

While reading through legal blogs, I happened upon a post analysing the recent decision of the Supreme Court in *R v Cyr-Langlois*, 2018 SCC 54 [*Cyr-Langlois*]. The case deals with an impaired driving charge and the presumption of reliability of breathalyser results. The blog post that I read, written by Nora Parker, reviews both the majority and dissenting reasons, and ultimately favours the dissent, asserting that the majority was too brief in its reasons and failed in addressing the larger issues that were at stake in the appeal.<sup>1</sup> As I had recently written on the topic of impaired driving laws, my interest was piqued, and I proceeded to read *Cyr-Langlois* for myself.

*Cyr-Langlois* is a fascinating case. I strongly recommend reading it. While it appears simple on its face, it is deceptively complex and technical. What should have been a simple decision became a legal quagmire that even the Supreme Court was unable to navigate without a dissent. It is one of a group of Supreme Court judgements that have significant implications for the adjudication of impaired driving charges, a topic that is all the more relevant with cannabis legalization. Best and most amusingly of all, the entire case revolves around the possibility that the accused *might* have burped. In the post that follows, both sides of the case are examined in further detail. I then provide my own argument rejecting the position forwarded by the dissent, and by extension the concern that the majority decision calls into question larger issues of the presumptions of reliability and innocence.

I would direct you to Parker's post for a detailed and comprehensive review of the facts in *Cyr-Langlois* (see link in footnotes). For our purposes, the relevant facts are as follows: Mr Cyr-Langlois was arrested on suspicion that he had been driving while over the legal limit for blood alcohol content. He was taken to the police station for the administration of a breathalyser test. Prior to testing, he was put into a room adjacent to the testing room. There was a window between

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<sup>1</sup> Nora Parker, "R v *Cyr-Langlois*: What Does It Take to Rebut the Presumption of Reliability for Breathalyzer Tests?" (13 December 2018), *the Court* (blog), online: <<http://www.thecourt.ca/r-v-cyr-langlois/>>.

the two rooms.<sup>2</sup> Cyr-Langlois was left alone to contact counsel and was observed by an officer through the window. Evidence given by the breathalyser technician revealed that observation of the accused was not continuous during this period of time.<sup>3</sup> Two tests were then administered, with about 20 minutes in between tests, resulting in the accused blowing 157 mg and 148 mg, respectively.

Breathalyser procedure stipulates that a subject be observed for 15-20 minutes prior to test administration because certain events, such as the subject burping, might distort the results of the test. Cyr-Langlois argued that the police could not know whether he burped during the time that he went unobserved, and so their failure to observe him continuously constituted improper operation of the breathalyser test that cast doubt on the reliability of results.<sup>4</sup> The central issue at all levels was whether this raised a reasonable doubt sufficient to rebut the presumption of reliability of breathalyser results imposed under the *Criminal Code*.<sup>5</sup> Ultimately, a majority of the Supreme Court found that it was not, because the defense raised by Cyr-Langlois was entirely speculative, and some degree of factual evidence as to the occurrence of a distorting event would have been needed.<sup>6</sup> Justice Côté wrote a dissent, arguing amongst other things that the reasoning of the majority has the effect of raising the burden that an accused has to meet in rebutting the presumption of reliability imposed by the *Criminal Code*.<sup>7</sup>

In order to rebut the presumed reliability of breathalyser results, an accused must:

- i) adduce evidence relating directly to the malfunctioning or improper operation of the instrument, and;
- ii) establish that this defect tends to cast doubt on the reliability of the results.

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<sup>2</sup> *R v Cyr-Langlois*, 2018 SCC 54 at para 6-7 [*Cyr-Langlois*].

<sup>3</sup> *Ibid* at para 9.

<sup>4</sup> *Ibid* at para 8, 18.

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46, s 258(1)(c).

<sup>6</sup> *Cyr-Langlois*, *supra* note 2 at para 14.

<sup>7</sup> Parker, *supra* note 1.

The majority took the view that each of these conditions has a theoretical and a practical element that must be made out. It was the second condition that was at issue in this case. The theoretical element of this condition is met where the accused proves that the purpose of a procedure is to ensure the reliability of results, while the practical element is met by establishing that the defect in procedure in this case could have affected the reliability of the results.<sup>8</sup>

Given the above test, the majority found that “there was clearly no evidence that this improper operation tended to cast doubt on the reliability of the results”.<sup>9</sup> As stated above, the argument of the accused was that the failure of the police to observe him continuously cast doubt on the reliability of the results because the police may not have noticed him burp, which could have disrupted the test results. The majority found this argument to be entirely hypothetical and speculative. While they acknowledge that it is irrelevant “whether the possible impact on reliability is inferred from the actual nature of the defect, from the extent of the defect or from other external circumstances”, the possibility that the defect affected the results must still be serious enough to raise a reasonable doubt.<sup>10</sup> Given the evidence at bar, the majority found that the accused would have had to present evidence relating more concretely to the facts in issue in order to meet this burden.<sup>11</sup>

Justice Côté’s issue with the reasoning of the majority was essentially that the practical element of the rebutting test effectively imposes an obligation on the accused to show that improper operation of the breathalyser in fact led to an inaccurate result.<sup>12</sup> This is inconsistent with the Supreme Court’s prior ruling in *R v St-Onge Lamoureux*, 2012 SCC 57 that requiring an accused to demonstrate “a connection between the deficiency and the results indicating a blood alcohol level

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<sup>8</sup> *Cyr-Langlois*, *supra* note 2 at para 4.

<sup>9</sup> *Ibid* at para 5.

<sup>10</sup> *Ibid* at para 16.

<sup>11</sup> *Ibid* at para 14.

<sup>12</sup> *Ibid* at para 22, 35.

exceeding the legal limit” was an unjustifiable infringement on the presumption of innocence.<sup>13</sup> On Justice Côté’s view,

“...where the evidence tends to show — on the reasonable doubt standard — that the malfunctioning or improper operation of the breathalyser increased the possibility of an inaccurate result, then reliability is affected and the accused has met his or her burden. The accused does not have to tender additional evidence in order to directly raise a reasonable doubt about the accuracy of the results on the facts of the case. In practice, it will be sufficient to adduce evidence tending to show that a recommended procedure was not faithfully followed and that the purpose of the procedure is to ensure the reliability of the results.”<sup>14</sup>

After reading the case and carefully considering the arguments raised, I find that I must respectfully disagree with Justice Côté. On my view, the majority got it right. While Justice Côté’s dissent is both thoughtful and thorough, it fundamentally misconstrues the reasoning of the majority and accepts any doubt, however slight, as a reasonable doubt. Furthermore, even if Cyr-Langlois’ argument is accepted, it not tend to cast doubt on the reliability of the test results, based on the evidence at bar.

Firstly, it is incorrect to say that the majority imposes a requirement on the accused to demonstrate factual inaccuracy of the breathalyser results, as Justice Côté asserts. The majority rejected Cyr-Langlois’ defence because no evidence was led that a result-disrupting event (a burp in this case) had actually occurred. In most cases of procedural or technical failure that can be envisioned, there is a direct link between that failure and the reliability of the test result. For example, in a situation where officers fail to calibrate a breathalyser prior to testing, there is a direct link between the procedural failure (not calibrating) and the possibility that the result might be unreliable. The failure to calibrate in itself may induce an unreliable result, meaning that that the procedural failure is itself the result-disrupting event. In the present case however, there is no direct link, which is what makes Cyr-Langlois’ defence peculiar. The failure to observe the accused

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<sup>13</sup> *Ibid* at para 35.

<sup>14</sup> *Ibid* at para 37.

continuously is not the potential result-disrupting event, the burp is. Thus, there is no necessary link between the failure to continuously observe and the increased possibility of an unreliable result. Such a link is required by the test set out in *St-Onge Lamoureux*. That the test explicitly qualifies the obligation to prove a defect by adding to it that said defect must tend to cast doubt on the reliability of the results indicates that proof of a defect alone is not necessarily sufficient to meet the requisite standard.

Had the accused led evidence that he had burped, and then been required by the court to lead further evidence that the breathalyser results were in fact inaccurate because of the burp, then Justice Côté's characterisation of the majority's decision would be accurate. As it is, however, the majority is merely requiring the accused to demonstrate the occurrence of a defect *that tends to cast doubt on the reliability of the breathalyser results*, per the test established in *St-Onge Lamoureux*. This just so happens to be a rare case where the procedural defect in question is not one which is inherently disruptive of the reliability of the test.

The nature of Cyr-Langlois' defence must also be kept in mind: it was doubly uncertain. A reasonable doubt could well have been raised if the accused had only asked the court to consider the strength of the possibility that a burp might affect the reliability of the test result. However, in this case the occurrence of the burp itself was also in doubt. Evidence was not led by Cyr-Langlois that he had in fact burped when officers were not looking. He argued only that he could have, *and if he had*, then it may have disrupted the breathalyser results. Thus, in considering whether a reasonable doubt was raised, the court had to consider not only how possible it was that a burp could disrupt test results, but also that the burp may not even have occurred.

It is well established that a reasonable doubt is something less than an absolute doubt in the guilt of an accused. However, "reasonable" implies that the standard has a floor as well as a ceiling. Just as I need not necessarily believe the testimony of the accused in order to form a reasonable

doubt as to his/her guilt, it also follows that not just any doubt raised will be sufficient. Otherwise, any possible alternative advanced by an accused in his/her defence would be grounds for an acquittal, no matter how unlikely. I have to agree with the majority that Cyr-Langlois' defence was simply not one that met the minimum standard required to establish a reasonable doubt. Essentially, his argument was that it is possible that he could have burped, though he does not assert that he did, and that if he had then this could have rendered the test results unreliable. There are simply too many "ifs" involved: the defence is too remote.

Even if this defence is accepted, and it is assumed that the accused did in fact burp when police were not looking, the evidence indicates that this could only have affected the first test, not the second. The testimony of the breathalyser technician, which both sides relied upon, was that the procedure is to observe a subject for 15 – 20 minutes prior to testing in order to ensure result reliability.<sup>15</sup> This procedure necessarily implies that an event such as burping will not disrupt test results if it occurs more than 20 minutes prior to administration, otherwise the observation period would be longer. The evidence indicates that the second test was administered to Cyr-Langlois 22 minutes after the first, and that he was observed continuously between the tests.<sup>16</sup> Therefore, at the time of the second test, the result-disrupting effect of any burp that may have occurred when the accused went unobserved would no longer have been felt. Even if a burp had occurred, and if it had in fact affected the testing, it could only have affected the first test, not the second, and the second one still indicated that Cyr-Langlois was significantly over the legal limit. Therefore, even if Cyr-Langlois' argument is accepted, and all assumptions are made in his favour, this argument still fails to cast doubt on the reliability of test results.

Thus, I am not persuaded by the dissent written by Justice Côté, nor by Parker's assertion that the majority overlooked the wider implications of their decision. While Justice Côté's dissent is

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<sup>15</sup> *Ibid* at para 8.

<sup>16</sup> *Ibid* at para 7.

thoughtful and well written, it seems to me to rest on a fundamental misapprehension of the majority's reasoning and an overly broad interpretation of what constitutes a reasonable doubt. The evidence also does not bear support the argument of the accused, even if that argument is accepted. For the above reasons, I do not think that this decision raises the burden that must be met by accused in rebutting the presumed reliability of breathalyser tests, nor does it call into question larger issues of the presumptions of reliability and innocence raised in the dissent. It is, without a doubt, a tricky case. However, if read in its proper context and with an eye to the legal and factual subtleties at play, it is entirely consistent with established Supreme Court jurisprudence.