

CANADA / JUDGMENT

R. v. Ghadban

2021 BCCA 69

COURT

British Columbia Court of Appeal

DECIDED

9 February 2021

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2021 BCCA 69 R. v. Ghadban

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Ghadban,

2021 BCCA 69

Date: 20210209

Docket: CA46865

Between:

Regina

Respondent

And

Ali Moussa Ghadban

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated

April 29, 2020 (R. v. Ghadban, 2020 BCSC 664, New Westminster

Docket X081468).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

D.H. Griffith

Counsel for the Respondent

(via videoconference):

R.G. Garson, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

February 3, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 9, 2021

Oral Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

Dissenting Oral Reasons by:

The Honourable Madam Justice Saunders (p. 17, para. 62)

Summary:

The appellant was riding a pedal-equipped electric scooter known as a Motorino XMr. He was charged with driving without a driver's licence and with driving without insurance. He contended that the scooter qualified as a motor assisted cycle under the Motor Vehicle Act, and that he did not need a licence or insurance. A judicial justice convicted the appellant on both charges. He appealed unsuccessfully to the B.C. Supreme Court. On further appeal, held: Appeal dismissed (Groberman and Stromberg-Stein JJ.A.; Saunders J.A. dissenting).

Majority (per Groberman and Stromberg-Stein JJ.A.): The scooter was not a motor assisted cycle, because the motor was incapable of operating while the device was being pedalled, and because the device was not designed to be operated primarily by human power. There is no prohibition on a motor assisted cycle being operated on electric power without pedaling, but it must be designed primarily to be human-powered. It is unnecessary to resolve two other issues on the appeal, that of how wheel diameter is measured and whether the Crown or the disputant has the

burden of proving that a device is a motor assisted cycle.

Dissent (per Saunders J.A.): The propulsion of the Motorino satisfies the definition of a motor assisted cycle in the legislative scheme, but the order should be set aside to allow for an new hearing because the convictions relied upon a finding concerning wheel size, an issue that was not properly advanced in the initial hearing.

- [1] GROBERMAN J.A.: Mr. Ghadban was convicted in Traffic Court in the Provincial Court of British Columbia of two infractions under the Motor Vehicle Act, R.S.B.C. 1996, c. 318: driving without a driver's licence (s. 24(1)), and driving without insurance (s. 24(3)). His summary conviction appeal to the Supreme Court of British Columbia was dismissed, and he now appeals to this Court, with leave, under s. 124 of the Offence Act, R.S.B.C. 1996, c. 338.
- [2] The question in this case is whether, at the time of the alleged infractions, Mr. Ghadban was operating a "motor vehicle" as that term is defined in the Motor Vehicle Act, or was, instead, operating a "motor assisted cycle". A person requires a valid driver's licence and insurance to operate a motor vehicle, but not to operate a motor assisted cycle.

Background Facts

- [3] Mr. Ghadban was riding a Motorino XMr at the time of the alleged infractions. In his testimony, he described it as a "scooter", a word also used in the owner's manual. As that is not a term used in either of the pieces of legislation we are concerned with -- the Motor Vehicle Act and the Motor Assisted Cycle Regulation, B.C. Reg. 151/2002 -- I will adopt it as a neutral generic term to describe devices like the one Mr. Ghadban was riding.
- [4] The facts of this case are straightforward. On July 24, 2018, a police officer observed Mr. Ghadban riding his scooter on a public road in the vicinity of the King George Skytrain station in Surrey. Mr. Ghadban's young son was also on the scooter. The officer asked Mr. Ghadban to produce his driver's licence and proof of insurance. Mr. Ghadban was unable to do so. In fact, he was not licenced to drive a motor vehicle, and the scooter he was riding was not an insured vehicle.
- [5] Mr. Ghadban had done extensive research before purchasing his scooter. He believed that it fell within the definition of "motor assisted cycle" in the Motor Vehicle Act and that he could ride it without having a driver's licence. He even made inquiries about getting insurance, but was, apparently, told that the Insurance Corporation of British Columbia does not offer insurance for electric scooters of that type.

The Scooter

- [6] At the trial before the judicial justice, the evidence included a number of sources of information about Mr. Ghadban's scooter. The police officer and Mr. Ghadban both testified. There were few, if any, discrepancies in their evidence. Exhibits entered on the trial included photographs of the scooter, and an owner's manual that included operating instructions and specifications.
- [7] The handlebars, wheels, seat, suspension, frame and instrumentation on the scooter all resemble the corresponding components of a motorcycle, at least superficially. The main difference, visually, is that the scooter has pedals attached to it. The pedals drive a chain connected to the rear wheel, so that it is possible to pedal the scooter, though, as I will indicate, its weight makes that a very unattractive option. The pedals can be removed without interfering with the ordinary operation of the scooter.
- [8] The primary motive power for the scooter is a 500-watt direct-drive brushless motor located in the rear wheel of the scooter. That motor does not use the chain, which, as I understand it, is similar to a bicycle chain, and is only functional when the scooter is being pedalled.
- [9] Both counsel have cautioned us that the fact that the scooter looks like a motorcycle is of no relevance to the case. I agree. If there is a problem, it is not that the scooter looks like a motorcycle, but rather that it functions as one.
- [10] In important ways, Mr. Ghadban's scooter does function as a motorcycle. He says that he, himself, has never used the pedals. His evidence is that the scooter weighs 300 lbs. Mr. Ghadban says he does not want to pedal that much weight. It seems unlikely that anyone would, except, perhaps, for the purpose of resistance training. The owner's manual does not specifically list the weight of the XMr model, but does show the weights of other models, which range from 199 lbs. to 239 lbs. with a standard battery. The judicial justice said the XMr with a standard battery weighs 244 lbs. I am unable to find that weight referenced in the record that has been produced for this appeal, but it may well be accurate. While the XMr may weigh somewhat less than the 300 lbs. estimate provided by Mr. Ghadban, it is clearly a heavy device.
- [11] Mr. Ghadban stated that the motor cannot be used while pedaling. He indicated that if a rider chooses to pedal the scooter, the motor always remains off. It is difficult, then, to see how the term "motor assisted cycle" would be apt to describe it. The motor never assists cycling. The scooter has two modes. It either operates as a low-powered electric motorcycle, with the motor providing all of the motive force, or as a very heavy, impractical bicycle, with the motor not operating.

[12] I fully understand that legislation can define words to mean something that they would not ordinarily mean, so the mere fact that the phrase "motor assisted cycle" is not an apt one to describe the scooter does not necessarily mean that the scooter cannot be a motor assisted cycle in law. Before addressing that issue further, I will summarize the legislative provisions and the judgments in the courts below.

Legislative Provisions

[13] The general definition section in the Motor Vehicle Act includes the following:

1 In this Act:

"motor assisted cycle" means a device

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

"motor vehicle" means a vehicle, not run on rails, that is designed to be self-propelled or propelled by electric power obtained from overhead trolley wires, but does not include mobile equipment or a motor assisted cycle;

[14] Part 3 of the statute includes the following provision:

182.1 (3) The Lieutenant Governor in Council may make regulations respecting motor assisted cycles including, without limitation, regulations prescribing

- (a) the criteria that must be met by a device in order for it to qualify as a motor assisted cycle for the purposes of this Act,

[15] The regulation made under s. 182.1 of the statute is the Motor Assisted Cycle Regulation. It contains a number of requirements for motor assisted cycles. For the most part, it is clear that Mr. Ghadban's scooter meets the specific requirements of the regulation. Its only motor is an electric one, and that motor does not exceed the maximum of 500 watts. While it is not entirely clear from the owner's manual, Mr. Ghadban's unchallenged evidence was that the scooter is incapable of exceeding 32 km/hr when the motor is engaged.

[16] It is also clear that the scooter is a two-wheeled vehicle (the maximum for a motor assisted cycle is three). The brakes, generator system, and the electrical terminal insulation all comply with the regulation, as does the manner in which the battery is attached to the scooter.

[17] The judicial justice considered that the scooter did not meet the requirements of s. 2(1) of the regulation:

2(1) The wheels of a motor assisted cycle must be 350 mm or more in diameter.

[18] He noted that the diameter of the wheels (as shown in the owner's manual) was 12", or about 305 mm. He considered that the wheel size, standing on its own, was sufficient to show that the scooter was not a motor assisted cycle, though he did go on to state other reasons that also led him to the same conclusion.

Interpretation of Section 3 of the Regulation

[19] With respect to the specific regulatory provisions, the judicial justice referred, as well, to ss. 3(1) and 3(2) of the regulation:

3(1) A motor assisted cycle must be equipped with a mechanism, separate from the accelerator controller, that

- (a) allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle, or
- (b) prevents the motors from turning on or engaging before the motor assisted cycle attains a speed of 3 km/hr.

(2) The motors of a motor assisted cycle must turn off or disengage if

- (a) the operator stops pedaling,
- (b) an accelerator controller is released, or
- (c) a brake is applied.

[20] With respect to 3(1), the judicial justice recognized that (a) and (b) are alternatives, and a motor assisted cycle does not need to meet both of them. Mr. Ghadban's scooter clearly does not have any mechanism that prevents the motor from engaging at speeds less than 3 km/hr, so it is required to have a mechanism that allows the driver to turn the motor on and off from a normal seated position. Mr. Ghadban argued that such a mechanism was present, in the form of an ignition key switch, which is located on the inner front cowl of the scooter. The judicial justice was doubtful, saying:

[30] It Is questionable whether the ignition switch instructed by the Owner's Manual to be turned on before beginning to ride, qualifies as such a mechanism.

[21] He does not, however, appear to have reached any firm conclusion on that issue. The summary conviction appeal judge was of the view that the ignition switch satisfied the requirements of s. 3(1), saying:

- [15] From observing the photos of the Motorino and the manual, that switch "allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle", as per s. 3(1)(a) of the [Motor Assisted Cycle] Regulation.
- [22] The question of whether the scooter conforms with s. 3(1) is not a contentious issue on this appeal. It is accepted that the ignition switch is a sufficient mechanism for the purposes of s. 3(1)(a).
- [23] With respect to s. 3(2), the judicial justice set out the issue as follows:
- [31] The officer also placed great emphasis on the fact that [the] motor of the Motorino XMr does not turn off or disengage when the operator stops pedaling, as required in Section 3(2) of the [Motor Assisted Cycle Regulation]. It is [the Crown's] position that the requirement in Section 3(2)(a) should be read as being conjunctive with the requirement of either (2)(b) or (2)(c) of that section. That is, that the requirement that the motor turn off or disengage when the operator stops pedaling, must always be present to qualify as a [motor assisted cycle]. By turn off or disengage, one would expect that the device would naturally come to a gradual stop on a flat surface without any further pedaling. This interpretation would certainly fit with the view of electric propulsion serving only to augment human propulsion, not replace it. The disputant argued that all three of the conditions in Section 3(2) of the [Motor Assisted Cycle Regulation] are to be read disjunctively, that is if any one of those requirements are true, the criteria of that section are met. While I do not have to decide that issue, I prefer the reasoning of Crown on that issue.
- [24] The summary conviction appeal judge did not address this issue. In this Court, both counsel took the position that the requirements of s. 3(2)(a), (b), and (c) are "disjunctive" and that a device can be a motor assisted cycle as long as one of the three listed situations cause the motor to disengage.
- [25] I would comment that, on this appeal, the Court has not been well-served by the Crown's decision not to attempt to uphold the decisions in the courts below. While I appreciate that the Crown is not required to make any particular argument, it seems to me that where the two lower courts have concurred on what is an arguably correct analysis of the case, there should be at least some attempt to illustrate to this Court how that reasoning might be upheld.
- [26] In respect of s. 3(2), my view is that the judicial justice was right to prefer the interpretation pressed by the prosecuting officer before him. Subsection 3(2) is, unfortunately, not well drafted. While the word "or" is disjunctive in subsection 3(2), as it usually is in both ordinary speech and in legislation, the subsection remains ambiguous. It could have either of two meanings. First, it could mean:
- (2) The motors of a motor assisted cycle must turn off or disengage in at least one of the following situations:

- (a) the operator stops pedaling;
- (b) an accelerator controller is released; or
- (c) a brake is applied.

[27] Equally, from a grammatical and syntactical standpoint, it could mean:

(2) The motors of a motor assisted cycle must turn off or disengage if any of the following occur:

- (a) the operator stops pedaling;
- (b) an accelerator controller is released; or
- (c) a brake is applied.

[28] It appears to me that s. 3(2) is a safety provision, designed to ensure that the motor is not providing motive force when the rider does something that shows that motive force is not required. Thus, the motor ought to disengage in each of the three situations. There would be no rationale for a regulation that required the motor to disengage in only one of the three situations.

[29] With respect to Mr. Ghadban's scooter, the evidence is that the motor will not operate when the operator is pedaling. Accordingly, while the motor does not turn off or disengage when the operator stops pedaling, that is only because it is already off. I will return to this point later in these reasons.

[30] It appears that the motor on Mr. Ghadban's scooter does turn off or disengage in the other two situations set out in s. 3(2). The accelerator controller on his scooter is the rotating throttle control on the right handlebar grip. The owner's manual states that when no force is applied to it, it sits in the "off" position. Without any information to the contrary, it can be inferred that that position turns the motor off.

[31] According to the owner's manual, the scooter has regenerative braking. When the brakes are applied, the motor stops providing motive force to the wheel, and becomes a generator, providing braking force in the process. That seems to me to be within the meaning of the term "disengage", since the motor is no longer powering the wheel.

The Intent of the Legislation -- Judgments in the Courts Below

[32] The judicial justice did not rest his judgment on the question of whether the scooter complied with s. 3 of the Motor Assisted Cycle Regulation. Instead, he based his judgment on the "intention" of the legislation:

- [21] [Q]uite apart from the discrepancy related to required wheel size, I would disqualify it as a [motor assisted cycle] for the simple reason that it does not function in accordance with the intention of the legislation pertinent to [motor assisted cycles]. Arguably, the Motorino XMr is in essence an electric scooter that is capable of being pedaled, rather than a "cycle" that is assisted by electric propulsion. That is, its primary mode of propulsion is an electric motor. The functions of the pedals, while not decorative are limited in application.
- [33] In support of this proposition, the judicial justice cited R. v. Rei, 2012 BCSC 1028. In Rei, the summary conviction appeal judge, after setting out provisions of the regulation, said, at para. 5, "[a] [motor assisted cycle] can be visualized as either a light scooter with pedals or as a regular bicycle with a small electric motor attached to the frame, near the pedals". The device Mr. Rei was riding was a light scooter that had once had pedals. Those pedals had been removed, however, so that it did not comply with the basic definition of a motor assisted cycle in the Motor Vehicle Act on the dates when Mr. Rei was charged under that statute.
- [34] The fact that the scooter had no pedals would have been sufficient to dismiss the appeals in Rei. The judge went further, however, referring to s. 3(2) of the regulation, saying:
- [12] [T]he cycle did not comply with the definitions set out in s. 3(2) of the [Motor Assisted Cycle Regulation], which require that the electric motor disengage or stop running when the operator stops pedaling, releases the accelerator or applies a brake. Obviously, without a pedal to push, there is no way to stop the motor from running.
- [35] He went on to say that "a [motor assisted cycle] is supposed to be incapable of running on the electric motor without some pedal propulsion".
- [36] It seems to me those statements in Rei were a misinterpretation of the regulation. As I have indicated, the motor on a motor assisted cycle must disengage in all three of the situations set out in s. 3(2). Thus, despite the absence of pedals on Mr. Rei's scooter, there were ways to stop the motor from running. He could stop the motor by applying the brakes, or by releasing the accelerator controller.
- [37] He could, of course, not stop the motor by ceasing to pedal, but that was because he was not pedaling to begin with. It is important to recognize that s. 3(2) does not require a rider to be pedaling in order to start or engage the motor; rather, it says that if a person is pedaling, and stops, the motor must stop or disengage. There is, then, no prohibition on running the electric motor without pedaling at the same time.
- [38] At para. 16 of Rei, the judge noted that "[human propulsion] is an essential component of a [motor assisted cycle]. This is what sets it apart from all other classes of motorized cycles. The electric motor on Mr. Rei's scooter is supposed to supplement, not supplant, human propulsion".

- [39] The judicial justice, after quoting from *Rei*, agreed with that conclusion, as he interpreted it, saying:
- [23] Although the *Rei* decision is distinguishable on its facts, Mr. Justice Brown's comments on the legislative intent and meaning of "motor assisted cycle" are equally germane to this case. By its plain meaning, the words "motor assisted cycle" arguably indicates an intention to include only devices where their primary means of propulsion is human (the cycle part) and that they are only intended to be "assisted" or supplemented by means of electric propulsion. With that principle in mind, I have concluded that the Motorino XMr is really an electric scooter with attached, removable pedals that may be used for human propulsion, but only if one is moved to do so.
- [40] The summary conviction appeal judge agreed, saying:
- [25] In the case of Mr. Ghadban and his Motorino XMr, Mr. Ghadban testified that in the five years he had owned the Motorino XMr, he had never pedalled the cycle and clearly had no intention of doing so, seeing that the weight of the Motorino XMr, with a driver's weight of 150 pounds, for example, would total over four hundred pounds.
- [26] On this basis, even if the wheels met the regulation, I agree with the trial judge's conclusion that a Motorino XMr does not comply with the intent of the legislation which was for a [motor assisted cycle] to supplement or assist the human power required to pedal the vehicle. As such, I find the evidence is more than reasonably capable of supporting the trial judge's conclusions.

Issues on This Appeal

- [41] There are two primary issues on this appeal. They are expressed in the order granting leave as follows:

Did the Supreme Court Judge err in law in upholding the conclusion of the judicial justice that the Motor Vehicle Act, RSBC 1996, c. 318 and associated regulations defining a Motor Assisted Cycle require, as a matter of legislative intent, that a Motor Assisted Cycle be primarily propelled by human power, with electric power limited to a supplementary role?

Did the Supreme Court Judge err in law in upholding the finding of the judicial justice that the Motorino had a wheel size that did not comply with s. 2(1) of the Motorcycle Assisted Cycle Regulation, B.C. Reg. 151/2002?

Must Human Power be "Primary"

- [42] In my view, the first question, as drafted, interprets the judgments below too narrowly. The question that the judicial justice and the summary conviction appeal judge dealt with was whether Mr. Ghadban's scooter was a motor assisted cycle, not whether the way he was using it met the intention of the legislation. Thus, the question is not whether the legislation requires that a motor assisted cycle "be primarily propelled by human power", but rather, whether it is designed to be primarily propelled by human power, with electric power

supplementing or assisting.

- [43] The confusion goes further. While there is some obiter language in *Rei* suggesting that a device is not a motor assisted cycle unless the rider must always be pedaling, there is no such language in the decisions in the courts below in this case. The ratio of the judicial justice's reasons is as follows:
- [27] It would appear from a reading of the Owner's Manual that both systems, that of electric propulsion and that of human propulsion, operate entirely independently of one another with the emphasis being on electric propulsion. While action of the pedals is transmitted to the rear wheel by way of a chain, the cessation of pedaling has no effect on operation of the electric motor, which is controlled primarily through the throttle grip on the right handle bar, and the action of braking.
- [28] During cross-examination, the disputant admitted that he has "never" pedaled the Motorino XMr and complained that the weight of the machine made it impracticable. The Motorino XMr equipped with a standard battery pack weighs in at 244 lb. The disputant also stated that there was "nothing automatic about engaging the motor through the pedals." I take that to mean that pedaling does not control the operation of the electric motor in any way.
- [29] Can such a device truly be considered to be a "cycle" augmented by electric propulsion? I think not.
- [44] The summary conviction appeal judge agreed with that conclusion.
- [45] I would not interpret these judgments as prohibiting the use of the electric motor except when a person is also pedaling. Rather, they simply say that the cycle must be designed in such a way that human power is the primary force intended to be used to power the device. The electric motor is characterized as being a secondary source of power, to assist the rider in cycling, not to be an alternative to it.
- [46] As I said earlier in this judgment, I accept the proposition that legislation can define a term in such a way as to include within its ambit things that would not, in ordinary language, be included. Legislation can define "cat" to mean "dog", but, if that is the legislative intention, we have a right to expect that it will be done clearly and unequivocally. If a piece of legislation defines "cat" as "a small four legged furry mammal that purrs" we would not expect that definition to include a dog fitted with a loudspeaker that plays a purring sound. The interpretation of legislation requires common sense to be applied to the language used.
- [47] In my view, "motor assisted cycle" should not, without good reason, be interpreted to include a device where the motor can be used only as an alternative to human power, or a device where the use of human power is impractical.

- [48] Despite my disagreement with some of the reasoning in *Rei*, it seems to me that what was said at para. 16 was, at least to some degree, sound. The Motor Vehicle Act and Motor Assisted Cycle Regulation deliberately chose to use the words "motor assisted", and the concept should be interpreted in a way that is, as far as possible, harmonious with the words chosen.
- [49] The regulation includes a provision in s. 3(2)(a) that specifically requires that the motor stop or disengage when the rider stops pedaling. In my view, that is telling. The drafter clearly contemplated a device that allowed the motor to be engaged while the rider was pedaling. That interpretation is consonant with the use of the term "motor assisted cycle". As I see it, a device cannot be a motor assisted cycle unless it is designed so that the motor is capable of being used to supplement human propulsion.
- [50] In saying this, I do not suggest that a motor assisted cycle cannot have the motor operating without the rider pedaling. It is quite consistent with the idea of "motor assisted cycling" that the rider can, at times, stop pedaling and rest, re-engaging the motor using the accelerator controller. It is also completely consistent with the language of the regulation. What is not consistent with the concept of a "motor assisted cycle" or with the regulation is an electric scooter where the motor is never used to assist human-powered cycling, but is used exclusively as an alternative to it.
- [51] Mr. Ghadban's scooter is not a "motor assisted cycle" for two reasons. The first is that, as the judicial justice and the summary conviction appeal judge held, the scooter is too heavy to be practical as a human-powered device. It is designed to be used as a motor-scooter, not a pedal powered cycle. That does not comply with the clear intention of the legislation.
- [52] Second, the evidence shows that the motor cannot operate at any time when the rider is pedaling. The motor is only an alternative to human-powered cycling, not an assistance to it.
- [53] Again, I do not suggest that a motor assisted cycle must be incapable of being operated when the rider is not pedaling. I say only that the design must contemplate human power being a primary means of propulsion, and must allow for a person to pedal at the same time as the motor is providing assistance.
- [54] In the result, I am of the view that the summary conviction appeal judge made no error of law in finding that Mr. Ghadban's scooter is not a motor assisted cycle.

Wheel Size

- [55] I turn to the second issue on appeal, the question of wheel diameter. The wheel diameter shown in the owner's manual is 12", or about 305 mm. It is common ground that that figure refers to the wheel rim diameter. On a motorcycle or automobile wheel, the rim is generally measured by the diameter of the bead seat (effectively, the inside diameter of the tire). The diameter of the lip of the wheel rim will be somewhat greater. Bicycle wheel sizes are typically measured using the outer diameter of the tire rather than the wheel. It is not in

dispute that the outer diameter of the tires on Mr. Ghadban's scooter exceed 350 mm.

[56] It is not entirely clear what the purpose of the wheel size requirement serves in the Regulation, with the result that it is difficult to know what measurement is contemplated by s. 2(1). If it is the inside diameter of the tire, the scooter's wheels would not meet the requirements for a motor assisted cycle. If it is the outside diameter of the tire, it would. We have not had any convincing explanation of the legislative history of the provision, nor even an exposition of the rationale for it. In the circumstances, I am reluctant to enter upon any definitive interpretation of the regulation when that is not necessary to resolve this appeal.

[57] I note, as well, that in the course of his testimony, the police officer, who also acted as the prosecutor in traffic court, stated that "[t]he other parts of the regulation dealing with the power of the motor, the size of the wheels, braking and the rest of it aren't in question". In the circumstances, it was not appropriate to decide this case on the basis of wheel size.

Burden of Proof

[58] The Crown has raised, on this appeal, the interesting question of who, in the context of the Motor Vehicle Act, has the burden of proving that the device either is or is not a motor assisted cycle. Mr. Ghadban says that it was for the Crown to prove that he was driving a "motor vehicle". Accordingly, he says, it was up to the Crown to prove that his scooter was not a motor assisted cycle. On the other hand, the Crown, citing *R. v. Van Berlo*, 2010 ONCA 242, says that because "motor assisted cycles" are excepted from the broader category of "motor vehicles" the burden of proof is on the disputant to show that he comes within the exception.

[59] I am not convinced that it is meaningful to speak of the burden of proof in the context of the evidence advanced in this case. Virtually the entirety of the evidence was uncontradicted, and there were no lacunae in the evidence. The case is not one that turns on the burden of proof. I am reluctant to tackle the issue in this case, when it does not affect the outcome.

Conclusion

[60] I am not persuaded that the summary conviction judge erred in law in finding that the appellant's scooter falls outside the definition of "motor assisted cycle". I would dismiss the appeal, and affirm the convictions.

[61] STROMBERG-STEIN J.A.: I agree with the reasons of Mr. Justice Groberman.

"The Honourable Mr. Justice Groberman"

Dissenting Oral Reasons for Judgment:

[62] SAUNDERS J.A.: At issue in this appeal from a summary conviction appeal order is the legal characterization of a scooter-like device, named a Motorino XMr: is it, or is it not, a motor assisted cycle under the Motor Vehicle Act, R.S.B.C. 1996, c. 318, and its regulations, particularly the Motor Assisted Cycle Regulation, B.C. Reg. 151/2002, and so not within the licensing and insurance requirements of the Act.

[63] Leave was given to appeal the summary conviction appeal order on September 30, 2020 on these questions:

Did the Supreme Court Judge err in law in upholding the conclusion of the judicial justice that the Motor Vehicle Act, ... and associated regulations defining a Motor Assisted Cycle require, as a matter of legislative intent, that a Motor Assisted Cycle be primarily propelled by human power, with electric power limited to a supplementary role?

Did the Supreme Court Judge err in law in upholding the finding of the judicial justice that the Motorino had a wheel size that did not comply with s. 2(1) of the Motorcycle Assisted Cycle Regulation, ... ?

[64] Those questions are broad enough, in my view, to capture the essence of the appeal, which is whether the judge erred in law in determining that the Motorino is a motor vehicle for the reason it does not come within the regulation applying to motor assisted cycles because of its propulsion design, and because of its wheel size.

[65] The owner of the device is the appellant Mr. Ghadban. On July 24, 2018, he received a ticket after riding his Motorino XMr on an access road to a Surrey Skytrain station. He did not hold a driver's licence and was subject to a prohibition from driving a motor vehicle. The ticket alleged Mr. Ghadban had violated s. 24(1) of the Motor Vehicle Act by driving a vehicle without a driver's licence and had violated s. 24(3)(b) of the Motor Vehicle Act by driving a vehicle without insurance. Mr. Ghadban was convicted of both offences by Judicial Justice Beer in the Provincial Court of British Columbia: *R. v. Ghadban* (26 March 2019), New Westminster AJ07827150.

[66] The primary question at trial was whether the Motorino is regulated under the Motor Vehicle Act as a motor vehicle or as a motor assisted cycle. Motor assisted cycles are not subject to s. 24 of the Act requiring insurance for motor vehicles and licences for their operators.

[67] The evidentiary portion of the trial focussed on the propulsion aspect of the Motorino and of motor assisted cycles as known in the Regulation. The reasons of the judicial justice convicting Mr. Ghadban addressed both the propulsion aspect and the wheel size of the device.

[68] The judicial justice found that the Motorino failed to meet both the minimum wheel diameter requirement and the propulsion requirement for categorization as a motor assisted cycle. In reaching his determination of the wheel size, the judicial justice referred to the Regulation, which requires wheels of a motor assisted cycle to be 350 mm or more in

diameter, and found that the diameter was too small. Second, he relied on the statutory language and case authority to determine that motor assisted cycles must be propelled primarily by human power wherein electric propulsion assists the human propulsion, which the Motorino is not.

- [69] The Motorino in question had removable pedals that are connected to a "freewheel" and located on the rear wheel. The appellant testified he had never pedalled the device because of its weight, in the range of 300 pounds. The evidence was that the engine would not work when the operator pedalled. The judge determined that the device primarily relies on electric propulsion, and so was not a motor assisted cycle within the meaning of the Regulation, with the result that Mr. Ghadban was convicted of the offences charged.
- [70] Mr. Ghadban appealed. Mr. Justice Jenkins, sitting as a summary conviction appeal judge, dismissed the appeal, agreeing with the trial judge's conclusion that the Motorino "does not comply with the intent of the legislation which was for a [motor assisted cycle] to supplement or assist the human power required to pedal the vehicle". In reaching that conclusion he relied, as had the judicial justice, on *R. v. Rei*, 2012 BCSC 1028. Justice Jenkins held also that the determination the wheels of the Motorino were smaller than those required of a motor assisted cycle was not in error.
- [71] The summary conviction appeal judge's conclusions in respect of the modes of propulsion of the Motorino, and its wheel size, are challenged by Mr. Ghadban in this appeal. In particular, he contends the judge erred in:
- 1) finding that the Motor Vehicle Act and Regulation defining a motor assisted cycle require, as a matter of legislative intent, that a motor assisted cycle be primarily propelled by human power, with electric power limited to a supplementary role; and
 - 2) upholding the finding of the judicial justice that the Motorino had a wheel size that did not comply with the Regulation.
- [72] In respect of the propulsion issue, Mr. Ghadban says that the legislative scheme does not require that the electric propulsion of the device be primary, or even that the engine be able to work while the pedals are engaged.
- [73] The respondent Crown has taken the uncommon step of agreeing with the appellant that the order appealed should be set aside because, says the Crown, the Regulation, correctly interpreted, does not support the conclusion that the Motorino is a motor vehicle. While the Crown agrees with the result in *Rei* because the device in that case had no pedals attached, it says that the statement in *Rei* to the effect that an electric motor may only assist, or be secondary to, pedal power is an incorrect interpretation of the Regulation.
- [74] On the wheel size issue, Mr. Ghadban notes that the prosecuting officer stated that wheel size was not in question and it was not mentioned again until the trial judge asked Mr. Ghadban a question about it in closing submissions. Accordingly, Mr. Ghadban was not advised of the need to establish that the wheel size of the Motorino complied with the

Regulation and, in fact, was told the contrary. The judicial justice, however, found that the Motorino wheel size did not meet the statutory requirement for qualification as a motor assisted cycle. The Crown acknowledges that it is open to us to conclude that Mr. Ghadban's trial was procedurally unfair because of the concession regarding wheel size, which would have led him to reasonably believe he did not need to call evidence to establish the Motorino's wheel size was within the requirements of the Regulation.

[75] Over and above the questions of law on which leave to appeal was granted, the Crown asks us to clarify the incidence of the burden of proof. The Crown says that s. 98(2) of the Offence Act, R.S.B.C 1996, c. 338, places the onus of establishing that a device is a motor assisted cycle on the defendant. Section 98(2) provides:

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[76] On this Mr. Ghadban does not agree. He contends the issue of whether the Motorino is a motor assisted cycle is not a question of an "exception, exemption, proviso, excuse or qualification prescribed by law" and that the issue of whether the Motorino is a motor vehicle is an element of the offences that is required to be proved by the Crown.

[77] The appeal falls to be resolved on the following provisions.

[78] Section 1 of the Act defines motor vehicle and motor assisted cycle:

In this Act

"motor assisted cycle" means a device

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

"motor vehicle" means a vehicle, not run on rails, that is designed to be self-propelled or propelled by electric power obtained from overhead trolley wires, but does not include mobile equipment or a motor assisted cycle;

[79] The Act provides for regulations:

182.1 (3) The Lieutenant Governor in Council may make regulations respecting motor assisted cycles including, without limitation, regulations prescribing

- (a) the criteria that must be met by a device in order for it to qualify as a motor assisted cycle for the purposes of this Act,

.

[80] The Regulation, in turn, provides:

3(1) A motor assisted cycle must be equipped with a mechanism, separate from the accelerator controller, that

- (a) allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle, or
- (b) prevents the motors from turning on or engaging before the motor assisted cycle attains a speed of 3 km/hr.

(2) The motors of a motor assisted cycle must turn off or disengage if

- (a) the operator stops pedaling,
- (b) an accelerator controller is released, or
- (c) a brake is applied.

[81] In addition to s. 3 concerning the propulsion of the device, the Regulation contains:

- s. 1 requiring any motor on a motor assisted cycle to be electric, to come within the wattage limits of the section, and to be incapable of propelling the device at a speed greater than 32 km/hr on level ground;
- s. 2 prescribing the minimum size and maximum number of wheels;
- s. 4 prohibiting power provided by a combustion engine;
- s. 5 concerning brake performance;
- s. 6 addressing drive system and equipment securement; and
- s. 7 requiring all electrical terminals to be insulated or covered.

Significantly, the Regulation has no weight limitation, as is found in other regulations applicable to such devices in other parts of the country.

[82] It will be apparent to all that the application of the licensing and insurance provisions of the Act have serious implications for not only the operator of the vehicle, but also members of the public who may collide with such a device ridden by an unlicensed person, which undoubtedly will occur, and who members of the public cannot count on to have the financial backup of insurance required by the Act. Further, it may seem that use of the word "assisted" in "motor assisted cycle" carries with it the promise that the motor is not the

primary means of propulsion. On close examination, however, that promise is not made out, in my view. Perhaps surprisingly, both s. 1 of the Act and the Regulation omit any provision compelling the rather common sense meaning of the word "assisted", which would suggest the motor must be capable of assisting pedal propulsion. Instead they set precise criteria that must be met.

- [83] The definition in s. 1 of the Act of "motor assisted cycle" defines such a device as one to which pedals are attached, that will allow for propulsion by human power, on which a person may ride, to which is attached a motor of the prescribed type with the prescribed output, and that meets the criteria in the Regulation. The first four of those requirements are plainly met, leaving only the question whether the criteria in the Regulation are satisfied.
- [84] Apart from the issue of the wheels, which I will come to, all criteria of the Regulation are, in my view, met by the Motorino. In particular, I note that there is no issue in respect of s. 3(1), and that s. 3(2) of the Regulation applies to disengagement of the motor, not engagement of the motor at the same time that the pedals propel. In other words, as advanced by the Crown, I consider that the Motorino comes within s. 3 of the Regulation, and the balance of the Regulation except for the wheel size issue.
- [85] Section 2 of the Regulation requires the wheels of a motor assisted cycle to be 350 mm or more in diameter. The term "wheel" is not defined. The contest here is between a measure from rim edge to rim edge, or from tire edge to tire edge. If the former, the Motorino's wheels are likely too small; if the latter, they are likely within the Regulation. The Crown would have us say that the interpretation of tire edge to tire edge is consistent with an ordinary non-technical meaning of the word "wheel" and should be adopted as it accords with the popular sense of the word.
- [86] The difficulty on this issue is that it was not explored at trial because the matter of wheel size was said, at the beginning of the trial, not to be in issue. Accordingly, we have not been provided with legislative history, or differing approaches to measuring a "wheel". For us to choose one over the other would be to grab at a moon beam.
- [87] Mr. Ghadban complains that the trial was unfair because he was led to believe there was no issue over wheel size, and he says the summary conviction judge erred in failing to recognize this procedural error in the trial. I agree. Given my conclusion that, except for the issue of the size of the wheels, all criteria of the Regulation and the other criteria in the s. 1 definition of "motor assisted cycle" in the Act have been met, conviction of Mr. Ghadban, in my view, rests on the wheel size issue. In these circumstances, I consider that Mr. Ghadban has established an error in law on the part of the judge in failing to set aside the convictions and to remit the matter to the Provincial Court for fresh determination on this question.

- [88] Last, the Crown has asked us to opine on the incidence of the burden of proof for establishing the character of the Motorino, be it a motor assisted cycle or a motor vehicle. In my view, that question is outside the ambit of the rather narrow questions on which leave to appeal was granted. I would not address that issue on this appeal.
- [89] In conclusion, I would allow the appeal. I would set aside the order appealed, set aside the convictions, and remit the charges to the Provincial Court for fresh determination.
- [90] SAUNDERS J.A.: For the reasons of Mr. Justice Groberman, the appeal is dismissed.
- "The Honourable Madam Justice Saunders"

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Prepared on 29 October 2026 · Esheria