NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Anand*, 2020 NSCA 12

Date: 20200214
Docket: CAC 483308
Registry: Halifax

Between:

Mehardeep Singh Anand

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: November 20, 2019, in Halifax, Nova Scotia

Subject: Section 100D(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293; use of hand-held GPS

Summary: An adjudicator believed the appellant's evidence that he was not texting on his iPhone but had picked up his GPS to find an alternate route. She nonetheless convicted him of text messaging on a communications device, contrary to s.100D(1) of the *MVA*. The Summary Conviction Appeal Court dismissed his appeal. The appellant seeks leave to appeal and moves to adduce fresh evidence to establish that a GPS cannot relay a message to the satellite.

Issues: Did the SCAC err in its interpretation of s. 100D(1) of the *MVA*?

Result: Leave to appeal is granted, the appeal allowed, the conviction quashed, and an acquittal entered. The motion to adduce fresh evidence is dismissed.

The SCAC erred in its application of the principles of statutory interpretation. The task was to determine the intent of the Legislature by reading the words of the section in their

grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*. The Supreme Court of Canada in two separate decisions defined "text messaging" as the use of standardized communication protocols and mobile telephone service networks to transmit short text messages from one mobile phone to another. That is also the dictionary definition. The SCAC erred when he refused to adopt these definitions. The SCAC did not interpret "text messaging" in a different statute or context but set out the well understood meaning of the term. Furthermore, a GPS did not fit within the ordinary and grammatical meaning of a "communications device". It is a navigation device.

While there may be similarities between the driver distraction inherent in the use of a GPS if done while the vehicle is in motion and without a hands-free option and manual text messaging on a cellular telephone, it is not the role of the Courts to fill in what they think should be banned by the Legislature.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 20 pages.

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Respondent

Judges:	Beveridge, Bryson and Beaton, JJ.A.
Appeal Heard:	November 20, 2019, in Halifax, Nova Scotia
Held:	Motion for fresh evidence dismissed; leave to appeal granted, and the appeal allowed, per reasons for judgment of Beveridge, J.A.; Bryson and Beaton, JJ.A. concurring
Counsel:	Mehardeep Anand, appellant in person Edward Murphy, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Technology helps us every day. Modern cars are loaded with electronic gadgetry to make it easier to park, change lanes safely, brake to avoid collisions and built-in navigation systems to obviate the pleated fold-out highway map or scribbled directions on a slip of paper.

[2] Mr. Anand, the appellant, did not have a built-in navigation system. He had a hand-held Global Positioning System (GPS). As he crept along a main thoroughfare in Halifax in rush hour traffic, he selected a street address on that device to try to help him avoid the traffic.

[3] A police officer issued him a ticket for using a hand-held cellular telephone or text messaging on a communication device while operating a vehicle on a highway, contrary to s. 100D of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as amended.

[4] The adjudicator convicted Mr. Anand. The Summary Conviction Appeal Court (SCAC) dismissed his appeal from conviction (2018 NSSC 307). Mr. Anand now seeks leave to appeal to this Court and asks that we admit fresh evidence.

[5] I would grant leave to appeal, allow the appeal and quash the conviction. I would not admit the fresh evidence. First, the facts are important, as they help inform how the case was argued and why the appellant sought to adduce fresh evidence.

THE FACTS

[6] The trial was short. Only two witnesses testified, Cst. Shawn Currie of the Halifax Regional Police Service and Mr. Anand, who appeared without a lawyer.

[7] Cst. Currie said traffic was heavy, just crawling along Connaught Avenue. Close to the intersection of Connaught Ave. and Bayers Road, he saw Mr. Anand in the far right-hand lane, using both hands to text on a white iPhone in a black case. Cst. Currie testified he could even see the text bubbles on the iPhone screen.

[8] Mr. Anand testified that Cst. Currie's evidence was wrong. He was in the far left-hand lane, he had a gold iPhone, which did not have a black case, and in any event, he was not texting on his iPhone. Mr. Anand explained that he had selected or entered a street name on his black hand-held Global Positioning System (GPS) device to obtain an alternate route. Mr. Anand was not cross-examined.

[9] The adjudicator did not convict on the basis of Cst. Currie's evidence. Instead, she appeared to accept Mr. Anand's evidence, but reasoned that a GPS is a communication device and, based on his admissions, he was guilty. In a short oral decision, she said this:

> [2] Mr. Anand, you gave evidence yourself and said you weren't texting, but you were texting on a GPS, not a cell phone. But a GPS is a communication device and so the charge reads you were using a hand-held cellular phone and text messaging on … so texting … on a communication device while operating a motor vehicle on a highway. So clearly you were … you admitted your own guilt with respect to the matter.
>
> [3] The whole purpose, if you will, behind the legislation is … is to avoid drivers being distracted and concentrating on other things and text … texting instead of watching where they're going on the road. And you were doing precisely that on that day.
>
> [4] So I'm satisfied beyond a reasonable doubt that you were texting on a communication device while you were on a highway.

PROCEEDINGS IN THE SCAC

[10] The Honourable Justice D. Timothy Gabriel sat as the SCAC judge. Mr. Anand was represented by counsel before the SCAC.

[11] Gabriel J. referred to three cases decided by the Nova Scotia Supreme Court with respect to use of hand-held cellular phones. He noted their seemingly inconsistent outcomes. While not directly on point, he found that those cases informed his statutory interpretation analysis which centered on whether a hand-held GPS device was a "communications device" and whether the appellant's use of it constituted "text messaging" within the meaning of s. 100D(1) of the *MVA*.

[12] The SCAC judge found that the manual entry of coordinates into a GPS device amounted to "text messaging" and, because the GPS device provided information to the user, it was a "communications device" within the meaning of s. 100D "in conjunction with the Legislature's purpose in enacting" the provision.

[13] The appeal failed. The appellant is now self-represented.

ISSUES

[14] I would frame the issues raised as:

1. Should this Court grant leave, pursuant to s. 839(1) of the *Criminal Code*?
2. Did the SCAC Justice correctly interpret s. 100D(1) of the *MVA*?
3. Should the fresh evidence be admitted?

ANALYSIS

Leave to appeal

[15] Following the lead of the Ontario Court of Appeal in *R. v. R. R.*, 2008 ONCA 497, our Court has endorsed the approach that leave to appeal pursuant to s. 839 of the *Criminal Code* does not automatically follow simply on presentation of an arguable appeal. Instead, the panel will examine: if the questions of law raised transcend the borders of the specific case and are significant to the general administration of justice; if a "clear" error is apparent, especially if the convictions are serious and the appellant faces a significant deprivation of liberty (see: *R. v. MacNeil*, 2009 NSCA 46; *R. v. Pottie*, 2013 NSCA 68; *R. v. R.E.M.*, 2011 NSCA 8; *R. v. McIntosh*, 2018 NSCA 39).

[16] The respondent argues that: the conviction is not serious; there is no clear error; and the enacted, but not yet proclaimed, *Traffic Safety Act*, S.N.S. 2018, c. 29, contains detailed provisions that clarify what exactly is prohibited; hence this Court's interpretation of s. 100D of the *MVA* would unlikely have lasting value to "the general administration of justice".

[17] While there is no evidence that the conviction is serious, I do view the error by the SCAC to be clear. Furthermore, the advent of the new *Traffic Safety Act* may well resolve many of the lingering uncertainties over what conduct constitutes an offence, but in the meantime, drivers are left to wonder what uses, if any, of hand-held or other devices are permitted. Clarification is warranted. I would grant leave to appeal.

Interpretation of s. 100D of the MVA

[18] We live in a society of laws. People are free to do what they want so long as they do not act contrary to a specific prohibition. Failure to take care can have consequences. If, for example, a driver is distracted by fiddling with the radio, CD player, a digital input for music, or a hand-held GPS and an accident ensues and causes harm to someone else, they may well be liable civilly for the failure to use reasonable care.

[19] But absent a specific prohibition, doing any of those distracting activities is not an offence under the present *MVA*, unless such conduct rises to the level of careless and imprudent driving.

[20] Whether selection of a predetermined destination or entry of an address in a hand-held GPS device is an offence under s. 100D of the *MVA* depends entirely on statutory interpretation. That is a question of law. We owe no deference to the SCAC.

[21] Because the SCAC relied on some of the pronouncements in *R. v. Ikede*, 2015 NSSC 264, *R. v. MacDonald*, 2014 NSSC 442, and *R. v. Ferguson*, 2013 NSSC 191, I will briefly mention them.

[22] *R. v. Ferguson* is the first in time. The respondent did not use her phone to text. She did not use her phone to make a phone call. She held the phone in her hand. It was connected to Google MapQuest. The adjudicator acquitted. The Crown appealed to the SCAC. The SCAC judge, Coughlan J., reversed and entered a conviction on the basis that checking the map displayed on Google MapQuest on her cellphone amounted to a "use" of it captured by the prohibition found in s. 100D of the *MVA*, because the Legislature's purpose was to prevent driver distraction.

[23] In *R. v. MacDonald*, the adjudicator acquitted the respondent. The police saw him with a cellphone in his right hand. He testified that he was not using his phone to make a call or to text, he just looked at it to see if he had received a text. The Crown appealed. The SCAC judge, Chipman J., followed the reasoning in *R. v. Ferguson* and entered a conviction. He concluded that the purpose of s. 100D is to prevent traffic accidents by a prohibition on distracted driving (para. 19). The narrow interpretation by the adjudicator was an error of law.

[24] In *R. v. Ikede*, a motorist was seen with an iPhone in his hand. He dictated a request to Siri, a virtual assistant that operates on Apple's operating systems. The request was for directions. He put the phone down and listened to the directions. The trial judge acquitted. The Crown appealed. This time, the SCAC dismissed the appeal. In a thoughtful and thorough decision, the SCAC judge, Campbell J., discussed some of the uncertainty in what is captured by the s. 100D prohibition—including what constitutes "use" of a hand-held cellular telephone.

[25] The relevant wording of Section 100D(1) is as follows:

> It is an offence for a person to use a hand-held cellular telephone or engage in text messaging on any communications device while operating a vehicle on a highway …

[26] After observing that Nova Scotia was one of the early adopters of distracted driving legislation, Campbell J. canvassed the legislative approach found in British Columbia, Alberta, Manitoba and New Brunswick where "use" and other important terms are defined. To that list I would add Ontario (see *R. v. Kazemi*, 2013 ONCA 585).

[27] There is no need to canvass these legislative schemes. But to illustrate, I will set out the New Brunswick legislation quoted by Justice Campbell:

> [16] … "use", in relation to a hand-operated electronic device, includes any of the following actions:
>
> *(a)* holding the device in a position in which it may be used, whether it is turned on or off;
>
> *(b)* operating any of the device's functions;
>
> *(c)* communicating by means of the device with another person or another device, by spoken word or otherwise;
>
> *(d)* looking at the device's display; and
>
> *(e)* taking any other action with or in relation to the device that is prescribed by regulation.

[28] More relevant to the issue in the case under appeal is New Brunswick's ban on the use of hand-operated electronic devices, which it defines as:

> [26] […]
>
> (a) a cellular telephone;

(b) a two-way radio;

(c) a portable global positioning system navigation device;

(d) a portable entertainment device;

(e) another electronic device that

(i) includes a telephone function, and

(ii) normally is held in the user's hand during use or requires the user to use his or her hand to operate any of its functions;

(f) an electronic device that is not otherwise described in paragraph (a), (b), (c), (d) or (e) but that

(i) is capable of transmitting or receiving e-mail or other text-based messages, and

(ii) normally is held in the user's hand during use or requires the user to use his or her hand to operate any of its functions; or

(g) any other hand-operated electronic device prescribed by regulation;

[29] If Connaught Avenue had been in New Brunswick, the appellant's proverbial goose would be cooked. But the appellant was in Nova Scotia where the *MVA* does not prohibit holding a cellular phone, let alone a GPS device. It prohibits "use" of a hand-held cellular telephone or to "engage" in text messaging on any communications device.

[30] Justice Campbell took this approach to what was caught by the prohibition against use of a hand-held cellular phone:

> [21] A telephone is widely understood to be a communication device that converts sound into electronic signals that can then be transmitted over long distances. It can convert those electronic signals back into sound. The transmission was originally by cables but can now be done through radio transmissions on what is called alternatively a cellular telephone or a mobile telephone. The modifying word "cellular" can be inserted back into the sentence to make it clear that what is forbidden is the use of a telephone that is cellular, or one that makes use of radio transmissions rather than cables.
>
> [22] It is against the law for a person to use a telephone that employs cellular technology while driving a vehicle. Since the days of Alexander Graham Bell "using" the telephone has meant communicating with another person by speaking, listening or pretending to listen through the telephone. What the legislature may have meant, based on the wording used, was to stop people from carrying on the dangerous activity of driving while distracted by carrying on a conversation on a telephone held in the driver's hand. The section goes on to make it illegal to send or receive text using any kind of device. Both activities involve communication.

> People should not be text-messaging or talking on hand-held cellular telephones while they are driving. It doesn't matter whether the driver is actually distracted or not. That part at least seems fairly plain.

[31] In this case, Gabriel J. commented that *R. v. MacDonald* reached an opposite conclusion to that of Justice Campbell in *R. v. Ikede*. You may recall that in *R. v. MacDonald*, the respondent had simply looked at his phone without having manipulated its functions in any way. He did not text, he did not call. He looked at it.

[32] If there is any conflict between the cases of *R. v. Ikede* and *R. v. Ferguson* and *R. v. MacDonald* [1], I far prefer the approach espoused by Justice Campbell in *R. v. Ikede*.

[33] With this background, I turn to the question of statutory interpretation.

[34] The guiding principles of statutory interpretation are well-known. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court gave clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court, wrote of this rule as follows:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger *in Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[35] This was later reinforced in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, where Iacobucci, again for the Court, elaborated:

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[1] To that list, I would add the unreported decision of *R. v. Lumsden* where the NSSC entered a conviction despite the fact that the adjudicator accepted the respondent's evidence that he had only looked at his cellphone to check the time.

> [26] ... Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described *in R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[36] Also important is the legislative guidance provided by the *Interpretation Act*, R.S.N.S. 1989, c. 235:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

[37] Consistent with these provisions is the original meaning rule, which requires courts to interpret the words in a statutory provision as they would have been understood at the time of enactment. This principle is explained by Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at pp. 140-41:

> The leading Canadian case on the original meaning rule is *Perka v. R.*, in which Dickson J. wrote:
>
>> The doctrine of *contemporanea expositio* is well established in our law. “The words of a statute must be construed as they would have been the day after the statute was passed...:” *Sharpe v. Wakefield*. See also Driedger, *Construction of Statutes*: “Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held”; *Maxwell on the Interpretation of Statutes* ... : “The words of an Act will generally be understood in the sense which they bore when it was passed”.

[38] Other leading texts echo this principle. For example, Côté on *The Interpretation of Legislation in Canada*, 2nd ed (Cowansville, QC: Yvon Blais, 1991), describes the principle as follows (pp. 224-25):

> As a general rule, the interpreter of a law should place himself at the time of enactment. His task is to rethink the thoughts of the legislator as expressed by the terms of the enactment. It seems logical, therefore, to give the words their ordinary meaning at the time of the legislation’s adoption, while taking into account, of course, the context in which they were enacted.

[39] The learned SCAC judge referred to *R. v. Rizzo*, the modern approach to statutory interpretation, and the *Interpretation Act*, but with respect, failed to properly apply them.

[40] There were two, albeit related, questions: is a hand-held GPS device a “communications device”; and, did the appellant engage in “text messaging” on it?

[41] The SCAC judge appropriately looked at the purpose of s. 100D. He concluded that the intent of the Legislature in enacting s. 100D was to target specific activities deemed to be sufficiently distracting to constitute an offence:

> [33] I have earlier concluded that the intent of the legislature in enacting s.100D(1) appears to target specific activities which are <u>deemed</u> to be sufficiently distracting to a driver so as to constitute, by the very act of performing them, an offence pursuant to the legislation.
>
> [Emphasis in original]

[42] I have no disagreement with this conclusion. But what were those specific activities? The answer lies in the plain and grammatical meaning of the Legislature's words. But before turning to them, it is useful to examine the mischief the Legislature intended to address.

[43] To ascertain the Legislature's purpose, the learned SCAC judge relied on Coughlan J.'s reasons in *R. v. Ferguson*, who quoted from Minister of Transportation's comments in the Legislature about the concerns over cellular phone use while operating a motor vehicle. It is worthwhile to repeat it:

> [30] So, at para. 18 of *Ferguson*, we find:
>
> <u>The purpose of prohibiting the use of a hand-held cellular telephone or text messaging on any communication device while operating a vehicle on the highway is clear: to prevent drivers from being distracted while operating a motor vehicle</u>. In moving second reading of the amendments to the *Motor Vehicle Act*, supra in 2007 which first introduced the provision, the Minister of Transportation and Infrastructure Renewal stated:
>
> > "Mr. Speaker, this bill addresses serious concerns Nova Scotians have about cellular phone use and other driver distractions in motor vehicles. **This bill makes it an offence to use a hand-held cellular telephone while operating a motor vehicle**. Driver distraction and inattention are leading causes of crashes and taking action to address distractions will help to reduce injuries and deaths in Nova Scotia. It is estimated that about 20 per cent of crashes are linked to driver distraction.
> >
> > Mr. Speaker, we are concerned for the safety of all Nova Scotians and evidence points to the fact that our young drivers are at the greatest risk of distractions inside the motor vehicle. Driver distraction is a growing concern for government and for Canadians. About 70 per cent of Canadians consider distractive driving a serious issue - up from just 40 per cent in the year 2001. An Angus Reid Poll conducted in 2007 found that 76 per cent of Canadians would support a federal ban on cellphones while behind the wheel. **Here in our own province, a survey conducted by my department indicated that 88 per cent of Nova Scotians think it is unsafe to use a hand-held cellular phone while operating a motor vehicle**.

> Other road safety stakeholders have advocated for a total ban on mobile devices while operating a motor vehicle. To them, I would say consult with police forces as they are the agencies that have to enforce this legislation. Discussions I have had with Nova Scotia's policing community have convinced me that a ban on hand-held devices while operating a motor vehicle is enforceable while a hands-free ban would be problematic from an enforcement perspective.
>
> Mr. Speaker, I believe it is incumbent upon all members of this House to create laws that are measured and enforceable. **Cellular phone use, while it is just one form of driver distraction, is a growing problem. The amendments will also give us the ability, through regulation, to prohibit other specific distractions and include other electronic devices as technology changes so the government can respond effectively to new concerns as they arise."**
>
> [Underlining added by Gabriel J.; bold by me]

[44] The announced mischief to be addressed by s. 100D was cellular phone use while driving. What were cellphones used for in 2007 that triggered the call for a ban? Telephone calls and text messaging. Some may have had more capabilities. Today, most do.

[45] In any event, hand-held or built-in GPS devices are not new technologies. Both had been in existence for many years prior to 2007. If the Legislature intended to prohibit the use of such devices while driving, it would have been easy to have done so. But the use of such devices, even though they may well constitute a distraction, were not proscribed in s. 100D. Instead, it was use of hand-held cellphones or text messaging on any communications device.

[46] There can hardly be any doubt about the plain meaning of "text messaging". The appellant cited to the SCAC judge *R. v. TELUS* Communications Co., 2013 SCC 16 and *R. v. Marakah*, 2017 SCC 59 for what is meant by "text messaging".

[47] *R. v. TELUS* reached the Supreme Court because the appellant unsuccessfully applied to quash a general warrant and related assistance order issued pursuant to ss. 487.01 and 487.02 of the *Criminal Code* that required it to provide to the police copies of prospective text messages sent or received by two Telus subscribers. The parties agreed that the general warrant and assistance order would capture stored text messages in existence prior to the date of the order.

[48] The issue before the Supreme Court was whether the authorities were compelled to obtain an authorization under Part VI of the *Criminal Code* for text

messages after the date of the order. The Court divided. The majority, made up of separate reasons by Abella J. and Moldaver J., concluded they did. The dissent by Cromwell J. (McLachlin C.J. concurring) said they did not. What is important is there was no dispute about what was meant by "text messaging".

[49] Abella J. wrote:

> [1] For many Canadians, text messaging has become an increasingly popular form of communication. Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication. The issue in this appeal is the proper procedure under the *Criminal Code*, R.S.C. 1985, c. C-46, for authorizing the prospective daily production of these messages from a computer database maintained by a telecommunications service provider.
>
> …
>
> [5] Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process. This distinction should not take text messages outside the protection of private communications to which they are entitled in Part VI. Technical differences inherent in new technology should not determine the scope of protection afforded to private communications.

[50] Justice Cromwell provided this definition of "text messaging":

> [111] Text messaging, technically known as Short Message Service ("SMS"), is a communication service using standardized communications protocols and mobile telephone service networks to allow for the exchange of short text messages from one mobile phone to another.

[51] It is apparent that Cromwell J. drew on the record from the proceedings before the Ontario Superior Court (2011 ONSC 1143), which described text messaging and its mechanics as follows:

> [9] …
>
>> 27. Text messaging (known more formally as Short Message Service ("SMS")) is a form of communication service using standardized communications protocols and mobile telephone networks to allow for the exchange of short text messages from one mobile phone device to another.
>>
>> 28. Text messages are always delivered using a cellular phone network. However, many phone companies now permit the initiation of text messages using the Internet.

[52] The plain meaning of what is meant by "text messaging" was repeated in the majority judgment in *R. v. Marakah*. The context was whether the appellant had standing to challenge the search and seizure of text messages he had sent to his co-accused. McLachlin C.J., for the majority, described text messaging as follows:

> [18] "Text messaging" refers to the electronic communications medium technically known as Short Message Service ("SMS"). SMS uses standardized communication protocols and mobile telephone service networks to transmit short text messages from one mobile phone to another: *TELUS*, at para. 111, per Cromwell J., dissenting but not on this point. Colloquially, however, "text messaging" (or the verb "to text") can also describe various other person-to-person electronic communications tools, such as Apple iMessage, Google Hangouts, and BlackBerry Messenger. These means of nearly instant communication are both technologically distinct from and functionally equivalent to SMS. Different service providers also handle SMS messages differently. The data that constitute individual SMS or other text messages may exist in different places at different times. They may be transmitted, stored, and accessed in different ways. But the interconnected system in which they all participate functions to permit rapid communication of short messages between individuals. In these reasons, I use "text messages" to refer to the broader category of electronic communications media, and "SMS" or "SMS messages" to refer to that medium specifically.

[53] The learned SCAC concluded that these straightforward definitions of what is meant by text messaging did not apply because the Supreme Court of Canada had defined "text messaging" in "other contexts" (para. 34). He labelled the "contexts" in *TELUS* and *Marakah* as "alien", and to adopt their definitions, antithetical to well-established norms of statutory interpretation set out in *R. v. Rizzo* and its progeny:

> [43] With respect, I do not agree. To adopt the Supreme Court of Canada's conclusions in relation to the meaning of "text messaging" as expressed in *Telus* and *Marakah* would be tantamount to applying pronouncements given in a completely alien context (i.e. the search and seizure provisions of the *Criminal Code* and the *Charter of Rights and Freedoms*), to the provincial legislation with which we are concerned here.
>
> [44] In fact, I would go so far as to say that this would be antithetical to the process of statutory interpretation as set forth in *Rizzo Shoes*, and as has been adopted and employed in the case law which discusses statutory interpretation ever since. It would, in effect, completely ignore the purpose of the Nova Scotia Legislature in enacting the subject provision and import concepts that were considered in a completely different context as determinative of the meaning of the language employed by the legislature in this specific instance.

[54] With all due respect, the SCAC judge erred in his approach. He should have determined what the Legislature meant by its prohibition against the "use of a cellular telephone or engaging in text messaging on a communications device". To do this, the judge should have read those words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature.

[55] The grammatical and ordinary sense of the words " text messaging" is set out in *R. v. TELUS* and *R. v. Marakah*. The Supreme Court of Canada did not interpret "text messaging" in a different statute or context, but simply recognized what everybody already knows—text messaging is the transmission of electronic text messages from one cellphone to another or from any device with text messaging capabilities.

[56] The Supreme Court of Canada's definitions of what is meant by "text messaging" were not influenced by the context of a legal dispute about Part VI authorizations or s. 8 of the *Charter*. It was the nature of text messaging that influenced the Court in its respective analyses of the legal requirements for the authorities to access text messages and whether the sender had a reasonable expectation of privacy.

[57] Rather than look at the ordinary and grammatical meaning of the Legislature's words, the SCAC judge examined the evils that the Legislature intended to uproot, which he said were the more egregious driver distractions. He saw no difference between a driver inputting coordinates into a GPS system to obtain information and text messaging. Hence, use of a GPS system was caught by the s. 100D prohibition.

[58] There may well be similarities between use of a GPS device or system and text messaging in terms of driver distraction, but the goal of statutory interpretation is not to look for similarities, but to determine what the Legislature meant by the prohibition set out in the actual words of s. 100D.

[59] The SCAC judge referred to the online version of the Merriam-Webster Dictionary when he considered whether a GPS is a "communications device". I will refer to this issue later. If the SCAC judge had looked at the same dictionary for "text messaging" he would have found essentially the same definition as in *R. v. TELUS* and *R. v. Marakah*:

> text messaging:
>
> the sending of short text messages electronically especially from one cell phone to another

[60] I know of no other definition. The Legislature's meaning could not, at least in this respect, have been clearer. A driver is prohibited from using a hand-held cellular phone or engaging in text messaging on any communications device while the vehicle is being operated.

[61] Words in an enactment should be interpreted in the context of which they are found. When that is done, the answer becomes even clearer.

[62] The prohibition is against text messaging on a "communications device". A hand-held or built-in GPS device is a navigation device. It helps the user, amongst other possible features, obtain a route to a particular destination. It does not, by any grammatical and ordinary meaning, send or receive text messages.

[63] The SCAC judge recognized that he must address the question whether a GPS device was a communications device. No one can doubt that it is a device. The SCAC judge reasoned that a "communications device" would be one that enables or facilitates "communications". He turned to the Merriam-Webster online dictionary for guidance:

> [48] A "communications device" would be one which enables or facilitates "communications". A typical definition of "communication" and "communications" is also to be found in the on-line *Merriam-Webster Dictionary*. It includes the following:
>
>> Communication:
>>
>> 1a: a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior the function of pheromones in insect communication also: exchange of information
>>
>> b: personal rapport a lack of communication between old and young persons
>>
>> 2a: information communicated : information transmitted or conveyed
>>
>> b: a verbal or written message: "The captain received an important communication".
>>
>> 3 communications *plural*
>>
>> a: a system (as of telephones or computers) for transmitting or exchanging information [as in] wireless electronic *communications*

> b: a system of routes for moving troops, supplies, and vehicles
>
> c: personnel engaged in communicating : personnel engaged in transmitting or exchanging information

[64] Equipped with this input, he found little difference between texts exchanged between individuals and an individual inputting coordinates into a GPS device to obtain information in return. Hence the input into a GPS device amounted to texting on a communications device:

> [49] **I return to my earlier observation that the provision appears to be aimed specifically at improving traffic safety by curbing the distraction that results from the combination of manipulating a proscribed device while also communicating or using other distracting functions enabled by the device.** Because of the multifacetted or multidimensional nature of the distraction, and in accordance with the spirit or intent of the legislature in enacting the provision, there is little difference between inputting information into a GPS device for the purposes of obtaining certain information in return, and texting as part of a back and forth conversation with another individual, and the distraction entailed by that. Both actions require the driver to look away from the road and at the device, first while the coordinates are entered into the device and usually (second) while the response is being received. In my view, for the Appellant to say "but, there wasn't another human party involved" raises a distinction without a difference.
>
> [50] One aspect of the Legislature's focus was directed at the distraction occasioned by the act of inputting information (such as GPS coordinates) into a device and the necessity to look at the screen in order to do so. This manual data input is virtually identical to that which is entailed by "texting" as part of a communication with a human recipient. It makes no difference, in my view, that the recipient of the coordinates which Mr. Annand "inputted" was a device intended to communicate with and obtain information from a satellite, obtain details of the "more efficient route" to the Appellant's destination and then provide him with that information.
>
> …
>
> [52] The process of entering the coordinates and receiving the answer is an exchange of information. Because it facilitates such transactions, a GPS is a "communications device" within the meaning of s. 100D(1). This is so when the plain meaning of the words used by the Legislature are considered in conjunction with its purpose in enacting it, and the other criteria in *Rizzo*.
>
> [Emphasis added]

[65] Use of hand-held or built-in GPS may well be just as distracting as using a cellphone to make a call or engage in text messaging. But the Legislature did not prohibit the use of a GPS device. It is decidedly not the role of the courts to fill in

the blanks and convict members of the public based on our views of whether the impugned conduct is just as bad as what the Legislature in fact had banned.

[66] A GPS device is not a proscribed device. A hand-held cellular telephone and a communications device are. It is useful to reflect on what Campbell J. wrote in *R. v. Ikede*:

> [39] The *Motor Vehicle Act* is not a living tree. The *Charter of Rights and Freedoms* is. But the *Motor Vehicle Act* is not. The *Motor Vehicle Act* should not be interpreted to keep up with technology and catch behaviours enabled by new technologies that were not contemplated by the wording and that are not analogous to those [*sic*] were. When the legislature banned hand-held cellphone use, it could be said to have banned the use of the telephone to do what telephones do, which is to make telephone calls. Or it could be interpreted to have banned the use of cellular telephones to do what cellular telephones were broadly understood to do at the time, which was to make telephone calls. Or it could cover all purposeful interactions with any hand-held device that has a cellular telephone function, regardless of whether the interaction involves the cellular telephone function at all and regardless of whether the application is related to driver distraction. It could have gone farther and covered holding or manipulating such a device.

[67] As I noted earlier, a GPS is not new technology. Hand-held and built-in car GPS systems have been in existence for decades. The same risk of driver distraction arises if they manually use the built-in GPS system, if available in a non-handsfree mode while driving.

[68] If the Legislature intended to prohibit the use of non-voice activated GPS systems in cars it would have been a simple thing to have done so. It did not.

[69] What of the consequences from the interpretation argued for by the respondent and endorsed by the SCAC judge? The respondent suggests that the use of a car's built-in navigation system (presumably not handsfree) while the vehicle is in motion is an offence contrary to s. 100D. Yet there is no difference between that distracting activity and programming the car radio to receive "communications" from a satellite or by radio waves, or manipulate the variety of knobs and dials to access information from the car's computer and hence receive information and engage in what the SCAC judge's logic would say is "communication". None of these activities are prohibited by s. 100D of the *MVA*. Maybe they should be, but that is not the issue.

[70] While not directly engaged by this appeal, I very much doubt that simply looking at a cellphone without manually accessing its features, making a call, or engaging in text messaging amounts to an offence contrary to s. 100D of the *MVA*.

[71] Many of the concerns and uncertainty in this area are reduced, if not eliminated, by the new *Traffic Safety Act*, S.N.S. 2018, c. 29. Although given Royal Assent on October 11, 2018, it has not yet been proclaimed.

[72] Under the *Traffic Safety Act*, it will be an offence while driving to manually input data into a built-in navigation system or to hold a hand-held communication, entertainment, or other proscribed electronic device. Some of the relevant provisions are:

> Distracted Driving
>
> …
>
> 183 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person is **using, holding or manipulating**
>
> (a) a hand-held communication device;
>
> (b) a hand-held entertainment device; or
>
> (c) **any other prescribed electronic device**.
>
> (2) Subsection (1) does not apply to a person
>
> (a) **using a hand-held communication device in hands-free mode without holding it;**
>
> (b) using a hand-held communication device to contact ambulance, law enforcement or fire department emergency services in relation to an immediate emergency;
>
> (c) using a hand-held communication device in the course of performing the person's duties as the driver of an emergency vehicle; or
>
> (d) prescribed by the regulations.
>
> 184 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person **is using a global positioning system navigation device unless the device is being used in a hands-free mode.**
>
> (2) Subsection (1) does not apply to a person prescribed by the regulations.
>
> 185 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person is using a logistical transportation tracking system device, dispatch system device or other device

> prescribed by the regulations unless the device is being used in a hands-free mode.
>
> [Emphasis added]

[73] With this legislation and whatever regulations come to be enacted, Nova Scotia will be brought into line with the general trend in other provinces. That has not yet happened.

Fresh evidence

[74] The appellant tendered an Agreed Statement of Facts in an effort to demonstrate that the SCAC judge erred when he concluded that a GPS was a communications device. The Agreed Statement is one sentence:

1. A Global Positioning Device ("GPS") can receive signals sent via satellite. A GPS cannot relay anything in return to a satellite.

[75] There is no need to admit the proposed fresh evidence. The issue is one of statutory interpretation, which has been resolved in the appellant's favour.

[76] I would grant leave to appeal, allow the appeal, quash the conviction and enter an acquittal.

Beveridge, J.A.

Concurred in:

Bryson, J.A.

Beaton, J.A.