

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under clause 116(2)(a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended.

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

— AND —

THOMAS WOehl

Appellant

Before Justice A.J. Watson

Heard on: May 11, June 25, July 20, August 7, September 21, 2015

Reasons for Decision released: October 28, 2015

Mr. N. Isak for the respondent Crown
Mr. T. Woehl the appellant, in person

REASONS FOR DECISION

WATSON J.:

[1] The appellant Thomas Woehl appeals under Part VII of the *Provincial Offences Act* (the “*POA*”) from his conviction following a trial on a Part III information for driving while suspended contrary to section 53(1) of the *Highway Traffic Act* (the “*HTA*”). Convictions for this offence and for the offence of operating a motor vehicle without insurance contrary to section 2(1)(a) of the *Compulsory Automobile Insurance Act* (the “*CAIA*”) arising out of the same incident were registered by Justice of the Peace LaCaprara on January 13, 2014 following a trial. On this appeal, the respondent conceded that there was insufficient evidence called at the appellant’s trial to support the *CAIA* conviction and the appeal was allowed on the *CAIA* charge and an acquittal was entered.

The Trial Evidence

[2] On January 19, 2012 at approximately 4:00 p.m., Niagara Regional Police Constable Nicholas Hawrylyshyn observed the appellant operating what the officer referred to as an “e-bike” with the left pedal inoperable on Niagara Street in St. Catharines. P.C. Hawrylyshyn followed the appellant as he drove the e-bike east on Church Street and then northbound on Page Street to a location behind a pharmacy. The roads were snow covered at the time. P.C. Hawrylyshyn spoke with the appellant, advised him that the pedal was inoperable and thereafter determined that the appellant’s driver’s licence was suspended for an unpaid fine. P.C. Hawrylyshyn testified that the appellant was charged with driving while suspended because the pedals on the e-bike were not operable and it was the officer’s belief that the e-bike was deemed thereby to be a motor vehicle.¹

[3] P.C. Hawrylyshyn testified that there was one pedal that was hanging from the left side of the e-bike and that there was no right pedal on the e-bike. P.C. Hawrylyshyn testified that e-bikes are vehicles which are battery powered and that the appellant’s vehicle was an “electric scooter” and as such had to be propelled with muscular force. P.C. Hawrylyshyn testified that if the battery shorts the e-bike is still deemed to be a bicycle “so the pedals have to be operable.” P.C. Hawrylyshyn testified that an e-bike requires both pedals to be attached to be propelled by muscular power.²

[4] P.C. Hawrylyshyn testified that if both pedals were attached, it would be classified as an e-bike also known as an electric scooter but if there are pedals missing it could no longer be operated with muscular power and would be classified as a motor vehicle under the *HTA*.³ P.C. Hawrylyshyn further testified that because it was an e-bike it does not have any type of vehicle identification number registering it with the Ministry of Transportation.⁴

[5] The appellant testified that on that day the road conditions were terrible for driving. He testified that his e-bike was not like a regular bike and the pedals are too low to the ground and would hit the ground. The appellant testified that just before being pulled over the pedal was hitting the ground because it was snow packed and higher and was spinning him around, so he took one pedal off because he was worried about the road conditions and falling. He took the pedal off that was on the same side that he knew he would be turning so that when he leaned to turn the pedal would not hit the ground.⁵ The appellant clarified at trial that the pedals are designed to click on and off in a second however he agreed that one could not pedal the bike if it was missing a pedal.⁶

¹ Transcript of Evidence taken January 13, 2014, page 9, line 12 to page 10, line 11.

² Transcript of Evidence taken January 13, 2014, page 10, line 12 to page 11 (note an amended page 11 of the trial transcript was marked Exhibit 1 on the appeal), line 19.

³ Transcript of Evidence taken January 13, 2014, page 13, lines 1 to 20.

⁴ Transcript of Evidence taken January 13, 2014, page 15, lines 11 to 14.

⁵ Transcript of Evidence taken January 13, 2014, page 16, line 29 to page 17, lines 1 to 24.

⁶ Transcript of Evidence taken January 13, 2014, page 20, lines 5 to 16.

[6] During the course of his evidence, the appellant made reference to an internet summary of a ruling by Justice of the Peace Dudar in *R. v. Pizzacalla* which was marked Exhibit 4 at his trial.⁷

[7] At the appellant's trial, His Worship Justice La Caprara held that an e-bike is an e-bike only when two pedals are in good working order, noting that if the battery went dead one could not pedal the bike until the pedal was put back on. Finding that the appellant's e-bike had one pedal off when observed by the officer, His Worship found the e-bike to be a "motor vehicle" under the *HTA*. His Worship further found that the defence of due diligence was not established since the appellant had other options available to him such as walking or making a wider turn on the e-bike so the pedal would not touch the ground. His Worship stated in his Reasons:

Now, you brought me a couple of decisions made by colleagues of mine and as I mentioned when Mr. Bykov put his case law forward that I am not compelled to follow anything that any one of my colleagues have decided. The case that you brought forward is under review or it is being appealed or whatever. It is not being decided upon as to what it is. I can only go by what is being presented to me and what the law says is the legal thing to do and that is all this Court tries to do is try to make it as legal as possible.⁸

[8] The appellant was convicted of driving while suspended and fined \$1,000.00.⁹

Application to Adduce Fresh Evidence on Appeal

[9] On this appeal, the appellant applies to introduce fresh evidence.

[10] I heard the proposed fresh evidence on a *voir dire* and withheld my ruling as to its admissibility until the judgment on this appeal.

The Proposed Fresh Evidence

[11] The applicant/appellant testified on the application as follows:

⁷ Justice of the Peace Dudar's decision in *R. v. Pizzacalla*, [2013] O.J. No. 437 (O.C.J.) was released January 30, 2013. The decision was the subject of a Crown appeal heard before Justice Wilkie of the Ontario Court of Justice. Justice Wilkie upheld the dismissals in that case by way of written reasons which were released June 6, 2014. Justice Wilkie's decision, which will be the subject of considerable comment later in this judgment, was not appealed by the Crown.

⁸ Transcript of Evidence taken January 13, 2014, page 23, lines 1 to 14.

⁹ The appellant was also convicted under the *CAIA* for failure to have insurance and fined \$1,500.00 which was less than the minimum fine of \$5,000.00 having been granted relief under section 59(2) of the *POA*. As indicated earlier the Crown has conceded the appeal on the *CAIA* charge on the basis that the Justice of the Peace failed to engage in a voluntariness *voir dire* concerning the appellant's admission to the police that he was the owner of the motor vehicle as set out in the charging document.

1. The e-bike he was riding had a manufacturer's sticker attached to it certifying that the vehicle is a "power-assisted bicycle" and meets all the requirements under section 1.2.1 of the *Canada Motor Vehicle Safety Regulations*. A photograph of the sticker was introduced as Exhibit 2 on the *voir dire*.
2. A memory stick of a video that was created by the applicant/appellant approximately one month before the date of the application was introduced as Exhibit 3 on the *voir dire* which shows the applicant/appellant sitting on the e-bike in question and moving his bike by pushing with his feet on the ground at a time when the engine was not running and the pedals were not attached.
3. An internet generated "New and Emerging Vehicles" fact sheet was introduced as Exhibit 4 on the *voir dire*. The document was purportedly generated by the Ministry of Transportation online and intended for the public for information purposes only regarding the various categories of "E-bikes, Mopeds and Motor Scooters".
4. The applicant/appellant testified that the pedal that was missing from the e-bike when he was stopped by the officer was at that time in a compartment underneath the seat of the e-bike. The applicant/appellant testified that he was allowed by the officer to reattach the pedal in the officer's presence and to drive the e-bike from the area.

[12] The Crown opposes the application and submits that the onus was upon the applicant/appellant at the time of his trial to establish that the bike that he was riding was not a motor vehicle pursuant to section 47(3) of the *POA* and that the applicant/appellant failed to do so at his trial. The Crown further submits that all of the evidence the applicant/appellant has adduced on the fresh evidence application was available prior to his trial. The position of the Crown as it relates to the application to adduce fresh evidence is as set out in paras. 49-53 of the Crown factum as follows:

49. The Respondent opposes the Appellant's motion to introduce fresh evidence. The applicable test for fresh evidence is that the party seeking to adduce fresh evidence must show:
- (a) the evidence could not through due diligence have been adduced at trial;
 - (b) the evidence is relevant in that it bears on a decisive or potentially decisive issue;
 - (c) the evidence is credible; and
 - (d) the evidence, if believed and taken with the other evidence, could be expected to affect the result.

The Appellant is seeking to adduce the fresh evidence. The Appellant has indicated the fresh evidence is a video that "can give a very clear picture

that the bike could be moved with muscular force”. The Respondent has not seen the evidence that is subject to the motion for fresh evidence.

R v Palmer, [1980] 1 SCR 759.

R v 1275729 Ontario Inc., [2005] OJ No 5515.

Appellant’s Notice of Application dated April 13, 2015

- i) The Evidence could have been adduced at trial through due diligence

50. The Appellant was present and actively participated at trial. He cross-examined the Prosecution witness, he gave viva voce evidence and tendered a document as an exhibit. There is no evidence provided as to why the Appellant could not have had this video ready at the time of trial. The Appellant submits that he has difficulty with words, and that this video would provide a clearer picture. There is no evidence that the Appellant had difficulty communicating at trial. The Respondent submits that the Appellant has not shown a reason why this evidence could through due diligence have been presented at trial.

Appellant’s Notice of Application dated April 13, 2015

- ii) The Evidence is possibly relevant to a decisive issue

51. The Respondent, although having not viewed the evidence, concedes that the alleged purpose of the evidence if taken as true, would be relevant to a matter at issue. However, the Respondent submits that a video created post-offence would be of limited relevance given the offence relates to conditions specific to the time of the offence.

- iii) The credibility of the evidence cannot be presently evaluated

52. The Respondent submits that without seeing the evidence that is sought to be adduced, the Respondent cannot comment on its credibility.

- iv) The potential for the evidence to affect the result cannot be presently evaluated

53. The Respondent submits that without seeing the evidence that is sought to be adduced, the Respondent cannot comment on the possibility it could affect the result.

The Cross-Examination of the Applicant/Appellant

[13] The Crown cross-examined the applicant/appellant regarding the availability of the evidence sought to be introduced on appeal at the trial. It was suggested to the

applicant/appellant that he could have taken a video of the bike prior to his trial. The applicant/appellant testified that he was not certain at that time as to how to present the evidence. He also testified that he tried to explain how the e-bikes are designed but the Justice of the Peace stopped him. He made reference to the transcript of his trial wherein he indicated that he had started to talk about how the e-bikes are designed and the Justice of the Peace asked him to wait until the Crown finished asking the question. The Crown thereafter commented that the applicant did not answer his question.¹⁰ The applicant/appellant testified that he thought that the pedals were a central issue at his trial and he was going to testify about them until he was interrupted by the Justice of the Peace. However he agreed with the Crown that he had indicated in examination-in-chief that he had said all he wished to say. The applicant/appellant believes that he was not concentrating at the time and therefore concentrated on his explanation as to why he took the pedal off in the first place because of the road conditions. He agreed he could have led a picture of the manufacturer's sticker at the time but testified that he was not a lawyer and assumed because the officer said the e-bike was a motor vehicle that it would be the police officer's job to get all the information from his bike. He had located the fact sheet introduced as Exhibit 4 from the web site over the last few weeks.

Judgment on the Fresh Evidence Application

[14] I will not allow the evidence contained in the video marked Exhibit 2, or the "New and Emerging Vehicles" fact sheet into evidence since I do not find them to be necessary to a determination of the issues on this appeal. That the e-bike could be pushed along on the roadway with one's feet without the use of power and pedals is not relevant to the issue as to whether the e-bike needs to have its pedals "attached" in order to fall within the exemption. The information contained in the fact sheet although interesting in that it sets out the Ministry of Transportation's view of the issue before this court as set out in the argument of the respondent, relates to the ultimate issue and is not binding on this court.

[15] The applicant/appellant's evidence regarding the location of the pedal when stopped by the police will be admitted into evidence because I do not believe that the relevance of the availability of the pedal to be "reattached" to the e-bike would have been clear as it related to the conflicting law that was in existence at the time of the trial noting that it is not apparent that the Justice of the Peace had had an opportunity to review the decision of Justice Dudar prior to rendering his decision. At the time of the applicant/appellant's trial, a Crown appeal of Justice Dudar's decision was before the Ontario Court of Justice. As such I disagree with the submission of the respondent that it would be inappropriate to consider the appeal decision in *R. v. Pizzacalla* retroactively. As well I accept the evidence of the applicant/appellant that he may have intended to present this evidence but became unfocused, noting that he was self-represented at his trial. I note further that arguably an inference can reasonably be made from the trial evidence that the pedal was available with the e-bike and could be reattached because the

¹⁰ Transcript of Evidence taken January 13, 2014, page 19, line 20 to page 20, line 9.

applicant/appellant had testified at his trial that he took the pedal off the bike when he was operating the bike that day because the pedal was hitting the ground. It would be reasonable to infer that the pedal remained with the bike and rider and was readily available to be accessed.

[16] The manufacturer's sticker is relevant evidence. While I would agree with the respondent that a photograph of the sticker could have been made an exhibit by the applicant/appellant at his trial, I accept that the applicant/appellant may have thought that it was the responsibility of the police to prove that the vehicle was a motor vehicle and that the police would have gathered this information. The respondent submits that section 47(3) of the *POA* placed the onus on the applicant/appellant at his trial to establish that his vehicle was a "power-assisted bicycle" and thereby exempted from the definition of "motor vehicle". Assuming without deciding the issue that the Crown is correct however recognizing that the applicant/appellant is not a lawyer and appears to have been unaware that he had this onus at his trial, I am prepared to allow the manufacturer's sticker into evidence on this fresh evidence application. I note as well that the vehicle was referred to as an "e-bike" throughout the proceedings by the officer who also explained that it had an electric motor and a missing pedal. I further find that it was accepted by the Justice of the Peace that the evidence established that but for the finding that the bike was missing a pedal, the vehicle being operated by the appellant was a "power-assisted bicycle" which would be deemed not to be a motor vehicle under the *HTA*. This was implicit in His Worship's Reasons for Judgment.

The Issue

[17] The issue may be simply put as follows:

Does a vehicle that in all respects meets the definition of a "power-assisted bicycle" under the *HTA* cease to be a "power-assisted bicycle" if one or more of its pedals are missing however can be readily reattached?

[18] Unfortunately, although the issue may be simply stated, the issue is not a straightforward one. If an e-bike with missing or inoperable pedals is in law a "motor vehicle", then the ramifications to the public are significant. A vehicle that did not require insurance must now as a matter of law be insured and the owner/operator will be liable to the same minimum penalties that apply to an owner of an automobile for failure to have insurance.¹¹ Furthermore, the operator would also have to possess a valid driver's licence which would mean that a person, as is the case here, whose licence is suspended provincially for an unpaid fine could be charged with driving while suspended

¹¹ I am putting aside the question of whether or not an e-bike without pedals is indeed an insurable vehicle at all because there was no evidence called one way or the other on this issue either at trial or on this appeal. I note that the case law in British Columbia sets out that insurance would not be available in that Province.

and if convicted would be subject upon conviction to a minimum fine and a further licence suspension.¹²

The Relevant Legislation

[19] The relevant statutory provisions include the following.

[20] Section 1 of the *HTA* includes the following definitions:

“motor-assisted bicycle” means a bicycle,
(a) that is fitted with pedals that are operable at all times to propel the bicycle,
(b) that weighs not more than fifty-five kilograms,
(c) that has no hand or foot operated clutch or gearbox driven by the motor and transferring power to the driven wheel,
(d) that has an attached motor driven by electricity or having a piston displacement of not more than fifty cubic centimetres, and
(e) that does not have sufficient power to enable the bicycle to attain a speed greater than fifty kilometres per hour on level ground within a distance of two kilometres from a standing start; (“cyclomoteur”)

“motor vehicle” includes an automobile, a motorcycle, a motor-assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine; (“véhicule automobile”)

“power-assisted bicycle” means a bicycle that,
(a) is a power-assisted bicycle as defined in subsection 2(1) of the *Motor Vehicle Safety Regulations* made under the *Motor Vehicle Safety Act* (Canada),

¹² I am also putting aside the issue that different licences are required for other forms of “bicycle-like motor vehicles”, namely “motor-assisted bicycles”, “limited speed motorcycles” and “motorcycles”, (Class M1, M2 or M or Restricted M2 or M with L endorsement) and which more closely resemble an e-bike than an automobile. Section 32 (1) of the *HTA* sets out that “No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver’s license issued to him or her under this Act.” The Respondent’s position is that since the “e-bike” would revert back to being a motor vehicle if operated without pedals attached or with inoperable pedals, a driver’s licence of a class that would be necessary for an automobile is required.

- (b) bears a label affixed by the manufacturer in compliance with the definition referred to in clause (a),
- (c) has affixed to it pedals that are operable, and
- (d) is capable of being propelled solely by muscular power; (“bicyclette assistée”)

[21] Section 2 of the *Motor Vehicle Safety Regulations*, pursuant to the *Motor Vehicle Safety Act* (Canada), S.C. 1993 c. 16, defines a “power-assisted bicycle” as follows:

“power-assisted bicycle” means a vehicle that:

- (a) has steering handlebars and is equipped with pedals,
- (b) is designed to travel on not more than three wheels in contact with the ground,
- (c) is capable of being propelled by muscular power,
- (d) has one or more electric motors that have, singly or in combination, the following characteristics:
 - (i) it has a total continuous power output rating, measured at the shaft of each motor, of 500 W or less,
 - (ii) if it is engaged by the use of muscular power, power assistance immediately ceases when the muscular power ceases,
 - (iii) if it is engaged by the use of an accelerator controller, power assistance immediately ceases when the brakes are applied, and
 - (iv) it is incapable of providing further assistance when the bicycle attains a speed of 32 km/h on level ground,
- (e) bears a label that is permanently affixed by the manufacturer and appears in a conspicuous location stating, in both official languages, that the vehicle is a power-assisted bicycle as defined in this subsection, and
- (f) has one of the following safety features,
 - (i) an enabling mechanism to turn the electric motor on and off that is separate from the accelerator controller and fitted in such a manner that it is operable by the driver, or
 - (ii) a mechanism that prevents the motor from being engaged before the bicycle attains a speed of 3 km/h; (*bicyclette assistée*)

[22] Section 38 of the *HTA* deals with the minimum age requirements and reads:

38(1) No person under the age of 16 years shall drive or operate a motor-assisted bicycle or power-assisted bicycle on a highway.

(2) No person who is the owner or is in possession or control of a motor-assisted bicycle or power-assisted bicycle shall permit a person who is under the age of 16 years to ride on, drive or operate the motor-assisted bicycle or power-assisted bicycle on a highway.

[23] Section 103.1 of the *HTA* deals with required equipment and reads:

103.1(1) Every power-assisted bicycle shall have the prescribed equipment and conform to the prescribed requirements and standards.

Helmet requirement

(2) No person shall ride on, drive or operate a power-assisted bicycle on a highway unless the person is wearing a helmet as required by subsection 104 (1) or (2.1).

Regulations

(3) The Minister may make regulations,
 (a) prescribing equipment for power-assisted bicycles;
 (b) prescribing requirements and standards for power-assisted bicycles;
 (c) exempting any class of power-assisted bicycles from subsection (1) or from any provision of the regulations made under this subsection and prescribing conditions and circumstances for any such exemption.

[24] Ontario Regulation 369/09 deals with power-assisted bicycles as follows:

Maximum weight

1. The unladen weight of a power-assisted bicycle must not be more than 120 kilograms. O. Reg. 369/09, s. 1.

Wheel width, diameter

2(1) The wheels of a power-assisted bicycle must not be less than 35 millimetres wide. O. Reg. 369/09, s. 2(1).

(2) The diameter of the wheels of a power-assisted bicycle must not be less than 350 millimetres. O. Reg. 369/09, s. 2(2).

Battery and motor

3(1) The battery and motor of a power-assisted bicycle must be securely fastened to the bicycle to prevent them from moving while the bicycle is in motion. O. Reg. 369/09, s. 3(1).

(2) The motor of a power-assisted bicycle must disengage if pedalling ceases, the accelerator is released or the brakes are applied. O. Reg. 369/09, s. 3(2).

Electric terminals

4. All electric terminals on a power-assisted bicycle must be completely insulated and covered. O. Reg. 369/09, s. 4.

Brakes

5. The brakes of a power-assisted bicycle must be capable of bringing the bicycle, while being operated at a speed of 30 kilometres per hour on a clean, paved and level surface, to a full stop within nine metres from the point at which the brakes were applied. O. Reg. 369/09, s. 5.

No modifications

6. A power-assisted bicycle must not be ridden on, driven or operated if it has been modified after its manufacture in any way that may result in increasing its power or its maximum speed beyond the limits set out in clause (d) of the definition of "power-assisted bicycle" in section 2 of the *Motor Vehicle Safety Regulations* made under the *Motor Vehicle Safety Act* (Canada). O. Reg. 369/09, s. 6.

Good working order

7. A power-assisted bicycle must not be ridden on, driven or operated unless it is in good working order. O. Reg. 369/09, s. 7.

8. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 369/09, s. 8.

[25] The *Criminal Code of Canada* defines a “motor vehicle” in section 2 as follows:

“motor vehicle”

« véhicule à moteur »

“motor vehicle” means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment;

[26] Under the *CALA* “motor vehicle” has the same meaning as it does in the *HTA*.

The Ontario Court of Appeal Decision in *R. v. Pizzacalla*, [2014] O.J. No. 4857

[27] The present state of the law is that a “power-assisted bicycle” is a motor vehicle as defined in section 2 of the *Criminal Code*. It is noteworthy that Justice Nadel on the appeal at first instance states in his judgment reported at [2012] O.J. No. 2342 (O.C.J.) at paras. 14-17:

14 Mr. Pizzacalla says, for a variety of reasons, I am not guilty. Yes, I was driving this device, but this device did not require me to be a licensed driver and therefore my prohibition was of no force and effect; it was irrelevant. He says you should find that, judge, because the definition of power-assisted bicycle, means, "... a bicycle that [among other things,] has affixed to it, pedals that are operable." This is, I am reading from the materials provided to me by Madam Crown, Ms. McCartan. I will file them as Exhibit A so that in any future appeal, the appeal court will have access to what I am referring to.

15 So, at tab two, under the definitions from the *Highway Traffic Act*, Mr. Pizzacalla shelters under that definition and urges me to find that the item that he was using that day was merely a power-assisted bicycle and that even though the pedals were not affixed to it, in plural, there was at least one pedal affixed.

16 There are two problems with his submission. The first is that two pedals have to be affixed, or at least more than one, and the pedals that are affixed. That means actually attached at the time, not capable of being attached as Mr. Pizzacalla would ask me to find, and are operable.

17 In this case, there were no operable pedals on the device and accordingly, while in some circumstances, the item Mr. Pizzacalla was operating might come within the definition of power-assisted bicycle, the device was not, on that occasion, in the manner in which he used it, a power-assisted bicycle. Rather it was a motor vehicle as defined by the *Criminal Code of Canada*, namely a vehicle that is, "... drawn, propelled or driven by any means other than muscular power."

[28] The appeal to the Superior Court, [2013] O.J. No. 451 and to the Court of Appeal, *supra*, only address the *Criminal Code* definition of “motor vehicle” and not the *HTA* definition of “power-assisted bicycle” in conjunction with the *HTA* definition of “motor vehicle” which exempts the “power-assisted bicycle”.

Position of the Appellant

[29] The appellant submits that I should allow his appeal based upon Justice Wilkie’s judgment in *R. v. Pizzacalla*, unreported decision of the Ontario Court of Justice dated June 6, 2014¹³ that the appellant submits is on all fours with the facts in this appeal.

Position of the Respondent

[30] Although it was argued by the respondent that the appellant has not demonstrated a factual basis upon which Justice Wilkie’s decision even if correct in law could be applied, given my findings on the evidence called at trial together with the application to adduce fresh evidence, I have found that the facts in this case are on all fours to the facts that were before Justice Wilkie. The outcome of this appeal therefore turns upon the legal issues raised.

[31] The respondent submits that Justice Wilkie’s decision is not binding upon this court and is of limited persuasive value. The respondent would further rely upon the obiter comments in Justice Nadel’s judgment set out earlier. It is submitted that Justice Wilkie misinterpreted and misapplied the law on the issue. In a very thorough factum, the respondent sets out its position at paras. 17 to 44. I note that the submissions in the respondent’s factum appear similar to the submissions that were made before Justice Wilkie given Justice Wilkie’s discussion of the issues. In addition, however, in the appeal before me, the respondent has filed recent case law from British Columbia. The respondent submits the appeal should be dismissed.

***R. v. Pizzacalla*, unreported decision of Justice Wilkie of the Ontario Court of Justice**

[32] The Crown appealed the respondent’s acquittals following two trials on various charges under the *HTA* and the *CAIA*. In both cases the respondent was acquitted because the Justice of the Peace determined that he was not operating a motor vehicle as defined by the *HTA* but rather a “power-assisted bicycle” commonly known as an e-bike. Justice Wilkie set out that it is common ground that e-bikes do not have a VIN or registration number and cannot be licensed and that the operator/owner is not required to have a driver’s licence or carry insurance. In each case when the respondent was observed riding the vehicle at least one of the pedals was missing so that the muscular power function was inoperable.

[33] The Crown’s position then as it is now in the case under appeal before me is that since the vehicle did not have an operable pedalling function, the respondent’s bike became a motor vehicle as defined by the *HTA* which required that the driver be licensed and the vehicle insured. This was so because the definition of a “power-assisted bicycle” as set out earlier in the legislation means a bicycle that among other things “has affixed to it pedals that are operable, and is capable of being propelled solely by muscular power.”

¹³ The respondent in the case before Justice Wilkie was the same Ricky Pizzacalla who was the appellant before the Ontario Court of Appeal in the *Criminal Code* appeal referred to earlier in this judgment.

[34] In a very thorough analysis Justice Wilkie concludes that the respondent in that case in both situations was operating a “power-assisted bicycle” notwithstanding that at least one of the pedals was missing and the muscular power function was inoperable. As such Justice Wilkie found that the respondent did not require insurance for the vehicle or a driver’s licence. Since I intend to follow Justice Wilkie’s decision on the facts on this appeal, and Justice Wilkie’s decision is unreported, I will quote extensively from the “Discussion” portion of his judgment at paras. 47 to 80:

Discussion

47. The position of the Appellant as stated in their Factum is that the trial judges erred in law in failing “to classify the vehicles in each of the trials as motor vehicles”. The argument that they ought to have done so, based on the evidence before them, is based on two propositions.

48. The first is that the evidence clearly showed that the Respondent’s vehicle at the time of the police stop did not in all respects meet the definition of a “power-assisted bicycle”. Two key elements were said to be missing. It did not have “affixed to it pedals that were operable” as required by subsection (c) and was not “capable of being propelled solely by muscular power” as per subsection (d).

49. The second proposition is that once the vehicle no longer fully complies with the definition of “power-assisted bicycle”, it loses its exempted status and becomes just another motor vehicle.

50. I agree that the Respondent’s vehicle in each instance, without a pedalling function was not complying with all aspects of the definition, but I am not satisfied that the courts below erred in law in refusing to find the vehicle thereby reverted to a motor vehicle.

51. It should first be noted that there is an argument to be made that the Respondent’s vehicles, even as modified, still met the definition of an e-bike. Both courts considered whether the definition, when placed in the context of the legislative scheme as a whole, could be interpreted broadly enough to include a vehicle with pedals temporarily removed or disabled. Both allowed that there might be some ambiguity as to whether the vehicle as configured in these two instances still fit the definition.

52. In this regard both trial courts saw no reason not to ascribe to the word “capable”, some aspect of future as well as present capability, particularly when, as here, the existence and proximity of the pedals and the potential for them to be reattached meant that the potential for muscular power was not remote.

53. Both courts not unreasonably in my view drew support for this position from a comparison with the definition of a “motor-assisted bicycle” which required not only the pedals be operable but also that they

be “operable at all times”, giving rise to whether the failure to specify as much with the e-bike was a deliberate omission of significance. No doubt if the legislative intent was to confine the notion of “capability” to the present tense only, this could have been accomplished by requiring operable pedals to always be attached.

54. Turning to the requirement that the pedals be “affixed” to the bicycle, here too some ambiguity about how to interpret that word arose, this time from paragraph (a) of the definition which incorporates the definition of “power-assisted bicycle” found in the *Motor Vehicle Safety Regulations* made under the federal *Motor Vehicle Safety Act*. That definition, which also requires that the vehicle be “capable of being propelled solely by muscular power”, does not mandate pedals be “affixed” but merely that the vehicle be “equipped” with pedals, a notion which would seem to fall short of necessarily requiring them to be actually attached at all times. On the evidence in both these trials, it would be hard to argue that the Respondent, even without both pedals attached, was not complying with this requirement.

55. Indeed this proved important to Justice Dudar, who determined that the Respondent had established that his vehicle was a power-assisted bicycle in that it was “equipped with pedals” and was “capable of being propelled solely by muscular power”.

56. To further muddy the waters it might be noted as well that there are other aspects of the federally incorporated definition which contemplates that vehicles that operate without the need for any pedalling function at all will still meet the definition of “power-assisted bicycle”.

57. This can be seen from paragraphs (d) (ii) and (iii) of the legislation which provides for two types of vehicles, one that requires the use of muscular power for the motor to be engaged and the other, instead of the pedals, to use what is called an accelerator controller to get it going. In the latter situation, while the vehicle would be equipped with pedals and capable of being propelled by muscular power, it would still be a power-assisted bicycle even if it was driven without resort to pedalling at any time.

58. This has been the case since 2001 when Regulations under the *Motor Vehicle Safety Act* were amended to remove power-assisted bicycles from the limited-speed motorcycle subclass and thereby relieve them from having to comply with the same federal safety standards that applied to full sized motorcycles. As was noted in the commentary to the Regulations in the Canada Gazette on March 29, 2001,

Initially the amendment was limited to power-assisted bicycles that require muscular power in order to engage the motor. Partly in response to the numerous comments

requesting that the Department do so, the scope of this amendment was broadened to include power-assisted bicycles that use an accelerator control to engage the motor, and thus do not have to be pedalled. There were two main reasons for this decision. The first was that an exhaustive study of electric bicycles conducted by the *Centre d'expérimentation des véhicules électriques du Québec* (CEVEQ) showed that these two types of power-assisted bicycles offer comparable levels of safety. The second reason was that, in accordance with its 2000 Sustainable Development Strategy, it is the Department's policy to promote and encourage the use of alternative modes of transportation that can reduce traffic congestion in urban areas, while also protecting the environment. Both types of power-assisted bicycles represent viable alternatives, with some users even preferring the power-assisted bicycle equipped with an accelerator control as a means of transportation to and from work.

59. Given this, one might be inclined to interpret the requirements under the federal definition that the vehicle be “equipped with pedals” and “capable of being propelled by muscular power” to include situations where there was a potential, as opposed to a present capability, of using the pedals, which of course is what the Respondent argued here fit the facts before the courts regarding his vehicles.

60. The Province of course is entitled to set any technical requirements they choose for these vehicles including specifications that are more restrictive than those in the “federal” portion of the definition. Having said that, when attempting to resolve any ambiguity in the wording of the overall definition, it is perhaps of significance that the Province has chosen to adopt and incorporate as part of the definition of these vehicles, a federal definition which is at odds with the notion that the use of pedals is a necessary essential characteristic of their operation.

61. The Crown's position is that these attempts to massage and broaden the words of the definition are inappropriate, that words such as “equipped”, “operable”, “capable” and “affixed” which define an exception under the Act ought to be given a narrow interpretive approach so as not to undermine its overall object and purpose which is to ensure the safety of those operating these vehicles as well as the public. See *Van Berlo (supra)*. Giving these words a narrow interpretation they say, means that they must describe the vehicle at the time of actual operation and not in terms of its potential to be reconfigured for some future operation.

62. While there are persuasive aspects to many of the arguments referred to above arising in part from what appear to be inconsistencies between different parts of the definition, it seems to me that the

Respondent's vehicles at the very least did not comply with the requirement that the pedals be "affixed". It must be conceded that giving that word its plain and ordinary meaning requires a "power-assisted bicycle", to have both pedals actually attached if it is going to comply with all aspects of the legislation.

63. That being so one must then consider the second proposition upon which the Crown's position rests, namely that a vehicle without operable pedals "affixed" ceases thereby to get the benefit of the e-bike exemption and must automatically revert as it were, to "any other vehicle propelled or driven otherwise than by muscular power" and hence a motor vehicle.

64. I would note that in their written submissions the Crown went so far as to say that any deviation of any sort from the specifications set out in the definition, (and not just those dealing with the muscular power function,) would mean that the vehicle would no longer fit the definition and be considered a motor vehicle. To illustrate the overreach of this argument one need only note that one of the specifications in the definition is that the vehicle bear a label from the manufacturer. It cannot in my view be seriously asserted that the operator of a power-assisted bicycle, meeting all technical and mechanical specifications, would be deemed instead to be operating a motor vehicle and exposed to prosecution for among other things, not having insurance, because the manufacturer's label had come off.

65. Although the language in each case was different, the essence of both decisions to acquit the defendant lay in the refusal to accept that the absence of a presently operable pedalling function caused the bike to become "any other vehicle propelled or driven otherwise than by muscular power." Both courts determined that in the circumstances before them the vehicle remained in essence an e-bike, a two-wheeled vehicle, with handlebars to steer, powered by an electric motor and equipped with a pedalling function.

66. In my view neither court erred in law in doing so for the following reasons.

67. First, I agree with Justice MacPhail, who emphasized in his reasons the importance of the fact that a power-assisted bicycle was specifically exempted from the definition of "motor vehicle".

68. The Crown's argument in essence is that power-assisted bicycles driven without resort to muscular power must be caught by the catch-all section of the definition of "motor vehicle". Yet that definition recognizes that there is a class of vehicles, power-assisted bicycles included among them, that are quite capable of being driven without muscular power, which nonetheless are going to be exempted from the definition and not considered motor vehicles. Indeed it is only because

these vehicles have that capability that they need to be exempted. It would be illogical in my view, to bring them back within the definition of “motor vehicle” because they possess the very quality that earned them the exemption in the first place.

69. Second, I agree with Justice Dudar that support for this conclusion is found, in the reasoning applied by the Court of Appeal in *R. v. Van Berlo* (*supra*). In my view removing the pedals or a pedal so as to temporarily disable the muscular power function, especially in circumstances where they are readily available for reattachment, is not enough to transform the essential function of the item for use as a motor vehicle. It also seems to me contrary to the finding in *Van Berlo* that the classification of any vehicle can turn a matter as ephemeral as the snapping on or off by hand of a single pedal.

70. Indeed I find it difficult to accept the Crown’s assertion that the absence of pedalling function alone, without more, alters the fundamental classification of this vehicle when the federal portion of the definition specifically includes a class of these vehicles that require no muscular power function to operate.

71. Furthermore, it seems to me that the Legislature would have to speak much more clearly than it has to infer an intention for a deviation of this sort from the definition to displace an exemption from the “motor vehicle” definition. After all, Regulations have been enacted to create offences where persons would deliberately modify one of these vehicles in other ways which would have the effect of taking it outside the definition.

72. An example is Regulation 369/09 which prohibits under penalty of a fine the operation of any e-bike with an electric motor that has been adjusted or changed to exceed specifications thereby permitting it to go faster. The specifications regarding the motor are built right into the definition of “power-assisted bicycle” meaning that with modifications to increase the speed, the vehicle would no longer be in compliance. Tellingly, even with an obvious safety issue such as this, the legislative response is not to deem the item a “motor vehicle”, but to prohibit its operation.

73. The Regulations, do not address the removal or disabling of the pedals but there is no reason why they could not do so.

74. It seems to me as well that these matters must be assessed for their practical effect. It makes no sense from the point of view of effective enforcement or from the requirement of owners and operators to be in compliance, that a vehicle’s status could be switched back and forth so readily, particularly when one considers the extremely serious consequences for what, as in this case, could be a temporary designation or classification as a motor vehicle.

75. While it is not this court's place in this context to give direction to the Legislature, it is hard to avoid the common sense observation that if the absence of an operable pedalling function is deemed to create a pressing problem, a more proportionate response, and one more in keeping with the exempted status of these vehicles, is to prohibit the sale of those with detachable pedals or simply make it an offence to operate without them.

76. While these reasons are sufficient to dispose of the appeals, I would make the following additional observations.

77. I realize that the facts in the two cases under consideration are not identical and that there is no evidence on the first trial of how quickly or easily the pedalling function could be restored. However given that in both instances the pedals were present I am satisfied that little if anything turns on this. In either case the vehicles as configured do not comply with all aspects of the definition, but given the obvious existence of a pedalling capability I am satisfied the courts made no error in determining that the vehicles retained their essential function for use as an e-bike.

78. Secondly, I am not unmindful that, although not pressed in argument, one of the positions adopted by the Crown was that the onus in these matters, arising from section 47(3) of the *HTA*, was on the Respondent to establish that his vehicle was a power-assisted bicycle and thereby exempted from the definition of "motor vehicle". Accepting that is correct, albeit with the same reservations expressed by Justice Dudar in his analysis, it is also true that at the first trial, the court incorrectly placed the onus on the Crown to prove that the Respondent's vehicle was a motor vehicle. I am satisfied however that the result would have been the same even had he not done so. The uncontradicted evidence on both trials from the arresting officers in each case was that the Respondent when stopped was operating an e-bike. This provided a sufficient basis for the court to make that finding. The result in neither case turned on the application of the onus of proof. Both trials proceeded through submissions on the understanding that the Respondent was operating a power-assisted bicycle, modified by the removal of pedals.

79. Finally, I will briefly comment on the related decision of *R. v. Pizzacalla*, [2012] O.J. No. 2342, where Justice Nadel found this same Respondent, operating his e-bike, guilty of driving while disqualified arising from the same events as the first trial under appeal. The conviction was confirmed on appeal to the Superior Court, [2013] O.J. No. 451. In my view the result in the matter before this court is not inconsistent with the determination in that case that the same vehicle, was a motor vehicle. The difference is accounted for by the wider definition of "motor vehicle" under the *Criminal Code* which contains no exemption for the power-assisted bicycle. In my view a power-assisted bicycle, even with operable pedals, unless it is being operated without

engaging the electric motor at all, will always be captured by the *Criminal Code* definition of “motor vehicle”. As noted by both courts in that case, the situation may have been different had the disqualification giving rise to the prohibition stemmed from a Provincial licence suspension which would have brought the *HTA* definition of “motor vehicle” into play.

80. For all of the above reasons these appeals are dismissed.

The Respondent’s Position regarding Justice Wilkie’s Analysis

[35] The respondent did not appeal Justice Wilkie’s judgment however asks me to reconsider the issue noting that I am not bound by Justice Wilkie’s analysis. I will quote extensively from the Crown factum which has been filed on this appeal commencing at para. 17 to para. 44:

B. The Decision in Pizzacalla has limited persuasive value and should not apply to the case at bar

i. The decision misinterprets the Regulations under the Motor Vehicle Safety Act defining a Power-Assisted Bicycle.

17. The definition of a power-assisted bicycle as set out in s. 2(1) of the *Motor Vehicle Safety Regulations (MSVR)* describe two types of power-assisted bicycle based on how the engine is engaged. One type, described at (d)(ii), has an engine that “if it is engaged by the use of muscular power, immediately ceases when the muscular power ceases”, and the other type, described at (d)(iii) has an engine that “if it is engaged by the use of an accelerator controller, power assistance immediately ceases when the brakes are applied”. Wilkie J. interpreted (d)(iii) to mean a vehicle that uses instead of pedals, “an accelerator controller to get it going”, that could be “driven without resort to pedalling at any time”. Furthermore he adopts an interpretation that the definition “contemplates that vehicles that operate without the need for any pedalling function at all will meet the definition of ‘power-assisted’ bicycle”.

Motor Vehicle Safety Regulations, CRC, c 1038, s. 2(1).

R v Pizzacalla, *supra* para 10, at para 56-9.

18. Respectfully, this interpretation by Wilkie J is incorrect. The Respondent submits that the *MVSR* clearly describes power-assisted bicycles as requiring operable pedals to be affixed to the vehicle. In support of this argument, the Respondent cites the Canada Gazette, Part II. By way of background, the *MVSR* was amended in 2001 to provide for a separate definition of “power-assisted bicycle”. Previously, power-assisted bicycles were subjected to the more stringent safety standards of a limited-speed motorcycle.

Regulations Amending the Motor Vehicle Safety Regulations (Power-Assisted Bicycles), PC 2001-483, 29 March 2001, SOR/2001-117, Canada Gazette, Part II, Vol. 135, No 8, p 658, 11 April 2001.

19. In initiating the amendments to the MVSR, Transport Canada selected a certain set of technical characteristics to include in the definition of a power-assisted bicycle. The underlying principle in this decision-making process was that “the use and performance of these vehicles must be similar to those of conventional bicycles”. Furthermore, Transport Canada indicated that a “power-assisted bicycle should require the use of pedals in order to be propelled by muscular power”.

Regulations Amending the Motor Vehicle Safety Regulations (Power-Assisted Bicycles), *supra*, p 659.

20. Part of the reason the Transport Canada took this position was an exhaustive study on these types of vehicles conducted by the Centre for Electric Vehicle Experimentation in Quebec (Centre d’expérimentation des véhicules électriques du Québec) [“CEVEQ”].

Véronique Lamy, Electric Bike 2000 Project, Centre for Electric Vehicle Experimentation in Quebec (CEVEQ). TP 13732E, April 2001.

21. The CEVEQ report identified two main types of electric bicycles, electrically assisted bicycles (EABs) and electrically propelled bicycles (EPBs). The study by CEVEQ describes the two types of power-assisted bicycles thusly:

Electrically assisted bicycles (EABs)

An EAB works like a conventional bicycle with an electric motor added to assist the pedalling action. It is simple to use: press the start switch and the electric motor assists you when you apply pressure on the pedals. The motor increases the amount of power transmitted to the wheel. A special characteristic of the EAB is that it only runs when pedalled.

Electrically propelled bicycles (EPBs)

When the electric motor is not providing assistance, the EPB also works like a conventional bicycle. When the cyclist turns the function switch to “on” and presses the hand accelerator, the cyclist is propelled effortlessly by the electric motor without having to pedal. The propulsion of this type of e-bike is similar to that of a moped.

Véronique Lamy, Electric Bike 2000 Project, *supra*, at 4.

22. One of the shared characteristics of both types of electric bicycles is that they can be operated like a conventional bicycle can be - with its pedals. This is consistent with the requirements in the *MVSR* that a power-assisted bicycle be equipped with pedals and be presently capable of being propelled by muscular power. In the case at bar, the vehicle was only equipped with one pedal on one side and was incapable of being propelled by muscular power.

Transcript of Proceedings dated January 13, 2014 at pg. 9, lines 15-17 and pg. 10, lines 18-20; pg. 20, lines 6-16

23. Notwithstanding the fact that the *MVSR* contemplates the sale or marketing of EPBs in Canada, the Canada Gazette makes it clear that “like any other vehicle, power-assisted bicycles must comply with all applicable provincial or territorial requirements”. In Ontario, the provincial requirements can be found in the *HTA*. Those requirements dictate that this class of vehicle must have “affixed to it pedals that are operable” and be “capable of being propelled solely by muscular power”.

Regulations Amending the Motor Vehicle Safety Regulations (Power-Assisted Bicycles), *supra*, p 660.

Highway Traffic Act, RSO 1990, c H.8, s 1.

24. Therefore, it is respectfully submitted that the interpretation by Wilkie J that a vehicle could still meet the definition of a power-assisted bicycle absent a pedalling function, is incorrect. It is clear the *MSVR* intended power-assisted bicycles to specify vehicles that are, at their basic, a conventional bicycle, whose function is assisted by an electric motor; and that motor can be engaged through pedalling or through a hand accelerator.

ii. There is no ambiguity about the meaning of “affixed” or “equipped” in the context of power-assisted bicycles.

25. Wilkie J. found there is ambiguity between the definitions of affixed and equipped in relation to how pedals were to be present on a power-assisted bicycle. Wilkie J found that equipped did not mean requiring pedals to be actually attached at all times.

R v Pizzacalla, *supra* para 10, at para 54.

26. Respectfully, the Respondent submits “equipped” in the context of power-assisted bicycles has a clear meaning of “attached to”. The definitions of a power-assisted bicycle in both the *HTA* and the *MVSR* indicate that pedals are a required part of this type of vehicle. The only distinction being that the *HTA* uses the term “affixed to it pedals that are operable” while the *MVSR* states that a power-assisted bicycle must be “equipped with pedals”.

27. The interpretation of a piece of legislation ought to be undertaken in a broad context, which includes the scheme and object of the Act in addition to the intentions of Parliament.

Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR No 227 at para 21.

Legislation Act, SO 1996, c 21, Schedule F, s 64(1).

28. It is respectfully submitted that the term “equipped with” has a different connotation that is dependent on whether the subject is a person or a thing. If the subject is a person, then an interpretation that this term means to “supply with” is far more logical than it would be in the context of a thing. A person may be equipped or supplied with items (i.e. a telephone, a flashlight, etc.). This does not mean that these items are physically attached to the person, but rather that they have them with him/her. On the other hand, if the subject is a thing, then it is respectfully submitted that the interpretation that is most logical is one that is consistent with items being physically attached to the subject. An automobile equipped with turn signals does not have these items supplied with it in a box located within the trunk of the vehicle or in the owner’s garage. Rather, the turn signals are attached to the vehicle and are operable.

29. For greater clarity, the Respondent refers to the French language version of the *HTA*. The French definition of a power-assisted bicycle (bicyclette assistée) in the *HTA* uses the words “est équipée de pédales qui peuvent être actionnées” as compared to the English version “has affixed to it pedals that are operable”. The term “est équipée” means “has” or is “equipped with”, which is the same terminology used in the *MVSR* definition of power-assisted bicycle. The root word of “equipped” is “equip” and is defined as:

supply with the necessary items for a particular purpose

"equip". Oxford Dictionaries. April 2010. Oxford Dictionaries. April 2010. Oxford University Press.
<http://oxforddictionaries.com/definition/english/equip?q=equipped> (accessed January 15, 2013).

30. The word “équipée” or “équipé” is used throughout several sections of the *HTA*, including s. 62(3), 63, 104.1(2), 109(3), 109(13), 109(13.1), 114(3), 115(1), 142(9) and 168. All of these sections, with the exception of 104.1(2), use these words in the context of a vehicle’s equipment. When reviewing the English version of each of these sections, it becomes readily apparent that “équipée” or “équipé” is used in a fashion which lends itself to the interpretation that requires the item to be “attached to” rather than “supplied with” the vehicle. For example:

- s. 62(3) pertains to lighting requirements for motorcycles “equipped with” a sidecar;

- s. 63 pertains to right hand drive vehicles “equipped with” a signal device;
- s. 109(3) and (13) pertain to a motor vehicle “equipped with” one or more mirrors;
- s. 109(13.1) pertains to a motor vehicle “equipped with” an aerodynamic device;
- s. 114(3) refers to vehicles “equipped with” a snow clearing device;
- s. 115(1) pertains to vehicles “equipped with” tires of a specific width;
- s. 142(9) pertains to a definition that includes street cars “equipped with” turn signals or brake lights; and
- s. 168 pertains to vehicles “equipped with” multiple beam headlamps.

31. Conversely, s. 104.1(2) uses the word in the context of a person “equipped with” stirrups, lending itself to the interpretation of “supplied with” rather than “attached to”.

32. This repeated usage of the words “équipée” or “équipé” and “equipped with” clearly demonstrates the different connotation that the words have, depending on the subject matter. It is the Respondent’s submission that when referring to a vehicle and its equipment, such as a power-assisted bicycle and its pedals, that the interpretation of “equipped with” to mean “attached to” is the interpretation that is the most harmonious with the intention of the legislation and the attainment of its objectives.

33. Furthermore, the term “power-assisted bicycle” in and of itself, implies that this type of vehicle is a bicycle which is merely assisted by a source of power. A bicycle, by definition, is a vehicle that consists of wheels, handlebars, a frame and pedals. This equipment is not superfluous or optional, rather they are requirements of a vehicle which seeks to fit the definition of a bicycle.

a vehicle consisting of two wheels held in a frame one behind the other, propelled by pedals and steered with handlebars attached to the front wheel.

"bicycle". Oxford Dictionaries. April 2010. Oxford Dictionaries. April 2010. Oxford University Press.
<http://oxforddictionaries.com/definition/english/bicycle?q=bicycle> (accessed January 15, 2013).

34. Therefore, it is respectfully submitted there is no ambiguity about the use of the term “equipped”. That once the pedals are removed from a power-assisted bicycle, it no longer fits within the definition of a bicycle or of a bicycle that is assisted by a power source. Instead, it becomes a

vehicle which is operated solely by electric power, rather than being assisted by it, thus classifying it as a motor vehicle for the purposes of the HTA.

iii. The principle in *Vanberlo* was incorrectly applied in *Pizzacalla*

35. Wilkie J. affirms the reasoning of Dudar J.P. in applying the principle in *R v Vanberlo* (*Vanberlo*) that temporary removal of pedals does not transform the essential function of a power-assisted bicycle, making it a motor vehicle.

R v Pizzacalla, *supra* para 10, at para 68.

R v Vanberlo, [2010] OJ No 1307 (QL) (CA) (*Vanberlo*).

36. The principle in *Vanberlo* is that a change to a vehicle has to be significant “enough that, viewed objectively, its essential character or function has been transformed for that specific use, although it may retain some limited capacity for other functions”. However, it is important to note the specific context in which the Ontario Court of Appeal used those words. In *Vanberlo*, the central issue was the definition of “self-propelled implement of husbandry” in the HTA. That definition requires, amongst other things, that a vehicle be “manufactured, designed, redesigned, converted or reconstructed for a specific use in farming” [emphasis added].

R v Vanberlo, *supra* para 35, at para 19.

Highway Traffic Act, RSO 1990, c H.8, s 1.

37. Moreover, the analysis in *Vanberlo* was based on the New Shorter Oxford Dictionary definition of “convert”, as the facts in that case were that the Appellant had converted a vehicle for specific farming use. In other words, the Appellant was trying to discharge his obligation to prove the exception afforded to a motorized vehicle that fit the definition of “self-propelled implement of husbandry”. This is unlike the case at bar, where the Appellant is claiming his vehicle falls under an exception as a power-assisted bicycle, and the modification is not significant enough to take it out of that category into that of a motor vehicle.

38. Notwithstanding, even if the test in *Vanberlo* applies to vehicles other than self-propelled implements of husbandry, the modifications made by the Respondent to his vehicles were objectively significant enough to change the essential character of a power-assisted bicycle. The Respondent submits an essential character of a power-assisted bicycle is its capability of being muscularly propelled through pedalling. Thus absent any operable pedals, the essential character has been significantly

changed, causing the vehicle to fall out of the definition of power-assisted bicycle.

iv. The application of *Pizzacalla* would lead to an absurd interpretation of the legislation.

39. In *Pizzacalla*, Wilkie J rejected the Prosecution's submissions that compliance with all the specification of the definition of a power-assisted bicycle is required for a defendant to claim the exception. Furthermore, he went on to find that failing to have operable pedals affixed, a specification, did not preclude the vehicle from still falling under that definition. Respectfully, the Respondent submits the application of this ruling leads to an absurd interpretation of the legislation.

R v Pizzacalla, *supra* para 10, at para 64, 70-4.

40. The absurdity rule is succinctly explained by professor of laws, and author, Ruth Sullivan as follows:

It is also considered absurd for the legislature to contradict itself or to act in a futile or self-defeating way. For example, a legislature would not go to the trouble of enacting rules that cannot be enforced or whose enforcement would tend to defeat the very purpose for which they were enacted. It would not enact provisions that would tend to defeat the very purpose for which they were enacted.

Ruth Sullivan, *Statutory Interpretation*, Concord: Irwin Law, 1997 at 150.

41. The Respondent submits that the legislature and Parliament would not include specifications into the definition of a power-assisted bicycle that were not intended to be followed. Thus, it is submitted the interpretation that does not lead to an absurd result is one where the specifications included in the definitions are meant to be fully complied with in order to meet that definition.

42. In addition, returning to the issue of any ambiguity between the requirements of pedals to be "affixed" under the *HTA*, or "equipped" under the *MVSR*, the Respondent submits the non-absurd interpretation would require the reading of both words to have the same meaning. The definition of power-assisted bicycle under the *HTA* sets out its own specification and incorporates the specifications as laid out in the *MSVR*. It would be self-defeating for the *HTA* to require one kind of specification, and then refer to another set of specifications that are contradictory. Therefore, the only harmonious reading is the legislature

intended the words “equipped with” under the *MVSR*, to have the same meaning as “affixed to” as used in *HTA*.

v. The decision from the related criminal proceedings provide a different interpretation of a power-assisted bicycle than adopted by Wilkie J.

43. In addition to the proceedings under the *Provincial Offences Act*, Mr. Pizzacalla had parallel criminal proceedings arising from the same incident. In convicting Mr. Pizzacalla at the criminal trial, Nadel J stated:

In this case, there were no operable pedals on the device and accordingly, while in some circumstances, the item Mr. Pizzacalla was operating might come within the definition of power-assisted bicycle, the device was not, on that occasion, in the manner in which he used it, a power-assisted bicycle.

R v Pizzacalla, [2012] OJ No 2342 (QL) (OCJ).

44. The decision in the criminal proceeding of Pizzacalla were upheld on appeal by the Superior Court of Justice and the Ontario Court of Appeal. Wilkie J did not have the benefit of these appeal decisions when he issued his judgment for the provincial offences proceeding. The Respondent submits that while the comments by Nadel J are obiter, and made in the criminal context, they should be considered a persuasive interpretation of what constitutes a power-assisted bicycle.

R v Pizzacalla, [2013] OJ No 451 (QL) (SCJ).

R v Pizzacalla, [2014] OJ No 4867 (QL) (CA).

Response to the Submissions of the Crown regarding Justice Wilkie’s Judgment

Re Alleged Misinterpretation of the Regulations under the *Motor Vehicle Safety Act* defining a Power-Assisted Bicycle

[36] I agree with the respondent’s submissions in paras. 19 and 24 that the legislators did wish to create legislation in keeping with the use of these vehicles as being similar to those of conventional bicycles.¹⁴ I note that Justice Wilkie at para. 50 of his judgment agreed that “the Respondent’s vehicle in each instance, without a pedalling function was not complying with all aspects of the definition...”

[37] The modern approach to the interpretation of statutes has been set out by the Supreme Court of Canada as articulated by Elmer Driedger in *Construction of Statutes*, 2nd ed. (Toronto:Butterworths, 1983):

¹⁴ Indeed the term bicycle is defined in the *HTA* as including a “power-assisted bicycle” and both must follow the rules of the road as set out in the *HTA* for all “vehicles” that are operated on a highway.

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁵

[38] In *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015] S.C.J. No. 47, a recent decision from the Supreme Court of Canada, wherein this principle is also reiterated at para. 18, the Court discusses ambiguity in the context of statutory interpretation. In my view Justice Wilkie found an ambiguity between the definition of “power-assisted bicycle” in the *HTA* and in the Federal legislation which was adopted by the *HTA* and therefore created an ambiguity in the *HTA* definition. To that regard the Supreme Court of Canada states in part at para. 22:

22 It is settled law that a genuine ambiguity only exists when there are “two or more plausible readings, each equally in accordance with the intentions of the statute”: *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Bell ExpressVu*, at paras. 29-30 ...

[39] I must caution myself that it is impermissible to rewrite legislation under the guise of interpreting it. As set out at para. 27 of the same Supreme Court of Canada judgment:

27 Mr. Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. This Court has cautioned against judicial rewriting of legislation under the guise of interpreting it:

... the contextual approach allows the courts to depart from the common grammatical meaning of *words* where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are “reasonably capable of bearing” a particular meaning that they may be interpreted contextually... The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. [First emphasis in original; second emphasis added.]

¹⁵ See for example, *R. v. Akintunde*, 2015 ONCA 597, at para. 26.

(*R. v. McIntosh*, [1995] 1 S.C.R. 686, at p. 701; cited with approval in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 174. See also *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at paras. 8-9 and 36; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 40.)

[40] I find that what Justice Wilkie has done is to depart from the common grammatical meaning of words because it is required by the context both under appeal before him and the appeal before me. It is clear that the legislators would have been aware that e-bikes can and would be operated without the actual use by an operator of the pedals as was envisioned by the federal definition which contemplates an e-bike that can be engaged by an accelerator controller. Indeed given the nature of these vehicles, it can reasonably be inferred that the legislators would reasonably have believed that this may well be more often than not the case. It is further clear that the legislators would have been well aware that it would be up to the operator of those vehicles that can engage with a throttle as opposed to pedals, as to when if ever they would use the pedals either on their own without the use of the electric motor or in combination with the electric motor. Would it not be a reasonable inference that notwithstanding the use of the words “affixed” or “fitted” that the legislators would have envisioned, given the discretionary use of the pedals by the operator, that pedals which were readily available to be affixed or fitted to the vehicle would fall within the definition? In other words, in the contextual analysis, I am of the view that the words used in both the provincial and federal legislation are “reasonably capable of bearing” the meaning that the pedals must be readily available to be affixed or fitted by the operator to the e-bike proximate in time to when the e-bike is being operated. I do not see this as a safety issue. A bicyclist might well choose to stop on a hill to catch his or her breath at the side of the highway. An e-biker, may likewise also choose to stop on a hill at the side of the highway to affix his or her pedals to the bike to help him or her travel uphill. Both present a comparable risk to their own safety and to others on the roadway.

[41] I therefore disagree with the respondent’s submission that Justice Wilkie’s and my own interpretation as it agrees with Justice Wilkie is a contravention of the “absurdity rule”. If anything, I find it absurd that the legislature would have envisioned that a strict interpretation of the wording of the definition would lead on the facts before this court to serious charges involving significant minimum penalties, and a licence suspension that would not have been the subject of charges if the pedal was not under the seat of the bike but on the vehicle.¹⁶

¹⁶ I make no comment as to the perhaps ill-advised decision of the appellant to ride the e-bike given the road conditions of the day, other than to note that an e-bike is a vehicle that if operated on a highway is subject to *HTA* scrutiny. A bicyclist may also choose ill-advisedly to ride their bike in the snow. It remains that if a vehicle be it an e-bike or a bicycle is being operated carelessly given the weather conditions, then the operator could face a charge of careless driving.

[42] Regarding the law as it relates to the *Criminal Code* definition of motor vehicle as set out earlier, had the appellant's licence been suspended pursuant to the *HTA* as a result of a *Criminal Code* conviction, he could have been charged under the *Criminal Code* with driving while disqualified. An operator of a "power-assisted bicycle" does not escape prosecution for alleged *Criminal Code* driving offences regardless of whether or not the pedals are off or on the e-bike.

British Columbia Motor Vehicle Act

[43] The respondent has referred the court to British Columbia cases that were not before Justice Wilkie that have examined the legislation in that province as it relates to "motor assisted cycles". I will refer to the one which is of most relevance.

[44] In *R. v. Rei*, [2012] B.C.J. No. 1451 (B.C.S.C.) the appellant had taken the pedals off of his "scooter" because he found them unsafe. Mr. Rei complained that when he was turning a corner the pedals were too low and scraped the pavement. Brown J. refers to the appellant as having operated a "motor assisted cycle" and set out the governing legislation in that province at paras. 3-6:

3 In both the March and April incidents, Mr. Rei, the Appellant, was operating what the *MVA* and *MVA* regulations define as a Motor Assisted Cycle ("MAC"). Section 1, the definition section of the *MVA*, defines a MAC as follows:

"motor assisted cycle" means a device

- (a) to which pedals or hand cranks are attached that will allow for the cycle to be propelled by human power,
- (b) on which a person may ride,
- (c) to which is attached a motor of a prescribed type that has an output not exceeding the prescribed output, and
- (d) that meets the other criteria prescribed under section 182.1(3)

4 Section 182.1 gives the Insurance Corporation of British Columbia ("ICBC") authority to make regulations for operators of MACs and equipment attached to them. The *Motor Assisted Cycle Regulation*, B.C. Reg. 151/2002 [*MAC Regulation*], proclaimed pursuant to that authorization includes the following criteria:

Motor Assisted Cycle

1(1) A motor assisted cycle must have no more than one motor for propulsion.

- (2) The motor of a motor assisted cycle must
 - (a) be an electric motor,
 - (b) have a continuous power output rating of not more than 500 watts, and
 - (c) not be capable of propelling the motor assisted cycle at a speed greater than 32 km/hr on level ground.

Wheels

- 2(1) The wheels of a motor assisted cycle must be 350 mm or more in diameter.
- (2) A motor assisted cycle must not have more than 3 wheels in contact with the ground.

Motor shut-off requirement

- 3(1) A motor assisted cycle must be equipped with a mechanism, separate from the accelerator controller, that
 - (a) allows the driver to turn the motor on and off from a normal seated position while operating the motor assisted cycle, or
 - (b) prevents the motor from turning on or engaging before the motor assisted cycle attains a speed of 3 km/hr.
- (2) The motor of a motor assisted cycle must turn off or disengage if
 - (a) the operator stops pedalling,
 - (b) an accelerator controller is released, or
 - (c) a brake is applied.

5 A MAC can be visualized as either a light scooter with pedals or as a regular bicycle with a small electric motor attached to the frame, near the pedals. The cycle Mr. Rei was riding on both days looks like a light scooter with bike-style pedals attached.

6 A cycle meeting all these criteria falls outside the s. 1 definition of "motor vehicle" in the *MVA* and requires no insurance.

[45] Brown J. notes that the legislation also provides for a “limited speed motorcycle” which is classified as a motor vehicle and for which one must be licensed and the vehicle insured.

[46] Brown J. found that the cycle that the appellant was riding corresponded to the definition of a “MAC” except in two ways, namely the pedals were detached and the cycle did not comply with section 3(2) of the MAC Regulation which required that the electric motor disengage or stop running when the operator stops pedalling, releases the accelerator or applies a brake. His Honour surmised that without a pedal to push there was no way to stop the motor from running. His Honour also stated that a MAC is supposed to be incapable of running on the electric motor without some pedal propulsion.¹⁷

[47] In this case there was evidence as to how ICBC (the British Columbia provincial insurance plan) views MACs. A person riding a MAC with the pedals attached and engaged correctly with the electric motor does not require registration, insurance or a driver’s licence. If someone removes the pedals, a cycle that was once a MAC is no longer a MAC as far as ICBC is concerned. It no longer falls within any recognized class of cycle and remains unregistrable and uninsurable.

[48] Brown J. found that once the pedals were removed there was no effective way for the appellant to propel the scooter himself and it no longer fell within the class of a “MAC”.

[49] I note that the British Columbia legislation does not incorporate section 2(1) of the *Motor Vehicle Safety Regulations* made under the *Motor Vehicle Safety Act* (Canada) into its definition of a “MAC”. I further note that in the Ontario legislation, no reference is made to the Ontario *Compulsory Automobile Insurance Act*. The British Columbia wording in relation to pedals, that is “... a device to which pedals or hand cranks are attached that will allow for the cycle to be propelled by human power” differs from the wording in both the Ontario *HTA* and federal regulations. In particular the words “capable of being propelled” as set out both in the Ontario *HTA* and the federal regulations is not found in the British Columbia legislation.

[50] The other two British Columbia cases I was referred to by the respondent, *R. v. Ryan*, [2012] B.C.J. No. 496 (B.C. Prov. Ct.) and *R. v. Claderone*, [2015] B.C.J. No. 955 (B.C. Prov. Ct.) deal with another category of vehicle with gas powered engines and not electric engines.

[51] I decline to follow *R. v. Rei*, *supra* from British Columbia.

¹⁷ *R. v. Rei*, *supra*, at paras. 11-14.

Conclusion

[52] For the reasons given, pursuant to section 120 of the *POA*, I will allow the appeal finding that the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, and direct that a finding of acquittal be entered.

Released: October 28, 2015

Signed: “Justice A.J. Watson”
Justice A.J. Watson