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Docket: CR 20-01-38162
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

HER MAJESTY THE QUEEN	)	**APPEARANCES**:
	)	
	)	Deann Sahulka
- and -	)	for the Crown
	)	
AUDREY K. KUNY	)	
(accused) appellant.	)	Audrey K. Kuny
	)	for the appellant
	)	(self-represented)
	)	
	)	JUDGMENT DELIVERED:
	)	May 6, 2021

DEWAR J.

INTRODUCTION

[1] This case considers whether a defendant is entitled to some pre-hearing disclosure when he/she contests a speeding ticket initiated by an enforcement officer using photo radar.

[2] Audrey Kuny has appealed a decision of a Judicial Justice of the Peace (the "JJP") wherein she was convicted as the owner of a motor vehicle which exceeded the posted speeding limit. Section 229(2) of ***The Highway Traffic Act***, C.C.S.M. c. H60 (the "***HTA***") reads:

> **229(2)**
> The owner of a vehicle that is involved in a contravention of this Act, a regulation or a rule or by-law made by a traffic authority under subsection 90(1) may be charged with any offence with which, in similar circumstances, the driver of a vehicle or the person having care, charge or control of one may be charged.

[3] Similarly, s. 10 of ***The Provincial Offences Act***, C.C.S.M. c. P160 (the "***POA***") reads:

> 10 In the case of a ticket for a parking offence or a photo enforcement offence, the owner of the vehicle as indicated in the records of the Registrar of Motor Vehicles is, upon being served with the ticket, liable to pay the fine indicated on the ticket.

FACTS

[4] In a traffic ticket sent to her by mail, it was alleged that a vehicle registered to Audrey Kuny had been observed speeding on December 11, 2019 travelling eastbound on Logan Avenue east of Blaine Street at 18:51 o'clock. The observations had been made by an individual named Azhar Khan who was operating a photo radar machine. The vehicle was alleged to have been travelling 63 km/h when the posted speed limit was 50 km/h.

[5] Ms. Kuny disputed the ticket, and with the assistance of her husband, Douglas Kuny, she attended before a JJP on July 23, 2020 for her hearing.

[6] At the hearing, Douglas Kuny did all of the talking for Audrey Kuny except when Ms. Kuny confirmed that she disputed the ticket and that she wished her husband to represent her. The evidence placed by the Crown before the JJP at the hearing were two coloured photographs and a Schedule "F" Operator's

Certificate, a Schedule "A" Tester's Certificate and a Certificate of Registration from the Registrar of Motor Vehicles for the Province of Manitoba.

[7] The Schedule "F" Operator's Certificate was in the form authorized pursuant to s. 8 of *Image Capturing Enforcement Regulation,* Man. Reg. 220/2002 made under the authority of the ***HTA***. It attested to the fact that a vehicle bearing a license plate registered to Audrey Kuny was observed through the use of a vehicle-mounted photo radar system, (a Gatso RS-GS11 made by Gatsometer BV) travelling at 63 km/hr in a playground zone where the posted maximum speed was 50 km/hr. It also attested to tests which the operator purportedly performed prior to and after the alleged offence in order to ensure the accuracy of the machine observations.

[8] The Schedule "A" Tester's Certificate was in the form specified by the *Image Capturing Enforcement Testers Regulation*, Man. Reg. 144/2017 made under the authority of the ***HTA*** which indicated that the equipment utilized by enforcement officer Khan had been tested by a qualified tester on August 21, 2019. Section 1(1)(b) of Man. Reg. 144/2017 requires the image capturing system to have been tested within six months before or after the date of the alleged offence. The Schedule "A" Tester's Certificate produced at the hearing showed compliance with that regulation.

[9] The Certificate of Registration from the Registrar of Motor Vehicles for the Province of Manitoba confirmed that the vehicle bearing the license plate shown in the photos belonged to Audrey Kuny.

[10] After the Crown had tendered the certificates and vehicle registration information, Douglas Kuny gave evidence and then, as his witness, called the individual who wrote the Schedule "F" certificate, namely Mr. Azhar Khan. No documentary evidence was put into the record at the trial by either Douglas Kuny or Mr. Khan.

[11] At the outset of the hearing, Douglas Kuny raised a concern with the JJP that he was seeking a number of documents which he intended to reference when the operator of the photo radar equipment was giving evidence. Mr. Kuny said that although he had issued a subpoena, documentation requested in that subpoena had not been produced. He also alluded to earlier communications with the Crown in which he had requested some of the same information which he had listed in the subpoena.

[12] The subpoena was ambiguously addressed as follows:

> Mr. Azhar Khan, ID#73 Enforcement Officer
>
> Employer: Conduent Traffic Safe Solutions
> 1313 Kenaston Blvd
> Winnipeg, Manitoba
> R3P 0Y4
> Operations Manager: Graham 204-488-4692

[13] Mr. Kuny advised the JJP that although the subpoena was served "at TSS this past Monday to this fellow called Graham", the operator, Mr. Khan, had told Mr. Kuny that he had never seen the subpoena. On the day of the hearing, as indicated above, Mr. Khan appeared. An individual by the name of Graham Curney apparently was in the gallery sitting beside Mr. Khan at the

beginning of the hearing. Mr. Kuny never attempted to call Mr. Curney as a witness. He seemed content to rely upon the evidence of Mr. Khan.

[14] The subpoena which Douglas Kuny had secured was never marked as an exhibit at the hearing. Nonetheless, it has been made available to this court and contains the following language:

> **THIS IS THEREFORE** to command you to attend before the Provincial Court, Provincial Offences Court 100-373 Broadway, Winnipeg, Manitoba R3C 4S4 Court Room 4B on the 23/07/2020 at … 0900 hrs. @Provincial Offences Court 100-373 Broadway, Winnipeg, Manitoba R3C 4S4 Court Room 4B to give evidence concerning the said charge

[15] The subpoena then lists a number of documents sought, but nowhere does the subpoena contain words such as "and to bring with you the following documents". Nonetheless, the documents listed in the subpoena are as follows:

> Any and all training materials, manuals, statutes and other training material utilized in "I have been trained and qualified to operate" statement found in your Schedule F (legal document) which includes Gatso Rs-GS11 Manual; Procedure Manual to do the actual "tests": Internal Circuit Test, External Tuning Fork Test; and Audio Doppler test as attested to, by you, in Schedule F making reference to Highway Traffic Act
>
> Form 2 as prescribed by Provincial Offences General Regulation (MR 95/2017) as referred to in the letter dated March 9, 2020 to Audrey Kuny from Manitoba Prosecution Service
>
> Any and All notes relating to statement "At the time that the speed of the above referenced vehicle was determined, I visually confirmed that the vehicle was within the above identified zone. Note: there are NO notes that are written on Winnipeg Photo radar Visual Observation Log
>
> Any and All documents that substantiate travel time from deployment location #1 to #2 and from #2 to #3 as documented on the legal document Winnipeg Photo Radar Deployment Log.

> Any and All Documents that disclose Deployment Test (Start and End) testing procedures. Also, included in these procedures is an explanation of the definition of "Time" which is part of the testing process.
>
> [Underlining in original.]

[16] Mr. Kuny began an exchange with the JJP by indicating that he had subpoenaed Mr. Khan from Traffic Safe Solutions (which he called "Conduent Traffic"), that the individual by the name of Graham was sitting beside Mr. Khan, and that Mr. Khan had not brought the documents requested. Mr. Kuny complained that the Crown had not been "all that considerate with the many emails" that he had sent them, and therefore he had issued his own subpoena. When he started to give specifics about the emails, the JJP said:

> We don't need to get into all that, sir. We're here for a hearing. Okay,

[17] The JJP ultimately inquired as to what documents were being sought. There followed this exchange:

THE COURT:	What documents did you want?
MR. KUNY:	Well, I'll give you a --
THE COURT:	No, it doesn't work that way. You don't approach the Court unless you have permission. What documents had you requested?
MR. KUNY:	Well, the Court should have a copy of the subpoena and --
THE COURT:	They don't give me anything ahead of time, sir.
MR. KUNY:	Okay. And -- yeah. Okay. What I'm looking for to substantiate the questions that will be asked of Mr. Khan are materials involving the training of him as an employee.
THE COURT:	Okay.

MR. KUNY: The -- which includes the -- the Gatso manual and other such training things as to how the tests are performed, the -- the tests that are specified in the Acts --

THE COURT: M-hm.

MR. KUNY: -- of the internal circuit tests, the --

THE COURT: M-hm.

MR. KUNY: -- external tuning fork test and the audio Doppler test.

THE COURT: M-hm.

MR. KUNY: Also, Form 2 from the Provincial Offences general regulation M.R.2 -- 2017.

THE COURT: Which is what?

MR. KUNY: Form 2?

[18] Mr. Kuny, in my view mistakenly, then goes on to request a Form 2 which was prescribed by *Man. Reg.* 95/2017 made under the authority of the ***POA***, about which I will say more later, and that exchange lasted for about four pages of transcript, during which counsel for the Crown interjected to give his position that Form 2 was not applicable in this case. Then:

THE COURT: Anything else?

MR. KUNY: -- so that's what I was asking in the subpoena as well. Plus, I was asking for any and all notes because I didn't know if there were other notes made up. There has been some references by the witness about that he has been provided with education and everything. When we get into his testimony, I'm sure that all of this has been supplied by TSS even though he doesn't know what Graham's full name is. But we can -- we can deal with that matter when we get to it. And -- and so everything that's been asked of him it will be used to substantiate what's been already said and to

which he will testify in the Schedules, which are going to be submitted by the Crown.

THE COURT: M-hm.

MR. KUNY: And they are outlined in the subpoena. And in talking with Mr. Khan, one he was not provided with the subpoena -- whatever.

THE COURT: M-hm.

MR. KUNY: But also, he has got in -- does not have any of the materials, none of the materials were given to him.

THE COURT: Okay.

MR. KUNY: So we have a kind of a problem with the subpoena.

THE COURT: M-hm. Okay. Are you making an application before me?

MR. KUNY: Well, I don't really know if -- okay. The subpoena's been done, the affidavit has been done that the subpoena has been served --

THE COURT: M-hm.

MR. KUNY: -- all of this has been done properly --

THE COURT: M-hm.

MR. KUNY: -- and in accordance to the forms and the rules of the -- of the *Acts*.

THE COURT: M-hm.

MR. KUNY: Okay. Now if I have to make a request on top of this because -- excuse me.

THE COURT: M-hm.

MR. KUNY: If any of my communication seems to be a little garbled or you -- you could just --

THE COURT: No, I -- I can hear you.

MR. KUNY: Oh okay. Because it -- my throat does get -- my understanding is if the subpoena isn't followed that

an automatic warrant or something is put out for the requested documents and -- and whatever.

THE COURT: Yeah. Well, that would be up to the discretion of the Court whether we felt that was necessary. Continue.

MR. KUNY: Oh, okay. So then there -- there's no such thing as breach of subpoena?

THE COURT: That would, again, be up to the discretion of the Court, which is me.

MR. KUNY: Okay. That's -- yeah.

THE COURT: Anything else?

MR. KUNY: Yeah. Because I, again, have asked the Crown for some guidance --

THE COURT: M-hm.

MR. KUNY: -- if I could in this matter because initially when Ms. Homenko was in this position, she had subpoenaed Mr. Khan --

THE COURT: M-hm.

MR. KUNY: There's been a changing of the guard, which I found out -- excuse me. And I had inquired about, you know, if they would acquire these documents through subpoena for me. Of course, I never heard anything back. So then using the guide for defendants --

THE COURT: M-hm.

MR. KUNY: -- which is a production of -- I followed that, produced the subpoena --

THE COURT: M-hm.

MR. KUNY: -- and served the subpoena with the request for documents.

THE COURT: Right.

MR. KUNY: So, I guess if I need to ask the Court for compliance or whatever you do to -- for the subpoena.

THE COURT: Yeah. It would usually be a motion to produce. So and there's -- there's other applications and motions you could also be making, but I'm not allowed to give you legal advice and the Crown of course, would not be giving you legal advice either. Was there anything else you wanted to say before we start your hearing?

MR. KUNY: Well, I'd like to make a motion to get these documents.

THE COURT: M-hm.

MR. KUNY: And because they are essential to the evidence that the witness will be giving. And so, I guess we could take it from there --

THE COURT: Okay.

MR. KUNY: -- with a motion.

THE COURT: Thank you. So I've listened to your submissions, now I am going to allow the Crown an opportunity to respond and then I'll make a decision on your motion.

[19] The submission of the Crown was short, as follows:

MR. ROZIERE: Your Worship, the Crown's position is simply that Officer Khan is here today, and the defendant can ask him any questions he likes in terms of, you know, weather or traffic conditions, et cetera, which is what he -- is really the heart of what he's looking for. And, again, we've informed the defendant that the documents that he's looking for are not something in our possession. And our position is they are not necessary for the fair hearing of this case.

[20] The following exchange then occurred:

THE COURT: Okay. Thank you. So I'm --

MR. KUNY: And --

THE COURT: -- prepared to make my decision --

MR. KUNY: My -- Your Worship --

THE COURT: No, it doesn't work that way, Mr. Kuny.

MR. KUNY: Well, the only thing is --

THE COURT: Mr. Kuny, excuse me, it doesn't work that way. I gave you an ample opportunity to present your notice, your motion. Now I've given the Crown the opportunity, now I make the decision.

MR. KUNY: Yeah. But I should be able --

THE COURT: Thank you, sir. That's enough.

[21] The ruling of the JJP was short.

THE COURT: So, I've listened to the motion, considered Mr. Kuny's submissions. And the reality is that the documents, Mr. Kuny, you are requiring as the Crown has indicated, are not something in their possession nor do I find they are necessarily relevant for the fair hearing of your court. I agree with the Crown on that point as well. So we're ready to proceed, your motion is dismissed.

[22] As can be seen from the above, no documents were required to be produced. Following the initial ruling, the trial proceeded with the Crown tendering the certificates described above in order to prove its case, and as indicated, Douglas Kuny gave evidence himself and in addition, led evidence from Mr. Khan.

[23] Mr. Kuny testified that on December 11, 2019, his wife and he were returning home from a movie. It was very dark and there was precipitation in the air. The wipers of his vehicle were on high because the ice fog was freezing. He described the route that he followed and indicated that it was so dark and

slushy and misty that one could not see the park, namely Stanley Knowles Park, which runs adjacent to Logan Avenue near the location where he was measured as speeding. He went on to say that traffic was heavy and weather conditions were poor. He said that there used to be playground equipment at the park but that equipment had been taken away a few years ago. On cross-examination, he reiterated that the weather conditions were such that it was icy, visibility was less than a car length and it was dark.

[24] The JJP decided that the evidence which was led convinced him beyond a reasonable doubt that Douglas Kuny had been speeding. In his decision, he referenced the photo radar observations. He also remarked that the photographs do not substantiate the poor weather and visibility to which Mr. Kuny had testified. The owner of the vehicle, namely Audrey Kuny, was convicted.

[25] When he pronounced his ultimate decision in which he convicted Audrey Kuny, the JJP referenced the document disclosure issue once again as follows:

> And in doing so, I should also make a comment on the motion that was before the Court. Mr. Kuny made a motion that there should have been documents produced by Mr. Khan including the photo radar operator manual, the radar manual, proof of training, various things and the kind of tests they do, all of these sorts of documents. He also asked, why isn't there a Form 2 certificate of evidence? Are there officer's notes? And so, he made that motion before this Court and I considered it.
>
> And I find based on my knowledge of case law and the *Highway Traffic Act*, the *Provincial Offences Act*, and *Capture Enforcement Act* and as well, the specific case that comes to mind for me is *R. v. Faires* where these manuals, et cetera, are not needed in Court, the Crown is not required to produce them if they are not relying on them and it's not something in their possession. And I find that's

> the case here today. I don't feel any of those documents would have been necessary for the Crown to produce and it's not the Crown's job to produce these things for the accused. Mr. Kuny could have found a way to get the -- the manual if he wanted to, other people have in the past. But in the end, I made the decision that the motion was denied, and I dismissed it.
>
> And I also in saying that because I find it wasn't required by the Crown to produce these documents and I would also say I don't feel it would have effected Mr. Kuny's opportunity to represent the case and have a fair hearing. If you really wanted these documents so badly, I suppose you could have gotten them, but considering the case of *R. v. Faires,* an officer using an approved speed measuring device has to be a qualified operator but does not have to be an expert. And so, in looking at that, that is why I made that decision.

POSITION OF THE PARTIES

[26] Ms. Kuny now appeals. There are four main concerns raised by her.

a) She argues that the JJP erred when he failed to require production either from the Crown or from Mr. Khan of the documents which were listed in the subpoena and therefore her ability to defend herself was materially and detrimentally affected.

b) She argues that the JJP erred by finding that the alleged offence took place in a playground zone.

c) She argues that the operator was required to utilize one of the forms of certificate attached to Man. Reg. 95/2017.

d) She argues that the JJP was biased in favour of the Crown.

[27] The Crown argues that the decision of the JJP wherein he did not order production of the requested documents was a discretionary one. She argues that the request for documents involved documents in the hands of a third party

who had privacy interests in them and that Ms. Kuny had failed to give notice to that third party, a pre-requisite to any production order made for documents in the hands of a third party. Alternatively, she argues that the JJP also concluded that the documents were not necessarily relevant to the issues in the case, and this being a discretionary decision, it should not be overturned unless it can be shown that the JJP misdirected himself or his decision resulted in an injustice. As to the alleged "missing" certificate, the Crown argues that the requested form was not used nor mandated for use in a photo radar case. As to the conviction itself, the Crown argued that the JJP weighed the evidence and came to a conclusion, and that this court should give deference to his findings. As to the submission of bias, the Crown submitted that the record does not substantiate such an allegation.

THE PROCESS

[28] The ***POA*** provides the following right of appeal:

> 79(1) A defendant may appeal the following to the Court of Queen's Bench:
> (a) a conviction;
> (b) a sentence imposed on the defendant, but only if the proceeding was commenced by an information;
> (c) any other order made by a justice against the defendant under this Act.
>
> …..
>
> 79(3) An appeal under subsection (1) or (2) for proceedings commenced by a ticket may be taken only with leave of a judge of the Court of Queen's Bench on a question of law or mixed fact and law

[29] In support of her appeal, Ms. Kuny filed two affidavits, namely an affidavit affirmed by Douglas Kuny on November 27, 2020 and an affidavit dated

November 27, 2020 from herself. The affidavit of Douglas Kuny has attached to it part of a letter from the Manitoba Prosecution Branch dated March 9, 2020 giving notice of the Crown's intention to tender the certificates at Ms. Kuny's hearing. The affidavit also attaches a quantity of emails from Mr. Kuny to and from various Crown attorneys about prehearing disclosures, emails to and from Mr. Kuny with a representative of the Winnipeg Police Service about the Gatso manual, and a series of emails to and from representatives of the City of Winnipeg regarding the current status of Stanley Knowles Park as a playground.

[30] The affidavit of Ms. Kuny does little more than repeat the frustration of Mr. Kuny in attempting to obtain prehearing disclosure and reiterates the difficulty of being self represented in a legal proceeding. I should mention that prior to the hearing of the appeal, the Crown had made a successful application before another judge to disqualify Douglas Kuny from acting for his wife on this appeal.

[31] At the outset of the hearing, I inquired of the parties as to whether I should have access to these affidavits in deciding this case. Ms. Kuny argued that those affidavits should be part of the record, and counsel for the Crown, perhaps understanding that Ms. Kuny was a self represented litigant, made no objection. I permitted Ms. Kuny to make reference to those affidavits during her submission, but I have concluded that I should not make use of them in coming to my decision. As indicated above, this proceeding is an appeal. Appeal proceedings are normally decided on the same information that was before the

judicial officer who made the initial decision. Indeed, it would be wrong to conclude that a judicial officer had erred where some of the information considered by the appellate court was not available to him. My decision therefore does not take into account the factual information contained within these affidavits.

[32] The task for this court on this appeal, based upon the same record that was available to the JJP, is whether the JJP made an error of law or applied the law improperly to the facts.

ANALYSIS

Whether the JJP erred in refusing to order the Crown to produce the requested documents.

[33] The ***POA*** is intended to provide an efficient and expeditious, but fair process for the prosecution of infractions against provincial statutes and regulations as well as municipal bylaws. This is especially the case in respect of offences where evidence is gathered through the use of photo radar systems.

[34] When one reads the ***POA*** as a whole, a speeding charge which results from the observations of a photo radar machine appears to be treated more like a civil action than a criminal prosecution. It is commenced with a ticket rather than an information and service on an owner is affected by ordinary mail rather than personal service. The alleged offender is not called "the accused" but rather "the defendant". The defendant is entitled to dispute the ticket, but the ***POA*** references a "hearing" as distinct from a "trial". If convicted, the ***POA*** only

contemplates payment by fine, which is enforceable by curtailment of driving privileges, by registering the fine as a judgment of this court, or by registering a statutory lien on the personal property of the defendant. Jail does not even seem to be an option for non-payment of the fine.

[35] At the hearing, the Crown does need not call an enforcement officer to relate his/her observations about the offence. The ***POA*** permits the Crown to prove the ingredients of the offence simply by tendering certificates. The ***POA*** specifies that the facts stated in the certificates are proof of the facts in the absence of evidence to the contrary. Indeed, the defendant is not even entitled to require the person who signed the certificate to attend to give evidence unless the JJP is satisfied that their attendance is necessary for the matter to be decided fairly. Furthermore, as further indication of how the process more closely resembles a civil proceeding than a criminal one, in deciding whether the person who signed the certificate should attend, the JJP is entitled to inquire about the nature of the evidence which requires the attendance of the operator, which in some respects requires a defendant to layout his/her case before the hearing begins.

[36] Nonetheless, the ***POA*** continues to retain some elements of a criminal proceeding since proof of the offence must still satisfy the reasonable doubt standard. Section 63(5) reads:

> **Onus**
> 63(5) In a hearing where a certificate is admitted in evidence, the onus remains on the prosecution to prove its case beyond a reasonable doubt.

[37] The actual offence which was described on the ticket sent to Ms. Kuny is speeding contrary to s. 95(1)(b) of the ***HTA***. It reads:

> 95(1) A person is guilty of an offence if the person drives a vehicle on any portion of a highway
>
> …
>
> (b) at a speed greater than the speed limit for that portion of the highway indicated by a traffic control device;

[38] In this case, signs posted a 50 km/h speed limit.

[39] Section 257.1 of the ***HTA*** authorizes the use of photo radar to catch speeding vehicles. However, it specifies that photo radar cannot be used anywhere. It may only be used in construction zones, playground zones, school zones, or at intersections that are controlled by traffic control lights. The section reads as follows:

> **Use of image capturing enforcement systems**
>
> 257.1(1) Municipalities, and peace officers acting on behalf of municipalities or the government, may use image capturing enforcement systems only if they are authorized to do so by the regulations and only
>
> (a) for enforcing subsections 88(7) and (9) (red light offences), subsection 95(1) (speeding offences), clauses 134(2)(b) and (c) (railway crossing offences) and subclauses 134(6)(a)(i) and (b)(i) (railway crossing offences); and
>
> (b) in accordance with any conditions, limitations or restrictions in the regulations about the use of such systems.
>
> **Limitations re speed limit enforcement**
>
> 257.1(2)Without limiting the generality of subsection (1), when municipalities and peace officers acting on behalf of municipalities or the government use image capturing enforcement systems for speed limit enforcement, they may only use them to detect speed limit violations that occur
>
> (a) in construction zones, playground zones and school zones; and
>
> (b) at intersections that are controlled by traffic control lights.

[40] Section 257.2 of the ***HTA*** contemplates the use of photographs to prove a speeding offence where the offence has been observed through the use of photo radar. It also says that the photograph and information on the photograph or appended to it is conclusive proof of the offence unless there is evidence tending to show that the photo radar device was malfunctioning or operated improperly. It reads:

> **Image capturing enforcement system evidence**
> 257.2(1) In a proceeding commenced under *The Provincial Offences Act* (other than a proceeding commenced by an information) for an offence referred to in clause 257.1(1)(a), if a reproduction on paper of an image obtained through the use of an image capturing enforcement system
>
> (a) shows the vehicle and the number plate displayed on the vehicle; and
>
> (b) displays, or has appended to it, the information prescribed by regulation in relation to the offence; the reproduction and the information appended to it are admissible in evidence.
>
> **Use of reproduction, etc. at hearing**
> 257.2(2) The evidence referred to in subsection (1) is conclusive proof of the information shown or displayed on the reproduction or appended to it, in the absence of evidence tending to show that the image capturing enforcement system from which the reproduction was obtained was malfunctioning or was operated improperly.
>
> **Limit on use of reproduction, etc. at hearing**
> 257.2(3) Subsection (2) applies only if
>
> (a) the image capturing enforcement system was tested as required by the regulations; and
>
> (b) the testing was conducted within the period of time before or after the alleged offence, as set out in the regulations.

[41] There are further provisions of the ***HTA*** which dictate that some testing of the photo radar equipment is necessary in order to ensure that citizens are not

ticketed for speeding on the basis of malfunctioning or improperly operated equipment.

Appointment of tester
257.3(1) The minister may appoint persons by name, title or office as testers to test image capturing enforcement systems or types of systems.

Tester's certificate re image capturing system
257.3(2) In order to prove the requirements set out in subsection 257.2(3), a copy of a certificate completed and signed by a tester appointed by the minister, stating

(a) that the image capturing enforcement system was tested in accordance with the regulations;

(b) the date and time of the testing; and

(c) that as a result of the testing conducted, the tester ascertained the system to be in proper working order; is admissible in evidence and is conclusive proof of the facts stated in the certificate in the absence of evidence to the contrary.

No need to prove tester's signature or appointment
257.3(3) There is no need to prove the signature or appointment of a tester who signs a certificate under this section.

Limited right to require tester to attend
257.3(4) The defendant is not entitled to require a tester who signed a certificate to attend to give evidence, unless the justice is satisfied that the tester's attendance is necessary for the matter to be decided fairly.

Decision as to attendance
257.3(5) In deciding whether to require a tester to attend, the justice is entitled to ask the defendant about the nature of the proposed evidence and must decide whether there is a reasonable and legitimate basis for requiring the tester to attend

Onus
257.3(6) In a hearing where a certificate is admitted in evidence, the onus remains on the prosecution to prove its case beyond a reasonable doubt.

Notice
257.3(7) In a hearing where a certificate is to be filed in evidence, the defendant is entitled to reasonable notice of the evidence, and a

> justice may adjourn the hearing if that is necessary for the matter to be decided fairly.
>
> **Regulations**
> 257.4 The Minister of Justice may make regulations
>
> (a) for the purpose of sections 257.2 and 257.3, specifying a test or tests for ascertaining that an image capturing enforcement system is in proper working order and when testing must be conducted;
>
> (b) prescribing a form of certificate for the purpose of subsection 257.3(2).

[42] Manitoba Regulation 220/2002 describes the form of certificate to be used by the operator of an image capturing enforcement system for a speeding offence. It is Schedule "F" to that regulation. What is important in this case is that the Man. Reg. also describes certain testing procedures which the operator needs to perform in order to be able to demonstrate that the radar equipment at the time of the offence was working properly. In particular, the regulation itemizes an Internal Circuit Test, an External Tuning Fork Test, and an Audio Doppler Test. Section 10(1) of Man. Reg. 220/2002 reads:

> For the purpose of subsection 257.2 (3) of the Act, to ascertain that an image capturing enforcement system is in proper working order, each image capturing enforcement system must be tested by the operator of the system as follows:
>
> a) within the 24-hour period before the alleged offence was committed;
>
> b) within the 24-hour period after the alleged offence was committed.

[43] Section 10(2) then specifies the type of tests which need to be utilized. It reads:

> 10(2) The tests to be conducted on a vehicle mounted photo radar system and a trailer mounted photo radar system are an internal circuit test, an external tuning fork test, and an audio doppler test.

[44] During his exchange with the JJP regarding his request for documents, although perhaps somewhat ambiguously, Mr. Kuny explained that he needed the documents in order to question the operator of the system, with specific mention of the training which he had and how the tests which demonstrate the accuracy of the machine are performed. In effect, he needed the documents to test the capability of the operator of the Image Capturing System as well as the functioning of the system itself. Some of the documents which he requested included the Gatso RS-GS11 Manual and the Procedure Manual to do the Internal Circuit Test, External Tuning Fork Test; and Audio Doppler tests.

[45] Although the Legislature appears to have significant confidence in the results from a photo radar system, it does recognize that the use of photo radar equipment is not infallible. It contemplates that the operator will perform certain tests in order to demonstrate that the machine was accurate at the relevant time period. This is seen in s. 257.4 of the ***HTA*** which authorizes regulations which specify the tests for ascertaining if the equipment is in proper working order and when they must be conducted. Man. Reg. 220/2002 is one of those regulations.

[46] This acknowledgment on the part of the Legislature that the use of photo radar machines is not infallible permits a defendant to question if the tests performed were performed correctly and if the machine was operated properly. Most machines in this day and age are supplied with a manual, and I see no good reason why a person who is charged with an offence as a result of the operation of a machine should not be entitled to at least see the operating

manual and other testing procedure manuals that are in the possession of the entity which is operating the radar device.

[47] The JJP simply accepted the Crown's submission that it did not have the manual or any of the other information sought by Mr. Kuny. He did not even inquire of the Crown whether the Crown had made any efforts to obtain the requested materials. In my respectful view he erred by not pressing the Crown as to the existence of the Gatso manual as well as any Testing Procedure Manual. There is a clear relationship between a machine manual and the operation of the machine, and when the operation of the machine and its accuracy are at issue, the manual is at least "likely relevant", especially when the operator of the machine is going to testify at the hearing.

[48] Before the JJP, Mr. Kuny intimated that he had been trying to obtain prehearing information from the Crown but without success. Normally, in prosecutions under the Criminal Code, ever since the decision in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326, significant disclosure is a Crown obligation. However, this case deals with a minor speeding offence. In ***Stinchcombe***, Sopinka J. at para. 26 wrote:

> 26 The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings….
>
> [Emphasis added.]

[49] There does appear to be general consensus in the authorities that some disclosure is required even as regards a minor offence under the ***HTA***. In ***R. v. Hoffman***, 2007 CarswellOnt 342, H.S. LaForme J.A. in dismissing an application for leave to appeal from a conviction for failing to wear a seatbelt, wrote at para. 3:

> 3 The Justice of the Peace was acutely aware that disclosure principles apply to provincial offences, including the one before him. He also acknowledged that the applicants had a right to such disclosure and seems to have accepted that their request for disclosure had not been properly answered by the prosecution….

[50] In my opinion, there is merit to the argument that the degree of disclosure is more limited in a prosecution of a minor speeding offence than it is in a prosecution under the Criminal Code. The challenge is to determine the extent of the right to disclosure in such a case. In ***R. v. Collins***, 2010 ABPC 19 (CanLII), B.D. Rosborough, Prov J, at paras. 47 through 61, provides a good analysis of the issue, balancing the right of the accused to some disclosure with the societal interest in providing a form of justice that is proportional to what is at stake. For example, in the case of a photo radar ticket, there is no downside risk of incarceration for the defendant. The ***POA*** indicates that a fine is the most drastic penalty for a photo radar speeding ticket addressed to the owner of the vehicle, and the enforcement of the fine is limited to curtailment of driving privileges, and the enforcement of a governmental lien, and property execution procedures in the Court of Queen's Bench. The absence of a risk to personal liberty compels the conclusion that disclosure is limited. Nonetheless, it exists, and the question here is whether the items listed in the subpoena ought to have

been provided before the hearing, or at the commencement of the hearing after reference was made to the subpoena.

[51] Both before the JJP and at the appeal hearing, no case was cited by either side where the question of disclosure in a photo radar case was adjudicated, whether it be a prehearing motion for disclosure or a hearing to compel production by subpoena. Such cases do exist. Some cases compel production of all or part of what has been requested (see ***R. v. Wheeler***, 2007 CanLII 38544 (NL PC), 2007 CarswellNfld 161 (Nfld. Prov Ct), ***R. v. Oosterman***, [1998] O.J. No. 5785, 1998 CarswellOnt 6213 (OCJ), ***R. v. Irwin***, 2007 ONCJ 440 2007 CarswellOnt 6423, ***R. v. Robichaud***, 2008 NSPC 51 (CanLII), ***Thunder Bay (City) v. Millar*** , 2009 ONCJ 485 (CanLII), and ***R. v. DePoe***, 2012 ONCJ 374 (CanLII). Others do not (see ***R. v. Longmire***, 1993 CarswellNS 4 (NSCA)).

[52] Recently, however, the matter has received some judicial appellate consideration in Ontario. In ***York (Regional Municipality) v. McGuigan***, 2018 ONCA 1062 (CanLII), 2018 CarswellOnt 22571, an accused fought a speeding ticket which had been issued when a police officer had the speed of the accused's vehicle observed by a Genesis Handheld Directional traffic radar device which the police force owned. Prior to trial, the accused sought disclosure of the testing and operating procedures for the subject radar device. The Crown indicated that the manual for the device could be viewed at the Prosecutor's Office. Nonetheless, the accused made requests for production of the device manual, which requests were ignored. At the commencement of the trial, the

presiding Justice of the Peace ruled that the accused was entitled to the disclosure that he claimed and ordered it to be provided. She adjourned the trial to accommodate that production. The decision of the JJP was appealed, at which time the presiding judge set aside the decision of the JJP on the basis that the device manual did not fall within the notion of "fruits of the investigation". The Ontario Court of Appeal restored the decision of the JJP.

[53] There are two reasons why this case is helpful. Firstly, insofar as the request for the Gatso RS-GS11 Manual is concerned, the Ontario court concluded that the device manual used in ***York (Regional Municipality)*** was "obviously relevant". It wrote at paras. 98 and 100 as follows:

> 98 The prosecutor argued in this case that the application judge did not err in denying first party disclosure to the appellant because the user manual excerpts the appellant seeks are not relevant, and absent relevance, no right of disclosure can exist.
>
> 99 We disagree. In our view, a manufacturer's testing and operating procedures for a speed measuring device are relevant and must be disclosed. By presenting the results obtained by a speed measuring device, the prosecutor is necessarily representing that those results are a reliable measure of vehicle speed. Evidence that has a logical tendency to cast doubt on that claim is therefore relevant. The question is whether information about the manufacturer's testing and operating procedures is relevant in challenging the prosecutor's necessary and implicit claim that the speed measurement is reliable.
>
> 100 In our view, this cannot reasonably be contested. Testing and operating procedures are provided precisely so that users can accomplish what the device is designed to accomplish, in this case, to provide an accurate measure of speed. If testing and operating procedures are not complied with, it may cast doubt on the integrity of the results. Naturally, compliance with testing and operating procedures cannot be determined unless those testing and operating procedures are known. Hence, the relevance for disclosure and production purposes of the manufacturer's testing and operating procedures for a speed measuring device that is relied on in the prosecution of a case.

[54] In the case at bar, when the JJP announced his decision, he treated the request for documentation as an all or nothing proposition. There was no attempt made by him to assess whether at least some of the requested documents could be relevant. The comments of the Ontario Court of Appeal above clearly support the position that where the operation of the radar device and the testing performed by the operator is put into question, the device manual is obviously relevant.

[55] The fact that the denial of access to the operating manual handcuffed the presentation of Ms. Kuny's case is later seen in Mr. Kuny's examination of Mr. Khan. Mr. Kuny was required to accept what Mr. Khan said about the tests which he performed on the day in question. Mr. Khan testified that he performed an External Tuning Fork test simply by pressing a button on the machine. Mr. Kuny expressed doubt that the press of a machine button would satisfy such a test, but he was unable to point to any document that would contradict Mr. Khan in that respect. Prior to the trial, it would have been helpful for Mr. Kuny to see what the manual had to say about such a test, but he never had that opportunity. If it showed that an External Tuning Fork test involves more than the press of a button, then Mr. Khan could have been confronted with the manual. If it showed that the press of a machine button was all that was required for an External Tuning Fork Test, then Mr. Kuny may have been more likely to accept what Mr. Khan had to say, and never asked those questions. The

absence of the manual detrimentally affected his ability to conduct the examination of Mr. Khan.

[56] The second important feature in the ***York (Regional Municipality)*** case involves the question as to whether an order for the production of a device manual can be made in the absence of a motion for third-party disclosure. In ***York (Regional Municipality),*** the court reviewed the law on disclosure and the question as to when a third party disclosure motion was necessary. It relied heavily on the case of ***R. v. McNeil***, 2009 SCC 3, [2009] 1 SCR 66 and ***R. v. Gubbins***, 2018 SCC 44 (CanLII), [2018] 3 SCR 35, two Supreme Court of Canada cases which deal with the principles underlying third party disclosure motions as contemplated in an earlier decision of ***R. v. O'Conner***, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411. In the ***York (Regional Municipality)*** case, the court was faced with the question whether the JJP should not have made a disclosure order because there was no third party disclosure motion before her. In that case, the police had possession of the manual document. At paras. 70-73 the court reviewed the modes of obtaining disclosure when it said:

> 70 To be eligible for disclosure, information and material must be relevant. There are different modes of achieving disclosure, and the relevance inquiry operates in modestly different ways between them. What is common to each disclosure mechanism is that if the information or material lacks logical relevance, no right of disclosure will exist.
>
> 71 There are two general categories of disclosure.
>
> 72 "First party disclosure" refers to information or material the Crown is obliged, on request, to deliver to the defendant without the need for an application to the court. Material will be subject to first party disclosure only if it is "in the possession or control of the prosecuting Crown": *R. v. Gubbins*, 2018 SCC 44 (S.C.C.), at para. 33.

> 73 If the accused wishes to compel the production of information that does not qualify for first party disclosure, it must bring a successful "third party disclosure" application, resulting in an order to have the third party produce the information. Mechanistically, this is achieved by serving notice on the third party record holder along with a subpoena requiring the target information to be brought to court so that it will be within the control of the court if production is ordered after a third party records hearing.

[57] Further, the court considered when a first party disclosure application was the preferable application to make. At para. 74, it wrote:

> 74 In *Gubbins*, Rowe J. discussed two ways that information can become subject to first party disclosure, thereby avoiding the need, delay, expense and formality of a third party record application, namely (1) as the "fruits of the investigation", or (2) as "obviously relevant" information: at para. 33. They are the disclosure mechanisms most directly at issue here.

[58] Since the court considered that the manual for the radar device was "obviously relevant", the Court concluded that the JJP had properly considered the disclosure request as a motion for first party disclosure. Applying the same logic, had a police officer operated the radar device that clocked Mr. Kuny as speeding, the disclosure request for the device manual would have been considered as a first party disclosure motion.

[59] The ***York (Regional Municipality)*** case was decided in the context of the Ontario legislation. Nonetheless, it stands for the proposition that a member of the public is entitled to see a manual for the machine which is responsible for the speeding charge which has been laid by way of a ticket. Even though the ***POA*** in Manitoba may be more streamlined than the Ontario legislation, the production of a manual or at least the relevant parts of the manual is something

which a defendant in a prosecution for speeding should be entitled to see. Disclosure in such a proceeding goes at least that far.

[60] The within case, however, is one step removed from the ***York (Regional Municipality)*** scenario. There is evidence that the City of Winnipeg has subcontracted the task of operating photo radar to a private company, Conduent Traffic Safe Solutions, presumably to save some of the costs of traffic enforcement in addition to other reasons. Here, the operator was not employed by a police force - he was employed by a private company which had been contracted by the City of Winnipeg to operate a mobile photo radar system. The question therefore arises - is a third party disclosure application necessary to obtain a radar machine manual simply because the enforcement entity is a private company as distinct from a police service or other government institution?. The Crown says that it is, and since no such application was made by Mr. Kuny, the JJP was correct in refusing disclosure.

[61] In my view, the retention of a private company to conduct traffic enforcement is no different from the same task being performed by a police department. Police departments are recognized in the authorities as being separate entities from the Crown Attorney's office. They are governed by various statutes as well as the common law (e.g., ***Dedman v. The Queen,*** 1985 CanLII 41 (SCC), [1985] 1 SCR 2, 1985 CarswellOnt 103 (SCC)). A private company utilized in the enforcement of statutory offences is governed by the

common law and the contract which it has with the governmental institution for whom it renders its enforcement service.

[62] If a radar device manual in the possession of a police department can be ordered to be produced in a "first party disclosure application", I see no good reason why the same cannot be ordered in respect of a private company under contract with the municipality. At the very least, the order can be made and the Crown then has a responsibility of seeking compliance with it. If compliance is not achieved voluntarily, the Crown should bring the private company before the court on notice both to the private company and to the accused. This is especially the case where, as in this case, the ticket which starts the prosecution indicates that the organization that issued the ticket was the Winnipeg Police Service. The defendant should not be obliged to take the steps necessary to compel the attendance of the private company for a document that would normally be subject to a "first party disclosure application".

[63] None of these considerations were assessed by the JJP in this case. The record shows that the Crown said that it was not in possession of the documents and that was that. In my respectful opinion, there was a responsibility on the Crown, at least in respect of the Gatso operating manual, to inquire of Conduent Traffic Safe Solutions for production of the manual, failing which the Crown ought to have compelled Conduent Traffic Safe Solutions to appear in court on a timely basis. I see no reason why an accused should have to make a third party disclosure motion for an item which is obviously relevant.

[64] One would expect that the entity using the photo radar machine would possess the manual which describes the operations of the machinery. The Crown indicated that they did not have it and therefore could not produce it. However, there is no evidence that the Crown even tried to look for it. And, the JJP made his decision without even inquiring of either Mr. Khan or his superior Mr. Curney whether their company was in possession of it.

[65] In my respectful opinion, where the Crown has the responsibility to prosecute speeding tickets and is in receipt of a request from accused defendant person as to whether an operating manual is at hand which explains the operation of the Image Capturing System, there is an obligation on the part of the Crown to at least inquire of the enforcement division, whether it be a police department or a private contractor, regarding the existence of such a document. The manual for the equipment, in my respectful view, would clearly be of assistance in challenging, or at least understanding, whether the equipment was used properly by the operator or tested properly, or whether it was susceptible to malfunctions in particular situations such as inclement weather.

[66] Respectfully, the decision of the JJP to require Mr. Kuny to defend the case without the manual in hand detrimentally affected Mr. Kuny's ability to defend the charge. It arose from an error in law surrounding prehearing disclosure, and was so clearly wrong as to amount to an injustice. (See ***R. v. Regan***, 2002 SCC 12 at para. 117)

[67] There is some ambiguity as to whether this issue as it unfolded was a ***Stinchcombe*** issue or a subpoena issue. On the basis of the ***York (Regional Municipality)*** case, at least as regards the Gatso manual, it is a ***Stinchcombe*** issue. In my view, the comments about device manuals in that case would also apply to a Procedure Manual pertaining to the Internal Circuit Test, the External Tuning Fork Test, and the Audio Doppler Test, as would they apply to any notes which Mr. Khan made which relate to his investigation of this offence.

[68] In articulating his decision to convict Ms. Kuny, the JJP made reference to the document issue again and referenced a case by the name of ***R. v. Faires***. I am assuming that the case referenced by the JJP is ***R. v. Faires***, 2001 MBQB 132. That case is of little assistance here. That case allowed a judge to satisfy himself that a machine was working properly through the *viva voce* evidence of the police officer who operated the machine rather than through testing certificates. I need not determine whether that case should apply to this case in light of the legislation that exists today, because even if it did, the issue in this case is different. The issue here is whether the process was fair. Mr. Kuny was deprived of the opportunity to properly question the operator in this case because he was not given proper disclosure of the Gatso manual. Whether or not the JJP was able to rely on the evidence of the machine operator to determine whether the machine was accurate, he could not do so without permitting Mr. Kuny to test the evidence of Mr. Khan.

[69] I might further add that although I have concentrated in these reasons on the operator's manual for the Gatso RS-GS11, I would also put into the same category of First Party Disclosure any Procedure Manual regarding the performance of the Internal Circuit Test, the External Tuning Fork Test and the Audio Doppler Test as well as any notes which Mr. Khan had made about this particular offence. I would not have required the training materials which Conduent Traffic Safety Solutions uses before an operator is qualified or any of the other material listed in the subpoena since it appears more to be in the kind of fishing expedition that should not be allowed in this kind of proceeding.

[70] Mr. Kuny was handicapped in the presentation of his case. I can see no alternative but to set aside the conviction and direct a new trial.

Whether the offence took place in a playground.

[71] One of the issues raised by Mr. Kuny at the hearing before the JJP was whether Stanley Knowles Park could be classified as a playground. This becomes important in a case where the Crown seeks to prove excessive speed with the results of photo radar because there are only certain areas within the City of Winnipeg where photo radar equipment can be used to ticket people who speed.

[72] As indicated earlier (see para. 39), the use of an image capturing enforcement system is limited under s. 257.1(2) of the ***HTA***.

[73] The prescribed Schedule "F" Operator's Certificate requires the operator to indicate whether the operator was operating the equipment in a Construction

Zone, a Playground Zone, or a School Zone. In this case, Mr. Khan had indicated on the certificate that he was set up in a Playground Zone.

[74] Section 12(1) of Man. Reg. 220/2002 provides the criteria for a playground zone. It reads:

> 12(1) For the purposes of subsection 257.1(2) of the Act, a playground zone is a portion or length of highway that
>
> (a) adjoins or is adjacent to an area set aside by a municipality for children's recreational activities; and
>
> (b) is identified as a playground zone by approved traffic control devices placed at the beginning of the zone facing each direction of traffic entering the zone.
>
> 12(2) A playground zone starts at the approved traffic control device facing one or more lanes of traffic and ends at the approved traffic control device facing the oncoming travel lanes. If there are no oncoming travel lanes or no device facing them, the playground zone ends at a point past the set-aside area that is the same distance past the area as the device marking the start of the zone is ahead of the area.

[75] The evidence from Mr. Kuny at the hearing before the JJP was that although there used to be children's playground equipment at Stanley Knowles Park, that equipment had been moved before the offence occurred. Mr. Kuny had argued that there was no longer a playground at the time of the offence. If he was right, the use of photo radar was therefore unlawful and its observations ought to have been inadmissible.

[76] Mr. Khan testified that he did not pay any attention as to whether there was playground equipment. He testified that on the day of the alleged offence, prior to setting up, he simply checked to see if playground signs were in place. Therefore, the evidence before the JJP, assuming both witnesses were believed,

indicated that playground signs had been erected as required by the Regulation, but no playground equipment was present in Stanley Knowles Park at that time.

[77] The JJP ruled that the offence had occurred in a playground zone. He said:

> So, I would make that finding today and that it in fact, was a playground zone. There's been some argument about whether it should be a playground zone anymore or whether those signs are appropriate or not. And I find that's not left up to the driver to make that determination, that if you have an issue with it being a playground zone and posted as such, you could bring that up to the city. But at the time, those signs were erected, and it is a driver's job to obey those signs whether they agree with it being a playground zone or not, you have to obey the speed limit.

[78] Other than the existence of the playground signs, there was no evidence in the hearing that the City of Winnipeg had "set aside" Stanley Knowles Park as an area for children's recreational activities as required by s. 12(1)(a) of Man. Reg. 220/2002. However, s. 80 of the ***HTA*** creates a presumption that the area had been designated as a playground. It reads:

> 80 The existence on a highway of a sign, marking, poster, notice, or traffic control device such as is required or permitted by this Act, purporting to regulate the use of the highway in any manner, raises the prima facie presumption that the sign, marking, poster, notice, or traffic control device was duly erected and maintained by the proper authority pursuant to the power given by this Act and in accordance therewith.

[79] It was therefore within the purview of the JJP to utilize the presumption that there had been a proper designation of Stanley Knowles Park as a playground. Although he did not mention the presumption in his reasons, it is implicit in his reasoning. The only evidence which was called by Mr. Kuny to rebut the presumption was his evidence that no playground equipment remained in the park. If Mr. Kuny intended to prove that Stanley Knowles Park was no

longer set aside for children's recreational activities, he ought to have led evidence from the City of Winnipeg to that effect. He did not, and in the absence of any evidence which I can use on this appeal, I cannot say that the JJP committed an error in concluding that the radar equipment was used in a Playground Zone.

[80] To the extent that I have already ordered a new trial, it would be open to Ms. Kuny to raise this issue at the new trial if material evidence exists to substantiate that the City no longer designated Stanley Knowles Park as a playground.

Whether the JJP erred in not requiring the Crown to produce a Form 2 Certificate pursuant to Man. Reg. 95/2017.

[81] During the hearing before the JJP, Mr. Kuny complained about the absence of a certificate prescribed by Man. Reg. 95/2017. Mr. Kuny argued that such a certificate must exist which details any observations which an enforcement officer makes and that he should have received a copy of it. Crown counsel argued that the enforcement officer did not use that certificate and more specifically, it is a form of certificate that is not appropriate to a photo radar ticket. It specifically applies to a situation where a driver is detained after an enforcement officer observed the traffic infraction.

[82] Although s. 24(1) of Man. Reg. 95/2017 prescribes a Form 1 and Form 2 certificate for the purposes of s. 63 of the ***POA***, that does not mean that those are the only forms of certificates which can be used by an enforcement officer

and tendered by the Crown at a hearing. The certificates used by the Crown at Ms. Kuny's hearing before the JJP are authorized by the ***HTA***. Furthermore, Mr. and Ms. Kuny had notice of those certificates and the Crown's intention to use them at the hearing. There is no merit to this ground of appeal.

Whether the JJP was biased.

[83] The final submission of Ms. Kuny can also be dealt with quickly. She alleges that the JJP was biased. The bias alleged here arose from the fact that the JJP did not order production of documents as requested by Ms. Kuny, did not require the use of the Form 2 certificate, and concurred with the observations of Mr. Khan as to what he saw in the photographs that were placed into evidence. I have reviewed the transcript several times. There are instances when the JJP intervened during the course of Mr. Kuny's examination of Mr. Khan. However, a judicial officer is entitled to intervene if he/she feels that time is being wasted on irrelevant matters or matters that have already been covered. The interventions of the JJP were justifiable on either of those two bases. It would have been preferable for the JJP to have allowed Mr. Kuny a right of reply during the argument about the production of documents, but that in itself does not demonstrate bias.

[84] The use of an allegation of judicial bias should be left to the most extreme situations. Far too often, it is raised without significant evidence. Our system of justice recognizes that judicial officers are human. They are not perfect. They are expected to listen intently to both sides and then decide. At times, they

make mistakes. That is why there are Courts of Appeal. Simply because the judge renders an unfavourable verdict to a party is not justification for alleging that the judicial officer was biased. That appears to be what has occurred here.

[85] Although there were decisions made by the JJP which were not favourable to Ms. Kuny, that does not demonstrate bias.

[86] There is no merit to this ground of appeal.

CONCLUSION

[87] I have concluded that the JJP erred when he did not order the production of the Gatso Manual or inquire as to the existence and production of any Procedure Manual regarding the mandated operator testing procedures. It appears that what notes Mr. Khan had were produced. Nonetheless, Mr. Kuny on behalf of his wife was frustrated by the absence of the manuals in his attempt to plead his wife's case, and for that reason, leave to appeal is granted, the conviction is set aside and a new trial is ordered before a different JJP. The issue as to whether Stanley Knowles Park is a playground remains a live issue at any new trial if new evidence from the City of Winnipeg is adduced.

[88] It is of course open to the Crown to exercise its discretion to stay the charge given the amount of time that has already been devoted to this $221 ticket.

_____J.