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Alberta's Alcohol-Related Administrative Licence Suspension Regime: The Constitutional Challenge and the Challenge to the Evidence

Written by: Jennifer Koshan

Case commented on: *Sahaluk v Alberta (Transportation Safety Board)*, 2013 ABQB 683

Several applicants are challenging the constitutionality of Alberta's Alcohol-Related Administrative Licence Suspension Regime, which requires those charged with impaired driving-related offences to surrender their drivers' licences to police and suspends them from driving until the charges are disposed of (when a conviction may result in further driving prohibitions under the *Criminal Code*, RSC 1985, c C-46, with no credit given for the provincial suspension). This regime is found in section 88.1 of the *Traffic Safety Act*, RSA 2000, c T-6, which is being challenged on the basis that it violates the applicants' rights under sections 7, 8 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and is in pith and substance criminal law and therefore *ultra vires* the Province of Alberta. In this preliminary application, the Registrar of Motor Vehicle Services sought an order striking out parts of three affidavits filed on behalf of the applicants on the basis that they contained "frivolous, irrelevant or improper information" contrary to rule 3.68(4) of the *Alberta Rules of Court*, Alta. Reg. 124/2010.

The Decision on the Affidavits

The affidavits were sworn by three lawyers – Shannon K.C. Prithipaul, Mark Ian Savage, and Thomas Allan Pearse. The passages of their affidavits objected to by the Registrar included: statements that some clients decided to plead guilty to the criminal charges against them even though they may have had good defences, and that clients were adversely affected when they could not work because of licence suspensions (Prithipaul and Savage); statements about the implications of a medical condition and that "the Government of Alberta has elected to punish people beginning at the time of their charge, rather than their sentence" (Pearse); and statements suggesting that the suspension regime would adversely impact persons living outside urban areas (Pearse and Savage) (at paras 3-7).

Mr. Justice Thomas W. Wakeling began his reasons by noting that the ordinary rules of evidence pertaining to civil litigation apply in the context of constitutional litigation. As Justice Wakeling indicated, "A judicial determination that legislation is unconstitutional must be based on reliable factual determinations that provide a comprehensive account of relevant social, political and cultural considerations" (at para 15). Justice Wakeling also noted the distinction between adjudicative facts (those that relate to the parties in the case) and legislative facts (those that relate to the purpose, background and context of legislation, which are "more general nature and are subject to less stringent admissibility requirements" (at para 16, quoting *Danson v Ontario*, [1990] 2 SCR 1086 at 1089)).

Justice Wakeling characterized the impugned portions of the affidavits as adjudicative facts, as the statements in question relate to information about identifiable persons. He also characterized the statements as hearsay, as they were out-of-court statements tendered in evidence as proof of the truth of their contents. Hearsay evidence may be admissible if it is not actually put forward for the truth of its contents, if it falls into one of the categorical exceptions to the hearsay rule, or if it accords with the principled approach the Supreme Court of Canada developed in *The Queen v Khan*, [1990] 2 SCR 531 and *The Queen v Khelawon*, [2006] 2 SCR 787. Under that approach, hearsay evidence may be admitted where it meets the criteria of necessity and reliability, and where its prejudicial effects do not outweigh its probative value (at paras 21-24). Justice Wakeling expanded upon these criteria as follows: "The necessity dimension recognizes the fundamental importance of accurate fact-finding. Is it necessary to admit the proffered hearsay evidence because there is no other reasonable means of presenting the evidence? The reliability marker acknowledges that a significant component of the value of proffered evidence in the fact-finding process is its reliability. Are there good reasons present that would justify the court in not subjecting the evidence to the best device known to test the reliability of evidence – cross-examination?" (at para 24).

Applying this approach to the Prithipaul and Savage affidavits, Justice Wakeling disagreed with the argument that the statements had been tendered for a purpose other than proof of the truth of their contents. Counsel for the applicants had argued that the impugned evidence was led to prove that "accused persons who have good defences may plead guilty", but this was still seen as amounting to hearsay (at para 27). If these statements were not tendered to prove the truth of their contents, they would have no value to the proceedings. Justice Wakeling also found that the statements did not meet the criteria of necessity and reliability, as there was nothing to indicate that the out-of-court declarants were unavailable to give evidence, and there may be other reasons why accused persons plead guilty that could not be tested by cross-examination based on the challenged affidavits (at paras 28-30). He noted that an expert witness could be used to bring forward this evidence, subject to cross examination. In some cases, judicial notice may also be available, but Justice Wakeling determined that the question "why do persons accused of some driving offences plead guilty … is not so notorious or generally accepted as not to be subject of debate among reasonable persons" (at para 33). He struck the relevant portions of the Prithipaul and Savage affidavits.

As for the Pearse and Savage affidavits, the question was whether they infringed the rule that affidavits should not include argumentation or the opinion evidence of lay persons (at para 35, citing e.g. *Alberta Human Rights Commission v. Alberta Blue Cross Plan*, (1983) 48 AR 192 (CA)). Justice Wakeling found that the impugned portions of the affidavits gave an opinion on a medical condition of a client (Pearse), and opinions and argument as to the adverse impact of section 88.1 on persons living outside rural areas (Pearse and Savage). Those portions of the affidavits were also struck.

Commentary

Justice Wakeling is a new appointee to the Court of Queen's Bench as of February 2013 (see here), and I must say his decision was a pleasure to read. It was easy to follow and supported by plenty of references to case law and secondary sources. I will be recommending this case to my constitutional clinical students next term, as it provides a very good summary of the rules of evidence in constitutional litigation and a well-reasoned application of those rules.

Justice Wakeling concluded by noting that his ruling "will not prejudice the ability of Mr. Sahaluk to present the factual foundation he needs to establish his case. The evidentiary process provides other means through which relevant and important facts may be adduced" (at para 37). This is an important acknowledgement, as the case raises significant constitutional issues and it should not be decided without providing the applicants the opportunity to present a proper evidentiary foundation.