SUPREME COURT OF NOVA SCOTIA

Citation: *Turner-Lienaux v. Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 292

Date: 20201021
Docket: Hfx No. 494797
Registry: Halifax

Between:

Karen Turner-Lienaux, of Bedford in the County of Halifax, Province of Nova Scotia

Applicant

v.

Kevin Mitchell, Registrar of Motor Vehicles for Nova Scotia and the Attorney General of Nova Scotia

Respondents

DECISION

Judge:	The Honourable Justice Scott C. Norton
Heard:	September 28, 29, and 30, 2020, in Halifax, Nova Scotia
Corrected Decision:	**The text of the original decision has been corrected according to the attached erratum dated November 6, 2020.**
Decision:	October 21, 2020
Counsel:	Charles Lienaux, for the Applicant
	Jack Townsend, for the Respondents

By the Court:

Introduction

[1] This decision responds to an Application in Court alleging that the respondents breached the applicant's rights under ss. 11(d) and (h) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"); committed the tort of misfeasance in public office; and that there has been a re-litigation of her criminal charges, contrary to the doctrines of *autrefois acquit*, *res judicata*, and abuse of process. The applicant seeks declaratory relief, compensatory damages, punitive damages and costs.

[2] The respondents say that the application should be dismissed, as Section 11 of the *Charter* does not apply to (and is not engaged by) administrative proceedings*;* *autrefois acquit* is a criminal plea, which is not available or relevant in civil or administrative proceedings; there was no re-litigation of the applicant's criminal charge; the respondents acted in compliance with their legal duties and powers; and there is no evidence that any of their actions were motivated by bad faith, malice, ill will, or a desire to harm the applicant. Rather, throughout their dealings with the applicant, they acted in good faith and in accordance with their understanding of their duties and powers. Accordingly, the applicant cannot satisfy either element of the test for misfeasance in public office.

[3] Both parties filed extensive briefs and books of authorities. The applicant's brief alone runs to 142 pages single spaced. The applicant has raised many arguments in support of the issues addressed by the pleadings. These arguments were often repetitive although made under separate headings. As a result, this decision is necessarily lengthy.

Background

The Registry of Motor Vehicles

[4] The issuance, suspension, and revocation of drivers' licences in Nova Scotia is regulated under the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 (the "*MVA*"), as well as the regulations made under that statute. The Registry of Motor Vehicles ("RMV") administers this regulatory regime, with many of the RMV's day-to-day functions being carried out through Access Nova Scotia.

[5] The head of the RMV is the Registrar, appointed under s. 3 of the *MVA*. The respondent Mr. Mitchell has been the Registrar since 2017.

[6] Stefanie Turner is one of two Deputy Registrars at the RMV's Head Office in Halifax. She has been a Deputy Registrar since October 2015. As set out in s. 2(ba) of the *MVA*, a reference to the Registrar in the statute includes the Deputy Registrar. Accordingly, a Deputy Registrar (like Ms. Turner) has the same authority as the Registrar under the *MVA*.

Factual Events Leading to Suspension Order

[7] The applicant was arrested on the evening of May 11, 2018. A report prepared by the arresting officer, Cst. Brent Woodworth of the Halifax Regional Police, provides the following description of the events leading up to the applicant's arrest:

> 2018-05-11
>
> 22:42 – Rosalee SAMPSON reported Remarks: WHT INFINITI OR LEXUS ALL OVER THE ROAD CROSSING OVER THE LANES… HITTING SIDE OF THE ROAD… CALLER CANNOT SEE PLATE
>
> SAMPSON was following the white Infinity on the Bedford Hwy and was headed towards Bedford. Upon hearing the call I travelled down Larry Uteck Blvd in the direction of the Bedford Hwy.
>
> 22:43 – I observed Cst. O'BRIEN following behind the white Infinity. The white Infinity turned left from the Bedford Hwy onto Larry Uteck Blvd and Cst. O'BRIEN activated his emergency equipment and pulled the vehicle over on Larry Uteck Blvd about 200-300 meters from the Bedford Hwy. I attended the location of the traffic stop. I could now see that the white Infinity had a Nova Scotia license plate # CAN 140.
>
> As Cst. O'BRIEN and I approached the drivers side of the vehicle I noted that there were 2 occupants; a male passenger and a female driver.
>
> Cst. O'BRIEN started speaking with the female driver. He asked her for her drivers license. The female (later identified via Nova Scotia Drivers License as Karen TURNER-LIENAUX) told Cst. O'BRIEN that she thought her drivers license was in the back seat of the vehicle. Karen asked Cst. O'BRIEN if she could exit the vehicle so that she could get her license. Cst. O'BRIEN told Karen that this would be fine. Karen exited the car and she had to keep both hands on the car while she walked towards the back seat to keep her balance. I saw Karen open up the back seat of the car and open her purse. Inside of her purse I could see a bottle of wine, but I could not see from where I was standing if there was any liquid inside of the bottle.
>
> Karen took her large black wallet out of her purse. She then turned and faced Cst. O'BRIEN and myself. I could smell liquor coming directly from Karen's breath

> while she spoke. When Karen opened her wallet I could see her drivers license in plain sight in one of the clear card holders. Despite this, Karen ran her hand up and down the card holders several times and then looked in the direction of Cst. O'BRIEN and myself. I pointed to the card holder where Karen's license was. After pointing this out, Karen then spent what I approximated to be over one minute trying to get her license out of the card holder before she was successful in doing so.
>
> While Karen was in the process of trying to get her card out, I asked her for her full name. It took Karen 3 attempts before she was able to say her name correctly. I noted that her speech was slurred when she spoke.

[8] Cst. Woodworth then arrested the applicant and took her to the police station, where she was given a breathalyzer test. The first sample of her breath, taken at 11:58 p.m. on May 11, registered a reading of 180 mg of alcohol in 100 ml of blood. A second sample, taken at 12:21 a.m. on May 12, registered a reading of 170 mg of alcohol in 100 ml of blood.

[9] At 12:30 a.m. on May 12, 2018, Cst. Woodworth served the applicant with a Notice and Order of Suspension/Vehicle Detainment ("Suspension Order"). The Notice and Order contains in Section A, "Driver Information" including the Nova Scotia Licence Master Number, Name, Address, Telephone Number, Date of Birth and "Vehicle Information" including Plate Number, Make/Model, VIN#, Vehicle Owner, and Vehicle Owner Address. All of this information was completed on the form. Section A also contains information as to the "Location of Stop: Larry Uteck Blvd/Bedford Hwy, City/Town: Halifax, County: Halifax" and "This Notice is effective from: 2018-05-12 @00:30 hrs (the 'Effective Date of Notice')".

[10] Section C of the Notice indicated that the basis for the suspension was s. 279A(1)(a)(i) of the *MVA* ("Blood Alcohol Exceeds 80 mg"). It also explained that the applicant's "valid Nova Scotia driver's license is suspended for a period of 3 months, effective 7 days from the Effective Date of Notice" (listed as "2018-05-02 @ 00:30 hrs"). It contained the words "See Reverse for Details".

[11] The reverse side of the standard Notice and Order of Suspension/Vehicle Detainment form that was served on the applicant also included the following information:

> …
>
> To the extent that any of the provisions on this page conflict with the provisions in the Motor Vehicle Act, the latter shall prevail.
>
> …

> A peace officer, who has reason to believe that a person who upon analysis has a blood alcohol level in excess of 80 milligrams of alcohol in 100 millilitres of blood… on behalf of the Registrar shall take possession of and suspend the person's license… for a period of 3 months
>
> **RE-INSTATEMENT REQUIREMENTS**
>
> Attend and obtain a satisfactory report from the Alcohol Assessment Program with the division of the District Health Authority. The fee for the Alcohol Assessment Program can be paid at any Access Nova Scotia/RMV office in Nova Scotia. You must produce payment receipt before an appointment can be booked with Addiction/Drug Dependency Services. It is your responsibility to contact the District Health Authority's regional office nearest you to make arrangements for attendance.
>
> Once the Assessment Program has been completed, you may make application for re-instatement of your driving privileges at any Access Nova Scotia/RMV office.
>
> **HEARING REVIEW PROCESS FOR NOTICE AND ORDER OF SUSPENSION**
>
> A hearing for an Administrative Suspension Review can be made either in writing or in person. The form titled Application for Administrative Suspension Review can be obtained from any Access Nova Scotia Centre/RMV office in Nova Scotia. The Registrar will only consider relevant information concerning the care or control of the motor vehicle, blood alcohol content readings, and the failure or refusal to supply a breath or blood sample. If you wish to file an application for review, or require further information on the review process, please contact a Driver Competency Representative at 1-902-424-4511.
>
> [Underline added]

[12] The applicant stipulates in her brief (para. 83) that the question of whether the Suspension Order was lawfully issued to the applicant by Cst. Woodworth is not in issue in this proceeding.

[13] Cst. Woodworth also charged the applicant with criminal offences under ss. 253(1)(a) and (b) of the *Criminal Code*. Judge Sakalauskas presided over the trial of these offences on May 8 and 14, 2019. An Agreed Statement of Facts was tendered in advance of the trial, which included the following information:

> 11. The Accused admits that she was operating her motor vehicle in an impaired state between approximately 10:40pm and 10:49pm on May 11th, 2018. At 10:40pm, the Accused was observed by a civilian driver stopped at the lights located on the corner of Windsor Street and the Bedford Highway in Halifax, N.S. The civilian driver was behind the Accused and observed that the tail lights on the Accused's vehicle were not lit and that the vehicle was partly in the lane to the right of its intended lane. The Accused's car was in the lane to turn left onto the Bedford Highway from Windsor Street. As the light turned green the Accused's vehicle

> proceeded, still occupying part of both lanes such that a bus driver had to move out of its lane slightly to avoid contact with the Accused's car. The civilian driver continued behind the Accused's vehicle while travelling on the Bedford Highway and observed it to cross over the yellow line, as well as the white lines in the lane of travel. The Accused was travelling approximately 45-50km/hour. The civilian witness obtained the license plate and phoned 911. The Accused ended up turning left onto Larry Uteck Blvd, approximately 6km away from the first observed location, and was shortly thereafter stopped by Halifax Regional Police and arrested. The Accused demonstrated significant signs of intoxication by alcohol including slurred speech, poor balance, confusion, and the smell of alcohol coming from her breath.
>
> …
>
> 15. The Accused admits all the essential elements of both offences for which she is charged, 253(1)(a) and 253(1)(b), save and except for the mental element (mens rea) requirement for each of these offences.
>
> 16. In relation to the charge of 253(1)(b) charge (sic), the Accused provided two samples of her breath pursuant to a valid breath demand with the samples being 170mg and 180mg. The Accused admits her blood alcohol content was 170mg in relation to this offence.

[14] The applicant's defence at trial was that she did not have the *mens rea* to commit offences under ss. 253(1)(a) and (b), due to an interaction between alcohol and prescription medication.

[15] Judge Sakalauskas delivered an oral decision on August 26, 2019 acquitting the applicant, on the basis that she was left in a reasonable doubt as to whether the applicant had the requisite *mens rea* to commit the criminal offences in question. Judge Sakalauskas concluded her reasons with the following comments:

> …Ms. Turner-Lienaux operated on the understanding that she could partake … could consume alcohol in moderation. And that's what she did that night, as she usually did. While it could be tempting to find she was reckless, taking the medications and the point there is taking them quickly after taking … taking alcohol quickly on the heels of late medication. That's where the Crown focused their argument on this. I can't do that in this situation on everything before me. Ms. Turner-Lienaux had never had adverse side effects before; she had never been directly warned at the pharmacy about alcohol. If there was warnings and an insert or other material, I accept that she didn't remember that at the time. It certainly wasn't highlighted by stickers on the bottle, not that that necessarily would absolve an accused of responsibility in this situation. While it might have been more prudent to pause and consider the wine, I cannot, on all the evidence before me, find it was reckless and I do have reasonable doubt on the *mens rea.*
>
> So Ms. Turner-Lienaux is not guilty. I do have reasonable doubt on *mens rea*.

The Applicant's Interactions with the Registrar

[16] On September 3, 2019 (a few days after Judge Sakalauskas handed down her decision), the applicant attended at the Access Nova Scotia office in Bayers Lake, in an effort to renew her driver's license. Access Nova Scotia staff advised the applicant that she would either have to complete an alcohol addiction rehabilitation program and pay a reinstatement fee or proceed with a review under s. 279B.

[17] Mr. Mitchell and Ms. Turner were not present for this interaction between the applicant and Access Nova Scotia staff, and they were not involved in this interaction or in directing staff as to how they should respond to the applicant's inquiries.

[18] The applicant elected to proceed with a review under s. 279B. She completed and signed a standard Application for Administrative Suspension Review form. The reverse side of the form provided the following information regarding the issues that would be determined on the application:

> PLEASE READ THIS INFORMATION BEFORE COMPLETING APPLICATION
>
> ISSUES TO BE DETERMINED
>
> The (sole issue) before the Department during a review of an administrative suspension under Section 279B of the Motor Vehicle Act is whether
>
> You operated or had care or control of a motor vehicle with an alcohol concentration which exceeded 80 milligrams of alcohol in 100 millilitres of blood or,
>
> You operated or had care or control of a motor vehicle and failed or refused to comply with a demand made by a peace officer to submit to testing in order to determine whether the concentration of alcohol in your blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.
>
> **Please refer to the Motor Vehicle Act for exact wording of the issues to be determined**.

[19] The applicant provided the following information on the front page of the form, in response to the prompt "Describe any circumstances relating to the taking of the breathalyzer test or sample of blood, the circumstances relating to the incident, which you consider relevant for the purpose of this review":

> Excessive alcohol consumption/amnesia were caused by prescription drug interaction with small amount of alcohol causing temporary blackout. One time event.

[20] She also provided the following information in response to the prompt, "Describe any additional circumstances or reasons why you believe the suspension of your driving privileges should be rescinded and your driving privileges should be reinstated":

> Perfect driving record for 38 years. No warning given to patient about adverse effect of alcohol on prescription drugs.*
>
> *Karen found not guilty for medical reasons by Judge Amy Sakalauskas Aug. 26/19

[21] Later that day, the applicant's counsel (who is also the applicant's husband) emailed Bruce Wambolt, a Driver Competency Coordinator with the Department of Transportation and Infrastructure Renewal. In this email, counsel argued (*inter alia*) that:

> On August 26, 2019 Judge Amy Sakalauskas of the Provincial Court found Mrs. Turner-Lienaux not guilty of the charges made by the Police officer under s. 279(A)(1)(a)(i) (sic) of the *MVA*. Therefore as a matter of law the administrative suspension issued by the officer is vacated and is no longer of any force or effect.
>
> S. 279B does not confer any authority on your Registrar to review a not guilty decision of a Provincial Court Judge. The Judge's decision automatically renders charges made by the Police officer null and void. The legal effect of the judge's not guilty decision is to erase the charges under s. 278(A)(1)(a)(i) by the Police officer. Therefore that suspension has been determined invalid as a point of law and your Registrar has no legal authority to revisit that legal issue.

[22] The applicant's counsel followed this email with a September 4, 2019 letter to Mr. Mitchell, stating:

> As a matter of law when the charges against my wife were dismissed by the Court the legal basis of the suspension of her licence ceased to operate. Since my wife was not convicted of the charges against her, her licence was never revoked. Accordingly there is no legal requirement for her licence to be reinstated.
>
> As you will appreciate the procedure directed to be followed by DMV staff has no application to the facts of my wife's case since it applies to a review of administrative suspensions. It does not provide for review of Court decisions where a person is acquitted.
>
> Therefore the only procedure that has to be completed by DMV is to have her licence "renewed" since it expired during the suspension period.
>
> In the circumstances I am writing to request that you direct DMV staff that the s. 279B review process directed by them is not required in this case. Accordingly, I ask that you direct DMV staff to issue a renewal of my wife's driver's licence as soon as it is expedient to sort out this matter with staff and let us know when we can attend to have the licence renewed.

[23] Prior to receiving this correspondence, Mr. Mitchell and Ms. Turner had had no knowledge of the applicant or her counsel. They had never met or spoken, and had had no dealings or interactions, with either of them.

[24] Upon reviewing this correspondence, Mr. Mitchell and Ms. Turner formed the impression that the applicant's counsel misunderstood the effect of the applicant's acquittal, as well as the powers of the Registrar under the *MVA* regarding a s. 279A suspension. According to their affidavit evidence, they formed this impression in light of:

1. Their understanding of the Court of Appeal's decision in *Selig*, which was that being acquitted of related criminal charges does not terminate or invalidate an administrative suspension under s. 279A.
2. Their reading of the *MVA* as a whole, which was that the only way to rescind a suspension under s. 279A is on a review under s. 279B (or, if that review is unsuccessful, on a further appeal to the *MVA*B under s. 279BA).
3. Their interpretation of s. 279A(7), which was that a person whose license is the subject of an un-rescinded s. 279A suspension must apply to have their license reinstated.
4. Their interpretation of s. 279A(8), which was that the Registrar may not grant an application for reinstatement unless the driver has satisfied any and all applicable requirements for reinstatement under the *MVA*.

[25] Their interpretation of s. 67(11), which was that the Registrar may not grant an application for reinstatement unless the driver participates in the DWI Program, and that the Registrar has no discretion to waive this requirement.

[26] Mr. Mitchell and Ms. Turner decided that Ms. Turner would prepare a response to the correspondence, but that Mr. Mitchell would sign the response, since the September 4, 2019 letter was addressed to him. Accordingly, Ms. Turner prepared the following response, which was approved by Mr. Mitchell and sent to the applicant's counsel on September 17, 2019:

> I am responding to your letter dated September 4th, 2019, and your email to Bruce Wambolt dated September 3th (sic), 2019, respecting the process for a s. 279B administrative review.
>
> Ms. Turner-Lienaux's administrative suspension proceedings are separate from her criminal law proceedings. Ms. Turner-Lienaux was not criminally charged under the Motor Vehicle Act. She was issued an Order of Suspension pursuant to s. 279A(1)(a)(i) of the *MVA*. The impaired driving charges were laid under the

> Criminal Code (Canada). The judge rendered a decision on the criminal matter, not on the Order of Suspension under the Motor Vehicle Act. These are two distinct processes. The issuance of suspensions is consistent with the principles of administrative law and the public safety purposes of the Motor Vehicle Act.
>
> The *MVA* contains specific restoration requirements associated with the suspension under s. 279A. There are two options. The first is to complete the Driving While Impaired (DWI) program offered by the Nova Scotia Health Authority. Section 67(11) of the *MVA* states, "The Registrar shall require that a person whose driver's license or privilege of obtaining a driver's license has been revoked for an alcohol related driving offence or suspended pursuant to Section 279A 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."
>
> By way of receipt of the Application for Administrative Suspension Review, it appears you wish to proceed with the second option of a review of the suspension pursuant to s. 279B of the *MVA*. If successful, completion of the DWI program is not required.

[27] The applicant's counsel replied by way of a September 23, 2019 facsimile. Although it was addressed to Mr. Mitchell, it was received by Ms. Turner, as it was sent to her facsimile number within the RMV.

[28] Further, Mr. Mitchell was out of the office at the time due to an illness in his family. Accordingly, and as s. 279B applications fell within her area of responsibility within the RMV, Ms. Turner attended to preparing a response to this correspondence.

[29] In his September 23, 2019 correspondence, the applicant's counsel advised that he was raising four "preliminary" legal objections "to the Review process which you propose to perform pursuant to s. 279B of the ***MVA***": issue estoppel, *autrefois acquit*; s. 11(h) of the Charter; and "that s. 279B(7) unlawfully fetters your quasi-judicial discretion to carry out this Review in accordance with the principles of natural justice". He phrased his objection under s.11(h) of the *Charter* in the following terms:

> S. 11(h) of the **Charter** provides as follows:
>
> > 11. Any person charged with an offence has the right
> >
> > > (h) if finally acquitted of the offence, not to be tried … or punished for it again;
>
> As shown above the impaired driving legal issue which the Registrar proposes to consider in my wife's 279B 'appeal' is identical to the impaired driving legal issue she was acquitted of by Judge Sakalauskas.
>
> This ***MVA*** 279B Review violates s. 11(h) of the Charter in two ways:

> (i) as stated in s. 278B(7) it proposes to retry the impaired driving legal issue defined by the Criminal Code dismissed by Judge Sakalauskas; and
>
> (ii) in addition to the 16 month administrative suspension imposed on my wife it proposes to add the further punishments of taking a rehabilitation course which costs approximately $500 and to charge her a penalty fee to have her licence 'reinstated' instead of allowing her to just pay the usual fee to have her licence 'renewed'.
>
> The Supreme Court of Canada in **Van Rassel** confirmed that s. 11(h) of the Charter is violated in circumstances where a party has been acquitted of an offence which is the same offence which is proposed to be prosecuted by another authority.
>
> S. 11(h) of the **Charter** therefore bars your office from conducting this Review, or imposing further penalties upon my wife arising from the impaired driving incident of May 11, 2018. This is because my wife has already been acquitted by Judge Sakalauskas of the impaired driving legal issue defined by the **Criminal Code** proposed to be ruled upon in this Review.

[30] For context, Section 10 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, provides as follows:

> Notice to Attorney General
>
> 10 (1) In this Section,
>
> (a) "court" means the Supreme Court of Nova Scotia, the Family Court, a judge of either of those courts, a judge of the provincial court or an administrative tribunal;
>
> (b) "law" includes an Act of the Parliament of Canada or of the Legislature and includes a proclamation, regulation or order in council made pursuant to any such Act;
>
> …
>
> (d) "remedy" means a remedy provided pursuant to section 24 of the Canadian Charter of Rights and Freedoms but does not include a remedy of exclusion of evidence or a remedy consequential on exclusion of evidence.
>
> (2) Where, in a court in the Province, in a proceeding other than a proceeding where the Attorney General for the Province is a party, is represented by counsel or has appointed counsel,
>
> (a) the constitutional validity or constitutional applicability of any law is brought into question; or
>
> (b) an application is made to obtain a remedy, the court shall not adjudge the law to be invalid nor shall it grant the remedy until after notice is served on the Attorney General in accordance with this Section.

[31] Ms. Turner read the applicant's s. 11(h) argument as questioning the constitutional validity or applicability of s. 279B, or as raising a request for a remedy under the *Charter*. Accordingly, she determined that the applicant should give notice of that argument to the Attorney General under the *Constitutional Questions Act*. She therefore prepared the following response to the above-mentioned September 23, 2019 correspondence:

> I am in receipt of your correspondence dated September 23, 2019.
>
> In your correspondence you raise a question regarding my jurisdiction to hear the suspension review and cite s. 11(h) of the Canadian Charter of Rights and Freedoms. Please consult the Nova Scotia Constitutional Questions Act and address the issue of giving notice to the Nova Scotia Attorney General.
>
> Please copy me on any such documentation.
>
> I will address the other matters you raise in due course.

[32] This response, dated September 27, 2019, was prepared under Mr. Mitchell's letterhead. Given Mr. Mitchell's absence from the office, Ms. Turner did not ask him to approve or sign the response before she sent it to the applicant's counsel. She instead used Mr. Mitchell's signature stamp to sign the response on his behalf.

[33] The applicant's counsel responded by way of an October 2, 2019 facsimile, which read as follows:

> This is to acknowledge receipt of your letter dated September 27 in which you make reference to the **Constitutional Questions Act**. I assume that you have not read the **Act** and are relying on someone in the AG's legal department for advice. If you take **a minute** to read the **Act** you will see clearly that it has no application to administrative matters such as this in-house review before you. There is ample authority in my letter nullifying your authority in this case without touching upon s. 11(h). As stated in my letter it is subversive of the court process.
>
> This is also to put you on notice that your action of delaying the renewal of my wife's driver's licence is tortious and therefore actionable in damages. This is because the departmental procedure which you have argued provides you with lawful authority, in the facts of this case, is unlawful. That is because s. 279B(7) of the ***MVA*** ceases to be enforceable in any case where an Applicant has already been tried and acquitted by a court of law of a charge of impaired driving "as defined in the **Criminal Code**" – which section of the ***MVA*** you have argued **wrongly** vests you with authority to retry that charge pursuant to the ***MVA***.
>
> This is further to give you notice that failure to renew my wife's driver's licence is causing us monetary damages because I have to driver her places which takes up time which I could use to earn income. Therefore if renewal of her licence is not forthcoming without any further **undue** delay my wife will seeks (sic) damages

> **from you** in Small Claims Court of $50.00 per day for each day renewal of her licence is unlawfully withheld by you.
>
> [Emphasis in original.]

[34] Although this correspondence was addressed to Mr. Mitchell, it came through Ms. Turner's facsimile number within the RMV. Further, as Mr. Mitchell was still out of the office due to a family illness, Ms. Turner attended to preparing a response to the correspondence.

[35] Ms. Turner re-reviewed the *Constitutional Questions Act*, and disagreed with counsel's suggestion that it does not apply to administrative review proceedings under s. 279B, as a "court" is defined for purposes of Section 10 of the Act as including an "administrative tribunal", and as she considered the Registrar or Deputy Registrar to be an "administrative tribunal" when adjudicating a s. 279B application.

[36] Further, Ms. Turner was confused by counsel's suggestion that "(t)here is ample authority in my letter nullifying your authority in this case without touching upon s. 11(h)." Specifically, she was not certain whether this was intended to convey that the applicant was withdrawing her objection under s. 11(h) of the *Charter*, or whether she continued to intend to advance that argument.

[37] Ms. Turner therefore prepared the following response to counsel's October 2 correspondence:

> I am in receipt of your correspondence dated October 2, 2019.
>
> It is unclear whether you are withdrawing your constitutional challenge. If you intend to rely on it, notice to the Attorney General is required pursuant to the Nova Scotia Constitutional Questions Act. Please see section 10 of the Act.
>
> If you are no longer advancing arguments about the constitutionality of the Motor Vehicle Act, I will proceed with the application for a written administrative suspension review. Otherwise, I must wait for at least 14 days from the date your notice is given to the Attorney General, pursuant to the Constitutional Questions Act, to hold the hearing, be it by paper or in person.
>
> Please advise how you wish to proceed.

[38] As counsel's October 2 correspondence was addressed to Mr. Mitchell, Ms. Turner prepared the response under Mr. Mitchell's letterhead. She used his signature stamp and sent the response to the applicant's counsel on October 15, 2019.

[39] Shortly after Ms. Turner sent this response, the RMV received further correspondence from the applicant's counsel, dated October 15, 2019. This correspondence, directed to Mr. Mitchell, read in part as follows:

> This follows my letter to you dated October 2, 2019.
>
> I am writing on the record to document that as of this date my wife is still being prevented by you from renewing her Driver's Licence. Attached is a Statement of Claim to be filed with the Small Claims Court which I have prepared for a damages claim against you for your illegal actions in this matter.

[40] This was followed by further correspondence from the applicant's counsel, dated October 21, 2019. Although it was addressed to Mr. Mitchell, it was received through Ms. Turner's facsimile number at the RMV. As Mr. Mitchell was still out of the office due to an illness (and, ultimately, a death) in his family, and as s. 279B applications fall within Ms. Turner's area of responsibility at the RMV, she attended to preparing a response.

[41] Ms. Turner reviewed counsel's October 2, 2019 correspondence, and noted that counsel agreed, for the sole purpose of the applicant's s. 279B review application, to withdraw his s. 11(h) *Charter* objection. Accordingly, Ms. Turner was satisfied that there was no longer any need for the applicant to provide notice to the Attorney General under s. 10 of the *Constitutional Questions Act* before the Registrar or Deputy Registrar heard her application.

[42] Ms. Turner also noted that the applicant's counsel stated that, "**before you proceed with any review**, I hereby request that you consider and make a quasi-judicial determination regarding the preliminary objections which I submitted to you in writing on September 23."

[43] Ms. Turner considered this issue, and ultimately determined that the Registrar or Deputy Registrar did not need to decide the applicant's preliminary objections before adjudicating the merits of her s. 279B application, but could instead address them at the same time as the application itself. The following considerations led Ms. Turner to this conclusion:

1. Her understanding that subject to the provisions of the *MVA* and the bounds of natural justice and administrative fairness, the Registrar or Deputy Registrar retains discretion to set the process and procedure that they will follow in adjudicating a s. 279B application.
2. Her understanding that the *MVA* does not contain any provisions that require the Registrar or Deputy Registrar to decide a preliminary objection before adjudicating a s. 279B application on its merits.
3. Her view that it was more efficient for the Registrar or Deputy Registrar to consider the applicant's preliminary objections at the same time as the merits of her application.

4. Her view that fairness could be achieved by giving the applicant an opportunity to make written submissions on her preliminary objections before her s. 279B application was adjudicated, particularly as she had requested that her application proceed by way of a written review as opposed to an oral hearing.

[44] Accordingly, Ms. Turner prepared the following response, dated October 28, 2019:

> I have your letter of October 21, 2019 in which you confirm you are withdrawing your Charter-based challenge to the Motor Vehicle Act and to my jurisdiction under that statute. I am therefore no longer required to wait for you to comply with the requirement in the Nova Scotia Constitutional Questions Act that the Attorney General for Nova Scotia be given 14 days' notice of the challenge. As such, we may proceed to set a review date.
>
> I am not required to hear what you term as "pre-liminary objections" before the hearing itself. As an administrative decision-maker, I set my own process and procedure, within the bounds of natural justice and administrative fairness. I will hear all matters you wish to address on the date of the review.
>
> You have chosen a paper hearing on behalf of your client. Please submit all written materials you wish to be considered in the above file. The date of the review will be November 12, 2019 and you have until that date to submit your materials.

[45] As counsel's October 21, 2019 correspondence was addressed to Mr. Mitchell, Ms. Turner prepared this response under his name. Again, as Mr. Mitchell was out of the office due to an illness (and ultimately a death) in his family, she signed the response on his behalf.

[46] On November 7, 2019, Ms. Turner received additional submissions and materials from the applicant's counsel in support of her s. 279B application.

[47] Ms. Turner assumed responsibility for deciding the applicant's application, as she had availability to do so, and as doing so fell within her area of responsibility at the RMV. Mr. Mitchell did not direct or order that Ms. Turner decide the applicant's application.

[48] As Ms. Turner reviewed the applicant's submissions (including her arguments that she was bound by Judge Sakalauskas's decision and that the s. 279B review could amount to a re-trial of her criminal charges), she continued to be of the view that these submissions were based upon a misunderstanding of the Registrar or Deputy Registrar's role and powers. Ms. Turner based this view upon, *inter alia*:

1. Her understanding that the processes under ss. 279A and 279B are civil, administrative matters, separate and distinct from any related criminal proceedings.

2. Her understanding that being acquitted of related criminal charges does not rescind a suspension under s. 279A, and that the only way to rescind the suspension is by a review under s. 279B (or, if that review is unsuccessful, a further appeal to the *MVA*B under s. 279BA).

3. Her interpretation of s. 279B(7)(a), which was that the sole issue before her was (a) whether the applicant operated or had care or control of a motor vehicle, as defined in the *Criminal Code*, and (b) whether the applicant did do while having a blood alcohol concentration in excess of 80 mg of alcohol in 100 ml of blood; and that whether the applicant had the *mens rea* to commit a criminal offence under s. 253 of the Criminal Code was not an issue that should be considered on a s. 279B application.

4. Her interpretation of s. 279B(9), which was that where the evidence before the Registrar or Deputy Registrar supports an affirmative determination on the sole issue under s. 279B(7)(a), the Registrar or Deputy Registrar must sustain the suspension.

[49] Ms. Turner also noted that there did not appear to be any dispute that the applicant had operated or had care or control of a motor vehicle at the relevant time, and that her blood alcohol concentration at that time was at least 170 mg of alcohol in 100 ml of blood. Accordingly, in light of all the evidence, as well as her understanding and interpretation of s. 279B, she determined that the sole issue under s. 279B(7)(a) had to be answered in the affirmative, and that she was required to sustain the applicant's suspension.

The Registrar's Decision

[50] Ms. Turner prepared written reasons detailing her decision, which provided in part as follows:

> [28] This proceeding is an administrative hearing in which the standard of proof is based on a balance of probabilities. It is not a criminal proceeding. I am not bound by decisions of a criminal court regarding the guilt or innocence of an individual based on the criminal standard.
>
> The review process does not operate under the Criminal Code (Canada) and determining mens rea is not considered in my statutory task under s.279B of the *MVA*. Whether the applicant subjectively intended to operate while in excess of 80

mg% is not an issue for me to consider. My task is to determine, as a finding of fact, whether the applicant operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) and, if so, having consumed alcohol in such a quantity that the concentration thereof in the person's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

The applicant's interpretation of s. 67(11) is incorrect.

With respect, the applicant has conflated the criminal and administrative proceedings; the criminal and administrative standards of proof; and the impact of the decision in the Provincial Court on this proceeding.

[29] On the matter of operation or care or control, I am satisfied the applicant operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) based on:

> (a) Cst. W's evidence that when Cst. O and Cst. W approached the driver's side of the vehicle, Cst. W noted the applicant as the female driver; and
>
> (b) Item 11 in the Agreed Statement of Facts where the applicant admits she was operating her motor vehicle in an impaired state between approximately 10:40 pm and 10:49 pm on May 11, 2018;

[30] On the matter of her BAC, I am satisfied, on a balance of probabilities, that the applicant's blood alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood based on the Intox EC/IR II Subject Test results and the Certificate of a Qualified Technician signed by Daniel M Roache on May 12, 2018 indicating the applicant had a blood alcohol concentration of 180 milligrams of alcohol in 100 millilitres of blood at 23:58 hours and 170 milligrams of alcohol in 100 millilitres of blood at 00:21 hours, respectively.

[31] I reviewed the letter dated March 27, 2019 from Greg Johnstone of PharmaTox Inc to Charles Lienaux. The letter states it is an addendum to a previous letter dated Oct 25, 2019. The applicant submitted the letter as evidence to support involuntary impairment and therefore a lack of intent. As stated above, determining mens rea is not considered in my statutory task and as a result, I did not give this letter any weight.

[32] Based on the evidence before me, I am satisfied, on a balance of probabilities the applicant operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

DECISION

[33] I hereby uphold the driver's license suspension.

Mr. Mitchell did not influence (or attempt to influence) Ms. Turner's decision in any way. Rather, Ms. Turner's decision was based upon how she viewed the evidence that was before her, in light of her understanding and interpretation of the *MVA*.

> Ms. Turner sent her written decision to the applicant by letter dated November 18, 2019, in which she noted as follows:
>
> I am responding to you with the decision of the Administrative Suspension Review (decision attached).
>
> In accordance with Section 279B of the Motor Vehicle Act, having reached an affirmative determination on the issue before me, the order of suspension is sustained and remains in full force and effect.
>
> Please note that your suspension period expired on August 19, 2018. There are restoration requirements to be met before your privileges to obtain a driver's license can be reinstated. You must attend an alcohol assessment/intervention program with Addiction Services, a division of the Nova Scotia Health Authority. The fee for the assessment must be paid at any Access Nova Scotia offering Registry of Motor Vehicle services or any full service Registry of Motor Vehicles Office before you can schedule an appointment with addiction services in your area. A list of Addiction Services contact numbers will be given to you when you pay your assessment fee.
>
> The department must receive a report from Addiction Services concerning your assessment before we can consider reinstatement of your driver's license. The fee for restoration of your driving privileges can be paid at the same location that you paid for the alcohol assessment program once you are eligible.
>
> If you would like to appeal this decision, you may apply for a review with the Motor Vehicle Appeal Board within thirty days of the date of this correspondence. For further information on the appeal process, please contact the Motor Vehicle Appeal Board at **(902) 424-4256** or toll free at **1-855-424-4256.** You may also visit the website at:
>
> accessns.ca/driver/motor-vehicle-appeal-board.asp
>
> Should you require more information on the procedures to follow for reinstatement of your driver's license, you can contact the Driver Compliance Section at **(902) 424-5587**, or toll free at **1-800-898-7668**. [Emphasis in original]

[51] The applicant's counsel responded to the receipt of the decision by facsimile correspondence dated December 2, 2019, in which he stated as follows:

> This will acknowledge receipt of the decision issued by your Department on November 18, 2019 finding my wife guilty of impaired driving as defined s. 253(1)(b) of the Criminal Code.
>
> This is to advise that in the near future I shall be filing documents for an Application in Court in the Supreme Court seeking inter alia the following relief:
>
> > (i) a number of declaratory judgements against you for misfeasance of public office;
> >
> > (ii) compensatory damages payable to my wife of $20,000;

> (iii) punitive damages payable to my wife of $20,000;
>
> (iv) punitive damages payable to the Halifax County Provincial Court of $100,000.00.

[52] Although this correspondence was directed to Mr. Mitchell, it arrived through Ms. Turner's facsimile at the RMV. She therefore prepared a response, doing so under Mr. Mitchell's signature. This response read in part as follows:

> I am in receipt of your letter dated December 2, 2019.
>
> As indicated in correspondence sent to you on November 18, 2019, an appeal of the decision is made to the Motor Vehicle Appeal Board within 30 days of the date of the decision. Please refer to s.279BA(1) of the Motor Vehicle Act regarding statutory appeals of decisions of the Registrar made under s.279B. Appeals are made to the Motor Vehicle Appeal Board and must be made within 30 days of the date of the Registrar's decision…

[53] The applicant did not appeal Ms. Turner's decision to the *MVA*B under s. 279BA. Similarly, the applicant has not taken the steps required under the *MVA* to have her license reinstated, despite the statutory period of suspension having expired in 2018.

The Legislative History

[54] One of the provisions of the *MVA* by which a driver's license can be suspended is s. 279A. At the time of the applicant's suspension, ss. 279A(1) and (2) provided in relevant part as follows:

> (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
> >
> > > (ii) …; 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 effective date… 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 signed 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).

[55] As set out in s. 279A(1)(c)(ii), a suspension under s. 279A is effected when a peace officer (a term defined in s. 2 of the *MVA* as including a police officer) serves a driver with an associated notice and order, and the suspension begins to run seven days after the date of the notice and order. The driver's license is then suspended for a period of three months, in accordance with s. 279A(5), which provides as follows:

> Unless otherwise ordered in a review pursuant to Section 279B, a driver's license is suspended pursuant to this Section and a person without a driver's license is disqualified pursuant to this Section from applying for or holding a driver's license or operating a motor vehicle for three months from the effective date of the suspension.

[56] S. 279A was originally inserted into the *MVA* by s. 15 of *An Act to Amend Chapter 293 of the Revised Statutes, 1989, the Motor Vehicle Act,* S.N.S. 1994-95, c. 12 (also known as "Bill 119"). During the second reading of Bill 119 in the Legislature, the Honourable Richard Mann, the then-Minister of Transportation and Communications, noted as follows:

> …The police officer will immediately suspend the driving privileges of an individual for doing one of two things; for failing the breathalyzer or for having a blood alcohol content, determined by a breath or a blood sample, in excess of the legal limit, or for refusing the breathalyzer. If one of these two events takes place then the police officer will immediately suspend the driving privileges and will report that to the Registrar of Motor Vehicles. Where possible, the police officer will physically confiscate the driver's license.

> …
>
> I have heard some comments about the ability of the province to proceed in that measure and how a challenge might be. I have done some research and I would briefly like to enter into the record here this similar type of legislation as it affects Manitoba and, of course, has been challenged in the Queen's Court. I will just read a couple of excerpts from the decision; "The province has the absolute right to manage the roads, and particularly to issue and revoke driver licenses. The court furthermore characterized the procedure of s.263.1 as purely administrative, and not criminal.".
>
> It also found that the administrative suspension was not a penalty imposed by the Legislature but, instead, a civil consequence of one of two acts committed by the individual refusing or failing the breathalyzer test.
>
> It was found that the role of the police officer was administrative and again, found that the action taken by the province in the roadside suspension, if you will, was certainly justified and completely within the authority of the provincial government.

[57] The Minister went on to note as follows in closing the debate on Bill 119:

> The member for Kings West raised the question about impaired driving. I point out that the bill, I do not believe, makes reference to impaired driving. The bill cites two specific incidents, whereby your license will be suspended: failing the breathalyzer or refusing the breathalyzer. It does not talk about impaired driving and I would like to make that very clear. The suspension of license is not, again, tied to a Criminal Code decision, it is an administrative decision. The police officer is making that suspension in the name of the Registrar of Motor Vehicles. The Registrar of Motor Vehicles has the authority to suspend license.

[58] The Court of Appeal considered these provisions soon after they were added to the *MVA*, in *Nova Scotia (Attorney General) v. Selig*, 1996 NSCA 187. Mr. Selig was charged under ss. 253(a)-(b) of the *Criminal Code*. His driver's licene was also suspended under s. 279A for the statutory period of three months, running from September 25, 1995 and expiring on December 25, 1995.

[59] In January 1996, Mr. Selig's criminal charges were dismissed in Provincial Court. Following his acquittal, Mr. Selig attempted to have the Registrar remove the three-month suspension from his driving record. The Registrar refused, and took the position that there were requirements to be fulfilled by Mr. Selig before he could get his license back – namely, the completion of an application to have his license reinstated, the payment of an associated fee, and an interview with a Driver Improvement Officer.

[60] Mr. Selig applied to the Supreme Court for an order declaring the suspension null and void. The chambers judge did not grant Mr. Selig this relief (nor an order removing the suspension from his driving record), but did order that the suspension be terminated without conditions, on the basis that: (1) Mr. Selig had been acquitted of his criminal charges; and (2) the suspension was time-limited, and the legislation did not give the Registrar authority to extend the suspension beyond the mandated three months. The Crown appealed, on the basis that the chambers judge had erred by restoring Mr. Selig's license, and by finding that the suspension terminated upon his acquittal. The Crown phrased its submissions on this latter issue in the following manner in its 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.

[61] The Court of Appeal agreed with the Crown's position, and noted as follows:

> 37 In *White v. Nova Scotia (Registrar of Motor Vehicles)* (1996), 147 N.S.R. (2d) 259 (S.C.) (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.
>
> 38 The lawful act of the police 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.
>
> 39 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.

[62] However, the Court of Appeal dismissed the Crown's appeal, on the basis that the Registrar did not have authority under the *MVA* to impose requirements for reinstatement, in addition to the three-month suspension. In this regard, the Court of Appeal noted that although various provisions in the *MVA* (like, for example, s. 67(11)) spoke to the reinstatement of a license that had been revoked, there was no

such provision for a license that had been suspended, and the terms "revocation" and "suspension" were not synonymous.

[63] Shortly after the Court of Appeal issued its decision in *Selig*, the Lieutenant Governor assented to *An Act to Amend Chapter 293 of the Revised Statutes, 1989, the Motor Vehicle Act,* S.N.S. 1996, c. 34 (also known as "Bill 28"). Bill 28 added provisions to the *MVA* which imposed requirements for the reinstatement of a license suspended under s. 279A, notwithstanding the expiry of the three-month suspension period. Specifically, s. 5 of Bill 28 added the following provisions as subsections (7) and (8) to s. 279A:

> (7) A person whose driver's license or privilege of obtaining a driver's license has been suspended pursuant to this Section shall, to have the driver's license or privilege of obtaining a driver's license reinstated, apply to the Registrar in the form and manner required by the Registrar.
>
> (8) The Registrar shall not reinstate a driver's license or the privilege of obtaining a driver's license pursuant to subsection (7) until the Registrar is satisfied that all requirements pursuant to this Act have been completed by the Applicant.

[64] Bill 28 also amended s. 67(11) of the *MVA*. As indicated, at the time of the Court of Appeal's decision in Selig, s. 67(11) spoke to requirements for reinstatement of a license that had been revoked, but did not refer to a license that had been suspended. Bill 28 amended s. 67(11) so that it read as follows:

> The Registrar may require that a person whose driver's license has been revoked for an alcohol related driving **offence or suspended pursuant to Section 279A** 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.
>
> [Bolding to show words added by Bill 28.]

[65] Accordingly, Bill 28 amended the *MVA* to require that a person apply for reinstatement of a license suspended under s. 279A; to prohibit the Registrar from reinstating their license until they satisfied all requirements for reinstatement under the statute; and to give the Registrar authority to require that person to "participate in such alcohol rehabilitation program as may be prescribed by regulation" as a pre-condition to reinstatement.

[66] Due to the use of the word "may" (i.e. "The Registrar may…") in s. 67(11), the effect of Bill 28 was to give the Registrar discretion in deciding whether to require a driver to complete the above-mentioned alcohol rehabilitation program as

a requirement for reinstatement of their license. In order words, the Registrar could – but was not required – to impose this as a pre-condition for reinstatement.

[67] The Legislature removed this discretion by enacting *An Act to Amend Chapter 293 of the Revised Statutes, 1989, the Motor Vehicle Act*, S.N.S. 1998, c. 32 (also known as "Bill 83"). Bill 83 amended s. 67(11) so that it read as follows:

> The Registrar ~~may~~ shall require that a person whose driver's license has been revoked for an alcohol related driving offence **or suspended pursuant to Section 279A** 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.
>
> [Bolding to show words added by Bill 28; strike-through and underlining to show amendments by Bill 83.]

[68] Accordingly, the effect of Bill 83 is that a driver whose license has been suspended under s. 279A cannot have their license reinstated until they complete the above-mentioned alcohol rehabilitation program. Due to the deletion of the word "may", and its replacement with the word "shall", the Registrar has no discretion to reinstate a license that has been suspended under s. 279A if the driver refuses to complete this program.

[69] S. 67(11) underwent a further amendment (albeit one which is not relevant on the facts of this case) in 2002, such that it ultimately provided as follows when the applicant's license was suspended in May 2018:

> **The Registrar shall require that a person whose driver's license** or privilege of obtaining a driver's license **has been** revoked for an alcohol related driving offence or **suspended pursuant to Section 279A 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**. [Emphasis Added]

[70] To summarize, by the time the applicant's license was suspended in May 2018, the net effect of the original version of s. 279A (as discussed in the Legislature during second reading), the Court of Appeal's interpretation of those provisions in *Selig*, the addition of ss. 279A(7)-(8) through Bill 28, and the various amendments to s. 67(11), was as follows:

1. Where a police officer has reason to believe (e.g. through a breathalyzer test) that a driver had a blood alcohol concentration in excess of 80 mg of alcohol in 100 ml of blood while operating (or having care or control

of) a motor vehicle, they are required to administratively suspend the driver's license under s. 279A(1).

2. The police officer exercises their authority under s. 279A on behalf of the Registrar, who (as outlined previously) is the head of the entity that regulates driver licensing in Nova Scotia. Accordingly, a suspension under s. 279A is a purely administrative action, and a civil consequence of the conduct described in s. 279A(1)(a)-(b). A suspension issued under s. 279A is not a penal or criminal matter; it does not result in an offence, and it is not tied to criminal charges or proceedings arising out of the same conduct. Accordingly, a suspension issued under s. 279A does not become unlawful or wrong (and does not terminate or become invalidated) simply where the driver is acquitted of criminal charges arising out of the same circumstances. The possibility of conflicting results (e.g. a criminal acquittal and an administrative suspension) is a consequence of a federal constitution which permits federal and provincial legislation to separately govern the same conduct.

3. An administrative suspension under s. 279A lasts three months from its effective date, unless the suspension is rescinded on a review under s. 279B (a process described in greater detail below).

4. If the suspension is not rescinded on review, the driver's license is not automatically reinstated after the three-month suspension period expires. Rather, s. 279A(7) requires that the driver apply to the Registrar to have their license reinstated. In turn, s. 279A(8) prohibits the Registrar from reinstating the license until they are satisfied that the driver has satisfied all the applicable requirements for reinstatement under the *MVA*.

5. Due to the inclusion of the word "shall" in ss. 297A(7)-(8) (i.e. "A person whose driver's license… has been suspended pursuant to this Section shall… apply to the Registrar"; The Registrar shall not reinstate a driver's license… until…" (emphasis added)), there is no discretion or authority for the Registrar to reinstate a license that has been suspended under s. 279A unless the driver has submitted the required application and completed any applicable requirements for reinstatement.

6. One such requirement for reinstatement is set out in s. 67(11), which provides that the Registrar shall require that a person whose driver's license has been suspended under s. 279A participate in "such alcohol rehabilitation program as may be prescribed by regulation" before the

> driver is entitled to reinstatement of their license. Due to the inclusion of the word "shall" in s. 67(11), participation in this program is mandatory, and the Registrar does not have any discretion to waive this requirement.

[71] The "alcohol rehabilitation program" referred to in s. 67(11) is set out in greater detail in the *Alcohol Rehabilitation Program Regulations*, N.S. Reg. 99/2001 (the "*ARP Regulations*"). Pursuant to s. 2 of the version of the *ARP Regulations* that was in force at the time the applicant's license was suspended, an "alcohol rehabilitation program" for purposes of s. 67 of the *MVA* is a program conducted, directed, or promoted by a district health authority under the *Health Authorities Act* for a person whose license has been, *inter alia*, suspended under s. 279A of the *MVA*.

[72] In 2015, Nova Scotia's district health authorities were merged to create the Nova Scotia Health Authority (or "NSHA"). Since that time, the NSHA has conducted the alcohol rehabilitation program referred to in s. 67(11) of the *MVA* and the *ARP Regulations*, which is known as the Driving While Impaired (or "DWI") Program.

[73] The DWI Program is delivered to participants through NSHA Mental Health and Addictions Services counsellors. It has two mandatory components:

1. An educational component, which is usually delivered in a group setting. This component is a half day in length, and its ultimate goals are to provide participants with information about the effects of alcohol and other drugs upon driving, to provide participants with education on the harms associated with such substances, to assist clients in reviewing factors involved in impaired driving, and to develop a plan or strategy to avoid future occurrences.
2. An assessment component, during which a counsellor will assess the participant's risk for alcohol or drug problems.

[74] As set out in s. 4 of the *ARP Regulations*, a participant in the DWI Program must pay costs in the amount of $455.00. These costs must be paid to the RMV before a driver can contact NSHA Mental Health and Addictions Services to secure an appointment to start the DWI Program.

[75] As indicated, if a s. 279A administrative suspension is not rescinded on review under s. 279B, a driver must follow the above-described process to have their license reinstated.

[76] A review under s. 279B is carried out by the Registrar (or, in light of the definition of "Registrar" in s. 2 of the *MVA*, a Deputy Registrar). As s. 279B applications fall within Ms. Turner's area of responsibility within the RMV, she adjudicates most of these applications, with Mr. Mitchell and another Deputy Registrar filling in as needed.

[77] The procedure that the Registrar or a Deputy Registrar should follow in adjudicating a s. 279B review application can arise through prescribed rules, or under the common law duty of fairness. See, for example, the following comments by Sara Blake at pp. 9-12 of *Administrative Law in Canada*, 6th ed.:

> The procedure followed by a tribunal may be found in a statute or regulation, or in rules, guidelines, or directives issued by the tribunal. It may be set out in a notice issued for a particular proceeding. It may be a matter of unwritten tribunal policy and practice.
>
> …
>
> In the absence of prescribed procedural rules, the courts require that a statutory decision that affects the rights of an individual person be made following fair procedures. This requirement is called the "doctrine of fairness" or the "duty to act fairly".
>
> At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, it gives the person to be affected an opportunity to influence the decision. Second, the information received from that person may assist the decision maker to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair.
>
> The right to be heard is not a right to the most advantageous procedure, nor a right to have one's views accepted nor a right to be granted the remedy sought. It is only a right to have one's views heard and considered by the decision maker.

[78] Subject to any prescribed procedural rules and the bounds of the duty of procedural fairness, the Registrar or Deputy Registrar retains discretion in determining the process to follow in adjudicating a s. 279B review application. See, for example, the following comments by Blake at p. 24 of *Administrative Law in Canada*, supra:

> Tribunals are given latitude in setting their own procedure. The courts are careful not to place decision makers in a procedural straightjacket. As long as the procedure adopted by a tribunal treats those who come before it fairly, a court will not intervene.

[79] Although the RMV does not currently have any policy-type documents in place regarding s. 279B review applications, several procedural rules are prescribed by s. 279B itself. Under s. 279B, a driver can elect to proceed by way of a written review or an oral hearing. If the driver elects to proceed by way of a written review, the following provisions apply:

> (1) A person may apply for review of an order of suspension pursuant to Section 279A by:
>
> > (a) filing an application for review with the Registrar;
> >
> > (b) paying the prescribed fee…
> >
> > …
>
> (2) The application for review shall be in the form, contain the information and be completed in the manner required by the Registrar.
>
> (3) The application for review may be accompanied by sworn statements or other evidence that the person wishes the Registrar to consider.
>
> (4) An application does not stay the suspension.
>
> (5) The Registrar is not required to hold an oral hearing unless the applicant requests an oral hearing at the time of filing the application and pays the prescribed fees.
>
> (6) In a review pursuant to this Section, the Registrar shall consider
>
> > (a) any relevant sworn or solemnly affirmed statements and any other relevant information;
> >
> > (b) the report of the peace officer;
> >
> > (c) a copy of any certificate of analysis under section 258 of the Criminal Code (Canada) without proof of the identity and official character of the person appearing to have signed the certificate or that the copy is a true copy…
> >
> > …
>
> (8) The Registrar shall
>
> > (a) where no oral hearing is requested, consider the application within ten days of compliance with clauses (1)(a), (b) and (d)…
> >
> > …
>
> (12) The decision of the Registrar shall be in writing and a copy of the decision shall be sent within seven days of the date the application was considered… by registered mail to the person at the person's last known address as shown in the records maintained by the Registrar and to the address shown in the application, if that address is different from the address of record.

[80] The substantive scope of a s. 279B review is circumscribed by s. 279B (7), which (at the material times) provided that:

> The sole issue before the Registrar in a review pursuant to this Section is whether it is established to the Registrar's satisfaction that
>
> > (a) the person operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) having consumed alcohol in such a quantity that the concentration thereof in the person's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood…

[81] The Registrar's powers flowing from their determination on this sole issue are similarly circumscribed by ss. 279B(9)-(10), which (at the material times) provided as follows:

> (9) Where the evidence before the Registrar supports an affirmative determination on the issue referred to in subsection (7), the Registrar shall sustain the order of suspension.
>
> (10) Where the evidence supports a negative determination on the issue referred to in subsection (7), the Registrar shall
>
> > (a) rescind the order of suspension;
> >
> > (b) return any driver's license surrendered to the Registrar; and
> >
> > (c) direct that the fees paid for the application for review be refunded.

[82] Like s. 279A, s. 279B was originally inserted into the *MVA* through Bill 119. Minister Mann noted as follows regarding s. 279B in closing the second reading debate regarding Bill 119:

> …When you are talking about what weight will be attached to the decision, the Registrar, if you look at the bill, it predetermines, for example, exactly what the Registrar's job is in dealing with this review and it is solely to determine what he will take into consideration, is whether or not the individual was operating a motor vehicle while having consumed alcohol in such a quantity that the concentration thereof in the person's blood exceeded .80 mg. That is failing the breathalyzer, or they have refused.
>
> I do not think that you are going to see as many appeals or requests for review as one might think at first glance here. Clearly what you are going to do is go and have to satisfy the Registrar of Motor Vehicles that one of those conditions did not apply. If you fail the breathalyzer or had a blood sample taken that was in excess of what is described in the Criminal Code of Canada, then you know you have to convince the Registrar of this. I do not think it is something that is going to be taken lightly and bandied about easily.
>
> [Emphasis added.]

[83] To summarize:

1. The only mechanism for rescinding a s. 279A suspension under the *MVA* is by way of a s. 279B review application.

2. A s. 279B review application can be adjudicated by the Registrar or a Deputy Registrar.

3. The Registrar or Deputy Registrar retains discretion in determining the procedure to follow in adjudicating a s. 279B review application, subject to ss. 279B(1), (2), (3), (5), (5), (6), (8), (11), and (12), and the common law duty of procedural fairness.

4. Under s. 279B(7), the sole substantive issue for the Registrar or Deputy Registrar to determine in circumstances like those involving the applicant is whether they are satisfied that the driver was operating (or had care or control of) a motor vehicle having consumed alcohol in such a quantity that their blood alcohol concentration exceeded 80 mg of alcohol in 100 ml of blood. The Registrar or Deputy Registrar does not determine, for example, whether the driver is guilty of the criminal offence of impaired driving, or whether they had the requisite *mens rea* to commit a criminal offence.

5. If the Registrar or Deputy Registrar is satisfied that the sole issue in s.279B(7) should be answered in the affirmative (that is, if they are satisfied that the driver operated a motor vehicle with a blood alcohol concentration in excess of 80 mg of alcohol in 100 ml of blood), the Registrar or Deputy Registrar must sustain the suspension under s.279B(9). Due to the inclusion of the word "shall" in s. 279B(9) (i.e. "…the Registrar shall sustain the order of suspension" (emphasis added)), the Registrar or Deputy Registrar has no discretion to rescind the driver's suspension if they are satisfied that the sole issue in s. 279B(7) should be answered in the affirmative.

6. If a driver's review application under s. 279B is unsuccessful, they may appeal the Registrar or Deputy Registrar's decision to the *MVA*B under s. 279BA of the *MVA*.

7. Alternatively, or if their appeal to the *MVA*B is also unsuccessful, the driver still has the option of completing the necessary requirements to have their license reinstated, including participating in the DWI Program.

Issues:

[84] The applicant's Amended Notice of Application in Court raises the following issues:

1. Were the applicant's s. 11 *Charter* rights engaged by the suspension under s. 279A and the review process under s. 279B?
2. If so, is the applicant entitled to compensatory damages and in what amount?
3. Was there re-litigation of an issue that was before Judge Sakalauskas, in a manner contrary to the doctrines of *autrefois acquit, res judicata*, or abuse of process?
4. If so, is the applicant entitled to compensatory damages and in what amount?
5. Should the court order punitive damages?
6. If so, to whom are they payable and in what amount?
7. Has the applicant satisfied the legal test for establishing that Mr. Mitchell and/or Ms. Turner committed the tort of misfeasance in public office?
8. If so, is the applicant entitled to compensatory damages and in what amount?

Were the applicant's s. 11 *Charter* rights engaged by the suspension under s. 279A and the review process under s. 279B?

[85] The applicant claims that her *Charter* rights under s. 11 (d) and (h) were intentionally violated by the respondents in conducting the review of the suspension of her license. At paragraph 57 of her pre trial brief she states:

> 57 Where Mitchell and Turner violated the Applicant's Charter rights - - by disregarding the **Charter** when they enforced Nova Scotia's impaired driving punitive sanctions against her - - is that when Nova Scotia grounded the enforcement of the Province's impaired driving punitive sanctions upon a person being charged with the **Criminal Code** offence of impaired driving this made the "processes" being enforced by Mitchell "criminal in nature". This made these "processes" subject to the protections provided to the Applicant by s. 11 of the **Charter**. This fact was not considered by either Court in **White** or **Selig**.
>
> 58 The provisions of the ***MVA*** prescribed by law provide by s. 279A(1)(b) that an unlawful BAC level reading must be related to the offence of impaired driving "as defined in the **Criminal Code**" as grounds for issuing a **Suspension Order**.

> Once an unlawful BAC level is proven, s. 279A(1)(c)(ii) mandatorily requires a peace officer to suspend a person's driver's licence. The only way a **Criminal Code** offence can ground the issue of a **Suspension Order** pursuant to s. 279A(1)(c)(ii) of the ***MVA*** is by charging a person with the offence alleged. If a person is not so charged an unlawful BAC level does not relate to the commission of the offence of impaired driving "as defined in the **Criminal Code**". Absent a **Criminal Code** charge Nova Scotia's impaired driving punitive sanctions are not enforceable.

[86] She says that her *Charter* rights were violated when the respondents conducted the review as that amounted to second hearing of a charge that she had been acquitted of in Provincial Court. Further, that the respondents applied the wrong (civil) burden of proof; did not inquire into whether she had the *mens rea* to be guilty of the criminal charge and erred by not having regard to exculpatory expert evidence that established that she was involuntarily intoxicated.

[87] Section 11 of the *Charter* provides as follows:

> 11. Any person charged with an offence has the right:
>
> …
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> …
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again…

[88] Section 11 of the *Charter* is engaged where a person is "charged with an offence". The corollary of this is that s. 11 is not engaged, and does not apply, in proceedings where a person is not "charged with an offence".

[89] The applicant cannot succeed unless she can establish that a suspension under s. 279A or a review application under s. 279B result in her being "charged with an offence". If she cannot cross this threshold, s. 11 has no application to this matter, and (in turn) nothing done by Mr. Mitchell or Ms. Turner could have resulted in a breach of s. 11.

[90] The foundational Supreme Court of Canada decision on the scope of s. 11 is *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. Justice Wilson (for the majority) concluded (at para. 25) that the "rights guaranteed by s. 11 … are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted." She went on to elaborate as follows at para. 23:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic, or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity… There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a license. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.
>
> [Emphasis added.]

[91] Justice Wilson added (at para. 24):

> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matter intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.
>
> [Emphasis added.]

[92] In *Martineau c. Ministre du Revenu national*, 2004 SCC 81, Justice Fish (for a unanimous Supreme Court of Canada) confirmed the following analytical framework under s. 11:

1. A matter only falls under s. 11 of the *Charter* if it is, by its very nature, a criminal proceeding, or if it can result in a "true penal consequence".
2. A distinction must be drawn between federal prosecutions under the *Criminal Code* and quasi-criminal prosecutions under provincial legislation on the one hand, and administrative proceedings instituted

in accordance with the policy of a statute on the other. Only the former attracts the application of s. 11.

3. A "true penal consequence" attracting the application of s. 11 is imprisonment or a fine.

[93] The respondents argues that under this framework, a suspension under s. 279A and a review proceeding under s. 279B do not attract the application of s. 11, as:

1. The suspension and review proceedings under ss. 279A and 279B are not penal. They are purely administrative. To use Justice Wilson's phraseology from para 32 of *Wigglesworth*, they are proceedings "to determine fitness to obtain or maintain a license", which are part and parcel of a regulatory regime to promote public safety under the *MVA*. To again borrow Justice Wilson's words, an administrative suspension (and an administrative review of that suspension) under the *MVA* is "part of a scheme for regulating an activity in order to protect the public", with the result that they "are not the sort of 'offence' proceedings to which s. 11 is applicable."

2. Proceedings or action taken under ss. 279A and 279B do not result in imprisonment or a fine. At most, they involve a suspension of a person's ability to drive a motor vehicle in the Province of Nova Scotia under the regulatory regime established by the *MVA*. An administrative suspension of this nature is not a "true penal consequence".

[94] The respondents say that this is consistent with a recent Supreme Court of Canada ruling, *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, regarding the constitutionality of British Columbia's automatic roadside prohibition (or "ARP") regime. Under this regime, a driver can be subjected to a driving prohibition following a roadside analysis using a screening device, together with "additional consequences beyond the normal costs associated with the prohibition itself, such as a reinstatement fee" (para. 11). These additional consequences may include penalties and costs totaling more than $4,000, in addition to the period of suspension, as well as mandatory vehicle impoundment.

[95] The appellant argued that the regime infringed his rights under s. 11(d) of the *Charter*. Justice Karakatsanis (for the majority; Chief Justice McLachlin dissenting in part) rejected this argument, on the basis that the ARP regime did not create an "offence" within the meaning of s. 11. She rejected the argument that the proceedings under the ARP regime were criminal in nature, noting that:

> 43 The ARP scheme imposes a driving prohibition coupled with a monetary penalty. It is not concerned with addressing the harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on *Criminal Code* seizure powers and is administered by police, the scheme is more accurately characterized as a proceeding of an administrative nature. As the chambers judge noted, the proceedings arising under the ARP scheme do not take the form of prosecutions. No criminal records result. The proceedings are initiated by the drivers themselves. It is evident that the process is not criminal in the manner contemplated in Martineau…
>
> 44 Administrative regimes do not attract s. 11 protections… "This Court has often cautioned against the direct application of criminal justice standards in the administrative law area"…
>
> [Emphasis Added]

[96] Justice Karakatsanis also found that the ARP regime did not impose or result in a "true penal consequence":

> 45 Nor are the consequences truly penal. While a 90-day suspension is a meaningful consequence for a licensing violation, and the approximately $4,000 in possible costs and penalties are significant, they are not sufficient to engage the fair-trial rights embodied by s. 11 – rights that, after all, are some of the most fundamental in our legal system. I note that financial penalties considerably more severe than those at issue here have been found to not constitute true penal consequences…
>
> 46 Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds… The fine is capped at $500… The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme's objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.
>
> [Emphasis Added]

[97] The decision in *Goodwin* is consistent with lower court decisions from across Canada, in which it has repeatedly been held that administrative suspension and review proceedings like those established under ss. 279A and 279B of the *MVA* do not engage s. 11 of the *Charter*. For example, in *Leclair v. R.*, 1990 CarswellMan 8 (Q.B.), Justice Hirschfield of the Manitoba Court of Queen's Bench rejected (at

para. 37) an argument that equivalent provisions in that province offended s. 11(d) of the *Charter*, for the following reasons:

> (a) The impugned sections do not, in themselves, create a criminal process or give rise to penal consequences. The consequences under the sections are regulatory, and carried out administratively, in that they are directed towards the maintenance of safety on the roads and highways.
>
> (b) It has been made clear by the Supreme Court of Canada in *R. v. Wigglesworth*… that s. 11 only applies to a process where an individual is charged with a criminal offence and subject, therefore, to penal consequences…
>
> (c) The fact an individual may be involved in two proceedings, one of which is of a criminal nature, does not render the non-criminal one subject to s. 11. The non-criminal proceedings under the impugned sections of the Act are "another aspect and another context" on similar fact. As Scollin J. said in *Rosenbaum v. Law Society (Manitoba)*…:
>
> The fact that, in another aspect and another context, the act alleged in the citation is a criminal offence does not make it in these proceedings any more than a breach of professional discipline and the potentially serious professional consequences of the breach do not convert a civil into a penal proceeding so as to render applicably s. 11 of the Charter of Rights which deals with 'offences'.
>
> (d) There have been a number of decisions in other provinces which have held that the suspension of a driver's license by a registrar of motor vehicles as a consequence of a conviction, or by such registrar or official as part of an administrative scheme, and independent of any criminal proceedings, does not bring into operation the provisions of s. 11, and particularly subs. (d) thereof, as the suspension does not involve the individual being charged with an offence.
>
> [Emphasis added.]

[98] Justice MacAdam of this court held to similar effect in *White v. Nova Scotia (Registrar of Motor Vehicles)*, 1996 CarswellNS 14 (S.C.), in the context of a constitutional challenge to (earlier versions of) ss. 279A and 279B under s. 7 of the Charter. Like Justice Hirschfield, he cited (at para. 15) the comments of Justice Scollin in *Rosenbaum*, and held that "(s)imply because a person is involved in two separate proceedings, one of which is a criminal or quasi-criminal process, does not render the "non-criminal" process subject to s. 7". He went on to hold (at para. 16) that:

> …although the loss of driving privileges are a real and substantial loss, the proceedings involved in the suspension are not converted from civil into penal proceedings by virtue of the fact the same acts have resulted in the laying of a criminal charge.
>
> [Emphasis added.]

[99] Justice MacAdam went on to note that:

> 48 The suspension by the Peace Officer and subsequent review, when requested, are "civil and not criminal" proceedings.
>
> 49 As stated by Hirschfield, J., in *Leclair v. R.*, supra, at p. 60:
>
> > In taking possession of the license and in issuing the notice of suspension, the peace officer is acting on behalf of and as agent for the registrar of motor vehicles, and thus performing an administrative act.
>
> …
>
> 51 Similarly, various American authorities have held that license suspensions are administrative acts and not penal proceedings. The Supreme Court of North Carolina in *Henry v. Edmisten*, 340 S.E. 2d 720 (N.C. 1986) at p. 734:
>
> …the summary revocation procedure … is not a punishment but a highway safety measure … our cases hold that revocation proceedings are civil rather than criminal in nature … 'The purpose of a revocation proceeding is not to punish the offender, but to remove from the highway one who is a potential hazard to himself and others.' … Revocation is not added punishment for a criminal act but a finding that a driver is no longer fit to hold and enjoy the driving privilege which the statute has granted under its police power. (authorities and citations omitted)

[100] Justice MacAdam also rejected an argument that the applicants had been deprived of the presumption of innocence, noting that:

> 112 The sole issue before the Registrar, or the Deputy Registrar, on a review, is whether "it is established to the Registrar's satisfaction" the Applicant operated or had care or control of a motor vehicle, having consumed alcohol in excess of the maximum permitted limits. As already noted, the suspension itself and the subsequent review are administrative acts and not criminal matters and therefore the criminal burden of proof is not applicable. A clear reading of ss. (7) suggests the burden is the civil burden of "balance of probabilities" and it is on this basis the Registrar is to decide whether it has been shown to his or her satisfaction that the requisite conditions for the suspension have been established. After considering all of the relevant evidence, it is for the Registrar to determine whether, pursuant to ss. (9), the evidence supports an affirmative determination on the issue, in which case the Registrar shall sustain the Order of Suspension or, pursuant to ss. (10), the evidence supports a negative determination on the issue, in which case the Registrar shall rescind the suspension, return the driver's license and direct refund of any fees paid.
>
> 113 Clearly in the case of the Applicants, the Registrar has made the determination, pursuant to ss. (9), that the evidence supports an affirmative determination, resulting in the decision to sustain each of the Orders of Suspension.
>
> 114 The Applicants suggest the Deputy Registrar failed to give recognition to the "presumption of innocence" in respect to the Applicants and their applications

> for review. As noted, the function of the Registrar is not to decide guilt or innocence but to sustain or rescind the administrative act by the peace officer. As such, the presumption of innocence is not relevant nor applicable on this review.
>
> [Emphasis added.]

[101] Justice Webber of the Prince Edward Island Supreme Court held to similar effect in *R. v. MacCormick*, 1998 CarswellPEI 34 (S.C. (T.D.)), affirmed 1999 CarswellPEI 28 (C.A.). In that case, the applicant argued that the PEI equivalent of s. 279A breached multiple sections of the *Charter*, including s. 11(d). Justice Webber noted that s. 11 of the *Charter* only applies where an applicant is "charged with an offence", and held that it was not engaged, as:

> 73 The administrative driving prohibition does not charge anyone with an offence. It states that if a peace officer has reasonable and probable grounds to believe that a person who has operated or had care and control of a vehicle, has done so with a blood alcohol content exceeding 80 mg. of alcohol in 100 milliliters of blood or has refused a breathalyzer, the peace officer shall serve the person involved with a notice of driving prohibition.

[102] In *R. v. Coombs*, 1999 CarswellOnt 395 (Ct. J. (Prov. Div.)), the accused applied for a stay of criminal charges of impaired driving, on the basis that a 90-day administrative suspension of his driver's license had deprived him of his rights under, *inter alia*, ss. 11(d)-(e) and (h) of the *Charter*. Judge Libman noted that the rights protected under s. 11 only apply where a person is charged with an offence, and held that s. 11(d) was not engaged, as:

> 38 A person is "charged with an offence" within the meaning of s. 11 of the Charter when an information is sworn alleging an offence against him or her, or where a direct indictment is laid if no information is sworn… However, the administrative driver's license suspension regime operates completely independent of any criminal charge. Indeed, there is no requirement that the suspected driver ever be charged. Neither does the withdrawal of the charge or its ultimate dismissal have any bearing therein. The only criteria that apply are those enumerated under s. 48.3 of the Highway Traffic Act, namely, that a person driving or having the care of a motor vehicle has a blood alcohol concentration in excess of the legal limit, or that he or she refuses to provide a sample of breath or blood in response to a demand made under s. 254 of the Criminal Code. Hence, the administrative driving prohibition does not "charge" anyone with an offence…
>
> 39 I observe further that s. 11(d) is limited to criminal or quasi-criminal proceedings or proceedings giving rise to penal consequences. A matter falls within the ambit of this section either because, by its very nature, it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence…

> 40 It is clear from the authorities that licence suspensions are administrative acts, not penal proceedings… Moreover, such actions illustrate the difference between criminal or quasi-criminal proceedings giving rise to penal consequences as opposed to administrative proceedings dealing with matters instituted for the protection of the public pursuant to a regulatory scheme… To put it shortly, a licence suspension is not criminal in nature; neither is it a true penal consequence.
>
> 41 Having concluded, then that s. 11 of the Charter of Rights is not engaged by the administrative suspension of one's driver's licence, nor that s. 11(d), in particular, applies to same, this part of the Applicant's argument must be rejected.
>
> [Emphasis added.]

[103] Judge Libman rejected the accused's argument under s. 11(h) for similar reasons, noting that (citations omitted):

> 47 Section 11(h) of the *Charter of Rights* is directed at preventing the state from engaging in multiple attempts to convict a person. Stated simply, it forbids the prosecution of an accused person twice for the same offence; in order for it to be operative there must be two proceedings or trials for the same offence…
>
> 48 The concept of double jeopardy, then, in the context of the Charter, means that a person is not to be punished twice for the same offence. It necessarily involves, in the respondent's submission, the same level of government acting against the subject, not two different levels carrying out separate proceedings of a fundamentally different nature.
>
> 49 This argument is well founded on the authorities. In *R. v. Huber*… it was held that a 12-hour licence suspension is not the equivalent of a conviction for, or charging of, an offence. As a result, s. 11(h) of the *Charter* was not applicable in a subsequent proceeding under the *Criminal Code*. In its brief endorsement, the court noted that "The suspension of the appellant's licence under s. 30(a) of the Ontario *Highway Traffic Act* does not involve the 'charging' of the appellant with an offence. The appellant has not been tried or found guilty twice relatively (sic) to the same offence, and hence s. 11(h) has no application".
>
> 50 Likewise, in *R. v. Art*… an accused given a 24-hour licence suspension was unsuccessful in invoking the protection in s. 11(h) against the drinking and driving charges arising out of the same incident. Hinkson JA, on behalf of the court, explained at p. 567:
>
> > In my opinion, the circumstances arising out of this case do not bring it within the provisions of s. 11 of the Charter. When the police constable imposed the 24-hour suspension, at that stage the appellant had not been charged with any offence within the meaning of the word "charged" in s.11 of the Charter. When he arrived at Provincial Court a trial on the charges arising out of s. 237(a) and (b) of the Code he had not ben found guilty and had not been punished for the offences with which he was then charged.

> 50 I conclude from the above that the protection guaranteed under s. 11(h) of the *Charter of Rights* does not shield the Applicant from prosecution in the circumstances of this case.

[104] Finally, in *Gonzales v. Alberta (Driver Control Board)*, 2003 ABCA 256, the Alberta Court of Appeal rejected an argument that that province's equivalent to s. 279B (a provision involving an appeal to a board, as opposed to a registrar) engaged s. 11(d), noting that:

> 36 In order to receive the protection of s. 11(d) of the *Charter*, a person must be "charged with an offence." The rights in s. 11(d) do not apply to administrative or civil proceedings, but are guaranteed for persons prosecuted by the state for public offences involving punitive sanctions…
>
> 37 Section 11(d) does not apply to a hearing before the Board. A driver subject to a suspension under the ALS program is not charged with a criminal or quasi-criminal offence; a driver faces a withdrawal of a privilege, not a punitive sanction, cannot be compelled to give evidence, and is not, at the end of the day, found guilty of an offence…
>
> [Emphasis added.]

[105] The Court went on to note (at paras. 71-73) that:

> …it is indeed conceivable that a driver could have his or her licence suspended after the Board has considered improperly obtained evidence and then, at a subsequent trial, be acquitted of any charges under the *Code* because the same evidence was excluded under s. 24(2) of the *Charter*. This result is not incongruous, unreasonable or a legitimate basis for avoiding the Board and seeking remedy from a court of competent jurisdiction. The loss of a driver's licence through the ALS program is a civil consequence and distinct from any criminal conviction or criminal penalty.
>
> In this regard, I agree with the Nova Scotia Court of Appeal in *Nova Scotia (Attorney General) v. Selig*… which held that the act of suspension and act of sustaining the suspension after review are lawful acts performed pursuant to valid provincial legislation. A subsequent acquittal on charges under the *Criminal Code* arising out of the same circumstances does not make the administrative licence suspension unlawful or void because the Board, in the exercise of its duty of fairness, considered the impugned evidence and, on that basis, confirmed the licence suspension.
>
> The objective of the ALS program is public safety. The consequences of a breach of the statute are civil – a licence suspension. A breach does not threaten a liberty interest nor result in the consequences of a criminal conviction…
>
> [Emphasis added.]

[106] The applicant argues in her brief that the *Selig* and *White* decisions were overturned by the Supreme Court of Canada in *Guindon v Canada*, 2015 SCC 41:

> 52 The above ruling [in *Selig*] that "the administrative act of suspension and the Registrar's review are civil and not criminal matters" was shown to be wrong in law **in 2015** by the Supreme Court of Canada. In **Guindon v. R.**, 2015 SCC 41, the Supreme Court of Canada considered whether penalties imposed pursuant to the **Income Tax Act** were "administrative" or "criminal" in nature. Justices Rothstein and Cromwell defined the criteria by which a court must determine whether government penalties are "administrative" or "criminal" in nature. They ruled that if processes impose penalties which are not grounded by a **Criminal Code** offence the processes are "administrative" in nature. Such processes do not engage s. 11 of the **Charter**. **If processes impose penalties grounded by a *Criminal Code* offence the process is "criminal" in nature.** Processes which are "criminal in nature" engage s. 11 of the **Charter**. **Guindon** explains as follows how a court must determine whether a "process" is "administrative" or "criminal" in nature.
>
> **(ii) The Process**
>
> [63] With respect to the process, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding. Fish J. referred to some of the relevant considerations in *Martineau*, including whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record: para. 45. The use of words traditionally associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", and "accused", can be a helpful indication as to whether a provision refers to criminal proceedings.
>
> [64] The fact that the penalty is imposed by a judge in a criminal court is, of course, another sign that the offence is criminal in nature. But whether a proceeding is criminal by nature does not depend on the actual penalty imposed. For example, parking tickets can involve relatively small fines, but where they are imposed in conformity with the general criminal process (e.g. pleading guilty or contesting the fine before a judge, prosecution by a Crown attorney), s. 11 rights apply: *Wigglesworth*, at para. 559**. Offences in the *Criminal Code***, the *Youth Criminal Justice Act*, S.C. 2002, c. 1, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and quasi-criminal offences under provincial legislation **are the type of proceedings which are criminal in nature**: see the *Constitution Act, 1867*, s. 92(15); *Wigglesworth*, at p. 560; *Martineau*, at para. 21.
>
> [65] If, considering all of these factors, the process is criminal in nature, it engages s. 11 of the *Charter*. [Bold emphasis and highlighting added.]

53 S. 279A(1)(b) of the ***MVA*** requires that before a person can be subjected to Nova Scotia impaired driving punitive sanctions he/she must be charged with the

> **Criminal Code** offence of impaired driving. S. 279B(7) of the ***MVA*** provides that when a review of a **Suspension Order** is conducted by Mitchell or his Department the "sole" issue they are permitted to determine is whether the Applicant for the review committed the offence of impaired driving "as defined in the **Criminal Code**".
>
> 54 According to **Guindon** the impaired driving punitive "processes" **legally prescribed by law in the *MVA*** - - required to be administered and enforced by the Registrar of Motor Vehicles - - are "criminal in nature". This is because the "processes" are grounded by offences contained in the **Criminal Code**. Grounding the enforcement of Nova Scotia's impaired driving punitive sanctions upon the **Criminal Code** offence of impaired driving makes the "processes" "criminal in nature". "Processes" that are "criminal in nature" engage s. 11 of the **Charter**.
>
> …
>
> 63 In **Guindon** the Supreme Court of Canada ruled that any proceedings which impose penalties for an offence in the **Criminal Code** are "criminal in nature" and therefore engage s. 11 of the Charter. Turner's decision quoted above in para. 50 [para. 28 of the Decision] is wrong in law. The issue of the **Suspension Order** pursuant to s. 279A(1)(c)(ii) and her review of the **Criminal Charge** pursuant to s. 279B(7) of the ***MVA*** were criminal matters based upon the Applicant being charged with the **Criminal Code** offence of impaired driving. When the Applicant was charged with the **Criminal Code** offence of impaired driving this engaged s. 11 of the **Charter.** Both Mitchell and Turner acted unlawfully when they intentionally ignored the Applicant's s. 11 **Charter** rights.
>
> [Double underline added]

[107] The applicant argues that the *MVA* impaired driving punitive sanctions are: (i) the requirement to successfully complete an alcohol rehabilitation program costing $455.00 and (ii) to pay a licence reinstatement fee costing $99.60.

[108] The applicant's argument is informed by the applicant's interpretation of s. 279 A(1)(b) and s. 279B (7)(a) of the *MVA.* These provisions are:

> 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 …
>
> (ii) [refusing breathalyzer clause omitted] 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 …
>
> (ii) suspend the person's driver's license by serving upon the person a notice of intention to suspend and order of suspension effective seven days from the date of the notice and order …
>
> 279B (1) A person may apply for review of an order of suspension pursuant to Section 279A …
>
> (7) The sole issue before the Registrar in a review pursuant to this Section is whether it is established to the Registrar's satisfaction that
>
> the person operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) having consumed alcohol in such a quantity that the concentration thereof in the person's blood equalled or exceeded 80 milligrams of alcohol in 100 millilitres of blood;
>
> [Underling added.]

[109] As appears from the double underlined portion of the applicant's brief above, and confirmed by the applicant's oral argument, the applicant is of the view that it is a requirement for the suspension of a license under s. 279A of the *MVA* and the review under s. 279B of the *MVA* that there must be an accompanying charge under the *Criminal Code*. With respect, that is not a requirement of the *MVA* on the face of the legislation. In addition, both Mr. Mitchell and Ms. Turner testified that it was not a requirement. Both testified that a police officer could issue a notice of suspension under the authority of s.279A without issuing a charge under the *Criminal Code*.

[110] The applicant argues that the incorporation by reference of the definition in the *Criminal Code* for "operation of or having care or control of a motor vehicle" is a reference to s. 253 of the *Criminal Code* – the offence of impaired driving. The argument proceeds that in order to make this determination the Registrar must determine the same issue that was determined by the Provincial Court Judge who dismissed the s. 253 charge.

[111] With respect, I do not agree that the references in s. 279A(1)(b) and s. 279B (7) are to s. 253 of the *Criminal Code*.

[112] First, there is no definition in s. 253 of the terms "operate" or "care and control" of a motor vehicle.

[113] Second, at the time of the suspension notice the *Criminal Code* contained the following definitions:

> 214 In this part
>
> …
>
> "operate"
>
> (a) means, in respect of a motor vehicle, to drive the vehicle
>
> …
>
> 258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),
>
> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operated a motor vehicle…the accused should be deemed to have had the care or control of the vehicle…unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle…in motion…

[114] In my view, it is to these definitions that the references in the *MVA* are made. Had the legislature intended to require that the suspension notice be linked to a charge being filed under s. 253 of the *Criminal Code* the provision would have clearly done so. I observe that is exactly what the legislature did, for example, in s. 67(12) of the *MVA* which states:

> (12) In this Section, "alcohol related offence" means an offence under sections 253, 254 or 255 of the *Criminal Code* (Canada).

See also s. 67(4) of the *MVA*.

[115] Applying the test in *Guindon*, I do not consider the requirements to pay a reinstatement fee of $99.60 or to pay for the $455.00 cost of the alcohol rehabilitation program to be punitive sanctions. Sections 279A and 279B do not create a criminal process or give rise to true penal consequences. Rather, a suspension and subsequent review under these provisions are civil or administrative. The potential consequences are regulatory, involving the withdrawal of a privilege, and are separate and distinct from any criminal conviction or penalty imposed in respect of the driver's conduct. Action taken under ss. 279A and 279B does not result in anyone being charged with an offence, and the regime created under those provisions operates completely independently of any criminal charges flowing from the same conduct. There is no requirement under s. 279A that the peace officer issuing the suspension on behalf of the Registrar lay criminal charges against the driver. Moreover, an acquittal on related criminal charges does not make the administrative suspension under s. 279A unlawful or void.

[116] The fact that the applicant's conduct on May 11, 2018 gave rise to criminal proceedings under s. 253 of the *Criminal Code* and administrative proceedings under ss. 279A and 279B of the *MVA* does not render the latter proceedings subject to s. 11. Put slightly differently, the fact that the applicant's conduct on May 11, 2018 also resulted in the laying of criminal charges does not convert her administrative suspension under s. 279A (or a subsequent administrative review under s. 279B) into a penal proceeding or consequence, so as to attract the application of s. 11 of the *Charter*.

[117] As set out in s. 279B(7) of the *MVA*, the sole issue before the Registrar or Deputy Registrar on a review application is whether they are satisfied that the driver operated or had care or control of a motor vehicle as defined by the *Criminal Code*, having consumed alcohol in excess of the maximum limit permitted under s. 279A(1). The Registrar does not decide whether the driver is guilty or innocent of a criminal offence, or whether they had the *mens rea* to commit a criminal offence; their task is simply to affirm or rescind the peace officer's administrative suspension. Accordingly, the presumption of innocence as codified in s. 11(d) of the *Charter* has no bearing upon a review under s. 279B.

[118] In oral argument the applicant referred the Court to the appellate decision in *Sahaluk v. Alberta (Transportation Safety Board)*, 2017 ABCA 153, as being on "all fours" with this case. The applicant says that in a similar administrative suspension fact situation where the applicant was charged with a criminal offence and issued a related suspension order, the Alberta Court of Appeal ruled that s. 11 of the *Charter* was engaged because drivers were charged with criminal offences from which provincially imposed consequences flowed.

[119] Upon closer examination of the decision it becomes apparent that the Alberta legislative framework is distinctly different from Nova Scotia. The Court of appeal concluded:

> The Attorney General argues that a driver subjected to an administrative licence suspension is not "charged with an offence" and therefore is not entitled to the protections of s. 11: Goodwin at para. 39; Thomson at para. 37. That analysis prevailed under the 1999 administrative licence suspension regime. As noted above, however, the 2011 regime under attack is directly tied to an "offence". The administrative suspension under s. 88.1 only applies to "a person [charged] with an offence under . . . the Criminal Code", the suspension is mandatory on being "charged", and the suspension specifically runs until "disposition of the criminal charge". No person who is not "charged with an offence" can be subjected to an administrative licence suspension under this provision, and once the "charge" is disposed of the suspension ends. The licence suspension is exactly concurrent with

> the entire criminal process: charge, bail, plea, election, plea bargaining, trial, and sentencing.
>
> [Emphasis added]

[120] It is clear from examining the provisions of s. 88.1 of the Alberta legislation that it is directly tied to being charged with an offence. These provisions replaced the provisions that were upheld as constitutional by *Gonzales*, *supra*. The *Sahaluk* decision does not support the applicant's claim.

[121] Having considered the arguments and authorities, I find that the applicant's s. 11 rights were not engaged by the suspension of her license under s. 279A, or during the processing of her review application under s. 279B. Given that these rights were not engaged, it follows that Mr. Mitchell and Ms. Turner did not breach those rights, with the result that the applicant's claims under ss. 11(d) and (h) of the *Charter* are dismissed.

[122] Was there re-litigation of an issue that was before Judge Sakalauskas, in a manner contrary to the doctrines of *autrefois acquit, res judicata*, or abuse of process?

[123] All three arguments under this heading are rooted in the applicant's belief, as discussed above, that the Registrar's decision on the review conducted pursuant to s. 279B of the *MVA* was a re-litigation of the criminal charge under s. 253 for which the applicant was acquitted by Judge Sakalauskas. In the applicant's brief she states:

> 236 The Applicant claims punitive damages for abuse of process from the Respondents grounded by: (a) the tortious refusal by Mitchell and Turner to comply with common law doctrines and case law authorities that were binding upon them; and (b) the unlawful enforcement against her by Mitchell and Turner of s. 279A(1)(a)(i) of the ***MVA***. The evidence set out below shows that the abuses of process - - **at least a dozen** - - are so numerous and violated every possible common law legal doctrine, legal authority and principle of natural justice conceivable that a substantial award of punitive damages is justified.
>
> 237 Numerous preliminary objections to Mitchell's jurisdiction to conduct a second quasi-criminal hearing of the **Criminal Charge** against the Applicant, after she was acquitted by Judge Sakalauskas, were sent to Mitchell. These included objections based upon: the doctrine of issue estoppel, the doctrine of *autrefois acquit*, case law re operating a motor vehicle while involuntarily intoxicated and s. 11(h) of the **Charter**. **Mitchell intentionally refused to rule upon these preliminary objections.** These preliminary objections were required by law to be ruled upon by Mitchell to determine whether he had lawful authority to prosecute the Applicant a second time after she was acquitted by Judge Sakalauskas. Mitchell was advised that these preliminary objections were required to be ruled upon before

he allowed the 279B Review to go forward (p. 38). By the letter dated October 28, 2019 (p. 39) Mitchell, whose name is typed on the letter, and Turner who 'stamped' the letter "for" Mitchell, refused to rule upon these preliminary objections as follows:

> I am not required to hear what you term as "pre-liminary objections" before the hearing itself. As an administrative decision-maker, I set my own process and procedure, within the bounds of natural justice and administrative fairness. I will hear all matters you wish to address on the date of the review. [Bold emphasis and highlighting added.]

238 The above statement shows that Mitchell and Turner thought they had free rein to exercise their powers in any way they saw fit. They obviously did not understand that their quasi-judicial authority required them to comply with the law - - **which they have violated in every conceivable way**. Their compliance with the law was particularly important in circumstances where s. 279B(7) of the ***MVA*** required them to determine whether the Applicant was guilty of the **Criminal Charge** after she had been acquitted by Judge Sakalauskas. Mitchell and Turner intentionally ignored the law that it is abuse of judicial process to issue a legal ruling that contradicts a prior judicial ruling on the identical issue. Mitchell and Turner intentionally ignored the fact that when a person is charged with a **Criminal Code** offence, pursuant to **the lawful wording** in s. 279A(1)(b) of the ***MVA***, the protections provided by s. 11 of the **Charter** are engaged.

239 The record set out below shows by a preponderance of the evidence that in the course of exercising their statutory powers Mitchell and Turner violated every conceivable legal authority, principle of quasi-judicial fairness and principle of natural justice in such a highhanded manner as to make out the tort of abuse of process.

…

246 *De facto* the 279B Review is not an "administrative process". According to **Guindon** supra at para. 52, it is a process which is "criminal in nature". The process requires the determination of a **Criminal Code** offence as the basis for determining whether Nova Scotia impaired driving punitive sanctions may be enforced against a person accused of impaired driving.

247 The **Criminal Code** offence in this case was the **Criminal Charge** acquitted by Judge Sakalauskas. The so-called 'Review' performed by Turner was a second quasi-criminal proceeding which found the Applicant guilty of the **Criminal Charge** after it had been acquitted by Judge Sakalauskas.

248 To determine whether the Applicant was the victim of quasi-judicial abuse of process in this case it is necessary to analyze the numerous acts committed by Mitchell and Turner, from their respective positions of power of Registrar and Deputy Registrar of Motor Vehicles. If they were "manifestly unfair" to the Applicant - - or brought the administration of justice into disrepute - - they committed the tort of abuse of process as that doctrine has been developed by the case law.

[124] The brief enumerates twelve separate arguments on pages 65-76. I will list and address them in turn as follows:

1. *Both Mitchell and Turner enforced Nova Scotia impaired driving punitive sanctions against the applicant after she was found not guilty of the Criminal Charge*. As stated above, there were no punitive sanctions enforced against the applicant.

2. *Mitchell did not advise Lienaux that s. 279B(7) of the MVA prohibited him from conducting an appeal from the Suspension Order the applicant paid $50.00 for him to conduct.* This is a semantic argument based on the computer generated receipt issued from Access Nova Scotia which referred to an "Appeal". The Application for review completed by the applicant with assistance from her legal counsel was clear as to the sole issue that would be considered on the review as defined by s.279B(7).

3. *Turner stated in her decision that the Order of Suspension issued to the applicant by Woodworth was issued pursuant to s. 279A(1)(a)(i) of the MVA. No such proceedings as "administrative suspension proceedings" are created by s. 279A(1)(a)(i) of the MVA.* This is again a semantic argument. The reference to s. 279A(1)(a)(i) was to distinguish the suspension for having a blood alcohol concentration over 80mgs in 100 ml of blood from a suspension based on a refusal under (1)(a)(ii). The applicant also took issue with the use of the phrase "administrative suspension proceedings" because there is no formal use of that phrase in the legislation. I find that this phrase was used descriptively in correspondence and the decision and did not suggest that it was a term quoted from the legislation.

4. *Mitchell and Turner intentionally ignored that law and enforced the Province's impaired driving punitive sanctions against the applicant after evidence was adduced in the Review submissions that the applicant was involuntarily intoxicated at the time the Criminal Charge was laid against her.* This issue has already been addressed in my reasons. The provisions of the *MVA* relating to suspension do not contain punitive sanctions and do not require a finding of *mens rea.*

5. *The letter of September 23, 2019 shows that Mitchell was advised of the NSCA decision in* ***Selig*** *holding that a Registrar of Motor Vehicles who imposes impaired driving punitive sanctions upon a driver, after the driver has been acquitted of an impaired driving charge by a court of law, commits an act which is contrary to the intent of the MVA. Mitchell*

intentionally ignored that law and persisted to pursue a rehearing of the Criminal Charge acquitted by Judge Sakalauskas pursuant to the 279B MVA *Review process.*

This issue has already been addressed in my reasons. The *MVA* does not impose punitive sanctions upon a driver.

6. *The letter of September 23, 2019 shows that Mitchell and Turner were provided with legal authority holding that a person acquitted of an impaired driving criminal charge is protected by the doctrine of issue estoppel from being subjected to a second quasi-criminal proceeding relating to the same criminal charge that had already been tried and acquitted.*

The applicant cites *R v Mahalingan* [2008] 3 SCR 316 as authority that there are three requirements for proof of issue estoppel in a criminal proceeding:

> 1. The issue has been decided in a prior proceeding. This requires the court in the second trial to decide whether the issue the Crown is seeking to prove is the same as an issue resolved in the accused's favour in a prior criminal proceeding.
>
> 2. The second requirement of issue estoppel is that the judicial decision which is said to create the estoppel be final.
>
> 3. The third requirement of issue estoppel is mutuality — that the parties to the two proceedings at issue are the same. Where issue estoppel is raised by the accused against the Crown, it is in complete harmony with other criminal law principles. If the second trial is a criminal proceeding, the parties are always the same — the Crown and the particular accused person. Allowing the accused to claim issue estoppel as to matters resolved in the accused's favour at the first trial poses no problems. If the second trial is not a criminal proceeding but an administrative proceeding, mutuality will not be met and the accused will not be able to raise a prior finding in his favour by way of issue estoppel: *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.). …

The Review was not a second trial of the same issue for the reasons previously stated. It is an administrative proceeding and thus fails to meet the first and third requirements of *Mahalingan*.

7. *The letter of September 23, 2019 shows that Mitchell and Turner were provided with legal authority holding that a person acquitted of an*

impaired driving criminal charge is protected by the doctrine of autrefois acquit from being subjected to a second quasi-criminal proceeding to determine whether the person is guilty of the previously acquitted criminal charge. Mitchell and Turner intentionally ignored that law and persisted to pursue a quasi-criminal rehearing of the Criminal Charge acquitted by Judge Sakalauskas.

The plea of *autrefois acquit* is a special plea available to an accused in a criminal proceeding. In *R v Van Rassell* [1990] 1 S.C.R. 225 McLachlin J. (as she then was) stated:

> To make out the defence of *autrefois acquit*, the accused must show that the two charges laid against him are the same. In particular he must prove that the following two conditions have been met:
>
> The matter must be the same, in whole or in part; and
>
> The new count must be the same as at the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at the at time to make the necessary amendments.

For the reasons already stated, the Review conducted by Ms. Turner was not a proceeding to determine whether the applicant was guilty of the previously acquitted criminal charge. The doctrine of *autrefois acquit* does not apply.

8. Mitchell denied the applicant of her right to procedural fairness when he refused to rule on her preliminary objections before the 279B Review was heard on the merits. If Mitchell had made a wrong decision on the preliminary objections this would have provided the applicant the opportunity to take court proceedings to quash that decision before any decision was made on the merits of the Criminal Charge acquitted by Judge Sakalauskas.

There was nothing preliminary about the objections. The applicant was seeking the Review determined summarily. There is no statutory authority for such process. The applicant cites the decision of the Supreme Court of Canada in *Brassard v Langevin*, (1878) 2 S.C.R. 319. In that case the court was interpreting a specific provision of the *Controverted Elections Act of 1873* that permitted preliminary objections. It has no bearing on the present case. It was open to the applicant to appeal the decision of the Registrar or seek judicial review if she thought that the Registrar made a wrong decision on the

"preliminary objections" as expressed in the review decision. The Registrar or Deputy Registrar retains discretion in deciding the process for adjudicating a s. 279B review application, subject to the provisions of the *MVA* and the requirements of the common law duty of procedural fairness. There are no provisions in the *MVA* which require that the Registrar or Deputy Registrar rule on preliminary objections before a hearing on the merits of a driver's s. 279B application. Further, no unfairness results from considering such objections at the same time as the merits of the application itself, particularly where the driver has requested a written review, and is given an opportunity to make written submissions and provide evidence on both matters before her application is adjudicated. Accordingly, it was entirely proper for Ms. Turner to decide to consider the applicant's preliminary objections at the same time as the merits of her review application.

9. *The letter of November 6, 2019 shows that Mitchell was advised that his refusal to allow the applicant to renew her driver's licence was causing the applicant to suffer damages for which compensation would be claimed. Mitchell ignored the fact that he was causing the applicant to suffer damages. The record shows that after being given notice of the damages he was causing the applicant to suffer Mitchell allowed Turner to perform the 279B MVA Review.*

The applicant fails to make clear on what basis she argues this to be an abuse of process.

10. *Turner's decision documents that instead of treating the preliminary objections as a separate legal issue before allowing the 279B Review to be heard on the merits, Turner included rulings on the preliminary objections as part of her quasi-judicial decision on the merits of the Review. Notwithstanding that Turner's statutory authority restricted her to determining one "sole" legal issue when performing the 279B MVA Review - - being the identical legal issue determined by Judge Sakalauskas - - Turner intentionally ignored that restriction and made the legal rulings in her Review decision. S. 279B(7) of the MVA did not permit Turner to make any quasi-judicial legal rulings when she performed the 279B Review. By ruling on the preliminary objections and interpreting s. 67(11) of the MVA as part of the merits of the 279B MVA Review Turner committed abuse of process by violating s. 279B(7) of the Act.*

The review decision authored by Ms. Turner determined the review by reference to the sole issue identified in s. 279(7). The fact that the review decision addressed other, irrelevant, issues that had been raised by the applicant as pre-hearing objections, does not make the review decision an abuse of process.

11. *Turner stated in her 279B Review decision inter alia that: "[28] ... My task is to determine, as a finding of fact, whether the applicant operated or had care or control of a motor vehicle as defined in the Criminal Code (Canada) ...". Turner's mandate pursuant to s. 279B(7) of the MVA was to determine whether the applicant was guilty of the Criminal Charge based upon the definition of impaired driving as defined in the Criminal Code. Every offence defined in the Criminal Code is subject to the presumption of innocence requirement set out in s. 6(1)(a) of the Criminal Code.*

    As stated above, the applicant does not correctly interpret the provisions of s. 279B when she argues that it requires the Registrar to determine whether the applicant is guilty of a criminal charge.

12. *Turner's issue of a quasi-judicial decision in a proceeding that was "criminal in nature" ruling that the applicant was guilty of the Criminal Charge after Judge Sakalauskas had previously acquitted the applicant of the Criminal Charge, was an abuse of process which undermined the integrity and credibility of the judicial process of Judge Sakalauskas and the Halifax County Provincial Court.*

    As stated above, I do not agree that the review decision was criminal in nature.

[125] As stated above, proceedings under ss. 279A and 279B are civil, administrative matters; they are not criminal. The doctrine of *autrefois acquit* is a special plea codified under the *Criminal Code*, that is available to an accused in a criminal proceeding. It is not available in a civil proceeding before an administrative decision-maker: *College of Physicians & Surgeons (Ontario) v. Rassouli-Rashti*, 2009 CarswellOnt 6978 (Sup. Ct. J. (Div. Ct.)), para. 51. Accordingly, it had no bearing upon the applicant's s. 279A suspension or s. 279B review application and has no bearing upon (or relevance to) this proceeding.

[126] As Donald J. Lange notes at p. 1 of *The Doctrine of Res Judicata in Canada*, 4th ed., the doctrine of *res judicata* is part of the general law of estoppel. It is defined

as "something that has clearly been decided" that has "passed into a matter adjudged". Lange goes on to explain (at pp. 10-11) that *res judicata* is ultimately comprised of the following six essential estoppel doctrines:

> (1) Issue estoppel bars an issue which has actually been decided in the first proceeding.
>
> (2) Issue estopped under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
>
> (3) Cause of action estoppel, the true *res judicata*, bars a cause which has actually been decided in the first proceeding.
>
> (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
>
> (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.
>
> (6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.

[127] The sixth doctrine – that of collateral attack – does not support the applicant's claims. The Registry of Motor Vehicles was not a party to the proceedings before Judge Sakalauskas and was not bound by any order in the applicant's criminal proceedings.

[128] The first and second doctrines – those relating to issue estoppel – are only engaged where the facts of a case satisfy all three requirements enunciated by the Supreme Court of Canada at para. 23 of *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63:

1. The issue in the second proceeding must be the same as the one decided in the first proceeding.
2. The decision in the first proceeding must have been final.
3. The parties to both proceedings must be the same, or their privies.

[129] Respectfully, the applicant cannot get over the first of these thresholds. As indicated:

1. The sole issue in the applicant's criminal proceedings before Judge Sakalauskas was whether the applicant had the required *mens rea* to commit a criminal offence under s. 253 of the *Criminal Code*.
2. The sole issue in issuing the administrative suspension under s. 279A (and in reviewing that suspension under s. 279B) was whether the

> applicant had operated or had care and control of her vehicle (as defined by *the Criminal Code*) with a blood alcohol concentration in excess of the specified limit. Whether she committed a criminal offence or had the *mens rea* to do so was never at issue under ss. 279A or 279B, and was not adjudicated or determined under either of those provisions.

[130] Further, the applicant cannot satisfy the third threshold. The applicant's criminal proceedings were prosecuted by the Public Prosecution Service ("PPS"), as the entity entrusted with prosecuting offences under federal criminal law on behalf of Her Majesty the Queen in right of Nova Scotia. Her administrative proceedings involved the RMV, under an administrative regime within the jurisdiction of the Department of Transportation and Infrastructure Renewal. The RMV played no role in the applicant's criminal proceedings (nor could it have), and the RMV's role as regulator under the *MVA* is separate and distinct from the PPS or Crown's role as prosecutor. Further, the objects of the applicant's criminal and administrative proceedings were entirely different. The mutuality requirement for issue estoppel is not established.

[131] Similarly, the third and fourth doctrines listed by Lange – those relating to cause of action estoppel – are irrelevant on the facts of this case. As Lange notes at p. 131, the mutuality requirement of issue estoppel also applies to cause of action estoppel. The Public Prosecution Service and the RMV are not the same parties or privies on the facts of this case.

[132] As Lange explains at p. 148, a "cause of action" is the set of facts which give a person a right to judicial relief against another person. To the extent the Crown had a "cause of action" against the applicant in her criminal proceeding, a key part of that cause of action was whether she had the requisite *mens rea* to commit the criminal offence of impaired driving. By contrast, to the extent the Registrar had a "cause of action" against the applicant under ss.279A and 279B the *MVA*, it did not require a consideration of whether the applicant committed a criminal offence or had the necessary *mens rea* to do so. As outlined in *Selig* and the above-mentioned cases regarding s. 11 of the *Charter*, administrative suspension proceedings under motor vehicle legislation are entirely independent of criminal proceedings for the same conduct under the *Criminal Code*, such that an acquittal in the criminal proceeding does not invalidate or terminate the administrative suspension.

[133] That leaves the fifth doctrine mentioned by Lange – that of abuse of process by re-litigation. At this juncture, it bears noting that the phrase "abuse of process" can refer to two distinct legal concepts – the doctrine of abuse of process, and the tort of abuse of process. The New Brunswick Court of Appeal described these two

concepts as follows at para. 14 of *Belong v. Canada (Attorney General)*, 2013 NBCA 68, leave to appeal to S.C.C. refused:

> The doctrine of abuse of process is concerned with maintaining the integrity of the judicial process by, for example, preventing the same issue from being litigated in multiple forums. This avoids the risk of inconsistent results which would bring the administration of justice into disrepute. The tort, on the other hand, is meant to address situations in which a person uses the processes of the court for an improper purpose. The trial judge articulated that the tort of abuse of process requires the establishment of the following two essential elements: 1. the misuse of process for any purpose other than that which it was designed to serve; and 2. some overt act or threat, distinct from the proceedings themselves, in furtherance of the improper purpose.

[134] Given the references in her Amended Notice of Application in Court, the applicant appears to be relying upon the doctrine of abuse of process, as opposed to the tort of abuse of process. The applicant has not established the required elements of the tort of abuse of process in any event, as:

1. The "processes" at issue in this matter – the administrative suspension under s. 279A, and the review under s. 279B – were not used for an improper purpose. Mr. Mitchell and Ms. Turner did not act in bad faith or in an effort to harm the applicant. They did not use their powers for a collateral or illicit purpose. At all material times, they acted in good faith, in accordance with their interpretation of the *MVA* and their understanding of their powers and duties under the legislation.
2. Mr. Mitchell and Ms. Turner did not commit any overt act or threat, distinct from these processes, in furtherance of an improper purpose.

[135] As set out in *C.U.P.E.*, the doctrine of abuse of process gives a judge or decision-maker discretion to prevent an issue from being re-litigated where re-litigation would bring the administration of justice into disrepute. *C.U.P.E.* involved a situation where an accused was convicted of sexual assault in criminal proceedings. He exhausted all possible avenues of appeal from his conviction. When he was fired after his conviction, his union sought to relitigate whether he had committed the assault during a grievance hearing under its collective agreement with his employer. The majority held that his conviction (with all its consequent legal effects) had to stand in these circumstances.

[136] However, different considerations apply where a person is acquitted in their criminal proceeding, and then goes on to deal with an administrative or tribunal process that relates to the same factual occurrence as their criminal charges. As the

Nova Scotia Court of Appeal noted at para. 55 of *Lunenburg County District School Board v. Haché,* 2004 NSCA 46:

> Generally speaking, acquittal at a criminal trial does not foreclose relitigation of the same allegations in the employment context. One reason for this is that there is no inconsistency between an acquittal, which reflects the Crown's inability to establish its case beyond a reasonable doubt, and a finding in the employment context of just cause for discharge arising from the same facts, which need not be proved to the criminal standard.

[137] Justice Garnett of the New Brunswick Court of Queen's Bench cited *Haché* in *Campbell v. New Brunswick (Chief of Police)*, 2016 NBQB 225, affirmed 2018 NBCA 54. In Campbell, the applicant (a police officer) was caught shoplifting. The jury was unable to agree on a verdict at her criminal trial, and prosecutors did not re-try her criminal charges. She then faced a conduct complaint and disciplinary proceedings under the *Police Act*. The arbitrator accepted that she had committed theft and discharged her from her employment. She applied for judicial review of the arbitrator's decision, arguing (in part) that the arbitrator should have found that it was an abuse of process to base the complaint on the alleged theft in light of the fact that she had not been convicted at her criminal trial. Justice Garnett rejected this argument, noting (at para. 12) that a hung jury was not the equivalent of a not-guilty finding, and went on to note that:

> 13 A review of the principles which govern the issue of abuse of process reveals that even if Campbell had been acquitted, disciplinary proceedings could still have been conducted.
>
> 14 In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (S.C.C.), after stating that "disciplinary offences are separate and distinct from criminal offences for the purpose of the rule against multiple convictions", Justice Wilson quoted with approval from the text The Doctrine of Res Judicata (2nd ed. 1969) by Spencer, Bower and Turner:
>
> > An example is readily found in an inquiry instituted by the disciplinary authority of a professional body, with a view to the expulsion of one against whom conduct infamous in a professional respect is alleged. In such a case it may be that the conduct alleged is no more and no less than conduct in respect of which the accused person has already been acquitted by a criminal court on a criminal charge. Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession.

> 15 She then adopted the following passage from the reasons of Justice Cameron of the Court of Appeal for Saskatchewan:
>
> > **A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public… And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers**. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damages he caused; and to the police force for discipline.
> >
> > [emphasis added]
>
> 16 In this case, even if Campbell had been found not guilty by the Maine Jury, the Arbitrator could still have considered her conduct to determine whether it offended professional standards. The reason for this is that the standard of proof is less onerous in an arbitration hearing than in a criminal court.

[138] The standard of proof in a review proceeding under s. 279B is the civil standard of balance of probabilities. It is not the criminal standard of beyond a reasonable doubt that applied at the applicant's criminal trial. Accordingly, there is no inconsistency between Judge Sakalauskas's determination that she was left in a reasonable doubt as to whether the applicant had had the *mens rea* to commit the criminal offence of impaired driving, and Ms. Turner's determination under s. 279B that it was more likely than not that the applicant had operated (or had care or control) of her vehicle with a blood alcohol concentration in excess of the specified limit.

[139] More fundamentally, however, it bears repeating that Ms. Turner did not relitigate the issue that was before Judge Sakalauskas. Again, the sole issue before Judge Sakalauskas was whether the applicant had the required *mens rea* to commit a criminal offence under s. 253 of the *Criminal Code*. Ms. Turner did not consider whether the applicant committed a criminal offence, or whether she had the *mens rea* to do so. Rather, she considered the sole issue that she was authorized to consider under s. 297B(7).

[140] Accordingly, the doctrines of *autrefois acquit*, *res judicata* and abuse of process are not engaged on the facts of this case, and the applicant's claims under these doctrines are dismissed.

[141] Has the applicant satisfied the legal test for establishing that Mr. Mitchell and/or Ms. Turner committed the tort of misfeasance in public office?

[142] By her Amended Notice of Application, the applicant claims as follows:

> 1 The Respondent Mitchell, as agent of and for the Crown, intentionally committed the tort of misfeasance of public office in September, 2019 by:
>
> (a) violating s. 67(11) of the Motor Vehicle Act ("*MVA*") by advising the Applicant that s. 67(11) of the *MVA* required Mitchell to refuse the Applicant's request to renew her driver's licence unless the Applicant either:
>
> (i) completed an alcohol rehabilitation program costing $455.00; and
>
> (ii) paid a reinstatement fee costing $99.60 to have her driver's licence reinstated even though it had never been revoked; or
>
> (iii) obtained a ruling by a 279B *MVA* Review hearing that the Applicant had not committed the criminal offence of impaired driving as defined by s. 253(1)(b) of the Criminal Code;
>
> after the Applicant had been acquitted of the criminal charge of impaired driving by Judge Amy Sakalauskas of the Halifax County Provincial Court; and
>
> (b) violating s. 279A of the *MVA* by falsely representing to the Applicant's counsel that renewal of the Applicant's driver's licence was being enforced pursuant to "administrative suspension proceedings" when no such "proceedings" exist in law.

[143] In her brief, the applicant further explains her claim as follows:

> 122 The Applicant's claim for misfeasance of public office can be simply summarized. **FIRST**, Mitchell has either created, or perpetuated, an unlawful "process" called "administrative suspension proceedings". As shown supra, at paras. 39 – 56 this "process" was not prescribed by law by the Nova Scotia Legislature in the provisions of the ***MVA***. As shown below at paras. 140 - 160, the **Criminal Code** offence component has been unlawfully removed from the "process" by which Mitchell is authorizing **Suspension Orders** to be issued. Prima facie, based on the Respondents' pleadings, Mitchell apparently believes that the removal of the **Criminal Code** component from the **Suspension Order** process transforms the issue of **Suspension Orders** from a "criminal process" into an "administrative process" which is not subject to the protections of s. 11 of the **Charter**. **Mitchell has unlawfully exceeded his statutory authority for the improper purpose of evading s. 11 of the *Charter* when enforcing the Province's impaired driving punitive sanctions**.
>
> 122A **SECOND**, as shown below at paras. 161 – 173 Mitchell is responsible for administering a sham "Administrative Suspension Review" process which

> augments the above unlawful "administrative suspension proceedings". This so-called "Review" process is held out to be an "appeal" process by which a person is permitted to appeal from the issue of a **Suspension Orde**r. In fact, as required by s. 279B(7) of the ***MVA***, this "process" is a quasi-criminal prosecution of the offence of impaired driving "as defined in the **Criminal Code**". Again, based on the Respondents' pleadings, Mitchell apparently believes that this purported "Administrative Suspension Review" process is "administrative" not "criminal" in nature and *ipso facto* not subject to s. 11 of the **Charter**. **Mitchell's unlawful actions ground the Applicant's claim against him for misfeasance of public office.**

[144] The leading Canadian case on the tort of misfeasance in public office is *Odhavji Estate v. Woodhouse*, 2003 SCC 69. In that case, Justice Iacobucci (for a unanimous Supreme Court of Canada) accepted (at para. 22) that:

> …the tort of misfeasance in public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or a class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff…

[145] Justice Iacobucci went on to note (at paras. 22-24) that:

> It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.
>
> In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers*, supra, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

[146] Justice Iacobucci reiterated (at para. 25) that the ambit of the tort is limited "by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff", and noted (at para. 28) that:

> …The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[147] The British Columbia Court of Appeal recently summarized *Odhavji* and the elements of the tort in *J.P. v. British Columbia (Children and Family Development*), 2017 BCCA 308, leave to appeal to S.C.C. refused. The Court reiterated (at para. 324) that the tort has two elements: "(1) deliberate unlawful conduct by a public officer in the exercise of his or her powers (the *actus reus*); and (2) the awareness (knowledge) that the unlawful conduct is likely to injure the particular plaintiff (the *mens rea*)". The Court went on to provide the following commentary (at paras. 326, 327, and 329) regarding the two ways in which the elements can be established (that is, Category A and Category B misfeasance):

> Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. Three Rivers described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff…
>
> Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is

> inconsistent with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act…
>
> …
>
> The mental element of Category A or Category B misfeasance establishes the "bad faith" or "dishonesty" of the public officer. Accordingly, it requires "clear proof commensurate with the seriousness of the wrong"… Awareness or knowledge that the unlawful act is likely to harm the plaintiff requires at least a subjective recklessness or willful blindness, if not actual knowledge, of the likely consequences of the unlawful act… Subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence. The mental element of the harm thus constrains its ambit from including inadvertent or negligent conduct by a public officer in the discharge of his or her official obligations…

[148] The authorities make clear that a claimant alleging misfeasance in public office has a hard case to prove. As the Ontario Court of Appeal noted at para. 77 of *Pikangikum First Nation v. Nault*, 2012 ONCA 705, leave to appeal to S.C.C. refused, the "tort of misfeasance in public office is difficult to establish. The plaintiff must prove more than mere negligence, mismanagement or poor judgment. To succeed, the plaintiff must demonstrate that the defendant knowingly acted illegally and in bad faith chose a course of action specifically to injure the plaintiff." The Court previously held, to similar effect, at para. 8 of *Martineau v. Ontario (Alcohol & Gaming Commission)*, 2007 ONCA 204, that negligent or even cavalier conduct by a public official does not establish the tort; rather, what is required is either "conduct carried out with an ulterior motive and an intention to injure the appellants (targeted malice)", or "conduct of a public officer acting without an honest belief that her actions were lawful and likely to injure the plaintiffs".

[149] If the applicant is to succeed, she must establish both elements of the tort of misfeasance in public office. Specifically, she needs to establish that:

1. Mr. Mitchell or Ms. Turner engaged in deliberate and unlawful conduct in their capacity as public officers – in other words, that they breached a provision of the *MVA* or another rule of law, or that they acted in excess of (or in a manner that was inconsistent with) their powers under the *MVA* and at common law.

2. Mr. Mitchell or Ms. Turner knew that their conduct was unlawful and was likely to harm the applicant. In other words, they must have acted dishonestly or in bad faith, and must (at a minimum) have been subjectively reckless or willfully blind as to the likely consequences of their conduct. This element will not be established if they honestly believed that their actions were lawful. Similarly, it will not be

> established if they did not intend to cause harm, or did not know that harm was likely to result from their actions.

[150] The applicant can satisfy both elements of the tort at once if she can establish that Mr. Mitchell or Ms. Turner acted for the express ulterior motive or improper purpose of harming her (i.e. that this is a case of Category A misfeasance). If there is no proof of such targeted malice, the applicant will have to proceed under Category B, and prove the elements of the tort independently of each other.

[151] There is no evidence that Mr. Mitchell or Ms. Turner acted with targeted malice towards the applicant, or that they acted with the express motive of purpose of harming her. To the contrary, their evidence is that none of their actions, conduct, or decisions were motivated by bad faith, malice, ill will, or a desire to harm the applicant in any way. The applicant did not tender anything to contradict or rebut Mr. Mitchell or Ms. Turner's evidence on this point. Accordingly, the applicant cannot proceed under a claim of Category A misfeasance. Rather, she must (if she is to succeed) proceed under Category B and establish both elements of the tort separately.

[152] There is no evidence to satisfy the second, mental element of the tort. There is no evidence that Mr. Mitchell or Ms. Turner acted in bad faith or in a dishonest manner, or that they acted with knowledge that their conduct was unlawful and likely to harm the applicant. To the contrary, their evidence is that they acted in good faith at all material times, and in accordance with their understanding of their duties, responsibilities, and powers under the *MVA*. Again, the applicant did not tender any evidence to contradict or rebut their evidence on this point. At most, the applicant has shown that Mr. Mitchell and Ms. Turner did not agree with arguments and positions her counsel put forward. Again, they did so based on a good faith understanding of their roles and responsibilities under the *MVA*. Accordingly, the applicant has not satisfied the second element of the tort, and her claims under misfeasance in public office can be dismissed on this basis alone.

[153] The applicant's claims must also fail under the first prong of the test, as none of Mr. Mitchell or Ms. Turner's actions were unlawful. At all material times, they acted in full compliance with their legal duties. The following facts bear repeating:

1. As the Court of Appeal held in *Selig*, the suspension of the applicant's license did not terminate, or suddenly become unlawful or wrong, simply because she was acquitted on her criminal charges. Further, there are no provisions in the *MVA* which terminate an administrative suspension issued under s. 279A simply because the license holder is

acquitted of criminal charges arising out of the same conduct that gave rise to the suspension.

2. Further, a license that is suspended under s. 279A is not automatically reinstated at the end of the statutory suspension period. Rather, the driver must (in accordance with s. 279A(7)) apply to have their license reinstated. Further, the Registrar or Deputy Registrar cannot (by virtue of s. 279A(8)) reinstate the license until they are satisfied that the driver has completed all the requirements for reinstatement under the *MVA*. Pursuant to s. 67(11), one such requirement is participation in the DWI Program. Due to the use of the word "shall" in ss. 67(11) and 279A(8), the Registrar and Deputy Registrar have no discretion to waive these requirements.

3. If a driver does not want to follow this path to reinstatement, their only other option under the *MVA* is to try to have the suspension rescinded by the Registrar or Deputy Registrar on a review under s. 279B (or, if that is unsuccessful, on a further appeal to the *MVA*B).

4. Given this legislative framework, Mr. Mitchell and Ms. Turner had no authority to allow the applicant to renew her license simply because she had been acquitted on her criminal charges. Under the legislation, the only options were for the applicant to take the necessary steps to apply for reinstatement, or to try to get the suspension rescinded. She chose to pursue the latter option.

5. A Registrar or Deputy Registrar dealing with a review application under s. 279B is an "administrative tribunal" for purposes of s. 10 of the *Constitutional Questions Act*. Accordingly, if an applicant brings the constitutionality of a law into question or applies for a remedy under s. 24 of the *Charter*, the Registrar or Deputy Registrar cannot pass judgment on that issue until the applicant notifies the Attorney General in accordance with s. 10.

6. One of the applicant's "preliminary objections" was that a refusal to allow her to renew her license would result in a breach of her rights under s. 11(h) of the *Charter*. However, as outlined above, the mandatory provisions of the *MVA* are such that Registrar and Deputy Registrar had no discretion to allow her to renew her license simply because she had been acquitted on her criminal charges. Again, the applicant's only options under the legislation were to request to have her license reinstated and complete the necessary requirements for reinstatement under ss. 67(11) and 279A(7)-(8), or apply to have her

suspension rescinded on a review under s. 279B. Accordingly, the effect of the applicant's objection under s. 11(h) was to bring into question the constitutionality of these statutory provisions, and/or to ask that the Registrar or Deputy Registrar not enforce them under s. 24 of the *Charter*. It was therefore proper to require the applicant to comply with s. 10 of the *Constitutional Questions Act* if she intended to pursue this argument on her s. 279B application.

7. The Registrar or Deputy Registrar retains discretion in deciding the process for adjudicating a s. 279B review application, subject to the provisions of the *MVA* and the requirements of the common law duty of procedural fairness. There are no provisions in the *MVA* which require that the Registrar or Deputy Registrar rule on preliminary objections before a hearing on the merits of a driver's s. 279B application. Further, no unfairness results from considering such objections at the same time as the merits of the application itself, particularly where the driver has requested a written review, and is given an opportunity to make written submissions and provide evidence on both matters before her application is adjudicated. Accordingly, it was entirely proper for Ms. Turner to decide to consider the applicant's preliminary objections at the same time as the merits of her review application.

8. Pursuant to s. 279B(7), there is only one issue for the Registrar to consider on an application under s. 279B. As Justice MacAdam explained at para. 112 of *White v. Nova Scotia (Registrar of Motor Vehicles)*, *supra*, that "is whether 'it is established to the Registrar's satisfaction' the applicant operated or had care or control of a motor vehicle, having consumed alcohol in excess of the maximum permitted limits". The Registrar does not (as Justice MacAdam noted at para. 114) "decide guilt or innocence". Put slightly differently, the Registrar does not consider whether the applicant is guilty of the criminal offence of impaired driving, nor whether the applicant possessed the required mens rea to be found guilty of that offence. Accordingly, the fact that Judge Sakalauskas acquitted the applicant based on a reasonable doubt on *mens rea* was entirely irrelevant to the task that was before Ms. Turner. Rather, the sole issue before Ms. Turner was whether the applicant had operated or had care or control of a motor vehicle, having a blood alcohol concentration in excess of 80 mg of alcohol in 100 ml of blood. All the evidence before Ms. Turner indicated that that question had to be answered in the affirmative. Accordingly, pursuant

> to s. 279B(9), Ms. Turner had no choice but to sustain the administrative suspension of the applicant's license. Under the *MVA*, Ms. Turner had no discretion to reach a decision to the contrary and rescind the applicant's suspension.

[154] There was no unlawful conduct on the part of Mr. Mitchell or Ms. Turner. At all material times, they acted in accordance with the mandatory provisions of the *MVA*, the *Constitutional Questions Act*, and the common law duty of procedural fairness.

[155] Accordingly, there is no basis on which to find that Mr. Mitchell or Ms. Turner committed misfeasance in public office, and the applicant's claims under this tort must be dismissed.

Conclusion

[156] In conclusion, I find that that:

1. Section 11 of the *Charter* was not engaged by the applicant's administrative proceedings under ss. 279A and 279B of the *MVA*. Accordingly, no acts or omissions by Mr. Mitchell or Ms. Turner in respect of those proceedings resulted in a breach of the applicant's ss. 11(d) and (h) *Charter* rights.
2. There was no relitigation of the issue that was adjudicated by Judge Sakalauskas in the applicant's criminal proceeding. As such there was no abuse of process and no contravention of the doctrines of *autrefois acquit* or *res judicata.*
3. The applicant has failed to establish either element of the tort of misfeasance in public office.
4. In the result there is no claim established for compensatory or punitive damages.

[157] The Application in Court is dismissed with costs payable to the respondents. If the parties cannot agree on costs I request that the parties make submissions in writing within 30 calendar days of receipt of this decision.

[158] Order accordingly.

Norton, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Turner-Lienaux v. Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 292

Date: 20201021
Docket: Hfx No. 494797
Registry: Halifax

Between:

Karen Turner-Lienaux, of Bedford in the County of Halifax, Province of Nova Scotia

Applicant

v.

Kevin Mitchell, Registrar of Motor Vehicles for Nova Scotia and the Attorney General of Nova Scotia

Respondents

ERRATUM

Judge: The Honourable Justice Scott C. Norton

Heard: September 28, 29, and 30, 2020, in Halifax, Nova Scotia

Decision: October 21, 2020

Erratum: November 6, 2020

Counsel: Charles Lienaux, for the Applicant
Jack Townsend, for the Respondents

Erratum:

Paragraph 115 should read:

> [115] Applying the test in Guindon, I do not consider the requirements to pay a reinstatement fee of $99.60 or to pay for the $455.00 cost of the alcohol rehabilitation program to be punitive sanctions. Sections 279A and 279B do not create a criminal process or give rise to true penal consequences. Rather, a suspension and subsequent review under these provisions are civil or administrative. The potential consequences are regulatory, involving the withdrawal of a privilege, and are separate and distinct from any criminal conviction or penalty imposed in respect of the driver's conduct. Action taken under ss. 279A and 279B does not result in anyone being charged with an offence, and the regime created under those provisions operates completely independently of any criminal charges flowing from the same conduct. There is no requirement under s. 279A that the peace officer issuing the suspension on behalf of the Registrar lay criminal charges against the driver. Moreover, an acquittal on related criminal charges does not make the administrative suspension under s. 279A unlawful or void.

Norton J.