PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Boudreau*, 2018 NSPC 5

Date: 20180108
Docket: 8097432 and 8097433
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Peggy L. Boudreau

Judge:	The Honourable Chief Judge Pamela Williams, C.J.P.C.
Heard:	December 4, 2017, in Dartmouth, Nova Scotia
Decision	January 8, 2018
Charge:	253(1)(a) and 253(1)(b) of the **Criminal Code**
Counsel:	M. MacDonald, for the Crown N. Fitch, for the Defence

By the Court:

[1] On or about April 8, 2017 Peggy Boudreau was charged with impaired driving and failing the breathalyzer contrary to sections 253(1)(a) and 253(1)(b) of the **Criminal Code**.

[2] At trial, the Crown relied on the testimony of a civilian, who had witnessed the single motor vehicle accident involving Ms. Boudreau, the investigating officer, who had contact with Ms. Boudreau at the scene, and a certificate of analysis of a qualified technician as per section 258(1)(g) of the **Criminal Code** which indicated that Ms. Boudreau had 120 milligrams of alcohol per 100 milliliters of her blood at the time.

[3] The Defense called no evidence.

[4] In submissions, the Crown maintained it had proven the case beyond a reasonable doubt and urged the Court to find Ms. Boudreau guilty of failing the breathalyzer pursuant to section 253(1)(b) of the **Criminal Code**.

[5] The Defense advanced two arguments: (1) that there was insufficient evidence to prove impaired driving beyond a reasonable doubt and (2) that the tendered Certificate was 'incomplete' in that it contained an error, having referenced the readings being taken on two separate dates - April 9, 2017 and March 9, 2017, thereby failing to meet the requirements of section 258(1)(g) of the **Criminal Code**.

Issues:

1. Was Ms. Boudreau's ability to operate a motor vehicle impaired by alcohol or drug?
2. Can the error in the certificate be corrected by the ***viva voce*** evidence of Constable Desrosiers to conform with the requirements of section 258(1)(g) of the **Criminal Code**?

I will deal with issue 2 first.

Facts:

[6] The facts are not disputed. They can be summarized as follows:

- At approximately 11:20 pm on April 8, 2017, Keigan Carter observed a van 'coming fast' around a sharp turn on Millwood Drive, Lower Sackville, Nova Scotia. It hit two small trees before going up over a curb and coming to a stop. The sole occupant, a lady, identified at trial as Ms. Boudreau, got out of the motor vehicle. Mr. Carter approached to ask if she was okay. The lady replied "yes", asked where she was and requested the use of a cell phone. Mr. Carter did not see any presence of alcohol; nor did he detect any signs of alcohol consumption on the part of Ms. Boudreau.

- Constable Etienne Desrosiers was dispatched to a single motor vehicle accident on Millwood Drive at 11:14 pm on April 8, 2017. He noted severe front-end damage to a minivan near a sharp 'S' turn. Both airbags had been deployed. He approached Ms. Boudreau who confirmed having been the driver. She indicated that she had lost control and hit a tree, but that she was not injured. Ms. Boudreau admitted to having had two drinks before supper. The constable smelled a strong smell of alcohol coming from Ms. Boudreau and noted that she seemed confused although he could not say if it was due to the accident or alcohol. There were no other indicia of impairment noted. Constable Desrosiers formed a suspicion that the accident was due to alcohol impairment. He arrested Ms. Boudreau and placed her in the back of his patrol car. At 11:24 pm he read the approved screen demand that she appeared to understand. Ms. Boudreau provided a valid sample which registered a 'fail'. At 11:38 pm he arrested Ms. Boudreau for impaired driving and read the police caution and her **Charter** rights. At 11:40 pm he read the breath demand which Ms. Boudreau said she understood. At 11:43 pm they left the scene and the constable transported Ms. Boudreau to the Lower Sackville RCMP detachment where he spoke with the breath technician, Constable Matthew Kingston. Constable Desrosiers called legal counsel for Ms. Boudreau, leaving a voice mail message. At 00:08 am Nick Fitch spoke with Ms. Boudreau, in private, for seven minutes. Ms. Boudreau was then placed in an observation room for 15 minutes during which time both Constables Desrosiers and Kingston noted that they did not observe any consumption of alcohol by Ms. Boudreau. Constable Desrosiers was present while Constable Kingston provided instructions and administered the breathalyzer. Ms. Boudreau seemed confused by the

instructions at first, but ‘then was okay with them’. Samples were taken at 00:37 and 00:57. Both readings were ‘120 milligrams in 100 milliliters’. The Certificate of a qualified technician was completed by Constable Kingston in duplicate. Constable Desrosiers served Ms. Boudreau with the Certificate of a Qualified Technician/Notice of Intention to Produce Certificate on April 9, 2017 at 1:09 am.

- The Crown tendered the Certificate of a Qualified Technician. In it Constable Matthew Kingston certified that he took two samples of the breath from a person identified to him as Peggy Leigh Boudreau. The first sample, taken at 00:37 on April 9, 2017, resulted in readings of 120 milligrams of alcohol in 100 milliliters of blood. The second sample, taken at 00:57 on March 9, 2017, resulted in readings of 120 milligrams of alcohol in 100 milliliters of blood. The certificate was dated April 9, 2017 and signed by Constable Kingston.

Law:

Section 258 Criminal Code

[7] The relevant parts of section 258(1) of the **Criminal Code** are:

> (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 subsections 255(2) or (3.2),
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> …
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> (c) where samples of the breath of the accused have been taken pursuant to a demand made under section 254(3), if
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> (i) [unproclaimed]
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> (ii) each sample was taken as soon as practicable after the time when the offense 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 15 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 …

…

(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) [unproclaimed]

> (B) the time when and place where each sample in 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,
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> 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;

[8] Duncan J, in **R. v. Hopkins, 2009 NSSC 53** at pages 8 and 9 explains the effects of this provision:

> [13] The statute permits the evidence of the technician to be admitted without his or her personal attendance at the trial, provided that the preconditions to admissibility set out above are met. Without legislative authorization for this procedure, and in the absence of the technician's testimony, the evidence would be inadmissible as hearsay. Parliament has seen fit to create this exception to the usual rule of evidence, and in so doing potentially saves the prosecution and the police services the cost and time commitment that requiring the personal attendance of the technician would necessarily entail.
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> [14] It also has the effect of putting the onus on the accused to bring forward a challenge to that evidence, or accept the information contained in the certificate as proven fact. In this respect, the procedure has an impact on the traditional means by which the Crown prosecutes and the accused defends a criminal case. As stated in the case of *R v Noble*, 1977 CanLII 169 (SCC), [1978] 1 S.C.R. 632, at page 638 :
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> > The effect of section 237 both before and after the amendment is to establish the conditions under which the certificate of a qualified technician is admissible, without further evidence, as proof of the proportion of alcohol in the blood of the accused. These provisions are obviously designed to assist the crown in proving its case, and as they serve to restrict the normal rights of the accused to cross examination and saddle him with the burden of proving that the certificate does not accurately reflect his blood-alcohol content at the time of the alleged offense, they are to be strictly construed and, where ambiguous, interpreted in favor of the accused.

[9] It is worthy of note that Justice Duncan goes on to state at p.9:

> [15] Notwithstanding this comment, there has been a considerable, judicially sanctioned, erosion of the requirement for strict compliance, albeit, as the ensuing review of the caselaw reflects, a principled and consistent one.

Caselaw:

[10] It is important to differentiate between the 'errors' cases where the certificate is 'complete on its face' and the 'signature cases' where the certificate is 'incomplete'.

[11] It is equally as important to consider the types of errors occasioned and whether the accused was misled as to his/her right to make full answer and defense and receive a fair trial.

[12] This Court is guided, in large part, by two Nova Scotia decisions; **R. v. Zeimer (1994), 132 N.S.R. (2d) 147 (N.S.C.A.)**, an 'errors case' and **R. v. Hopkins**, noted above, a 'signature case' both of which reference an earlier NS decision, **R. v. Gosby (1974), 8 N.S.R. (2d) 183**.

[13] Though not directly on point, The Nova Scotia Court of Appeal in **Zeimer** considered a case where the lot number of the alcohol standard was incorrectly stated in the certificate of analysis. The technician testified at trial that the test ampoule lot number was inserted instead of the lot number of the alcohol standard. Hallett J.A., on behalf of the Court, at par. 11 confirmed that ***viva voce*** evidence can correct an error in the certificate:

> [11] There is ample authority to allow ***viva voce*** evidence to correct an error in a certificate. If the certificate is complete on its face, even though it contains an error, it is admissible and can be corrected (**R. v. Pearce** (1983), 3 C.C.C. (3d) 434 (Ont. C.A.); **R. v. Taylor**, 38 M.V.R. 263 (C.A.); **R. v. Gosby**, (1974) 8 N.S.R. (2d) 183).

[14] However, Hallett J.A., at par 13 considered this error to be substantial, and although the certificate was complete on its face, and capable of being corrected by ***viva voce*** evidence, it had the potential to mislead the accused as to his right to make full answer and defense and receive a fair trial. A new trial was therefore ordered.

[15] But before doing so, Justice Hallett distinguished the **Zeimer** error from the **Gosby** error at par 12:

> [12] In the **Gosby** case there was a typing error in the certificate as to the times the breath samples were given by the accused. This Court ruled that the certificate should not have been admitted into evidence. The Crown had not called the police officer who had completed the certificate to correct the error. MacKeigan, C.J.N.S. stated at p. 185:
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> > The criminal law cannot, however, convict on probabilities. We cannot guess or assume that this was a typist's error or that the early morning test was necessarily the only test taken by the appellant on June 17th. The prosecution could easily have removed all doubt by calling the analyst as a witness or even just by asking the appellant when he was on the stand whether he took any other test that day. This was not done. [Emphasis added].
> >
> > The Crown could have proved the results of the breathalyzer test by the ***viva voce*** testimony of the technician who conducted it. Instead it relied on a certificate, which if in proper form, would have been evidence of the results of a chemical analysis which, under s. 237(1)(c), is "proof of the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed".

Analysis:

[16] The error, citing the second test as having occurred on March 9, 2017, is a typographical error. All evidence points to the breath tests having been performed on April 9, 2017, within two hours of Ms. Boudreau's arrest for impaired driving.

[17] Constable Desrosiers confirmed the identity of the breath technician as Constable Matthew Kingston. He was present while Constable Kingston provided instructions and administered the breathalyzer to Ms. Boudreau. Constable Desrosiers also confirmed that samples were taken at 00:37 and 00:57 and that both readings were '120 milligrams in 100 milliliters'. The tendered Certificate of a qualified technician had been completed and signed by Constable Kingston in duplicate, and was dated April 9, 2017. Constable Desrosiers testified that he had served Ms. Boudreau with the Certificate of a Qualified Technician/Notice of Intention to Produce Certificate on April 9, 2017 and completed an affidavit of service noting that service was affected at 1:09 am on April 9, 2017. Both documents were tendered with the Certificate.

[18] Counsel for Ms. Boudreau argues that the tendered Certificate is incomplete and would require the breath technician to provide ***viva voce*** evidence to correct the error. With respect, I disagree.

[19] The tendered Certificate in this case was 'complete on its face', as in **Zeimer**. But unlike **Zeimer** this Certificate contained a typographical error, like the error in the **Gosby** certificate, which could have been corrected by ***viva voce*** evidence of the breath technician or the appellant.

[20] Guided by the above findings of Hallett J.A., in **Zeimer** and MacKeigan C.J.N.S in **Gosby**, I conclude that a typographical error in a completed Certificate of Analysis can be corrected by ***viva voce*** evidence without prejudicing the accused's right to full answer and defense. Though not explicitly stated by CJ MacKeigan, a trial judge can consider extrinsic evidence, other than that of the breath technician, to correct the typographical error and the Certificate.

[21] Counsel for Ms. Boudreau also submits that Constable Desrosier's evidence is insufficient to correct the error. He states that Constable Desrosiers incorrectly and inadequately referred to the sample readings by testifying they were "120 millimeters in 100 milliliters" (failing to note alcohol and blood).

[22] Having listened to Constable Desrosier's evidence again, I am satisfied that he said "120 milligrams in 100 milliliters". His failure to use the words alcohol and blood are not fatal. The certificate was complete on its face and did not require 'certification' of the type set out in **Hopkins** as that case dealt with an incomplete certificate as it had not been signed by the breath technician. There the evidence led by the Crown did not certify the accuracy of all the material facts set out in the Certificate. As stated by Justice Duncan at par. 47, "In the absence of such certification or other evidence as to the test procedures and results, the court lacked sufficient evidence upon which to admit the Certificate, or to otherwise conclude that the requirements of section 258(1)(c) were met".

[23] This is not an 'incomplete certificate' case. As stated at the outset, it is important to differentiate between the 'errors' cases where the Certificate is 'complete on its face' and the 'signature cases' where the Certificate is 'incomplete'.

[24] Constable Desrosier's ***viva voce*** evidence corrects a typographical error on the face of the completed Certificate and satisfies me, beyond a reasonable doubt that the date of the second reading was April 9, 2017 and not March 9, 2017. There is no other logical conclusion as the second reading must follow the first which occurred on April 9, 2017.

[25] In conclusion, the typographical error in the tendered Certificate is corrected by ***viva voce*** evidence and therefore conforms to section 258 of the **Criminal Code** and is admissible. Accordingly, I find Ms. Boudreau, guilty pursuant to section 253(1)(b) of the **Criminal Code** for failing the breathalyzer.

[26] A judicial stay will be entered with respect to count 1, that of impaired driving.

Pamela Williams., C.J.P.C.