

**NOTICE OF APPEAL
AVIS D'APPEL INTERJETÉ**

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIO

Parts I and II under Section 135 of the Provincial Offences Act
Parties I et II, aux termes de l'article 135 de la
Loi sur les infractions provinciales

Form / Formule 1
Courts of Justice Act
Loi sur les tribunaux judiciaires
O. Reg. / R  gl. de l'Ont. 722/94

1. Ontario Court of Justice at
Cour de justice de l'Ontario  
2. Appellant is: / *La partie appelante est :*
☒ Defendant
le d  fendeur (la d  fenderesse) ☐ Prosecutor
le poursuivant ☐ Attorney General
le procureur g  n  ral
3. Name of Appellant: Ms. Anne-Marie SHERK
Nom de l'appelant(e) :
Address for service:
Domicile   lu : B0106-2720 Queensview Drive, Ottawa ON K2B1A5
4. Counsel for Appellant: Name: Rob STOCKI (613)627-2727
Avocat(e) de l'appelant(e) : Nom :
Address for service:
Domicile   lu : B0106-2720 Queensview Drive
Ottawa ON K2B1A5
5. Name of Respondent (if known): City of Brockville, Provincial Prosecutions
Nom de l'intim  (e) (s'il est connu) :
Address for service:
Domicile   lu : 32A Wall Street, Brockville, ON K6V4R9
6. Counsel for Respondent (if known): Mr. Gerry McDOUGALL
Nom de l'avocat(e) de l'intim  (e) (s'il est connu) :
Address for service:
Domicile   lu : 32A Wall Street, Brockville, ON K6V4R9
7. Decision of Ontario Court of Justice: / *D  cision rendue par la Cour de justice de l'Ontario :*
(include name of Judge or Justice of Peace appealed from, if known / *inscrivez le nom du juge ou du juge de paix dont la d  cision est port  e en appel, s'il est connu*)

Guilty

8. Date of decision: / *Date de la d  cision :* July 17th, 2013
9. The Appellant appeals against: / *L'appelant(e) interjette appel :*
☒ Conviction
de la d  claration de culpabilit   ☐ Dismissal
du rejet de l'accusation ☐ Sentence
de la sentence
10. If Appellant is in custody, place where held:
Si l'appelant(e) est sous garde, lieu de d  tention :
11. (a) Description of offence:
Description de l'infraction : Speeding - s.128 HTA
(b) Certificate number (if known): / *Num  ro du proc  s-verbal (s'il est connu) :* [REDACTED]

FOR INFORMATION ON ACCESS
TO ONTARIO COURTS
FOR PERSONS WITH DISABILITIES, CALL
1-800-387-4456
TORONTO AREA 416-326-0111



POUR PLUS DE R  F  RENCES SUR L'ACC  S
DES PERSONNES HANDICAP  ES
AU TRIBUNAL DE L'ONTARIO, COMPOSEZ LE
1-800-387-4456
R  GION DE TORONTO 416-326-0111

Highway Traffic Act

12. (1) Statute²: _____
Loi²
13. Date of offence: 2013-02-18
Date de l'infraction : _____
14. Plea at trial:
Plaidoyer au procès :

The plea entered was:

Le plaidoyer inscrit :

(check one / cocher la case appropriée)

- ☐ guilty
coupable
- ☒ not guilty
non coupable
- ☐ not known
non connu

15. The Appellant wants the appeal court to:
L'appelant(e) désire que le tribunal d'appel :
(check one / cocher la case appropriée)

- ☒ Find the Defendant not guilty / Déclare la partie défenderesse non coupable
- ☐ Find the Defendant guilty / Déclare la partie défenderesse coupable
- ☐ Order a new trial / Ordonne la tenue d'un nouveau procès
- ☐ Change the sentence / Modifie la sentence
- ☐ Other: / Autre :
(specify / préciser)

16. The grounds of appeal are: / Les motifs d'appel sont les suivants :

See Attached Appendix - This appeal has been perfected from it's original submission.

Complete No. 17 for Provincial Offences Act, Part II, parking Offences where the municipality is collecting its own parking fines. Remplir le N°17 dans le cas des infractions de stationnement visées par la partie II de la Loi sur les infractions provinciales, lorsque la municipalité perçoit ses propres amendes de stationnement.

17. The fine has been paid in full at: _____ on _____
L'amende a été payée intégralement à _____ (municipality / municipalité) le _____ (date)
18. Date: 2014 - 02 - 06
19. Signature of Appellant or Counsel or Agent: _____
Signature de l'appelant(e) ou de son avocat(e) ou représentant(e) :

NOTES:

- (1) If Appellant's address for service is that of the Appellant's Counsel, state Counsel's full address and Appellant's own full address.
- (2) Please notify the clerk of the court in writing immediately of any change of address. The court will communicate with you by mail at the address shown by you in this notice unless you notify the court of a change in your address.
- (3) This notice of appeal must be filed with the local registrar of the Superior Court of Justice or Ontario Court of Justice.

Sections 111 and 112 of the *Provincial Offences Act* are as follows:

111. (1) A notice of appeal by a Defendant shall not be accepted for filing if the Defendant has not paid in full the fine imposed by the decision appealed from.
- (2) A judge may waive compliance with subsection (1) and order that the Appellant enter into a recognizance to appear on the appeal, and the recognizance shall be in such amount, with or without sureties, as the judge directs.
112. The filing of a notice of appeal does not stay the conviction unless a judge so orders.

REMARQUES :

- 1) Si le domicile élu de l'appelant(e) est celui de son avocat(e), indiquer l'adresse au complet de l'avocat(e) de même que l'adresse au complet de l'appelant(e) lui-même(elle-même).
- 2) En cas de changement d'adresse, en aviser immédiatement le greffier du tribunal par écrit. Si le tribunal n'est pas avisé, il communiquera avec vous par courrier à l'adresse indiquée au présent avis.
- 3) Le présent avis d'appel doit être déposé auprès du greffier local de la Cour supérieure de justice ou de la Cour de justice de l'Ontario.

Les articles 111 et 112 de la Loi sur les infractions provinciales se lisent comme suit :

111. 1) l'avis d'appel d'un défendeur n'est pas accepté pour dépôt s'il n'a pas payé intégralement l'amende imposée par la décision portée en appel.
- 2) Un juge d'appel peut dispenser l'appelant de se conformer au paragraphe (1) et lui ordonner de consentir un engagement à comparaître en appel. Le juge décide du montant de l'engagement, avec ou sans caution.
112. Le dépôt d'un avis d'appel ne suspend pas la déclaration de culpabilité à moins qu'un juge d'appel ne l'ordonne.

² for example *Highway Traffic Act* / par exemple, Code de la route
POA 0201 CSD (rev.11/03) (posted / affichée 03/01/05)

Appeal – SHERK, Anne-Marie – Appendix

Contents

Background	2
Preparation for Trial.....	2
Evidence of the Officer	5
Evidence In Chief.....	5
Cross Examination.....	6
Grounds For Appeal	8
The grounds for Appeal are as follows:	8
Remedy Sought	11
Disclosure.....	11
Fair Access To Justice	13
Caselaw	14

Background

1. On February 18th, 2013, on Hwy 401, in the jurisdiction of the City of Brockville, Ms. Anne Marie SHERK was charged with speeding.
2. Ms. SHERK exercised her option for trial.
3. A trial date was scheduled for July 17th, 2013 in the City of Brockville.
4. Ms. SHERK chose to be represented in trial by her husband, Mr. Jeffery SHERK.

Preparation for Trial

5. Prior to the trial date, Ms. SHERK made a number of requests for disclosure which were not fulfilled.
6. Originally disclosure was requested on March 26th, 2013. Among the things asked for were:
 - a. The make, model and serial number of the radar/laser unit used; and,
 - b. A copy of the manual pertaining to the unit used; and,
 - c. A copy of the officers notes; and,
 - d. If any of the items were not provided, for an explanation of why the item was not being provided.
7. The Prosecution responded on May 4th, 2013 via fax. The prosecution provided:
 - a. In relation to the Make Model and Serial Number:
 - i. Nothing to explain what was the Make Model and Serial Number.
 - ii. The indication of the make model and serial number becomes more relevant in relation to the manual in the second request for disclosure.
 - b. In relation to the manual:

- iii. A copy of the front cover of the "GENESIS II Select Directional(TM) Users Manual and Installation Guide – Canada Variant – Revised August 25th, 2010".
 - iv. A portion of the manual indicating Section 7. All previous portions omitted, and all subsequent portions omitted. The document with Section 7 of the manual is less than a single page out of the entire manual.
 - c. A copy of the officers notes were provided.
 - d. No indication or explanation of why the other items were not provided.
8. Disclosure was requested a second time on June 13th, 2013 in writing. There were 7 paragraphs of items requested in the second request for disclosure. Among the 7 paragraphs, two paragraphs are especially relevant to this appeal.
- a. In paragraph two of the second request for disclosure, the defence informed the prosecution that the front cover of the manual provided does not match the device PC Crowe used to measure the speed of Ms SHERK's vehicle: Paragraph two in the second request for disclosure states:

"The make, model and serial number of the radar/laser unit used. PC Crowe mentions in his notes "Radar Genesis II Select G25-17312" but it is not clear what is the make, what is the model and what is the serial number. Also the front page of the Users Manual provided says Genesis II Select Directional, so it is not clear if a Genesis II Select and a Genesis II Select Directional are the same or not;"
 - b. Paragraph three of the second request for disclosure states:

"Any manuals for the unit (training, operators, user, owners, etc). The front cover, back cover and page 39-40 of the Users Manual were provided, but not the rest of the manual. All sections of this manual (including controls, maintenance, calibration, limitations, specifications, field tests, care and cleaning, case law, etc) are important in order to prepare a defense. Also if this is the only manual available please specify so, otherwise please provide full copies of all other manuals as well. Note that photocopies of the manual(s) are acceptable or you can email me PDF documents of the manual(s) to jeff@iwebss.com."
9. On June 14th, 2013, the following day after sending the second disclosure request, Mr. SHERK called the Brockville Provincial Offences office. He spoke to a clerk who stated it was not possible to verify receipt of the second disclosure request since the document would have been sent to the prosecutor.

10. Immediately Mr. SHERK left a message for the prosecutor. A prosecutor returned his call at 1:31 pm. The person on the telephone identified himself as Mr. McDOUGALL. Mr. McDOUGALL indicated he can't verify receipt but that if the disclosure request was sent, that he has it.
11. Two weeks later, on July 2nd, 2013, Mr. SHERK left a message for Mr. McDOUGALL regarding the second disclosure request.
12. On July 5th, 2013, at 1120 am, Mr. McDOUGALL returned Mr. SHERK'S call is quoted as saying "The information we already provided is what we are going to rely on at trial and will not be providing anything else".
13. The notes of these conversations taking place on:
 - a. June 14th, 2013;
 - b. July 2nd, 2013; and,
 - c. July 5th, 2013were made by Mr. SHERK on the fax receipt document of the second request for disclosure.
14. Prior to trial, Mr. SHERK repeatedly attempted to secure disclosure.
15. Mr. SHERK was unable to secure proper disclosure as requested.
16. On the date of trial, Mr. SHERK again attempted to secure disclosure. Mr. SHERK motioned the court to dismiss the charge due to the inability to make a full answer and defence to the charge as a result of not receiving the disclosure as requested.
 - a. Mr. SHERK advised the Learned Justice prior to trial that the make and model of the device used for speed enforcement weren't clear in the original sparse disclosure package, nor was this clarified as requested in a followup correspondence prior to trial.
 - b. The court heard that the method of operation for the device was not disclosed as requested.
 - i. The court simply advised that Mr. SHERK is not entitled to the full manual. No reference to any caselaw was provided.
 - ii. Mr. SHERK asked the court how he was to question the officer if he does not have the manual to reference. The Learned Justice advised Mr. SHERK to "Go

to the library and look up the manual there. The province isn't going to provide everybody with a full copy of the manual..."

- c. The terse remarks by the court did not assist Mr. SHERK's earnest attempt to secure full and proper disclosure.
 - d. It is the defence position that attending the library to familiarize oneself with a speed measurement device the officer may have used to make a speed measurement is an unrealistic burden and unreasonable answer to a legitimate defence request for disclosure.
 - e. The prosecutor responded that the issues and questions raised by Mr. SHERK can be simply put to the officer on the stand, and that it's not the prosecutors position to lay a foundation for everyone's case. The prosecutor protested, stating that disclosure of the manual would remove need for anyone having to build a defence because the "Crown would be doing it all for them." --Essentially, the prosecution was stating that if the public were to be privy to how the device was supposed to be used, that the public would be given the ability to put forward a defence.
17. Prior to the trial, the Learned Justice erred by remaining silent on the lack of disclosure issues raised by Mr. SHERK. The court had not ruled on the issue of disclosure and had not provided reasons either way, or references to caselaw which would guide the Learned Courts decision either way.
18. The Learned Justice erred by immediately committing the case to trial and not allowing the defence to obtain the disclosure as requested.
19. The Learned Justice arraigned the accused on the charge of speeding.
20. Mr. SHERK entered a plea of "Not Guilty" on behalf of Ms. SHERK.

Evidence of the Officer

Evidence In Chief

21. Officer CROWE was the sole witness for the prosecution at trial.
22. During the trial, in Evidence In Chief, the officer stated he tested the device according to the manufacturers specifications before and after the speed enforcement action.

23. The officer testified he observed the accused's vehicle travelling at 133 km/hr but laid a charge for speeding 115 km/hr in a 100 km/hr zone.
24. The officer stated he used a Genesis II Select RADAR device for this enforcement action.
25. The officer stated that his training and the manufacturer's instructions for the use and operation of the device were the same.
 - a. It should be noted that the manufacturer's instructions for the use and operation of the device, which were relied upon by the officer to secure a conviction, were not disclosed to the defence as repeatedly requested in writing and via telephone calls prior to trial.

Cross Examination

26. Mr. SHERK's first question was critical to the defence. Prior to the officer answering, the prosecution objected to the question. Mr. SHERK had asked the officer how many RADAR units the officer was trained on. The prosecution immediately objected, stating to the court that the evidence of the charge was directly related to the GENESIS II (per the officers testimony) and no other RADAR unit.
27. The court ruled the defence was restricted to the Genesis II Select version of the speed measuring device (P.12 line 32).
28. The defence enters exhibit #2 (P.17, line 10) **Note that the line says exhibit #1, but exhibit #1 was entered previously. Line 10 here should say exhibit #2 and it's the testing procedures for the Genesis II Select.
29. The witness officer confirms he used the testing procedures in the manual provided. (P.17, line 16).
30. The defence requests the officer read the title of the front cover of the manual provided in disclosure. (P.17, line 21). The officer reads in "Genesis II Select Directional" (P.17, line 23).
31. The defence asks the officer if the Genesis II Select and the Genesis II Select Directional are two distinct and separate models. (P.17, line 24).
32. The officer acknowledges that they are. (P.17, line 27)
33. When plainly asked why the officer used the testing procedures for the Genesis II Select Directional instead of the Genesis II Select (P.17, line 28), the officer stated he didn't understand the question. (P.17, line 32).

34. Mr. SHERK reminds the officer that he stated the units are two separate models. (P.18, line 1).
35. The court intervenes and informs the officer that Mr. SHERK had picked up that the device testing procedures given to him are for a different model than the device the officer used for enforcement. The court asks the officer if the devices are two separate units (P.18, line 9).
36. The officer confirms that the units are separate units, but provides that the testing procedures for both devices are the same. (P.18, line 11).
37. Between P.18, line 16 to P.20, line 32, Mr. SHERK attempts to cross examine the officer further on why the officer used the manual for a unit he wasn't operating at the time. Mr. SHERK is interrupted by the prosecutor in the process as well as on P.20, line 9, the court concedes Mr. SHERK has made his point. Mr. SHERK certainly could have continued this line of questioning but the Learned Justice seemed to accept that Mr. SHERK made his point, causing Mr. SHERK to move to another line of questioning.
38. In the next line of questioning, Mr. SHERK attempts to understand what the officer means by "Medium" traffic. (P.20, line 19.)
39. The officer concedes it means different things to different people. In as little as a few sentences, the court becomes impatient with Mr. SHERKS questions and asks for the point to the question. (P.20, line 8).
40. Essentially the court is now interfering with Mr. SHERK from setting up his cross examination of the officer based on research Mr. SHERK has done on what may become a relevant point in the officers enforcement action with regard to the identity of the vehicle the officer measured the speed of.
41. The officer first states that Ms SHERKS vehicle is the lone vehicle in the RADAR beam. (P.20, line 25).
42. Mr. SHERK managed to have the officer admit that his description of what light traffic was vs what medium traffic were similar. This becomes relevant in later testimony where the officer is unable to determine how far the RADAR beam could be picking up other vehicles, thus the possibility that another vehicle may have caused the speed reading.
43. The officer concedes that the RADAR device was set to maximum range. (P.23, line 9).
44. The officer concedes that the RADAR beam has no limit at this setting and the beam travels to infinity. (P.23, line 10).

45. Mr SHERK cross examines the officer to the possibility of the RADAR beam registering another vehicle. (P.23, line 31).,
46. The officer states it's not possible because Ms SHERKS vehicle was the closest vehicle. (P.24, line 1). (This testimony is immediately contradicted by the officer since he states the RADAR doesn't always register the closest vehicle).
47. From P.24, line 1 to P.23, line 11, Mr. SHERK asks the officer if sometimes a truck or a larger vehicle could reflect the strongest signal even though it may not be the first vehicle, the officer states "It's possible...but there were no other vehicles" (P.23, line 9).
- a. This line of questioning was directly related to a previous line where the defence was attempting to establish exactly how many vehicles the officer recalls being on the road that day at the time of the alleged offence but was unable to due to interference by The Court.
 - b. The whole of page 24, the officer contradicts himself stating that the beam for the RADAR device is infinite, but that the officer is unfamiliar with the range that the radar device will track vehicles.
 - c. Eventually, even despite interference from the Learned Justice, on Page 26 between lines 5 and 14, the officer concedes that he didn't see any other vehicles, but that it's possible there were others.
48. The proper use of the RADAR device comes into question with the line of questioning on page 26 line 15, to page 27 line 12, where the officer admits he did not visually estimate the speed of the vehicle prior to activating the RADAR device. There is caselaw requiring the officer to visually estimate speed as a step in an enforcement action. However, because the operational procedures weren't provided in this case, there is no basis for the defence to test the officer on this issue. Without the manual, the officer may simply say this step isn't required and the defence would be left without ability to contradict the officer.

Grounds For Appeal

The grounds for Appeal are as follows:

49. The Learned Justice failed to ensure the accused was furnished with proper disclosure prior to conducting a trial, contrary to R vs STINCHCOMBE.
50. The Learned Justice improperly instructed the unlicensed agent for the accused as to his ability to testify, even though he was a witness to the incident. The agent for the accused is the

husband of the accused. Prior to the trial, on Page 1 of the transcript, line 10, the court asks Mr. SHERK if he was in the vehicle. Mr. SHERK advises he was. The court provides that Mr. SHERK will have difficulty giving evidence if he wasn't the driver. By being in the vehicle at the time of the incident, Mr. SHERK would have made observations and witnessed the happenings of the traffic stop. It is unclear why the Learned Justice should suggest Mr. SHERK would have difficulty giving evidence if he wasn't the driver. The court made this statement prematurely, having no possible regard as to how the evidence would unfold.

51. R vs W.(D.) - Weight of the officers testimony.

- a. The Learned Justice failed to properly consider R vs W.(D.) when assessing the officers evidence. The first failure to apply R vs W.(D.) occurs with the Learned Justice giving absolute weight to the officers evidence, regardless of the contradictions.
- b. During the cross-examination of the officer, the Learned Justice intercedes. On page 29, line 17, the court advises Mr. SHERK: "THE COURT: And as I've explained to you at the start of the trial, your wife's not here to give evidence and you can't give evidence. So I'm going to be bound by what the officer is saying, basically."
- c. The court is not bound by what the officer is saying. The court must consider all evidence and must evaluate the evidence within the principals of R vs W.(D.).
- d. There is significant contradiction and lack of clarity with regard to the officers testimony that at least, there should have been a mention of R vs W.(D.), to provide reasons why the evidence of the officer should be found to be so credible and accepted.

52. R vs W.(D.) – Instructions for RADAR operation of the unit used pertain to a completely separate and distinctly different model.

- a. The officer tested and operated a speed detection device according to the manual of a separate and otherwise different unit model.
- b. The fact that the officer acknowledged that the device he used and the manual for which he referenced operational procedures pertain to a completely separate and distinct model, should have immediately resulted in the Learned Justice finding the use of the RADAR device unreliable.
- c. The defence relied upon R. vs Hofland (2011 ONCJ 40) to make this point. The decision in R. vs Hofland was based on the landmark cases of Regina v. Niewiadomski and R. vs Kololgi.

- d. Paragraph 82 of R. vs Hofland (2011 ONCJ 40) is material to this case as follows: “In reaching my decision in this matter, I have adopted the reasoning enunciated by Schnall J. in Regina v. Niewiadomski, supra. that the absence of full compliance with the testing and operational procedures with respect to the particular speed measuring device should make the speed measurement derived from the device suspect. Furthermore, in reaching my decision in this matter, I am persuaded by the reasoning articulated by Hourigan J. in Regina v. Kololgi supra. as follows: “Compliance with the manufacturer’s requirement for enforcement is an essential element because only with strict compliance to the manufacturer’s mandatory specifications can the Court be assured of the reliability and the accuracy of reading obtained through the operation of the device beyond a reasonable doubt”.”
- e. The Learned trial Justice, recognized the discrepancy between the device used and the fragment of the manual given as disclosure, and should have found that the testing procedures of the device could not be reliable beyond a reasonable doubt, therefore any reading obtained should have been weighted as suspect.

53. R vs W.(D.) – Unfamiliarity with the range issue.

- a. The officer stated he set the range for the radar to the maximum range and that the beam on that setting travels in infinity.
- b. The officer stated it’s possible there could have been other vehicles in the beam but he didn’t see any.
- c. The points above alone deserve some comment from the Learned Justice in his decision.
- d. The fact that the RADAR beam travels to infinity means the device could be tracking any number of things far out of the sight of the operator. This should have raised some doubt as to the reliability of the reading obtained.
- e. The possibility exists that the officer erred in his assessment of the capabilities of the RADAR, but the manual was not provided, therefore, the defence could not reliably explore this issue further, or test the officers familiarity of the device used.

54. Trial Fairness – The Learned Justice failed to properly consider the courts duty to ensure a fair trial. The Learned Justice acted unfairly to the agent for the accused as follows:

- a. Referencing the transcript, The Court repeatedly interfered with the defence’s ability to setup and proceed with a cross examination of the single witness officer.

- b. The Court improperly prompted the prosecution to amend the charge the accused was facing to a higher speed, according to the decision in *York (Regional Municipality) v. Winlow*, 2009 ONCA 643.
- c. With regard to the action of “amending up” the speed of the charge on the Certificate of Offence to match the testimony of the officer, the court failed to consider the reliability of the evidence in the first place. The court should have found, according to the caselaw presented in *R. vs Hofland*, that the evidence of the use of the RADAR device was insufficient to support a conviction, much less an “amendment up” to a higher rate of speed. The prerequisite of being able to sustain a conviction is material to the practice of “amending up”, and is referenced in paragraph [67] of *York (Regional Municipality) v. Winlow*, 2009 ONCA 643.

[67] Obviously the court can "amend up" a certificate only if the evidence supports the amendment.

Remedy Sought

55. The appellant seeks to have the finding of guilt against Ms. SHERK overturned and for this Honourable Court to find the appellant “Not guilty” for the following reasons:

Disclosure

56. The appellant, prior to trial, put great effort into attempting through all reasonable means to secure disclosure in a fair and timely fashion.
57. Securing complete disclosure with regards to the manual of the speed detection device used, is essential to being able to put forward a competent defence and answer to the charge, and would uncover, prior to trial, if indeed a defence exists.
- a. The prosecution relies on the use of a speed measurement device in order to secure a conviction. Without access to the complete manual for the device, the ability for the defence to put forward a defence is severely impaired since there is no basis to ensure that the officer is properly using the device according to the manufacturer’s specifications.
58. Access to the manual of the speed detection device in past trials has provided information with regards to:
- a. Proper use of the device.

- b. Proper techniques for testing before and after a speed measurement to ensure accuracy
 - c. Situations to be aware of that can cause errors or otherwise spurious readings.
 - d. Situations where a speed measurement result should not be used in an enforcement action.
59. Since access to the manual is critical to the police to be able to familiarize themselves with the operational techniques of the device, the same degree of access should be afforded to the defence in cases where a defendant wishes to challenge the evidence of an officer in trial.
60. Having access to this information can also speed up the court process in Provincial Offences Court since it would be possible to demonstrate to the prosecution where evidence in disclosure is deficient, and thus save the time of trial with an appropriate withdrawal or perhaps lowering of the charge in the circumstances, depending on the issue raised prior to trial.
61. The disclosure was not provided under the premise that providing the disclosure would result in the prosecution furnishing a defence for the accused. Specifically the prosecution states on Page 5 line 16 of the transcript: "If this was the case on every radar case, we would spend probably eight or 10 hours, just putting together evidence and then sending it out, and we'd be building a case; there wouldn't be any need to have anybody do a defence. The Crown would be doing it for them. And that's not what the process is all about."
62. With technology today, specifically, the ubiquity of email and the ability to instantly reproduce documents in Portable Document Format, furnishing the accused with a copy of the manual used in an enforcement action can be done in a matter of seconds and without cost. There is no paper to provide, there is no inventory to keep, there is no postage to pay, there is no fax toner to use and there is otherwise no reproduction cost involved. As a matter of fact, it would have been easier and cheaper to provide the entire manual to the appellant in PDF fashion as oppose to the hardcopy whisps of the manual that were provided.
63. There is natural precedent for this option. The legal system is already heavily supportive of the use of PDF documents, as caselaw is published on the internet and accessible by members of the public in PDF format. Members of the public along with the legal community routinely use CANLII and other legal document repositories for information. There is no reason why officers cannot provide disclosure in the same fashion, or to at least make the manual of the device they used, available for scrutiny in those relatively rare cases where a speeding case goes to trial.
64. Similarly to video remands, there might be some sort of protest or objection to conducting business using the relatively common tools such as PDF documents that are available to everyone. However, it's within the scope of this appeal to object at the lack of disclosure

provided in this case, as well as assert the right to have disclosure provided in a fair and timely fashion, as required in *R. vs Stinchcombe*.

65. In his decision, the Learned Justice on page 45 line 24 states: "There is no evidence to the contrary that the device is not working properly, and in fact the officer did testing both before and after." The defence respectfully submits there should have been more to the evidence than just that the device was properly tested. Ensuring the device was properly functioning and ensuring the device was properly used, according to the manufacturers specifications should have been allowed by virtue of disclosing the manual.

Fair Access To Justice

66. Access to justice can be and often is a time-consuming and costly affair for the average individual.
67. The Learned Justice failed to appropriately assist the accused. Libman J. states in *R. v. Rijal*, 2010 ONCJ 329, paragraph 1. "...The justice's duty to an unrepresented defendant to ensure that he has a fair trial and that his defence "is brought out with its full force and effect" (*R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont.C.A.) at 347) was not met. As a result, the appeal must be allowed, and, given the history and nature of these proceedings, an acquittal entered in place of the conviction imposed by the trial justice."
68. Citing *R. v. Rijal*, supra, paragraph 54, Libman J. states: "... The underlying philosophy of the Provincial Offences Act is such as to encourage persons to personally represent themselves at trials of provincial offences. In the spirit of the Statute, Judges and Justices presiding in those courts should approach the proceedings with tolerance and understanding towards such unrepresented persons and should permit certain latitudes in matters of procedure and law, provided no offence be done to basic principles of law and evidence. Defendants are frequently uncomfortable and occasionally awed in courtrooms. Some will enlist the assistance of a friend or a relative to "speak" for them and the same consideration ought to be extended to such an agent."
69. Citing *R. v. Rijal*, supra, paragraph 55, Libman J. states: "The Ontario Court of Appeal has also made it clear that the Provincial Offences Act was "intended to establish a speedy, efficient and convenient method of dealing with offences" under provincial statutes: *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at 552. However, it was not, cautioned MacKinnon A.C.J.O., "intended as a trap for the unskilled or unwary but rather, as already stated, as an inexpensive and efficient way of dealing with, for the most part, minor offences."
70. Having been told by the presiding Justice to get disclosure at "The Library" (Transcript Page 4, line 14), is hardly fair or helpful to the accused. It was the start of a trial wrought with

interference and unfairness to the defence, necessitating the much larger costs of an appeal, and potentially the jeopardy of having to take more uncompensated time off from work to attend another trial.

71. The defence is always in a state of David vs Goliath, in that the means of the defence are meager, compared to the inexhaustible time and funding resources of the prosecution.
72. To date, the defence of Mrs SHERK has necessitated the retention of a legal professional to take the case to appeal. The costs associated with the necessity for appeal, when compared to the charge itself – one of the lowest in the form of seriousness in Provincial Offences – has resulted in an unfair burden on the defence, which has greatly exceeded, many times over, any penalty Mrs SHERK would be facing, had a fair trial been afforded, and a finding of guilt been made.
73. On the basis of trial fairness, it is respectfully submitted that in this case, the appeal should be allowed.
74. Should the Honourable Court allow the appeal, on the basis of costs already incurred to seek justice on this matter, it is respectfully submitted that substituting a verdict of “Not Guilty”, would be appropriate.

Caselaw

75. R. v. Rijal, 2010 ONCJ 329 (attached).
76. R. v. Hofland, 2011 ONCJ 40 (attached).
77. York (Regional Municipality) v. Winlow, 2009 ONCA 643 (not provided since the ability to “Amend Up” is not being challenged. It is the evidence required to sustain a conviction which is being challenged, prior to “Amending Up” a speeding charge).

ONTARIO COURT OF JUSTICE
(TORONTO REGION)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MOHAMOD RIJAL

Appellant

Vartan HS Manoukian, for the appellant
Iwona Stamicar, for the respondent

On appeal from the conviction entered by Justice of the Peace J. Cottrell of the Ontario Court of Justice, on 16 December 2005, at Toronto, Ontario

Heard: 12 July 2010; Released: 9 August 2010

REASONS FOR JUDGMENT

Libman J. : -

Introduction

[1] Like some persons in the province of Ontario who are given a certificate of offence and go to trial under Part I of the *Provincial Offences Act*,¹ Mr. Rijal chose not to have any legal representative appear on his behalf. Instead, he conducted his own defence. As an unrepresented defendant, he appeared in court on the trial date where he met his judge and the prosecutor, as well as the officers who gave him a ticket for failing to stop for a school bus while he was driving his taxi. However, the justice of the peace hearing the case did not address the appellant before the trial started, and gave him no explanation of the process which followed. This lack of assistance resulted in the appellant not being

given sufficient guidance throughout the trial, such that the justice's duty to an unrepresented defendant to ensure that he has a fair trial and that his defence "is brought out with its full force and effect" (*R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont.C.A.) at 347) was not met. As a result, the appeal must be allowed, and, given the history and nature of these proceedings, an acquittal entered in place of the conviction imposed by the trial justice.

[2] In coming to this conclusion, I wish to explain why I do not share the concerns expressed recently by my brother, Justice Bellefontaine, in *R. v. Saeed*, 2010 ONCJ 251, whom in a decision concerning provincial offences trials of unrepresented defendants, stated at para. 10 that such trials would be unduly lengthened if the "accepted principles in a criminal trial" with respect to giving guidance to defendants without legal representation, applied to proceedings under Parts I and II of the *Provincial Offences Act*. I do not think, with respect, that justices of the peace should be constrained by the time it takes to ensure that an unrepresented defendant receives a fair trial. To the contrary, trial justices are under a duty to ensure that parties who defend themselves without legal representation do have a fair trial, even if the time that "the trials are scheduled for and usually completed to the conclusion of judgment and sentencing in 15 minutes" (*Saeed*, para. 2) is exceeded. The length of time required for giving meaningful assistance to unrepresented defendants who are charged with provincial offences must not be subject to arbitrary time limits of no precise duration. Trial justices, in other words, should not feel compelled to render less assistance to a person who chooses to defend himself/herself for a Part I or Part II offence, rather than one under Part III, on the basis that there is less time for fairness.

[3] Stated shortly, providing meaningful assistance through the trial process to an unrepresented defendant under the *Provincial Offences Act*, so that his/her defence is brought out with its full force and effect, should neither be subject to time constraints nor depend upon the nature of the provincial offences proceedings in question.

Circumstances of the Offence and History of Proceedings

[4] The appellant was given a ticket on 3 February 2005 for failing to stop his taxi as it approached a school bus, contrary to s.175 of the *Highway Traffic Act*.² The offence was alleged to have taken place at 11:23a.m., on Eglinton Ave East and Rosemount Drive, in the City of Toronto. The set fine for the offence was \$405, with a total payable of \$500. This amount represents the maximum fine permitted, at the time, under Part I of the *Provincial Offences Act*.³ It also carries six demerit points, which is the second highest number of demerit points available for a traffic infraction, thereby putting the appellant's offence in the same category as careless driving, stunt driving, and speeding 50 km/h or more.⁴

[5] Mr. Rijal filed his Notice of Intention to Appear in court on 16 February 2005. Six months later, on 11 August 2005, the clerk of the court issued the Notice of Trial to the appellant. It gave him a trial date of 27 October 2005, at 1:30p.m. However, this document mistakenly referred to the charge as being for the offence of failing to report

damage, contrary to s.175(1) of the *Highway Traffic Act*; the section number is also in error. This clerical mistake, though, caused the appellant to be confused as to the nature of his trial, as will be apparent from the very first words he uttered after entering his not guilty plea once the proceedings commenced.

[6] On 27 October 2005, the appellant duly appeared for his day in court. He intended to defend himself and was ready for his trial. As the original court documents have gone missing, the events that took place on this date may only be gleaned from a photocopy of the back of the certificate of offence. It appears that the matter could not be reached, and the trial was adjourned until 16 December 2005 at 9:00a.m.

The Appellant's Trial

[7] On the re-scheduled date for trial, 16 December 2005, Mr. Rijal appeared in court. Once again he had no legal representation. The opening remarks of the justice of the peace, clerk of the court, prosecutor and appellant, prior to the calling of the first witness at the trial, are as follows:

Ms. Stoeckl: Thank you Your Worship, if we can begin a trial matter, line 9 Mohamod Rijal.

The Court: Good Morning sir what is your name please?

Mr. Rijal: My name is Mohamod Rijal.

The Court: Thank you.

Ms. Stoeckl: And you are ready to proceed with your trial today sir?

Mr. Rijal: Yep.

Ms. Stoeckl: Thank you. Seeking arraignment please Your Worship.

Clerk of the Court: Mohamod Rijal is charged on the 3rd day of the second month, in the year 2005 at 11:23a.m. at westbound Eglinton Avenue East, east of Rosemount Drive in the City of Toronto, did commit the offence of Fail to Stop for School Bus Meeting, contrary to the *Highway Traffic Act*, section 175(11). How do you plead to this charge sir, guilty or not guilty?

Mr. Rijal: Not guilty. Actually I receive a different letter from that one ...

The Court: Thank you for the plea, sir.

Clerk of the Court: Just have a seat.

Ms. Stoeckl: Thank you. 65454. I'll ask the other officer to step outside Your Worship...

The Court: Yes, if you would please ...

Ms. Stoeckl: ... in terms of fairness...

The Court: ... thank you very much sir.

Ms. Stoeckl ... if there is an exclusion of witnesses, thank you Officer Momeni.

Clerk of the Court: Sir, you can just have a seat.

The Court: Just have a seat sir.

[8] Constable Ireland was the first witness to testify. No explanation was provided to the appellant beforehand as to the procedure for asking questions or the manner in which

witnesses would be called and examined, or how the trial was to be conducted at all. In fact, when the prosecutor asked for permission for the officer to refer to his notes, the justice did not address the appellant and merely stated, “Constable Ireland, feel free to use refer to your notes as required sir.”

[9] The officer proceeded to describe how the school bus in question was stopped in the curb lane of Eglinton Avenue East, with its red lights flashing, but that the appellant passed the bus in the centre lane without stopping. After describing how his was the only motor vehicle not to pull over for the bus school, the prosecutor had Constable Ireland confirm that he never lost sight of the appellant’s car, and that he was satisfied with the appellant’s identification.

[10] At the conclusion of the officer’s examination in chief, the following exchange occurred:

Ms. Stoeckl: Thank you. No further questions Your Worship for this officer.

The Court: Thank you. Mr. Rijal ...

Mr. Rijal: Yes.

The Court: ... do you have any questions for to ask the police officer at this time sir?

Mr. Rijal: Yeah, ahh.

The Court: Do you, yes or no?

Mr. Rijal: Yes.

Clerk of the Court: Stand up please sir.

The Court: Okay, please stand.

[11] By way of cross-examination, the appellant asked these questions:

Q. The first question I am asking the officer is that, I received this letter from the court that I have been charged on the 3rd day of February 2005, at 11:23a.m. at westbound Eglinton Avenue East; you did commit the offence of fail to Report damage contrary to the *Highway Traffic Act*, Section 175(1).

The Court: Pass that over to the prosecutor, please, I noticed that myself. There are two documents in they both make the same statement.

Ms. Stoeckl: As the Court is well aware – if I can address the issue, Your Worship, the charging document before the Court is the certificate of offence, the defendant does have his notice as well stating what the charge is before the court, as you know this is just a notice to the defendant to compel him to court, it is not the charging document before the Court.

The Court: The Court is fully aware of that. Sir, the charge before the Court is the charge of which the officer gave you a copy of the Part I certificate number 82774300 that is the official document before the Court sir, even though the receptionist or secretary or a clerk within the court, in fact typed the wrong charge. The charge with which you are charged is the

correct charge which is before this Court that being Fail to Stop for School Bus/Meeting contrary to the *Highway Traffic Act*, section 175 (11).

Continue with your questions sir.

Mr. Rijal: If I were charged on that offence actually – that’s true I was traveling and driving a taxi.

The Court: Where is your question sir? You have not been sworn in yet, the officer has been sworn in, this is your opportunity to ask any questions in your defence.

Mr. Rijal: Officer. Did I stop or I didn’t stop on to ..

Clerk of the Court: You are going to have to speak up sir; I need to be able to hear you for the recording.

Mr. Rijal: Okay, officer when you came to me, should I be traveling or I was stopping, because I stopped at ...

The Court: Nope, you are making a statement sir, this is your chance for question, you can do a preamble, briefly and then ask the question but I don’t want you making statements.

Mr. Rijal: I have no other question sir.

The Court: Are you positive?

Mr. Rijal: Yeah.

The Court: Okay.

Mr. Rijal: But ..

The Court: Thank you.

Mr Rijal: ... I’d like to make a statement.

Ms. Stoeckl: Thank you, no re-direct, thank you. If can call Officer Momeni please?

[12] The second witness, Constable Momeni, was also permitted to refresh his memory with his notes, without any explanation to the appellant of the procedure being followed, or asking whether he wished to ask any questions about the officer’s notes. Constable Momeni proceeded to state how he observed Constable Ireland pull over the appellant’s motor vehicle after it passed the stopped school bus, notwithstanding that all of its equipment had been activated.

[13] On this occasion, the appellant did ask a series of questions to the witness. He wanted to know how many other vehicles had gone by the stopped school bus ahead of his taxi cab. The officer replied that he was the last vehicle to pass it. He then asked the officer if he was sure that he had passed the school bus. The witness replied, “Oh yes sir, I have no doubt. I was watching you.” The appellant’s remaining questions were to ask which way he was traveling on Eglinton Avenue, and where the school bus was located.

[14] At the conclusion of the appellant’s questions, the prosecutor indicated that she had no questions in “redirect,” and closed her case. The justice of the peace then addressed Mr. Rijal:

The Court: Thank you. Mr. Rijal, do you wish to call any evidence sir?

Mr Rijal: I suppose ...

The Court: Yes or no sir? You wish to call any evidence ..
 Mr. Rijal: Yes I can call evidence.
 The Court: Okay. Up you come, please sir.
 Mr. Rijal: I don't have right now.
 The Court: You don't have what right now sir? You made a statement there about right now. I am wondering what you said.

[15] The appellant proceeded to be affirmed. His evidence in chief commenced in this manner:

The Court: Feel free to give evidence sir, just bear in mind that you may be cross-examined.
 Mr. Rijal: Okay.
 The Court: Feel free.
 Mr. Rijal: As I told you before my – I been received with this letter, indicating that I was charge it was a different charges, which is different from which I ...
 The Court: We already clarify that for you sir ..
 Mr. Rijal: Yes I understand.
 The Court: .. the official document is 827774300, which is Fail to Stop for School Bus/Meeting contrary to the *Highway Traffic Act*, 175(11), we've already stated that sir; and is the document before the court, the other document may say something different, however that document is not an official document.
 Mr. Rijal: I was traveling east bound on Eglinton, driving a taxi cab, plate number AMPC 956..

[16] Mr. Rijal went on to explain that there were a number of cars ahead of him, but that he did not pass the school bus. He maintained that he had not passed it, although the other cars ahead of him did so. When he attempted to give evidence as to his conversation with the officer who pulled him over, the prosecutor objected, leading to this exchange:

Ms. Stoeckl: I am gonna object...
 Mr. Rijal: ... that I attempted, I tried to stop.
 Ms. Stoeckl: ... further to any statements that ...
 The Court: It's hearsay. I am fully aware...
 Ms. Stoeckl: Yes.
 The Court: .. hearsay. I am trying to get one word from this gentleman ...
 Ms. Stoeckl: I know Your Worship, and that why..
 The Court: ... that he had said seven times ...
 Ms. Stoeckl: ... I haven't been ...
 The Court: Yeah.
 Ms. Stoeckl: .. objecting.
 The Court: I am trying to get one word from him, that he has used seven times and I still don't understand what the word is. You keep saying that the officer stopped you and he something to you.⁵

Mr. Rijal: He said you tried to stop, you attempted to stop.

The Court: No, that's not the word I keep hearing, sounds to me like bullied, but I'm...

Mr. Rijal: No, I was not bullied.

The Court: ... Sure.

Mr. Rijal: He came to me and he told me that I attempted to stop the school bus.

The Court: Okay.

Mr. Rijal: I tried to stop the school bus, but I failed to stop, but in that case I was already in a stop position, I didn't pass the school bus and the officer knows that.

The Court: Okay. Any cross-examination?

Ms. Stoeckl: Yes.

[17] Without any explanation to the appellant as to the procedure that was about to follow, the prosecutor proceeded to ask her questions. The first question was to have the appellant acknowledge that the school bus was on the south side of Eglinton, and that, secondly, the officer had pulled him over. He maintained, however, that he did not pass the school bus, and that he had stopped his vehicle by the time the officers came over to speak to him.

[18] The prosecutor concluded her questions shortly afterward. The Court then addressed the appellant as to what would happen next:

Ms. Stoeckl: Thank you, no further questions Your Worship.

The Court: Thank you sir, do you have further witnesses to call?

Mr. Rijal: I don't have witness's sir ...

The Court: Okay.

Mr. Rijal: ... at this time.

The Court: Thank you very much, round in front please. Submissions, please, Mr. Rijal final statements to the court sir.

[19] There was no further explanation as to what was meant by "submissions" or "final argument", or asking the prosecutor to address the Court first so that the appellant would know what the prosecutor's position was. The appellant made this statement to the Court:

Mr. Rijal: Ah, I believe that I – I believe that I didn't pass the school bus. I did the best way to stop, I stop from the school bus, look at the children getting – unloading the school bus and - I believe I'm not guilty.

The Court: Any further statement?

Mr. Rijal: No.

[20] The prosecutor then made her submissions to the Court, stating that the prosecution had presented "a prima facie case and a case beyond a reasonable doubt." She asked that a conviction be imposed. The trial justice did not ask the appellant if he wished to say anything in reply, and instead delivered his reasons for judgment, finding him guilty. In

doing so he observed that the appellant did not “have the foggiest notion what was going on” at the time he approached the stopped school bus, and that he did not believe the appellant’s testimony as he appeared confused as to which way he was traveling.

[21] Having found Mr. Rijal guilty of the offence of failing to stop for the school bus, His Worship asked the prosecutor for submissions as to penalty. She declined to make any, stating that she would “leave it in the Courts hands.” The Court then proceeded to impose the set fine of \$405 without asking the appellant if he wished to say anything on sentencing.

Providing Assistance to Unrepresented Defendants in Provincial Offences Proceedings

Overview

[22] The task that a court faces when conducting a provincial offences proceeding where the defendant is unrepresented is a challenging one, notwithstanding that it is a quasi-criminal offence, and not a true crime, that is the subject of such a trial. As Harris J. observed in *R. v. Sholtens*, 2008 ONCJ 282 at para. 16, it requires the trial justice to engage in a “complex balancing act that must be undertaken between impartiality and the judicial obligation to provide assistance to the unrepresented.”

[23] Justice Harris proceeded to explain this quandary as follows:

This case highlights one of the fundamental weaknesses of the adversarial system – its underlying assumption that both sides of the litigation, the adversaries, are evenly matched thus permitting the impartial decision-maker to remain above the conflict. When that assumption is untenable because the defendant is unrepresented and the matter involves some complexity, every step a court takes to assist the unrepresented party tends to erode the confidence of the opposing litigant in the court’s fairness and impartiality. Jurists who preside in courts where most accused are unrepresented, find themselves on the horns of this insoluble dilemma on a daily basis.

[24] Of course, the challenge posed by an unrepresented defendant is one that trial courts, of every level across the province, encounter on a not infrequent basis. With respect to criminal charges, the Ontario Court of Appeal has provided trial judges with guidance as to the appropriate level of assistance that should be provided to unrepresented defendants in such cases.

[25] In a decision rendered over twenty years ago, *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347, the Ontario Court of Appeal stated:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him

throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must be of necessity a matter of discretion.

[26] The Court went on to observe that a judge is not required to become the defendant's advocate.

[27] Subsequent decisions of the Court of Appeal have echoed these comments. In *R. v. Taubler* (1987), 20 O.A.C. 64, the Court opined that while a trial judge has a duty to ensure that an unrepresented accused has a fair trial, that duty only extends to doing what is "reasonable under the circumstances." The judge cannot be the advocate for the defendant and remain an impartial arbiter at the same time. Neither does the court's duty extend to providing the accused, at each stage of the trial, the kind of advice that counsel would be expected to provide if the defendant were represented by counsel.

[28] In *R. v. Tran*, [2001] O.J. No. 3056 at para. 33 (QL) (C.A.), Borins, J.A., for the Court, specified the type of matters upon which the trial judge should be expected to give assistance to an unrepresented defendant. After noting that the defendant appeared to be confused as to how he should plead to the charge, and was thus "ignorant of the most basic stage of his trial – his arraignment", the Court stated that it was incumbent upon the trial judge to recognize that the task of conducting a fair trial for this particular unrepresented defendant would require a "significant degree of instruction and vigilance on his part." Justice Borins proceeded to state:

At this stage of the trial, to satisfy the minimum requirement of providing assistance for the appellant, the trial judge should have explained to the appellant the course which the trial was to take, beginning with his arraignment, followed by the Crown Attorney calling her witnesses, his right to cross-examine the witnesses and to object to irrelevant evidence, his right to call witnesses and to testify, the risks inherent in testifying and not testifying, and finally, the right to make closing argument.

[29] The *Tran* judgment was applied in *R. v. Gonsalves* (2005), 196 O.A.C. 83 at para. 3 where the Court found that the trial judge had failed to provide the unrepresented defendant "with the minimum level of assistance as described in *Tran*." By way of example, it was noted that at the outset of the trial no explanation was provided to the defendant of the court proceedings and how they would unfold. Neither did the trial judge tell the defendant he was entitled to object to evidence led by the Crown, nor adequately explain the purpose of cross-examination of a witness and how to conduct it. The purpose of *voir dire*s respecting the police officers' and security persons' notes was not explained. Finally, the trial judge did not explain the factors an accused should consider before testifying on his own behalf. In the result, the defendant did not receive a fair trial.

Provincial Offences Proceedings for Part III Offences: Applying the *McGibbon* Standard of Assistance to Unrepresented Defendants

[30] While the *McGibbon* decision, and those that follow it in the Ontario Court of Appeal respecting trials of unrepresented defendants, involve criminal charges, it has been applied on many occasions to provincial offences trials involving persons who defend themselves without legal representation. Moreover, it has been found in several such instances, that a fair trial did not take place on account of the lack of a minimum level of assistance provided by the trial justice.

[31] These cases, while not reaching the level of the Ontario Court of Appeal, have firmly taken root and dot the provincial offences landscape. Accordingly, it is beyond question that a trial justice conducting a provincial offences proceeding has a duty to provide minimal assistance to an unrepresented defendant to ensure that there is a fair trial, and that the person's defence is brought out with its full force and effect. What is not so clear, however, is the extent that such assistance should take.

[32] Let me illustrate with a number of decisions that have considered the scope of the trial justice's duty to conduct a fair trial in provincial offences cases where the defendant has been unrepresented.

[33] In one of the earliest cases to consider this issue, *R. v. Messina*, 2005 ONCJ 560, the unrepresented defendant was convicted of the *Highway Traffic Act* offences of careless driving and failing to remain at the accident scene. The charges were laid under Part III of the *Provincial Offences Act*. It was conceded by the prosecutor that the presiding judicial officer has a "heightened duty" in such a case to "ensure the fairness of the trial process, a concession accepted by Bovard J. as being in keeping with the *McGibbon* decision. (*Messina*, para. 28).

[34] Justice Bovard went on to set out what he considered would be reasonable to do in most provincial offences trials of unrepresented defendants so as to ensure that "the spirit of *McGibbon* is followed":

- Ask why the person is unrepresented. And if they want to be represented, find out if there is any reasonable thing that could be done to assist them in getting representation. For example, granting an adjournment to retain counsel or an agent.
- If the Court concludes that the trial can proceed fairly without representation,
 1. Determine if the defendant understands the charges and what the case is that he or she has to meet. Explain the charge and what the prosecution is required to prove.
 2. Explain that the Prosecution has the onus of proof and that the standard is proof beyond a reasonable doubt.

3. Explain briefly the mechanics of the trial. For example, the right of each side to call witnesses, introduce documentary evidence, object to evidence adduced, the choice to testify or not, and that if the persons chooses to testify they will be cross-examined, and the right to make submissions at the appropriate junctures during the trial.
4. The same should be done if a *voir dire* is held. And if one is held, what a *voir dire* is should be explained.
5. Ask if the person needs pen and paper to take notes during the trial.
6. Explain the role of the Justice vis-à-vis the undefended person, that the Justice is there to ensure that he or she has a fair trial and can offer some guidance regarding the procedures of the trial, but cannot act as the person's advocate.
7. Ask if the person has any questions, and tell the person to ask if during the trial there is something that they do not understand.
8. Make an order for the exclusion of witnesses.

[35] Other decisions in the provincial offences appeal court, involving convictions of unrepresented defendants charged under the provisions of Part III, have given rise to similar sentiments. For example, in *R. v. Rodriguez*, [2010] O.J. No. 1665 (QL) (C.J.), the trial justice was found to have failed in her duty to ensure that the unrepresented defendant received a fair trial for careless driving. It was noted in this regard that the justice failed to explain to the defendant the court proceedings and how they would unfold, even though the defendant indicated he understood the “procedure of a trial.” However, it became evident, early in the proceedings, that in fact he did not. The trial justice did not tell the defendant that he was entitled to object to evidence led by the prosecutor, or the factors the defendant should consider before testifying on his own behalf. Neither did she explain the purposes of cross-examination of a witness and how to conduct it; the defendant had difficulty putting into questions the issues he wished to raise in cross-examination of the witnesses. Lastly, it was observed that English was not the defendant's first language, and the trial justice should therefore have assisted him in the proper formulation of questions.

[36] In another case, however, the defendant appeared to be a “well prepared and well informed self-represented litigant, who understood the issues and was familiar with the documentation”: *North Perth (Municipality) v. McTaggart*, 2009 ONCJ 710 at para.61. Accordingly, McKerlie J. found that, unlike in *Tran*, there was no indication that the defendants, who were charged with *Building Code Act* violations, did not understand the court process or the issues for trial. In fact, the justice made inquiries to ensure that they knew about their right to counsel, and had decided to proceed to trial without counsel. When the defendant made her submissions, the justice interrupted and made inquiries to ensure that she understood she had a right to call evidence.

[37] Justice McKerlie went on to find that the trial justice provided the minimum level of assistance required by the self-represented litigants in the case, stating at para. 59:

It must be remembered that unlike the indictable criminal charges in *Tran*, this was a trial in Provincial Offences Court. As explicitly set out in section 2(1) of the *Provincial Offences Act*, the purpose of the Act is to replace the summary conviction procedure for the prosecution of provincial offences ... with a procedure that reflects the distinction between provincial offences and criminal offences.

Provincial Offences Proceedings for Part I Offences: Less Assistance for Less Serious Offences?

[38] The cases reviewed to this point respecting the duty of the trial justice to provide assistance to unrepresented defendants so as to ensure that there is a fair trial, and that the party's defence is brought out with its full force and effect, have concerned prosecutions under Part III of the *Provincial Offences Act*. However, there are also many instances where provincial offences appeal courts have ruled that there is the same obligation on justices presiding over Part I trials of unrepresented defendants.

[39] In *R. v. Zimmerman*, [2005] O.T.C. 301 (S.C.J.), Trafford J., in a prerogative remedy application, considered the trial justice's role in assisting an unrepresented defendant to bring a *Charter of Rights* application for unreasonable delay in a careless driving case where the matter was charged under Part I of the Act. He observed that the "statutorily mandated informality" of provincial offences proceedings "was not intended to mandate a significant departure from principles of natural justice or procedural fairness. Rather, such statutory informality merely provides the context within which the essential fairness of the proceedings is to be maintained." (*Zimmerman*, para. 20)

[40] Justice Trafford held that the trial justice had a duty to assist the defendant, an unrepresented litigant, in the conduct of his defence, including the presentation of the application under s.11(b) of the *Charter*. The trial justice, he pointed out, could have "easily described to the defendant at the outset of the application the need for transcripts of the prior proceedings or, as a substitute, an agreed statements of facts to properly rule on the application," doing so "in simple language, maintaining the impartiality of the Court and the appearances of justice, on the one hand, and, on the other hand, ensuring the orderliness and fairness of an unrepresented defendant's trial." (*Zimmerman*, para. 22)

[41] Making reference to the *McGibbon* and *Tran* decisions, Trafford J. observed at para. 23:

... the Courts emphasize the duty of a trial judge, in a criminal case, to provide assistance to an unrepresented defendant so as to ensure that his defence is brought out with full force and effect, keeping in mind that this duty does not require the trial judge to provide the sort of advice that could be expected of a fully-retained counsel. The spirit of these principles applies with equal force in the quasi-criminal proceedings under the POA, given their informality.

[42] In *R. v. Shinbin*, [2006] O.J. No. 3403 (QL) (C.J.), another careless driving prosecution under the Part I trial procedure resulted in a conviction of a defendant who lacked legal representation. Although the appeal was allowed on other grounds, Shamai J. rejected the argument that the trial justice did not provide sufficient assistance to the defendant. Indeed, assistance was provided to the defendant during his trial by both the justice of the peace and the prosecutor; during the testimony of the first witness the prosecutor interrupted the evidence to suggest that the justice urge the defendant to seek legal representation “in view of the seriousness of the incident.” Justice Shamai considered that while the assistance offered to the unrepresented defendant was “not at a standard of perfection, it was not bad either”. (*Shinbin*, para. 4).

[43] Similarly, in *R. v. Kulwant*, 2007 CarswellOnt 5751 (C.J.), it was noted at para. 5 that the trial justice explained the “mechanics of the trial” to the unrepresented defendant, including the procedure as to asking questions about the police officer’s notes, and his opportunity to give evidence in his own defence. It appeared, therefore, that the trial justice was “mindful of his obligation with an unrepresented defendant as he properly should be.”

[44] On the other hand, a conviction for speeding was set aside in *Durham (Regional Municipality) v. Singh*, 2008 CarswellOnt 3166 (C.J.) where the defendant was not provided “fulsome explanations for how the process worked.” As Devlin J. commented at para. 3, this was “particularly important given that he was representing himself.”

[45] In *R. v. Novelo*, 2009 ONCJ 346 at para. 6, Blouin J. made these observations in finding that the trial justice did not provide sufficient assistance to a person who defended himself on a charge of disobeying a stop sign:

Firstly, an adequate explanation of the trial process by the trial justice to an unrepresented defendant did not occur. In fact, there was no explanation. In my view, every defendant is entitled to be made aware, even in the most basic language, of the procedure involved in a trial. That explanation need not take more than a few minutes outlining the basic concepts of burden of proof, sequence of witnesses, relevant questions, and option of testifying or not. Here, there was no explanation.

[46] In the *Novelo* case, Justice Blouin made reference to the fact that the trial justice did not adequately deal with issues that arose during the trial, such as the defendant’s photograph evidence, and his option to testify or not. In particular, it was not explained to the defendant that he could rely on the position that the prosecutor had not proven beyond a reasonable doubt the prohibited act, as was its obligation, and that he did not have to testify.

[47] As for *Saeed*, a speeding case under Part I of the *Provincial Offences Act*, Justice Bellefontaine expressed the concern at para. 14 that “providing the full panoply of legal

information to a self-represented accused is inconsistent with the object of the legislation to provide speedy and efficient trials of these matters.” He continued:

These trials are overwhelmingly dealt with in an informal manner with self-represented accused by prosecutors who are not lawyers and in front of Justices of the Peace who are not lawyers. Detailed explanations of substantive and procedural criminal law are not in keeping with the nature of the proceedings. As the appeals and case law in this area continue to expand, each adding another requirement for Justices of the Peace to comply with, procedural complexity is eliminating any possibility of simple and efficient trial.

*

*

*

The practical reality is that given the time constraints that govern these trials, the imposition of a burden that meets the criminal standards will not be able to be met in the Provincial Offences courts. While this would not be determinative if the criminal standard of explanation was clearly required, I am reticent to interpret ambiguous law in a fashion that could require the government to double the number of trial justices at huge public expense thereby imposing legal obligations that are overwhelmingly ignored.

[48] Bellefontaine J. went on to explain that in order to have the “minimum assistance” provided to self-represented accused to meet the core objective of *R. v. McGibbon* and the cases following it, such that the presiding justice ensures an accused is able to bring out his intended defence with full force and effect, it was not necessary for the trial justice to “articulate to the accused any rules, procedures, rights or burdens that will assist the defence in raising a doubt about the Crown’s case.” (para. 15) Neither were “procedural explanations” required for matters including the right to object, or the right to not testify.

[49] On the other hand, the trial justice was required to explain “in basic and general terms appropriate to the case” the following: the right to cross examine witnesses; the right to call witnesses, including himself, in his defence, who may be cross-examined by the prosecutor; that any arguments he chooses to make at the completion of the trial must be supported by evidence; at the completion of evidence, explain the purpose of closing argument and give the accused an opportunity to make his arguments; assisting with questioning if it is needed to bring out the accused’s apparent defence; and prevent the prosecutor from adducing inadmissible evidence or asking improper or abusive questions.

[50] Justice Bellefontaine concluded at para. 18:

To be clear, setting out these minimal standards of explanation and assistance for self-represented accused does not detract from a justice’s obligation to ensure that the appropriate evidentiary and procedural

standards and burden of proof are met and complied with by the Crown. The obligation to follow standard court procedures, hold required *voir dire*s, prevent improper evidence from being led and applying the proper onus and burden of proof is still in place even if the duty to explain those matters to the accused has been lifted in Part I and Ii matters. The duty to provide a fair trial and allow an accused to make full answer and defence is fundamental and transcends any derogation of the duties to explain the court proceed to an accused.

[51] While the reasons of Bellefonatine J. in *Saeed* do not detract from the proposition that the trial justice conducting a provincial offences proceeding has a duty to ensure that the unrepresented defendant has a fair trial, and that his/her defence is brought out with its full force and effect, I am unaware of any other authority that suggests that this is to be done by less exacting means simply because the matter is governed by Part I of the *Provincial Offences Act*, as opposed to Part III.

[52] In my respectful opinion, there is no good reason for distinguishing between the trial justice's duty under a Part I or Part III proceeding as it relates to rendering assistance to unrepresented defendants. Indeed, I believe that the drafters of the *Provincial Offences Act*, as well as the courts in this province in interpreting it, have recognized the special role that trial justices play in dealing with those persons who come to this court without legal representation, but whose experience with the administration of justice in Ontario is so often informed through the lens of the *Provincial Offences Act*, regardless of the nature of the provincial offences proceedings in question.

[53] Writing at the time of the inception of this new statute, W. Douglas Drinkwater and J. Douglas Ewart, *Ontario Provincial Offences Procedure* (Carswell: Toronto, 1980) at 123-124 commented:

In most parts of the province, provincial offences proceedings will be segregated from proceedings in relation to criminal offences. Either separate courtrooms or separate appearance times can be used to accomplish this. Once a justice is sitting in a court containing only persons charged with provincial offences, it is expected that he or she will adopt a more relaxed attitude towards the defendants and the procedural formalities of trying them. This relaxed attitude, however does not apply to the offence-creating provisions themselves, to which full and fair effect must be given according to the ordinary principles of statutory interpretation.

[54] These comments were echoed by Justice Nadeau, who is credited by Drinkwater and Ewart as playing a role in the design of the legislation, in *R. v. Hill*, [1987] O.J. No. 1935 (QL) (Prov.Ct.) where he stated at 3:

The underlying philosophy of the *Provincial Offences Act* is such as to encourage persons to personally represent themselves at trials of

provincial offences. In the spirit of the Statute, Judges and Justices presiding in those courts should approach the proceedings with tolerance and understanding towards such unrepresented persons and should permit certain latitudes in matters of procedure and law, provided no offence be done to basic principles of law and evidence. Defendants are frequently uncomfortable and occasionally awed in courtrooms. Some will enlist the assistance of a friend or a relative to “speak” for them and the same consideration ought to be extended to such an agent.

[55] The Ontario Court of Appeal has also made it clear that the *Provincial Offences Act* was “intended to establish a speedy, efficient and convenient method of dealing with offences” under provincial statutes: *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at 552. However, it was not, cautioned MacKinnon A.C.J.O., “intended as a trap for the unskilled or unwary but rather, as already stated, as an inexpensive and efficient way of dealing with, for the most part, minor offences.”

[56] More recently, in *R. v. Winlow*, 2009 ONCA 643 at paras. 71-72, Laskin J.A., on behalf of the Court, made these observations in a case involving the power of a trial justice to grant the prosecutor’s request to “amend up” the speed that the defendant is driving, in order to conform with the officer’s evidence, where he/she pleads not guilty to speeding at the reduced rate alleged in the certificate of offence:

Justices of the peace and prosecutors should be especially sensitive to the question of prejudice. As they know better than most, many defendants who appear in traffic court are self-represented; many have little or no knowledge of the justice system; many are poorly educated or have but a rudimentary knowledge of English. As McKinnon A.C.J.O. said nearly 30 years ago, in words still true today, “the *Provincial Offences Act* is not intended as a trap for the unskilled or unwary”: see *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 at p.562.

Special care must be taken to ensure that POA proceedings are fair to defendants. Where the prosecutor seeks to “amend up”, the prosecutor and the court should ensure, at a minimum, that the defendant understands the amendment, understands the consequences of the amendment and is given a reasonable opportunity to make submissions on why the amendment should not be granted.

[57] In light of these statements as to the philosophy which illuminates provincial offences proceedings, and especially trials of persons who choose to defend themselves, it seems to me that omitting to give guidance on key aspects of the trial process and procedure so as to limit the time for justices to provide minimal assistance to unrepresented defendants in Part I matters only, is akin to imposing restrictions on the number of witnesses for the prosecutor to prove its case, or questions for the defence to ask in cross-examination.

[58] It is one thing to provide an estimation of the length of trial for the purposes of scheduling; it is another to impose limitation periods in order to ensure that the proceedings conclude within a pre-set time. Justices conducting provincial offences proceedings should not be expected to give a two minute warning because of the length of the time that it takes to ensure that the unrepresented defendant receives a fair trial.

[59] Moreover, it is not a workable distinction to mandate, as it were, “premium assistance” for unrepresented defendants in Part III proceedings, but only “economy assistance” for those under Part I. As the cases above demonstrate, offences such as careless driving might be the subject of proceedings under either Part I (*Zimmerman, Shinbin*) or Part III (*Messina, Rodriguez*), depending upon the charging decision of the officer. To permit less assistance in the former, merely because the court has fewer options on sentencing for the same offence, seems an arbitrary distinction.

[60] The trial process involving this unrepresented appellant exposed him to the maximum fine of \$500 permitted at the time for Part I proceedings, and six demerit points. For professional and novice drivers alike, the consequences of such a conviction could be significant, and the antithesis of a minor offence. Where, one might ask, should the line thus be drawn for providing less meaningful assistance under Part I if cases such as this one are deserving of more than the usual Part I standard of assistance: for fines of \$500 or less, now that the maximum penalty has been raised to \$1,000? In cases of no demerit points? Where there is no moving violation, such as improperly displaying a parking permit, but the matter is not prosecuted under Part III, as was the case in *Sholtens*? There is simply no bright line as to which of these provincial offences proceedings merits more or less meaningful assistance for the unrepresented defendant, and courts ought not to impose one.

[61] To be sure, the time required for hearing a case to its conclusion impacts on trial scheduling for the immediate and other cases. However, the justice’s statement to a defendant who represents himself/herself at the outset of the trial is only one part of the proceedings. To limit the time for same so as to shorten the proceedings to their usual allocation of 15 minutes, will inevitably result in a false economy of saved time, as important matters such as understanding the arraignment and process of the trial will neither be adequately explained, nor likely understood. On the other hand, a statement by the trial justice before the trial commences will have the effect of focusing the proceedings, not lengthening them, while permitting the unrepresented defendant to know what is properly the subject of the trial, and what matters should therefore be addressed in the evidence, including the defendant’s own testimony.

[62] As the instant case demonstrates, by not instructing the unrepresented defendant as to the trial process, Mr. Rijal from the moment of the arraignment through his cross-examination and testimony in chief, wished to address the court as to the erroneous information contained in his trial notice, a matter that was legally irrelevant. Moreover, while this issue had no bearing on the merits of the case, it exposed the appellant to being cross-examined by the prosecutor. The justice gave no warning to the appellant as to the consequence of testifying until after being sworn in, and then drew an adverse inference

from his evidence. Such persistent lack of assistance throughout the proceedings, and the results that flowed from it, is a recipe for a miscarriage of justice.

[63] In summary, I consider that there is no basis for holding that trial justices conducting proceedings under Part I under the *Provincial Offences Act* should render less assistance to unrepresented defendants than under Part III. There is no compelling reason in either law or logic for doing so. The overarching issue for the trial justice, in every proceeding, is to ensure that the unrepresented defendant receives a fair trial, and that his/her defence is brought out with its full force and effect. It should be left to the trial justice, who has the advantage of seeing and hearing the unrepresented defendant in person, to determine the length of time that is required for doing so.

[64] As for the parameters of such assistance, I commend the approach put forth by Bovard J. in *Messina*. After verifying that the unrepresented defendant wishes in fact to proceed to trial, the justice should determine during the course of his/her opening statement to the person whether there are circumstances such as language comprehension or the party's sophistication that require a greater degree of vigilance to ensure that there is a fair trial. Conversely, if it appears the party understands the court process and is prepared to conduct one's own defence, the justice may consider that the trial should proceed, with further explanations at appropriate junctures, such as prior to calling on the defendant to ask questions in cross-examination, or at the conclusion of the prosecution's case when deciding to call a defence, as well as making closing submissions.

[65] I wish to emphasize that the trial justice's duty to provide assistance to the unrepresented defendant throughout the proceedings is a continuous one. It does not end with the justice's statement, at the outset of the trial, as to the issues set out by Justice Bovard; there is no top ten list for unrepresented defendants, to be repeated one time only. Trial justices should be mindful that as the proceedings unfold, legal issues may arise, as occurred in the instant case: eg., the prosecutor's request for a police officer to be permitted to refer to a notebook for the purpose of refreshing the witness' memory; objections by the prosecutor to the defendant's evidence as hearsay. It is important that such matters are properly explained so that the unrepresented defendant is made aware of his/her right to address the Court, and to make submissions and/or indicate a position, on issues that the trial justice is required to make a procedural or evidentiary ruling. In addition, the trial justice may be called upon to help the party frame his/her questions in a way that that will not be objectionable, or focus the witness's testimony on matters that are relevant to the trial proceedings.

[66] To repeat the words of Laskin J.A. in *Winlow*, at para. 71, a case involving the trial of a party who conducted his own defence under Part I of the *Provincial Offences Act*, "Special care must be taken to ensure that POA proceedings are fair to defendants. "

Application of Law to Facts

[67] The appellant in this case was not given the requisite minimal level of assistance by the trial justice so as to ensure he received a fair trial, and that his defence was brought

out with its full force and effect. Indeed, there was heightened need for vigilance by the trial justice with respect to providing such assistance, given the appellant's obvious lack of understanding of the trial process, as evident from the arraignment, which may have been exacerbated by his not speaking English as his first language.

[68] Indeed, no explanation was provided to the appellant of the proceedings at all. His plea of not guilty made reference to the erroneous information contained in the trial notice, as did his subsequent questions to the police officers, as well as his own evidence. He was not provided with any basic explanation of his right to make objections, or to ask questions in cross-examination, including when the police officers asked to refer to their notebooks to refresh their memories in testifying; the appellant was unable to successfully pose one question in cross-examination to the first witness who testified at his trial. In particular, the appellant was not afforded any explanation as to his right not to call any evidence and instead argue that the prosecution had not proven its case, and that should he decide to testify he could be cross-examined by the prosecutor. Neither was he instructed as to the purpose of making submissions at the conclusion of the trial, nor to make any reply to the prosecutor once he heard her submissions after his.

[69] A review of the record of the appellant's trial proceedings compels this conclusion. While his trial may well have been held within its allocated 15 minutes, too little time was spent determining that the appellant understood and meaningfully participated in the process. This reflects the fact that he was not provided with the minimal level of assistance required to ensure that there was a fair trial. The finding of guilt of the appellant was the product of a miscarriage of justice. In these circumstances, the conviction cannot stand and must be set aside.

Final Observations

[70] One of the unintended consequences of the *Access to Justice Act*,⁶ which has created under the auspices of the Law Society a new class of paralegal practitioners with the authority to appear in the provincial offences court, is that if the associated costs of licensing result in increased fees which are passed on to defendants charged with provincial offences, many such persons may choose instead to represent themselves in the provincial offences court. As a result, courts may continue to conduct a significant number of trials of unrepresented defendants under the *Provincial Offences Act*, particularly Part I proceedings.

[71] Innovative and creative strategies should therefore be encouraged, as Justice Bellefontaine stated in *Saeed* at para 9, such as making available a "memorandum for the accused without counsel in the Ontario Court of Justice", which is modified for provincial offences proceedings. Given the first attendance process that is now in place across the province for requesting provincial offences trials under Part I, such a handout could be made available at the time the defendant appears in person at the court location to meet with the prosecutor. Alternatively, it might be enclosed with the notice of trial which is subsequently sent to the defendant in the mail, or perhaps even made available

on-line by posting on the courts' website. Copies could also be provided, if necessary, to defendants at the time of appearing for their trial.

[72] The issue of overcrowded courts and lengthy dockets is hardly a new one. However, courts should not scale back the amount of minimal assistance given to unrepresented defendants out of concern for how such assistance may impact on administration and staffing issues. As I read the *Saeed* decision, the court's reference to additional judicial resources being required should the type of information conveyed at a criminal trial be imparted to unrepresented defendants charged with provincial offences, was not based upon evidence or statistical information put before it. Indeed, the Law Commission of Ontario has recently put forth a proposal in its November, 2009 Consultation Paper, which would free up a considerable amount of court time: replacing Part II of the *Provincial Offences Act*, which governs parking infractions, with administrative monetary penalties; such a regime might also be extended to some Part I offences: see *The Modernization of the Provincial Offences Act* at 10-12.⁷

[73] Chief Justice Bonkalo in her speech at the Opening of the Courts on 14 September 2009, observed the following as to the workload of the Ontario Court of Justice:

Our judges and justices of the peace preside in courtrooms across this vast province, from its biggest cities to remote communities without road access. Justices of the peace provide service seven days a week, 24 hours a day, for bail, search warrants and other emergency orders when necessary. Some 600,000 criminal charges, 27,000 family law matters and about 1.2 million provincial offences matters are handled by this Court. Many can be resolved quickly: some are complex, lengthy proceedings. Every one of them is important to the community and those directly affected by any given case.⁸

[74] Accordingly, there is no reason to think that a person charged with an offence under Part I of the *Provincial Offences Act*, and who defends himself/herself in court without legal representation, considers that the trial justice should view the matter as being less deserving of assistance so as to ensure that a fair trial is held, and that the defence is brought out with its full force and effect, than any other matter that the court hears. Neither should courts conducting trials for provincial offences proceedings.

Disposition

[75] The trial of this appellant, and the appeal proceedings which followed, do not present a flattering picture of the administration of justice in this province. Whereas the appellant responded to his certificate of offence within the requisite 15 days, his trial notice was not issued until 6 months later. Upon receiving the maximum penalty under Part I of the *Provincial Offences Act* at a trial where he was afforded little assistance by the Court, he filed an appeal within days; the transcript of his trial, which is approximately 20 pages in length, took two and one-half years to prepare. The certificate of offence has been lost. The offence which is the subject of these proceedings took place

more than five and one-half years ago. There is no societal interest in subjecting this appellant to any further provincial offences proceedings.

[76] In the result, the appeal is allowed, the conviction imposed by the trial justice set aside, and a verdict of acquittal entered.

¹ R.S.O. 1990, c.P.33.

² R.S.O. 1990, c.H.8

³ The *Good Government Act*, 2009, S.O. 2009, c.33, s.1(18), effective 15 December 2009, raised the maximum fine for Part I proceedings to \$1,000.

⁴ O.Reg. 339/94.

⁵ Although the Appellant did not request the use of an interpreter at trial, he required the assistance of a Somali interpreter for the appeal proceedings. The justice's difficulty in understanding what the Appellant was saying, and the Appellant's testimony in broken English, indicates that he would have benefited from the assistance of an interpreter at trial.

⁶ S.O. 2006, c.21.

⁷ Ontario Law Commission, *The Modernization of the Provincial Offences Act*. (Consultation Paper, November 2009) (Toronto: Law Commission of Ontario, 2009).

⁸ Opening of the Courts, 14 September 2009, Speech of Chief Justice Annemarie Bonkalo, at.1.

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— AND —

Andrew Hofland

Before Justice of the Peace Kenneth W. Dechert

Heard on June 30th, 2010

Reasons for Judgment released on January 26th, 2011

Provincial Offences Court – Milton, Ontario

A. Senkus for the prosecution

G. Burd for the defendant Andrew Hofland

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, as amended, ss. 1(1), para. 128(1)(d), ss. 128(2).

Cases cited:

Corporation of the City of London v. Polewsky (2005), 202 C.C.C. (3d) 257 (Ont. C.A.);
Regina v. Dziarski, [2003] O.J. No. 196 (Ont. C.J.);
Regina v. Hickey (1976), 13 O.R. (2d) 228 (Ont. C.A.);
Regina v. Kololgi, [2009] O.J. No. 5742 (Ont. C.J.);
Regina v. Le, [2002] O.J. No. 894 (Ont. C.J.);
Regina v. Niewiadomski, [2004] O.J. No. 478 (Ont. C.J.);
Regina v. Odusanya, [2002] O.J. No. 3209 (Ont. C.J.);
Regina v. Richard Tozer, (January 4th, 2008, unreported) (Ont. C.J.);
Regina v. Vancrey, [2000] O.J. No. 303 (Ont. C.A.);
Regina v. Volfson, 2009 ONCJ 227; 2009 CarswellOnt 2654 (Ont. C.J.);
Regina v. Williams, 2008 CarswellOnt 1504 (Ont. C.J.).

K.W. DECHERT, J.P. (orally):

INTRODUCTION

[1] Under certificate of offence no. 1260-3788527A, the defendant, Andrew Hofland stands charged that he on the 12th day of February 2010 at Trafalgar Road and Hornby Road in the Town of Halton Hills, did commit the offence of speeding - 107 kilometres per hour in a 70 kilometres per hour zone, contrary to the *Highway Traffic Act*, section 128.

[2] On June 30th, 2010, the defendant entered a plea of not guilty to the subject charge and a trial of the matter then ensued before me. The trial was completed on June 30th, 2010 and the matter was adjourned to January 26th, 2011 for my judgment.

[3] The prosecution was represented by Ms. A. Senkus. The defendant appeared through and was represented by his legal representative Mr. G. Burd.

THE EVIDENCE

[4] During the course of the trial in this proceeding, the Court received the testimony of Police Constable Kevin Hanowski, tendered on behalf of the prosecution. The defendant's representative did not call any evidence on behalf of the defendant.

(i) The Testimony of Police Constable Kevin Hanowski

[5] Constable Hanowski testified that as of June 30th, 2010, he was employed as a police officer with the Halton Regional Police Service and that he had been so employed since April of 2003. During the course of his testimony, he made reference to a document described as "an evidence collection sheet", containing his investigative notes pertaining to the subject matter. He stated that he made these notes shortly after the time of the subject incident and that he had not made any alterations, additions or deletions to the said notes. He advised that he had a recollection of the incident, independent of the information contained in the notes, but that he sought to make reference to the notes for purposes of refreshing his memory.

[6] Following cross-examination on the preliminary issue of the use of the "evidence collection sheet" notes by the officer, the Court granted leave to Constable Hanowski to refer to the said investigative notes during the course of his testimony, for purposes of refreshing his existing memory.

(a) Examination-in-Chief

[7] Constable Hanowski testified that on the 12th day of February, 2010, he was in uniform operating an unmarked police cruiser for purposes of conducting "speed measuring

exercises” at the intersection of Trafalgar Road and Hornby Road, in the Town of Halton Hills. He advised that in conducting the said exercises he was using a laser speed measuring device, which he described as a “hand-held Lidar unit”, being “model number LTI 20/20”. He stated that “Lidar is a device used to measure the speed of moving motor vehicles”.

[8] Constable Hanowski testified that as of the date of his testimony on June 30th, 2010, he was a “qualified Lidar operator” and that he had been so qualified since June of 2005. He went on to state that he was “recertified” in the operation of the Lidar device on January 4th, 2010.

[9] Constable Hanowski testified that at the beginning of his shift on February 12th, 2010, at 12:16 p.m., he tested the Lidar unit that he was using that day, bearing serial number “TS001652”, at the police station for Division #11 of the Halton Regional Police Service, located in the Town of Halton Hills. He advised that he tested the subject laser speed measuring device “according to manufacturer’s instructions” and found it “to be in working order”.

[10] Constable Hanowski testified that on the said date at approximately 1:06 p.m., he was sitting in his police cruiser situated on the south side of Hornby Road on the shoulder of the road approximately “20 to 30 metres” west of its intersection with Trafalgar Road. He stated that at the said time, he utilized his “Lidar” unit to measure the speed of a vehicle travelling in a northerly direction on Trafalgar Road approaching his location. He later determined that this vehicle was being driven by the defendant.

[11] In describing the weather conditions at the subject time, the officer stated that the skies were “partly cloudy and that there was no precipitation. He advised that the temperature was “about minus three degrees”. He stated that at the relevant time, the roads were dry and he described the traffic as being of “light intensity”.

[12] In describing the area where he was located for purposes of conducting speed enforcement at the relevant time, Constable Hanowski testified as follows:

If I can describe the area where I was, Trafalgar, for all intents and purposes runs north and south and there is a single lane for traffic in each direction. There’s an ‘S’ bend. And Hornby Road which is two lanes intersects Trafalgar from the west to form a ‘T’ intersection with Hornby Road ending at Trafalgar and that intersection is north of the ‘S’ bend.

[13] As stated above, the officer advised that his police vehicle was situated on the south shoulder of Hornby Road approximately 20 to 30 metres to the west of its intersection with Trafalgar Road. He testified that from this position, he had a “clear view” of the “straightaway” in the ‘S’ bend on Trafalgar Road. In this regard, the officer described the said ‘S’ bend as an “elongated ‘S’ bend”, with a straightaway in between the two bends.

[14] Constable Hanowski testified that the speed limit for northbound traffic in the ‘S’ bend on Trafalgar Road at the relevant time, was 70 kilometres per hour. In this regard, he advised that at the subject time there were two “regulation” 70 kilometres per hour speed limit signs posted on Trafalgar Road, in a location south of the “straightaway in the ‘S’

bend”. He indicated that as one would travel in a northerly direction in the said ‘S’ bend, one would pass the two 70 kilometres per hour speed limit signs prior to entering into the straightaway in the middle of the bend.

[15] Constable Hanowski testified that at approximately 1:06 p.m. on the subject date, he observed a single motor vehicle travelling in a northerly direction on Trafalgar Road approaching his location. He advised that he observed the vehicle when it was “on the ‘S’ bend” of Trafalgar Road “coming into the straightaway”. He stated that the vehicle appeared to be travelling well in excess of the posted speed limit of 70 kilometres per hour. He estimated that the vehicle was travelling at a rate of speed of between 100 and 105 kilometres per hour.

[16] Constable Hanowski testified that at that time, he utilized his “hand-held Lidar” device to confirm his observations. He advised that in doing so he shot the laser beam of the device through the open front passenger seat window of his police vehicle. He advised that prior to “shooting” the laser beam, he moved the “red dot” in the sight scope of the Lidar device, such that it was over the license plate of the targeted vehicle. He noted that this vehicle was the only vehicle in sight at the material time.

[17] Constable Hanowski testified that upon activating the Lidar device on the approaching motor vehicle, the device measured the rate of speed of the vehicle as being 107 kilometres per hour at a distance of 441.4 metres. He advised that once he obtained the measurement of the rate of speed of the targeted motor vehicle, he pulled up to the stop sign at the intersection of Hornby Road and Trafalgar Road and stopped his police vehicle. The officer stated that the targeted vehicle then passed his location, at which time he pulled out behind the subject motor vehicle and followed the vehicle in a northerly direction on Trafalgar Road.

[18] Constable Hanowski testified that upon entering Trafalgar Road to follow the said motor vehicle, he activated the emergency lights and the siren on his police cruiser and then stopped the vehicle. He described the subject vehicle as a silver-coloured Volkswagen, being a motor vehicle as defined in the *Highway Traffic Act*, bearing Ontario licence plate number BHBV195. He noted that the driver was the only occupant of the vehicle.

[19] Constable Hanowski testified that at that time, the driver of the said Volkswagen produced a valid Ontario driver’s licence to him. The officer stated that the license contained a photograph of the driver of the vehicle and that he was able to identify the driver as Andrew Hofland, by means of the driver’s licence document. The officer stated that as he was satisfied with the proof of identification provided by the driver, he issued provincial offence notice #3788527A to Andrew Hofland for the offence of speeding – 107 kilometres per hour in a posted 70 kilometre per hour zone, contrary to section 128 of the *Highway Traffic Act*.

[20] Constable Hanowski testified that he re-tested the subject Lidar speed measuring device at the end of his shift at approximately 9:16 p.m., at the police station for Division #11 of the Halton Regional Police Service in the Town of Halton Hills. He stated that he

conducted the test “according to manufacturer’s instructions” and found the device “to be in working order”.

[21] Constable Hanowski concluded his testimony-in-chief by advising that he did not ever lose sight of the motor vehicle being driven by the defendant from the time that he first saw it until the time that he stopped it on Trafalgar Road.

(b) Cross-Examination

[22] During cross-examination, Constable Hanowski stated that he could not recall the time when he arrived at the intersection of Hornby Road and Trafalgar Road, for purposes of conducting speed enforcement activities on February 12th, 2010. He advised that he did not record that piece of information in any of his notes relative to the subject charge. He stated, however, that he likely arrived at the said location approximately 15 to 20 minutes after he had tested the subject Lidar unit at the police station, located at 217 Guelph Street in Georgetown, Ontario, at 12:16 p.m.

[23] In answer to a series of questions posed of him by the defendant’s representative, Constable Hanowski acknowledged that he did not record any details relevant to the allegations against the defendant, into his “evidence collection sheet” until the completion of his investigation of the subject incident. In this regard, the officer testified that he made a mental note of his actions in testing the Lidar device at 12:16 p.m. but did not record this piece of information in his evidence collection sheet pertaining to the subject matter until some-time after 1:06 p.m.

[24] In response to the representative’s questions pertaining to the officer’s evidence that he re-tested the subject Lidar device at the end of his shift on the subject date, at 9:16 p.m. and in respect of the procedure he employed to record this piece of information in his evidence collection sheet, Constable Hanowski testified as follows:

Q: Did you make a record then of the testing at 9:16 p.m. somewhere?

A: The only record is on the evidence collection sheet. This is what I do, I have a routine. I come into 11 Division at the end of the shift. I test the Lidar again. See what time it is. If it’s working properly I go back to my cruiser and I fill in the second test time on all my evidence sheets.

Q: On all your evidence sheets?

A: That pertain to the Lidar that I used.

[25] In response to the representative’s query as to how long it takes him to perform the tests on the Lidar unit, Constable Hanowski advised: “a minute maybe”. When asked as to what the testing process consisted of, the officer advised as follows:

There’s a display test that shows you all the digits on the display so that you can see that the digits are all working. They’re all lit up.

...

There’s a sight alignment test where I verify that vertically and horizontally that the dot is accurate so when I place it on the cars, it’s on that car. And then there’s

a zero velocity distance test. There's two of those to make sure that it's measuring correctly the distance.

The officer then testified that he did not perform any other tests than those stated.

[26] Constable Hanowski was then asked a series of questions by the defendant's representative as to whether he conducted a "self test" on the Lidar unit. The exchange between the representative and the officer reads as follows:

Q: Do you do a self test on the unit?

A: Well, it tests itself, yeah.

Q: I'm sorry?

A: It tests itself, yes.

...

Q: What do you mean, sir, it tests itself?

A: It tells me if there's any problems.

Q: How does it do that?

A: It would display on the LED.

Q: So, there's not a specific test and a specific button you activate in order to conduct the self test?

A: No.

Q: Are you sure?

A: Yes.

...

[27] Following questions posed of him relative to the "self test", Constable Hanowski answered a number of questions pertaining to the performance of the "sight alignment test".

[28] In describing this test, Constable Hanowski stated that he uses a "square telephone pole" to conduct the test. He advised that in performing this test he looks through the "sight" scope of the Lidar unit, aiming the unit in the direction of the telephone pole approximately 15 to 20 metres away. He stated that he then moves the dot in the sight scope back and forth in an effort to line the dot up with the pole. He went on to state that the device emits a tone when the dot is aligned with the telephone pole. He indicated that he repeats this test when he turns the unit to a ninety degree angle in order to ensure that the sight scope is aligned for both the horizontal and vertical axes.

[29] When the officer was asked if the sight alignment test procedure he used was in conformity with the testing methodology set out in the instructional manual prepared by the manufacturer of the device, the officer replied: "It's what my instructor told me to do".

[30] The defendant's representative then questioned Constable Hanowski as to the procedure he employed in conducting the two "zero velocity distance tests" on the unit. In describing these tests, the officer stated as follows:

... There's a sign at 11 Division that we use and there's two marked spots. One's 40 metres from the sign and one's 50 metres from the sign. I do the distance twice, test twice, one at each location.

[31] The defendant's representative then produced photocopies of a document to Constable Hanowski and asked him if the document contained instructions from the manufacturer relative to the Lidar device that he was operating on the date of the subject offence. After reviewing the document the officer indicated that it appeared to be instructions for the particular device.

[32] The representative then asked the officer two questions referable to the contents of a portion of the said document, set forth on page 31 thereof, titled "Instrument Self Test". The question and answer exchange between the representative and Constable Hanowski are set out below, as follows:

Q: I'm going to start with what appears to be page 31 of this particular bound unit. It's titled "Instrument Self Test". And it says, "Just like when the instrument is powered on during the self test the micro-controller interrogates the systems electronics. To complete the self test..." And then it gives you further instructions on what to do to do its self test. And then it gives you further instructions in case it fails the self test. Are you reading that correctly or do you see what I'm talking about here?

A: Yeah.

Q: Your evidence was that the unit does its own self test and that you did not do that. You didn't say you did not do that but what you did say was the self test is – the unit does its own self test and lets me know if there's a problem. That's not what the manufacturer's instructions indicate that you should be doing for purposes of self test, is it?

A: No.

[33] In making reference to the copy of the manufacturer's instructions which he produced to Officer Hanowski, the defendant's representative asked the officer if he could review the portion of the document related to the "fixed zero velocity distance" test. After he read the instructions for this test, Constable Hanowski asserted that the test he conducted on the Lidar device on February 12th, 2010, conformed with the recommended procedure for the "fixed zero velocity distance test".

[34] The representative noted that the fixed zero velocity distance test as described in the instructional documentation for the subject Lidar device, was a single test performed from a recommended fixed distance of 60 metres. The representative reminded the officer of his earlier testimony during cross-examination where he advised that in conducting the "fixed zero velocity distance" test, he performed the test from two separate distances of 40 and 50 metres. The representative then suggested to the officer that he was not conducting the same "distance" test as recommended by the manufacturer, to which the officer replied: "I guess I'm doing the same test twice".

[35] The defendant's representative then asked the officer to turn his attention to a section of manufacturer's instructional document produced, which made reference to an

additional “distance” test, described as the “fixed delta test, two distance delta test”. The referral to this portion of the document triggered the following question and answer exchange between the representative and Constable Hanowski:

Q: Well, I’m going to ask you now to turn your attention over to the fixed delta test, two distance delta test. And that requires, and you can confirm or not confirm, that there’s two pre-measured delta distances within the unit itself, 45 metres and 55 metres. It seems to me – do you agree with that....

A: Yeah.

Q: So it seems to me Officer, that you’ve done some test that falls somewhere in between both of those two but is neither of those two tests.

A: If there’s not enough space available, specific distance is not crucial. So I’m doing two fixed distance zero velocity tests; one at 40 metres and one at 50 metres.

Q: So, is that – okay, so you agree that the zero fixed velocity test only requires one fixed distance but you’re saying well, I did two. I’m making double sure.

A: Again, I’m doing what I was instructed to by my instructor.

Q: Well, okay, but you’ve also indicated to this Court under oath that you tested that unit according to the manufacturer’s instructions, correct?

A: Yeah.

Q: Have you ever seen those manufacturer’s instructions before?

A: Yes.

(c) Re-examination

[36] During re-examination, Constable Hanowski testified that on the date of the subject offence he was using a laser device known as a LTI 20/20 device, which was manufactured by a firm known as “True Speed”. The prosecutor then produced to the officer the document that was shown to him by the defendant’s representative and the officer acknowledged that the document was titled “Laser Technology LTI 20/20 True Speed Metric Users Manual”. The officer stated that he was trained in the operation of the LTI 20/20 laser device (the Lidar device) and was familiar with the instructions for the device set out in the manual that was produced to him for review.

[37] Constable Hanowski testified that during the course of his training on the subject laser device, he was taught about its specific testing procedures. He advised that he had reviewed the user’s manual for the laser device.

[38] Constable Hanowski testified that in conducting the tests of the device on the date in question, he was relying on what he had been taught by his trainer in terms of the distances required for such tests. When he was asked by the prosecutor whether he had any reason to doubt the accuracy of the tests that he performed on the device, when he was out in the field performing speed measurement exercises, the officer replied: “no”.

THE ISSUES

[39] The ultimate issue in this proceeding is whether the prosecution has proved the subject charge to the standard of proof beyond a reasonable doubt.

[40] In its decisions in *Regina v. Hickey* (1976), 13 O.R. (2d) 228 (Ont. C.A.) and *The Corporation of the City of London v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), the Ontario Court of Appeal classified the offence of speeding under section 128 of the *Highway Traffic Act* as one of absolute liability. Accordingly, once the issues of the *actus reus* of the offence and the identification of the defendant have been established to the standard of proof beyond a reasonable doubt, the fault element of negligence is automatically imported into the offence. As the offence is one of absolute liability it is not open to the defendant to attempt to exculpate himself by showing that he was free from fault.

[41] The sub-issues in this proceeding are as follows:

1. whether the prosecution has established all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt; and
2. whether the prosecution has established the identity of the defendant as the person who committed the *actus reus* of the subject offence, to the standard of proof beyond a reasonable doubt.

[42] In his final submissions to the Court, the defendant's representative argues that the prosecution has failed to prove, beyond a reasonable doubt, the element of the posted speed zone that the defendant's motor vehicle was travelling in, at the time that its speed was measured from a distance of 441.4 metres.

[43] Furthermore, the representative submits that the prosecution failed to prove the rate of speed of the defendant's motor vehicle at the material time. He argues that the Court should be left in a state of reasonable doubt as to the accuracy and reliability of the evidence of the rate of speed of the defendant's motor vehicle at the material time. In that regard, he contends that through his cross-examination of Constable Hanowski, he has raised a reasonable doubt as to whether the subject laser speed measuring device was tested both before and after its use on the day in question, in accordance with manufacturer's instructions.

[44] The representative argues that the Court is not, therefore, able to take judicial notice of the accuracy and reliability of the rate of speed of the defendant's vehicle as measured by the subject laser speed detection device. He submits, therefore, that there is insufficient evidence before the Court which establishes the rate of speed of the subject motor vehicle, beyond a reasonable doubt. He therefore submits that the subject offence against the defendant should be dismissed.

[45] On the other hand, the prosecutor submits that all of the elements of the *actus reus* of the subject offence and the element of the identification of the defendant have been established beyond a reasonable doubt, through the testimony of Constable Hanowski.

[46] The prosecutor argues that Constable Hanowski's evidence was both credible and

compelling. She submits that on the date in question the officer was in a position to observe a vehicle, which he later determined to be operated by the defendant, being driven in a northerly direction on Trafalgar Road. She submits that the officer's evidence establishes that the subject vehicle was, at the relevant time, travelling in a posted 70 kilometres per hour zone. She notes that at this time, the officer estimated that the vehicle was being operated at a rate of speed of between 100 and 105 kilometres per hour.

[47] The prosecutor submits that the police officer activated the Lidar speed measuring device he was using at that time, to confirm his reasonable belief that the vehicle was travelling well in excess of the posted speed limit. The prosecutor submits that the laser speed reading obtained of 107 kilometres per hour can be considered accurate and reliable and when considered in the context of the officer's opinion as to the rate of speed of the defendant's motor vehicle at the time, is sufficient evidence to prove the element of the rate of speed of the defendant's vehicle, beyond a reasonable doubt.

[48] The prosecutor contends that the defendant has failed to raise a reasonable doubt that the device was not in proper working order due to the improper testing procedures. She submits that the totality of the evidence establishes that in testing the laser device on the subject date, Constable Hanowski substantially complied with the testing instructions contained in the operational manual for the device.

[49] The prosecutor submits that she has met her burden of proof in this proceeding, and that the defendant should be found guilty of the subject offence, as charged.

THE LAW

(i) Relevant Statutory Provisions

[50] The defendant is charged with the offence of speeding 107 kilometres per hour in a posted 70 kilometres per hour zone contrary to section 128 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, hereinafter referred to as "the Act". The relevant portion of subsection 128(1) of the Act, reads as follows:

No person shall drive a motor vehicle at a rate of speed greater than, ...

(d) the rate of speed prescribed for motor vehicles on a highway in accordance with subsection (2), (5), (6), (6.1) or (7); ...

[51] Subsection 128(2) of the Act reads as follows:

The council of a municipality may, for motor vehicles driven on a highway or portion of a highway under its jurisdiction, by by-law prescribe a rate of speed different from the rate of speed set out in subsection (1) that is not greater than 100 kilometres per hour and may prescribe different rates of speed for different times of day.

[52] The following portions of subsection 1(1) of the Act are relevant to this proceeding:

In this Act,

...

‘highway’ includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

...

‘motor vehicle’ includes an automobile, a motorcycle, a motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicles running only on rails, a power assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine;

...

(ii) Relevant Common Law

[53] In his decision in *Regina v. Williams*, 2008 CarswellOnt 1504 (Ont. C.J.), Pockele J. made the following comments pertaining to the essential elements of the offence of speeding under section 128 of the Act.

The appellant takes the position that the Justice of the Peace erred in fact and erred in law by deciding that the radar device was properly tested, that it accurately measured speed and further argues that it was “an essential element of the offence” to establish that the machine had been properly tested and set up.

I wish to address the issue of “essential element of the offence”. There is a vast body of law that relates to the operation of mechanical speed detection devices, cases that have been decided at the trial level and the appellate level which relate to the testing, operation and set up of such devices. While these decisions have value as precedents, it must be noted that the decisions are highly specific to the individual devices used in specific cases. The only “essential elements of the offence” in a speeding charge are the date, place, posted speed, identification of the vehicle operator, and the speed of the motor vehicle. The *Highway Traffic Act* leaves it open to the prosecution as to how the rate of speed is established in court. There are many different ways to establish excessive speed such as – and this is not meant to be an exhaustive list – pacing a vehicle, mechanical road cables, aerial observation, radar, laser, etc. Whatever method is employed by the prosecution, the burden is upon the prosecution to establish the rate of speed beyond a reasonable doubt after the evidence has been fully challenged. In *R. v. Bland*, speed based on speedometer readings, *R. v. Ghow*, radar-photography device where the Court held:

The evidence must meet the test of demonstrating a circumstantial guarantee of trustworthiness and accuracy and that without any evidence to the contrary, the evidence was admissible and was entitled to weight.

...

However, a “reasonable doubt” might be raised regarding the accuracy of a speed measurement where an operator is not qualified or has no experience or has no training in the operation of a speed measurement device or system. Similarly where a mechanical speed detection device is utilized, the prosecution may wish to call evidence, although it is not necessary to do so, that the device has been properly maintained and tested prior to operation. Certainly, these questions would be asked by the defence if not explored by the prosecution, the defence

attempting to raise a “reasonable doubt” as to the accuracy of the rate of speed indicated.

...

[54] The leading case with respect to the issue of the reliability of speed measurement evidence derived from laser speed measuring devices is the decision of the Ontario Court of Appeal in *Regina v. Vancrey*, [2000] O.J. No. 303 (Ont. C.A.). In that decision, Feldman J.A. made the following comments, in paragraphs 21 and 22 of the decision, relative to the evidence required to establish the accuracy and reliability of the measurement of a moving motor vehicle as determined by a laser device:

...

The Crown seeks to uphold the conviction on the basis that there was led at trial *prima facie* evidence of the accuracy and reliability of the particular laser unit, consisting of the performance of the manufacturer’s tests for good working order both before and after the use of the device, together with the earlier verification of the accuracy of the laser unit for measuring the velocity of moving vehicles on a highway, when compared with an accurate radar unit by a qualified laser and radar operator.

In my view, the position of the Crown is correct. The court received evidence that the officer who operated the laser device was trained and experienced and that he tested the device both before and after its use in accordance with manufacturer’s instructions to ensure it was operating properly on the date in question. The Court also received evidence of the accuracy of the device for measuring the speed of vehicles on a highway by comparing its readings with those of an accurate radar unit. The radar test provides the independent guarantee of accuracy of the laser unit to measure the speed of a moving vehicle.

[55] In his decision in *Regina v. Le*, [2002] O.J. No. 894 (Ont. C.J.), Fairgrieve J. determined that the decision of the Ontario Court of Appeal in *Regina v. Vancrey*, *supra*. did not require the prosecution to lead evidence that readings from the particular laser device had been recently compared with those of an accurate radar device, before a court could be satisfied that the laser speed readings were reliable. In paragraph 14 of his decision, Fairgrieve J. made the following observations:

...

In my opinion, regardless of whether the reliability of laser devices to measure the speed of motor vehicles is regarded as so “notorious” that it cannot be disputed by reasonable people, or whether one accepts the judgments in *Delangis* [1999] J.Q. no. 4936, and *Mukasa*, [2001] O.J. No. 262, as demonstrating prior judicial acceptance of the device’s reliability, it is now appropriate for other courts to take judicial notice of that fact. Laser devices have been used for this purpose by law enforcement agencies for almost a decade, the evidence obtained through their use has been routinely admitted as reliable, and at least one provincial appellate court has held that their reliability is so well-known that it requires no evidence to establish it.

[56] In her decision in *Regina v. Odusanya*, [2002] O.J. No. 3209 (Ont. C.J.) Lane J. adopted the reasoning of Fairgrieve J. in *Regina v. Le*, *supra*. in finding that one could take judicial notice of the accuracy of laser speed measuring devices without any independent

comparison testing. In commenting on the reliability of evidence of the rate of speed of a motor vehicle derived from a laser speed measuring device, Madam Justice Lane stated as follows:

That where there is no evidence raising any doubt or suggesting that the device was not operating properly according to manufacturer's specifications or had not been tested on the day in question, then its results ought to be accepted.

[57] Furthermore, in his decision in *Regina v. Dziarski*, [2003] O.J. No. 196 (Ont. C.J.), Wolder J. made the following comments pertaining to the accuracy and reliability of evidence of the speed of a moving motor vehicle determined by a laser speed measuring device:

...

While the appellant is correct that the Crown has not provided expert evidence to explain how the device actually measures speed, I find that based upon the decisions of Justice Lane in *R. v. Odusanya*, [2002] O.J. No. 3209 (Ont. C.J.) and Justice Fairgrieve in *R. v. Le*, [2002] O.J. No. 894 (Ont. C.J.), which I accept, there is no requirement by the Crown to lead such evidence. It was open to the appellant at trial to have led such evidence to attempt to challenge the *prima facie* inference of accuracy of such instruments but he chose not to do so. I find that it has now been accepted that these instruments can be relied upon as having the capability of measuring the speed accurately no matter how the mechanics of the device's operation are described. Therefore, unless the appellant at trial adduces expert evidence to the contrary which is capable of challenging that *prima facie* inference of accuracy, evidence of speed measured by such a device, which has been properly tested both before and after the use of such device, is *prima facie* proof that the measurement of speed is, in fact, accurate.

...

[58] In her decision in *Regina v. Niewiadomski*, [2004] O.J. No. 478 (Ont. C.J.), Schnall J. opined that a court may infer that evidence of the rate of speed of a motor vehicle obtained through the use of radar or laser speed measuring devices is reliable, provided that the evidence before the court as to the use and working order of the device and the qualifications of the operator are uncontradicted.

[59] In the final paragraphs of her decision, Madam Justice Schnall stated as follows:

...

Where, however, as in the case before me, the defence through cross-examination challenges the training and qualifications of the operator, and the operation of the device and whether it was in proper working order, judicial notice cannot be taken of the reliability and accuracy of the readings. The court must consider whether the cross-examination of the police officer and the admissions he made to raise a reasonable doubt.

I was referred to a number of cases by Ms. Charron, for the prosecution (respondent). These include: *R. v. Grainger* [1958] O.J. No. 218; *D'Astous v. Baie -Comeau (Ville)* (1992), 74 C.C.C. (3d) 73; and *R. v. Giffin*, [1980] N.S.J. No. 17, CH33207.

These cases do not advance the respondent's case beyond the position which I

already accept; that is, that where the prosecution presents evidence as to the qualifications of the operator, as to the device being in proper working order both before and after the incident, and as to its proper operation, the Crown will have established a *prima facie* case. A *prima facie* case can support a conviction unless the defence raises a reasonable doubt through independent evidence, or through cross-examination of the Crown witness.

Ms. Charron further submits, however, that cross-examination of the radar police operator which elicits admissions of non-compliance with the manufacturer's specifications and directives as to testing and operation should be insufficient to raise a reasonable doubt, unless the officer is also asked what effect the non-compliance would have on the device and its reading.

I do not accept this argument. The officer testified that the radar device would not be effective if, for example, distance requirements were not met. It is not necessary for the officer to testify as to the consequence of each element of non-compliance, whether the readings would be high, or low, as a result of not following the specifications and directions of the manufacturer.

It can be assumed that the absence of full compliance with the testing and operational process should make the reading suspect. There would be no reason for the device manufacturer to set out specifications and directions if it mattered not whether these were complied with.

...

[60] In his decision in *Regina v. Richard Tozer*, (January 4, 2008, unreported) (Ont. C.J.), LeDressay J. dismissed the appeal of the conviction of the appellant on a charge of speeding, where the evidence of the rate of speed of the subject motor vehicle was calculated through the use of a radar device.

[61] In dismissing the appeal, Mr. Justice LeDressay was satisfied that the evidence adduced at trial established that the police officer who was operating the subject radar device on the day of its use had conducted all mandatory tests of the device as stated in the instructional manual prepared by the manufacturer of the device. In reaching his decision, the jurist acknowledged that the radar operator failed to perform some additional tests mentioned in the manufacturer's instructional manual, which according to the evidence were considered to be optional tests. He concluded, however, that the failure to perform these "additional", "unspecified" tests did not raise a reasonable doubt as to the accuracy of the radar unit at the material time.

[62] In reaching his decision in that regard, LeDressay J. stated, in part, as follows:

...

I find in reviewing the totality of the transcript of the trial of this matter that there is an absence of any evidence to suggest that the tests performed by the qualified radar operator, in accordance with his training on the two separate occasions by a qualified radar trainer in May of 2003 and March 2005 were in any way inadequate. The test that the officer referred to in his evidence is what I will refer to as the "test button test". This test performs, according to the evidence, the internal diagnostic tests that are required by this radar unit and displays the results ultimately indicating whether the unit has received a pass reading, which it did in both tests that are relevant in this particular case, that being the test before the

defendant's vehicle was clocked by radar and the test that was conducted after the defendant's vehicle was clocked by radar.

In my view, the highest point reached by the evidence from the defendant's perspective is that there are additional tests set out in the manufacturer's manual that could be done. There is no evidence, however, to suggest that these tests are required to be performed before the operator could reach the conclusion that the radar unit was in proper working order. In fact, according to the officer's evidence, his training was that the only tests that were required with respect to this particular radar unit was what I have referred to thus far as the "test button test".

...

Here in my view, the cross-examination of the qualified radar operator does not support the proposition that a reasonable doubt has been raised concerning the accuracy of the radar unit because other unspecified tests in the manufacturer's manual were not performed. I say that particularly taking into consideration the evidence that is before the court in terms of what tests were performed by the qualified radar operator and the reason why he performed those tests.

...

[63] In his decision in *Regina v. Volfson*, 2009 ONCJ 227; 2009 CarswellOnt 2654 (Ont. C.J.), Klein J. made the following comments pertaining to the effect of the failure of a qualified radar operator to follow the mandatory instructions contained in the manufacturer's manual for the operation a Genesis II radar device:

...

Manufacturer's directions are *not* statutory requirements and should not be elevated to that status. They are not written for that purpose nor have they been adopted as such.

Reducing the requirement that all tests be performed at "start and conclusion of [the] tour of duty" has no purpose other than to ensure that the first stop of the day based on the device is as a result of accurate and reliable evidence gathering by using that device.

Courts should look to the *practical* effect of the requirements set out by the manufacturer. Practically they operate as a scheme or a checklist to ensure the accuracy and reliability of the radar device. They are meant to be complied with as part of this scheme or checklist. Slavish adherence to these directions is not required if it does not practically affect the accuracy or reliability of the results obtained by the radar device. To hold otherwise could and would result in absurd findings.

...

In reaching this conclusion I am well aware that I am in respectful disagreement with my sister Justice Schnall's conclusion in *R. v. Niewiadomski*, [2004] O.J. No. 478, at paragraph 29:

There would be no reason for the device manufacturer to set out specifications and directions if it mattered not whether they were complied with.

Simply put, there are times when it mattered not and this is one of them when examined in a purposeful and practical fashion.

...

[64] In her decision in *Regina v. Kololgi*, [2009] O.J. No. 5742 (Ont. C.J.), Hourigan J. allowed the defendant's appeal of her conviction on a charge of stunt driving, to wit: speeding at a rate of speed of 106 kilometres per hour in a posted 60 kilometres per hour zone, contrary to section 172(1) of the Act. In allowing the appeal, Madam Justice Hourigan noted that the qualified radar operator in this case failed to follow two required components of the user manual, prepared by the manufacturer of the subject "Genesis II" radar speed measuring device, related to the proper operation of the device at the time it is to be used for enforcement action.

[65] In reaching her decision in this matter, Justice Hourigan made reference to the decision of Klein J. in *Volfson*, *supra.*, where he stated that he disagreed with the comments of Schnall J. in *Niewiadomski*, *supra.*, "that there would be no reason for the manufacturer to set out directions if it mattered not that they were followed". In this regard, Justice Hourigan stated, in part, as follows:

...I respectfully disagree with Justice Klein's decision in this matter. I agree that the direction must be read in a purposeful and practical fashion. However, I think if this is done the only logical result would be to conclude that the requirements must be complied with in order to establish the reliability and accuracy of radar device reading beyond a reasonable doubt.

[66] In the concluding paragraphs of her decision, Hourigan J. stated as follows:

The respondent submits that the police may omit certain requirements as set out by the manufacturer, when application of those requirements is redundant on a purposeful and practical approach. In this regard the respondent relies on Constable Santos' evidence at trial where he testified that the manufacturer's direction should be followed to ensure that the device is in proper working order, however, the police can set their own policies regarding the usage of the equipment.

I am in agreement with Justice Schnall's comments and with the decisions rendered by Justice Wright and Justice Griffin in the cases of *Martin* [2008 ONCJ 217] and *Cormier* [[2008] O.J. No. 4964 (Ont. C.J.)] respectively. The provision in the Manual I find must be complied with by an officer if there is to be enforcement. The officer cannot pick and choose which requirements he will adhere to and which requirements he will ignore. If this were so, there would be an uneven application of the law on this issue, subject to the individual discretion of an officer. There is reason for the inclusion of all of these components in the manual. A conclusion as to the accuracy and reliability of the device is founded on compliance with these requirements. This is particularly essential in a case such as this where the entire prosecution is founded on the numerical reading obtained by the officer through the operation of the device. Compliance with the manufacturer's requirement for enforcement is an essential element because only with strict compliance to the manufacturer's mandatory specifications can the Court be assured of the reliability and the accuracy of reading obtained through operation of the device beyond a reasonable doubt.

In conclusion then, as confirmed by the Court of Appeal in the *Martin* case [[2008] O.J. No. 2709 (Ont. C.A.)], the onus is on the Prosecution to establish this offence beyond a reasonable doubt. Keeping in mind this burden of proof, together with Constable Santos' evidence of non-compliance with two of the required components of the User Manual, I have concluded that a reasonable doubt should

have been raised in the mind of the Justice of the Peace as to the accuracy and reliability of the radar reading obtained by the officer and relied on by the Prosecution as the pivotal evidence against the Appellant.

...

ANALYSIS

[67] As stated above, the issues in this proceeding are:

- (i) whether the prosecution has proven all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt; and
- (ii) if those elements have been established, whether the prosecution has established the identity of the defendant as the person who committed the *actus reus* of the subject offence, beyond a reasonable doubt.

[68] In my view, based on the undisputed and unchallenged evidence in this proceeding, the following elements of the offence against the defendant, have been proven to the standard of proof beyond a reasonable doubt:

- (i) that on the 12th day of February 2010, at approximately 1:06 p.m., the defendant Andrew Hofland was driving a motor vehicle;
- (ii) that at that time, the defendant was driving the motor vehicle, being a silver-coloured Volkswagen, in the northbound lane of a highway being Trafalgar Road, south of its intersection with a highway being Hornby Road;
- (iii) that the portion of Trafalgar Road where the defendant was driving his motor vehicle at the material time, is located in the Town of Halton Hills.

[69] The disputed elements of the *actus reus* of the subject offence relate to the proof of the posted speed limit for the portion of Trafalgar Road where the defendant was driving his motor vehicle at the material time and the proof of the rate of speed of the defendant's motor vehicle at the material time.

[70] After carefully considering the issue of whether the defendant was driving his motor vehicle in a posted 70 kilometres per hour speed zone at the time when Constable Hanowski measured the speed of the vehicle by means of the subject laser speed measuring device, I am of the view that this element of the offence has been established by the uncontradicted testimony of Constable Hanowski, beyond a reasonable doubt.

[71] During his testimony-in-chief, Constable Hanowski advised that from his stationary position, 20 to 30 metres west of the intersection of Trafalgar Road and Hornby Road, he had a clear view of the elongated straightaway in the 'S' bend of Trafalgar Road, south of his position. He stated that there were two regulation 70 kilometres per hour speed limit signs posted for northbound traffic on Trafalgar Road, south of the straightaway in the 'S' bend. The officer advised that as one travels in northerly direction into the 'S' bend on

Trafalgar Road, one passes the two 70 kilometres per hour speed limit signs, before entering into the straightaway portion of the bend.

[72] Constable Hanowski testified that at approximately 1:06 p.m., he observed the motor vehicle, which he later determined to be operated by the defendant, travelling in the ‘S’ bend of Trafalgar Road “coming into the straightaway”. It was at this moment in time that the officer formed the opinion that the said motor vehicle was travelling at an estimated rate of speed of between 100 and 105 kilometres per hour and took steps to measure its speed by activating the Lidar speed measuring device that he was using at the time.

[73] In my view, based on this evidence, I am able to draw a logical and reasonable inference that at the point in time when the officer activated the speed measuring device on the subject motor vehicle it had entered the straightaway of the ‘S’ bend. Accordingly, at that time the vehicle would have passed the two 70 kilometres per hour speed limit signs posted at a location within the ‘S’ bend, but south of the commencement of the straightaway portion of the bend.

[74] I am satisfied that the officer’s evidence pertaining to the speed zone signage establishes, on a *prima facie* basis, that the defendant was, at the time that the rate of speed of his vehicle was measured, driving the motor vehicle in a zone where the prescribed maximum rate of speed was that of 70 kilometres per hour. There is no evidence before me which contradicts the officer’s credible evidence in respect of this issue. Accordingly, I find that the prosecution has proven, beyond a reasonable doubt, that at the material time the defendant was driving a motor vehicle in the northbound lane of Trafalgar Road approaching its intersection with Hornby Road, in the Town of Halton Hills, within a posted 70 kilometres per hour speed limit zone.

[75] The remaining issue to be determined in this proceeding is whether the prosecution has proven the element of the rate of speed of the motor vehicle being driven by the defendant at the material time. In that regard, the prosecution submits that the speed of the subject motor vehicle has been established beyond a reasonable doubt, by the speed reading derived from the laser speed measuring device being operated by Constable Hanowski at the relevant time. I must now determine whether the evidence pertaining to the speed of the defendant’s motor vehicle is sufficiently accurate and reliable so as to constitute *prima facie* evidence equivalent to proof beyond a reasonable doubt that the vehicle was travelling at the rate of speed of 107 kilometres per hour.

[76] After carefully considering the totality of the evidence in this proceeding, I find that the prosecution has failed to prove, beyond a reasonable doubt, that the defendant was, at the material time driving his motor vehicle at a rate of speed of 107 kilometres per hour as alleged in the certificate of offence herein. In fact, I have reached the conclusion that the prosecution has failed to adduce sufficient reliable evidence to establish the rate of speed of the defendant’s motor vehicle, beyond a reasonable doubt.

[77] In reaching my conclusion in this regard, I find that I am unable to take judicial notice of the reliability and accuracy of the reading obtained by Constable Hanowski through

the activation of the Lidar device at the material time. In weighing the totality of the evidence before me and in particular the testimony of Constable Hanowski tendered during cross-examination, I find that I have been left in a state of reasonable doubt as to whether the officer tested the subject Lidar LTI 20/20 speed measuring device, both before and after its use relative to the subject charge, in accordance with the procedures recommended by the manufacturer of the device to ensure its proper operation at the subject time.

[78] During his testimony-in-chief, Constable Hanowski asserted that on February 12th, 2010, he tested the laser device that he used to measure the speed of the defendant's motor vehicle, both before and after its use, "according to manufacturer's instructions". During cross-examination, the officer advised that on the day in question he performed tests on the subject laser device, which he described as "the display test", the sight alignment test" and the "fixed zero velocity distance test". He advised, however, that he did not perform a test described as a "self test" on the device, noting that the machine tests itself. In that regard, the officer stated that if there were any problems with the device, those issues would be indicated on its LED display.

[79] At a later point, in cross-examination, the officer acknowledged that the instructional manual for the subject Lidar device, prescribed a "self test" procedure, which required the officer to do certain things in order to complete the test. It would appear that as of the date of his testimony, Constable Hanowski was not aware of the manufacturer's instructions pertaining to the proper self test procedure for the Lidar LTI 20/20 device. The officer candidly admitted that he did not perform the "self test" on the subject laser device in the manner recommended by the "Laser Technology LTI 20/20 True Speed Metric Users Manual", which was shown to him by the defendant's representative during cross-examination.

[80] The admission made by Constable Hanowski relative to his failure to perform the instrument self test on the subject laser speed measuring device, according to the procedures prescribed and recorded in the user's manual prepared by the manufacturer of the device, causes me to be left in a state of reasonable doubt as to whether the device was, in fact, in proper working order at the time it was used to measure the speed of the defendant's vehicle on February 12th, 2010. In light of my finding in this regard, I am not able to take judicial notice of the reliability and accuracy of the laser speed measurement for the defendant's vehicle at the relevant time, indicating a rate of speed of 107 kilometres per hour at a distance of 441.4 metres.

[81] The prosecution has therefore failed to establish a *prima facie* case that at the material time, the motor vehicle being driven by the defendant was travelling at a rate of speed of 107 kilometres per hour as alleged. Furthermore, in light of my finding that the laser speed reading in this matter cannot be considered reliable, the prosecution has failed to establish, on a *prima facie* basis, the rate of speed of the defendant's motor vehicle at the relevant time.

[82] In reaching my decision in this matter, I have adopted the reasoning enunciated by Schnall J. in *Regina v. Niewiadomski*, *supra*. that the absence of full compliance with the

testing and operational procedures with respect to the particular speed measuring device should make the speed measurement derived from the device suspect. Furthermore, in reaching my decision in this matter, I am persuaded by the reasoning articulated by Hourigan J. in *Regina v. Kololgi supra.* as follows: “Compliance with the manufacturer’s requirement for enforcement is an essential element because only with strict compliance to the manufacturer’s mandatory specifications can the Court be assured of the reliability and the accuracy of reading obtained through the operation of the device beyond a reasonable doubt”.

[83] Based of my analysis of the totality of the evidence as set out above, I find that the prosecution has failed to prove the element of the rate of speed of the defendant’s motor vehicle, to the standard of proof beyond a reasonable doubt. As stated above, the evidence received by me during the cross-examination of the Constable Hanowski has left me in a state of reasonable doubt as to the accuracy and reliability of the laser speed measurement of the defendant’s motor vehicle at the material time. There is no reliable evidence before me which establishes, beyond a reasonable doubt, the speed of the defendant’s vehicle at the subject place and time.

THE DECISION

[84] The prosecution has failed to prove the essential element of the *actus reus* of the subject offence, relative to the rate of speed of the motor vehicle being driven by the defendant at the relevant time, beyond a reasonable doubt.

[85] The defendant is therefore found not guilty of the subject charge and the certificate of offence is endorsed as being dismissed.

Released: January 26th, 2011

Signed: “Justice of the Peace Kenneth W. Dechert”