
CANADA / JUDGMENT

R. v. Tannhauser

2020 BCCA 155

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 155 R. v. Tannhauser

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Tannhauser,

2020 BCCA 155

Date: 20200601

Docket: CA45966

Between:

Regina

Appellant

And

Patrick Forster Tannhauser

Respondent

Corrected Judgment: The text of the judgment

was corrected at para. 27 on June 3, 2020.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

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

February 19, 2019 (R. v. Tannhauser, 2019 BCSC 330,
Victoria Docket AH99887732-1).

Counsel for the Appellant:

S. Elliott

N. Grabe

Counsel for the Respondent:

G. Hooper

Place and Date of Hearing:

Vancouver, British Columbia

December 9, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 1, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

Summary:

The accused was acquitted of the offence of use of an electronic device while driving. The judicial justice reasoned that his cellphone, which he was holding on the steering wheel of his car, could not have been held "in a position in which it may be used" within the meaning of s. 214.2(1) of the Motor Vehicle Act because the phone had software disabling the device's functions installed. Thus, no "use" of the device had occurred. The summary conviction appeal judge upheld the acquittal, determining the cellphone was not an "electronic device" within the meaning of the statute because of the software. Held: Appeal allowed. Reading the provision in its entire context, a cellphone with no immediate functionality is an electronic device and can be held in a position in which it may be used.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

[1] This appeal concerns "use" of an electronic device while driving.

- [2] Section 214.2(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] prohibits "holding [an electronic device] in a position in which it may be used". Does this provision prohibit holding a cellphone in such a position even when some, or all, of its immediate functions are disabled? I conclude it does.
- [3] Patrick Tannhauser was seen with his cellphone on the steering wheel of his car while driving. However, he was acquitted when a judicial justice concluded he could not have made "use" of the cellphone because it had software disabling its functions installed: 2018 BCPC 183. A judge of the Supreme Court of British Columbia upheld this decision, concluding that the cellphone, given its software, was not an "electronic device" within the meaning of the MVA: 2019 BCSC 330 (unpublished). The Crown has appealed to this Court with leave: 2019 BCCA 220.
- [4] For the reasons that follow, I would allow the appeal. A cellphone remains an "electronic device" within the meaning of the MVA regardless of its immediate functionality. Further, the MVA prohibits the holding of a device in certain positions, not the holding of a device with certain functions. The legislature has carefully carved out exceptions to the general prohibition on cellphone use, and has not created an exception for a cellphone without immediate functionality. Viewed in its entire context, there is no legitimate basis on which to conclude such an exception exists in the MVA.

II. Background

Facts

- [5] The relevant facts are brief.
- [6] On 17 August 2017, Patrick Tannhauser was issued a ticket for using an electronic device while driving.
- [7] Mr. Tannhauser was on the Trans-Canada Highway near Victoria, B.C. when he was observed by an officer conducting enforcement of electronic device and seat belt laws. The officer--Cst. Buerfeind--was standing on the side of the overpass above the highway and gave evidence that Mr. Tannhauser was holding an electronic device in his hand at the top of the steering wheel. He testified, and Mr. Tannhauser agreed, the device was a "cellphone", and I will use this term throughout these reasons for consistency.
- [8] Cst. Buerfeind radioed Cst. Seutter, a second officer stationed further down the road. Shortly thereafter, Cst. Seutter stopped Mr. Tannhauser and issued him a ticket under s. 214.2(1) of the MVA.

Summary Conviction Judgment

- [9] Following a brief trial in May 2018, a judicial justice acquitted Mr. Tannhauser of the ticketed offence and gave reasons indexed at R. v. Tannhauser, 2018 BCPC 183.

- [10] Mr. Tannhauser admitted that he had a cellphone in his hand at the time Cst. Buerfeind saw him. He testified, however, that his cellphone was equipped with software that disabled its functions while the vehicle was in motion, so use of it would have been impossible.
- [11] The ticket was issued under s. 214.2(1) of the MVA, which states that "[a] person must not use an electronic device while driving or operating a motor vehicle on a highway." This is commonly referred to as a prohibition on distracted driving.
- [12] The relevant definition of "use" is found in s. 214.1(a):

Definitions

214.1 In this Part:

"use", in relation to an electronic device, means one or more of the following actions:

- (a) holding the device in a position in which it may be used;
- [13] There was no dispute over the fact that Mr. Tannhauser was holding the cellphone. The question at trial became whether it was being held "in a position in which it may be used".
- [14] Mr. Tannhauser argued this was not the case, as the disabling software meant it was impossible for the cellphone to be used while the vehicle was moving.
- [15] The judicial justice accepted this argument. He concluded that Mr. Tannhauser was not holding his cellphone in a useable position because, on the balance of probabilities, "the software prevented it from being used": at para. 49.
- [16] If wrong in his interpretation of use, the justice would have acquitted on a defence of due diligence. He found Mr. Tannhauser reasonably believed the software had disabled the cellphone's functions: at paras. 50-53.

Summary Conviction Appeal Judgment

- [17] A justice of the Supreme Court dismissed the Crown's appeal, finding the judicial justice was correct to conclude that the infraction did not occur: *R. v. Tannhauser*, 2019 BCSC 330 (unpublished).
- [18] Instead of relying on the definition of use, the summary conviction appeal judge concluded that "a device which is disabled from functioning is not an electronic device under s. 214.1 (a)": at para. 17. This definition reads:

214.1 "electronic device" means

- (a) a hand-held cellular telephone or another hand-held electronic device that includes a telephone function,
- (b) a hand-held electronic device that is capable of transmitting or receiving electronic mail or other text-based messages, or

(c) a prescribed class or type of electronic device;

[19] He reasoned that functionality was a required element of the definition of an electronic device:

[19] And so while a driver may well be distracted by what is an inert object rendered inert by software, that is not what the section is aimed at, in my view, and in this case, the finding of the Justice of the Peace really amounts to a conclusion that, at the time the ticket was issued, this cellular telephone, because of the operation of its disabling software, was really no different than the brick counsel for the Crown mentioned in argument, or a cup of coffee, or any other object in the car.

[20] The appeal judge did not discuss the judicial justice's analysis, or whether the device was "in a position in which it may be used".

Leave to Appeal

[21] In reasons indexed at 2019 BCCA 220, a justice granted the Crown leave to appeal to this Court. In doing so, he noted the existence of "an exceptional circumstance justifying a further appeal"; that the summary conviction appeal judge had upheld the acquittal on a different basis than the judicial justice (at para. 9).

[22] This appeal is from the appeal judge's decision. Because I conclude the summary conviction appeal judge erred in his disposition of the appeal, I must necessarily consider if the verdict can be upheld on the basis of the judicial justice's reasoning instead.

III. Issues

[23] This appeal raises two issues. First, is a cellphone with no immediate functionality an "electronic device" as defined in s. 214.1 of the MVA? Second, can a device with no immediate functionality be held "in a position in which it may be used"?

[24] I would answer both questions in the affirmative. As I will explain, neither provision of the statute incorporates cellphone functionality as an element of the relevant definition. Thus, the disabling software in question cannot form the basis for a successful defence.

IV. Analysis

A. Overview of Legal Principles

[25] Standards of appellate review apply equally to second courts of appeal: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 34. Questions of statutory interpretation are questions of law and attract a standard of correctness: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 50; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Statutory Interpretation

- [26] This appeal concerns the interpretation of statutory language. In embarking on this task, the words of the statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, both quoting *Elmer A. Driedger, Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. The Interpretation Act, R.S.B.C. 1996, c. 238, s. 8 reinforces the importance of taking a comprehensive approach to interpretation, stating an enactment "must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
- [27] The respondent urges this Court to strictly construe the relevant provisions. The rule of strict construction directs that where a provision affects the liberty of a subject and is subject to multiple reasonable meanings, the interpreting court should adopt the interpretation most favourable to the accused person: *R. v. McIntosh*, [1995] 1 S.C.R. 686 at paras. 28-29. The rule historically applied to "any prohibition or restriction on freedom that is enforced through punishment", such as a fine: *Ruth Sullivan*, *Statutory Interpretation*, 3d ed. (Toronto: Irwin Law, 2016) at 228.
- [28] I conclude the rule of strict construction is not engaged in this case for two reasons.
- [29] First, where there is ambiguity in the enactment of a regulatory offence like the one at bar, strict construction is "of limited value": *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at para. 33. It is undoubtedly an important principle that restrictions on liberty not be broadened beyond what the legislature intended. However, the ultimate endeavour of the courts is to determine that intention. For this inquiry, interpretive factors beyond the protection of liberty remain relevant: *Merk* at paras. 33-35.
- [30] Second, as I will explain, the provisions in this case contain no ambiguity when viewed in their entire context and in light of legislative intent. In the absence of dueling meanings, one cannot apply a rule that asks the more favorable meaning be chosen.
- [31] With this in mind, I will briefly consider the general objects of the statute before turning to the provisions at issue.

Overarching Legislative Objects

- [32] This case is concerned with Part 3.1 of the MVA, titled "Use of Electronic Devices while Driving". Also relevant to that part is the Use of Electronic Devices While Driving Regulation, B.C. Reg. 308/2009 [Use Regulation], as definition (d) of "use" and definition (c) of "electronic device" in s. 214.1 both incorporate the regulation.

- [33] It is uncontroversial that the MVA's overall objects are to enhance road safety and prevent death or injury on the roads: see e.g. *Sutherland v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 65 at para. 81.
- [34] The provisions at issue were enacted in 2009 to enhance road safety in the face of the "devastating consequences" of a lapse of attention caused by a cellphone or other device. The legislation was intended to "ensure that drivers keep their hands on the wheel and their eyes on the road": *British Columbia, Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Parl., 1st Sess., Vol. 5 (21 October 2009) at 1360 (Hon. K. Heed).
- [35] I note that while Hansard evidence is not determinative, it may play a role in clarifying legislative intent: *Rizzo* at para. 35; *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 34; *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210 at para. 30.
- [36] I will thus approach the interpretative task at hand with this overarching legislative intent in mind.

B. The Provisions at Issue

1. Is a Cellphone with No Immediate Functionality an Electronic Device?

- [37] The summary conviction appeal judge erred in concluding Mr. Tannhauser's cellphone was not an electronic device in the context of the MVA. Cellphones are electronic devices in ordinary parlance. Cellphones are included in the definition of "electronic device" in the MVA. If the legislature intended the courts to conclude cellphones were not, in fact, electronic devices in certain circumstances, it would have stated this explicitly.
- [38] The ordinary meaning of the term "cellphone" in this context is not contested. Mr. Tannhauser throughout his testimony referred to it as his "cellphone". Both the justice and the appeal judge referred to it as a cellphone, the judicial justice additionally as a "smartphone" (at para. 10). There is no controversy that, ordinarily understood, the device includes a telephone function; it can be used to make or receive telephone calls.
- [39] The statute evinces a clear intention to reference the ordinary meaning of cellphones, or "cellular telephone[s]" in defining them as electronic devices. I reproduce the statutory definition for ease of reference:

214.1 "electronic device" means

- (a) a hand-held cellular telephone or another hand-held electronic device that includes a telephone function,
- (b) a hand-held electronic device that is capable of transmitting or receiving electronic mail or other text-based messages, or
- (c) a prescribed class or type of electronic device;

[40] Additional examination of the statutory context and scheme does nothing to displace this ordinary understanding of what a cellphone is. The context in fact supports an inclusive reading of the term "electronic device". The Use Regulation adds six categories of device to those specified in s. 214.1:

3 (1) The following electronic devices are prescribed for the purposes of paragraph (c) of the definition of "electronic device" in section 214.1 of the Act:

- (a) electronic devices that include a hands-free telephone function;
- (b) global positioning systems;
- (c) hand-held electronic devices, one of the purposes of which is to process or compute data;
- (d) hand-held audio players;
- (e) hand microphones;
- (f) televisions.

[Emphasis added.]

[41] The scheme captures a large number of devices. Unlike the definition of "use"--which, as will be discussed below, makes exceptions for certain forms of use--there are no exceptions to exclude certain devices from the category of "electronic device". Notably, any device intended to "process or compute data"--a huge array--is captured. Further, the definitions overlap; most of the devices commonly referred to as "phones" at this moment in time would be capable of performing any of the functions of a device on the above list.

[42] What is important here is what is not found in any of the ordinary meaning, statutory scheme, statutory context, or Hansard: an intention to exclude cellphones without immediate functionality from the definition of an "electronic device".

[43] Despite this, the appeal judge concluded the device was not in fact a telephone, or a device with a telephone function. This conclusion was based on the judicial justice's finding that the device could not be used as such when Mr. Tannhauser was pulled over. The appeal judge seems to have assumed the existence of a statutory requirement that the electronic device not only have a cellphone function, but that at the moment of the offence, the cellphone function be operable.

[44] This assumption has no basis in the legislation. The provision at issue mandates no inquiry into whether a device can be used as a telephone at the specific moment of the offence. Further, I find no basis to assume the legislature intended some such requirement.

[45] I note that a cellphone permanently without functionality must cease to be, at some point, an electronic device. I would not think the above definitions include a device that no longer has any capacity to make phone calls or compute data because it is, for example, disassembled or badly broken. But the case at bar does not require a determination of what

this point is; it is clear the device here was temporarily, not permanently, without functionality. It retained its ability to distract by virtue of a screen that might light up, and the possibility it might return to full function.

- [46] That electronic devices with suspended functionality remain electronic devices is consistent with an ordinary understanding of objects. The functions objects possess generally are distinct from the ways they are capable of functioning in a specific moment. A lamp unplugged is still a lamp; a cellphone turned off (or with the phone function otherwise disabled) is still a cellphone.
- [47] I would decline to uphold the strained reading that an object commonly understood to be a telephone is not in fact a telephone for the purposes of this statute.
- [48] Having concluded the appeal judge erred in his analysis of what constitutes an "electronic device", I will now consider if the appeal judge erred in failing to reverse the judicial justice's acquittal on the basis of "use".
2. Can a Cellphone with No Immediate Functionality Be Held in a Position in Which It May Be Used?
- [49] The MVA does not permit a driver to hold a device when its functions are disabled. The statute creates no exceptions for devices with suspended functions, and I find no basis to conclude such an exception exists in the broader statutory context.
- [50] In my view, holding an electronic device on top of a steering wheel, in clear view, is sufficient to constitute holding it in a position in which the device may be used. This view is supported by the ordinary meaning, context, and intention behind the statute.
- [51] Beginning with the ordinary meaning, I cannot agree with Mr. Tannhauser's submission that there was no way the cellphone could be "used" in the commonly understood sense of that word because of the disabling software. Looking at the screen of a cellphone constitutes that cellphone being "used" in many circumstances. Thus, holding the cellphone where the screen can be viewed is sufficient to constitute holding it in a position in which it may be used.
- [52] Further, one can imagine circumstances in which a cellphone with no immediate functionality can nonetheless be used: a cellphone that is turned off can be turned on; a cellphone with a dead battery can be plugged in (see *R. v. Jahani*, 2017 BCSC 745, where a ticket was upheld for a person who did just that); a cellphone with software limiting its functionality can, potentially, be used to disable that software.
- [53] Importantly, the legislature's intention to promote road safety supports this reading. All of the above actions have the potential to distract the driver. The purpose of public protection is served by understanding that this form of distracted behaviour is indeed prohibited.

- [54] The argument may be made that it is overly cautious to prohibit holding a phone that is turned off in a position in which it may be used. Some distraction-free holding of a device may be captured by such a broad prohibition. But if the legislature intended a statute to be cautious, that intent must guide a court's analysis. In other words, "[i]f it is concluded in all the relevant circumstances that the legislature intended a broad approach, that is the approach that will be adopted": *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at para. 33.
- [55] Further, as the Crown states, prohibiting conduct that may fall short of actual distraction assists in effective detection, enforcement, and prevention of distraction. Detecting distracted driving poses a challenge for law enforcement. An officer must observe use of an electronic device from outside the vehicle, frequently from a distance. If an officer needs to confirm not only that a device is being held but also that it is functional in the moment of being held, it is reasonable to conclude more distracted driving would occur without sanction.
- [56] Further, requiring the judicial justice trying a distracted driving case to delve into the functions of an electronic device in the moment the ticket was issued poses difficulties. There is a risk of expert evidence being required to properly explain how certain software operates, or to interpret phone records showing how the software operated on the specific device; or, of the judiciary being asked to analyse the functionality of devices without this evidence. Either approach could lead to problems, and there are good public policy reasons to support a scheme that avoids the need for these inquiries.
- [57] Thus, the ordinary meaning of the term "use" and legislative intent both support an interpretation of the provision as capturing a device with no immediate functionality.
- [58] This interpretation is also consistent with the scheme and context of the statute, which repeatedly makes clear its desire to limit contact between drivers' hands and their cellphones.
- [59] After setting out definitions and creating a broad prohibition on the use of devices while driving, the remainder of Part 3.1 of the MVA is concerned with spelling out exceptions to the prohibition (excepting s. 214.6, which describes regulation-making powers). Emergency personnel are exempted from the prohibition by s. 214.3, and narrow exceptions also apply to ordinary drivers (i.e., those who are not emergency personnel). The exceptions demonstrate that only a "hands-free manner" of use is allowed:

Exceptions to prohibition -- certain permitted activities

214.4 Section 214.2 does not apply to a person who uses an electronic device

- (a) while operating a motor vehicle that is safely parked off the roadway or lawfully parked on the roadway and is not impeding traffic,

- (b) to call or send a message to a police force, fire department or ambulance service about an emergency, or
- (c) that is configured and equipped to allow hands-free use in a telephone function, is used in a hands-free manner and is used in accordance with the regulations, if any.

[Emphasis added.]

- [60] The Use Regulation describes in more detail which uses of electronic devices are and are not permitted by ordinary drivers. Section 7 provides that the hands-free telephone functions of a device can be used in certain circumstances, including that the device be installed in the vehicle in a certain way. Section 8 provides that a global positioning system on a device can be used while driving, again in certain circumstances. Use of hand microphones, hand-held audio players, and televisions are all permissible for limited purposes, or where certain precautions are taken: Use Regulation, ss. 9-11.
- [61] Notably, none of the exceptions in the statute or regulation allow a person to hold an electronic device in their hand while driving. Indeed, s. 214.4(c) of the MVA and ss. 8(2)(b), 8(3)(a), and 10(a)(i) of the Use Regulation all reiterate prohibitions on drivers' hands making contact with their devices.
- [62] The provision that permits contact between a driver's hand and their device is s. 7(1)(b) of the Use Regulation. The exception is notably narrow: a voice-controlled device can be used in a hands-free fashion if, and only if, it "is voice-activated or requires only one touch in order to initiate, accept or end a call" [emphasis added].
- [63] If this was insufficient evidence of what the statute was intended to accomplish, the legislation was described at its introduction as "prohibit[ing] drivers from holding electronic devices": British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 39th Parl., 1st Sess., Vol. 5 (21 October 2009), at 1360 (Hon. K. Heed) [emphasis added].
- [64] Legislation is presumed to be drafted coherently and clearly: Sullivan 40-43. This presumption is both intuitive and well-established: see e.g. *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at para. 64 (where the Court rejected an interpretation of the Immigration Act, R.S.C. 1985, c. I-2, ss. 30, 69(1) that would have limited the term "other counsel" to unpaid non-lawyers, noting that "the section would have been drafted differently" if it were intended to deviate so strongly from the ordinary meaning of the term); *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 at 1481 (interpreting s. 6(1) of the Charter); *University of Saskatchewan v. Peng*, 2014 SKCA 98 (interpreting the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1); *Kerr v. Danier Leather Inc.*, [2005] O.J. No. 5388 at para. 94 (interpreting the Securities Act, R.S.O. 1990, c. S.5).

- [65] In 2009, the legislature was well aware that, for example, cellphones could be turned off. The fact that it did not write in any concern for the functionality of the cellphone, but rather a concern for its position in relation to the driver, indicates it had no intention that the officers enforcing the provision (or the justices trying disputes) would be required to perform a functionality assessment.
- [66] If the legislature intended to allow individuals to hold electronic devices without immediate functionality in positions in which they may be used, it would have made such an exception explicit. No such exception exists in this statute and I would decline to presume one was intended.
- [67] Thus, the appeal judge erred in upholding the judicial justice's decision to acquit Mr. Tannhauser on the basis of the functionality of his cellphone, as functionality is not an element of the definition of "use".

C. Defence of Due Diligence

- [68] As referenced above, the judicial justice would also have acquitted Mr. Tannhauser on the basis of a defence of due diligence.
- [69] This defence is available to a defendant who "reasonably believed in a mistaken set of facts that, if true, would have rendered his or her act or omission innocent": *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63 at para. 56.
- [70] There is no allegation that the facts as Mr. Tannhauser believed them are incorrect; the issue here is that the law does not render him innocent on these facts. This defence cannot apply.

V. Conclusion

- [71] I would allow the appeal and order a new trial, if the Crown is of a mind to proceed at this time.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Fitch"

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