IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bates v. British Columbia (Superintendent of Motor Vehicles),* 2018 BCSC 1211

Date: 20180430
Docket: S23724
Registry: Fort St. John

Between:

Wayne William Bates

Petitioner

And

The Superintendent of Motor Vehicles for the Province of British Columbia

Respondent

Before: The Honourable Mr. Justice Betton

On judicial review from: Decision of delegate of Superintendent of Motor Vehicles, May 12, 2017

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	B.E. Fitzpatrick
Counsel for the Respondent appearing by teleconference:	E.L. Ross
Place and Date of Trial/Hearing:	Kelowna, B.C. April 26, 2018
Place and Date of Judgment:	Kelowna, B.C. April 30, 2018

[1] **THE COURT:** This matter is for decision this morning. The petitioner seeks to have the decision of an adjudicator confirming an immediate roadside driving prohibition set aside and the prohibition quashed. The decision under judicial review is the second decision arising out of a driving prohibition served on October 1, 2016. This decision was made May 12, 2017, following an oral hearing. The first decision was made October 24, 2016, and the petitioner filed a petition seeking similar relief there. That petition was resolved by way of a consent order dated March 24, 2017, and it provided that the decision of the adjudicator dated October 24, 2016, be set aside, that the Superintendent of Motor Vehicles rehear the application of the petitioner to review the notice of driving prohibition issued pursuant to s. 215.41 of the *Motor Vehicle Act* on October 1, 2016, as well as some other ancillary orders.

[2] The petitioner was pulled over by Constable Cooper on October 1, 2016, in Fort St. John. At 20:58, he advised Constable Cooper that his last drink had been 10 minutes earlier, that is 20:48. Constable Cooper formed the grounds for the ASD demand and made the demand at 21:03. At 21:14, the first of two ASD tests was administered. At 21:20, a second test was conducted at the petitioner's request. Both resulted in fail readings. The prohibition was then issued.

[3] Constable Cooper submitted materials to the Superintendent, including a report to Superintendent. That report is in a format that prompts certain information. At number 12, the question is posed, "Was there a delay in making the demand or administering the first ASD?" and Constable Cooper checked off the box indicating "No".

[4] In the narrative also supplied to the Superintendent, Constable Cooper said this in part:

> At 2103 hours, Cst COOPER read the ASD Demand verbatim from her charter card. There were no delays in reading the request. BATES acknowledged that he understood the demand. At 2114 hours the first ASD test was administered. The ASD temperature was within range and the result was a fail. The result was shown to BATES.
>
> At 2120 hours the right to request a second ASD test was read from the charter card. BATES understood and stated that he would like another test.

> At 2128 hours the second ASD test was administered. There were no delays in administering the test. The ASD temperature was within range and the result was a fail. …

[5] No further information is contained in the materials submitted by Constable Cooper to explain the delay from 21:03, that is the time of the demand, to 21:14, that is the time that the first sample was taken.

[6] Several issues were raised by the petitioner in the oral hearing before the adjudicator. Only the delay is relevant on this judicial review.

[7] There are a number of comments made by the adjudicator in the decision which is in evidence, including the following:

> In considering Mr. Fitzpatrick's submissions regarding the delay between the time the ASD demand and the time of the first ASD test, I note that an analysis of an alleged *Charter* infringement in an administrative proceeding is different from criminal proceedings. That is because the focus and purpose of administrative driving prohibitions is public safety. In IRP review hearings the public safety and deterrence objectives of the IRP scheme are prominent considerations that I must weigh in balance. However, I recognize that basic rules of fairness and justice could affect the way certain information or evidence is treated in an administrative context, and I have an overall duty to be fair when conducting this review. Therefore, I will review this issue from a fairness perspective and consider whether the evidence or information in your case was obtained in violation of the *Charter* or *Charter* values.
>
> I acknowledge that according to the Report provided by Cst. Cooper there was an 11 minute delay between the time of the demand and the time of the first test. While in the criminal context an 11 minute time period, depending on the circumstances, may or may not meet the "forthwith" requirement of section 254(2) of the *Criminal Code*, the focus of my analysis in this review is whether it would be unfair for me to consider the evidence obtained by the officer as a result of her ASD demand . . . In the Report, Cst. Cooper indicates that when asked the time of your last drink, you stated that it was 10 minutes prior to being asked the question, which she indicates would have put the time of your last drink at 20:58 hours. Cst. Cooper then goes on to state that she administered the first test at 21:14 hours, and that the result was a "FAIL" reading.
>
> While I acknowledge that Cst. Cooper has not explicitly stated the reason she waited until 21:14 hours to administer your first ASD test, she also does not state that in her Narrative that there were no delays in administering the test . . .
>
> I find that the officer's line of questioning, and that fact that you stated your last drink was 10 minutes prior to her question, which she specifically states would have put your last drink at

-- and this is obviously a typographical error --

> . . . 00:58 hours, indicates to me to me that she turned her mind to the possibility of mouth alcohol causing a falsely high reading on the ASD. I note that according to the Technical Information on the Operation and Calibration of ASDs in British Columbia . . . provided by Cst. Cooper, "breath samples should be taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol. Mouth alcohol can cause falsely high breath test readings". . . .

[8] The petitioner argues and Superintendent's counsel concedes that the adjudicator erred in reaching the conclusion that the petitioner reported his last drink to be 20:58. In fact, properly understood, the information before the adjudicator was that the reported last drink was 20:48.

[9] Turning to a summary of the issues and the positions of the parties. Written submissions were provided, in addition to oral submissions. In the petitioner's written submissions, he says this in part:

> 42. Had the adjudicator not misapprehended Cst. Cooper's evidence concerning the time of the last drink, then the adjudicator would not have been able to speculate that Cst. Cooper was concerned about the possibility of mouth alcohol. This is because 15 minutes elapsed from the time of the last drink (20:48 hours) to the time of the ASD demand (21:03 hours) and this would preclude any argument by the adjudicator that the 11 minute delay between the ASD demand (21:03 hours) and the first ASD test (21:14 hours) was due to Cst. Cooper putting her mind to the possibility of mouth alcohol.

[10] Carrying on, the submissions are:

> 43. In our respectful submission, the adjudicator in the present case knew that an 11 minute delay between the ASD demand and the first ASD test, absent a legitimate and justifiable explanation for the delay, would, as per *Tsogas*, *supra*, result in a breach of Mr. Bates' s. 8 *Charter* rights. Given that Cst. Cooper had not provided any explanation for the delay, the adjudicator, as per *Verdonk, supra*, attempted to supply the necessary explanation even though one was lacking. By doing so, the Decision of the adjudicator was unreasonable.

[11] The petitioner says that, given the history of this matter, the result should be a quashing of the prohibition rather than a rehearing.

[12] For its part, the Superintendent's counsel says, in part, in their submissions, referencing a number of authorities:

> 36. . . . the Respondents submit that an adjudicator is entitled to rely on specialized knowledge to evaluate evidence and submissions, but may not rely on specialised knowledge in place of evidence. In this case, the Adjudicator did not rely on her own knowledge in place of evidence to make a finding of fact to the detriment of the petitioner. Rather, the Adjudicator relied on her knowledge to evaluate counsel's submissions with respect to the 11-minute delay and made her findings on the basis of those submissions, the petitioner's own evidence (in light of the petitioner's burden of proof), and the Report to Superintendent.
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> 37. The respondent submits that, approached as an organic whole, the adjudicator's conclusion that the 11-minute delay between the demand and the administration of the ASD did not amount to a serious and flagrant infringement of the petitioner's s. 8 *Charter* rights was a correct application of the *Charter*, based on a reasonable findings of fact.

[13] As to remedy, the Superintendent argues that if the judicial review is successful, that this is not a situation for quashing it, that matters should be remitted back for a rehearing. Specifically, the argument states:

> 47. The petitioner's submission that he has been through "two review hearings and two petitions for judicial review" is not borne out. As noted above, while the petitioner did file an application for judicial review following the initial review decision of the Superintendent, the respondent consented to an order setting aside the October 24 review decision and to rehear the petitioner's application for an oral review. The respondent submits that in these circumstances. the petitioner does not meet the test for the exceptional remedy of quashing the immediate roadside prohibition.

[14] Turning then to my analysis. The *Motor Vehicle Act* provisions relevant to this matter are set out in Part 4. Of particular relevance to the issues here are provisions that are summarized at paragraph 13 of the respondent's written submissions, in particular:

> 13. . . . c. A person served with a Notice may apply to the Superintendent for a review of the driving prohibition (s. 215.48). The driver may submit any statements or other evidence the driver wishes the Superintendent to consider (215.48(3)).
>
> d. In a review, the Superintendent may consider, among other things, any relevant written statements or evidence submitted by the applicant, the peace officer's sworn or solemnly affirmed report, and any other relevant documents forwarded to the Superintendent by the peace officer who served the notice of

> driving prohibition or any other peace officer, including peace officers' reports that have not been sworn or solemnly affirmed (s. 215.49).
>
> e. The burden of proof in a review of a driving prohibition is on the person on whom the notice of driving prohibition was served (s. 215.5(1)).

[15] As to the standard of review, reference was made to the decision of this court in *Tsogas v. British Columbia (Superintendent of Motor Vehicles),* 2016 BCSC 1742, and in particular paragraphs 26 and 27:

> [26] Interpretation and application of the *Charter* are sufficiently outside the ambit of an adjudicator's home statute that the correctness standard is invoked: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30. The factual underpinning of the delay inquiry, however, is within the usual range of factual and evidentiary issues that adjudicators deal with regularly, bringing this question back to the reasonableness standard of review. The interplay between the legal and factual questions that arise when *Charter* issues are raised in applications to revoke administrative driving prohibitions, or petitions to review their refusal, call for analysis along the lines suggested for appeals in *R. v. Farrah (D.)*, 2011 MBCA 49, adopted by this court, at least in summary appeal proceedings, in *R. v. Boden*, 2014 BCSC 66 at para. 43:
>
> > [43] The Court in *Farrah* described the standard of review in this situation at para. 7:
> >
> > > [7] By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
> > >
> > > a) When examining a judge's decision on whether a Charter breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
> > >
> > > b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* at para. 129).
> > >
> > > c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).

> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

[27] See also the comments of Rothstein J. for the majority in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at para 26:

> [26] The parties agree that the applicable standard of review in cases of constitutional interpretation is correctness: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. However, as the respondent Teamsters also note, the ALRB's constitutional analysis rested on its factual findings. Where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, curial deference is owed to the initial findings of fact: see *Lévis (City) v. Fraternité des policiers de Lévis Inc*., [2007] 1 S.C.R. 591, at para. 19. In the present case, I agree with the majority of the Court of Appeal that the ALRB's factual findings regarding the operations and organizational structure of *Fastfrate* merit deference.

[16] However, they are summarized as well in the respondent's written argument as follows:

> 19. . . . a. interpretation and application of the *Charter* is subject to a correctness standard of review; and
>
> b. the factual underpinnings of the delay inquiry are subject to a reasonableness standard of review.

[17] Reference is made to the decision of the B.C. Court of Appeal in *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485 at paragraph 55, which is summarized by counsel as saying this:

> 21. The BC Court of Appeal confirmed in *Kenyon* . . . that, in order for a reviewing court to set aside an adjudicator's decision on judicial review, "any flaw in reasoning should be obvious and should be fundamental to the conclusion reached by the adjudicator".

[18] The basis for demands to be made by peace officers of operators of motor vehicles is s. 254(2) of the *Criminal Code* which has been the subject of substantial

judicial comment. In the *Tsogas* decision, Mr. Justice Johnston makes some observations:

> [17] The *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, has no mechanism by which breath samples can be obtained. The legislation depends for that on s. 254(2) of the *Criminal Code*, which provides:
>
> > (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
> >
> > > (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
> > >
> > > (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.
>
> . . .
>
> [19] There has been no argument before me, nor have I been taken to any argument made to the Superintendent's delegate, that these statutory prerequisites were not met in this case.
>
> [20] The Court in *Goodwin* held that "the demand to breathe into a roadside screening device constitutes a seizure that infringes on an individual's reasonable expectation of privacy," invoking the protection of s. 8 of the *Charter* (at para. 51). Further, although the demand is made under s. 254(2) of the *Criminal Code*, for the purposes of s. 8, the provincial legislative scheme authorizes the seizure and thus the provincial legislation is open to *Charter* scrutiny (*Goodwin* at para. 54).
>
> [21] *Charter* scrutiny of a search or seizure requires a court to determine if the search or seizure was reasonable. The requirements are that: (1) the search or seizure must be authorized by law; (2) the authorizing law must be reasonable; and (3) the search or seizure must be carried out in a reasonable manner (*Goodwin* at para. 48, citing *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 10 and *R. v. Collins*, [1987] 1 S.C.R. 265 at 278).
>
> [22] The search or seizure effected by the breath test in this case was authorized by s. 254(2) of the *Criminal Code*. This provision is constitutionally valid as it minimally interferes with protected rights: see *R. v. Woods*, 2005 SCC 42 at paras. 14, 29 and 30; *R. v. Thomsen*, [1988] 1 S.C.R. 640. The

> Court in *Woods* decided that s. 254(2), under which the demand was made, is "inextricably linked" to the implicit requirement that a demand will be made forthwith after formation of suspicion, and the explicit requirement that a driver of whom a sample is demanded provide that sample forthwith. Thus the reasonable immediacy of both demand and test is what saves s. 254(2) from a constitutional off-side for breaching *Charter* ss. 8 (unreasonable search and seizure), 9 (arbitrary detention) and 10 (right to be informed promptly of reasons for detention, to consult counsel and be informed of that right). The petitioner did not directly argue before the adjudicator that the ten-minute delay in administering the test offended the requirement that the search be carried out in a reasonable manner. However, the repeated assertion that the delay was unreasonable, or led to a breach of the petitioner's *Charter* rights is sufficient to have raised the issue.

[19] That serves as one example of the judicial comment. In those paragraphs, reference is made to several other authorities on the subject, including the decision of the Supreme Court of Canada in *R. v. Woods*, 2005 SCC 42. In that decision, the Supreme Court of Canada said this at paragraph 15:

> 15 Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster.

[20] At paragraph 29:

> 29 The "forthwith" requirement of s. 254(2) of the *Criminal Code* is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the *Charter*. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's choice of language, but also Parliament's intention to strike a balance in the *Code* between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.

[21] At paragraph 30:

> 30 As earlier explained, Parliament enacted a two-step legislative scheme in s. 254(2) and (3) of the *Criminal Code* to combat the menace of impaired driving. At the first stage, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted. They necessarily interfere with rights and freedoms guaranteed by the *Charter*, but only in a manner that is reasonably necessary to protect the public's interest in keeping impaired drivers off the road.

[22] In *Wilson v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 47, these observations are made:

> [33] In addition, it has long been recognized that regulatory legislation, such as the *MVA,* differs from criminal legislation in the way it balances individual liberties against the protection of the public. Under regulatory legislation, the public good often takes on greater weight. . . .
>
> [34] . . . Roadside driving prohibitions are a tool to promote public safety. As such, the legislation necessarily places greater weight on this goal. Unlike the criminal law regime, persons who register a "Warn" or "Fail" under the regulatory regime do not end up with a criminal record, nor are they exposed to the more onerous sanctions under the criminal law, including the risk of incarceration. In short, regulatory legislation does not share the same purpose as the criminal law, and it would be a mistake to interpret it as though it did. I therefore reject Mr. Wilson's contention that the ARP scheme must incorporate the same protections as those provided under the *Criminal Code* regime.

[23] Here Constable Cooper offered no explanation in the materials before the adjudicator for the delay. The adjudicator references the concerns of recent consumption of alcohol and mouth alcohol and says in her decision:

> . . . In my view, in the context of this investigation, where there is evidence of very recent consumption of alcohol, 11 minutes is not an unreasonable period of time for the officer to wait before administering the ASD test to ensure a reliable result. I do not find an 11 minute time period in these circumstances amounts to a serious and flagrant infringement of your section 8 *Charter* rights on the part of the officer. As there is no evidence before me to indicate that the evidence in your case was gathered in a manner that violated your rights, I do not think it is manifestly unfair for me to consider the two "FAIL' results obtained as a result of the demand.

[24] Those statements were made on the basis of erroneous findings of fact. The adjudicator was, in fact, faced with an unexplained delay. Despite that, and in the context of specialized knowledge and the technical information referenced, the adjudicator concluded the officer had turned her mind to the possibility of mouth alcohol causing a falsely high reading. This resulted in the conclusions I have just referenced regarding fairness.

[25] Based on a correct understanding of the evidence, noting that the officer turned her mind to the issue provides no justification for the delay.

[26] The Superintendent in argument expressed concern that I do not lose sight of s. 215.5 of the *Motor Vehicle Act* which places the onus on the petitioner. Where a *Charter* violation is asserted, it is of course for the petitioner to establish the violation on a balance of probabilities. The adjudicator expressly says, that I have just referenced:

> . . . As there is no evidence before me to indicate that the evidence in your case was gathered in a manner that violated your [*Charter*] rights, I do not think it is manifestly unfair for me to consider the two "FAIL' results obtained as a result of the demand.

[27] This, in my view, does not meet the correctness standard. The adjudicator's decision not to revoke the prohibition and ancillary penalties is both incorrect where it applies the law to the facts, and unreasonable as to the facts found with respect to the timing of the apparent last drink. The decision of the adjudicator must, in my view, be set aside.

[28] As to the remedy, it is true that referring the matter back for a rehearing would be the third such hearing and that two petitions seeking judicial review have been filed. The last petition, as noted, did not result in a hearing. I am unable to say that the good administration of justice requires that I quash the administrative driving prohibition. Given the manner in which the *Charter* breaches must be dealt with in the administrative scheme, I cannot say that the result of a rehearing is inevitable.

[29] Accordingly, I remit the matter back to the Superintendent for a rehearing of the application for review of the administrative driving prohibition.

[30] Now, unless there is anything that I have failed to address, I know that the petition had sought costs, but I was informed by counsel that costs were not being pursued, so I am not obviously making any order as to costs. Is there anything else from your perspective, counsel?

[31] MR. FITZPATRICK: No, My Lord.

[32] THE COURT: All right. Ms. Ross?

[33] MS. ROSS: No, My Lord.

[34] THE COURT: All right, thank you both.

[35] MS. ROSS: Thank you.

"Betton J."