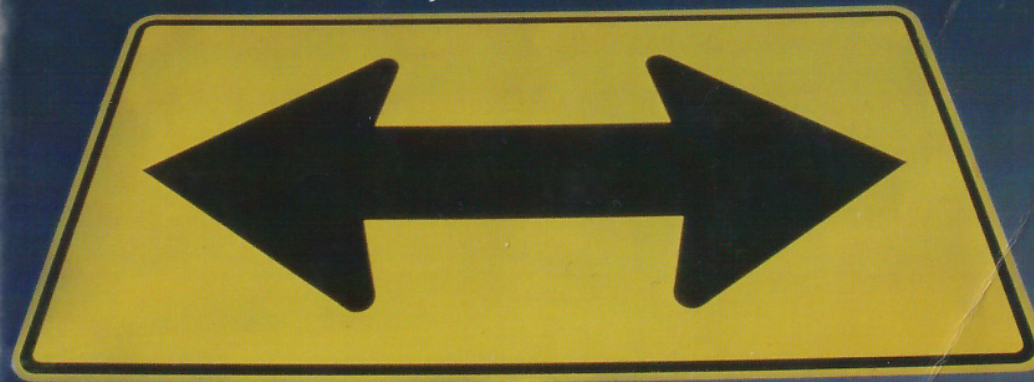




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The Law of Traffic Offences

Third Edition



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the volume of work done by the Provincial Offences Court, the various mechanisms in place for the accused to deal with the charge without excessive technical difficulties, the minimal penalties, and the "fail-safe" provisions in s. 11, the court found that the relatively minor infringement of the *Charter* right was justified.

The same result was reached in *Richard*³⁶ by the Supreme Court of Canada which held that the overall organization of the provisions in the New Brunswick procedural statute³⁷ amounted to a scheme to determine when and how an accused might waive his or her right to a trial.

(g) Part III Prosecutions: Charges on Information

(i) Initiating Proceedings

As noted above, Part III prosecutions are initiated by the laying of an information before a Justice of the Peace. The procedure employed in such a prosecution is similar to that employed in *Criminal Code* prosecutions and is generally more complex and cumbersome than that found in Part I, Certificate prosecutions. To issue the charging document the person who wishes to charge the accused must lay before a Justice a sworn statement alleging facts which would constitute an offence under provincial legislation. While a Certificate may only be issued by a Provincial Offences Officer, anyone may initiate a Part III prosecution by laying a sworn information before a Justice of the Peace.³⁸

Where an officer finds someone in the act of violating some provision of a provincial law which is deserving of a Part III prosecution, he may issue a summons before laying the information.³⁹ If the Justice of the Peace refuses to issue process (i.e., accepts the charging document, but declines to issue any formal document requiring the accused person to attend and answer the charge), the Justice shall cancel the summons so issued and give notice of the cancellation to the defendant. It should be noted that the summons is not the charging document and as such is not subject to the same legal scrutiny as the information.

³⁶ *Supra*, note 7.

³⁷ *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1.

³⁸ Section 3(2) of the *Provincial Offences Act* only empowers "a provincial offences officer" to issue a certificate of offence. Any private citizen wishing to lay a charge under a provincial Act must look to Part III. The purpose of requiring individuals to use this more complex procedure is to limit abuses by private complainants. By requiring a private citizen to convince a Justice of the Peace on evidence given under oath that there is good reason to believe that an offence has been committed, this provision operates to prevent frivolous complaints. The streamlined procedure under Part I might become the vehicle for injustice if it could be set in motion by anyone who was upset with his or her neighbour.

³⁹ See s. 22. This is similar to s. 451 of the *Criminal Code* which allows an officer to issue an appearance notice to an accused before process issues.

There is no requirement that the Justice and the defendant reside in the same jurisdiction or even that the Justice be assigned to the jurisdiction where the offence is to be tried, so long as the information is returnable in the proper jurisdiction.⁴⁰

When the Justice issues process on an information he confirms any summons issued by the officer. Some authors have suggested that there is nothing to prevent an officer from presenting a single information to a series of Justices, each fulfilling a separate function (the first accepting the information and confirming the summons and the second actually issuing process).⁴¹

Section 25 sets out the statutory requirements of an information.⁴²

(ii) Why Proceed under Part III?

There are three principal reasons that a Provincial Offences Officer might choose to swear a Part III information (rather than a Certificate of Offence). Firstly, he might simply want to ensure that it will be open to the prosecution to seek the more serious penalties available under Part III. Secondly, the expiration of the thirty-day limitation period for service of a Notice⁴³ may have expired since the date of the offence, leaving no option. Finally, it is possible that, in rare cases, the authorities would want the Justice to issue a province-wide warrant for the arrest of the accused. Under s. 24 such a power is available in limited cases.⁴⁴

4. ATTACKING THE CHARGING DOCUMENT: 'GETTING OFF' ON TECHNICALITIES UNDER THE ONTARIO *PROVINCIAL OFFENCES ACT*

(a) Introduction

It is important to remember that the central purpose of the modern procedural statutes like the *Provincial Offences Act*⁴⁵ has been to eliminate unnecessary procedural 'technicalities' from regulatory prosecutions.⁴⁶ It was not intended that a purely formal defect should be fatal to

⁴⁰ Section 23(2).

⁴¹ Drinkwater and Ewart, *supra* note 26, at 92.

⁴² See below under heading "Attacking the Charging Document."

⁴³ See s. 3(3).

⁴⁴ For a helpful discussion of the advantages of proceeding under Part III, see Drinkwater and Ewart, *supra* note 26, at 79-84.

⁴⁵ R.S.O. 1990, c. P.33.

⁴⁶ For an example of the sort of trivial defect that might have been fatal in an earlier age, see *R. v. Sullivan* (1968), 3 C.R. (N.S.) 132 (Ont. S.C.) which held that a checkmark in a box on a ticket invalidated it because the statute referred to marking the box with an "X". See also *Toronto (Metropolitan) v. Beck* (1990), 23 M.V.R. (2d) 61 (Ont. H.C.J.) criti-

a charging document. The main consideration in these cases is to be the effect of the defect on the parties and their rights under the procedures available under the Act. Even a substantive error may be allowed if it is possible for the court to correct the error without depriving the defendant of his right to know and defend the charge against him.

Most such statutes provide broad powers to amend a charge to cure defects which are merely formal in nature. For example, under the *Provincial Offences Act* the Justice has a broad discretion to amend the charging document to cure defects and to bring it in line with evidence. The court may amend the Certificate or Information in certain circumstances set out in s. 34:

34. (1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

(a) fails to state or states defectively anything that is requisite to charge the offence;

(b) does not negative an exception that should be negated; or

(c) is in any way defective in substance or in form.

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

(a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or

(b) the place where the subject-matter of the proceedings is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

(a) the evidence taken on the trial, if any;

(b) the circumstances of the case;

(c) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

cizing the "overly technical" approach of the trial court to *Provincial Offences Act* issues. In another case, *R. v. Donovan*, 2005 CarswellNB 57, 2005 NBPC 1, 277 N.B.R. (2d) 187, 727 A.P.R. 187, 27 C.R. (6th) 8 (N.B. Q.B.), the court found that although the traffic ticket contained a technical defect, it did not mislead and cause irremediable injustice that warranted dismissal of the charge.

(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law . . .

The key passage in understanding this power is s. 34(4)(c). If the court cannot make the amendment without depriving the accused of some right, then it should not use its power to repair the document. In fact, if it is impossible to amend without depriving the accused to some right, the Justice probably has no jurisdiction to make the amendment.

Section 34 provides that particulars may be ordered before or during trial if necessary to ensure a fair trial for the defendant. Particulars should describe the alleged violation in more detail than is found in the charging document in order to make it possible for the defendant to put forward a full answer and defence to the charge. An order for particulars should not, however, be made if it would simply serve to bind the prosecution to prove unnecessary facts.⁴⁷

(b) Duplicitous Charging Documents

Section 33 provides:

33. (1) A defendant may at any stage of the proceeding apply to the court to amend or divide a court that,

(a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or

(b) is double or multifarious,

on the ground that, as framed, it prejudices him in his defence.

This provision would be used where the charge in the Certificate or Information as worded is broad enough to include two possible offences. In such a case, the accused is really called upon to answer two charges at once. Further, if the accused is later charged in respect of the same wrongful act he or she may be prevented from pleading a previous conviction because, on the face of the Certificate, it is impossible to say for certain what the charge was.

Challenges based on this complaint are often based on an interpretation of the section giving rise to the allegation — does it create one offence or two?⁴⁸ For example, the language creating the common offence of 'careless driving' normally prohibits driving "without due care or attention" or "without reasonable consideration for others using the high-

47 In the criminal context, see *R. v. Govedarov* (1975), 3 O.R. (2d) 23 (Ont. C.A.), affirmed on other grounds (*sub nom. R. v. Popovic*) [1976] 2 S.C.R. 308 (S.C.C.).

48 See, for example, *R. v. Timplaru* (1987), 47 M.V.R. 41 (Sask. Q.B.).

way". Is this one offence or two?⁴⁹ If the section creates one offence that can be committed in several ways, then generic charging language is permissible — if it creates two offences, then the charge must be worded to identify which is alleged. While an amendment to cure such a defect is common, it has, for the accused, the advantage of focusing the allegation by the prosecutor and thereby may provide a defence.

(c) The Misspelled Name

A frequently cited error is a misspelled name. Often a defendant will seek to quash a charging document because the name on the document is not spelled correctly. The test in such cases is whether typical reasonable defendant, reading the misspelled name would say "This is not me" or "This is me, but there is a mistake in the spelling of my name".⁵⁰

(d) Objections at Trial

An objection to a defect on the face of the document should be taken before the plea. If an amendment is allowed by the court and an adjournment is necessary, the court has a limited power to order costs in favour of the accused.⁵¹

It is important to raise an objection at trial to a defect in a charging document. If a defendant fails to object to the wording of the document at trial he will be deemed to have accepted the form of the charge and cannot appeal on the ground that it was somehow defective.⁵²

When challenging the charging document, it is important to remember the circumstances under which it is usually presented to the accused. Normally, the officer has served an Offence Notice on the accused immediately after the incident giving rise to the charge. The circumstances will usually be such that the defendant will have actual knowledge of the transaction alleged in the charging document.⁵³ If this is not the case and the defendant intends to challenge the charging document, the defendant

49 See ch. 6, "Careless Driving," below.

50 This problem is thoroughly canvassed in J.D. Ewart, "Appellation non Contrôlée: The Misspelling of the Defendant's Name in Informations or Certificates of Offence" (1981), 23 Crim. L.Q. 492.

51 See ss. 37 and 60 of the Ontario *Provincial Offences Act*.

52 Section 124 provides:
124 (1)

Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused notwithstanding that the variance had misled the appellant.

53 *R. v. Spurring*, *supra*, note 6.

should make it clear to the court that the charge was not communicated to him until some time after the event giving rise to the charge or that the confusing nature of the events giving rise to the charge deprives the defendant of any special advantage in understanding the charge.

(e) Short Forms in the Regulations

Most statutes provide that certain pre-approved short form language can be used to charge common traffic offences. For example, s. 13(2) of the *Provincial Offences Act* provides:

13. (2) The use on a [Offence Notice or Summons] of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence designated by such word or expression. [Emphasis added.]

The regulations made under this section create official short forms to describe offences. They generally provide a fair, common sense description of the offence alleged.⁵⁴ If the officer preparing the Offence Notice or summons does not know the official short form, or in cases where there is no such short form for the offence alleged, any words adequately describing the offence are allowed.⁵⁵ A document using the officially approved short form cannot be challenged as failing to give sufficient information about the offence charged.⁵⁶

If something other than the official short form is used, the charging document will nonetheless be sufficient if it clearly:⁵⁷

1. Identifies the offence alleged (i.e., the statutory breach that is alleged);
2. Gives reasonable information with respect to the act or omission to be proved; and
3. Identifies the transaction referred to.

54 The short forms for the relevant offences are reproduced in Appendix C.

55 *R. v. Myers* (1975), 23 C.C.C. (2d) 50 (B.C. C.A.) and *R. v. Delfing* (1982), 17 Man. R. (2d) 343 (Man. Co. Ct.), approving the use of the expression "possess a radar detector in a motor vehicle" to describe the offence created by *Highway Traffic Act*, R.S.M. 1970, c. H-60, s. 223(4)(a)(iii).

56 *R. v. Spurring*, *supra*, note 6. See also *Charlottetown (City) v. MacKinnon* (1991), 32 M.V.R. (2d) 1 (P.E.I. C.A.). See also *Ontario (Ministry of Transportation) v. Dagmar Construction Inc.* (1995), 1995 CarswellOnt 450, 12 M.V.R. (3d) 99 (Ont. Prov. Div.) where it was determined that the justice of the peace was required to request further particulars if they are readily available in order to clarify any vagueness of the information. An adjournment should then be offered to the defence.

57 See Ewart & Drinkwater, *supra* note 26 at 67-70 and 99-102.

It is not necessary for a charge to be exhaustive in its description of the transaction alleged to be sufficient to survive challenge. In some cases, where the charge is legally sufficient, the accused may nonetheless desire or require additional details to know the charge against him or her. In such cases the accused can move for particulars, which amount to a more detailed factual allegation about the conduct of the accused alleged to constitute an offence.⁵⁸

(f) Defects Not Affecting the Validity of a Charging Document or Which May be Amended⁵⁹

Given the nature of charging documents under modified procedural statutes, and the broad flexibility shown in respect of defects in such documents, it is not surprising that a number of 'defects' have been held not to go to the substance of the charge. It is equally unremarkable that few facial defects in charging documents alleging traffic offences result in the document being quashed. Between the latitude shown to such defects, the relative ease of preparing such charging documents, and the training provided to officers, few, if any, fatal defects should arise.

The following errors in charging documents have been held to be either no defect, or subject to amendment by the court at the request of the prosecutor:

- Failure of an officer to sign a Notice or Summons;⁶⁰
- Failure to state the district and court in which the offence notice is to be returnable;⁶¹
- Use of unofficial short forms (e.g., H.T.A.) provided the document is otherwise sufficient;⁶²
- Charging "speeding" without proper statutory references;⁶³

58 *R. v. Devereaux* (1975), 22 C.C.C. (2d) 568 (Ont. H.C.J.) and *R. v. Gauthier* (1977), 36 C.C.C. (2d) 420 (Ont. H.C.J.).

59 For a complete list of the statutory terms of an information or certificate in Ontario, see s. 25 of the *Ontario Provincial Offences Act*.

60 *R. v. Elliot* (1981), 12 M.V.R. 35 (Ont. C.A.). See also *R. v. Tait* (2001), 2001 CarswellOnt 6037, [2001] O.J. No. 2948 (Ont. C.J.).

61 *R. v. Callahan* (1981), 21 M.V.R. 127 (Ont. C.A.); *R. v. Arnold* (1982), 17 M.V.R. 61 (Ont. H.C.J.); *R. v. Greenspan* (1982), 17 M.V.R. 57 (Ont. Prov. Ct.).

62 *R. v. Lemieux* (1980), 15 M.V.R. 126 (Ont. C.A.). See also *R. v. Vaughan* (1978), 1 M.V.R. 32 (Ont. Dist. Ct.) dealing with proceedings under the old *Summary Convictions Act*, R.S.O. 1970, c. 450, s. 7(5).

63 *R. v. Karina* (1979), 2 M.V.R. 259 (Ont. H.C.J.); *R. v. Lemieux* (1978), 1 M.V.R. 27 (Ont. Dist. Ct.).

- Failure to name the victim of the offence;⁶⁴
- Failure to specify the means of carrying out the offence;⁶⁵
- Omitting the word "limited" in a corporate name;⁶⁶
- Using the word "operate" instead of "drive";⁶⁷
- Failure to note the filing time on the information;⁶⁸
- The time allotted by the issuing officer between voluntary payment and appearance did not meet the requirements of the Act as "working day" did not include Saturdays, Sundays or holidays;⁶⁹
- Use of incorrect section number or failure to state a section number where the offence is adequately described in words;⁷⁰ and
- Minor deviations in the form used for the ticket, or minor departures from approved forms.⁷¹

(g) Defects for Which Amendments have been Refused or Which Have Been Held to Render the Charging Document a Nullity

These defects, which will be rare, would seem to render a charging document a nullity:

- Missing signature on the information (either the Justice or the informant);⁷²
- No date of the offence;
- No name for the defendant;⁷³

64 Section 25(7)(a).

65 Section 25(7)(f).

66 *Re R. and J. F. Brennan & Associates Ltd.* (1981), 61 C.C.C. (2d) 1 (Ont. H.C.).

67 *R. v. West* (1982), 35 O.R. (2d) 179.

68 *Stephenson v. New Brunswick (Provincial Court Judge)* (1991), 1991 CarswellNB 529, [1991] N.B.J. No. 10 (N.B. Q.B.). So long as the traffic ticket appeared on the court docket, if one was generated, or was in possession of the presiding judge the statutory requirements were met.

69 *R. v. Haché* (1995), [1995] N.B.J. No. 513, 1995 CarswellNB 251 (N.B. Q.B.).

70 *R. ex rel. James v. Joy Oil Co. Ltd.* (1959), 123 C.C.C. 370 (Ont. C.A.). See also *R. v. Jamieson* (Oct. 25, 1985, B.C. Co. Ct.) summarized at 15 W.C.B. 143.

71 *R. v. Schepens* (1989), 16 M.V.R. (2d) 198 (Alta. Q.B.); *R. v. Scott*, (May 18, 1995), Batten Prov. J., [1995] O.J. No. 4282 (Ont. C.J.). See also the applicable interpretation statute, such as the *Ontario Interpretation Act*, R.S.O. 1990, c. 1.1-1, s. 28(d), which permits deviations from prescribed forms, generally if they do not alter the substance of the form, and are not calculated to mislead.

72 *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.).

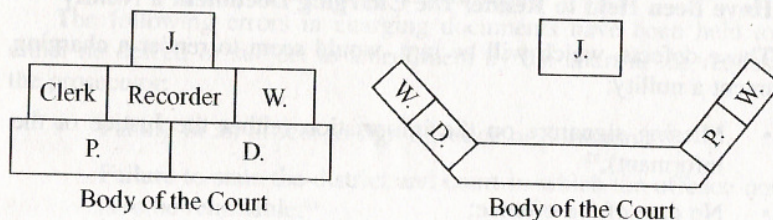
73 *Supra*, note 50.

- No name for the charging officer;⁷⁴
- No location given for the offence;
- No offence indicated or none known to law;
- Certificate of offence did not show the set fine amount, although the total payable fine amount was present on it and the offence notice;⁷⁵
- Information sworn after the end of the limitation date; and
- Failing to properly identify offence that accused (as owner) stood charged with.⁷⁶

5. THE TRIAL

(a) Procedural Details

Courtrooms used in traffic cases are usually arranged in one of two patterns:



- J. = Judge or Justice of the Peace
 W. = Witness Box
 D. = Defendant or Defendant's Representative
 P. = Prosecution

The cases to be heard at the sittings of the court for that day will usually be listed on a docket outside the courtroom. The list may be called in any order and, while the judge or justice presiding retains control over the proceedings, as a practical matter, the prosecutor usually arranges the order in which the list is to be called. Ordinarily matters are called in the order which will allow the quickest cases to be dealt with first. Shorter cases (adjournments on consent, guilty pleas) with counsel are called first, and then pleas without counsel are called. Finally, matters involving trials

⁷⁴ *R. v. Bertolucci et al.*, [1995] O.J. No. 4283 (Ont. Prov. Div.).

⁷⁵ *R. v. Pham* (November 14, 1996), Quon Prov. J., [1996] O.J. No. 4366 (Ont. Prov. Ct.).

⁷⁶ *R. v. Schepens*, *supra*, note 71; *R. v. Oakcrest Food Stores (1976) Ltd.* (1982), 17 M.V.R. 103 (B.C. S.C.).

are called, usually with an eye to the anticipated length of the particular matter, and its procedural history.

Where an accused has indicated an intention to plead not guilty after receiving an Offence Notice or where a Summons has been issued in a Part I prosecution or in any Part III prosecution, the Clerk of the Court will set the case down for trial. As a matter of practice, the court will usually co-ordinate with the officer preparing the Certificate, setting the case for that officer's next "court day".

6. DISCLOSURE

The prosecution in criminal and quasi-criminal cases (such as traffic offences) has a general duty to disclose to the defendant the nature of the evidence which will be lead by the prosecution at trial, as well as any other exculpatory evidence, or information, in the hands of the prosecution which might be helpful for the defence. For example, if the defendant made a statement at the time of the incident giving rise to the charges, the defence has a right to know what was taken down and under what circumstances.

In the leading case dealing with disclosure, *R. v. Stinchcombe*,⁷⁷ the Supreme Court of Canada left open the question of whether the duty on the prosecution to make disclosure in summary matters (and provincial offences) was the same as the very demanding duty imposed in more serious indictable cases.⁷⁸ There is no principled reason to invite a different rule in summary or provincial offences, but obviously the resources devoted to disclosure in a modest traffic offence cannot be the same as that in a more serious matter. The form or manner of disclosure for a traffic offence will not be identical, therefore, to that in more serious criminal cases. In Ontario the issue of disclosure was canvassed by a special committee convened to assist the Attorney General on matters related to dis-

⁷⁷ (1991), 68 C.C.C. (3d) 1 (S.C.C.).

⁷⁸ *R. v. Stinchcombe*, *ibid.*, at p. 13, where Mr. Justice Sopinka for the court said:

The general principles referred to herein arise in the context of indictable offenses. While it may be argued that the duty of disclosure extends to all offenses, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offenses. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offenses should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offenses, consideration would have to be given as to where to draw the line.

closure generally. The committee report (taking the name of the chair and known as the Martin Report) noted:⁷⁹

In summary conviction and *Provincial Offences Act* prosecutions, proper disclosure will, as suggested by Sopinka J. in *Stinchcombe* [(1991), 68 C.C.C. (3d) 1 (S.C.C.)] no doubt will vary with the nature of the statute defining the offence, and the circumstances of the prosecution. Accordingly, the detailed recommendations with respect to disclosure that follow may have varying degrees of applicability and/or importance. In most summary conviction prosecutions and prosecutions under the *Provincial Offences Act*, the disclosure will be simple and brief. On the other hand, certain matters, for example, some prosecutions under [environmental protection legislation] may be highly complex, and may involve very serious allegations with grave consequences. In such cases, full disclosure may be more lengthy and complex, and its significance may be heightened.

Disclosure of material in the possession of the prosecutor in traffic offences is usually simple enough to arrange.⁸⁰ Often, all that is in the possession of the prosecutor, however, is a prosecution sheet or summary prepared by the investigator. This should be obtained through the prosecutor's office. In addition though, there is nothing to prevent the defen-

79 The Report of the Attorney General's Committee on Charge Screening, Disclosure and Resolution Discussions (Ontario Ministry of the Attorney General, Toronto; 1993) (the "Martin Report") at p. 186. The Report recommended (recommendation 36, found at p. 184 of the report) that "the nature and extent of disclosure should not vary based on whether the charge was prosecuted by way of indictment, summary conviction procedure, or prosecuted under the *Provincial Offences Act*". See also *R. v. Fineline Circuits Ltd.* (1991), 10 C.R. (4th) 241 (Ont. Prov. Div.).

80 In Ontario the *Crown Policy Manual*, (the manual for Ontario Crown Attorneys and prosecutors) policy D-1 "Disclosure" provides:

In Provincial Offence prosecutions, upon request, the defendant in a minor part one [ticket traffic offence] will be provided with a copy of the certificate of offence and a copy of the notes of the police officer and witnesses if any.

For more serious part one [traffic ticket] offences, upon request, the defendant will be provided with the above plus a copy of any accident reports or other documents to be utilized by the prosecution.

For part three offences [charged on an Information with more serious penalties] the defendant will be provided with a copy of the Information, police officer or witness notes and any documents to be utilized in the prosecution.

For photo-radar offences, the defendant will be provided with a copy of the certificate of offence, a copy of the notes of any police officer and an opportunity to view the photograph. If the defendant wishes a copy of the photograph, he or she can make arrangements with the police authority to secure a copy at the defendant's cost.

Any additional material such as the radar manual should be the subject of an application to court.

See also *R. v. Shannon* (1992), 42 M.V.R. (2d) 128 (Ont. C.A.) where the Court held that an accused has no right to obtain a copy of the operating manual for a mere investigative aid or tool such as a "radar-detector" (which identified cars possibly using radar detection equipment).

dant or the defendant's representative from contacting the officer responsible and asking to see his or her notes.

While upholding the denial of disclosing the radar operating manual, the Alberta Provincial Court in *R. v. Makuch*,⁸¹ allowed disclosure of sufficient information to answer relevant matters expected to be in the average police officer's knowledge. Such knowledge included the basic theory and operation of radar, an accurate description of the specific device used and its capabilities, and a description of how to operate the device and how to test its accuracy.

Of course there is no duty on the defence to give up the theory or evidence that it intends to rely upon.⁸²

It is not unheard of, however, for the representative of the defendant or the defendant to wait until the trial date to ask to see the file on the accused. This is too late. While the prosecutor may give disclosure at this time if possible, there is no duty to do so. The only obligation on the prosecution is to give disclosure in response to a reasonable and timely request. If the defence has sought disclosure from the prosecution and been refused, the defendant may make a motion to have the charge dismissed.⁸³

If a defendant has been diligent in seeking reasonable disclosure from the prosecution and such has not been forthcoming, the trial court can order that disclosure be made in a reasonable manner before the case proceeds.⁸⁴ The defence must show that the material that it seeks is at least potentially relevant to an issue in the case before the court will order disclosure. As well, material in the possession of the Crown may be withheld based on recognized legal privilege.⁸⁵

7. COSTS

The term "costs" connotes two forms of expense incurred by an accused. Firstly, there is the cost of retaining a representative to defend the charge. Secondly, there are out of pocket expenses associated with having witnesses attend and give evidence. In general, there is no authority in a traffic court to award "costs" in the form of lawyer or agent fees to a

81 (1996), 1996 CarswellAlta 873, 192 A.R. 299 (Alta. Prov. Ct.).

82 With the exception of business records which must be served by whatever party intends to produce them at trial at least 5 days before trial. *Ontario Evidence Act*, R.S.O. 1990, c. E.23, s. 35(3).

83 But see *Ewaschuk*, *Criminal Pleadings & Practice in Canada* (2nd ed.) (Canada Law Book, Aurora: 1987, looseleaf) §31: 8390 and the cases cited therein.

84 *R. v. Stinchcombe*, *supra*, note 77.

85 *R. v. Shannon*, *supra*, note 80.

defendant.⁸⁶ There is, however, a very limited power to make an order of costs to defray the expenses associated with the attendance of witnesses.⁸⁷

8. MOTIONS PRIOR TO PLEA

Before entering a plea to the charge, the accused should bring any challenges to the charging document. A failure to do so will usually constitute an acceptance of the document as valid on its face. While the court continues to have jurisdiction to amend the document, the plea can be read as curing any defect going to the accused person's understanding of the offence charged (for example the date or the section number).

(a) Adjournments

(i) Generally

It may sometimes happen that either the defence or prosecution is unable to proceed on the date which has been set for trial. (In prosecutions where the process of setting a date takes place in writing this is more likely because, once the defendant indicates an intention to plead not guilty, he or she is not necessarily consulted as to the date to be set for trial.)⁸⁸ In such a case, either side may seek an adjournment. A witness for the prosecution or the defence may be sick or travelling and therefore unable to attend on the date set for trial. Some valid reason may prevent the defendant from coming to court to answer the charge.

A motion for an adjournment should normally be made as soon as the need for an adjournment comes to the party's attention (in most cases on at least three days notice). The party seeking the adjournment should file a notice of motion with the court three days before the day when the motion is proposed to be heard. The notice of motion should include an affidavit indicating the facts upon which the moving party relies in the application for the adjournment.

The trial court in Ontario also has a general power under s. 49(1) to grant adjournments in such circumstances. When the defendant or his representative seeks an adjournment, it is important to explain exactly why

⁸⁶ *R. v. 974649 Ontario Inc.* (1995), 101 C.C.C. (3d) 48 (Ont. Gen. Div.); *R. v. Lem* (1993), 45 M.V.R. (2d) 322 (Ont. C.A.); *R. v. Anachemia Solvents Ltd.* (1994), 14 C.E.L.R. (N.S.) 110 (Ont. Prov. Div.). There is a limited power to award costs on appeal: see *Ontario Provincial Offences Act*, s. 138(3).

⁸⁷ See s. 60 of the *Ontario Provincial Offences Act* and the regulations made thereunder: R.R.O. 1990, Reg. 945 (as amended by O. Regs. 678/92, 501/93, 493/94).

⁸⁸ In some parts of Ontario a 'first attendance court' procedure is used to require those who want a trial to attend in person to set a date: *Ontario Provincial Offences Act*, s. 5.1. This provision facilitates pre-trial discussions between defendants and prosecutors as well as ensuring that when a date is set for a trial, the accused has some input.

the trial should not proceed as scheduled. Both sides should be allowed to make representations to the court. If, for example, a witness has gone away on holidays, the defendant should be ready to explain to the court in general terms what the witness will give evidence about and when they are expected to return. If the defendant has waited to the last minute to raise the need for an adjournment, the prosecution will point out that it has its civilian witnesses in court and is ready to proceed.

While it is not unusual for a court to grant an adjournment if the defendant has a good reason on the first appearance, there is no rule requiring that an adjournment be granted. When the defendant sends some representative (lawyer, agent, friend or relative) to explain why the defendant cannot attend, that person should be ready to proceed to trial and make submissions as to sentence just in case the adjournment is denied and the trial goes ahead.

In deciding whether to allow an adjournment of a trial because a witness is not available, the court will consider:⁸⁹

1. whether the absent witnesses are material witnesses in the case;
2. whether the party applying has been guilty of delay or neglect in omitting to endeavour to procure the attendance of these witnesses; and
3. whether there is a reasonable expectation that the witness can be procured at the future time to which it is sought to put off the trial.

(b) Adjournment to Obtain Representation

The *Provincial Offences Act* recognizes the basic right of the defendant to be represented by counsel or an agent of his choice (though the agent may be rejected by the trial judge).⁹⁰ The cases have held that this important right requires that every reasonable adjournment to retain representation should be granted.⁹¹ This is, however, no absolute right to an adjournment. If a defendant is responsible for the fact that his representative has not appeared (either by firing him or failing to inform him of the court date), he may be forced to proceed.⁹²

⁸⁹ *R. v. Darville* (1956), 116 C.C.C. 113 (S.C.C.); *R. v. Barrette* (1977), 29 C.C.C. (2d) 189 (S.C.C.).

⁹⁰ See also *R. v. Lawrie and Points Ltd.* (1987), 59 O.R. (2d) 161 (Ont. C.A.). See also *R. v. Lemonides* (1997), 10 C.R. (5th) 135 (Ont. Gen. Div.). Another case is *R. v. Romanowicz* (1998), 1998 CarswellOnt 19, 14 C.R. (5th) 100, [1998] O.J. No. 12 (Ont. Gen. Div.), affirmed (1999), 45 M.V.R. (3d) 294 (Ont. C.A.).

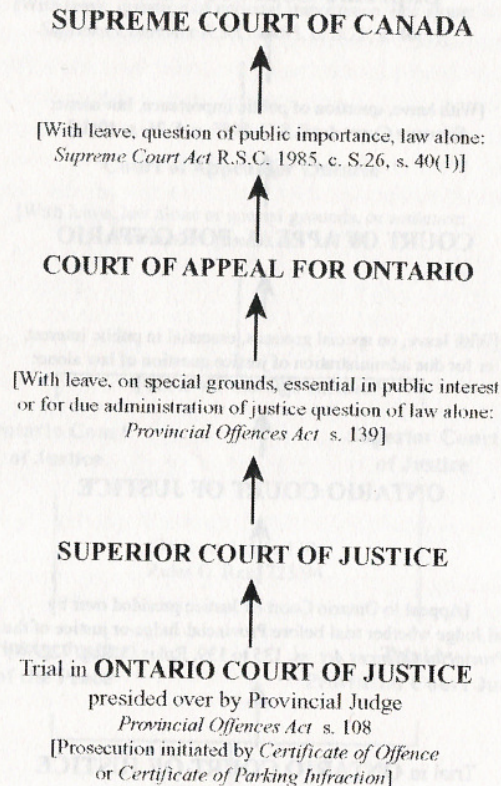
⁹¹ *Barrett v. the Queen* (1976), 29 C.C.C. (2d) 189 (S.C.C.).

⁹² *R. v. Harrison and Alonzo* (1982), 67 C.C.C. (2d) 401 (Alta. C.A.).

Appellate Review
Under Part I & II of the *Provincial Offences Act*

R.S.O. 1990, c. P-33

WHERE DEFENDANT IS A "YOUNG PERSON"



4

Evidence and Traffic Offences

1. INTRODUCTION: EVIDENCE IN CONTEXT

The Supreme Court of Canada recently provided the following useful overview of the role and purpose of evidence in any trial:¹

The ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth. In a criminal trial the search for truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which he is charged. The evidence adduced must be relevant and admissible. That is to say, it must be logically probative and legally receivable. The evidence may be that of eyewitnesses, or it may be circumstantial, including the production of physical evidence which is often termed "real evidence". In every criminal case, if there is to be conviction, the evidence must be sufficiently convincing that the trier of fact is satisfied beyond a reasonable doubt of the guilt of the accused.

Whether charged with a parking offence or with first degree murder, an individual can only be convicted if a judge or justice is satisfied to the requisite degree of proof that the evidence presented by the prosecutor demonstrates the defendant's guilt. The Court is bound by the factual portrayal of the events in question: conjecture, speculation, myth, or stereotype can play no part in a finding of guilt. Similarly, if the accused person presents a version of events to the court that casts doubt on the claims advanced by the prosecution, then the accused should be found not guilty.

The proper, thoughtful and comprehensive presentation of evidence plays a fundamental role in the outcome of any dispute. Without sufficient and proper evidence, a prosecutor cannot be expected to take a case to trial, and, while many accused persons are acquitted without calling any evidence, effective presentation of defence evidence will often secure an

¹ *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at 1206.

acquittal in the face of a compelling case for the prosecution.² It is not the role of the trier of fact, however, to search for the facts him or herself, but to adjudicate on the basis of the evidence put before the Court, to supervise the presentation of that evidence, and to ensure that all parties are given a fair opportunity to present their case. The adversarial context for this evidence is a fundamental principle of Canadian justice.³ In short:

Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy.⁴

The presentation of evidence, however, is not simply a lining up of anything and everything that may inform the issue. Both effective tactics, and the myriad of rules governing the admissibility of evidence will influence the unraveling of a case. An understanding of the fundamental laws of evidence is central to effective advocacy and thus satisfactory adjudication in any level of court. While it is beyond the scope of this text to explore in detail all the evidentiary decisions which may comprise trials in the context of traffic offences, it is hoped that an outline of some of the more common evidentiary issues that arise will assist those who appear and adjudicate in these cases.

While the formalities of the rules of evidence may not always be strictly enforced in the trial of provincial traffic offences,⁵ particularly where the accused is unrepresented, some basic principles still apply, and some more complex evidentiary problems arise fairly frequently.

² Consistent with the terminology of the *Provincial Offences Act*, s. 1, the terms "prosecutor" and "prosecution" rather than "Crown" are used here, since trials of traffic offences include those conducted by private and/or Municipal prosecutors, who are not agents of the Attorney General (and thus the Sovereign) but are agents for the Municipality, and hence referring to them as "Crowns" is improper.

³ *Borowski v. Canada (Attorney General)* (1989), 47 C.C.C. (3d) 1 at 13 (S.C.C.); *R. v. Swain* (1991), 63 C.C.C. (3d) 481 at 504 (S.C.C.). See also Weiler, "Two Models of Judicial Decision Making" (1968), 46 *Can. Bar Rev.* 406 at 412.

⁴ *Phillips et al. v. Ford Motor Co. Of Canada Ltd. et al.*, [1971] 2 O.R. 637 (Ont. C.A. per Evans J.A.).

⁵ One of the philosophies of the *Provincial Offences Act* is to eliminate excessive technicalities that sometimes punctuate trials of more serious offences: *Ontario (Ministry of Labour) v. Discovery Place Ltd.* (1996), [1996] O.J. No. 690 (Ont. Gen. Div.), varied (1997), [1997] O.J. No. 1887 (Ont. C.A.); *Toronto (Metropolitan) v. Beck* (1990), 23 M.V.R. (2d) 61 (Ont. H.C.); *R. v. Scott* (May 18, 1995), Batten Prov. J., [1995] O.J. No. 4282 (Ont. C.J.).

2. THE BURDEN AND STANDARD OF PROOF

(a) The Presumption of Innocence

Perhaps the best known principle of the law of evidence is the presumption of innocence. That principle underlies the concepts of the burden and standard of proof. An accused person is presumed to be innocent until the prosecution proves that he or she committed the offence with which he or she is charged. In other words, the burden of proving the case falls on the prosecution, and there is no burden on the defendant to prove innocence. If the prosecution cannot meet the burden of proving guilt, then the accused must be found not guilty, whether or not he or she has called any evidence. The presumption of innocence also requires that the evidence be convincing beyond a reasonable doubt. This is known as the standard of proof. The most famous statement of this rule is found in *Woolmington's Case*,⁶ where Viscount Sankey L.C. said:

... [T]hroughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt ... If, at the end of and on the whole of the case, there is a reasonable doubt ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Both the presumption of innocence and the requirement of proof beyond a reasonable doubt are accorded constitutional status by virtue of ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.⁷ Section 11(d) reads:

11. Any person charged with an offence has the right ...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial inquiry.

A person "charged with an offence" includes someone charged with a quasi-criminal offence such as those found in provincial highway traffic acts, since they are in their very nature criminal offences, some carrying penal consequences.⁸ For our purposes, it is sufficient to say that the presumption of innocence is a constitutional rule requiring that the prosecu-

⁶ [1935] A.C. 462 at 481 (H.L.).

⁷ *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11).

⁸ *Wigglesworth v. The Queen* (1987), 37 C.C.C. (3d) 385 (S.C.C.); *R. v. Richard*, [1998] 3 S.C.R. 525. Procedurally, however, it may be that a person is not "charged with an offence" at the time of issuance of the certificate of offence. These certificates have been held only to be administrative documents which are preliminary to the actual charging: *Re McCutcheon and City of Toronto et al.* (1983), 41 O.R. (2d) 652 (Ont. H.C.). But see *Saint-Lambert (Ville) v. Dries* (1991), 31 W.C.B. (2d) 254 (Que. S.C.). See Chapter 2 on procedure in trials of traffic offences.

tion prove every element of a provincial offence beyond reasonable doubt before the defendant may be convicted.⁹ The presumption of innocence has some particular relevance in the regulation of highway traffic. For example, many provinces have passed legislation which incorporates a "reverse onus" with the concomitant aim of protecting the public. School bus stopping offences are an example.¹⁰

It should be remembered too that any piece of evidence in and of itself is not a fact until the Judge or Justice accepts it as such. Additionally, while the elements of the offence must be proven beyond a reasonable doubt, it is not every single piece of evidence which is subject to the criminal standard of proof, rather the Judge "must consider the evidence as a whole and determine whether guilt is established beyond a reasonable doubt."¹¹

(b) The Standard of Reasonable Doubt

Notoriously difficult to define and explain, the nebulous concept of reasonable doubt is nevertheless at the heart of our trial process. As the Ontario Court of Appeal has recently stated:¹²

The reasonable doubt standard imports our society's value judgment that it is better to let the guilty go free than to convict the innocent. And it infuses our criminal law with the moral force needed to command the respect and confidence of the community.

Although the presumption of innocence requires that the prosecution present proof of guilt beyond a reasonable doubt, it is not easy to articulate exactly what amounts to such proof. As the noted legal author Wigmore observed:¹³

The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis for one's belief.

⁹ In so far as the elements of the offence are concerned, it is important to keep in mind the special status of strict liability offences and the absence of any mental element in the definition of the offence. While the prosecution need not prove any mental state, the accused is allowed to escape a conviction if he or she can prove that there was an innocent mental state. See generally Chapter One. See J. C. Morton & S. C. Hutchison, *The Presumption of Innocence*, (Carswell, Toronto: 1987) at pp. 93-95.

¹⁰ *R. v. Wilson* (1997), 31 M.V.R. (3d) 238 (N.B. C.A.).

¹¹ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.) at 211 per Sopinka J..

¹² *R. v. Jenkins* (1996), 107 C.C.C. (3d) 440 (Ont. C.A.) at 459, leave to appeal refused (1997), 210 N.R. 320 (note) (S.C.C.).

¹³ 4 *Wigmore on Evidence* (3d ed., Chad. Rev.), para. 2497.

The Supreme Court of Canada has recently entrenched the following fundamental elements of the concept of reasonable doubt:¹⁴

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty;
- it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;
- more is required than proof that the accused is probably guilty — a conclusion only that the accused is probably guilty must result in acquittal;
- it is not simply an ordinary expression, but has a special meaning in the criminal law context;
- equating reasonable doubt to a "moral certainty" is not appropriate;

While the burden of proof falls on the prosecution in proving all the elements of an offence, that burden is legally reversed in certain instances, both in true crimes and in regulatory statutes.

In traffic offences this reversal is particularly germane, as many offences provide for an exception or exemption which, if shown to operate in favour of the accused will provide a full defence to the charge. Section 47(3) of the *Provincial Offences Act*, for example, states that:

[T]he burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

The evidentiary burden on the defendant is on a balance of probabilities. The section has been upheld as not being in violation of s. 11(d) of the *Charter* as it creates an exception rather than an presumption.¹⁵

¹⁴ *R. v. Lifchus*, [1997] 3 S.C.R. 320. The Court described reasonable doubt as a term which has "come echoing down the centuries in words of deceptive simplicity." See also *R. v. Bisson*, [1998] 1 S.C.R. 306.

¹⁵ *R. v. Schwartz*, [1988] 2 S.C.R. 443; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. (3d) 539 (Ont. C.A.).

(c) Evidence Statutes

Both the federal and provincial governments have enacted evidence acts to deal with certain evidentiary issues.¹⁶ In traffic cases, the Ontario statute applies.

There are many potentially applicable sections of the *Evidence Act*, particularly relating to the admissibility of public documents.¹⁷ The most important question dealt with under the Ontario legislation is proof by way of a business record.¹⁸ Section 35 provides:

(1) In this section,

(a) "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

(b) "record" includes any information that is recorded or stored by any means.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

16 Federally, see the *Canada Evidence Act*, R.S.C. 1985, c. C-5; *Alberta Evidence Act*, R.S.A. 2000, c. A-18; *British Columbia Evidence Act*, R.S.B.C. 1996, c. 124; *Manitoba Evidence Act*, C.C.S.M. 1987, c. E150; *New Brunswick Evidence Act*, R.S.N.B. 1973, c. E-11; *Newfoundland Evidence Act*, R.S.N. 1990, c. E-16; *Northwest Territories Evidence Act*, R.S.N.W.T. 1988, c. E-8; *Nova Scotia Evidence Act*, R.S.N.S. 1989, c. 154; *Ontario Evidence Act*, R.S.O. 1990, c. E.23; *Prince Edward Island Evidence Act*, R.S.P.E.I. 1988, c. E-11; *Saskatchewan Evidence Act*, S.S. 2006, c. E-11.2; *Yukon Territory Evidence Act*, R.S.Y. 2002, c. 78.

17 Sections 24-29, 31-35.

18 For example, proof by an invoice book to establish the value of damage done to a vehicle, or a work time sheet to establish a defence of alibi.

If otherwise admissible, there is no need to serve the document in accordance with subsection (3).¹⁹

Of course Parts IV and V of the *Provincial Offences Act* itself contain a number of provisions which speak to evidentiary issues, such as general trial procedure on a not guilty plea,²⁰ the Court's authority to receive and consider evidence on a different charge,²¹ and the recording of evidence.²² Regulations are in place respecting electronic documents, providing for, *inter alia*, the proper certification and filing of electronic documents in court.²³

3. SOME BASIC EVIDENTIARY RULES**(a) Relevance and Materiality**

The first principle of the law of evidence is that all relevant evidence is admissible unless rendered inadmissible by virtue of some exclusionary rule. The general rule states that evidence will only be relevant if it is logically connected to a material fact in the case. In other words, relevance:²⁴

... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B." As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.

Relevance will be determined according to this general principle on a case by case basis, since the ultimate determination is obviously dependent on what issues are material to the case at hand. Thus, the weather conditions at the time of the alleged offence will likely be irrelevant to a charge of driving while suspended, but may be highly relevant to a charge of careless driving. The importance of relevance is often overlooked in favour of other more 'complicated' objections.²⁵

19 *R. v. Bredin*, [1993] O.J. No. 854 (Ont. Prov. Div.).

20 Section 46.

21 Section 47(1).

22 Section 83.

23 O. Reg. 499/94 under the *Highway Traffic Act*.

24 *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.) at pp. 323 to 324.

25 Hearsay is a classic example. The classic response to a hearsay objection is that the statement is not being offered for the truth of its contents but for the fact of the statement having been made. The fact of the statement having been made must of course be relevant. See Hon. Mr. Justice David Watt, "Hearsay, or not Hearsay? C'est la Question." February 1995 *Canadian Bar Association - Ontario 1995 Institute of Continuing Legal Education - Recent Issues and Developments in Criminal Law*.

(b) Probative Value vs. Prejudicial Effect

Regardless of how relevant a piece of evidence may be, it will nevertheless be subject to exclusion if its probative value is outweighed by its prejudicial effect. In other words, the significance and expedience of the evidence in establishing the proposition in question will be weighed against the potential for the evidence to improperly distort the reasoning process of the trier of fact in reaching a just conclusion. Typically such prejudice will arise from viewing inflammatory photographs or hearing inflammatory comments, which often amount to comments on the accused's character or past conduct which, while strictly speaking relevant to the charge, run the risk of leading the trier of fact into an impermissible chain of reasoning in reaching a verdict. Defence counsel will wish to consider this line of objection in assessing photographs of an accident scene or the potential evidence of any eye witnesses.

(c) Circumstantial Evidence

Often there will be no one who saw the accident or the alleged violation. Rather, there will be evidence which we are able to use to come to a conclusion because of our knowledge of how the world works. The former type of evidence is known as direct evidence, while the latter is usually referred to as indirect or circumstantial evidence. It is evidence of surrounding circumstances to an alleged offence from which logical inferences can be drawn. For example, if someone tells us that they looked outside and saw it snowing, we have direct evidence that it snowed. If, however, we go to bed with the ground bare and then, upon awakening the next morning, we see the ground covered in snow, we have indirect or 'circumstantial' evidence that it snowed. It is a common misunderstanding that a conviction cannot result from evidence which is entirely circumstantial. Often, circumstantial evidence is all that is available, and will offer compelling indication as to what occurred. Because of the potential remoteness of this type of evidence, however, there is a protective rule in place to help guard against the danger of a miscarriage of justice.

(d) The Rule in *Hodge's Case*

In most cases there will be both circumstantial and direct evidence. However, if there is only circumstantial evidence, this rule (which takes its name from an old English case)²⁶ ensures the operation of the presumption of innocence. The rule requires that, where the evidence against the accused person on any element of the offence is entirely circumstantial, the court must be satisfied that the evidence defeats any reasonable

explanation. That is, the circumstantial evidence must be such as to leave no reasonable explanation but that which indicates the guilt of the accused.²⁷ Before the court can find the defendant guilty, it must be satisfied, not only that the circumstances have been proved beyond reasonable doubt and that they are consistent with the defendant having committed the offence, but also that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is guilty.²⁸

(e) Judicial Notice

While, as we have said, it is a fundamental principle that a court is allowed to consider only the facts which have been proven by admissible evidence actually before it when deciding a case, some facts are so obvious that it would be foolish to require proof of their existence. For example, it would be absurd to dismiss a traffic case because a prosecutor failed to present evidence that the intersection of Queen and Bay in Toronto is a built up area or that February is a winter month in Canada. The concept of judicial notice allows the acceptance by a Court of a factual matter without the requirement of proof. While the concept of judicial notice has expanded beyond its original meaning, and encompasses more than one form,²⁹ for our purposes the rule is stated simply and accurately by O'Hearn Co. Ct. J. in *R. v. Bennet*:³⁰

Courts will take judicial notice of what is considered by reasonable men [and women] of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men [or women] in the situation of members of that court.

Thus, there is no need to call evidence of a fact which is known to be true. Courts will usually take judicial notice of facts such as dates and times (for example, the fact that a particular day was a Monday or a pub-

27 This rule sees its most common traffic application in careless driving cases, where the police rely on the final resting places of the automobiles to prove that a driver was careless. See below, Chapter 6, "Careless Driving". Consider also *R. v. Ouseley*, [1973] 1 O.R. 729 (Ont. C.A.) for a discussion of the issue in the context of 'follow too closely.'

28 *R. v. Cooper*, [1978] 1 S.C.R. 860 at 873; *R. v. Charemski*, [1998] 1 S.C.R. 679; Tanovich, D., "Upping the Ante in Directed Verdict Cases where the Evidence is Circumstantial" (1998) 15 C.A. (5th) 21.

29 See David. M. Paciocco, "Judicial Notice in Criminal Cases: Potential and Pitfalls" (1997), 40 C.L.Q. 35.

30 (1971), 4 C.C.C. (2d) 55 at 66 (N.S. Co. Ct.). See also *R. v. Peter Paul* (1998), (sub nom. *R. v. Paul*) 124 C.C.C. (3d) 1 (N.B. C.A.), leave to appeal refused (1998), (sub nom. *R. v. Paul*) 235 N.R. 392 (note) (S.C.C.); *R. v. Bélanger* (1991), 43 Q.A.C. 208 (Que. C.A.).

26 *Re Hodge's Case* (1838), 168 E.R. 1136.

lic holiday)³¹ or well-known geographical features (for example, the general division of the counties of the province,³² that Toronto is in Canada,³³ that a certain town is within the local judicial region,³⁴ or that one cannot drive from Dartmouth to a point outside of Nova Scotia in under twenty minutes),³⁵ the location and configuration of major roads in the area where the case is being tried,³⁶ or that the sun sets in the west, not the north-west.³⁷ In one case the court took judicial notice of the fact that a "Dodge" is a motor vehicle within the meaning of the legislation.³⁸ While in many instances the judicially noticed facts are indisputable, and the court then is required to notice them, there is some authority for the view that a trial judge retains the discretion not to take judicial notice.³⁹ It should be remembered that one of the purposes of judicial notice is to increase the efficiency of the trial process.

The common law position that the Court is required to judicially notice domestic, common and statute law is entrenched by legislation, including, in Ontario, the *Interpretation Act*:

7. (1) Every Act shall be judicially noticed by judges, justices of the peace and others without being specially pleaded.

(2) Every proclamation shall be judicially noticed by judges, justices of the peace and others without being specifically pleaded.

31 Where an offence can only be committed during certain times and days (for example, no stopping during rush hour Monday to Friday), the Court will usually take judicial notice of a calendar whether or not the officer has one in his or her possession, or whether the officer is able to testify as to the specific day in question. In fact, it is probably sufficient for the officer to simply testify that the ticket was issued on one of the specified days without having to say which particular day of the week it was, and the evidence is open to challenge on cross-examination or by defence evidence in chief.

32 *R. v. McGregor* (1895), 2 C.C.C. 410 (Ont. H.C.J.).

33 *R. v. Cerniuk* (1948), 91 C.C.C. 56 (B.C. C.A.).

34 *R. v. Discovery Place Ltd.*, *supra*, note 5.

35 *R. v. Porter* (1961), 130 C.C.C. 116 (N.S. S.C.); *R. v. Goodwin*, [1965] 2 C.C.C. 127 (B.C. C.A.); *Harnden v. Kosir* (February 13, 1995), Doc. 393724/90 (Ont. Gen. Div.).

36 *R. v. Dawson*, [1994] B.C.J. No. 678 (Prov. Ct.); *R. v. Gardiner*, [1990] O.J. No. 2370 (Gen. Div.); *R. v. Yachmin*, [1995] O.J. No. 1304 (Prov. Div.). These and other examples of forms of judicial notice are cited in Paciocco, *supra* note 29 at 38-39. See also *R. v. Banks* (2007), 216 C.C.C. (3d) 19 (Ont. C.A.), leave to appeal refused (2007), 2007 CarswellOnt 5670 (S.C.C.).

37 *MacNeil Estate v. Gillis* (1994), 128 N.S.R. (2d) 305 (N.S. S.C.).

38 *R. v. Smith* (1957), 119 C.C.C. 227 (N.S. S.C.).

39 *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused (1987), 56 C.R. (3d) xviii. See also *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, where L'Heureux Dubé J. stated in dissent that a judge could take judicial notice of the prevalence of racism in an area.

An "Act" includes an "enactment."⁴⁰ However, delegated legislation such as that passed by municipalities to regulate parking under the authority of the *Municipal Act* will often not be familiar or accessible enough to be judicially noticed, and will need to be proved as a fact, and it would appear that the *Interpretation Act* does not apply to municipal by-laws, proof of which are governed by the *Municipal Act* itself.⁴¹ Thus, in trials of parking offences the prosecutor will enter the pertinent by-law as an exhibit (even though a separate copy of the by-law need not be filed as an exhibit for each case — a certified copy of the by-law present in the court is sufficient).⁴² The Ontario *Evidence Act* requires courts to take judicial notice of the signature of any Canadian judge appended to a judgment, order, certificate, etc.⁴³

Matters which should not be the subject of judicial notice include scientific issues, or the effect of medication on an individual's impairment.⁴⁴ Nor should judicial notice be taken of the fact that the standard written demand for a screening device that was usually read out contained the express words that the sample of breath be provided "forthwith".⁴⁵ The workings of sophisticated equipment (for example, radar or breathalyzers) cannot be judicially noticed,⁴⁶ although it is not necessary for the prosecution to call expert evidence as to the inner workings of such devices. To the extent that a court is satisfied that the officer operating the radar device for example, has received adequate training, can operate the instrument competently, and that the readings obtained are an accurate reflection of the facts, then judicial notice is in effect taken of the fact that the device is generally known to be a reliable instrument for measuring speeds, so that radar evidence will establish a *prima facie* case for the Crown.⁴⁷ The issue was considered in *R. v. Joudrey*⁴⁸ where it was held

40 *Interpretation Act*, R.S.O. 1990, c. I.11.

41 See *Peterborough (City) v. Lockyer* (1992), 12 O.R. (3d) 214 (Ont. Prov. Div.) and the critique of the holding in that case by Martin Teplitsky, "Proof of By-Law is Governed by Legislation, Not Judicial Notice" (1993), 15 *Advocates' Q.* 380. See also *Grand Central Ottawa Ltd. v. Ottawa (City)* (1997), 39 O.R. (3d) 47 (Ont. Prov. Div.).

42 *R. v. Margetis* (1988), 9 M.V.R. (2d) 19 (Ont. H.C.J.).

43 Section 36(1).

44 *R. v. Van Groen* (1997), 34 W.C.B. (2d) 510 (B.C. S.C.); *R. v. Hoyles* (2005), 26 M.V.R. (5th) 168 (N.L. Prov. Ct.).

45 *R. v. Phelan* (1997), 35 W.C.B. (2d) 175 (Nfld. C.A.).

46 *R. v. Waschuk* (1970), 1 C.C.C. (2d) 463 (Sask. Q. B.). See also *R. v. Bland* (1974), 20 C.C.C. (2d) 332 (Ont. C.A.). See also *R. v. Le* (2002), 27 M.V.R. (4th) 75 (Ont. C.J.); *R. v. McLachlan* (2006), 37 M.V.R. (5th) 302 (Ont. C.J.) and *R. v. Caine* (2006), 33 M.V.R. (5th) 284 (Ont. C.J.).

47 *D'Astous v. Baie-Comeau (Ville)* (1992), 74 C.C.C. (3d) 73 (Que. C.A.); *R. v. Williams* (2008), 2008 CarswellOnt 1504 (Ont. C.J.).

48 (1992), 39 M.V.R. (2d) 235 at 244 (N.S. Prov. Ct.). See also *R. v. Prasad* (2002), 2002 CarswellOnt 5842 (Ont. C.J.).

that radar devices have provided reliable and accurate evidence in many cases:

... even though it is not clear such accuracy is "within the knowledge of persons generally". But it is within the knowledge of judges and the law.

When matters are relevant to a particular issue, as here the possibilities of inaccuracy in the radar readings, and there has been a full disclosure at trial, as in this case, so that the information, coming apparently from an accurate source, is not received "behind the back of counsel" ... it seems a judge may take judicial notice of them

Based in part on passages from a textbook on speeding and radar, the trial judge in that case went on to take judicial notice that:⁴⁹

- a radar instrument reading is *prima facie* evidence of speed;
- it is not, however, infallible;
- exterior factors, be they atmospheric or environmental, such as clouds, snow, rain, fog, wind or glass, may affect the accuracy of its reading.

This rule of evidence also allows the court to look to readily available and reliable sources to get information. Two acceptable sources of information under this rule are dictionaries⁵⁰ and recently published maps.⁵¹

The court should not take judicial notice of a matter which is central to the dispute, even if it seems to be a matter which is not open to argument. A common example in traffic cases is the qualifications of an officer to operate a radar device properly, or that the particular device was operating properly at the particular time.⁵² Courts should not take judicial notice of such matters. In certain circumstances, doing so will in effect create a "judicial reverse onus", contrary to s. 11(d) of the *Charter*.⁵³ The rule which allows judicial notice is intended to make it possible for the court to avoid endless streams of evidence on obvious points. It is not intended to relieve the duty on the prosecution to prove disputed points. In *R. v. Eagles*,⁵⁴ the court refused to take judicial notice of the actual boundaries of a municipality. There the trial court had taken judicial no-

⁴⁹ *Ibid.*, at p. 245.

⁵⁰ See *R. v. Quinn* (1975), 27 C.C.C. (2d) 543 (Alta. S.C.); *R. v. Scaynetti* (1915), 25 C.C.C. 40 (Ont. H.C.J.).

⁵¹ *R. v. Jameson and others* [1896] 2 Q.B. 425. Judicial notice should also be taken of a calendar where one is available, if the charge is limited to certain days (e.g., stopping in a posted no stopping zone during rush hour Monday to Friday).

⁵² Manraj & Haines, *The Law on Speeding and Radar*, (2nd ed.) (Butterworths: Markham, 1991) at p. 26.

⁵³ *R. v. Stewart* (1997), 30 M.V.R. (3d) 305 (N.B. Q.B.).

⁵⁴ (1976), 31 C.C.C. (2d) 417 (Ont. H.C.J.).

tice of the fact that Lakeshore Road is within the City of Sarnia. The charge was speeding, under what is now s. 128(1)(b), and proof that the area was "built up" was essential to a conviction. If the defendant disputed the fact of location and the prosecution failed to prove it by evidence, the trial court could not properly take judicial notice of so central a matter. This rule should rarely work any hardship on the prosecution; if the issue is genuinely within the ambit of normal judicial notice (that is, if it is truly obvious), it should be simple to prove.

While this position is probably correct (that is, that even the obvious must be proved if the defendant disputes it), cases have repeatedly held that where the location of the offence is so well-known as to be notorious, the court may take judicial notice of the place. Thus in one case, the court took notice of the fact that the location of a speeding charge was on property of the National Capital Commission.⁵⁵ See also *R. v. Redlick*,⁵⁶ where the court said:

It is clear that the location is an essential ingredient of this offence. The court must be satisfied in order to convict that the offence occurred in a city, town, police village or other built-up area. Normally this would require evidence, especially if there is a dispute as to this matter, but I do not believe that evidence must be given in all cases, especially where it is so obvious to everyone that the offence has occurred within such an area. One should not be required to prove the patently obvious. It is only where there is some dispute or some possible disagreement about whether the location is within such an area or whether it is not [that evidence must be lead].

(f) Facts Proved in Other Cases

Some issues of fact are repeatedly before the courts. There is a great temptation to dispense with full proof of such factual matters and simply get on with the trial. It is improper, however, to use evidence or findings of fact from previous trials to convict in a later case. Thus, for example, it was an error for a trial court to dispense with proof of the scientific accuracy of a breathalyzer simply because the matter had been proved in cases already heard.⁵⁷ It is submitted that this rule prevents trial courts from accepting evidence derived from radar or other technical equipment without proof of the reliability of this type of equipment as a part of the body of evidence presented in the trial in which such evidence is offered.

The damaging effects of drinking and driving are a well-known and indisputable fact such that they have been held to properly be the subject

⁵⁵ *R. v. Potts* (1982), 66 O.R. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused, May 17, 1982).

⁵⁶ (1978), 41 C.C.C. (2d) 358 at p.359 (Ont. H.C.J.).

⁵⁷ *R. v. Skelton*, [1968] 3 C.C.C. 35 (B.C. S.C.).

of judicial notice.⁵⁸ The presumption of regularity that the Ministry had properly designated a construction zone was within the ambit of judicial notice.⁵⁹

(g) Refreshing Memory

The evidence of a police or provincial offences officer will almost invariably commence with the "qualification" of the officer's notes.⁶⁰ Typically, the following sequence of questions and answers occurs:

Q: On [date of offence] I understand you were employed as a [police/provincial offences officer]?

A: Yes.

Q: Did you make any notes regarding the matter before the court?

A: Yes.

Q: When did you make these notes? A: At the time of [or immediately following] the offence.

Q: Have you made any additions, deletions or alterations to these notes?

A: No.

Q: Why do you wish to refer to these notes?

A: In order to refresh my memory of the events in question.

The prosecutor will then ask for the Court's permission for the officer to refer to the notes in order to refresh his or her memory of the events in question. Defence counsel will sometimes wish to address questions of their own with respect to the notebooks, but should be limited at this time to questions which go to the currency of the notes, and the nature of any alterations or additions that may have been made. The issue of refreshing memory, while usually *pro forma* in criminal trials, is not always straightforward. Particularly in traffic offences, where an officer may issue dozens of tickets in a given week, or even day, the reality is that the officer's memory may not be refreshed, and he or she may have no memory of the individual ticket at all. In practice, many trials of traffic matters are perfunctory and, particularly where an accused is unrepresented, it is usually immaterial as to whether the officer really remembers the incident in question.

Strictly speaking, the rule on refreshing memory falls into two categories, in Wigmore's terminology a "present memory revived" and a "past recollection recorded". The former occurs when the reviewing of a

⁵⁸ *R. v. Tremblay* (1995), 30 W.C.B. (2d) 317.

⁵⁹ *Ontario v. Druce* (2006), 32 M.V.R. (5th) 215 (Ont. C.J.); *R. v. Kopf* (2003), 2003 CarswellOnt 9138 (Ont. C.J.).

⁶⁰ The "note" is usually nothing more than the officer's copy of certificate of infraction, occasionally supplemented by some notes in the officer's memo book or, in the case of parking infractions, notes made at the bottom of the officer's copy itself.

note "jogs" the memory such that the event as it happened is recalled to memory. The latter occurs when the witness is unable, notwithstanding a memory aid, to recall the event in question, but is able to say that on an earlier occasion he or she had a perfect recollection of the incident, and at that time truly recorded the same. At common law this latter evidence was admissible, but it presents problems for the cross-examiner who can only examine as to the usual practice of the witness, not his or her conduct on the particular occasion in question. Hence the contemporaneity requirement, and the requirement that the witness be able to vouch for the accuracy of the recording of his or her recollection.⁶¹ The situation is encapsulated in this excerpt from what is still the leading case in this area:

The witness could not, from memory alone, testify to an inspection made shortly before the accident; it would hardly be possible that he could; it was then proposed to put into his hand a report, signed by him in the usual course of his work, shewing that the car had been examined at that time; but, upon such objection, that was prevented. If looking at the report, the witness could have said, "that is my report, it refers to the car in question, and shews that it was examined at the time, and, though I cannot from memory say that it was then examined, I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew that it was true." That would, of course, be very good evidence.⁶²

The witness in this situation is not "refreshing his memory", but the procedure has nevertheless been mislabeled as such through the years. In such cases, it is the document that constitutes the evidence, and theoretically should be received as an exhibit for the truth of its contents, the officer having no capacity to testify to the events he or she no longer recalls. The rule is, in essence, simply an exception to the hearsay rule on the basis that the statement was made in circumstances that guarantee its reliability. Further, the occasions on which an officer will not be allowed to testify will be few, since it would seem that the memory loss must be total for the rule to be triggered.⁶³ Thus in practice the categories of recollection are not so distinct, the strict rule probably often honoured in the breach, and officers will routinely testify notwithstanding that their recollection of the events in question is not perfect.⁶⁴ Further, there is nothing

⁶¹ In the former category of cases, contemporaneity is not an essential requirement. See also *R. v. B. (K.G.)* (1998), 125 C.C.C. (3d) 61 (Ont. C.A.); *R. v. Shergill* (1997), 13 C.R. (5th) 160 (Ont. Gen. Div.) for a review of the law in this area, as well as a useful review of the procedure to be followed when refreshing a witness' memory. See also *Durham (Regional Municipality) v. Hawkshaw* (2007), 2007 CarswellOnt 4651 (Ont. C.J.).

⁶² *Fleming v. Toronto Railway Co.* (1911), 25 O.L.R. 317 at 325 (Ont. C.A.).

⁶³ *C.(J.) v. College of Physicians and Surgeons of British Columbia*, [1990] 2 W.W.R. 673 (B.C. C.A.).

⁶⁴ This will be particularly so in trials alleging a breach of parking by-laws.

to prevent an officer from "refreshing" his or her memory from notes prior to testifying. In any event, where the witness purports to recall the events, the veracity of that recollection and the accuracy of the events related can of course be tested under cross-examination.⁶⁵

(h) Statements and Admissions made by the Accused

Where the prosecution tenders evidence of a statement made by the accused to a police officer, the statement should normally be subject to a *voir dire* to determine its voluntariness, which the Crown must prove beyond a reasonable doubt. Unless a sufficient explanation can be given for not doing so, the prosecution will generally be required to call at the voluntariness *voir dire* any and all officers present during the giving of the statement.⁶⁶ Typically, in highway traffic matters this will be a statement made by the accused at the time the ticket was issued. The following standard questions are usually put to an officer testifying on the *voir dire*:

1. When you approached the accused were you with anyone else?
2. Were you in uniform?
3. Did you have a conversation with the accused?
4. Where did this conversation take place?
5. Did you have any physical contact with the accused?
6. Did you promise any favours or threaten the accused in any way?
7. Did the accused appear to have an understanding of the English language?
8. Did the accused appear to be under the influence of alcohol or drugs?
9. Was the accused under arrest at the time?

Of course if the answer to the last question is yes, then the officer will have been obliged to advise the accused of his or her *Charter* rights to counsel and to remain silent. Defence counsel will rarely call the accused to testify on a voluntariness *voir dire*. As a general rule, the accused's statement should be adduced as part of the prosecution's case in chief.⁶⁷ If the prosecution attempts to lead the statement in cross-examination it is open to the accusation of splitting its case. The prosecution is not permitted to introduce the statement for the first time in rebuttal.⁶⁸

⁶⁵ See also *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.), leave to appeal to S.C.C. quashed for want of jurisdiction 69 C.C.C. (3d) iii (note) (S.C.C.).

⁶⁶ *Thiffault v. The King* (1933), 60 C.C.C. 97 (S.C.C.).

⁶⁷ *R. v. Briden* (1960), 127 C.C.C. 154 (Ont. C.A.).

⁶⁸ *Ibid.*

An accused cannot of course be compelled to give a statement, and where voluntariness is not established, the statement will not be admissible. However, most provincial statutory regimes include a requirement that the driver of a vehicle involved in a traffic collision give a statement to a police officer, or other person in authority. For example, s. 199(1) of the *Highway Traffic Act* in Ontario obliges the operator of a vehicle involved in an accident which results in a prescribed amount of damages to report the accident forthwith.⁶⁹ Subsection (3) further requires that:

A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, the particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and the other information as may be necessary to complete a written report concerning the accident and shall forward the report to the Registrar within ten days of the accident.

The section does not relieve the prosecution of the need to prove the voluntariness of any statement thus made, however, the statutorily compelled nature of the statement may render it inadmissible against the maker where it is given in compliance with the statute.⁷⁰ Some provincial legislation prohibits the use of such statements at trial, and it is submitted that even where such a statutory prohibition does not exist, where an accused knowingly gives a statutorily compelled statement, that statement should be *prima facie* inadmissible as a violation of the accused's right to protection from self-incrimination.⁷¹

(i) Prior Statements

As a general principle, a witness who gives evidence inconsistent with a statement previously made, can have the contradiction put to him or her. If the witness does not adopt the prior statement, then the trier of fact can only use the prior statement to assess the credibility of the witness. It cannot be used for its truth unless it meets the criteria of necessity and reliability as set out by the Supreme Court of Canada in *R. v. B.*

⁶⁹ See Chapter 8, "Common Offences."

⁷⁰ *R. v. Sarkonak* (1990), 23 M.V.R. (2d) 45 (Man. Q.B.); *R. v. Tveter* (1997), 25 M.V.R. (3d) 228 (Alta. Q.B.). But see also *R. v. White* (1998), 32 M.V.R. (3d) 161 (B.C. C.A.), leave to appeal allowed (1998), 55 C.R.R. (2d) 188 (note) (S.C.C.), affirmed (1999), 135 C.C.C. (3d) 257 (S.C.C.); and *R. v. Spyker* (1990), 29 M.V.R. (2d) 41 (B.C. S.C.).

⁷¹ However, see *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 for a consideration of this issue in the context of provincial fisheries legislation. It would seem well-reasoned that such a statement should be inadmissible in the trial of a *Criminal Code* offence: *R. v. White*, *supra*, note 70.

(K.G.).⁷² The procedural requirements of adducing evidence of prior statements are governed by ss. 20 and 21 of the Ontario *Evidence Act*.⁷³

It is also generally inadmissible for an accused person to lead evidence that he or she on an earlier occasion had given an exculpatory statement consistent with his or her evidence at trial. The policy reason for the rule is that such a statement is generally seen as being of little assistance to the trier of fact. It unnecessarily expands the scope of the trial,⁷⁴ and is inherently unreliable due to the potential for fabrication.⁷⁵ Prior consistent statements are admissible under certain circumstances. They are generally inapplicable to trials of traffic offences, but are generally not admissible to prove the truth of their contents.⁷⁶

4. A PRIMER ON HEARSAY

(a) Introduction

The basic rule against hearsay evidence is frequently misunderstood. The general principle says that an out of court statement made to the witness is not admissible through the mouth of the witness to prove the truth of that statement. In other words, in a prosecution for careless driving, witness X cannot testify that accused A told her that she was driving without her lights on. The prosecution would clearly want to rely on that statement to prove that A was indeed driving without her lights on, and as such would fall foul of the prohibition. The common law rule has undergone substantial change in recent years, such that it can reasonably be said that the rule now operates on a general principle that where *prima facie* hearsay evidence is otherwise necessary (in that it is evidence otherwise unavailable) and reliable (the circumstances surrounding the making of the statement satisfy certain criteria of trustworthiness) then the evidence will be admitted and can be used for the truth of its contents.⁷⁷

⁷² (1993), 79 C.C.C. (3d) 257 (S.C.C.). See also *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.).

⁷³ R.S.O. 1990, c. E-23, ss. 20, 21.

⁷⁴ *R. v. Beland* (1987), 36 C.C.C. (3d) 481 at 489-90 (S.C.C.); *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.).

⁷⁵ Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (Butterworths: Markham, 1992) at 307-308.

⁷⁶ *R. v. Lajoie* (1993), 64 O.A.C. 213 (Ont. C.A.), leave to appeal refused (1993), 160 N.R. 242 (S.C.C.); *R. v. J.A.* (1996), 95 O.A.C. 383 (Ont. C.A.).

⁷⁷ The law on hearsay and the admissibility test that is applied to such evidence has been shifting in the last few years. The Supreme Court of Canada in *R. v. Starr*, 2006 SCC 57 (S.C.C.) outlined an approach to reconciling the potential conflict between the traditional and principled approaches to hearsay exceptions. The Court revisited the issue in *R. v. Khelawon* (2000), 147 C.C.C. (3d) 449 (S.C.C.) and overturned *Starr* to the extent that it divided factors into categories relevant to threshold and those relevant to ultimate reliability, and forbade consideration of evidence extrinsic to the making of the statement.

Unrepresented accused will regularly proffer hearsay evidence, and the prosecutor is often placed in the awkward position of having to object to evidence which the accused sees as being wholly relevant to their defence. Unless the evidence is clearly not harmful to the prosecution, it is nevertheless important that the objection be registered.

(b) Multanova Photo-Radar Evidence of Speed As Hearsay Evidence⁷⁸

Photographic evidence of speed in the form of "photo radar" has been held to be admissible hearsay evidence since it possesses a sufficient circumstantial degree of trustworthiness and accuracy.⁷⁹

Certain statutory provisions allow for the reception of hearsay evidence, most notably where evidence is provided by way of a certificate purporting to verify the content of some official record, most often vehicle and plate ownership, and the driving history of a defendant.⁸⁰ While in practice it is rarely an issue, s. 47(2) of the *Provincial Offences Act* allows a Court to decide whether or not the defendant is the person referred to in the document on the basis of "credible or trustworthy" information, including hearsay.⁸¹ The Ontario *Evidence Act* also stipulates that there is no requirement to prove the handwriting or official position of anyone certifying to the truth of "any matter or thing as to which he or she is by law authorized or required to certify."⁸²

5. VIVA VOCE EVIDENCE

Our system of proof places great emphasis on oral or *viva voce* (literally, 'living voice') evidence. The bulk of the evidence presented in any case will come in the form of sworn oral testimony given by witnesses appearing in the courtroom. The rules which govern the way such evidence is to be introduced are intricate, and the art of extracting just the right evidence is one that is difficult for even the most experienced counsel. This short chapter is no place to learn either the art or law of questioning witnesses. We intend only to highlight the principal issues and to relate them to the law dealing with traffic offences. Anyone wishing a

⁷⁸ Photo radar is now no longer in use in Ontario as a result of a change in government policy in 1995.

⁷⁹ *R. v. Chow* (1991), 68 C.C.C. (3d) 190 (Alta. C.A.). See the general principles of this exception to the rule against the admission of hearsay evidence, *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915.

⁸⁰ *Highway Traffic Act* s. 210(7); *Provincial Offences Act* s. 47(2), s. 48.1, s. 57(4) *R. v. Vlakovic* (1994), 5 M.V.R. (3d) 219 (Ont. C.A.).

⁸¹ See also *Provincial Offences Act* s. 104.

⁸² Section 37.

more thorough discussion of the art or law of examining witnesses is referred to Earl Levy's leading text, *The Examination of Witnesses in Criminal Cases*.⁸³

(a) Preparing Witnesses

It is entirely proper for the party calling a witness to prepare that person to give evidence. This should not, however, go to the point of coaching the witness by encouraging or signalling the witness as to the nature of the evidence that the counsel or agent wants given. Rather the witness should be made aware of the case the party needs to make and the area upon which that party intends to question the witness. There is no property in a witness, and either side is entitled to speak to any witness prior to trial. A witness is not, of course, obliged to talk to counsel.⁸⁴

There is no duty on the defence to call witnesses whose evidence might help the prosecution, though the prosecutor has a duty to present all helpful evidence to the court.⁸⁵

A witness should be told where to stand and how to address the court ("your worship" for a Justice of the Peace, or "your honour" for a judge). The role of counsel or agent should be made clear and the forms of examination in chief, cross-examination and re-examination explained. A witness should be told to speak loud enough to be heard and to address his or her answers to the judge or to counsel asking the question. A witness being cross-examined should never look to counsel who called the witness for the answer.

If language is a problem this is the time (and not the day of trial) to decide whether an interpreter is needed, although the requirement for an interpreter is often taken care of by virtue of the first appearance process.

(b) Exclusion of Witnesses

Before any evidence is tendered, counsel is entitled to ask, and a judge has the authority to exclude from the courtroom any prospective witness.⁸⁶ The reason for this rule is to prevent subsequent witnesses from knowing the evidence which has already been given, thus minimizing the danger of a witness shaping his or her evidence to conform with the theory of one side of the case. This is a common law rule stemming from the Court's inherent authority to control its own process, and differs in that

sense from s. 52 of the *Provincial Offences Act* which grants a judge authority to exclude the accused and members of the public under certain limited circumstances. While a witness who disobeys such an order may be in contempt of court, the evidence of that witness should still be allowed. The fact that the witness has heard earlier witnesses only affects the weight of his or her evidence.⁸⁷ As a rule an order excluding a witness will be granted as a matter of course.⁸⁸ Normally, the investigating officer is allowed to remain in the courtroom to instruct the prosecutor. The defendant can only be excluded from the courtroom under very limited and rarely invoked situations.

Where expert opinion evidence is to be led, the court will normally allow an expert to stay in the courtroom to hear the background which will form the basis of his or her opinion.⁸⁹

(c) Other Matters Relating to Oral Evidence

Some jurisdictions permit the informant officer to appear as the prosecutor, testifying on his own behalf, and cross-examining witnesses. For most minor offences, particularly parking violations, this is merely a matter of administrative expediency where the charge presents little or no issues of legal complexity and most trials are *pro forma*. The practice has been upheld as a justified infringement of an accused's s. 11(d) right under the *Charter* to be tried by an independent tribunal.⁹⁰

Section 39(1) of the *Provincial Offences Act* empowers the Court to issue a summons to any witness who is able to give material evidence in a proceeding under that Act. New amendments to the *Provincial Offences Act*, not yet proclaimed, allow for witnesses to give evidence by video conference, audio conference, telephone conference or another electronic means prescribed by the regulations.⁹¹

With the consent of all parties, the court may consider evidence against an accused on more than one charge.⁹² This will be common in charges arising from the *Highway Traffic Act* where a defendant is often charged with two or more offences arising out of a single incident. An accused's consent is not required, however, for two offences contained in the same information to be tried together. In other words, s. 38(2) of the *Provincial Offences Act* allows for severance where it is determined that "the ends of justice" require it. The general rule is that offences under the

⁸³ 5th Edtn., Carswell, 2004.

⁸⁴ For a discussion of prosecutorial considerations when interviewing witnesses, see *The Commission on Proceedings Involving Guy Paul Morin*, Fred Kaufman C.M., Q.L., Commissioner (1990), Vol. 2, p. 1221.

⁸⁵ *Wu (alias Wu Chuck) v. R.* (1934), 62 C.C.C. 90 (S.C.C.).

⁸⁶ *R. v. Hoyt* (1943), 93 C.C.C. 306 (N.B. S.C., App. Div.).

⁸⁷ *R. v. Dobberthien*, [1975] 2 S.C.R. 560.

⁸⁸ *R. v. Learn* (1981), 63 C.C.C. (2d) 191 (Ont. H.C.).

⁸⁹ *Bleta v. R.* [1964] S.C.R. 561.

⁹⁰ *R. v. Randall* (1989) 8 W.C.B. (2d) 15 (B.C. Co. Ct.); *R. v. 397273 Ontario Ltd.*, [1993] O.J. No. 3417 (Ont. Prov. Div.); *R. v. Kennedy*, [1997] O.J. No. 2717 (Ont. Gen. Div.).

⁹¹ *Provincial Offences Act* s. 83.1.

⁹² *Provincial Offences Act* s. 47(1); *R. v. Chunas*, [1992] 1 S.C.R. 595.

Highway Traffic Act arising out of the same circumstances should be tried together.⁹³ A defendant may be convicted of an offence, even though that offence is not charged, where all the elements have been proven and it is included in the offence charged.⁹⁴

While to all intents and purposes rendered superfluous by the *Canadian Charter of Rights and Freedoms*, the basic principles of the conduct of a trial are statutorily defined in the *Provincial Offences Act*:

46. (2) The defendant is entitled to make full answer and defence.

(3) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses.

(4) The court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof or evidence.

(5) Despite section 8 of the *Evidence Act*, the defendant is not a compellable witness for the prosecution.

Evidence in proceedings under the *Provincial Offences Act* must be recorded,⁹⁵ and this invariably means by audio tape recording which can later be transcribed if required for further proceedings.

(d) Examination-in-chief

Sometimes called 'direct examination' (the American expression), examination-in-chief occurs when the party calling the witness elicits evidence by asking the witness questions. As a general rule, a witness may not be asked a leading question in examination-in-chief. The reason for this rule is self-evident:⁹⁶

Some of the reasons given for this prohibition are the danger that a witness who is nervous will simply assent to a question or give the easiest answer and accordingly give evidence which he did not intend to give or which he does not believe. Further, leading questions are objectionable because of the possibility of pre-arrangement between examiner and the witness as well as the impropriety of suggesting the existence of facts which are not in evidence.

To this one can only add the danger of a witness who innocently desires to please the party who has put him or her in the box and is therefore open to suggestion from that party.

(e) Leading Questions

A leading question is one which improperly suggests to the witness the answer which the questioner expects to be given. As Levy observes:⁹⁷

A leading question is one that suggests the desired answer to the witness. Where the questioner wishes to elicit from the witness a description of a hat that the witness observed, the witness should not be asked: "Was Mr. Jones wearing a white straw hat?" The witness should be guided through a series of questions of this nature: "Did Mr. Jones have anything on his head? What was it? What was the hat made of? What colour was the hat?" A question is also leading if it assumes a fact in dispute which has been given in evidence so that the witness has ostensibly to admit the fact in order to answer the question.

Leading questions are proper when the topic is one which is not in dispute. Thus it is often proper for a witness to be lead through evidence as to background (address, occupation, etc.) and even lead up to the time and place of the events in issue.

(f) Cross-Examination

Cross-examination is the *sine qua non* of our adversarial system. It is essential in testing the strength or frailty of the opposing party's case. Probably because of its central importance, it is the subject of many rules and practices. Good cross-examination only comes with experience, but it is important to know some of the more fundamental rules.

As a matter of procedure, in Part I and II infractions, the defendant's opportunity to challenge the evidence of the officer who issued the ticket is specifically drawn to the charged person's attention, and the defendant is required to indicate at the time of requesting trial whether he or she intends to challenge the officer's evidence.⁹⁸

⁹³ *R. v. Vlajkovic*, *supra* note 79.

⁹⁴ *Provincial Offences Act* s. 55.

⁹⁵ *Provincial Offences Act* s. 83. Mechanical failure causing an incomplete record will invariably lead to a new trial being ordered if an appeal is taken: *R. v. Harbour View* (1984), 13 W.C.B. 319 (Ont. Prov. Ct.).

⁹⁶ Bruce Long, *The Prosecutor's Handbook*, 1987, Ministry of the Attorney General, p. B11-1. See also *R. v. Deacon* (1947), 87 C.C.C. 271 (Man. C.A.); *R. v. Williams* (1982), 66 C.C.C. (2d) 234 (Ont. C.A.).

⁹⁷ *Supra* note 82.

⁹⁸ *Provincial Offences Act* s. 5.2(1), 18.1.2. It would seem that in practice this option is rarely exercised, either because it is not specifically explained to the attention of the defendant at the time of requesting trial, or, more likely, because the defendant can then rely on the prosecution inevitably withdrawing the charge if the officer fails to attend on the trial date. This is perhaps unfortunate, as many defendants indicate that they wish to challenge the officer's evidence and then plead guilty with an explanation, thus defeating the purpose of the section, that of administrative efficiency. See, however, *R. v. Chatterton* (February 10, 1995) (Ont. Prov. Div.) for comments on this section. See also *Metropolitan Toronto (Municipality) v. Banwait* (1997), 32 M.V.R. (3d) 16 (Ont. Gen. Div.).

The rules respecting proper cross-examination are many.⁹⁹ In general, a party is given wide latitude in cross-examination, but the prosecution is more restricted in its approach than the accused. Some of the more frequently encountered prohibitions on cross-examination are the following:

- the prosecutor cannot cross-examine the accused as to "bad character" unless the accused first puts his or her character in issue;¹⁰⁰
- It is improper to ask the accused (or any witness) why another witness would be lying.¹⁰¹ The credibility or veracity of a witness is something for the judge to assess;
- It is improper, both ethically and legally for counsel to ask questions which are known to be inadmissible. Thus counsel should not examine documents or other evidence which he or she is not entitled to put into evidence,¹⁰² particularly after the evidence has already been ruled inadmissible;¹⁰³
- But counsel may put unproven facts to a witness, although where the witness denies the fact counsel will be stuck with the answer.¹⁰⁴ Such hypotheticals should not amount to prejudicial or abusive examination, and the judge retains the discretion to prevent questioning along this line;¹⁰⁵
- Overly aggressive cross-examination will not be permitted. The judge is duty bound to protect a witness from abusive or harassing cross-examination.¹⁰⁶ Constantly repeating questions which have already been answered is improper.¹⁰⁷

(g) Rebuttal Evidence

The prosecution is obliged to call all the evidence required to prove its case in chief, and the judge should exercise his or her discretion to allow the prosecution to reopen its case judicially.¹⁰⁸ It is not proper to 'hold back' evidence in order to surprise the accused. Where evidence is only marginally relevant to the prosecution's case in chief, or where the evidence is only made relevant by virtue of evidence led by the defence, then the prosecution will be entitled to call that evidence in reply.¹⁰⁹

99 For a thorough consideration of the limits of proper cross-examination, see Peter M. Brauti, "Improper Cross-Examination," (1997), 40 C.L.Q. 69.

100 *R. v. McNamara* (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), affirmed 19 C.C.C. (3d) 1 (S.C.C.), *sub nom. R. v. Canadian Dredge & Dock Co.*

101 *R. v. Vandenberghe* (1995), 96 C.C.C. (3d) 371 (Ont. C.A.); *R. v. F. (A.)* (1996), 1 C.R. (5th) 382 (Ont. C.A.).

102 *R. v. Howard* (1989), 48 C.C.C. (3d) 38 (S.C.C.).

103 *R. v. Calder* (1996), 105 C.C.C. (3d) 1 (S.C.C.).

104 *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 (P.C.).

105 *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.).

106 *R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.).

107 *R. v. Fanjoy* (1985), 21 C.C.C. (3d) 312 (S.C.C.).

108 *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716.

109 *R. v. Ostell* (1992), 15 W.C.B. (2d) 427 (Ont. Gen. Div.).

6. INTERPRETERS

It is not unusual for a witness or a defendant to require someone to interpret the court proceedings into a language other than English or French. In larger metropolitan areas, this is more common and courts have translators readily available within the building. As pointed out already, the first appearance process has assisted in the efficient assignment of interpreters where required. Where the request for trial form indicates that the accused has requested an interpreter, and the interpreter has not been assigned to the court, the prosecution may request an adjournment. It is submitted, however, that the prosecution should only do so where it is not in the public interest to withdraw the charge. If, however, an accused is capable of proceeding in the language of the court, then the prosecution is entitled to ask that the trial proceed.

Section 84 of the *Provincial Offences Act* authorizes the use of interpreters in proceedings under the Act. There is nothing, however, requiring an 'official' interpreter: anyone who is proficient in both the language of the trial (English or French) and the language spoken by the witness or defendant may act as an interpreter.¹¹⁰ Where a defendant does not speak the language of the proceedings, he or she is allowed to have an interpreter sit at the defence table and translate the proceedings. An interpreter sworn under s. 84(1) of the *Provincial Offences Act* should be sworn in the following manner:¹¹¹

I, do swear (or solemnly affirm) that I am capable of translating and will translate to the best of my skill and ability from (language) to (language of proceedings) and from (language of proceedings) to (language) in this proceeding.

SO HELP ME GOD (Omit this last line in an affirmation).

Pursuant to s. 126(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, an accused who speaks French has the right to require that the proceedings be bilingual. However, it would seem that it is no violation of the accused's rights if the prosecutor is not bilingual as long as there is an interpreter present.¹¹² Section 14 of the *Charter of Rights* provides that "a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter". The right to an interpreter is also

110 *Provincial Offences Act* s. 84(2).

111 Rules in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200, subrule 27(2). The oath to be given to an interpreter sworn under the less formal authority of subsection 84(2) is contained in subrule 27(2).

112 *R. v. Chevrier* (May 7, 1997), Khawly J. (Ont. Prov. Div.), leave to appeal refused (August 7, 1997), Doc. CA M20679 (Ont. C.A. [In Chambers]).

a component of the constitutional right of an accused to make full answer and defence.

7. DEMONSTRATIVE EVIDENCE

(a) Photographs¹¹³

Often the best way to demonstrate some point in court is to present photographs. For example, in a case where the charge is one of failing to obey a traffic sign, the defence might present photographs showing that it is impossible to see the sign from the driver's position because of foliage. In such a case, a photograph can dramatically and conclusively bring home the point to the court.

The rule of photographic evidence in traffic offence trials has become particularly important since the introduction of "photo radar" evidence in speeding cases.¹¹⁴

Before a photograph may be admitted the party offering it must establish, by oral evidence, that it is a fair and accurate depiction of the scene or thing shown and is relevant to some issue at trial.¹¹⁵ In most cases, it will be important to establish that the photograph was taken at or very near to the time of the alleged offence. Usually this will be done by calling the photographer, but anyone familiar with the true appearance of the scene may confirm the accuracy of the photograph¹¹⁶ (although *Levy*¹¹⁷ suggests that *Charette v. R.*¹¹⁸ holds that these factors are now only applicable to weight, and not admissibility).

As a practical matter, where photographs are made an exhibit, they or any other exhibit can be returned to the defendant immediately following the trial on the consent of both parties, otherwise it is held with the court until the expiry of any appeal periods.¹¹⁹

(b) Videotapes or Films

Videotapes can provide cogent and convincing evidence. Their use as viable, real and testimonial pieces of evidence has been recognized in a

113 The discussion here relates to photographic evidence of surrounding circumstances as opposed to establishing identity where a judge is called on to make an evidentiary assessment of the photograph: *R. v. Nikolovski*, *supra*, note 1.

114 See *R. v. Tsang* (April 22, 1998), Doc. Vancouver SA02258269 (B.C. Prov. Ct.); *R. v. Bosworth* (August 27, 1997), Doc. Vancouver SA00030445 (B.C. Prov. Ct.).

115 *Dilabio v. R.* (1965), 46 C.R. 131 (Ont. C.A.).

116 *R. v. Wildman* (1981), 60 C.C.C. (2d) 289 reversed on other grounds, [1984] 2 S.C.R. 311; *R. v. Creemer and Cormier* (1968), 1 C.R.N.S. 146 (N.S. S.C., A.D.).

117 *Levy*, *supra*, note 82, p. 34.

118 (1980), 51 C.C.C. (2d) 350 (S.C.C.).

119 *Provincial Offences Act* s. 48.

variety of contexts over the years.¹²⁰ The Supreme Court of Canada recently had this to say about videotapes in the context of evidence of identity:¹²¹

The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

Generally speaking, evidence in the form of videotape may be admissible on the same terms as a photograph. In summary:¹²²

Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

The weight to be accorded that evidence can be assessed from a viewing of the videotape. The degree of clarity and quality of the tape, and to a lesser extent the length of time during which the accused appears on the videotape, will all go towards establishing the weight which a trier of fact may properly place upon the evidence.

The trier of fact assesses the weight that should be accorded the evidence of the videotape in the same manner as he or she assesses the weight of the evidence given by *viva voce* testimony.¹²³

8. COLLISION RECONSTRUCTIONS

Reconstruction evidence traditionally consists of police evidence concerning road measurements, tire marks, distances between cars, etc. The

120 *R. v. Pleich* (1980), 55 C.C.C. (2d) 13; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *R. v. Leaney*, [1989] 2 S.C.R. 393; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. B. (K.G.)*, *supra* note 72; *R. v. Nikolovski*, *supra* note 1.

121 *R. v. Nikolovski*, *supra* note 1 at 1210. In *R. v. Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.), however, evidence in the form of a videotape of a hockey fight was excluded because it was in slow motion and therefore not a true representation of what had happened.

122 *R. v. Nikolovski*, *supra* note 1 at 1215.

123 *Ibid.*

potential exists, however, for a party to introduce accident reconstructions through the use of computerized images. This form of evidence is very new (indeed may only have been used in the United States), and its admissibility will undoubtedly be challenged. It is submitted that it will be subject to the rules relating to expert evidence (see below).

9. EXPERT EVIDENCE

(a) The Normal Rule Against Opinion Evidence

As a general rule, courts are interested in fact, not opinion. Thus a witness is prohibited from expressing an opinion on a matter in issue. There are two exceptions to this rule. First, a witness may give an opinion on a matter about which he or she is qualified to testify as an expert. Secondly, any witness can offer an opinion about particular matters deemed to be within the realm of everyone's knowledge, and which thus require no special expertise.¹²⁴ For example, any witness could testify as to their estimate of how fast a car was travelling,¹²⁵ but only a properly qualified expert could give an opinion on how fast a vehicle would have had to have been travelling to make a given set of skid marks.

Speeding is of course the most common offence which will involve expert testimony at trial, that testimony invariably coming from the police officer who operated the specialized equipment used to detect speeding vehicles.¹²⁶ But the scope of expert evidence is considerable. Experts may even testify on matters which would not at first blush be susceptible to that kind of analysis. Thus they have testified to the circumstances consistent with classic signs of a driver falling asleep or displaying a lack of attention, suddenly awakening or regaining awareness, and taking evasive action.¹²⁷

The Ontario *Evidence Act* limits to three the number of experts each side may call without leave of the judge.¹²⁸ In practice, however, it would seem that this limitation would apply to each issue rather than constituting an overall cap.

¹²⁴ *R. v. Fisher*, [1961] O.W.N. 94 (Ont. C.A.).

¹²⁵ *R. v. German* (1949), 89 C.C.C. 90 (Ont. C.A.); *R. ex rel. Neely v. Tait*, [1965] 1 C.C.C. 16 (N.B. Co. Ct.).

¹²⁶ For two cases considering whether the evidence provided by the police officer constituted opinion evidence, see *R. v. Fattah*, 2007 CarswellAlta 1676, 2007 ABCA 400 (Alta. C.A.), leave to appeal refused (2008), 2008 CarswellAlta 1231 (S.C.C.) and *R. v. Dove*, 2008 CarswellBC 457, 2008 BCCA 102 (B.C. C.A.), leave to appeal refused (2008), 2008 CarswellBC 1608 (S.C.C.).

¹²⁷ *R. v. Kozun* (1996), 31 W.C.B. (2d) 433 (Sask. Prov. Ct.), reversed (1997), 154 Sask. R. 81 (Sask. Q.B.).

¹²⁸ Section 12.

(b) Matters Where Expertise is not Required

While the law relating to expert evidence has undergone some changes in recent years, the fundamental test for when an expert is necessary has remained the same:

An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.¹²⁹

As already suggested, there are some areas in which everyone is an expert. That is, there is no need for special skill before a court will listen to an opinion without a special qualification. These include:

- estimates of a vehicle's speed;
- whether a person is intoxicated;¹³⁰
- handwriting;¹³¹
- age;¹³²
- identity of a person.¹³³

(c) The Criteria for Admissibility of Expert Evidence

Expert evidence will be received if:¹³⁴

- it is relevant to a fact in issue;¹³⁵
- the expert is properly qualified;
- the expert evidence is of assistance to the trier of fact; and
- the evidence is not subject to some rule of exclusion.

Where the evidence offered relates to a novel scientific technique or area of knowledge, then it must meet a threshold test of reliability which takes into account the validity or *bona fide* nature of the subject matter.¹³⁶

¹²⁹ *R. v. Abbey* (1982), 29 C.R. (3d) 193 at 210 (S.C.C.).

¹³⁰ *Graat v. R.*, [1982] 2 S.C.R. 819.

¹³¹ *Petre v. R.*, [1933] S.C.R. 69.

¹³² *R. v. Cox*, [1898] 1 Q.B. 179.

¹³³ *R. v. Lanigan* (1983), 53 N.B.R. (2d) 388 (N.B. C.A.).

¹³⁴ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.).

¹³⁵ See "Relevance and Materiality" above.

¹³⁶ *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.). See also D. Paciocco, "Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons From the Law of Evidence" (1994), 27 C.R. (4th) 302.

Even if the expert evidence satisfies all other criteria with respect to admissibility, it will still be excluded if it contravenes an exclusionary rule apart from the rule against opinion evidence itself.¹³⁷ The most likely rule of exclusion to which the evidence may succumb is that which forbids evidence going only to the disposition of the accused person to commit the crime. It is particularly important to ensure that this criteria is adhered to when it is the prosecution which seeks to tender the evidence. If it is established that the expert evidence is relevant to an issue other than simply disposition, such as the identity of the perpetrator, then the probative value of the evidence in relation to that issue must be weighed against its prejudicial effect on the accused. Expert testimony will also sometimes appear to fall foul of the rule against hearsay evidence. However, it is well-established in Canadian courts that, "there is an acceptable hearsay component in the make-up of every expert's knowledge which is drawn upon in formulating the opinion."¹³⁸

Expert evidence is to be weighed by the trier of fact in the same manner as any other evidence. When faced with conflicting expert opinions on a crucial point, the trier of fact can only act on the basis of the prosecution's expert evidence if he or she feels sure that it was correct.¹³⁹

(d) Qualifying the Expert

The proper qualification of an expert demands two requirements: first, the expert must possess a sufficient level of competence or qualification in the area in which he or she is to testify. Second, the expert should testify *only* with respect to the areas of expertise in which he or she has been qualified. In other words, the expert should not stray beyond the bounds of his or her properly qualified knowledge. In *Mohan, supra*, Sopinka J. put it this way:¹⁴⁰

the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

As long as the court is satisfied that the expert possesses knowledge that will assist the trier of fact, the extent or depth of the witness' qualifications is a matter of weight for the jury.¹⁴¹ A determination as to the adequacy of the witness' qualifications can be reflected in many factors including *inter alia*, academic qualifications, practical experience, length of

¹³⁷ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.).

¹³⁸ *Supra*, note 75 at p. 547.

¹³⁹ *R. v. B. (C.)* (1997), 118 C.C.C. (3d) 43 (Ont. C.A.); *R. v. Molnar* (1990), 55 C.C.C. (3d) 446 at 447 (Ont. C.A.).

¹⁴⁰ *Supra* note 133 at p. 414.

¹⁴¹ *R. v. Marquard* (1993), 85 C.C.C. (3d) 193 at 224 (S.C.C.) *per* McLachlin J.

time in their chosen profession, publications and pedagogical record. Before a court will listen to the opinion of a witness on some point, the party tendering the witness as an expert must satisfy the court that the witness has some special knowledge or skill which will allow him or her to help the court understand the evidence.

There is no requirement, however, that an expert's knowledge be supported by any formal course of training. Indeed, it is often the case that one would want to have someone with practical experience rather than 'book-learning'.¹⁴² For example, where a defence of unavoidable mechanical breakdown is offered, there is no reason to believe that a local automobile mechanic will be any less credible or helpful to the court than a university educated engineer.

When qualifying an expert for the court, it is acceptable to lead the witness. In cases where the witness' qualifications are extensive, it is appropriate to file the witness' resumé with the court as an exhibit. When the witness' various qualifications (whether they come from a course of study or from experience) have been put before the court, the party offering the expert should ask that the witness be accepted by the court as an expert in the appropriate area. Defence counsel may cross-examine with respect to the validity of the witness' qualifications. Unless the area of proposed expertise is particularly novel, however, this is usually done in the course of normal cross-examination, and the extent of the witness' expertise is a matter of weight.

(e) Experts and Radar

Radar evidence, when properly proven, establishes a *prima facie* case¹⁴³ and, unchallenged, is convincing beyond a reasonable doubt. It must be remembered, however, that radar is simply a tool and that, like any tool, it can malfunction or be improperly used. Until the court is convinced beyond a reasonable doubt that the radar was in good working order and properly operated, evidence of a reading is useless.

As Manraj and Haines observe,¹⁴⁴ modern radar devices are "deceptively simple" to use. It must nonetheless be remembered that the instrument is a sophisticated scientific device which is subject to alteration by the slightest upset. For example, a surface scratch of only 1/20,000 of a centimetre on a tuning fork used in calibrating a radar device can lead to an inaccurate reading of up to eight kilometres per hour.¹⁴⁵

¹⁴² *Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. Div. Ct.); *R. v. Dugadzic* (1981), 57 C.C.C. (2d) 517 (Ont. C.A.).

¹⁴³ *R. v. Ayler* Unreported August 20 1981 (Prov. Off. Appeal Court).

¹⁴⁴ *Supra*, note 52.

¹⁴⁵ *Ibid.*, at pp. 26-32.

As explained above, before anyone, whether police officer or civilian witness, is allowed to give opinion evidence on the functioning or operation of a radar unit that person should be qualified as an expert in the operation of radar devices (though a witness need not have an understanding of the scientific principles which support the working of the instrument).

(f) A Prosecution Checklist¹⁴⁶

The proper operation of the radar on the day in question should be proven. The prosecution should prove that:

- the radar vehicle was properly stationed;
- the radar speed control unit was working (no false readings, fluctuations);
- the radar was properly calibrated (either by a proven tuning fork or by running a car with a proven speedometer through the beam before and after the shift);
- the conditions under which the vehicle entered the beam;
- the reading and notation of the speed from the unit.

In proving the expertise of the operator, the prosecutor should put before the court:

- formal training programmes the officer has taken;
- years of experience;
- types of units used; and
- the techniques used in this case (stationary vehicle, moving same direction, moving opposite direction).

The police officer witness will generally give this information as a matter of course without even being asked these specific questions by the prosecutor. Thus counsel should pay careful attention to the officer's evidence in order to ensure that its *pro forma* appearance does not leave out or misstate any important information.

The use of laser speed detectors by police officers is now commonplace. Their validity is still being established in the courts, but will undoubtedly soon reach a status similar to that of traditional radar. Currently, an officer will often testify that he or she tested the laser device by passing it through a traditional radar.

¹⁴⁶ Ibid.

(g) Questioning the Expert

An expert is presented to give an opinion to the judge or justice to assist him or her in understanding the significance of evidence already before the court. The proper form of questioning, then, is to present the facts as established by the evidence (or as the evidence at least suggests) to the expert as a hypothetical and then to ask his or her opinion on that scenario.

For example, if, in a radar case, there is evidence that there was an electrical storm, an international airport, and a large neon sign near the officer's radar unit, the witness should be asked what affect, in his or her opinion, these factors might have on the accuracy of the reading.¹⁴⁷ "If there had been an electrical storm on the scene would that, in your opinion, affect the reading?" "What if there was an international airport within two miles of the place where the reading was taken?" "Would your opinion change if I suggested that there was a large neon sign less than fifty feet from the line of sight where the officer's radar reading was taken?"¹⁴⁸ The expert's answers to these questions will allow the judge to understand the significance of the evidence led on these issues.

(h) Laying the Basis

The expert's function is to interpret evidence for the court and so it is important to be sure that there is something for the expert to interpret. This is called laying the basis for the expert's opinion. Continuing our radar example, if there was no evidence suggesting that there was an airport near the location of the radar unit, it would be improper to ask the expert how that would change his or her opinion. Without some evidence before the court suggesting that there was an airport, such a question is irrelevant.

(i) A Defence Checklist for Radar

- Jurisdiction must be established;
- The officer visually observed the target vehicle and formed the opinion that it appeared to be speeding. This observation was then corroborated by the radar reading;
- The instrument must be operated by someone trained in its operation. He or she need not have knowledge of the electronics or mechanism of the device but must be thoroughly familiar with its use. That, it is submitted, means that she actually has knowledge

¹⁴⁷ The examples are drawn from Manraj and Haines *supra*, note 52 at pp. 66-7.

¹⁴⁸ See generally Levy, *supra* note 82, chapter 12.

of the specific radar instrument she is using and not merely a general knowledge of how radar instruments should be operated. In short, the training must be adequate;

- Evidence relating to the testing of the instrument should include the following:
 - (i) The operator must give evidence that he or she conducted an approved test of the instrument. The officer may establish this by showing that he or she read the manual which relates to the specific device operated, and which indicated that certain tests should be performed in a specific manner. Otherwise, the officer may indicate that he or she was trained with respect to the particular device being operated, certain tests are required to be performed. Generally speaking, this will entail an automatic internal calibration test and a calibrated tuning fork test being performed;
 - (ii) Following *R. v. Bourque, supra*, there may be a requirement that the accuracy of the tuning fork be proven beyond a reasonable doubt. This requirement may, however, be limited to jurisdictions which have legislation requiring a certificate of accuracy relating to the tuning fork used be tendered into evidence. It may be argued that such a requirement is advisable in light of the fact that an accused motorist is denied the opportunity to substantiate the radar reading. Radar is today accepted as a technological wonder which is thought to be virtually infallible. A requirement that the tuning forks used to test the device are themselves accurate simply provides an additional safeguard against human and mechanical errors;¹⁴⁹
 - (iii) Time of tests must be noted before and after occurrence. Obviously, they should be performed before and after the speed of the accused motorist has been captured by the instrument. Tests performed after the motorist is targeted should be performed in the same manner as they were prior to his being pulled over. In the usual course of events, an officer will test

¹⁴⁹ This, of course, imposes an additional burden on the prosecution. The argument is made that, ultimately, such safeguards lead to an absurd result. Do we then require the prosecution to show that the device which established the tuning forks to be accurate, itself is accurate? And what about the device that established this device was accurate? Moreover, tuning forks are calibrated to a certain reading and are usually then stamped or engraved with that reading. If the radar device being tested produces the exact reading as that indicated by the tuning fork, it defies reason to suggest that there is an exact corresponding inaccuracy in the device being tested.

the device at the beginning and end of the time spent at any one location. The cases do not establish that it is absolutely necessary but it is preferable if a patrol car travelling at a pre-determined speed is run through the radar field in order to ensure that the device is truly capable of accurately measuring speeds;

- (iv) The tests performed should have satisfied the officer that the instrument was operating properly and was capable of accurately registering speeds. Moreover, the officer should be sure that the device operated properly in reference to the motorist's vehicle;
 - (v) The range of the instrument should be established, as should the fact that the instrument was capable of accurately registering speeds across this entire range. Some cases indicate this requirement is not essential, however, the radar operator should be able to establish that the target vehicle was within the operational area of the beam at the time the reading was displayed;
- The officer may be challenged by suggesting that he or she flagged down an allegedly speeding vehicle whose speed is attributable to the speed of another vehicle within the range of this unit.¹⁵⁰ Also, the device should have been used in an area where road conditions are such that there is minimum possibility of distortion;
 - Identity of the driver must be established, usually by the driver having produced for the officer a valid driver's licence;
 - Like any evidence, radar readings may be rebutted on cross-examination. A reasonable doubt may be raised either by matters elicited in examination-in-chief or cross-examination of defence evidence. For example, while the failure to show the radar reading to the defendant is not fatal where the reading has been locked in, it would probably go to credibility that an officer refused to show the motorist the radar reading upon request. Often, police officers do not make any notes when they charge a person with speeding, and they may flag down a great many speeders on any given day. Their inability to recall specifics relating to the charge may enable the defence to raise a reasonable doubt as to the accuracy of the radar reading.

¹⁵⁰ Laser speed detectors purport to overcome this problem.