

PART 1

STATEMENT OF FACTS

1. The following facts were agreed to by the parties at the trial of this matter:
 - (1) Douglas Stead, representative for the accused, received the following documents for Violation Ticket SA00391011:
 - (1) a copy of Violation Ticket SA00391011;
 - (2) a copy of Registered Owner's Offence Image;
 - (3) a copy of Certificate of Enforcement Officer Photographic Evidence executed by Paul Ronto;
 - (4) a copy of Photographic Radar Program Vehicle Image;
 - (5) a certified copy of Certificate of Enforcement Officer Qualified Operatory executed by Bernie Schutz; and
 - (6) a copy of Vehicle Ownership Licensing Information Certificate of an Enforcement Officer of the Insurance Corporation of British Columbia
 - (2) The specified penalty for violation of s. 151 of the *Motor Vehicle Act* in this case is a \$100.00 fine.
 - (3) Photographic radar is not being used in all communities in British Columbia.
 - (4) 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.

- (5) Photographic radar is not being used in the Municipality of Surrey.
- (6) 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*.

Appeal Book, p. 61

2. Three pieces of Certificate evidence were presented and referred to at the trial and are set out in the Appeal Book at pp. 3 - 7:

- (1) Certificate of Enforcement Officer Photographic Evidence;
- (2) Certificate of Enforcement Officer Qualified Operator; and
- (3) Certificate of Vehicle Ownership

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

Appeal Book, p. 29, Reasons for Judgment of Mahkdoom, J.P.

PART 2

ERRORS IN JUDGMENT

1. The Honourable Justice erred in holding that once a driver's license is granted, the ability to drive is not protected within section 7 of the *Canadian Charter of Rights and Freedoms*;
2. The Honourable Justice erred in holding that ss. 83.1 and 83.2 of the *Motor Vehicle Act* do not violate section 11(d) of the *Canadian Charter of Rights and Freedoms*.

PART 3

ARGUMENT

1. This is an appeal against a judgment granting the Crown's appeal from the decision of the trial court which held that s. 83.1 and 83.2 of the *Motor Vehicle Act* violate s. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and ordered a stay of proceedings against the Appellant, Tri-M Systems Inc.

2. The Respondent submits that the impugned photo radar legislation is unprecedented and violates the most basic and integral principles in our justice system protected under sections 7 and 11(d) of the *Charter*. Before the accused ever steps into a courtroom, the legislative scheme creates a mandatory presumption of guilt against the accused even in the absence of actual proof beyond a reasonable doubt on an essential element of the offence. This statutory presumption of guilt is based solely on certificate evidence without the requisite procedural safeguards to ensure the reliability of that evidence. The burden rests entirely on the accused to present evidence to the contrary of the bald conclusions of fact set out in the certificates. This violates the accused's right to be presumed innocent until proven guilty and renders an individual's right to make full answer and defence merely "illusory".

I. STATUTORY FRAMEWORK

3. Sections 83.1 and 83.2 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "MVA") apply only to cases in which evidence of speeding is gathered by a photographic radar

device. The pertinent legislation is reproduced below:

Liability of Owner for Speeding Violations

83.1 (1) In this section:

“owner” includes:

- (1) a person in possession of a motor vehicle under a contract by which the person may become the owner on full compliance with the contract, and in whose name alone the motor vehicle is registered under the Act,
- (2) a person who rents or leases a motor vehicle from another person, and
- (3) a person who holds a licence under section 38, 41, 42 or 44;

“Speed monitoring device” means a speed monitoring device prescribed under subsection (8) that is capable of photographing or capturing the image of a motor vehicle while accurately and simultaneously measuring and recording its speed.

- (2) The owner of a motor vehicle is liable for the contravention of section 140, 146(1), (3), (5), or (7), 147 or 148(1) if evidence of the contravention was gathered through the use of a prescribed speed monitoring device.
- (3) The owner is not liable under subsection (2) if the owner establishes that
 - (1) the person who was, at the time of the contravention, in possession of the motor vehicle was not entrusted by the owner with possession, or
 - (2) the owner exercised reasonable care and diligence in entrusting the motor vehicle to the person who was, at the time of the contravention, in possession of the motor vehicle.
- (4) If an owner is liable under this section, in place of the fine or term of imprisonment, a fine of not more than \$2,000 may be imposed.
- (5) On a prosecution of the owner of a motor vehicle for an offence under this section, the burden is on the defendant to prove that
 - (1) the person in possession of a motor vehicle was not a person entrusted by the owner with the possession, or
 - (2) the registered owner is not the owner.
- (8) The Lieutenant Governor in Council may prescribe a speed monitoring device for the purpose of subsection (2).

Certificate as Evidence

S. 83.2 (1) In this section, “**enforcement officer**” means an enforcement officer as defined in

the *Offence Act*.

- (2) An enforcement officer may provide, by signing a completed certificate in the prescribed form, evidence of an offence
 - (1) by an owner of a motor vehicle under section 83.1(2), or
 - (2) by another person under a provision referred to in section 83.1(2) if evidence of the offence was gathered through a speed monitoring device prescribed for the purpose of that section.
- (3) A certificate under this section is, without proof of the signature or the official position of the person signing the certificate, evidence of the facts stated in the certificate.
- (4) A person against whom a certificate under this section is produced, may with leave of the court, require the attendance of the enforcement officer who signed the certificate, for the purpose of cross-examination.
- (5) An enforcement officer who signs a certificate under this section must promptly send the certificate to the Insurance Corporation of British Columbia.
- (6) The Insurance Corporation of British Columbia must keep a record of every certificate sent to the superintendent under subsection (5).
- (7) The Lieutenant Governor in Council may prescribe the form and content of the certificate for the purposes of this section.
- (8) The recorded image referred to in subsection 83.1(11) may be included as part of a certificate under subsection (2) of this section.

II PRESUMPTION OF INNOCENCE UNDER S. 11(d) OF THE *CHARTER*

3. The Appellant respectfully submits that the Honourable Justice in the court below erred in finding that sections 83. 1 and 83.2 of the *MVA* do not violate s. 11(d) of the *Canadian Charter of Rights and Freedoms*.
4. It is submitted that sections 83.1 and 83.2 of the *Motor Vehicle Act* in conjunction with s.

24 of the *Interpretation Act* violate all three minimum requirements of the right to be presumed innocent as guaranteed by s. 11(d) of the *Charter*.

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

s. 11(d) 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.

6. The right to be presumed innocent as guaranteed under s. 11(d) of the *Charter* applies to all quasi-criminal offences under provincial legislation. Prosecutions of traffic offences, even where the only consequence upon conviction is imposition of a nominal fine, must comply with the requirements of the presumption of innocence under s. 11(d) of the *Charter*.

R. v. Wigglesworth, [1987] 2 S.C.R. 541 at 558 - 559

7. Section 11(d) of the *Charter* protects three essential and minimum components of the right to presumption of innocence:

(a) an accused must be proven guilty beyond a reasonable doubt;

(b) the State must bear the burden of proving the essential elements of the offence;
and

(c) prosecutions must be carried out in accordance with fair, public and lawful procedures.

R. v. Oakes, [1986] 1 S.C.R. 103 at 121

8. The State has both the ultimate legal burden of proof beyond a reasonable doubt, but also the evidential burden of establishing all elements of an offence before the accused is required to respond either by testifying or calling evidence.

Oakes, supra
R. v. Boyle, (1983), 35 C.R. (3d) 34 at 45 (Ont. C.A.)

9. The scope and content of s. 11(d) rights may vary with the context, however, the S.C.C. has affirmed that even for non-criminal offences, the presumption of innocence under 11(d) is not “meaningless”. The Appellant submits that all prosecutions must comply with the minimum requirements set out by the S.C.C. in *Oakes*. For absolute liability offences such as speeding, the Crown must bear the burden of proving the actus reus of the offence beyond a reasonable doubt in fair, impartial and public hearing. To deprive the accused of the minimum content of s. 11(d) would be to render the right to be presumed innocent virtually meaningless.

R. v. Wholesale Travel Inc., [1991] 3 S.C.R. 154

III. **MANDATORY PRESUMPTIONS AND VIOLATIONS OF S. 11(d)**

13. In the court below, Brenner J. gave 3 reasons for finding no violation of the presumption of innocence:
- (a) the provisions merely impose an evidentiary burden;
 - (b) it is open for the accused to raise a reasonable doubt based on the contents of or omissions in the certificate evidence itself; and
 - (1) the accused may raise a reasonable doubt through cross-examination of the

makers of the certificate evidence.

Appeal Books, pp. 53 - 56, Reasons for Judgment of Brenner, J.

14. The Appellant submits that Brenner, J. in reaching his conclusion that the impugned legislation does not violate s. 11(d) misconstrued the nature and effect of mandatory presumptions and the circumstances in which mandatory presumptions violate s. 11(d).

A. Mandatory Statutory Presumptions

15. It is well settled law in British Columbia and across Canada that a mandatory presumption is created wherever legislation deems that a document (or proof of one fact), *in the absence of evidence to the contrary*, is admissible to establish certain facts [emphasis added]. In these circumstances, the trier of fact is required to find the presumed fact has been proven beyond a reasonable doubt and enter a conviction, unless the accused is able to adduce evidence to the contrary.

R. v. Proudlock, [1979] 1 S.C.R. 525

R. v. Slavens (1991), 64 C.C.C. (3d) 29 at 33 - 34 (B.C.C.A.)

R. v. Boyle, supra (Ont. C.A.)

R. v. Nagy (1988) 45 C.C.C. (3d) 350 (Ont. C.A.)

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

R. v. Shaw (1994), 75 O.A.C. 378 (Ont. C.A.)

R. v. Beals (1991), 68 C.C.C. (3d) 277 (N.S. Co. Ct.)

16. It is the phrase “in the absence of evidence to the contrary” which creates the mandatory nature of the presumption. As noted by Professor Stuart, the statutory presumption clause

“in the absence of evidence to the contrary” would be superfluous if this did not impose a burden on the accused to adduce evidence to the contrary and if it permitted a trier of fact to disregard the legislative presumption of proof and find that the presumed fact has not been proven even though the accused has not adduced evidence to the contrary.

Stuart, Donald, *Criminal Law A Treatise*, 3d Ed., 1995 at 43 - 44

2. Mandatory Presumptions which Violate s. 11(d)

13. The characterization of a statutory provision as imposing an evidential rather than legal burden on the accused is not determinative of whether the legislation in question violates s. 11(d) of the *Charter*.

14. Mandatory presumptions which eliminate the Crown’s burden of proving an essential element of the offence and cast an evidentiary burden on the accused to raise evidence to the contrary sufficient to raise a reasonable doubt violate s. 11(d).

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

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

R. v. T., *supra*, at 130

15. Whether the court is dealing with a reverse onus clause which places a burden on the accused to disprove the presumed fact on a balance of probabilities or with a mandatory presumption which places a burden on the accused to adduce evidence which raises a reasonable doubt, s. 11(d) will be violated if there is a possibility that the accused may be

convicted despite the absence of proof beyond a reasonable doubt on an essential element of the offence. It does not matter that the absence of proof beyond a reasonable doubt arises from a reverse onus provision or the elimination of the need to prove an essential element of the offence.

R. v. Slavens; supra;

R. v. Nagy, supra

16. A mandatory presumption which places an evidential burden on the accused is no different from a reverse onus clause if the existence of the presumed fact does not inexorably lead to the conclusion that the essential elements of the offence exist or have been proven beyond a reasonable doubt. In both cases, an accused person may be convicted despite the existence of reasonable doubt on one of the essential elements of the offence.

Slavens, supra at 34 citing *R. v. Nagy*

17. The Appellant submits that the proper test for determining whether a reverse onus provision or a mandatory presumption violates s. 11(d) is the one adopted by this Court in *Slavens*, supra and by the Ontario Court of Appeal in *R. v. Nagy*, supra. That is, mandatory presumptions and reverse onus clauses will violate s. 11(d) of the *Charter* if:

- (a) the existence of the presumed fact does not inexorably lead to the conclusion that all elements of the offence have been proven beyond a reasonable doubt; or
- (2) In order to avoid conviction, the accused may be required to call evidence or

testify where the evidence adduced by the Crown may not amount to a case to meet.

If either of these circumstances arise, s. 11(d) will be violated.

R. v. Slavens, supra at 37
R. v. Nagy, supra at 360 - 361

IV. APPLICATION OF S. 11(d) TO SECTIONS 83.1 and 83.2 OF THE MVA

19. It is submitted that sections 83.2 and 83.1 of the *MVA* violate the presumption of innocence under s. 11(d) by:

- (a) creating the possibility that an accused person could be convicted on the basis of a mandatory presumption despite the absence of proof beyond a reasonable doubt on an essential element of the offence;
- (b) relieving the State of its burden of proving all elements of the offence beyond a reasonable doubt and requiring the accused to call evidence or testify in order to avoid conviction when the Crown's evidence may not amount to an actual case to meet; and
- (c) denying the accused the right to be presumed innocent until proven guilty in accordance with public, fair and lawful procedures.

A. Mandatory Presumption and Reverse Onus Clause

3. The Appellant submits that s. 83.2 when read in conjunction with s. 24 of the *Interpretation Act* creates a mandatory presumption that all elements of the offence of speeding have been proven beyond a reasonable doubt, and in the absence of the accused raising evidence to the contrary, the trier of fact is required to convict on the basis of the mandatory presumption.
4. The mandatory presumption is created by operation of s. 83.2 of the *Motor Vehicle Act* and s. 24 of the *Interpretation Act*.
5. Section 83.2 permits the use of certificate evidence and s. 83.2(3) states that:

A certificate under this section is, without proof of the signature or the official position of the person signing the certificate, evidence of the facts stated in the certificate.
6. Section. 24 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, states:

s. 24 If an enactment provides that a document is evidence or 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.
7. The wording in s. 83.2 of the *Motor Vehicle Act* and s. 24 of the *Interpretation Act* falls squarely within the kind of provisions which have consistently been found to be mandatory presumptions.
8. Provincial Courts that routinely apply the impugned provisions, including the trial court in this case, have concluded that the legislation creates a mandatory presumption.

R. v. Evans (16 January, 1998), Victoria Registry, SA00114596
Reasons for Judgment of J.P. Makhdoom, *R. v. Tri-M Systems Inc.*, Appeal Book,
pp. 8 - 38
R. v. Bosworth (27 August, 1997), Vancouver Registry, SA00030445
R. v. Nadalin (24 June, 1998), Vancouver Registry, SA01324805

9. Further, sections 83.1(1) - (5) also creates a reverse onus by imposing liability against the registered owner for the offence unless the owner can establish on a balance of probabilities that the person in possession of the motor vehicle was not entrusted by the owner with possession, the registered owner is not the owner, or that the owner exercised reasonable care and diligence in entrusting the motor vehicle to the person who was, at the time of the contravention, in possession of the motor vehicle.

2. In this case, the Accused was provided with three Certificates which were provided to the presiding Justice of the Peace at the trial:
 - (1) Certificate of Enforcement Officer Qualified Operator, dated October 22, 1996;
 - (2) Certificate of Enforcement Officer, Photographic Evidence, dated January 9, 1997;
 - (3) Certificate of Vehicle Ownership, dated January 6, 1997

Appeal Books, pp. 3 - 7

3. The Certificate Evidence contains all the necessary elements of the offence of speeding.

4. Applying the test adopted by this Court in *Slavens*, supra, at 37, two questions must then be asked to determine if the impugned legislation violates s. 11(d):

- 1) do the presumed facts inexorably lead to the conclusion that the actual facts have been proven beyond a reasonable doubt, or
- 2) In order to avoid conviction, is it possible that the accused person may be required to call evidence or testify where the evidence adduced by the Crown may not amount to a case to meet?

R. v. Slavens, supra at 37
R. v. Nagy, supra at 360 - 361

(i) **Does the Certificate Evidence Lead Inexorably to the Conclusion that the Facts Necessary to Prove all Elements of the Offence Have Been Proven beyond a Reasonable Doubt?**

30. It is submitted that the certificate evidence under the impugned legislation contains a number of deficiencies which, in the absence of the statutory presumption, may not even be admissible and would likely not be sufficient to prove all elements of the offence beyond a reasonable doubt. The particulars of these deficiencies include:

- (a) The certificate evidence is printed on standard pre-printed forms and contain assertions and conclusions of fact about the accuracy and reliability of the evidence gathered by the photographic radar device, without providing the proper background information or viva voce evidence to determine how the conclusion was reached or to assess the reliability of the assertions. This deficiency was noted by the trial court in this matter;

Appeal Books, pp. 20 - 21, Reasons for Judgment of Mahkdoom, J.P.
R. v. Evans, supra

(2) the certificates contain out of court statements with respect to every element of the offence of speeding. Hearsay evidence may exceptionally be admitted only if it meets the requirement of necessity and reliability. Neither of those conditions is met in this case:

- (1) prosecutions of non-photo radar speeding offences are conducted without the aid of certificate evidence and legislative presumptions and have the additional safeguard that the radar accuracy is visually corroborated by the enforcement officer (*Bosworth*, supra);
- (ii) the impugned legislation contains no procedural safeguards to ensure that the information contained in the certificates is reliable. This is very different from other legislation such as breathalyzer legislation which permits the use of certificate evidence only where strict pre-conditions are met. This fact was duly noted by the trial court which concluded that the photo radar legislation was “deficient vis-a-vis procedural safeguards and protections”

Appeal Book pp. 21 - 23, Reasons for Judgment of Makhdoom,
J.P.

(c) The inner workings of the photo radar technology or the accuracy of the device are not observable or verifiable by looking at the certificate evidence.

31. It is further submitted that as a result of the reverse onus provision in s. 83.1, an accused person may be able to raise a reasonable doubt, but may not be able to discharge the

burden of proving on a balance of probabilities either that another person was driving and/or the appropriate due diligence was exercised when entrusting the vehicle to another person.

32. The likelihood of a person being convicted despite an absence of proof beyond a reasonable doubt on an essential element is even greater as a result of the heavy burden cast upon the accused to raise evidence to the contrary. The Appellant refers this Court to the submissions below which address the burden of raising evidence to the contrary of the statutory presumptions.
 33. Based on the foregoing, the Appellant submits that the certificate evidence does not inexorably lead to the conclusion that the facts set out in the certificate exist or have been proven beyond a reasonable doubt. A conviction may be obtained even where reasonable doubt may exist on one or more of the essential elements of the offence. This constitutes a violation of the presumption of innocence under s. 11(d) of the *Charter*.
- (ii) **Does the Impugned Legislation Require the Accused to Call Evidence or Testify When the Crown's Evidence May Not Amount to A Case To Meet?**
32. For the reasons set out above, it is possible under the impugned legislation that in order to avoid conviction, an accused person may be required to call evidence or testify to adduce evidence to the contrary when the certificate evidence does not in fact amount to a case to meet. This also constitutes a violation of s. 11(d) of the *Charter*.

B. Fairness of the Prosecution

34. The Appellant submits that the impugned legislation also violates the third minimal component protected under s. 11(d) as set out in *Oakes*, namely, the requirement that prosecutions be conducted with fair and lawful procedures.
35. Where a person is charged with a non-photo radar speeding offence, the Crown must prove all elements of the charge beyond a reasonable doubt. The Crown calls witnesses to testify and those witnesses are subject to cross examination in accordance with judicial ethics and evidentiary rules. As noted in *Bosworth*, supra, the accuracy of the radar device is visually corroborated by the enforcement officer. None of these components of procedural fairness are available to a person accused of speeding under the impugned legislation.

(i) Burden on the Accused of Raising Evidence to the Contrary

36. In order to raise evidence to the contrary and rebut the mandatory presumption, the accused must adduce evidence which is admissible, relevant, cogent and probative, and which is not only capable of raising a reasonable doubt, but does in fact raise a reasonable doubt on an essential fact contained in the certificate.

R. v. Jones (1978), 8 B.C.L.R. 78 at 81 (C.A.)

37. Evidence which does nothing more than raise a basis for conjecture and speculation, or amount to a general attack on the technology used and/or the enforcement policies of the State, are not sufficient to raise a reasonable doubt on a specific matter before the court.

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

R. v. McMullan (1985), 19 C.C.C. (3d) 495 at 498 (B.C.C.A.)

R. v. Bosworth, *supra*, at 13 - 15

38. It is submitted that the prosecution of photo radar offences under the impugned legislation is particularly unfair given that the only evidence submitted by the Crown contain only “bald assertions of fact”, and other than the identify of the driver, information about the operation of and accuracy of the photo radar device, are not matters within the mind or knowledge of the accused. In these circumstances, the accused is saddled with the burden of adducing evidence to the contrary in what is effectively a factual void.

(ii) Burden on the Accused to Obtain Disclosure of Documents

39. As stated above, the burden imposed on the accused to adduce evidence to the contrary is even greater due to the lack of information available to the accused. In order to obtain disclosure of documents from the Crown, an accused person must be able to indicate some discrepancy or live issue relating to the actual speeding offence before the court. In light of the factual void created by the legislation, the burden of showing a discrepancy or live issue is very onerous

Bosworth, *supra*, at 14 - 15

40. The difficulties facing an accused person seeking disclosure of documents or further

particulars of the Crown's evidence, is evidenced by Provincial Court decisions in which disclosure of documents are routinely denied or quite circumscribed. Applications for service and maintenance records, working manuals, and particulars of the accuracy of the photo radar device on the day in question are being denied by the courts on the grounds of relevancy, third party confidentiality or control, or that the accused is on a fishing expedition.

R. v. Bosworth, supra

R. v. Stead (20 January, 1998), Coquitlam Registry, SA00835762

R. v. Tollefson (31 March, 1998), Victoria Registry, SA00792856

41. In his Reasons for Judgment, Brenner, J. referred to the fact that the accused may obtain leave to cross-examine the makers of the certificate evidence as a factor in his conclusion that there is no s. 11(d) violation. The Appellant respectfully submits that the right to cross-examine does not address the procedural deficiencies in this legislation or render the trial process a fair one. Even if the accused is successful in obtaining leave to cross-examine, due to the lack of access to background information about the alleged offence and the accuracy of the speed enforcement device, the accused will likely not be able to prepare a full answer and defence or mount an effective cross-examination.

42. There are a number of other factors which raise questions about the fairness of photo radar prosecutions such as the fact that in most cases the accused does not have a lawyer present and is facing legal counsel who is equipped with all of the requisite State legal and fact finding resources.

43. The Appellant submits that in the circumstances, the accused is deprived of the right to be presumed innocent until proven guilty in accordance with fair procedures as guaranteed under s. 11(d) of the *Charter*.

V. APPLICABILITY OF SECTION 7 OF THE *CHARTER*

1. It is submitted that the Honourable Justice erred in finding that s. 7 does not apply to the impugned legislation and that depriving a person of the licensed ability to drive does not trigger a liberty interest under section 7 of the *Charter*.
2. The Appellant does not argue that there is an absolute right to drive that is protected by section 7.
3. The Appellant submits firstly that the protections of section 7 are triggered in this case by the violations of section 11(d) as outlined above. Secondly, the Appellant argues that the definition of liberty in section 7 is sufficiently broad as to extend protection to the individual's ability to employ his or her skill to drive that arises once a license to drive has been granted.
 - A. Is section 7 triggered in this case by the provisions of section 11(d)?
4. It is already well-established that in the context of criminal cases, the presumption of innocence, although protected expressly in s.11(d) of the Charter, is referable and integral

to the general protection of life, liberty and security of the person contained in s. 7 of the Charter. The Supreme Court of Canada asserted in *R. v. Oakes* that the presumption of innocence is necessary to protect the fundamental liberty and human dignity of persons accused by the state of criminal conduct, by reason of the grave social and personal consequences that such individuals face, including potential loss of personal liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. The presumption of innocence validates our belief that citizens are decent and law-abiding until proven otherwise.

R. v. Oakes, supra at 19 - 120

5. The Appellant argues that once a license to drive is granted to a person by the state, there will be the potential for significant loss of personal liberty, subjection to social stigma, as well as other social, psychological and economic harm to flow from the withdrawal of the license, and the attendant liberty. For instance, the removal of the license to drive may deprive a person of the ability to obtain the necessities of life or it may be the basis for a person to lose his or her employment, or ability to compete for employment, where the duties pertaining to employment require the person to have a valid driver's license.
6. In *R. v. Robson* Esson J.A. (Taggart J.A. concurring) specifically recognized that while the deprivation of liberty involved in a 24 hour suspension of a license is minor in comparison to incarceration, it is not an insignificant effect, potentially preventing individuals from following their occupations or precluding movement, particularly in less

populated parts of this province.

R. v. Robson, (1985), 45 C.R. (3d) 68 at 76 (C.A.)

B. Once licensed, is the ability to employ one's skill to drive a liberty protected under section 7?

7. There has been to date extensive argument in the courts as to whether or not S.C.C. cases have effectively determined that section 7 does not apply with respect to the driving of a motor vehicle. In *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, the B.C.C.A. reviewed the comments of the S.C.C. made in various decisions with respect to this issue, but did not find that the issue had been determined at the level of the S.C.C.

Buhlers v. British Columbia (Superintendent of Motor Vehicles), (24 February, 1999) Victoria Registry, CAV03242

8. Once a driver is licensed in accordance with the requirements of the *Motor Vehicle Act*, the right to employ one's skill and ability to drive is a liberty right protected under section 7 of the *Charter* which cannot be taken away except in accordance with principles of fundamental justice.

R. v. Robson (1985) 45 C.R. (3d) 68 at 71

R. v. Sengara (1988), 26 B.C.L.R. (2d) 171

Horsefield v. Ontario (The Registrar of Motor Vehicles) (1997), 34 O.R. (3d) 509

9. A broad definition of liberty in the context of s. 7, has been endorsed by both the S.C.C. and this Court.

Robson, supra, at 71;
R. v. Morgentaler, [1988] 1 S.C.R. 30
Wilson v. Medical Services Commission of British Columbia (1988), 30 B.C.L.R.
(2d) 1 (C.A.) at 18 leave to appeal to the S.C.C. refused;
B.(R.) v. Children's Aid Society, [1995] 1 S.C.R. 315 at 368
Buhlers, supra, at para. 109
Godbout v. Longueuil [1997] 3 S.C.R. 844

10. The decision of Nemetz C.J.B.C. in *Robson*, supra, specifically addresses the application of section 7 to cases involving the driving of a motor vehicle, and reads in part as follows at p. 71:

Liberty” under the Charter cannot be taken to create an absolute right to drive. Age, infirmity, and other impediments may restrict the granting of driver’s licenses. However, once the license is granted there becomes attached to it the general liberty to employ one’s skill and ability - in this case the ability to drive. Accordingly, such liberty constitutes a right under the Charter and a person cannot be deprived of it except in accordance with the principles of fundamental justice.

11. In *Sengara*, supra, the B.C.S.C. revisited the Court of Appeal’s decision in *Robson* in light of the S.C.C. decision in *R. v. Dedman*. The B.C.S.C. affirmed the decision in *Robson* and held that once a driver’s license is granted, the right to drive is a liberty right protected under section 7 of the *Charter*. The B.C.C.A. has not overturned its decision in *Robson*.
12. It is respectfully submitted that the decision of this Court in *Buhlers*, supra, is in error, to the extent that the decision asserts that the scope of the liberty interest protected by s. 7 does not extend to the licensed ability to drive a motor vehicle on a public highway.
13. The effect of narrowly interpreting the “right to liberty” under section 7 of the *Charter* to

those circumstances where there is a potential for imprisonment is to deprive most citizens of the full benefit of the *Charter*'s protection under section 7. As noted by the trial court below, the S.C.C. has consistently emphasized the importance of applying a contextual and purposive analysis of rights and freedoms guaranteed under the *Charter* so as to ensure that all individuals enjoy the full benefit of the *Charter*'s protections.

Appeal Book, pp. 15 - 16, Reasons for Judgment of Makhdoom, J.P.

14. While it is true that the scope of *Charter* rights may be different in a regulatory context, our Courts have not suggested that in these circumstances *Charter* rights ought to be meaningless or eliminated altogether.
15. In a modern, democratic society, a wide range of human activities are subject to codes of proper societal conduct and governmental. The Appellant respectfully submits that, *looked at in totality*, the various privileges granted and denied in the regulation of such activities have the potential to significantly limit, if not deprive, individuals of the integral components of personal autonomy, as defined by reference to the ability of the individual to live his or her own life and to make decisions of fundamental personal importance.
16. The consequence of limiting the scope of the "right to liberty", is to effectively shield the government from any challenges to legislation which improperly deprives an individual of the license to drive. Taken to its logical conclusion, such a proposition would allow

the State, through the use of enforcement agencies and prosecutorial powers, to obtain a conviction and deprive drivers of their licenses by any means possible, irrespective of whether or not those convictions were obtained in accordance with principles of fundamental justice or the regulatory purposes of the Act. Such an interpretation is not consistent with the meaning and purpose of rights guaranteed under the *Charter*.

17. The same reasoning could be extended to support the proposition that the State is free to potentially deprive an individual of all of his or her privileges arising under a licensing scheme without affording the individual any protections under s. 7 of the *Charter*, solely on the basis that the privileges attaching to the license are “regulatory” in nature.

18. It is submitted that when given a broad, purposive and contextual analysis, once a license has been granted, the right to employ one’s skill and ability to drive is a liberty right protected under section 7 of the *Charter*.

C. Do The Impugned Provisions Have the Potential to Deprive an Accused of the Right to Employ one’s skill and Ability to drive?

20. In order to impugn the legislation in question, it will be sufficient for the Appellant to establish that the provisions have the potential to deprive the person of such a right.

R. v. Swain, [1991] 1 S.C.R. 933

20. Section 26 of the *Motor Vehicle Act* states:

S. 26 The Insurance Corporation of British Columbia may, without a hearing, refuse to issue a

driver's license to a person who

- (c) is indebted to the government because of his or her failure to pay a fine imposed as a result of a conviction under
 - (ii) the Motor Vehicle Act

Therefore, the impugned provisions have the potential to deprive an accused of the ability to drive.

21. The question of whether or not a license is refused is a matter of discretion, but a person is subject to the possibility of having his or her license taken away on the basis of a conviction under the Act. The S.C.C. in *Swain*, supra, has affirmed that section 7 of the *Charter* is triggered where there is a potential for a person to be deprived of the right to life, liberty or security of a person. It is possible for I.C.B.C. to make a fair administrative decision and deprive the person of a driver's license on the basis of a conviction.

VI. DO THE IMPUGNED PROVISIONS VIOLATE PRINCIPLES OF FUNDAMENTAL JUSTICE?

22. It is submitted that the impugned provisions violate principles of fundamental justice by:
- (a) violating the presumption of innocence guaranteed in s. 11(d) of the *Charter*;
 - (b) potentially depriving a person of the right to drive based on considerations that have nothing to do with criteria for regulating driving under the Act;
 - (c) rendering the accused's right to make full answer and defence merely illusory; and
 - (1) as noted by the trial court, the legislative scheme potentially deprives "deadbeat

drivers” rather than “bad drivers” of the right to drive

Appeal Book p. 25, Reasons for Judgment of Mahkdoom, J.P.

23. The S.C.C. has found that the principles of fundamental justice are to be found in the basic tenets of our legal system. These basic tenets include the right to be presumed innocent until proven guilty as guaranteed under s. 11(d) of the *Charter* and the right to make full answer and defence.

Swain, supra at 504 - 505
Oakes, supra

24. The Appellant repeats the submissions set out above that the impugned provisions violate the presumption of innocence, including the right to a fair hearing.

25. It is further submitted that photo radar legislation effectively denies an accused the right to full answer and defence. The legislation imposes a burden to raise evidence to the contrary of the mandatory presumptions created by the legislation without any factual foundation to do so. The certificates do not set out the background facts or circumstances in which the alleged evidence of speeding was obtained nor do they provide a factual basis for the conclusion that the photo radar accurately measured the speed of the vehicle shown in the photograph. In these circumstances, the right of a lay person unfamiliar with the technical operations of the radar, to present a full answer and defence, or to mount an effective cross examination if leave is obtained, is in many instances illusory.

26. The Appellant submits that for all the reasons set out above, the impugned provisions

have the potential to deprive a person of the liberty right to employ one's skill and ability to drive once a license is granted and that deprivation is not in accordance with principles of fundamental justice.

NATURE OF ORDER SOUGHT

1. The Appellant seeks a declaration that s. 83.1(1) - (5) and s. 83.2 of the *Motor Vehicle Act* violate s. 7 and/or 11(d) of the *Canadian Charter of Rights and Freedoms* are of no force and effect; and
2. An order for a stay of proceedings against the Defendant, Tri-M Systems Inc.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Barbara E. Brown
Counsel for the Appellant

At the City of Vancouver, in the Province of British Columbia, this 10th day of
March, 1999.

LIST OF AUTHORITIES

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