

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ALEXANDRA NICOLE DRUTZ

Before Justice Peter C. West

Heard on October 9, 2009

Reasons for Judgment released on November 19, 2009

Mr. Z. Green for the Crown

Mr. P. Cooper and Mr. V. Rondinelli..... for the accused Alexandra Nicole Drutz

WEST J.:

1. Introduction and Position of the Parties:

[1] This is an application by Alexandra Nicole Drutz for a declaration that section 172 (the “stunt driving” portion) of the *Ontario Highway Traffic Act (HTA)* in combination with section 3(7) of Ontario Regulation 455/07 are of no force or effect by virtue of section 52 of the *Constitution Act, 1982*. It is argued that the combination of section 172 and section 3(7) creates an absolute liability offence with penalty provisions which provide for up to six months imprisonment, thereby violating section 7 of the *Canadian Charter of Rights and Freedoms*.

[2] It is also argued that the automatic seizure and detention of a motor vehicle mandated by sections 172(5)(b), (7)(a) and (b) violates section 8 of the *Charter* as being an unreasonable search and seizure and consequently, I should enter a stay of proceedings pursuant to section 24(1).

[3] Further, Ms. Drutz seeks an order for costs pursuant to section 24(1) of the *Charter* relating to her costs and other losses connected to the seizure and detention of the motor vehicle in this case.

[4] It is the position of the Crown that section 172 of the *HTA* and section 3(7) of the Regulations creates a strict liability offence and is therefore constitutional. Further, impounding the vehicle that is being operated at the time of the alleged commission of the offence does not infringe section 8 of the *Charter*. Even if section 8 is infringed this is not one of the “clearest of cases” where it would be appropriate for me to exercise my discretion to stay the charge pursuant to section 24(1) of the *Charter*.

[5] It is the Crown’s position that I do not have jurisdiction to entertain a “costs” application for the “losses connected to the seizure and detention of the motor vehicle” as a *Charter* section 24(1) remedy.

[6] Finally, it is the alternative position of the Crown, that if I find that section 172 of the *Highway Traffic Act* in combination with section 3(7) of Ontario Regulation 455/07 creates an absolute liability offence, I should only excise that portion of the penalty provision in section 172(2) that imposes a term of imprisonment up to six months rather than striking down the entire section; in other words, I should read down section 172(2) so that it conforms with section 7 of the *Charter*.

2. **Relevant Legislation:**

[7] Sections 7, 8 and 52(1) of the *Canadian Charter of Rights and Freedoms* provide:

(a) Section 7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(b) Section 8

Everyone has the right to be secure against unreasonable search or seizure.

(c) Section 52(1)

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[8] Section 172 of the *Highway Traffic Act*, R.S.O. 1990, CHAPTER H.8 reads as follows:

Racing, stunts, etc., prohibited

172. (1) No person shall drive a motor vehicle on a highway in a race or contest, *while performing a stunt* or on a bet or wager. (Emphasis added)

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than \$2,000 and not more than \$10,000 or *to imprisonment for a term of not more than six months*, (Emphasis added) or to both, and in addition his or her driver's licence may be suspended,

(a) on a first conviction under this section, for not more than two years; or

(b) on a subsequent conviction under this section, for not more than 10 years.

Determining subsequent conviction

(3) In determining whether a conviction is a subsequent conviction for the purposes of subsection (2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

10-year limitation

(4) A conviction that is more than 10 years after the previous conviction is deemed to be a first conviction for the purpose of subsection (2).

Police to require surrender of licence, detention of vehicle

(5) Where a police officer believes on reasonable and probable grounds that a person is driving, or has driven, a motor vehicle on a highway in contravention of subsection (1), the officer shall,

(a) request that the person surrender his or her driver's licence; and

(b) detain the motor vehicle that was being driven by the person until it is impounded under clause (7) (b).

Administrative seven-day licence suspension

(6) Upon a request being made under clause (5) (a), the person to whom the request is made shall forthwith surrender his or her driver's licence to the police officer and, whether or not the person is unable or fails to surrender the licence to the police officer, his or her driver's licence is suspended for a period of seven days from the time the request is made.

Administrative seven-day vehicle impoundment

(7) Upon a motor vehicle being detained under clause (5) (b), the motor vehicle shall, at the cost of and risk to its owner,

(a) be removed to an impound facility as directed by a police officer; and

(b) be impounded for seven days from the time it was detained under clause (5) (b).

Release of vehicle

(8) Subject to subsection (15), the motor vehicle shall be released to its owner from the impound facility upon the expiry of the period of impoundment.

Early release of vehicle

(9) Despite the detention or impoundment of a motor vehicle under this section, a police officer may release the motor vehicle to its owner before it is impounded under subsection (7) or, subject to subsection (15), may direct the operator of the impound facility where the motor vehicle is impounded to release the motor vehicle to its owner before the expiry of the seven days if the officer is satisfied that the motor vehicle was stolen at the time that it was driven on a highway in contravention of subsection (1).

Duty of officer re licence suspension

(10) Every officer who asks for the surrender of a person's driver's licence under this section shall keep a record of the licence received with the name and address of the person and the date and time of the suspension and shall, as soon as practicable after receiving the licence, provide the person with a notice of suspension showing the time from which the suspension takes effect and the period of time for which the licence is suspended.

Duty of officer re impoundment

(11) Every officer who detains a motor vehicle under this section shall prepare a notice identifying the motor vehicle that is to be impounded under subsection (7), the name and address of the driver and the date and time of the impoundment and shall, as soon as practicable after the impoundment of the motor vehicle, provide the driver with a copy of the notice showing the time from which the impoundment takes effect, the period of time for which the motor vehicle is impounded and the place where the vehicle may be recovered.

Same

(12) A police officer shall provide a copy of the notice prepared under subsection (11) to the owner of the motor vehicle by delivering it personally or by mail to the address of the owner shown on the permit for the motor vehicle or to the latest address for the owner appearing on the records of the Ministry.

No appeal or hearing

(13) There is no appeal from, or right to be heard before, a vehicle detention, driver's licence suspension or vehicle impoundment under subsection (5), (6) or (7), but this subsection does not affect the taking of any proceeding in court.

Lien for storage costs

(14) The costs incurred by the person who operates the impound facility where a motor vehicle is impounded under this section are a lien on the motor vehicle that may be enforced under the *Repair and Storage Liens Act*.

Costs to be paid before release of vehicle

(15) The person who operates the impound facility where a motor vehicle is impounded under subsection (7) is not required to release the motor vehicle until the removal and impound costs for the vehicle have been paid.

Owner may recover losses from driver

(16) The owner of a motor vehicle that is impounded under this section may bring an action against the driver of the motor vehicle at the time the vehicle was detained under clause (5) (b) to recover any costs or other losses incurred by the owner in connection with the impoundment.

Offence

(17) Every person who obstructs or interferes with a police officer in the performance of his or her duties under this section is guilty of an offence and on conviction is liable to a fine of not less than \$200 and not more than \$5,000 or to imprisonment for a term of not more than six months, or to both.

Intent of suspension and impoundment

(18) The suspension of a driver's licence and the impoundment of a motor vehicle under this section are intended to promote compliance with this Act and to thereby safeguard the public and do not constitute an alternative to any proceeding or penalty arising from the same circumstances or around the same time.

Impoundment concurrent with other administrative impoundments

(18.1) The impoundment of a motor vehicle under this section runs concurrently with an impoundment, if any, of the same motor vehicle under section 41.4, 48.4, 55.1, 55.2 or 82.1.

(19) REPEALED: S.O. 2008, c. 17, s. 43, effective March 6, 2009 (O. Gaz. 2009 p. 578).

Regulations

(20) The Lieutenant Governor in Council may make regulations,

(a) requiring police officers to keep records with respect to licence suspensions and vehicle impoundments under this section for a specified period of

time and to report specified information with respect to licence suspensions and vehicle impoundments to the Registrar and governing such records and reports;

(b) exempting any class of persons or class or type of vehicles from any provision or requirement of this section or of any regulation made under this section, prescribing conditions for any such exemptions and prescribing different requirements for different classes of persons or different classes or types of vehicles;

(c) defining the terms "race", "contest" and "stunt" for the purposes of this section.

Definition

(21) In this section,

"driver's licence" includes a driver's licence issued by another jurisdiction.

Same

(22) In this section and in section 172.1,

"motor vehicle" includes a street car, a motorized snow vehicle, a farm tractor, a self-propelled implement of husbandry and a road-building machine.

[9] The Regulations under the *Highway Traffic Act*, R.S.O. 1990 CHAPTER H.8, Ont. Reg. 455/07 (made June 27, 2007 and filed August 15, 2007) provide as follows:

Definition, "race" and "contest"

2. (1) For the purposes of section 172 of the Act, "race" and "contest" include any activity where one or more persons engage in any of the following driving behaviours:

1. Driving two or more motor vehicles at a rate of speed that is a marked departure from the lawful rate of speed and in a manner that indicates the drivers of the motor vehicles are engaged in a competition.
2. Driving a motor vehicle in a manner that indicates an intention to chase another motor vehicle.
3. Driving a motor vehicle without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person by,
 - i. driving a motor vehicle at a rate of speed that is a marked departure from the lawful rate of speed,

- ii. outdistancing or attempting to outdistance one or more other motor vehicles while driving at a rate of speed that is a marked departure from the lawful rate of speed, or
- iii. repeatedly changing lanes in close proximity to other vehicles so as to advance through the ordinary flow of traffic while driving at a rate of speed that is a marked departure from the lawful rate of speed.

(2) In this section,

"marked departure from the lawful rate of speed" means a rate of speed that may limit the ability of a driver of a motor vehicle to prudently adjust to changing circumstances on the highway.

Definition, "stunt"

3. For the purposes of section 172 of the Act, "stunt" includes any activity where one or more persons engage in any of the following driving behaviours:

- 1. Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift axles on commercial motor vehicles.
- 2. Driving a motor vehicle in a manner that indicates an intention to cause some or all of its tires to lose traction with the surface of the highway while turning.
- 3. Driving a motor vehicle in a manner that indicates an intention to spin it or cause it to circle, without maintaining control over it.
- 4. Driving two or more motor vehicles side by side or in proximity to each other, where one of the motor vehicles occupies a lane of traffic or other portion of the highway intended for use by oncoming traffic for a period of time that is longer than is reasonably required to pass another motor vehicle.
- 5. Driving a motor vehicle with a person in the trunk of the motor vehicle.
- 6. Driving a motor vehicle while the driver is not sitting in the driver's seat.
- 7. Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit.
- 8. Driving a motor vehicle without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person by,

- i. driving a motor vehicle in a manner that indicates an intention to prevent another vehicle from passing,
- ii. stopping or slowing down a motor vehicle in a manner that indicates the driver's sole intention in stopping or slowing down is to interfere with the movement of another vehicle by cutting off its passage on the highway or to cause another vehicle to stop or slow down in circumstances where the other vehicle would not ordinarily do so,
- iii. driving a motor vehicle in a manner that indicates an intention to drive, without justification, as close as possible to another vehicle, pedestrian or fixed object on or near the highway, or
- iv. making a left turn where,

(A) the driver is stopped at an intersection controlled by a traffic control signal system in response to a circular red indication;

(B) at least one vehicle facing the opposite direction is similarly stopped in response to a circular red indication; and

(C) the driver executes the left turn immediately before or after the system shows only a circular green indication in both directions and in a manner that indicates an intention to complete or attempt to complete the left turn before the vehicle facing the opposite direction is able to proceed straight through the intersection in response to the circular green indication facing that vehicle.

Exceptions

4. (1) Despite section 2, "race" and "contest" do not include,

(a) a rally, navigational rally or similar event that is conducted,

(i) under the supervision of the Canadian Association of Rally Sport,

(ii) under the supervision of a club or association approved in writing by the Ministry, or

(iii) with the written approval of the road authority or road authorities having jurisdiction over the highway or highways used;

(b) motor vehicle owners engaged in a tour, scenic drive, treasure hunt or other similar motoring event in which the participants drive responsibly and in a manner that indicates an overall intention to comply with the provisions of the Act; or

(c) an event held on a closed course with the written approval of the road authority having jurisdiction over the highway, including any event lawfully using any of the trademarks "CART", "Formula One", "Indy", "IndyCar", "IRL" or "NASCAR".

(2) Despite sections 2 and 3, "race", "contest" and "stunt" do not include any activity required for the lawful operation of motor vehicles described in subsections 62 (15.1) or 128 (13) of the Act, or the lawful operation of an emergency vehicle as defined in subsection 144 (1) of the Act.

[10] Section 128(14), (14.1) & (15) of the *Highway Traffic Act*, R.S.O. 1990, CHAPTER H.8 reads as follows:

Penalty

(14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,

(a) is less than 20 kilometres per hour over the speed limit, to a fine of \$3 for each kilometre per hour that the motor vehicle was driven over the speed limit;

(b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the speed limit, to a fine of \$4.50 for each kilometre per hour that the motor vehicle was driven over the speed limit;

(c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the speed limit, to a fine of \$7 for each kilometre per hour that the motor vehicle was driven over the speed limit; and

(d) is 50 kilometres per hour or more over the speed limit, to a fine of \$9.75 for each kilometre per hour that the motor vehicle was driven over the speed limit. 2005, c. 26, Sched. A, s. 17 (7).

Penalty for speeding in construction zones

(14.1) Every person who contravenes this section in a construction zone designated under subsection (8) or (8.1) when there is a worker in the construction zone is liable on conviction, not to the fines set out in subsection (14), but, where the rate of speed at which the motor vehicle was driven,

(a) is less than 20 kilometres per hour over the posted speed limit, to a fine of double the fine set out in clause (14) (a) for each kilometre per hour that the motor vehicle was driven over the speed limit;

(b) is 20 kilometres per hour or more but less than 30 kilometres per hour over the posted speed limit, to a fine of double the fine set out in clause (14)

(b) for each kilometre per hour that the motor vehicle was driven over the speed limit;

(c) is 30 kilometres per hour or more but less than 50 kilometres per hour over the posted speed limit, to a fine of double the fine set out in clause (14)

(c) for each kilometre per hour that the motor vehicle was driven over the speed limit; and

(d) is 50 kilometres per hour or more over the posted speed limit, to a fine of double the fine set out in clause (14) (d) for each kilometre per hour that the motor vehicle was driven over the speed limit. 2005, c. 26, Sched. A, s. 17 (8).

Suspension of licence on conviction

(15) Subject to subsection 207 (7), where a court has convicted a person for a contravention of this section and has determined that the person convicted was driving at a rate of speed of 50 or more kilometres per hour greater than the speed limit, the court may,

(a) suspend the driver's licence of the person for a period of not more than 30 days;

(b) upon the first subsequent conviction where the court determined in respect of each conviction that the person was driving at a rate of speed of 50 or more kilometres per hour greater than the speed limit, suspend the driver's licence of the person for a period of not more than 60 days;

(c) upon the second subsequent conviction or an additional subsequent conviction, where the court determined in respect of each conviction that the person was driving at a rate of speed of 50 or more kilometres per hour greater than the speed limit, suspend the driver's licence of the person for a period of not more than one year. 2005, c. 26, Sched. A, s. 17 (9).

3. The Facts:

[11] As this application was brought immediately after arraignment, no facts were presented to the Court concerning Ms. Drutz's driving behaviour on March 28, 2008. I have been advised by both counsel that Section 3(7) of the Regulations (O. Reg. 455/07) is applicable to Ms. Drutz's conduct. I have also been advised that pursuant to being charged Ms. Drutz's license was suspended for seven days and the vehicle she was operating was impounded for seven days.

[12] I am also aware of the decision of Griffin J. in *R. v. Raham*, unreported, September 4, 2009 (Ont. C. J.) declaring that the offence of stunt driving under section 172(1) of the *Highway Traffic Act*, as defined by section 3(7) of the Ontario Regulation 455/07 is an abso-

lute liability offence, which cannot be saved by section 1 of the *Charter* and is therefore unconstitutional as one could be imprisoned for up to six months, which is contrary to section 7 of the *Charter*. I was advised by Mr. Green that the Crown appeal of Justice Griffin's ruling is set for sometime in January 2010.

[13] The issues raised in this application pursuant to sections 8 and 24(1) were not argued before Justice Griffin.

4. **Analysis:**

i. **Absolute liability or strict liability**

[14] The first issue to be determined is whether driving 50 km or more above the speed limit as set out in section 3(7) of the Regulations creates an absolute liability offence or a strict liability offence. In *Reference re: Motor Vehicle Act, British Columbia, s. 94(2)*, [1985] S.C.R. 486; 23 C.C.C. (3d) 289 at 293, Lamer J., for the majority of the Supreme Court of Canada held that "... absolute liability and imprisonment cannot be combined."

[15] Both parties are agreed that if I find that the combined effect of section 172 of the *HTA* and section 3(7) of the Regulations (455/07) creates an absolute liability offence, the offence cannot be saved by section 1 of the *Charter* as a reasonable limit on the appellant's rights under section 7 of the *Charter*.

[16] The starting point for any analysis of the classification of a "regulatory" or "public welfare" offence is the Supreme Court of Canada decision of *R. v. The City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; 40 C.C.C. (2d) 353. Dickson J. for the Court divided these types of offences into three categories – *mens rea* offences, strict liability offences and absolute liability offences and defined them, respectively, as follows: (at pp. 373-374 C.C.C.)

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

[17] Justice Dickson then set out how to differentiate among the three categories of regulatory offences at p. 374 C.C.C..

Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. *The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used* will be primary considerations in determining whether the offence falls into the third category. (Emphasis added)

[18] MacPherson J., on behalf of the Ontario Court of Appeal, in *R. v. Kanda*, (2008) 88 O.R. (3d) 732; [2008] O.J. No. 80 held that based on the above passage from *Sault Ste. Marie*, Dickson J. articulated a presumption that public welfare offences are strict liability offences and consequently, this presumption must be the starting point in any analysis of a regulatory provision such as section 172 of the *HTA* and section 3(7) of the Regulations. He further held that "the classification of a particular provision follows from an assessment of the four factors ... — *the overall regulatory pattern, the subject matter, the penalty, and the precision of the language used.*" (Emphasis added)

[19] Before turning to an assessment of these four factors, I wish to comment on two decisions of the Supreme Court of Canada that followed *Sault Ste. Marie, supra*; namely, *R. v. Pontes* [1995] 3 S.C.R. 44 and *Lévis (City) v. Tétreault* [2006] 1 S.C.R. 420.

[20] In *Pontes, supra*, Mr. Justice Cory, for the majority, appeared to set out a two-stage test for determining whether an offence is an absolute liability offence. The four factors set out in *Sault Ste. Marie* should first be considered and then, secondly, "the availability of a due diligence defence must be considered...in order for an offence to be one of strict liability, the defence of due diligence *must* be available." (at para. 28) (Emphasis in the original)

[21] In *Tétreault, supra*, LeBel J., in reconsidering *Pontes, supra*, held

This added refinement [The second stage which was set out by Justice Cory in *Pontes*.] to the classification approach established in *Sault Ste. Marie* does not make it easier to apply. The objective of the interpretive approach adopted in *Sault Ste. Marie* is in fact to *determine the nature of the defences available to the accused. To say that it is necessary to determine whether the accused can plead due diligence amounts simply to restating the very purpose of this judicial exercise.* It would therefore be better to return to the clear analytical framework and classification approach adopted in *Sault Ste. Marie*. (Emphasis added)

[22] Consequently, part of the assessment and analysis in considering the four factors set out in the classification approach in *Sault Ste. Marie* is whether there is, in fact, a due diligence defence available on a particular offence. If a due diligence defence is not available, the presumption that public welfare offences should be classified as strict liability must fail. See also *R. v. Wilson* [1997] N.B.J. No. 377 at para. 17 (per Bastarache, J. N.B.C.A.)

ii. **Analysis of the Four Factors in *Sault Ste Marie***

[23] I now turn to an assessment of the four factors set out in *Sault Ste. Marie, supra*.

A: Overall Regulatory Scheme

[24] The overall regulatory scheme of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 as noted by MacPherson, J. in *Kanda, supra*, at para. 26, creates all three classifications of offences and, to that extent, the “overall regulatory pattern is neutral.” Therefore, the overall regulatory scheme of the *Highway Traffic Act* will not assist me in the assessment of whether section 172 of the *HTA* and section 3(7) of the Regulations is a strict liability or an absolute liability offence.

B: The Subject Matter

[25] The conduct described in section 3(7) of O. Reg. 455/07 is essentially driving at a speed 50 percent or more above the permissible maximum speed limits set in Ontario. The objective of this provision is to address public safety by deterring excessive speed. As Justice Griffin observed in *R. v. Raham, supra*, p. 14:

Speeding is a factor in many accidents, which have resulted in death, serious bodily harm and significant property damage.

Excessive speed or extreme speed only creates greater risk and in the interest of protecting the public it was determined that there must be more serious sanctions for the driver who drives at grossly excessive speeds.

[26] In *R. v. Hickey* (1976), 13 O.R. (2d) 228; 30 C.C.C. (2d) 416 the Ontario Court of Appeal held that the offence of speeding under the *Highway Traffic Act* was an offence of absolute liability and consequently, a reasonable mistake of fact was not a defence. In a recent Ontario Court of Appeal decision, *Corporation of the City of London v. Polewsky* (2005), 202 C.C.C. (3d) 257, at para. 3, the Court declined to revisit *Hickey* holding that:

Speed is a factor in many collisions. The *overall regulatory pattern adopted by the legislature, the subject matter of the legislation, and the language used* suggest that speeding should continue to be interpreted as an offence of absolute liability. (Emphasis added)

[27] In *Polewsky*, the Court applied the factors set out in *Sault Ste. Marie* and came to the conclusion that speeding pursuant to section 128 of the *Highway Traffic Act* was an absolute liability offence. There was no necessity to consider the third factor; namely, the penalty

imposed, as the only consequences in section 128 were escalating fines, dependant upon the rate of speed in excess of the speed limit and a license suspension, in the case of driving 50 or more kilometres over the speed limit.

[28] It is interesting to note that the majority judgment of Galligan J. in the Ontario Divisional Court decision in *R. v. Hickey* (1976), 12 O.R. (2d) 578 concluded that the offence of speeding was, in fact, a strict liability offence. Justice Galligan held that:

...the appellant legally had available to him the defence that he honestly believed on reasonable grounds in a state of facts which if true would have rendered his act an innocent one and that he was entitled to have that defence adjudicated upon. The failure of the learned trial Judge to adjudicate upon that defence amounted to an error in law.

This, of course, is the Crown's argument in this case, that the applicant has available to her the defence that she honestly believed, on reasonable grounds, in a state of facts which if true would render her act an innocent one; namely, this is a strict liability offence where the defence of due diligence is available. This position was rejected by Estey, C.J.H.C., in dissent, who reached "the conclusion...that s. 82 [now section 128] creates a strict liability affording no defence of honest and reasonable mistake of fact or, in other terminology, an absolute liability."

[29] Jessup J., in *R. v. Hickey*, on behalf of the Court, adopted Estey, C.J.H.C. categorization (which was later adopted by Dickson J. in *Sault Ste. Marie*, as noted above in para. 16, *supra*.) and found that speeding was an absolute liability offence for which the defence of reasonable mistake of fact is not available.

[30] Section 128 of the *HTA* provides for the various rates of speed permitted on roads and highways in Ontario. Subsections 128(14) and 128(14.1) set out the penalties to be imposed depending on the rate of speed in excess of the speed limit. Subsections 128(14)(d) and 128(14.1)(d) set out the penalty for driving a motor vehicle at a rate of speed 50 kilometres or more over the speed limit. Subsection 128(15) sets out an additional penalty involving suspension of a driver's license where a motorist is driving 50 kilometres or more over the speed limit.

[31] The Ontario legislature introduced the Safer Roads for a Safer Ontario Act, 2007 (Bill 203), which included amendments to section 172 of the *Ontario Highway Traffic Act* on April 12, 2007. As is indicated in the debates, which took place over several days, Bill 203 received support from all three political parties and focused primarily on the increased prevalence of drinking and driving offences and street racing activities by youthful drivers involving high rates of speed, which resulted in many fatalities or serious injury.¹ The Bill was passed unanimously on May 29, 2007. The specific definitions of "race", "contest" and "stunt" set out in O. Reg. 455/07, pursuant to section 172(20)(c), were never debated in the legislature and were prepared by the government subsequently. The Regulations were not

¹ The debates in Hansard can be found on the following dates: April 19 and 23, 2007 (first reading); April 24, 2007 (second reading) and May 14 and 28, 2007 (third reading).

filed until August 15, 2007.

[32] Subsections 128(14), (14.1) and (15) were not repealed by the legislature when the government defined stunt driving under section 3(7), O. Reg. 455/07 as driving 50 or more kilometres over the speed limit. In my opinion, there is no difference in the conduct addressed by section 128 as it pertains to driving 50 or more kilometres over the speed limit and section 3(7) of O. Reg. 455/07 and section 172 of the *HTA*. This fact is significant as it relates to an assessment of the second factor under *Sault Ste. Marie*.

[33] It is my opinion that the subject matter of the legislation in issue is undoubtedly speeding, which the Court of Appeal has defined as an absolute liability offence. I am bound by that characterization. Further, it is my view that calling the conduct “stunt” driving does not change its characterization – it is still a speeding offence albeit by a different name. There is nothing about the manner of driving 50 or more kilometres above the speed limit in section 3(7) of the Regulations that elevates or differentiates the conduct from the conduct set out in section 128 (a speeding offence).

C: The Penalty

[34] Section 172(2) provides for a sentence upon conviction of a fine not less than \$2,000.00 and not more than \$10,000.00 or to imprisonment of not more than six months, or both and, in addition, the driver’s licence may be suspended for a first offence, not more than two years and for a subsequent offence, not more than ten years.

[35] The potential penalty involving incarceration militates against a classification of absolute liability and therefore supports the presumption that regulatory offences are strict liability offences as indicated in *Kanda*. In my opinion, however, this is not determinative.

D: The Precision of the Language Used

[36] When one examines the other subsections of section 3 of O. Reg. 455/07 it is abundantly clear that the government has used very precise language which imports both full *mens rea* offences and strict liability offences. The use of the following language: “driving a motor vehicle in a manner that indicates an intention to...” as contained in section 3(1), (2), (3), (8)(i), (8)(ii) and (8)(iii) clearly denotes the necessity of proof of *mens rea* by the Crown. The use of language such as “reasonably required” contained in section 3(4) or “driving a motor vehicle without due care and attention, without reasonable consideration for other persons...” contained in section 3(8)(iv) clearly denotes offences of strict liability where the defence of due diligence is available to be proved by the defendant on a balance of probabilities.

[37] Section 3(7) contains no such language. That subsection uses the following language: “Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit.” This is exactly the same language used in section 128(14)(d).

[38] Section 172(1) provides that “no person shall drive a motor vehicle...while performing a stunt...” In *R. v. Kanda, supra*, at para. 38, MacPherson, J. points out that:

First, the case law does not support the proposition that the language “no person shall” points to an absolute liability offence.

[39] However, MacPherson, J. also points out that some offences in the *HTA* employing the “no person shall” or “every driver shall” language have been interpreted as being absolute liability offences. He cites *R. v. Polewsky*, *supra*, (speeding) and *R. v. Kurtzman* (1991), 4 O.R. (3d) 417, 66 C.C.C. (3d) 161 (failing to stop at a red light) as examples. Justice MacPherson then draws the following distinction between the *HTA* offence under consideration in *Kanda* [section 106(6): seat belt infraction] and *Polewsky* and *Kurtzman* (at para. 39):

...in those cases [referring to *Polewsky* and *Kurtzman*] the *proscribed conduct resulted directly from the person's own action*. Section 106(6) of the *HTA*, on the other hand, deals with a situation in which another person – the child passenger – is potentially involved in creating the violation. (Emphasis added)

He continues his analysis by adopting the logic of the interpretation of section 106(6) proposed by the *amicus curiae* (at para. 41):

Where the section in essence creates an offence of failing to meet a standard or duty of care, in respect of another person, it is counterintuitive to suggest that the defendant cannot raise a defence of due diligence or reasonable care.

[40] In the case at bar, the proscribed conduct results directly from the charged person's own conduct or action – driving 50 kilometres or more above the speed limit. In my view, this provides further support for a classification of absolute liability.

[41] In *R. v. Raham*, Justice Griffin held that the fourth factor, “precision of the language used” was neutral and therefore did not assist him in his assessment of whether the combination of section 172(1) of the *HTA* and section 3(7) of O. Reg. 455/07 created an absolute or strict liability offence. It is my respectful view, however, that the fourth factor is not neutral; rather, it speaks strongly in favour of classifying the subject offence as one of absolute liability. First, the Court of Appeal in *Polewsky* relied upon the fourth factor in *Sault Ste. Marie* to find that speeding was an absolute liability offence.² Second, the language used is identical to the language used in the penalty provisions of section 128(14)(d). And third, the legislature did not utilize the type of language that was used to define other examples of stunt driving in section 3 of O. Reg. 455/07 which clearly set out either the requirement of *mens rea* or which allowed for a defence of reasonable mistake of fact or due diligence.

iii: Conclusion as to Whether Section 3(7) is Absolute or Strict Liability

[42] It is my opinion that the assessment of whether a due diligence offence is available to an individual charged with stunt driving by driving 50 or more kilometres over the speed limit should be made during the analysis of the four factors set out in *Sault Ste. Marie*. As held by the Supreme Court of Canada in *Tétreault*, “the objective of the interpretive approach adopted in *Sault Ste. Marie* is in fact to determine the nature of the defences available

² See para. 26, *supra*, setting out the holding of the Court of Appeal in *Polewsky*.

to the accused.”³ (Emphasis added)

[43] I adopt the comments of Griffin, J.⁴ in *Raham*, respecting whether a defence of due diligence actually exists in the conduct defined in section 3(7) of O. Reg. 455/07, where he held at p. 18:

It is simply not realistic to say that a person could reasonably advance a defence that they did not know they were speeding when they would have to have been travelling 50 percent above the speed limit. Accordingly, the person would have to admit speeding, just not at the extreme level of 50 percent over the limit, which would defeat a due diligence defence. The defence would fail because it is impossible to reconcile an admission of speeding with the idea of taking all reasonable steps to avoid speeding at a rate 50 kilometres per hour over the speed limit. The notion that a broken or malfunctioning speedometer could give rise to a mistaken set of facts is simply untenable.

And further at p. 19:

Due diligence requires all reasonable care, or a reasonable belief in a mistaken set of facts, and it is not possible in my view to speed at 50 percent over the speed limit and suggest you took all reasonable care, or had a reasonable belief in a mistaken set of facts....It is in my view an unfair fallacy to say to the person charged with the offence of stunt driving by speed alone that it is a strict liability offence, and that you are free to advance a due diligence defence when it is clear that no such defence truly exists.

In my view, his comments are equally applicable during the assessment of the four factors set out in *Sault Ste. Marie* and I adopt his conclusions.

[44] Consequently, it is my opinion, after conducting the classification approach mandated by *Sault Ste. Marie*, a due diligence defence is not available to a person charged with stunt driving by speed alone (section 3(7) of the Regulations) making this an offence of absolute liability. There is no air of reality to the Crown’s submissions that a defendant charged with stunt driving under section 172 of the *HTA* in respect of the conduct set out in section 3(7) of the Regulations has an available defence of due diligence.

[45] Having regard to the subject matter of the legislation, the decisions of the Ontario Court of Appeal in *Hickey* and *Polewsky* (which are binding on me), the precise language used in section 3(7) in comparison with the other subsections contained in section 3 and the comments by MacPherson, J. in *Kanda*, respecting *Polewsky*, where he held that the Court of

³ See paras. 21 and 22, *supra*.

⁴ Justice Griffin does not appear to have been provided with *Tétreault*, *supra*, and he relied on Cory, J.’s judgment in *Pontes* in considering whether the due diligence defence was actually available. Consequently, his analysis of whether the conduct defined in section 3(7) affords a defence of due diligence was discussed after he determined that the four factors in *Sault Ste. Marie* were not of assistance in determining whether the classification was absolute or strict liability.

Appeal previously held that the offence of speeding was an absolute liability offence because the conduct resulted directly from the person's own conduct, it is my conclusion that section 3(7) of O. Reg. 455/07 creates an absolute liability offence. The combination of that subsection with section 172 of the *HTA* which provides for imprisonment up to six months in jail is therefore contrary to section 7 of *The Canadian Charter of Rights and Freedoms* and cannot be saved by the operation of section 1 of the *Charter*. Pursuant to the decision of *Reference re: Motor Vehicle Act, British Columbia, s. 94(2)*, (SCC), *supra.*, section 3(7) of the Regulations is therefore unconstitutional and therefore, of no force and effect.

iv. Presumption of Constitutional Validity

[46] The Crown has argued that where “a statute is open to more than one interpretation, one of which is constitutional and the other which is not, the interpretation which is consistent with the constitution should be adopted.” (para. 20 Crown Factum) *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 29, see also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 87. I agree with this submission.

[47] However, in my view, the combination of section 172 of the *HTA* and section 3(7) of O. Reg. 455/07 is only open to one interpretation and having regard to my assessment that the conduct described by section 3(7) is an absolute liability offence, the possibility of the imposition of up to six months imprisonment thereby renders this section unconstitutional.

v. Remedy

[48] The Crown argues that I do not have jurisdiction to grant the remedy sought by the defence; namely, a general declaration of legislative invalidity. It is my view that the defence is not asking me to make a “general declaration” of constitutional invalidity. The defence seeks a declaration that section 172 of the *HTA* in combination with the conduct described in section 3(7) of the Regulations is unconstitutional as it relates to Ms. Drutz's case. I certainly have jurisdiction to make that finding. See *R. v. 974649 Ontario Ltd.*, [2001] 3 S.C.R. 575, *R. v. Khan* [2009] O.J. No. 111, 184 C.R.R. (2d) 342 (MacDonnell, J. Ont. S.C. J.).

[49] The Crown further argues that if I find, as I have, that section 3(7) of O. Reg. 455/07 in combination with section 172 of the *HTA* violates section 7 of the *Charter*, the appropriate remedy under section 52 of the *Constitution Act, 1982* is to simply decline to apply the words “or to imprisonment for a term of not more than six months” in section 172(2), as these words alone are the extent of the inconsistency with the Constitution.

[50] The Crown relies upon the Supreme Court of Canada decision in *Schachter v. Canada*, [1992] 2 S.C.R. 679. In *Schachter* the majority stated:

26 The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or “reading down”. Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it

is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

27 Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify....

29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized.

[51] I certainly agree with the doctrine of severance as set out by the Supreme Court; however, in my view, the more appropriate way to deal with the unconstitutional portion (section 3(7)) of O. Reg. 455/07 defining “stunt” driving, is to excise that subsection completely. The penalties set out in section 172(2) of the *HTA* relate to various conduct that is set out in section 2 and 3 of O. Reg. 455/07. As discussed above, some of the definitions clearly require the Crown to establish *mens rea* and other definitions afford the defence of due diligence. In those circumstances a potential sentence of imprisonment will not violate section 7 of the *Charter*. That is not the situation with respect to section 3(7).

[52] Furthermore, the conduct set out in section 3(7) of O. Reg. 455/07 is also contained in section 128(14)(d). The legislature can be presumed to be aware of the Court of Appeal’s decisions in *Hickey* and *Polewsky*, which held that speeding is an absolute liability offence. Section 128 has provisions specifically addressing increased penalties by way of fine and licence suspension for driving a motor vehicle 50 or more kilometres over the speed limit. In my view, the increased fines, the immediate administrative license suspension of seven days and the immediate impoundment for seven days of the motor vehicle being driven, provided for in section 172(2) could have formed part of an amendment to the existing section 128 (Rate of Speed) of the *HTA*. If that had been done, there would be no violation of the *Charter*. In my opinion, however, section 7 of the *Charter* is clearly infringed where an absolute liability offence; namely, section 3(7), is included as part of the definitions created by Regulations under section 172 of the *HTA*, where the penalty provisions provide for the possibility of up to six months imprisonment.

[53] Consequently, section 3(7) of O. Reg. 455/07 is unconstitutional and is of no force and effect. Applying the doctrine of severance, only that subsection need be severed from the Regulations. The charge against Ms. Drutz is therefore dismissed.

vi. Section 8 Application

[54] The defence has also argued that section 8 of the *Charter* is violated by the automatic seizure and detention of a motor vehicle mandated by sections 172(5)(b), (7)(a) and (b) as this is an unreasonable search and seizure. Consequently, the defence argues that I should

enter a stay of proceedings pursuant to section 24(1) of the *Charter*.

[55] In my view, given my previous finding that section 3(7) of O. Reg. 455/07 is unconstitutional, it is not necessary to go on to consider this issue as I have already dismissed the charge.

[56] It is my opinion, however, that the impoundment and seizure of a motor vehicle, pursuant to subsections 172(5)(b) and (7) of the *HTA*, is part of a regulatory scheme which seeks to protect public safety and ensure compliance and does not amount to an unreasonable seizure. The impoundment and seizure of a motor vehicle under section 172 is an administrative act, carried out by a police officer, acting pursuant to the *HTA*, with the purpose of attempting to ensure that motorists comply with the regulatory scheme. In the case at bar, the police did not seize any of the contents of the vehicle; rather, the vehicle was impounded for seven days and then returned to the owner. In my view, I fail to see how the seizure of the motor vehicle plays any part in the charge of “stunt” driving which is before me. See *Horsefield v. Ontario (Registrar of Motor Vehicles)*, [1999] O.J. No. 967; 134 C.C.C.(3d) 161 (Ont. C.A.)

[57] In *R. v. Nicolosi* (1998), 127 C.C.C. (3d) 176 police seized a motor vehicle pursuant to s. 221(1) of the *HTA*, which empowers police to remove, transport for storage, and store any vehicle which is on a public roadway without a proper licence plate. Doherty, J.A. held at para. 18:

Section 221(1) of the *H.T.A.* authorized the impounding of the vehicle. Given the need to regulate vehicles and the fundamental importance of licensing to that regulation, a power to remove all improperly licensed vehicles from the roadway is not unreasonable. The statute clearly contemplates that the police will remove, transport and store improperly licensed vehicles. The police conduct in this case fell within the four corners of the statute and did not amount to an unreasonable exercise of that power. The seizure of the vehicle did not violate s. 8 of the *Charter*.

[58] In *Nicolosi*, police observed and seized an unregistered firearm after the car was impounded. The defence in *Nicolosi* alleged that section 8 was violated as a result of the officers utilizing section 221(1) as a ruse to search the vehicle; however, the trial judge found that the police acted properly and within the statute. In the case at bar, there is no allegation that the police acted outside the four corners of the statute. Consequently, in my view, there is no violation of section 8 of the *Charter*.

vii: Costs Application

[59] The defence also applies for an order for costs pursuant to section 24(1) of the *Charter* respecting the Applicant’s costs and other losses connected to the seizure and detention of the motor vehicle in this case.

[60] No materials were put before me respecting what the Applicant’s out-of-pocket ex-

penses or other losses were in connection with the impoundment of her motor vehicle. The Crown argues that the “Supreme Court is clear that individual monetary remedies under s. 24(1) of the *Charter* are not available in conjunction with a remedy under s. 52, except in cases of ‘conduct that is clearly wrong, in bad faith or an abuse of power.’” *Schachter, supra*, at para. 89, *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 at para. 19, *R. v. Demers*, [2004] 2 S.C.R. 489 at para. 62 and *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 102. In light of my comments respecting the section 8 application and in light of the above authorities provided by the Crown (The defence did not provide any authority to support its submission that I should order costs.) I decline to make an order for costs pursuant to section 24(1) of the *Charter*.

Released: November 19, 2009.

Signed: “Justice Peter C. West”