THE PROVINCIAL COURT OF NOVA SCOTIA
(Citation: R. v. Thibault, 2003NSPC036)

Date: May 12, 2003
Case No. 1175532
Registry: Annapolis Royal

BETWEEN:

HER MAJESTY THE QUEEN

v.

ERIC THIBAULT

D E C I S I O N

BEFORE: The Honourable Judge Jean-Louis Batiot, J.P.C.

DATE HEARD: May 12th, 2003

PLACE HEARD: Annapolis Royal, Nova Scotia

CHARGE: *On or about the 29th of March, 2002 at 9:31 a.m. at or near Highway 101, Princedale, County of Annapolis, Nova Scotia did unlawfully commit the offence of driving in excess of 110 kilometers an hour contrary to Section 106(2) of the Motor Vehicle Act, R.S.N.S. 1989, c-293.*

COUNSEL: David Acker, for the Crown

P. Star, Q.C., for the Defence

EVIDENCE

[1] March 29th, 2002 was a clear and sunny day. Constable Johnson, a 23 year veteran of the RCMP, patrols, eastbound, highway 101 in Clementsvale, Princedale, Annapolis County, Nova Scotia. She is familiar with the road; this is her fifth year on this beat.

[2] She observes a motor vehicle, to all appearances going fast, coming towards her. She activates her radar. Almost immediately another vehicle, a yellow Corvette, appears, catching up to the first one, going at a very high rate of speed. She eliminates from the radar beam the first vehicle, targets the second vehicle and obtains a reading of 144 kilometers an hour. She intercepts it, and identifies the driver as the Defendant.

[3] There are no issues with respect to calibration or accuracy of the radar equipment; the Defendant confirms these particulars except for the speed; indeed he says he was going about 92 to 95 kilometers and hour. Both describe the stop, the conversation that was admitted into evidence, Constable Johnson asking him why he was being pulled over (*no idea*), and her advice to him: *you were going 144 kilometers an hour*, and his reply: *no way*, *do you think the car is stolen*?

[4] Constable Johnson asked for the driver's license, the vehicle permit and the insurance. The defendant hands over the first two, and the officer does not recall the third one. She went back to her vehicle, wrote out the ticket, after having verified the accuracy of the working of the radar by calibrating it again. As a result, she deleted the reading on which she relied to write the ticket. She issued and served it onto Mr. Thibault, who then asked to see the radar display. Constable Johnson informs him it was no longer available as it had been cleared.

Charter application

[5] Constable Johnson, it is argued, ought to have kept the reading of the speed on the display of her radar. Not to do so amounts to a breach of ss. 7 and 11(d) of the **Canadian Charter of Rights and Freedoms,** Part I, **Constitution Act**, 1982. Mr. Acker, on the other hand, argues that there was no reason for her to keep it there: Mr. Thibault knew that he was being charged for speeding and he knew also that the issue was the speed itself, 144 km/h versus *no way*; he was simply too late in asking for that evidence.

[6] Notice was sent to the Court, dated 18th of October 2002, alleging breaches of the Applicant's rights. The particulars are 1) failure of the investigating officer to show the accused his speed on the radar when such a request was made by the accused, and thus resulting in an infringement of the Applicant's right to a fair hearing in accordance with the principles of fundamental justice; 2) such other grounds as appear at trial, i.e., a possible s. 10 (a) **Charter** breach, of not advising the Defendant, upon detention, of the nature of the offence.

[7] In support of its argument, the Defence refers to several cases. In **R. v. Selig** (1991) 101 N.S.R. (2d) 281 (NSSC Ap. Div.). At issue was whether the accused had

> *the right, on request, to observe the results of the breath test as recorded on the gauge of the breathalyser instrument and, if so, whether a denial of that right constituted an infringement of the respondents right to a fair hearing in accordance with the principles of fundamental justice as provided by section 7 and 11(d) of the Charter* (Para. 3).

The accused had been stopped in Truro on July 15th, 1988 because he was driving on the wrong side, or down the middle of the street. His eyes were bloodshot and there was a smell of alcohol from his breath. He was a stranger in town and he was being directed to his destination by a passenger. Judge McDougall, of this court, found that Mr. Selig's request to see the breathalyser readings were denied. Mr. Selig had been polite and cooperative. Judge McDougall concluded that the accused had had an honest belief that he would *pass* the test and had a real interest in observing the instrument as well as an appreciation of the importance of those readings to the ultimate outcome of that procedure.

[8] Justice Hall upheld Judge McDougall; the Appeal Division dismissed the further appeal. It held, at para. 17, that *there was a request to view the breathalyser gauge; it was politely made at the time the tests were being administered; it was for a sincere and understandable reason.* Dealing with the denial of such a request, the Court, at para. 20, states:

> *Left unexplained was the reason for the denial, which denial was found as a fact by the trial judge. Indeed the inference from the technician's evidence is that had a request been made, it would have been granted.*

Further, at the same paragraph, the Court states:

> *unless the Respondent were permitted to observe the gauge he would not be able to dispute*

> *the record prepared by the technician as the reading on the gauge was transitory. By viewing the gauge, an accused may be able to address "evidence to the contrary".*

In conclusion, the Court of Appeal upheld the decisions and stated, at para. 21:

> *There must be full disclosure by the Crown relating to relevant and material matters, provided that the request for disclosure has a factual foundation, a meaningful capacity to advance the defence, an air of reality to it, and that it be a request or demand which is reasonably able to be satisfied so as not to disrupt the course of justice ....; it must be made in a timely fashion ...; and the accused must not have disadvantaged himself ...*

[9] Mr. Star also referred to a decision of the Honourable Judge Robert Prince of this Court who, on November 27th, 2002, in **Her Majesty The Queen** v. **Anthony A. Carter**, The Honourable Judge Prince of this Court held, also in a speeding case, involving a radar:

> *the only justification advanced for the failure to lock the reading, and to be in a position to disclosed, was the preference of the Officer, amounted to a breach of section 7 and 11(d) of the* ***Canadian Charter of Rights****.*

[10] In a speeding case, in order to make full answer and defence, a Defendant may wish to have as much of the evidence as is available, including that available to the officer. The key, objective, evidence of the radar reading, to prove speed, is central to the case. This is an issue of disclosure. The request to see it, given the ephemeral nature of such reading, must be made in a timely manner, (**R. v. Stinchcombe**, [1991] 3 SCR 326 (SCC)) and the obligation to so request could be triggered by notice of a charge, although, in practice, it is on the arraignment on the charge.

[11] Constable Johnson's action to test and calibrate her radar before issuing an SOT is consistent with great efficiency to ready the radar for the next target, eliminating the reading or, in light of Mr. Thibault's denial, ascertaining whether the radar was working properly before issuing the SOT. I accept the latter: Constable Johnson in fact double-checked that the radar was working properly before issuing the SOT. But was her action premature?

Timely request for disclosure

[12] There is no doubt that the Defendant was under *some form of compulsory constraint*, having

obeyed the officer's signal to stop; he was detained on the side of the road (**R.** v. **Therens** (1985) 18 CCC (3d) 481 (SCC)). The question is whether the exchange between the accused and the officer that day amounted to information *of the reasons of the detention,* to comply with the s. 10(a) requirement of the **Charter.**

[13] The other attendant obligation, to be informed *to retain and instruct counsel without delay*, was held not to apply to roadside detention on both an ALERT (now an approved screening device); see **R.** v. **Redding,** S.C.C. 01804 (N.S.S.C., App. Div.)**; R.** v. **Drapeau** (1986), 23 C.C.C. (3rd) 376 (N.S.S.C., App. Div.). A fortiori, it applies to this case, a short detention for the issuance of a Summary Offence Information for a regulatory offence, where none of the evidence needed to emanate from the detained Defendant.

[14] The events developed quickly, and the Officer advised the Defendant directly of his speed, well in excess of the permitted speed on any highway in Nova Scotia. She did not state that she was going to issue a Summary Offence Information (commonly referred to as a SOT, or ticket), but she gathered and took with her, back to her car, the driving documents requested, to identify the driver and the car. In light of the disclosed speed, these circumstances establish a factual situation where the only reasonable inference was the issuance of a ticket. The officer retained a discretion not to do so, but the Defendant had already denied the speed, and did not ask, there and then, to see the display. On these facts there was sufficient information disclosed of the reason for the detention.

[15] Possibly the officer could have invited the Defendant to the cruiser, to show him the display, and confirm her information to him. It would have been simpler particularly as there is no evidence as to whether other concerns existed, such as officer's safety, and thus a possible pat down search before the Defendant be permitted to enter the cruiser (**R. v. Hewlin**, [2001] NSJ 43 (NSCA)), and, if so, whether the Defendant would have pursued his late request.

[16] I do find, on the evidence, Constable Johnson' concern was to ascertain the radar was working properly, in light of the Defendant's denial. The deletion of the reading was due to the necessary calibration, and there was neither *unacceptable negligence* (**R. v. B. (F.C.)**, [2000] NSCA 35), nor *abuse of process (***R. v. Vu (1997)**, 116 CCC (3rd) 97 (SCC)).

[17] Accordingly, there is no breach of a **Charter** right.

[18] I am satisfied the Defendant did, at one point, drive at 92-95 km/h, as he was slowing down. The objective speed was as stated by Constable Johnson, 144 km/h, in a 100 km/h zone, on highway 101, and well above the 110 km/h indicated on the Information. The infraction has been made out beyond a reasonable doubt. I must find the Defendant guilty.

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Jean-Louis Batiot, J.P.C.

July 15th, 2003
Annapolis Royal, Nova Scotia