SUPREME COURT OF YUKON

Citation: *R v MacDonald*, 2021 YKSC 26

Date: 20210507
S.C. No. 19-AP005
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND

ANDREW MACDONALD

RESPONDENT

Before Justice E.M. Campbell

Appearances:
Leo Lane — Counsel for the Public Prosecution Service of Canada
David A. McWhinnie — Counsel for the Respondent

REASONS FOR DECISION

INTRODUCTION

[1] The Crown appeals the acquittal of the respondent, Andrew MacDonald, on a charge of operating a conveyance and consuming alcohol in such a quantity that the concentration in his blood was equal to or exceeded 80 mg of alcohol in 100 mL of blood within two hours after ceasing to operate the conveyance, contrary to s 320.14(1)(b) of the *Criminal Code*, RSC, 1985, c C-46, (the "*Criminal Code*").

[2] This appeal turns on the admissibility and sufficiency of the certificate of a qualified technician to establish the elements set out in s 320.31(1) of the *Criminal Code*, which, once proven, allow the Crown to adduce the results of an accused's breath samples as conclusive proof of their blood alcohol concentration at the time the analyses were made.

[3] One of the elements the Crown must establish under s 320.31(1), and more specifically under s 320.31(1)(a) is that, before taking each breath sample, the qualified technician conducted a system calibration check on the approved instrument, the result of which was within 10% of the target value of an alcohol standard certified by an analyst.

[4] At trial, the Crown relied on the certificate of a qualified technician to prove that the result of each calibration check were within 10% of the target value of the alcohol standard certified by an analyst. The Crown also tendered in evidence the print out of the approved instrument. The Crown did not file a certificate of analyst with respect to the alcohol standard nor did it call the qualified technician or the analyst to testify. The trial judge found that the assertions contained in the certificate of the qualified technician did not provide the necessary evidentiary foundation to prove the elements required by s 320.31(1)(a), and that, as a result, the Crown could not benefit from the conclusory effect of s 320.31(1) to establish the blood alcohol concentration of the respondent at the relevant time. The trial judge acquitted the respondent, as the Crown did not otherwise prove his blood alcohol concentration at the relevant time.

FACTS

[5] At approximately 12:15 a.m. on June 8, 2019, Cst Hartwig, of the Whitehorse RCMP, saw a vehicle speeding and crossing the centre line of the roadway. He stopped the vehicle and identified Andrew MacDonald, the respondent, as the driver. Upon observing indicia of consumption of alcohol, Cst Hartwig demanded that Mr MacDonald blow into a roadside screening device. Mr MacDonald complied and the device registered a "fail".

[6] Cst Hartwig arrested Mr MacDonald and transported him to the RCMP Detachment, where Cst Caron, a qualified technician, obtained breath samples from him that resulted in readings of 100 mg of alcohol in 100 mL of blood.

[7] Cst Hartwig served the certificate of a qualified technician and notice of intention to produce that certificate in evidence on Mr MacDonald before releasing him on a promise to appear.

[8] Cst Hartwig was the only witness called by the Crown to testify at trial.

[9] Pursuant to s 320.33 of the *Criminal Code*, the Crown tendered in evidence the print out of the approved instrument. The defence did not object, and the print out became Exhibit 1. A copy of the print out is attached as Appendix A to this decision.

[10] In addition, the evidence of Cst Caron, the qualified technician, was tendered via certificate pursuant to s 320.32(1) of the *Criminal Code*. The defence objected to the admissibility and evidentiary value of the certificate, which was marked, at first, for identification.

[11] The certificate of the qualified technician contains a number of statements including that:

- Cst Caron is designated as a qualified technician by the Attorney General of Canada;
- Cst Caron received two samples of Mr MacDonald's breath into an Intox EC/IR II, an approved instrument;
- before each breath sample, Cst Caron conducted a system blank test, the result of which was not more than 10 mg of alcohol in 100 mL of blood;
- before each breath sample, Cst Caron conducted a system calibration check, the result of which was within 10% of the target value of an alcohol standard which was certified by an analyst (my emphasis);
- the first breath sample was taken at 01:13 a.m. and the result was 100 mg of alcohol in 100 mL of blood; and
- the second breath sample was taken at 01:34 a.m. and the result was 100 mg of alcohol in 100 mL of blood.

[12] The certificate of a qualified technician does not state what the target value of the alcohol standard was, nor does it state where or from whom the qualified technician obtained the specific target value of the alcohol standard.

[13] The print out of the approved instrument contains information that identifies the manufacturer and lot number of the alcohol standard used in this case, which match the assertions contained in the certificate of the qualified technician, its expiry date, a dry gas value (at sea level), dry gas target data, the breath samples readings, as well as the results of other tests and checks performed with or by the instrument.

[14] The Crown did not tender in evidence a certificate of analyst regarding the certification of the alcohol standard used by the qualified technician to perform the calibration checks nor did it call an analyst to testify.

[15] At the end of the Crown's case, the parties agreed to make their submissions on the admissibility of the certificate of the qualified technician in closing submissions instead of entering into a *voir dire* to determine its admissibility. As such, at some point during the proceeding, the certificate became Exhibit 2. The certificate of a qualified technician is attached as Appendix B to this decision.

[16] The defence called no evidence after the Crown closed its case.

[17] The trial judge, in *R. v. MacDonald*, 2020 YKTC 10, determined that the Crown had failed to establish one of the elements set out in s 320.31(1)(a), namely that the alcohol standard was certified by an analyst, and, as such, could not rely on the breath sample results as conclusive proof of the respondent's blood alcohol concentration at the material time. The trial judge acquitted the respondent, as the Crown adduced no other evidence to establish Mr MacDonald's blood alcohol concentration at the relevant time.

[18] The trial judge found that the certificate of the qualified technician, as worded, did not provide a sufficient evidentiary foundation to prove that the results of the calibration checks he performed were within 10% of the target value of an alcohol standard certified by an analyst, as required by s 320.31(1)(a) of the *Criminal Code*.

[19] In coming to that conclusion, the trial judge stated that:

> [27] The qualified technician, Cst. Caron, did not testify in the case before me. There is no evidence that Cst. Hartwig or Cst. Caron ever looked at the Certificate of Analyst.

> [28] What I am being asked to do is accept, at face value, the assertion on the certificate that the alcohol standard was certified by an analyst.
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> [29] I am not prepared to do that without an evidentiary foundation that points me to some reliable evidence that, in making this statement, the qualified technician had actually done something to satisfy himself that this was the case. This would not be an onerous thing to do, and hardly places any kind of difficult or time-consuming evidentiary burden on the Crown.

[20] Having determined that something beyond the statement contained in the certificate of a qualified technician was required to prove the certification of the alcohol standard, the trial judge declined to delve any further on the nature and scope of evidence required by the *Criminal Code* to prove that the alcohol standard used to perform the calibration checks was certified by an analyst and what its target value was:

> [30] I am not prepared to weigh in further on the issues that will be before the Alberta Court of Appeal in ***Goldson*** beyond stating that, at a minimum, if the Crown wishes to rely on the Certificate of Qualified Technician as evidence that the alcohol standard was certified by an analyst, and as evidence sufficient to satisfy the need to have an appropriate target value that the breath instrument must be within 10 percent of, there needs to be some evidence that someone, either the qualified technician or even the officer through whom the certificate is tendered at trial, actually looked at the Certificate of Analyst in relation to the breath instrument in question.
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> [31] I am not saying that such *viva voce* evidence would necessarily be sufficient for the presumption of accuracy to be applicable. That is an argument for another day, and one that may soon be resolved in Alberta, at least, and may provide appellate-level guidance for trial judges in other jurisdictions.
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> [32] I am saying that an argument founded on evidence of someone who actually looked at the Certificate of Analyst would at least provide a foundation to ground such an argument upon.

> [33] I am not prepared to simply accept the bald assertion on the Certificate that this is the case. I appreciate that there is an argument to be made that this assertion is premised on an assumption that the qualified technician did satisfy him or herself as to the appropriate certification having been made by the analyst. That would be consistent with the decisions of Ho J. and Norheim J. in ***Goldson*** and ***Chudak***. That is, however, not an argument that I am prepared to accede to. (bolding in original)

GROUNDS OF APPEAL

[21] This appeal raises the following issues:

1. Did the trial judge err in interpreting s 320.31(1) (and s 320.32(1)) of the *Criminal Code*, as requiring evidence beyond the certificate of a qualified technician to prove that the calibration checks performed on the authorized instrument were within 10% of the target value of an alcohol standard certified by an analyst?

2. Did the trial judge err by finding that the Crown failed to prove that the alcohol standard used by the qualified technician to perform the calibration checks was certified by an analyst?

POSITIONS OF THE PARTIES

The appellant

[22] The appellant contends that the statement contained in the certificate of a qualified technician, which essentially repeats the wording of s 320.31(1)(a) of the *Criminal Code*, is both admissible and sufficient to meet the evidentiary requirement of that provision.

[23] The appellant submits that the trial judge erred in law by taking an incorrect approach to interpreting s 320.31(1)(a) of the *Criminal Code,* in that he considered only the plain meaning of the words of s 320.31(1)(a); whereas the modern approach to statutory interpretation requires that the plain meaning of the words be considered in

their entire context harmoniously with the scheme of the legislation, the object of the legislation and the intent of Parliament.

[24] The appellant submits that this first error led to the trial judge also erroneously concluding that the statement contained in the certificate of a qualified technician adduced at trial was, on its own, insufficient to meet the requirements set out in s 320.31(1)(a), and most specifically that the alcohol standard used to perform the calibration checks was certified by an analyst.

[25] The appellant contends that, in coming to that conclusion, the trial judge disregarded Parliament's intent as well as the long-standing role of qualified technicians in providing evidence about the basic operation of approved instruments.

[26] The appellant submits that, prior to the enactment of the new impaired driving offences framework, which includes s 320.31(1), courts had recognized that: (i) the purpose of the previous drinking and driving regime was to provide for streamlined prosecutions of impaired drivers; and (ii) the legislative scheme was designed to confirm the primacy of the approved instrument.

[27] Also, the appellant submits that the purpose of the new regime is to simplify and streamline impaired driving proceedings while respecting *Charter Rights* in order to reduce delay and court time necessary to deal with impaired driving cases.

[28] The appellant contends that the trial judge's determination that evidence beyond the statement contained in the certificate of a qualified technician is required to comply with the requirement of s 320.31(1)(a) is inconsistent with the stated purpose of the legislation and the intent of Parliament.

[29] In addition, the appellant submits that Parliament's overriding purpose of streamlining proceedings would be frustrated by importing a requirement for additional superfluous evidence, as the trial judge did in this case, by requiring evidence regarding how the qualified technician satisfied himself that the alcohol standard was certified.

[30] The appellant also submits that courts should avoid interpreting impaired driving provisions in a manner that would require the Crown to call unnecessary witnesses, as the trial judge did in this case.

[31] The appellant asserts that if courts do not broadly admit qualified technicians' evidence, the Crown could be required to call alcohol analysts, instrument technicians, as well as experts in breath analysis, and human physiology as witnesses in every routine impaired driving trial, which would defeat Parliament's intent when it amended the impaired driving offences regime. The appellant submits that statutory interpretations that unduly burden the prosecution should be avoided as unintended by Parliament.

[32] In addition, the appellant submits that the trial judge compounded his statutory interpretation error by limiting the qualified technician's unique role in a legally unsupportable way.

[33] According to the appellant, both the prior and current statutory regimes recognize the special role of qualified technicians in impaired driving matters; and that, for reasons of trial efficiency, evidence of qualified technicians has always been the subject of exceptions to the hearsay rule.

[34] The appellant contends that appellate courts have consistently taken a broad view regarding the scope of admissible evidence a qualified technician can provide; and

that courts have rejected an approach that looks behind the technician's evidence and requires the Crown to prove independently the basic elements of breath testing.

[35] The appellant submits that assertions in certificates of qualified technicians about their status, as a qualified technician, and the status of the instrument, as an approved instrument, are hearsay statements that appellate courts have found admissible over the years.

[36] The appellant also submits that, under the previous regime, the assertion in a certificate of a qualified technician that the alcohol standard was "suitable for use" was found to be both admissible and sufficient by appellate courts, without the Crown having to file a certificate of analyst to prove the suitability of the alcohol standard.

[37] The appellant further submits that qualified technicians have been deemed capable of making critical determinations relating to the breath testing process, and that confirming the type of alcohol standard used is well within a qualified technician area of expertise. The appellant contends that, in that context, the trial judge erred in treating the qualified technician as an ordinary witness and by determining that the expression "certified by an analyst" in s 320.31(1)(a) ought to be treated differently than other hearsay evidence deemed admissible under the previous regime.

[38] In addition, the appellant submits that there is a critical safeguard built in the new impaired driving regime in that s 320.34(1) compels the Crown to disclose the certificate of analyst to the accused in advance of the trial. According to the appellant, this ensures that the qualified technician cannot use an uncertified solution undetected. The appellant points out that, in this case, the respondent raised no disclosure concerns and called no evidence to suggest the alcohol standard was not certified.

[39] With respect to the second issue raised in this appeal, the appellant submits that the admissible evidence adduced by the Crown at trial, including the statements contained in the certificate of the qualified technician, meets the requirements of s 320.31(1), and that, overall, the Crown has proven beyond a reasonable doubt that the respondent committed the offence with which he was charged.

[40] The appellant contends that, as a result, the appeal should be allowed, and a conviction entered, as the respondent chose to call no evidence at trial, and the trial judge would have convicted were it not for the error of law he committed.

The respondent

[41] The respondent submits that the trial judge rightly refused to assume the reliability of the unsourced hearsay asserted in the certificate of a qualified technician regarding the alcohol standard used to perform the required calibration checks. The respondent submits that, consequently, the trial judge did not err in finding that the Crown had failed to prove all the elements required by s 320.31(1) of the *Criminal Code* to establish the accuracy and reliability of the breath sample readings, and benefit from the conclusory proof of the respondent's blood alcohol concentration.

[42] The respondent contends that by enacting s 320.31(1), Parliament transformed what was, under the previous regime, an evidentiary shortcut available to the Crown to prove its case (pursuant to s 258(1)(g)) into a provision that triggers an irrefutable presumption of accuracy of the readings once all its constituent elements are made out, and, ultimately, conclusive proof of an accused's blood alcohol concentration at the relevant time.

[43] The respondent submits that, as a result, the criminal standard of proof beyond a reasonable doubt should apply to the proof of the constituent elements of s 320.31(1), as, once they are established, the Crown can adduce the readings of the breath samples as conclusive proof of the accused blood alcohol concentration at the critical time.

[44] The respondent further submits that this change affects the applicability of the case law interpreting the previous impaired driving provisions, which gave rise to a rebuttable presumption.

[45] In addition, the respondent submits that the recent amendments to the impaired driving regime, including s 320.31(1), should be strictly construed, as they have not only restricted an accused's ability to cross-examine the author of a certificate (whether it be an analyst, a qualified technician or a qualified medical practitioner), but have also completely eliminated an earlier line of defence that permitted the accused to provide evidence to the contrary in order to rebut the presumption of accuracy of the readings.

[46] The respondent contends that it does not matter whether the qualified technician's assertion regarding the certification of the alcohol standard is made in the certificate or form part of their *viva voce* testimony, as, in both cases, that assertion constitutes presumptively inadmissible hearsay, as it is made to establish the truth of its contents.

[47] The respondent acknowledges that this Court has to consider any applicable statutory exceptions to the rule to determine whether the hearsay is admissible. In that regard, the respondent recognizes that, prior to the amendments, s 258(1)(g)

constituted such an exception, and that Parliament also intended ss 320.32 and 320.33 to constitute statutory exceptions to the hearsay rule.

[48] However, the respondent submits that these provisions simply provide that a certificate originating from designated classes of persons or a print out of an approved instrument “is evidence” that may be received in court. These provisions do not prescribe the evidentiary weight to be given to the facts contained in the certificate or print out. In addition, there is no reference in s. 320.32(1) to a qualified technician being permitted to attest to the suitability of the alcohol standard.

[49] Furthermore, the respondent submits that the hearsay at issue is not admissible under the principled exception to the hearsay rule**.** The respondent contends that the Crown cannot meet the criteria of necessity in this case because it is in the possession of the certificate of analyst. As such, the respondent contends that the proposed hearsay is clearly inadmissible in this case.

[50] The respondent submits that whether an exception to the hearsay rule could be permitted is a decision that has to be informed by any other evidence the Crown may choose to adduce on the nature and source of the hearsay evidence. The respondent points out that, in this case, the Crown did not tender evidence other than the certificate of a qualified technician in that respect. The respondent submits that, given the lack of supporting information adduced at trial, the trial judge made no error in declining to give any weight to the unsupported hearsay evidence about the certification of the alcohol standard.

[51] The respondent does not dispute that other key assertions made in the certificate of a qualified technician regarding the designation of the technician as a qualified

technician, and/or the designation of an instrument as an approved instrument constitute admissible hearsay. However, the respondent submits that these assertions are distinguishable from the hearsay assertion regarding the alcohol standard as they are capable of independent verification and proof by reference to the relevant ministerial orders published in the Canada Gazette.

[52] The respondent contends that the trial judge was alive to the concern that the new framework should not be interpreted in a way that would frustrate Parliament's intent to unduly burden the prosecution. The respondent submits that any extra burden imposed on the Crown in interpreting s 320.31(1) as requiring the prosecution to file the certificate of analyst, which it has the obligation to disclose to the accused pursuant to s 320.34, is minimal.

[53] Finally, the respondent submits that not much should turn on the appellant's assertion that the defence did not raise any issue with the timeliness and sufficiency of the Crown's disclosure, as the Crown never sought to introduce the certificate of analyst as evidence at trial.

[54] Finally, the respondent submits that, if this Court finds that the trial judge erred in his statutory interpretation, it should nonetheless maintain the acquittal as a result of the Crown's lack of timely disclosure mandated by s 320.34; or, in the alternative, that any order directing a new trial be stayed on the same basis.

STANDARD OF REVIEW

[55] The first ground of appeal raises a question of statutory interpretation. This is a question of law reviewable on the basis of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

[56] The second ground of appeal concerns the application of a legal standard to a set of undisputed facts. This also constitutes a question of law reviewable on the basis of correctness (see *R v Morin*, [1992] 3 SCR 286 at paras 15-16; *R v Araujo*, 2000 SCC 65 at para 18).

ANALYSIS

1. Did the trial judge err in interpreting s 320.31 (and s 320.32) of the *Criminal Code*, as requiring evidence beyond the certificate of a qualified technician to prove that the calibration checks performed on the authorized instrument were within 10% of the target value of an alcohol standard certified by an analyst?

[57] On December 18, 2018, substantial changes to the impaired driving framework of the *Criminal Code* came into force (Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*).

[58] One of the changes brought in by the new amendments was to replace the offence commonly known as “driving over 80” pursuant to s 253(1)(b), by an offence of having a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood, within two hours after ceasing to operate a conveyance, pursuant to s 320.14(1)(b).

[59] Consequentially, the elements of the rebuttable presumptions of identity and accuracy, formally found at s 258(1)(c) of the *Criminal Code*, which were described as shortcuts to establish an accused’s blood alcohol level at the time of driving, were replaced by s 320.31(1) of the *Criminal Code*, which is also aimed at facilitating the proof of an accused’s blood alcohol level at the relevant time. The new provision sets

out a number of elements, which, if established, lead to the conclusive proof of an accused's blood alcohol level at the time the analyses were made.

[60] Section 320.31(1) reads that:

> 320.31 (1) Breath samples – If samples of a person's breath have been received into an approved instrument operated by a qualified technician, the results of the analyses of the samples are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made if the results of the analyses are the same – or, if the results of the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made – if
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> (a) before each sample was taken, the qualified technician conducted a system blank test the result of which is not more than 10 mg of alcohol in 100 mL of blood and a system calibration check the result of which is within 10% of the target value of an alcohol standard that is certified by an analyst;
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> (b) there was an interval of at least 15 minutes between the times when the samples were taken; and
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> (c) the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ more than 20 mg of alcohol in 100 mL of blood. (my emphasis)

[61] There is no dispute between the parties that one of the elements the Crown has to establish in order to benefit from the conclusory effect of s 320.31(1) is that before taking each of the respondent's breath samples, the qualified technician conducted a system calibration check on the approved instrument, the result of which was within 10% of the target value of an alcohol standard certified by an analyst.

[62] Instead, the dispute between the parties stems from the fact that the new regime does not specify how the constitutive elements of s 320.31(1) may be proven, and more specifically, if hearsay evidence from the qualified technician may be adduced to

establish that the alcohol standard used to perform the calibration checks was certified by an analyst. The appellant contends that the qualified technician's evidence in that respect constitutes admissible hearsay. The respondent, on the other hand, contends that it is impermissible hearsay, and that the Crown must adduce evidence from the analyst, either through a certificate or *viva voce* testimony, who certified the alcohol standard.

[63] Hearsay evidence relates to an out of court statement tendered for the truth of its contents. It is presumptively inadmissible in the absence of either a statutory or a common law exception to the rule. In this case, the evidence of the qualified technician regarding the certification of the alcohol standard he used to perform the calibration checks constitutes hearsay evidence, as it is information obtained from an out of court statement of the analyst (contained in their certificate).

[64] The new impaired driving regime contains an exception to the hearsay rule. Section 320.32(1) provides that the Crown may adduce a certificate *in lieu* of the testimony of a qualified technician, analyst or qualified medical practitioner as evidence of the facts alleged in the certificate. It states:

> 320.32(1) Certificates – A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.

[65] However, s 320.32(1) does not specify what these professionals can admissibly attest to in their respective certificates. It does not specify that the technician can attest to all the constituent elements of s 320.31(1) for the truth of their contents, including

those that the technician obtained either directly from the analyst or by viewing the analyst's certificate, such as the certification by an analyst of the alcohol standard.

[66] The previous regime also contained a statutory exception to the hearsay rule. It, too, permitted the admission of a certificate of a qualified technician to be filed for the truth of its contents in lieu of *viva voce* evidence (*R v Alex*, 2017 SCC 37 ("*Alex*") at para 17). However, s 258(1)(g) clearly identified and listed the facts the technician could attest to. Those facts had to be included in the certificate of a qualified technician in order to allow the Crown to rely on the certificate to prove the breath samples readings. Section 258(1)(g) provided, among other things, that the qualified technician could attest to the suitability of the alcohol standard with the approved instrument. Section 258(1)(g) stated that:

> [W]here samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating
> (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
> (ii) the results of the analyses so made, and
> (iii) if the samples were taken by the technician,
> (A) [*Repealed without coming into force*, 2008, c. 20, s. 3.]
> (B) the time when and place where each sample and any specimen described in clause (A) was taken, and
> (C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,
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> is evidence of the facts alleged in the certificate without proof of the signature or official character of the person appearing to have signed the certificate; (my emphasis)

[67] The previous regime also contained a statutory exception to the hearsay rule, allowing the admission of a certificate of analyst without the need for *viva voce* evidence (s 258(1)(f)).

[68] In light of the substantial changes to the impaired driving legislation brought by Bill C-46, it is not surprising that conflicting case law has developed across the country on whether the evidence of a qualified technician regarding the certification of the alcohol standard and its target value constitute admissible hearsay that the Crown may adduce to establish the requirements of s 320.31(1)(a) under the new framework.

[69] In a number of cases, courts have found that evidence from qualified technicians is both admissible and sufficient to establish the elements set out in s 320.31(1)(a) (*R v Porchetta,* 2019 ONCJ 244; *R v Taylor*, 2019 ABPC 165; *R v Hanna*, 2019 ABPC 157; and *R v Phee*, 2019 ABPC 174). I note that most of those cases were transitional cases, where the accused was charged before the coming into force of the amendments but the trial proceeded after. In those cases, the certificate of a qualified technician had been issued under the previous legislation, and did not contain all the information now required by s 320.31(1). As a result, the Crown called the qualified technician to "amplify" the evidence contained in the certificate or called the technician *in lieu* of filing the certificate.

[70] This conclusion was also reached by the summary conviction appeal judge in *R v Goldson*, 2019 ABQB 609 ("*Goldson*"). In that decision, the court determined that the new regime does not require the Crown to adduce evidence beyond that of the qualified technician to prove that the alcohol standard used to perform the calibration checks is certified, as required by s 320.31(1)(a). The court found that this interpretation is

consistent with the object and scheme of the amending act, and in line with the consistent treatment by the courts of s 258(1)(g) and related evidentiary provisions under the previous regime. The court, in *Goldson*, stated as follows:

> 50 In light of the object and the scheme of the *Amending Act*, it is my view that Parliament did not intend to place further evidentiary burdens on the Crown and section 320.31(1)(a) should not be interpreted to require the Crown to tender the certificate of analyst. Evidence from a qualified technician in the form of either *viva voce* evidence or a certificate of a qualified technician is sufficient, provided the evidence identifies whether the alcohol standard was certified by an analyst. It was not the intention of Parliament to add a requirement on the Crown to tender additional evidence beyond that of the qualified technician.
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> 51 The interpretation of section 320.31(1)(a) that the Crown is not required to introduce the certificate of analyst into evidence is consistent with the courts' previous treatment of the now historical section 258(1) and the evidentiary issues that arose in that context.

[71] I note that the Alberta Court of Appeal has granted leave to appeal in that matter (*Goldson*). However, the Court of Appeal has not issued its decision. *Goldson* was followed by the Ontario Superior Court of Justice in *R v Bahman*, 2020 ONSC 638, sitting as a summary conviction appeal court. It was also cited with approval by the Court of Queen's Bench of Manitoba in *R v Denis*, 2021 MBQB 39, also sitting as a summary conviction appeal court.

[72] Another line of cases has taken the opposite view, and found that the qualified technician's evidence regarding the certification of the alcohol standard and/or its purported target value constitutes impermissible hearsay. Those cases have determined that the Crown must adduce evidence from the analyst, either *viva voce* or through a certificate, in order to meet the requirements set out in s 320.31(1)(a) of the

Criminal Code (see *R v Kettles*, 2019 ABPC 140; and *R v Flores-Vigil*, 2019 ONCJ 192).

[73] This line of reasoning has recently found support in a summary conviction appeal decision from Quebec: *R c Brisson*, 2020 QCCS 3794 ("*Brisson*"). The summary conviction appeal judge in *Brisson* specifically rejected the approach taken in *Goldson* (see para 24). *Brisson* was a transitional case in which the Crown filed a certificate of analyst issued under the previous regime that did not state the target value of the certified alcohol standard. The Crown argued that it had nonetheless proven the target value of the alcohol standard through the testimony of the qualified technician, and by filing the print out produced by the approved instrument. The summary conviction appeal judge found that the new provisions at issue are not ambiguous, and that the new regime does not contain a statutory exception to the hearsay rule that would allow the Crown to rely on the testimony of the qualified technician (either *viva voce* or through a certificate) or the print out of the approved instrument to prove the target value of the certified alcohol standard as required by s 320.31(1)(a). As a result, he concluded that the Crown must adduce evidence directly from the analyst (either *viva voce* or through a certificate) to prove those elements, as evidence from the qualified technician and the print out constitutes impermissible hearsay.

[74] The conflicting case law reveals that the amendments to the impaired driving legislation created uncertainty and ambiguity regarding the scope of the exception to the hearsay rule provided by s 320.32(1). More specifically, on whether a qualified technician may attest to facts that constitute hearsay to prove the certification of the alcohol standard used to perform the calibration checks as required by s 320.31(1)(a).

[75] In that sense, I do not agree that the ambiguity resides in the wording of s 320.31(1). Instead, I am of the view that the ambiguity arises from the broad wording of s 320.32(1), which provides that a certificate of a qualified technician "is evidence of the facts alleged in the certificate", in light of the broad scope of facts a qualified technician could attest to in their certificate pursuant to s 258(1)(g) of the previous regime. I would add that, generally, the plain meaning of the expression "is evidence of the facts alleged in the certificate" without any specific qualifier would not lead to ambiguity and would not be construed as permitting otherwise non-admissible hearsay evidence to be adduced for the truth of its contents. Instead, the ambiguity arises from the change in the legislation, and the fact that under the previous scheme, qualified technicians could attest to a wide range of facts in their certificate, including the suitability of the alcohol standard with the approved instrument.

Statutory Interpretation

[76] The guiding principle of interpretation was reiterated recently by the Supreme Court of Canada in *Alex* at para 24:

> [24] The modern approach to statutory interpretation is now well established. It requires that the words of a provision be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[77] In *Alex* at para 31, the Supreme Court of Canada stated that the plain meaning of the words of a provision is not determinative, and that a statutory interpretation analysis is not complete without considering the context and purpose of the legislation as well as the relevant legal norms.

[78] In addition, s 12 of the Federal *Interpretation Act*, RSC 1985, c I-21, provides that:

> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

a) The scheme and object of the legislation and Parliament Intent

i) The preamble of the legislation

[79] The preamble of Bill C-46 sets out a number of considerations that motivated the enactment of the new legislation, including that dangerous and impaired driving are unacceptable at all times and in all circumstances; and that it is important to simplify the law relating to proving blood alcohol concentration. Theses considerations are intended to be read as part of the amending act and assist in explaining its purpose and objectives (s 13 of the *Interpretation Act*).

ii) Parliamentary debates and Parliament's committee

[80] Debates in the House of Commons and appearances before the Standing Committee on Justice and Human Rights also provide insight on the objectives of Bill C-46.

[81] In introducing the second reading of Bill C-46 in the House of Commons, the Minister of Justice stated that one of the objectives of the amendments was to simplify the proof of blood alcohol concentration. The Minister also referred to the importance of streamlining impaired driving prosecutions in order to create court efficiencies in a way that does not unfairly restrict the rights of the accused to full disclosure.

> I would now like to discuss some of the proposals in Bill C-46 which would strengthen the law, while also creating much needed court efficiencies. Impaired driving, is one of the most litigated offences in the Criminal Code and takes up

> a disproportionate amount of time in courts. This is all the more important since the Supreme Court of Canada's decision in R. v. Jordan last July.
>
> One proposal is to limit crown disclosure obligations to scientifically relevant information about breathalyzers and blood alcohol concentration without unfairly limiting access to relevant disclosure. Another is to simplify proof of blood alcohol concentration by setting out in the code what the Crown must specifically prove.[1]

[82] In addition, during her appearance before the Standing Committee on Justice and Human Rights, the Minister of Justice stated that the amendments were to provide for a simplified modernized and coherent legislative framework.[2]

[83] The Deputy Minister of Justice appearing with the Minister before the Committee added that the new amendments were also intended to eliminate defences based on dangerous behaviour or scientifically irrelevant considerations:

> … The effort in this bill is to streamline the procedures associated with what is either the highest or second highest volume case occupying provincial court time generally across the country right now, to the extent that streamlining those prosecutions to get to fair justice more quickly, more efficiently and eliminating defences based on dangerous behaviour or other things that we think are scientifically irrelevant, has to be a saving to the system as well. … [3]

iii) The evidentiary scheme of the legislation

[84] In addition, the evidentiary scheme of the new impaired driving framework is consistent with the stated objective to streamline and facilitate the prosecution of impaired driving matters.

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[1] House of Commons Debates, Volume 148, Number 181, 1st Session, 42nd Parliament, May 19, 2017, 11469.
[2] House of Commons, Standing Committee on Justice and Human Rights, Just, Number 061, 1st Session, 42nd Parliament, June 13, 2017, 2.
[3] *Ibid*, 5.

[85] Section 320.31(1) recognizes the widely accepted scientific evidence that well-functioning approved instruments provide accurate and reliable results (see *R v St-Onge Lamoureux*, 2012 SCC 57 ("*St-Onge Lamoureux*") at para 72). This recognition is embedded in s 320.12, which states:

> … It is recognized and declared that:
>
> …
>
> (c) the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration;

[86] In addition, ss 320.32(1) and 320.33 facilitate the task of the Crown to meet its burden at trial in permitting evidence to be adduced by certificate for certain categories of witnesses, and/or the print out from the approved instrument, without calling *viva voce* evidence. These provisions not only facilitate the Crown's task at trial, but shorten the duration of the proceeding. Nonetheless, an accused may still apply in writing, in advance of the trial, for an order to cross-examine the author of the certificate, but must set out their reasons for doing so. This process ensures that only cross-examination on relevant issues occur.

[87] In addition, s 320.34 sets out the initial disclosure obligation of the Crown. It requires the Crown to disclose specific documents and information directly related to the requirements set out in s 320.31(1), including a certificate of analyst regarding the alcohol standard. Further disclosure may be requested by the accused upon an application in writing in advance of the trial. This section streamlines the proceeding by limiting the initial disclosure to scientifically recognized relevant information.

[88] As a result, I agree, for the most part, with the summary conviction appeal judge's finding in *Goldson* that Bill C-46 was enacted to simplify the investigation and prosecution of impaired driving trials, and to decrease delay, all while respecting the *Charter* rights of Canadians.

[89] The combined application of ss 320.31(1) and 320.32(1) must therefore be given an interpretation that is consistent with that purpose and object.

b) Interpretation of s 320.31(1) and s 320.32(1)

[90] The object and intent of the legislation certainly supports a broad interpretation of s. 320.31(1) and s. 320.32(1), one that simplifies and streamlines the court process. In that sense, the appellant's position, which finds support in *Goldson* – that allowing one witness, the qualified technician, through *viva voce* evidence or the filing of their certificate, to attest to the constituent elements of s 320.31(1) that relate to the functioning and operation of the approved instrument for the truth of their contents, including the out-of-court statement of the analyst regarding the certification of the alcohol standard – is certainly in line with the object and intent of the amending legislation. This interpretation recognizes that the qualified technician has been trained and deemed qualified to operate the approved instrument.

[91] However, if Parliament had intended to allow a qualified technician to attest to facts that constitute hearsay, as an exception to the general hearsay rule, it could have specifically stated so. Parliament could have prescribed the facts that either have to or could be contained in the certificate of a qualified technician, as it did under the former regime. Yet, Parliament clearly chose not to do so, as s 320.32(1) is silent in that regard.

[92] In *Alex*, the majority of the Supreme Court of Canada recognized that the purpose of the evidentiary shortcuts in the previous impaired driving framework was to streamline proceedings by dispensing with unnecessary evidence. The majority added that:

> [34] … The preconditions governing the evidentiary shortcuts are concerned with the reliability of the breath test results and their correlation to the accused's blood-alcohol concentration at the time of the offence. …

[93] As the lawfulness of the breath demand has no bearing on the accuracy of the breath readings, the majority held that the Crown did not have to establish the lawfulness of the breath demand before it could take advantage of the evidentiary shortcuts provided by ss 258(1)(c) and 258(1)(g). The majority held that finding otherwise could require the Crown to call two unnecessary witnesses "to prove that which a certificate of analysis reliably establishes" (para 36). The majority added at para 45:

> … [W]e should avoid an interpretation that forces the Crown to call unnecessary witnesses and promotes an outcome not based on the merits, but rather on the limitations of an overburdened criminal justice system. Indeed, such an approach would be antithetical to this Court's recent jurisprudence emphasizing the importance of participants in the criminal justice system working together to achieve fair and timely justice [citations omitted].

[94] However, the same cannot be said about the evidence at issue in this case, which is necessary to establish one of the stated preconditions to the application of the evidentiary shortcut provided by s 320.31(1). The calibration checks performed by the qualified technician will not meet the requirement of s 320.31(1)(a) unless they are performed with an alcohol standard certified by an analyst, and produce results within

10% of the established target value of that certified alcohol standard. In that sense, the evidence emanating from the analyst is essential, not superfluous.

[95] In addition, an interpretation resulting in the Crown having to file evidence from the analyst before it could benefit from the evidentiary shortcut set out in s 320.31(1) could hardly be characterized as defeating Parliament's intent to streamline proceedings, as s 320.32(1) allows the Crown to file and rely on a certificate of analyst for the truth of its contents without the need of *viva voce* evidence. Nor would a requirement that the Crown provide notice to the accused of its intention to produce the certificate of analyst before trial create hardship on the Crown, as it could be fulfilled at the same time the notice of intention to produce the certificate of a technician is given to the accused – either at the time the accused is released from custody or shortly after the breath samples are taken.

[96] In addition, as pointed out by the respondent, in streamlining its impaired driving legislation, Parliament restricted the lines of defence, based on the malfunction of the approved instrument or its improper operation, that were formerly available to an accused to rebut the presumption of accuracy (see s 258(1)(c) and *St-Onge Lamoureux* at para 138). The expression "conclusive proof" in s 320.31(1) is no longer followed by expressions such as in the absence of "evidence tending to show" or "evidence to the contrary", which usually permit an accused to present evidence to counter a presumption (see *St-Onge Lamoureux* at para 16). Instead, the wording of s 320.31(1) appears to leave very little room for a defence based on the malfunction of the approved instrument or its improper operation once the Crown has proven all the prerequisite elements of its application. Conversely, I note that the expression in the absence of

"evidence tending to show" appears in s 320.31(2) with respect to the presumption applicable to the results of blood samples where proof of improper performance of testing is still available.

[97] This change supports an interpretation that is consistent with the Crown's obligation to prove, in a complete manner and on the basis of a proper factual foundation, all the requirements triggering a determination that the readings are accurate and reliable, and constitute conclusive proof of one of the essential elements of the offence, i.e. of an accused's blood alcohol concentration at the time the breath samples were taken (see *Brisson* at para 16, citing *Falcon c R*, 2020 QCCA 867 at paras 21-23), from the QCCA).

i) Jurisprudence under the previous impaired driving legislation

[98] The appellant contends that interpreting the current framework as permitting qualified technicians to attest to the certification of the alcohol standard is in line with a body of court of appeal decisions, rendered under the previous framework, that consistently took a broad view of qualified technicians' evidence.

[99] In *R v Kroeger* (1992), 15 WCB (2d) 342 (SKCA) ("*Kroeger*"), the Crown tendered at trial the usual certificate of a qualified technician which stated, among other things, that he had ascertained the breathalyzer to be in proper working order by testing it with a suitable alcohol standard. The certificate also specifically identified the alcohol standard used by the technician. The accused applied for and obtained permission to cross-examine the qualified technician. The technician testified at trial that he had performed a check test on the breathalyzer with a standard alcohol solution prior to taking the breath samples, but that he did not have or had not examined a certificate

stating that it was a suitable solution. The technician also stated that he had not conducted any test regarding the nature of the alcohol standard. The Court of Appeal rejected the argument that the technician's certificate could not be admitted into evidence pursuant to s 258(1)(g) unless there was evidence that the technician either had personal knowledge that the alcohol standard solution was suitable for use or was able to produce a certificate proving that it was. It held that the filing of a certificate of analyst under s 258(1)(f) of the *Criminal Code* was not a prerequisite to the admissibility of the certificate of technician pursuant to s 258(1)(g).

[100] The Court of Appeal found that neither s 258(1)(g) nor s 258(1)(c), required the Crown to file the certificate of analyst:

> [27] As Culliton, C.J.S., in the *Brady* case and Cameron, J.A., in *Paulson* case have stated, subs. 258(1)(g) is simply a statement of the contents of what must be in the technician's certificate. If a piece of paper contains the information required by subs. 258(1)(g), including the information that the approved instrument has been ascertained by the technician to be in proper working order by means of an identified alcohol standard, that is suitable for use with an approved instrument, it is "evidence of [such facts] without proof of the signature or the official character of the person appearing to have signed the certificate". The certificate is then used to provide the crucial elements of proof required by subs. 258(1)(c) to set up the rebuttable presumption contained therein. That section makes no reference to a need for a check test or a need for information that would be found in the analyst's certificate referred to in subs. 258(1)(f). The information required by subs. 258(1)(c) is limited to the timing of the taking of each sample, the receipt of each sample into an approved instrument that is operated by a qualified technician and that each sample was analyzed by means of an approved instrument operated by a qualified technician. Once that evidence is supplied, the evidence of the results of the analyses so made is "in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed

> was … the concentration determined by the analyses …" The 1985 amendment has not changed the interaction of subs. 258(1)(c) and subs. 258(1)(g). It merely expands the information that is required by the technician's certificate and thereby requires the check-test to be made, but if the technician can state that he or she has ascertained the breathalyzer to be in proper working order by means of an alcohol standard that ends the matter, unless, of course, there is reason to go further in either the evidence of the Crown or the accused. As found by the trial judge there is no such reason in this case. (my emphasis)

[101] I am of the view that this passage reveals that the Court of Appeal grounded its reasoning in the specific wording of s 258(1)(g), which, at the time, clearly set out the facts the technician not only could, but had to assert in the certificate in order for it to be admissible. The Court of Appeal also noted that none of the constituent elements of the presumptions found at s 258(1)(c) required evidence coming directly from an analyst, and that the amendments to the legislation, at the time, had not changed the interaction between s 258(1)(g), which permitted the evidence of the technician to be adduced by certificate, and the set preconditions that gave rise to the presumption of accuracy and identity under s 258(1)(c).

[102] The decision in *Kroeger* was firmly anchored in the specific wording of ss 258(1)(c) and 258(1)(g). However, Parliament's most recent amendments have brought substantial changes to these provisions. I am of the view that these changes have modified the interaction between the statutory exception to the hearsay rule now found at s 320.32(1) and the constituent elements of s 320.31(1), which leads to the conclusory proof of an accused's blood alcohol concentration, in that one of the preconditions to the application of s 320.31(1) now requires evidence emanating from the analyst or their certificate. Section 320.31(1)(a) clearly requires that calibration tests

be performed, in order to ensure the proper functioning of the approved instrument, prior to the taking of the breath samples. It also requires that the calibration checks be performed with an alcohol standard certified by an analyst in order to determine whether they produce results within an acceptable margin (10%) of the target value of the certified alcohol standard. At the same time, while Parliament has seen fit to retain the exception to the hearsay rule permitting the filing of a certificate of a qualified technician without *viva voce* evidence, it has removed any reference or requirement regarding its content.

[103] The decision of the Court of Appeal for Ontario, in *R v Harding* (1994), 17 OR (3d) 462, in which the court rejected essentially the same argument that was made in *Kroeger*, was also grounded in the specific wording of s 258 (1)(g), which does not have a true equivalent in the new legislation. So were the decisions of *R v Fox*, 2003 SKCA 79 and *R v Squires* (1994), 14 NFLD & PEIR 157 (CA).

[104] I am also of the view that the jurisprudence that held that qualified technicians could attest to their status as qualified technicians or to the status of the breathalyzer they used as an approved instrument were also grounded in the specific and clear wording of s 258(1)(g). However, I would add that, as pointed out by the respondent, the approval of a specific instrument, for example, may be independently assessed by reference to the relevant Ministerial Orders published in the Canada Gazette (see *Criminal Code,* ss 320.11, 320.39 and 320.4).

[105] As a result, I find that these decisions, while informative, are not determinative with respect to the scope of admissible evidence a qualified technician may provide under the new framework.

Conclusion

[106] Given my above analysis, I am unable to read into the silence of s 320.32(1), a statutory exception to the hearsay rule that would entitle the qualified technician to attest to information emanating from an out of court statement of an analyst regarding the certification of an alcohol standard for the truth of its contents, in order to meet the requirements of s 320.31(1)(a). Such an interpretation does not offend the intent of the legislation to streamline the investigation and prosecution of impaired driving matters as the Crown already has the obligation to disclose the certificate of analyst to the accused, and may adduce it at trial without the need of *viva voce* evidence. In addition, this interpretation is not unduly technical as it arises from the requirements that an admissible and scientifically relevant evidentiary basis be established before the Crown may benefit from the conclusory effects of s 320.31(1). As a result, I find that the trial judge did not err in his statutory interpretation of the combined application of ss 320.31(1) and 320.32(1).

2. Did the trial judge err by finding that the Crown failed to prove that the alcohol standard used by the qualified technician to perform the calibration checks was certified by an analyst?

[107] Having determined that the new impaired driving framework does not contain a statutory exception to the hearsay rule, which would permit a qualified technician to attest to the certification of the alcohol standard, I must now determine whether the technician's evidence in that regard may be admissible under an already recognized common law exception to the hearsay rule or, on a case-by-case basis, under the principled exception to the hearsay rule.

[108] The jurisprudence filed by the appellant regarding the interpretation of

s 258(1)(g), which, as I have stated, specifically set out what the technician could attest to under the previous impaired driving framework, does not support a broader conclusion regarding the existence of an already recognized common law exception to the hearsay rule based on the specialized role of qualified technicians in impaired driving matters.

[109] However, hearsay evidence may also be found admissible, on a case-by-case basis, if it satisfies the criteria of necessity and reliability under the principled exception to the hearsay rule (see *R v Khan*, [1990] 2 SCR 531 at 546 and 547; *R v Starr*, 2000 SCC 40 at 153 to 155).

[110] While it may well be that, in transitional cases, necessity could be established; this is not a transitional case. The respondent was arrested and charged approximately six months after the new impaired driving regime came into force. In addition, there was no evidence adduced at trial that could lead to the conclusion that it was reasonably necessary to rely on the qualified technician's certificate to adduce evidence emanating from the analyst.

[111] Also, as I have already indicated, I am of the view that having to file a second certificate (the certificate of analyst) in the context of an impaired driving prosecution does not create a hardship on the Crown. As necessity has not been established in this case, I find that the hearsay evidence of the qualified technician regarding the certification of the alcohol standard is not admissible in this case under the principled exception to the hearsay rule. Having said that, I am not excluding the possibility that, in particular circumstances that do not exist here, necessity may be established.

[112] As previously indicated, the Crown did not file a certificate of analyst, nor did it call the analyst to testify at trial. The Crown adduced evidence from Cst Hartwig, and filed the certificate of a qualified technician as well as the print out of the approved instrument at trial not only to meet the requirements of s 320.31(1), but to meet its burden to prove that the respondent committed the offence with which he was charged beyond a reasonable doubt.

[113] Cst Hartwig did not provide evidence relevant to the certification of the alcohol standard.

[114] In addition, while the print out contains assertions regarding the manufacturer and lot number of the alcohol standard, it does not contain any assertion or statement to the effect that the alcohol standard was certified by an analyst.

[115] As I have found that the statement made by the qualified technician in his certificate regarding the certification of the alcohol standard constitutes inadmissible hearsay when tendered for the truth of its contents, and as the Crown did not adduce any other evidence to establish the certification of the alcohol standard, I am of the view that the Crown has not met the requirements set out in s. 320.31(1)(a) and, therefore, cannot benefit from the conclusory effect of s 320.31(1) to prove the respondent's blood alcohol concentration at the relevant time.

[116] In addition, as the Crown did not otherwise adduce evidence to prove the respondent's blood alcohol concentration at the material time, I am of the view that the trial judge did not err in acquitting the respondent.

[117] I do not find it necessary to comment on the admissibility of the factual assertions appearing on the print out of the approved instrument, which was filed at trial pursuant

to s 320.33, for the truth of their contents, as it is not necessary to dispose of this appeal.

[118] I will also refrain from commenting on the admissibility of the statement contained in the certificate of the qualified technician regarding the target value of the alcohol standard, even though it is an issue that was alive at the trial level, as it does not constitute the subject-matter of this appeal, and as I did not need to consider it to dispose of this appeal.

CONCLUSION

[119] For all these reasons, I would dismiss the appeal.

_____
CAMPBELL J.

APPENDIX "A"

Intox EC/IR II: Subject Test

RCMP
WHITEHORSE
YUKON TERRITORY

Serial Number: *011593* Test Number: *1098*
Test Start Date: *2019.06.08*

Occurrence No.: *2019811182*
Q.T. Name: *CARON, FRANCIS JOSEPH CLAUDE*
Subject's Name: *MACDONALD, ANDREW MATTHEW*
Observation Start Time: *00:49*
Observer's Name: *HARTWIG, MICHAEL BRIAN*

Software Version: VS00378-D
Firmware Version: VS00171-BN
Dry Gas Value (at sea level): 82 mg/100mL
Alcohol Standard Manufacturer: AIRGAS
Alcohol Standard Lot Number: AG816201
Expiry Date of Cylinder: 2020.06.11

Breath Sequence 1

Test	mg/100mL	Time
DIAG	Pass	01:07
BLK	0	01:08
STD	75	01:09
BLK	0	01:10
SUBJ	100	01:12
Investigator Time:		01:13
Investigator Date:		2019.06.08
BLK	0	01:14

Breath Sequence 2

Test	mg/100mL	Time
DIAG	Pass	01:29
BLK	0	01:30
STD	75	01:31
BLK	0	01:32
SUBJ	100	01:33
Investigator Time:		01:34
Investigator Date:		2019.06.08
BLK	0	01:35

Dry Gas Target Data

Std	Tgt	Bar
75	76	93.6 kPa
75	76	93.6 kPa

I, FRANCIS CARON, a qualified technician, certify this to be the printout produced by the approved instrument when it made an analysis of the breath samples of the above named subject.

Date: 2019/06/08 Signature:

APPENDIX "B"

Protected A
once completed

Royal Canadian Mounted Police / Gendarmerie royale du Canada

Certificate of a Qualified Technician

Identifier Number
Police File Number
Occurrence Number 2019-811182

I, Francis Joseph Claude CARON (Name of Qualified Technician), am a person designated pursuant to paragraph 320.4(a) of the *Criminal Code of Canada*, or its predecessor, as a qualified technician by the Attorney General of Canada (Attorney General) and am qualified to operate the Intox EC/IR II, an approved instrument.

I do hereby certify that:

At Whitehorse (City or Town), Yukon Territory (Province or Territory) pursuant to a demand under subsection 320.28(1) of the *Criminal Code of Canada*, I did take two samples of the breath of a person identified to me as Andrew Matthew MACDONALD (Name of Subject), as in my opinion were necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the blood of the said person.

I did receive each of the said samples directly into an Intox EC/IR II, an approved instrument as defined in Section 320.11 of the *Criminal Code of Canada*, that was operated by me.

Prior to each of the said samples I conducted a system blank test, the result of which was not more than 10 milligrams of alcohol in 100 millilitres of blood. System blank tests are recorded by the approved instrument and documented on the subject test record produced in relation to the testing of the said person. The results of the system blank tests are abbreviated as "BLK" on that document.

Prior to each of the said samples I conducted a system calibration check, the result of which was within 10% of the target value of an alcohol standard which was certified by an analyst. The alcohol standard was suitable for use in the said approved instrument and identified as AIRGAS (Alcohol Standard Manufacturer), lot AG816201 (Lot Number). System calibration checks are also documented on the subject test report and abbreviated as "STD".

Prior to each test the approved instrument performed diagnostic tests which the instrument passed. The results of these tests are recorded on the subject test record and abbreviated "DIAG".

The first of the said samples was taken at 01:13 (Hour) hours on the 8th (Day) day of June (Month), 2019 (Year) and that the result of the proper analysis of this sample was 100 (Result) milligrams of alcohol in 100 millilitres of blood.

The second of the said samples was taken at 01:34 (Hour) hours on the 8th (Day) day of June (Month), 2019 (Year) and that the result of the proper analysis of this sample was 100 (Result) milligrams of alcohol in 100 millilitres of blood.

There was an interval of at least 15 minutes between the times when the samples were taken.

The results of the analyses, rounded down to the nearest multiple of 10 milligrams, did not differ by more than 20 milligrams of alcohol in 100 millilitres of blood.

I further certify that the statements in this certificate are true to the best of my skill and knowledge.

Dated this 8th (Day) day of June (Month), 2019 (Year) at Whitehorse (City or Town), Yukon Territory (Province or Territory).

63563
Signature of Qualified Technician

Notice of Intention to Produce Certificate

To Andrew Matthew MACDONALD (Name of Subject) of Whitehorse (City or Town)

Take notice that, pursuant to subsection 320.32(1) and subsection 320.32(2) of the *Criminal Code of Canada*, the prosecution intends to produce in evidence a copy of which appears above.

Dated this 8 (Day) day of June (Month) 2019 (Year) at Whitehorse (City or Town), Yukon (Province or Territory).

(HEARTWICK # 52482)
Signature of Person Serving this Notice for the Prosecution