

COURT OF APPEAL FOR ONTARIO

FINLAYSON, CATZMAN AND CHARRON JJ.A.

B E T W E E N :	)	
	)	Michel Y. H%lie
RONALD HORSEFIELD	)	for the appellant
	)	
(Respondent)	)	
	)	
and	)	R.J. Blaise MacLean
	)	for the respondent
THE REGISTRAR OF MOTOR VEHICLES	)	
	)	
(Appellant)	)	
and	)	
	)	Sharon E. Lavine
CRIMINAL LAWYERS' ASSOCIATION	)	Paul K. Burstein
	)	for the Intervenor Criminal
(Intervenor)	)	Lawyers' Association and
)	)	
	)	
MOTHERS AGAINST DRUNK DRIVING	)	Sandra Antoniani
	)	for the Intervenor MADD
	)	
	)	
(Intervenor)	)	
	)	Heard: March 11, 1999

FINLAYSON J.A.:

[1] The Attorney General, acting on behalf of the Registrar of Motor Vehicles ("Registrar"), appeals the judgment of the Honourable Mr. Justice Stong of the Ontario Court (General Division) dated August 5, 1997. Stong J. allowed the application brought by Ronald Horsefield under s. 6(2) of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1 ("JRPA") and declared inoperative s. 48.3 of the Highway Traffic Act, R.S.O. 1990, c. H.8, as am. by S.O. 1996, c. 20, s. 8 ("HTA").

[2] Section 48.3 of the HTA establishes the so-called Administrative Driver's Licence Suspension Program ("ADLS Program"). The Program provides for a 90-day licence suspension effective immediately upon the Registrar receiving notice that a peace officer is satisfied that a driver person driving or having the has care, charge or and control of a motor vehicle with had a blood alcohol concentration exceeding 80 mg milligrams of alcohol in 100 ml millilitres of blood as revealed by a breathalyser or blood sample taken pursuant to s. 254 or s. 256 of the Criminal Code or fails or has refused to provide a breath or blood sample in response pursuant to a demand by a police officer pursuant to under s. 254 of the Criminal Code or pursuant to s. 256 of the Criminal Code (blood samples taken by a physician pursuant to a warrant).

[3] On August 8, 1997, Stong J. further ordered the Registrar to

pay Horsefield his costs of the application on a solicitor-client basis. The Attorney General also appeals this order. Stong J.'s judgment is reported at (1997), 34 O.R. (3d) 509.

Facts

[4] On December 29, 1996 at 12:18 a.m., Horsefield was stopped while driving in the City of Oshawa by a R.I.D.E. program operated by the Durham Regional Police. During a brief conversation with Horsefield, the officer detected a moderate odour of alcohol on his breath. Horsefield complied with a demand to provide a breath sample for a road-side screening device, which registered a "fail" reading. He was then arrested for driving with more than 80 milligrams of alcohol in 100 millilitres of blood ("over 80"). The officer then read him his rights to counsel and made a further demand of him to provide a breath sample for an approved breath analysis instrument pursuant to s. 254(3) of the Criminal Code.

[5] Horsefield accompanied the investigating officer to the police station where, slightly more than two hours after the arrest, he submitted two breath samples. The results of the breathalyzer tests showed a blood alcohol concentration ("BAC") of 90 mg of alcohol per 100 ml of blood for both samples. The breathalyzer technician prepared a certificate of analysis showing these results and the appellant was charged with driving with more than 80 milligrams of alcohol in 100 millilitres of blood.

[6] After the certificate was obtained, a notice of licence suspension was given to Horsefield at the station on the basis that an analysis of his blood breath sample showed that he had a concentration of alcohol in his blood in excess of 80 milligrams in 100 millilitres of blood ("over 80"). This suspension procedure was authorized by the ADLS Program that is here impugned.

Procedural History

[7] On February 6, 1997, Horsefield commenced an application for judicial review of the Registrar's decision to suspend his licence. He also sought an interlocutory and permanent injunction to prohibit the Registrar from suspending his licence pending the hearing and/or trial of the charge of over 80 as well as an interim and permanent order staying the suspension of his driver's licence pending the determination of the judicial review application.

[8] Stong J. denied the application for an interlocutory injunction and interim order. As a result, Horsefield served the 90-day licence suspension in full. The over 80 charge against him under the Criminal Code was withdrawn at the request of the Crown on May 5, 1997.

[9] The application for judicial review was disposed of on August 5, 1997. Stong J. declared that s. 48.3 of the HTA is unconstitutional because it is ultra vires the jurisdiction of the Province of Ontario and is inconsistent with paramount federal legislation in ss. 254, 256 and 258 of the Criminal Code. In addition, Stong J. declared that s. 48.3 constitutes a deprivation of liberty within the meaning of s.7 of the Canadian Charter of Rights and Freedoms ("Charter") and is not saved by s. 1. He concluded that the Registrar acted without legal authority in imposing the 90-day administrative driver's licence

suspension on Horsefield and quashed this decision.

[10] The Attorney General, acting on behalf of the Registrar, brought a motion before a single judge of this court on August 15, 1997 seeking a stay of Stong J.'s decision pending the motion for leave to appeal, and if leave were granted, pending the appeal. The motions judge granted the stay. Leave to appeal from the judgment of Stong J. was granted by a panel of this court on February 5, 1997.

Relevant Statutory Provisions

[11] The statutory framework of the ADLS Program consists of the following provisions of the HTA, which read as follows at the time of the application before Stong J.:

s.48.3 (1) Where a police officer is satisfied that a person driving or having the care, charge or control of a motor vehicle meets one of the criteria set out in subsection (3), the officer shall notify the Registrar of that fact, or cause the Registrar to be so notified, in the form and manner and within the time prescribed by the regulations.

(2) Upon being notified under subsection (1), the Registrar shall suspend a person's driver's licence for a period of ninety days.

(3) The criteria for the purpose of subsection (1) are:

1. The person had a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 millilitres of blood, as shown by an analysis of the person's breath or blood taken pursuant to a demand made under section 254 of the Criminal Code (Canada) or pursuant to section 256 of the Criminal Code (Canada).

2. The person failed or refused to provide a breath or blood sample in response to a demand made under section 254 of the Criminal Code (Canada).

(4) The suspension takes effect from the time notice of the suspension is given, in accordance with section 52, to the person whose licence is suspended.

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(7) Whether or not the person is unable or fails to surrender his or her driver's licence under subsection (5) or (6), the licence is suspended and invalid for any

purpose for a period of ninety days from the time notice is given to the person.

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(10) The suspension of a driver's licence under this section is intended to safeguard the public and does not constitute an alternative to any proceeding or penalty arising from the same circumstances or around the same time.

49.1 (1) The board known as the Licence Suspension Appeal Board is continued under the name Licence Suspension Appeal Board in English and Commission d'appel des suspensions de permis in French.

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50.1 (1) A person whose driver's licence is suspended under section 48.3 may appeal the suspension to the Board.

(2) The only grounds on which a person may appeal under subsection (1) and the only grounds on which the Board may order that the suspension be set aside are,

- (a) that the licence was suspended solely because of a mistake as to the identity of the person who met one of the criteria set out in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

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(4) The Board may confirm the suspension or may order that the suspension be set aside.

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(6) The decision of the Board under this section is final and binding.

(7) The suspension under section 48.3 continues to apply despite the filing of an appeal under this section unless the

Registrar reinstates the licence pursuant to the Board's order that the suspension be set aside, and this subsection prevails over the Statutory Powers Procedure Act.

(8) The Board is not required to hold an oral hearing under this section unless the appellant requests an oral hearing at the time of filing the appeal and bases the appeal on one of the grounds set out in subsection (2).

(9) Despite a request by the appellant for an oral hearing, the Board may order that the suspension be set aside on the basis of the material filed with the Board without holding an oral hearing.

(10) One member of the Board is a quorum for the purposes of an appeal under this section.

[12] Subsequent to the application before Stong J., ss. 48.3 and 50.1 were amended by the Comprehensive Road Safety Act, 1997, S.O. 1997, c. 12 proclaimed in force 1 August 1997. The changes to s. 48.3 do not address the constitutional impediments identified by Stong J. These amendments are as follows:

3. (1) Section 48.3 of the Act, as enacted by the Statutes of Ontario, 1996, chapter 20, section 8, is amended by adding the following subsection:

(2.1) A person has no right to be heard before or after the notification by the officer, or before or after the Registrar suspends the licence, but this subsection does not affect the taking of any proceeding in court.

(2) Paragraph 1 of subsection 48.3(3) of the Act, as enacted by the Statutes of Ontario, 1996, chapter 20, section 8 is repealed and the following substituted:

1. The person is shown, by an analysis of breath or blood taken pursuant to a demand made under subsection 254(3) of the Criminal Code (Canada) or pursuant to section 256 of the Criminal Code (Canada), to have a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 millilitres of blood.

4. Clause 50.1 (2)(a) of the Act, as

enacted by the Statutes of Ontario, 1996, chapter 20, section 10 is repealed and the following substituted:

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

[13] The relevant provisions of the Charter of Rights and Freedoms read as follows:

Life, Liberty and Security of Person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Issues

(1) Is s.48.3 of the HTA constitutionally valid under the division of powers established by ss. 91 and 92 of the Constitution Act, 1867?

(2) If the legislation is within the legislative competence of the provincial government under s.92 of the Constitution Act, 1867, is there nevertheless a violation of s. 7 of the Charter?

(3) Does the administration of the license suspension provisions of the ADLS Program offend the principles of natural justice?

(4) How should the costs of the application and the appeal be awarded?

Analysis

[14] The Criminal Lawyers' Association took the lead in presenting the argument on behalf of the respondent, Horsefield. It supported the reasons of the application judge for striking down the impugned legislation on the basis of both the federalism or separation of powers argument and the submission that s. 48.3 of the HTA violates s. 7 of the Charter. In my opinion, neither constitutional attack on the ADLS Program in the HTA can succeed. The Supreme Court of Canada has ruled conclusively that the right to build and operate highways, including the right to provide for the circulation and safety of traffic, is wholly within the purview of the provinces under one or more heads of s.92 of the Constitution Act, 1867. As for the Charter argument, the weight of judicial authority is against the conclusion that the right to drive a motor vehicle is a liberty within the meaning of s. 7. Accordingly, it is not a constitutionally protected interest. A subsidiary argument that the ADLS Program somehow interferes with

mobility rights under s. 6 of the Charter has no currency whatsoever.

[15] It seems to me that the same argument is being advanced under both arms of the constitutional challenge. It is submitted that the ADLS Program in using the provisions in the Criminal Code relating to procedures for conducting breathalyser and blood tests thereby injects itself into a field already occupied by federal legislation. Similarly, the intervenor Criminal Lawyers' Association submits that the Registrar, by making use of the Code procedures to initiate license suspensions that in turn can be enforced by criminal sanctions including imprisonment, has engaged a liberty interest protected by the Charter. As the intervenor put it in its factum:

(1) As to the separation of powers analysis:

In enacting the ADLS scheme the Government of Ontario has attempted to combine a valid legislative objective with the criminal law and procedure in a manner which gives the provincial proceeding the benefit of the criminal enactment while, at the same time, bypassing the protection accorded an individual by the same criminal law and procedure. In so far as s. 48.3 of the Highway Traffic Act does so, it is ultra vires the province and should be declared of no force and effect.

(2) With reference to s. 7 of the Charter:

It is respectfully submitted that the suspension of a driver's license enforced by penalty provisions including the possibility of imprisonment for breach of the license suspension represents an interference with a person's right to liberty within section 7 of the Charter of Rights such that a person has the right under that section not to be deprived thereof except in accordance with the principles of fundamental justice.

[16] The reference to imprisonment is to s. 53 of the HTA providing for the imposition of fines and imprisonment for a term of up to six months for driving while a motorist's license is under suspension. The factum continues:

In other words, if this Honourable Court were not, contrary to the above submissions, persuaded that the license suspension per se represents an interference with a liberty interest which can only be carried out in accordance with the principles of fundamental justice, then it is submitted that by penalizing driving in violation of such suspensions with the threat of

imprisonment as enforcement, then a liberty interest is created, whose impairment must live up to the rules of fundamental justice. Therefore, the initial element in that impairment, the suspension, must be examined for compliance with the rules of fundamental justice in precisely the same way.

[17] Almost the entire argument before us, whether directed to the separation of powers issue or the issue whether the legislation interferes with a protected right under the Charter, was focussed on the additional burden this legislation is said to impose on the motorist who is under suspicion for driving while under the influence of alcohol. The first and most obvious argument was that an over 80 reading would bring about an automatic suspension of the motorist's license, a penalty over and above what the motorist is already exposed to under the Code. A second argument was that a motorist who complied with a demand and had an over 80 reading would be reluctant to test the validity of the demand or the reading in court because he or she would be subject to the 90-day license suspension while awaiting a trial date, a suspension for which he would receive no credit against the suspension that is called for following a conviction under the Code. It was submitted that this affected the motorist's options in that it made more difficult the motorist's choice of complying with the breathalyzer demand or refusing with the intention of contesting the lawfulness of the demand.

[18] In my opinion, these arguments are irrelevant to either constitutional challenge. Matters of inconvenience or economic hardship or difficult legal choices have nothing to do with the constitutional authority of the provincial legislature to suspend a driver's license. Similarly, these matters are of no concern under the Charter unless a driver's license is a protected interest or some other right is engaged under the Charter. The immateriality of the intervenor's concerns becomes apparent when one takes the traditional approach and subjects the legislation to a segregated analysis, the first under the heading of separation of powers and the second under the heading of compliance with the Charter.

[19] Admittedly, it is possible that a given piece of legislation could be impugned under either approach, but problems arise when the two issues are combined and addressed as one constitutional problem. A good example is the result achieved in this case. The applications judge decided that the legislation is ultra vires the province because it makes use of a criminal law enacted by the Government of Canada under s. 91(27) to impose a sanction on a motorist without incorporating the Criminal Code safeguards that justify the deprivation of basic rights under the Charter. This led him to hold that the provincial legislature had enacted legislation in an area occupied by Parliament that created an actual conflict with federal legislation sufficient to invoke the doctrine of paramountcy.

[20] In my opinion, the fact that a provincial enactment has the object or effect of violating Charter rights of a citizen is immaterial to its constitutionality under s. 92 of the Constitutional Act, 1867. The separation of powers analysis should proceed without reference to the Charter. The enactment of

the Charter postdates the separation of powers under our constitution and gives a separate and distinct authority to the court to strike down legislation which is otherwise constitutional in the event that it violates the fundamental freedoms enshrined therein. This is an additional constitutional tool. The court always has had the power to declare provincial legislation ultra vires as not being supportable under s.92.

Issue 1 Is s.48.3 of the HTA constitutionally valid under the division of powers established by ss. 91 and 92 of the Constitution Act, 1867?

[21] The appellant properly relies on the Supreme Court of Canada decision in Prince Edward Island (Provincial Secretary) v. Egan, [1941] S.C.R. 396 as authority for the constitutionality of s. 48.3 of the HTA with respect to the separation of powers issue. At issue in Egan was the legislative competence of the province of P.E.I. to enact a provision of the Highway Traffic Act of that province which imposed a 12-month licence suspension on a person convicted of driving while impaired. In addition, the provision prohibited the Provincial Secretary from issuing a licence to any person during the suspension period.

[22] The appellant in particular cites Rinfret J.'s statement at pp. 415-416:

The right of building highways and of operating them within a province... is wholly within the purview of the province...and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. ...It has nothing to do with the Dominion aspect of the creation of a crime and its punishment. And it cannot be said that the Dominion, while constituting the criminal offence of driving while intoxicated and providing for certain penalties therefor, has invaded the whole field in such a way as to exclude all provincial jurisdiction....

Surely the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them, upon the

happening of certain conditions. The provision that a person convicted of driving while intoxicated will lose his licence for a time or forever is, in a certain sense, a condition upon which the licence, or permit, is granted by the province. [Emphasis added.]

[23] The appellant also relies on *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, wherein the court reaffirmed its holding in *Egan* that the provincial legislature has authority to regulate the system of driver's licences to secure the observance of regulations enacted in the public interest. Like *Egan*, *Ross* was decided in the context of a constitutional challenge to a provincially imposed post-conviction licence suspension.

[24] The argument is made that the facts in *Egan* and *Ross* are distinguishable from those in *Horsefield* because the licence suspension in the former cases followed a conviction under the Criminal Code for an alcohol-related driving offence whereas the ADLS Program mandates suspension prior to and consequently, irrespective of, a conviction. This attempted distinction ignores the seminal finding by Rinfret J. that the suspension scheme in *Egan* had nothing to do with the creation of crime and its punishment; rather, the suspension scheme created a civil disability arising out of a conviction for a criminal offence. The fact that the suspension in the case in appeal is not tied to a conviction for a criminal offence, but is connected to the failure to supply a breath sample with a reading that is not over 80, distances the scheme further from the federal criminal law jurisdiction under s. 91(27).

[25] This point was made by Melvin J. of the British Columbia Supreme Court in *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1998), 33 M.V.R. (3d) 164 where he heard a constitutional challenge to the ADLS program enacted by amendments to the Motor Vehicle Act, R.S.B.C. 1996, c. 318. The nature of the challenge was identical to that brought by *Horsefield*. Melvin J. was satisfied that the impugned legislation relates to the entitlement of an individual to hold a valid driver's licence, which is a subject properly and solely within provincial jurisdiction. He found at p. 173 that this conclusion was unaffected by the fact that the behaviour leading to the suspension may also support a conviction under the Criminal Code.

[26] In reaching this conclusion, Melvin J. relied on the decision of the British Columbia Court of Appeal in *R. v. Wolff* (1979), 9 B.C.L.R. 390, which considered the constitutionality of a roadside suspension of a driver's licence by a peace officer on suspicion of alcohol consumption by the driver. At p. 172 Melvin J. quoted the following observation of the Court in *Wolff*:

...I cannot see why the *Egan* case should be distinguished merely because the provincial legislature provided that the action with regard to the licence would be taken after a conviction under the Criminal Code. If the legislation is

within

the competence of the provincial legislature, it is valid

whether

the powers be exercisable before or after a conviction under

the

Criminal Code. The legislature is trying to ensure the safety of the users of the highway, and is legislating within its jurisdiction.

[27] The judgment of Melvin J. was upheld by the B.C. Court of Appeal in a judgment that was released February 24, 1999. Hinds J.A., speaking for the court, dismissed both constitutional challenges against the B.C. legislation: see [1999] B.C.J. No. 408. In extensive reasons, he reviewed many of the same authorities that I have considered, including without comment as to its merit, the decision of Stong J. in Horsefield.

[28] On the division of powers issue, Hinds J.A. concluded at paragraph 61:

Upon reviewing the provisions of the Legislation and the extrinsic evidence adduced in the court below, I conclude that

the purpose and effect of the Legislation, its pith and substance, is the licensing of persons to drive motor

vehicles

and the enhancement of public safety on the highway. Those are

matters within the jurisdiction of the province. The authorities

to which I have referred (with the exception of the Horsefield

decision), establish that the Legislation did not improperly encroach upon the federal jurisdiction under s. 91(27) of the Constitution Act, 1867. I therefore conclude that the Legislation, on a division of powers analysis, is not ultra vires.

[29] Lower courts in Manitoba, Nova Scotia and P.E.I. have also upheld the constitutionality of ADLS programs in their provinces. The Manitoba ADLS program was challenged in *R. v. Leclair* (1990), 67 Man.R. (2d) 265 (Man. Q.B.) on the basis that it was criminal law and thus was outside the province's jurisdiction to enact. However, the court concluded at p. 274 that the purpose and effect of the impugned provisions are to regulate and control traffic on provincial highways and are thus within the legislative competence of the Province under s. 92(13) of the Constitution Act, 1867. The ADLS program in Nova Scotia was upheld by MacAdam J. in *White et al. v. Nova Scotia (Registrar of Motor Vehicles)* (1996), 426 A.P.R. 259 (N.S.S.C.). His decision, which did not consider the federalism issue, was affirmed without reasons by the Nova Scotia Court of Appeal on May 27, 1996. In *R. v. MacCormick*, [1998] 1 P.E.I.R. 298, Webber J. rejected a challenge to the scheme of P.E.I., which included the argument that the impugned legislation offended the division of powers. She analysed the reasons of Stong J. on the federalism issue and declined to follow them. Her judgment was recently upheld by the P.E.I. Court of Appeal in very brief reasons dated March 12, 1999.

[30] To my way of thinking, the conclusion that the legislation is intra vires the province is clear. However, Stong J. reached the opposite conclusion. He said at pp. 518-19:

The Parliament of Canada has from its exclusive jurisdiction over the criminal law given evidentiary vitality and viability to the breath test, but only within the safeguards of s. 258 of the Criminal Code.... Parliament has legislated the permissible evidentiary effect of breath tests. The province on the other hand has attempted to legislate to utilize those tests while at the same time ignoring the safeguards that Parliament has imposed on the tests to give them not only life, but scientific and factual validity. The province has adopted a scatter-gun approach to the federal legislation upon which it bases s. 48.3 of the Highway Traffic Act.

. . . .

While it is accepted that the province may make a licensing decision contingent upon the happening of an event, when that event is a reference back to an action which itself is a creation of federal law, the province acts at its own peril when it alters the action so as to destroy its validity. When the reference is back to an action taken pursuant to federal law, then that action itself must be a legitimate action [Emphasis in original].

[31] Stong J. held:

Insofar as the province has legislated inconsistently with an area occupied by Parliament, s. 48.3 of the Highway Traffic Act runs afoul of the "division of powers" in the Constitution, and creates an actual conflict sufficient to invoke the doctrine of paramountcy. The provincial scheme cannot stand and so is declared inoperative by virtue of its unconstitutionality.

[32] The reasons of Stong J. are not consistent with those of the Supreme Court in Egan and Ross, supra. His conclusion on the federalism issue has also been the subject of academic criticism by Professors Solomon, Hovius and Usprich in an article entitled, "90-Day Administrative Licence Suspensions: Constitutional Challenges on the Road to Traffic Safety" (1998), 30 M.V.R.(3d) 119. The authors concluded that Stong J.'s decision in Horsefield should not be upheld.

[33] These authors contend that the ADLS Program is constitutionally valid legislation based on the provincial authority over property and civil rights, citing Egan, supra, in support of that conclusion. The authors disagree with Stong J.'s conclusion that the impugned legislative scheme conflicts with

the Criminal Code procedural safeguards so as to invoke the doctrine of paramountcy. In doing so they comment critically on his objection that the breathalyzer demand in this particular case was not made within the two hours called for by the Code. The authors state at pp. 135-136:

Stong J. concluded that Ontario's 90-day ALS provisions conflicted with the Criminal Code because they impose a licence suspension on motorists based on a single Breathalyzer test, even if it was conducted more than two hours after the alleged impaired driving incident.

His conclusion appears to be based on the view that Parliament has occupied the field on the validity of Breathalyzer and blood tests. As indicated, however, the Canadian courts have repeatedly rejected the "occupied field" or "negative implication" test in recent years [see *Multiple Access v. McCutcheon*, [1982] S.C.R. 161]. Moreover, the clear language of s. 258(1)(c) and (d) limits the application of that section to the criminal prosecution of drinking and driving offences. Finally, even if Parliament had intended to control the provinces' use of Breathalyzer and blood tests in licensing matters and had used unequivocal language to that effect, its constitutional authority to do so is highly questionable. Parliament has no constitutional authority to dictate to the provinces the standards and procedures that they must use in regulating the licensing of drivers. In our view, Parliament did not have the intent, nor would it have the constitutional authority, to limit how the provinces use Breathalyzer and blood test results. [Emphasis added].

[34] In addition to rejecting the possibility that the federal legislation occupied the field, these authors reject the notion that the Criminal Code and HTA provisions are in actual conflict. They point out at p. 136 that compliance with one statute does not necessitate violating the other: "Consequently, the doctrine of paramountcy does not apply and both provisions are operable".

[35] In conclusion, I am of the view that the ADLS Program was enacted in accordance with the Province's jurisdiction under s. 92 of the Constitution Act, 1867 and, further, that there is no conflict, either actual or by implication, between the ADLS Program and the Criminal Code provisions.

Issue 2 If the legislation is within the legislative competence of the provincial government under s.92 of the Constitution Act, 1867, is there nevertheless a deprivation of a liberty protected by the Charter?

[36] The applications judge found that the ADLS Program constituted a deprivation of a liberty protected by the Charter. He observed at p. 524 that:

...once a licence is granted and the citizen is qualified to drive, there attaches to that licence a general liberty to employ one's skill and ability, in this case the ability to drive. A driver's licence properly obtained and validly held... can be characterized in modern society as a major component of the liberty known as freedom of movement. When one considers the vastness of Ontario, it is little wonder that the automobile of the 20th century has been compared to the steam locomotive of the 19th century. ... In our highly mobile and mechanized society communities are so geographically separated and the people so demographically scattered that entitlement to legally drive a motor vehicle can be more properly characterized as a necessity than a luxury. The mobility of the citizenry has taken on the quality of an essential "need" in this large province. [Emphasis added.]

[37] However, the weight of judicial authority is firmly against the conclusion that the right to drive is a liberty within the meaning of s. 7 of the Charter. While the question has not been directly considered by the Supreme Court of Canada, several provincial appellate courts have ruled on the matter.

[38] A leading case is the early Charter decision of the Alberta Court of Appeal in *R. v. Neale* (1986), 28 C.C.C. (3d) 345, from which the Supreme Court denied leave to appeal: [1987] 1 S.C.R. xi (note). This decision was not referred to by Stong J. in *Horsefield*. In *Neale*, the Court held that circulation in a motor vehicle is not a right protected by s. 7 of the Charter. In the words of Lieberman J.A. for the Court at p. 352: "On the face of it, a suspension of driving privilege has no effect on the accused's liberty as the suspension does not restrict his right to go where he chooses. There is no physical restraint on him." In *Yehia v. Alberta (Solicitor General)* (1992), 40 M.V.R. (2d) 57, the Alberta Court of Appeal reaffirmed its decision in *Neale*.

[39] *Neale* was referred to by the Manitoba Court of Appeal in *R. v. Gray* (1988), 54 Man. R. (2d) 240 as establishing that the suspension of a driver's licence does not constitute a deprivation of liberty under s. 7 of the Charter.

[40] *Neale* was also relied on by the P.E.I. Court of Appeal in *P.E.I. (Registrar of Motor Vehicles) v. Rankin* (1991), 30 M.V.R. (2d) 122 as authority for the proposition that the right to drive is not protected by the Charter. The issue in that case was whether the absence of a provision in the Highway Traffic Act, R.S.P.E.I. 1988, c. H-5, for a stay of a licence cancellation pending an appeal of a conviction on a charge of driving over 80 violated s. 7. Mitchell J.A. for the Court held as follows at pp.

123-124:

The absence of a stay provision only matters if the Charter gives some protection to a right to drive in the first place. I have concluded that it does not. Section 7 comes under the heading of "Legal Rights" in the Charter. Considering the historical origins of our notion of liberty in that context, I have concluded that in s. 7 that term refers to an absence of legal restraints on physical movement. Its purpose is to allow people to freely move about and go where they choose. However, it does not go so far as to guarantee that they can move according to the mode of their choice. The Supreme Court of Canada in *R. v. Dedman* ... has already characterized the so called "right to drive" a motor vehicle on the highway in a way which puts it beyond the pale of s. 7.... It follows, therefore, that the failure of the Highway Traffic Act to provide a stay of licence cancellation pending appeal does not offend s. 7 of the Charter because that section does not guarantee any right to drive in the first place.

The Court recognizes that cancellation of a licence while an appeal is still pending seems unfair. Perhaps the Highway Traffic Act ought to be amended to allow for a stay by adding a provision similar to s. 261 of the Criminal Code. However, that is a matter for the Legislature, not the Courts. The Charter neither provides constitutional protection for all human activities nor a remedy for every grievance. [Emphasis added.]

[41] The Quebec Court of Appeal has also ruled that the right to drive a motor vehicle is not a fundamental right protected by the Charter, but is a right of an economic character: see *R. v. Duguay*; *R.v. Lepage*, [1993] R.J.Q. 722 (Q.C.A.); leave to appeal to S.C.C. refused [1987] 1 S.C.R. xi. Similarly, the Saskatchewan Court of Appeal in *Ginther v. Saskatchewan Government Insurance*, [1988] 4 W.W.R. 738 (Sask. C.A.) ruled at p. 741 that "...the right to life, liberty and security of the person as contemplated by s. 7 of the Charter does not include the "right" to drive an automobile."

[42] The only exception to this line of jurisprudence at the appellate level is the British Columbia Court of Appeal decision in *R. v. Robson* (1985), 19 C.C.C. (3d) 137. The Court in that case held that legislation empowering a peace officer to require a driver to surrender his licence where the officer has reason to suspect that the driver had consumed alcohol violated s. 7 of the

Charter. The Court expressed the view at p. 140 that once a driver's licence "...is granted there becomes attached to it the general liberty to employ one's skill and ability -- in this case the ability to drive. Accordingly, such liberty constitutes a right under the Charter and a person cannot be deprived of it except in accordance with the principles of fundamental justice."

[43] However, in the very recent decision in *Buhlers*, supra, the British Columbia Court of Appeal expressly refused to follow *Robson*. Hinds J.A. for the Court at paragraph 110 held that "...the right or privilege to drive a motor vehicle on a public highway is not a liberty protected by s. 7".

[44] Although the Supreme Court has not directly considered whether the right to drive is a liberty interest protected by s. 7 of the Charter, it has considered s.7 in the driving context. Passages from several of the Court's judgments in this area provide support for the conclusion that the right to drive is not protected by s. 7. For example, in *R. v. Richard*, [1996] 3 S.C.R. 525 the Court considered whether a New Brunswick provision, which permitted conviction for an offence under the Motor Vehicle Act, S.N.B. 1987, c. P-22.1 where a driver fails to appear in court at the time and place indicated in the ticket, infringed s. 11(d) of the Charter. La Forest J. for the Court raised the issue whether s. 7 of the Charter was engaged. He held at p. 546 that it was not:

In the case at bar, however, there is absolutely no possibility of imprisonment, since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment.

Thus, the liberty component of s. 7 of the Charter does not come into play.

[45] The decision of the Supreme Court in *R. v. Pontes*, [1995] 3 S.C.R. 44 is capable of supporting the same conclusion. The facts in *Pontes* were that the accused had been prohibited from driving a motor vehicle under s. 92 of the British Columbia Motor Vehicle Act. That section provided that a person convicted of an offence under certain sections of the Act was "automatically and without notice" prohibited from driving a motor vehicle for 12 months. The accused was later found driving a motor vehicle during the period of prohibition and was charged under s. 94(1) of the Act, which provided that a person who drives a motor vehicle on a highway while he is prohibited from doing so under s. 92 is liable on conviction to a fine and imprisonment. The issue before the Supreme Court was whether s. 94(1) created a strict or absolute liability offence.

[46] Cory J. concluded that ss. 92 and 94 created an absolute liability offence. Nonetheless, he held that the absolute liability offence did not contravene the Charter. The reason for this holding was that ss. 4.1 and 72(1) of the Offence Act, R.S.B.C. 1979, c. 305, as amended, prohibited imprisonment with respect to an absolute liability offence. Cory J. had earlier noted at p. 50 that:

Obviously, if the offence is one of absolute liability,
 but there is no risk of imprisonment, then the provision will not
 offend s. 7 of the Canadian Charter of Rights and Freedoms.
 [47] Accordingly, because an accused convicted under ss. 92 and
 94 faced no risk of imprisonment, the Court concluded that no s.
 7 violation was established.
 [48] Hinds J.A. made the following observation about the majority
 decision in Pontes at paragraph 83, with which I agree:

The majority concluded that the provisions of s. 7 were
 not involved because, although the offence was an absolute
 liability offence, the accused faced no risk of imprisonment and,
 therefore, the accused's personal liberty was not affected.
 But if the majority had been of the opinion that, absent the
 liability to imprisonment, the accused's right to drive was,
 nevertheless, a liberty protected under s. 7 of the Charter,
 it is anticipated that the majority would have so stated.
 [49] It would thus run counter to the weight of authority at the
 appellate level throughout Canada to hold that the right to drive
 is a liberty within the meaning of s. 7 of the Charter. The
 reluctance to find the right to drive as being a liberty interest
 protected by s. 7 no doubt stems in part from a fear of
 trivializing the Charter. Along these lines, Webber J. in
 MacCormick, supra stated:

There are good reasons for restricting "liberty" in the
 Charter to fundamental rights in the tradition of our common
 law. This should ensure that the principles that we as a society
 hold very dear and believe are fundamental to a democratic system
 of government are upheld while, at the same time, ensure that
 the courts don't become the legislators of society.
 [50] Also as pointed out by Webber J., there was no evidentiary
 basis before Stong J. to establish that the right to drive is as
 essential to liberty as Stong J. assumed. On the contrary, the
 evidence showed that Horsefield was able to make alternate
 arrangements to get to work and to run his errands. As well,
 Stong J. cited the study submitted by the appellant in the form
 of an affidavit of John Hughes, Director of the Safety Policy
 Branch at the Ministry of Transportation, which concluded that
 suspended drivers are able to make alternative arrangements to
 get to and from work. The evidentiary record thus does not
 provide a firm basis for concluding that the right to drive falls
 within the s. 7 guarantee.
 [51] I adopt the latest word on this subject as expressed by
 Hinds J.A. in Buhlers, supra. On the Charter challenge, he had
 this to say at paragraph 109:

In my view, the broadened scope of the liberty interest protected by s. 7, as expressed by some of the members of the Supreme Court in *B. (R.) [B. (R.) v. Children's Aid Society, [1995] 1 S.C.R. 315]* and in *Godbout [Godbout v. Longueil (City), [1997] 3 S.C.R. 844]*, does not extend to the driving of a motor vehicle on a public highway. It is not a matter that is fundamental or inherently personal to the individual. It is not a matter that goes to the root of a person's dignity and independence. To hold otherwise would trivialize the liberty sought to be protected by s. 7.

[52] The Supreme Court decision of *Godbout v. Longueil (City), [1997] 3 S.C.R. 844* was referred to this court as well. The case involved a resolution by the City of Longueil requiring all permanent employees of the City to live in Longueil. Ms. Godbout, a permanent employee, moved to a neighbouring municipality and was discharged. She sued for wrongful dismissal maintaining that her right to privacy under s.5 of the Quebec Charter and her rights under s.7 of the Charter had been violated. In upholding her claim, the Supreme Court was unanimous in agreeing that her right to privacy under the Quebec Charter had been violated and three members of the court agreed that there was also a violation of her s.7 rights under the Charter. The reasoning was that s.7 was an interference with her right to make an inherently private choice of her residence free from state interference. It was suggested in this court that the decision could also be supported by invoking the mobility rights provision in s. 6 of the Charter.

[53] I hardly think that losing for 90 days the privilege or license to drive a motor vehicle is in the same category as suffering the state to dictate one's place of residence. The suggestion does trivialize the Charter, which is intended to protect fundamental liberties, not to insulate the citizen from inconvenience, no matter how great that inconvenience may be in the individual case. As La Forest J. put it in expressing the minority view with respect to s.7 in *Godbout*, *supra*, at p.893:

Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s.7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

[54] For the reasons set out above, I am of the opinion that s. 48.3 of the HTA establishing the ADLS Program does not interfere

with a liberty protected by s.7 of the Charter.

[55] I think the reasoning set out above also disposes of the alternative argument advanced by the intervenor Criminal Lawyers' Association that even if a licence suspension under s. 48.3 of the HTA does not per se represent an interference with a liberty interest protected by s. 7 of the Charter, by penalizing driving in violation of such suspensions with the threat of imprisonment, the legislature has created a liberty interest is created, whose impairment must live up to the rules of fundamental justice. We are dealing here with the power to suspend a license. The offence of driving without a licence contrary to s.53 of the HTA is not restricted to the 90 day suspension that this appeal is considering. It involves all driving suspensions for whatever reason. To suggest that any person who is operating an automobile without a license or while his or her license is suspended can raise a Charter argument that he should not be required to have a license or that the license he did acquire was unconstitutionally suspended is simply arguing in circles. There is, I repeat, no constitutional right to acquire or preserve a license to drive a car.

Issue 3 Does the administration of the license suspension provisions of the ADLS Program offend the principles of natural justice?

[56] This issue was argued by the Registrar but was not seriously contested by the intervenor. It has no application to the constitutional challenges. Having found that the province has plenary powers to enact the impugned legislation, there is no issue that it has the power to proceed to an administrative suspension of a driver's licence without a hearing or a full right of appeal. A brief reference to authority makes that clear.

[57] The principles of natural justice were recognised by the Supreme Court of Canada in *Cardinal and Oswald v. Kent Institution (Director)*, [1985] 2 S.C.R. 643 at 653:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual....

[58] The common law duty of fairness may be modified or abrogated by statute. As stated by Estey J. in *Inuit Tapirisat of Canada and National Antipoverty Organization of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 at 755:

While it is true that a duty to observe procedural fairness, as expressed in the maxim 'audi alteram partem', need not be express ... it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order

to see to what degree, if any, the legislator intended the principle to apply.

[59] The Supreme Court of Canada has also established that the intent to modify or abrogate the rules of natural justice must be revealed by clear statutory language. As stated by L'Heureux-Dubé J. in *Knight v. Board of Education of Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 677-678:

However, as was pointed out by Dickson J. in *Kane v. Board of Governors of the University of British Columbia* ... "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument."

[60] The legislative scheme that the respondent Horsefield challenges does not provide for a pre-suspension hearing. That such a hearing is not contemplated was implicit in the legislation considered by Stong J., but has since been made explicit by the 1997 amendment to s. 48.3 of the HTA, which for convenience I will repeat:

(2.1) A person has no right to be heard before or after the notification by the officer, or before or after the Registrar suspends the licence, but this subsection does not affect the taking of any proceeding in court.

[61] Section 50.1 of the HTA provides a right to appeal the suspension decision to the Licence Suspension Appeal Board. However, a suspension order will be rescinded only on the grounds of mistaken identity or by showing that a medical reason existed for refusing to provide a breath sample. The Registrar is not required to consider relevant statements or information in deciding whether to affirm or rescind the suspension.

[62] In contrast, the review proceedings in the Manitoba, Nova Scotia, P.E.I. and British Columbia ADLS programs require that relevant information be considered by the Registrar. As well, the Manitoba, Nova Scotia and P.E.I. legislation requires the Registrar to consider whether the driver had an over 80 blood-alcohol level or whether the driver in fact failed to comply with a demand for breath or blood samples. The B.C. legislation, in addition to directing the Registrar to consider these issues, adds that a ground for revoking the suspension is if the driver had a reasonable excuse for failing or refusing to comply with a breath demand.

[63] Although the legislation of other provinces provides greater review rights than does the Ontario ADLS Program, there is no legal requirement that constitutionally valid legislation provide for any right of appeal from an administrative act. Accordingly, the sufficiency of the right of review in the ADLS Program is a matter for the legislature.

[64] It is also noted that the British Columbia, Manitoba, Nova Scotia and Prince Edward Island programs, unlike the Ontario program, provide for the issuance of a temporary licence after the brief roadside suspension expires. This temporary licence allows the motorist to make alternative transportation

arrangements and to seek review by the Registrar of the suspension. In Manitoba, Nova Scotia. and P.E.I., the temporary licence is valid for seven days; in B.C. it is valid for 21 days.

[65] I mention these distinctions only to indicate that I am aware of them. The absence of a more elaborate procedural safeguards does not impact on the fundamental principle that the legislature has the right to override common law administrative law principles relating to natural justice. Accordingly, the ADLS Program is immune from attack on this ground as well.

Issue 4 How should the costs of the application and the appeal be awarded?

[66] The applications judge awarded solicitor and client costs to Horsefield following his success in challenging the ADLS Program. The Registrar appeals this award as to costs and suggests that party and party costs would have sufficed. The Registrar also submits that if it is successful on this appeal, all of the parties to the appeal should bear their own costs.

[67] Horsefield was never convicted of an offence under the Criminal Code. Since his license suspension has long expired, he has no personal interest in these proceedings except to preserve his award of costs. The two intervenors were thus of great assistance in ensuring that all the issues relating to the constitutionality of the ADLS Program were fully explored.

[68] I am well aware that the Registrar had no choice but to appeal the judgment of Stong J., but he had to be aware that an attack on the constitutionality of the legislative scheme was inevitable. Horsefield, a private citizen of modest means who found himself caught up in the ADLS Program, was entitled to challenge the scheme. His arguments were obviously not frivolous because they were successful in the first instance. Horsefield, through his counsel, appeared before me on the stay application. His simple request was that the Registrar exclude the cost order from the stay application but the Registrar declined to do so. No intervenors appeared at that time and accordingly the only effective opposition to the motion came from Horsefield's counsel, Mr. MacLean. His submissions were most helpful and the fact that the matter was fully argued made me more comfortable in making my decision to grant the stay.

[69] I think that Horsefield should receive his costs on a solicitor and client basis throughout.

[70] Similarly, I think the court and the administration of justice were well served by the two intervenors who presented arguments on both sides of this important constitutional case. I think that both should receive costs on a solicitor and client basis for this appeal and for any participation in the preparation of or cross-examination upon any affidavits that were prepared for the purposes of this appeal.

Fresh evidence

[71] I note in passing that there was a motion by the appellant to admit fresh evidence that made current the experience of law enforcement agencies in dealing with the new legislation. It was not necessary for my determination of this case and consequently I have not relied upon it.

Disposition

[72] Accordingly, the appeal is allowed, the judgment of Stong J. is set aside, except for the order as to the costs awarded to Horsefield. In its place an order is to go declaring that s. 48.3 of the HTA is intra vires the province under s. 92 of the Constitution Act, 1867 and that it is not in violation of s. 7 of the Charter. Notwithstanding the outcome, Horsefield and the two intervenors are entitled to their costs of the appeal on a solicitor and client basis.

Released: April 8, 1999

G.D. Finlayson J.A.

I agree

M.A. Catzman J.A.

I agree

Louise Charron J.A.