



SUPREME COURT OF CANADA

CITATION: R. v. Rousselle, 2025
SCC 35

APPEAL HEARD: April 24, 2025
JUDGMENT RENDERED: November
14, 2025
DOCKET: 41153

BETWEEN:

Tony Rousselle
Appellant

and

His Majesty The King
Respondent

- and -

**Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta and
Criminal Lawyers' Association (Ontario)**
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**JOINT REASONS
FOR JUDGMENT:** Rowe and Moreau JJ. (Wagner C.J. and Karakatsanis, Martin,
Kasirer, Jamal and O'Bonsawin JJ. concurring)
(paras. 1 to 148)

DISSENTING Côté J.

REASONS:

(paras. 149 to 228)

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Tony Rousselle

Appellant

v.

His Majesty The King

Respondent

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta and
Criminal Lawyers' Association (Ontario)**

Interveners

Indexed as: R. v. Rousselle

2025 SCC 35

File No.: 41153.

2025: April 24; 2025: November 14.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK

Criminal law — Evidence — Impaired driving — Breath alcohol testing — Statutory presumption of accuracy for breath sample analysis results — Requirement that alcohol standard used in system calibration test be certified by analyst — Accused charged with driving with blood alcohol concentration over legal limit — Whether Crown can rely at trial on certificate evidence from qualified technician who operated breath analysis instrument to prove that alcohol standard used in instrument system calibration test was certified by analyst in order to benefit from statutory presumption of accuracy for breath sample analyses results — Criminal Code, R.S.C. 1985, c. C-46, ss. 320.31(1)(a), 320.32.

In 2018, Parliament amended the evidentiary scheme for proving blood alcohol concentration (“BAC”) for purposes of prosecuting impaired operation offences under s. 320.14(1) of the *Criminal Code*. Section 320.31(1) establishes a “presumption of accuracy” which allows the Crown to rely on a person’s breath alcohol test results as “conclusive proof” of their BAC at the time the breath tests were conducted. In order to benefit from this presumption, the Crown must prove beyond a reasonable doubt a series of preconditions set out in s. 320.31(1)(a) to (c). As part of the precondition in s. 320.31(1)(a), there must be 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”, and therefore the Crown must prove that the alcohol standard used in the system calibration check was “certified by an analyst”. Previous iterations of the evidentiary scheme permitted the qualified technician to give evidence on whether an

alcohol standard was suitable for use, in satisfaction of a precondition to the presumption of accuracy.

The accused was stopped by police while driving his motor vehicle, arrested, and taken to a police station where he provided two breath alcohol samples that indicated that his BAC was 100 mg of alcohol in 100 mL of blood at the time of testing. He was charged under s. 320.14(1)(b) of the *Criminal Code* with having a BAC equal to or exceeding 80 mg of alcohol in 100 mL of blood within two hours of ceasing to operate a motor vehicle. At trial, the Crown sought to rely on the presumption of accuracy to prove the accused's BAC. It did not call the qualified technician who administered the accused's breath alcohol tests nor the analyst who had certified the alcohol standard used in the breath testing procedure, but rather relied on the certificate of the qualified technician to assert that the latter conducted a system calibration check the result of which was within 10% of the target value of an alcohol standard that was certified by an analyst. Two certificates of analysts stating that the alcohol standard was certified by an analyst were not received into evidence because the trial judge found the Crown had failed to give reasonable notice of its intention to produce the certificates.

The trial judge held that the Crown needed to produce evidence, either by certificate or *viva voce*, directly from the analyst to prove that the alcohol standard used in the system calibration check was certified by an analyst. As the certificates of analyst were inadmissible, the trial judge held that the Crown had not proven the precondition

in s. 320.31(1)(a) beyond a reasonable doubt and therefore that it could not rely on the presumption of accuracy. The accused was acquitted. On appeal by the Crown, the summary conviction appeal judge overturned the trial judge's interpretation of s. 320.31(1)(a) and entered a conviction. He held that the Crown could prove that the alcohol standard was certified by an analyst through the qualified technician's evidence, whether by certificate or *viva voce*. A unanimous panel of the Court of Appeal upheld the summary conviction appeal judge's decision and confirmed the conviction.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, **Rowe**, Martin, Kasirer, Jamal, O'Bonsawin and **Moreau JJ.**: The text, purpose and context of the 2018 evidentiary scheme, together with the legislative evolution of the scheme, lead to the conclusion that Parliament intended to maintain the scope of the evidence a qualified technician may give. Consequently, s. 320.31(1)(a) does not preclude the Crown from proving that the alcohol standard used in the system calibration check is "certified by an analyst" through the evidence of the qualified technician, either by certificate or *viva voce* testimony. The Crown is not required to produce evidence from the analyst, either by certificate or *viva voce* testimony, to prove this fact. In the instant case, the Crown placed into evidence a certificate from the qualified technician who administered the accused's breath alcohol tests. That certificate stated that before each breath sample was obtained, the qualified technician conducted a system calibration check the result

of which was within 10% of the target value of an alcohol standard that was certified by an analyst as being suitable for use. This assertion was sufficient to prove beyond a reasonable doubt that the alcohol standard used in the system calibration check had been certified by an analyst.

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This modern approach — text, context, and purpose — is the primary tool to determine the meaning of a statutory provision. Other principles of interpretation, such as the strict construction of penal statutes, only receive application where there is ambiguity. Ambiguity does not arise because courts have come to different conclusions or because a provision is complex. A genuine ambiguity only exists where the modern approach can give rise to two or more plausible interpretations. A provision’s initial formulation and all subsequent formulations can shed light on the intention of the legislature in repealing, amending, replacing or adding to a statute.

In interpreting “certified by an analyst” in s. 320.31(1)(a), regard should be had to the legislative evolution of the 2018 evidentiary scheme. It is well accepted that the Crown has historically been able to rely on the qualified technician, rather than the analyst, to prove that the alcohol standard was “suitable for use”, even if this evidence is presumptively inadmissible hearsay. The evidentiary scheme for prosecuting impaired driving offences was introduced in 1969. Between 1970 and

1985, Parliament made several amendments to the wording of the provisions in the scheme but the substance of the scheme remained the same. Early jurisprudence interpreted the evidentiary scheme to allow hearsay evidence from the qualified technician regarding the suitability of the substance or solution to be admissible for its truth, which meant that the Crown could rely solely on the evidence of the qualified technician to satisfy the preconditions for the presumption of accuracy. In 1985, the evidentiary scheme was renumbered, but the substance of the presumption remained unchanged from its predecessor. In 2008, the evidentiary scheme was amended again. The nature of the presumption of accuracy remained unchanged, and no substantive changes were made to the statutory exception to the hearsay rule.

Although the repeal by Parliament of all of the former driving-related offences and their re-enactment under Part VIII.1 of the *Criminal Code* constituted a complete overhaul of the *Criminal Code*'s driving provisions, Parliament intended to maintain, rather than change, the evidentiary rule that the qualified technician's evidence is sufficient to prove that the alcohol standard used in the system calibration check was certified by an analyst. The 2018 amendments furthered objectives of coherence, efficiency, simplification, and modernization of the *Criminal Code* provisions relating to driving offences. They are consistent with Parliament's previous efforts to simplify and streamline the prosecution of driving related offences. In light of this purpose, it is clear that Parliament intended that the 2018 evidentiary scheme would create a simplified route to proving an accused's blood alcohol concentration

that is anchored in the scientific consensus on the reliability and accuracy of breath alcohol test results.

Additional technical requirements that Parliament did not intend the Crown to prove in order to rely on the presumption of accuracy should not be read into the *Criminal Code*. The phrase “alcohol standard, identified in the certificate, that is suitable for use with an approved instrument”, which had existed since the 1985 amendments to the evidentiary scheme, does not appear in s. 320.31(1)(a). Rather, Parliament has said that the alcohol standard must be “certified by an analyst” before the Crown can rely on the presumption of accuracy. These words do not sufficiently indicate that Parliament intended to remove the evidentiary shortcut. When s. 320.31(1)(a) is read in the context of ss. 320.34(1)(e) and 320.4(c), it is clear that Parliament intended the phrase “certified by an analyst” to carry the same meaning as “suitable for use”. Parliament has changed where the relevant wording is found, but has not changed the meaning of the provision. The structural changes in s. 320.31(1)(a) were not intended to fundamentally disturb the state of the law or limit the scope of a qualified technician’s certificate. Rather, in relocating the requirement that the alcohol standard be certified by an analyst to s. 320.31(1)(a), Parliament intended to simplify and consolidate the preconditions to the presumption of accuracy into one statutory provision.

This interpretation is also consistent with the legislative purpose of the 2018 amendments. Parliament’s intention for the phrase “an alcohol standard that is

certified by an analyst” must also be interpreted in the context of the other provisions that make up the 2018 evidentiary scheme. Section 320.32(1) stipulates that a certificate “is evidence of the facts alleged”. This means that, unlike its predecessors, s. 320.32(1) does not require the certificate of the qualified technician to state that the alcohol standard was “suitable for use”. By removing language regarding what is contained in the certificate of the qualified technician, Parliament sought to broaden the scope of the statutory exception to hearsay in s. 320.32(1). Parliament must be presumed to know the broader legal context in which it operates, and would have been aware that evidence in the certificate of the qualified technician on the suitability of the alcohol standard was admissible hearsay evidence. Parliament carried this well-established rule forward into the new evidentiary scheme.

The text of s. 320.32(1) also supports this interpretation. Section 320.32(1) is not limitless. 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 *Criminal Code*. It is within a qualified technician’s role to assert that the alcohol standard used in the system calibration was certified by an analyst. Furthermore, even if the Crown chooses to introduce only the certificate of the qualified technician, the evidentiary scheme would continue to function as Parliament intended. Section 320.32(3) still allows the accused to raise a reasonable doubt as to the alcohol standard aspect of the s. 320.31(1)(a) precondition. The Crown must disclose the certificate of the analyst as part of its statutory obligation. If the Crown proceeds with only the certificate of the

qualified technician, the accused could rely on a defect or inconsistency to argue the likely relevance of cross-examining the qualified technician's assertion that they used a certified alcohol standard. Allowing the Crown to prove that the alcohol standard is certified by an analyst through the qualified technician does not undermine the cross-examination provisions or render the certificate of the analyst meaningless. The Crown's disclosure obligations under s. 320.34 must be distinguished from the evidentiary requirements that the Crown must meet to prove the presumption of accuracy at trial. Simply because the Crown is required to disclose the certificate of an analyst under s. 320.34(1)(e) does not mean that the Crown is required to produce it at trial as proof that the alcohol standard was certified by an analyst. The precondition in s. 320.31(1)(a) is not a significant change from its preceding iterations, and is intended to preserve the qualified technician's ability to provide hearsay evidence as to the suitability of an alcohol standard in lieu of evidence from the analyst.

Per Côté J. (dissenting): The appeal should be allowed and an acquittal entered. Parliament's 2018 amendments to the provisions of the *Criminal Code* relating to impaired driving now require the Crown to lead evidence directly from an analyst, either by certificate or by way of *viva voce* testimony, that the alcohol standard was certified by the analyst. In the instant case, the Crown cannot rely on the presumption of accuracy in s. 320.31 because of its failure to prove that the alcohol standard was certified by an analyst.

Section 320.31(1) allows the Crown to rely on a presumption of accuracy of an accused's blood alcohol concentration at the time a sample of his or her breath was analyzed, provided that the conditions set out in that provision are met. One of these conditions is that the qualified technician taking the samples must have conducted a system calibration check. Pursuant to s. 320.31(1)(a), the result of the system calibration check must be within 10% of the target value of an alcohol standard that is certified by an analyst. Section 320.32 then works in tandem with s. 320.31(1) by allowing this condition to be proven by certificate, creating an exception to the hearsay rule by allowing three enumerated individuals — the analyst, the qualified medical practitioner, or the qualified technician — to provide evidence without having to appear in court. Section 320.31(1) replaces the presumption of accuracy found in s. 258(1) of the *Criminal Code*, under which a qualified technician's certificate was required to attest to a specific series of facts, including that the alcohol standard was "suitable for use".

In accordance with the modern approach to statutory interpretation, the words of a statutory provision must be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. A proper interpretation of the provisions at issue reveals that, in order for the Crown to prove that the alcohol standard has been certified by an analyst, and therefore to have the benefit of the presumption of accuracy, a certificate or *viva voce* evidence is required from the analyst. A qualified technician cannot attest to what is not within his or her knowledge; this amounts to inadmissible

hearsay. Throughout the statutory interpretation exercise, the evidentiary rules regarding the inadmissibility of hearsay evidence must be kept in mind. Although Parliament has the ability to create exceptions to the general rule that hearsay evidence is presumptively inadmissible, where Parliament creates a hearsay exception, it must do so very clearly. Parliament has not demonstrated the positive intent to create a hearsay exception in its new legislation.

Close attention must be paid to the text of the statute, which remains the anchor of the interpretive exercise. A plain reading of the text of ss. 320.31 and 320.32 accords with an interpretation that requires each enumerated individual involved in the blood alcohol concentration testing process — the analyst, the qualified medical practitioner and the qualified technician — to provide evidence about his or her own respective spheres of work and knowledge. Although the text of s. 320.32(1) does not specify which facts each of these individuals can attest to in their respective certificates, naturally, the evidence given in these certificates must be with respect to facts that are actually within the individual's area of knowledge and expertise, given his or her individualized role in the process. Section 320.31(1) expressly delineates the respective roles of the qualified technician and the analyst; that statutory distinction cannot be undermined by reading s. 320.32(1) in a manner that collapses the clear separation established in the preceding provision.

The context and purpose of the impugned provisions further buttress the conclusion that is already clear from a plain reading. As to the purpose, the additional

technical requirements and burdens placed on the Crown in the provisions at issue demonstrate a dual purpose: to streamline the provisions and to enhance the reliability of the scientific evidence used in impaired driving cases. Even though Parliament generally intended to streamline some aspects of proving the blood alcohol concentration of drivers, it established additional requirements for proving blood alcohol concentration in ss. 320.31 and 320.32, not fewer. The requirement that the alcohol standard be “suitable for use” under the former s. 258(1)(g)(i) is no longer listed in the provision outlining what the certificate of a qualified technician may contain — this change alone suggests a departure from the previous regime and undercuts the narrative that the 2018 amendments are not an elevation but rather a standardization of evidentiary requirements. Even more important is the fact that the 2018 regime places new requirements both on the Crown and on the technical and scientific process that signal Parliament’s desire to add in necessary safeguards despite streamlining the provisions generally. The more demanding scientific and technical requirements in the 2018 amendments also align with the increased strength of the presumption of accuracy brought out by these amendments. The Crown benefits from a stronger evidentiary presumption in exchange for being subject to more rigorous technical safeguards. Therefore, sufficient deference must be paid to those safeguards.

With respect to the context, s. 320.4 makes it clear that Parliament envisioned a distinct delineation of the three roles in the blood alcohol concentration testing process: para. (a) refers to the qualified technician; para. (b) refers to the qualified medical practitioner; and para. (c) refers to the analyst. The 2018 amendments

created more technical and thorough tasks for both qualified technicians and analysts, which further delineated the difference between the two roles. If a qualified technician were able to attest to the certification process done by an analyst when the qualified technician has no involvement in it, it would usurp the role of the analyst and make a certificate of an analyst completely redundant from an evidentiary standpoint. Furthermore, a certificate from a qualified technician cannot prove that the alcohol standard was certified by an analyst when that is a matter entirely outside of the qualified technician's knowledge. The qualified technician may be able to say that he or she believed that the alcohol standard was certified based on the information given to the technician when he or she conducted the testing process. However, the qualified technician cannot go beyond this limit to give evidence about the certification process — a matter clearly beyond the bounds of his or her role and outside of his or her personal knowledge: it is double hearsay. Each level of hearsay must fall within an exception or be admissible under the principled approach. Given the risks inherent in relying on two levels of hearsay evidence, Parliament would have made it explicitly clear if it were establishing such an exception.

As well, the majority's interpretation likely leads to unconstitutionality. The question of whether different interpretations are constitutionally compliant cannot be ignored as part of the statutory interpretation exercise. Where multiple interpretations of a provision exist, courts should consider only those interpretations that are constitutionally compliant. The interpretation of ss. 320.31 and 320.32 must therefore be made with the accused's right to make full answer and defence in mind. It

would compromise trial fairness if the Crown is allowed to introduce unreliable hearsay evidence against the accused.

Finally, Parliament could not have intended to create a shortcut that falls apart once a qualified technician is cross-examined, as the qualified technician will be unable to answer any question on cross-examination about the certification process. An exception that allows the Crown to lead double hearsay evidence to trigger such an important presumption is a significant privilege given to the Crown. Parliament would not have created a shortcut that allows the Crown to so easily evade the important inadmissibility rule for double hearsay, the effect of which is negated as soon as the qualified technician is asked a question about the certification process. This would create a pointless hearsay exception. Such a hearsay exception would be a quick route to an acquittal. Surely a Parliament focused on making prosecutions for impaired driving easier, not more difficult, would not have built such a simple route to acquittal.

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R. v. Gubbins, 2018 SCC 44, [2018] 3 S.C.R. 35; *R. v. Ocampo*, 2014 ONCJ 440, 68 M.V.R. (6th) 291; *R. v. Cyr-Langlois*, 2018 SCC 54, [2018] 3 S.C.R. 456; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Charles*, 2024 SCC 29; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Vigneault*, 2024 QCCA 793; *Bakalis v. R.*, 2021 QCCS 3990; *R. v. Pahl*, 2021 SKQB 179, 81 M.V.R. (7th) 97; *R. v. Kim*, 2025 ONCA 478, 450 C.C.C. (3d) 441; *R. v. Kenny*, 2024 NWTSC 29, [2024] 9 W.W.R. 288; *R. v. Greening*, 2024 NSSC 57; *R. v. Brown*, 2024 SKKB 86; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15; *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Kosicki v. Toronto (City)*, 2025 SCC 28; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499; *R. v. Gibson*, 2008 SCC 16, [2008] 1 S.C.R. 397; *R. v. Moreau*, [1979] 1 S.C.R. 261; *Lightfoot v. The Queen*, [1981] 1 S.C.R. 566; *R. v. Squires* (1994), 114 Nfld. & P.E.I.R. 157; *R. v. Kroeger* (1992), 97 Sask. R. 263; *R. v. Wolfe*, 2024 SCC 34; *R. v. Kelly*, 2025 ONCA 92, 446 C.C.C. (3d) 100; *R. v. Hebert*, 2013 ONCJ 7.74; *R. v. Evanson* (1973), 11 C.C.C. (2d) 275; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612.

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36; *R. v. Goldson*, 2021 ABCA 193, 406 C.C.C. (3d) 84; *R. v. MacDonald*, 2022 YKCA 7, 419 C.C.C. (3d) 100; *Lightfoot v. The Queen*, [1981] 1 S.C.R. 566; *R. v. Squires* (1994), 87 C.C.C. (3d) 430; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43; *R. v. Wolfe*, 2024 SCC 34; *Larocque v. R.*, 2024 NBCA 4, 433 C.C.C. (3d) 58; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Vigneault*, 2024 QCCA 793.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Richard C.J. and Baird and LaVigne JJ.A.), 2024 NBCA 3, 433 C.C.C. (3d) 31, 93 C.R. (7th) 5, [2024] N.B.J. No. 4 (Lexis), 2024 CarswellNB 8 (WL), affirming the decision of Robichaud J., setting aside the acquittal entered by Sonier Prov. Ct. J. and entering a conviction. Appeal dismissed, Côté J. dissenting.

Emily A. Cochrane and Mireille A. Saulnier, for the appellant.

Patrick McGuinty and Joanne Park, for the respondent.

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The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

ROWE AND MOREAU JJ. —

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I. Overview

[1] This appeal relates to the interpretation of s. 320.31(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. This provision forms part of the evidentiary scheme for proving blood alcohol concentration (“BAC”) for purposes of prosecuting impaired operation offences under s. 320.14(1) of the *Criminal Code*.

[2] Section 320.31(1) establishes a “presumption of accuracy” which allows the Crown to rely on a person’s breath alcohol test results as “conclusive proof” of their BAC at the time the breath tests were conducted. In order to benefit from this presumption, the Crown must prove beyond a reasonable doubt a series of preconditions set out in s. 320.31(1)(a) to (c). Notably, as part of the precondition in s. 320.31(1)(a), there must be 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”.

[3] The interpretation of s. 320.31(1)(a) has been the subject of significant judicial debate since Parliament amended the evidentiary scheme in 2018 (see *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21, referred to throughout as the “*Amending Act*” or “*Bill C-46*”). Trial and appellate courts across Canada are divided

on what the Crown must prove in order to rely on the presumption of accuracy, and how the Crown can meet its onus.

[4] In this case, the Crown seeks to rely on the presumption of accuracy to prove that Mr. Rousselle's BAC was equal to or over 80 mg of alcohol in 100 mL of blood ("mg percent") within two hours of ceasing to operate a conveyance, contrary to s. 320.14(1)(b) of the *Criminal Code* (commonly known as an "80 and over" offence). The issue is whether the Crown has proven all preconditions to the presumption, including the requirement that the alcohol standard be "certified by an analyst". At trial, the Crown did not adduce evidence, whether by certificate or *viva voce* testimony, from the analyst who certified the alcohol standard used in the breath testing. Instead, the Crown opted to produce and rely on a certificate of the qualified technician, which contained an assertion that the alcohol standard was certified by an analyst.

[5] It is undisputed that previous iterations of the evidentiary scheme permitted the qualified technician to give evidence on whether an alcohol standard was suitable for use, in satisfaction of a precondition to the presumption of accuracy. The issue at the core of this appeal is to what extent, if at all, this evidentiary rule was carried forward into the 2018 evidentiary scheme by the *Amending Act*, such that a qualified technician can give evidence as to whether an alcohol standard was "certified by an analyst".

[6] For the reasons that follow, we would dismiss the appeal. The text, purpose and context of the 2018 evidentiary scheme, together with the legislative evolution of

the scheme, lead us to conclude that Parliament intended to maintain the scope of the evidence a qualified technician may give. Consequently, s. 320.31(1)(a) does not preclude the Crown from proving that the alcohol standard used in the system calibration check is “certified by an analyst” through the evidence of the qualified technician, either by certificate or *viva voce* testimony. The Crown is not required to produce evidence from the analyst, either by certificate or *viva voce* testimony, to prove this fact.

[7] These reasons are released together with our reasons in the companion appeal, *R. v. Larocque*, 2025 SCC 36.

II. Facts

[8] On August 22, 2019, Tony Rousselle was stopped by an RCMP officer while driving his motor vehicle. The officer formed reasonable grounds to believe that Mr. Rousselle was driving while his ability to operate a motor vehicle was impaired by alcohol. Mr. Rousselle was arrested and taken to a police station, where he provided two breath alcohol samples that indicated that his blood alcohol concentration was 100 mg percent at the time of testing. He was charged under s. 320.14(1)(b) of the *Criminal Code* with having a blood alcohol concentration equal to or exceeding 80 mg percent within two hours of ceasing to operate the motor vehicle.

[9] The Crown called one witness — the arresting officer — at trial. The Crown did not call the qualified technician who administered Mr. Rousselle’s breath

alcohol tests nor the analyst who had certified the alcohol standard used in the breath testing procedure. Instead, the Crown relied on the certificate of the qualified technician to assert that it had proven all preconditions to the presumption of accuracy in s. 320.31(1) of the *Criminal Code*. Specifically, for purposes of this appeal, the Crown pointed to the following statement in the certificate of the qualified technician to prove the precondition in s. 320.31(1)(a):

[TRANSLATION] Before taking [Mr. Rousselle's breath] samples, I conducted a system blank test the result of which was not more than 10 mg of alcohol in 100 mL of blood and a system calibration check the result of which was within 10% of the target value of an alcohol standard that was certified by an analyst as being suitable for use with the Intox EC/IR II. This alcohol standard being described:

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(A.R., at p. 109)

[10] Two certificates of analyst that stated the alcohol standard was certified by an analyst were not received into evidence because the trial judge found the Crown had failed to give reasonable notice of its intention to produce the certificates under s. 320.32(2) of the *Criminal Code*. The Crown did not appeal that ruling and it is therefore not before this Court.

[11] The trial judge found that s. 320.31(1)(a) required evidence from the analyst for the Crown to prove that the alcohol standard was certified by an analyst, and acquitted Mr. Rousselle. The summary conviction appeal judge overturned the trial judge's interpretation of s. 320.31(1)(a) and entered a conviction. A unanimous panel

of the New Brunswick Court of Appeal upheld the summary conviction appeal judge's decision and confirmed the conviction.

III. Breath Alcohol Testing: How It Works and Operational Procedures

[12] Before we interpret s. 320.31(1)(a) and apply it to the facts of this case, we pause to summarize the technical and procedural aspects of breath alcohol testing — that is, how a breath analysis machine functions and the process followed to obtain a breath alcohol reading — as well as the statutory scheme for “80 and over” prosecutions.

[13] In so doing, we take notice of certain facts which are “beyond serious controversy” (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 65). In this instance, it is only by reference to that which is not in dispute that one can properly make sense of that which is: whether Parliament intended to permit the Crown to prove that an alcohol standard was certified by an analyst by means of the certificate of the qualified technician.

A. *How Does an Approved Instrument Measure Blood Alcohol Concentration?*

[14] The scientific basis for breath alcohol testing is well established (*R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, at paras. 34 and 40). The analysis of a breath sample to determine BAC is based on the principle that the quantity of alcohol in a person's breath is proportional to the quantity of alcohol in a person's

blood. This is known as the blood to breath ratio. Thus, measuring breath concentration can establish whether a person's BAC is equal to or exceeds the prescribed legal limit. A "breathalyzer", literally a "breath" "analyzer", applies this principle by receiving samples of a person's breath and analyzing them to determine their BAC (see B. T. Hodgson, "The Validity of Evidential Breath Alcohol Testing" (2008), 41 *Can. Soc. Forensic Sci. J.* 83, at pp. 83-85; K. M. Dubowski, *The Technology of Breath-Alcohol Analysis* (1992), at pp. 2-5; A. W. Jones and J. M. Cowan, "Reflections on variability in the blood-breath ratio of ethanol and its importance when evidential breath-alcohol instruments are used in law enforcement" (2020), 5 *Forensic Sciences Research* 300).

[15] While the word "breathalyzer" has entered the common lexicon to describe any breath analysis instrument, it comes from Robert F. Borkenstein's "Breathalyzer", the commercial name for one of the earliest breath analysis instruments that could quantify alcohol concentration (see R. F. Borkenstein and H. W. Smith, "The Breathalyzer and its Applications" (1961), 2 *Med. Sci. & L.* 13, at p. 21). Since the "Breathalyzer" was introduced in 1954 for use in impaired driving prosecutions, numerous other breath analysis instruments have been developed and adopted into use by law enforcement. Although various instruments employ somewhat different technology, they all determine the same thing: how much alcohol is in a person's blood.

[16] Parliament has granted authority to the Attorney General, under s. 320.39(c) of the *Criminal Code*, to designate certain "approved instruments" as suitable to receive and make an analysis of a sample of a person's breath to determine their

BAC for impaired driving prosecutions (K.-E. Harrison, *Capacités affaiblies: principes et application* (3rd ed. 2017), at p. 132). Presently, approved instruments are set out in the *Approved Breath Analysis Instruments Order*, SI/85-201. Approved instruments now in use are more technologically advanced than the original Breathalyzer. While the Breathalyzer relied on the operator to ensure the instrument was operating properly or to detect an error, current approved instruments will abort the testing process if a required procedure is not followed and they will record such errors. They also produce printed records of the test results and of any errors, rather than (in the case of earlier instruments) relying on the operator’s handwritten records (Hodgson, at p. 87; see, e.g., *R. v. Gault*, 2023 ONSC 2994, at paras. 40-52 (approved instrument recording a “deficient sample” caused by inadequate blow)).

[17] In these reasons, we use the term “approved instrument” to mean any breath analysis machine that may be used in a *Criminal Code* prosecution, including the Intox EC/IR II — an approved instrument under s. 2(r) of the *Approved Breath Analysis Instruments Order* — that analyzed Mr. Rousselle’s breath samples.

B. *What Are the Operational Procedures for Testing Breath Samples?*

(1) Alcohol Test Committee

[18] The current breath alcohol testing procedures in the *Criminal Code* were prepared by the Canadian Society of Forensic Science’s Alcohol Test Committee (“ATC”). As we explain in more detail below, in the *Amending Act*, Parliament

incorporated ATC recommendations in the *Criminal Code* procedures for breath alcohol testing (Department of Justice, *Backgrounder for former Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, as enacted (2019)* (“*C-46 Backgrounder (2019)*”), at p. 45). Thus, it is useful to understand these procedures and their scientific basis before considering the statutory requirements in issue.

[19] The ATC is comprised of forensic alcohol scientists from across Canada. It advises the Minister of Justice and Attorney General on quality assurance and operational standards for breath alcohol testing, including the operation of approved instruments. The ATC and its predecessors have existed since 1967 when the Canadian Society of Forensic Science established a “Special Committee on Breath Testing” to study breath alcohol testing science, technology and law enforcement (*Canadian Society of Forensic Science Alcohol Test Committee: Recommended Operational Procedures*, April 20, 2023 (online), at p. 1). Parliament adopted the committee’s recommendations on equipment suitable for use in *Criminal Code* prosecutions when it enacted the “over 80” offence in 1969 (K. Jokinen and P. Keen, *Impaired Driving and Other Criminal Code Driving Offences* (2nd ed. 2023), at pp. 9-10).

[20] More recently, the ATC has become the Department of Justice’s “principal scientific advisor on matters related to breath testing” (*Recommended Operational Procedures*, at p. 1). The ATC has developed operating procedures for approved instruments to ensure “accurate and reliable results” when police administer breath

alcohol tests in the field (i.e., outside of a controlled laboratory environment) (p. 4). By “accurate and reliable” the ATC does not mean that an approved instrument will never malfunction or produce an incorrect result. The ATC acknowledges the possibility of errors in the operation of an approved instrument. But, any error will be *detectable* if the operational procedures are followed (J. F. Kenkel, *Impaired Driving in Canada* (7th ed. 2025), at p. 263; Alcohol Test Committee, “Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results” (2012), 45 *Can. Soc. Forensic Sci. J.* 101, at p. 102). Put another way, the ATC’s operational procedures ensure that a subject’s breath alcohol test results will not include an *undetectable false high*, which would lead to a wrongful conviction if relied on in an impaired driving prosecution (Jokinen and Keen, at p. 328).

(2) Those Involved in Breath Testing Procedures and What They Do

(a) *Analyst*

[21] For the purposes of breath alcohol testing, s. 320.11 of the *Criminal Code* states that an analyst is an individual designated by the Attorney General pursuant to s. 320.4(c) “to certify that an alcohol standard is suitable for use with an approved instrument”. As we will explain below, an alcohol standard is used to ensure that the approved instrument is properly calibrated. The analyst conducts a test to confirm whether an alcohol standard was manufactured with the correct proportion of alcohol in a gas or liquid solution. The analyst’s certification of an alcohol standard — essentially a “guarantee of quality” (Jokinen and Keen, at p. 341) — accompanies the

batch or lot of alcohol standard when it is sent to the qualified technician (Royal Canadian Mounted Police and Alberta Breath Test Committee, *Intox EC/IR II Resource Reading Material*, December 2018 (online) (“*Intox EC/IR II Manual*”), at p. F-2). The qualified technician then uses the alcohol standard to conduct the system calibration check, which is a process that we will explain below.

[22] As the alcohol standard is certified before it is sent to the qualified technician, the analyst may well be located outside of the jurisdiction where the breath alcohol testing takes place. For example, the analysts who certified the alcohol standard in the *Larocque* appeal were located in British Columbia while the offence occurred in New Brunswick (A.R. (*Larocque*), vol. I, at pp. 99-100).

(b) *Qualified Technician*

[23] For the purposes of breath alcohol testing, s. 320.11 of the *Criminal Code* states that a qualified technician is an individual designated by the Attorney General pursuant to s. 320.4(a) as qualified “to operate an approved instrument”. This means that a qualified technician determines that the approved instrument is functioning properly and operates the approved instrument in order to test a person’s breath samples so as to measure alcohol concentration. In practice, most qualified technicians are police officers who have received training as to how to operate an approved instrument (Jokinen and Keen, at p. 338).

(3) Conducting a Breath Test: What Are the Steps and the Purpose(s) of Each Step?

[24] The ATC prescribes the following procedures for the qualified technician to follow to ensure an accurate breath alcohol test result.

(a) *System Blank Check*

[25] The system blank check, also called an air blank check, is the first test procedure that must be conducted prior to obtaining a person's breath alcohol sample. The system blank check is intended to prevent the breath alcohol test from being contaminated by a prior test or the environment of the testing location. The approved instrument purges any alcohol remaining in it, tests the alcohol content of the ambient air, and sets a baseline that eliminates the effect of any ambient alcohol in the test results (*R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35, at para. 4(a); Kenkel, at p. 271).

[26] The ATC prescribes that the system blank check must produce a result that is not more than 10 mg percent (*Recommended Operational Procedures*, at p. 4). If the result is more than 10 mg percent, called an "ambient fail", the approved instrument will not allow the qualified technician to process a sample from the subject (Jokinen and Keen, at p. 339).

(b) *System Calibration Check*

[27] If the approved instrument passes the system blank check, the qualified technician will then conduct a system calibration check. This procedure ensures that the approved instrument is generating accurate readings by testing it using a known product: the alcohol standard (*Gubbins*, at para. 4(b); *R. v. Ocampo*, 2014 ONCJ 440, 68 M.V.R. (6th) 291, at para. 56; Jokinen and Keen, at p. 340). Alcohol “standard” means a particular proportion of alcohol in a solution, either a gas (called “dry gas” standards) or liquid (called “wet bath” standards). Alcohol standards are prepared by a manufacturer and certified for use with an approved instrument by an analyst before they are shipped to the qualified technician. As above, certification by an analyst is a factual statement; it means the solution meets the requirement of the alcohol standards that are suitable for use with an approved instrument (Jokinen and Keen, at p. 341).

[28] Approved instruments, including the Intox EC/IR II, can accept either dry gas or wet bath alcohol standards to conduct the system calibration check. But, as the intervening Attorney General of Ontario and Attorney General of Alberta noted, police services in certain jurisdictions across Canada tend to use one or the other standard. Ontario is a “wet bath” jurisdiction, whereas RCMP jurisdictions, including New Brunswick and Alberta, typically use dry gas alcohol standards (I.F. (Attorney General of Ontario), at para. 31; I.F. (Attorney General of Alberta), at para. 21).

[29] The ATC prescribes that the system calibration check is successful if the approved instrument gives a reading within 10% of the target value of the alcohol standard certified by an analyst (*Recommended Operational Procedures*, at p. 4).

“Target value” is the result that an approved instrument should produce when it reads the alcohol standard sample, expressed in mg of alcohol per 100 mL of solution/gas (Jokinen and Keen, at p. 340). The approved instrument draws in a sample of alcohol-saturated vapour that is produced by the alcohol standard. The approved instrument then reads the vapour sample in the same way as it would a breath sample. If the approved instrument reads that the alcohol standard sample has a concentration that is within 10% (e.g., 10 mg of alcohol per 100 mL of solution/gas for target values equal to or exceeding 100 mg percent) of the target value, then the approved instrument is operating properly (*Intox EC/IR II Manual*, at p. C-10). If the approved instrument does not produce a result that is within 10% of the target value, the approved instrument will not allow the qualified technician to test the subject’s breath samples (*Gubbins*, at para. 4(b)).

[30] Wet bath alcohol standards generally have a concentration of 121 mg of alcohol (plus or minus 3 mg) in 100 mL of liquid solution. These standards are known as “100 milligram percent solutions” (Jokinen and Keen, at p. 341) because they have a target value of 100 mg percent, provided that the temperature of the alcohol standard is within a range of 33.8 to 34.2°C (*Recommended Operational Procedures*, at p. 4). Therefore, if the approved instrument reads a wet bath alcohol standard sample and produces a result of between 90 and 110 mg percent, the approved instrument is functioning properly (*Intox EC/IR II Manual*, at p. C-10).

[31] By contrast, the target value of a dry gas alcohol standard can fluctuate, even at the correct testing temperature. While dry gas alcohol standards generally have a base target value of 82 mg percent at sea level, the precise concentration of alcohol in the gas solution is subject to changes in barometric pressure. Prior to conducting a system calibration check with a gas alcohol standard, the approved instrument or an accessory device (depending on the particular approved instrument) will establish the corrected target value at the testing location at that time (*Recommended Operational Procedures*, at p. 4; *Intox EC/IR II Manual*, at p. C-10). For example, if the corrected target value is 80 mg percent due to a decrease in barometric pressure (lower pressure results in lower alcohol concentration), the approved instrument is functioning properly if it produces a system calibration check result of 72 to 88 mg percent.

[32] Each unit (e.g., a cylinder of dry gas) of an alcohol standard has both an expiry date and a limited number of uses. In the same way that a failed system calibration check will shut down the approved instrument, if an alcohol standard is used beyond its expiry date or number of tests, the approved instrument will not allow the qualified technician to conduct the test (*Intox EC/IR II Manual*, at pp. K-3 and K-4).

(c) *Two or More Breath Samples*

[33] If the system blank check and the system calibration check each produce the correct results, the qualified technician can proceed to obtain a breath sample from a person to measure their BAC. Then, prior to obtaining another sample, the qualified

technician must repeat the entire testing process, beginning with the system blank check (*Gubbins*, at para. 4(f)).

[34] The ATC recommends that the qualified technician wait at least 15 minutes before starting or restarting the procedure to obtain a breath sample. The 15-minute observation period ensures that the sample is not distorted by a “digestive issue that had introduced alcohol into [the subject’s] mouth” (Jokinen and Keen, at p. 335; see also *R. v. Cyr-Langlois*, 2018 SCC 54, [2018] 3 S.C.R. 456; *C-46 Backgrounder* (2019), at p. 46).

[35] To further ensure accurate breath alcohol test results, the ATC also recommends that the qualified technician re-test if two results differ by more than 20 mg percent. The qualified technician will continue to conduct the entire testing process until the approved instrument has produced two results that are within 20 mg percent of each other (*Recommended Operational Procedures*, at p. 5).

IV. Statutory Scheme for “80 and Over” Prosecutions

[36] Having set out the technical and operational aspects of breath alcohol testing, we turn now to the statutory scheme at issue in this appeal. This scheme was created by the *Amending Act* and is situated in Part VIII.1 of the *Criminal Code*. The relevant statutory provisions discussed below are reproduced in the Appendix.

A. “80 and Over” Offence

[37] Since 1969, the *Criminal Code* has prohibited operating a conveyance with a BAC over 80 mg percent (*St-Onge Lamoureux*, at para. 5; Department of Justice, *Legislative Background: reforms to the Transportation Provisions of the Criminal Code (Bill C-46) (2017)* (“*C-46 Backgrounder (2017)*”), at p. 6; see, e.g., *Criminal Code*, s. 253(1)(b), as it appeared in 2017). Given the legal BAC threshold, the offence was historically called the “over 80” offence.

[38] In 2018, the *Amending Act* repealed the “over 80” offence and enacted a new offence under Part VIII.1 of the *Criminal Code* (*C-46 Backgrounder (2019)*, at p. 23; *C-46 Backgrounder (2017)*, at pp. 13-14; Jokinen and Keen, at p. 21). Pursuant to s. 320.14(1)(b), it is an offence for a person to have a BAC that is “equal to or exceeds” 80 mg percent within two hours after they have ceased to operate a conveyance:

320.14 (1) Everyone commits an offence who

...

(b) subject to subsection (5), has, 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;

Due to the lowered legal BAC threshold as compared to the historical “over 80” offence, this current offence is commonly known as the “80 and over” offence.

[39] Section 320.14(5) sets out an exception to the “80 and over” offence:

(5) No person commits an offence under paragraph (1)(b) if

(a) they consumed alcohol after ceasing to operate the conveyance;

(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood; and

(c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

B. *Proving Blood Alcohol Concentration Through Breath Samples*

[40] In this section, we discuss the evidentiary scheme set out in Part VIII.1 for proving, among other impaired offences listed in that Part, “80 and over” offences. Throughout these reasons, we will refer to the scheme set out in ss. 320.31 to 320.34 as the “2018 evidentiary scheme”.

(1) Section 320.31(1): Presumption of Accurate Breath Alcohol Results

[41] The presumption of accuracy in s. 320.31(1) functions as an evidentiary shortcut for proving “80 and over” offences. The presumption allows the Crown to rely on the accused’s breath alcohol test results as “conclusive proof” of the accused’s BAC at the time that the tests were conducted. This relieves the Crown from having to lead expert evidence to prove the accuracy and reliability of breath test results in each impaired driving prosecution. If the results of the breath alcohol test are different, the

Criminal Code allows the Crown to rely on the lowest of the results as conclusive proof of the accused's BAC:

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

[42] The presumption of accuracy stems from Parliament's stated confidence in the accuracy and reliability of breath alcohol test results from an approved instrument:

320.12 It is recognized and declared that

. . .

(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;

The declaratory statement in s. 320.12(c) aligns with this Court's recognition in *St-Onge Lamoureux* of the scientific accuracy and reliability of the results from approved instruments (paras. 40 and 72; see also *C-46 Backgrounder* (2017), at p. 45; *C-46 Backgrounder* (2019), at p. 46).

[43] That said, Parliament's confidence in the accuracy and reliability of breath alcohol analysis results is contingent on the approved instrument being operated in accordance with the ATC's recommended procedures (*C-46 Backgrounder* (2017), at

p. 22; *C-46 Backgrounder* (2019), at p. 45; see also Jokinen and Keen, at pp. 347-48; Kenkel, at p. 263). For this reason, before the Crown can benefit from the presumption, it must first prove that a series of operational procedures were followed:

320.31 (1) . . .

(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.

[44] The preconditions in s. 320.31(1)(a) to (c) correspond with the ATC's recommended procedures to ensure accurate results, as discussed above. For example, the precondition in s. 320.31(1)(a) requires the qualified technician to conduct a system blank test before each breath alcohol test, "the result of which is not more than" 10 mg percent. The precondition also requires the qualified technician to conduct "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". Both of these requirements codify the ATC's recommended margins of error for the system blank test and system calibration check (see *Recommended Operational Procedures*, at p. 4).

[45] In addition, the precondition in s. 320.31(1)(b), which requires two breath alcohol samples to be separated by "an interval of at least 15 minutes", codifies the

ATC's recommended period of time that a qualified technician should wait between tests (see Jokinen and Keen, at p. 335; see also *Cyr-Langlois; C-46 Backgrounder* (2019), at p. 46). Similarly, the precondition in s. 320.31(1)(c), which requires the results of the breath alcohol test results (rounded down to the nearest multiple of 10 mg) to be within 20 mg percent of each other, reflects the ATC's recommendation to re-test if two results differ by more than that margin (*Recommended Operational Procedures*, at p. 5).

[46] In sum, the preconditions set out in s. 320.31(1)(a) to (c) are derived from the operational procedures recommended by the ATC. Following these procedures gives rise to a conclusive presumption that the breath alcohol test results are accurate and reliable.

[47] The conclusive nature of the presumption of accuracy has implications for the standard of proof that attaches to the preconditions in s. 320.31(1). As this Court held in *R. v. Egger*, [1993] 2 S.C.R. 451, at pp. 474-75, when admission of evidence may "have a conclusive effect with respect to guilt, the criminal standard is applied". If the presumption of accuracy is established, the accused will be unable to challenge the accuracy or reliability of the test results, and a finding of guilt will ordinarily follow. For this reason, the lower burden of proof on a balance of probabilities is not appropriate. Instead, the Crown must prove each precondition in s. 320.31(1) beyond a reasonable doubt (see also Jokinen and Keen, at pp. 331-32; Kenkel, at p. 264; *C-46 Backgrounder* (2017), at p. 45; *C-46 Backgrounder* (2019), at p. 45).

[48] While the presumption of accuracy functions as an evidentiary shortcut for proving “80 and over” offences, it is not itself an element of the offence. Failure to prove the statutory preconditions beyond a reasonable doubt means that the Crown cannot rely on the presumption to prove an accused’s BAC at the time of testing. However, there may be other avenues for the Crown to prove its case against the accused, depending on the evidence before the court (see Jokinen and Keen, at p. 348).

(2) Section 320.34: Disclosure of Information

[49] Section 320.34(1) of the *Criminal Code* requires the Crown to “disclose to the accused” information “sufficient to determine” whether the preconditions in s. 320.31(1) have been met. Namely, the Crown must disclose:

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.

[50] If an accused person seeks further disclosure, s. 320.34(2) provides that they may “apply to the court for a hearing” on that matter. Section 320.34(3) and (4) sets out the form, content and procedural requirements of this application.

(3) Sections 320.32 and 320.33: Relying on the Presumption of Accuracy at Trial

[51] As described above, s. 320.31(1)(a) to (c) sets out the preconditions to the presumption of accuracy. It is open to the Crown to seek to prove these preconditions by *viva voce* evidence at trial. Alternatively, documentary evidence — namely, the certificate of an analyst, certificate of a qualified technician, and the printout from an approved instrument — may satisfy the preconditions. Sections 320.32 and 320.33 permit these documents to be received in evidence for the truth of their contents without *viva voce* evidence.

[52] Specifically, s. 320.32(1) permits certificates of analysts, qualified medical practitioners, and qualified technicians to be admitted for the truth of “the facts alleged in the certificate” without evidence from the person who signed the certificate:

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.

[53] The procedure for admitting certificate evidence is set out in s. 320.32(2) to (5). Notably, the provisions employ the term “produce” to mean place into evidence

at trial; this is distinct from the term “disclose”, which is utilized in the statutory disclosure obligation provision, s. 320.34, discussed above.

[54] While it will often be the Crown who is seeking to rely on certificate evidence in its case against the accused (see *C-46 Backgrounder* (2017), at p. 24; *C-46 Backgrounder* (2019), at p. 49), the wording in s. 320.32(2) to (5) is party-neutral. Under s. 320.32(2), before trial begins, a party seeking to “produce” the certificate must provide the other party with “reasonable notice” of its intent to produce the certificate, as well as a copy of the certificate. Under s. 320.32(3), the party “against whom the certificate is produced may apply” for leave to cross-examine the individual who signed the certificate. The application must be in writing and it must “set out the likely relevance of the proposed cross-examination with respect to the facts alleged in the certificate” (s. 320.32(4)).

[55] Section 320.33 stipulates that a printout from an approved instrument can also be admitted for the truth of its contents without *viva voce* evidence, provided that it is signed by a qualified technician who certifies it to be such a printout:

320.33 A document that is printed out from an approved instrument and signed by a qualified technician who certifies it to be the printout produced by the approved instrument when it made an analysis of a sample of a person’s breath is evidence of the facts alleged in the document without proof of the signature or official character of the person who signed it.

[56] Thus, ss. 320.32 and 320.33 function as statutory exceptions to the common law rule against the admissibility of hearsay evidence. Among other things,

they offer a pathway for the Crown to establish the preconditions to the presumption of accuracy via documentary evidence. However, we hasten to add that ss. 320.32 and 320.33 may be used for other purposes; these reasons should not be read as limiting the potential uses of these provisions in prosecutions under Part VIII.1 of the *Criminal Code*.

[57] Having set out the relevant provisions in the statutory scheme for “80 and over” prosecutions, we now turn to the issue on appeal.

V. Issue

[58] This appeal focuses on one of the preconditions to the presumption of accuracy in s. 320.31(1). Per s. 320.31(1)(a), the Crown must prove that the alcohol standard used in the system calibration check was “certified by an analyst”. To do so, can the Crown rely on evidence from the qualified technician, either by certificate or *viva voce*? Or, must the Crown prove this fact by means of evidence from the analyst, either by certificate or *viva voce*?

[59] This is a question of statutory interpretation, one which it is helpful to frame in the following way: Is s. 320.31(1)(a) a significant change from its predecessors, such that evidentiary rules that Parliament established under previous iterations of the evidentiary scheme do not survive the *Amending Act*? In order to answer this, regard should be had to the legislative evolution and the purpose, text and context of s. 320.31(1)(a).

VI. Decisions Below

A. *New Brunswick Provincial Court (Sonier Prov. Ct. J.)*

[60] The trial judge held that the Crown needed to produce evidence, either by certificate or *viva voce*, directly from the analyst to prove that the alcohol standard used in the system calibration check was certified by an analyst. The trial judge reached this conclusion by relying on the Alberta Court of Appeal's reasons in *R. v. Goldson*, 2021 ABCA 193, 406 C.C.C. (3d) 84, which was released several months before Mr. Rousselle's trial.

[61] As noted above, the trial judge ruled that the certificates of analyst were inadmissible due to a lack of reasonable notice of intent to produce. Without the certificates of analyst, the trial judge held that the Crown had not proven the precondition in s. 320.31(1)(a) beyond a reasonable doubt; accordingly, the Crown could not rely on the presumption of accuracy. The breath test results recorded in the certificate of the qualified technician were, therefore, not conclusive proof of Mr. Rousselle's BAC at the time of testing. Mr. Rousselle was acquitted.

B. *New Brunswick Court of King's Bench (Robichaud J.)*

[62] The Crown appealed Mr. Rousselle's acquittal. The summary conviction appeal judge noted that since the trial decision, Bauman C.J. of the Yukon Court of Appeal had advanced an alternative interpretation of s. 320.31(1)(a) in *R. v.*

MacDonald, 2022 YKCA 7, 419 C.C.C. (3d) 100. The summary conviction appeal judge rejected the reasoning in *Goldson*, adopted the reasoning in *MacDonald*, and held that the Crown could prove that the alcohol standard was certified by an analyst through the qualified technician's evidence, whether by certificate or *viva voce*. In other words, the Crown does not need to produce into evidence both the certificate of the qualified technician and the certificate of the analyst in order to rely on the presumption of accuracy.

[63] Consequently, the trial judge erred in concluding that the Crown had not proven all preconditions to the presumption of accuracy beyond a reasonable doubt. The certificate of the qualified technician properly established that the alcohol standard used in the system calibration check was certified by an analyst. Therefore, Mr. Rousselle's breath test results were conclusive proof of his BAC at the time of testing.

[64] As the trial judge found that the Crown proved all other elements of the offence beyond a reasonable doubt, the summary conviction appeal judge set aside the acquittal and entered a conviction.

C. *New Brunswick Court of Appeal, 2024 NBCA 3, 433 C.C.C. (3d) 31 (Richard C.J. and Baird and LaVigne JJ.A.)*

[65] A panel of the Court of Appeal unanimously agreed with the summary conviction appeal judge that *MacDonald* set out the correct interpretation of s. 320.31(1)(a). Nothing in s. 320.31(1) requires independent confirmation of the

qualified technician's evidence that the alcohol standard was certified as suitable for use with the approved instrument. The Crown can rely on the certificate of the qualified technician attesting that all preconditions to the presumption of accuracy have been met.

[66] The Court of Appeal agreed with Bauman C.J.'s observation in *MacDonald* as to how *Goldson* had erroneously characterized the 2018 amendments to the *Criminal Code* as a "significant change" (see *Goldson*, at para. 48). In the Court of Appeal's view, *MacDonald* correctly concluded that a precondition that requires the Crown to prove that the alcohol standard used has been certified by an analyst is the "functional equivalent" (para. 59) of the requirement that the alcohol standard was suitable for use, which was a necessary condition to the admission of the certificate of the qualified technician under s. 258(1)(g) of the preceding scheme. Parliament moved the placement of the impugned precondition when it consolidated the certificate evidence and hearsay shortcuts into s. 320.32. This reorganization better aligned the evidentiary requirements for the presumption of accuracy — they are now the same whether the Crown adduces evidence *viva voce* or by certificate. In that way, the amendments did not change the Crown's burden or establish a new requirement. Rather, they standardized the admission requirements for the qualified technician's evidence.

[67] The Court of Appeal concluded that Bauman C.J.'s interpretation in *MacDonald* better accorded with Parliament's stated purpose for amending the scheme: to simplify and streamline the trial process in impaired driving cases.

[68] For those reasons, the Court of Appeal affirmed Mr. Rousselle's conviction under s. 320.14(1)(b). Mr. Rousselle appealed his conviction to this Court.

VII. The Current State of the Jurisprudence on Section 320.31(1)(a)

[69] As is clear from the decisions below, the issue on appeal is informed by the jurisprudential debate across Canada regarding the interpretation of s. 320.31(1)(a). Appellate courts have divided as to whether Parliament intended to permit the Crown to rely on hearsay evidence from the qualified technician to prove that the alcohol standard was "certified by an analyst".

[70] It is not in dispute that evidence from the qualified technician as to whether the alcohol standard is certified by an analyst is presumptively inadmissible hearsay. As previously explained, the alcohol standard is certified prior to being shipped to the qualified technician (*Intox EC/IR II Manual*, at p. F-2). Consequently, the qualified technician has no direct knowledge of the fact of certification of the alcohol standard. The qualified technician only learns that the alcohol standard is certified from the certificate of the analyst that ordinarily accompanies the alcohol standard (p. F-2). As the qualified technician's knowledge of the certification of the alcohol standard rests on an out-of-court statement (the certificate of the analyst), this means that any

evidence from the qualified technician about the fact of certification is presumptively inadmissible (see, e.g., *R. v. Charles*, 2024 SCC 29, at para. 43; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 21).

[71] Moreover, the qualified technician’s statement in their certificate that the alcohol standard was certified by an analyst is *double* hearsay (see *R. v. Vigneault*, 2024 QCCA 793, at para. 5). The qualified technician’s knowledge of the fact of certification is predicated on an out-of-court statement, and their knowledge of this fact is *itself* introduced into evidence through an out-of-court statement — the certificate of the qualified technician.

[72] In *Goldson*, the Alberta Court of Appeal held that the proper interpretation of “certified by an analyst” in s. 320.31(1)(a) excludes the qualified technician’s hearsay evidence as to this fact. In the court’s view, the Crown must produce evidence from the analyst regarding certification of the alcohol standard (para. 83). The court acknowledged that preceding iterations of the evidentiary scheme allowed the qualified technician to provide hearsay evidence as to the suitability of an alcohol standard in satisfaction of the presumption of accuracy (para. 18). However, the court held that s. 320.31(1) was a “significant change” from its predecessors (para. 48), such that the previous evidentiary rules were not carried forward into the 2018 evidentiary scheme. Thus, while s. 320.32(1) permits a certificate to be filed for the truth of its contents, this evidentiary shortcut does not apply to a qualified technician’s statement that the alcohol standard was “certified by an analyst” (para. 73). Instead, the Crown must rely

on the ordinary rules of evidence or file a certificate of the analyst under s. 320.32(1) to satisfy s. 320.31(1)(a) (para. 73).

[73] The Yukon Court of Appeal in *MacDonald* reached the opposite conclusion. The court held that, “[r]ather than clear legislative intention to substantially change the law”, there were “innocuous explanations” for Parliament’s decision to amend the evidentiary scheme in 2018 (para. 67). As such, the certificate of the qualified technician could continue to be admissible as evidence of the fact that the alcohol standard was “certified by an analyst” (para. 45). This interpretation also gives effect to s. 320.32(1), which is a broadly worded statutory exception to hearsay (para. 53). Pursuant to that exception, the entirety of the certificate of the qualified technician can be filed as “evidence of the facts alleged” (para. 45). In light of this, it is unnecessary for the Crown to call the analyst to give evidence of certification so as to satisfy the precondition in s. 320.31(1)(a).

[74] Appellate courts across Canada have endorsed the reasoning in either *Goldson* (see, e.g., *Bakalis v. R.*, 2021 QCCS 3990; *R. v. Pahl*, 2021 SKQB 179, 81 M.V.R. (7th) 97) or *MacDonald* (see, e.g., *Vigneault*; *R. v. Kim*, 2025 ONCA 478, 450 C.C.C. (3d) 441; *R. v. Kenny*, 2024 NWTSC 29, [2024] 9 W.W.R. 288; *R. v. Greening*, 2024 NSSC 57; *R. v. Brown*, 2024 SKKB 86). This appeal presents the Court with an opportunity to consider the competing lines of authorities, and to provide clarification on permissible ways to establish that an alcohol standard is “certified by an analyst”, as required by s. 320.31(1)(a).

VIII. Positions of the Parties

[75] In the same way as the caselaw has developed in the wake of *Goldson* and *MacDonald*, the parties to this appeal urge this Court to substantially adopt one or the other as the correct interpretation of s. 320.31(1)(a).

[76] Mr. Rousselle urges this Court to adopt the *Goldson* interpretation and hold that the Crown must adduce evidence from the analyst to prove that the alcohol standard was certified for use with an approved instrument (A.F., at para. 24). Parliament has set out distinct roles for the qualified technician and the analyst in conducting breath alcohol tests (transcript, at p. 27). The analyst is the only person who is qualified to certify that an alcohol standard is suitable for use with an approved instrument. Parliament's intention cannot have been to deprive courts of the analyst's firsthand evidence of certification (A.F., at para. 32). While the purpose of the presumption of accuracy is to simplify impaired driving prosecutions, that does not mean the Crown must receive the benefit of the easiest means to prove the preconditions (transcript, at pp. 17 and 24-25).

[77] Mr. Rousselle submits that, if Parliament had not intended to change the requirements for the presumption of accuracy, it would have kept the same wording from the old s. 258(1)(g) that set out precisely what the certificate of the qualified technician could establish as evidence (A.F., at paras. 34-36). Further, if the Crown can establish the preconditions through the hearsay evidence of the qualified technician without tendering the certificate of the analyst, then ss. 320.32 and 320.34 have no

purpose (paras. 41 and 52). Even though the certificate of the analyst must be disclosed, if the Crown does not also produce the analyst's certificate into evidence, the accused is precluded from applying to cross-examine the analyst. This is tantamount to infringing the accused's right to full answer and defence (paras. 46-50).

[78] For its part, the Crown asks the Court to follow *MacDonald* and the Court of Appeal in this case. The Crown submits that although attesting to the fact that the qualified technician conducted the system calibration check with an alcohol standard that was certified by an analyst is hearsay evidence, it falls within the scope of the qualified technician's role (R.F., at para. 45). Previous iterations of the evidentiary scheme established that the qualified technician could provide evidence that the alcohol standard was suitable. There is no indication that Parliament meant to change the law (para. 66). Rather, the text, context, and purpose of the current scheme demonstrate that the qualified technician remains competent to state that the alcohol standard was certified by an analyst.

[79] First, the Crown submits that the broader wording of the certificate admissibility provisions in s. 320.32 show that Parliament's intent was to ensure that the qualified technician could continue to provide evidence as to each step that they took to ensure the approved instrument was in proper working order, including that they performed a system calibration check with a certified alcohol standard (R.F., at paras. 47-53). Second, as the Court of Appeal held, Parliament moved the alcohol standard requirement from the certificate provisions to the presumption of accuracy to

fix an anomaly between certificate and *viva voce* evidence, rather than to increase the Crown's burden of proving the preconditions (paras. 54-58). And third, "certified by an analyst" is not a substantive change from "suitable for use". By virtue of s. 320.4, the *Criminal Code* is clear that "certified by an analyst" means "certified by an analyst as being suitable for use with an approved instrument" (paras. 59-60).

IX. Analysis

[80] It is settled law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, at para. 30; *Piekut v. Canada (National Revenue)*, 2025 SCC 13, at para. 42).

[81] The modern approach — text, context, and purpose — is the primary tool to determine the meaning of a statutory provision. Other principles of interpretation, such as the strict construction of penal statutes, "only receive application where there is ambiguity" (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 28). Ambiguity in the statutory interpretation context does not arise because courts have come to different conclusions or because a provision is complex. Rather, a "genuine" ambiguity only exists where the modern approach can give rise to

two or more plausible interpretations (paras. 29-30 and 61-66; *Piekut*, at para. 48; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 35).

A. *The Legislative Evolution of the Evidentiary Scheme*

[82] Despite the competing lines of authorities, it is well accepted that the Crown has *historically* been able to rely on the qualified technician, rather than the analyst, to prove that the alcohol standard was “suitable for use” (see, e.g., *Goldson*, at para. 18; *MacDonald*, at para. 40). While, as explained above, this evidence is presumptively inadmissible hearsay, previous iterations of the evidentiary scheme up to the *Amending Act* in 2018 allowed for its use to prove the preconditions to the presumption of accuracy.

[83] The point of jurisprudential disagreement is whether Parliament intended to carry this rule forward into the 2018 evidentiary scheme, or whether Parliament intended the 2018 evidentiary scheme to be a “significant change” from its predecessors such that this rule no longer applies (see, e.g., *Goldson*, at para. 48).

[84] Accordingly, in interpreting “certified by an analyst” in s. 320.31(1)(a), regard should be had to the legislative evolution of the 2018 evidentiary scheme. It is well established that a “provision’s initial formulation and all subsequent formulations” can “shed light on the intention of the legislature in repealing, amending, replacing or adding to a statute” (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43; *Kosicki v. Toronto*

(*City*), 2025 SCC 28, at para. 43; see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 23.02[1]).

[85] The evidentiary scheme for prosecuting impaired driving offences was introduced in 1969 alongside the “over 80” offence (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 16). As this Court recognized in *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, Parliament has sought to address the challenges posed by large numbers of drinking and driving offences by taking steps to “simplify and streamline the trial process” (para. 2). This includes enacting and amending provisions of the evidentiary scheme over the years.

[86] In 1970, the initial 1969 evidentiary scheme was carried forward into the *Criminal Code*, R.S.C. 1970, c. C-34 (“*Criminal Code (1970)*”), and its provisions were renumbered from s. 224A(1) to s. 237(1). Between 1970 and 1985, Parliament made several amendments to the wording of the provisions in the evidentiary scheme (see *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 18). The substance of the evidentiary scheme, however, remained the same as in 1969.

[87] Section 237(1)(c) of the *Criminal Code (1970)* established a presumption that an accused’s breath alcohol test result was evidence of their BAC at the time the offence was alleged to have been committed. This presumption would later become known as the “presumption of identity” (see *R. v. St. Pierre*, [1995] 1 S.C.R. 791, at paras. 20-22; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 14; *R. v. Gibson*, 2008 SCC 16, [2008] 1 S.C.R. 397, at para. 16; *St-Onge Lamoureux*, at para.

15). In order to benefit from this presumption, the Crown was required to satisfy several preconditions set out in s. 237(1)(c)(i) to (iv):

237. (1) In any proceedings under section 234 or 236,

...

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 235(1), if

(i) [not yet proclaimed]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and in any event 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) a chemical analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the chemical analyses so made is, in the absence of any evidence to the contrary, proof that the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the proportion determined by such analyses and, where the results of the analyses are different, the lowest of the proportions determined by such analyses;

(*Criminal Code (1970)*, s. 237(1)(c), as it appeared in 1976.)

[88] The evidentiary scheme also included two statutory exceptions to the hearsay rule. First, s. 237(1)(e) prescribed that the certificate of the analyst could be admitted as evidence of the suitability of the “substance or solution” as long as the certificate contained certain assurances:

(e) a certificate of an analyst stating that he has made an analysis of a sample of any substance or solution intended for use in an approved instrument and identified in the certificate and that the sample analyzed by him was found to be suitable for use in an approved instrument, is evidence that the substance or solution so identified is suitable for use in an approved instrument, without proof of the signature or the official character of the person appearing to have signed the certificate;

(*Criminal Code (1970)*, s. 237(1)(e), as it appeared in 1976.)

[89] Second, s. 237(1)(f) carved out a statutory exception to hearsay for the certificate of the qualified technician. This exception gave rise to a “presumption of accuracy”, wherein the qualified technician’s reading was presumed to be an accurate determination of the accused’s blood alcohol level at the time of testing (see *R. v. Moreau*, [1979] 1 S.C.R. 261; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089, at p. 1099; *St. Pierre*, at paras. 24-26 and 31-40; *Boucher*, at para. 14; *St-Onge Lamoureux*, at para. 6):

(f) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 235(1), a certificate of a qualified technician stating

(i) that each chemical analysis of the samples has been made by means of an approved instrument operated by him in which a substance or solution suitable for use in that approved instrument and identified in the certificate was used,

(ii) the results of the chemical analyses so made, and

(iii) if the samples were taken by him,

(A) [not proclaimed]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

(*Criminal Code (1970)*, s. 237(1)(f), as it appeared in 1976.)

[90] Early jurisprudence interpreted the evidentiary scheme to allow hearsay evidence from the qualified technician regarding the suitability of the “substance or solution” to be admissible for its truth. In doing so, this meant that the Crown could rely solely on the evidence of the qualified technician to satisfy the preconditions for both the presumptions of accuracy (s. 237(1)(f)) and identity (s. 237(1)(c)).

[91] With regard to the presumption of identity in s. 237(1)(c), the Ontario Court of Appeal in *R. v. Ware* (1975), 30 C.R.N.S. 308, held that the Crown needed to file only the certificate of the qualified technician under the statutory exception to hearsay in s. 273(1)(f). When this was done, an analyst’s *viva voce* testimony or certificate was not needed to supplement the qualified technician’s evidence on suitability. Lacourcière J.A., writing for the court, observed that mandating the Crown to tender evidence from an analyst would be tantamount to reading in a technical requirement which did not accord with the evidentiary scheme (p. 315). This Court subsequently endorsed Lacourcière J.A.’s reasoning in *Lightfoot v. The Queen*, [1981] 1 S.C.R. 566, at pp. 574-75.

[92] With regard to the presumption of accuracy, this Court held in *Crosthwait* that the Crown needed only to produce statements from the qualified technician on each precondition set out in s. 237(1)(f)(i) to (iii). In that case, the accused sought to argue that his breath alcohol test results were not reliable as the qualified technician did not confirm that there was less than a one-degree difference between the air temperature and the temperature of the solution. Pursuant to the manufacturer's instruction manual, which had been filed as evidence at trial, such a test must be conducted before an accurate result could be obtained. Pigeon J., for a unanimous Court, rejected this argument. He explained that the presumption of accuracy did not require a court to look beyond the qualified technician's assertions:

It is clear from the wording of the *Code* that the rebuttable presumption arises from the mere statements in the certificate itself. . . . It may very well be that a scientist would not sign a certificate of analysis on the basis of the tests as performed by the technician, but this is irrelevant. Parliament has prescribed the conditions under which a certificate is evidence of the results of breath analyses and did not see fit to require evidence that the approved instrument was operating properly. [p. 1099]

[93] In 1985, the evidentiary scheme was renumbered as s. 258(1) (*Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27 (1st Supp.), s. 36). The presumption of identity, previously captured in s. 237(1)(c), became s. 258(1)(c). However, apart from a few textual modifications, the substance of the presumption remained unchanged from its predecessor (see *Goldson*, at para. 42).

[94] The statutory exceptions to hearsay for certificates of both the analyst and the qualified technician were renumbered as s. 258(1)(f) and s. 258(1)(g), respectively.

The text in both provisions was amended to include a reference to “an alcohol standard”:

(f) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with an approved instrument and that the sample of the standard analyzed by the analyst was found to be suitable for use with an approved instrument, is evidence that the alcohol standard so identified is suitable for use with an approved instrument without proof of the signature or the official character of the person appearing to have signed the certificate;

(g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

(i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

(ii) the results of the analyses so made, and

(iii) if the samples were taken by the technician,

(A) [not proclaimed]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

(*Criminal Code*, at it appeared in 1994.)

[95] Despite this amendment, *Ware*, *Lightfoot*, and *Crosthwait* remained good law. Appellate courts found that Parliament had not enacted anything that would prevent the Crown from continuing to rely on the qualified technician to prove the suitability of an alcohol standard in lieu of an analyst's evidence (see, e.g., *R. v. Squires* (1994), 114 Nfld. & P.E.I.R. 157 (C.A.), at paras. 22-23; *R. v. Kroeger* (1992), 97 Sask. R. 263 (C.A.), at para. 27).

[96] In 2008, the evidentiary scheme was amended again by the *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 24. Parliament incorporated the presumption of accuracy into s. 258(1)(c) so that it now was situated in the same provision as the presumption of identity (*St-Onge Lamoureux*, at para. 15). Parliament also amended the text of s. 258(1)(c) to provide that evidence of the results of the analysis was “conclusive proof” rather than “in the absence of evidence to the contrary, proof” of the accused's BAC at the time of testing and the time of the offence:

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(i) [Not in force]

(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

(*Criminal Code*, as it existed in 2008.)

[97] However, the nature of the presumptions of accuracy and identity remained unchanged (*St-Onge Lamoureux*, at para. 15), and no substantive changes were made to either of the statutory exceptions to the hearsay rule in s. 258(1)(f) and (g).

B. *Is the Precondition in Section 320.31(1)(a) a “Significant Change” From the Preceding Scheme?*

[98] We now turn to the current iteration of the evidentiary scheme. As we noted above, a key question in interpreting s. 320.31(1)(a) is whether this iteration of the evidentiary scheme is a significant change from its predecessors.

[99] Mr. Rousselle submits that the *Amending Act* was a significant change such that the interpretation of the preceding evidentiary schemes should not govern the current scheme (A.F., at paras. 25 and 28-30). In his view, Parliament has eliminated the ability of the Crown to rely on the qualified technician's hearsay evidence to prove the preconditions to the presumption of accuracy.

[100] We agree with Mr. Rousselle that, in repealing all of the former driving-related offences and re-enacting them under Part VIII.1 of the *Criminal Code*, the *Amending Act* constituted a “complete overhaul” of the *Criminal Code*’s driving provisions (*R. v. Wolfe*, 2024 SCC 34, at para. 12). We recognize that, among other amendments, Parliament removed both presumptions of identity, formerly under s. 258(1)(c) and (d.1), from the evidentiary scheme.¹ As explained above, whereas the former “over 80” offence required the Crown to prove the accused’s BAC at the time they operated the conveyance, the new “80 and over” offence in s. 320.14(1)(b) expanded the relevant time of offence to be “within two hours after ceasing to operate a conveyance”. In light of this, the previous presumptions of identity, which related the breath alcohol test results back to the time of operation, are no longer necessary for proving all elements of the offence (Jokinen and Keen, at pp. 22-23).

[101] Despite these significant amendments, we are of the view that Parliament intended to maintain, rather than change, the evidentiary rule that the qualified technician’s evidence is sufficient to prove that the alcohol standard used in the system calibration check was certified by an analyst. We reach this conclusion having regard not only to the legislative evolution discussed above, but more fundamentally to the purpose, text, and context of s. 320.31(1)(a) itself, to which we now turn.

¹ We note that, while it is not discussed above, amendments in 1997 (*Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 10(2)) created a second presumption of identity in s. 258(1)(d.1) (*Boucher*, at para. 14). This presumption established that, where the breath alcohol testing produces a reading above 80 mg percent, the accused’s blood alcohol concentration is presumed to have exceeded 80 mg percent at the time of the alleged offence, absent evidence “tending to show” that the accused’s blood alcohol concentration did not in fact exceed 80 mg percent (see *St-Onge Lamoureux*, at para. 15-17).

(1) The Purpose of the *Amending Act*

[102] In *Wolfe*, this Court observed that the *Amending Act* “furthered objectives of ‘coherence, efficiency, simplification, and modernization of the *Criminal Code* provisions relating to driving offences” (para. 78).

[103] In this way, the *Amending Act* is consistent with Parliament’s previous efforts to simplify and streamline the prosecution of driving related offences (*R. v. Kelly*, 2025 ONCA 92, 446 C.C.C. (3d) 100, at para. 17). The preamble to the *Amending Act* declares “it is important to simplify the law relating to the proof of blood alcohol concentration”. Parliament’s intention is also expressed in more detail in the summary of the *Amending Act*:

Part 2 repeals the provisions of the *Criminal Code* that deal with offences and procedures relating to conveyances, including those provisions enacted by Part 1, and replaces them with provisions in a new Part of the *Criminal Code* that, among other things,

(a) re-enact and modernize offences and procedures relating to conveyances;

...

(c) establish the requirements to prove a person’s blood alcohol concentration;

[104] In light of this stated purpose, it is clear that Parliament intended that the 2018 evidentiary scheme would create a simplified route to proving an accused’s blood alcohol concentration that is anchored in the scientific consensus on the reliability and

accuracy of breath alcohol test results. The presumption of accuracy gives effect to this purpose by operationalizing the ATC's science-based recommended procedures. Parliament has "avoid[ed] needless delays in drinking and driving proceedings" (see, by analogy, *Alex*, at para. 36) by reducing trials to only that evidence which is scientifically necessary to have confidence in the proper functioning of the approved instrument.

[105] It follows that the interpretation of "an alcohol standard that is certified by an analyst" in s. 320.31(1)(a) is to be informed by Parliament's intention to streamline "80 and over" trials. Additional technical requirements that Parliament did not intend the Crown to prove in order to rely on the presumption of accuracy should not be read into the *Criminal Code*. Such requirements would hinder, rather than promote, what Parliament sought to achieve through the evidentiary scheme.

(2) "Certified by an Analyst" Is the Same as "Suitable for Use"

[106] We turn to consider whether the text of s. 320.31(1)(a) indicates that Parliament intended to require the analyst's evidence on certification. We accept that the phrase "alcohol standard, identified in the certificate, that is suitable for use with an approved instrument", which had existed since the 1985 amendments to the evidentiary scheme, does not appear in s. 320.31(1)(a). Rather, Parliament has said that the alcohol standard must be "certified by an analyst" before the Crown can rely on the presumption of accuracy.

[107] It is “presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, to change the law” (Sullivan, at §23.02[3]; see also *Wolfe*, at para. 39). Consequently, Mr. Rousselle submits that the change in phrase from “suitable for use” to “certified by an analyst” signals that Parliament intended to change the preconditions for the presumption of accuracy, such that evidence that the alcohol standard was certified by an analyst must come from analysts themselves (A.F., at para. 28).

[108] The Alberta Court of Appeal in *Goldson* reached a similar conclusion:

The grammatical and ordinary meaning of s. 320.31(1) sets out the preconditions to the existence of the presumption of accuracy. It envisions the employment of a calibration check to confirm the accuracy of the approved instrument. The alcohol standard’s usefulness in this calibration procedure depends upon it containing a known concentration of alcohol, which explains the requirement that the alcohol standard be “certified by an analyst”. This change to the legislation indicates that successful calibration is a fundamental precondition to the existence of a presumption of accuracy . . . [Emphasis added; para. 67.]

[109] Respectfully, we differ. These words do not sufficiently indicate that Parliament intended to remove the evidentiary shortcut. Though some of the words have changed, the meaning of the text has not. The provisions in the evidentiary scheme surrounding s. 320.31(1)(a) shed light on how the text should be understood. In particular, ss. 320.34(1)(e) and 320.4(c) show that Parliament has sought to preserve, rather than repeal, the meaning conveyed by the phrase “suitable for use” in the text of s. 320.31(1)(a).

[110] First, s. 320.4(c) of the *Criminal Code*, when read together with s. 320.11, defines an analyst as a person designated by the Attorney General “to certify that an alcohol standard is suitable for use with an approved instrument”:

320.4 The Attorney General may designate

(a) a person as qualified, for the purposes of this Part, to operate an approved instrument;

(b) a person or class of persons as qualified, for the purposes of this Part,

(i) to take samples of blood, or

(ii) to analyze samples of bodily substances; and

(c) a person or class of persons as qualified, for the purposes of this Part, to certify that an alcohol standard is suitable for use with an approved instrument.

[111] Second, s. 320.34(1)(e) of the *Criminal Code* provides that a certificate of an analyst must contain a statement that “the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument”.

[112] When s. 320.31(1)(a) is read in the context of ss. 320.34(1)(e) and 320.4(c), it is clear that Parliament intended the phrase “certified by an analyst” to carry the same meaning as “suitable for use”. Parliament has simply changed where the relevant wording is found, but has not changed the meaning of the provision. The textual difference between the current scheme and its predecessor is not a substantive change that requires the Crown to prove that the alcohol standard was certified through the analyst’s evidence.

(3) Certification of the Alcohol Standard Is Not a New Precondition to the Presumption of Accuracy

[113] Mr. Rousselle also submits that the 2018 evidentiary scheme is a significant change from its preceding iterations because Parliament chose to require, for the first time, the Crown to prove that the alcohol standard was “certified by an analyst” in order to rely on the presumption of accuracy (A.F., at para. 30). Mr. Rousselle submits that, prior to the *Amending Act*, the presumption of accuracy did not require the Crown to adduce evidence on the suitability of the solution used or the alcohol standard; such a requirement was not found in any of the three criteria in s. 258(1)(c) or its predecessor s. 237(1)(c) (para. 30). Thus, by elevating the certification of the alcohol standard to a precondition, Parliament intended to require the Crown to provide evidence from an analyst in this regard. We note that the Alberta Court of Appeal in *Goldson* adopted a similar interpretation (para. 48).

[114] We would decline to adopt this interpretation. The legislative evolution of the current evidentiary scheme demonstrates that the suitability of the alcohol standard is not a new requirement for the presumption of accuracy. As discussed above, before the 2008 amendments, the presumption of accuracy was found in s. 258(1)(g) (and its predecessor, s. 237(1)(f)). In order for the Crown to rely on the certificate of the qualified technician to satisfy the preconditions to the presumption of accuracy, s. 258(1)(g)(i) required the certificate to state that the alcohol standard was “suitable for use”. Pursuant to *Crosthwait*, this precondition was satisfied by the qualified technician’s “mere statemen[t]” of this fact (p. 1099).

[115] In 2008, the presumption of accuracy was incorporated into s. 258(1)(c), but the nature of the presumption did not change (*St-Onge Lamoureux*, at para. 15). However, the amendment created a “statutory anomaly” (*MacDonald*, at para. 63) in the operation of the presumption as a whole. Under the 2008 evidentiary scheme, the suitability of the alcohol standard did not consistently function as a precondition to the presumption of accuracy. Rather, its application depended on whether the Crown produced certificate or *viva voce* evidence from the qualified technician (paras. 58-59; see also *St-Onge Lamoureux*, at para. 6; *R. v. Hebert*, 2013 ONCJ 774, at para. 36). Where the Crown sought to establish the presumption of accuracy by producing the certificate of the qualified technician, s. 258(1)(g)(i) required the qualified technician to attest that the alcohol standard was “suitable for use” (*MacDonald*, at paras. 58-59):

(g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

(i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument

(*Criminal Code*, as it existed in 2008.)

[116] On the other hand, where the Crown sought to establish the presumption of accuracy through a qualified technician’s *viva voce* evidence, s. 258(1)(c) did *not* require the technician to give evidence about the suitability of the alcohol standard:

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), 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

(*Criminal Code*, as it existed in 2008.)

[117] In 2018, the *Amending Act* resolved this statutory anomaly. Parliament carried forward the requirement that the alcohol standard be “suitable for use” into the new evidentiary scheme through the words “certified by an analyst”. However, instead of housing this precondition under a statutory exception to hearsay, Parliament relocated it in s. 320.31(1)(a). In doing so, Parliament *standardized* this precondition for all forms of evidentiary proof (*MacDonald*, at paras. 59 and 63). The Crown must now satisfy this precondition in every case — regardless of whether it chooses to proceed by way of *viva voce* evidence or certificate of the qualified technician — before it can rely on the presumption of accuracy.

[118] We would therefore agree with the Crown that the structural changes in s. 320.31(1)(a) were not intended to “fundamentally disturb the state of the law or limit the scope of a qualified technician’s certificate” (R.F., at para. 58). Rather, there are

“innocuous explanations for the reorganization” (*MacDonald*, at para. 67). Parliament, in relocating the requirement that the alcohol standard be “certified by an analyst” to s. 320.31(1)(a), intended to simplify and consolidate the preconditions to the presumption of accuracy into one statutory provision. This interpretation is also consistent with the legislative purpose of the *Amending Act*, as standardized evidentiary rules encourage consistency and uniformity in trial proceedings (R.F., at para. 56).

(4) The Evidentiary Scheme as a Whole Supports This Interpretation

[119] Parliament’s intention for the phrase “an alcohol standard that is certified by an analyst” must also be interpreted in the context of the other provisions that make up the 2018 evidentiary scheme. In this section of our reasons, we discuss two neighbouring provisions: s. 320.32 and s. 320.34.

(a) *Section 320.32(1) — A Statutory Exception to the Hearsay Rule*

[120] As explained above, s. 320.32(1) is a statutory exception to the hearsay rule that applies to certificate evidence from the analyst, qualified technician, and qualified medical practitioner. This exception is structured differently from previous statutory exceptions in the evidentiary scheme. Whereas s. 258(1)(f) and s. 258(1)(g) of the *Criminal Code* required certificates of the analyst and of the qualified technician to contain specific language in order for a certificate to be accepted as “evidence of the facts alleged”, s. 320.32(1) does not. Instead, s. 320.32(1) simply stipulates that a certificate “is evidence of the facts alleged”. Notably, this means that, unlike its

predecessors, s. 320.32(1) does not require the certificate of the qualified technician to state that the alcohol standard was “suitable for use”.

[121] The parties offer two competing interpretations of s. 320.32(1), each of which has implications as to how the Crown can prove certification of the alcohol standard in satisfaction of the precondition in s. 320.31(1)(a).

[122] Mr. Rousselle asks this Court to endorse the interpretation from *Goldson* (A.F., at para. 36). There, the Alberta Court of Appeal found that Parliament intentionally removed language regarding the contents of the certificates in s. 320.32(1) in order to curb the qualified technician’s ability to provide certificate evidence on the alcohol standard. In the absence of such language, the Crown is left with the ordinary rules of evidence to prove that the alcohol standard was “certified by an analyst” (*Goldson*, at para. 73). Practically speaking, this means that the Crown must call on the analyst to give evidence regarding certification, either by way of *viva voce* evidence or through a certificate, in order to satisfy the precondition in s. 320.31(1)(a) (para. 83).

[123] In response, the Crown submits that by removing language regarding what is contained in the certificate of the qualified technician, Parliament sought to broaden the scope of the statutory exception to hearsay in s. 320.32(1) (R.F., at para. 51). The expansive language in s. 320.32(1) ensured that qualified technicians could provide evidence as to the steps they undertook, including whether the system calibration check was conducted with a certified alcohol standard (para. 53). We note that the Yukon Court of Appeal accepted a similar argument in *MacDonald* (paras. 16 and 52-53).

[124] We are persuaded by the Crown’s submission, as it aligns with the purpose, context, and text of s. 320.32(1), as well as a careful reading of its legislative evolution.

[125] Beginning with the purpose of s. 320.32(1), it is clear that Parliament aimed to consolidate the previous statutory exceptions to hearsay into one hearsay exception. Parliament’s decision to consolidate the exceptions flowed from the *Amending Act*’s stated purpose to simplify and streamline “80 and over” prosecutions. As the *C-46 Backgrounder* (2019) notes, at p. 49:

Rather than having provisions for several types of certificates each listing what is to be included in that certificate as was formerly the case, subsection 320.32(1) is a general provision regarding certificates being used as proof of the facts alleged. [Emphasis added.]

[126] If this Court were to endorse the interpretation of s. 320.32(1) advanced by Mr. Rousselle and set out in *Goldson*, s. 320.32(1) would preclude the Crown from relying on the certificate of the qualified technician as proof of the certification of the alcohol standard. Effectively, the Crown would be required to call on the analyst to provide evidence, either *viva voce* or through a certificate, as to certification of the alcohol standard. This interpretation would not only hinder the purpose of the *Amending Act* — as calling evidence from an additional witness adds complexity to a trial — but it would also mean that s. 320.32(1) would be *narrower* in scope than the previous statutory exceptions to the hearsay rule. This cannot be what Parliament intended when it sought to consolidate the previous statutory exceptions into one “general” provision (*C-46 Backgrounder* (2019), at p. 49).

[127] Parliament must be presumed to know the broader legal context in which it operates (*Canadian Human Rights Commission*, at para. 45; *Summers*, at para. 55). Parliament would have been aware that, pursuant to *Ware*, *Lightfoot*, and *Crosthwait*, it was broadly accepted that evidence in the certificate of the qualified technician on the suitability of the alcohol standard was admissible hearsay evidence. In consolidating the previous statutory exceptions into s. 320.32(1), Parliament carried this well-established rule forward into the new evidentiary scheme.

[128] The text of s. 320.32(1) also supports this interpretation. Section 320.32(1) states that a certificate “made under this Part is evidence of the facts alleged in the certificate”. The phrase “is evidence” indicates that Parliament intended *all* of a certificate’s contents to be admissible for their truth. Thus, where the certificate being produced is the certificate of the qualified technician, s. 320.32(1) allows all of the statements contained in the certificate to be admissible for their truth, including a hearsay statement that the alcohol standard was certified by an analyst. In this way, s. 320.32(1) has preserved the double hearsay exception that existed in previous iterations of the evidentiary scheme. Further, Parliament’s decision to remove specific conditions for each certificate in the current evidentiary scheme “broaden[ed] the scope of what may be set out in the certificate” (*MacDonald*, at para. 52).

[129] That said, s. 320.32(1) is not limitless. This section provides that a certificate’s contents are only admissible for their truth if the certificate is “made under this Part”. As *MacDonald* states, “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*" (para. 54). For this reason, our colleague's reference to a hypothetical certificate of a qualified medical practitioner that speaks to the system calibration check (at para. 42) is misplaced, as it would not be within the role of a qualified medical practitioner.

[130] On the other hand, it is within a qualified technician's role to assert that the alcohol standard used in the system calibration was certified by an analyst. To reiterate, s. 320.31(1)(a) requires proof of the *fact* of certification; the "guarantee of quality" (Jokinen and Keen, at p. 341). A qualified technician would be able to attest to this fact as, while they do not certify alcohol standards, they must ensure that the alcohol standard is suitable (i.e., certified) when conducting the system calibration check. Consequently, s. 320.32(1) enables the qualified technician to give evidence, via certificate, that the alcohol standard was certified in lieu of evidence from an analyst.

(b) *Section 320.32(3) — Cross-Examining the Certificate Author*

[131] Mr. Rousselle submits that, if the Crown is allowed to rely on a qualified technician to prove that the alcohol standard was certified by an analyst, an accused would be precluded from cross-examining the analyst under s. 320.32(3) (A.F., at paras. 41-53). In a similar way to our colleague, Mr. Rousselle asserts that our interpretation undermines the utility of the cross-examination provision in s. 320.32(3) because the qualified technician did not certify the alcohol standard and so cannot speak

to certification (transcript, at p. 20; Côté J.'s reasons, at paras. 53 and 72-75). If the accused is not able to cross-examine the analyst, Mr. Rousselle submits that it also renders the certificate of the analyst meaningless.

[132] We respectfully disagree. Mr. Rousselle is correct that s. 320.32(3) limits the accused's ability to cross-examine the certificate's author. Per s. 320.32(2), an accused may apply for leave to cross-examine if the Crown gives notice of its intention to produce and provides the accused with a copy of the certificate before trial. If the Crown does not give notice of its intention to produce the certificate of the analyst, then the accused is not in a position to apply to cross-examine the analyst. But, this does not leave the accused without a means to challenge the certification of the alcohol standard as it relates to the precondition in s. 320.31(1)(a) (*contra, Goldson*, at para. 77). Nor does it render the certificate of the analyst meaningless in an "80 and over" prosecution.

[133] Section 320.31(1) does not prescribe a method for proving the preconditions to the presumption of accuracy. The Crown may seek to prove the preconditions by different means from one prosecution to the next. In the instant case, the Crown produced only the certificate of the qualified technician to assert that the preconditions were met, whereas in *Larocque*, the Crown produced a combination of certificates and the qualified technician's *viva voce* evidence (see *Larocque*, at para. 6).

[134] If the Crown seeks to prove the preconditions through only certificate evidence — whether that is the certificate of the qualified technician, the certificate of the analyst, or both — the opportunity to apply for leave to cross-examine under s.

320.32(3) serves as an avenue for the accused to raise a reasonable doubt that the “facts alleged in the certificate” satisfy one or more of the preconditions (see, by analogy, *R. v. Evanson* (1973), 11 C.C.C. (2d) 275 (Man. C.A.), at p. 280).

[135] Even if the Crown chooses to introduce only the certificate of the qualified technician, the evidentiary scheme would continue to function as Parliament intended. Section 320.32(3) still allows the accused to raise a reasonable doubt as to the alcohol standard aspect of the s. 320.31(1)(a) precondition. This is so because, as explained above, the Crown must disclose the certificate of the analyst as part of its statutory obligation under s. 320.34(1). This gives the accused the ability to ascertain, before trial, whether there are any defects in the certificate of the analyst or inconsistencies between the certificate of the analyst and the certificate of the qualified technician (*Kenny*, at para. 101). If the Crown proceeds with only the certificate of the qualified technician, the accused could rely on such a defect or inconsistency to argue the “likely relevance” (s. 320.32(4)) of cross-examining the qualified technician’s assertion that they used a certified alcohol standard. If leave to cross-examine is granted, such a defect may raise a reasonable doubt as to whether the precondition in s. 320.31(1)(a) was satisfied.

[136] For example, if the certificate of the analyst shows that the alcohol standard used in the system calibration check had expired at the time of testing (i.e., it was no longer suitable for use), this might raise a reasonable doubt as to whether the qualified technician conducted the system calibration check in accordance with s. 320.31(1)(a).

The analyst has knowledge of the certification process and should be able to speak to an apparent expiry date defect. The qualified technician, on the other hand, does not have this knowledge. If leave to cross-examine is granted, it is unlikely that the qualified technician will be able to speak to the certification process or provide an explanation for the defect. In such a scenario, the accused may be able to impeach the qualified technician's assertion in their certificate that the alcohol standard was certified. This may be sufficient to raise a reasonable doubt that the qualified technician conducted the required procedures prior to obtaining a breath sample under s. 320.31(1). As counsel for Mr. Rousselle acknowledged at the hearing (transcript, at pp. 11-12), it is the Crown who bears the risk of being unable to rely on the presumption of accuracy (see, similarly, *Vigneault*, at para. 28).

[137] In short, allowing the Crown to prove that the alcohol standard is certified by an analyst through the qualified technician does not undermine the cross-examination provisions or render the certificate of the analyst meaningless.

(c) *Section 320.34 — Disclosure Obligations*

[138] Finally, Mr. Rousselle submits that the Crown's disclosure obligations under s. 320.34, part of which requires it to disclose a certificate of the analyst (s. 320.34(1)(e)), suggests that Parliament intended to prescribe a certain method for proving the precondition in s. 320.31(1)(a), namely, through placing the certificate of an analyst in evidence (A.F., at para. 51).

[139] We are not persuaded. It is true that the *Amending Act* added a new mandatory disclosure obligation to the evidentiary scheme. As explained above, s. 320.34 requires the Crown to disclose information “sufficient to determine” whether the preconditions to the presumption of accuracy have been met. This is an important element of the evidentiary scheme; it safeguards the accused’s ability to challenge the Crown’s reliance on the presumption of accuracy. As above, the certificate of the analyst has a role to play in the accused’s ability to apply to cross-examine the qualified technician, even if the certificate is not itself produced at trial. Similarly, as seen in the companion appeal *Larocque*, disclosing the results of the system calibration check and the target value allows the accused to ascertain whether the approved instrument was functioning properly. In this way, disclosure balances the presumption of accuracy as a matter of fairness.

[140] However, the Crown’s disclosure obligations under s. 320.34 must be distinguished from the evidentiary requirements that the Crown must meet to prove the presumption of accuracy at trial. Simply because the Crown is required to disclose the certificate of an analyst under s. 320.34(1)(e) does not mean that the Crown is required to produce it at trial as proof that the alcohol standard was certified by an analyst.

C. *Conclusion on the Interpretation of Section 320.31(1)(a)*

[141] In conclusion, we disagree with Mr. Rousselle’s submission that the precondition in s. 320.31(1)(a) is a “significant change” from its preceding iterations. When Parliament enacted s. 320.32(1)(a), it intended to preserve the qualified

technician's ability to provide hearsay evidence as to the suitability of an alcohol standard in lieu of evidence from the analyst. None of the changes that Mr. Rousselle identified, including differences in the text and structure of ss. 320.31(1) and 320.32(1), suggest that Parliament intended to depart from this evidentiary rule.

[142] We note that Mr. Rousselle asks the Court to construe s. 320.31(1)(a) strictly so as to require the Crown to adduce evidence from both the qualified technician and the analyst in every case (A.F., at para. 52). Pursuant to *Bell ExpressVu*, other principles of interpretation, such as the strict construction of penal statutes, “only receive application where there is ambiguity” (para. 28). As explained above, there is no ambiguity in the meaning of “an alcohol standard that is certified by an analyst”. We would therefore decline Mr. Rousselle's request to apply this doctrine of strict construction.

[143] In addition, as there is no constitutional challenge before us, the broader implications of the evidentiary scheme on an accused's right to make full answer and defence are properly left for another day. This appeal raises only a question of statutory interpretation. While recourse to the *Canadian Charter of Rights and Freedoms* or division of powers doctrines may be necessary to resolve ambiguities in the modern approach to statutory interpretation, courts must be careful not to use constitutional principles to “create ambiguity where none exists” (*R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at para. 1). Questions of statutory interpretation must not become *de facto*

constitutional questions. “This Court does not lightly wade into constitutional disputes that are unnecessary to resolve the appeal” (*Telus Communications*, at para. 82).

[144] Accordingly, the Crown is entitled to rely on the evidence of the qualified technician to prove that an alcohol standard was certified by an analyst, as required by the precondition in s. 320.31(1)(a). It is unnecessary for the Crown to call on the analyst to give evidence as to this fact, either by certificate or *viva voce*; requiring the Crown to do so would amount to reading in a technical requirement that is inconsistent with the purpose, text, and context of s. 320.31(1)(a).

X. Application

[145] In this case, the Crown placed into evidence a certificate from the qualified technician who administered Mr. Rousselle’s breath alcohol tests. That certificate stated that before each breath sample was obtained, the qualified technician conducted

a system calibration check the result of which was within 10% of the target value of an alcohol standard that was certified by an analyst as being suitable for use with the Intox EC/IR II. [Emphasis added.]

We agree with the Court of Appeal that, by virtue of the hearsay exception in s. 320.32(1), this assertion was sufficient to prove beyond a reasonable doubt that the alcohol standard used in the system calibration check had been certified by an analyst.

[146] It is not disputed that the Crown has proven all other preconditions to the presumption of accuracy.² Therefore, the Court of Appeal did not err in concluding that the Crown can rely on the presumption in s. 320.31(1) that Mr. Rousselle's breath test results are conclusive proof of his BAC at the time of testing.

XI. Conclusion

[147] For all these reasons, the Crown may rely on evidence from the qualified technician to prove that the alcohol standard used in the system calibration check was certified by an analyst as suitable for use with an approved instrument.

[148] We would dismiss the appeal and affirm Mr. Rousselle's conviction.

The following are the reasons delivered by

CÔTÉ J. —

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² We note, for our accompanying reasons in *Larocque*, that the Crown does not need to produce evidence of the *target value* of an alcohol standard that is certified by an analyst.

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I. Overview

[149] Rules of evidence exist to protect the essential truth-seeking function of trials. They ensure that evidence used to ground convictions is reliable. They are integral to trial fairness. They set the “rules of the game”, so to speak. And appellate

courts across the country routinely overturn convictions based on the improper admission of evidence and reliance on inadmissible evidence at trials.

[150] The presumptive inadmissibility of hearsay evidence is one of these rules. As this Court recognized in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, “the hearsay rule serves as a cornerstone of a fair justice system” (para. 199). Over time, courts and legislatures across the country have fashioned exceptions to this rule. But given the importance this Court has placed on the general hearsay rule, exceptions created by legislatures or courts should be clearly expressed.

[151] Impaired driving is an inherently dangerous activity that often results in serious injury and loss of life. There can be no doubt about this. Nevertheless, evidentiary rules apply *regardless* of the charge or the nature of the crime. In this appeal, Mr. Rousselle, the appellant, argues that the Court of Appeal of New Brunswick erred in allowing the Crown to rely on the presumption of accuracy of the blood alcohol concentration testing in this impaired driving case. He does so on the basis that the Crown failed to satisfy one of the preconditions to the presumption enumerated in s. 320.31(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 — namely, the requirement that a qualified technician conduct “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” (s. 320.31(1)(a)).

[152] Though s. 320.32(1) does create an explicit exception to the hearsay rule allowing a qualified technician to testify to the completion of this system calibration

check through the production of a certificate rather than by *viva voce* evidence, the qualified technician is not the one who certifies the alcohol standard used in the system calibration check; that is the job of the analyst. Mr. Rousselle argues that independent evidence from the analyst, either through a certificate or *viva voce* testimony, is needed to establish this precondition.

[153] The operation of the evidentiary shortcut and the blood alcohol concentration testing process are highly technical. Nevertheless, at the end of the day, the appellant's arguments are based on the fact that the Court of Appeal's interpretation recognizes an implicit statutory exception to the rule against hearsay. As counsel for the appellant stated at the oral hearings of both this appeal and its companion case, *R. v. Larocque*, 2025 SCC 36, "these appeals are not just about impaired driving, these appeals are about the presumptive inadmissibility of hearsay" (transcript, at p. 2). And, notably, they are about the presumptive inadmissibility of hearsay in supporting "an irrebuttable and conclusive presumption of guilt" against an accused (*ibid.*).

[154] This appeal requires our Court to determine whether Parliament's 2018 amendments to the provisions of the *Criminal Code* relating to impaired driving now require the Crown to lead evidence directly from an analyst, either by certificate or by way of *viva voce* testimony, that the alcohol standard was "certified" by the analyst. In my view, the answer is yes.

II. Facts and Procedural History

A. *Facts*

[155] On August 22, 2019, a peace officer stopped Mr. Rousselle while he was driving his vehicle. The peace officer formed reasonable grounds to believe that Mr. Rousselle was driving while impaired and arrested him. Mr. Rousselle provided two breath samples at the police station, which were found to contain 100 mg of alcohol in 100 mL of blood. On this basis, he was charged with having operated a motor vehicle with a blood alcohol concentration equal to or exceeding the legal limit within two hours of ceasing to operate the motor vehicle.

B. *New Brunswick Provincial Court (Sonier J.)*

[156] At trial, the prosecution called the police officer who arrested Mr. Rousselle as its sole witness. The Crown purported to prove Mr. Rousselle's blood alcohol concentration by relying on a qualified technician's certificate, which included a recognition by the qualified technician that the alcohol standard had been certified by an analyst. The trial judge concluded that the Crown had to provide evidence from an analyst, tendered either by certificate or orally, to attest to the certification of the alcohol standard. Without this, the Crown could not rely on the presumption of accuracy. Since the certification of the alcohol standard was not in evidence, the trial judge acquitted Mr. Rousselle.

C. *New Brunswick Court of King's Bench (Robichaud J.)*

[157] The summary conviction appeal judge overturned the acquittal of Mr. Rousselle. He pointed out the contradictory jurisprudence — *R. v. Goldson*, 2021 ABCA 193, 406 C.C.C. (3d) 84, and *R. v. MacDonald*, 2022 YKCA 7, 419 C.C.C. (3d) 100 — but noted that several other decisions of the Court of King’s Bench had already adopted the *MacDonald* line of reasoning. One of those cases was under appeal to the Court of Appeal. The summary conviction appeal judge found that he was bound by earlier decisions made by his colleagues because of horizontal *stare decisis*. As a result, he found that the certificate of the qualified technician was admissible and that the presumption of accuracy applied without the analyst having to provide separate proof of the certification of the alcohol standard. He convicted Mr. Rousselle and remitted the matter to the Provincial Court for sentencing.

D. *New Brunswick Court of Appeal*, 2024 NBCA 3, 433 C.C.C. (3d) 31 (*Richard C.J. and Baird and LaVigne JJ.A.*)

[158] The Court of Appeal of New Brunswick dismissed the appeal, finding that the summary conviction appeal judge committed no error of law.

[159] The Court of Appeal reviewed the decisions in *Goldson* and *MacDonald*. Ultimately, the Court of Appeal sided with the Yukon Court of Appeal’s decision in *MacDonald*, concluding that the condition that the alcohol standard be “certified by an analyst” is functionally equivalent to the pre-amendment requirement that the alcohol standard be “suitable for use” (para. 59). Although the regime no longer defines what the certificate of a qualified technician must or may contain, the Court of Appeal held

that this makes no difference and, in fact, “broadens the potential content of the certificate” (para. 63).

[160] The Court of Appeal ended its analysis by noting that impaired driving trials have consumed a great proportion of judicial resources. Parliament created evidentiary shortcuts to remedy delays. Ultimately, for the Court of Appeal, it was “the intention of Parliament that the prosecution should be able to conclusively prove the blood alcohol concentration of the accused, that the accuracy of the results should be presumed when certain conditions are met, and that these conditions all be provable by means of the qualified technician’s certificate” (para. 74).

III. Issue

[161] This appeal requires our Court to decide whether s. 320.32 of the *Code* allows the hearsay evidence of a qualified technician attesting to the certification of the alcohol standard by an analyst to be sufficient in order to rely on the presumption of accuracy in s. 320.31, or whether independent evidence is needed in the form of a certificate or *viva voce* testimony from the analyst directly.

IV. Analysis

A. *Legislative Background and Jurisprudential Debate*

[162] In 2018, Parliament amended the *Criminal Code* provisions relating to impaired driving by enacting *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21 (“Act” or “Bill C-46”). The Act came into force on December 18, 2018. Sections 320.31 to 320.35 of the post-2018 regime deal with evidentiary issues relating to impaired driving prosecutions. Section 320.31(1) allows the Crown to rely on a presumption of accuracy of an accused’s blood alcohol concentration at the time a sample of his or her breath was analyzed, provided that the conditions set out in that provision are met.

[163] The relevant conditions for being able to rely on the presumption of accuracy, for the purposes of this appeal, are that the qualified technician taking the samples must have conducted a system blank test and a system calibration check. The result of the system calibration check must be “within 10% of the target value of an alcohol standard that is certified by an analyst” (s. 320.31(1)(a)). Section 320.32 then works in tandem with s. 320.31(1) by allowing these conditions to be proven by certificate. For convenience, both provisions are set out below:

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;

...

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.

[164] Section 320.32 thereby creates an exception to the hearsay rule, allowing the three enumerated individuals — the analyst, qualified medical practitioner, or qualified technician — to provide evidence without having to appear in court. This evidentiary shortcut is at the discretion of the Crown: the evidence of any of those three individuals can be admitted by way of *viva voce* testimony, or s. 320.32 can be used to tender their evidence by way of a certificate. In short, s. 320.31(1) sets out what must be established in order for the Crown to discharge its burden, while s. 320.32 sets out how that can be established.

[165] Section 320.31(1) replaces the presumptions of accuracy and identity found in s. 258(1) of the *Criminal Code* until 2018. A full comparison between the relevant sections of the old and new regimes is as follows:

Pre-2018 Regime: Sections 258(1)(c), (f) and (g)	Post-2018 Regime: Sections 320.31(1) and 320.32(1)
258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),	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

...

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(i) [Repealed before coming into force, 2008, c. 20, s. 3]

(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

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.

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;

...

(f) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with an approved instrument and that the sample of the standard analyzed by the analyst was found to be suitable for use with an approved instrument, is evidence that the alcohol standard so identified is suitable for use with an approved instrument without proof of the signature or the official character of the person appearing to have signed the certificate;

...

(g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

(i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

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.**

(ii) the results of the analyses so made, and

(iii) if the samples were taken by the technician,

(A) [Repealed before coming into force, 2008, c. 20, s. 3]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

[166] As can be seen above, the provisions related to the evidentiary shortcut have been significantly cut down in length. Section 320.32(1), for example, has been cut to one single provision. The crux of this appeal is whether the current provisions allow the Crown to prove that the alcohol standard used in the system calibration check was certified by an analyst through the evidence of the qualified technician, either by certificate or *viva voce* testimony.

[167] Under the old s. 258(1)(g), a qualified technician's certificate was required to attest to a specific series of facts, including that the alcohol standard was "suitable for use". In *Lightfoot v. The Queen*, [1981] 1 S.C.R. 566, our Court addressed the issue

of whether an additional certificate from an analyst stating that the alcohol standard was “suitable for use” was required. In that case, our Court’s conclusion was that it was not, even though s. 237(1)(e) permitted the Crown to produce a certificate of an analyst should the defence challenge the alcohol standard’s suitability (pp. 574-75; *R. v. Squires* (1994), 87 C.C.C. (3d) 430 (N.L.C.A.), at pp. 437-39; J. F. Kenkel, *Impaired Driving in Canada* (5th ed. 2018), at p. 332).

[168] I agree with my colleagues’ account of the operational procedures for testing breath samples under the post-2018 impaired driving regime (paras. 12-35). I also agree with the observation that the operating procedures “d[o] not mean that an approved instrument will never malfunction or produce an incorrect result” and that “the [Canadian Society of Forensic Science’s Alcohol Test Committee] acknowledges the possibility of errors in the operation of an approved instrument” (para. 20).

[169] Following the 2018 amendments, two appellate courts, the Alberta Court of Appeal and the Yukon Court of Appeal, disagreed regarding the proper interpretation of s. 320.31.

[170] In *Goldson*, Mr. Goldson was stopped for suspected impaired driving and was required to provide two breath samples at a police detachment. The results were 130 and 120 mg of alcohol in 100 mL of blood. He was charged with impaired driving and driving “over 80” (as the offences under s. 253(1)(a) and (b) were commonly known). Mr. Goldson was charged before the amendments came into effect, but they applied retrospectively to his trial. The Crown attempted to prove the certification of

the alcohol standard through the *viva voce* evidence of the qualified technician. The Alberta Court of Appeal (“ABCA”) held that the phrase “certified by an analyst” in s. 320.31(1) of the *Criminal Code* required the certification to be proven *by the analyst* either through a certificate or through *viva voce* evidence (para. 83).

[171] In coming to this conclusion, the ABCA surveyed the “growing body of conflicting case law across the country” (*Goldson*, at para. 15) and then engaged in an exercise of statutory interpretation. The ABCA was of the view that the grammatical and ordinary meaning of s. 320.31(1) indicates that successful calibration is a fundamental precondition to the existence of a presumption of accuracy (para. 67). As Parliament is presumed to know the law, it would have known that hearsay evidence is inadmissible absent a statutory exception — which does not exist in the statute. Parliament also would have been aware that, for decades, the legislative scheme included a provision that enumerated what exactly had to be included in a certificate of a qualified technician (s. 258(1)(g)) or in a certificate of an analyst (s. 258(1)(f)) before either could be used by the Crown to rely on the evidentiary presumption. The exclusion of a similarly worded provision from the 2018 amendments was presumably intentional (paras. 69-71). This leaves ordinary rules of evidence to prove that the alcohol standard was certified by an analyst: either through *viva voce* evidence from the analyst or through the statutorily recognized exception to the hearsay rule, i.e., the production of the certificate of the analyst. This is consistent with the purpose of the amending Act and the intention of Parliament (para. 73). The ABCA noted that tendering the certificate of the analyst is hardly an onerous obligation. It is consistent

with simplifying the law and is a simple and effective means of establishing the presumption (para. 74).

[172] The Yukon Court of Appeal came to the opposite conclusion in *MacDonald*. Mr. MacDonald failed a roadside breath test and was arrested. At the RCMP detachment, a qualified technician conducted breath sample analyses on Mr. MacDonald. The results reported 100 mg of alcohol in 100 mL of blood, and he was charged with “80 and over” (as the offence under s. 320.14(1)(b) is commonly known). The only witness called by the Crown was the arresting officer, not the qualified technician. The evidence at trial consisted of the certificate of the qualified technician who conducted the breath sample analyses. The trial judge concluded that the certificate of the qualified technician was not sufficient and entered an acquittal. The summary conviction appeal judge affirmed the acquittal, concluding that, in order for the Crown to take advantage of the presumption of accuracy, evidence from the analyst is required.

[173] Bauman C.J. acknowledged that there are “clear differences in the structure and wording of each scheme” but noted that “no one disputes that the overall purpose of both schemes remains as stated” by this Court in *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, namely to “streamline the trial process” (*MacDonald*, at para. 32, quoting *Alex*, at para. 35). He stated that the 2018 reorganization of the presumptions and evidentiary shortcuts did not change the law that the certificate of a qualified technician is “evidence of the facts alleged in the certificate” (para. 64). The certificate

provision, he found, continues to operate as a statutory exception to the hearsay rule, as did its predecessor in the former scheme.

[174] Before engaging in statutory interpretation, Bauman C.J. made two observations. First, recognizing Parliament's purpose behind streamlining impaired driving prosecutions, Bauman C.J. rhetorically asked the following question: "[W]hy would Parliament be seen to be adding an evidentiary requirement on the Crown to prove the reliability of the alcohol standard by resort to the oral evidence or the certificate of the analyst who certified it?" (*MacDonald*, at para. 44). Second, assuming that certification of the alcohol standard is a fact in issue to be proven by the Crown (which he accepted was the case), Bauman C.J. said "we must give effect to the clear words of s. 320.32(1) that the certificate of the qualified technician is 'evidence of the facts alleged in the certificate'" (para. 45). He took issue with the ABCA's observation in *Goldson* that the removal of the prescribed language to be included in the certificate of the qualified technician — particularly the reference to "suitable for use" — is determinative of the interpretation. He disagreed, saying that this removal, if anything, broadens the scope of what may be set out in the certificate (para. 52).

[175] Turning to the legislative text itself, Bauman C.J. first noted that there is no longer a distinction in the statutory text between the evidence by certificate approach and the *viva voce* evidence approach, making the evidentiary requirements more uniform. He again rejected the suggestion that this is an "elevation", opting to label it a "standardization" of the requirement that the Crown must always establish in its case

that the qualified technician used an alcohol standard that was certified by an analyst (*MacDonald*, at para. 63 (emphasis deleted)). Second, he found that the 2018 amendments “simplified” the various hearsay/certificate shortcuts; consequently, he was of the view that it would be a “poor fit” and would “re-complicat[e]” the “now simple language” to attempt to import the “suitable for use” language into the interpretation of the amended version (para. 65). He concluded that the reasons of our Court in *Lightfoot* still apply to the 2018 amendments.

B. *Statutory Interpretation*

[176] This appeal raises a question of statutory interpretation. In accordance with the modern approach, the words of a statutory provision must be interpreted “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[177] In my view, a proper interpretation of the provisions at issue reveals that, in order for the Crown to prove that the alcohol standard has been certified by an analyst, and therefore to have the benefit of the presumption of accuracy, a certificate or *viva voce* evidence is required from the analyst. A qualified technician cannot attest to what is not within his or her knowledge; this amounts to inadmissible hearsay.

[178] Throughout the statutory interpretation exercise, we must keep in mind the evidentiary rules regarding the inadmissibility of hearsay evidence. Ordinarily, evidence is given through *viva voce* testimony. A witness will be called to testify to matters within his or her direct knowledge and expertise. But a witness generally cannot testify to the truth of a statement made by someone else. Evidentiary rules regarding hearsay evidence are engaged where an out-of-court statement is adduced to prove the truth of its contents without the contemporaneous opportunity to cross-examine the declarant (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35). The fundamental concern about hearsay statements lies in the inability to test their reliability; the declarant may have misperceived or wrongly remembered the facts, narrated the facts in an unintentionally misleading manner, or knowingly made a false assertion (*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 32; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at paras. 105-6). It is for this reason that, absent an exception, hearsay evidence is presumptively inadmissible (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at pp. 135-37).

[179] Of course, Parliament has the ability to create exceptions to this general rule of inadmissibility of hearsay evidence. Over time, courts and legislatures have recognized a long list of hearsay exceptions under the common law and by statute. These exceptions are “in place to facilitate the search for truth by *admitting* into evidence hearsay statements that are reliably made and/or can be adequately tested” (Paciocco, Paciocco and Stuesser, at p. 151 (emphasis added)). The exceptions add predictability and certainty, though they can always be tested against the principles of

necessity and reliability (p. 154). But where Parliament creates such an exception, it must do so very clearly, given the importance of the general rule against the admissibility of hearsay evidence.

[180] It is true that hearsay evidence that does not fall under a traditional exception may still be admissible on a case-by-case basis through the principled approach if the evidence is necessary and meets the test for threshold reliability. Threshold reliability can be established if the statement has sufficient features of substantive or procedural reliability, or features of both (*Bradshaw*, at para. 107). And just as evidence that does not fall within an exception may still be admissible, an existing hearsay exception “can be challenged to determine whether it is supported by indicia of necessity and reliability” and can be modified as necessary to bring it into compliance with the principled approach (*R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 15; see also *Khelawon*, at para. 42).

[181] Absent a traditional or principled exception, hearsay is inadmissible. Indeed, our Court has repeatedly affirmed the importance of the general exclusionary rule against hearsay evidence. In *Starr*, Iacobucci J. stated that “[b]y excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system” (para. 199; see also *Khelawon*, at para. 59).

[182] With this background in mind, I move on to consider the text, context, and purpose of the provision.

(1) The Text

[183] While the context and purpose of a statute will always remain important, as recently noted by my colleague Wagner C.J., “close attention” must be “paid to the text of the statute, which remains the anchor of the interpretative exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes” (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para. 24).

[184] With this in mind, in my view, a plain reading of the text of ss. 320.31 and 320.32 accords with an interpretation that requires each enumerated individual involved in the blood alcohol concentration testing process to provide evidence about his or her own respective spheres of work and knowledge. With respect, to find otherwise leads to absurd results.

[185] As set out in full earlier, the text of s. 320.31(1) outlines the contours of the presumption of accuracy. It states that “[i]f 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”. It then indicates that the results can be taken as conclusive proof “if” the three preconditions listed have been met. Since the word “if” was placed immediately before the enumerated preconditions, the ordinary meaning is clear that the presumption of accuracy is dependent on all three preconditions being met. This

conclusion is also reinforced by the French version of the provision, which explicitly states “*si les conditions suivantes sont réunies*”.

[186] Only precondition (a) is at issue for the purposes of this appeal. The provision contemplates a calibration of the approved instrument by a qualified technician to confirm its accuracy. The following was stated by the ABCA in *Goldson*, at para. 67:

The alcohol standard’s usefulness in this calibration procedure depends upon it containing a known concentration of alcohol, which explains the requirement that the alcohol standard be “certified by an analyst”. This change to the legislation indicates that successful calibration is a fundamental precondition to the existence of a presumption of accuracy. . . .

[187] While the text of s. 320.31(1) reveals what must be proven by the Crown to rely on the presumption of accuracy, the text of s. 320.32(1) provides a measure of discretion to the Crown with regard to the manner of proving the requirements of s. 320.31(1). Indeed, it creates an evidentiary shortcut, as it contemplates the possibility of three different individuals providing evidence through a certificate as opposed to through oral testimony: an analyst, a qualified medical practitioner, or a qualified technician. Under Part VIII.1, each of these three individuals has a different role. A qualified technician must conduct a “system blank test” and “system calibration test”, while an analyst must certify the alcohol standard used in that calibration test (s. 320.31(1)(a)). A qualified medical practitioner plays a role only when blood samples are collected (s. 320.28(1)(a)(ii)).

[188] Section 320.32(1) allows a certificate of an analyst, qualified medical practitioner, or qualified technician to be admitted for the truth of the facts alleged in the certificate without further evidence from the person who signed the certificate. The text of s. 320.32(1) does not specify which facts each of these individuals can attest to in their respective certificates. However, naturally, the evidence given in these certificates *must* be with respect to facts that are actually within the individual's area of knowledge and expertise, given his or her individualized role in the process.

[189] It would be absurd to suggest, for example, that a qualified medical practitioner who has merely drawn blood from a detained or arrested individual be permitted to produce a certificate considered admissible that speaks to the certification of the alcohol standard — something clearly designated to be the role of the analyst. Equally absurd would be the suggestion that an analyst who certified the alcohol standard in an approved instrument, and who was not physically present at the moment a given individual provided bodily samples for testing, should somehow attest to the work of the qualified medical practitioner who drew those samples. Yet this is the interpretation underlying my colleagues' analysis. In effect, it is my colleagues' position that s. 320.32(1) must apply to *all* roles enumerated within its text, despite the strange consequence that one of the three professionals could tender evidence that would be *de facto* admissible even though that individual has no personal knowledge of the evidence he or she advances.

[190] It appears that my colleagues' answer is to point to the text of s. 320.32(1) as support for their interpretation, because, they reason, the statement that a certificate "made under this Part is evidence of the facts alleged in the certificate" indicates that Parliament intended *all* of a certificate's contents to be admissible for their truth (para. 128). This was also the reasoning adopted in *MacDonald*. The natural conclusion of this expansive interpretation, to which I allude above, is that a certificate of a qualified medical practitioner could provide admissible evidence that the system calibration check was performed and that the result was within 10 percent of the target value of an alcohol standard certified by an analyst, despite the fact that the qualified medical practitioner would have no knowledge at all of the breath sample testing, given that it is a process exclusively carried out by the qualified technician and the analyst.

[191] To summarize what the text reveals, evidence tendered by way of a certificate pursuant to s. 320.32(1) enables the Crown to rely on the presumption of accuracy. In other words, it streamlines the Crown's ability to prove essential elements of the offence without being required to produce *viva voce* evidence. This certificate evidence, however, does not lead to innocuous results; it plays a pivotal role in supporting a conviction. Section 320.31(1) expressly delineates the respective roles of the qualified technician and the analyst. That statutory distinction cannot be undermined by reading s. 320.32(1) in a manner that collapses the clear separation established in the preceding provision.

(2) Context and Purpose

[192] The context and purpose of the provisions further buttress the conclusion that is already clear from a plain reading: evidence from the analyst, either through a certificate or oral testimony, is required to prove that the alcohol standard was certified.

[193] As to the purpose, the additional technical requirements and burdens placed on the Crown in the provisions at issue demonstrate a dual purpose, as I explain below. I agree with counsel for the appellant that simplifying the law in impaired driving cases is not an “all or nothing” proposition that requires “giving little attention to the corollary new safeguards and overall fairness to accused persons” that arise from the language of the Act (A.F., at para. 34).

[194] With respect to the context, my interpretation accords with the entirely distinct roles of the qualified technician and the analyst in the blood alcohol concentration testing process. Furthermore, as my colleagues acknowledge, the exception that is created by their interpretation would be an exception for admitting *double hearsay* — one that would have constitutional implications. On the assumption that Parliament intended to give a constitutionally compliant meaning to the text, there is no room for doubt that independent evidence from an analyst is necessary to prove the certification of the alcohol standard.

- (a) *The Legislative Evolution of Sections 320.31 and 320.32 Supports an Interpretation That Requires the Certification of the Alcohol Standard To Be Proven Through Evidence Independent of the Qualified Technician’s Certificate or Viva Voce Testimony*

[195] I do not disagree that the purpose of the 2018 amendments in Bill C-46 was to streamline impaired driving prosecutions. In the context of the specific provisions at issue in this appeal, the then Minister of Justice and Attorney General of Canada, the Hon. J. Wilson-Raybould, outlined that the goal was to make it easier to prove a driver's blood alcohol concentration (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 34, 1st Sess., 42nd Parl., January 31, 2018, at p. 34:11). I agree with my colleagues on this point.

[196] However, I cannot accept that this overarching goal justifies interpreting s. 320.32 in ways that are unmoored from the text as long as this is efficient for the purpose of prosecution. The legislative evolution of the particular provisions at issue in this case demonstrates that, even though Parliament generally intended to streamline some aspects of proving the blood alcohol concentration of drivers, Parliament established *additional* requirements for proving blood alcohol concentration in ss. 320.31 and 320.32, not fewer. While my colleagues refer to these amendments as constituting a “complete overhaul” (para. 100, quoting *R. v. Wolfe*, 2024 SCC 34, at para. 12) of the impaired driving provisions, with respect, their interpretation neglects to take stock of the significant change the Bill introduced by reformulating and rewording the prior statutory exceptions to hearsay in the provisions. In this way, the amendments to the evidentiary provisions in the impaired driving regime reflect a *dual purpose*: to streamline the provisions and to enhance the reliability of the scientific evidence used in impaired driving cases.

[197] The ABCA in *Goldson* helpfully summarized the changes in what are now ss. 320.31 and 320.32, at para. 47:

- a) First, the phrase “alcohol standard, identified in the certificate, that is suitable for use” changed to “alcohol standard that was certified by an analyst”. The phrase was also moved from the Certificate of Qualified Technician provision (s. 258(1)(g)) to become one of the preconditions for the presumption of accuracy in s. 320.31(1) (previously s. 258(1)(c)). The precondition also, for the first time, included a requirement that the QT conduct a “system blank test” 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) Second, the two provisions that contained information to be contained in the Certificate of Qualified Technician (s. 258(1)(g)) and Certificate of Analyst (s. 258(1)(f)) were replaced with one provision that allowed the certificates to be admitted without calling the QT or analyst to give evidence (s. 320.32). However, this new provision did not delineate the information to be contained within the certificates, or preconditions to the evidentiary short cut. Instead, reference is made only to a “certificate . . . made under this Part is evidence of facts alleged within the certificate”.

[198] As a preliminary point, I note that the requirement that the alcohol standard be “suitable for use” under the former s. 258(1)(g)(i) — the equivalent now being that the alcohol standard be certified by an analyst — is no longer listed in the provision outlining what the certificate of a qualified technician may contain (s. 320.32(1)). In my view, this change alone suggests a departure from the previous regime and, with respect, undercuts the narrative that the amendments are not an “elevation” but rather a “standardization” of evidentiary requirements (*MacDonald*, at para. 63 (emphasis deleted); see also Rowe and Moreau JJ.’s reasons, at para. 117).

[199] Even more important, however, is the fact that the 2018 regime places new requirements both on the Crown and on the technical and scientific process that signal Parliament's desire to add in necessary safeguards despite streamlining the provisions generally. The overarching purpose of a series of amendments may sometimes be at odds with the purpose of a change to a particular provision within those amendments. Sections 320.31 to 320.34 now require a system blank test and a system calibration check the result of which is within 10 percent of the target value of an alcohol standard certified by an analyst before the Crown can rely on the presumption of accuracy.

[200] The new regime, by way of s. 320.34(1), also imposes added disclosure requirements, compelling the Crown to disclose information sufficient to determine whether the conditions set out in s. 320.31(1)(a) to (c) have been met, and gives the defence the ability to apply for a hearing to determine whether there should be further disclosure (s. 320.34(1) and (2)). Section 320.34(1) also makes a distinction, for the purposes of disclosure, between that which is the responsibility of the analyst and the responsibility of the qualified technician. The disclosure requirements include the certificate of an analyst stating that the sample of the alcohol standard that is identified in the certificate is suitable for use with the approved instrument (s. 320.34(1)(e)). This, surely, is indicative of Parliament's recognition of the importance of the role of the analyst and its importance to the defence.

[201] Of course, disclosure cannot be equated with production. While the Crown is required to disclose the certificate of the analyst to the defence, cross-examination of

the analyst at trial is permitted only if the Crown gives notice of its intention to produce the certificate as evidence. Notably, once notice has been given of the Crown's intention to produce a certificate under s. 320.32(2), the defence may apply to the court for an order requiring the attendance of *the person who signed the certificate* for the purposes of cross-examination (s. 320.32(3)). If the defence wants to cross-examine on a matter within the analyst's field of knowledge and expertise, it would make little sense for it to apply to cross-examine the qualified technician. Yet this is the process to which the defence would be entitled under my colleagues' interpretation.

[202] The more demanding scientific and technical requirements in the 2018 amendments also align with the increased strength of the presumption of accuracy brought out by these amendments. As my colleagues acknowledge (at para. 96), under the former regime, so long as the preconditions in s. 258(1)(c) were met, evidence of the results of the analyses was "conclusive proof" of the accused's blood alcohol concentration at the time of the offence, but only "in the absence of evidence" tending to show that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in a determination that the accused's blood alcohol concentration exceeded 80 mg of alcohol in 100 mL of blood, and that the blood alcohol concentration would not have exceeded this amount. The presumption was therefore a qualified one. Under the current regime, no such qualification exists; s. 320.31(1) states that as long as the preconditions in s. 320.31(1)(a) to (c) are met, the results of the analyses are "conclusive proof of the person's blood alcohol concentration at the time when the analyses were made". There

is no longer a limitation to the effect that the presumption applies only in the absence of evidence pointing to the unreliability of the analyses. The Crown, in effect, benefits from a stronger evidentiary presumption in exchange for being subject to more rigorous technical safeguards. Therefore, sufficient deference must be paid to those safeguards.

[203] In light of the additional safeguards introduced in the 2018 regime, I am unable to conclude that Parliament intended to continue to allow a qualified technician to give evidence of the certification done by an analyst. Though the revisions broadly have the effect of streamlining and simplifying the law relating to proof of blood alcohol concentration, the revisions also underscore the other purpose of the amendments, which is to enhance the reliability of scientific evidence by imposing more thorough requirements in order for the Crown to be able to rely on the presumption of accuracy under the specific provisions at issue.

[204] Moreover, my colleagues reach the conclusion that, despite Parliament's "complete overhaul" of the provisions (para. 100), the words chosen by Parliament in the 2018 amendments "do not sufficiently indicate that Parliament intended to remove the evidentiary shortcut" (para. 109). Respectfully, in my view, in the circumstances of a complete overhaul of a previous regime, the question should not be approached from a negative perspective by asking whether Parliament sufficiently indicated the intent to *eliminate* a previous hearsay exception; the proper question is whether Parliament has demonstrated the positive intent to *create* a hearsay exception in its new legislation.

When the issue is viewed through this lens, I cannot agree that Parliament created a double hearsay exception.

[205] Indeed, even if the text itself remained unpersuasive — which is not the case — once this contextual element is considered alongside the fact that the majority’s approach is likely to raise constitutional issues relating to the admission of double hearsay evidence, it is clear that the certificate of the analyst is necessary to prove certification of the alcohol standard.

- (b) *The Need To Independently Prove Certification of the Alcohol Standard by an Analyst Aligns With the Different Roles Played by the Qualified Technician and the Analyst*

[206] As stated in my analysis of the text of s. 320.32(1), qualified technicians and analysts play distinct roles in the blood alcohol concentration testing process. These roles are interconnected, but different. Section 320.4 makes this clear:

320.4 The Attorney General may designate

- (a) a person as qualified, for the purposes of this Part, to operate an approved instrument;
- (b) a person or class of persons as qualified, for the purposes of this Part,
 - (i) to take samples of blood, or
 - (ii) to analyze samples of bodily substances; and
- (c) a person or class of persons as qualified, for the purposes of this Part, to certify that an alcohol standard is suitable for use with an approved instrument.

[207] The text of s. 320.4 makes it clear that Parliament envisioned a distinct delineation of the three roles in question: para. (a) refers to the qualified technician; para. (b) refers to the qualified medical practitioner; and para. (c) refers to the analyst.

[208] The qualified technician *relies* on the work of the analyst. This is because the qualified technician must rely on the target value in order to compare it with the result of the system calibration check. The Court of Appeal's description of the process followed by the qualified technician is useful here not only to understand the sequence of events but also to understand what falls within the knowledge of the qualified technician and what does not (*Larocque v. R.*, 2024 NBCA 4, 433 C.C.C. (3d) 58, at para. 43):

It is accepted that a proper calibration procedure is the key to verifying the accuracy of an approved instrument. To conduct the system calibration check, the qualified technician ascertains that the approved instrument is in proper working order by measuring a sample (alcohol standard) containing a known alcohol concentration (target value). At this preliminary stage, the blood alcohol concentration indicated by the approved instrument is compared with an objective and reliable measurement standard, i.e., the target value of the alcohol standard certified by an analyst. A system calibration check that gives a certain result only makes sense if the target value of the alcohol standard is known. Obviously, the qualified technician must know this target value in order to compare it with the result of the system calibration check. Whether he or she **obtains** this information from a label attached to the cylinder containing the certified alcohol standard, from a document accompanying the cylinder, from the analyst's certificate or from another source, it is his or her duty to know the target value of the alcohol standard he or she is using to check that the approved instrument is in proper working order. [Emphasis added.]

[209] Indeed, the qualified technician must *know* the target value, but has no apparent role in certifying the alcohol standard. As the excerpt above shows, the qualified technician must *obtain* the target value of the alcohol standard that is certified by the analyst. As my colleagues acknowledge, “the qualified technician has no direct knowledge of the fact of certification of the alcohol standard” (para. 70). In those circumstances, it makes sense for the certification of the alcohol standard to be proven only by the analyst, either through his or her *viva voce* testimony or through a certificate prepared by him or her.

[210] As I outline above, the 2018 amendments created more technical and thorough tasks for both qualified technicians and analysts. This further delineated the difference between the two roles. Overall, an analysis of the two roles leads to an obvious question: Why should a qualified technician be able to attest to the certification process done by an analyst when the qualified technician has no involvement in it and might have simply read the target value on a label? Not only would this interpretation usurp the role of the analyst, but it would also make a certificate of an analyst completely redundant from an evidentiary standpoint.

[211] Furthermore, although my colleagues conclude that, under s. 320.32(1), the phrase “is evidence” indicates that “Parliament intended *all* of a certificate’s contents to be admissible for their truth” (para. 128 (emphasis in original)), with respect, their reasons fail to give effect to these words. In my view, where the section refers to “[a] certificate of an analyst, qualified medical practitioner or qualified

technician made under this Part”, the words “made under this Part” require our Court to consider whether the certificate is compliant with the whole of the impaired driving regime, including the delineation of the distinct roles of a qualified technician and an analyst. With respect, I fail to understand how a certificate from a qualified technician “made under this Part” can prove that the alcohol standard was certified by an analyst when that is a matter entirely outside of the qualified technician’s knowledge. The qualified technician has no right to attest to matters that are entirely within the mandate of the analyst. In the absence of an express statutory hearsay exception, this interpretation cannot stand.

[212] My colleagues rely on the Yukon Court of Appeal’s decision in *MacDonald* to say that the context in which a certificate is generated and its authorized purpose in a prosecution constitute a limitation on the scope of the certificate of a qualified technician, limiting the evidence in the certificate to only those matters that are within the scope of the qualified technician’s role under Part VIII.1 (para. 129). I agree that the qualified technician may be able to say that he or she believed that the alcohol standard was certified based on the information given to the technician when he or she conducted the testing process. However, the qualified technician cannot go beyond this limit to give evidence about the certification process — a matter clearly beyond the bounds of his or her role and outside of his or her personal knowledge. A qualified technician may ensure that the alcohol standard is suitable, but the actual certification process can indisputably be carried out *only* by the analyst according to Parliament’s chosen definitions (ss. 320.4(c) and 320.11). A qualified technician’s

belief that the alcohol standard was certified therefore cannot be proof of the truth of the certification.

(c) *If Parliament Intended To Preserve an Exception Allowing Double Hearsay Evidence To Be Admitted Despite Significant Statutory Changes, It Would Have Done so Expressly*

[213] As stated earlier, given the importance of the long-standing principle that hearsay evidence is inadmissible, Parliament must make it explicitly clear when it departs from this general exclusionary rule. The scope of the exception must be clear. Indeed, in allowing a certificate of an analyst, a qualified medical practitioner, or a qualified technician to be evidence of the facts alleged in that certificate rather than requiring *viva voce* testimony, Parliament created a clear hearsay exception. This exception also includes notice requirements, as outlined above, and gives the party against whom the certificate is produced the power to apply for an order requiring the attendance of *the person who signed the certificate* for the purposes of cross-examination.

[214] But the hearsay issue arising from the qualified technician's statement, in his or her own certificate, that the alcohol standard was certified by an analyst relates to hearsay of a different kind: it is double hearsay. Double hearsay requires a court to believe in the truth of the contents of the statement of a qualified technician without *viva voce* evidence, *and* it requires the court to be satisfied that the analyst's statement, through the qualified technician's recall, is true. My colleagues acknowledge this point (para. 71).

[215] Parliament has chosen to allow a court to rely on a qualified technician's certificate, even though it is hearsay, for the matters within the knowledge and expertise of the qualified technician — this is first-level hearsay. But this is not enough for double hearsay; each level of hearsay must fall within an exception or be admissible under the principled approach (*Starr*, at para. 172). Given the risks inherent in relying on *two* levels of hearsay evidence, Parliament would have made it explicitly clear if it were establishing such an exception. While the previous regime *did* make this explicitly clear in s. 258(1)(g)(i) by stating that an alcohol standard that was “suitable for use” could be put in the certificate of a qualified technician, the post-2018 regime does away with this entirely. This is hardly just a “standardized” version of the previous legislation (Rowe and Moreau JJ.'s reasons, at para. 117 (emphasis deleted)). The Court cannot lose sight of the fact that the evidentiary shortcuts provided for the Crown are exceptions to the general rule.

[216] I agree with the Court of Appeal that “[i]mpaired driving trials consume a considerable proportion of our judicial resources” and that evidentiary shortcuts are useful in avoiding needless delays (para. 72). But this should not be an overriding consideration. I cannot accept that introducing a certificate from an analyst already prepared and disclosed by virtue of s. 320.34(1)(e) creates an onerous burden on the Crown to the point that it creates a significant constraint on Crown resources. For instance, in the case of Mr. Larocque (in the companion appeal), the two certificates of analysts were introduced without issue. The stakes are high. So too should be the evidentiary safeguards attaching to the presumption.

(d) *The Majority's Interpretation Likely Leads to Unconstitutionality*

[217] Section 11(d) of the *Canadian Charter of Rights and Freedoms* gives all people in Canada the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Section 7 of the *Charter* likewise protects the right to make full answer and defence (*Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505).

[218] As Iacobucci J. said in *Starr*, “[i]t would compromise trial fairness . . . if the Crown is allowed to introduce unreliable hearsay [evidence] against the accused” (para. 200). Yet introducing hearsay evidence is exactly what the majority’s interpretation entails, by allowing the qualified technician to give evidence that the alcohol standard was certified by an analyst.

[219] Although the Court of Appeal stated that “[a]bsent a constitutional challenge, [its] function [was] to give effect to Parliament’s intention” (para. 7), and although my colleagues note that there is no constitutional challenge before us (at para. 143), the question of whether different interpretations are constitutionally compliant cannot be ignored as part of the statutory interpretation exercise. This is because, where multiple interpretations of a provision exist, courts should consider only those interpretations that are constitutionally compliant (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1077-78; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 12).

[220] As Healy J.A. noted in *R. v. Vigneault*, 2024 QCCA 793 (albeit in the context of the issue arising in the companion appeal), “statutory provisions should be interpreted in a manner that is favourable to the accused in case of ambiguity and most compatible with values expressed in the Charter” (para. 24). Our Court’s interpretation of ss. 320.31 and 320.32 must therefore be made with the accused’s right to make full answer and defence in mind.

(e) *Parliament Could Not Have Intended To Create a Shortcut That Falls Apart Once a Qualified Technician Is Cross-Examined, as Acknowledged by my Colleagues*

[221] As a final remark, I wish to address a point made by my colleagues to the effect that the defence is not without recourse under the interpretation now adopted by the majority, given that the defence has the option to cross-examine the qualified technician, who will of course be unable to answer any question about the certification process. My colleagues concede that “the accused may be able to impeach the qualified technician’s assertion in their certificate that the alcohol standard was certified”, which “may be sufficient to raise a reasonable doubt that the qualified technician conducted the required procedures prior to obtaining a breath sample under s. 320.31(1)” (para. 136).

[222] I note first that the disclosure requirements in s. 320.34 do not safeguard the accused’s ability to challenge the Crown’s reliance on the presumption of accuracy, contrary to what my colleagues assert (para. 139). This is because, without notice of the Crown’s intention to produce the certificate as evidence at trial, which allows the

accused to apply to cross-examine the person who signed the certificate, the disclosure of the certificate does not unlock the door to the opportunity to cross-examine anyone. The disclosure of an alcohol standard alone tells an accused nothing about the certification process behind it and does not give the accused any meaningful way to cross-examine the person who carried out the certification process.

[223] But more importantly, Parliament could not have intended to create an implied exception for the admission of double hearsay evidence to support the presumption of accuracy that has the effect of immediately falling apart once the defence cross-examines the qualified technician. Why would one allow the Crown to sidestep the burden of proving the blood alcohol concentration, just to render the shortcut useless once the qualified technician is asked about it in cross-examination?

[224] Respectfully, this cannot be the case. An exception that allows the Crown to lead double hearsay evidence to trigger such an important presumption is a significant privilege given to the Crown. Parliament would not have created a shortcut that allows the Crown to so easily evade the important inadmissibility rule for *double* hearsay, the effect of which is negated as soon as the qualified technician is asked a question about the certification process. This would be to create a pointless hearsay exception.

[225] Practically speaking, such a hearsay exception would be a quick route to an acquittal. Defence counsel would apply for leave to cross-examine the qualified technician in every single case where the technician has attested to certification by the

analyst. This result is, at the very least, certainly at odds with the preamble of the Act, which recognizes that impaired drivers “kill thousands of people in Canada every year” and that impaired driving is “unacceptable at all times and in all circumstances”. Surely a Parliament focused on making prosecutions for impaired driving easier, not more difficult, would not have built such a simple route to acquittal.

(3) Conclusion on Statutory Interpretation

[226] In summary, the plain meaning of ss. 320.31 and 320.32 supports the need for independent evidence — by way of oral testimony or a certificate — from the analyst to demonstrate that the alcohol standard was certified. The additional requirements introduced by the 2018 regime into the preconditions set out in s. 320.31(1) demonstrate a second purpose in addition to that of simplifying impaired driving prosecutions: to enhance the reliability of the scientific evidence underlying the presumption. The distinct roles of the qualified technician and the analyst accord with this interpretation. Absent clear language, we cannot presume that Parliament intended to allow the Crown to rely on double hearsay for such a crucial evidentiary presumption.

V. Application and Disposition

[227] In the instant case, the Crown cannot rely on the presumption of accuracy in s. 320.31 because of its failure to prove that the alcohol standard was certified by an analyst under s. 320.31(1)(a). No certificate of an analyst was tendered by the Crown

to prove certification of the alcohol standard by the analyst. The Court of Appeal below erred in concluding that the qualified technician's certificate was sufficient to satisfy that precondition in s. 320.31(1)(a).

[228] The Crown has therefore not established all of the elements of the offence beyond a reasonable doubt. I would therefore allow the appeal, set aside Mr. Rousselle's conviction, and enter an acquittal.

APPENDIX

Relevant Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46

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.

320.14 (1) Everyone commits an offence who

(a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

(b) subject to subsection (5), has, 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;

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

(5) No person commits an offence under paragraph (1)(b) if

(a) they consumed alcohol after ceasing to operate the conveyance;

(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood; and

(c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

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.

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.

(5) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.

320.33 A document that is printed out from an approved instrument and signed by a qualified technician who certifies it to be the printout produced by the approved instrument when it made an analysis of a sample of a person's breath is evidence of the facts alleged in the document without proof of the signature or official character of the person who signed it.

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.

(2) The accused may apply to the court for a hearing to determine whether further information should be disclosed.

(3) The application shall be in writing and set out detailed particulars of the information that the accused seeks to have disclosed and the likely relevance of that information to determining whether the approved instrument was in proper working order. 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.

(4) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.

(5) For greater certainty, nothing in this section limits the disclosure to which the accused may otherwise be entitled.

Appeal dismissed, CÔTÉ J. dissenting.

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