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Distracted Driving and the *Traffic Safety Act*

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Case Commented On: *R v Ahmed*, 2019 ABQB 13 (CanLII)

Alberta added distracted driving offences to the *Traffic Safety Act*, RSA 2000 c T-6 in 2011, and two of these provisions are the subject of this decision by Justice John T. Henderson. The accused was charged under section 115.1(1)(b) for operating a vehicle while looking at his mobile phone. This particular section prohibits driving while holding, viewing or manipulating a hand‑held electronic device or a wireless electronic device. The facts were not in dispute at trial, but the traffic commissioner ruled that a mobile phone is not an "electronic device" and thus acquitted the accused. The Crown appealed this decision to the Court of Queen's Bench. A literal or plain reading of section 115.1(1)(b) does lead one to question the view that a mobile device is not an electronic device, but statutory interpretation is not always a literal exercise – particularly when the provisions themselves are written in a complicated or "inelegant" manner as is noted by the court here. This case is perhaps more about distracted drafting than it is distracted driving.

The mobile phone is on a shortlist of technology which has effected a profound change in our daily routine. These devices are an impressive and powerful machine with all sorts of functionality. I'm old enough to remember when the Walkman fundamentally changed how we listen to music, followed later by the Watchman, which never did have the same impact on viewing. But these days your mobile phone offers both of these services in a much more convenient and far more powerful technology, along with many other functions and connectivity. Describing these devices as a 'phone' has become a misnomer, and harkens back to a time when people actually used mobile devices to talk to each other. These are more properly described as a portal into the virtual reality of the internet and social media where most communication occurs as cryptic messaging and images.

The functionality of mobile devices is highly addictive, and this is readily observable in just about any public setting. Think of how many people walk past you with their head pointed down at their mobile device, thumbs and fingers punching away and buds in their ears. Nearly all of us have done the same. The addictive nature of these devices also means they can be a distraction. This can be an annoyance when someone focused on their mobile device while walking gets into the right-of-way of others, but when it comes to driving a vehicle this distraction is a public safety hazard.

Unfortunately, many of us succumb to the temptation of using these devices while driving. How many times have you looked over to other drivers waiting at an intersection with their attention focused on a mobile device? Alberta Transportation publishes distracted driving enforcement statistics compiled annually since 2011. I was surprised to learn that the total distracted driving

convictions in Alberta have ranged from 23,500 to 27,500 per year. The statistics also provide a breakdown of convictions by age and gender for the 2014 to 2018 years. When the offences were enacted back in 2011, the penalty was a fine of $187 and the conviction did not result in demerit points. Today, the penalty for a distracted driver conviction is $287 along with 3 demerit points (see the *Procedures Regulation*, Alta Reg 63/2017 and the *Demerit Point Program and Service of Documents Regulation*, Alta Reg 331/2002). Other provinces are increasing the penalties in even greater magnitude. In Ontario, a distracted driver now faces a license suspension and a fine up to $1000.

The distracted driving offences are set out in sections 115.1 to 115.4 of the *Traffic Safety Act*. While only section 115.1 was at issue in *R v Ahmed*, I have set out all the sections (with some editing for length) in order to illustrate the peculiar drafting in these provisions:

> Cellular telephones, electronic devices, etc.
>
> 115.1(1) Subject to this section and the regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway while at the same time
>
> (a) holding, viewing or manipulating a cellular telephone, radio communication device or other communication device that is capable of receiving or transmitting telephone communication, electronic data, electronic mail or text messages, or
>
> (b) holding, viewing or manipulating a hand-held electronic device or a wireless electronic device.
>
> (2) An individual may drive or operate a vehicle on a highway while using a cellular telephone or radio communication device in hands-free mode.
>
> (3) Subsection (1)(a) does not apply to … [**clauses (a) to (d) in subsection (3) are omitted here, but these clauses reference the use of a 2-way radio or cellular phone or other communication device for required purposes such as employment or in an emergency situation**]
>
> (4) Subsection (1) does not apply to an individual driving or operating an emergency vehicle while the individual is acting within the scope of the individual's employment.
>
> ….
>
> Display screen visible to driver prohibited
>
> 115.2(1) Subject to this section and the regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway if the display screen of a television, computer or other device in the vehicle is activated and is visible to the individual.

(2) Subsection (1) does not apply in respect of the display screen of … [**clauses (a) to (f) in subsection (2) are omitted here, but these clauses reference a GPS system, cellular or radio communication device in hands-free mode, commercial tracking device, dispatch system, collision avoidance system, and instrumentation regarding status of vehicle systems**]

(3) Subsection (1) does not apply to an individual driving or operating an emergency vehicle while the individual is acting within the scope of the individual's employment.

Global positioning system

115.3(1) Subject to this section and the regulations made under section 115.5, no individual shall use a global positioning system navigation device for navigation purposes while driving or operating a vehicle on a highway.

(2) An individual may use a global positioning system navigation device while driving or operating a vehicle on a highway if the system

(a) is programmed before the individual begins to drive or operate the vehicle, or

(b) is used in a voice‑activated manner.

…

Prohibited activities

115.4(1) Subject to this section and the regulations made under section 115.5, no individual shall drive or operate a vehicle on a highway while engaged in an activity that distracts the individual from the operation of the vehicle, including but not limited to

(a) reading or viewing printed material located within the vehicle other than an instrument, gauge, device or system referred to in section 115.2(2)(f),

(b) writing, printing or sketching,

(c) engaging in personal grooming or hygiene, and

(d) any other activity that may be prescribed in the regulations.

….

These provisions set out four categories of distracted driving offences: a mobile device in section 115.1; a laptop or similar device with a display screen in section 115.2; a GPS navigation device in section 115.3; and the catch-all distracting activities in section 115.4. In *R v Ahmed*, Justice

Henderson observes the potential for overlap in the application of these provisions, and notes that the use of a mobile device while driving could be the *actus reus* in each of sections 115.1 to 115.4 (at para 28). I would add, however, that while using a mobile device would fall within the literal meaning of the phrase "engaged in an activity that distracts the individual" in the catch-all section 115.4, the *ejusdem generis* principle of statutory interpretation tells us that a general phrase such as this should be limited in scope to activities which share the genus of the more specific activities listed thereafter, which in clauses (a) to (c) of section 115.4(1) seem to be concerned with either printed materials or personal hygiene. No flossing teeth while driving!

None of the operative words and phrases used to identify distracting activities are defined in the *Traffic Safety Act*, so these provisions will necessarily be the subject of some interpretation in cases where the accused does not admit guilt. What constitutes "personal grooming or hygiene"? What other activities are captured by section 115.4? What is an "electronic device"? What is "hands-free mode"? What does it mean to "manipulate" a device? Etc.

Alberta Transportation provides some interpretive guidance on the terms used in these sections, although most of it is merely a literal reading of the legislation and thus not very insightful. The website includes the following as activities not specifically prohibited under the general prohibition in section 115.4:

- using an earphone – if it is used in a hands-free or voice-activated manner
- drinking beverages – coffee, water or pop
- eating a snack
- smoking
- talking with passengers
- listening to a portable audio player – as long as it is set up before you begin driving

Yet it is not difficult to envision scenarios where any of these activities conducted while driving constitutes an "activity that distracts an individual" under section 115.4. Eating a poorly wrapped donair with extra sub sauce while driving a vehicle with a standard transmission can be a distraction while driving if the person having this snack is preoccupied with ensuring the sandwich doesn't drip onto their clothes.

The need for some interpretation in section 115.4, together with the requirement that the Crown has to prove beyond a reasonable doubt that the activity distracts from the operation of a vehicle, is likely why there are relatively few convictions under section 115.4. The statistics compiled by Alberta Transportation reveal that the overwhelming majority of convictions are under section 115.1(1). This is because section 115.1(1) presumes the activities listed therein will be a distraction, so it is an offence to merely hold a cellular phone or hand-held electronic device while driving; there is no need for the Crown to prove it is a distraction. Which brings us to *R v Ahmed*. Readers may want to refer back to the excerpt of sections 115.1 to 115.4 above while reading the following.

The accused was charged under section 115.1(1)(b) for operating a vehicle while looking at his mobile phone, and the traffic commissioner acquitted on the ground that a mobile phone is not an "electronic device" under clause (b) in subsection (1). While a mobile phone would obviously

fall within a literal meaning of an "electronic device", reading section 115.1(1)(b) in context with the other distracted driving sections places some doubt on whether this literal reading was intended by the Legislature; most notably, that the prohibition against using a mobile phone is expressly set out in clause (a) of subsection (1) with reference to a cellular phone. This context suggests that the Legislature intended clause (b) to capture devices other than a mobile phone – this is an application of the *expressio unius* principle in statutory interpretation, which holds that where a word is explicitly used in one provision its absence in another provision can be given meaning because had the Legislature intended to capture the word it would have explicitly done so. This was the conclusion of the traffic commissioner in ruling that section 115.1(1)(b) does not cover the use of a mobile phone while driving.

The Crown argued that the traffic commissioner erred in this interpretation, asserting that clauses (a) and (b) should be interpreted as constituting a single offence, not separate ones. Justice Henderson did not appear to accept this argument by the Crown, however he granted the appeal because he found the traffic commissioner erred in the interpretation that clause (b) does not include the use of a mobile phone. Justice Henderson set out the following as the basis for his interpretation of section 115.1(1)(b):

- the literal meaning of a "hand‑held electronic device" or a "wireless electronic device" in clause (b) obviously includes a mobile phone (at paras 15 to 21);
- the use of the disjunctive "or" between clauses (a) and (b) in section 115.1(1) is not determinative of an intention by the Legislature to create them as separate offences (at paras 25 to 27);
- the use of a mobile device while driving could be the *actus reus* in each of sections 115.1 to 115.4, thus supporting the view that section 115.1(1)(b) includes this as well (at paras 28 to 31);
- the *expressio unius* principle is the weakest principle of statutory interpretation and thus should not be followed here, and moreover the court should not read in the words 'other than those referred to in clause (a)' beside "hand-held electronic device" in clause (b) (at paras 35 & 36);
- the fact that the exceptions set out in section 115.1(3) only apply to clause (a) in subsection (1) and not clause (b) (see the excerpts from the provisions set out above) is acknowledged by Justice Henderson as problematic for a reading that mobile phones are captured by both clauses (a) and (b), however this is simply an oversight in the "inelegant" drafting of section 115.1 (at paras 32 to 41).

The knock on principles of statutory interpretation is that too often their application seems like a results-orientated exercise. John Willis made this observation almost 80 years ago in his seminal article "Statute Interpretation in a Nutshell" published in the Canadian Bar Review. The accusation is that judges pick and choose between whether to give emphasis to a literal reading of words in a statutory provision or whether to read the words using nearby provisions or other aides external to the statute to assert that the purpose or intention of the Legislature was to give a meaning different from the literal one. It can be difficult to predict when a literal reading will be preferred to a contextual or purposive reading, or vice versa. Likewise, there are other principles of interpretation that seem to arise in some cases but not others. Here, for example, I was surprised not to see reference to the canon of interpretation that says legislation should be

construed strictly in favour of an accused. It seems *R v Ahmed* was exactly the sort of case for which that ancient maxim was designed for.

In *R v Ahmed*, Justice Henderson fails to address the difficulty in section 115.1 which flows from his interpretation that clause (b) in subsection (1) includes the use of a mobile phone while driving: A person charged under section 115.1(1)(b) for holding their mobile phone while driving cannot escape liability by asserting one of the exceptions listed in subsection (3), whereas those exceptions are available to a person who is charged under section 115.1(1)(a) for the very same activity of driving while holding their mobile phone. Surely this was not simply an oversight by the Legislature in subsection (3) to only refer to clause (a) in subsection (1) and not clause (b). The complexity of sections 115.1 to 115.4 suggests otherwise, and it would be an absurdity to suggest it is not an offence to use a "cellular phone" for an emergency purpose because of the application of subsection (3) to clause (a) in subsection (1), but it is an offence to use a "hand-held electronic device", which is a mobile phone for the same emergency purpose because subsection (3) does not state that it applies to clause (b) in subsection (1). In addition, Alberta Transportation itself lists convictions by each clause in subsection (1) independently with its enforcement statistics: clause (a) is 'communication'; clause (b) is 'electronic', which also suggests an intention that clause (b) was intended to capture devices other than mobile phones.

It seems that what really transpired here was that the charge against the accused was incorrectly laid under section 115.1(1)(b). It was an oversight on the part of someone, but I would respectfully say it is not helpful to stretch the principles of statutory interpretation beyond what they can bear in order to correct a mistake made in charging the accused. There is no dispute that the overall purpose in these sections includes preventing drivers from using their mobile devices while driving (as noted by Justice Henderson at paras 43 to 50), but that purposive reading does little to support a finding that mobile phones are captured in both clauses (a) and (b) in light of how the section is drafted.

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