PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Kelly*, 2019 NSPC 73

Date: 2019/12/06
Docket: Case # 8316948
Registry: Sydney

Between:

Her Majesty the Queen

v.

Michaela Elizabeth Kelly

Before: Judge A. Peter Ross

Heard: 3 September 2019

Place: Sydney, N.S.

Decided: 27 September 2019

Written decision: December 6, 2019

Charge: s.320.14(1)(a) Criminal Code of Canada

Crown Counsel: Mr. Darcy MacPherson

Defence Counsel: Mr. William P. Burchell

Reasons for Decision

Summary:

The accused was tried on a charge of impaired operation of a conveyance contrary to s.320.14(a). Crown tendered a certificate of qualified technician (CQT) showing blood alcohol readings of 200 and 180. Crown conceded that it could not rely on the presumption of accuracy in s.320.31(1) but argued that the certificate

was never the less admissible evidence of alcohol use, and thus one piece of circumstantial evidence tending to prove that the accused's ability to operate a motor vehicle was impaired by alcohol.

The certificate was ruled inadmissible, without which there was insufficient evidence to prove impairment. The accused was found not guilty.

Admissibility of the certificate depended upon whether it was "made under" Part VIII.1 of the Criminal Code. This required a consideration of what is implied by the wording of s.320.33. The form of certificate was out-dated, but more importantly it did not state within it the preconditions necessary to establish admissibility. Neither were these prerequisites to admissibility proven by other means.

The following things are discussed:

(a) the prerequisites to (i) admissibility of certificate evidence and (ii) the operation of presumptions, under both previous and current legislation,

(b) the meaning of "conclusive proof" in s.320.31(1),

(c) the possibility that a certificate of qualified technician may supply evidence of blood alcohol concentration (BAC) without conclusively proving same,

(d) potential importance of BAC evidence on a charge of impaired operation,

(e) the meaning of "made under this Part" in s.320.32 as it applies to a certificate of qualified technician, and principles of interpretation by which this is derived

(e) how the preconditions to admissibility of a CQT may be proven

INTRODUCTION

[1] The accused, Michaela Kelly, was charged and tried with having care or control of a conveyance while her ability to do so was impaired by alcohol, contrary to s.320.14(1)(a) of the Criminal Code. Crown decided not to proceed with a second charge under s.320.14(1)(b), having a blood alcohol concentration (BAC) at or exceeding 80 mg per 100 ml of blood within two hours after ceasing

to operate a conveyance. I will term ss.(a) “impaired operation”. I will call ss.(b) “80 or over”.

[2] At trial the court heard from just one witness, the police officer who came upon the scene and took the accused to the Detachment for a breath test. The testing was done by a Qualified Technician (QT) on an approved instrument. Crown tendered the Certificate which he prepared (CQT). It also tendered photographs of the accused’s vehicle and a report of motor vehicle collision authored and attested to by the arresting officer. The accused did not testify or call evidence.

[3] The Crown’s case is built on circumstantial evidence. The CQT is part of that case. Ultimately I must decide whether the elements of the impaired operation offence have been proven beyond a reasonable doubt, but admissibility issues arise along the way and give rise to the bulk of these reasons.

[4] Revamped impaired driving legislation came into effect on December 18, 2018. The events in question occurred twelve days later.

ISSUES

[5] 1. Is there admissible evidence to prove beyond a reasonable doubt that the accused’s ability to operate a conveyance (motor vehicle) was impaired by alcohol?

[6] 2. Can a Certificate of Qualified Technician tendered under s.320.32 constitute evidence of facts contained in the document where the presumption of the accuracy of the certificate found in s.320.31(1) does not pertain? Where the Crown evidence fails to establish the prerequisites for the presumption of accuracy of a measured blood alcohol concentration, is a CQT stating the results of analyses nevertheless admissible as evidence with probative value on the issue of impairment?

[7] 3. Under what conditions is a CQT admissible under s.320.32?

FACTS

[8] In the early morning hours of December 30th, 2018 the accused was involved in a single-car accident at the beginning of an exit ramp (Exit 8) leading from Highway #125 to George St., near Sydney, N.S. It appears she drove her car into a bank of snow left by a plow at the bottom of the ramp. The vehicle came to rest a short distance further along. Cst. James Penney of the Cape Breton Regional Police Service came upon the scene a short time later. A run-in with a snow bank had become a run-in with the law.

[9] The officer spoke with a passenger, a Mr. Steele, outside the vehicle. Seeing Ms. Kelly emerge from the driver's door, he then spoke with her. Crown and Defence agreed that Ms. Kelly's statements would be received as evidence, not solely with respect to the formulation of grounds for a breath demand but as substantive evidence on the impaired operation charge.

[10] The accused said that she was not injured, that she had been driving to a friend's house from 'the old triangle', and that a red Dodge car had forced her off the road, causing the accident. She said this happened within the previous half hour. Working from the officer's notes, this puts the time of the accident at shortly after 03:00 hours.

[11] When Ms. Kelly exited the vehicle, she was unsteady on her feet. Cst. Penney detected "an odour of alcoholic beverage from her mouth" and noted that her speech was slow and slurred. Ms. Kelly became upset and started to cry. When an ambulance attended, she refused help.

[12] The officer arrested the accused for impaired driving and put her into the back of his police car. He read a standard breath demand. She said she understood and would comply. At the Detachment, once told she had a right to contact legal counsel, she called her mother. Police contacted duty counsel. The accused finished speaking with him at 04:18. Ms Kelly was taken for breath tests at 04:22. These were administered by Cst Matt McNeil. According to his Certificate of Qualified Technician the first sample was taken at 04:49, a second at 05:12. The blood alcohol concentrations (BACs) were measured at 200 mg/100 ml and 180 mg/100ml. respectively.

[13] Cst. MacNeil used a form of CQT commonly in use prior to December 18, 2018, one consistent with the former (repealed) legislation. A copy of his certificate, and a 'notice of intention to produce', were served on the accused by Cst. Penney a few days later. The certificate, exhibit #2 in the case, is reproduced here in Appendix 'A".

[14] Photos of the vehicle show extensive damage, particularly to the front end. The engine hood is deformed. The front grill and bumper are missing. The headlights are smashed. The front airbags are deployed. The back bumper is gone. Parts of the vehicle were found on the road. The roads were icy at the time – this in Cst. Penney's "report of motor vehicle collision" which he prepared shortly afterward and adopted at trial.

BACKGROUND

[15] *R. v. Egger* [1993] 2 S.C.R. 451 concerned the taking of blood samples, provision of a second sample to an accused, disclosure and notice requirements. That case did not concern analyses by an approved instrument; the case before me does. *Egger* considered how 'notice of intention to produce' factored into admissibility; in the case at hand notice is not in issue. However certain comments in *Egger* are pertinent, for example in par. 14 –

> As I observed when setting out the relevant statutory provisions above, the availability of the presumption and the admissibility of the Certificate of Analyst and Certificate of QT as evidence are two separate questions. The admissibility of the CA and CQT does not depend on meeting the conditions for the presumption. Unfortunately, there appears to be some confusion of the two issues . . .

[16] The judgement continues at par. 32 –

> The effect of satisfying the burden of proving preliminary facts to the admissibility of evidence is only that the evidence is admitted: it determines neither the weight of the evidence nor the guilt of the accused. This occurs in the next step in the process during which the Crown must satisfy its legal burden.

Presumptions

[17] The legislation governing impaired driving and certificate evidence has changed a number of times over the years. *R. v. Alex* [2017] 1 S.C.R. 967 dealt with antecedent legislation but is never the less instructive. At par.18 and 19 the court described the two well-known presumptions contained in former s.258(1)(c):

> Section 258(1)(c) then provides two inferences that may be presumptively drawn from the certificate. The first inference, referred to as the presumption of accuracy, is that the breath readings in the certificate are accurate measures of the

> accused's blood-alcohol concentration. This presumption dispenses with the need to call the qualified technician who administered the tests to verify their accuracy.
>
> The second inference, known as the presumption of identity, provides that the breath test results also identify the accused's blood-alcohol concentration at the time of the alleged offence. This presumption avoids the need to call an expert toxicologist to interpret or "read-back" the breath readings with a view to identifying the accused's blood-alcohol concentration at the time of the alleged offence.

[18] From a reading of s.258(1)(c) one may distill the essential components – things which needed to be established in order for the presumptions of accuracy and identity to apply. These can be set out in different ways, in different combinations, but I will break them down as follows:

1. Samples of the accused's breath were taken
2. Pursuant to a demand made in an impaired driving investigation
3. Samples taken as soon as practicable, first not less than two hours after time of alleged offence
4. An interval of at least 15 minutes between samples
5. Samples received directly into an approved instrument
6. Operated by a qualified technician
7. Analyses made by such instrument and technician

[19] The use of an "alcohol standard" to ascertain proper working order is not mentioned.

[20] Section 258(1)(c) is reproduced in Appendix "B".

[21] As of December 18, 2018 the presumption of identity has been reborn as an element of an offence in s.320.14(1)(b) – having a BAC at or over 80 mg/100 ml within two hours of operation is *per se* unlawful. This was a legislative response to the "bolus drinking" and "drinking after driving" defences. Impaired driving *simpliciter* remains an offence, as it has been for many years, although it is now re-framed to read "operate a conveyance". Impairment may be by alcohol or drug or both. To "operate" a motor vehicle or other conveyance means "to drive it or to have care or control of it".

[22] The remaining presumption, the presumption of accuracy, is now found in s.320.31(1). I will call s.258(1)(c) and its counterparts in current and previous legislation the "presumption" section.

Evidence

[23] Former s.258(1)(g) dealt with evidence. For reference, it too is reproduced in Appendix "B". The section deemed a CQT to be evidence of its contents provided certain specific conditions were met. In *Alex (SCC)*, *supra*, at par.20 the court says, "evidentiary shortcuts streamline the trial proceedings by permitting an accused's BAC at the time of the alleged offence to be presumptively proven through the filing of a certificate of analysis." This statement should apply equally to the presumption of accuracy. The court does not say here that presumptive proof of blood alcohol concentrations is the *only* purpose to which a certificate may be put. In Ms. Kelly's trial the Crown tendered it for a somewhat different reason.

[24] Par. 20 continues, "To be clear, these shortcuts . . . affect only the manner of admission . . ." The manner is affected by dispensing with the need to call the technician to attest to the certificate, to the accuracy of the measurements, as would be required under ordinary common law modes of proof.

[25] It continues ". . . in *R. v. Deruelle*, [1992] 2 S.C.R. 663, the court observed that breath readings remain admissible at common law through *viva voce* evidence, irrespective of whether the shortcuts apply."

[26] In *Alex* the court uses the term "evidentiary shortcut" to refer to both certificate evidence and fulfillment of a presumption. At par. 27 the court speaks in general terms about the preconditions which must be met before the evidentiary shortcuts apply:

> These preconditions share a common theme of ensuring that certain procedures are followed in the taking and recording of a breath reading, all of which bear directly on the reliability of the evidentiary shortcuts. In particular, they set out requirements pertaining to the timing, method, instrument type and operator qualifications.

[27] The CQT tendered in Ms. Kelly's trial is in a form customarily used under former s.258(1)(g). That section required, among other things, as a precondition to admissibility CQT, that the analyses be done on an approved instrument ascertained by the technician to be in proper working order by means of an alcohol standard. Because these requirements, set out in ss.(i) (ii) and (iii), were linked by the word "and" it followed that all needed to be set out in the CQT in order for it to be admissible.

[28] From a reading of s.258(1)(g) one may distill the following essential components – things which one would expect to find in such a certificate in order for it to become evidence:

1. Samples of breath taken from the accused person
2. Pursuant to a demand made in an impaired driving investigation
3. Procedure done and certificate prepared by a Qualified Technician, who is identified
4. On an "approved instrument", which is identified
5. Ascertained to be in proper working order by means of an identified alcohol standard
6. Alcohol standard was suitable for use
7. Number of samples and results for each (BACs)
8. The time and place of the sampling
9. Samples received directly into the approved instrument

[29] A time interval of 15 minutes between samples is not mentioned.

[30] This section was replaced by present s.320.32(1) just days before Ms. Kelly's arrest. I will call s.258(1)(g) and its counterparts in previous and current legislation the "is evidence" section.

THE CURRENT REGIME

[31] As above I will attempt to distill the essential components of the new "is evidence" section, 320.32(1) and the new "presumption" section, 320.31(1). For ease of reference I have reproduced these and other Part VIII.1 provisions in Appendix "C".

Evidence

[32] It appears the following are required for a certificate of Q.T. to become evidence per s.320.32(1):

1. Qualified Technician, identified as such
2. Certificate is "made under this Part", being Part VIII.1 of the Criminal Code

[33] Legislatively, the admissibility of a Certificate of Q.T. is greatly simplified in s.320.32(1). There are no specific preconditions, no prescribed content. If it is

"made under this Part" it becomes "evidence of the facts alleged". Whereas previously the preconditions to admissibility could be discerned from the section, currently any preconditions must be inferred from the phrase "made under this Part". I will consider later what this phrase might entail and whether any such preconditions must appear in the CQT itself.

[34] Notice of intended use is required, as before, and the section makes provision for cross-examination of the QT with leave of the court. These aspects are not in issue in the instant case.

Presumption

[35] S.320.31(1) creates a presumption of accuracy and spells out prerequisites to its operation. The section employs the phrase "conclusive proof", without qualification. As I will discuss below, the word "presumption" may not be the best descriptor, but I will use it for the sake of consistency.

[36] It appears the following are required, expressly or by necessary implication, for the presumption of accuracy in s.320.31(1) to apply:

1. Person from whom samples obtained, identified by name
2. Testing followed upon a demand of a peace officer made under s.320.28
3. Time of the analyses
4. Used an approved instrument, identified
5. Operated by a Q.T., identified
6. Samples necessary for a proper analysis were obtained
7. Number of samples, results for each, expressed in mg/100 ml. blood (BACs)
8. System blank test conducted, result within prescribed limit of 10 mg.
9. System calibration check conducted, result within 10% of an alcohol standard
10. Alcohol standard certified by an analyst
11. Interval of at least 15 minutes between samples
12. Results not differ by more than 20 mg. when rounded down

[37] A given BAC, put in evidence by a certificate under s.320.32(1) or by *viva voce* evidence, can be elevated to a proven fact under s.320.31(1). This section takes a trier of fact from "results of the analyses" to "conclusive proof". In the prosecution of an "80 or over" charge, this may serve to prove a crucial element of the offence. However, any level of BAC, even less than 80 mg./100 ml., may be probative of impairment on an impaired operation charge.

[38] As noted above, use of an alcohol standard to ascertain "proper working order" was a necessary component of a valid certificate in former s.258(1)(g). Following the wording of that section it would normally be identified in the CQT as "suitable for use". Then, the use of a proper alcohol standard was included in the "is evidence" section. Now, an alcohol standard "certified by an analyst" has been incorporated in the section creating the presumption, along with requirements for a system blank test, a system calibration test, etc. Failure to establish these things means the presumption of accuracy does not apply. S.320.31 does not prescribe how these prerequisites are to be established. Only for the alcohol standard does it mention the possibility of proof by certificate.

[39] In the prosecution of an "80 or over" offence, or an "impaired operation" charge, the Crown is not tied to proof by certificate. Crown can adduce *viva voce* evidence from the QT. In *R. v. Hanna*, [2019] A.J. No. 878, where the presumption of accuracy was in issue, the court, referring to *R. v. McRae*, 2019 ONCJ 310 at par. 18, held that hearsay evidence of the alcohol standard may come in either by certificate or by viva voce evidence. In *R. v. Goldson*, [2019] A.J. No. 1064 (Alta. Q.B.) the issue was whether the requirements of s.320.31(1)(a) – in particular, whether the alcohol standard was certified by an analyst – could be proven through *viva voce* testimony. The judge stated that the requirements of s. 320.31(1)(a) could be met through *viva voce* testimony or through a CQT, referring to *R. v. Lightfoot*, [1981] 1 S.C.R. 556 at 575, where the Supreme Court stated "the Crown may obtain the advantage of the statutory presumption under s. 237(1)(c) by offering proof, by certificate or by oral evidence, of the three elements specified therein. Nothing more is required..." A discussion of the evidentiary scheme in the new impaired driving legislation, and the applicability of existing jurisprudence to the new law, may be found in *Goldson* at par. 42 to 74.

Presumption vs. Conclusive Proof

[40] S. 320.12 declares that "the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration". No such declaration is made for blood analysis.

[41] S. 320.31(1) states that the results of breath analyses are "conclusive proof" of BAC at the time of analysis, provided certain the conditions set out in ss.(a), (b), (c) are met. S.320.31(2) states that the result of blood analysis is "proof" of BAC at the time the sample was taken "in the absence of evidence tending to show that the analysis was performed improperly." The section goes on to eliminate certain things from "evidence to the contrary" in the context of blood analysis.

[42] The wording employed for blood samples in ss.(2) is what courts have customarily referred to as a "presumption". The allowance for contrary evidence makes it a rebuttable presumption. The difference in wording between ss.(1) and (2) suggests that "conclusive proof" means something more than the usual presumption. The wording suggests that upon fulfillment of the conditions the BAC is a proven and irrefutable fact, a fact the court *must* rely upon in deciding the case.

[43] In Watt's *Manual of Criminal Evidence*, 2019, at S.13.01, the author states that "a conclusive or irrebuttable presumption of law is a rule of substantive law, ill-suited to the language of presumption". The presumption of accuracy is what the author would term a "presumption with basic facts" – i.e. there is a factual substrate on which it rests. That factual substrate may be established through a CQT. Perhaps "conclusion of accuracy" would better suit the language of s.320.31(1).

[44] The phrase "conclusive proof" is carried over from the former s.258(1)(c). However, in its previous iteration the term was qualified by the phrase "in the absence of evidence tending to show . . . (three things follow)". After the burden on the accused was 'read down' in *R. v. S-Onge Lamoureux*, [2012] 3 S.C.R. 187, the accused would have to show that the approved instrument was malfunctioning or had been operated improperly. As such, the section expressly provided for the possibility of rebuttal. Perhaps this justified continued use of the word "presumption".

[45] Presently, s.320.31(1) has no such qualifying words; there is nothing equivalent to the phrase "in the absence of evidence tending to show", or "in the absence of evidence to the contrary". "Conclusive proof" may now mean precisely what it says.

[46] The Interpretation Act states, at s.25 (1):

> Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

[47] Parliament, through use of the phrase "conclusive proof", may have intended to protect s.320.31(1) from the application of s.25(1).

[48] That said, courts are inclined to say that the current s.320.31(1) still creates a "presumption of accuracy". For example, *R. v. Sivalingam*, [2019] O.J. No.1975, reads at par.79: "The new presumption of accuracy is essentially the same as under the old law, although the conditions under which the new presumption of accuracy applies are somewhat different from those of the old presumption of accuracy." Other cases which refer to s.320.31(1) as containing a "presumption of accuracy" include *R. v. Hanna*, [2019] A.J. No. 878; *R. v. Goldson*, [2019 A.J. No. 1064; *R. v. McRae*, [2019] O.J. No. 2493.

[49] While the new sections, through use of the term "conclusive proof" appear to leave little room for doubt on the accuracy of the readings, there may be instances where legitimate concerns arise about the functioning of the instrument. A defence based on the functioning of the instrument or procedure of the technician should not be completely foreclosed (see s.320.34(3)). That said, it will be very difficult for an accused to mount a defence based on the unreliability of a certificate once it has been received into evidence.

[50] The fact which a CQT potentially proves is of high importance, comprising a very element of the offence of "80 and over", and comprising very damning evidence in an "impaired operation" prosecution.

[51] If "conclusive proof" creates an even more powerful tool by which to convict an accused, there is even greater reason to insist that it rests on a proper factual substrate. This in turn suggests that the standards of admissibility for certificates tendered under s.320.32 mirror many of the same features which underscore the accuracy of the results. I will return to this below.

[52] In passing, I note that the conclusion of accuracy applies only to the BACs, not to the time of the testing, although times customarily appear in a CQT. Conceivably the time of testing could support proof of the time of operation, which is also an element of an "80 or over" offence under the new scheme. Parliament has not, as yet, identified a need to protect chronometers from creative attack by the criminal defence bar.

DISCLOSURE

[53] Section 320.34 mandates disclosure to the accused of the results of the system blank tests, the calibration checks, any error messages from the instrument,

the results of the analysis and the certificate of analyst concerning the alcohol standard. Further disclosure may be ordered on application. Notably the disclosure requirement is directed to the presumption of accuracy, specifically to the preconditions set out in subsections 320.31(a) to (c). It is not directed to the admissibility of a certificate.

[54] The prescribed disclosure is connected to the testing procedure. The section is not meant to limit disclosure, but no additional disclosure is required unless the accused successfully applies for it. *Stinchcombe* obligations still apply to the Crown/police files as a whole.

[55] The issue before me is not whether a failure to follow the disclosure mandated by s.320.34 renders a certificate inadmissible. Perhaps that shortcoming is more amenable to a procedural remedy such as an adjournment or stay or proceedings. In this case the Crown acknowledged failure to comply with the disclosure requirements of s.320.34 and took the position that because of the failure to disclose it could not rely on the presumption of accuracy for the results. Recognizing it could not establish the presumption of accuracy for the results, Crown offered no evidence on the 80 or over charge and proceeded to trial on the impaired operation. Perhaps a simpler reason for the unavailability of the presumption rests on the absence of evidence to support the requirements of s.321.31(1)(a), but the effect on the proceeding is the same either way. The disclosure section has no direct bearing on the issue at hand.

POTENTIAL SIGNIFICANCE OF THE CERTIFICATE EVIDENCE

[56] In this trial, Crown maintains that the Certificate of Qualified Technician is admissible evidence and carries probative value. Specifically, it contends that the certificate constitutes evidence of alcohol *use*, corroborates observations of Cst. Penney made at the scene, and thus supports proof of alcohol *impairment*.

[57] The Crown seeks to connect Ms. Kelly's BAC at the time of sampling with her condition - i.e. impairment, not any particular BAC - at the time of operation. It is *not* suggesting that the court do an "extrapolation" as such, as has been done by toxicologists in many cases, as a judge may now do under s.320.31(4).

[58] The results were 200 and 180 mg./100 ml. Given the legal limit prescribed by statute, is this evidence of a high degree of impairment as of 04:49 and 05:12?

Given the proximity to the time of driving, does this constitute evidence of impairment at that earlier time, shortly after 03:00? Are the readings evidence of impaired operation completely aside from any presumption of their accuracy?

[59] To my mind this is relevant and potentially probative evidence. If a person registers a high BAC about two hours after driving, with no intervening consumption, this makes more likely the fact which the Crown seeks to prove, i.e. that her ability to operate the car at the time of driving was impaired to some degree by alcohol. Decades of experience with this sort of evidence and untold numbers of reported cases make this readily apparent.

[60] As noted above, Crown seeks to use the CQT as evidence simply of alcohol use. It argues that because there was a "positive response" to the breath test procedure, the court therefore has evidence that Ms. Kelly "had alcohol in her body". This begs the question whether the Crown might be aiming too low. If admissible at all, does the CQT not provide evidence (though not proof) of the actual readings – here 200 and 180? Why would it be evidence merely of alcohol ingestion? Given the paring down of the "is evidence" section (320.32), is the CQT evidence of Ms. Kelly's actual blood alcohol concentrations? The weight ultimately attributed to the measured BACs is a different (though related) matter.

[61] I had occasion to consider the foregoing issues in *R. v. Devison*, [2016] N.S.J. No. 274, at par.101 to 121. In that case the presumption of identity was unavailable because the Crown could not establish that the readings were taken within two hours of driving. The accused was found not guilty on a charge of "over 80 causing bodily harm", but there was nevertheless evidence of the accused's BAC before the court on the charge of "impaired driving causing bodily harm". The BAC evidence came in *viva voce* from the testimony of the QT, not by certificate.

[62] Although in *Devison* the precise times could not be proven, the evidence showed a relatively short span of time – just over two hours - between the BAC of the accused at the time of testing (170) and the condition of the accused at the earlier time of driving. I took note of the decision in *R. v. Marahaj*, [2007] O.J. No.157, where this circumstance was termed "proven proximate impairment".

[63] At par.135 I noted that trial judges can give some weight to a high BAC on a charge of impaired driving, *even in the absence of interpretive expert evidence*. In that case, as here, there was no evidence of bolus drinking, nor of drinking after

driving, important things to eliminate before attributing much weight to the BAC evidence. Ms. Devison was convicted.

[64] In the case of Ms. Kelly the evidence of her BAC, which was also very high (200/180), was provided in certificate form. I mention the *Devison* case simply to show what is at stake for Ms. Kelly. If the evidence of her BAC is admitted, via the certificate, it is highly incriminating.

[65] In *R. v. Dinelle*, [1986] N.S.J. No. 246 (NSCA), the accused was charged with both driving "over 80" and impaired care or control of a motor vehicle. The trial judge dismissed the "over 80" charge after finding the breathalyzer tests were not taken "as soon as practicable" after the time when the offence was alleged to have been committed. At the time this was a prerequisite to the presumption of identity; hence, the Crown could not prove the BAC at time of driving. The trial judge did however find the accused guilty of impaired care or control. The appeal court concluded in a brief judgment, "In this case the trial judge did not base the conviction of the appellant solely on the evidence of the certificate. He considered it was only one piece of evidence before him which indicated that prior to the time the appellant was stopped in his vehicle he most likely had consumed alcohol. This, together with all other findings he made on the non-rebutted evidence, caused him to conclude the appellant was impaired."

[66] In *Devison* at par.103 *et seq* I applied the *ratio* from *Dinelle*: the certificate of the Q.T. constituted evidence of some amount of alcohol in the accused's system, probative of impairment. Neither in *Dinelle* nor in *Devison* was the admissibility of a certificate in issue.

[67] With the change in legislation and evolution of the case law I think that *Dinelle* should be regarded with caution. As noted above, how could a CQT under s.320.32 provide evidence of alcohol ingestion but not evidence of the actual BAC's stated therein? It would seem that a CQT either constitutes "evidence of the facts contained in the certificate" or does not. Attribution of weight would follow.

[68] It is hypothetically possible that a qualified technician might, through *viva voce* testimony, provide evidence that the instrument disclosed the presence of alcohol in the test subject, without being able to verify the exact BAC. The value of such testimony would be tested in cross-examination and weight given accordingly. But "reading down" a certificate, as it were, such that it supplies proof of an "included fact", if I may call it that, is not provided for in the

legislation. It seems to me that if a CQT is admissible at all, it can only be as evidence of what is actually alleged. I realize that this goes against the grain of *Dinelle*, but I think *Dinelle* goes against the grain of the current legislation and much subsequent case law. I don't think this reasoning contradicts *Devison* because there the BAC evidence came in *viva voce*, the admissibility of a CQT was not before the court, and the QT was available for cross-examination.

[69] On my interpretation of the current legislation, a certificate of a Q.T. under s.320.32 *may* provide evidence of facts alleged in the certificate - nothing more, nothing less. Whether one goes from "*may* provide evidence" to "is evidence" depends upon admissibility. Unless it crosses that hurdle, a certificate won't sustain a presumption, corroborate observational evidence, nor otherwise bolster a prosecution for an offence under Part VIII.1.

"MADE UNDER THIS PART"

[70] To this point I have considered whether the CQT might constitute evidence of alcohol ingestion or, more properly in my view, whether a CQT might constitute evidence of an accused's BAC at the time of testing. As I see it the latter is the better approach, for reasons stated above. However, both positions presume that the certificate is admissible. The more basic question is whether it comes in under s.320.32 at all, as evidence of anything.

[71] Typically a QT is in no position to assess the validity of a demand, made earlier by another peace officer. S/he may not know whether a person is properly in custody or whether all the detainee's Charter rights have been observed. The following discussion concerns the validity and admissibility of a certificate, not potential Charter issues or s.24(2) exclusion remedies.

<u>What needs to be proven</u>

[72] Should the admissibility requirements differ depending on the charge for trial or the purpose to which CQT evidence will be put? Should the requirements depend upon the potential significance of the CQT to the prosecution's case? Having different standards for admissibility depending on charge, purpose or significance would create uncertainty and result in an uneven application of the law to assorted accused. It would often involve guesswork, for a trial judge will not be able to gauge the significance of evidence until the end of the case.

Standards for admissibility should be consistent, whether the charge for trial is impaired operation by alcohol, impaired operation by alcohol and drug, "80 or over", etc.

[73] In *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24, at par.10 the Supreme Court of Canada explained that legislative provisions should be read in their entire context to as to ascertain: (1) the object of the Act (the ends sought to be achieved), (2) the scheme of the Act (the relation between the individual provisions), and (3) the intention of Parliament (the law as expressly or impliedly enacted by the words).

[74] The "is evidence" section as it read prior to December 18, 2018, in s.258(1)(g), described the specific components of a CQT, such as "an approved instrument", "ascertained to be in proper working order", "an alcohol standard suitable for use", "the results" and "the time . . . when each sample . . . was taken". The current "is evidence" section, 320.32 does not set out discrete components; it simply says, "made under this Part". This invites consideration of cognate provisions in Part VIII.1 of the *Criminal Code*.

[75] In *R. v. Noble*, [1978] 1 S.C.R. 632, the court states that "the provisions are designed to assist the Crown in proving its case, and as they serve to restrict the normal rights of the accused to cross-examination and saddle him with the burden of proving that the certificate does not accurately reflect his BAC at the time of the alleged offence, they are to be strictly construed." While a pragmatic approach has been taken since, (e.g. *R. v. Shrirasa*, [2018] O.J. No. 7031, at par 90) the general principle of strict construction is still valid.

[76] What then, with respect to a CQT, is suggested by the phrase "made under this part"? Parliament has attempted to simplify the law. In section 320.32 it has created a powerful tool, one which will most commonly be employed to prosecute an 80 or over charge. In return for that, fairness to an accused suggests that the threshold for admissibility should be high. It does not follow as a matter of logic, but as a matter of fairness, that the prerequisites to the presumption of accuracy should inform the "preliminary facts to the admissibility" of a CQT as evidence (see par. 16, above).

[77] Neither the presumption section, 320.31(1) nor the disclosure section, 320.34, deal with admissibility *per se*, but they do suggest the importance of certain things to the reliability of the results. The evidentiary shortcut (CQT) and the conclusion of accuracy are closely connected, both in the scheme of the

legislation and by the purpose to which such evidence is most often put. As stated in *Goldson*, at par.43

> Sections 320.31-320.35 are grouped together under the heading "Evidentiary Matters." When provisions are grouped together, "it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions": *R v ADH*, 2013 SCC 28 at para 115, citing Ruth Sullivan, *Sullivan on the Construction of Statutes 5th ed* (Markham: LexisNexis Canada, 2008) at 394. These sections work in concert to simplify prosecutions.

[78] An interpretation of the phrase "made under this Part" comes primarily from the surrounding provisions, but the previous "is evidence" section may provide some guidance, given the need to infer Parliament's intent.

[79] Section 320.32 allows for documentary hearsay. Potentially this evidence will speak for itself without explication by a technician or expert. Admissibility under this section does not entail a "principled exception" analysis, as in *Bradshaw* or *Khelawon*; it is a statutorily created exception to the hearsay rule. However, the rationale for the "principled approach" may inform the interpretation of s.320.32. *Necessity* may be found in the "overriding purpose . . . to streamline proceedings" (per *Alex*). So far as the *reliability* of the statements are concerned, I conclude from the overall scheme of the legislation that a system blank check and a calibration test are implicit in the phrase "made under this Part". These things cannot be assumed. Absent clear indicia of reliability, a certificate should not be received into evidence.

[80] I conclude that the following preliminary facts must be established for a CQT to be "made under this Part" and hence admissible under s.320.32(1):

1. Person from whom samples obtained, identified by name
2. Testing followed upon a demand of a peace officer made under s.320.28
3. Time of the analyses
4. Used an approved instrument, identified
5. Operated by a Q.T., identified
6. Samples necessary for a proper analysis were obtained
7. Number of samples, results for each, expressed in mg/100 ml. blood (BACs)
8. System blank test conducted, result within prescribed limit of 10 mg.
9. System calibration check conducted, result within 10% of an alcohol

standard

10. Alcohol standard certified by an analyst

[81] The list above largely mirrors the list of components to the presumption of accuracy, set out earlier. Simply put, a stand-alone CQT will not be admissible unless these criteria are established.

[82] I have not included a requirement for two samples within 20 mg./100 ml. at least 15 minutes apart. This *is* expressly required for the results to be deemed accurate under the preceding section, s.320.31(1). From an operational point of view, consistency of result gives an additional assurance of reliability. Legally it may serve to take the trier of fact from "results" to "conclusive proof". However, a single result should still have evidentiary value, provided the instrument passes the tests designed to ensure that it is in proper working order. Notably, the "two-sample / 20 mg. / 15 minute" requirement was not included in the previous "is evidence" section, 258(1)(g).

[83] For various reasons a test may only proceed as far as one result. This may have nothing to do with the operation of the instrument. The accused may be unwilling, or physically unable to provide the second sample. In such circumstances, a stand-alone CQT showing only one result may never the less constitute evidence of an accused's BAC, to be weighed with all the other evidence in the case. If the charge is "80 or over" it is highly unlikely that this piece of evidence alone would meet the criminal standard of proof. If the charge is impaired operation the evidence may contribute to proof of impairment.

[84] Quite likely others will arrive at different conclusions, perhaps thinking that a CQT should be admissible on far fewer preliminary facts than I have outlined above. Perhaps some will insist on more. As noted earlier at par. 16, the Supreme Court said, in *Egger,* that the admissibility of a CQT did not depend on meeting the conditions for the presumption of identity. Possibly some courts will conclude that under current legislation the admissibility of a CQT *does* depend upon meeting *all* the conditions for the presumption of accuracy.

[85] In a recent trial in another provincial court centre in Nova Scotia a CQT was tendered into evidence (Case # 8275229, 8275230) It was in a form seemingly approved by the R.C.M.P., designed with the current legislation in mind. It contained the following elements, which I have ordered to correspond to the list above, not the sequence they appear in the certificate:

1. Name of subject (accused)
2. Pursuant to a demand made pursuant to s.320.28(1)
3. Place, date and time of samples
4. Qualified technician identified
5. Samples "as were necessary" in Q.T.'s opinion to do proper analysis, received directly into the instrument
6. Number of samples, results for each, expressed in mg. alcohol / 100 ml blood (BACs)
7. An approved instrument, identified by make and model
8. System blank test, within prescribed parameters
9. System calibration check, within prescribed parameters
10. Alcohol standard utilized was certified by an analyst
11. Interval of at least 15 minutes between samples
12. Results did not differ by more than 20 mg/100 ml.
13. Alcohol standard identified by manufacturer and lot number
14. Diagnostic tests run prior to sampling, successfully

[86] Some statements in this example are over and above those which I have concluded are essential components to admissibility, for example the place of testing, the diagnostic test, the lot number of the alcohol standard, two samples within 20 mg, etc. This leads to the question (which need not be answered here) whether there are limits to what a CQT under s.320.32 should contain. For instance, in *R. v. Merritt*, [2017] A.J. No. 300, a statement of place in a CQT was received as evidence to establish jurisdiction over the offence. What of signs of impairment noted during the "observation period" customarily observed prior to testing (on an impaired operation charge), or a read-out of insufficient sampling (on a charge of refusal)? Determining the ambit of "made under this Part" will require setting limits as well as prerequisites.

The standard of proof

[87] Where evidence would serve to prove a vital issue determinative of guilt the criminal standard applies. Here, Ms. Kelly's BAC might be highly incriminating, but is not itself an element of an impaired operation charge. I do not need to distinguish the burdens in the case at hand but will note in passing this passage from *Egger*, at par.32 –

> 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] 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] 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] 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).

How the "preconditions to admissibility" might be proven

[88] Manner of proof differs from burden of proof. There are different ways to prove things.

[89] In *R v Singh*, 2019 ONCJ 776, the judge made the following comment:

> 30. Failure to establish the presumption of accuracy provided for in section 320.31(1) does not render breath samples inadmissible. The pre-requisites to the presumption of accuracy are not elements of the offence of "over 80," nor are they pre-requisites to the admissibility or reliability of breath tests *at common law* . . . The breath samples remain admissible through viva voce evidence of the breath technician together with the Certificate of Qualified Technician.

[90] In such a situation a witness attests to the validity of the certificate and the integrity of the underlying procedures. The witness can "speak to it". What the above passage does *not* say is whether the prerequisites to the presumption of accuracy are pre-requisites to admissibility *by statute*, i.e. by certificate under s.320.32.

[91] From *R. v. Wu*, [2019] O.J. No.5000:

> 9. The enumerated criteria in s.320.31(l) of the *Criminal Code* are not elements of the offence of "over 80", or pre-requisites to the admissibility or reliability of breath tests at common law. Rather they are pre-requisites to reliance on the evidentiary short-cut set out in s.320.31(1) of the *Criminal Code*. I note that in Bill C-46, s.320.31(1) immediately follows the heading "Evidentiary Matters". The point of the evidentiary short-cut is to avoid the need for testimony from a breath technician. But it remains open to the Crown to prove the offence by calling a breath technician."

> 10. In proceeding based on the *viva voce* evidence of a breath technician, and not relying on the evidentiary short-cut in s.320.31(l), the Crown did not need to prove that the criteria set out in s.320.31(1) were present in order for the results of the breath tests to be admissible at common law, or for the results to be found to be reliable.

[92] In *Wu* the accused had the opportunity to cross-examine the Q.T. at trial. The CQT functioned more as a memorandum than as a discrete piece of evidence. In the case at hand, the certificate contains written assertions not tested in cross-examination. In *Wu*, admissibility and reliability had been established before the trial judge through testimonial evidence from the qualified technician and a toxicologist. Here, in the case against Ms. Kelly, no such assurances of reliability are given.

[93] Under s.320.33 a "document" printed out from an approved instrument, signed by a QT and certifying it as such, is evidence of the facts alleged in the document. This is a carry-over of a similar provision in s.258(1)(f.1). Given that an instrument can generate a comprehensive breath test report, a number of things may be proven by this means. Might this section thus permit Crown to prove BACs, system blank tests, system calibration test, etc. by this route? The judge in *R. v. Ha*, [2015] O.J. No. 2125, said at par. 16 "it is clear that it (s.258(1)(f.1)) can prove a number of things." However, the judgement goes on to say at par.19 that "There are no . . . notice requirements for s.258(1)(f.1). This suggests to me that Parliament did not intend the Breathalyzer Printout to prove the conditions precedent to the presumption in the same way that the CQT can."

[94] I am not aware of a case where a printout from an approved instrument has itself stood as evidence, bypassing the usual CQT method of proof. Reported decisions describe situations where printouts are supplemented by a CQT, or testimony from the QT. One hopes that caselaw will clarify how s.320.33 fits within a legislative scheme designed to facilitate proof of impaired driving cases while mindful of the need for fairness to accused persons and for outcomes based on sound evidence.

[95] As noted above, the Crown may call *viva voce* evidence; a certificate is not the only evidentiary route (see for example *R. v. Hanna*, 2019 ABPC 157; *R. v. Porchetta*, [2019] O.J. No. 1985 at par 46, 47; *R. v. Pereula*, [2019] O.J. No. 3333). Testimony, a certified print-out from the instrument per s.320.33, a CQT per s.320.32 - theoretically all could speak to the system blank check and

calibration test. With respect to the certified alcohol standard, an analyst's certificate might support the admissibility of a technician's certificate.

[96] Former s.258(1)(g) set out the preconditions to admissibility and stipulated that these preconditions form part of the certificate itself. It served as a definition, of sorts, of a CQT. The current section does not say that anything in particular must appear in the certificate. I am reluctant to suggest that there is only one proper form.

[97] If it is now correct to say that the prerequisites to admissibility need not be established by the certificate itself, a court could receive a certificate provisionally, subject to the Crown otherwise proving all the admissibility requirements, before finally deciding to "receive" the certificate as evidence at the end of the case. In a sense, this is what I have done with respect to Exhibit #2 in the case at hand.

[98] That said, some may think that s.320.32 contemplates a certificate which spells out any and all requirements for admissibility within the four corners of the document itself. One supposes that Crown prosecutors would prefer the simplest manner of proof, where the QT itself contains the assertions which make it admissible. There is a certain circularity to this, but the logic has withstood challenge.

Procedural fairness in this case

[99] As with many matters in provincial court, the trial issues were argued rather summarily. The court did not require or receive briefs.

[100] When Exhibit #2 was first produced I inquired whether there were admissibility issues. Defence said the "document itself" was in issue but did not frame it as a question of admissibility. Later in the trial defence counsel referred to things going to the "validity" of the CQT. Later, in argument, when I asked whether Ex#2 was admissible, Defence counsel said "I don't see how it is." The parties framed the issue around the failure to disclose, and so I remarked at the end of submissions that I was left to consider whether breach of the s.320.34 obligation rendered the CQT inadmissible. However I had also told counsel that I was "wide open on how I treat this." I invited counsel to take some additional time if needed, but was this suggestion was not taken up.

[101] As the proceeding came to a close, the lights went off in the courtroom because of a wide-spread power outage in Sydney. Defence counsel kindly

supplied his lighter to the clerk to search "the book" for a date for decision. Everyone left in a state of darkness.

Reasoning applied to this case

[102] With respect to the alcohol standard, I have no evidence that the technician reviewed a certificate of analyst, nor any other evidence about the alcohol standard other than the claim that it was "suitable for use".

[103] The CQT of Cst. MacNeil states that the instrument was "ascertained by me to be in proper working order". While this might refer *inter alia* to system blank test and / or calibration check, it does not clearly and explicitly say so.

[104] In Ms. Kelly's case there is neither testimonial nor CQT evidence that the alcohol standard was certified by an analyst. While the certificate says the instrument was determined to be in proper working order by means of an alcohol standard, there is nothing to show that the results were within the permitted 10% margin. While the QT may indeed have ascertained that the alcohol standard he employed was certified by an analyst, and while he may indeed have done system tests described in the section, there is no specific evidence of this and it would be wrong to assume that these important measures had been followed.

[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.

[106] With so many deficiencies, it does not appear that the certificate of Q.T. tendered here was "made under" Part VIII.1. It should not be received in evidence against the accused.

CONCLUSION ON ADMISSIBILITY

[107] The proffered evidence, the certificate (Ex #2, Appendix A) is in a form familiar to the court. I have received certificates similar to this one in many previous cases, where the legislated prerequisites to admissibility were met.

However the legislation has changed; former practices cannot simply be transposed. The certificate should not be received in evidence against the accused.

[108] A Certificate of Qualified Technician is not admissible evidence against an accused in a prosecution for any Part VIII.1 offence unless the Crown can show that it was "made under this Part". This in turn requires that preconditions to its reliability be established. Those which I think should be shown are noted in par. 80, above. These preconditions may be established through the certificate itself, other certificates proffered under other sections, or by *viva voce* evidence.

MISCELLANEOUS

[109] I was asked to take judicial notice that a place referred to as the 'old triangle' is a drinking establishment in Sydney.

[110] In *R. v. Find*, 2001 SCC 32, at par.48 the court said, "Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."

[111] I think the names of local drinking establishments fall short of the standard for judicial notice. Moreover, one worries that judicial notice might be conflated with personal habits. Even if I "took notice" that "the old triangle" is, and could only be a local drinking establishment, Ms. Kelly's statement that she was "coming from the old triangle" is flimsy evidence that she herself had been drinking alcohol beverages there.

[112] The Information alleges that the accused "did have care and control of a conveyance". In Part VIII.1 "operate" is defined to mean both driving a motor vehicle and having "care or control" of it. I would be prepared to amend the wording of the charge to read "did operate a conveyance" to conform to the evidence at trial and the prevailing legislation. I see no prejudice to the accused in doing so, but in the result it is a moot point.

PROOF OF IMPAIRMENT

[113] Absent any evidence originating from the breath test procedure I am left with the following:

- Collision with the snowbank

- Unsteadiness upon exiting the vehicle
- Slow, slurred speech
- Emotional upset, crying
- A smell of alcohol from the accused's breath

[114] I should not consider an alternative explanation for each these observations and then eliminate that piece of evidence as a possible indicator of impairment. I should instead consider the probative value of the entire "constellation of factors" listed above. That said, four of the five are consistent with established facts unrelated to impairment.

[115] Given the icy conditions documented by the police officer, I cannot safely attribute the collision with the snowbank to an impaired ability to drive. In addition, the accused said she had been forced off the road by another vehicle.

[116] The force of impact and deployment of air bags could reasonably account for the physical presentation of the accused.

[117] I am left primarily with police officer's opinion of the smell of an alcoholic beverage, but I have no objective scientific evidence of the amount of alcohol in her bloodstream nor any evidence of the time or manner of drinking.

[118] The admissible evidence is insufficient to prove beyond a reasonable doubt that Ms. Kelly's ability to operate a motor vehicle was, at the material time, "impaired to any degree" by alcohol.

[119] The accused is found not guilty.

Dated at Sydney, N.S. this 6th day of December, 2019.

A. Peter Ross, PCJ

Appendix A

Certificate of Qualified Technician

I, Matthew J McNeil, a person designated pursuant to subsection 254 (1) of the Criminal Code of Canada by the Attorney General of Nova Scotia, as being qualified to operate the Intox EC/IR II, an approved instrument, and being, therefore, a qualified technician,

DO HEREBY CERTIFY

THAT at Sydney, in the Province of Nova Scotia, pursuant to a demand under subsection 254(3) of the Criminal Code of Canada, I did take two samples of the breath of a person identified to me as Michaela Elizabeth Kelly, as in my opinion were necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the blood of said person.

THAT I did receive each of the said samples directly into an Intox EC/IR II, an approved instrument as defined in subsection 254(1) of the Criminal Code of Canada, that was operated by me.

THAT the analysis of each of the said samples was made by means of the said instrument operated by me and ascertained by me to be in proper working order by means of an alcohol standard which was suitable for use in the said approved instrument and identified as AIRGAS, lot number AG807901.

THAT the first of the said samples was taken at:
04:49 hours on the 30 day of December, 2018,
And that the result of the proper analysis of this sample was:
200 milligrams of alcohol in 100 millilitres of blood.

THAT the second of the said samples was taken at:
05:12 hours on the 30 day of December, 2018
And that the result of the proper analysis of this sample was:
180 milligrams of alcohol in 100 millilitres of blood.

I FURTHER CERTIFY:

THAT the statements in this certificate are true to the best of my skill and knowledge.

DATED this 30 day of December 2018 at Sydney, Nova Scotia

Cst Matt J McNeil
Qualified Technician

Appendix B

S. 258(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(i) [Repealed before coming into force, 2008, c. 20, s. 3]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

(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) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

(ii) the results of the analyses so made, and

(iii) if the samples were taken by the technician,

(A) [Repealed before coming into force, 2008, c. 20, s. 3]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

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;

Appendix C

320.14 (1) Everyone commits an offence who

(a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

(b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

320.28 (1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable

(a) require the person to provide, as soon as practicable,

(i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to take one, the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood alcohol concentration; and

(b) require the person to accompany the peace officer for the purpose of taking samples of that person's breath or blood.

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

(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.

(2) The result of an analysis made by an analyst of a sample of a person's blood is proof of their blood alcohol concentration or their blood drug concentration, as the case may be, at the time when the sample was taken in the absence of evidence tending to show that the analysis was performed improperly.

(3) Evidence of the following does not constitute evidence tending to show that an analysis of a sample of a person's blood was performed improperly:

(a) the amount of alcohol or a drug that they consumed;

(b) the rate at which the alcohol or the drug would have been absorbed or eliminated by their body; or

(c) a calculation based on the evidence referred to in paragraphs (a) and (b) of what their blood alcohol concentration or blood drug concentration would have been at the time the sample was taken.

(4) For the purpose of paragraphs 320.14(1)(b) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance and the person's blood alcohol concentration was equal to or exceeded 20 mg of alcohol in 100 mL of blood, the person's blood alcohol concentration within those two hours is conclusively presumed to be the concentration established in accordance with subsection (1) or

(2), as the case may be, plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours.

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

(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.

(2) The result of an analysis made by an analyst of a sample of a person's blood is proof of their blood alcohol concentration or their blood drug concentration, as the case may be, at the time when the sample was taken in the absence of evidence tending to show that the analysis was performed improperly.

(3) Evidence of the following does not constitute evidence tending to show that an analysis of a sample of a person's blood was performed improperly:

(a) the amount of alcohol or a drug that they consumed;

(b) the rate at which the alcohol or the drug would have been absorbed or eliminated by their body; or

(c) a calculation based on the evidence referred to in paragraphs (a) and (b) of what their blood alcohol concentration or blood drug concentration would have been at the time the sample was taken.

(4) For the purpose of paragraphs 320.14(1)(b) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance and the person's blood alcohol concentration was equal to or exceeded 20 mg of alcohol in 100 mL of blood, the person's blood alcohol concentration within those two hours is conclusively presumed to be the concentration established in accordance with subsection (1) or (2), as the case may be, plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours.

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.

(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.

(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.

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.

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:

(a) the results of the system blank tests;

(b) the results of the system calibration checks;

(c) any error or exception messages produced by the approved instrument at the time the samples were taken;

(d) the results of the analysis of the accused's breath samples; and

(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.

(2) The accused may apply to the court for a hearing to determine whether further information should be disclosed.

(3) The application shall be in writing and set out detailed particulars of the information that the accused seeks to have disclosed and the likely relevance of that information to determining whether the approved instrument was in proper working order. 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.

(4) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.

(5) For greater certainty, nothing in this section limits the disclosure to which the accused may otherwise be entitled.