CANADA

PROVINCE OF NEW BRUNSWICK

PROVINCIAL COURT

Hearing Date: October 14th, 2022
Decision Date: January 27th, 2023
Docket No.: 159171
Neutral Citation: 2023 NBPC 03

HIS MAJESTY THE KING

- and -

TREVOR ELMER ADAMS

Decision of the Honourable Judge Scott A. Brittain of the Provincial Court of New Brunswick

DELIVERED ORALLY

Note: Non-substantive editorial/grammatical changes were made to this decision following it being delivered orally on January 27th, 2023.

APPEARANCES:

Bannon B. Morrissy, on behalf of His Majesty The King
Leslie F. Matchim, on behalf of Mr. Adams

INTRODUCTION & ISSUE

1. Mr. Adams is charged with the following two indictable offences:

> Trevor Elmer ADAMS, on or about the 21st day of May, 2021, at or near Little Bartibog, in the County of Northumberland and Province of New Brunswick, did within two hours after ceasing to operate a conveyance, have a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 mL of blood, thereby committing an indictable offence, contrary to and in violation of Paragraph 320.14(1)(b) of *the Criminal Code of Canada* and amendments thereto.
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> Trevor Elmer ADAMS, on or about the 21st day of May 2021, at or near Little Bartibog, in the County of Northumberland, in the Province of New Brunswick, did operate a conveyance while his ability to operate it was impaired to any degree by alcohol, thereby committing an indictable offence, contrary to and in violation of Paragraph 320.14(1)(a) of the *Criminal Code of Canada* and amendments thereto.

2. Having elected to be tried before this Court, Mr. Adams pleaded not guilty to both counts on March 28th, 2022 and a full day trial was scheduled for October 14th, 2022.
3. At the commencement of trial on October 14th, 2022, the Court canvassed with counsel whether there were any preliminary issues. At this time, the Crown advised the Court of the following deficiencies relative to the express provisions of the *Criminal Code*, namely Sections 320.32 and 320.34 (together, the "Deficiences"):
    a. The Crown disclosed two copies of the Certificate of Analyst (the "COA") to counsel for Mr. Adams only a few minutes before 9:30am on October 14th, 2022;
    b. The Crown did not previously disclose the COA to Mr. Adams or his counsel, and
    c. The Crown did not serve a Notice of Intention on Mr. Adams or his counsel to enter the COA into evidence as an exhibit at trial.
4. The Crown sought an adjournment to permit it to cure the Deficiencies. Counsel for Mr. Adams objected. For the oral reasons given on October 14th, 2022, the Crown's adjournment request was denied and I advised that the trial would proceed as scheduled.
5. After the adjournment decision was rendered, both the Crown and counsel for Mr. Adams sought a preliminary ruling from this Court on the use, if any, that could be made of the COA at trial.

6. The Crown conceded that, pursuant to Subsection 320.32(2) of the *Criminal Code*, the COA could not be admitted into evidence as an exhibit at trial owing to the Deficiencies. The Crown, however, signaled that it would be seeking permission from this Court to have the intended Crown witness, being a Qualified Technician, refer to the content of the COA during his *viva voce* testimony at trial and/or in his Certificate of Qualified Technician ("CQT").
7. Counsel for Mr. Adams took the position that the Deficiencies, taken together, preclude the Crown from making any reference whatsoever to the content of the COA at trial and that any attempt to do so would, in effect, be permitting the Crown to do indirectly what the Crown candidly acknowledged it is foreclosed from doing directly in light of the Deficiencies. This, submitted Mr. Adams' solicitor, would be tantamount to this Court finding the front door to be securely locked while the back door remains wide open.
8. Oral argument was made on these points. In turn, this led to my review of a highly divergent body of non-binding appellate-level case law from outside New Brunswick and related argument presented by counsel. Additional questions were raised and further common law authority and associated argument was provided to this Court by counsel in support of their respective positions. Given the nuances of the issues raised and, relatedly, the divergent authority respecting the threshold issue before me, this Court reserved decision until December 9th, 2022 and requested post-hearing briefs from counsel. Owing to illness on my part in the immediate lead up to December 9th, 2022, the delivery of this preliminary decision was adjourned until today's date.
9. The issue that this Court must untangle and, quite frankly, the issue that has generated such divergence in appellate case law outside New Brunswick, can be distilled to the singular question of what use, if any, a COA can be put to by the Crown in circumstances where it clearly cannot be entered as an exhibit at trial owing to the Crown's failure to observe the recently adopted requirements set out by Parliament in the *Criminal Code*. Put another way, do the Deficiencies preclude any reliance upon or reference to the COA at trial via the evidence of the intended Crown witness?

POSITIONS OF THE PARTIES

Common Ground

10. The Crown and counsel for Mr. Adams part company on nearly every aspect of the preliminary issue before this Court; however, both agree that there is no higher authority from the Court of King's Bench of New Brunswick or the Court of Appeal of New Brunswick which obligates this Court to dispose of this matter in a particular way. That being said, the Crown takes the position that this Court is bound by a principle of law known as "horizontal *stare decisis*" and relies on the decision of Morrison, J. in *R. v. Oland*, 2019 NBQB 259 (Ruling No. 8) in support of this position. Morrison, J. found as follows at paragraph 39:

> …In that ruling I outline the relationship between the doctrine of *stare decisis* and decisions of courts of coordinate authority often referred to as "judicial comity". To reiterate, this Court is bound by Justice Walsh's decision in Ruling #3 (2015 Trial) unless:
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> 1) Subsequent decisions have affected the validity of the previous decision;
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> 2) There is a precedent, statute or argument that was not before the deciding court;
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> 3) The decision was not considered (i.e. given without opportunity to consult authority); or
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> 4) The essential facts of the case are distinguishable.

11. More particularly, the Crown cites the decision of my colleague, Gunn, PCJ, in *R. v. Underhill*, 2020 NBPC 3 as the basis for requiring my application of horizontal *stare decisis* in this case. At the time of Gunn, PCJ's decision in *R. v. Underhill*, the Court of Appeal of Alberta had not yet rendered its decision in *R. v. Goldson*, 2021 ABCA 193, leave refused 2022 CanLII 10371 (SCC). Indeed, Gunn, PCJ relied heavily on the summary conviction appeal decision of what is now the Court of King's Bench of Alberta in *R. v. Goldson*, 2019 ABQB 609, which was subsequently overturned by the Court of Appeal of Alberta. Likewise, *R. v. Underhill* predated the Yukon Court of Appeal's decision in *R. v. MacDonald*, 2022 YKCA 78, which arrived at a conclusion that is greatly at odds with the decision of

the Court of Appeal of Alberta and, seemingly coming full circle, in significant alignment with the summary conviction appeal decision in *R. v. Goldson*.

12. It bears mentioning that there have been several unreported decisions from my colleagues of this Court addressing various permutations of this issue. The outcomes of these decisions reside on both sides of what I will refer to as the "*Goldson/MacDonald* Divide". If nothing else, this emphasizes the overall divergence running along the interpretative fault line that the Supreme Court of Canada declined to conclusively resolve at the national level when it refused leave to appeal the decision of the Court of Appeal of Alberta in *R. v. Goldson*. In view of the foregoing considerations, I decline the Crown's invitation to find that this Court is bound to follow the reasoning in *R. v. Underhill* owing to the application of horizontal *stare decisis*.

13. In *R. v. Goldson*, the Court of Appeal of Alberta explained the bounds of the interpretative schism that I have described as the *Goldson/MacDonald* Divide. I note that this split has only become more pronounced post-*R. v. Goldson*. Beginning at paragraph 14 in *R. v. Goldson*, the Court of Appeal of Alberta observed as follows:

> [14] No one disputes that hearsay is presumptively inadmissible and that the QT's *viva voce* evidence or Certificate of Qualified Technician as it relates to whether the alcohol standard is certified by an analyst is hearsay in both forms. The issue is whether the changes introduced by the *Amending Act* should be interpreted to include a statutory exception to the hearsay rule (commonly referred to as an evidentiary shortcut) and permit evidence from the QT to prove that the alcohol standard used to conduct the test was certified by an analyst or whether it is necessary to tender the Certificate of Analysis or call *viva voce* evidence from the analyst to establish that the alcohol standard was certified.
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> [15] As noted, both by the summary conviction appeal judge and the trial judge, there continues to be a growing body of conflicting case law across the country on the answer to this question. The cases of *R c Brisson*, 2020 QCCS 3794, *R v Flores-Vigil*, 2019 ONCJ 192 and *R v Kettles*, 2019 ABPC 140 are consistent with the reasoning of the provincial court trial judge and hold that the QT's evidence is inadmissible to establish that the alcohol standard was certified by an analyst.
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> [16] The cases of *R v Francis*, 2020 CanLII 63759 (NL PC), *R c Garneau*, 2020 QCCQ 2321, *R c Gohier Goyer*, 2019 QCCQ 5277, *R v Taylor*, 2019 ABPC 165, *R v Hanna*, 2021 ABQB 68, *R v Phee*, 2019 ABPC 174, *R v Porchetta*, 2019 ONCJ 244, *R v Chudak*, 2019 ABPC 231, *R v McDermott*, 2019 NSPC 70, *R v Does*, 2019 ONCJ 233, *R v Savage*, 2020 ABQB 618, *R v Brar*, 2019 ONCJ 399, *R v Bahman*, 2020 ONSC 638, *R v Baboolall*, 2019 ONCJ 204, *R v Yip-Chuck*, 2019 ONCJ 367, *R v McRae*,

2019 ONCJ 310, *R v Denis*, 2021 MBQB 39, *R v Underhill*, 2020 NBPC 3, and *R v Bhandal*, 2019 ONCJ 337 are consistent with or expressly adopt the reasoning of the summary conviction appeal judge and find that the QT's evidence is sufficient to establish the requirements of s. 320.31(1)(a).

[17] There have also been a number of other cases decided under the *Amending Act* that are not directly related to the issue under appeal, but illustrate other difficulties arising from the evidentiary provisions in the *Amending Act*, such as those related to evidence of the target value. These cases demonstrate that the changes may not have achieved the simplification of the law related to proof as intended. See: *R v Wu*, [2019] OJ No. 5000, 2019 Carswell 15534 (Sup Ct), *R v Afriyie*, 2020 ONSC 2894, *R v Mundy*, [2019] OJ No 1996 (Ct J), *R v Vinocai*, [2019] OJ No 1997 (CT J), *R v Murphy*, 2020 QCCQ 3574, *R v Sakhuja*, 2020 ONCJ 484, *R v Cousins-Tremblay*, 2020 ONCJ 101, *R v Wadien*, 2019 ONCJ 796 and *R v Caputo*, 2019 ONCJ 846.

[18] Despite reaching opposite conclusions, both lines of authority on this issue largely: (i) apply the modern approach to statutory interpretation; (ii) acknowledge that the previous breathalyzer legislation had been interpreted to permit hearsay evidence from a QT (viva voce or by certificate) to address whether the solution or alcohol standard used to conduct the breath analysis was "suitable for use", which was a matter determined by an analyst rather than by the QT; and (iii) recognize that the scheme and object of the *Amending Act* was to simplify the law relating to the proof of blood alcohol concentration (BAC).

[19] Broadly speaking, the authorities that conclude such hearsay is no longer permissible rely on significant changes that have been made to the wording and structure of the breathalyzer provisions to find that this statutory exception to the hearsay rule is no longer available. By contrast, the authorities that conclude such hearsay continues to be admissible, like the judgment in the court below, rely heavily on the historical cases decided under the predecessor provisions to conclude that the changes to the evidentiary provisions in the *Amending Act* do not suggest Parliament intended to require direct evidence (*viva voce* or certificate) from an analyst on a matter which could previously have been introduced by a QT. (emphasis added)

Mr. Adams' Position

14. Counsel for Mr. Adams takes the position that any reference at trial to the COA in the testimony of the intended Crown witness, being a Qualified Technician, or in his CQT, is precluded for three distinct reasons as it would amount to: (1) inadmissible hearsay; (2) an abuse of process, and/or (3) a contravention of provisions of the *Criminal Code*.
15. In his submissions, Mr. Adams' solicitor invites this Court to follow the reasoning of the Court of Appeal of Alberta in *R. v. Goldson* and to decline the Crown's invitation to follow

the reasoning of the Yukon Court of Appeal in *R. v. MacDonald*. On the hearsay issue, the argument put forward by counsel for Mr. Adams follows that the Crown must satisfy the criteria set out in Paragraphs 320.31(1)(a) through (c) of the *Criminal Code*, which collectively address what is referred to as the "presumption of accuracy".

16. One of these criteria is that the approved instrument used to measure blood alcohol content must be calibrated using "an alcohol standard that is certified by an analyst". The Court of Appeal of Alberta found in *R v. Goldson* that evidence of an analyst must emanate directly from the analyst either via his *viva voce* testimony or through the admission of the COA. Further, the Court of Appeal of Alberta determined in *R. v. Goldson* that *viva voce* testimony from a Qualified Technician as to the contents of the COA or, alternatively, by written reference to the contents of the COA in the CQT, now constitutes inadmissible hearsay. The contrary view is taken in *R. v. MacDonald*, which holds that what I have referred to as the "presumption of accuracy" may be proven through what it found to be admissible hearsay evidence from the Qualified Technician. That conclusion is significantly premised on what the Yukon Court of Appeal refers to at paragraph 66 as the "presumption of stability in the law".
17. It is the position of Mr. Adam's solicitor that to follow the reasoning in *R. v. MacDonald* on the hearsay issue would, in effect, render almost the entirety of Section 320.32 of the *Criminal Code* "mere surplusage", contrary to the established principle of statutory interpretation which strongly militates against such interpretative outcomes. It is also submitted that the line of authority culminating in *R. v. MacDonald* employs reasoning to suggest that hearsay evidence should be received by this Court owing to specific safeguards built into the *Criminal Code* but the combined effect of these safeguards is to ensure that the accused is not caught off guard or surprised and that fairness to the accused is observed throughout.
18. It is also noted that the *Criminal Code* affords all accused with an avenue to thoroughly test the evidence of the analyst. Paragraph 320.34(1)(e) of the *Criminal Code*, for example, imposes a positive obligation on the Crown to "disclose to the accused…a [COA] stating that the sample of an alcohol standard that is identified in the [COA] is suitable for

use with an approved instrument". Building further on this argument, Mr. Adams' solicitor also points out that in accordance with Subsections 320.32(3), (4) and (5), the accused may apply to this Court to cross examine the analyst. In such a circumstance, a hearing to permit or deny such cross examination must be held at least 30 days before trial with the accused being obligated to serve its application to do so upon the Crown at least 30 days before such hearing. These safeguards, argues counsel for Mr. Adams, have not been observed in this case owing to the Deficiencies. The conclusion Mr. Adams' solicitor asks this Court to reach is that the Crown's failure to observe these new safeguards would work the effect of prejudicing the position of his client should this Court permit the so-called admissible hearsay "back door" to remain ajar.

19. The abuse of process argument put forward by Mr. Adams' solicitor follows a similar thread and is founded on overall trial fairness and this Court's corresponding obligation to guard against "trial by ambush", which can occur in circumstances of untimely disclosure.

20. Finally, counsel for Mr. Adams argues that the Deficiencies amount to a contravention of certain *Criminal Code* provisions, namely what I have referred to as the "presumption of accuracy" emanating from the criteria set out in Paragraphs 320.31(1)(a) through (c). Building on this, Paragraph 320.34(1)(e) of the *Criminal Code* grounds the position that this Court would be precluded from "determining" whether the so-called "presumption of accuracy" has been established in circumstances where the Crown has failed to disclose the COA. In particular, Paragraph 320.34(1)(e) provides as follows:

> 320.34(1) In proceedings in respect of an offence under section 320.14, the prosecution shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in paragraphs 320.31(1)(a) to (c) have been met, namely:
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> *****
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> (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument. (emphasis added)

21. Mr. Adams' solicitor notes that the decision of what is now the Court of King's Bench of Saskatchewan in *Kvasek v. R.*, 2021 SKQB 283 stands for the proposition that Paragraph 320.34(1)(e) of the *Criminal Code* is to be interpreted in a manner so as to preclude the Crown from succeeding on a prosecution of an "80 or over" charge in circumstances where it has failed to disclose the COA. Moreover, counsel for Mr. Adams asks this Court to interpret "disclose" so as to incorporate the timelines contemplated in Subsections 320.32(4) and (5). This is to say that for the Crown to effect proper disclosure of the COA it must disclose same more than 60 days in advance of trial.

The Crown's Position

22. Independent of the Crown's argument that I am bound to follow the reasoning in *R. v. Underhill* owing to the application of horizontal *stare decisis*, which I earlier dealt with, the Crown submits in the alternative that this Court ought to still adopt the reasoning set out in paragraphs 29 through 31 in *R. v. Underhill*:

> 29. Justice Ho reviewed the legislative history of the predecessor to s. 320.31, ss. 258(1)(e) and 258(1)(g), and noted that the new presumption of accuracy replaced the presumptions found in those sections: the presumption of identity and accuracy.' As she noted the question of whether the presumption of identity continues to exist was not before her, nor was it raised here. I would pause to note, however, that the weight of authority has held that the "presumption of identity" continues to be available for s. 253(1)(b) offences."
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> 30. The conclusion reached by Justice Ho, after a review of the approach to legislative interpretation, the preamble to the *Amending Act*, the context of the *Amending Act*, the Parliamentary debates and reports, and the historical treatment of the predecessor legislation, was that:
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> > In light of the object and the scheme of the *Amending Act*, it is my view that Parliament did not intend to place further evidentiary burdens on the Crown and section 320.31(1)(a) should not be interpreted to require the Crown to tender the certificate of analyst. Evidence from a qualified technician in the form of either viva voce evidence or a certificate of a qualified technician is sufficient, provided the evidence identifies whether the alcohol standard was certified by an analyst. It was not the intention of Parliament to add a requirement on the Crown to tender additional evidence beyond that of the qualified technician."

> 31. I also note that in *Goldson*, the qualified technician testified that the approved certificate of analyst on the wall in the RCMP detachment confirmed that the alcohol standard was certified. Justice Ho held that such testimony is subject to an exception to the hearsay rule and is admissible. I come to the same conclusion.
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> > 28. Cst. MacDougall's testimony with respect to the system blank test is also admissible and provides evidence of the establishment of the pre-condition in s. 320.31(1)(a).
> >
> > 29. I note that the conclusions of Justice Ho were recently accepted and adopted by another summary conviction appeal court in *R. v. Bahman* where Andre, J. held:
> >
> > > To the extent that McLeod J. concluded that documentary evidence was required as proof of the accuracy of the alcohol standard solution, he erred in law in concluding that the technician's evidence was hearsay. This is not an error of mixed fact and law, as Mr. Bahman's counsel contends, since it is based on an error of law regarding the legal requirements for proving the alcohol standard solution. Given that the three preconditions in s. 320.31(1) were met, the trial judge should have accepted the viva voce evidence regarding the alcohol standard solution of the machine.

23. The Crown also cites three decisions of the Ontario Superior Court of Justice, being *R. v. Bahman*, 2020 ONSC 638*, R. v. Porchetta*, 2021 ONSC 1084 and *R. v. Hepfner*, 2022 ONSC 6064, to further ground its position that to allow the Qualified Technician, by either giving *viva voce* evidence at trial respecting the COA or by making written reference to the contents of the COA in the CQT, amounts to the exercise of admissible hearsay notwithstanding the Deficiencies present in this case. In particular, the Crown cites paragraphs 66 through 71 of *R. v. Hepfner* to suggest that an unencumbered admissible hearsay path remains open to it through the so-called “back door”:

> [66] Here, though, the appellant takes the position that the trial judge’s conclusion that the evidence of the qualified technician was satisfactory in this respect was an unreasonable conclusion. He says that “there was no evidence that the alcohol standard used for the calibration check was certified by either an analyst specifically or the CFS generally, or even what the target value and the concentration of alcohol in the standard was.”
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> [67] I do not accept this argument. First, I have already found above that the trial judge was entitled to conclude that the standard was certified by an analyst based on the evidence of the qualified technician that there was a certificate of analysis. As the Crown submits, the fact that there was a certificate is by itself evidence

that the alcohol standard solution was certified. That, as well as the technician's evidence that the alcohol standard solution had been certified by the CFS, allowed the trial judge to conclude – reasonably – that the alcohol standard solution had been certified by an analysist.

[68] Second, there was evidence upon which the trial judge could reasonably conclude that the target value for the alcohol standard solution was 100 mg of alcohol in 100 mL of blood and that the calibration tests returned results within 10% of this value.

[69] The breath technician testified repeatedly as to the target value. He said that he knew the target value from his training. He said that he had never operated an approved instrument where the target value was not 100 mg of alcohol in 100 mL of blood. He said that that target value was on the label on the bottle containing the standard solution. He reported that the calibration checks returned results of 98 and 96 mg of alcohol in 100 mL of blood, both within 10% of the target value.

[70] On the basis of this evidence, and his finding that the breath technician was a credible witness, the trial judge concluded that "the calibration check was within 10% of the target value of an alcohol standard that was certified by an analysist."

[71] On the evidence, that conclusion was reasonably open to the trial judge. Therefore, I would not give effect to this ground of appeal.

24. Smith, J. also addressed the disclosure issue in *R. v. Hepfner*, stating at paragraphs 62 and 63 as follows:

[62] Section 320.34 provides for no remedy for non-disclosure. Section 320.31 does not include compliance with section 320.34 as one of the preconditions for the Crown's ability to rely on the presumption of accuracy. Had Parliament intended the joint functioning assumed by the appellant, it would have been a straightforward thing for Parliament to have been explicit on this point, either by providing for that remedy in section 320.34 or by including compliance with section 320.34 in the list of preconditions to reliance on the presumption of accuracy in section 320.31. It did neither.

[63] In the absence of such express direction in the statute, there is in my opinion no reason to conclude that Crown failures to comply with the disclosure requirements in section 320.34 cannot be dealt with in the same way as any other failure to disclose, that is, in context and with a remedy that is crafted by the trial judge in response to a satisfactory record on a *Charter* motion brought by the accused. In slightly different circumstances, Justice Moldaver made a similar point in *Regina v. Alex, supra*, at para. 43:

> This role that s. 8 [of the *Charter*] fulfills in relation to unlawful breath demands is consistent with the approach taken when the police fail to comply with the requirements of other statutory provisions, governing their authority. For example, non-compliance with the statutory search

warrant requirements does not result in automatic loss of evidence – rather, it is subject to challenge under s. 8 of the *Charter*

25. As for the abuse of process and non-disclosure arguments put forward by counsel for Mr. Adams, the Crown submits that the corresponding remedies for such breaches arise only under the *Charter*, which would have to be advanced by way of Notice of Application before this Court in order for it to entertain same.

LAW & ANALYSIS

26. On June 21st, 2018, *An Act to Amend the Criminal Code (offences related to conveyances) and to make consequential amendments to other Acts*, SC 2018 c. 21 (the "*Amending Act*") received Royal Assent. The *Amending Act* came into force on December 18th, 2018.
27. Suffice it to say, the *Amending Act* substantially overhauled many components of the impaired driving regime in Canada by, among other things, restructuring certain presumptions and evidentiary shortcuts available to the Crown in such proceedings. The corollary to this is that some new safeguards were incorporated by Parliament into the *Criminal Code* to, in my view, ensure continued fairness to those who stand accused of impaired driving. In other words, Parliament was attentive to the fact that unchecked new presumptions and evidentiary shortcuts could be prejudicial to those accused of impaired driving absent the inclusion of corresponding safeguards and Parliament was not prepared to simplify procedures for the benefit of the Crown at the expense of the accused.
28. Quite frankly, these new safeguards are the opposite of burdensome for the Crown. For the purposes of this case, these non-onerous obligations include a requirement that the Crown disclose to the accused the COA under Paragraph 320.34(1)(e) of the *Criminal Code*, as already cited. Additionally, a very clear process is now incorporated in Section 320.32 of the *Criminal Code* to guarantee the admissibility of the COA, which includes the Crown giving notice pursuant to the terms of Subsection 320.32(2) of its intention to produce the COA sufficiently in advance of trial to accommodate an application on the

part of the accused to cross-examine the analyst together with clearly articulated timelines by which such an application needs to be made by the accused.

29. Part of the stated intention set out by Parliament in the Preamble to the *Amending Act* was to "…simplify the law relating to the proof of blood alcohol concentration". It seems that the line of authority that most closely follows *R. v. MacDonald* often tends to conclude that simplifying the law in this area is an "all or nothing proposition" and that the *Amending Act* could only have been intended by Parliament to lighten the Crown's load in impaired driving cases while giving short shrift to its corollary, being the new safeguards and overall fairness to those accused of impaired driving that arises from the express language of the *Amending Act*. This, in turn, nourishes what I believe to be an erroneous conclusion that these new safeguards couldn't have been intended by Parliament, for example, to interfere with the state of affairs that prevailed immediately prior to the coming into force of the *Amending Act* as it pertained to admissible hearsay. I find the notion untenable that Parliament's stated objective of simplifying the law in this area is somehow incapable of coexisting with the inclusion of new safeguards and I prefer to view these considerations as opposite sides of the same coin or as a trade-off in the broader context of a revised impaired driving regime that was intended by Parliament to strike a balance between expediency and fairness.

30. Paragraph 320.31(1)(a) to (c) of the *Criminal Code* came into effect under the *Amending Act* and collectively addresses the "presumption of accuracy", providing as follows:

> 320.31(1) If samples of a person's breath have been received into an approved instrument operated by a qualified technician, the results of the analyses of the samples are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made if the results of the analyses are the same - or, if the results of the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made - if
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> (a) before each sample was taken, the qualified technician conducted a system blank test the result of which is not more than 10 mg of alcohol in 100 mL of blood and a system calibration check the result of which is within 10% of the target value of an alcohol standard that is certified by an analyst;

(b) there was an interval of at least 15 minutes between the times when the samples were taken; and

(c) the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ by more than 20 mg of alcohol in 100 mL of blood. (emphasis added)

31. Moreover, and as already stated, Paragraph 320.32(1) through (5) of the *Criminal Code* now provide as follows:

> Certificates
>
> 320.32(1) A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.
>
> (2) No certificate shall be received in evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention to produce it and a copy of the certificate.
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> (3) A party against whom the certificate is produced may apply to the court for an order requiring the attendance of the person who signed the certificate for the purposes of cross-examination.
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> (4) The application shall be made in writing and set out the likely relevance of the proposed cross-examination with respect to the facts alleged in the certificate. A copy of the application shall be given to the prosecutor at least 30 days before the day on which the application is to be heard.
>
> (5) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held. (emphasis added)

32. Finally, Paragraph 320.34(1)(e) provides as follows:

> 320.34 (1) In proceedings in respect of an offence under section 320.14, the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in paragraphs 320.31(1)(a) to (c) have been met, namely:
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> *****
>
> (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument. (emphasis added)

33. In considering the *Goldson/MacDonald* Divide, I find the conclusions reached by the Court of Appeal of Alberta in *R. v. Goldson* to best align with the modern approach to statutory

interpretation having regard to the legislative changes introduced in the *Amending Act*. Accordingly, I follow the reasoning articulated by the Court of Appeal of Alberta in *R. v. Goldson* and decline to follow the reasoning of the Yukon Court of Appeal in *R. MacDonald*.

34. Beginning at paragraph 58, the Court of Appeal of Alberta had this say on the issue:

> [58] As set out above, the two lines of authority appear to turn on Parliament's stated intent to simplify the law related to proof of the BAC and how to reconcile that intent with the changes in wording to the provisions.
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> [59] The scheme of the *Amending Act* contemplates the following procedures:
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> a) An analyst certifies the alcohol standard: s. 320.31(1)(a).
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> b) The QT conducts the system blank test and then tests the breath samples: s. 320.31(1).
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> c) The test results and Certificate of Analyst are disclosed to the accused: s. 320.34(1).
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> d) The accused may apply for further disclosure: s. 320.34(2).
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> e) The Crown has the option of introducing certificates from the analyst and QT, presumably in lieu of calling them to testify: s. 320.32(1).
>
> f) If so, notice of intention to produce the certificate in evidence is to be given by the Crown: s. 320.32(2).
>
> g) If notice is given, the accused can apply for an order requiring the attendance of the person who signed the certificate for the purpose of cross-examination: s. 320.32(3).
>
> [60] There are a number of similarities to the procedures that existed before the *Amending Act*. Both the prior scheme and the current one contemplate the role of an analyst and QT (s. 254(1); s. 320.11) and the use of certificates to establish the statutory presumptions (ss. 258(1)(c)(f) and (g); s. 320.32(1)). Both permit cross-examination of the analyst or QT by the accused pursuant to a court order (s. 258(6); s. 230.32(3)), and both require that certificates be disclosed to the accused before trial in order to be received into evidence (s. 258(7); s. 320.32(2)).
>
> [61] The changes introduced in the *Amending Act* require the performance of a system blank test and a system calibration check within 10% of the target value of an alcohol standard certified by an analyst as a precondition to the presumption of accuracy (s. 320.31(a)), require the Crown to disclose information to the accused, including the results of the those tests and the analyst's certificate (s. 320.34(1)), and requires that, in an application to cross-examine on a certificate, the accused set out "the likely relevance of the proposed cross-examination" (s. 320.32(4)).

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

35. I further adopt the extensive reasoning of the Court of Appeal of Alberta at paragraphs 63 through 77 of its decision, where it methodically unpacks many of the same problems with the position being advanced by the Crown in this case from an interpretative perspective:

> [63] The modern approach to statutory interpretation will guide resolution of this issue. The modern approach requires us to consider the words of the *Amending Act* in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute and the intention of Parliament: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26.
>
> [64] If after applying all the interpretative principles to the language of the *Criminal Code*, an ambiguity remains, then the rule of strict construction is engaged. Only, clear, explicit and specific words can be used to support a conclusion that it was intended to authorize infringement of rights or liberty: *R v SAC*, 2008 SCC 47 at para 16 and *R v Canadian Broadcasting Corporation*, 2018 ABCA 391 at paras 18-21.
>
> [65] The legislative evolution of provisions may be relied on by courts to assist interpretation and is generally considered to be part of the entire context. However, it is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, or to change the law: *Construction of Statutes* at § 23.21-23.22. This presumption is rebuttable: see *Construction of Statutes* at §23.21 and §23.34 and *Interpretation Act*, RSC 1985, c I-21 at s. 45.
>
> [66] The summary conviction appeal judge correctly identified the modern approach to statutory interpretation and considered the necessary requirements of the test. She recognized that s. 320.31(1) of the *Criminal Code* does not indicate how "certified by analyst" is to be proved. Therefore, in her view, there was ambiguity. She then used the historical case law and the legislative scheme to conclude that there was an evidentiary shortcut. This is where she fell into error.
>
> [67] The grammatical and ordinary meaning of s. 320.31(1) sets out the preconditions to the existence of the presumption of accuracy. It envisions the employment of a calibration check to confirm the accuracy of the approved instrument. The alcohol standard's usefulness in this calibration procedure depends upon it containing a known concentration of alcohol, which explains -the requirement that the alcohol standard be "certified by an analyst". This change to the legislation indicates that successful calibration is a fundamental precondition

to the existence of a presumption of accuracy: *Flores-Vigil* at paras 29-30 and *Hanna* at para 46.

[68] Unlike the predecessor provision of s. 258(1)(g)(i), which expressly set out that the Certificate of Qualified Technician would state, among other things, that the alcohol standard would be "suitable for use", the new provisions (ss. 320.31(1) and 320.32(1)) do not specifically delineate what facts "made under this Part" are required in the Certificate of Qualified Technician to trigger the presumption of accuracy.

[69] Parliament is presumed to know the law: *Canada (Attorney General) v Mowat*, 2011 SCC 53 at para 45. This would include the general rules about admissibility of evidence in criminal trials as set out in *R v Egger*, [1993] 2 SCR 451 at 474-475, 1993 CanLII 98 (SCC):

> While proof on a balance of probabilities is an acceptable standard in deciding a preliminary question of fact with respect to the admissibility of evidence (see *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740), the general rule with respect to determination of vital issues in the criminal process requires proof beyond a reasonable doubt. See *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368, at p. 415 …. When admission of the evidence may itself have a conclusive effect with respect to guilt, the criminal standard is applied. This accounts for the application of this standard with respect to the admission of confessions (see *Ward v. The Queen*, 1979 CanLII 14 (SCC), [1979] 2 S.C.R. 30, at p. 40, …) … Establishing the facts which trigger a presumption with respect to a vital issue relating to innocence or guilt is a step further advanced than the admissibility of evidence and is only reached after crossing the hurdle of admissibility. The effect of the presumption in this case is to provide conclusive proof of the accused's blood alcohol concentration at the critical time, in the absence of evidence to the contrary. This conclusion respecting the application of the criminal standard is supported by the view which has been taken relating to the presumption which arises by virtue of s. 258(1)(a).

[70] Further, Parliament would have known that hearsay evidence, in particular, was inadmissible unless a statutory exception was created. It also would have been aware that for decades the legislative scheme included a similarly-worded provision that set out what must be contained in the Certificate of Qualified Technician and that prior case law, including the Supreme Court of Canada, found that this created an evidentiary shortcut that not only allowed the Crown to rely upon the QT's hearsay evidence but also the analyst's hearsay evidence: see *Ware* and *Lightfoot*. As set out in *Construction on Statutes* at §8.32:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that

> meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.

[71] The exclusion of a similarly-worded provision from the new scheme in the *Amending Act* was presumably intentional.

[72] The *Amending Act* demonstrates that Parliament was aware of its ability to create a statutory exception to the rule against hearsay. As discussed above, the evidentiary short cut to allow certificates in place of viva voce evidence remains in s. 320.32(1) of the *Criminal Code*.

[73] The revised conditions to trigger the presumption of accuracy and the omission of language in the *Amending Act* setting out the content of the certificates must be taken to be intentional, leaving the Crown with the ordinary rules of evidence to prove that the alcohol standard was "certified by an analyst" or by way of the statutorily recognized Certificate of Analyst. As the Supreme Court has recognized, the preconditions or elements now specified in s. 320.31 must all be proven, "by certificate or by oral evidence": see *Lightfoot* at 575. The content of those elements has now changed, but they must still be proven for the Crown to obtain the advantage of the statutory presumption.

[74] In our view, this interpretation is consistent with the purpose of the *Amending Act* and the intention of Parliament. To require the Crown at the very minimum to tender the Certificate of Analyst at trial, which it must produce to defence under s. 320.34(1) in any event, is hardly an onerous obligation and is consistent with simplifying the law related to proof of BACs. Based on our interpretation, the conditions will be met if the Crown tenders these two certificates as long as they contain the information set out in s. 320.31(1). This provides the Crown with a very simple and effective means of establishing the presumption. A similar conclusion was reached by the trial judge in *Kelly* at para 105:

> It is a relatively simple matter for police to produce a certificate showing the timing and results of readings, to ascertain that the alcohol standard was approved by an analyst, etc. These simple steps greatly facilitate proof of impaired driving offences, support enforcement of such laws and thus serve to protect the public. However, fairness to accused persons requires that these measures be strictly observed if the Crown intends to avail itself of the evidentiary shortcuts provided for in the legislation.

[75] We reject the Crown's submission that because it is obligated to disclose the certificates to the defence, the defence has what it needs to bring any meritorious challenge to the accuracy of the breath samples, and as a result, it is not required to tender the Certificate of Analyst at trial. The summary conviction appeal judge also relied upon this procedure in support of her interpretation that a hearsay exception existed.

[76] This reasoning appears to shift the burden to the accused and is inconsistent with fundamental criminal law principles. If the Crown wishes to rely on the statutory presumption of accuracy, it is up to the Crown to prove (not the accused to disprove) that the statutory preconditions to its operation are met.

> [77] Additionally, an accused can only bring an application to cross-examine the analyst, and thus test or challenge his or her analysis of the alcohol standard, after the Crown gives notice that it intends to produce the Certificate of Analyst at trial (ss. 320.32(2) and (3)). If the Crown is not required to either call the analyst as a witness or tender the Certificate of Analyst, then there is no process for the accused to challenge the information contained within it. (emphasis added)

36. All of this builds to the conclusion reached by the Court of Appeal of Alberta at paragraph 83 of *R. v. Goldson*, with which I also entirely agree:

> [83] The answer to the question on leave is as follows: the proper interpretation of "certified by an analyst" in s. 320.31(1)(a) of the *Criminal Code* requires evidence from the analyst regarding certification, either by way of the analyst's viva voce evidence or by way of the statutorily recognized Certificate of Analyst. The QT's evidence about whether an alcohol standard is certified by an analysis is inadmissible hearsay. (emphasis added)

37. I would add to the Court of Appeal of Alberta's comprehensive interpretative analysis in *R. v. Goldson*, as earlier adopted, a brief consideration of what is referred to as the "presumption against tautology", which was perhaps best articulated by Lamer, CJ in *R. v. Proulx*, 2000 SCC 5 at paragraph 28: "It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage". Elaborating on this principle at page 159 of the fourth edition of her leading text, *Sullivan and Driedger on the Construction of Statutes*, Ruth Sullivan notes that "…every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant".

38. To accept the position of the Crown and effectively conclude that the Deficiencies can be ignored, sidestepped or cured by the continued survival of admissible hearsay in the context of the updated impaired driving regime introduced in the *Amending Act* is, in my view, entirely at odds with the presumption against tautology and would render the bulk of Section 320.32 of the *Criminal Code*, including the entire process whereby the accused can apply to cross-examine the analyst on the contents of the COA, "mere surplusage". Why would the Crown ever be bothered providing a Notice of Intention regarding the COA, thereby creating an opportunity for the accused to cross-examine the analyst (which

would not otherwise exist), if that procedural nuisance and clutter could simply be avoided by having the content of the COA admitted through the evidence of the Qualified Technician?

39. Having considered the changes to the impaired driving regime introduced in the *Amending Act* and the interplay between the provisions that I have earlier cited and examined, I am left to conclude that it was not Parliament's intention in simplifying the impaired driving regime in the *Amending Act* to set the table for a situation where the Crown could fail to discharge the very light new obligations imposed upon it by Parliament, being the new safeguards that have been earlier canvassed in detail, only to then be able to "back door" the very same evidence that it is statutorily barred from admitting through the front door owing to the continued availability of the admissible hearsay path. There was a failure on the part of the Crown to disclose the COA under Paragraph 320.34(1)(e) of the *Criminal Code* until moments before the commencement of the trial in this case coupled with a failure on the part of the Crown to observe the notice requirements set out in Section 320.32 of the *Criminal Code*. In my opinion, that is prejudicial to Mr. Adams' interests.

40. Simplification of the law of impaired driving by Parliament is not incompatible or otherwise incongruous with the adoption of corresponding new safeguards designed to protect the accused. To the contrary, they necessarily compliment each other by giving the Crown a clearer and more expeditious evidentiary path forward in such proceedings provided that the Crown, in turn, follows a few uncomplicated and easily satisfied procedural obligations.

41. In view of these conclusions on the broader interpretative issue, which comingles consideration of the hearsay question and the construction of the *Criminal Code*, as modified by the *Amending Act*, I consider it unnecessary to deal with the abuse of process arguments advanced by counsel for Mr. Adams and I decline to do so.

CONCLUSION

42. In conclusion, and for the reasons earlier stated, I find that both the front door and back door are closed to the Crown to admit any contents whatsoever of the COA in the trial of this matter. The front door is closed owing to the Deficiencies relative to the new provisions of the *Criminal Code* while the back door is no longer open because the use to which the Crown wishes to put the COA by introducing it through the evidence of the intended Crown witness, being the Qualified Technician, no longer constitutes admissible hearsay in the post-*Amending Act* world.

BRITTAIN, PCJ