PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. McDermott*, 2019 NSPC 70

Date: 20191112
Docket: 8239327, 8239328
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kevin McDermott

Judge:	The Honourable Judge Theodore Tax,
Heard:	September 4, 2019, in Dartmouth, Nova Scotia
Decision	October 31 2019
Charge:	253(1)(a) & 253(1)(b) of the **Criminal Code of Canada**
Counsel:	Bryson McDonald, for the Nova Scotia Public Prosecution Wayne Bacchus, for the Defence Counsel

By the Court:

[1] This decision relates to the implications of the amendments to the **Criminal Code of Canada** which came into effect in December 2018 and to the admissibility of certain certificates which the Crown seeks to introduce as Exhibits in the trial on this *voir dire*.

[2] Mr. Kevin McDermott has been charged with having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code.** He was also charged with unlawfully having care control of his motor vehicle after having consumed alcohol in such a quantity that the concentration thereof exceeded 80 mg of alcohol in 100 ml of blood contrary to section 253(1)(b) of the **Criminal Code.** The offences are alleged to have occurred on June 23, 2018 at or near Dartmouth, Nova Scotia.

[3] The Crown proceeded by way of summary conviction, Mr. McDermott entered a not guilty plea and the trial date was set for July 24, 2019. Prior to the trial, Defence Counsel filed a notice of **Charter** application on behalf of his client alleging that there had been breaches of his **Charter** rights pursuant to sections 7, 8, 9, 10(a) and 10(b). Briefs based on the anticipated evidence were filed by Defence Counsel and the Crown Attorney prior to the trial date.

[4] The instant case is one of the many cases that have appeared before courts across the country where charges were laid by the police prior to significant changes in the **Criminal Code** which came into effect on December 18, 2018. The coming into force of Bill C-46 meant that ongoing trials where evidence had been heard and the trial had proceeded prior to the coming into force of the new provisions, continued on the basis of the prior law. However, questions were raised during this trial as to whether the new provisions apply, and if so, to what extent, to those people charged under the prior law, but the trial commenced after December 18, 2018 as this one did.

[5] During the trial, the Crown Attorney sought to introduce three documents as Exhibits in the trial. Defence Counsel objected to those documents being introduced as Exhibits. During this *voir dire*, the Crown sought to introduce a Certificate of a Qualified Technician signed by Const. Grant Fiander on June 23, 2018 [VD-1], a Certificate of an Analyst signed by Clifton Ho, dated July 21, 2016 [VD-2(a)] and a Certificate of an Analyst signed by Karen Chan, also dated July

21, 2016 [VD-2(b)] and a printout of the subject test of Mr. Kevin McDermott from an Intox EC/IR II, signed by Const. Fiander on June 23, 2018 [VD- 3].

[6] During the *voir dire*, there were submissions on the admissibility of all three proposed Exhibits, and the Court concluded that VD-3 would be marked and admitted as Exhibit 1 in the trial proper. Defence Counsel had argued that the printout of the "subject test" had not been printed directly "from" the Intox EC/IR II, the "approved instrument" as some of the breathalyzer machines had done in the past. According to Const. Fiander, the "subject test" had been printed on a printer located near and connected to the "approved instrument" and immediately after the printout was received, he signed and dated it on June 23, 2018.

[7] The issue raised by Defence Counsel related to the interpretation of section 320.33 of the **Criminal Code** which reads as follows:

> **Printout from approved instrument**
>
> 320.33 A document that is 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 an analysis of a sample of a person's breath is evidence of the facts alleged in the document without proof of the signature or official character of the person who signed it.[Emphasis is mine]

[8] During the trial evidence and blended *voir dire*, Const. Grant Fiander confirmed that he has been a trained and certified as a Qualified Breath Technician and Gazetted as such in 2013. In particular, he had been trained in the utilization of the Approved Instrument, the Intox EC/IR II. He met with Mr. Kevin McDermott at about 8:18 PM on June 23, 2018 to administer breath tests on that instrument. He testified that the first suitable sample was provided at 8:43 PM and registered 150 mg of alcohol in 100 ml of blood. Then, he waited 15 minutes between tests and Mr. McDermott provided the 2nd suitable sample at 9:10 PM which registered 140 mg of alcohol in 100 ml of blood. Const. Fiander stated that immediately after the tests, he printed a copy of the Subject Test, then signed and dated that document.

[9] As mentioned previously, the Court concluded that Const. Fiander's testimony and the printout itself had met all of the requirements of section 320.33 of the **Code**. The Court concluded that the printout signed by Const. Fiander had actually come "**from**" the Intox EC/IR II as it had specifically referred to the Subject Tests for Kevin McDermott, with the first breath sequence beginning at

8:35 PM on June 23, 2018. In those circumstances, the document was admitted as Exhibit 1 in the trial proceedings.

[10] During Const. Fiander's testimony on this blended *voir dire*, but in particular, in relation to the subject test for Mr. Kevin McDermott on June 23, 2018, he pointed out all of the steps taken by the Approved Instrument in the first and 2nd breath sequences of suitable samples provided by Mr. McDermott. As part of Const. Fiander's *viva voce* evidence, as confirmed by the information contained on the Subject Test for Mr. McDermott which has been marked as Exhibit 1, he pointed out that the dry gas value (at sea level) was 82 mg/100 ml, that the manufacturer of the alcohol standard was Airgas with lot number AG 618701 and that the expiry date of that cylinder was July 5, 2018. Const. Fiander also pointed out that the cylinder was inside the instrument, but the label on the outside of the instrument was updated to confirm the information that he provided in court.

[11] Const. Fiander also provided *viva voce* evidence relating to the breath sequences conducted by the Approved Instrument during his interaction with Mr. McDermott. The officer stated that the breath sequences started with a diagnostic test that registered a pass, then a system blank to clear the instrument, followed by a test of the alcohol standard. The system blank test registered as zero to indicate that no ambient air was in the instrument to affect the sample, which was followed by a test of the Airgas alcohol standard sample which was 81 mg/% which was followed by a further system blank test which registered as zero to ensure that the instrument was ready to receive samples of the Mr. McDermott's breath.

[12] The Crown Attorney maintained that Exhibit 1 satisfied the requirements of section 320.33 of the **Criminal Code** with respect to the presumption of accuracy. The Crown Attorney submitted that this was essentially the same wording as the former section 258 (f.1) of the **Criminal Code**.

[13] It was the position of Defence Counsel that even if the document was admitted as an Exhibit, the subject test is only a certificate for the readings and not conclusive proof for the purpose of conviction. Moreover, given the fact that Defence Counsel maintained that since they did not get reasonable notice of the Crown's intention to file the two Certificates of the Analysts, the Crown has not complied with the requirements to establish the presumption of accuracy.

[14] Given the number of other issues addressed by the Defence Counsel and the Crown Attorney during their brief oral submissions, the Court was of the view that further written submissions on the specific issues raised by Defence Counsel would

assist the court in rendering its decision. The Crown Attorney filed his written brief on September 23, 2019 and Defence Counsel replied on October 2, 2019.

[15] The issues before the Court on this *voir dire* are:

1. What laws apply to the case at bar;
2. Does the presumption of identity as codified in the former section 258(1)(c) apply to this case;
3. What is required to meet the new requirements of section 320.31 (the new presumption of accuracy);
4. What are the conclusions of the Court with respect to timely disclosure of the Certificates of the Analyst, viva voce testimony with respect to the alcohol standard, and if the contested certificates are admitted as exhibits in the trial proper, what, if any, other orders should result from that decision.

Analysis:

[16] In providing a brief overview of the positions of the parties on the issues before the Court, there is a significant dispute between the parties on all issues with the exception of the first one outlined above.

Issue 1: What laws apply to the case at bar?

[17] On this point, the Crown Attorney and Defence Counsel agree that the new laws to amend the **Criminal Code** by repealing former sections and creating offences in relation to conveyances and other consequential amendments apply in this case. I find that the amendments enumerated in Bill C-46 came into force on December 18, 2018 and that the new provisions in the **Criminal Code** would apply to any trials commenced after that date, even if they related to charges which had proceeded under the prior law.

[18] I find that Parliament intended that the new laws would be applicable in cases such as this one which have been called “transition cases” where the accused was charged prior to the amendments, but the trial occurs, after the amendments came into force. As a result, I agree with the Crown Attorney that the new section 320.14 of the **Code** dealing with the offence of operation of a conveyance while impaired applies in this case.

[19] I also agree with the Crown Attorney that the provisions listed under the heading "Evidentiary Matters" relating to breath samples which are found in the new section 320.31(1) the **Criminal Code**, will also apply in the circumstances of this case. Those provisions essentially replace the former "presumption of accuracy" which were found in section 258(1)(d) of the **Criminal Code**. The wording of section 32(2) of Bill C-46 makes it clear that Parliament intended that the presumption of accuracy be applied retrospectively.

[20] Under the "Transitional Provisions" contained in Bill C-46, section 32(2) stated as follows:

> "32(2) Subsection 320.31(1) of the **Criminal Code**, as enacted by section 15 of this Act, applies to the trial of the accused that is commenced on or after the day on which that section 15 comes into force if the sample or samples to which the trial relates were taken before that date."

[21] The retrospective application of this "presumption of accuracy" has been the position adopted by Courts in unreported decisions in this province as well as in many other Courts across the country: see, for example, **R. v. Goldson**, 2019 ABQB 609, **R. v. Porchetta**, in 2019 ONCJ 244, **R. v. Does**, 2019 ONCJ 233, **R. v. McRae**, 2019 ONCJ 310, **R. v. Fulkerson,** 2019 ONCJ 335 and **R. v. Chuck**, 2019 ONCJ 367.

[22] I agree with the position adopted by the Courts referred to above and come to the conclusion that Parliament specifically intended, in the new legislation, that the new presumption of accuracy would retrospectively apply in these so-called "transitional cases."

*Issue 2: Does the Presumption of Identity as Codified in the Former Section 258(1)(c) of the **Code** apply in this case?*

[23] With respect to this issue, there is a significant difference of opinion between the Crown Attorney and Defence Counsel.

[24] Defence Counsel submits that the presumption of identity does not apply as it has been "purposely repealed." He relies upon the statutory interpretation analysis and conclusion contained in the decision of Burstein J. In **R. v. Shaikh**, 2019 ONCJ 157 at paras. 20-22. In that decision, the learned judge concluded that no presumption of identity survived the repeal of the former sections of the

Criminal Code and that without extrapolation, the prosecution would fail to meet the burden of proof on an over 80 charge.

[25] For his part, the Crown Attorney submits that the new provision in the **Criminal Code** [section 320.14(1)(b)] represents a different legislative regime than existed before the amendments which came into force on December 18, 2018. He submits that, with the adoption of that new section, the new offence of having 80 mg or more of alcohol or more in 100 ml of blood now includes the time period within two hours after ceasing to operate a "conveyance." This new offence is subject to certain exceptions found in subsection 320.14(5) of the **Criminal Code**, however, the focus is no longer on the driver's blood-alcohol concentration solely at the time of driving as was the case under the repealed section 253(1)(b) **Code**.

[26] As result of the creation of the new criminal offence relating to the operation of that "conveyance", the Crown Attorney submits that new offence focuses on the driver's blood-alcohol concentration at the time of the testing, as there is no longer a need for the presumption of identity to read back the blood-alcohol concentration to the time of operation or care or control of a motor vehicle.

[27] During his submissions on this issue, the Crown Attorney relies on the Supreme Court of Canada's comments in **R. v. Myers**, 2019 SCC 18 at para. 19 where they described the modern approach to statutory interpretation with respect to sections of the **Criminal Code**:

> "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."

[28] The Crown Attorney submits that Parliament clearly intended to simplify the law, based upon the preamble to the new legislation and statutory interpretation, and that Parliament did not intend to produce absurd consequences requiring the Crown to call a toxicologist as an expert witness in the prosecution of over 80 charges which predated the coming into force of the new provisions.

[29] In support of his position that the former presumption of identity still applies to transitional cases for charges under section 253(1)(b) of the **Criminal Code**, the Crown Attorney relies upon the reasoning of the courts in **R. v. Porchetta**, 2019 ONCJ 244; **R. v. Yip-Chuck**, 2019 ONCJ 367; **R. v. Peters** 2019 ABPC 172; **R. v. Kettles**, 2019 ABPC 140; and **R. v. Hanna**, 2019 ABPC 157.

[30] In addition to the authorities cited by counsel, I have also reviewed several recent cases which have dealt with this issue and rejected the reasoning of the learned judge in **R. v. Shaikh,** *supra*. It goes without saying that any trial decisions in Nova Scotia and any trial decisions or summary conviction appeals from other provinces are not binding authorities in this case.

[31] On the issue with respect to whether the former presumption of identity found in section 258 of the **Criminal Code** continues to apply with respect to so-called "transitional cases," I find that the words of Rahman J in the recent case of **R. v. Patel**, 2019 ONCJ 544 at para. 20, decided on July 26, 2019, succinctly summarize the conclusion of the court on this issue:

> "20. The overwhelming weight of authority has rejected the analysis in **Shaikh** and has held that the presumption of identity in former section 258 of the **Criminal Code** applies to so-called transitional cases. I adopt and accept the reasoning in those cases, including Latimer J.'s decision in **R. v. McAlorum**, 2019 ONCJ 259 and Duncan J's decision **in R. v Yip-Chuck,** 2019 ONCJ 367. The Crown may rely on the presumption of identity in section 258 of the **Criminal Code**."

[32] Similarly, in **R. v. Phee**, 2019 ABPC 174, Pahl J. of the Alberta Provincial Court was referred to similar arguments to the ones presented in this case and adopted the reasoning in the cases provided by the Crown and rejected the position proposed by the Defence which relied upon the decision of **R. v. Shaikh**, *supra*. In that case, the trial judge adopted the reasoning of other Ontario and Alberta decisions, including **R. v. Sivalingam**, 2019 ONCJ 239; **R. v. McAlorum**, *supra*, **R. v. Porchetta,** *supra;* **R. v. Hiltschuk**, [2019] O.J. no. 1015. In all of those cases, the Court concluded that the presumption of identity survives the December 2018 amendments and would continue to be applicable in transition cases.

[33] It is well accepted that the preamble of an Act is intended to assist in explaining the object: see **Interpretation Act,** RSC 1985 c. I-21, sect.13.

[34] In the **Phee** case at para. 13, Judge Pahl observed that the resolution of the case depended on the interpretation of the **Criminal Code** amendments made on December 18, 2018 and he reproduced the preamble to the amending legislation, which read as follows:

> "Whereas dangerous driving and impaired driving injure or kill thousands of people in Canada every year;

> Whereas dangerous driving and impaired driving are unacceptable at all times and in all circumstances;
>
> Whereas it is important to deter persons from driving when impaired by alcohol or drugs;
>
> Whereas it is important that law enforcement officers be better equipped to detect instances of alcohol impaired or drug impaired driving and exercise investigative powers in a manner that is consistent with the **Canadian Charter of Rights and Freedoms**; and
>
> Whereas it is important to simplify the law relating to the proof of blood-alcohol concentration;"

[35] In his written submissions on this issue, the Crown Attorney referred to the preamble of the new legislation and to the objectives of Parliament, which had also been clearly indicated by the Minister of Justice in Parliament on the 2nd reading of Bill C-46. Furthermore, in support of his position, the Crown Attorney submits that section 43 of the **Interpretation Act**, RSC 1985, c. 1-21, pertains to the situation before the Court. Section 43 states as follows:

Effect of repeal

> 43. Where an enactment is repealed in whole or in part, the repeal does not
>
> **(a)** revive any enactment or anything not in force or existing at the time when the repeal takes effect,
>
> **(b)** affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,
>
> **(c)** affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,
>
> **(d)** affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or
>
> **(e)** affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),
>
> and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.
>
> (Emphasis added)

[36] In **Phee**, *supra*, Judge Pahl referred to section 43 of the **Interpretation Act** and having already considered the impact of the Preamble to the Bill C-46, adopted the comments by the Court in **R. v. Sivalingam**, *supra*, at para. 96:

> "…For cases started on or after December 18, 2018, the inapplicability of the old presumption of identity would require expert evidence. Added layers of in court testimony is the opposite of simplification."

[37] I agree with and adopt those comments in this case.

[38] I find that it is evident that Parliament had the clear intention in C-46 to simplify the law relating to the proof of blood-alcohol concentration. As Rose J. said in **R. v. Porchetta**, *supra*, at para. 38 and 39:

> "38….It would be quite inconsistent to find that Parliament intended to keep section 253(1)(b) intact for "legacy cases" but make it substantially more difficult to prove those charges by wiping away the presumption of identity and rendering null and void the police investigations for those cases. That would be absurd…… Parliament's express intention (was) to simplify proof of over 80 cases. The new over 80 and impaired operations are quite different. The presumption of identity is unnecessary in the new provisions because the new legislation does not require proof of blood-alcohol concentration at the time of driving.
>
> 39. For these reasons I find that, in law, section 258 applies to the case at bar."

[39] I also agree with Justice Rose and adopt his conclusions in this case. I find that the presumption of identity formally found in section 258(1)(c) of the **Code** applies to "transitional" trials where the breath tests were taken before December 18, 2018, but the trial was heard after that date. In those circumstances, I find that the former presumption of identity applies in this "transitional" case.

Issue 3: What is Required to Meet the New Requirements of section 320.31 (the New Presumption of Accuracy):

[40] With respect to this issue, the Crown Attorney and Defence Counsel have submitted quite different interpretations of what is required to be established by the Crown under the heading of "Evidentiary Matters" in the new provisions relating to the three requirements for the Crown to establish in the new presumption of accuracy outlined in sections 320.31(1)(a)(b) and (c) of the **Code**. In essence, this new presumption of accuracy is an evidentiary shortcut, much like the previous provisions, to streamline prosecutions and provides that 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 three requirements are met.

[41] There are two contentious issues between the parties in this case in relation to the “Evidentiary Matters” as they relate to Mr. McDermott’s breath samples. The first issue between the parties relates to the interpretation of section 320.31(1)(a) of the **Code**. Defence Counsel submits that, under that section, the Crown is required to establish that before each sample was taken, the qualified technician conducted a system blank test, the result of which was not more than 10 mg of alcohol in 100 mL of blood and that a system calibration check was within 10% of the target value of an alcohol standard “that is certified by an analyst.” It is the last requirement that is the point of contention between the parties.

[42] Defence Counsel also submits that, pursuant to the new provisions, the Crown did not provide “reasonable notice” of their intention to produce a copy of the certificates pursuant to section 320.32 of the **Code** dealing with certificates. In those circumstances, he submits that the Certificates should not be admitted as exhibits in the trial.

[43] In addition, Defence Counsel submits that the two Certificates of an Analyst dated July 21, 2016, which the Crown has sought to introduce as exhibits on the *voir dire*¸ even if admitted, provide no numeric value of the alcohol standard in the certificate. Therefore, Defence Counsel submits that, even if the court concludes that notice was reasonable and the certificates were admissible, the certificates fail to meet the requirements of section 320.31(1)(a) of the **Code** because there is no numeric value to the certified alcohol standard contained in the Certificate of an Analyst. In those circumstances, he submits that it is impossible to determine whether the sample was within 10% of an “unquantified value” and that, therefore, the Crown has not established the presumption of accuracy.

[44] Defence Counsel acknowledges that there is case law to support the introduction of “hearsay evidence” by a qualified technician to establish this aspect of the new presumption of accuracy. However, he submits that the qualified technician’s evidence is not “documentary” and care must be taken in accepting this type of evidence as “documentary hearsay” without tendering the document itself or producing the authors of the certificates for cross-examination. In advancing this proposition, Defence Counsel relies on the decision in **R. v. Flores-Vigil**, 2019 ONCJ 192.

[45] There is also dispute between the parties with respect to whether the Court should grant an adjournment, in light of this decision on the *voir dire* with respect to the admissibility of the two Certificates of an Analyst to allow the Defence to assess its position under section 320.32 of the **Code** to apply to the court for an order requiring the attendance of the person(s) who signed the Certificates of an Analyst for the purposes of cross-examination.

[46] It is the position of the Defence that the notice provided by the Crown with respect to their intention to produce the Certificates of an Analyst was inadequate as it was only provided a few days before the trial. In those circumstances, there was no possibility for him to meet the timelines and requirements established in ss. 320.32 (4) and (5) of the **Code**. Therefore, Defence Counsel submits that the Certificates should not be admitted as exhibits in the trial.

[47] With respect to the position of the Defence that the proposed Certificates should be excluded from being "received in evidence" because there was a lack of reasonable notice as required by section 320.32(2) of the **Code**, the Crown Attorney submits that there is no mention in the legislation that the exclusion of the Certificates is an available remedy. The Crown Attorney submits that the correct remedy, as is the case in situations where notice given was deemed not to be reasonable, is an adjournment.

[48] On this point with respect to the remedy, the Crown Attorney relies on the reasoning in **R. v. Peters**, 2019 ABPC 172 at paras. 33-34 where the judge stated that the legislation gives no guidance on the remedy for failing to provide notice. The Court concluded that the "law generally provides that where these issues arise, the remedy is an adjournment to permit the parties to properly prepare their case. Since there is nothing otherwise unusual about the case, that is the remedy that would be applicable here."

[49] Based upon my review of the cases submitted in support of their positions by counsel and additional research on the points in dispute between the parties with respect to the new presumption of accuracy, I agree with the Crown Attorney that the requirements of section 320.31(1) of the **Code** may be met in any one of the following three ways:

1. Filing a new Certificate of Qualified Technician as the post amendment certificates contain a certification that subsection (a) has been met: see **R. v. Does**, 2019 ONCJ 233 at paras. 15-17;

2. Filing a Certificate of an Analyst under section 320.32 of the **Code**: see **Porchetta** at paras. 46-49, where the trial judge comes to a different conclusion than the court in the **Flores-Vigil** case but concurs with his colleague's decision in the case of **R. v. Does**; and finally

3. *Viva Voce* testimony from the Qualified Technician in the same manner that the Qualified Technician can testify that the Intoxilyzer (or any other instrument) is an approved instrument based on appearance and its operation: see **Porchetta** at para. 47 and **Does** at para. 17.

[50] While none of those decisions are binding on me, I certainly adopt and agree with their conclusions and their practical reasoning in light of Parliament's stated intentions that the new provisions were an important way to simplify the law relating to the proof of blood alcohol concentration.

[51] With respect to the issues raised under this heading, I also agree with and adopt the conclusions reached by Justice Bernadette Ho of the Alberta Court of Queen's Bench in **R. v. Goldson**, 2019 ABQB 609, which were rendered as a summary conviction appeal.

[52] In **Goldson,** at para. 45, the Court concluded that the evidence for the purposes of section 320.31 of the **Code,** may be satisfied by evidence of the qualified technician, whether by way of *viva voce* evidence or by tendering a certificate of qualified technician. In coming to that conclusion, the Court stated that "this interpretation is consistent with Parliament's intention to simplify and streamline prosecutions."

[53] Next, dealing with the provisions contained in section 320.32 (3)-(5) of the **Code** which deal with the application and timing of the application by Defence to require the attendance of the person who signed the certificate for the purposes of cross-examination, Justice Ho points out in **Goldson** at para. 46, that the party against whom the certificate is produced may apply to the court and that the subsequent sections speak to the form and content of the application and that if a hearing is granted, it must be held at least 30 days before the trial. These sections "discourage unmeritorious challenges to evidence."

[54] Madam Justice Ho concludes, in **Goldson** at para. 50:

> "In light of the object and scheme of the new provisions, Parliament did not intend to place further evidentiary burdens on the Crown and section 320.31(1)(a)

> of the **Code** 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, as it was not the intention of Parliament to add a requirement on the Crown to tender additional evidence beyond that of the qualified technician."

[55] One of the other issues that is evident in this case comes from the fact that the Crown has tendered, on the *voir dire*, the Certificate of a Qualified Technician, which is dated June 23, 2018. Obviously, the form of the Certificate of the Qualified Technician was prepared in such a manner as to meet the requirements of the **Criminal Code** in relation to cases involving an accused person's blood alcohol concentration as the law existed prior to December 18, 2018. In my opinion, that document which was served upon Mr. McDermott on June 23, 2018 certainly provided him with the immediate notice of the intention to produce that certificate at a later date.

[56] In my opinion, the Certificate of a Qualified Technician (dated June 23, 2018) should be received as an exhibit and evidence in this trial as it certainly conformed with the law as it stood prior to December 18, 2018. It would be inconceivable that Parliament, in an effort to simplify and streamline prosecutions, by introducing the new provisions, had any intention to bar the introduction in evidence of certificates which under the old legislation, as well as the new provisions, are evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate: see section 320.32(1) of the **Code**.

[57] In coming to this conclusion, I find that the introduction of the Certificate of a Qualified Technician based upon the previous legislation will only be applicable as these so-called "transitional cases" work their way through the system. As indicated above, I find that there are several ways to meet the requirements of the new legislation, and I would expect that as the "transitional cases" are completed, the Crown will be relying upon the new form of Certificate of Qualified Technician which specifically addresses all of the new requirements found in section 320.31(1) of the **Code**.

[58] In this case, I have found that the subject test information was received "from" the Intox EC/IR II which outlined the set-up of that approved instrument. The subject test printout also provided information relating to the two breath

sequences provided by Mr. McDermott and the dry gas target data. The Subject Test Printout has already been marked as Exhibit 1 in the trial.

[59] Furthermore, with respect to the two Certificates of an Analyst which were filed as *voir dire* exhibits 2(a) and 2(b), the Court was informed that they were served upon Defence Counsel five (5) days before the trial commenced on July 24, 2019. Defence Counsel maintained that five days' notice of an intention to produce the certificates was not reasonable for two reasons: first, the late notice essentially provided insufficient time to study the issue and secondly, the late notice meant that he could not comply with subsections 320.32(3)-(5) of the **Code** which contain the timelines and requirements for the presentation of an application and a hearing before the trial commenced. Defence Counsel submits that it was impossible for him to comply with those timelines and requirements of an application for the attendance of an analyst for cross examination, given the fact that the documents in question were served upon him, just days before the trial.

[60] As I mentioned previously, I find that it is clear that Parliament's purpose in putting those requirements and timelines in the legislation was to discourage unmeritorious challenges to evidence. It was also to ensure that an already overburdened criminal justice system does not have to address last-minute challenges which delay or prolong the trial.

[61] In my opinion, some latitude has to be applied by the Court to ensure that Parliament's intention to simplify and streamline these prosecutions is not rendered nugatory in these "transitional cases". Defence Counsel points out that the new provisions in section 320.32 of the **Code** would have required the Crown to serve notice of the intention to file the Certificate of an Analyst approximately 90 days before the trial actually began in order for him to be able to comply with the form and content of an application and the timing of that application before the trial.

[62] In this case, the previous form of the Certificate of a Qualified Technician was served upon Mr. McDermott following his breath tests on June 23, 2018. With respect to that certificate with the attached Notice of Intention to Produce Certificate, there can be no doubt that Defence Counsel had ample notice that the Crown intended to rely on it during a trial. Once these "transitional cases" are completed and the Crown relies upon the new Certificate of a Qualified Technician which conforms with the requirements of the new legislation, the issues raised on this application will no longer be relevant.

[63] For all the reasons outlined above, I am not prepared to exclude the Certificate of the Qualified Technician dated June 23, 2018 or the two Certificates of an Analyst dated July 21, 2016 in relation to Airgas lot AG 618701. They shall be marked as Exhibits in this trial.

[64] In this "transitional" case, Defence Counsel had five days' notice of the Crown's intention to produce those certificates in evidence and in the normal course, I find that that would have been reasonable notice. However, since this is a "transitional case" and Parliament has put timelines in place for an application to be made by the defence if they wish to cross-examine the person who signed the certificate, the appropriate remedy for that situation is, in my opinion, to grant a short adjournment prior to continuing the trial in order to allow Defence Counsel to assess his position.

[65] Taking all of those circumstances into account, I find it is not necessary to grant a lengthy adjournment prior to continuing with the trial, since Defence Counsel was served with the notice and those certificates of an analyst on July 19, 2019. Moreover, since I have also concluded that the Crown may establish the requirements of section 320.31(1) of the **Code** in any one of three ways, Defence Counsel may require a short adjournment before the trial resumes to consider his position with respect to applying to cross-examine the analysts, calling defence evidence in the trial or in relation to his **Charter** applications.

[66] Finally, Defence Counsel had sought costs to be awarded against the Crown if the court was to grant a brief adjournment in order to cover his transportation costs to return to Nova Scotia. He also sought costs from the Crown for the provision of additional legal services for Mr. McDermott, which were, in his opinion, all occasioned as a result of the delay in the prosecution of this trial by virtue of the late notice to introduce the Certificates of an Analyst.

[67] With respect to the question of costs being awarded against the Crown for the purposes outlined in Defence Counsel's brief, he has not provided any authority for such a proposition generally, let alone, in the unique circumstances which have been raised in this "transitional case." In my opinion, there is no basis upon which I could conclude, in all the circumstances of this case, that it would be appropriate to order costs against the Crown and I decline to do so.

Theodore Tax, JPC