COURT OF APPEAL OF YUKON

Citation: *R. v. MacDonald*,
2022 YKCA 7

Date: 20220812
Docket: 21-YU875

Between:

Regina

Appellant

And

Andrew MacDonald

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Charlesworth

On appeal from: An order of the Supreme Court of Yukon, dated May 7, 2021 (*R. v. MacDonald*, 2021 YKSC 26, Whitehorse Docket 19-AP005).

Counsel for the Appellant:	L. Lane
Counsel for the Respondent:	D.A. McWhinnie
Place and Date of Hearing:	Whitehorse, Yukon May 17, 2022
Place and Date of Judgment:	Vancouver, British Columbia August 12, 2022

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Charlesworth

Summary:

After a summary conviction trial, the accused/respondent was acquitted of an 80-and-over charge—that is, "within two hours after ceasing to operate a conveyance" having "a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood." The evidence at trial consisted of the certificate of the qualified technician who conducted the breath-sample analyses. Since 2018, the Crown has been able to take advantage of a presumption of accuracy of breath-sample analyses if, among other preconditions, the qualified technician conducted a system calibration check using an alcohol standard that is certified by an analyst. Can the Crown rely on the admissibility and sufficiency of the certificate of the qualified technician stating that they used an alcohol standard that was certified by an analyst? Or, must the Crown adduce evidence directly from the analyst (either by certificate or by calling that person as a witness)? The trial judge concluded that the certificate of the technician was not sufficient and entered an acquittal. The summary conviction appeal judge affirmed the acquittal, concluding that, in order to take advantage of the presumption of accuracy, evidence from the analyst is required. The Crown appeals.

Held: Appeal allowed. The certificate of the qualified technician in this case was admissible as evidence of the facts stated therein and it was not countered by any evidence to the contrary: a conviction necessarily follows. The 2018 reorganization of the presumptions and evidentiary shortcuts did not change the law that the certificate of a qualified technician is "evidence of the facts alleged in the certificate." The certificate provision continues to operate as a statutory exception to hearsay, as did its predecessor in the former scheme. This best serves the modern rules of statutory construction, interpreting the words harmoniously with the overarching objective of the legislative scheme historically and today and the objectives set out in the preamble to the 2018 Amending Act: "… to simplify the law relating to the proof of blood alcohol concentration."

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] In 2018, Parliament amended the *Criminal Code* to change the nature of the "80-and-over" impaired-driving offence and to restructure the various presumptions and evidentiary shortcuts available to the Crown. The question is whether these amendments introduced a requirement that, in order to take advantage of the key presumption in this scheme—the presumption of accuracy—the Crown must adduce evidence directly from an analyst (either by certificate or by testimony) about the alcohol standard that was used by the qualified technician who operated the approved instrument.

[2] Such evidence was not required prior to 2018. In my view, the 2018 amendments did not change this. The Crown can continue to rely on the admissibility and sufficiency of the certificate of the qualified technician as evidence that the technician used an alcohol standard that was certified by an analyst.

[3] I conclude that in finding to the contrary, the judge below erred in law. The certificate of the qualified technician in this case was admissible as evidence of the facts stated therein and it was not countered by any evidence to the contrary: a conviction necessarily follows.

Background

[4] On 8 June 2019, Mr. MacDonald, the respondent/accused, failed a roadside breath test using an approved screening device and was arrested. He was taken to an RCMP detachment where a qualified technician conducted breath-sample analyses that reported 100 mg of alcohol in 100 mL of blood. The respondent was charged under s. 320.14(1)(b) of the *Criminal Code*. That is the offence of "within two hours after ceasing to operate a conveyance" having "a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood"—colloquially, the "80-and-over" offence.

[5] At trial, the only witness called by the Crown was the arresting officer, not the qualified technician. The defence called no evidence. Evidence from the approved instrument and from the qualified technician were introduced in documentary form. At issue in this appeal is the admissibility and sufficiency of the certificate of the qualified technician that was tendered by the Crown relying on s. 320.32(1), so I will briefly summarize the legislative context.

[6] The current provisions were introduced by Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2018), S.C. 2018, c. 21 [*2018 Amending Act*]. The relevant provisions came into force on 18 December 2018.

[7] Section 320.31(1) deems breath-sample analyses from an approved instrument operated by a qualified technician to be conclusive proof of the person's blood alcohol concentration at the time of the analyses if, among other preconditions, "before each sample was taken, the qualified technician conducted a… system blank test… 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" (emphasis added).

[8] Section 320.33 allows for the use of a printout from the approved instrument that has been signed and certified by the qualified technician as evidence of the facts alleged on the printout.

[9] Section 320.32(1) allows the evidence of the qualified technician to be tendered via certificate:

> 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.

[10] In this case, the certificate of the qualified technician included a statement that said the result of their system calibration check was within "10% of the target value of an alcohol standard which was certified by an analyst."

[11] The defence argued that the certificate of the *qualified technician* included inadmissible hearsay evidence of the certification of the alcohol standard *by an analyst*. Because of this, the defence argued, the Crown could not establish the statutory prerequisites under s. 320.31(1) to use the breath sample analyses as conclusive proof of Mr. MacDonald's blood alcohol concentration. The defence argued that evidence of an analyst having certified the alcohol standard must be introduced by either *viva voce* evidence from the analyst or by a certificate of the analyst (as allowed by s. 320.32(1)). This is the same argument the respondent/accused makes now on appeal.

[12] The respondent was acquitted, with reasons indexed as *R. v. MacDonald*, 2020 YKTC 10 [*Trial Judgment*]. The acquittal turned on whether the Crown could rely on the statement in the certificate of the qualified technician to establish that the technician used an alcohol standard that was certified by an analyst. While the judge did not come to a conclusive interpretation of the evidentiary requirements, he found the certificate of the qualified technician to be inadequate because there was "no evidence that [the arresting officer] or [the qualified technician] ever looked at the Certificate of Analyst." He found that the Crown failed to fulfil the s. 320.31(1) preconditions, so the Crown could not rely on the breath-sample analyses as conclusive proof of the respondent's blood alcohol concentration. The trial judge acquitted the respondent.

[13] The Crown's summary conviction appeal was heard by Justice Campbell: *R. v. MacDonald*, 2021 YKSC 26 [*Summary Conviction Appeal Judgment*]. She concluded that a qualified technician is not entitled 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)": at para. 106. The summary conviction appeal was dismissed and the acquittal affirmed.

[14] Since then, the Court of Appeal of Alberta released its judgment in *R. v. Goldson*, 2021 ABCA 193, leave to appeal to SCC refused, 39809 (17 February 2022). On this issue, that court held that the Crown must adduce:

> evidence from the analyst regarding certification, either by way of the analyst's *viva voce* evidence or by way of the statutorily recognized Certificate of Analyst. The [qualified technician's] evidence about whether an alcohol standard is certified by an [analyst] is inadmissible hearsay.
>
> [Emphasis added.]

Issues on Appeal

[15] Leave to appeal was granted on a single issue. See *R. v. MacDonald* (23 August 2021), 21-YU875 (Y.K.C.A.) (Grauer J.A. in Chambers):

> whether the statement made by the qualified technician in his certificate that he used an alcohol standard that was certified by an analyst constitutes admissible and sufficient evidence that the alcohol standard used had been certified by an analyst.

Positions of the Parties

[16] I understand the essence of the Crown's position to be as follows. The purpose of the 2018 amendments was to simplify and streamline prosecutions of impaired drivers. It had long been recognized that under the former s. 258(1)(g), the certificate of the qualified technician could (and was required to) state that the alcohol standard used was "suitable for use with an approved instrument." The Crown says that the substitution of the words "certified by an analyst" did not reflect an intention to heighten the Crown's burden of proof or change the evidentiary shortcuts available to it. The Crown says that by not specifying in the new s. 320.32(1) that a qualified technician's certificate could be evidence about the suitability of the alcohol standard that was used, Parliament was broadening rather than narrowing the scope of what the qualified technician can attest to in their certificate. Section 320.32(1) "removed all the prescribed elements and simply provides that a qualified technician's certificate is evidence of its contents."

[17] The respondent/accused argues that s. 320.31(a) elevates the requirement that the alcohol standard be "certified by an analyst" to a "vital element of proof." Only by meeting these new requirements is the Crown entitled to treat the results of the approved instrument as conclusive proof of the accused's blood alcohol concentration. The respondent says that this Court must give effect to Parliament's considered decision to alter the wording from "suitable for use" to "certified by an analyst." He says there is nothing in s. 320.32(1) conveying a hearsay exception that would allow the qualified technician to attest to the fact that they used an alcohol standard that had been certified by an analyst.

[18] The respondent argues that an interpretation that requires evidence from the analyst (in either certificate or *viva voce* form) is not inconsistent with an overall objective to simplify proceedings, given that the 2018 amendments took an entire line of defence off the plate—if the preconditions are established, the accused no longer has the option of providing evidence to the contrary to rebut the conclusive proof of their blood alcohol concentration. (However, as discussed below at para. 74, the accused can argue that the preconditions themselves have not been established by the Crown, and there is an exception to the "80-and-over" offence for certain kinds of post-driving consumption of alcohol in s. 320.14(5).)

[19] The respondent argues that even if the Crown is correct regarding the admissibility of the statement in the qualified technician's certificate, the reason for the acquittal should not be upset: that even if the qualified technician's statement by way of certificate *can* establish that the alcohol standard that was used was certified by an analyst, the trial judge was simply not convinced that in fact it had been certified by an analyst.

Analysis

[20] The admissibility of the qualified technician's certificate as evidence that the alcohol standard was "certified by an analyst" is a question of statutory interpretation and as such is a question of law. This is to be reviewed on a standard of correctness: see *Knight v. Black*, 2022 BCCA 130 at para. 13; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[21] I repeat the critical statutory provisions on appeal.

[22] When prosecuting an "80-and-over" charge, the Crown must prove that an accused, subject to the exceptions in s. 320.14(5):

> has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

See s. 320.14(1)(b).

[23] The *Criminal Code* provides the Crown with the benefit of certain presumptions and evidentiary "shortcuts" or "accommodations" consistent with the overarching legislative purpose of the scheme which has remained consistent under its various iterations (*R. v. Alex*, 2017 SCC 37 at paras. 35–36):

> … to streamline the trial process in this heavily litigated and complex area of the law… to avoid needless delays in drinking and driving proceedings.

[24] The critical presumption is the "conclusive proof" provision in s. 320.31(1). In the language of the jurisprudence under the previous regime, this is the *presumption of accuracy*. It provides that in the circumstances stated, the analyses of the breath samples "are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made…." But this is only so if (among three requirements):

> (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;

[25] The Crown is afforded an evidentiary accommodation in proving this requirement by allowing for the use of a certificate setting out the results in lieu of calling the responsible qualified technician as a witness at trial. Section 320.32(1) provides in this regard:

> 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.

[26] This is enough context to repeat the critical questions on appeal:

(i) For the purposes of proving the requirement in s. 320.31(1)(a) that the qualified technician conducted a system calibration check the result of which was within 10% of the target value of an alcohol standard that was certified by an analyst, may the Crown rely only on the certificate of the qualified technician stating this as a fact? Or,

(ii) Must the Crown, in addition to filing the certificate of the qualified technician (or calling that person as a witness), file the certificate of the analyst who certified the alcohol standard (or call that person as a witness)?

[27] These are the questions at the heart of this appeal. The court below answered the first "no" and the second "yes." So too did the Court of Appeal of Alberta in *Goldson*, reversing the decision of the Queen's Bench in that province: 2019 ABQB 609. The division of opinion in Alberta mirrors a division of opinion across the country as I will detail below in reviewing the Court of Appeal's reasons in *Goldson*.

[28] I start with jurisprudence that considered what is arguably an identical issue under the predecessor legislation.

[29] Immediately before the *2018 Amending Act*, the essence of the impaired driving offence involved operating a motor vehicle "having consumed alcohol in such a quantity that the concentration of the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood": s. 253(1)(b) as it appeared on 17 December 2018. And, again, the Crown was afforded the benefit of presumptions and evidentiary shortcuts similar to the critical ones at bar.

[30] Similar to the new scheme, the previous one contained a "conclusive proof" provision containing both a "presumption of accuracy" and a "presumption of identity": see generally *Alex* at paras. 18–19. It was in these terms in s. 258(1)(c) (as it appeared on 17 December 2018):

> (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
>
> (i) [Repealed before coming into force, 2008, c. 20, s. 3]
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

> (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
>
> (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things—that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;
>
> [Emphasis added.]

[31] I have highlighted the critical words for our purposes. And again the Crown was afforded the evidentiary shortcut of filing the certificate of a qualified technician in s. 258(1)(g) (as it appeared on 17 December 2018):

> where 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 …
>
> is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

[32] Of course, there are clear differences in the structure and wording of each scheme but no one disputes that the overall purpose of both schemes remains as stated by the court in *Alex*: "… to streamline the trial process…." For our purposes I

will concentrate on the requirement in the predecessor scheme that the qualified technician certificate had to state that the analysis was:

> 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.
>
> [Emphasis added.]

See s. 258(1)(g)(i) as it appeared on 17 December 2018.

[33] This is similar to the requirement we are concerned with at bar, that is, "an alcohol standard that is certified by an analyst": s. 320.31(1)(a). Under the predecessor scheme, the critical questions were:

(i) For the purposes of proving the requirement in s. 258(1)(g)(i) that the technician ascertained the approved instrument was in working order by means of an alcohol standard "suitable for use with an approved instrument" may the Crown rely only on the certificate of the qualified technician stating this as a fact? or

(ii) Must the Crown in addition to filing the certificate of the qualified technician (or calling that person as a witness) file the certificate of the analyst (or call that person as a witness) who determined the suitability of the alcohol standard?

[34] The guiding jurisprudence under the predecessor scheme answered question (i) "Yes" and question (ii) "No."

[35] The leading case in this regard is the Supreme Court of Canada's decision in *R. v. Lightfoot*, [1981] 1 S.C.R. 566, 123 D.L.R. (3d) 104.

[36] In *Lightfoot* the questions stated included this one (at 567):

> (ii) Did I err in law in concluding that there had to be proof of the suitability of the substance or solution used in the breathalyzer machine at the time of the analyses of the samples of the accused's breath, and proof of how the chemical analyses were conducted

> where no certificate evidence was relied upon and the Crown proceeded by way of *viva voce* evidence?

[37] There the scheme provided in s. 237(1)(c) (as it appeared in 1981) for the evidence of the results of the chemical analyses (in the absence of evidence to the contrary) as proof of the accused's blood alcohol level at the time of the alleged offence if three conditions were met. One of the conditions was that the chemical analysis be made by means of an approved instrument operated by a qualified technician.

[38] The scheme again had the evidentiary shortcut represented by the qualified technician's certificate. Section 237(1)(f) (as it appeared in 1981, which would eventually become s. 258(1)(g)) provided in part:

> (f) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 235(1), a certificate of a qualified technician stating
>
> > (i) that each chemical analysis of the samples has been made by means of an approved instrument operated by him in which a substance or solution suitable for use in that approved instrument and identified in the certificate was used,
> >
> > (ii) the results of the chemical analyses so made,
> >
> > …
>
> is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

[39] The Chief Justice stated for the court:

> I find considerable difficulty in reconciling the two cases of *Rogers* and *York* but, in any event, I think that Robins J., who purported to follow the judgment of the Ontario Court of Appeal in *R. v. Ware* was correct in doing so even if he were not bound to it by *stare decisis*. Lacourcière J.A. who spoke for the Ontario Court of Appeal in the *Ware* case said this (at p. 315) on the point in issue here:
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> … in my view, the learned trial Judge was in error in holding that the suitability of the substance or solution for use in an approved instrument had to be proved as part of the Crown's case before the accused could be found guilty of the offence charged. In my view subs. (1)(*e*) [allowing submission of the certificate of analyst] is merely an evidentiary subsection providing the Crown with the means by which to rebut any evidence that the substance or solution was unsuitable. I am of [the] opinion that it is sufficient for the Crown,

> in order to prove the commission of the offence, merely to bring the accused within subs. (1)(*a*) and to file the certificate under subs. (1)(*f*) or prove the three enacted requirements of subs. (1)(*c*) by viva voce evidence.
>
> Parliament created a new offence, the actus reus of which includes the prohibited blood-alcohol concentration; it set out a workable procedure to prove it. With great respect, it is not for the courts to defeat the laudable social purpose of the legislation, i.e., keeping off the roads people whose blood-alcohol proportion may exceed the prescribed limit, by adding, as part of the required [*sic*] proof of an offence, the necessity of an analysis of the solution in every case. I am required to "approach the matter by considering what is the mischief aimed at by this Act" […] and to avoid reading into the section technical requirements which do not flow from the language used by Parliament.
>
> In short, the Crown may obtain the advantage of the statutory presumption under s. 237(1)(*c*) by offering proof, by certificate or by oral evidence, of the three elements specified therein. Nothing more is required, in the absence of any evidence to the contrary. In my opinion, both *Gorgichuk* and *Rogers* were wrongly decided.
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> [Explanatory parenthetical added; a correction and an omission noted.]

[40] To enjoy the "advantage" of the statutory presumption under the predecessor scheme, the Crown needed only to lead the certificate of the qualified technician or their oral evidence. The certificate of the analyst or their oral evidence as to the suitability of the substance or solution intended for use in the approved instrument was <u>not</u> required (even though a certificate in that regard was provided for in s. 237(1)(e)).

[41] *Lightfoot* was followed in a decision of the Court of Appeal for British Columbia in *R. v. Moore*, [1981] B.C.J. No. 1184, 63 C.C.C. (2d) 135 (C.A.). Justice Taggart, for the court, held (at paras. 20 and 21):

> 20 As I view that argument it depends upon the interpretation to be given to Section 237(1)(f) and what meaning is to be taken from the words "suitable for use in that approved instrument and identified in the certificate"? Does that mean that the Crown must adduce evidence in addition to that of the qualified technician as to the suitability of the solution? Certainly that is not the case where the qualified technician is called to give testimony on behalf of the Crown; that is to say, where the Crown does not seek to rely upon the certificate of the qualified technician. That is made quite clear by Regina v. Lightfoot, a decision of the Supreme Court of Canada dated May 11th, 1981 and apparently not yet reported. Or, does it mean merely that if the requirements of Section 237(1)(f) are met and the qualified technician states in his certificate that the solution suitable for use in that approved instrument and identified in the certificate was used, the certificate becomes, to use the

> words of subsection (f) "Evidence of the statements made therein". If emphasis is given to the latter aspect, that is to say, that it is indeed evidence of the statements made therein, then it seems to me the Crown can use the certificate as evidence of the results of the chemical analysis so made, again to use the words of Section 237(1)(c).
>
> 21 I think the certificate is and remains evidence of the statements contained in it, notwithstanding that the qualified technician, as he was bound to do, conceded that he did not have any personal knowledge of the contents of the ampules which were used in making the chemical analysis of the respondent's breath. That being the case, it seems to me the argument for the respondent must fail.

[42] These cases answer the questions I have posed under the predecessor scheme. Are there different answers to the similar questions under the *2018 Amending Act*? Are the summary conviction appeal judge's view below and that of the Court of Appeal of Alberta in *Goldson* correct that the answers differ under the new scheme? In my view they are not.

[43] My analysis of *Goldson* will serve as an answer to both courts.

[44] But I begin by stating two propositions. The first is rhetorical: given that the legislative purpose of the "80-and-over" scheme across its various iterations has always been as the *Alex* court stated, why would Parliament be seen to be adding an evidentiary requirement on the Crown to prove the reliability of the alcohol standard by resort to the oral evidence or the certificate of the analyst who certified it?

[45] The second proposition is simply this. If the certification of the alcohol standard is a fact in issue that must be proven by the Crown, and I conclude it is—and even if we reject the Crown's submission to us that we are not dealing in the qualified technician's certificate with hearsay from the analyst—we must give effect to the clear words of s. 320.32(1) that the certificate of the qualified technician is "evidence of the facts alleged in the certificate," and here, as in all such certificates, the qualified technician has stated:

> 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, lot AG816201. System calibration checks are also documented on the subject test report and abbreviated as “STD”.

[46] The point is simply this, if the qualified technician’s certificate is “evidence of the facts alleged” in it, the Crown has, by filing the certificate introduced evidence that the alcohol standard was certified by the analyst.

[47] Are these propositions properly to be rejected in the context of the *2018 Amending Act*? I turn to *Goldson*.

[48] There the court stated the issue so (at para. 14):

> The issue is whether the changes introduced by the *Amending Act* should be interpreted to include a statutory exception to the hearsay rule (commonly referred to as an evidentiary shortcut) and permit evidence from the [qualified technician] to prove that the alcohol standard used to conduct the test was certified by an analyst or whether it is necessary to tender the Certificate of Analysis or call *viva voce* evidence from the analyst to establish that the alcohol standard was certified.

[49] The court then helpfully identified the conflict in the case law across the country on this point:

> [15] As noted, both by the summary conviction appeal judge and the trial judge, there continues to be a growing body of conflicting case law across the country on the answer to this question. The cases of *R c Brisson*, 2020 QCCS 3794, *R v Flores-Vigil,* 2019 ONCJ 192 and *R v Kettles*, 2019 ABPC 140 are consistent with the reasoning of the provincial court trial judge and hold that the [qualified technician]’s evidence is inadmissible to establish that the alcohol standard was certified by an analyst.
>
> [16] The cases of *R v Francis*, 2020 CanLII 63759 (NL PC), *R c Garneau*, 2020 QCCQ 2321, *R c Gohier Goyer*, 2019 QCCQ 5277, *R v Taylor,* 2019 ABPC 165, *R v Hanna*, 2021 ABQB 68, *R v Phee*, 2019 ABPC 174, *R v Porchetta*, 2019 ONCJ 244, *R v Chudak*, 2019 ABPC 231, *R v McDermott*, 2019 NSPC 70, *R v Does*, 2019 ONCJ 233, *R v Savage*, 2020 ABQB 618, *R v Brar*, 2019 ONCJ 399, *R v Bahman*, 2020 ONSC 638, *R v Baboolall*, 2019 ONCJ 204, *R v Yip-Chuck*, 2019 ONCJ 367, *R v McRae*, 2019 ONCJ 310, *R v Denis*, 2021 MBQB 39, *R v Underhill*, 2020 NBPC 3, and *R v Bhandal*, 2019 ONCJ 337 are consistent with or expressly adopt the reasoning of the summary conviction appeal judge and find that the [qualified technician]’s evidence is sufficient to establish the requirements of s. 320.31(1)(a).

[50] The court proceeded to canvass the case law under the predecessor scheme including *Lightfoot* and *R. v. Ware*, [1975] O.J. No. 705, 30 C.R.N.S. 308. I reproduce this critical portion of the court's analysis (*Goldson* at paras. 46 and 47):

> [46] In all these iterations of the scheme that predated the *Amending Act*, there were three types of provisions or evidentiary shortcuts: (1) the preconditions to the presumption of accuracy and identity (ss. 237(1)(c) and 258(1)(c); (2) the information contained in the Certificate of Analyst and allowing for its admission into evidence as proof (ss. 237(1)(e) and 258(1)(f)); and (3) the information contained in the Certificate of Qualified Technician and allowing for its admission into evidence as proof (ss. 237(1)(g) and 258(1)(g)).
>
> [47] These three provisions and their relationship changed with the *Amending Act.*
>
> a) First, the phrase "alcohol standard, identified in the certificate, that is suitable for use" changed to "alcohol standard that was certified by an analyst". The phrase was also moved from the Certificate of Qualified Technician provision (s. 258(1)(g)) to become one of the preconditions for the presumption of accuracy in s. 320.31(1) (previously s. 258(1)(c)). The precondition also, for the first time, included a requirement that the [qualified technician] conduct a "system blank test" 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". These changes are noted in italics in the table below.
>
> b) Second, the two provisions that contained information to be contained in the Certificate of Qualified Technician (s. 258(1)(g)) and Certificate of Analyst (s. 258(1)(f)) were replaced with one provision that allowed the certificates to be admitted without calling the [qualified technician] or analyst to give evidence (s. 320.32). However, this new provision did not delineate the information to be contained within the certificates, or preconditions to the evidentiary short cut. Instead, reference is made only to a "certificate ... made under this Part is evidence of facts alleged within the certificate". These changes are bolded below*.* The applicable provisions from ss. 258(1)(c), (f) and (g) and ss. 320.31(1) and 320.32(1) are set out below for comparison

[51] The court returned to reiterate these points at paras. 61 and 62:

> [61] The changes introduced in the *Amending Act* require the performance of a system blank test and a system calibration check within 10% of the target value of an alcohol standard certified by an analyst as a precondition to the presumption of accuracy (s. 320.31(a)), require the Crown to disclose information to the accused, including the results of the those tests and the analyst's certificate (s. 320.34(1)), and requires that, in an application to

> cross-examine on a certificate, the accused set out "the likely relevance of the proposed cross-examination" (s. 320.32(4)).
>
> [62] Most importantly for the purposes of the appeal, and as described above, the requirement for a system blank test and system calibration check within 10% of the target value of an alcohol standard that is "certified by an analyst" has been added to the section that sets out the preconditions for the presumption of accuracy, in s. 320.31(1)(a), and the language regarding what is contained in the Certificate of Qualified Technician has been removed.

[52] I would address the last point first that the new scheme removes "language regarding what is contained in the Certificate of Qualified Technician." I do not see how this in any way diminishes the force of the bald statement in s. 320.32(1) that the certificate of the qualified technician is "evidence of the facts alleged in the certificate…." If anything, the removal of a list of required content to the certificate broadens the scope of what may be set out in the certificate.

[53] Parliament can choose to create a narrow exception or a broad-scoped exception to the rule against hearsay. Here, Parliament has chosen a broadly worded provision, but, at law, the provision still operates as a statutory exception to the rule against hearsay.

[54] It is said by way of an *in terrorem* argument that this might open the door to any number of assertions in the certificate which then become "evidence." But this is a groundless fear. The certificate is expressly said to be "made under this Part." Clearly, the specific context in which the certificate is generated and its authorized purpose in a prosecution would limit statements in the certificate to those matters relevant to the qualified technician's role under Part VIII.1 of the *Code*.

[55] The most telling point in the *Goldson* court's analysis is that made in para. 62 about what has been added to the preconditions for the Crown to enjoy the presumption of accuracy. To repeat, it is said in para. 47:

> [47] These three provisions and their relationship changed with the *Amending Act*.
>
> a) First, the phrase "alcohol standard, identified in the certificate, that is suitable for use" changed to "alcohol standard that was certified by an analyst". The phrase was also moved from the Certificate of Qualified Technician provision (s. 258(1)(g)) to

> become one of the preconditions for the presumption of accuracy in s. 320.31(1) (previously s. 258(1)(c)). The precondition also, for the first time, included a requirement that the [qualified technician] conduct a "system blank test" 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".
>
> [Emphasis added.]

[56] But is it accurate to say, in effect, that today's equivalent of an alcohol standard "suitable for use," that is, an alcohol standard that was certified by an analyst, has somehow been "elevated" (as suggested by the respondent) by its adoption as a precondition for the presumption of accuracy in the *2018 Amending Act*? Does this fundamentally change what the Crown must now prove, and importantly, how it might do so?

[57] In my view, it has always been the case that utilizing only an alcohol standard "suitable for use" has been a necessary condition to the admission of the qualified technician's certificate, or a *practically* necessary condition when proceeding by way of a qualified technician's oral evidence in support of the reliability of the test results.

[58] As for the certificate, the predecessor scheme always required the statement as to suitability. As for the oral evidence of a qualified technician, if the qualified technician were asked about but could not swear to the alcohol standard's suitability for use, the evidence of the analysis would fall short of grounding the presumption because of concerns about the reliability of the technician's evidence. Quite simply there would be no assurance that it was the output of an approved instrument operated in an appropriate manner.

[59] Before the *2018 Amending Act*, asserting the suitability of the sample was only necessary at first instance if the Crown sought to establish the preconditions to the presumption of accuracy by way of the certificate of the qualified technician. Since the *2018 Amending Act*, that the qualified technician used a certified alcohol standard is something that must be established in *every case* in which the Crown seeks to take advantage of the presumption of accuracy contained in s. 320.31(1).

The question is whether this structural change makes a difference as to whether the qualified technician may assert that fact in their certificate.

[60] Respectfully, the fact that use of a certified alcohol standard has been made a precondition to reliance on the presumption of accuracy seems to be a specious reason to interpret the new scheme as imposing a new evidentiary requirement on the Crown. Although arguably it would not be terribly onerous for the Crown to provide certificate evidence from the analyst in every case, this was never a feature of the scheme in the past according to the guiding jurisprudence and runs counter to the aim and object of that scheme and the new one.

[61] The error of the Court in *Goldson* was to read the addition of the certification of the alcohol standard as a precondition to be a "significant change." That understanding fails to consider the scheme (or the predecessor scheme) as a whole.

[62] The changes introduced by the *2018 Amending Act* can be understood as follows.

[63] There is no longer a distinction in the statutory text between the evidence-by-certificate and evidence-by-testimony approach. The reorganization renders the evidentiary requirements more uniform between these two approaches—no matter which approach the Crown uses to establish the preconditions for the presumption of accuracy, it must now always establish in its case that the qualified technician used an alcohol standard that was certified by an analyst. I would not call this an "elevation" of the requirement, but rather, a *standardization* of the requirement. In my view, it was a statutory anomaly that the Crown had previously only been required to introduce evidence about the suitability of the alcohol standard at first instance when proceeding by way of the technician's certificate.

[64] Second, the amendments simplified the various hearsay/certificate shortcuts. There is now a single omnibus hearsay/certificate allowance for analysts, medical practitioners, and technicians. See again s. 320.32(1):

> 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] The previous requirement that the qualified technician's certificate must assert the suitability of the alcohol standard lost its textual home. Today's s. 320.32(1) would be a poor fit, without re-complicating the now simple language.

[66] There is also a presumption of stability in the law. See *R. v. D.L.W.*, 2016 SCC 22 at para. 21:

> There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law: see, generally, Sullivan, at §17.5; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at paras. 1793 ff. This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear: *Walker v. The King*, [1939] S.C.R. 214, at p. 219; *Nadeau v. Gareau*, [1967] S.C.R. 209, at p. 218; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at p. 764.
>
> [Emphasis added.]

[67] Under this understanding of the previous scheme and of the 2018 reorganization, it is understandable that the requirement to establish that the alcohol standard has been certified by an analyst has been placed among the preconditions in s. 320.31(1). Rather than clear legislative intention to substantially change the law, these are innocuous explanations for the reorganization.

[68] I turn to address a point made by the summary conviction appeal judge below in response to the point I make in my second proposition that we must give effect to the clear words in s. 320.32(1) that the certificate of a qualified technician is "evidence of the facts alleged in the certificate." I have said that this would extend to

the fact of the certification of the alcohol standard notwithstanding the lack of direct knowledge of that fact by the qualified technician.

[69] Here the judge below stated at para. 75:

> ... 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...

[70] The judge cites no authority for this proposition. It appears to me to run counter to the cases I have already referred to. *Lightfoot* has made clear that under the predecessor scheme the certificate of a qualified technician was indeed considered to be sufficient evidence of the suitability of the alcohol standard.

[71] This is made even clearer by the court in *Moore*. In the paragraphs from that decision quoted above, the court refers to the provisions stating that the certificate becomes “evidence of the statements made therein.” The court continued (to quote again para. 21):

> I think the certificate is and remains evidence of the statements contained in it, notwithstanding that the qualified technician, as he was bound to do, conceded that he did not have any personal knowledge of the contents of the ampules which were used in making the chemical analysis of the respondent's breath. That being the case, it seems to me the argument for the respondent must fail.

[72] To the same effect is the decision of the Saskatchewan Court of Appeal in *R. v. Kroeger* (1992), 15 W.C.B. (2d) 242, 36 M.V.R. (2d) 55 (S.K.C.A.) cited by the judge below at para. 98. The judge distinguished *Kroeger* in part because the legislation then specified the content of the qualified technician’s certificate while the *2018 Amending Act* does not. I have already dealt with this submission above; in my view, it offers no basis for the distinction drawn by the judge.

[73] The judge below also stressed an inference from Parliament's alleged restriction of the lines of defence in the *2018 Amending Act* (at para. 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.
>
> [Emphasis added.]

[74] But the accused *can* challenge (albeit subject to application) any of the certificate evidence that the Crown has put forward to establish the preconditions (see s. 320.32). Section 320.31(2) (relating to blood samples) still has the "absence of evidence tending to show that the analysis was performed improperly" clause because s. 320.31(2) is wholly devoid of preconditions that would establish safeguards as to the interpretation of the blood alcohol or drug concentration.

[75] In my view, the reasons of the Supreme Court of Canada in *Lightfoot*, applied by the Court of Appeal for British Columbia in *Moore*, continue to apply to the scheme created by the *2018 Amending Act*. It is not necessary for the Crown to go beyond the qualified technician's certificate or oral evidence as to the fact of the alcohol standard's certification. If the accused in any case wishes to put that fact in further issue, they may avail themselves of the procedures set out in ss. 320.32(2), (3) and following:

> **320.32** …
>
> **Notice of intention to produce certificate**
>
> **(2)** No certificate shall be received in evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention to produce it and a copy of the certificate.
>
> **Attendance and cross-examination**
>
> **(3)** A party against whom the certificate is produced may apply to the court for an order requiring the attendance of the person who signed the certificate for the purposes of cross-examination.
>
> …

[76] In my view, this disposition of the issue of statutory interpretation best serves the modern rules of statutory construction, interpreting the words harmoniously with the overarching objective of the legislative scheme historically and today and the objectives set out in the preamble to the *2018 Amending Act*: "… to simplify the law relating to the proof of blood alcohol concentration."

[77] The trial judge's concern was that the qualified technician did not testify and "there was no evidence that [the arresting officer] or [the qualified technician] ever looked at the Certificate of Analyst," that there was no evidentiary foundation that in making this statement about the analyst's certification Constable Caron "had actually done something to satisfy himself that this was the case." It will be seen that this concern is not necessarily driven by resolving the issue of statutory interpretation. In my view, however, the concern is completely answered by the record before the trial judge.[1] The certificate says that the qualified technician conducted the appropriate calibration check using an alcohol standard "which was certified by an analyst." That is evidence of "the facts alleged." There was no evidence to the contrary before the trial judge; a conviction necessarily follows.

[1] And, as Grauer J.A. stated in his reasons granting leave to appeal in this matter: "I am not quite clear on why if it is admissible evidence, it is not sufficient."

[78] I would allow the appeal and enter a conviction on the charge before the court.

[79] The appellant Crown has requested the statutory minimum sentence be imposed (see s. 320.19(1)), but this depends on the number of previous offences, if any. We do not have this information before us and therefore remit the matter to the Territorial Court for sentencing.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Charlesworth"