

Alberta Court of Appeal Broadens the Scope of Offences for Conditional Discharges

By: Serena Eshaghurshan

Case Commented On: R v Chowdhury, [2019 ABCA 205](#)

In May 2019, the Alberta Court of Appeal (ABCA) heard an appeal for a dangerous driving causing bodily harm case. The appellant, Mr. Chowdhury, sought a conditional discharge, but the sentencing Judge refused to grant one. Mr. Chowdhury appealed his sentence and was surprisingly granted a conditional discharge, the first of its kind for this offence.

Facts:

Mr. Chowdhury is a chartered accountant and a married father of two. On July 20, 2017 he was driving on a highway in Alberta. However, he was stuck behind a truck carrying woodchips, and he decided to overtake the truck due to debris falling off the vehicle. As he drove into the oncoming lane, he realized a motorcyclist was approaching his vehicle. Mr. Chowdhury braked and tried to return to the proper lane but could not successfully do so. Due to Mr. Chowdhury's actions, the motorcyclist went into a ditch and suffered severe physical injury. Mr. Chowdhury subsequently plead guilty to dangerous operation of a motor vehicle causing bodily harm, contravening s 249(3) of the *Criminal Code* (now repealed):

249(1) Every one commits an offence who operates

- (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
- (b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;
- (c) an aircraft in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of that aircraft or the place or air space in or through which the aircraft is operated; or
- (d) railway equipment in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of the equipment or the place in or through which the equipment is operated.

(3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Mr. Chowdhury was sentenced to a one year driving prohibition, a \$3,500 fine, and a victim surcharge of \$1,050. While Mr. Chowdhury sought a conditional discharge under s 730 of the *Criminal Code*, the sentencing Judge refused to grant one, and Mr. Chowdhury appealed his sentence to the Alberta Court of Appeal.

Sentencing Decision

The sentencing Judge convicted Mr. Chowdhury under s 249(3) of the *Criminal Code*, and refused to grant a conditional discharge in lieu of another, more punitive sentence. Under s 730 of the *Criminal Code*, a conditional discharge may be granted “where the court considers it to be in the best interest of the accused and not contrary to the public interest” (at para 3). A conditional discharge allows a defendant to avoid a criminal record, and thus is a highly appealing (but rare) sentence to be granted. The sentencing Judge held it was in Mr. Chowdhury’s best interest to grant a conditional discharge; he was not impaired at the time of the accident, was not speeding, had never received an infraction on his 20-year driving record, and was gainfully employed as a chartered accountant. However, the Judge held it would be contrary to the public interest to grant a conditional discharge (at para 6). In coming to his judgment, the sentencing Judge mentioned the fundamental principle under s 718.1 of the *Criminal Code*, which states “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The sentencing Judge held that while Mr. Chowdhury’s responsibility for the offence was “at the lower end of the scale,” it could not be negated as the gravity of the offence was ‘high’:

The gravity of the offence... looks at the harm or likely harm to the victim, the harm or likely harm to society. Well, when I look at the gravity of the offence, I must rate it high in both cases. And we all drive and there’s probably no one who hasn’t taken a chance that we shouldn’t have taken on the road, but when we do that, we end up with situations like this with harm and actual harm to... the victim.

We also must think about the harm or likely harm to society and its values...But, one thing that’s lost for society is that sense of security and safety on the highways if we don’t take these sorts of crimes seriously and impose serious penalties. (sentencing decision cited by ABCA at para 7)

Due to the sentencing Judge’s refusal to grant a conditional discharge, Mr. Chowdhury appealed his sentence to the Alberta Court of Appeal.

Issue for the Court of Appeal:

Is a conditional discharge ever an appropriate sentence for dangerous driving causing bodily harm?

Alberta Court of Appeal Decision

Madam Justices Patricia Rowbotham, Ritu Khullar and Dawn Pentelchuk were unanimous in their decision to allow the appeal and substitute Mr. Chowdhury's sentence with a conditional discharge. They held that the sentencing Judge made an error in holding that a conditional discharge "would be outside the range of a fit and proper sentence," as there was no case law precedent offered by the Crown or Defence to support a conditional discharge for s 249(3) (at para 8). However, the Justices noted that conditional discharges had been previously granted for dangerous driving. In *R v Poryadin*, [2016 ABQB 320](#), the defendant, who was speeding, making dangerous lane changes and following other vehicles too closely, was granted a conditional discharge. In *R v Angelov*, [2013 ONCJ 117](#), the defendant was granted an absolute discharge despite waiving a BB gun at another driver, which caused the driver to swerve into another lane. In *R v Smith*, [2012 ONSC 910](#), the defendant was granted a conditional discharge despite driving in a dangerous and reckless manner. While the Justices concede that none of the cases involved s 249(3) of the *Criminal Code*, most of the defendants displayed conduct "with a higher degree of blameworthiness than Mr. Chowdhury" (at para 9).

The Justices critiqued the sentencing Judge for concentrating only on the consequences of Mr. Chowdhury's actions, but not on the circumstances of the accident when determining 'seriousness' (at para 11). Critical circumstances include the fact that Mr. Chowdhury took evasive action to avoid the motorcyclist but was unable to do so. The Justices mentioned that dangerous driving sentences are not a one size fits all solution, but rather there is a range of sentences that vary upon the circumstances of the offence. The Justices went on to cite *R v Lacasse*, [2015 SCC 64](#):

The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation... Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. (at para 58)

Lastly, the Justices mentioned *R v MacFarlane*, [1976 AltaSCAD 6](#), 55 AR 222, which provided a list of factors to consider when determining if a conditional discharge should be granted. The *MacFarlane* factors include:

1. The nature of the offence;
2. The prevalence of the particular offence;
3. Whether the accused stood to make personal gain at the expense of others;
4. For property offences, the value of the property;
5. Whether the crime was committed impulsively or was pre-planned;
6. Whether the crime should be a matter of record to make the public aware the accused has committed the offence in question.

Of the mentioned factors, the Justices held that only the first factor, the nature of the offence, was applicable to Mr. Chowdhury's case. While the Justices conceded the consequences of his actions were indeed significant, Mr. Chowdhury's moral culpability was low. Thus, the Justices held that granting Mr. Chowdhury a conditional discharge would not be contrary to the public interest (*R v Reid*, [2015 ABCA 334](#) at para 16). The Justices argued the need for a just sanction, which would not include imposing a criminal record on Mr. Chowdhury. Using the sentencing Judge's own words, the Justices were of the view that nearly every driver makes some error at some point, and that in of itself is not deserving of criminal sanction. As stated in *Reid* at para 17: "Parliament has recognized that in exceptional cases the full impact of the criminal law does not necessarily serve its objectives."

In conclusion, the Justices agreed that it was in Mr. Chowdhury's best interest and not contrary to the public interest to grant a conditional discharge. Furthermore, the Justices stated that the purposes of sentencing under s 718 of the *Criminal Code*, such as deterrence or denunciation can still be served via a conditional discharge. Instead of paying a fine and a victim surcharge, Mr. Chowdhury is required to serve a one-year period of probation, complete community service, and is subject to a one year driving prohibition.

Commentary

In my opinion, the Court of Appeal judgment is the fair and just one. As the sentencing Judge said himself, there is probably not a single driver who has not made an error in judgment at some point in his/her driving record. The only difference to the case at hand is that Mr. Chowdhury's lapse in judgment resulted in an individual being severely injured. While it seems natural to focus on the consequences of one's actions in determining an appropriate sentence, it is equally important to focus on the preceding circumstances. Mr. Chowdhury was not intoxicated, distracted or reckless- he simply made a mistake that resulted in an unfortunate outcome. Regardless, this case is noteworthy for broadening the scope of offences for which conditional discharges can be granted. It will be interesting to see how this precedent plays out in future cases.

This post may be cited as: Serena Eshaghurshan, "Alberta Court of Appeal Broadens the Scope of Offences for Conditional Discharges" (May 29, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/05/Blog_SE_RvChowdhury.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

