



SUPREME COURT OF CANADA

CITATION: R. v. Cyr-Langlois, 2018 SCC 54

APPEAL HEARD AND JUDGMENT RENDERED:

October 15, 2018

REASONS DELIVERED: December 6, 2018

DOCKET: 37760

BETWEEN:

Her Majesty The Queen
Appellant

and

Marc Cyr-Langlois
Respondent

- and -

**Attorney General of Ontario, Association québécoise des
avocats et avocates de la défense and Criminal Lawyers' Association**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT: Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon,
(paras. 1 to 19) Brown, Rowe and Martin JJ. concurring)

DISSENTING REASONS: Côté J.
(paras. 20 to 59)

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R. v. CYR-LANGLAIS

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Criminal law — Driving with blood alcohol level over legal limit — Evidence — Statutory presumptions of accuracy and identity for breathalyzer test results — Burden of proof for rebutting presumptions — Scope of evidence that must be adduced to rebut presumptions — Whether evidence that is purely theoretical is sufficient to show that improper operation of breathalyzer tends to cast doubt on reliability of results — Criminal Code, R.S.C. 1985, c. C-46, s. 258(1)(c).

The accused was charged with operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood. At the police station, the qualified technician failed to observe the accused himself for a period of 15 or 20 minutes before administering each breathalyzer test. The accused argued that this was a breach of the duty to operate the breathalyzer properly and that it was sufficient to rebut the presumptions of accuracy and identity applicable to breathalyzer test results under s. 258(1)(c) of the *Criminal Code*, which had to lead to his acquittal in the absence of additional evidence from the Crown. At trial, only the qualified technician testified. The trial judge found that because the observation procedure, whose general purpose was to ensure the reliability of the results, had not been followed in this case, this was sufficient to raise a reasonable doubt about the reliability of the results. He therefore acquitted the accused. On appeal, the Superior Court set aside the judgment of acquittal and ordered a new trial. A majority of the Court of Appeal set aside the Superior Court's judgment and restored the verdict of acquittal.

Held (Côté J. dissenting): The appeal is allowed, the verdict of acquittal is set aside and a new trial is ordered.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.: To rebut the presumptions in s. 258(1)(c) of the *Criminal Code*, an accused must adduce evidence tending to show that the malfunctioning or improper operation of the approved instrument casts doubt on the reliability of the results. The accused's burden is discharged if the following conditions are met: (1) the accused adduces evidence relating directly to the malfunctioning or improper operation of the instrument, and (2) the accused establishes that this defect tends to cast doubt on the reliability of the results. In the case of improper operation of an instrument, while abstract evidence alone may sometimes meet the requirement of raising a reasonable doubt about the reliability of the results, it is more likely that evidence that relates more concretely to the facts in issue will be required. What is essential is that the possibility that the defect affected the reliability of the results is serious enough to raise a reasonable doubt.

In the instant case, the evidence adduced did not rebut the presumptions. Even if it is assumed that improper operation of the instrument was established here based on failure to complete the 15- or 20-minute observation period, there was clearly no evidence that this improper operation tended to cast doubt on the reliability of the results. The mere improper operation alleged by the accused did not in itself tend to show that the reliability of the results was in doubt. Without evidence that

related more concretely to the facts in issue, the accused's argument was in the realm of speculation and could not satisfy the reasonable doubt test. Acceptance of theoretical evidence based on speculation reflects a misinterpretation of the accused's burden of proof, which is an error of law.

Per Côté J. (dissenting): The appeal must be dismissed. An accused who seeks to counter the presumptions in s. 258(1)(c) of the *Criminal Code* bears only the burden of raising a reasonable doubt about a malfunction or improper operation of the breathalyzer that could affect the reliability of the results. Requiring evidence that relates more concretely to the facts in issue imposes an obligation on the accused to cast doubt on the accuracy of the results on the facts of the case, which is contrary to the Court's reasoning in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187.

In *St-Onge Lamoureux*, the Court found that the requirement of adducing evidence tending to show that the instrument was malfunctioning or was operated improperly was justified under s. 1 of the *Charter*, notably because there was still a real possibility that the accused could counter the statutory presumptions by showing that the relevant procedures had not been followed, in which case the reliability of the results could not be assumed. Thus, where the evidence tends to show — on the reasonable doubt standard — that the malfunctioning or improper operation of the breathalyzer increased the possibility of an inaccurate result, reliability is affected and the accused has met his or her burden. The accused does not have to tender additional

evidence in order to directly raise a reasonable doubt about the accuracy of the results on the facts of the case. It is sufficient for the accused to adduce evidence tending to show that a recommended procedure was not faithfully followed and that the purpose of the procedure is to ensure the reliability of the results.

In this regard, a qualified technician's testimony may be sufficient to counter the presumptions. Where the technician testifies about a recommended procedure, states that its purpose is to ensure the reliability of the results and, finally, admits that he or she did not follow the procedure faithfully or does not know whether it was followed faithfully, the accused is not obliged to tender additional evidence. If the Crown then fails to prove beyond a reasonable doubt that the deficiency in question had no impact on the accuracy of the results on the facts of the case, the Crown completely loses the benefit of the statutory presumptions in s. 258(1)(c). It is for the trier of fact to assess the evidence adduced in order to determine whether it is sufficient to counter the statutory presumptions.

In the instant case, the trial judge made no error of law that would warrant appellate intervention in finding that the accused had raised a reasonable doubt about improper operation of the breathalyzer that could affect the results and that the presumptions of accuracy and identity in s. 258(1)(c) had therefore been countered. It was open to the trial judge to make that finding in light of the concrete and specific evidence showing that a procedure for ensuring the reliability of the results had not been followed and that this deficiency could affect the

reliability of the results. Requiring an accused to testify about his or her alcohol consumption and physiological reactions, even though the qualified technician's testimony was sufficient to raise a reasonable doubt about improper operation of the breathalyzer that could affect the reliability of the results, would upset the delicate balance between the constitutional rights of accused persons and Parliament's objectives.

Finally, the Court should not order a new trial based on arguments made for the first time on appeal, because to do so would be to give the Crown a second chance to have the accused convicted. Such a result would be contrary to the double jeopardy principle.

Cases Cited

By Wagner C.J.

Referred to: *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. So*, 2014 ABCA 451, 9 Alta. L.R. (6th) 382; *R. v. Lifchus*, [1997] 3 S.C.R. 320.

By Côté J. (dissenting)

R. v. St-Onge Lamoureux, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Gubbins*, 2018 SCC 44; *R. v. Drolet*, 2010 QCCQ 7719, [2010] R.J.Q. 2610; *R. v.*

Gibson, 2008 SCC 16, [2008] 1 S.C.R. 397; *R. v. So*, 2014 ABCA 451, 9 Alta. L.R. (6th) 382; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089; *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221; *Lampard v. The Queen*, [1969] S.C.R. 373; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Varga* (1994), 90 C.C.C. (3d) 484; *R. v. Knight*, 2015 ABCA 24; *R. v. Suarez-Noa*, 2017 ONCA 627, 139 O.R. (3d) 508; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. Vaillancourt* (1995), 105 C.C.C. (3d) 552; *R. v. Patel*, 2017 ONCA 702, 356 C.C.C. (3d) 187; *Wexler v. The King*, [1939] S.C.R. 350.

Statutes and Regulations Cited

Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, S.C. 2018, c. 21.

Canadian Charter of Rights and Freedoms, ss. 1, 11(d).

Criminal Code, R.S.C. 1985, c. C-46, ss. 254(3)a(i), 258(1)c, d.01), d.1), 320.31(1) [ad. 2018, c. 21, s. 15].

Authors Cited

Petit Robert: dictionnaire alphabétique et analogique de la langue française, nouvelle éd. Paris: Le Robert, 2012, “exactitude”, “fiabilité”.

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Bélanger and Hogue JJ.A.), 2017 QCCA 1033, 39 C.R. (7th) 123, 17 M.V.R. (7th) 75, [2017] Q.J. No. 8609 (QL), 2017 CarswellQue 10389 (WL Can.), [2017] AZ-51405750, setting aside a decision of Zigman J., 2015 QCCS 4369, [2015] J.Q.

n° 9181 (QL), 2015 CarswellQue 9159 (WL Can.), [2015] AZ-51216659, setting aside the acquittal of the accused and ordering a new trial. Appeal allowed, Côté J. dissenting.

Gabriel Bervin and Maxime Lacoursière, for the appellant.

Marie-Pier Boulet and Hugo T. Marquis, for the respondent.

Written submissions only by *James V. Palangio* for the intervener the Attorney General of Ontario.

Jean-Philippe Marcoux, for the intervener Association québécoise des avocats et avocates de la défense.

Adam Little, Jonathan M. Rosenthal and James Foy, for the intervener the Criminal Lawyers' Association.

English version of the judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE —

I. Background

[1] Where an accused is charged with operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood, once the Crown has established certain conditions, the burden shifts to the accused to raise a reasonable doubt about the reliability of the breathalyzer test results. If there is no evidence raising such a doubt, the results are presumed to be accurate, which is to say that the alcohol level in the breath sample is presumed to reflect the alcohol level in the accused's blood at the time of testing, and that level is presumed to be identical to the alcohol level in the accused's blood at the material time.

[2] This appeal concerns the scope of the evidence that must be adduced to rebut the presumptions of accuracy and identity that are applicable to breathalyzer test results under s. 258(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"). From the bench, the Court allowed the Crown's appeal from the judgment of the Court of Appeal, set aside the verdict of acquittal restored by the Court of Appeal, and ordered a new trial, with reasons to follow. These are those reasons.

[3] The extent of the burden resting on an accused in such circumstances has been the subject of much debate. In *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, this Court put an end to that debate. Since that decision, it has been settled that to rebut the presumptions in s. 258(1)(c) *Cr. C.*, an accused must adduce evidence tending to show that the malfunctioning or improper operation of the approved instrument casts doubt on the reliability of the results (*St-Onge Lamoureux*, at para. 52). Thus,

the new provisions [of the *Cr. C.*] do not make it impossible to disprove the test results. Rather, Parliament has recognized that the results will be reliable only if the instruments are operated and maintained properly, and that there might be deficiencies in the maintenance of the instruments or in the test process. What the new provisions require is that evidence tending to cast doubt on the reliability of the results relate directly to such deficiencies. [para. 41]

This requirement has two purposes. First, it aims to ensure continued scientific recognition of breathalyzer test results, and second, it promotes the proper functioning and proper operation of instruments in order to prevent the reliability of the results from being compromised (*St-Onge Lamoureux*, at paras. 33-36).

[4] The accused's burden is discharged if the following conditions are met: (i) the accused adduces evidence relating directly to the malfunctioning or improper operation of the instrument, and (ii) the accused establishes that this defect tends to cast doubt on the reliability of the results. Each of these conditions has a theoretical element and a practical element. Therefore, for the improper operation of the instrument to be established, it must first be found that a specific procedure is generally required (theoretical element), and it must then be shown that the procedure was not in fact followed (practical element). The evidence from which it can be inferred that the defect tends to cast doubt on the reliability of the results must be looked at in the same manner. The theoretical element is satisfied where it is proved that the purpose of the procedure in question is to ensure the reliability of the results. On the practical element, the evidence must establish that, in the particular case, the defect could have affected the reliability of the results.

[5] In the instant case, there is no need to deal with the first condition. Even if we assume, without deciding, that improper operation of the instrument was established here based on failure to complete the 15- or 20-minute observation period, there was clearly no evidence that this improper operation tended to cast doubt on the reliability of the results. The Court of Appeal's judgment must be reversed. The Superior Court's judgment setting aside the verdict of acquittal by the Court of Québec and ordering a new trial must be restored.

A. *Facts*

[6] On July 12, 2012, the respondent Marc Cyr-Langlois was stopped by Constables Boissonneault and Cousineau while he was driving his vehicle. Constable Cousineau arrested him around 12:35 a.m. The respondent was frisk searched and then taken to the police station. When they arrived at the station around 12:54 a.m., the three men went into two adjacent rooms separated by a window. Constable Boissonneault, a qualified technician, went into the breathalyzer room to prepare the instrument and run a control test. Constable Cousineau accompanied the respondent to the interrogation room and then joined Constable Boissonneault in the adjacent breathalyzer room while the respondent exercised his right to counsel confidentially. Constable Cousineau observed the respondent through the window while he placed a call to his counsel, which ended around 1:05 a.m.

[7] At 1:08 a.m., Constable Boissonneault gave the respondent a first breathalyzer test, which showed 157 mg of alcohol in 100 ml of blood. During the

statutory waiting period prior to the second test, the respondent was alone with Constable Cousineau in the interrogation room. At 1:30 a.m., Constable Boissonneault administered the second breathalyzer test, which showed 148 mg of alcohol in 100 ml of blood. Both results were therefore over the legal limit, with a difference of less than 10 mg. The respondent was then charged with operating a motor vehicle while his ability to do so was impaired by alcohol and with operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood. Only the second charge is in issue here.

B. *Procedural History*

(1) Court of Québec

[8] At trial in the Court of Québec, the parties agreed that the court should begin by determining whether Constable Boissonneault had breached the duty to operate the breathalyzer properly by failing to observe the accused himself for a period of 15 or 20 minutes before administering each test. The accused argued that, in such a case, the presumptions were rebutted, which had to lead to his acquittal in the absence of additional evidence from the Crown.

[9] Only Constable Boissonneault testified for the Crown, and the trial judge rendered his decision from the bench. The trial judge found that, while the technician was not required to observe the accused himself, the period during which Constable Cousineau had done so was not continuous. He then stated that, since the general

purpose of the observation procedure is to ensure the reliability of the results, his finding that the procedure had not been followed in this case was sufficient to raise a reasonable doubt. He did not refer to any additional evidence in this regard. He therefore acquitted the respondent of the second charge, and the Crown stated that it had no evidence to adduce on the first charge.

(2) Quebec Superior Court, 2015 QCCS 4369

[10] Since it was of the view that the evidence required to rebut the presumptions had not been adduced, the Crown appealed as of right to the Superior Court, which allowed the appeal, set aside the judgment of acquittal and ordered a new trial. Zigman J. relied on the principles enunciated in *R. v. So*, 2014 ABCA 451, 9 Alta. L.R. (6th) 382, and concluded as follows:

[TRANSLATION] The Court agrees with the principles stated by the Alberta Court of Appeal at paragraph 47 of *So*, and it therefore concludes that in this case, the trial judge did not properly apply the law and made a fatal error of law in acquitting the [respondent]. [para. 10 (CanLII)]

[11] In *So*, the Alberta Court of Appeal had summarized the burden of proof that rests on an accused in such circumstances as follows:

To rebut the statutory presumptions an accused must establish to the reasonable doubt standard: (a) a deficiency in the functioning or operation of the instrument; and (b) that the deficiency directly related to the reliability of the breath test results. [para. 47]

(3) Quebec Court of Appeal, 2017 QCCA 1033

[12] The respondent subsequently sought leave to appeal to the Court of Appeal on a question of law, which was granted. A majority of the Court of Appeal set aside the Superior Court's judgment and restored the verdict of acquittal. All of the judges agreed that an accused must not only establish that the breathalyzer was operated improperly, but must also adduce evidence tending to show that its improper operation [TRANSLATION] "[could] influence the result" (paras. 38 and 69 (CanLII)). In short, the deficiency alleged must be serious enough to raise a reasonable doubt (*St-Onge Lamoureux*, at para. 59). In the instant case, the majority found that this determination essentially concerned a question of fact and that the Superior Court had erred in intervening absent an unreasonable assessment of the evidence by the trial judge. The dissenting judge would have upheld the Superior Court's decision on the ground that [TRANSLATION] "[t]he [Court of Québec] judge was not faced with evidence showing a deficiency [that could] affect the result" (para. 71).

II. Analysis

[13] The only real issue is how, in cases where there is evidence that an instrument was operated improperly (the respondent not having challenged the functioning of the instrument), the accused can show that this defect tends to cast doubt on the reliability of the results. The heart of the dispute comes down to the following: is evidence that is purely theoretical sufficient for this purpose?

[14] While it is not impossible that abstract evidence alone may sometimes meet the requirement of raising a reasonable doubt about the reliability of results, it is more likely that evidence that relates more concretely to the facts in issue will be required. This was the case here: without such evidence, the accused's argument was in the realm of speculation and could not satisfy the reasonable doubt test (*St-Onge Lamoureux*, at paras. 52-53).

[15] As a result, I do not agree with the respondent's argument that it was enough in this case to show that the procedural defect in issue could, in theory, compromise reliability. Relying on such evidence amounts to accepting a [TRANSLATION] "mere hypothetical possibility", which is clearly not sufficient to raise a reasonable doubt (*R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 30). Moreover, it is important to remember that the respondent was searched twice, that he was monitored by the police officers and that the two test results were consistent, which means that if there was a digestive issue that had a distorting effect, it must have occurred before each test and affected each result in the same way. In this context, the mere improper operation alleged by the respondent did not in itself tend to show that the reliability of the results was in doubt. The minimum evidence required for this purpose was simply not adduced.

[16] I do not rule out the possibility that improper operation may be so serious or so closely connected with reliability that it will be sufficient in itself to raise a reasonable doubt about the reliability of the results obtained. In short, it does not

matter whether the possible impact on reliability is inferred from the actual nature of the defect, from the extent of the defect or from other external circumstances. What is essential is that the possibility that the defect affected the reliability of the results is serious enough to raise a reasonable doubt. Bélanger J.A., dissenting in the Court of Appeal, noted the following on this point:

[TRANSLATION] Although expert evidence is not essential, concrete evidence must be tendered to show that the improper operation or malfunctioning of the instrument may be linked to the results (as opposed to the necessity to show that improper operation did in fact lead to unreliable results). In sum, the evidence should not be mere hypothesis or conjecture. [para. 75]

I agree entirely with her analysis. The Court of Québec judge did not point to any concrete evidence in this regard, and for good reason: beyond conjecture and speculation, the evidence showed nothing. Zigman J. of the Superior Court correctly found that there was no evidence tending to cast doubt on the reliability of the results, and the majority of the Court of Appeal erred in reversing his decision.

[17] An intervener, the Criminal Lawyers' Association, argues that it would be impossible for an accused to testify about his or her alcohol consumption or digestive problems without contravening s. 258(1)(d.01) *Cr. C.* The intervener is mistaken. It is well established that challenges to the presumptions in s. 258(1)(c) *Cr. C.* can be based only on issues relating to the proper functioning and proper operation of an instrument. However, an accused who testifies to establish that he or she had a digestive problem is not seeking thereby to show that the instrument was operated

improperly. Rather, the accused is providing concrete, rational evidence that the reliability of the results may have been affected, after first identifying a deficiency in the operation of the instrument. This distinction is crucial. Of course, the fact that such testimonial evidence is admissible does not make it compulsory.

[18] Moreover, I do not agree with the respondent, who maintains that he did not present a “burping defence” because that defence relates solely to s. 258(1)(d.1) *Cr. C.* The burping defence was an essential part of his arguments. He argued that the improper operation of the instrument cast doubt on the reliability of the results precisely because, in such a case, the police might not notice certain digestive issues that can have a distorting effect: the discussion during the hearing before the Court of Québec judge confirms that this question was central to the respondent’s submissions.

[19] Ultimately, in light of the material in the record, and particularly the consistency of the results, there was absolutely no evidence tending to show that the alleged defect cast doubt on the reliability of the results. That defect therefore could not form the basis for a reasonable doubt. In addition, acceptance of theoretical evidence based on speculation reflects a misinterpretation of the accused’s burden of proof, which is an error of law. The Superior Court did not err in setting aside the respondent’s acquittal and ordering a new trial.

CÔTÉ J. —

I. Overview

[20] It was held in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 27, that the evidentiary scheme applicable to offences involving driving with a blood alcohol level over the legal limit infringes the right to be presumed innocent guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*. One reason why this infringement is justified in part is because of the recognized reliability of breathalyzer test results. However, the reliability of the results is itself contingent on the proper functioning and proper operation of the instrument. Where an accused raises a reasonable doubt in this regard, there is no longer any basis for the presumptions of accuracy and identity created by s. 258(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”),¹ and those presumptions must be discarded.

[21] In the instant case, the trial judge found that the qualified technician’s testimony tended to show that the observation period required prior to the administration of the breathalyzer test had not been complied with and that this was sufficient to raise a reasonable doubt about the reliability of the results and thus to deprive the prosecution of the benefit of the statutory presumptions. In my view, the

¹ The *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21, which received royal assent on June 21, 2018, repeals s. 258(1)(c) *Cr. C.* and essentially replaces it with s. 320.31(1). The amendment will come into force on December 18, 2018.

trial judge made no error of law that would warrant appellate intervention. The issue is ultimately one of weighing of evidence, and the acquittal must therefore be upheld.

[22] To require, as the majority does in practice, evidence tending to show that the improper operation of the breathalyzer in fact led to inaccurate results — for example, in this case, by imposing an obligation on the accused to testify about his physiological reactions (such as burping) — would upset the delicate balance between the constitutional rights of accused persons and Parliament’s objectives. Coupled with the recent majority judgment in *R. v. Gubbins*, 2018 SCC 44, holding that breathalyzer maintenance records are not available under first party disclosure, such a requirement would render even more illusory the defences on which the constitutionality of the evidentiary scheme at issue in *St-Onge Lamoureux* depends.

[23] Therefore, I will briefly discuss this Court’s reasoning in *St-Onge Lamoureux*. Then, I will provide some clarification concerning the respective burdens of the defence and the Crown with regard to the functioning and operation of the breathalyzer. I will then consider the facts of this case in order to demonstrate that the original verdict of acquittal is, in my view, unimpeachable. Lastly, I will conclude by emphasizing that it would be unfair to order a new trial given the fact that the Crown is relying on arguments made for the first time on appeal.

II. Analytical Framework

A. *Compliance With the Relevant Procedures Underpins the Constitutionality of the Presumptions in Section 258(1)(c) Cr. C.*

[24] Essentially, this appeal requires the Court to consider the burden resting on an accused who seeks to counter the presumptions of accuracy and identity in s. 258(1)(c) *Cr. C.* as well as the type of evidence that the accused must adduce to discharge that burden.

[25] My position is based, as it was in the recent decision in *Gubbins*, on the majority reasons in *St-Onge Lamoureux*. In the instant case, the majority also acknowledges the relevance of *St-Onge Lamoureux*, but in my view, and with respect, it departs from that decision. The reason why the validity of the evidentiary scheme applicable to offences involving driving with a blood alcohol level over the legal limit was upheld in part in *St-Onge Lamoureux*, despite the infringement of the right to be presumed innocent (paras. 24 and 27-28), was notably because there was still a real possibility that the accused could counter the statutory presumptions by raising a reasonable doubt about the proper operation of the breathalyzer.

[26] Although the scientific evidence adduced in *St-Onge Lamoureux* demonstrated the reliability of breathalyzers, it also highlighted the importance of following the relevant procedures faithfully in order to obtain accurate results:

The expert evidence filed in the instant case reveals that the possibility of an instrument malfunctioning or being used improperly when breath samples are taken is not merely speculative, but is very real . . .

... Thus, human error can occur when samples are taken and at various steps in the maintenance of the instruments, which, it should be mentioned, are used Canada-wide. Hodgson's report, which the prosecution itself relied on as a source of the statutory amendments, refers to the importance of proper operation and maintenance:

... to achieve scientifically sound results in operational use, user agencies must ensure that approved instruments are operated by qualified personnel using procedures based on good laboratory practice. [p. 83] [Emphasis added; paras. 25-26.]

(see also paras. 26, 38, 41 and 72)

[27] In discussing the relevant procedures for ensuring the reliability of results, the Court gave the specific example of the period during which the accused must be observed prior to the test:

The Alcohol Test Committee ("Committee") of the Canadian Society of Forensic Science ("CSFS") has made a series of recommendations concerning the procedures to be followed by the professionals who operate the instruments The Committee states that before collecting a breath sample, the qualified technician must, among other things, observe the test subject for 15 minutes . . . [Emphasis added; para. 25.]

(see also *R. v. Drolet*, 2010 QCCQ 7719, [2010] R.J.Q. 2610, at paras. 92-94, cited at para. 35 of *St-Onge Lamoureux*)

[28] In determining whether the infringement was justified under s. 1 of the *Charter*, the Court expressly emphasized the fact that the constitutionality of the provisions at issue depended, among other things, on "whether it is possible, and how easy it is, for the accused to rebut the presumption" (paras. 30-31 (emphasis added)).

[29] In this regard, the Court found that only the first of the three requirements imposed on the accused by s. 258(1)(c) *Cr. C.* — that of adducing evidence tending to show that the instrument was malfunctioning or was operated improperly — constituted a reasonable limit on the right to be presumed innocent (para. 3). This burden was justified because it reflected the fact that “the results will be reliable only if the instruments are operated and maintained properly” (para. 41).

[30] The Court declined to specifically determine the nature and scope of the evidence required to show that the instrument was operated improperly (para. 42). However, Deschamps J. made a point of noting the relevance of the recommendations made by the Alcohol Test Committee of the Canadian Society of Forensic Science:

In its recommendations, the CSFS Committee also suggested mechanisms for ensuring that the instruments function properly and for assuring the quality of breath alcohol analyses. It can be inferred from these recommendations that the instruments may not function optimally if the suggested procedures are not followed. [Emphasis added; para. 43.]

[31] It was therefore in light of the fact that it was possible for the accused to show that the relevant procedures had not been followed — in which case the reliability of the results could not be assumed — that the Court ultimately concluded that the first requirement imposed by s. 258(1)(c) *Cr. C.* was justified under s. 1 of the *Charter*. In my view, that conclusion sheds light on the burden resting on an accused who seeks to counter the statutory presumptions.

B. *An Accused Who Seeks to Counter the Presumptions in Section 258(1)(c) Cr. C. Bears Only the Burden of Raising a Reasonable Doubt About Improper Operation of the Breathalyzer That Could Affect the Reliability of the Results*

[32] I am not suggesting that *St-Onge Lamoureux* elevated the various recommendations concerning the operation of breathalyzers — including that there be a period of observation of the accused — to the level of statutory conditions that the Crown must meet to benefit from the presumptions of accuracy and identity in s. 258(1)(c) *Cr. C.* The only applicable statutory conditions are those imposed by Parliament in s. 258(1)(c)(ii) to (iv).

[33] As noted by the majority of the Quebec Court of Appeal, an accused who seeks to counter the statutory presumptions bears only the burden of adducing evidence tending to show a malfunction or improper operation of the breathalyzer that could affect the reliability of the results; the accused is not required to show that the results are in fact inaccurate (2017 QCCA 1033, at paras. 38, 41, 56 and 60 (CanLII)). It is also clear that the evidence in question need only raise a reasonable doubt in this regard (*St-Onge Lamoureux*, at para. 16; *R. v. Gibson*, 2008 SCC 16, [2008] 1 S.C.R. 397, at para. 17).

[34] This formulation of the burden is consistent with *St-Onge Lamoureux*, which simply requires evidence of a “defect that could cast doubt on the reliability of the results” (para. 63; see also paras. 41 and 48), and with the principles enunciated in *R. v. So*, 2014 ABCA 451, 9 Alta. L.R. (6th) 382, at paras. 44 and 47.

[35] Like the Crown, the majority purports to accept that the burden on the accused is simply to raise a reasonable doubt about the *reliability* of the results by means of evidence tending to show that the breathalyzer was malfunctioning or was operated improperly (majority reasons, at para. 4). Yet by requiring “evidence that relates more concretely to the facts in issue” (para. 14) — what it refers to as the “practical element” — the majority is effectively imposing an obligation on the accused to cast doubt on the *accuracy* of the results on the facts of the case. With respect, I consider it contrary to this Court’s reasoning in *St-Onge Lamoureux* to impose such a burden, since it amounts to resurrecting, in attenuated form, the second requirement in s. 258(1)(c) *Cr. C.* It will be recalled that this Court held in *St-Onge Lamoureux* that this second requirement — that of demonstrating a connection between the deficiency and the results indicating a blood alcohol level exceeding the legal limit — constituted a serious infringement of the right to be presumed innocent that could not be justified (para. 59).

[36] It is no accident that *St-Onge Lamoureux* requires evidence that raises a reasonable doubt about the *reliability* rather than the *accuracy* of the results. These two terms, though related, do not have the same meaning. The former refers, in its technical sense, to the [TRANSLATION] “[a]bility of a system . . . to function without incident for a period of time” and, by extension, to the “[n]ature of something that can be relied on” (*Le Petit Robert* (new ed. 2012), at p. 1036, definition of “*fiabilité*” (reliability)). The latter refers to “[c]onformity to the truth” (p. 964, definition of “*exactitude*” (accuracy)). In *St-Onge Lamoureux*, the Court could have required the

accused to rebut the presumption of *accuracy* by adducing evidence that raised a reasonable doubt about the *accuracy* of the results. Instead, the Court asked the accused to raise a reasonable doubt about the *reliability* of the results. In my opinion, this distinction is significant.

[37] Simply put, where the evidence tends to show — on the reasonable doubt standard — that the malfunctioning or improper operation of the breathalyzer increased the *possibility* of an inaccurate result, then *reliability* is affected and the accused has met his or her burden. The accused does not have to tender additional evidence in order to directly raise a reasonable doubt about the *accuracy* of the results on the facts of the case. In practice, it will be sufficient to adduce evidence tending to show that a recommended procedure was not faithfully followed and that the purpose of the procedure is to ensure the reliability of the results. In my view, this is a “defect that could cast doubt on the reliability of the results” within the meaning of *St-Onge Lamoureux* (emphasis added). The accused’s burden ends there, because the application of the presumptions in s. 258(1)(c) *Cr. C.* is justified only insofar as the relevant procedures are complied with (see *St-Onge Lamoureux*, at paras. 27, 38, 41, 43 and 63).

[38] The burden then shifts to the Crown to prove beyond a reasonable doubt that the deficiency in question had no impact on the *accuracy* of the results on the facts of the case. In *St-Onge Lamoureux*, Deschamps J. noted that there is nothing excessive about this reverse onus: “[B]eing the party that has to prove that there is no

connection after the accused has adduced evidence to show that the instrument malfunctioned or was operated improperly does not impose a significant additional burden on the prosecution” (para. 57 (emphasis added)). However, if the Crown fails to discharge this burden, it completely loses the benefit of the statutory presumptions in s. 258(1)(c) *Cr. C.* As Mr. Cyr-Langlois aptly observes in his factum, [TRANSLATION] “[t]he Crown should not be able to rely on the rigour of the technicians to persuade this Court that the results are reliable and then trivialize the importance of that rigour when the reliability of the results is challenged” (para. 192).

C. *A Qualified Technician’s Testimony May Be Sufficient to Counter the Presumptions in Section 258(1)(c) Cr. C.*

[39] There is nothing to prevent the accused from relying solely on the qualified technician’s testimony to raise a reasonable doubt about the reliability of the results. As the Court stated in *R. v. Crosthwait*, [1980] 1 S.C.R. 1089, at p. 1100, evidence to counter the statutory presumptions may be “sought in depositions given by witnesses of the Crown as well as in depositions of defence witnesses”.

[40] Under the *Criminal Code*, the qualified technician is responsible for the proper operation of the breathalyzer (see, for example, ss. 254(3)(a)(i) and 258(1)(c)(iv)). Where the technician testifies about a recommended procedure, states that its purpose is to ensure the reliability of the results and, finally, admits that he or she did not follow the procedure faithfully or does not know whether it was followed faithfully, the accused is not obliged to tender additional evidence — such as a copy

of the training manual in issue — to corroborate the technician’s testimony. That testimony is in itself evidence that can raise a reasonable doubt about the reliability of the results. To take the opposite position would be to disregard the unique role conferred by Parliament on qualified technicians in the context of blood alcohol analysis.

[41] It is for the trier of fact to assess the evidence adduced in order to determine whether it is sufficient to counter the statutory presumptions. Of course, the trier of fact may well find that, in the circumstances, the qualified technician’s testimony does not in itself raise a reasonable doubt, for example because the problems identified are “frivolous or trivial” (*St-Onge Lamoureux*, at paras. 52 and 59).

III. Application to the Facts

A. *The Trial Judge Made No Error of Law*

[42] The trial judge correctly stated the law. He properly noted that the accused must adduce evidence tending to show that the breathalyzer was malfunctioning or was operated improperly and that the deficiency in question must raise a reasonable doubt about the [TRANSLATION] “reliability of the test taken” (A.R., vol. 1, at pp. 3 and 6). His findings of fact on this point are supported by the evidence adduced by the parties. In my opinion, the verdict of acquittal is therefore unimpeachable.

[43] The Crown has not identified any error of law that would warrant this Court's intervention. Contrary to what it argues, it was deprived of the benefit of the presumptions in s. 258(1)(c) *Cr. C.* not because of a [TRANSLATION] "mere speculative possibility", but rather because of concrete and specific evidence showing that a relevant procedure — observation of the accused for a period of time — had not been followed and that this deficiency could affect the reliability of the results.

[44] In this regard, I cannot agree with the majority that the trial judge misinterpreted the reasonable doubt standard and that his findings were based on "speculation" (majority reasons, at paras. 14, 15 and 19). This loses sight of the fact that the accused was not required to raise a reasonable doubt as to whether his blood alcohol level exceeded the legal limit, or even about the accuracy of the results on the facts of the case. The reasonable doubt simply had to relate to improper operation of the breathalyzer that could affect the reliability of the results. On this point, the evidence adduced in the instant case was not "theoretical".

[45] Moreover, the majority concedes that, in certain circumstances, evidence of improper operation may in itself raise a reasonable doubt about the reliability of the results (para. 16). In my view, this is a matter for the trier of fact to decide, since it involves assessing the sufficiency of the evidence (see *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221, at p. 231; *Lampard v. The Queen*, [1969] S.C.R. 373, at pp. 380-81; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 608).

B. *The Evidence Adduced at the Hearing Was Sufficient to Counter the Presumptions in Section 258(1)(c) Cr. C.*

[46] In the present case, Mr. Cyr-Langlois adduced relevant evidence concerning the improper operation of the breathalyzer and the trial judge found that that evidence was sufficient to raise a reasonable doubt about the reliability of the results. This Court should therefore not intervene.

[47] First, Constable Boissonneault, the qualified technician, himself stated that the procedures prescribed by the École nationale de police du Québec include a 20-minute observation period. He said that this period is meant to ensure that the accused has not consumed alcohol, vomited, regurgitated or burped before the breath samples are taken, since any of these may leave residual alcohol in the accused's mouth, which could distort the results. This testimony was more than sufficient to show that a procedure exists for ensuring the reliability of the test results. There was no need to file the training manual of the École nationale de police du Québec, to which the witness referred, or to have an expert testify to corroborate what the witness had said.

[48] Constable Boissonneault's cross-examination also tends to show that Mr. Cyr-Langlois was not observed during the prescribed period to ensure that no physiological reaction affected the reliability of the results. The qualified technician stated that he had not observed the accused himself because he had been busy preparing the breathalyzer. Another police officer, Constable Cousineau, did so

instead. However, Constable Boissonneault could not confirm that his colleague had observed the accused continuously during the 20-minute period preceding the breathalyzer test. In addition, there was a certain amount of time when Constable Cousineau was unable to determine whether Mr. Cyr-Langlois burped, since Mr. Cyr-Langlois was alone in a soundproof room exercising his right to counsel. Constable Boissonneault does not appear to have been concerned about this, even though he acknowledged that, as the qualified technician, he was responsible for ensuring that no physiological reactions occurred before he took the breath samples. As a result, the trial judge could certainly find that the qualified technician's testimony was sufficient to raise a reasonable doubt about compliance with the prescribed observation period.

[49] Ultimately, it was open to the trial judge to find that Mr. Cyr-Langlois had adduced evidence tending to show improper operation of the breathalyzer that could affect the reliability of the results, and not "simply [to] show that a deficiency is possible". In my opinion, this is neither "conjecture" nor "speculation" (majority reasons, at para. 16), since, according to the evidence adduced, the qualified technician administered the tests without faithfully following the prescribed procedure and without ensuring, as he was required to do, that the accused did not have any physiological reaction that could distort the results. The trial judge could therefore have a reasonable doubt about their reliability.

[50] At that point, the accused had discharged his burden under s. 258(1)(c) *Cr. C.* and did not have to adduce any other evidence. As Hogue J.A. of the Quebec Court of Appeal aptly wrote:

[TRANSLATION] In the absence of additional evidence allowing him to conclude that the possibility of the invalid result to which Officer Boissonneault referred could be ruled out, the first instance judge was entitled not to extend the benefit of the presumptions to the prosecution. He did not have to require anything further from the accused. [para. 50]

[51] In fact, it would be contrary to the right to remain silent and the right to be presumed innocent to require an accused to testify about his or her alcohol consumption and physiological reactions when the accused has *already* adduced evidence tending to show improper operation of the breathalyzer that could affect the reliability of the results. With respect, the majority's approach shifts the obligation to the accused to observe himself or herself, make note of every physiological reaction and then testify about this, failing which the improper operation of the breathalyzer will be presumed to be of no consequence. I highly doubt that this could be a justified infringement of the accused's rights. It is the state's responsibility, not that of the accused, to ensure compliance with the requisite conditions for obtaining accurate results.

[52] The majority suggests that the relative consistency of the two test results — among other evidence — tends to show that failure to comply with the observation period had no impact in this case, and thus tends to confirm the reliability of the results (majority reasons, at para. 15). Even on the assumption that this is true, the

onus was on the Crown to prove it, for example by having the qualified technician or an expert testify on this point. The Crown did not do so, however, and it must accept the consequences. The application of the presumptions of accuracy and identity in s. 258(1)(c) *Cr. C.* was no longer justified, and the presumptions therefore had to be discarded. In the absence of any other evidence showing that Mr. Cyr-Langlois was guilty, the trial judge had no choice but to acquit him.

C. *The Court Should Not Order a New Trial Based on Arguments Made for the First Time on Appeal*

[53] In closing, I would add that, even if I agreed with the Crown's position that the accused had to introduce the qualified technician's training manual in evidence and to testify about his alcohol consumption and physiological reactions, I would hesitate to order a new trial in this case. As pointed out by an intervener, the Association québécoise des avocats et avocates de la défense, the position taken by the prosecution on appeal is clearly different from the one it took at trial.

[54] The Crown prosecutor never argued before the trial judge that the qualified technician's testimony could not be sufficient *in law* to counter the presumptions in s. 258(1)(c) *Cr. C.* He did not submit that it was necessary to introduce evidence of the recommended procedures by filing the relevant training or instruction manuals (in fact, he seemed to object to the filing of those manuals). Most importantly, he did not argue that the accused had to testify about his alcohol consumption and physiological reactions (such as burping) because otherwise there

could be no reasonable doubt about the reliability of the results. Rather, the prosecutor's position was that Constables Boissonneault and Cousineau had observed the accused for a period of time that was sufficient in the circumstances.

[55] To order a new trial would therefore be to give the Crown a second chance to have Mr. Cyr-Langlois convicted, on the basis of arguments that were made for the first time on appeal. In my view, such a result would be contrary to the double jeopardy principle (see, for example, *R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.), at p. 494; *R. v. Knight*, 2015 ABCA 24, at para. 22 (CanLII); *R. v. Suarez-Noa*, 2017 ONCA 627, 139 O.R. (3d) 508, at paras. 30-35; *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 895-96; *R. v. Vaillancourt* (1995), 105 C.C.C. (3d) 552 (Que. C.A.); *R. v. Patel*, 2017 ONCA 702, 356 C.C.C. (3d) 187, at paras. 34 and 58-61; *Wexler v. The King*, [1939] S.C.R. 350, at pp. 353-56).

IV. Conclusion

[56] In summary, the trial judge made no reviewable error in finding that Mr. Cyr-Langlois had raised a reasonable doubt about improper operation of the breathalyzer that could affect the results and that the presumptions of accuracy and identity in s. 258(1)(c) *Cr. C.* had therefore been countered. I agree with Hogue J.A. that the trial judge [TRANSLATION] “did not have to require anything further from the accused” (para. 50; see also the reasons of Chamberland J.A., at paras. 60-61).

[57] In my view, the majority's approach unduly limits the defences based on improper operation of a breathalyzer that in fact make it possible to justify the evidentiary scheme applicable to offences involving driving with a blood alcohol level over the legal limit under s. 1 of the *Charter*.

[58] Finally, the majority's reasons are essentially based on arguments that the Crown made for the first time on appeal. It would be all the more inappropriate, in the circumstances, to order a new trial.

[59] For all these reasons, I would dismiss the appeal.

Appeal allowed, CÔTÉ J. dissenting.

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