

INTRODUCTION

1. This is an application pursuant to s. 9(6) of the *Court of Appeal Act* to vary the Order of Madam Justice Proudfoot in Chambers issued on November 16, 1999 denying the Appellant's application for leave to appeal and its application to amend the notice of appeal. Her Ladyship focussed on the aspects of the application that related to s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In her written Reasons for Judgment, however, Her Ladyship did not address whether or not the arguments raised by the Appellant under s. 11(d) of the *Charter* are important and justify full hearing by this Honourable Court. It is submitted that the arguments raised under s. 11(d) of the *Charter* in relation to the photo radar legislation present serious issues of public importance which this Honourable Court should address at a full hearing. The Appellant therefore seeks an order that leave be granted to appeal on the s. 11(d) ground.

PART I -- STATEMENT OF FACTS

Facts relating to the alleged offence

2. The following facts were agreed to by the parties at the trial of this matter:
 - a. Douglas Stead, representative for the accused, received the following documents for Violation Ticket SA00391011;
 - i. a copy of Violation Ticket SA00391011;
 - ii. a copy of Registered Owner's Offence Image;
 - iii. a copy of Certificate of Enforcement Officer Photographic Evidence executed by Paul Ronto;
 - iv. a copy of Photographic Radar Program Vehicle Image;

- v. a certified copy of Certificate of Enforcement Officer Qualified Operator executed by Bernie Schutz; and
 - vi. a copy of Vehicle Ownership Licensing Information Certificate of an Enforcement Officer of the Insurance Corporation of British Columbia.
- b. The specified penalty for violation of s. 151 of the *Motor Vehicle Act* in this case is a \$100.00 fine.
 - c. Photographic radar is not being used in all communities in British Columbia.
 - d. Since the introduction of photographic radar in 1996, some municipalities passed motions attempting to opt out of the use of photographic radar devices to enforce speeding offences in their jurisdiction.
 - e. Photographic radar is not being used in the Municipality of Surrey.
 - f. Other methods of speed enforcement other than a photographic radar device continue to be used in British Columbia to enforce speeding offences under the *Motor Vehicle Act*.

Motion Book, p. 64

Facts relating to the trial in the Provincial Court

- 3. Three pieces of Certificate evidence were presented and referred to at the trial:
 - a. Certificate of Enforcement Officer Photographic Evidence;
 - b. Certificate of Enforcement Officer Qualified Operator; and
 - c. Certificate of Vehicle Ownership

Motion Book, pp. 57-63

4. No evidence or arguments were submitted by the Crown at the trial to justify the impugned legislation.

Reasons for Judgment, Mahkdoom J.P., Motion Book, p. 26

5. At trial on July 9, 1998, the Learned Justice of the Peace found that sections 83.1 and 83.2 of the *Motor Vehicle Act* violate sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and ordered a stay of proceedings against the Appellant.

Facts relating to the appeal by the Crown to the Supreme Court

6. On appeal before the Supreme Court on November 19, 1998, the Honourable Mr. Justice Brenner overturned the decision of the Learned Justice of the Peace and ordered that the matter be remitted to the Provincial Court for a new trial.

Order and Reasons for Judgment, Brenner J., Motion Book, pp. 6, 8

Facts relating to the appeal by the Appellant in the Court of Appeal

7. On December 15, 1998, the Appellant filed a Notice of Appeal of the Honourable Mr. Justice Brenner's decision that sections 83.1 and 83.2 of the *Motor Vehicle Act* do not offend sections 7 and 11(d) of the *Charter*. On February 12, 1999, the Appellant filed the Appeal Book and on March 12, 1999 the factum.

Motion Book, p. 66-67

8. In addition to stating a ground of appeal as being that the Learned Justice erred in holding that ss. 83.1 and 83.2 do not violate s. 11(d) of the *Charter*, the Notice of Appeal also states that the Learned Justice erred in holding that "the ability to drive is not protected within s. 7 of the [*Charter*]."

Reasons for Judgment, Proudfoot JA, Motion Book, p. 3

9. The Appellant retained new counsel in July, 1999. It was determined that leave to appeal was required and that the notice of appeal insofar as it relates to s. 7 should be regularized. Thus, the Appellant's application in this matter had two aspects to it:
- a. an application for leave to appeal generally; and
 - b. an application to amend the Notice of Appeal in respect of s. 7.

Motion Book, pp. 136

10. On November 16, 1999, Her Ladyship the Honourable Madam Justice Proudfoot issued her Reasons for Judgment and dismissed the application.

Reasons, Proudfoot JA, Motion Book, pp. 2-5

PART II -- ISSUES

11. Are the matters raised by the Appellant under s. 11(d) of the *Charter* of such public importance that this Honourable Court should grant leave to appeal on that ground alone?

PART III -- ARGUMENT

12. Leave to appeal from an order of the British Columbia Supreme Court on a provincial offence appeal can only be granted on a question of law: *Offence Act*, RSBC 1996, c. 338, s. 124. As well, the Court should be satisfied that there is a good arguable case that raises matters of sufficient general importance. Therefore, the general arguments relating to s. 11(d) of the *Charter* which will be presented at the appeal of this matter are outlined here so that their importance and *prima facie* merit can be assessed.

Re Kanee Estate (1992), 69 BCLR (2d) 89 (CA)

Statutory framework

13. Sections 83.1 and 83.2 of the *Motor Vehicle Act* R.S.B.C. 1996, c. 318 (*MVA*) apply only to cases in which evidence of speeding is gathered by a photographic radar device. The pertinent legislation is attached as Tab F to this submission.

14. Section 24 of the *Interpretation Act* R.S.B.C. 1996, c 238 is also relevant. It stipulates:

24. If an enactment provides that a document is evidence of proof of a fact, unless the context indicates that the document is conclusive evidence, the document is admissible in any proceeding, and the fact is deemed to be established in the absence of any evidence to the contrary.

15. Section 11(d) of the *Charter* provides:

11. Any person charged with an offence has the right
 d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

General principles relating to s. 11(d)

16. Section 11(d) applies to all quasi-criminal offences under Provincial legislation.

Even though the consequence upon conviction is the imposition of a fine and not of imprisonment the requirements of the presumption of innocence under s. 11(d) of the *Charter* must be complied with

R. v. Wigglesworth [1987] 1 S.C.R. 541 at 558-599.

17. The right to be presumed innocent until proven guilty requires that s. 11(d) have at a minimum the following content:

a. the accused must be proven guilty beyond a reasonable doubt;

- b. the Crown has the burden of proving the accused guilty beyond a reasonable doubt as well as that of making out the case against the accused before he or she needs to respond;
- c. prosecutions must be carried out in accordance with fair, public and lawful procedures.

R. v. Oakes, [1986] 1 SCR 103 at page 121.

Mandatory presumptions and violation of s. 11(d)

18. A mandatory statutory presumption is created wherever legislation deems that a document (or proof of a given fact), *in the absence of evidence to the contrary*, establishes certain facts. In such circumstances the court is required to find that the presumed fact has been proven beyond a reasonable doubt unless the accused adduces evidence to the contrary.

R. v. Slavens (1991), 64 C.C.C. (3d) 29 (B.C.C.A.) at pp. 32 – 34.

19. In the instant case, s. 83.2 (3) of the *MVA* must be read in conjunction with s. 24 of the *Interpretation Act*. When these provisions are read together, the mandatory presumption that the owner of the motor vehicle photograph was driving at the speed recorded on the date recorded arise.

20. Moreover, s. 83.1(3) stipulates that an owner is not liable if the owner establishes that the person who was driving the vehicle at the time of the contravention was not entrusted with possession by the owner or that the owner exercised reasonable care and diligence in entrusting possession of the vehicle to such other person. This

means that the owner cannot raise a reasonable doubt as to who was driving the vehicle at the time of the alleged offence: the owner must establish that fact on a balance of probabilities.

21. As a general rule, such a mandatory presumption eliminates the Crown's burden of proving one or more essential elements of the offence. It casts an evidentiary burden on the accused to establish evidence to the contrary sufficient to raise a reasonable doubt. As a general rule, such a mandatory presumption would be held to violate, on a *prima facie* basis, s. 11(d) of the *Charter*.

R. v. Laba, [1994] 3 S.C.R. 965 at 1010,

R. v. Slavens, *supra*, at p. 34

R. v. T. (1985), 18 C.C.C. (3d) 125 (N.S.C.A) at p. 130.

22. It is submitted that s. 83.1 and 83.2 of the *MVA* strike at the heart of the protection afforded by s. 11(d) by increasing the likelihood that the innocent will be convicted. This likelihood is made even more acute by reason of the fact the owner cannot adduce evidence to raise a reasonable doubt that he or she was driving at the time of the alleged offence: the owner must "establish" that the person who was driving was either not entrusted with possession or had been entrusted with possession with due diligence (that is, on a balance of probabilities).

23. The courts have held it to be a breach of s. 11(d) when the presumed facts (here, that the registered owner was driving the vehicle at the recorded speed at the stipulated location at the time and date in question) are not a necessary and "inexorable" inference from the document or stipulated fact.

R v. Slavens, supra, pp 36 – 37,
R. v. Nagy (1988) 45 C.C.C. (3d) 350 (Ont.C.A.) at pp 360-361.

24. In this case, the accused was provided with three Certificates which were adduced into evidence at trial: they set out all of the elements of the offence of speeding:
- a. Certificate of enforcement officer qualified operator dated January 9, 1997;
 - b. Certificate of enforcement officer qualified operator photographic evidence dated January 9, 1997;
 - c. Certificate of vehicle ownership dated January 6, 1997
25. According to s. 83.2(3) (and applying s. 24 of the *Interpretation Act*) the facts set forth in the Certificates are deemed to be established in the absence of any evidence to the contrary. In light of s. 83.1(3), the owner cannot merely raise a reasonable doubt as to whether he or she was driving on the date in question. He or she must establish non-possession (without entrusting or with entrusting with due diligence) on a balance of probabilities. In light of the fact that notice of the alleged violation from the Crown occurs weeks after the alleged offence, the burden placed on the accused is heavy. The likelihood that innocent accused will be convicted is great. It is submitted that the combination of ss. 83.1 and 83.2 of the *MVA* and s. 24 of the *Interpretation Act* result in a violation of s. 11(d) of the *Charter*.
26. The accused owner has no means of knowing or assessing whether the alleged facts (aside from that of possession) are accurate or not. As a matter of common sense, weeks after the alleged violation, it is usually very difficult for an owner to be able to determine whether he or she was in fact at the alleged location at the stipulated time

and date. It is impossible for an owner, weeks after the alleged offence, to recall the his or her exact speed at the time of alleged violation. It is generally impossible for such an owner to be able to assess independently the accuracy of the prescribed photoradar devices not only generally but also on the date and time in question.

27. Thus, it is likely that owners are convicted without knowing if they were even driving on the date in question, whether they were at the described location, or whether they were in fact speeding. It is submitted that the likelihood of innocent persons being convicted of the offence is such that s. 11(d) must be violated by the impugned legislation.

28. The procedures outlined by the legislation require the accused to adduce “evidence to the contrary”: such evidence must be admissible, relevant, cogent and probative and which is not only capable of raising a reasonable doubt but does in fact raise such a reasonable doubt.

R. v. Jones (1978), 8 BCLR 78 (CA) at p 81

R. v. Moreau, [1979] 1 SCR 261 at 272

R. v. McMullan (1985), 19 CCC (3d) 495 (BCCA) at 498

29. Moreover, if the accused wishes to cross-examine the makers of the certificate evidence, he or she must apply for leave to do so. Even if he or she is able to obtain such leave, because notice of the alleged offence is given so long after the fact it is not likely that the accused would be able to prepare a full or effective cross-examination.

30. In summary, the legislation stacks the case against the accused. It is usually impossible for the accused to assess the validity of the alleged violation and procedurally difficult to mount an effective defence. It is submitted that, on a *prima facie* analysis, s. 11(d) of the *Charter* is violated by ss. 83.1 and 83.2 of the *MVA*.

Are the issues of such public importance that they merit the attention of this Court?

31. It is submitted that the matters raised by the Appellant under s. 11(d) of the *Charter* are of such general public importance that this Honourable Court should grant leave to appeal on the 11(d) ground alone.

32. Thousands of drivers and vehicle owners are affected on a daily basis by this legislation. It is submitted that many innocent vehicle owners will be convicted under this legislation. The Court's review of the applicable law and guidance to the population and the legislature is required.

PART IV – ORDER SOUGHT

33. The Appellant seeks an order varying the order of Madam Justice Proudfoot such that leave to appeal is granted in respect of the s. 11(d) ground of appeal.

All of which is respectfully submitted

Dated this 7th day of December 1999

Solicitor for the Applicant/Appellant
Tri-M Systems Inc.

PART V – AUTHORITIES

	Page
Caselaw	
<i>R. v. Jones</i> (1978), 8 BCLR 78 (CA)	9
<i>R. v. Laba</i> , [1994] 3 S.C.R. 965	7
<i>R. v. McMullan</i> (1985), 19 CCC (3d) 495 (BCCA)	9
<i>R. v. Moreau</i> , [1979] 1 SCR 261	9
<i>R. v. Nagy</i> (1988) 45 C.C.C. (3d) 350 (Ont.C.A.)	7
<i>R. v. Oakes</i> , [1986] 1 SCR 103	6
<i>R. v. Slavens</i> (1991), 64 C.C.C. (3d) 29 (B.C.C.A.)	6,7
<i>R. v. T.</i> (1985), 18 C.C.C. (3d) 125 (N.S.C.A)	7
<i>R. v. Wigglesworth</i> [1987] 1 S.C.R. 541	5
<i>Re Kanee Estate</i> (1992), 69 BCLR (2d) 89 (CA)	4
Statutes	
<i>Canadian Charter of Rights and Freedoms</i> ss. 1, 7, 11(d), 52	1, 3-5, 7-10
<i>Court of Appeal Act</i> , R.S.B.C. 1996, c.77 s. 9(6)	1
<i>Interpretation Act</i> , R.S.B.C. 1996, c. 238, s. 24	5, 6
<i>Motor Vehicle Act</i> , R.S.B.C. 1996, c.318 ss. 83.1, 83.2	2, 3, 4, 6-8, 10
<i>Offence Act</i> , R.S.B.C. 1996, c. 338 s. 124	4