

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

-and-

MARC CYR-LANGLOIS

RESPONDENT

-and-

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PART I – OVERVIEW

1. The presumptions of accuracy and identity that underlie the compulsory breath testing regime in Canada are based on a number of assumptions: the approved instruments used to calculate blood-alcohol levels are in good working order and are being used properly by qualified technicians. When the court has reasonable doubt as to any one of these assumptions, the court can no longer have confidence in the reliability of the blood-alcohol results and the presumptions of accuracy and identity cannot apply.

2. This case requires this Court to once again interpret the fine balance set out in s. 258 of the *Criminal Code* that gives effect to the state's desire for efficiency in proving drinking and driving cases without unconstitutionally undermining the presumption of innocence. The CLA submits that this Court should not move backwards and re-impose the unconstitutional components of s. 258(1)(c) struck down in *R. v. St-Onge Lamoureux*. Requiring the defence to show that the improper operation or instrument malfunction actually had an impact on the blood-alcohol test results is inconsistent with the presumption of innocence and would create an impossible standard for the defence to meet.

3. Nor should this Court set mandatory categories of evidence that a defendant is required to lead in every case in order to raise a reasonable doubt. The cases in which the defence seeks to raise a doubt that the instrument was malfunctioning or improperly operated necessarily require different forms of evidence. What raises a doubt in one case may not raise a doubt in another. Parliament specifically chose not to impose mandatory evidentiary requirements on the defence and this choice must be respected.

4. The CLA submits that once a reasonable doubt exists as to either the improper operation or malfunctioning of an instrument the Crown must establish that the improper operation or instrument malfunction had no impact on the reliability of the result, and that the presumptions of accuracy and identity can still apply.

5. The CLA takes no position on the facts.

PART II – CLA POSITION ON QUESTIONS ON APPEAL

6. The CLA submits:

- (1) Once the Crown has met the statutory requirements in s. 258(1)(c) of the *Criminal Code*, the burden shifts to the defendant to raise a reasonable doubt that the instrument was malfunctioning or was operated improperly in such a

way that it could impact the results. It is always open to the Crown to establish that the instrument malfunction or improper operation did not in fact impact the results. This in no way creates any additional burden of proof on the Crown, but rather respects the statutory scheme and the assumptions underlying the presumptions of accuracy and identity.

- (2) The defendant does not have to raise a doubt about the effect of the improper operation or malfunctioning instrument on the reliability of the particular results in his or her case. Rather, a reasonable doubt will exist when the improper operation or instrument malfunction *could* affect the reliability of the test results because the problem with the instrument or its use was related to the instrument's ability to produce accurate results.
- (3) There is no particular form or categories of evidence required for the defendant to raise a reasonable doubt. Each case will turn on its own facts.

PART III – STATEMENT OF ARGUMENT

A. The compulsory breath testing regime relies on the proper use of instruments

7. The presumptions of accuracy and identity are a central component of the compulsory breath testing regime. The presumption of accuracy says that a technician's certificate of analysis is an accurate picture of a person's blood alcohol level at the time the sample was taken. The presumptions of identity say that the results of a blood alcohol test are presumed to show a person's blood alcohol level at the time of the alleged offence.¹

8. The presumptions of accuracy and identity help the state economically prove drinking and driving offences; without them, the state would be forced to call multiple witnesses in every case to establish that a person's blood alcohol level at the police station was accurate and that the results meant their blood alcohol level exceeded the legal limit at the time of the offence.

9. But the state's desire for an efficient mechanism for the prosecution of drinking and driving offences cannot undermine the presumption of innocence. Parliament recognized this and limited the state's ability to efficiently prove these offences in two key ways. First, the prosecution has to establish the statutory requirements set out in s. 258(1)(c) (i.e. that the samples were taken as soon as practicable, that the samples were not later than two hours after the time of the alleged offence, that an approved instrument was used by a qualified technician,

¹ *R. v. St-Onge Lamoureux*, 2012 SCC 57, at para. 6.

and that any analysis was done by an approved instrument used by a qualified technician). If the Crown does not prove the requirements in s. 258(1)(c), then it cannot rely upon the presumptions to prove its case.

10. Second, the defence can challenge the presumptions when the instruments are not used properly. The presumptions of accuracy and identity assume that the instruments are functioning properly and were used properly. As stated by this Court in *St-Onge Lamoureux*, “the expert evidence accepted by the courts over the past few years has established that breathalyzer tests are very reliable, provided that the instruments are operated and maintained properly (emphasis added).”²

11. The statutory scheme presupposes the proper operation and maintenance of the instruments. But when a reasonable doubt exists that the particular instrument was malfunctioning or was used improperly, the assumptions underlying the presumptions must fall away.

12. These safeguards are essential to ensuring that the need for efficiency does not undermine the presumption of innocence. The defence’s ability to challenge the presumptions when there is a legitimate concern that an instrument is malfunctioning or has been used improperly must not be unduly restricted.

B. Defendants do not have to raise a reasonable doubt that the improper operation of a breathalyzer would necessarily have led to a different result

13. If a reasonable doubt exists as to malfunctioning or improper operation of the instrument the presumption of identity or accuracy is rebutted. This by no means results in an acquittal but merely results in the Crown having to prove the defendant’s blood-alcohol level absent the presumption. Because the proper functioning of the instrument is only relevant insofar as it relates to the results of the test, the malfunctioning or improper operation of the instrument must be linked to the reliability of the results themselves. In other words, the defence must show that the instrument malfunctioned or was operated improperly in a way that *could* cast a realistic and reasonable doubt on the reliability of the test results.

14. This is not an insignificant hurdle. As stated by this Court in *St-Onge Lamoureux*, arguments that are “frivolous or trivial ... will not cast doubt on the proper functioning or operation of the instrument, and the defence must fail.”³ Not every problem with the instrument

² *St-Onge Lamoureux*, at para. 72.

³ *St-Onge Lamoureux*, at para. 52.

or its operation will leave the court with a reasonable doubt.⁴ If the improper operation of an instrument could not affect the reliability of the result the presumption will still apply. In other words, the improper operation or malfunction of the instrument in the abstract is not sufficient. However, the defendant is never required to prove that the breathalyzer results *would* have been different in her case.

15. Casting a doubt on the proper use of the instruments in a way that implicates the reliability of the results undermines the assumptions that justify the presumptions of accuracy and identity. Requiring the defence to show that the improper use of the instrument *would* affect the result would be an unjustifiable infringement on the presumption of innocence and undermine the balance struck by this Court in *St-Onge Lamoureux*.

a. *The defendant is not required to raise a doubt that an improper use of the instrument changed the result*

16. The Appellant asks for a restrictive interpretation of s. 258(1)(c) that would bar the defence from raising a doubt about the operation of an instrument unless the defendant can show a direct link between the misuse and the reliability of the results. For the Appellant, a link between the misuse of the instrument and *possibility* that the misuse could impact the results is insufficient. Instead, the defendant would have to raise a doubt that the misuse impacted the particular blood-alcohol level results in his or her case.⁵

17. Adopting the Appellant's approach would re-introduce elements of s. 258(1)(c) that were struck down in *St-Onge Lamoureux*.⁶ In that case, the Court struck down part of s. 258(1)(c) as an impermissible infringement of a defendant's presumption of innocence. The Court held that the defendant was not required to raise a doubt that (1) a malfunctioning or improperly operated instrument resulted in the test being over the legal limit or that (2) the concentration of the alcohol in the defendant's blood would have been less than the legal limit.⁷

18. The Appellant contends that requiring proof that the malfunction or improper operation of an instrument affected the reliability of the result in any specific case is distinct from re-

⁴ See e.g. *R. v. Sergalis*, 2013 ONCJ 513, aff'd 2014 ONCA 624, where the trial judge found that using an external printer rather than an internal printer on the instrument could have no impact on the reliability of the results.

⁵ Appellant's Factum, at paras. 43-44.

⁶ *Criminal Code*, R.S.C. 1985 c. C-46, s. 258(1)(c).

⁷ *St-Onge Lamoureux*, at paras. 59, 63.

imposing the unconstitutional statutory requirements considered in *St-Onge Lamoureux* and requiring the defendant to show that the breathalyzer result would have been different.

19. This is a distinction without a difference. Requiring the defendant to prove that the result in a specific case is unreliable is functionally the same as requiring the defendant to prove that the result would have been different. The reliability of a breath result is directly linked to whether it is accurate or not. If the defendant is required to raise a reasonable doubt as the accuracy of the actual breathalyzer result in any given case, the defendant is being asked to prove that the result would necessarily have been different. This requirement would put the onus of proof on the defendant to essentially establish her own innocence.⁸

20. This Court has already concluded that defendant does not have to raise a doubt as to the reliability of the test results in his or her case. The defendant is only required to cast doubt on the assumption that the instrument is reliable because it was used properly:

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 [Emphasis added].⁹

In other words, if there is a doubt that the test result is reliable because it was operated and maintained properly, the Crown will lose the benefit of the presumptions. Nothing more is required.

21. The evidentiary limits imposed by Parliament, in s. 258(1)(d.01), support the argument that the defendant is not required to prove that the reliability of the test results were impacted by the improper operation or malfunctioning of the instrument. Section 258(1)(d.01) places significant limits on a defendant's ability to lead evidence that could raise a doubt as to the reliability of the test results. This is especially apparent in the so-called "burping" cases.

22. According to the Appellant, in burping or regurgitation cases the defendant will have to lead evidence relating to when he or she last used alcohol and that a physiological reaction could have impacted the results of the test.¹⁰ This proposed requirement puts the defendant in an impossible position. To demonstrate that the reliability of the result was impacted in any

⁸ This interpretation of a defendant's burden in rebutting the presumptions was rejected by this Court in *R. v. St-Pierre*, [1995] 1 S.C.R. 791, at paras. 56-57.

⁹ *St-Onge Lamoureux*, at para. 41.

¹⁰ Appellants Factum, at paras. 41-42.

given case, the defendant would have to prove that the amount of alcohol she consumed and rate of alcohol absorption meant that the alcohol was still in her digestive in the 15 to 20 minutes leading up to the taking of a breath sample. This evidentiary requirement would be contrary to s. 258(1)(d.01) of the *Criminal Code*, which specifically prohibits the defendant from relying on such evidence to demonstrate that an instrument was malfunctioning or improperly operated.

23. Without being able to rely on evidence of alcohol consumption or its absorption, a defendant would be unable to raise a reasonable doubt under the Appellant's approach. This significantly undermines the presumption of innocence. As stated in *St-Onge Lamoureux*:

Although the requirement that the accused raise a doubt that his or her blood alcohol level in fact exceeded .08 could be justified when there were no limits on the evidence the defence could tender to cast doubt on the test results, it constitutes an excessive burden in the context of a statutory scheme under which the evidence must relate directly to the functioning or operation of the instrument.¹¹

24. The same concern can be said for the Appellant's proposed burden; that the defendant raises a doubt that the improper operation of the instrument in fact impacted the reliability of the test results *in his or her case*.

25. The comments from this Court in *R. v. Crosthwait* about the defendant's ability to rebut the presumption of accuracy will be of limited assistance in deciding this appeal.¹² *Crosthwait* was decided under a wholly different statutory scheme and never considered the provisions from a constitutional perspective. As the Court said in *St-Onge Lamoureux*, "[t]he context of the new provisions is completely different."¹³ Parliament has now expressly limited the type of evidence that a defendant is entitled to rely on to raise a doubt that the instrument was malfunctioning or operated improperly. The standard that the defendant is required to meet under s. 258(1)(c) has to be interpreted in light of these evidentiary limits. While the facts of *Crosthwait* may provide an example of circumstances that do not raise a reasonable doubt (because there was no evidence in that case that a difference in temperature between the solution and the air could impact the results of the test), the case is no longer helpful in articulating the legal standard that the defence has to meet.¹⁴

b. The appropriate standard was articulated by the courts of appeal in this case and So

¹¹ *St-Onge Lamoureux*, at para. 56.

¹² *R. v. Crosthwait*, [1980] 1 S.C.R. 1089.

¹³ *St-Onge Lamoureux*, at para. 54

¹⁴ *St-Onge Lamoureux*, at para. 52.

26. The majority of the Quebec Court of Appeal properly articulated the standard in this case:

[Translation] I conclude that an accused who seeks to rebut the presumptions of accuracy and identity with respect to blood alcohol content must advance evidence tending to show the malfunctioning or improper operation of the instrument likely to influence the result (*serious enough to raise a reasonable doubt* are the words of Deschamps J. at paragraph 59 [in *St-Onge Lamoureux*]) without being required to show that the deficiency in fact led to an inaccurate result.

...

Remember, however, that for the purpose of rebutting the presumptions, the accused will never have to prove that the malfunctioning or improper operation of an instrument led to an erroneous result.¹⁵

27. This is consistent with the Alberta Court of Appeal’s decision in *R. v. So*. In that case, the evidence did not suggest that there was non-compliance with the required procedures for operating the instrument, nor did it suggest that such non-compliance could impact the reliability of the test.¹⁶ The Alberta Court of Appeal expressly noted that the defendant *does not* have to raise a reasonable doubt “as to the effect of any ... improper operation.” The defendant “must raise a reasonable doubt about proper operation, not as to its effects.”¹⁷

28. There is an important distinction between the requirement re-iterated by the courts of appeal in this case and in *So* (that the improper operation of the instrument be linked to the reliability of the test) and the requirement rejected as unconstitutional in *St-Onge Lamoureux* (that the defendant show the improper operation “resulted in” an inaccurate result). Linking the improper operation to the reliability of the result requires the defendant to show that the improper operation *could* influence the accuracy of the results. This possibility undermines the court’s ability to have confidence in the presumptions of accuracy and identity that rely on the proper maintenance and operation of the instruments. Requiring the defendant to show that the defect *would* or did lead to an inaccurate result in his or her case is, on the other hand, a much higher standard that undermines the presumption of innocence in such a way that cannot be constitutionally justified.

c. *Once there is a reasonable doubt, it is open to the Crown to demonstrate that the result is nevertheless reliable*

29. A reasonable doubt will exist under s. 258(1)(c) of the *Criminal Code* if the instrument malfunctioned or was operated improperly. That does not end the court’s inquiry, however. The

¹⁵ *Cyr-Langlois v. R.*, 2017 QCCA 1033 at paras. 38, 45.

¹⁶ *R. v. So*, 2014 ABCA 451, at para. 40.

¹⁷ *So*, at para. 44.

Crown can still rely on the statutory presumptions if it establishes that the problem with the instrument had, in fact, no impact on the reliability of the result.

30. The Crown's burden to establish that the results are reliable in spite of the improper operation of an instrument or malfunctioning instrument is consistent with this Court's decision in *St-Onge Lamoureux*. Deschamps J. noted that once the defendant has raised a reasonable doubt as to the operation of the presumption of accuracy, the burden will shift to the Crown:

... An accused who produces evidence to rebut one of these presumptions will do so by calling an expert, and the prosecution will have to call a technician, and possibly an expert. As a result, being 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. [Emphasis added.]¹⁸

31. This approach also recognizes the two ways in which s. 258(1)(c), as interpreted in *St-Onge Lamoureux*, limits the state's ability to efficiently prove drinking and driving offences in order to protect the presumption of innocence. The Crown must first establish the prerequisites in s. 258(1)(c) before the presumptions apply. Once it does so, these presumptions will stand unless the assumptions underlying the presumptions are undermined through evidence: that the instruments were not malfunctioning or operated improperly. If this assumption is undermined, then it is up to the Crown to show that the court can nevertheless rely upon the results because, on the facts of this particular case, the test results were accurate and reliable.

32. Even if the Crown is unable to show that the test results were reliable despite the improper operation or malfunction demonstrated by the defence the state retains the ability to prosecute drinking and driving offences. As noted by Deschamps J.:

[W]here the accused raises a reasonable doubt that the instrument functioned or was operated properly, this simply means that the prosecution *loses the benefit of the presumptions* under s. 258(1)(c). The prosecution can still tender additional evidence to prove that, despite the proven deficiency, the blood alcohol level of the accused exceeded .08 as shown by the test results [Emphasis in original].¹⁹

C. The defence is not obligated to introduce specific forms of evidence to raise a reasonable doubt

33. The defendant is not required to introduce a particular form or type of evidence in order to raise a doubt as to whether the instrument was malfunctioned or was operated improperly, or indeed, any evidence at all. There is no standard form of evidence that a judge is required to

¹⁸ *St-Onge Lamoureux*, at para. 57.

¹⁹ *St-Onge Lamoureux*, at para. 58.

have before the court to have a reasonable doubt that the instrumentation was functioning properly or operated properly.

34. This is consistent with the role the defence's ability to raise a reasonable doubt about the operation of the instrument plays within the broader statutory scheme. The presumptions of accuracy and identity assume that the instruments are in good working order. Casting doubt on this assumption will require different evidence depending on the type of instrument used, its history, and the specific manner in which it was operated.

35. Evidence identified by a defendant that raises a reasonable doubt that an instrument was functioning and operated properly can include the user-manual for the particular breathalyzer instrument²⁰, expert evidence²¹, testimony of the breathalyzer technician²², maintenance logs for the breathalyzer instrument, or evidence showing the particular health problems of a defendant.²³ Each case demands something different.

36. Some of these types of evidence relate to the personal circumstances of the defendant, like the fact that the defendant had residual alcohol in his or her mouth²⁴ or had a medical condition that could impact the reliability of the blood-alcohol results if precautions were not taken to ensure the instrument was operated properly. Other types of evidence will relate to the maintenance of the instrument.²⁵ Evidence could also be led about a qualified technician's failure to follow proper testing procedure and whether that could impact the reliability of the results.

37. The only restrictions in the *Criminal Code* which limit how a court may find a reasonable doubt are set out in s. 258(1)(d.01). Absent any other legislated limitation, courts must be especially cautious about creating judicially imposed constraints on the nature and

²⁰ See e.g. *R. v. So*, 2014 ABCA 451.

²¹ See e.g. *R. v. Petrin*, 2013 NWTCA 1.

²² See e.g. *R. v. McGee*, 2015 ONCJ 698.

²³ *St-Onge Lamoureux*, at para. 78. See e.g. *R. v. Peters*, 2013 ONCJ 680; *R. v. Coffey*, 2013 ONCJ 178.

²⁴ Courts have taken judicial notice of the fact that residual mouth alcohol can produce an unreliable test result in the context of approved screening demands. The effect of mouth alcohol on the reliability of breath results is a well-known phenomenon and readily capable of judicial notice: *R. v. Notaro*, 2018 ONCA 449, at para. 41. See also *R. v. Au-Yeung*, 2010 ONSC 2292, at para. 29; *R. v. Mastromartino* (2004), 70 OR (3d) 540 (Ont. Sup. Ct.).

²⁵ The defendant still has to show that the maintenance could impact the reliability of the results: see e.g. *R. v. Rickett*, 2015 ONSC 1890; *R. v. Lam*, 2015 ONSC 2194.

quality of evidence which may ultimately lead to a reasonable doubt on this issue. While this section was added to eliminate the *Carter* defence, it has a broader application than only the typical *Carter* defence case. The defendant is precluded from relying on any of the following evidence in order to raise a doubt about the proper operation of the instrument and its possible impact on the reliability of the test result: the amount of alcohol consumption, the rate at which that alcohol would have been absorbed and eliminated, or a calculation at what the defendant's blood alcohol level would have been at the time of the offence.

38. Although they would be constitutionally vulnerable, Parliament could have placed more evidentiary restrictions on defendants. Or, it could have required the defendant to prove certain factual circumstances to displace the presumptions of accuracy and identity, just as the Crown is required to prove certain things to rely on those presumptions. But Parliament did not choose to do so.

39. Ultimately, whether the court has a reasonable doubt is a question of fact for the trial judge. The failure of the defendant to produce a particular type of evidence does not necessarily bar his or her claim that the presumptions of accuracy and identity have been rebutted.

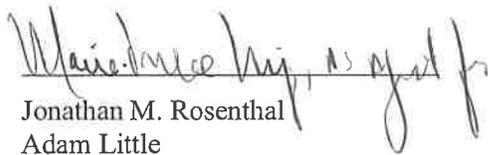
PART IV – SUBMISSIONS ON COSTS

40. The CLA does not seek costs and asks that none be awarded against it.

PART V – NATURE OF THE ORDER REQUESTED

41. The CLA makes no submissions on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of August, 2018.


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PART VI – TABLE OF AUTHORITIES

CASES	PARAGRAPH(S)
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STATUTORY PROVISIONS

Criminal Code, RSC 1985, [c C-46, ss. 258\(1\)\(c\), 258\(1\)\(d.01\)](#)

Code criminel, LRC 1985, [c C-46 ss. 258\(1\)\(c\), 258\(1\)\(d.01\)](#)