

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Selig, 1996 NSCA 187

Hallett, Matthews and Flinn, JJ.A.

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA
Appellant

- and -

BRIAN KENNETH SELIG
Respondent

) Alexander M. Cameron
) for the Appellant

) Michael V. Coyle
) for the Respondent

) Appeal Heard:
) October 1, 1996

) Judgment Delivered:
) October 29, 1996

THE COURT: Appeal dismissed with costs to the respondent in the amount of \$750 inclusive of imbursements per reasons for judgment of Flinn J.A.; Hallett and Matthews JJ.A. concurring.

FLINN, J.A.:

Introduction

The Registrar of Motor Vehicles (Registrar), pursuant to recent amendments to the **Motor Vehicle Act**, S.N.S. 1994-95, c. 12 (the **Act**) has the power to suspend, for three months, a person's driver's license where a peace officer, by reason of an analysis of the blood of that person, "has reason to believe" that the person was operating a motor vehicle while his blood/alcohol level exceeded .08.

These recent amendments are the subject matter of this appeal, and two issues are raised which are briefly described as follows:

1. After a three month period of suspension expired, but while unfulfilled conditions for reinstatement were outstanding, the respondent was acquitted of charges under s. 253(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (driving while over .08). Does the respondent's acquittal have any effect on the outstanding suspension? and
2. When a person's driver's license is suspended for three months pursuant to s. 279A of the **Act**, does the Registrar have statutory authority to impose requirements for reinstatement of the person's driver's license?

Relevant Legislation

It is appropriate to set out, here, the recent amendments to the **Act**, to the extent that they are relevant to this appeal.

Section 279A is the operative section. It provides that where, because of the results of a breathalyzer test, a peace officer has reason to believe that a

person is operating a motor vehicle while his blood alcohol level exceeds .08, the peace officer, acting on behalf of the Registrar, has the power to take possession of a person's driver's license, issue a temporary license for seven (7) days, and suspend the person's driver's license for three months (effective seven days later). To effect the suspension the peace officer serves on the person a Notice of Intention to Suspend and Order of Suspension.

The peace officer has similar power where the person refuses a breathalyzer test. As well, a different process ensues where the person does not have a valid driver's license, or has a driver's license from a jurisdiction other than Nova Scotia, or has a temporary license. Those provisions are not relevant to this appeal.

Section 279A, to the extent that it is relevant to this appeal, provides as follows:

"279A (1) Where

(a) a peace officer

(i) by reason of an analysis of the breath or blood of a person, has reason to believe that the person has consumed alcohol in such a quantity that the concentration thereof in the person's blood exceeds 80 milligrams of alcohol in 100 millilitres of blood, or

. and

(b) the occurrence is in relation to the operation of or having care or control of a motor vehicle as defined in the *Criminal Code* (Canada),

the peace officer on behalf of the Registrar shall

(c) where the person holds a valid driver's license issued pursuant to this Act to operate the motor vehicle,

(i) take possession of the person's driver's license and shall, subject to subsection (2), issue a temporary driver's license that expires seven days from the date of issue or on the expiry of the license seized by the officer, whichever is the earlier, and

(ii) suspend the person's driver's license by serving on the person a notice of intention to suspend and order of suspension effective seven days from the date of the notice and order;

.

(2) A peace officer who serves a notice and order pursuant to subsection (1) shall, without delay, forward to the Registrar

(a) the person's driver's license, if one has been surrendered;

(b) a copy of the temporary driver's license, if one has been issued;

(c) a copy of the completed notice and order;

(d) a report sworn or solemnly affirmed by the peace officer; and

(e) a copy of any certificate of analysis under section 258 of the *Criminal Code* (Canada) with respect to the person referred to in subsection (1).

(3) The notice of intention and order of suspension, temporary driver's license and report of the peace officer referred to in this Section shall be in the form, contain the information and be completed in the manner required by the Registrar.

(4) Where a person who holds a valid driver's license does not surrender it, the driver's license is nevertheless suspended.

(5) Unless otherwise ordered in a review pursuant to Section 279B, a driver's license is suspended pursuant to this Section for three months from the effective date of the suspension."

.....

Section 279B provides the person with an opportunity to have a review

of any suspension which is imposed under s. 279A. The review is conducted by the Registrar. The Registrar may sustain the order of suspension, or he may rescind it and return the person's driver's license.

Facts

On September 18th, 1995, following a motor vehicle accident at or near Nictaux, in the County of Annapolis, an investigation by the R.C.M. Police, and the administration of a breathalyzer test, the respondent was charged with failing the breathalyzer test (s. 253(b) of the **Criminal Code**) and with impaired driving (s. 253(a) of the **Criminal Code**). Pursuant to the provisions of s. 279A of the **Act**, the respondent's driver's licence was suspended for three months commencing one week later on September 25, 1995.

As mandated in s. 279A(c)(ii) the respondent was served with a notice and order of suspension on September 18th, 1995. The notice and order of suspension is a Form document. It contains information about the respondent. It contains the formal order of suspension of his driver's license for a period of three months, to commence September 25th, 1995. It also contains the temporary driver's license (for 7 days) issued under s. 279A(1)(c)(i).

Immediately below the portion of the document which orders the suspension the following wording appears:

"UPON TERMINATION OF THIS SUSPENSION, NO FURTHER LICENSE WILL BE ISSUED UNTIL YOU COMPLY WITH THE REINSTATEMENT REQUIREMENTS. (SEE REVERSE)"

On the reverse of the document the following appears:

"Reinstatement Requirements

- You are not eligible to operate a motor vehicle until your period of suspension has expired, you have made application for reinstatement of your driving privileges **and the Department has issued you a driver's license.**
- Applications for reinstatement may be obtained at any Registry of Motor Vehicles office. Completed applications must be submitted with a reinstatement fee of \$75.00 (cheque or money made payable to the Registry of Motor Vehicles).
- You will be advised prior to the end of your suspension if there will be additional reinstatement requirements. These could include an alcohol assessment by the Department of Health, a re-examination with this Department or an educational program on alcohol and driving."

Section 279A(3) provides that the notice of intention and order of suspension shall be "in the form, contain the information and be completed in the manner required by the Registrar"; however, whether there is statutory authority for the Registrar to impose the reinstatement requirements set out in that notice is an issue in this appeal and will be dealt with later in this opinion.

As he is entitled to, under s. 279B of the **Act**, the respondent requested the Registrar to review the suspension. On October 11, 1995, the Registrar, following a review, sustained the suspension.

The decision of the Registrar to sustain the suspension was not challenged, nor is it challenged at the hearing of this appeal. Likewise, the decision of the peace officer to issue the Notice of Intention to Suspend and Order of Suspension, with the exception of the review which the respondent requested, has not been challenged, nor is it challenged on this appeal.

On January 16th, 1996, the respondent appeared in Provincial Court to answer the charges under the **Criminal Code**. The Crown offered no evidence on

the charges and the charges were dismissed.

Following his acquittal, the respondent made attempts, through the Registrar's office, to have the three month suspension of his driver's license removed from his driving record. The Registrar refused. As well, the Registrar indicated to the respondent that there were reinstatement requirements to be fulfilled.

On March 28th, 1996, the respondent made application to a judge of the Supreme Court of Nova Scotia for an order "declaring the suspension of his driver's license null and void". In support of the application an affidavit of the respondent was filed which deposed to the sequence of events from the time his driver's license was initially suspended up to and including the date of his acquittal in Provincial Court. The respondent then deposes in his affidavit as follows:

"8. THAT since that time I have provided the Registry of Motor Vehicles with a copy of the Order of Dismissal and I have spoken to several officials of the Registry including Mr. James D. Vance, in an attempt to have the suspension of my driver's license removed from my driving record. Each time I have been refused and, indeed, the Registry maintains that, in order to get my license back, I must pay a "reinstatement fee" of \$75.00 and submit to an interview with a Driver Improvement Officer, and I am advised that the suspension will remain permanently on my Driving Abstract. A copy of my Driving Abstract as obtained from the Registry of Motor Vehicles is attached hereto and marked as Exhibit "H"."

Decision of the Chambers Judge

The Chambers judge did not grant the respondent the relief requested. He did not declare the suspension null and void, nor did he order that reference to the suspension be removed from the respondent's driving record. The Chambers

judge ordered that the suspension "be and is hereby terminated without conditions".

It appears that the Chambers judge came to this conclusion because he decided that the suspension, with conditions, could not stand in light of the acquittal on the criminal charge. He said, in the concluding words of his decision:

"The question which is put by the Applicant is, did the Legislature intend that a license suspension imposed upon a person suspected of impaired driving would continue after the acquittal of that person of the companion charge or of the charge which triggered the suspension? If it was the intention of the Legislature that such authority or such discretion was being given to the Registrar by that section, it is clearly not apparent within the terms of the section itself. Mr. Selig, having chosen to exercise his full rights with respect to the criminal charge, having proceeded through the Court process, and having been found not guilty of the charge by a Court of Law, it appears to me that it is subversive of the Courts and the authority that's vested in them to impose punishments or penalties on a person, on the basis of allegations which have not been able to be proved in a Court of Law. It is, in effect, punishment without a conviction. I cannot believe that the Legislature intended that that should be the result of the amendment which they made to the Motor Vehicle Act."

However, quite apart from the acquittal on the criminal charge, the three month suspension had long since expired (December 25, 1995), yet the Registrar was extending the suspension, beyond the three months, until such time as certain reinstatement requirements were fulfilled. The Chambers judge in his decision referred to the fact that the Registrar had no authority under the legislation to extend the period of suspension beyond the three months. He said:

"I read into the record the provisions of Section 259(A). I am asked, in the course of this application, to determine what it was that the Legislature determined to authorize when it passed that section, or approved that section. There are a number of words which pop out at a reader of the section. It is a "suspension", not a "revocation" of a driver's license. It is a time-limited suspension. There is no authority given under that specific section for the Registrar to extend the period of suspension beyond the time which is specified in the section.

.....this suspension took place under Section 279(A) and there is no suggestion that the Registrar is exercising any authority, other than that which is given to him, under Section 279(A)."

Grounds of Appeal

The Crown appeals the decision and Order of the Chambers judge. The grounds of appeal are:

1. THAT the Chambers judge erred in law in restoring the Respondent's driver's license;
2. THAT the Chambers judge erred in law in finding that the suspension of a driver's license pursuant to, *inter alia*, s. 279A of the *Motor Vehicle Act*, S.N.S. 1994-95, c. 12, determines upon the driver's acquittal on relevant charges under the *Criminal Code*.

Disposition

First Ground of Appeal

Consideration of the first ground of appeal, necessitates a review of the provisions of the **Act** to determine if the Registrar has the statutory authority to impose requirements for reinstatement, in addition to the three month suspension.

It is clear that the amendments to the **Act**, which are the subject of this appeal, make no reference to anything other than suspension. Section 279A(1)(c)(ii) gives the peace officer, on behalf of the Registrar, the authority to "suspend the person's driver's license". Section 279(5) provides that "a driver's license is suspended pursuant to this section for three months from the effective date of the suspension."

The **Act** makes no provision for that suspension continuing until such time

as requirements for reinstatement are fulfilled. Indeed, there is no provision for reinstatement at all.

Counsel for the Crown was asked, during the hearing of this appeal, to indicate the statutory authority for imposing requirements for reinstatement, following the suspension of a driver's license under s. 279A of the **Act**. Counsel referred to a **Regulation** entitled **Motor Vehicle Registry Service Fees** which provides, among many other items, the following:

"Application for restoration or reinstatement of driver's license or privilege of obtaining driver's license following a revocation or suspension other than under Section 279(1)(c) of Section 285(1) of the Motor Vehicle Act \$75.00"

Counsel also referred to s. 280 of the **Act** which provides as follows:

"280 (1) The Registrar by written notice may, from time to time, require the holder of a driver's license to furnish the Registrar, within ten days after the date of the notice, with information respecting the age of the person, his driving experience, his physical condition and such other matters relevant to his driving ability or his fitness to be licensed as the Registrar requires.

(2) The Registrar by written notice may require the holder of a driver's license to submit himself to examination or re-examination by an examiner designated by the Registrar within ten days after the date of the notice."

Since there is no direct reference to requirements for reinstatement, following suspension, under s. 279A, these references are, at best, ambiguous.

There are various provisions in the **Act** dealing with reinstatement of a driver's license that has been revoked.

"Alcohol rehabilitation program

67 (11) The Registrar may require that a person whose driver's license has been revoked for an alcohol related driving

offence participate in such alcohol rehabilitation program as may be prescribed by regulation made by the Governor in Council before he is entitled to reinstatement of his license.

Interview

(15) Notwithstanding subsections (11) to (14), in the case of a second or subsequent revocation of a driver's license or privilege of obtaining a driver's license for an alcohol related offence the applicant shall attend an interview with a person designated by the Nova Scotia Commission on Drug Dependency and that person shall give a report of the interview to the Registrar.

Reinstatement fee

68 An applicant for the restoration of a driver's license or privilege of obtaining a driver's license following a revocation for an alcohol related offence, as defined in Section 67, shall pay a reinstatement fee of one hundred dollars."

There are no similar provisions in the **Act** dealing with reinstatement, or restoration, of a driver's license which has been suspended.

The words "revocation", "cancellation" and "suspension" are used throughout the **Act** in reference to taking away one's driver's license. While the words "revocation" and "cancellation", as used in the **Act**, may be synonymous, the word "suspension" is not synonymous with either revocation or cancellation. This distinction was pointed out by McLellan, Co. Ct. J. in **R. v. MacPhee** (1970), 11 C.R.N.S. 123. He said at p. 128:

"I think it is clear that etymologically "suspend" and "revoke" have different meanings. According to the Shorter Oxford English Dictionary "suspend" means:

- '1. To debar, usually for a time, from the exercise of a function or enjoyment of a privilege;
- '2. To put a stop to, usually for a time; *esp.* to bring to a (temporary) stop; to intermit the use or exercise of, put in abeyance.'

The same authority gives a number of meanings to 'revoke', of which the following appears to be the most

applicable to its use here:

'4. To annul, repeal, rescind, cancel.'

That The Motor Vehicle Act makes a distinction between the two words is evident from a comparison of ss. 250 and 251. As above set forth, s. 250 deals with revocation by the Registrar, and automatically, on the happening of certain events, s. 251 permits the Registrar to suspend the license of any person (subs. (1)) under certain circumstances, and to suspend or revoke under certain other circumstances (subs. (3), (4), (5) and (7)). *Rex v. Whynacht*, 16 M.P.R. 267, 77 C.C.C. 1, [1942] 1 D.L.R. 238, a decision of the Nova Scotia Supreme Court *en banco* holds that a revocation under a predecessor section to the present s. 250(1) of The Motor Vehicle Act was a cancellation within the meaning of the section of the Code similar to the present s. 225(2). Thus, there is authority for equating the words 'revocation' and 'cancellation', but I am unaware of any authority holding that 'revocation' and 'suspension' are synonymous."

Obviously, then, the provisions of the **Act** relating to restoration or reinstatement of a driver's license which has been revoked do not apply where the license has only been suspended.

Since there is no clear statutory authority for doing so, the Registrar cannot impose requirements for reinstatement of the respondent's driver's license, which had been suspended under s. 279A of the **Act**.

The Chambers judge was, therefore, correct in, his ultimate conclusion, that the suspension should be terminated without conditions, because more than three months had passed from the date of the suspension under s. 279A of the **Act**, and there is no legislative authority for continuing that suspension pending the fulfilment of requirements for reinstatement.

That is sufficient to dispose of this appeal. However, since the Chambers judge appears to have come to his conclusion on the basis of his decision that the acquittal on the criminal charges, of itself, terminates the suspension, and since this

finding is the basis of the second ground of appeal, I will deal with that ground as well.

Second Ground of Appeal

Counsel for the Crown argues that the recent amendments to the **Act** are provincial legislation entirely separate and distinct from federal criminal law. He says in his factum:

"The fact that the two legislative schemes may give rise to apparently conflicting results, a criminal acquittal and an administrative suspension, or an administrative restoration of license and a criminal conviction, is irrelevant. That is simply a potential consequence of a federal constitution which permits federal and provincial legislation to separately govern the same conduct."

Counsel for the respondent argues in his factum:

"It is submitted that it is absurd that a man merely suspected of an offence should suffer an administrative penalty for it notwithstanding his acquittal on that very offence by a court of law."

In considering this matter it is important to recognize what is not in issue in this appeal. Counsel for the respondent concedes that the amendments to the **Act**, which are the subject of this appeal, represent valid provincial legislation. There is no constitutional challenge here. Likewise, there is no argument that the legislation violates the respondent's **Charter** rights. Further, as I have indicated previously in this opinion, the decision of the peace officer to suspend the respondent's driver's license (with the exception of the review of that decision) has not been challenged; nor has the decision of the Registrar, to sustain the suspension, been challenged.

For the purpose of this appeal, therefore, it can be said that the act of suspension of the respondent's driver's license for three months, and the act of

sustaining the suspension after review, are lawful acts, performed pursuant to valid provincial legislation.

In **White et al. v. Registrar of Motor Vehicles** (1996), 147 N.S.R. (2d) 259 (affirmed without reasons - N.S.C.A. May 27th, 1996) MacAdam J., in reviewing these amendments to the **Act**, for the purpose of determining whether the driver's **Charter** rights were violated, referred to the act of suspension and the act of review as administrative acts and not penal proceedings. He said at p. 281:

"...the administrative act of suspension and the Registrar's review are civil and not criminal matters."

The lawful act of the peace officer, in suspending the respondent's driver's license under s. 279A of the **Act**, does not suddenly become unlawful, or wrong, simply because the respondent was subsequently acquitted of charges under the Federal **Criminal Code** arising out of the same circumstances.

I agree with the submission of the Crown on this issue. In my opinion, and with respect, the Chambers judge was in error in deciding that the acquittal of the respondent, on the criminal charges, should, of itself, cause the suspension of the respondent's driver's license to be terminated, without conditions.

However, because of my conclusions on the first ground of appeal, the appeal should be dismissed. I would order the appellant to pay the respondent his costs of this appeal which I would fix at \$750, inclusive of disbursements.

Flinn J.A.

Concurred in:

Hallett J.A.

Matthews J.A.

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ATTORNEY GENERAL OF NOVA SCOTIA

Appellant

- and -

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Respondent

REASONS FOR
JUDGMENT BY:

FLINN, J.A.