

R. v. Egger, [1993] 2 S.C.R. 451

Josef Hans Egger

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Egger

File No.: 22816.

1992: October 9; 1993: June 10.

Present: L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Criminal law -- Impaired driving -- Presumption of impairment arising from certificates made following blood test -- Requirement that a sample be available to accused for independent testing -- Accused not receiving notice of existence of sample until day before trial -- What information to be disclosed, and when, for presumption to operate -- Whether accused must request second sample before the presumption available -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C., 1985, c. C-46, ss. 253(b), 255(2), 258(1)(d), (7), 676(1)(a).

Appellant was involved in a traffic accident. Two blood samples were taken in hospital for analysis of blood alcohol level -- one for the police and one for independent analysis by the accused. Some two months after the accident, appellant was charged with two counts of impaired driving causing bodily harm (*Criminal Code*, s. 255(2)) and one "over 80" count (*Criminal Code*, s. 253(b)). At the same time he was served with a Certificate of Analyst (CA) which revealed that he had had four times the statutory limit of concentration of alcohol in his blood at the time the samples were taken. The Certificate of Analyst did not mention the existence of a second blood sample. In the six months between the time he gave blood samples and his trial, appellant neither requested the extra sample of his blood nor applied to any court for its release. The appellant was served with a Certificate of Qualified Technician (CQT) the day before his trial. The CQT stated that the taking of the two samples complied with the *Criminal Code*, and that a second sample was taken to permit an analysis to be made by or on behalf of the accused. The delay in serving the CQT was apparently inadvertent, and the Crown called the technician as a witness at trial. The appellant was acquitted of all counts when the trial judge refused to admit the CQT and the CA into evidence. With that the "over 80" charge fell. The trial judge also dismissed the other two charges for other reasons. The Court of Appeal allowed respondent's appeal and ordered a new trial on all counts.

Two questions arose for determination. First, what must the prosecution disclose to the accused, and when, in order to have the benefit of the presumption that the reading in the CA was the blood alcohol level at the time of the accident? Second, what action, if any, is necessary on the part of the accused to obtain the second sample before the presumption is available?

Held: The appeal should be allowed.

The accused had no notice of the availability of the second blood sample until the CQT was served the day before his trial. The Court of Appeal was not empowered to overturn this finding of fact because the Crown's appeal was limited to questions of law alone by s. 676(1)(a) of the *Criminal Code*. The trial judge's finding was not alleged to be an error of law and was supported by the evidence.

The availability of the presumption and the admissibility as evidence of the CA and CQT, which do not depend on the conditions governing the presumption, are two separate questions. The certificates are admissible if reasonable notice of the intent to produce them and copies of them are given to the accused (s. 258(7)) and they are evidence of the factual allegations therein without formal proof of the authenticity of the documents (s. 258(1)(h)(iii) for the CQT and 258(1)(i) for the CA).

The findings of fact that the appellant was not given reasonable notice of the CQT, that the usual practice of serving it or the Certificate of Qualified Medical Practitioner (CQMP) when the sample is taken was not followed, and that the Crown failed without excuse to execute and serve the certificate well in advance of the trial were all supported in the evidence. It was well within the trial judge's judicial discretion to find that service of the CQT the afternoon before the trial did not in the circumstances constitute reasonable notice as required by s. 258(7).

The CA, which was considered on the heels of the CQT and excluded without any independent ground supporting that exclusion, should have been considered separately. It was served long in advance of the trial and was admissible.

Section 258(1)(d) must be interpreted in light of the accused's right to make full answer and defence and the Crown's duty to disclose all information reasonably capable of affecting the accused's ability to exercise that right. Disclosure must be made early enough to leave the accused enough time to take any steps that may affect that right and should be done before the accused elects a mode of trial or pleads. This obligation to disclose extends to information relevant and necessary for the accused to decide whether or not to take such steps. This requires a determination by the reviewing judge as to whether the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or in making a decision which may affect the conduct of the defence. The Crown bears the burden of justifying its discretion to withhold irrelevant or privileged information.

The statutory presumption in s. 258(1)(d) requires that the accused know the charge against him or her and know of the Crown's analysis evidence and be informed of the existence of a second sample available for independent testing. Neither the CA nor the summons meets this requirement because neither refers to the existence or availability for testing of the second sample. Since a certificate which is often the basis of conviction cannot be cross-examined, the accused's only line of defence is to conduct his or her own test of the sample. The right to a sample must be a meaningful right to be exercised or waived on the basis of relevant basic information.

Although the Crown may be required to retain the second sample beyond the statutory requirement of 3 months and, therefore, the accused might have an alternative remedy under s. 605(1) of the *Code*, this is not a substitute for notice of the second sample with the 3-month period. Such notice would, however, satisfy any production requirements of the Crown to produce after the statutory 3-month period has expired.

The most appropriate and convenient way to notify the accused of the existence of the second sample is by serving the CQT or CQMP. Notice can be effected by other means, however, if it is to the same effect and it is proved in accordance with the criminal standard that the accused was made aware in a timely fashion. (The criminal standard of proof applies because the admission of the evidence, given the effect of the presumption can be conclusive proof of the accused's blood alcohol concentration.) The accused must receive the information with enough time to apply for an order under s. 258(4). The amount of time reasonably necessary to do so is a question of fact. The earlier the information is provided, the better, and in most cases the CQT can be served when the samples are taken. If not served when taken, the CQT, or a notice advising of the availability of the sample for testing, should be given when the summons is served.

The appellant did not have the information reasonably necessary for the informed exercise of his right to obtain the second sample and hence the presumption in s. 258(1)(d) was not available to the Crown.

The presumption is available even if the accused takes no action to obtain the second sample. An interpretation consistent with the legislative intent must be

adopted because the plain and ordinary meaning of s. 258(1)(d)(i) would defeat its legislative purpose which is to give the Crown the benefit of an evidentiary presumption, given certain conditions, in order to facilitate the prosecution of drinking and driving offences. This purpose is inconsistent with making the presumption subject to the caprice of the accused as to whether or not to exercise his or her right to request the second blood sample.

The presumption will not necessarily stand whenever the requisite notice is given, regardless of other circumstances. If the accused is not able to exercise his or her right due to factors beyond his or her control, the application of the presumption may be denied. Being denied the benefit of the presumption clearly, however, does not derail "over 80" prosecutions. It simply requires the Crown to prove them by recourse to the evidential tools on which it would ordinarily have to rely in the absence of the presumption.

The Crown quite rightly did not seek a new trial. In the absence of the presumption in s. 258(1)(d) or expert evidence of metabolic rates and extrapolation to the time of the accident, the CA does no more than provide a blood alcohol reading 2 hours after the accident. Without the presumption there was no evidence supporting the "over 80" count. The Crown, having relied on the presumption which it knew was disputed, could not seek to set aside the acquittal and obtain a new trial in order to permit it to proceed on another basis with new evidence.

Cases Cited

Considered: *R. v. Aujla* (1989), 47 C.C.C. (3d) 481; *R. v. Montgomery* (1992), 70 C.C.C. (3d) 229; *R. v. Corning* (1987), 81 N.S.R. (2d) 53; **referred to:** *R. v. Frizzell* (1971), 5 C.C.C. (2d) 499; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Hackie* (1988), 8 M.V.R. (2d) 222; *Lightfoot v. The Queen*, [1981] 1 S.C.R. 566; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Ward v. The Queen*, [1979] 2 S.C.R. 30; *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *R. v. Appleby*, [1972] S.C.R. 303; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Redmond* (1990), 37 O.A.C. 133; *R. v. Morin*, [1988] 2 S.C.R. 345; *Savard v. The King*, [1946] S.C.R. 20; *Wexler v. The King*, [1939] S.C.R. 350.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Criminal Code, R.S.C., 1985, c. C-46, ss. 253(b) [as am. by R.S.C., 1985, c. 27 (1st Supp.), s. 36], 255(2) [as am. *idem*], 258(1)(d), (7) [as am. *idem*], 676(1)(a) [as am. by *ibid.*, s. 139].

Supreme Court Act, R.S.C., 1985, c. S-26.

Authors Cited

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Pomerance, Renee M. "'Over 80' and Under Scrutiny: Selected *Charter* Issues in Drinking and Driving Cases" (1992), 4 *J.M.V.L.* 121.

APPEAL from a judgment of the Alberta Court of Appeal (1991), 120 A.R. 360, 8 W.A.C. 360, 69 C.C.C. (3d) 97, 32 M.V.R. (2d) 161, allowing an appeal from an acquittal by Reilly Prov. Ct. J. Appeal allowed.

David F. Younggren, for the appellant.

Peter W. L. Martin, Q.C., for the respondent.

//*Sopinka J.*//

The judgment of the Court was delivered by

SOPINKA J. -- This drinking and driving case concerns the availability of the statutory presumption in s. 258(1)(d) of the *Criminal Code*, R.S.C., 1985, c. C-46, that the accused's blood alcohol level at the time a sample of the accused's blood was tested is proof of the accused's blood alcohol level at the time of the alleged offence of driving "over eighty". Section 258(1)(d) imposes several conditions on the availability of the presumption. The present appeal focuses only on some of these, namely what, if anything, must be disclosed to the accused, and when must it be disclosed, before the Crown may rely on the presumption, and whether a request by the accused for the second blood sample (taken at the same time as the sample tested by the prosecution) and its release to the accused are prerequisites for the availability of the presumption.

Facts

On March 24, 1990, the car the appellant was driving was involved in a motor vehicle accident. At the scene of the accident, the police formed the opinion that the appellant was impaired, and demanded samples of his blood for analysis. They did not demand a breath sample because the appellant had some lacerations on

his face and they thought that the presence of blood in the appellant's mouth might affect the accuracy of a breath sample analysis. The appellant agreed to the blood sample demand and was taken to a hospital where a nurse took the blood samples. At the hospital the appellant asked why blood samples were being taken; the investigating constable told him that two blood samples would be taken and that one was for police use while the other was kept for him in case he wanted to analyze it later on. The appellant was not charged with any offence at this time, although the investigating officer told the appellant that he would be charged with impaired driving in due course. The trial judge found, however, that in the circumstances the appellant did not have notice of the retention of the second blood sample, a point to which I shall return later.

On May 22, 1990, some two months after the accident, the appellant was charged with two counts of impaired driving causing bodily harm (*Criminal Code*, s. 255(2)) and one "over 80" count (driving with a blood-alcohol content of more than 80 mg per 100 ml of blood -- *Criminal Code*, s. 253(b)). At the same time he was served with a Certificate of Analyst (CA) which revealed that he had had four times the statutory limit of concentration of alcohol in his blood at the time the samples were taken. The Certificate of Analyst did not mention the existence of a second blood sample.

He was tried on September 21, 1990. In the six months between the time he gave blood samples and his trial, he neither requested the extra sample of his blood nor applied to any court for its release. The appellant was served with a Certificate of Qualified Technician (CQT) the day before his trial. The CQT stated, among other things, that the taking of the two samples complied with the *Criminal*

Code, and that a second sample was taken to permit an analysis to be made by or on behalf of the accused. The delay in serving the CQT was apparently because of inadvertence, and the Crown called the technician (the nurse who had taken the samples) as a witness at trial. The appellant was acquitted of all counts when the trial judge refused to admit the CQT and the CA into evidence. With that the "over 80" charge fell. The trial judge also dismissed the other two charges for other reasons. The respondent's appeal was allowed by the Court of Appeal which ordered a new trial on all counts.

Relevant Statutory Provisions

The statutory presumption that the blood alcohol concentration at the time of testing the blood samples is the same as at the time of driving is found in s. 258(1)(d) of the *Criminal Code*. The provisions in Part VIII of the *Code* dealing with the use of evidence of breath and blood samples are, as McClung J.A. in the court below described, "long, convoluted and in some instances, obscure" (*R. v. Egger* (1991), 120 A.R. 360 (C.A.), at p. 362). Section 258(1)(d) provides as follows:

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),

...

(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, at the request of the accused made within three 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;

Subparagraph (i) refers to the request of the accused, within three months from the taking of the sample, for the release of the second sample. The accused may apply for the release of the sample by right within the three months. Subsection (4) provides:

(4) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction shall, on the summary application of the accused made within three months from the day on which samples of the blood of the accused were taken, order the release of one of the samples for the purpose of an examination or analysis thereof, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the sample and its preservation for use in any proceedings in respect of which it was retained.

The admissibility in evidence of the CA and CQT are unrelated to the availability of the presumption, and are governed by other provisions in s. 258(1).

First, as to the CQT, para. (h) provides:

(h) 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,

...

(iii) a certificate of a qualified technician stating that the technician took the sample and the facts referred to in clauses (i)(B) to (D)

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

Clauses (i)(B) to (D) of para. (h) provide:

(B) at the time the sample was taken, the medical practitioner took an additional sample of the blood of the accused to permit an analysis of one of the samples to be made by or on behalf of the accused,

(C) the time when and place where both samples referred to in clause (B) were taken, and

(D) both samples referred to in clause (B) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed and that are identified in the certificate

Admissibility of the CA is governed by s. 258(1)(i):

(i) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood of the accused that was contained in a sealed approved container identified in the

certificate, the date on which and place where the sample was analyzed and the result of that analysis is evidence of the facts alleged in the certificate without proof of the signature or official character of the person appearing to have signed it.

Finally, the admissibility of both the CA and CQT is made subject to the notification requirement in s. 258(7):

(7) No certificate shall be received in evidence pursuant to paragraph (1) . . . (h) or (i) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate.

Judgments Below

Provincial Court of Alberta, Reilly Prov. Ct. J., September 21, 1990

Reilly Prov. Ct. J. refused to admit into evidence either the CA or CQT because the CQT had been served on the appellant the day before the trial even though the Crown had the opportunity to serve it on him when the samples were taken. Since only the CQT made any mention of the existence of the second sample, the trial judge held that:

. . . [the appellant] has never had the written notice that there is a second sample of blood available for him to test. And I find that that does constitute an abrogation of his right to make full answer in [sic] defence and that the -- that because of that, Exhibit 2 [CQT] is not properly in evidence and neither is Exhibit 3 [CA] because he has not had the background which would allow him the proper opportunity in that regard. And those two items of evidence are ruled then, to be inadmissible.

The trial judge found as a fact that the accused did not have notice of the second sample before being served with the CQT. Although the appellant had been told of the second sample at the hospital, this did not constitute notice due to his injury and disorientation, and the fact that the oral notice was only a conversation among a whole lot of other conversation.

With the exclusion of the CA the "over 80" charge fell because there was no other evidence of the appellant's blood alcohol concentration. Ultimately the appellant was acquitted on all charges.

Alberta Court of Appeal (1991), 120 A.R. 360, McClung, J.A., Kerans and Egbert JJ.A., concurring

McClung J.A. rejected Egger's contention that an application in court by the accused for the second sample was a necessary precondition to the statutory presumption in s. 258(1)(d) of the *Criminal Code*. He held at p. 366 that if the accused were given a right of control over the use of the presumption simply by not requesting the release of one of the samples within three months of their taking, "one suspects that the statutory provisions which guide it might have said so and in explicit terms". McClung J.A. held that such an interpretation went against the legislative intent, and rejected the holding of Lambert J.A. in *R. v. Aujla* (1989), 47 C.C.C. (3d) 481 (B.C.C.A.), that a request by the accused was a prerequisite for the use of the presumption. He concluded at p. 368 that s. 258(1)(d) does not endow the accused with "a silent veto over the later use of certificate evidence arising from the analysis of the first sample".

McClung J.A., at p. 367, rejected as speculation the trial judge's finding of fact that the accused might not have understood the oral notice police gave him concerning the second sample immediately after the accident:

I think the following facts are relevant. Egger was told, after inquiry, of the availability of the second sample for his use or that of his lawyer. The judge speculated that he might not have understood this but Egger did not say that. This all took place on March 24, 1989, [*sic*], at the Calgary General Hospital and before the samples were taken. On May 22, 1990 he was served with a Certificate of Analysis which told him of the results of the analysis as well as its intended use at his trial. That trial took place on September 21, 1990, some four months later, a period within which it was not unreasonable for him to obtain the second sample if he disputed the accuracy of the laboratory analysis of the first sample. Clearly Egger was served with the Certificate of Analysis within the three month window set out in s. 258(1)(d)(i). On the proven facts I do not see that Egger was either unfairly treated (apart from his unnecessary arrest) or left uninformed about what he was facing from the Crown.

Point in Issue

The issue in this appeal is the proper interpretation of subpara. (i) of s. 258(1)(d). As indicated at the outset, two questions arise for determination. First, what must the prosecution disclose to the accused, and when must it do so, in order to have the benefit of the presumption? Second, what, if any, action by the accused to obtain the second sample is necessary before the presumption is available?

Analysis

Before dealing with these questions, two preliminary points should be resolved.

1. *The Appellant Did Not Have Notice of the Second Sample*

The trial judge found as a fact that before the service of the CQT, the appellant did not receive notice so as to make him aware that a second sample was taken which was available for testing by him or on his behalf. The Court of Appeal overturned this finding of fact. It was not empowered to do so, however. The Crown's appeal to the Court of Appeal from the acquittal of the appellant was limited to questions of law alone: *Criminal Code*, s. 676(1)(a). There is no suggestion that the trial judge's finding amounted to an error of law. Since there was evidence which, if accepted, supported this finding, it could not be characterized as speculation. Therefore, I must proceed on the basis that the accused had no notice of the availability of the second sample until the day before his trial.

2. *Availability of the Presumption and Admissibility of the Certificates*

As I observed when setting out the relevant statutory provisions above, the availability of the presumption and the admissibility of the CA and CQT as evidence are two separate questions. The admissibility of the CA and CQT does not depend on meeting the conditions for the presumption. Unfortunately, there appears to be some confusion of the two issues, and this is particularly apparent in the decisions below in the present case. McClung J.A. appears to have equated unavailability of the presumption with inadmissibility of the CQT when he said, at pp. 364-65:

If we were to read s. 258(1)(d)(i) as [counsel for the appellant Egger] urges, the blood samples and evidence of their content, although patently relevant to the case, could not be evidence unless the accused had firstly,

requested release of one of the samples within three months of their taking and, secondly, that the release had been ordered by a court under s. 258(4).

Admissibility of the certificates of analysis and qualified technician, on the contrary, is governed by ss. 258(7), which says that they are admissible if reasonable notice of the intent to produce them and copies of them are given to the accused, and ss. 258(1)(h)(iii) (CQT) and 258(1)(i) (CA) which say that the certificates are evidence of the factual allegations therein without formal proof of the authenticity of the documents.

Notice of the Crown's intention to introduce the CQT, and a copy thereof, were only given to the appellant on the afternoon of the day before the trial. The respondent notes that two days' notice has been held reasonable (*R. v. Frizzell* (1971), 5 C.C.C. (2d) 499 (N.S.C.A.) (dealing with production of a CA in a breathalyser case)). The trial judge held that the appellant was not given reasonable notice of the CQT, and in arriving at this conclusion he stressed the facts that the usual practice of serving the CQT or CQMP at the time the sample is taken was not followed, and that the Crown failed without excuse to use the ample subsequent opportunity to execute and serve the certificate well in advance of the trial. This finding is supported in the evidence and it was well within the trial judge's judicial discretion to find that service of the CQT the afternoon before the trial did not in the circumstances constitute reasonable notice as required by s. 258(7). The trial judge's ruling that the CQT was inadmissible should therefore be restored. This makes no practical difference to the outcome, though, since the qualified technician testified at the trial.

The CA is a different story, however. It was served long in advance of the trial, and there is no reason to doubt its admissibility. The trial judge cited no independent ground for excluding it. Rather, it was excluded directly on the heels of the CQT. The admissibility of the two documents should have been considered separately. Service of the CA four months before the trial constituted, in my view, reasonable notice, and the trial judge thus erred in excluding the CA.

It was necessary for the sake of clarifying the issues to deal with these questions of admissibility at the outset. I must re-emphasize that my holding on the admissibility of the certificate evidence has no influence on the availability of the statutory presumption in s. 258(1)(d), which is the main issue in this appeal and to which I now turn. I will return to the implications of my holdings on admissibility at the conclusion of my reasons.

3. The First Issue: Notice Requirements of Section 258(1)(d)(i)

The Crown submitted that s. 258(1)(d) does not require that the accused be advised in writing or by any other means of the existence of a second sample which is available for independent examination at his or her request within three months of the time the sample was taken. While the accused has the right to production of the sample on request within three months, Crown counsel argued that nothing requires the Crown to tell the accused of this right. The Court of Appeal held that having been charged and served with the CA within the three months, and in light of the other circumstances, the appellant was aware of the Crown's intentions and the presumption was available.

The interpretation of s. 258(1)(d) must be approached keeping in mind the accused's right to make full answer and defence. It must be interpreted, where reasonably possible, in accordance with the principle underlying this Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, that the Crown has a duty to disclose to the accused all information reasonably capable of affecting the accused's ability to make full answer and defence, and to do so early enough to leave the accused adequate time to take any steps he or she is expected to take that affect or may affect such right. This obligation has constitutional underpinnings deriving from s. 7 of the *Canadian Charter of Rights and Freedoms* which reflect

the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. [*Stinchcombe, supra*, at p. 336.]

The Crown's disclosure obligation is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the nondisclosure of which is required by the rules of privilege, or to delay the disclosure of information out of the necessity to protect witnesses or complete an investigation: *Stinchcombe, supra*, at pp. 335-36, 339-40. As was said in *Stinchcombe, supra*, at p. 340, "[i]nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule".

The trial judge reviewing the Crown's disclosure decisions, and by backward extension the Crown itself in exercising its discretion,

should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. [*Stinchcombe*, at p. 340.]

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe, supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

Finally, as to the timing of disclosure, the Court held in *Stinchcombe* that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. The reason for this was that "[t]hese are crucial steps which the accused must take which affect his or her rights in a fundamental way" (at p. 342). This reasoning does not apply just to the fundamental steps of election or pleading, but to any situation in which the accused is expected to take steps which affect or may affect his or her right to make full answer and defence. The Crown's disclosure obligation in such circumstances extends at least to the disclosure of information which is relevant and necessary for the accused to make a decision whether or not to take such steps.

Applying the foregoing principles to the interpretation of the statutory presumption in s. 258(1)(d), the legislation requires, in my view, that the accused have knowledge of the charge against him or her, the analysis evidence upon which

the Crown intends to rely and the existence of a second sample available for testing by him before the presumption becomes available. This holding is a natural extension of the existing case law and is necessary to make the accused's statutory right to demand the second sample meaningful. The statutory right to demand and have production of the second sample is contained in s. 258(1)(d)(i) and (4), reproduced above. The right to obtain the second sample is a reflection of the concern of Parliament both with regard to the potential conclusiveness of this form of evidence and its source. The combined operation of the various statutory provisions relating to impaired driving often results in the conviction of the accused on the basis of several certificates. The basis of these certificates is a body substance emanating from the accused. Since a certificate cannot be cross-examined, the only line of defence is the ability on the part of the accused to conduct his or her own test of the sample. The right to a sample must, therefore, have been intended to be a meaningful right to be exercised or waived on the basis of relevant basic information.

The case law has developed in this direction. In *R. v. Aujla, supra*, the majority of the British Columbia Court of Appeal held that the Crown could not rely on the presumption where, although a Certificate of Qualified Medical Practitioner (CQMP) was served on the accused when the samples were taken, the CA and the summons were not served within three months. The CQMP serves basically the same purpose as the CQT, depending on whether a nurse or a doctor draws the blood samples. Like the CQT, the CQMP states, *inter alia*, that there is a second sample available to the accused. Taggart J.A. held at p. 487 (Toy J.A., concurring) that:

Section 241(1)(d) [258(1)(d)] imposes no obligations on the [accused]. If the person from whom the two samples of blood are taken wishes to have one of them analyzed he must act under s. 241(4) [258(4)]

within three months of the taking of the samples. As I view the matter, his decision to do so must be one made on the basis of information as to what, if any, charges he faces and what, if any, evidence by way of an analyst's certificate is relied on by the Crown as supporting its allegations. Until he has such information he cannot make an informed decision.

In *R. v. Montgomery* (1992), 70 C.C.C. (3d) 229 (Ont. C.A.), the Ontario Court of Appeal agreed with Taggart J.A. In that case the accused was not served with the summons, CA or CQMP within the three-month period and, even though the delay was for compassionate reasons, the Crown was denied the presumption for the following reasons at pp. 237-38:

Given the factual circumstances of this case, as the summary conviction appeal court judge properly concluded, the respondent cannot be said to have received notice either of the charges that had been or were to be brought against him, or of the analyst's certificate in support of those charges upon which the Crown intended to rely as evidence, before the expiration of the period during which the statutory right to production must be exercised.

In my opinion, the respondent was not obliged to decide in advance of such notification whether or not to request a blood sample. At that stage, he had no practical reason to make such a request, and could not reasonably be expected to do so. A decision of this nature will realistically depend on an accused's knowledge of the precise charges he or she faces and the certificate evidence upon which the Crown proposes to rely. The fact that service of the summons or the certificate may have been delayed for compassionate reasons seems to me immaterial in construing provisions of a penal statute which confer rights on an accused that can only be exercised within a specific time period. Since that time period had passed before the respondent in this case was made aware of the charges against him and the certificate evidence upon which the Crown relied, and since he, therefore, was not in a position within the three-month period set by the *Code* to make an informed decision on whether to exercise his right to request production of one of his blood samples, he was effectively denied the opportunity of invoking the procedure required to obtain the mandatory release of the sample to which he was clearly entitled under s. 258(1)(d).

The court rejected the Crown's argument that this holding would place an effective three-month limitation period on "over 80" charges. As the court held in that case, these requirements only affect the availability of the presumption (see pp. 238-39). They do not affect admissibility of the certificate evidence and thus do not preclude the successful prosecution of "over 80" charges in the event that the presumption is unavailable.

The case of *R. v. Corning* (1987), 81 N.S.R. (2d) 53 (C.A.), is not inconsistent with these principles. There the accused was tried within three months, after having been served with the summons, CA and CQT. He argued that the presumption could not arise because the three months in which he could apply for the second sample had not expired and he had not yet requested the sample. That contention was rejected. Putting the facts of the case in terms of the requirements enunciated in the above cases, the accused had notice of the charges and the certificate evidence and thus had the opportunity to make an informed decision. His failure to choose to demand the sample should not deprive the Crown of the presumption, a point which I will discuss further below.

The Court of Appeal in this case did not dispute the correctness of these principles, but actually cited them with approval. McClung J.A. held that the presumption's notification conditions were satisfied in this case, in that the appellant was served with the summons and the CA within the three-month period and that in any event he did have actual knowledge of the availability of the second sample by virtue of his discussion with the constable at the hospital. As I have held that the trial judge's finding that the appellant did not have notice of the second sample should not be disturbed, the question is reduced to whether notice of the charges and

the analyst's certificate within the three months is sufficient to allow the Crown the benefit of the statutory presumption.

I conclude that service of the CA and notice of the precise charges are not exhaustive of the notice requirements under s. 258(1)(d). The rationale behind the holdings in *Aujla* and *Montgomery, supra*, is that the accused must have sufficient information to make an informed decision as to the exercise of the right to demand the second sample. In *Aujla* the accused had already been served with the CQMP so the issue of the effect of absence of notice of the second sample did not arise. In *Montgomery*, none of the relevant information had been communicated to the accused, and the failure to serve the CA and summons was a sufficient ground for the holding in that case. Neither case precludes, in my view, holding that the accused must know that there is a sample available to him or her in order to exercise his or her right intelligently. Indeed, such knowledge is basic to the right: how can the accused make an informed decision without knowledge of the existence of the very thing to which he or she has a right of access? If the accused is unaware of the existence of the sample, the very purpose of his or her statutory right -- to give him or her the benefit of independent analysis is, as the appellant submits, thwarted.

What is required, then, for the presumption of the blood alcohol level at the time of driving to arise (subject to satisfaction of the other conditions spelled out in s. 258(1)(d)), is that the accused have notice within the three-month window that he or she is charged with an impaired driving offence, that the Crown has had a sample of the accused's blood analyzed and that a second sample was taken and is available to permit an analysis of it by or on behalf of the accused. To put it more simply, the accused must have notice that a second sample is available for testing

and that there is reason (consisting in the jeopardy of criminal charges and the results of the Crown's blood sample analysis) to obtain it. Service of the CA and summons do not meet this requirement because neither document refers to the existence or availability for testing of the second sample.

This is consonant with the Crown's disclosure obligation as enunciated in *Stinchcombe, supra*. The existence and availability for testing of the second sample is clearly information that is reasonably capable of being used to test the Crown's case. Indeed, in this type of case, it is a statutory substitute for the right which would otherwise exist to cross-examine an expert witness. The accused is placed in a situation in which he or she is expected to take steps which affect or may affect his or her right to make full answer and defence: within the three-month period the accused may demand production as of right of a blood sample which may provide evidence to rebut the presumption in s. 258(1)(d). Moreover, an interpretation of the legislation favouring early disclosure of the availability of the sample is consistent with another point made in *Stinchcombe, supra*, at p. 334: in a significant portion of cases, access to the second sample will save time and expense by demonstrating the strength or weakness of the Crown's case and encouraging guilty pleas or withdrawal of charges, as the case may be.

Furthermore, it was suggested in argument that the accused's right to make full answer and defence might be irreparably prejudiced if the accused were not notified of the existence of the second sample before the three months pass by, since after that time the Crown may destroy the samples: *Corning, supra*, at p. 54. The *Code* only requires the second sample to be retained for three months, after which time the accused does not have a statutory right of access to it and there is no

further statutory obligation to retain it. There may, however, be an obligation to retain the sample beyond the three-month period based on the disclosure requirement resulting from *Stinchcombe* referred to above. Accordingly, if the sample is retained for a longer period, the accused may be able to move for production of it in the discretion of a judge under s. 605(1) of the *Code*, which allows for the release of exhibits for examination and testing: see, e.g., *R. v. Hackie* (1988), 8 M.V.R. (2d) 222 (Man. Prov. Ct.). An ordinary production request or an application for *Charter* relief may also be available. This does not mean that these alternative remedies can be relied on by the Crown as a substitute for notice of the second sample. In this regard, I would adopt the reasoning of Robins J.A. in *Montgomery, supra*, at p. 238, with respect to the significance on the rights of the accused of other remedies:

While the respondent is not necessarily without a remedy once the three-month period expires, s. 258(1)(d)(i) and (4) provide a summary procedure by which he, as a person from whom blood samples have been lawfully taken, may obtain mandatory production of a sample to allow for independent examination or analysis. He was entitled to avail himself of the procedure established by these sections for the benefit of an accused charged under s. 253, and was not required to resort to other means in order to obtain the sample to which he was statutorily entitled.

If an accused is given timely notice of the existence of a second sample, as provided in these reasons, absent special circumstances, any disclosure requirement based on *Stinchcombe* would be satisfied and failure on the part of the accused to exercise the right to request production within the three-month period would foreclose any complaint that the prosecution was unable to produce the sample by reason of its destruction following the expiry of the three-month period.

With respect to the requirement to notify the accused within the three-month period of the existence of the second sample, the most appropriate and convenient way to notify the accused is by service of the CQT (or CQMP, as the case may be), which states that the qualified technician "took an additional sample of the blood of the said person to permit an analysis of one of the samples to be made by or on behalf of this person" (to quote from the CQT the appellant received). I would note that in this case the investigating constable testified that the usual practice is to fill out and serve the CQT on the person at the hospital when the samples are taken, and that this practice was not observed because there were no blank certificates available. I would not rule out notice by other means so long as it is to the same effect and it is proved in accordance with the criminal standard that the accused was made aware in a timely fashion. Indeed, it has been established in the breathalyser jurisprudence that entitlement to the presumption does not depend on using the CQT but may still arise when the technician gives oral testimony to the same effect (*Lightfoot v. The Queen*, [1981] 1 S.C.R. 566, at pp. 568-69, 575). In such circumstances, no CQT may exist and notice must be given by means other than service of the CQT.

I have referred to the fact that the criminal standard of proof applies. When notice is given by means of service of the CQT, there will usually be no difficulty in meeting this standard. It may assume greater significance in a case such as this in which notice is alleged to have been given orally or by means other than service of the CQT. While proof on a balance of probabilities is an acceptable standard in deciding a preliminary question of fact with respect to the admissibility of evidence (see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, the general rule with respect to determination of vital issues in the criminal process requires proof beyond a

reasonable doubt. See *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 415. The issue here is very different from a question of admissibility of evidence. The effect of satisfying the burden of proving preliminary facts to the admissibility of evidence is only that the evidence is admitted: it determines neither the weight of the evidence nor the guilt of the accused. This occurs in the next step in the process during which the Crown must satisfy its legal burden. When admission of the evidence may itself have a conclusive effect with respect to guilt, the criminal standard is applied. This accounts for the application of this standard with respect to the admission of confessions (see *Ward v. The Queen*, [1979] 2 S.C.R. 30, at p. 40, *per* Spence J., for the Court, and *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at pp. 670, 674-75, *per* Martland J., for the majority, and at p. 696, *per* Lamer J. (as he then was), concurring). Establishing the facts which trigger a presumption with respect to a vital issue relating to innocence or guilt is a step further advanced than the admissibility of evidence and is only reached after crossing the hurdle of admissibility. The effect of the presumption in this case is to provide conclusive proof of the accused's blood alcohol concentration at the critical time, in the absence of evidence to the contrary. This conclusion respecting the application of the criminal standard is supported by the view which has been taken relating to the presumption which arises by virtue of s. 258(1)(a). In *R. v. Appleby*, [1972] S.C.R. 303, confirmed in this regard by *R. v. Whyte*, [1988] 2 S.C.R. 3, *per* Dickson C.J., at p. 13, it was accepted that "[t]he presumption was included to allow the Crown to prove care or control by proving beyond a reasonable doubt that the accused occupied the driver's seat".

As to timeliness of the notice, the accused must receive the information with enough time to exercise the right. In practical terms this means that the accused

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must receive it in time to apply for an order under s. 258(4). The amount of time reasonably necessary to do so is a question of fact that does not arise in this case. Without derogating from this statement, I make the following additional comments in order to simplify proof and to avoid unnecessary factual disputes. The earlier the information is provided, the better, and in most cases there will be no obstacle to serving the CQT at the time the samples are taken, which accords with standard practice in some jurisdictions. If the CQT is not served when the samples are taken, then the CQT, or a notice advising of the availability of the sample for testing, should be given when the summons is served.

Applying the above reasoning to this case, the appellant did not have the information reasonably necessary for the informed exercise of his right to obtain the second sample and hence the presumption in s. 258(1)(d) was not available to the Crown.

4. *The Second Issue: Demand by the Accused*

The appellant submits in the alternative that Lambert J.A., in *Aujla*, *supra*, (alone in taking this position) was right to hold that the presumption is not available unless a court has ordered the release of the second sample at the request of the accused made within the three-month period: *Aujla*, *supra*, *per* Lambert J.A., at p. 490. This submission must, in my opinion, fail. The language of s. 258(1)(d)(i) is problematic in this regard. To repeat the subparagraph for convenience, it provides:

258. (1) . . .

(d) . . .

(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, at the request of the accused made within three months from the taking of the samples, one of the samples was ordered to be released pursuant to subsection (4)
. . . .

It has been observed that this provision is "at best, poorly drafted, and at worst, potentially out of [harmony] with the legislative framework in which it appears": Renee M. Pomerance, "'Over 80' and Under Scrutiny: Selected *Charter* Issues in Drinking and Driving Cases" (1992), 4 *J.M.V.L.* 121, at p. 167. Indeed, this is a case where the plain and ordinary meaning of a portion of the statutory language would defeat the legislative purpose and therefore, an interpretation consistent with the legislative intent which goes against the literal meaning of the statute must be adopted.

The structure of s. 258(1)(d)(i) suggests that there are three requirements for the presumption to arise (ignoring for the moment the requirements in the other subparagraphs):

1. at the time the sample was taken, the person taking the sample took an additional sample, AND
2. one of the samples was retained to permit an analysis thereof by or on behalf of the accused, AND

3. at the request of the accused made with the three month period, one of the samples was ordered to be released pursuant to subs. (4).

This is not a case of ambiguity, as the appellant contends in the alternative. The meaning is clear, and it is just as clear that this meaning frustrates the purpose of the legislative scheme enacted by the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19. I would adopt McClung J.A.'s holding in the court below that the principal objective of the legislative scheme for the gathering and receipt of blood and breath sample evidence is to facilitate, with appropriate safeguards, the admission of the evidence and not to exclude it. At a more basic level, the intent of the legislative reforms of 1985, which introduced the provision currently under consideration, was to allow the more effective prosecution of drunk driving offences. The legislation should be given a reasonable interpretation in line with the legislative intent. If the plain meaning of the words of subpara. (i) were given effect, the accused would always be in a position to deprive the Crown of the evidentiary advantage the legislation intended to give it, and every well advised accused would do just that by choosing not to demand a sample. The accused would, in effect, be given a "silent veto" over the Crown's use of the statutory presumption.

In my view, this legislation fits into the principle of construction enunciated by Professor Elmer A. Driedger in the following terms in *Construction of Statutes* (2nd ed. 1983), at p. 105:

. . . If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, . . . then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

The purpose of s. 258(1)(d) is to give the Crown the benefit of an evidentiary presumption where certain conditions are met in order to facilitate the prosecution of offences which involve driving while under the influence of alcohol. Such a purpose is inconsistent with making the presumption subject to the caprice of the accused. Even Lambert J.A., the sole authority relied on by the appellant in this regard, recognized that his interpretation may not have been intended by Parliament (*Aujla, supra*, at p. 490). I would agree with one commentator's remarks in a comment on *Aujla, supra*, that

such an interpretation would obviously render nugatory the purpose of the legislation. To put it shortly, if compliance with s. 258(1)(d)(i) is dependent upon accused persons requesting production of their blood samples, one may query what would motivate an accused to do so. [Rick Libman, Annotation -- *R. v. Aujla* (1989), 13 M.V.R. (2d) 276, at p. 279.]

The interpretation most in line with the objective of the legislation and the Crown's disclosure obligations is that arrived at in the previous section of these reasons, namely that the accused must have notice of the existence and availability of the second sample to permit reasonable time for an informed choice as to the exercise of the right to demand production of the sample. Requiring positive action by the accused to exercise this right before the statutory presumption becomes available would further neither the legislative intent nor the accused's right to make full answer and defence. Nor would it help to enforce the Crown's disclosure obligation since that is accomplished by notifying the accused of the existence and availability of the sample. Under the interpretation that I propose, the availability of the presumption would be tied (as the reference to the right in the subparagraph appears to indicate) to the accused's opportunity to exercise his or her right, without being hamstrung by it.

One might object that this allows the presumption to stand whenever the requisite notice is given, regardless of other circumstances making the accused's right meaningless. This is not necessarily the case. To give one example, in *R. v. Redmond* (1990), 37 O.A.C. 133 (C.A.), the blood samples were accidentally destroyed before the accused requested production of one of them. The Court of Appeal quite rightly denied the Crown the benefit of the presumption. That was a situation where the accused could not exercise his right because of factors out of his control, and the court can always step in to deny the application of the presumption in such circumstances. The result in *Redmond, supra*, was that the Crown was required to adduce *viva voce* expert testimony extrapolating the accused's blood alcohol concentration and level of impairment at the time of driving. Being denied the benefit of the presumption clearly does not derail "over 80" prosecutions. It simply requires the Crown to prove them by recourse to the evidential tools on which it would ordinarily have to rely in the absence of the presumption. As the Ontario Court of Appeal held in *Montgomery, supra*, at pp. 238-39:

While the Crown may lose the evidentiary advantage of the presumption in s. 258(1)(d) and be precluded from using certificate evidence of the result of the analysis as proof of the concentration of alcohol in an accused's blood at the time the offence was allegedly committed, the Crown remains free to prove the accused's guilt through *viva voce* evidence. [Emphasis added.]

5. *Implications for this Case*

The result of this analysis is that the Crown was not entitled to the benefit of the presumption in s. 258(1)(d) because it was not established on the facts, on the criminal standard, that the appellant had received notice within the time reasonably

necessary for him to make an informed decision as to the exercise of his right to demand the second blood sample, of the charges facing him, the results of the Crown's blood sample analysis, and the existence and availability of the second sample for testing by him. On this basis, the appeal should be allowed. The respondent Crown did not ask for a new trial in the event that this Court found that it was disentitled to the presumption in s. 258(1)(d). Without the benefit of the presumption, there was no evidence supporting the "over 80" count. The trial judge found that the evidence on the other counts was insufficient to establish impairment beyond a reasonable doubt. Although I have concluded that the trial judge improperly excluded the CA, this did not affect the result. In the absence of the presumption or expert evidence of metabolic rates and extrapolation to the time of the accident, the CA does no more than provide a blood alcohol reading two hours after the accident.

In the circumstances, the respondent Crown was quite right in not seeking a new trial. In this respect, this Court is guided by the provisions of s. 45 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, which provides that when an appeal is not dismissed, we are entitled to make the order that the court appealed from ought to have made. In this case, the Court of Appeal ought to have found that the presumption did not apply. It properly found that it was error to exclude the CA. In the state of the record, could the Court of Appeal set aside the acquittal and direct a new trial? In this regard, it was bound to apply the principle expressed in *R. v. Morin*, [1988] 2 S.C.R. 345. At page 374, the majority judgment states:

The onus resting on the Crown when it appeals an acquittal was settled in *Vézéau v. The Queen*, [1977] 2 S.C.R. 277. It is the duty of the

Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.

I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.

As I have explained above, without the aid of the presumption, the Crown has no case and therefore the accused would be necessarily acquitted. The Crown, having relied on the presumption which it knew was disputed, could not seek to set aside the acquittal and obtain a new trial in order to permit it to proceed on another basis with new evidence. See *Savard v. The King*, [1946] S.C.R. 20, at p. 49, and *Wexler v. The King*, [1939] S.C.R. 350, at p. 353.

Disposition

The appeal is therefore allowed, the judgment of the Court of Appeal is set aside and the verdicts of acquittal entered by the trial judge on all counts are restored.

Appeal allowed.

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Solicitor for the respondent: The Office of the Attorney General for Alberta, Calgary.

