Court of Queen's Bench of Alberta

Citation: R v Dylan Alexander Pratt, 2022 ABQB 407

Date: 20220610
Docket: 190467100S1
Registry: Edmonton

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

DYLAN ALEXANDER PRATT

Appellant

Decision
of the
Honourable Madam Justice M. Hayes-Richards

Appeal from the Conviction by
The Honourable Judge R. Brandt
Convicted on the 04th day of March 2021

I. Introduction

[1] Drunk driving has been a significant concern to Canadian society for decades. In 1995, the Supreme Court of Canada recognized the trail of death, injury, heartbreak, and destruction that drunk driving causes: ***R* v *Bernshaw*,** (1995) 1 SCR 254 at para 22 [***Bernshaw***]. In an effort to curb the devastation, Parliament enacted Bill C-46, ***An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts***, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2018) (Bill C-46), which simplified criminal driving

prosecutions and expanded police powers at the roadside by introducing mandatory alcohol screening (MAS). The new police powers allow an officer to demand a sample of breath from the operator of a motor vehicle (the driver) if the officer has an approved screening device (ASD) in his or her possession and is in the course of a lawful exercise of police power. There are no other threshold requirements for the MAS demand. A breath sample that produces a "FAIL" result on the ASD provides an officer with reasonable grounds to demand that the driver provide further breath samples, from which criminal consequences could flow. If the driver does not comply with the MAS demand, he or she may also face criminal consequences.

[2] At the heart of this appeal is the constitutionality of the MAS regime. The Appellant argues that the MAS regime intrudes too far on the constitutionally protected interests of individuals in Canada as enshrined in ss 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 (the *Charter*).

II. Facts and Issues at Trial

[3] On March 31, 2019, the Edmonton Police Service (EPS) was conducting random traffic stops as part of a Checkstop Alberta campaign. Cst. Requena stopped the Appellant after noting that the Appellant's motor vehicle was not maintaining the centre of the lane in which the Appellant was driving. Cst. Requena made a MAS demand of the Appellant. The Appellant provided three samples of his breath into an ASD. The first two breath samples were not suitable for analysis by the ASD. The third sample registered a "FAIL" result on the ASD. The Appellant was placed under arrest for impaired operation of a conveyance and taken to a Checkstop bus where he was provided an opportunity to contact counsel, after which he provided two evidentiary samples of his breath into an approved instrument.

[4] At trial, the Appellant challenged the constitutionality of the MAS regime, which is specified in s 320.27(2) of the *Criminal Code of Canada,* RSC 1985, c C-46 (*Criminal Code*). Specifically, the Appellant argued that the MAS regime breached his ss 8, 9, and 10(b) rights under the *Charter*. It was understood that if the Court were to find *Charter* breaches, further evidence may be called on whether any breaches could be saved under s 1 of the *Charter* as being reasonable limits justified in a free and democratic society. The Crown's position throughout, however, was always that there was no need for a s 1 *Charter* hearing with respect to any breach of ss 9 or 10(b) *Charter* rights. The Crown submitted that random vehicle stops and the suspension of the roadside right to counsel have already been found to be saved by s 1 of the *Charter* in relation to detention surrounding suspicion-based testing. Since the MAS regime has no greater impact on a person's ss 9 and 10(b) *Charter* rights as under the previous suspicion-based regime, a s 1 *Charter* analysis was not required.

[5] A *Charter voir dire* was held. The Crown led evidence from several witnesses, including five experts. The expert evidence at issue in this appeal came from three police witnesses: Sgt Robert Davis of the EPS, Sgt Richard Butler of the Calgary Police Service (CPS) and Supt Gary Graham of the Royal Canadian Mounted Police (RCMP) K Division. The Appellant took issue with the expert qualifications and admissibility of the opinions of the three police witnesses. After a contested *voir dire* on qualifications, admissibility, and relevance, the trial judge qualified the three police witnesses as experts with limited qualifications and admitted their evidence.

[6] After hearing the *voir dire* evidence, the parties agreed to proceed by way of written argument only. In an oral decision delivered on November 26, 2020, the trial judge found no breaches of the Appellant's *Charter* rights and declined to consider s 1 of the *Charter*. As a result, neither party called evidence nor argued any issues pertaining to s 1 of the *Charter*. A conviction was later entered against the Appellant after a failed s 11(b) *Charter* application.

III. Issues

[7] The Appellant raises four grounds of appeal:

1) The trial judge erred in law by qualifying Sgt Davis, Sgt Butler, and Supt Graham as expert witnesses.
2) The trial judge erred in law by finding that s 320.27(2) of the *Criminal Code* does not violate s 8 of the *Charter*.
3) The trial judge erred in law by finding that s 320.27(2) of the *Criminal Code* does not violate s 9 of the *Charter*.
4) The trial judge erred in law by finding that s 320.27(2) of the *Criminal Code* does not violate s 10(b) of the *Charter*.

Issue 1: Expert Evidence

[8] The Appellant argues that the trial judge erred in qualifying Sgt Davis, Sgt Butler, and Supt Graham as experts. Specifically, the Appellant argues that the trial judge erred in the application of the expert qualification test and as a result, the trial judge relied too heavily on the opinion evidence given by the three police witnesses.

[9] The Crown Respondent argues that the trial judge made no such error, and properly balanced the evidence from the police officers in his analysis regarding the *Charter* allegations.

A. Standard of Review

[10] The admissibility of expert evidence is a question of law, reviewable for correctness insofar as the proper articulation and application of the legal test is concerned: ***R v Underwood***, 2008 ABCA 263 at para 10. Absent an error in principle, deference is owed to decisions of trial judges to admit or reject expert evidence: ***R v DD***, 2000 SCC 42 [***DD***] at paras 12 – 13; ***R v Youvarajah***, 2013 SCC 41 at para 31; see also ***R v Couture***, 2007 SCC 8 at para 81. No deference is owed where the trial judge fails to undertake their gate-keeping function in determining the admissibility of expert evidence: ***R v Jacobs***, 2014 ABCA 172 at para 56; see also ***R v Dominic***, 2016 ABCA 114 [***Dominic***] at para 17.

B. The Legal Test for Admitting Expert Evidence

[11] The framework for admitting expert evidence is a two-step process. At the first step, the proponent of the evidence must establish the four threshold requirements as set out in ***R v Mohan***, [1994] 2 SCR 9 [***Mohan***] at p 20:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule; and

4. A properly qualified expert.

[12] Relevance of the evidence is a threshold requirement and a matter to be decided by a judge as a question of law. Evidence will be logically relevant if it relates to a fact in issue: ***Mohan*** at pp 20 – 21.

[13] The evidence must also be necessary. Expert evidence becomes necessary when it provides information that is outside the experience and knowledge of a trier of fact: ***R v Abbey***, 2009 ONCA 624, leave to appeal to SCC refused, [2010] SCCA No 125 [***Abbey ONCA***] para 96; ***Mohan*** at p 22 – 23, or when it provides context to difficult evidence in a way that is useful to the trier of fact: ***Anderson v Canada (Attorney General)***, 2015 NLTD(G) 138 at paras 8 – 11. The subject matter of the inquiry must be such that ordinary persons are unlikely to form a correct judgment about it if unassisted by persons with special knowledge: ***DD*** at para 24.

[14] Necessity is a contextual consideration. The normal experiences of different triers of fact may differ, and society's common views can shift over time. If the common view on a subject-matter is incorrect, expert evidence is necessary to counter myths, stereotypes, and biases that the public may have regarding certain classes of people or subjects: ***R v Lavallee***, [1990] 1 SCR 852 at pp 870 – 873; ***DD*** at para 32. Because necessity is contextual, it is normally best decided by a trial judge who is in a strong position to determine what may come within the normal experience of a trier of fact in the community in which the case is being tried. Appellate courts will normally exercise considerable deference in reviewing decisions of this nature. A trial judge has considerable elbow room to be wrong: ***R v T(JG)***, 2003 ABCA 33 at para 28.

[15] If, on the proven facts, a trier of fact can form their own conclusions without help, then the expert opinion is not necessary: ***Mohan*** at p 22 – 23; see also ***Abbey ONCA*** at para 94; ***R v Abbey***,[1982] 2 SCR 24 [***Abbey SCC***] at p 42; ***White Burgess Langille Inman v Abbott and Haliburton Co.***, 2015 SCC 23 [***White Burgess***] at paras 19 – 24.

[16] The evidence must be otherwise admissible and not run afoul of any exclusionary rule: ***Mohan*** at p 25.

[17] The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matter on which he or she undertakes to testify: ***Mohan*** at p 25.

[18] Once the four threshold requirements have been met, the second stage of the process is for the trial judge to balance the potential benefits and risks of admitting the evidence. Often referred to as the "gatekeeping" stage of the inquiry, the trial judge must engage in a cost-benefit analysis to determine whether the probative value of the expert evidence outweighs any prejudicial effect. The trial judge must weigh the relevance, reliability, and necessity of the expert evidence against the consumption of time, prejudice, and potential for confusion: ***R v J-LJ,*** 2000 SCC 51 at para 47. If the cost-benefit analysis weighs toward admitting the evidence, the evidence will be legally relevant to the inquiry: ***Mohan*** at p 21; ***Dominic*** at para 16.

[19] Admissibility is not an all-or-nothing proposition, nor is the trial judge limited to either accepting or rejecting the opinion evidence as tendered by one party or another. The trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion: ***Abbey ONCA*** at para 63; ***R v Wilson,*** [2002] OJ No 2598 (Ont SCJ).

C. Constitutional Challenges

[20] When dealing with a legislative challenge based on violations of the *Charter,* decisions must not be made in a factual vacuum. The presentation of facts is not a mere technicality, but essential to proper consideration of *Charter* issues. Decisions cannot be made on the unsupported hypotheses of enthusiastic counsel: ***MacKay v Manitoba***, [1989] 2 SCR 357 at pp 361 – 362. Before a court can measure the impugned legislation against provisions of the *Charter*, a proper factual foundation must be laid. This factual foundation can include adjudicative facts (those that concern the immediate parties) and legislative facts (those that establish the purpose and background of the legislation, including its societal, economic, and cultural context): ***Danson v. Ontario (Attorney General)***, [1990] 2 SCR 1086 [***Danson***] at p 1099.

D. The Expert Evidence

[21] The Appellant argues that the trial judge erred in the application of the necessity branch of the ***Mohan*** test and failed to exercise his gatekeeping function by admitting the evidence. The Crown Respondent argues that there is no basis for appellate intervention in the trial judge's decision to admit the police evidence. The police evidence provided a broad factual picture of the impact of the MAS regime on drivers and its effectiveness of meeting Parliament's goals, and the trial judge properly balanced the probative value against any potential prejudice.

i. Sgt Robert Davis

[22] The Crown offered Sgt Davis as an expert in police techniques for detection of impaired drivers, including screening for alcohol impairment. Sgt Davis had 15 years experience as a member of the EPS. He was a patrol officer for 5 years, which included engaging in many impaired driving investigations. He held a position of Constable in the impaired driving unit for two years before being promoted to Sergeant. At the time of trial, he had been Sergeant of the impaired driving unit for three years and had taken significant law enforcement-only training in relation to alcohol-detecting instruments and impaired driving investigation.

[23] As sergeant of the impaired driving unit, Sgt Davis was responsible for all EPS training in relation to impaired drivers, oversight and on-street monitoring of the Checkstop program, and oversight of maintenance for all alcohol-impaired investigative instruments used by EPS. Sgt Davis also acted as a primary consultant to members of the EPS and other policing agencies in the areas of alcohol and drug impaired investigations.

[24] In relation to the Alco-Sensor FST and Intoxilyzer 400D approved screening devices, Sgt Davis was trained as an operator, in calibration and accuracy testing, and annual maintenance of both types of devices. In relation to effects of alcohol on the human body, Sgt Davis has participated in numerous alcohol workshops where volunteers are dosed with a controlled amount of alcohol and then observed to determine absorption, distribution, and elimination rates of that alcohol on the individual.

[25] In relation to the Checkstop programs, Sgt Davis was responsible for organizing and coordinating all static Checkstop locations and had supervised 32 of the 40 static Checkstops that had been conducted between the date that mandatory alcohol screening came into effect and the date of trial. As the on-street monitor, Sgt Davis was involved with administering ASD tests during static Checkstops.

[26] Sgt Davis, other members of the impaired driving unit, and patrol members engaged in Checkstop shifts collected data, which was then collated and put into a database. The data

included the number of officer-citizen contacts, impaired driving arrests, immediate roadside, 24-hour, and graduated licence suspensions issued, summons issued, warrants executed, suspended drivers encountered, other criminal charges laid, and vehicle checks that are conducted. This data was collected before and after the MAS regime was implemented.

[27] Since the MAS regime was implemented, approximately 12,000 ASD tests were conducted by the EPS. During some static Checkstops, Sgt Davis had an officer record the start and stop time of 42 vehicle stops where a MAS demand was made to determine how long it took to make a MAS demand and take a breath sample. This data collection was done very informally and totally randomly and was done to gather information for operational usage within the EPS impaired driving unit, and not for any other purpose.

[28] Sgt Davis did not have any direct involvement with any aspect of the investigation of the Appellant on March 31, 2019.

[29] The Crown argued that Sgt Davis's evidence and opinion was relevant to the issue of whether the MAS regime was *Charter* compliant. The evidence was necessary to give the court perspective on the number of people being screened, the time it takes to complete the screening, the results of the screening, and interpreting that data in the context of the usefulness of the MAS regime in detecting impaired drivers. Sgt Davis was qualified to give an opinion on the issue at hand because of his experience as an EPS officer and specialized training in alcohol-detecting instruments. Further, the Crown argued there was no evidence that Sgt Davis was biased and that much of his evidence was admissible as factual even if he was not qualified to give expert opinion evidence.

[30] The Appellant conceded that some of Sgt Davis' evidence had logical relevance to the issues at trial but argued much was not legally relevant. The Appellant had concerns about the small sample size that was used to determine how long a MAS demand and breath sample took, and further argued that an expert was not required to tender or interpret that information. The Appellant conceded that the statistical information would be admissible under the *Canada Evidence Act,* RSC 1985, c C-5 (*CEA*) as business records collected by the EPS in the ordinary course of business. The Appellant conceded that Sgt Davis had specialized knowledge, but the broad qualification that the Crown was seeking did not actually speak to the issue to be decided. The opinion that Sgt Davis offered about the effectiveness of the MAS regime was of limited value and may be biased as it was coming from someone in law enforcement.

[31] The Court found that there was a disconnect between the documentary evidence before the Court, Sgt Davis' extensive training and experience, and the proposed area of expertise. The Court also found that much of the evidence offered by Sgt Davis did not call for an opinion and was therefore not expert evidence. In applying the legal test from ***Mohan***, the Court found that Sgt Davis' evidence was relevant, necessary, and did not run afoul of an exclusionary rule. With respect to necessity, the Court found that there was no other evidence regarding the operation of roadside screening tests, including MAS systems, and therefore the opinion of Sgt Davis was necessary. However, the Court found that the area of qualification that the Crown was seeking was too broad, and restricted Sgt Davis' qualifications to "the operation and training with respect to alcohol screening systems, including mandatory alcohol screening and the usefulness of such systems to the Edmonton Police Service."

ii. Sgt Richard Butler

[32] The Crown offered Sgt Butler as an expert in the operation and training of roadside alcohol screening systems, including mandatory alcohol screening and the usefulness of such systems to the CPS. Sgt Butler had been a member of CPS since 1987. At the time of trial, he was the supervisor of the Alcohol and Drug Recognition Expert Unit of the CPS, a position he held since the unit's inception in September 2011. From 2007 to 2011, Sgt Butler was the supervisor of the Alcohol Unit within the Traffic Section of CPS. From 1993 to 2006, Sgt Butler was a member of the CPS Alcohol Unit.

[33] The Alcohol and Drug Recognition Expert Unit has six members and acts as a resource unit for frontline CPS members and develops training for impaired driving investigations, including training for qualified breath technicians, standard field sobriety testing, and drug recognition experts. As the supervisor of that unit, Sgt Butler supervises the other members of that unit, develops policy, and acts as an instructor for CPS members and the public, and a liaison between CPS and other stakeholders. Sgt Butler does not participate in individual investigations but is available as a resource for officers conducting impaired driving investigations.

[34] Sgt Butler is a member of the Canadian Society of Forensic Science and the International Association for Chemical Testing. He has significant training in the fields of alcohol screening devices, alcohol detecting instruments, standard field sobriety testing, and drug recognition evaluations. Sgt Butler is not trained as a drug recognition expert.

[35] Sgt Butler has instructed over 50 recruit-level impaired driving classes and has trained approximately 400 officers through in-service training. He has trained CPS members how to conduct an impaired driving investigation, including what to look for and how to articulate their grounds, and how to use, calibrate, and maintain breath testing instruments. With regards to the Alco-Sensor FST and mandatory alcohol screening training, Sgt Butler developed a training and e-learning module that was required training for all frontline members.

[36] Sgt Butler had never been qualified as an expert and had only ever testified for the Crown in previous cases.

[37] The Crown argued that Sgt Butler's opinion could still provide the Court with useful information. Sgt Butler's evidence would not overwhelm the Court and was not an improper use of Court resources to allow his evidence. The majority of Sgt Butler's evidence would be admissible absent his opinion, and the opinion he was offering was on a very narrow issue. While similar to the evidence of Sgt Davis, Sgt Butler's evidence was specific to CPS, which has different practices and procedures than EPS.

[38] The Appellant conceded that based on his training and experience, Sgt Butler was a properly qualified expert in the area for which the Crown was seeking qualifications. The Appellant took issue with whether Sgt Butler's opinion met the necessity branch of the ***Mohan*** test, given that much of Sgt Butler's evidence was a repetition of Sgt Davis' evidence.

[39] The Court found that Sgt Davis's opinion was limited to the usefulness of the MAS regime to the EPS, and that there was an important distinction between the opinions of Sgt Davis and Sgt Butler because their opinions related only to their respective police services. The Court noted that the Crown needed a certain latitude on how to call its case, and there was nothing that would suggest that Sgt Butler's evidence would somehow be irrelevant. The Court ultimately

qualified Sgt Butler as an expert in the operation and training with respect to roadside alcohol screening systems, including mandatory alcohol screening, and the usefulness of such systems to the CPS.

iii. Supt Gary Graham

[40] The Crown offered Supt Graham as an expert in management of police involved in the detection of impaired drivers, assessment of performance, and outcomes in safety and enforcement. Supt Graham had been a member of the RCMP for 43 years and was the program manager of the Integrated Provincial Traffic Services program for the RCMP in Alberta. In that role, Sgt Graham provided day-to-day insight and supervision to the operations, administrative, and operational function of the RCMP traffic program. Supt Graham supervised 188 sworn RCMP members, 109 provincial traffic sheriffs, and 28 support staff, and provided material, funding, and direction in relation to public policy or statutory requirements of the program, which included assessing the effectiveness of various traffic interventions that are undertaken by members.

[41] Supt Graham has a Master of Business Administration with an emphasis on Human Resources, and diploma in counselling, research, media, strategies, and techniques. Prior to assuming his current role, Supt Graham acted in various supervisory roles with the RCMP, included overseeing all traffic units in Southern Alberta.

[42] Supt Graham uses traffic enforcement statistics that are tabulated and collated by a strategic analyst that cover trends in fatalities and serious injury collisions, mandatory alcohol screening, speeding events, and crime reduction initiatives. Supt Graham also meets regularly with senior officers in the traffic program, data entry clerks, and senior management to obtain information on the various police programs and public feedback. Those statistics and meetings help him determine whether policies and statutes are being properly applied to lawfully place officers in their interactions with the public, and the effectiveness of various programs in the areas of enforcement of seatbelt use, impaired and distracted driving, and education.

[43] Supt Graham provided RCMP statistics and survey analysis that related to the number of eTicket traffic stops, MAS demands by traffic service members, “FAIL” ASD results, criminal charges, refusals, medical excuses for failing to provide a sample, time required to perform the test, usefulness of the MAS program, and policy goals. The RCMP National Survey Centre assisted in developing the survey, which was distributed to 169 RCMP members by email in December 2019. 74 responses were recorded.

[44] Supt Graham does not have specialized training in statistical or actuarial analysis, or psychometrics.

[45] The Crown argued that Supt Graham was in the best position to provide insight into the survey results and data collection, and that Supt Graham’s opinion was necessary to the issue of detection and deterrence rates and the effectiveness of mandatory alcohol screening in the rural landscape. The Crown further argued that Supt Graham’s opinion was highly relevant and essential to assist the Court in determining whether the MAS regime was reasonable.

[46] The Appellant argued that Supt Graham was not qualified to give the opinion that the Crown was seeking. Supt Graham was an expert in management and human resources, not statistical analysis. The statistics proffered by Supt Graham were not designed for court or intended to comment on effectiveness of the MAS program. The report that Supt Graham

submitted was only directed by him and was prepared by a statistical analyst. The survey itself was problematic and unreliable. Aside from the fact that the report was hearsay and unreliable, Supt Graham's evidence was minimally relevant, the probative value was extremely low, and the prejudicial effect would result in bogging down the trial with extraneous information. Additionally, Supt Graham was not an expert in statistical analysis and in no better position than the Court to draw inferences from the statistical data.

[47] The Court found that some of the evidence from Supt Graham would be relevant to the core issues in terms of when mandatory alcohol screening was being used and if and how the law is being applied. Without Supt Graham's evidence, the Court would not know whether mandatory alcohol screening was being applied by the RCMP, or how often or in what circumstances it was being applied. As such, Supt Graham's evidence was necessary. The Court found that the survey was problematic, contained hearsay and personal perceptions, and was not scientific, but that was an issue of weight. Supt Graham could certainly testify to the data that he caused to be collected. Ultimately, the Court limited his expertise to the management of RCMP officers involved in the detection of impaired drivers.

E. Positions of the Parties

[48] The Appellant argues that the trial judge erred on the necessity branch of the ***Mohan*** test in relation to all three police experts. Specifically, the Appellant argues that the key issue was whether the benefits to the State in detecting and deterring impaired drivers justified the privacy intrusion inherent in the MAS regime, not whether the MAS regime could be beneficial in detecting and deterring impaired drivers. The evidence tendered by the three police witnesses concerned the implementation of MAS by individual Albertan police forces. Any inferences that could be drawn as to the reasonableness of the law itself would not derive from their evidence of that practical application and could have been done by the Court without the need for any opinion evidence. The Appellant further argues that if the trial judge did not err on the necessity branch, the evidence was duplicitous and had the potential to distract and confuse.

[49] The Crown Respondent argues that the police evidence provides a broader factual picture of the impact of the MAS regime and the effectiveness in meeting Parliament's goals of deterring and detecting impaired drivers. With regards to necessity, the Crown Respondent submits that the evidence from the police experts was necessary in order to assess the efficacy of the search mechanism as well as the potential degree of intrusiveness, and to explain the significance of the data and their experience in relation to roadside sobriety testing. The trial judge was alive to his gatekeeping function and to trial fairness, and properly limited the scope for which each witness was qualified. The Crown Respondent submits that if the trial judge erred in qualifying the three police witnesses as experts and admitting their opinion evidence, the evidence of the three police witnesses consisted of factual matters, statistical evidence, and police practices, which were otherwise admissible as common law business records.

F. Analysis

[50] I find the trial judge did not err in admitting the opinion evidence of the three police witnesses. I also find the trial judge did not err in his gatekeeping function. The evidence of the three police witnesses was necessary for the trial judge to determine whether the MAS regime was a reasonable intrusion on the *Charter* protected interests of individuals and the evidence did not overwhelm the trial.

[51] The three police witnesses provided evidence on the implementation and efficacy of the MAS regime by the police forces of the two biggest urban centres in Alberta, and from the rural perspective of the RCMP. All three witnesses provided evidence in the form of data that was collected by various means. The trial judge was alive to the fact that the data upon which their opinions were based was flawed, incomplete, unscientific, and limited in terms of ultimate weight. However, he also noted that the data surrounding the MAS regime in Alberta was limited in that way because the regime had only been available for a relatively short period of time and no thorough studies had been conducted.

[52] All three police witnesses opined that a MAS demand is conducted faster than suspicion-based testing, thus enabling more people to be tested. The trial judge properly recognized that the data pools from which that opinion was drawn were small, incomplete, and not subject to rigorous scientific testing, and took that into consideration when assessing the weight to be afforded to that evidence. The trial judge gave little weight to the survey evidence given by Supt Graham given the problems identified by the Appellant during cross-examination.

[53] Even if the trial judge erred in allowing the opinions of the officers about the comparative speed of the two regimes to be admitted, based on the admissible factual evidence, the trial judge would have logically concluded the same.

[54] Both Sgts Butler and Davis gave evidence regarding what is required for a suspicion-based ASD screening test. This includes a demand for documentation from the driver, asking questions of the driver, and looking for signs of impairment while the driver produces the documents and answers questions. If the officer forms reasonable suspicion, the driver is then removed from his or her vehicle and placed in the police vehicle (and likely subject to an officer safety pat-down search before being placed in the police vehicle), at which point the demand is read to the driver, instructions are given, and the test is administered. Comparatively, the MAS demand is conducted while the driver is seated in his or her own vehicle and often without asking any questions of the driver or demanding any sort of documentation.

[55] Sgt Davis testified about incidents where the driver of a motor vehicle displayed no obvious or visible signs of alcohol consumption or impairment, but the driver’s breath sample into the ASD registered a “FAIL” result. Not only does this show that the MAS regime will identify impaired drivers that may have been able to defeat suspicion-based screening, but it also suggests that the commonly held belief that a person who was impaired by alcohol would exhibit some sign of alcohol consumption or impairment is wrong. Without the evidence of Sgt Davis on this point, that commonly held belief may have incorrectly influenced the trial judge.

[56] The opinions from the three police witnesses were directly relevant to the issue of whether the benefits to the State in detecting and deterring impaired drivers justified the degree of privacy infringement inherent in the MAS regime. The trial judge considered the evidence of the three police officers in that context, properly narrowed their areas of expertise, and considered the probative value of their evidence in assisting him in determining that issue. Wide latitude is to be afforded to the trial judge in these circumstances.

[57] Further, the trial judge did not rely on the opinions of the respective officers to determine the ultimate issue. Rather, he determined that their evidence was of some assistance to him in determining the reasonableness of the MAS regime. The trial judge properly weighed the evidence and the opinions in the context of the issues at trial.

[58] Additionally, the opinions of the respective officers were quite narrow. The bulk of their evidence was admissible as factual evidence and would have been admissible had the officers testified as merely factual witnesses. The Appellant has conceded as much.

[59] I find no reversible error in the trial judge's decision to admit the opinion evidence of the officers given the standard of review and the considerable deference to be afforded the trial judge in these circumstances.

Issues 2 and 3: Sections 9 and 10(b) of the *Charter*

[60] The Appellant submits that the trial judge misapprehended the test in relation to violations of ss 9 and 10(b) of the *Charter* and misinterpreted the impact of the jurisprudence on the analytical framework to be applied. The Crown Respondent submits that the trial judge correctly found there was no greater impact on an individual's ss 9 and 10(b) *Charter* rights under the new MAS regime and consequently, the trial judge was correct in his conclusion that prior Supreme Court jurisprudence applied. There was no need for a fresh s 1 *Charter* analysis because the s 1 *Charter* analysis done in relation to random traffic stops and roadside right to counsel in previous cases applied equally to this case.

A. Section 9 of the *Charter*

[61] The Appellant argues that the trial judge erred in finding no breach of the Appellant's s 9 *Charter* rights. The authorities the trial judge relied upon held that random traffic stops did in fact infringe on a person's s 9 *Charter* rights, but that infringement was justified under s 1 of the *Charter*. The Appellant submits that because the MAS regime has no criteria under which a police officer can stop a driver, it is within the full discretion of the police and thus there is a higher degree of intrusion than that involved with suspicion-based testing. As such, the trial judge was required to find a breach and conduct a s 1 *Charter* analysis to determine if the new regime was justified.

[62] The Crown Respondent argues that the trial judge did not err in finding no breach of the Appellant's s 9 *Charter* rights. Although the Appellant suggested that it was unclear whether the trial judge had found no breach of s 9 and 10(b) of the *Charter* or that any infringement was justified under s 1 of the *Charter*, the Crown Respondent submits that this is a distinction without a difference. On either view, the trial judge was correct to follow binding Supreme Court of Canada jurisprudence in finding s 320.27(2) of the *Criminal Code* to be constitutional.

[63] The Crown Respondent further submits that the trial judge was correct in finding that the MAS regime has no greater impact on an individual's s 9 *Charter* rights than suspicion-based testing. The MAS regime does not materially affect the duration of the detention, the minimal inconvenience to the individual, the non-intrusive nature of roadside sobriety testing, and the substantial risk posed by impaired drivers. Since the reasonable suspicion threshold was never a consideration in the reasonableness of limiting s 9 *Charter* rights at the roadside, there was no need for the trial judge to engage in a further s 1 *Charter* analysis.

[64] The trial judge found that the lawfulness of random stops to check licencing, registration, mechanical fitness of the vehicle, and sobriety of the driver is a matter of "settled law" and cited the Supreme Court's decisions in ***Dedman v The Queen***, [1985] 2 SCR 2 [***Dedman***] and ***R v Ladouceur***, [1990] 1 SCR 1257 [***Ladouceur***]. Later in his reasons, the trial judge specified that the "settled law" was that traffic stops related to suspicion-based testing do not infringe s 9 *Charter* rights. The trial judge further stated that the MAS regime does not present any real

difference from suspicion-based testing in terms of police stopping powers, and that the reduced interaction between the police and driver at the roadside under the MAS regime constitutes an even slighter infringement on the driver's s 9 *Charter* rights.

[65] I agree with the Crown Respondent that to the extent of the uncertainty as to whether the trial judge found a violation saved by s 1 of the *Charter* or no violation at all, this is a distinction without a difference. It is clear the trial judge found that the MAS regime constitutes an even slighter infringement on a driver's s 9 *Charter* rights than suspicion-based testing, and therefore, based on prior Supreme Court jurisprudence, there was no s 9 *Charter* violation.

[66] The Supreme Court authorities are clear that drivers are arbitrarily detained when they are subject to random traffic stops, but that detention is justified under s 1 of the *Charter*: see ***Dedman*** at pp 34 – 35; ***R v Hufsky***, [1988] 2 SCR 621 at paras 12 – 13 and 20; ***Ladouceur*** at pp 1276 – 77. The trial judge was alive to the issues encapsulated in s 9 of the *Charter*: whether the Appellant's detention was authorized by law, and whether the law was reasonable. The trial judge quoted from ***Dedman*** at para 73, which states the following:

> The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis, without any grounds for suspicion or belief that the particular driver has committed or is committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological effects for the innocent driver. These effects, however, would tend to be minimized by the well-publicized nature of the program, which is a necessary feature of its deterrent purpose. Moreover, the stop would be of relatively short duration and of slight inconvenience. Weighing these factors, I am of the opinion that having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not, therefore an unjustifiable use of a power associated with the police duty, within the *Waterfield* test. I would accordingly hold that there was a common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. program.

[67] I agree with the Crown Respondent that the reasonable suspicion threshold has not been a consideration in the analysis concerning the reasonableness of limiting an individual's rights under s 9 of the *Charter* at the roadside. The relevant considerations have always been the limited use of the roadside screening result, the duration and minimal inconvenience of a roadside stop, the non-intrusive nature of roadside sobriety testing, and the substantial risk posed by impaired drivers: see the discussions regarding detention in ***R v Thomsen,*** [1988] 1 SCR 640 [***Thomsen***] at p 652 – 53 and ***R v Orbanski; R v Elias***, 2005 SCC 37 [***Orbanski***] at para 58. The fact that reasonable suspicion has been removed from the MAS regime does not change these factors, which apply with equal measure regardless of whether the police engage in mandatory or suspicion-based alcohol screening.

[68] The only potential difference between a detention under the MAS regime and under the reasonable suspicion regime is the duration of the arbitrary detention. With suspicion-based testing, the arbitrariness of the detention ends when the officer's suspicion crystalizes. After that point, the detention is authorized by the provisions of the *Criminal Code* that allow an officer to make an ASD demand. With the MAS regime, the arbitrariness of the detention lasts until the

ASD records a result from the driver's breath sample. The result from the ASD will determine if the officer has grounds for an evidentiary breath demand, and, if grounds exist, the provisions of the *Criminal Code* will authorize any further detention. While the MAS regime still involves an arbitrary detention of the driver, it does not create any new stopping powers for police.

[69] The issue of whether the MAS regime infringes on a person's s 9 *Charter* interests has been considered by other provincial courts in other provinces. In all cases, the Courts have found that the MAS regime did not change the stopping power of the police, which was already upheld in the cases of ***Hufsky*** and ***Ladouceur***. In ***R* v *Blysniuk***, 2020 ONCJ 603 [***Blysniuk***] at paras 14 and 18 and ***R* v *Day***, 2022 MBPC 2 [***Day***] at paras 79 – 86, the Courts found that, while the MAS regime breached an accused's s 9 *Charter* rights, it was not necessary to re-engage in a s 1 *Charter* analysis because there was no change to the stopping power that already exists for investigating a driver's sobriety. Other courts have found no s 9 *Charter* breach using the same principles: see ***R* v *Morrison***, 2020 SKPC 28 [***Morrison***] at paras 136 – 137; ***R* v *Kortmeyer***, 2021 SKPC 10 [***Kortmeyer***] at paras 32 – 35; ***R* v *Switenky***, 2020 SKPC 46 [***Switenky***] at paras 77 – 79; ***R* v *Brown***, 2021 NSPC 32 [***Brown***] at para 24.

[70] The trial judge was correct in his finding that the MAS regime does not present any real difference from suspicion-based testing in terms of police stopping powers. The trial judge concluded that the reduced interaction between the police and driver at the roadside under the MAS regime constituted a slighter infringement on the driver's s 9 *Charter* rights than the interaction under suspicion-based testing. This was a reasonable conclusion for the trial judge to make based on the evidence. Although the Appellant is correct that nothing in s 320.27(2) of the *Criminal Code* requires an officer to perform the MAS while the driver remains in their vehicle, even if an officer were to require a driver to attend at the police vehicle to take the MAS, the s 9 *Charter* infringement is still no greater than under the prior regime.

B. Section 10(b) of the *Charter*

[71] The Appellant argues that the trial judge erred in finding no breach of the Appellant's s 10(b) *Charter* rights at the roadside. The Appellant submits that the existing jurisprudence is clear that the right to counsel is engaged at the roadside, but justifiably suspended. The Appellant argues that because the MAS regime will impact more innocent drivers than suspicion-based testing, the trial judge was required to engage in a new s 1 *Charter* analysis.

[72] The Crown Respondent submits that the trial judge did not err in failing to conduct a new s 1 *Charter* analysis. While the MAS regime may allow police to test a higher number of individuals once they are stopped, there was no evidence that the MAS regime will result in police stopping a higher number of individuals.

[73] The trial judge found that the MAS regime did not represent any difference with respect to an accused's right to counsel at the roadside in that the right to counsel is suspended under the MAS regime for the same reasons as suspicion-based testing. The trial judge concluded that the issue of roadside right to counsel is "settled law," and that an accused who fails a MAS test is in the exact same position as an accused who fails a suspicion-based test. As a result, the Appellant's s 10(b) *Charter* rights were not breached.

[74] As with his analysis with respect to the Appellant's s 9 *Charter* rights, the trial judge did not err in concluding that there was no breach of the Appellant's s 10(b) *Charter* rights. The Supreme Court's reasoning in ***Thomsen*** and ***Orbanski*** is clear that an individual is detained at

the roadside, and therefore s 10(b) of the *Charter* is engaged. However, the right to counsel at the roadside is suspended and the limitation on that right is justified under s 1 of the *Charter*. The justification for the roadside limitation under s 10(b) of the *Charter* is the same as under s 9 of the *Charter*: the limited use of the roadside screening result, the duration and minimal inconvenience of a roadside stop, the non-intrusive nature of roadside sobriety testing, and the substantial risk posed by impaired drivers.

[75] In ***Blysniuk*** at paras 15 – 18, the Court relied on the reasoning in ***Thomsen*** and found that the MAS regime was more streamlined than suspicion-based testing, and therefore less of an infringement on an individual's rights. In ***Kortmeyer*** at para 36, the Court found that the MAS regime did not breach the accused's s 10(b) *Charter* rights, and if it did, the breach was saved by s 1 of the *Charter* per ***Orbanski***.

[76] The trial judge was correct in finding that the MAS regime was no different than suspicion-based testing in relation to the suspension of an individual's right to counsel at the roadside. There was no need to find a violation and conduct a further s 1 *Charter* analysis.

[77] It should be noted that during oral argument on this summary conviction appeal, an issue arose with respect to whether the transcript accurately reflects the trial judge's comments regarding whether he should conduct a s 1 *Charter* analysis. Commencing at page 19 line 18 of the transcript, the transcript reads "I have <u>an urge</u> to carry out a section 1 analysis..." (emphasis added). Both parties agree that what the trial judge actually said was "I have <u>been urged</u> to carry out a section 1 analysis..." (emphasis added). This correction is in line with the argument of the Appellant during the trial *voir dire* that the trial judge should find violations of ss 8, 9 and 10(b) of the *Charter* and then conduct a s 1 *Charter* analysis.

Issue 4: Section 8 of the *Charter*

[78] The Appellant submits that the trial judge erred in his analysis of whether the MAS regime was an unreasonable intrusion on the privacy interests of an individual. The Appellant argues that the trial judge gave too much weight to some factors and not enough on others and did not properly balance the competing interests between the individual and the state. Specifically, the Appellant contends that the trial judge erred in the following ways:

A. The trial judge placed too much weight on police expert evidence about the practical implementation of MAS rather than assessing the reasonableness of the MAS regime itself;

B. The trial judge failed to recognize the heightened degree to which the MAS regime impacts an individual's privacy interests;

C. The trial judge erred in his characterization of the nature of the MAS regime as "regulatory" as opposed to "criminal";

D. The trial judge erred in the assessment of the mechanism of the search, particularly with regards to the threshold of the search;

E. The trial judge erred in his appreciation of the reasonable suspicion standard; and

F. The trial judge erred in failing to properly consider the potential for racial or discriminatory application.

[79] The Crown Respondent submits the trial judge made no such errors. In the alternative, if the trial judge did err, there is a sufficient evidentiary record for this appellate Court to assess the reasonableness of the MAS regime.

[80] There is no dispute regarding the applicable law surrounding a s 8 *Charter* analysis in this case. The parties agree that the focus is on the second prong of the three-pronged test in ***R v Collins***, [1987] 1 SCR 265 at para 23: whether the law itself is reasonable. When determining the reasonableness of the law itself, the applicable test to be applied is laid out in ***Goodwin v British Columbia (Superintendent of Motor Vehicles)***, 2015 SCC 46 [***Goodwin***] at paras 55 – 75. Although not an exhaustive list, ***Goodwin*** directs the Court should consider:

A. The purpose of the legislation;

B. The nature of the legislation;

C. The mechanism of seizure; and

D. The availability of judicial oversight.

A. Over-Reliance on Police Expert Evidence

[81] The Appellant argues that the trial judge erred in his reliance on evidence about police practices and the practical implementation of the MAS regime in Alberta when determining whether the MAS regime was reasonable. The Appellant submits that the trial judge should have focused on whether the legislation was reasonable with the safeguards that exist.

[82] The Crown Respondent argues that the trial judge was entitled to rely on the evidence from the police witnesses in his analysis regarding the reasonableness of the MAS regime and it was open to the trial judge to accept all, some, or none of the officers' evidence.

[83] I agree with the Crown Respondent that the trial judge was entitled to rely on the evidence from the police witnesses in his analysis and that he did not place too much weight on the evidence of these witnesses. The trial judge did not simply accept the police evidence. Rather, he weighed all of the evidence and came to reasonable conclusions based on that evidence.

[84] In the trial judge's reasoning surrounding the mechanism of seizure and judicial oversight, the trial judge considered the police officers' evidence in terms of what is at play at the roadside in a suspicion-based investigation as opposed to a MAS investigation, the potential for racial and other profiling, the subjective and fallible nature of suspicion-based investigations, and the duration of the traffic stops under both regimes. However, the trial judge did not just consider the evidence of the police witnesses. He also carefully considered the evidence of Dr. Bierness, and the documentary evidence from the Department of Justice. Additionally, the trial judge examined all the evidence within the analytical framework surrounding privacy interests at the roadside as outlined by the Supreme Court in ***Goodwin***, ***Hufsky***, ***Ladouceur***, and ***Orbanski***.

[85] The Appellant takes a significant objection to the trial judge's reliance on Sgt Davis' evidence regarding the length of time it takes to conduct a suspicion-based investigation (7 – 14 minutes) as opposed to a MAS investigation (average of 1 minute and 35 seconds). I find no appealable error in the trial judge's conclusion that a MAS investigation can be conducted more quickly than a suspicion-based investigation. The trial judge's reasons focus on the amount of surreptitious investigation involved in a suspicion-based investigation and note that none of that is required for a MAS investigation. I agree with the Crown Respondent that the trial judge

ultimately made very little use of the actual time increments in Sgt Davis' evidence. Rather, the trial judge relied primarily on the officers' descriptions of what occurs during the respective roadside investigations.

B. The Impact of the MAS Regime on Privacy Interests

[86] The Appellant argues that the trial judge erred in failing to consider the impact on privacy interests that the MAS regime will have. The Appellant submits that because the reasonable suspicion threshold has been removed from the MAS regime, the impact on an individual's privacy interests will be exponentially higher as it impacts both individually and collectively, and the trial judge failed to take that into consideration.

[87] The Crown Respondent submits that the trial judge properly weighed all considerations in determining the impact of the MAS regime on individual and collective privacy interests. The Crown Respondent argues that the trial judge properly considered the impact that the MAS regime would have on individuals, the intrusiveness of providing an ASD breath sample, the absence of any need for reasonable suspicion, the mandatory nature of the demand, and the impact that the MAS regime will have in terms of capturing innocent drivers.

[88] I find no error in the trial judge's reasoning in consideration of the privacy interests engaged by the MAS regime.

[89] The trial judge was correct in stating that the reasonableness of a search is not determined by the threshold required for that search. The trial judge noted that reasonable suspicion is not a constitutionally protected minimum below which all searches are unreasonable, and it was simply the threshold required under suspicion-based testing. The trial judge was alive to the reduced expectation of privacy that a driver has when operating a motor vehicle and further took into consideration the nature of a suspicion-based investigation as opposed to a MAS investigation when considering the impact on the privacy interests of individuals. Specifically, the trial judge considered several factors in suspicion-based investigations, including the surreptitious investigative steps that an officer might take before informing the driver of anything, the potential for humiliating and stigmatizing a driver, and the subjective nature of the reasonable suspicion standard. The trial judge contrasted this with the MAS regime, which involves no preliminary investigative steps, minimal inconvenience, applies to any driver who is stopped by police, and is completely objective.

[90] The trial judge further considered the requirement for the driver to be lawfully stopped, that the officer have the ASD device in his or her possession when the demand is made, the non-invasive nature of a breath sample, the expeditious nature of ASD testing, and the impersonal nature of the ASD information. While the trial judge did not comment on the increase in testing of potentially innocent drivers, he did consider that every driver stopped could be subject to a MAS demand as opposed to only those who exhibit some signs of alcohol consumption or impairment based on the officer's reasonable suspicion.

C. The Characterization of the MAS regime as regulatory as opposed to criminal

[91] The Appellant submits that the trial judge erred in characterizing the MAS regime as regulatory as opposed to criminal. The Appellant argues that the trial judge's references to the highly regulated nature of driving ignores the criminal investigative purpose of the MAS regime.

[92] The Crown Respondent correctly concedes that the MAS regime is a criminal law regime aimed at deterring and punishing impaired drivers and argues that the trial judge did not err in

mischaracterizing the MAS regime. The Crown Respondent submits that the trial judge understood that he was dealing with a *Charter* application in a criminal trial and referred to criminal consequences that could flow from a MAS investigation. While the trial judge commented on the highly regulated nature of driving, he clearly understood the nature of the MAS regime as a criminal one.

[93] I find nothing in the trial judge's reasons that would support the Appellant's argument.

[94] The trial judge distinguished the case before him from the case of ***Goodwin***, which dealt with an administrative scheme enacted by Provincial legislation. The trial judge understood the issue he was dealing with was with respect to s 320.27(2) of the *Criminal Code* and an ASD, and not about any consequences that might flow from Provincial legislation. The trial judge was also clear that judicial oversight is available with respect to every aspect involving a demand under the MAS regime because if criminal charges result, the person charged has the right to a trial.

[95] Nowhere in the trial judge's reasons is there any discussion about the MAS regime being regulatory in nature. The trial judge discussed the highly regulated environment of motor vehicle operation, noting that driving is one of the most heavily regulated activities engaged in by members of the public. The trial judge discussed regulations surrounding the type of vehicle, mechanical fitness, manner of operation, and licensing, registration, and insurance requirements. The trial judge's reason for describing the regulated nature of driving was to contextualize driving as a privilege that comes with onerous and complex laws. The trial judge's point was that a person can choose to be subject to investigation for compliance with those laws or choose not to drive if they do not wish to be investigated.

[96] The Appellant also argues that the trial judge failed to recognize the criminal jeopardy that flows from a failure or refusal to comply with a MAS demand in assessing the reasonableness of the MAS regime. There is the potential for innocent drivers to be criminally convicted of failing or refusing to comply with a MAS demand absent any evidence of driving pattern or alcohol consumption. The Appellant submits that the suspicion-based regime requires that there be some indication of criminal activity by the driver to ground the demand, thus providing some evidence for a Court to review in assessing police actions, and there are no such safeguards with the MAS regime.

[97] The Crown Respondent submits that a person who is subject to a MAS demand is in the same position as any other person subject to a roadside breath demand under suspicion-based testing. The Crown Respondent argues that in cases of failure or refusal to comply with a MAS demand, the Crown would still be required to prove a lawful demand and the failure or refusal in the absence of any reasonable excuse. As such, the MAS regime allows for a Court to exercise a robust review of police actions to ensure that they conform to the law.

[98] The trial judge did not address this argument in his reasons. On appeal, a reviewing court is concerned with whether there is a reversible error, and if the reasons were sufficient in the context of the case for which they were given. Appellate courts must not finely parse the trial judge's reasons in a search for error: ***R* v *GF***, 2021 SCC 20 [***GF***] at para 68. If the legal basis of the trial judge's decision can be discerned from the record, in the context of a live issue at trial, then the reasons will be legally sufficient: ***GF*** at para 75.

[99] The trial judge thoroughly considered the impact of removing reasonable suspicion from the MAS regime and the legal requirements imposed on police when exercising the MAS power.

The trial judge's failure to address this particular point is not sufficient to warrant appellate intervention.

[100] Additionally, I agree with the Crown Respondent that a driver who fails or refuses to comply under the MAS regime is in exactly the same position as a driver who fails or refuses to comply under the suspicion-based regime. In either case, there is meaningful judicial oversight of police actions.

[101] Failing to provide a breath sample suitable for analysis and refusing to comply with a lawful breath demand are not impaired driving offences. They are offences against the administration of justice. A person who either refuses a lawful demand or frustrates a police investigation by wilfully defeating an ASD is no longer an "innocent driver." Instead, the driver is obstructing a lawful investigation. If the driver is charged criminally, the driver has a right to a trial, and the Crown has the burden of proving beyond a reasonable doubt a lawful demand and a failure or refusal to provide a breath sample with no reasonable excuse. The trial provides meaningful judicial oversight of the officer's reasons for the traffic stop, the demand itself, the driver's words of refusal or actions in failing to provide the breath sample, and any potential excuse offered by the driver. In that regard, the MAS regime is no different than suspicion-based testing and has no greater impact on "innocent drivers" than the previous suspicion-based regime.

D. and E. Threshold of the search and reasonable suspicion

[102] The Appellant submits that the trial judge erred in discounting the significance of the threshold for the search under the MAS regime. The Appellant argues that the threshold for a search provides an important constitutional check and balance reflective of the privacy and legal interest caught by the search and seizure question and is an important consideration in the assessment of the mechanism of the seizure. Additionally, the Appellant argues that the trial judge erred in failing to take into consideration the prior jurisprudence surrounding reasonable suspicion and the protection that it affords an individual.

[103] The Crown Respondent submits that the trial judge gave careful consideration to the absence of reasonable suspicion in the MAS regime and properly balanced the absence of that threshold requirement with the restrictions on the use of MAS demand powers by police. The Crown Respondent argues that the trial judge properly noted that the threshold for the search is not the only determinative factor, and the context of the entire scheme must be taken into consideration. The Crown Respondent further argues that the ineffectiveness of suspicion-based testing was established through *viva voce* evidence and the Parliamentary record of the debates surrounding the MAS regime, and the trial judge did not err in considering the fallible nature of suspicion-based investigations.

[104] The trial judge found that the absence of a threshold requirement in the MAS regime did not make the law unreasonable. I see no error in the trial judge's conclusion on this point. Nor do I see any error in the trial judge's consideration of the subjective nature of suspicion-based testing.

[105] As mentioned previously, the trial judge was correct when he stated that reasonable suspicion is not a constitutionally protected minimum below which all searches are unreasonable. Reasonable suspicion is simply one of many standards for determining whether a search is reasonable. As the Crown Respondent points out, the MAS regime is not the first search

and seizure to be found reasonable where no grounds are required: see ***R v Campanella***, [2005] OJ No 1345 (CA) which found that warrantless searches of all persons entering a courthouse and their personal property were reasonable searches; and ***R v Jarvis***, 2002 SCC 73 which found that at-will searches to enforce tax compliance were reasonable searches.

[106] As the Crown Respondent submits, the trial judge carefully considered the absence of reasonable suspicion in s 320.27(2) of the *Criminal Code*. The trial judge noted the non-intrusive nature of breath samples, the lack of personal information that those breath samples provide, the limited use that can be made of ASD results, the low threshold required for reasonable suspicion, and the subjective nature of a suspicion-based investigation. The trial judge also compared the subjectivity of suspicion-based testing to the objective nature of the MAS regime and noted the addition of significant restrictions on an officer engaged in a MAS investigation, including the immediacy of the demand, that the officer has the ASD in his or her possession, be in the lawful exercise of police powers, and that the driver must be operating a motor vehicle immediately before the demand is made.

[107] The trial judge was alive to the issues surrounding suspicion-based testing, both in protecting the individual and in detecting impaired drivers. Based on the evidence, the trial judge properly concluded that reasonable suspicion is characterized by subjective elements and police judgment at every stage, which includes the officer's evaluation of the driver's speech, motor control, source of odour of alcohol, and driving pattern. While the Appellant suggests that these are a constellation of objectively discernable facts, the evidence in this trial suggests otherwise, specifically, that those "objectively discernable facts" are subjective and fallible.

F. The potential for discriminatory application

[108] The Appellant submits that the trial judge erred in his assessment of the potential for discriminatory application of the MAS regime. The Appellant argues that the trial judge misapprehended the evidence of Supt Graham, and therefore ignored the issue surrounding targeted or racially motivated detentions and searches with no ability for meaningful *Charter* review.

[109] The Crown Respondent submits that the trial judge properly considered the potential for discriminatory application and dismissed it. The Crown Respondent argues that the trial judge considered the evidentiary record before him and properly concluded that the universal application of the MAS regime made it less subjective and therefore less likely to involve unconscious bias and discriminatory misuse. I see no error in the trial judge's reasoning regarding the potential for discriminatory practices that would warrant appellate intervention.

[110] I agree with the Crown Respondent that the trial judge properly considered the evidentiary record before him. There was no evidence that the MAS regime will result in a greater risk of misuse than suspicion-based testing. The trial judge properly considered and rejected the Appellant's argument on this issue and found that because the MAS regime is less subjective, it is less likely to result in discriminatory application. The trial judge noted that the RCMP had turned their minds to the issue of discriminatory misuse and were taking steps to address it. The evidence that the trial judge considered included the police practices used when MAS was engaged, the anonymous nature of a MAS demand, and active monitoring of complaints arising from MAS stops across Alberta by the RCMP.

[111] There was no evidence that the Appellant himself was the victim of a discriminatory traffic stop.

Conclusions regarding s 8 of the *Charter*

[112] Since I find no appealable error in the trial judge's reasoning, I see no need to conduct a *de novo* analysis of the reasonableness of the MAS regime.

[113] I note that other Provincial court cases that have considered the constitutionality of the MAS regime have all found the law to be reasonable. In ***Blysniuk***, the Court also had the benefit of evidence from Dr. Bierness. In that case, the Court found that the MAS regime complies with s 8 of the *Charter*. The same conclusion was reached in ***Brown***, where the Court relied on the reasoning in ***Blysniuk*** and of the trial judge in this case. There are two unreported decisions in Alberta that post-date the trial judge's decision in this case that also found the new regime compliant with s 8 of the *Charter*: ***R v Hackett*** (22 March 2021), Red Deer 190691519P1 (Alta Prov Ct) [***Hackett***]; ***R v Goodswimmer*** (23 July 2021), Edmonton 191226851P1 (Alta Prov Ct) [***Goodswimmer***]. In both of those cases, the Courts had a similar evidentiary record before them as the one before the trial judge in this case.

[114] There is a line of cases out of Saskatchewan that found the MAS regime offends s 8 of the *Charter* but is saved by s 1 of the *Charter*. The first of those decisions is ***Morrison***, which was considered and distinguished by the trial judge in this case on the basis of the evidentiary record before him. The evidence in ***Morrison*** included *viva voce* evidence from two investigating officers and the accused. The only documentary evidence appeared to come from a statistical report on collisions involving alcohol and some Hansard records surrounding Bill C-46. There was no expert evidence called.

[115] The subsequent case of ***Switenky*** was decided by the same judge as ***Morrison***, who relied on his own reasoning. In ***Kortmeyer***, the Court relied on the principle of judicial comity and concluded that deference was owed to the trial judge's reasoning in ***Morrison***.

[116] The evidentiary record before the trial judge in this case was robust, and the analysis undertaken more fulsome than that in ***Morrison***. Since ***Switenky*** and ***Kortmeyer*** simply followed the reasoning in ***Morrison***, I do not find them persuasive.

[117] I find the trial judge properly concluded that the MAS regime is a reasonable intrusion on the privacy rights of drivers and does not breach s 8 of the *Charter*.

IV. Conclusion

[118] For the above reasons, the appeal is dismissed.

Heard on the 21st day of January 2022.
Dated at the City of Edmonton, Alberta this 10th day of June 2022.

M. Hayes-Richards
J.C.Q.B.A.

Appearances:

Matthew Greiner and Kate Andress
for the Respondent

Tania Shapka
for the Appellant