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BUCKLE UP!

ALBERTA'S SEAT BELT LAW REINSTATED

Bruce P. Elman

For almost a year, the future of Alberta's seat belt legislation was shrouded in uncertainty. On the 11th of December, 1989, the Alberta Court of Appeal removed that uncertainty, for the time being at least, by reinstating section 65(3)(a) of the Highway Traffic Act which provides for compulsory seat belt use. The story of the seat belt law's journey through the Alberta Court system begins with one Kim Maier.

Kim Maier is a bit of a maverick. He likes to take risks. A refrigerator repairman by occupation, Maier enjoys motorcycle jumping. Kim Maier doesn't like the government telling him how to live his life. Thus, it is not surprising that, on the 1st of July, 1987, he was extremely upset when the Highway Traffic Amendment Act was proclaimed into law. This statute made the use of seat belts compulsory in the Province of Alberta.

Mandatory seat belt use was a long time in coming to Alberta. Indeed Alberta was the last province to enact legislation of this sort. It never was Conservative government policy to require seat belt use. Ultimately, it took a private member's bill and strong lobbying from various quarters to make mandatory seat belt use a reality.

The statute requires all occupants of a motor vehicle to wear seat belts while the vehicle is being operated. It is also unlawful to operate a vehicle when a passenger under the age of 16 is not wearing a seat belt. Any contravention of the provisions of the Act is punishable by a maximum fine of \$500.00 or imprisonment for up to 6 months, or both fine and imprisonment.

Kim Maier was so agitated by this new law that, on the very day that section 65(3)(a) the Highway Traffic Act came into force, he went "trolling for a ticket". Maier's antics on that day are described in the February 20, 1989 issue of Alberta Report as follows:

First, he tried circling the Calgary police station with his seat belt hanging out the door. But city cops, who recognized him from his media appearances, refused to oblige him with a fine, so he put a sign on his truck announcing his misdeed to the world. Then he took to shouting at passing police cruisers: "Hey, I'm not wearing a seat belt. Give me a ticket."

Four days later, on July 5, 1987, after spending some eight hours taunting the Calgary police, Maier got a \$25.00 ticket and a chance to challenge the law he considered an infringement of his freedom.

The Trial: Maier was tried before Associate Chief Judge H.G. Oliver in Provincial Court in Calgary. The case proceeded on the basis of a statement of admitted facts. In this statement of facts, Maier admitted: that on the 4th of July, 1987, he was operating a motor vehicle on a highway within the city of Calgary, in the Province of Alberta; that the motor vehicle was equipped with a seat belt assembly;

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that he was in the driver's seat of this motor vehicle; and that he was not wearing the complete seat belt assembly. He further admitted that these facts were sufficient for conviction. Of course, Maier was not in court to dispute the facts. He was there to challenge the right of the Alberta legislature to pass the law in the first place. Thus the trial entered a second phase.

Essentially, Maier's argument, or at least his legal argument, was that Alberta's mandatory seat belt law was a violation of his right to "life, liberty, and security of the person" as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms. In support of this claim, the defence called a number of witnesses and submitted numerous documents.

Maier, himself, was the first witness. He claimed to have read extensively on the safety of seat belt use. From his reading, he was convinced that seat belt use can cause serious injury. Among other problems, Maier testified that lap belts could cause "submarining" or "bobbing under the belt" and whiplash. He also expressed concern about being trapped in a car because of a "belt release problem". He claimed to have talked to others who had been injured in this manner. In addition, he testified that he would not want to be a cyclist or a pedestrian confronted by a motorist wearing a seat belt because "car drivers feel safer and therefore drive faster and are not as careful".

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The central thrust of his testimony, however, was that seat belts could cause him injury and that he should not be forced to wear one. Whether to wear a seat belt was, according to Maier, "an intelligent decision he should make for himself".

The next three witnesses had all been involved in accidents. Essentially, their testimony was that in those accidents where they had not been wearing seat belts, they were saved from serious injury. In one of the accidents, where a witness had been wearing a seat belt, she suffered some broken vertebrae as a result of wearing the belt. This was anecdotal evidence which, given the potential number of individuals who could give contrary testimony, was probably of limited value.

The next two witnesses were William Grove, a professional stunt man, and Donald Stalker, who was described as a driver of "big trucks". Stalker had also been a fire chief in Fort St. James and a first aid instructor and accident investigator with Edmonton Fire and Rescue for 26 years. Both were accepted as experts and were, therefore, entitled to give their opinions on the safety of seat belt use.

William Grove was highly critical of the standard seat belt assembly. He testified that he modified them for his own use. He further testified that "seat belts are good and save people as well as killing them". "The best seat belt", he noted, "is to drive defensively".

Donald Stalker testified that he doesn't wear a seat belt because he doesn't feel safe in them. (When one drives "big trucks", seat belts may seem superfluous.) He estimated that in the thousand accidents he has seen, "fifteen to twenty percent of the drivers would have been injured if they had been wearing seat belts". Stalker had been to many accidents where the vehicle was demolished but the persons involved were walking around afterwards. He commented, "How they got out I don't know...I definitely would not want to tie that person into the drivers seat...I don't think they would have survived".

Two other expert witnesses testified on behalf of the defence. Marshall Paulo was qualified as an expert in "accident reconstruction specializing in restraint systems". He testified that he was an "advocate of seat belts" and that he "always wears a seat belt wherever I go". He was, however, critical of the lap belt systems in particular and seat belt design generally.

John Adams was accepted as an expert in "transport planning and road safety". He testified that he had studied jurisdictions where seat belt laws had been enacted and had found no "clear evidence of a net saving in lives and there is a fairly strong suspicion of an adverse effect in terms of a shift of the burden of risk from the people wearing seat belts to other vulnerable road users". In cross-examination, he admitted that his theory --- because one wears a seat belt,

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one drives more carelessly --- could never be proved. This closed the case for the defence.

The Crown relied exclusively on expert evidence. The first witness was Murray Dance, an employee of Transport Canada. He was qualified as an expert in "accident reconstruction, seat belt performance, seat belt failure modes, and seat belt injuries". He testified that seat belts were the most effective safety device in the motor vehicle. He had attended about 600 fatal accidents in the previous 10 years. When asked if he had seen any cases where the person would have been better off if unrestrained, he replied, "maybe one or two, yes". Mr. Dance also expressed concern that unrestrained passengers might injure other persons in the motor vehicle by being propelled against them.

The same concern was expressed by the second Crown witness, Peter Keith, an automotive engineer. He noted, "Unrestrained occupants are like cannonballs". He testified that seat belts were, overall, "very effective". On the problem of "submarining", he noted a passage in the documentary evidence provided by the defence which stated: "It has been determined that abdominal injuries caused by classical submarining do not occur or are of such limited nature that no further study of the phenomenon is deemed necessary".

The third expert was Lauriston Keown, Assistant Director of Transportation Safety in Alberta. He challenged the substance and research methodology of Dr. Adams' theory that greater use of seat belts brought about a higher incidence of careless driving.

In analyzing the evidence presented at trial, Judge Oliver addressed two issues (See R. v. Maier (1987) 83 A.R. 194):

First, does the mandatory seat belt legislation deprive a person of their rights under section 7 of the Charter, that is the right to life, liberty, or security of the person and the right not to be deprived thereof except in accordance the principles of fundamental justice?

Second, is the mandatory seat belt legislation, pursuant to section 1 of the Charter, a reasonable limit demonstrably justified in a free and democratic country?

On the first question, Judge Oliver drew four conclusions:

1. On all the evidence in this case, seat belts and restraint systems reduce injury and death,
2. Misuse not proper use of lap belts cause injury or death, and there is strong evidence of more than adequate dissemination in Alberta of information regarding the proper use of restraint systems,
3. The accused's constitutional rights under section 7 of the Charter to life, liberty, and security of the

person have not been infringed and the mandatory seat belt legislation in Alberta does not violate the principle of fundamental justice, and

4. The law is not inconsistent with section 7 of the Charter and the accused's challenge to its constitutional validity fails.

Because of his conclusions on the first issue, Judge Oliver was not required to address the second issue. Nonetheless, he did so. He concluded that the mandatory seat belt legislation was a reasonable limit which was demonstrably justified in a free and democratic society.

Maier, not being satisfied with this determination, appealed. As the matter involved a provincial offence, the appeal was heard by Justice Lutz of the Alberta Court of Queen's Bench.

Queen's Bench Appeal: In Justice Lutz's view, the appeal revolved around the answers to three questions (See Maier v. The Queen (1989) 94 A.R. 163):

1. Do seat belts cause injury?
2. If so, does the mandatory seat belt legislation contravene section 7 of the Charter?
3. If so can the legislation be justified under section 1 of the Charter?

In addressing the first question, Justice Lutz began with the conclusions reached by Judge Oliver at trial. The verdict at trial was, according to Justice Lutz, based upon the trial judge's finding of fact (misstated) that "a seat belt assembly does not cause injury". Justice Lutz considered this finding to be reviewable under Criminal Code section 613(1)(a)(i) [now section 686(1)(a)(i)] which provides that a verdict may be set aside if it is "unreasonable or cannot be supported by the evidence". From his review of the evidence presented at trial, Justice Lutz drew the conclusion that "a court could be satisfied, on a preponderance of probability that injuries are caused by use of a seat belt assembly even if worn properly." He continued: "In short, the factual findings of the trial judge were not those that a properly instructed judge, acting judicially, could reasonably have rendered".

Based upon his conclusion that "injuries are caused by use of a seat belt assembly even if worn properly", Justice Lutz found that the mandatory seat belt legislation violated Maier's security of the person. This is not sufficient, however, for a finding that the accused section 7 rights have been violated. The Court must still ascertain whether the accused was deprived of his right to security of the person in a manner which was not in accordance with the principles of fundamental justice. Before Justice Lutz could give a complete answer to the second question, therefore, his Lordship had to determine whether the violation of Maier's

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right to security of the person was in accordance with the principles of fundamental justice.

What does "fundamental justice" mean in the context of seat belt use? First, according to Justice Lutz, it meant that in pursuing a lawfully permitted activity, "no person ... must be subjected to penal sanction for refusal to comply with legislation regulating that activity when to comply would render one's person at risk of injury". Second, "no person must be denied the personal choice when to do so" would subject one to physical injury. In Justice Lutz's view, the mandatory seat belt law required the defendant to take "positive action which places him at risk" and was, therefore, a violation of section 7 of the Charter.

Was the mandatory seat belt legislation justified on the basis of section 1 of the Charter? Justice Lutz applied the test from Oakes. The legislation did not pass the proportionality element of the test. In particular, Justice Lutz disagreed with Judge Oliver's finding that "seat belts lead to protection of the public". "In my view", he commented, "this conclusion is not supported by the evidence". He also held that the objective of protecting the public could be achieved by less intrusive means and that the deleterious effects of the legislation outweighed the importance of the legislation.

In summary, then, Justice Lutz held that Alberta's mandatory seat belt legislation violated Maier's rights under section 7 of the Charter and that the violation was not reasonable and justifiable in a free and democratic society. He issued a declaration that the law was constitutionally invalid and overturned Maier's conviction under the statute.

The Crown did not accept this reversal and further appeal to the Alberta Court of Appeal was undertaken.

Court of Appeal: The Alberta Court of Appeal allowed the Crown appeal and reinstated the verdict of Judge Oliver. The Court held that Justice Lutz erred when he reversed the trial judge's findings of fact. Chief Justice Laycraft, speaking for the Court, noted that Justice Lutz had misstated Judge Oliver's finding of fact that "wearing a seat belt assembly reduces risk of injury or death". As well, the Chief Justice expressed the view that there was "ample, even overwhelming, evidence" to support Judge Oliver's conclusion that wearing seat belts leads to protection of the public. The Appeal Court was of the opinion that Judge Oliver was in a far better position to assess the evidence, both documentary and testimonial (including the expert witnesses), than was Justice Lutz. They overturned the declaration that the seat belt legislation was invalid, reinstated the law and Maier's conviction with it.

Maier, not surprisingly, remains unconvinced. In announcing his desire to appeal the matter to the Supreme Court of Canada, he said: "I like risk and I think seat belts reduce my

enjoyment of life. I'm doing this so that my kids can enjoy life".

Comment: Although seat belt use had declined sharply (82 percent to 50 percent) after Justice Lutz's ruling, most Albertans were pleased when the Alberta Court of Appeal reinstated the seat belt law. Automobile safety advocates such as the Alberta Motor Association, the Alberta Safety Council, and police departments in the province are all convinced that when motorists do not wear seat belts, their risk of injury increases. The medical profession is similarly convinced that mandatory seat belt use will result in a decrease in human misery and a lowering of health care expenses. All of these groups and individuals, as well as many others, will applaud the Court of Appeal's decision.

Lawyers, government policy makers, constitutional scholars, and Charter watchers will, most likely, find the judgment unsatisfying. This is because the province's highest court never addressed Kim Maier's challenge to the validity of the mandatory seat belt legislation on the merits. Rather, their decision rests upon a point of procedure, that is: when can an appeal court review and revise a trial judge's findings of fact?

Mandatory seat belt legislation is only one of the multitude of social welfare programs in place in this country. These social welfare programs are important for the functioning of Canadian society. The Maier case is an important one because it involves reconciling the rights of the individual with the welfare of society as a whole. Because other social welfare laws will, in the future, be the subject of Charter challenge, the lower courts require some direction on the balancing of these competing interests. As well, the public wants some indication from our highest courts as to which government initiatives are constitutionally permissible.

The determination of the constitutional validity of mandatory seat belt legislation is an important one. A strong statement from the Alberta Court of Appeal supporting the constitutional validity of this type of social welfare program, which benefits so many, would have been desirable. Unfortunately, none was forthcoming.

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**THE CANADIAN SENATE
WHAT IS TO BE DONE?**

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