November 12, 2015

Impaired Driving and Approved Screening Devices

By: Shaun Fluker, Elliot Holzman, and Ian Pillai

Case Commented On: *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46; *Wilson v British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 47

In October the Supreme Court of Canada issued two companion judgments concerning the constitutionality and meaning of the Automatic Roadside Prohibition (ARP) provisions set out in the *Motor Vehicle Act*, RSBC 1996, c 318. In *Goodwin v British Columbia (Superintendent of Motor Vehicles)* the Supreme Court upheld British Columbia's ARP scheme as valid provincial law that does not unlawfully invade federal criminal law power or contravene section 11 of the *Charter*, but the Court also ruled that the seizure of a breath sample using an approved screening device (ASD) under the scheme as previously administered was an unreasonable seizure under section 8 of the *Charter*. In ruling as such, the Supreme Court upheld the ruling of the Chambers Justice who heard the matters back in 2010. Subsequent to that initial ruling the Province of British Columbia amended the ARP scheme in an attempt to remedy the unreasonable seizure, and the Supreme Court's companion judgment in *Wilson v British Columbia (Superintendent of Motor Vehicles)* concerns the interpretation of these new provisions employing principles of statutory interpretation. In this comment we provide an overview of the ARP scheme and the issues raised by the use of ASDs in impaired driving cases, and bring this matter into an Alberta context. We also examine the Supreme Court's constitutional analysis in *Goodwin* and its application of the principles of statutory interpretation in *Wilson*.

Overview of the ARP Scheme and the Use of ASDs

Prior to 2010, impaired driving investigations in British Columbia looked similar to every other province. If an officer had reasonable and probable grounds that an individual had a blood alcohol level that exceeded 80 milligrams of alcohol in 100 milligrams of blood ("over 80"), they were statutorily required to serve a notice of driving prohibition on the individual. In practice, the grounds for serving notices came from a breath analysis by an approved instrument ("breathalyser") usually done at the police station. This scheme was upheld as constitutional, as regards both the division of powers and s.7 of the *Charter*: *Buhlers v Superintendent of Motor Vehicles (B.C.)*, 1999 BCCA 114.

In 2010, British Columbia instituted a regime in the *Motor Vehicle Act* (MVA) known as "ARP" – automatic roadside driving prohibition – and it marked a shift in the province's approach to the regulation of impaired driving. Under s.215.41(3.1) of the *MVA*, reproduced in a later section of this analysis, instead of relying on the breathalyser reading at the police station, driving prohibitions would now be issued immediately at the roadside, following an analysis using an ASD.

The ASD is a handheld machine administered by a peace officer that a driver blows into at the roadside. Typically, the peace officer puts in a new straw every three blows and the machine will read "Fail" if a driver blows over the legal limit. In Alberta, the ASD is used as an investigatory

aid rather than an evidentiary instrument in most impaired investigations. That is, no criminal charges flow from registering a "Fail" on an ASD. Rather, a peace officer, having formed reasonable and probable grounds that the driver is operating a vehicle while impaired by alcohol, will then demand a breath sample from the approved instrument at the station. The maintenance logs of an ASD used in an impaired investigation are not disclosed partly because there is no direct charge that result from blowing a "Fail" on an ASD, while the maintenance logs for the approved instrument are: see *R v Kilpatrick*, 2013 ABQB 5, leave denied in *R v Kilpatrick*, 2013 ABCA 168.

When a driver registers a "Warn" or "Fail" on the ASD under the British Columbia scheme, a peace officer must issue a Notice of Driving Prohibition, provided that the officer "has reasonable grounds… that the driver's ability to drive is affected by alcohol." A "Fail" reading (blood alcohol over 80mg) would immediately result in a 90-day driving suspension, while for the first time, a "Warn" reading (blood alcohol between 50mg and 80mg) would result in a suspension between 3 and 30 days, depending on past driving history.

A person issued an ARP can apply to the BC Superintendent of Motor Vehicles for a review. When this new scheme was enacted in 2010, the grounds for review by the Superintendent were limited to three areas: whether the applicant was actually the driver, whether in the case of a "Warn" reading, the prohibition was a subsequent prohibition, and whether the driver failed or refused, without reasonable excuse, to provide a sample. The scheme was amended in 2012 and now allows review by the Superintendent regarding the calibration of the ASD (i.e. whether the ASD was working properly).

Both appeals involved persons who were subject to an ARP. Richard Goodwin failed to provide an adequate sample into the ASD. Lee Michael Wilson was stopped at a police road check and provided two samples of his breath that registered a "Warn" reading. Wilson was served with a Notice, prohibiting him from driving for three days. Goodwin was prohibited from driving for 90 days, had his car impounded for 30 days, and was required to pay monetary penalties and fees.

Wilson: Principles of Statutory Interpretation and the ARP scheme

The *Wilson* judgment looks at the ARP provisions in the British Columbia *Motor Vehicle Act* as amended to address the section 8 *Charter* violations noted above. Wilson was pulled over at a road check where a police officer noted the odour of alcohol on his breath. Wilson provided breath samples into two ASDs – and both devices registered a "Warn" reading. As a result of these readings, the officer issued Wilson a Notice prohibiting him from driving for 3 days pursuant to the Act.

Wilson sought a review with the Superintendent of Motor Vehicles, asking that the Notice be revoked on the ground that the officer lacked reasonable grounds to believe his ability to drive was affected by alcohol. Wilson's argument was that the applicable provision in the Act does not provide the officer with the power to form reasonable grounds on the basis of the ASD readings alone. The Superintendent dismissed Wilson's appeal, finding that the "Warn" reading from the ASD alone provides the officer with reasonable grounds to issue the notice of driving prohibition under the relevant provision of the Act.

The relevant provision is section 215.41(3.1) of the *Motor Vehicle Act* as follows (emphasis added):

(3.1) If, at any time or place on a highway or industrial road,

(a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, must,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) subject to section 215.42, serve on the driver a notice of driving prohibition.

The legal issue here comes down to the meaning of the phrase 'as a result of the analysis' in clause (b) noted above. Specifically, can the analysis be solely the readings provided by the ASD in a roadside checkstop? Or must the analysis be in addition to the ASD readings?

The Supreme Court begins its analysis by observing the now familiar position in substantive judicial review that the interpretation by the Superintendent of its home legislation is presumptively owed deference (at para 17). The issue being one of statutory interpretation, the Court then cites the principle on statutory interpretation known as the 'modern approach' as the authority to determine whether the Superintendent's interpretation of its home legislation is a reasonable one (at para 18). The modern approach essentially amounts to reading statutory provisions in their literal sense as well as in light of their nearby context and overall purpose, to decipher the intention of the Legislature (or Parliament for federal legislation) in relation to the meaning of legislative text. In cases where 'real' ambiguity in meaning remains after these various approaches, a reviewing court will turn to either or both of external context (eg. committee work or house debates) and common law presumptions to decide on meaning. The leading authorities on the modern approach are *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42.

The Court also notes the onus is on Wilson to not only provide a reasonable interpretation of the provisions in question, but also demonstrate the Superintendent's interpretation is unreasonable (at para 20). This onus comes from the Court's 2013 decision in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 and was the subject of an earlier ABlawg.

Wilson argues section 215.41(3.1) requires the peace officer to have additional evidence of impairment in addition to the ASD readings in order to form reasonable grounds to believe a driver is impaired and issue the Notice to prohibit driving. His reading of the words "as a result of the analysis" in clause (b) is that the legislature would not have included this phrase if it were solely the ASD readings that triggered the obligation to issue the Notice, and therefore the phrase itself must stand for analysis in addition to the ASD readings (at paras 27 and 28). He further argues this reading is necessary to ensure section 215.41(3.1) is consistent with *Charter* values, and in particular the rights of drivers contained in sections 8 and 10(b) of the *Charter* (at paras 23 and 24).

Writing for the Court, Justice Moldaver rejects these arguments in favour of a reading that the phrase 'as a result of the analysis' in clause (b) can mean solely the readings provided by the ASD in a roadside checkstop. In other words where a driver triggers a "Warn" or "Fail" reading in two ASD samples, the officer administering the ASD test must issue the Notice to prohibit driving. Justice Moldaver dismisses the application of *Charter* values here because the Court sees no real ambiguity here (at para 25). As noted above, the modern approach only calls for external aids and presumptions such as the presumption that legislation conforms with *Charter* values where there is real ambiguity.

Justice Moldaver runs through a literal, contextual and purposive analysis to find the Superintendent's interpretation is a reasonable one. The literal text of section 215.41(3.1) links the officer's assessment of the driver to the ASD results. In the words of the Court: "The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer's belief" (at para 26). Justice Moldaver also looks at the factors a Superintendent may consider when hearing a review application from a driver on the issuance of a Notice, and he observes those factors are focused primarily on the manner in which the ASD is administered and the reliability of the results (at para 30). For Justice Moldaver this context supports the interpretation that analysis means ASD results only. Finally, Justice Moldaver looks to external aids of interpretation (other judicial decisions and Hansard debates) to confirm the Superintendent's interpretation is in line with the overall public safety purpose of the legislation to confront and reduce impaired driving (at para 37).

This judgment is another example of the Court speaking of deference at the outset but seemingly applying correctness when it gets into the substance of the matter. Of note, we are never provided with the reasons of the Superintendent for rejecting Wilson's appeal of the Notice in the first instance. Accordingly, Justice Moldaver's statutory interpretation analysis stands alone and reads very much like the Court is deciding the interpretive issue for itself rather than deferring in any way to the Superintendent's reasons.

And then there is the perception that the modern approach to statutory interpretation is a very results-orientated principle. The literal text of section 215.41(3.1) is not all that clear about linking the phrase 'as a result of the analysis' in clause (b) solely to the ASD readings. More clarity in the drafting of clause (b) to expressly link the analysis to that conducted by the officer under clause (a) would be helpful. And moreover the external context cited by the Court near the end of its judgment (at paras 36 to 39) in fact says nothing specific about relying on ASD readings alone as the basis for issuing Notices to prohibit driving under the legislation.

Goodwin: Constitutionality of the ARP Scheme

While the issue in *Wilson* came down to a question of statutory interpretation, the central issue in *Goodwin* was whether the ARP scheme was *intra vires* the province (see generally paras 16 to 34). The Supreme Court ruled it was. Goodwin argued that, in pith and substance, the scheme replaced the *Criminal Code's* impaired driving provisions with a provincial regime of severe penalties – a roundabout way of ousting the criminal law. The province argued that the ARP scheme fell under s.92(13) of the *Constitution Act, 1867*, which gives the provinces jurisdiction over civil rights and property.

The Court found that the scheme was *intra vires* for two principal reasons. First, they rejected Goodwin's submission that the true intent of the scheme was to provide a criminal law response

to drunk driving without having to engage the *Charter*. The Court found that the purpose of the legislation was to prevent death and serious injury on the roads of B.C.

Second, the Court rejected Goodwin's submission that the "punitive" nature of the penalties imposed by the legislation was akin to the criminal law. Goodwin asserted that the tendency for police officers to enforce the ARP scheme over the criminal law provisions set out in the *Criminal Code* illustrated the legislation's "criminal" intent. The Court found that while Goodwin's submission was a factor to consider in determining pith and substance, it was not determinative, as police are granted more discretion than other members of society to adopt different strategies to prevent death and serious injury.

These findings constitute further evidence of Canadian courts' reluctance to use the Constitution to invalidate schemes that are regulatory and not penal, and deny persons the same procedural rights afforded to those accused of crimes: see also *Guindon v Canada*, 2015 SCC 41. Moreover, it is relevant that there is a growing tendency to use ARPs and not charge people under the *Criminal Code* when assessing the constitutionality of provincial legislation. The Court found that the scheme was not meant to oust the criminal law, yet in practice, that is exactly what it has done. It is our understanding that for the vast majority of first-time offenders, police go straight to the ARP scheme, thus denying many of the *Charter* rights that someone charged criminally would receive. Moreover, even where there is an accident causing bodily harm or death, or the individual has past impaired driving convictions, the ARP scheme is increasingly used over the *Criminal Code* provisions. So while the Supreme Court dismissed Goodwin's submission on this point, there is evidence to support his claim that the scheme's practical effects are ousting the criminal law as the preferred means of dealing with suspected impaired drivers.

ARPs Coming to a Province Near You?

In dismissing the appeals in *Goodwin* and *Wilson*, the Court may be opening the door for other provinces to enact similar schemes. Earlier this year, Justice Wakeling of the Court of Queen's Bench of Alberta dismissed a challenge to section 88.1 of the *Traffic Safety Act* RSA 2000, c T-6 (TSA) on similar grounds that the Supreme Court used in *Goodwin* and *Wilson*: *Sahaluk v Alberta (Transportation Safety Board)*, 2015 ABQB 142.

At issue in *Sahaluk* were amendments made to the *TSA* that provided for an immediate suspension of a person's drivers' licence who was charged with an alcohol-related driving crime. In practice, Albertans charged with alcohol-related driving crimes under sections 253 and 254 of the *Criminal Code* have their licenses suspended for the entire pre-trial period, and if found guilty at trial, face a mandatory one-year driving suspension for first-time offenders. Sahaluk raised similar arguments to Goodwin and Wilson: the Alberta scheme was *ultra vires* the head of government that enacted it, and if that argument failed, the scheme violated sections7, 8 or 11(d) of the *Charter*.

Similar to the decisions in *Goodwin* and *Wilson*, Justice Wakeling found no conflict between the provincial scheme and the *Criminal Code*, noting at para. 244 that section 88.1 of the *TSA* promoted highway safety, while the *Criminal Code* punishes the offender by imposing post-conviction sanctions. The *Charter* arguments were similarly dismissed: a person has no constitutional right to drive, therefore the liberty interests protected by section7 are not applicable. Moreover, the sanction under section 88.1 of the *TSA* does not charge the person with anything, therefore s.11(d) is not engaged.

The Alberta and B.C. schemes raise serious issues about procedural rights. Both cleverly sidestep basic *Charter* rights by using provincially administered suspension schemes to tackle the issue of impaired driving, which bar the accused from accessing the remedial provisions of the *Charter*. Both are an attack on the presumption of innocence by revoking the drivers' licence of an individual before they can mount a defence at trial or in an administrative hearing. By removing these licences from people who have not been found guilty by a court or tribunal, it potentially extorts guilty pleas out of people who may have legitimate defences but who neither have the money nor time to spend months or sometimes years awaiting trial.

There is a common thread running the opening lines of these decisions. In *Sahaluk*, Justice Wakeling notes that the Government of Alberta is taking "dead aim at those who choose to drink and drive," while the Supreme Court in *Goodwin* and *Wilson* mentions the "devastating consequences of impaired driving reverberate throughout Canadian society" and "Impaired driving is a matter of grave public concern in Canada." In fact, some found it odd that the Supreme Court even granted leave to appeal in *Goodwin* and *Wilson*. After all, the Court essentially adopted the exact same position as the British Columbia Court of Appeal: see *Sivia v British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79 and *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 202.

Perhaps the Supreme Court is trying to send a message that impaired driving is such a scourge on society that the Court is increasingly less likely to allow *Charter* arguments to continue to dominate impaired driving law. One also may wonder whether the Court was trying to send a message to the provinces that they will be more deferential to provincial schemes that avoid *Charter* rights by treating drunk driving as a regulatory, rather than criminal offence. Time will tell whether the provinces will heed the call.