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Third-Party Constitutional Remedies to Unjust Law during Stays in Declarations of Invalidity

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Case Commented On: *Laverick v Alberta (Transportation Safety Board)*, 2018 ABQB 57 (CanLII)

In *Laverick v Alberta (Transportation Safety Board)*, 2018 ABQB 57 (CanLII), Justice W. P. Sullivan acknowledged that a third-party applicant may argue for a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* against charges under section 88.1 of the *Traffic Safety Act*, RSA 2000, c T-6 [*TSA*], the administrative license suspension ("ALS") regime. Despite the suspended declaration of section 88.1's invalidity under section 52 of the *Constitution Act*, 1867, 30 & 31 Vict, c 3, an applicant may utilise the Court's decision in *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153 (CanLII) [*Sahaluk I*] (see here for a case commentary) as precedent for a constitutional exemption provided that he or she: 1) pled not guilty, 2) exhausted all statutory remedies, 3) demonstrated personal *Charter* right violations, and 4) passed the balance of convenience test.

A Summary of *Sahaluk*

In *Sahaluk I*, the Alberta Court of Appeal found section 88.1 of the *TSA* unconstitutional under section 52 of the *Constitution Act* and suspended the declaration of invalidity until May 18, 2018. Following the ruling, an application attempted to imbed individual exemptions for third parties charged under the law in the interim (*Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 233 (CanLII) [*Sahaluk II*]; see also the comment section of the blog on *Sahaluk I*).

The Court rejected the subsequent application. The majority argued that a section 88.1 license suspension did not amount to "extraordinary circumstances" and distinguished the proceeding from *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII), a recent case on individual exemptions from an unconstitutional law during its stay of invalidity. In dissent, Justice Myra Bielby contended against the decision to suspend the declaration of invalidity. She highlighted that such declarations were developed as tools of last resorts (*Sahaluk II* at para 20). Furthermore, denying exemptions from the ALS Regime in the interim created permanent and unjust damage and the proposed alternatives under the statute were ineffective substitutes (*Sahaluk II* at paras 22, 25).

The Alberta Court of Queen's Bench Decision in *Laverick*

In this case, Laverick's driving license was suspended pursuant to section 88.1 of the *TSA* just prior to the ruling in *Sahaluk I*. As a consequence of *res judicata*, that decision precluded him from pursuing a section 52 declaration of invalidity under of the *Constitution Act*; instead, he

sought a constitutional exemption under section 24(1) of the *Charter*, stating that the license suspension regime violated his section 7 *Charter* rights to liberty and security of the person (at paras 3, 21). He claimed that the suspension was a significant interference with his profession as a car salesman and his relationship with his children, whose custody he shared with their mother 70 km away.

The parties, including the Attorney General of Alberta and the Registrar of Motor Vehicle Services, asked two questions during the proceeding (at para 4):

1. Can Laverick apply for a stay of the ALS Regime pending the resolution of the *Charter* issues?
2. Can Laverick rely on s. 88.1's invalidity to seek relief while that declaration is stayed?

Third-Party Exemption to the Application of the ALS Regime During the Interim Period

For the first question, the Court applied the test from *Sahaluk v Alberta (Transportation Safety Board)*, 2013 ABQB 107 (CanLII) [*Sahaluk QB*], where Chief Justice Neil Wittmann asked the applicants to show (at para 19):

1. That there is a serious question to be tried;
2. That there will be irreparable harm to them in the event no stay is granted; and
3. That the balance of convenience favours the granting of the stay.

There is a Serious Question to be Tried

The Court determined the first point in the affirmative. For a serious question to be tried, the law requires only a determination that the case goes beyond "frivolous or vexatious" (at para 6, citing *Sahaluk QB* at paras 23-24). The Court reasoned that Laverick had a legitimate section 7 case and that a section 24(1) exemption was an appropriate remedy to seek in the circumstances of a stay of a section 52 declaration of invalidity (at paras 21, 12, citing *R v Edward Books*, [1986] 2 SCR 713, 1986 CanLII 12 (SCC), and *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 1993 CanLII 75 (SCC)). Furthermore, *Sahaluk II* did not preclude the availability of constitutional exemptions nor were section 24(1) exemptions out of reach for third parties.

Firstly, the Court decided that *Sahaluk II* did not bar constitutional exemptions during the suspension period. Rather, Justice Sullivan interpreted that decision as a refusal to endorse an abstract set of criteria for third-party claimants (at para 15). As the applicants in that case were not seeking the exemptions for themselves, the Court in *Sahaluk II* was uncomfortable designing conditions around a "reasonable hypothetical" accused (at para 14). Furthermore, appellate courts, like the Alberta Court of Appeal in *Sahaluk II*, do not have the jurisdictional power to override the wide discretion of *Charter* section 24(1) remedies with restrictions (at para 15).

Secondly, Justice Sullivan established that third parties have arguable cases in seeking section 24(1) exemptions during a suspended section 52 declaration of invalidity. Citing Chief Justice McLachlin in *R v Ferguson*, 2008 SCC 6 (CanLII), and Chief Justice Lamer in *Rodriguez*, he noted that the Supreme Court did not rule against section 24(1) remedies in conjunction with a

suspended declaration of invalidity of unconstitutional legislation (at paras 17-18). Indeed, the Supreme Court affirmed the approach in *Corbière v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC), where applicants were granted section 24(1) exemptions during a section 52 stay of invalidity (at para 19). Consequently, Justice Sullivan saw no legal difference in third parties seeking the same section 24(1) relief as applicants during section 52 suspensions, concluding that it was unsettled law and available at that proceeding (at paras 19-20).

There Will Be Irreparable Harm if No Stay is Granted

For the second point of Chief Justice Wittmann's test, the parties agreed that Mr. Laverick would suffer irreparable harm from the regime without a remedy.

The Balance of Convenience Favours the Granting of the Stay

Finally, for the third point, Justice Sullivan ruled that the balance of convenience favours a stay in proceedings. Unlike the Chief Justice's decision in *Sahaluk QB*, the facts in this case did not raise the risk of floodgates in litigation. Firstly, in *Sahaluk QB*, the applicants were challenging the legislation's constitutionality using abstract points. In contrast, Mr. Laverick raised personal and concrete *Charter* violations that did not have such universal application.

Secondly, authorizing constitutional remedies during the suspension period would not undercut the justice system. The Court in *Sahaluk QB* decided against a stay of proceedings prior to a ruling on the legislation's unconstitutionality. Chief Justice Wittmann reasoned that granting stays would leap-frog over the final constitutional determination and undermine the ALS Regime (at para 26). However, this was not the concern in this case as the Court had already ruled the regime unconstitutional in *Sahaluk I*.

Thirdly, Justice Sullivan concluded that Laverick's petition to the Court rather than the appropriate appeal procedure under the *TSA* would not lead to inevitable floodgates. The Alberta Transportation Safety Board had argued that Laverick did not exhaust the alternative remedies available under the *TSA* (at para 28). Justice Sullivan agreed that future applicants would have to undergo the appropriate procedure; however, he refuted the respondents' contention since Laverick's appeal period lapsed due to awaiting the final verdict in *Sahaluk I*. Because of the lack of legal uncertainty in subsequent cases, the risk of floodgates is minimal as future applicants would have fewer reasons to avoid the appeal procedure under the *TSA*.

Reliance on the Jurisprudential Effect of a Legislation's Invalidity during the Interim Period

For the second question, Justice Sullivan ruled that a party may rely on the *Sahaluk I* decision during the suspended declaration of invalidity as *stare decisis* but may not invoke its remedial effect until the suspension lapses (at para 38). Lower courts are, in some respects, bound to comply with the conclusions regarding the constitutional value of the *TSA*; however, they cannot use the decision to justify a party's entitlement to a remedy until May 18, 2018 (at para 36). As long as Mr. Laverick wasn't proposing a declaration under section 52, he was free to use the reasoning of the Court of Appeal's decision to his benefit in seeking the section 24(1) exemption.

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