SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rankin*, 2024 NSSC 309

Date: 20241021
Docket: *Hfx*, No. 533833
Registry: Halifax

Between:

His Majesty The King

v.

Lisa Marie Rankin

Summary Conviction Appeal Decision

Judge: The Honourable Justice Christa M. Brothers

Heard: September 9, 2024, in Halifax, Nova Scotia

Decision: October 21, 2024

Counsel: Rob Jollimore and Jim Janson, for the Appellant
Thomas Morehouse, for the Respondent

By the Court:

Overview

[1] The advent and widespread use of the cellular telephone or smartphone, combined with the growing number of functions these devices perform, has led to a corresponding growth in concern over driver distraction. Nova Scotia needs legislative clarity concerning when driver engagement with such devices is prohibited. Activities that one might expect, as a matter of common sense, to be captured by a provision on distracted driving are not necessarily prohibited by the current legislation.

Background

[2] On December 20, 2023, the respondent, Lisa Marie Rankin, was charged with "using a hand-held cellular telephone or text messaging on a communication device while operating a vehicle on a highway" contrary to section 100D(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 ("*MVA*")

[3] The trial took place on May 1, 2024, and the presiding Justice of the Peace ("J.P.") acquitted the respondent by way of a directed verdict. The evidence of Cst. DesRochers was that he had ample opportunity to observe Ms. Rankin driving while holding her phone in her right hand at chest level with her thumb on the screen of her cellphone.

[4] In acquitting the respondent, the J.P. cited *R. v. Anand*, 2020 NSCA 12, and found that "use" of the cellphone was not made out. The J.P. relied upon the following *obiter* comments of Justice Beveridge:

> [70] While not directly engaged by this appeal, I very much doubt that simply looking at a cellphone without manually accessing its features, making a call, or engaging in text messaging amounts to an offence contrary to s. 100D of the MVA.

[5] The Crown appeals from the May 1, 2024, decision of J.P. Gass. The appeal, filed on May 29, 2024, lists one ground:

> The Presiding Justice of the Peace erred in law. She incorrectly interpreted the *Motor Vehicle Act* section 100(D). She then entered a directed verdict of acquittal based on this incorrect interpretation.

[6] Before considering the merits of the appeal it is useful to reproduce JP Gass' oral decision:

> **GASS, P.J.P.**
>
> I have been around quite a while, too, and have been doing these cell phone cases and it's recently certainly been brought to my attention by some of my fellow JPs of this case, *Anand,* and that I have been interpreting that incorrectly, in their view.
>
> But in any event, I have read it and gone over it and I know it is *obiter* and I have always said myself, I didn't believe holding a cell phone was enough to convict on these type of charges.
>
> On this case, with the evidence that has been given, I don't think there is anything beyond holding a cell phone in the Crown's evidence and, therefore, I agree with the defendant's motion that a directed verdict should issue and that an acquittal should be entered.
>
> …
>
> **THE COURT:**
>
> And when I say that, I don't find anything wrong with Cst. DesRochers' evidence.

[7] The Crown argues that the J.P. erred in law in her interpretation of s. 100D(1), which she based on *Anand, supra,* and the comments made in *obiter*. The Crown's position at trial and on appeal is that the purpose of s. 100D(1) is to prevent distracted driving caused by the use of hand-held cellular phones while driving.

Issues:

1. What is the Standard of Review?

2. What is the correct interpretation of s. 100D(1) of the *Motor Vehicle Act*?

Standard of Review

[8] The sole issue on appeal is whether or not the J.P. erred in law by misinterpreting s. 100D(1) of the *MVA*. This raises a pure question of law involving statutory interpretation. *Housen v. Nikolaisen et al*., 2002 SCC 33, provides that the standard of correctness applies to questions of law. The court stated:

> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial

> judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans, supra* at p. 90.

[9] Furthermore, in *R. v. Nickerson*, 1999 NSCA 168, Cromwell J.A. (as he then was) described the applicable standard of review on a summary conviction appeal at para. 6:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 (S.C.C.) at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was *some* evidence to support the trial judge's conclusions nor a new trial on the transcript.

[10] Sitting as a Summary Conviction Appeal Court, I can review the evidence to determine if it is reasonably capable of supporting the J.P.'s conclusion.

Case Before the Lower Court

[11] On May 1st, 2024, the Crown called Cst. DesRochers. He testified that on December 20, 2023, he was assigned to an area of the Bedford Highway by Lindsay Hill. His sole purpose was to monitor traffic in the area and determine if motorists were using cellphones while operating vehicles on the highway. He was in a stationary marked vehicle positioned one car length from the stop sign where he could watch vehicles as they slowly passed him to the left and the right. The evidence from Cst. DeRochers was as follows:

> A. So, Your Honour, I observed a vehicle traveling south on the Bedford Highway from my left to my right. I looked into the cabin of the motor vehicle. I seen the motorist holding …and I'm … demonstrate for the court, Your Honour. I'm holding my hand up, chest level off to the right, a cell phone, thumb clearly on the cell phone.

The traffic at the time was very heavy. I would guesstimate a time that vehicle went from left to right a good five seconds. Gave me ample time to make that observation.

Once I made the observation and formulated the grounds for a traffic stop, I then conducted a traffic stop.

…

Q. Could you describe specifically what you saw?

A. In my notes, and I made these notes right after the traffic stop, Your Honour, the thumb was clearly on the face of the phone as the driver was holding it …

Q. All right.

A. … just like so.

Q. What, if any, observations did you make of the driver's face or eyes specifically?

A. I didn't capture any evidence like that I … I must admit. Yeah.

Q. And what, if any, movement inside the vehicle as it … as the driver passed in front of you? Did you note anything like that?

A. Nothing unusual other than holding the phone with the thumb on the phone. Yeah.

[12] On cross-examination, Cst. DesRochers provided the following evidence:

Q. You never actually observed the cell phone on, is that right?

A. That's correct.

Q. You never observed Ms. Rankin operate the cell phone in any manner, is that right?

A. Holding the cell phone with her right thumb on the face of the phone is my evidence.

Q. Okay. You didn't observe her text message using the phone?

A. No. I … I wasn't in …

Q. You didn't observe her make a call?

A. I wasn't in the cabin of the vehicle. What she was doing with the phone, I wouldn't know.

Q. You didn't … … you didn't observe her make a phone call, is that right?

A. No.

…

> Q. And nowhere in your notes do you give any direct evidence that Ms. Rankin operated any of the functions on her cell phone, made a phone call, or engaged in any text messaging, is that fair?
>
> A. Correct.

[13] In summary, Constable DesRochers testified that:

- He did not make any observations of Ms. Rankin's face;
- He did not observe the cell-phone on;
- He made no observation of Ms. Rankin text messaging;
- He made no observations of Ms. Rankin making a call; and,
- He made no other observations of Ms. Rankin operating any of the functions on the cellphone.

[14] Ms. Rankin sought a directed verdict. By granting the directed verdict, the Crown argues that the J.P. relied too heavily on *Anand*, *supra*, and, in particular, on the *obiter* statement at para. 70.

Position Advanced on Appeal

[15] The appellant wants this court to distance itself from the comments in *Anand*, *supra*. It argues that the ratio of *Anand* relates to whether the use of handheld GPS devices is prohibited under s. 100D(1) of the *MVA*, and has nothing to do with cellphone use. The appellant argues that *obiter* comments do not constitute binding precedent (*R. v. Henry*, 2005 SCC 76). The appellant acknowledges that the comments could be potentially persuasive, but reiterates that they are not binding. The appellant says the *obiter* statements in *Anand*, *supra*, have "muddled" what is considered "use" of a cellphone under the 100D(1) of the MVA.

Law and Analysis

[16] Section 100D(1) was passed by the legislature in 2007. It states:

> It is an offence for a person to use a hand-held cellular telephone or engage in text messaging on any communications device while operating a vehicle or an electronic kick-scooter on a highway or operating a personal transporter on a roadway or sidewalk.

[17] The appellant argues that an interpretation of this section consistent with para. 70 of *Anand, supra*, would make it difficult for police officers who would need to visually confirm an act of texting, or other "use". Furthermore, the interpretation would mean that individuals could read information on their phone screens, necessarily distracting their attention from driving, without violating the statute. The Crown submits that such an interpretation is inconsistent with the purpose of the legislation which is to prevent driver distraction. The appellants argue that the decisions in *R. v. Ferguson*, 2013 NSSC 191, as well as *R. v. MacDonald*, 2014 NSSC 442, are to be preferred. The appellants further contend that the proper interpretation of section 100D(1) of the *MVA* should be undertaken while keeping in mind the purpose of the provision, which is to prevent driver distraction.

Judicial Interpretations

[18] To determine whether there was an error of law committed in directing a verdict and entering an acquittal, I must review and consider previous decisions interpreting s. 100D(1) of the *MVA*.

[19] In *R. v. Ferguson*, 2013 NSSC 191, Ms. Ferguson was operating a motor vehicle and had her cellphone in her hand while waiting in traffic to make a left turn. The phone was held up above the steering wheel. The police officer, who testified, was not able to determine what Ms. Ferguson was doing with the telephone. Ms. Ferguson at no time had her cellphone up to her mouth or ear, nor was she texting with it. Ms. Ferguson had a Bluetooth device in her ear and she testified her device was connected to Google Map Quest. The trial judge in *Ferguson, supra*, found as a fact that checking Google Map Quest on a cellphone was a "use". The trial judge went on consider the proper interpretation of the term "hand-held cellular telephone", adopting the definition once contained in the *Highway Traffic Act* of Newfoundland and Labrador. Prior to 2010, the Newfoundland legislation provided that the use of a hand-held cellular phone required the phone to be placed in proximity to the mouth and ear by being held in the hand or by another means that used one or more parts of the body. Applying the above definition, the trial judge concluded Ms. Ferguson was not using a hand-held cellular telephone and acquitted her. The Crown appealed.

[20] In considering the proper interpretation of "hand-held cellular phone", Justice Coughlan referred to the purpose of section 100D(1) in the *MVA*:

> [18] The purpose of prohibiting the use of a hand-held cellular telephone or text messaging on any communication device while operating a vehicle on the highway

is clear: to prevent drivers from being distracted while operating a motor vehicle. In moving second reading of the amendments to the *Motor Vehicle Act, supra* in 2007 which first introduced the provision, the Minister of Transportation and Infrastructure Renewal stated:

> Mr. Speaker, this bill addresses serious concerns Nova Scotians have about cellular phone use and other driver distractions in motor vehicles. This bill makes it an offence to use a hand-held cellular telephone while operating a motor vehicle. Driver distraction and inattention are leading causes of crashes and taking action to address distractions will help to reduce injuries and deaths in Nova Scotia. It is estimated that about 20 per cent of crashes are linked to driver distraction.
>
> Mr. Speaker, we are concerned for the safety of all Nova Scotians and evidence points to the fact that our young drivers are at the greatest risk of distractions inside the motor vehicle. Driver distraction is a growing concern for government and for Canadians. About 70 per cent of Canadians consider distractive driving a serious issue - up from just 40 per cent in the year 2001. An Angus Reid Poll conducted in 2007 found that 76 per cent of Canadians would support a federal ban on cellphones while behind the wheel. Here in our own province, a survey conducted by my department indicated that 88 per cent of Nova Scotians think it is unsafe to use a hand-held cellular phone while operating a motor vehicle.
>
> Other road safety stakeholders have advocated for a total ban on mobile devices while operating a motor vehicle. To them, I would say consult with police forces as they are the agencies that have to enforce this legislation. Discussions I have had with Nova Scotia's policing community have convinced me that a ban on hand-held devices while operating a motor vehicle is enforceable while a hands-free ban would be problematic from an enforcement perspective.
>
> Mr. Speaker, I believe it is incumbent upon all members of this House to create laws that are measured and enforceable. Cellular phone use, while it is just one form of driver distraction, is a growing problem. The amendments will also give us the ability, through regulation, to prohibit other specific distractions and include other electronic devices as technology changes so the government can respond effectively to new concerns as they arise.

[21] Allowing the appeal, Coughlan J. held that the term “hand-held cellular telephone” is not ambiguous, and that the trial judge erred in concluding that Ms. Ferguson was not using a hand-held cellular telephone while operating her motor vehicle:

> 21 If a person on the street was asked whether the device was a hand-held cellular telephone -- he or she would answer it was. The device was a cellular telephone.

> Ms. Ferguson said so and she held it in her hand. It was a hand-held cellular telephone.
>
> 22 The trial judge erred in adopting the definition of hand-held cellular telephone once contained in the *Highway Traffic Act* of Newfoundland and Labrador. Section 100D of the *Motor Vehicle Act, supra*, is not ambiguous -- its clear words should be given effect. Although Ms. Ferguson had a Bluetooth device in her ear when using Google MapQuest, she had the cellular telephone in her hand. On the facts as found by the trial judge, Ms. Ferguson was using her hand-held cellular telephone while operating a vehicle on a highway.
>
> 23 I allow the appeal, set aside the acquittal and enter a conviction of Paula B. Ferguson of the charge pursuant to section 100D(1) of the *Motor Vehicle Act*, *supra*.

[22] In *R. v. Lumsden*, (unreported decision of the Honourable Justice John D. Murphy), dated July 17, 2013, Mr. Lumsden drove past a police car and was seen with a cellular telephone in his hands, touching the keys on his phone. He was charged with a violation of s. 100D(1) of *MVA*. At trial, Mr. Lumsden admitted that he had been holding his cellphone and touching the keys. He testified that he was not using his phone to communicate with anyone but was instead using it as a clock. He said he had pushed a button on his phone to bring up the screen which displayed the time. The question before the J.P. was whether Mr. Lumsden's conduct amounted to "use" under s. 100D(1) of the *MVA*.

[23] The J.P. found that Mr. Lumsden's actions did not constitute "use" under s. 100D(1) because there was no communication involved. On summary conviction appeal, Justice Murphy concluded that the J.P. erred in acquitting Mr. Lumsden. In overturning the acquittal, Justice Murphy held that s. 100D(1) prohibits "use" of a cellphone for any purpose while driving, not just for the purpose of communication:

> And essentially what the case says is that the offence is committed if you use a cellphone. And you can use it … the purpose for which you use it doesn't matter. If you use it to tell the time as you did, if you use it as a GPS as Ms. Ferguson did, or if you use it for communication or for any reason, if you're using a cellphone, that is all that has to happen for the offence to take place.

[24] Justice Murphy added on page eight:

> And I find also that the purpose of the section is as Justice Coughlan found. It's to avoid distraction in driving. It's not to interfere with communication. And while it may seem an innocent act to look at a cellphone to see what time it is, in fact that

> is something I find which does involve the use of a cellphone. And to do that while you have operation of a motor vehicle is under the *Act* and offence.

[25] In *R. v. MacDonald*, 2014 NSSC 442, a police constable observed Mr. MacDonald holding a "device" in his right hand while driving. During the course of the traffic stop Mr. MacDonald told the officer, "I was just looking at my cellphone". The trial judge accepted Mr. MacDonald's evidence that he was holding the device in his hand because he had sent a text message to a friend five minutes earlier and was awaiting a response. The trial judge acquitted Mr. MacDonald on the basis that he was not "using" his cellphone while driving since there was no evidence that he was texting at the time relevant to the charge.

[26] In the course of his ruling, the trial judge distinguished *R. v. Ferguson, supra* by finding that Ms. Ferguson, unlike Mr. MacDonald, was actively using her telephone as a navigation aid. The Crown appealed. In allowing the appeal, Justice Chipman held that the trial judge erroneously distinguished *R. v. Ferguson*, *supra,* where Coughlan J. held that the legislature's purpose in enacting s. 100D(1) was to prevent drivers from being distracted while operating a motor vehicle. Justice Chipman stated:

> [16] In my view, the adjudicator erred in law by interpreting "use" in a manner that is inconsistent with the purpose of the specific section as well as the overall purpose of the MVA. In this regard, the purpose of s. 100D(1) is to prevent people from driving while distracted. Further, the purpose of the MVA is to regulate highway traffic in the interest of public welfare and safety.

Justice Chipman acknowledged that the trial judge had not had the benefit of Justice Murphy's oral decision in *R. v. Lumsden, supra*. After reviewing *Lumsden*, Chipman J. held that "use" should be given a broad interpretation consistent with the purpose of s. 100D(1):

> [19] In all of the circumstances, I find the purpose of s. 100D(1) is to prevent traffic accidents. The method of prevention is to prohibit distracted driving. The section aims to accomplish this purpose through a ban on hand-held cellular telephone use and text messaging while driving. In my view, the adjudicator did not consider the purpose of this section is to prohibit distracted driving caused by hand-held cellular telephone use. The adjudicator's narrow interpretation of cellular telephone use is inconsistent with the purpose of the section. Accordingly, this was an error of law.
>
> [20] In the present case, the evidence established the respondent was using his hand-held cellular telephone while driving. The evidence demonstrated that he was distracted in two ways. First, by looking at his cellular phone while driving to check

> and see whether he had received a text. Second, Mr. MacDonald was holding the cellular phone in his hand while driving. Once again, the section in question prohibits the use of hand-held devices. In my view, physically holding one's phone is important to the interpretation of "use" in the context of the purpose of the section; i.e., to prevent accidents.
>
> [21] Mr. MacDonald acknowledged looking at his device to see if he had received a text. In my view, he was clearly using the device notwithstanding that he was not speaking on phone or texting. Recall, the section in question says it is an offence to use a hand-held cellular telephone OR engage in text messaging. In my view, the plain meaning of the word "use" includes holding a hand-held cellular telephone and looking at it in anticipation of an incoming text message. Both of these activities would distract a person from keeping his or her eyes on the road.
>
> [Emphasis Added]

[27] The next decision dealing with the interpretation of s. 100D(1) of the *MVA* is *R. v. Ikede*, 2015 NSSC 264. In this case, Justice Campbell was again considering the meaning of "to use a hand-held cellular telephone" in s. 100D(1). Justice Campbell's observations in paras. 3 and 4 are as true now as they were then:

> [3] The meaning of the phrase "to use a hand-held cellular telephone" is not as clear as it might at first appear. It has been interpreted to mean using electronic devices such as smartphones that happen to have cellular telephone functions. It has been held to be broader than having a conversation and to include accessing other applications. It does not include just holding the device in the hand though. The legislation does not provide a precise description of what is prohibited. Case law has had to define the terms, gradually. The result is a law that is difficult for people to understand.
>
> [4] How far the scope of the prohibition goes in this case and in its current form is governed by the context, which is distracted driving. "Use" does not encompass *all* interactions with hand-held devices that have cellular telephone functionality. When the driver, without looking at the screen of the device, engaged a voice-activated navigational system related directly to the safe operation of the vehicle, through a hand-held electronic communication device, he was not "using" a cellular telephone.

[28] In *Ikede, supra*, the police observed Dr. Ikede driving his vehicle with what appeared to be a cellular telephone in his right hand. Dr. Ikede had put the device to "voice level", meaning that he brought it up to his face and spoke to it. He was using the Siri feature on the iPhone to obtain directions. The trial judge accepted Dr. Ikede's evidence that he was not using the phone to make or receive a phone call, to check or leave a voicemail, or to communicate with anyone either by voice or text.

He was not looking at the screen, but speaking into the voice activated navigation system.

[29] The trial judge concluded that Dr. Ikede was not "using" a hand-held cellular telephone. She concluded that "use" in s. 100D(1) has to be interpreted "in the context of distraction", which is what the law is intended to address. She concluded that because he was accessing a voice-activated navigational system to assist in the safe operation of the vehicle, and was not even required to look at the device, he was not "using" a hand-held cellular telephone as the word "use" is intended in the legislation.

[30] The issue as phrased by Justice Campbell was whether in some limited circumstances a driver holding a cellular telephone and speaking into the device is not a "use" of a cellular telephone as described in s. 100D(1) *MVA*.

[31] Justice Campbell noted that the MVA offers little guidance on how to interpret s. 100D(1):

> [12] The legislation provides no definition of the term "hand-held cellular telephone" and no definition of "to use". The meaning of the section is not as self-evident as it might at first appear. Nova Scotia was a relatively early adopter of distracted driving legislation. Other provinces have subsequently addressed the issue and have provided more direction on both terms.
>
> [13] If the word "use" is singled out of the sentence and defined alone it does admit of the definition of employing something to achieve an end or a purpose. That is one of the widely understood meanings of "use". In the context of distracted driving and "using" a cellular telephone or other electronic device it needs a more specific meaning.

[32] Justice Campbell reviewed the motor vehicle legislation in British Columbia, New Brunswick, Manitoba and Alberta which all contain expansive definitions of "use". The New Brunswick *Motor Vehicle Act*, R.S.N.B. 1973, M-17, for example, was amended in 2010 to include the following definition at s. 265.01:

> "use", in relation to an electronic device, means one or more of the following actions:
>
> (a) holding the device in a position in which it may be used;
>
> (b) operating one or more of the device's functions;

> (c) communicating orally by means of the device with another person or another device;
>
> (d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device

[33] Justice Campbell cautioned, however, that "use" in s. 100D(1) should not necessarily be interpreted to be consistent with "use" in other provinces. He further pointed out that the legislation in other provinces shows that the word "use" "does not have a definition that is the same in all circumstances" (para. 17).

[34] In dismissing the appeal, Justice Campbell held that "use" should be given a nuanced and contextual interpretation:

> [40] … the word "use" should be given a nuanced and contextual interpretation. It should have regard to the object of the verb, the hand-held cellular telephone and the evolving meaning of the term and functions of the device. A smartphone is considered to be cellular telephone. But "using" a smartphone is not always the same as using an older cellular telephone. The device has evolved and the meaning of "use" should evolve with it. "Use" as Judge MacDonald reasonably interpreted it, evolved to capture the vast majority of ways of interacting with hand-held devices that are enabled by smartphone technology. It recognizes that one form of interaction, that does not involve communication or looking at the screen of the device and is directed toward the safer operation of the vehicle by accessing a voice-activated navigation system is not "use". It deals with this case. It does not purport to resolve some of the other apparently arbitrary distinctions in a law that technology seems to have left behind.
>
> [Emphasis Added]

[35] Justice Campbell prophetically spoke of how this important safety issue was being left to a series of judicial decisions interpreting a 2007 provision which had neither kept pace with technology nor public sentiment. Justice Campbell concluded with a call for legislative clarity that has, unfortunately, gone unheeded for the last nine years:

> [52] The legislation in Nova Scotia is simple on its face. The problem is that in its simplicity it has not kept pace with more complex evolving technology. Judges can keep interpreting the section, so that it includes smartphones and other non-communication applications, assuming that to be the intent. Should judges interpret "use" to include merely holding the device so that it can be used? The issue is how far judicial interpretation should go to bring clarity to a law that is not so clear anymore. What Dr. Ikede did would be illegal in many other provinces because

> they make it clear that even holding an electronic device while driving is prohibited. In Nova Scotia the section does not provide that kind of direction. It would be unfortunate if the important safety issue of distracted driving is left to a series of judicial decisions. Needless to say at this point, that is not a recipe for clarity.
>
> [Emphasis Added]

[36] Most recently, in *R. v. Anand*, *supra*, the Nova Scotia Court of Appeal reviewed a conviction entered and upheld on summary conviction appeal. In that case, the constable testified that he observed Mr. Anand driving in the far right hand lane and using both hands to text on a white iPhone in a black case. The constable testified he could even see the text bubbles on the iPhone screen. Mr. Anand testified that the constable was in error and that he was in the far left hand lane, he had a gold iPhone which did not have a black case, and he was not texting on his phone. He explained that he had selected or entered a street name on his black handheld GPS device to obtain an alternate route.

[37] In the lower court, Mr. Anand was not cross-examined. The adjudicator accepted Mr. Anand's evidence that he was using a handheld GPS device but reasoned that a GPS is a communication device and, by Mr. Anand's own admission, he was "texting" on it. Mr. Anand was convicted under s. 100D(1) of the *MVA*. The Summary Conviction Appeal Court judge concluded that the manual entry of coordinates into a GPS device amounted to text messaging and because the GPS device provided information to the user, it was a communication device within the meaning of s. 100D(1). Mr. Anand appealed.

[38] In arguing unsuccessfully against leave to appeal, the respondent noted that the enacted but not yet proclaimed *Traffic Safety Act,* S.N.S. 2018 c. 29, contains detailed provisions which clarify what exactly is prohibited and meant by "use", hence the court's interpretation of s. 100D(1) of the *MVA* would likely have no lasting value to the general administration of justice. How misguided that argument would turn out to be, given that four years later the *Traffic Safety Act* is still not proclaimed and the court is again left to grapple with the meaning of "use" in s. 100D(1). The following observation by Justice Beveridge in *Anand, supra*, has continuing relevance:

> [17] …Furthermore, the advent of the new *Traffic Safety Act* may well resolve many of the lingering uncertainties over what conduct constitutes an offence, but in the mean time, drivers are left to wonder what uses, if any, of hand-held or other devices are permitted. Clarification is warranted. …
>
> [Emphasis Added]

[39] It is obvious that the Court of Appeal was seeking to provide a modicum of clarity in an area which desperately needed it, and which continues to need it four years later due to the failure to proclaim and the detailed provisions of the *Traffic Safety Act*.

[40] Counsel for the appellant argues that the comments by Justice Beveridge with regards to "use" of a hand-held cellular device are only *obiter* because the main issue before the court was whether a GPS was a communication device. In my view, however, the Court of Appeal's comments are very persuasive and ought to be followed in this case. Justice Beveridge stated the following when considering the interpretation of s. 100D(1) of the *MVA*:

> [18] We live in a society of laws. People are free to do what they want so long as they do not act contrary to a specific prohibition. Failure to take care can have consequences. If, for example, a driver is distracted by fiddling with the radio, CD player, a digital input for music, or a hand-held GPS and an accident ensues and causes harm to someone else, they may well be liable civilly for the failure to use reasonable care.
>
> [19] But absent a specific prohibition, doing any of those distracting activities is not an offence under the present *MVA*, unless such conduct rises to the level of careless and imprudent driving.
>
> [20] Whether selection of a predetermined destination or entry of an address in a hand-held GPS device is an offence under s. 100D of the *MVA* depends entirely on statutory interpretation. That is a question of law. We owe no deference to the SCAC.

[41] Justice Beveridge reviewed *R. v. Ferguson, supra*, *R. v. MacDonald*, *supra*, and *R. v. Ikede*, *supra*. The Court of Appeal observed that Nova Scotia was one of the early adopters of distracted driving legislation. The court referred to the British Columbia, Alberta, Manitoba, New Brunswick, and Ontario legislation where "use" and other important terms are defined. In reviewing the New Brunswick legislation, and the fact that it bans the use of a GPS device as well as the holding of any device whether it is turned on or off, the court said:

> [29] If Connaught Avenue had been in New Brunswick, the appellant's proverbial goose would be cooked. <u>But the appellant was in Nova Scotia where the *MVA* does not prohibit holding a cellular phone, let alone a GPS device. It prohibits "use" of a hand-held cellular telephone or to "engage" in text messaging on any communications device.</u>
>
> [Emphasis Added]

[42] In deciding whether or not the use of a GPS device was prohibited, Beveridge J.A. stated:

> [65] Use of hand-held or built-in GPS may well be just as distracting as using a cellphone to make a call or engage in text messaging. But the Legislature did not prohibit the use of a GPS device. It is decidedly not the role of the courts to fill in the blanks and convict members of the public based on our views of whether the impugned conduct is just as bad as what the Legislature in fact had banned.

[43] Importantly, at para. 32, the Court of Appeal gave its view on any conflict in the trial level decisions in relation to s. 100D(1):

> [32] If there is any conflict between the cases of *R. v. Ikede*, *R. v. Ferguson*, and *R. v. MacDonald*, I far prefer the approach espoused by Justice Campbell *in R. v. Ikede.*

[44] Given this clear, unequivocal statement, I conclude that the J.P. did not err in law in granting a directed verdict in the case before me.

[45] In *Anand*, *supra*, the court held that use of a GPS device is not proscribed under s. 100D(1). Later on in the decision, the court commented on the scope of cellphone "use" prohibited by the provision:

> [70] While not directly engaged by this appeal, I very much doubt that simply looking at a cellphone without manually accessing its features, making a call, or engaging in text messaging amounts to an offence contrary to s. 100D of the *MVA.*
>
> [71] Many of the concerns and uncertainty in this area are reduced, if not eliminated, by the new *Traffic Safety Act*, S.N.S. 2018, c. 29. Although given Royal Assent on October 11, 2018, it has not yet been proclaimed.
>
> [72] Under the *Traffic Safety Act*, it will be an offence while driving to manually input data into a built-in navigation system or to hold a hand-held communication, entertainment, or other proscribed electronic device. Some of the relevant provisions are:
>
> > Distracted Driving
> >
> > …
> >
> > 183 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person is **using, holding or manipulating**
> >
> > (a) a hand-held communication device;
> >
> > (b) a hand-held entertainment device; or

> (c) **any other prescribed electronic device**.
>
> (2) Subsection (1) does not apply to a person
>
> (a) **using a hand-held communication device in hands-free mode without holding it;**
>
> (b) using a hand-held communication device to contact ambulance, law enforcement or fire department emergency services in relation to an immediate emergency;
>
> (c) using a hand-held communication device in the course of performing the person's duties as the driver of an emergency vehicle; or
>
> (d) prescribed by the regulations.
>
> 184 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person **is using a global positioning system navigation device unless the device is being used in a hands-free mode.**
>
> (2) Subsection (1) does not apply to a person prescribed by the regulations.
>
> 185 (1) No person shall drive a vehicle or other conveyance on a highway while the vehicle or other conveyance is in motion and the person is using a logistical transportation tracking system device, dispatch system device or other device prescribed by the regulations unless the device is being used in a hands-free mode.
>
> [Emphasis added]
>
> [73] With this legislation and whatever regulations come to be enacted, Nova Scotia will be brought into line with the general trend in other provinces. That has not yet happened.

[46] If this new legislation is ever proclaimed, it will give much needed clarity to how and when a person can engage with a device while driving. Until then, the important safety issue of distracted driving continues to be left to a series of judicial decisions.

Conclusion

[47] The evidence before the J.P. was that Ms. Rankin was holding her cellphone at chest level with her thumb on the screen while driving. There was no evidence that she operated any of the functions on her cell phone, made a phone call, or engaged in any text messaging. There was no evidence that Ms. Rankin even looked at her phone or was otherwise distracted by it. The J.P. concluded that holding a cellphone while driving is not prohibited by s. 100D(1). She made no error of law in her interpretation of the provision, which is supported by the most recent case law.

[48] For the foregoing reasons, I dismiss the appeal.

Brothers, J.