

Is My Helmet Legal?

One of the most frequently asked questions received by the Coalition is whether or not a particular style or brand of helmet is approved for use by riders in both B.C. and Alberta. This two-part article will attempt to give the history of helmet usage in B.C. and it is hoped that it will allow the reader to better understand this complex subject.

The legal citations are available at most courthouse libraries.

I will fast forward by telling you that as you read this material, which will take us from 1965 to approximately 1990, demonstrates exactly how difficult it is for any organization to go against the enormous resource of the government. The challenges that I brought against the provincial government were all done on a volunteer basis and I have to tell you that it was quite disheartening to discover that after every successful and hard-fought legal challenge, the government simply got the legislature to pass new laws or amend existing ones to bring them into compliance with the various court decisions. They of course appealed all of our victories and when we were successful, simply changed the legislation. We attempted for years to get the government to include motorcyclists in the decisions concerning helmets but they never have and they never will. Instead of going to rank and file Riders, they simply rely upon government funded tame entities to tell them what they want to hear. You will see how we threw out the helmet law seven times between 1978 and 1986.

The initial section, which implemented compulsory motorcycle helmet usage in the Province of British Columbia, read as follows:

Section 207: No person shall ride on a motorcycle unless he is properly wearing a safety helmet of a type approved by the Superintendent, 1965, chapter 27, Section 34; 1966 chapter 30, section 13. Approval of five different standards was made by the B.C. Regulations 46/77.

Section 207 as it then was, and Regulation 46/77 were attacked by us successfully in the Provincial Court of British Columbia. That case is reported as R. vs. Ciarniello, 12 B.C.L.R., 394.

As you will see, we have attempted to try to get a seat at the decision-making table and we have consistently been ignored.

We challenged the government by way of a Supreme Court of British Columbia action called Judicial Review.

R. vs. Ciarniello (No. 1) attracted considerable public scrutiny. It was the intent of this Petition to compel the Superintendent of Motor Vehicles to hold public hearings. During the intervening time the Superintendent of Motor Vehicles enacted B.C. Regulation 264/79. Several people were charged under 264/79 and it was those charges, which gave them "standing" to challenge the then regulation. Again, the

problem with the inability of a citizen to know whether or not his helmet was “approved”. On the evening before the petition was to be heard, the Superintendent of Motor Vehicles filed Regulations 408/79, 409/79, and 410/79.

Regulation 408/79 listed a number of motorcycle helmets as being “approved” and at the same time, by regulation 409/79 and 410/79 gave blanket approval to helmets that met or exceeded the standards set by the following organizations. “Safety Helmets for Motorcycles” C.S.A. Standard D 230-1970, published June, 1970 by the Canadian Standards Association, 178 Rexdale Boulevard, Rexdale, Ontario.

And this is the beginning of all the confusion. Is this list of helmets the list or is it simply a list?

At the time the learned Counsel for the Constitutional Law Department for the Attorney General for the Province of British Columbia appeared before the Supreme Court Justice at the hearing of the Petition, which was set for the Supreme Court of British Columbia and announced that the Regulations had been passed. At that time all charges outstanding against the Petitioners were stayed and Mr. Justice Locke held that there was no standing on the part of the Petitioners to appear.

Another fight!

Extensive briefs were exchanged. Regulations 408/79, 409/79, and 410/79 were ruled *ultra vires* by Provincial Court Judge Woodcliffe, in the case of R. vs. Dwight Currie. A copy of which will be available on the website, which decision was handed down on August 11th, 1980. Again, all charges outstanding against motorcyclists up to August 11th, 1980 were stayed by the Attorney Generals Department. On August 22nd, 1980, Section 33.1 came into effect, see website, and a new Section 218 was enacted. At that time any standard was applicable if that standard had been prescribed by the Lieutenant Governor in Council under Section 851.1 (x), which has now been renumbered to Section 211 (1). 1 (x).

Sound confusing? It was because the government repealed the proceeding regulations, which had given approval to the shopping list of helmets. So what was the effect if a person had purchased one of these helmets? Was it legal?

The problems associated with the inability of any motorcyclists to determine whether or not the appliance that he had was a “helmet” or not is illustrated in two cases. The first is R. vs. Ricky Ciarniello (Ciarniello No. 2) and R. vs. Ronald Houniet, both in Provincial Court and County Court, see website. As a result of the County Court decision of R. vs. Ronald Houniet, a decision of the Honourable C.M. Hyde of the County Court of Westminster which decision was rendered on November 25th, 1985, the then Section 218 was struck down with the Learned County Court Judge observing;

“I conclude, as the Learned Trial Judge did, that compliance with any of the five (standards) meets the test required by law and if they cannot be ascertained the cyclists cannot comply with them and I agree with the resolution of the Learned Trial Judge in this respect that the regulation is drawn in violation of Section 7 and 24 under the Canadian Charter of Rights. I find it necessary to deal with the first ground because of my finding on Count 2 and the appeal with be dismissed.”

What this means is that the judge decided that it was impossible for any motorcyclists to determine whether or not the helmet he was wearing was legal. We had earlier obtained a decision from the Supreme Court of British Columbia in a case called R. vs. Sandor Varga in May 1983, which held that (and this gets complex) a person could ride bare-headed if he was incapable of understanding the law even if he had taken diligent steps to determine what it is. The government enacted new legislation:

It was as result of the decision of the Honourable Judge Hyde of November 25th, 1985 that the legislature enacted in Bill 58, Section 9 whereby Section 218 was amended.

9. Section 218 is amended
 - (a) in subsection (1) by adding “motorcycle” before “safety helmet”, and
 - (b) by repealing subsection (2) and substituting the following:
 - (2) For the purposes of subsection (1), a helmet that has, by regulations that may be made by the superintendent, been designated as an approved motorcycle safety helmet, shall be deemed to be a motorcycle safety helmet

The next section of this article, which will be published in the next newsletter, will talk about the attack made upon Bill 58 whereby the Superintendent of Motor Vehicles was given the unprecedented power to set laws. What this means is that an appointed government bureaucrat could set standards and laws that if you disobeyed, you would go to jail. Interestingly enough, this legislation was responsible for the creation of BCCOM.

In 1986, in a case called Regina vs. Lawrence Stone, I successfully argued that the Superintendent of Motor Vehicles lacked the capacity to make Regulations setting out what was an “approved motorcycle safety helmet”. As discussed in an earlier newsletter, we had argued that the Legislature alone could remove people’s rights and at the Provincial Court level the Trial Judge agreed with us. The Government filed a Petition pursuant to the Judicial Review Act and that Petition came before the Supreme Court of British Columbia on October 6, 1986, we were again successful in asserting that the Superintendent of Motor Vehicles (who is a non elected official) cannot make Regulations which place a criminal sanction against people who do not follow that

Regulation. Some may remember that throughout 1986 and into 1987 British Columbia was a freedom of choice jurisdiction.

The case went to the B.C. Court of Appeal in May of 1987 and the three judge panel upheld the Government's position and overruled the Supreme Court of British Columbia. We were unable to appeal to the Supreme Court of Canada, and, as a result of that, we have the current B.C. standard which is an uneasy truce between the Government and the Coalition whereby a person who is wearing a device on his head which consists of a hard outer shell, soft inner liner and which is affixed by a strap, then that person will not face criminal sanctions. That has been the law in B.C. for 15 years and it is unique to B.C. Occasionally, a zealous Police Officer confiscates helmets but those charges are rarely approved by Crown Counsel. Crown Counsel does not wish to rock the boat and the Coalition has decided as well that the vast majority of the riders of B.C. are content with the Legislation as it stands.

BUT, what is the at Legislation?

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1996	Motor Vehicle Act	RS CHAP. 318
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Motorcycle safety helmets

221. (1) A person who operates or rides as a passenger on a motorcycle without properly wearing a motorcycle safety helmet commits an offence.

- (2) For the purposes of subsection (1), a helmet that has, by regulations that may be made by the Lieutenant Governor in Council, been designated as an approved motorcycle safety helmet, is deemed to be a motorcycle safety helmet.
- (3) The Lieutenant Governor in Council may make regulations exempting any person or class of persons from the requirements of this section and prescribing conditions for those exemptions.

Obviously no person can tell whether or not those Lists which have been published are merely "A" list or are "THE" list.

Compulsory motorcycle helmet usage is a topic which people are either passionately for or vehemently against. It is an issue very much like the abortion issue, which is seen by Society as a mirror of larger issues. Some people believe that motorcycle safety helmets are a cheap and effective method of reducing injuries to motorcyclists. We have long argued against this position simply because we view it as a simplistic knee jerk reaction to a complex problem. In all the cases which we have fought in the Courts, we have attempted to demonstrate that safety helmets statistically have little impact upon motorcycle death rates and, in fact, in many cases saddle the rider with a device which adversely affects vision, hearing and fatigue levels. The argument we have advanced is that compulsory use of helmets is a "prophylactic" type of solution. At a

time when our Health Care system is being brought to its knees by costs associated with sexually transmitted diseases, alcohol and smoking, we could reduce an enormous percentage of the cost of hospital care simply by compelling people to wear condoms when they have sex and not smoke or drink. Motorcyclists die because they or other drivers make unsafe choices. Mandated helmet use, we argued, shifts the onus of responsibility onto the victim rather than the perpetrator.

Those who endorse compulsory motorcycle helmet usage say that as Society pays the price for injured motorcyclists, then Society has a stake in determining what the motorcyclists should be wearing when he/she shows up at the hospital door. But, the causation issues relating to motor vehicle accidents are still not addressed.

Like the abortion issue, no one is neutral. Unfortunately in B.C., Government interest in motorcycle safety consists of ticketing bareheaded drivers. We can recite a litany of complaints about the short-fallings of Governments dealings with motorcyclists but that is fodder for another article.

You may recall the shopping list of helmets from 1979, which was outlined in the previous newsletter. Well, are they legal...still? I don't know. Is your helmet, in reality, a Penguin CX7055 and therefore legal? We argued that if you compel a person to wear an item of clothing then he/she should be able to know whether or not he/she is breaking the law. There is no place in B.C. where one can turn to have a helmet tested or approved. I still wake up in the middle of the night screaming, "Section 218 is ultra-vires," but in reality, no one knows what is a helmet as defined by the Motor Vehicle Act and its Regulations.

But if "the list of helmets" is what is legal in B.C. it gives The Helmet Manufacturers the right to set standards in B.C. We said the failure of the Superintendent of Motor Vehicles to provide a standard or code for safety helmets still does not make it possible for a motorcycle helmet to comply with the law.

We suggested that there is in effect a sub-delegation of the Superintendent of Motor Vehicle's authority to designate approved motorcycle safety helmets to the manufacturers because there is no specific standard to be met and it would be a simple proposition for the manufacturers to produce any type of helmet and put on it the model designation or produce one which fits the description in the Schedule to B.C. Regulations. This violates the principle of law, which provides that a described authority cannot be sub-delegated without clear legislation making it possible.

In the absence of a standard for motorcycle safety helmets a lesser quality motorcycle helmet than was originally anticipated by the Superintendent of Motor Vehicles would be in compliance with the law if it merely possessed the requisite model designation. It is our suggestion that the due diligence of a motorcyclist would not enable him to discover whether or not his helmet was a "motorcycle safety helmet" without some standard being provided. It is also our suggestion that there has been an abdication of

legislative authority resulting from the Superintendent of Motor Vehicles merely providing a Schedule of helmets with the requisite description and model designation to be met by manufacturers.

So, ...who knows?

Jim McNeney
Legal Counsel