Court of Appeal File No.: CA39638

COURT OF APPEAL

On appeal from the judgment of the Honourable Mr. Justice Sigurdson of the Supreme Court of British Columbia pronounced December 23, 2011.

BETWEEN:

AMAN PREET SIVIA

APPELLANT
(PETITIONER)

AND:

BRITISH COLUMBIA (SUPERINTENDANT OF MOTOR VEHICLES) AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS
(RESPONDENTS)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

INTERVENOR'S FACTUM

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CHRONOLOGY

The British Columbia Civil Liberties Association does not take a position on the chronology of relevant dates for this appeal.

OPENING STATEMENT

The ARP regime provides for a bundle of sanctions to be imposed on drivers who register a "fail" or "warn" reading or who fail to provide a breath sample including: mandatory driving prohibition, automatic monetary penalties, attending at remedial programs, impoundment of vehicles and towing, storage and other fees. The Chambers Judge considered each of these sanctions individually and determined that they did not constitute "true penal consequences" such that the ARP regime would constitute an offence for purposes of section 11(d) of the *Charter* under the test set out by the Supreme Court of Canada in *R. v. Wigglesworth*.

The cases that follow *Wigglesworth,* including the Supreme Court of Canada's decision in *Martineau*, establish that the test for true penal consequences requires an inquiry as to the nature and purpose of the sanctions in the context of the regime as a whole. Where the purpose of the sanctions is punitive and aimed at redressing a wrong done to society at large, the sanctions create "true penal consequences". Here the bundle of sanctions has an aspect that is aimed at punishment rather than merely compliance with traffic regulations. The regime is stigmatizing and promotes specific deterrence of future conduct as well as punishment of past conduct. More generally, taken together, the bundle of sanctions reflects a number of the traditional goals of criminal sentencing including denunciation, rehabilitation and protection of the public.

The Chambers Judge erred in failing to consider the bundle of sanctions as a whole in determining that they did not create true penal consequences.

PART 1: STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association ("BCCLA") was granted leave to intervene on the issue of whether the automatic roadside prohibition regime ("ARP regime") creates "true penal consequences" in respect of the test for an "offence" in section 11(d) of the *Charter*.

2. The ARP regime provides for a bundle of sanctions to be imposed on drivers who register a "fail" or "warn" or who fail to provide a breath sample, as follows:

a. Mandatory driving prohibition: 90 days for registering a "fail" or refusing to provide a breath sample; for registering a "warn", a 3-day suspension for a first prohibition, 7 days for a second prohibition, or 30 days for a subsequent prohibition. The number of prohibitions a driver has been subject to in the previous five years determines whether it is a first, second or subsequent prohibition.[1]

b. Automatic monetary penalties: in the case of a 3-day driving prohibition, $200; in the case of a 7-day prohibition, $300; in the case of a 30-day prohibition, $400; in the case of a 90-day prohibition, $500.[2]

c. Attendance at remedial program: drivers who are issued 30-day or 90-day driving prohibition are required to register in, attend and pay the cost of any remedial program required by the Superintendent;[3]

d. Impoundment of vehicles: drivers issued a 30-day or 90-day prohibition are subject to a mandatory impoundment of their vehicle. The peace officer has discretion to order impoundment when issuing a 3 or 7 day prohibition where it is "necessary to prevent the person from driving or operating the motor vehicle before the prohibition expires";[4]

e. Other costs and fees: a driver whose vehicle is impounded is liable for the costs of towing and storage and a mandatory $250 fee to have their driver's license *reinstated*;[5]

f. Ignition interlock program: the Superintendant has discretion to require a driver to participle in and pay for an ignition interlock program and this is imposed as a matter of course following a "fail reading".[6]

3. In addition to the driving prohibition, the total cost of registering a "fail" is estimated to be $4,060 by the Ministry of Public Safety and Solicitor General.[7]

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[1] ss. 215.41(2), 215.43(2), 215.43(1) of the *Motor Vehicle Act* R.S.B.C. 1996 c. 318 ("*MVA*"); Appeal Record ("A.R.") at p. 26 – 7, at para. 23
[2] *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09, (s. 215.43(4)) A.R. at p. 27, para. 25
[3] s. 25.1 of the *MVA*, A.R. at p. 27, para. 26
[4] s. 215.46(2) of the *MVA*, A.R. at p. 27, para. 27
[5] s. 255(2) of the *MVA*, A.R. at p. 28, para. 28; s. 97.2 of the *MVA*,A.R. at p. 28, para. 29.
[6] s. 25.1 of the *MVA*; A.R. at p. 28, para. 29 – 30
[7] A.R. at p. 28, para. 31

PART 2: ERRORS IN JUDGMENT

4. The BCCLA submits that the Chambers Judge erred in holding that the regime did not impose true penal consequences and accordingly did not create an offence.

PART 3: ARGUMENT

A. Overview of true penal consequences test

5. Section 11 of the *Charter* protects certain rights of persons "charged with an offence". In particular section 11(d) of the *Charter* provides as follows:

> 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;

6. Since the Supreme Court of Canada's decision in *R. v. Wigglesworth,* it has been well established that, "A person can claim the protection of section 11 if either (1) the proceedings are, by their very nature, criminal proceedings; or (2) the punishment invoked involves the imposition of 'true penal consequences'."[8]

7. The Court in *Wigglesworth* made clear that while all criminal offences under the *Criminal Code* or quasi-criminal offences under provincial legislation are automatically subject to section 11, "Under the second branch of the test, a proceeding that is *not* criminal or quasi-criminal in nature but attracts a 'true penal consequence' (such as 'imprisonment' or fine of certain magnitude. . .') will be equated to a criminal or quasi-criminal proceeding for s. 11 purposes".[9]

8. Wilson J. in *Wigglesworth* described "true penal consequences" as including "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline." She continued, "[T]he possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity either a private sphere of activity. . ." However, where fines are imposed "to redress the harm done to society at large", section 11 rights must be afforded.[10]

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[8] *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 ("*Rodgers*"), at para. 60; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 ("*Wigglesworth*")
[9] *Rodgers* at para. 61 (quoting *Wigglesworth*)
[10] *Wigglesworth*, at 561

9. Where the "very nature" and the "true penal consequences" tests conflict, "the 'by nature' test must give way to the 'true penal consequence' test."[11]

10. While it is apparent from *Wigglesworth* that imprisonment or a fine may be sufficient to constitute "true penal consequences", the cases that follow look to the nature and purpose of the sanctions within the context of the legislative scheme instead of or in addition to the magnitude of the penalties in order to assess whether they constitute "true penal consequences".

11. In particular, as set out further below, a review of the cases following *Wigglesworth* discloses the following factors which may assist in determining whether sanctions imposed constitute "true penal consequences" engaging s. 11 of the *Charter*:

a. whether the nature and magnitude of the sanction is punitive and aimed at redressing a wrong to society at large;
b. whether the purpose of the sanction is to punish or whether it is to protect the public and/or to encourage compliance;
c. whether the sanction imposed is stigmatizing;
d. whether the sanctions are aimed at specific or general deterrence; and
e. whether the sanctions are otherwise consistent with the principles of criminal sentencing.

12. Each of these factors is explored below as it applies to the bundle of sanctions at issue. BCCLA submits that that bundle of sanctions, when considered in the light of the factors that emerge from the cases, clearly constitutes true penal consequences. The Chambers Judge erred in failing to consider the bundle of sanctions imposed by the regime in the aggregate in assessing whether the sanctions imposed constituted true penal consequences.

B. The regime creates "true penal consequences"

13. The factors above are inter-related but they can be generally grouped in two categories: (i) the magnitude and nature of the sanctions; and (ii) the purpose of the sanctions. Each category will be addressed in turn below.

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[11] *Wigglesworth*, at 561-562

(i) The nature and magnitude of the sanctions

14. In *Wigglesworth,* Wilson J. suggests that the nature and magnitude of the sanctions are to be considered in determining whether they constitute true penal consequences. She writes, at 561:

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would 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.

15. While the above passage could suggest that true penal consequences are limited to imprisonment or large fines, in the same paragraph, Wilson J. goes on to cite with approval the statement of Professor Stuart that:

> . . . other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h). [emphasis in original]

This suggests that fines or imprisonment are simply examples of what might constitute true penal consequences. It is the substantive nature of the consequence as punitive, such that it would be expected to redress wrongs against society that matters to the analysis, not simply its form.

16. This analysis is borne out by the approach taken by the Supreme Court of Canada in *Shubley* and *Martineau* and the Courts of Appeal that follow these decisions, in which the inquiry is into whether the sanction is by its nature punitive or aimed at redressing a wrong against society at large.

17. In *Shubley,* the Court considered the whether a set of potential sanctions for inmate misconduct which included loss of prison privileges constituted true penal consequences. In that case, the Court noted that the sanctions at issue constitute neither fine nor imprisonment but does not dispose of the issue on that basis. Rather the Court analyzes the nature of the sanctions, writing:

> The privilege of remission (it is not a right) is conferred as a matter of prison administration to provide incentives to inmates to rehabilitate themselves and co-operate in the orderly running of the prison. The removal of that privilege for conduct that violates these standards is equally a matter of internal prison discipline . . . I conclude that the sanctions conferred on the superintendant for prison misconduct do not constitute "true penal consequences" with the *R. v. Wigglesworth* test. Confined as they are to the manner in which the inmate

> serves his time, and involving neither punitive fines nor a sentence of imprisonment, they appear to be entirely commensurate with the goal of fostering internal prison discipline and are not of a magnitude or consequence that would be expected for redressing wrongs done to society at large.[12]

18. Following *Shubley,* it has been consistently held that where the nature of the sanction is merely the withholding a privilege--including the privilege of holding a driver's license--the sanction does not constitute true penal consequences.[13]

19. In *Martineau,* Fish J considered whether a customs forfeiture in which the amount claimed was over $315,000, being the deemed value of the goods illegally exported, constituted true penal consequences. In that case, the appellant had argued based on *Wigglesworth* that the magnitude of the payment demanded was such that it constituted true penal consequences. Fish J framed the question as whether the penalty "constitutes a fine that, by its *magnitude*, is imposed for the purpose of *redressing a wrong done to society at large,* as opposed to the purpose of maintaining the effectiveness of customs requirements."[14]

20. In answering that question in the negative, Fish J noted that, in contrast to a fine that is "clearly penal in nature and thus takes into account the relevant factors and principles governing sentencing", the amount claimed was "civil in nature and purely economic" and is arrived at by a "simple mathematical calculation".[15]

21. Further, the *in rem* nature of the proceeding, in which the guilt or innocence of the owner of the forfeited property is irrelevant, undermined the suggestion that the sanction could be said to be a true penal consequence based on its magnitude.[16]

22. Following *Martineau,* the Federal Court of Appeal wrote with respect to determining whether monetary penalties constitute true penal consequences: "The important thing is purpose. Magnitude might be an indicator of purpose, but there are other indicators as well."[17]

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[12] *R. v. Shubley*, [1990] 1 S.C.R. 3, at 22-23
[13] *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256, 330 A.R. 262, at para. 37; *Sigurdson v. HMTQ et al.*, 2003 BCCA 535, 232 D.L.R. (4th) 228 at para 17
[14] *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737 ("*Martineau*"), at para. 60
[15] *Martineau*, at para. 62
[16] *Martineau*, at para. 63
[17] *Canada (AG) v. United States Steel Corp.*, 2011 FCA 176, at para. 76

23. The Alberta and Ontario Courts of Appeal have both considered whether provisions of their respective securities laws, which allowed a maximum penalty of up to $1 million, constituted true penal consequences. In each case they held that the provisions did not create true penal consequences. The Ontario Court of Appeal wrote:

> The constitution does not impose a defined limit on what is permissible by way of administrative monetary sanctions. The limit can only be determined by reference to the purpose of the penalty in relation to the regulatory mandate of the tribunal.[18]

24. On the other hand, in *Thow*, this Court considered whether administrative penalties totalling $6 million ($1 million per contravention) were "punitive" and therefore could not be applied retrospectively. In that case, Groberman JA held that the meaning of punishment "must be taken in context" and that here where the sanction was "designed to penalize Mr. Thow and to deter others from similar conduct", it was "'punitive' in the broad sense of the word".[19]

25. In summary, the key inquiry is into the purpose of the sanctions regime. Where the purpose is punitive, it creates true penal consequences. Magnitude may be an indicator of purpose, but the key is purpose. As set out below, a consideration of the purpose of the ARP regime reveals that it has a punitive aspect, such that it creates true penal consequences.

(ii) The purpose of the sanctions

26. In *Martineau,* Fish J analyzed the civil forfeiture sanction regime in order to determine whether it was imposed "for the purpose of redressing a wrong done to society at large" or for "the purpose of maintaining the effectiveness of customs requirements."[20]

27. Similarly, in the cases that follow *Martineau*, Courts of Appeal consider whether the sanctions regime is directed at punishment or whether it is directed merely at a public protection or at encouraging compliance with an administrative regime. If the

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[18] *Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208, at para. 53; *see also*, *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48

[19] *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46, 307 D.L.R. (4th) 121 ("*Thow*"), at para. 47, 49

[20] *Martineau*, at para. 60

latter, the sanction is held not to create true penal consequences.[21]

28. In addition to the nature of the regime itself, courts look to a number of factors including whether the sanction is stigmatizing, whether it promotes specific deterrence and whether it conforms with the principles of criminal sentencing.[22]

29. As discussed below, when considered in light of each of these factors, the bundle of sanctions implicated by the ARP regime appears to have a punitive purpose.

a. The sanctions are intended to punish rather than simply to encourage compliance

30. In *Martineau*, the Court held that the purpose of the mechanism was to "ensure compliance with the [*Customs Act*] by giving customs officers a timely and effective means of enforcing it." While ascertained forfeiture "may in some cases have the effect of 'punishing' the offender, that is not its purpose."[23]

31. The bundle of sanctions here has aspects that by their nature appear to be directed at ensuring compliance with driving regulations, such as the roadside suspension and the installation of the interlock system. The Chambers Judge concluded that, while the effect of those sanctions—particularly significant in the case of an employed person whose livelihood requires use of a vehicle—may have amounted to punishment, their purpose was not punitive.

32. However, the sanctions imposed here cannot be said to be limited to "ensuring compliance" with driving regulations, but rather necessarily have a punitive aspect to their purpose. The automatic monetary penalties tied to a driving suspension demonstrate the point. The inclusion of this sanction in the ARP bundle is punitive.

b. The regime stigmatizes drivers

33. In *Martineau,* the Court held that the demand by written notice "stigmatizes no one" and considers this a factor in determining that the regime does not create true penal consequences.[24]

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[21] *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48, at para. 23; *Canada (AG) v. United States Steel Corp*, 2011 FCA 176, at para. 54 – 57; *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409, at para. 80
[22] *Martineau* at para. 36 – 39 and 64 - 66
[23] *Martineau* at para. 36 – 37
[24] *Martineau* at para. 64

34. Here, it is uncontroversial that there is a stigmatizing aspect to the bundle of sanctions. The Chambers Judge acknowledges that "in some circumstances the removal of the privilege of driving may . . . impose a stigma." The same may be true of installation of the interlock system.

c. The sanctions promote specific deterrence and punishment

35. In *Martineau,* the Court held that ascertained forfeiture is intended to produce a deterrent effect but that "actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders nevertheless do not constitute criminal proceedings".[25]

36. In other contexts, the Supreme Court of Canada has endorsed the view that sanctions aimed at general deterrence alone are not punitive.[26]

37. In *Thow,* Groberman JA distinguishes between sanctions intended to generally deter future conduct, sanctions intended to specifically deter a particular person "who poses a risk for the future, and ought, therefore, to be disqualified or otherwise restricted from activities for the protection of the public" and cases in which a penalty is imposed for "penal purposes" rather than as "a prophylactic measure to protect society against future wrongdoing by that person." Where the sanction at issue was intended to both specifically deter future conduct and punish past conduct, it was found to constitute "punishment".[27]

38. The bundle of sanctions in the ARP regime has aspects that indicate all three of these purposes. First, as the Chambers Judge acknowledges, the sanctions imposed under the ARP regime have a general deterrence aspect intended to deter future conduct by removing impaired drivers from the road.[28]

39. Second, there is a specific deterrence aspect in particular with respect to increased penalties for repeat offenders who blow in the "warn" range. The nature of those increased penalties suggests that they have both prophylactic and punitive goals. While it can be said that a longer driving suspension may be intended to promote future

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[25] *Martineau*, at para. 38
[26] *Re Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672, at para. 60
[27] *Thow* at para. 44, 46
[28] A.R. at p. 35, para. 60

public safety, there can be no explanation for the associated automatic monetary fine other than as a punishment for the past transgression.

d. More generally, the regime engages principles of sentencing

40. In *Martineau*, Fish J distinguished the fines applicable to the appellant from those constituting a true penal consequence, partly on the basis that "the principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded."[29]

41. As reviewed recently by the Supreme Court of Canada in *R. v. Ipeelee*:

> ...the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society". This is accomplished by imposing "just sanctions" that reflect one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.[30]

42. It is clear from the case law that the goals of sentencing can be achieved absent fine and imprisonment – no particular format is required.[31]

43. The bundle of sanctions in the ARP regime reflects a number of these sentencing goals, beyond merely ensuring compliance with the provincial regime. Not only are the goals of general and specific deterrence met, as described, but the regime also advances the goals of denunciation, rehabilitation, and protection of the public.

44. The swift and significant consequences indicate society's disapprobation of the conduct in issue and fulfil the objective of denunciation. The remedial programs that violators may be obliged to attend speak to the goal of rehabilitation. The immediate removal of violators from the roads, and the mandatory suspensions fulfil the goal of removing violators from the roads and protecting the public.

45. The overall purposes of the bundle of consequences available under the ARP regime are in keeping with the traditional goals of criminal law sentencing.

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[29] *Martineau,* at para. 65.
[30] *R. v. Ipeelee*, 2012 SCC 13 at para. 35
[31] For example, In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, the Supreme Court of Canada made it clear that a conditional sentence of imprisonment, in which an offender serves his or her sentence in the community, has both a punitive and a rehabilitative aspect, and is capable of meeting the goals of sentencing.

C. The Chambers Judge erred in failing to consider the bundle of sanctions as a whole

46. The essential inquiry that emerges from the cases following *Wigglesworth* is, looking to the nature, magnitude and purpose of the sanctions that may be imposed on offenders, do those sanctions amount to "true penal consequences" such that s. 11 is engaged. That inquiry requires a consideration of the full bundle of sanctions to which an offender may be exposed.

47. Here, the Chambers judge acknowledged that he must "look at the consequences of the ARP regime as a whole" and confirms that in finding that the regime does not impose true penal consequences, he comes to that view "[t]aking into account all of the consequences, including the automatic monetary penalty and additional possible costs to the driver."[32]

48. However, in his analysis, instead of considering the bundle of sanctions in light of the themes that emerge from the cases, the Chambers judge errs by slicing the bundle of sanctions into its constituent parts, errs by rejecting the argument that each sanction creates a true penal consequence individually, and errs again by not finding that they do so in the aggregate by their interaction with each other.

49. At no point does the Chambers Judge take the full bundle of sanctions set out in the ARP regime and consider whether – as a whole – it constitutes true penal consequences. In BCCLA's submission, there is no authority in *Wigglesworth, Martineau,* or otherwise for the Chambers Judge's conclusion that it does not.

PART 4: ORDER SOUGHT

50. The Intervenor supports the Appellant in the relief he seeks. It seeks no costs and asks that no order of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated Aug 8, 2012

Claire E. Hunter
Eileen M. Patel
Counsel for the Intervenor, British Columbia Civil Liberties Association

[32] A.R. at p. 62, para. 167; p. 66, para. 181

LIST OF AUTHORITIES