

1996 CarswellOnt 5454
Ontario Court of Justice (General Division)

R. v. Phillips

1996 CarswellOnt 5454, 108 C.C.C. (3d) 514, 138 D.L.R. (4th) 121, 32 W.C.B. (2d) 11

Her Majesty the Queen and Christopher Phillips and Neil Williams

Corbett J.

Oral reasons: June 24, 1996

Docket: Toronto none given

Counsel: *Ms. L. Earle*, for the Crown.

Mr. D. Midanik, for the Defendant Phillips.

Mr. N. Weinstein, for the Defendant Williams.

Subject: Criminal; Constitutional

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Firearms and other offensive weapons — Restricted weapon in motor vehicle — General

Accused were charged under s. 91(3) of Criminal Code with being occupants of motor vehicle in which they knew there was restricted weapon — Accused brought application under s. 24(1) of Charter for declaration that s. 91(3) was inconsistent with ss. 7 and 11(d) of Charter and for declaration that it was of no force and effect — Section 91(3) placed onus on accused to establish that he had reason to believe some occupant had permit — As accused could be convicted even though weapon was lawfully in vehicle, s. 91(3) therefore infringed presumption of innocence — Section 91(3) infringed both ss. 7 and 11(d) of Charter in violation of presumption of innocence — Section failed first part of proportionality test — As Crown was unable to establish legislative objective of section, it was impossible to say that reverse onus was rationally connected to objective — Section 91(3) was declared of no force and effect — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 7, 11(d) — Criminal Code, R.S.C. 1985, c. C-46, s. 91(3).

Table of Authorities

Cases considered by *Corbett J.*:

Boyle v. R. (1983), (sub nom. *R. v. Boyle*) 41 O.R. (2d) 713, 35 C.R. (3d) 34, 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 5 C.R.R. 218 (Ont. C.A.) — considered

Canada v. Pharmaceutical Society (Nova Scotia), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 114 N.S.R. (2d) 91, 313 A.P.R. 91 (S.C.C.) — applied

R. v. Canadian Pacific Ltd., 41 C.R. (4th) 147, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, (sub nom. *Ontario v. Canadian Pacific Ltd.*) 183 N.R. 325, (sub nom. *Ontario v. Canadian Pacific Ltd.*) 24 O.R. (3d) 454 (note), (sub nom. *Ontario v. Canadian Pacific Ltd.*) 82 O.A.C. 243, (sub nom. *Ontario v. Canadian Pacific Ltd.*) 30 C.R.R. (2d) 252, (sub nom. *Ontario v. Canadian Pacific Ltd.*) [1995] 2 S.C.R. 1031 (S.C.C.) — considered

R. v. Downey, 2 Alta. L.R. (3d) 193, 136 N.R. 266, 125 A.R. 342, 14 W.A.C. 342, 90 D.L.R. (4th) 449, [1992] 2 S.C.R. 10, 13 C.R. (4th) 129, 9 C.R.R. (2d) 1, 72 C.C.C. (3d) 1 (S.C.C.) — applied

R. v. Dunlop, [1979] 2 S.C.R. 881, 99 D.L.R. (3d) 301, 27 N.R. 153, [1979] 4 W.W.R. 599, 8 C.R. (3d) 349, 12 C.R. (3d) 339, (sub nom. *Dunlop v. R.*) 47 C.C.C. (2d) 93 (S.C.C.) — considered

R. v. Finlay, [1993] 7 W.W.R. 513, 23 C.R. (4th) 321, 156 N.R. 374, 83 C.C.C. (3d) 513, 105 D.L.R. (4th) 699, [1993] 3 S.C.R. 103, 17 C.R.R. (2d) 46, 113 Sask. R. 241, 52 W.A.C. 241 (S.C.C.) — applied

R. v. Heywood, 34 C.R. (4th) 133, 174 N.R. 81, 50 B.C.A.C. 161, 82 W.A.C. 161, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 94 C.C.C. (3d) 481, [1994] 3 S.C.R. 761 (S.C.C.) — considered

R. v. Ireco Canada II Inc. (1988), 65 C.R. (3d) 160, 17 C.E.R. 245, 29 O.A.C. 161, 43 C.C.C. (3d) 482 (Ont. C.A.) — considered

R. v. Laba, 34 C.R. (4th) 360, (sub nom. *R. v. Johnson*) 174 N.R. 321, (sub nom. *R. v. Johnson*) 76 O.A.C. 241, 94 C.C.C. (3d) 385, 25 C.R.R. (2d) 92, 120 D.L.R. (4th) 175, [1994] 3 S.C.R. 965 (S.C.C.) — applied

R. v. Lee's Poultry Ltd. (1985), 43 C.R. (3d) 289, 7 O.A.C. 100, 17 C.C.C. (3d) 539, 12 C.R.R. 125 (Ont. C.A.) — considered

R. v. Mara (1996), 46 C.R. (4th) 167, 88 O.A.C. 358, 105 C.C.C. (3d) 147, 133 D.L.R. (4th) 201, 27 O.R. (3d) 643, 35 C.R.R. (2d) 152 (Ont. C.A.) — distinguished

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719 (S.C.C.) — applied

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (S.C.C.) — considered

R. v. Schwartz (1988), [1989] 1 W.W.R. 289, [1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1, 88 N.R. 90, 56 Man. R. (2d) 92, 45 C.C.C. (3d) 97, 66 C.R. (3d) 251, 39 C.R.R. 260 (S.C.C.) — distinguished

R. v. Shelley, [1981] 2 S.C.R. 196, [1981] 5 W.W.R. 481, 21 C.R. (3d) 354, 26 C.R. (3d) 150 (Fr.), 9 Sask. R. 338, 59 C.C.C. (2d) 292, 123 D.L.R. (3d) 748, 3 C.E.R. 217, 37 N.R. 320 (S.C.C.) — considered

R. v. Whyte, 6 M.V.R. (2d) 138, [1988] 2 S.C.R. 3, [1988] 5 W.W.R. 26, 51 D.L.R. (4th) 481, 86 N.R. 328, 29 B.C.L.R. (2d) 273, 42 C.C.C. (3d) 97, 64 C.R. (3d) 123, 35 C.R.R. 1 (S.C.C.) — considered

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, [1986] D.L.Q. 90 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 1 — considered

s. 7 — considered

s. 8 — referred to

s. 9 — referred to

s. 11(d) — considered

s. 24(1) — referred to

Criminal Code, R.S.C. 1970, c. C-34

s. 106.7(1) [en. 1976-77, c. 53, s. 3] — referred to

Criminal Code, R.S.C. 1985, c. C-46

Pt. III — considered

s. 21 — considered

s. 21(1) — referred to

s. 84(1) "firearm" [rep. & sub. 1991, c. 40, s. 2(1)] — referred to

s. 84(1) "prohibited weapon" [rep. & sub. 1991, c. 40, s. 2(2)] — referred to

s. 84(1) "restricted weapon" [rep. & sub. 1991, c. 40, s. 2(4)] — referred to

s. 84(1.1) [en. 1991, c. 40, s. 2(6)] — referred to

s. 84(1.2) [en. 1991, c. 40, s. 2(6)] — referred to

s. 84(2) — referred to

s. 89(1) — referred to

s. 90(2) — considered

s. 91(3) — considered

s. 94(3) [en. 1995, c. 39, s. 139] — considered

s. 110 — referred to

s. 212(1)(j) — referred to

s. 212(3) — referred to

s. 306 — considered

s. 394(1)(b) — referred to

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)

Generally — referred to

Firearms Act, S.C. 1995, c. 39

Generally — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

APPLICATION by accused under s. 24(1) of Canadian Charter of Rights and Freedoms for declaration that s. 91(3) of Criminal Code is inconsistent with ss. 7 and 11(d) of Charter and therefore of no force and effect.

Corbett J. (Orally):

1 Christopher Phillips and Neil Williams are jointly charged on two counts that, on July 4th, 1994, they were occupants of a motor vehicle in which they knew there was a restricted weapon, one count in respect of a pistol and another count in respect of a revolver, for which no occupant of the motor vehicle was the holder of a permit under which he may lawfully have that weapon in his possession in such motor vehicle, contrary to the *Criminal Code*. Christopher Phillips faces two additional charges of possession of a restricted weapon. The Crown conceded there was no evidence of possession of a restricted weapon with respect to Neil Williams.

2 An application was brought by counsel for Christopher Phillips, which was joined by counsel for Neil Williams, raising a constitutional issue whether s. 91(3) of the *Criminal Code* breaches ss. 7 and 11(d) of the Canadian *Charter of Rights and Freedoms* and whether any such contravention is justified under s. 1 of the *Charter*.

3 The issues raised on the application were whether the section creates an offence where the conduct alleged cannot be characterized as criminal, whether the section is overbroad, and whether the section creates a reverse onus and shifts the burden of proof to the accused. The order sought is a declaration that s. 91(3) is a violation of ss. 7 and 11(d) of the *Charter* and is of no force and effect.

4 Both accused brought other pre-trial applications alleging violations of s. 8 and s. 9 of the *Charter*. In addition, a pre-trial application was brought by Phillips alleging that his rights to counsel were contravened. A *voir dire* was also conducted with respect to the voluntariness of the statements allegedly made by Christopher Phillips. Evidence on all applications was heard at the same time.

5 Section 91(3) of the *Criminal Code* provides as follows:

Every one who is an occupant of a motor vehicle in which he knows there is a restricted weapon is, unless some occupant of the motor vehicle is the holder of a permit under which he may lawfully have that weapon in his possession in the vehicle, or he establishes that he had reason to believe that some occupant of the motor vehicle was the holder of such permit,

(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) guilty of an offence punishable on summary conviction.

6 Section 7 of the Canadian *Charter of Rights and Freedoms* provides that:

Every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7 Section 11 provides:

Any person 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.

8 Section 24(1) provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Background

9 On July 4, 1994, an emergency 911 call was made at 2:20 a.m. that a person had a gun in his car and had fired a shot. Information was given about the location of the car, its direction of travel, and its description. The car was identified, followed, and stopped on the ramp to the Don Valley Parkway at York Mills Road in the City of Toronto.

10 The driver, Christopher Phillips, was removed at 2:25 a.m. The remaining five occupants of the vehicle were also removed. Neil Williams was the second person removed from the rear passenger side of the vehicle.

11 There was evidence that a restricted weapon, a pistol, was located on the mat under the driver's seat by Constable Horvath. He described it as being one and a half feet from the gas pedal. A second restricted weapon, a revolver, was located behind a rear seat. In this vehicle each of the rear seats can recline to afford access to the trunk. Constable Niemirowski observed a revolver when the seat was pulled back in the centre at the base of the seat. Constable Horvath testified it fell into the trunk when the seat was pulled forward, and that it was close to the forward area of the trunk space. He testified that a hand could go through to the trunk area.

12 Constable Horvath described the pistol as a .32 calibre Savage semi-automatic pistol. He testified that he observed 3 live rounds in the magazine and that the safety was off. A report of the Centre of Forensic Sciences described this pistol as a Savage .32 ACP 7.65 millimetre calibre semi-automatic pistol with its serial number removed. The pistol was examined and test fired. The results of the examination were that the weapon is a barrelled weapon designed to be held and fired by the action of one hand. Its projectiles were capable of inflicting serious bodily harm or death to a person and exceeded 152.4 metres per second. As well, 4 unfired .32 ACP 7.65 millimetre calibre cartridges were described to be of Czechoslovakian manufacture and suitable for use in the pistol.

13 Constable Horvath described the revolver as an Iver Johnson with 5 live rounds in its chamber without a safety mechanism. The Centre of Forensic Sciences examination described this revolver as a .38 calibre top grade revolver made by Iver Johnson with a serial number. The revolver was test fired and described as a barrelled weapon designed to be held and fired by the action of one hand. Its projectiles were capable of inflicting serious bodily harm or death to a person and exceeded 152.4 metres per second. Five unfired .38 Smith and Wesson calibre cartridges were described to be of Winchester manufacture and suitable for use in the pistol.

14 All six occupants of the vehicle were arrested and transported to 41 Division.

Nature of the Offence

15 It was submitted by counsel for the accused that s. 91(3) creates an offence where the conduct alleged cannot be characterized as criminal activity, contrary to s. 7 of the *Charter*. The elements of the offence are occupancy in a motor vehicle and knowledge of the presence of a restricted weapon in the motor vehicle. There is no requirement that the occupant have any control over the weapon, or that the occupant consent to the presence of the weapon, or that the occupant have knowledge that the weapon was used or would be used in relation to any criminal activity.

16 It was also submitted that s. 91(3) creates an offence of guilt by association, contrary to s. 21 of the *Criminal Code* which sets out the circumstances whereby a person may be a party to an offence. I do not accept the submission that s. 21(1) of

the *Criminal Code* prohibits the lawful enactment of crimes which are essentially passive in nature and where liability arises through non-action or presence.

17 Defence counsel relied on the decision of *R. v. Dunlop* (1979), 47 C.C.C. (2d) 93 (S.C.C.) in support of the proposition that mere presence at the scene of a crime is not sufficient to ground culpability. In that case it was held that mere presence at the scene of a rape and passive observation of that rape did not make a person a party to an offence under s. 21(1) of the *Criminal Code*. This conclusion was made in determining the application of s. 21(1) and what must be done in respect of the principal offender. It was submitted that s. 91(3) criminalizes accidental presence in the absence of any overt action or moral blameworthiness.

18 In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* (1985), 23 C.C.C. (3d) 289 (S.C.C.) which dealt with a minimum seven-day jail sentence for driving while a licence was suspended, Lamer J. (as he then was) wrote for the majority and stated at p. 293:

A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Canadian Charter of Rights and Freedoms ...

In other words, absolute liability and imprisonment cannot be combined.

19 Lamer J. discussed the history of the fundamental principles that the innocent not be punished and the necessity of establishing a guilty mind. Wilson J. concurred and in a separate decision, accepted that a guilty mind was an essential element of a crime at common law but not necessarily true of a crime created by a statute. Provided it does so in clear and unambiguous terms, the legislature is free to make a person liable for the *actus reus* without the *mens rea*.

20 Counsel for the defence submitted that s. 91(3) has elements of the first and second categories of offences in the three categories described in *R. v. Sault Ste. Marie (City)* (1978), 40 C.C.C. (2d) 353 (S.C.C.). Dickson J. set out three categories of offences that must be recognized at p. 373:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

He went on to state at p. 374:

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, prima facie, be in the second category.

Dickson J. stated at p. 362:

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of

a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

21 Counsel for the Crown submitted that s. 91(3) creates a true crime since the mental element of knowledge is required, although accepting that there are public safety offences in the *Criminal Code* respecting restricted weapons beyond their use in crime.

22 The cases respecting statutory offences are of limited analytical assistance in this case which involves a *Criminal Code* offence. In my opinion, Parliament clearly intended that s. 91(3) constitute a true crime, notwithstanding that there may be individual and public safety concerns in respect of restricted weapons in motor vehicles. This is not a case of a regulatory or public welfare offence designed simply to regulate conduct in the public interest where no moral delinquency is involved. See Wilson J.'s discussion in *Re s. 94(2) MVA* respecting social stigma and the analysis described in *R. v. Finlay* (1993), 83 C.C.C. (3d) 513 (S.C.C.).

23 In this case, there is a liability on conviction to imprisonment for five years. Although the degree of fault required is minimal, there is a social repugnance to being found in the presence of illicit handguns. In my view, considerable social stigma would attach to a conviction under s. 91(3). I conclude that Parliament intended to create a true crime by the enactment of s. 91(3) of the *Criminal Code*.

Presumption of Innocence

24 Mr. Midanik referred to the elements of the second category of offences outlined in *Sault Ste. Marie* which are contained in s. 91(3), namely, due diligence types of defence in his submissions respecting the nature of the offence created. These elements of s. 91(3) clearly raise the question of whether a constitutionally invalid reverse onus is imposed on an accused under the section. Because of the manner of the drafting of s. 91(3), this issue is intertwined with the issue of the constitutional sufficiency of *mens rea* required for liability. In view of my finding that a true crime is created, the issue is more appropriately dealt with in considering whether s. 91(3) places a burden on an accused person to prove his innocence or whether the burden imposed is merely evidentiary.

25 In *R. v. Laba* (1994), 94 C.C.C. (3d) 385 (S.C.C.) the Court determined that s. 394(1)(b) of the *Criminal Code* infringed s. 11(d) of the *Charter* and was not a reasonable limit on a s. 11(d) right pursuant to s. 1 of the *Charter*.

26 Section 394(1)(b) of the *Criminal Code* provided:

Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who "(b) sells or purchases any rock, mineral, or other substance that contains precious metals or unsmelted, untreated, unmanufactured, or partly smelted, partly treated or partly manufactured precious metals, unless he establishes that he is the owner or agent of the owner or is acting under lawful authority."

27 Sopinka J., writing for the majority in *Laba* on this issue, stated at p. 411:

The purpose of s. 394(1)(b) is clearly to criminalize trade in stolen precious metal ore. It does not apply to legitimate transactions ...

28 Sopinka J. found that s. 394(1)(b) created a true criminal offence, and like other true criminal offences involved activity bereft of social utility and expressed society's repugnance to the conduct described. The objective of determining precious metal ore was a pressing and substantial concern. Sopinka J. found that there was a rational connection between placing the onus on the accused to establish that the ore was not stolen, having regard to the difficulties on the Crown to prove the goods had been stolen. Sopinka J. stated at p. 418:

The legislature is entitled to some deference in choosing the means of attaining a given objective. ... '... Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective' (emphasis in original). ... In drafting s. 394(1)(b), Parliament could have chosen merely to place an evidentiary burden rather than a full legal burden

of proving ownership, agency, or lawful authority upon the accused. Under such a provision the accused would simply be required to adduce or point to evidence which, if accepted, would be capable of raising a reasonable doubt as to whether he was the owner or agent of the owner or was acting under lawful authority. If he or she succeeded in raising such a doubt, the burden would shift to the Crown to prove the contrary beyond a reasonable doubt. If the Crown failed to dispel a reasonable doubt, the accused would be acquitted. Knowledge of the availability of this option must be imputed to Parliament since evidentiary burdens of this kind are, and were, commonly used to relieve the Crown of the burden of proving that an accused did not legitimately acquire possession of property.

At p. 419 Sopinka J. held:

In my opinion, Parliament's purpose will be effectively served by the imposition of an evidential burden. A seller will have to testify or produce documents tending to show that he or she was either the owner or agent of the owner, or is duly authorized. A purchaser may be required to adduce *viva voce* evidence or produce a document tending to show that the person from whom he or she purchased the material was the owner, agent of the owner or duly authorized. In either case, the matter will have been narrowed to identify the basis of the seller's claim in the one case and the identity of the seller in the other.

29 In *Laba*, had he been required to, Sopinka J. would have found that the provision failed a proportionality test as well because of the excessive invasion of the presumption of innocence, having regard to the degree of advancement of Parliament's purpose.

30 The Court in *Laba* referred to *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (S.C.C.) where the accused was charged under s. 212(1)(j) of the *Criminal Code* with living wholly or in part on the avails of prostitution. Section 212(3) provided that evidence that a person lives with or is habitually in the company of a prostitute is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution.

31 Cory J., writing for the majority, reviewed the authorities and summarized the principles derived therefrom at p. 13:

I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II. If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

III. Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

IV. Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. ...

V. A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(d).

VI. A provision that might have been intended to play a minor role in providing relief from conviction will none the less contravene the Charter if the provision ... must be established by the accused: see *Keegstra*, supra. (1990), 61 C.C.C. (3d)

32 Cory J. found that the mandatory presumption under s. 212(3) of the *Criminal Code* resulted in an evidential burden whereby an accused must call evidence unless there is evidence to the contrary in the Crown's case. The presumption infringed s. 11(d) of the *Charter* as it could result in the conviction of an accused despite the existence of a reasonable doubt. However, the presumption was held to be justified under s. 1 of the *Charter* as addressing the social evil of the exploitation of prostitutes by pimps. The proportionality test was satisfied.

33 In *R. v. Schwartz* (1988), 45 C.C.C. (3d) 97 (S.C.C.), an accused was charged under s. 89(1) of the *Criminal Code* with unlawfully having in his possession a restricted weapon for which he did not have a registration certificate. In *Schwartz*, McIntyre J. held that there was no reverse onus imposed on an accused by s. 106.7(1) despite the words which were employed in the section and noted that the accused was not required to prove or disprove any element of the offence or anything related to the offence. McIntyre J. stated at p. 128:

In pre-Charter cases the imposition of a reverse onus upon an accused was frequently recognized and accepted as an exception to the general rule requiring proof by the Crown of all elements of an offence beyond a reasonable doubt. It was settled, as well, that where the accused was required to discharge an onus relating to an element of a criminal offence, he had to do so according to the civil standard of proof, that is, he had to establish the matter on a balance of probabilities. A statement of the rule, as then accepted, is to be found in *R. v. Appleby* (1971), 21 D.L.R. (3d) 325, 3 C.C.C. (2d) 354, [1972] S.C.R. 303. It must be recognized now, however, that a statutory provision which imposes a burden of proof or disproof of an element of an offence on an accused creates an impermissible reverse onus under the Charter ... It has been held that any statutory provision which could have the effect of permitting a conviction, notwithstanding the existence of a reasonable doubt as to guilt, would contravene s. 11(d) of the Charter which guarantees the right to be presumed innocent until proven guilty according to law.

34 McIntyre J. found that those principles were not of assistance to the appellant in *Schwartz*, and that there was no reverse onus imposed on an accused by s. 106.7(1) despite the words which were employed in the section. As he stated at p. 129:

The holder of the registration certificate cannot be made subject to a conviction under s. 89(1). He is not required to prove or disprove any element of the offence or for that matter anything related to the offence. At most, he may be required to show by the production of the certificate that s. 89(1) does not apply to him and he is exempt from its provisions. Far from reversing any onus, s. 106.7 provides in s-s. (2) that a document purporting to be a valid registration certificate is evidence and, therefore, *prima facie* proof of the statements contained therein and in the case at bar conclusive proof ...

Schwartz was not referred to in *Laba* or in *Downey*.

35 In the case at hand, the use of the word "establishes" requires an accused person to prove on a balance of probabilities that he had reason to believe that some occupant of the motor vehicle was the holder of such permit.

36 As stated in *Downey* at p. 9:

Thus there is implicit in the right to be presumed innocent an obligation on the Crown to make out a case for the accused to meet before a response can be called for from the accused.

37 Under s. 91(3), the Crown must establish beyond a reasonable doubt the occupancy of the accused in a motor vehicle and the presence of a restricted weapon. If no defence is called at the end of the Crown's case, the trier of fact, in my view, would be required to convict. Moreover, the trier of fact would be required to convict notwithstanding that a restricted weapon may lawfully be in the motor vehicle. A restricted weapon may, or may not be lawfully carried in a motor vehicle and may, or may not be carried in accordance with relevant safety conditions respecting its transportation.

38 The contrast with s. 90(2) of the *Criminal Code* is striking. Section 90(2) provides:

Every one who is an occupant of a motor vehicle in which he knows there is a prohibited weapon

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

39 No person may be in lawful possession of a prohibited weapon. On the other hand, a person may lawfully possess a restricted weapon. Prohibited weapons and restricted weapons are defined in the *Criminal Code*. Section 84(1) provides as follows:

'Prohibited weapon' means

- (a) any device or contrivance designed or intended to muffle or stop the sound or report of a firearm,
- (b) any knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife,
- (c) any firearm, not being a restricted weapon described in paragraph (c) or (c.1) of the definition of that expression in this subsection, that is capable of, or assembled or designed and manufactured with the capability of, firing projectiles in rapid succession during one pressure of the trigger, whether or not it has been altered to fire only one projectile with one such pressure,
- (d) any firearm adapted from a rifle or shotgun, whether by sawing, cutting or other alteration or modification, that, as so adapted, has a barrel that is less than 457 mm in length or that is less than 660 mm in overall length, or
- (e) a weapon of any kind, not being an antique firearm or a firearm of a kind commonly used in Canada for hunting or sporting purposes, or a part, component or accessory of such a weapon, or any ammunition, that is declared by order of the Governor in Council to be a prohibited weapon, or
- (f) a large-capacity cartridge magazine prescribed by regulation;

'Restricted weapon' means

- (a) any firearm, not being a prohibited weapon, designed, altered or intended to be aimed and fired by the action of one hand,
- (b) any firearm that
 - (i) is not a prohibited weapon, has a barrel that is less than 470 mm in length and is capable of discharging centre-fire ammunition in a semi-automatic manner, or
 - (ii) is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or
- (c) any firearm that is designed, altered or intended to fire bullets in rapid succession during one pressure of the trigger and that, on January 1, 1978, was registered as a restricted weapon and formed part of a gun collection in Canada of a genuine gun collector, or
- (c.1) any firearm that is assembled or designed and manufactured with the capability of firing projectiles in rapid succession with one pressure of the trigger, to the extent that
 - (i) the firearm is altered to fire only one projectile with one such pressure,
 - (ii) on October 1, 1992, the firearm was registered as a restricted weapon, or an application for a registration certificate was made to a local registrar of firearms in respect of the firearm, and the firearm formed part of a gun collection in Canada of a genuine gun-collector, and
 - (iii) subsections 109(4.1) and (4.2) were complied with in respect of that firearm, or

(d) a weapon of any kind, not being a prohibited weapon or a shotgun or rifle of a kind that, in the opinion of the Governor in Council, is reasonable for use in Canada for hunting or sporting purposes, that is declared by order of the Governor in Council to be a restricted weapon.

(1.1) For the purposes of paragraph (d) of the definition 'prohibited weapon' and of subparagraph (b)(i) of the definition of 'restricted weapon' in subsection (1), the length of a barrel of a firearm means

(a) in the case of a revolver, the distance from the muzzle of the barrel to the breach end immediately in front of the cylinder; and

(b) in any other case, the distance from the muzzle of the barrel to and including the chamber, but not including the length of any part or accessory including parts or accessories designed or intended to suppress the muzzle flash or reduce recoil.

(1.2) Where the Governor in Council makes an order referred to in paragraph (e) of the definition 'prohibited weapon' in subsection (1), the Governor in Council may also, by order, declare that a person who possesses a weapon referred to in that paragraph prior to the coming into force of the order referred to in that paragraph shall only retain the ownership and possession of the weapon if the person obtains a registration certificate in respect of the weapon in accordance with section 109 and, where the Governor in Council makes such an order, the weapon is deemed to be a restricted weapon for that person for the purposes of this Act.

(2) Notwithstanding the definition 'firearm' in subsection (1), for the purposes of the definitions 'prohibited weapon' and 'restricted weapon' in that subsection and for the purpose of section 93, subsections 97(1) and (3) and sections 102, 104, 105, and 116, the following weapons shall be deemed not to be firearms:

(a) an antique firearm unless

(i) but for this subsection, it would be a restricted weapon, and

(ii) the person in possession thereof intends to discharge it;

(b) any device designed, and intended by the person in possession thereof, for use exclusively for

(i) signalling, notifying of distress or firing stud cartridges, explosive-driven rivets or similar industrial ammunition, or

(ii) firing blank cartridges;

(c) any shooting device designed, and intended by the person in possession thereof, for use exclusively for

(i) slaughtering of domestic animals,

(ii) tranquillizing animals, or

(iii) discharging projectiles with lines attached thereto; and

(d) any other barrelled weapon where it is proved that that weapon is not designed or adapted to discharge a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or to discharge a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.

'Firearm' means any barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

40 Section 91(3) is not drafted in a similar fashion to s 90(2). It was not drafted so as to provide that "every one who is an occupant of the motor vehicle in which he knows there is a restricted weapon for which no occupant of the motor vehicle is the holder of a permit is guilty of an offence." Although not drafted in that fashion, in order for an accused person to be found guilty under s. 91(3) the weapon must be in the motor vehicle without a proper permit. If there is a permit, the accused is morally blameless. Thus, the accused is put in the position of having to prove an essential ingredient of the offence. In my view, this distinguishes the case at hand from that in *Schwartz*.

41 I am mindful that in *Schwartz*, Dickson C.J.C. dissented and concluded that it mattered little whether or not the lack of registration was an essential element of s. 89(1) of the Code. At p. 112 he stated:

It is essential to the verdict. If the lack of registration is an essential element of the offence, then s. 106.7(1) relieves the Crown of the onus of proof of part of the offence charged. If a registration certificate is simply a defence to the charge, then the Crown is not required to disprove that defence beyond a reasonable doubt, which it is normally required to do. However the question of registration is characterized, s. 106.7(1) relieves the Crown of the onus of proof beyond a reasonable doubt.

42 Nonetheless, in this case, s. 91(3) contains no criminal element on its face or by necessary implication as part of the substantive offence charged, namely, being an occupant of a motor vehicle in which he knows there is a restricted weapon. This section is entirely unlike many cases where a blameworthy or criminal element is incorporated into the substantive offence itself.

43 The following are examples: having in his possession "without lawful excuse" goods unlawfully imported, *R. v. Shelley*, [1981] 2 S.C.R. 196 (S.C.C.); possession of property "knowing the property was obtained from commission of an offence," *Boyle v. R.* (1983), 5 C.C.C. (3d) 193 (Ont. C.A.); harbouring goods "without lawful excuse," "unlawfully importing," *R. v. Ireco Canada II Inc.* (1988), 43 C.C.C. (3d) 482 (Ont. C.A.); possession of a narcotic for the "purpose of trafficking," *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.); having care or control of a motor vehicle "while impaired," *R. v. Whyte* (1988), 42 C.C.C. (3d) 97 (S.C.C.); having "unlawfully" in his possession a restricted weapon, *R. v. Schwartz*; allowing to be presented or given an "immoral, indecent, or obscene performance," entertainment, or representation, *R. v. Mara* (1996), 27 O.R. (3d) 643 (Ont. C.A.).

44 In each of these cases, absent the legal presumption or evidentiary burden, a true crime is alleged to have been committed, e.g., the presumption that arises upon proof of the basic facts that a motor vehicle was obtained by commission of crime is entirely reasonable. (See Martin J. at p. 214 in *Boyle*.)

45 In this case there is no presumption or inference that arises upon proof of the basic facts, namely, occupancy in a motor vehicle or knowledge that there is a restricted weapon. There is no criminal element in the basic offence and an accused person, in effect, must establish an essential ingredient of the offence. In my view, s. 93(1) infringes both ss. 7 and 11(d) of the *Charter* in violation of the presumption of innocence.

Vagueness

46 Defence counsel submitted that s. 91(3) is so vague or overbroad as to constitute a violation of the accused's right under ss. 7 and 11(d) of the *Charter*. Crown counsel submitted that s. 91(3) is not so overbroad as to constitute a *Charter* violation, and that any consideration of its overbreadth arises as an analytical tool under s. 1 scrutiny respecting minimal impairment.

47 In my opinion, s. 91(3) is not impermissibly vague under s. 7 of the *Charter*, i.e., contrary to the rule of law which requires that the provision give citizens fair notice of the consequences of their conduct so that they may avoid liability and benefit from a full answer and defence should they be tried. As well, s. 91(3) does not limit law enforcement discretion, i.e., it is not so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute: See the discussion in *Canada v. Pharmaceutical Society (Nova Scotia)* (1992), 74 C.C.C. (3d) 289 (S.C.C.) at p. 308.

48 Section 91(3) is not vague on its face. Its terms are clear and precise. As a result, in my view, the appropriate analysis of overbreadth in such circumstances is under a s. 1 analysis. There are no words or expressions in the section that are vague in

themselves such as the word "loiter" in *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.). Nor is the fact that an accused can raise a due diligence defence determinative of vagueness: See *R. v. Canadian Pacific Ltd.* (1995), 99 C.C.C. (3d) 97 (S.C.C.), following *Pharmaceutical Society (Nova Scotia)*.

49 There is also, in my view, a subjective understanding that the law is based on shared societal values that illegal handguns are dangerous and are used by criminal elements in the community. Although the language used in s. 91(3) is clear and precise, the provisions of the *Criminal Code* dealing with restricted weapons themselves are numerous, complicated, and technical. In my view, this section and the analysis of its overbreadth character arises only under s. 1 scrutiny.

Analysis Under s. 1 of the Charter

50 Having found that s. 91(3) contravenes the *Charter*, I must now turn to a consideration of whether or not the section is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*. This requires me to answer two questions. First, does the impugned provision relate to concerns which are pressing and substantial in a free and democratic society? Second, do the means chosen to achieve the legislative objective pass a three-part proportionality test which requires that they, a) be rationally connected to the objective; b) impair the right or freedom in question as little as possible; and, c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of sufficient importance.

51 The Crown tendered *viva voce* evidence in support of the constitutionality of s. 91(3) as a reasonable limit in a free and democratic society. As well, I have been provided with a legislative history of gun control laws in Canada, "Gun Control in Canada: Politics and Impact," being chapter 4 of *A Century of Criminal Justice* by Martin Friedland, 1984, and an extract from "An Evaluation of the Canadian Gun Control Legislation" by Elisabeth Scarff, Supply and Services Canada, 1983.

52 There is no reference in this historical material to the particular rationale of s. 91(3). Crown counsel has advised me that her review of the Legislative Debates was of no assistance with respect to the rationale of s. 91(3).

53 In this regard, notice was given to the Attorney-General of Canada respecting this application, but the Attorney-General of Canada did not appear on the application. Regrettably, Crown counsel did not have assistance from the Attorney-General of Canada, notwithstanding that a *Criminal Code* provision was challenged, that this challenge was the first constitutional challenge on the subject provision, and that the section is proposed to be amended by Bill C-39, expected to be in force in January, 1997.

54 The new section, s. 94(3), provides as follows:

Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

55 Nonetheless, three witnesses were called by the Crown in support of the Crown's argument that s. 91(3) is a reasonable limit on ss. 7 and 11(d) of the *Charter*. Detective Paul Mullin is a firearms registrar for Toronto, and he worked for the Metropolitan Toronto Police from 1964 to 1994. He was qualified as an expert respecting firearms and the firearms acquisition certificate system. An F.A.C. is required to acquire a restricted weapon, and each handgun must have a registration certificate under s. 306 of the *Criminal Code*. A carrying permit is required to be able to transport the weapon. A wide range of conditions may be placed on the permits. The regulations prescribe detailed standards respecting the transportation of firearms, whether being carried on the person or otherwise. He described the carrying permit as giving absolute jurisdiction to carry the weapon which "removes all legislative restrictions," including, for example, safe storage. Other provisions require a person finding a firearm to deliver it to police authorities. A person may have a carrying permit under s. 110 and/or a transportation permit or a conveyance permit.

56 His evidence on the whole is supportive of the description of gun control legislation described by both Dickson C.J.C. (in dissent) and McIntyre J. in *Schwartz*. Dickson C.J.C. stated at pp. 117-118:

Part II.1 of the Code, which contains s. 106.7(1), represents the latest attempt by Parliament to strike the proper balance between the interest of Canadian society in protecting its members from violent actions and the freedom of individuals to possess and use guns for legitimate purposes. It embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons. ...

The policy of Part II.1 is to limit the ownership of dangerous weapons to those people who will use them in an honest, responsible fashion. Some types of weapons are prohibited altogether. The availability of other types of weapons, notably handguns, is restricted, while long-guns are subject to less strict control. ...

57 Dickson C.J.C. went on to state at pp. 118-119:

Part II.1 creates a number of offences with respect to the acquisition, possession and use of firearms. Section 83(1) provides that the use of a firearm during the commission of an indictable offence is itself an indictable offence. Section 84 prohibits the careless use of a firearm. Section 88(1) provides that every one who has a prohibited weapon in his or her possession commits an indictable offence. Section 89(1) ... prohibits the possession of an unregistered restricted weapon. There are numerous other offences relating to the sale, delivery or acquisition of firearms and other offensive weapons (ss. 91-97).

Part II.1 thus expresses a clear legislative intention to prohibit the acquisition, possession and use of all restricted weapons except under the authority of a firearms acquisition certificate and a registration certificate, or under statutory exemptions such as those mentioned in s. 90 with respect to peace officers and police officers. The Code thus contains ... 'a comprehensive "gun control" legislative scheme intended to discourage the use of firearms by the criminal element of our society'. That the objective behind Part II.1 in general and s. 106.7(1) in particular relate[s] to concerns which are pressing and substantial in a free and democratic society' is self-evident.

58 In *Schwartz*, McIntyre J. stated at p. 127 that the strict control of handguns has been and remains an essential feature of Canadian gun control laws and that the overall intention of Parliament is to prohibit the acquisition and use of weapons, save in accordance with the strict controls prescribed.

59 With respect to s. 91(3) itself, Detective Mullin testified that the section placed an onus on an occupant of a motor vehicle to make proper inquiries to establish the proper documentation. This may involve ascertaining the serial number of the handgun, although it may be removed, such as in the case of the pistol herein, and although it may be difficult to locate on the handgun, such as in the case of the revolver herein. No permits are issued for handguns without serial numbers.

60 In addition, he testified that as the registrar of firearms, he has access to the CPIC system and to the National Firearms Registry. Detective Mullin was not helpful respecting any particular rationale for s. 91(3). Indeed, Detective Mullin referred to concerns raised respecting s. 91(3), which concerns resulted in the proposed amendments to s. 91(3) referred to earlier.

61 The evidence of Detective Geoffrey Francis was of limited assistance as his area of expertise related to the smuggling and distribution of firearms which included firearms in motor vehicles. He described that the vast majority of handguns originated in the United States and were smuggled into Canada. He described concealment devices in connection with guns and their transportation, including not driving one's own car or using the motor vehicle of another, such as rental vehicles. He described guns as being extremely dangerous in motor vehicles because those who possess illicit firearms have no hesitation in using them. In his view, guns and criminal activity are inter-related.

62 Detective Francis produced statistical data of firearms seized from vehicles by crime category. Of 67 out of 107 police forces reporting in 1996, 58 weapons were seized. The breakdown in respect of these firearms by crime category was: smuggled, 22; possession, 16; narcotics, 16; Customs Act, 14; firearms offences, 12; robbery/burglary, 6; found, 2; firearms trafficking, 3; other, 5; no crime involved, 4. This data is part of a new program to gather data to determine at what point guns become illicit.

63 In his experience, occupants in vehicles in which there are illicit guns are not innocent bystanders. Again, Detective Francis' expertise concerned the source and distribution of illicit guns and enforcement problems in relation thereto. His evidence was of limited assistance. His other opinions are best described as well-founded personal opinions.

64 Detective Donald MacCallum was qualified to give evidence respecting the prevalence of illegal firearms and safety concerns. He testified that improperly stored restricted weapons can cause bodily harm or death if not properly stored since a trigger could accidentally go off. He also testified that cheaper automatic handguns without a safety mechanism are unsafe if accessible.

65 In his view, the only purpose of illicit handguns is to kill people, that persons who are in vehicles in which there are illegal guns are condoning the activity, and that a person in such a situation should leave the motor vehicle and report the existence of the gun to police authorities. In his experience, where firearms are recovered, all persons get charged with a firearms offence unless a person says it is his gun.

66 There is no particular legislative intention evident on a facial reading of s. 91(3). It is, however, part of a comprehensive code respecting the use, possession, and acquisition of firearms. Part III of the *Criminal Code* addresses various concerns which were raised on the evidence, including limiting access to illegal weapons, the physical safety of occupants in motor vehicles through improper storage, although restricted weapons may be properly stored in a motor vehicle, and the imposition of guilt by association. In general, illegal guns are only used for illegal purposes and other members of society should not be in their presence.

67 The Crown submitted that Part III of the *Criminal Code* is aimed at regulating individuals who come into contact with firearms, that the objective of s. 91(3) is to ensure that illegal firearms are not in motor vehicles, or if they are, that an occupant extricate him or herself from the motor vehicle. It is the view of the Crown that once an occupant makes an inquiry about the legality of the weapon and decides to leave the motor vehicle if it is illegal, such action will put all the other occupants on notice that they have the same duty to act. This duty, in the submission of the Crown, is part of the overall scheme with respect to firearms.

68 The Crown further submitted that the section is aimed at limiting the accessibility of individuals to illegal firearms which, in turn, will reduce the risk that the weapon will be used in furtherance of other criminal activity which would jeopardize the safety of the public. As an example of this type of activity, the Crown referred to drive-by shootings whereby the combination of access to the weapon with the ability to quickly flee the scene of the crime in a motor vehicle presents a grave danger to society.

69 I have no difficulty whatsoever recognizing the dangers associated with illegal weapons and their use in the commission of criminal offences, and that motor vehicles are often used in the commission of offences. Vehicles may be used to transport illegal weapons or to facilitate the commission of an offence or to ensure the flight of offenders. Motor vehicles also play a role in the smuggling and distribution of illegal weapons and are used to facilitate transactions in which illegal firearms are further distributed.

70 While Part III of the *Criminal Code* addresses objectives which are pressing and substantial, in a free and democratic society so as to satisfy the first branch of the *Oakes* test, I am not persuaded that s. 91(3) is rationally connected to this objective so as to satisfy the first part of the proportionality test. It is difficult on the evidence before me to conclude that the concerns referred to are addressed by s. 91(3) so as to control the acquisition or use of weapons, even accepting that firearms have inherent potential to do serious damage to life and limb.

71 Further, this is not a provision addressing the control, use, or possession of firearms: See *R. v. Finlay* (1993), 83 C.C.C. (3d) 513 (S.C.C.). In some respects, it may be described as creating a trickle-down criminality, aimed at those who are not in possession or control of restricted weapons but who are in motor vehicles in which they may be located.

72 There was no evidence adduced before me of particular concerns respecting drive-by shootings. Such a rationale may be persuasive but no evidence was adduced, statistical or otherwise, to support this rationale.

73 I am mindful that Sopinka J. stated in *Laba* at p. 417:

... there is no general requirement that a presumption be internally rational in order to pass the rational connection phase of the proportionality test. The only relevant consideration at this stage of the analysis is whether the presumption is a logical method of accomplishing the legislative objective.

74 Nonetheless, not being able to ascertain the legislative objective of s. 91(3), it is difficult to ascertain if s. 91(3) is a logical method of accomplishing the objective.

75 Crown counsel submitted that s. 91(3) imposed a duty not to take a ride in a vehicle in which there is a restricted weapon, and that s. 91(3) prohibits occupancy and not entry. Crown counsel submitted there was a duty to report the existence of a restricted weapon in a vehicle; however, no such duty is imposed under s. 91(3). There is also no requirement that knowledge precede entry into the vehicle.

76 Further, in my opinion, s. 91(3) would not pass the minimal impairment provision. Although I do not have to deal with this test, I note the following on the evidence heard before me. Under the first limb of the possible defences in s. 91(3), a complete defence is provided if any occupant of a motor vehicle is the holder of a permit. Severe practical problems arise in addressing that provision.

77 Unlike *Schwartz*, the evidential burden to establish that another person is the holder of an appropriate permit is unduly onerous and many practical problems arise. There is no duty placed on the holder of such a permit to disclose its existence, nor is there any duty placed on the holder to identify him or herself. Presumably, no charge would be laid under this section if a CPIC check was run by the investigating authorities.

78 Nonetheless, an accused person has no access to the CPIC system in order to obtain such information on a readily accessible basis. On the evidence before me, an application would be required to be made under the *Freedom of Information Act*, a time consuming process. An accused person would be required to make a search under the Office of the Federal Commissioner for Firearms.

79 This case is not within that line of cases holding that the burden of proving an exception, an exemption, an excuse, or a qualification only shifts when the facts constituting it are peculiarly within the accused's own knowledge, as was the case in *Schwartz*. In this case, where the second statutorily-prescribed defence is not available, an accused person must establish the existence of a fact that is peculiarly not within an accused's own knowledge and he has no realistic ability to access it.

80 *Schwartz* is in keeping with cases such as *R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539* (Ont. C.A.) where regard was had to the ease with which an accused person could prove a licence existed, and it was rationally open to an accused to prove the existence of a licence in respect of the offence of engaging and operating as a meat slaughtering plant without a licence.

81 In conclusion, in my opinion, s. 91(3) does not withstand scrutiny under s. 1 of the *Charter*. It does not pass the proportionality test in that it is not rationally connected to the objective and it does not impair the right and freedom in question as little as possible.

Remedy

82 In my opinion, the appropriate remedy is not to read-down the section for several reasons. First, a new section is contained in Bill C-39. Second, I have insufficient guidance to read-down the section, having regard to the problems in ascertaining the concern addressed by s. 91(3). Third, a myriad of other offences including s. 21 of the *Criminal Code* continue to apply to the unlawful storage and use of illegal weapons so that striking down the section creates no legislative vacuum.

83 Accordingly, I find and declare that s. 91(3) of the *Criminal Code* is inconsistent with ss. 7 and 11(d) of the Canadian *Charter of Rights and Freedoms* and is of no force and effect.

Application granted.

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