IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***M. Buchart***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
(Respondent) Respondent	)	***C. P. R. Murray***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
RAYMOND JOSEPH BERNIER	)	***January 30, 2020***
	)	
(Accused) (Appellant) Applicant	)	*Decision pronounced:*
	)	***July 17, 2020***

BEARD JA

THE ISSUE

[1] The accused applies for leave to appeal the decision of a Court of Queen's Bench summary conviction appeal court judge (the appeal judge) dismissing his appeal from two speeding convictions under *The Highway Traffic Act*, CCSM c H60 (the *Act*). The accused was convicted under section 229(2) of the *Act* as the owner of a vehicle involved in a contravention under the *Act*, not as the driver. He is not challenging the finding that his vehicle was being driven in contravention of the *Act*; rather, he is challenging the legality of the legislation.

[2] In his brief and in oral argument, the accused alleges that the legislation breaches both section 11(*c*) (the right of an accused not to be

compelled to be a witness in proceedings against him or her in respect of an offence), and 11(*d*) (the presumption of innocence) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The allegation of a breach of section 11(*c*) is being raised for the first time before this Court and was not considered by the lower courts, so this application will be restricted to the issue that was considered by those courts, being whether there was a breach of the accused's rights under section 11(*d*).

BACKGROUND

[3] The accused was charged as the registered owner of a vehicle that was caught speeding by an image capturing enforcement system (photo radar) on two separate occasions, in 2016 and again in 2017, as a result of which two image capturing enforcement system offence notices (photo radar tickets) were issued. The photo evidence shows the licence plate of the vehicle, but it does not show the driver. Because the driver was unknown, the accused was identified through the licence plate and registration as the registered owner of the vehicle and charged under sections 95(1) and 229(2) of the *Act*.

[4] The accused pled not guilty and had a trial in the Provincial Court. At his trial, he did not seriously contest the facts; rather, he argued that section 229 violated his presumption of innocence and that, as a result, he should be acquitted.

[5] The trial judge found that the issue of whether section 229(2) breached an accused's presumption of innocence as protected by section 11(*d*) of the *Charter* had been determined by this Court in *R v Gray* (1988), 44 CCC (3d) 222. In that decision, this Court found that the provision did not breach

section 11(*d*), and the trial judge found that he was bound to accept that ruling. He then convicted the accused of both speeding offences.

[6] The accused filed an application under section 79(3) of *The Provincial Offences Act*, CCSM c P160 (the *POA*), for leave to appeal his summary conviction. The appeal judge granted leave to appeal on the basis that there was an appellate decision from the New Brunswick Court of Appeal (*R v Wilson*, 1997 CarswellNB 390), that had come to a different conclusion from that in *Gray*, and that it should be for this Court to determine whether to review its decision in *Gray* in light of *Wilson*. Regarding the substance of the appeal as to the constitutionality of section 229(2), the appeal judge found that he was bound by the decision in *Gray*, and he dismissed the appeal.

[7] The accused now wishes to appeal the decision of the appeal judge to this Court. As this would be a second-level appeal, the accused requires leave to appeal. (See section 84 of the *POA*.)

TESTS TO BE APPLIED

[8] The determination of the application for leave to appeal engages two tests: whether the accused's appeal meets the test for permitting a second-level appeal, and whether there is an arguable case that it meets the test for an appellate court to reconsider a prior decision of the Court.

[9] The test for granting leave to appeal from a decision of a judge of the Court of Queen's Bench acting as a summary conviction appeal court is well known, involving three criteria: (i) the grounds of appeal must involve questions of law alone (see section 84 of the *POA*); (ii) the matter must raise an arguable case of substance; and (iii) the case must be of sufficient

importance to merit the attention of the full court. While these criteria are often considered in relation to summary conviction appeals under the *Criminal Code*, they apply equally to summary conviction appeals under provincial legislation, including the *POA*. (See, for example the following chambers decisions, *R v Fenske (HB)*, 2015 MBCA 113 at paras 11-12 (including an explanation regarding the basis for the more limited appeal at the second level); *R v Grant*, 2017 MBCA 84 at para 18; *Winnipeg (City of) v The Neighbourhood Bookstore and Café Ltd*, 2019 MBCA 3 at paras 36, 40, 42; and *R v Grant*, 2019 MBCA 51 at paras 11-12.)

[10] It has often been emphasised that access to a second-level appeal should be limited to those cases in which the appellant can demonstrate some exceptional circumstances justifying a further appeal. (See *R v R (R)*, 2008 ONCA 497 at para 27; and *R v Dickson (WA)*, 2012 MBCA 2 at paras 12-14.)

[11] The test for reconsidering an earlier decision was reviewed in some detail in *Siwak v Siwak*, 2019 MBCA 60 at paras 33-34. (See also Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thompson Reuters, 2019) vol 1 (loose-leaf release 2020-2) ch 1 at paras 1:3212-1:3220, 1:3240-1:3247.)

[12] In summary, the doctrine of *stare decisis* provides that an appellate court will be bound by its past decisions, subject to its ability to overrule a past decision in appropriate circumstances. (See Brown at para 1:3212.) The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 260, Abella

and Karakatsanis JJ, for the minority, but not on this point, quoting from *Kimble v Marvel Entertainment, LLC*, 135 S Ct 2401 at 2409 (2015)).

[13] While it is open for courts to reconsider and overrule prior decisions, "[r]econsideration of a prior decision cannot be done lightly. If one panel of the court is at liberty to depart from a pronouncement of an earlier panel, the result is an unacceptable level of uncertainty in the law" (*Mellway v Mellway*, 2004 MBCA 119 at para 26).

[14] The test for reconsideration sets a high bar—described as "a step not to be lightly undertaken" and requiring the court to "be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Canada v Craig*, 2012 SCC 43 at paras 24-25). Dickson CJC (in the minority, but not on this point) stated in *R v Bernard*, [1988] 2 SCR 833, that "even if a case were wrongly decided, certainty in the law remains an important consideration. There must be compelling circumstances to justify departure from a prior decision" (at p 849). In a similar vein, the majority in *Vavilov* stated that any reconsideration can be justified only in "compelling circumstances," and cannot be undertaken "lightly" (at para 18).

STATUTORY PROVISIONS

[15] The relevant provisions of the *Act* are:

> **Owner may be charged with driver's offence**
> **229(2)** The owner of a vehicle that is involved in a contravention of this Act, a regulation or a rule or by-law made by a traffic authority under subsection 90(1) may be charged with any offence with which, in similar circumstances, the driver of a vehicle or the person having care, charge or control of one may be charged.

> **Conviction of owner**
> **229(2.1)** If the judge or justice before whom the owner is tried is satisfied that the vehicle was involved in the contravention, the owner is guilty of the offence, unless the owner proves to the satisfaction of the judge or justice that at the time of the contravention the vehicle was, without the owner's express or implied consent, in someone else's possession.
>
> **Owner not guilty when driver is guilty**
> **229(3)** An owner is not guilty of an offence under subsection (2.1) in relation to an occurrence if the owner satisfies the judge or justice that the driver of the vehicle or the person having care, charge or control of it, being in either case a person other than the owner, was convicted of the offence in relation to the same occurrence.
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> **Owner penalty**
> **229(4)** An owner who is guilty of an offence under subsection (2.1) is liable, on summary conviction, to the penalty to which the driver or person having care, charge or control is subject except that the owner is not liable to imprisonment.

THE PARTIES' POSITIONS

[16] In addressing the test for a second-level appeal, both parties agree, as do I, that the proposed ground of appeal raises a question of law and, therefore, meets the first criterion of the test. The Crown challenges the granting of leave on the basis that the accused has not presented an arguable case of substance.

[17] The accused's position is that three other appellate courts have found that provisions similar to section 229(2) breached the *Charter*. He argues that "this court on revisiting [the *Act*], section 229, now in 2020, may with the benefit of those other appellate decisions, obtain a different answer regarding its constitutionality than it did in 1988".

[18] The Crown's position is that the three cases on which the accused bases his argument do not, in fact, support that argument. It further argues that developments in the law regarding section 11(*d*) of the *Charter* subsequent to *Gray* support, rather than cast doubt on, the findings in *Gray*. Finally, it argues that there are no exceptional circumstances that would suggest that this Court should reconsider its prior decision in *Gray*. Thus, its position is that the accused has not met the test for granting leave to appeal to this Court, and his application should be dismissed.

ANALYSIS

(i) Arguable Case of Substance

Gray

[19] In *Gray*, the accused was charged, under what was then section 229(1) of the *Act*, (now section 229(2)), with being the registered owner of a vehicle involved in several driving offences. At his trial, he successfully challenged the validity of the legislation under sections 7, 11(*c*), and 11(*d*) of the *Charter*, and he was acquitted. The Crown appealed, and the appeal judge found that the legislation did not violate any of the *Charter* provisions. That finding was appealed to the Court of Appeal.

[20] Huband JA, for the Court, found, based on *Re BC Motor Vehicle Act*, [1985] 2 SCR 486; and *R v Burt* (1987), 38 CCC (3d) 299 (Sask CA), that reasonable care or due diligence in lending a vehicle did not constitute a defence for the owner under section 229(1) of the *Act*, with the result that it created an absolute liability offence. (This is an offence for which an accused can be convicted merely upon proof of the proscribed Act, without any proof

of any additional fault element such as guilty knowledge or negligence. (See, for example, *The Queen v Sault Ste Marie*, [1978] 2 SCR 1299 at 1326; and Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 242.))

[21] Huband JA also found, following *Re BC Motor Vehicle Act*, that the provision violated the right to liberty guaranteed by section 7 of the *Charter* due the possibility, albeit remote, of incarceration for the non-payment of a fine, if one were imposed as a penalty. (See paras 20-25.)

[22] As regards section 11(*d*) of the *Charter*, that is the presumption of innocence, Huband JA concluded that the onus remained with the Crown to establish the basic ingredients of the offence beyond a reasonable doubt, being that the accused was the owner of the vehicle and that the vehicle was involved in a violation of the *Act*. While section 229(1) stated the owner would be guilty "unless, the owner satisfies the judge or justice that, at the time of the violation, the motor vehicle was in the possession of a person other than the owner . . . without the consent of the owner", he held that this does not create a reverse onus or deny the benefit of the presumption of innocence. Rather, this provided the accused with a statutory defence, which would arise after the Crown had established a complete case for conviction. (See para 28.)

[23] On this basis, he found that section 229(1) did not violate section 11(*d*) of the *Charter*.

[24] Having found that the provision violated section 7 of the *Charter*, Huband JA then considered whether it could be saved under section 1. He stated that the determining issue was whether there was a potential for imprisonment following a conviction under section 229(1). He found that imprisonment was inherently unlikely, which led him to conclude that the test

under section 1 had been met and section 229 was valid legislation. (See paras 37-40.) It was on this last point that Huband JA differed from the Court in *Burt*, which found that even a prospect of imprisonment for an absolute liability offence rendered the legislation unconstitutional. (See para 60).

[25] It should be noted that the *Act* was subsequently amended with the addition of section 229(4), which removes the possibility of imprisonment for a conviction under this provision. Thus, the section 7 breach that was found in *Gray* and *Burt* is no longer an issue.

The Accused's Cases

[26] The first case referred to by the accused is *Burt*. His position is that, although the *Burt* decision, as it related to the breach of section 7, does not apply to this appeal, Bayda CJS's discussion of the inapplicability of the doctrine of vicarious liability from tort law to criminal and regulatory law is relevant to the present matter. Section 11(*d*) was not at issue in *Burt*, and, unfortunately, the accused does not explain how it would apply and whether there are any differences regarding its application to section 7 as compared to section 11(*d*) of the *Charter*.

[27] The second case is that of *R v Sutherland* (1990), 55 CCC (3d) 265 (NSCA). In oral argument, defence counsel said that he had overstated the effect of this case and that he accepted the Crown's position.

[28] I would agree with the Crown that Chipman JA, for the majority in *Sutherland*, held that a provision similar to section 229(1) in *Gray* as it related to proof by the owner that he or she did not consent to the operation of the vehicle did not operate as a reverse onus. Chipman JA found that the

exemption from liability where the accused "can prove" that the vehicle was operated without his consent was not an element of the offence, but one way to establish the defence of due diligence. Thus, he found no breach of section 11(*d*).

[29] The difficulty with the Crown's position is that it misses an important aspect of Chipman JA's decision because it does not take into account the difference between the underlying offences in *Sutherland* and this case. In *Sutherland*, the underlying offence was *a failure by the registered owner to respond to a demand made of him or her* for information regarding the particulars of the driver of his vehicle, where that vehicle was involved in an offence. Importantly, the registered owner was not being charged with the underlying driving offence, but with his or her own failure to provide information. Thus, the *actus reus* of the offence was the act or omission of the owner regarding the provision of information, not an offence related to the operation of the vehicle. This distinction was clearly important to Chipman JA. (See paras 9-12.) This is not the same as the offence under section 229(2) of the *Act*, pursuant to which the registered owner can be convicted of a driving offence even if there is no proof that he was the driver.

[30] Chipman JA found that the offence of failing to comply with a demand for information was a strict liability offence (not an absolute liability offence, as in *Gray*) and that the defence of due diligence was available. He then found that the second part of the provision, that the owner could raise the defence that the vehicle was being operated without his or her consent, was an aspect of the due diligence defence and not a reverse onus provision.

[31] In my view, the difference in the underlying offences in *Sutherland* and the present case is significant. While the finding in *Sutherland* that the lack of consent defence does not constitute a reverse onus would apply in this case, *Sutherland* does not address the argument of whether there is a breach of section 11(*d*) as a result of the owner being convicted of the underlying driving offence without proof that he or she was driving. Thus, it does not support *Gray* on this issue.

[32] The final case is *R v Wilson*. In *Wilson*, the accused was convicted as the owner of a vehicle that failed to stop for a school bus. This is comparable to the present case, where the owner was convicted of the underlying driving offence. It is correct, as the Crown points out, that the Crown in *Wilson* conceded breaches of sections 11(*c*) and (*d*), and the only issue was whether the legislation was saved under section 1 of the *Charter*.

[33] Notwithstanding the Crown's concession, however, Bastarache JA, for the Court, considered whether there had been a breach of sections 11(*c*) and (*d*), stating that he disagreed with the decisions, including *Gray*, that found no violation of section 11. He found that the owner liability provisions created a presumption that the owner was the driver and the owner then had the onus to rebut this presumption, which breached the accused's section 11 rights and was not saved by section 1. To remedy that breach, he read down the legislation to provide a due diligence defence. (See paras 15, 21.)

[34] The essential difference between *Gray* and *Wilson* is in their interpretations of the decision in *R v Holmes*, [1988] 1 SCR 914. That decision involved a conviction for having possession of house-breaking tools under section 309(1) of the *Criminal Code*. The offence included a

presumption of guilt from possession, unless the accused established a lawful excuse, "the proof of which lies on him". The Court found that the presumption did not constitute a reverse onus in violation of section 11(*d*) because all elements of the offence, including possession by the accused, had to be proved by the Crown, and the reference to the accused proving a lawful excuse was "little more than a recognition of the accused's statutory right . . . to make full answer and defence" (at p 945).

[35] In *Gray*, Huband JA found that the offence under section 229(1) consisted of being the owner of a vehicle involved in an offence under the *Act*, and that the Crown was required to prove all elements, being that the accused was the owner and that his vehicle was involved in a driving offence. He did not address the issue of the owner being convicted of a driving offence without the Crown having to prove that he was driving. This is the vicarious liability issue raised in *Burt*, to which the accused alluded in his argument.

[36] Bastarache JA distinguished the offence in *Holmes* from those in *Gray* and *Wilson* on the basis of the *actus reus* of the offence and what was required to be proved by the Crown. He stated that, in *Holmes*, the illegal act was one of possession by the accused, and the Crown was required to prove beyond a reasonable doubt that the accused had possession. In *Gray* and *Wilson*, the illegal act was the act of driving in violation of the driving laws, but the Crown did not have to prove that the owner was driving—he said that proof of driving was, effectively, presumed from proof of ownership. This then placed an onus on the owner to rebut the presumption that he was the driver, which breached section 11(*d*). (See p 926.) Thus, he agreed that there was no breach of 11(*d*) in *Holmes* because the Crown had to prove that the accused committed the possession offence, but there was a breach in *Wilson*

because the Crown did not have to prove that the accused committed the driving offence, and he disagreed with the finding of no breach in *Gray*, finding that it misapplied *Holmes*.

[37] The Crown, in arguing that *Sutherland* actually supports the finding in *Gray*, does not address this distinction at all.

[38] While the Crown referred to jurisprudence that states that, in some cases, a reverse onus is constitutional in regulatory cases (see, for example, *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154; and *R v Tri-M Systems Inc*, 2001 BCCA 277), in my view this argument requires a more detailed analysis than was provided at the leave hearing.

(ii) Case of Sufficient Importance

[39] The Crown did not address this criterion separately from that of whether there was an arguable case. As the accused points out, section 229(2) applies to every offence under the *Act*, which includes thousands of photo radar tickets issued every year and affects a large number of people. Thus, he states, it is not a marginal, narrow issue.

[40] I would agree that, notwithstanding the decision in *Gray*, the question of the constitutional validity of section 229 of the *Act* raises a significant issue that is of sufficient importance to merit the attention of the full Court.

[41] I am also satisfied that the issues raised in this appeal arguably meet the test to have this Court review its earlier decision in *Gray*.

Conclusion

[42] Based on the jurisprudence set out above, section 229(2) of the *Act* potentially breaches section 11(*d*) of the *Charter* in two ways. The first argument is that the offence of being the owner of a vehicle involved in a violation of the *Act* violates section 11(*d*) because the owner can be convicted of a driving offence without the Crown having to prove that he or she was driving and, to avoid conviction (apart from the limited statutory defences), the owner must prove that he or she was not driving, creating a reverse onus. The second argument is that the exemption from guilt in section 229(2) of the *Act*, itself, creates a reverse onus because the owner must prove that the vehicle was being operated without his consent, which also breaches section 11(*d*).

[43] The parties have not provided any jurisprudence to indicate that the second argument has found any favour in the courts. What is at issue, although not at all well articulated, is the first argument.

[44] The tests for both granting leave for a second-level appeal from a summary conviction appeal decision and for an appellate court to reconsider a prior decision set a high bar—the applicant must establish "exceptional circumstances", and these decisions "cannot to be undertaken 'lightly'" (see paras 8-14 herein).

[45] In my view, that high bar is met in this case. For the reasons set out above, I am satisfied that there is an arguable case of substance that the provisions of section 229(2) of the *Act* that make an owner guilty of a driving offence without proof that he or she was the driver create a reverse onus and

breach section 11(*d*) of the *Charter*, regarding an accused's presumption of innocence, and that this issue merits the attention of the Court.

[46] I would caution both counsel that the appeal appears to raise issues related to absolute versus strict liability offences and the constitutionality of reverse onus provisions that were only alluded to in this application. Thus, the appeal will have to entail a much more in-depth analysis than has been presented to date.

Remedy

[47] The Crown argues that, while the accused is seeking a stay of the proceedings against him under section 24(1) of the *Charter*, if he is successful, the appropriate remedy would be one under section 52 of the *Constitution Act, 1982*, so that the defect is cured for all persons affected by the *Act*, and not just this accused. This will, obviously, be a decision for the Court, if the legislation is found to be unconstitutional.

DECISION

[48] For these reasons, I would grant the accused's application for leave to appeal, which will be limited to the question of whether section 229 of the *Act* breaches section 11(*d*) of the *Charter* as set out above. The issue of the appropriate remedy will be for the Court, if the accused is successful on his appeal.

"Beard JA"