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A Guide to BREATHALYZER CERTIFICATES IN CANADA

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What's New in This Update

This release features to the updates in Chapters 8 (Evidence to the Contrary), Words and Phrases.

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Highlights

All parties will want to review: *R. v. Kim*, 2025 ONCA 478 (Ont. C.A.). This case involved three separate appeals to the Ontario Court of Appeal. All three cases dealt with what evidence the Crown must adduce from an analyst of the certification of an alcohol sample used to calibrate the approved instrument. This was the first time the Ontario Court of Appeal had considered this issue. Nationally, the caselaw is divided between two lines of authority. On the one hand, the Alberta Court of appeal in *R. v. Goldson*, 2021 ABCA 193 (Alta. C.A.), leave to appeal refused 2022 CarswellAlta 478 (S.C.C.) held that direct evidence was required, whereas the Yukon Court of Appeal in *R. v. MacDonald*, 2022 YKCA 7 (Yukon C.A.) held the contrary. CC 320.14(1)(b) of the criminal code creates an offence for an accused to have within two hours after ceasing to operate a conveyance, a blood-alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood. The provisions of the criminal code governing this section were substantially revised in 2018. CC 320.31.(1) now provides that the results of a blood-alcohol test conducted with an approved instrument are conclusive proof of the accused's blood-alcohol level if specified conditions are met. These conditions require that, prior to administering a blood-alcohol test, a qualified technician must (1) calibrate the approved instrument against a blank sample, and (2) conduct a system calibration check against a standard alcohol sample that is been certified by an analyst. A qualified technician is authorized to provide evidence of the blood alcohol content reading from the approved instrument by way of a certificate, and CC 320.32(1) provides that the certificate of qualified technician is evidence of the facts alleged in the certificate. Under CC 320.32(2), before a certificate can be received as evidence at trial the crown is required to produce a copy to the accused and give notice of this intention. Under CC 320.32(3), the accused can then apply for an order that the author of the certificate attend for the trial for cross-examination, but this must be done at least 30 days prior to the trial. CC 320.32 and CC 320.33 address the evidential value of a printout from the approved instrument. CC 320.32 to 320.32 impose disclosure obligations on the crown. In order for the crown to have recourse to the presumption of accuracy, the qualified technician must attest to the results of the blood alcohol concentration analysis and that the preconditions for accuracy are satisfied, including that the alcohol sample used to calibrate the approved instrument was certified by an analyst. Thus, there are two certificates of evidence contemplated: one from the qualified technician speaking to the evidence of the blood alcohol content reading from the approved instrument and one from the analyst speaking to the quality of the alcohol sample that the qualified technician uses to calibrate the approved instrument. All three cases were prosecutions for operating a motor vehicle with the blood alcohol concentration at or over 08. In each case, the crown

tender evidence from a qualified technician who conducted the blood alcohol test, but not from the analyst who certified the sample of alcohol that was used in the system calibration check. All three appeals turned on whether the statutory regime requires the crown to either call the analyst to testify to the veracity of the sample of alcohol used in the system calibration check or tender a certificate of the analyst in order for the crown to rely on the blood alcohol test as conclusive proof of the accused's blood-alcohol concentration at the time of the operation of the vehicle. The question on appeal was whether the crown is required by the amended provisions to tender a certificate of an analyst at trial and/or to call the oral evidence of the analyst to prove that the alcohol standard sample has been certified by the analyst as accurate, or is the crown able to rely on the presumption of conclusive proof by tendering the certificate of qualified technician as to the proper calibration of the approved instrument? The majority of the Ontario cases have found that the statutory regime provides for the crown to rely on the conclusive proof of blood-alcohol concentration without tendering the certificate of an analyst or direct evidence from the analyst as to the alcohol standard used for the calibration check. The modern principle of statutory interpretation requires a court to interpret statutory language according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the act as a whole. Statutory interpretation is centred on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent. Thus, the text of the provision under consideration is always the starting point and the anchor of the analysis. Just as the text must be considered in light of the context and objective, the objective of the statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise. Furthermore, statutory interpretation requires attending not only to the ends the legislature sought to achieve, but the specific means legislature chose to achieve that purpose. The text specifies, among other things, the means chosen by the legislators to achieve its purpose. These means may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation. Sometimes the meaning of a word or sentence is ambiguous, potentially leaving the reader uncertain as to which of two or more meanings was intended. Most semantic ambiguity is easily resolved by reference to the immediate context in which the words are used. Where ambiguity appears irresolvable, extraneous evidence of intent can be permitted. Unlike other forms of contextual indeterminacy – such as vagueness – irresolvable ambiguity in legislative drafting is never intentional and is extremely rare. The nature of litigation means that judges are often presented with two opposed interpretations of statutes. A common error in litigating interpretive questions is to attribute these differences in interpretation to semantic ambiguity. However, uncertainty and disagreement about the meaning of legislative purpose can have many causes.

Some disagreements result from non-ambiguous linguistic choices, such as the intentional use of generality and vagueness in legislative drafting. Because the uncertainty in these cases does not arrive from ambiguity, it does not trigger the resort to extrinsic interpretive aids that are appropriate in cases of irresolvable ambiguity. The crux of the appeal is the interpretation of CC 320.31(1). This section provides that the results of the breath sample analysis will be conclusive proof of the accused's blood-alcohol concentration when the three conditions are met. The main condition, for the purposes of this appeal, is that 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 alcohol standard that is certified by an analyst. On the plain reading of the text, this section does no more than direct that, in order for the analysis to be considered conclusive proof of a blood-alcohol concentration, the qualified technician must conduct the test to ensure the machine is functioning correctly. One of the tests is a system calibration check. With respect to calibration, the machine will be deemed reliable if it returns result within 10% of the target value of the alcohol standard. The alcohol standard that is used by the qualified technician for calibration must have been certified by an analyst. The core of the accused's argument is that is that the McDonald interpretation is inconsistent with the text and context of the amendments to the criminal code. The argument of inconsistency with the text is difficult to make. The accused's second argument is more complex. In this argument, the accused's assert that the purpose of the amendments were twofold: (1) to provide a more efficient system for adjudicating impaired driving offences, and (2) to provide an evidential regime that better protects the CRF 11(d) rights of the accused. The appellants argue that the fair trial rights of an accused were not well protected by the previous legislative regime, and that Parliament overhauled the criminal code to provide enhanced legal protection. The appellants argue that the amendments were therefore intended to work as a substantial change in the law. The nature of this change is that the previous practice of not requiring direct evidence of the certificate of the alcohol standard was replaced by a requirement that the analyst provide evidence, either *viva voce* or by filing a certificate. This new requirement enhances the rights of the accused by providing the opportunity to cross-examine the analyst on the certificate of the alcohol standard. The appellants also argued that this purpose of enhancing the fair trial protections of the accused is evident when the amendments are contrasted with the legislation it superseded. Therefore, any ambiguity must be resolved in favour of increased fair trial protection. The Ontario Court of Appeal rejected this argument, noting that the certificate of the qualified technician is evidence of the facts alleged in the certificate. Through the standard form certificate, the qualified technician certifies that the alcohol standard at a target value of 100 mg of alcohol in 100 mL of blood, and that it was certified by an

analyst. As such, if the qualified technician's certificate is evidence of the facts alleged in it, then the Crown has, by filing the certificate introduced evidence that the alcohol standard was certified by the analyst. The legislation is clear and precise, without ambiguity or other forms of into immediacy on its face. The court in McDonald also rightly rejected the argument that the legislative history reveals any ambiguity in the meaning of the text. Under the amendments, there is no longer a distinction in the statutory text between the evidence by certificate and evidence by testimony approaches. 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. The Ontario Court of Appeal also rejected the suggestion that the pre-amendment sections violated CRF 11. This argument rests on a misunderstanding of the grammar of charter rights. Charter adjudication provides two steps. The first step is best understood, following the text of CRF 1 which speaks of reasonable limits, as the determination of whether a person's charter right has been limited in some way. All the court sometimes speak of violations or infringements; at this first stage the term "violation" is used in an unintended weighted sense and is not a statement of that the claimant's charter rights have been violated. That conclusion can only be reached after consideration of the second analytical step under the Oaks test. It is only after considering the limits on the claimant in the context of what would constitute reasonable limits in a free and democratic society that a court can pronounce that a person's charter rights may have been violated. As such, the appellants overstate the significance of the finding of a first stage limit. Second, even without the misapprehension of the nature of charter rights, the appellants fall afoul of the purpose error. Parliament intends not only ends, but also means. Where the means are stated clearly, no interpretive difficulty arises. Purpose cannot be allowed to override the clear language Parliament has used. The appellants argument rests on a further misapprehension: that an accused's constitutional right to make full answer and defence would be prejudiced by an inability to cross-examine the analyst and that Parliament could not have intended this. The certificate of an analyst is to be disclosed to the defence prior to the trial if the Crown wishes to rely upon it as evidence. If there appears to be reason to cross-examine the analyst of the certificate of an analyst, the appellant can apply before trial for leave to cross-examine. If the Crown fails to disclose the certificate of an analyst, and the accused wishes to argue that he has not been provided with information sufficient to determine whether the standard used was suitable, this can be dealt with by reference to the specific disclosure obligations under the criminal code, invoking the same remedies as for any other shortcomings in disclosure. No unfairness ought to result. The court dismissed the appeal.

