Citation: *R. v. Kroeker,* 2014 YKTC 31

Date: 20140626
Docket: 12-11073
Registry: Dawson City
Heard: Dawson City
and Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Chisholm

REGINA

v.

DAVID KROEKER

Appearances:
Bonnie Macdonald — Counsel for the Crown
Shawn Beaver — Counsel for the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. David Kroeker is charged that he drove his motor vehicle while impaired by alcohol and while having a blood alcohol level greater than the legal limit. The alleged offences occurred in Dawson City, Yukon on October 20, 2012.

[2] The defence alleges breaches of sections 8 and 9 the *Charter* and seeks a remedy to exclude evidence pursuant to section 24(2).

[3] The defence also challenges the designation of the R.C.M.P. officer who performed the breath tests and who prepared the Certificate of Analyst. The defence argues that the Crown has failed to prove beyond a reasonable doubt that Mr. Kroeker's

ability to operate a motor vehicle was impaired by alcohol.

[4] The Crown called its evidence in a *voir dire* and counsel agreed that the evidence deemed admissible would become part of the trial proper, and that no further evidence would be called.

[5] The defence called no evidence.

SUMMARY OF FACTS

[6] Cst. Bundt and another officer were patrolling in downtown Dawson City in the early morning hours of October 20, 2012. At approximately, 2:20 a.m. Cst. Bundt, who was driving a marked police vehicle, noted a motor vehicle stopping and turning right onto Fifth Avenue. The vehicle made a wide turn. He followed the vehicle for a few more minutes as it headed out of town. Based on the driving pattern he observed, he decided to pull the vehicle over. Mr. Kroeker was the driver and sole occupant of the vehicle. The police officer spoke to him for a short period of time, including asking him for his driver's licence, registration and insurance.

[7] Soon thereafter, based on the officer's observations of Mr. Kroeker and the previous observations of his driving pattern, he formed the opinion that Mr. Kroeker's ability to operate a motor vehicle was impaired by alcohol. The police officer arrested, Chartered and warned Mr. Kroeker and gave him the breathalyzer demand.

[8] After his arrival at the police detachment, Mr. Kroeker provided samples of his breath which were over the legal limit of 80 mg percent.

ISSUES

a) Did Cst. Bundt have reasonable grounds to arrest Mr. Kroeker and make the breath demand?

b) Were there violations of either and/or both sections 8 and 9 of the *Charter*?

c) Was the designation of the Qualified Technician, who performed the breathalyzer tests, valid?

d) Was Mr. Kroeker's ability to drive a motor vehicle impaired by alcohol consumption?

ANALYSIS

a) Reasonable grounds to arrest and make breath demand

[9] The Crown has the burden of proving that reasonable grounds existed for the arrest and subsequent breath demand. (*R. v. Bush,* 2010 ONCA 554; *R. v. Haas*, (2005), 76 O.R. (3d) 737 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 423)

[10] There is both a subjective and objective component to the reasonable grounds test. The officer making the demand must have an honest belief that the driver committed an offence contrary to s. 253 of the *Criminal Code* and that belief must be objectively reasonable. *R. v. Bernshaw* [1995] 1 S.C.R. 254, *R. v. Usher*, 2011 BCCA 271.

[11] In *R. v. Gunn*, 2012 SKCA 80, the Court noted at para. 8:

> Where an individual challenges the validity of a breath-demand on the basis that the police officer's belief was not reasonable, the question for the trial judge is whether, on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the individual's ability to

> operate a motor vehicle was impaired (see: *R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 250; and *R. v. Restau*, 2008 SKCA 147, 314 Sask. R. 224 at para. 17)…

[12] And later at para. 15:

> In a *voir dire* held to determine the reasonableness of the police officer's belief, the trial court must consider whether the observations and circumstances articulated by the officer are rationally *capable* of supporting the inference of impairment which was drawn by the officer; however, the Crown does not have to prove the inferences drawn were true or even accurate. In other words, the factors articulated by the arresting officer need not prove the accused was *actually* impaired. This is so because that is the standard of proof reserved for a trial on the merits (*i.e.*, proof beyond a reasonable doubt).

[13] In the *voir dire*, the Crown entered a video recording from the police vehicle driven by Cst. Bundt which recorded the period of time from when Mr. Kroeker's vehicle was first observed until he was arrested and taken to the police detachment. This video recording also had an audio component. A video/audio recording was also entered which covers the period when the breath tests were taken.

[14] Cst. Bundt, the investigating officer, has 9 years of experience as an R.C.M.P. officer. Previous to this work, he had worked as a doorman at a bar. He has a fair amount of experience dealing with intoxicated individuals.

[15] Cst. Bundt had the opportunity to observe the truck driven by Mr. Kroeker for approximately three minutes before he pulled him over. He first noted Mr. Kroeker stop and proceed to make a wide turn from a side street onto Fifth Avenue. He testified he saw one-third of the vehicle travel into the oncoming lane of traffic as he made this turn. The video recording entered on the *voir dire* depicts Mr. Kroeker's truck travelling over

what appears to be the centre line area (which was covered in snow). I am unable to agree that a full third of the vehicle was in the oncoming lane, although it was clearly a wide turn and over the middle of the street.

[16] The officer also observed the vehicle move or drift to the right of Fifth Avenue and into the snow as it continued down that street. From a review of the video, this appears to be an area of the street where vehicles would park, although no vehicle was parked there at that time of the morning.

[17] Once on the highway leading out of town, the officer testified (and the video confirms) that Mr. Kroeker's vehicle moved to the left, with the driver's-side wheels on and at times over what was effectively the centre line of the road. There was snow on the ground and there were areas where well-worn paths had been established which were not consistent with any painted markings on the road. However, the movement of Mr. Kroeker's vehicle on the highway as described above involved travel over the centre line where snow was present and towards the lane where oncoming traffic would be expected. After approximately 10 seconds, the vehicle is adjusted back in the appropriate lane of travel. The officer described the vehicle moving to the left twice, but from a review of the video, there is only one clear movement to the left which is discernable.

[18] After leaving the 40 kilometre an hour zone, Mr. Kroeker did not speed up in a 70 km/hour zone in the short period of time before being pulled over.

[19] Other driving observed by the officer was unremarkable. For example, when Mr. Kroeker stopped at a stop sign to turn left, he used his signal light and made an

appropriate turn. Also, when the officer activated his emergency lights, Mr. Kroeker immediately turned on his right blinker and appropriately moved to the side of the road where he stopped.

[20] This investigation occurred in the early morning hours when, up to the point of Mr. Kroeker being pulled over, there was no visible traffic on the road.

[21] The officer's decision to pull over Mr. Kroeker has, quite properly, not been challenged.

[22] After initiating the stop, the officer approached the vehicle and requested to see Mr. Kroeker's licence, vehicle registration and insurance. Mr. Kroeker was the only occupant of the vehicle. The officer observed Mr. Kroeker's eyes to be red and droopy. He stated that Mr. Kroeker's motions were slow and deliberate and a bit 'fumbly'. The officer stated Mr. Kroeker was mumbling his words, although he admitted Mr. Kroeker spoke only a few words before his arrest. In response to a request by the officer for his documents, Mr. Kroeker attempted to hand him his wallet, and stated, 'It's all there'.

[23] In total, Cst. Bundt had made the following observations before forming his opinion, arresting Mr. Kroeker and reading the breath demand:

- Some erratic driving in a three minute period (wide turn; movement to the right of Fifth Avenue; sustained travel with driver's-side wheels on and to the left of the centre line on the highway; no change of speed when entering an increased speed zone);
- A smell of alcohol from the interior of the vehicle which he believed was coming from the driver;
- Red and droopy eyes;

- Mr. Kroeker mumbled his words (although he only said a few words before arrest);
- When asked to produce his vehicle documents, he attempts to pass his whole wallet to the officer, while saying, 'it's all there';
- Slow and deliberate movements when searching for and handing his license to the officer; although he produced his wallet quickly, and indicated all documents were in it, from a review of the video it required almost 60 seconds for him to locate his licence.

[24] Cst. Bundt arrested Mr. Kroeker and read him the breath demand just over a minute after approaching the vehicle. This short period of interaction with and observation of a driver prior to arrest does not automatically call into question the formation of reasonable grounds to believe that a driver's ability to operate a motor vehicle is impaired by alcohol. In *R. v. Bush,* the investigating officer formed his belief in a relatively short period of time, although the indicia of impairment in that case - hearsay of bad driving, an accident involving a parked truck, an odour of alcohol, unsteady balance, red glassy eyes and a glazed look – were arguably more than in the matter before me.

[25] As described in *Bush*, reasonable grounds lie between a suspicion and proof beyond a reasonable doubt. The Supreme Court of Canada explained in *R. v. Shepherd,* 2009 SCC 35 (para. 23) that reasonable grounds do not reach the level of proof beyond a reasonable doubt or of a *prima facie* case for conviction.

[26] Cst. Bundt believed subjectively that he had reasonable grounds to make the breath demand. I am required to consider the totality of the evidence in determining whether he had objectively reasonable grounds to believe that Mr. Kroeker was driving while his ability to operate a motor vehicle was impaired.

[27] I find that on the totality of the evidence, the officer has met the objective test of reasonable grounds. Considering that during a three-minute period of observation there were three separate occasions of erratic or inconsistent driving (while driving the vehicle at a low rate of speed), plus a failure to increase his speed while leaving the 40 kilometre an hour zone, all in combination with the signs of impairment noted by the officer while dealing with Mr. Kroeker in Mr. Kroeker's vehicle, the reasonable grounds threshold is met.

[28] The video of the investigation which shows Mr. Kroeker exit his vehicle upon arrest is of assistance in deciding whether, objectively, the police officer had grounds for the demand. The video captures Mr. Kroeker exiting his vehicle immediately after his arrest. Even though the officer's grounds had crystallized in his own mind at this point in time, in my view I can take into account (or, in other words, cannot ignore) what the video depicts, to better understand what the officer had just observed during his interaction with Mr. Kroeker. As the saying goes, a picture is worth a thousand words. My observations are of an individual who, seconds after his arrest, has a confused and awkward demeanour. For example, after exiting his truck and being asked to accompany the officer to the police vehicle, Mr. Kroeker complies and starts walking beside the officer. He then, unexpectedly, stops, turns toward and stares at the officer, before saying 'sure', after which he continues moving towards the vehicle with the officer. He walks in a slow and deliberate fashion. This assists me in understanding the description the officer painted of Mr. Kroeker while producing his license. I wish to emphasize I am in no way using this to buttress the grounds articulated by the officer, as it only assists me in understanding what the officer observed before arrest.

b) Were there violations of either and/or both sections 8 and 9 of the Charter?

[29] Based on my finding that Cst. Bundt had reasonable grounds to make the breath demand, I find there were no breaches of sections 8 and 9 of the *Charter*.

[30] If I am in error in my finding that the officer had both subjective and objective reasonable grounds for the breath demand, thus constituting a breach of sections 8 and 9 of the *Charter*, I would not have excluded the evidence pursuant to s. 24(2). I am mindful of the three part test enunciated in *R. v. Grant,* 2009 SCC 32, namely:

1) The seriousness of the *Charter*-infringing conduct;
2) The impact on the *Charter*-protected interests of the accused;
3) Society's interest in the adjudication of the case on its merits;

[31] It is true that the arrest led to the detention of Mr. Kroeker for several hours. However, even if the officer in this case did not have objectively reasonable grounds for the arrest before the accused exited his truck, sufficient grounds were apparent shortly thereafter based on additional indicia of impairment, as depicted in the video entered by the Crown. Accordingly, any breach was short-lived. It is my view that, overall, the officer was acting in good faith.

[32] The impact of the *Charter*-protected privacy interest is less serious in this case than in other types of searches (e.g. a search of one's home). Aside from the period of detention, any other *Charter* breach was minimally serious. There was no impact on Mr. Kroeker's dignity, any impact on his privacy was not at the high end of the spectrum, and the impact on his bodily integrity was very low.

[33] The offences for which Mr. Kroeker is charged are serious. There is a strong public interest in the detection of individuals whose ability to drive is impaired. As well, the breath samples constitute reliable evidence.

[34] On balance, the analysis in this case favours inclusion of the evidence.

c) *Was the designation of the Qualified Technician, who performed the breathalyzer tests, valid?*

[35] Defence raises a further issue about the admissibility of the breath results. This is a technical argument based on whether Cpl. Morin, the police officer who took the breath samples, was, in fact, properly qualified under the *Criminal Code*. There is a presumption of regularity in s. 258(1) of the *Code* with respect to breath readings, however it is premised on the operation of the instrument by a 'qualified technician':

> 258(1) …
>
> (f.1) the document printed out from an approved instrument and signed by a qualified technician who certifies it to be the printout produced by the approved instrument when it made the analysis of a sample of the accused's breath is evidence of the facts alleged in the document without proof of the signature or official character of the person appearing to have signed it;
>
> (g) 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) through (iii) detail what information is required in a certificate with respect to results, time, procedure etc.]*
>
> 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.

> Pursuant to s. 254(1):
>
> "qualified technician" means
>
> (a) in respect of breath samples, a person designated by the Attorney General as being qualified to operate an approved instrument, …
>
> "Attorney General" is defined in s. 2 of the *Code* as:
>
> …
>
> (b) with respect to the Yukon Territory, the Northwest Territories and Nunavut … means the Attorney General of Canada and includes his or her lawful deputy.
>
> …

[36] A certified copy of Cst. Morin's Certificate of Designation, dated January 13, 2012, was introduced into evidence. The certificate is signed by George Dolhai, then the Acting Deputy Director of Public Prosecutions ("A/Deputy DPP").

[37] The issue arises because the authority of the Attorney General of Canada to prosecute, *inter alia*, *Criminal Code* offences was devolved to the Director of Public Prosecutions under the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121 (the "*DPP Act"*) on December 12, 2006. Defence counsel takes the position that the authority to designate qualified technicians under the *Code* did not devolve with the general authority to prosecute, and that, in the absence of an explicit grant of this authority, the designation made by Mr. Dolhai in his capacity as A/Deputy DPP is invalid.

[38] The Crown must prove the proper qualification of a technician beyond a reasonable doubt. In order to raise a reasonable doubt, the defence must provide

probative evidence that does more than invite conjecture or make it a mere possibility that a designation is invalid. As framed by Gerein J. in *R. v. Cleveland* (1986), 49 Sask. R. 96 (Q.B.), at para. 8 (QL):

> Evidence to the contrary such as to raise a reasonable doubt as to the validity of the designation of a qualified technician may be adduced by way of witnesses called by the defence or by way of cross-examination of Crown witnesses. Yet, whatever method is adopted, the evidence adduced must do more than raise the mere possibility that the designation is invalid. It is not sufficient to simply raise the question of the validity of the designation. There must be probative evidence which points to the designation being invalid and which causes the trial judge to have a reasonable doubt as to the validity of the designation. Evidence which brings about conjecture on the part of the trier of fact does not constitute evidence to the contrary. I am satisfied that my view as expressed above is consistent with what has been enunciated in *R v. Proudlock* (1979) 1 S.C.R. 525; *R v. Crosthwait* (1980) 1 S.C.R. 1089; *Oliver v. The Queen* (1981) 2 S.C.R. 240; and *R v. Nordmarken* (supra).

[39] In *Cleveland,* Gerein J., in his capacity as a summary conviction appeal judge, was considering a designation made pursuant to the authority given to the Attorney General of Saskatchewan. The certificate designating the qualified technician was signed by "Serge Kujawa, A/Deputy Attorney General". The trial judge found that the Crown had not satisfied him that an 'A/Deputy Attorney General' was a lawful deputy of the Attorney General with the ability to designate a qualified technician and entered an acquittal. Gerein J. on the appeal found that this finding was made prematurely. At p. 8 (QL) he wrote:

> In the instant case, Cpl. Petty believed he was a qualified technician. That this was so was confirmed by the certificate purporting to so designate him. The difficulty arose because

> of the "A/" which preceded the reference to the office "Deputing Attorney General." The trial judge concluded that the "A/" could refer to any of three possible offices. He then concluded that the legislation did not empower any one of the offices of make the impugned designation. In coming to this conclusion he erred.
>
> It matters not whether Mr. Kujawa was assistant, acting or associate Deputy Attorney General. The question which had to be answered was whether he had authority to designate Cpl. Petty as a qualified technician. The certificate in itself established the necessary authority. Because the court was uncertain what office Mr. Kujawa held or what power resided in his office, whatever it may have been, did not justify the conclusion that the requisite power was absent. Such a conclusion amounted to conjecture. It would have been otherwise had there been evidence that all or even one of the stated offices was not empowered to designate qualified technicians. Absent such evidence, there was no evidence to the contrary and on the basis of the certificate the trial judge was bound to find that it was proven that Cpl. Petty was a qualified technician.

[40] In the case of Mr. Kroeker, the defence has provided evidence in the form of legislation and Notices from the Canada Gazette that support his argument that the Acting Deputy Director of Public Prosecutions is not empowered to make designations pursuant to s. 254 (1) of the *Code*. The question is whether this evidence is sufficient to raise a reasonable doubt about the valid designation of Cst. Morin. This requires an analysis of the authority and jurisdiction transferred from the Attorney General in the *DPP Act*.

[41] The office of the Director of Public Prosecutions was created in 2006 by the *DPP Act*. Pursuant to that legislation, the Director has the rank and status of the deputy head of a department (s. 3(2)). There is a list of powers, duties and functions set out in s. 3(3) of the *Act,* and “for the purpose of exercising the powers and performing the duties and

functions referred to in subsection (3), the Director is the Deputy Attorney General of Canada" (s. 3(4)).

[42] Pursuant to s. 6 of the *DPP Act,* the Governor in Council appoints Deputy Directors of Public Prosecutions, who, while being supervised by the Director "may exercise any of the powers and perform any of the duties or functions referred to in subsection 3(3) " and, who "for that purpose is a lawful deputy of the Attorney General".

[43] The authorities of the Director and/or Deputy Director in s. 3(3) of the *Act* are as follows:

> (3) The Director, under and on behalf of the Attorney General,
>
> (a) initiates and conducts prosecutions on behalf of the Crown, except where the Attorney General has assumed conduct of a prosecution under section 15;
>
> (b) intervenes in any matter that raises a question of public interest that may affect the conduct of prosecutions or related investigations, except in proceedings in which the Attorney General has decided to intervene under section 14;
>
> (c) issues guidelines to persons acting as federal prosecutors respecting the conduct of prosecutions generally;
>
> (d) advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
>
> (e) communicates with the media and the public on all matters respecting the initiation and conduct of prosecutions;
>
> (f) exercises the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of - or direct the stay of - such

> prosecutions; and
>
> (g) exercises any other power or carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director.

[44] With respect to the basket clause in ss. 3(3)(g), these other powers, duties or functions cannot be exercised or carried out without certain formalities:

> (6) Any assignment under paragraph (3)(g) must be in writing and be published by the Attorney General in the Canada Gazette.

[45] It is common ground between counsel that there have been three assignments and one directive Gazetted pursuant to this subsection: two assignments and one directive on March 10, 2007 and a third assignment on September 29, 2007. None of them touches on the ability to designate qualified technicians under s. 254(1) of the *Criminal Code*. The Director of Public Prosecutions therefore has not explicitly been given the authority to make these designations.

[46] The Crown, however, takes the position that an explicit assignment under s. 3(6) of the *DPP Act* is not a necessary precondition to the exercise of s. 254 designatory authority by the DPP or A/Deputy DPP. Instead, counsel relies on the so-called *Carltona* doctrine to locate this jurisdiction (see *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.)). This doctrine has been codified into s. 24(2) of the federal *Interpretation Act:*

> 24…
>
> (2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

> (a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;
>
> (b) the successors of that minister in the office;
>
> (c) his or their deputy; and
>
> (d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

[47] However, this section must be read alongside s. 3(1) of the *Interpretation Act*, which says that:

> 3. (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

[48] The Crown has also filed chapter 16 of the PPSC Deskbook, the terminology of which pre-dates the *DPP Act*. The March 10, 2007 Gazette directive made the Deskbook applicable to the Office of the DPP and to federal prosecutors. However, the Deskbook as a whole has not been Gazetted by the Attorney General pursuant to s. 3(6) of the *DPP Act*. In Chapter 16, Appendix B of the Deskbook, the Assistant Deputy Attorney General (Criminal Law) is cited as being the 'effective decision-maker' to consent to the 'designation of blood analysts, qualified breathalyzer technicians and qualified blood technicians' pursuant to s. 254(1) of the *Criminal Code.* The position occupied by Mr. Dolhai after the creation of the Office of the DPP may well be the equivalent of the former Assistant Deputy Attorney General (Criminal Law). However, the Statement of the Policy of the Deskbook (16.3), reads:

> '…The appendices to this policy set out a scheme in which

> particular types of decisions are *delegated* to officials whom experience has shown are the appropriate decision-maker….' (Emphasis added)

In my view, a previous delegation to the Deputy Attorney General (Criminal Law) does not equate to a devolution of this delegation to the A/Deputy DPP.

[49] The introduction to the Deskbook states that '…[i]t is not intended to create any rights enforceable at law in any legal proceeding'. As noted in *R. v. Atomic Energy of Canada Ltd.*, [2001] O.J. No. 1580 (S.C.), although the directives given in the Deskbook provide guidance in the context of prosecutions, its status is that of policy – it does not have, nor was it intended to have legal implications that would trump the application of case and statutory law (para. 18).

[50] As I see it, the only possible route by which the Director or Deputy Director could make a s. 254 designation under the *Carltona* doctrine as codified is if they are "[persons] appointed to serve, in the department … over which the [AG] presides, in a capacity appropriate to the doing of the act or thing" and no contrary intention appears in the *DPP Act*. Accordingly, the questions that need to be answered, are, firstly, whether the Director presides 'in a capacity appropriate' to the making of designations, and secondly, if so, whether the *DPP Act* expresses a contrary intention to this implied delegation of power.

[51] I think that it is likely that the Director is in an appropriate capacity to designate qualified technicians under s. 254 of the *Code*, however the *DPP Act* could also be viewed as expressing a contrary intention to that implied delegation. The scheme of the *DPP Act* is such that only certain powers and duties were specifically devolved. There

is nothing explicit about making designations, either under s. 254 or any other section. I do not find that such a function is readily viewed as implicit. The delegated functions and authority set out in ss. 3(a) through 3(f) seem to relate solely to the conduct of prosecutions and communicating or advising about prosecutions. The only reference to a role with law enforcement or investigations is with respect to advising entities on a specific prosecution or prosecutions generally. There is no suggestion that the Director is empowered to make designations about investigative roles or functions. Furthermore, the language of the basket clause in s. 3(3)(g) seems to reflect the language of s. 24(2) of the *Interpretation Act*, i.e. the Director can exercise other duties or functions 'compatible' with the office, however, any such assignment must be Gazetted and placed on the public record.

[52] The *DPP Act* could have easily been broader in its conferral of authority, for example by assigning and transferring all the powers of the Attorney General under the *Criminal Code,* but it was not. For example, in *R. v. Spanos*, 2007 ONCA 241, the Court of Appeal of Ontario dismissed a challenge to the designation of a qualified technician after the government moved powers from the Solicitor General's office to the office of the Minister of Public Safety and Security. In that matter the provincial government has simply transferred from the Solicitor General and assigned to the Minister of Public Safety and Security all powers and authorities, including the authority to designate qualified technicians under s. 254(1) of the *Criminal Code.* The transfer and designation were made by means of an Order in Council that had the effect of simply changing the title of the responsible official – the scope of authority was unaltered. That is unlike the case here, where the intent was clearly to carve out and

transfer a sphere of authority from the Attorney General to the Director of Public Prosecutions.

[53] As well, it is notable that the *DPP Act* does appear to transfer the ability to "exercise any powers or perform any duties or functions of the Attorney General under the *Extradition Act* or the *Mutual Legal Assistance in Criminal Matters Act*" (s. 3(9)). The interpretive principle of implied exclusion further suggests than an explicit and broad devolution of authority under these two statutes, but not the *Criminal Code*, is indicative of a legislative intent to limit the scope of the powers transferred under the *Code*.

[54] The *Act* is clear in its transfer of certain discrete duties and functions to the Director. To the extent that the *Act* contemplates additional assignments under s. 3(3)(g), it requires that they be explicit and public. Both of these requirements to me seem contrary to the very permissive implied delegation clause in s. 24(2)(d) of the *Interpretation Act*. The *DPP Act* reveals a contrary intention, as envisioned by s. 3(1) of the *Interpretation Act*, to the implied delegation of power to designate qualified technicians.

[55] As noted at the outset, the defence only needs to raise a reasonable doubt about Cpl. Morin's valid designation as a qualified technician. I find that it has done so.

[56] The Certificate of a Qualified Technician is not admissible.

d) Was Mr. Kroeker's ability to drive a motor vehicle impaired by alcohol consumption?

[57] Two longstanding decisions still govern when considering the issue of impaired driving. As summarized by the Yukon Court of Appeal's decision in *R. v. Schmidt*, 2012 YKCA 12:

> In *R. v. Stellato*, [1993] O.J. No. 18, aff'd [1994] 2 S.C.R. 478, the Ontario Court of Appeal held that the offence of impaired driving is proved if the trial judge is satisfied that an accused's ability to operate a motor vehicle was impaired by alcohol or drugs to any degree ranging from slight to great. In order to make out the offence, it must be proven not simply that the accused has consumed alcohol, but also that such consumption impaired the accused's ability to operate a motor vehicle (*R. v. Andrews*, 1996 ABCA 23). para 15

[58] I earlier described the officer's reasonable grounds for giving Mr. Kroeker the breath demand. Other indicia of impairment became evident as the investigation proceeded.

[59] When the officer read Mr. Kroeker his rights to counsel, there was confusion on the part of Mr. Kroeker. After the officer provides his right to counsel, by reading from a card, Mr. Kroeker poses a question which, in listening to the audio recording, begins with the words: '*How does that –'*, the rest of the question being inaudible.[1] Cst. Bundt testified that in response to learning of his right to counsel, Mr. Kroeker stated: '*How does that pertain to this? In a certain understanding, yes*'. The following exchange then takes place:

> *Cst. Bundt:* '*Anytime anybody is arrested, they have the right to contact counsel, so I am just explaining that to you.'*

[1] This question is inaudible due to the microphone not clearly picking up his voice. Other 'inaudibles' in this exchange are for the same reason.

> *Mr. Kroeker: Inaudible*
>
> *Cst. Bundt:* '*well because you have been arrested*'.
>
> *Mr. Kroeker:* '*I really don't understand that*'.
>
> *Cst. Bundt:* '*It's your right when you're arrested to contact a lawyer, and I am explaining to you that you have that right, and that there is free legal advice should you wish, o.k., so do you kind of understand that when I explain it in those terms.*'
>
> *Mr. Kroeker: Inaudible*
>
> *Cst. Bundt:* '*Because like I explained to you David, you have been arrested and every person who is arrested has that right. O.k., so do you understand what I am saying?'*
>
> *Mr. Kroeker: 'Yeah.'*
>
> *Cst. Bundt: 'O.k., so do you want to call a lawyer?'*
>
> *Mr. Kroeker: Inaudible*
>
> *Cst. Bundt: 'It's your choice. It's your choice if you want to call a lawyer David. [Pause] O.k., so do you, do you know what I am saying.'*
>
> *Mr. Kroeker: 'Yeah.'*
>
> *Cst. Bundt: 'Would you like to call a lawyer?'*
>
> *Mr. Kroeker: 'Yeah.'*
>
> *Mr. Kroeker: Inaudible*
>
> *Cst. Bundt*: '*Well, like I said, because you have been arrested for impaired driving*.'

[60] The officer then gives Mr. Kroeker the police warning and breath demand. The latter is explained twice. Approximately six minutes later, the officer and Mr. Kroeker arrive at the detachment. This conversation ensues:

> *Cst. Bundt: 'Do you have a lawyer in particular you want to call or Legal Aid's good?'*

Mr. Kroeker: 'No.'

Cst. Bundt: 'Pardon me.'

Mr. Kroeker: 'No.'

Cst. Bundt: 'You don't want to call a lawyer?'

Mr. Kroeker: 'Well, do I need to?'

Cst. Bundt: 'Well, it's your right to.'

Mr. Kroeker: 'Well, I mean if it's, it's going to be an issue, well, I never thought it would be an issue.'

Cst. Bundt: 'Well, like I said, anytime somebody's arrested, it's their right to talk to a lawyer, o.k. And they can give you legal advice or -'

Mr. Kroeker: 'Well, if it's going to be a problem, well sure whatever, but I didn't, never thought it would be an issue.'

Cst. Bundt: 'Like I said, it's your right. Like right now you're being investigated for, like, a Criminal Code offence. Like, impaired driving is a Criminal Code offence, right.'

Mr. Kroeker: 'I really don't think I'm impaired.'

Cst. Bundt: 'O.k., well, like I said, it's your choice. I can't make you phone a lawyer or not make you phone a lawyer. Do you know what I mean? The ball is totally in your court.'

Mr. Kroeker: 'I really don't think I'm impaired, but I'm [pause] per se you think that means [Inaudible]. Per se you mean that you think that the course of the, I don't know how to legally say this, but if you think that's the course of the action, then, well for sure.'

Cst. Bundt: 'It's your, it's your choice though David, o.k.'

Mr. Kroeker: 'If you don't think that's the course of the action [Inaudible] then 'no'.'

Cst. Bundt: 'It doesn't matter what I think, it's your decision. It's like if you, if I say do you want to have supper. You can say 'yes' or you can say 'no'. It's the same.'

Mr. Kroeker: 'Well, for sure.'

Cst. Bundt: 'It's your right to contact a lawyer.'

> *Mr. Kroeker: 'If you think that [pause], no I don't think I'm impaired, but'*
>
> *Cst. Bundt: 'O.k.'*
>
> *Mr. Kroeker: 'If you think I'm impaired, then well.'*
>
> *Cst. Bundt: 'Obviously I think you're impaired because I arrested you, right.'*
>
> *Mr. Kroeker: 'Well, yeah, then definitely.'*
>
> *Cst. Bundt: 'O.k. so you want to talk to a lawyer?'*
>
> *Mr. Kroeker: 'Sure.'*

[61] In my view, these exchanges demonstrate that Mr. Kroeker is having a difficult time processing what is occurring. Although it may be expected that an individual, especially one who has never been previously arrested, would become nervous and uncertain in this type of situation, Mr. Kroeker's demeanour is beyond this state, and is consistent with someone who is impaired.

[62] Cst. Bundt also had an opportunity to interact with Mr. Kroeker three days later at the police detachment. He describes Mr. Kroeker as having clearer speech, more fluid movement and an absence of the odour of alcohol on his breath. Despite some issues pointed out by the defence (i.e. Cst. Bundt's lack of detailed notes of this encounter, some unclearness as to the length of the encounter), in my view this evidence is still of value in assessing Mr. Kroeker's ability to drive a motor vehicle on October 20th.

[63] Considering all of the evidence, I find beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol.

CONCLUSION

[64] I find Mr. Kroeker not guilty of the offence contrary to s. 253(1)(b) of the *Code,* but guilty of the offence of impaired driving, contrary to s. 253(1)(a).

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CHISHOLM T.C.J.