

HALLETT, J.A.:

This is an appeal from conviction for having an overweight truck on a provincial highway contrary to the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293. The appeal was heard in conjunction with an appeal, **Lenihan v. Her Majesty the Queen**, C.A.C. No. 129710.

The appeal was on an agreed statement of facts as follows:

"At 12:15 p.m. on 18 October 1995 the Appellant was driving a truck loaded with pulpwood on Provincial Highway Number 201 near Greenwood, Kings County, Nova Scotia. That highway was and is a public highway within the meaning of the **Motor Vehicle Act** and the truck was a vehicle covered by the legislation in issue.

A peace officer specifically appointed to monitor Nova Scotia's highways for overweight vehicles noticed the vehicle being driven by the Appellant and, based on visual observation, had reason to believe that the weight of the vehicle and its load was in excess of the maximum permitted under Section 2(1)(e) of the **Regulations** in issue. The peace officer stopped the vehicle using the emergency equipment on his vehicle. The peace officer then ordered the Appellant to drive the vehicle upon the police officer's portable scales at the roadside in order to weigh an axle assembly of the vehicle. Without the assistance of the Appellant the truck could not be weighed by this method. The peace officer would have charged the Appellant pursuant to the Act for refusing to assist with the weighing procedure if the Appellant did not comply with the peace officer's instructions, and the scale readings would not have been obtained.

The Appellant complied with the peace officer's instructions and the weight in question, as indicated by the readings on the portable scales, was in excess of the maximum permitted.

According to the evidence of the peace officer and the Appellant, the entire procedure lasted from 20 to 30 minutes, from the time the Appellant was detained by the peace officer until the Appellant departed.

The peace officer did not, at any material time, advise the Appellant that he had the right to retain and instruct counsel without delay pursuant to Section 10(b) of the **Charter**.

Counsel for the Applicant objected to the admission of the scale readings into evidence at the trial and made application for the exclusion of the scale readings pursuant to Section 24(2) of the **Charter of Rights and Freedoms** as the result of the s. 10(b) violation. The learned trial Judge held that His Honour's decision in **R. v. Lenihan**, (April 24, 1996, Case No. 578705) applied and did not exclude the scale readings.

The Applicant was convicted by the trial court for operating a vehicle with a weight in excess of the maximum permitted under s. 2(1)(e) of the **Regulations** made pursuant to the **Motor Vehicle Act**."

We dismissed the Lenihan appeal by a judgment filed today.

I am of the opinion that this appeal ought to be dismissed notwithstanding the additional facts agreed to on this appeal that:

"...Without the assistance of the Appellant the truck could not be weighed by this method. The peace officer would have charged the Appellant pursuant to the Act for refusing to assist with the weighing procedure if the Appellant did not comply with the peace officer's instructions, and the scale readings would not have been obtained."

The fact that the peace officer would have charged the appellant with the refusal pursuant to s. 192 of the **Motor Vehicle Act** does not alter my conclusion that the trial judge did not err in admitting the evidence of the scale reading. I would dismiss the appeal.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JERRY LEO NOWE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR
JUDGMENT BY:

HALLETT, J.A.