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ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

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AMOS TAMAN

15
PROCEEDINGS AT APPEAL

BEFORE THE HONOURABLE JUDGE R. E. BOGUSKY
on March 12, 1998, at NEWMARKET, Ontario

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CHARGE: s. 128 H.T.A - Speeding

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APPEARANCES:

T. Norman

R. Dullege

Counsel for the Crown

Counsel for the accused

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Thursday,
March 12, 1998

.COURT OPENS

.OTHER MATTERS DEALT WITH AT THIS TIME

MR. NORMAN: I would like to address the matter that Mr. Dulle is here on, please.

THE COURT: Yes, Mr. Dulle.

MR. DULLED: Yes, good day, sir.

THE COURT: Good day.

MR. DULLEE: It's the Taman matter I believe it is. It's number 17 on the list.

THE COURT: Yes.

MR. NORMAN: I've got a number of cases, Your Honour, that I am going to be relying on in the course of the argument. This is a crown appeal.

Mr. Dulle is here and anxiously awaiting me....

MR. DULLEE: I just thought I would get the cases now so I could look through them while we are going.

MR. NORMAN: Yes, that's a good idea.

MR. DULLEE: We will be relying on some of the same cases so I'll wait and see what Mr. Norman provides for you and we will go from there.

MR. NORMAN: Has a factum been filed for Your Honour....

THE COURT: I've got a transcript, I have the notice, and now I have got more stuff. I have a factum.

MR. NORMAN: I trust my friend has a factum too.

I believe we sent one over to his office earlier in the week. Is that correct?

MR. DULLEGE: Yes. Maybe what we could do is I can just confirm which cases you've given His Honour. I know you've just given me some and I don't want to jumble them up. I can give him the other ones and then we can put all the names on the record and the spelling for the clerk so we don't have to worry about that later on. How would that be?

THE COURT: Yes, in front of me I have Regina versus Werenka, W-E-R-E N-K-A, Regina versus Grainger, with an "i" in it, Regina versus Kolthammer, K-O-L-T-hammer, Regina versus Renouf, R-E-N-O-U-F, Regina versus Alladina, A-L-L-A-D-I-N-A, Regina versus Sutherland, that's Regina versus Sutherland in the Provincial Court and Regina versus Sutherland on appeal, I suspect, in the Queen's Bench.

MR. DULLEGE: I'll add two more for the record. I'm going to give you Regina versus Feraco, F-E-R-A-C-O, it's also Queen's Bench, Alberta. I'm going to give you Regina versus Kyle Marshall, K-Y-L-E, last name M-A-R-S-H-A-L-L, which is an appeal proceeded before His Honour Weheant, W-E-H-E-A-N-T, in Brampton.

THE COURT: Doesn't ring a bell.

MR. DULLEGE: I'll give you those as well.

MR. NORMAN: You gave me one of those.

MR. DULLEGE: No, I gave you - yes, I'm sorry, I gave you Weheant, - Sorry,

MR. NORMAN: You gave me the Marshall case, I

think.

MR. DULLEGE: Marshall. I'll give you Feraco, which is right here.

THE COURT: Yes, I'll hear from the crown.

MR. NORMAN: Obviously Your Honour has just taken the time to read through the appellant's factum. The crux of the case, from the crown's point of view, is that evidence was given by the investigating officer in this case, which was a case of speeding, and Constable - actually, I'm sorry, it may not be Constable Grenville.

MR. DULLEGE: Sergeant.

MR. NORMAN: Sergeant Grenville gave evidence for the crown. There was only one witness called by the crown and that was Sergeant Grenville. The evidence consisted of a description of the use of a laser device for obtaining the speed of a motor vehicle. The transcript relates what that officer did, and then there was some concessions at the end of the trial as to what the second officer would say, and that relates to the stopping of the vehicle in question.

The facts are set out in the appellant's factum, and the crux of the - or the most important facts in the submission of the crown are the evidence that Sergeant Grenville was trained in the operation of the unit and that he tested the unit in accordance with the Manufacture's instructions prior to setting it up and after he concluded for the day. And on both of those occasions he found that the unit was working properly according to

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Manufacturer's instructions. Sergeant Grenville also, in the course of his testimony, gave evidence as to his qualifications, and he has an operator's certificate from the Manufacturer to establish his training and qualifications. He further testified as to the capabilities of the instrument. I'm not referring you to the transcript as I don't think that the facts really in this case are going to be an issue. They weren't particularly an issue at the trial themselves. It was more the effect to give to the evidence that was adduced at trial that came into question.

And finally the capabilities of the instrument that was being used. That's the laser unit. This is at paragraph 11 in our factum. It says, "Sergeant Grenville testified that the laser unit was capable of measuring the speed of motor vehicles in the distance." In the course of the trial Sergeant Grenville was cross-examined as to which of the tests he performed, and he described four tests: The self test, the startup test, the display test, and the scope alignment test with the fixed distance test. That was in cross-examination, and that was the entirety of the evidence adduced for the crown. The defence didn't call any evidence in the course of argument. Defence counsel brought a number of cases. There are a line of cases from Alberta, most of which, if not all of which, have been provided for Your Honour today. The suggestion

being that the evidence in the cases in Alberta, which is very similar to the evidence occurred in the Ontario case, wasn't sufficient to ground a conviction for a speeding charge. The idea being that some further test was required of the officer, and that test being that there was a comparison of the use of the laser unit in calculating speed. With the use of a radar device in calculating speed to see that those were working similarly, I suppose, is how the argument goes.

The crown's position that on the evidence that the learned justice of the peace had before her at the time of making this decision, there was sufficient evidence to base a conviction, and she erred in law in coming to the conclusion that a further test was required before she could conclude that the device did what the evidence said it could do. So she erred in accepting that an independent test must be performed on the laser unit in finding that the cases to that effect from Alberta were persuasive enough on the evidence she had before her to come to that conclusion. So that's the crux of the issue that the crown has with the decision. That being said, and before I turn to the cases, perhaps we should readdress Mr. Patel.

.OTHER MATTERS DEALT WITH AT THIS TIME

MR. NORMAN: I've provided a number of cases for Your Honour. I've also provided, in addition to

5 the Taman transcript, I understand Your Honour should have two other transcripts of proceedings, Tony Scivoletto and Andrew Watson. Do you have those?

THE COURT: I do.

MR. NORMAN: I trust my friend has those.

MR. DULLEGE: Yes.

10 MR. NORMAN: These are two transcripts, and what they describe, Your Honour, is two convictions registered before Her Worship, Justice of the Peace Holmes on the same date as the Taman matter based on the same type of evidence that was heard in the Taman matter with respect to the steps that the officers' take to satisfy themselves that the instrument's working properly and the abilities of the instrument itself involves the particulars of the event. And on both of these occasions the learned justice of the peace came to the conclusion, in essence, that she could rely on the instrument to be an accurate instrument for determining the speed of a vehicle in these cases.

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25 You'll see at page 11 of the Scivoletto matter at the very bottom paragraph, she says, "The only question before the court here is what is the accurate speed obtained." She says, "I will accept the evidence of the officer that he indicated that when he obtained the speed of 119 from the pickup truck, your motor vehicle appeared to him to be at a higher rate of speed. So that would indicate to me that it would have been over 115. You also indicated that your speedometer had

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never been calibrated. So on the totality of the evidence I'm satisfied that the crown has proven the case beyond a reasonable doubt, sir. There will be a finding of guilt." For Your Honour's information I don't think I alluded to it, but I think it's in the factum. The officer also did give an independent estimate that the vehicle in the Taman case appeared to be traveling at a higher rate of speed I think than the speed limit, although I stand to be corrected. The precise words used perhaps I'll go to that.

MR. DULLEGE: I'll concede that.

MR. NORMAN: Thank you. So that was the finding in the Scivoletto matter.

In the Watson matter it says at page 14, about halfway through, "But on your own admissions, sir" And this is in the Watson matter, "But on your own admissions, sir, and not giving the court the speed that you were driving, the only accuracy the court has is that the speed obtained by the laser unit that day, which is 106. So on the totality of the evidence I have to find you guilty as charged." Again she relies on the laser unit speed reading in convicting Mr. Watson and Mr. Scivoletto of the offence of speeding. In the Taman matter on the same day she accepted the submissions of defence counsel and found that she, on the totality of the evidence in that case, didn't have enough to convict. The reason that these other cases are being put before Your Honour isn't to suggest that they are in any way binding

on you, of course not, they are from a lower court. But it does suggest and my submission is that the laser unit and its readings are being accepted regularly in the courts that are trying these types of cases, and in fact, by the same justice of the peace who tried the case that's before Your Honour. And that will relate to submissions I make further as to the effect you should be putting on both the Alberta cases and the cases pertaining to radar cases in this province at this point.

So the first case I'd like to take you to is the Grainger case. It's an old case from the 14th of May, 1958 and it's from the Ontario Court of Appeal. The accused was convicted of speeding after driving through a radar speedometer at 45 miles an hour. The court at page 85 in the last full paragraph says, "In my respectful opinion, it is implicit in the police officer's evidence as summarized in the case stated, that this particular radar speedometer, when properly used, is capable of registering the speed of a motor vehicle and that, at the time in question, it was being properly used and in good working order. True, the officer admitted that he was not an electronics expert, and, therefore, could not explain all of the scientific mechanisms that made up the machine and that resulted in it recording accurately the speed of a motor vehicle. He was, however, familiar with the manner in which the machine was intended to be used, and from his

familiarity with it over a two-week period he stated that the data furnished by it was extremely accurate." Later in the next paragraph, about two sentences from where I just ended, it says, "Although he could not give a scientific explanation of the operation, he stated that when the vibrations of a given tuning fork set up certain results in the machine, that in the light of his experience the machine was in good working order and capable of recording the speed of a motor vehicle. If the machine was subject to all the weaknesses and inaccuracies which Mr. Ross enumerated in argument in this Court, the accused could have called evidence to show these facts. He did not. On the only evidence that was before the justice of the peace, it was open for him to convict the accused." And I'm asking Your Honour to consider this case in the context of radar to stand for the proposition that conviction can be entered on the evidence obtained by the radar if the evidence is adduced that it was in good working order and properly used. That is, it sets up in my submission a prima facie case for the speed of which the motor vehicle was traveling. And that's of course in the context of radar. I'm going to be asking you to extend the reasoning in this case to the operability of the laser unit, because in my submission, the type of evidence that has commonly been used in radar and that was accepted in the Grainger case, and that has been accepted in many other courts, to the time in which the laser instruments were introduced, is -

5 well, the type of evidence is exactly the same as the type of evidence the crown's attempting to rely on in the laser unit cases. And there is no reason, in my submission, to depart from the reasoning in the Ontario Court of Appeal in the Grainger case when applying it to the laser unit. And that is that it sets up a prima facie case, in my submission, for the crown, given that you have certain evidence from the officer as to its abilities, which we have in this case, as to the officer's qualifications in using it and as to the tests that were conducted before and after the use of the radar.

15 The next case I'd like to refer Your Honour to is the case of Regina versus Alladina. And this is a case from the Alberta Court of Queen's Bench from 1994. It's reported at 4 M.V.R.(3d). Starting at page 180. It goes through the use of the LTI 20-20 laser unit in this case. It talks about the tests that were conducted. And at page 181 it says there was an experienced operator using the unit, having completed a course and having about 500 hours of experience in operating the device. Prior to the speed enforcement operation, he tested the laser unit against a stationary object and ensured the gun was pointed at the object it was directed at. These tests were the tests approved by the Manufacturer of the laser. And he testified that, "...because of all of these tests, I was satisfied that the laser was working properly and is able to measure the speeds of

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moving vehicles in kilometres per hour accurately." It says that this officer also conducted a comparison test of the laser machine in question with a radar unit. The radar had been tested with a tuning fork as approved by the Manufacturer, and as a result of the comparison test, testified that he was satisfied that both the laser unit and the radar were able to accurately measure the speeds of moving motor vehicles. And I'll note for Your Honour that that evidence is missing in the case that you have before you. We don't have that evidence, but at that time of the offence, which was April 16, 1993, the officer hadn't, at that point, conducted this comparison test. I see the charge was from April the 16th, 1993 in the case that I'm referring to and that the evidence was that on August the 17th, 1993, that officer conducted the comparison test.

The argument in this case was that there had to be an approved test to measure the accuracy of a laser instrument, used here. The argument was that the law requires the instrument to be used to be tested by an approved method, and this could only mean approved by some regulatory authority. The court goes through some of the other cases and concludes at page 183 that on the basis - or it says, "In my view, circumstances in this case are remarkably similar to that in Werenka. The officer gave evidence that he performed tests on the laser unit in accordance with his training

that he had taken and that the laser worked properly and was capable of accurately measuring the speed of a moving vehicle. There was no other evidence to consider. On the basis of such evidence alone, I would hold (as was held in Werenka, supra) that the uncontradicted evidence of the constable is prima facie evidence of the speed given by the constable. Moreover here, there was additionally the evidence of Constable Van Beek of the test performed with the radar (albeit some months later) and his visual observations regarding the speed of the appellant's vehicle both confirming the laser reading both of which were also considered by the learned Commissioner in arriving at his decision." So the court in this case concluded that it would be enough, without going to the comparison of the radar, to the laser, to have the officer talk after giving evidence as to his training and tests that he conducted, rely on that evidence or the evidence of the laser device, which is uncontracted evidence as prima facie evidence of the speed given by the constable. And that's again what the crown is asking you to do in this case, and again what the crown is suggesting that the learned trial judge or the justice of the peace in that case, failed to do. In this case, the additional evidence wasn't necessary in the trial judge's - or in this case in determining that it sets up a prima facie case. But he comments that there was additional evidence that this had in fact taken place.

5 The Werenka case that I've provided, which is at
11 Motor Vehicle Reports, page 280, is a radar
case. And again, this is to suggest or support
the proposition that the crown's making - the
crown has to prove a prima facie case, in that the
crown is not obligated in the context of radar to
demonstrate that the instrument was capable of
accurately registering speeds over the entire
10 range of the instrument, or there's no evidence to
throw doubt on the officer's evidence. That is to
say that the argument in this case was that the
tuning fork, as I understand it, tests for one
frequency and based on that, the officers'
conclude that the instrument's working properly.
15 It supports the proposition, in my submission,
that the tests that are conducted by the officers'
or at least on the evidence that we have, with no
evidence suggesting that other tests are required,
is sufficient to allow this court to rely on the
accuracy of the instrument and consider that there
20 is a prima facie case for the crown when we have
such testimony as we did have in this case.

25 The further cases that are being provided are all
from the Alberta Court of Queen's Bench. These
are the cases that suggest that the laser testing,
or the laser device, and the evidence that was
given that it was working properly and an accurate
instrument for measuring speed of motor vehicles,
isn't enough given the way the machine is tested.
30 And that's the line of cases that was relied on at
trial. The court in all these cases is concerned

that there's no circumstantial guarantee of trustworthiness in a laser device, and that's based on the fact that there is no evidence elicited at trial that the machine - how the machine comes to the speed reading that it does, and the fact that there is no approved instrument for measuring speed according to the Highway Traffic Act. And that is something Your Honour, in my submission, can consider. It's unlike the breathalyzer type regime where the alcohol testing regime we have in the criminal code where there are approved screening devices and approved devices in the Highway Traffic Act. There are no approved devices for measuring speed, and that's to say that neither radar - because radar hasn't ever been an approved device or approved radar instrument, and similarly there aren't approved laser devices for measuring speed. The acceptance of this type of evidence has come through the case law, and it's not a creature of statute at any rate.

In the Sutherland case, the court discusses at some length the type of evidence that's being elicited or that was elicited. They relied on some case law from the States and came to the conclusion that the crown's asking the court to make a quantum leap - and this is at page 6 of the judgment. That, "The crown's asking the court to make a quantum leap in accepting the technology of laser readings on the same basis as radar readings. Radar speed meters have been around for

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decades. When they were first utilized, empirical evidence of a test car driven through the radar beam at a predetermined speed was adduced together with evidence that the speedometer of the car was checked using a measured mile and a stopwatch. The cumbersome evidentiary process gradually gave way to the use of tuning forks as the testing device. These tests thereafter received tacit legislative approval. S. 173 of the Highway Traffic Act creates and simplifies admission in evidence of tuning fork test certificates." It's my understanding that that's not the case in Ontario, although I stand to be corrected on that point. But as I said before, we don't have a legislative regime as it appears that Alberta does.

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The other cases suggest that a further test, a comparison test, is required before there will be a sufficient guarantee of trustworthiness. And I'll leave it for my friend to go into those cases in more detail if he desires to do so, but that's what they stand for in my submission, that some sort of comparison with the laser to the radar is necessary before the courts can conclude that laser is reliable or that they can rely on the evidence of reliability from the officers' that are giving that kind of evidence. It is my submissions that it is not required. And I am asking you, as I suggested earlier, to consider the type of evidence that's accepted in radar cases and apply that to the laser cases. It's my

submission to you that there is no reason for doing otherwise. In Grainger they talk about the effect of radar evidence and what evidence would be available if the instrument was inaccurate, and they suggested the accused could call that type of evidence to suggest that the instrument is inaccurate. And some argument can be made that that's shifting an onus of proof onto the defence. That's shifting the onus of proof onto the defence to prove their innocence. In my submission that's not the case at all. It's my submission that what that would force the accused to do is set up an evidentiary basis for the argument that they are going to later put forward that the instrument isn't an instrument that accurately measures speed when tested in the way it's tested and operated by the people it's operated by. It would be merely, in my submission, an evidentiary burden on the defence to leave the trier of fact with that type of evidence in the case so that they could conclude, or come to the conclusion, as the justice of the peace here did, that they're not satisfied with the accuracy of the instrument given the testing that's done. However, absence of that evidence, it's my submission, that you have to look at the evidence that is before the trier of fact, and that evidence is that it's an accurate instrument for measuring speed, that it's tested according to the Manufacturer's instructions, and they go through in not much detail the tests that are conducted, and that the person's qualified to operate the instrument.

There's no evidence to suggest anything to the contrary to that. And it's my submission that you would have to be taking judicial notice of what could go wrong with a laser device to come to the conclusion that it's not accurate given the evidence of the officers' that they have the instrument, they are trained in using the instruments, that they did use the instrument and they tested it before and after and found it to be working properly. You have to be taking judicial notice that there is some sort of problem with the laser unit to conclude that that evidence was unreliable. I'm asking you to accept the radar cases as good authority for the laser cases, because it's in my submission that a judge or justice can no more take judicial notice of the accuracy of radar than they can of laser. It's technology that truly to a layman, or a judge, or people who work in this type of area, we don't know the intricacies behind how it works. It has come to be accepted that radar was acceptable, but to suggest that it's somehow more useful or accurate than the laser testing is not, in my submission, grounded on any evidence that's being brought before the court. It's my submission that the evidence that the learned justice of the peace had in this case was sufficient to find a conviction. And again, I refer you to the two cases in which she concluded that the laser device was sufficient to ground convictions on the same day, to allow you to conclude that this is evidence that is being accepted routinely, and

that in my submission, leads credence to my submission that it should be viewed in the same way as the radar type of measurement of speed is being used, and that it would allow you to apply the Grainier case suggesting that the crown sets up a prima facie case given that type of evidence. And that before you could conclude otherwise, given the evidence, that it's working properly, it was tested before and after, that the person's qualified, and that it's an accurate device for measuring speed, that any evidence to the contrary of that, that's the only evidence the trier of the fact has, and the findings should be based on that evidence alone. So subject to questions you have, those are my submissions.

THE COURT: Yes.

MR. DULLEGE: Let's start with these other two transcripts that my friend's produced for you. Scivoleto, S-C-I-V-O-L-E-T-O, and Watson. What they really demonstrate is that she be represented at trial, because what we know is the trier of fact hearing a trial can't use issues from previous trials. And so what we know in these cases is that the issue is not being raised at the trial. Both parties testified they were speeding. Because they testify they are speeding, but maybe not that much, and the issue not being raised, in my respectful submission, isn't of assistance to the court on this particular issue. It's analogous to the following: For years officers have stood in the witness stand and said I'm a qualified radar operator. And when they say those

magic words, if left unchallenged, and the rest of the evidence is there, there will be a conviction. However, when they say those words, and if they are challenged, and it's found out that they may not in fact be as qualified or have done the appropriate tests, then the acquittal will be entered. And we know that from a case called Brewer, which is out of this court from years gone by, when York Regional Police retrained all their officers, because it was found out that they were in fact qualified. They thought they were, but they all had to be retrained as a result of that. And so what happens is, in a case where an officer gives evidence and says I'm qualified, the justice - the trier of fact has nothing else there, it's unchallenged. The trier of fact will enter a conviction. When the officer says I'm qualified and they're challenged, the trier of fact will, subject to Brewer, enter an acquittal. The same goes in this case. In this case the setup in the use of the laser wasn't argued in the other two cases. So in my respectful submission, they are not of any significant assistance to you. One can only presume of course it had of been argued, the same result would have resulted. We would have been here on three appeals instead of one today, from the crown's perspective. Let's look at what my friend has said to you. What he said is that radar is reliable, it has been around a long time, and you should accept that evidence. That's what Grainger says to you and some of the other cases he has spoken of. The worrisome part

is that laser has not. And so what the court says is, before we're just going to buy into this technology, because there is not presumption of accuracy, - when my friend talks about defence calling evidence, it is a reverse onus. In fact, when he says, why would you presume it to be inaccurate, well, why would you presume it to be accurate. It's their job to prove that. And so the court says, this is new stuff. Now, if you're going to use new stuff, we want to hear something that makes me satisfied as a trier of fact that it's accurate. And it's not - this burden that's being placed on the crown is miniscule. This is not a case where we're saying, you know, if your finding today, Your Honour, is contrary to the crown's position, then laser radar will never be used in this province. Nonsense. All it means is that they are going to test it against a conventional radar and make sure it's accurate. That's all that's going to happen in my respectful submission. And I tend to boil things down as Your Honour knows. And to me that's what this boils down to. We know the cases are out there that tell you what you should do. Go ahead and do it. When we talk about - when my friend cites these cases, and he uses a couple of radar cases to establish the basis of radar, that's a given. We still know we have appeals on radar convictions on the basis of qualifications, operations, setup, use of the radar and so on. That doesn't end. But when he deals with these cases, in my respectful submission, we have to look at them in

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some order. And so we start talking about laser. We have the Alladina decision on March 14, '94. We have Sutherland, which predates that. And then we have Renouf, R-E-N-O-U-F, which postdates that, which is the 8th of December, '94.

THE COURT: I think it's that one that distinguishes or discusses Sutherland and the next one that you mentioned.

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MR. DULLEGE: Correct, yes. So what we know is that as this is coming through the appeal process, the court is considering what has been decided and why. And in this case it's clear that the court adopts a position that without the appropriate tests being conducted, there's not sufficient circumstantial guarantees of trustworthiness of the laser unit, and therefore they allow the appeal and set aside the conviction. So in regards to the chronological history in Alberta of the laser radar, in my respectful submission, you end up with a position that considers the previous cases and says, we're not just going to assume reliability, we're not just going to assume accuracy. So if we're not going to do that, convince us otherwise. And what do they do? They say, do a test against a conventional radar.
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That's all you have to do. That will convince us. And that's what they say. So then we come to Ontario and we see the Marshall case. What happens in the Marshall case is kind of interesting, because I'm sure my friend will argue later on that, boy, look at the burden we're placing on the crown now. What happens in
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Marshall is, it's a laser radar case, and the officer says that they test the laser radar by the Manufacturer's instructions, and they use a Muni-Quip radar as well. And so the court considers the testing of the radar. And what happens is that the court considers a number of issues, and I think they are very important. One, - eventually, by the way, the court in Marshall enters an acquittal, and it's on the basis that if you're going to use a laser and you're going to bring a radar to test it, which we think you should do in my respectful submission, which is what the court says, it says, Based on Alberta, I think you should do this. And if you're going to do it, you can't just come along with a radar and say I took a radar and I tested it and it was fine. You have to at least say that somebody who was qualified checked the radar. Okay, that you used a properly working radar to test the laser. In this case there was no evidence of that. And so the court said, well, I'm not prepared to adopt the test because there is no evidence that the person operating the radar was qualified. Again, not a huge evidentiary burden on the crown. The laser officer gets up, says I tested it according to Manufactures specifications, I'm a qualified laser operator, I compared it with a standard radar unit, Muni-Quip number whatever, and I'm qualified to operate that as well. I checked it, it was working properly. That's the burden on the crown, in my respectful submission. So we look at Marshall, and we look at the judgment, the reasons

for acquittal. It talks about, "I'm going to rule that the fact that had to be proven here for this charge to hold, that Mr. Marshall was going 99 kilometres per hour. This was the rate of speed that was not measured by what is now commonly accepted to be an accurate speed measurement, a radar machine. It was measured by a new device, a laser machine. No evidence was given as to why a certain test had to be performed and what the consequences of those tests are, and the relative importance of each test to each other." In this case I have no doubt that this is the case, was that she tested it against a more traditional radar machine. Perhaps only because of the state of the jurisprudence at this point, the crown did not see fit to ask the questions which would have allowed the court to determine the officer was qualified to run the radar machine against which she tested the laser machine. To my mind that is fatal. Given the lack of evidence on the relative importance of the test, it very well may be that testing the laser radar against the traditional radar set is the all important test for determination that laser is capable of measuring the speed of a motor vehicle. If that's the case, I would think that the proper evidence would have been called in order to establish beyond a reasonable doubt that the radar was in working order and the police officer using it for the test purposes was qualified to do so." So in that case, we have an Ontario court sitting as an appeal court saying that based on their

5 understanding of the jurisprudence, the test - the officer conducted the test, but unfortunately the court couldn't find there was a foundation, an evidentiary foundation, to rely upon the test of the radar, because the evidence just wasn't given, it wasn't there.

10 The other interesting case that the crown provided was Kolthammer. One of the tests they do in this, and one of the things I think you have to differentiate between radar and laser, I think it's very important, what we have done over time through various cases, appeal cases and court cases, is establish that the radar has to be tested, and one of the tests includes a tuning fork test. And what that is, is an external test measuring movement. Because that's what a tuning fork test is. It changes the frequency, obviously, and brings up a speed on the radar. In this case, there's nothing external. And the only test done for motion is stationary. We're going to see if that wall is moving or not. And that's a fact that that's what their evidence is. I aimed it at the wall and the wall was stationary. But there's no evidence, unlike the external tuning fork test, which says that anything was ever measured or ever determined about accuracy with regards to moving objects. And I think that's why the court eventually grew into relying on radar, because of the external calibration test. And the Queen's Bench in Alberta turned its mind to that. "The utilization of instruments

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such as this one" This is on page two. "is one way of establishing speed. The test that is recommended by the Manufacturer, in my view, would not constitute a test which one can describe as an approved test. If one looks at that test, that test no doubt establishes that stationary items are not moving but it does little more than that. To extrapolate from that, one has to extend science beyond logic, and consequently I do not believe that the test in this particular instance is one that one might consider to be properly an approved test. If one looked at a clocking device, one would expect that the clocking device be compared to some form of absolute; in other words, another known clocking device that is properly working. One would not expect to compare that clocking device to something that is not measuring time. In this instance we are comparing moving items to a stationary item and I consider that such a comparison in terms of the utilization of the same for an approved test does not constitute what was meant by Madam Justice McFadyen and Mr. Justice" I can't read it, "in relation to their decisions as to an approved test. Certainly, I allow the appeal and quash the conviction." So at the end of the day, I mean, what does this come down to? In my respectful submission, and if I'm off base I'll trust Your Honour to get me back on track here, but in my respectful submission, this comes down to an evidentiary burden on the crown when they seek to introduce an instrument which is not legislatively

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approved, and to use it to obtain convictions. Obtain convictions on certain people for traveling certain specific speeds, of course which follow certain penalties. They often argue, well the officer said that they were speeding, that's good enough. Well I think in Marshall it speaks to that. Well you can say he was speeding, but I can't find he was doing 99. Not based on this evidence. And it's not enough and it's not accurate enough to enter a conviction for an allegation of a specific speed. But at the end of the day, what burden is put on the crown when they introduce the new instrument? The only burden is, from time to time they check it against a radar. In one case, seven months progressed. Although, it says seven months after, in the transcript that speaks to that case, in Renouf I think it is. One of the other transcripts speaks about that, and there may be a date mess-up in the original transcript of that case, because it talks about being tested seven months before Mr. Alladina was charged. It said it was test seven months prior to the appellant. There was no evidence it was tested subsequent to it. It talks about the constant velocity test as well in Renouf, which talks about that the court has criticized it in the past. "It has been questioned and criticized by this court on more than one occasion prior to today." At the end of the day, if Your Honour - well, first of all, I guess the test is, was the justice of the peace wrong? Because I think that's what you have to look at as an appeal

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court. Could she come to this conclusion based on what she had before her? In my respectful submission, she certainly could. Based on what she knew from the cases out West, based on what she had before her, and based on her position. And let's just look at that. She assesses the decisions in Sutherland and Renouf. She didn't have Marshall. I'm sure this stare decisis would be the argument because if she'd had Marshall, I don't think she'd have any difficulty agreeing with the cases that were provided. She obviously didn't have any difficulty, but it would have been I think just open and shut in regards to what we would have been doing here today, because I would have argued that she was bound by that and it shouldn't be disturbed. But she assesses the case, she assesses the evidence, she assesses all of the factors and comes to a conclusion. Could she come to that conclusion? In my respectful submission, of course she could, absolutely. And she did. If Your Honour doesn't overturn that conclusion, where does it leave the crown? And I say that because as I said before, I'm a practical individual and I don't want this to be made out to be more than it is. Where it leaves the crown is, at some point and time they didn't do tuning fork tests on radar, and a court came along and said, do the tests. The Manufacturer said we'll invent these tuning fork tests and that will appease the court. And that's what happened. And the great burden placed on the crown, or on the police, was that they used an external method of calibrating

the radar, or checking the radar, for accuracy and their evidence became accepted. If Your Honour says today laser, for the purpose of measuring speeds of motor vehicles, is a relative unknown to those triers of fact, and they should not be taking judicial notices of what it can and cannot do, but if it's corroborated in some way, shape, or form by a simple comparison, which these courts set out in the past and continue to set out in my respectful submission, all they have to do is check it from time to time against the radar, and if they get accurate readings then I'll find that it's reliable. Until then, I'm not prepared to put the reliability in a laser that I am in a radar. That's all the justice of the peace is saying. That's all the crown has to do. It doesn't end laser radar - or laser speed measuring devices in this province or anywhere else in my respectful submission. In this case they didn't do it. They had to do it. It's not unlike other cases we've argued before Your Honour with regards to testing that should be done on a radar. In this case it's a laser. And unless Your Honour has any questions of something I'm missing, those are my submissions, sir. I think the cases support my position in fairness. And certainly post Allaina cases certainly support my position. With the last case being, of course, December 22, 1995 out of Brampton.

THE COURT: The fact that Alberta has been using them since January of 1993, doesn't that say that the court has pretty well accepted them?

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MR. DULLEGE: When they test them properly. When they compare them.

THE COURT: But it seems a shame to bring out something as intricate as that and then say, well go back to the old obsolete guide that we love and trust. Well we don't love, but we trust, and test it as against that. And then who is to say that if you withdraw your consent that radar is a recognized machine. Doesn't the thing become like infinity. It's like looking into your vanity, looking down and looking at yourself in infinity. You use the radar to test the new guy. Then you have to use something to test the tuning fork.

MR. DULLEGE: Oh, no, we've never gone beyond that.

THE COURT: No.

MR. DULLEGE: Never even close. And radar is accepted on that basis. Now, would you ever convict in an over 80 case on a Borkenstein, which is an approved instrument, without the use of a standard, alcohol standard?

THE COURT: No, but once the officer has said I did everything required and I checked off everything, unless he is pressed, I accept that as being the case that it was working well.

MR. DULLEGE: Correct.

THE COURT: His plenary statement, I found it to be working correctly.

MR. DULLEGE: Are you talking about in this case or are you talking about in an over 80 case?

THE COURT: In an over 80.

MR. DULLEGE: Because (A), it's a creature of

statute, and (B), there's presumptions. But even in spite of the statute and the presumptions, they still have to use - which is on the certificates of course, that I tested by means of a standard suitable for use with this instrument.

THE COURT: Yes.

MR. DULLEGE: That has to be there because there were certificates out some time ago that didn't have the word, "suitable" and of course those charges went away. Even a device of statute is tested by an external means. Even a device of nonstatute, i.e. the radar, is tested by external means. In this case the court is saying, I'm just not prepared to buy into laser technology until (A), there is an external test, or some other comparative test. They could have said there was some other method of doing it, I don't know. But, what they said was, we trust radar. We've grown to rely on the use of radar over a long period of time and the evidentiary burden on the crown is very low. Prove it was working properly. Prove it was set up by a qualified operator. Prove they did the Manufacturer's tests. And that's good enough. Part and parcel, because they accept the Manufacturer's tests as being reasonable tests obviously. In this case what the court in Alberta says is, we don't even buy into this stationary test. When we look at it we can say, well the Manufacturer says this is good enough, but objectively viewed we don't think it is. And in my respectful submission, that's what they say. They say if you're testing a device to measure

moving vehicles, seeing if a wall's stationary is not - it might be an approved test, but it doesn't do anything for you. It's fundamentally flawed. That's their position. Even in the Manufacturer's tests. So they say you've got to go one step further. And the one step is, at least compare it to a device that we accept. And we accept radar, why? Because of all the reasons my friend has told you you should. But we can't just make the leap, and that's what - you've heard the words that were used in some of these decisions. You can't make the leap to say, well, okay we accept radar, we'll accept laser. I don't understand how there can be some presumption. That means that someone in this courtroom comes up with some other new device and says, well this will measure speed. We've tested it, it's a good one. Okay, officer give evidence. Well I've tested it and they told me what to do. I used it, I clocked a vehicle, it looked pretty good, there you go. Now there's some presumption of accuracy of that, and every defendant is going to call evidence of inaccuracy. No, sir. The crown wants to create a presumption of accuracy. Let them do it. Let him do it how the courts tell him to do it. Just test it from time to time against a standard radar, and we'll then accept that there is some accuracy here. But until then, we're just not going to buy into the next creature, or the next creation. And is there any reason for them to buy into it?

THE COURT: I think we all know that in 20 years time when we look back we'll say that the laser

5 was so much more sophisticated than the radar. We were really out of touch when we said, use modern technology only if it's tested by, you know, something that has had its day. I know what you're saying.

MR. DULLEGE: We may, we may. We may on the other hand look back and say, jeez, you know that laser just wasn't quite what it was cracked up to be.

10 THE COURT: But when radar was introduced, if you look back socially, everything was radar. Our early warning radar line, the D.E.W. line, everything was radar. It became a magic word and feared. Now we keep our supersonic jets up in the air with computers and laser. Radar is not even a factor, I think. Radar is too slow.

15 MR. DULLEGE: And that be the case one day with this.

THE COURT: Yes.

20 MR. DULLEGE: And I'm not going to argue that - I mean we're using laser for various things, I mean we have laser disc readers. What is the difference between this and a laser disc reader?

25 J.P. doesn't know. I don't know. She's not going to take notice. And I think one of these decisions speaks to that very issue about the use of lasers for various things. But the bottom line at the end of the day is, for this particular use, the court says, I want a comfort level. And it's not just one justice of the peace. It's a provincial court judge in Brampton. It's the court of Queen's Bench in Alberta. It's appeal case after appeal case where they say, we want a

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comfort level that tells us it's reliable. We're just not prepared to accept it. Someone manufacturers something, markets it to a police force and it's suddenly reliable. And I guess, you know, when you look at the J3A, you know now again, that was a creature of statute and that's why it survived a lot of the challenges that it did, because it being a creature of statute, an approved device or an approved roadside screening device. We find out later of course there has been all sorts of little things done to it and eventually it gets struck off the list and it goes away. Old technology. I mean we still use, you know, you talk about the Borkenstein. It's very old technology. Ancient. But we still rely on it. And when we do blood tests, quite often they compare them to the Borkenstein in terms of, when you hear your cases, over 80 cases, and you hear toxicologists giving evidence about comparisons. In this day and age of moving so fast forward in analysis of blood, where we can now analyze DNA, which we couldn't have done five years ago even. They still relate it back to a Borkenstein in terms of elimination when they do elimination tests on people. The blood and the Borkenstein. So it's not far appealed in any way, shape, or form. The issue becomes - and when the justice of the peace hears this evidence and she says, I am just not convinced at this point in time. Based on the cases from out West, and the last case being Renouf, that's been presented here today, I believe, still takes the same position. She says,

test it against what I know works. That's all she said. When there certainly can't be a presumption of trustworthiness. If that were the case, everybody is guilty upon accusation. Especially in light of the fact that you can't even go get - let's take my friend's position. It's my place to raise a defence. Okay, give me your laser radar please, I want to do some tests on it. Get out of here, you're not getting the laser. Not a hope. So what they want is their cake and eat it too. THE COURT: Send one of your client's over to... MR. DULLEGE: They want their cake and eat it too though. They want to say, let's presume it's accurate and no, you can't have it. It just doesn't work that way. So at the end of the day, as I say, Your Honour, it's not a big - you know, this should not be blown out of proportion, it's a simple issue. It's a simple feature. Court in Alberta says, we want this done. The court in Ontario says, we want it done, in my respectful submission. And that might be pushing Marshall a little bit further, but what Marshall says is they tested it against the conventional radar, but they didn't give the necessary requirements for the conventional radar. We want it done. Just do it. And then what will happen? What's the downside of being decided that way? In a few years they will test the radar, they'll test it with the radar, they'll test the laser, and a court's going to sit down and say, you know what, we have no issue with laser now. That may be what happens. On the other hand, they may get out there and go, oh oh,

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laser says he's doing 131, conventional says he's doing 142 or vice versa. And that will be the dilemma for the individual officer who tested it. But nonetheless, if it is accurate and if it is worthy of the trustworthiness my friend wants you to put in it, let them establish that. And they'll do that over a period of time if it is in fact that way. Once that happens, it will be a moot point. Just as it is today with radar to say what you can't - how could you ever consider accurately measuring speed of a vehicle with radar. Well, that's a given these days. If properly operated, if properly setup, and properly tested, and so on, so on.

THE COURT: Do you actually think a police force would invest a whole ton of money into something that doesn't work without investigating it to see that it's reliable?

MR. DULLEGE: They invested a ton of money in J3A's and they had to throw out the garbage. They invested a ton of money in computers in this region where they are now getting rid of them all because they are antiquated and out of shape. What else did they invest money in they never use? Let's think about that for a moment.

THE COURT: I'm sorry I opened up that.

MR. DULLEGE: Yes, I do. I think that police forces are subject to pressures, public pressures, political pressures. They go out and they say, you've got to get these people. There's a lot of reasons why radar tickets are written. There's a lot of reasons. Some are perfectly well founded,

some may be political, but the fact of the matter is that if I come to this police force and say, here's a new device that's going to let you get individual cars out of packs so you run it right through rush-hour and you just hammer, hammer, hammer, and it's going to raise tremendous revenue. The province of Ontario says, right on. We can take one of these devices and we can run them now from four o'clock until seven o'clock at night because we can pick out individual cars, revenue goes up significantly. As a government there is, of course, the inherent interest in public safety, even though everybody's moving at 115 or 120. As a government why wouldn't they? There is no evidence here of stringent testing. There is no evidence of - there is one of the cases from Alberta that talks about expert evidence where they would require expert evidence to bring in this new technology to have a court accept it. We're not going that far. I'm not suggesting for a moment that the crown has to hire a permanent retainer, somebody from this company to come and say what this device does. But they do have to go as far at least as the courts have led him to this point, in my respectful submission. I just don't see any presumption of accuracy here.

THE COURT: I would like to be able to distinguish the Alberta cases. You say that Ontario doesn't have legislative authorization for anything that measures speed under the Highway Traffic Act. In actual fact it does, because it comes in the

backdoor. Because Ontario, does it not, taboos radar detectors. So therefore isn't that by the backdoor, saying that radar in fact is a recognized device? Whereas even in Alberta

everybody...

MR. DULLEGE: Well that supports my position.

THE COURT: ... plugs it in, puts it on the dash, and they say, oh, there's radar within three

blocks. Everybody knows that. It's not against the law to have one, I can only assume.

MR. DULLEGE: Well, I'll adopt that position, Your Honour.

THE COURT: Yes.

MR. DULLEGE: Because what that says is, Ontario

says, we adopt radar as an accurate device, but

you can get a laser detector. Because the section says, police speed measuring radar. The

definition of radar detector is any device

designed to detect police speed measuring radar.

THE COURT: Okay.

MR. DULLEGE: So if we take that analogy, and we

adopt that, then they say radar is somehow a

creature of statute. Laser isn't.

THE COURT: In any event, I just left it with you

because Alberta deals with speeders different than

Ontario.

MR. DULLEGE: They do.

THE COURT: Yes.

MR. DULLEGE: Yes, they do.

THE COURT: If you are from Alberta you get to

know that.

MR. DULLEGE: There's a lot of different things

they do out there. I mean, they still use photo radar out there. And then everybody pleads to photo radar. It's owner liability. They still do that out there so you don't get any demerit points or anything like that.

THE COURT: It still has very low insurance rates though.

MR. DULLEGE: I guess all those radar detectors aren't such bad things.

THE COURT: But it's the States saying you can't drive fast, and everybody is saying, well it's a straight line, why can't you drive fast on a straight line.

MR. DULLEGE: I just want to look that up to make sure I'm not misleading you.

THE COURT: No, what you are saying, it rings a bell. I'm sympathetic to the crown's position for practical reasons. But you seem to have the law on your side, whereas he has got practicality on his side.

MR. DULLEGE: It's not a big burden, Your Honour, if we go with the law on this one.

THE COURT: Well it's just that my mind goes back 25 years when I didn't have a J.P. up north and I would have to hear every traffic ticket, because in those days under the Summary Convictions Act you could not deprive a citizen of anything unless you did it judicially. So on a Friday morning I would sit there without one member of the public present. Back in those days there were only guy police officers, so there would be 30 guys who are getting four hours overtime in their Bermuda

shorts, and I then have to listen, radar is a device intended, blah blah, blah blah, blah blah. And the crown would go 30 for 30.

MR. DULLEGE: Right. And they may again on this, but not today, in my respectful submission.

THE COURT: Well I'm just trying to save the J.P.'s a whole lot of time. That's the practical side of me, but I have to look at the legal side of this. Was there anything to be - yes?

MR. NORMAN: If I can just comment on a couple of points in reply.

THE COURT: Yes.

MR. NORMAN: Most specifically the fact that the case law appears to be on Mr. Dullege's side, and practicality appears to be on the crown's side.

I'm asking you to look at the case law. What they're saying in the case law as to this requirement of the testing, which appears to be the problem. Not just the link, but the testing. And in my submission, there is no basis in the evidence, either on this case or, apparently, on any of the Alberta cases, to come to the conclusion that what the officer says isn't true when they say that it's tested to the Manufacture's specifications, and I came to the conclusion it was working properly. The court draws the inference that because they test a stationary object, that that somehow doesn't translate into being able to determine that it's working properly on a moving object. Well, that's entirely without foundation. And with respect to the courts that have made that decision, I don't

know how they can come to it without having any evidence on that point. Because they don't know, or it doesn't appear on the record, that they know any more about it than anyone in this room would know about it. And I certainly wouldn't be able to stand up and suggest any test that should be included in testing a laser device that aren't already completed by the police officers, because I don't know about the instrument itself. And neither do the courts. There is no evidence, apparently, in the cases that suggests that that should be done.

Secondly, getting a zero reading on the speed and having that measured as part of the test, well, zero is a velocity. It's zero. I mean, it may well be that it's what you'd expect, the wall is not moving, but it's certainly accurately measuring the speed of the wall. Similarly, they had a measured object going across that constantly said, one, I don't really see how that really would help or hurt the crown in proving that it accurately measures the speed of moving motor vehicles, other than to say that it accurately measures the speed of moving motor vehicles that travel at one. It doesn't matter that it's a test that's set out there and I don't - there's is no basis, in my submission, for the courts to be adding this requirement for this test as my friend suggests. My friend says why buy into it. Why should you accept this evidence without that one more thing that they compare it with radar. Well,

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that's a whole circle that I don't - I'm not going to really address further because I think you understand the point of where does that end, you know, I tested the laser with a radar, and I tested the radar with the car, and I tested the car with, you know, whatever, I mean, with a plane. It doesn't end. So I'm not going to go further than to say that that argument is a circular argument that shouldn't be persuasive in this courtroom.

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My friend finally asks, why buy into it? Why should you accept this evidence? Why should you accept it as being accurate? Because on the transcript that the trial judge had, that's the only evidence that was before the trier of fact. That it was an instrument that measures a speed of moving motor vehicles, that it was tested before and after and found to be working properly, and that when it was operated this instance it arrived at the speed it arrived at. And that's the only evidence that the trier of fact had before it, and to conclude otherwise, without any evidentiary foundation for it is - there is no basis to conclude otherwise given the unchallenged evidence of the officer to that affect. And that's my submission, that you have to look at the evidence that's before the court. And when I talk about why it would be open for the defence to do it, it is merely an evidentiary burden. It's not - you have to bring a laser in and suggest that it wasn't working properly. You merely have to bring

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some evidence that would suggest that what the officer says about it being an accurate instrument to measure the speed of a moving motor vehicle, and the test that they conduct are somehow flawed. It would be an evidentiary burden, and it's a reasonable one, in my submission, to leave with the defence. It would also put the crown in a position to be able to call reply evidence at that stage of the proceedings, as opposed to after all the evidence is in, hearing submissions, and relying on a matter that's not in evidence at all. That, in my submission, is a reasonable outcome of what I would consider a favourable ruling for the crown in this instance.

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Finally, and my last point, my friend suggests that because it wasn't brought out in argument in the other two cases that were decided on the same day, that those cases really have no bearing or merit to be applied when we consider this case. Well, in my submission, that's not accurate in the circumstances of this case. And what you have here is less a challenge to the officer's evidence of the testing than a description in this case as to what the officer did in respect of the testing. That was the evidence that was before this court, what the test actually were. On the other cases, the matter was left with, I believe it was tested, there may be some details about it. But that's the evidentiary basis for which the justice of the peace was coming to her conclusions, on all of the cases. And on all the cases the evidence being

5 the same. In my submission, it doesn't matter
what argument was put forth by the defence, and
the excellent argument that was put forward - or
persuasive argument that was put forward by my
friend at trial, doesn't take away from the fact
that there was no more evidence to come to that
conclusion in this case than there was on the
other cases. And just because it is persuasive,
10 in my submission, that they're following the laser
regime in other cases, and it's not open for a
trier of fact to say, well, if they would have
argued this I would have given it to them based on
the same evidence, but since they didn't argue it,
I'm not going to give it to them. If the issue
15 had been raised differently in the evidence, and
that's by calling evidence that would detract from
the officer's comments as to what the instrument
does and what its capabilities are, than that's
one thing, but there's is no differentiation in
the evidence, and therefore the fact that
20 different submissions were made shouldn't put this
case in a different position than other cases that
are decided in the exact same basis. So that's
why it is useful in considering it altogether.
And it also, in my submission, gives effect to the
25 submission that this is evidence that is being
accepted regularly in courts at that level. In
fact, by the same justice who found contrary to
one case on that day.

30 THE COURT: But we all know on a given day,
unfortunately, the quality of justice is directly
related to the quality of your counsel.

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MR. DULLEGE: And that's important because I've stood in this court before on P.O.A. appeals when a trier of fact, i.e., a justice of the peace has on their own motion come up with something and dismissed a charge for whatever reason, and the crown says, wait a second, how can you do that? It's up to the person to argue their case, and now they have entered the arena and what are they doing jumping in? And it relates back to that issue about "qualified." The trier of fact wouldn't then say to an officer who gives their evidence uncontradicted, uncross-examined, unchallenged, wait a second, officer, tell me how you got qualified. How did you do it, when did you do it, where did you do it, who qualified you, was he qualified, so on and so forth. The trier of fact would never do that. They would convict the person. And it's completely the same issue, in my respectful submission.

With regards to my friend's - about defence somehow having to call some rebuttal evidence, and then they can call reply evidence, it's somehow, you know, we're sneaking in the bush here, and we're waiting to see if they call the appropriate evidence. Well, if my friend had a radar trial, or the prosecutor had a radar trial, and let's say for example, the officer didn't give evidence that he or she were qualified, so somehow there's a burden that I'm going to stand up and I'm going to say, call defence to prove they're not qualified and then they can reply. Of course not. I sit, I

wait, they finish, they sit down, I say, thank you very much, there's no evidence they're qualified to operate the radar. The charge is gone away, as we know from Marshall. It's gone away. And I think I just want to keep the focus on the issue here. And the issue is, and I think the law does support my position as Your Honour stated, the issue is, it's a creature not of statute of a relatively new use, in this jurisdiction for sure. In other jurisdictions they require this evidence, as we know from the cases, and it is not this circular burden about - that's a red herring, in my respectful submission, to the greatest respect to my friend, it's a red herring. Well, now you're going to have to qualify the radar, you're going to have to qualify the tuning fork. Nobody, in my respectful submission, in the last ten years that I've been doing this, has ever successfully argued that a tuning fork needs to be qualified somehow. So that argument, it just doesn't exist. Take your laser, take your radar, compare the two, satisfy the trier of fact, so they can be satisfied that this technology is working and is consistent with the cases where they started using it out West. Do that little thing, and eventually that technology will earn the respect of the court if it is accurate. That's all there is to it in my respectful submission.

THE COURT: So just to recap, you're saying that because all the tests of that machine are done by itself, that that does not show reliability. You're not taking exception with that wall test,

are you?

MR. DULLEGE: I think it's silly, personally, but I think if you're going to test a radar just to suggest that we could test - if that test is valid, then what it means is that it doesn't take a whole lot to qualify anybody. And I'm just thinking about this, because it seems to me - now, let's see, if I worked as a policeman for a long time, and I could accurately estimate the speeds of moving motor vehicles, and I can stand here and tell you that wall is not moving, and I can meet the criteria that they've met, I should be able to just convict people on what I see. One would think the least you'd want to do is have a test that measures velocity of something actually moving to determine accuracy. And maybe that's what the J.P. is saying in part. Zero may be velocity, but you're not out measuring zero speeds of vehicles traveling zero ever, and bring them to court.

THE COURT: But in the Criminal Division, I think the judges' have become sufficiently bored with the approved screening device, that it's working correctly. And especially now, since it's now relevant in Carter defences, that we accept the testimony that, "I had nothing to drink, I blew into it and it registered zero." We say, ah, that's pretty good proof that it's working. It shows that it's capable of reading zero.

MR. DULLEGE: Yeah, what's a good indicator I think more than that is that you can actually provide a sample through it, and I think that's

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why I don't take exception to those types of tests, because what it says is that you can actually blow into the device, it vents, and you know, lights are working and so on. That's really what it does for you, in my respectful submission. You're actually going through - especially in a case, for example, a refusal. I mean, that's fabulous evidence for the crown, a refusal at roadside. You'd want to know that it could take a sample. And, theoretically, of course, you're not being charged on the use of a roadside. And that's why it has gotten around all of the 10(b) stipulations. You're not charged on the use of a roadside side screening device, you are on this. A roadside is only to get reasonable probable grounds as an investigative tool to get someone into the Borkenstein. So for that minimal capacity of what it's used for, it's at a very low criteria. Very low level. Very low standard. THE COURT: Well, of course as we know its edge has been sharpened where counsel is trying to cut into the retroactive presumption of the Borkenstein. So it's not as negative a tool now as it was.

MR. DULLEGE: Yeah, it depends on which line of cases you follow with regard to 10(b) and all that stuff, and how much you can use it. It's just one small piece of evidence. But, at the end of the day, I ask you to accept my argument, Your Honour, and it's not a big burden.

THE COURT: Do we have any other files left kicking around?

MR. NORMAN: I think Mr. Dullege has another matter, actually.

THE COURT: Let's take the lunchtime and I'll look at this stuff, see if law overcomes practicality.

R E C E S S

(1:30)

U P O N R E S U M I N G :

(2:45)

.OTHER MATTERS DEALT WITH AT THIS TIME

THE COURT: Now, back to the Taman matter.

MR. DULLEGE: If I need to, I'll give you one other little piece of what might be of some

assistance to you.

THE COURT: Yes, okay.

MR. DULLEGE: I took the opportunity at the break, or the lunch, to try to look and see what has been happening in terms of more recent decisions in this area. And I can suggest to you that it seems to me that as late as January of '96, that the court out West still took the position that the comparative tests should be done from time to time with regards to the use of the laser in order to assure the reliability of that particular instrument. And I say that just because I found -

I showed my friend, we were just looking at it, it's just a summary, I gather it's an unreported decision, of Cox from January 26, of '96. The

Alberta Queen's Bench. It cites Sutherland and speaks to that issue. So it's still a - what it seems to me is, - and in that case it was done.

5 And that's why that case - where an appeal was unsuccessful. So I think that as a requirement it's not an overly onerous one, and it's not impractical for the officers to do it. And I know Your Honour wanted to turn your mind to the practicality of it. It's not impractical, in my respectful submission.

10 THE COURT: But we all know in terms of doing the motorist a favour, the laser does the motorist a better favour than radar when you consider the beam that's emitted, and the accuracy of the beam, et cetera.

15 MR. DULLEGE: Not when you take into account that every case that I've ever heard, an officer's giving evidence that it was the only vehicle in the radar beam. So apparently they've had no trouble distinguishing up until now. So I would not accept that as a given in respect of all the evidence I've heard, and certainly this court has heard, on prior appeals in terms of the evidence of officers. It's always, of course, "It's the only vehicle in the radar beam." Or else they wouldn't be there. So I don't think it does - it does fall.

20 THE COURT: In another occupation, how did you eliminate the lineup for the radar?

25 MR. DULLEGE: Sorry?

THE COURT: In another occupation, how did you skillfully eliminate the other cars in the radar?

30 MR. DULLEGE: You - we'll talk about that. The bottom line is, Your Honour, and I know when you left you wanted to look at those cases, I trust

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you're still at the position that the law supports my position in regards to this matter. And I'm going to urge Your Honour to accept the position that having an officer from time to time check it with a radar device is not impractical. And given time, it may eventually become unnecessary, but in the meantime, until there are external tests for that instruments, until there are test that can be done other than by the instrument itself, then the court is reluctant to rely on it, it should be, and it's not a burden, as I say, and like I said, practical is one thing, but this is not a burden, in my respectful submission.

THE COURT: My references to Alberta were just because I'm an ex-Albertan, and my clerk, in fact, worked for the Queen's Bench in Grand Prairie from which Regina v. Sutherland arose.

MR. DULLEGE: I'm sure her local knowledge would support it was well reasoned.

REASONS FOR JUDGMENT

BOGUSKY, Prov.Ct.J. (Orally):

There are various institutions in our society, which actively avoid our human tendency to race ahead. The judicial system is one of them. The courts' have traditionally resisted change, especially as the change relates to things mechanical. The courts' have had to be dragged reluctantly into the twentieth century, and now into the twenty-first coming up. This is an unusual appeal in the sense that the real question I have to answer is whether a relatively new

mechanical device can be used and relied upon by a court where its testing is primarily done by itself, as opposed to testing against machines which have become acceptable to the court. And so the appeal itself is not talking about the veracity of the particular machine in question, it is talking about a principle of evidence, or a principle of what has to be proved in the court.

The cases that come out of Alberta, they start in 1993, and looking at the résumé of one case, I think it was Sutherland, it cites that that particular type of machine, or laser machine, has begun its life in Alberta in January or so of 1993. Alberta seems to be consistent right on through, that the machine itself has to be tested against an already recognized motion machine. The only case that comes out of Ontario is 1995, and it is a provincial offences appeal court, presided over by a provincial court judge.

We have the machine itself being before the court starting in 1993 in Alberta, 1995 in Ontario, and now, of course, this is 1998. Now I think we all know and can see the writing on the wall, ultimately, the laser machines are going to be accepted on their own merit after the passage of time. The question is, has enough time gone by. And here, again, because this appeal is primarily a question of proof as opposed to the veracity of the machine. I can only conclude that applying that traditional principle of reluctance to

proceed, I have to say in answer to the question, does a new machine have to be corroborated by an older recognized machine? I have to answer, yes, that the machine has not been before the courts' long enough, so the decision probably reflects, I think it was either Coke or Bacon, perhaps hundreds of years ago, who said we must make haste slowly. So the decision of the J.P. is upheld. Thank you, Mr. crown.

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus to the best of my skill and ability.

A. L. L. L. L.

Heather Cornelisse,
Certified Court Reporter