

Case Name:

R. v. Fox

Between

Her Majesty the Queen, appellant, and
Major Jay Fox, respondent

[2003] S.J. No. 556

2003 SKCA 79

Docket: 585

**Saskatchewan Court of Appeal
Vancise, Sherstobitoff and Jackson JJ.A.**

Heard: June 4, 2003.

Written reasons: September 2, 2003.

(93 paras.)

On appeal from Q.B.A. No. 004 of 2002 J.C.B.

Counsel:

Anthony B. Gerein, for the appellant.
The respondent appeared on his own behalf.

The judgment of the Court was delivered by

JACKSON J.A.:—

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I. OVERVIEW

¶ 1 With respect to a charge of driving while over .08, Mr. Major Jay Fox gave two breath

samples showing a blood alcohol content of .13. At trial, he adduced evidence to the effect that the amount of alcohol he had consumed should not have resulted in a reading over .06 let alone .13. While the trial judge found this evidence rebutted the presumption of the Intoxilyzer's accuracy, he ultimately rejected it and convicted Mr. Fox on the basis of the evidence as a whole, including his "fail" reading produced by the roadside screening device. Mr. Fox appealed his conviction to the summary conviction appeal court.

¶ 2 The summary conviction appeal court judge allowed Mr. Fox's appeal and ordered a new trial on the basis that the trial judge erred when he considered the "fail" reading on the roadside screening device.

¶ 3 The Crown applies for leave to appeal. These are the questions of law: (i) whether evidence of low alcohol consumption, without direct evidence of breathalyzer malfunction, operator error or contamination, can be evidence to the contrary capable of rebutting the presumption of accuracy created by subsection 25(1) of the Interpretation Act [See Note 1 below] as applied to clause 258(1)(g) of the Criminal Code; and (ii) if the answer is "yes," did the summary conviction appeal court judge err in concluding that the trial judge erred when he referred to the "fail" on the roadside screening device as a means of testing Mr. Fox's credibility and thereby confirming the accuracy of the certificate?

Note 1: R.S.C. 1985, c. I-21.

¶ 4 I answer "yes" to the first question, but nonetheless would allow the appeal. While it is possible for evidence of low alcohol consumption to overcome the presumption of accuracy created by subsection 25(1) of the Interpretation Act as applied to clause 258(1)(g) of the Criminal Code, the trial judge did not err in rejecting that evidence in the face of the certificate and the whole of the evidence, including the roadside screening result. This holds open the possibility that an accused can bring forward evidence that he or she did not drink or drank so little that there must be an inaccuracy in the machine, but it also permits the trier of fact to weigh all of the evidence to decide the guilt or innocence of the accused.

II. SUMMARY OF THE EVIDENCE

¶ 5 Cst. Platford stopped Mr. Fox on June 11, 2000 because there were no licence plates on his truck. Mr. Fox produced a temporary permit, but in the course of doing so, Cst. Platford noted an odour of liquor on Mr. Fox's breath.

¶ 6 Mr. Fox provided an approved screening device sample at 3:32 a.m. The approved

screening device registered a "fail." Cst. Platford arrested him and demanded that he provide a sample of his breath. He observed no other indicia of alcohol consumption. He testified that Mr. Fox stopped his vehicle responsibly and safely on the busy roadway. Mr. Fox was polite and cooperative throughout.

¶ 7 Mr. Fox testified that he had consumed a maximum of six 355 millilitre cans of beer with an alcohol content of 5% between no earlier than 10:30 p.m. on June 10th and no later than 1:30 a.m. on June 11th. At 4:08 a.m., Mr. Fox provided a breath sample, showing 130 milligrams of alcohol in 100 millilitres of blood, into an "approved instrument" within the meaning of subsection 254(1) of the Criminal Code, i.e., an Intoxilyzer 5000C. His second test, at 4:30 a.m., yielded the same result.

¶ 8 Mr. Fox consulted Mr. Bruce Miller. Mr. Miller is "an expert in the absorption and elimination of alcohol in the human body" [See Note 2 below] and "in the operation and functioning of the Intoxilyzer 5000C." [See Note 3 below] Mr. Miller conducted lab tests in March 2001 which led him to conclude that Mr. Fox, who weighed 230 pounds at the time, absorbs alcohol at a rate of 12 milligrams per ounce consumed and eliminates alcohol at 13 milligrams per hour. Mr. Miller was of the opinion that the readings of 130 milligrams were "totally inconsistent" with Mr. Fox's stated drinking pattern, the amount consumed and the rate at which Mr. Fox absorbs and eliminates alcohol. [See Note 4 below] Mr. Miller concluded that Mr. Fox's blood alcohol level at the time of driving would have been about .60 [See Note 5 below] which means that, one-half hour later at the time of the test, his blood alcohol level would have been about .53. Without saying that the Intoxilyzer malfunctioned, because there was no direct evidence of that, Mr. Miller testified that no scientific instrument is infallible. [See Note 6 below]

Note 2: 2. Transcript of trial proceedings at p. 62, lines 1 &

Note 3: Ibid. at p. 65, lines 12 & 13.

Note 4: Ibid. at p. 70, lines 13 to 15.

Note 5: Ibid. at p. 67, lines 24-25.

Note 6: Ibid. at p. 82, lines 20-21.

¶ 9 While Mr. Fox was not represented before us, he was represented at trial and on his first appeal.

III. TRIAL JUDGE'S DECISION

¶ 10 The trial judge found that Mr. Fox was challenging the presumption of accuracy. Following the analysis set out in *R. v. Gibson*, [See Note 7 below] he concluded that Mr. Fox's and Mr. Miller's testimony met the first test, i.e., this constituted some evidence legally capable of being evidence to the contrary. The trial judge wrote:

Note 7: (1992), 72 C.C.C. (3d) 28 (Sask. C.A.).

The first stage is to see if there is some evidence which is legally capable of being evidence to the contrary (For example, evidence attacking the scheme of Parliament in designating qualified technicians or approving instruments would fail this test) At this stage the court is looking at the probative value of the testimony not its persuasive value. Put another way the testimony does not have to be accepted as true, but only has to avoid rejection.

In my view the testimony of the accused in this case meets this first test. [See Note 8 below]

Note 8: *R. v. Fox* 2002 SKPC 15 (Prov. Ct.).

Thus, he answered the Crown's first question raised by this appeal affirmatively.

¶ 11 When he moved to the second stage, which is to weigh the whole of the evidence, he wrote:

The second stage is to weigh the evidence of the accused and any other evidence that points to rebuttal against other evidence pointing to acceptance. This is the test described as weighing the whole of the evidence. It is now settled law that in performing this test the court can consider the readings obtained on the approved instrument *R. v. Kaminski* (1992), 100 Sask.R. 192 (Sask C.A.) *R. v. Martin* (as of yet, unreported decision of Deshaye J. Sask Prov. Ct. Jan 2002).

In this case there is no evidence of inaccuracy in the intoxilyzer or in its manner of operation on the date in question. As an approved instrument its results have more value as persuasive evidence than results from an ordinary instrument. As well the accused blew a fail on an Alcotest 7410 GLC moments after he was stopped by officer Platford. This is again a testing device approved by Parliament. Officer Platford testified that this instrument records a fail only at blood alcohol levels of 100 mg percent or more. This is the evidence pointing to acceptance.

The accused did not demonstrate any of the usual indicia of impairment. He was not charged with impaired driving. His actual driving as observed by officer Platford was unremarkable. The accused stood up well in cross examination. There was nothing in his demeanour or background that would raise any doubt about his veracity.

His story, standing alone, was quite plausible. He was unable to bring other witnesses to corroborate his consumption, but nothing turns on this circumstance. It merely means there is nothing in the case to support what the accused says is the truth.

If the accused's account of his drinking in this case is believed the end result will be acquittal. This is so regardless of the probative value of any other Crown evidence.

Accepting the accused's testimony as accurate would necessarily result in a finding of a considerable inaccuracy in this approved instrument or its manner of operation on June 11th 2000. The attack on this approved instrument is not a direct attack, it is an indirect attack on the accuracy of this instrument. The Supreme Court spoke of Parliament's policy reasons for using such instruments in their scheme in *R. v. Moreau*, [1979] 1 S.C.R. 261

Yet, one of the reasons if not the only reason why Parliament prescribed the use of approved instruments must have been that it wanted its precise prohibition to be exactly enforceable. This intent would be frustrated if approved instruments were treated as ordinary instruments.

An accused is not left at the mercy of the qualified technician and the certificate of analysis. An accused has the right to disclosure of the maintenance and calibration records of the instrument. The accused can also request leave to cross-examine the qualified technician. These are methods by which the accused can test the accuracy of the instrument, together with whatever other evidence is available.

To find a considerable inaccuracy in this instrument on June 11th, 2000 on the facts of this case would amount to treating this instrument as an ordinary instrument. When I consider all of the evidence of this case I do not believe that the accused is giving an accurate account of his drinking during the night in question. I cannot accept his testimony as reasonably being true. [See Note 9 below] [emphasis in the original].

Note 9: Ibid.

Mr. Fox appealed his conviction to the Court of Queen's Bench.

IV. DECISION OF THE SUMMARY CONVICTION APPEAL COURT

¶ 12 The summary conviction appeal court judge found that the trial judge erred in ruling that the roadside screening result could be used to discredit the accused's testimony. She relied on *R. v. Bernshaw* [See Note 10 below] and *R. v. Lambert*. [See Note 11 below]

Note 10: [1995] 1 S.C.R. 254 at 271-72; (1995), 95 C.C.C. (3d) 193 at 206.

Note 11: (1996), 150 Sask.R. 64 (Q.B.) at para. 19.

¶ 13 She went on to consider the first question of law raised by the Crown before this Court. She wrote:

[6] While it is unnecessary for me to address the other grounds of appeal, it is important to deal with an issue raised by the Crown as to the presumption of accuracy as provided by s. 258(1)(g) of the Criminal Code and s. 25 of the Interpretation Act, R.S.C. 1985, c. I-21. It is Crown's position that to raise a reasonable doubt as to the accuracy of the breathalyzer instrument, something more than the uncorroborated evidence of the accused that he drank less alcohol than the reading of the instrument indicates is required in law. This matter was thoroughly argued by the Crown before Meekma P.C.J., in *R. v. Simonson*, [2001] S.J. No. 570 (Prov. Ct.). In a thorough and well-reasoned judgment, Meekma P.C.J., concluded that the state of the law is that the Crown cannot rely on the presumption of accuracy if there is evidence to the contrary before the court which is believed. The presumption is lost. But the court is entitled to consider the results of the Certificate of Analyses when weighing all the evidence.

[7] The appeal of the *Simonson*, supra, case was not published until a few months after this trial decision, and this provincial court judge did not have the benefit of reading it along with the appeal decision of Baynton J., in *R. v. Simonson (S.)*, [2002] S.J. No. 412; 221 Sask.R. 156 (Q.B.). However, it is now clear that, at this appellate level, the issue of use of uncorroborated evidence of the accused to rebut the presumption of accuracy provided by s. 258(1)(g) of the Criminal Code has been decided. I need say no more about it. [See Note 12 below]

Note 12: *R. v. Fox* (2002), 229 Sask.R. 284 (Q.B.).

¶ 14 Thus, the summary conviction appeal court judge agreed with the trial judge that evidence of low alcohol consumption without more can rebut the presumption of accuracy, but that the trial judge's reliance on the roadside screening test merited a new trial. The Crown appeals from this decision.

V. CAN LOW ALCOHOL CONSUMPTION CONSTITUTE EVIDENCE TO THE CONTRARY CAPABLE OF REBUTTING THE PRESUMPTION OF ACCURACY?

A. The Presumptions Created by Section 258

¶ 15 Section 258 of the Criminal Code creates two presumptions which I will review in this judgment. The first presumption is variously called the "first presumption," the "temporal presumption" or the "presumption of identity." Arbour J. first used the phrase "presumption of identity" in her dissenting judgment in *R. v. St. Pierre*. [See Note 13 below] The phrase has been adopted generally in Canada to refer to the first presumption created by clause 258(1)(c).

Note 13: (1992), 76 C.C.C. (3d) 249 (Ont. C.A.) at 271; (1992), 10 O.R. (3d) 215 at 237.

¶ 16 Clause 258(1)(c) reads:

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),

...

- (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), 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 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, in the absence of evidence to the contrary, proof that the concentration 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 concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses [emphasis added];

¶ 17 Clause 258(1)(c) works this way. Upon certain preconditions being met, the accused's blood alcohol content when the samples are taken is presumed to be identical to that when driving, hence, the phrase "presumption of identity." One can challenge the presumption of identity, while still accepting that the readings at the time of testing are accurate-eg. through late or bolus consumption of alcohol between the time of the offence and time of testing. [See Note 14 below] Our decision in Gibson [See Note 15 below] is an example of a successful challenge to the presumption of identity which resulted in a new trial being ordered where the trial judge failed to consider evidence that the accused's blood alcohol reading may not have been the same at the time of driving as at the time of testing. (I recognize that clause 258(1)(d.1) now plays a role in assessing evidence to the contrary challenging the presumption of identity, but the issues raised by that clause are not engaged in this appeal so I need not discuss it further.)

Note 14: R. v. St. Pierre, [1995] 1 S.C.R. 791.

Note 15: Gibson, supra note 7.

¶ 18 To put the presumption of identity in context, we start with the "certificate of analyses" certified by a "person designated as a qualified technician ... pursuant to subsection 254(1) of the Criminal Code." In signing the standard form "certificate of analyses" in this case, the "qualified technician" certified that:

1. he took two samples of Mr. Fox's breath that in his opinion were necessary to enable proper analyses to be made to determine the concentration, if any, of alcohol in Mr. Fox's blood;
2. he received each sample directly into an Intoxilyzer 5000C, which is an approved instrument as defined in subsection 254(1) of the Criminal Code; and
3. he analysed each sample by means of the Intoxilyzer which was ascertained by him to be in proper working order by means of an alcohol standard that was suitable for use with the approved instrument which he identifies as an ethyl alcohol standard, Alcohol Countermeasure Systems lot 9907D.

The presumption of identity applied to this certificate means that Mr. Fox's blood alcohol content at the time of driving (3:30 a.m.) is presumed to be the same as when he blew into the Intoxilyzer (4:08 a.m.). His blood alcohol content is, therefore, presumed to be .13 at the time of driving. All this, however, assumes the accuracy of the information contained in the certificate, which brings us to the second presumption.

¶ 19 The second presumption, called the presumption of accuracy and the one which arises here, is found through the application of subsection 25(1) of the Interpretation Act [See Note 16 below] to clause 258(1)(g) of the Criminal Code. Clause 258(1)(g) states:

Note 16: Supra note 1.

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),

...

- (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 yet 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 [emphasis added];

¶ 20 Clause 258(1)(g) is nothing more than a statutory exception to the hearsay rule, but "the presumption of accuracy" - i.e., the presumption that the results of the analyses of the breath of the accused accurately reflect the blood alcohol concentration of the accused when he or she blew into the device - is found in subsection 25(1) of the Interpretation Act, which reads:

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.

Thus, with the application of this subsection, the facts stated in the certificate are "deemed to be established in the absence of any evidence to the contrary." This includes the statement contained in the certificate that the machine has been "ascertained by the technician to be in proper working order." That is the extent of this "presumption."

¶ 21 The presumption of identity establishes that the blood alcohol content at the time of the test indicates the blood alcohol content at the time of driving. A challenge to the presumption of

identity accepts the reading at the time of the test, but argues that the reading at the time of driving could not be what the machine showed, not because that reading was not accurate, but because it does not reflect the blood alcohol level at the time of driving.

¶ 22 While the presumption of identity concerns the blood alcohol content at the time of driving, the concern of the presumption of accuracy, on the other hand, is the blood alcohol content at the time of the test. Evidence directed to the blood alcohol content at the time of the test is the category of evidence which is capable of being evidence to the contrary for the purposes of rebutting the presumption of accuracy. Thus, evidence to the contrary for the purposes of challenging the presumption of identity must be evidence which accepts the result at the time of the test and shows that the blood alcohol content at the time of the test does not reflect the blood alcohol content at the time of driving. Thus, Iacobucci J. in *R. v. St. Pierre* states:

[29] I agree with the following remarks of Arbour J.A., found at p. 237, which distinguish between the two presumptions:

This presumption [of identity] can be displaced by evidence to the contrary; that is, any evidence which raises a reasonable doubt that the levels at the two different points in time were in fact identical. [See Note 17 below]

Note 17: *St. Pierre*, supra note 14 at 812.

¶ 23 In this case, Mr. Fox states that his blood alcohol content was not .13 at the time of driving because it was not .13 at the time of the test. This second prong to his argument makes this a presumption of accuracy case. He argues that the reading cannot be correct because he did not drink enough to generate that level. Thus, his evidence is directed at the operation of the machine, or its accuracy, and is not directed at whether those results show his blood alcohol content at the time of driving. The issue put forward by the Crown is whether evidence of low alcohol consumption, on its own, is capable of rebutting the presumption of accuracy, or, is some specific evidence directed to the machine, or its operation, required.

¶ 24 In my view, the trial judge's decision was predicted by our decisions in *R. v. Goddu*, [See Note 18 below] *R. v. Parent*, [See Note 19 below] *R. v. Gibson*, [See Note 20 below] and *R. v. Kaminski*, [See Note 21 below] and the many Provincial Court and Queen's Bench decisions on point plus authorities from other appellate courts. This law is not changed, as Crown counsel argues, by dicta contained in the Supreme Court of Canada decisions in *R. v. Moreau*, [See Note 22 below] *R. v. Crosthwait*, [See Note 23 below] and *R. v. St. Pierre*. [See

Note 24 below] I also find support in five appellate decisions from other jurisdictions. I will now review this jurisprudence.

Note 18: (1984), 34 Sask.R. 251.

Note 19: (1982), 17 Sask.R. 361.

Note 20: Gibson, supra note 7.

Note 21: (1992), 100 Sask.R. 192.

Note 22: [1979] 1 S.C.R. 261.

Note 23: [1980] 1 S.C.R. 1089 at 1101; (1980), 52 C.C.C. (2d) 129 (S.C.C.) at 139.

Note 24: St. Pierre, supra note 14.

B. Saskatchewan Jurisprudence

¶ 25 In Goddu, [See Note 25 below] the accused blew .18 and then .17. While the accused was found guilty at trial, this Court, speaking through Cameron J.A., ordered a new trial. It was not necessary for the accused to have "established" or "shown" [See Note 26 below] that the results of the tests were inaccurate, but rather to raise a reasonable doubt about whether the accused, at the time of driving, was over .08, in order for the presumption to be rebutted. In Gibson, which clarified the distinction between the two presumptions for this jurisdiction, Goddu is classified as a "presumption of accuracy case." [See Note 27 below] Thus, in Goddu this Court has already said that an accused who calls into question the accuracy of the test results need not "establish" or "show" that the results were inaccurate. In Goddu, the only evidence proffered by the accused pertained to the accused's limited consumption of alcohol, his condition as an asthmatic, his use of a medicated asthma spray and some evidence of the possible effect of all this on the breathalyzer result. There was no scientific evidence pertaining to the specific machine's operation.

Note 25: Goddu, supra note 18.

Note 26: Ibid. at para. 11.

Note 27: Gibson, supra note 7 at 39.

¶ 26 Goddu builds on our earlier decision in Parent where this Court considered whether certain evidence was "evidence to the contrary" within the meaning of what is now subsection 25(1) of the Interpretation Act. In Parent, the first test was .18 and the second .16. There was a 22-minute interval between the two. Two noted experts testified that it was not possible for an individual to eliminate alcohol this rapidly (60 milligrams in one hour). After referring to Crosthwait, Bayda C.J.S., writing for the Court, said:

[9] While it is true that the evidence of Dr. Jutras and Dr. Cohen in the present case casts doubt upon the absolute accuracy of the results of the two chemical analyses, the evidence does not "leave a doubt as to the blood-alcohol content of the accused person being over the allowable maximum". Here, the highest reading was 100 millilitres (of alcohol in 100 milligrams of blood) over the maximum limit of 80 milligrams, and the lowest reading 80 milligrams over the maximum limit. Nothing in the evidence of Dr. Jutras or Dr. Cohen has the effect of reducing these proportions to a level where it can be said that the evidence raises a reasonable doubt about whether the appellant was over the allowable maximum. The two doctors said only that the readings were unreliable but said nothing about how unreliable. Their evidence met the qualitative but not the quantitative aspect of the test. Accordingly, their evidence does not qualify as "evidence to the contrary" within the meaning of s. 237(1)(c) of the Code.

...

[11] Does the evidence of Dr. Jutras and Dr. Cohen qualify as "evidence to the contrary" within the meaning of s. 24(1) of the Interpretation Act to invalidate for evidentiary purposes the whole or any part of the certificate made under s. 237(1)(f) of the Code?

...

[14] There can be no reasonable suggestion that the evidence of Dr. Jutras and Dr. Cohen contradicts any of the facts specified in clauses (i) or (iii) of s. 237(1)(f) as those facts are more particularly set forth in the certificate. In each instance, the evidence and the fact can stand together. Only when the evidence is examined in relation to the fact specified in clause (ii) does the possibility of a contradiction emerge. Does the evidence of the doctors contradict the results of the chemical analyses? As noted, the evidence may cast doubt upon the accuracy of the results, but it can hardly be said to cast doubt upon the fact of the results. The evidence may suggest that the technician should have obtained a different result, but it does not suggest that he actually obtained a result different from what he said he obtained. In the end, the evidence and the fact can stand together and do not contradict. Hence, I find that the evidence of the two doctors

does not qualify as "evidence to the contrary" within the meaning of s. 24(1) of the Interpretation Act. The certificate of analyses thus remains unimpeached.
[See Note 28 below]

Note 28: Parent, supra note 19 at 365-67.

Thus, the Court rejected the expert's evidence as not being evidence to the contrary because of its unspecific and speculative nature: it did not address the question of the accused's very high rating of .16 or bring the reading below the allowable limit. In this case, Mr. Fox's expert's evidence brings him below .08 which means that the certificate and his evidence "cannot stand together," to use the words in Parent.

¶ 27 Then in Gibson, the accused sought to adduce evidence of a different alcohol level when driving than when he blew into the machine. He did this for the purpose of rebutting the presumption of identity by showing that the breathalyzer reading was not identical to his alcohol level at the time of driving. The accused had been drinking in a measured way between 7:30 p.m. and 10:30 p.m. and consumed his last two drinks "in quite a bit faster manner." [See Note 29 below] He was stopped by the police at 10:40 p.m. and did not give a breath sample until 11:20 p.m. The expert witness testified as to the possible effect of unabsorbed alcohol on the breathalyzer results. The trial judge rejected this evidence as not being evidence to the contrary for the purposes of the presumption of identity. This Court allowed the appeal and ordered a new trial.

Note 29: Gibson, supra note 7 at 31.

¶ 28 While Gibson is a presumption of identity case, Bayda C.J.S. thoroughly reviewed the Supreme Court authorities of Moreau and Crosthwait, which are presumption of accuracy cases, and he also provided extensive guidance on how to determine what constitutes evidence to the contrary:

... A judge should look for evidence - "some evidence" - which could make a material difference. The difference is material if it tends to put the accused within the permitted limit. A difference which tends to show a concentration less than the breathalyzer results but not sufficiently less to put it within the permitted limit is not material (see this court's decision in *Batley*). If the judge finds evidence which could make a material difference, it is evidence which is "sufficient at least to raise a reasonable doubt" and thus sufficient to rebut the presumption. I should observe that in this context I equate the phrase "could make a material difference" with "may reasonably be true" which was the phrase used in *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 91 D.L.R. (3d) 449, [1979] 1 S.C.R. 525 (referred to by Pigeon J. in *Crosthwait*) as the basis for the standard of evidence required to raise a reasonable doubt sufficient to rebut a similar statutory presumption there under consideration. ... [See Note 30 below]

Note 30: *Ibid.* at 41-42.

... The process of determining whether an item or a series of items of evidence is "evidence to the contrary" is a process whereby the adjudicator places a value on the evidence with a view to deciding whether there is sufficient value or worth there for the fact-finder to take the evidence into consideration should the time come for him or her to balance and weigh the whole of the evidence in order to make a finding of the fact in issue. In short, the process is one of determining the probative value of the evidence. The process is not one involving demonstration or one of producing a finding of the fact in issue. In short, it is not one of determining the persuasive value of the evidence. That comes later (and only if the presumption is rebutted).

What kind of evidence is "evidence to the contrary" within the meaning of s. 258(1)? The cases broadly delineate two categories: (i) evidence which is directed at showing the blood-alcohol concentration of the accused at the time when the offence is alleged to have been committed-the time of driving-and at showing that the concentration is not the same as that indicated by the chemical analyses done within two hours after the driving, and (ii) evidence which is directed at the accuracy or reliability of the chemical analyses. [See Note 31 below]

Note 31: *Ibid.* at 34-35.

The trial judge in the case before us applied Gibson. He found Mr. Fox's evidence, which he could not reject out of hand, to be, in the words of Gibson, "evidence which is directed at the accuracy or reliability of the chemical analyses." [See Note 32 below]

Note 32: Ibid.

¶ 29 Then, in Kaminski, the accused testified that in the 50 minutes prior to being stopped by the police, he had consumed two beers only. There was also evidence of exposure to chemical fumes. The trial judge accepted expert evidence to the effect that no significant amount of solvent would affect the breathalyzer readings, but then went on to say simply "[t]here is no evidence to the contrary before me." [See Note 33 below]

Note 33: Kaminski, supra note 21 at para. 16.

¶ 30 As Bayda C.J.S., writing for the Court in Kaminski, points out, it was unclear what the trial judge did with the evidence of the accused to the effect that he had consumed two beers in the 50 minutes immediately prior to driving. A new trial was ordered because it was incumbent upon the trial judge to consider the accused's evidence, coupled with the Crown's expert's testimony as to the effect of such consumption on the reading at the time of driving, as evidence to the contrary for the purposes of clause 258(1)(c). In doing so, the Court provides these additional helpful distinctions between the two presumptions:

[20] In Gibson the majority judgment referred to the broad delineation by the cases of two categories of "evidence to the contrary":

- (i) evidence which is directed at showing the blood-alcohol concentration of the accused at the time when the offence is alleged to have been committed-the time of driving-and at showing that the concentration is not the same as that indicated by the chemical analyses done within two hours after the driving, and
- (ii) evidence which is directed at the accuracy or reliability of the chemical analyses.

There is no doubt that evidence pertaining to the effect of the inhalation of chemical fumes upon the breathalyzer readings which the accused sought to have declared as "evidence to the contrary" was an example (potential) of the second category of "evidence to the contrary". It was evidence directed at showing the inaccuracy or unreliability of the results of the chemical analyses of the accused's breath at 2:27 a.m. and 2:47 a.m. Even if he had not preferred Mr. Laughlin's evidence in this respect over Dr. Michel's and had relied solely on Dr. Michel's evidence, the trial judge in reaching his conclusion that this evidence was not "evidence to the contrary" would have been right. The principles established by the Supreme Court of Canada in *R. v. Crosthwait*, [1980] 1 S.C.R. 1089; 31 N.R. 603; 25 Nfld. & P.E.I.R. 509; 68 A.P.R. 509; 52 C.C.C. (2d) 129; 111 D.L.R. (3d) 431; 6 M.V.R. 1, and applied by this court in *R. v. Parent* (1982), 17 Sask.R. 361; *R. v. Goddu* (1984), 34 Sask.R. 251; 28 M.V.R. 117, and *R. v. Batley* (1985), 39 Sask.R. 259; 32 M.V.R. 257; 19 C.C.C. (3d) 382, confirm the correctness of this conclusion. But it is not this second category evidence which concerns us in this case. [See Note 34 below]

Note 34: *Ibid.* at 198.

¶ 31 As the Court makes clear in the preceding paragraph, the evidence of chemical inhalation was the type or category of evidence which pertained to the presumption of accuracy. Referring to *Crosthwait*, [See Note 35 below] *Parent*, [See Note 36 below] *Goddu* [See Note 37 below] and *R. v. Batley*, [See Note 38 below] Bayda C.J.S. maintained that the evidence of chemical inhalation in the case before him would not, as a matter of law, constitute evidence to the contrary sufficient to rebut the presumption of accuracy because it did not go far enough. It did not bring the accused within the permitted limit.

Note 35: *Crosthwait*, *supra* note 23.

Note 36: *Parent*, *supra* note 19.

Note 37: *Goddu*, *supra* note 18.

Note 38: (1985), 19 C.C.C. (3d) 382; (1985), 39 Sask.R. 259.

¶ 32 I recognize that the Court in Kaminski did not address the point that we are now considering-whether evidence standing on its own of "low alcohol consumption," coupled with a toxicologist's evidence, rebuts the presumption of accuracy-but, from the record, it is apparent that the issue was not argued. Thus, it is not direct authority for the proposition being put forward here, but the significance of the case for us is what Kaminski says, in obiter, about evidence to the contrary for the purposes of rebutting the presumption of accuracy and how the trial judge determines whether such evidence exists.

¶ 33 In Kaminski, it was sufficient to adduce evidence of consumption coupled with expert evidence to establish that at the time of the offence the accused's alcohol level was within the permitted limit. Evidence tendered to rebut the presumption of accuracy was rejected because it did not bring the accused within the allowable limit. But, in the appeal before us, we have the kind of evidence which was missing in Kaminski. Mr. Fox testified as to alcohol consumption, the trial judge was not able to reject it out of hand, and an expert opined that, as a result of what may be an inaccuracy in the machine, Mr. Fox's alcohol level was within the permitted limit.

¶ 34 This is also the way in which the law has been interpreted by the many Provincial Court and Court of Queen's Bench judges writing in this province. For example, in R. v. Simonson, [See Note 39 below] which was relied upon by the trial judge and the summary conviction appeal court judge in this case, Meekma P.C.J. wrote:

Note 39: [2001] S.J. No. 570

[29] I agree with Crown counsel that when weighing the evidence, we must give appropriate weight to the analysis of an instrument approved under statutory authority, and not relegate it to the category of ordinary instruments. But in my opinion that is only one factor which adds to the weight, or persuasive value, of that particular piece of evidence. The onus of proof is still on the Crown, and although the results should be given more weight than the results of any ordinary instrument, they are not conclusive and it must still be open to the Court to accept the uncorroborated evidence of the accused and find a reasonable doubt at the stage where the evidence is weighed-that stage when we weigh the persuasive value of the evidence, after the presumption has been rebutted. Assessing credibility is far from a perfect science, relying as it does on our impressions of a witness, his demeanor and forthrightness, and the skill of the cross-examiner. But it is an integral part of the trial process as we know it and it must remain open to the fact-finder to believe the uncorroborated evidence of the accused and acquit him. In fact, if the fact-finder believes the accused he or she must acquit him. (R. v. W.(D.), [1991] 1 S.C.R. 742).

Meekma P.C.J. ultimately disbelieved the accused and convicted him. On appeal to the Queen's Bench, Baynton J. agreed with this statement. [See Note 40 below] Indeed, he had made similar comments in other well-researched decisions: *R. v. Rendle*, [See Note 41 below] and *R. v. Jess*. [See Note 42 below] Meekma P.C.J.'s comments were also relied upon in *R. v. Hrebenuk*. [See Note 43 below] See also *R. v. Krowicki*. [See Note 44 below]

Note 40: *R. v. Simonson* (2002), 221 Sask.R. 156 at paras. 9-10.

Note 41: 4. (1997), 154 Sask.R. 140 (Q.B.) at para. 12, point

Note 42: (2001), 214 Sask.R. 310 (Q.B.) at para. 12.

Note 43: [2003] S.J. No. 271, 2003 SKPC 62 (Prov. Ct.) at para. 10.

Note 44: [2003] S.J. No. 229, 2003 SKPC 53 (Prov. Ct.) at para. 22.

C. Supreme Court Jurisprudence: Moreau, Crosthwait and St. Pierre

¶ 35 The Supreme Court authorities do not change this view. In *Moreau*, I note that Beetz J., for the Court, rejected evidence which raised only a "possible uncertainty," [See Note 45 below] and Pigeon J. for the Court in *Crosthwait* rejected evidence of a "conjectural possibility." [See Note 46 below] But both cases involved challenges attacking the system or the process by which an accused may be found guilty using the results of an approved instrument. They do not concern the case we have here, which is one where the trial judge found the accused's testimony "plausible" coupled with an expert's testimony which place the accused's alcohol level below the permitted limit and in direct contradiction to the certificate.

Note 45: *Moreau*, supra note 22 at 272.

Note 46: *Crosthwait*, supra note 23 at 1102.

¶ 36 In *Crosthwait*, for example, a chemist testified that there was a possibility that the air temperature in different parts of the room could be different, but he could not say what effect any difference in temperature would have upon the breathalyzer results. There was evidence

taken from the breathalyzer manual stating that the temperature of the standard alcohol solution and of the room air must be within one degree celsius of each other if accurate answers are to be obtained. The breathalyzer technician had not verified that the two were within one degree celsius of each other.

¶ 37 Notwithstanding this evidence, Pigeon J. writing for the Court said:

In the instant case, the certificate filed at the trial fully complies with the conditions stated in para. (f). It was, therefore, by itself, evidence of the results of the analyses. With respect, I cannot agree that there is another implicit condition namely, that the instrument used must be shown to have been functioning properly, and the technician had followed the manufacturer's instructions in testing its accuracy. It is clear from the wording of the Code that the rebuttable presumption arises from the mere statements in the certificate itself. The presumption may no doubt be rebutted by evidence that the instrument used was not functioning properly but the certificate cannot be rejected on that amount. 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. Parliament did not see fit to require a check test be made with a standard alcohol solution and made reference only to the solution used for the actual test. Technicians are instructed to make a check test but the making of this test or its results have not been made conditions of the validity of the certificate and it has not been provided that the certificate would not be valid if it was not shown that the instrument had been maintained and operated in accordance with the manufacturer's instructions.

There is no need to dwell on the reasons for which Parliament did not specify those additional conditions, they are obvious. In *R. v. Moreau* [[1979] 1 S.C.R. 261], Beetz J. said (at p. 273):

... one of the reasons if not the only reason why Parliament prescribed the use of approved instruments must have been that it wanted its precise prohibition to be exactly enforceable. This intent would be frustrated if approved instruments were treated as ordinary instruments.

This does not mean that the accused is at the mercy of the technician: while the certificate is evidence by itself, the facts of which it is evidence are "deemed to be established only in the absence of any evidence to the contrary". Thus, any evidence tending to invalidate the result of the tests may be adduced on behalf of the accused in order to dispute the charge against him. As was pointed out in *R. v. Proudlock* [[1979] 1 S.C.R. 525], it is not necessary in such cases that the rebutting evidence should do more than raise a reasonable doubt and, of course, this evidence may be sought in depositions given by witnesses of the Crown as well as in depositions of defence witnesses. Therefore, in my view, the situation here is that the certificate was evidence of the results of the analyses by virtue of the express provisions of the Criminal Code, however, the further question remained: Was there any evidence to the contrary sufficient at least to raise a reasonable doubt? [See Note 47 below]

Note 47: *Ibid.* at 1099-1100.

...

I am therefore of the opinion that the evidence of Dr. Newlands does not constitute evidence to the contrary under s. 237(1)(c) of the Criminal Code. Mere possibility of some inaccuracy will not assist the accused. What is necessary to furnish evidence to the contrary is some evidence which would tend to show an inaccuracy in the breathalyzer or in the manner of its operation on the occasion in question of such a degree and nature that it could affect the result of the analysis to the extent that it would leave a doubt as to the blood alcohol content of the accused person being over the allowable maximum. There is no such evidence before the Court in the case at bar. Dr. Newlands' testimony, taken at its face value, does not supply it. It merely affords evidence of a mere possibility of some inaccuracy in the check test, but no evidence as to the extent of such inaccuracy in the case at bar or as to the possibility or probability of the effect which any such inaccuracy might have had upon the results of the breath analysis. The certificate therefore remains uncontradicted. [See Note 48 below]

Note 48: *Ibid.* at 1101.

...

In my view in order to conclude that there was no evidence before the Magistrate to rebut the certificate, it is enough to note that the only evidence was merely of a possibility of a temperature difference without any indication that this could have affected the results to a significant extent. While it is for the trier of fact to weigh the evidence, the question whether there is any evidence is a question of law and an acquittal based on doubt resting on a conjectural possibility will be set aside: *Wild v. The Queen* [[1971] S.C.R. 101]. [See Note 49 below]

Note 49: *Ibid.* at 1102.

¶ 38 But these comments, and those in *Moreau*, are explicable on the basis that an accused cannot avail himself or herself of evidence attacking the system, as such, which determines blood alcohol content by means of an approved instrument and qualified technician. Mr. Fox is not attacking the system or its general operation. Instead, he argues that he did not consume enough alcohol to justify a reading of .13, and therefore there can be no other conclusion than that the approved instrument malfunctioned or there was an error in its operation. For my part, *Moreau* and *Crosthwait* do not address the issue at hand.

¶ 39 Then in *St. Pierre*, *Iacobucci J.*, writing for the majority, clarified for the first time, the true distinctions between the presumption of identity and the presumption of accuracy. While *St. Pierre* is a presumption of identity case, as *Iacobucci J.* makes clear, he offers a number of helpful comments about the presumption of accuracy. Crown counsel asks us to look at these comments to show that something more than evidence of low alcohol consumption is necessary to rebut the presumption of accuracy:

[34] The second critical case is *R. v. Crosthwait*, *supra*. This Court established that there is nothing in s. 258(1)(c) of the Criminal Code establishing a presumption of accuracy. In this case, an accused was being tried for "over 80", and in defence he argued that the results of the breathalyzer were not reliable because the technician did not confirm that there was less than a one degree difference between the air temperature and the temperature of the solution, as the manufacturer's instruction manual said must be done before an accurate result could be obtained. *Pigeon J.*, for a unanimous Court, pointed out the distinction between the presumption of identity, contained in s. 258(1)(c), and the presumption of accuracy in s. 258(1)(g) and s. 25 of the Interpretation Act. After quoting these sections, *Pigeon J.* said (at p. 1099) that "[i]t is clear from the wording of the Code that the rebuttable presumption arises from the mere statements in the certificate itself. The presumption may no doubt be rebutted by

evidence that the instrument used was not functioning properly but the certificate cannot be rejected on that account".

[35] In that case, the accused was not attacking the presumption of identity, that is, he was not claiming that his blood alcohol level as recorded on the breathalyzer was not the same as his blood alcohol level at the time he was driving. Rather, he argued that the blood alcohol level recorded by the breathalyzer did not accurately reflect his actual blood alcohol level, because the technician did not compare the temperatures of the air and solution before proceeding. In other words, he was attacking the presumption of accuracy. Therefore, the evidence he led to try to rebut this presumption was not "evidence to the contrary" under s. 258(1)(c), but was "evidence to the contrary" under s. 25 of the Interpretation Act. Pigeon J. made this clear when he said (at p. 1100):

... while the certificate is evidence by itself, the facts of which it is evidence are "deemed to be established only in the absence of any evidence to the contrary". Thus, any evidence tending to invalidate the result of the tests may be adduced on behalf of the accused in order to dispute the charge against him. . . . Therefore, in my view, the situation here is that the certificate was evidence of the results of the analyses by virtue of the express provisions of the Criminal Code, however, the further question remained: Was there any evidence to the contrary sufficient at least to raise a reasonable doubt? [See Note 50 below]

Note 50: St. Pierre, supra note 14 at 813-14.

¶ 40 But Iacobucci J. quotes here the same passages from Beetz J. in Moreau and Pigeon J. in Crosthwait which I have previously considered. These cases reject evidence that is aimed at "denying its [the presumption's] very existence" or "evidence solely directed at defeating the scheme established by Parliament under ss. 236 and 237 [now sections 237 and 238 respectively]." (See: Moreau. [See Note 51 below]) But that is a different issue than Mr. Fox has raised.

Note 51: Moreau, supra note 22 at 271.

¶ 41 Other passages, fairly pointed out by Crown counsel, indicate a better reading of St.

Pierre for the issue before us:

[48] The problem with this line of reasoning is that the majority [of the Ontario Court of Appeal in *St. Pierre*] is confusing the presumptions. Their point is a valid one with respect to the presumption of accuracy. When an accused seeks to rebut the presumption of accuracy, as contained in s. 258(1)(g) and s. 25 of the Interpretation Act, it does not matter that they are able to prove that their actual blood alcohol level should have been .150 instead of the .200 as recorded on the breathalyzer. This is immaterial as far as the commission of the offence is concerned. This is why it is well established that, in order to rebut this presumption, the accused must adduce or point to evidence which tends to show that his or her blood alcohol level was actually under .08. [See Note 52 below]

Note 52: *St. Pierre*, supra note 14 at 818.

As Iacobucci J. says in this passage: to rebut the presumption of accuracy, the accused must adduce or point to evidence which tends to show that his or her blood alcohol level was actually under .08 at the time of the offence, but in making this comment, he does not mention the need for scientific evidence directed to the particular machine's operation.

D. Other Appellate Authority

¶ 42 None of the Supreme Court of Canada cases nor the decisions from this Court directly address the question of whether evidence of low alcohol consumption, coupled with a toxicologist's testimony, can be "evidence to the contrary" for the purposes of rebutting the presumption of accuracy or whether direct evidence of machine malfunction or contamination or operator error is required. There are, however, five appellate authorities which do address the specific issue: *R. v. Davis*, [See Note 53 below] *R. v. Kucher*, [See Note 54 below] *R. v. Carter*, [See Note 55 below] *R. v. Dubois* [See Note 56 below] and *R. v. Gilbert*. [See Note 57 below]

Note 53: [1974] 1 W.W.R. 87; (1973), 14 C.C.C. (2d) 513 (B.C.C.A.).

Note 54: (1979), 48 C.C.C. (2d) 115 (Alta. S.C. (A.D.)).

Note 55: (1985), 19 C.C.C. (3d) 174 (Ont. C.A.). For a critical examination of *Carter*, see Thomas E.K. Fitzgerald "Evidence to the Contrary" and the Breathalyzer, [1991] 3 J.M.V.L. 225.

Note 56: (1990), 62 C.C.C. (3d) 90 (Que. C.A.) at 92.

Note 57: (1994), 92 C.C.C. (3d) 266 (Ont. C.A.).

¶ 43 In each of these five cases, the accused testified that he had consumed little alcohol and a toxicologist testified that the amount of alcohol consumed should not have resulted in the over .08 reading obtained. There was no direct evidence in any of these cases attacking the work of the qualified technician, the machine's operation or the quality of the sample. Nonetheless, in each of these cases, the defence evidence was found to constitute evidence to the contrary.

¶ 44 For example, in Kucher, Clement J.A., speaking for himself **and Shannon J.** (ad hoc) said:

... To hold otherwise [and require scientific or similar evidence] might well restrict probative evidence to an attack on the fallibility of the particular Borkenstein Breathalyzer instrument used in the case, or to evidence of circumstances intervening between the time of the alleged offence and the time of the breath tests such as, for example, consumption of quantities of alcoholic beverages. [See Note 58 below]

Note 58: Kucher, supra note 54 at 121.

In Carter, Finlayson J.A., speaking for the Court, raised the issue of a person who had testified that he did not drink on any occasion and had nothing to drink prior to being tested. In such circumstances, Finlayson J.A. held that the trial judge would have to either disbelieve the accused or accept that, for some reason or another, the breathalyzer reading is wrong. He found the latter course to be more acceptable:

Clearly, since the breathalyzer instrument is intended to measure the quantity of alcohol in the person being tested, any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and if accepted can raise a doubt as to the accuracy of the breathalyzer reading. ... the trial judge must either disbelieve the accused or accept that for some reason or other the breathalyzer reading is wrong. [See Note 59 below]

Note 59: Carter, supra note 55 at 178.

In Gilbert, Osborne J.A., speaking for the Court, said:

... An accused who is charged with an offence, the essence of which is that he was driving with an impermissibly high blood-alcohol concentration level must be able to lead evidence as to the quantity of alcohol that he consumed at relevant times. I do not think it is necessary that this kind of evidence be accompanied by an attack on the particular breathalyzer machine, or its operator. It may well be that without such an attack it may be difficult for an accused to have the tendered evidence accepted to the point of raising a reasonable doubt. [See Note 60 below]

Note 60: Gilbert, supra note 57 at 280.

Thus, direct evidence which challenges the functioning or operation of the machine is not required to rebut the presumption of accuracy.

¶ 45 Crown counsel in this case sought to distinguish these five cases on a number of bases: (i) the last four cases rely on Davis, which Crown counsel distinguishes for several reasons including its assimilation of the two presumptions and the limited question asked of the Court in that case; (ii) all five were decided before St. Pierre; (iii) Carter is a blood case; (iv) they give no weight to the Crown's disclosure obligations under Stinchcombe [See Note 61 below] and the corresponding lack of any defence disclosure; and (v) they do not explain how Parliament could have approved instruments which are inherently and, without explanation, randomly infallible.

Note 61: R. v. Stinchcombe, [1991] 3 S.C.R. 326.

¶ 46 I agree that these cases are not without difficulty, and I do not adopt all of what is said in them. For example, Davis is troubling for a couple of reasons. It refers to the presumption of identity while considering evidence of low alcohol consumption, and in the result, upholds an acquittal when the trial judge appears not to have considered the whole of the evidence. Davis

is, however, explainable on two bases. First, it was an appeal by way of stated case. The Court was asked to answer one question only: was the defence evidence of low alcohol consumption capable of being evidence to the contrary. Second, it predates *St. Pierre* and makes no mention of the presumption of accuracy. Nonetheless, it finds evidence of low alcohol consumption to constitute evidence to the contrary, which makes it a presumption of accuracy case and, therefore, applicable here. (The fact situation in *Davis* raises the presumption of identity, in that the test was taken 19 minutes after the accused stopped driving, but the issue before the Court of Appeal did not relate to this aspect of the evidence. The Court of Appeal decision appears to concern only the matter of low alcohol consumption.)

¶ 47 As *Iacobucci J.* in *St. Pierre* indicates, many older decisions refer to the presumption of identity when the presumption of accuracy is in play. [See Note 62 below] These five cases make this same error, but it is clear that the accused, in each case, is not only saying that the result at the time the breath sample was taken did not reflect the result at the time of driving. The accused is also saying that the test result is wrong. Nonetheless, I do not think this error detracts from the force of these cases. While the evidence for the two presumptions is not the same, the test for determining what constitutes evidence to the contrary is the same for both presumptions, i.e., is there "some evidence" which could make "a material difference"? The assimilation of the two presumptions becomes a relevant consideration only when one moves to the second stage of the analysis, which I consider later.

Note 62: *St. Pierre*, supra note 14 at paras. 30 and 42.

¶ 48 As to the remaining Crown arguments used to distinguish these five decisions, *Gibson* and *St. Pierre* do not assist the Crown, and indeed, as I have indicated earlier in these reasons, they assist Mr. Fox. I do not see how *Carter* being a blood case changes matters. As to the last two arguments, I believe they are better addressed as part of the second stage analysis where the trial judge considers the whole of the evidence, than at the point of determining whether there is evidence to the contrary to rebut the presumption of accuracy.

¶ 49 If the law were, as Crown counsel asserts, that defence evidence of low or no alcohol consumption is insufficient to rebut the presumption of accuracy, the rule would apply in all cases. As *Finlayson J.A.* in *Carter* [See Note 63 below] points out, even if the trial judge believes the accused's testimony or is faced with irrefutable evidence that the accused had little or nothing to drink, or otherwise has a reasonable doubt about the accuracy of the machine or the technician's operation of it, he or she would never reach the stage of being able to assess that evidence against the whole of the evidence. The trial judge would have to convict. This cannot be.

Note 63: Carter, supra note 55.

¶ 50 Even without considering the Charter of Rights and Freedoms, I can safely say that the administration of justice could not support a result where the trial judge must convict even though he or she believes the accused. A trial judge must be able to consider whether, on the whole of the evidence, he or she is left with a reasonable doubt as to the accused's guilt. If scientific evidence must accompany evidence of low alcohol consumption to rebut the presumption of accuracy, the trial judge never reaches the stage of assessing the evidence to determine whether a reasonable doubt exists.

E. Summary of Analysis

¶ 51 From these decisions, particularly Moreau, Crothwait, St. Pierre, Kucher, Gibson, Gilbert, Dubois and Kaminski, I conclude the following:

1. case law prior to Gibson, in this jurisdiction, and St. Pierre, nationally, must be read with the realization in mind that many earlier decisions tended to blur the presumptions of identity and accuracy;
2. evidence for one presumption may not be evidence for the other, and in particular, evidence of low or no alcohol consumption, alone, is evidence which challenges the presumption of accuracy and not the presumption of identity;
3. to determine whether such evidence is capable of rebutting the presumption of accuracy, a trial judge looks for "some evidence" which could make "a material difference";
4. a material difference is one which tends to put the accused within the permitted limit and which might reasonably be true;
5. evidence of low alcohol consumption alone, without direct evidence of breathalyzer malfunction, operator error or contamination, can be the type of evidence which can constitute evidence to the contrary capable of rebutting the presumption of accuracy;
6. at the stage of assessing the evidence to the contrary, the trial judge considers the probative value of the evidence and not its persuasive worth;
7. once the trial judge determines there is evidence to the contrary, the judge must still proceed to consider the whole of the evidence without regard for the presumption.

The trial judge followed that approach in this case. He determined that Mr. Fox was challenging the presumption of accuracy. He found some evidence which could place Mr. Fox within the permitted limit and which might reasonably be true. In weighing the evidence at the first stage of the Gibson analysis, he said the evidence does not have to be accepted as true, but only must need avoid rejection. [See Note 64 below] He found he could not reject that evidence.

Note 64: Fox, supra note 8.

¶ 52 Accordingly, I answer "yes" to the first question raised on appeal: evidence of low alcohol consumption, without direct evidence of breathalyzer malfunction, operator error or contamination, can be evidence to the contrary capable of rebutting the presumption of accuracy created by subsection 25(1) of the Interpretation Act as applied to clause 258(1)(g) of the Criminal Code.

VI. CAN A COURT CONSIDER THE ROADSIDE SCREENING TEST WHEN ASSESSING THE WHOLE OF THE EVIDENCE?

A. Question of Law Raised

¶ 53 The trial judge found Mr. Fox's testimony and Mr. Miller's opinion to be evidence to the contrary for the purposes of rebutting the presumption of accuracy. Nonetheless, the trial judge ultimately rejected Mr. Fox's testimony.

¶ 54 The trial judge wrote: "When I consider all of the evidence of this case I do not believe that the accused is giving an accurate account of his drinking during the night in question. I cannot accept his testimony as reasonably being true." The evidence to which the trial judge referred is this: (i) the "persuasive evidence" of the approved instrument made more so by the comments of the Supreme Court of Canada in Moreau; (ii) the fact that Mr. Fox "blew a fail on an Alcotest 7410 GLC" which is "again a testing device approved by Parliament" and "Officer Platford testified that this instrument records a fail only at blood alcohol levels of 100 mg percent or more." He concluded by saying:

An accused is not left at the mercy of the qualified technician and the certificate of analysis. An accused has the right to disclosure of the maintenance and calibration records of the instrument. The accused can also request leave to cross-examine the qualified technician. These are methods by which the accused can test the accuracy of the instrument, together with whatever other evidence is available. [See Note 65 below]

Note 65: Ibid.

As authority for the proposition that he could look at the roadside screening results, the trial judge referred to Kaminski and R. v. Martin. [See Note 66 below]

Note 66: Unreported decision of Deshaye J. Sask. Prov. Ct. Jan 2002.

¶ 55 In Kaminski, Bayda C.J.S., speaking for the Court, wrote:

[26] After finding "evidence to the contrary" the approach the trial judge should have taken, as noted in Gibson, is this. He should have found that the statutory presumption did not apply. He should then have proceeded to examine and weigh the whole of the evidence including the evidence respecting the accused's driving, the A.L.E.R.T. results, the breathalyzer readings at 2:27 a.m. and 2:47 a.m., the evidence of Mr. Laughlin, particularly in relation to the unabsorbed alcohol at 1:50 a.m., and the evidence of the accused and his companion as to the former's consumption of alcohol that evening, all with a view to answering the question: Do I have a reasonable doubt about the accused's blood-alcohol concentration being in excess of 80 milligrams at 1:50 a.m.? Only then would he have been in a position to render a verdict. The record does not show that to have been his approach. [See Note 67 below]

Note 67: Kaminski, supra note 21 at 200.

(While the trial judge also referred to Martin, I do not see it as dealing with this point.)

¶ 56 Then, on appeal, in the case at bar, the summary conviction appeal court judge appears to have concluded that Bernshaw [See Note 68 below] is the controlling authority on point. She wrote:

Note 68: Bernshaw, supra note 10.

[3] It is established law that the A.L.E.R.T. testing devices cannot be used for any other purpose than investigation. It is the breathalyzer test which is concerned with criminal liability. See: R. v. Bernshaw (N.) (1995), 176 N.R. 81; 53 B.C.A.C. 1; 87 W.A.C. 1; 95 C.C.C. (3d) 193 (S.C.C.), at 206.

[4] In R. v. Lambert (N.E.R.) (1996), 150 Sask.R. 64 (Q.B.), McLellan, J., applied Bernshaw, supra, and added the following at para. 19:

The evidence relating to the demand for a breath sample to be used in the screening device and the results of the test may only be used to decide whether the officer had reasonable and probable grounds for the breathalyzer demand. That evidence cannot be used for any other purpose. ... [See Note 69 below]

Note 69: Fox, supra note 12 at 285.

It is on this basis that she ordered a new trial.

¶ 57 Crown counsel did not initially raise the issue of the trial judge's consideration of the roadside screening test because a negative answer to the first question would have made the trial judge's reliance upon the roadside test irrelevant. The appeal would have been allowed and the conviction restored. An affirmative answer, however, affirms the decision under appeal and, if the Court does not address this second issue, Mr. Fox will be subjected to a new trial at which the Court would be required to consider the result in this case in light of the Kaminski decision. To avoid the attendant confusion including the possibility of a further appeal, the Court raised this issue with Crown counsel on the hearing of the appeal, and based on a subsequent request of the Court, he filed a further brief questioning this aspect of the summary conviction appeal court judge's decision. The Court, accordingly, reformulated the questions posed by the Crown to add: did the summary conviction appeal court judge err in ordering a new trial on the basis that the trial judge erred in considering the results of the roadside screening test?

¶ 58 In light of Kaminski, one may ask whether this Court need go any further. While the comments in Kaminski are obiter, they are nonetheless binding on this Court unless distinguishable or we are prepared to say that the issue was not addressed. While Mr. Fox is unrepresented, it must nonetheless be considered as though he were asking this Court to take the latter course and reconsider Kaminski in light of recent Ontario Court of Appeal authority which distinguishes its earlier jurisprudence and holds that a "fail" result cannot be used to assess the accused's credibility.

B. If the Presumption of Accuracy is rebutted, can the Court still consider the certificate as some evidence?

¶ 59 It is important at this point to place the question of whether a trial judge may have regard for the roadside test in the context of the whole trial process. The two-step process established by Gibson directs a trial judge to determine first whether there is evidence to the contrary, and if there is, to consider the whole of the evidence without regard for the presumption. Subsequent case law interpreting Gibson and St. Pierre has concluded that, as regards the presumption of accuracy, the certificate remains part of the evidence: Kaminski, [See Note 70 below] Rendle, [See Note 71 below] Jess, [See Note 72 below] Simonson, [See Note 73 below] Hrebeniuk [See Note 74 below] and Krowicki. [See Note 75 below]

Note 70: Kaminski, supra note 21.

Note 71: Rendle, supra note 41.

Note 72: Jess, supra note 42.

Note 73: Simonson, supra note 40.

Note 74: Hrebeniuk, supra note 43.

Note 75: Krowicki, supra note 44.

¶ 60 Allen C. Edgar distinguishes between the different functions which a presumption can play. [See Note 76 below] With respect to the presumption of accuracy and the effect of subsection 25(1) of the Interpretation Act, he writes:

Note 76: Allen C. Edgar, "Evidence to the Contrary" and "Over 80": Presumptions, their Rebuttal and Assessment of Defence Evidence of Alcohol Consumption (2000), 49 M.V.R. (3d) 64.

This is not much of a presumption. Upon proof of the basic fact that the breathalyzer indicated that the accused's BAC was of a particular level, the presumed fact is that the BAC was at the level. The presumption merely compels an inference that would, it is submitted, usually be made without the presumption. It adds little, so rebuttal subtracts little. [See Note 77 below]

Note 77: Ibid. at 80.

Indeed, there are two parts to subsection 25(1). One part creates the presumption and the other part, which is not dependent on the presumption, renders the certificate admissible.

¶ 61 The presumption of accuracy is not the same as the presumption of identity on this point. Once the presumption of identity is rebutted, the Crown must prove the blood alcohol level of the accused at the time of driving by other means, which usually involves an expert who can interpret the breathalyzer reading and read it back to the time of driving. Without this additional evidence, there is no evidence which provides the blood alcohol level at the time of driving. But when the presumption of accuracy is rebutted, the presumptive effect of subsection 25(1) of the Interpretation Act is eliminated, but the evidentiary aspect of that subsection remains as does clause 258(1)(g) of the Criminal Code. Clause 258(1)(g) states that the certificate is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who has signed the certificate.

¶ 62 This is the view that has been taken of the presumption of accuracy in this province in the cases above cited. Except for one comment in *St. Pierre*, these authorities would mean that I need say no more about this issue.

¶ 63 But, again, as Mr. Fox is not represented, Crown counsel fairly pointed out this passage in *St. Pierre*:

[26] Clearly, the result of these two provisions is that a presumption that the reading received on the breathalyzer provides an accurate determination of the accused's blood alcohol level at the time of the testing is established. Hence, the certificate can be tendered in evidence to prove what this blood alcohol level was. However, if the accused leads or points to "evidence to the contrary" which tends to show that, in fact, his or her blood alcohol level, at the time of testing, was not that shown on the certificate, then the certificate is no longer proof of that fact. Therefore, for the Crown to be successful it must prove the accused's blood alcohol level some other way. Indeed, the Crown may still prove that the blood alcohol level of the accused at the time of the offence was over 80 mg of alcohol in 100 ml of blood. This "presumption of accuracy" relates to the accuracy of the readings at the time of the test, as stated in the certificate of analysis, and is presumed by the operation of s. 25 of the Interpretation Act, in the absence of "evidence to the contrary". [See Note 78 below]

Note 78: St. Pierre, supra note 14 at 810.

¶ 64 This seems to indicate that once Mr. Fox successfully rebutted the presumption of accuracy, there was no longer any evidence before the trial judge of Mr. Fox's blood alcohol reading of .13, such that we never reach the second question of law. In my respectful view, this statement must be read in light of established law, much of which is referred to in St. Pierre: Kucher, [See Note 79 below] Gibson, [See Note 80 below] Kaminski, [See Note 81 below] Gilbert [See Note 82 below] and R. v. Coutts. [See Note 83 below] All of these authorities take the view indicated above, which is that the certificate remains. These comments, in para. 26 of St. Pierre, must be read in light of the balance of the judgment, which in my view, indicates that the certificate remains but that the Crown must now prove its case on the whole of the evidence.

Note 79: Kucher, supra note 54.

Note 80: Gibson, supra note 7.

Note 81: Kaminski, supra note 21.

Note 82: Gilbert, supra note 57.

Note 83: (1999), 136 C.C.C. (3d) 225 (Ont. C.A.); (1999), 45 O.R. (3d) 288.

¶ 65 If the certificate does not form part of the evidence, there is no evidence of the accused's blood alcohol content. There is no other way for the Crown to prove blood alcohol level, after the fact, than by means of the analysis of the accused's breath. The Court in *St. Pierre* could not have been referring to calling the technician instead of using the certificate because the rationale for providing the certificate was to eliminate the need to call the technician, and, more significantly, the technician would not be able to add anything more with respect to the level of the blood alcohol content than what is already shown on the certificate. Procedurally, such an interpretation would be difficult to sustain, as the Crown would have to convince the Court that calling the technician would be appropriate rebuttal evidence and permit an adjournment to procure the technician's attendance.

¶ 66 Once an accused successfully rebuts the presumption of accuracy, the certificate is no longer deemed to establish the blood alcohol content at the time of testing, to use the words of subsection 25(1) of the Interpretation Act, but the certificate remains part of the evidence, and it is some evidence of the facts contained therein. Thus, the certificate, minus the presumption of its accuracy, is part of the evidence being considered at the second stage of the Gibson analysis.

C. Use of the Roadside Screening Test Result

¶ 67 Testing by means of the roadside screening device is authorized by ss. 254(2) and 254(3) of the Criminal Code which read:

- (2) Testing for presence of alcohol in the blood - Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.
- (3) Samples of breath or blood where reasonable belief of commission of offence - Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

- (a) such samples of the person's breath as in the opinion of a qualified technician, or
- (b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
 - (i) the person may be incapable of providing a sample of his breath; or
 - (ii) it would be impracticable to obtain a sample of the person's breath,

such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

¶ 68 With all due respect to the summary conviction appeal court judge, I do not think that the Supreme Court's decision in *Bernshaw* answers the question before us. The ratio of *Bernshaw* [See Note 84 below] which applies here is contained in these extracts taken from the judgment of Sopinka J., writing in the majority:

Note 84: *Bernshaw*, supra note 10 at 285.

[49] It is clear that Parliament has set up a statutory scheme whereby a screening test can be administered by the police merely upon entertaining a reasonable suspicion that alcohol is in a person's body. The purpose behind this screening test is evidently to assist police in furnishing the reasonable grounds necessary to demand a breathalyzer. The roadside screening test is a convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence under s. 253 of the Code. A "fail" result may be considered, along with any other indicia of impairment, in order to provide the police officer with the necessary reasonable and probable grounds to demand a breathalyzer. Normally, where a properly conducted roadside screening test yields a "fail" result, this alone will be sufficient to furnish a police officer with such grounds.

[50] Nonetheless, as I stated at the outset, it cannot be said that a "fail" result per se provides reasonable and probable grounds. If that were the case, it was open to Parliament to indicate this intention in the Criminal Code. Yet, nowhere in s. 254 is it indicated that a "fail" result on an approved screening device is deemed to provide reasonable and probable grounds. Thus, it is necessary to determine as a question of fact in each case whether or not the police officer had an honest belief based on reasonable and probable grounds that the suspect had committed an offence under s. 253 of the Code.

Thus, a police officer who suspects that a driver has been drinking may demand that the driver submit to a roadside screening test, the result of which may be used to determine whether the officer has reasonable and probable grounds to demand that the person submit to a breathalyzer test.

¶ 69 I acknowledge that Cory J., speaking for the minority, in Bernshaw states:

[21] ... The ALERT test used as an investigatory tool obviously causes far less inconvenience to a driver than would a breathalyzer test. A driver who fails an ALERT test is not subject to criminal liability but may be required to take the more accurate breathalyzer test provided for in s. 254(3) of the Criminal Code. [22] It is the breathalyzer test which is concerned with criminal liability. [See Note 85 below]

Note 85: Ibid. at 271-72.

This is authority for no more than the proposition that the roadside screening test is not to be used as part of the Crown's case to decide whether the accused was over .08 or impaired. (Insofar as Lambert [See Note 86 below] extends this ratio, it is not to be followed.) The rationale for this rule is two fold: the sample is compelled; and there is normally no right to counsel before giving a roadside screening device sample because no criminal liability can follow (see R. v. Talbourdet [See Note 87 below] and R. v. Thomsen [See Note 88 below]).

Note 86: Lambert, supra note 11.

Note 87: (1984), 12 C.C.C. (3d) 173 (Sask C.A.) at 181-82.

Note 88: [1988] 1 S.C.R. 640 at 649-50.

¶ 70 The issue which confronts us here, however, is not the use of the roadside screening result to show that Mr. Fox's blood alcohol content was over .08, or in other words, to convict him of that offence on the basis of the "fail" reading, but rather, to test the credibility of his statement that he had consumed six beer only. The need to consider the evidence is triggered by his evidence of low alcohol consumption. The roadside result is being considered to answer the question whether, without the presumption of accuracy, on the whole of the evidence the Crown has proven its case beyond a reasonable doubt.

¶ 71 This specific question has been considered by other Courts of Appeal. In *Coutts*, [See Note 89 below] the Ontario Court of Appeal held that the screening result cannot be used even to evaluate the accused's credibility when he or she offers evidence of a drinking pattern inconsistent with the approved instrument reading. *R. v. Milne*, [See Note 90 below] however, is the underlying basis of the Court of Appeal's decision in *Coutts*.

Note 89: *Coutts*, supra note 83.

Note 90: (1996), 107 C.C.C. (3d) 118 (Ont C.A.).

¶ 72 In *Milne*, the Court considered a provision of the Ontario Highway Traffic Act which provides for roadside sobriety tests. The issue was whether the state can use sobriety test evidence to prove impaired driving. Citing the Ontario Court of Appeal's earlier jurisprudence in *R. v. Saunders*, [See Note 91 below] Moldaver J.A. emphasized that the intention was not to provide evidence of an offence:

Note 91: (1988), 41 C.C.C. (3d) 532.

... I am not prepared to accept that s. 48(1) [of the Ontario Highway Traffic Act providing for roadside sobriety tests] would survive s. 1 Charter scrutiny if it were found to be a device by which the police could gather evidence for the purpose of incriminating a motorist at his or her impaired driving trial. In my view, such a scheme would impermissibly broaden the scope and purpose of the testing procedures contemplated by s. 48(1). It would also render it constitutionally permissible for the police, acting on mere suspicion, to compel a detained motorist to participate directly in the creation of self-incriminating evidence that could later be used to convict the motorist at trial, absent any requirement that the motorist be advised of his or her s. 10(b) Charter rights. To my mind, such a scheme would not pass s. 1 Charter scrutiny. [See Note 92 below]

Note 92: Milne, supra note 90 at 129.

¶ 73 While Milne dealt with roadside sobriety tests, the learned justice went on to draw an analogy to the roadside screening device after referring to Thomsen. [See Note 93 below] Speaking generally of roadside testing being used to incriminate an accused, he opined:

Note 93: Thomsen, supra note 88.

... If roadside test results could be used in this manner, this would overshoot their limited objective. That objective, it will be recalled, is to provide the police with the tools needed to remove impaired drivers from the highway immediately and thereby avoid the calamitous results likely to occur if they are allowed to proceed. The objective is not to convict impaired drivers at any cost. If it were, there would be no reason for insisting that the motorist be given his or her Charter rights when the investigation moves to the arrest stage for impaired driving or to a request for a breathalyzer demand pursuant to s. 254 of the Criminal Code. And yet, the law is clear that, at this juncture, the motorist is entitled to full protection of the rights accorded by the Charter: *R. v. Therens*, [1985] 1 S.C.R. 613.... That protection, I suggest, would be hollow indeed if the state could simply turn around and use the results of the roadside A.L.E.R.T. test to convict the motorist of over 80, or, as in this case, use the inability of the appellant to adequately perform the physical co-ordination tests to convict the appellant of impaired driving. [See Note 94 below]

Note 94: Milne, supra note 90 at 131.

For my part, this is a well-supported proposition resting on good authority as referred to earlier: Talbourdet and Thomsen.

¶ 74 Then in Coutts, Moldaver J.A. wrote, again on behalf of **the Court**:

[31] To the extent, however, that the Crown seeks to use the roadside test results at trial to impeach "evidence to the contrary", I am of the view that the principles in Milne, supra, apply, such that the use of the evidence for that purpose would render the trial unfair. The unfairness arises because the motorist has been compelled, at the behest of the state, to provide evidence that would not have been obtained but for the motorist's participation in its construction and the evidence is being tendered for a purpose beyond that contemplated by s. 254(2) of the Code. [see Milne, supra, at pp. 127-128 and 133-134]

[32] Apart from constitutional considerations, on a practical level, it seems to me that where roadside test results are proffered for the limited purpose of discrediting "evidence of the contrary", there is a real danger that they will be used not for that purpose, but rather, to bolster the reliability of the breathalyzer readings. [See Note 95 below]

Note 95: Coutts, supra note 83 at 236.

¶ 75 Thus, the Ontario Court of Appeal, speaking through Moldaver J.A., saw no distinction between using the roadside evidence to gather evidence of the offence or using it to test the accused's credibility. In reaching this decision, the Court of Appeal had to distinguish its decision in Gilbert where Osborne J.A., speaking for the Court, treated the results of the roadside screening device and those of the breathalyzer test, absent the presumption, on the same basis, i.e., as a means of testing the accused's credibility.

¶ 76 In upholding the conviction in Gilbert, the Court wrote:

It was open to the trial judge to consider the respondent's breathalyzer readings (and the fact that he failed the A.L.E.R.T. test) in the determination of whether to accept the tendered evidence to the contrary. In my opinion, the trial judge made it clear that he rejected "the defence evidence as to alcohol consumption". On the basis of the trial judge's findings of fact, there was no evidentiary foundation to support the conclusion that at the time of the offence, the respondent's blood-alcohol concentration was below 80. Accordingly, I think that the trial judge was correct in finding the respondent guilty based upon the lower of his two breathalyzer test readings-128 mg. of alcohol in 100 ml. of his blood. [See Note 96 below]

Note 96: Gilbert, supra note 57 at 281.

¶ 77 In R. v. Bernard, [See Note 97 below] the Québec Court of Appeal followed Coutts saying, simply, that it shared the Ontario Court of Appeal's view in that decision. [See Note 98 below]

Note 97: (1999), 140 C.C.C. (3d) 412 (Que. C.A.).

Note 98: Ibid. at 415 and 421.

¶ 78 In my view, Coutts and Bernard are dependent for their analysis on likening the use of the roadside screening device to a confession. I find that I prefer the Ontario Court of Appeal's approach in Gilbert.

¶ 79 The roadside screening test is not being used, on its own, to convict the accused. It is, instead, some evidence which the court can consider to test the accused's statement that he or she had little to drink and to test the inference which flows from that statement that the breathalyzer was not working properly.

¶ 80 The Criminal Code does not preclude the use of the roadside test in this manner. Parliament permits the police officer to obtain this evidence to confirm a suspicion that the driver may be over .08. While the accused has no option but to provide the sample, it is difficult to see where there may be an abuse of authority in the way such abuse may arise when a confession is obtained. This is not a compelled action by means of a state official against an

individual as one would see with respect to a confession. In this case, Parliament has made the decision that individuals must provide a roadside breath sample.

¶ 81 Once having obtained the result of the test, it forms part of the officer's reasonable and probable grounds to demand samples of the accused's breath. The procedure in this jurisdiction is that the arresting officer details all of the evidence from the initial contact with the accused until a demand is made, for the purposes of laying the foundation for his or her reasonable and probable grounds to have made the demand. Thus, the evidence is before the court as part of the record.

¶ 82 Until the accused takes the stand and swears that he or she consumed little or no alcohol, the Crown does not know what the accused's defence will be. In a system which requires full Crown disclosure and no defence disclosure, it is not unreasonable for the Crown, at that point in the trial, to ask the court to consider the evidence of the roadside screening device to weigh the accused's credibility. As Crown counsel says "one should not exclude a dispassionate assessment by an approved screening device which can significantly help the trier of fact reach the truth." Accordingly, I am not persuaded to abandon the approach outlined in Kaminski.

D. Reliability of the Roadside Test

¶ 83 The next issue concerns the reliability of the approved screening device result. In *Coutts*, the Court also expressed concern about the accuracy of the device:

[20] Before considering the constitutional implications of the distinction proposed by Ms. Woollcombe, I feel obliged to point out that on the basis of this record, even if I were to accept her argument, I would nevertheless dismiss the appeal. I say that because in the final analysis, the evidentiary value of roadside test results to discredit "evidence to the contrary" is dependent on the fact that roadside screening devices are calibrated to register a "fail" where a motorist has a blood-alcohol level equivalent to or greater than 100 mg of alcohol per 100 ml of blood. And yet, no evidence was led in this case to establish that critical fact. Nor for that matter, was there any evidence as to when the screening device was last calibrated or whether it was in proper working order.

[21] Manifestly, where a roadside test is being used solely for the purpose of confirming or rejecting a police officer's suspicion that a motorist might be impaired or over the legal limit, none of these facts need be proved. It is sufficient if the administering officer reasonably believes them to be true. Where, however, the test result is being offered for the truth of its contents, these facts must be proved by admissible evidence. Therefore, even if it was open to the trial judge to use the test result to discredit the "evidence to the contrary" adduced by the respondent, the evidentiary foundation needed to do so was missing. [See Note 99 below]

Note 99: Coutts, supra note 83 at 232.

¶ 84 While I agree that there must be some evidence as to when the device registers a "fail," which may at some point become a matter of judicial notice, I do not agree that there must be evidence of recent testing or opinion evidence as to proper working order. The roadside test result is not being used to convict the accused. It is merely "some evidence" which the court can consider in weighing the whole of the evidence. If evidence is led which calls into question the proper functioning or recent testing of the device, the trial judge may consider such evidence as part of the weighing process, but the absence of evidence of proper functioning or recent testing should not lead to the automatic rejection of the test result.

¶ 85 I find some support for this proposition in these words of Sopinka J. taken from Bernshaw:

[80] ...Where the particular screening device used has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary. [See Note 100 below]

Note 100: Bernshaw, supra note 10 at 298.

This was said in answer to the accused's concern that the device was not functioning properly due to the presence of alcohol in the accused's mouth which may have distorted the result.

¶ 86 In the case before us, Cst. Platford testified that he was trained in the operation of the approved screening device. [See Note 101 below] He also testified that the approved screening device is calibrated so that it will register a fail at .10 or greater [See Note 102 below] and that

Mr. Fox's fail reading led him to believe that Mr. Fox was over .08. [See Note 103 below] While it is clear from the evidence that Cst. Platford used this information for the purposes of arresting Mr. Fox for driving over .08, none of his evidence regarding his training, the functioning of the roadside screening device or its proper operation was questioned by defence counsel. Again, in a system where there is no defence disclosure, it seems unfair now to say that it was incumbent upon Crown counsel to prove all of those matters in case the accused puts forward a defence of low alcohol consumption.

Note 101: Transcript of trial proceedings, p. 18 lines 16-18

Note 102: Ibid. at p. 19, lines 22-23.

Note 103: Ibid. at p. 18, line 26.

E. When is the evidence of the Roadside Test to be Considered?

¶ 87 There is one other point which may lead to confusion and that is this: when does the court consider the evidence of the roadside screening device, i.e., can it be used to reject the accused's evidence to the contrary as not being believed? The danger, in considering the roadside test result to assess the evidence to the contrary, is that the court may move prematurely to a conclusion which may deny the accused the benefit of a reasonable doubt. On this point, I disagree with Gilbert and query the result in Dubois.

¶ 88 It may be, in part, one of the reasons why the Courts of Appeal in Ontario and Québec have taken the view that they have regarding the use of the approved screening device. In both Gilbert and Dubois, the specific question asked was whether such evidence could be used to reject the accused's evidence to the contrary.

¶ 89 In Gilbert, the Court wrote:

4. In the determination of whether to accept the tendered evidence to the contrary, the trier of fact should take into account all of the evidence, including the breathalyzer results absent the statutory presumption: see Lefaive, [1992] O.J. No. 2638. If after considering all of the evidence the trier of fact rejects the tendered evidence to the contrary, then it follows that there is no basis upon which to conclude that the presumption should not be applied. [See Note 104 below]
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Note 104: Gilbert, supra note 57 at 280.

In Dubois, as well, the Québec Court of Appeal appears to have considered the whole of the evidence to determine whether the evidence tendered could constitute evidence to the contrary. While neither case considered the use of the roadside test result, these cases lay the foundation for Coutts and Bernard.

¶ 90 The approach in Gilbert and Dubois is contrary to the approach in Gibson where Bayda C.J. set out the procedure to be followed when assessing evidence to the contrary, and I repeat:

... The process of determining whether an item or a series of items of evidence is "evidence to the contrary" is a process whereby the adjudicator places a value on the evidence with a view to deciding whether there is sufficient value or worth there for the fact-finder to take the evidence into consideration should the time come for him or her to balance and weigh the whole of the evidence in order to make a finding of the fact in issue. In short, the process is one of determining the probative value of the evidence. The process is not one involving demonstration or one of producing a finding of the fact in issue. In short, it is not one of determining the persuasive value of the evidence. That comes later (and only if the presumption is rebutted). [See Note 105 below]

Note 105: Gibson, supra note 7 at 34-35.

It is also contrary to the approach in Kucher. [See Note 106 below]

Note 106: Kucher, note 54 at 126.

¶ 91 The problem in taking into account the roadside result, to determine whether there is evidence to the contrary, is this. The issue is the accuracy of the breathalyzer or its operation. If the court considers the roadside result at the first stage, it is difficult to see where the line between evidence which is to be considered, and that which is to be excluded, is to be drawn. When the court considers the whole of the evidence absent the presumption of accuracy, as I have indicated, the court is entitled to consider the certificate. It would be peculiar to consider

the strength of the certificate's contents at the first stage because that is what is being assessed to determine if there is evidence to the contrary to rebut the presumption of accuracy. The problem is circumvented by considering the defence evidence in isolation and following the process in Gibson and Kucher.

VII. CONCLUSION

¶ 92 I, accordingly, conclude that the trial judge did not err when he held that given all of the evidence, including the strength of the certificate representing the results taken by a trained technician on an approved machine, and the "fail" on the roadside screening device, that the accused's testimony could not be believed and that no reasonable doubt existed. In the result, I conclude that the summary conviction appeal court judge erred in holding that the trial judge was not entitled to consider the roadside screening device result and in ordering a new trial.

¶ 93 Leave is granted. The appeal is allowed. The judgment from the Court of Queen's Bench is set aside and that of the Provincial Court restored.

JACKSON J.A.

VANCISE J.A.:— I concur.

SHERSTOBITOFF J.A.:— I concur.

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