SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Anand*, 2018 NSSC 307

Date: 20181130
Docket: Hfx No. 473336
Registry: Halifax

Between:

Mehardeep Singh Anand

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice D. Timothy Gabriel

Heard: October 2, 2018, in Halifax, Nova Scotia

Counsel: Joshua Nodelman and Brittni L.A. Deveau (Articled Clerk) for the Appellant
Edward J. Murphy, for the Respondent

By the Court:

Introduction

[1] The Appellant was charged with "using a handheld cellular telephone or text messaging on a communications device while operating a motor vehicle on a highway" contrary to section 100(D)(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 ("*MVA*"). The matter was heard on January 17, 2018, before Adjudicator Debbi Bowes who convicted.

[2] Mr. Anand has appealed his conviction to this court. The appeal is dismissed for the following reasons.

Background

[3] The essence of the factual matrix in this case is found in the Respondent's factum:

> [8] In cross-examination, the Appellant verified which lane Officer Currie remembered him driving in (Appeal Book, Transcript [page 8], page 8). The Appellant suggested, and Officer Currie agreed, that Officer Currie approached the vehicle and knocked on the window before issuing the ticket (Appeal Book, Transcript [page 8], page 9). Officer Currie further specified that he observed a white iPhone with a black case at that time.
>
> [9] The Appellant then testified that he was in a different lane on Connaught Avenue. He further testified that his iPhone did not have a black case, and that his iPhone was white and gold: "It's called a white iPhone. It's the same iPhone. It's a golden one." (Appeal Book, Transcript [page 8], page 13). Finally, the Appellant testified that he had a black Global Positioning System ("GPS") device in his car at the time, and presented an alternative explanation for Officer Currie's observations: "[…] during the high traffic volume actually I was texting the street name on my GPS because I wanted to get there early." (Appeal Book, Transcript [page 8], page 14).
>
> [10] Adjudicator Bowes considered Officer Currie's evidence that he had witnessed the Appellant texting with both hands on a device while driving on Connaught Avenue. She then stated that the Appellant admitted to his guilt when he testified to texting on the GPS. Adjudicator Bowes stated that a GPS is a communications device and convicted the appellant. (Appeal Book, Transcript [page 8], page para. 2 at page 16).

[4] Mr. Anand contends that the activity with which he was charged is not an offence known to law. This is because he says that what he did was enter coordinates into a global positioning device ("GPS") while operating his motor vehicle. He argues that this does not constitute "text messaging" and that a GPS device is not a "communications device" for the purposes of s. 100(D)(1) of the *MVA*.

[5] The Crown's position (on appeal) is that the Adjudicator determined the matter correctly. It does not take issue with what Mr. Anand said he was doing which led to the charges being laid. It contends that, in effect, that to which the Appellant has admitted constitutes "text messaging on … [a] communications device while operating a vehicle on a highway…"

Issue

[6] Are the actions to which the Appellant admits within the ambit of s. 100(D)(1) of the *MVA*? In order to answer this I must determine whether he was:

i. "text messaging"; and

ii. whether a GPS is a "communications device", for the purposes of s. 100D(1) of the *MVA*.

Analysis

What is the standard of review?

[7] I begin with the section itself:

> 100D (1) It is an offence for a person to use a hand-held cellular tele-phone or engage in text messaging on any communications device while operating a vehicle on a highway or operating a personal transporter on a roadway or a side-walk.
>
> [Emphasis added]

[8] This section does not apply to a person who uses a handheld cellular phone or other communications device to report an immediate emergency situation.

[9] There is no definition of either "text messaging" or "communications device" in the *MVA*.

[10] Therefore, in effect, I am being asked to determine whether Mr. Anand's impugned actions (entering coordinates on a GPS device) constituted "text messaging", and also whether a "GPS device" is included within the words "communications device".

[11] These issues involve an interpretation of the meaning of certain words used in s. 100D of the *MVA*. As a consequence, my review of the Adjudicator's decision will be conducted on the basis of correctness.

[12] Any number of authorities could be stated for this proposition. It suffices, however, to refer to the decision in *R. v. Hicks*, 2013 NSCA 89:

> 12. The Crown's appeal to this Court from the decision of the SCAC is taken pursuant to s. 839 of the *Criminal Code*. It requires our leave and is limited to questions of law. It is not a second appeal against the judgment at trial, but rather an appeal against the decision of the SCAC. The error of law required to ground jurisdiction in this Court is that of the SCAC judge and not the trial judge. See for example, *R. v. Fitzpatrick*, 2006 NSCA 65; and *R. v. Ord*, 2012 NSCA 115, leave to appeal ref'd [2012] S.C.C.A. 537.
>
> 13. The question for us then is whether Justice Scanlan erred in law by affirming Mr. Hicks' acquittal based on his interpretation of the legislation which is the focus of our analysis in this case.
>
> 14. The issues on appeal invite our determination of the proper meaning to be given to certain words found in the Act. The interpretation of legislation is a question of law. The standard of review is one of correctness. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Housen v. Nikolaisen*, 2002 SCC 33; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Keizer v. Slauenwhite*, 2012 NSCA 20; *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35.

How does one go about interpreting a statute?

[13] The modern approach to statutory interpretation was conclusively settled by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re.)* [1998] 1 S.C.R. 27.

[14] *Rizzo*'s "bottom line" may be extracted thus:

> 21. Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter

> "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp*., 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.

[15] There are many authorities which have subsequently elaborated upon the approach outlined in *Rizzo*. *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, is one such authority. Therein, at paras. 36 – 41, Chief Justice MacDonald explained:

> 36. The Supreme Court of Canada[in *Rizzo*] had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > .. the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> …
>
> 38. In any event, as Professor Ruth Sullivan explains in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:
>
> …
>
> 40. … Professor Sullivan would invite us to answer three questions:

> Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> - what is the meaning of the legislative text?
>
> - what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
>
> - what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

41. Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:

> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

[16] Consistent with the approach also taken in *Rizzo (supra.)* (although that case dealt with the Ontario legislative equivalent), I turn to s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 which provides:

> 9.(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;

> (c) the mischief to be remedied;
>
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[17] As I noted earlier, I have not been referred to any authorities in which the words "text messaging on any communications device" have been interpreted. I am fortunate, however, to have available prior decisions of this court in which the words "…for a person to use a handheld cellular telephone …" have been considered. Although not directly on point, they are helpful, because they discuss the legislature's objective, or apparent purpose, in enacting s. 100D(1).

[18] For example, we have *R. v. Ikede*, 2015 NSSC 264. Therein, Mr. Ikede was observed driving his vehicle along Commercial Street in New Minas. He was holding what appeared to be a cellular telephone in his hand. It was accepted that he had put the device to "voice level" at the time he was pulled over by the police, meaning that he was speaking into it. The Trial Judge accepted that he was using the "Siri" feature on his phone to ask for directions. It was further accepted that he was not looking at the screen but speaking into the voice activated navigation system.

[19] In the course of a thoughtful decision, Justice Campbell concluded that the thrust of s. 100D(1) was directed towards activities which distract the driver's attention from the road.

[20] In the course of developing his reasons, Campbell J. noted at para. 31:

> Section 100 D (1) was passed in 2007. That was at time when the iPhone and so called smartphone technology were coming onto the mass market. Most cellphones of 2007 now, only 8 years later, seem embarrassingly, or for some proudly, out of date. Their function was largely to just make telephone calls. Smartphone technology has fundamentally changed what the device is, both in terms of the functions it is capable of performing and in terms of its unrelenting hold over the attention of those who cling to it. It has been argued, unsuccessfully in Nova Scotia, that a smartphone is not a cellular telephone at all. It is a device with a mobile operating system that combines the functions of a personal computer with those of a mobile

> or cellular telephone. The cellular telephone is one increasingly unimportant feature of a smartphone. It isn't a cellular telephone as that term was widely understood in 2007. But, it has been determined that smartphones are indeed cellular telephones. What Dr. Ikede had was a cellular telephone. The broad range of applications does not change that it is a cellular telephone but it should have some bearing on what it means to use that device.

[21] Then, at paras. 35 and 36 he continues:

> 35. Regardless of the device, if the action is actually distracting the driver there … [are] … provisions under s. 100 the *Motor Vehicle Act* to deal with that. That section requires drivers to drive in a careful and prudent manner. What s. 100 D (1) does is to make it illegal "to use a cellular telephone" regardless of whether that use is actually prudent and careful in the circumstances. It presumes that use of the hand-held cellular telephone is unsafe. That presumption of unsafeness is based on the unsafe nature of the behaviour. Having a telephone conversation on a hand-held phone is not safe when driving. Did the legislature intend that the same presumption would apply in all circumstances, for every application on all hand-held devices that also are capable of functioning as telephones?
>
> 36. That's where the word "use" comes in.
>
> [Emphasis added]

[22] Justice Campbell distinguished "use" *simpliciter* from "use" that was in accordance with the objective (or the "evil" which the Legislature intended to eradicate, if you will). At paras. 52 and 53 he explained that:

> 52. The legislation in Nova Scotia is simple on its face. The problem is that in its simplicity it has not kept pace with more complex evolving technology. Judges can keep interpreting the section, so that it includes smartphones and other non-communication applications, assuming that to be the intent. Should judges interpret "use" to include merely holding the device so that it can be used? The issue is how far judicial interpretation should go to bring clarity to a law that is not so clear anymore. What Dr. Ikede did would be illegal in many other provinces because they make it clear that even holding an electronic device while driving is prohibited. In Nova Scotia the section does not provide that kind of direction. It would be unfortunate if the important safety issue of distracted driving is left to a series of judicial decisions. Needless to say at this point, that is not a recipe for clarity. [Emphasis added]

> 53. The iPhone was not being used by Dr. Ikede to carry on any communication with any other person. He wasn't "using the telephone" in that sense. The iPhone was not being used in a way that required the driver to divert his attention from the task of driving. It was being used for the very purpose of driving more safely by using a voice-activated navigational system. There was no visual distraction. The driver was not looking at the screen. In those specific circumstances he was accessing an application far removed from the cellular telephone application and that was not objectively distracting. [Emphasis added]

[23] In *R. v. MacDonald*, 2014 NSSC 442, an opposite conclusion was reached. It involved the operation of a motor vehicle by the accused while holding a "device" in his right hand. When the police officer initiated a traffic stop the accused indicated that he was "…just looking at my cellphone". The Adjudicator found, in that case, *inter alia*, "there is no evidence he [Mr. MacDonald] was either operating it with his hand or speaking into the device". He acquitted the accused.

[24] In allowing the Crown appeal, Justice Chipman indicated at para. 19:

> In all of the circumstances, I find the purpose of s. 100D(1) is to prevent traffic accidents. The method of prevention is to prohibit distracted driving. The section aims to accomplish this purpose through a ban on hand-held cellular telephone use and text messaging while driving. In my view, the adjudicator did not consider the purpose of this section is to prohibit distracted driving caused by hand-held cellular telephone use. The adjudicator's narrow interpretation of cellular telephone use is inconsistent with the purpose of the section. Accordingly, this was an error of law.
>
> [Emphasis added]

[25] He continued in this vein at para. 21:

> Mr. MacDonald acknowledged looking at his device to see if he had received a text. In my view, he was clearly using the device notwithstanding that he was not speaking on phone or texting. Recall, the section in question says it is an offence to use a hand-held cellular telephone OR engage in text messaging. In my view, the plain meaning of the word "use" includes holding a hand-held cellular telephone and looking at it in anticipation of an incoming text message. Both of these activities would distract a person from keeping his or her eyes on the road.
>
> [Emphasis added]

[26] Even before *Ikede* and *MacDonald*, we had *R. v. Ferguson*, 2013 NSSC 191. In that case, the accused operated a motor vehicle at a time during which she had a cellular telephone in her hand while waiting in traffic to make a left turn. The phone was above the level of the steering wheel. The officer who issued the ticket was not able to tell what the accused was doing with the device but it did not appear she was talking into it. Nor was any texting observed.

[27] The accused indicated in her *viva voce* evidence that her device was connected to Google Map Quest.

[28] The Trial Judge found that utilizing Google Map Quest on her cellular telephone qualified as "use" within the meaning of s. 100D(1).

[29] In the course of his analysis, Justice Coughlan very clearly articulated the rationale and objective of the section in question as he described the Legislature's apparent goal in enacting it.

[30] So, at para. 18 of *Ferguson*, we find:

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

> conducted in 2007 found that 76 per cent of Canadians would support a federal ban on cellphones while behind the wheel. Here in our own province, a survey conducted by my department indicated that 88 per cent of Nova Scotians think it is unsafe to use a hand-held cellular phone while operating a motor vehicle.
>
> Other road safety stakeholders have advocated for a total ban on mobile devices while operating a motor vehicle. To them, I would say consult with police forces as they are the agencies that have to enforce this legislation. Discussions I have had with Nova Scotia's policing community have convinced me that a ban on hand-held devices while operating a motor vehicle is enforceable while a hands-free ban would be problematic from an enforcement perspective.
>
> Mr. Speaker, I believe it is incumbent upon all members of this House to create laws that are measured and enforceable. Cellular phone use, while it is just one form of driver distraction, is a growing problem. The amendments will also give us the ability, through regulation, to prohibit other specific distractions and include other electronic devices as technology changes so the government can respond effectively to new concerns as they arise."

[Emphasis added]

i. "*Text messaging"*

[31] The aforementioned cases aid in the determination of the overall legislative intent in enacting the subject legislation, and the approaches that have entered into interpreting it. That said, and as noted earlier, I have not been provided with any cases in which the words "text messaging" or "any communications device" have been discussed. Note, however, that we are not dealing with just any type of "use" when the charge in the case at bar is considered. We are dealing with a specific type of "use": that of "text messaging".

[32] This distinction ties in with the one of the Appellant's opening arguments. As he points out, not all activities involving driver distraction are encompassed within s. 100D, or, indeed, within the *Motor Vehicle Act* as a whole. For example, changing the temperature in one's vehicle, changing the channel on one's radio (or music device), lighting a cigarette and other activities of this ilk are not mentioned in either

the section or in the legislation as a whole. Presumably, if an individual's actions involving some of these "other" distracting activities were considered to be egregious enough, a charge under s. 100 could be laid, since that Section specifies that a driver "…shall drive or operate the [motor vehicle] … in a careful and prudent manner having regard to all the circumstances". We are not dealing with a charge under s. 100 here.

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

[34] The Appellant has cited examples of how "text messaging" has been defined in other contexts. In fact, he references Supreme Court of Canada authority in *R. v. Telus*, [2013] 2 S.C.R. 3 and *R. v. Marakah*, 2017 S.C.C. 59.

[35] In *Telus*, the police had obtained a general warrant and orders under ss. 487.01 and 487.02 of the *Criminal Code* requiring Telus to provide them with copies of any stored text messages sent or received by Telus subscribers. Telus applied to quash the general warrant arguing that the "prospective daily acquisition of text messages from their computer data base constitutes an interception of private communications" and therefore requires authorization under the wire tap authorization provisions in Part VI of the *Code*. The focus of the appeal related to whether the general warrant power could authorize the prospective production of future text messages from a service provider computer.

[36] Both Justices Abella and Moldaver spoke for the majority in *Telus*. In the course of so doing, Justice Abella stated at para. 1:

> For many Canadians, text messaging has become an increasingly popular form of communication. Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy [page15] in the communication. The issue in this appeal is the proper procedure under the *Criminal Code*, R.S.C. 1985, c. C-46, for authorizing the prospective daily production of these messages from a computer database maintained by a telecommunications service provider.

[37] He also noted para. 5:

> Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process. This distinction should not take text messages outside the protection of private communications to which they are entitled in Part VI. Technical differences inherent in new technology should not determine the scope of protection afforded to private communications.
>
> [Emphasis added]

[38] Justice Cromwell (in a dissenting opinion) had this to say at para. 111:

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

[39] In *Marakah*, the issue was whether an accused has a reasonable expectation of privacy in text message conversations recovered from an accomplice's device and therefore, whether an accused had standing to challenge the search for, and admission of, such evidence pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms.*

[40] Writing for the majority, Chief Justice McLaughlin expressed views to the effect that text messages which have been sent and received may, in some cases, attract a reasonable expectation of privacy and therefore may be protected against unreasonable search and seizure under s. 8 of the *Charter*.

[41] Within the context whether Mr. Marakah had a reasonable expectation of privacy in the text messages, the Chief Justice noted at paras 18 to 20:

> 18. "Text messaging" refers to the electronic communications medium technically known as Short Message Service ("SMS"). SMS uses standardized communication protocols and mobile telephone service networks to transmit short text messages from one mobile phone to another : *TELUS*, at para. 111, per Cromwell J., dissenting but not on this point. Colloquially, however, "text messaging" (or the verb "to text") can also describe various other person-to-person electronic communications tools, such as Apple iMessage, Google Hangouts, and BlackBerry Messenger … The data that constitute individual SMS or other text messages may exist in different places at different times. They may be transmitted, stored, and accessed in different ways. But the interconnected system in which they

> all participate functions to permit rapid communication of short messages between individuals. In these reasons, I use "text messages" to refer to the broader category of electronic communications media, and "SMS" or "SMS messages" to refer to that medium specifically.
>
> 19. When a text message is searched, it is not the copy of the message stored on the sender's device, the copy stored on a service provider's server, or the copy in the recipient's "inbox" that the police are really after; it is the electronic conversation between two or more people that law enforcement seeks to access. Where data are physically or electronically located varies from phone to phone, from service provider to service provider, or, with text messaging more broadly, from technology to technology. The s. 8 analysis must be robust to these distinctions, in harmony with the need to take a broad, purposive approach to privacy protection under s. 8 of the *Charter* : *Spencer*, at para. 15; *Hunter*, at pp. 156-57. If "the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 is meant to keep pace with technological development" (*R. v. Wong*, [1990] 3 S.C.R. 36, at p. 44), then courts must recognize that SMS technology, in which messages may be said to be "sent", "received", and "transmitted" between devices, is just one means of text messaging among many and is, from the point of view of the user, functionally identical to numerous others. As Abella J. stated in *TELUS*, at para. 5, "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private [page626] communications". The subject matter of the search is the conversation, not its components.
>
> [Emphasis added]

[42] Having referenced *Telus* and *Marakah*, the Appellant extrapolates from these decisions to advance the following propositions:

> 29. Reading the above definition in the entire context, with the object and scheme of the *MVA* in mind, reveals the intention of the Legislature. That intention is to limit driving distractions caused by back and forth electronically facilitated conversations between individuals. It is the Appellant's position that for the purposes of the provision, "text-messaging" concerns a conversation or potential conversation, a communication, between individuals over a cellular phone or a communication device. Logically this would include messaging through a text-message application, emailing, and other forms of conversation or possible conversation facilitators as stated in *R. v. Marakah*. [Emphasis added]

> 30. If the above is accepted, Mr. Singh was not "text messaging" when he was issued the traffic ticket. Mr. Singh was not engaged in a texting conversation, a back and forth, with his GPS. Typing coordinates into a GPS is not "text-messaging" for the purpose of the *MVA*.
>
> [Emphasis added]
> (*Appellant's factum, p. 12, paras. 29 and 30)*

[43] With respect, I do not agree. To adopt the Supreme Court of Canada's conclusions in relation to the meaning of "text messaging" as expressed in *Telus* and *Marakah* would be tantamount to applying pronouncements given in a completely alien context (i.e. the search and seizure provisions of the *Criminal Code* and the *Charter of Rights and Freedoms*), to the provincial legislation with which we are concerned here.

[44] In fact, I would go so far as to say that this would be antithetical to the process of statutory interpretation as set forth in *Rizzo Shoes,* and as has been adopted and employed in the case law which discusses statutory interpretation ever since. It would, in effect, completely ignore the purpose of the Nova Scotia Legislature in enacting the subject provision and import concepts that were considered in a completely different context as determinative of the meaning of the language employed by the legislature in this specific instance.

[45] For example, if we start with the premise that the "evils" that the legislature was intending to uproot or address were the more egregious driver distractions posed by certain activities, we must also bear in mind the points made in *Ikede* and *Ferguson.* These concluded that it is the process of attracting the user's eyes to the screen (as opposed to their proper place, which is the road) which was the focus of the legislature's attention. Certain activities, including "…Text messaging on any communications device…" were deemed by the Legislature to be sufficiently distracting to constitute an offence upon proof that the accused had engaged in this activity " … while operating a vehicle on a highway…"

[46] I can see very little difference between text messaging within the context of an interpersonal conversation, and one which involves the manual downloading of coordinates into a GPS system so as to obtain information from the device (in return) as to a more efficient route to one's destination. The action to which Mr. Anand has admitted involves the manual inputting of information into a GPS, with the anticipation of the receipt of a response (albeit, a non-human one) from that device with the coordinates of the "quicker route".

ii. "Communications device"

[47] A GPS is certainly a "device". A definition of that word may be found in any standard dictionary. To cite merely one example, the definition of "device" taken from the on-line version of the *Merriam-Webster Dictionary*, includes:

> … a piece of equipment or a mechanism designed to serve a special purpose or perform a special function
>
> //smartphones and other electronic devices

[48] A "communications device" would be one which enables or facilitates "communications". A typical definition of "communication" and "communications" is also to be found in the on-line *Merriam-Webster Dictionary*. It includes the following:

> Communication:
>
> 1a: a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior the function of pheromones in insect communication also : exchange of information
>
> b: personal rapport a lack of communication between old and young persons
>
> 2a: information communicated : information transmitted or conveyed
>
> b: a verbal or written message: "The captain received an important communication".
>
> 3 communications *plural*
>
> a : a system (as of telephones or computers) for transmitting or exchanging information [as in] wireless electronic *communications*
>
> b : a system of routes for moving troops, supplies, and vehicles
>
> c : personnel engaged in communicating : personnel engaged in transmitting or exchanging information

[49] I return to my earlier observation that the provision appears to be aimed specifically at improving traffic safety by curbing the distraction that results from

the combination of manipulating a proscribed device while also communicating or using other distracting functions enabled by the device. Because of the multifacetted or multidimensional nature of the distraction, and in accordance with the spirit or intent of the legislature in enacting the provision, there is little difference between inputting information into a GPS device for the purposes of obtaining certain information in return, and texting as part of a back and forth conversation with another individual, and the distraction entailed by that. Both actions require the driver to look away from the road and at the device, first while the coordinates are entered into the device and usually (second) while the response is being received. In my view, for the Appellant to say "but, there wasn't another human party involved" raises a distinction without a difference.

[50] One aspect of the Legislature's focus was directed at the distraction occasioned by the act of inputting information (such as GPS coordinates) into a device and the necessity to look at the screen in order to do so. This manual data input is virtually identical to that which is entailed by "texting" as part of a communication with a human recipient. It makes no different, in my view, that the recipient of the coordinates which Mr. Annand "inputted" was a device intended to communicate with and obtain information from a satellite, obtain details of the "more efficient route" to the Appellant's destination and then provide him with that information.

[51] The transaction involved entry by Mr. Anand of a set of coordinates (tantamount to a question, "can you provide me with a more efficient route to my destination?"). The second part of the transaction involved the receipt of an answer (albeit, from a non-human communicant) presenting the particulars of the "more efficient route". In order to input this information, the driver had to take his eyes away from the road, while his vehicle was being operated on the highway.

[52] The process of entering the coordinates and receiving the answer is an exchange of information. Because it facilitates such transactions, a GPS is a "communications device" within the meaning of s. 100D(1). This is so when the plain meaning of the words used by the Legislature are considered in conjunction with its purpose in enacting it, and the other criteria in *Rizzo.*

[53] I conclude for the purposes of s. 100D of the *MVA*, that the act of "text messaging" includes the manual entry of coordinates into a GPS, and that a GPS is a "communications device".

[54] So the *actus reus* of the offence has been made out. As to the mental element, or *mens rea*, s. 100D of the *MVA* belongs to a species of offences which are considered to involve strict liability. What this means was first identified in the well known case of *R. v. Sault Ste. Marie (City of)*, 85 DLR (3d) 161 (SCC). As (then) Chief Justice Dickson indicated therein, strict liability offences are:

> 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…
>
> [Emphasis added]

[55] Whether due diligence has been established by the accused is a question of fact: *R. v. Harris*, 1997 NSCA 203. Ignorance of the law cannot furnish a deference to an offence of strict liability or otherwise: *R. v. MacDougall*, [1982] 2 SCR 605.

[56] Mr. Annand did not provide the Court with anything upon which to found the defence of due diligence. At most, all that he has established is that he did not realize that what he was doing contravened s. 100D(1) of the *MVA*. Even if this were accepted, it would constitute a mistake of law, or ignorance of the law, which cannot be relied upon to found the defence.

Conclusion

[57] The offence was made out. The appeal is dismissed.

Gabriel, J.