

CANADA / JUDGMENT

R. v. Thachuk

2024 BCSC 2393

COURT

Supreme Court of British Columbia

DECIDED

22 November 2024

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2024 BCSC 2393 R. v. Thachuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Thachuk,

2024 BCSC 2393

Date: 20241122

Docket: 85144-3

Registry: New Westminster

Rex

v.

Jefferson Thachuk

Before: The Honourable Mr Justice Crerar

On appeal from: An order of the Provincial Court of British Columbia, dated July 29, 2024 (R. v. Thachuk, Surrey Registry Docket No. EA00413626-1).

Oral Reasons for Judgment

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K.M. Lee

Place and Date of Hearing:

New Westminster

November 22, 2024

Place and Date of Judgment:

New Westminster

November 22, 2024

- [1] THE COURT: These are my oral reasons for judgment in this matter. I make the usual reservations to edit and expand them if a transcript is ordered or for any other reason.
- [2] The Crown is the appellant in this matter.
- [3] I have been presented with excellent written arguments by both the appellant Crown and the respondent Mr. Thachuk, and I will be relying upon them extensively in these oral reasons for judgment.
- [4] Before I get into the details of the procedural history and the issues before the appeal, I will set out the context of this appeal.
- [5] Mr. Thachuk faced two charges with respect to speeding. As recognized by counsel in the course of these proceedings, such speeding hearings are very common. Indeed, Ms. Lee refers to them as "incredibly common" before the Provincial Court judicial justices, as in the case. They are part of the extremely busy case load dealt with through judicial justices.
- [6] There is good reason for evidence in traffic court to be less constrained than in criminal trials. The singular nature of Offence Act, RSBC 1996, c 338 prosecutions was described by Judicial Justice Adair in *R. v. Prediger*, 2021 BCPC 11:
- [3] In British Columbia more than 500,000 ticket informations are issued per year, alleging infractions of various provincial statutes and regulations. The vast majority are issued pursuant to the Motor Vehicle Act and the Commercial Transport Act, but charges are also issued under many other statutes, including the Wildlife Act, the Liquor Control & Licensing Act, and so forth.
- [4] The ticket informations are processed, and tried (if disputed), pursuant to the provisions of the Offence Act, RSBC 1996 c. 388. Trials are held in the Provincial Court of BC and are routinely heard by judicial justices, but on rare occasion they may be heard by Provincial Court judges, primarily in very remote communities.

- [5] Such ticket informations charge minor infractions, for which a prescribed fine amount is indicated on the ticket. There is no possibility of incarceration in the event of a guilty finding. If the Crown is seeking a greater penalty under the statutory provisions of the Offence Act - such as a period of incarceration - then a "long information" is laid, and the matter proceeds to trial before a Provincial Court Judge.
- [6] In our Covid-era courts, 50-70 trials are scheduled per day, broken into 10 time slots through the day with 5-7 trials per half hour time slot. Taking into account guilty pleas, stays of proceedings, or successful adjournment requests prior to the trial date, the hearing judicial justice is routinely left with 40-50 matters per day for trial or disposition.
- [7] To facilitate the efficient handling of that judicial workload, the Offence Act specifically authorizes a more supple approach for both evidence and procedure at trial:

15.1 (1) Despite section 60, a justice hearing the trial on a violation ticket may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the justice considers is

- (a) relevant to an issue in the trial, and
 - (b) credible and trustworthy.
- (2) A justice may not admit under subsection (1) anything that is privileged under the laws of evidence.

15.2 (1) Despite section 60, but subject to the applicable Rules of Court, a justice hearing the trial on a violation ticket may adopt procedures that are conducive to justly and expeditiously determining the matter.

- [8] In considering the trial regime authorized by the Offence Act in relation to ticket informations, the British Columbia Court of Appeal concluded as follows in *R. v. Cooper*, at para. 29:
- [29] The intention is also to provide a fair and balanced system. In the context of such a large volume of trials on relatively minor matters, fairness and balance are in part achieved and access to justice is enhanced, by an expeditious and relatively inexpensive process, provided always that the core hallmark of a fair trial, an opportunity to make full answer and defence before an independent and impartial tribunal, is maintained.

[emphasis added]

- [7] Accordingly, the scenario before the Judicial Justice was an altogether typical one. The primary unusual facet is that there was one lawyer in the room: Ms. Lee. A more common scenario is with no lawyers in the room, and the accused representing themselves. Needless to say, the presence of experts is extremely rare in those circumstances.
- [8] Legislatively, this case volume is reflected in the Offence Act, s. 15.1:

Evidence admissible in trial on a violation ticket

15.1 (1) Despite section 60, a justice hearing the trial on a violation ticket may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the justice considers is

- (a) relevant to an issue in the trial, and
- (b) credible and trustworthy.

(2) A justice may not admit under subsection (1) anything that is privileged under the laws of evidence.

[9] Section 15.1 bestows broad discretion upon the judicial justice to admit evidence that would not ordinarily be admitted under the formal rules of evidence at a trial in this Court, for example. Unless such liberality were bestowed upon judicial justices, it is highly unlikely that the volume alluded to in Judicial Justice Adair's *Prediger* passage would be achieved, and the whole system would break down.

[10] With those framing statements, I will give a background to these proceedings.

[11] The offence in question occurred on March 4, 2023. Constable Tan had parked his unmarked SUV on the side of the road. That area was marked with a 50-kilometres-an-hour speed zone. At 2:54 pm, Constable Tan observed Mr. Thachuk's vehicle approaching eastbound. The constable visually estimated the speed of Mr. Thachuk's vehicle at 90 kilometres an hour. Based on his visual assessment that Mr. Thachuk was driving 40 kilometres over the speed limit, he used his laser device to confirm the speed. The laser device recorded a speed of 97 kilometres an hour. Constable Tan then stopped Mr. Thachuk. He confirmed the identity of Mr. Thachuk, he issued a violation ticket, and he impounded the vehicle.

[12] The import of the 90-kilometre or 97-kilometre-an-hour speed in a 50-kilometre-an-hour zone sets out the initial charge against the driver, as well as the lesser included offence found by the Judicial Justice. Specifically, the Judicial Justice concluded that it had not been proven beyond a reasonable doubt that Mr. Thachuk had committed the offence of excessive speeding. Rather, he was convicted of the lesser included offence of speeding under s. 146(7) of the Motor Vehicle Act, RSBC 1996, c. 318.

[13] At the trial before the Judicial Justice, there was only one witness: Constable Tan. Mr. Thachuk did not call any evidence himself and, indeed, neither testified nor attended at trial.

[14] In brief reasons, the Judicial Justice determined that there was no evidence that she could accept with respect to the margin of error of the laser-reading device. The Judicial Justice concluded that:

...without any more information on the accuracy of the laser I cannot accept...the laser beyond a reasonable doubt.

- [15] Accordingly, the Judicial Justice was left solely with the visual estimate of the constable. Attaching to that visual estimate the constable's own acknowledged range of error--approximately plus or minus 7, which was expanded to plus or minus 12 on cross-examination--put the speed proven beyond a reasonable doubt below the 40-kilometres-an-hour over the speed limit, leading to the conclusion that the Court could only find him guilty of simple speeding.
- [16] It is Constable Tan's rate of error that forms the basis of one of the respondent's responses to this appeal. The respondent describes the visual estimate as contradicting the evidence provided by the laser device. Specifically, the visual estimate of 90 kilometres an hour--plus or minus 7, perhaps plus or minus 12 as elicited in cross-examination--contradicted the reading of the device.
- [17] As Ms. Lee responsibly acknowledges, it is not a contradiction in the usual sense of that legal concept. Rather, it is the constable's acknowledgment that, based upon his experience, there is a potential range of error. Indeed, if one takes plus 7 kilometres an hour or, as expanded by Ms. Lee, plus 12 kilometres an hour, there is just as much possibility that the visual rate corroborates rather than contradicts the device.
- [18] I also note that the visual estimate's primary role is to prompt the constable to train his device on a vehicle that appears to be speeding. The purpose of the device is to provide a technical and more precise measurement in an electronically precise manner that is prima facie superior to the human process of eyeballing the speed of a moving vehicle.
- [19] It is thus not the case of alternate precise devices producing different results: in the case of, for example, multiple breathalyzers being applied to a subject, with different results, thus prima facie raising a concern about the accuracy of at least one of those devices. Rather, it is a sequential method that, by its nature, defers to the precise electronic device.
- [20] Going back to the trial before the Judicial Justice, the constable testified that the handheld device was the DragonEye Speed Lidar device. That is a target-specific device using a laser activated by a trigger to measure the speed of its target at which it is pointed. Constable Tan testified that he had received training to be a qualified operator of that handheld device since September 2019.
- [21] He then proceeded to provide advice about the rate of error of the device. This prompted an objection by Ms. Lee as hearsay:
- [1] CNSL K. LEE: Sorry, Your Worship, I do object to what the officer says with respect to the device according to the manufacturer. That would be hearsay.
- [2] THE COURT: I was going to say, where did that information come from?
- [3] A: Your Worship, I have brought -- at the end of my testimony I was going to enter into exhibits -- enter into an exhibit the device manual which I have brought me and which has been disclosed to counsel.

[4] THE COURT: That's simply hearsay. You don't have any certified -- you don't -- do you have any expert testimony you --

[5] A: No.

[6] THE COURT: So it's simply -- it's no different than bringing a book.

[7] A: Okay. I understand.

[8] THE COURT: All right. So I appreciate it's odd; you're a witness and over there you're Crown.

[9] A: Yes.

[10] THE COURT: So defence has made an objection so I just want you to put your very brief Crown hat on and tell me --

[11] A: Yes.

[12] THE COURT: -- what your position with respect to the objection is.

[13] A: Your Worship, as you were saying, if it's hearsay then it's -- then I won't try to enter it.

[14] THE COURT: All right. Thank you.

[emphasis added]

[22] As indicated, the constable explained that he had brought the device manual with respect to establishing the reliability of the device. I will return to this further in a moment.

[23] The Court appears to have encouraged the constable to present submissions with respect to the assertion of hearsay. As indicated by the passage, the constable seemed to accept the Judicial Justice's words as a ruling that it was a hearsay, and did not pursue the matter further.

[24] The evidence before the Judicial Justice established that the constable tested the device according to the daily recommended tests, as specified by the manufacturer. These included the self test, the display integrity test, the fixed target distance test, and the scope alignment test. Constable Tan explained those tests. Those tests were carried out not just once but, as per protocol, at the beginning and at the end of his shift. Constable Tan indicated that he was satisfied that the device was working properly.

[25] Constable Tan's qualifications were not challenged by the respondent, nor were the fact of and the methods of the testing of the device or the use and functioning of the device.

[26] The reasons of the Judicial Justice were very brief:

[1] THE COURT: I can say, certainly, unless there is further submissions, I do have concerns as to the fact whether the court can accept beyond a reasonable doubt that it was 97. Certainly the visual estimate puts it --

[2] CST. A. TAN: Yes.

[3] THE COURT: -- does not put it, in fact the visual estimate puts it well below excessive speed --

[4] CST. A TAN: Yes, Your Worship.

[5] THE COURT: -- and the laser, while it was tested and working, there is no evidence the court can accept as to the margin of error.

[6] CST. A TAN: Yes, Your Worship.

[7] THE COURT: So I do agree that the Crown has not proven beyond a reasonable doubt excessive speed. The Crown suggested it should be, at a minimum, Level 1 speeding; is that the Crown's position?

[PROCEEDINGS]

[8] THE COURT: Just have a seat for a moment. You can rise in a moment. Yes, but what I thought I indicated clearly, I find that without any more information on the accuracy of the laser I cannot accept --

[9] CST. A. TAN: Yes, Your Worship.

[10] THE COURT: -- the laser beyond a reasonable doubt.

[11] CST. A. TAN: Okay.

[12] THE COURT: So we are left with a visual estimate that my notes were varied as much as between five, seven or 12.

[PROCEEDINGS]

[13] THE COURT: At this point I think the court is relying on a visual and the visual is between, what was it, five, seven or 12, so we are looking at, on a reasonable doubt, the Crown must prove beyond a reasonable doubt, I think that Crown's best case, would be 78 kilometres per hour, minusing the 12, if my math is correct. So 78 kilometres per hour in a 50-kilometre zone is a Level 2 speeding and at this point in time I do find the Crown has proven beyond a reasonable doubt Level 2 speeding.

[14] I will indicate not guilty as charged but guilty to the lesser offence and I will put Level 2 speeding.

[emphasis added]

[27] In brief, the Court found that while the laser was tested and working, it could not be relied upon by the Court because there was no admitted evidence with respect to the margin of error of that device. Accordingly, the Court was left solely with the constable's visual estimate. Applying the 12-kilometre margin of error elicited by Ms. Lee on cross-examination, it knocked his estimate of 90 kilometres per hour down to 78 kilometres per hour, thus below the 40-kilometre-an-hour threshold for the excessive speeding charge.

[28] The appellant Crown raises the following issues:

- a) whether the Judicial Justice erred in the application of the legal prerequisites to the admissibility of the results obtained from equipment capable of registering the speed of an offending vehicle;
- b) whether the Judicial Justice erred in law by not admitting into evidence part of the oral testimony of a witness based on hearsay and by failing to apply s. 15.1 of the Offence Act; and
- c) whether the Judicial Justice erred in law by not admitting into evidence documentation in contravention of the doctrine of judicial notice and by failing to apply s. 15.1 of the Offence Act.

[29] Those were the issues as advanced in the initial statement of argument. They were supporting a primary position that this Court substitute its finding of a conviction to the offence as charged.

[30] At the hearing, the Crown has modified its position.

[31] Turning first to the remedy, the Crown now seeks an order for a new trial with directions. The Crown is not seeking specific orders that the Judicial Justice had to reach the conclusions based upon the findings of this Court with respect to the law that I will canvass in a moment. Rather, the thrust of the Crown's position at this hearing is that the Judicial Justice ought to have considered her powers under s. 15.1 of the Offence Act in deciding whether to admit the device manual, notwithstanding its ostensible status as hearsay evidence.

[32] I agree that a new trial should be ordered, on the basis of the Court's obligation to consider s. 15.1 of the Offence Act in the particular circumstances of this case, within the context of a trial with respect to excessive speeding: the kind of trial that would be "incredibly common" before that Court.

[33] The jurisprudence confirms the admissibility of laser readings and similar devices in the context of speeding cases. *R. v. Khadikin*, 1999 CanLII 5234 (BCSC) sets out the legal prerequisites to the admissibility of the results obtained from equipment capable of registering the speed of a vehicle:

[14] The Crown must establish that the operator was qualified as a foundation for any inference that he or she reliably performed tests verifying the accuracy of the equipment. There must be evidence of testing before such evidence will be received because radar units are not the sort of simple mechanical devices the court will presume to be accurate.

[15] The assertion of qualification, together with a description of the tests undertaken, is a sufficient foundation for the reception of the evidence. I do not think the case law suggests that the court should necessarily presume that as between models of radar units there are distinctions requiring specific training or experience, such that training or experience on

the very model employed becomes an element of the offence. Unchallenged, the assertion of qualification and experience on the type of device used (i.e. radar), coupled with evidence that the equipment was tested and working, will, if accepted, found a conviction. In this case there was, as well, the added corroboration of the witness' direct observation of speed.

[bolded and italicised emphasis added; underlined emphasis in original]

[34] This Court in *R. v. Tschampa*, 2022 BCSC 2129 noted that extensive evidence about the details of radar testing is not required to provide the proper foundation for the admission of radar evidence:

[27] Neither of these cases suggest that extensive evidence about the details of radar testing is required in order to provide the proper foundation for the admission of radar evidence. In *Geraghty*, the court said that evidence of testing of the radar unit with whatever tests were required or suggested for it, and *Khadikin* simply referred to the assertion of qualification together with a description of the tests undertaken as a sufficient foundation for the reception of evidence.

[emphasis added]

[35] Many cases have noted the reliability of the use of laser devices to measure the speed of vehicles. *R. v. Hofland*, 2011 ONCJ 40 reviews extensively the jurisprudence confirming the ability of the court to rely upon laser devices:

[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.

[emphasis added]

[36] Hofland, a 2011 decision, noted that such devices had been in common use for 10 years at that point. Of course, there is now another 13 years under the bridge compounding that statement when viewed from 2024.

[37] There is also established jurisprudential authority from this province for the proposition that a laser reading of speed may be relied upon, without specific evidence of the rate of error for the laser device.

[38] In *R. v. Gjoka*, 2017 BCPC 163 at para. 29, the Court followed the principle:

if I do accept that Cst. Klear tested the laser instrument before and after enforcement this day, that on the basis of all of the other evidence of the officer, the evidence of the speed measured by it is *prima facie* proof that it is in fact accurate.

[39] The Gjoka Court found that the officer used the laser instrument properly and accurately from training and experience, and that he had tested the laser in the beginning and end of the shift: paras. 40-41. The Court implicitly took judicial notice of the "notorious fact that,

properly tested and used by a trained operator, the laser provides a reliable and accurate calculation of the speed of that moving vehicle and the distance from the laser at the time the reading was taken": para. 50. The Court noted that "it is not necessary for proof of a laser's accuracy for the Crown to put forward evidence of the speed displayed on the laser having been compared with the speed displayed by a radar on a moving vehicle." The Court convicted the accused of excessive speeding: para. 58.

[40] In *R. v. Zhang*, 2017 BCPC 276, although the visual reading of the officer, accounting for the most error, would not have put the accused in the excessive speeding category, the Court still convicted the accused of excessive speeding using the laser reading:

[21] I agree with Mr. Zhang's submission that I should apply the limit of the margin of error of ± 10 km/h to Cpl. Whitbread's estimate of speed and apply it to the evidence of his testimony of 130 km/h. If I do apply the limit of the margin of error to the estimate of speed, the speed of Mr. Zhang's vehicle could have been traveling 120 km/h. To convict Mr. Zhang of excessive speeding on this evidence alone, I have to be satisfied that the speed was over 120 km/h.

[22] I do not agree with Mr. Zhang's submission that I should not accept as accurate the other evidence: the speed displayed on the laser device. A laser device is manufactured for and is capable of accurately measuring the speed of moving vehicles. This laser device was tested before and after use and shown to be in good working order and it was used by an experienced and properly trained police officer.

[emphasis added]

[41] In *R. v. Prediger*, *supra*, the Court reasoned on the point of judicial notice:

[20] Secondly, I would take judicial notice of the fact that a properly working radar operated by a qualified officer doing traffic enforcement is capable of measuring the speed of moving vehicles. With respect to the extent of judicial notice, I refer to *R. v. Spence*, 2005 SCC 71, for the proposition that a court may take judicial notice of a fact that is so notorious and generally accepted as to not be the subject of debate among reasonable persons. In my view, in 2020-2021, the average informed and reasonable motorists in BC would understand as obvious, the proposition that a properly tested and properly working radar device being operated by a qualified operator, would be capable of measuring the speeds of moving vehicles.

[emphasis added]

[42] In *R. v. Wang*, 2021 BCSC 1547, the Court dismissed the accused's appeal of his conviction of excessive speeding, on the basis that the officer's evidence on the legal prerequisites of admitting the laser reading was not challenged in cross examination:

[19] In light of Cst. Colgan's evidence as to the specific measures he took of Mr. Wang's actual speed, which was not shaken on cross-examination, there is a clear basis for the judicial justice's finding that Mr. Wang was speeding. In particular, Cst. Colgan's evidence about his

estimate of Mr. Wang's speed, his testing of his laser device and its readout, and the speedometer reading on his vehicle during his pacing of Mr. Wang, was not the subject of any cross-examination. As a result, there was an evidentiary basis for the judicial justice's finding, and there was no palpable and overriding error.

[emphasis added]

- [43] I turn to the midtrial ruling with respect to the refusal to admit the device manual, as hearsay.
- [44] In the context of the tribunal and its frequent consideration of speeding offences, with the express powers under the Offence Act, s. 15.1 to consider evidence that is less formally proven than would be required in this Court, the Court was obliged to consider its powers under s. 15.1 in light of the jurisprudence that I have just cited, to consider whether the device manual could be adduced into evidence.
- [45] I need not decide today the point of distinction drawn by the counsel in front of me. The Crown argues that s. 15.1 is an overarching power. Ms. Lee argues that it is only engaged upon application by one party, such that the Judicial Justice does not have to consider his or her powers under s. 15.1, unless there is a formal application request that they do so.
- [46] Ms. Lee further argues that the Crown conflates the issue of whether a given piece of evidence--in this case the manual and, by extension, the laser device--may be considered versus what weight can be given to it.
- [47] Turning to the actual midtrial ruling, I conclude that the Judicial Justice, in describing the book as hearsay and, indeed, referring to it as no different than bringing a book, one, stopped prematurely in the analysis, and, two, indicated to the reasonable observer that she was, in fact, ruling on the issue.
- [48] Having made a preliminary determination that the manual would be hearsay and no better than bringing a book, she was obliged to consider that under her broad powers under s. 15.1, she could, as is frequently accepted in that tribunal, have nonetheless considered evidence that was prima facie hearsay evidence, and that was indeed literally a book.
- [49] Apart from the centrality of the Offence Act, s. 15.1, in the efficient administration of that tribunal, the jurisprudence that I have just cited does establish the prima facie reliability of laser devices, absent concrete evidence adduced by the person seeking to displace that reliability of problems with that device. Again, there was no such evidence adduced by the respondent at trial.

- [50] Ms. Lee argues that there is, in effect, no free-floating obligation on the Judicial Justice to consider her powers under s. 15.1, and that he or she must wait for a formal request to do so. I have already addressed the centrality of s. 15.1 to the operation of the adjudication of speeding offences. But I would note that, in fact, the Judicial Justice was prompted by, in effect, an application putting the issue in question. That application of sorts indeed comes with Ms. Lee's initial objection to that advice.
- [51] That objection speaks to the power of the jurisprudence that I have just recited, to the effect that such devices can *prima facie* be relied upon, absent indications that they should be put into question through evidence adduced by the accused. There was an application before the Court to determine that issue. Once a hearsay objection is raised, it clearly engages s. 15.1 and the obligation to consider that she has the power to admit such hearsay evidence. At that point, there would be a decision as to whether or not to exercise her powers under s. 15.1, and exercise her discretion and assessment of the credibility and reliability of that evidence. That assessment would have to take place in light of the jurisprudence, just recited, binding on that Court.
- [52] Given these conclusions, I will be brief in my further analysis of some of the alleged errors.
- [53] I agree generally with the submissions made by the appellant in this regard. I agree that the Judicial Justice made an error in law by applying the threshold requirement that there be evidence on the margin of error before the Court can rely at all on the reading of the device to convict the respondent. As indicated by the case authorities I have just cited, that places the analysis, with respect, backwards.
- [54] Similarly, the Judicial Justice made an error in law by not considering the *prima facie* accuracy of the reading after the legal prerequisites had been met. Again, specifically, Constable Tan established in his evidence that he was trained and qualified to reliably perform tests, to verify the accuracy of the device, and to operate it. Second, he had tested the device, both before and after the measurement of the speed on Mr. Thachuk's vehicle. Finally, he established that the device passed the test, both in the pre-measurement and post-measurement tests.
- [55] Again, those were unchallenged in cross-examination, in light of the jurisprudential obligation to raise a doubt about the accuracy of the reading and the *prima facie* reliance on that device's proper functioning.
- [56] I also agree, as a further expansion of a point already made, that the visual estimates did not displace the *prima facie* accuracy of the device. The visual estimate, again, is a human triggering process that prompts the aiming of the more reliable scientific device of the laser gun at the vehicle. While, as set out in Zhang, cited earlier, a visual estimate can corroborate laser readings to find guilt, it is not a requirement that the laser reading be supported by an identical visual estimate, let alone any visual estimate. The visual estimate was icing on the cake, as it were.

[57] Although it was not necessary for the constable to establish the rate of error of the device, these problems were further compounded by the ruling that the manual for that device was inadmissible.

[58] I will address one final argument advanced by the respondent that I alluded to earlier. Ms. Lee argues that the Court did, in effect, consider her powers under s. 15.1 of the Offence Act when she invited the constable to provide submissions on the hearsay point. The Judicial Justice said:

So defence has made an objection so I just want you to put your very brief Crown hat on and tell me...what your position with respect to the objection is.

[59] As the transcript makes clear, the constable appears to be misunderstanding the invitation and seems to interpret her statements that it is hearsay, and that it is no better than bringing a book, as a conclusory statement along the lines of a ruling that those items are hearsay.

[60] Ultimately, again, this issue is secondary, given the lack of an obligation on the Crown to provide evidence of the margin of error with respect to the device in light of the jurisprudence that I have just surveyed.

[61] Anything arising from that, counsel?

[62] CNSL K. LEE: No, Justice.

[DISCUSSION OF, INTER ALIA, CORRECTION OF CITATIONS]

[63] THE COURT: Yes, all right, well that is a responsible correction on the record as well. Thank you very much.

"Crerar J"

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Prepared on 26 October 2026 · Esheria