

THE PROVINCIAL COURT  
WINNIPEG CENTRE

In the Matter of: The Highway Traffic Act, S.M. 1985 - 86 c.3 Chap.  
Sections 95(1), 95(1.1), 95 (1.2), 77(7), 77 (7.1)

Between: HER MAJESTY THE QUEEN,

Represented by  
Stephanie Hermiston and  
Katie Dojack  
Courtney St. Croix

And

Gordon Sasaki accused represented by Jodi Koffman

Suzanne Boyko ) represented by selves

David Enns )

James Gunning )

Robert Atkins )

Kuljit Singh Gill )

Dale J. Adair )

Portia M. Connell )

Patricia Loewen )

---

Reasons for Decision

---

Norman Sundstrom  
Judicial Justice of the Peace

These reasons deal with a number of accused, all who have been charged with speeding contrary to section 95(1) of The Highway Traffic Act. In all these matters the charging informations were issued by Commissioners who were using photo radar equipment pursuant to the jurisdiction given to them by section 257.1(2) of The HTA. The alleged offences all took place in construction zones.

Sec 257.1(2)

**Limitations re speed limit enforcement**

Without limiting the generality of subsection (1), when municipalities and peace officers acting on behalf of municipalities or the government use image capturing enforcement systems for speed limit enforcement, they may only use them to detect speed limit violations that occur

- (a) in construction zones, playground zones, and school zones; and
- (b) at intersections that are controlled by traffic control lights.

In all the cases herein being considered there was appropriate signage designating a "construction zone" set up at each end of the zone. As well, there were signs indicating that the speed in the zone was 60kph. It is noted that in most of the trials, if not all, the evidence was that the 60kph signs were of a temporary nature, lowering the normal speed allowed from 80kph to 60kph within the zone. In none of the cases was there any

evidence that 60kph was the normal speed in the area prior to the construction zone being established.

I find that the construction signs and speed signs were erected pursuant to subsections 77(7) and 77(7.1) HTA. For clarity I quote these subsections:

**Signs where construction work in progress**

77(7) Where any portion of a highway is under construction, or where any reconstruction, widening, marking, repair thereof or other work with respect thereto is being carried on, the traffic authority may erect, not further from each end of that portion of the highway than 450 metres

(a) a traffic control device facing traffic entering upon the highway or portion thereof

(i) which shall indicate that work of some of the kinds mentioned in this subsection is being done on the highway or portion thereof, and

(ii) of which the design and dimensions have been approved as provided in section 81; and

(b) a traffic control device facing traffic leaving the highway or portion thereof,

(i) which shall indicate that the highway or portion thereof to which the traffic control device mentioned in clause (a) relates ends at that place, and

(ii) of which the design and dimensions have been approved as provided in section 81.

**Signs indicating workers or equipment are present**

77(7.1) A traffic control device erected under clause (7)(a) or another traffic control device the traffic authority erects

adjacent to it or before any part of the construction zone where workers may be present or using equipment, may indicate

(a) that workers are present or using equipment in the construction zone; and

(b) that, while workers are present or using equipment in the construction zone, travel on the highway is prohibited, or traffic must proceed on the highway only in the manner or at the permissible speed indicated by the traffic control device. (underlining my own)

In all the cases before me, the accused were proven to have driven in excess of 60kph – but not over 80kph which would have been the legal speed in the work area if it had not been for the placement of the of the special reduced speed (60kph) signs pursuant to section 77(7) and 77(7.1) HTA.

In none of the cases was there any workers present or equipment being operated in the construction zone at the time the alleged offences occurred.

MEANING of CONSTRUCTION ZONE

The Highway Traffic Act and the Regulations have two separate definitions of the term "construction zone";

95(1.1) In subsection (1.2), HTA "construction zone" means a portion or length of highway

(a) that is under construction, or where any reconstruction, widening, marking, repairs or other work is being done by or on behalf of the traffic authority, including installation of, and repairs and modifications to, the equipment or facilities of any person who the

traffic authority allows to maintain equipment or facilities on or under the highway; and

(b) that is identified as a construction or work zone by approved traffic control devices placed at the beginning and end of the zone facing each direction of travel in the zone.

AND

**Construction Zones**

11(1) Image Capturing Enforcement Regulation For the purpose of subsection 257.1(2) of the Act, a construction zone is a portion or length of highway that

(a) is under construction or where any reconstruction, widening, marking, repairs or other work is being done by or on behalf of the traffic authority; and

(b) is identified as a construction or work zone by approved traffic control devices placed at the beginning and end of the zone facing each direction of travel in it.

While the wording of the two definitions varies slightly I find that the essential meaning or description of the term "construction zone" is essentially the same; ie: that work is being done on behalf of the traffic authority and that appropriate signage will be present. The purpose of the definitions of sec 11(1) of the Regulation is to define the jurisdiction of the officer using the photo enforcement equipment – (thus, a somewhat simple definition). The purpose of the definition under section 95(1.1) in my opinion is ultimately to protect workers by setting out the rules for drivers to follow.

I conclude then that no matter which definition is used, a construction zone is a construction zone. It should not matter who is policing it – either a photo radar operator or a regular police officer with other instrumentation – the same rules ought to apply.

### The Issue

Counsel for one of the accused argues that s. 95(1.2) of The HTA ought to apply to the case against her client, and that since there were no workers present in the “construction zone” – her client should be governed by the “normal” speed in the area (80kph) – not the 60kph sign which the ordinary interpretation of s. 95(1.2) means has effect only when there are workers present in the zone.

The prosecution does not agree. It is her position that the accused drivers should be convicted for driving in excess of 60kph and that the signs (60kph) should be treated as ordinary speed signs. The rule as set out in s. 95(1.2) does not apply to the accused drivers in their cases because they were not charged under s. 95(1.2) ie: speeding in a construction zone (where double the ordinary penalty might be imposed). They are charged with ordinary speeding, under section 95(1) – which just

happens to be in a "construction zone" – for purposes of jurisdiction of the photo radar operator.

The crown further argues that s. 77(7.1) of The HTA should not be read as creating a defence for the accused. The phrase "while workers are present or using equipment in the construction zone" modifies only the first phrase of the three phrases or alternates that follows in the sentence under 77(7.1)(b). That is, the last phrase "or at the permissible speed indicated by the traffic control device" should not be read as being modified by "while workers are present..etc".

In support of this argument the Crown cites Rizzo & Rizzo Shoes Ltd (Re) 1998 Can L11 837 (S.C.C.) wherein Justice Iacobucci writing for the Supreme Court of Canada – quoting from Elmer Driedger in

CONSTRUCTION OF STATUTES states:

par 21 "Today there is only one principle or approach, namely, the words of an Act are to be read in this entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and intentions of Parliament"

While the Crown did not argue section 6 of The Interpretation Act of Manitoba – they certainly did imply it in this argument and in Rizzo Justice Iacobucci relies on the equivalent section in the Ontario Interpretation Act.

(6) Every Act and Regulation must be interpreted as being remedial and must be given the fair, image and literal interpretation that best insures the attainment of its objects

As I understand the Crown's position it is that the general and broad intention of the Manitoba Legislature was to protect drivers as well as workers in a "construction zone" and a way of meeting their aim is to interpret 77(7.1) in such a manner as to conclude that "while workers are present or using equipment in a construction zone" is meant to modify or pertain only to the first part - but not the third part of the sentence in 77(7.1)(b) - that is "or at the permissible speed indicated by the traffic control device."

With respect, I don't agree with crown's contention for the following reasons:

1) The Meaning of section 77(7.1) HTA.

It is my opinion that section 77(7.1) HTA was enacted to allow the authorities to erect signage and other traffic control devices in "Construction zones" - which warn that construction is occurring and amongst other things, reduce by way of signage the normal speed to some other lesser speed.

The words in the Act "may indicate" are permissive not mandatory and therefore mean that the authority need not erect a reduced speed sign -



but can, and if they do erect one, the reduced speed sign will take effect –  
“while workers are present or using equipment in the construction  
 zone...” (my emphasis). My conclusion on this is based on the following:

A) In my opinion the ordinary common sense and grammatical meaning of the clause “while workers are present – etc” is to be read so as to modify or refer to all three of the following clauses in the statement in s. 77(7.1)(b) HTA – including the last line ie “or at the permissible speed indicated by the traffic control device”. Common sense indicates that if the Legislature intended the speed sign to have effect only when workers are present (as I find that indeed they did) – they would not have had to use the phrase “when workers are present” before each and everyone of the three phrases that follow. This would be both awkward and redundant. A fair reading of s. 77 (7.1)(b) indicates this both by the style and the rules of ordinary grammar. The section clearly means that workers must be present for any special speed sign to take effect.

**B) The Scheme of the Act**

Sections 77(7), 77(7.1) and section 95(1.2) indicate a legislative scheme to protect workers in construction zones.

The first part of the scheme is to allow for signage and other traffic control devices to be used to create or set up construction zones, and control

traffic in these zones – primarily, in my view, to protect workers.

The second part of the legislative scheme is to enforce the “safety plan” by creating an offence for speeding in a construction zone. For convenience of reference again I quote section 95(1.2);

**Speed when workers or equipment present**

95(1.2) Despite subsection(1), when workers are present or using equipment in a construction zone, or in part of a construction zone, where a traffic control device warning of their presence or the equipment’s use has been erected in accordance with subsection 77(7.1), no person shall drive a vehicle in the construction zone, or in the particular part of it, at a rate of speed greater than the lesser of

(a) the maximum speed otherwise permissible under subsection (1); and

(b) the maximum permissible speed indicated by any traffic control device erected in accordance with subsection 77(7.1).

(My emphasis)

-Two things about this section should be noted:

- 1) The section actually refers to section 77(7.1) HTA.
- 2) The section clearly intends to punish for violations of the special speed sign only “when workers are present”.

These two sections (77(7.1)(b) and 95(1.2) indicate a legislative scheme that consistently intends to protect workers in a construction zone and consistently make it an offence to exceed the indicated speed in the reduced speed sign only when “workers are present”.

C) In considering the “object of the Act” and the intention of the legislature as principles of interpretation as set out by Justice Iacobucci in

Rizzo, as well as section 6 of The Interpretation Act of Manitoba, one has to agree with the Crown that a general object of The Highway Traffic Act has to be the safety of drivers – nevertheless this does not mean that every section of the Act should be interpreted as being directed to that particular end. For example s. 141(1), 141(2) and 141(3) are clearly intended to protect pedestrians in cross walks, etc – not drivers.

In my view s. 6 of The Interpretation Act, and the law as stated in Rizzo is a call to give a broad, fair and liberal interpretation of the law but should not be used as a rationalization for a court to either make law or change law when to do so would go against the clear intention of the legislature. In these cases I find that sections 95(1.2) and 77(7.1)(b) shows a clear intention on the part of the legislature to allow reduced speeds signs in construction zones to be in effect “when workers are present” and not otherwise. Although some people might feel that the legislation would be wiser to force drivers to slow down even after workers have gone home for the day, this is not in my view a justification for the court to add to or change the law under the guise of interpretation.

## 2) The Effect of s. 95(1.2)

It should be noted that the photo radar operators who lay charges under s. 95(1) HTA after an enforcement procedure in a “construction zone”

have no jurisdiction to lay a charge under s. 95(1.2) HTA. see: 257.1(1)

257.1(1) Municipalities, and peace officers acting on behalf of municipalities or the government, may use image capturing enforcement systems only if they are authorized to do so by the regulations and only

(a) for enforcing subsections 88(7) and (9) (red light offences), subsection 95(1) (speeding offences), clauses 134(2)(b) and (c) (railway crossing offences) and subclauses 134(6)(a)(i) and (b)(i) (railway crossing offences); and

(b) in accordance with any conditions, limitations or restrictions in the regulations about the use of such systems.

It is rather ironic, that the peace officers who operate the photo radar equipment are restricted by the legislation to enforce speed limits only in school zones, play ground zones, and construction zones yet cannot lay charges under s. 95(1.2), (speeding in construction zones). In my opinion this stems from an unfortunate glitch in the legislation; and has lead to confusion in the mind of the driving public and perhaps convoluted reasoning on the part of the peace officers who are charged with speed enforcement using photo radar devices.

It seems to me that there is an inconsistency in the position that the speed zone set up by the temporary signage in a "construction zone" is an ordinary speed sign, enforced by prosecution under sec 95(1) HTA - by photo radar operators - (commissionaires) but at the same time can be prosecuted under 95(1.2) by police officers who are not limited by section

257.1(1) HTA – but in fact are limited by the requirement that workers be present in the zone.

What is an ordinary member of the driving public to do with this befuddling situation? Is he or she protected by 95(1.2) or not? Should it matter who is policing her or prosecuting her? Surely not. The position taken by the crown here clearly seems to offend the general principle that there should be a consistent interpretation and enforcement of the law.

In my opinion the rule as set out in 95(1.2) will apply to any prosecution for speeding that occurs in construction zones, and that any reduced speed sign that was placed there essentially to make the zone safer for workers – is enforceable only when workers are present.

For the above given reasons the charges against all the accused are dismissed.

N. Sundstrom