SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Greening*, 2024 NSSC 57

Date: 20240227
Docket: CRH 522740
Registry: Halifax

Between:

His Majesty the King

v.

Tiffany Greening

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	August 21, 2023, in Halifax, Nova Scotia
Oral Decision:	February 27, 2024
Written Release:	February 27, 2024
Counsel:	William Mathers and Gregory Morris, for the Provincial Crown Nicholaus Fitch, for the Defendant

By the Court (orally):

[1] The facts of this case are deceptively simple. As will be seen shortly, their simplicity belies the nature of the issue to which they give rise.

[2] Before providing those background facts, it is appropriate to note that in 2018, Parliament passed Bill C-46. The Bill's preamble confirmed that one of Parliament's objectives was to "simplify the law relating to proof of blood-alcohol concentration" (S.C. 2018 c. 21). The question is whether, as a result of the changes inaugurated by this Bill, and in order to rely on the presumption of accuracy in s. 320.31(1) of the *Criminal Code*, the Crown now needs to tender evidence from the analyst with respect to the alcohol standard, either by certificate or *viva voce* testimony. Put differently, is the Crown able to continue to prove the standard through the (hearsay) evidence of the qualified technician?

[3] The issue has generated two lines of authority across the country. In *R v. Goldson*, 2021 ABCA 193 ("Goldson"), the Court ruled that the Crown must call evidence from the analyst, either by certificate or *viva voce* testimony. The genesis of the competing line of authority is found in *R v. MacDonald*, 2022 YKCA 7 ("MacDonald"), which took the opposite position.

[4] The Crown concisely summarizes the occupants of the "opposing camps":

> 1. Québec, Saskatchewan and, and Newfoundland are following *Goldson*.
> 2. Ontario and Manitoba are following *MacDonald* as is, most recently, New Brunswick with a trio of Appellate decisions. (*R v. Landry*, 2023 NBBR 070, *R v. Jones*, 2023 NBBR 071, *R v. LaRocque*, 2023 NBBR 072).
> 3. In Nova Scotia, the Provincial Court has split in a series of unreported decisions. The only reported decision is *R v. Kelly*, 2023 NSPC 19. which followed *MacDonald*.
>
> (*Crown factum, para. 5*)

Background

[5] On June 13, 2021 Constable Troy Redden initiated a traffic stop after having observed the Respondent's vehicle speeding. Ms. Greening was the driver and sole occupant of the vehicle. Upon noticing the smell of alcohol emanating from her

breath, the officer read to her the approved screening device demand and a "fail" was registered at 1:29 a.m.

[6] Ms. Greening was arrested for impaired driving and produced two breath samples as part of that process. The test results showed 100 mg of alcohol per 100 mL of blood and 110 mL of alcohol per 100 mL of blood, at 2:44 a.m. and 3:06 a.m. respectively.

[7] The Respondent was initially facing charges under Section 320.14(a), which is to say "impaired operation", and Section 320.14(1)(b) ("over 0.08"). However, at trial, the Crown invited an acquittal on the charge of impaired operation.

[8] In the course of its prosecution of the "over .08" charge, the Crown tendered the Certificate of Qualified Technician ("CQT"). This document contained the following paragraph:

> Prior to each of the said samples, I conducted a system calibration check, the result of which was within 10% of the target value of an alcohol standard which was certified by an analyst. The alcohol standard was suitable for use in the said approved instrument and identified as Airgas, Lot #AG023801. System calibration checks are also documented as "STD".
>
> [Emphasis added]

[9] The Crown also put the qualified technician on the stand. Counsel for the Respondent did not question him regarding the alcohol standard used during her breath tests. Moreover, the Crown did not tender a certificate from the analyst with respect to the suitability of the alcohol standard which was used in the approved instrument.

[10] The reason for failure to adduce a certificate of analyst with respect to the alcohol standard is explained by the Crown (in its factum) in the following terms:

> [8] In July of 2022, Cst. Redden attempted to serve a certificate of analysis on the Respondent [the 'COA']. Cst. Redden left her several unreturned phone messages and attended her residence to serve the certificates on her, without success. On August 4, 2022 Cst. Redden left two copies of COA at defence counsel's law office with a woman the officer thought was defence counsel's secretary. At trial, the Crown attorney stated that he also emailed copies directly to the defence attorney the next day. The defence attorney did not directly deny this, but essentially argued there was no evidence before the Court that he had received the notice via email.

> …
>
> [12] The trial judge ruled that the Crown failed to prove, on a balance of probabilities, notice of its intention to introduce a copy of the COA.

[11] In the course of her ruling, the Trial Judge clearly applied the *Goldson* line of authorities in acquitting the Respondent on the remaining Section 320.14 (1)(b) charge. She stated:

> Certified by analyst is to be proven by analyst, whether its by certificate [or] *viva voce*, not impermissible hearsay from a qualified technician. These certificates serve different functions, they're not substitutes for each other. (Appeal Book, Tab 5, p. 33)

[12] The Appellant contends that the trial judge erred when she made that determination.

[13] Therefore, the issue resolves itself into the following:

Must the Crown, when it attempts to prove the requirements of s. 320.31(1) of the Code, (in addition to calling either the viva voce or certificate evidence of the qualified technician), also call the evidence of the analyst, either in viva voce or certificate form, as to the suitability of the alcohol standard for use in the approved instrument?

Analysis

[14] It is common ground between the parties that the issue in this case engages a question of statutory interpretation. Thus, it is reviewable on a standard of correctness.

[15] Section 320.31(1) states that breath sample results are conclusive proof of blood-alcohol content (BAC) when the preconditions are met:

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

[16] The crux of the disagreement between the parties lies, first, by observing that prior to Bill C–46, the Crown could prove the BAC simply by tendering the evidence of a qualified technician. The trial judge, as well as judges in those jurisdictions which follow *Goldson,* concluded that the specific reference to "an alcohol standard that is certified by an analyst" in s. 320.31(1)(a) creates a new onus upon the Crown, one which now requires it to tender a certificate from the analyst, or provide viva voce evidence from that person.

[17] The Crown's argument, concisely stated, is that the CQT, which was tendered at trial, stated that the Airgas alcohol standard used in the instrument "was certified by an analyst". As a consequence, this satisfies the precondition or "burden" mentioned in what is now s. 320.31(1) (referenced above). They argue that they need do nothing more in order to rely on the presumption created by that section.

[18] The Respondent's position simply relies upon *Goldson*, and some other authorities decided under its auspices.

[19] The main thrust of *Goldson* is captured in the following paragraphs:

> [48] The *Amending Act*, for the first time, added certification of the alcohol standard by an analyst as a precondition to triggering the presumption of accuracy, in s. 320.31(1) (formerly s. 258(1)(c)). This is a significant change from the way that the legislation was drafted when the Supreme Court found in Lightfoot, citing Ware, that "the Crown may obtain the advantage of the statutory presumption under s. 237(1)(c) [later s. 258(1)(c)] by offering proof, by certificate or by oral evidence, of the three elements specified therein." Reference to the solution used or alcohol standard was not one of the three preconditions to triggering the presumption at that time.
>
> [49] The evidentiary short cut still exists to allow the certificates (which are hearsay) to be entered into evidence without calling either the QT or the analyst, but there is no guidance in the current scheme as to what that evidence will contain other than that it is "made under this Part".

[Emphasis added]

[20] In order to adequately consider the reasoning in *Goldson*, I must first have regard to the genesis of the assumptions upon which the accuracy of the BAC test results rest. It begins in 1969, when Parliament enacted the "over .08" offence. The presumption of accuracy was to be found (at that time) in ss. 224A(1)(f), 237(1)(f) and 258(1)(g) of the *Code*. The other applicable presumption was one of identity. It was found at this time, in ss. 224A(1)(c), 237(1)(c), and 258(1)(c).

[21] The interrelationship of these two presumptions was explained in *R v. St.-Pierre*, [1995] 1 SCR 791 in the following manner:

> 26. … section 258 refers to two presumptions of accuracy (section 258(1)(g)) and the presumption of identity (section 258(1)(c)). The first presumption addresses the dilemma of how to prove in court what the accused's blood alcohol content was at the time of testing on the breathalyzer….
>
> …
>
> 28. Clearly, the result of these two provisions is that a presumption that the reading received on the breathalyzer provides an accurate determination of the accused's blood alcohol level *at the time of the testing* is established. Hence, the certificate can be tendered in evidence to prove what this blood alcohol level was. However, if the accused leads or points to "evidence to the contrary" which tends to show that, in fact, his or her blood alcohol level, at the time of testing, was not that shown on the certificate, then the certificate is no longer proof of that fact. Therefore, for the Crown to be successful it must prove the accused's blood alcohol level some other way. Indeed, the Crown may still prove that the blood alcohol level of the accused at the time of the offence was over 80 mg of alcohol in 100 ml of blood. This "presumption of accuracy" relates to the accuracy of the readings at the time of the test, as stated in the certificate of analysis, and is presumed by the operation of s. 25 of the *Interpretation Act*, in the absence of "evidence to the contrary"….

[22] Next came the inauguration of Bill C–2, in 2008, in the course of which Parliament altered the wording of s. 258(1)(c). This effected a merger (so to speak) of the two presumptions, as explained by the court in *R v. St Onge-Lamoreaux*, 2012 SCC 57:

> [15] Before 2008, it was settled law that s. 258 *Cr. C.* established two presumptions of identity and one presumption of accuracy. The amendments have not changed the nature of these presumptions. Section 258(1)(*c*) *Cr. C.* establishes a presumption of accuracy of the results of the analyses, and a presumption of identity according to which the results are presumed to correspond to the blood

> alcohol level of the accused at the time of the alleged offence. (In the past, this Court placed the presumption of accuracy in s. 258(1)(*g*) *Cr. C.* However, the 2008 amendments indicate clearly that Parliament intended them to apply to both the presumption of accuracy and the presumptions of identity, and that it was also incorporating the presumption of accuracy into s. 258(1)(c).) Section 258(1)(d.1) *Cr. C.* establishes a second presumption of identity according to which a blood alcohol level over .08 at the time of the analysis is presumed to be the same as the blood alcohol level of the accused at the time of the alleged offence.
>
> [Emphasis added]

[23] So, although they were grouped together in the same section in 2008, the nature of the presumptions remained extant. It is incontestable that, until 2018, the Crown could file a CQT and rely upon the presumptions of the accuracy of the document with the following prerequisites:

> 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),
>
> ...
>
> (g) where samples of the breath of the accused have been taken pursuant to a demand under subsection 254 (3), a certificate of qualified technician stating:
>
> (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
>
> (ii)the results of the analyses so made, and
>
> (iii) if the samples were taken by the technician,
>
> A) repealed
>
> B) the time when and place where each sample and any specimen described in clause (a) was taken, and
>
> C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician, is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;
>
> [Emphasis added]

[24] The point of particularizing the above genesis has been to show that the state of the law, as it relates to the issue on appeal has essentially been a continuum from

1969 to 2018, insofar as it concerns the preconditions for the presumption of accuracy which are (now) enshrined in section 320.31 (1). The CQT still needed to contain the required information, including that the technician had ascertained that the instrument was in proper working order "by means of an alcohol standard identified in the certificate, that is suited for use with an approved instrument". It is the means by which the technician has been satisfied that the instrument is in "proper working order".

[25] Goldson asserts that Bill C-46 had effected a significant change to the proof of the suitability of the alcohol standard. It turns upon Parliament's use of the phrase "the result of which is within 10% of the target value of an alcohol standard certified by an analyst". That Court stated that this changed the way in which the Crown must go about proving the preconditions which trigger the presumption of accuracy (para. 48).

[26] With that said, as we have just seen, the case law from 1969-2018 supported the view that a recital in the CQT was sufficient to establish the suitability of the alcohol standard. This was a (statutorily created) exception to the hearsay rule. The question is whether the Bill C-46, in 2018, changed this situation.

[27] The Respondent, citing *Goldson*, and those decisions which followed it, argues (by implication) that the law governing the manner in which proof of the alcohol standard could be established between 1969 and 2018, came to an abrupt end in 2018 when Bill C-46 was passed by Parliament.

[28] This assertion must be examined closely. In *Goldson*, the court explained its view of the purposes and objectives of the 2018 amendments and Parliament's operative scheme:

> [60] There are a number of similarities to the procedures that existed before the *Amending Act*. Both the prior scheme and the current one contemplate the role of an analyst and QT (s. 254(1); s. 320.11) and the use of certificates to establish the statutory presumptions (ss. 258(1)(c)(f) and (g); s. 320.32(1)). Both permit cross-examination of the analyst or QT by the accused pursuant to a court order (s. 258(6); s. 230.32(3)), and both require that certificates be disclosed to the accused before trial in order to be received into evidence (s. 258(7); s. 320.32(2)).
>
> [61] The changes introduced in the *Amending Act* require the performance of a system blank test and a system calibration check within 10% of the target value of an alcohol standard certified by an analyst as a precondition to the presumption of accuracy (s. 320.31(a)), require the Crown to disclose information to the accused, including the results of the those tests and the analyst's certificate (s. 320.34(1)),

> and requires that, in an application to cross-examine on a certificate, the accused set out “the likely relevance of the proposed cross-examination” (s. 320.32(4)).
>
> [62] Most importantly for the purposes of the appeal, and as described above, the requirement for a system blank test and system calibration check within 10% of the target value of an alcohol standard that is “certified by an analyst” has been added to the section that sets out the preconditions for the presumption of accuracy, in s. 320.31(1)(a), and the language regarding what is contained in the Certificate of Qualified Technician has been removed.

[29] The court proceeded to interpret section 320.31(1)(a) with respect to a rule of strict construction of ambiguities in the *Criminal Code*, and the presumption that amendments "are made for some intelligible purpose: to clarify the meaning, to correct a mistake, or to change the law" (para 63 – 65). It went on to note that there was ambiguity in that section, because it "does not indicate how “certified by analyst" is to be proved" (para 66).

[30] The Court went on to conclude that, by its grammatical and ordinary meaning, the subsection:

> ...envisions the employment of the calibration check to confirm the accuracy of the approved instrument. The alcohol standard usefulness in this calibration procedure depends upon it containing a known concentration of alcohol, which explains the requirement that the alcohol standard be "certified by an analyst". <u>This change to the legislation indicates that successful calibration is a fundamental precondition to the existence of a presumption of accuracy</u> ... (Goldson, para 67)
>
> [Emphasis added]

[31] Further (*Goldson* continues), unlike its predecessor provision, section 258(1)(g)(i), "which expressly sets out that certificate of qualified technician must state, among other things, that the alcohol standard would be "suitable for use", the new provisions (ss.320.31(1) and 320.32(1) do not specifically tell us what facts "made under this Part" are required in the CQT to trigger the presumption of accuracy (para 68).

[32] It was noted that Parliament is presumed to know the law, including "the general rules about admissibility of evidence in criminal trials" (para 69) and that hearsay "was inadmissible unless a statutory exception was created. It is also presumed aware that for decades the legislative scheme included a similarly worded provision that set out what must be contained in the CQT.

[33] The Court in *Goldson* described the conclusion to which this reasoning had led it:

> [72] The *Amending Act* demonstrates that Parliament was aware of its ability to create a statutory exception to the rule against hearsay. As discussed above, the evidentiary short cut to allow certificates in place of *viva voce* evidence remains in s. 320.32(1) of the C*riminal Code*.
>
> [73] The revised conditions to trigger the presumption of accuracy and the omission of language in the *Amending Act* setting out the content of the certificates must be taken to be intentional, leaving the Crown with the ordinary rules of evidence to prove that the alcohol standard was "certified by an analyst" or by way of the statutorily recognized Certificate of Analyst. As the Supreme Court has recognized, the preconditions or elements now specified in s. 320.31 must all be proven, "by certificate or by oral evidence": see *Lightfoot* at 575.The content of those elements has now changed, but they must still be proven for the Crown to obtain the advantage of the statutory presumption.
>
> [74] In our view, this interpretation is consistent with the purpose of the *Amending Act* and the intention of Parliament. To require the Crown at the very minimum to tender the Certificate of Analyst at trial, which it must produce to defence under s. 320.34(1) in any event, is hardly an onerous obligation and is consistent with simplifying the law related to proof of BACs. Based on our interpretation, the conditions will be met if the Crown tenders these two certificates as long as they contain the information set out in s. 320.31(1). This provides the Crown with a very simple and effective means of establishing the presumption. A similar conclusion was reached by the trial judge in *Kelly* at para 105:
>
> > It is a relatively simple matter for police to produce a certificate showing the timing and results of readings, to ascertain that the alcohol standard was approved by an analyst, etc. These simple steps greatly facilitate proof of impaired driving offences, support enforcement of such laws and thus serve to protect the public. However, fairness to accused persons requires that these measures be strictly observed if the Crown intends to avail itself of the evidentiary shortcuts provided for in the legislation.
>
> [Emphasis added]

[34] With great respect, however, the conclusion rendered by the Court in *Goldson* would appear to fly in the face of Parliament's stated objectives in passing the Bill:

- Whereas dangerous driving and impaired driving injure or kill thousands of people in Canada every year;
- Whereas dangerous driving and impaired driving are unacceptable at all times and in all circumstances;

- Whereas it is important to deter persons from driving while impaired by alcohol or drugs;
- Whereas it is important that law enforcement officers be better equipped to detect instances of alcohol-impaired or drug-impaired driving and exercise investigative powers in a manner that is consistent with the *Canadian Charter of Rights and Freedoms*;
- 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;
- Whereas it is important to deter persons from consuming alcohol or drugs after driving in circumstances where they have a reasonable expectation that they would be required to provide a sample of breath or blood;
- Whereas it is important that federal and provincial laws work together to promote the safe operation of motor vehicles;
- And whereas the Parliament of Canada is committed to adopting a precautionary approach in relation to driving and the consumption of drugs, and to deterring the commission of offences relating to the operation of conveyances, particularly dangerous driving and impaired driving;

(Appellant's book of authorities, Vol. 1, Tab 1, p. 2)

[35] As a consequence of the above, for Parliament to shift gears (as it were) and impose a new condition which effectively negated the Crown's ability to rely on a hearsay recital in the CQT, or in the *viva voce* testimony of the technician, to the effect that "the result of which was within 10% of the target value of an alcohol standard which was certified by an analyst", (as it had been able to do prior to Bill C-46) would be counterproductive to everything stated in the preamble. It would serve to complicate, rather than "simplify the law relating to the proof of blood-alcohol concentration", which had been noted in the preamble to Bill C-46 as one of the objectives to which Parliament had aspired in passing it.

[36] I observe that the modern approach to statutory interpretation was conclusively settled by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re.)*, [1998] 1 S.C.R. 27. *Rizzo's* "bottom line" may be referenced thus:

> 21. Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)),

> 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. Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.
>
> [Emphasis added]

[37] As was observed earlier, *Goldson* has not been met with universal acceptance. In *MacDonald*, Bauman, CJBC (sitting as Chief Justice of the Yukon) rejected *Goldson's* reasoning and, in so doing, held that the amendments did not introduce a new evidentiary requirement. This created the competing line of authority:

> [56] But is it accurate to say, in effect, that today's equivalent of an alcohol standard "suitable for use," that is, an alcohol standard that was certified by an analyst, has somehow been "elevated" (as suggested by the respondent) by its adoption as a precondition for the presumption of accuracy in the *2018 Amending Act*? Does this fundamentally change what the Crown must now prove, and importantly, how it might do so?
>
> [57] In my view, it has always been the case that utilizing only an alcohol standard "suitable for use" has been a necessary condition to the admission of the qualified technician's certificate, or a *practically* necessary condition when proceeding by way of a qualified technician's oral evidence in support of the reliability of the test results.
>
> [58] As for the certificate, the predecessor scheme always required the statement as to suitability. As for the oral evidence of a qualified technician, if the qualified technician were asked about but could not swear to the alcohol standard's suitability for use, the evidence of the analysis would fall short of grounding the presumption because of concerns about the reliability of the technician's evidence. Quite simply there would be no assurance that it was the output of an approved instrument operated in an appropriate manner.
>
> [59] Before the *2018 Amending Act*, asserting the suitability of the sample was only necessary at first instance if the Crown sought to establish the preconditions to the presumption of accuracy by way of the certificate of the qualified technician. Since the *2018 Amending Act*, that the qualified technician used a certified alcohol standard is something that must be established in *every case* in which the Crown

> seeks to take advantage of the presumption of accuracy contained in s. 320.31(1). The question is whether this structural change makes a difference as to whether the qualified technician may assert that fact in their certificate.
>
> [60] Respectfully, the fact that use of a certified alcohol standard has been made a precondition to reliance on the presumption of accuracy seems to be a specious reason to interpret the new scheme as imposing a new evidentiary requirement on the Crown. Although arguably it would not be terribly onerous for the Crown to provide certificate evidence from the analyst in every case, this was never a feature of the scheme in the past according to the guiding jurisprudence and runs counter to the aim and object of that scheme and the new one.
>
> [61] The error of the Court in *Goldson* was to read the addition of the certification of the alcohol standard as a precondition to be a "significant change." That understanding fails to consider the scheme (or the predecessor scheme) as a whole.
>
> [Emphasis added]

[38] The Court in *MacDonald* next explained its view of the changes wrought by the amendments:

> [63] There is no longer a distinction in the statutory text between the evidence-by-certificate and evidence-by-testimony approach. The reorganization renders the evidentiary requirements more uniform between these two approaches—no matter which approach the Crown uses to establish the preconditions for the presumption of accuracy, it must now always establish in its case that the qualified technician used an alcohol standard that was certified by an analyst. I would not call this an "elevation" of the requirement, but rather, a *standardization* of the requirement. In my view, it was a statutory anomaly that the Crown had previously only been required to introduce evidence about the suitability of the alcohol standard at first instance when proceeding by way of the technician's certificate.
>
> [64] Second, the amendments simplified the various hearsay/certificate shortcuts. There is now a single omnibus hearsay/certificate allowance for analysts, medical practitioners, and technicians. See again s. 320.32(1):
>
> A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.
>
> [65] The previous requirement that the qualified technician's certificate must assert the suitability of the alcohol standard lost its textual home. Today's s. 320.32(1) would be a poor fit, without re-complicating the now simple language.
>
> [Emphasis added]

[39] Chief Justice Bauman next references the presumption of stability in the law:

> [66] There is also a presumption of stability in the law. See *R. v. D.L.W.*, 2016 SCC 22 at para. 21:
>
> There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law: see, generally, Sullivan, at §17.5; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at paras. 1793 ff. This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear: *Walker v. The King*, 1939 CanLII 2 (SCC), [1939] S.C.R. 214, at p. 219; *Nadeau v. Gareau*, 1967 CanLII 109 (CSC), [1967] S.C.R. 209, at p. 218; *R. v. T. (V.)*, 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749, at p. 764.
>
> [67] Under this understanding of the previous scheme and of the 2018 reorganization, it is understandable that the requirement to establish that the alcohol standard has been certified by an analyst has been placed among the preconditions in s. 320.31(1). Rather than clear legislative intention to substantially change the law, these are innocuous explanations for the reorganization.
>
> [Emphasis added]

[40] I would adopt the reasoning espoused in *MacDonald* for a number of reasons. Its foundational premises with respect to the historical development of the law appear to be more sound than those in *Goldson*. Moreover, there is no evidence of a clear legislative intent to change the Crown's ability to rely on hearsay evidence to prove that the alcohol standard has been certified by an analyst as required in s. 320.31(1)(c). Finally, the conclusion in *MacDonald* is, in my view, much more commensurate with the stated objectives of Parliament in passing Bill C-46.

[41] This aligns with the reasons of the Provincial Court in *R v. Kelly*, 2023 NSPC 19. In *Kelly*, Russell, JPC dealt with a situation that was different to *MacDonald* in the sense that, in *MacDonald*, the Crown had proceeded by way of tendering the CQT, whereas in *Kelly* there were errors in the CQT. Consequently, the Crown did not rely upon it, instead calling the officer to testify to all aspects of what would normally be contained in the CQT.

[42] Judge Russell did not place a great deal of significance upon this difference, explaining that:

> [52] … to make such a fine line distinction between cases proceeding by way of Certificate of Qualified Technician and those which do not appears to be a strikingly arbitrary. It is especially so given that under both scenarios a court is

> dealing with exactly the same issue; namely that hearsay evidence is being offered to satisfy that the alcohol standard was "certified by an analyst". Hearsay is the reality no matter which of the two options are selected by the Crown. Short of directly calling the analyst to testify to the alcohol standard both certificate and *viva voce* cases deal in hearsay.
>
> [53] However, the fact remains that hearsay evidence relates to an out of court statement tendered for the truth of its contents. It is presumptively inadmissible in the absence of a categorical/common law, statutory, or principled exception to the rule. Therefore, there does remain room for the possibility that it was Parliament's intention to specifically carve out a statutory exception to the hearsay rule in cases where the Crown proceeds by way of Certificate of Qualified Technician. Afterall, section 320.32(1) does allow the Crown to adduce a certificate *in lieu* of testimony of the qualified technician as evidence of the facts alleged in the certificate.
>
> [Emphasis added]

[43] He concluded that the court was able to consider the qualified technician's *viva voce* evidence as to the contents of what would ordinarily be included in the CQT, including that the alcohol standard had been certified by the analyst. In so doing, he referenced *R v. Maan*, [2022] OJ No. 1763 (Ontario Superior Court of Justice) and, in particular the following paragraph thereof:

> 8. I have reviewed and considered the *Queen v. Bahman*, 2020 ONSC 638, the *Queen v. Porchetta*, 2021 ONSC 1084 and the *Queen v. Dulal*, 2021 ONSC 2798 and the *Queen v. Singh*, 2021 ONCJ 539. These cases make it clear that the Crown has two options when seeking to prove the content of a Certificate of Analyst; it can be done by introducing the certificate without a witness, pursuant to s. 320.32, provided the notice provisions are met, or through the *viva voce* evidence of the breath technician. I am aware that the *Queen v. Goldson*, 2021 ABCA 193, takes a different view on this issue.
>
> [Emphasis added]

[44] In deciding to apply the reasoning in *MacDonald*, Judge Russell reasoned:

> [80] I will not speculate that the document he looked at might have been different than the original. I adopt the following passages from R. v. Cardwell, as they are equally applicable in the matter before me:
>
> > 24… the authorities set out that the hurdle that the Crown faces is low. In *R. v. MacDonald*, *supra*, the court made it clear that all that was required is proof, whether by certificate or oral evidence, that the alcohol standard was certified…[by an analyst]…

> 25 Based on *R. v. MacDonald*, *supra*, it is clear that the burden on the Crown is a low one and is to simply prove that the alcohol standard was certified. On the evidence before the Court, the Crown has met that burden and has proved beyond a reasonable doubt that the alcohol standard used was certified by an analyst.
>
> 26….to accede to the defence argument is to engage in speculation or conjecture. I note that, if there was any concern more than speculation or conjecture, then defence could have brought an application for further disclosure or could have applied to cross examine the analyst.
>
> [Emphasis added]

[45] My reasons in this case, as set out above, were substantially complete when two recent Court of Appeal decisions from the Province of New Brunswick were released. They too, provide very strong support for the position expressed in *MacDonald*. These decisions are *Rousselle v. R*, 2024 NBCA 3 and *Larocque v. R*, 2024 NBCA 4, respectively.

[46] The principal reasoning relied upon in each is found in *Rousselle*, where LaVigne, JA stated:

> [57] I adopt the reasoning and analysis of Bauman C.J., who was for the Yukon Court of Appeal in *MacDonald,* as well as its comprehensive interpretive analysis, which I believe is consistent with the teachings of the Supreme Court, the purpose of An Act to amend the *Criminal Code* and Parliament's intent.
>
> [58] Since the coming into force of amendments to the relevant provisions of the Code by An *Act to amend the Criminal Code*, the Crown must demonstrate beyond a reasonable doubt that each of the conditions set out in At para. 320.31(1) has been complied with in order to rely on the presumption of accuracy between breath test results and blood alcohol concentration of the accused at the time of the analyses. In particular, it is required that the qualified technician prior to the collection of each sample, performed a calibration test with allowed for a maximum deviation of ten per cent from the value Target of the typical alcohol certified by an analyst.
>
> [59] In *Goldson*, the Alberta Court of Appeal characterized a "change in the important" (para. 48), the addition of a precondition that requires the Crown to provide evidence that the type of alcohol used has been "certified as a by an analyst" to qualify for the presumption of accuracy. With respect, I am of the view that this condition is the functional equivalent of the requirement under which the typical alcohol was well suited to use, which in the past was a necessary condition "for the admission of the technician's certificate qualified, or a *condition that is practically* necessary when one had Use of oral testimony from a qualified technician to support reliability of the results of the analysis" (*MacDonald*, at

> para. 57). Its location in the new regime does not justify subjecting the Crown to a new evidentiary requirement.
>
> [Emphasis added]

[47] Lavigne, JA went on to emphasize that the amendments were best understood as a means of simplifying procedural and evidentiary requirements, rather than adding to them. Thus, and in effect, they should be regarded as a reorganization (as had been mentioned by the Court in *MacDonald*) rather than a change to the way the Crown would have to prove its entitlement to rely on the presumptions set forth in s. 320.31(2):

> [60] One of the of the amendments introduced by An *Act to amend the Criminal Code* consists of to eliminate the distinction between the evidence to be established in the testimony of a the qualified technician's vote and the one to be set out in the qualified technician's certificate. The effect of this reorganization is to harmonize the requirements for evidence. In order to meet the prerequisites for the presumption of accuracy, The Crown must now establish that the qualified technician used a type alcohol certified by an analyst, which is done by means of a certificate or an oral testimony. As Bauman C.J. correctly pointed out in *MacDonald*, this is not a "'reinforcing' of the requirement, but a rather a *normalization* of it" (para. 63).
>
> [61] As In the past, the new regime has provided for a mechanism for production by certificate of the relevant information in the possession of the Qualified technician. However, for the sake of simplicity, the *Act amendments to the Criminal Code consolidated the* shortcuts for certificates and hearsay in a single section, art. 320.32, which includes the requirements relating to the certificates of the analyst, the qualified technician and the qualified medical practitioner. This article provides that the certificate shall constitute proof of the facts alleged in the certificate and it specifically refers to a certificate "issued under this Part", so as to restrict the content of the certificate to information relevant to Part VIII.1 of the *Criminal Code offences*, which include offences relating to means of transport.
>
> [Emphasis added]
>
> [62] Consolidating the provisions dealing with certificates, the legislator has moved the requirement to certify that the sample alcohol has been certified by an analyst to include it in s. 320.31(1), which sets out the evidence required to establish the presumption of accuracy. This amendment has the additional salutary effect of making the certification of standard alcohol an explicit rather than implicit requirement in the event that the technician is called to testify. It would have been difficult to include this requirement in s. 320.32(1), which deals only with evidence by certificate without further complicating the organization of the provisions relating to the impaired driving.
>
> [Emphasis in original]

[48] Lavigne, JA rejected the *Goldson* Court's concern about the new provisions' lack of specifics about the content of the CQT on the following basis:

> [63] Thus noted by the Alberta Court of Appeal, the new regime does not further delineate what the technician's certificate must or can contain … However, I do not see how this diminishes the statement, which is contained at para. 320.32(1), which states that the certificate "shall prove the facts that are alleged'. On the contrary, it expands the possible content of the certificate. The provision remains a statutory exception to the rule against hearsay.
>
> [64] Paragraph 320.12(c) of the *Code* specifically recognizes that "the analysis of breath samples using an approved breathalyzer indicates blood alcohol concentration with reliability and accuracy." In this way, the legislator gives effect to the scientific opinion, recognized in R. *v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, that the resulting blood alcohol measurement using an approved breathalyzer is held to be reliable and accurate if the device works well and if handled correctly.
>
> [Emphasis added]

[49] Finally, he concluded thus:

> [69] … the Crown must disclose to the accused "a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument" as well as "the results of the system calibration checks" (ss. 320.34(1)(b) and (e)) in order to allow the accused to check, among other things, whether the condition set out in s. 320.31(1)(a) has been met.
>
> [70] Nothing in s. 320.31(1) requires confirmation of the information contained in the qualified technician's certificate. In accordance with s. 320.32(1), the certificate that is issued is evidence of the facts alleged therein. Nothing more is required. However, s. 320.32 allows the accused to apply to the court for an order requiring the attendance of the qualified technician for the purposes of cross-examination if he or she can establish "the likely relevance of the proposed cross-examination with respect to the facts alleged in the certificate" (s. 320.32(4)). For example, if the information alleged in the technician's certificate is inconsistent with the information contained in the analyst's certificate or any other document that has been disclosed, it may be relevant to cross-examine the qualified technician with respect to the contents of his or her certificate.
>
> [71] It was undoubtedly evidence to the contrary of this kind that Bauman C.J. had in mind when he said: "The certificate says that the qualified technician conducted the appropriate calibration check using an alcohol standard 'which was certified by an analyst.' That is evidence of 'the facts alleged.' There was no evidence to the contrary before the trial judge".
>
> [Emphasis in *Rouselle*]

Conclusion

[50] In my respectful view, the decision in *MacDonald* correctly disposed of the issue before this Court. Accordingly, I would allow the appeal, set aside the acquittal and substitute a conviction on the charge under section 320.14(1)(b). I would also remit the matter back to the Provincial Court for the imposition of sentence.

Gabriel, J.