SUPREME COURT OF YUKON

Citation: *R. v. Skookum*, 2019 YKSC 8

Date: 20190213
S.C. No. 17-AP013
Registry: Whitehorse

BETWEEN

REGINA

RESPONDENT

AND

BRETT J. SKOOKUM

APPELLANT

Before Madam Justice E.M. Campbell

Appearances:
Kim Sova — Counsel for the respondent
Allan Lane — Appearing for the appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Skookum appeals from his conviction, after trial, of three territorial offences related to his operation of a commercial vehicle, namely that, on August 30, 2017, he:

- failed to report to the weigh scale contrary to s. 9(1) of the *Highways Act Regulation*, O.I.C. 2002/174, as amended*;*
- failed to secure cargo contrary to the *National Safety Code* Standard 10, s. 2; and
- operated a motor vehicle with the wrong class of licence, contrary to s. 31(a) of the *Motor Vehicles Act,* R.S.Y. 2002, c. 153, as amended (the "*Act*").

[2] Mr. Skookum was not present at trial nor at the hearing of his appeal. Mr. Allan Lane acted as agent for him on both occasions.

[3] The appellant submits that his convictions for all three offences should be overturned based on a number of errors made by the trial judge.

FACTS

[4] This matter arises from a roadside stop that a carrier compliance officer made after observing a piece of sod blowing off a pick-up truck moving south on the Alaska Highway. The appellant was the driver of that truck. An exchange between the officer and the appellant took place. The appellant handed over his driver's licence as well as the vehicle's insurance and registration to the officer. The appellant possessed a class 5 driver's licence. The Certificate of Registered Ownership for the vehicle indicated a maximum gross vehicle weight of 15,599 kg. As a result, the officer issued two tickets alleging four driving related offences. The carrier compliance officer, Sebastien Nadeau, was the only witness for the Crown at trial. Mr. Lane was the only witness for the defence. The appellant did not testify. The Crown stayed one of the charges at the outset of the trial. The appellant was found guilty on the other three.

ISSUES ON APPEAL

[5] The appellant raises the following issues on appeal:

1. Did the trial judge err in dismissing the appellant's application for a stay of proceedings? The appellant raises the following issues under this ground of appeal:

(i) Did the trial judge err in dismissing the appellant's application to enter the carrier compliance officer's notes into evidence in support of his application?

(ii) Did the trial judge err in dismissing the appellant's stay of proceedings application based on a breach of his right to full disclosure and, consequently, of his right to make full answer and defence pursuant to s. 7 of the *Charter of Rights and Freedoms*;

(iii) Did the trial judge err in finding that there was no abuse of process due:

(a) to the Crown proceeding without reasonable and probable cause; and/or

(b) to impropriety of the Crown's conduct.

2. Did the trial judge err in finding that the appellant's roadside statement was voluntary?

3. Did the trial judge err in finding Officer Nadeau, the carrier compliance officer, credible?

4. Did the trial judge err in finding that the sod that fell off the vehicle driven by the appellant, was "cargo" and not secured?

5. Did the trial judge err in her interpretation of the expression "registered gross vehicle weight" and in convicting the appellant of operating a motor vehicle with the wrong class of licence, contrary to s. 31(a) of the *Act*?

Powers of the Summary Conviction Appeal Court

[6] Pursuant to s. 2.01(2) of the *Summary Convictions Act,* R.S.Y. 2002, c. 210, as amended, the summary conviction appeal provisions of the *Criminal Code* apply to Mr. Skookum's appeal.

[7] As per s. 822 of the *Criminal Code*, ss. 683 to 689, with the exception of subsections 683(3) and 686(5), apply to summary conviction appeals and govern the powers of a summary conviction appeal court.

[8] Sections 686(1) (a) and (b) are of particular relevance to this matter. These sections provide:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
>
> …

Standard of Review on Appeal

[9] An appeal is not a retrial of a case (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 7).

[10] On appeal, the standard of review on a question of law is correctness (*R. v. D.A.I.*, 2012 SCC 5, at para. 89; *Housen,* at para. 8).

[11] When assessing the reasonableness of the verdict on appeal, which is a question of law, the standard of review on a question of facts, such as the assessment of credibility at trial, is "palpable and overriding error" (*R. v. Mian*, 2014 SCC 54, at para. 40; *R. v. G. (L),* 2006 SCC 17, at para. 10; *Housen*, at para. 10).

ANALYSIS

1. Did the trial judge err in dismissing the appellant's application for a stay of proceedings?

[12] At the outset of the trial, the appellant brought an application for a stay of proceedings with respect to the charges of failure to report to the weigh scale and failure to secure cargo.

[13] The stay application was based on an alleged breach of the appellant's right to full disclosure and, consequently, to make full answer and defence pursuant to s. 7 of the *Charter*.

[14] In the alternative, the appellant submitted that there was an abuse of process which warranted a stay of proceedings. In summary, the appellant argued at trial that Officer Nadeau's notes, written on the back of the tickets issued to the appellant and disclosed by the Crown, lacked any reference to the statement the appellant allegedly made roadside to the officer at the time of the incident. It was only after Mr. Lane spoke to Crown counsel that she prepared and disclosed to the defence, a Can-Say Statement for Officer Nadeau referring to the statement allegedly made by the appellant. This was three months or so after the charges were laid. According to the appellant, the alleged statement is the only evidence the Crown had and relied on to prove its case regarding the charge of failure to report to the weigh scale.

[15] The appellant submitted at trial that the officer had failed to properly and timely preserve the appellant's alleged statement by not recording it in his notes. Mr. Lane stated, on behalf of the appellant, that he did not have the confidence that the notes were "a reliable reflection of the actual conversation between the officer and the accused". The appellant further submitted that the officer's failure to record the statement in his notes was akin to a case of lost and/or destroyed evidence. He further submitted that for the Crown to rely at trial on a statement reported three months or so after the fact, was not only prejudicial to the accused but also impugned the integrity of the justice system, therefore warranting a stay of proceedings.

[16] The transcript of the proceedings reveals that the appellant's abuse of process argument was not clearly developed or argued at trial. The argument was only raised to the extent that Mr. Lane submitted to the trial judge that Crown counsel had "created" Officer Nadeau's Can-Say in order to fill in the gaps in the Crown's case, which he had brought to her attention prior to trial (Transcript of proceedings, p. 7, lines 14 to 34).

[17] No witnesses testified in support of the appellant's application. The appellant attempted to enter Officer Nadeau's notes into evidence on the application. The Crown did not object to the notes being entered into evidence. However, the trial judge refused to admit the notes as evidence or to look at them.

[18] In her submissions at trial, Crown counsel listed the documents disclosed prior to trial by the Crown to the appellant. The disclosure included Officer Nadeau's notes on the back of the tickets and Can-Say; a copy of the vehicle's registration and insurance; the appellant's driver's licence; the appellant's driver's abstract; maps; photos; and applicable legislation.

[19] Crown counsel acknowledged that the only notes Officer Nadeau took were the ones on the back of the tickets. Crown counsel also acknowledged that she contacted the officer after speaking with Mr. Lane about the case. She acknowledged that Officer Nadeau's Can-Say was prepared to address some of the issues Mr. Lane had raised with her. She confirmed that the Can-Say was provided prior to trial.

[20] Crown counsel submitted that the Crown had fulfilled its disclosure obligations and that the situation did not amount to an abuse of process. Crown counsel submitted that the issue raised by Mr. Lane was best described as one of credibility of the officer.

She further stated that it was open to Mr. Lane to test the officer's recollection of events or for Mr. Skookum to testify as to his own recollection if he chose to do so.

[21] Mr. Lane did not deny receiving the disclosure listed by the Crown.

[22] The trial judge dismissed the defence's application for a stay of proceedings. She found that:

> Your motion for a judicial stay in respect of this matter is denied. The information that's before the Court would not support that as being an appropriate remedy in respect of this matter. It would appear as though the disclosure that was provided to you in respect of this matter is what was available. There's no suggestion that anything has been destroyed.
>
> And the can-say statement that has been provided in respect of that matter is simply what it is, it is an expectation of what that witness will testify to if that witness is called at the trial such that there is no surprise, and that it would meet the obligation of providing relevant information to the defence so that they're able to decide how they wish to proceed in respect of the matter, so that there's no surprises when they get here to find out it's something that they've never heard of before. It's an expectation of what the witness will testify to. It is not notes recorded at the time and there's quite a difference in that.
>
> So the application for a judicial stay, as I say, is not made out in respect of this matter. And it's certainly - there's no indication that this is an abuse of process.
>
> So your - both applications in respect of that matter are denied and the matter will proceed to trial. (Transcript of proceedings, p. 8, lines 20 – 38)

[23] I agree with the conclusions of the trial judge. I dismiss this ground of appeal for the following reasons.

i) Did the trial judge err in dismissing the appellant's application to enter the carrier compliance officer's notes into evidence in support of his application?

[24] The appellant submits that the trial judge erred in dismissing his request to have Officer Nadeau's notes entered as evidence in support of his application. At the hearing

of the appeal, he made an application to have Officer Nadeau's case summary (notes and photographs) considered on appeal. The documents were sealed pending my decision on their admissibility on appeal.

[25] The accused has the burden of proving, on a balance of probabilities, a breach of his or her *Charter* right. In this case, the appellant bore the burden of showing that:

1. there was non-disclosure; and
2. the lack of disclosure caused him prejudice or had an adverse effect on his ability to make full answer and defence (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 74).

[26] The appellant submits that Officer Nadeau's notes were relevant in order to demonstrate the extent of the Crown's non-disclosure and the evidence it had in its possession.

[27] In refusing to admit the officer's notes into evidence, the trial judge stated that officers' notes are memory-aids, they are not, in the usual course, entered into evidence at trial.

[28] Despite the trial judge refusing to have the notes entered into evidence in support of the application, in his submissions, the appellant specifically referred to the nature of the information that did not appear in Officer Nadeau's notes, but was later disclosed in his Can-Say:

> On December 4, 2017, I received a PDF document by email. That document was named "S. Nadeau Can-Say 17 November 4" or "11-04". In further query of legal services, I learned that this document was created sometime after November 29, 2017. <u>The majority of this can-say provided is without reference to any existing disclosed investigator notes or other timely reference and purports in its largest part to include self-incriminating statements of the Accused after his</u>

> detention. Simply put, the actions of this enforcement officer are inexcusably negligent. He fails in a basic Crown duty to collect or preserve evidence, at minimum through professional note-taking.
>
> Continuing with a trial while recognizing that the Crown seeks to rely on evidence detailed some three months after the fact is not only prejudicial to the Accused, but impugns the integrity of the judicial system. (my emphasis) (Transcript of proceedings, p. 2, line 47 to p. 3, line 12)

[29] The transcript further reveals that the trial judge was alert to the issue that the appellant sought to raise by adducing the officer's notes into evidence, (i.e. the fact that the officer's Can-Say, prepared and provided a number of months after the events, contained relevant information that did not appear in the officer's notes). Further, the trial judge was aware of his concern that the Crown wanted to rely on that additional information to prove its case. The trial judge had an exchange with Mr. Lane on that point regarding the difference between contemporaneous notes and Can-Say statements:

> MR. LANE: Your Honour, it's - my concern that I'm bringing to you in making this application is that they seek to bring notes made three months after the fact –
> THE COURT: Sir, a –
> MR. LANE: -because -
> THE COURT: – can-say statement is not notes made three months after the fact; a can-say statement before the court is "should this witness come before the court to testify, this is what we anticipate the witness can say." That's why it's called a "can-say" statement. It's not a sworn document. It is an expectation of what the witness will testify to to give the other side of the case, whether it's the accused or the accused's counsel, an indication of the nature of that testimony if the person is to come before the court. It's not notes that the officer made at the time. It is a "can-say". The expectation, so that there's no surprises when the person comes before the court to know what it's

> anticipated they may testify to. Whether they do or not is something that you have to wait and see.
> MR. LANE: In - with respect, Your Honour, that can-say is created because of the gap.
> THE COURT: Correct
> MR. LANE: And the problems that I brought to the attention of the Crown. Otherwise, I wouldn't have that.
> THE COURT: Right. But you do have it, sir.
> MR. LANE. Yeah.
> THE COURT:So therefore you have disclosure as to what it's anticipated the witness would testify to, so that when the witness gets here the issues that you've raised, you're aware as to what it's likely the witness will testify to.
>
> So I haven't had the chance to read the decision of Justice Gower in detail, but Justice Gower says something in there that is certainly very well known in the issue of whether or not stays are granted by the court, and that is that it's usually a last resort. A stay, judicial stay is granted in exceptional circumstances. (Transcript of proceedings, p. 7, lines 14 to 44)

[30] Even though the trial judge did not allow the appellant to enter the officer's notes into evidence, the transcript shows that she did consider the fact that Officer Nadeau's Can-Say contained information that did not appear in his notes. That is precisely why the appellant wanted the notes in evidence before the Court. I therefore find that the appellant was not prejudiced by the trial judge's decision not to review the officer's notes.

[31] At trial and on appeal, Crown counsel acknowledged that Officer Nadeau's Can-Say contained additional relevant information that did not appear in his notes. I am prepared to review the trial judge's decision on that factual basis. Taking into consideration the above and my decision on the stay of proceedings application, I find it unnecessary to review the documents tendered by the appellant on appeal.

ii) Did the trial judge err in dismissing the appellant's stay of proceedings application based on a breach of his right to full disclosure and, consequently, of his right to make full answer and defence pursuant to s. 7 of the *Charter?*

[32] The Crown has an obligation to disclose all relevant information in its possession or control relating to an investigation against an accused. First party disclosure includes not only information related to matters the Crown intends to enter into evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of his or her right to make full answer and defence (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, pp. 343-44; *R. v. McNeil*, 2009 SCC 3, at para. 17).

[33] The Crown must disclose to the accused all materials in its possession except for information that is clearly irrelevant, privileged, or which disclosure is otherwise governed by law (*McNeil,* para. 18).

[34] The principles applicable where a stay of proceedings is sought in response to a breach of the Crown's disclosure obligation, were set out in the reasons of L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 83, as follows:

> [83] Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

[35] A stay of proceedings is therefore only granted in the clearest of cases.

[36] At para. 74, L'Heureux-Dubé J. also discusses the defence's evidentiary burden in establishing that the non-disclosure by the Crown violates s. 7 of the *Canadian Charter of Rights and Freedoms*:

> [74] Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the Charter, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial. Once a violation is made out, a just and appropriate remedy must be found.

[37] The appellant submits that Officer Nadeau failed to timely and/or contemporaneously collect, record or preserve in his notes, or otherwise, any roadside statements made to him by the appellant in the course of the investigation. He further submits that Officer Nadeau's failure to timely record the alleged statement equates to a case of lost and/or destroyed evidence, which amounts to a breach of the appellant's rights to full disclosure and full answer and defence pursuant to s. 7 of the *Charter*.

[38] The appellant's position would require officers to record everything of relevance in their notes in order to fulfill the Crown's duty to provide full disclosure, and the accused's corollary right to make full answer and defence. Failure to do so would amount to a loss of evidence and breach of the accused's s. 7 *Charter* right.

[39] For the following reasons, I do not share this view.

[40] The primary role of officers' notes is to assist them in recalling events when called to testify in court (*R. v. Machado*, 2010 ONSC 277, at paras. 120 - 121; *R. v. Antoniak*, [2007] 75 W.C.B. (2d) 532, at para. 24).

[41] Also, in *Wood v. Shaeffer*, 2013 SCC 71, the Supreme Court of Canada recognized the importance of contemporaneous, accurate and comprehensive officers' notes in the context of criminal investigations.

[42] Officers' notes that are relevant to the case at issue are part of the materials that the Crown has the obligation to disclose to an accused as first party disclosure. However, I have not been provided with any legal authority supporting the conclusion that incomplete notes, alone, amount to a breach of an accused's right to full disclosure and consequently, to his right to make full answer and defence.

[43] I adopt the reasoning of Durno J. in *R. v. Machado*, 2010 ONSC 277:

> [120] Third, is whether the absence of more fulsome notes from the scene and throughout the preparation of the report diminished the weight to be attached to his opinion. Included in that question is another issue, whether the notes are intended to be disclosure or whether the notes are only to be prepared to assist the officer in refreshing his or her memory and happen to be disclosed to defence counsel.
>
> [121] While officers' notes are provided as part of disclosure, there is no law that I am aware of that an officer must record everything he or she did or saw in their notebook to comply with the Crown's disclosure obligation. While some (note Mr. Brauti) have attempted to elevate the judgment in *R. v. Zack*, [1999] O.J. No. 5747 (O.C.J.) to a statement that if an event or observation is not in the notes, that it did not occur, that is not what the judgment says. Indeed, there are numerous authorities where events or observations that are not noted have been accepted: *R. v. Thompson* (2000), 151 C.C.C. (3d) 339 (Ont. C.A.); *R. v. Bennett* [2005] O.J. No. 4035 (S.C.J.).

> [122] I agree with the following comments of Garton J. in *R. v. Antoniak*, [2007] O.J. No. 4816:
>
> > 24 It should be remembered that an officer's notes are not evidence, but are merely a testimonial aid. Trial judges routinely tell officers on the witness stand that they may use their notes to refresh their memory, but that they must also have an independent recollection of the events. To elevate the absence of a notation to a mandatory finding that the event did not occur would eliminate the officer's independent recollection from the equation. The notes would become the evidence.
> >
> > 25 The significance of an omission in an officer's notebook, just like the significance of an inconsistency in a witness's testimony, must be determined by the trier of fact on a case-by-case basis.
>
> [123] The question is whether the absence of more fulsome notes impacted on P.C. Wright's evidence. (my emphasis)

[44] This statement of Durno J. was recently adopted in *R. v. Gill*, 2015 ONSC 7872, at para. 46; and *R. v. Hassan*, 2017 ONSC 233; see also *R. v. Bailey*, 2005 ABPC 61, *R. v. AGB*, 2011 ABPC 190, and *R. v. Whitton*, 2016 BCSC 1799.

[45] In *Stinchcombe*, the Supreme Court of Canada recognized the possibility of a relevant witness statement not being recorded either in officers' notes or otherwise. In that case, the Supreme Court of Canada suggested that a Can-Say be prepared to ensure that such relevant information be provided to the accused.

[46] In *R. v. Wicksted* (1996), 29 O.R. (3d) 144, p. 10, the Ontario Court of Appeal stated that:

> There is, of course, an obligation on the Crown to disclose any information which it may have which may tend to incriminate or exculpate an accused person. This is so even though there is no physical evidence by way of recorded statements or records in that regard: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at pp. 345-46, 68 C.C.C. (3d) 1 at pp. 15-16.

[47] In *R. v. Brown*, 2014 ONSC 1383, at para. 25, Durno J. reiterated the statement he made in *Machado* in a context similar to the case at bar. In *Brown*, the police officer had not recorded in his notes roadside statements made to him by the accused. The defence only learned about the officer's evidence regarding the accused's statements when the officer testified at trial (para. 19). Durno J. ruled that the trial judge did not err in relying on the roadside statements in determining whether the warrantless search was reasonable and whether the officer had a reasonable belief the ASD readings would be reliable even though the statements did not appear in the officer's notes (paras. 14 - 15).

[48] I take, from these cases, that while the absence of a note of a relevant information in an officer's notebook or handwritten report is a factor that the court may take into consideration in assessing the credibility and the reliability of the officer's testimony, that absence, in and of itself, does not amount to a *Charter* breach.

[49] In the present case, there is no evidence that the officer deliberately omitted or withheld relevant information in his notes to avoid having to disclose it to the appellant. There is also no evidence that he lost or destroyed recorded relevant information or documents (*R. v. Carosella*, [1997] 1 S.C.R. 80 and *R. v. La,* [1997] 2 S.C.R. 680).

[50] There is also no evidence that the Crown withheld, lost or destroyed relevant information or documents, including Officer Nadeau's notes, in its possession or control.

[51] The evidence is to the effect that the Crown disclosed, prior to trial, all the relevant information in its possession or control. The appellant's alleged statement was disclosed to him prior to trial through the Can-Say of Officer Nadeau.

[52] Consequently, I find that there is no breach of the appellant's right to full disclosure and to make full answer and defence pursuant to s. 7 of the *Charter*.

iii) Did the trial judge err in finding that there was no abuse of process due:

(a) to the Crown proceeding without reasonable and probable cause

[53] The appellant submits that the Crown did not have reasonable and probable cause to continue or bring the prosecution against him before the court.

[54] As stated in *G.C. v Ontario (Attorney General),* 2014 ONSC 455, at para. 40:

> [40] Reasonable and probable cause concerns a prosecutor's professional, not personal or subjective, opinion on the merits of the case in question. For there to be reasonable and probable cause for a prosecution, there must exist sufficient evidence, which assuming it to be true, could reasonably lead any ordinarily prudent and cautious man, placed in the position of the prosecutor to conclude that the plaintiff was guilty of the crime. The reasonableness of a prosecution is a matter of the prosecutor's professional assessment of the legal strength of the case and whether, based on the existing evidence, proof beyond a reasonable doubt could be made out in a court of law: *Miazga v. Kvello Estate*, *supra*, at paras. 58-77; *Proulx v. Quebec (Attorney General)*, *supra*, at para. 31.

[55] Whether to bring to prosecution a charge laid by an officer or continue a prosecution are matters of prosecutorial discretion (*R. v. Anderson*, 2014 SCC 41, at para. 40.).

[56] As Moldaver J. stated for the Supreme Court of Canada in *Anderson*, at para. 48 "prosecutorial discretion is entitled to considerable deference." Matters of prosecutorial discretion can only be reviewed on the grounds of abuse of process (*Anderson*, at paras. 1, 5 and 48).

[57] An “abuse of process refers to the Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system” (*Anderson,* at para. 50).

[58] The appellant bears the burden of proving the abuse of process on a balance of probabilities (*Anderson,* at para. 52). Also, considering the unique nature of prosecutorial discretion, the appellant must first meet the threshold of establishing a proper evidentiary foundation to his or her claim before the Crown may be required to provide reasons justifying its decision (*Anderson*, para. 52). “Prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motive” (*Anderson*, at para. 55, citing *Sriskandarajah,* at para. 27).

[59] As indicated previously, the appellant did not raise this specific argument at trial.

[60] The only evidence before the Court regarding this argument comes from Crown counsel’s acknowledgement at trial that she contacted Officer Nadeau after speaking to Mr. Lane about this case. Officer Nadeau’s Can-Say was prepared and disclosed to address some of the issues raised by Mr. Lane. The content of the conversation(s) and exchange(s) of email(s) between Crown counsel and defence are not in evidence before the Court. The transcript of the proceedings at trial reveals that Officer Nadeau’s Can-Say referred to statement(s) made by the appellant that did not appear in his notes or any other material disclosed by the Crown up to that point. The appellant’s statement is the only evidence the Crown relied upon to prove the charge of failing to report to the weigh scale. Crown counsel proceeded to trial on three of the charges laid against the appellant. One of the charges was stayed before trial.

[61] Crown counsel's professional assessment of the strength of a prosecution is conducted throughout the proceedings. It is an ongoing process, which may involve interactions between the Crown and the investigative body.

[62] I do not find that the facts in evidence before the Court demonstrate bad faith or improper motive on the part of Crown counsel in bringing or continuing the prosecution of the charges laid by Officer Nadeau against the appellant. These facts fall short of establishing a proper evidentiary foundation to support the appellant's claim. This ground of appeal is dismissed.

b) Impropriety of the Crown's conduct.

[63] The appellant submits that Crown counsel acted inappropriately in using, to the Crown's advantage, information disclosed to her by the defence in the course of settlement discussions. The appellant submits that Crown counsel used that privileged information to produce Officer Nadeau's Can-Say in order to fill in the gaps in the Crown's case the defence had brought to her attention prior to trial.

[64] The evidentiary record before the Court, which I have already referred to, is insufficient to draw an inference of impropriety on the part of the Crown and to support the appellant's submissions. I would therefore dismiss this ground of appeal.

2. Did the trial judge err in finding that the appellant's roadside statement was voluntary?

[65] At trial, the Crown sought to rely on the appellant's statement allegedly made roadside to Officer Nadeau. Officer Nadeau testified that he stopped the appellant, who was heading south on the Alaska Highway, after seeing a piece of sod falling off the pick-up truck he was driving. Officer Nadeau approached the truck and obtained the appellant's driver's licence as well as the vehicle's registration and insurance. When

asked by Officer Nadeau where he was coming from and where he was going to, Officer Nadeau testified that the appellant replied that he was coming from the sod farm, made a stop in Whistle Bend, and was heading up to his company's yard.

[66] A *voir dire* was held to determine the voluntariness of the appellant's statement. Officer Nadeau was the only witness for the Crown. The defence did not call any witnesses on the *voir dire*.

[67] At the conclusion of the *voir dire*, the trial judge found that the appellant had made the statement voluntarily and admitted it in evidence.

[68] The appellant submits that the trial judge erred in admitting the statement into evidence because the Crown did not discharge its burden to prove beyond a reasonable doubt that the statement was voluntary for the following reasons:

(a) There was no mention of the appellant's statement in Officer Nadeau's notes.

(i) The absence of notes demonstrates that no statement was made; and

(ii) Officer Nadeau's testimony did not represent the full exchange he had with the appellant. The absence of notes led to Officer Nadeau providing a brief, selective and tailored recount of the conversation he had with the appellant. Therefore, the Crown cannot prove the accuracy and completeness of the appellant's alleged statement.

(b) Not all officers involved in the investigation of the appellant testified on the *voir dire*.

[69] The Crown bears the burden of proving beyond a reasonable doubt that the statement made roadside by the appellant to Officer Nadeau, a person in authority, was made voluntarily (*R. v. Oickle*, 2000 SCC 38, at para. 30).

[70] Voluntariness, or lack thereof, is determined through a contextual approach that considers all the circumstances surrounding the statement including, but not limited to, the presence or absence of inducements, such as threats or promises, oppressive circumstances, the lack of an operating mind and police trickery (*Oickle*, at paras. 68 to 71).

[71] If a trial judge properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a question of facts reviewable on the basis of an overriding and palpable error (*Oickle*, at para. 71).

[72] The appellant relies on the decision of *R. v. Wilkinson*, 2013 SKCA 46, to submit that in order to fulfill its burden, the Crown is required to produce evidence of every word said to, or in the presence of the accused.

[73] I do not find that *Wilkinson* goes that far and stands for that proposition. It instead states that the Crown is required to produce an evidentiary record that will permit the court to assess voluntariness based on all the relevant circumstances surrounding the statement:

> [11] As noted, a statement is not admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. Accordingly, a trial judge must “strive to understand the circumstances surrounding the [statement] and ask if it gives rise to a reasonable doubt as to the [statement’s] voluntariness,” (see *Oickle*, at para. 71). It is further well-established that the Crown bears the burden of proving beyond a reasonable doubt the admissibility, or voluntariness, of a statement. This means it is incumbent on the Crown to show affirmatively that an accused was

> properly treated and not questioned outside the context of the taking of the statement in question (see: *R. v. Holmes* (2002), 169 C.C.C. (3d) 344 (Ont. C.A.) and the cases cited therein). In practical terms, the Crown must place before the trial judge all relevant circumstances surrounding the taking of the statement so that the trial judge, having all the facts, can form his or her own opinion as to whether the statement was free and voluntary.

a) The absence of contemporaneous notes referring to the appellant's statement

(i) Does the absence of notes equate to an absence of statement?

[74] The appellant submits that the trial judge erred in finding that the Crown met its burden to prove the voluntariness of his alleged statement. The appellant submits that the absence of a notation in Officer Nadeau's notes regarding the statement he allegedly made roadside to Officer Nadeau is evidence that he did not make that statement.

[75] The absence of a notation in an officer's notes regarding a relevant observation or event does not automatically lead to the conclusion that the observation was not made or the event did not occur. The testimony of an officer is the evidence at trial, not his or her notes. The absence of a note is however a factor to consider in assessing the reliability and the credibility of the officer's testimony (See *R. v. Antoniak*, [2007] 75 W.C.B. (2d) 532, at para. 22; *R. v. Carr*, [2016] O.J. No. 5696, at paras. 5 and 6; and *Machado*, at paras.121 and 122). This assessment must be done on a case-by-case basis.

[76] In my view, this reasoning also applies to the absence of a notation concerning a statement made roadside to an officer by an accused (See *Antoniak,* at paras. 24 and 25,.and *Brown*).

[77] While I am aware that the Court of Appeal of Ontario has stated, after *Oickle*, that an unrecorded statement of an accused obtained where police has access to video and audio recording equipment is *prima facie* suspect (*R. v. Moore-McFarlane* (2001), 160C.C.C. (3d) 493; *R. v. Ahmed* (2003), 170 C.C.C. (3d) 27, I note that other Courts of Appeal have taken a different view (*R. v. Crockett*, 2002 BCCA 658; *R. v. Ducharme*, 2004 MBCA 29).

[78] Also, in this case, the appellant's statement was made roadside after being intercepted for a driving violation. The officer testified that he was attending to another matter at the time he stopped the appellant roadside and that he did not have his notebook with him. His explanation was not challenged in cross-examination.

[79] During the *voir dire*, the trial judge recognized that the absence of a notation referring to the appellant's statement in Officer Nadeau's notes was a relevant factor to consider in assessing his reliability and credibility*:*

> MR. LANE: I know, Your Honour.
> The basis of my objection in the *voir dire* is going to be that there is no notes of that conversation –
> THE COURT: There doesn't need to be, sir
> MR. LANE Okay.
> THE COURT: The question will be the reliability and the credibility of the witness. Whether there's notes or there's not notes is only one of the factors that will be looked at in that matter, sir.
> So we're now sitting in a *voir dire*.
> Go ahead.
> (Transcript of proceedings, p. 14, lines 18 to 27)

[80] I find that this exchange, as well as the trial record, demonstrate that the trial judge correctly directed herself in determining that the absence of notes about the appellant's statement was one of the factors to consider in assessing the credibility and reliability of Officer's Nadeau testimony on the *voir dire*, and in assessing whether the

Crown had met its burden to prove beyond a reasonable doubt the voluntariness of the statement.

(ii) Officer Nadeau only provided a partial recount of his roadside exchange with the appellant

[81] The appellant submits that Officer Nadeau's brief recount of his roadside exchange with the appellant is insufficient to constitute an accurate and reliable description of the ten-minute conversation he had with the appellant.

[82] At trial, Officer Nadeau testified that he had a five- to ten-minute roadside conversation with the appellant. He also indicated that he did not have an extensive conversation with the appellant. Officer Nadeau testified that, during that five- to ten-minute period, he asked the appellant for his driver's licence. He obtained the vehicle's registration and insurance. He also indicated to the appellant the reason why he had stopped him. He asked him where he was coming from, where he was going and what he was doing. Officer Nadeau stated the answers provided by the appellant to his questions. He also testified that he told the appellant that there were other pieces of sod that had fallen off the skid and were laying on the deck of the truck. He asked the appellant to strap his load down and to follow the marked vehicle to the weigh scale. Officer Nadeau was the only witness to testify on the *voir-dire*.

[83] Based on the short duration of his encounter with the appellant, Officer Nadeau's recount was not so brief or lacked so many details as to be insufficient to provide a basis for the trial judge's voluntariness assessment.

b) Not all officers involved in the investigation of the appellant testified on the *voir dire.*

[84] The appellant submits that Officer Nadeau's use of the pronouns "we" and "us" a number of times throughout his testimony, and during the *voir dire*, demonstrates that another officer was present at the scene and had contact with the appellant prior to him making the alleged statement. By not calling all the other officers present at the time, the Crown failed to prove all the circumstances relevant to the making of the statement and consequently failed to meet its burden.

[85] Neither Crown nor defence specifically questioned Officer Nadeau about the presence of one or more other officers at the roadside stop. Officer Nadeau was the only witness to testify on the *voir dire*.

[86] While the transcript does show that Officer Nadeau used the pronouns "us" and "we" when referring to events that took place before and after his roadside interaction with the appellant, Officer Nadeau used the pronoun "I" when testifying about the roadside interactions with the appellant:

> Q And why were you driving that vehicle at that time?
> A We had a scale matter to take care of.
>
> …
>
> A We were waiting for traffic to be clear to proceed. A white Dodge pickup truck drove on the Alaska Highway southbound in front of us. And that's where we noticed a piece of sod flying off his truck, landing on the middle of the highway, making it dangerous for oncoming traffic.
>
> …
>
> A We then proceeded pulling the vehicle over, the matter reason being the piece of sod on the Highway.
> …

> A We proceeded by turning our emergency lighting on and pulling over the vehicle.
> Q So - excuse me.
> Where did the vehicle pull over?
>
> …
>
> Q On the shoulder? Can you tell us about how you initiated a conversation with Mr. Skookum.
> A I proceeded to walk up to the driver window, identify myself, and proceeded to ask him where he was coming from, where he was going, and what he was doing.
>
> …
>
> Q And what did you do immediately after the conversation?
> A What did I personally do?
> Q yes
> A I told Mr. Skookum that we'd escort him back to the Whitehorse weight scales, and we then proceeded to do that, and – after he had strapped his load and secured his load.
> (my emphasis) (Transcript of proceedings, p. 11 line 15 to p. 18, line 16)

[87] The transcript of the proceedings does not support the argument that more than one officer interacted with the appellant prior to him telling Officer Nadeau where he was coming from and where he was going to. I therefore reject this argument.

[88] In this case, Officer Nadeau testified that his roadside interactions with the appellant were of a relatively short duration, five to ten minutes. Officer Nadeau clearly recalled his roadside interactions with the appellant and the statement he made. Officer Nadeau was consistent throughout his cross-examination during the *voir-dire.* The appellant did not call any evidence on the *voir dire* that disputed the existence or accuracy of the statement.

[89] Consequently, I do not find that the trial judge made a palpable and overriding error in determining that the statement was made voluntarily and in admitting it in evidence.

[90] I pause here to address an issue that arose at trial, after the *voir dire*, in relation to Officer Nadeau's Can-Say. It became clear, during Officer Nadeau's cross-examination, that he did not prepare nor review the Can-Say. Crown counsel prepared the Can-Say based on her conversation with Officer Nadeau. It appears, from the transcript of the proceedings, that the content of the Can-Say created some confusion as to where some of the interactions between Officer Nadeau and the appellant occurred (weigh scale or roadside). (See transcript or proceedings, p. 22, lines 33 to 47 and p. 23 lines 1 to 18.) Although there was some questioning as to where certain interactions occurred between the officer and the appellant, Officer Nadeau maintained throughout his cross-examination that he obtained the relevant documentation from the appellant roadside and that the appellant also made his statement roadside.

[91] When a Can-Say is prepared to provide to the defence additional information that does not appear in an officer's notes, a better way to proceed would be for the Crown to ensure that the officer review and even sign his or her Can-Say. In doing so, Crown counsel would avoid putting herself or himself in a position where she or he could potentially become a witness. However, in the present case, I do not find that this issue had an impact on the credibility of Officer Nadeau.

3. Did the trial judge err in finding Officer Nadeau credible?

[92] Findings of credibility by a trial judge are entitled to great deference. They should not be interfered with unless the trial judge committed a palpable and overriding error (*Housen, R. v. W.(R.),* [1992] 2 S.C.R. 122, at para. 20).

[93] The appellant submits that the record does not support the trial judge's finding that Officer Nadeau was credible, but instead, that the record demonstrates obstruction and fabrication on the part of Officer Nadeau. The appellant also submits that the officer's testimony was misleading. In support of his position, the appellant raises two main issues regarding Officer Nadeau's testimony:

1. he refused to answer questions and was argumentative; and
2. his testimony is contradicted by the evidence adduced at trial and contains a number of inconsistencies.

[94] The transcript shows that Officer Nadeau was at times argumentative in cross-examination and that he refused, at first, to answer a number of questions he thought were irrelevant. The trial judge, in her Reasons for Judgment, addressed the Officer's attitude on the witness stand. She noted that he appeared confused at times due to the nature and the formulation of the questions put to him in cross-examination. She also acknowledged that he expressed his view that some of the questions put to him in cross-examination were irrelevant. However, the trial judge found that Officer Nadeau's position or comments did not affect his credibility as she agreed that some of the questions were irrelevant to his role as an enforcement officer or to the Territorial legislation he has to enforce. I note that the trial judge had to intervene a number of times to redirect the conduct of the cross-examination by the appellant's representative.

I also note that the appellant's representative had a tendency to argue with the witness instead of asking him questions. I find that, overall, the officer answered the questions put to him once clarified or when directed to do so.

[95] The appellant also submits that Officer Nadeau's testimony contains inconsistencies and is contradicted by the evidence.

[96] The appellant submits that the photo filed at trial as Exhibit D4 contradicts the Officer's testimony that he got out of his vehicle to take that photo after pulling over the pick-up truck driven by the appellant. Officer Nadeau testified as follows:

> Q And could you briefly tell us about how you came to stop the vehicle in question.
> A I was on Range Road, facing Sumanik Drive, waiting to create a left-hand turn on the Alaska Highway to go south. The vehicle proceeded to drive in front of us southbound with a piece of sod flying off the back of the vehicle.
> Q Okay, And can you tell us about how you stopped the vehicle.
> A We proceeded by turning our emergency lighting on and pulling over the vehicle.
> Q So – excuse me.
> Where did the vehicle pull over?
> A The vehicle pulled over roughly half a kilometre past where I was parked on Range Road by the time we got out and pulled him over.
> Q And in relation to the highway, can you tell us where the vehicle came to a stop.
> A Just on – roughly even with the end of, well, the start of the airport property.
> Q Okay. Was the vehicle in a parking lot?
> A No, just on the shoulder area. (Transcript of proceedings, p. 14, line 47 to p. 15, line 18)
>
> …
>
> Q How- how close were you to Mr. Skookum's vehicle when this sod appeared to fall?
> A The width of a lane sir, because, I was parked at the stop sign. There was the width of the northbound

> lane, and he came right in the southbound lane, and that's where it flew off.
> Q And so that intersection would be in any pictures taken? Because you're sitting there, the sod flew off, you'd see it?
> A I was driving the vehicle at the time. I do not take pictures while I drive. So once I pulled over, I then got out of the vehicle and took a picture of the sod on the highway which was provided to you. (Transcript of proceedings, p. 32, line 42 to p. 33, line 4)

[97] Exhibit D4 shows a piece of sod lying on the highway, the enforcement vehicle parked roadside and, according to Mr. Lane's testimony, the vehicle driven by the appellant parked further on the same side of the highway. The appellant submits that the photo demonstrates that the officer did not have to pursue him and pull him over. I do not agree with the appellant. I do not see how this photo is, in and of itself, incompatible with Officer Nadeau's recollection of events.

[98] Officer Nadeau also testified that he saw one skid of sod on the deck of the pick-up truck. The appellant submits that this statement is inconsistent with Exhibit D3, a photo that shows two skid of sods on the deck of a vehicle. Mr. Lane, who was not in the truck when the appellant was pulled over, testified that the photo represents what the truck and cargo looked like when he attended to the truck some unknown time after the events. The trial judge addressed this argument in her Reasons for Judgment. She noted that there was no indication as to when Mr. Lane attended to the vehicle. I agree with the trial judge. This photo, taken sometime after the events took place, does not, on its own, establish what the cargo looked like and/or how the pieces of sod were stacked on the truck when Officer Nadeau made his observations.

[99] The appellant also submits that the Certificate of Registered Ownership filed as Exhibit C1 demonstrates the unreliability of Officer Nadeau's testimony. The officer

testified that he identified “the company by the vehicle’s registration”. However, as pointed out by the appellant, the registration certificate indicates that two individuals, not a company, owned the pick-up truck. The appellant did not bring this issue to the attention of the trial judge. The trial judge did not address this inconsistency in her decision. However, in assessing the credibility of a witness, a trial judge does not have to address every possible inconsistency in his or her testimony. I find that this is a minor inconsistency that does not relate to a fact that is material to the offences before the court. I also note that the officer was aware that there was a company involved in this matter as the appellant told him roadside that he was on his way back to his company’s yard.

[100] Overall, I am unable to accede to the appellant’s submissions that the record does not support the trial judge’s finding of credibility. The trial judge properly directed herself on the issue of credibility. She explained why she found Officer Nadeau credible. She found that he testified in a straightforward manner and “provided the information he had as to how he recalled the matter, what he did, why he did it, and what the basis of the legislation that he was acting upon was”. The trial judge made no error in how she addressed the inconsistencies raised by the appellant concerning the officer’s testimony. I also find that the minor inconsistency pointed out by the appellant in relation to the owner of the truck is insufficient to impact the trial judge’s finding of credibility.

[101] Findings of credibility are entitled to great deference. Based on the record before me, I do not find that the trial judge’s conclusion regarding Officer Nadeau’s credibility is unreasonable or, otherwise, that she made a palpable and overriding error in coming to that conclusion. I would therefore dismiss this ground of appeal.

4. Did the trial judge err in finding that the sod that fell off the vehicle driven by the appellant was "cargo" and not secured?

[102] The appellant was charged with failing to secure cargo pursuant to Standard 10 of the *National Safety Code* ("*NSC*").

[103] The *Act* incorporates a number of provisions of the *NSC* through the *National Safety Code Regulation*, OIC 2007/168 ("*NSC Regulation*").

[104] Section 3(1) of the *NSC Regulation*, provides that, subject to the *Act*, Standard 10 of the *NSC* is deemed to have the force of law to the same extent as if it had been set out in the *NSC Regulation*.

[105] Section 2(a) of Standard 10 provides that:

> Cargo transported by a vehicle shall be contained, immobilized or secured so that it cannot:
>
> (a) leak, spill, blow off, fall from, fall through or otherwise be dislodged from the vehicle, or
>
> (b) shift upon or within the vehicle to such an extent that the vehicle's stability or manoeuvrability is adversely affected.

[106] Standard 10 defines cargo as "all articles or material carried by a vehicle, including those used in the operation of the vehicle".

[107] Section 5(2) of the *NSC Regulation* provides that no driver shall operate a commercial vehicle in violation of this *NSC Regulation* or of a Standard to which this *NSC Regulation* gives the force of law.

[108] The appellant submits that the trial judge err in determining that the piece of sod that fell from the truck on the highway was cargo.

[109] The appellant also submits that the trial judge err in finding that the cargo was insecure and that Mr. Skookum failed in a reasonable standard of care to secure his cargo.

[110] The appellant submits that he should not have been convicted of the offence as he was compliant with s.193.1 (1) of the *Act*:

> 193.1(1) No person shall drive a vehicle with a load in, on, or attached to the vehicle on the highway unless the person has done what is reasonable to secure that type of load in the prevailing highway and weather conditions, so that the load or any part of the load remains in, on, or attached to the vehicle.

[111] First, I note that the appellant was charged with the specific offence aimed at the operation of vehicles set out in s .2(b) of Standard 10 of the *NSC*. I also note that s.193.1(2) of the *Act* is almost identical to the offence the appellant was charged with:

> 193.1(2) No person shall drive a vehicle on a highway which carries a load in, on or attached to the vehicle in such a manner that the load or part of the load falls off or out of the vehicle, or is a hazard to, or harms, any other highway user.

[112] The appellant also points to Exhibit D3, a photo showing two skids of sod on the deck of the pick-up truck, each secured by a strap, to submit that Officer Nadeau's description of the cargo is unreliable and to demonstrate that the cargo was secure.

[113] Even if I accept that due diligence is a defence to this charge, no evidence was filed at trial to support a finding that the appellant was diligent in properly securing his load before the piece of sod flew off the pick-up truck. The appellant did not testify at trial nor did he lead any evidence to describe how the pieces of sod were stacked, attached or secured when Officer Nadeau intercepted him. As indicated previously, Exhibit D3 is a photo taken by Mr. Lane some unknown time after the events. It is not, in

and of itself, indicative of the way the skids of sod were stacked, attached or secured on the truck at a time that is material to the commission of the offence.

[114] The appellant also relies on the decision of *Michel v. John Doe*, 2008 BCSC 40, to submit that the piece of sod that fell off the pick-up truck was not cargo but debris. In that decision, the presiding judge found that a rock constituted "debris foreign to the cargo of logs". The court acknowledged that the regulation at stake in that case imposed a high standard with regard to containment on cargo. However, the judge was not persuaded that the regulation went as far as requiring containment "that would completely prevent dislodgement of contamination of a load by debris such as rocks, soil, ice, snow or mud that may have been inadvertently trapped in the log cargo during the loading process".

[115] Mr. Lane testified at trial that the piece of sod depicted in Exhibit D3 lying on the highway is, in his experience, more consistent with a "piece of discard sod" than a piece of marketable sod.

[116] While the piece of sod that blew off may have been smaller than the other pieces of sod on the truck, the piece depicted in Exhibit D3 is not of an insignificant size either. Furthermore, I agree with the respondent that the marketability of the piece of sod that fell off the truck does not change its nature. It remains sod.

[117] I also agree with the respondent that this not a case of a foreign material or debris such as rocks or ice, inadvertently trapped in the cargo. In that regard, I note that, in Standard 10 of the *NSC*, cargo is defined as "all articles or material carried by a vehicle, including those used in the operation of the vehicle". Sod was the material

carried by the vehicle. This is a case where a piece of sod blew off a truck carrying sod. The piece of sod was cargo.

[118] I further agree with the trial judge when she states in her Reasons for Judgment that:

> [39] In order for the sod to blow off of the vehicle, it clearly was not contained, immobilized, or secured such that it could not do so. I do not use Latin very often because it is not something that we use in everyday language, but there is a legal Latin phrase *res ipsa loquitur*, which means "the thing speaks for itself." When something blows off a load, lands in the middle of the highway, and is consistent with what is on the truck otherwise, then obviously it either blew off, it fell from, or somehow was dislodged from the vehicle it was on. It therefore was not immobilized, was not contained, and was not secured sufficiently to prevent it from becoming dislodged, blowing off, falling from and somehow leaving the vehicle and ending up anywhere other than one vehicle.

[119] I therefore do not find that the trial judge erred in her interpretation of the word cargo nor that she err in finding that the cargo was insecure.

5. Did the trial judge err in her interpretation of the expression "registered gross vehicle weight" and in convicting the appellant of operating a motor vehicle with the wrong class of licence, contrary to s. 31(a) of the *Act*?

[120] The appellant submits that the trial judge erroneously interpreted the terms "registered gross vehicle weight" in s. 2 of the *Motor Vehicles Regulations* (the "*Regulations*").

[121] The material facts in relation to this ground of appeal are the following:

- The appellant was the driver of a Dodge Ram SLT 5500 truck that Officer Nadeau intercepted on the Alaska Highway;
- At all material times, the appellant possessed a Class 5 Yukon driver's licence;

- At all material times, there was no trailer attached to the pick-up truck;
- The Certificate of Registered Ownership issued by the Government of Yukon for the Dodge Ram truck indicates a maximum gross vehicle weight ("GVW") of 15,999 kg;
- The gross vehicle weight rating ("GVWR") as per the manufacturer's label for that particular truck is 8,846kg.

[122] Section 31 of the *Act* provides that:

> 31. A person who operates a motor vehicle on a highway
>
> (a) of a type that they are not authorized to operate under the class of operator's licence that they hold; or
>
> (b) contrary to a restriction or condition on their licence;
> is guilty of an offence

[123] Section 2(1) of the *Regulations* sets out the different classes of Yukon driver's licences and the types of vehicles a licence holder may operate.

[124] As it is not disputed that, at all material times, the appellant possessed a Class 5 driver's licence, s. 2(1)(e) (i) and (ii) of the *Regulations* are relevant to this issue:

> 2(1) The following are the classes of operator's licence and the types of vehicles the holder of a licence of each class is authorized to operate, subject to the other provisions of these *Regulations* and the *Act*:
>
> …
>
> (e) Class 5:- the holder may operate
>
> (i) a motor vehicle not exceeding a registered gross vehicle weight of 11,000 kilograms other than a high speed motor cycle
>
> (ii) any combination of vehicles where the towed vehicle in the combination does not exceed a registered gross

> vehicle weight of 4,550 kilograms and the towing vehicle is authorized by subparagraph (i),
>
> … (my emphasis)

[125] It is not disputed that, at all material times, the appellant was not towing another vehicle, including a trailer. The appellant was therefore only authorized to operate a motor vehicle not exceeding a registered GVW of 11,000 kg (s. 2(i)(e)(i) of the *Regulations*).

[126] The terms “registered gross vehicle weight” or “gross vehicle weight” are not defined in the *Act* or the *Regulations*.

[127] The judge found that the term “registered gross vehicle weight” means the weight that an owner registers his or her vehicle for pursuant to Yukon legislation. As the Certificate of Registered Ownership for the Dodge Ram indicates a registered weight of over 11,000 kg (i.e. 15,999 kg), she convicted the appellant of operating a motor vehicle with the wrong class of licence contrary to s. 31(a) of the *Act*.

[128] The appellant submits that the trial judge erred in law when she reached that conclusion. The appellant argues that registered GVW ought to refer to the GVWR that appears on the label that manufacturers are required to affix on motor vehicles as per federal legislation. According to the appellant, the GVWR corresponds to the recommended maximum operating weight of a vehicle as specified by the manufacturer pursuant to federal legislation.

[129] The appellant invokes the doctrine of paramountcy of Federal legislation to submit that it would run contrary to Federal legislation if the owner of a vehicle were allowed under Territorial legislation to register a vehicle for a GVW that is over its GVWR. The Territorial legislation should therefore be interpreted to conform with the

Federal legislation. The appellant submits that the only way to achieve conformity is by interpreting "registered gross vehicle weight" as referring to the GVWR of the motor vehicle.

[130] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, the Supreme Court of Canada adopted the modern approach to statute interpretation proposed by Elmer Driedger in *Construction of Statutes* (2nd ed. Toronto: Butterworths, 1983) "the words of an Act are to 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."

[131] The Court went on to say that there is no ambiguity to resolve unless the provision at stake is "reasonably capable of more than one meaning."

[132] In the case at bar, I do not find that the term "registered gross vehicle weight" is ambiguous or reasonably capable of more than one meaning even if it is not specifically defined in the *Act* or the *Regulations*.

[133] The verb register or "registered" means enter or record on an official list or directory (Oxford Dictionary). When read in its grammatical and ordinary sense in the context of the legislative and regulatory scheme, the term "registered" clearly refers to the process of recording a motor vehicle under the *Act* and more specifically under Part 2 of the *Act* entitled "Registration of Motor Vehicles and Trailers".

[134] Sections 39 and 42 of the *Act* provide that motor vehicles and/or trailers as defined under the *Act*, must be registered pursuant to the *Act*. The owner of the vehicle is responsible to apply for that registration. A certificate of registration for a motor vehicle is issued pursuant to s. 45 of the *Act.*

[135] While the expression “registered gross vehicle weight” is not specifically defined under the *Act*, a similar term “licensed gross weight” is defined. Section 1 of the *Act* defines “licensed gross weight” as the gross weight for which a vehicle is licensed.

[136] The term “licence” is defined as a valid licence which has been issued under the *Act* and which has not been suspended or cancelled (s. 1 of the *Act*).

[137] The term “licence issuer” is also defined at s. 1 of the *Act*. It means a person authorized by the Registrar to issue an operator’s licence, a certificate of registration or a general identification card. The term “certificate of registration” means a certificate issued under s. 45 of the *Act* (s. 1 of the Act).

[138] I also note that the *Highways Regulations,* O.I.C. 2002/174, enacted pursuant to the *Highways Act,* refers to the notions of “gross vehicle weight” and “vehicle weight” without the term registered. Section 7 of the *Highways Regulations* defines “gross vehicle weight” as “the total weight transmitted to the highway by a vehicle or combination of vehicles”; and “weight of a vehicle” as “each of the axle weight, the gross vehicle weight, and any other measure of the weight of a vehicle and its load which this Regulation limits, whichever is relevant in the context and circumstances”. These definitions are used in the regulations for the purpose of determining, for example, the types of vehicles that have to report to the weigh scale, or roads weight restrictions.

[139] By analogy, and logically, the expression “registered gross vehicle weight” cannot refer to anything else than the gross weight for which a vehicle is registered under the *Act* by its owner and for which a Certificate of Registered Ownership is issued pursuant to the *Act*.

[140] I therefore agree with the trial judge that the registered GVW of the Dodge Ram is the weight that appears on the Certificate of Registered Ownership issued for that vehicle by the Government of Yukon. The Certificate of Registered Ownership entered into evidence in this matter shows a registered max GVW of 15,999 kg.

[141] The appellant submits that such an interpretation is inconsistent with Federal legislation. In his written submissions, the appellant refers to the case of *Paananen v. Nicholson Chevrolet*, 2006 ABPC 339, to emphasize the importance of not overloading a vehicle by respecting its GVWR.

[142] The doctrine of paramountcy applies when there is a real conflict between validly enacted but overlapping federal and provincial or territorial legislation. “When there is a genuine “inconsistency” between federal and provincial legislation, that is when the operational effects of provincial legislation are incompatible with federal legislation”, the federal law prevails: *Alberta (Attorney General) v. Maloney*, 2015 SCC 51, at para. 16.

[143] The *Act* and the *Regulations* govern the activity of driving and the rules of the road in the Yukon, including the issuance and suspension of operators’ licences (Part 1 of the *Act*), and vehicles registration (Part 2 of the *Act*).

[144] The Federal legislation, the *Motor Vehicle Safety Act*, S.C. 1993, c. 16, and the *Motor Vehicle Safety Regulations*, C.R.C., c. 1038, governs the manufacture and importation of motor vehicles and motor equipment for health and safety reasons. (See the preamble of the *Motor Vehicle Safety Act and Motor Vehicle Safety Regulations*). Federal regulations prescribe that manufacturers and importers must display the GVWR of a vehicle on a compliance label affixed to the vehicle (s. 6(1) and s. 9(1) of the *Motor Vehicle Safety Regulations*).

[145] That is the extent of the record that is before the Court in this matter.

[146] Based on that record, I am unable to find that Territorial legislation that allows a vehicle to be registered at a weight over its GVWR for registration purposes directly contradicts the Federal legislation, which addresses how GVWR is determined and sets standards and/or regulates how manufacturers label vehicles.

[147] The appellant also submits that, in this case, the only reasonable way to explain why the truck was registered at a weight over is GVWR of 8,846 kg, is that the GVW appearing on the Certificate of Registered Ownership takes into consideration the possible gross combined weight of the Dodge Ram and a trailer. The appellant submits that Officer Nadeau's testimony supports his position.

[148] Unfortunately, neither the appellant nor the owners of the truck testified at trial to explain the circumstances that led to registering the truck for 15,599 kg. The appellant did not call any employee of the Motor Vehicle Branch to testify at trial in order to explain the registration process or the content of the Certificate of Registered Ownership. Officer Nadeau's testimony does not confirm the appellant's position either. Officer Nadeau testified that he relied on the weight indicated on the Certificate of Registered Ownership. He further testified that he did not know how the owners "went about" to register the truck. Officer Nadeau further stated that he did not recognize the weight indicated on the Certificate of Registered Ownership as the sum of two vehicles because the certificate does not indicate that the weight represents the sum of two vehicles, it deals with capacity (Transcript of proceedings, p. 30, lines 9 to 45). I also note that, pursuant to the *Act*, motor vehicles and trailers are to be registered separately (ss. 39 and 42 of the *Act*).

[149] There is therefore no proper evidentiary foundation to support the appellant's position and defence.

[150] Overall, I do not find that the judge erred in finding the appellant guilty of driving a motor vehicle with the wrong class of licence based on the maximum GVW appearing on the Certificate of Registered Ownership of the truck filed as evidence at trial, which is over 11,000 kg.

CONCLUSION

[151] I would dismiss the appeal, without costs.

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CAMPBELL J.