds of error and challenging the ARP regime on constitutional grounds. Mr. Justice Dley dismissed Mr. Goodwin's petition on the administrative law grounds holding that the adjudicator's decision was reasonable. He also dismissed the constitutional issues for the reasons given by Mr. Justice Sigurdson in *Sivia # 1*.

VI RESULTS OF THE HEARING OF THE PETITION

[59] The petitioners argued before Mr. Justice Sigurdson that the ARP regime was beyond the competence of the province to legislate as it is, in effect, criminal law, a head of power reserved to the federal government under s. 91(27) of the *Constitution Act*, *1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (the division of powers challenge). They also submitted that the impugned legislation violated ss. 8, 10(b) and 11(d) of the *Charter*. In his reasons for judgment, Mr. Justice Sigurdson dismissed the division of powers challenge, dismissed, in their entirety, the *Charter* challenges to the ARP regime based on s. 10(b) (which he held was saved on a s. 1 analysis) and s. 11(d) (no "offence" created) and dismissed the s. 8 *Charter* challenge so far it relates to a prohibition imposed as a result of a refusal to provide a sample, and to a "warn" reading on an ASD. He found, however, that the s. 8 *Charter* challenge succeeded and the s. 1 justification was not made out where the prohibition was imposed as a result of a "fail" reading.

[60] After a hearing on December 19, 2011, Mr. Justice Sigurdson issued further reasons for judgment on December 23, 2011, which confirmed that his finding of an

infringement of s. 8 for a "fail" reading did not apply to a case involving a refusal. The Chambers judge stayed his declaration of invalidity to June 30, 2012, and adjourned to allow further submissions (*Sivia #2*).

[61] In his final set of reasons Mr. Justice Sigurdson dismissed the application for "personal and monetary remedies" (*Sivia* #3).

VII THE GROUNDS OF APPEAL

[62] The grounds of appeal may be stated as these:

1) The learned Chambers judge erred in law by holding that the automatic roadside prohibition regime is valid provincial legislation. In particular, he erred in law in failing to characterize the legislation as criminal in nature and thus within the exclusive jurisdiction of the government of Canada to legislate.

2) The learned Chambers judge erred in law in failing to classify the ARP regime as an offence "by its very nature" or that it imposes "true penal consequences" and by failing to find that it unjustifiably infringes s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

[63] The respondents cross appeal on the ground that:

> The Chambers judge erred in law when he concluded that the aspect of the ARP regime that imposes prohibitions, costs and penalties for an ASD reading in the "fail" range violates s. 8 of the *Charter* and is not saved by s. 1.

VIII THE FIRST GROUND OF APPEAL

A. Division of Powers – Is the Challenged Legislation Criminal Law?

[64] The heads of power under the *Constitution Act*, 1897 at issue on this ground of appeal are: The federal power found in s. 91(27), that is:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the

> Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

[65] And, the provincial power found in s. 92(13), that is:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> 13. Property and Civil Rights in the Province.

[66] The appellants submit that the ARP regime is, in its pith and substance, criminal law. They say that the legislation is a colourable attempt to supplant the *Criminal Code* impaired driving provisions and to punish behaviour deemed to be immoral with a series of severe sanctions without even the key features of an administrative regime, that is, notice and an opportunity to be heard. They sum up the argument this way in their factum:

> While the Province has enacted the ARP regime to target drinking and driving under the auspices of a Provincial licensing regime, its intentions and the legal and practical effects of the legislation show that the regime is a colourable attempt to enact criminal legislation designed to save expense to the Province. In effect, this legislation is a template for the further substitution of "administrative" schemes for criminal offences. The ARP regime is criminal law because
>
> a) it specifically targets criminal behaviour and a *Criminal Code* offence (s. 253[3])
>
> b) it substitutes the procedural protections of the criminal law with a provincial procedure that vitiates driver's rights;
>
> c) in practical effect, it actually circumvents the criminal law by the non-enforcement of s. 253 by police and Crown counsel for first time

[3] s. 253 (1) Every one commits an offence who operates a motor vehicle…or has the care or control of a motor vehicle…whether it is in motion or not,

(a) while the person's ability to operate the vehicle…is impaired by alcohol…; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

> offenders and the use of ARP regime penalties as a substitute for criminal penalties; and
>
> d) it does not have the key features of a valid administrative regime: notice and an opportunity to be heard.
>
> These four elements have never all been simultaneously present in any previous provincial drinking and driving regime. It is their combination that renders the ARP regime *ultra vires* the Province.

[67] The respondents take the position that the ARP regime is a legitimate expression of the provincial power with respect to property and civil rights, that is, the right of building highways and of operating them and of providing for the safety of circulation and traffic on the highways. They say that a proper constitutional analysis, applying the principles set out in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [*CWB*], yields this result.

1) Reasons for Judgment

[68] At the beginning of his reasons for judgment the Chambers judge made reference to *Provincial Secretary of Prince Edward Island v. Egan,* [1941] S.C.R. 396, [1941] 3 D.L.R. 305 [*Egan*], noting that provinces have long passed legislation which contains provisions contingent upon criminal convictions for drinking driving offences. In *Egan* the argument was that s. 84(1) of the *Highway Traffic Act*, S.P.E.I. 1936, c. 2, which imposed a provincial motor vehicle licence suspension on conviction for the criminal offence of driving while intoxicated, constituted a foray by the province into the federal area of criminal law. The Court in *Egan* found s. 84(1) to be valid provincial legislation. The reasoning in *Egan* continues to provide the analytical distinction between the federal criminal law power and provincial authority over property and civil rights where driving offences and driving suspensions are at issue. Speaking of the powers of a province Rinfret, J. said this 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 (*O'Brien v. Allen* [(1900) 30 Can. S.C.R. 340], 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 therefor[e], has invaded the whole field in such a way as to exclude all provincial jurisdiction. It cannot have superseded section 84, which was obviously made from the provincial aspect of defining the right to use the highways in Prince Edward Island and intended to operate in a purely provincial field.

[69] Rinfret, J. then moved to the question whether the provincial licence suspension was designed to be an additional penalty for having committed the criminal offence of impaired driving. He said at 415-416:

> As to the contention that the Provincial legislation imposes an additional penalty for the punishment of an offence already punished by the *Criminal Code*, the answer, it seems to me, is simply that the Provincial legislation does not do so.
>
> 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). 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*. 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* [[1923] S.C.R. 681; 40 C.C.C. 404]. 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.
>
> There may be added what was said by Lord Atkin, in *Lymburn v. Mayland* [[1932] A.C. 318, at 323]:
>
> > It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon

> the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise *intra vires,* the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.
>
> It would seem to me beyond doubt that provisions of a provincial statute for the cancellation of licences to carry on certain kinds of business, or creating a disability from holding public offices, or creating any kind of civil disabilities, as a result of a conviction under the *Criminal Code,* does not make such provisions legislation in relation to criminal law; and, hence, they are not *ultra vires* of the provincial legislatures. It never occurred to anybody to dispute the power of the provinces to issue licences, or permits, for the right to drive motor vehicles on the highways of their respective territories. Surely the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them, upon the happening of certain conditions. The provision that a person convicted of driving while intoxicated will lose his licence for a time or forever is, in a certain sense, a condition upon which the licence, or permit, is granted by the province.
>
> I would think, for these reasons, that section 84 of *The Highway Traffic Act* of Prince Edward Island is not unconstitutional.

[70] After his reference to *Egan*, Sigurdson J. moved to a brief history of driving legislation in British Columbia. The legislation has progressively imposed harsher and longer driving prohibitions and licence suspensions for drivers, not just convicted of, but suspected of impaired driving. I will not repeat the history here as the Chambers judge thoroughly set it out in his reasons for judgment.

[71] The Chambers judge began his analysis with a reference to the law he was obliged to apply in determining whether the challenged legislation was validly enacted. He first referred to the question of the "pith and substance" of the legislation. He said at paras. 75-76:

> 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.
>
> 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.
> >
> > [Emphasis added.]

[72] The central argument of the petitioners before the Chambers judge, which they maintain before this Court, is that the challenged legislation has "crossed the line between what is properly federal and what is properly provincial jurisdiction." Mr. Justice Sigurdson observed that the line is not a bright one. He said:

> [86] In *Chatterjee* [*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19] 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).
>
> [Emphasis added.]
>
> [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 in original.]

[73] Turning to what is meant by "incidental effects" the Chambers judge said:

> [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 in original.]

[74] At the hearing of the petition the petitioners listed three indicia which they said placed the ARP regime squarely within the criminal law:

1. The fact that the ARP regime is used as an alternative for first-time criminal offenders.

2. The use of a search power under the *Criminal Code* to gather evidence for the driving prohibition.

3. The extent of the penalties that accompany a driving prohibition.

[75] The Chambers judge addressed the three concerns in his reasons. First he held that how the police and prosecution choose to enforce an interlocking scheme of federal and provincial statutes does not determine their constitutionality. He said:

> [110] [T]his 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 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.

[76] As for the use of a search power, citing *Egan* and *Buhlers*, the Chambers judge concluded the ARP reliance or authorization of a search power did not mean that the legislation was criminal in itself.

[77] Commenting on the petitioners' last point as to the monetary penalties and costs of the ARP regime, the Chambers judge made reference to *Chatterjee* where Binnie J. accepted the proposition that it was open to the provinces to concern themselves with the suppression of crime. Binnie J. said at para. 15 of *Chatterjee*:

> 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 in original.]

[78] Finally, the Chambers judge asked:

> [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 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.

[79] Mr. Justice Sigurdson ended his analysis with these conclusions:

> [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.

2) Analysis

[80] The appellants say that the Chambers judge erred in failing to reach the conclusion that the ARP regime is designed to supplant, and does supplant or usurp

the *Criminal Code*. They say that in so doing, the provincial legislation is a colourable attempt to enter the criminal field. The appellants do not take issue with the Chambers judge's understanding or articulation of the law he was required to apply. As I understand their argument, it is that the Chambers judge both underestimated the strength of each piece of evidence that indicated a criminal law purpose or effect, and dismissed the indicators without examining them as a whole to understand the full impact of the legislation.

[81] Specifically, the appellants say that the Chambers judge put no weight on extrinsic evidence before the Court of the government's intention to pass legislation that would be harsher than the provisions of the *Criminal Code*; failed to appreciate the value of the testimony of a police officer they put forward concerning police policy; and undervalued the contents of a Crown policy manual, which they say indicates that government ministries have removed any discretion from these parties as to which law they enforce.

[82] First, the appellants note that the government press release was accompanied by a "backgrounder" which called the changes to the *Motor Vehicle Act* "major amendments", and emphasized the immediacy and severity of the penalties. It included this:

> 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.
>
> (Public Safety and Solicitor General, Backgrounder, 2010PSSG0026-000472, (April 27, 2010)).

[83] The appellants also placed evidence before the Chambers judge that in practice, drivers with no prior impaired driving charges who registered a "fail" reading at the roadside were generally not prosecuted under the *Criminal Code* if there was no personal injury or property damage. They referred to the evidence of a former

police officer to that effect, and excerpts from a Crown Counsel Policy Manual. The appellants went further in this Court to allege that the Ministry of the Solicitor General had given the different police forces in the province the directive to use the ARP regime instead of the *Criminal Code* in these circumstances, thus providing, they said, the evidence that the intent of the government in passing this legislation was to supplant the *Criminal Code*.

[84] I cannot accept the position advanced by the appellants that government has removed the discretion of the Crown and police to prosecute drinking driving offences.

[85] I accept the submission of the Province that there was no evidence before the court of any such directive, which would be highly improper, coming from government to the police.

[86] The Court had the benefit of having the Crown Counsel Policy Manual placed before it. The manual gives guidance to the Crown in assessing whether or not the charge approval standard has been met: that is, there must be a substantial likelihood of conviction and it should be in the public interest to lay a charge. Taking account of the ARP regime consequences for the driver, it is stated in the Policy Manual that laying impaired or refusal charges under the *Criminal Code* will generally not be in the public interest unless there are aggravating factors such as:

1. A prior conviction for a *Criminal Code* impaired driving offence
2. A breathalyzer reading of more than .16
3. Evidence of significant impairment
4. A prior 90 day IRP or a prior administrative driving prohibition (ADP) under s. 94.1 of the *Motor Vehicle Act*
5. An allegation in the report to Crown Counsel that other *Criminal Code* driving offences were committed during the same event, including driving while prohibited
6. Any other aggravating factor relevant to the public interest (for example, where there is a child in the motor vehicle)

[87] The Policy Manual is designed to provide guidance as to how Crown counsel should exercise their discretion. As the respondents say in their factum: “Thus, first

time impaired offenders (i.e., those without a prior conviction for a *Criminal Code* impaired driving offence) will face prosecution under the *Criminal Code* where the police Report to Crown Counsel provides information concerning any aggravating factor that makes it in the public interest to approve a charge."

[88] It seems to me that the best the appellants can make of this evidence is that in certain circumstances the Crown prefers not to charge under the *Criminal Code*, but to be content with the imposition of the provincial administrative consequences of drinking and driving. None of this supports the contention that the ARP was designed to displace the *Criminal Code*.

[89] Nevertheless, the appellants argue that if one adds the severity of the consequences of a s. 215.41 violation to the equation, which they say the Chambers judge failed to do, the ARP regime can only be seen as a substitute criminal procedure. The appellants rely on the reasoning in *Starr v. Houlden,* [1990] 1 S.C.R. 1366 [*Starr*] for their proposition. As they put it: "[A] province may not dress up substitute criminal procedures within the guise of an *intra vires* provincial activity".

[90] The facts in *Starr* were that Ms. Starr, a charity fund-raiser in Toronto, was identified in several articles in the press as having made contributions from her charity's funds to political parties, and that a public official had received benefits from her. A commission of inquiry was set up to inquire into the facts surrounding the relationships between Ms. Starr, any person or corporation she may have acted for, and any elected and appointed officials. The terms of reference included this:

> … a Commission be issued appointing the Honourable Justice Lloyd W. Houlden who is, without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization:
>
> 1) …
>
> 2) to inquire into and report upon any such circumstances or dealings where, in the opinion of the Commissioner, there is sufficient evidence that a benefit, advantage or reward or any kind was conferred upon an elected or unelected public official or upon any member of the family of any elected or unelected public official, or where, in the opinion of the Commissioner, there is sufficient evidence that there was [an] … agreement or attempt to confer a benefit, advantage or reward of any kind upon an elected or unelected public official or upon any member of the family of an elected or unelected public official.

[91] Ms. Starr applied to the Ontario Divisional Court and then to the Ontario Court of Appeal seeking an order that the Commissioner state a case as to the constitutionality of the inquiry. The case worked its way to the Supreme Court of Canada where the Court ruled that the terms of the inquiry exceeded the province's jurisdiction, holding that the inquiry in effect served as a substitute police investigation and preliminary inquiry with compellable accused in respect of s. 121 of the *Criminal Code* [influence peddling] and was in pith and substance a matter falling within Parliament's exclusive criminal law power. Lamer J. (as he then was) said for the majority at 1397-1398:

> … [T]he inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons. The use of the inquiry process in that way, having regard for the ability to coerce those named individuals to testify, would in effect be circumventing the criminal procedure which is within the exclusive jurisdiction of Parliament.

[92] I do not see the reasoning as analogous with the issue before this Court. The ARP regime does not authorize an investigation or preliminary inquiry in respect of criminal offences. It requires a peace officer who, in the course of a criminal investigation, obtains a "fail", "warn" or refusal to blow into an ASD to take action under the provincial legislation in the form of a mandatory prohibition from driving. The criminal investigation launches the provincial legislation. On obtaining a "warn" from the ASD, the police office will follow the path prescribed by the provincial legislation. On obtaining a "fail" the officer has two choices. He or she can choose to take only the one provincial path, but nothing precludes the officer from choosing both.

[93] Nor does the severity of the consequences provide further impetus to move the impugned legislation from competent provincial legislation into the federal sphere of criminal law. Section 92(15) of the *Constitution Act*, *1867*, empowers a legislature to impose fines or other punishments to enforce its laws. It provides:

> The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

[94] I agree with the analysis of Mr. Justice Sigurdson with respect to the division of powers issue. In my view he examined the evidence and legislation as a whole and properly reached the conclusion that the challenged legislation was not criminal law.

3) Further Analysis

[95] What follows is a further discussion of the issues which supports the analysis of Mr. Justice Sigurdson.

[96] As Sigurdson J. understood, the first question that must be addressed in a division of powers analysis is a determination of the pith and substance of the legislation. The pith and substance of an impugned law is an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. If the impugned legislation is related to a matter within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.

[97] The Supreme Court of Canada in *CWB* provided a useful framework for analysis. To determine the pith and substance, two aspects of the law must be examined: the purpose of the enabling body and the legal effect of the law. As Binnie and LeBel JJ. said in their majority reasons at para. 27:

> …To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).
>
> [Emphasis added.]

4) Considerations

i. Hansard and Other Sources of Stated Government Intent

[98] The "backgrounder" referred to by the appellants must be viewed in the context of the actual government announcements and what was said in the legislature. When the challenged legislation was introduced into the legislature a news release of April 27, 2010 proclaimed:

> 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.
>
> …
>
> "We believe that this new initiative will help all law enforcement officers to apprehend and reduce the number of impaired drivers in our province," said Insp. Mike Diack of the RCMP's B.C. Traffic Services. "There are people killed on B.C. highways each year as a direct result of impaired drivers. With additional enforcement powers, our police officers will be better equipped to reduce those casualties. Harm reduction is our number-one priority."
>
> (Public Safety and Solicitor General, News Release, 2010PSSG0026 - 000472, "B.C. Introduces Toughest Impaired Driving laws" (27 April, 2010)).

[99] On May 17-18, 2010, the Minister of Public Safety and Solicitor General stated in the legislature on second reading:

> 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 program.
>
> …
>
> 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.
>
> In B.C. upwards of 130-plus individuals and their families last year were impacted in the most terrible of ways by impaired driving. I suppose most disturbing of all is the fact that after a period where society did recognize the horror and react by altering behaviour in a fairly significant way the trend lines of late have begun to move in the wrong direction. Those accidents and those deaths are going up. There are comprehensive surveys that examine these sorts of things, and they indicate that the number of alcohol-related accidents and deaths is on the increase.
>
> This approach laid out in this legislation will be the toughest in Canada. I'm not sure that is necessarily the only way it should be characterized, but I suppose that is a simple and straightforward means of communicating to people who persist in this behaviour that they are going to feel significant and severe sanction. They will complement the *Criminal Code* provisions that remain in effect, and that is another point worth emphasizing when we talk about these provisions dealing with drinking and driving.
>
> The *Criminal Code* provisions exist. They will continue to exist. Whilst police will have additional tools - I think fair to say more immediate, more efficient tools - to deal with impaired driving, with swift and severe penalties available at the roadside, the prospect of facing *Criminal Code*-related procedures and sanctions does not disappear. In many instances it will still be the preferred route by which sanctions are brought to bear against drivers.
>
> (British Columbia, Legislative Assembly, *Hansard*, 39th Parl, 2nd Sess, No. 7 (17 May 2010) at 5416 -5417 (Hon. M. de Jong).

ii. Extrinsic Evidence

[100] The unchallenged expert evidence of Professor Robert E. Mann, a Ph.D. in psychology and an associate professor at the Dalla Lana School of Public Health at the University of Toronto, filed in an affidavit at the hearing of the petition set out the following:

1. Alcohol related collisions are common and one of the largest preventable sources of injuries, deaths and important costs to society;

2. The evidence from Canada and the U.S. shows that administrative suspensions have strong and important specific and general deterrence effects in reducing drinking driving recidivism, collisions, injuries and fatalities;

3. Alcohol increases the risk of collision involvement and the increase is exponential in nature; collision risks are significantly increased beginning in the .05-.08% range and possibly below; the pattern of exponentially increasing risk as blood/alcohol concentration ("BAC") increases can be observed in all age and gender groups;

4. At BAC levels of .05% and above, driving skills are significantly impaired and the likelihood of being involved in a collision is significantly elevated;

5. Administrative licencing action, licence suspensions, participation in remedial programs, participation in ignition interlock programs and being subject to vehicle impoundment significantly reduce recidivism rates;

6. The identification of drinking drivers on the road by observation alone can be very difficult; recent estimates are that one arrest occurs for every 27,000 miles driven by a drunk driver; one-time drinking events leading to apprehension for a drinking driving offence are likely extremely rare; these findings suggest that by the time a driver is apprehended on a drinking driving offence, he or she has typically driven while impaired many times;

7. Remedial or rehabilitative programs, which typically attempt to educate offenders about the risks associated with impaired driving, excessive alcohol and drug consumption, and the importance of separating substance abuse from driving are common in North America; recent reports and data confirm the value of combining remedial programs with licensing actions and interlock programs; and

8. Remedial programs like the responsible driver program in B.C. and ignition interlock requirements provide evidence of a longer term positive impact in terms of reducing drinking and driving.

iii. The Legislation as a Whole

[101] As counsel for the Province put it in his factum:

> The legislative regime is intended to get drinking drivers off the road for various periods of time, remove the risk to other users of the highways, and provide an opportunity for the drinking driver to rethink whether he/she wishes to continue risky behavior. The legislative regime of which the ARP is a part has as its central feature prohibitions from driving, backed by serious sanctions for driving while prohibited. Those prohibitions include*:*
>
> a. s. 93(1) – Superintendent's discretionary prohibition in the public interest for failure to comply with the Act or for an unsatisfactory driving record;
>
> b. s. 94.1 to s. 94.6 – Administrative driving prohibition ("ADP") for 90 days for blowing over .08 on a breathalyzer instrument or failing/refusing to provide a sample of breath;
>
> c. s. 98 – Court ordered discretionary prohibition for conviction of a motor vehicle related *Criminal Code* offence;
>
> d. s. 99 – Automatic 12 month prohibition for motor vehicle related *Criminal Code Offence*; and
>
> e. s. 215(2) – Twenty four hour prohibition where a police officer believes on reasonable and probable grounds that a person's ability to drive a motor vehicle is affected by alcohol.

[102] Violation of the prohibitions is sanctioned by s. 95 of the *Motor Vehicle Act* which provides:

> Driving while prohibited
>
> 95 (1) A person who drives a motor vehicle on a highway or industrial road knowing that
>
> (a) he or she is prohibited from driving a motor vehicle under section 91, 92, 93, 94.2, 215, 215.43 or 251 (4)
>
> (b) [Repealed 2010-14-10.]
>
> commits an offence and is liable,
>
> (c) on a first conviction, to a fine of not less than $500 and not more than $2 000 or to imprisonment for not more than 6 months, or to both, and
>
> (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $500 and not more than $2 000 and to imprisonment for not less than 14 days and not more than one year.

[103] The extrinsic evidence, *Hansard* and the legislative scheme itself provide a sound basis for the conclusion of the Chambers judge that the purpose and effect of the legislation is to regulate the highways and to enhance public safety.

[104] When placed against this background and examined as a whole, what might be seen as contra-indicators (the search, lengthy prohibitions, high costs and penalties), support the notion that the provincial government intended to create in purpose and effect strict rules and deterrents to keep intoxicated drivers off the road in order to encourage public safety. The appellants were unable to demonstrate before Justice Sigurdson, or in this Court, that in spite of what appears on the face of the legislation it constitutes a colourable attempt to legislate in the criminal field.

[105] I have not overlooked the "fresh evidence" which was put before this Court with the consent of the respondents. It concerned the number of Reports to Crown Counsel received by the Crown prior and subsequent to the ARP regime, and, statistics relating to the number of roadside suspensions issued pursuant to the ARP regime after it came into force. I do not intend to discuss the numbers, they are not that clear. In any event, as I have alluded to earlier, when placed in context, the success or failure of the ARP to reduce impaired driving charges cannot affect the question of the constitutional validity of the legislation.

[106] Through its pronouncements and legislation the provincial government has expressed concern about the death and injury to its citizens caused by drinking and driving, concluding that criminal sanctions are an insufficient and ineffective way to deter it. In my view it is open to the legislature, under the auspices of its licensing power, to require drivers who have been found to be operating a motor vehicle with risky amounts of alcohol in their system to employ the interlock device, to enlist in remedial programs and to be subjected to driving prohibitions to encourage them and other drivers to understand the dangers of drinking and driving so as to reduce their risk to others and make the highways safer.

[107] I would not accede to this ground of appeal.

IX THE SECOND GROUND OF APPEAL

A. Does the Legislation Violate s. 11(d) of the *Charter*?

[108] Section 11 of the *Charter* provides certain rights and procedural protections to persons "charged with an offence":

> s. 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;

[109] The Chambers judge concluded that ss. 215.41 to 215.51 were free from *Charter* scrutiny because they do not create an "offence" within the meaning of s. 11(d). The appellants take issue with that conclusion.

[110] The appellants' arguments, which I will turn to shortly, cannot be assessed without first understanding what is meant by "offence" in s. 11.

1) Meaning of "offence" in s. 11 of the Charter

[111] The meaning of "offence" as it is used in s. 11 was first considered by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*]. The Court concluded that the protections under s. 11 are available to persons prosecuted by the state for criminal, quasi-criminal and regulatory offences, either federally or provincially enacted (*Wigglesworth,* at 554).

[112] The Court went on to find that there are two ways to determine whether a matter could be considered an "offence": the first, whether because by its very nature it is a criminal [or quasi-criminal] proceeding; the second, because a conviction in respect of the offence leads to a true penal consequence.

i. "Criminal by nature"

[113] Writing for the majority in *Wigglesworth* Madam Justice Wilson said this at 559:

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are

> proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. 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.]

[114] Some offences by their very nature must fall within s. 11: matters of a public nature that tend to promote public order and welfare within a public sphere of activity. These are distinguished from matters that are private, domestic or disciplinary proceedings. There is also a distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. As Wilson J. explained at 560:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino*,*supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission*, *supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But 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.

[115] In the subsequent case of *R. v. Shubley*, [1990] 1 S.C.R. 3, McLachlin J., (as she then was) noted that in determining whether it can be said that proceedings are "criminal in nature" the focus is on the nature of the proceedings rather than the

nature of the act giving rise to the proceedings: "The question of whether proceedings are criminal in nature is concerned with, not the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves" (*Shubley*, at 18-19).

[116] In determining the nature of a proceeding there is a distinction drawn between matters that are public and matters that are private or internal. In *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, Mr. Justice Fish explained it this way at paras. 21-23:

> 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.*

[117] Fish J. then set out three matters to consider when determining whether the nature of a proceeding is criminal or quasi-criminal. He said at para. 24:

> 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.

[118] In *Martineau*, the legislation at issue was the *Customs Act*, and in particular the provisions whereby a customs officer can demand, via a notice of ascertained forfeiture, the value of goods that a person allegedly attempted to export by making false statements. The Court determined that the objectives of the *Customs Act* are to regulate, oversee and control cross-border movements of people and goods.

[119] Although the act of making false statements could result in criminal prosecution under the *Customs Act*, the Court determined that this did not mean that

the notice of ascertained forfeiture could be characterized as a penal proceeding. The appropriate test is the nature of the proceedings, not the nature of the act (*Martineau,* at para. 31).

[120] In *Martineau* the Court concluded that the purpose of the ascertained forfeiture was not to punish the offender. The Court held the purpose of the mechanism was to ensure compliance with the *Customs Act* by giving officers a timely and effective method of enforcing it. Although the forfeiture provision is intended to produce a deterrent effect, "actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings" (*Martineau*, at para. 38). There was also no indication the purpose of the ascertained forfeiture was to address a wrong to society.

[121] Finally, the Court in *Martineau* asked: does it look like a criminal or quasi-criminal proceeding? The Court found that the ascertained forfeiture involved a four-step administrative process that had little in common with penal proceedings. Fish J. observed at para. 45:

> 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.

ii. "True penal consequences"

[122] The Court in *Wigglesworth* accepted that even if a matter was not "criminal by its very nature" it might also be subject to s. 11 of the *Charter* because it imposed "true penal consequences". This second test considers whether a "person charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere" nevertheless is protected by s. 11 of the *Charter* because it involves the imposition of true penal consequences. Wilson J. said at 560-561:

> 24. This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. 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.

[123] This second test is difficult to satisfy. Wilson J. continued at 561-562:

> [I]t is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the Charter only when a public wrong or transgression against society, as opposed to an internal wrong, is committed.

[124] However, Wilson J. did decide that the proceeding at issue in *Wigglesworth* was just such a case. The proceedings in that case involved a constable who was convicted of a "major service offence" under the *Royal Canadian Mounted Police Act.* Wilson J. stated at 563-564:

> It would therefore seem that the proceedings before the Royal Canadian Mounted Police Service Court fail what I have called the "by nature" test. They are neither criminal proceedings nor quasi-criminal proceedings. They do not appear to be the kind of proceedings which fall within the ambit of s. 11. But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the Royal Canadian Mounted Police Act if he or she is found guilty of a major service offence. …As I have indicated above, in a case of conflict the "by nature" test must give way to the "true penal consequence" test. I find, therefore, that s. 11 applies to proceedings in respect of a major service offence before the Royal Canadian Mounted Police Service Court.

2) Reasons for Judgment

[125] In the case at bar Mr. Justice Sigurdson applied the two-pronged *Wigglesworth* test. He first considered the nature of the proceeding, contrasting it

with criminal proceedings, and concluded that under the first part of the *Wigglesworth* test s. 11 did not apply:

> [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.

[126] The Chambers judge then considered the second part of the *Wigglesworth* test, whether the sanctions associated with the proceedings were imposed for the purpose of redressing a wrong done to society at large and therefore a "true penal consequence".

[127] He first looked at the individual consequences of the penalties: the prohibition, the costs associated with re-instating the licence, towing, storage, remedial programs, the interlock device and the automatic monetary penalty. He held that driving is a privilege and the prohibition is a removal of a privilege and not a true penal consequence (at paras. 168-169). The costs associated with the prohibition are administrative consequences of registering in the "fail" range and are aimed at the prevention of harm, not toward addressing a wrong to society (at para. 170). He distinguished punitive penalties from penalties aimed at general or specific deterrence and concluded that, in this case, the penalties were aimed at deterrence (paras. 171-180).

[128] Lastly, the trial judge considered the penalties as a whole and concluded that they were not true penal consequences. He concluded at paras. 181-184:

> 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.

> 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.
>
> 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".
>
> 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*.

3) Analysis – criminal by nature

[129] The appellants' argument is largely based on their central position in this case – that the legislation in question is criminal in nature. They argue that the consequences of the roadside prohibition amount to sanctions and penalties designed not just to deter but to punish the drinking driver. It follows from this that although they need only to meet one aspect of the *Wigglesworth* test, they urge this Court to find that the legislation meets both, that the legislation is criminal in nature and that it imposes true penal consequences.

[130] The appellants sum up their position this way in their factum:

> The primary function of the ARP regime is to supplant the *Criminal Code* and replace it with a provincial regime that vitiates procedural protections and eliminates the cost of criminal proceedings. Justice Sigurdson failed to classify the ARP regime as a criminal proceeding "by its very nature" because he mischaracterized the ARP regime's purpose as being "to provide for the suspension of a person's driver's licence." The ARP regime proceedings focus entirely on replacing *Criminal Code* proceedings, removing the procedural protections of the criminal law, and thereby reducing the expense to the province of proscribing drinking and driving.

[131] Thus in the latter part of their argument the appellants take aim at the manner in which the prohibitions are obtained, the practical inability of a driver to challenge

the results of the ASD, the restricted nature of the re-instatement hearing, and the significant monetary cost to those caught by the legislation. Many of these points would attract the provisions of s. 11(d) of the *Charter* if the legislation were criminal in nature. But the alleged unfairness of the process is not a way to gauge whether it is criminal legislation or not. This part of their argument does not address the issues faced by the Court in this case.

[132] That said, the appellants properly address the *Wigglesworth* issues with their assertion that the objective of the legislation is to replace the *Criminal Code* and that the purpose of the suspension and penalties is to punish and stigmatize drivers who "fail" the ASD test.

[133] As I noted earlier, in determining whether a matter is criminal in nature, *Martineau* requires a court to consider the objectives of the legislation, the purpose of the sanctions and the process leading to the imposition of the sanction.

[134] The conclusion of the Chambers judge that the impugned legislation is valid provincial legislation dealt with the objectives of the legislation which he found were the licensing of drivers, the enhancement of highway traffic safety and the deterrence of persons from driving on highways when their ability to drive is impaired by alcohol. There is no need to discuss it further here.

[135] The Chambers judge also dealt extensively with the purpose of the sanctions. I have reproduced his analysis in paragraph [128] above. I will return to this point later in these reasons. For now it is enough to say that the reasons of the Chambers judge fully addressed the second of the *Martineau* criteria.

[136] Finally the Chambers judge examined the process leading to the sanctions. He noted that it did not take the form of a prosecution. The appellants argue that according to the trial judge's logic, the provincial legislature could avoid the application of s. 11 by simply removing the procedural elements and safeguards that make a proceeding appear criminal. However, the fact that the proceedings do not take the form of a prosecution is one of the elements that must be examined. It will

be remembered that in *Martineau* the court asked whether it *looked* like a criminal or quasi-criminal proceeding. The fact that no one was charged with an offence and that no criminal record resulted from the proceeding were important markers. I am satisfied that the last criteria in *Martineau* was examined properly in this case.

[137] Nonetheless, the appellants argued in the alternative that driving is something that is of a public nature and the *Motor Vehicle Act* is intended to promote public order and welfare within this public sphere of activity and therefore this matter clearly falls within s. 11.

[138] However, Wilson J. said in *Wigglesworth* there is a difference between proceedings to promote public order and proceedings to maintain a licence at 560:

> There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

[139] In my view the Chambers judge was correct in finding that the challenged legislation was not criminal by nature.

4) Analysis - true penal consequence

[140] The appellants were supported by the intervenors, the British Columbia Civil Liberties Association (BCCLA), in their argument that the legislation imposed a true penal consequence.

[141] The BCCLA says that the bundle of sanctions when seen as a whole "has an aspect that is aimed at punishment rather than merely compliance with traffic regulations." They say the regime is stigmatizing and promotes specific deterrence of future conduct as well as punishment of past conduct. The argument continues with the assertion that the bundle of sanctions "reflects a number of the traditional

goals of criminal sentencing including denunciation, rehabilitation and protection of the public."

[142] This last observation is not helpful to the analysis. Both criminal sentencing and regulatory sanctions have in common the protection of the public as their ultimate goal. They both may do so by employing punishments that aim toward deterrence and in some cases, rehabilitation. What they specifically do not have in common is the notion of redressing the wrong done to society or what was described in *R. v. M.(C.A.),* [1996] 1 S.C.R. 500 as "retribution" and "denunciation". Speaking for the court in that case Lamer C.J. said this at paras. 79 and 81:

> Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. With regard to the attribution of criminal liability, I have repeatedly held that it is a principle of "fundamental justice" under s. 7 of the *Charter* that criminal liability may only be imposed if an accused possesses a minimum "culpable mental state" in respect of the ingredients of the alleged offence. See *Martineau*, *supra*, at p. 645. See, similarly, *Re B.C. Motor Vehicle Act*, *supra*; *R. v*. *Vaillancourt*, [1987] 2 S.C.R. 636. It is this mental state which gives rise to the "moral blameworthiness" which justifies the state in imposing the stigma and punishment associated with a criminal sentence. See *Martineau*, at p. 646. I submit that it is this same element of "moral blameworthiness" which animates the determination of the appropriate quantum of punishment for a convicted offender as a "just sanction"….
>
> …
>
> Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v*. *Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". The relevance of both retribution and denunciation as goals of

> sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.
>
> [Emphasis in original.]

[143] The question in this case then is whether the sanctions imposed on a driver caught under s. 215.41 can be said to impose a true penal consequence in the sense that the punishment incorporates principles of retribution or denunciation. In other words, are they imposed for the purpose of redressing the wrong done to society at large.

[144] The BCCLA submitted the Chambers judge erred in his conclusion that the legislation did not impose a true penal consequence because he looked at the sanctions in a piecemeal fashion rather than examining the scheme as a whole. They submit that by isolating each sanction for separate analysis the Chambers judge failed to grasp the significance of the sanctions as a whole. I disagree.

[145] In my view when the Chambers judge analyzed each individual sanction, he concluded that each served the objects of the legislation. Examining it as a whole, the Chambers judge concluded that the sanctions are a package, the facets of which work together to achieve the goal of highway safety.

[146] That said, the Chambers judge also recognized the sum of the parts may be greater than the whole. In *Wigglesworth*, Wilson J. had observed that a regulatory system might impose "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong to society at large." The Chambers judge considered this specifically and found that it did not. He said:

> [180] As evidenced by the above excerpts from *Thow* and *Lavallee* [citations omitted] 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".

[147] In my view the Chambers judge did not err in his analysis of this aspect of the *Wigglesworth* test.

[148] I would not accede to this ground of appeal.

X CONCLUSION

[149] In my view the provincial ARP regime does not trench upon the federal criminal power, nor can it be reviewed under s. 11(d) of the *Charter*. In the result I would dismiss Mr. Goodwin's appeal.

XI THE CROSS APPEALS

[150] The respondents have filed cross appeals with respect to the issues raised in the cases of Ms. Beam, Mr. Chisholm, and Mr. Roberts.

[151] Rather than create more confusion, I will refrain from identifying the parties as the "appellants" and "respondents". I will refer to the appellant on the cross appeals

as "the Province" and the respondents on the cross appeals as "the drivers" or by their names.

[152] The Province appeals this portion of the December 23 2011 order:

> THIS COURT ORDERS AND DECLARES that s. 215.41(3)(a), s. 215.42(1), s. 215.43(2)(a) and s. 215.5(1)(b)(i) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, insofar as they apply to a situation where an approved screening device registers a fail reading over 0.08, unjustifiably infringe s. 8 of the *Charter of Rights and Freedoms* and are to that extent invalid, and of no force or effect;

A. Conclusions of the Chambers Judge

[153] The Chambers judge concluded that:

1. The requirement that a driver provide a sample of breath into the ASD at roadside is a search and seizure within the meaning of s. 8 of the *Charter*.

2. That the search is authorized by s. 241.41(3) of the *Motor Vehicle Act*.

3. That the law authorizing the search is unreasonable principally because it does not meaningfully allow the driver to challenge the validity of the search results.

4. The Province did not justify the s. 8 violation created by under s. 1 of the *Charter*.

B. The Legislation

[154] The essential parts of the *Motor Vehicle Act,* for purposes of the cross appeals, are the following:

> 215.41 (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.

[155] The legislation under review also provides:

> 215.42 (1) If an analysis of the breath of a person by means of an approved screening device under section 215.41 (3) registers a warn or a fail, a second analysis must be performed if, after a peace officer serves on the person a notice of driving prohibition under section 215.41(3)(d), the person forthwith requests the second analysis.
>
> (2) A second analysis performed under this section must be performed with a different approved screening device than was used in the analysis under section 215.41(3).
>
> (3) If a person provides a sample of breath for a second analysis under this section forthwith on being requested to do so by the peace officer, the result of the second analysis governs, and any prohibition resulting from the analysis under section 215.41(3) continues or terminates or is varied accordingly.

[156] The legislation provides for the following consequences for a driver who registers a "fail" on the ASD:

> 215.43 (2) Subject to section 215.42(3), if a person is served with a notice of driving prohibition under section 215.41 in circumstances where
>
> (a) an approved screening device registers a fail, or
>
> (b) the person refuses or fails to comply with a demand as described in section 215.41 (4),
>
> the person is prohibited from driving for a period of 90 days.
>
> (3) A period of prohibition under this section takes effect immediately on service of the notice of driving prohibition under section 215.41.
>
> …
>
> 215.44 (1) A person who has been served with a notice of driving prohibition under section 215.41 is also liable to pay, no later than 30 days after the date the notice is served, a monetary penalty in the amount prescribed by regulation.

> (2) The monetary penalty must not exceed the amount prescribed by regulation, and in any event must not exceed $500.
>
> 215.45 If a person is prohibited from driving for a period of 30 or 90 days under section 215.43, the person must register in and attend any remedial program required by the superintendent under section 25.1.
>
> …
>
> 215.46 (2) If a peace officer serves a person with a notice of a 30-day or 90-day driving prohibition under section 215.41 (3), the peace officer must cause the motor vehicle that the person was driving or operating at the time the notice was served to be taken to and impounded at a place directed by the peace officer.
>
> 215.47 A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent
>
> > (a) the person's licence or permit or any document issued in another jurisdiction that allows the person to operate a motor vehicle, if the peace officer took the licence, permit or document into possession,
> >
> > (b) a copy of the notice of driving prohibition,
> >
> > (c) a certificate of service, in the form established by the superintendent, showing that the notice of driving prohibition was personally served on the person subject to the driving prohibition, and
> >
> > (d) a report, in the form established by the superintendent.

[157] If a person who has been given a 90-day roadside prohibition wishes to contest it, he or she may apply for a review. The legislation provides:

> 215.48 (1) A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to the superintendent for a review of the driving prohibition by
>
> > (a) filing an application for review with the superintendent,
> >
> > (b) paying to the superintendent the prescribed hearing fee, and
> >
> > (c) if it has not been taken by the peace officer or sent to the superintendent under section 215.41, surrendering to the Insurance Corporation of British Columbia his or her licence or permit to operate a motor vehicle unless the person completes and files with the superintendent a statutory declaration stating that the licence or permit has been lost, stolen or destroyed.
>
> (2) An application for review must be in the form, contain the information and be completed in the manner required by the superintendent.

(3) An applicant may attach to the application for review any statements or other evidence that the applicant wishes the superintendent to consider.

(4) The filing of an application for review does not stay the driving prohibition.

(5) The superintendent is not required to hold an oral hearing unless

(a) the driving prohibition is for 30 or 90 days, and

(b) the applicant

(i) requests an oral hearing at the time of filing the application for review, and

(ii) pays the prescribed oral hearing fees.

(6) If a person requests an oral hearing and fails to appear on the date and at the time and place arranged for the hearing, without prior notice to the superintendent, the right to an oral hearing is deemed to have been waived by the person.

215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider

(a) any relevant written statements or evidence submitted by the applicant,

(b) the report of the peace officer forwarded under section 215.47 (d),

(c) a copy of the notice of driving prohibition,

(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer,

(e) in the case of an oral hearing, any relevant evidence given or representations made at the hearing, and

…

(2) In a review under section 215.48, no person may be cross examined.

(3) Despite subsection (1), the superintendent may, in the superintendent's discretion, proceed with a hearing whether or not the superintendent has received, at the time of the hearing, all those documents required to be forwarded to the superintendent under section 215.47.

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,

…

(b) in respect of a 90-day driving prohibition,

> (i) an approved screening device registered a fail, or
>
> …
>
> the superintendent must confirm the driving prohibition, the monetary penalty for which the person is liable under section 215.44 and the impoundment imposed under section 215.46 for the period specified in section 253.
>
> …
>
> (3) If, after considering an application for review under section 215.48 in respect of a 90-day prohibition, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and an approved screening device registered a warn rather than a fail, the superintendent must
>
> (a) substitute a 3-day, 7-day or 30-day driving prohibition, as applicable and,
>
> (b) vary accordingly the monetary penalty for which the person is liable under section 215.44 and, in respect of the impoundment, section 253(8) applies.
>
> (4) If, after considering an application for review under section 215.48, the superintendent is satisfied that
>
> (a) the person was not a driver within the meaning of section 215.41(1),
>
> (b) ...or
>
> (c) in the case of a 90-day driving prohibition,
>
> (i) an approved screening device did not register a fail or a warn, or,
>
> (ii) ...
>
> the superintendent must
>
> (d) revoke the driving prohibition,
>
> …
>
> [Emphasis added.]

[158] As mentioned at the outset (para. [5]), bill 46, the *Motor Vehicle Amendment Act*, 2012 S.B.C., c. 26 [*Amendment Act*], came into force on June 15, 2012. The *Amendment Act* was intended to correct the constitutional defect in the legislation identified by Mr. Justice Sigurdson. Although this part of the legislation has been amended, the appeals based on the repealed legislation are not moot. If this Court finds that the Chambers judge erred in finding the legislation violated the s. 8 rights of Ms. Beam, Mr. Chisholm and Mr. Roberts, their prohibitions and fines will be reinstated and their claim for damages dismissed.

C. Position of the Province

[159] The Province takes the position that the Chambers judge erred in finding that the ARP legislation authorizes a search and seizure for purposes of s. 8 of the *Charter*.

[160] In the alternative the Province says that if the legislation does authorize a search or seizure, then the Chambers judge erred in finding that it was unreasonable within the meaning of s. 8 of the *Charter* because a driver has no expectation of privacy when it comes to matters concerning his or her licence.

[161] Finally the Province submitted that if there is a search and it is said to be unreasonable, the Chambers judge erred in finding that the Province had not justified it under s. 1 of the *Charter*.

[162] Rather than set out the arguments of the Province, I will deal with them in my analyses of the issues.

D. Analysis

1) Does the Legislation Authorize a Search or Seizure?

[163] In reaching his conclusion that the *Motor Vehicle Act* authorized a search Justice Sigurdson said this:

> [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.

[164] Counsel for the Province submitted that this reading of the legislation is incorrect. He says that s. 251.41 of the *Motor Vehicle Act* does not authorize a search on its face, it merely requires the peace officer who has made the demand for breath under s. 254(2) of the *Criminal Code* to act upon the information if a "warn" or "fail" reading is obtained. The one follows the other.

[165] As I understand his reasons, the Chambers judge found that the provincial legislation did more than use the *Criminal Code* search as a simple trigger to administrative action. He saw the provisions of the *Motor Vehicle Act* as creating an interlocking scheme with those of the *Criminal Code* wherein the Province utilized the *Code* provisions as a platform to craft a broader search, one which uses not only a "fail" but a "warn" on an ASD (which must be a device authorized by the Province under s. 215.41(2)) to require action.

[166] In my view this is a matter of statutory interpretation. I agree with the analysis of the Chambers judge. I would not accede to this ground of appeal.

2) Is the Search Reasonable – A Driver's Expectation of Privacy

[167] At the hearing of the petitions the Province took the position that a driver had *no* expectation of privacy with respect to the type of search anticipated by the impugned provisions.

[168] The Chambers judge rejected the submission that a driver had no expectation of privacy. He concluded that the driver had a *lower* expectation of privacy. He said:

> [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 in original.]

[169] On this appeal the Province argues that a driver with a *diminished* expectation of privacy would expect to be required to submit to the ASD testing at roadside. The Province asserts that when a person chooses to exercise the privilege of driving granted by a driver's licence he or she may be fairly presumed to have willingly and voluntarily accepted all of the obligations and duties that accompany that privilege that he or she will not consume alcohol over the legal limit and that he or she will be subject to providing a sample for analysis by an ASD.

[170] This aspect of the appeal is answered by the analysis of the Chambers judge with respect to the unreasonableness of the review provided by the ARP regime of a prohibition based on the results of the ASD. The Chambers judge concluded that a motorist had no meaningful way under this legislation to challenge the results of the ASD. In my view a motorist cannot be presumed to agree to provide a sample of breath into an instrument the results of which he or she has no ability to challenge.

[171] It should also be remembered that a driver who drives while prohibited faces quasi-criminal charges under s. 95 the *Motor Vehicle Act* (see para. [102] above). An offender may be fined or imprisoned for violating that section of the *Act*. This fact fortifies the view that a motorist cannot be presumed to agree to provide a sample of

breath, the results of which he or she has no meaningful way to challenge, and should he or she chose to drive while under such a prohibition could be charged with an offence and sent to jail.

3) The Reasonableness of the Law

[172] Next the Chambers judge turned to the reasonableness of the law authorizing the search. In doing so he noted what had been said in *Del Zoto v. Canada* (1997), 147 D.L.R. (4th) 457 (F.C.A.) by Justice Strayer whose dissenting opinions were adopted in the Supreme Court of Canada ([1999] 1 S.C.R. 3). Justice Strayer said this at 478:

> 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.

[173] Using these criteria as his starting point, the Chambers judge founded his analysis on the premise that driving is a privilege rather than a right (*Buhlers*); the licensing of driving is a highly regulated provincial activity; drivers have a diminished expectation of privacy in a breath sample compelled at roadside for assessing sobriety; and that the search is minimally intrusive. He said these factors suggest that the legislation is reasonable (para. 259).

[174] However, countervailing considerations include the fact that the ASD has a limited use in a criminal investigation but forms the basis of a prohibition in the challenged legislation. In the ARP regime the results of the ASD are reasons for the suspension – it is not a regulatory regime that merely requires the production of a document or evidence that may be produced in a later regulatory proceeding. The Chambers judge noted that the search was conducted on the basis of reasonable suspicion rather than reasonable belief; that the ARP "is not far removed" from the criminal law; that the penalties were not inconsequential; and finally, that the driver

has a very limited ability to challenge the grounds for the prohibition and penalty (paras. 260, 284).

[175] After noting the evidence relating to possible inaccuracies with the ASD, that is, that it cannot account for mouth alcohol from recent consumption, mouthwash, or regurgitation, the Chambers judge moved on to a discussion of the reviewability of the ARP and possibility of an unjust result. He said:

> [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.
>
> [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.
>
> [Emphasis added.]

[176] Examining the reviewability of the prohibition imposed after negative ASD results he said:

> [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.
>
> ...
>
> [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.

[177] Based on those considerations the Chambers judge found that the impugned legislation created an unreasonable search under s. 8 of the *Charter* as it relates to drivers who register a "fail" on the ASD. The question whether it produces an unfair result for those who register a "warn" is not before the Court on this appeal.

[178] The Province did not challenge this part of Justice Sigurdson's conclusions. Instead, counsel submitted that the s. 8 violation created by the ARP regime was justified under s. 1 of the *Charter*.

E. Is the Impugned Legislation Saved by s. 1 of the *Charter*?

[179] The Province submitted that the Chambers judge erred in failing to find that the violation of s. 8 by the ARP regime was justified under s. 1 of the *Charter*. Section 1 of the *Charter* provides:

> 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.

[180] In order to justify the breach the Province was required to meet the test in *R. v. Oakes* [1986], 1 S.C.R. 103 [*Oakes*].

[181] *Oakes* set out two central criteria which must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society: First, the objective to be served by the measures which limit a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the state must show the means employed to achieve its objects to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components: 1. The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective; 2. The means should impair the right in question as little as possible; and 3. There must be proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

[182] In employing the *Oakes* test Justice Sigurdson said this:

> [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.

[183] Thus the Chambers judge concluded that the s. 8 privacy rights of motorists subject to a roadside breath demand taken under the provisions of the *Motor Vehicle Act* challenged on these appeals are breached and the legislation cannot be saved by s. 1 of the *Charter* as it does not minimally impair the right. The legislation does not provide a meaningful review of the results of the test on which the sanctions are based.

[184] I agree with the Chambers judge and would add nothing to his analysis.

XII CONCLUSION

[185] For the foregoing reasons I am of the view that the cross appeals must be dismissed.

"The Honourable Madam Justice Ryan"

Dated: _____

I AGREE:

"The Honourable Mr. Justice Hinkson"

I AGREE:

"The Honourable Madam Justice MacKenzie"

Appendix "A"

215.41 (1) In this section, "driver" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion.

(2) In this section and in sections 215.42, 215.43, and 215.5:

> "approved screening device" means a device prescribed by the Lieutenant Governor in Council for the purposes of this section;
>
> "fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood;
>
> "warn" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

(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).

(5) If the driver is not in possession of his or her licence or permit issued under this Act to operate a motor vehicle at the time the driver is served with the notice of driving prohibition, the driver must promptly send the licence or permit to the Insurance Corporation of British Columbia.

(6) The notice of driving prohibition must be in the prescribed form and must contain the following:

> (a) a statement that the driver is immediately prohibited from driving, for the period set out in the notice of prohibition;

(b) a statement setting out

(i) the amount of any monetary penalty imposed on the driver under section 215.44, and
(ii) the requirement that the monetary penalty be paid no later than 30 days after the date the notice is served;

(c) a statement of the right to have the driving prohibition reviewed by the superintendent under section 215.48;

(d) instructions describing how to apply for that review.

(7) A notice of driving prohibition must not be served on a person under this section if a notice of driving prohibition is served on the person under section 94.1.

Opportunity for second analysis

215.42 (1) If an analysis of the breath of a person by means of an approved screening device under section 215.41 (3) registers a warn or a fail, a second analysis must be performed if, after a peace officer serves on the person a notice of driving prohibition under section 215.41 (3)(d), the person forthwith requests the second analysis.

(2) A second analysis performed under this section must be performed with a different approved screening device than was used in the analysis under section 215.41 (3).

(3) If a person provides a sample of breath for a second analysis under this section forthwith on being requested to do so by the peace officer the result of the second analysis governs, and any prohibition resulting from the analysis under section 215.41 (3) continues or terminates or is varied accordingly.

Effect of driving prohibition under section 215.41

215.43 (1) Subject to section 215.42 (3), if a person is served with a notice of driving prohibition under section 215.41 in circumstances where an approved screening device registers a warn, the person is prohibited from driving for

(a) 3 days, in the case of a first prohibition,

(b) 7 days, in the case of a second prohibition, or

(c) 30 days, in the case of a subsequent prohibition.

(2) Subject to section 215.42 (3), if a person is served with a notice of driving prohibition under section 215.41 in circumstances where

(a) an approved screening device registers a fail, or

(b) the person refuses or fails to comply with a demand as described in section 215.41 (4),

the person is prohibited from driving for a period of 90 days.

(3) A period of prohibition under this section takes effect immediately on service of the notice of driving prohibition under section 215.41.

(4) For the purposes of subsection (1), a prohibition is

(a) a first prohibition if a person has not been subject to a previous prohibition under that subsection within the 5 year period preceding the prohibition,

(b) a second prohibition if a person has been subject to one previous prohibition under that subsection within the 5 year period preceding the prohibition, and

(c) a subsequent prohibition if the person has been subject to 2 or more previous prohibitions under that subsection within the 5 year period preceding the prohibition.

(5) For the purposes of determining whether a prohibition is a second or subsequent prohibition, the prohibition must not be considered to be a previous prohibition unless

(a) the period for requesting a review of the prohibition under section 215.48 has expired, or

(b) if the person requests a review of the prohibition, the period referred to under section 215.5 (6) or (7), as applicable, has expired.

Additional consequences — monetary penalty

215.44 (1) A person who has been served with a notice of driving prohibition under section 215.41 is also liable to pay, no later than 30 days after the date the notice is served, a monetary penalty in the amount prescribed by regulation.

(2) The monetary penalty must not exceed the amount prescribed by regulation, and in any event must not exceed $500.

Additional consequences — remedial program

215.45 If a person is prohibited from driving for a period of 30 or 90 days under section 215.43, the person must register in and attend any remedial program required by the superintendent under section 25.1.

Additional consequences — impoundment of vehicle

215.46 (1) If a peace officer serves a person with a notice of a 3-day or 7-day driving prohibition under section 215.41 (3) and believes that impoundment of the motor vehicle that the person was driving or operating at the time the notice was served is necessary to prevent the person from driving or operating the motor vehicle before the prohibition expires, the peace officer may cause the motor vehicle to be taken to and impounded at a place directed by the peace officer.

(2) If a peace officer serves a person with a notice of a 30-day or 90-day driving prohibition under section 215.41 (3), the peace officer must cause the motor vehicle that the person was driving or operating at the time the notice was served to be taken to and impounded at a place directed by the peace officer.

Duties of peace officer related to driving prohibition under section 215.41

215.47 A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent

> (a) the person's licence or permit or any document issued in another jurisdiction that allows the person to operate a motor vehicle, if the peace officer took the licence, permit or document into possession,
>
> (b) a copy of the notice of driving prohibition,
>
> (c) a certificate of service, in the form established by the superintendent, showing that the notice of driving prohibition was personally served on the person subject to the driving prohibition, and
>
> (d) a report, in the form established by the superintendent.

Review of driving prohibition under section 215.41

215.48 (1) A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to the superintendent for a review of the driving prohibition by

> (a) filing an application for review with the superintendent,
>
> (b) paying to the superintendent the prescribed hearing fee, and
>
> (c) if it has not been taken by the peace officer or sent to the superintendent under section 215.41, surrendering to the Insurance Corporation of British Columbia his or her licence or permit to operate a motor vehicle unless the person completes and files with the superintendent a statutory declaration stating that the licence or permit has been lost, stolen or destroyed.

(2) An application for review must be in the form, contain the information and be completed in the manner required by the superintendent.

(3) An applicant may attach to the application for review any statements or other evidence that the applicant wishes the superintendent to consider.

(4) The filing of an application for review does not stay the driving prohibition.

(5) The superintendent is not required to hold an oral hearing unless

> (a) the driving prohibition is for 30 or 90 days, and
>
> (b) the applicant
>
> > (i) requests an oral hearing at the time of filing the application for review, and

(ii) pays the prescribed oral hearing fees.

(6) If a person requests an oral hearing and fails to appear on the date and at the time and place arranged for the hearing, without prior notice to the superintendent, the right to an oral hearing is deemed to have been waived by the person.

Considerations on review under section 215.48

215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider

(a) any relevant written statements or evidence submitted by the applicant,

(b) the report of the peace officer forwarded under section 215.47 (d),

(c) a copy of the notice of driving prohibition,

(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer,

(e) in the case of an oral hearing, any relevant evidence given or representations made at the hearing, and

(f) in the case of a second or subsequent prohibition, as described in section 215.43 (4) and (5), the person's driving record.

(2) In a review under section 215.48, no person may be cross examined.

(3) Despite subsection (1), the superintendent may, in the superintendent's discretion, proceed with a hearing whether or not the superintendent has received, at the time of the hearing, all those documents required to be forwarded to the superintendent under section 215.47.

Decision of superintendent after review under section 215.48

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) in respect of a 3-day, 7-day or 30-day driving prohibition,

(i) an approved screening device registered a warn, and

(ii) in the case of

(A) a 7-day driving prohibition, the driving prohibition was a second prohibition, or

(B) a 30-day driving prohibition, the driving prohibition was a subsequent prohibition, or

(b) in respect of a 90-day driving prohibition,

(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 imposed under section 215.46 for the period specified in section 253.

(2) If, after considering an application for review under section 215.48 in respect of a 7-day or 30-day driving prohibition, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and an approved screening device registered a warn, and determines that

(a) in the case of a 7-day driving prohibition, the prohibition was a first prohibition, or

(b) in the case of a 30-day driving prohibition, the prohibition was either

(i) a first prohibition, or

(ii) a second prohibition,

the superintendent must

(c) substitute

(i) a 3-day driving prohibition, in the circumstances described in paragraph (a) or (b) (i), or

(ii) a 7-day driving prohibition, in the circumstances described in paragraph (b) (ii), and

(d) vary accordingly the monetary penalty for which the person is liable under section 215.44 and, in respect of any impoundment, section 253 (8) applies.

(3) If, after considering an application for review under section 215.48 in respect of a 90-day prohibition, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and an approved screening device registered a warn rather than a fail, the superintendent must

(a) substitute a 3-day, 7-day or 30-day driving prohibition, as applicable and,

(b) vary accordingly the monetary penalty for which the person is liable under section 215.44 and, in respect of the impoundment, section 253 (8) applies.

(4) If, after considering an application for review under section 215.48, the superintendent is satisfied that

(a) the person was not a driver within the meaning of section 215.41 (1),

(b) in the case of a 3-day, 7-day or 30 day driving prohibition, an approved screening device did not register a warn, or

(c) in the case of a 90-day driving prohibition,

(i) an approved screening device did not register a fail or a warn, or,

(ii) the person did not fail or refuse to comply with a demand made on the person as described in section 215.41(4), or had a reasonable excuse for failing to comply with the demand,

the superintendent must

(d) revoke the driving prohibition,

(e) cancel the monetary penalty for which the person would otherwise be liable under section 215.44 and, in respect of any impoundment, section 253 (8) applies, and

(f) if the person held a valid licence or permit issued under this Act to operate a motor vehicle at the time the notice of driving prohibition was served under section 215.41, direct the Insurance Corporation of British Columbia to return any licence or permit to operate a motor vehicle taken into possession by the peace officer or sent to the corporation.

(5) Despite subsection (4)(b), the superintendent must not take any action described in subsection (4)(d), (e) or (f) in respect of a 3-day, 7-day or 30-day driving prohibition if the superintendent is satisfied that, in the circumstances under review, an approved screening device registered a fail instead of a warn.

(6) Subject to subsection (7), the decision of the superintendent and the reasons for the decision must be in writing and a copy must be sent to the applicant within 21 days of the date the notice of driving prohibition was served on the applicant under section 215.41.

(7) If the superintendent is unable to send the decision to the applicant within the 21 day period set out in subsection (6), the superintendent may extend that period for a period determined by the superintendent.

(8) If the superintendent extends the period for sending a decision to the applicant under subsection (7), the superintendent may

(a) stay the driving prohibition imposed on the applicant under section 215.43 for the period of the extension determined under subsection (7), and

(b) if the applicant held a valid licence or permit issued under this Act to operate a motor vehicle at the time the applicant was served with the notice of driving prohibition under section 215.41, direct the Insurance Corporation of British Columbia to issue to the applicant a temporary driver's licence that expires with the period of extension determined under subsection (7).

(9) The superintendent must promptly give the person notice of an extension made under subsection (7).

(10) The copy referred to in subsection (6) and the notice referred to in subsection (9) must be sent to the person

(a) at the last known address of the person as shown in the records maintained by the Insurance Corporation of British Columbia, or

(b) at the address shown in the application for review, if that address is different from the address in the Insurance Corporation of British Columbia's records.

(11) A notice of extension given under subsection (9) is deemed to be a notice of prohibition for the purposes of section 95 (4) (a) or (b).

Regulations — automatic roadside driving prohibitions

215.51 Without limiting the authority of the Lieutenant Governor in Council to make regulations under any other provision of this Act, the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing an approved screening device for the purposes of the definition of "approved screening device" in section 215.41 (2);

(b) prescribing the form of notice of driving prohibition for the purposes of section 215.41 (6);

(c) for the purposes of section 215.44,

(i) prescribing monetary penalties, including prescribing a schedule of increasing monetary penalties based on whether a driving prohibition is a first, second or subsequent prohibition as described in section 215.43 (4), and

(ii) prescribing the manner for payment of monetary penalties;

(d) prescribing hearing fees, including oral hearing fees, for the purposes of section 215.48.