

# MEMORANDUM OF ARGUMENT

## PART I

### STATEMENT OF FACTS

1. This is an Application pursuant to Section 40(1) of the *Supreme Court Act*, R.S.C. 1985 , c.S-26 for Leave to Appeal from the decision of the British Columbia Court of Appeal rendered April 11, 2001 upholding the constitutional validity of the Photo Radar scheme established and administered under Sections 83.1 and 83.2 of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.

10 2. It is the position of the Applicant that the Court of Appeal erred in its conclusion and that the Photo Radar scheme violates the presumption of innocence guaranteed by Section 11(d) of the *Canadian Charter of Rights and Freedoms*.

3. The Applicant further submits that the issues raised in the proposed Appeal are of sufficient national and public importance to warrant Leave to Appeal to this Honourable Court because:

- (a) The decision of the Court of Appeal, which is inconsistent with previous decisions in this Court, significantly diminishes the content of the Section 11(d) right and the extent of the protection afforded thereby;
- (b) The number and value of Photo Radar tickets issued in British Columbia indicate  
20 that the scheme has had a broad impact on Canadians;
- (c) The issues raised in the proposed Appeal are not limited to British Columbia given the use of Photo Radar elsewhere in Canada; and

- (d) This Court has in the past recognized the importance of examining the constitutional implications of the use of invasive forms of technology by law enforcement agencies.

### **The Applicant**

4. The Applicant, Tri-M Systems Inc., received a Violation Ticket in January, 1997 alleging a violation of Section 151(1) (now Section 146(1)) of the British Columbia *Motor Vehicle Act* by reason of the offence of speeding. The Violation Ticket, which was dated November 6, 1996, alleged that the offence occurred on October 22, 1996 at or near New Westminster, British Columbia.

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**Leave Application, p. 41.**

### **Legislative Scheme**

5. Section 151(1) of the *Motor Vehicle Act* must be read in conjunction with Sections 83.1 and 83.2 (formerly Sections 76.1 and 76.2) which set out the Photo Radar scheme. **(See pp. 151 - 156 of Leave Application)** The key elements of the Photo Radar scheme may be summarized as follows:

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- (a) Section 83.1(1) of the Act defines a speed monitoring device to be Photo Radar;
- (b) Section 83.1(2) of the Act provides that the owner of a motor vehicle is liable for the offence of speeding if evidence of the offence was gathered through the use of Photo Radar;
- (c) Section 83.1(3) of the Act sets out certain statutory defences. That section provides that an owner shall not be liable **if the owner establishes** that:
  - (i) 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

(ii) 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.

(d) Section 83.1(5) of the Act provides that 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:

(i) the person in possession of the motor vehicle was not a person entrusted by the owner with possession; or

(ii) the registered owner is not the owner.

10 (e) Pursuant to Section 83.2, an enforcement officer may provide, by signing a completed certificate in the prescribed form, evidence of an offence;

(f) Section 83.2(3) provides 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;

(g) Section 83.2(4) requires the accused to obtain leave of the Court in order to require the attendance of the enforcement officer for the purposes of cross-examination;

(h) Sections 83.1 and 83.2 must be read in conjunction with Section 24 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 which stipulates:

20 “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.”

**Leave Application, pp. 149 - 150.**

6. Once issued, Photo Radar tickets are sent by ordinary mail to the address of the registered owner of the motor vehicle in issue. As noted by Brenner, J. (as he then was) in the

British Columbia Supreme Court, this can take a number of weeks. In the case at bar, the alleged offence took place on October 22, 1996. The violation ticket was dated November 6, 1996 and was not received by the Applicant until sometime in January 1997.

**Reasons for Judgment of Brenner, J., p. 4; Leave Application, p. 83;**

**Stead Affidavit, paras. 2 – 3; Leave Application, pp. 5 - 6.**

7. The combined effect of the relevant provisions is that all elements of a Photo Radar offence may be proven by certificate evidence and the registered owner of the motor vehicle will be found guilty unless:

- 10 (a) The motor vehicle owner can establish on a balance of probabilities that either
- (i) he or she had not entrusted the possession of the vehicle to the person who in fact had possession, or
  - (ii) he or she had exercised reasonable diligence and care in entrusting the vehicle to another person; or
- (b) The motor vehicle owner can raise a reasonable doubt about some other element of the alleged offence, for example the time, date, location or speed of vehicle.

8. This scheme must be examined in light of the guaranteed right to be presumed innocent as set out in Section 11(d) of the *Charter*:

“11. Any person charged with an offence has the right

- 20 (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

**Underlying Facts of the Alleged Offence**

9. The following facts were agreed to by the parties at the trial of this matter before a Justice of the Peace:

(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;

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(b) The specified penalty for violation of S. 146(1) of the *Motor Vehicle Act* in this case is a \$100 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 jurisdictions;

(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*.

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**Reasons for Judgment of the Court of Appeal, p. 3; Leave Application, p. 108.**

**Procedural History**

10. The matter came on before Makhdoom, JP in the Provincial Court of British Columbia. Three pieces of evidence were presented by the Crown:

- (a) Certificate of Enforcement Officer Photographic Evidence;
- (b) Certificate of Enforcement Officer Qualified Operator; and

(c) Certificate of Vehicle Ownership.

11. At trial on July 9, 1998 Makhdoom, JP found that Sections 83.1 and 83.2 of the *Motor Vehicle Act* violate Sections 7 and 11(d) of the *Charter* and he accordingly ordered a stay of proceedings against the Applicant.

**Reasons for Judgment of Makhdoom, pp. 21 - 23; Leave Application, pp. 68 - 70.**

12. The Crown made no submissions and adduced no evidence at the trial to justify the impugned provisions under Section 1 of the *Charter*.

13. The Crown appealed to the British Columbia Supreme Court. On November 19, 1998 Brenner, J. allowed the appeal and remitted the matter to the Provincial Court for trial. His Lordship found that Sections 7 and 11(d) of the *Charter* were not violated.

**Reasons for Judgment of Brenner, J., pp. 12, 18; Leave Application, pp. 91, 97.**

14. The Applicant sought Leave to Appeal to the British Columbia Court of Appeal. On November 16, 1999 Leave was denied by Proudfoot, J.A.

**Reasons for Judgment of Proudfoot, J.A.; Leave Application, pp. 98 - 101.**

15. The Applicant then sought review of Proudfoot, J.A.'s decision by a three justice panel. On February 2, 2000, Southin, J.A., with Hollinrake and Rowles, JJ.A. concurring, granted Leave to Appeal on the Section 11(d) issue only. Southin, J.A.'s order was subject to the Crown being granted liberty to adduce evidence in support of a justification argument under Section 1 of the *Charter*. Southin, J.A. further ordered that the Applicant be at liberty to apply for leave to file evidence as well on the Section 1 issue.

**Reasons for Judgment of Southin, J.A., pp. 2-3; Leave Application, pp. 103 - 104.**

16. In granting Leave to Appeal on the Section 11(d) issue, Southin, J.A. said:

“We are also of the opinion that, because the issue raised here as to the constitutionality of Section 83.1 of the *Motor Vehicle Act*, the so called “Photo Radar” section, is a matter of importance in the Province and there is a very great risk in conflicting decisions in the lower courts, leave ought to be given and this Court should address the matter.”

**Reasons for Judgment of Southin, J.A., p. 2; Leave Application, p. 103.**

10 17. The Appeal was heard on February 13, 2001. The Crown adduced no evidence going to the Section 1 analysis although it did make submissions on this issue. As a result, the Applicant was precluded from adducing its own evidence under Section 1.

18. On April 11, 2000, the Court of Appeal rendered its Reasons for Judgment dismissing the appeal and holding that the Photo Radar scheme does not offend Section 11(d) of the *Charter*.

**Reasons for Judgment of the Court of Appeal, pp. 14 -15; Leave Application, pp. 119 - 120.**

### **Future of Photo Radar in British Columbia**

19. The new Government of British Columbia, elected on May 16, 2001, has  
20 indicated its intention to cancel the use of Photo Radar in the Province but as at the date of this Application for Leave to Appeal, Photo Radar is still in use.

**Hoeschen Affidavit, para. 4; Leave Application, p. 37.**

**PART II**  
**POINTS IN ISSUE**

20. The central issue in the proposed appeal is whether the Court of Appeal for British Columbia erred in holding that the Photo Radar scheme as established and administered under Sections 83.1 and 83.2 of the *Motor Vehicle Act* does not infringe the right to be presumed innocent as guaranteed by Section 11(d) of the *Canadian Charter of Rights and Freedoms*.

21. It is submitted that this issue is of sufficient national and public importance to warrant further consideration by this Honourable Court because:

- 10 (a) The decision of the Court of Appeal, which is inconsistent with previous decisions in this Court, significantly diminishes the content of the Section 11(d) right and the extent of the protection afforded thereby;
- (b) The number and value of Photo Radar tickets issued in British Columbia indicate that the scheme has had a broad impact on Canadians;
- (c) The issues raised in the proposed Appeal are not limited to British Columbia given the use of Photo Radar elsewhere in Canada; and
- (d) This Court has in the past recognized the importance of examining the constitutional implications of the use of invasive forms of technology by law enforcement agencies.



**PART III**  
**STATEMENT OF ARGUMENT**

**Errors in the Court of Appeal**

22. Mr. Justice Low on behalf of the Court of Appeal held that the reverse onus provisions of the Photo Radar scheme do not infringe the Section 11(d) right to be presumed innocent. In support of this conclusion, his Lordship cited the decisions of this court in *R. v. Proudlock*, [1979] 1 S.C.R. 525; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; and *R. v. Ellis – Don Ltd.*, [1992] 1 S.C.R. 840.

- 10 23. With respect, Low, J.A. has misapplied these decisions:
- (a) *Proudlock* is a pre-Charter decision which takes no account of this Court’s subsequent analysis of Section 11(d) of the *Charter*; and
  - (b) In both *Wholesale Travel* and *Ellis-Don* this Court (by majority decision in *Wholesale Travel*) upheld the reverse onus provisions in issue under Section 1 of the *Charter*. Contrary to what is suggested by Low, J.A., those decisions do not stand for the proposition that such clauses do not offend Section 11(d).

24. In *R. v. Downey*, Cory, J. for the majority of this Court summarized the key principles underlying the Section 11(d) right as follows:

- 20
- (a) The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
  - (b) If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disapprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

- (c) Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.
- (d) Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.
- (e) A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(d).
- (f) A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the *Charter* if the provision (such as the truth of a statement) must be established by the accused;
- (g) It must of course be remembered that statutory presumptions which infringe s. 11(d) may still be justified pursuant to s. 1 of the *Charter*.

***R. v. Downey*, [1992] 2 S.C.R. 10 at p. 29.**

25. This Court has made it clear that, in the context of strict liability offences such as that in issue here, a requirement that the accused establish (i.e. prove on a balance of probabilities) that he exercised due diligence will offend Section 11(d):

“The absence of due diligence (presence of negligence) is clearly necessary for a finding of guilt. Thus, it seems clear to me that under Section 37.2(2) an accused could be convicted of false/misleading advertising despite the existence of a reasonable doubt as to whether the accused was duly diligent and, therefore, despite the existence of a reasonable doubt as to guilt.”

***R. v. Wholesale Travel Group Inc.*, supra per Lamer, C.J. at p. 198; See also LaForest, J. at p. 210; Iacobucci, J. at p. 255; McLachlin, J. (as she then was) at p. 259;**

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

26. These authorities suggest that the validity of such statutory provisions falls to be determined under Section 1 of the *Charter*. This point will be addressed in further detail below.

27. It is submitted that the Photo Radar scheme as established under Sections 83.1 and 83.2 infringes the right to be presumed innocent as guaranteed by Section 11(d) because:

(a) The legislation requires the accused to establish on a balance of probabilities the statutory defences set out in Section 83.1(3), including the defence of due diligence; and

(b) The mandatory presumption set out in Section 83.2(3) (read in conjunction with Section 24 of the *Interpretation Act*) taken together with the administrative delay in the delivery of the violation ticket will result in conviction of accused persons notwithstanding that there may exist reasonable doubt. This is particularly so given the absence of a right to cross-examine the enforcement officer who issued the certificate.

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28. The case at bar provides a textbook example of the hurdles faced by a Defendant in attempting to defend a Photo Radar ticket. The alleged offence occurred on October 22, 1996. The Violation Ticket was not issued until November 6, 1996 and not received by the Applicant until January, 1997. Given the passage of time, Mr. Stead (President of the Applicant company) has no independent recollection of the circumstances surrounding the alleged offence nor any means of refreshing his memory. As such, it is virtually impossible for him to either raise a doubt as to one of the requisite elements of the offence or establish one of the statutory defences set out in Section 83.1(3).

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**Stead Affidavit, para. 5; Leave Application, p. 6.**

29. The Photo Radar scheme as established and administered under Sections 83.1 and 83.2 of the *Motor Vehicle Act* establishes the Photo Radar results, as reflected in the certificate, as paramount and virtually ensures that innocent people will be convicted.

## **Importance of the Issues Raised in the Proposed Appeal**

30. For the reasons set out in paragraphs 3 and 21 above, it is submitted that the issues raised in the proposed Appeal are of sufficient national and public importance to warrant Leave being granted to this Court.

### **(a) The nature of the Section 11(d) right**

31. The right to be presumed innocent is a fundamental constitutional value in Canada:

10 “The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused is guilty beyond a reasonable doubt he or she is innocent. This is essential in a society committed to fairness and social justice. The  
20 presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are decent and law abiding members of the community until proven otherwise.”

***R v. Oakes*, [1986] 1 S.C.R. 103 at p. 119 – 120.**

32. This Court has confirmed that Section 11(d) applies to all *quasi* criminal offences, including regulatory offences such as that created by Sections 83.1 and 83.2 of the *Motor Vehicle Act*.

***R. v. Wholesale Travel Group Inc.*, supra at p. 196.**

33. This Court has said that the right to be presumed innocent requires, at a minimum, that:

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

- (b) The Crown bears 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; and
- (c) Prosecutions must be carried out in accordance with fair, public and lawful procedures.

***R. v. Oakes, supra at p. 121.***

34. The interpretation of Section 11(d) advanced by the Court of Appeal in this case does not conform to these minimum requirements. As such, the protection afforded the citizens of British Columbia under Section 11(d) has been diminished.

10 35. In particular, the Photo Radar scheme presumes the infallibility of the technology and establishes the Photo Radar results as conclusive and determinative of the offence in that an accused person will generally not have available to himself or herself the facts or knowledge necessary to rebut the presumption created by the certificate evidence. This strikes at the heart of the Section 11(d) guarantee.

**(b) Broad Impact of Photo Radar**

36. Statistics prepared by the British Columbia Ministry of the Attorney General indicate that between August 1986 when Photo Radar was instituted in British Columbia and March 2001, 1,094,896 Photo Radar tickets were issued in British Columbia.

**Stead Affidavit, para. 6; Leave Application, p. 6.**

20 37. That means that in excess of \$100,000,000 in Photo Radar fines have been imposed in British Columbia alone.

38. Moreover, Photo Radar has in recent months been the focus of wide spread public and media discussion in British Columbia. It is clearly an issue that has touched the public consciousness.

**Hoeschen Affidavit, para. 2 - 3; Leave Application, pp. 36 - 37.**

**(c) The Issues Raised in the Proposed Appeal are not Limited to British Columbia**

39. British Columbia is not alone in Canada in its use of Photo Radar.

40. In Alberta, Photo Radar is not provincially mandated but rather is operated in a number of municipalities under authorization by the Alberta Solicitor General and pursuant to the Alberta *Highway Traffic Act*, R.S.A. 1980, c. H-7 and the *Provincial Offences Procedure Act*, R.S.A. 1980, c.P-21.5. Photo Radar is currently being used by the municipal police services in Calgary, Edmonton, Lethbridge, Medicine Hat and Camrose and by the RCMP in Strathcona, Rockyview, Wood Buffalo and Red Deer.

**Ostrow Affidavit, para. 5; Leave Application, p. 35.**

41. The legislative provisions governing the use of Photo Radar in Alberta provide that evidence of an offence may be given by way of affidavit by the operator of the Photo Radar device and that affidavit will be accepted as *prima facie* proof of the offence in the absence of evidence to the contrary. The Defendant may only cross-examine the deponent with leave of the Court.

***Provincial Offences Procedure Act, supra at s. 38.1; Leave Application, p.158.***

42. In Ontario, Photo Radar was introduced in 1993 but was discontinued on provincial highways in late 1995. However, the provisions governing the use of Photo Radar

were not removed from the Ontario *Highway Traffic Act*, R.S.O. 1990, c.H-8, and at least one municipality has requested that the Minister of Transportation re-institute Photo Radar.

**Ostrow Affidavit, para.7; Leave Application, p. 35.**

43. Section 205.1(1) of the *Highway Traffic Act* provides that:

“a photograph obtained through the use of a photo radar system is admissible in evidence in a proceeding under the *Provincial Offences Act* respecting an alleged offence under section 128 of the *Highway Traffic Act* if the alleged offence was committed within an area of Ontario designated by the regulations.”

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**Leave Application, p. 146.**

44. Under Section 205.1(3), in the absence of evidence to the contrary, the photograph is proof that the vehicle was, on the date and at the time shown or indicated on the photograph, being driven at the rate of speed shown or indicated on the photograph.

**Leave Application, p. 146.**

45. As in British Columbia and Alberta, a Defendant may only cross-examine the Photo Radar operator with leave of the Court.

***Highway Traffic Act, supra at s. 205.9; Leave Application, p. 147.***

20 46. The Regulations do not currently designate any areas in Ontario for the purposes of Section 205.1(1). However, a Private Members Bill (Bill 148) has been introduced into the Legislative Assembly of Ontario which Bill would seek to amend the Ontario *Highway Traffic Act* so as to permit Photo Radar on highway 401 between London and Windsor.

**Ostrow Affidavit, para. 7; Leave Application, p. 35.**

47. In addition to British Columbia, Alberta and Ontario, the Applicant understands that Photo Radar is also currently being considered in Saskatchewan and Quebec.

**See reference to Saskatchewan in Exhibit “B” to Hoeschen Affidavit; Leave Application, p. 40.**

**(d) Review by this Court of Emerging Law Enforcement Technologies**

48. Photo Radar is a relatively new and emerging technology available for use by law enforcement agencies. This Court has in the past considered it necessary and appropriate to subject to constitutional scrutiny the use of such technologies. See for example:

- (a) *R. v. Duarte*, [1990] 1 S.C.R. 30 (Electronic audio surveillance);
- (b) *R. v. Wise*, [1992] 1 S.C.R. 527 (Electronic tracking devices);
- (c) *R. v. Wong*, [1990] 3 S.C.R. 36 (Video surveillance);
- (d) *R. v. St. Pierre*, [1995] 1 S.C.R. 791 (Breathalyzer).

49. In *Wong*, La Forest, J. noted that:

“...constitutional provisions aimed at protecting individual rights and liberties must be interpreted as providing a continuing framework for the legitimate exercise of government power. These observations remind one that the broad and general right to be secure from unreasonable search and seizure guaranteed by Section 8 is meant to keep pace with technological development and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by the agents of the State, whatever technical form the means of invasions may take.”

***R. v. Wong, supra* at pp. 43 – 44.**

50. While His Lordship’s observations were made in a context of a challenge under Section 8 of the *Charter*, it is submitted that they are apposite to the case at bar.

51. This Court’s decision in *St. Pierre, supra* is particularly instructive as to the importance of the issues raised in this case. The issue in *St. Pierre* concerned the use of certificate evidence to establish the requisite elements of the offence under Section 253(b) of the *Criminal Code* of driving with a blood alcohol level of over .08. In particular, the Court



examined the statutory presumptions created by Section 253(b) and the meaning of “evidence to the contrary”. It is submitted that the similar provisions governing the British Columbia Photo Radar scheme are equally deserving of scrutiny by this Court.

**Section 1 of the Charter**

52. The Applicant acknowledges that the absence of a full Section 1 record and a Section 1 analysis in the Courts below may be of concern to this Court in considering whether or not to grant Leave to Appeal. It is the position of the Applicant however that the absence of a Section 1 record does not diminish the importance of the issues raised nor does it suggest that this case is not worthy of further consideration by this Court. If anything, the fact that this case  
10 has progressed through the Courts without a full Section 1 argument underscores the need for further intervention by this Court.

53. It should be noted that the Crown was offered an opportunity to adduce Section 1 evidence before the Justice of the Peace but declined. It was subsequently an express term of the Order granting leave to appeal to the Court of Appeal that the Crown be given an opportunity to adduce Section 1 evidence. The Crown again declined.

**Reasons for Judgment of Southin, J.A., p. 3; Leave Application, p. 104.**

54. This is fundamentally a Section 1 case. It is clear from this Court’s authorities interpreting Section 11(d) that the legislative provisions governing Photo Radar infringe the right  
20 set out in Section 11(d) to be presumed innocent. The real issue therefore is whether that infringement can be justified.

**See *supra* at paras 22 - 29.**

55. To date the Crown has not been called upon to justify the Section 11(d) infringement. In particular, the Crown has not been required to establish that Photo Radar is an effective and proportional means of achieving the stated objective of increasing public safety. The decision of the Court of Appeal holding that the impugned legislation does not infringe Section 11(d) means that the Crown will never be called upon to justify its use of Photo Radar. Put another way, given the Court of Appeal's decision, it is unlikely that a "better" case will present itself to this Court for consideration of these important questions.

56. Moreover, unless this Court intervenes, the narrowing of the Section 11(d) right reflected in the Court of Appeal's decision will be permanent for the people of British Columbia.

10 57. It is submitted therefore that Leave should be granted. If this Court agrees that Photo Radar infringes Section 11(d) it may grant the Crown leave to adduce Section 1 evidence before it or send the matter back for trial on the Section 1 issue.

### **Cancellation of Photo Radar in British Columbia**

58. As noted above in paragraph 19, the new Government of British Columbia has announced its intention to cancel Photo Radar in British Columbia, although as at the date of this Application for Leave to Appeal Photo Radar is still in use in the province.

59. It is submitted that this announced intention does not lessen the importance of the issues raised in the proposed Appeal, most notably the erroneous narrowing of the right protected under Section 11(d) of the *Charter*. Moreover, as noted in the newspaper article attached as  
20 Exhibit "B" to the Hoeschen Affidavit, Photo Radar is, and will remain, a very live issue in British Columbia and elsewhere in Canada.

## **Summary and Conclusion**

60. There is a delicate balance between, on the one hand, allowing law enforcement agencies to carry out their work in the most effective and productive manner and, on the other hand, respecting the rights of citizens. Maintaining that balance has always been a challenge for both legislators and courts, yet the balance must be respected. As Dickson, C.J. noted in dissent in *Dedman v. The Queen*, a case concerning random roadside breathalyzer testing:

10 “In striving to achieve one desirable objective, the reduction of the death and injury that occurs each year from impaired driving, we must ensure that other, equally important, social values are not sacrificed. Individual freedom from interference by the state, no matter how laudable the motive of the police, must be guarded zealously against intrusion. Ultimately, this freedom is the measure of everyone’s liberty and one of the cornerstones of the quality of life in our democratic society.”

***Dedman v. The Queen*, [1985] 2 S.C.R. 2 at p. 19.**

61. The provisions governing Photo Radar in British Columbia upset the balance in favour of the Crown. Rather than simply making use of Photo Radar as a useful law enforcement tool, the legislation presumes the infallibility of Photo Radar and permits the Photo Radar certificate to virtually determine the offence. As a consequence, the right of accused persons to  
20 be presumed innocent as guaranteed under Section 11(d) of the *Charter* is rendered illusory.

62. It is submitted that in all of the circumstances further review by this Honourable Court is warranted.

**PART IV**  
**NATURE OF ORDER SOUGHT**

63. That Leave to Appeal to this Honourable Court be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 7, 2001

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RON A. SKOLROOD  
Counsel for the Applicant/Appellant

## PART V

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3. <i>Highway Traffic Act</i> , R.S.O. 1990, c.H-8, Part XIV.1	15
4. <i>Interpretation Act</i> , R.S.B.C. 1996, c. 238, s. 24	3, 11
5. <i>Motor Vehicle Act</i> , R.S.B.C. 1996, c.318, ss. 83.1 and 83.2	1, 2, 3, 5,6, 8, 11, 12
6. <i>Provincial Offences Procedure Act</i> , R.S.A. 1980, c.P-21.5	14