File Number: 39997

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JENNIFER BASQUE

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF ALBERTA

Intervener

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ALBERTA

RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. The appellant entered a guilty plea to driving with her blood/alcohol over the legal limit. She intended to apply for a curative discharge and adjourned her sentencing twice for that purpose. During this time, she was on bail conditions for 21 months prohibiting her from driving. In the end, she abandoned that application and was sentenced. The sentencing judge purported to back-date the driving prohibition to credit the appellant with time she had spent prohibited from driving as a part of her bail conditions. On summary conviction appeal, the New Brunswick Court of Queen's Bench correctly held that a sentence cannot be backdated. However, it found instead that the appellant could be given "credit" to bring the prohibition below the mandatory minimum in light of the bail conditions and dismissed the prosecution's appeal.

2. The prosecution appealed further with a view to clarifying the law. A majority of the New Brunswick Court of Appeal allowed the prosecution's appeal, holding that the sentencing judge had no jurisdiction to impose a driving prohibition below the mandatory minimum at the time of sentencing. The dissenting justice held that bail conditions could justify prohibition orders below the mandatory minimum based on principles of statutory interpretation, specifically consequential analysis, proportionality, and fundamental fairness. The appellant was granted leave to appeal to this Court. She asks this Court to rule on whether a judge can impose a driving prohibition below a mandatory minimum at the time of sentencing to credit an offender for a driving prohibition as a part of bail conditions. The appellant argues that this is possible based on statutory interpretation of the C*riminal Code*.

3. The Attorney General of Alberta agrees with the written submissions of the respondent that the sentencing judge had no jurisdiction to impose a driving prohibition below the mandatory minimum at the time of sentencing. In addition, Alberta submits the following arguments. Principles of statutory interpretation are not standalone laws. Even if they were, they

do not supersede legislation. The “actual order of positive laws” makes valid legislation paramount over the common law.[1] This is subject to constitutional oversight by the courts.

4. On the facts of this specific case, the respondent has conceded that the bail conditions prohibiting the appellant to drive were unfair. However, that will not always be the case. In sentencing, principles of fairness, equity and justice are not just for the offender. The principle of fairness should be considered more broadly when interpreting the statute for broader application. The sentencing provisions balance the rights of the victims and interests of public safety as well as the rights and interests of offenders. The minority decision below and the appellant both err in their statutory interpretation by focusing only on the perspective of the offender without considering the interests of the public and the safety of potential victims.

5. Alternatively, even if courts could give credit for bail conditions below a statutory minimum, this must be limited by constitutional federalism. Federal and provincial laws must operate in parallel without interfering with one another. Unless it is impossible for a citizen to comply with both laws pursuant to federal paramountcy, compliance with one cannot make a citizen immune to the other. If a common law principle allows credit for bail conditions below a mandatory minimum, that rule should not extend to allow similar credit for provincial sanctions. Doing so could interfere with the purpose and intent of Legislature or Parliament.

Statement of Facts

6. The facts are not contested and have been accurately described by the parties.

[1] *Singh v Canada (Attorney General)*, [2000] 3 FC 185 at para 34

PART II – ISSUES

Question in Issue **Does a sentencing court have jurisdiction to credit an offender's pre-trial driving prohibition to the extent that the go-forward sentencing prohibition can be reduced below the mandatory minimum prescribed by the *Criminal Code*?**

Intervener's Position with regard to Question in Issue

No, there is no jurisdiction to do so.

Parliament has legislated that a sentence begins when it is imposed, subject to any relevant enactments. There is no enactment allowing mandatory minimum driving prohibitions to begin before they are imposed.

While bail conditions are relevant to imposing a proportionate sentence, they cannot result in a court imposing a sentence below a mandatory minimum. A constitutional challenge is the only path to do so.

PART III – STATEMENT OF ARGUMENT

7. Correct statutory interpretation of the mandatory minimum driving prohibitions in light of the requirement that sentences begin when they are imposed, does not allow credit for bail conditions below the minimum at the time of sentencing. Principles of statutory interpretation are not standalone common law apart from any statute they are used to interpret. Even if they were, they do not supersede legislation. Valid legislation is paramount over the common law.

8. Conclusions of statutory interpretation in one legislative context cannot transfer directly to another. The interpretation of different laws will necessarily lead to different results. Consequential analysis as a tool of statutory interpretation must consider the various competing interests of sentencing, not only the interest of the offender. What may seem absurd or unfair from the perspective of the offender may be in the interest of the victim or public safety.

9. In the alternative, if the legislation can be read to allow credit for bail conditions below a minimum driving prohibition at the time of sentencing, such an interpretation must be limited to

bail conditions. Extending that principle to allow for credit for provincial driving suspensions would have the effect of undermining the provincial law that operates parallel to the federal one.

Legislation prevails over Common Law which must be read in Context

10. Giving credit at sentencing for bail conditions cannot be applied to reduce a sentence below a mandatory minimum at the time it is imposed. In *Lacasse*, this Court briefly considered whether an offender should receive credit against a post-conviction driving prohibition for bail conditions that had prohibited driving while awaiting trial. In that case, the offence did not attract a mandatory minimum driving prohibition, so statutory limits were not considered or interpreted.

11. *Lacasse* quoted from the dissent in *R v Sharma*, that because of the offender's bail conditions not to drive, "[e]ssentially, the appellant had already begun serving [the prohibition part of] his sentence".[2] This quote from *Sharma* was the foundation for the reasoning in both *R v Bland* and *R v Edwards*[3]. Their reasoning is relied upon by the appellant. These cases err by taking this quote literally and out of context, and applying it despite legislation to the contrary.

12. This Court recently addressed the issue of reading a statement literally and out of context in *R v Sullivan*.[4] In a prior decision, *R v Ferguson*, this Court stated that a finding of unconstitutionality pursuant to s. 52(1) means that a law is "null and void, and is effectively removed from the statute books."[5] In *Sullivan*, this was argued to be a literal statement of the law, superseding principles of *stare decisis* and federalism. It was argued that any finding of unconstitutionality by a superior court had the effect of literally removing it from the books for the entire country. This Court clarified that the phrase in *Ferguson* should be read in its context "as a useful figure of speech rather than [taking] what the Court said in literal terms."[6] The legal principle being described had to be applied within the context of constitutional supremacy, the rule of law, and federalism.[7]

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[2] *R v Sharma*, [1992] 1 SCR 814 quoted at para 38 of the Appellant's factum.
[3] The Appellant's factum at paras 52-56
[4] *R v Sullivan*, 2022 SCC 19
[5] *R v Ferguson*, 2008 SCC 6 at para 65
[6] *Sullivan*, *supra* note 4 at para 54
[7] *Ibid* at para 60

13. The same issue arises here with the quotation from *Lacasse* being read both literally and out of context. In that case, the question was whether bail conditions prohibiting driving should be considered at all at sentencing to reduce an otherwise proportionate driving prohibition that does not attract a minimum. In that context, this Court stated "where a driving prohibition is not only one of the release conditions imposed on an accused but also part of the sentence […] the length of the presentence driving prohibition must be subtracted from the prohibition".[8] This is consistent with sentencing principles that allow many different conditions affecting an accused to mitigate their sentences, including strenuous bail conditions. However, none of these considerations can lower a sentence below a mandatory minimum. [9] These common law principles cannot supersede legislative limits.

14. In particular, the phrase cited by the majority from *Sharma* that "the accused had in fact begun serving his sentence" is in direct conflict with s. 719(1) of the *Criminal Code* which states that a sentence begins when it is imposed, except where a relevant enactment otherwise provides. Where legislation and common law are in conflict, legislation prevails.

15. Like in *Sullivan*, the quote from *Sharma* was a helpful turn of phrase in the context of what the case was deciding, but it cannot be taken literally and out of context.[10] Courts do not have that power. It is outside of their jurisdiction.

When interpreting sentencing statutes the whole context includes competing principles

16. The appellant argues a constitutional challenge is not required here because her proposed result can be achieved through statutory interpretation. She does not take issue with the statutory minimum in s. 259(1), "it is our position, without a doubt, that the Appellant must be prohibited from driving for not less than the applicable minimum period of one year. We are not challenging the prohibition's constitutional validity."[11] That leaves s. 719(1) to be interpreted in light of that minimum.

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[8] *R v Lacasse*, 2015 SCC 64 at para 113
[9] *R v Nasogaluak*, 2010 SCC 6 at paras 53-55; *R v Downes*, 2006 CanLII 3957 (ON CA) at paras 33-36
[10] *R v Kirkpatrick*, 2022 SCC 33 at para 84
[11] Appellant's Factum at para 9

17. The appellant seeks to rely on principles of statutory interpretation, such as the presumption that Parliament does not intend "absurd results", as broad common law authority that supersedes legislation. She cannot. The "actual order of positive laws" in our system makes valid legislation paramount over the common law."[12] When interpreting sentencing legislation harmoniously with the scheme of the Act, it must be considered that sentencing is a balance of many principles. Results that may appear absurd from one perspective, may be reasonable and based in common sense when considered within the scheme and intent of the Act more broadly. A fair sentence balances the interest of the offender with those of the community and potential victims.

18. This Court in *Wust* cited the principle that "provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused."[13] This was properly applied in the context of that case. Section 719(3) specifically allows for pre-sentence credit to be applied to a sentence. In *Wust*, there was ambiguity as to whether such credit could result in a sentence below a minimum at the time it is imposed. Here there is no ambiguous provision like that one. Favourability to the accused is not a common law principle of sentencing that supersedes others.

19. Public safety is a primary goal of criminal law. Reading sentencing provisions in their entire context and harmoniously with the Act, and intent of Parliament, requires considering public safety and the protection of victims along with fairness to the accused. For example, if a judge grants bail for someone charged with personal violence, threats, intimidation or criminal harassment (among others), they are required to consider imposing no-contact orders for the safety of victims and witnesses.[14] Judges may also impose similar no-contact orders if probation is imposed as a part of sentencing for the same offences.[15] While these no-contact orders would have "the same effect regardless of whether [they were] imposed before or after the [offender] was sentenced",[16] it does not follow that no-contact orders should be reduced at sentencing in consideration for the length of time the offender was subject to no-contact conditions while on bail. Fairness to the offender is not the only consideration. The safety of the victims and the

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[12] *Singh*, *supra* note 1
[13] *R v Wust*, 2000 SCC 18 at para 34
[14] *Criminal Code*, RSC 1985, c C-46, s 515(4.2)
[15] *Criminal Code*, RSC 1985, c C-46, s 732.1(3)(a.1)
[16] Appellant's factum at para 62 citing *Lacasse*, *supra* note 8

public is also relevant. The principles of fairness, justice and common sense relied upon in *Wust* may require that no-contact orders be in place as long as legislatively permitted.

20. While this is not a perfect analogy, it demonstrates the point. Impaired driving remains a deadly crime that threatens the lives of Canadians. While not arising on the facts of this case or those in *Lacasse*, it easy to conceive of an offence and an offender where public safety calls for the maximum available driving prohibition at sentencing, despite the offender having previously been on bail conditions not to drive.

21. An even closer analogy is s. 109 of the *Criminal Code*. This section requires the imposition of mandatory firearm prohibitions when an offender is found guilty of various violent or weapons related offences. Section 515(4.1) of the *Criminal Code* also requires judges to order a firearms prohibition as a part of the release conditions when granting bail for an accused who is charged with violent or firearms related offences, unless they are satisfied that such an order is not required for anyone's safety. A judge must provide reasons on the record if they choose not to do so.[17] As a result, many offenders charged with offences that would attract a s. 109 order at sentencing, would have also had a firearms prohibition as a part of their bail conditions.

22. Section 109(2) specifies that the prohibition order for a first offence "(i) begins on the day on which the order is made, and (ii) ends not earlier than ten years after the person's release from imprisonment […] or […] after the person's conviction for or discharge from the offence".[18]. Parliament intends that the minimum 10 year order runs from the date of sentencing or release from prison. Time spent on bail with firearms prohibitions is not subtracted from a s. 109 order when it is imposed. Mandatory minimum driving prohibitions are similar to firearms prohibitions. While they have a punitive effect on many offenders, they are primarily aimed at public safety.[19]

23. Motor vehicles in the hands of impaired drivers can be as deadly as firearms. Part of the danger with impaired driving is that when a person is intoxicated, they can be unable to discern that they it is not safe to drive. This can occur to otherwise law abiding offenders. Despite their

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[17] *Criminal Code*, RSC 1985, c C-46, s 515(12)
[18] *Criminal Code*, RSC 1985, c C-46, s 109(2)(a)
[19] *R v Wiles*, 2005 SCC 84 at para 3

intentions, these drivers still cause innocent civilians to be seriously injured or killed. If an offender demonstrates an inability to choose not to drive when intoxicated, a longer driving prohibition is in the best interest of public safety.

24. Varying lengths of bail conditions along with mandatory minimums for both driving and firearms prohibitions mean that there might be some unfairness between offenders subject to these orders. However, this Court has acknowledged that unfairness can sometimes arise from legislative limits in sentencing. This does not change the meaning of the Act.

25. In *R v Summers*, this Court interpreted Parliament's limit on credit for pre-trial custody.[20] Section 719(3) of the *Criminal Code* capped credit to "a maximum of one day for each day spent in custody" with an exception in s. 719(3.1) that "if circumstances justify it, the maximum is one and one-half days for each day spent in custody".[21] This Court determined that "circumstances" that could justify one and one-half to one credit could include both quantitative and qualitative circumstances. Quantitative being the lost opportunity for early release, and qualitative being the actual conditions in pre-trial custody.[22]

26. In concluding that both circumstances could be considered relevant for the exception, this Court observed that the cap would necessarily cause some unfairness, "[a] cap is a cut-off, and means simply that the upper limit will be reached in more cases. It should not lead the judges to deny or restrict credit when it is warranted." It noted, "[t]he unavoidable consequence of capping pre-sentence credit at this rate is that it is insufficient to compensate for the harshness of a pre-sentence detention in *all* cases."[23] This conclusion, that some unfairness was inevitable, was reached in the context of statutory interpretation where the section was being read in harmony with the Act. The resulting unfairness did not prevent this interpretation.

Issues of Federalism must be considered when interpreting statutes

27. Even if credit should be given for bail conditions to impose a sentence below a mandatory minimum, this principle should not be extended to credit for provincial sanctions.

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[20] *R v Summers*, 2014 SCC 26
[21] *Criminal Code, RSC 1985, c C-46*, s 719(3.1)
[22] *Summers*, *supra* note 20 at paras 23-31, 70
[23] *Ibid* at para 72

This has been conceded by the appellant in this case.[24] However, because this Court is not bound by that concession, the Alberta Attorney General highlights the distinction due to the potential scope of a decision arising from this appeal.

28. Alberta has legislated administrative license suspensions related to impaired driving that operate in addition to the *Criminal Code* driving prohibitions.[25] Other provinces have similar legislation.[26] Provinces have a right to legislate within their heads of power, including imposing sanctions related to traffic and road safety.[27] Neither the provincial or federal sanctions should interfere with the other unless it is impossible to comply with one without breaching the other. As this Court held in considering the principle of federal paramountcy in *Canadian Western Bank*, "a provincial law may in principle add requirements that supplement the requirements of federal legislation […]. In both cases, the law can apply concurrently, and citizens can comply with either of them without violating the other".[28] This is not a case where the same citizen is being told to do inconsistent things by the provincial and federal governments. However, where a citizen can comply with both laws, there is no reason to consider federal paramountcy or preclusion.[29]

29. In *R v Sohal*, the Alberta Court of Appeal considered whether to credit offenders with time spent on provincial driving suspensions against their mandatory minimum driving prohibitions after criminal conviction. The result was the same conclusion as the New Brunswick Court of Appeal on the application of s. 719(1) of the *Criminal Code*. There was no relevant enactment allowing a minimum sentence to begin before it is imposed.[30]

30. If the minority decision were adopted, that credit must be given for prior driving prohibitions because it would be an "absurd" consequence to the offender if it were not, that reasoning would extend on its face to situations where prior driving prohibitions arise from

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[24] Appellant factum at paras 47-48
[25] *Traffic Safety Act*, RSA 2000, c T-6 ss. 83, 88(1), 88.1
[26] See Respondent factum note 93
[27] *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153 at paras 68-69
[28] *Canadian Western Bank*, 2007 SCC 22 at para 72
[29] *Ibid* at para 71, citing *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161 at p 191
[30] *R v Sohal*, 2019 ABCA 293

provincial legislation.[31] This would result in a similar problem to that previously discussed in *Sullivan*, that a description of the law in one context is taken literally in another, interfering with other legal frameworks like federalism. Applying the conclusion of the minority in the case below out of context would contravene the principles of federalism.

31. The original sentencing judge in *Sohal*, citing *Wust*, relied on the same statutory interpretation principles proposed by the appellant in this case of "equity, rationality, fairness, justice and common sense" to conclude that credit could be granted for provincial license suspensions to order driving prohibitions below the mandatory minimum at sentencing.[32] This had the effect of rendering the provincial legislation ineffective or moot contrary to principles of federalism entrenched in the Constitution. As such, any interpretation in this case that would allow credit to be applied for bail conditions below a minimum, should be clearly limited to bail conditions, to prevent future frustration to constitutional principles.

PART IV – COSTS

32. The Attorney General of Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

PART V – ORDER SOUGHT

33. The Attorney General of Alberta takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 18th day of August, 2022.

ELISA FRANK
COUNSEL FOR THE INTERVENER

EF/lc

[31] *R v Basque*, 2021 NBCA 50 at paras 129-131
[32] *Ibid* at para 24

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

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