COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Whyte v. British Columbia (Superintendent of Motor Vehicles),* 2013 BCCA 454

Date: 20131023
Docket: CA040396

Between:

Spencer Donald Robert Whyte

Respondent
(Petitioner)

And

The Superintendent of Motor Vehicles and Attorney General of British Columbia

Appellants
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Smith
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated October 23, 2012 (*Whyte v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1559, New Westminster Docket S134840).

Counsel for the Appellant:	F. Zaltz
Counsel for the Respondent:	J.C. Gopaulsingh
Place and Date of Hearing:	Vancouver, British Columbia September 18, 2013
Place and Date of Judgment:	Vancouver, British Columbia October 23, 2013

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith

Summary:

The Superintendent of Motor Vehicles and the Attorney General of British Columbia appeal a judicial review that quashed Mr. Whyte's 90-day immediate driving prohibition. There were significant discrepancies in the evidence given by the police officer who issued the prohibition and the evidence given by Mr. Whyte. The chambers judge held it was not reasonable for the adjudicator to refuse to address these discrepancies because they went to the heart of the issue as to whether Mr. Whyte had care or control of the vehicle.

Held: Appeal dismissed. A court is entitled to quash an administrative decision if the route to the decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the record.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] The Superintendent of Motor Vehicles and the Attorney General of British Columbia appeal the outcome of the judicial review in *Whyte v. British Columbia*, 2012 BCSC 1559, which quashed a driving prohibition issued under s. 215.41 of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 [the *Act*], and remitted the matter for a new hearing.

[2] Mr. Whyte was issued a 90-day immediate driving prohibition (the "IDP") pursuant to s. 215.5(1) of the *Act*. Pursuant to s. 215.48 of the *Act,* he applied to have the IDP reviewed. Section 215.49 of the *Act* requires an adjudicator to consider, (a) any relevant written statements or evidence submitted by the applicant, (b) the report of the peace officer, (c) a copy of the notice of driving prohibition, and (d) any other relevant documents and information forwarded by the peace officer.

[3] The adjudicator was required to confirm Mr. Whyte's driving prohibition under s. 215.5(1) of the *Act* if he was satisfied that Mr. Whyte was a driver within the meaning of s. 215.41(1) and that the approved screening device ("ASD") had registered a "fail". A driver within the meaning of s. 215.41(1) includes "a person having the care or control of a motor vehicle on a highway … whether or not the motor vehicle is in motion."

[4] On the review, the adjudicator was faced with significant conflicts in the evidence between the affidavits provided by Mr. Whyte and the report from the police officer who issued the IDP. The adjudicator decided it was not necessary to resolve those conflicts in order to find that Mr. Whyte was a driver and that he registered a fail on the ASD.

[5] Mr. Whyte sought judicial review of the adjudicator's decision on the basis that he was required to address the conflicts in the evidence. He was successful and the adjudicator's order was quashed for the following reasons:

> [34] As a result, I find that no adjudicator acting reasonably could have reached a decision in this case without considering the implications of the conflicts in the evidence on these critical points. This adjudicator's failure to do so went to the very heart of his jurisdiction. In that potentially decisive evidence was precluded from consideration by his error, a substantial wrong or miscarriage of justice has occurred as a result.
>
> [35] Accordingly, I order that this matter be returned for a new hearing, one that must be based on the proper considerations that I have identified. Specifically, the adjudicator must grapple with the conflicting evidence and the resulting reasons for decision must give some indication that the conflicts have been resolved by reasonable findings of credibility and fact.

[6] As set out in their factum, the appellants allege that the chambers judge erred by:

> a. incorrectly applying the law pertaining to care or control, by concluding that although the adjudicator made findings of fact on key elements that established care or control, they did not constitute a proper analysis; and
>
> b. incorrectly applying the reasonableness standard of review to the decision of the Adjudicator by:
>
> i. concluding that he ought to interfere because no adjudicator acting reasonably could have reached a decision on the Respondent's intention to drive without considering the implications of the conflicts in the evidence, despite having previously determined that the finding of fact about the Respondent's intention to drive was reasonably made, and was based on the evidence; and
>
> ii. holding that although the adjudicator was entitled to reject the Respondent's evidence, he was not entitled to conclude that the Respondent's evidence did not matter to his analysis.

[7] In order to set the issues on appeal in context, it is useful to set out the background giving rise to them. That background is helpfully summarized by the chambers judge:

> [2] There is no issue that on the evening of April 7, Mr. Whyte was prohibited from driving for 90 days by Constable Alice Fox of the Integrated Road Safety Unit, pursuant to s. 215.41 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The ostensible basis for the prohibition under the legislation was that Mr. Whyte had care or control of a vehicle, a sample of his breath registered a "fail" in an approved screening device, and his ability to drive was affected by alcohol.
>
> [3] Pursuant to s. 215.47 of the *Act*, Constable Fox forwarded the material required by that section to the Superintendent of Motor Vehicles. The documents that she forwarded that are relevant to this petition were:
>
> - Notice of Driving Prohibition and Certificate of Service (one document);
> - Report to Superintendent; and
> - a brief synopsis of her investigation.
>
> [4] In her report and synopsis, Constable Fox described Mr. Whyte [as] being the driver and sole occupant of his vehicle on Wesbrook Mall at the University of British Columbia. The vehicle was running, with the keys in the ignition. Mr. Whyte had a strong odour of liquor on his breath and his eyes were slightly watery and bloodshot. He provided breath samples into two different approved screening devices, one at 8:07 p.m. and the other at 8:10 p.m., and both registered as "fail".
>
> [5] As he was entitled to do, Mr. Whyte sought a written review of the prohibition pursuant to s. 214.48 of the *Act* on April 12. In support of the review he swore an affidavit describing his version of the events and also provided one from a friend, Mariah Spence.
>
> [6] Mr. Whyte describes a very different interaction with the police in his affidavit. According to him, the plan was for Ms. Spence to drive him, in his car, from UBC to his home in Burnaby. He conceded that he was sitting in the driver's seat but maintained that he did not intend to drive. The keys were in the centre console and the engine was not running. Ms. Spence was still retrieving her belongings from a nearby building.
>
> [7] A male police officer pulled up, asked him to roll down his window and then asked him where the keys were. Mr. Whyte showed the keys and in response to further questions, confirmed that he had been drinking and that his last drink was at 3 p.m. The officer requested him to step out of the car and after he did had him blow into a "handheld breathalyzer". He was told that he had failed, and this male officer then placed him in handcuffs and told him to stand on the sidewalk.
>
> [8] After he had stepped out of his car, another police car containing two additional male officers arrived, but he did not have any contact with them.

[9] Once he was standing on the sidewalk, a third, unmarked police car arrived, driven by a female police officer. She placed Mr. Whyte into the back of her car and had him blow into a second breathalyzer, which he was told also registered as a fail. She advised him that his licence would be suspended and his car would be impounded and then had him sign some "paperwork".

[10] Ms. Spence describes the same plan to drive Mr. Whyte to Burnaby in his car and similarly disavows any intention on his part to drive it. She deposes that she was about five feet from his car when the male officer approached him. Her description of the events that followed is the same as in Mr. Whyte's affidavit, with the exception that she did not see what Mr. Whyte did while he was in the back of the female officer's car and that she left the scene for about five minutes at this point, to look for one of Mr. Whyte's friends. In addition, she spoke to the female officer, who told her that the paperwork would take about 15 minutes and that she could wait for Mr. Whyte, I infer, to be released.

[11] In his written submissions in support of the review, which he provided on April 19, Mr. Whyte's counsel emphasized the conflicts between Constable Fox's unsworn report and the consistent affidavit evidence of Mr. Whyte and Ms. Spence. He pointed to the absence of any description in the report of the circumstances under which she first came to deal with Mr. Whyte and of any reference to other officers who attended -- details that one might expect to find in a report of this kind. In this regard, counsel raised the unlikelihood of a single officer possessing two approved screening devices, which would have to have been the case if she was the only one who dealt with Mr. Whyte and no other officers were there.

[12] The use of two devices and the gap of three minutes between their use supports Mr. Whyte's claim of having been dealt with by two officers, it was argued, and is not consistent with Constable Fox's implicit assertion that she was on her own.

[13] Finally, counsel submitted that the plausibility of Mr. Whyte's evidence, confirmed on these points by Ms. Spence, that the keys were in the console and the car was not running, combined with Mr. Whyte's sworn assertion that he had no intention to drive, should resolve the question of whether he had care or control of the car in his favour.

[14] On April 20, 2011 the adjudicator provided written reasons confirming the prohibition.

[15] On the issue of whether Mr. Whyte was a "driver" within the meaning of s. 215.41(1) of the *Act*, the critical parts of his analysis were:

> The evidence you and Ms. Spence provided conflicts with certain aspects of the police evidence, and your lawyer...argued that I must prefer your evidence over the evidence of the constable. However, I find that I do not need to resolve the conflict in the evidence. You have admitted that you were in the driver's seat, and I find it reasonable to infer that you were awake at the time. Although you and Ms. Spence have both said you did not intend to drive, I have difficulty

> believing this if you were awake in the driver's seat with the keys close at hand, whether or not they were in the ignition. I find that this alone is sufficient for me to reject your assertion that you did not intend to drive, and to find you were in care or control of the vehicle. I am, however, bolstered in this finding when I consider your statement "[a]s Mariah was walking towards my vehicle, a male police officer pulled up...", which, in my view indicates you were aware that Ms. Spence was approaching your vehicle, but yet you remained in the driver's seat and did not shift to the passenger's seat. Ms. Spence said she was only five feet away when the constable confronted you.
>
> ...
>
> I have found it not necessary to determine whether the vehicle was running or not, or whether the keys were in the ignition or not or on the console. I have also found it not necessary to determine whether the constable who wrote the report was the same officer as the one who confronted you. Overall, you have not satisfied me that you did not intend to drive. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the *Act* on April 7, 2011 at 2005 hours.

[16] On the issue of whether Mr. Whyte had registered a fail on the approved screening devices, after recounting his counsel's arguments the adjudicator concluded:

> ... Here again, I do not find it necessary to resolve any inconsistencies in the evidence, since you have admitted that you were told twice that you failed ASD tests, and there is no evidence before me that you did not fail these ASD tests, nor that the devices themselves were faulty.
>
> Based on the evidence before me, I am satisfied that an ASD did register a "fail" on April 7, 2011 at 2010 hours.

[8] After laying out the legislative provisions governing the 90-day roadside prohibitions and the review process, the judge identified the principles governing judicial review. Those principles are not contentious. The standard of review is reasonableness. The adjudicator is entitled to resolve issues of credibility and make findings of fact on the basis of a written record provided there is some evidence on which such findings can reasonably be made: *Nagra v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154. Nothing in the chambers judge's statement of the governing principles gives rise to any ground of appeal. Rather, the issue here is the application of those principles to the findings of fact of the adjudicator.

[9] The chambers judge's reasons on this point are brief. The judge said:

> [29] Although it was expressed as his inability to be satisfied that Mr. Whyte did not intend to drive, the adjudicator in effect found, despite conflicting evidence, that he did intend to drive. He provided reasons for coming to that conclusion, which are in essence that Mr. Whyte was in the driver's seat with the keys close at hand and that he did not vacate this position despite Ms. Spence, who was supposed to be driving, being only five feet away. Nothing about that part of his decision-making process can be said to be unreasonable. The risks posed by a person in care or control of a vehicle clearly go beyond the intention to drive and embrace the broader risk of inadvertently setting the vehicle in motion, despite the absence of any intention: *Kalja v. British Columbia (Superintendent of Motor Vehicles)* (5 May 2010), Vancouver S101702 (B.C.S.C.), at paras. 4-5.
>
> [30] The problem instead is with the adjudicator's assertion that it was not necessary for him to decide whether the key was in the ignition and the engine was running, or whether only one officer carried out all aspects of the investigation, as asserted by Constable Fox and denied by Mr. Whyte and his friend. If the constable was not being truthful about any of those matters, then the findings could have been quite different.
>
> [31] If findings of fact were made that the engine was off and the keys were in the centre console, then that would have to be weighed in the analysis when deciding whether Mr. Whyte had established a lack of intention to drive and that he had committed no act that raised the risk of setting the car in motion. Similarly, if Constable Fox was not actually there when Mr. Whyte was taken out of the car, her assertions about the state of the engine and keys could not reasonably be given any weight.
>
> [32] Of course the adjudicator's own reasons for rejecting Mr. Whyte's claims would still have gone into the mix as well, but the point is that under a proper analysis his reasons would have had to be balanced against this other potentially relevant evidence *before* a conclusion was reached. Instead, the possibility of any competing findings of fact was dismissed from consideration at the outset.
>
> [33] In short, the adjudicator was perfectly entitled to reject the evidence of Mr. Whyte and Ms. Spence. What he was not entitled to do was conclude that their evidence did not matter in his analysis. If it had been properly considered, it may have mattered.

[10] In my opinion, the alleged errors set out by the appellants and quoted above mischaracterize the judge's reasons.

[11] As it appears to me, the judge quite properly recognized that the adjudicator is entitled to make findings of fact, provided they are reasonably supportable by some evidence in the record. Those findings include making credibility findings,

even on the basis of a written record. A court will not interfere unless those findings are unreasonable. But a court is entitled to interfere if the route to a decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the record. The point the judge was making was that a reasonable trier of fact, facing this record with these conflicts in the evidence, could not properly come to a conclusion that Mr. Whyte had intended to drive without considering the implications of the conflicting evidence. The path to a decision necessarily involved resolving the question whether the engine was running or the keys were on the console because making those findings, one way or the other, might (not necessarily would) affect the conclusion that Mr. Whyte intended to drive. The appellants have not persuaded me that the judge erred in principle in approaching the issue as he did.

[12] Contrary to the appellants' argument, I do not think the judge misapprehended the law concerning when someone may be found to have care or control of a motor vehicle. He recognized that having care or control of a vehicle may be a matter of intending to drive or that it may also involve, as he put it, "the broader risk of inadvertently setting the vehicle in motion". The judge acknowledged that the adjudicator found facts sufficient to constitute having care or control because the adjudicator found that Mr. Whyte intended to drive. The adjudicator's decision was not grounded on a finding that there was a risk that the vehicle might be inadvertently set in motion. The problem, as the judge apprehended, was the way in which the adjudicator came to that conclusion in the face of the conflicts in the evidence. Accordingly, I would not give effect to this alleged error. The chambers judge correctly applied the law pertaining to care or control.

[13] In my opinion, the second alleged error also mischaracterizes the judge's analysis. Contrary to the submission of the appellants, the chambers judge did not decide that the adjudicator's finding that Mr. Whyte intended to drive was made reasonably and was based on the evidence. What the chambers judge says is that "[n]othing about <u>that part</u> of his decision-making can be said to be unreasonable" (at

para. 29, emphasis added). That passage refers to the adjudicator's conclusion that Mr. Whyte intended to drive based only on the evidence that Mr. Whyte was in the driver's seat with the keys nearby and did not move from that seat even though the intended driver was only five feet from the car and was approaching it. The problem was that this evidence was only part of the evidence the adjudicator was reasonably required to consider in making the material finding.

[14] I take it the chambers judge, in the passage just quoted, was acknowledging the evidence *could* have been used to support the ultimate finding that Mr. Whyte intended to drive. However, that evidence, and the adjudicator's reasoning about it, was only part of the relevant evidence. It follows that the adjudicator's reasoning was therefore only part of the reasoning required for a reasonably supportable finding. The evidence that was not considered involved the location of the keys, whether the engine was running, and the significance of the conflicts on those matters between the police officer and the evidence forming Mr. Whyte's case. The criticism the judge made was this unconsidered evidence was potentially significant to the findings of fact capable of reasonably supporting a determination of care or control. To put it simply, this evidence had to be considered before a reasonably supportable conclusion could be reached that Mr. Whyte intended to drive (or, alternatively, for example, that there was a risk of inadvertently setting the vehicle in motion).

[15] The basis of the chambers judge's conclusion was that it was necessary to weigh the conflicting evidence, and not to set those conflicts aside as irrelevant to the determinations to be made, because assessing the conflicts could affect whether the adjudicator would ultimately find, for example, that Mr. Whyte intended to drive. This reasoning underlies the chambers judge's conclusion that it was necessary to make findings of fact about whether the engine was running with the keys in the ignition or whether the keys were in the central console, as Mr. Whyte deposed.

[16] As the chambers judge recognized, there was evidence in the record capable of supporting a finding of fact that Mr. Whyte intended to drive. His criticism was

that, in these particular circumstances, that finding could not properly be made without considering the significance of the conflicting evidence. I agree. I agree also with the chambers judge's conclusion that the adjudicator's failure to consider the implications of this relevant evidence goes to the heart of the adjudicator's jurisdiction. Accordingly, I would not give effect to the appellants' second alleged error.

[17] In summary, while the evidence relied upon by the adjudicator was capable of supporting a finding that Mr. Whyte intended to drive (and therefore met the definition of driver under the *Act*), if the adjudicator had made findings regarding the conflicts in the balance of the evidence, it cannot be said that he would necessarily have reached the same decision.

[18] It is useful to say something about what this appeal is not about so that the scope of the principles discussed in these reasons is not misunderstood. My reasons should not be taken as suggesting that a trier of fact need explicitly resolve all conflicts in the evidence, make explicit findings on each constituent element leading to a conclusion, address every argument or lay bare every step in the chain of reasoning leading to a result. The Supreme Court of Canada has said much about the adequacy of reasons, and I do not think the reasoning of the chambers judge, or these reasons, fail to respect what that Court has said.

[19] Moreover, nothing in these reasons should be taken to doubt the capacity of triers of fact to make findings of fact without resolving conflicts in the evidence where to do so is in fact unnecessary because, for example, facts can be found against a party based only on that party's evidence, without regard to other evidence.

[20] The point here is that the conflicts in the evidence are significant because they go to the heart of whether Mr. Whyte intended to drive. Thus a reasonably supportable finding that he did so intend could be made only after considering the implications of those conflicts.

[21] Having not been persuaded that the chambers judge erred, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice D. Smith"