

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

V.

FRANK KURAY

BEFORE THE HONOURABLE MADAM JUSTICE R. SHAMAI

ON JUNE 24th, 2002, AT TORONTO.

APPEARANCES:

COUNSEL FOR THE CROWN

COUNSEL FOR THE ACCUSED

GUNNESS, A., ESQ.

HIGGINS, M., MR.

OLD CITY HALL

COURTROOM A

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MR. HIGGINS: Good afternoon Your Honour, Higgins, initial M. for the record. This matter is a continuation of an appeal brought by the defense with regards to a lack of disclosure and an eventual deeming not to dispute by the Crown on August the 8th of 2001. In previous discussions my friend has alluded, perhaps, that the original transcript, that being from May the 30th, 2001, would be most assistive. Has the Court been served with that copy?

THE COURT: It is in the file now.

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MR. HIGGINS: Terrific, yes. It's very short. On page two of that transcript Mr. Moore, who is an associate of my office attended and did indicate that a request for an adjournment would be put forth. We had sought disclosure on the 10th of May of the year 2001, by way of fax to the Crown's office, and I have a fax confirmation for that.

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Mr. Knight(ph) for the Crown, indicates he has submissions and he, in fact indicates, I think sideways, he's received them. He knows what it's about, indicating the request for disclosure, "... it's a request that the officer produce the radar manuals". He says it's not a proper request. Then Mr. Knight goes on to say, "If he wished that the officer disclosed the notes, that's fine but it's another thing to request the manuals."

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5 The Court for some reason rules without
evidence that the manuals are not necessary
and we won't get those, but that the matter
is adjourned and made peremptory upon the
defense. I would submit that that certainly
doesn't preclude us from seeking some
disclosure, any disclosure on the matter.
10 The radar - - or sorry, the disclosure was
requested, if I could pass that through Madam
Clerk to Your Honour, would indicate a
service date of May the 10th by way of fax,
and the bottom of that document does
indicate, "Any other pertinent disclosure in
15 the possession of the Crown at this time,
specifically the radar manuals but any
disclosure in possession of the Crown." Mr.
Knight admits he has received it, says it's
fine to ask for that but never indicates it's
going to be forwarded.
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Subsequent to that, on July the 5th, a second
request for disclosure was made indicating
the trial date of August the 8th, and I'll
pass that to Madam Clerk as well for Your
25 Honour's perusal, with the fax confirmation.
Again, indicating specifically the manuals,
however, any disclosure in the possession of
the Crown. Getting closer to the trial date
my office, of course not in a position to
30 proceed with no disclosure whatsoever, on the
27th of July, made a further follow-up fax at

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3:30 in the afternoon, and I'll pass that to Madam Clerk, with a cover page on it indicating this is our third request for disclosure in this matter, received by the Crown's office, Scarborough.

Subsequent to that, we then get into the issue of Mr. Booth's attendance on August the 8th, in front of His Worship Shantura(ph) where he was instructed specifically by myself as another associate of my office to seek an adjournment because we had received no disclosure. Mr. Swales indicates that, "... he has to be here to make a defense to the Court", and this is on page two of the August transcript, that is marked peremptory. It's his understanding, "... he should be here today to make a defense and he's not present." And Mr. Swales goes on to say at line 25 that, "... the disclosure was denied by Justice of the Peace Kant, on May 30th it was marked peremptory and not to reargue the motion."

I would submit it certainly hasn't been put on by Mr. Kant that we could not reargue the motion. Any disclosure or certainly all was going to be an issue with regards to it. The issue of the manuals, I think comes up during the trial, and the Court of Appeal case of R. v. Shannon, is certainly in our back pocket'

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waiting for that. It's available during the trial process but certainly I submit, with no disclosure whatsoever we're precluded from being prepared in any way, shape or form for this trial, in any form. And we'd be working blind. I don't even know if it was a laser machine or a radar machine, I have no idea because I have no disclosure at this time.

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Mr. Booth, on those instructions, certainly was not prepared to go to trial. I think it would have been an unfair process, I'm submitting anyway Your Honour, to put Mr. Booth in a spot at that point for a trial. Mr. Swales, I think then does the administrative thing and asks for a deeming not to dispute conviction, when Mr. Booth indicates that's all the instructions he has.

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I would submit certainly on the face of these two transcripts and the information you now have before you, the disclosure was certainly requested quite diligently on a number of occasions, and specifically certain items, but any disclosure in the Crown's possession. The Crown at one time indicates they will give it to me and that's fine, but of course at this point nothing's ever been given. And we stand now before Your Honour with an appeal on a matter which was never, ever given by the Crown.

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I'm in your hands with regards to it, and I'd certainly be seeking remedy from this Court, appropriate to what this Court would decide by way of any remedy under the Provincial Offences scheme, including anything up to a stay and or costs on this matter for the amount of time that we have spent on this and the number of times we've come back to eventually find out that we were right all along and that the Crown has certainly been far offside with regards to their responsibilities here. And I submit at the very least, a new trial and costs if not a stay and costs. But certainly should costs be considered, I'd certainly be prepared to put it over for that assessment, motion, et cetera, and have my friend have a chance to respond of course, and you have to have a chance to read some of the matters.

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I've recently come into possession of a number of cases, including your own and I'm still digesting them myself there. I wish I was a little more legal literate in some of these matters, but they are certainly quite informative. I can see that the scope of where they're going but certainly the full digest is not quite there yet. I received about 12 of them at once, *R. v. Pinnacle Transport*, *R. v. Moreira*, from Your Honour, *R. v. Smith*, *R. v. Dufrusia*(ph), all matters

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in P.O.A., and disclosure issues with costs. But I'm certainly open to any suggestion the Court might have, and of course, we haven't heard from my friend.

THE COURT: Thank you sir.

MR. HIGGINS: Thank you.

THE COURT: Mr. Gunness?

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MR. GUNNESS: Yes, Your Honour. The issue first, dealing with one part of disclosure. There's a request here where the prosecution, on a day, dated May the 17th, '01, to Officer Woolley, and I'm not sure if Your Honour's got a copy of that in your file, from Tim Demosio(ph), the provincial prosecutor, "Re: Frank Kuray, and please attached find a copy of request for disclosure which was sent to the police officer."

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Now the practice is for defense to obtain this covering letter, and if Your Honour has one, which would indicate that some sort of disclosure would have been provided. For the defense to just get the letterhead and no disclosure, I think that is highly impossible on this disclosure, it was provided in the Crown's brief and in your folder.

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THE COURT: Okay, I have something that ...

MR. GUNNESS: Yes.

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THE COURT: ... from this distance...

MR. GUNNESS: Yes, this

THE COURT: ... resembles what you have in

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5 your hand. On the head of it is, "Memo from the Provincial Prosecutors Office at 1911 Eglinton Avenue East, Scarborough, dated May 17th, '01 to Woolley, et cetera.

MR. GUNNESS: And if the defense has a copy of this in their possession, that would indicate that some form of disclosure would have been provided.

10 MR. HIGGINS: I can indicate, I don't have that, have never been given that document Your Honour.

MR. GUNNESS: But the documents are squarely before the Court, Your Honour.

15 THE COURT: Well I do not know why it is in this file, in the appeal file. I am going to pass it down to Mr. Higgins. What it says is, it is a memo to the officer from the provincial prosecutor, in this case Mr. DeMosio and, "Re: Frank Kuray, November 24th, 2000, charged with speeding, trial date May 30th, '01", and there are a list of items that can be checked off. What is checked off on this document is regarding disclosure.

25 "Please find a copy of a request for disclosure." The next block that is checked off says, "This charge is a minor traffic night court matter, we are no longer in possession of your notes. Please provide a copy of your notes to the prosecutor's office, ASAP."

30 MR. HIGGINS: Yes, I have never been served

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with a copy of that document, Your Honour. I can see what it is, it's an internal memo and certainly it's not something I would have privy to in any event, I would indicate so, not unless policies have changed.

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MR. GUNNESS: I don't think the policy has changed because if I've got a copy and the Court has got a copy, sure Mr. Higgins must have a copy. But having said that, Your Honour, we get to the real issue here where Mr. Higgins, as the agent of record sent various agents with regards to the issue of disclosure. And none of the agents when they appeared to seek the adjournment could be candid with the Court with regards to disclosure, other than the fact - - the issue of manuals.

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THE COURT: The issue of manuals

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MR. GUNNESS: The issue of the radar manuals is what is the key issue, at least on every occasion with regards to adjournments. I can indicate to Your Honour that the manual is something that could be ordered or subpoenaed in the ordinary course and I draw the analogy, after speaking to some Crown Attorney's, with the breathalyser manual which is never given out to, even counsel. They have to either subpoena it or make the appropriate representation to the Crown
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whereby they can get a letter of some sort, thereby they can sit down and look at the
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5 manual. And I spoke to a couple of Crown Attorneys this morning and they clearly indicated to me that they never provide the manual. That's - - as a courtesy they would say, 'speak to the police officer or give us a letter and you can look at the manual'.

10 And one of the key reasons on that issue deals with the Copy Right Act whereby the police department has the right to photocopy manuals and give it out to any agent or someone who is not really regulated, any form or distribute this manual. I don't know what the repercussion would be but it could have serious repercussions on behalf of the police department, from what I gathered. And that's about the only problem I could see with regards to the issue of the manuals.

20 And the reason why I am saying that Your Honour, the manual is something that is not in the prosecution's possession at any time. And the manual only goes on the issue of accuracy as to whether this unit when it was tested, tested accordingly to what is prescribed and it deals with accuracy. That is the key issue in reading the manual and doing a case presentation. That's from what I gather.

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30 THE COURT: Okay.

MR. GUNNESS: And having said that Your

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5 Honour, on this issue, the manual is the issue. It's a simple task whereby agents could really subpoena the manuals or purchase it from the manufacturer to meet the ends of justice, if that's what they require. If it's so germane to their defense, that would be the recourse I would suggest that is appropriate under the circumstances.

10 Another issue, Your Honour that arose, and I have copies of the case that came up, and this is a case that came up recently in the appeal court. I'm going to pass a copy up to Your Honour, it's a copy of *R. v. Man Sidhu*, it's unreported. And this deals with the issue of agents appearing on behalf of agents without instructions from the accused, from the defendants. And Judge Khawley clearly indicates that the Justice of the Peace have a right to question agents about what instructions they have from the mouths of the accused. And Judge Khawley found it was totally inappropriate and improper for an agent to appear on behalf of an agent. And in so finding Your Honour, in this similar situation with the case of - - Judge Khawley came to the conclusion that ultimately the defendant is the one who suffers and he sent it back to trial but not before he made the ruling that an agent cannot appear for another agent.

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So, in conclusion Your Honour, I would say where the matter appeared on the docket on ' the 8th of April, before the learned Justice of the Peace at that time, I am going to respectfully submit to you, Your Honour, the Justice of the Peace was not in error in convicting the defendant on the deem not to dispute for the simple reason that it was marked peremptory, the matter of disclosure was properly dealt with on the previous occasion when it was peremptory, and that the transcript - - the Justice of the Peace, when he gave the adjournment to Mr. Moore, he said at line 20, "Okay, all right, just tell him that the Court does not accept his argument about the disclosure because"

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Mr. Moore, "okay, so you are saying nobody can get it, it's not a valid request?"

Then, "we'll give you the adjournments but no manuals...". This would be at line 27, Your Honour.

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THE COURT: Sorry, of the ...

MR. GUNNESS: This is at ...

THE COURT: ... the August 8th transcript?

MR. GUNNESS: This is of the last - - the transcript of May 30th.

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THE COURT: May 30th.

MR. GUNNESS: This was the date of the adjournment to the trial date where I am

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submitting to you, Your Honour that the learned Justice of the Peace carefully dealt with the issue of disclosure and the issue of the manuals, and when it appeared on August the 8th, the Justice of the Peace having an agent before him with no instructions from the mouth of the accused or the accused not being present on the peremptory date, I would submit to you that the Justice of the Peace was not wrong in entering the conviction as required. That would be my submission at this stage, Your Honour.

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THE COURT: Thank you sir. Did you wish to respond Mr. Higgins?

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MR. HIGGINS: Very briefly. My friend does not address before this Court, Your Honour, the issue, in fact that I've never received any disclosure. This issue of the manuals, he's trying to compartmentalize it, it's a double issue here. Any disclosure whatsoever, I submit could have been assistive in preparing a defense.

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And when my friend brings up the matter of R. v. Sidhu, I would submit that the - - on page eight of that transcript, His Honour Khawley indicates it's going to succeed in any event. And when Mr. Brown gets up and puts his two cents in, of course there's an exchange back and forth with Judge Khawley giving his opinion on really how to get a secondary

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agent in, which is certainly learned, but I submit it's obiter because he grants the appeal on the other issue of the fact that only one, the defendant is affected(sic). It really shouldn't be deemed when someone else is there.

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With regards again to the issue of manuals, Mr. Booth didn't bring it up, I think on the second transcript, the word manuals comes in when he's indicating a conversation from the Crown. And that's on page two. He says, "The agent on record is Malcolm Higgins, I know he did request some disclosure, I believe my friend indicated the manual, is that correct?" And then - - that's the only issue of the manual, but doesn't address the issue of any disclosure whatsoever. I have 15
three requests for this disclosure. My friend's indicated they responded once in May and where do they go from there. I've certainly never been given that document, it's an internal memo. I don't think I really should be having private communication 20
between them and their officers that are witnesses. That's not my proloin(ph). It's got nothing to do with the actual matter of was Mr. Kuray or was he not speeding. And I can't figure that out until I can create a defense for him.

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THE COURT: Mr. Higgins, with respect to the

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request for disclosure in this matter, you have shown me a few letters, the first of them appears to be have been dated May 10th?

MR. HIGGINS: Yes.

THE COURT: There was a fax transmission slip on that one, and there was the appearance on May 30th, 2001 which, of course Justice of the Peace Kant - - where disclosure was denied.

There were two subsequent requests for disclosure made and then the appearance on August 8th, the trial date where again disclosure was sought and an adjournment as well.

MR. HIGGINS: Yes.

THE COURT: That is the entire history of the disclosure requests?

MR. HIGGINS: Yes, May the 10th I believe, July the 5th and July 27th, all to the Scarborough Crown's office.

THE COURT: Okay. And you received nothing?

MR. HIGGINS: Absolutely nothing.

THE COURT: Do you have a copy of the Provincial Offenses Act handy?

MR. GUNNESS: No.

MR. HIGGINS: I did bring a copy of the relevant sections under Section 135, the Appeal section of the part one...

THE COURT: I am interested ...

MR. HIGGINS: ... certificate of offenses ...

THE COURT: I am interested in the 'deemed not to dispute section', have neither one of

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you ...

MR. HIGGINS: Specifically what might Your Honour - - I'm very familiar with it.

THE COURT: I would like to read it over.

MR. HIGGINS: Okay.

MR. GUNNESS: Your Honour?

THE COURT: Yes.

MR. HIGGINS: If we could stand down for even just a couple of moments, I am sure there are a number of agents over in B court who will have a P.O.A. with them, I could secure that for Your Honour's perusal.

MR. GUNNESS: Your Honour, I just wanted to point out one issue with regards to this letter ...

THE COURT: Yes?

MR. GUNNESS: ... that's before you. This letter's always the possession of the prosecution or the Crown, save and except when it gets into court on the trial date, the Court will just have the notice of trial and the certificate of offense before the Court. When the Crown is obliged to make representation, then and only then would the Crown produce this on the trial date, or whatever time. So that's one of the reasons why this would be in the Court's possession, to verify that something was done with regards to disclosure.

THE COURT: A memo was written, we know that.

MR. GUNNESS: Yes and the only way the ...

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MR. HIGGINS: Why wasn't - - why doesn't he order the transcript?

MR. GUNNESS: The only way the Court will get this document is when the Crown present it to the Court on the trial date, otherwise the Court will never have that in their possession.

THE COURT: I can only rely on the evidence, and certainly the submissions of counsel, while the Court ought to rely on them ...

MR. GUNNESS: That's the only reason

THE COURT: ... that does not amount to evidence and that is one of the difficulties in this case, ...

MR. GUNNESS: That's the only reason

THE COURT: ... there is no record of evidence. So, I would like to see the wording of, I believe it is Section 9.1, 'deemed not to dispute' section, and perhaps we could deal with - - perhaps if you would not mind helping me with that Mr. Higgins, finding me a copy of it. I can deal with the other matter ...

MR. HIGGINS: I will get one right now, if I can be excused?

THE COURT: Yes, thank you very much Mr. Higgins.

... REPORTER'S NOTE: OTHER MATTER DEALT WITH

UPON RESUMING:

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THE COURT: Mr. Kuray appeals from a finding of guilt that was made on August 8th, 2001 by Justice of the Peace Shantura. Mr. Kuray was found guilty of speeding and fined a total of - - fined \$42.50 on that date. He had retained an agent to appear on his behalf. I understand that it was the agent who appears today in this matter, Mr. Higgins, who was retained.

In defending this matter Mr. Higgins sought disclosure and in particular, the radar manuals for the machine which was used. To that end a number of efforts were made. I have been provided with a sheet titled, "Request for disclosure", along with the transmission verification report and the first one of these was sent on May 10th, 2001. An application was heard when the matter came before the Court on the 30th, 2001(sic). That application I will discuss a little more in a moment, however it was not the end of the efforts made on behalf of Mr. Kuray to obtain disclosure of the Crown's case. A further fax was sent on July 5th and again on July 27th. The trial was to have taken place on August 8th, 2001 and on that date Mr. Booth attended on the matter.

The net result of Mr. Booth's attendance in

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Mr. Kuray's matter on August 8th, was that Mr. Booth asked for an adjournment as a result of the lack of disclosure. When the adjournment was denied Mr. Booth asked the following question, "May I be dismissed from the Court?" The Justice of the Peace did not directly respond but it appears that when the matter was called a little later in the evening, the Court characterized Mr. Booth's attendance in the following way, "Mr. Booth had a limited retainer on that to represent an agent to adjourn it." The motion was denied since it was already marked peremptory. The defendant is not here, a notice was sent out, a notice of intention to appear filed, the certificate is proper on its face, deemed not to dispute, conviction is entered, and the set fine of \$42.50 was imposed.

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Much attention has been focussed on the request for the radar manuals in this case. At the attendance before Justice of the Peace Kant on May 30th, the prosecutor there indicates his opposition to the request for disclosure in the following terms, that, "First of all the request for disclosure, as my friend has indicated was made but it's because the officer produce the radar manuals for the machine that was used and that's not - - in the Crown's position, that's not a

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proper request for disclosure."

5 The Court says, "Right, if Mr. Higgins would..."

10 Mr. Knight continues, "If Mr. Higgins wish that the officer disclose his notes pertaining to this particular matter, that would be fine but it's another thing to request the radar manuals for the machine used. I will point out this is a very minor offense, it is only 15 kilometres over the speed limit. Secondly, I think that Mr. Higgins ought to be here to argue that kind of a request himself, not saddle Mr. Moore with the onerous task."

20 And then the Court interrupts saying, "Okay, the Court will agree with you that the ..."

25 Mr. Knight says, "I'd ask that the motion for the adjournment be dismissed." The Court says, "Okay, the request for the disclosure of the manuals, you'd never get that. Okay, sir."

30 Mr. Moore says, "I don't know much about this case except that I'm just here as the messenger as you can well appreciate and ..."

The Court says, "Okay, all right. Just tell

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him that the Court does not accept his argument about the disclosure because ...

Mr. Moore says, "Okay, so you're saying ..."

The Court says, "Nobody can get that."

Mr. Moore says, "It's not a valid request then for the ..."

The Court says, "We will give you the adjournment."

Mr. Moore says, "... radar manuals?"

The Court says, "But no manuals, okay. So this ground will not be accepted in the future. Okay, date sir?"

Mr. Knight says, "Are you granting the adjournment in any event, Your Worship?"

The Court says, "Just give him the adjournment."

The prosecutor then asks that a trial date be set on August 8th and it be made peremptory, and Mr. Moore agrees to that. And at the request of the prosecutor it is marked peremptory.

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5 The prosecutor points to - - today, to the
memo from the prosecutor's office at the
Scarborough location to the officer in
charge. It is a form letter and it seeks
disclosure of the officer's notes to the
prosecutor's office. The note is dated May
10 17th, 2001. The assertion of the agent
retained by Mr. Kuray is that there has been
no disclosure whatsoever received, and
although there has been much made of the
radar manuals, there was never any disclosure
whatsoever received.

15 Unfortunately, as I have mentioned in the
course of hearing the argument, there has
been no evidence actually heard in these many
applications to seek disclosure. I
characterize the May 30th appearance as an
20 application for disclosure as well as the
August 8th appearance as an application for
disclosure. A record is created at the
hearing of the appeal today with regard to
the letters which were sent as well as the
internal memo I've just now mentioned, from
25 the prosecutor's office addressed to the
police officer. However, I had to rely on
the correspondence and the assertions of
counsel, I do not have anything more than
that.

30 In particular, with regard to the radar

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5 manual, this Court is faced with the somewhat
difficult prospect of a flat denial of
disclosure by the Court which heard the
application. The Court, without hearing any
evidence whatsoever says, "... he'll never
get that." No reasons are given and while I
have heard further submissions on the
10 practice with regard to manuals today, there
is at the very least a concession that
disclosure of a manual in an analogous, seems
to the one before this Court, can be made in
a manner that does not infringe copy right.
Whether the case is properly made out for
15 disclosure of the manual in these situations
- - in a radar situation is, itself a
somewhat interesting question. Certainly it
is in possession of the Crown deemed to be so
in that it is, I think no doubt in the
20 possession of the police officers who operate
the machines. Whether it is as a matter of
fact and law to be considered part of the
case which ought to be disclosed is something
that I do not have, I think, a full record
25 on, in any event.

30 However in this case, the easier question is
with respect to the disclosure of the Crown's
case, again it's Mr. Kuray. I have the
assertion by the prosecutor that if the memo
is in the file then the notes must have been
transmitted. However, on one of the

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appearances for which I have transcripts, is there any reference to it? The prosecutor suggests to this Court that if it is in the file of the Court, which it is, then it must have become the subject of some mention in the course of proceedings. That is not borne out by any of the transcripts that I have here and again, opposite the assertion of the prosecutor that it must have been made, I have the assertion of Mr. Higgins, who was initially retained in this matter, that it never was made. So again, I am faced with a rather unsatisfactory situation here.

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I tend to prefer the assertion of Mr. Higgins in that Mr. Gunness, on behalf of the prosecutor's office is relying on the usual course of things, if this is here then it means that something happened. Whereas Mr. Higgins speaks with a somewhat greater proximity to the matter at hand in that, he was retained as agent and he did not receive it.

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Nonetheless the bottom line is, with great respect to the two very able agents, one for the prosecutors and one for the defendant, the two counsel in this case, I do not have evidence. I do not have anything that constitutes sworn testimony or testimony subject to a solemn acclamation, nothing has

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been the subject of cross examination. It is not a satisfactory record on which I can really make a finding as to whether that aspect of disclosure was ever made. So that is certainly a significant difficulty for the record in this matter.

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When it comes to the - - there are two issues which I think are sufficiently developed for the Court to deal with in this case. One is raised, again by the appellant in this matter, and that has to deal with the manner in which the adjournment application was dismissed and the trial issue, the charge of speeding, dealt with by way of a deemed not to dispute docket on August the 8th of last year. The other is the position taken by the prosecutor, the respondent in this appeal countering really, the propriety of the conviction by saying that the appearance of agent for agent on behalf of Mr. Kuray was not an appropriate retainer of agent and in effect, no one appeared properly on behalf of Mr. Kuray and therefore, there is no
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impropriety in the matter being dealt with on the deemed not to dispute docket. I think that that is essentially the position of the prosecution on the point we are dealing with right now.

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I have reviewed the decision of R.v.Sidhu,

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5 the decision of my colleague Justice Khawley,
and His Honour does deal with the question of
an agent representing someone where the
instructions have not been given directly
from the defendant but rather an agent acting
on behalf of another agent. It seems to be
that the facts in that case are rather
different than the ones before this Court,
10 and I would not go so far, even with respect
to the *R.v.Sidhu*, as to see it as a bar by
His Honour for one agent speaking for another
on behalf of someone who has retained the
first agent.

15 However, the inadequacy of instructions is a
very significant issue in the case before me.
Mr. Booth, like Mr. Higgins are experienced
commercial agents, no doubt in my mind some
of the better ones who come into these
20 courts. Yet when Mr. Booth appeared on
August 8th he had, as the Justice of the Peace
points out, various limited instructions. He
had instructions to bring an application for
adjournment. Now one always likes to be
25 confident taking a position before the Court,
however, surely Mr. Booth, and Mr. Higgins
instructing him, has to take into account the
possibility, especially since the matter was
marked peremptory, that the application to
30 adjourn might be dismissed. It was
dismissed; rightly or wrongly the application

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5 was dismissed by the Justice of the Peace.
At that point Mr. Booth asks a question,
which I take to mean, ' may I withdraw from
the court', and indeed, that is what he does.
I have read out that passage of the
transcript earlier on. Mr. Booth asks, "May
I be dismissed from the court", and he is not
10 addressed directly on that but later on - -
sorry, he is not addressed directly on his
request which I take to be a request to
withdraw from the court, however Mr. Swales
for the prosecution, directly says that he
intends to have the matter dealt with as a
15 deemed not to dispute matter. Mr. Booth is
clearly still there because in response to
Mr. Swales assertion he intends to have it
dealt with as a deemed not to dispute, the
Court says, "Okay." Mr. Booth then says,
20 "Thank you, Your Worship, I thank my friend."

25 Now there is a problem here. If Mr. Booth
was in fact, acting on behalf of Mr. Kuray,
the alleged speeder here, then he was obliged
in my estimation to see through the matter
before the Court. At the very least his
attendance before the Court would have caused
a trial of the matter to take place on behalf
of his client. And let us not forget that
30 even where one agent is appearing on behalf
of an agent, the person's whose interest is

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5 before the Court is not, as in this situation
Mr. Higgin's interest, it is Mr. Kuray's
interest. Mr. Booth, with great respect to
him, abandoned Mr. Kuray's interest by
withdrawing from the court, knowing in
10 particularly the matter was going to be dealt
with on the deemed not to dispute docket.
There is no possibility of Mr. Kuray
benefiting, for example, from a missing
witness or something of that sort, or some
glaring deficiency in the radar equipment.

15 So when I am asked to consider the
impropriety of the proceedings on the
adjournment having been denied by the Justice
of the Peace, I have a problem with it. Not
in quite the categorical terms that I am
asked to by the prosecutor here; I think that
20 an agent can take a brief from another agent
acting in the interest of the client. Here
that did not occur. However, my task is not
to focus on the conduct of counsel, it will
play in the decision I make. However, having
25 regard to the adjournment application which
was denied and resulted in the deemed not to
dispute disposition, again, I have to trace
back what happened in this case.

30 The finding of guilt was entered on the
deemed not to dispute docket after numerous
applications were made for disclosure. No

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5 disclosure appears ever to have been received
by the defendant in that matter. Mr. Kuray
made significant effort to be represented and
he received some fairly present
representation. Counsel appeared to argue
the motion, pursued the application with some
10 attentiveness, numerous faxes were sent in
addition to having the matter addressed
before the Court on a number of occasions,
and yet the Court expressed its intention to
proceed, notwithstanding the failure to make
disclosure of the most fundamental aspect of
the Crown's case. In addition, the denial of
15 the radar manual was made on May 30th in a
manner, which clearly subverts the notion
that a decision be made on the evidence,
without any evidence whatsoever before the
Court. The Justice of the Peace on that
application says, "No, you'll never get
20 that." That is not, in my respectful view a
Judicial decision. It is not based on the
evidence or the submissions of counsel, nor
is any of the law which Judicial officers are
deemed to know, founded in support of the
25 conclusion of the Justice of the Peace on
that application.

30 The proceedings, even under Section 9.1 of
the Provincial Offenses Act, the most summary
of proceedings that we entertain in these
courts cannot, in these circumstances be

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5 permitted to stand as a proper proceeding. There is every intention that the defendant be represented. There was no proper adjudication of a request for disclosure. An adjudication of a charge, even so insignificant as the Justice of the Peace seemed to regard this one to be, in the absence of a properly disclosed prosecution case denies the alleged speeder his right to a fair trial. And I do not care if it is 15 kilometres over the speed limit or a much more serious criminal charge, the same principles apply and he cannot have had a fair trial.

20 So for those reasons I will allow the appeal and as part of the order I will order disclosure of the police notes. That is simple. It is the application for the radar manuals which seem to raise some different considerations. If it is to be pursued, it seems to me that is a proper issue for a trial court and as I have suggested, it ought to be dealt with on the basis of the evidence that might be available and any law that may have been generated in relation to what is part of the Crown's case and what lies flatly outside of it.

30 I have been asked to impose a stay and at the very least, to assess costs against the

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prosecutor in this case. Certainly I am not imposing a stay, I have already made an order for a new trial in this case; a stay is only to be imposed in the rarest of cases and the course of this matter does not take it into the category of case that might be stayed. With respect to costs, again I am quite disturbed that in the result of this case the agent on behalf of Mr. Kuray withdrew from the court knowing that it was going to be dealt with by way of deemed not to dispute. A partial retainer, partial instructions must, nonetheless, cover the exigencies and the obvious possibilities of outcomes in these cases. In this case, the conduct of this agent on behalf of Mr. Kuray, while no doubt conducted with the usual courtesy and efficiency that Mr. Booth always demonstrates to this Court, was not on the basis of sufficient instructions and he did not do, what, in my view, is his minimum obligation as an agent. So, I am certainly not making an order for costs in this case.

I hope that I have sufficiently covered the points that are raised by this case. There are a number of interesting points, I do not propose to spend longer on any of them. I am returning - - I will keep the copy Mr. Higgins, I would like to keep a record in the file here, I do not know if you have

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additional copies of those ...

MR. HIGGINS: Actually I don't, if they're attached, they're fine.

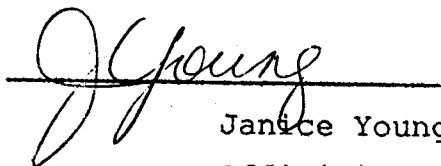
THE COURT: ... you might well need them down the line if you intend to argue the whole matter again.

MR. HIGGINS: I think if they're attached they're fine. It's a form letter that I use in any event.

THE COURT: Okay.

... matter adjourned to set date ...

This is to certify that the foregoing is a true and accurate transcript of my recordings to the best of my skill and ability.



Janice Young
Official Court Reporter