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A Case for Adopting the *Lewko* Approach to Refusal Law

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Case Commented On: *R v Soucy*, 2014 ONCJ 497

Obtaining breath samples from those suspected of driving while impaired is a necessary practicality in enforcing impaired driving law. A police officer must have a legal authority to demand that an individual supply a sample of his or her breath, and there must be legal ramifications should that individual decline. Consequently, s. 254(5) of the *Criminal Code*, RSC 1985, c C-46 makes it an offence to fail or refuse to comply with a breath demand, without a reasonable excuse. As a criminal offence, s. 254(5)'s necessary elements include both an *actus reus* and a *mens rea*. Two deeply divided lines of authority arise from interpreting s. 254(5)'s requisite *mens rea*, or culpable state of mind.

The first line of case law has become known as the '*Lewko* approach,' or '*Lewko* position,' after the Saskatchewan Court of Appeal case of *R v Lewko*, 2002 SKCA 121. To convict, the Crown must prove the accused intended to fail or refuse to comply with the breath demand. The case's articulation of the offence's elements is reproduced below (at para 9):

> The elements of the offence that the Crown must prove beyond a reasonable doubt are three. First, the Crown must prove the existence of a demand having the requirements of one of the three types mentioned in ss. (2) and (3). Second, the Crown must prove a failure or refusal by the defendant to produce the required sample of breath or the required sample of blood (the *actus reus*). Third, the Crown must prove that the defendant intended to produce that failure (the *mens rea*).

The second line of case law is the '*Porter* approach,' named after the Ontario Superior Court of Justice case of *R v Porter*, 2012 ONSC 3504. To convict under this approach the Crown must prove the accused had knowledge or awareness of the offence. In *Porter*, the Court intentionally departed from the *Lewko* approach (at para 34):

> It seems to me that the flaw in [cases following the *Lewko* approach] is that they treat the mental element enacted by s. 254(5) as a specific intent rather than a general intent, that is, they read in the term "wilfully". It must be remembered that s. 254(5) is silent as to the *mens rea* and so the legislative intent on this point, as to the level of *mens rea*, is a matter of judicial interpretation. There is a strong line of binding authority to the effect that where a criminal offence is silent as to the *mens rea*, and where the *actus reus* is the doing of

> some immediate act without any ulterior consequence, then knowledge or recklessness as to the doing of the prohibited act is a sufficient *mens rea*.

Multiple cases follow both decisions, and neither *Lewko* nor *Porter* was the first authority on their respective interpretations. This post will side with the Ontario Court of Justice's reasoning in *R v Soucy*, 2014 ONCJ 497, in which Justice David M. Paciocco adopts the *Lewko* approach. For the sake of brevity, this post will not comment on the related but separate analysis arising from the wording "without reasonable excuse".

As the above passage from *Porter* displays, the justification for its approach is derived from the fact that Parliament omitted the word "wilfully" from s. 254(5). And indeed, there is jurisprudence suggesting that such an omission leads to the presumption that the *mens rea* must then be knowledge or recklessness. One of the earliest precedents for this presumption – and a case cited by *Porter* (at para 34) – is *R v Beaver*, [1957] SCR 531. The case involved two co-accused – Max and Louis Beaver – who were in joint possession of a package that contained heroin. Both were caught when Max Beaver attempted to sell the package to an undercover police officer. The issue of *mens rea* arose because Louis Beaver was unaware that the substance contained in the package was heroin, believing it to be sugar or milk. The offence was outlined in the *Opium and Narcotic Drug Act*, RSC 1952, c. 201, a precursor to today's *Controlled Drugs and Substances Act,* SC 1996, c 19. Section 4(1) of the Act prohibited an individual from "[having] in his possession any drug . . .". The Act was silent on whether one must know the substance he or she possesses is a prohibited one. The Court in *Beaver* applied a rule of statutory interpretation, citing (among others) the 1819 case of *Margate Pier v Hannam et al.*, 106 ER 661, which holds that:

> Acts of Parliament are to be so construed as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.

Although now subject to the *Canadian Charter of Rights and Freedoms*, the Supreme Court in *Beaver* also cites a number of cases holding that Parliament can create an offence which does not require a culpable state of mind, but only if the wording of the statute explicitly provides for this. The Court holds that:

> It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking-soda but which in fact contained heroin, . . . but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation.

Although the reasoning in *Beaver* is sound, its application to s. 254(5) is flawed. If one refuses to provide a breath sample, knowledge that a sample was demanded would rationally suffice for the Crown to prove a culpable state of mind. The act of refusing necessarily implies the individual who refused intended to do so. The difficulty arises in cases where one attempts to provide a sample, but fails. To apply *Beaver* in this situation, as the *Porter* approach does, has the consequence of deeming an individual who does not intend to break the law a criminal.

The nature of possession offences makes 'knowledge' the most relevant *mens rea*. One must know he or she possesses a prohibited substance. However, the Court in *Soucy* asserts (at para 45) that even with possession offences "'knowledge' is not a self-standing *mens rea*." The Court cites *R v Chaulk*, [2007] OJ No 4627 in holding that "[t]o be guilty of possession an accused

person must intend to exercise control over the thing they know they possess" (at para 45). By making this assertion, Paciocco J. attacks the very foundation of the *Porter* approach.

R v Buzzanga, [1979] OJ No 4345 is another case cited by *Porter* (at para 34) as standing for the position that silence on mental state leads to the presumption that the *mens rea* must then be knowledge or recklessness. However, *Soucy* points out that the case has been misquoted. Martin J.A. in *R v Buzzanga* states that (at para 32):

> The general *mens rea* which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks to prevent . . .

As such, *Soucy* regards the presumed *mens rea* for offences that are silent on mental state as "'intention or recklessness' not 'knowledge or awareness of the prohibited act'" (at para 43).

Recall that the *Porter* approach asserts that the *Lewko* approach treats s. 254(5) as a crime of specific rather than general intent by reading in the term "willfully." Paciocco J. responds to this, arguing that the *Porter* approach is based upon a confusion between crimes of general and specific intent. *R v George*, [1960] SCR 871 is cited to provide a definition of the two (*Soucy* at para 35):

> In considering the question of *mens rea*, a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand.

Therefore general intent offences require intent to bring about an immediate end, such as pushing a button with the intent of causing the button to be pushed, while specific intent offences require intent to cause an ulterior purpose, such as pushing a button with the intent of firing a rocket. *Soucy* holds that "[o]n this standard, the act of refusing or failing in order to bring about the immediate end of avoiding the provision of a suitable sample would be an example of general intention" (at para 35). In this way, *Soucy* takes issue with *Porter*'s assertion that the *Lewko* approach "interpret[s] the element of intention as meaning a desire or purpose of bringing about an unsuitable test result" (*Porter* at para 33). On this, Paciocco J. states that "requiring proof that someone produced a result 'on purpose' is different from proving 'desire'" (*Soucy* at para 38). Thus under the *Lewko* approach the Crown can convict an individual under s. 254(5) without proving that the individual had an ulterior purpose or motive, but he or she must prove that the individual intended to fail or refuse to provide a breath sample. Applying this interpretation of the law would avoid convicting an individual who chose to provide a suitable sample, but could not do so due to his or her inability (*Soucy* at para 36).

It is telling that *Beaver* read 'knowledge' into s. 4(1) of the *Opium and Narcotic Drug Act* to avoid convicting an individual who had no guilty state of mind. Likewise, intent must be read into s. 254(5) of the *Criminal Code.* The *Lewko* approach is consistent with the basic principles of criminal law, the foremost being that an individual cannot be found guilty without a guilty state of mind. However, despite the persuasive reasoning of Paciocco J. in *Soucy*, the *Porter* approach continues to be applied in Alberta's courts. In *R v Le*, 2014 ABPC 177, Fraser Prov. Ct. J. held the *mens rea* of s. 254(5) to be "'knowledge and awareness of the prohibited act'" (at para 21, explicitly following *Porter*) despite finding that the accused "intended to provide samples that resulted in failures" (at para 22). A more nuanced approach was taken by Fradsham Prov. Ct. J. in *R v Ennis*, 2015 ABPC 9, yet he explicitly disagreed with *Soucy* in finding that the requisite *mens rea* "is the intention to commit the acts which then resulted in the non-compliance with the breath demand. The Crown does not need to prove that the accused person intended the result of non-compliance" (at para 64). In any event, he found that "on either of the *Porter* or *Soucy/Lewko* tests, Ms. Ennis had the requisite *mens rea* to commit the offence" (at para 67).