PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Brown*, 2021 NSPC 32

Date: 20210707
Docket: 8380034
8380035
Registry: Amherst

Between:

Her Majesty the Queen

v.

Carlyle William Brown

DECISION (ON MOTION BY DEFENDANT TO EXCLUDE EVIDENCE OF RESULTS OF BREATH SAMPLE)

Judge: The Honourable Judge Rosalind Michie

Heard: 9 February 2021, in Amherst, Nova Scotia

Decision: 6 July 2021

Charges: Sections 320.14(1)(a) & 320.14(1)(b) *Criminal Code*

Counsel: Paul Drysdale, for the Crown
Jim O'Neil, for the Defence

By the Court:

[1] The accused, Carlyle William Brown, is charged in an information sworn on September 4, 2019 that he did:

> *…on or about the 22th (sic) day of July, 2019, at or near Springhill, Cumberland County, Nova Scotia, did operate a conveyance while their ability to operate it was impaired to any degree by alcohol, or a drug, or both, contrary to s. 320.14(1)(a) of the Criminal Code*
>
> *AND FURTHERMORE, at the same date and place did within two hours after ceasing to operate a conveyance, have a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 mL of blood, contrary to s. 320.14(1)(b) of the Criminal Code.*

[2] The Applicant seeks the exclusion of evidence of the results of an analysis of Mr. Brown's breath by an Approved Instrument, taken pursuant to a demand made by Cst. Cedric Landry, following Mr. Brown's failure of an Approved Screening Device test conducted pursuant to s. 320.27(2) of the *Criminal Code*.

[3] There is no allegation that the ASD test conducted failed to comply with the statutory provisions of s. 320.27(2), but the Notice requests that this Court find and hold that the provisions of s. 320.27(2) of the *Criminal Code* are in violation of Section 8 and 9 of the *Canadian Charter of Rights and Freedoms*, are not "saved" by the provisions of s. 1 of the *Charter*, and thus, pursuant to s. 52 of the *Constitution Act*, of no force or effect, at least to the extent that the limited constitutional jurisdiction of this Court allows. The result would be the exclusion from evidence of the results of the analysis of breath samples provided by Mr. Brown pursuant to a demand made by Cst. Landry under that section of the *Criminal Code*.

[4] The Crown takes the position that s. 320.27(2), despite authorizing the taking of a breath sample for MAS testing without the existence of reasonable grounds or suspicion, does not violate ss. 8 and 9 of the *Charter*. If the Court finds differently, then the Crown submits that the provisions are a "reasonable limit, prescribed by law" and "demonstrably justified" in a "free and democratic society."

[5] With respect to the remedy available to Mr. Brown, as a Provincial Court Judge on a s. 52 application, my jurisdiction is limited to determining whether this subsection applies to Mr. Brown in this specific case (*R. v. Lloyd*, 2016 SCC 13, at paras. 15 and 19).

Facts

[6] Pursuant to the provisions of s.655 of the *Criminal Code,* the Crown and the accused agree that the following facts are agreed to and admitted:

1. On Monday evening, July 22, 2019, Constable Cedric Landry ("LANDRY") and Constable Mark Hurlburt ("HURLBURT"), were conducting a Mandatory Alcohol Screening ("MAS") checkpoint on Nova Scotia Highway 321, near Springhill, Cumberland County, Nova Scotia.

2. Both LANDRY and HURLBURT were and are members of the Royal Canadian Mounted Police – Northern Traffic Services Division and were and are Peace Officers in and for the Province of Nova Scotia. Both were wearing standard RCMP uniforms and operating fully marked police cruisers at all

material times.

3. The purpose of the MAS Checkpoint was primarily the enforcement of *Criminal Code* impaired driving legislation and the detection and interdiction of impaired drivers, but also the enforcement of Nova Scotia *Motor Vehicle Act* provisions. All drivers entering or passing by the MAS Checkpoint were subject to Mandatory Alcohol Screening.

4. At approximately 9:35 p.m. on 22 July 2019, a conveyance, being a 2019 GMC Sierra pickup truck red in colour and bearing NSL FXG 049, operated by the Accused, Carlyle W. L. Brown ("BROWN") approached the MAS Checkpoint. Cst. LANDRY approached Mr. BROWN and, after asking for and being provided with a valid Nova Scotia Drivers' license and checking the registration and safety inspection sticker of the vehicle, advised him of the requirement that all drivers provide breath samples, pursuant to the provisions of s. 320.27(2) of the *Criminal Code*.

5. Cst. LANDRY read to Mr. BROWN the Mandatory Approved Screening Device Demand from a card provided by the RCMP.

6. Cst. LANDRY had in his possession at the time an Approved Screening Device, namely, an AlcoSensor FST, S/N 201443, which had been validly calibrated and was in good operating order. The MASD Demand was read to Mr. BROWN at 9:35 p.m.

7. Cst. LANDRY did not, prior to the reading of the MASD Demand, detect any indicia of impairment on the part of Mr. BROWN; nor did he detect any smell of odour of alcohol on Mr. BROWN's breath.

8. Cst. Landry waited a moment while Mr. Brown finished a cookie.

9. Mr. BROWN was cooperative throughout and provided a sample of his breath, suitable for analysis, at 9:38 p.m. The result of the analysis was a "Fail", resulting in Cst. LANDRY forming reasonable and probable grounds to believe that Mr. BROWN was committing an offence contrary to s. 320.14(1)(b) of the Criminal Code. Cst. LANDRY asked Mr. BROWN to step out of the truck and placed him under arrest.

10. Cst. Landry read Mr. Brown his *Charter* Rights and Police Caution from memory. Mr. BROWN was advised of the reason for his arrest. He indicated he understood. Mr. BROWN was advised of his right to retain and instruct counsel without delay and of his rights to free legal advice through the Nova Scotia Legal Aid program. He indicated he understood. He was read the standard Police Caution, which he indicated he understood.

11. When asked if he wanted to contact legal counsel, Mr. BROWN advised that he did not know what to do.

12. Mr. BROWN was read a demand for samples of breath for analysis by an Approved Instrument, in accordance with s. 320.28(1)(a)(i) of the *Criminal Code*. Mr. BROWN indicated he understood.

13. At 9:44 p.m., Cst. LANDRY escorted Mr. BROWN to his Police vehicle. Cst. LANDRY observed Mr. BROWN to be walking without difficulty, although Mr. BROWN did indicate that he might have difficulty getting into the Police Vehicle due to recent knee replacements. Mr. BROWN was not observed to exhibit any indicia of impairment.

14. Mr. BROWN was transported to the Springhill Detachment of the RCMP, arriving at 10:01 p.m. Mr. BROWN was taken to the interview room and again asked if he wanted to speak to counsel. Mr. BROWN indicated he did not know what to do. He indicated he did not have a lawyer since a personal matter some 35 years previous. Cst. LANDRY explained that free Legal Aid was available, and Mr. BROWN asked to speak to duty counsel.

15. Between 10:05 p.m. and 10:23 p.m., Cst LANDRY contacted duty counsel phone approximately 18 times before finally getting an answer. Duty Counsel advised that there would be a delay due to high volume of calls. Cst. LANDRY waited for approximately one half hour before calling again, approximately 8 more times, before Duty Counsel called back at 11:07 p.m. Mr. BROWN was placed in contact with duty counsel at 11:13 p.m. and spoke to her for approximately 23 minutes, before advising Cst. LANDRY that he was satisfied with the advice he had received.

16. Mr. BROWN was introduced to Qualified Technician Cst. HURLBURT at 11:36 p.m. and provided samples of breath, suitable for analysis, at 11:56 p.m.

and again at 12:18 a.m.

17. The results of the analysis are set out in the Certificate of Qualified Technician, which will be filed, were 90 milligrams of alcohol in 100 milliliters of blood at 11:36 p.m. and 80 milligrams of alcohol in 100 milliliters of blood at 12:18 a.m.

18. Release documents were prepared for Mr. BROWN and he was released to the care of his daughter at 1:33 a.m.

19. Pursuant to the provisions of ss. 320.31(1) and 320.31(4) of the *Criminal Code*, Mr. BROWN's blood alcohol concentration "within those two hours" [of operating the conveyance] is "conclusively presumed" to be 80 milligrams of alcohol in 100 milliliters of blood.

Issue

[7] This issue in this case is whether the Mandatory Alcohol Screening (MAS) demand made pursuant to s. 320.27(2) of the *Criminal Code* violates sections 8 and 9 of the *Charter*, and if so, whether that violation can be "saved" by the application of s. 1 of the *Charter*.

Legislation

[8] Section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 ("the *Charter*"), reads as follows:

> *8 Everyone has the right to be free from unreasonable search and seizure.*

Section 9 of the *Charter* reads as follows:

> *9 Everyone has the right not to be arbitrarily detained or imprisoned.*

[9] Prior to December 18, 2018, a demand to provide a sample into an approved screening device could only be made if the officer had formed a reasonable suspicion that the driver of the motor vehicle had alcohol in their body, pursuant to s. 254(2) of the *Criminal Code*.

[10] On April 13, 2017, the Minister of Justice and Attorney General of Canada introduced Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, SC 2018. *Criminal Code* s. 320.27(2) is included in Part 2 and reads as follows:

> *320.27(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.*

[11] The Mandatory Alcohol Screening (MAS) provisions are new to the *Criminal Code* and have been the subject of much legal debate. Such demands may be made without any grounds and there is no requirement for an officer to suspect the individual has blood or alcohol in his or her body.

[12] There does not appear to be any allegation that Cst. Landry did not follow the provisions of this section in making the demand he did and therefore the question is whether the law itself is constitutional.

[13] To the date of this decision, there are only five reported cases addressing the constitutionality of the MAS provisions:

a. *R v Morrison*, 2020 SKPC 28 (CanLII) – Baniak J. of the Saskatchewan Provincial Court found the legislation to be a violation of s. 8, but found it to be a reasonable limit, pursuant to s. 1 of the *Charter*.
b. *R v Switenky*, 2020 SKPC 46 (CanLII) – Baniak J. adopted his own reasoning from *Morrison* to the same end.

c. *R. v. Blysniuk*, 2020 ONCJ 603 – Laszczynski J. of the Ontario Court of Justice held that s. 320.27(2) does not infringe s. 8 of the *Charter* and, had the Court found differently, would have upheld it under s. 1.

d. *R. v Labillois*, 2020 ABQB 200 (CanLII) – Justice Yamauchi upheld the decision of the Trial Judge holding that s.320.27(2) does not infringe s.8 of the *Charter* and, had the Court found such a breach, it would not have excluded the evidence in any event following a s.1 *Charter* analysis.

e. *R. v. Kortmeyer*, 2021 SKPC 10 (Sask. Prov. Ct.) – Green, J. found the legislation to be a violation of s. 8, but found it to be a reasonable limit and upheld it, pursuant to s.1 of the *Charter*.

Does s. 320.27(2) violate section 9 of the *Charter*?

[14] Mr. Brown was initially lawfully stopped by Constable Landry at a police checkpoint. The purpose of the checkpoint was to conduct Mandatory Alcohol Screening tests on drivers who passed through the checkpoint.

[15] Police also possess the power to randomly stop vehicles to check for driver's licences, insurance and driver sobriety, at common law. The source of the initial police screening powers is found in the common law and is also implied by the statutory power to stop vehicles.

[16] In Nova Scotia, the police are authorized to conduct traffic stops primarily pursuant to s. 83(1) of the *Motor Vehicle Act*, R.S.N.S. 293, s.1. (MVA), which states:

> *83(1) It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer.*

And to a lesser extent ss. 78(2) and 18 MVA which provide the authority for peace officers to demand and inspect drivers' licenses and vehicle permits from drivers. (see *R. v. MacLennan*, 1995 NSCA 51, and *R. v. Cooper*, 2005 NSCA 47.

[17] The police power to stop a vehicle and engage in screening tests such as driver observations, speaking to the driver, and asking about alcohol consumption was recognized in *Dedman v. The Queen*, [1985] 2 SCR 2, 1985 CanLII 41; *R. v. Hufsky*, [1988] 1 SCR 621, 1988 CanLII 72, *R. v. Ladouceur*, [1990] 1 SCR, 1257, 1990 CanLII 108, and *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, [2005] 2 SCR 3.

[18] In *Dedman*, *supra*, the driver was stopped under the R.I.D.E (Reduce Impaired Driving in Etobicoke) program, the purpose of which was to reduce impaired driving. The driver was charged with refusal to provide a breath sample. He was acquitted at trial, and the acquittal was upheld by the Ontario Supreme Court. The Crown appealed to the Ontario Court of Appeal, which set aside the acquittal. The accused's appeal to the Supreme Court was dismissed. McIntyre J., for the majority at paragraph 68 stated:

> *[68] In applying the Waterfield field test to the random stop of a motor vehicle for the purpose contemplated by the R. I. D. E. Program, it is convenient to refer to the right to circulate in a motor vehicle on a public highway as a "liberty". That is the way it was referred to in Hoffman v. Thomas, supra, and in Johnson v.. Phillips, supra.* ***In assessing the interference with this right by a random vehicle stop, one must bear in mind, however, that the right is not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property.*** *Applying the Waterfield test, them, and using the word "liberty" in this qualified and special sense, it may be said that the random vehicle stop in this case was prima facie an unlawful interference with liberty since it was not authorized by statute. The first question, then, under the Waterfield test is whether the random stop fell within the general scope of the duties of a police officer under statute or common-law.* ***I do not think there can be any doubt that it fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic. These are the very objects of the R. I. D. E. Program, which is a measure to improve the deterrence and detection of impaired driving, a notorious cause of injury and death.*** *(emphasis added).*

[19] The *Dedman* case was decided prior to the enactment of the *Charter*, but the principles in relation to police power for roadside checkpoints set out in *Dedman* were upheld in *Hufsky*, *supra*, which was a *Charter* challenge alleging arbitrary

detention contrary to s. 9, as well as in relation to specific individual random highway checks in *Ladouceur*, *supra*.

[20] The leading case dealing with police powers to screen drivers that are applied under provincial powers of the police to stop is the Supreme Court of Canada's decision in *R. v. Orbanski; R. v. Elias, supra*. In *Orbanski* , a field sobriety test was conducted after telling the driver that the test was voluntary. In *Elias*, the police conducted a random stop and question the driver about his drinking history. In both cases, the screening measures were challenged by the defence on the basis that rights to counsel were not provided prior to the screening procedure. The Supreme Court noted several contextual factors in assessing screening measures in *Elias* at paragraph 24-27:

> *24 First, we are concerned here with the use of a vehicle on a highway. This Court has recognized that, while movement in a vehicle involves a "liberty" interest in a general sense, it cannot be equated to the ordinary freedom of movement of the individual that constitutes one of the fundamental values of our democratic society. Rather, it is a licensed activity that is subject to regulation and control for the protection of life and property: see Dedman v. The Queen, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 35. The need for regulation and control of the use of vehicles on the highway is heightened both because of the high prevalence of the activity and its inherent dangers.*

> *25 Second, the effective regulation and control of this activity give rise to a unique challenge when it comes to protecting users of the highway from the menace posed by drinking and driving. This challenge arises from the fact that drinking and driving is not in and of itself illegal. It is only driving with*

an impermissible amount of alcohol in one's body, or driving when one's faculties are impaired, that is criminalized. The line between the permissible and the impermissible is not always easy to discern, and the necessary screening can only be achieved through "field" enforcement by police officers. It follows that these officers must be equipped to conduct this screening, though with minimal intrusion on the individual motorist's Charter rights.

26 Third, the challenge in this area of law enforcement is increased by the fact that the activity in question is ongoing and the drinking driver who has exceeded permissible limits presents a continuing danger on the highway. The aim is to screen drivers at the road stop, not at the scene of the accident. Hence, effective screening at the roadside is necessary to ensure the safety of the drivers themselves, their passengers, and other users of the highway. Effective screening should also be achieved with minimal inconvenience to the legitimate users of the highway.

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

[21] Constable Landry was operating a roadside screening checkpoint on the evening in question. There is no suggestion by the applicant that the initial stop was arbitrary or motivated by an improper purpose.

[22] The applicant's further detention, however, that resulted from the demand under s. 320.27(2) to check on his sobriety, in circumstances where Constable Landry did not have any grounds to suspect the applicant had alcohol in his body, nor reasonable and probable grounds to believe that he had committed an offence is an arbitrary detention for the reasons described in *R. v. Hufsky, supra*, wherein Ledain, J. stated at para. 20:

> *[20] In view of the importance of Highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by the mere observation of driving, I am of the opinion that the limit imposed by s.189a(1) of the Highway Traffic Act on the right not to be arbitrarily detained guaranteed by s. 9 of the Charter is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the purposes of the spotcheck procedure in the present case, remembering that the driving a motor vehicle is a licensed activity subject to regulation and control in the interests of safety is proportionate to the purpose to be served.*

[23] The Supreme Court of Canada in *R. v. Ladouceur, supra*, followed the reasoning articulated in *Hufsky* and held that completely random stops authorized by the relevant provincial highway legislation to check on sobriety, for licenses,

insurance and the mechanical fitness of cars were inconsistent with s. 9, but were again saved under s. 1 as it was found that the random stop is rationally connected and carefully designed to achieve safety on the highways and impair as little as possible the rights of the driver. It does not so severely trench on individual rights. Indeed, stopping vehicles is the only way of checking on a driver's license and insurance, the mechanical fitness of the vehicle, and the sobriety of the driver.

[24] Section 320.27(2) does not create a new stopping or detention power by the police, and it does not change the existing stopping power pursuant to section 83(1) of the *Motor Vehicle Act*. Nor does it lengthen the detention from that which would otherwise have been lawful for the purposes of investigating a driver's sobriety compared to that which has already been considered in the context of random stops to check on the sobriety of the driver. It is settled law that while the detention which flowed from the demand made pursuant to section 320.27(2) of the *Criminal Code* was arbitrary and therefore a breach of the applicant's section 9 rights, it is saved by section 1 for the reasons set out in *Hufsky* , and *Ladouceur* . For the reasons stated, I am not satisfied that s. 320.27(2) violates s. 9 of the *Charter*.

Does s. 320.27(2) violate section 8 of the *Charter*?

[25] A driver is required by law to comply with a demand for a breath sample made pursuant to s. 320.27(2) of the *Criminal Code*, just as he or she was obliged to do under the previous demand section. Failure or refusal to comply with the demand may result in the driver being charged with refusal to provide a breath sample. The major difference, however, is that under s. 320.27(2) of the *Criminal Code*, a police officer is not required to formulate any grounds or a reasonable suspicion about the driver's consumption of alcohol or sobriety prior to making the demand.

[26] Section 8 of the *Charter* provides that "everyone has the right to be secure against unreasonable search or seizure". This right is engaged where the state conducts a search or seizure that interferes with an individual's reasonable expectation of privacy. This does not mean that every state-initiated search violates section 8 of the *Charter*. Before the protections of s. 8 are engaged, it is first necessary to determine whether the applicant has established, on a balance of probabilities, that they have a subjective and objectively reasonable expectation of privacy that exists in the item searched or seized, taking into account "the totality

of the circumstances of a particular case". (per Cory J. in *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 31).

[27] In *R.v. Tessling*, [2004] 3 S.C.R. 432 at para. 18, Binnie J. stated:

> *[18] In the result the right to be free from examination by the state is subject to constitutionally permissible limitations. First, "not every form of examination conducted by the government will constitute a search for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals as the government action in question constitute a 'search' within the meaning of s.8."; Evans, supra, at para. 22. It is only "[i}f the police activity invades a reasonable expectation of privacy,[that] the activity is a search"; R. v. Wise, [1992] 1 S.C.R. 527 at P. 533. Second, as the language of S.8 implies, even those investigations that are "searches are permissible if they are "reasonable." A search will not offend s. 8 if it is authorized by a reasonable law and carried out in a reasonable manner: R. v. Caslake, [1998] 1 S.C.R. 51 [page 433]; R. v. Collins, [1987] 1 S.C.R. 265.*

[28] The Crown in this case argues that s.320.27(2), despite authorizing the taking of a breath sample for MAS testing without the existence of reasonable grounds or suspicion, does not violate s. 8 of the *Charter*. If the Court finds that it does, then the Crown submits that the provisions are a "reasonable limit", "prescribed by law" and "demonstrably justified" in a "free and democratic society". The Crown also argues that s.8 of the *Charter* is not engaged with respect to Mandatory Alcohol Screening as set out in s.320.27 (2), as when looking at the entire context of the situation, a person who chooses to operate a motor vehicle has a highly reduced

expectation of privacy, if any at all, in a breath sample demanded while they are engaged in the highly regulated field of driving. In essence, the Crown argues that there is a lesser expectation of privacy associated with the action of driving a vehicle, a highly regulated activity, in comparison to the privacy rights a person can expect within his or her home.

[29] *Goodwin v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 46 (CanLII) [2015] 3 SCR 250 sets out a framework for analysis of a challenge to legislation based on s. 8 of the *Charter*. The issue in *Goodwin* was the Automatic Roadside Prohibition ("ARP") scheme established by the British Columbia *Motor Vehicle Ac*t, which established automatic driving prohibitions upon drivers who "failed" or received "warn" readings on ASD tests taken pursuant to s. 254 (2) of the *Criminal Code*.

[30] At paragraph 48, Karakatsanis J. set out the parameters of the analysis:

> *[48] Section 8 of the Charter provides that "[e]veryone has the right to be secure against unreasonable search or seizure." This right is engaged where the state conducts a search or seizure that interferes with an individual's reasonable expectation of privacy. The expectation of privacy is a normative concept, reflecting the level of privacy that we, as a society, should reasonably expect in a given circumstance: R. v. Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 44; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. It is not merely a function of how much privacy a person may expect or enjoy*

> *with respect to their person, space or belongings. Where a search or seizure engages the protection of s. 8, a reviewing court must determine whether the search or seizure is reasonable. In this regard, (1) the search or seizure must be authorized by law, (2) the law itself must be reasonable, and (3) the search or seizure must be carried out in a reasonable manner: R. v. Caslake, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, at para. 10; R. v. Collins, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, at p. 278. (emphasis added)*

[31] Dickson J. in *Hunter et al. v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 SCR 145 at 159 found that a purposive review of the challenged legislation is to be taken in light of s. 8 of the *Charter*:

> *The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.*

[32] The Crown conceded in their written submissions that the MAS demand constitutes a warrantless seizure and that the onus falls on the Crown to justify such seizure, per *Hunter*, 161, *Goodwin*, at para. 51.

[33] The Court must determine if the search and seizure was a breach of the Applicant's s. 8 rights or if the law is reasonable. The test for reasonableness is set

out in *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23, see also *Goodwin, supra*, at para. 48, which states that a search is reasonable if:

> *1. It is authorized by law*
>
> *2. The law is reasonable; and*
>
> *3. The search was carried out in a reasonable manner*

1. Is the search authorized by law?

[34] I find that the first part of this test is met in the circumstances of this case. Constable Landry made the Mandatory Alcohol Screening demand to Mr. Brown explicitly pursuant to S.320.27(2) of the *Criminal Code*, which had been enacted and was in force at the time of the stop. The officer's stated purpose for setting up the checkpoint was not only for the enforcement of the Nova Scotia *Motor Vehicle Act* provisions and to enforce *Criminal Code* impaired driving legislation and the detection and interdiction of impaired drivers, but specifically to subject all drivers entering or passing by the checkpoint to Mandatory Alcohol Screening.

[35] Under s. 320.27(2) the following prerequisites must be met before a MAS demand may be made:

> *A peace officer must have in his or her possession an Approved Screening Device;*

> *The peace officer must be acting in the course of his or her duties under an Act of Parliament, an Act of a provincial legislature or arising at common law;*
>
> *The target of the MAS demand must be "operating" a conveyance.*

[36] Constable Landry had complied with the statutory preconditions, such that the applicant was operating a motor vehicle at the time and Cst. Landry had an approved screening device in his possession at the time of the demand.

[37] Constable Landry was acting in the lawful exercise of his duties when the stop was conducted, pursuant to the provisions of the *Motor Vehicle Act* and the common law power of a police officer to stop drivers at checkpoints, per *Dedman v. The Queen, supra,* as discussed in the previous section dealing with s.9 of the *Charte*r.

[38] The fact that the search and seizure was authorized by law favours its reasonableness.

2. Is s. 320.27(2) a reasonable law?

[39] The applicant has the onus to establish whether the law itself is reasonable. All searches and seizures conducted without warrant are presumptively unreasonable, absent exigent circumstances, and the burden of establishing reasonableness rests with the Crown.

[40] An analysis of the constitutionality of subsection 320.27 (2) will be based on a determination of the impact of that legislation on any reasonable expectation of privacy on the part of drivers operating conveyances in Canada. The question is whether, "… In a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement", see *Hunter*.

[41] In the context of breath samples, Justice Karakatsanis, in *Goodwin, supra*, stated the following:

> [57] This Court has generally declined to set out a "hard and fast" test of reasonableness: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at p. 495. In my view, this flexible approach remains compelling. This Court has nonetheless identified certain considerations that may be helpful in the reasonableness analysis, including "the nature and the purpose of the legislative scheme . . . , the mechanism . . . employed and the degree of its potential intrusiveness[,] and the availability of

> judicial supervision": *Del Zotto v. Canada*, 1997 CanLII 6349 (FCA), [1997] 3 F.C. 40 (C.A.), per Strayer J.A., in dissenting reasons adopted by this Court in 1999 CanLII 701 (SCC), [1999] 1 S.C.R. 3. (emphasis added*)*

The nature and purpose of the legislative scheme

[42] There can be no reasonable argument that the purpose of s. 320.27(2) of the *Code*, to deter, detect and remove impaired drivers from the streets and highways of Canada is highly compelling. Despite the efforts of government and society over decades, impaired driving remains the most significant criminal cause of death in Canada. This legislative purpose or intent is clear from the preamble to Bill C-46 and s. 320.12 of the *Criminal Code.*

[43] The preamble of Chapter 21 states in part:

> *Whereas dangerous driving and impaired driving injure or kill thousands of people in Canada every year;*
>
> *Whereas dangerous driving and impaired driving are unacceptable at all times and in all circumstances;*
>
> *Whereas it is important to deter persons from driving while impaired by alcohol or drugs;*

> *Where it is important that law enforcement officers be better equipped to detect instances of alcohol-impaired or drug impaired driving and exercise investigative powers in a manner that is consistent with the Canadian Charter of Rights and Freedoms.*
>
> *Whereas it is important to simplify the law relating to the proof of blood alcohol concentration;*
>
> *Whereas it is important to protect the public from the dangers posed by consuming large quantities of alcohol immediately before driving;*
>
> *Whereas it is important to deter persons from consuming alcohol or drugs after driving in circumstances where they have a reasonable expectation that they would be required to provide a sample of breath or blood;*
>
> *Whereas it is important that Federal and Provincial laws work together to promote the safe operation of motor vehicles;*
>
> *And whereas the Parliament of Canada is committed to adopting a precautionary approach in relation to driving and the consumption of drugs, and to deterring the commission of offences relating to the operation of conveyances, particularly dangerous driving an impaired driving.*

[44] Section 320.12 sets out the objectives of detection and deterrence, and states, in part:

> *It is recognized and declared that*
>
> > *Operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that included licensing, the observance of rules and sobriety;*
> >
> > *The protection of society is well served by deterring persons from operating conveyances or while their ability to operate them is impaired*

> *by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;*

The mechanism

[45] A law's purpose as criminal rather than regulatory can lead to it being subject to more stringent scrutiny: *Goodwin, supra*, at paragraph 60. In examining the BC ARP scheme in 2015, Karakatsanis J. noted that an ASD test is only the first stage of an impaired driving investigation. She also noted the highly regulatory nature of driving as an activity and that driving itself is not a right, but a privilege (at paragraphs 62-63):

> *[62] The ASD test is the sole basis for the penalties and suspensions provided for in the ARP scheme. This is markedly different from the criminal context, in which the ASD test is only the first part in the Criminal Code's two-step process for investigating drunk-driving offences. At this first stage, an officer need only have a reasonable suspicion that the driver has alcohol in their body: R. v. Lindsay (1999), 1999 CanLII 4301 (ON CA), 134 C.C.C. (3d) 159 (Ont. C.A.); R. v. Butchko, 2004 SKCA 159, [2005] 11 W.W.R. 95. However, these reduced protections for drivers at the roadside screening stage are counterbalanced by limitations on the use to which a potentially unreliable ASD result can be put. It has the limited role of constituting the grounds for a further breath demand, conducted using a breathalyser at a police station, and cannot alone establish an offence under the Criminal Code. (emphasis added)*

> *[63] Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced. This reality, combined with the scheme's location within a broader regulatory framework targeting driving and highway safety, supports characterizing the regime as regulatory and applying a more flexible standard in assessing its reasonableness. However, other features of the scheme suggest that closer scrutiny is required to ensure*

> *the state does not unreasonably interfere with a driver's privacy interest. First, while the breath seizure occurs for a regulatory purpose, it nonetheless has certain criminal-like features, such as its administration by a police officer pursuant to Criminal Code authorization. Second, while the consequences that follow a "fail" reading or the failure to provide a sample are not criminal, they are immediate and serious, and arise without a further test using a (more reliable) breathalyser.*

[46] In *Goodwin*, at paragraphs 64-68, Karakatsanis J. noted two specific aspects of the ASD test which would be relevant to the reasonableness analysis in the context of the challenged regime.

[47] The first is the degree of intrusiveness, which she noted that a breath test in fact amounts to the use of a person's body against him (paragraph 65), but noted that:

> *[65] However, a roadside ASD test is far less intrusive than many other searches or seizures that may be performed for law enforcement purposes, such as the blood sample at issue in Dyment, or a DNA swab, which contains deeply personal information: R. v. S.A.B., 2003 SCC 60, [2003] 2 S.C.R. 678, at para. 48. The roadside breath demand authorized by the Criminal Code has a much less significant impact on an individual's bodily integrity and privacy interests: R. v. Stillman, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, at para. 90. This minimally intrusive character supports the reasonableness of the ASD seizure.*

[48] The second aspect of the mechanism is reliability. In *Goodwin*, this is where the legislation failed, in that there was no mechanism for the reliability of the ASD

test to be challenged or reviewed. Indeed, in subsequent amendments, the BC government made provision for this. At paragraph 67:

> *[67] The reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself: R. v. Chehil, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 48. As noted in Chehil, "[a] method of searching that captures an inordinate number of innocent individuals cannot be reasonable": para. 51. By contrast, a high degree of accuracy has been crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion: R. v. A.M., 2008 SCC 19, [2008] 1 S.C.R. 569, at para. 11; see also R. v. Kang-Brown, 2008 SCC 18, [2008] 1 S.C.R. 456.*

[49] The lack of meaningful safeguards to ensure reliability, including the absence of an opportunity for a second test, was seen as a serious flaw in the BC ARP scheme, both at this stage and at s. 1.

[50] In the case of s. 320.27(2), reliability and availability of judicial review are not the factors they were in *Goodwin*. With respect to reliability, the MAS results themselves are not evidence of either impaired driving or of having an excess blood alcohol level. The results go only to grounds for a further, more precise and accurate test by an Approved Instrument. A driver found by an Approved Instrument to have an excess Blood Alcohol Concentration will have all of the procedural safeguards available to him under Canadian law.

[51] Determining whether and to what extent a person can reasonably expect privacy in a particular situation requires a contextual assessment that takes into account the totality of the circumstances. The idea that a variety of circumstances may reasonably inform a person's expectation of privacy is consistent with a common sense understanding of the concept of privacy. *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128, at paras. 31 and 45.

[52] Operating a conveyance on Canadian streets, roads and highways is a privilege and not a right, a privilege which comes with expectations on the part of other operators and society at large that a person will be qualified to operate said conveyance, and that drivers will comply with the other requirements of federal and provincial law. As noted by Cory J., concurring in the result, in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 SCR 254 at paragraph 33:

> *[33] This requirement to undergo the ALERT testing immediately should be regarded as one of the obligations that flows from the right to drive. In Galaske v. O'Donnell, 1994 CanLII 128 (SCC), [1994] 1 S.C.R. 670, at p. 686, it was noted that the driving of a motor vehicle is neither a God-given nor a constitutional right.* ***Rather, it is a privilege granted by licence. Attached to every right are concomitant duties, obligations and responsibilities. This is true of the licensed right to drive. One of the prime responsibilities of a driver is to see that reasonable care is exercised in the operation of the motor vehicle, and specifically, that it is driven in a manner which does not endanger members of the public. That duty or responsibility cannot be fulfilled by an impaired driver who, by definition, endangers others.*** *In furtherance of the duty not to endanger others, there exists an obligation to comply with a police officer's reasonable request to supply a breath sample. Complying with a*

> *reasonable request to take an ALERT test is a very small price to pay for the privilege of driving. (emphasis added)*

[53] The Court in *Bernshaw* was dealing with the meaning to be assigned to the word "forthwith" in light of an allegation of a s. 10(b) violation, but the same principle would apply.

[54] A person simply has a reduced expectation of privacy when operating a conveyance on a highway. This has been recognized regularly in Canadian Courts. For example, in *R. v. Koulakis*, 2012 QCCQ 4276 (CanLII), the Quebec Superior Court noted, in a case involving an alleged *Charter* s. 8 breach involving the discovery of cocaine in a vehicle, that:

> *[40] The Supreme Court has consistently held that an individual has a reasonable expectation of privacy in his automobile. However, the same judicial pronouncements have also opined that an individual's reasonable expectation of privacy in an automobile is considerabley [sic] less than in a private dwelling. As Sopinka J. explained in R. v. Belnavis:*
>
> > *There is a marked difference between the expectation of privacy in a dwelling and an automobile which, pursuant to decisions of this Court, can be lawfully stopped by police officers virtually at random. (See R. v. Ladouceur, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257, and R. v. Wise, 1992 CanLII 125 (SCC), [1992] 1 S.C.R. 527.*
>
> *[41] A reduced expectation of privacy in a motor vehicle was justified on the grounds of public safety and the need to regulate driving on public thoroughfares. In the case of R. v. Wise, Cory J. explained that:*
>
> > *Society (. . .) requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of*

> *surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection.*
>
> *[42] Automobiles are justifiably the subject of pervasive regulation by the State. Every driver of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some degree upon that operator's privacy. The Supreme Court has ruled on a number of occasions that pursuant to statutory authority the police can randomly stop persons for "reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle."*

[55] The comments on this issue by Cory J., for the majority, in *R. v. Wise*, 1992 CanLII 125 (SCC), [1992] 1 SCR 527 at p. 11 (CanLII), while expressed in the context of a warrantless attachment of an electronic tracking device to a murder suspect's car, bear repeating at further length:

> ***11. The expectation of privacy in a vehicle cannot be as great as that contended by my colleague.*** *For the safety and well-being of society, motor vehicles and their drivers are subject to a great many statutory requirements, conditions and regulations. Almost every aspect of the use of a motor vehicle is controlled. The side of the road on which a car may be driven; the speed at which it may proceed; when it may overtake and where it may overtake another vehicle; where and when it must stop; the mechanical condition of the vehicle; the installation of certain accessories, be they required or prohibited; the places where a vehicle may park: all these and many more are circumscribed by various Acts and regulations.*
>
> *For the safety of all, it is essential that drivers be tested before receiving their licence; that RIDE programs be instituted to discourage the drinking driver; that the speed of vehicles be supervised and that the mechanical fitness of vehicles be inspected.* ***These inspections and tests and this supervision do not constitute unreasonable breaches of basic civil liberties. Rather, they are common sense rules that exist for the protection of society as a whole. Reasonable surveillance and supervision of vehicles and their drivers are essential. Without them, motor vehicles inevitably become instruments of crippling injury, death and destruction.***

> ***Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.*** *(emphasis added)*

[56] Questioning of drivers in relation to their consumption of alcohol has been found to be within police powers at common law and a reasonable limit on s. 10(b) rights to counsel, see: *R. v. Orbanski; R. v. Elias*, *supra*, at paras. 55-60.

[57] In *R. v. Weintz*, 2008 BCCA 233, application for leave to appeal dismissed by the Supreme Court of Canada 2008 CanLII 59063 (SCC), a BC police officer stopped a vehicle following reports of erratic driving:

> *[4] The motorist who made the observation phoned a police operator and a police vehicle was dispatched to the area where the respondent was driving his truck. Cst. Long, the officer who stopped the respondent, said that after following the vehicle for a short distance he observed the truck sort of wandering away from the centre line to the fog line and back again. Cst. Long testified that as he stood conversing with the respondent driver at the window of the vehicle, there was a smell of liquor coming from the interior. Cst. Long asked the respondent if he had been drinking anything, but before he could answer, a companion of the respondent who was sitting in the passenger seat said that he had been drinking and that any smell of liquor was coming from him. Cst. Long then asked the driver to get out of the vehicle. After the respondent exited the vehicle, Cst. Long directed the driver to "blow in his face". The respondent complied with the request and the officer detected an odour of alcohol on his breath.*

[58] The question before the court was whether the request made by the officer that the driver "blow in his face" constituted an unreasonable search. The BC Court of Appeal found that it did not and leave to appeal to the Supreme Court of Canada was refused. At paragraphs 22 to 27, Hall J.A., wrote for the Court:

> *[22] Doherty J.A. observed in Smith that he saw little distinction between evidence that flows from a physical sobriety test and evidence resulting from a driver's answers to questions about drinking put to him by a police officer. In the present case, I likewise do not perceive any distinction between those sorts of investigative procedures and asking a person to blow breath into the face of the investigating officer. All are simply different roadside screening methodologies utilized by a police officer to detect the presence of alcohol in the body of a driver. In the instant case, such a request was reasonable because of the factual circumstances of this case. When the officer here directed a question to the respondent about drinking, there was an immediate response from the adult passenger that he had been drinking and that any odour of alcohol in the vehicle was presumably attributable to the passenger. It then became requisite for the officer to determine the source of the odour of liquor.* ***An effective and speedy methodology of doing such an assessment was to make the request the officer did to this respondent. Such a procedure is, in my opinion, minimally intrusive and can be speedily performed at the side of the road. It thus accords with the parameters enunciated by Doherty J.A. in Smith and approved in Orbanski at para. 46.***
>
> *...*
>
> *[25] However, the factual situation disclosed in the present case is quite different from what occurred in Stillman.* ***The results of roadside screening techniques or questions about alcohol consumption are not to be utilized as evidence to incriminate a driver.*** *Charron J. noted this in para. 58 of Orbanski: "[...] evidence obtained as a result of the motorist's participation without the right to counsel can only be used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired. It cannot be used as direct evidence to incriminate the driver". She referred, as well, with approval to previous cases such as R. v. Milne (1996), 1996 CanLII 508 (ON CA), 107 C.C.C. (3d) 118, 28 O.R. (3d) 577 (C.A.), leave to appeal to S.C.C. refused,*

[1996] 3 S.C.R. xiii, where it was held that evidence obtained from roadside screening procedures should be limited to determining whether there existed a proper basis to make a demand for a breath sample under the provisions of the Criminal Code. ***In my opinion, the appeal judge fell into error when he found Stillman to be applicable here because the request to blow breath was not for the purpose of obtaining evidence to incriminate the respondent. The possibility of obtaining evidence that could incriminate the respondent only arose at that point in time when the investigating officer concluded he had reasonable and probable grounds to believe that the individual had been driving whilst impaired or had consumed alcohol to an extent to have a blood alcohol reading over .08.*** *At that point in time, of course, the required information must be furnished to a driver that he has the right to retain and instruct counsel without delay and the driver is to be afforded such right (Charter s. 10(b)).*

[26] This was made clear in the following passages from the judgment of Charron J.:

> *[56] As discussed earlier, because of the nature of the activity, it is necessary that the police be empowered to use effective roadside screening methods to assess the level of impairment of drivers so as to ensure the safety of all users of the highways. Hence the use of reasonable screening methods within the scope that we have discussed, and the implicit abridgment of the right to counsel, are rationally connected to the state objective.*
>
> *[57] The infringement on the right to counsel is also no more than necessary to meet the objective. As described earlier, the scope of authorized police measures is carefully limited to what is reasonably necessary to achieve the purpose of screening drivers for impaired driving. Further, the limitation on the right to counsel has strict temporal limits – there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the Charter right to counsel.*

> *[27] At the point in time when the officer directed the request to the respondent to blow breath in his face, the respondent was not being asked to provide evidence that could be used to incriminate him. This request was simply part of a roadside screening process of the type found permissible under authorities such as Bonin, Smith and Orbanski. Information thereby obtained would not be available to incriminate the respondent, unlike the situation where a breathalyzer test is requested…. (emphasis added)*

[59] Some of these cases involve s. 10(b) right to counsel, rather than s. 8 unreasonable search, arguments, but the similarities in approach should be noted, especially in light of the statutory codification of the limits on the use of the results of such screening techniques as are found in s. 320.31(9) of the *Code*. An officer can constitutionally demand, **without any specific statutory authorization**, that a driver blow in his face to determine the presence of alcohol in the driver's body. A demand to provide a sample into an approved screening device would not be much more intrusive.

[60] Several factors will impact on the "totality of the circumstances" in determining the extent of the "reasonable expectation of privacy" of a driver subject to an MAS demand.

[61] Canadian Courts have in the past found a reasonable expectation of privacy in bodily substances, see: R. v. *Stillman*, 1997 CanLII 384 (SCC), [1997] 1 SCR 607.

The primary issue in *Stillman* related to the question of search incidental to arrest. The Court, after defining that police power and finding that the seizure of hair and buccal swabs, as well as dental impressions, were made outside that power, determined the seizure to be a s. 8 breach. At paragraph 42, Cory J. wrote:

> *[42] I agree with that position. It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. In R. v. Pohoretsky, 1987 CanLII 62 (SCC), [1987] 1 S.C.R. 945, at p. 949, Lamer J., as he then was, noted that, "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home". In addition, La Forest J. observed in R. v. Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 431-32, "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Finally, in R. v. Simmons, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, at p. 517, Dickson C.J. stated:*
>
> > *The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.*
> >
> > *Searches of the third or bodily cavity type may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection.*

[62] However, while courts have found a reasonable expectation of privacy in breath and blood samples where those samples <u>have been used for the purpose of criminal prosecution</u>, that expectation should be, it is submitted, lower in cases of

roadside screening, where the sample is not for that purpose. For example, in *Bernshaw* , L'Heureux-Dube J. argued at paragraph 100 that:

> *[100] What is the nature of the reasonable expectation of privacy in relation to the monitored activity in question (in this case, roadside assessments of drivers' sobriety)? As was the case in Simmons, supra, I believe that this activity is one in which the reasonable expectation of privacy is lower due both to the nature of the activity and to the nature of the means available to regulate it. ALERT tests, spot checks, and other such measures all regulate conduct arising in the particular context of driving and with the particular goal of curtailing a particular subset of that activity -- impaired driving. When individuals obtain a driver's licence, they accept the many responsibilities that come with that privilege and, most importantly, undertake a responsibility to others to conduct themselves safely on the nation's roadways. It is common knowledge, moreover, that impaired driving is dangerous and that the state must take certain measures to curb this pressing problem. People who decide to drink and drive do so either in conscious disregard for, or wilful acceptance of, the risks which that activity entails. Any reasonable expectation of privacy which they may entertain while in their vehicle is therefore lower <u>with respect to assessments of their sobriety</u> than with respect to most other activities that do not raise similar considerations.*

[63] As Professor Robert Solomon argues:

> *Balancing against this, however, is the fact that providing a breath sample on an ASD is minimally intrusive. Placed on the spectrum of bodily intrusions, breath samples are much less intrusive than providing other bodily fluids (such as urine or blood), pat-down and strip searches, searches of body cavities, and so-called "bedpan vigils." In fact, providing a breath sample seems less intrusive than having hair samples or buccal swabs taken for DNA testing, which were found not to violate section 8 in R v SAB. While that case admittedly examined DNA samples seized under a special warrant for forensic analysis, it does suggest that the courts are becoming less prudish about the taking of bodily samples than they were in the 1980s and 90s, when for example, the Ontario Court of Appeal referred to the taking of a blood sample as "an interference of a very intrusive nature," and somewhat melodramatically condemned the taking of a breath sample as the seizure of "the very breath one breathes." By contrast, Justice Arbour explained in SAB that the process of DNA testing is not necessarily intrusive:*

> *[U]nder a properly issued DNA warrant, the degree of offence to the physical integrity of the person is relatively modest. A buccal swab is quick and not terribly intrusive. Blood samples are obtained by pricking the surface of the skin — a procedure that is, as conceded by the appellant, not particularly invasive in the physical sense. With the exception of pubic hair, the plucking of hairs should not be a particularly serious affront to privacy or dignity.*
>
> *We submit the approach in SAB provides a more realistic assessment of the level of physical intrusiveness involved in taking many bodily samples. Extending this reasoning to RBT, the capture of a driver's exhaled breath seems minimally intrusive. The sample takes only seconds to provide and does not involve pain or discomfort. There is no intrusion into the driver's body, nor an exposure of any body parts that are normally concealed. Indeed, some of the arguments that have been made in support of fingerprinting could be made with greater force in support of breath testing on ASDs. For instance, in R v Beare; R v Higgins, Justice La Forest explained, "[w]hile some may find [fingerprinting] distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it." Further, unlike fingerprints, which provide a lasting record and may tie an individual to other crimes, the results of a breath test on an ASD are transitory and do not implicate a driver in any other offence.*
>
> *Prof. Robert Solomon, Prof. Erika Chamberlain, Maria Abdoullaeva, Ben Tinholt and Suzie Chiodo, "The Case for Comprehensive Random Breath Testing Programs in Canada: Reviewing the Evidence and Challenges" (2011) 49:1 Alberta Law Review 37 at 38 (2011 CanLIIDocs 139) (footnotes omitted).*

[64] *R. v. Monney*, 1999 CanLII 678 (SCC), [1999] 1 SCR 652, where a law authorizing the detention of a traveller entering Canada in a "bed pan vigil" while awaiting a bowel movement which was expected to contain drugs was upheld, with the Court holding that:

[44] A second important distinction between the circumstances of this appeal and those present in Stillman is that the customs officers, in detaining the respondent in this case and subjecting him to a passive "bedpan vigil", were not attempting to collect bodily samples ***containing personal information relating to the respondent.*** *Cory J. in Stillman expressed particular concern that the actions of the police in gathering DNA evidence violated the respondent's expectations of privacy in using his body to obtain personal information. He relied in part on La Forest J.'s observation in R. v. Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 431-32, that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Thus the right of privacy protected by s. 8 of the Charter ensures that individuals are able to maintain bodily integrity and autonomy in the face of potential state interference. Cory J. summarized the connection between privacy and bodily integrity as follows, at para. 87:*

> *Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy.*

[45] Heroin pellets contained in expelled faecal matter cannot be considered as an "outward manifestation" of the respondent's identity. An individual's privacy interest in the protection of bodily fluids does not extend to contraband which is intermingled with bodily waste and which is expelled from the body in the process of allowing nature to take its course. It is not necessary for determination of the issue in this appeal to address the question of whether, if the customs officers had adopted a more invasive form of collection, such as surgery or inducing a bowel movement, the result would necessarily be the same.

[46] As to my determination that the passive "bedpan vigil" conducted by the customs officers is properly classified as a search within the second category, a review of the representative border searches provided by Dickson C.J. in his analytical framework reveals that the principal distinction between searches in the second and third categories is that all of the examples listed in the third category involve, to a greater or lesser degree, the intentional application of force. Search techniques such as the insertion of a probe into a body cavity or the administration of an emetic could all be characterized in the absence of lawful authority as an assault. Consequently, the potential degree of state interference with an individual's bodily integrity for searches in the third category requires a high threshold of constitutional justification. In Stillman, Cory J. affirmed the highly invasive nature of searches in the third category when he stated as follows, at para. 42:

> *It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. In R. v. Pohoretsky, 1987 CanLII 62 (SCC), [1987] 1 S.C.R. 945, at p. 949, Lamer J., as he then was, noted that, "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home". In addition, La Forest J. observed in R. v. Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 431-32, "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Finally, in R. v. Simmons, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, at p. 517, Dickson C.J. stated:*
>
> > *The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.*
>
> …

[48] While I conclude that the compelled production of a urine sample or a bowel movement is an embarrassing process, it does not interfere with a person's bodily integrity, either in terms of an interference with the "outward manifestation" of an individual's identity, as was the central concern in Stillman, or in relation to the intentional application of force, as was relevant in Simmons. As is the case with other investigation techniques in the second category such as a strip search, subjecting travellers crossing the Canadian border to potential embarrassment is the price to be paid in order to achieve the necessary balance between an individual's privacy interest and the compelling countervailing state interest in protecting the integrity of Canada's borders from the flow of dangerous contraband materials….

[65] As argued by Professor Solomon:

Millions of Canadians are routinely subject to mandatory screening at Canadian airports, courts and other government facilities, where they are required to pass through a metal detector and have their baggage and person searched. In 2015, an estimated 131 million passengers "enplaned and deplaned" at Canadian airports, at which it is not uncommon for them to have

> *to take off their shoes, belt and jewellery; have their carry-on belongings swabbed for explosive residue; be subject to a full body scan for weapons under their clothes; empty their pockets into a tray; and/or submit to a thorough pat-down search (which involves being touched on the neck, legs, arms, chest, hips, and buttocks through their clothes). Nor is it uncommon to stand in line for 10 or 15 minutes waiting to be subject to these screening and search procedures. Nevertheless, as [Professor Peter] Hogg noted, "[t]he concerns about safety that prompt these procedures are well understood by travellers, and so far as I know they have never been challenged."*
>
> *We would suggest that, for many people, it is a far greater intrusion on privacy to have one's purse, briefcase and luggage publicly searched, and more humiliating to be patted down in public or strip-searched in private at a busy airport, than to provide a breath sample while sitting in one's car for two minutes at roadside like every other driver passing through a MAS checkpoint. As indicated above, nearly 80% of Canadians surveyed responded that MAS is a reasonable intrusion on drivers.*
>
> *The roughly 91 million returning Canadians and international visitors entering the country each year may be subject to similar border screening and search procedures. In R. v. Simmons, the Supreme Court of Canada stated in regard to routine inspections of baggage and pat-down searches at border crossings, "No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada, and no constitutional issues are raised." The Court explained that given the state's security interests and the diminished expectation of privacy at border crossings, such routine inspections neither violated s. 8, nor constituted a detention within the meaning of the Charter.*
>
> *Prof. R. Solomon, Prof E. Chamberlain, "The Road to Traffic Safety: Mandatory Breath Screening and Bill C-46", (2018) 23 Can. Crim. L. Rev. 1. (footnotes omitted)*

[66] In *R. v. Campanella*, 2005 CanLII 10880 (ON CA), the Ontario Court of Appeal found that laws authorizing the screening of persons entering a courthouse were valid under s. 8. While attempting to enter a courthouse for a court

appearance on a drug charge, the accused was required to pass through a metal detector. Under the screening program in place at the time, anyone without a security clearance had to pass through metal detectors. Bags and purses that contained metal were searched manually for weapons or anything that could be used as a weapon. A person in the security line could turn back at any time if he or she did not wish to be examined, and could pause to transfer non-metallic objects from hand baggage to a pocket where it would not be searched. As the accused's purse would have set off the metal detector, she voluntarily produced it for manual inspection. A baggie containing a small amount of marijuana was found in the purse, and the accused was charged with possession of a controlled drug.

[67] The Court held, at paragraphs 18-19:

> *[18] I start with the importance of the government objective. It is notorious that, unfortunately, there have been serious incidents of violence in the courthouses of this province by the use of weapons that have been brought into the courthouse. Court proceedings are emotionally intense. Family, criminal and civil litigation involves matters of great consequence to the parties and those associated with them. The proceedings can provoke strong emotions. Everyone with business in the courthouse and ordinary members of the public have the right to expect that a courthouse will be a place of safety. The public generally expects the government to ensure the safety of people who are either required or wish to attend court. We pride ourselves on having an open and transparent justice system. A necessary incident of that system is that people who attend the courthouse to participate in or merely observe the proceedings will feel safe when they do so. Most members of the public would expect the government to take reasonable measures to ensure the safety of the courtroom environment.*

> *[19] The means chosen by the legislature are reasonable. I agree with the federal and provincial Crown that the only effective way to diminish the risk in a large courthouse is to subject everyone without prior security clearance to some kind of inspection. I can see no other feasible means of achieving the aim. Indeed any other measure, such as random checks, would likely lead to concern that the law was being administered in a discriminatory manner.*

[68] The Court noted:

> *[25] I am sensitive to the concern that we should not erode the benefits and protections of s. 8 by gradually sanctioning ever-greater intrusions into privacy because of unfounded fears. We should not lightly accept that searches in public places are justified solely because people have become used to them and expect them. However, the record in this case establishes the justification for the kinds of searches carried out in this case.*
>
> *[26] I agree with the reasons of Jewers J. in R. v. Lindsay, 2001 MBQB 226 (CanLII), [2001] M.J. No. 377, 158 Man. R. (2d) 176 (Q.B.), at para. 58 (approved in R. v. Lindsay, 2004 MBCA 147 (CanLII), [2004] M.J. No. 380, 187 Man. R. (2d) 236 (C.A.), at para. 18), considering a similar statutory scheme in Manitoba:*
>
> > *In summary I find the law to be reasonable. The legislation addresses a legitimate concern - the safety of all those in the court complex; experience both here and in other jurisdictions has shown that weapons are being brought into the courthouses and it is desirable that they be detected and prohibited. The Manitoba authorities could have chosen to rely upon the pre-existing security regime but that was not sufficient to discover all of the many varied types of weapons or potential weapons that were being brought into the court complex. The current system makes for a safer and more reassuring environment. The means chosen are non-intrusive and bear no stigma. A requirement for prior authorization based on reasonable and probable grounds would not be feasible. The law is neither vague nor over-reaching. It is constitutional.*

[69] This is the approach taken by Leszczynski J. in *Blysniuk, supra*. There, a driver had been stopped under the *Highway Traffic Act* for a peeled license plate.

Once stopped, the Investigating Officer made a s. 320.27(2) MAS demand, because it was a Saturday night during the Christmas holiday period.

[70] Leszczynski J. examined the constitutionality of ss. 320.27(2) under s. 8, 9 and 10(b) of the *Charter*. The Court found:

> *(a) The accused's s. 8 rights were triggered, in that the taking of a MASD sample constituted a search and that the driver had a reasonable expectation of privacy, although "minimal and residual" for the reasons which the undersigned has expressed above (paragraphs 19-31)*
>
> *(b) The search was authorized by law (para. 33)*
>
> *(c) s. 320.27(2) is a reasonable law (paragraphs 34-62)*
>
> *(d) The search was carried out in a reasonable manner (paragraph 63-64).*

[71] Leszczynski J. concluded, at paragraph 66:

> *[66] I have concluded based on a balancing of all of the factors I have referred to above, that the search and seizure that was carried out pursuant to s. 320.27(2) was reasonable in the circumstances. The personal and informational privacy interests of an individual who is operating a motor vehicle in their blood alcohol concentration as measured by an approved screening device administered pursuant to the statutory requirements of s. 320.27(2) is, at its highest, a minimal and residual privacy interest. The pressing and substantial objectives of the law aimed at increasing the rate and reliability of detection and increasing deterrence are met by eliminating suspicion-based testing, which has proven to be unreliable in many circumstances, with a screening method that is scientifically-accepted and reliable. While drivers who have not consumed any alcohol may now be required to provide a sample of their breath into an ASD, the law already permits the police to stop and detain such drivers and to take steps to investigate their sobriety. Although prior screening measures did not involve a search and seizure unless an officer had a reasonable suspicion that the driver had alcohol in their body, the impact of the search and seizure*

> *pursuant to s. 320.27(2) is minimally intrusive on a person's privacy interests and bodily integrity. The statutory requirements when a demand is made are set out in s. 320.27(2) and are designed to ensure that it results only in a very brief roadside detention of an individual who is voluntarily engaged in the highly regulated and dangerous activity of driving a motor vehicle, which in this case lasted not more than 2 minutes. Section 320.27(2) contains appropriate restrictions on when and in which circumstances the police may conduct this screening (lawful stop, present operation of a motor vehicle, and the approved screening device in the officer's possession), as well as, the limited use that can be made of the results (only as a screening measure and not to establish guilt). If charges are laid against an individual, there is judicial oversight through a trial where the defence can challenge the lawfulness of the stop, lawfulness of the demand and the search itself. While there is the potential for the disproportionate application of this law against racialized and other marginalized populations, this can also be said of the former s. 254(2). In many ways s. 320.27(2) serves to increase overall fairness by removing the subjectivity involved in the prior suspicion-based testing. Overall, the law is reasonable having consideration of the totality of the circumstances and the context. In this particular case, the search was authorized by the law, the law itself is reasonable and the search was carried out reasonably and in full compliance with the statutory requirements of s. 320.27(2) and met the test in Smith, supra.*

3. Was the search carried out in a reasonable manner?

[72] The reasonableness of the search must be assessed in light of the totality of the circumstances (*R. v. Mann*, [2004] 3 S.C.R. 59 at para. 44). This includes an assessment of police conduct in executing the search, the extent of the interference, and whether the search was minimally intrusive on the privacy interest at stake, per *R. v. Macdonald*, [2014] 1 S.C.R. 37 at para. 47.

[73] In this case, it is not disputed that Cst. Landry complied with the statutory requirements set out in s. 320.27(2). The officer lawfully stopped the Applicant, who was operating a motor vehicle at a MAS checkpoint. He had a screening device in his possession at the time and made a demand of the Applicant driver at the scene pursuant to s. 320.27(2). He quickly administered the screening test at the scene. According to the agreed statement of facts, from the time the demand was made at 9:38 p.m., the result of the analysis was a "fail", resulting in Cst. Landry forming reasonable and probable grounds to believe that Mr. Brown was committing an offence contrary to s. 320.14(b) of the *Criminal Code*. As a result, Mr. Brown was placed under arrest.

[74] There was no evidence of any conduct on the part of the officer that he improperly stopped the Applicant or that he was delayed in making the demand or administering the test. There is no suggestion that the Applicant's safety was put at risk as a result of the detention or the administering of the test, that the officer breached his privacy further than was required to administer the test, or that the search was carried out in a manner that went beyond that which was necessary in order to obtain a suitable breath sample. For these reasons, I conclude that the search and seizure was carried out in a reasonable manner.

[75] For the reasons set out above, I find that the taking of a MASD sample constituted a search, which triggered the Applicant's s. 8 *Charter* rights, and that he had a reasonable expectation of privacy, although the privacy interest in this case is minimal and residual. I further find that the search was authorized by law and that s. 320.27(2) is a reasonable law, and the search was carried out in a reasonable manner.

[76] The MAS regime authorized by s. 320.27(2) is not in conflict with s. 8 of the *Charter*. Prior judicial authorization is unreasonable to expect and subsequent judicial review is available. A driver has a highly reduced expectation of privacy, if any at all, in a breath sample demanded while she is engaged in a highly regulated field. A breath sample as authorized by s. 320.27(2) is minimally intrusive, taking only seconds to provide while the driver sits in his car. There is no stigma attached as no drivers are singled out. The sample itself is for screening purposes only and has no evidentiary value, except to provide grounds for further investigations at which point all the suspect's *Charter* and other rights will and must be fully recognized. More importantly, a breath sample demanded under s. 8 provides neither identifying nor lasting information.

[77] I am satisfied that s. 320.27 strikes an appropriate balance between the pressing and substantial interest in the detection and deterrence of impaired driving and the individual driver's privacy interests and does not infringe s.8 of the *Charter* and accordingly, the results of the analysis of Mr. Brown's breath by an Approved Instrument are admissible at trial.

Section 1 *Charter* analysis

[78] If I am wrong in my conclusion, I have considered whether s. 320.27(2) is saved by s. 1 of the *Charter* as a reasonable limit that is demonstrably justified in a free and democratic society, per *R. v. Oakes*, [1986] 1 S.C.R. 103, at paras. 66-70.

[79] Section 1 of the *Charter* reads as follows:

> *The Canadian Charter of Rights and Freedoms guarantees the right 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.*

[80] As stated in *Morrison, supra*, at paragraphs 154-156:

> *[154] The test focuses on two main considerations: 1) the legislative objective must be sufficiently important to warrant restricting or overriding the Charter*

right; and 2) the means employed to achieve the legislative objective must be proportional to the objective.

[155] According to Oakes, the Crown bears the burden of proving, on a balance of probabilities, that the infringing legislative provision is reasonable and justifiable. The test requires that the following be considered:

> *(a) is the enacted law pursuing a pressing substantial objective?*
>
> *(b) is the law rationally connected to that objective?*
>
> *(c) does the law impair the right or freedom as little as possible? and*
>
> *(d) is there a proportionality of effects between the deleterious and salutary effects of the law?*

[156] M. R. McCreary, J, in Robb v R, 2019 SKQB 295 at para 22, wrote as follows:

> *In Bedford [33] at para 126, the Supreme Court of Canada summarized the approach to be taken under the Oakes test:*
>
> > *As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. . .*

1. Does s. 320.27(2) have a pressing and substantial objective?

[81] The objectives of s. 320.27(2) are clear; to deter, detect and punish impaired drivers. This is most certainly a "pressing and substantial objective". One does not have to look far to see the carnage caused on Canadian roadways as a result of drinking and driving. All levels of Court have lamented the loss of life and destruction left in the wake of impaired driving and the need to find a means to effectively deal with the frequency of impaired driving in Canada.

[82] When Bill C–46, part two, which contained s. 320.27 (2), was introduced in Parliament on May 19, 2017, Minister of Justice and Attorney General of Canada Jody Wilson-Raybould said the following:

> *I introduce the bill with the ultimate goal of reducing the significant number of deaths and injuries caused by impaired driving, a crime that continues to claim innocent lives and wreak havoc and devastation on Canadian families. No law is adequate comfort for devastating loss, but I want to stress that this proposed legislation was drafted with all victims of impaired driving in mind. (House of Commons Debates, Volume 14, Number 181, 1st Session, 42nd Parliament at p 11459).*

[83] As the Crown set out in their written submissions, impaired driving is the leading criminal cause of death in Canada. Steps taken by the Federal Government to combat impaired driving have been upheld under s. 1 of the *Charter* for this reason, even though they may infringe on a particular *Charter*-protected right.

2. Is s. 320.27(2) rationally connected to the "Pressing and Substantial" objective?

[84] It is clear that the selective breath testing regime (SBT) under the former s. 254(2) legislative regime was inadequate to effectively and consistently detect and deter drivers with an elevated blood alcohol concentration. This occurs as a result of an officer's general inability to reliably observe indicia that a driver had alcohol in their body during routine traffic stops or in circumstances where the driver does not admit to alcohol consumption and is not exhibiting indicia of alcohol consumption or impairment, notwithstanding that they do have an elevated blood alcohol concentration or are impaired.

[85] Mandatory alcohol screening by use of an approved screening device is a scientifically reliable screening measure that will increase detection by officers in circumstances where they would otherwise be relying on their subjective and potentially erroneous observations and will enhance deterrence.

[86] For these reasons, I find that mandatory alcohol screening as set out in s. 320.27(2) is rationally connected to the objectives of the law.

3. Does s. 320.27(2) impair the right or freedom as little as possible?

[87] To pass the minimal impairment stage, the government must have considered and reasonably rejected any viable alternatives which would have constituted a lesser intrusion upon *Charter* rights. McLachlin C.J. and Lebel J. stated in *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] S.C.R. 1 at para. 149, that, "The Government is not required to pursue the least drastic means of obtaining its objective; merely one which falls within a range of reasonable alternatives".

[88] With respect to minimal impairment, Baniak J., in *Morrison, supra*, noted at para. 169:

> *[169] Previous attempts or strategies to detect alcohol in a driver such as observation for signs of impairment like slurred speech or bloodshot eyes, smell of alcohol, questioning of a driver about his alcohol consumption and field sobriety tests have all had varying degrees of success but also of failure. And since driving, as stated in Orbanski, is not an inherent right and is subject to extensive regulations to protect life and property, and since I find that there are no obvious or apparent less restrictive schemes that the government could employ, I find that the Crown has proven, on a balance of probabilities, that the legislation impairs the accused's right in a minimal way.*

[89] According to the agreed statement of facts in this case, obtaining a result from the MAS demand took a very short period of time, perhaps a minute. The search

itself was minimally invasive and no lasting personal or identifying information about the accused was obtained. The Crown submitted, and I find that the MAS procedure is far less of an infringement than is routinely found at airports or courthouses and enjoys a very high level of acceptance among the public. Through the public service messages and efforts of groups such as MADD, the public is demanding that drunk driving be addressed so that streets and highways are safe.

[90] I adopt the reasoning of Justice Leszczynski in *Blysniuk, supra*, when he stated at para. 75:

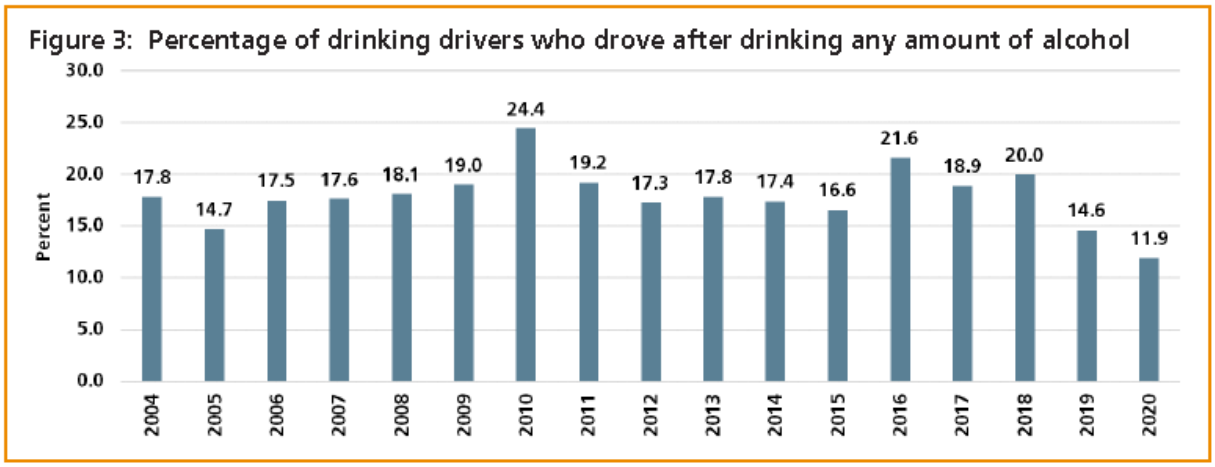
> *[75] In my view, the already existing power of police to stop drivers to check on their sobriety, the elimination of the time required for an officer to form a reasonable suspicion, the minimal intrusiveness of an approved screening device test on a subject's bodily integrity and privacy, along with the statutory requirements that an officer have possession of an approved screening device when they make the demand, the immediacy requirement in the demand and the efficiency of the test itself, which can be administered and produce results in as little as 5 seconds or not more than 2 minutes, all favor a conclusion that s. 320.27(2) is minimally impairing to the driver's freedom and rights.*

[91] After considering all of the foregoing, I find that the mandatory provision of a non-evidentiary breath sample impairs the Applicant's s. 8 *Charter* rights as little as possible.

4. Is there a proportionality of effects between the deleterious and salutary effects of the law?

[92] The salutary effects of the legislation are clear, and may become more apparent with the passage of time. It will increase detection and deterrence of drinking and driving and thereby decrease the loss of life, injury, property damage and overall social cost that it too frequently still causes.

[93] Preliminary data from the Traffic Injury Foundation, December 2020 report seems to show a decrease in the number of Canadians who drove after consuming alcohol since s. 320.27(2) came into force. This report is included in Tab 3 of the Crown's brief, and includes the following survey statistic:



[94] There is no doubt that the MAS provisions are helpful to police in detecting the presence of alcohol in drivers who do not display readily observable symptoms of impairment.

[95] Parliament and society take a dim view of impaired drivers. Baniak J. at paragraph 72 of *Morrison, supra*, stated "Any reasonable legislation that would act as a deterrent and encourage responsible behaviour will benefit and safeguard society".

[96] The deleterious effects of the legislation is that all drivers can now be required to provide a breath sample in the absence of any reasonable suspicion on the part of the officer that the driver has consumed alcohol. The act of driving is sufficient to trigger a MAS demand. This may result in persons who have not consumed any alcohol to be required to provide breath samples into an approved screening device. In a free and democratic society everyone should be free from warrantless search and seizure, especially when such search or seizure yields incriminating evidence.

[97] The new legislation eliminates the requirement for an officer to form a reasonable suspicion, however it is framed as a supplemental investigative tool

which is not determinative of guilt and is subject to judicial review and is restricted to breath samples only.

[98] Essentially, a balance must be struck between the deleterious and salutary effects of the MAS provisions. In this case, I find that the legislation achieves proportionality between its deleterious and salutary effects, and the provision would have been saved by s. 1 of the *Charter* in the final analysis.

R. Michie, JPC