DRIVING OFFENCES UNDER CRIMINAL CODE—PROVINCIAL LEGISLATION PROVIDING FOR MINIMAL SUSPENSION PERIOD UPON A CONVICTION—CONSTITUTIONALITY OF SUCH LEGISLATION— *FINDLAY* v. *MINISTER OF HIGHWAYS FOR ALBERTA*

Most Canadians are surprised to learn that the sentence imposed by the trial judge on a convicted criminal may be increased by a Court of Appeal should the Crown wish to appeal. In most common law countries and provinces this power of appeal to increase sentence is used more sparingly than it is in Alberta. However, even Albertans would be surprised, and possibly shocked, to discover that for certain criminal driving offences the lawfully imposed sentence of a competent criminal court may be increased by a Department of the Provincial Government. This interference with sentence by the Executive Branch would seem to be contrary to all our much vaunted ideals about the Rule of Law. Nevertheless this is what happened in *Findlay* v. *Minister of Highways for Alberta.*[1]

On October 29th, 1964, Findlay was convicted of impaired driving under Section 223 of the Criminal Code of Canada for a second time within five years, but the conviction was not charged or proved as a second offence; accordingly, the Court imposed a fine, together with a prohibition against driving in Canada for six months pursuant to the provisions of Section 225 of the Criminal Code. However, in Alberta the Provincial Legislature has imposed minimum suspension periods for drivers convicted of certain offences, and in this case the relevant legislation is as follows:[2]

> Where a person is convicted under the Criminal Code anywhere in Canada of driving a motor vehicle or of having the care or control of a motor vehicle while his ability to drive a motor vehicle is impaired by alcohol or a drug, when the convicted person is the holder of an Operator's License, his license is thereupon suspended, for the following period of time:
>
> (d) In the case of a second or subsequent conviction for that offence within five years of a previous conviction for that offence, for a period of one year from the date of the latest conviction, or, if an order prohibiting him from driving a motor vehicle on the highway in Canada is made as a result of the latest conviction, for the period driving is prohibited, which ever is the longer period;

It is to be noted that the Alberta legislation does not require that the offence be formally charged and proved as a second offence, so that it appears to become a "second or subsequent conviction" merely if the Department records show the prior conviction within five years. In Findlay's case the Department records did so show and accordingly Findlay's license was not returned to him after the Court's sentence of six months prohibition from driving had been served. Findlay thereupon took certiorari and mandamus proceedings against the Minister for the return of his license on the grounds that Section 20 (2) of the Vehicles and Highway Traffic Act is ultra vires of the Provincial Legislature, or alternatively, is rendered inoperative when a Court has imposed a driving prohibition pursuant to Section 225 of the Criminal Code of Canada.

1 (1965), 53 W.W.R. 397.
2 Vehicles and Highway Traffic Act, R.S.A. 1955, Ch. 356, s. 20 (2).

In finding that the Alberta legislation was neither ultra vires nor inoperative, Riley, J. felt that he was bound by the Supreme Court of Canada's decision in *Provincial Secretary of P.E.I.* v. *Egan*,[3] and he quoted the following passages from the judgment of Duff, C. J. in that case:[4]

> I do not find any difficulty in dealing with the present case. Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways, and the operation of a system of licenses for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local legislatures.
>
> Sections 84 (1) (a) and (c)[5] are enactments dealing with licenses. The legislature has thought fit to regard convictions of the classes specified as a proper ground for suspending the license of the convict. Such legislation, I think, is concerned with the subject of licensing, over which it is essential that the Province should primarily have control. In exercising such control it must, of course, abstain from legislating on matters within the enumerated subjects of Section 91. Suspension of a driving license does involve a prohibition against driving; but so long as the purpose of the Provincial legislation and its immediate effect are exclusively to prescribe the conditions under which licenses are granted, forfeited, or suspended, I do not think, speaking generally, it is necessarily impeachable as repugnant to Section 285 (7) of the Criminal Code in the sense above mentioned.

On the basis of the *Egan* case, Riley, J. decided that the Alberta legislation was not in pith and substance criminial law, and was therefore valid. But when Sections 84 (1) (a) and (c) were passed by the P.E.I. Legislature in 1936 no reference was made in the text of the Statute to the Dominion legislation because at that time there was no Dominion legislation in the field. Section 285(7) of the Criminal Code referred to in Duff, C.J.'s judgment (which is the forerunner of the present section 225 of the Criminal Code) was first enacted by Parliament in 1938.[6] Accordingly it is quite clear that the P.E.I. Legislature had no intention of invading a Federal field, and the Supreme Court of Canada was able to find that the impugned legislation was primarily concerned with the subject of licensing and that its true purpose was "to prescribe the conditions under which licenses are granted, forfeited, or suspended" and as such came within the Province's power. Duff, C. J. did not attempt to suggest that any valid distinction can be made between the different choice of language, namely, "suspension of driving license" used in the Provincial Statute and "prohibition against driving" used in the Federal Statute for as he says: "Suspension of a driving license does involve a prohibition against driving".[7] Rinfret, J. thought a distinction could be made on this point: "The automatic cancellation of the P.E.I. license would not, of itself, prevent the person affected by it from obtaining a driver's license in other provinces".[8] But in the present state of the Federal legislation driving in another Province when one's Alberta license is legally suspended renders one liable to two years imprisonment under Section 225 (3) of the Criminal Code of Canada. Moreover, with all the modern methods of cross checking license applications the Province applied to would almost certainly pick up the legal suspension and refuse to issue a license in such circumstances. Thus the Alberta suspension does have extra territorial effect and whether that effect is direct or

---

3 [1941] S. C . R. 396.
4 *Id*, 402.
5 Highway Traffic Act, P.E.I. 1936, c. 2.
6 R.S.C. 19, c. 44, s. 16.
7 *Ibid*, n. 3, 402-3.
8 *Id*, 414.

indirect does not much matter to the citizen who is prevented from driving. For him there is no distinction between having his license suspended and being prohibited from driving, and to sustain the Provincial legislation on that ground alone would be legal casuistry in the present state of the legislation.

The other difficulty created by the *Egan* decision is that the Supreme Court held that the suspension of Egan's driver's license was not an additional penalty, and therefore not an invasion of a federal field (regardless of whether Parliament had legislated in this field: see *Ontario Fisheries*[9] and *Union Colliery* v. *Bryden*[10]), for as Duff, C. J. said the true purpose of the impugned P.E.I. legislation was regulation of licenses and not the prescription of a penalty for a Criminal Code offence. In view of the history of the P.E.I. legislation this was undoubtedly true of that legislation but one is entitled to wonder whether the Supreme Court of Canada could possibly come to that conclusion on the basis of the wording and effect of Section 20 (2) of the Alberta V.H.T. Act,[11] especially the words "whichever is the longer period". As Duff, J., as he then was, himself said in the Supreme Court of Canada in the *City of Montreal* v. *Beauvais*:[12]

> A Province cannot (it is probably needless to say) by simply restricting the operation of it territorially, validly enact legislation that, in its real scope and purpose, deals with a subject committed exclusively to the Dominion: *Union Colliery Co.* v. *Bryden.*

Yet it is respectfully submitted that this is exactly what the Alberta Legislature appears to be doing by Section 20 (2) of the Alberta V.H.T. Act, and doing successfully.

Similar legislation in Quebec has not met with such success. In *R.* v. *Langlais*[13] the trial judge held the impugned Provincial legislation to be inoperative and specifically distinguished and refused to follow the *P.E.I.* v. *Egan* decision since, as he pointed out, changes in legislation and social conditions had destroyed the basis for that decision. The learned judge also noted that in *R.* v. *Girard*[14] the Quebec Court of Appeal had decided that when passing sentence under the Provisions of the Criminal Code a trial judge need not take any notice or give any effect to a Provincial Statute. Neither of these decisions has been appealed by the Attorney-General for Quebec.

Another matter that seems to be worthy of greater consideration than it has received in the reported cases dealing with *P.E.I.* v. *Egan* is the relevancy of that decision to similar fact situations in view of the passing by Parliament of Section 5 (1) of the Criminal Code of Canada subsequent to the decision of the Supreme Court of Canada in *P.E.I.* v. *Egan.* Section 5 (1) of the Criminal Code provides as follows:

> Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,
> (a) A person shall be deemed not to be guilty of that offence until he is convicted thereof; and
> (b) A person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

9 [1898] A.C. 700.
10 [1899] A.C. 580.
11 *Ibid*, n. 2.
12 (1910), 42 S.C.R. 211, 215.
13 (1965), 46 C.R. 236.
14 [1964] Que. Q.B. 544.

This immediately leads one into the problem of whether suspension of a person's driving license is a punishment. In a large country with a public transportation system that assumes most people have their own cars the suspension of the driver's license is, of course, the worst part of the penalty and most practising lawyers agree that almost all citizens would prefer to suffer a heavier fine or a short term of imprisonment rather than lose their driver's license for an extended period of time. Also one must take into account the vast number of jobs, a precondition of which is a driver's license which have developed since *P.E.I.* v. *Egan* was decided twenty-five years ago. These are obvious factors that must be considered before one suggests that effectively preventing a man from driving by suspending his driver's license, is primarily an administrative and regulatory act. It seems to this writer that at least the Alberta legislation, by its reference to the Criminal Code provisions, is frank enough to imply that prohibiting driving by any means is primarily punitive. In fact the Criminal Code itself badly states in Section 225 that "*in addition to any other punishment* that may be imposed for that offence (i.e. impaired driving) the Court may make an order prohibiting him from driving a motor vehicle on the highway in Canada . . ." Apparently the Parliament of Canada felt that effectively prohibiting a person from driving was an additional punishment to be imposed at the discretion of the trial judge. However, the Alberta Legislature, not being content with these provisions, has set minimum license suspension periods for certain Criminal Code convictions, and seeks to justify these as being done under its Provincial regulatory power. It is respectfully submitted that the application of these minimum suspension periods in the Findlay case accomplishes precisely what Section 5 (1) of the Criminal Code prohibits, namely additional punishment. Moreover, the prescription of minimum penalties is generally speaking abhorrent to both lawyers and judges alike because it disallows the court from taking into consideration very different fact situations.

The true distinction between regulatory and criminal matters is often very difficult to state precisely, as is illustrated by the Supreme Court of Canada's decision in *Henry Birks & Sons (Montreal) Limited et al* v. *The City of Montreal and the Attorney General of the Province of Quebec*,[15] for as Duff, C. J. said in the *Egan* case: "We are here on rather delicate ground."[16] In each case it is the pith and substance of the wording and effect of the legislation that must be examined in order to ascertain its legislative purpose and character. While some general principles can be deduced from the reported decisions (such as whether the penal sanction is authorized not as an end, but solely as a means to ensure the realization of an order of things which the Legislature has the competence to regulate) each case will turn on the wording and effect of the statute being considered. Thus, while the leading aspect of the P.E.I. legislation in *Egan's* case was held to be regulatory and not punitive, the Supreme Court of Canada might well hold that the leading aspect of Section 20 (2) of the Alberta V.H.T. Act is punitive; accordingly it is respectfully submitted that *P.E.I.* v. *Egan* is a case which should be confined to its particular facts.

15 [1955] S.C.R. 799.
16 *Ibid*, n. 3. 401.

Moreover, given the present state of the Provincial and Federal legislation in this field, and given the present socio-economic conditions that prevail in Canada in 1966, the total prohibition from driving (whether it is effected by means of Provincial suspension of a driver's license under a Provincial Statute, or judicial order under a Federal Statute) as a result of the commission of a Criminal Code offence is a punishment which is appropriate Federal legislation and inappropriate Provincial legislation. In prohibiting impaired drivers from driving, judges have a difficult enough job on their hands without being directed by two different governments.

In this field the need for a national standard outweighs the need for Provincial autonomy, and it should go without saying that the Federal parliament is the better physician to prescribe the remedy for a Federal crime, and that the discretion of the trial judge as to sentence should not be fettered by the prescription of minimum license suspension periods by a subordinate legislature under guise of its regulatory power.

P. G. G. KETCHUM*

* P. G. G. Ketchum; B.A. (U. of Toronto), M.A., LL.B. (Cambridge), of the Alberta Bar.