Date: 2013 04 26
Docket: A-1-AP 2013000001

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

BETWEEN

PAUL PETRIN

Appellant/Applicant

- and –

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an Application by Paul Petrin for leave to appeal the decision of the Summary Conviction Appeal Court, dismissing his appeal from a conviction on a charge of having operated a motor vehicle with a blood alcohol level exceeding 80 milligrams of alcohol in 100 millilitres of blood.

A) INTRODUCTION AND OVERVIEW

1. Procedural History

[2] Mr. Petrin was found guilty after a trial held in the Territorial Court of the Northwest Territories on August 9 and 10, 2011. At the conclusion of the evidence, the Trial Judge's decision was adjourned to give counsel an opportunity to prepare written submissions. In a written decision filed November 22, 2011, the Territorial Court Judge found Mr. Petrin guilty. *R.* v. *Petrin*, 2011 NWTTC 21.

[3] Mr. Petrin appealed his conviction and sentence to the Summary Conviction Appeal Court. On July 19, 2012, that appeal was dismissed. *Petrin* v. *HMTQ*, 2012 NWTSC 60.

[4] The Memorandum of Judgment dismissing the appeal was sent to counsel shortly after it was filed. The Formal Judgment was filed August 17, 2012. As a result of an administrative error, it was not received by Mr. Petrin's counsel until November 7, 2012. Mr. Petrin instructed his counsel to make application to this Court for leave to appeal the matter further. Those instructions were received towards the end of December 2012, just before the Registrar's office closed for the holiday season. The leave application was filed January 16, 2013. It was argued in this Court on March 25, 2013.

[5] Ordinarily, this procedural history would not be relevant to the Application. In this case, it is, because Mr. Petrin argues that *R. v. St. Onge Lamoureux,* 2012 SCC 57, (*St. Onge Lamoureux*) released on November 12, 2012, has a substantive bearing on his case. Mr. Petrin argues that he can rely on *St-Onge Lamoureux* because the appeal period had not yet expired on his case when that decision was released. His position is that the appeal period began to run on November 7, when his counsel received the Formal Judgment.

[6] The Crown argues that the appeal period on Mr. Petrin's case ran from July 19, 2012, the date the Memorandum of Judgment was filed, and that it had expired by the time *St. Onge Lamoureux* was released. The Crown argues that, in any event, the changes in the law arising from that decision would not have had any bearing on the outcome of the trial or the first appeal, and are irrelevant to this Application.

2. Overview of trial proceedings

[7] Even though this Application is for leave to appeal the decision of the Summary Conviction Appeal Court, given the nature of the grounds of appeal that Mr. Petrin wants to pursue, it is necessary to refer to the trial proceedings to some extent to put the parties' positions in their proper context.

[8] At trial, the Crown called the police officer who investigated this matter. That officer testified about his interaction with Mr. Petrin on the day in question, the basis for his decision to make a breathalyser demand to Mr. Petrin, and how matters unfolded from that point on. Mr. Petrin did provide samples of his breath. A certificate setting out the results of the tests was filed. Those results were that the concentration of alcohol in Mr. Petrin's blood was above the legal limit. The Crown relied on the presumption, provided for in paragraph 258(1)(c) of the *Criminal Code*, that the test results were conclusive of what Mr. Petrin's blood alcohol level was at the time of driving.

[9] Mr. Petrin testified in his own defence, and called an expert witness, Dr. Jerry Malicky. Mr. Petrin advanced a number of arguments at trial but, for the purposes of this Application, what is relevant is the evidence that he called to rebut the presumption that the Crown was relying on. For this, he relied on his own testimony and on the testimony of Dr. Malicky.

[10] Mr. Petrin testified about his alcohol consumption during the relevant time frame. He also testified that he suffers from a condition called “acid reflux” and was experiencing symptoms of that condition shortly before he provided the samples of his breath. Specifically, he testified that he felt some of his stomach content come up in his mouth while he was at the R.C.M.P. detachment, before he provided the breath samples. He testified that he could taste "puke" in his mouth.

[11] As for Dr. Malicky, Defence sought to have him qualified as an expert witness to give opinion evidence in three areas: the absorption and elimination of alcohol in the human body; the theory and operation of breath testing devices; and the effect of acid reflux on breath testing device results.

[12] At the conclusion of the *voir dire*, the Trial Judge qualified Dr. Malicky to give opinion evidence about the absorption and elimination of alcohol in the human body; the theory and operation of the two specific breathalyser machines that he had experience with (the Borkstein and the Intoxilyzer 5000C); and the effect of mouth alcohol on breathalyser test results. The Trial Judge refused to qualify him as an expert on the condition of acid reflux or its physical effects on the body.

[13] Defence counsel sought clarification as to the implications of this ruling, and specifically, as to whether he would be permitted to ask Dr. Malicky about how acid reflux symptoms might cause alcohol in the stomach to be brought into the mouth. He indicated that if the decision on Dr. Malicky’s qualifications prevented him from doing that, he would seek an adjournment. The following exchange followed:

> THE COURT: Hold on before you get into your adjournment application, let’s deal with one thing at a time here.
>
> Now Mr. Beaver, I understand - - the reason I’m not saying you can’t ask questions about acid reflux is I don’t know how Dr. Malicky knows of the physical effects or the physical process of acid reflux. He may know that. So it’s just that as a pharmacist I won’t qualify him to give that. You can certainly ask how he knows it and then he may be able to definitively say that if a person has acid reflux there

> would be alcohol brought up. But I certainly, I would need to know how he would know that and if it's just from casual reading well then we may have a problem. I mean he says he has taken a course although he can't remember it on acid reflux but he must have. That's not, that's not an expert in this area.
>
> MR. BEAVER: So if I understand your ruling correctly then, I'm allowed to ask him those questions, of course the Court may after hearing his answer determine that it is either not an admissible answer or whatever weight it puts on.
>
> THE COURT: Mm-hmm.
>
> MR. BEAVER: Thank you. I'm prepared to proceed.

Trial transcript, p.174, line 3 to p.175 line 2.

[14] Dr. Malicky testified that the presence of alcohol in the mouth can affect the results of breathalyser tests and make them unreliable. He also testified about alcohol absorption rates and gave his opinion about what the concentration of alcohol in Mr. Petrin's blood would have been at the time of the breathalyser tests, on the basis of certain assumptions that were put to him about Mr. Petrin's drinking pattern during the relevant time frame.

[15] Dr. Malicky also testified about the condition of acid reflux and how it is treated. He explained that acid reflux can cause stomach content to come up to the mouth. He also testified that if there was alcohol in the stomach, and stomach content was brought up to the mouth because of acid reflux, there would necessarily be alcohol in the stomach content brought up to the mouth. *Trial transcript*, p.188, line 15 to p.194, line 6.

[16] In her Reasons for Judgment, the Trial Judge expressed serious concerns about the evidence of Dr. Malicky generally. She said he was not a careful witness, and that his evidence was at times over-stated and exaggerated. She gave the example of Dr. Malicky having said that he believed he had tested more individuals than anyone in the world, and questioned how he would know that.

[17] She noted that in an Affidavit Dr. Malicky had previously sworn, and was made an exhibit at the trial, he had deposed that he had been qualified as an expert witness to give opinion evidence about the effects of acid reflux on breath testing devices. During cross-examination at the trial, Dr. Malicky acknowledged that he had never, in fact, been qualified as an expert in that specific regard.

[18] The Trial Judge also addressed more specifically her concerns about Dr. Malicky's evidence dealing with the effects of acid reflux:

> Dr. Malicky had a nonchalant attitude to the evidence he was giving, especially so with respect to his education and experience. In listening to Dr. Malicky's evidence dealing with his experience, I found it surprising that Dr. Malicky was initially tendered as an expert to give expert evidence on "the effects of acid reflux on breath-testing devices", though he had sworn he had been previously qualified as an expert in this area. Yet when asked about his education or experience with respect to acid reflux, the only education or experience Dr. Malicky had was that he may have taken a continuing education course on acid reflux, but had no recollection of that; he does not keep current with respect to any literature on acid reflux; he had not done any studies in the area of acid reflux; he had no professional development in the area of acid reflux. It is not surprising that Dr. Malicky had in fact *never* been qualified as an expert in that area.

Reasons for Judgment, para.32.

[19] The Trial Judge accepted Mr. Petrin's evidence that he suffered from acid reflux and was experiencing symptoms of it on the evening in question. She also accepted Dr. Malicky's evidence that mouth alcohol can affect results of breathalyser testing. But as far as the symptoms, effects, and physical implications of acid reflux, she gave no weight to Dr. Malicky's evidence:

> Though Dr. Malicky testified as to the symptoms, effects and physical implications of acid reflux, in light of Dr. Malicky's education and experience I give very little, if any, weight to any of Dr. Malicky's evidence with respect to the symptoms of acid reflux, or its effects, if any, on the results of the analysis of breath samples taken on breath samples devices to determine blood alcohol content. I found Dr. Malicky's evidence as well as his report very conclusory; Dr. Malicky did not explain the reasons for his conclusions and in light of his education and experience in the area I find no basis to simply accept his evidence in this area.

Reasons for Judgment, para. 42

[20] Having decided that Dr. Malicky's evidence was not of any assistance on this topic, she concluded that the evidence was lacking on the details of acid reflux and its potential effects:

> In carefully reviewing the evidence on this trial, I do not know what effect acid reflux has on the analysis of breath samples. It is unfortunate that there was no evidence called on exactly what acid reflux is; whether or not there can be alcohol in the stomach (as opposed to the blood) four to five hours after ingesting it;

> whether or not coughing can bring alcohol into the mouth, as opposed to belching or burping; if alcohol is in fact still in the stomach after four to five hours, how much alcohol would be in the stomach; if acid reflux brings alcohol into the esophagus, how would that effect mouth alcohol; and possibly other questions relating to Mr. Petrin's condition that Dr. Malicky was not qualified to answer. Medical evidence may have been helpful on this trial.

Reasons for Judgment, para. 43.

[21] The Trial Judge concluded:

> In consideration of all the evidence on this trial, there being no evidence tending to show 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 Mr. Petrin's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, and that the concentration of alcohol in Mr. Petrin's blood at the time he was driving, I am satisfied beyond a reasonable doubt that Mr. Petrin was operating a motor vehicle on the dated in question, with a blood alcohol level exceeding .08, and he will be convicted of Count 2.

Reasons for Judgment, para. 45.

3. The appeal to the Summary Conviction Appeal Court

[22] On Appeal to the Summary Conviction Appeal Court, Mr. Petrin advanced a number of grounds. One was that the trial Judge erred in her conclusion that the breath samples were taken "as soon as practicable". That ground was rejected and is not being pursued on this Application.

[23] Other grounds related to the treatment of Dr. Malicky's evidence, and the impact it had on the Trial Judge's application of the relevant *Criminal Code* provisions. The Summary Conviction Appeal Court found that the Trial Judge's assessment of the reliability and probative value of Dr. Malicky's evidence was entitled to deference. The Summary Conviction Appeal Court also concluded that, having assigned no weight to Dr. Malicky's testimony about the effects of acid reflux, the Trial Judge made no error in concluding that there was no evidence to rebut the presumption set out in paragraph 258(1)(c). The Court found that without the evidence explaining the effects of acid reflux, all that was left was evidence of how much alcohol Mr. Petrin had consumed and the evidence about absorption and elimination rates, which, pursuant to paragraph 258(1)(d.01), cannot be used to rebut the paragraph 258(1)(c) presumption.

[24] The two legal issues that Mr. Petrin wishes to be granted leave to proceed to a further appeal are:

> (1) whether *St Onge Lamoureux* applies to this case and justifies a new trial being ordered, and
>
> (2) whether the Trial Judge and the Summary Conviction Appeal Court erred in their interpretation of the interaction of paragraphs 258(1)(c), 258(1)(d), and 258(1)(d.01) of the *Criminal Code*.

B) ANALYSIS

1. Legal Framework

[25] This Application is governed by section 839 of the *Criminal Code*:

> 839 (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> (*a*) a decision of a court in respect of an appeal under section 822; or
>
> (*b*) a decision of an appeal court under section 834, except where that court is the court of appeal.
>
> (1.1) An appeal to the Court of Appeal of Nunavut may, with leave of that court or a judge of that court, be taken on any ground that involves a question of law alone, against a decision of a judge of the Court of Appeal of Nunavut acting as an appeal court under subsection 812(2) or 829(2).
>
> (2) Sections 673 to 689 apply with such modifications as the circumstances require to an appeal under this section.
>
> (3) Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.
>
> (4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.
>
> (5) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part.

[26] While the wording of the provision suggests that this Court has unfettered discretion to grant leave, it is well established that not every issue of law will justify leave to appeal being granted.

[27] In *R.* v. *R.(R.)*, 2008 ONCA 497, the Ontario Court of Appeal emphasized three aspects of the provision:

> In addressing the scope of appellate review contemplated by s. 839 (1), three aspects of that provision deserve emphasis. First the appeal is not a second appeal from the trial decision; rather, it is an appeal from the decision of the Superior Court judge. Second, the appeal is limited to questions of law alone. Like the Supreme Court of Canada on indictable appeals brought under the *Criminal Code* provisions, this court cannot revisit factual findings or correct errors of mixed fact and law. Third, even if the applicant raises a question of law arising out of the decision of the Superior Court Judge, the applicant must still convince this court (or a judge of this court) that leave to appeal should be granted on that question of law. Not all questions of law merit a second appeal.

R. v. *R.(R.)*, *supra*, at para. 24

[28] The Court of Appeal concluded that the focus of the inquiry should be the apparent merits of the case and the broader potential significance of the question of law on which leave is sought. It also quoted with approval the following excerpt of *R.* v. *Chaluk* (1998), 237 A.R. 366 (C.A.):

> Section 839 of the *Criminal Code* confines leave to issues of law alone. Courts have further confined leave to matters of public importance. This public aspect underscores both the insufficiency of mere error, as well as the need to demonstrate the potential for significant impact on the administration of justice. Well settled principles of law do not present that sort of further potential. But it is also of public importance that injustices flowing from clear errors of law not be condoned.

R. v. R.(R.), *supra*, at para.31.

[29] I agree with these observations. The power to grant leave to appeal to this Court in summary conviction proceedings reaches two categories of cases. The first category is where there is at least an arguable case on an issue of law that has significance to the administration of justice beyond the immediate case. The second is where there appears to be a clear error of law. The public interest in granting leave in those two categories of cases was underscored in *R. R.(R.)*:

> The public interest in granting leave to appeal in the first category of case described above is obvious. It is this court's function, subject of course to decisions of the Supreme Court of Canada, to settle questions of law of general

> application. In doing so, the court performs a valuable function for the administration of justice beyond its error correcting function in the individual case.
>
> The value to the administration of justice in granting leave to appeal in the second category of case described above is also clear. Summary proceedings can result in criminal convictions that carry strong social stigma and serious penalties, including significant incarceration. The interests of justice require that a person who stands convicted of a serious criminal offence and has perhaps lost his or her liberty should have access to this court to review the merits of that conviction if he or she can show a strong likelihood that the conviction was sustained at the first level of appeal because of an error in law.

R. v. *R.(R.)*, *supra*, paras. 33-34.

2. Whether *St-Onge Lamoureux* has a bearing on this Application

[30] The first issue that Mr. Petrin seeks leave to appeal on is premised on the notion that the legal foundation for his conviction, and the later dismissal of his appeal, have now been found to be unconstitutional. He argues that because his case was still active when *St-Onge Lamoureux* was released, fairness dictates that he be entitled to have his case re-examined in light of the law as it now stand.

[31] Mr. Petrin's argument is persuasive if he can show that he was found guilty by operation of provisions that were found to be unconstitutional while the appeal period was still in force. The determination of whether this is so requires a close examination of the trial record and of the relevant provisions.

[32] As I have already alluded to, paragraph 258(1)(c) of the *Criminal Code* creates a presumption that the Crown can rely on, provided that certain prerequisites are met. The provision, as it read at the time of the trial and of the first appeal, stated that results from breathalyser testing are conclusive of the concentration of alcohol in the accused's blood both at the time of the testing and at the time the accused is alleged to have committed the offence "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".

[33] In *St. Onge Lamoureux*, the Supreme Court of Canada decided that the requirement for evidence tending to show the second and third thing contravened the *Canadian Charter of Rights and Freedoms*. As a result, an accused who seeks to rebut the presumption now has to adduce evidence tending to show one thing: that the breathalyser instrument malfunctioned or was operated improperly.

[34] The excerpts of the Trial Judge's decision, quoted above at Paragraphs 18-21, show that she concluded that the evidence adduced by Mr. Petrin did not tend to show that the breathalyser malfunctioned or was operated improperly. She did accept his testimony that he suffered from acid reflux and from symptoms of that condition on the night in question. She did accept Dr. Malicky's evidence that mouth alcohol can affect breathalyser results. But having decided to attribute no weight to Dr. Malicky's evidence about the effects of acid reflux, there was no basis for her to conclude Mr. Petrin's symptoms that night had the effect of bringing up alcohol in his mouth, therefore interfering with the proper operation of the apparatus.

[35] Dr. Malicky's evidence on the topic of acid reflux might, if accepted, also have been relevant to the other things then required to rebut the presumption in paragraph 258(1)(c). But any consideration of those other requirements became entirely irrelevant once the Trial Judge found there was no evidence to meet the first one. The fact that the first requirement was not met ended matters; the presumption could not be rebutted.

[36] Mr. Petrin argues that the requirements that have been struck down as unconstitutional "permeate" both the Trial Judge's decision and the Summary Conviction Appeal Court's decision. With respect, I find this submission without merit. It is true that the Trial Judge referred to provision as it then read, including the portions that have now been struck down. But she did so in the concluding paragraph of her decision. In so doing she correctly stated the legal test that was applicable at the time. But her Reasons for Judgment, read as a whole, show that the focus of her decision was whether there was evidence tending to show that the breathalyser malfunctioned due to the presence of alcohol in Mr. Petrin's mouth.

[37] The Summary Conviction Appeal Court focused on that issue as well, and correctly so. Again, any reference to the parts of paragraph 258(1)(c) that have since been struck down in the appeal decision was made in the context of referring to the law as it existed at the time of the appeal.

[38] For those reasons, I conclude that the changes in the law arising from *St. Onge Lamoureux* would not have affected the outcome of the trial or of the appeal,

and have no bearing on this Application. That being the case, I do not need to decide when the appeal period regarding the decision of the Summary Conviction Appeal Court started to run.

3. Alleged errors in the interpretation of paragraphs 258(1)(c), 258(1)(d), and 258(1)(d.01) of the *Criminal Code*

[39] The consideration of Mr. Petrin's second proposed ground of appeal must be undertaken in light of the criteria outlined above at Paragraphs 25 to 29, to determine whether it is an issue that merits a second appeal.

[40] As already stated, the two considerations on an application like this one are the merits of the grounds of appeal advanced and the importance of the issue beyond the case itself. Both considerations weigh in the balance:

> In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables – the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must be at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

R. v. R.(R.), supra, at para.37.

[41] In my view, the record of these proceedings does not disclose any clear or manifest error of law that would, in and of itself, justify leave being granted. In fact, it is not even clear to me that Mr. Petrin meets the threshold of having an "arguable case", even recognizing that it is a relatively low threshold.

[42] It was for the Trial Judge to decide how much weight she would accord to the evidence presented, and what inferences or conclusions she would draw from that evidence.

[43] In her Reasons for Judgment, as outlined above, she went to some length to explain why she had difficulties with Dr. Malicky's evidence generally, and in particular his evidence on the topic of acid reflux. It was completely open to her to attach limited weight to his evidence about acid reflux. The Summary Conviction

Appeal Court was correct in concluding that there was no basis to interfere with those findings of fact.

[44] But Mr. Petrin argues that even setting aside Dr. Malicky's evidence about the mechanics of acid reflux, the courts below were wrong in concluding that there was no evidence tending to show that the breathalyser malfunctioned, because the Trial Judge did accept Mr. Petrin's testimony that he tasted stomach content in his mouth shortly before the breathalyser tests and she also accepted Dr. Malicky's evidence that mouth alcohol, no matter how it ends up in the mouth, can affect the breathalyser readings. Mr. Petrin argues that the courts below erred in finding that the rejection of Dr. Malicky's evidence about the effects of acid reflux was fatal to the Defence's case.

[45] I disagree. Accepting that Mr. Petrin tasted *stomach content* in his mouth is not the same as accepting that there was *alcohol* in that stomach content at that point, or that that alcohol would necessarily been brought up in his mouth as a result of his acid reflux symptoms. That crucial link was required for the Defence to succeed. Trial Judge found that there was no reliable evidence establishing that link. I refer again to her comments, already quoted above at Paragraph 20:

> In carefully reviewing the evidence on this trial, I do not know what effect acid reflux has on the analysis of breath samples. It is unfortunate that there was no evidence called on exactly what acid reflux is; whether or not there can be alcohol in the stomach (as opposed to the blood) four to five hours after ingesting it; whether or not coughing can bring alcohol into the mouth, as opposed to belching or burping; if alcohol is in fact still in the stomach after four to five hours, how much alcohol would be in the stomach; if acid reflux brings alcohol into the esophagus, how would that effect mouth alcohol; and possibly other questions relating to Mr. Petrin's condition that Dr. Malicky was not qualified to answer. Medical evidence may have been helpful on this trial.

Reasons for Judgment, para. 43

[46] The type of evidence the Trial Judge refers to in this excerpt is precisely the type of evidence that was adduced in the case of *R.* v. *Coffey*, 2013 ONCJ 178. That case was decided on April 10, 2013, while this Application was on reserve, and Mr. Petrin's counsel brought it to this Court's attention. *Coffey* is very helpful in that it provides an interesting comparator and underscores the shortcomings in the evidence that were identified by the Trial Judge in this case.

[47] In *Coffey*, the trial court had the benefit of an Agreed Statement of Facts that included detailed medical evidence, and in particular, details about the effects of acid reflux. These agreed facts included, for example, a statement that in the event

that the accused was not taking his prescribed drug for acid reflux and had alcohol in his stomach, even a small amount of alcohol could be forced into his oesophagus and into his oral pharynx. Significantly, there was also evidence of a toxicologist called by the defence that, based on the assumptions presented to him, the accused could still have had some amount of alcohol in his stomach and small intestine by the time the breathalyser testing was done. That evidence was disputed by another toxicologist, called by the Crown, but the court ultimately accepted the evidence of the toxicologist called by the defence. *R.* v. *Coffey*, *supra*, at paras 13-16 and 27.

[48] In any event, leaving aside the merits of this proposed ground of appeal, Mr. Petrin has not established that the issue he wants to raise has implications beyond this immediate case. There may not be many reported cases dealing with acid reflux as "evidence tending to show" that a breathalyser apparatus malfunctioned, but there is also no controversy about whether it is evidence capable of rebutting the presumptions of accuracy and identity set out at paragraph 258(1)(c).

[49] The defence succeeded in *Coffey*, *supra*, and in *R.* v. *Lynch* (2011), 14 M.V.R. (6th) 146 (Nl Prov. Ct.) In this case, it did not succeed, but not because the Trial Judge's interpretation of the legislative scheme that governs these matters. The defence failed because, unlike the trial judges in *Coffey* and *Lynch*, the Trial Judge found that she could not give any weight to the evidence adduced in support of a crucial aspect of the defence – that there was alcohol in Mr. Petrin's stomach at the relevant time and that his acid reflux symptoms resulted in some of that alcohol being brought to his mouth. In stating that medical evidence might have been helpful on the case, the Trial Judge obviously recognized that, with the proper evidentiary foundation, the defence might have succeeded. It is noteworthy that medical evidence was called in both *Coffey* and *Lynch*, but not in this case.

[50] It seems to me that all three decisions recognize that evidence about acid reflux and its effect may constitute "evidence tending to show" that the breathalyser apparatus malfunctioned or was not operated properly. The different outcomes did not flow from inconsistent interpretations of the law, but on differences in the evidence adduced and, ultimately, on these trial judges' assessment of the evidence before them.

[51] On that basis, I conclude that the legal issue that Mr. Petrin wishes to raise does not have a potential impact on the administration of justice generally.

C) CONCLUSION

[52] As the Ontario Court of Appeal stated in *R. v. R.(R.)*:

> Appeals are an integral part of the criminal justice system in Canada. They protect against wrongful convictions and enhance the fairness of the process. The benefits afforded by the appellate process, however, come at some cost. Appeals extend the life of criminal proceedings, thereby exacerbating the uncertainty and anxiety the process causes to individuals caught up in it. Most appeals fail and ultimately delay the imposition of the appropriate order made at first instance. Prolonged appellate proceedings detract from the timeliness and finality of criminal verdicts. Dispositions in criminal matters made in the detached, rarefied climate of the appeal court, years after the relevant events, by a court with virtually no connection to the place or people affected by the allegation are not the ideal way to resolve criminal cases.
>
> (…)
>
> Canadian criminal law policy balances the benefits of appellate review and the negative effects inherent in that process by distinguishing between first and second levels of appeal in criminal proceedings. Access to the former is virtually carte blanche. Access to the latter is narrowly restricted.

R. v. *R.(R.)*, *supra*, at paras 16 and 18

[53] Bearing those principles in mind, and for the reasons set out above, I am not satisfied that this case is one where it would be appropriate to grant Mr. Petrin leave to appeal this matter further.

[54] The Application is dismissed.

L.A. Charbonneau
J.A.

Dated at Yellowknife, NT, this
26th day of April 2013

Counsel for the Appellant/Applicant: Shawn Beaver
Counsel for the Respondent: Jennifer Bond

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
