File No: 38739

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

KEN CHUNG

APPELLANT
(RESPONDENT)

v.

HER MAJESTY THE QUEEN

RESPONDENT
(APPELLANT)

RESPONDENT'S FACTUM

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

Solicitor for the Respondent:

DAVID LAYTON, Q.C.
BC Prosecution Service
Criminal Appeals and Special Prosecutions
6th Floor – 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: (604) 660-1145
Fax: (604) 660-1133
Email: david.layton@gov.bc.ca

Ottawa Agent for the Respondent:

ROBERT HOUSTON, Q.C.
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON. K1P 1C3
Tel: (613) 783-8817
Fax: (613) 783-3500
Email: robert.houston@gowlingwlg.com

Solicitor for the Appellant

RICHARD S. FOWLER, Q.C.
ERIC PURTZKI
Fowler Blok
1200 – 1111 Melville Street
Vancouver, BC V6E 3V6
Tel: (604) 684-1311
Fax: (604) 681-9797
Email: rflowler@fowlerbloklaw.ca

Ottawa Agent for the Appellant:

MICHAEL SOBKIN
Barristers & Solicitors
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.com

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On a Saturday morning in November 2015, the appellant was driving his silver Audi at the posted speed limit of 50 km/hr, in the curb lane on Oak Street in Vancouver, about a block away from a major intersection at 41st Ave. (the "Intersection"). Then, for reasons not explained by the evidence, over a period of "mere seconds" he deliberately accelerated to 140 km/hr, almost three times the posted limit. The Intersection towards which the appellant was speeding was a mixed use residential and commercial area. Businesses were open, and although traffic was relatively light, numerous vehicles and pedestrians were in the immediate vicinity.

2. The appellant engaged his brakes only on entering the Intersection. He missed rear-ending a green Toyota that had been turning right from the same lane by only 0.5 seconds – as the trial judge noted, it was a close call. A left-turning red Suzuki was not so lucky. It had not quite cleared the Intersection, and the appellant hit it on the passenger side. The appellant's speed at impact was 119 km/hr – still far over twice the posted limit. The Suzuki was destroyed. Its lone occupant, Dr. Alphonsus Hui, died at the scene from multiple blunt force traumas.

3. At the appellant's trial for dangerous driving, the Crown argued that he was guilty by reason of his grossly excessive speed combined with other substandard driving conduct, such as passing multiple cars in the curb lane, inattentiveness regarding the Toyota and Suzuki, and failing to yield to the turning Suzuki. However, the Crown also argued that the appellant's grossly excessive speeding by itself justified a conviction, because even absent any other driving miscues, it constituted a marked departure from the standard of driving expected of a reasonable person in the same circumstances.

4. The trial judge rejected all of the Crown's arguments. He held that the appellant had passed only a single car from the inside lane, and had not been inattentive to the presence of the Toyota or the Suzuki. He further held that the appellant had the right of way because there was no evidence as to whether Dr. Hui had activated his left-turn signal as required by law. Finally, the trial judge found that the "marked departure" test was not met on the criminal standard because the appellant's excessive speeding had been momentary, lasting only "mere seconds". He therefore acquitted the appellant.

5. The Court of Appeal for British Columbia ("BCCA") allowed the respondent's appeal on the ground that the trial judge erred in law by wrongly conceiving that a principle exists under which a brief period of speeding alone cannot, absent other driving deficiencies, establish the *mens rea* for dangerous driving.[1] The BCCA held that, but for this error, the appellant would have been found guilty, and so overturned the acquittal and entered a conviction.[2]

6. The appellant contends that the BCCA erred in law, because the trial judge did not apply the principle that a brief period of speeding cannot alone establish the *mens rea* for dangerous driving, but rather endorsed the view that "*generally*, where speeding is involved, there are other factors that combine with it to amount to dangerous driving" (emphasis added). The appellant says his acquittal should thus be restored, because the trial judge made no errors of law in acquitting him, and hence there is no proper basis upon which a Crown appeal could succeed.[3]

7. Yet the trial judge did err in law by misconceiving the principles governing whether or when momentary speeding can on its own establish the *mens rea* for dangerous driving. A careful review of his reasons shows that he erred by, in essence, adopting the principle that momentary speeding alone cannot prove the *mens rea*. Alternatively, he erred by adopting the principle that, *generally*, momentary speeding alone cannot satisfy the *mens rea*. Either way, the trial judge erred in law by creating an artificial and unjustified impediment to the Crown proving its case, so as to justify overturning the acquittal.

8. But the trial judge also made several other errors of law that justify overturning the appellant's acquittal. This appeal should thus be dismissed even if, contrary to the respondent's main argument, this Court finds that the trial judge did not misconceive the principles regarding whether or when momentary speeding alone can establish the *mens rea* for dangerous driving.

9. Some of these other errors of law relate to the Toyota that was lingering at the corner of the Intersection, in the appellant's lane, for over three seconds prior to the collision. For example, the trial judge found that the appellant was not inattentive to the Toyota's presence as he accelerated towards the Intersection. But, having made this finding, the trial judge erred in law by

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[1] BCCA Reasons, ¶33, 39-43, Appellant's Record Vol. 1 ("AR1") pp. 40, 42-43.
[2] BCCA Reasons, ¶45, AR1 p. 43.
[3] Appellant's Factum, ¶4-5.

failing to consider the appellant's awareness of the Toyota in determining whether the *mens rea* for dangerous driving was met. In particular, he neglected to consider whether the appellant's awareness of the lingering Toyota, while he accelerated to 140 km/hr behind it, applying his brakes only on entering the Intersection, and avoiding rear-ending it by just 0.5 seconds, helped support a finding that the appellant's driving met the marked departure test.

10. The trial judge also made several legal errors associated with his finding that the appellant saw the Suzuki commence its left turn. For example, having made this finding, the trial judge erred in law by deciding the issue of guilt without considering uncontested evidence from a Crown expert, which established that the Suzuki commenced its turn between 3.0 and 3.5 seconds before the collision. This evidence was highly material to the *mens rea* issue, because the appellant's conduct in accelerating from 50 km/hr to 140 km/hr, and in applying his brakes only on entering the Intersection, despite knowing that the Suzuki was turning left, favoured a finding that his driving satisfied the marked departure test.

11. Regardless of *which* error of law the trial judge committed, not only should the appellant's acquittal be overturned, but a conviction should be entered instead, as the BCCA determined. The appellant accelerated from 50 to 140 km/hr over a period of seconds, and applied his brakes only on or just before entering a major urban intersection with numerous vehicles and pedestrians in the immediate vicinity. This driving conduct, though brief, was deliberate and sustained, as opposed to arising from a momentary period of inattention or a split-second miscalculation. And it was extraordinarily dangerous, presenting an egregiously high risk of easily foreseeable harm to the public. The evidence does not reveal why the appellant decided to drive in this atrociously reckless manner, but in terms of the danger it presented, his driving was tantamount to "drag racing himself" into the Intersection. In these circumstances, there is no realistic possibility that a reasonable trier of fact, committing no errors of law, would have entertained a reasonable doubt as to whether the appellant's driving constituted a marked departure from the standard expected of a reasonable person in the same circumstances.

12. As a final point, the appellant also argues that the Crown should not be permitted to appeal his acquittal on the basis that the trial judge erred in applying the facts to the law, and in particular in applying the facts to the legal definition of the elements of the offence. However, the respondent

is not suggesting that the conviction entered by the BCCA should be upheld on this basis. This issue is thus not engaged on the appeal, and need not be decided by this Court.

B. Statement of Facts

13. The respondent mostly accepts the appellant's statement of facts as accurate, but relies on the following more detailed factual review, which includes pinpoint references to the evidence.

(i) Description of Intersection and Road Conditions at Time of Collision

14. The collision occurred at the Intersection at about 8:43 a.m. on November 14, 2015.[4] It had been raining, and the road was still damp or wet.[5] Traffic was fairly light.[6]

15. Oak Street is a major north-south arterial route in Vancouver. In each direction approaching 41st Ave., there are three through lanes and a dedicated left-turn lane with its own turn signal.[7] 41st Ave. is a major east-west arterial route. In each direction approaching Oak Street, there are two through lanes and a dedicated left-turn lane.[8]

16. The Intersection is a mixed residential and commercial area, with a posted speed limit of 50 km/hr.[9] A nursing home is located at the northwest corner.[10] At the northeast corner is a Petro-Canada gas station with a 7-11 store.[11] When the collision occurred, the lights were on in the 7-11 and vehicles were at the gas pumps, indicating that the business was open.[12]

17. A Jewish community centre called the Lubavitch Centre is at the southeast corner of the Intersection.[13] A Chevron gas station is at the southwest corner.[14] At the time of the collision,

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[4] Trial Reasons, ¶2, AR1 p. 2; Admission ¶1, AR2 p. 97.
[5] Trial Reasons, ¶27-28, AR1 pp. 7-8; Transcript, AR3 12/25-13/18, 39/4-27.
[6] Trial Reasons, ¶27-28, AR1 pp. 7-8; Transcript, AR3 12/25-13/18, 39/4-27.
[7] Trial Reasons, ¶7, 73, AR1 pp. 3, 18; Transcript, AR3 p. 13/24-30, 33/18-22.
[8] Trial Reasons, ¶6, 72, AR1 pp. 3, 18; Transcript, AR3 p. 13/30-40.
[9] Trial Reasons, ¶9, 67, 72, 108-109, AR1 pp. 3, 17-18, 25; Transcript, AR3 pp. 13/41-14/38.
[10] Transcript, AR3 pp. 13/46-47, 31/17-27; Photo 44, AR2 p. 121.
[11] Trial Reasons, ¶9, 67, AR1 pp. 3, 17; Transcript, AR3 pp. 13/41-46, 26/46-27/30; Photos 11-17, AR2 pp. 104-107.
[12] Trial Reasons, ¶70-71, AR1 pp. 17-18; Video 4:43:15 (Frame 17); BCCA Reasons, ¶9-10, AR1 pp. 33-34.
[13] Trial Reasons, ¶9, AR1 p. 3; Transcript, AR3 pp. 14/2-5, 15/46-16/2; Photo 6, AR2 p. 101.
[14] Trial Reasons, ¶9, AR1 p. 3; Transcript, AR3 pp. 13/47-14/2, 24/12-31; Photo 1, AR2 p. 99.

vehicles were at the Chevron's pumps, indicating that it was open.[15] Just south of the Chevron is a building with little businesses or shops, but it was unclear whether any of them were open.[16]

18. There are three bus stops around the Intersection – on Oak Street, to the north[17] and south[18] of 41st Ave.; and on 41st Ave., just west of Oak Street.[19] There was no evidence to suggest that any pedestrians were waiting at these bus stops when the collision occurred.[20]

19. Neither Oak Street nor 41st Ave. has any appreciable curve that would obstruct a motorist's view.[21] The evidence established that people driving on Oak Street will travel faster than 50 km/hr, although how much faster was not in evidence.[22]

20. The street preceding the Intersection as a vehicle travels northbound on Oak Street – 42nd Ave. – is visible in an aerial photo contained in Crown expert Trevor Dinn's report.[23] The distance between city blocks in this area is about 100 metres.[24]

(ii) Main Witnesses Regarding Events Before, During and After the Collision

21. The trial judge accepted **Shedrack Katarama's** evidence as credible and reliable.[25] Mr. Katarama was driving his silver Mercedes B200 northbound on Oak Street into Vancouver when he saw the Audi at an on-ramp to the Oak Street Bridge. The Audi appeared to be "in a hurry", because it merged into traffic by driving directly in front of the vehicle ahead of Mr. Katarama, causing both he and the other driver to brake.[26]

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[15] Video, 4:43:10 to 4:43:12; BCCA Reasons, ¶9-10, AR1 pp. 33-34.
[16] Trial Reasons, ¶9, 67, 70, AR1 pp. 3, 17-18; Transcript, AR3 p. 26/22-31; Photo 8, AR2 p. 102.
[17] Transcript, AR3 p. 14/6-14, 27/17-21; Photo 15, AR2, p. 106.
[18] Video 4:43:12 (Frame 1).
[19] Video 4:43:09 (Frame 1).
[20] Trial Reasons, ¶67, 69, AR1 p. 17.
[21] Trial Reasons, ¶73, AR1 p. 18; Photos 1-15, AR2, pp. 99-106.
[22] Trial Reasons, ¶29, 72, AR1 pp. 8, 18; Transcript, AR3 p. 37/4-36.
[23] Transcript, AR3 p. 110/23-46; Figure 15, Expert Report, Respondent's Record p. 17.
[24] Transcript, AR3 p. 83/32-37.
[25] Trial Reasons, ¶87, AR1 p. 20.
[26] Trial Reasons, ¶19-22, 88, AR1 pp. 6, 21; Transcript, AR3 pp. 88/17-89/14, 91/31-93/5, 94/15-22.

22. Mr. Katarama next saw the Audi in his rear-view mirror as he drove north on Oak Street at 49th Ave.[27] There are no traffic lights between 49th and 41st Avenues.[28] After crossing 42nd Ave., Mr. Katarama continued towards the Intersection at 41st Ave., driving in the centre lane at 50 km/hr. The lights turned green and Mr. Katarama saw the Suzuki making its left-hand turn. Mr. Katarama believed that the Suzuki had plenty of time to turn in front of his Mercedes.[29]

23. The Audi then passed Mr. Katarama's car on the inside and zoomed into the Intersection. There was a horrible crash. Mr. Katarama parked his car and asked the Audi's driver – the appellant – if he was okay. The appellant said yes, and then added, "That was a green light".[30]

24. **Todd Millway** was driving south on Oak Street and had stopped in the Intersection, preparing to turn left onto 41st Ave. He was behind the Suzuki, which was already in the process of turning left. Mr. Millway thought the Suzuki was clearing the Intersection. He was about to see whether it was clear for him to go too, when he saw the Audi come "very, very quickly" down the curb lane and strike the Suzuki.[31]

25. Mr. Millway did not see the Audi until it was a few metres away from the Intersection because of the other cars that were coming along and the angle of entry, and it entered very, very quickly.[32]

(iii) Jimmy Hsieh and the Events Depicted on His Dash-Cam Video

26. Just prior to the collision, Mr. Hsieh was travelling in the curb lane eastbound on 41st Ave., intending to turn right onto Oak Street. As he approached Oak Street, the light was red.[33] Mr. Hsieh's vehicle had a dash-cam. He provided a copy of the dash-cam video to the police, after editing it to remove unrelated content from before and after the crash.[34]

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[27] Trial Reasons, ¶22, 25, AR1 pp. 6-7; Transcript, AR3 pp. 96/14-46.
[28] Transcript, AR3 p. 114/31-34.
[29] Trial Reasons, ¶23, 25, 89, AR1 pp. 6-7, 21; Transcript, AR3 pp. 89/23-35, 93/35-38, 94/11-27, 97/3-38.
[30] Trial Reasons, ¶23-24, 89 AR1 pp. 6, 21; Transcript, AR3 pp. 89/11-90/11, 93/35-44, 97/44-98/12.
[31] Trial Reasons, ¶15, AR1 p. 5; Transcript, AR3 pp. 47/44-48/30.
[32] Transcript, AR3 p. 48/24-30.
[33] Trial Reasons, ¶11, AR1 p. 4; Transcript, AR3 pp. 53/47-54/22, 61/5-25.
[34] Trial Reasons, ¶11, AR1 p. 4; Transcript, AR3 p. 56/4-33, 60/11-28.

27. The dash-cam was not calibrated to real time, so the video clock does not accord with the time at which events occurred.[35] Nonetheless, one second on the clock equates with one second in real time.[36] The video recorded at 30 frames per second.[37] The video starts at 4:43:09 (Frame 1) and ends at 4:43:28 (Frame 11). The collision occurred at 4:43:15 (Frame 5).

28. The trial judge held that the quality of the video was "very good", and that it constituted reliable evidence of the events before, during and after the collision.[38]

29. The video initially depicts events from the vantage point of the eastbound centre lane on 41st Ave. approaching Oak Street, but within a couple of seconds Mr. Hsieh's vehicle has moved into the 41st Ave. curb lane and is proceeding towards the painted stop line at the southwest corner of the Intersection.[39]

30. At the beginning of the video, four vehicles are moving northbound on Oak Street, having presumably just cleared the Intersection.[40] A pickup truck is moving southbound on Oak Street, having presumably cleared the Intersection from the opposite direction.[41] As Mr. Hsieh's vehicle moves forward, the video shows a car moving westbound on 41st Ave., presumably having turned left from Oak Street.[42] Five vehicles are stopped at the red light in the westbound lanes on 41st Ave., while eight vehicles, including Mr. Hsieh's, are either waiting in the eastbound lanes on 41st Ave. or, in two cases, turning right from the curb lane on to Oak Street.[43]

31. The beginning of the video also shows Dr. Hui's Suzuki as the lone stationary vehicle in the left-turn lane on southbound Oak Street. A blue SUV travelling northbound on Oak Street

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[35] Transcript, AR3 pp. 57/28-58/25.
[36] Transcript, AR3 pp. 78/11-14.
[37] Transcript, AR3 pp. 78/30-33, 106/41-45, 107/28-29; AR2, p. 149, ¶2.
[38] Trial Reasons, ¶79-80, AR1 p. 19.
[39] Video, 4:43:09 (Frame 1) to 4:43:11 (Frame 10); Trial Reasons, ¶47, AR1 p. 12.
[40] Video, 4:43:09 (Frame 1) to 4:43:11 (Frame 1).
[41] Video, 4:43:09 (Frames 1-14). As the BCCA noted, over the course of the video about a dozen cars travelling on Oak Street clear 41st Ave., and although there are no lineups for through traffic on Oak Street, cars turning left have to wait to do so (BCCA Reasons, ¶8-9, AR1 pp. 33-34).
[42] Video, 4:43:11 (Frame 26) to 4:43:13 (Frame 3).
[43] Video, 4:43:09 (Frame 1) to 4:43:16 (Frame 1); BCCA Reasons, ¶8 (3rd sentence), AR1 p. 33.

approaches then enters the Intersection from the opposite side of 41st Ave.[44] As Mr. Hsieh's vehicle moves towards Oak Street, and the vantage point of the dash-cam changes, the Suzuki is obscured by stopped vehicles in the centre eastbound lane of 41st Ave., but the blue SUV can still be seen crossing the Intersection, until it too is obscured by these stopped vehicles.[45]

32. Also at the beginning of the video, the front of the green Toyota can be seen in the northbound curb lane on Oak Street, slowing almost to a stop just before the painted stop line in front of the crosswalk, at about 4:43:11 (Frame 2).[46] The Toyota's right turn signal is activated.[47]

33. The Toyota then continues forward to negotiate its right turn, but extremely slowly. By about four-and-a-half seconds into the video (4:43:13 (Frame 13)), which is a little less than two seconds before the Audi hits the Suzuki at 4:43:15 (Frame 5), the Toyota's front wheels have only reached the painted line at the north side of the crosswalk, and the Audi is still not visible in the video.[48] The very slow movement of the Toyota is no doubt the result of the pedestrian who can be seen crossing the east side of 41st Ave. at that time.[49]

34. The vantage point of the video moves forward as the Toyota continues to make its right turn into the eastbound 41st Ave. curb lane, and Dr. Hui's Suzuki becomes visible again. The Suzuki is in the process of turning left on to eastbound 41st Ave. At almost the same time as the Suzuki reappears, the Audi enters the video, at 4:43:13 (Frame 25), travelling at a high rate of

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[44] Video, 4:43:09 to 4:43:10 (Frame 9); Trial Reasons, ¶49, AR1 p. 12.
[45] Video, 4:43:10 (Frame 10) to 4:11:11 (Frame 14).
[46] Video, 4:43:09 (Frame 1) to 4:43:11 (Frame 2).
[47] Although the Toyota's right-turn indicator is visible only after it has completed the turn (Video 4:43:14 (Frame 1) to 4:43:15 (Frame 7)), the trial judge found that it was activated before the Toyota slowed to make the turn (Trial Reasons, ¶50, AR1 p. 12).
[48] 4:43:11 (Frame 2) to 4:43:13 (Frame 13). Trevor Dinn testified that the Toyota was moving "so slowly" that its pre-impact positions over time in his diagram "are partially on top of each other" (Transcript, AR3 p. 110/11-15; Figure 15, Expert Report, Respondent's Record p. 17).
[49] Video 4:43:10 (Frame 11) to 4:43:11 (Frame 14); Trial Reasons, ¶54 (2nd sentence), AR1 p. 13.

speed in the northbound curb lane on Oak Street. The Audi is in the process of passing Mr. Katarama's Mercedes, which is in the northbound centre lane on Oak Street.[50]

35. The Toyota continues its right-hand turn from the northbound Oak Street curb lane onto 41st Ave. The Audi very quickly gains on the Toyota. The Suzuki is continuing its left turn onto 41st Ave. The Audi's front wheels reach the painted stop line in front of the crosswalk at the Intersection at about 4:43:14 (Frame 22), which is 0.5 seconds before it hits the Suzuki.[51]

36. As it enters the Intersection, the Audi almost rear-ends the right-turning Toyota.[52]

37. The Audi hits the passenger side of the Suzuki, just behind centre, at 4:43:15 (Frame 5).[53] The Suzuki, rendered partly airborne, flies backward, strikes a fire hydrant and crashes into the Petro Canada sign at the northeast corner of the Intersection. The Audi spins so that its front is facing southbound, then slides backwards in the northbound curb lane until it goes off camera.[54]

38. As the Audi slides out of the frame, the traffic light for north-south traffic on Oak Street is green and the pedestrian signal on the southwest corner of the Intersection indicates five, then four seconds left to cross the west side of 41st Ave.[55]

39. Post-collision photos show that, after passing a bus shelter, the Audi came to rest on the sidewalk on the east side of Oak Street, partly blocking an entrance to the Petro Canada station.[56]

(iv) Four Pedestrians are Visible on the Dash-Cam Video

40. As the Audi speeds by the southeast corner of the Intersection, the pedestrian who had just crossed the street (see paragraph 33 above) can be seen at that corner. This pedestrian appears to have been heading into the Lubavitch Centre on the corner, but after the collision he or she changes direction, walks to the corner, and looks north towards the wreckage.[57]

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[50] Video 4:43:13 (Frame 14) to 4:43:13 (Frame 30); Trial Reasons, ¶51, AR1 p. 13.
[51] Video 4:43:13 (Frame 30) to 4:43:14 (Frame 21).
[52] Video 4:43:14 (Frame 21) to 4:43:14 (Frame 30).
[53] Video, 4:43:14 (Frame 25) to 4:43:15 (Frame 5).
[54] Video, 4:43:15 (Frame 5) to 4:43:16 (Frame 21).
[55] Video, 4:43:16 (Frame 1) to 4:43:16 (Frame 22).
[56] Photos 15, 26-32, AR2 pp. 106, 112-115.
[57] Video 4:43:14 to 4:43:28.

41. A second pedestrian can be seen walking westbound on 41st Ave. towards the same corner as the Audi speeds into the Intersection. He or she stands still for several seconds, then slowly walks closer to the corner and looks north in the direction of the wreckage.[58]

42. Immediately after the Audi hits the Suzuki, a third pedestrian can be seen walking northbound on the east side of Oak Street.[59] The Audi comes very close to this pedestrian as it spins out of control and slides northbound in the curb lane.[60]

43. After the collision, a fourth pedestrian on the south side of 41st Ave. can be seen running westbound to the southeast corner of the Intersection.[61]

(v) Expert Evidence

44. **Cst. Uwe Rieger** was qualified as an expert in forensic collision reconstruction and analysis.[62] Based on the time the Audi took to travel 27.85 meters between two light standards, Cst. Rieger calculated that its speed between the two standards was 143 km/hr.[63] The second of these standards is located at the southeast corner of the Intersection, at the painted stop line for northbound traffic.[64]

45. **Trevor Dinn, P. Eng.**, was qualified as an expert in motor vehicle collision investigation, reconstruction and analysis.[65] His evidence was that the green Toyota initiated its right turn at

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[58] Video, 4:43:14 (Frame 1) to 4:43:24 (Frame1); Trial Reasons, ¶54 (last sentence), AR1 p. 13.
[59] Video, 4:43:15 (Frames 13-26); Trial Reasons, ¶54, 68, AR1 pp. 13, 17. The trial judge was incorrect to state that this pedestrian was walking westbound on the south side of 41st Ave.
[60] Video, 4:43:15 (Frame 27) to 4:43:16 (Frame 20); Trial Reasons, ¶54, AR1 p. 13.
[61] Video, 4:43:21 to 4:43:28; Trial Reasons, ¶54, AR1 p. 13.
[62] Trial Reasons, ¶32, AR1 p. 8; Transcript, AR3 pp. 72/18-73/34.
[63] Trial Reasons, ¶34-36, 90, AR1 pp. 9, 21; Transcript, AR3 pp. 78/5-81/45, 82/45-83/9. Contrary to the appellant's suggestion (AF ¶11), the evidence does not indicate, and the trial judge did not find, that the appellant accelerated from 50 to 140 km/hr over a 27-metre distance.
[64] Transcript, AR3 pp. 80/46-47, 81/25-26. This standard is depicted at 4:43:16 (Frame 1). The other standard can be seen at 4:43:13 (Frame 30), very near the front of the northbound Audi.
[65] Trial Reasons, ¶38, AR1 p. 10; Transcript, AR3 pp. 98/45-99/6.

4:43:11 (Frame 22), which was 2.1 seconds before the Audi appeared in the video at 4:43:13 (Frame 25), and 3.4 seconds before the Audi hit the Suzuki at 4:43:15 (Frame 5).[66]

46. Mr. Dinn testified that the Suzuki probably started its left turn at about 3.0 to 3.5 seconds prior to impact, because that is when the northbound blue SUV to which the Suzuki was yielding the right of way would have cleared the Intersection.[67] At this point, the green Toyota was in the northbound curb lane with its front bumper near the southerly crosswalk bar,[68] while the Audi was not yet visible in the video (it did not appear until 1.3 seconds before impact).[69] Mr. Dinn used a pen to mark on a photograph the approximate location of the Audi on Oak Street when it first appeared on the video – about half way between 42nd and 41st Avenues.[70]

47. Based on the Audi's positions in the video at 1.2 and 0.5 seconds before impact, Mr. Dinn calculated that it was travelling at 139 km/hr between these two points.[71] At 0.5 seconds before impact, the Audi was almost at the stop line located just in front of the Intersection.[72]

48. Mr. Dinn determined that the Audi came within a half-second of rear-ending the Toyota in the curb lane.[73] The Audi then collided with the Suzuki at a speed of 119 km/h, which meant that it was braking during the period between 0.5 seconds before impact and impact. The Suzuki was travelling at 34 km/hr at the time of impact.[74]

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[66] Figure 12, Expert Report, Respondent's Record p. 14.
[67] Transcript, AR3 pp. 107/35-109/22; Section 5.3, Expert Report, Respondent's Record p. 17.
[68] Section 5.3, Expert Report, Respondent's Record p. 17.
[69] Transcript, AR3 pp. 122/38-123/21; Figure 12, Expert Report, Respondent's Record p. 14.
[70] Hand-drawn oval, Figure 15, Expert Report, Respondent's Record p. 17.
[71] Trial Reasons, ¶42, 90, AR1 pp. 11, 21; Transcript, AR3 pp. 113/26-29, 123/27-44, 130/44-47; Figure 15, Expert Report, Respondent's Record p. 17. Using other data points, he also obtained a speed of 141 km/hr (Transcript, AR3 pp. 130/44-131/8).
[72] Figure 12, Expert Report, Respondent's Record p. 14; Video, 43:14 (Frame 19). See also Figure 15, Expert Report, Respondent's Record p. 17.
[73] Transcript, AR3 p. 113/42-43; 6.0 Conclusions, Expert Report, ¶3, Respondent's Record p. 19.
[74] Trial Reasons, ¶41-42, 90, 94, AR1 pp. 11, 21-22; Transcript, AR3 pp. 113/37-114/6, 123/40-124/8.

49. Mr. Dinn testified that the Audi was very powerful and could accelerate from 0 to 60 m/hr in 4.5 seconds, and from 45 to 65 m/hr in 2.1 seconds, although its acceleration capabilities would not be the same if, as in this case, the road was wet.[75]

(vi) Trial Judge's Key Findings of Fact and Decision to Acquit

50. The trial judge found that businesses near the Intersection were open and pedestrians were in the area at the time of the collision.[76] He also held that traffic was light, visibility was good, and neither 41st Ave. nor Oak Street had any curve that would obstruct a driver's view.[77] He accepted that drivers on Oak Street often travel at above the 50 km/hr posted speed limit.[78]

51. The trial judge found that the appellant was driving at 50 km/hr from before 49th Ave. until 42nd Ave.[79] He further found that there was no evidence that the appellant was overtaking vehicles in the curb lane of Oak Street, except when driving between 42nd and 41st Avenues.[80]

52. The trial judge held that the appellant accelerated from 50 km/hr to about 140 km/hr over a short distance between 42nd and 41st Avenues, in a period of "mere seconds",[81] and that he passed Mr. Katarama's Mercedes "at a high speed" between 42nd and 41st Avenues.[82]

53. Based on his review of the video, the trial judge held that the light was green when the appellant drove into the Intersection,[83] and that the appellant applied the Audi's brakes "just before entering" or "as he entered" the Intersection, but was only able to bring his speed down to 119 km/hr at the time of impact.[84]

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[75] Trial Reasons, ¶43, AR1 p. 11; Transcript, AR3 p. 125/29-125/44, 129/11-40.
[76] Trial Reasons, ¶67-71, 108, AR1 pp. 17-18, 25.
[77] Trial Reasons, ¶55, 73-74, 109, AR1 pp. 13, 18, 25.
[78] Trial Reasons, ¶72, AR1 p. 18.
[79] Trial Reasons, ¶113, AR1 p. 26.
[80] Trial Reasons, ¶96, AR1 p. 22.
[81] Trial Reasons, ¶94, 109, 117, AR1 pp. 22, 25, 27.
[82] Trial Reasons, ¶89, AR1 p. 21.
[83] Trial Reasons, ¶84, AR1 p. 20.
[84] Trial Reasons, ¶52, 94, 101, 109, 114, AR1 pp. 13, 22, 23, 25, 27. A police officer testified that on the video the Audi's brake lights appear to be engaged after it reaches the painted stop line (Trial Reasons, ¶31, AR1 p. 8; Transcript, AR3 pp. 39/37-40/42).

54. The trial judge found that, while the appellant came within half a second of rear-ending the Toyota, the fact was that no collision occurred, and this "close call" was not indicative of inattention on the appellant's part.[85]

55. The trial judge held that the appellant saw the Suzuki "commencing its turn eastbound onto 41st Ave."[86] He came to this conclusion for three reasons. First, the dedicated left-turn lane in which the Suzuki started its turn was at an angle to the curb lane in which the appellant was travelling.[87] Second, the appellant engaged the Audi's brakes "as he entered" the Intersection, which the trial judge concluded was more consistent with attention rather than inattention to "the hazard" posed by the Suzuki as it made a left turn.[88] Third, after the collision the appellant told Mr. Katamara: "That was a green light", which supported the inference that the appellant had seen the Suzuki but did not expect it would turn in front of him on a green light.[89]

56. The trial judge held that the appellant had the right of way because there was no evidence to suggest that Dr. Hui signalled to make a left turn as required by s. 174 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 ("*MVA*").[90]

57. With regard to the *actus reus*, the trial judge found that the respondent's driving was objectively dangerous, stating:

> [108] In this case, the evidence establishes that 41st Ave. at Oak Street in Vancouver is a major intersection. The collision occurred shortly before 9 AM on a Saturday. The intersection is controlled by numerous illuminated traffic lights. The area is a mix of residential and small businesses. Traffic was light in the area. There were also several pedestrians in the area of the intersection.
>
> [109] The posted speed limit is 50 km/h. The Audi is a powerful motor vehicle. This would have been known to the accused. The Audi accelerated over a short distance between 42nd Ave. and 41st Ave. to almost three times the posted speed limit. At the time of impact with the Suzuki the Audi was travelling at 119 km/h.

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[85] Trial Reasons, ¶97, AR1 pp. 22-23.
[86] Trial Reasons, ¶114, AR1 p. 27.
[87] Trial Reasons, ¶98-99, AR1 p. 23.
[88] Trial Reasons, ¶98-101, 114, AR1 pp. 23, 27.
[89] Trial Reasons, ¶98-100, 115, AR1 pp. 23, 27.
[90] Trial Reasons, ¶102, AR1 p. 24.

> [110] I find that the excessive speed of the Audi, taking into account all of the surrounding circumstances, objectively establishes the *actus reus* for dangerous driving beyond a reasonable doubt.[91]

58. As for the *mens rea*, the trial judge concluded that he had a reasonable doubt as to whether the appellant's objectively dangerous conduct as a result of excessive speeding amounted to a marked departure from the standard of a reasonable person.[92] In reaching this conclusion, the trial judge mentioned the following factors:

a. There was no evidence of conduct prior to the collision "that would be described as a marked departure"; *e.g.* the appellant was not speeding before reaching 42nd Ave., ran no red/yellow lights or stop signs, and did not swerve into oncoming lanes.[93]

b. It was daylight, visibility was good, traffic was light and the roadway was wide and straight in both directions.[94]

c. The appellant engaged his brakes "at the time" he entered the intersection, which established that he saw the Suzuki commence its turn onto 41st Ave.,[95] and the appellant's comment after the collision ("That was a green light") established that he did not expect the Suzuki would turn in front of him, because he had the green light.[96]

d. Because the appellant's excessive speed lasted for "mere seconds", his lapse of judgment was only momentary in nature.[97]

(vii) BCCA's Decision

59. The BCCA's decision has already been described at paragraph 5 above.

PART II – RESPONDENT'S POSITION REGARDING APPELLANT'S QUESTIONS

60. The respondent's position on the questions in issue listed in the appellant's factum is that:

1) the trial judge did commit an error of law by misconceiving the test for the *mens rea* of dangerous driving;

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[91] Trial Reasons, ¶108-110, AR1 pp. 25-26.
[92] Trial Reasons, ¶119, AR1 p. 28.
[93] Trial Reasons, ¶113, AR1 p. 26. The trial judge made somewhat similar observations in discussing the case law regarding speeding: see Trial Reasons, ¶103-107, AR1 pp. 24-25.
[94] Trial Reasons, ¶113, AR1 p. 26.
[95] Trial Reasons, ¶114, AR1 p. 27.
[96] Trial Reasons, ¶115, AR1 p. 27.
[97] Trial Reasons, ¶117-119, AR1 pp. 27-28.

2) the trial Crown did advance the theory of liability that momentary excessive speeding alone was sufficient to prove the *mens rea* for dangerous driving;

3) if this Court rejects the respondent's position regarding Question #1 or Question #2, the trial judge nonetheless made several errors of law in his assessment of the evidence, and based on these errors this appeal should be dismissed; and

4) it is not necessary to determine whether or when the Crown can appeal an acquittal arising from the application of a legal standard to the facts, because the respondent is not suggesting that the appellant's acquittal should be overturned on this basis.

PART III – STATEMENT OF ARGUMENT

A. General Principles Regarding Crown Appeals from Acquittal

61. On an appeal from acquittal under s. 676(1)(a) of the *Criminal Code*, the Crown is restricted to a "question of law alone".

62. Sometimes a trial judge's shortcomings in assessing the evidence can amount to an error of law.[98] Three situations in which this type of error of law can occur are relevant to this appeal.

63. First, it is an error of law for a trial judge to make a finding of fact for which there is no supporting evidence. However, this principle generally does not apply to a decision to acquit based on a reasonable doubt.[99]

64. Second, it is an error of law to assess the evidence based on the wrong legal principle.[100]

65. Third, it is an error of law for a trial judge to fail to consider all of the evidence in relation to the ultimate issue of guilt or innocence, although the reasons must demonstrate that this was not done.[101] A trial judge is not required to refer to every item of evidence considered or to detail how it was assessed, provided the reasons are responsive to the case's live issues.[102] Caution must be taken to avoid seizing on a perceived deficiency in a trial judge's reasons for acquittal as a conceit to create a ground of unreasonable acquittal.[103]

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[98] *R. v. J.M.H.*, 2011 SCC 45, ¶24.
[99] *J.M.H.*, ¶25-26.
[100] *J.M.H.*, ¶29-30.
[101] *J.M.H.*, ¶31.
[102] *J.M.H.*, ¶32.
[103] *J.M.H.*, ¶32.

66. Even where a trial judge has been shown to have erred in law, a Crown appeal will succeed only where the Crown can also establish that the error might reasonably be thought to have had a material bearing on the acquittal.[104]

B. Respondent Can Advance Any Argument in Support of the Judgment Below

67. As a respondent in this Court, the Crown can advance any argument on the appeal that would support the judgment below, apart from a new argument that would have required additional evidence to be adduced at trial.[105]

C. General Principles Regarding Dangerous Driving

68. The offence of dangerous driving is set out in s. 249(1)(a) of the *Criminal Code*, and the *actus reus* of the offence is defined by the words in s. 249(1)(a). The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was driving in a manner that was dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the vehicle was being operated and the amount of traffic that at the time was or might reasonably be expected to have been at that place.[106]

69. The *mens rea* of dangerous driving is determined by applying a modified objective test, which asks whether, on the basis of all of the evidence, including any evidence about the accused's actual state of mind, the accused's driving amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances.[107]

70. In determining whether the *actus reus* and *mens rea* have been established, it is the manner in which the vehicle was operated that is at issue, not the consequences of the driving, although the consequences may assist in assessing the risk created by the manner of driving.[108]

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[104] *R. v. Graveline*, 2006 SCC 16, ¶14-16.
[105] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶58; *R. v. Keegstra*, [1995] 2 S.C.R. 381, ¶25-26; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at 643-644, ¶20 (QL).
[106] *R. v. Beatty*, 2008 SCC 5, ¶43(a), 45; *R. v. Roy*, 2012 SCC 26, ¶28, 33-35.
[107] *Beatty*, ¶43(b), 48; *Roy*, ¶28, 36, 39.
[108] *Beatty*, ¶46; *Roy*, ¶34-35; *R. v. Romano*, 2017 ONCA 837, ¶64-86; *R. v. Ally*, 2017 ONCA 67, ¶7.

71. For example, in *R. v. Romano*, 2017 ONCA 837, a police officer was travelling 109 km/hr in a 60 km/hr zone, in an effort to catch up with other officers he was assigned to assist,[109] when he hit and killed a pedestrian who was jaywalking on a four-lane city street in the nighttime.[110] The jury charge included passages that instructed the jury to assess whether the *mens rea* for dangerous driving had been proven by examining whether the collision with the pedestrian was foreseeable and avoidable, as opposed to whether the manner of driving presented foreseeable and avoidable risks to the public.[111]

72. Writing for the Court, Justice Paciocco held that these passages were in error because in assessing the *mens rea* the focus should be on the manner of driving, not its consequences. This is so because it is an offence to drive dangerously even if no one is injured; the conduct that the offence captures is driving in a manner that puts the public at risk.[112] Indeed, the wording in s. 249(1)(a) makes clear that what is relevant is the danger to the public generally.[113] Accordingly, the proper issue for the jury to consider was not the specific question of whether the collision with the jaywalking pedestrian was foreseeable and avoidable, but the more general question of whether the manner of driving created foreseeable risks to the public, including the risks that would arise if persons entered the roadway.[114]

D. Trial judge erred in law by misconceiving test for *mens rea* of dangerous driving

73. The trial judge did err in law by misconceiving the test for the *mens rea* of dangerous driving. This is so either because, as the BCCA held, he wrongly conceived that a principle exists pursuant to which a brief period of speeding alone *cannot* satisfy the *mens rea* requirement, or because he wrongly conceived that a principle exists pursuant to which a brief period of speeding alone *generally cannot* satisfy the *mens rea* requirement.

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[109] *Romano*, ¶2.
[110] *Romano*, ¶22, 49.
[111] *Romano*, ¶74-82
[112] *Romano*, ¶68-71.
[113] *Romano*, ¶72.
[114] *Romano*, ¶78.

(i) Trial Crown's position in closing submissions

74. At trial, the Crown argued that excessive speed alone can constitute dangerous driving, even where the driving is not also deficient in other respects, and cited several cases in support of this proposition, including *R. v. Richards*, (2003), 174 C.C.C. (3d) 154 (Ont. C.A.), ¶7-12, *R. v. Malkowski*, 2015 ONCA 887, and *R. v. Ally*, 2017 ONCA 67, ¶15 (2nd sentence). In particular, *Richards*, ¶11, holds that "under certain circumstances, evidence of excessive speed, in itself, can constitute the offence of dangerous driving" and confirms the comment in *R. v. M.(M.K.)* (1998), 35 M.V.R. (3d) (Ont. C.A.), ¶2 (QL), that, "depending on the context in which it occurred, excessive speed can amount to a marked departure from the standard of care of a prudent driver".[115]

(ii) Reasons in the courts below: momentary excessive speed and dangerous driving

75. In the section of his reasons entitled "Excessive Speed in the Context of Dangerous Driving", the trial judge discussed case law addressing whether excessive speed can on its own, absent any other deficient driving conduct, establish the *mens rea* for dangerous driving.[116]

76. In this discussion, the trial judge distinguished several authorities, including the *Malkowski* and *Ally* cases relied on by the Crown, on the ground that in those cases the impugned driving included not just momentary excessive speed, but other risky conduct such as driving after consuming alcohol, cutting corners, occupying the wrong lane, racing with another vehicle, or speeding for an extended period of time.[117]

77. The trial judge then referenced *R. v. St. Pierre*, 2005 BCSC 1899, ¶21, for the proposition that, "generally, where speeding is involved, there are other factors that combine with it to amount to dangerous driving", such as a failure to keep a proper lookout for other cars, missing traffic control signs, permitting distractions to take one's attention from the road, speeding in a car that is unfamiliar or in poor mechanical condition, or speeding at night or in difficult driving conditions.[118]

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[115] Transcript, AR3 pp. 136/5-8, 150/37-156/29, 160/10-15; Written Argument, AR2 pp. 201-202, ¶60-65.
[116] Trial Reasons, ¶103-107, AR1 pp. 24-25.
[117] Trial Reasons, ¶103-106, AR1 pp. 24-25.
[118] Trial Reasons, ¶107, AR1 p. 25.

78. In assessing the *mens rea* for dangerous driving in this case, the trial judge held that the appellant had engaged in no other driving conduct "that would be described as a marked departure" from the standard expected of a reasonable person. In this respect, the trial judge noted that the appellant did not run any stop signs or traffic lights, or swerve into an oncoming lane, and he did not speed until after he reached 42nd Ave. Visibility was good, and the road was wide and straight, with light traffic. And he was not inattentive to the presence of the turning Suzuki.[119] Although not mentioned in this part of the judgment, the trial judge had previously concluded that the appellant had the right of way in entering the Intersection,[120] and that he was not inattentive to the presence of the Toyota in the curb lane.[121]

79. In short, the trial judge ruled out the presence of any additional risk factors of the sort that he had canvassed in the part of his reasons entitled "Excessive Speed in the Context of Dangerous Driving". Having done so, the trial judge concluded: "Critically, I find that the excessive speed was momentary – mere seconds in duration", and held that he therefore had a reasonable doubt as to whether the marked departure test had been met. The trial judge concluded that, "the momentariness of the accused's conduct in excessively speeding" was "insufficient to meet the criminal fault component" for dangerous driving.[122]

80. On appeal, the BCCA held that the trial judge erred in law by holding that momentary speeding, unless combined with other dangerous driving conduct, cannot sustain a conviction for dangerous driving.[123]

(iii) Trial judge erred in law by misconceiving test for the mens rea of dangerous driving

81. The appellant says the BCCA erred in overturning the acquittal because the trial judge's adoption of the proposition in *St. Pierre* that "generally, where speeding is involved, there are other factors that combine with it to amount to dangerous driving" (emphasis added), shows that

[119] Trial Reasons, ¶113-115, AR1 pp. 26-27.
[120] Trial Reasons, ¶102, AR1 p. 24.
[121] Trial Reasons, ¶97, AR1 pp. 22-23.
[122] Trial Reasons, ¶117-120, AR1 pp. 27-28.
[123] BCCA Reasons, ¶31-33, 40, 42-43, AR1 pp. 38-40, 42-43.

the trial judge did not conclude that a principle exists pursuant to which speeding alone can never establish the *mens rea* for dangerous driving.[124]

82. However, a careful reading of the trial judge's reasons reveals that he did, in fact, err in law by misconceiving the test for the *mens rea* for dangerous driving, in one of two ways. Either he wrongly adopted the principle that momentary excessive speed alone can *never* satisfy the *mens rea*. Or he wrongly adopted the principle that momentary excessive speed alone *generally* cannot satisfy the *mens rea*.

83. The trial judge's erroneous view of the law is evident in a number of aspects of his reasons for judgment.

84. To begin with, the trial judge distinguished the cases discussed in his reasons on the basis that they involved more than just momentary excessive speed, which suggests that he was adopting the principle that momentary excessive speed, without more, either cannot under any circumstances, or generally cannot, satisfy the *mens rea* for dangerous driving.

85. Furthermore, the trial judge declined to follow the principle set out in *Richards*, namely, that "under certain circumstances, evidence of excessive speed, in itself, can constitute the offence of dangerous driving", insofar as he stated that *Richards* was a pre-*Beatty* case that had been followed but rarely, and only where the circumstances comprised of more than just excessive speed.[125] The clear tenor of the trial judge's reasons in this respect is that the principle articulated in *Richards* does not represent good law.

86. It is in this context that the trial judge noted that *St. Pierre*, while "also a pre-*Beatty* case," was nonetheless "useful as it establishes that generally, where speeding is involved, there are other factors that combine with it to amount to dangerous driving". Having declined to follow the principle in *Richards*, the trial judge thus endorsed a <u>different</u> principle, namely, that speeding alone will <u>generally</u> not suffice to satisfy the *mens rea* for dangerous driving. At the very least,

[124] Appellant's Factum, ¶55-57.
[125] Trial Reasons, ¶105, AR1 p. 24.

then, the trial judge adopted the proposition that speeding alone is ordinarily or usually insufficient to justify the imposition of criminal fault for dangerous driving.

87. Next, after holding that the only flaw in the appellant's driving was excessive speed,[126] the trial judge observed that, "critically", the speeding was momentary, amounting to "mere seconds in duration". He then adopted a comment by Justice Doherty in *R. v. Willock* (2010), 210 C.C.C. (3d) 60 (Ont. C.A.), ¶31, that "conduct that occurs in such a brief timeframe in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum."[127] This reliance on *Willock* provides additional support for the conclusion that the trial judge proceeded on the erroneous basis that momentary speeding, without more, is in law either incapable of satisfying the *mens rea* for dangerous driving, or is generally incapable of doing so.

88. In this respect, it is worth noting that in *Willock* the evidence was reasonably capable only of establishing "a momentary lapse of attention" on the part of the accused driver, which led him to lose control of his car on a highway.[128] In these circumstances, Justice Doherty's proposition that driving conduct of two or three seconds duration that is otherwise proper in all respects is more suggestive of civil than criminal liability is justified. But this proposition is not justified where the conduct of two or three seconds duration is deliberate, as Justice Doherty recognized in the very next paragraph of his judgment, where he observed that a criminal conviction for criminal negligence (the charge in *Willock*) would have been reasonable had the evidence shown that the accused lost control of the vehicle because he was jerking the steering wheel to impress or frighten his passengers.[129]

89. Having held that the appellant's speeding was more suggestive of civil than criminal liability because it was "mere seconds in duration", the trial judge concluded that "the momentariness of the accused's conduct in excessively speeding is insufficient to meet the criminal fault standard and he must be acquitted". [130] Prior to coming to this conclusion, the trial

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[126] Trial Reasons, ¶117, AR1 p. 27.
[127] Trial Reasons, ¶113-116, AR1 pp. 26-27.
[128] *Willock*, ¶36.
[129] *Willock*, ¶32.
[130] Trial Reasons, ¶120, AR1 p. 28.

judge did not engage in any analysis as to whether, despite the momentary nature of the driving conduct, the appellant's deliberate acceleration into a major urban intersection at almost three times the speed limit could constitute a marked departure from the standard expected of a reasonable person in the same circumstances.

90. The trial judge's failure to carry out such an analysis further supports the conclusion that he was proceeding on the basis that momentary speeding alone cannot satisfy the *mens rea* for dangerous driving. It does not matter that the trial judge did not expressly state that speed alone cannot satisfy the marked departure test, because his reasons viewed as a whole indicate that this was the principle upon which he based the acquittal.[131] Alternatively, his decision to acquit was based on the principle that momentary speeding alone will generally not suffice to satisfy the *mens rea* for dangerous driving.

91. Ultimately, whether momentary speeding alone can satisfy the *mens rea* for dangerous driving depends on the circumstances of the case. It is an error of law to proceed on the basis that, absent other deficient driving conduct, speeding alone can *never* amount to a marked departure, or will *generally* not meet this standard. Such an error is especially problematic where, as in this case, the speeding is deliberate and wildly excessive, and there is no evidence to suggest that it was caused by a perceived risk that might have led to the same reaction in other ordinary drivers.[132] In such circumstances, to proceed on the principle that momentary speeding alone cannot, or

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[131] See *R. v. Abramoff*, 2018 SKCA 21, ¶38-44, where the trial judge's erroneous conclusion that a pattern of dangerous driving behaviour was necessary to satisfy the marked departure test was implicit in the way that she had structured her reasons.

[132] Contrast *R. v. Harry*, 2018 BCSC 820, ¶61-66, where the accused's initial decision to speed to escape a tailgating driver was a "momentary lapse in judgement" that, while not ideal, fell within "the norm of typical reactions of ordinary drivers" and so did not amount to a marked departure. Nonetheless, because the accused continued to speed for a period of time and at a rate beyond what was reasonably necessary to avoid the tailgating driver, his driving constituted a marked departure and so justified a conviction for dangerous driving.

generally cannot, constitute dangerous driving is to erect an artificial and unjustified impediment to the Crown proving its case, and therefore constitutes an error in law.

(iv) Trial judge's error justifies overturning the acquittal and entering a conviction

92. There is no reasonable possibility that, but for the trial judge's error, a trier of fact, properly instructed, would have acquitted the appellant. The BCCA was therefore correct not only to quash the acquittal, but in addition to enter a conviction pursuant to s. 686(4)(b)(ii) of the *Criminal Code*.

93. In this respect, it is worth commenting on the concepts of momentary lapses of attention, and momentary lapses of judgment, in context of the offence of dangerous driving.

94. In *Beatty*, the accused's momentary lapse of *attention* caused his vehicle to cross the centre line and immediately collide with another vehicle, killing three of its occupants. In these circumstances, this Court recognized that, given the "automatic and reflexive nature" of driving, even the most able and prudent driver will from time-to-time suffer from momentary lapses of attention, the product of "little conscious thought", which while they may be objectively dangerous, should not be viewed as a marked departure and thus criminalized.[133]

95. In *Roy*, a similar result was occasioned by a momentary lapse of *judgment*, as the accused's decision to pull on to a highway at a difficult intersection, and in poor visibility, was caused by a single and momentary miscalculation regarding the speed and distance of an oncoming tractor-trailer. In such circumstances, this Court held that the accused's driving could not reasonably be seen to constitute a marked departure from the standard expected of a reasonable person in the same circumstances.[134]

96. In the case at bar, the trial judge found that the appellant knew that his car was powerful. And there was no evidence to suggest that the acceleration was unintentional. Indeed, the trial judge found that the appellant's excessive speeding was the result of a lapse in judgment, not a

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[133] *Beatty*, ¶34.
[134] *Roy*, ¶54-55.

lapse of attention. Nor was there any evidence to suggest that this lapse of judgment was an understandable reaction to a reasonably perceived danger.[135]

97. Intentionally accelerating to almost three times the speed limit into a major city intersection over a period of seconds does not reflect the type of "automatic and reflexive" driving, or split-second miscalculation, exhibited in *Beatty* and *Roy*. Rather, it constitutes deliberate, sustained and exceptionally dangerous conduct that rendered the appellant completely incapable of responding to any risk arising at the Intersection, and left everyone else at the Intersection, whether pedestrian or driver, unable to adequately gauge the appellant's speed, let alone safely react to it. The record is silent as to *why* the appellant decided to accelerate as he did, but in the absence of any evidence capable of supporting a good reason for doing so, his deliberate driving conduct can aptly be described as, or analogized to, "drag racing with himself", in terms of both its extreme recklessness and the acute danger that it presented.

98. In these circumstances, the appellant's driving could only be reasonably seen as a marked departure from the standard expected of a prudent driver in the same circumstances. The appellant would therefore have been convicted but for the trial judge's error of law, and the BCCA was right to enter a conviction rather than simply ordering a retrial.[136]

(v) New issue raised by BCCA

99. To the extent that this error of law was distinct from the grounds of appeal raised by the Crown, the BCCA had the jurisdiction to raise the issue because, but for the error, there is every reason to believe that the appellant would have been convicted.[137] Any concern about an absence of notice to the parties is moot, because this Court has received full submissions on the issue.[138]

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[135] See footnote 132.
[136] BCCA Reasons, ¶33 (last sentence), 39-45, AR1 pp. 40, 42-43; *R. v. Cassidy*, [1989] 2 S.C.R. 345 at 354"h" -355"a", ¶16 (QL).
[137] *Barton*, ¶50.
[138] *Barton*, ¶51.

E. Trial Crown did advance theory of liability that momentary excessive speed alone was sufficient to prove *mens rea* for dangerous driving

100. The appellant's alternative argument is that, even if the trial judge erred in law regarding whether or when speed alone can satisfy the *mens rea* for dangerous driving, his acquittal should be restored because the trial Crown never advanced a theory of liability pursuant to which he could be convicted based on excessive speed alone. He says that, in overturning the acquittal based solely on his grossly excessive speed, the BCCA erroneously permitted the Crown to advance on appeal a different case from the one it chose to advance at trial.[139]

101. This argument cannot succeed, however, because the theory of liability advanced by the trial Crown encompassed the possibility of a conviction founded solely on the appellant's grossly excessive speeding.

(i) The applicable legal principles

102. As recently held in *R. v. Barton*, 2019 SCC 33, due to fairness concerns, and in particular the principle against double jeopardy enshrined in s. 11(h) of the *Charter*, the Crown is barred from securing a retrial by advancing a new theory of liability for the first time on appeal. Double jeopardy concerns are especially acute where the arguments on appeal contradict positions taken by the Crown at trial. Accordingly, the Crown cannot put forward a different case on appeal than the one it chose to advance at trial.[140]

103. In *Barton*, the accused argued that, because the Crown had not objected to the admissibility of the victim's prior sexual activity at trial, it should not be permitted to appeal based on the trial judge's failure to comply with the limitations on admissibility set out in s. 276 of the *Criminal Code*. This Court rejected this argument, and allowed the Crown to raise the objection for the first time on appeal, because the ultimate responsibility for enforcing s. 276 lay with the trial judge, a responsibility that could not be waived by mere inadvertence on the Crown's part, in particular given that the Crown gained no tactical advantage by failing to object.[141]

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[139] Appellant's Factum, ¶27, 64-69.
[140] *Barton*, ¶47.
[141] *Barton*, ¶68.

(ii) Applying the legal principles to the facts of this case

104. While the trial Crown argued that several risky or careless aspects of the appellant's driving combined to meet the marked departure test, this does not mean that the Crown chose to advance a theory of liability pursuant to which the appellant's grossly excessive speed could not, in itself, constitute dangerous driving. The appellant's grossly excessive speeding was the centrepiece of the Crown's case. As the trial Crown stated near the beginning of her closing submissions, the appellant "was driving dangerously, for a number of reasons, not just speeding, but certainly because he was excessively speeding".[142]

105. More specifically still, in her closing the trial Crown pointed out that the defence would likely argue that the appellant's driving consisted solely of speeding and so could not constitute dangerous driving, and noted that a key issue would therefore be whether the appellant's speeding amounted to dangerous driving.[143] In anticipation of this defence argument, the trial Crown contended that, pursuant to cases such as *Richards*, and especially *Malkowski*, excessive speed alone could constitute dangerous driving.[144] She adopted a passage from *Malkowski*, regarding the *mens rea* for dangerous driving being established because the accused was speeding at three times the posted limit, as representing "the thrust" of the Crown's position in the appellant's case.[145] The trial Crown returned to this theme later in her closing, noting that, while some of the "speed alone" cases involved speeding on a highway, the appellant had accelerated to almost three times the speed limit at an intersection in the heart of the city.[146]

106. Given these submissions, it is not surprising that in his closing defence counsel spent considerable time addressing whether speed alone could satisfy the marked departure test.[147] At one point he stated: "Nor can you go and suggest, as my friend has done, that speed alone permits

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[142] Transcript, AR3 p. 136/5-8. Also see AR3 p. 136/15-17.
[143] Transcript, AR3 pp. 136/22-35.
[144] Transcript, AR3 pp. 136/5-8, 150/37-156/29, 160/10-15; Written Argument, AR2 pp. 201-202, ¶60-65.
[145] Transcript, AR3 p. 150/37-151/46.
[146] Transcript, AR3 pp. 160/10-15.
[147] Transcript, AR3 pp. 174/33-177/35, 181/40-182/43, 183/14-33, 184/46-185/20, 187/26-46, 190/26-191/17, 192/15-193/11; Written Argument, AR2 pp. 174-182, 185-189, ¶22-47, 57-58, 61, 64-66.

a finding of dangerous driving".[148] Defence counsel thus correctly perceived that the Crown was arguing that the appellant's grossly excessive speed could, by itself, satisfy the *mens rea* for dangerous driving. And in response, he relied on the same passage from *St. Pierre* that the trial judge relied on in acquitting the appellant,[149] and argued that "it is implicit in a charge of dangerous driving that factors other than speed must be present in order to establish the alleged offence".[150]

107. In sum, the record shows that the trial Crown contended that the appellant's speeding could, by itself, amount to dangerous driving. This is therefore not a case in which the Crown is seeking to advance a new theory of liability for the first time on appeal.

F. The Trial Judge's Other Errors of Law

108. The appellant argues that, if the trial judge did not misconceive the test for the *mens rea* for dangerous driving, his conviction should be overturned, and the acquittal restored, because the trial judge otherwise applied the correct legal principles and committed no error of law.[151]

109. The respondent's position is that, even if the trial judge did not err in law as to whether or when speed alone can satisfy the *mens rea* for dangerous driving, he made several errors of law in assessing the evidence, and based on these errors this appeal should be dismissed.

(i) Errors of Law Regarding the Appellant's Near Rear-Ending of the Toyota

110. The trial judge found that, although the appellant almost rear-ended the Toyota that had been lingering at the Intersection prior to the collision, he was not inattentive to its presence. However, having made this finding, the trial judge erred in law by failing to go on to consider the appellant's awareness of the Toyota in determining the ultimate issue of guilt. Alternatively, he erred in making this finding to begin with, either because it was the result of an incorrect application of the law, or because it was unsupported by the evidence.

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[148] Transcript, AR3 p. 174/39-41.
[149] Transcript, AR3 p. 182/44-183/5; Written Argument, AR2 pp. 176-177, ¶26-28.
[150] Written Argument, AR2 p. 189, ¶66 (original emphasis).
[151] Appellant's Factum, ¶5, 73-74.

Crown's submission and trial judge's finding regarding appellant's awareness of Toyota

111. One of the trial Crown's submissions was that the appellant's driving constituted a marked departure in part because he was not paying attention to what was happening in front of him as he accelerated towards the Intersection, and so he did not see the right-turning Toyota, with the result that he came within 0.5 seconds of rear-ending it as he entered the Intersection at a grossly excessive speed.[152]

112. In his review of the evidence, the trial judge observed that it was unclear from the video whether, had the appellant not braked just before entering the intersection, he would have rear-ended the Toyota.[153] Then, as part of his analysis of "Excessive Speed in the Context of Dangerous Driving", the trial judge addressed the Crown's submission regarding the near rear-ending of the Toyota, stating as follows:

> [95] In part, the Crown has submitted that the appellant was not attentive to the upcoming intersection as he travelled north on Oak Street.
>
> […]
>
> [97] While the accused came close to rear ending the right turning vehicle onto E. 41st Ave., the fact is that no collision occurred. From a careful review of the dashboard camera video, I would describe what took place as a close call but not indicative of an inattention on the part of the accused.[154]

Trial judge erred by not considering appellant's awareness of the Toyota in assessing *mens rea*

113. If, as the trial judge found, the appellant was aware of the Toyota's lingering presence in the curb lane at the corner of the Intersection, this means that, *despite this knowledge*: (i) the appellant accelerated to a grossly excessive speed; (ii) applied his brakes only on or just before entering the Intersection; and (iii) missed rear-ending the Toyota by a mere 0.5 seconds. There is a strong argument that no reasonable person with this awareness of the Toyota's presence would have driven towards the Intersection in such a highly reckless manner. The appellant's awareness of the Toyota was thus material to whether the marked departure test was met.

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[152] Trial Reasons, ¶56, Bullet 6(2), AR1 pp. 13-14; Transcripts, AR3, pp. 138/17-39, 144/19-28, 145/8-11, 145/22-41, 150/36-151/46, 158/35-43, 159/16-23, 160/36-44; Written Argument, AR2 pp. 195, 198-199, 205-206, ¶17-18, 42-44, 48-49, 74-76, 80-82.
[153] Trial Reasons, ¶52, AR1 p. 13.
[154] Trial Reasons, ¶95, 97, AR1 pp. 22-23.

114. However, the trial judge said nothing about the appellant's awareness of the Toyota in analyzing whether the *actus reus* or *mens rea* for dangerous driving were made out. The only reasonable conclusion is that, having found that the appellant was not inattentive to the Toyota's presence, the trial judge concluded – wrongly – that his manner of driving *vis-à-vis* the Toyota was irrelevant to the assessment of whether the charged offence was proven. The trial judge thus erred in law by failing to consider the appellant's awareness of the Toyota in determining the ultimate issue of guilt, in particular regarding the *mens rea* for dangerous driving.

115. But for this error, there is at the very least a reasonable possibility that the trial judge would have concluded that the *mens rea* for dangerous driving was established, because the appellant's awareness of the lingering Toyota materially supported the conclusion that accelerating towards the Intersection (and thus the Toyota) at a grossly excessive speed constituted a marked departure from the standard expected of a reasonable person in the same circumstances.

116. Finally, reliance on this error in seeking to uphold the result in the BCCA does not amount to the Crown advancing a new theory of liability on appeal. Rather, as part of her argument based on the "speed alone" cases such as *Richards* and (especially) *Malkowski*, the trial Crown submitted that a reasonable person in the same circumstances would have foreseen the risk created by the right-turning Toyota and taken steps to avoid the risk by slowing down.[155] Accordingly, while the trial Crown argued that the appellant was inattentive to the Toyota's presence, she also argued that the appellant's grossly excessive speed alone met the marked departure test, in part, because a reasonable person would not have driven towards the lingering Toyota at such a grossly excessive speed.

Trial judge erred by finding that the appellant was not inattentive to the Toyota's presence

117. If this Court concludes that, contrary to the submissions just made, the trial judge did not err by failing to consider the appellant's awareness of the Toyota in assessing whether the *mens rea* for dangerous driving had been made out, the trial judge nonetheless erred in law in finding that the appellant's manner of driving *vis-à-vis* the Toyota was not indicative of inattention, for either or both of the following two reasons.

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[155] Transcript, AR3 pp. 150/36-152/34. See also Transcript, p. 145/22-41, and Written Argument, AR2 p. 199, ¶48-49.

118. First, the trial judge's conclusion that the appellant's close call in almost rear-ending the Toyota was not due to inattention was based, at least in part, if not largely or entirely, on the fact that no collision had occurred. In particular, he stated:

> [97] While the accused came close to rear ending the right turning vehicle onto E. 41st Ave., the fact is that no collision occurred. From a careful review of the dashboard camera video, I would describe what took place as a close call but not indicative of an inattention on the part of the accused.[156] [emphasis added]

119. As explained at paragraphs 70-72 above, whether or not the impugned driving results in a collision is not the proper focus in analyzing the *actus reus* or *mens rea* for dangerous driving. Rather, the focus must be on the manner of driving given the objectively foreseeable risks, whether or not any of those risks actually come to pass. The trial judge's misplaced focus on the absence of a collision demonstrates that he assessed the evidence regarding the Toyota based on the wrong legal principle, and thus constitutes an error of law.

120. But for this error, the trial judge would have found that the appellant was inattentive to the presence of the Toyota, because the evidence established that: (i) the Toyota lingered at the Intersection in the curb lane, with its right-turn indicator engaged, for over three seconds prior to the appellant hitting the Suzuki; (ii) during this period, the appellant accelerated towards the Intersection in the same lane, reaching the grossly excessive speed of 140 km/hr; (iii) the appellant only applied his brakes on or just before entering the Intersection; and (iv) he missed rear-ending the Toyota by 0.5 seconds, which as the trial judge correctly noted constituted a "close call".

121. Had the trial judge found that the appellant was inattentive to the presence of the Toyota in the curb lane, there is at the very least a good possibility that he would have concluded that the *mens rea* for dangerous driving was made out. This is so because the evidence would have established not only grossly excessive speeding by the appellant, but also inattentiveness to what was happening at the Intersection. A material point upon which the trial judge rested his reasonable doubt, at least in part, would therefore no longer have been applicable, and the Crown case would have been strengthened as a result.

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[156] Trial Reasons, ¶97, AR1 pp. 22-23.

122. Second, and in any event, the trial judge's finding that the appellant was not inattentive to the presence of the Toyota constitutes an error of law because it is not supported by the relevant evidence, which is set out at paragraph 120 above. The trial judge was plainly wrong to suggest that "a careful review of the dashboard camera video" provided a basis for concluding that the appellant was not inattentive to the Toyota's presence. But for this error, there is at the very least a reasonable possibility that the trial judge would have found that the *mens rea* for dangerous driving had been made out, for the reasons provided at paragraph 121 above.

(ii) Error of Law Regarding the Timing of the Suzuki Commencing Its Turn

123. The trial judge erred in law by determining the ultimate issue of guilt without considering Crown expert Trevor Dinn's uncontested evidence that the Suzuki commenced its turn 3.0 to 3.5 seconds before impact. As explained below, this overlooked evidence was significant to the *mens rea* issue, and there is at the very least a reasonable possibility that the result would have been different had it been considered by the trial judge.

Trial judge erred by failing to consider Mr. Dinn's evidence in assessing *mens rea*

124. In assessing whether the *mens rea* for dangerous driving was made out, the trial judge found that the appellant saw the Suzuki commence its left turn. The trial judge also implicitly found that, until the Suzuki commenced its left turn, the appellant did not expect that it would turn in front of him because he had the green light.[157] In light of these findings, any evidence bearing on when the Suzuki commenced its left turn became material to the *mens rea* analysis. The key evidence on this point came from Mr. Dinn, who testified that the Suzuki probably commenced its left turn between 3.0 and 3.5 seconds before impact with the Audi.[158]

125. Mr. Dinn's evidence on this point was not challenged by the defence in cross-examination or closing submissions. If accepted, it necessarily established that the appellant's expectation that the Suzuki would not turn in front of him ended between 3.0 and 3.5 seconds prior to impact, because that is when he saw the Suzuki start its turn. This would mean that, despite knowing that the Suzuki was turning left, over the next several seconds the appellant accelerated from 50 km/hr to 140 km/hr, and only applied his brakes on or just before entering the intersection. There is a

[157] See paragraphs 55 and 58(c) above.
[158] See paragraph 46 above.

strong, indeed overwhelming, argument that such conduct would represent a marked departure from the standard expected of a reasonable person in the same circumstances.

126. However, in determining the ultimate issue of guilt, and in particular whether the *mens rea* for dangerous driving was made out, the trial judge failed to consider Mr. Dinn's evidence regarding when the Suzuki commenced its turn. This failure constitutes an error of law. And, for the reasons explained in the preceding paragraph, there is at the very least a reasonable possibility that but for this error the verdict at trial would have been different.

127. It is true that, early in his reasons, when recounting what he saw on the video, the trial judge commented that the Suzuki started to make its turn at the same time as the Toyota slowed down to turn onto 41st Ave.[159] It is also true that a review of the video shows that the Toyota slowed down, almost to a stop, to turn onto 41st Ave. at about 4:43:11 (Frame 2), which is 3.4 seconds before the Audi hit the Suzuki at 4:43:15(5). The trial judge's comment that the Suzuki commenced its left turn at the same time as the Toyota slowed down to turn is thus consistent with Mr. Dinn's evidence that the Suzuki likely started its left turn between 3.0 and 3.5 seconds before impact.

128. But the mere fact that a piece of evidence is mentioned somewhere in a trial judge's reasons does not necessarily mean that it was properly considered in relation to the ultimate issue of guilt.[160] For example, in *R. v. Laverdure*, 2018 ONCA 614, ¶24-28, the trial judge fully considered all of the relevant evidence in assessing the *actus reus* for dangerous driving, but erred in law by failing to do so when analyzing the *mens rea*.

129. Here, it cannot be said that, simply because earlier in his reasons the trial judge commented that the Suzuki started its turn as the Toyota slowed down to turn onto 41st Ave., he must have considered the evidence regarding how long before impact the Suzuki commenced its turn in assessing whether the *mens rea* for dangerous driving was made out. This is so for two reasons.

130. First, in making this comment, the trial judge said nothing about how long prior to impact the Suzuki commenced its turn. He also said nothing about how this evidence might bear on the *mens rea* issue. Nor did he mention Mr. Dinn's evidence regarding how long before the collision

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[159] Trial Reasons, ¶50, AR1 p. 12.
[160] See generally *R. v. Rudge*, 2011 ONCA 791, ¶47-69.

the Toyota started its turn, either at this point or anywhere else in his reasons. Plus, the trial judge's comment preceded the "Analysis and Findings" section of his reasons, in which: he made his findings regarding the weather and road conditions, the actions of the appellant as shown on the video, the civilian evidence and the expert evidence;[161] and assessed whether the *actus reus* and *mens rea* of the offence had been proven.[162]

131. Second, and perhaps most importantly, in assessing whether the *mens rea* had been proven, the trial judge found that the appellant saw the Suzuki commence the turn, and that prior to this point he had not expected that it would turn in front of him. These findings squarely and necessarily raised the issue of how long before impact the Suzuki commenced its turn. Yet the trial judge did not mention Mr. Dinn's evidence bearing on this issue in considering whether the *mens rea* was made out. The failure to mention this evidence rendered his reasons unresponsive to a live issue in the case. In these circumstances, the only reasonable conclusion is that the trial judge failed to consider Mr. Dinn's evidence in coming to his ultimate decision on the issue of guilt, and thereby erred in law.

132. As a final point, reliance on this error in seeking to uphold the result in the BCCA does not amount to the Crown advancing a new theory of liability on appeal. In closing submissions, the trial Crown relied on Mr. Dinn's evidence regarding when the Suzuki commenced its turn and how far away from the Intersection the appellant would have been at that point.[163] She also argued that the appellant's driving was dangerous in part because he failed to yield to the Suzuki, which was in the process of finishing its turn.[164] And in making the argument that excessive speed alone could constitute dangerous driving, she submitted that a reasonable person in the appellant's circumstances would have foreseen the risk created by the left-turning Suzuki and taken steps to avoid it by slowing down.[165]

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[161] Trial Reasons, ¶67-94, AR1 pp. 17-22.
[162] Trial Reasons, ¶95-120, AR1 pp. 22-28.
[163] Transcript, AR3 pp. 144/47-145/15, 151/42-46; Written Argument, AR2 p. 199, ¶47-48.
[164] Transcript, AR3 pp. 136/5-21, 138/17-46; Written Argument, AR2 p. 192, ¶3, pp. 194-195, ¶15-19.
[165] Transcript, AR3 pp. 150/36-151/46.

133. The fact that the trial Crown also submitted that the appellant was not paying attention to the approaching Intersection, and so did not notice the turning Suzuki until it was too late,[166] does not equate with an express or implicit acceptance that the appellant should be acquitted if, having seen the Suzuki commence its left turn, he accelerated towards the Intersection at a grossly excessive speed. Viewed in proper context, the trial Crown's position was that, if the appellant saw the Suzuki turning in front of him as he approached the Intersection, his decision to accelerate to a grossly excessive speed, and only to apply his brakes on or just before entering the Intersection, constituted a marked departure from the standard expected of a reasonable person in the same circumstances.

Trial judge did not reject Mr. Dinn's evidence regarding when the Suzuki started its turn

134. The appellant may argue that the trial judge in fact rejected Mr. Dinn's evidence as to when the Suzuki commenced its left turn, and so cannot be said to have erred in law in not considering it when assessing whether the *mens rea* for dangerous driving was made out. If so, this argument cannot succeed for two reasons.

135. First, at no point in his reasons did the trial judge suggest that he was rejecting Mr. Dinn's evidence on this point. Indeed, he did not mention this evidence at all. Were he rejecting it, one would have expected him to say so, especially given that this evidence was not challenged by the defence in cross-examination or closing submissions.

136. Second, in his reasons the trial judge stated that the Suzuki proceeded to make the left turn at the same time as the Toyota slowed down to turn onto 41st Ave., and a review of the video shows that the Toyota slowed down as described a little over three seconds before impact.[167] This timing is consistent with Mr. Dinn's evidence regarding when the Suzuki likely commenced its left turn. The trial judge's finding that the Suzuki started its turn as the Toyota slowed down to turn onto 41st Ave. is thus decidedly inconsistent with the trial judge having rejected Mr. Dinn's evidence on this point.

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[166] Transcript, AR3 pp. 160/35-44; Written Argument, p. 206, ¶82.
[167] See paragraph 127 above.

137. However, if this Court concludes that the trial judge did reject Mr. Dinn's evidence as to when the Suzuki commenced its turn, and that he instead found that the Suzuki did not start to turn until immediately before the appellant applied his brakes, the respondent submits that the trial judge erred in law in making such a finding because it was not supported by the evidence. This is so for a number of reasons.

138. To begin with, Mr. Dinn's evidence that the Suzuki probably started its turn between 3.0 and 3.5 seconds prior to impact, and his basis for saying so (*i.e.* that the Suzuki likely would have started its turn once the blue SUV had passed by), was eminently reasonable. As noted, Mr. Dinn's evidence on this point was not challenged by the defence.

139. Moreover, the trial judge accepted Mr. Katarama's evidence as reliable, and Mr. Katarama testified that the Audi passed him after the Suzuki had started its turn. When the Audi first appears on the video, at 1.3 seconds before impact, it is already in the process of passing Mr. Katarama's Mercedes B200. Taken together, Mr. Katarama's evidence and the evidence from the video is consistent with Mr. Dinn's evidence regarding when the Suzuki likely commenced its turn, and is inconsistent with the conclusion that the Suzuki did not start to turn until immediately before the appellant applied his brakes.

140. Also relevant in this regard is the video and expert evidence showing that the Suzuki was in the northbound curb lane of Oak Street when it was hit by the Audi.[168] This means that, from its starting point in the dedicated southbound left-turn lane on Oak Street, the Suzuki had already completely cleared the left and centres lanes for northbound through traffic on Oak Street. The Suzuki was thus well into its turn when the appellant applied his brakes on or just before entering the Intersection, as opposed to having just commenced turning.[169]

141. As for the evidence that the appellant applied his brakes on or just before entering the Intersection, this does not make it any more likely that the Suzuki started its turn immediately beforehand. The appellant applying his brakes at this point is equally consistent with the Suzuki

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[168] Video, 43:15 (Frame 5); Figure 15, Expert Report, Respondent's Record p. 17.
[169] Mr. Dinn testified that the Suzuki would have cleared the Audi's path in another 0.5 seconds, or probably even less (Transcript, AR3 pp. 112/33-113/17).

having started its turn between 3.0 and 3.5 seconds before impact, and the appellant either having been inattentive as to its presence until the last moment or having seen it turning but wrongly assumed that it would be able to clear the Intersection safely.

142. The evidence that the appellant told Mr. Katarama that he had a green light is also equivocal, for the same reasons. Indeed, had the Suzuki not commenced its turn until immediately before the appellant applied his brakes, one would have expected the appellant to say more to Mr. Katamara by way of explanation than simply, "That was a green light".

143. Finally, the trial judge's conclusion that the appellant had the right of way does not support the inference that the Suzuki did not start its turn until just before the appellant applied his brakes. For one thing, the trial judge concluded that the appellant had the right of way because there was no evidence as to whether the Suzuki signalled to make a left turn as required by s. 174 of the *MVA*, not because of any suggestion that the Suzuki failed to yield to opposing traffic that was, in the words of s. 174, "so close as to constitute an immediate hazard".[170] In any event, as the BCCA intimated in its reasons,[171] the absence of evidence regarding whether the Suzuki activated its turn signal did not support the conclusion that the appellant had the right of way on entering the Intersection. Nor did any other evidence. The trial judge's conclusion to the contrary therefore constitutes an error of law, as it is unsupported by the evidence.

G. Unnecessary to Consider Issue #4 Raised in Appellant's Factum

144. It is unnecessary to determine whether the Crown has a right to appeal an acquittal arising from the application of a legal standard to the facts, because the respondent is not suggesting that the appellant acquittal is susceptible to be overturned on this basis.

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[170] Trial Reasons, ¶102, AR1 p. 24. Section 174(1) states that a driver who intends to turn left at an intersection "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn."

[171] BCCA Reasons, ¶23-26, AR1 p. 37.

PART IV – SUBMISSIONS ON COSTS

145. There are no submissions on costs.

PART V – ORDER SOUGHT

146. The appeal should be dismissed.

David Layton, Q.C.
Counsel for the Appellant

December 2, 2019
Vancouver, British Columbia

PART IV – SUBMISSIONS ON CASE SENSITIVITY

147. There are no orders, bans, classifications of information in the file as confidential under legislation or restrictions on public access to information in the file that could have an impact on the reasons of this Court, if any, in this appeal.

PART VII - LIST OF AUTHORITIES

PARAGRAPH