Court File No. 37760

THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

MARC CYR-LANGLOIS

Respondent

-and-

ATTORNEY GENERAL FOR ONTARIO, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE and CRIMINAL LAWYERS' ASSOCIATION

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Court File No.: 37760

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

MARC CYR-LANGLOIS

Respondent

-and-

ATTORNEY GENERAL FOR ONTARIO, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE and CRIMINAL LAWYERS' ASSOCIATION

Intervener

FACTUM OF THE INTERVENER
ATTORNEY GENERAL FOR ONTARIO
PURSUANT TO RULE 59 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: STATEMENT OF FACTS

1. This appeal from the Court of Appeal for Quebec concerns the proper scope of evidence "tending to show" that the approved instrument malfunctioned or was operated improperly in order to rebut the presumptions of accuracy and identity in s. 258(1)(c), a provision enacted for the fair and efficient prosecution of offences involving breath testing.[1] On a more fundamental level, the issue is whether the failure to follow one's training or an instruction manual or a recommendation to the letter is, by itself, evidence of "improper operation" sufficient to negate Parliament's well-informed, carefully crafted, and scientifically based presumptions in s. 258(1)(c).

2. Courts have steadfastly resisted past attempts at reading into this section technical requirements which do not flow from the language used by Parliament.[2] Ontario submits that the effect of the judgement at trial and of the majority at the Court of Appeal in this case does precisely that. In the case of the so-called "observation period" at issue here, Ontario submits that the failure to follow this recommendation can have no effect on the reliability of the readings when other requirements involved in the taking of breath samples are met. The "observation period" is a "best practice" – the obvious purpose of which is to maximize the likelihood of obtaining two samples "in good agreement" on the first two tests and to minimize the necessity of taking a third breath sample.

3. Ontario takes no position with respect to the facts of the instant case.

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 258; *R. v. Alex*, 2017 SCC 37 at paras 2-4, 12, 35-38, 44-45.
[2] *R. v. Lightfoot*, [1981] 1 S.C.R. 566 at 574-575; *R. v. Alex*, 2017 SCC 37 at paras 27, 35.

PART II: ISSUES

4. The intervener, the Attorney General for Ontario, substantially agrees with the arguments advanced on behalf of the appellant, but offers clarifications and supplementary arguments to those advanced. Specifically, Ontario agrees that "evidence tending to show" must be evidence that is capable of raising a "real doubt" about the accuracy of the breath test results. Any deviation from an instruction manual, a training aid, or a recommendation must be assessed by evaluating its impact based on the evidence in a particular case. Ontario further agrees that in order to assess whether an alleged omission can amount to "evidence tending to show," there must be something – either in the evidence tendered by the Crown or the defence – to put the reliability of the test results *in play* in the *particular case*. Put another way, there must be *some evidence* that the alleged deviation could have *actually mattered*. In the circumstances at issue here, this would include *some evidence* of recent alcohol consumption or some physiological reaction to raise the *real possibility* of the presence of mouth alcohol. There is nothing unfair in requiring the accused to come forward with some evidence that raises a reasonable doubt by pointing to evidence of unusual circumstances particularly within his or her knowledge.[3]

5. Where the issue of mouth alcohol is truly in play, Ontario submits that all the evidence must be considered, including precisely what the *actual* instruction, direction, or recommendation at issue says, its apparent purpose, and whether following other instructions, directions, recommendations – or whether other safeguards inherent in the breath testing process itself – will compensate for the particular alleged deviation.

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[3] *R. v. Paszczenko; R. v. Lima*, 2010 ONCA 615 at paras. 28-34; *R. v. St-Onge Lamoureux*, 2012 SCC 57 at paras. 93-96 (per Deschamps, J.), 174 (per Cromwell J., dissenting, though not on this point).

6. Specifically, Ontario submits that the mere failure to completely observe a test subject for some 15 to 20 minutes prior to administering the first breath test, standing alone, is incapable of constituting "evidence tending to show", particularly in the face of two breath samples taken at least 15 minutes apart that are "in good agreement".

PART III: ARGUMENT

Supplementing statutory requirements

7. Attempts to "read into" ss. 258(1)(c) and 258(1)(g) conditions that Parliament has not seen fit to prescribe are not new. This Court has resisted such attempts in *R. v. Moreau* (taking into account the approved instrument's inherent variability), in *R. v. Crosthwait* (failure to record room temperature as required by an instruction manual), *R. v. Lightfoot* (that *viva voce* testimony must include those elements prescribed for certificates), and most recently in *R. v. Alex* (adding a valid demand requirement).[4] Allowing the absence of a complete "observation period" prior to the first breath test – standing alone – to cast doubt on the accuracy of breath readings under the guise of "evidence tending to show" is tantamount to a non-legislated statutory precondition, proof of which would be necessary in all breath sample cases.

[4] *R. v. Moreau*, [1979] 1 S.C.R. 261 at 271-273; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089 at 1099; *R. v. Lightfoot*, [1981] 1 S.C.R. 566 at 569-571, 574-575; *R. v. Alex*, 2017 SCC 37 at paras 27, 35. An argument similar to that advanced in *Lightfoot* was dismissed in *R. v. Harding*, 17 O.R. (3d) 462 (C.A.). Attempts to read an observation period requirement into s. 258(1)(c) and (g) go at least as far back as *R. v. Gladyszewski*, [1979] P.E.I.J. No. 12 (S.C.) at paras 2, 15-18. According to the Alberta Court of Appeal in *R. v. Mudry*, 1979 ABCA 286 at paras 16-18, the practice of observing the subject prior to the *first* test appears to have arisen around this time, based on the recommendation of some lower court judges. In *Mudry*, the defence argued that the delay in observing the subject prior to the first test was unreasonable as it was *not* statutorily required, and that the samples were therefore not taken "as soon as practicable". The Court rejected that argument.

8. Any additional, non-statutorily prescribed requirements can have a significant, deleterious impact on the ability of ss. 258(1)(c) and 258(1)(g) to meet their objectives of ensuring the fair and efficient adjudication of the large number of impaired driving cases in an already overburdened criminal justice system.[5] If the failure to observe the test subject for 15 minutes prior to conducting the first breath test is, by itself, "evidence tending to show" operator error, additional *viva voce* witnesses may be necessary to testify to this fact. The observing officer will often *not* be the qualified technician, since the technician will typically be engaged in preparing the approved instrument to receive the subject's breath samples, which must be taken "as soon as practicable" under s. 258(1)(c)(*ii*). Where the qualified technician *is* the observing officer, the technician will be required to attend court to testify to this fact, thus largely neutering the trial economy benefits of filing a technician's certificate under s. 258(1)(g). And since the accused must be afforded privacy when speaking to counsel, any observation period intent on discovering the most subtle of physiological reactions would have to take place after the consultation has concluded, thus delaying the taking of breath samples further.[6]

9. Parliament has never seen fit to incorporate an observation period in ss. 258(1)(c) or 258(1)(g) in order to ensure the accuracy of breath test results. It has also not included an observation period in the amendments to the *Criminal Code* that are to come into force on

[5] *R. v. Alex*, 2017 SCC 37 at paras 2-4, 12, 35-38, 44-45. At para 27, this Court reaffirmed that the only requirements to invoking the presumptions in s. 358(1)(c) are those enumerated in subparas (*ii*) to (*iv*), and to admitting a breath technician's certificate under s. 258(1)(g) are those enumerated in subparas (*i*) to (*iii*).

[6] *R. v. Karcha*, 2018 SKQB 101 at para 49 (observing officer not staring at accused for the entire 15 minutes, but glancing at her "all the time"; officer admitting he may not have noticed a "polite" burp); *R. v. Dobson*, 2016 ONCJ 136 at paras 9-11, 24-26 (accused embarrassed by acid reflux symptoms continually making efforts to minimize visible effects of regurgitation, which officer did not observe and trial judge could not discern from video); *R. v. Holland*, 2017 ONCJ 948 at paras 105-111 (trial judge finding failure to observe too speculative to raise a reasonable doubt, and that continuous observation while accused spoke to counsel could be a breach of accused's right to consult in private).

December 18, 2018 (formerly Bill C-46) that will enact a new presumption regime in respect of breath samples.[7] While that new provision incorporates virtually all of the Alcohol Test Committee's ("ATC") [8] latest recommendations regarding the breath testing sequence, an "observation period" is not among them.[9] It may be safely inferred from this omission that Parliament is satisfied that the other requirements for conducting a proper breath test adequately ensure that the test results are both accurate and reliable. Ontario submits that Parliament's decision not to require an observation period is informed by the ability of modern approved instruments to detect mouth alcohol, and more importantly by the requirement that truncated breath test results obtained at least 15 minutes apart be in "good agreement" – specifically, within 20 mg/100mL. Given the transient nature of mouth alcohol,[10] when all other safeguards are taken into

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[7] *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21, s. 15 will enact s. 320.31(1), which is to come into force on December 18, 2018.

[8] The ATC is a committee of the Canadian Society of Forensic Science that advises the Minister of Justice on alcohol breath testing and that recommends various devices and instruments for ministerial approval: K.L. Blake, et al., "Canadian Society of Forensic Science Alcohol Test Committee – Recommended Operational Procedures" (2014), 47 *Can. Soc. Forensic Sci. J.* 170-173 at 170 [ATC Recommendations]; *R. v. Sutton*, 2013 ABPC 308 at paras 15-22, 166.

[9] ATC Recommendations at 170. This Court cited an earlier version of this document in *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 25, as did the courts in *R. v. So*, 2014 ABCA 451, leave to appeal dismissed [2015] S.C.C.A. No. 78, at paras 26-27 and *R. v. Sutton*, 2013 ABPC 308 at paras 16, 166. At that time, a single document included the ATC's recommended operating procedures, its recommended best practices for running a breath alcohol testing program, and its evaluation procedures for instruments submitted for possible approval. In 2014, these were separated into three distinct documents to provide "greater clarity" (170-171). A substantially revised and more streamlined version of the ATC's recommended operational procedures, effective September 29, 2016, does not appear to be reported in the *Journal* but is available online at the Canadian Society of Forensic Science's website: <https://www.csfs.ca/wp-content/uploads/2016/05/2016-09-29-Operational-Procedures.pdf>.

[10] In *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at paras 30 (per Cory J.) and 57-58 (per Sopinka J.), this Court first accepted what is now uncontroversial – that any effects from mouth alcohol will have dissipated after 15 minutes. See also *R. v. Furtado*, 2011 ONCJ 338 at paras 196, 198 (including endnote 16), where Dr. Daryl Mayers (now the chair of the ATC), testified that mouth alcohol may dissipate almost immediately or after 5-10 minutes at most, which is why 15 minutes is the recommended wait period.

account, the likelihood of undetected mouth alcohol skewing two breath tests taken more than 15 minutes apart to similar degree is theoretical at best, if not entirely fantastic.

Not all recommendations are created equal

10. This Court held in *R. v. St-Onge Lamoureux* that "evidence tending to show" must be evidence that is capable of raising a "real doubt" about the accuracy of the breath test results.[11] In holding that frivolous or trivial arguments will not amount to "evidence tending to show", Deschamps J. cited this Court's decision in *R. v. Crosthwait* as a good illustration of such an argument.[12] In that case, the defence claimed that the failure to compare the temperatures of the room and the standard alcohol solution raised a doubt regarding the reliability of the breath test results. This Court held that the mere *possibility* of an inaccuracy was insufficient to displace the presumptions in what is now s. 258(1)(c). What the defence must show is a malfunction or improper operation that is "serious enough to raise a reasonable doubt".[13] If such an error or deficiency is shown, the Crown may demonstrate that there is no connection between the deficiency and the reliability of the results.[14]

11. The requirement that any alleged deficiency be "serious enough" is an important one – particularly where numerous and diverse entities contribute to different documents, such as instruction manuals, training aids, or best practice recommendations. Manufactures of approved instruments, police services, forensic laboratories, or advisory bodies may all produce documents recommending procedures to be followed in order to obtain reliable results.[15] But not all such

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[11] *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 53.
[12] *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 52.
[13] *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 59
[14] *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 57; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089 at 1101; *R. v. Karcha*, 2018 SKQB 101 at paras 28-31, 44, 47.
[15] It should not be assumed that documents of this kind contain *all* of the instruction or direction that breath technicians may be provided with during training. For example, in *R. v. Smith*, 2012 ONSC 4492 at paras 12-29, the

recommendations are created equal. Any failure to follow one's instruction, a training or user's manual, or a particular recommendation must be assessed by evaluating the impact of that failure on the whole of the evidence in a particular case. To paraphrase the Ontario Court of Appeal's recent decision in *R. v. Jennings* (a case involving the failure to follow a police service's ASD manual), not all instructions, directions or recommendations will bear equally, or perhaps at all, on whether the approved instrument was operated or functioning properly; it is necessary to take the further step and determine how or whether specific failures identified in the evidence undermine the reliability of the test results.[16] Slight deviations from recommended procedures do not automatically result in "operator error".[17]

12. Merely pointing to instances of such deviations to displace the presumptions in s. 258(1)(c) elevates the authors of such manuals and recommendations to legislators.[18] Ontario submits that all the evidence must be considered, including precisely what the *actual* instruction, direction, or recommendation at issue requires, its apparent purpose, and whether following other instructions, directions, recommendations, or whether other safeguards, will compensate for the particular failure.

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trial judge accepted the qualified technician's testimony that she did not have to wait 15 minutes between unsuitable samples unless mouth alcohol was the cause. She had been trained not to wait where the reason was due to an inadequate breath sample, despite the fact that the training material failed to distinguish between the two causes. The appeal judge was critical of the manual for failing to make this distinction clear.

[16] *R. v. Jennings*, 2018 ONCA 260 at para 17 (officer's failure to follow three steps in administering the ASD could not affect validity of the ASD test result); *R. v. Ketler*, 2014 ONSC 4344 at paras 14-17, 35-37 (failure to prevent accused from using an inhaler prior to tests was not procedural error where its use could not have affected results).

[17] *R. v. Ketler*, 2014 ONSC 4344 at paras 35-37.

[18] *R. v. So*, 2014 ABCA 451, leave to appeal dismissed [2015] S.C.C.A. No. 78, at para 42; *R. v. Sutton*, 2013 ABPC 308 at paras 16, 166; *R. v. Furtado*, 2011 ONCJ 338 at paras 321-323 (trial judge rejecting defence argument that failure to comply with *any* recommended protocol by *any* entity would *a fortiori* amount to reasonable doubt).

13. Nevertheless, given the assortment of materials produced by these various entities, Ontario submits that the recommendations of the ATC should be paramount. This submission, however, does not elevate the ATC's recommendations to statutory requirements. As the ATC itself states in its *Recommended Operational Procedures* regarding approved instruments: "These recommendations are not proposed by the Committee as required elements of proof additional to those already provided in the *Criminal Code*." [19]

The position of the ATC on pre-test *deprivation*

14. In *R. v. Gupta*[20], Dr. Robert Langille (then past chair of the ATC) testified that while observation may be a good practice, it is not necessary. He testified that what the ATC actually recommends is a *deprivation* period – not an *observation* period – during which the subject shall not have consumed or placed alcohol (or any other substance that may interfere with the test) in the mouth for at least 15 minutes prior to the collection of a breath sample.[21] Deprivation consists of being in police custody and not consuming alcohol for 15 minutes before the first and second test. Dr. Langille did not endorse an absolute observation period or oral cavity searches, though many American states do. Not all of those jurisdictions, however, require 20 minutes between the first and second breath test. [22]

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[19] ATC Recommendations at 172; *R. v. Sutton*, 2013 ABPC 308 at para 16.

[20] *R. v. Gupta*, [2013] O.J. No. 6236 (C.J.). Dr. Langille was one of a handful of breath test experts mentioned in *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para 40.

[21] *R. v. Gupta*, [2013] O.J. No. 6236 (C.J.) at paras 95-99; ATC Recommendations at 172. See also *R. v. Sutton*, 2013 ABPC 308 at para 156 ("mouth alcohol" – "Thus the [ATC] protocol does not specifically suggest that the Qualified Technician must observe the suspect for 15 minutes.").

[22] *R. v. Gupta*, [2013] O.J. No. 6236 (C.J.) at paras 95-99, 107-109. Alcohol consumption *after* arrest and while in police custody is exceedingly rare. One of the few reported cases in which the accused claimed to have consumed alcohol after her arrest and before providing breath samples is *R. v. St Pierre*, [1995] 1 S.C.R. 791.

15. These same ATC recommendations require the qualified technician to obtain two samples of deep lung air at least 15 minutes apart, producing truncated results upon analysis that must not differ by more than 20 mg/100mL. Having results in "good agreement" strongly suggests that mouth alcohol is not a factor, and therefore that the readings are accurate.[23] If the first two results are *not* in good agreement, the ATC recommends taking further breath samples until two results within 20 mg/100mL have been obtained.[24] If the lack of good agreement is caused by mouth alcohol contaminating one of the samples, then the taking of a third test after a further 15 minute delay should result in the second and third samples being in good agreement.[25] Thus, it should not suffice to simply point to the lack of an "observation period" standing alone as "evidence tending to show" operator error – particularly in circumstances where it is plain on the whole of the evidence that the omission was of no consequence once two subsequently obtained breath samples taken at least 15 minutes apart are in "good agreement".[26]

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[23] *R. v. Powichrowski*, 2009 ONCJ 490 at paras 42-46; *R. v. Karafa*, 2014 ONSC 2901 at para 51 (per Trotter J., as he then was); *R. v. Mahaffy*, 2017 ONCJ 115 at paras 14, 20-28; *R. v. Gupta*, [2013] O.J. No. 6236 (C.J.) at paras 86, 107-108; 142-143; *R. v. Furtado*, 2011 ONCJ 338 at paras 105-107, 198-213, 336-338, 362-365; *R. v. Mirzazadah*, 2014 ONCJ 320 at paras 9, 19, 22, 24; *R. v. Karcha*, 2018 SKQB 101 at paras 49-57; *R. v. Ketler*, 2014 ONSC 4344 at paras 8, 14, 16-17, 35-37; *R. v. Sutton*, 2013 ABPC 308 at paras 30 ("slope detector"), 38; *R. v. Holland*, 2017 ONCJ 948 at paras 105. As many of these decisions illustrate, while having two samples taken at least 15 minutes apart in good agreement (within 20 mg/100mL) is the best evidence that mouth alcohol was not present, it is not the only confirmation. Modern approved instruments also have mouth alcohol ("slope") detectors which can provide a further measure of assurance that mouth alcohol is not present. While not sufficiently reliable on their own to entirely eliminate the possibility of mouth alcohol, they do provide the qualified technician with one more potential safeguard that ensures mouth alcohol is not present.

[24] ATC Recommendations at 172.

[25] *R. v. Smith*, 2012 ONSC 4492 at paras 14-22 (technician knew mouth alcohol could not be the cause of improper sample because accused had been in custody and had not consumed alcohol for more than 15 minutes prior to first test); *R. v. Furtado*, 2011 ONCJ 338 at paras 207-208, 210 (Dr. Mayers testifying that second of both samples would be significantly lower if first contaminated with mouth alcohol; Dr. Mayers testifying further that for burping to impact the results, subject would have to burp, hold it in one's mouth, and exhale that into instrument on both tests, all while having significant amounts of alcohol in the stomach, which is normally rapidly absorbed).

[26] *R. v. Ketler*, 2014 ONSC 4344 at paras 8, 14, 16-17, 35-37.

Conclusion

16. Ontario submits that the failure to observe a test subject for 15 minutes prior to the first breath test – standing alone – should not suffice to displace the presumptions in s. 258(1)(c). Parliament has not seen fit to impose such a requirement, and none is necessary, when *deprivation* of alcohol (or other contaminants) will suffice. This is likely accomplished by the time the arrested subject is turned over to the technician. As a further safeguard, technicians are instructed that the two suitable samples s. 258(1)(c) requires must be in good agreement, which all but eliminates any concern about mouth alcohol. When such concerns do arise, technicians are instructed to take subsequent samples until mouth alcohol is no longer present, which fully rectifies any concern about the absence, duration, or adequacy of the initial "observation period".

PART IV: SUBMISSIONS CONCERNING COSTS

17. Ontario makes no submissions concerning costs.

PART V: ORDER REQUESTED

18. Ontario makes no submissions as to orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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James V. Palangio
Of Counsel for the Intervener
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Dated this 21st day of August, 2018.

PART VI: TABLE OF AUTORITIES

Paragraph Nos.

STATUTES/REGULATIONS/RULES

Paragraph Nos.

SECONDARY SOURCES