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The Applicability of *Charter* Protection to Traffic Safety Laws

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Case Commented On: *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153 (CanLII)

In *Sahaluk v Alberta (Transportation Safety Board),* Mr. Justice Slatter, writing for the majority (Madam Justice Bielby concurring; Madam Justice Paperny dissenting), examined the constitutionality of Alberta's recent amendment to the *Traffic Safety Act*, RSA 2000, c. T-6 (the 'Act'), specifically section 88.1. The amendment eclipsed previous provincial administrative licence suspension regimes for impaired driving in its manner and degree of punishment, raising inquiries into whether the province overstepped its legislative power and whether it complied with the *Canadian Charter of Rights and Freedoms*. Using evidence pertaining to the objectives and effects of the amended licence suspension scheme, Justice Slatter allowed the appeal of the chamber's judge's decision upholding the law, and declared that while section 88.1 was valid on federalism grounds, it was in violation of sections 7 and 11 of the *Charter*.

The *Traffic Safety Act*

The punitive consequences of the 2011 version of the *Traffic Safety Act* took a significant leap forward from prior law. Its most recent predecessor, the *Traffic Safety Act,* SA 1999, c T-6.4, enforced an immediate 24-hour licence suspension and a 3-month suspension 21 days after a criminal charge related to impaired driving under the *Criminal Code*, RSC 1985, c C-46 (i.e. impaired driving and driving "over 80" (section 253), and refusal to comply with a demand made under section 254), and two parallel one-year suspensions upon conviction (section 83 of the *Traffic Safety Act* and section 259 of the *Code*) (see section 88 of the 1999 Act).

In contrast, in 2011 the Act was amended to enable peace officers to impose an automatic and immediate licence suspension subsequent to an alcohol related driving charge under the *Criminal Code* (see section 88.1). The suspension ran until either a criminal conviction, resulting in an additional one-year suspension, or a dismissal of the charges and successive lifting of the suspension. The latter conclusion totalled the loss of driving privileges for an indefinite number of months until a case was disposed of in court, despite a finding of not guilty.

Evidence

Mr. Justice Slatter examined several sources to reach his conclusions (at paras 16-51). These included the *Provincial Strategy to Reduce Impaired Driving*, *Alberta Hansard*, statistical information on alcohol related driving costs, psychologist reports, the appeal process, and the effect on guilty pleas.

Justice Slatter inferred that the *Provincial Strategy to Reduce Impaired Driving* had been the root of the amendment. The *Provincial Strategy* is a 14-page restricted government document from March 27, 2011, which was obtained by the appellants through a *Freedom of Information* request (at para 21). It contained a proposal for a new strategy aimed at reducing impaired driving with a number of plans including the establishment of norms and attitudes against impaired driving, the improvement of detection and monitoring of offenders, and the speed of sanctions. Of particular emphasis was the reduction of costs associated with the administration of justice through increasing the perception of the likelihood of detection, swiftness of response, certainty of consequences, and supervision (at para 20).

The *Alberta Hansard* (November 21, 2011, at 1238) provided valuable data unveiling the pith and substance and overall purpose of the legislation. The Minister of Transportation, during the new regime's proposal, advised that although the purpose was the improvement of road safety, an effect would be the increase of consequences to impaired drivers. This was met with disagreement by other members, who stated that the punishment was unjust "without a fair and impartial hearing under the law" (*Alberta Hansard*, November 23, 2011, at 1307).

The government submitted statistical evidence to the chambers hearing outlining the indirect and direct costs of impaired driving. Justice Slatter expressed concern that the evidence was too general and lacked precision relating to true criminal driving, such as driving "over 80" under section 253(1)(b) of the *Code*, and did not consider the assortment of additional variables affecting the results (at para 31). Furthermore, approximately 20% of impaired driving cases did not result in guilty judgements yet attracted suspensions under section 88.1 (at paras 2 and 31).

Despite this setback, psychologist reports concluded that licence suspensions were highly effective at reducing impaired driving (at para 35). On the other hand, the installation of alcohol ignition interlock devices – which section 88.1 does not deal with – was determined to be a more reliable solution because of physical incapacity, and less imposing than the complete licence suspension (at para 38).

Justice Slatter also considered the procedure for appeals. A person disqualified or suspended from driving by section 88.1 may appeal to the Alberta Transportation Safety Board as per section 39.2 of the *Traffic Safety Act*. Unfortunately, the Board's jurisdiction is limited: it may not consider *Charter* arguments, nor make use of any discretion beyond whether or not the offence was committed (at paras 39-44).

Finally, the accelerative effect on guilty pleas was highlighted. Returning to the *Provincial Strategy*, Justice Slatter gave emphasis to its objective to deter "extensive Charter litigation" by "specialized counsel" and to find methods that reduce the "institutional time and related costs such prosecution now entails" (at para 49) – all of this while encouraging individuals "to take responsibility for their actions promptly".

In addition, while the statistical evidence was weak, there was some data that showed an acceleration of guilty pleas and a drop in the number of charged drivers going to trial. This data was supported by evidence demonstrating a potential chilling effect of section 88.1 on arguing in court: those found not guilty faced an average suspension time between 3.6-9.63 months, those who pleaded guilty faced an average suspension time of 14.69 months, and those who pleaded not guilty but were found guilty faced an average suspension time between 15.6-21.63 months.

Legislative Power

Justice Slatter (with Justice Bielby concurring) concluded that the province did not overstep its boundaries into territory reserved for the federal government under the *Constitution Act, 1867*; the law was *intra vires* the province. He countered the appellants' paramountcy argument, stating that modern federalism law enabled "federal and provincial regimes to operate in parallel" (at para 72, citing *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 (CanLII) at para 33). Paramountcy renders a provincial law inoperative only where there is impossibility of dual compliance or frustration of the federal purpose (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (CanLII) at para 18).

The appellants argued that the provincial law interfered with federal criminal laws on impaired driving and reasonable bail conditions under section 515 of the *Code* and section 11(e) of the *Charter*. Justice Slatter refuted these points, stating that the first branch of the *Moloney* test was not met as the impugned provision and federal laws regarding drunk-driving and bail conditions can be complied with simultaneously (at paras 73-74). The second branch also failed as there was no indication of intersections rendering federal laws ineffective due to the provincial administrative licence suspension scheme (at para 75).

***Charter* Compliance**

The heart of the judgment was the discussion of section 88.1's compliance with the *Charter*. Justice Slatter outlined several points leading to his decision (with Justice Bielby concurring with him on these points):

- Section 11 of the *Charter* applies to laws of a punitive nature. Section 88.1, through its automatic penal consequences, indefinite licence suspension time, and direct link to criminal proceedings, fit the description and was therefore in violation of section 11 of the *Charter* (para 108).
- Section 7 of the *Charter* provides a barrier against unjust laws that hinder life, liberty, or security of the person, subject to the principles of fundamental justice. The appellants argued that section 88.1's suspension regime violated liberty, and offended principles of fundamental justice relating to the presumption of innocence and substantive factors such as overbreadth and gross disproportionality. The majority agreed that there was a violation of section 7 (at paras 116, 135).
- Neither of these violations were saved by section 1 of the *Charter* (at para 149).

Section 11

To begin, imposing sanctions before conviction violates the fundamental spirit of the presumption of innocence under section 11(d). The *Charter*'s reach extends into matters of criminal justice where individuals, upon being charged by the police, are entitled to be presumed innocent until proven otherwise in the courts.

The chilling effect brought upon drivers charged under the Act, forcing them to plead guilty and relinquish their right to a fair trial, further propelled the injustice of the Act. Justice Slatter inferred from the government's evidence that the strategy relied on an unconstitutional

"propensity reasoning" justification (at para 106): those caught under the Act are likely to be high risk drivers and likely to reoffend. Guilty until proven innocent is a direct contradiction to the *Charter* values of section 11.

However, this section has its limits. As explained in *R v Wigglesworth*, 1987 CanLII 41 (SCC) (cited in *Sahaluk* at para 83), section 11 only shields people "prosecuted by the State for public offences involving punitive sanctions" rather than administrative regimes designed for the protection of the public (*Wigglesworth* at paras 16, 23). Nonetheless, the true criminal nature of section 88.1 was exposed through its discrete connection to criminal charges and the "punitive nature of the administrative licence suspensions" (at para 83).

First, the connection is described by Justice Slatter as follows:

> [T]he administrative suspension under section 88.1 only applies to 'a person [charged] with an offence under . . . the *Criminal Code*', the suspension is mandatory on being 'charged', and the suspension specifically runs until 'disposition of the criminal charge'. No person who is not 'charged with an offence' can be subjected to an administrative licence suspension under this provision, and once the 'charge' is disposed of the suspension ends. (at para 85)

In other words, the province can't have its cake and eat it too. If it wishes to make use of its power to impose penal sanctions congruent with the *Code*, it must adhere to the rules of the *Charter*. The collateral effect of the licence suspension regime in relation to the *Code* does not save it because, whether a provincial or federal statute, *Charter* protection remains.

Secondly, the Act's disputed section reflected objectives similar to those of the *Criminal Code*. Section 88.1's automatic and immediate suspension, imposed without an official conviction, coupled with an indefinite termination date created a foundation similar to section 718 of the *Code*: protection of society, denunciation, deterrence, rehabilitation of offenders, and punishment. The foundation is made explicit in the stated objectives of the *Provincial Strategy,* which included punishment, deterrence, and the alteration of "some implications of the criminal justice process that it found inconsistent with traffic safety concerns" (para 93).

Finally, this is a first-of-its-kind case that addresses a provincial licence suspension regime "triggered and terminated" by the *Code* (at para 89). Even though *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), *Alberta v Moloney*, *supra*, and *Thomson v Alberta (Transportation and Safety Board)*, 2003 ABCA 256 (CanLII) crystallized the rule that driving is not a privilege protected under the *Charter*, none of the prior cases addressed a quasi-criminal regime that was dependent upon criminal law. The withdrawal of these privileges to deter and punish alleged criminal behaviour is sufficient to be considered a sanction of conduct undesired by the state, distinguishing the law from an administrative penalty. Therefore, such a provision should be put under the light of section 11, according to Justice Slatter.

Section 7

Section 7 is engaged when an individual has his/her rights to life, liberty, or security of the person violated, subject to the principles of fundamental justice. According to jurisprudence, liberty may be offended through imprisonment, extradition, or, most applicable to this issue, the

restriction of free movement. Based on the last point, an automatic, universal, and indefinite licence suspension regime transgresses the right to liberty (at paras 109-112).

The principles of fundamental justice are defined in *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) as "the basic, bedrock principles that underpin a system" (at para 122, cited in *Sahaluk* at para 114). Relevant to this case are the presumption of innocence and the substantive values of arbitrariness, overbreadth, and gross disproportionality. Presumption of innocence, one of the oldest principles of law, was explained above in the discussion on section 11. The majority's analysis of the remaining principles is discussed below.

Arbitrariness

Arbitrariness means that the law's purpose and effects are not linked. Arbitrariness does not apply when there is a high degree of effectiveness between the law's objective and outcomes. The objective of the impugned law is traffic safety, and the majority found that the licence suspension of individuals charged with driving offences represents an extreme, but effective, consequence. Therefore, section 88.1 is not arbitrary (at para 119).

Overbreadth

Overbroad laws are those that interfere with people or circumstances beyond their objectives. As discussed above, the majority held that the impugned section does not discriminate, nor attempt to, between high risk offenders and innocent parties. The "propensity reasoning", the assumption that all alleged offenders are likely to be guilty and therefore must be treated as such, was found to be the section's downfall (at para 122).

An automatic suspension strategy to make bad drivers take responsibility for their actions is overreaching when 20% of those sifted through the system are innocent. The risk of imprisoning a few innocent or not guilty people for the sake of a larger goal was rejected as an acceptable justification in the *Motor Vehicle Reference* (at paras 95-96). The statistics on conviction rates show, therefore, that the law is overbroad (*Sahaluk* at paras 123-129).

Gross Disproportionality

The law also failed because the punishment does not fit the crime. As noted by Justice Slatter, evidence showed that pre-trial licence suspension had little influence on the overall deterrence of impaired driving (at para 134). If anything, the results showed only a marginal improvement in contrast to the severe and punitive impact such sanctions had on the accused. As such, the universal and automatic licence suspension regime developed by the *Traffic Safety Act* was considered grossly disproportionate to the desired outcome.

Section 1

Although a law may be in violation of the *Charter*, the Constitution leaves room for deference to government under section 1. If an offending provision can be demonstrably justified in a free and democratic society, through the *Oakes* factors of pressing and substantial objective, rational connection, minimal impairment, and proportionality, then it will survive *Charter* scrutiny (see *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103).

Pressing and Substantial Objective / Rational Connection

A law with effects that rationally connect to its pressing and substantial objective will fulfill this point of the section 1 *Oakes* test. Justice Slatter found that traffic safety was a pressing and substantial objective with a rational connection to the licence suspension consequences; however, reducing administrative costs, as emphasized in the evidence above, was not a pressing and substantial objective (at para 139).

Minimal Impairment

Minimal impairment relates to a law's degree of intrusiveness and whether there are more reasonable alternative measures available to perform its objective(s). The government must demonstrate it took time to tailor the law according to constitutional circumstances; the institution of a simple blanket restriction is generally not owed much deference at this stage.

One of the regime's objectives was the supervision of drivers charged under traffic and driving-related laws. Justice Slatter stated that a universal, automatic, and mandatory licence suspension was "the opposite of 'supervision'" as it eliminated anything to supervise (at para 141). In addition, the evidence demonstrated that an interlock program would also be effective in attaining the objective without the unnecessary intrusiveness of licence suspension.

The next objective was education. Clearly, there were more useful and less draconian methods of re-educating drivers charged under traffic law: seminars, rehabilitation, etc. Justice Slatter concluded from these objectives that the provision lacked sufficient minimal impairment (at paras 143-144).

Proportionality Between Salutary and Deleterious Effects

Proportionality is achieved if the salutary effects, in this case the riddance of unsafe drivers from the roads, are appropriately balanced with the deleterious effects, which considers the punitive impact on individual rights. Justice Slatter concluded this matter in a relatively quick stroke: the incremental evidence of reductions in impaired driving discussed above was marginal compared to the substantial negative effects of the automatic licence suspension with its "significant punitive consequences" (at paras 146-148).

In conclusion, the appellants successfully demonstrated that section 88.1 was inconsistent with sections 7 and 11 of the *Charter*, despite being *intra vires* the province. Noting his concern about the province's tip-toeing effort to extend the *Traffic Safety Act*'s impact upon individuals (at para 150), Justice Slatter allowed the appeal and declared section 88.1 of the Act of no force or effect, suspending the declaration of invalidity for one year from May 18, 2017 (at para 151).

Commentary

Madam Justice Paperny, for the dissent, made several points to justify her dissatisfaction with the majority ruling. I respectfully disagree with her argument because it seems she disregarded most of the objectives uncovered by Justice Slatter's analysis of the *Provincial Strategy* and the significant impact of universal and automatic licence suspension sanctions to individual rights.

First, Justice Paperny diverged from the majority's evaluation of section 88.1's encroachment on liberty. She stated that section 7 was not activated because, although punitive, the withdrawal of a driving privilege does not "elevate what is a privilege to a *Charter* protected right" (at para 180) nor does "[t]he lack of a driver's licence . . . amount to a restriction on freedom of movement" (at para 179). She agreed with the chambers judge that the acceleration of guilty pleas was merely "an incidental and relatively unimportant consequence" rather than a demonstrative legislative intent of section 88.1 (at para 183).

With respect, Justice Paperny seems to favour public safety over individual rights, therefore potentially skewing the judgement in favour of the government: "[f]rom a societal perspective, guilty pleas are seen as having several positive systemic effects, including the preservation of judicial resources, earlier sentencing, and avoiding the need for witnesses to testify" (at para 188). This concerns me as it signals a preference toward convenience at a large, administrative scale, overlooking real and harmful consequences at the individual level. Isn't this what the *Charter* serves to prevent?

In response to the contention that the scheme accelerated guilty pleas, she explained: "merely because a law operates in a manner that encourages early resolution of criminal charges . . . does not render it a breach of a liberty interest" (at para 188). Justice Paperny relied on a confidence in the courts to weed out guilty pleas made involuntarily or unequivocally (at para 189).

But should we give such reliance to the courts' ability to assess whether guilty pleas are "voluntary, informed and unequivocal"? Laws should be tailored to avoid accelerated guilty pleas, and a law's defective features shouldn't leave the courts picking up the pieces. If a provision creates problems from the inception, such as premature pleas, then it should be fixed at its source. Shifting the responsibility to the courts seems inefficient and a drain on resources, not to mention a possible violation of the *Charter* where the laws themselves are the problem.

Next, a strong contention Justice Paperny had against Justice Slatter's judgment was his application of the standard of correctness, withholding deference to the chambers judge's use and disuse of certain evidentiary sources; this was apparent with Justice Slatter's 's emphasis on the *Provincial Strategy*, which, in contrast, was lightly touched on by the chambers judge. According to Justice Paperny, "attributing to [the *Provincial Strategy*] the weight suggested by the appellants . . . amounts to an impermissible reweighing of evidence" (at para 186). Because of this, it appears that she dismissed most of Justice Slatter's inferences that constructed a more complex array of objectives than mere traffic safety. Interestingly, Justice Bielby also disagreed with Justice Slatter's discussion of standard of review, although she did concur with his reasons on section 88.1's noncompliance with the *Charter* (at paras 152-154).

Finally, Justice Paperny reserved a great deal of discussion for *Charter* section 11 and its application solely to criminal charges, not to regulatory offences. She argued that although the suspension depended on a pending criminal charge, jurisprudence showed that this did not make the administrative scheme a true criminal sanction. The following extracts help show her position:

- "Several courts have considered these issues in the specific context of administrative licence suspensions . . . the jurisprudence consistently has held that

such licence suspension schemes do not amount to the charging of an offence, and do not engage s 11 protections" (at para 204).

- "As to whether the nature of the process is criminal, regard must be had to the extent to which the process has the traditional hallmarks of a criminal proceeding." (at para 213).
- "The [licence suspension] process under the *Traffic Safety Act* does not involve an information being laid, no one is arrested and no summons to appear before a court is prepared. In my view, the character of the process does not change simply because the [licence suspension] is linked to, but is distinct from, criminal charges" (at para 215).
- "[T]he lengthy licence suspensions that can result under s 88.1 of the *Traffic Safety Act* may have serious effects on people's lifestyle, but the effects do not fall within the category of true penal consequences" (at para 218).

I have several concerns with this approach. First, I believe this argument limits criminal law into a strict compartment despite its plenary scope (*RJR-MacDonald Inc. v Canada (Attorney General)*, 1995 CanLII 64 (SCC) at para 28). There are many laws that are, in pith and substance, considered criminal that do not rely on conventional penal formats nor intentions (e.g., *R v Hydro-Québec*, 1997 CanLII 318 (SCC)).

Second, this analysis ignores evidence suggesting the law's criminal nature. Justice Paperny relied on *Guindon v Canada*, 2015 SCC 41 (CanLII) and its interpretation of *Wigglesworth's* application of section 11, which emphasized leveraging the law's purpose when determining whether or not it was criminal (at para 201). She concluded that the provision fit best in highway traffic safety law (at paras 211-212). Unfortunately, her analysis did not stray far from the chamber judge's decision or that of *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256 (CanLII), an outdated judgement on the Act's predecessor.

Finally, it can be said that Canadian culture places value on punishment suitable to the crime, so it is vital to consider the moral weight and stigma associated with drunk-driving offences. Morality and community perception play a large role in demarcating true crimes from regulatory offences. Imposing sanctions prior to conviction is akin to absolute liability fault, which I do not believe should be associated with drunk-driving infractions. Therefore, when unearthing the law's true nature, consideration should be taken of moral factors as well.

To wrap up this discussion, I will conclude with an extract by Mr. Rob Anderson, former MLA for Airdrie-Chestermere, discussing the Act's proposed amendment (*Alberta Hansard*, November 23, 2011, at 1308):

> This is not a parking ticket. This is much more serious than that. It is not only much more serious, the evidence surrounding whether someone is intoxicated at the wheel or not is a lot more difficult to prove. These breathalyzer tests are often not accurate. Most of the time they are, but oftentimes they're not. There are many different factors that go into proving somebody has driven under the influence. So it's not as simple and straightforward as a speeding ticket or a traffic ticket, for example. In other words, presuming someone is guilty essentially until proven innocent I don't think should be allowed in this case.

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