PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Whitehead*, 2020 NSPC 13

Date: 2020-01-15
Docket: 8288315-8288316
Registry: Halifax

Between:

Her Majesty the Queen

v.

Lucas Whitehead

Judge:	The Honourable Judge Amy Sakalauskas
Heard:	June 10, 2019 and December 3, 2019 in Halifax, Nova Scotia
Oral Decision	January 15, 2020
Charge:	Section 253(1)(A) and 253(1)(b) of the Criminal Code
Counsel:	Emma Baasch (trial) and Timothy Leatch (final submissions) for the Crown Nicholaus Fitch for the Defence

By the Court:

Introduction

[1] Lucas Whitehead is alleged to have committed offences on November 21, 2018, contrary to Section 253(1)(a) (impaired operation) and 253(1)(b) of the *Criminal Code* (Over 80).

[2] *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, S.C. 2018 c. 21* ("Act to Amend") overhauled our impaired driving laws on December 18, 2018. This is a transitional case. Mr. Whitehead was charged before the amendments came into force, but his trial was held after they were law.

[3] Regarding the "Over 80" offence, the defence argues that the presumption of identity was repealed and the Crown must now have both the breath technician and a toxicologist testify in order to determine Mr. Whitehead's blood alcohol content ("BAC") at the time of the offence. Alternatively, even if the presumption of identity was in effect during the transitional period, the defence argues that the Crown has not proven its prerequisites. For the presumption of identity, the defence argues that the Crown has not proven the prerequisite that the standard solution was certified by an analyst. In short, the defence argues that the Crown cannot prove the breath readings.

[4] Regarding the impaired operation, the defence argues that the Crown has not proven the elements of the offence beyond a reasonable doubt.

[5] The trial took place in June 2019. In the days leading to my original decision date, I sent a question to counsel. At that time, I learned that the trial Crown had taken a job out of the jurisdiction. The matter was adjourned so a new Crown could be assigned. One was assigned but then became involved in a multi-month matter in another Courthouse. A third Crown stepped in to give the response to my question, after having a transcript prepared. Final submissions took place on December 3, 2019.

[6] The Crown has the burden to prove its case beyond a reasonable doubt. Mr. Whitehead is presumed innocent and does not have to prove anything. Absolute certainty is not required, but I must find that it is more than probable or possible that he committed these offences. In ***R. v. Lifchus*** **[1997] 3 S.C.R. 320**, the Supreme Court of Canada explained (at paragraph 39) that even if I believe the accused is probably guilty or likely guilty, that is not sufficient. In such a case, I must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand I must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. In short if, based upon the evidence before the court, I am sure that the accused committed the offence I

should convict since this demonstrates that I am satisfied of his guilt beyond a reasonable doubt.

Summary of Findings

[7] I find that:

1. The Presumption of Identity applies in transitional cases.
2. Direct evidence is not required to satisfy the requirements for the presumption of identity, nor does the qualified technician have to use the exact words of the section. The Court can rely on sufficient circumstantial evidence to infer the prerequisites were met.
3. The evidence before me falls short of allowing me to make this inference. The Crown has not proven beyond a reasonable doubt that Mr. Whitehead provided each sample directly into the approved instrument.
4. The new Presumption of Accuracy applies to this case.
5. The Crown does not need to tender a Certificate of Qualified Technician nor a Certificate of Analyst but can prove the Presumption of Accuracy prerequisites by way of *viva voce* evidence from the technician.
6. The evidence provided by the Crown in this cases falls short of meeting those prerequisites, specifically as it relates to the standard solution used in the testing.
7. The Crown did not call a toxicologist and cannot rely on the presumptions. The Crown has not proven that Mr. Whitehead operated a motor vehicle while his BAC was Over 80. He is acquitted of that charge.

8. The Crown has not proven that Mr. Whitehead operated a motor vehicle while his ability to do so was impaired by alcohol, and he is acquitted of that charge.

Overview of the Evidence

[8] I heard from two police officers and one civilian witness. They were forthright, appeared impartial and openly acknowledged the limits of their direct knowledge. The officers gave detailed, balanced, and prepared testimony with excellent knowledge and recall of the matters before the Court.

[9] Laura Casey testified that while a car passenger she saw a silver Chevy Silverado truck driving erratically around 2:00 a.m. on November 21, 2018, along the Hammonds Plains Road and onto Bedford Hills and nearby streets. Ms. Casey's driver followed the truck in question for 15-20 minutes, during which time she called 911 and provided the license plate information. Ms. Casey said the truck driver was going side to side of the road, curb to curb, weaving in and out. The driver reportedly ran multiple stop signs, with escalating speed in a residential area. She didn't see the driver. She didn't see inside the cab and was not sure how many people were in it.

[10] Constable Dustin Durette, Royal Canadian Mounted Police, heard the complaint over dispatch at 2:23 a.m. and waited at Mr. Whitehead's address. He

was the expected driver of the vehicle because police ran the plate. 5-10 minutes later, when the vehicle pulled in, the officer conducted a traffic stop. He did not see any issues with the driving, being parked facing the truck coming toward him. It was a blue Chevrolet Silverado, with the matching license plate. The only occupant was Mr. Whitehead, the driver. He noted a moderate smell of alcohol in a wave when Mr. Whitehead rolled down his window.

[11] Mr. Whitehead failed a roadside screening. Constable Durette arrested Mr. Whitehead, read him his rights and police caution, and took him to the Tantallon detachment for a breath test. They left the house at 2:58 a.m. and arrived at the police station at 3:15 a.m. He observed for Constable Haines, the breath technician. Constable Durette observed Mr. Whitehead to have red watery eyes, a flushed face, a slight slur, was slow to respond, and walked with an extended gait, appearing to have trouble keeping his balance. The odor of alcohol continued, and was of a fermented type – potent, pungent, obvious. There were no issues with Mr. Whitehead's interaction or ability to understand the situation.

[12] Constable Laurie Haines, of the Royal Canadian Mounted Police, was the qualified breath technician. He noted a significant, strong smell of liquor from Mr. Whitehead's breath as soon as he walked by which continued. It was strong enough that he had Mr. Whitehead sit in the hallway, away from the instrument, so

as not to contaminate the ambient air. When Mr. Whitehead walked in, he saw that Mr. Whitehead was walking penguin-like, with a shifting wider stance. He said this was a very different walk than what he observed in the Courthouse on the trial date. Mr. Whitehead was swaying back and forth while he fingerprinted him, and it took him a minute to determine his right from his left. He had delayed reactions and comments and had red, watery eyes.

[13] Testing was performed by a qualified technician on an approved instrument. Constable Haines testified that there were no concerns with the instrument, the testing, or the pre-test checks. Mr. Whitehead blew 200mg% at 3:40 a.m. and blew 180mg% at 4:00 a.m.

[14] Constable Haines said he told Mr. Whitehead general instructions about how to provide the samples and explained the 15 minute waiting periods between samples. The only thing he said to the Court about "blowing" related to the second sample. When he was reviewing the results, he said, "And again, it was a good strong breath".

[15] Several exhibits were tendered via Constable Haines, signed by him, including the Subject Test results and associated Certificate of a Qualified Technician, along with a Certificate of Qualified Technician that reflects the new

requirements under the *Code*. His testimony as to their contents focused on the diagnostics, blank and standard tests, along with the readings and timing. He confirmed that the second Certificate was drawn up to reflect new requirements in the *Code* and that he reviewed it before signing it, to ensure it had the same information as the original. He did not reference or explain the new requirements under the *Code*.

[16] Constable Haines gave the paperwork to Constable Durette to serve on Mr. Whitehead. The Crown conceded that it was not relying on the Certificate for the purpose of the presumption, as they did not prove service. They rely upon *viva voce* evidence of the technician. I will review portions of that in more detail, below. Constable Haines also explained the Subject Test Sheet readings for the diagnostic tests, blank and standard tests for the sample as being within the acceptable range, and said they verified that the instrument was functioning properly.

Has the Crown Proven Operation While Over 80?

[17] The Crown must prove beyond a reasonable doubt that Mr. Whitehead operated the motor vehicle when his blood alcohol content was over 80. I must consider the presumption of identity and the presumption of accuracy.

Does the Presumption of Identity Apply in Transitional Cases?

[18] The Presumption of Identity was in the former s. 258(1)(c) of the *Code*. If certain prerequisites are met and in the absence of evidence to the contrary, the breath reading is presumed to accurately reflect the BAC of the accused at the time of the offence – making it unnecessary for a toxicologist to "read back" the results from the time of testing to the time of the offence. The issue of whether this presumption survived the amendments to the *Code* has been the subject of multiple Canadian court decision in recent months.

[19] The defence urged me to accept the early reasoning in ***R. v. Shaikh,* 2019 ONCJ 157** ("*Shaikh*") and ***R. v. Jagernauth*, 2019 ONCJ 231**. Another judge of this Court following this reasoning in ***R. v. Mombourquette*** (Provincial Court, unreported oral decision April 25, 2019 ("*Mombourquette*")). I thank the defence for providing me a transcript of that decision. The line of reasoning holds that the presumption did not survive the December 2018 amendments and is not available in transitional cases. It notes the plain language of the word "repeal" and contrasts this with Parliament's direct language to continue the presumption of accuracy. This reasoning means the Crown needs expert toxicology evidence to "read back" the BAC in transitional cases.

[20] The state of the law since *Mombourquette* is much changed. This jurisprudence has been fast growing and changing. Illustratively, as noted by the Judge in ***R. v. Hanna,* 2019 ABPC 157** ("*Hanna*"):

> 12… It is notably that the justice in Jagernauth has now, in essence, overruled himself on this issue in the latter case of R. v. Bhandal, 2019 ONJC 337 (Ont. C. J). He did so after reviewing the ever-growing jurisprudence from Ontario that concludes the presumption of identity still applies.

[21] The main reason for this development is that discussion of the Parliamentary intent is missing from *Shaikh*. The legislative intention is important because there is an ambiguity in the *Act to Amend*. As noted by Justice Schwarzl, in ***R. v. Sivalingam,* 2019 ONCJ 239** ("*Sivalingam")*, the new presumption of identity cannot apply to the transitional cases because it is contained within the new offence, which does not require a determination of the BAC at a time before breath testing. Thus, the law is very unclear as to how to prove BAC at the time of driving in transitional cases (see paragraph 91).

[22] Judge Hayes-Richards, of the Alberta Provincial Court, adopted the reasoning in *Sivalingam* in *Hanna*, and noted:

> 15 Having found an ambiguity, Justice Schwarzl considers the intention of Parliament in amending the law. He points out, and I agree, one of the key legislative goals common to the old and new legislation is the simplification of both the investigation and the prosecution of excess alcohol offences.
>
> 16 If I were to agree with the accused's position respecting the presumption of identity, the only way for the Crown to prove the offence in straddle cases

> would be for it to call an extrapolation expert, making proof of this offence more difficult and complex in straddle cases than it was before Bill C-46 came into effect. This is contrary to both the legislative intent of Bill C-46 as well as the preamble of Bill C-46, and it is also contrary to the evidentiary shortcuts that are found in both s. 258 of the Criminal Code and in Bill C-46.

[23] Justice Schwarzl himself summarized his findings after a lengthy discussion, by saying, in *Sivalingam*:

> 112 In summary, I find that the only rational interpretation of the new law is that the presumption of identity established in former section 258(1)(c) applies to all 253(1)(b) trials not commenced until on or after December 18, 2018 given,
>
> (a) that the Act to amend clearly intended to make excess alcohol trials as simple as possible;
>
> (b) that the Act to amend did not intend in the repeal of section 258 to make outstanding Over 80 trials more and needlessly complex, reintroduce old defences, or deprive defendants of the use of the lowest test result;
>
> (c) that the inapplicability of the old presumption of identity is incompatible with the object of the new law so much so as to defeat one of its stated purposes; and
>
> (d) that there is no clear intention of Parliament to abolish the old presumptions not otherwise replaced for the outstanding Over 80 matters.

[24] In ***R. v. McAlorum*, 2019 ONCJ 259** (“*McAlorum”)*, Justice Latimer reviewed the Parliamentary intent with the new provisions, along with what occurred in similar transitional situations in the past, and stated:

> 18 In conclusion, we either learn from history or are doomed to repeat it. Each time these provisions have been amended, interpretive challenges and arguments have followed consuming considerable court resources at every level of court. Each time, in the end, an appellate court has applied the statutory law to transitional cases in a sensible manner – adapting the old to fit with the new – in order to avoid absurd results. In my view, requiring expert toxicological evidence in every transitional case meets the legal definition of absurdity (Rizzo & Rizzo

Shoes Ltd., Re, [1998] 1 S.C.R. 27 (S.C.C.), at 43), and is not mandated by an application of the relevant statutory instruments.

[25] In ***R. v. Ranger,*** **2019 ONCJ 413,** Justice Bourgeois noted:

> [52] ….
>
> > 38 Aside from the substantive nature of s. 258, and clearly substantive changes to the drinking and driving legislation, I find that Parliament had a clear intention in C-46 to simplify the law relating to proof of BAC. It would be quite inconsistent to find that Parliament intended to keep s. 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 rendered null and void the police investigations for those cases. That would be absurd…I disagree with Burstein J.'s finding in Shaikh at par. 34(iii) that the new evidentiary provisions can be adopted to trials of existing charges. It is not possible to do that and still implement Parliament's express intention to simplify proof of Over 80 cases. The new Over 80 and impaired operation provisions are quite different. The presumption of identity is unnecessary in the new provisions because the new legislation doesn't require proof of BAC at the time of driving. [*R. v. Porchetta,* 2019 ONCJ 244]

[26] In ***R. v. Patel*****, 2019 ONCJ 544,** Justice Rahman noted that:

> 20 Enough judicial ink has been spilled on this issue by several of my colleagues. I will not waste anymore. The overwhelming weight of authority has rejected the analysis in **Shaikh**, and has held that the presumption of identity in former s. 258 of the Criminal Code applies to so-called transitional cases. I adopt and accept the reasoning in those cases… The Crown may rely on the presumption of identity in S. 258 of the Criminal Code.

[27] In addition to the cases I already mentioned, many other Ontario judges have found that the presumption still applies:

- ***R. v. Porchetta,*** **2019 ONCJ 244** ("*Porchetta*")
- ***R. v. Brar,*** **2019 ONCJ 399**
- ***R. v. Fram,*** **[2019] O.J. No. 2276 (Ont. C.J.)**

- ***R. v. Hiltschuk,* [2019] O.J. No. 1015 (Ont. C.J.)**
- ***R. v. McRae,* 2019 ONCJ 310**
- ***R. v. Chavez,* 2019 ONCJ 278 (*Obiter*)**
- ***R. v. Benoit,* 2019 ONCJ 469**
- ***R. v. Cox*, 2019 ONCJ 491**
- ***R. v. Nirwan,* 2019 ONCJ 472**

[28] Likewise, in Alberta, in addition to *Hanna*, the survival of the presumption of identity for transitional cases was endorsed in:

- ***R. v. Kettles,* 2019 ABPC 140** (obiter)
- ***R. v. Phee,* 2019 ABPC 174**
- ***R. v. Taylor*, 2019 ABPC 165**

[29] The strongest rationale for this conclusion is considering the legislative intent. As the Crown very ably pointed out, this is supplemented by analysis considering the substantive nature of the underlying legislation (meaning it can only be applied prospectively), as well as s. 43 of the *Interpretation Act* supporting the position that as the Over 80 offence has survived the amendments, the related shortcuts do as well.

[30] Although none of these cases are binding on me, I adopt their reasoning as persuasive and find that the s. 258(1)(c) presumption of identity continues to apply to prosecutions for offences under the former s. 253(1)(b) of the *Code*. I note that in ***R. v. McDermott,* 2019 NSPC 70,** Judge Tax reached the same conclusion.

If the Presumption of Identity applies, has the Crown met its requirements?

[31] As I explained, the presumption of identity applies. It is available where:

- The samples have been taken pursuant to a demand made under subsection 254(3);
- The samples were taken "as soon as practicable" and not later than 2 hours after the alleged offence and with at least 15 minutes between samples;
- Each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
- An analysis of each sample was made by means of an approved instrument operated by a qualified technician.

[32] The defence conceded all prerequisites except the one that each sample be received "directly into the instrument". The Crown agrees that "directly into the instrument" must be proven and urges me to find it has been proven based on inferences from evidence before me.

[33] I considered the cases provided to me by counsel on this issue. The defence provided:

- ***R. v. Willier,* 2007 ABPC 246**
- ***R. v. Donut,* [2009] O.J. No. 2519** ("*Donut*")

- ***R. v. McNamara,* [2014] O.J. 5593** (“*McNamara”)*
- ***R. v. Ha,* [2015] O.J. No. 2125** (“*Ha*”)

[34] The Crown provided:

- ***R. v. Schlecter,* 2018 SKCA 45** (“Schlecter“)
- ***R. v. Mulroney,* 2009 ONCA 766** (“*Mulroney*”)
- ***R. v. Gundy,* 2008 ONCA 284**

[35] The Crown must prove the prerequisites beyond a reasonable doubt (***Mulroney***). The defence cautions against taking judicial notice and points to the lack of specifics in the evidence, reminding me of the Crown’s high onus and need to safeguard the use of shortcuts. I agree with both. Taking judicial notice is not proper (***Ha***; ***McNamara***). There must be some evidence capable of establishing the specific proposition that the sample was received directly into the instrument (***R. v. Li,* 2017 ONCJ 375** (“*Li*”)). It need not be direct evidence that the accused blew directly into the instrument, nor a recitation of the section wording, but there must be some evidence upon which I might reasonably draw this inference (***Schlecter***).

[36] Constable Haines, a qualified technician using an approved instrument who identified no issues with the instrument or the testing, confirmed that:

- He would have explained “kind of general instructions” to Mr. Whitehead as to “how he would be asked to provide the sample” (trial transcript, page 45);

- He had Mr. Whitehead wait outside the breath testing room while he readied the instrument, so as not to have the ambient air contaminated by his breath, which smelled of alcohol;
- The first test was a reading of 200 mg% (trial transcript, page 49)
- He waited the 15 minutes and did a second test "and again it was a good strong breath" and a reading of 180 mg% (trial transcript, page 49).

[37] The Crown pointed out that in ***Schlecter***, the Saskatchewan Court of Appeal confirmed that the evidence of the breath technician established beyond a reasonable doubt that the accused blew directly into the instrument (paragraphs 81 -83). The accused person had been directed to "please blow". I have not found another case comparable to *Schlecter*. Other cases where the presence of the prerequisite was inferred had more evidence to support such a finding.

[38] In ***R. v. Syniak,* 2019 ABPC 225**, the Alberta Court found that while the qualified technician did not expressly state the accused's breath samples were received directly into the approved instrument, there was ample circumstantial evidence to infer that they were so received:

> 67 The Qualified Technician also explained that the Accused's 'breath samples were tested by the machine' after she took the following steps:
>
> > A. So I would've explained to Ms. Syniak that, you know, the instrument was preparing or ready. I would've shown her a mouthpiece still wrapped in plastic. I always shake it, it just shows that the valve is moving. And I would've explained that I would be putting this new mouthpiece on the tube and I would ask her to keep her hands to her side when she approached the instrument, not to touch it or reach out and touch the tube. And I would ask her to put a firm seal on the mouthpiece and blow

> continuously and steadily.
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> …
>
> A. I would also let her know that both of us would be aware if she was providing a sample or not. Some people kind of tinker around and don't actually blow so I would – you know, I always like to tell them that I'll know and you'll know if you're providing a breath sample because you'll hear an audible tone from the instrument.
>
> …
>
> A. And then, yeah, I would've walked her the couple of feet it is to where the instrument was inside the room. I asked her to stand by the instrument, keep her hands to her side, **put on the mouthpiece and I would've held it out for her to blow into.** And then as soon as she was done blowing, I would – or as soon as I told her to stop, I would you know, retrieve the hose, take the mouth piece off and ask her to leave the room. And, yeah, that's about it
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> …
>
> A. I did all of those things. That's my typical routine of how I do a breath sample. I like to explain what I am doing, that I will know, if, you, they're messing about, what a sample would sound like, you'll hear an audible tone, I'll know and you'll know, and that I'm going to just ask you to blow steadily and continuously until I ask you to stop.
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> …
>
> A. Her reading was 190 milligrams of alcohol in 100 millilitres of blood.
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> …
>
> A. I did make notes as to how the accused – what she did while providing the sample, cheek were puffed and she was obviously – she was trying hard to provided a good sample. And then once those things were entered, the instrument kinda – it does a countdown basically waiting for preparation for the next sample."

Cst. Legaarden, Transcript/ February 11, 2019 (pg. 21, lines 21-39; pg. 22, lines 4-31)

[39] The same occurred in ***Donut***, *supra*, a summary conviction appeal decision of the Ontario Superior Court of Justice:

> 18 In this case, the evidence provided by the officer, if it does not provide a direct demonstration that the appellant provided a breath sample directly into the instrument, does demonstrate that it was open to the trial judge to infer this fact

from the testimony provided. The statement that the appellant was "instructed" to blow directly demonstrates that the officer was alive to the requirement. That fact and the statement that an appropriate sample was received, which follows immediately thereafter, are sufficient to support the inference that the sample was received directly into the instrument. To require an intervening statement confirming that the appellant followed the instructions, to my mind, is asking to ignore the obvious

19 Moreover, the words, as used by the officer in evidence, could be understood to lead directly to a determination that the sample was properly given. Only the trial judge was present and heard the emphasis placed on each of the words.

20 This does not take into account the second test. In describing this procedure, the officer did not use the word "directly". He said:

> …upon re-entering the breath room, I inserted a second new mouthpiece into the approved instrument, and the accused provided a suitable breath sample into the instrument, at 9:15 p.m.

(Transcript of the trial: evidence of Adrian Perry, at p. 61)

[40] ***R. v. Ciccaglione*, 2017 ONCJ 907** shared the opposite result:

18 I have carefully reviewed the testimony of Officer Valovich. He did not testify about the process involved in obtaining either of the samples from Ciccaglione, nor the instruction given to him for that purpose. Nor did he state that Ciccaglione blew a sample of this breath into the approved instrument or the mouthpiece of the approved instrument, or directly into such instrument, to obtain the test result recorded in exhibit 1.

19 Officer Valovich made no reference whatsoever to the process in obtaining samples from the accused referring only to his having conducted a "first test" and a "second test" and the results therefrom.

20 The Crown argues that, despite such direct testimony, because Officer Valovich is a qualified technician, who made the appropriate demand for a suitable sample into an approved instrument, combined with the operation of ss. 258(1)(c)(f.1), I can reasonably infer that the accused's breath went directly into the approved instrument.

21 I disagree. In this case I am left only with speculation about how Ciccaglione's breath sample got into the Intoxilyzer 8000C.

22 The cases are clear that there must be some evidence upon which I might reasonably draw the inference that the accused provided a sample of his breath directly into the approved instrument.

[41] In *McNamara*, *supra*, the judge reasoned as follows in deciding that the prerequisite was not proven:

> 15 In R. v. Wiebe, [2013] O.J. No. 5377 (Ont. C.J.) the defence conceded that the Q.T. was a Q.T. and that he was operating an approved instrument. G.F. Hearn J., at paragraph [65], concluded that "[a] logical and reasonable inference from the admission ... [was] that [the Q.T.] was a properly qualified individual capable of operating the approved instrument and receiving samples in a proper manner in order that results could be obtained; i.e. by samples being provided directly into the approved instrument."
>
> 16 In arriving at this conclusion, Hearn J. relied upon the fact that the Q.T. conducted a diagnostics check, a calibration check and a self-test which the Q.T. described as "blowing into the machine," and further that he explained the test to Wiebe and how it worked, "how the instrument worked."
>
> 17 Given all of that, Hearn J. concluded that "it is a logical and reasonable inference that a qualified technician when explaining the 'test' would advise the accused as to the manner of providing a sample in order that 'results' would be obtained. The 'results' would be obtained in the same manner as the self-test result undertaken by [the Q.T.], i.e. by 'blowing into the instrument'." Hearn J. went on to observe "[i]ndeed, it is hard to imagine results being obtained in any other fashion other than the samples of breath being provided directly into the instrument."
>
> 18 Regrettably, given the high readings demonstrated by McNamara's test result, I am unable to agree. It seems to me that unless the breath of the detainee can be assuredly introduced into the approved instrument in isolation, that is to say, directly into the approved instrument, the Crown is not entitled to take the benefit of the "presumption of identity" provided for in s. 258(1)(c)(iii). The point of the provision appears to be to guard against the introduction of ambient air into the instrument so as to achieve a reliable result unique to the accused.
>
> 19 In this case there was no evidence of any of the following:
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> • that the Q.T. instructed the defendant as to how to provide a proper sample;
>
> • that the defendant sealed his lips around the mouthpiece and provided a proper sample;
>
> • that the same procedures were used to obtain the second sample; or,
>
> • that the defendant blew into the mouthpiece of the instrument as instructed.

> 20 It is almost a certainty that McNamara's tests were properly conducted but my confidence in that conclusion is a product of impermissible judicial notice or information that I gleaned from evidence called in prior cases. If I was permitted to apply that knowledge I would undoubtedly convict. However, I am not permitted to supplement the evidence adduced by filling in the missing testimony that McNamara blew "directly into" the approved instrument.
>
> 21 That particular fact must be given in evidence or must be inferable to the exclusion of any reasonable doubt. In my view, the evidence called in this case falls short of demonstrating to the exclusion of any reasonable doubt that s. 258(1)(c)(iii) was complied with. In the result, I find the defendant not guilty.

[42] In *Ha*, *supra,* the breath technician testified that he prepared the instrument, conducted diagnostic and calibration tests, and did a self test by providing his own breath into the instrument. He was satisfied it was in good working order and the accused provided two breath samples. The Certificate could not be relied upon, as service could not be proven, but the Subject Printout was filed. The judge found that the Crown had not proven beyond a reasonable doubt that the accused provided his breath directly into the instrument, even with the Subject Printout and the evidence of the technician.

[43] In *Li*, ***supra,*** the Court also found that the Crown failed to prove the prerequisite that the samples were received directly into the approved instrument. Justice McInnes explained that the precondition must be proven on the evidence. He continued, relying on **Ha** and **McNamara**:

> 15 . . . Even relatively inexperienced judges of this court generally know from evidence heard in other “over 80” cases that approved instruments by their very

> design do not generate a result unless a breath sample has been provided directly into the machine. But the law is clear that this precondition cannot be proven by way of judicial notice . . .

[44] I accept, as outlined by Judge Walsh of the Newfoundland and Labrador Provincial Court, in ***R. v. Clarke*, [2013] N.J. No. 221**, that when the Crown relies on the testimony of the technician, the prerequisites for the presumption of identity must be strictly complied with. There, the judge found the prerequisite about breath being provided directly into the instrument was not met. This, despite that the breath tech testified that she instructed the accused on how to blow into the mouthpiece on the first two of three samples. The problem was that she did not repeat this evidence in relation to the third sample.

[45] Do I have enough evidence before me to support the only reasonable inference that Mr. Whitehead blew directly into the instrument?

[46] I find that even supplemented by the Subject Test printout, I do not have the evidence necessary to make this finding beyond a reasonable doubt. I do not need exact wording from the Code, but even saying that, the testimony was deficient in any explanation of how the testing was conducted. I would have to fill in very large evidentiary gaps despite knowing it was an approved device, operated by a qualified technician without an issue, and that there was a "good strong breath".

[47] If I am wrong in this, I also find that the Crown has not satisfied the Court beyond a reasonable doubt that the breath results accurately reflect Mr. Whitehead's BAC. That is, the presumption of accuracy has not been satisfied.

Are the Prerequisites for the Presumption of Accuracy Satisfied?

[48] The presumption of accuracy is in s. 320.31(1)

> **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.

[49] This presumption applies to transitional cases by virtue of s. 32(2) of the *Act to Amend*:

> **32(2)** Subsection 320.31(1) of the Criminal Code, as enacted by section 15 of this Act, applies to the trial of an 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 day.

[50] Thus, the breath results are presumed to accurately prove an accused's BAC provided the Crown has established the statutory preconditions in s. 320.31(1).

[51] The notice requirement for the new Certificate is clear:

> **320.32(2)** No certificate shall be received in evidence unless 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.

[52] There was no notice and the Certificate cannot properly be in evidence for the presumption. Therefore, the Crown relies on the testimony of Constable Haines. They also rely on the Subject Test Print Out, and argue that it is admissible under the former s. 258(f.1) of the *Code*:

> **s. 258(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 and 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;

[53] This is now s. 320.33 of the *Code:*

> **s. 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 this document without proof of the signature or official character of the person who signed it.

[54] Constable Haines testified about the subject test printout as follows (trial transcript, pages 51-52):

> **Q.** So what's the first document in front of you?

> **A.** The first one that I'll talk about . . . the subject test sheet . . . because it's the first one I check. When I do the tests, once the two samples are obtained, if they're within 20-milligram per of each other and I don't need to do a third test**, this will print off** and I go through and I double-check to make sure everything indicates that the instrument was functioning properly. So it's . . . it's the subject text . . . test sheet for the Intox ECIR-2, and it's got the date, his name on it, the test number, the observation start time. What I would look at, specifically, is under breath test sequence number one, it shows that the diagnostic test that the instrument ran was a pass. It shows that it did a blank test, so it had a reading of zero after that. And then it does a standard test where it compares it to a known sample of . . . of dry gas, and that standard test is within the acceptable range that's required by the Criminal Code. Second blank test . . . so it . . . it purged itself, and then the subject test of 200. And I would have checked those same things for the second breath test sequence to make sure there's a proper diagnostic test within limits and then another blank sample and then his . . . his sample. All that indicated it was working correctly . . . the instrument was working correctly. So I signed and dated that.
>
> At the same time, **it also prints off** a Certificate of Qualified Technician, so I reviewed that to make sure the readings that are on there are accurate and, again, it shows the readings that are on there are accurate and, again, it shows exactly what I just testified to. At 3:40 there was a reading of 200 milligrams of alcohol in 100 milliliters of blood. And then, 20 minutes later, at 4 a. m., the reading was 180. And again, I signed that. That's got my original signature on it. [emphasis mine]

[55] After the *Code* amendments, Constable Haines prepared and signed the new form of Certificate. Like the original Certificate, the Crown could not establish service. Thus, neither Certificate is properly before the Court. Constable Haines did not review the (new) Certificate information in his testimony.

[56] I am satisfied on the evidence that the Subject Test printout was printed out from an approved instrument and signed by the qualified technician and is properly before the Court. However, it does not, on its own, satisfy the prerequisites for the

Presumption of Accuracy. Judge Ross provided an excellent discussion of this issue in ***R. v. Kelly*, 2019 NSPC 73**.

[57] The defence relies upon ***R. v. Flores-Vigil*, 2019 ONCJ 192** (“*Flores-Vigil”)*. Justice Parry found that the evidence did not establish the concentration of alcohol standard used, nor that it was certified by an analyst, and that allowing this information to come in via the technician would be impermissible hearsay.

[58] The Crown relies on the reasoning in ***R. v. Yip-Chuck*, 2019 ONCJ 367**, which holds that a technician may testify as to what she has learned about the alcohol concentration and target values of the solutions used. If by doing so, they satisfy the prerequisites to the presumption of accuracy, it applies. Justice Duncan noted:

> 12 In R. v. Flores-Vigil [2019 CarswellOnt 5202 (Ont. C.J.)] the Court held that the Crown must prove that the solution was one tested and certified by an analyst but also that the solution so certified contains an identified concentration of alcohol that should produce a certain target result when introduced into the Intoxilyzer - if that machine is working properly. In this case, unlike Flores-Vigil, an analyst's certificate was presented in evidence certifying that the solution was suitable for use in the Intoxilyzer. It did not, however, reveal the concentration of alcohol in that solution.
>
> 13 I agree with Justice Parry in Flores-Vigil that the word "calibrate" means to test or adjust a tool or instrument against a known standard. Accordingly, a calibration check that yields a certain result is meaningless unless the value of the standard is known.
>
> 14 However, there is more than one way that a fact can be "known". It could be set out in the analyst's certificate itself - and I understand that the new analyst's certificates put in use after December 18 2018 include a statement regarding the concentration. Or it could be "known" as part of the qualified technician's

> training. Such is the case here. His training taught him that the standard alcohol solutions certified by the CFS for Ontario always contain a concentration that produces a target value of 100 plus or minus 10. A calibration check that produces a reading of 99, as in this case, is therefore a meaningful check of the machine's accuracy. [emphasis mine]

[59] This same approach was taken in *Porchetta*, where a qualified technician testified that he was using a standard solution calibrated to 100 and that he viewed the Certificate of Analyst that showed the solution was suitable for the instrument. In ***R. v. Does*, 2019 ONCJ 233** the technician testified that he saw the Certificate of an Analyst and was confident it verified a suitable solution, which he knew from training and experience to be 100 mg%, especially coupled with the successful calibration tests that confirmed it was within 10% of that target. Justice Ho's reasoning in the summary conviction appeal in ***R. v. Goldson*, 2019 ABQB 609** ("*Goldson*") takes this same line of thought, which I adopt.

[60] In *Goldson*, the qualified technician testified that the approved certificate of analyst was on the wall of the detachment and confirmed that the alcohol standard was certified. Justice Ho wrote:

> [61] To satisfy the new conditions, the qualified technician must testify that the alcohol standard used was certified by an analyst. This requires the qualified technician to look at the certificate of analyst on the wall of the detachment and match it with the results.

[61] I agree that the Crown does not need to tender a Certificate of Qualified Technician or a Certificate of Analyst but can properly prove the prerequisites by way of *viva voce* evidence from the technician.

[62] In ***McAlorum***, the judge faced the same situation as is before me, after not admitting the Certificate due to a lack of notice. The qualified technician gave more detailed testimony on prerequisites and the judge was able to find them satisfied beyond a reasonable doubt.

[63] In ***R. v. Kettles, supra***, the Crown relied on *viva voce* evidence of the technician, which the judge ruled fell short, "Simply stating generically that an analyst certifies the standard and that the certificates are posted on the wall does not engage the presumption."

[64] The Crown here is relying on Constable Haines' testimony. They argue that he "filled in the gaps" and to supplement his testimony the Crown points to the Subject Test Printout. Constable Haines testified (trial transcript, pages 42-43):

> **Q:** Okay. And did you have a . . . the opportunity to run any tests on the Intoxilyzer . . . I think you would have called . . . Intoxilyzer?
>
> **A:** Yes. Like, prior to them even arriving at the detachment, I would have checked to make sure it was . . . it was ready to go, that it was functioning, that the dry gas solution that does the standard test was proper, wasn't expired, <u>that we had the paperwork for it showing that it was certified, and that we were able to use it</u>. . . .

> And then, during the test, it would run a couple of tests. There's a diagnostics test and then there's a . . . a standard test, where it tests it against a known solution, just to ensure that the instrument is properly calibrated. It kind of tests the calibration of the instrument. So I would have done that before each of the . . . the samples of the breath.
>
> **Q:** You said you would have done that. Do you recall if you did?
>
> **A:** Oh, I absolutely did and it's . . . it actually shows on the subject test printout that it was done and what the results were.

[65] Constable Haines did not address the new requirements for the presumption of accuracy in his testimony to the point where I am able to find that they are satisfied beyond a reasonable doubt. He explained the diagnostic tests as per the Subject Test Print Out and the Crown urges me to accept this as enough. It is not enough. He said he made sure the police "*had the paperwork for it showing it was certified"*, meaning the solution. He did not say he viewed that paperwork, nor explain the specifics of the solution.

Has the Crown Proven Impaired Operation of a Motor Vehicle?

[66] To prove impaired operation of a motor vehicle, the Crown must prove beyond a reasonable doubt that (1) Mr. Whitehead operated a motor vehicle, and (2) did so while his ability to do so was impaired by alcohol.

[67] A conviction for impaired operation of a motor vehicle requires more then proof of the accused's impairment by alcohol. The Crown must prove the

accused's ability to operate a motor vehicle was impaired by alcohol. Proof of impairment of the accused's ability to operate a motor vehicle to even the slightest degree satisfies the legal requirement (***R. v. Stellato***, **[1994] 2 S.C.R. 478 (SCC)).** Minor variations from normal conduct or minor signs of impairment may not provide enough basis for a conviction (***R. v. Sampson,* 2009 NSSC 191**). The Court must consider the totality of the evidence.

[68] I have no evidence of poor driving by Mr. Whitehead. Direct evidence of Mr. Whitehead operating the vehicle came from Constable Durette, who saw him drive up the street to his home. The driving was not problematic. Ms. Casey could not say how many people were in the vehicle, let alone identify the driver. I accept her evidence of the poor driving, but the Crown has not proven this was Mr. Whitehead. Someone else could have been driving the car. I have no evidence of what happened with the truck after Ms. Casey lost sight of it, until it pulled into the driveway. There are too many possibilities for me to infer it was also Mr. Whitehead driving earlier.

[69] I have no toxicological evidence. I must ask whether the only reasonable conclusion, based on the evidence, is that Mr. Whitehead's ability to operate a motor vehicle was impaired to at least some degree.

[70] Both officers testified that Mr. Whitehead showed indicia of impairment. Constable Durette, who started interacting with Mr. Whitehead at about 2:30 a.m., said he detected a moderate odour of alcohol and asked Mr. Whitehead to step out of the car. After the roadside testing, he took Mr. Whitehead to the detachment for the breath test and acted as the observer. He had never interacted with Mr. Whitehead before that night. He said Mr. Whitehead had "red eyes, watery eyes, flushed face" (trial transcript, page 30). He also said Mr. Whitehead had a slight slur to his words and walked with a wide gait, seeming to have trouble keeping his balance but without staggering (trial transcript, page 30). The smell of a pungent alcohol remained consistent on Mr. Whitehead's breath.

[71] Constable Haines started interacting with Mr. Whitehead shortly after 3:00 a.m. He noticed a slight slurring in Mr. Whitehead's speech and was often delayed or slow in responding. He walked into the detachment almost in a penguin-like manner, a kind of shifting back and forth. He had on ankle boots that did not lace up. Constable Haines had no concerns with his ability to understand or answer questions. The smell of alcohol from his breath was significant. He was unsteady when being fingerprinted and seemed to have trouble distinguishing his right hand from his left. His eyes were watery and a little red.

[72] This evidence is not enough to establish beyond a reasonable doubt that Mr. Whitehead's ability to operate a motor vehicle was impaired.

Conclusion

[73] The Crown has not proven beyond a reasonable doubt that Mr. Whitehead operated a motor vehicle while impaired or while his BAC was Over 80. He is not guilty of these offences.

Amy Sakalauskas, JPC