Citation: *R. v. MacDonald*, 2020 YKTC 10

Date: 20200127
Docket: 19-00223
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

ANDREW MACDONALD

Appearances:
Leo Lane — Counsel for the Crown
David A. McWhinnie — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Andrew MacDonald has been charged with having committed offences contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*. At the commencement of trial, Crown counsel indicated that the Crown was only proceeding on the (b) charge; therefore, I dismissed the s. 320.14(1)(a) charge.

[2] The only witness at the trial was Cst. Hartwig. He testified that on June 8, 2019, in Whitehorse, he observed a vehicle being driven by Mr. MacDonald speeding and crossing over the center-line of the roadway. He pulled the vehicle over, observed indicia of the consumption of alcohol and obtained a "fail" sample from Mr. MacDonald into a roadside screening device.

[3] Mr. MacDonald was subsequently taken to the RCMP detachment, where he provided breath samples that resulted in readings of 100 mg/% blood alcohol.

[4] Filed as Exhibit 2 at trial is the Certificate of Qualified Technician (the "Certificate"). Cst. Caron signed the Certificate as the qualified technician. This document was served on Mr. MacDonald.

[5] Filed as Exhibit 1 at trial is the Intox EC/IR II Subject Test.

[6] On both Exhibit 1 and 2, blood alcohol readings of 100 mg/% are noted as having been obtained from Mr. MacDonald.

[7] Section 320.31(1)(a) of the *Criminal Code* reads:

> 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
>
> > (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;

[8] Counsel for Mr. MacDonald submits that the Crown has failed to prove that the system calibration check provided a result within 10 percent of the target value of an alcohol standard that is certified by an analyst. In particular, counsel submits that the

portion of the Certificate that states the solution was certified by an analyst is inadmissible hearsay.

[9] The impugned portion of the Certificate, which counsel for Mr. MacDonald challenges is inadmissible hearsay, reads as follows:

> Prior to use of the said samples, I conducted a system calibration check, the result of which was within 10 percent of the target value of an alcohol standard which was certified by an analyst.

[10] There is an abundance of conflicting case law on the issue of what, exactly, is required for the Crown to prove that the alcohol standard has been certified by an analyst. In the case of ***R.** v. **Kettles***, 2019 ABPC 140, the Crown called the qualified technician, who testified that generally an analyst certifies the alcohol standard. The qualified technician further testified that he had looked at the certificates posted on the wall.

[11] In ***Kettles**,* the Court noted that, as the Crown must disclose the Certificate of Analyst to the accused, the Crown can hardly rely on the necessity component of the principled approached for the admissibility of this hearsay evidence.

[12] In para. 26, the Court noted that:

> …Simply stating generically that an analyst certifies the standard and stating that certificates are posted on the wall does not engage the presumption [of accuracy].

[13] Referencing the case of ***R.*** v. ***Flores-Vigil***, 2019 ONCJ 192, the Court held that "…tendering the analyst's assertions through the mouth or the certificate of the qualified

technician would be impermissible hearsay…" (para. 21 of ***Kettles***). The Court further held that the analyst's certificate must include a statement indicating the specific concentration of the analyzed solution (para. 22 of ***Kettles***).

[14] In ***R.*** v. ***Porchetta***, 2019 ONCJ 244, Rose J. disagreed with the decision in ***Flores-Vigil***. Rose J. stated the question as follows in para. 43:

> …can the Crown prove that the standard solution is certified by viva voce evidence of the Qualified Technician, or is a higher standard required, namely a certificate, per s. 320.32 or viva voce evidence from the analyst who tested the standard solution?

[15] Rose J. stated in para. 49:

> In the case at Bar I am satisfied that Sgt. Mohan was a Qualified Technician, that he was operating an Approved Instrument, and that he was using a standard solution which was calibrated to 100 mg %. His evidence that he viewed the Certificate of Analyst which evidenced suitability for the standard solution as well as his evidence that he is not aware of a standard solution which was not 100 mg % is uncontradicted. I accept it. In argument I was directed to the decision *R. v. Flores – Vigil* 2019 ONCJ 192. It follows that I have come to a different conclusion than Parry J. but a similar one to Justice De Filippis in *R. v. Does* 2019 ONCJ 233.

[16] As noted in ***R.*** v. ***Brar***, 2019 ONCJ 399, in ***Does***, the qualified technician testified that he had viewed the Certificate of Analyst and "…was satisfied that the approved instrument contained a solution that had been certified as suitable for use by the Centre of Forensic Science" (para. 16).

[17] In ***Does***, De Filippis J. held that the Certificate of Analyst did not need to be filed but that the presumption of accuracy could be proven through the evidence of the breath technician (para. 17 of ***Brar***).

[18] In ***Brar***, Jaffe J. stated in paras. 19 and 20 that:

> 19 In cases prosecuted before the December 2018 amendments, a filing of certificate of the Qualified Breath Technician satisfied the statutory pre-conditions to the presumption of accuracy. Now, something more is required either in the form of the Certificate of the Analyst or *viva voce* evidence concerning the analyst's certification of the alcohol standard. That "something more" was present in the case before De Filippis J. in *Does*, as it was before Kenkel J. in *R. v. McRae*, [2019] O.J. No. 2493 (C.J.) and Rose J. in *R. v. Porchetta*, [2019] O.J. No. 1985 (C.J.). In other words, in those cases there was evidence that the breath technician viewed the certificate of analyst and there was some evidence the solution was certified. I do not have that evidence before me.
>
> 20 Accordingly, a precondition to the operation of the presumption of accuracy has not been proven. …

[19] ***R.*** v. ***Goldson***, 2019 ABQB 609, was a summary conviction appeal of a trial judge's acquittal of Mr. Goldson on the basis that the hearsay *viva voce* evidence of the qualified technician who testified that the alcohol standard was certified by an analyst was not sufficient to satisfy the requirements of s. 320.31(a).

[20] The summary conviction appeal justice, Ho J., overturned the acquittal and convicted Mr. Goldson. She concluded that s. 320.31(a) did not require the Crown to tender a Certificate of Analyst, and that the qualified technician's *viva voce* evidence or the Certificate of Qualified Technician indicating that the alcohol standard was certified by an analyst was sufficient.

[21] Ho J. noted that in Mr. Goldson's trial, the qualified technician testified that the alcohol standard was certified by an analyst. He testified that he had referred to the Certificate of Analyst on the wall in the RCMP detachment, had ensured that the Certificate of Analyst was not expired and then matched the certificate on the instrument itself when conducting his initial checks on the system (para. 11).

[22] Ho J. stated in ***Goldson*** at paras. 50 and 62:

> 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.
>
> …
>
> 62 The Ontario Court of Justice recently dealt with this exact issue in *R v Yip Chuck*, 2019 ONCJ 367. The Court stated at paras 15-17,
>
> > It is recognized that there is an element of hearsay involved in most if not all knowledge gained from training or education. I suspect that only a small percentage of what one "knows" is gained from firsthand experience or personal verification. At some point any hearsay concern dissipates and a witness may testify as to learned knowledge.
> >
> > In this exact context courts have permitted qualified technicians to testify over hearsay objections as to the suitability of solutions used in breath testing machines: see *R. v. Porchetta*, [2019] O.J. No. 1985 and authorities cited therein particularly *R. v. Ware* (1975), 30

> C.R.N.S. 308 (Ont. C.A.) and *R. v. Harding* (1994), 17 O.R. (3d) 462 (C.A.). See also *R. v. Lightfoot*, [1981] 1 SCR 566.
>
> In the same way, in my opinion, the technician may testify as to what he has learned about the alcohol concentration and target values of the solutions that are used: *R. v. Does*, [2019] O.J. No. 1924. That evidence was given by the technician in this case and established what was required to give rise to the presumption of accuracy.

[23] The comment in para. 50 in ***Goldson*** that simply filing the Certificate of Qualified Technician is sufficient for the presumption of accuracy to apply, (notwithstanding that at trial there was also *viva* voce evidence of the qualified technician), was consistent with the decision of Norheim J. in ***R.*** v. ***Chudak***, 2019 ABPC 231 at para. 13 where, referencing ***Goldson****,* he states:

> I conclude that the technician's certificate is proof of its contents. The provisions requiring the Crown to provide a certificate of the analyst in advance of the hearing is not a requirement that the certificate be entered in court. It is part of a requirement requiring the Crown to make full disclosure so that the defendant can know the case against him. The sections provide a mechanism where, after seeing the certificate of the analyst, the defendant may require the Crown to produce the analyst. The section does not require evidence from the analyst in every case.

[24] I appreciate that there is an argument that the disclosure requirement in s. 320.34(e) is solely for the purpose of allowing counsel for an accused to, in appropriate circumstances, advance a defence based on information related to this disclosure, and that the disclosure was not intended to trigger an obligation on the Crown to file the Certificate of Analyst as part of the Crown's case.

[25] I can no better sum up the jurisprudence on this issue than by referring to the comments of Pentelechuk J.A. in ***R.*** v. ***Goldson***, 2019 ABCA 416, at para. 16, in which leave to appeal was granted to Mr. Goldson from the decision of Ho J. on the following question of law:

> What is the proper interpretation of "certified by an analyst" in s 320.31(1)(a) of the *Criminal Code* and must the Crown tender evidence from an analyst, whether *viva voce* or through a certificate of analyst, to prove the requirements of this section?

[26] After noting that the case law has developed with cases both following and not following the line of reasoning in ***Flores-Vigil***, Pentelechuk J.A. stated in paras. 14 and 15:

> 14 As the summary conviction appeal judge noted, the plain words of s 320.31(1)(a) give rise to ambiguity, so she grounded her interpretation in the scheme, object, and Parliamentary intent behind the words. The ambiguity in the provision and the current uncertainty in the jurisprudence also satisfies the requirement that the appeal is reasonably arguable before this court. Where an issue of law is not settled, consideration by this court is often warranted: *R v DCA*, 1999 ABCA 244.
>
> 15 Finally, the sheer number of decisions addressing the interpretation of s 320.31(1)(a) that have come out since the section came into force less than a year ago establishes that this matter has public importance beyond the limited confines of this case.

Application to this Case

[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.

[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.

[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.

[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.

[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.

[34] As such, a pre-condition to the presumption of accuracy has not been proven. Mr. MacDonald is therefore acquitted of the s. 320.14(b) charge.

_____

COZENS T.C.J.