

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW & APPEALS LIST

Not Restricted

S CI 2010 04085

BRUCE EGGETT MACDONALD

Plaintiff

v

THE COUNTY COURT OF VICTORIA

First Defendant

PAUL TARAS STEFANIW

Second Defendant

JUDGE: EMERTON J
WHERE HELD: Melbourne
DATE OF HEARING: 11 February 2013
DATE OF JUDGMENT: 13 March 2013
CASE MAY BE CITED AS: Macdonald v County Court of Victoria
MEDIUM NEUTRAL CITATION: [2013] VSC 109

ADMINISTRATIVE LAW – Judicial review of a decision of the County Court of Victoria – Charges of driving in excess of the speed limit on two occasions found proven and fines imposed – Whether traffic cameras were required to comply with the requirements of the *National Measurement Act 1960* (Cth) and the *National Measurement Regulations 1999* (Cth) – Whether refusal of an adjournment involved a denial of procedural fairness – Whether the plaintiff was denied the right to internal review of the infringement notices under the *Infringements Act 2006* (Vic) – Whether penalty imposed by the County Court was greater than the penalty that applied at the time of the offences - *Road Safety Act 1986* (Vic) s 83 and s 83A - *Infringements Act 2006* (Vic) s 22 - *National Measurement Act 1960* (Cth) ss 19A, 19AAA and 19AAB - *Charter of Human Rights and Responsibilities* ss 25 and 27(2) – *Supreme Court (General Civil Procedure) Rules 2005* O 56.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	In person	
For the Second Defendant	Ms F Dalziel	Mr C Hyland, Solicitor for Public Prosecutions

HER HONOUR:

Background

- 1 The plaintiff, Mr Macdonald, was convicted in the Magistrates' Court of Victoria and subsequently in the County Court of Victoria of driving in excess of the speed limit on two occasions, the first on 11 April 2008 and the second on 16 April 2008. On both occasions, the speeding was detected by a traffic camera and infringement notices were issued. Although Mr Macdonald was not the owner of either car (both were rental vehicles), he was identified by the owners¹ as being in charge of the vehicles at the relevant times.
- 2 In respect of each infringement, certificates were issued by authorised persons under s 83 and s 83A of the *Road Safety Act 1986* (Vic) certifying, among other things, that the traffic camera had been tested in accordance with the *Road Safety (General) Regulations 1999*, and that the test confirmed that the camera was working correctly in accordance with the Regulations
- 3 The connection between Mr Macdonald and the relevant vehicle was established on the basis of certificates and information recording the registered number of the vehicle in question and associating the vehicle with the owner, and by statutory declarations from the owners associating Mr Macdonald with those particular vehicles during the periods in question. This evidence was not challenged by Mr Macdonald.
- 4 However, on 24 June 2008, Mr Macdonald wrote to Civic Compliance Victoria applying for a waiver of the penalties in the infringement notices. Mr Macdonald's letter stated as follows:

The grounds on which I apply for the penalties to be waived are as follows:

- (1) All of these infringements relate to rental vehicles. If indeed it could be established that at the time I was the driver you should consider the scientific information available in relation to time and space perspectives which proves that the sense of speed is an acquired knowledge gained over time and derived from experience. In the case of rentals that faculty has not developed.

¹ Or their agents.

- (2) I note that in all instances the notices are not sent until close to one month after the alleged event and then not received up to a week later again in all roughly five odd weeks. Please be advised in absolute terms that I have no capacity to determine my actions or whereabouts after that period of time nor can I correctly ascertain who of many people was likely to have been driving the vehicle. This situation is a matter of record and is derived from my extensive substance abuse years ago further compounded by extensive treatment specifically with that end in mind.
- (3) The receipt of the notices so long after the fact and outside of my capacity to recollect issues related to them would tend to deny me natural justice.
- (4) In the absence of the photo concerned I am denied further the capacity to make representation to you in relation to any event that may have arose as a result of traffic or other factors. I consider the manner in which such infringements are issued deficient on the basis that not seeing the photo I am not aware in cognitive terms of the allegation against me. I contend that if you raise the allegation by way of postal service that there is an onus at law for you to supply also a copy of the photo.

5 In short, Mr Macdonald submitted that he should not be penalised when he was not in a position to determine whether he was driving the vehicles at the relevant times.

6 In response, the enforcement agency wrote to Mr Macdonald on 6 August 2008 referring to his 'Nomination Statement' to advise him that it had been rejected because the enforcement agency was not satisfied of the details supplied.

7 Mr Macdonald elected to have the matters dealt with by a court and the charges were heard and found to be proven by the Magistrates' Court of Victoria. Mr Macdonald appealed to the County Court of Victoria. On 15 October 2009, the County Court found the charges proven and imposed the same penalty that had been imposed by the Magistrates' Court.

8 Mr Macdonald now seeks to have the decision of the County Court reviewed by this Court under O 56 of the *Supreme Court (General Civil Procedure) Rules* 2005.

9 The Court has the benefit of the transcript of the hearing of the appeal in the County Court and the reasons for decision of the learned judge (delivered *ex tempore* and

apparently unrevised).² The Court also has before it the affidavit of Mr Rodney Knight (solicitor at the Office of Public Prosecutions) sworn on 28 July 2011 and the affidavit of Mr Macdonald affirmed on 11 February 2013.³ Mr Knight's affidavit exhibits the following materials that were before the County Court:

- (a) A summary prepared by the counsel for the OPP;
- (b) Two certificates prepared under s 83 of the *Road Safety Act* dated 18 July 2008;
- (c) Two certificates of an authorised person under s 83A of the *Road Safety Act* dated 12 November 2008;
- (d) An extract from the entry in the Register of Motor Vehicles (South Australia) dated 11 April 2008;
- (e) A copy of the statutory declaration declaring that motor vehicle registration number XRP 189 was rented to Mr Macdonald dated 26 May 2008;
- (f) A certificate prepared under s 84 of the *Road Safety Act* dated 21 September 2009;
- (g) A copy of the automatic detection device corporate notification statutory declaration dated 2 May 2008; and
- (h) A letter from Mr Macdonald to Civic Compliance Victoria dated 24 June 2008 and its reply dated 6 August 2008.

10 As this is an application for judicial review of a decision of an inferior court, the Court is restricted in what it may have regard to.⁴ However, Mr Macdonald's grounds of review embrace both error of law on the face of the record and denial of procedural fairness, and the Court may look beyond the record in respect of the

² *DPP v Bruce Macdonald* (Ruling, Unreported, County Court of Victoria, Judge Duggan, 15 October 2009).

³ On 29 March 2011, Mr Macdonald filed three affidavits, one of which exhibits the orders made in the County Court on 15 October 2009.

⁴ See *Craig v South Australia* (1995) 184 CLR 163, 176; s 10 *Administrative Law Act* 1978 (Vic).

latter.⁵ In this case, the transcript of the hearing, which includes the reasons for decision of the learned County Court judge, the orders made and the certificates upon which the charges were found to be proven, are sufficient for the disposition of the proceeding.

The County Court appeal

Preliminary question

11 At the commencement of the appeal, the County Court was called upon deal to with a preliminary issue arising from an unanswered subpoena issued at Mr Macdonald's behest to a company referred to as 'Granada Productions', which had produced a documentary about speed cameras that Mr Macdonald wished to utilise for his defence. Mr Macdonald submitted that if the Granada documentary was put in evidence, the Court would be in a better position to understand the scientific and technical information that he intended to put forward in his defence. Mr Macdonald sought an adjournment to obtain the Granada documentary by other means.

12 The learned judge doubted the admissibility of the evidence sought to be adduced from Granada Productions, and stated that he was not going to grant an adjournment based upon the failure to comply with the subpoena. His Honour said that if he was wrong in that preliminary assessment and it became apparent that Granada Productions was able to offer some relevant evidence, then there would be no difficulty in accommodating that in some way. However, he was not prepared to grant an adjournment based on Granada's non-compliance with the subpoena when it seemed that the evidence was (a) not admissible and (b) might not be relevant to the facts in issue in any event.

The certificates

13 The prosecution relied on certificates given under ss 83 and 83A of the *Road Safety Act* to establish the commission of the speeding offences. Mr Macdonald objected to the use of the certificates issued under s 83A on the basis that it had not been

⁵ *Craig v South Australia* (1995) 184 CLR 163, 176.

established that they were produced using ‘the prescribed process’.

14 Mr Macdonald called an employee of Serco Traffic Services, Mr Kevin Bolton, to give evidence about the production of the certificates issued by him under s 83A of the *Road Safety Act* (‘s 83A certificates’). Mr Bolton gave evidence that, in relation to the certification that the traffic camera had been tested and sealed in accordance with the regulations, he knew everything was up to date, tested and running because he obtained that information from the ‘verifications office’ and the police. However, Mr Bolton agreed that when he produced the s 83A certificates, he made a ‘presumption’ based on a document provided to him that the traffic camera was sealed and tested. Mr Bolton did not have any direct knowledge that the speed camera was sealed and tested in accordance with the regulations and procedures.

15 Mr Bolton also gave evidence that he did not know whether the traffic camera complied with ‘Australian Standards’. Mr Bolton was asked about his knowledge as to whether the speed camera complied with what was broadly described as ‘Commonwealth legislation’. Mr Bolton was not aware of any such compliance.

Mr Macdonald’s submissions

16 In closing submissions, Mr Macdonald submitted that ‘due process wasn’t served in relation to the application for a review’.⁶ In this context, he submitted that his letter seeking a waiver of penalties constituted an application for an internal review under Division 3 of Part 2 of the *Infringements Act* 2006 (Vic) and that the enforcement agency had failed to accord him his statutory right to an internal review of the decision to issue the infringement notices. Mr Macdonald also contested the admissibility or authenticity of the certificates relied upon, describing them as ‘a bit dodgy’ inasmuch as by Mr Bolton’s own admission, they did not comply with ‘the prerequisites’.⁷

17 Mr Macdonald further submitted that he was not in a position to establish who was

⁶ Transcript of Proceedings, *DPP v Bruce Macdonald* (County Court of Victoria, Judge Duggan, 15 October 2009) 43 (‘Transcript’).

⁷ Ibid.

driving when the speeding was detected and that it was ‘beyond the pale of human capacity’ to do so after 24 days. It was ‘tenable’ that somebody else was driving. He submitted that the enforcement agency could have sought further information under the *Infringements Act*.⁸

18 Mr Macdonald submitted that there were two pieces of Commonwealth legislation imposing certification requirements for speed cameras that were not observed, giving rise to a constitutional matter.

19 Finally, Mr Macdonald referred briefly to the Magna Carta, and was interrupted by the learned judge.⁹ He now says that he was prevented from making out his defence based on the Magna Carta. The transcript of the exchange between his Honour and Mr Macdonald is set out in full in the discussion below of the relevant ground of review.

Decision

20 The learned judge dealt principally with two arguments advanced by Mr Macdonald: the alleged failure of the enforcement agency to conduct an internal review under the *Infringements Act*; and Mr Macdonald’s attack on the s 83A certificates upon which the prosecution relied to prove the offences.

21 In respect of the former, his Honour concluded that he was, in effect, being asked to find that the enforcement agency’s rejection of Mr Macdonald’s application for internal review was unreasonable. His Honour found Mr Macdonald’s assertion that the passage of time prevented him from identifying a driver to be implausible, particularly in the absence of details as to why someone else might have been driving at the relevant times. Having considered Mr Macdonald’s letter, his Honour held that the rejection of his application for review was far from unreasonable. His Honour took the view that there was no denial of natural justice by the enforcement agency.

⁸ Ibid 44.

⁹ Ibid 45-46.

22 As to the certificates relied upon by the prosecution, his Honour said that he did not find the certificates to be 'dodgy' at all. Referring to the attack on the s 83A certificates prepared by Mr Bolton, his Honour said that while it was true that it had emerged from Mr Bolton's evidence that Mr Bolton had no direct knowledge of whether the traffic cameras were tested and sealed and that, insofar as he was able to certify to that effect, the certification was based upon an acceptance that proper procedures had been adopted, his Honour found the certificates to be 'adequate'. Moreover, there was an overlap between the certificates issued under s 83A and the certificate issued under s 83, which confirmed that the device was operating correctly in accordance with the requirements of the regulations. His Honour found the certificates plausible and of evidentiary effect. He held that the facts asserted in the certificates were made out and that the charges were proved.

23 Finally, as to penalty, his Honour indicated to the parties that he proposed to impose the same fine as that imposed by the Magistrates' Court. When asked whether he had anything to say on the question of penalty, Mr Macdonald said that he wished to say nothing.

Grounds of review

24 In his originating motion dated 11 December 2009, Mr Macdonald raised eight grounds of review:

- (a) Grounds 1 and 3 relate to whether the traffic cameras were required to comply, and whether they in fact complied, with the requirements of the *National Measurement Act 1960* (Cth) and regulations.
- (b) Grounds 2 and 4 relate to Mr Macdonald's allegation that he was prevented by the learned judge from developing a legal argument based on the Magna Carta.
- (c) Ground 5 is, in essence, that Mr Macdonald was denied procedural fairness when refused an adjournment to obtain material was not produced by Granada Productions in response to the subpoena.

- (d) Ground 6 is that there was no basis upon which the County Court could find that the certificates issued under s83A of the Act were produced in accordance with a prescribed process, because there was no prescribed process.
- (e) Ground 7 is that the County Court did not have power to impose a penalty in an amount that was higher than the amount specified on the original infringement notice or notices.
- (f) Finally, by Ground 8 (which is not a ground of review at all), Mr Macdonald seeks an order that he be provided with transcript of the County Court appeal and the transcript of this proceeding. I note that transcript of the appeal in the County Court has already been made available to Mr Macdonald and that it appears in the court book prepared for this proceeding.

Grounds based on the *National Measurement Act 1960 (Cth)*

25 Mr Macdonald contends that the speed cameras that were used to take the photos and record the speed of the vehicles in question did not comply with the requirements of the *National Measurement Act* and that, in the absence of approval and the provision of the certificate under by the *National Measurement Act* and *National Measurement Regulations 1999 (Cth)*, the speed cameras were illegal. Mr Macdonald referred to the requirements of ss 19A, 19AAA and 19AAB of the *National Measurement Act* and asserted that the prosecution had failed to produce certificates establishing that the speed cameras had been verified in accordance with the requirements of Reg 18 of the Regulations.

26 Although I was not taken to it by Mr Macdonald, I have had regard to the *National Measurement Act* as in force in April 2008, when the speed cameras photographed and recorded the speed of the vehicles in question.¹⁰

27 The *National Measurement Act* is concerned with the verification or approval of

¹⁰ In these reasons, all references to the *National Measurement Act 1960 (Cth)* and the *National Measurement Regulations 1999 (Cth)* are references to Act and Regulations as in force in April 2008.

measuring instruments in limited circumstances only. It has a much broader ambit. Its objects are:

- (a) to establish a national system of units and standards of measurement of physical quantities; and
- (b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia; and
- (c) to coordinate the operation of a national system of measurement; and
- (d) to bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and
- (e) to provide for a system of verification of utility meters used for trade.

28 The system of verification of utility meters used for trade is contained in Part VA of the Act.¹¹ However, it was common ground that a speed camera is not a utility meter for the purposes of Part VA. Rather, Mr Macdonald relied on Part VI, which contains the provisions that he referred to. These provisions – ss 19A, 19AAA and 19AB – do not require the doing of anything. Rather, they provide for the making of regulations, specifically for or in relation to the examination, approval and verification of ‘patterns’ of measuring instruments, for the issuing of certificates in respect of the approval and verification of patterns of measuring instruments and for the reception in evidence of documents purporting to be such certificates.¹²

29 It is therefore necessary to have regard to the Regulations (as in force in April 2008). Although Mr Macdonald referred to regulations 18 and 80A, they do not appear to

¹¹ Division 3 deals with the verification of utility meters, and Division 4 deals with verifying authorities (applications for appointment, appointment of verifying authorities, conditions on appointment, disciplinary action for breaches of conditions of appointment and so on). Division 5 deals with enforcement powers in respect of utility meters.

¹² Section 19A provides for the making of regulations for the examination of patterns of measuring instruments. Section 19AAA provides for the making of regulations for certificates in respect of a pattern of a measuring instrument to specify tolerances. Section 19AAB provides for the making of regulations that are required to be satisfied before a measuring instrument with an approved pattern is taken to be in accordance with the pattern and the procedures to be followed to ascertain whether measuring instruments with an approved pattern are in accordance with the pattern.

me to be relevant to the argument that he apparently seeks to make. Part VI of the Regulations deals with patterns of measuring instruments. Regulation 58 provides that an application may be made for approval of the pattern of a measuring instrument and then sets out the procedure by which that is undertaken. Regulation 60 provides that on application under Regulation 58, the approving authority may approve the pattern of a measuring instrument by certifying that the instrument is suitable for use for trade or as a legal measuring instrument. If the pattern of the measuring instrument is approved, the approving authority must issue a certificate of approval to the applicant. Regulation 63 sets out the form of the certificate of approval. Regulation 64 and Division 3 of Part VI deal with the circumstances in which an approval may be withdrawn or cancelled.

30 Part IV of the Regulations deals with the certification of individual measuring instruments. Regulation 36 provides that an application may be made for certification of a measuring instrument, and Regulation 37 provides that, upon application under Regulation 36, the certifying authority may examine the measuring instrument and may certify the measuring instrument. For a measuring instrument to be certified, it must have an approved pattern and bear a mark that identifies the particular instrument.

31 The relevant regulations are therefore largely permissive in character. A person *may* apply for approval or certification of a pattern or of an individual measuring instrument, but it is not mandatory.

32 Having regard to the Regulations, I can find no requirement that speed camera types or individual speed cameras be certified, verified, calibrated or otherwise approved under the *National Measurement Act* or the Regulations. Mr Macdonald could not point to any specific requirement in the *National Measurement Act* or the Regulations that speed cameras be approved, verified or certified either individually or more generally as to pattern. He argued, instead, that it was the general 'tenor' of the *National Measurement Act* that they be approved, verified or certified.

33 I do not accept this submission. In my view, the County Court was not prevented from finding the charges proven in the absence of approval, verification or certification under the *National Measurement Act* of either the pattern of the speed cameras or the individual speed cameras, as there was no such requirement.

34 It follows that the constitutional issue raised by Mr Macdonald based on the alleged inconsistencies between the *Road Safety Act* and the *National Measurement Act* and Regulations does not arise.

35 Grounds 1 and 3 are not made out.

Ground 2 – Refusal to entertain arguments based on the Magna Carta

36 Mr Macdonald alleges that he was prevented from making out his defence based on the Magna Carta and that the County Court thereby breached the rules of natural justice and displayed bias.

37 There is a preliminary issue as to whether the learned County Court judge in fact prevented Mr Macdonald from making the argument that he wished to make in his defence based on rights he contends are conferred by the Magna Carta. The transcript of the County Court appeal records the following exchange between Mr Macdonald and the learned judge right at the end of closing submissions:

APPELLANT: In summation, referring to ancient law, I'd like to put to the Court that in keeping with my natural rights and inherent rights, they seem to be slipped out of my hands so to speak, and I'm unsure about the current legislation wherein it suggests or purports, or has been exercised that the certificate is admissible on its own. Well ...

HIS HONOUR: That legislation has been around for a long time and has been employed in many different contexts for many years.

APPELLANT: Absolutely and I'm here to have a stab at it because I ...

HIS HONOUR: Yes I can see that.

APPELLANT: I'd assert that within section 38 or Part 38, or Charter 38 of the Magna Carta ...

HIS HONOUR: Don't start quoting the Magna Carta, that's ...

APPELLANT: I think it's relevant.

HIS HONOUR: There's a lot of illusions about the Magna Carta and one of them is that it's some sort of constitution that still has

application and it's long since not the case.

APPELLANT: Well you know, it further goes in the document that in section or part of Charter 52 of it, if those rights outlined in it are impinged or reduced, that they are to be restored. So it's a matter of the font of the law. And I contend before the Court it's really a bit much in the history of law to expect that people are found guilty merely on a photograph or a thing that's presented to the Court that can't be addressed; it can't be contested; no evidence can be extracted or obtained to the contrary and it's in the absence of two witnesses.

HIS HONOUR: Yes.

APPELLANT: There's just no support or corroboration of the fact before the Court. It's a thing that's out in the open and hung to dry.

HIS HONOUR: Yes.

APPELLANT: And I find that repugnant to the ethos and objective of the law with respect. Thank you Your Honour.

HIS HONOUR: Thank you. I really don't think I need to hear from you, Ms Manova.'

38 This exchange does not reveal Mr Macdonald to have been prevented from presenting his argument on the Magna Carta. Mr Macdonald explained to the judge how he sought to use the Magna Carta, namely as a bar to any conviction based merely on a photograph and in the absence of evidence from witnesses.

39 His Honour was correct to point out that the Magna Carta is not some sort of 'constitution'. The *Imperial Acts Application Act 1980 (Vic)*, contains a schedule of enactments which continue to have the effect in Victoria that they had at the commencement of that Act. The schedule includes [1297] 25 Edward 1 (Magna Carta) c. XXIX. This is relevantly set out in Division 3 of Part II as follows:

'[1297] 25 Edward I (Magna Carta) c. XXIX

No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.'

40 It is not clear if or how Mr Macdonald seeks to avail himself of these protections or if or how he contends there was a failure to afford him these protections. The learned judge did not err in warning Mr Macdonald that the Magna Carta did not have the

force or effect for which was sometimes contended. In this case, the County Court was bound to give effect to the provisions of the *Road Safety Act*. The express terms of the *Road Safety Act* enabled the County Court to find the charges against Mr Macdonald proven, based upon the certificates produced under ss 83 and 83A of that Act. His Honour's refusal to countenance lengthy argument that would have required him, in essence, to ignore the express terms of the *Road Safety Act* does not, in my view, reflect any bias or prejudgment on his part or otherwise amount to a denial of procedural fairness.

41 Ground 2 is not made out.

Ground 4 - the right to internal review

42 Ground 4 arises from the treatment by the enforcement authority of Mr Macdonald's request for a waiver of the penalties that were imposed. Mr Macdonald says that he sought to have the infringement notices reviewed pursuant to s 22 of the *Infringements Act* by letter addressed to Civic Compliance dated 24 June 2008. He contends that the enforcement authority failed to implement the internal review, failed to seek further information (as it was entitled to do under s 25 of the *Infringements Act*), and failed to respond with a decision in the prescribed time. He submits that s 24(4) of the *Infringements Act* provides that in such circumstances, the infringement notices are deemed to have been withdrawn.

43 This last of these arguments (based on s 24(4) of the *Infringements Act*) was not made in the County Court, which dealt with this issue on the basis that Mr Macdonald's reasons for internal review lacked plausibility and by concluding that the rejection of his application for review was reasonable.

44 In fact, there is an important threshold question, which is whether Mr Macdonald had a right to internal review of the infringement notices under the *Infringements Act* at all.

45 Division 3 of Part 2 of the *Infringements Act* deals with internal reviews. Section 21 provides:

This Division does not apply to an infringement notice or an infringement offence of a kind to which any of the following provisions apply-

- (a) sections 89A to 89D of the *Road Safety Act 1986*;
- (b) section 215C of the *Transport (Compliance and Miscellaneous) Act 1983*;
- (c) sections 61A and 61BA of the *Marine Act 1988*.

46 Sections 89A to 89D of the *Road Safety Act* are contained in Part 7, which governs infringements. Sections 89A to 89D make specific provision for particular types of traffic infringements, namely, drink driving infringements, drug driving infringements and excessive speed infringements. In effect, ss 89A to 89D of the *Road Safety Act* contain discrete procedures for objecting to infringement notices issued in respect of those types of driving offences. Among other things, s 89A provides that the giving of a notice of objection to the infringement notice under s 89A has the effect that the infringement notice is cancelled and the person to whom the infringement notice was issued may only be proceeded against by a charge filed for the alleged offence.

47 As the recipient of infringement notices for excessive speed infringements, Mr Macdonald had no right to internal review under Division 3 of Part 2 of the *Infringements Act* as the relevant provisions of the *Infringements Act* were inapplicable.

48 Mr Macdonald elected to have the matters dealt with by a court, which was his entitlement under s 89A.

49 Ground 4 is not made out.

Ground 5 - denial of procedural fairness in respect of the subpoena

50 Mr Macdonald claims that he was denied the ability to obtain material from Granada Productions by subpoena and denied an adjournment, and that this constituted a disruption to the minimum guarantees that had to be afforded him under s 25 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the 'Charter'). He also refers more generally to being denied the ability to call witnesses and to have

facilities by way of evidence available to him in order to enable him to present a defence to the charges. He further asserts that the material requested on subpoena constituted a 'specialised communication tool' for the purposes of s 25(2)(j) of the Charter to which he was unlawfully denied access.

51 Section 25 of the Charter sets out rights in criminal proceedings. Sub-section (2) contains minimum guarantees given to a person charged with a criminal offence, including:

(b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or adviser chosen by him or her; and

...

(h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

...

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has a communication or speech difficulties that require such assistance;

...

52 In my view, s 25(2)(j) is inapplicable, as there was no evidence that Mr Macdonald had communication or speech difficulties that required the assistance of assistants and specialised communication tools. In any event, I do not consider that a television documentary that would not be admissible as expert evidence could be a 'specialised communication tool' for the purposes of that provision.

53 Insofar as Mr Macdonald asserts that he was denied the opportunity to obtain the attendance and examination of witnesses, including experts on the operation of traffic cameras, when questioned by the Court he said that he had had difficulty securing the attendance of witnesses in other proceedings. With the exception of the Granada documentary, there is no indication that he was denied any such opportunity in the County Court appeal. In fact, Mr Macdonald called Mr Bolton as a witness and was given a fairly free rein to ask him questions as he saw fit.

54 As to the Granada documentary, the ruling made by his Honour was to deny Mr Macdonald an adjournment to obtain a copy of the documentary by other means. His Honour so ruled as an ordinary incident of the management of the appeal on the basis that he doubted the admissibility and relevance of the Granada documentary. The judge clearly saw little utility in delaying the hearing of the appeal to enable Mr Macdonald to obtain material of a kind that was unlikely to be admissible or relevant. However, his Honour left the door open by saying that if it became evident in the course of hearing the appeal that the Granada documentary was or could be relevant, he would revisit his ruling. The judge was not asked to revisit his ruling.

55 I see no error in the approach taken by the learned judge. The refusal of the adjournment did not prevent Mr Macdonald from presenting his case as fully as necessary within the limits of the law,¹³ in circumstances where the adjournment was sought for the purpose of gathering evidence that was likely to be neither admissible nor relevant.

56 Ground 5 is not made out.

Ground 6 – no prescribed process for issuing certificates

57 Mr Macdonald contends that the County Court failed, having seen that the s 83A certificates had not been proven to have been produced by the prescribed means, to find that the photos and the certificates relied upon by the prosecution did not comply with the requirements of the *Road Safety Act* and Regulations.

58 Mr Macdonald bases his argument on the following propositions:

- (a) the *Road Safety Act* refers to a ‘prescribed process’ for the production of certificates;
- (b) no process has been prescribed;
- (c) it follows that no certificate can be issued in accordance with the prescribed

¹³ *AJP v R* [2010] VSCA 224, [16]; *Bates v McDonald* (1985) 2 NSWLR 89, 97 (Kirby P); *Onus v Sealy* [2004] VSC 396 [32] (Kaye J).

process as required by the *Road Safety Act*; and

- (d) the County Court therefore erred in accepting the s 83A certificates as prima facie evidence of their contents.

59 Section 83A of the *Road Safety Act* provides as follows:

- (1) A certificate containing the prescribed information purporting to be issued by an authorised person certifying-
- (a) that a prescribed road safety camera was tested, sealed or used in the prescribed manner; or
 - (b) that an image or message described in the certificate was produced by a prescribed road safety camera or by a prescribed process; or
 - (c) as to any other matter that appears in, or that can be determined from, the records kept in relation to the prescribed road safety camera or the prescribed process by the police force of Victoria -

is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the certificate.

60 Section 83A does not require the certificate to be produced in accordance with a 'prescribed process'. It provides that a certificate purporting to be issued by an authorised person certifying as to the matters in (a), (b) or (c) is admissible and proof of those matters in the absence of evidence to the contrary. The only references to a 'prescribed process' are in paragraphs (b) and (c), where a 'prescribed process' is expressed to be an alternative to a prescribed road safety camera. This is a reference to the process of producing the image or message or recording of the matter. It is not a reference to the process of producing the certificate. In this case, the 'prescribed process' would appear not to be relevant, as the image and message in question is certified to have been produced by a prescribed road safety camera.

61 Exhibit RMK-3 to the affidavit of Rodney Michael Knight sworn on 28 July 2011 is a certificate purportedly given under s 83A of the *Road Safety Act* by Mr Bolton as an authorised person. It contains the following:

- (a) A statement that the traffic camera was a prescribed detection device for the

purposes of s 66 of the *Road Safety Act* and was tested, sealed and used in the prescribed manner and that it produced the images in printed form in paragraph (c);

(b) A statement that the printed images and messages set out in paragraph (c) were produced by a process prescribed for the purposes of ss 81(1) and 81(2) of the *Road Safety Act*;

(c) Two printed photographs, being a photograph of a car in an intersection and a photograph of the numberplate of a car of the same colour, each of which bear the following printed notation:

At the intersection of Middlesbrough Road and Eastern Freeway, Box Hill North in lane 1 from the left carriageway for the vehicle direction of travel.

60km/h speed limit on 11/04/2008 at 1:49:24pm speed 70km/h

(d) The signature of Kevin Bolton under the statement:

I Kevin Bolton, am the person who caused the printed images and messages produced in paragraph (c) to be printed and I certify that, to the best of my knowledge and belief, the matters set out in this Certificate are true and correct and I am the person authorised by the Chief Commissioner of Police for the purposes of s 83A of the *Road Safety Act 1986* to issue this Certificate under s 83A(1) of the *Road Safety Act 1986*.

62 Sections 81(1) and (2) of the *Road Safety Act* provide for certain matters indicated by speed cameras to be sufficient evidence. Sub-section (1) provides that evidence of speed of a vehicle as indicated or determined by:

(a) a detection device prescribed for the purposes of s 66 when tested, sealed and used in the prescribed manner;

(b) an image or message produced by such a device;

(c) an image or message produced by a prescribed process when used in the prescribed manner,

is proof of the speed of the vehicle in the absence of evidence to the contrary.

63 Subsection (2) makes similar provision for proof of the speed limit, which is as indicated or determined 'by an image or message produced by a prescribed process when used in the prescribed manner'.

64 Neither of these provisions have anything to say about the process for producing the s 83A certificates. The s 83A certificate in evidence states that the printed images and messages set out in paragraph (c) (the annotated photographs) were produced by a process prescribed for the purposes of ss 81(1) and 81(2), and they are therefore prima facie evidence of the speed at which the vehicle was travelling and the applicable speed limit.

65 I can find no requirement that the s 83A certificates be produced in accordance with a 'prescribed process'. It seems to me that Mr Macdonald has misread the legislation.

66 In any event, even if the legislation referred to a 'prescribed process' for the production of s 83A certificates by the authorised person, but no process was in fact prescribed, the certificates would have legal effect, providing that they otherwise complied with the legislation.

67 Ground 6 is not made out.

Ground 7 - amount of the penalty

68 Mr Macdonald contends that the County Court exceeded its 'jurisdictional capacity as defined within s 27(2) of the Charter' by imposing a fine for the offences that was greater than the fine that was due at the time the alleged offences took place. According to Mr Macdonald, the infringement notices required the payment of \$138, whereas the penalty imposed by the County Court was \$165.¹⁴

69 Section 27(2) of the Charter provides that:

A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

¹⁴ The infringement notices were put before the Court.

70 The protection afforded by s 27(2) of the Charter is, in substance, a protection against the retrospective operation of laws that are harsher than the laws in force when the offence was committed. The focus of s 27(2) is 'the penalty that applied to the offence' when the offence was committed. The penalty that applied to the offence at the time that it was committed is the penalty specified in or authorised by the legislation or rules in force at that time.

71 So far as I can tell, Mr Macdonald does not contend that the County Court imposed a penalty that was higher than the penalty that the court was authorised to impose by the laws in force at the time the speeding offences occurred. He does not contend that he was penalised pursuant to laws that were not in force when the offences were committed, but simply refers to an increase in dollar amounts.

72 There was some discussion before me about whether the difference in dollar figures was explicable by reference to an increase in the value of a penalty unit between the dates of the infringement notices and the County Court decision. Given the paucity of material before the Court, it is not possible to draw any conclusions as to why there was a difference in the dollar figures. However, nothing turns on this. In order to succeed on Ground 7, Mr Macdonald needed to establish that the County Court imposed a penalty on him that it was not authorised to impose under the laws in force at the time of the offences. He has not done so.

73 Ground 7 is not made out.

Ground 8

74 Ground 8 is not a ground of review. Mr Macdonald seeks access to the transcript of the hearing before the Court on the basis that it involved a criminal matter even though it was heard in the civil list as a civil proceeding. He told the Court he could not afford to pay for transcript.

75 Given that the decision under review involved a criminal matter, the novel character of some of the arguments advanced by Mr Macdonald and the fact that he is self-represented and may be assisted to understand the Court's reasons having regard to

the way in which argument unfolded during the hearing, I will order that he be provided with transcript.

Conclusion

76 The grounds of review are not made out. The originating motion filed 28 July 2010 is dismissed.