S.C.C. No.: 35864

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

RICHARD JAMES GOODWIN

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- and -

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PART I: STATEMENT OF FACTS

1. The Criminal Lawyers' Association (the "CLA") takes no position on the facts.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. The CLA takes no position on whether ss. 215.41 to 215.51 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, as enacted on September 20, 2010 are ultra vires the province of British Columbia as being exclusively within the federal government's criminal law power under s. 91(27) of the Constitution Act, 1867.

3. The CLA submits the impugned provisions of the *MVA* infringe s. 11(d) of the *Charter* and that the infringement cannot be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

4. The CLA further submits the impugned provisions of the *MVA* infringe s. 8 of the *Charter* and that the infringement cannot be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

PART III: STATEMENT OF ARGUMENT

5. This appeal is about how far provincial governments can go in creating offences that serve the same goals as the criminal law, have penalties comparable to those imposed by the criminal law, but offer none of the substantive and procedural guarantees of fairness required by the *Charter* in the criminal context. The stated justification for such legislation is administrative efficiency and public order: to avoid clogging the courts with *Charter* challenges and to enforce justice immediately and decisively. The impugned provisions of the *MVA* essentially provide no ability for an accused person to raise a defence. Even *actual innocence* is foreclosed as a defence, as the scheme does not permit an accused to argue that the screening device did not accurately measure blood or breath alcohol levels.

6. British Columbia is undoubtedly correct that the immediate, decisive, and effectively unchallengeable penalties in the *MVA* provide a significant deterrent to those who would drive while impaired or under the influence of alcohol. Yet this is precisely why procedural safeguards are needed. It will always be the case that denying all rights to accused persons can

more effectively deter crime. But the Rule of Law in a democratic society requires more. Drinking and driving can be addressed and combatted in ways that do not rob people and the administration of justice of basic procedural and substantive fairness.

A. The Impugned Provisions of the MVA infringe s. 11(d) of the *Charter* and the infringement is not justified under s. 1

(1) Overview

7. Section 11(d) of the *Charter* guarantees that those charged with an offence have the right to be presumed innocent until proven guilty at a fair hearing. Those accused of drinking and driving and facing significant regulatory license suspensions should be entitled to this protection.

8. The ability to drive, for many Canadians, is a necessity not a luxury. In geographically dispersed communities that do not have robust public transit, the effect of a driving prohibition or licence suspension is similar to house arrest: the person will not be able to work, socialize or even provide the basic necessities of life for themselves or their families without the assistance of someone with a car. For those who live in rural or remote areas, a driving prohibition or licence suspension can be devastating.

9. The *MVA*'s impaired driving scheme not only provides for lengthy license suspensions, but also provides for significant fines and vehicle impoundment. In British Columbia, the *MVA* has become the preferred method of combatting drinking and driving, a problem traditionally addressed by the criminal law. The *MVA* is additionally intertwined with and depends on a criminal law search power. As such, even if the *MVA* is not *quite* criminal law (the CLA takes no position on the division of powers question), it nonetheless has features that *approach* the criminal law thereby warranting different substantive and procedural protections than other regulatory regimes.

10. While similar to criminal law in its coerciveness and consequences, the *MVA* affords none of the criminal law's guarantees of fairness. For example, an accused under the *MVA* cannot argue the screening device malfunctioned or that a medical condition caused the device to overestimate

blood alcohol. As such, not only does the *MVA* not *presume* innocence in the traditional sense, it in some cases prevents a factually innocent accused from *even raising* innocence as a defence.[1]

11. The CLA does not dispute that drinking and driving is a serious problem and that combatting it may well require the imposition of severe penalties such as those provided for under the *MVA*. However, when the state seeks to impose such severe penalties it should be required to either comply with s. 11(d) of the *Charter* or justify non-compliance under s. 1 as demonstrably justifiable in a free and just society.

(2) The *Wigglesworth* Approach to s. 11(d)

12. Section 11(d) only applies when a person is charged with an "offence". Notably, the drafters did not restrict the application of s. 11(d) to *criminal* offences. In *Wigglesworth*, Wilson J. held that something is an offence if it is "by its nature" an offence or if it creates "true penal consequences". She summarized the "by its nature" test as follows:[2]

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. (Citations omitted.)

This Court then described true penal consequences as those that "appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."[3]

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[1] The CLA submits that factually innocent people will inevitable be caught by the MVA scheme because roadside screening devices are not reliable. In *R v. Bernshaw*, [1995] 1 S.C.R. 254 [Book of Authorities ("BA") Tab 1], this Court held that a fail reading on a roadside screening device was insufficiently reliable to even establish reasonable and probable grounds per se. This Court cautioned that "[i]t is important to understand the frailties associated with the roadside screening tests and the potential unreliability which may result from the presence of mouth alcohol. The manufacturer of the alcohol screening device used in the present case recognizes that <u>when certain circumstances prevail, the results will not be accurate</u> (para 55, emphasis added)." Under the *MVA*, a fail reading is conclusive, irrefutable proof of guilt no matter what circumstances prevail.

[2] *R. v. Wigglesworth*, [1987], 2 S.C.R. 541, at para. 23 [BA Tab 5].

[3] *Wigglesworth*, at para. 24 [BA Tab 5].

13. The "by its nature" and "true penal consequences" tests, rigidly applied, suggest a clean bifurcation between provisions directed at public order and welfare and those directed at private licensing or the regulation of a particular activity. But no such clean bifurcation exists in reality. Many statutory provisions, such as the one at issue in this appeal, seek to promote public order and welfare *through* the imposition of severe licensing sanctions. Because of the large grey area between public order provisions and licensing provisions, rigid application of the *Wigglesworth* test leads to arbitrary and absurd results.

14. For example, while the courts below found that the *MVA* did not create an "offence", this Court in *Wigglesworth* endorsed the statement that "[t]here can be no question that parking infractions are 'offences' as that word is used in s. 11 of the *Charter*."[4] The practical result of this distinction is absurd: there is "no question" that someone facing the minor inconvenience of a parking ticket is entitled to be presumed innocent until proven guilty at a fair hearing, but a person facing a lengthy license suspension, a significant fine, vehicle impoundment, and the stigma of being branded a drunk driver under the *MVA*, is entitled to no procedural protections whatsoever.

15. The courts below held that the *MVA* did not create an "offence" because the impugned provisions were directed only at "the licensing of drivers, the enhancement of highway traffic safety and the deterrence of persons from driving on highways when their ability to drive is impaired by alcohol" and was not directed at promoting public order.[5] It is difficult to see how deterring those who are impaired from driving on highways is not, at least in part, directed at promoting pubic order. The strained categorization exercise mandated by *Wigglesworth* is inconsistent with the nature of modern provincial regulatory schemes, which often seek to bridge the gap between maintenance of public order and regulation of private activity. As such, it should be abandoned in favour of a more flexible, principled approach.

(3) The CLA's Proposed Approach to s. 11(d)

16. The CLA submits that this Court should modify the *Wigglesworth* test. Instead of first attempting to categorize legislation as being directed at *either* promoting public order and welfare *or* regulating conduct within a limited sphere, and then attempting to categorize the penalties as

[4] *Wigglesworth*, at para. 22, citing with approval Linden J. in *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C.) [BA Tab 5].
[5] *Sivia v. British Columbia* (Superintendent of Motor Vehicles), 2014 BCCA 79, at para. 134 [BA Tab 6].

being directed at *either* redressing the wrong done to society at large *or* the maintenance of internal discipline, courts should recognize that many provisions and their corresponding penalties will simultaneously be directed at both of these goals. Instead, courts should ask a single question: is maintenance of public order and welfare *a* significant feature of the scheme having regard to both its purpose and effect? The proposed test would give courts greater flexibility to reach conclusions consistent with common sense and basic notions of fairness in a particular case.

17. An approach that eschews strained legalistic categorization in favour of flexibility is necessary in part because governments may seek to create hybrid criminal/administrative legislation specifically *for* the purpose of circumventing *Charter* rights. The current all-or-nothing approach to s. 11(d) – whereby an accused either gets the full presumption of innocence and right to a *fair* hearing, or is precluded from even *arguing* innocence as a defence or having *any* meaningful hearing, depending on how a scheme's purpose is characterized – invites attempts to "legislate around" *Charter* rights.

18. The CLA's proposed test would lead to more provisions being classified as "offences". However, the protections required by s. 11(d) are contextual and what is required for a fair hearing will always depend on the seriousness of the offence at issue.[6] While the *MVA* would not attract the highest possible procedural protections, the severity of lengthy license suspensions warrants, at minimum, the right to argue actual innocence as a defence and the right to a meaningful hearing.

19. Because the *MVA* provides no meaningful hearing to the accused, and prohibits the accused from even arguing that he was actually innocent of the charges, it infringes s. 11(d) of the *Charter*. This infringement is not minimally impairing. Drinking and driving can be combatted,[7] and has been combatted, in ways that provide the accused with basic rights to a fair process. Accordingly, the infringement cannot be justified under s. 1 of the *Charter*.

[6] See, e.g. *R. v. Généreux*, [1992] 1 SCR 259, at para. 40 [Ba Tab 4].

B. The Impugned Provisions of the MVA infringe s. 8 of the *Charter* and the infringement is not justified under s. 1

(1) Overview

20. The ability to demand that drivers submit to a roadside breath sample seizure is a constitutional compromise. Rights under s. 10(b) of the *Charter* are suspended, but the results of the roadside demand cannot be used substantively at a criminal trial. Further, the accused can challenge both the basis for making the roadside demand and the reliability of the results in the trial context. It is only as a result of this compromise that the s. 254(2) of the *Criminal Code* survives *Charter* scrutiny.[8]

21. The impugned provisions of the *MVA* graft onto the *Criminal Code* search power, but do away with the procedural and substantive protections that are essential to the latter's constitutionality. The *MVA* incorporates those features of the constitutional compromise favourable to the state while incorporating none of the features favourable to the accused. Where an officer proceeds under the *MVA* instead of the *Code*, s. 10(b) rights are still suspended at the roadside. However, not only is the roadside breath sample admissible against the accused, it is statutorily deemed to be irrefutable proof of the accused's guilt, notwithstanding the unreliability of roadside screening devices. In addition, the accused is prohibited from even questioning whether the officer who made the breath demand had any legal grounds for the demand. The result is no compromise at all.

(2) Section 8 of the *Charter* Applies to the Impugned Provisions of the *MVA*

22. The *MVA* does not itself authorize a breath demand. However, the CLA submits the following basic principle governs the analysis in this case: where a provincial scheme incorporates and relies on a *Code* search power, the provincial scheme's compliance with s. 8 of the *Charter* must be assessed as if the search power were part of the provincial scheme. In most cases, this will have no effect on the result. A constitutional stand-alone search power in the

[8] See, e.g. *Bernshaw*; *R. v. Coutts* (1999), 136 CCC (3d) 225 (Ont. C.A.) [BA Tab 1].

Criminal Code would also be constitutional if reproduced in a provincial scheme.[9] The fact that drafters of a provincial scheme decided to incorporate a *Criminal Code* search power as opposed to drafting an identical provincial search power would ordinarily be of no moment.

23. In the present case, however, there is no stand-alone constitutional search power in the *Criminal Code*. The *Code* creates a *framework* that is constitutional only in its entirety. The Province seeks to import an isolated provision from this framework. It would be absurd if this Court reached a different result in the present case than it would reach if the power to make the roadside breath demand were located directly in the *MVA*. Such an approach would elevate form over substance by reaching different constitutional conclusions in situations where the substantive effects were identical, and would be inconsistent with a purposive approach to *Charter* rights.

24. The substantive effect of the *MVA* scheme, including its incorporation of the *Code* search power, is as follows: an officer is allowed to demand a breath sample upon reasonable suspicion; rights under s. 10(b) of the *Charter* are suspended at the roadside; the accused is prohibited from challenging whether the officer actually had reasonable suspicion; and the accused cannot challenge the reliability of the breath sample analysis. It is this cumulative effect that must be tested for compliance with s. 8 of the *Charter*.

B. The Impugned Provisions of the *MVA* Are Not a Reasonable Law

25. For a search to be legal, it must be authorized by law, the law must be reasonable, and the search must be carried out in a reasonable manner.[10] The CLA submits the *MVA*, including its incorporation of s. 254(2) of the *Code*, is not a reasonable law.

26. First, where an officer intends only to impose the administrative license suspension and not to obtain a further sample at the police station pursuant to a breath demand (as would be required for charges under the *Code*), there is no way for an accused to challenge the officer's grounds for the search. As a result, while officers are *in theory* required to have reasonable

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[9] The state has a broader power to search in regulatory contexts than it does in criminal contexts, and so a search power that is constitutional in a criminal context will be equally constitutional in a regulatory context.

[10] *R. v. Castlake*, [1998] 1 S.C.R. 51 [BA Tab 2].

suspicion before demanding a breath sample, *in practice* they can demand breath samples from anyone without any basis at all, and their decisions are insulated from any challenge so long as they proceed only under the *MVA* (the record indicates that proceeding only under the *MVA* has become the default practice in British Columbia). The legislative requirement for "reasonable suspicion" becomes meaningless in the absence of a mechanism to review the objective validity of that belief.

27. Second, the evidence seized in the form of a breath sample is not presumptively reliable. Despite this, the data from the roadside screening device forms the entire basis of the subsequent suspension. A driver has no ability to argue he is innocent by demonstrating that the roadside screening device malfunctioned, was unreliable, or was not an accurate representation of his blood alcohol level.

28. By suspending 10(b) rights, offering no ability to challenge an officer's grounds for the search, and prohibiting the accused from challenging the reliability of seized evidence, the *MVA* runs counter to the basic norms of fairness and reasonableness which underpin the validity of both administrative law regimes and our criminal justice system. It is an unreasonable law. As an unreasonable law that authorizes a search, it infringes s. 8 of the *Charter*. In order to survive s. 8 *Charter* scrutiny, a regulatory regime like this one would have to provide a forum for the detainee to challenge the basis for the demand with meaningful officer participation. Additionally, where the detainee takes issue with the reliability of the reading, there must be a mechanism to challenge the readings.

29. The impugned provisions of the *MVA* are not minimally impairing. The state bears the burden of establishing justification under s. 1 of the *Charter*, and there is no evidence that drinking and driving could not be effectively combatted while still allowing accused persons to both challenge an officer's grounds for a warrantless search and to test the reliability of evidence seized.

PART IV: SUBMISSIONS ON COSTS

30. The CLA does not seek costs and asks that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

31. The CLA respectfully requests leave to present oral argument for no more than 10 minutes at the hearing of these appeals.

All of which is respectfully submitted this 1st day of May, 2015.

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PART VI: TABLE OF AUTHORITIES

CASES **PARAGRAPH(S)**

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PART VII: STATUTORY PROVISIONS

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***Charter of Rights and Freedoms*, s. 1, 8, 10(b), 11(d)**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

8. Everyone has the right to be secure against unreasonable search or seizure.

10. Everyone has the right on arrest or detention

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

11. Any person charged with an offence has the right

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

10. Chacun a le droit, en cas d'arrestation ou de détention :

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

11. Tout inculpé a le droit :

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Criminal Code of Canada, R.S.C., 1985, c. C-46, s. 254(2)

254 (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (*a*), in the case of a drug, or with either or both of paragraphs (*a*) and (*b*), in the case of alcohol:

> (*a*) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
>
> (*b*) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

254 (2) L'agent de la paix qui a des motifs raisonnables de soupçonner qu'une personne a dans son organisme de l'alcool ou de la drogue et que, dans les trois heures précédentes, elle a conduit un véhicule — véhicule à moteur, bateau, aéronef ou matériel ferroviaire — ou en a eu la garde ou le contrôle ou que, s'agissant d'un aéronef ou de matériel ferroviaire, elle a aidé à le conduire, le véhicule ayant été en mouvement ou non, peut lui ordonner de se soumettre aux mesures prévues à l'alinéa *a*), dans le cas où il soupçonne la présence de drogue, ou aux mesures prévues à l'un ou l'autre des alinéas *a*) et *b*), ou aux deux, dans le cas où il soupçonne la présence d'alcool, et, au besoin, de le suivre à cette fin :

> *a*) subir immédiatement les épreuves de coordination des mouvements prévues par règlement afin que l'agent puisse décider s'il y a lieu de donner l'ordre prévu aux paragraphes (3) ou (3.1);
>
> *b*) fournir immédiatement l'échantillon d'haleine que celui-ci estime nécessaire à la réalisation d'une analyse convenable à l'aide d'un appareil de détection approuvé.