File No: 35864

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN

RICHARD JAMES GOODWIN, JAMIE ALLEN CHISHOLM, SCOTT ROBERTS and CAROL MARION BEAM

APPELLANTS

AND

BRITISH COLUMBIA (SUPERINTENDANT OF MOTOR VEHICLES), and ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

AND

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PART I: OVERVIEW

1. This appeal is about whether government can successfully avoid s. 11 of the *Canadian Charter of Rights and Freedoms* by supplanting what has traditionally been dealt with through criminal law with what purports to be an administrative regime meting out strict penalties through the police and motor vehicle regulatory authorities. The BCCLA submits that this Court should be wary of approving such measures. Both branches of the *Wigglesworth* test ought to be viewed as requiring that the real nature and purpose of such penalties be examined in the real context of the regime as a whole.

2. The BCCLA has a long history of advocating against efforts by government to erode or deny due process rights. Where the purpose of sanctions is punitive and aimed at redressing a wrong done to society at large, the protections of s.11 apply. Here, the bundle of sanctions clearly includes aspects aimed at punishment rather than mere compliance with traffic regulations. The regime stigmatizes offenders and promotes specific deterrence of future conduct, as well as punishment of past conduct. The BCCLA submits that the bundle of sanctions here, by their nature and purpose, serve traditional goals of criminal sentencing including denunciation, rehabilitation and protection of the public. Proceedings under such laws should properly be viewed as attracting the protection of section 11 of the *Charter*. If that is not clearly so given how *Wigglesworth* has been interpreted and applied thus far, then the Court should reconsider how the test should be applied.

PART II: STATEMENT OF POINTS IN ISSUE

3. The BCCLA limits its submissions to the question of whether sections 215.41 – 215.51 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "ARP Regime") create an offence that is subject to the protection of s. 11 of the *Charter*.

PART III: STATEMENT OF ARGUMENT

4. Section 11 of the *Charter* protects certain rights of persons "charged with an offence". In particular s. 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;

5. This Court's decision in *R. v. Wigglesworth* established that, "A person can claim the protection of s. 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'."[1] This Court has rejected a "categorical approach" to determining whether s. 11 protections apply; instead, the applicability of s. 11 depends on the outcome of a principled analysis.[2] Simply stated, if either the nature of a legislative regime or the consequences of its application are essentially criminal proceedings the regime is subject to section 11 scrutiny.

6. Since *Wigglesworth,* while the reach of the administrative regulation continues to expand, courts have been reluctant to find that administrative schemes create offences that attract section 11 protection. This case provides an opportunity for this Court to clarify both branches of the *Wigglesworth* test to ensure that Canadians subject to administrative regulation that punishes and stigmatizes will have the protection of section 11 of the *Charter.*

A. The "very nature" test

7. In respect of the first branch of *Wigglesworth,* this case raises the question of the extent to which this Court's subsequent decision in *Martineau* created a formal test with specific criteria to be satisfied in order for a legislative scheme to be found to create proceedings that are "by their very nature, criminal proceedings". In *Martineau,* the Court held that "To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of [the legislation]; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction".[3]

8. The appellants submit that the lower courts "fell into error because they remained overly focused on a formalistic approach they interpreted *Martineau* to require"[4]. *Martineau* itself does not seem to contemplate that it is creating a new test for the first branch of *Wigglesworth*. While stating that the "case law must be reviewed in light of" the three articulated criteria in that particular case, it is sensible to infer that it is only to the extent the listed criteria can shed light on whether the proceeding is of a public, penal nature.[5] In other cases it may be that additional criteria should be considered in order to shed light on the nature of the scheme.

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[1] *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 ("*Rodgers*"), at para. 60 [Respondents' Book of Authorities ("RBA") Vol I Tab 30]; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 ("*Wigglesworth*"), RBA Vol I Tab 35
[2] *R. v. Shubley*, [1990] 1 S.C.R. 3 ("*Shubley*"), at 18, RBA Vol I Tab 31
[3] *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737 ("*Martineau*"), at para. 24, RBA Vol I Tab 14
[4] Appellant's Factum at para. 95
[5] This reading of *Martineau* is further supported by the French version of this paragraph of the judgment which reads "Pour déterminer la nature de la procédure, un examen de la jurisprudence sous l'eclairage des critères suivants s'impose. . .", RBA Vol I Tab 14

9. The legislative scheme at issue in this case demonstrates the difficulty in requiring a consideration of each of the three *Martineau* criteria in each case. Where, as here, what is at issue is the alleged constitutional inadequacy of a process, there is a circularity to the reasoning driven by a consideration of the "process leading to imposition of the sanction" in determining whether the regime creates an offence entitling the accused to procedural protections; where the alleged constitutional defect is the lack of procedural protection it cannot be that the legislation escapes constitutional scrutiny *because* the regime provides for no procedural protection.

10. In this circumstance, the focus of the analysis under the first branch of the *Wigglesworth* test should be on the first and second criteria expressed in *Martineau*: (1) the objectives of the legislation and (2) the purpose of the sanction. The purpose of the sanction analysis, as returned to below, dovetails with the analysis under the second "true penal consequences" branch of *Wigglesworth*, but in the first branch a consideration of the purpose of the sanction informs the consideration of the objectives of the legislation.

11. This analysis drives towards a determination that the ARP proceedings are directed at promotion of "public order and welfare in a public sphere of activity" through the imposition of punishment for drinking and driving, and as such are offences that attract the protection of s. 11.

B. The purpose of the sanctions and "true penal consequences"

12. The second branch of the *Wigglesworth* test provides that "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".[6] Where the "very nature" and the "true penal consequences" tests conflict, "the 'by nature' test must give way to the 'true penal consequence' test."[7] Where the purpose of the sanctions informs an interpretation of the objectives of the legislation under the first branch of the test, the "true penal consequences" analysis is imported into the first branch: in *Martineau*, Justice Fish frames the purpose of the sanction inquiry as "does the [legislation] constitute a true penal consequence?"[8]

13. Here the "penal consequences of the ARP regime consist of the bundle of sanctions imposed on drivers who register a "fail" or "warn" or fail to provide a breath sample:

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[6] *Rodgers* at para. 61 (quoting *Wigglesworth*), RBA Vol I Tab 30
[7] *Wigglesworth*, at 561-562, RBA Vol I Tab 35
[8] *Martineau*, at para. 57, RBA Vol I Tab 14

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.[9]

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.[10]

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;[11]

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";[12]

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*;[13]

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".[14]

14. 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.[15]

15. A review of the cases following *Wigglesworth* discloses the following factors which may assist in determining whether sanctions either indicate that a proceeding is by its nature criminal or penal, or 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;

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[9] ss. 215.41(2), 215.43(2), 215.43(1) of the *Motor Vehicle Act* R.S.B.C. 1996 c. 318 ("*MVA*"), RBA Vol II Tab 44, Joint Record, Volume I, at p. 11-12, at para. 23

[10] *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09, (s. 215.43(4)) RBA Vol II Tab 44, Joint Record, Volume I, p. 12, para. 25

[11] s. 25.1 of the *MVA*, RBA Vol II Tab 44, Joint Record, Volume I, at p. 12, para. 26

[12] s. 215.46(2) of the *MVA*, RBA Vol II Tab 44, Joint Record, Volume I, at p. 12, para. 27

[13] s. 255(2) of the *MVA*, RBA Vol II Tab 44, Joint Record, Volume I, at p. 13, para. 28; s. 97.2 of the *MVA*, RBA Vol II Tab 44, Joint Record, Volume I, at p. 13, para. 29.

[14] s. 25.1 of the *MVA*, RBA Vol II Tab 44, Joint Record, Volume I, at p. 13, para. 29 – 30

[15] Joint Record, Volume I, at p. 13, para. 31

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.

(i) The nature and magnitude of the sanctions

16. In *Wigglesworth,* Wilson J. suggests that the nature and magnitude of the sanctions are to be considered to determine 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.

17. 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.

18. This analysis is borne out by the approach taken by this Court 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.

19. In *Shubley,* the Court considered whether a set of potential sanctions for inmate misconduct which included loss of prison privileges constituted true penal consequences. 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.[16]

20. 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.[17]

21. 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."[18]

22. 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".[19] 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.[20]

23. 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."[21]

24. 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:

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[16] *Shubley*, at 22-23, RBA Vol I Tab 31
[17] *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256, 330 A.R. 262, at para. 37 RBA Vol I Tab 40 ; *Sigurdson v. HMTQ et al.*, 2003 BCCA 535, 232 D.L.R. (4th) 228 at para. 17, RBA Vol I Tab 39
[18] *Martineau* at para. 60
[19] *Martineau*, at para. 62, RBA Vol I Tab 14
[20] *Martineau*, at para. 63, RBA Vol I Tab 14
[21] *Canada (AG) v. United States Steel Corp.*, 2011 FCA 176 "*United States Steel Corp.*"), at para. 76, BCCLA Book of Authorities ("BCCLA BA")Tab 1

> 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.[22]

25. On the other hand, in *Thow*, the British Columbia Court of Appeal 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".[23]

26. In summary, the key inquiry, under both branches of the *Wigglesworth* test is into the purpose of the sanctions regime. Where the purpose is punitive, it is the result of a proceeding which is criminal by nature, and it creates true penal consequences. Magnitude may be an indicator of purpose, but the key is purpose. A consideration of the purpose of the ARP regime reveals that it has a punitive aspect.

(ii) The purpose of the sanctions

27. 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."[24]

28. 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 public protection or at encouraging compliance with an administrative regime. If the latter, s. 11 rights are not engaged.[25] 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.[26]

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.

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[22] *Rowan v. Ontario (Sec.Comm.)*, 2012 ONCA 208, at para. 53, BCCLA BA Tab 6; *see also, Lavallee v. Alberta (Sec. Comm.)*, 2010 ABCA 48 ("*Lavallee*"), BCCLA BA Tab 2
[23] *Thow v. B.C. (Sec. Comm.)*, 2009 BCCA 46, 307 D.L.R. (4th) 121 ("*Thow*"), at para. 47, 49, BCCLA BA Tab 7
[24] *Martineau*, at para. 60, RBA Vol I Tab 14
[25] *Lavallee* at para. 23; *United States Steel Corp*, at para. 54 – 57; BCCLA BA Tab 1; *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409, at para. 80, BCCLA BA Tab 3
[26] *Martineau* at para. 36 – 39 and 64 – 66, RBA Vol I Tab 14

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

30. 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 courts below 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.[27]

31. 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

32. It is submitted that the presence or absence of stigma is a "key indicator that the offence is of a fundamentally different kind and deserves special protection"[28]. 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.[29]

33. Here, it is uncontroversial that there is a stigmatizing aspect to the bundle of sanctions. The chambers judge acknowledged that "in some circumstances the removal of the privilege of driving may . . . impose a stigma." The same may be said of installation of the interlock system.

c. The sanctions promote specific deterrence and punishment

34. Sanctions aimed at general deterrence alone are not punitive.[30] In *Thow,* the British Columbia Court of Appeal distinguished 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."

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[27] Joint Record, Volume I, at p. 51-2, para. 181-183; Joint Record, Volume I, at p. 213-214, para. 143
[28] S. Aylward and L. Ritacca, "In Defence of Administrative Law: Procedural Fairness for Administrative Monetary Penalties", 28 Can. J. Admin. L. & Prac. 35 (March, 2015), at 48, RBA Vol II Tab 58
[29] *Martineau* at para. 64, RBA Vol I Tab 14
[30] *Re Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672, at para. 60, RBA Vol I Tab 7

Where the sanction at issue was intended to both specifically deter future conduct and punish past conduct, it was found to constitute "punishment".[31]

35. The bundle of sanctions in the ARP regime has aspects that indicate all three of these purposes. First, the sanctions imposed under the ARP regime have a general deterrence aspect intended to deter future conduct by removing impaired drivers from the road.[32]

36. 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 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

37. 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."[33]

38. As restated by this Court 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.[34]

39. It is clear from the case law that the goals of sentencing can be achieved absent fine and imprisonment – no particular format is required.[35]

40. The bundle of sanctions in the ARP regime reflects a number of these sentencing goals. 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.

41. The swift and significant consequences indicate society's disapprobation of the conduct

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[31] *Thow* at para. 44, 46, BCCLA BA Tab 7
[32] Joint Record, Volume I p. 20, para. 60
[33] *Martineau*, at para. 65, RBA Vol I Tab 14
[34] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 35, BCCLA Tab 4
[35] For example, In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61,BCCLA BA Tab 5, this Court made it clear that a conditional sentence of imprisonment has both a punitive and a rehabilitative aspect, and is capable of meeting the goals of sentencing.

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.

(iii) Purpose and effect of the bundle of sanctions as a whole must be considered

42. 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 indicate either a proceeding which, by its very nature is criminal, or in respect of which the consequences 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. Here, a consideration of the aggregate impact of the sanctions indicates both a punitive purpose and a penal consequence, such that the protections of s. 11 are invoked under either branch of the *Wigglesworth* test.

PART IV: SUBMISSIONS RELATING TO COSTS

43. BCCLA does not seek costs and asks that costs not be awarded against it.

PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

44. BCCLA requests the opportunity to make oral submissions at the hearing of this appeal in order to clarify these submissions and respond to any questions the Court may have.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: 4 May 2015

Claire E. Hunter

Eileen M. Patel

Counsel for the intervener, the British Columbia Civil Liberties Association

PART VI: TABLE OF AUTHORITIES

Cases	**Paragraph**
Canada (AG) v. United States Steel Corp., 2011 FCA 176	23
Lavallee v. Alberta (Securities Commission), 2010 ABCA 48	24
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Thomson v. Alberta (Transportation and Safety Board), 2003 ABCA 256, 330 A.R. 262	20
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Acts and Regulations	
Canadian Charter of Rights and Freedoms, Part 1 of *the Constitution Act, 1982*, ss. 1 and 7-14, being Schedule B to the *Canada Act, 1982 (UK)*, c. 11	1-4, 15, 43
Motor Vehicle Act R.S.B.C. 1996 c. 318	3
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Secondary Sources	
Aylward and Ritacca, "In Defence of Administrative Law: Procedural Fairness for Administrative Monetary Penalties", (2015) 28 Can. J. Admin. L. & Prac. 35	32

PART VII: LEGISLATION AT ISSUE

Canadian Charter of Rights and Freedoms

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

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

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Motor Vehicle Act, R.S.B.C. 1996, c. 318

(as enacted on September 20, 2010)

Automatic roadside driving prohibition

215.41 (1) In this section, "driver" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion.

(2) In this section and in sections 215.42, 215.43 and 215.5,

"approved screening device" means a device prescribed by the Lieutenant Governor in Council for the purposes of this section;

"fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood;

"warn" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

(3) If, at any time or place on a highway or industrial road,

(a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, must,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take

possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) serve on the driver a notice of driving prohibition.

(4) If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device, the peace officer, or another peace officer, must take those actions described in subsection (3) (c) and (d).

(5) If the driver is not in possession of his or her licence or permit issued under this Act to operate a motor vehicle at the time the driver is served with the notice of driving prohibition, the driver must promptly send the licence or permit to the Insurance Corporation of British Columbia.

(6) The notice of driving prohibition must be in the prescribed form and must contain the following:

(a) a statement that the driver is immediately prohibited from driving, for the period set out in the notice of prohibition;

(b) a statement setting out

(i) the amount of any monetary penalty imposed on the driver under section 215.44, and

(ii) the requirement that the monetary penalty be paid no later than 30 days after the date the notice is served;

(c) a statement of the right to have the driving prohibition reviewed by the superintendent under section 215.48;

(d) instructions describing how to apply for that review.

(7) A notice of driving prohibition must not be served on a person under this section if a notice of driving prohibition is served on the person under section 94.1.

Opportunity for second analysis

215.42 (1) If an analysis of the breath of a person by means of an approved screening device under section 215.41 (3) registers a warn or a fail, a second analysis must be performed if, after a peace officer serves on the person a notice of driving prohibition under section 215.41 (3) (d), the person forthwith requests the second analysis.

(2) A second analysis performed under this section must be performed with a different approved screening device than was used in the analysis under section 215.41 (3).

(3) If a person provides a sample of breath for a second analysis under this section forthwith on being requested to so by the peace officer, the result of the second analysis governs, and any prohibition resulting from the analysis under section 215.41 (3) continues or terminates or is varied accordingly.

Effect of driving prohibition under section 215.41

215.43 (1) Subject to section 215.42 (3), if a person is served with a notice of driving prohibition under section 215.41 in circumstances where an approved screening device registers a warn, the person is prohibited from driving for

(a) 3 days, in the case of a first prohibition,

(b) 7 days, in the case of a second prohibition, or

(c) 30 days, in the case of a subsequent prohibition.

(2) Subject to section 215.42 (3), if a person is served with a notice of driving prohibition under section 215.41 in circumstances where

(a) an approved screening device registers a fail, or

(b) the person refuses or fails to comply with a demand as described in section 215.41 (4),

the person is prohibited from driving for a period of 90 days.

(3) A period of prohibition under this section takes effect immediately on service of the notice of driving prohibition under section 215.41.

(4) For the purposes of subsection (1), a prohibition is

(a) a first prohibition if a person has not been subject to a previous prohibition under that subsection within the 5 year period preceding the prohibition,

(b) a second prohibition if a person has been subject to one previous prohibition under that subsection within the 5 year period preceding the prohibition, and

(c) a subsequent prohibition if the person has been subject to 2 or more previous prohibitions under that subsection within the 5 year period preceding the prohibition.

(5) For the purposes of determining whether a prohibition is a second or subsequent prohibition, the prohibition must not be considered to be a previous prohibition unless

(a) the period for requesting a review of the prohibition under section 215.48 has expired, or

(b) if the person requests a review of the prohibition, the period referred to under section 215.5 (6) or (7), as applicable, has expired.

Additional consequences – monetary penalty

215.44 (1) A person who has been served with a notice of driving prohibition under section 215.41 is also liable to pay, no later than 30 days after the date the notice is served, a monetary penalty in the amount prescribed by regulation.

(2) The monetary penalty must not exceed the amount prescribed by regulation, and in any event must not exceed $500.

Additional consequences – remedial program

215.45 If a person is prohibited from driving for a period of 30 or 90 days under section 215.43, the person must register in and attend any remedial program required by the superintendent under section 25.1.

Additional consequences – impoundment of vehicle

215.46 (1) If a peace officer serves a person with a notice of a 3-day or 7-day driving prohibition under section 215.41 (3) and believes that impoundment of the motor vehicle that the person was driving or operating at the time the notice was served is necessary to prevent the person from driving or operating the motor vehicle before the prohibition expires, the peace officer may cause the motor vehicle to be taken to and impounded at a place directed by the peace officer.

(2) If a peace officer serves a person with a notice of a 30-day or 90-day driving prohibition under section 215.41 (3), the peace officer must cause the motor vehicle that the person was driving or operating at the time the notice was served to be taken to and impounded at a place directed by the peace officer.

Duties of peace officer related to driving prohibition under section 215.41

215.47 A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent

(a) the person's licence or permit or any document issued in another jurisdiction that allows the person to operate a motor vehicle, if the peace officer took the licence, permit or document into possession,

(b) a copy of the notice of driving prohibition,

(c) a certificate of service, in the form established by the superintendent, showing that the notice of driving prohibition was personally served on the person subject to the driving prohibition, and

(d) a report, in the form established by the superintendent.

Review of driving prohibition under section 215.41

215.48 (1) A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to the superintendent for a review of the driving prohibition by

(a) filing an application for review with the superintendent,

(b) paying to the superintendent the prescribed hearing fee, and

(c) if it has not been taken by the peace officer or sent to the superintendent under section 215.41, surrendering to the Insurance Corporation of British Columbia his or her licence or permit to operate a motor vehicle unless the person completes and files with the superintendent a statutory declaration stating that the licence or permit has been lost, stolen or destroyed.

(2) An application for review must be in the form, contain the information and be completed in the manner required by the superintendent.

(3) An applicant may attach to the application for review any statements or other evidence that the applicant wishes the superintendent to consider.

(4) The filing of an application for review does not stay the driving prohibition.

(5) The superintendent is not required to hold an oral hearing unless

(a) the driving prohibition is for 30 or 90 days, and

(b) the applicant

(i) requests an oral hearing at the time of filing the application for review, and

(ii) pays the prescribed oral hearing fees.

(6) If a person requests an oral hearing and fails to appear on the date and at the time and place arranged for the hearing, without prior notice to the superintendent, the right to an oral hearing is deemed to have been waived by the person.

Considerations on review under section 215.48

215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider

(a) any relevant written statements or evidence submitted by the applicant,

(b) the report of the peace officer forwarded under section 215.47 (d),

(c) a copy of the notice of driving prohibition,

(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer,

(e) in the case of an oral hearing, any relevant evidence given or representations made at the hearing, and

(f) in the case of a second or subsequent prohibition, as described in section 215.43 (4) and (5), the person's driving record.

(2) In a review under section 215.48, no person may be cross examined.

(3) Despite subsection (1), the superintendent may, in the superintendent's discretion, proceed with a hearing whether or not the superintendent has received, at the time of the hearing, all those documents required to be forwarded to the superintendent under section 215.47.

Decision of superintendent after review under section 215.48

215.5 (1) If, after considering an application for review under section 215.48, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and,

(a) in respect of a 3-day, 7-day or 30-day driving prohibition,

(i) an approved screening device registered a warn, and

(ii) in the case of

(A) a 7-day driving prohibition, the driving prohibition was a second prohibition, or

(B) a 30-day driving prohibition, the driving prohibition was a subsequent prohibition, or

(b) in respect of a 90-day driving prohibition,

(i) an approved screening device registered a fail, or

(ii) the person failed or refused, without reasonable excuse, to comply with a demand made on the person as described in section 215.41 (4),

the superintendent must confirm the driving prohibition, the monetary penalty for which the person is liable under section 215.44 and the impoundment imposed under section 215.46 for the period specified in section 253.

(2) If, after considering an application for review under section 215.48 in respect of a 7-day or 30-day prohibition, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and an approved screening device registered a warn, and determines that

(a) in the case of a 7-day driving prohibition, the prohibition was a first prohibition, or

(b) in the case of a 30-day driving prohibition, the prohibition was either

(i) a first prohibition, or

(ii) a second prohibition,

the superintendent must

(c) substitute

(i) a 3-day driving prohibition, in the circumstances described in paragraph (a) or (b) (i), or

(ii) a 7-day driving prohibition, in the circumstances described in paragraph (b) (ii), and

(d) vary accordingly the monetary penalty for which the person is liable under section 215.44 and, in respect of any impoundment, section 253 (8) applies.

(3) If, after considering an application for review under section 215.48 in respect of a 90-day prohibition, the superintendent is satisfied that the person was a driver within the meaning of section 215.41 (1) and an approved screening device registered a warn rather than a fail, the superintendent must

(a) substitute a 3-day, 7-day or 30-day prohibition, as applicable, and

(b) vary accordingly the monetary penalty for which the person is liable under section 215.44 and, in respect of the impoundment, section 253 (8) applies.

(4) If, after considering an application for review under section 215.48, the superintendent is satisfied that

(a) the person was not a driver within the meaning of section 215.41 (1),

(b) in the case of a 3-day, 7-day or 30-day driving prohibition, an approved screening device did not register a warn, or

(c) in the case of a 90-day driving prohibition,

(i) an approved screening device did not register a fail or a warn, or

(ii) the person did not fail or refuse to comply with a demand made on the person as described in section 215.41 (4), or had a reasonable excuse for failing to comply with the demand,

the superintendent must

(d) revoke the driving prohibition,

(e) cancel the monetary penalty for which the person would otherwise be liable under section 215.44 and, in respect of any impoundment, section 253 (8) applies, and

(f) if the person held a valid licence or permit issued under this Act to operate a motor vehicle at the time the notice of driving prohibition was served under section 215.41, direct the Insurance Corporation of British Columbia to return any licence or permit to operate a motor vehicle taken into possession by the peace officer or sent to the corporation.

(5) Despite subsection (4) (b), the superintendent must not take any action described in subsection (4) (d), (e) or (f) in respect of a 3-day, 7-day or 30-day driving prohibition if the superintendent is satisfied that, in the circumstances under review, an approved screening device registered a fail instead of a warn.

(6) Subject to subsection (7), the decision of the superintendent and the reasons for the decision must be in writing and a copy must be sent to the applicant within 21 days of the date the notice of driving prohibition was served on the applicant under section 215.41.

(7) If the superintendent is unable to send the decision to the applicant within the 21 day period set out in subsection (6), the superintendent may extend that period for a period determined by the superintendent.

(8) If the superintendent extends the period for sending a decision to the applicant under subsection (7), the superintendent may

(a) stay the driving prohibition imposed on the applicant under section 215.43 for the period of the extension determined under subsection (7), and

(b) if the applicant held a valid licence or permit issued under this Act to operate a motor vehicle at the time the applicant was served with the notice of driving prohibition under section 215.41, direct the Insurance Corporation of British Columbia to issue to the applicant a temporary driver's licence that expires with the period of extension determined under subsection (7).

(9) The superintendent must promptly give the person notice of an extension made under subsection (7).

(10) The copy referred to in subsection (6) and the notice referred to in subsection (9) must be sent to the person

(a) at the last known address of the person as shown in the records maintained by the Insurance Corporation of British Columbia, or

(b) at the address shown in the application for review, if that address is different from the address in the Insurance Corporation of British Columbia's records.

(11) A notice of extension given under subsection (9) is deemed to be a notice of prohibition for the purposes of section 95 (4) (a) or (b).

Regulations – automatic roadside driving prohibitions

215.51 Without limiting the authority of the Lieutenant Governor in Council to make regulations under any other provision of this Act, the Lieutenant Governor in Council make may regulations as follows:

(a) prescribing an approved screening device for the purposes of the definition of "approved screening device" in section 215.41 (2);

(b) prescribing the form of notice of driving prohibition for the purposes of section 215.41 (6);

(c) for the purposes of section 215.44,

(i) prescribing monetary penalties, including prescribing a schedule of increasing monetary penalties based on whether a driving prohibition is a first, second or subsequent prohibition as described in section 215.43 (4), and

(ii) prescribing the manner for payment of monetary penalties;

(d) prescribing hearing fees, including oral hearing fees, for the purposes of section 215.48.