Ontario Court of Justice

Her Majesty The Queen

Against

Christopher Boglis

Excerpt of Trial Proceedings

Before the Honourable Justice P. Tetley
At Newmarket, Ontario, on June 13, 2007

Appearances:

B. McCallion	Counsel for the Crown
M. Rombis	Counsel for the Accused

MR MCCALLION: Your Honour, I propose to complete the Boglis matter.

THE COURT: Yes.

MR ROMBIS: Good morning again, Your Honour.

THE COURT: Good morning. Can I just see the information, madam clerk, on the Boglis matter?

CLERK OF THE COURT: Yes, Your Honour. Mr. Rombis.

MR ROMBIS: Yes, Your Honour. As I have indicated to Your Honour initially, the defence is not calling any evidence.

THE COURT: All right, sir. So submissions from the Crown.

MR MCCALLION: Your Honour, the counts that are before the Court are dangerous operation and race. Am I correct?

THE COURT: Yes.

MR MCCALLION: And we have two different informations, I understand, each with one count. Is that correct?

THE COURT: Yes.

MR MCCALLION: All right. Well, dealing with the dangerous driving, Your Honour, the charge is pursuant to s. 249 sub 1(a), and that provision reads, “Everyone commits an offence who operates a motor vehicle in a manner that is dangerous to the public having regard to all the circumstances, including the nature, conditions,

and use of the place at which the motor vehicle is being operated and the amount of traffic at the time or might reasonable be expected to be at that place." So there are a number of things that I submit the Court must assess in the matter, Your Honour. Number one is the driving itself, obviously. And number two, the circumstances and the area in which the driving is alleged to have occurred.

Now, the Crown's case was comprised of two witnesses. First witness was Officer Ho, who was the main pursuit officer. And just to briefly reiterate some of Officer Ho's more salient evidence. At about 10:18 p.m. on September 20th, 2006 he's on uniform patrol. He's alone in a marked police cruiser. He's proceeding northbound on McCowan Road. He passes Unionville Avenue. He's in lane number one when he witnesses a Ford Mustang travelling at a high rate of speed southbound and also a second car, a Honda, in lane number 2 southbound. And it appeared that they were side by side trying to keep up with one another at approximately the same speed, which Officer Ho estimated to be about 120 kilometers in a zone that had a posted limit of 60 kilometers and hour. The vehicle passed Officer Ho. He activates his emergency equipment, performs a u-turn to follow, however, they gain distance and the officer de-activates his emergency equipment. He feared that the emergency equipment would cause the two vehicles to flee, thereby causing further public safety concerns.

The vehicles proceed through an amber light at south Unionville Road and they continue southbound. The officer then activates his lights again. The two vehicles passed two cars and the two vehicles proceed over the 407 ramp and they stop at the eastbound ramp-- at the eastbound off ramp and they're stopped at a red light. The officer hears loud revving noises. A green light follows and the officer in his evidence observed the Mustang squeal its tires for about one second. The officer is in lane number two at this time. His emergency equipment is activated. He's passing some civilian cars in order to pursue the two, and the officer gives evidence that he observed two vehicles, the Honda and the Mustang, proceeding at about 100 kilometers and hour still in the same posted zone of 60 kilometers and hour.

Approaching 14th southbound they enter a right turn lane and they take a position there. They que up waiting behind some other vehicles to turn right, and that is where the traffic stop initiated. Officer Ho approaches the driver of the Mustang, who is identified to be Mr. Boglis, and the arrest is made. Officer gives evidence that it is a convertible Mustang with no modifications, so that was Officer Ho's evidence.

The second officer gave evidence that he is on his way—at the same time at about 10:18 p.m., he's on his way to 5 District northbound on McCowan when he observed the black vehicle head southbound extremely fast in excess, the officer estimates, of 120 kilometers. He hears engines sounding prior to seeing it, and then be observes a second vehicle attempting to catch the first vehicle. The second vehicle was just behind the first vehicle. He describes the engine sound as being loud. Both passed him at the same time. It was fast. It caught his attention. And the officer expressed a certain voter vernacular, which we're all familiar with, however, it's—and the officer appologized to the Court for expressing that. However, I would submit, Your Honour, that kind of expression, that sort of spontaneous expression, is useful in terms of its kind of surprise. It's a common expression that I think everybody would probably likely vocalize in that situation. So I think there's a ring of truth to the second officer's response to what he had seen on that occasion.

That officer had traffic around him and he was unable to actually perform the u-turn. The officer described the area—and this gets into the second part of the dangerous driving provisions. What are the circumstances? What is the area like? What is reasonable? What is the traffic like in that area? That officer describes the area has having a plaza on the corner. There is a Tim Horton's. There is a McDonald's. There are intersections to residential areas. This is on McCowan Road around the 407 area. So it is—it's commercial. It's near residential areas. And the second officer sees Officer Ho's vehicle proceeding southbound behind the vehicles. He doesn't know if Officer Ho is knowledgeable about the other vehicles that he had seen. The second officer hears a radio call for assistance so he initiates a turn and

proceeds and assists in the arrest of the two vehicles. The second officer is mainly concerned with the second driver, namely the black Honda, and that vehicle is described as being stripped down, bucket seats, roll bar. It's—it had temporary plates on it. The inference the Court can make is that the second car, the black Honda, is built for speed.

Now, I think it's fair to say, Your Honour, that the evidence that the Court can quite safely accept is the speed—well, first of all, is identification. I would submit the Court can be quite satisfied that we have Mr. Boglis being observed in the subject vehicle, in the Mustang. Secondly, I think the Count can quite safely accept that Mr. Boglis was travelling at an extremely high rate of speed down McCowan Road.

There was evidence that the two vehicles had passed other vehicles. So we have evidence that there was other traffic on the road at the time, and this is a Monday evening at about 10:18, 10:20 p.m. in a commercial area where stores may be open. Certainly the Tim Horton's around there will be open. There are accesses to residential areas, so there's going to be residential traffic in the area. And I would submit that that level of speed is not reasonable for that situation in a residential and light commercial area at that time and that place. There was—Officer Ho gave evidence that he observed a lane change, that there was a smooth—there were smooth lane changes, at least one lane change. We don't have any evidence before the Court that there was an accident at all or any defensive maneuvers required by any other traffic on the street at the time. However, I would submit, Your Honour, given the Supreme Court case of Hundal, which indicates that there is a marked departure test to be applied here, and it is—is there a marked departure from what a reasonable person would observe in the accused's situation. And I would submit, Your Honour, number one, the speed of the vehicles is certainly a marked departure from what a reasonable person would do in an area which is commercial and residential. The estimate of 120 kilometers in a 60 kilometers an hour zone I acknowledge is an estimate. However, I would submit if they estimate at 120 kilometers an hour, I would submit that it is—the Court ought to submit that the

speed that was being travelled at the time was well, well in excess of the posted limit and was—it was not reasonable for the situation, I'd submit, was dangerous.

The fact that the evidence that the vehicles were travelling alongside other traffic is also, I would submit, a marked departure from what a reasonable person would be doing in that situation. And I would submit that vehicles travelling at that speed in close proximity to other traffic is, I would submit, meets the marked departure test of the dangerous driving provisions in the code.

I would simply point out the case of Richards. Unfortunately I don't have the actual case with me, but I do have its citation. It's 2003, 174 CCC (3rd) series, page 154, which indicates—and that's Richards—which indicates under certain circumstances, except of speed alone, may be sufficient to constitute dangerous driving. So subject to the Court questions, those are the Crown's submissions. I submit the Crown has met the onus and has proven Mr. Boglis beyond a reasonable doubt is guilty of the count of dangerous driving. Thank you, Your Honour.

THE COURT: Before we received defence submissions, can I just canvas what happened with Mr. Price and his case?

COURT REPORTER'S NOTES: The matter of Christopher Boglis was held down at this time.

THE COURT: Go ahead, Mr. Rombis.

MR ROMBIS: Yes. Your Honour, in my respectful submission the Crown has clearly fallen short of proving beyond a reasonable doubt that my client operated a motor vehicle in a dangerous manner on that particular day.

Just dealing with the dangerous driving count. My friend has eluded to the relevant test developed by the Supreme Court of Canada in Regina vs. Hundal and I'm not

going to repeat it quite simply, as whether an accused person has operated—whether the accused's operation of the motor vehicle has been a marked departure from that of a reasonable prudent driver. My friend is as well correct, Your Honour, there's a number of factors that have been taken into consideration when determining if a person has in fact operated a motor vehicle in a dangerous fashion. One of them is the time of day of the driving. Secondly, the driving conditions. Thirdly, the traffic. Or I should say more specifically, the degree of traffic at that given time. Further, the type of road itself. Are there a number of intersections? Are there a number of residential homes that line the street that would provide for driveways? Last—not lastly. The actions of the accused with respect to the driving itself. Whether the accused was able to maintain control of his or her motor vehicle at that given time. And lastly, Your Honour, the actions of any other motor vehicles, or more specifically, the actions of any other drivers as a result or in relation to the driving of the accused.

Now, just before I proceed, I'd like to deal with my friend's submissions, Your Honour. My friend, if I understand his submissions correctly, essentially bases the thrust of his submission with respect to supporting a conviction for dangerous driving is that of the speed itself and the fact that the speed was excessive, being 120, and that is then placed into the context of a commercial and residential area.

My first submission, Your Honour, is that I would agree with my friend and I concede and Highway 7 and McCowan, the intersection itself is commercial. However, if Your Honour recalls from the evidence, PC Ho first observed these motor vehicles as he was travelling northbound when he passed Unionville Road. That is somewhat south of Highway 7. And that's where essentially the observations begin to take place. It's south of Highway 7, Your Honour, at Unionville Road. And it's from Unionville Road up until 14th Avenue that I think is the most relevant with respect to accepting the type of roadway and whether it is a populated in a commercial residential setting. And if Your Honour may recall, I actually spent sometime cross-examining Police Constable Pelham with respect to the geographic

location of that area, specifically Unionville Road and McCowan all the way south to 14th Avenue. And if Your Honour may recall, there was evidence that you have Highway 407, you have some farm area, you have a conservation park, you have a Jehovah Witness Kingdom Hall to the left. And in fairness, on the left side of McCowan you have an entrance, a roadway that leads into residential area. But clearly the officer conceded that there was not many roadways that led onto McCowan in relation to that particular piece of roadway on McCownan between Unionville Road and 14th Avenue.

So I think, Your Honour, it's important that Officer Ho first observed these vehicles as he was travelling on Unionville Road. Again, the observations at the intersection of McCowan and Highway 7, and I think that's very important, Your Honour, in considering the roadway.

My friend has made reference to a decision of the Ontario Court of Appeal, Regina and Richards. I am familiar with that decision and I would agree with my friend with respect to the Court's analysis and reasons. But I think the case can be differentiated from this one, Your Honour. In Ricahrds there was an accident and there was no explanation for this accident. And I believe the Ontario Court of Appeal essentially held that given that there's no other explanation, it's a proper inference that can be made that the speed alone was dangerous, which in turn caused this accident to take place. And I think that case can be differentiated from the case at bar because there was no accident, Your Honour. And I intend to review some of the fact in relation to this particular case.

Dealing first with Police Constable Ho's evidence. I would ask Your Honour—Your Honour's clearly entitled to accept a witness's evidence, to completely reject it, or accept certain parts, a portion, of a witness's evidence. And in dealing with PC Ho's evidence, I would ask Your Honour to place no weight or accept any evidence with respect to his testimony concerning the swerving—to his testimony concerning the lane changes. If Your Honour may recall when I cross-examined Officer Ho in

relation to these particular areas, there was no indication in his notes with respect to any of those observations and I extensively canvassed this with him. And unfortunately, Your Honour, do not have the relevant case with me, but there is a decision by your brother, Justice Duncan, Regina v Zack, and I'm sure Your Honour's familiar with that decision.

THE COURT: I hear about it almost every day.

MR ROMBIS: I'm sorry, Your Honour?

THE COURT: Almost every day someone cites Regina and Zack. I am sure Justice Duncan never intended that he would have such a widespread appeal amongst particularly the defence bar, but so be it.

MR ROMBIS: Sir, I don't indent then to thoroughly canvass the case. I'm sure Your Honour has my submission unless—

THE COURT: It seems to me what Justice Duncan was endeavoring to reference in that case is when there is a salient or important fact and it is omitted, in the circumstances of that case particularly from the officer's notes, that calls into question the ability of the officer to recollect an event he has not notes at trial and raises a legitimate suspicion about whether that observation or representation is accurate. That is all that means.

MR ROMBIS: Exactly.

THE COURT: But we know that police officers cannot possibly note every fact in their notebook. And I think sometimes—and this may be one of those times, this officer is making certain observations of the events in issue, at least initially, from the other side of the road. He is travelling in another direction. And once he gets himself turned around, he has indicated in his evidence—and this is what I have it—

that the issue was that the two vehicles were obviously racing, were travelling at a high rate of speed, were moving through traffic. But one might reasonably presume that without a note, don't you think?

MR ROMBIS: Yes, Your Honour. But I believe there's a difference between swerving and lane changing.

THE COURT: Well, I do not read much into the characterization the officer made. You did a good job quite frankly, of cross-examining the officer; there was no suggestion that your client's vehicle was even weaving within its own lane. But one might reasonably presume given such a high rate of speed—and I do not think there is much dispute about that—and I only have the officer's evidence on that. I do not have any contradictory evidence that vehicles are travelling much faster than the other vehicles that were occupying the roadway, and one might reasonably presume that they are going to be moving through traffic. And I think that is what the officer was indicating. I do not read too much into the fact that there were lane changes because I think the officer, even through there was an absence of a note in this regard, was fairly charitable in his estimation as to how those lane changes took place. Now, you said at one point there was squealing of tires, that the vehicles left. But in terms of the lane changes I think the vehicles simply moving in and out of traffic because they are travelling much faster than everybody else. That is what I took from his evidence.

MR ROMBIS: Then I would refer, Your Honour. I just want to address that issue.

THE COURT: It seemed to me that both vehicles were referenced as being under control, although travelling at a significantly higher speeds than they perhaps should have been.

MR ROMBIS: My second point that I wanted to raise, Your Honour, is with respect to the officer's evidence, is that he characterized the traffic as moderate. It was light to moderate I believe.

THE COURT: Right.

MR ROMBIS: And I stand to be corrected if I'm wrong. But Your Honour, it's quite interesting and I think significant that there's only reference to two cars or two other vehicles ever being overtaken. Just two. Now I guess we could get into an argument as to what constitutes light traffic as opposed to average traffic. But once the officer turns around he observes my client and the other driver continuing down McCowan, he observes these other two motorists being overtaken. Then the officer pulls up to the set of lights in which my client is remaining at that red light. He pulls in behind the two cars, and at that point he overtakes these two cars to then come behind my client who's stopped now at 14th avenue.

So Your Honour, what I'm simply submitting is that an inference can be drawn from that evidence that the traffic was extremely light at that time. There was only reference to two other vehicles on the roadway travelling southbound at any given time during the officer's evidence.

THE COURT: Well, you have to consider the evidence in its totality. Constable Pelham had a different view of that.

MR ROMBIS: Yes. But again, that's contradicted from the evidence of Office Ho, in my respectful submission, just based on his review of what actions he took while operating his vehicles to catch up to my client. And I think, Your Honour, what's also important is considering whether my client operated a motor vehicle in a dangerous manner is—again, as Your Honour has comment on a couple of factors—there was no swerving. My client operated his vehicle at all times within his lane. There was some testimony given by Officer Ho that the changes were not made with the signal.

But then again, after cross-examination he wasn't sure, ultimately. I think it's also relevant, Your Honour, that my client came to a stop at the eastbound light—sorry, at the 407, eastbound lane.

THE COURT: He did not have much of a choice though.

MR ROMBIS: No, but he did.

THE COURT: No, I understand that. He did not run the red light.

MR ROMBIS: No, he didn't run the red light.

THE COURT: No.

MR ROMBIS: Yes.

THE COURT: Well, thank goodness for that.

MR ROMBIS: And, again, Your Honour, the other drivers did not have to take any evasive action as a result of my client passing them, and I think that's important as well. And essentially, Your Honour, as Your Honour has noted, my client operated his vehicle at all time in control of the motor vehicle itself. Fortunately there were no accidents in relation to any of the drivers. So I would conclude, Your Honour, by submitting—I just have one case, Your Honour, that I'd like to provide to you. That's the decision of the Ontario Superior Court of Justice, Justice Sheppard, decision of Regina v Abola, A-B-O-L-A, a decision of July the 12th, 2000. This was an appeal from the conviction of dangerous driving. The officer observed the accused speeding at approximately 150 on a city street, which I'm sure Your Honour can make the it's not 100 kilometers per hour, so clearly double the limit. The officer saw the accused them travelling northbound. He observed the accused stopped at all lights and signs. The appeal was allowed. Justice Sheppard held that the trial judge erred in failing to

take into account the fact that no other driver was affected by the accused's driving and the accused seemed to obey all stop lights and stop signs. That's the evidence to not support the conviction. So essentially, Your Honour, I would submit that the driving is high and it is excessive. But Your Honour, just look at the driving itself—120—if Your Honour is to accept that estimate because we have an absence of any corroboration with respect to that speed, there's no radar that was obviously utilized, no laser that was utilized to corroborate that speed. So what we have is a visual estimate of that speed. And just dealing with the speed alone, Your Honour, every day officers issue part 3 summonses for that speed, doing 120 in a 60, I'm certain, which is double the speed limit. And given all of the other circumstances and the lack of certain other actions that would usually be found in a case of dangerous driving, I would ask Your Honour to find that the Crown has not proven beyond a reasonable doubt that my client operated a motor vehicle in a dangerous manner.

With respect to the racing then, Your Honour, there's no specific evidence there was an agreement to race, obviously. Your Honour clearly would be entitled to draw an inference. But as my friend said in his own submissions, they seemed to be catching up to one another in an attempt to race. Well, it seems that Your Honour clearly falls short of—in my respectful submission, the test is on a balance of probabilities, but not a quasi criminal offence the test is beyond a reasonable doubt as well. And in my respectful submission there's just simply not enough evidence that there was an agreement to race and that agreement was common between both parties. Subject to any specific questions that Your Honour may have, those are my submissions.

THE COURT: I just have one. It is a practical consideration. Do you have—do you happen to have Hundal?

MR ROMBIS: I don't have Hundal, Your Honour, no.

THE COURT: Richards? No?

MR ROMBIS: Your Honour, I may have Ricahrds.

THE COURT: I can access them, but I thought if you had them I could…

MR ROMBIS: I do, Your Honour.

THE COURT: All right. If you could provide Richards. Richards is probably the operative case, in any event. Anything further from the Crown?

MR MCCALLION: Just a couple of points. Your Honour, the driving that was observed was two instances of driving north of the lights in which they stopped at and then south of the lights where they squealed the tires. So this is not simply a discrete incident of speeding. This is a – this is an ongoing example of flagrant disregard of the posted limit. This is not someone trying to get home from work in a hurray where an officer happens to step out with a radar gun and catches a vehicle at once single discreet point in time speeding. This is a continuous process of where both vehicles are speeding at an extremely high rate of speed and then right after they continue that same type of driving. Even the tires were squealing. So in my submissions, that's further evidence of the marked departure test. And when the two vehicles are pulled over they both pull into the same right turn lane behind one another. So they are behaving in concert with one another. I think that's evidence that they're behaving together in concert with one another. And I think that is—this was racing type of behavior. So subject to your questions, those are all my submissions, Your Honour.

MR ROMBIS: Your Honour, I just wasn't sure. I didn't hear my friends submissions when he first began with respect to whether there was evidence north of Highway 7. Am I correct?

MR MCCALLION: I meant 407. Excuse me.

MR ROMIS: Oh, 407, Okay.

THE COURT: I see, gentleman, that we are almost at the break, so maybe I will take a minute and just review the Hundal case just before I give the ruling and maybe we can address Mr. Fox's matter. We will have the morning break and we will resume.

RECESS

THE COURT: Thank you for the indulgence, counsel. I have had a chance to review the case law cited and some additional case law that may have relevance to this particular situation.

Christopher Boglis is charged with two offences. They both arise out of the same circumstances. The allegations are that on or about the 20th of September, 2006 at the Town of Markham Christopher Boglis was engaged in a race with another motor vehicle contrary to s. 172(1) of the Highway Traffic Act. It is further alleged that on the same day Mr. Boglis operated a motor vehicle in a manner that was dangerous to the public. In order words, engaged in an act of dangerous driving contrary to s. 149(1)(a) of the Criminal Code.

I propose to deal firstly with a brief summary of the facts as related during the evidence of the Crown witnesses. Two crown witnesses were called. The first Constable Ho indicated that on the date in question he was operating his police cruiser northbound on McCowan Road south of Unionville in the vicinity of the Town of Markham. His attention was initially attracted to the motor vehicle being operated by the defendant as a consequence of the loud engine noise. The defendant's motor vehicle was observed to be proceeding southbound on McCowan at the time. The officer also noted another vehicle similarly travelling in a rapid fashion, also proceeding southbound on McCowan at the point he initially made his observations of Mr. Boglis' automobile.

The investigating officer effected a u-turn and activated the roof lights of his cruiser. His initial assessment of the speed at which Mr. Boglis was operating his motor vehicle was that the Boglis vehicle was travelling at at least 120 kilometers in a posted 60 kilometer an hour zone. According to Constable Ho both noted vehicles, in his words, “flew by”. A brief active pursuit took place whereupon, following a brief passage of time, Constable Ho testified be deactivated his roof lights for fear of escalating the speed at which the defendant was operating his motor vehicle.

Detective Ho testified that there were several lane changes observed during the period of time in which he had the Boglis motor vehicle under observation. He described Mr. Boglis’ motor vehicle as, in his words, “slipping in and out of traffic” and he fairly conceded, when he was questioned by defence counsel, that he could not recall whether Mr. Boglis signaled any observed lane changes, but he could not discount that possibility.

Constable Ho offered the opinion that the other motor vehicle, which was subsequently determined to be a modified Honda, modified for the purpose of racing, appeared to in fact have been engaged in a race with the motor vehicle operated by Mr. Boglis. That was certainly the inference that Constable Ho drew from his observations.

He conceded that Mr. Boglis’ motor vehicle operated within its lane except while passing. Constable Ho concluded that he did not observe any adverse or reactionary response from any of the vehicles that Mr. Boglis passed while he was subject to observation by the officer. There was no observed braking or evasive maneuvering required by any other motor vehicle operating on the same stretch of highway during that period of time. Constable Ho also conceded that Mr. Boglis stopped his motor vehicle at the traffic lights at Highway 407 and McCowan, as did the Honda motor vehicle. He concluded that an incident of dangerous driving had in fact taken place for the following reasons: Finally, Constable Ho concluded that both Mr. Boglis and the operator of the Honda motor vehicle had been engaged in what he termed

an obvious race through a largely residential area; secondly two, the high rate of speed, which was estimated at being at least 120 kilometers in a posted 60 kilometer an hour zone; thirdly, the fact that in spite of the officer's presence and the fact he, at least for a period of time, had activated the roof lights of his cruiser, no appreciable deterrent effect was observed in the driving of either Mr. Boglis or the other operator.

Constable Pelham was also northbound on McCowan in a separate police vehicle at the time Mr. Boglis was operating his motor vehicle southbound. He described the area, an area he was well familiar with as being both commercial and residential. And he indicated that the flow of traffic at the time when this incident was observed to have occurred later in the evening of September 20th, 2006 as being regular for that time of day. By that I took Constable Pelham's evidence to suggest a relatively light flow of traffic, and I think that much was born out by the observations of Constable Ho.

Constable Pelham, who is a more experience officer had an experience radar operator indicated that he inferred the rate of speed to be in the vicinity of that suggested by Constable Ho. And his observations or determination in speed he conceded was largely predicated on the sound as motor vehicles passed his location and a visual – what he termed as a visual estimation.

I turn now to consider the submissions of counsel. And Mr. McCallion reviewed the evidence of the investigating officers and referenced those observations in support of his contention that the Crown has satisfactorily established the defendant's identity as the operator of the Mustang automobile which was observed particularly by Constable Ho. Mr. McCallion cited the extreme rate of speed as Mr. Boglis operated his motor vehicle southbound on McCowan, particularly during the period of observation by Constable Ho. I should note that Constable Ho testified that he endeavored to catch the two motor vehicles under observation and was unable to make an appreciable gains despite the fact that he was travelling at a rapid rate of

speed. He was only able to apprehend the defendant and the operator of the Honda when they came to a stop at an intersection south of the 407. The lane changes, passing from lane to lane to avoid slower moving traffic, was cited by the Crown as a incident that might substantiate the charge when combined with the speed, particularly the charge of dangerous operation and the fact that his driving has taken place in a residential area or a built up municipality area with 60 kilometers an hour speed limit.

The Supreme Court of Canada decision of R v Hundal [1993], SCR 867 79 CCC (3rd), 97, 19 CRL (4th) 169 was cited. I think this case is well known to all referencing the standard that I am required to consider. That is whether the observed driving constitutes a marked departure from the standard of case one might reasonably expect a reasonable person to employ in like circumstances. The Crown noted the close proximity to other traffic and the fact that at the observed rate of speed it was perhaps more good fortune than good management that something much more significant did not transpire.

With respect to the count of racing, the Crown submits, given that both vehicles were travelling at approximately the same excessive rate of speed, one might reasonable infer that that was the intention of the two drivers.

In response, the defence references the considerations that arise from the circumstances in which this driving took place. In that regard the time of day, the relatively light traffic patten, the weather conditions, the lighting conditions, the type of road, and the fact that the defendant exhibited care and control over his motor vehicle are cited as factors for consideration. Further, the defence cites the fact that no other driver was observed to have taken or had been required to take any evasive actions as a consequence of the defendant's operation of the motor vehicle.

The defence noted that at least a portion of this driving took place in an area that is largely commercial, or rural, as opposed to residential, and that there is an imprecise assessment of speed given that Constable Pelham's observations or assessment of speed are made from the opposite side of the road with both officers inferring the speed based on observations rather than any more precise scientific measurement. The fact the defendant was in control of his motor vehicle throughout and stopped as required at a red light and the fact there was no accident as consequence of the driving are also cited as factors to be considered with respect to the racing count. The defence cites the absence of any apparent observed agreement to race between the operators of the Honda motor vehicle and the defendant, and suggests that the fact that the vehicles appeared to be travelling in lock step does not necessarily constitute a race.

I propose to address the racing count first. S. 172(1) of the Highway Traffic Act indicated that, "No person shall drive a motor vehicle on a highway in a race or on a bet or a wager." Reference is made to the annotated version of the Ontario Highway Traffic Act text which contains a helpful review of the relevant case law with respect to this particular section of the Highway Traffic Act. The case of Canning V Wood, (1918), 52, PSR 452, 44 DLR 525 (TD) is cited. It is an old case from 1918, I gather it originates in Nova Scotia, but it presumable is still good law. One might wonder what the speed was in 1918 that would constitute a race. In any event, the word 'race' was defined in that case. I conclude the section itself, given that it references to the additional element of "No person shall drive a motor vehicle on a highway in a race or in a bet or wager", suggests that perhaps the harm that that section is designed to address is the use of highways as a race track. The object aimed at by that section is that prevention of the use of the public highway for that purpose. That is essentially what Canning v Wood indicates. I appreciate the section is framed in the alternatively indicating it is an offence to race on a highway or to race for a bet or wager. Essentially this section is designed to prevent the use of the highway was a race track.

Regina v Smith, [1971] 5, WWR 674, (SASK DST CT), which is a decision of the Saskatchewan District Court from 1971 indicates that the Crown is not obliged to prove that the accused expressly agreed with another, or others, to embark on a race. The court can infer that intention from the observed conduct. In that regard, it is not necessary, as the defence's submission would suggest, for the Crown to establish proof of a joint intention to engage in a race. If the observable behavior supports a negative inference it is open to the Court to drawn such a conclusion. R v Flannery, [1982], 15, MVR 116, 15 MAN r (2nd) 162, involved a case where appellant was convicted of racing under the Manitoba Highway Traffic Act. The judge on review, concluded that the test that the judge has to apply in considering this section is whether from observed conduct the conduct and manner of driving constituted a race. Speed is one element of a race, but all the circumstances have to be looked at and inferred from the conduct.

I reference the entirety of the conduct under observation here. There is evidence that two vehicles are travelling quickly together. I do not think the evidence can support the contention that they were involved in a race. The speed was excessive. It appears that there was some evasive maneuvering to avoid slower moving cars. There is nothing to suggest, in my view, other than the fact they were speeding and they were travelling at relatively the same rate of speed, that they were in fact engaged in a race. There is no suggestion of overtaking by one car followed by attempts to overtake by the other. In fact, the Crown's case in this regard is comprised simply because the distance from which those observations were made was significant. Constable Ho, as a consequence of the excessive speeds in which the motor vehicles were being operated, was unable to gain much ground, and consequently he was unable to provide detailed observations which might support that contention. Is it an available inference? Well, I would concede and acknowledge the Crown's submission in that regard that it is. Is it persuasive inference on the criminal standard of proof? I do not think, for the reasons I have referenced, that one could safely conclude that Mr. Boglis was the operator of the modified Honda automobile were in fact engaged in a race. They were driving excessively fast. They

were travelling the roadway together, but I do not think I have heard that one vehicle was overtaking the other. In fact, the evidence in that regard suggests that at least during the one point of relatively proximate observation the Honda motor vehicle was in fact behind the Mustang.

The other consideration is the fact that when one operates a motor vehicle like a modified Honda and perhaps like a stock Mustang, occasionally one may invite challenges without forming an agreement or a mutual intent to race. I have to be live to the possibility that may have occurred. It may have been that the Honda automobile was issuing a challenge. I do not conclude one can safely say that Mr. Boglis accepted it based on the limitations inherent in the observations of Constable Ho. With respect to that count I conclude that Crown has failed to establish proof of the offence alleged on the basis of the criminal standard of proof, that is proof to the point of near certainty or proof beyond a reasonable doubt.

With respect to the issue of dangerous driving, I am obliged to consider whether the Crown has established the necessary actus reus and whether the facts substantiate the requisite actions or mens rea which references a criminal intent.

The “actus reus” of dangerous driving is defined in a case called R v MacGillvaray, [1995], 1 SCR 890. It is a 1995 decision of the Supreme Court of Canada. That case defines the “actus reus” of dangerous driving as conduct which viewed objectively amounts to a significant or marked departure from the standard of a reasonably prudent person. In that case the terms “marked” and “significant” are referenced as synonymous. The mens rea of dangerous driving is set out in the Hundal case that counsel referenced during their submissions. That is a case that preceded MacGillivray, a 1993 decision of the Supreme Court of Canada. Mr. Justice Cory, on behalf of the Court, expressed the standard of a modified objective test in these terms, a marked departure from the standard of case that a reasonable person would observe in the accused’s situation. The question to be asked is not what the accused subjectively intended, but rather when viewed objectively, whether the

accused exercised the appropriate standard of care. The mens rea for this dangerous driving is to be assessed objectively but in the context of all the events surrounding the incident. As with any objective mens rea standard in criminal law it is often difficult to separate the mental element from the act itself.

Arguably any conduct, including excessive speeding, could give rise to a criminal sanction if the conduct constitutes a marked departure from that which one would expect from a reasonably prudent driver in the accused's situation.

There have been other decisions that I had an opportunity to review briefly over the break this morning as I have reflected on what this modified objective test means in terms of application. The Ontario Court of Appeal decision in R v Rajic, [1993], 80 CCC (3rd) 533, 21 CR (4th), 208 (ONT CA), is one such case. There are others dealing specifically with the issue of excessive speeding, which is what we are essentially dealing with in this case, including R v Richard (2003) 174 CCC (3rd) 154, 169 OAC 339, 35 MVR (4th) 25 (CA),which is a judgment of the Ontario Court of Appeal. Krochek and Richards come to different conclusions in terms of whether speed alone can constitute the basis for a conviction for dangerous driving. Richards concluded that speed could be inference as a consequence of a motor vehicle collision that resulted in the death of two individuals and Rajic came to a contrary conclusion.

In this particular case I am confronted with a circumstance where we have estimates of speed. I have Constable Ho indicating that the speed was excessive in the extreme. The motor vehicle being operated by the defendant was estimated as travelling at least twice the posted speed limit. There is no real means to verify the accuracy of those observations. No radar was employed in the police vehicle operated by Constable Ho. Although Constable Ho was following the vehicle being operated by Mr. Boglis, he was never able to get close enough to effect an accurate speed estimate. The observations of Constable Pelham are comprised to a great degree by the fact that his assessment of speed is made while he was operating his

motor vehicle on the opposite side of the highway travelling in the opposite direction. He offered a colorful descriptor as to how fast he believes the accused's motor vehicle was being operate but it is not particularly helpful to define with precision exactly hoe fast the defendant's motor vehicle was actually going.

I think one might safely conclude that it was being operated at a speed far in excess of the posted limit. Having said that, I think it would be speculation, and really nothing more—perhaps speculation born of experience, for the officers to suggest a precise speed. Certainly the defendant's vehicle was travelling considerably faster than everyone else that was operating their motor vehicle on the highway on the night in question. He, however, was not travelling at a speed where he was observed to lose control of his motor vehicle. There was no weaving even within his own lane to the extent that his ability to control his motor vehicle compromised either the operation of that motor vehicle or any other motorists. No evasive action was required to be taken by any of the other motorists operating their motor vehicles on the night in question. As the defence rightfully points out, all traffic signals were observed by the defendant. He was able to control his motor vehicle and come to a stop. No red lights were run. Consequently, it is difficult to infer, with any agree of accuracy, at what speed this motor vehicle was being operated given the limitations inherent in the fact that Constable Ho never got close enough to effect an accurate assessment.

When I consider the totality of the driving evidence here, while it leaves much to be desired—and I would underline that word "much"—it is difficult to conclude that this driving constitutes a marked departure from the standard of care that a reasonable person would observe in the accused's situation. Unfortunately, as the defence rightfully points out, normally prudent drivers operate their motor vehicles at excessive rates of speed on our highways and biways almost every waking moment of every day. This speed was significant. It might well have constituted—and most certainly did constitute a violation of the Highway Traffic Act because the defendant was travelling at a rate in significant excess of the posted limit. Within the

context of Hundal and the considerations that arise, particularly in Ricahrds, it is not the type of case where one can infer, in my estimation, that speed alone was sufficient for the Court to conclude that the driving was dangerous. As I have indicated, as I reflect on Mr. McCallion's submissions although he did not use these words, it is more a matter of good fortune and good management that much more significant consequences did not ensue, but they did not. It may well be that they might have. Mr. Boglis may well have lost control of his motor vehicle or suffered a malfunction of one of the operating systems of his car and tragic consequences may well have ensued.

Based on the objective evidence when I consider the totality of what transpired here within the reasonable or modified objective test or reasonably prudent person test that I am obliged to reflect upon these facts, I conclude that the Crown has failed to establish proof that Mr. Boglis was operating his motor vehicle in a manner dangerous to the public peace on the criminal standard of proof, that is proof beyond a reasonable doubt. Can you stand, please, Mr. Boglis? I hope you were able to follow that and I hope you were particularly able to follow the point that there is really little that you did that day to justify this conclusion. This conclusion is primarily based on the frailties of the Crown's case. Had that officer, Constable Ho, been able to provide a more accurate assessment of your speed, he had been closer to make more detailed observations of the driving, you might well have been convicted of both of these offences. You should be aware, and I am quite confident your counsel has made you aware, of the dangers inherent in operating a motor vehicle at a high rate of speed, particularly a performance automobile like a Mustang. Particularly when that speed is occasioned on a residential street with another similarly like-minded individual, if that is what was actually transpiring here. At your age with a conviction for dangerous driving or a speeding offence more than twice the legal limit, you would not likely be able to afford insurance. Perhaps there is a lesson to be learned here. You have escaped, in effect, criminal liability for the reasons I have indicated. Those reasons are primarily predicated on the weakness of the Crown's case. Not really anything you did. Do you understand?

So the word to the wise is to slow down, behave like a responsible adult, because that is what you are when you operate a motor vehicle. If you do maybe you will live long enough to enjoy what I suspect will be a bright future that could have been curtailed permanently by actions similar to those you engaged in on September the 20th, 2006. You get the message?

THE ACCUSED: Yes, sir.

THE COURT: I hope you do. For the reasons indicated, you will be found not guilty of both offences. Those charges will be noted dismissed.

MR ROMBIS: Thank you very much. May I be excused?

THE COURT: Yes.