

R. v. Richard

page

Indexed as:

R. v. Richard

Her Majesty The Queen, appellant;

v.

Réjean Richard, respondent.

And between

Her Majesty The Queen, appellant;

v.

Léo J. Doiron, respondent.

And between

Her Majesty The Queen, appellant;

v.

J. M. Denis Lavoie, respondent, and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

[1996] 3 S.C.R. 525

[1996] S.C.J. No. 43

File No.: 24582.

Supreme Court of Canada

Hearing and judgment: April 23, 1996.

Reasons delivered: October 31, 1996.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Presumption of innocence — Right to fair and public hearing by independent and impartial tribunal — Waiver — Persons stopped for speeding convicted under provincial statutory provision because they failed to pay fine indicated in ticket and to appear in court at time stated in ticket — Whether provincial provision infringes rights guaranteed to persons charged with offences by s. 11(d) of Canadian Charter of Rights and Freedoms — Whether s. 11(d) rights waived — Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, s. 16.

The respondents were stopped for an offence under the New Brunswick Motor Vehicle Act and each received a ticket. They did not pay the fine and did not appear in court at the time and place indicated in the ticket. The respondents were accordingly convicted without a trial and ordered by a Provincial Court judge to pay a fine in accordance with the procedure set out in s. 16 of the Provincial Offences Procedure Act. In the Court of Queen's Bench, the respondents challenged the constitutionality of that section. The court found that s. 16 infringed s. 11(d) of the Canadian Charter of Rights and Freedoms but that this infringement was justifiable under s. 1 of the Charter. The Court of Appeal, in a majority decision, reversed that judgment, finding s. 16 to be invalid because it had the effect of depriving a citizen of the right guaranteed by s. 11(d) to be tried by an independent and impartial tribunal and because no statute may encroach upon the independence of the judiciary.

QUICKLAW

R. v. Richard

page

Held: The appeals should be allowed.

Section 16 of the Provincial Offences Procedure Act does not infringe s. 11(d) of the Charter since, as a result of the characteristics of the regulatory scheme set up by the New Brunswick legislature, s. 16 applies to situations where the accused has validly waived the benefit of s. 11(d). The liberty component of s. 7 of the Charter does not come into play here since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment.

In the context of regulatory offences for which imprisonment is not a possibility, s. 11(d) of the Charter does not prevent the legislature from inferring from an accused's failure to act that he or she waives the right to be presumed innocent and the right to a fair and public hearing by an independent and impartial tribunal, provided that the accused is fully aware of the consequences of failing to act and that the procedural scheme in place provides sufficient safeguards to ensure that the conduct of the accused was not due to events over which he or she had no control. In the present case, the system in place in New Brunswick meets these requirements fully. The Provincial Offences Procedure Act expressly requires that the ticket state that failure by the accused to act may result in conviction (s. 10(1)(h)), and the ticket must be delivered to the accused personally. In addition, s. 16 provides that the judge required to convict the accused if the accused neither pays the fine nor appears in court must perform certain checks, such as verifying that the ticket was delivered to the accused in accordance with the Act. The judge must not convict the accused if the judge has reason to believe that there are any irregularities. Finally, the Act affords accused persons the possibility of having their conviction set aside by applying to the court within 45 days of the conviction (s. 117), after being notified of their conviction pursuant to s. 48(1), if they satisfy a judge that their failure to appear was not their fault. Under this procedural scheme an accused is thus fully informed of the consequences of failing to act and there are sufficient safeguards to prevent injustices from occurring.

Cases Cited

Applied: R. v. Lee, [1989] 2 S.C.R. 1384; *referred to:* R. v. Carson (1983), 147 D.L.R. (3d) 754; R. v. Greckol (1991), 64 C.C.C. (3d) 430; R. v. Swain, [1991] 1 S.C.R. 933; Liyanage v. The Queen, [1967] 1 A.C. 259; Re Heriot and The Queen (1986), 37 D.L.R. (4th) 706; R. v. Hess (No. 2), [1949] 4 D.L.R. 199; R. v. Wigglesworth, [1987] 2 S.C.R. 541; Adgey v. The Queen, [1975] 2 S.C.R. 426; Brosseau v. The Queen, [1969] S.C.R. 181; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. Morin, [1992] 1 S.C.R. 771; Clarkson v. The Queen, [1986] 1 S.C.R. 383; R. v. Tran, [1994] 2 S.C.R. 951; R. v. Fitzpatrick, [1995] 4 S.C.R. 154; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(d).
Motor Vehicle Act, R.S.N.B. 1973, c. M-17, ss. 140(1.1) [ad. 1981, c. 48, s. 8; am. 1983, c. 52, s. 12; am. 1990, c. 61, s. 84(3)], 347.1(5) [rep. & sub. 1991, c. 34, s. 1].
N.B. Reg. 91-50, General Regulation -- Provincial Offences Procedure Act, s. 3(1)(e).
Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, ss. 2, 3, 5, 9, 10 [am. 1990, c. 18, s. 4; am. 1991, c. 29, s. 3], 11 [am. 1991, c. 29, s. 4], 12(1), 13, 14 [am. 1990, c. 18, s. 5; am. 1991, c. 29, s. 5; am. 1992, c. 41, s. 1], 16 [sub. 1990, c. 18, s. 7], 24, 28 [am. *idem*, s. 13], 29(1), 48(1) [am. *idem*, s. 26], 117(1).

Authors Cited

Boisvert, Anne-Marie. "La renonciation aux droits constitutionnels: quelques réflexions", dans *Développements récents en droit criminel*. Cowansville, Qué.: Yvon Blais, 1989, 185.

R. v. Richard

page

APPEALS from a judgment of the New Brunswick Court of Appeal (1995), 156 N.B.R. (2d) 309, 401 A.P.R. 309, allowing the appeal of the accused from judgments of Deschênes J. (1993), 131 N.B.R. (2d) 181, 333 A.P.R. 181, dismissing the appeal of the accused, who had been convicted of speeding. Appeals allowed.

Gabriel Bourgeois, for the appellant.

J. M. Denis Lavoie, for the respondents.

Bernard Laprade, for the intervener the Attorney General of Canada.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Shawn Greenberg, for the intervener the Attorney General of Manitoba.

George H. Copley, for the intervener the Attorney General of British Columbia.

Roger B. Langille, Q.C., for the intervener the Attorney General of Prince Edward Island.

Sandra Folkins, for the intervener the Attorney General for Saskatchewan.

Richard F. Taylor, for the intervener the Attorney General for Alberta.

B. Gale Welsh, Q.C., for the intervener the Attorney General of Newfoundland.

Solicitor for the appellant: The Office of the Attorney General, Fredericton.

Solicitors for the respondents: Doiron, Lavoie, LeBouthillier & Boudreau, Tracadie-Sheila, New Brunswick.

Solicitor for the intervener the Attorney General of Canada:

The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Prince Edward Island: The Office of the Attorney General, Charlottetown.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Department of Justice, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: Chris Decker, St. John's.

English version of the judgment of the Court delivered by

¶ 1 **LA FOREST J.**:- The Court has before it three appeals raising the constitutional validity, in light of s. 11(d) of the Canadian Charter of Rights and Freedoms, of s. 16 of the Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1 (the "Act"), as it relates to the prosecution of offences under the Motor Vehicle Act, R.S.N.B. 1973, c. M-17. Section 16 provides that accused persons who neither promptly pay the amount of the fine indicated in the ticket issued to them nor appear in court at the time and place stated therein may be convicted without a trial, by a judge who has carried out certain procedural checks, and ordered to pay a fine. Failure to pay a fine imposed for a contravention of the Motor Vehicle Act is in no case punishable by imprisonment: s. 347.1(5).

I. Background

¶ 2 The facts giving rise to the three appeals are not in dispute. Each of the respondents was stopped for speeding and received a ticket and signed the notice of prosecution corresponding to the ticket pursuant to the Act. All three were convicted of violating s. 140(1.1) of the Motor Vehicle Act after failing both to pay the amount of the fine indicated in the ticket and to appear in court at the time and place stated therein.

R. v. Richard

page 4

Court of Queen's Bench (1993), 131 N.B.R. (2d) 181

¶ 3 The respondents appealed their convictions to the Court of Queen's Bench the only defence relied on being the unconstitutionality of s. 16 of the Act, but they were not successful. Deschênes J., following the decision of the Ontario Court of Appeal in *R. v. Carson* (1983), 147 D.L.R. (3d) 754, and the decision of the Alberta Court of Queen's Bench in *R. v. Greckol* (1991), 64 C.C.C. (3d) 430, which concerned similar provisions, found that s. 16 of the Act infringed s. 11(d) of the Charter. He was of the opinion, however, that the limitation on the s. 11(d) rights of persons charged with offences was justifiable under s. 1. In his view, the objective of establishing a more expeditious and efficient and less costly scheme for minor provincial offences was important enough to justify such a limitation. He also saw a rational connection between the scheme set up under s. 16 of the Act and this objective of efficiency in the context of offences under the Motor Vehicle Act. Referring to this Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, he stated that he was satisfied that s. 16 comes within the range of means that impair the rights guaranteed by s. 11(d) of the Charter as little as possible. Deschênes J. concluded that the salutary effects of the measure adopted in s. 16 were sufficiently proportional to its deleterious effects.

Court of Appeal (1995), 156 N.B.R. (2d) 309

¶ 4 The respondents appealed Deschênes J.'s decision to the New Brunswick Court of Appeal, where they were successful. Angers J.A., who wrote the reasons of the majority, relied on *Liyanage v. The Queen*, [1967] 1 A.C. 259 (P.C.), *Re Hertel and The Queen* (1986), 37 D.L.R. (4th) 706 (B.C.S.C.), and *R. v. Hess* (No. 2), [1949] 4 D.L.R. 199 (B.C.C.A.), and held s. 16 to be invalid for the following reasons (at p. 316):

[Translation] Every statute which, as a matter of substantive law, has the effect of depriving a citizen of the right to be tried by an independent and impartial tribunal ipso facto negates the citizen's fundamental rights: rights which are guaranteed under the Charter. It is in order to protect the citizen's right to a hearing before an independent and impartial tribunal that no statute may encroach upon the independence of the judiciary. In my view, a provision such as section 16 is invalid.

The majority did not discuss s. 1 of the Charter.

¶ 5 Ayles J.A. saw things differently. He agreed with Deschênes J.'s reasoning as to the scope of s. 11(d) in the context of this case and with his analysis under s. 1. He also criticized the reasoning adopted by the majority, being of the view that there was nothing unlawful or harmful to judicial independence in the procedure established by s. 16 of the Act.

¶ 6 On February 27, 1995, a few days after the Court of Appeal's decision, L'Heureux-Dubé J. granted the appellant a stay of execution of that decision. On June 1, 1995, the Chief Justice and Gonthier and Iacobucci JJ. granted the appellant leave to appeal the Court of Appeal's decision: [1995] 2 S.C.R. vii. At the same time, they ordered that the stay of execution be extended until this Court had rendered its judgment. The following constitutional questions were stated by the Chief Justice on August 30, 1995:

1. Does the procedure established by s. 16 of the Provincial Offences Procedure Act, R.S.N.B., c. P-22.1, offend s. 11(d) of the Canadian Charter of Rights and Freedoms as it relates to the prosecution of offences under the Motor Vehicle Act, R.S.N.B. 1973, c. M-17?
2. If the answer to question 1 is yes, is the procedure justified under s. 1 of the Canadian Charter of Rights and Freedoms?

¶ 7 On April 23, 1996, this Court allowed the appeals in a judgment rendered from the bench, with reasons to follow. No order was made as to costs. The first constitutional question was answered in the negative, and the second question was accordingly not raised.

QUICKLAW

R. v. Richard

page 5

II. Analysis

¶ 8 Contrary to the opinion expressed by the Court of Queen's Bench and the Court of Appeal, s. 16 of the Act does not infringe s. 11(d) of the Charter. In my view, an accused who fails both to pay the fine indicated in the ticket and to appear in court at the time and place stated therein waives the benefit of s. 11(d) of the Charter, and therefore the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", in the same way as if he or she had, for example, decided to plead guilty. Although at common law, the silence of the accused is equivalent to a plea of not guilty rather than to one of guilty and therefore in a criminal context ss. 7 and 11(d) might require any waiver to be made only upon appearance (a question on which I express no opinion), it is entirely different in the context of regulatory offences for which imprisonment is not a possibility and which accordingly do not bring the liberty component of s. 7 into play. In such a context, I am of the view that s. 11(d) of the Charter in no way prevents the legislature from inferring from the accused's failure to act a waiver on his or her part of the right to a fair and public hearing by an independent and impartial tribunal, provided that he or she is fully aware of the consequences of failing to act and that the procedural scheme in place provides sufficient safeguards to ensure that the conduct of the accused was not due to events over which he or she had no control. That is the case here.

¶ 9 Before getting to the heart of the matter, it will be necessary to summarize the impugned legislative scheme.

A. The Legislative Scheme

¶ 10 As its title indicates, the Provincial Offences Procedure Act lays down the procedural rules applicable to the prosecution of regulatory offences in New Brunswick. A regulatory offence may be prosecuted in one of three ways. Section 2 states that, except as otherwise provided in a statute, proceedings are commenced by the laying of an information before a judge on oath or solemn affirmation by any person who has reasonable and probable grounds to believe that a person has committed an offence (s. 3). Proceedings may also be commenced by way of an appearance notice served by a police officer who has reasonable and probable grounds to believe that a person has committed an offence (s. 5(1) of the Act) or by an authorized person who has reasonable and probable grounds to believe that a person has committed an offence referred to as a "prescribed offence" (s. 5(2)). In each of these cases, the appearance notice is followed by the laying of an information. When proceedings are commenced in either of these ways, they follow a course that may be described as traditional. An appearance notice is served on the accused, who must then enter a plea. If the accused does not do so, the judge must enter a plea of not guilty (s. 24). If the accused does not appear, the trial proceeds ex parte (see ss. 25 and 29(1)). If the ex parte trial results in a conviction, the accused will still be able to have the verdict set aside if he or she can satisfy the judge, on an application made not later than 45 days after the conviction, that the failure to appear occurred through no fault of the accused (s. 117(1)).

¶ 11 The other way in which proceedings may be instituted -- which is the one we are concerned with here -- is set out in ss. 9 et seq. of the Act. A police officer or authorized person who believes, on reasonable and probable grounds, that a person has committed a "prescribed offence" may serve that person with a ticket in prescribed form (s. 9). New Brunswick Regulation 91-50 under the Provincial Offences Procedure Act specifies what types of offences are "prescribed" for the purposes of the Act. Section 3(1)(e) provides that:

3(1) The following offences are specified to be prescribed offences under section 9 of the Act:

- (e) all offences under the Motor Vehicle Act other than
 - (i) offences under sections 105.1, 345 and 346 of that Act, and
 - (ii) offences that are created by by-laws made by a local authority under that

R. v. Richard

page 6

Act and that are not approved by the Lieutenant-Governor in Council

Section 10 of the Act specifies the information that must appear in the ticket, which must be served on the defendant by being delivered to him or her personally (s. 11(1)). The ticket must set out in very precise terms the offence with which the defendant is charged (ss. 10(1)(b) and 10(2)) and must also state the time and place of the appearance (s. 10(1)(c)). The ticket must state that the defendant has the right to choose the official language in which the proceedings will be conducted and to retain and instruct counsel (ss. 10(1)(d) and (e)). Section 10(1)(g) requires that the ticket state the amount of the fixed penalty and the time, place and manner of payment. Section 10(1)(f) provides that the defendant may pay the indicated penalty in the prescribed manner, in which case he or she will be deemed to have been convicted of the offence. Finally, under s. 10(1)(h), the ticket must state that if the defendant does not pay the fixed penalty and does not appear in court at the stated time and place, he or she may be convicted of the offence.

¶ 12 The ticket must be accompanied by a notice of prosecution, which the defendant must sign or, in the event of a failure or refusal to sign, a certification to that effect (s. 11(2)). The notice must name the defendant in addition to setting out the offence with which he or she is charged and stating the time and place of the appearance (s. 11(3)). The notice of prosecution must be filed with a judge no later than the date stated in the ticket for the defendant's appearance unless the defendant has duly paid the penalty in accordance with s. 14 (s. 12(1)). Section 13 provides that a defendant who wishes to dispute the charge set out in the ticket must appear in court at the time and place stated, and where the defendant so appears the proceedings continue as if an information has been laid and a summons issued and served.

¶ 13 Where the proceedings are initiated by means of a ticket, the only sentence that may be imposed is monetary in nature. This can be seen from all the provisions of the Act dealing with the ticket procedure and from more specific provisions, such as ss. 14(5) and 16(1).

¶ 14 It is now necessary to reproduce, in its entirety, s. 16 of the Act, which is central to the debate in these appeals:

- 16(1) Where the defendant has not paid a fixed penalty before the time stated in the ticket for the payment of the fixed penalty and does not appear in court at the time and place stated in the ticket, the judge shall examine the notice of prosecution and, if the notice of prosecution contains the certificate referred to in subsection (2), the judge shall, subject to subsection (3), convict the defendant and impose a fine in the amount of the fixed penalty set out in the ticket.
- 16(2) The certificate on a notice of prosecution shall be in prescribed form, shall be signed, and shall state
- (a) that the person signing the certificate delivered personally to the defendant the ticket to which the notice of prosecution corresponds, and
 - (b) that the ticket was in prescribed form and was completed in the same manner as the notice of prosecution.
- 16(3) The judge shall not convict the defendant if
- (a) the judge has reason to believe that the certificate on the notice of prosecution is inaccurate, or
 - (b) the notice of prosecution contains a defect and the defect cannot be cured under section 106.

¶ 15 There is no need for the purposes of these appeals to further summarize the provisions of the Act. It is in the context of this detailed and very complete legislative scheme that the provision whose constitutionality

R. v. Richard

page

is being challenged arises.

B. Section 11(d) of the Charter

¶ 16 The respondents maintained that s. 16 of the Act violates s. 11(d) of the Charter in two ways. First, they argued that permitting a judge to convict an accused without requiring the Crown to adduce any evidence whatever deprives the accused of the right under s. 11(d) to be presumed innocent. Secondly, the respondents agreed with the conclusion of the Court of Appeal and submitted that s. 16 of the Act restricts the right of the accused under s. 11(d) of the Charter to be tried by an independent tribunal, since the effect of the impugned provision is to prevent the judge from deciding to the best of his or her knowledge and belief after hearing the facts of the case.

¶ 17 The appellant maintained on the contrary that it can be seen from a contextual analysis of the scope of the protection conferred by s. 11(d) that s. 16 of the Act does not infringe that constitutional provision. For the purposes of s. 11(d), it is sufficient that the established procedure afford accused persons a reasonable opportunity to appear or to plead their innocence, which the Act does afford them. In the alternative, the appellant argued that accused persons who fail both to pay the amount of the penalty set out in the ticket and to appear in court at the time and place stated therein, by their conduct, waive the benefit of s. 11(d) of the Charter. Section 16 of the Act accordingly does not violate s. 11(d), which affords no protection to anyone who has waived it.

¶ 18 I shall digress here. I find it very hard to see how the appellant Crown's main argument is different from its alternative argument. It began by arguing that the essence of s. 11(d) in the context of this case is to afford accused persons a reasonable opportunity -- of which they must avail themselves -- to benefit from the rights and freedoms set out therein. Its alternative argument is that legislatures can deprive accused persons of their rights under s. 11(d) where, as in the present case, the accused have waived those rights. If s. 11(d) must be interpreted in the instant case as merely affording an opportunity to benefit from those rights, it follows that persons who do not exercise them will lose the benefit of that protection and, thus, that persons who wish to benefit from them will have to exercise their rights. In my view, an analysis showing that a person has not exercised his or her rights is closely akin to that of the circumstances capable of amounting to a waiver of these rights. The conduct of the accused person ceases to amount to a waiver as soon as he or she begins to exercise his or her rights. Whichever way the analysis is conducted, the considerations will be the same, with the result that the same constitutional reality will be expressed in two ways. In *R. v. Lee*, [1989] 2 S.C.R. 1384, a decision to which I will be returning, Wilson J., who was supported by a majority of the members of this Court on the issue, came to the same conclusion on this very distinction. In *Lee*, the Court was considering the constitutionality of s. 526.1 of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 598), in light of s. 11(f) of the Charter, which guarantees the right to a jury trial in certain circumstances. The impugned statutory provision inferred a waiver of the right to a jury trial from the failure of an accused to appear for his or her trial without a legitimate excuse. As in the case at bar, the Crown argued that the provision was valid both because it was directed at situations where accused persons fail to exercise their right and because it was directed at situations where accused persons, by their conduct, waive their constitutional right to a jury trial. Wilson J. stated the following about the distinction between these two arguments, at pp. 1412-13:

Similar in kind to the argument based on waiver is the submission that the accused by failing to appear without a legitimate excuse has simply failed to exercise his right to a jury trial. The British Columbia Court of Appeal in *Re McNabb and The Queen* expressed the view that s. 526.1 did not deprive an accused of his Charter right; rather, what the section did was to specify the consequences if an accused chose not to exercise his right by failing to appear at his trial. The Court held that if the accused could satisfy the court that he had a legitimate excuse for failing to appear, then he would not have failed to exercise his right. But if he had no such excuse, then he would have failed to exercise his Charter right and could

R. v. Richard

page 8

not thereafter be heard to complain that he had been deprived of it.

The nub of this argument is the same as in the argument based on waiver, namely that it is the accused's own conduct and not the statute which deprives him of his Charter right. The only difference is that in this case the conduct is characterized as a failure to exercise the right as opposed to a waiver of the right. Presumably, it is thought through this distinction to avoid the strict standard of proof required in the case of waiver. [Emphasis in second paragraph added.]

Thus, any right that can be waived may be seen as affording those who have it the opportunity to exercise it. I will be analysing the issue in the case at bar from the perspective of waiver, however, since that is how this Court has ordinarily approached such questions in the past.

¶ 19 It should first be noted that s. 11(d) applies to regulatory offences such as those at issue here. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, this Court defined the scope of the protection afforded by s. 11 of the Charter in the context of regulatory offences. Wilson J., on behalf of the Court, made the following comments, which are highly relevant here, concerning the applicability of s. 11(d) (at pp. 559-60):

There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that, just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C.). In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At page 205 Linden J. said:

This provision of the Charter is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against her.

There can be no question that parking infractions are "offences" as that word is used in s. 11 of the Charter. The respondents contend that these are not the types of transgressions against society s. 11 of the Charter is directed at, since there is virtually no stigma attached to a parking ticket. In my view, however, the degree of stigma is of no significance.

¶ 20 Section 11(d) reads as follows:

11. Any person charged with an offence has the right

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

The constitutional guarantee provided for in s. 11(d) is broad. The provision essentially confers two things on any person charged with an offence: the constitutional right to be presumed innocent -- with all its corollaries -- and the right to a hearing that must, according to s. 11(d), have certain characteristics, namely those of being fair, public and conducted by an independent and impartial tribunal. Section 11(d) raises certain fundamental rules of our common law to the level of constitutional values.

R. v. Richard

page 9

¶ 21 However, the possibility for accused persons of pleading guilty, thereby waiving the benefit of the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal by admitting their criminal liability, is an equally essential component of our common law. The effect of a guilty plea was described as follows by Laskin J. (as he then was), dissenting on other issues, in *Adgey v. The Queen*, [1975] 2 S.C.R. 426, at p. 440:

A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge.

Owing to the obviously prejudicial consequences of a guilty plea for the accused, the common law gives judges some discretion to ensure that the accused entered the plea with full knowledge of those consequences in order to avoid any injustice. Thus, a judge may refuse, for "valid reasons", to accept the plea of guilty, or the plea may subsequently be varied by having the accused substitute a plea of not guilty (*Brousseau v. The Queen*, [1969] S.C.R. 181, and *Adgey*, supra). My purpose in drawing a parallel with the guilty plea here is to show that the rights and freedoms protected by s. 11(d) are, by their very nature, rights that can be waived by those to whom they apply.

C. Waiver of Charter Rights and Freedoms

¶ 22 This Court has already recognized that there are circumstances in which a right or freedom conferred by the Charter can be waived. However, the possibility of waiving certain constitutional rights, the manner in which such a waiver may be made, the extent to which such rights can be waived and the effect of a waiver may vary with the nature and scope of the right in question: A.-M. Boisvert, "La renonciation aux droits constitutionnels: quelques réflexions", in *Développements récents en droit criminel* (1989), 185, at pp. 186-87. That is why, for example, the right to be tried within a reasonable time (see *Mills v. The Queen*, [1986] 1 S.C.R. 863, *R. v. Rahey*, [1987] 1 S.C.R. 588, and *R. v. Morin*, [1992] 1 S.C.R. 771) is not necessarily waived in the same way and to the same extent as the right to counsel (see *Clarkson v. The Queen*, [1986] 1 S.C.R. 383), and why it may sometimes even be impossible to waive a constitutional right (see *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 996). It is clear, however, that where it is possible to waive a given right or freedom, this Court has always stressed that the conduct of the holder of the right or freedom amounting to waiver must be voluntary and that he or she must have full knowledge of the consequences of that waiver.

¶ 23 The possibility of waiving the benefit of s. 11(d) of the Charter implies -- as is the case with any Charter right or freedom that can be waived -- that legislatures can "deny" an accused the benefit of s. 11(d) if they do so in circumstances in which the accused has by his or her conduct waived that benefit. It is clear that in so doing they are not in actual fact denying a constitutional right. If the impugned legislative measure relates to a situation in which the accused has waived the benefit of s. 11(d), it is quite simply no longer open to the accused to argue that the measure in question is unconstitutional. This proposition can be illustrated with an obvious example. A statute providing that "an accused who pleads guilty is no longer entitled to a trial" could not be challenged on the ground that it denies accused persons the benefit of s. 11(d). Section 11(d) does of course grant them the right to a trial, but when a guilty plea is validly entered, the accused just as validly waives his or her right to a trial. Thus, nothing prevents the legislature, in such circumstances, from expressly denying the benefit of the constitutional provision that is at the very heart of the waiver.

¶ 24 That is exactly what the appellant is arguing in the case at bar. Section 16 of the Act applies where a person charged with an offence has waived the benefit of s. 11(d) of the Charter. As a consequence, s. 16, the effect of which is to provide for conviction without a trial, does not constitute a limitation on that constitutional provision.

¶ 25 In order to deal with such an argument properly, it must be determined whether the impugned

R. v. Richard

page 10

statutory provision is applicable only in circumstances in which the accused has actually (and validly) waived the constitutional provision in question.

¶ 26 The analytical approach to be followed can best be illustrated and explained by drawing a parallel with this Court's decision in *Lee*, supra. As I explained, *Lee* concerned the constitutionality of s. 526.1 (now s. 598) of the Criminal Code, which provides that accused persons who fail to appear for their trial and do not give the court a legitimate excuse are deemed to have waived their right to a jury trial. It was argued that the impugned provision did not offend s. 11(f) of the Charter because it dealt with a situation where the accused had by his or her conduct and omission waived his or her constitutional rights under s. 11(f). Wilson J., speaking for the majority on this point, stated that to dispose of this argument, the Court had to determine whether it was constitutionally possible to infer a valid waiver of the benefit of s. 11(f) of the Charter from the conduct referred to in s. 526.1, which meant that we had to determine in what circumstances an accused could be said to have waived the constitutional right to a jury trial. The Court held that a waiver of s. 11(f) of the Charter, to be valid, must be clear and unequivocal and that, since the conduct from which the legislation inferred a waiver of the right to a jury trial was not sufficiently "clear and unequivocal", s. 526.1 violated s. 11(f) of the Charter. There was quite simply no sufficiently clear connection between an accused's failure to appear without a legitimate excuse and the form of trial.

D. Section 16 of the Act

¶ 27 The analytical approach to be followed in this case is similar to the one adopted by this Court in *Lee*, and in applying it here, I have reached the conclusion that, as a result of the characteristics of the regulatory scheme set up by the New Brunswick legislature, s. 16 of the Act applies to situations where the accused has validly waived the benefit of s. 11(d) of the Charter. The analysis obviously requires that I consider in what circumstances an accused will have validly waived the benefit of s. 11(d). The difficulty in the present case lies in the fact that the conduct covered by the impugned provision constitutes an omission rather than a positive expression by the accused that he or she intends to waive his or her right to be presumed innocent and his or her right to a fair and public hearing by an independent and impartial tribunal.

¶ 28 First of all, the context of the impugned provisions must be taken into account. In the recent unanimous decision in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, where this Court had to consider the scope of the right against self-incrimination in a regulatory context, I stressed the importance of the context in determining the scope and extent of Charter rights and freedoms (at para. 30):

This Court has often stated that the context of a Charter claim is crucial in determining the extent of the right asserted; see for example my comments in *Lions*, supra, at p. 361, and in *Thomson Newspapers*, supra, at pp. 505-8 and 516-17. In particular, in *Wholesale Travel*, supra, at p. 226, Cory J. held that "a Charter right may have different scope and implications in a regulatory context than in a truly criminal one", and that "constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences".

It should be noted that in the case at bar, this Court does not have to rule on the Charter's requirements as to the manner and circumstances in which a guilty plea can be entered and accepted by the court in the context of a criminal offence. This Court has not ruled on that question, and in my view it is simply not appropriate to do so in the present case. Rather, the Court must deal with the manner in which accused persons can waive their rights under s. 11(d) of the Charter in a quasi-criminal or regulatory context. I wish to point out that the fact I am dealing with the regulatory context in the present case does not necessarily mean that I would reach a different conclusion in a purely criminal context. However, I recognize the possibility that in such a context, the public interest may require that accused persons waive their rights in court, by performing a positive act, owing to the far more serious consequences of a waiver of the benefit of s. 11(d) of the Charter in such cases resulting, inter alia, from the potential loss of liberty and the stigma attached to criminal culpability.

¶ 29 In my view, the context to which I referred in *Fitzpatrick*, supra, may be relevant -- without necessarily

R. v. Richard

page

affecting the outcome -- and can be taken into consideration in determining both the scope and extent of the rights and the manner in which and extent to which a right can be waived. Such an approach seems to me to be perfectly consistent with past decisions of this Court on the waiver of constitutional rights. Let us therefore consider the context that is relevant here.

¶ 30 First of all, the constitutionality of s. 16 of the Act is being challenged in the context of regulatory offences. In Fitzpatrick, supra, as mentioned earlier, this Court unanimously adopted the statement by Cory J. in R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, that the scope and extent of a right may vary with the context -- regulatory or criminal -- in which it is asserted. In Wholesale Travel, however, a majority of this Court was of the view that it would be inappropriate, in the circumstances of the appeal before it, to limit the scope of s. 11(d) because the provision at issue in that case, while regulatory and not criminal in nature, could result in imprisonment. Lamer C.J. explained this as follows, at p. 197:

Again, both the Crown and a number of interveners have argued that this interpretation of s. 11(d) should not apply in a regulatory setting. I can only reiterate my earlier comment that it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the Charter analysis. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. A person whose liberty interest is imperilled is entitled to have the principles of fundamental justice fully observed. The presumption of innocence, guaranteed by s. 11(d), is clearly a principle of fundamental justice. [Emphasis in original.]

Sopinka J. concurred in the Chief Justice's reasons. My own reasons were to the same effect. I stated, at pp. 209-10:

In the present case we are dealing with a provision under which a five-year term of imprisonment may be imposed if an individual is convicted. Such a deprivation requires much stricter requirements to conform with the principles of fundamental justice than mere monetary penalties. I should add that the context and values at stake in Thomson Newspapers Ltd., supra, were profoundly different from those in the present case. Thomson Newspapers Ltd. was really concerned with the procedural protection that should be afforded privacy in relation to business documents. Here the effect of the provisions is the removal of the requirement that an offence involving a serious deprivation of liberty be proved beyond a reasonable doubt. While, in my view, in the regulatory context in which the provisions operate a requirement that a reasonable doubt be raised by the accused that he or she has exercised due diligence meets the requirements of fundamental justice (under s. 7 of the Charter) in these circumstances, a requirement that the accused prove such diligence on the balance of probabilities goes too far. The same is true under s. 1 of the Charter if one approaches the issue in terms of s. 11(d). The provision substantially divests him of the presumption of innocence.

The reasons of Iacobucci J., in which Gonthier and Stevenson JJ. concurred, were to the same effect with respect to the scope of s. 11(d) in this context: see p. 255. Wholesale Travel shows clearly that while the scope and extent of rights may vary depending on whether the context is regulatory or criminal, this will not be true in every case. Owing to the possibility that the offence at issue in that case would result in imprisonment, it was necessary to avoid drawing a distinction based on the regulatory nature of the offence.

¶ 31 In the case at bar, however, there is absolutely no possibility of imprisonment, since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment. Thus, the liberty component of s. 7 of the Charter does not come into play. The concern of the majority of this Court in Wholesale Travel that a

R. v. Richard

contravention might result in imprisonment does not arise here. This, therefore, is the context to be taken into account in analysing the scope of the constitutional rights at issue in this case and, more specifically, in analysing the extent to which rights conferred on accused persons under s. 11(d) of the Charter can be waived.

¶ 32 In my view, in a context in which litigants cannot be imprisoned for offences of a regulatory nature, it is open to both the provincial legislatures and Parliament to infer from the failure of those litigants to act that they have waived their right to be presumed innocent and their right to a hearing and at the same time to have consented to a conviction made against them, provided that under the procedural scheme applicable to them, they are fully informed of the consequences of failing to act and there are sufficient safeguards to prevent injustices from occurring.

¶ 33 In the case at bar, the system set up by the New Brunswick legislature seems to me to meet these requirements fully. First of all, the Act expressly requires that the ticket state that failure by the accused to act may result in conviction: s. 10(1)(h). The following wording currently appears on each ticket issued in accordance with this provision:

If you do not pay the fixed penalty and do not appear in court at the time and place stated on this ticket you may be convicted of the offence and fined. It is therefore very important for you to appear in court at the time and place stated on this ticket if you wish to dispute the charge.

Furthermore, the Act requires that the ticket be delivered to the accused personally: s. 11(1). The accused is also required to sign the notice of prosecution corresponding to the ticket (s. 11(2)) and his failure or refusal to do so must be certified. In addition, s. 16 provides that the judge required to convict the accused if the accused neither pays the penalty nor appears in court must ensure, *inter alia*, that the ticket was in fact delivered to the accused in accordance with the Act. Moreover, the judge can refuse to enter a conviction if he or she has reason to believe that there are any irregularities. In my view, the general effect of these requirements is to prevent a conviction from being entered unless a judge -- an independent and impartial third party -- is satisfied that the Crown has met the requirements intended to ensure that the accused is fully informed of the consequences of failing to act.

¶ 34 Furthermore, the Act affords accused persons the possibility of having their conviction set aside by applying to the court within 45 days of the conviction (s. 117 of the Act), after being notified of their conviction pursuant to s. 48(1) of the Act, if they satisfy a judge that their failure to appear was not their fault. In my view, these provisions minimize any possibility of injustice against accused persons. They ensure that accused persons can take advantage of s. 11(d) of the Charter if their failure to appear or to pay the amount of the fine set out in the ticket was the result of events beyond their control. In other words, these provisions relate to the voluntary nature of the waiver by the accused of the benefit of s. 11(d).

¶ 35 It is therefore my view that the New Brunswick legislature has acted in accordance with the Charter. While it is true that it has established a scheme that deprives accused persons of the benefit of s. 11(d) of the Charter, that deprivation operates in circumstances where the litigants involved have in any event validly waived their right to be presumed innocent and their right to a fair and public hearing by an independent and impartial tribunal.

III. Conclusion

¶ 36 It was for these reasons that this Court allowed these appeals in a judgment rendered from the bench on April 23, 1996, answering the first constitutional question in the negative, which made it unnecessary for us to answer the second constitutional question.

QL Update: 970401
cp/d/hbb/DRS/DRS

R. v. Richard

[1996] 3 S.C.R. 525

[1996] S.C.J. No. 43

DRS 96-16633

File No.: 24582.

**Supreme Court of Canada
(from New Brunswick)**

Hearing and judgment: April 23, 1996.

Reasons delivered: October 31, 1996.

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka.

Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
(28 pp.)

Civil rights — Trials, due process, fundamental justice and fair hearings — Criminal and quasi-criminal hearings — Right to an independent and impartial tribunal — Procedure contrary to fundamental justice — Section 16, New Brunswick Provincial Offences Procedure Act .

Crown appeal. Each of the three accused were stopped for speeding and were given a ticket under the New Brunswick Motor Vehicle Act. They did not pay the fine and did not appear in court as indicated on the ticket. They were convicted without a trial and ordered to pay a fine in accordance with the procedure set out in section 16 of the Provincial Offences Procedure Act. The accused appealed their convictions, challenging the constitutionality of section 16. The Court of Queen's Bench found that section 16 infringed section 11(d) of the Canadian Charter of Rights and Freedoms but the infringement was justified under section 1 of the Charter. The New Brunswick Court of Appeal reversed that decision and found that section 16 was invalid because it deprived a citizen of the right to be tried by an independent and impartial tribunal, and no statute could encroach upon the independence of the judiciary. The Crown appealed to the Supreme Court of Canada.

HELD: Appeals allowed. Section 16 did not infringe the Charter because the regulatory scheme set up by the legislature resulted in section 16 applying to situations where the accused had validly waived the benefit of section 11(d) of the Charter. Section 7 of the Charter did not apply because penalties for a ticket did not include imprisonment. Section 11(d) did not preclude the legislature from inferring waiver of the right to be presumed innocent and the right to a fair hearing from an accused's failure to act, provided that the accused was fully aware of the consequences of failing to act and the procedural scheme in place provided sufficient safeguards to ensure the accused's conduct was not due to events over which he or she had no control.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. , 7, 1(d).

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, ss. 2, 3, 5, 9, 10, , 13, 14, 16, 24, 28, 29(1), 48(1).

Provincial Offences Procedure Act, General Regulation, N.B. Reg. 91-50, s. 3(1)(e).

QL Update: 961
d/sdd/hbb

Indexed as:

R. v. Richard

Her Majesty The Queen, appellant;

v.

Réjean Richard, respondent.

And between

Her Majesty The Queen, appellant;

v.

Léo J. Doiron, respondent.

And between

Her Majesty The Queen, appellant;

v.

J. M. Denis Lavoie, respondent, and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

[1996] 3 S.C.R. 525

[1996] S.C.J. No. 43

File No.: 24582.

Supreme Court of Canada

Hearing and judgment: April 23, 1996.

Reasons delivered: October 31, 1996.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Presumption of innocence — Right to fair and public hearing by independent and impartial tribunal — Waiver — Persons stopped for speeding convicted under provincial statutory provision because they failed to pay fine indicated in ticket and to appear in court at time stated in ticket — Whether provincial provision infringes rights guaranteed to persons charged with offences by s. 11(d) of Canadian Charter of Rights and Freedoms — Whether s. 11(d) rights waived — Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, s. 16.

The respondents were stopped for an offence under the New Brunswick Motor Vehicle Act and each received a ticket. They did not pay the fine and did not appear in court at the time and place indicated in the ticket. The respondents were accordingly convicted without a trial and ordered by a Provincial Court judge to pay a fine in accordance with the procedure set out in s. 16 of the Provincial Offences Procedure Act. In the Court of Queen's Bench, the respondents challenged the constitutionality of that section. The court found that s. 16 infringed s. 11(d) of the Canadian Charter of Rights and Freedoms but that this infringement was justifiable

under s. 1 of the Charter. The Court of Appeal, in a majority decision, reversed that judgment, finding s. 16 to be invalid because it had the effect of depriving a citizen of the right guaranteed by s. 11(d) to be tried by an independent and impartial tribunal and because no statute may encroach upon the independence of the judiciary.

Held: The appeals should be allowed.

Section 16 of the Provincial Offences Procedure Act does not infringe s. 11(d) of the Charter since, as a result of the characteristics of the regulatory scheme set up by the New Brunswick legislature, s. 16 applies to situations where the accused has validly waived the benefit of s. 11(d). The liberty component of s. 7 of the Charter does not come into play here since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment.

In the context of regulatory offences for which imprisonment is not a possibility, s. 11(d) of the Charter does not prevent the legislature from inferring from an accused's failure to act that he or she waives the right to be presumed innocent and the right to a fair and public hearing by an independent and impartial tribunal, provided that the accused is fully aware of the consequences of failing to act and that the procedural scheme in place provides sufficient safeguards to ensure that the conduct of the accused was not due to events over which he or she had no control. In the present case, the system in place in New Brunswick meets these requirements fully. The Provincial Offences Procedure Act expressly requires that the ticket state that failure by the accused to act may result in conviction (s. 10(1)(h)), and the ticket must be delivered to the accused personally. In addition, s. 16 provides that the judge required to convict the accused if the accused neither pays the fine nor appears in court must perform certain checks, such as verifying that the ticket was delivered to the accused in accordance with the Act. The judge must not convict the accused if the judge has reason to believe that there are any irregularities. Finally, the Act affords accused persons the possibility of having their conviction set aside by applying to the court within 45 days of the conviction (s. 117), after being notified of their conviction pursuant to s. 48(1), if they satisfy a judge that their failure to appear was not their fault. Under this procedural scheme an accused is thus fully informed of the consequences of failing to act and there are sufficient safeguards to prevent injustices from occurring.

Cases Cited

Applied R. v. Lee, [1989] 2 S.C.R. 1384 ; *referred to*

R. v. Carson (1983), 147 D.L.R. (3d) 754; R. v. Greckol (1991), 64 C.C.C. (3d) 430; R. v. Swain, [1991] 1 S.C.R. 933; Liyanage v. The Queen, [1967] 1 A.C. 259; Re Hertel and The Queen (1986), 37 D.L.R. (4th) 706; R. v. Hess (No. 2), [1949] 4 D.L.R. 199; R. v. Wigglesworth, [1987] 2 S.C.R. 541; Adgey v. The Queen, [1975] 2 S.C.R. 426; Brosseau v. The Queen, [1969] S.C.R. 181; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. Morin, [1992] 1 S.C.R. 771; Clarkson v. The Queen, [1986] 1 S.C.R. 383; R. v. Tran, [1994] 2 S.C.R. 951; R. v. Fitzpatrick, [1995] 4 S.C.R. 154; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Motor Vehicle Act, R.S.N.B. 1973, c. M-17, ss. 140(1.1) [ad. 1981, c. 48, s. 8; am. 1983, c. 52, s. 12; am. 1990, c. 61, s. 84(3)], 347.1(5) [rep. & sub. 1991, c. 34, s. 1].

N.B. Reg. 91-50, General Regulation -- Provincial Offences Procedure Act, s. 3(1)(e).

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, ss. 2, 3, 5, 9, 10 [am. 1990, c. 18, s. 4; am. 1991, c. 29, s. 3], 11 [am. 1991, c. 29, s. 4], 12(1), 13, 14 [am. 1990, c. 18, s. 5; am. 1991, c. 29, s. 5; am. 1992, c. 41, s. 1], 16 [sub. 1990, c. 18, s. 7], 24, 28 [am. idem, s. 13], 29(1), 48(1)

[am. idem, s. 26], 7(1).

Authors Cited

Boisvert, Anne-Marie. "La renonciation aux droits constitutionnels: quelques réflexions", dans *Développements récents en droit criminel*. Cowansville, Qué.: Yvon Blais, 1989, 185.

APPEALS from a judgment of the New Brunswick Court of Appeal (1995), 156 N.B.R. (2d) 309, 401 A.P.R. 309, allowing the appeal of the accused from judgments of Deschênes J. (1993), 131 N.B.R. (2d) 181, 333 A.P.R. 181, dismissing the appeal of the accused, who had been convicted of speeding. Appeals allowed.

Gabriel Bourgeois, for the appellant.

J. M. Denis Lavoie, for the respondents.

Bernard Laprade, for the intervener the Attorney General of Canada.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Shawn Greenberg, for the intervener the Attorney General of Manitoba.

George H. Copley, for the intervener the Attorney General of British Columbia.

Roger B. Langille, Q.C., for the intervener the Attorney General of Prince Edward Island.

Sandra Folkins, for the intervener the Attorney General for Saskatchewan.

Richard F. Taylor, for the intervener the Attorney General for Alberta.

B. Gale Welsh, Q.C., for the intervener the Attorney General of Newfoundland.

Solicitor for the appellant: The Office of the Attorney General, Fredericton.

Solicitors for the respondents: Doiron, Lavoie, LeBouthillier & Boudreau, Tracadie-Sheila, New Brunswick.

Solicitor for the intervener the Attorney General of Canada:

The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Prince Edward Island: The Office of the Attorney General, Charlottetown.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Department of Justice, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: Chris Decker, St. John's.

English version of the judgment of the Court delivered by

¶ 1 **LA FOREST J.**— The Court has before it three appeals raising the constitutional validity, in light of s. 11(d) of the Canadian Charter of Rights and Freedoms, of s. 16 of the Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1 (the "Act"), as it relates to the prosecution of offences under the Motor Vehicle Act, R.S.N.B. 1973, c. M-17. Section 16 provides that accused persons who neither promptly pay the amount of the fine indicated in the ticket issued to them nor appear in court at the time and place stated therein may be convicted without a trial, by a judge who has carried out certain procedural checks, and ordered to pay a fine.

Failure to pay a fine imposed for a contravention of the Motor Vehicle Act is in no case punishable by imprisonment: s. 347.1(5).

Background

¶ 2 The facts giving rise to the three appeals are not in dispute. Each of the respondents was stopped for speeding and received a ticket and signed the notice of prosecution corresponding to the ticket pursuant to the Act. All three were convicted of violating s. 140(1.1) of the Motor Vehicle Act after failing both to pay the amount of the fine indicated in the ticket and to appear in court at the time and place stated therein.

Court of Queen's Bench (1993), 131 N.B.R. (2d) 181

¶ 3 The respondents appealed their convictions to the Court of Queen's Bench the only defence relied on being the unconstitutionality of s. 16 of the Act, but they were not successful. Deschênes J., following the decision of the Ontario Court of Appeal in *R. v. Carson* (1983), 147 D.L.R. (3d) 754, and the decision of the Alberta Court of Queen's Bench in *R. v. Greckol* (1991), 64 C.C.C. (3d) 430, which concerned similar provisions, found that s. 16 of the Act infringed s. 11(d) of the Charter. He was of the opinion, however, that the limitation on the s. 11(d) rights of persons charged with offences was justifiable under s. 1. In his view, the objective of establishing a more expeditious and efficient and less costly scheme for minor provincial offences was important enough to justify such a limitation. He also saw a rational connection between the scheme set up under s. 16 of the Act and this objective of efficiency in the context of offences under the Motor Vehicle Act. Referring to this Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, he stated that he was satisfied that s. 16 comes within the range of means that impair the rights guaranteed by s. 11(d) of the Charter as little as possible. Deschênes J. concluded that the salutary effects of the measure adopted in s. 16 were sufficiently proportional to its deleterious effects.

Court of Appeal (1995), 156 N.B.R. (2d) 309

¶ 4 The respondents appealed Deschênes J.'s decision to the New Brunswick Court of Appeal, where they were successful. Angers J.A., who wrote the reasons of the majority, relied on *Liyanage v. The Queen*, [1967] 1 A.C. 259 (P.C.), *Re Hertel and The Queen* (1986), 37 D.L.R. (4th) 706 (B.C.S.C.), and *R. v. Hess* (No. 2), [1949] 4 D.L.R. 199 (B.C.C.A.), and held s. 16 to be invalid for the following reasons (at p. 316):

[Translation] Every statute which, as a matter of substantive law, has the effect of depriving a citizen of the right to be tried by an independent and impartial tribunal ipso facto negates the citizen's fundamental rights: rights which are guaranteed under the Charter. It is in order to protect the citizen's right to a hearing before an independent and impartial tribunal that no statute may encroach upon the independence of the judiciary. In my view, a provision such as section 16 is invalid.

The majority did not discuss s. 1 of the Charter.

¶ 5 Ayles J.A. saw things differently. He agreed with Deschênes J.'s reasoning as to the scope of s. 11(d) in the context of this case and with his analysis under s. 1. He also criticized the reasoning adopted by the majority, being of the view that there was nothing unlawful or harmful to judicial independence in the procedure established by s. 16 of the Act.

¶ 6 On February 27, 1995, a few days after the Court of Appeal's decision, L'Heureux-Dubé J. granted the appellant a stay of execution of that decision. On June 1, 1995, the Chief Justice and Gonthier and Iacobucci JJ. granted the appellant leave to appeal the Court of Appeal's decision: [1995] 2 S.C.R. vii. At the same time, they ordered that the stay of execution be extended until this Court had rendered its judgment. The following

¶ 11 The other way in which proceedings may be instituted -- which is the one we are concerned with here -- is set out in ss. 9 et seq. of the Act. A police officer or authorized person who believes, on reasonable and probable grounds, that a person has committed a "prescribed offence" may serve that person with a ticket in prescribed form (s. 9). New Brunswick Regulation 91-50 under the Provincial Offences Procedure Act specifies what types of offences are "prescribed" for the purposes of the Act. Section 3(1)(e) provides that:

3(1) The following offences are specified to be prescribed offences under section 9 of the Act:

(e) all offences under the Motor Vehicle Act other than

(i) offences under sections 105.1, 345 and 346 of that Act, and

(ii) offences that are created by by-laws made by a local authority under that Act and that are not approved by the Lieutenant-Governor in Council. . . .

Section 10 of the Act specifies the information that must appear in the ticket, which must be served on the defendant by being delivered to him or her personally (s. 11(1)). The ticket must set out in very precise terms the offence with which the defendant is charged (ss. 10(1)(b) and 10(2)) and must also state the time and place of the appearance (s. 10(1)(c)). The ticket must state that the defendant has the right to choose the official language in which the proceedings will be conducted and to retain and instruct counsel (ss. 10(1)(d) and (e)). Section 10(1)(g) requires that the ticket state the amount of the fixed penalty and the time, place and manner of payment. Section 10(1)(f) provides that the defendant may pay the indicated penalty in the prescribed manner, in which case he or she will be deemed to have been convicted of the offence. Finally, under s. 10(1)(h), the ticket must state that if the defendant does not pay the fixed penalty and does not appear in court at the stated time and place, he or she may be convicted of the offence.

¶ 12 The ticket must be accompanied by a notice of prosecution, which the defendant must sign or, in the event of a failure or refusal to sign, a certification to that effect (s. 11(2)). The notice must name the defendant in addition to setting out the offence with which he or she is charged and stating the time and place of the appearance (s. 11(3)). The notice of prosecution must be filed with a judge no later than the date stated in the ticket for the defendant's appearance unless the defendant has duly paid the penalty in accordance with s. 14 (s. 12(1)). Section 13 provides that a defendant who wishes to dispute the charge set out in the ticket must appear in court at the time and place stated, and where the defendant so appears the proceedings continue as if an information has been laid and a summons issued and served.

¶ 13 Where the proceedings are initiated by means of a ticket, the only sentence that may be imposed is monetary in nature. This can be seen from all the provisions of the Act dealing with the ticket procedure and from more specific provisions, such as ss. 14(5) and 16(1).

¶ 14 It is now necessary to reproduce, in its entirety, s. 16 of the Act, which is central to the debate in these appeals:

16(Where the defendant has not paid a fixed penalty before the time stated in the ticket for the payment of the fixed penalty and does not appear in court at the time and place stated in the ticket, the judge shall examine the notice of prosecution and, if the notice of prosecution contains the certificate referred to in subsection (2), the judge shall, subject to subsection (3), convict the defendant and impose a fine in the amount of the fixed penalty set out in the ticket.

16(2) The certificate on a notice of prosecution shall be in prescribed form, shall be signed, and shall state

- (a) that the person signing the certificate delivered personally to the defendant the ticket to which the notice of prosecution corresponds, and
- (b) that the ticket was in prescribed form and was completed in the same manner as the notice of prosecution.

16(3) The judge shall not convict the defendant if

- (a) the judge has reason to believe that the certificate on the notice of prosecution is inaccurate, or
- (b) the notice of prosecution contains a defect and the defect cannot be cured under section 106.

¶ 15 There is no need for the purposes of these appeals to further summarize the provisions of the Act. It is in the context of this detailed and very complete legislative scheme that the provision whose constitutionality is being challenged arises.

B. Section 11(d) of the Charter

¶ 16 The respondents maintained that s. 16 of the Act violates s. 11(d) of the Charter in two ways. First, they argued that permitting a judge to convict an accused without requiring the Crown to adduce any evidence whatever deprives the accused of the right under s. 11(d) to be presumed innocent. Secondly, the respondents agreed with the conclusion of the Court of Appeal and submitted that s. 16 of the Act restricts the right of the accused under s. 11(d) of the Charter to be tried by an independent tribunal, since the effect of the impugned provision is to prevent the judge from deciding to the best of his or her knowledge and belief after hearing the facts of the case.

¶ 17 The appellant maintained on the contrary that it can be seen from a contextual analysis of the scope of the protection conferred by s. 11(d) that s. 16 of the Act does not infringe that constitutional provision. For the purposes of s. 11(d), it is sufficient that the established procedure afford accused persons a reasonable opportunity to appear or to plead their innocence, which the Act does afford them. In the alternative, the appellant argued that accused persons who fail both to pay the amount of the penalty set out in the ticket and to appear in court at the time and place stated therein, by their conduct, waive the benefit of s. 11(d) of the Charter. Section 16 of the Act accordingly does not violate s. 11(d), which affords no protection to anyone who has waived it.

¶ 18 I shall digress here. I find it very hard to see how the appellant Crown's main argument is different from its alternative argument. It began by arguing that the essence of s. 11(d) in the context of this case is to afford accused persons a reasonable opportunity -- of which they must avail themselves -- to benefit from the rights and freedoms set out therein. Its alternative argument is that legislatures can deprive accused persons of their rights under s. 11(d) where, as in the present case, the accused have waived those rights. If s. 11(d) must be interpreted in the instant case as merely affording an opportunity to benefit from those rights, it follows that persons who do not exercise them will lose the benefit of that protection and, thus, that persons who wish to benefit from them will have to exercise their rights. In my view, an analysis showing that a person has not exercised his or her rights is closely akin to that of the circumstances capable of amounting to a waiver of these rights. The conduct of the accused person ceases to amount to a waiver as soon as he or she begins to exercise his or her rights. Whichever way the analysis is conducted, the considerations will be the same, with the result

that the same constitutional reality will be expressed in two ways. In *R. v. Lee*, [1989] 2 S.C.R. 1384, a decision to which I will be returning, Wilson J., who was supported by a majority of the members of this Court on the issue, came to the same conclusion on this very distinction. In *Lee*, the Court was considering the constitutionality of s. 526.1 of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 598), in light of s. 11(f) of the Charter, which guarantees the right to a jury trial in certain circumstances. The impugned statutory provision inferred a waiver of the right to a jury trial from the failure of an accused to appear for his or her trial without a legitimate excuse. As in the case at bar, the Crown argued that the provision was valid both because it was directed at situations where accused persons fail to exercise their right and because it was directed at situations where accused persons, by their conduct, waive their constitutional right to a jury trial. Wilson J. stated the following about the distinction between these two arguments, at pp. 1412-13:

Similar in kind to the argument based on waiver is the submission that the accused by failing to appear without a legitimate excuse has simply failed to exercise his right to a jury trial. The British Columbia Court of Appeal in *Re McNabb and The Queen* expressed the view that s. 526.1 did not deprive an accused of his Charter right; rather, what the section did was to specify the consequences if an accused chose not to exercise his right by failing to appear at his trial. The Court held that if the accused could satisfy the court that he had a legitimate excuse for failing to appear, then he would not have failed to exercise his right. But if he had no such excuse, then he would have failed to exercise his Charter right and could not thereafter be heard to complain that he had been deprived of it.

The nub of this argument is the same as in the argument based on waiver, namely that it is the accused's own conduct and not the statute which deprives him of his Charter right. The only difference is that in this case the conduct is characterized as a failure to exercise the right as opposed to a waiver of the right. Presumably, it is thought through this distinction to avoid the strict standard of proof required in the case of waiver. [Emphasis in second paragraph added.]

Thus, any right that can be waived may be seen as affording those who have it the opportunity to exercise it. I will be analysing the issue in the case at bar from the perspective of waiver, however, since that is how this Court has ordinarily approached such questions in the past.

¶ 19 It should first be noted that s. 11(d) applies to regulatory offences such as those at issue here. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, this Court defined the scope of the protection afforded by s. 11 of the Charter in the context of regulatory offences. Wilson J., on behalf of the Court, made the following comments, which are highly relevant here, concerning the applicability of s. 11(d) (at pp. 559-60):

There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that, just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C.) In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At page 205 Linden J. said:

This provision of the Charter is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against

her.

There can be no question that parking infractions are "offences" as that word is used in s. 11 of the Charter. The respondents contend that these are not the types of transgressions against society s. 11 of the Charter is directed at, since there is virtually no stigma attached to a parking ticket. In my view, however, the degree of stigma is of no significance.

¶ 20 Section 11(d) reads as follows:

11 Any person charged with an offence has the right

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

The constitutional guarantee provided for in s. 11(d) is broad. The provision essentially confers two things on any person charged with an offence: the constitutional right to be presumed innocent -- with all its corollaries -- and the right to a hearing that must, according to s. 11(d), have certain characteristics, namely those of being fair, public and conducted by an independent and impartial tribunal. Section 11(d) raises certain fundamental rules of our common law to the level of constitutional values.

¶ 21 However, the possibility for accused persons of pleading guilty, thereby waiving the benefit of the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal by admitting their criminal liability, is an equally essential component of our common law. The effect of a guilty plea was described as follows by Laskin J. (as he then was), dissenting on other issues, in *Adgey v. The Queen*, [1975] 2 S.C.R. 426, at p. 440:

A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge.

Owing to the obviously prejudicial consequences of a guilty plea for the accused, the common law gives judges some discretion to ensure that the accused entered the plea with full knowledge of those consequences in order to avoid any injustice. Thus, a judge may refuse, for "valid reasons", to accept the plea of guilty, or the plea may subsequently be varied by having the accused substitute a plea of not guilty (*Brosseau v. The Queen*, [1969] S.C.R. 181, and *Adgey*, supra). My purpose in drawing a parallel with the guilty plea here is to show that the rights and freedoms protected by s. 11(d) are, by their very nature, rights that can be waived by those to whom they apply.

C. Waiver of Charter Rights and Freedoms

¶ 22 This Court has already recognized that there are circumstances in which a right or freedom conferred by the Charter can be waived. However, the possibility of waiving certain constitutional rights, the manner in which such a waiver may be made, the extent to which such rights can be waived and the effect of a waiver may vary with the nature and scope of the right in question: A.-M. Boisvert, "La renonciation aux droits constitutionnels: quelques réflexions", in *Développements récents en droit criminel* (1989), 185, at pp. 186-87.

That is why, for example, the right to be tried within a reasonable time (see *Mills v. The Queen*, [1986] 1 S.C.R. 863, *R. v. Rahey*, [1987] 1 S.C.R. 588, and *R. v. Morin*, [1992] 1 S.C.R. 771) is not necessarily waived in the same way and to the same extent as the right to counsel (see *Clarkson v. The Queen*, [1986] 1 S.C.R. 383), and why it may sometimes even be impossible to waive a constitutional right (see *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 996). It is clear, however, that where it is possible to waive a given right or freedom, this Court has always stressed that the conduct of the holder of the right or freedom amounting to waiver must be voluntary and that he or she must have full knowledge of the consequences of that waiver.

¶ 23 The possibility of waiving the benefit of s. 11(d) of the Charter implies -- as is the case with any Charter right or freedom that can be waived -- that legislatures can "deny" an accused the benefit of s. 11(d) if they do so in circumstances in which the accused has by his or her conduct waived that benefit. It is clear that in so doing they are not in actual fact denying a constitutional right. If the impugned legislative measure relates to a situation in which the accused has waived the benefit of s. 11(d), it is quite simply no longer open to the accused to argue that the measure in question is unconstitutional. This proposition can be illustrated with an obvious example. A statute providing that "an accused who pleads guilty is no longer entitled to a trial" could not be challenged on the ground that it denies accused persons the benefit of s. 11(d). Section 11(d) does of course grant them the right to a trial, but when a guilty plea is validly entered, the accused just as validly waives his or her right to a trial. Thus, nothing prevents the legislature, in such circumstances, from expressly denying the benefit of the constitutional provision that is at the very heart of the waiver.

¶ 24 That is exactly what the appellant is arguing in the case at bar. Section 16 of the Act applies where a person charged with an offence has waived the benefit of s. 11(d) of the Charter. As a consequence, s. 16, the effect of which is to provide for conviction without a trial, does not constitute a limitation on that constitutional provision.

¶ 25 In order to deal with such an argument properly, it must be determined whether the impugned statutory provision is applicable only in circumstances in which the accused has actually (and validly) waived the constitutional provision in question.

¶ 26 The analytical approach to be followed can best be illustrated and explained by drawing a parallel with this Court's decision in *Lee*, supra. As I explained, *Lee* concerned the constitutionality of s. 526.1 (now s. 598) of the Criminal Code, which provides that accused persons who fail to appear for their trial and do not give the court a legitimate excuse are deemed to have waived their right to a jury trial. It was argued that the impugned provision did not offend s. 11(f) of the Charter because it dealt with a situation where the accused had by his or her conduct and omission waived his or her constitutional rights under s. 11(f). Wilson J., speaking for the majority on this point, stated that to dispose of this argument, the Court had to determine whether it was constitutionally possible to infer a valid waiver of the benefit of s. 11(f) of the Charter from the conduct referred to in s. 526.1, which meant that we had to determine in what circumstances an accused could be said to have waived the constitutional right to a jury trial. The Court held that a waiver of s. 11(f) of the Charter, to be valid, must be clear and unequivocal and that, since the conduct from which the legislation inferred a waiver of the right to a jury trial was not sufficiently "clear and unequivocal", s. 526.1 violated s. 11(f) of the Charter. There was quite simply no sufficiently clear connection between an accused's failure to appear without a legitimate excuse and the form of trial.

D. Section 16 of the Act

¶ 27 The analytical approach to be followed in this case is similar to the one adopted by this Court in *Lee*, and in applying it here, I have reached the conclusion that, as a result of the characteristics of the regulatory scheme set up by the New Brunswick legislature, s. 16 of the Act applies to situations where the accused has validly waived the benefit of s. 11(d) of the Charter. The analysis obviously requires that I consider in what

circumstances an accused will have validly waived the benefit of s. 11(d). The difficulty in the present case lies in the fact that the conduct covered by the impugned provision constitutes an omission rather than a positive expression by the accused that he or she intends to waive his or her right to be presumed innocent and his or her right to a fair and public hearing by an independent and impartial tribunal.

¶ 28 First of all, the context of the impugned provisions must be taken into account. In the recent unanimous decision in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, where this Court had to consider the scope of the right against self-incrimination in a regulatory context, I stressed the importance of the context in determining the scope and extent of Charter rights and freedoms (at para. 30):

This Court has often stated that the context of a Charter claim is crucial in determining the extent of the right asserted; see for example my comments in *Lyons*, supra, at p. 361, and in *Thomson Newspapers*, supra, at pp. 505-8 and 516-17. In particular, in *Wholesale Travel*, supra, at p. 226, Cory J. held that "a Charter right may have different scope and implications in a regulatory context than in a truly criminal one", and that "constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences".

It should be noted that in the case at bar, this Court does not have to rule on the Charter's requirements as to the manner and circumstances in which a guilty plea can be entered and accepted by the court in the context of a criminal offence. This Court has not ruled on that question, and in my view it is simply not appropriate to do so in the present case. Rather, the Court must deal with the manner in which accused persons can waive their rights under s. 11(d) of the Charter in a quasi-criminal or regulatory context. I wish to point out that the fact I am dealing with the regulatory context in the present case does not necessarily mean that I would reach a different conclusion in a purely criminal context. However, I recognize the possibility that in such a context, the public interest may require that accused persons waive their rights in court, by performing a positive act, owing to the far more serious consequences of a waiver of the benefit of s. 11(d) of the Charter in such cases resulting, inter alia, from the potential loss of liberty and the stigma attached to criminal culpability.

¶ 29 In my view, the context to which I referred in *Fitzpatrick*, supra, may be relevant -- without necessarily affecting the outcome -- and can be taken into consideration in determining both the scope and extent of the rights and the manner in which and extent to which a right can be waived. Such an approach seems to me to be perfectly consistent with past decisions of this Court on the waiver of constitutional rights. Let us therefore consider the context that is relevant here.

¶ 30 First of all, the constitutionality of s. 16 of the Act is being challenged in the context of regulatory offences. In *Fitzpatrick*, supra, as mentioned earlier, this Court unanimously adopted the statement by Cory J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, that the scope and extent of a right may vary with the context -- regulatory or criminal -- in which it is asserted. In *Wholesale Travel*, however, a majority of this Court was of the view that it would be inappropriate, in the circumstances of the appeal before it, to limit the scope of s. 11(d) because the provision at issue in that case, while regulatory and not criminal in nature, could result in imprisonment. Lamer C.J. explained this as follows, at p. 197:

Again, both the Crown and a number of interveners have argued that this interpretation of s. 11(d) should not apply in a regulatory setting. I can only reiterate my earlier comment that it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the Charter analysis. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. A person whose liberty interest is imperilled is entitled to have the principles of fundamental justice fully observed. The presumption of innocence, guaranteed by s. 11(d), is clearly a

principle of fundamental justice. [Emphasis in original.]

Sopinka J. concurred in the Chief Justice's reasons. My own reasons were to the same effect. stated, at pp. 209-10:

In the present case we are dealing with a provision under which a five-year term of imprisonment may be imposed if an individual is convicted. Such a deprivation requires much stricter requirements to conform with the principles of fundamental justice than mere monetary penalties. I should add that the context and values at stake in Thomson Newspapers Ltd., supra, were profoundly different from those in the present case. Thomson Newspapers Ltd. was really concerned with the procedural protection that should be afforded privacy in relation to business documents. Here the effect of the provisions is the removal of the requirement that an offence involving a serious deprivation of liberty be proved beyond a reasonable doubt. While, in my view, in the regulatory context in which the provisions operate a requirement that a reasonable doubt be raised by the accused that he or she has exercised due diligence meets the requirements of fundamental justice (under s. 7 of the Charter) in these circumstances, a requirement that the accused prove such diligence on the balance of probabilities goes too far. The same is true under s. 1 of the Charter if one approaches the issue in terms of s. 11(d). The provision substantially divests him of the presumption of innocence.

The reasons of Iacobucci J., in which Gonthier and Stevenson JJ. concurred, were to the same effect with respect to the scope of s. 11(d) in this context: see p. 255. Wholesale Travel shows clearly that while the scope and extent of rights may vary depending on whether the context is regulatory or criminal, this will not be true in every case. Owing to the possibility that the offence at issue in that case would result in imprisonment, it was necessary to avoid drawing a distinction based on the regulatory nature of the offence.

¶ 31 In the case at bar, however, there is absolutely no possibility of imprisonment, since the penalties that can be imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment. Thus, the liberty component of s. 7 of the Charter does not come into play. The concern of the majority of this Court in Wholesale Travel that a contravention might result in imprisonment does not arise here. This, therefore, is the context to be taken into account in analysing the scope of the constitutional rights at issue in this case and, more specifically, in analysing the extent to which rights conferred on accused persons under s. 11(d) of the Charter can be waived.

¶ 32 In my view, in a context in which litigants cannot be imprisoned for offences of a regulatory nature, it is open to both the provincial legislatures and Parliament to infer from the failure of those litigants to act that they have waived their right to be presumed innocent and their right to a hearing and at the same time to have consented to a conviction made against them, provided that under the procedural scheme applicable to them, they are fully informed of the consequences of failing to act and there are sufficient safeguards to prevent injustices from occurring.

¶ 33 In the case at bar, the system set up by the New Brunswick legislature seems to me to meet these requirements fully. First of all, the Act expressly requires that the ticket state that failure by the accused to act may result in conviction: s. 10(1)(h). The following wording currently appears on each ticket issued in accordance with this provision:

If you do not pay the fixed penalty and do not appear in court at the time and place stated on this ticket you may be convicted of the offence and fined. It is therefore very important for you to appear in court at the time and place stated on this ticket if you wish to dispute the

charge.

Furthermore, the Act requires that the ticket be delivered to the accused personally: s. 11(1). The accused is also required to sign the notice of prosecution corresponding to the ticket (s. 11(2)) and his failure or refusal to do so must be certified. In addition, s. 16 provides that the judge required to convict the accused if the accused neither pays the penalty nor appears in court must ensure, *inter alia*, that the ticket was in fact delivered to the accused in accordance with the Act. Moreover, the judge can refuse to enter a conviction if he or she has reason to believe that there are any irregularities. In my view, the general effect of these requirements is to prevent a conviction from being entered unless a judge -- an independent and impartial third party -- is satisfied that the Crown has met the requirements intended to ensure that the accused is fully informed of the consequences of failing to act.

¶ 34 Furthermore, the Act affords accused persons the possibility of having their conviction set aside by applying to the court within 45 days of the conviction (s. 117 of the Act), after being notified of their conviction pursuant to s. 48(1) of the Act, if they satisfy a judge that their failure to appear was not their fault. In my view, these provisions minimize any possibility of injustice against accused persons. They ensure that accused persons can take advantage of s. 11(d) of the Charter if their failure to appear or to pay the amount of the fine set out in the ticket was the result of events beyond their control. In other words, these provisions relate to the voluntary nature of the waiver by the accused of the benefit of s. 11(d).

¶ 35 It is therefore my view that the New Brunswick legislature has acted in accordance with the Charter. While it is true that it has established a scheme that deprives accused persons of the benefit of s. 11(d) of the Charter, that deprivation operates in circumstances where the litigants involved have in any event validly waived their right to be presumed innocent and their right to a fair and public hearing by an independent and impartial tribunal.

III. Conclusion

¶ 36 It was for these reasons that this Court allowed these appeals in a judgment rendered from the bench on April 23, 1996, answering the first constitutional question in the negative, which made it unnecessary for us to answer the second constitutional question.

QL Update: 970401
cp/d/hbb/DRS/DRS