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CASE COMMENT ON *GOODWIN V BRITISH COLUMBIA (SUPERINTENDENT OF MOTOR VEHICLES)*, 2015 SCC 46: REVIEWING THE CONSEQUENCES OF A SEARCH OR SEIZURE IN ADMINISTRATIVE REGIMES

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Section 8 of the *Charter* has always been centrally concerned with independent judicial oversight of state powers to invade privacy by search and seizure.[1] This concern is muddied in the context of administrative and regulatory regimes where there is a diminished expectation of privacy. Are individuals impacted by searches under those regimes restricted to asserting section 8 protections only on the basis of privacy? Or can section 8 apply to a broader set of personal autonomy interests such as those represented by the principles of fundamental justice?

The Supreme Court of Canada's (SCC) recently released decision *Goodwin v British Columbia (Superintendent of Motor Vehicles)* substantially clarifies and advances the law on section 8's application to administrative searches, and affirms that section 8 analysis can

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1 *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11.

extend beyond privacy to include consideration of the principles of fundamental justice.[2]

In *Goodwin*, a number of drivers challenged British Columbia's new legislation, which created an administrative scheme to sanction impaired driving. The scheme, known as the "Administrative Prohibition Regime" (or "ARP regime"), was a complete scheme enforced by police that in practical effect replaced the *Criminal Code*.[3] The ARP regime authorized police to conduct a warrantless search of a driver's breath using a portable breath device that purported to measure blood alcohol and output a result of "warn" (above .05) or "fail" (above .08).[4] The reading formed the sole basis upon which a police officer must issue an immediately effective sanction at the side of the road.[5] The portable breath device had known reliability issues. Sanctions involved licence suspensions up to 90 days, mandatory interlock devices, and $4,000 worth of fines and various penalties.[6] The scheme provided for extremely limited review of the police decision by an adjudicator delegate of the Superintendent of Motor Vehicles.[7] The ARP regime only authorized the adjudicator to overturn the penalty if the driver could prove that the breath device did not read "warn" or "fail".[8] Drivers were not permitted to attempt to prove that their actual blood alcohol was below the limit or challenge the reliability of the breath device.[9] In a 6–1 decision (with McLachlin CJC dissenting), the SCC affirmed the Chambers Judge's decision (upheld by the BC Court of Appeal) that the legislation violated section 8 of the *Charter* for failing to provide a sufficient review mechanism to review

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2 2015 SCC 46, [2015] 3 SCR 250 [*Goodwin*].

3 *Motor Vehicle Act*, RSBC 1996, c 318, ss 215.41–215.51 as it appeared on 7 June 2012; *Criminal Code*, RSC 1985, c C-46.

4 *Ibid*, s 215.41.

5 *Ibid.*

6 *Ibid*, ss 215.41–215.45; *Goodwin*, *supra* note 2 at para 11.

7 *Ibid*, ss 215.48–215.5.

8 *Ibid.*

9 *Ibid.*

the reliability of the device, thereby capturing potentially innocent individuals. All members of the Court dismissed the drivers' arguments that the ARP regime was criminal law and that it violated section 11(d) of the *Charter*.[10]

Chief Justice McLachlin's dissent centred on the section 8 reasonableness analysis and held that the administrative nature of the scheme justified the extremely limited administrative nature of the review.[11] Throughout the remainder of this paper, any reference to the "Court" will be to the majority's decision.

In terms of the broader impact of the Court's decision, the SCC held that section 8 requires judicial oversight not just of the lawfulness of a search or the manner of a search, but also the consequences of a search.[12] The ARP regime in *Goodwin* raised particular concern because the breath device used to effect the search had known problems with reliability and yet it was used as the sole basis for immediately effective and severe sanctions issued by police officers.[13]

The Court concluded that a search or seizure cannot be reasonable if a fault in the search or seizure may lead to an innocent person being sanctioned but the law authorizing the search or seizure does not provide a means to challenge the faultiness of the search.[14]

The Court premised its analysis on the principle that the reasonableness of a search or a law authorizing a search must be consistent with the principles of fundamental justice. A search's impact on those principles is thus relevant to section 8 analysis in both the criminal and administrative context. This is true even in cases (such as *Goodwin*) where other sections of the *Charter* more traditionally associated with the principles of fundamental justice, such as sections 7 or 11, are not engaged.

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10 *Goodwin*, *supra* note 2 at paras 35–47, 91.

11 *Ibid* at para 109.

12 *Ibid* at para 71.

13 *Ibid* at para 62–63.

14 *Ibid* at paras 71–72.

This paper will review how the Supreme Court arrived at its current position on judicial review under section 8 and consider the possible impact of the *Goodwin* decision onother administrative and regulatory regimes. It concludes that *Goodwin* provides an important elucidation that the full range of principles of fundamental justice may apply in an analysis of the reasonableness of an administrative scheme under section 8 of the *Charter*.

I. SECTION 8 AND THE RIGHT TO FULL ANSWER AND DEFENCE

While section 8 is classically concerned with privacy interests, these interests do not determine the limit of section 8 protections. In *Hunter* Justice Dickson (as he then was), writing for a unanimous Court, stated that "the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy".[15]

The nature of the legislation before the Court in *Goodwin* engaged this residual set of interests protected by section 8. To understand why these residual interests were engaged, one must look at the fundamental debate at the heart of the case. The ARP regime highlighted the classic tension between crime control and due process, the two models of criminal procedure first articulated by Herbert Packer in his famous 1964 civil rights era essay "Two Models of the Criminal Process". As Mr. Packer observed in that essay, "the kind of criminal process we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning."[16]

Mr. Packer describes the Crime Control Model as one purely concerned with efficiency:

> There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing occasions for challenge. The process must not be cluttered

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[15] *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 at 159 [*Hunter*].

[16] Herbert L Packer, "Two Models of the Criminal Process" (1964) 113:1 U Pa L Rev 1.

> with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court; it follows that extrajudicial processes should be preferred to judicial processes, informal to formal operations. Informality is not enough; there must also be uniformity. Routine stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly line or conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that bring it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. . . .
>
> What is a successful conclusion? One that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest with a minimum of occasions for challenge, let alone postaudit. . . .
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> The presumption of guilt allows the Crime Control Model to deal efficiently with large numbers. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt.[17]

The Due Process Model "is not the converse" of the Crime Control Model and does not "deny the social desirability of repressing crime".[18] Rather, the Due Process Model is primarily concerned with the possibility of error, the primacy of the individual, and limits on the exercise of state power: "The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty."[19] Of course, with this protection, efficiency is sacrificed.[20]

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17 Packer, supra note 16 at 10–11 [emphasis added].

18 *Ibid* at 7, 13.

19 *Ibid* at 15.

20 *Ibid.*

The Court's decision in *Goodwin* engaged in the debate between efficient, administrative crime-control and inefficient protection of due process rights. By deciding that the ARP regime was in pith and substance administrative in nature and not criminal law, the Court leaned heavily toward the Crime Control Model as one focused on efficiency, speed, and finality. However, the pith and substance analysis was in tension with the reality that on the ground drivers were facing significant sanctions with severely truncated forms of redress. In other words, it is likely that the Court's conclusion on division of powers influenced its focus on drivers' potential innocence in the section 8 analysis. The majority's concern appeared to be that if the provinces can enact crime control regimes as administrative schemes, there must remain some residual due process rights lest the Crime Control Model become too dominant. As such, the Court was not prepared to sanction the use of a search and seizure power in administrative legislation operating under the Crime Control Model without any constitutionally mandated oversight of the impact of that power on the individual. In order to achieve this goal, the Court had to look beyond the traditional concern of section 8 with privacy, the lawfulness of a search, and the manner in which a search was executed, and look instead to the residual non-privacy interests protected by section 8.

In *Tessling*, the Court referenced *Hunter* to explain the breadth of section 8 and its extension beyond privacy interests: "Building upon the foundation laid by the common law, s. 8 of the *Charter* creates for '[e]veryone' certain areas of personal autonomy where 'all the forces of the crown' cannot enter."[21]

Goodwin has affirmed and clarified that these protected areas of personal autonomy include the principles of fundamental justice.[22] The Court laid the groundwork for this link by relying on two of its previous criminal law decisions.

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[21] *R v Tessling*, 2004 SCC 67 at para 15, [2004] 3 SCR 432 [*Tessling*] [emphasis added].

[22] *Supra* note 2.

The first important case in this regard, *R v Mills*, involved an accused in a sexual assault trial seeking production of records related to the complainant that were held by a psychiatrist and a child and adolescent services association.[23] While the case concerned the accused's section 7 and 11(d) rights, the Court also considered the impact of *Criminal Code* provisions permitting orders for the production of records. The Court determined that such provisions authorize "a seizure within the meaning of s. 8 of the *Charter*" and that this engaged the complainant's reasonable expectation of privacy to be left alone by the state and to control the dissemination of confidential information.[24] In balancing this right against the accused's right to full answer and defence under section 7 of the *Charter*, the Court decided that a reasonable search or seizure is one that is consistent with the principles of fundamental justice.[25] Those principles of fundamental justice include the right to make full answer and defence. Thus, the Court held that "a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right."[26] The compromise was to permit the accused access to the records but only insofar as they were relevant to his defence.[27]

In the second case, *R v SAB*, an accused in another sexual assault proceeding challenged the constitutionality of provisions of the *Criminal Code* that permitted seizure of blood from the accused for the purposes of conducting forensic DNA analyses.[28] The accused argued that the provisions violated the principle of fundamental justice against self-incrimination. While the challenge was made under sections 7 and 8 of the *Charter*, the Court focused exclusively on section 8. The Court cited the passage from *Hunter* that indicated section 8 is not limited to

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23 [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills* cited to SCR].

24 *Ibid* at para 77.

25 *Mills*, *supra* note 23 at paras 87–89.

26 *Ibid* at para 88.

27 *Ibid* at para 128.

28 2003 SCC 60, [2003] 2 SCR 678 [*SAB*].

protecting privacy interests: searches pursuant to a DNA warrant engage, though they engage the principle of fundamental justice against self-incrimination, are best considered under section 8 as well.[29] Though the right was relevant and engaged in the section 8 analysis, the Court concluded the search was nevertheless reasonable because the offence to physical integrity was modest, the requirement for judicial pre-authorization was considerable, the focus of the DNA analysis was solely for forensic purposes and did not reveal any medical, physical or mental characteristics, and there were limits on the use to which the DNA test could be put.[30] When these factors were combined with the state's significant interest in the DNA warrant scheme to effect useful law enforcement, the balance favoured the reasonableness of the *Criminal Code* provisions.[31]

The lesson from these two cases is that the principles of fundamental justice are relevant to section 8 analysis, but are not in themselves determinative. A search that infringes on a principle of fundamental justice can still be reasonable if there are sufficient countervailing factors to support the reasonableness of the search.

The Court took its analysis from *Mills* and *SAB* a step further in *Goodwin*. Despite the fact that neither section 7 nor section 11 were engaged by British Columbia's ARP legislation, the Court still held that the section 8 analysis of the legislation required consideration of the principles of fundamental justice, stating:

> [t]his is not the first time this Court has considered the significance of procedural safeguards in a s. 8 analysis. Although the adequacy of such safeguards will often be challenged under s. 7, this Court recognized in *R. v. Mills*, [1999] 3 S.C.R. 668, that the right to full answer and defence is a relevant consideration when assessing the reasonableness of a search or seizure.[32]

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29 *SAB*, *supra* note 28 at para 35.

30 *Ibid* at paras 44–52.

31 *Ibid* at para 52.

32 *Goodwin*, supra note 2 at para 70 [citations omitted].

As such, the SCC has now affirmed that the principles of fundamental justice are applicable to administrative regimes that use search powers even though those regimes would not otherwise engage sections 7 or 11. This is an important elucidation of the application of *Charter* rights in the administrative sphere.

II. THE ROUTE TO EXPANDED JUDICIAL OVERSIGHT: SECTION 8 AND PROCEDURAL FAIRNESS

The Court's affirmation that "an unreviewable, discretionary power of search and seizure would be contrary to s. 8" in the administrative context, as well as the criminal context, means that courts must now scrutinize administrative legislation authorizing a search to determine if the authorizing legislation creates sufficient grounds for review.[33] Given the above, courts considering the adequacy of a legislative scheme's grounds for review must take into consideration whether those grounds provide sufficient protections to, and vindications of, the principles of fundamental justice.

Though it has expanded the law, the Court provided minimal comment on precisely how this expanded role for judicial oversight under section 8 should be crafted in other administrative contexts, stating only:

> The nature of the review required will of course vary with the circumstances, including the nature of the scheme. On the other hand, the availability of oversight is particularly important where, as here, a search or seizure occurs without prior authorization. While less exacting review may be sufficient in a regulatory context, the availability and adequacy of review is nonetheless relevant to reasonableness.[34]

In the context of the ARP regime, the Court applied section 8 and the principle of full answer and defence to find that the legislation required greater procedural fairness protections and safeguards for individuals caught by the regime:

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[33] *Goodwin*, supra note 2 at para 70 [citations omitted].

[34] *Ibid* at para 71 [citations omitted].

> While s. 8 is not primarily concerned with issues of procedural fairness and safeguards, the restrictive review of the basis and consequences of the breath demand was a central feature of the ARP scheme, particularly given the concerns about the reliability of the ASD, the lack of an intermediate step between the ASD analysis and the roadside suspension, and the immediacy of the penalties that ensue. A driver's ability to challenge the accuracy of the ASD result is thus critical to the reasonableness of the ARP scheme.[35]

In dissent, Chief Justice McLachlin applied a different test. She held that section 8 reasonableness should be determined by examining three requirements: "(1) a state objective capable of overriding individual private interests; (2) restraint of the incursion on the private interest to what is reasonably necessary to achieve the object; and (3) the availability of judicial supervision"[36] As with the majority of the Court, the Chief Justice's analysis of the ARP regime focused on the third requirement. She held that the regime satisfied the judicial reviewability requirement because a driver can request a second test on a different device and the driver may present statements and evidence at the review before the superintendent's delegate. Further, under the scheme, a peace officer is required to have reasonable grounds to believe the driver is impaired. This could allow a peace officer to choose not to sanction the individual if he or she doubted the accuracy of the test. Last, a driver can challenge the manner of the search on review.[37]

The majority of the Court rejected that approach because in their view the appeal did notraise an issue concerning the reviewability of the manner of the search by police, but rather engaged "a more fundamental issue": was the law itself reasonable?[38] The majority declined to answer the question of whether the ARP regime permitted manner of search challenges upon review, and instead focused on the reliability issue.[39]

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35 *Goodwin*, supra note 2 at para 72.

36 *Ibid* at paras 92, 97–99.

37 *Ibid* at paras 107–08.

38 *Ibid* at para 74.

39 *Ibid.*

Though the "administrative nature of the scheme" justified the "administrative nature of the review", it was not reasonable to impose consequences on individuals as a result of a search that could capture an innocent individual without letting that potentially innocent individual challenge the basis for the sanction.[40] The ability of a driver to request a second test was not sufficient protection.[41] The reliability concerns remained even in the looser administrative context with an extremely minimal expectation of privacy. As the majority of the Court stated, "[a]bsent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress."[42]

The bottom line is that those concerned with potential overreach of administrative legislation and insufficient protections for potentially innocent individuals can now add section 8 to the basket of constitutional tools for challenge.

III. POTENTIAL APPLICATIONS TO REGULATORY SEARCHES

While it is not possible to create an exhaustive list of administrative schemes that may be impacted by the SCC's new framework and while it is ultimately for the courts to determine how this new approach should play out in particular cases, there are some common themes that can be taken away from the *Goodwin* decision moving forward.

First, all principles of fundamental justice are now potentially relevant to administrative searches. These include:

- The right to full answer and defence;
- the principles of natural justice;
- the right against self-incrimination;
- the right to counsel;

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40 *Goodwin*, supra note 2 at para 75.

41 *Ibid* at para 68.

42 *Ibid* at para 75.

- the presumption of innocence;
- non-vagueness; and
- overbreadth.

Second, all search powers require some form of oversight if the search leads to even modestly significant consequences. In the absence of review (either pre- or post-search), a minimal expectation of privacy is of less concern than the impact on the individual. As such, even highly regulatory contexts in which individuals have minimal, or perhaps even no, expectation of privacy cannot escape the requirement to provide sufficient protections for potentially innocent individuals impacted by administrative/regulatory searches.

Third, since the principles of fundamental justice include the principles of natural justice, administrative legislation that authorizes a search does not have free reign to eliminate procedural fairness protections.[43] Searches, thus, may not be reasonable in schemes that derogate from procedural fairness rights, such as notice and the opportunity to be heard, knowing the case to be met, *audi alteram partem*, legitimate expectations, and the rule against bias. Of course, given that the extent of procedural fairness owed depends on context, an application of these procedural fairness rights through section 8 would have to align with that administrative law principle on a case-by-case basis.

These are all helpful developments in the law of search and seizure. They are particularly relevant as the provinces expand their reach into the criminal sphere by enacting administrative laws built on a Crime Control Model that focuses on efficient, speedy, and final results. The SCC has affirmed that the state power to search and seize cannot be wholly discretionary or absolute even in regulated contexts and that the protection of innocent individuals will remain at the

[43] This adds new restrictions to the principle that the Legislature can abrogate from procedural fairness obligations by explicit legislation, articulated in *Ocean Port Hotel v British Columbia (Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781.

forefront of the Court's jurisprudence dealing with quasi-criminal and administrative sanctions.