In the Provincial Court of Alberta

Citation: R v Wells, 2016 ABPC 171

Date: 20160715
Docket: A34597872R
Registry: Ponoka

Between:

Her Majesty the Queen

Crown

- and -

Robert Dale Wells

Defendant

Reasons for Judgment of the Honourable Judge B.D. Rosborough

[1] Canadians place a high value on their freedom of expression. Some choose to exercise that freedom by the verbal exchange of opinions or ideas at public assemblies. Others exercise that freedom by written submissions to print or electronic media. Robert Dale Wells ("Wells") chose to exercise that freedom by mounting a large fluorescent pink sign bearing the phrase "Fuck Harper" in the rear window of his motor vehicle and drive around on Highway #2.

[2] Public complaints about Wells' sign resulted in Wells being issued a Violation Ticket for the regulatory offence of "stunting". This case considers whether display by Wells of his sign contravened the provisions of the *Traffic Safety Act* ("*TSA*"), R.S.A. 2000, c.T-6, s.157(1)(a)/115(2)(e) ("stunting"). It also considers whether charging and prosecuting Wells for this offence violates his constitutional right to freedom of expression.

Charge & Procedure

[3] On August 16th, 2015 the R.C.M.P. issued Wells a violation ticket alleging that he:

> On or about August 16th, 2015 at or near Ponoka, Alberta, did unlawfully contravene Section 115(2)(e) of the *TSA* (engage in activity likely to distract/startle/interfere w [*sic*] other users of hwy [*sic*]).

Wells was summoned to appear before a Justice of the Peace presiding in the Provincial Court of Alberta on November 12th, 2015.

[4] On October 26th, 2015 Wells filed a document entitled "Preliminary Notice of Constitutional Argument" with the Provincial Court. In it, he announced his intention to seek a remedy or remedies authorized by the *Canadian Charter of Rights and Freedoms* ("*Charter*"). In accordance with the *Justice of the Peace Regulation,* AR 6/1999, s.3(2)(b), the matter was transferred for hearing by a Provincial Court Judge.

[5] Wells' trial and *Charter* application were scheduled for hearing on April 1st, 2016. Given the potential complexity of the *Charter* application he was bringing, the court canvassed with Wells the prospect of seeking the assistance of legal counsel. Wells advised that, " ... the cost of the legal counsel is going to be probably more than what the fine is, ..." and, accordingly, he, " ... just want[s] to bring these issues before the Court and will accept your -- your -- your wisdom on the matter."

[6] Wells was provided with the booklet, *Information for Self-Represented Litigants* (see: Exhibit A) and court was adjourned in order to afford him the opportunity to read it. This booklet not only highlights the benefit of representation by legal counsel but also provides contact information where self-represented litigants can obtain free legal advice. It contains information designed to assist the self-represented litigant with conduct of criminal litigation. Following the adjournment, Wells confirmed that he had read the booklet and had no questions arising from it. Nevertheless, he was invited by the court to seek assistance or raise any questions he had relating to matters of substance or procedure as the trial progressed.

[7] Wells elected to give evidence during the course of the trial. Before doing so, he was re-cautioned that the burden of proving essential elements of the offence alleged rested with the prosecution. He had the right to remain silent and refrain from incriminating himself. He had no obligation to testify or call evidence.

[8] As a general rule, the procedure followed on the hearing of a *Charter* application such as this is that outlined in ***R v Brodersen***, 2012 ABPC 231. Because Wells had chosen to represent himself, however, the court directed the prosecution to first lead evidence in support of the allegation that Wells had contravened the *TSA,* s.115(2)(e). The reason for that was explained by the court. Wells clearly appreciated the explanation, commenting, "If I – if I may interject – with your permission, if – if, speculating, there is a finding that the elements of the charge are not met, I may be in a position to withdraw the *Charter* application and speed things up."

The *Charter* Application

[9] Wells' intent in making reference to the *Charter*, ss.2(a), 2(b) and 9 was to have the court pronounce on the legality of his act of displaying a large sign in the rear window of his vehicle as he drove along Highway #2. The sign displayed the phrase "Fuck Harper". In Wells' view, this was a form of political expression protected by the *Charter.* He also sought to have the court denounce, as a form of arbitrary detention, police efforts to suppress that expression by charging him with the offence described in the *TSA*, s.115(2)(e).

[10] It became clear by the close of trial that Wells was <u>not</u> attacking the constitutional validity of the *TSA*, s. 115(2)(e). Rather, he was seeking to have the *TSA*, s. 115(2)(e) interpreted

in such a way that it conformed to the rights described in the *Charter,* ss.2(a) and (b). That position was clarified in the following exchange with the court:

> THE COURT: All right, and I am just going to paraphrase this back to you because I want to make sure I have your argument. In a nutshell, what you are saying is that sections 2(a) and (b) of the *Charter* guarantee the protest right or the right of people to protest matters in a democratic society.
>
> THE ACCUSED: Yes.
>
> THE COURT: That that includes the right to post a sign and a sign in the terminology that was used by you on this particular occasion, and that because the constitution is the supreme law of Canada, section 115(2)(e) of the *Traffic Safety Act* should be interpreted in such a way that it does not limit the right to freedom of expression or the freedom of conscience and religion. Is that the substance of the argument that you are making?
>
> THE ACCUSED: That's very – very concise. I'm not – I'm not at all arguing on the validity of the law, but when it's used in a way which tramples on another right, then it – it – it's in the interpretation and the application of the law. I think the law itself is very good.

[11] I note, parenthetically, that the constitutionality of the *TSA,* s.115(2)(e) was considered by the court in ***R v Pawlowski,*** 2009 ABPC 362 ("***Pawlowski***"). Fradsham P.C.J. concluded that the offence of stunting was not constitutionally infirm. More particularly, he found that, as properly interpreted, it did not create an offence that was "overbroad".

[12] Wells' "*Charter* Application" is two-fold: First, displaying a large sign bearing the phrase "Fuck Harper" in the rear window of a motor vehicle being operated on a public highway does not contravene *TSA,* s.115(2)(e). The offence of "stunting" is largely directed at the safe and orderly flow of traffic on and about public highways. It is not intended to suppress the expression of a political view, even if that view is expressed in a profane or vulgar manner. Second, Wells submits that, by charging him with and prosecuting him for a regulatory offence based upon that act, the R.C.M.P. and prosecution have violated his *Charter,* ss.2(a) and (b) rights.

[13] In the event that Wells proves a violation of his *Charter,* ss.2(a) and/or (b) rights, he seeks, "A declaration that the improper use of section 15(2)(e) [*sic*] of the *Traffic Safety Act* to suppress political dissent is a violation of the Applicant's rights protected by sections 2(a) and (b) of the *Charter."* As phrased, the remedy sought is beyond the jurisdictional competence of the Provincial Court of Alberta. The Supreme Court has made this clear by its recent decision in ***R v Lloyd***, 2016 SCC 13. In that case, the court stated (at para.15):

> The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s.52(1) of the *Constitution Act, 1982*; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power. However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them. As this Court stated in ***R v Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, at p. 316, "it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute."

And further (at para.19):

> The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[14] Wells is a self-represented litigant, however. The remedy of a "declaration", when taken as a term of art is beyond the jurisdictional competence of this court, However, if phrased somewhat differently, the remedy sought by Wells can take the form of a ruling by this court that state agents (police and prosecution) cannot suppress his right to express a political view by charging him with and prosecuting him for the regulatory offence of stunting.

[15] The Respondent (prosecution) submits that, in the event the court concludes that Wells' *Charter*, ss.2(a) and/or (b) rights were violated by charging him with and prosecuting him for the offence described in *TSA*, s.115(2)(e) their respective exercises of discretion were justified. Use of this regulatory offence to prevent distracting signs on the highway is a reasonable limit on that right within the meaning of the *Charter*, s.1.

[16] Having clarified the nature of his application, Wells went on to abandon his allegation that the R.C.M.P. violated his *Charter*, s.9 right by detaining him for the offence of stunting. He made that intention clear in the following exchange with the court:

> THE COURT: All right, take your time. I will hear from you on the constitutional argument first, please ... . In your notice, you indicate that you feel that the officer arbitrarily detained you, as that phrase is used in section 9 of the *Charter*.
>
> THE ACCUSED: I – I would withdraw that now, and I'm just seeking clarification on the legality of the sign, whether that's freedom of expression or not.

Facts

[17] On Sunday, August 16th, 2015 Amanda Sleeman ("Sleeman") was a passenger in the family's Mitsubishi Outlander as it was driven northbound in the left or passing lane of Highway #2. The highway was busy that day. Near Airdrie, her attention was drawn to a silver-colored Saturn Astra being operated by Wells and travelling in the same direction and ahead of the Sleeman vehicle. The Astra had a large, bright, fluorescent pink sign covering most of its rear window. The sign was visible from a considerable distance.

[18] Sleeman described the sign as having large black lettering spelling the words, "Fuck Harper". It was approximately 1 foot high and 5 feet long with lettering approximately 6 inches in height. The Sleemans followed this vehicle at a speed of approximately 115 kph for some time before pulling out to pass. She described the events which followed in these terms:

> And my husband said, "Look at the car", and I said, "Yes, I see it". And when we came closer to the vehicle, my husband said, "Give him the finger". So I did and when I did that the car came forward very quickly and then cut into our lane very

> quickly. And I was scared and my husband slammed on the brakes and then I phoned the police.

[19] Sleeman told her husband, "Just let it go. This isn't worth being in an unsafe situation. Our kids are in the car," ... "Let's just let this go, and that's – then we parted ways. We didn't have any more interaction after that."

[20] Sleeman acknowledged in cross-examination that she was upset when she gave the other driver (Wells) the finger. She candidly admitted doing so in order to startle or distract him. In her words, "Yeah, I did. I thought it would be. I – that's why I did it."

[21] That same day, Linda Trewin ("Trewin") and her husband were travelling northbound on Highway #2 having just had lunch in Red Deer. Trewin noted that Highway #2 was "extremely busy" at that time. Approximately 2 to 3 kilometers north of Red Deer, Trewin's attention was drawn to Wells' vehicle. She saw the sign in its rear window and was offended by it.

[22] The Trewin's truck and holiday trailer were in the right hand lane as they approached Wells' vehicle from behind. Wells was driving at a speed below the limit of 110 kph, prompting the Trewins to change lanes into the left or passing lane. As they drove up beside Wells' vehicle, Trewin, " ... mouthed, "Remove the sign from your window. It's disgusting," or words to that effect. She also emphatically "gave him the finger" and/or made a motion with her hand which would signify slashing her throat. The Trewin vehicle then passed Wells' vehicle and eventually returned to the right hand lane of Highway #2.

[23] Trewin's husband had been a professional truck driver for approximately 40 years. He was described as a cautious driver who had won awards in the past for his careful driving. He generally drove at or near the speed limit and was doing so that day. In Trewin's words, " ... he's a professional truck driver, so he – he knows better than to – and on a holiday road, he doesn't speed."

[24] Trewin continued to observe Wells' driving activity for approximately 40 minutes after they had passed him. She eventually lost sight of him when they reached the overpass designed to accommodate traffic exiting Highway #2 enroute for Ponoka. Trewin made the following additional observations:

> He would slow down to 80 and 90 kilometers and he would – as my husband was driving, he would put his head at me like this and just give me a grin and not paying attention to the highway. [She described the head movement as turning his head 90 degrees so that he was actually facing her as their vehicles proceeded side-by-side.]
>
> ... people would bring their vehicles, trucks and trailers or cars and trailers, whatever, in behind his vehicle. They'd see the sign. If they had kids, which, of course, would be disturbing to me, they would immediately put their signal light on to get back into the left lane to pass him.
>
> Some of them said things. You could see them moving or their arms moving. I'm assuming that's what they were doing, and then they would carry on and get ahead of them, and – but as soon as I said that to him, he would wait until my husband and I got a little bit past him and pulled back into the right-hand lane,

> and then he would come up behind us and come over and cut us off again. My husband would be doing 110, and he would slow right down to 80 and 90 kilometers and whatnot and just keep doing that and doing that, and he did it three times to us.

[25] Trewin testified that Wells' vehicle would follow a pattern. Because it was being operated below the speed limit, traffic would catch up to it and see the sign in the rear window. Some, especially those with small children inside, would change lanes into the passing lane to move by him. Trewin estimated that Wells changed lanes twenty to thirty times in order to position his vehicle in front of others. He would vary his speed in order to overtake vehicles and move in front of them. He would then slow down so that their vehicle would be positioned behind his vehicle in full view of the sign. Eventually, Trewin called R.C.M.P. and reported Wells' driving behaviour.

[26] Wells denied that he had slowed down to 90 kph when in front of the Trewin vehicle. He testified: "I disagree with slowing down to 90. I did slow down somewhat because when I pulled in front of another vehicle, if that distance is fairly close, I like to have two seconds between the other vehicle. The following exchange took place when under cross-examination:

> Q. Okay. I put it to you that what you were actually doing is getting in front of vehicles because you wanted everyone to see the sign, and so you would get in front of vehicles and slow down for – so that everyone could see the "Fuck Harper" sign you had in your back window.
>
> A. No.
>
> Q. You do acknowledge it was bright pink. It was in the back window. It was all large because you wanted people to see it.
>
> A. Yes.
>
> Q. But you're saying now when you were getting in front of the vehicles, you were not slowing down.
>
> A. I didn't say I wasn't slowing down. I said if I slowed down, it was because the vehicle ahead of me was getting too close, and I would have to back off slightly to increase the safe distance.

[27] Trewin described the sign in the rear of Wells' vehicle as being orange in color. In examination-in-chief, the only motion she described making to Wells was a "throat-slashing" motion. However, she later acknowledged "giving the finger" to Wells as her vehicle passed his. And, on cross-examination, she acknowledged posting the following messages on Facebook:

> Please shoot this ugly slime ball who is trying to cause huge accidents on the highway Sunday with holiday people coming home. I'm the one who called the R.C.M.P. while my husband was driving. I gave him the finger and mouthed, "Remove the sign" and then for eighty kilometers he harassed us and others on the highway.
>
> This pig should be put to slaughter.

I was offended by his filth.

[28] Cst. Zerr was dispatched by the R.C.M.P. to the complaints made about Wells' vehicle that day. He had been made aware of Trewin's complaint before stopping the vehicle and Sleeman's complaint thereafter. He was also aware that Trewin found the sign offensive and that the vehicle was driving "fairly slow". Cst. Zerr spotted Wells' vehicle northbound on Highway #2 near the Millet overpass; at the intersection of Highway #2 and Highway #616. It was travelling "about 85". He also spotted the sign in the vehicle's rear window: "It was taking up the entire back window, I guess, "C" pillar to "C" pillar ...".

[29] Cst. Zerr followed Wells' vehicle for a time. He described traffic conditions and the obstruction caused by Wells' vehicle in these terms:

> The speed limit on that highway is 110 and it was a busy summer day. Traffic was to the higher volume, so, I mean, it was obstructing traffic a little bit in the slow lane. There was [*sic*] lots of travel trailers on the road ... So, I mean, the average travel speed I've noticed on that highway isn't 110. It's about 120, so traffic is continually catching up to this vehicle. They have to slow down, wait for a chance to pull into the fast lane, get around the slower vehicle, then move back.
>
> He was causing a bit of an obstruction by driving slowly and then, of course, the – the sign in the back window.

[30] Cst. Zerr noted that they passed a police vehicle with its emergency equipment activated. Traffic around that location had slowed. This event did not account for the fact that Wells persisted in driving at a speed well below the posted speed limit thereafter. Cst. Zerr testified:

> We passed that officer. People started moving over into the slow lane again, and as I caught up and eventually got in behind Mr. Wells, we were well past that scene, that traffic stop, and he was – that's when he was still only going 85 kilometres an hour.

[31] Wells did not deny having slowed down when passing the police vehicle at the side of the road. He agreed with Cst. Zerr that "somewhat after" that scene he was still travelling at a reduced speed. He did not contest the suggestion that it was 85 kph.

[32] When asked why he had stopped Wells' vehicle, Cst. Zerr replied: "I informed him of the – that I pulled him over because of a complaint and because of a very large sign in the back window." He continued, "As soon as I saw the sign myself, I thought, wow. Like, that jumps right out at you. I mean, I know why these people are calling about it now, right?" He had not made any notes of his conversation with Trewin, however, as he was "driving my vehicle". When asked in cross-examination if his concern was "that the sign was offensive", he replied: "No, my concern was that it was interfering with the safe operation of other users on that roadway."

[33] When asked about his own reaction to the sign, Cst. Zerr testified, "I – me, personally, as soon as I saw the sign, I thought it was absolutely distracting. I thought it could startle people driving by. I mean, without – without a driving complaint, I would have pulled a vehicle such as yours over for that sign." Cst. Zerr asked Wells to remove the sign. Wells declined. He was issued a violation ticket for "stunting".

[34] Wells testified that he was a "human rights activist". He has expressed that "activism" in the past by displaying a bumper sticker on his vehicle stating, on one side: "Fuck Ralph" and, on the other side: "No private hospitals." In the context of this case, he described his rationale for displaying the "Fuck Harper" sign in the following terms:

> I've been concerned about human rights issues for most of my life, and I have been involved with numerous human rights actions, that my decision to make a sign was made out of good intention. It was made out of the highest level of contempt and disgust for the conduct of our previous prime minister, for the way he has shown contempt for the courts, contempt for the *Charter of Rights*, contempt for the constitution, and so for that reason, I made the sign, and I made it with the knowledge that signs such as those are not illegal.

And further:

> ... I do believe, as Christians, we're called to take a stand against injustice.

He was aware that his activities attracted media attention but testified that the media had sought him out rather than his seeking the attention of the media.

[35] Wells had been on vacation in Vancouver on the weekend in question and placed the sign in the rear window of his vehicle. He testified that, "I was getting thumbs up by lots of drivers, totally agreed with me. When I was coming back through Alberta, it's a different scene. Then I start getting the one-finger salute." Wells took the time to "mentally tally" drivers from B.C. who had expressed approval for his sign. In his own words, "I believe I counted sixty-five or sixty-eight people that had given me the thumbs up."

[36] Wells recounted the incident with Trewin. He testified that, when the Trewin vehicle pulled alongside his vehicle, Trewin appeared to mouth the words, ""F" you, asshole." He acknowledged, however, that, "... I don't read lips that well." He also testified that, as that vehicle passed his, the driver, "... made a very abrupt swerve over to the lane and back ...". He noted the licence plate number on the trailer of the vehicle but was unable to obtain the licence plate number of the truck.

[37] Wells also testified that, "At no time did I do anything which was a violation of any traffic rules. I signalled all my turns. I cleared my turns before I changed lanes. And that's all I have to say."

Essential Elements

[38] The essential elements of the offence alleged against Wells in this case are as follows:

- the date on which the offence is said to have occurred; in this case "on or about August 16th, 2015".
- the jurisdiction in which the offence is said to have occurred; in this case "at or near Ponoka, Alberta".
- Wells identity as the individual referenced in the evidence of the prosecution's witnesses.

- that Wells engaged, " ... in any stunt or other activity that is likely to distract, startle or interfere with users of the highway."

[39] At the close of evidence and while discussing the content of argument to follow, Wells narrowed the issue for determination by the court in the following exchange:

> THE COURT: Your argument could be as simple as the prosecution has failed to prove the case beyond a reasonable doubt. Remember, you are not required to prove anything here. The Crown has to prove that essential element beyond a reasonable doubt. Now, it sounds to me, to assist you with that, that you are not contesting that on August 16th, 2015, at or near Ponoka, Alberta, you were operating a motor vehicle on a highway, and, indeed, your vehicle was the one that was seen by the police officer.
>
> THE ACCUSED: Yes.
>
> THE COURT: You are not contesting those.
>
> THE ACCUSED: I'm not contesting that at all.
>
> THE COURT: What you are saying, and I need you to disagree with me if I am not saying this correctly, but what I hear you saying is the activity or activities you were engaged in, as attested to by you and by the witnesses – and there will be some conflict there – that type of activity did not constitute stunting.
>
> THE ACCUSED: Yes.
>
> THE COURT: Is that fair to say?
>
> THE ACCUSED: That is very accurate.

Notwithstanding this concession, I have reviewed the evidence heard at this trial and am satisfied that the prosecution has proven beyond a reasonable doubt that Wells was operating the motor vehicle referenced by the witnesses in this case on August 16th, 2015 at or near Ponoka, Alberta.

Issues

[40] Has the prosecution proven beyond a reasonable doubt that Wells contravened the *TSA*, s.115(2)(e) by displaying a large, pink sign displaying the phrase, "Fuck Harper" in the rear window of his motor vehicle as it was being operated on a highway?

[41] Has the prosecution otherwise proven beyond a reasonable doubt that Wells' activity on the occasion in question contravened the *TSA*, s.115(2)(e)?

Position of the Parties

[42] The prosecution submits that the offence described in the *TSA*, s.115(2)(e) has been proven beyond a reasonable doubt based upon one or both of two theories of liability. First, and regardless of whether Wells' activities on the occasion in question constituted a "stunt" as that term is used in the *TSA*, s.115(2)(e), the sign in Wells' vehicle was likely to distract other users

of the highway. Cst. Zerr testified that the sign distracted him personally and Wells testified that many people in both B.C. and Alberta were distracted enough by the sign to motion there approval or disapproval to him. Second, Wells' act of pulling in front of traffic and slowing down to see his sign, together with the act of cutting off motorists as attested to by Ms. Sleeman constituted a stunt.

[43] It is submitted that Wells chose the message "Fuck Harper" in order to garner attention. He was disingenuous in his evidence about why he chose that particular phrase and, "... was looking for more attention than he was willing to admit – admit to the Court ...". His evidence about his manner of driving should not be believed.

[44] The prosecution also rejects the submission that convicting Wells for displaying a large and vulgar sign in the rear window of his vehicle would violate either or both of his *Charter*, ss.2(a) or (b) rights. It is submitted that, "A highway where people regularly travel 120 kilometres per hour is, from the Crown's perspective, simply not the place for political discourse." While Wells should enjoy full rights to freedom of expression, he should not be free to display a "massive sign" on a public highway; "... driving is a highly regulated activity". The charging and prosecution of Wells for the offence of stunting in this context is both reasonable and justifiable.

[45] Wells submits that the size of the sign in his vehicle is irrelevant. A large sign can be more easily seen by drivers and may be less distracting than a small sign which forces a driver to more closely approach in order to read it. And, if size is an issue, surely the Stephen Harper campaign bus with the words, "Harper for good government" in two-foot lettering must be a sanctionable distraction. Other distractions like a, "... pretty girl with a bikini on ..." should not constitute the offence of stunting.

[46] Wells notes that, in ***R v James*** (2004), 356 A.R. 134 (Prov. Ct.) ("***James***") the court found that activity sufficient to contravene the *TSA*, s.115(2)(e) must be, " ... of such a compelling nature that it adversely impacted the driver's ability to give due care and attention to the safe operation of a vehicle". He also notes that the activity described in ***R v Tremblay*** (1974), 23 C.C.C. (2d) 179 (Alta.C.A.) ("***Tremblay***") was not sufficient to constitute stunting. Finally, the mere fact of driving below the speed limit or making an unsafe lane change should not amount to the offence of stunting as they are addressed by other regulatory offences in the *TSA*.

[47] Wells invites the court to reject the evidence of Trewin and Sleeman. Trewin was "excitable" or "almost hysterical". She embellished or exaggerated her evidence because of the severe umbrage she took to Wells' sign. Sleeman should be disbelieved because she "admits to being guilty of stunting. She did a deliberate act to startle and distract me." In his view, her anger at the sign adversely affected her objectivity as a witness.

[48] Finally, Wells submits that, "... all the courts have taken a very strong position for freedom of expression, free speech." While, "... courts have recognized that there might be some expressions that are not always agreeable with people ... they still are protected ..." In his submission, "Ms. Trewin may not like my sign, and I'm sure they don't, and it's quite obvious that they were adamantly angered by it, but that does not take away my right to have it there."

Burdens of Proof

[49] It is well-established in Canadian criminal law that the ultimate burden of proving the violation of a constitutionally-protected right rests with the Applicant. Violation must be proven on a balance of probabilities. In ***Collins v The Queen***, [1987] 1 S.C.R. 265, Lamer J. (as he then was) stated:

> The appellant, in my view, bears the burden of persuading the court that her *Charter* rights or freedoms have been infringed or denied. That appears from the wording of s. 24(1) and (2), ... The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not. [citations omitted]

[50] The Supreme Court has commented upon the nature of evidence sufficient to discharge the burden of proof on a balance of probabilities. In ***F.H. v McDougall, et al,*** 2008 S.C.C. 53, the Court was called upon to consider whether there ought to be varying degrees of proof within the "balance of probabilities" burden. That notion was rejected, with Rothstein J. noting that, "... evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (at para.46).

[51] The burden of proving a justification for charging and prosecuting Wells for an offence where doing so violates his Charter, ss.2(a) and/or (b) rights rests with the prosecution. As will be explained in the reasons to follow, the process of justifying these decisions is different than a typical *Charter*, s.1 justification. Nevertheless, the burden on the Respondent (prosecution) in undertaking that justification is on the balance of probabilities.

[52] Should Wells discharge the burden of proving an unjustifiable violation of the *Charter*, ss.2(a) and (b) by evidence that is sufficiently clear, convincing and cogent, the Court's jurisdiction to fashion a remedy under the *Charter*, s.24 is engaged. The burden of proving entitlement to a remedy rests with Wells. It, too, can be discharged on a balance of probabilities.

[53] Wells is presumed to be innocent of the charge brought against him unless and until the prosecution proves all essential elements of that charge beyond a reasonable doubt. Reasonable doubt means a doubt that is based upon reason and common sense and is logically connected to the evidence or absence of evidence: it is not based on sympathy or prejudice. This does not mean that the prosecution is required to prove all elements to an absolute certainty as this would be an impossibly high standard. However, the reasonable doubt standard falls much closer to absolute certainty than to proof on a balance of probabilities: ***R v Lifchus*** [1997] 3 S.C. 320 and ***R v Starr***, [2000] 2 S.C.R. 144.

[54] Since Wells has testified in this trial, I must consider his evidence and the issue of credibility within the analytical framework prescribed by the Supreme Court of Canada in cases such as ***R v W.D.***, [1991] 1 SCR 742 and ***R v J.H.S.***, 2008 SCC 30. That framework has recently been commented upon by the Alberta Court of Appeal in the case of ***R v. Gray***, 2012 ABCA 51 and restated in terms which I will paraphrase as follows for the purpose of this trial:

- The burden of proof is on the prosecution to establish Wells' guilt beyond a reasonable doubt, and that burden remains on the Crown so that Wells is never required to prove his innocence, or disprove any of the evidence led by the Crown.

- In that context, if Wells' evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves me with a reasonable doubt, then I am required to acquit.

- While I should attempt to resolve conflicting evidence bearing on Wells' guilt or innocence, a trial is not a credibility contest requiring me to decide that one of the conflicting versions is true. Any inability to decide between exculpatory evidence and other evidence that incriminates Wells will usually indicate that I have a reasonable doubt, which again must work to Wells' benefit.

- In the event Wells' evidence (or where applicable, other exculpatory evidence) is entirely disbelieved such that it does not raise a reasonable doubt, I may not convict unless I am satisfied that the prosecution has proven the Wells' guilt beyond a reasonable doubt by other evidence that I do accept.

I pause to add that, in the event that I reject Wells' evidence, that rejection does not add to or bolster the case for the prosecution.

Charter, ss.1, 2(a) and (b)

[55] The Charter, ss.2(a) and (b) state:

> 2. Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion;
>
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

While Wells has conjoined these protected rights in his submissions, it is apparent that the focus of his submission is on his right to express a political view (*viz.* "Fuck Harper") and to do so by exhibiting the sign in the rear window of his motor vehicle. These reasons will adopt the same focus.

[56] The breadth of the fundamental freedom described in the *Charter*, s.2(b) is aptly summarized in *Criminal Pleadings & Practice in Canada*, 2nd ed., Ewaschuk, at 31:59 where the author states:

> Freedom of expression extends to all forms of expression and applies to all phases of production from creator to viewer, reader, or listener. Freedom of expression is a right fundamental to democratic society, so much so that the ambit of the right must be generously interpreted and any limitation on its guarantee, with limited exceptions, must be justified under s.1 of the *Charter*.

[57] It must be born in mind that the *Charter,* s.2(b) protects not only wise or pleasant expression, but objectionable expression as well. The court in ***R v Sharpe***, [2001] 1 S.C.R. 45 commented in that regard (at para.21, emphasis added):

> Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.

[58] In order to determine whether Wells has proven on a balance of probabilities that his *Charter*, s.2(b) right was infringed, I must undertake several inquiries. These were the subject of recent comment by the court in ***Montréal (City) v 2952-1366 Québec Inc.,*** [2005] 3 S.C.R. 141 ("***Montréal***"). The accused in that case were "squeegee kids" and at issue was the constitutional validity of a bylaw limiting their activities. The court in ***Montréal*** expanded and refined the test for determining whether a law infringes the *Charter,* s. 2(b); it restated the three questions for a court to ask in the following terms (at para.56):

> First, did the noise have expressive content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law infringe that protection, either in purpose or effect?

Ruling

[59] I am satisfied that Wells chose to exhibit his sign because of his antagonism towards then Prime Minister Stephen Harper for his conduct as a politician. It was Wells' belief, for instance, that Mr. Harper had shown contempt for the constitution. On its face, Wells' sign bearing the phrase "Fuck Harper" had expressive content. Indeed, it constituted a form of political expression. And political expression is one of, if not the most important form of expression protected by the *Charter,* s.2(b). See: ***Harper v Canada (A.G.)***, [2004] 1 S.C.R. 827.

[60] The fact that the form of political expression chosen by Wells was vulgar or offensive does not, *ipso facto*, remove it from the sphere of conduct protected by the *Charter,* s.2(b). This principle is well-illustrated by the case of ***R v Lawrence*** (1992), 132 A.R. 194 (Q.B.); aff'd. (1993), 141 A.R. 183 (C.A.); leave denied 149 A.R. 160n (S.C.C.). In that case, the conduct in question occurred at a public meeting in Athabasca where the premier, ministers of the Crown and members of the public were present. Cooke J. (sitting as a summary conviction appeal court) described the impugned conduct in these terms:

> The conduct of the Appellant consisted of mounting the speaker's platform, raising his middle finger to each of the assembled government representatives and shouting "fuck you". Following this incident he was escorted to his seat and warned that further conduct of that nature would result in arrest for causing a

> disturbance. His arrest resulted from his conduct some five to ten minutes later when he stood up from his seat and shouted "fuck you" to the entire panel while raising his middle finger to the members of the panel generally.

[61] This conduct was found to be a form of political expression. Cooke J. held that it fell within the sphere of conduct protected by the *Charter*, s.2(b), stating:

> This latter conduct and articulation of the four letter obscenity combines both content and form and is clearly an expression of his feelings toward the members of the panel and the government's position with respect to the pulp mill development and his perception of its impact on the environment. It is, therefore, an expression that falls within the protection of s. 2(b) of the Charter, ***Irwin Toy***, *supra*, and, ***Cohen v California***, 403 U.S. 215 (wearing a jacket in a courthouse bearing the words "Fuck the Draft" found to be an expression protected by the First and Fourteenth Amendments).

[62] I am satisfied that Wells was attempting to express dissatisfaction with the federal government of the day. His message would be understood by those who saw it as relating to Canada's head of government or Prime Minister. As a form of political expression it fell within the sphere of conduct protected by the *Charter,* s.2(b).

[63] I must consider whether "the method or location" of Wells' act of expression removed from it the protection afforded by the *Charter,* s.2(b). The location of Wells' sign was the rear window of his own motor vehicle. While it is true that the vehicle was being operated on a public highway, it was a highway to which Wells had a right of access. It was not a private driveway or private land.

[64] In ***Montreal***, the court considered uses to which "streets" could be put. It concluded that they were venues of public communication where freedom of expression must be protected. Highways may be different, in that they are primarily used for the passage of vehicular traffic. Nevertheless, much expressive content is displayed on and along Alberta's highways. Commercial expression (to which a lesser degree of constitutional protection is accorded) abounds both on signage at the side of those highways and on vehicles travelling along them. Indeed, posters bearing the names (or photos) of those politicians are a commonplace. In my view, the display of a sign containing political expression in the rear window of a motor vehicle is not incompatible with the highway's primary function of serving the needs of the travelling public nor did it undermine the values protected by the *Charter,* s.2(b).

[65] Wells' method of expressing the contents of his sign must be considered in two different contexts. The first would be the simple act of displaying the sign in the rear window of his motor vehicle and driving in an otherwise unobjectionable manner down the highway. The second would be both to display the sign in the rear window of his motor vehicle and also to operate that motor vehicle in the manner described by Sleeman, Trewin and Cst. Zerr. I infer from their evidence that Wells operated his vehicle in the manner described by them <u>for the purpose of ensuring that they were confronted by his sign</u>.

[66] In my view, the first of these methods (i.e. the simple act of displaying a sign in the rear window of a private motor vehicle being driven on a public highway) does not undermine the values protected by the *Charter,* s.2(b). The otherwise lawful conduct of that motor vehicle along a public highway would provide the opportunity for people to observe its expressive content but

would not, without more, render its display inimical to the freedom of expression. On the facts of this very case, for example, it was not the expressive content of Wells' sign that directly led to any aberrant driving behaviour.

[67] The second method of displaying Wells' sign (i.e. the type of conduct attested to by Sleeman, Trewin and Cst. Zerr) raises different considerations. According to this evidence, Wells' expressive conduct extended beyond mere display of the sign in his rear window. Rather, he chose to display the content of his sign by driving behaviour that interfered with other users of the highway. Wells was driving at an uncharacteristically slow speed, he is said to have passed vehicles and then slowed down in front of them and, at least on one occasion, he conducted a hazardous lane change, cutting off the Sleeman vehicle and forcing it to "slam" on the brakes.

[68] This latter "method" of expression would run contrary to the values protected by the *Charter*, s.2(b). Freedom of expression does not protect one's opportunity to impede or otherwise create a hazard for traffic on a public highway. Nor does the *Charter*, s.2(b) protect a motorist's hazardous driving behaviour even when the intent behind that driving is to facilitate viewing of the expressive conduct. My findings of fact in this regard will be made later in these reasons.

[69] The final stage of my consideration must be to consider whether the actions of Cst. Zerr in charging Wells with "stunting" or those of the Crown in prosecuting him for that offence, infringe the protection afforded to Wells' expressive conduct, either in purpose or effect. In doing so I must bear in mind that the expressive conduct in this case is bifurcated in the manner indicated above. In doing so, I must determine the reason why Cst. Zerr charged and the Crown has prosecuted Wells with the offence of stunting.

[70] I have previously noted Cst. Zerr's evidence that, " ... I pulled him over because of a complaint and because of a very large sign in the back window." He later confirmed that his concern was that the sign, " ... was interfering with the safe operation of other users on that roadway." He did not reference the driving conduct attested to by Sleeman and/or Trewin as the reason for charging Wells with the regulatory offence of stunting. Both the purpose and effect of Cst. Zerr's actions in charging Wells with that offence infringed the *Charter*, s.2(b).

[71] Unlike Cst. Zerr, however, the Crown undertook prosecution of Wells on the basis of two theories of liability. The first was restricted to display of the sign; a theory in accord with the charging decision of Cst. Zerr. The second, however, was directed at Wells' driving conduct as attested to by the prosecutions' witnesses. The gravamen of the offence of stunting on this latter theory was Wells' driving behaviour. The sign was merely Wells' motive for driving in that fashion. On this latter theory of liability, the purpose underlying the prosecution of Wells was the public's interest in safe driving conduct on public highways. Prosecuting an individual for that conduct does not unconstitutionally affect Wells' expressive behaviour.

[72] In summary, I find that Wells' *Charter*, s.2(b) right was infringed by Cst. Zerr when he charged him with stunting in order to punish the expressive conduct created by Wells' sign. With respect to the Crown, prosecution on a theory of liability relating to display by Wells of his sign, *simpliciter*, would also violate the *Charter*, s.2(b). However, Wells' *Charter*, s.2(b) right would not be infringed or denied by prosecuting him for the offence of stunting based upon his aberrant driving conduct. This, even if that conduct was prompted by Wells' desire to promote his sign. The prosecution of a regulatory offence falls under the control of the relevant Attorney General. To that extent, Cst. Zerr's purpose in charging Wells ceases to be relevant.

[73] I have already noted that this case does not involve an attack on the legislation charging Wells with an offence. Rather, it involves the exercise of discretions by the R.C.M.P. and Attorney General. A typical *Charter,* s.1 analysis is inappropriate in that context.

[74] Rather, a review of those exercises of discretion analogous to the review conducted by the court in ***Dore v Bareau du Quebec****,* 2012 SCC 12 is required. The "typical" *Charter,* s.1 analysis balances the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. In the case of a statutory officials' exercise of discretion to charge and/or prosecute an offence, however, the court must balance other considerations. These are whether, in this case, the R.C.M.P. and Attorney General have disproportionately and, therefore unreasonably, limited a *Charter* right by their acts. The court must determine the appropriate balance between the *Charter* rights involved and the objectives pursued in order to ensure that the rights at issue are not unreasonably limited.

[75] This modified *Charter,* s.1 analysis would apply only where the prosecution's first theory of liability for the offence of stunting is advanced. It is only in that instance that Well's *Charter,* s.2(b) right would be infringed. Accordingly, at this stage of the analysis I must consider whether the acts of the R.C.M.P. and Attorney General in charging him with and prosecuting him for the offence of stunting by displaying his sign, *simpliciter* would disproportionately and, therefore unreasonably limit Wells' *Charter,* s.2(b) right.

[76] Cst. Zerr testified to the fact that Wells' sign was distracting to himself and to those who had complained to the R.C.M.P. Crown Counsel submitted that, "A highway where people regularly travel 120 kilometres per hour is, from the Crown's perspective, simply not the place for political discourse." I am satisfied that that both police and prosecution elected to charge and initiate prosecution against Wells in order to achieve the broader social objective of safe conduct of vehicular traffic on Alberta's public highways. There can be no gainsaying the value or social utility of that objective.

[77] Nevertheless, it is not readily apparent that the display of Wells' sign *simpliciter* in any way rendered vehicular traffic on the highway unsafe. I pause to emphasize that this does not reference the manner of driving attested to by Sleeman, Trewin and Cst. Zerr. Rather, the evidence does not establish that mere display of Wells' sign had any adverse effect on traffic flow on the occasion in question.

[78] Moreover, the value of the expressive conduct undertaken by Wells falls at the higher end of the freedom of expression continuum. Political expression is vital to the health of any democracy. Punishing the mere display of a sign in the rear window of a car by prosecution is a severe response. This, despite the fact that the sign may use vulgar or offensive language. It is my view that quasi-criminal prosecution is a disproportionate response to the expressive conduct at issue in this case. It is unreasonable and, accordingly, cannot limit Wells' *Charter,* s.2(b) right as that term is used in the *Charter,* s.1.

[79] In conclusion, I am satisfied that prosecuting Wells for the simple act of displaying his sign in the rear window of a motor vehicle being driven down a public highway is a violation of the *Charter,* s.2(b) which cannot be "saved" by the *Charter,* s.1. Charging and prosecution of Wells for the aberrant driving behaviour attested to by Sleeman, Trewin and Cst. Zerr, even if it is motivated by a desire for other motorists to observe his political expression is not a violation of the *Charter,* s.2(b).

The Offence of "Stunting"

[80] The offence under consideration in this case (referred to generically as "stunting") is created by the *TSA*, R.S.A. 2000, c.T-6, s.157(1)(a) and is described in the *TSA*, s.115(2)(e). The latter provision provides that:

> 115(2) A person shall not do any of the following:
>
> (e) perform or engage in any stunt or other activity that is likely to distract, startle or interfere with users of the highway;

[81] There are two forms of conduct proscribed by this offence. The first is performance of or engaging in a "stunt". The second is performance of or engaging in "other activity". This dichotomy has been recognized from early on. See: ***Tremblay***; ***R v White***, 2009 YKSC 26.

[82] The term "stunt" is not defined in the *TSA* or elsewhere in Alberta legislation. Meaning has been assigned to the term by reference to dictionaries and by analogy to conduct found by other courts to have constituted a stunt. See, for example, ***Tremblay*** at para.21. Recently, in ***R v Brown***, 2016 ABPC 110 ("***Brown***"), Norheim P.C.J. referenced the definition of the term "stunt" in *The Canadian Oxford Dictionary*, 2nd ed., *viz.*:

> (1) Something unusual done to attract attention
>
> (2) An act notable or impressive on account of the skill, strength, or daring, etc. required to perform it; an exciting or dangerous trick or manoeuvre.

[83] Courts have found the following activities to constitute "stunts" as that term is used in the *TSA*, s.115(2)(e):

- Passing within one foot of a police vehicle parked at the side of the road with its emergency lights activated while travelling at an excessive speed and honking the horn: ***R v Sidhu***, 2015 YKTC 46
- Driving a motorcycle for a distance with the front wheel in the air; a "wheelie" or "catwalk": ***R v Beaudoin***, 2009 SKQB 113 ("***Beaudoin***")
- Swerving into the lane of oncoming traffic and then back across that lane to make a right hand turn at an intersection: ***R v Young***, 2008 SKQB 82
- Excessively speeding up a vehicle's engine to a high pitch and then speeding: ***R v Burton*** (1984), 29 M.V.R. 229 (Sask.Q.B.)

[84] Courts have found the following activities not to constitute "stunts" as that term is used in the *TSA*, s.115(2)(e):

- Skateboarding down a hill in a national park: ***Brown***
- Member of a street church ministry setting up and using speakers and an amplification system in a park and on a street/sidewalk: ***Pawlowski***

- Exhibiting an “horrific” and large photograph of a dead foetus to passing motorists: ***R v Whatcott***, 2004 SKQB 413
- “Squeegee kid” washing the windows of cars stopped at traffic lights: ***James***
- Prostitute peering into the window of a motor vehicle that approached her and motioning the car over with her head: ***R v Jones***, 1983 ABCA 70 (“***Jones***”)
- Turning headlights on and off, likely to warn of an impending “radar trap”: ***Tremblay***

[85] The examples cited in the preceding paragraph were found not to be either stunts or “other activity” falling within the purview of the *TSA*, s.115(2)(e). In order to constitute “other activity” as that phrase is used in *TSA*, s.115(2)(e), the activity must be “likely to distract, startle or interfere with” users of the highway. The court in ***Jones*** provided guidance with respect to the meaning of these terms, stating (at paras.12-15):

> The *Shorter Oxford Dictionary* defines "startle" as follows: to cause to start; to frighten; to surprise greatly; to shock. The word "interfere" is defined as: to run into each other; to intersect; to interpose so as to affect some action; to intervene.
>
> Clearly the actions of the appellant do not fall in either of these categories; they neither frighten or greatly surprise; nor do they intersect or intervene with other users of the highway.
>
> The same dictionary defines "distract" as: turning aside in a different direction; to perplex or to confuse; to derange the intellect. For purposes of comparison it is helpful to examine the meaning of the word "attract", defined as: to draw forth and fix upon oneself the attention or notice of others, to excite towards oneself the pleasurable emotions of a person who thus "feels drawn" to one. "Activity" is defined as: the state of being active; the exertion of action or energy.
>
> The ordinary meaning of these words leads me to conclude that the legislation was not directed at activities that merely drew attention to oneself or excited towards oneself pleasurable emotions of those whose attention is drawn to them. A distraction must be more serious than an attraction. If such were not the case, one could envision everyday activities which would fall within this section, in fear that those activities might divert the attention of some careless drivers. Immediately one thinks of neon signs, a donkey, a movie star, a well-known politician or children doing cartwheels or selling lemonade.

[86] Wells has submitted that, in addition to the statutory requirements referred to by these authorities, the prosecution must also prove that any conduct said to contravene the *TSA*, s.115(2)(e) has a serious or significant consequence to other users of the highway. In support of that proposition, he notes the following comment from ***James*** (at para.18):

> I am satisfied that section 115(2)(e) is directed at conduct occurring on or near a highway that adversely impacts the exercise by a driver of the due care and attention that is required for the safe operation of a vehicle on the highway. The conduct complained of must be of a compelling nature, such that the effect or

> consequence of that conduct on the users of the highway is or is likely to be serious and significant.

[87] With respect, I am not satisfied that the prosecution bears this additional proof element. In my view, once the prosecution has proven beyond a reasonable doubt the conduct expressly proscribed by the *TSA*, s.115(2)(e), it need not go further and prove that there was any superadded effect or consequences to other users of the highway. This view is in accordance with the court's ruling in ***Beaudoin*** where Currie J. concluded (in relation to an identical provision in Saskatchewan's highway traffic legislation) (at paras.58-9):

> If the legislature had intended to limit the offence to those cases in which another driver actually was nearby and was affected, the legislature could have inserted words to that effect in the subsection. For example, the legislature could have prohibited a stunt or activity "that distracts, startles or interferes with other users of the highway". Instead, the legislature prohibited a stunt or activity "that is likely to distract, startle or interfere with other users of the highway". The use of the phrase "that is likely to" indicates that the legislature intended to entirely prohibit this kind of activity on highways, regardless of whether in a particular case the activity had affected another driver, and regardless of whether in a particular case it could be established that another driver was nearby.
>
> The focus of s. 214(2) is on the driving activity that has the potential to create a hazard on a highway, not on whether a hazard actually has been created by the driving activity on any one occasion. This focus is consistent with the overall purpose of the statute, which is to ensure traffic safety.

I note that Norheim P.C.J. appears to have arrived at a similar conclusion in ***Brown***.

[88] Alberta's Provincial Legislature is presumed to enact legislation which conforms to the *Charter*. See: ***R v Sharpe***, [2001] 1 S.C.R. 45, at para.33. The *TSA* (including s.115 (2)(e)) was enacted primarily to promote the safe and orderly conduct of traffic on and about public highways. See: ***R v Raham***, 2010 ONCA 206, per Doherty J.A. at para.33. It was <u>not</u> enacted in order to regulate political expression on or about those highways. The offence of "stunting" can (and ought to be) interpreted in a manner that conforms to the values expressed in the *Charter*, ss.2(a) and (b).

[89] Even if a statutory provision can be interpreted in more than one manner, preference should be given to an interpretation that conforms to *Charter* values. This is clear from the judgment of the court in ***Hills v Canada (Attorney General),*** [1988] 1 S.C.R. 513 where the court stated:

> Appellant, while not relying on any specific provision of the *Charter*, nevertheless urged that preference be given to *Charter* values in the interpretation of a statute, namely freedom of association. I agree that the values embodied in the *Charter* must be given preference over an interpretation which would run contrary to them (***RWDSU v Dolphin Delivery Ltd.,*** [1986] 2 S.C.R. 573; ***Manitoba (Attorney General) v Metropolitan Stores Ltd.,*** [1987] 1 S.C.R. 110).

[90] To like effect is the comment of Lamer J. in ***Slaight Communications Inc. v Davidson,*** [1989] 1 S.C.R. 1038 where he ruled (in dissent, but not on this point):

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

Ruling

[91] The evidence before me conflicts on the nature and effect of Wells' driving conduct on the occasion in question. It is the evidence of the prosecution's witnesses that Wells was deliberately driving slowly in order to ensure that traffic travelling at or near the speed limit on Highway #2 would approach his vehicle from behind and see his sign. In addition, there is evidence that Wells abruptly cut off the Sleeman vehicle, forcing the driver to "slam" on the brakes. Trewin testified that Wells was making a practice of overtaking vehicles, pulling over in front of their vehicles and then deliberately slowing down in order to have them come up behind his vehicle and see his sign. Wells, on the other hand, has testified that, "At no time did I do anything which was a violation of any traffic rules. I signalled all my turns. I cleared my turns before I changed lanes. And that's all I have to say."

[92] Having reviewed the evidence in the context of the applicable burden of proof, I must conclude that I do not believe Wells' evidence about his driving behaviour. Wells was passionate about the message he wished to express. This is amply demonstrated by his having kept track of the number of drivers who appeared to approve of his message and those few who did not. I am satisfied that he took active steps to position his vehicle in front of other vehicles in order to force their occupants to see his sign. Wells explained why, for a brief period of time he lowered his speed (i.e. presence of a police vehicle at the side of the road). This does not explain why he was travelling at a speed well below both the speed limit and the speed at which the majority of traffic was travelling for extended periods of time. This, both before and after encountering that police vehicle. I specifically accept Cst. Zerr's evidence in this regard.

[93] I am aware that demeanor assessments can be an unreliable gauge of a witness' credibility. Nevertheless, I was unimpressed with Wells' response to questions about his desire for publicity relating to his "anti-Harper" message. His desire to express that sentiment and justifiable right to do so has been the subject of comment in these reasons. However, I am satisfied that he deliberately downplayed his desire to have the public and/or media made aware of that message and that this detracted from the overall credibility of his evidence.

[94] Notwithstanding disbelief of Wells' evidence in relation to his driving conduct on the occasion in question, I must consider his evidence in the context of the case as a whole in order to determine whether it leaves me with a reasonable doubt. I have concluded that it does not. Each of Sleeman, Trewin and Cst. Zerr testified that Wells' driving behaviour on the occasion in question was aberrant and, at least in the case of Sleeman, potentially hazardous. While I have reservations about the evidence of Trewin, I found each of Sleeman and Cst. Zerr to be credible witnesses. I also accept Trewin's evidence that Wells' vehicle was deliberately varying its speed and lane on the highway in order to force other motorists behind him to view his sign. He deliberately and unnecessarily interfered with the progress of their vehicles by doing so.

[95] I found Sleeman to be a credible witness for a number of reasons. Unlike Trewin, Sleeman readily acknowledged having made an obscene gesture to Wells as their vehicles drew alongside. This did not have to be "extracted" from her during cross-examination. She went

further and acknowledged that she intended her act to be distracting. She candidly agreed with Wells' suggestion that this would constitute a stunt. Sleeman remained resolute in her evidence that Wells cut her vehicle off and forced her husband to abruptly apply the brakes.

[96] I also found Cst. Zerr to be a credible witness. His evidence was balanced, precise and unqualified on cross-examination. He acknowledged that there was a reason for Wells slowing down at one point in his journey. But he was also firm in his evidence that Wells was driving at an unusually slow rate of speed (for no apparent reason other than to force people to see his sign) both before that event and thereafter.

[97] On the evidence that I do accept, I am satisfied that Wells was intentionally interfering with other traffic in order to advertise his "anti-Harper" sentiment via the sign in the rear window of his vehicle. He would also pass vehicles in the left lane and return to the right lane where he would slow down again for the same purpose. I am satisfied that he was angry at Sleeman for her rude gesture and deliberately cut off her vehicle thereafter. Doing so would, and did, startle the driver. And, finally, while I do not accept all of Trewin's evidence, I do accept her evidence to the extent that she observed Wells switching lanes and moderating his speed on more than one occasion in order to ensure that other motorists saw his sign.

[98] Was Wells' act of displaying the sign bearing the phrase "Fuck Harper" of itself a "stunt" within the definition of that term referenced earlier in these reasons? In my view it was not. Display of a sign in the rear window of a vehicle was hardly a notable or impressive act of skill or daring. Likewise, it could not amount to an exciting or dangerous trick or manoeuver.

[99] Did this same conduct amount to the "other activity" referenced by the *TSA*, s.115(2)(e)? Wells' clearly intended to attract the attention of other users of the highway by the color, size and messaging on his sign. And, in fact, he did attract the attention of Sleeman, Trewin and Cst. Zerr. I am not satisfied that drawing their attention "frightened", "shocked" or "startled" them. It did not "perplex" or "confuse" them or "derange their intellect". What it did was offend them. Trewin and Sleeman no doubt felt that Wells' vulgar language was not something that they should have to put up with or have children see in order to use Highway #2.

[100] The perceived immorality of Wells' language likely colored the reactions of the witnesses called by the prosecution. However, that perceived immorality cannot be the *sine qua non* of the "other activity" said to fall within the purview of the *TSA*, s.115(2)(e). That is evident from the acquittal of ***Jones*** who was charged with (and ultimately acquitted of) stunting for attracting the attention of motorists while plying her trade as a prostitute.

[101] The TSA, s.115(2)(e) ought to be interpreted in such a way as to exclude constitutionally permissible expressive conduct from the definition of "stunt" or "other activity". Wells' sign attracted the attention of other users of the highway but did not distract them in the manner intended by the *TSA*, s.115(2)(e). The sign was unusual and it was offensive. But neither or both of these qualities of what was otherwise constitutionally permissible expressive conduct rendered it a "stunt or other activity" as those terms are used in the *TSA*, s.115(2)(e). I find that the prosecution fails on its first theory of liability.

[102] The prosecution's second theory of liability posits that Wells' driving conduct, alone or in addition to merely displaying his sign, constituted a "stunt" or "other activity" as those terms are used in the *TSA*, s.115(2)(e)? I am satisfied that it did so. Wells consciously operated his motor vehicle in such a fashion that other motorists would be required to view his sign. He

interfered with or impeded the orderly progress of other vehicles on Highway 2 in order to satisfy his desire to have them view his sign. In addition, his actions in cutting off the Sleeman vehicle were startling and shocked the occupants such that they "slammed on" the car's brakes. That act was also a hazardous manoeuvre. I am confident that the act also surprised the Sleemans.

[103] I conclude that the prosecution has proven beyond a reasonable doubt that the operation by Wells' of his vehicle on the occasion in question constituted "other activity that was likely to distract, startle or interfere with other users of the highway". I find him guilty of the offence described in *TSA*, s.115(2)(e).

Heard on the 1st day of April, 2016.

Dated at the Ponoka, Alberta this 15th day of July, 2016.

B.D. Rosborough
A Judge of the Provincial Court of Alberta

Appearances:

S.M. Degen
for the Crown

In Person
for the Defendant