

# LIBERALS OFF THE HOOK FOR FLAWED LAW

## Refunding drunk-driving fines, penalties too costly: appeals judges

Still, it is appalling it has taken ordinary people who had their rights infringed five years to crawl through the courts and then be told too bad.

More than 16,500 drivers penalized under flawed sections of the province's anti-drunk driving law between 2010 and 2011 are out of luck recouping their losses.



*RIC ERNST/FILES* The B.C. Liberals' Immediate Roadside Prevention scheme came into force in September 2010.

In a churlish unanimous decision, a B.C. Court of Appeal division said the law might have breached drivers' charter rights but they deserve no relief — the declaration of invalidity was not retroactive.

In short, the appeal judges agreed it would be too costly for Victoria to refund the fines and penalties for the Liberal administration's legal screw-up.

"Clearly, a retroactive declaration of invalidity has the potential to have a significant financial impact on the government even though this is a 'sanctions' case and not a 'benefits' case," Justice Sunni Stromberg-Stein wrote with the support of colleagues Nicole Garson and Gregory Fitch.

"This is especially true given the pending class action with approximately 16,500 class members. There is no doubt that this is a relevant consideration in examining whether 'a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources.' "

The panel explained that "a government must pass laws and take administrative actions with an eye to what the constitution requires. ... However, when a court changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable."

In a complicated analysis, Justice Stromberg-Stein said in the ruling that the provincial legislation violated the constitution and represented a substantial change in the law. Still, it is appalling it has taken ordinary people who had their rights infringed five years to crawl through the courts and then be told too bad, so sad.

This debacle has roots in a November 2011 B.C. Supreme Court ruling that parts of the Motor Vehicle Act's Immediate Roadside Prohibition (IRP) scheme, which came into force in September 2010, violated the protection against unreasonable search and seizure.

Justice Jon Sigurdson concluded the review process in cases where someone blew a "fail" was so restrictive as to preclude any meaningful challenge of the approved screening device result.

But he suspended the impact of his ruling for six months to give the government time to fix the so-called toughest anti-drunkdriving law in Canada. It did.

Sigurdson's ruling was later upheld by the appeal bench and also the Supreme Court of Canada. But Sigurdson denied the handful of drivers on this appeal damages for loss of use of their vehicle and loss of income as well as compensatory, general, and punitive damages.

Further, he said they didn't deserve restitution for administrative penalties, driver's licence reinstatement fees, vehicle towing and storage fees, cost for counselling required by the Responsible Driver Program, Interlock installation and maintenance fees, cost for alternative transportation, and legal fees and disbursements for disputing the prohibitions.

Sigurdson held that the motorists were not entitled to any personal or monetary remedies because the government acted in good faith. He said there was no misconduct in the passing of the IRP scheme or in the actions of the officials carrying out their duties under the regime.

Finally, he concluded that due to the prospective application of the declaration of invalidity, any petitioner with outstanding fees, penalties or suspensions was still on the hook.

All four appellants had completed the 90-day driving prohibition; but three had their remedial programs cancelled and the fourth, who had partly completed his, had the remainder cancelled.

"The effect of (Sigurdson's reasoning) was to recognize that the constitutional guarantee against unreasonable searches or seizures applied in a new situation — roadside screening using an (approved screening device) in the context of the IRP scheme," Stromberg-Stein said.

"This goes beyond applying pre-existing law to new facts. In other words, broad s. 8 Charter principles found new expression ... previous constitutional challenges to other drunk-driving regulatory schemes were consistently unsuccessful."

A class action, with more than 16,500 drivers, but not involving the appellants, was being held in abeyance pending this decision.

This ruling appears to make that futile unless an appeal is pursued at the Supreme Court of Canada. The province claims the IRP program is responsible for saving nearly 300 lives and recent Statistics Canada figures indicate the 2014 B.C. rate of impaired driving was the lowest in a decade — down nearly 25 per cent from 2004.

In 2011, the province recorded its highest rate of the decade. Regardless, B.C.'s drunk-driving rate remains more than twice as high as Ontario's, the province with the country's lowest rate of drunk driving according to the statistics.

Message: The road to hell may be paved with good intentions. -cjk