

alleged by defence -- Trial judge finding accused's testimony not credible and rejecting expert evidence -- Accused found guilty -- Whether expert opinion based on testimony that not credible can constitute evidence to contrary -- Whether there other evidence that could raise reasonable doubt -- Whether Court should intervene in trial judge's assessment of credibility of accused -- Criminal Code, R.S.C. 1985, c. C-46, s. 258(1)(g).

Summary:

The accused was charged in Municipal Court with operating a vehicle while his blood alcohol level exceeded the legal limit. His blood analysis certificates indicated 93 and 92 mg. He testified that he had drunk two large beers during the few hours prior to his arrest. The defence expert asserted that, where a person with the accused's physical characteristics consumed this amount, the normal result would be much less than the level recorded on the certificates. The trial judge found the accused guilty. In her opinion, the accused's testimony was not credible, and she rejected the related expert opinion. She concluded that the statutory presumption in s. 258(1)(g) of the *Criminal Code* that the test results were accurate had not been rebutted. On appeal, the Superior Court set aside the guilty verdict on the basis that the evidence as a whole, including the expert's testimony, raised a reasonable doubt in favour of the accused. The majority of the Court of Appeal affirmed the acquittal.

Held (Binnie, LeBel, Fish and Charron JJ. dissenting in part): The appeal should be allowed and the guilty verdict restored.

Per McLachlin C.J. and Major, Bastarache, **Deschamps** and Abella JJ.: The standard of proof that must be met to rebut the presumption of accuracy is reasonable doubt. The defence has no burden of proof. Evidence to the contrary that raises a reasonable doubt that the certificate correctly reflects the blood alcohol level at the time when the offence was alleged to have been committed is sufficient to rebut the presumption under s. 258(1)(g). In the case at bar, it cannot be found based on the evidence that there is a reasonable doubt as to the accuracy of the results of the breathalyzer tests. The trial judge rejected the accused's testimony on the basis that it was not credible, and an expert opinion based on that testimony cannot constitute evidence to the contrary. Furthermore, the expert evidence merely provides theoretical information without regard for the accused's personal level of alcohol tolerance, the results of the tests themselves cannot be used to demonstrate their own inaccuracy, and the absence of symptoms of intoxication, although relevant as a defence to a charge of impaired driving, is not significant where the charge is driving with a blood alcohol level exceeding 80 mg. Finally, in concluding that only the expert evidence would have been capable of constituting evidence to the contrary if it had had any basis, the trial judge necessarily assessed the evidence as a whole. [para. 1] [para. 15] [para. 21] [para. 31] [paras. 33-36]

In assessing the credibility of the accused, the Municipal Court judge correctly identified the applicable standard, namely reasonable doubt. It is true that she erred when she said that the evidence must not merely be reasonably true. However, this comment was not part of an instruction to a jury, and it was made immediately after she identified the standard. It reflects a problem with the wording she used. The judge also erred when she stated that the credibility of the accused and his witnesses could be assessed in light of the results of the breathalyzer tests, but she did not rely on the test results at all in her analysis of the evidence. The erroneous statements, considered in their context, did not influence her assessment of the accused's testimony. The main reason she gave for rejecting his testimony is grounded in fact. It relates to the accused's change of route as he approached the police roadblock. The accused was entitled not to answer the police officer's questions at the

time of the arrest. However, the trial judge could assess the whole of the accused's testimony and conclude, in light of its flaws, that his version of the facts could not be accepted. There is no reason to intervene. [paras. 42-44] [paras. 48-49]

Per Binnie, LeBel, Fish and **Charron JJ.** (dissenting in part): In the instant case, there is nothing apart from the expert evidence based on the accused's testimony that could constitute evidence to the contrary, and the correctness of the trial judge's verdict therefore ultimately depends on her assessment of the accused's credibility. In considering only whether she believed the accused without determining whether, should her response be negative, the accused had nevertheless raised a reasonable doubt in her mind about the quantity of alcohol he had actually consumed, the trial judge made a fatal error in principle. Given that this error was repeated throughout her reasons and given the statement that the accused's evidence must not merely be reasonably true, it cannot be concluded that the error was a mere flaw in the wording she chose. Furthermore, the reasons given by the trial judge for rejecting the accused's testimony have little weight. First, she found fault with him for remaining silent when the police officer asked him questions about his route. The right to remain silent is a principle of fundamental justice of which the accused was entitled to avail himself, and the trial judge could not draw any inference against him for having exercised that right. Second, she noted that the accused's testimony contained a number of contradictions, which a careful reading of the transcript of the evidence reveals not to be contradictions. The trial judge imposed too heavy a burden of proof on the accused and committed a number of errors in assessing his testimony, and it is impossible to determine the extent to which those errors contributed to her rejection of that testimony. It should therefore be ordered that a new trial be held. [para. 51] [para. 56] [para. 60] [para. 63] [paras. 66-67]

Cases Cited

By Deschamps J.

Applied: *R. v. Proudlock*, [1979] 1 S.C.R. 525; *R. v. Crosthwait*, [1980] 1 S.C.R. 1089; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; approved: *R. v. Latour* (1997), 116 C.C.C. (3d) 279; *R. v. Dubois* (1990), 62 C.C.C. (3d) 90; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Duguay*, [1993] Q.J. No. 58 (QL); distinguished: *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Lifchus*, [1997] 3 S.C.R. 320; disapproved: *R. v. Bernard* (1999), 140 C.C.C. (3d) 412; *R. v. Gilbert* (1994), 92 C.C.C. (3d) 266.

By Charron J. (dissenting in part)

R. v. Abbey, [1982] 2 S.C.R. 24; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; *R. v. Latour* (1997), 116 C.C.C. (3d) 279; *R. v. Proudlock*, [1979] 1 S.C.R. 525; *R. v. Dubois* (1990), 62 C.C.C. (3d) 90; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Bernard* (1999), 140 C.C.C. (3d) 412; *R. v. Gilbert* (1994), 92 C.C.C. (3d) 266; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Turcotte*, 2005 SCC 50.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 254(3), 258(1).

Interpretation Act, R.S.C. 1985, c. I-21, s. 25(1).

Authors Cited

Béliveau, Pierre, et Martin Vaclair. *Traité général de preuve et de procédure pénales*, 11^e Éd. Montréal: Thémis, 2004.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Beauregard, Rothman and Forget JJ.A.), [2004] R.J.Q. 423, 183 C.C.C. (3d) 550, 22 C.R. (6th) 148, 6 M.V.R. (5th) 174, [2004] Q.J. No. 531 (QL), affirming a decision of Downs J., [2001] Q.J. No. 4670 (QL). Appeal allowed, Binnie, LeBel, Fish and Charron JJ. dissenting in part.

Counsel:

Gaëtan Plouffe and Germain Tremblay, for the appellant.

Alexandre St-Onge and Marco LaBrie, for the respondent.

English version of the judgment of McLachlin C.J. and Major, Bastarache, Deschamps and Abella JJ. delivered by

1 DESCHAMPS J.:-- Is an expert opinion probative if it is based on testimony that is not credible? If not, what evidence may be used to rebut the presumption of accuracy set out in s. 258(1)(g) of the *Criminal Code*, R.S.C. 1985, c. C-46, according to which the reading received on a breathalyzer test provides, in the absence of evidence to the contrary, an accurate determination of the blood alcohol level at the time of the test?

2 The Court considered questions similar to these in *R. v. St. Pierre*, [1995] 1 S.C.R. 791, and *R. v. Proudlock*, [1979] 1 S.C.R. 525. Those cases, however, did not concern the specific context of s. 258(1)(g) *Cr. C.* So some clarification would appear to be necessary.

3 The respondent, Eric Boucher, was charged with operating a motor vehicle while his blood alcohol level exceeded the legal limit, as that level was 93 mg according to the first breathalyzer test and 92 mg according to the second. The charge was brought before the Municipal Court of Montréal. Mr. Boucher testified that he had drunk two large beers in a tavern during the two to three hours before 2:40 a.m., the time of the arrest. He submitted expert evidence to show that the blood alcohol level recorded by the breathalyzer did not correspond to the level that a person with his physical characteristics should have had.

4 The expert expressed the opinion, based on the quantity of alcohol Mr. Boucher said he had consumed, that since the average elimination rate for a 28-year-old man who weighs 175 pounds and is 5'11" tall is 15 mg per hour, Mr. Boucher's blood alcohol level should have been 45 mg at the time of the arrest. Using a less favourable absorption rate of 10 mg, Mr. Boucher's blood alcohol level should have been 60 mg at the time the breathalyzer test was administered. The expert said that, to produce a result of 90 to 95 mg, it would have been necessary for Mr. Boucher to drink twice as much as he said he had. The expert also noted that, if the alcohol had been consumed in the moments just before the arrest, the level recorded might have differed from the level actually recorded at the time of the alleged offence, since the alcohol would not have been absorbed yet at the time of the arrest but would have been absorbed when the test was administered.

5 Judge Baribeau of the Municipal Court found Mr. Boucher guilty. She was of the opinion that his testimony was not credible and so could not serve as a basis for the expert opinion. She therefore concluded that the statutory presumption had not been rebutted:

[TRANSLATION] This expert evidence is based on the defendant's testimony about the facts. However, if the judge does not believe the defendant as regards the quantity of alcohol consumed, there is no evidence to the contrary. [at pp. 6-7]

6 Mr. Boucher appealed to the Superior Court. He argued that the Municipal Court judge had erred in fact and in law [TRANSLATION] "in interpreting and applying the evidence to the contrary" required to rebut the presumption that applied to the breathalyzer result. He also argued that the judge had erred in assessing his credibility. The Superior Court judge was of the opinion that the Municipal Court judge could not limit herself to analysing Mr. Boucher's credibility ([2001] Q.J. No. 4670 (QL)). Without reversing the decision as to credibility, he concluded as follows:

[TRANSLATION] Accordingly, with respect, even if the court does not believe the accused as regards the quantity of alcohol consumed, this is not sufficient to find that there is no evidence to the contrary. The Court is of the view that an analysis of the evidence as a whole may raise a reasonable doubt about whether the blood alcohol level exceeded the permissible limit at the time of the arrest.

Thus, the absence of any symptoms other than the smell of alcohol and the expert's testimony regarding the possibility that the accused drank more than he stated are evidence that raises a reasonable doubt, and the appellant should have been given the benefit of that doubt. [at paras. 23-24]

7 The prosecution appealed to the Court of Appeal. The appeal was limited to one question of law: whether the Superior Court could accept the expert's testimony when there was no credible evidence of the facts on which the opinion was based.

8 The three judges of the Court of Appeal wrote separate reasons ([2004] R.J.Q. 423). Rothman J.A. was of the opinion that the case concerned the nature of the evidence to the contrary required under s. 258(1)(c) *Cr. C.* to rebut the presumption as to the accuracy of the blood analysis certificate. He concluded that the Municipal Court judge had applied the wrong standard of proof to the question of what constitutes evidence to the contrary under s. 258(1)(c) *Cr. C.* In his opinion, regardless of whether or not the Municipal Court judge believed Mr. Boucher as regards his consumption, the evidence as a whole had to be taken into consideration. Citing the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, he reached the following conclusion:

the evidence of the accused together with the evidence of the expert witness coupled with the absence of any symptoms of impairment other than a smell of alcohol on the breath of the accused, as well as the relatively low level of alcohol recorded in the certificate of analysis were sufficient to raise a reasonable doubt that the accused was driving while he had a level of alcohol in his blood exceeding the level permitted by law. [at para. 28]

9 On the use of the expert evidence, Beauregard J.A. disagreed with the Superior Court and Rothman J.A. He was of the opinion that the expert could not help in assessing the plausibility of Mr. Boucher's testimony. He agreed with Rothman J.A.'s conclusion because of the weakness of the reasons given by the Municipal Court judge for rejecting Mr. Boucher's testimony.

10 Forget J.A., dissenting, was of the opinion that, given the breathalyzer results of 93 mg and 92 mg, [TRANSLATION] "it is perfectly understandable that the police officers did not observe any physical symptoms of alcohol impairment other than the smell on the accused's breath" (at para. 32). He concluded as follows:

[TRANSLATION] Since the trial judge rejected Boucher's testimony and the Superior Court judge found no palpable error in her assessment of the evidence, the expert evidence cannot raise any reasonable doubt to rebut the presumptions of accuracy and identity. [at para. 50]

11 Relying on the Ontario Court of Appeal's decision in *R. v. Latour* (1997), 116 C.C.C. (3d) 279, he then found that, without evidence concerning Mr. Boucher's alcohol tolerance, the fact that there were no physical symptoms other than the smell on his breath was not evidence to the contrary that could be used to rebut the presumptions set out in the *Criminal Code*.

12 The prosecution is appealing to this Court. It argues that the Municipal Court judge did not err in law in refusing to accept the expert's testimony as evidence to the contrary, since that testimony was based on Mr. Boucher's testimony, which had been rejected. Relying on the reasons of Rothman J.A., Mr. Boucher reiterates that the Municipal Court judge erred by not accepting his testimony.

1. Analysis

13 Since Rothman J.A. referred in his reasons to s. 258(1)(c) *Cr. C.* and Forget J.A. referred in his reasons to the two presumptions in the *Criminal Code*, it will be helpful to review the scope of the rules set out in ss. 258(1)(c), 258(1)(d.1) and 258(1)(g) *Cr. C.* (these provisions are reproduced in the Appendix). I will then consider how the law applies to the facts and will conclude with a few comments on Mr. Boucher's argument regarding his credibility.

1.1. *Rules in ss. 258(1)(c), 258(1)(d.1) and 258(1)(g) of the Criminal Code*

14 Where samples of an accused's breath have been taken pursuant to a demand made under s. 254(3) *Cr. C.*, Parliament has established separate presumptions in s. 258(1) *Cr. C.* to facilitate proof of the accused's blood alcohol level: two presumptions of identity and one presumption of accuracy. According to the presumption of identity in s. 258(1)(c) *Cr. C.*, the accused's blood alcohol level at the time when the offence was alleged to have been committed is the same as the level at the time of the breathalyzer test. According to s. 258(1)(d.1) *Cr. C.*, where the alcohol level exceeds 80 mg at the time of the test, there is a presumption that it also exceeded 80 mg at the time when the offence was alleged to have been committed. The presumption of accuracy in s. 258(1)(g) *Cr. C.* establishes *prima facie* that the technician's reading provides an accurate determination of the blood alcohol level at the time of the test. These presumptions have certain similarities, but they remain distinct presumptions.

1.2. Similarities

15 The standard of proof that must be met to rebut the presumptions of identity and accuracy is the same: reasonable doubt. The defence has no burden of proof. Where there is evidence tending to show (1) that the blood alcohol level recorded on the certificate is not the same as the level at the time of the offence, (2) that the level did not exceed 80 mg or (3) that the certificate does not accurately reflect the blood alcohol level, the court does not have to be satisfied on a balance of probabilities. This evidence can come from that adduced by the Crown or the accused. In *Proudlock*, in explaining the expression "evidence to the contrary" in s. 306(2)(a) *Cr. C.*, the Court made the following comment:

... [A]ll the presumption does is to establish a *prima facie* case. The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, all he has to do is to raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt. [Emphasis added; at pp. 548-49.]

16 This standard was applied by this Court to the expression "evidence to the contrary" in s. 258(1) *Cr. C.* in *R. v. Crosthwait*, [1980] 1 S.C.R. 1089, and in *St. Pierre*, at p. 850.

17 Section 258(1)(c) *Cr. C.* expressly provides that the alcohol level measured by a test administered within two hours after the vehicle was driven is, "in the absence of evidence to the contrary", the same as the level at the time when the offence was alleged to have been committed. Although s. 258(1)(g) *Cr. C.* does not use the expression "in the absence of any evidence to the contrary", those words are included therein by implication because of s. 25(1) of the *Interpretation Act*, R.S.C. 2985, c. I-21, which allows the presumption to be rebutted by evidence to the contrary:

25.(1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

See *St. Pierre*, at para. 26, and P. BÉliveau and M. Vauclair, *Traité gÈnÈral de preuve et de procÈdure pÈnales* (11th ed. 2004), at para. 830.

1.3. Differences Between the Presumptions

18 Although the differences between the presumptions are evident from reading s. 258(1) *Cr. C.*, the courts tended to confuse them. This Court therefore clarified these differences in *St. Pierre*.

19 The presumption of identity in s. 258(1)(c) *Cr. C.* can be rebutted by evidence that tends to show that the blood alcohol level at the time when the offence was alleged to have been committed was different from the level measured at the time of the breathalyzer test (*St. Pierre*, at paras. 44, 46 and 49). Thus, in *St. Pierre*, the accused consumed two miniature bottles of vodka after being arrested but before taking a breathalyzer test, and this fact was capable of rebutting the presumption

that the blood alcohol level measured at the time of the test was the same as the blood alcohol level at the time she was driving her vehicle.

20 Such evidence to the contrary adduced to rebut the presumption of identity does not deprive the prosecution of the benefit of the presumption that the certificate accurately states the blood alcohol level at the time of the breathalyzer test (the presumption of accuracy). The Crown can still prove that the accused's blood alcohol level at the time when the offence was alleged to have been committed exceeded 80 mg; one piece of evidence would then be the reading taken by the breathalyzer, the accuracy of which is not in dispute. Additional evidence would be needed, however, to prove the blood alcohol level at the time when the offence was alleged to have been committed.

21 Evidence to the contrary that is adduced to rebut the presumption of accuracy in s. 258(1)(g) *Cr. C.* must tend to show that the certificate does not in fact correctly reflect the blood alcohol level at the time of the breathalyzer test. This evidence must raise a reasonable doubt about the accuracy of the breathalyzer result.

22 Shortly after *St. Pierre*, Parliament amended the *Criminal Code* to add s. 258(1)(d.1) *Cr. C.*, which expands the presumption of identity. According to this new provision, where the accused's blood alcohol level exceeded 80 mg at the time of the breathalyzer test, it will be presumed, in the absence of evidence to the contrary, to have exceeded 80 mg at the time when the offence was alleged to have been committed. The effect of the enactment of s. 258(1)(d.1) *Cr. C.* was not to change the type of evidence needed to rebut the presumption of identity in s. 258(1)(c) *Cr. C.* or the presumption of accuracy in s. 258(1)(g) *Cr. C.*, but to reinforce the presumption of identity.

23 Having regard to the above-mentioned similarities and differences, we must now ask whether the presumptions have been rebutted in this case.

2. Application of the Law to the Facts of this Case

24 Mr. Boucher's defence was that, given what he had consumed, his blood alcohol level could not have been the level recorded by the breathalyzer test. He disputed the accuracy of the test and challenged the presumption set out in s. 258(1)(g) *Cr. C.* Although the expert tacitly alluded to the presumption of identity in s. 258(1)(c) *Cr. C.* in saying that, if the alcohol had been consumed in the minutes preceding the breathalyzer test, the level recorded by the test might not have been the same as the level at the time Boucher was stopped, this was not the defence theory. Rothman J.A. was correct to say that the case concerned the nature of the evidence to the contrary required to rebut the presumption of accuracy, but the parties and the judges were wrong to refer to s. 258(1)(c) *Cr. C.*. The question is therefore whether Mr. Boucher adduced evidence to the contrary that raised a reasonable doubt about the accuracy of the breathalyzer results.

25 Rothman J.A. found that the Municipal Court judge had failed to consider the evidence as a whole as required by *W.(D.)*. In that case, this Court suggested an approach for determining whether guilt has been proved beyond a reasonable doubt in cases where credibility is in question. That clarification was needed because the trial judge had told the jurors that, to reach a verdict, they had to decide whether they believed the defence evidence or the Crown's evidence. This charge was incorrect because it excluded a third possibility: that the jury could still have a reasonable doubt either because of the accused's testimony or in light of the evidence as a whole (at p. 757). The instructions proposed in that case were as follows (at p. 758):

- (1) if the testimony of the accused is believed, the accused must be acquitted;
- (2) if the testimony of the accused is not believed but there is still a reasonable doubt, the accused must be acquitted;
- (3) even if the testimony does not raise any doubt, the jurors must still ask themselves whether, on the basis of all the evidence that they do accept, they are convinced beyond a reasonable doubt of the guilt of the accused.

26 In the case at bar, the trier of fact did not believe the respondent and found that he had adduced no evidence to the contrary. The Superior Court judge reversed the trial judgment, not on the basis of credibility, as he had been asked to do, but because he found that the judge had erred with respect to the standard of proof required to rebut the presumption. He was of the opinion that the evidence as a whole could raise a reasonable doubt about whether the accused's blood alcohol level exceeded the permissible limit at the time of the arrest (at para. 23). I myself do not think that the trier of fact committed an error that warrants intervention.

27 In assessing the consequences of rejecting Mr. Boucher's testimony, I will begin by accepting the trier of fact's finding on credibility, and will then explain why there is no reason to intervene on the question of credibility.

2.1. *Consequences of Rejecting Mr. Boucher's Testimony*

28 What are the consequences of rejecting Mr. Boucher's testimony? According to *Proudlock* (at p. 542), "if the trier of fact does not believe the evidence so tendered, the statutory presumption operates" in the absence of any other evidence. Or as Fish J.A., as he then was, stated in *R. v. Dubois* (1990), 62 C.C.C. (3d) 90:

"Evidence to the contrary" that is *disbelieved* will, of course, fail to neutralize, or to render inoperative, the presumption created by s. 258(1)(c) of the *Code*. [Emphasis in original; at p. 92.]

29 With respect, the case at bar was not one to which *W.(D.)* applied. To neutralize the presumption, the judge needed only to have a reasonable doubt about the accuracy of the breathalyzer result. The approach set out in *W.(D.)* is not a sacrosanct formula that serves as a straitjacket for trial courts. Trial judges deliver oral judgments every day and often limit their reasons to the essential points. It would be wrong to require them to explain in detail the process they followed to reach a verdict. They need only give reasons that the parties can understand and that permit appellate review: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, and *R. v. Burns*, [1994] 1 S.C.R. 656. In the instant case, the judge, by stating that she did not believe Mr. Boucher, was implicitly addressing the first two steps in *W.(D.)*.

30 What evidence other than Mr. Boucher's testimony, which was rejected, could have been taken into consideration? The expert's evidence could have been, according to the Superior Court judge and Rothman J.A. of the Court of Appeal.

31 The expert's opinion about the blood alcohol level the breathalyzer test should have shown was based on Mr. Boucher's testimony. The expert did not evaluate Mr. Boucher's resistance to alcohol. He simply provided average figures relating to the blood alcohol level of a 28-year-old man who weighs 175 pounds and is 5'11" tall and who consumes 44 ounces of beer containing five per cent alcohol over a period of two to three hours. If a judge does not believe that an accused con-

sumed 44 ounces of beer, the expert's calculation is of no help. Such evidence merely provides theoretical information that differs from the facts on which judgment was based. If the expert evidence is based on the accused's testimony and the accused's testimony is not believed, the expert's evidence cannot assist the court or constitute evidence to the contrary. What else is left?

32 The Superior Court judge and Rothman J.A. were of the opinion that the absence of symptoms other than the smell of alcohol was also a factor that could raise a reasonable doubt. Forget J.A., on the other hand, was of the opinion that this was a neutral factor. He was correct, in my view.

33 Evidence that there are no symptoms is indeed very relevant to the charge of impaired driving. In fact, this explains why, when the prosecution closed its case, it asked the judge to acquit Mr. Boucher on that charge. The situation is quite different for the charge of driving with a blood alcohol level over 80 mg. The offence of driving with a level exceeding 80 mg does not require proof of impairment. The absence of symptoms of impairment is generally not sufficient to constitute evidence to the contrary that can be used to rebut the presumption of accuracy. This is because a lack of evidence of the usual symptoms of impairment, such as staggering and slurred speech, does not provide information about the actual blood alcohol level. Symptoms such as these usually accompany extremely high blood alcohol levels. Conversely, very low levels are generally consistent with an absence of symptoms. An absence of symptoms is therefore not significant in itself if the court does not know the accused's level of alcohol tolerance.

34 The expert who testified in this case has not enlightened the Court about Mr. Boucher's alcohol tolerance. He relied on statistical averages. By definition, the reason there are averages is that not everyone who consumes alcohol reacts in the same way. The level of alcohol tolerance is not a matter for judicial notice, particularly when the case does not involve extremely high levels. The difference of opinion between two judges of the Court of Appeal on this point is certainly indicative of a need to rely on the usual methods of proof in this regard. Like Forget J.A., I agree with the following statement by Charron J.A., as she then was, in *Latour* (at para. 14):

Second, and more importantly, this evidence is not capable of constituting "evidence to the contrary". Even accepting as a fact that a "normal, average" person with the same breathalyzer readings should exhibit stronger indicia of impairment than that observed in the respondent, this fact is of no consequence in the absence of evidence on the respondent's tolerance to alcohol. This opinion evidence, as presented, without any connection to the respondent, is merely speculative and of no evidentiary value.

35 Mr. Boucher's testimony, the expert evidence and the absence of the usual symptoms of intoxication (except the smell of alcohol) were not evidence to the contrary. What other evidence constituted evidence to the contrary? In the opinion of Rothman J.A., the low level recorded by the breathalyzer test was another factor that could raise a reasonable doubt. But I find it difficult to see how the fact that the alcohol levels were 93 mg and 92 mg (which Rothman J.A. characterized as low) could constitute evidence that the breathalyzer result was inaccurate. How can the results of 93 mg and 92 mg show that the result itself was inaccurate? The result is precisely the figure that the accused claimed was inaccurate. To achieve his goal, he should logically have tried to discredit that figure, not to use it. The result cannot be both evidence and evidence contrary to that evidence.

36 The Municipal Court judge stated that, because she did not believe Mr. Boucher, the expert evidence was not evidence to the contrary. This statement implied that, of all the evidence she had heard, only the expert evidence would have been capable of constituting evidence to the contrary if it had had any basis. To reach that conclusion, she must necessarily have assessed the evidence as a whole. In my opinion, the Superior Court judge and Rothman J.A. could not reproach her for failing to consider the evidence as a whole.

37 In short, unless Mr. Boucher's testimony is reassessed and given a different weight than the trial judge gave it, I see nothing that the trial judge rejected that she should have taken it into consideration to find that there was a reasonable doubt.

38 I will make one further comment on the expert's testimony about the difference in the levels, attributable to the absorption time, between the time when the offence was alleged to have been committed and the time of the test. This evidence was adduced as evidence to the contrary in relation to the presumption of identity. It is relevant to recall that the argument to which the expert alluded is not a new one. It was made in *St. Pierre*, and this Court rejected it:

If any evidence of difference between the accused's blood alcohol level at the time of the testing and at the time of the driving could be considered "evidence to the contrary" within the meaning of s. 258(1)(c) so as to rebut the presumption, then the presumption could be rebutted in every case. The simple reason for this is that an intoxicated person's blood alcohol level is constantly changing as a result of absorption and elimination of alcohol into and out of the blood. A person charged with "over 80" could simply show that his blood alcohol level changed between driving and being stopped because some of the alcohol had been metabolized in the interim, and suddenly the presumption in s. 258(1)(c) would be gone... . If this normal process of absorption and elimination were considered to be "evidence to the contrary", then the presumption would be useless, since it could always be rebutted.

...

The effect of normal biological processes of absorption and elimination of alcohol cannot of and by itself constitute "evidence to the contrary", because Parliament can be assumed to have known that blood alcohol levels constantly change, yet it saw fit to implement the presumption. Therefore, as Arbour J.A. states, to permit this to become "evidence to the contrary" would, in effect, be nothing more than an attack on the presumption itself by showing that it is a legal fiction and therefore should never be applied. In my view, such an attack on the presumption should not be allowed. [Emphasis added; at paras. 59 and 61.]

39 In light of this passage from *St. Pierre*, the evidence regarding absorption time presented by the expert in the case at bar was inadmissible. The expert's evidence was based not on the accused's personal reaction to alcohol but rather on the absorption process in general and the fictional nature of the presumption itself.

2.2. Questioning of Credibility

40 In this Court, Mr. Boucher is again arguing that the Municipal Court judge should not have rejected his testimony.

41 There is no need to refer to all this Court's decisions relating to the standard of intervention that applies to a trial judge's findings on the credibility of witnesses. Appellate courts exercise great restraint in dealing with this issue. In the instant case, I agree with my colleagues that the Municipal Court judge erred in law in stating the principles that guided her analysis of Mr. Boucher's credibility. However, her errors were not fatal. I said above that this is not a case to which *W.(D.)* applies, and I am also of the opinion that it is not a case to which *R. v. Lifchus*, [1997] 3 S.C.R. 320, applies.

42 The Municipal Court judge correctly identified the applicable standard, namely reasonable doubt. It is true that she erred when she said that the evidence must not merely be reasonably true: *R. v. Duguay*, [1993] Q.J. No. 58. However, since that comment was made immediately after she identified the standard, I do not believe that the error warrants intervention. The reasonable doubt standard is applied by trial judges on a daily basis. In this case, the erroneous comment was not part of an instruction to a jury. The error reflects a problem with the wording she used more than a misconception of the applicable law.

43 The judge also erred when she stated that the credibility of the accused and his witnesses could be assessed in light of the results of the breathalyzer tests before applying the presumption. She relied for this on the decisions of the Quebec and Ontario Courts of Appeal in *R. v. Bernard* (1999), 140 C.C.C. (3d) 412, and *R. v. Gilbert* (1994), 92 C.C.C. (3d) 266, which should not be followed on this point. Breathalyzer results cannot be used to assess the credibility of a witness. As I explained earlier, it would be circular to rely on the test results to determine whether there is evidence that could raise a doubt regarding those very results. However, despite the reference to this principle, which is incorrect in law, the judge did not rely on the test results at all in her analysis of the evidence. Since the judge gave detailed reasons with respect to Mr. Boucher's credibility and did not refer to the results, it would be speculative to claim that her mistaken wording influenced her analysis. Her statements about the law, like the reasons she gave for rejecting Mr. Boucher's testimony, must be considered in their context and assessed as a whole.

44 The main reasons given by the Municipal Court judge for rejecting Mr. Boucher's testimony are grounded purely in fact. They relate to the route he took on the night of his arrest.

45 Eric Lambert, a police officer, testified that a main roadblock had been set up on Boulevard La Vèrendrye north of the Lachine Canal to stop drivers who had been drinking. The vehicles targeted were travelling from east to west. A main roadblock with flashing lights was set up at 2:00 a.m. in a place where there was not much traffic. Since the blue and red flashing lights were visible from a considerable distance, any streets that could be used to bypass the main roadblock were blocked by secondary roadblocks. Mr. Boucher was seen driving on La Vèrendrye and turning onto such a street, where he was stopped.

46 Dany Godin, also a police officer, explained that the secondary roadblock had been set up to intercept drivers who saw the main roadblock and tried to bypass it. Le Caron, the street where the secondary roadblock was set up, was the only street vehicles could take to leave the area. Only one car was stopped there, namely Mr. Boucher's. The officer testified that he had asked Mr. Boucher why he had gotten off La Vèrendrye, on which he had been driving toward Ville La Salle, where he lived, to take Le Caron but that he had received no answer.

47 On cross-examination, Mr. Boucher testified that his usual route was to take St-Patrick, a street on the other side of the canal, and admitted that the "logical" route would have been to take La VÈrendrye to Ville La Salle. He gave no explanation for his change of direction. He first claimed not to have seen the flashing lights but then said that they [TRANSLATION] "were farther off":

[TRANSLATION]

...

Q. Fine. You didn't see the roadblocks?

A. No.

Q. So, I understand that you didn't see the flashing lights or anything ahead of you at all ...

A. Well, they were farther off, it ...

Q. That's what people say, but you are familiar with the southwest.

A. Yes, I'm familiar with the southwest.

Q. Right, you ... you heard the police officers testify about the place where the ...

A. Yes.

Q. ... main roadblock was set up, you'll agree with me that it wasn't far ...

A. No.

Q. ... from the intersection of Le Caron and the main roadblock?

A. That's right.

Q. It wasn't 200 metres away?

A. I have no idea ...

Q. O.K.

A. ... of the distance.

...

48 Mr. Boucher was certainly entitled not to answer the police officer's questions. However, the judge could take into consideration the fact that he had not followed his usual route, or a logical one, the night of the arrest. No explanation for this change of route could be found in the evidence. It constituted circumstantial evidence that the judge could interpret in light of the reticence Mr. Boucher showed at various points in his testimony. Presumptions of fact could operate where pure logic could not explain Mr. Boucher's conduct before his arrest. The following extract from the oral judgment is revealing:

[TRANSLATION] I find that in your testimony, right from your examination in chief, you tried to justify, among other things, why you took Le Caron, but the only explanation you gave was: I took La VÈrendrye to take Le Caron. In light of the evidence that usually you at least take St-Patrick, otherwise La VÈrendrye all the way to La Salle, and that that evening it was La VÈrendrye to Ville La Salle, this makes me doubt your credibility.

...

And then, with regard to ... the evidence with regard to the roadblock, I have evidence from the prosecution that it was impossible not to see it. And you are telling me: look, I didn't see anything! I cannot accept your version. [at pp. 8-9]

49 The Court's role is not to reassess the evidence but to determine whether the reasons given by the judge reveal errors of law that may have influenced her assessment of the evidence. I find that they reveal no such errors. The judge was in a position to assess the demeanour of the witness, the content of his testimony and what he omitted, and this is not a case in which a new trial should be ordered.

3. Conclusion

50 For all these reasons, I would set aside the decisions of the Court of Appeal and the Superior Court and restore the Municipal Court's judgment convicting the respondent of driving with a blood alcohol level exceeding the legal limit.

English version of the reasons of Binnie, LeBel, Fish and Charron JJ. delivered by

51 CHARRON J.:-- I have read the reasons of Deschamps J., and I too believe that we must set aside the acquittal entered by Rothman and Beauregard JJ.A. of the Court of Appeal (each for different reasons): [2004] R.J.Q. 423. However, for the reasons that follow, I disagree with the analysis by Deschamps J. of the trial judge's assessment of Mr. Boucher's credibility. As found by Downs J. of the Superior Court ([2001] Q.J. No. 4670 (QL)) and the majority of the Court of Appeal, the trier of fact made a fatal error in principle on this question: Judge Baribeau considered only whether she *believed* the accused, without determining whether his testimony, even though she did not believe it, raised a reasonable doubt in her mind about his consumption of alcohol on the evening in question. This is one of the reasons why I cannot agree that the trial judgment convicting Mr. Boucher should be restored. Rather, I am of the opinion that we should order a new trial.

52 When all is said and done, Mr. Boucher's credibility is the issue on which this case turns. I will explain why.

53 Mr. Boucher was charged with operating a motor vehicle with a blood alcohol level of 93 mg per 100 ml of blood according to the first breathalyzer test and 92 mg according to the second. At paragraphs 3 and 4 of her reasons, my colleague summarizes Mr. Boucher's testimony about his alcohol consumption as well as the expert evidence. As she notes, Mr. Boucher testified that he had drunk two large beers in a tavern during the two to three hours prior to his arrest. Based on that consumption, the defence's expert witness said that, in his opinion, a man of Mr. Boucher's age, weight and height should in fact have had a blood alcohol level of between 45 and 60 mg. The expert also expressed the following opinion concerning the possibility that the quantity Mr. Boucher consumed differed from the amount he said he had consumed:

[TRANSLATION] In other words, if he isn't telling us the truth and he did in fact drink four large beers, if we believe that he finished them ten minutes before he was stopped, even if that is true it might be ... it is entirely possible to think he wouldn't have gone over, but once he got to the police station he reached a plateau and had the levels put in evidence before the court.

54 First, if Mr. Boucher's testimony about the alcohol he consumed had not been rejected, the expert evidence could have rebutted the presumption of accuracy in s. 258(1)(g) of the *Criminal*

Code, R.S.C. 1985, c. C-46, since the expert in the case at bar was of the opinion that the breathalyzer results would not have exceeded 60 mg. However, without a factual basis, the opinion of the expert witness had no evidentiary value: *R. v. Abbey*, [1982] 2 S.C.R. 24. In the instant case, only Mr. Boucher's testimony about the alcohol he consumed was capable of providing that factual basis. Since there is nothing to suggest that the expert evidence was not credible in itself, the case therefore turned on the assessment of Mr. Boucher's credibility. I will come back to this point.

55 Second, regarding the possibility that Mr. Boucher had consumed more alcohol than he stated (namely four large beers, leading to the results of 93 mg and 92 mg obtained in this case), the expert evidence, as summarized in the above passage, was offered as evidence to the contrary to rebut the presumption of identity in s. 258(1)(c), which is a presumption that the breathalyzer results correspond to the blood alcohol level at the time of the offence. In this respect, I am entirely in agreement with my colleague (at para. 39) that the expert's testimony was nothing more than an allusion to the fact that blood alcohol levels constantly change as a result of the absorption and elimination of alcohol into and from the blood. That testimony could not be evidence to the contrary within the meaning of s. 258(1)(c): *R. v. St. Pierre*, [1995] 1 S.C.R. 791. Thus, Downs J. of the Superior Court and Rothman J.A. of the Court of Appeal both erred when they relied in part on this aspect of the expert evidence to find that there was evidence to the contrary. Moreover, without expert evidence about Mr. Boucher's level of alcohol tolerance, the fact that he had no symptoms of intoxication other than the smell of alcohol was merely speculative evidence, which was also of no evidentiary value: *R. v. Latour* (1997), 116 C.C.C. (3d) (Ont. C.A.).

56 Accordingly, since there was nothing apart from the expert evidence based on Mr. Boucher's testimony that could constitute evidence to the contrary, the correctness of the trial judge's verdict ultimately depends on her assessment of Mr. Boucher's credibility. I will therefore review that assessment.

57 It is important to begin by noting, as my colleague does at para. 15, that the standard of proof that must be met to rebut the presumptions of identity and accuracy is *reasonable doubt*. Mr. Boucher did not have to satisfy the trial judge that he had drunk only two large beers; he had only to raise a reasonable doubt about this in the judge's mind. The judge could very well not have believed that Mr. Boucher had consumed only two large beers while nevertheless continuing to doubt the accuracy of the breathalyzer results as a result of his testimony. My colleague quotes, at para. 28, passages from this Court's decision in *R. v. Proudlock*, [1979] 1 S.C.R. 525, and from the reasons of Fish J.A., as he then was, in *R. v. Dubois* (1990), 62 C.C.C. (3d) 90, in support of her assertion, at para. 29, that the case at bar was not one to which *R. v. W.(D.)*, [1991] 1 S.C.R. 742, applied. With respect for my colleague's opinion, the passages quoted from *Proudlock* and *Dubois* cannot be read in this way. A judge who does not believe an accused as regards the amount of alcohol consumed but who nonetheless has a reasonable doubt in this respect cannot convict the accused. In *Dubois*, Fish J.A. explicitly said this more than once in his judgment:

If the trier of fact considers that the "evidence to the contrary" raises a reasonable doubt or, as is sometimes said, that it might reasonably be true, then the incriminating breathalyzer result will no longer support a conviction... .

...

In my respectful view, then, a breathalyzer result cannot support a conviction under s. 253 if there is contrary evidence which *raises a reasonable doubt* or *suggests a reasonable possibility of innocence* or *might reasonably be true*. [Emphasis in original; at p. 92]

In *Proudlock*, Pigeon J., writing for Martland, Ritchie, Dickson, Beetz and Pratte JJ., said that there is no persuasive burden on the accused in providing evidence to the contrary and that "it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt" (at p. 549). In *W.(D.)*, this Court pointed out that there is a very real and significant difference between believing the accused (which implies that the balance of probabilities favours the accused) and giving the accused the benefit of a reasonable doubt. Thus, the judge had to so instruct the jury. There is no question that these principles apply equally to a trial before a judge alone.

58 Downs J. of the Superior Court and Rothman and Beauregard JJ.A. of the Court of Appeal (Forget J.A., dissenting, expressed no opinion on this issue) all concluded that the trier of fact had erred in principle by considering only whether she *believed* the accused without determining whether Mr. Boucher's testimony, even though she did not believe it, raised a reasonable doubt in her mind. As I will explain, I agree that the trial judge made this error. Deschamps J. acknowledges that the trial judge erred but finds that the error reflects a problem in the wording she used in relation to the applicable standard more than a misconception of the applicable law. With respect, I do not share that view.

59 I agree with Deschamps J. that a ritual incantation is not required in every case. The trial judge did not have to repeat the formula set out in *W.(D.)* to demonstrate that she had relied on correct legal principles in assessing the accused's credibility. Moreover, she is presumed to know those principles. Thus, when a trial judge states that he or she "rejects" an accused's testimony, it can generally be concluded that the testimony failed to raise a reasonable doubt in the judge's mind. Here, however, it is apparent from the whole of the trier of fact's reasons that she imposed too heavy a burden of proof on the accused.

60 At the beginning of her judgment, Judge Baribeau defined the parameters of her reasoning, stating that she had to ask herself [TRANSLATION] "whether I believe the defendant as regards the amount of alcohol he drank during the period of time he stated". Dealing more specifically with the rebuttal of the presumption of accuracy by evidence to the contrary, she stated that such evidence [TRANSLATION] "must raise a reasonable doubt and not merely be reasonably true" (emphasis added). This is a clear error of law. As stated by this Court in *Proudlock* and by the Quebec Court of Appeal in *Dubois*, a reasonable doubt may be raised in the mind of the trier of fact if the accused adduces evidence that might reasonably be true. Once again, the trial judge stated that [TRANSLATION] "if the judge does not believe the defendant as to the quantity of alcohol consumed, there is no evidence to the contrary", and she concluded as follows: [TRANSLATION] "since I cannot accept your version, I have no evidence to the contrary and I have no choice but to find you guilty of the offence charged". It is apparent from these passages that, throughout her judgment, Judge Baribeau thought she had to believe the accused's version of the facts to find that there was evidence to the contrary that rebutted the presumption of accuracy. Given that this error was repeated throughout the reasons, I am unable to conclude that it was a mere flaw in the wording she chose.

61 Having found that this error was fatal to the judgment convicting Mr. Boucher, Rothman J.A. expressed his agreement with Downs J. of the Superior Court by finding that there was evidence to

the contrary even apart from the accused's testimony and that Mr. Boucher should have been given the benefit of that evidence. As I explained earlier, that finding cannot be accepted, and an acquittal cannot be entered based on those reasons.

62 The second majority judge, Beauregard J.A., did not rely on that evidence to acquit Mr. Boucher. He began by deciding, as I mentioned above, that the trial judge had erred in principle in thinking that she had to believe the accused's version of the facts to find that there was evidence to the contrary that rebutted the presumption of accuracy. In light of that error, Beauregard J.A. said that he was tempted to allow the appeal and order a new trial. However, after more closely examining the reasons of the trier of fact and the supporting evidence, he instead decided, for the following reasons, to subscribe to Rothman J.A.'s view and acquit Mr. Boucher:

[TRANSLATION] However, the more I reread the judgment of the Municipal Court of Montréal, the more I see that the judge's reasons for not believing the accused have little weight. In fact, the judge erred in law with respect to two of these reasons, since [she] reproached the accused for having twice remained silent. In addition, the judge saw contradictions in the accused's testimony that are not there.

In short, the testimony of the accused was plausible. It was plausible not only in theory but also in light of the evidence as a whole and the fact that none of that evidence tended to show that he was not telling the truth.

In the circumstances, I agree with the conclusion of Rothman J.A. [at paras. 63-65]

63 As I will explain below, I agree with Beauregard J.A.'s conclusion that the reasons given by the trier of fact for rejecting the accused's testimony have little weight. On the other hand, and with the utmost respect, Beauregard J.A. exceeded his powers when he entered an acquittal based on his own assessment of Mr. Boucher's credibility. In this case, the verdict of the trier of fact, which was wrong because it was erroneous in law, was nonetheless not unreasonable. Beauregard J.A. should instead have ordered that a new trial be held.

64 Before I explain why the trial judge's reasons for rejecting Mr. Boucher's testimony have little weight, a second error in principle made by the trial judge should be noted. Judge Baribeau relied on *R. v. Bernard* (1999), 140 C.C.C. (3d) 412 (Que. C.A.), and *R. v. Gilbert* (1994), 92 C.C.C. (3d) 266 (Ont. C.A.), in saying that [TRANSLATION] "[t]he judge can weigh the credibility of the accused and the accused's witnesses, *inter alia* as regards the consumption of alcohol, in light of the breathalyzer results before applying the statutory presumption and also in light of the evidence as a whole". Like Deschamps J., I am of the opinion that those decisions should not be followed with respect to the rebuttal of the presumption that the breathalyzer result is *accurate*. As my colleague states: "it would be circular to rely on the test results to determine whether there is evidence that could raise a doubt regarding those very results" (at paras. 35 and 43). In other words, the trial judge could not rely, as a ground for rejecting Mr. Boucher's assertion in his testimony that he had drunk only two beers, on the fact that the breathalyzer result itself indicated that he had drunk more than that.

65 It is important to note, however, that the situation is not the same when it is clear that the defence is challenging only the presumption of identity, for example where an accused testifies that he consumed eight ounces of alcohol between the time he was arrested and the time the breath samples were taken. In such a case, the trier of fact can properly consider the breathalyzer result in assessing the evidence to the contrary adduced by the accused, since what is disputed is not the accuracy of that result but only the fact that it reflects the accused's blood alcohol level at the time the offence was committed. In this way, even if the trier of fact accepts the accused's testimony that he drank alcohol between the time he was arrested and the time he took the breathalyzer test, the trier can take into account an especially high breathalyzer result, among other factors, to find that, notwithstanding the alcohol consumed subsequently, the accused's blood alcohol level already exceeded the legal limit when he was arrested, and accordingly to reject the accused's evidence to the contrary.

66 I agree with Deschamps J. that, despite this incorrect reference to *Bernard* and *Gilbert*, the trial judge does not seem to have relied on the breathalyzer results to reject the accused's testimony. On the other hand, I agree with Beauregard J.A. that Judge Baribeau erred in law in some of the reasons she gave for rejecting that testimony. She found fault with the accused for remaining silent when the police officer [TRANSLATION] "asked him why he had taken Le Caron" and said that "this is the first factor that prevents me from accepting your version". The right to remain silent is a principle of fundamental justice of which Mr. Boucher was entitled to avail himself, and the trier of fact could not draw any inference against him for having exercised that right: *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Turcotte*, [2005] S.C.J. No. 51, 2005 SCC 50. In addition, the trier of fact found that the accused's testimony contained a number of contradictions, which, after carefully reading the transcript of the evidence, I do not consider to be contradictions. Given the errors of law already mentioned and my conclusion that it is necessary to order a new trial, I see no purpose in reviewing those supposed contradictions in further detail.

Conclusion

67 In view of the fact that the trial judge imposed too heavy a burden of proof on the respondent, that she committed a number of errors in assessing his testimony and that it is impossible to determine the extent to which those errors contributed to her rejection of that testimony, but given that the Court of Appeal did not have the power to enter an acquittal, I would allow the appeal and order a new trial.

* * * * *

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

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

...

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(i) ...

- (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
- (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
- (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;

(d) where a sample of the blood of the accused has been taken pursuant to a demand made under subsection 254(3) or otherwise with the consent of the accused or pursuant to a warrant issued under section 256, if

- (i) at the time the sample was taken, the person taking the sample took an additional sample of the blood of the accused and one of the samples was retained, to permit an analysis thereof to be made by or on behalf of the accused and, in the case where the accused makes a request within six months from the taking of the samples, one of the samples was ordered to be released pursuant to subsection (4),
- (ii) both samples referred to in subparagraph (i) were taken as soon as practicable after the time when the offence was alleged to have been committed and in any event not later than two hours after that time,
- (iii) both samples referred to in subparagraph (i) were taken by a qualified medical practitioner or a qualified technician under the direction of a qualified medical practitioner,
- (iv) both samples referred to in subparagraph (i) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed, and
- (v) an analysis was made by an analyst of at least one of the samples that was contained in a sealed approved container,

evidence of the result of the analysis is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was the concentration determined by the analysis or, where more than one sample was analyzed and the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;

(d.1) where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (c) or (d) under the conditions described therein and the results of the analyses show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred millilitres of blood, evidence of the result of the analyses is, in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed exceeded eighty milligrams of alcohol in one hundred millilitres of blood;

...

(g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

- (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
- (ii) the results of the analyses so made, and
- (iii) if the samples were taken by the technician,
 - (A) ...
 - (B) the time when and place where each sample and any specimen described in clause (A) was taken, and
 - (C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

Solicitors:

Solicitors for the appellant: Gaëtan Plouffe and Germain Tremblay, Montréal.

Solicitors for the respondent: LaBrie, St-Onge, Boucher, Huet, Gariépy, Longueuil.

cp/e/qw/qlscl/qlcas

---- End of Request ----

Print Request: Current Document: 1

Time Of Request: Tuesday, February 12, 2008 18:55:00