Citation: *R.* v. *Drummond,* 2017 YKTC 63

Date: 20171213
Docket: 15-00220
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JOHN ANDREW DRUMMOND

Appearances:
Leo Lane — Counsel for the Crown
Tam Boyer — Counsel for the Defence

REASONS FOR JUDGMENT

[1] John Drummond has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] A *Charter* Notice was filed February 15, 2016, in which counsel for Mr. Drummond asserts that Mr. Drummond's rights under ss. 8, 9 and 10(b) of the *Charter* were breached. Counsel seeks that the evidence obtained through these breaches, in particular all evidence obtained by the RCMP following the traffic stop of Mr. Drummond's vehicle, be excluded from the trial.

[3] By agreement of counsel, the entirety of the evidence of the arresting officer, Cst. Kidd, was heard in the *voir dire*, with agreement that any admissible evidence would form part of the trial proper.

[4] Cst. Kidd was the only witness called by the Crown on the *voir dire*. Following his evidence, submissions of counsel were made both in respect of the *Charter* issues raised and the trial proper.

[5] I provided an oral decision on November 17, 2017 with written reasons to follow. These are the written reasons.

Evidence of Cst. Kidd

[6] In the early morning hours of June 14, 2015 Cst. Kidd received a report of an erratic driver possibly driving down Two Mile Hill towards downtown Whitehorse. He could not recall whether a description of the vehicle had been provided to him.

[7] He positioned his police cruiser in the Petro-Canada parking lot directly across from the Yukon Inn on 4th Avenue. He said that he was looking for the vehicle to be travelling from Two Mile Hill onto 4th Avenue to downtown. He stated that he felt that this was the best position to wait for this vehicle.

[8] In cross-examination, however, Cst. Kidd stated that he would usually set up at the intersection of 4th Avenue and 2nd Avenue, as there was an intersection there where a driver could turn off, rather than continuing down 4th Avenue towards the downtown area and past the area where Cst. Kidd in fact parked. Cst. Kidd was unable to provide

a reason why he parked where he did and admitted that perhaps he did not park in the best location.

[9] While he was waiting in the Petro-Canada parking lot, Cst. Kidd observed a vehicle in the Yukon Inn parking lot driving towards 4th Avenue without its headlights on. According to his watch, he observed the vehicle at approximately 1:31 a.m. According to the VICS system the time was 1:24:26.

[10] The vehicle turned onto 4th Avenue and headed south without its headlights and taillights on. Cst. Kidd turned onto 4th Avenue behind this vehicle and activated his emergency lights and siren. At or about the same time, the vehicle's headlights and taillights came on.

[11] Cst. Kidd agreed that it was not a completely dark evening at the time. He also agreed that there were lamp standards illuminating the Yukon Inn parking lot.

[12] He further agreed that it was not necessarily that unusual for a vehicle to drive a short distance in a parking lot without the headlights being activated, but he testified that it was more abnormal for a vehicle to be driving on a main road such as 4th Ave. without the vehicle's lights being activated.

[13] Cst. Kidd testified that his initial reason to stop this vehicle was due to public safety concerns arising from the headlights not being illuminated. He agreed in cross-examination that his sole reason for stopping the vehicle was to determine why the headlights were not illuminated when he first observed the vehicle being operated. He

testified that there were several possible reasons running through his mind and that he needed to speak to the driver of the vehicle in order to find out the answer.

[14] Cst. Kidd testified that the fact that Mr. Drummond activated the vehicle lights did not cause him to believe that there was no longer any reason to stop the vehicle. He felt that he needed to do so in order to determine why they had not been activated in the first place. He stated that he was considering the possibility that the driver was intoxicated, as well as the possibility that there was a defect in the vehicle's lighting system. He stated that the fact the lights had been turned on did not necessarily mean that there was no defect in the vehicle's lighting system.

[15] Cst. Kidd agreed that by the time the vehicle pulled over, the stop was no longer solely for the purpose of investigating a motor vehicle offence, given his concerns that the driver of the vehicle could possibly be intoxicated. He further stated that he felt that it was more likely that intoxication of the driver was the reason the lights had not been initially turned on, although he had not completely discounted other possible reasons. He testified that the possibility of an impaired driver was not his sole concern in stopping the vehicle.

[16] The vehicle pulled into the Chilkoot Inn parking lot and was approached by Cst. Kidd.

[17] Mr. Drummond was the driver of the vehicle and he had a male passenger beside him.

[18] Cst. Kidd advised Mr. Drummond that he had been stopped due to not having had his vehicle's lights on, and asked him to produce his driver's license.

[19] Cst. Kidd noted an overpowering odour of liquor coming from the inside of the vehicle and asked Mr. Drummond how much he had had to drink that night. Mr. Drummond stated that he had had a drink approximately 15 – 20 minutes before being stopped. I note that in cross-examination Cst. Kidd agreed that his notes made at 1:42 a.m. did not include an admission by Mr. Drummond to having consumed alcohol prior to driving.

[20] At Cst. Kidd's request, Mr. Drummond accompanied him to the rear of the vehicle. Cst. Kidd noted that Mr. Drummond's eyes were red and that there was an odour of liquor on his breath.

[21] At that time Cst. Kidd formed the suspicion that Mr. Drummond had been operating his vehicle with alcohol in his body.

[22] He testified that his suspicion was based upon the following:

- Night-time driving without headlights and taillights being on;
- The overpowering odour of liquor from inside the vehicle;
- The odour of liquor on Mr. Drummond's breath, noted once he was outside of the vehicle;
- The admission by Mr. Drummond to the recent consumption of alcohol; and
- Mr. Drummond having "slight" red eyes (as per notes made at the time. In the General Occurrence Report the reference is only to "red eyes").

[23] As a result, Cst. Kidd made a demand that Mr. Drummond provide a sample of his breath into a “breathalyser”, meaning an approved screening device.

[24] After two unsuccessful attempts, Mr. Drummond provided a suitable sample into the Alco-Sensor FSE. A “fail” reading was recorded. As a result Mr. Drummond was arrested at 1:37 a.m., handcuffed and placed into the police cruiser.

[25] According to his watch, Cst. Kidd left the roadside to return to the Detachment at 1:43 a.m., arriving at 1:46 a.m. Once at the Detachment, Cst. Kidd provided Mr. Drummond an opportunity to speak with legal counsel. Cst. Kidd contacted the legal aid number at 1:51 a.m. and counsel called back at 1:56 a.m. Mr. Drummond concluded his conversation with counsel at 2:00 a.m.

[26] Cst. Kidd testified that he did not provide Mr. Drummond an opportunity to speak to legal counsel at the roadside after his arrest for impaired driving, as he did not wish to allow his personal phone to be used. He also did not want Mr. Drummond to use his own cell phone, as Cst. Kidd would not have control over who Mr. Drummond was actually calling. He also had concerns about the lack of privacy for Mr. Drummond in the rear of the police cruiser and the difficulty of his being able to make a call while in handcuffs. In Cst. Kidd’s mind, it made more sense to drive the short distance to the Detachment in order to allow Mr. Drummond to contact counsel from there.

[27] In cross-examination Cst. Kidd agreed that he could have facilitated a call to legal counsel at the roadside, but that he felt it was better to drive back to the Detachment several blocks away in order to allow for Mr. Drummond to speak to legal counsel in privacy, in the room set aside for this purpose.

[28] Subsequent to Mr. Drummond's arrest, Cst. Kidd requested that passing police officers attend the scene, in order to have them wait for a tow truck, so that he could transport Mr. Drummond to the Detachment more quickly.

[29] At the Detachment, Cst. Kidd conducted an initial observation period, after which Mr. Drummond provided a breath sample to Cst. Leggett. Cst. Kidd commenced a second observation period prior to Mr. Drummond providing a second sample.

[30] The Certificate of Qualified Technician was tendered as an exhibit on the *voir dire*. It shows that the results of the two breath tests were readings of 110 mgs/% at 2:30 a.m. and 100 mgs/% at 2:52 a.m.

[31] In cross-examination, counsel for Mr. Drummond queried Cst. Kidd in regard to certain maintenance records and documentation specific to the breath test machine used to obtain the breath readings taken at the Detachment.

[32] Cst. Kidd's knowledge was limited to knowing that the approved screening device and approved instruments were supposed to be serviced and inspected annually. He was unable to speak to how the servicing takes place.

[33] A booklet of Maintenance Records specific to the approved instrument used in this case was filed as an exhibit in the *voir dire*. By agreement of counsel, only those documents specifically referred to in the questions asked of Cst. Kidd are evidence I should consider.

[34] At Tab 1 is an Intox EC/IR II Initial Inspection Report with attached Maintenance Certificate, both dated March 29, 2011. The qualified service technician noted that:

"This instrument had been individually inspected and found to be in proper working order and is properly set up for use in a Canadian breath test program."

[35] At Tab 2 is a Maintenance Certificate dated October 15, 2012. Under the Description heading is a notation that there was a service request for annual maintenance. Below is noted that "Instrument tested and performing to manufacturers' specifications."

[36] At Tab 3 is a Certificate of Annual Maintenance dated May 30, 2013. The qualified service technician noted: "I am satisfied that the instrument is in proper working order and continues to meet the manufacturers specifications."

[37] Also at Tab 3 is a Maintenance Certificate dated June 4, 2013. Under the Description heading it is noted: "Dry gas accuracy checks out of range. New style heated sim tube does not stay attached to unit. Annual maintenance". Following this notation are notations that indicate some work was performed, and then a further notation: "Complete Annual Inspection, Performance and Linearity Testing. Instrument tested and performing to manufacturers' specifications". The next notation indicates that the work was completed May 30, 2013.

[38] At Tab 4 is a Maintenance Certificate dated June 5, 2014. Under the Description heading is a notation: "Complete Annual Inspection, Performance and Accuracy Testing. Instrument tested and performing to manufacturers' specifications". Further notations show that an O-Ring, Dry Gas, 1/8" x 5/8" and an O-Ring, Breath Tube, EC/IR II were ordered and shipped. A final notation shows the work was completed May 29, 2014.

[39] At Tab 5 is a Maintenance Certificate dated May 27, 2015. Under the Description heading is a notation: “Complete Annual Inspection, Performance and Accuracy Testing. Instrument tested and performing to manufacturers’ specifications”. A further notation shows that an O-Ring, Breath tube, EC/IR II was ordered and shipped. The final notation shows that the work was completed on May 5, 2015.

[40] At Tab 6 is a Maintenance Certificate dated May 30, 2016. Under the Description heading is a notation: “Complete Annual Inspection, Performance and Accuracy Testing. “ There is a further notation: “Replaced Part”, that indicates 2 parts were ordered and shipped. There also are notations that show that an O-Ring, Breath Tube, EC/IR II and an O-Ring, Dry Gas, 1/8” x 5/8” and were ordered and shipped. A final notation shows the work completed May 11, 2016.

[41] Unlike in the Maintenance Certificates and other documentation from 2011-2015, there is no notation or comment in the May 30, 2016 Maintenance Certificate that the Instrument was tested and performing to manufacturer’s specifications.

Submissions of Counsel on the *Voir Dire*

[42] In respect of the s. 8 and 9 *Charter* issues, counsel for Mr. Drummond submits that Cst. Kidd’s decision to stop Mr. Drummond’s vehicle, ostensibly for the lack of operating headlights, was in fact a pretext for conducting an impaired driving investigation.

[43] In saying this, counsel acknowledges that a police officer has legal authority to stop someone on a highway where the vehicle's headlights are not illuminated in dark conditions.

[44] Further, counsel submits that a police officer has legal authority to stop a driver on a random basis in order to check the driver's sobriety.

[45] However, counsel submits that an otherwise lawful stop can amount to a *Charter* breach where the lawful authority is a pretext for another type of investigation.

[46] Counsel relies on the case of ***R.*** v. ***Gayle***, 2015 ONCJ 575, where a police officer detained an individual, known to the police, who was riding a bicycle without a helmet and did not stop at a stop sign. It was found that the real purpose of the stop was to investigate the individual to determine whether he was complying with his court-ordered conditions.

[47] While there was a legal authority to stop the cyclist for the *Highway Traffic Act* infraction, there was no legal authority to detain him to investigate whether he was complying with conditions. Dual-purpose stops are legal, in that "…the existence of a secondary investigative purpose does not affect the legality of the stop and detention, provided that purpose is not improper" (para. 12). However, '…the use of the legal stopping authority…cannot be a mere pretext or ruse employed in order to further the other investigative purpose". (para. 13).

[48] The Court went on to note that ***R.*** v. ***Humphrey***, 2011 ONSC 3024 found that a stop could only be a pretext if it was determined that: "… the <u>sole purpose</u> of the stop

was to further the other criminal investigation and that there was no intention at all to investigate or pursue the HTA [*Highway Traffic Act*] offence". (para. 14).

[49] In ***Gayle***, Duncan J. focused on what occurred after the traffic stop in order to determine the lawfulness of the stop. In particular, he considered whether the officer's concerns in regard to the ostensible reason for the initial stop manifested themselves concurrently with the other investigation, or whether these concerns were almost immediately abandoned. His analysis considered whether the change in focus from the reason for the initial stop was triggered by information and/or observations arising after the stop.

[50] In ***Gayle***, the Court found that the facts established that the traffic stop was a pretext for the investigation into compliance with court-ordered conditions. As such the accused's ss. 8, 9 and 10(a) and (b) *Charter* rights were violated and the evidence was excluded.

[51] In para. 10 the Court stated:

> The Supreme Court has said that these encounters require the courts to proceed **step by step** through the interaction from the initial stop onwards to determine whether the police stayed within their authority: Close and careful analysis is required because:
>
> > *The vibrancy of a democracy is apparent by how wisely [the court] navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties.*
>
> (***R.*** v. ***Nolet***, [2010] 1 S.C.R. 851 at para. 4; ***R.*** v. ***Mann***, [2004] 3 S.C.R. 59 at para. 15)

[52] Counsel for Mr. Drummond submits that Cst. Kidd conducted no investigation after the stop into the issue, pursuant to the *Motor Vehicles Act*, RSY 2002 c. 153 ("*MVA*") of not having the vehicle's headlights and taillights operating while driving at night. Rather, the investigation immediately became an impaired driving investigation.

[53] Counsel submits that, although lawfully entitled to pull Mr. Drummond's vehicle over to investigate the headlight/taillight issue, the lack of any further investigation into this issue is evidence that all along Cst. Kidd was only intending to conduct an impaired driving investigation. Counsel further points to the fact that no ticket was issued under the *MVA*. He also points out that Cst. Kidd's location directly across from the Yukon Inn at that time of night, and not in a better location to observe a possibly erratic driver coming down Two Mile Hill, is further evidence that he was simply looking for the opportunity to detain and possibly arrest someone for impaired operation of a motor vehicle. Mr. Drummond's failure to immediately activate his headlights and taillights provided Cst. Kidd with an excuse to do what he had been looking to do all along.

[54] I have no doubt that Cst. Kidd positioned his police cruiser where he did as it afforded him an opportunity to not only possibly observe the complained-of vehicle driving down Two Mile Hill, but to also look for possibly impaired drivers leaving the Yukon Inn.

[55] When Mr. Drummond began driving his vehicle out of the parking lot without activating his headlights, Cst. Kidd decided to abandon the "search" for the erratic driver and to investigate Mr. Drummond for the possible commission of an offence. While Cst. Kidd stated that his initial reason for stopping Mr. Drummond was to investigate why the

headlights and taillights had not been turned on prior to driving, he made it clear that one of the reasons that he thought this may have occurred was because of impairment of the driver.

[56] To the extent that it may be perceived that Cst. Kidd was undervaluing the importance of his impaired driving investigation and emphasizing the *MVA* aspect of the motor vehicle stop, I do not find this to be particularly problematic. Unlike the situation in ***Gayle***, Cst. Kidd did not stop Mr. Drummond's vehicle through the pretext of a legal basis for detention, in order to pursue an investigation for which the detention would not have been legal. Cst. Kidd was entitled to stop Mr. Drummond's vehicle and detain him for either an *MVA* investigation or an impaired driving investigation. He was not doing something he was not entitled to do by using the *MVA* stop as a ruse.

[57] Certainly, I am satisfied that the primary purpose for the stop of Mr. Drummond's vehicle was to conduct an impaired driving investigation. The location where Cst. Kidd was waiting in his police cruiser supports this. However, in my opinion he was lawfully entitled to do this. And while Cst. Kidd may have relied on the lack of headlights and taillights as a basis for the stop, he was candid in that he thought from the beginning that the underlying reason for this may have been impairment of the driver.

[58] I am also satisfied that the admission of Mr. Drummond that he had recently consumed alcohol provided Cst. Kidd with the requisite grounds for making the s. 254(2) breath demand. Although Cst. Kidd did not include a reference in his notes made at the time about Mr. Drummond having made this admission, I am satisfied that it was made.

[59] As such I do not find there was a breach of Mr. Drummond's ss. 8 and 9 *Charter* rights.

[60] Counsel also argues that Mr. Drummond's s. 10(b) *Charter* right was infringed because he was not afforded the opportunity to speak to legal counsel immediately after he was arrested and advised that he could do so. Counsel takes no issue that Mr. Drummond was properly informed of his legal right to counsel, but he submits that the right to counsel was not implemented as it should have been.

[61] Counsel relies on the case of ***R.*** v. ***D.M.R.***, 2014 BCSC 63 where Romilly J., in paras. 60-65, reviewed the legal authorities for the informational and implementational aspects of the s. 10(b) *Charter* right to counsel. In particular, Romilly J. quotes extensively from ***R.*** v. ***Taylor***, 2013 ABCA 342 in which the Court cited the following passage from ***R.*** v. ***Suberu***, 2009 SCC 33 at para. 42:

> …In our view, the words "without delay" mean "immediately" for the purposes of s. 10(*b*). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

[62] Counsel recognized that, as stated in para. 75 of ***Taylor***, there are certain limitations on the implementational component of the right to counsel, such as:

- The need to receive medical care;
- Delay caused by proceeding to the police station to have private access to a telephone, or waiting for the availability of a telephone;
- Time needed to control the scene and conduct reasonable investigations at the scene of the arrest; and

- Time needed to deal with the personal property and affairs of the detained person.

[63] These factors are in addition to concerns about officer or public safety and possible destruction of evidence.

[64] Counsel submits that none of the above factors were an issue in this case, and that Mr. Drummond should have been provided the opportunity to contact counsel at the scene, using his own cell phone. He was never provided that opportunity.

[65] Counsel points to the primary concern regarding the importance of providing the implementational component of the right to counsel, which is to protect against the involuntary self-incrimination of the accused, something speaking to legal counsel may prevent.

[66] I agree that none of the above factors were present in this case. Cst. Kidd acknowledged that he could have provided Mr. Drummond the opportunity to speak with legal counsel at the roadside stop, after arresting him. He chose not to do so because he was not comfortable allowing his own phone to be used; he was concerned about the lack of control he would have over the phone call if Mr. Drummond were to call using Mr. Drummond's phone; he was concerned about the fact that Mr. Drummond was in handcuffs and calling would be difficult; he was concerned about the possibility of other individuals showing up and creating difficulties with respect to the conduct of the investigation; and he was concerned about the possibility of having to wait at roadside for legal counsel to call back. Further, Cst. Kidd felt that Mr. Drummond's right

to speak to counsel in private would be better facilitated at the Detachment which was only minutes away.

[67] In this case, Cst. Kidd did not attempt to elicit any incriminating information from Mr. Drummond after arresting him. I recognize that this nonetheless did not prevent Cst. Kidd from making observations as to anything Mr. Drummond may have chosen to say, or as to his physical appearance. As I understand the Crown is not asking for a conviction on the s. 253(1)(a) charge of impaired driving, any observations Cst. Kidd may have made post-arrest and before Mr. Drummond spoke to legal counsel are not relevant in any event.

[68] In ***Taylor***, the Court, noted that the decision in ***Suberu*** was primarily concerned with the issue of when "detention" occurs and not with the implementational component of the right to counsel. The Court stated that ***Suberu***, read in context, reinforces that the immediacy requirement is in relation to the point in time at which a reasonable opportunity for implementation of the right to counsel arises.

[69] It is clear that "when a reasonable opportunity arises" is a factor to be determined on the specific circumstances of each case.

[70] There is nothing egregious in the conduct of Cst. Kidd in this case in respect of his dealings with Mr. Drummond after he was arrested. He did not seek to elicit additional incriminating evidence from Mr. Drummond. He made arrangements for other officers to wait for the tow truck so that he could take Mr. Drummond back to the Detachment as soon as possible. The Detachment was very close by. Once at the

Detachment, Mr. Drummond was provided an opportunity to speak with legal counsel in a timely fashion.

[71] The issue in this case is whether there was a requirement for Cst. Kidd to, at a minimum, ask Mr. Drummond whether he wished to contact legal counsel on a cell phone at the roadside stop and, if the answer was yes, allow him to do so.

[72] Absent extenuating circumstances, I do not believe that a police officer should be required to allow a detainee to use the police officer's personal cell phone. I am not saying that could never be the case, but the circumstances would need to be somewhat out of the norm for this to be an expectation.

[73] However, in the world of today, there is a considerable likelihood that a detained or arrested individual would have a cell phone on them. I am reluctant to consider that the possibility of an individual contacting someone other than a lawyer, and/or having a person or persons attend at the scene, is enough to justify a general rule, so to speak, of not allowing someone to use their own phone to call legal counsel. I believe that there would need to be an articulation of such concerns relevant to the individual and the circumstances of the specific case.

[74] There is certainly jurisprudence that makes it clear that there are circumstances, such as delay, where it is incumbent on a police officer to facilitate a call between an accused and counsel from roadside, using an available cell phone.

[75] The question, taken to its simplest form, is whether a delay of several minutes to allow for Mr. Drummond to be taken back to the Detachment to speak to legal counsel

in a private interview room means that he was “immediately” provided the opportunity to speak with legal counsel at the first reasonable opportunity.

[76] In my opinion, it is important not to get caught up in minutiae of detail; i.e. what if the roadside stop was in front of the police station, what if it was one block away, or was two blocks away, and so on.

[77] What constitutes “reasonable” is really a matter of objective consideration. In my opinion, a delay of several minutes in order to provide Mr. Drummond an opportunity to contact counsel in a private interview room at the nearby Detachment was reasonable in the circumstances of this case. Had Cst. Kidd used the delay to seek to obtain further incriminating evidence from Mr. Drummond, I may have found otherwise.

[78] I am loathe to determine that the immediacy requirement for the implementation of the right to counsel would require police officers, as a matter of course, to be required to provide detained or arrested individuals the opportunity to contact legal counsel at roadside, when there is a Detachment nearby where the right can be facilitated in private, including privacy from the eyes of the public. Certainly there will be circumstances, including when there is undue delay, that a police officer will be required to allow for a detained or arrested individual to contact legal counsel from the place of detention or arrest. This, however, is not one of those cases.

[79] As such I find that there has been no breach of Mr. Drummond’s s. 10(b) *Charter* right.

Trial Issue

[80] Counsel for Mr. Drummond submits that, on the basis of the maintenance records that have been filed, the presumption of accuracy in respect of the Certificate of Analyst has been rebutted. As such it is no longer conclusive proof of the offence contrary to s. 253(1)(b) and Mr. Drummond should be acquitted.

[81] Both counsel have agreed that the following four facts are admitted into evidence via the maintenance records filed as Exhibit 3 in the *voir dire*:

1. The breathalyzer device utilized in this case was put into service in 2011;
2. Annual maintenance was conducted on the schedule dates set out in the certificates;
3. In 2014 the O-Rings were replaced for the dry gas and the breath tube, in 2015 the O-Ring was replaced for the breath tube, and in 2016 the O-Rings were replaced for the dry gas and the breath tubes; and
4. In 2012 to 2015 the maintenance certificates include the phrase "Instrument tested and performing to manufacturers' specifications", and that the maintenance certificate in 2016 does not include that phrase.

[82] Defence counsel notes that the presumptions set out in s. 258 are evidentiary shortcuts, which provide that the filing of the Certificate of Analyst is proof of the information therein, in the absence of evidence tending to show that the device was malfunctioning or operated improperly.

[83] Counsel does not assert that the instrument was improperly operated.

[84] However, counsel submits that there is a question as to whether the instrument was malfunctioning. As a result, with the presumption of accuracy being rebutted, the

Crown cannot rely on the Certificate of Analyst to prove beyond a reasonable doubt that Mr. Drummond committed an offence under s. 253(1)(b), without calling the breath technician to give evidence.

[85] Counsel submits that there is no burden on the accused to prove that the instrument was malfunctioning at the time of the breath tests being taken; all that is required is that a reasonable doubt be raised.

[86] Counsel relies on the decision in ***R.*** v. ***Gibson***, 2008 SCC 16, where Charron J. states in para. 17:

> It is well established that the standard of proof required to rebut the statutory presumptions is reasonable doubt. The expressions "evidence to the contrary" in s. 258(1)(*c*), "any evidence to the contrary" implicit in s. 258(1)(*g*) and "evidence tending to show" in s. 258(1)(*d.*1) reflect this same standard. In *Boucher*, the Court emphasized that the burden of proof never shifts to the accused. Rather, "it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt" (*Boucher*, at para. 15, citing *R. v. Proudlock*, [1979] 1 S.C.R. 525, at p. 549).

[87] Counsel notes that the date of the alleged offence is June 14, 2015, which is a little over a month after the last annual maintenance, and the notation that the instrument was tested and operating properly. In 2016 there is no such notation that the instrument was tested and found to be operating properly. It is known that the O-Rings were replaced for the dry gas and the breath tube on May 30, 2016.

[88] Therefore, counsel submits, a reasonable doubt exists as to whether the instrument was working properly at the time of the annual maintenance in 2016 and, if

such a doubt is found to exist, there is also a reasonable doubt raised as to whether it was working on the date of the alleged offence.

[89] The evidence, while including the Certificate of Analyst, does not include the breath test tickets, which show the instrument's performance, utilizing control samples, at the time of the breath samples being obtained. It also does not include the testimony of Cst. Leggett, as the breath tech, that he had tested the instrument prior to administering the breath test to Mr. Drummond and that the instrument was operating properly and not malfunctioning, therefore providing reliable results.

[90] Crown counsel submits that counsel for Mr. Drummond is in error when he states that the presumption of accuracy in s. 258(1)(c) has been rebutted.

[91] Crown counsel submits that the maintenance records are not evidence tending to show that the instrument was malfunctioning at the time of the samples being taken. Counsel submits that counsel for Mr. Drummond is asking me to speculate that this is the case.

[92] With respect to the phrase "Instrument tested and performing to manufacturers' specifications", present in the maintenance records for the years 2012 – 2015, but absent in 2016 maintenance records, counsel submits that the admission made is not an admission that this evidence is probative of whether the instrument was tested or to what degree it was performing to manufacturer's specifications. Counsel submits that the admissions in regard to the maintenance certificates are admissions only as to the fact that these notations were made, and, as hearsay, are not admissible for the truth of

their contents. Counsel submits that I should not be drawing any inferences from the admissions or speculating as to what they may mean.

[93] Counsel further submits that, even if the failure to include the phrase in 2016 can be inferred to mean something, the admissions also show that, a little over a month before the date of the alleged offence, the instrument was tested and determined to be operating in accordance with manufacturer's specifications. The fact that the notation to that effect is not present in the 2016 maintenance certificate should not cast doubt on the functioning of the instrument on June 14, 2015.

[94] Further, Crown counsel disagrees with the submission of counsel for Mr. Drummond that, in the absence of the presumption, the Crown could nevertheless have made its case by calling Cst. Leggett at trial to testify as to the instrument operating properly at the time the breath samples were obtained. He asserts that the Crown would have been required to also call an expert to testify about the blood alcohol level of Mr. Drummond at the time of driving.

Analysis

[95] The question to be answered here is whether the lack of the words "Instrument tested and performing to manufacturer's specifications" in the 2016 Annual Maintenance report for the instrument, as compared to previous years and the notations as to maintenance performed, raises as a reasonable possibility that the instrument was not operating properly at the time that the breath samples were obtained from Mr. Drummond. Further, what is the requisite level of "possibility" to raise a reasonable doubt as to the accuracy of the breath samples that were taken.

[96] In ***R.*** v. ***Portelance***, 2016 ONCJ 394, Keast J. considered an argument by counsel for the accused that the breath samples that were obtained were unreliable.

[97] The expert witness, called by counsel for the accused, testified that the historical and maintenance records for the instrument showed several functioning errors, including calibration errors, in the past history of the instrument. He concluded, as a result of these past functioning errors, that there was a real doubt about the reliability of the results of the breath tests of the accused.

[98] There was evidence before the court that there were no errors in the functioning of the instrument at the time that the breath samples were obtained from the accused.

[99] Keast J. summarized his understanding of the law in regard to challenging the reliability of the breath test results from an approved instrument, starting with the decision in ***R.*** v. ***St-Onge Lamoureux***, 2012 SCC 57:

> 43 The starting point is the Supreme Court of Canada decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57. It is sufficient for an accused to rebut the presumption of accuracy of breath samples taken by an Intoxilizer, by eliciting evidence that the breath readings were unreliable because the instrument was not properly maintained or was operated improperly. It is not sufficient for an accused to raise a *possibility* that the instrument malfunctioned or was improperly operated.
>
> …
>
> 45 It is not enough for an accused to demonstrate the instrument may not have been properly maintained in the past; there must be a nexus from any such deficiency to a doubt about the specific breath readings in issue. In *R. v. Lam*, [2015] O.J. No. 1697 (Ont. S.C.J.) paragraph 31, the Court states:
>
> > "That is because *St-Onge* itself makes it clear that an accused person must link the improper operation or the

> failure to maintain the breath machine directly to an unreliable result."
>
> In other words it is not enough to simply say, "The machine wasn't maintained properly". An accused person must be able to say: "the machine wasn't maintained properly, and it led to a problem with the machine".
>
> 46 In summary, there must be a clear link between an alleged problem with the instrument and the actual breath testing in dispute. Establishing a generic problem is not sufficient.

[100] Keast J. rejected the evidence of the defence expert and convicted the accused.

He stated in paras. 56-58:

> Before a person is subject to breath tests, these instruments go through a quality assurance process, which is designed to ensure proper functioning of the instrument during an actual breath test sequence.
>
> These quality assurance tests are performed automatically by the instrument. In fact, unless all the preconditions to proper breath testing are completed, the instrument itself will not allow the operator to take a breath test. A printout is produced by the instrument as to the quality assurance process. Further, the operator is trained to troubleshoot any errors and to remedy them.
>
> The COBRA data on all other functions of this instrument, other than the day of Ms. Portelance's breath tests, is not relevant to the accuracy of Ms. Portelance's breath tests.

[101] In para. 66, Keast J. also considered and adopted the position of the Alcohol

Test Committee ("ATC") which stated:

> "Records relating to periodic maintenance or inspections, cannot address the working status of an approved instrument at the time of the breath test. The required quality control information which must be reviewed to assess the working order of an approved instrument is produced during the subject breath testing procedure." (Canadian Society of Forensic Science, Alcohol Test Committee Recommended Best Practices for a Breath Alcohol Testing Program May 4, 2014, page 11)

[102] I note that in paras. 80-82 Keast J. considered the impact of the case of ***R.*** v. ***Jackson***, 2015 ONCA 832. In ***Jackson***, Watt J. concluded that an accused is not entitled to disclosure of historical records of Intoxilizer service records, usage and calibration records, and COBRA data, on the basis that this information is not likely relevant to the issue of the Intoxilizer maintenance and operation.

[103] Keast J. adopted the reasoning and conclusions of Nelson J. in ***R.*** v. ***Tonkin***, 2016 ONCJ 360, in which she stated:

> 82 …If the records are not even sufficiently relevant to be disclosable to defence, how can information derived from them be relevant to the defendant's effort to rebut the presumption of accuracy? It is ironic, indeed that the very records used by Mr. Joseph [the same expert who testified in ***Portelance***] to formulate his opinions regarding Mr. Tonkin's breath tests would not have been disclosed to defence after the *Jackson* case."

[104] In ***R.*** v. ***Drummond***, 2017 YKTC 11, I chose not to follow the decision in ***Jackson***, preferring the reasoning of Rowbotham J.A. in dissent in ***R.*** v. ***Vallentgoed***, 2016 ABCA 358, and of Paciocco J. (now J.A.) in ***R.*** v. ***Fitts***, 2015 ONCJ 262. While I may agree with the general approach taken by Keast J., I would take a somewhat less restrictive approach to the potential relevance of historical and maintenance documentation, both with respect to disclosure, and to the potential probative value and potential relevance of this documentation at trial, being mindful of the burden that rests on an accused.

[105] It is sufficient for Mr. Drummond to establish, on the evidence, that there is a reasonable doubt as to whether the breath test results are reliable as indicators that he was operating his vehicle with a blood alcohol level in excess of 80 mgs/%. I equate the

"reasonable doubt" standard with that of a "reasonable possibility" that the results from the breath testing of the samples Mr. Drummond provided may not be reliable. (See ***R.*** v. ***Dubois*** (1990), 62 C.C.C. (3d) 90 (Que.C.A.).

[106] As stated by Deschamps J., in her dissenting reasons in ***Gibson***, in para. 86 in regard to what constitutes a reasonable doubt:

> In my view, the prevailing direction approach can be used to justify an acquittal, because the evidence presented at trial need only raise a reasonable doubt. "[A] reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence"…

[107] Counsel for Mr. Drummond has conceded that a conviction for the s. 253(1)(b) offence would follow if the Crown had called Cst. Leggett to testify that he had conducted testing of the approved instrument prior to obtaining the breath samples from Mr. Drummond, and that the results of this prior testing had shown the approved instrument to be operating properly.

[108] Counsel also concedes that a conviction for the s. 253(1)(b) offence would follow if the breath tickets that were produced at the time of any such prior testing had been in evidence, also showing that the approved instrument was operating properly at the time the breath samples were taken.

[109] However, in the absence of the testimony of Cst. Leggett and/or the subject breath test tickets, counsel submits that there is no evidence that the approved instrument was operating properly at the time that the breath samples were obtained from Mr. Drummond. This, coupled with the maintenance work that was performed in

2016, and the anomaly in the 2016 maintenance records as compared to 2012 – 2015, raises a reasonable possibility that the approved instrument was malfunctioning or not operating properly on June 14, 2015.

[110] I am inclined to agree with the notion that perhaps the most relevant information, in regard to whether an approved instrument is operating properly and producing reliable results, is information that indicates that, at the date and time in question, the instrument had been tested and was working as it should. This type of information is usually provided in the form of the subject breath testing tickets that are generated for each breath sample. It can also be provided by the testimony of the qualified technician who tested the approved instrument and obtained the breath samples.

[111] Information obtained from the historical and maintenance records of the approved instrument are of less relevance in providing an evidentiary foundation to rebut the presumption of accuracy, in the face of reliable evidence that the approved instrument was operating properly at the date and time that the breath samples were obtained. That is not to say they would never be relevant. There may be cases in which they would, however I would expect that in cases where counsel for an accused is challenging the breath testing results on that basis, the evidentiary burden would be more significant and likely require the calling of expert evidence.

[112] Conversely, if there is evidence adduced that raises a question as to whether the approved instrument was in fact operating properly, then, in the absence of evidence that it was operating properly on the date and time in question, the historical and

maintenance records may have more significance in raising a reasonable doubt as to the reliability of the breath sample testing results.

[113] In the present case, there is evidence that maintenance was performed on the approved instrument on May 5, 2015. Maintenance was again performed on May 11, 2016. In regard to Crown counsel's concerns that the information contained in the maintenance records is inadmissible hearsay, I disagree. These fall within the business records exception to the hearsay rule.

[114] This said, I have no evidence before me as to what it means that maintenance was performed, or its impact upon the operation of the approved instrument at the time that the breath samples were obtained from Mr. Drummond. I also have no evidence as to what the lack of inclusion of the words "Instrument tested and performing to manufacturers' specifications" in the 2016 maintenance report means.

[115] There is no evidence before me to suggest that the maintenance record documentation means that it is likely that the approved instrument was operating improperly when the breath samples were obtained from Mr. Drummond.

[116] I agree that it raises a possibility. However, is this possibility a reasonable one?

Section 258(1)(g) reads:

> (1) In any proceedings under…s. 253…
>
> > (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,
>
> …
>
> (B) the time when and place where each sample…was taken, and
>
> (C) that each sample was received from the accused directly 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.

[117] The Certificate of a Qualified Technician filed as an Exhibit in this case complies with all of the above requirements. In particular it includes a statement as follows:

> That the analysis of each of the said samples was made by means of the said instrument operated by me and ascertained by me to be in proper working order by means of an alcohol standard which was suitable for use in the said approved instrument…

[118] Counsel for Mr. Drummond has conceded, properly in my view, that had the Crown adduced the evidence of the breath technician, Cst. Leggett that he had tested the approved instrument prior to obtaining each of the breath samples from Mr.

Drummond, and that the results of this testing showed that the instrument was functioning properly, or had the Crown filed the breath test tickets as evidence of the pre-testing confirming that the instrument was functioning properly, the Crown would have proved its case beyond a reasonable doubt.

[119] On the facts of this case, in my opinion, evidence establishing that the approved instrument had been tested and was functioning properly at the time that the breath samples were taken from Mr. Drummond, would render the information contained in the historical and maintenance documentation speculative at best, at least with respect to the proper operating or functioning of the instrument.

[120] Cst. Leggett did not testify and the breath testing tickets were not filed at trial. However, does the above wording in the Certificate of a Qualified Technician suffice as evidence that the approved instrument had been tested and was operating properly when Mr. Drummond provided his breath samples?

[121] The federal *Interpretation Act,* R.S.C. 1985, C-I-21, states as follows:

> **25** (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

[122] In the Certificate of a Qualified Technician, Cst. Leggett states that he had confirmed that the instrument was operating properly. This statement of fact is deemed to be established unless there is any evidence to the contrary. Is there such evidence? In my opinion there is not.

[123] The evidence that arises from the historical and maintenance documentation, in relation to the approved instrument used in this case, at best raises a question as to whether the approved instrument was operating correctly that day, based upon annual maintenance being performed approximately 11 months later that showed some parts were replaced, and that failed to include wording that the instrument was tested and performing to manufacturer's specifications.

[124] This question, however, does not equate to a reasonable possibility that it was malfunctioning, in the face of the statement in the Certificate of a Qualified Technician that the instrument had been ascertained by Cst. Leggett to be in proper working order.

[125] In my opinion, this statement is evidence that the instrument had been tested by Cst. Leggett and had passed the tests, such that a reliable sample would be obtained. I do not see this as being different in any significant way from Cst. Leggett taking the stand and saying the same or the breath testing tickets being filed to show that the instrument had been tested and was operating properly.

[126] Therefore, the question raised by the historical and maintenance documentation, as to whether the approved instrument was operating properly at the time that the breath samples were obtained from Mr. Drummond, has been answered in the affirmative. For me to find otherwise would be to lower the threshold from "a reasonable possibility" to that of "any or a remote possibility", which would constitute an error.

[127] Without this statement in the Certificate of a Qualified Technician, or if there was evidence that pointed to something being amiss at the time that the breath samples were obtained from Mr. Drummond, I may have found otherwise.

[128] Therefore I find Mr. Drummond guilty of having committed the s. 253(1)(b) offence.

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COZENS T.C.J.