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Indexed as:

R. v. Pilipovic

Between
Her Majesty the Queen, respondent, and
Dragan Pilipovic, appellant

[1996] O.J. No. 3139

Ontario Court of Justice (Provincial Division)
Brampton, Ontario
Blacklock Prov. J.

August 29, 1996.
(40 pp.)

Motor vehicles — Regulation of vehicles and traffic — Rate of speed — Civil rights — Trials, due process, fundamental justice and fair hearings — Criminal and Quasi-criminal proceedings — Right to be present at trial.

Appeal of two convictions under the Provincial Offences Act for speeding. The defendant had obtained court dates for two speeding tickets and appointed an agent but both failed to appear at trial. The defendant was convicted in his absence. The grounds of the defendant's appeal were that section 9.1 of the Act was unconstitutional and breached section 11(d) of the Canadian Charter of Rights and Freedoms which provided that anyone charged with an offence was presumed innocent until proven guilty. The Crown argued that it was not the legislation which denied the defendant a right to a hearing, but the defendant's own action in failing to appear.

HELD: Appeals dismissed. The default conviction provisions of section 9.1 deprived defendants of the chance of having an ex parte trial, but it had contributed to an improved case flow and had bolstered public confidence in the administration of justice by reducing the numbers of defendants who elected a trial in the hope of delaying a conviction indefinitely. Section 9.1 was, on the balance of probabilities, a reasonable limit which was demonstrably justifiable in a free and democratic society within the meaning of section 1 of the Charter, despite the fact that it was a prima facie breach of section 11(d). Section 9.1 met the test of section 1 in that the objective of the legislation made it appropriate to limit a constitutionally protected right, the legislation was rationally connected to the objective identified, the legislation infringed the right as little as possible and the deleterious effects of the legislation were proportionate given its objective.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 11(d).
Criminal Code, ss. 193, 195(1).
Highway Traffic Act, R.S.O. 1990 c. H.8, s. 128.
Liquor Control Act, R.S.O. 1990, c. L.18.
Motor Vehicle Act, s. 94(2).
Provincial Offences Act (1979) S.O. c. 4, ss. 7, 9, 11, 66, 67, 68, 69, 69(2), 69(3), 69(6), 69(7), 69(20), 70, 118, 135, 138.
Provincial Offences Act R.S.O. 1990, c. P-33, ss. 5.1, 7, 9.1, 11, 12, 66(5), 66(6), 68, 69(2), 69(3),

69(4), 135.
Provincial Offences Procedure Act, R.S.N.B. 1987, c-P.22, s. 16.
Provincial Offences Procedure Act, S.A. 1988 c. P-21.5, s. 33(1).
Provincial Offences Statute Law Amendment Act 1993, S.O. c. 31, s. 26.

Counsel:

S. Aujla, for the Crown.
Mr. Burd, for the accused.

BLACKLOCK PROV. J.:—

A) Introduction

¶ 1 I have before me the case of Regina v. Dragan Pilipovic. He is appealing two convictions registered pursuant to section 9.1 of the Provincial Offences Act R.S.O. 1990 C-P.33 as amended.

¶ 2 The first charging document in this case was a Part I Certificate of Offence alleging the offence of speeding, 65 km/hr in a 50 km/hr zone with an offence date of August 26, 1995.

¶ 3 The Offence Notice, which was served on the Defendant, contained a warning indicating that unless the defendant responded by attending the court within the next 15 days requesting that a trial date be set he would be deemed not to dispute the charge and he may be convicted. Other options were also set out by which the defendant could admit responsibility and pay a fine.

¶ 4 The material before me shows that the defendant did pursuant to section 5.1 of the Provincial Offences Act supra, appear by agent and file on August 29, 1995, a Notice of Intention to Appear in relation to this matter. Immediately above the agent's signature on this notice is a warning that a failure to appear at the time and place fixed for trial will be taken as meaning that the defendant does not wish to dispute the charge and a conviction may follow. Notice was also given by Mr. Burd to the court that the Not Guilty, Agents at Court had been retained by Mr. Pilipovic to represent him and they were authorized by him to receive all documentation on his behalf regarding this charge.

¶ 5 Notice of Trial was delivered to Mr. Burd, as Agent for the accused on September 12, 1995. The notice indicated that the defendant's trial would take place in Court Rm. 19, 50 Kennedy Rd. S. Brampton, Ontario at 1:30 P.M., October 19, 1995. It also contained the following warning

> "Your trial will be held on the time noted above at the Ontario Court (Provincial Division) shown. You and your witnesses should be ready for your trial at that time. If you do not appear, you will be deemed not to dispute the charge and the court may convict you in your absence without further notice."

¶ 6 Neither the defendant nor his agent appeared at the appointed time and place. The presiding Justice of the Peace found that the accused was deemed not to dispute the allegation and pursuant to the provisions of section 9.1 of the Provincial Offences Act supra, entered a conviction. The defendant was fined $47.50.

¶ 7 Similar steps were taken regarding the second speeding ticket before me. This ticket was received by the defendant Pilipovic and alleged that he was speeding 79 in a 60 km/hr zone on September 27, 1995. Again, although the defendant obtained a trial date from the court which was forwarded to him at the address that was provided in his notice of intent to appear neither he nor anyone on his behalf attended. He was convicted and was fined $67.50 on this occasion again pursuant to section 9.1 of the Act.

¶ 8 I also have before me a number of other appeals brought on behalf of other individuals who raise the same point as Mr. Pilipovic regarding the constitutionality of convictions registered pursuant to section 9.1 of the Provincial Offences Act supra. It is agreed that all appeals before me will be governed by my ruling in the

Pilipovic matter. It is of some interest, however, to note the nature of the charges which the other individuals before me face. They include charges such as "improper left turn", "fail to display two licence plates, "speeding", "drawing trailer no plate", "improper means of attachment", "insecure load", "fail to stop for school bus", "follow too close", "failing to stop for a red light".

¶ 9 Section 9 and 9.1 of the Provincial Offences Act supra, read as follows.

> 9(1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section s 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute that charge and the justice shall examine the certificate of offence and,
>
> (a) where the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendants absence; or
> (b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding
>
> (2) Where a defendant is deemed not to wish to dispute a charge under subsection (1) in respect of an offence under a by-law of a municipality the justice shall enter a conviction under clause (1)(a) without proof of the bylaw that creates the offence if the certificate of offence is complete and regular on its face.
>
> 9.1(1) If a defendant who has given a notice of intention to appear fails to appear at the time and place appointed for the hearing, the defendant shall be deemed not to dispute the charge.
>
> (2) If subsection (1) applies section 54 does not apply, and the justice shall examine the certificate of offence and shall without a hearing enter a conviction in the defendant's absence and impose the set fine for the offence if the certificate is complete and regular on its face.
>
> (3) The justice shall quash the proceeding if he or she is not able to enter a conviction.

¶ 10 The defendant asserts that I ought to declare that section 9.1 of the legislation, as set out above, to be unconstitutional in that it is a breach of section 11(d) of the Charter of Rights and Freedoms which is not justified under the provisions of section 1.

¶ 11 Section 11(d) of the Charter reads as follows:

> Anyone 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.

B) Position of the Parties

¶ 12 Mr. Burd on behalf of the defendant argues firstly, that the provisions operate to deny the accused a true hearing into his guilt or innocence. Secondly he asserts that because the court has no discretion but to convict, the judicial officer presiding under section 9.1 lacks the institutional independence required by section 11(d). He asserts, moreover, that these violations cannot be justified under the provisions of section 1 of the Charter of Rights and Freedoms in that the section fails all branches of the section 1 test enunciated in Regina v. Oakes (1986) 24 C.C.C. (3d) 321 (S.C.C.).

¶ 13 The Crown argues that 11(d) is not breached as the accused has not been denied a right to a hearing. It is argued that it is not the legislation that denies him his hearing it is the defendant's own action of not appearing that operates to deny him this right. It is also suggested by the Crown that the accused must be taken to have waived any right he had to the hearing, particularly in light of the warnings on the documentation before the

court. It is finally argued that there is nothing offensive to the independence of the presiding justice of the peace in the section in issue. The Crown's alternative position is that any breach of section 11(d) is justified under section 1.

C) Analysis

i) Section 11(d)

¶ 14 It is clear that the offences before me are ones being prosecuted by the state. They have a public interest component to them and they involve penal sanctions. Consequently it is clear on the authority of Wigglesworth v. The Queen (1987) 37 C.C.C. (3d) 385 at 397 S.C.C. that the defendant is a person who is "charged with an offence" within the meaning of section 11 of the Charter. He is thus entitled to claim the protection of section 11(d).

¶ 15 I must say, that I am in something of an awkward situation in this case in that the issue of whether of not section 16 of the Provincial Offences Procedure Act R.S.N.B. 1987 c-P.22, which is analogous in some respects to sections 9 and 9.1 of the Ontario legislation, is currently before the Supreme Court of Canada in Regina v. Richard (unreported decision of the Supreme Court of Canada, result released April 23, 1996). I was advised during the course of the argument of this appeal that the Supreme Court had allowed the Crown's appeal and reversed the Court of Appeal for New Brunswick in that case. The Court of Appeal of New Brunswick had earlier held section 16 of the New Brunswick legislation was a breach of section 11(d) at least to the extent that the lack of discretion to acquit caused the presiding justice to cease to be an independent and impartial tribunal. (See Regina v. Richard unreported decision of the New Brunswick Court of Appeal February 6, 1995.)

¶ 16 I would note a much broader basis of unconstitutionality was argued when Richard supra, was before Deschenes J. of the New Brunswick Queen's Bench. At that time the arguments appear to have been analogous to those rejected by our Court of Appeal in Regina v. Carson (1983) 4 C.C.C. (3d) 476 (Ont. C.A.).

¶ 17 At the time the appeals before me were argued I originally understood that at its highest, all the Supreme Court could be taken as having done in Richard supra, was to confirm the approach taken by our Court of Appeal in Carson supra. From an examination of the Supreme Court's answers to the constitutional questions which have since been provided to me by the parties, it appears, however, that the Court has, at least in some context, found that section 16 of the New Brunswick legislation is not a prima facie breach of section 11(d) at all. This may well be an indication of a new approach to section 11(d) or waiver which is not to be found in the cases decided to date.

¶ 18 The Supreme Court has yet, however, to deliver their reasons in Richard supra. I also have no clear information as to when the Supreme Court will give reasons in that case. I am also advised that the issue before me has come up a number of times before Provincial Offences Appeal Courts in this Province and the Crown urges me to deal with the case now.

¶ 19 Originally I was not disposed to do so without the benefit of the Supreme Court's reasons but in light of the conclusion I have come to on section 1 I have decided that will. I can also indicate that I will proceed to deal with this case on the assumption that Mr. Burd is right when he submits that section 9.1 is a prima facie breach of section 11(d) to the extent that it forecloses a hearing being conducted by the presiding judicial officer into the allegations set out in the certificate of offence and compels a conviction on the basis of the defendant's failure to appear at the time fixed for trial. I am also prepared in this case to proceed on the assumption that not all failures to appear can be taken as involving a waiver of the full scope of the rights guaranteed by section 11(d).

¶ 20 I do not, however, find any merit in Mr. Burd's second point outlined above. It seems to me, that at a minimum the decision of the Supreme Court in Regina v. Richard supra, must be taken as having resolved this issue in favour of the Crown.

¶ 21 In light of my decision to proceed in this case on the assumption that section 9.1 amounts to an unwaived breach of section 11(d), I must now turn to section 1 of the Charter.

ii) Section 1

¶ 22 The test which the Crown must meet under section 1 has been set out by the Supreme Court of Canada in Regina v. Oakes supra, at pg. 348 - 9. That test essentially requires the Court to consider four matters. The Court must determine whether or not (a) the objective of the legislation in question is of a nature that makes it appropriate to limit a constitutionally protected right, (b) the legislation is rationally connected to the objective identified, (c) the legislation infringes the right "as little as possible" and (d) the deleterious effects of the legislation are proportionate given the objective aimed at.

a) The Nature of the Objective

¶ 23 One area that has been of particular concern to me in dealing with this case is the question of whether on not it can be said that the objective of the legislation in question is discordant with the principles integral to a free and democratic community? In the context of the case before me, can it be said that this legislation is aimed at matters that are truly "pressing and substantial"?

¶ 24 There are clearly some objectives which may be viewed by many as "pressing and substantial" but they are simply out of step with the values inherent within the rights protected by the Charter and they are thus not entitled to consideration under section 1 of the Charter. This principle appears as yet to have received relatively little attention in the section 1 cases. It was, however, the subject of comment by Dickson C.J.C. in Regina v. Big M Drug Mart (1985) 18 C.C.C. (3d) 385 at pg. 430.

> "At the outset it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which governmental objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen achieve this interest are reasonable ---- a form of proportionality test. (Emphasis added)

¶ 25 Dickson C.J.C. then went on to illustrate his point in the context before him. He stated again at pg. 430

> "Two reasons have been advanced to justify the legislation here in issue as a reasonable limit. It can be urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a) ..." [Emphasis added]

¶ 26 There have also certainly been expressions of opinion by other members of the Supreme Court which suggest that, short of true social emergency, a breach of the rights enshrined in section 7 cannot be justified on the basis of administrative expedience. See for example, Reference re section 94(2) of Motor Vehicle Act (1985) 23 C.C.C. (3d) 289 at pg. 313 per Lamer J., as he then was.

¶ 27 In addition, there have been occasions when some members of that court have been unwilling to give any real weight to questions related to the economic implications inherent in securing to individuals the full scope of rights protected under section 7. (See for example the comments of Wilson J. in Singh et al. v. The Minister of Employment and Immigration [1985] 1 S.C.R. 177 at pg. 218 - 219, a case concerning the hearing rights of those applying for status as Convention refugees.)

¶ 28 Mr. Burd, on behalf of the appellant, characterizes the objective in section 9.1 of the Provincial Offences Act, supra as administrative convenience. He argues that unlike proceedings under section 9 of the Provincial Offences Act, supra all the Crown's witnesses would have to be present in any event, if the Crown was a position to proceed at the time of the defendant's non appearance. He argues that the only purpose of the section in question can be to avoid the time taken in an ex parte trial and to avoid dismissals or withdrawals in cases in which the Crown's witnesses are not present.

¶ 29 He argues that the purpose of this legislation is simply to strip defendants who do not appear at trial of the presumption of innocence and their right to any real hearing into the question of their guilt because it is convenient to do so. He suggested that to look at this as a legitimate objective would be to put a dollar price on his client's Charter rights. As I understood Mr. Burd it was his submission in effect that this would be discordant with the principles integral to a free and democratic society.

¶ 30 He goes on to suggest that while there is a need for a reasonable degree of efficiency in the administration of justice, the provisions of section 9 coupled with the provisions of 5.1 which require an attendance to file notice of intention to appear facilitating effective pre-trial resolution are sufficient to ensure that the Provincial Offences Courts are not ground to a halt. He consequently argues that I ought not to be satisfied that the objective of section 9.1 is sufficiently important to limit the rights protected under section 11(d).

¶ 31 While I agree with Mr. Burd that the focus of this case must be on section 9.1 its purposes and how it is tailored to achieve them I believe it would be wrong to look at the section in isolation. Rather I would adopt the same approach as that taken by our Court of Appeal in Carson supra, and view the provision in question here in its proper context. This requires an examination of history of the default mechanisms of the Provincial Offences Act supra, and an examination of the other provisions surrounding them.

¶ 32 The fact that the courts in Ontario have been in a degree of crisis was recognized at least as early as 1973 by the Law Reform Commission of Ontario. In their "Report on Administration of Ontario Courts" the Commission recognized the tremendous volume of work that non-Criminal Code charges represented to the system of justice even in the early 1970s. At pg. 59-60 of the Commission's report it was stated that as of 1971 Criminal Code cases in fact represented only 10% of the then Provincial Court (Criminal Division)'s cases. The rest of the case load was, at the time, made up of 48% Highway Traffic Act cases, 35% Municipal Bylaw cases and 8% were prosecutions under other statutes.

¶ 33 In 1971, the Provincial Division disposed of approximately 2,000,000 prosecutions under Provincial Statutes. The procedure employed to process these charges was analogous to that employed in relation to true crimes. As the Commission pointed out, those charged with relatively minor Provincial Offences were thus being dealt with in a way that associated their activity with serious criminal wrongdoing. This volume combined with this method of procedure was recognized as putting tremendous strain on the resources of the police and the courts. It was also condemned by The Commission as wrongfully stigmatizing many offenders.

¶ 34 In addition the Law Reform Commission found a backlog to be growing. The Commission indicated that in 1972 the backlog in undisposed of charges under the Highway Traffic Act alone grew by about 23,000 charges in a period of 8 months and by 50,000 charges in relation to all provincial offences.

¶ 35 At pg. 63 of their report the Commission stated

> "The matters which we have been discussing are in our view symptomatic of a much larger problem. The whole system of administration of provincial offences is collapsing, not only in court but also with respect to the service of summons execution of warrants and the vast amount of related paper work. Police resources are being used to enforce parking tags while subpoenas in serious criminal cases are being sent by ordinary mail. Some police officers do not bother to attend as witnesses. Defendants are acquitted apart from the merits. The latter result maybe unobjectionable if some other desirable purpose is served, but if the acquittal is simply the consequence of administrative incapacity it can only encourage disrespect for the system."

¶ 36 The Commission made a number of recommendations. Some of these recommendations included a reclassification of Provincial Offences. Under the Commission's approach what it believed to be the more serious provincial offences would continue to be dealt with by way of procedure generally analogous to that applicable to summary convictions under the Criminal Code. They suggested, however, an entirely different approach be taken with respect to the less serious order of Provincial Offences which they described as infractions.

¶ 37 With respect to these offences the Commission recommended a procedure that certainly did not appear to afford the offender a traditional hearing before the imposition of penalty. While not identical to either section 9 or 9.1 of the Provincial Offences Act, which were subsequently adopted by the Legislature, the Commission's recommendation appears to represent the roots of both tools.

¶ 38 At pg. 66 of the Report supra the Commission put its recommendation this way.

> "We recommend that where an infraction is alleged to have been committed a ticket be left on the vehicle or handed to the offender setting out details of the infraction and specifying the amount of the fine to be paid. If the fine is not paid by a certain date, a "notice of infraction" should be sent by prepaid registered post to the driver or owner of the vehicle as the case may be indicating that a fine has been. assessed against him and requiring him to either pay the specified fine together with an additional amount for costs or to appear before (rather than on) a specified date if he wishes to dispute the assessment. The notice should also indicate that if an appearance is not made before the specified date to show cause why a fine should not be assessed commission of the infraction shall be deemed to be admitted."

¶ 39 The volume of work which Provincial Offences represented did not disappear as the Province passed through the 1970s. Indeed the material before me indicated, for example, that in 1976 there were approximately 1.3 million summary conviction tickets served on defendants in the Province for non-Criminal Code violations.

¶ 40 Prior to the enactment of the Provincial Offences Act (1979) S.O. Ch. 4 the only way in which these matters could be disposed of absent a withdrawal or plea of guilty was to mad them the subject of a trial. If the defendant did not appear for the trial the court had a discretion to order a warrant for the defendant's arrest and upon apprehension the matter would be tried or the case could be dealt with on an ex parte basis without the issuance of an arrest warrant. Both options, however, involved the calling of evidence and the accompanying use of court time.

¶ 41 The material before me suggests that ex parte trials themselves in fact involved the use of considerable court resources at this point in time. Of the approximately 1.3 million summary conviction tickets served in 1976 approximately 800,000 resulted in a trial in the absence of the accused. (See Ministry of the Attorney General Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals, 1978 pg. 11-12.) All of these cases involved a hearing in a fully staffed court room.

¶ 42 In 1979, the Province of Ontario became the first Province in Canada to create a "default conviction" mechanism as part of a fundamental overhaul of how Provincial offences were to be prosecuted. The Provincial Offences Act supra, while not identical to the model proposed by the Law Reform Commission in its report in 1973, was clearly inspired by many of its recommendations.

¶ 43 The Provincial Offences Act, (1979) supra created a three part system involving Parts I, II and III of the Act. Part II was applicable to municipal by-laws and but its procedures generally were the same as that applicable to offences governed by Part I. Part III was the procedure employed with respect to the more serious range of Provincial Offence. Part III established a code of procedure for proceedings separate from the summary conviction provisions of the Criminal Code. Under its provisions however, proceedings were still instituted by an information and the procedures utilized were in many ways analogous to the summary conviction provisions of the Criminal Code. When a prosecution was instituted under Part III imprisonment remained a sentence which could be imposed as a direct sentencing sanction. Warrants could be issued to bring the defendant before the court for his or her trial.

¶ 44 Part I of the Act, however, employed quite different procedures involving a certificate of offence. Under that procedure imprisonment was not a sanction open to the court as a matter of imposing sentence. The maximum fine which could be imposed was, under section 12, one of $300.00 and the court could not issue a warrant to bring the accused before the court for the purpose of his trial.

¶ 45 Under the Part I procedure set out in 1979, the Chief Judge of the Province was authorized to establish set fines in relation to Provincial Offences. A provincial offences officer, once a set fine was established, could then properly lay a charge using the Part instead of the more complex and potentially more serious procedure set out in Part III.

¶ 46 Under the Part I a Notice of Offence was given to the defendant and the certificate of offence was filed with the Provincial Offences Court. Options were set out on the Offence Notice which indicated amongst other things that if the accused wanted to plead not guilty and have a trial he or she could indicate this desire by delivering notice to the court within 15 days. This notice could be sent in by mail should the defendant so desire. The offence Notice also advised the defendant however that a failure to do anything for 15 days would be taken as an indication that the certificate of offence was not disputed and could result in a conviction.

¶ 47 There was what was referred to as a "failsafe" procedure created in section 11 of the Provincial Offence's Act 1979 supra. Under that provision if the defendant could show that the offence notice had not in fact been delivered to him through no fault of his own and if he applied for the finding to be struck within 15 days of the conviction coming to his attention the finding of guilt made under section 9 could be set aside. (See Drinkwalter and Ewart, Ontario Provincial Offences Procedure Toronto Carswell's 1980 pg. 63-65.)

¶ 48 In addition, a further option was provided to those charged by means of a Certificate of Offence. Under section 7 a defendant could appear before a justice and enter a plea of guilty with and explanation. Under this provision the Justice could, in his or her discretion, accept the plea and reduce the sentence that would otherwise be imposed. The justice acting under section 7, however, had no authority to take a plea to a reduced or included offence. (See Drinkwalter and Ewart supra, pg. 58-61)

¶ 49 Any conviction registered under any of the Part I procedures was subject to what were the very broad and simple appeal provisions set out in the then section 118 of the Act. Finally there were provisions enacted restricting the circumstances in which warrants of committal could issue for non-payment of fines that went into default (See Provincial Offences Act (1979) supra, section 67, 69, 70 and Drinkwalter and Ewart supra pg. 228-239)

¶ 50 It can thus be seen that the 1979 legislation tried to achieve a number of objectives and in the course of doing so struck a balance between the rights of the defendants charged and the proper administration of justice. Provincial Offences were decriminalized. A separate stream of procedures were created. A mechanism was created that operated to separate the more and less serious provincial offences. The less serious order of offences could be dealt with by way of a procedure that did not expose them to a sentence of imprisonment. Defendants could invoke their right to a trial by simply mailing in a request for trial and a notice of time and place for the hearing would be sent out to them. Defendants also had the option of attending at a convenient time and entering a plea of guilty advancing mitigating circumstances on sentence under section 7 of the Act. If however they did nothing within 15 days that they were deemed not to dispute the charge and an administrative finding of guilt would be made without the need for any type of hearing. There was, in addition, the safe guard provided by section 11 referred to above and a speedy informal and broad right of appeal to a locally based court under the then section 118. Finally some safeguards were also in place which minimized the chances of imprisonment due to fine default.

¶ 51 That then was the general back drop when the issue of constitutionality section 9 of the Provincial Offences Act (1979) supra, came before the Ontario Court of Appeal in Regina v. Carson supra. In light of that backdrop our Court of Appeal said in Carson supra at pg. 479

> "Section 9 is found in Part I which establishes a simple expeditious procedure for dealing fairly with provincial offences and imposes a limitation as to penalty. This is as opposed to the procedures under Part III of the Act by way of information and summons in which case a greater penalty may be attracted. The procedure under Part I was intended to alleviate inconvenience, cost and hardship to !hose charged with offences under Provincial Acts. It was also intended to remedy an over taxed court system which was very costly to the people of the Province. Under the scheme of Part I the person charged may complete the offence notice and

> deliver it specifying, from the available options, how his case is to proceed. As indicated above, he may plead guilty and pay a fine that is fixed without having to go to court. He may also plead guilty with an explanation and simply appear at court at a convenient time to explain the situation to the person in authority. Finally' he may plead not guilty in which case there is a trial. However the scheme imposes a time limit within which the person must act as requested. If he does not act, and that is his choice, the section provides and the notice states "you will be deemed not to wish to dispute the charge, and a Justice shall enter a conviction in your absence." We think that this approach is both fair and logical in the circumstances ...
> Having regard to the type and class of offences, the number of such cases, the reasons for the legislation, the options given to the person charged and to the disposition of the case and the provisions of sec 11 and 118 to avoid any miscarriage of justice, we are satisfied that section 9 of the Provincial Offences Act in its context and its effect is a reasonable limitation such as is contemplated by sec 1 of the Charter of Rights."

¶ 52 I do not believe that it is straining the doctrine of judicial notice for me to also say that the justice system in this Province has continued through the 80's and 90's to be under real pressures arising from the volume of work it handles. There is material before me that also suggests that police resources continue to be under strain. (See Tab G to the affidavit of Ms John)

¶ 53 The fine default mechanisms have continued to be the subject of study by the Ontario Law Reform Commission (See "Report on the Basis of Liability tor Provincial Offences" 1990) while pre-trial procedures have been examined by a committee chaired by the Honourable Mr. Justice Martin.

¶ 54 In the "Report of the Attorney General's Advisory Committee on Charge Screening Disclosure and Resolution Discussions", 1993, it was recommended by the committee chaired by the Honourable Mr. Justice Martin, that processes be put in place to ensure proper disclosure, post charge screening and increased use of resolution discussions in order to enhance the administration of justice in the Province. The Committee's work focused on Criminal Code matters. The principles they discuss would appear, however, to be of general applications and at times at least, the Committee expressly says so. (See for example Recommendation 36.) Provisions have now been put in place which facilitate a process of post charge screening and pretrial resolution in relation to Provincial Offences in some jurisdictions in this Province. (See discussion of section 5.1 of the Provincial Offences Act R.S.O. 1990 C-P.33 as amended infra).

¶ 55 Provincial governments also have continued to experiment with different ways to detect regulatory offenders and to process the charges that resulted from those investigative efforts. For example, in August of 1994, The Provincial Offences Statute Law Amendment Act 1993 S.O. Ch. 31 came into force. That legislation amongst other things brought into effect provisions that provided for the use of photo radar. Under this regime the owner of a vehicle could be charged with speeding if a vehicle licensed to him was photographed and recorded as speeding by photo radar devices. This legislation was only applicable to certain targeted areas of the Province. (The photo-radar provisions are now no longer of any effect. See Ontario Regulations 500/94 and 333/95 effective July 5 1995)

¶ 56 The current section 5.1 of the Provincial Offences Act supra was also enacted as part of the Provincial Offences Statute Law Amendment Act (1993) supra. Pursuant to Ontario Regulation 495/94 the Municipality of Metropolitan Toronto and this jurisdiction along with certain other Municipalities were designated for the application of section 5.1 of the Provincial Offences Act supra.

¶ 57 Section 5.1 requires all those charged with Provincial Offences to actually appear in person or by agent in order to file their notice of intention to have a trial. Individuals are still entitled to initially appear at any time prior to 15 days following the alleged offence date as opposed to on a particular date. They can also appear personally or by agent. They can attend at the court office listed on the ticket or if another court is closer to them they are given a number to call. They are also advised that, for their convenience, before attending at the court office they can call and set up an appointment. (See exhibit D to the affidavit of Patricia John). They also continue to have the option of pleading guilty and paying a set fine out of court via the mail or attending before a justice of the peace and pleading guilty with an explanation under section 7 of the Act.

¶ 58 Upon attendance to file a Notice of Intention to Appear, a number of tasks can be accomplished that are in the interest of both the defendant and the orderly administration of justice. Information can be given that aids in more informed decision making, an accurate determination can be made as to whether there is a need for an interpreter for the defendant or his witnesses and attendance in person or by agent can also facilitate pre-trial resolution meetings with the prosecutor. The affidavit material before me makes it clear that this later process unlike the process under section 7 of the Provincial Offences Act can lead to a withdrawal or to the acceptance of a plea to a reduced charge. As a result the defendant may be able avoid demerit points being registered. (See Affidavit of Patricia John Respondent's factum tab F and Drinkwalter and Ewart, supra, pg. 58-9.)

¶ 59 Section 9.1 was enacted at the same time as section 5.1. Changes were also made to the "failsafe" and fine default mechanisms. (See section 26 of the Provincial Offences Statute Law Amendment Act supra and discussion infra.)

¶ 60 In introducing the provisions of the Provincial Offences Statute Law Amendment Act (1993) supra the Attorney General made it clear that the Government was motivated by a number of concerns some of them being similar concerns that motivated it in relation to the enactment of section 9 of the Provincial Offences Act.

¶ 61 References to the Attorney General's comments infra indicates that prior to the enactment of these provisions, there were still large numbers of people across the Province who asked for a trial and were provided a trial date but who then did not appear. This meant, under the scheme prior to the enactment of section 9.1, that the court still had to utilize court time in conducting these ex parte trials.

¶ 62 There was also discussion during the legislative process which indicated a concern amongst legislators that this situation itself created an incentive to request a trial date with no intention of ever truly defending the charge. This was done in the hopes that the case would be delayed or Crown witnesses would not appear. (See comments of the Attorney General infra and in addition comments of Mr. Winniger Hansard, Debates of the Legislature of Ontario November 1 1993 pg. 3859).

¶ 63 At the time of the debate on the Provincial Offences Amendment Act supra Attorney General Marion Boyd stated, more specifically,

> Backlogs and delays have become facts of life in our courts dealing with minor provincial offences. This is because of a dramatic increase in the volume of charges in our system and because requests for trial have increased, even when there is no real intent on the part of the accused to dispute the charge. As a result, valuable court and police officer time is wasted on minor charges where nothing is disputed and in some cases when the accused does not attend the hearing at all.
> During the last fiscal year in Metro Toronto alone defendants were not present for nearly 32,000 of 201,000 requested trials under the Provincial Offences Act. The figure represents a ten percent increase over the previous year.
> The changes that we are proposing to the Provincial Offences Act focus on the following matters:
> First appearance courts will be established in high volume areas such as Metro Toronto and in all areas where the photo radar initiative will be piloted.
> Defendants wishing to dispute a charge must appear in person in court in order to schedule a trial. At that first appearance, defendants will be able to plead guilty and make submissions to a justice of the peace concerning that penalty. Experienced police officers will also be available to discuss charges with defendants. We expect that when defendants are clear about the law and about how their cases will be judged under the law this process will result in more guilty pleas. In other cases charges may be withdrawn or reduced once the facts are clear. In some cases trials will still need to occur and those trials will be scheduled in as timely a way as possible.
> Defendants who have received packing tickets will go through a similar process in some municipalities. We will be working in partnership with the municipalities on this initiative.

> Defendants under the above process will be convicted without a hearing if they do not appear for trials scheduled at their request. A failure to appear will be treated in the same way as failure to respond to the ticket. Those who were unable to attend through no fault of their own will be able to apply to the court to have the matter re-opened and subsequently tried. ...

She then continued after outlining other matters

> All of these measures are designed to improve court efficiency, to reduce errors and to provide cost savings.
> I also wish to announce today the amendments to the fine collections process. We are expanding the use of licence suspensions to collect fines to include a longer list of offences. At present suspensions only apply to moving violations under the Highway Traffic Act. Now this method will be used for collecting fines for driving without insurance and for the misuse of snowmobiles and road vehicles.
> We also want to ensure that jail is not used to enforce a fine when people are unable to pay. This has been a serious problem in the past and we believe it is possible to introduce a method of ensuring that this does not happen. This new Bill ensures that no one will be jailed without a hearing where he or she can raise the issue of ability to pay. The Bill also removes jail as an enforcement tool in cases of public drunkenness and illegal possession of liquor.
> The measures I've outlined today as well as the measures that my colleague the parliamentary assistant for the Minister of Transport will outline will ensure that our roads an our society are safer for all Ontarians.

(Reference Hansard Debates of the Legislature of Ontario October 21, 1993 pg. 3677)

¶ 64 Mr. Winniger's comments along the similar lines were as follows

> The Minister of Transportation, the Attorney General and the Minister of Transportation's Parliamentary Assistant I think spoke eloquently for the need for these kinds of initiatives, given that each year we lose 1,000 lives on our highways, given the fact that each year 90,000 people are injured on our highways with immense costs both in human terms and also in economic terms because these kinds of injuries and deaths cost society billions of dollars.
> The Attorney General said at the commencement of second reading proceedings that Bill 47 will reduce backlogs in the courts that it will prevent the dropping of charges due to delay or to police not showing up for the trials and restore pubic confidence in our justice system. It's a well known fact that many defendants choose to elect to have a trial, hoping that the trial will be delayed or hoping that the police officer will not show up and that the charge will be dropped. This costs our police system and our court system dearly. Great time and expense is needlessly expended for ex parte trials where the defendant does not show up but the charge must still be proved.
> The first appearance courts that are initiated under Bill 47 in Toronto and perhaps in other venues where photo-radar may be piloted will serve to greatly narrow the issues before the court. Charges can be withdrawn or reduced of appropriate after consultation between the defendant and the police or prosecutor guilty pleas can be entered in an expeditious fashion, frequently with submissions as to sentence or it the issue is irresolvable at the first appearance court, a trial date can be scheduled in a timely and expeditious process. This will certainly reduce the pressure on our courts and relieve the police and the courts for more important work.

¶ 65 As adverted to above with the introduction of section 9.1 also came an amendment to the "failsafe" provision of section 11. It was no longer confined to showing that the notice of offence was not delivered through no fault of the defendant. Convictions could now be set aside if within 15 days of the conviction coming to the defendant's attention he satisfied a justice of the peace that he had failed to appear for any reason other than fault of his own.

¶ 66 While the weight to be attached to statements during legislative debate may be more limited than the weight to be attached to other materials, I find that there is some support for the comments and concerns of the Attorney General in other statistical data before me and in the conclusions I am prepared to draw from an examination of the statutory scheme itself.

¶ 67 Ms. John has deposed in paragraph 14 of her affidavit that the statistics attached as exhibit H to her affidavit represent the number of individuals sentenced in absentia "at their trial date". I infer from this that these sentencings are sentencings attached to trials conducted in absentia be they Part I or Part III proceedings. This would not include it would seem sentencings flowing from a section 9 findings of guilt as no trial date would ever have been established with respect to these matters.

¶ 68 While the statistics before me may not demonstrate that the system is under the same extreme pressure as it was when the original reforms contained in the Provincial Offences Act was undertaken, these statistics would appear to support the comments of the then Attorney General Marion Boyd with respect to the significant drain on court resources that the ex parte trial conducted in all cases would represent. It would appear that across the Province for the years 1992 to 1995 there were still in excess of 1.5 million sentencings in absentia at a trial date. Mr. Burd points out that on the statistics given to me there is no way to distinguish between Part I ex parte sentencings and Part III ex parte sentencings. I accept that he is correct in this but given the over all structure and scheme of the Act I am satisfied that it is more likely than not that a significant majority of those 1.5 million ex parte sentencings would be Part I matters.

¶ 69 While all of the statistics before me do not line up perfectly they do, strongly suggest that there has been a significant drop in the number of persons who are sentenced in absentia at their trial date. Moreover, given the extent of that drop, it would not appear that this drop cannot be accounted for simply by looking to changes in the number of charges coming into the system. This can be illustrated, at least, in relation to charges laid under the Highway Traffic Act R.S.O. 1990, c. H.8, as amended.

¶ 70 The material before me, for example, shows that there were in 1992-3 approximately 350,000 charges laid under the Highway Traffic Act supra, in Metropolitan Toronto In 1993-4 the number of those charges dropped to 297,000 while in 1994-5 they rose to 305,600. The statistics filed at tab H of Ms. John's affidavit show the number of sentencings in absentia at a trial date to drop in all Metro jurisdictions in 1995 to half the level they were at the end of 1992 or less. Moreover, three of the five Metropolitan Toronto jurisdictions show significant reductions in 1994 over 1993 and all Metro jurisdictions show a further significant drop in 1995. These last two years being years in which the Provincial Offences Statute Law Amendment Act (1993) supra including section 9.1 was in force.

¶ 71 I accept that on the statistics before me I cannot isolate which part of the Provincial Offences Statute Law Amendment Act (1993) supra has caused this change. It strikes me as most probable that a number of things have happened and that all have contributed to the reduction in the number of ex parte proceedings reflected in statistics before me. Fewer persons may have requested a trial under this regime given the need to attend in person or by agent to request a date. The pre-trial resolution system now in place would itself also in all probability lead to a reduction in trial case load and would thus further reduce the number of ex parte sentencings following the setting of a trial date.

¶ 72 In addition, I find that I am satisfied, having considered the structure of the Provincial Offences Act pre 1993 amendment that the system as it then existed did create an incentive to file a notice of trial in an effort to secure a "dismissal through attrition". That is, there was an incentive to request a trial, not with any real intent to appear, but simply in the hope that the matter could be delayed or that the investigator or other Crown witnesses would not attend for whatever reason and the charge would be dismissed in that fashion. The new system including section 9.1 removes that incentive. Although agree with Mr. Burd that I am unable to identify statistically the role that section 9.1 has played in the reduction in ex parte sentencings at trial date, I am satisfied as a matter of logic, that it is more probable than not that this too is part of the reason for the reduction in ex parte proceedings reflected in the statistics before me.

¶ 73 Having considered all the background material I find that I am satisfied on the balance of probabilities that The Provincial Offences Statute Law Amendment Act (1993) supra, in general, including section 9.1, should be seen as part of an ongoing experiment by the government of this Province to provide an efficient and yet fair method of processing those charged with the less serious order of regulatory offences.

¶ 74 Although the balance struck under section 9.1 may be different that struck under section 9 it can be said that the objects of the two sections are in many regards analogous. In fact section 9.1 can be seen as an effort to address weaknesses in the original Provincial Offences Act model while continuing to achieve the same overall ends.

¶ 75 The new provisions do continue to provide a greater degree of convenience to the defendant than the pre 1979 regime. In addition it continues to provide, an acceptable measure of fairness to those requesting a trial when the context and safeguards surrounding section 9.1 are taken into account.

¶ 76 There is no doubt that in part this legislation is aimed at cost saving and administrative efficiency. I accept that efficiency has never been nor ought to become the primary factor for government to be concerned with in relation to the administration of justice. There is also no doubt that post Charter, there are contexts in which it is now for the judiciary to dictate to government what the capacity of the justice system ought to be. On the other hand, one cannot deny that justice is not being properly administered nor the rule of law well served, if there is not some ongoing effort to utilize public resources well and to protect the justice system from real or potential abuse. I would add that this is particularly the case in the context of a system that deals in the volume and nature of offences associated with the cases before me.

¶ 77 Having examined all the material available to me in this case I am satisfied that the elimination of ex parte trials will result in a real reduction in case load in not only in avoiding the need to having to conduct the ex parte trial but also in eliminating the incentive to file requests for a trial in the hope that through administrative error, illness or other duties the investigating officers or other witnesses might not appear and a dismissal might result. This reduction of caseload can only assist in the concentration of resources on those defendants who truly desire to have a trial by permitting their cases to be reached in a more timely way. In addition, these provisions can be seen as a means of freeing police and court resources to permit their refocusing on other pressing and Substantial matters. This overall approach can also, when the surrounding safeguards are considered, be appropriately characterized as an effort to enhance the public's confidence in and respect for the administration of justice in that it renders the system less prone to abuse to the detriment of other members of society.

¶ 78 Notwithstanding the comments of Mr. Justice Lamer, as he then was, in B.C. Motor Vehicle Reference supra and Mde. Justice Wilson in Singh supra adverted to above, the courts have previously recognized the types of objectives I have identified as being sufficiently pressing and substantial to override constitutionally protected rights in such in cases as Carson supra, Grokel (1991) 64 C.C.C. (3d) 430 (Alta. Q.B.) supra and Richard supra per Deschenes J. Analogous concerns were also recognized as being sufficiently pressing and substantial to limit other features of the rights protected in section 11(d) in Wholesale Travel Group v. The Queen (1991) 67 C.C.C. (3d) 193 (S.C.C.) and to restrict section 11 (f)'s guarantee of a jury trial in Regina v. Lee (1989) 52 C.C.C. (3d) 289 (S.C.C.).

¶ 79 I find then that I am satisfied that these objectives involve more than mere administrative convenience and they satisfy the first branch of the Oakes test. They are all sufficiently important, in my view, to over ride a constitutionally protected right. Of course such a finding is just the first step in section 1 analysis. In pursuing even these ends government is constrained in the manner in which it does so by the proportionality component of the section 1 test. Furthermore as I shall attempt to make clear what is permissible under this branch of the Oakes test may vary considerably depending upon the context in which they are pursued.

(b) Rational Connection

¶ 80 Mr. Burd argues here that there is no rational connection between the failure of the accused to appear at trial and his guilt or innocence. This may well be true in the sense that in some cases non-appearance may be due to factors other than a decision not to dispute the charge. Furthermore a decision not to dispute the charge

may not be the same as an admission of guilt. I do not see that, however, at as the central question at this stage of the analysis. Rather the central question ought to be "Is the legislation rationally connected to the achievement of the objectives identified as pressing and substantial?"

¶ 81 There is no doubt in my mind that there is a rational connection between the elimination of ex parte hearings at a trial date in a provincial offence context when sufficient safeguards are in place to guard against a miscarriage of justice and the objectives have outlined above. I say this is so essentially for the reasons I have already advanced under the first stage of the section 1 analysis.

¶ 82 Moreover, I do not see the mechanism of section 9.1 to be significantly more arbitrary, unfair or irrational than the mechanism found in section 9. A decision not to mail in or attend for a trial date at all equally may be due to factors other than a decision not to dispute the charge in some cases. It may, for example, be due to forgetfulness or a failure to understand due to language skills. Furthermore, a decision not to schedule a trial on a Provincial Offences matter may reflect factors other than a true admission of responsibility. It may simply reflect a busy life style or a failure to appreciate all the consequences that can be associated with a conviction in some cases. These breakdowns in the chain of reasoning inherent in some section 9 cases were not, however, sufficient to cause the Court of Appeal in Carson supra to find that section 9 was an irrational tool. I am not prepared to say that given the safeguards in section 11 and 135 of the Provincial Offences Act supra that section 9.1 is markedly different.

(c) Minimal Intrusion

¶ 83 This branch of the section 1 test enunciated in Oakes has frequently been the basis upon which legislation examined under that provision has failed. While some courts have interpreted this branch of the Oakes test as requiring that the legislative arm of government utilize the least intrusive means open to it in pursuit of its objective it has become clear that this is not always the case.

¶ 84 In Edward's Books and Art (1986) 30 C.C.C. (3d) 385, Laforest J. in a separate concurring judgment wrote at pg. 451 in a passage with which I fully concur,

> Let me first underline what is mentioned in the Chief Justice's judgement, that in describing the criteria compromising the proportionality requirement the court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern the Legislature must be given adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution courts must be sensitive to what Frankfurter J in McGowan supra at p. 524 calls the practical living facts to which a Legislature must respond. That is especially so in a field of so many competing pressures as the one here.
>
> By the foregoing I do not mean to suggest that this court should as a general rule defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary I would have thought the Charter established the opposite regime. On the other hand having accepted the importance of the legislative objective one must in the present context recognize that if the legislative goal is to be achieved it will be achieved to the detriment of some. Moreover attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.
>
> In seeking to achieve a goal that is demonstrably justified in a free and democratic society therefore a Legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course what is reasonable will vary with the context. Regard must be had to she nature of the interest infringed and to the legislative scheme sought to be implemented.

This "flexible" approach to section 1 analysis has been described in a number of ways since.

¶ 85 In Regina v. Swain (1991) 63 C.C.C. (3d) 481, a case that in part dealt with certain features surrounding the raising of the defence of insanity, Lamer C.J.C. stated at pg. 514,

> ... This court has stated on a number of occasions that the absolutely least intrusive means need not be chosen in order for a law to pass the "as little as possible test" ... In cases where the legislative provisions have been challenged under section 52(1) of the Constitution Act 1982 this court has been cognizant of the fact that such provisions are enacted by an elected body which must respond to the competing interests of different groups in society and which must always consider the polycentric aspects of any given course of action. For this reason this court has indicated that Parliament need not always choose the absolutely least intrusive means to attain its objective but must come within a range of means which impair the Charter right as little as possible ... (Emphasis added)

¶ 86 In Regina v. Chaulk (1990) 62 C.C.C. (3d) 193, a case that dealt with the constitutionality of the onus in relation to the defence of insanity Lamer C.J.C. went on to amplify the flexible approach to section 1 in the following terms at pg.

> Recent judgements of this court ... indicate that Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve that "same objective or would achieve the same objective as effectively" (Emphasis added)

¶ 87 Chief Justice Dickson also described the flexible approach to section 1 analysis in relation to this branch of the Oakes test in Reference Re ss. 193 and 195(1)(c) of the Criminal Code: The Prostitution Reference (1990) 56 C.C.C. (3d) 65 at 75 in the following manner,

> "The legislative scheme that was eventually implemented and has now been challenged need not be the "perfect" scheme that could be imagined by this court or any other court. Rather, it is sufficient if it is appropriately and carefully tailored in the context of the infringed right." (Emphasis added)

(See also R.J.R. MacDonald v. Canada (Attorney General) (1995) 127 D.L.R. (4th) 1 at 90-93 [S.C.C.]).

¶ 88 The context of the case before me involves legislation aimed at the case flow of the courts in relation to the lower end of the spectrum of regulatory offences. These offences represent as I have attempted to demonstrate a tremendous volume of work for the courts and generally involve a reduced level of stigma and penal sanction directed at those who are convicted when compared to true crimes or even when compared to the more serious order of regulatory offences.

¶ 89 This is also a context in which a hearing into the accused's guilt or innocence on the basis of evidence before the court is precluded but in the final analysis it is only precluded to those who do not appear through their own fault and for whom the justice of the peace is satisfied that the certificate of offence is complete and regular on its face.

¶ 90 Furthermore, even those who fail to appear and do so as a result of what could be described as some measure of their own fault or those who may to some degree been tardy in resorting to section 11 have the added protection of an appeal which is informal and readily available through a locally based court under section 135. That, section ensures that even those who fall outside of the protection of section 11 can still obtain an order for a new trial if it can be said that such an order is in the all the circumstances in the interest of justice. (See section 135 and 138).

¶ 91 The regulatory offence/11(d) context is an area in which the Supreme Court of Canada has, in the past, adopted what I have referred to above as the flexible approach to the section 1 analysis. This appears, to have been due to a combination of features including the tremendous volume of regulatory offences, the reduced

levels of stigma and the practical difficulties in imposing on the state the full force of the obligations contemplated by section 11(d).

¶ 92 For example, in Wholesale Travel Group Inc. v. The Queen (1991) 67 C.C.C. (3d) 193 notwithstanding that the offence charged in that case involved a potential 5 year jail term for an individual convicted of that offence and notwithstanding that a person charged attended for trial and advanced a constitutionally protected defence the majority of the Court held that it was permissible to place the burden of making out that defence on defendant on the balance of probabilities.

¶ 93 Thus, notwithstanding that some defendants would, in theory, face a maximum of up to five years in jail, notwithstanding the accused's unambiguous efforts and desire to defend himself and notwithstanding the fact that he had been successful in doing so to the point that the court entertained a reasonable doubt about a constitutionally required element of the offence the defendant would none the less be convicted. While a majority of the court in Wholesale Travel supra, held that this was indeed a breach of section 11(d) of the Charter, a differently constituted majority in same case held that this breach was justifiable under section 1.

¶ 94 The section 1 majority also held that it was not necessary for the legislative branch of government to utilize what clearly was a less intrusive measure of placing an evidentiary burden on the accused to adduce evidence of due diligence on the basis that it would not be an effective method of achieving the end of enforcing regulatory offences. See per Lamer C.J.C. pg. 223-226 per Cory J. pg. 256-260 Iacobucci J. pg. 265-268. In a sense then it might well be argued that the Supreme Court in Wholesale Travel supra, has held that an intrusion into the section 11(d) interests of the defendant which is more severe than the intrusion section 9.1 represents can be justified in the interests of maintaining an effective regulatory scheme.

¶ 95 The maintenance of the current technique of conducting an ex parte trials upon the failure of any defendant to appear on his or her trial date would do nothing to address all of the important government objectives identified above. It was argued by Mr. Burd, however, that there is a less intrusive means available to the Legislature to achieve the objectives served by section 9.1 in that the section could have been structured in a way that created a discretion in the presiding justice to adjourn trials involving nonappearance by the defendant as opposed to requiring the registration of a conviction.

¶ 96 It was suggested that this is the means chosen by the Alberta legislature in section 33(1) of the Provincial Offences Procedure Act S.A. 1988 c. P-21.5 as amended. That section, however, reads as follows

> If a defendant pleads not guilty but fails to appear in Court in person or by agent on his trial date the justice shall if the certificate of offence is complete and regular on its face,
>
> (a) enter a conviction in the defendants absence and without a hearing and impose the specified penalty
> (a.1) on application by a prosecutor, proceed to conduct that trial ex parte
> (b) on application by a prosecutor, adjourn the proceedings, set a new trial date and direct that the defendant be notified of the new trial date by ordinary mail at his address for service [Emphasis added]

¶ 97 I note that the Alberta section does not create a discretion in a justice of the peace that is unfettered in terms of ordering an adjournment and/or in conducting an ex parte trial. That discretion only arises on application by the prosecutor. In my view, the legislative branch of government could reasonably be concerned that the adoption of an unfettered discretion in the presiding justice in either of these regards could undercut the end of reducing incentive to request a trial simply in the hope that the matter could be delayed or could result in a dismissal of the charges through witness non-attendance. This, in turn, could adversely effect the speed with which other persons who truly desired trials could obtain them and it would not as effectively address the question of public confidence referred to above.

¶ 98 This may explain the fact that the Alberta legislation only permits the conduct of an ex parte trial or an adjournment of the matter when the prosecutor makes that application. When this added limitation is placed on

the jurisdiction of the presiding justice to adjourn that jurisdiction can not be seen as a particularly significant protection from the point of view of Charter analysis. Under either the Ontario model or the Alberta model the fact remains the state or its agents has taken into their own hands the question of whether or not the a defendant who defaults in his appearance will have his case adjourned or will receive an ex parte trial. Under the Ontario model the state has decided to refuse in all cases to permit this subject to the provisions of section 11 and section 135 while in Alberta it has come to the same decision except to the extent that its agent chooses in the exercise of his or her own discretion to do so. (See by analogy Smith v. The Queen (1987) 34 C.C.C. (3d) 97 at 143).

¶ 99 I would also note that the Ontario scheme can not be seen as completely divorced from Crown discretion. If the Crown for example, having considered the background of the case felt that in law the charge was not properly founded it would, be duty bound, as with any charge, to exercise their prerogative to withdraw the charge. In saying this also hasten to add that this is, of course, not the only basis upon which the Crown may chose to withdraw a charge.

¶ 100 It may be that the Alberta mechanism contained in section 33(1) of their legislation is fairer to the defendant than section 9.1 of the Ontario legislation. The Charter, however, as the authorities referred to above make clear does not require, as a matter of constitutional law, that the Legislature adopt what appears to the judiciary to be the "perfect" or "ideal" solution to the problem being confronted. (See also Regina v. Lippe (1991) 64 C.C.C. (3d) 513.

¶ 101 Although not argued, I have also considered certain other alternatives to section 9.1. For example, I have considered the possibility of utilizing heavy sanctions in cost for non-appearance on a trial date. This approach would remove some of the incentive to request a trial date simply in tee hopes of securing a "dismissal through attrition" although it would not remove all of it. One would, traditionally however, only get to an order for costs if the defendant were to be convicted. Thus while very significant awards of costs might make the gamble less attractive it would not remove the temptation to gamble all together. It would also do nothing to remove from the court what appeared to the Attorney General in 1992 at least, to be the expanding workload represented by the ex parte trials themselves so as to facilitate a more timely trial for those who truly wanted one.

¶ 102 I have also considered the alternative of requiring the Crown to file a certified statement of the officer in writing to ensure that any conviction registered is well founded on the facts of the case. On reflection however it seems to me that this would, in the vast majority of cases, provide relatively little protection for the defendant. It would also preserve a degree of incentive in defendants to file for a trial in the hopes that the required certified statement would not make its way before the court at the appropriate time.

¶ 103 I also note that the absence of a requirement for a certified witness statement from the officer outlining the basis of the allegations in the Certificate of Offence did not lead the Court of Appeal in Carson supra to conclude that section 9 ceased to be a reasonable limit on the rights guaranteed under section 11(d). Nor was such a tool suggested as being required by the Ontario Law Reform Commission in their recommended solution in 1973 referred to above. Nor is it present in the schemes utilized in other Provinces such as New Brunswick.

¶ 104 Again, in my view, such an approach may be fairer to a defendant who fails to appear. A failure to require this, however, when the provisions of section 11 and 135 are in place does not take the solution which the Legislature has in fact chosen to use in this area outside the range of reasonable means that it might choose to use in pursuit of the objectives I have identified above.

¶ 105 I am also aware that under the provisions of the Provincial Offences Act supra although imprisonment is not available as a sentence it is, on the face of the legislation at least, available in certain circumstances should the defendant default in the payment of his or her fine. (See the provisions of sections 66, 68, 69 Provincial Offences Act supra). In this regard I note that the much more direct sanction of very substantial periods of imprisonment as a sentence was not sufficient to take the limit on section 11(d) in Wholesale Travel supra outside of the range of limits justifiable under section 1.

¶ 106 I am also aware that there were different provisions in force regarding the issuance of Warrants of Committal in relation to fine default at the time of the Court of Appeal's judgment in Carson supra.

¶ 107 Under the former section 69(3) a Warrant of Committal could only issue in restrictive circumstances. Those were that an order under the former 69(2) had not resulted in payment within a reasonable time; all other reasonable methods of payment had been tried and failed or were unlikely to succeed within a reasonable time and 15 days notice had been given to the defendant and he had had an opportunity to be heard.

¶ 108 While the circumstances in which a Warrant of Committal could issue were thus narrowed a Warrant of Committal could issue without the defendant ever being before the court on a hearing directed at his ability to pay the fine. See Rule 24(1) R.R.O. 1990 Reg. 200. In fact there were instances, particularly in relation to the enforcement of fines levied under the Liquor Control Act R.S.O. 1990 c. L.18, in which the issuance of Warrants of Committal under the Provincial Offences Act supra were commented upon adversely. See Regina v. Hill unreported decision of the Ontario Supreme Court [1985] O.J. No. 873 and as well the Ontario Law Reform Commission, "Report on the Basis of Liability for Provincial Offences" (1990).

¶ 109 The new provisions governing the issuance of warrants of committal again strike a different balance. The new balance may to some degree may not be as sensitive to the liberty interests of some defendants as the scheme in existence at the time of the Court of Appeals decision in Carson supra. On the other hand, it may in fact, be more sensitive to the liberty interests of others.

¶ 110 While the provisions would appear to better ensure that a hearing into the accused's ability to pay is held before any warrant of committal may issue, unlike the provisions first enacted in 1979, a warrant of arrest may issue to bring the defendant before the court for the purposes of the hearing itself. A warrant of arrest under section 69(6) can only issue, however, as a result of the exercise of discretion by a judicial officer.

¶ 111 I note that this discretion is only to be exercised as a last resort. Other means of fine enforcement must have been tried and failed or appear to be unlikely to result in payment within a reasonable time. Given the nature and object of the Provincial Offences Act supra, and section 69 strict criteria would have to be applied, by the judicial officer entertaining the application for such a warrant before being satisfied that those prerequisites to the exercise of the discretion created in section 69(6) were met. In addition, given the provisions of 69(7) which provide for the issuance of a summons to secure the defendant's appearance the judicial officer asked to issue a warrant would have to be completely satisfied that the defendant's attendance could not be secured by a summons. It may even be, although I come to no firm view on it, that given the structure of section 69 as a whole some articulable basis should be before the justice from whom the warrant is sought under section 69(6) to suggest that the defendant in fact has some ability to pay the fine which was not being exercised before the judicial officer should resort to a warrant of arrest to compel attendance.

¶ 112 I would also observe that under 69(20) of the current legislation, warrants cannot now be issued in any circumstances for the purpose of enforcing fines imposed in relation to certain provisions the Liquor Control Act supra nor can they be issued in relation to persons less than 18 years of age. These provisions go some distance to address some the concerns articulated in Regina v. Hill supra.

¶ 113 I can also say that notwithstanding reservations I have with respect to some aspects of the new section 69 I find that there is some support for the approach taken by the Legislature in this regard in the work of the Ontario Law Reform Commission "Report on the Basis of Liability for Provincial Offences" (1990). The Commission, in that Report, recommended that amendments be made to ensure that only those with the capacity to pay ought to be the subject of imprisonment for default in the payment of a fine and that imprisonment be used as a last resort. This would of necessity require some type of hearing mechanism which the new section provides for. It should also be observed that the Commission did not recommend doing away with all imprisonment in default or even mad such recommendation with respect to those who had been convicted and fined under the then existing provisions of section 9 of the Provincial Offences Act. (See page 49 of report. See also Report of the Canadian Sentencing Commission "Sentencing Reform a Canadian Approach" 1987 pg. 380-384)

¶ 114 I also note that if a fine is imposed in the absence of the defendant section 66(5) still requires that a notice of fine and due date be sent to the defendant and that the defendant be advised of his right to seek an

extension of time. More than one extension of time also continues to be contemplated by the provisions of section 66(6). Section 68 still provides for civil enforcement.

¶ 115 Section 69(2)-(4) of the current Provincial Offences Act also appears to expand the use of enforcement mechanisms such as the suspension of licences and permits as an enforcement mechanism for the collection of fines that are in default.

¶ 116 In any event, the issue of the validity of the fine enforcement provisions or any warrant issued under them is not directly before me on this application. For my purposes, it is sufficient to deal with the issues in, this case to state that I am satisfied that the new sections do still continue to provide a number of real procedural protections against the use of jail as a fine enforcement mechanism as was the case at the time the Court of Appeal considered the validity of section 9 in Carson, supra.

¶ 117 Having considered the impugned legislation, namely section 9.1 of the Provincial Offences Act supra, in its context, I find that I am satisfied on the balance of probabilities that it is within the range of reasonable means open to the legislature to adopt in order to effectively address the problems the legislation is aimed at. Consequently I am also satisfied that the Crown has satisfied this branch of the Oakes test.

(d) Deleterious effects

¶ 118 It should be noted that the section does not compromise the guarantees under section 11(d) of anyone charged with a true crime or of anyone charged with a Provincial Offence who appears personally or by agent at their trial. Furthermore, when viewed in context, section 9.1 only operates to limits the rights under section 11(d) of those charged with a regulatory offence under the Part I procedures of the Provincial Offences Act and who have failed to appear on their trial date through some fault of their own. It should also be observed that to the extent that any miscarriage of justice results from the operation of these provisions an appeal court that is readily accessible to the public is available for relief under section 135.

¶ 119 I am aware that the onus to show the that the failure to appear was through no fault of his own rests with the defendant under section 11. On the other hand given that the reason for non-appearance generally will lie in the exclusive knowledge of the defendant do not see this as fatal to the scheme adopted by the Legislature. Indeed, a similar onus appeared in the Criminal Code section that was examined by the Supreme Court in Lee supra.

¶ 120 The only offences caught by the provisions of section 9.1 are ones which the Chief Judge has established a set fine thus triggering the ability of a Provincial Offences Officer to utilize the Part I procedure. (See Drinkwalter and Ewart supra pg. 39.) Under these provisions while there may still be consequences for items such as the defendant's driver's licence no period of incarceration is available as a sentence for the offence itself. Furthermore the maximum fine available under Part I is limited to $500.00. See section 12 Provincial Offences Act supra).

¶ 121 Although the Ontario legislation does provide on its face for the issuance of warrants of committal for a failure to pay a fine that is in default there are a number of protections that continue to be built into the legislation which minimize the risk of imprisonment for the failure to pay a fine.

¶ 122 I also note that the only effect of the deemed guilty provision in many cases is to deprive the defendant of chance of having an ex-parte trial. The extent to which this form of trial provides any meaningful protection to defendants is itself highly questionable as has been recognized by others including representatives of governments other than the one which enacted section 9.1.

¶ 123 In the course of discussing the implications of section 9 the then Attorney General, R. Roy McMurtry analogized offences proceeding under Part to civil default proceedings and then went on to state

> It is important to note that under the existing procedure just as in the procedure applicable to minor criminal offences the court may proceed in the absence of the defendant. It is these in

> absentia trials rather than full scale criminal trials which have been replaced by our default convictions.
> Last year Mr. Speaker, over 800,000 in absentia hearings were held for provincial offences in Ontario at great cost to the tax payer yet with very little, if any, benefit to the defendant. [Emphasis added]

¶ 124 While as I adverted to above I accept that I can not say exactly to what exact extent section 9.1, itself, has improved case flow I do not feel I need to be satisfied of that given what I find to be the limited nature of the deleterious effects of the section when seen in context. I am certainly satisfied that as a matter of logic and on the material in front of me it has reduced the courts work load in a real way.

¶ 125 As noted in Keegstra v. The Queen (1991) 61 C.C.C. (3d) 1 the government is entitled to attack a problem through using a number of means. At pg. 65 Dickson C.J.C. put the principle as follows,

> In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim. (Emphasis added)

¶ 126 This multifaceted approach is what I see in the provisions of section 9.1 and the other sections of the Provincial Offences Statute Law Amendment Act (1993) supra.

¶ 127 For reasons I have set out above, I am also satisfied, that quite apart from statistically demonstrable reductions in case load, section 9.1 taken in context can also be seen as bolstering public confidence in the administration of justice. The section goes some distance to ensure that the Provincial Offences Court does not come to be perceived as kind of game. This is the perception that can be created if one can simply send in one's ticket or attend at any time within a 15 day period of the alleged offence date to obtain a trial date and then simply go on with one's life hoping that the case will be significantly delayed or that the system will not be able to properly process it; all the while causing dislocation to witnesses and prejudice to other users of the court's services.

¶ 128 In light of the limited nature of the deleterious effects of section 9.1 when viewed in the context of the safeguards surrounding the section and in light of the importance of the objectives aimed at I find that I am satisfied on the balance of probabilities that the deleterious effects of section 9.1 are not disproportionate in all the circumstances.

¶ 129 In light of all those considerations then I find that I am satisfied on the balance of probabilities that section 9.1 is a reasonable limit which is demonstrably justifiable in a free and democratic society within the meaning of section 1 notwithstanding my assumption that it is a prima facie and unwaived breach of section 11(d). For all those reasons then I have come to the conclusion that these appeals must be dismissed.

BLACKLOCK PROV. J.

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