R v Kenny, 2024 NWTSC 29

Date: 2024-06-14
Docket: S-1-CR-2022-000 092

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

Appellant

-and-

ROCKY KENNY

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] On December 18, 2018, Part 2 of *An Act to amend the Criminal Code (offenses relating to conveyances) and to make consequential amendments to other Acts*, SC 2018, c 21 (the *Amending Act)* came into force. The *Amending Act* created Part VIII.1 of the *Criminal Code* RSC 1985, c C-34 (the *Criminal Code*), replacing the legislative framework that deals with driving offenses.

[2] The issue in this appeal concerns the interpretation of certain evidentiary provisions of that framework. The same issue arose in an unrelated case, *R v Whittle* (CR-2022-000107). Because the issue raised in these appeals is identical, the two were heard together. Although filed as a separate decision, the Memorandum of

Judgment in *Whittle* is essentially identical to this one, except for the relief granted. *R v Whittle*, 2024 NWTSC 30.

[3] Given the narrow nature of the issue, the details of the circumstances that led to the investigation and arrest of the Respondents are not relevant. The key elements that are relevant are that:

(a) they were charged with having had, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that was equal or exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to section 320.14(1)(b) of the *Criminal Code*;

(b) they were the subject of a demand by a peace officer to provide samples of their breath and did provide breath samples;

(c) at trial, the Crown sought to prove the Respondents' blood alcohol concentration by filing a certificate signed by the Qualified Technician (QT) who obtained the breath samples and relied on a provision that deems the results of the breathalyser tests to be accurate if certain conditions are met.

[4] Section 320.31(1) of the Code sets out certain conditions the Crown must meet to benefit from a statutory presumption that the results of a breath test are conclusive proof of blood alcohol content. The issue at both trials was whether the Crown had adduced admissible evidence proving all the conditions required to engage this presumption. Both trial judges found that the Crown had failed to prove one of the conditions and that the presumption was not engaged. As a result, there being no evidence of the Respondents' blood alcohol concentration, they were found not guilty.

II) THE ISSUE

[5] This appeal turns on the interpretation of two provisions.

[6] The first is section 320.31(1) itself:

> 320.31 (1) If samples of a person’s breath have been received into an approved instrument operated by a qualified technician, the results of the analyses of the samples are conclusive proof of the person’s blood alcohol concentration at the time when the analyses were made if the results of the analyses are the same — or, if the results of

> the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made — if
>
> > (a) before each sample was taken, the qualified technician conducted a system blank test the result of which is not more than 10 mg of alcohol in 100 mL of blood and a system calibration check the result of which is within 10% of the target value of an alcohol standard that is certified by an analyst;
> >
> > (b) there was an interval of at least 15 minutes between the times when the samples were taken; and
> >
> > (c) the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ by more than 20 mg of alcohol in 100 mL of blood.

[7] The second is section 320.32(1), which allows the Crown to present certain evidence by filing certificates:

> 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.
> (...)

[8] The certificates in these cases included, among other things, an assertion that the QT had conducted the tests required to engage the presumption set out at section 320.31(1)(a). With respect to the calibration test, each certificate stated:

> 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.

[9] The issue is whether a QT's certificate that includes such an assertion is admissible to prove that the alcohol standard used by the QT to perform the calibration test was "certified by an analyst", or whether that fact has to be proven by evidence from the analyst who certified the alcohol standard.

[10] The Appellant argues that the trial judges erred in concluding that the certification of the alcohol standard had not been proven. The Respondents argue that the trial judges were correct in concluding that in order to prove this fact, the Crown was required to adduce evidence from the analyst, either by certificate or by calling the analyst as a witness.

III) STANDARD OF REVIEW

[11] On appeal, issues of statutory interpretation are reviewed on a standard of correctness.

[12] The interpretation of these provisions has given rise to litigation across the country. It has led to conflicting results at both the trial and appellate levels. Examples include *R v Goldson*, 2021 ABCA 193, leave to appeal to SCC refused, 2022 CanLII 10371 (SCC) [*Goldson*]; *R v MacDonald*, 2022 YKCA 7 [*MacDonald*]; *R v Rousselle*, 2024 NBCA 3 [*Rousselle*]; *R v Larocque*, 2024 NBCA 4 [*Larocque*]; *R v Hepfner*, 2022 ONSC 6064, *R c Vigneault*, 2021 QCCS 3341 (leave to appeal granted, *R c Vigneault*, 2021 QCCA 1411); *R v MacKenzie Wright*, 2023 SKKB 236. *R v Greening*, 2024 NSSC 57. There are several other cases dealing with the interpretation of these provisions. At the time of writing, the only cases that I am aware of where courts of appeal have decided the issue that is before this Court in these appeals are *Goldson*, *MacDonald*, and *Rousselle*. *Larocque*, although dealing with the interpretation of the same provision, raised a slightly different issue.

[13] *Goldson* concluded that the QT's certificate cannot be used to establish that the alcohol standard was certified by an analyst. *MacDonald* concluded that it can. *Rousselle*, decided sometime later, adopted the *MacDonald* interpretation. Trial courts in several provinces have followed *MacDonald*. Courts in Québec have sided with the *Goldson* interpretation.

[14] Given this divide, regardless of the outcome of these appeals, I do not expect that mine will be the last word on the issue in the Northwest Territories. It also seems clear that in order for there to be consistency across the country in this important area of the law, the debate will eventually have to be settled by the Supreme Court of Canada, or by Parliament through a clarifying amendment.

IV) RULES OF STATUTORY INTERPRETATION

[15] The modern approach to statutory interpretation requires that words used in legislation be considered in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament. *R v Alex*, 2017 SCC 37 at para 24; *Bell ExpressVu Limited Partnership v Rex*, 2022 SCC 42 at para 26.

[16] Ambiguities are not uncommon, even when the text may seem clear at first blush. As recently noted by the Supreme Court of Canada:

> First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (R v Alex, 2017 SCC 37 at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (Montréal (City) v 2952-1366 Québec Inc, 2005 SCC 62 at para. 10).
>
> Second, a provision is only "ambiguous" in the sense contemplated in Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42, if its words can reasonably be interpreted in more than one way after due consideration of the context in which they appear and of the purpose of the provision (paras 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the Canadian Charter of Rights and Freedoms — only if differing readings of the same provision cannot be decisively resolved through the contextual and purposive approach set out by Driedger.

La Presse inc v Quebec, 2023 SCC 22 at paras 23 and 24.

[17] When dealing with a bilingual statute, as is the case here, it may also assist to compare the French and English versions. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham ON: LexisNexis, 2014), pp 447-454, 679-700, and 113-144. [*Sullivan*].

[18] Prior versions of the legislation are also instructive. *Sullivan*, pp. 660-678. The evolution of provisions forms part of the context within which the most recent legislative scheme must be understood. In addition, it is generally presumed that amendments to the wording of a statute are made for a reason: to clarify the meaning, to correct a mistake or to change the law. *Goldson* at para 65.

V) OVERVIEW OF EVOLUTION OF THE LEGISLATIVE FRAMEWORK

[19] The competing interpretations of the current provisions are in part based on earlier iterations of the legislative framework and can only be understood in light of how the regime operated in the past. Given this, a brief overview of the how this legislative regime has evolved over the years is a useful starting point.

[20] Some of the cases I have been referred to include detailed reviews of the legislative evolution and jurisprudence in this area. *Goldson*, paras 31-53;

MacDonald, paras 28-42. For present purposes I will only highlight certain aspects of that history, and more particularly, those that are most relevant to understanding where the *Amending Act* altered the legal landscape and where it did not.

[21] Drinking and driving legislation is a technical and complex area of the law, in part because of the scientific nature of determining blood alcohol concentration and the impact this has on evidentiary issues. This complexity has resulted in a legislative scheme that includes somewhat cumbersome and convoluted provisions. It has also led to extensive litigation.

[22] Until the *Amending Act* came into force, the "over 80" offence was defined as operating a vehicle - or being in the care and control of it - while having a blood alcohol concentration that exceeds the legal limit. This created evidentiary challenges as there would inevitably be a lapse of time between the alleged commission of the offence and the time when evidence of the blood alcohol concentration could be obtained. Given this, and due to the technical nature of breathalyser testing, the legislative scheme dealing with "over 80" offenses has always included evidentiary shortcuts.

[23] One shortcut became known in the caselaw as the "presumption of identity". Provided that certain conditions were met, it deemed the accused's blood alcohol concentration at the time of testing to have been the same at the time of the driving, unless the accused adduced evidence to the contrary. The purpose of this presumption was to bridge the gap between the time of the testing and the time of the driving. Without it, the Crown would have had to call expert evidence in every case to extrapolate the breathalyser results back to the time of driving.

[24] The second short-cut became known as the "presumption of accuracy". It allowed the Crown to use a certificate prepared by a QT as proof of its contents without the need to call its author as a witness, provided the certificate met certain requirements. It was, in effect, a codified exception to the rule against the admissibility of hearsay. The provision also created a presumption that the information set out in the certificate - including breathalyser test results - was accurate. The provisions were interpreted as leaving it open to an accused to call evidence to rebut the presumption and challenge the accuracy of the results. *R v St Pierre,* 1995 CarswellOnt 6, [1995] 1 SCR 791 at para 48.

[25] Before 2008, the legislative scheme included, as a condition for the admissibility of the certificate, the requirement that the certificate include a declaration that the QT, before conducting the test, ascertained the proper functioning of the breathalyser instrument by using a substance suitable for use in

that instrument. The original provisions referred to "a solution". That term was eventually replaced by the term "alcohol standard". There was no mention of the alcohol standard being "certified".

[26] The legislative scheme did however contemplate a certification process for the substances used for the calibration test. Reference to analysts preparing certificates to this effect were part of the regime from the start. *Goldson*, para 33.

[27] An issue eventually arose as to whether the QT's certificate was sufficient to prove the suitability of the substance used to test the instruments (by then, the legislation used the term "alcohol standard"), or whether the Crown was required to call evidence from the analyst, by testimony or through a certificate, to prove this. The caselaw was divided on this point. The issue eventually went to the Supreme Court of Canada, which concluded that the suitability of the substance could be proven through the QT's certificate. *Lightfoot v R*, 1981 CanLII 47 (SCC), [1981]1 SCR 566 [*Lightfoot*].

[28] In 2008, Parliament enacted the *Tackling Violent Crime Act*, SC 2008, c 6. That legislation amended several aspects of the "over 80" legislative scheme.

[29] The structure of the scheme was altered in that the "presumption of accuracy" was removed from the certificate provision and "combined" with the presumption of identity. Conditions had to be met for both presumptions to be triggered. The ability for the Defence to challenge both these presumptions was significantly curtailed:

> S.258(1)
> (...)
> (c) where samples of the breath of an accused have been taken pursuant to a demand (...), if (...)
>
> > (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
> > (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
> > (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of

> the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things - that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in 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.

In *R v St-Onge Lamoureux* 2012 SCC 57, two of the requirements placed on accused to rebut the presumptions (causality and proof that blood alcohol concentration level was not over the legal limit) were found to be contrary to the *Charter*. The requirement that "evidence to the contrary" pertain to breathalyser malfunction or its improper operation were upheld as constitutional.

[30] The conditions required to be proven to trigger the presumptions did not include any reference to testing the breathalyser instrument. Those requirements remained in the "certificate" provision, at section 258(1)(g). Certificates continued to be admissible for their truth. As had been the case with its predecessor, the provision outlined the information that had to be set out in the certificate for it to be admissible. This included a declaration that the QT ascertained that the instrument was in proper working order "by means of an alcohol standard suitable for use with an approved instrument".

[31] Provisions referring to analysts certifying the suitability of alcohol standards, preparing certificates to this effect, and how such certificates could be entered in evidence, also remained.

[32] This is where things stood before the enactment of the *Amending Act*.

VI) THE CHANGES BROUGHT ABOUT BY THE *AMENDING ACT*

[33] The *Amending Act* altered the legislative framework in a number of ways.

[34] First, the "over 80" offence itself was changed: it is now defined, subject to a narrow exception that is not relevant here, as having a blood alcohol concentration equal to or in excess of the legal limit within two hours of having ceased to operate a conveyance. This change renders largely irrelevant intervening events between the time of driving and the time of testing and eliminates many avenues of defences that were available to accused under the previous law. The scheme no longer

includes a presumption of identity, as the elements of the new offence have rendered that presumption redundant.

[35] Second, the presumption of accuracy has been strengthened: if the conditions to engage it are met, the breathalyser results are "conclusive proof" of the accused's blood alcohol concentration at the time of testing. The ability to call evidence to challenge breathalyser results had already been narrowed considerably in the 2008 amendments, but never as much as now.

[36] Third, section 320.32, which governs the admissibility of certificates without calling their authors, no longer prescribes what information must be included in those certificates, beyond describing the certificate as one "made under this Part".

[37] Fourth, section 320.34 sets out disclosure requirements that are linked to the conditions required to engage the presumption of accuracy that pertain to the proper operation of the breathalyser instrument:

> 320.24(1)
> (...) the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in paragraphs 320.31(1)(a) to (c) have been met, namely:
>
> (a) the results of the system blank tests;
> (b) the results of the system calibration checks;
> (c) any error or exception messages produced by the approved instrument at the time the samples were taken
> (d) the results of the analysis of the accused's breath samples; and
> (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument.

[38] Finally, and this is the change that bears most directly on the issue in these appeals, the *Amending Act* addresses the QT's responsibilities to ascertain the proper operation of the instrument differently from how the previous legislation did.

[39] The first difference is a structural change. As noted above, after the 2008 amendments, the steps that the QT had to take to ensure the proper functioning of the breathalyser instrument were conditions for the admissibility of the QT's certificate. Now, they are included in the conditions required to engage the presumption of accuracy.

[40] The other difference is in the description of what the QT is required to do. There is a new requirement: the QT has to perform a blank system test *and* the result has to be not more than 10 mg of alcohol in 100 ml of blood.

[41] Next, the calibration test remains, but the legislation is more specific than it was before. Previously, the wording required the QT to "ascertain the proper functioning of the instrument by means of an alcohol standard suitable for use in the instrument". Now, the requirements in s 320.31 are that: (a) the QT perform a calibration check; (b) the result must be within 10% of the target value of an alcohol standard; and (c) the alcohol standard used must be one that is certified by an analyst.

VII) THE JURISPRUDENTIAL DEBATE

[42] As I noted at the outset, the competing currents of jurisprudence as to the proper interpretation of the new regime are the interpretations in *Goldson* and *MacDonald*. The divide between those two decisions boils down to the evidence required to meet the preconditions in s 320.31(1)(c), more specifically, what the words “certified by an analyst” entail. The courts in these two cases considered the same factors in their analyses: the purpose of the legislation, its evolution, the past jurisprudence, modern principles of statutory interpretation, and the wording of the new provisions. Yet, they reached opposite conclusions.

[43] Both analyses are comprehensively outlined by LaVigne JA in *Rousselle*, at Paragraphs 41-52. That decision also summarizes cases that have been decided since.

[44] As I already noted, the *Goldson* court concluded that in order for the Crown to benefit from the presumption set out at section 320.31(1), it has to present evidence that the alcohol standard used for the calibration test was certified by an analyst, and that the Crown cannot prove that fact through an assertion in the QT's certificate.

[45] The court considered that the change in the wording referring to the alcohol standard (from "suitable for use in an approved instrument" to "certified by an analyst") was significant, as was the fact that reference to it was now included in the conditions required to create the presumption of accuracy. *Goldson*, paras 47-48, 61-62 and 70-73.

[46] The court in *Goldson* also noted the change to the certificate provision. The former certificate provision specified what had to be included in a certificate, while

the new s 320.32(1) simply states that a certificate of analyst, qualified medical practitioner, or qualified technician “made under this Part” is evidence of the facts alleged in it. The court concluded that the change made the exception to the inadmissibility of hearsay more narrow than it had previously been, and that this too was significant. *Goldson*, paras 49-53.

[47] The court also observed that, given that the regime allows the Crown to prove the analyst's certification by way of certificate, an interpretation that results in this additional evidentiary burden on the Crown does not unduly complicate these prosecutions and is not at odds with the purpose of the *Amending Act*. *Goldson*, para 74.

[48] The *MacDonald* court reached the opposite conclusion. It concluded that a declaration in the QT's certificate that the alcohol standard used for the calibration test "was certified by an analyst" is admissible evidence to prove that the standard was so certified, and sufficient to meet the requirement of section 320.31(1)(a).

[49] The court found that the various changes in how the provisions were structured were aimed at simplifying and streamlining the legislative scheme. Specifically, the *MacDonald* court did not view the introduction of the language "certified by an analyst", or the calibration test having become a condition for triggering the presumption of accuracy, as having been intended to alter the Crown's evidentiary burden from what it was under the previous scheme. It found that the analysis and conclusions reached in *Lightfoot* remain applicable under this new regime: just as a QT's certificate could establish that the alcohol standard used to ascertain the proper functioning of a breathalyser instrument was "suitable for use", a QT's certificate could establish that the alcohol standard used was certified by an analyst. *MacDonald*, paras 35-44; 63-75.

[50] *MacDonald* also concluded that the changes to the certificate provision rendered the exception to the inadmissibility of hearsay more broad, not more restrictive. *MacDonald*, paras 52-54.

[51] It also found that the language in section 320.32(1) was clear. Noting that the QT's certificate filed at trial in that case included a statement by the QT that the alcohol standard used to conduct the calibration check was certified by an analyst, the court said:

> The point is simply this, if the qualified technician's certificate is "evidence of the facts alleged" in it, the Crown has, by filing the certificate, introduced evidence that the alcohol standard was certified by the analyst.

MacDonald, para 46.

VIII) WHICH INTERPRETATION SHOULD PREVAIL?

[52] The Appellant urges this Court to adopt the *MacDonald* approach, while the Respondents argue that the trial judges in these cases were correct in following *Goldson*. The jurisprudential divide demonstrates that reasonable people can disagree about the correct interpretation of these provisions.

[53] I am mindful of the persuasive weight of jurisprudence from the Alberta Court of Appeal in this jurisdiction, as the Court of Appeal for the Northwest Territories is largely composed of judges who sit on that Court. Still, *Goldson* is not binding. In addition, since it was decided, there have been many other decisions on this issue, many of which have not endorsed its interpretation. I must therefore embark on my own analysis of these provisions.

1. The objectives of the *Amending Act*

[54] There is no debate between the parties as to the objectives of the *Amending Act*.

[55] Over the years, Parliament has progressively put in place mechanisms that enhance the tools available to the Crown in the prosecution of drinking and driving offenses. This is not surprising, given the ravages that drinking and driving has caused, for decades, across Canada, and has been consistently recognized by our courts, including the Supreme Court of Canada. *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 16; *R v Lacasse*, 2015 SCC 64.

[56] The Preamble of the *Amending Act* reflects this. It refers, among other things, to the injuries and deaths that drinking and driving and dangerous driving cause every year, to the fact that drinking and driving and dangerous driving are unacceptable at all times and in all circumstances, and to the importance of simplifying the law relating to the proof of blood alcohol concentration.

[57] The provisions themselves also shed light on Parliament's purpose in enacting them. The new Part VIII.1, entitled "Offenses Relating to Conveyances", begins

with a list of defined terms. This is followed by a "Recognition and Declaration" provision:

> 320.12 It is recognized and declared that
> (a) operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
> (b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
> (c) the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration; and
> (d) an evaluation conducted by an evaluating officer is a reliable method of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

[58] The statements made by the Minister of Justice and others when the legislation was introduced and debated in Parliament make clear that the *Amending Act* was intended to simplify the law in this area, make trials more efficient, and avoid some of the delays caused by challenges to the results produced by breathalyser instruments, in light of the body of scientific knowledge that shows that these instruments produce accurate results when they are operated properly. *House of Commons Debates*, No 148, Hansard Number 181, 42-1, May 19, 2017 (Hon Jody Wilson-Raybould).

[59] All that being said, I find the legislative objectives, clear as they might be, are of limited assistance in resolving the interpretation issue.

[60] I say this because the *Amending Act* altered the legislative framework in a substantive way. It changed the *actus reus* of the "over 80" offence, which has significant consequences and removes substantive defences that were previously available. It added certain details to the process that must be followed by the QT to ensure that the breathalyser instrument is functioning properly. It strengthened the presumption of accuracy.

[61] The new regime gives effect to the scientific opinion that breathalyser instruments produce accurate and reliable results provided that they are functioning properly and operated properly, as had been recognized in *R v St-Onge Lamoureux*, 2012 SCC 57, para 111. That being the case, I do not think that it would be

incongruous at all to bolster requirements imposed on the Crown to establish that the instrument was indeed functioning properly.

[62] In other words, I disagree with the proposition that adding to the Crown's evidentiary burden would necessarily be inconsistent with Parliament's objectives to simplify and streamline the law in this area. As one judge put it:

> Simplification of the law of impaired driving by Parliament is not incompatible or otherwise incongruous with the adoption of corresponding new safeguards designed to protect the accused.

R v Adams, 2023 NBPC 3, para 40.

[63] This is why I do not find that a consideration of Parliament's objectives in enacting this legislation is of any great assistance in resolving the interpretation issue before me. I find that both interpretations would result in a scheme that would be consistent with Parliament's intent.

2. The French text of the provisions

[64] The Appellant argues that the French text of section 320.31(1)(a) supports its position. I do not find this submission persuasive.

[65] The relevant portion of the French text reads:

> 320.31 (1) Lorsque des échantillons de l'haleine d'une personne ont été reçus dans un éthylomètre approuvé manipulé par un technicien qualifié, les résultats des analyses de ces échantillons font foi de façon concluante de l'alcoolémie de la personne au moment des analyses, cette alcoolémie correspondant aux résultats de ces analyses lorsqu'ils sont identiques ou au plus faible d'entre eux s'ils sont différents, si les conditions suivantes sont réunies :
>
> a) avant le prélèvement de chaque échantillon, le technicien qualifié a fait un test à blanc ayant donné un résultat d'au plus dix milligrammes d'alcool par cent millilitres de sang et un test d'étalonnage ayant permis d'observer un écart maximal de dix pour cent par rapport à la valeur cible de l'alcool type certifié par un analyste;
>
> b) les échantillons ont été prélevés à des intervalles d'au moins quinze minutes;
>
> c) les résultats des analyses, arrondis à la dizaine inférieure, montrent une alcoolémie variant d'au plus vingt milligrammes d'alcool par cent millilitres de sang.

[66] As I understand the argument, the Appellant says that the French version is more precise than the English text. This is based on verb tenses used in section 320.31(1)(a).

[67] In describing the calibration test, the wording used in French is "(...) un test d'étalonnage *ayant permis d'observer* un écart maximal de dix pour cent par rapport à la valeur cible de l'alcool type certifié par un analyste (...) ". The wording used in English is "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 (...)".

[68] In its Factum, the Appellant writes:

> (...) the use of the past-participle in the French text makes clear that the action of comparing the results of the calibration check to the target value certified by an analyst (which would include confirming that the alcohol standard, was, in fact, certified by an analyst) is done and completed in the past. This clarifies who Parliament intended would confirm the facts referred to in s.320(1)(a): the qualified technician, whose analyst would be conducted and completed in the past, and not the court, in the present.

Appellant's Factum, Paragraph 69.

[69] I disagree. The QT is responsible for taking steps to ensure that the breathalyser is in working order, and for conducting the two tests referred to in section 320.31(1)(a). In order to do this, the QT must be satisfied that the alcohol standard used for the calibration test is certified by an analyst. This will always have happened "in the past" in reference to the time of trial.

[70] However, separate and apart from that, for the section 320.31(1) presumption to be engaged at trial, the trier of fact has to be satisfied that the conditions set out in the provision are met. This, I find, includes the fact that the calibration test was done using an alcohol standard that was certified. In this regard, I agree with *MacDonald* that the certification of the alcohol standard is a fact that the Crown has to prove. *MacDonald*, para 45.

[71] The question is not *whether* evidence has to be adduced before the trier of fact about the certification of the alcohol standard. The question is *how* the Crown can prove this fact: through the QT's certificate (or presumably, the QT's *viva voce* testimony if the QT is called), or by presenting evidence from the analyst who certified the standard. The differences in the tenses used in the French and English text of the provision do not assist in resolving that issue.

[72] I am reinforced in this view by the fact that none of the French and bilingual decisions on this particular interpretation issue (from Québec and New Brunswick) make any reference to the difference between the French and English texts as being of any assistance in resolving this interpretation issue.

[73] This is especially interesting in the context of the companion cases of *Rousselle* and *Larocque* from New Brunswick. *Rousselle* examined the same issue as the one that arises here. The analysis of the court does not include any discussion about the differences between the French and English text of section 320.31(1) that the Appellant attempts to rely on here.

[74] By contrast, in *Larocque* (decided by the same panel), the issue was whether the Crown was required to establish, to benefit from the presumption, the target value of the alcohol standard used to perform the calibration test. *Larocque,* para 20.

[75] In concluding that it did not, the court relied in part on the French wording of the provision and found that it cleared up any ambiguity that may arise from the English text:

> I would make one final comment concerning the French version of s. 320.31(1)(a), and, more specifically, the phrase "la valeur cible de l'alcohol type certifié par un analyste" (the target value of an alcohol standard certified by an analyst). It is obvious that the certification of the analyst does not apply to the target value of the alcohol standard, but only to the fact that this alcohol standard is suitable for use with an approved instrument, since the word "certifié" (certified) is in the masculine gender (thus qualifiying the term "alcohol type" (alcohol standard) rather than the feminine gender (as if it were qualifying the term "valeur cible" (target value).

Larocque, para 50.

[76] Evidently, the Court of Appeal of New Brunswick was alive to the potential usefulness of comparing the English and French texts when resolving interpretation issues. Yet, in *Rousselle*, in examining at length the issue that is before me, the court did not rely on any differences between the two versions.

[77] Comparing the English and French text of bilingual legislation can sometimes be very instructive on interpretation issues. However, I do not find this to be the case here.

3. The wording of the provisions

[78] To resolve the interpretation issue, I find that the most helpful clues lie in the wording of the provisions themselves, considered in the context of the history of the legislative framework.

[79] This legislative scheme has always contemplated the existence of safeguards to ensure that QTs verified that the instrument was functioning properly.

[80] The regime, as it operated for many years before the *Amending Act* came into force, included the following features:

> (a) the Crown could rely on a QT's certificate for proof of its contents;
>
> (b) the content of the certificate was specified by statute (and this content was also a requirement for admissibility);
>
> (c) one of the things that had to be included was that the QT had ascertained the proper functioning of the instrument by using an alcohol standard suitable for use in the instrument;
>
> (d) the legislation provided for analysts to certify the suitability of an alcohol standard for this use, and outlined a means of proving this certification either by testimony or by filing the analyst's certificate.

[81] While these requirements were tied into the admissibility of the certificate, practically speaking, if the Crown sought to prove its case by calling the QT as a witness, that witness would have to satisfy the trier of fact that the instrument was functioning properly. Establishing this would be a practical necessity even in cases where the Crown was not relying on the certificate. *MacDonald*, paras 57-58.

[82] Before the *Amending Act*, the testing process was a condition of admissibility of the QT's certificate. It was not listed as a condition to trigger the presumption of accuracy. Still, in cases where the Crown sought to rely on the certificate, it was a fact that the Crown was required to prove.

[83] It was in this context that *Lightfoot* arose. To repeat, the issue in that case was whether the assertion in the certificate that the QT had "ascertained the proper functioning of the instrument by using an alcohol standard suitable for use in the instrument" was sufficient, or whether the Crown was also required to adduce evidence from the analyst who had certified the alcohol standard as "suitable for

use". The Supreme Court of Canada concluded that the Crown could rely on the assertion in the certificate. *Lightfoot* at para 14.

[84] In short, there has always been a role, in this legislative scheme, for analysts to certify that solutions or alcohol standards were suitable for use in breathalyser instruments. QTs tasked with verifying the proper functioning of the breathalyser instruments have always had to use a solution or alcohol standard that was "suitable for use" and the legislation contemplated that this "suitability for use" would be certified by someone else - the analyst.

[85] Although the wording "certified by an analyst" did not appear in previous provisions that described the calibration tests that QTs were required to perform before taking samples, the certification process for the alcohol standard and its role in the overall scheme are nothing new. QTs have always had to rely on the certification by an analyst to determine that the alcohol standards they were using to test the breathalyser instrument were suitable for that use. The suitability of the alcohol standard is not a fact that the QT has personal knowledge of. Suitability is determined by the analysts. That was the case under the previous regime. Yet, the Supreme Court of Canada concluded in *Lightfoot* that evidence emanating from the analyst was not required.

[86] Despite the structural and substantive changes brought about through the *Amending Act*, I find it difficult to distinguish the interpretation issue that arises here from the one that was decided in *Lightfoot*. I reach the same conclusion in this regard as the *MacDonald* court did. *MacDonald*, paras 35-42.

[87] I find that the words "alcohol standard certified by an analyst" are the functional equivalent of the expression "alcohol standard suitable for use in an approved instrument" in the previous regime. *Rousselle*, para 59. I respectfully disagree with *Goldson* that the change in this wording, and the fact the requirement moved from the "certificate provision" to the "presumption provision" justifies a conclusion different than the one reached in *Lightfoot*.

[88] The analysis in *Goldson* places considerable weight on changes to the certificate provision, which is the basis for the admissibility of the QT's certificate for its truth. As I mentioned previously, earlier versions of the certificate provision set out what was to be included in the certificate. This was a condition for admissibility but at the same time also determined (and therefore limited) what facts could be proven in this manner, as an exception to the usual rule against the inadmissibility of hearsay. The new provision merely states that a certificate "is

evidence of the facts alleged in the certificate", without any limitation. As I already noted, *Goldson* reasoned that the effect of this was to make the hearsay exception more narrow than had previously been the case.

[89] I respectfully disagree. I accept that exceptions to the usual rules of evidence, including the inadmissibility of hearsay, must be strictly construed. Still, I find it difficult to see how eliminating a fixed list of items from the provision can result in narrowing its scope. On the contrary it seems to me that the current certificate provision is much broader than the previous one. *MacDonald*, para 52; *Rousselle*, para 63.

[90] I also find this change is consistent with Parliament's objectives. It builds in some flexibility as to what can be included in the QT's certificates, and accounts for adjustments that may have to be made from time to time.

[91] I recognize that interpreting this provision broadly could theoretically open the door to an attempt by the Crown to include all sorts of other facts in the QT's certificate to avoid having to call *viva voce* evidence on topics that have nothing to do with the operation of the breathalyser instrument. However, in my view, despite the broad wording of section 320.23(1), it could not reasonably be interpreted as giving the Crown carte blanche to prove any fact it wants simply by including it in a certificate. As the Court said in *MacDonald*:

> It is said by way of an *in terrorem* argument that this might open the door to any number of assertions in the certificate which then become "evidence". But this is groundless fear. The certificate is expressly said to be "made under this Part". Clearly, the specific context in which the certificate is generated and its authorized purpose in a prosecution would limit statements in the certificate to those matters relevant to the qualified technician's role under Part VIII.1 of the *Code*.

MacDonald, para 54.

[92] Despite what I consider to be clear, broad and unambiguous language of section 320.32(1), other parts of the certificate provision have given me pause because they could support the *Goldson* interpretation.

[93] In addition to stating that a certificate is evidence of the facts alleged in it, the certificate provision sets out notice requirements and the possibility for the defence to make application to cross-examine the author of a certificate that the Crown intends on filing:

> 320.32 (1) A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.
> (2) No certificate shall be received in evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention to produce it and a copy of the certificate.
> (3) A party against whom the certificate is produced may apply to the court for an order requiring the attendance of the person who signed the certificate for the purposes of cross-examination.
> (4) The application shall be made in writing and set out the likely relevance of the proposed cross-examination with respect to the facts alleged in the certificate. A copy of the application shall be given to the prosecutor at least 30 days before the day on which the application is to be heard.

[94] As pointed out by the Respondents, unless the Crown gives notice that it intends on filing the analyst's certificate, the Defence does not have the option to apply to cross-examine the analyst. This point was made in Goldson:

> Additionally, an accused can only bring an application to cross-examine the analyst, and thus test or challenge his or her analysis of the alcohol standard, after the Crown gives notice that it intends to produce the Certificate of Analyst at trial (ss.320.32(2) and (3)). If the Crown is not required to either call the analyst as a witness or tender the Certificate of Analyst, then there is no process for the accused to challenge the information contained within it.

Goldson, para. 77.

[95] The Respondents also note that there would have been no need to include certificate of analysts in the certificate provision if Parliament had intended for the certification of the alcohol standard to simply be proven through the QT's certificates.

[96] However, subsections 320.32(2) and (3) contemplate *either* party seeking to rely on certificates, not just the Crown. Accordingly, as pointed out in *MacDonald*, in a case where there is an issue with the certificate of the analyst that the Defence wishes to raise, it is open to the Defence to avail itself of the procedure set out in these provisions. *MacDonald*, para 75. The Defence could also choose to subpoena the analyst, depending on the issue it wishes to raise. The ability to rely on the broad language of section 320.32(1) to prove the certification of the alcohol standard through the QT's certificate does not foreclose the possibility that in certain cases, either party will choose to also file the analyst's certificate or call that person as a witness.

[97] I agree with *Goldson* that it is for the Crown to prove that the conditions required to engage the presumption are met, and not for the Defence to disprove them. But I do not see a case where the accused would file the certificate of the analyst or call the analyst as a witness as resulting in a reversal of the burden of proof. Rather, I see it as an example of an accused adducing evidence to challenge the evidence presented by the Crown. Calling into question whether the conditions required to trigger the presumption of accuracy have been established is part of making full answer and defence. It is analogous, albeit in a different context, to an accused calling "evidence to the contrary" to challenge the presumption of accuracy or the presumption of identity under the previous regime.

[98] It is also important to remember that the *Amending Act* introduced new disclosure obligations that are directly linked to the conditions required to trigger the presumption of accuracy:

> 320.34 (1) In proceedings in respect of an offence under section 320.14, the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in paragraphs 320.31(1)(a) to (c) have been met, namely:
> (a) the results of the system blank tests;
> (b) the results of the system calibration checks;
> (c) any error or exception messages produced by the approved instrument at the time the samples were taken;
> (d) the results of the analysis of the accused's breath samples; and
> (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument.

[99] Subsection (2) provides that an accused can apply for a hearing to determine if further information should be disclosed.

[100] Some of these documents - in particular the results of the analysis of the accused's breath - would have been part of the Crown's general disclosure obligations under the common law in any event. Others may not have been.

[101] With this codified disclosure obligation, all the information relevant to the QT's determination that the breathalyser was functioning properly is, in every case, disclosed to the accused, regardless of whether the Crown seeks to rely on the certificate. This ensures that in every case, any anomaly that arose during the testing of the instrument, issue with the analyst's certificate pertaining to the alcohol standard, or discrepancy between that certificate and the information included in the

QT's certificate, will be known to the accused and can inform the conduct of the defence.

[102] The enhanced disclosure requirements are consistent with the overall philosophy that underlies the *Amending Act*, in that while great reliance is placed on breathalyser results, there must also be safeguards in place to ensure that the accused has all the information relevant to the testing and proper functioning of the breathalyser instrument.

[103] I conclude that the interpretation I propose to adopt does not take any substantive avenue of defence away from the accused. I disagree with the conclusion in *Goldson* that it "leaves no process for the accused to challenge the certification of the alcohol standard".

[104] I would make one final observation, about the issue of whether the requirement to file a certificate of analyst would or would not be complicated and cumbersome for the Crown. It has been said in some of the cases I reviewed, and mentioned specifically by the trial judge in *Whittle*, that it would not be particularly burdensome for the Crown to be required to file, in every case, the certificate of the analyst who certified the alcohol standard. Comments were made about this at the hearing of these appeals as well. The Respondents' counsel said that post-*Goldson* trials in Alberta have proceeded without any particular difficulty despite the requirement that the Crown file analysts' certificates in every case. The Appellant took issue with this assertion and suggested that the assumption that producing these certificates is a simple matter is not necessarily correct.

[105] I might have been inclined to think that filing these certificates would not be particularly burdensome for the Crown. But in the absence of any evidence on this topic, and as I understand the issue to be somewhat controversial, I have simply not taken it into account, either way, in my analysis.

IX) CONCLUSION

[106] For these reasons, I conclude that the trial judges in both this case and in *Whittle* erred in their interpretation.

[107] In this case, had the trial judge interpreted the provisions correctly, the evidence adduced by the Crown would have established conclusively the Respondent's blood alcohol concentration levels. No other issues were raised at trial and the other elements of the offence were also proven to the requisite degree.

Accordingly, a conviction will enter on count #2 of the Information. Count #1 is stayed.

[108] In his Factum, the Appellant asks this Court to impose sentence, and seeks the mandatory minimum sentence. Given the results of the breathalyser tests and the fact that this is the Respondent's first conviction for such an offence, the minimum sentence is a fine of $2,000.00, and a driving prohibition for a period of 1 year. *Criminal Code*, Sections 320.19(3)(b) and 320.2492)(a). At paragraph 94 of its Factum, the Appellant also seeks "the 15% victim fine surcharge".

[109] I note that section 737(2)(a) of the *Criminal Code*, which requires the imposition of the surcharge, states that the amount, when a fine is imposed, must be 30% of the amount of the fine. There is discretion to reduce this amount, but reasons must be given when this is done. *Criminal Code*, Sections 727(2.1) and (2.4). Given this, I require clarifications from the Appellant as to the basis for seeking a surcharge of 15%.

[110] In addition, I do not recall the Respondent addressing, at the hearing of the appeal, how sentencing should be dealt with if the appeal was allowed. While I appreciate that a mandatory minimum sentence is engaged, the fact remains that this Court does not have any of the information about the Respondent's personal circumstances that would normally be presented at a sentencing hearing. Out of an abundance of caution, I require confirmation by the Respondent that he is agreeable to being sentenced by this Court in the manner suggested by the Appellant.

[111] I direct that counsel communicate their positions to the Registry, in writing, no later than June 21, 2024. If they require more time they should contact the Registry and suggest a different deadline. Either way, once I have the benefit of their positions, I will issue a further Memorandum addressing the issue of sentencing.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
14th day of June, 2024

Counsel for the Crown: Morgan Fane and Matthew Scott

Counsel for the Respondent: Kim Arial

S-1-CR-2022-000092

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HIS MAJESTY THE KING

Appellant

-and-

ROCKY KENNY

Respondent

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