SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cameron*, 2020 NSSC 58

Date: 20200213
Docket: CRAT No. 490715
Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Keegan Michael Cameron

Respondent

DECISION

Judge:	The Honourable Justice N.M. Scaravelli
Heard:	January 20, 2020, in Antigonish, Nova Scotia
Written Decision:	February 13, 2020
Counsel:	Courtney J. MacNeil, for the Appellant
	Nicole Rovers, for the Respondent

By the Court:

[1] The Crown appeals the Respondent's acquittal on a charge under Section 253(1)(b) of the *Criminal Code* of driving with a blood alcohol concentration ("BAC") exceeding 0.8. The trial judge's decision came out of a blended voir dire in which he dealt with the admissibility of the Crown's evidence and with alleged Charter violations. The Crown sought to rely on the presumption of identity formerly found in Section 258(1)(c) of the *Criminal Code* which had been repealed since the Respondent was charged. That provision created a presumption that the accused's blood alcohol concentration when he was driving was the same as when he was tested. Provincial Court Judge Richard J. MacKinnon held that the repeal applied to proceedings conducted after the amendments came into force, so that the Crown did not have the benefit of the presumption. The trial judge followed the reasoning from an Ontario trial court decision, and an unreported Nova Scotia Provincial Court decision.

[2] For the reasons that follow, I find the trial judge erred in law by holding that the presumption was unavailable and the appropriate remedy is to enter a conviction.

Overview

[3] The Police were called to the scene of a reported break and enter. On approaching the scene, they saw a vehicle driving away and pulled it over. The Respondent was driving the vehicle. Constable Michael Drake smelled alcohol on the Respondent's breath, and observed that his eyes were glossy, and decided to administer a test with a roadside screening device. The trial judge set out the sequence of events as follows:

> [15] In the present case, Constable Drake stopped Keegan Michael Cameron's vehicle … at 2:40 a.m. At 2:45 a.m. he formed a suspicion that Mr. Cameron had alcohol in his body because of the odour of liquor from his breath and his glossy eyes. Between 2:45 and 2:52 a.m. Constable Drake had conversation with Mr. Cameron about a roadside screening test. At 2:52 a.m. he gave a demand to Mr. Cameron to provide a sample of his breath for analysis by means of an approved screening device. At 2:53 a.m. Constable Pelly arrived with the approved screening device. Constable Drake had further conversation with Mr. Cameron explaining the roadside screening device test and then at 2:59 a.m. the test was performed and Mr. Cameron's result was a fail.

[4] Forming the opinion that the Respondent was driving while impaired, Constable Drake arrested him and read him his right to counsel at 3:03 a.m. At 3:06, he made a demand to the Respondent to provide breath samples and to come to the detachment to do so. At 3:40, the Respondent underwent breath tests by a qualified technician. A Certificate of Evidence on the voir dire showed a BAC of 1.70mg/100mL at 4 a.m., and 1.60 at 4:20 a.m.

[5] The Respondent alleged that his Charter rights under Sections 8 and 10(b) were violated by a Police failure to comply with Section 254(2) of the *Criminal Code*, which requires that a breath sample demand be made "forthwith". The trial judge concluded

> [16] In my view, because there were approximately seven minutes between the time when Constable Drake formed suspicion that Mr. Cameron had alcohol on his body and the time he made demand upon Mr. Cameron does not mean that the demand was made forthwith…

[6] The trial judge concluded that there was no Charter breach, and dismissed the application to exclude the breath test evidence.

[7] Turning to the charges, the trial judge held that there was insufficient evidence to conclude that the Respondent's ability to drive was impaired by alcohol and found him not guilty under Section 253(1)(a).

[8] As for Section 253(1)(b) charge of driving with a BAC exceeding 0.08, the trial judge found that the Respondent's BAC was 1.70 or 1.60 at the time of the tests. The remaining question is whether the Crown had proven that the Respondent's BAC was over 0.08 when he was driving. This required a determination as to the applicability of Section 258(1)(c) of the *Criminal Code* which had been repealed effective December 18, 2018, pursuant to SC 2018, c.21,

s.14. The effect of that provision was to create a presumption that the accused's BAC when he was driving was the same as when it was when he was tested. The trial judge held that the repeal applied to proceedings conducted after the amendments came into force, so that the Crown did not have the benefit of the presumption.

[9] In providing reasoning for his conclusion, the trial judge cited the opening words of Section 258(1), those being "in any proceedings", and then noted that the repealing Act stated that the heading before Section 249 and Sections 249 to 261 of the Act are repealed. He continued:

> [31] With respect to Section 251(1)(c) the statutorily enacted presumption having those words in Section 258(1) in any proceedings, in my view, means that a statutorily enacted presumption is operable in proceedings and is only operable in proceedings under Section 255 of the *Criminal Code*.
>
> [32] I conclude that this provision which repeals Section 258(1)(c) that provision being "The heading before section 249 and sections 249 to 261 of the Act are repealed", I conclude that that provision which repeals Section 258(1)(c) of the *Criminal Code*, means that in proceedings after December 18th , 2018, Section 258(1)(c) is not in effect.

[10] The trial judge acknowledged (without identifying) that there was a line of case law, mainly in Ontario, holding that Section 258(1)(c) still applied to existing proceedings. He said:

> [34] These cases conclude that the preamble to [the amending Act] allows the Court to conclude that Section 258(1)(c) still operates, or is in effect after December 18th, 2018. I don't agree. In my view, the preamble does not allow a Court to conclude that Parliament intended that the repealing legislation, although silent, includes the notion and should be read as including the words "except for Section 258(1)(c) which is still in effect for proceedings after December 18th, 2018 for offences that occurred prior to December 18th, 2018.

[11] The trial judge also rejected the suggestion that the *Interpretation Act* supported the availability of Section 258(1)(c). He adopted the reasoning in **R. v. Shaikh,** 2019 ONCJ 157, which he noted had been followed by Provincial Court Judge Halfpenny-MacQuarrie in the unreported decision of **R. v. Mombourquette**. As a result, he held up that the Crown had not proven that the Respondent's BAC exceeded 0.08 at the time of driving. He added that if Section 258(1)(c) presumption was available, he would have convicted the Respondent.

Grounds of Appeal

[12] The Crown submits that the trial judge erred in law

1. In holding that the Crown could not rely on the presumption of identity in the now repealed Section 258(1)(c) of the *Criminal Code;*
2. In finding that without expert evidence of retrograde extrapolation, there was no evidence of the Respondent's blood alcohol concentration at the time of driving.

Standard of Review

[13] Acknowledging **Housen v. Nickolaisen,** (2002) SCJ No. 31, the parties agree that the issues on appeal are questions of law subject to a correctness standard.

Analysis

[14] Before its repeal, paragraph 258(1)(c) described the presumption of identity. The subsection provided, in part, as follows:

> Proceedings under section 255
> 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),
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> …
>
> (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
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> …
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> (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,
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> (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
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> (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;
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> …
>
> (d.1) if samples of the accused's breath or a sample of the accused's blood have been taken as described in paragraph (c) or (d) under the conditions described in that paragraph and the results of the analyses show a concentration of alcohol in blood exceeding 80 mg of alcohol in 100 mL of blood, evidence of the results of the analyses is proof that the concentration of alcohol in the accused's blood at the time when the offence was alleged to have been committed exceeded 80 mg of alcohol in 100 mL of blood, in the absence of evidence tending to show that the accused's consumption of alcohol was consistent with both
>
> > (i) a concentration of alcohol in the accused's blood that did not exceed 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed, and
> >
> > (ii) the concentration of alcohol in the accused's blood as determined under paragraph (c) or (d), as the case may be, at the time when the sample or samples were taken…

[15] The *Amending Act*, SC 2018, c 21, repealed sections 249-261. The repeal came into force on 18 December 2018. In place of the section 258 presumption of identity, section 15 of the amending Act enacted a new presumption of accuracy by way of s 320.31(1) of the *Criminal Code*, replacing the previous presumption of accuracy, also found in section 258(1). As a result, the inquiry is no longer into the

accused's BAC at the time of driving. The s 258(1)(b) presumption of identity is obsolete going forward, but a modified presumption of accuracy remains. Pursuant to the Amending Act, the new s 320.31 presumption "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": Amending Act, s 32(2). No such transitional provision addresses the repeal of the presumption of identity.

[16] The 2018 amendments are the most recent in a line of amendments to the impaired driving provisions of the *Criminal Code* spanning several decades. The overall purpose of this legislative evolution was considered in **R. v. Taylor**, 2019 ABPC 165:

> [13] The evolution of the law relating to these presumptions was guided by three principles. First, given advances in technology, modern approved breath testing instruments were designed to prevent malfunction and "ensure accuracy": *R v Gubbins*, 2018 SCC 44 at para 4 and 48. Second, to address "the challenges posed" by the increasing volume of impaired driving charges, "Parliament has, over the years, taken steps to simplify and streamline the trial process": *R v Alex*, 2017 SCC 37 at para 2. And, third, as explained in *R v St-Onge Lamoureux*, 2012 SCC 57 at para 33(*St-Onge*):
>
> > ... Parliament intended to limit the evidence that can be adduced to raise a reasonable doubt about the reliability of the test results. As can be seen from the legislative history, the objective of the amendments, which form part of a scheme whose purpose is to "reduc[e] the carnage caused by impaired driving" (*Orbanski*, at para 55), was to give the reliability of the test results a weight consistent with their scientific value.

> [14] Then, on December 18, 2018, everything changed. Again.
>
> [15] Bill C-46 repealed the above presumptions, and for the first time in the history of Canada's blood alcohol concentration laws, the focus of the offence shifted away from the time of driving. A new presumption of accuracy, that applies to this trial, was created in section 320.31(1) of the *Criminal Code*. A new type of presumption of identity became embedded within sections 320.14(b) and 320.31(4). However, unlike section 253(1)(b), which criminalized the act of operating a motor vehicle with a blood alcohol concentration exceeding 80 mg%, the new law creates a criminal offence in relation to a blood alcohol concentration equal to, or exceeding, 80 mg% within two hours after ceasing to operate a conveyance. "This difference represents a profound transformation in approach to the offence of driving with too much alcohol": *R v Sivalingam*, 2019 ONCJ 239 at para 73.

[17] The situation in this case is analogous to that described in **R. v. Porchetta**, 2019 ONCJ 244:

> [23] On its face, the Act to Amend rendered null and void the entirety of the old offence provisions for drinking and driving. But there is more to it than that. In the case at bar Ms. Porchetta entered a plea of not guilty after December 18, 2018 to the charge of Over 80 Operation under s. 253(1)(b). Mr. Lindsay concedes that the old Over 80 provision remains a valid charge on which to have a trial. It is a fair concession. Clearly s. 253(1) (b) remains valid legislation for charges arising before C-46 came into force. The baby has not been thrown out with the bathwater. Indeed, in *R. v. Shaikh* Burstein J. convicted the defendant of Impaired Operation for a delict from February of 2018 at a trial started and completed in 2019. The Act to Amend is not the entire answer to the question of applicable legislation in the circumstances.

[18] The Crown contends that Parliament did not intend the repeal of the presumption of identity to operate retroactively, despite its procedural character. As a result, the Crown submits, the presumption was available to the trial judge in this case. The Crown concedes that the text of the amendments provides no clear

guidance respecting the principles of statutory interpretation, including the *Interpretation Act*, RSC 1985, c I-21, government commentary respecting legislative intention, and the weight of the caselaw on this issue.

[19] In terms of statutory interpretation, the Crown refers to **Re Rizzo v. Rizzo Shoes Ltd,** [1998] 1 SCR 27:

> [21] Although much has been written about the interpretation of legislation…, Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] The Crown submits that the presumption of identity is a procedural, given that it relates to the manner of proof of a specific fact. Procedural amendments are presumed to apply retroactively. The majority put it in the following terms in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248:

> [57] Driedger and Sullivan generally describe procedural law as "law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings": Sullivan, *supra*, at p. 583. Within this rubric, rules of evidence are usually considered to be procedural, and thus to presumptively apply immediately to pending actions upon coming into force... However, where a rule of evidence either creates or impinges

> upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect... Examples of such rules include solicitor‑client privilege and legal presumptions arising out of particular facts.

[21] The presumption of retroactive application will be rebutted by contrary intention of Parliament. As the majority said in **R. v. Ali**, [1980] 1 SCR 221:

> [32] It is not in dispute that the rule as to the retrospective operation of procedural statutes is not absolute; it is only a guide that is intended to assist in the determination of the true intent of Parliament which is the main objective of statutory construction. This presumption in favour of the retrospective operation of procedural enactments must therefore yield to the contrary intent of Parliament; a procedural statute shall not be construed retrospectively when Parliament has expressed its intention to the contrary…
>
> [33] Given the assumption afore-mentioned, the simple question for determination is whether Parliament has indicated its intent that the amendments to s. 237 should operate prospectively only. The language used by Parliament should first be examined.

[22] The court in **R. v. McManus**, 2019 ABQB 829, the first decision on this issue from a Summary Conviction Appeal Court, held that the presumption of identity was procedural in nature. As a result, the amendments would presumptively apply retroactively, so that the presumption of identity would not be available. However, the court in **Porchetta** took a different view, holding that earlier Supreme Court of Canada authority on amendments to s 258 treated those

amendments as substantive. The principal authority to this effect was **R. v. Dineley**, 2012 SCC 58, of which the court in **Porchetta** said:

> [35] In *R. v. Dineley* … the Court once again was asked to consider whether changes to s. 258 were substantive or procedural. That Court identified the framework to be used to determine whether a changed enactment applies to historic prosecutions.
>
> > 10 There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively... However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases...
>
> [36] The background for *Dineley* is that in 2008 Parliament changed s. 258 to take away the defence of 'evidence to the contrary', or what was known as the "Carter" defence. The Court in *Dineley* found that s. 258 affects a substantive right, not a procedural one. One of the reasons why is that,
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> > 21 The possibility for the accused of rebutting the statutory presumptions by means of a *Carter* defence (under the former legislation) or by adducing evidence related to the instrument (under the Amendments) is determinative of whether the infringement of the right to be presumed innocent is justified. However, the conclusion that the infringement is justified in the context of the new legislation does not alter the fact that constitutional rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply.

> [37] The nature of the substantive right, in the Court's finding, lay in the manner in which Parliament determined how to defend the charge, not just for the old provision, but the new one too. I do not read *Dineley* as finding that the old s. 258 section was substantive but the new one wasn't. I read *Dineley* as finding that both the old s. 258 section, and the new one (sans "Carter" defence) were both substantive provisions. Both affected the manner of proof in an Over 80 case. Both affected how the defendant made full answer and defence to the charge. The new provision from *Dineley* is exactly the provision in force on June 29, 2017. It contains a law creating a presumption arising out of certain facts and is therefore substantive, see *R. v. Wildman*, [1984] 2 S.C.R. 311. As the Court found in the companion case to *Dineley*, "The amendments have not changed the nature of these presumptions" see *R. v. St. Onge-Lamoureux*...

[23] It is not clear that the present amendments are analogous to those at issue in **Dineley**, which were concerned with the availability of a substantive defence. In **McManus**, having held the provisions to be procedural in nature, Henderson J went on to consider whether there was any indication of contrary intent from parliament. The Amending Act specifically provided that the new presumption of accuracy under s 320.31 – replacing the former presumption of accuracy under ss 258(1)(c) and (g) – applied to trials commencing after the amendments came into force. Justice Henderson rejected the argument that this indicated that the repeal of the presumption of identity – also located in the repealed s 258(1)(c) – also applied retroactively:

> [83] I conclude that the "presumption of accuracy" in 258(1)(c) and s 258(1)(g) was repealed retrospectively because the preconditions to the operation of the new "presumption of accuracy" are more comprehensive than the former preconditions. The preconditions for the new "presumption

> of accuracy" does not include the "as soon as practicable" requirement for the breath tests but does contain greater safeguards for the accused person than [existed] under the former provisions. The additional safeguards include new requirements to prove blank system checks, system calibration checks and the requirement that the two breath samples must have readings which differ by no more than 20 mg of alcohol in 100 ml of blood. In adding these additional safeguards Parliament was specifically approving of some of the recommendations in the ATC Report. Parliament took steps to ensure that more comprehensive preconditions and the additional safeguards were available to accused persons at trial, regardless of whether the offence was alleged to have been committed before or after December 31, 2018.
>
> [84] The same rational does not exist in relation to the "presumption of identity", which is now irrelevant in relation to the offence under s 320.14(1)(b). The offence is committed if the accused has the prohibited blood alcohol concentration within 2 hours of operating a conveyance (motor vehicle). As a result, for offences that take place after December 18, 2018 there is no need for a "presumption of identity".
>
> [85] The "presumption of identity" only has relevance in relation to offences that were alleged to have occurred prior to December 18, 2018.
>
> [86] The fact that one of the two presumptions in s 258(1)(c) has been repealed retrospectively does not necessarily mean that Parliament intended that both presumptions would be repealed retrospectively. Parliament had a specific reason to retrospectively repeal the "presumption of accuracy", but did not have any reason to repeal the "presumption of identity" retrospectively.

[24] As such, Henderson, J. said, the express statutory language did not give any guidance as to parliamentary intent.

[25] In support of the submission that the repeal of the presumption of identity does not operate retrospectively, the Crown relies on section 43 of the *Interpretation Act*, RSC, 1985, c I-21, particularly ss 43(b) and (e):

> Effect of repeal

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

[26] The Crown cites caselaw under earlier amendments to the impaired driving provisions, such as **Ali**, where the majority held that the effect of s 43 (then s 35) of the *Interpretation Act* was to preserve the operation of repealed provisions governing breath samples in impaired driving cases where the offences preceded the repeal, and **R. v. Copley** (1988), 43 CCC (3d) 396, 1988 CarswellOnt 24 (Ont CA), where the Ontario Court of Appeal considered an amendment that eliminated a statutory presumption and replaced it with a new section. The court said:

> 5 Mr. Kostman for the appellant argues that the new subs. 241(1)(c) referring as it does to subs. 238(3) of the *Criminal Code*, cannot apply to samples taken before the latter section came into existence; moreover, the

> old s. 237 does not apply because it has been repealed. He specifically refers us to s. 207 of the 1985 amending statute which provided:
>
> > 207. Paragraphs 237(1)(e) and (f) of the *Criminal Code*, as they read immediately before the coming into force of the amendments to those paragraphs, as enacted by section 36 of this Act, continue to apply to any proceedings in respect of which a certificate referred to in those paragraphs was issued prior to the coming into force of the amendments to those paragraphs.
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> He notes that subss. 237(1)(e) and (f) referred to are the subsections dealing with the validity of the certificate, and that no mention was made of former subs. 237(1)(c), the presumption section. He argues, therefore, that Parliament intended that during the transitional period, evidence would be necessary to establish the link between the blood alcohol level at the time of the analysis and the blood alcohol level at the time of the alleged offence.
>
> 6 I do not believe that Parliament had any such intention which would create a hiatus for proof of blood alcohol level for a very limited period and for a very limited number of persons charged, i.e., those alleged to have committed an offence prior to December 4, 1985 and who have been tried subsequently. I concede however, as I must, that however unpalatable that conclusion might be it must be reached if the statutory form of the enactment leaves no other choice. In my opinion, s. 207 clearly shows an intention to preserve the evidentiary value of the certificate made in accordance with the former subsection. While there is no clear intention to preserve the presumption, there is certainly no clear intention to abolish it, even for a limited period. The certificates would be much less valuable without the presumption. In my opinion, the most that can be said is that s. 207 is neutral as to the continuance of the presumption. No clear intention therefore having been shown, the *Interpretation Act*, R.S.C. 1970, c. I-23 which applies "unless a contrary intention appears" can be resorted to and in my opinion, ss. 35 and 36 of that Act readily resolve the problem…

[27] Similarly, the Crown argues, Parliament had no intention to create a hiatus for proof of blood alcohol content in transitional cases pursuant to the current amendments.

[28] Dealing with this issue in respect of the current amendments, the court in **McManus** said:

> [88] Whether the repeal of the "presumption of identity" operates retrospectively must be considered in light of s 43 of the *Interpretation Act*, which deals with the repeal of legislation and transitional cases. That section provides, *inter alia*, that where an enactment is repealed in whole or in part, the repeal does not ... "affect the previous operation of the enactment so repealed or anything done or suffered thereunder".
>
> [89] Prior to December 18, 2018 the "operation" of s 253(1)(b) included not just the elements of the offence specified in that subsection. The "operation" of s 253(1)(b) also included the procedures available to prove those elements, including the statutory presumptions in s 258. The "operation" of s 253(1)(b) is inextricably linked to the statutory presumptions. It has only been in very exceptional cases over the last 50 years that the statutory presumptions have not been used. This is because the statutory presumptions were included in the *Criminal Code* to make it easier for the prosecution to prove the s 253(1)(b) offence: *St-Onge Lamoreaux* at para 5 to 6.
>
> [90] The presumption in s 43 of the *Interpretation Act* does not operate if a contrary intention is expressed by Parliament (see s 3 of the *Interpretation Act*). In the case of the "presumption of accuracy", s 32(2) of the 2018 Code Amendments show that Parliament has expressed a contrary intention and directed that the new "presumption of accuracy" apply to all trials whether the offence date is before or after December 18, 2018.
>
> [91] However, the 2018 Code Amendments do not express a contrary intention with respect to the "presumption of identity". As a result, s 43 of the *Interpretation Act* suggests that the previous operation of the "presumption of identity" should continue to operate just as the provisions of s 253(1)(b) continue to operate for offences that are alleged to have taken place prior to December 18, 2018.

[29] Similarly, in **Porchetta**, the trial judge said:

> [24] The reason why s. 253 (1) (a) and (b) remain valid charging provisions post December 18, 2018 is found in other legislation. When

> legislation is repealed and replaced, the *Interpretation Act* R.S.C. 1985, c. I-21 contains express provisions dealing with such transitions.
> …
>
> [25] Notably, s. 43(c) stipulates that repeal, in this case of s. 253, does not affect any liability incurred while s. 253 was in force. That is an answer to the question of why s. 253 survives its repeal for purposes of cases coming to trial after December 18, 2018. The law in effect at the time of the conduct remains, notwithstanding its repeal.
>
> [26] S. 43 also goes on to carry the investigation forward. The case may be enforced after the charging provision is repealed, see s. 43 (e) *et seq*.
>
> [27] Two other provisions of the *Interpretation Act* are important in divining legislative intent.
>
> [28] The first is s. 12, which deems enactments to be remedial, and the second is s. 13.
>
> 12. Enactments deemed remedial
> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> 13. Preamble
> The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

[30] The Crown supplements its arguments under the *Interpretation Act* by reference to statements in Hansard and the federal government's Legislative Background document, which each indicate that the intention of the amendments is to "make the investigation and prosecution of impaired driving offences simpler while respecting the *Charter* rights of Canadians. Similar sentiments can be found in the preamble to the Amending Act, which, pursuant to s.13 of the *Interpretation*

Act, "shall be read as a part of the enactment intended to assist in explaining its purport and object." The preamble includes the following passages:

> Whereas it is important that law enforcement officers be better equipped to detect instances of alcohol-impaired or drug-impaired driving and exercise investigative powers in a manner that is consistent with the Canadian Charter of Rights and Freedoms;
>
> Whereas it is important to simplify the law relating to the proof of blood alcohol concentration;
>
> Whereas it is important to protect the public from the dangers posed by consuming large quantities of alcohol immediately before driving…

[31] On this theme, the court said in **Porchetta:**

> [30] I would therefore give effect to the preamble as mandated by s. 13 of the *Interpretation Act* to find that, in law, Parliament's intention with C-46 was to simplify the manner of proof when the defendant is charged with excess blood alcohol. This was a legislative response to the unacceptable level of dangerous driving occurring in Canada which kills or injures thousands of people each year. I find that Parliament's intention is clear and unambiguous. Any suggestion that C-46 rendered the manner of proof of BAC more *difficult* would be in tension to the clear, unambiguous language of Parliament. It is axiomatic that principles of statutory interpretation require the Court to read the words of the *Criminal Code* in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, see *R. v. Myers* 2019 SCC 18 at par. 19. The *Criminal Code* must be read as a coherent whole. [Emphasis in *Porchetta*.]

[32] In **McManus,** Henderson, J. noted the preamble's statement about simplifying the law, combined with the commentary in the "Legislative Background" and various statements by the Minister, including a Hansard

statement that the *Amending Act* was intended to "strengthen the law, while also creating much needed court efficiencies".

[33] The principal case supporting the trial judge's decision is **Shaikh**, which has been mentioned earlier. In that case, as in this one, the accused was charged with driving with a BAC over .08 before the repeal came into force, and came to trial after. The Crown relied on the s 258 presumption of identity to establish the accused's blood alcohol concentration at the time he was alleged to have been in care or control of the vehicle. Burstein J held that Legislative intent to simplify trials did not justify reading down the provisions of the *Amending Act* expressly repealing section 258. The language was not ambiguous, and its plain meaning did not lead to an absurd result. The court further rejected, *inter alia*, arguments based on the *Interpretation Act.*

[34] The subsequent caselaw has overwhelming rejected the reasoning and result of **Shaikh**. Most of the post-**Shaikh** caselaw has held that the presumption of identity remains available for transitional cases. The relevant reasoning is summarized in **Porchetta**:

> [37] The nature of the substantive right, in the Court's finding, lay in the manner in which Parliament determined how to defend the charge, not just for the old provision, but the new one too. I do not read *Dineley* as finding that the old s. 258 section was substantive but the new one wasn't. I read *Dineley* as finding that both the old s. 258 section, and the new one (sans

> "Carter" defence) were both substantive provisions. Both affected the manner of proof in an Over 80 case. Both affected how the defendant made full answer and defence to the charge. The new provision from *Dineley* is exactly the provision in force on June 29, 2017. It contains a law creating a presumption arising out of certain facts and is therefore substantive, see *R. v. Wildman* 1984 CanLII 82 (SCC), [1984] 2 S.C.R. 311. As the Court found in the companion case to Dineley, "The amendments have not changed the nature of these presumptions" see *R. v. St. Onge-Lamoureux* 2012 SCC 57 (CanLII), [2012] S.C.J. No. 57.
>
> [38] … 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 rendering null and void the police investigations for those cases. That would be absurd. Furthermore, C-46 affected not just the new law, but the old one as well, as discussed above. If Parliament were to have intended the preamble about simplification of manner of proof of BAC in Over 80 cases to apply only to new charges under s. 320.14, but not the old ones that it repealed but still in the Court system, it would have said so. 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.

[35] Similarly, in **R. v. Yip-Chuck**, 2019 ONCJ 367, the Court said:

> [8] With respect to the first option, it should be kept in mind that the presumption of identity has been part of Canada's breathalyzer law since it was first enacted in the 1960's – over 50 years ago. The presumption has been an integral part of that scheme – necessary to connect the test readings back to the time of driving. It is unimaginable that, after fifty years, Parliament would intentionally decide to repeal and discontinue that presumption for the last few months for which it would be required.

[36] The law in Nova Scotia is not limited to cases following **Shaikh**, namely, the unreported **Mombourquette** decision and the decision under review on this

appeal. The only published decision in this province points to the **McManus** and **Porchetta** result. In November, Tax Prov Ct J released **R. v. McDermott**, 2019 NSPC 70, where the accused was charged under s 253(1)(b) in June 2018 and came to trial in July 2019. Judge Tax considered **Shaikh** and the caselaw that subsequently rejected its reasoning. He said:

> [31] On the issue with respect to whether the former presumption of identity found in section 258 of the *Criminal Code* continues to apply with respect to so-called "transitional cases," I find that the words of Rahman J in the recent case of *R. v. Patel*, 2019 ONCJ 544 at para. 20, decided on July 26, 2019, succinctly summarize the conclusion of the court on this issue:
>
> > "20. The overwhelming weight of authority has rejected the analysis in *Shaikh* and has held that the presumption of identity in former section 258 of the *Criminal Code* applies to so-called transitional cases. I adopt and accept the reasoning in those cases, including Latimer J.'s decision in *R. v. McAlorum*, 2019 ONCJ 259 and Duncan J's decision in *R. v Yip-Chuck*, 2019 ONCJ 367. The Crown may rely on the presumption of identity in section 258 of the *Criminal Code*."
>
> [32] Similarly, in *R. v. Phee*, 2019 ABPC 174, Pahl J. of the Alberta Provincial Court was referred to similar arguments to the ones presented in this case and adopted the reasoning in the cases provided by the Crown and rejected the position proposed by the Defence which relied upon the decision of *R. v. Shaikh*, *supra*. In that case, the trial judge adopted the reasoning of other Ontario and Alberta decisions, including *R. v. Sivalingam*, 2019 ONCJ 239; *R. v. McAlorum*, *supra*, *R. v. Porchetta*, *supra*; *R. v. Hiltschuk*, [2019] O.J. no. 1015. In all of those cases, the Court concluded that the presumption of identity survives the December 2018 amendments and would continue to be applicable in transition cases.

[37] Judge Tax went on to consider the preamble to the Amending Act, as well as the *Interpretation Act* repeal provisions, and accepted the Crown submission that the **Shaikh** reasoning was inconsistent with Parliament's intent:

> [36] In *Phee, supra,* Judge Pahl referred to section 43 of the *Interpretation Act* and having already considered the impact of the Preamble to the Bill C-46, adopted the comments by the Court in *R. v. Sivalingam*, *supra*, at para. 96:
>
> > "…For cases started on or after December 18, 2018, the inapplicability of the old presumption of identity would require expert evidence. Added layers of in court testimony is the opposite of simplification."
>
> [37] I agree with and adopt those comments in this case.
>
> [38] I find that it is evident that Parliament had the clear intention in C-46 to simplify the law relating to the proof of blood-alcohol concentration. As Rose J. said in *R. v. Porchetta*, *supra*, at para. 38 and 39:
>
> > "38….It would be quite inconsistent to find that Parliament intended to keep section 253(1)(b) intact for "legacy cases" but make it substantially more difficult to prove those charges by wiping away the presumption of identity and rendering null and void the police investigations for those cases. That would be absurd…… Parliament's express intention (was) to simplify proof of over 80 cases. The new over 80 and impaired operations are quite different. The presumption of identity is unnecessary in the new provisions because the new legislation does not require proof of blood-alcohol concentration at the time of driving.
> >
> > 39. For these reasons I find that, in law, section 258 applies to the case at bar."
>
> [39] I also agree with Justice Rose and adopt his conclusions in this case. I find that the presumption of identity formally found in section 258(1)(c) of the Code applies to "transitional" trials where the breath tests were taken before December 18, 2018, but the trial was heard after that date. In those circumstances, I find that the former presumption of identity applies in this "transitional" case.

[38] As such, Judge Tax held that the presumption remained available to the Crown in transitional trials where the breath tests were taken before December 18, 2018, but the trial was heard after that date.

Conclusion

[39] In my view, the **McDermott** view is more persuasive than the result of **Shaikh**. This was also the conclusion in **McManus**, the first Summary Conviction Appeal Court decision on this issue, as well as the overwhelming majority of cases decided after **Shaikh**. **Shaikh** focussed heavily on a close (and narrow) reading of the Amending Act, whereas the subsequent caselaw has more convincingly focused on the broader Parliamentary intention. As such, the trial judge in this case erred in law in holding that the presumption of identity was unavailable to the Crown.

Toxicology reports as a substitute for the presumption

[40] The Respondent in the present case claims that Parliament's intention was to make it necessary to lead expert toxicology evidence in transitional cases. This was also mooted in **Shaikh**. A similar suggestion was addressed – and rejected – in **R. v. McAlorum**, 2019 ONCJ 259:

> [17] My colleague in *Shaikh* … relies on the availability of toxicological evidence to fill any gap caused by the demise of the presumption of identity. While I acknowledge the theoretical availability of a section 657.3 affidavit, experience teaches that live witnesses – often scientists from the Centre of Forensic Sciences – are almost always required to attend in person, either to testify, consult, or explain their report. Ontario is a big province, and 'Over 80' cases occur daily in every region, city and town. It is not in the public interest to adopt an approach that requires scientists to attend court on a daily basis, nor is it consistent with the principles of fairness and efficiency that have animated the last sixty years of drinking and driving legislation.
>
> [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, and is not mandated by an application of the relevant statutory instruments.

[41] Similar comments appear in **R. v. Taylor**, 2019 ABPC 165, where the court said:

> [29] Finally, without the benefit of the presumption of identity, the Crown would need to call, in every transitional case, expert toxicological evidence. The Court in *R v Shaikh* … concluded that this result is consistent with Parliament's clear intent expressed through the immediate repeal of section 258 of the Code. I come to the opposite conclusion. This is not a matter easily resolved by section 657.3 of the *Criminal Code*, and a "routine report attached to an affidavit," as stated in *Shaikh* at para 25. Rather, the Crown would be required to tender expert opinion evidence, individualized to the unique facts of every case, and this expert witness would, upon application, be subject to cross-examination. The effect would be to complicate and convolute the trial process. And, this result would be wholly incompatible with Parliament's objective of reducing "the carnage caused by impaired driving" by giving "the reliability of the test results a weight consistent with their scientific value": *St-Onge* at para 33.

[42] The suggestion that Parliament intended that impaired driving cases coming to trial during the transitional period to be subject to the more onerous evidentiary demands of expert toxicology evidence is implausible. This notion is clearly inconsistent with the legislative intention to simplify the process of trying such cases.

Remedy

[43] The Respondent filed a notice of contention, asserting that the trial judge's decision should be affirmed on the basis that there was a violation of his rights under ss 8 and 10(b) of the *Charter of Rights and Freedoms*. The trial judge found no Charter violation.

[44] The Respondent has not appealed that finding, and has made no argument on it, although the Crown filed a reply brief defending the trial judge's Charter decision. Counsel for the Respondent submitted that in the event the appeal was allowed, the raising of the Charter issue in the Notice of Contention should lead to an order for a new trial, rather than a substituted verdict. However, the trial judge expressly said that he would have convicted but for his decision on the legal issue of the applicability of the presumption of identity. In my view, the mere act of

disputing the Charter determination in a Notice of Contention should not entitle the Respondent to a new trial.

[45] As a result, I allow the appeal, enter a conviction of guilty, and remit the matter to the Summary Conviction Court for sentencing.

Scaravelli, J.