

## ONTARIO COURT OF JUSTICE

**B E T W E E N :**

**Her Majesty The Queen**

— AND —

**Andrew Hofland**

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Before Justice of the Peace Kenneth W. Dechert

Heard on June 30<sup>th</sup>, 2010

Reasons for Judgment released on January 26<sup>th</sup>, 2011

Provincial Offences Court – Milton, Ontario

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**A. Senkus ..... for the prosecution**

**G. Burd ..... for the defendant Andrew Hofland**

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### **Statutes, Regulations and Rules cited:**

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

### **Cases cited:**

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

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

## **INTRODUCTION**

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

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

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

## **THE EVIDENCE**

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

### **(i) The Testimony of Police Constable Kevin Hanowski**

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

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

### ***(a) Examination-in-Chief***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***(b) Cross-Examination***

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

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

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

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

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

Q: On all your evidence sheets?

A: That pertain to the Lidar that I used.

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

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

...

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

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

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

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

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

A: Well, it tests itself, yeah.

Q: I'm sorry?

A: It tests itself, yes.

...

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

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

Q: How does it do that?

A: It would display on the LED.

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

A: No.

Q: Are you sure?

A: Yes.

...

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

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

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

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

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

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

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

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

A: Yeah.

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

A: No.

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

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

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

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

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

A: Yeah.

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

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

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

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

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

A: Yeah.

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

A: Yes.

***(c) Re-examination***

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

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

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



## THE ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

## THE LAW

### (i) Relevant Statutory Provisions

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

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

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

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

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

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

In this Act,

...

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

...

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

...

## **(ii) Relevant Common Law**

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

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

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

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

...

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

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

...

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

...

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

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

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

...

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

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

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

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

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

...

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

...

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

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

...

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

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

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

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

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

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

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

...

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

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

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

...

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

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

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

...

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

...

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

...

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

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

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

...

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

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

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

...

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

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

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

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

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

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

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



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

...

## ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **THE DECISION**

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

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

**Released: January 26<sup>th</sup>, 2011**

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