



SUPREME COURT OF CANADA

CITATION: R. v. Dineley, 2012 SCC 58

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BETWEEN:

Samuel Dineley

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Canada and Attorney General of Quebec

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Deschamps J. (LeBel, Fish and Abella JJ. concurring)
(paras. 1 to 26)

DISSENTING REASONS: Cromwell J. (McLachlin C.J. and Rothstein J. concurring)
(paras. 27 to 81)

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R. v. DINELEY

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Indexed as: R. v. Dineley

2012 SCC 58

File No.: 33640.

2011: October 13; 2012: November 2.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law — Defences — “Carter defence” — Accused charged with impaired driving and driving “over 80” — Amendments brought to Criminal Code during accused’s trial limiting evidence that may be adduced in defence to raise doubt about reliability of breathalyzer test results — Whether Carter defence available to accused — Whether amendments have retrospective effect to time of alleged offences — Whether amendments affect procedural or substantive rights — Criminal Code, R.S.C. 1985, c. C-46, ss. 258(1)(c), 258(1)(d.01) — Tackling Violent Crime Act, S.C. 2008, c. 6.

Legislation — Interpretation — Effect of new legislation — Amendments brought to Criminal Code during accused’s trial limiting evidence that may be adduced in defence to raise doubt about reliability of breathalyzer test results — Whether amendments have retrospective effect to time of alleged offences — Whether amendments affect procedural or substantive rights — Whether Parliament provided for preservation of evidence for cases that began before amendments came into force — Criminal Code, R.S.C. 1985, c. C-46, ss. 258(1)(c), 258(1)(d.01) — Tackling Violent Crime Act, S.C. 2008, c. 6.

D was involved in a motor vehicle incident, following which he was asked to submit to breathalyzer tests. The instrument registered 99 and 97 mg of alcohol per 100 ml of blood. D was charged with impaired driving and driving with a blood alcohol level over the legal limit of 80 mg of alcohol in 100 ml of blood.

At the beginning of D's trial, counsel for D advised the judge that he intended to tender a toxicology report in order to challenge the accuracy of the breathalyzer test results — what is known as a *Carter* defence. Crown counsel wished to cross-examine the toxicologist on his report, but the latter was not present and the trial was accordingly adjourned. Following the adjournment but prior to the resumption of D's trial, amendments to the *Criminal Code* were enacted, the effect of which is to eliminate the *Carter* defence as an independent means to raise a doubt about the reliability of breathalyzer test results.

The trial judge accepted the *Carter* defence adduced by D and entered an acquittal. The summary conviction appeal judge upheld that decision concluding that the new legislative provisions virtually eliminated the *Carter* defence, that they were substantive in nature and not procedural, and that they therefore applied only prospectively. The Court of Appeal reversed that decision and held that the new legislative provisions were merely evidentiary and that they therefore applied to the case. A new trial was ordered to proceed on the basis of s. 258(1) of the *Criminal Code* as amended.

Held (McLachlin C.J. and Rothstein and Cromwell JJ. dissenting): The appeal should be allowed and the acquittal restored.

Per LeBel, **Deschamps**, Fish and Abella JJ.: Courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where new legislative provisions affect either vested

or substantive rights, retrospectivity has been found to be undesirable. The key task in determining the temporal application of new legislative provisions lies not in labelling the provisions “procedural” or “substantive”, but in discerning whether they affect substantive rights.

The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected. As a result of the amendments to the *Criminal Code* and the decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57, the only evidence that can be tendered to raise a reasonable doubt about the reliability of breathalyzer test results is now evidence that the instrument was malfunctioning or was operated improperly. The *Carter* defence has been eliminated as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results. This illustrates that the amendments to the *Criminal Code* are not merely procedural; they affect a defence open to an accused and are therefore subject to the presumption against the retrospective application of new legislation.

The broad scheme put in place by Parliament is based on presumptions that the results of the breathalyzer analyses are accurate and that they are identical to the blood alcohol level of the accused at the time of the alleged offence. As discussed in *St-Onge Lamoureux*, these statutory presumptions infringe the constitutionally protected right to be presumed innocent. The conclusion that the infringement is justified in the context of the new legislation does not alter the fact that constitutional

rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply.

Finally, where the former legislation does not contemplate the gathering of evidence that is required by the new legislation, the new legislation can only be prospective.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ. (dissenting): There are three principles of statutory interpretation that are potentially relevant to the issue of when new legislative provisions apply. One principle is that the legislature is presumed not to intend legislation to change the legal character or consequences of actions that occurred before its enactment. Another is that the legislature is presumed not to intend to interfere with vested rights. A third is that the legislature intends an enactment dealing with exclusively procedural matters, including matters of evidence, to apply immediately to all proceedings, whether commenced before or after the enactment comes into force. The principal question in this case is whether the new legislative provisions at issue are procedural or substantive.

The new legislative provisions in issue meet all of the tests enunciated in the Court's jurisprudence for determining whether a provision is procedural and they have none of the characteristics of provisions which are properly characterized as substantive. The provisions deal with factual presumptions and what is required to

rebut them, and their operation is dependent on the existence of litigation. Evidentiary provisions like these are ordinarily considered to be procedural. Moreover, the provisions have none of the hallmarks of substantive provisions. They do not attach new consequences to past acts or change the substantive content of a defence, nor do they change the existence or content of a right. The elements of the offence have not changed and it remains open to the accused to point to evidence raising a reasonable doubt about the existence of those elements. The provisions do not make conduct unlawful that was lawful at the time it occurred. In addition, the fact that a provision is found to limit an accused's right to be presumed innocent under s. 11(d) of the *Charter* does not support the conclusion that the provision is substantive.

The new provisions do not eliminate or neuter a defence. The so-called “*Carter* defence” in reality is a particular type of evidence adduced in order to raise a reasonable doubt. If these provisions are characterized as taking away a defence, then any evidentiary provision that increases the risk of conviction would have to be so characterized. The jurisprudence of this Court makes clear that this is not the case.

The new provisions accordingly relate only to the rules of evidence which apply at trial and they are therefore purely procedural. As such, these new provisions are subject to the presumption of immediate application, and there is nothing to rebut this presumption.

Cases Cited

By Deschamps J.

Referred to: *R. v. St-Onge Lamoureux*, 2012 SCC 57; *R. v. Carter* (1985), 19 C.C.C. (3d) 174; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *R. v. Gervais* (1978), 43 C.C.C. (2d) 533; *R. v. Ali*, [1980] 1 S.C.R. 221; *R. v. Loiseau*, 2010 QCCA 1872, [2010] Q.J. No. 10487 (QL).

By Cromwell J. (dissenting)

R. v. Crosthwait, [1980] 1 S.C.R. 1089; *R. v. St. Pierre*, [1995] 1 S.C.R. 791; *R. v. Carter* (1985), 19 C.C.C. (3d) 174; *R. v. St-Onge Lamoureux*, 2012 SCC 57; *R. v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349; *R. v. Monney*, [1999] 1 S.C.R. 652; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306; *West v. Gwynne*, [1911] 2 Ch. 1; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530; *Ciecierski v. Fenning*, 2005 MBCA 52,

195 Man. R. (2d) 272; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Moon v. Durdan*, [1848] 2 Ex. 22, 154 E.R. 389; *Midland Railway Co. v. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419; *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553; *Martin v. Perrie*, [1986] 1 S.C.R. 41; *The Ydun*, [1899] P. 236; *Republic of Coast Rica v. Erlanger*, [1876] 3 Ch. D. 62; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548; *R. v. Gervais* (1978), 43 C.C.C. (2d) 533; *R. v. Taylor* (1876), 1 S.C.R. 65; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038; *R. v. Puskas*, [1998] 1 S.C.R. 1207; *R. v. Ali*, [1980] 1 S.C.R. 221; *R. v. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. v. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. v. Loiseau*, 2010 QCCA 1872, [2010] Q.J. No. 10487 (QL).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).

Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(a), (b), 258(1)(c), (d.01).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44.

Tackling Violent Crime Act, S.C. 2008, c. 6.

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Roubier, Paul. *Le droit transitoire: conflits des lois dans le temps*, 2^e éd. Paris: Dalloz et Sirey, 1960.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Cronk and Epstein JJ.A.), 2009 ONCA 814, 98 O.R. (3d) 81, 248 C.C.C. (3d) 489, 71 C.R. (6th) 25, 256 O.A.C. 235, 86 M.V.R. (5th) 45, [2009] O.J. No. 4875 (QL), 2009 CarswellOnt 7170, setting aside a decision of Sproat J. (2009), 86 M.V.R. (5th) 34, 2009 CanLII 24636, [2009] O.J. No. 2007 (QL), 2009 CarswellOnt 2698, upholding the acquittal entered by Clements J. Appeal allowed, McLachlin C.J. and Rothstein and Cromwell JJ. dissenting.

Paul Burstein and J. Thomas Wiley, for the appellant.

Philip Perlmutter and James Palangio, for the respondent.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Michel Déom, Jean-Vincent Lacroix, Marie-Ève Mayer and Patricia Blair, for the intervener the Attorney General of Quebec.

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

DESCHAMPS J. —

[1] This appeal raises the question whether certain provisions of the *Tackling Violent Crime Act*, S.C. 2008, c. 6 (“Amendments”), which amended the *Criminal Code*, R.S.C. 1985, c. C-46, operate retrospectively.

[2] As I explain in greater detail in my reasons in *R. v. St-Onge Lamoureux*, 2012 SCC 57, a case heard concurrently with the case at bar, the Amendments limit the evidence an accused can adduce to raise doubt about the reliability of breathalyzer test results obtained using an approved instrument. The objective of the Amendments, which form part of a broader scheme implemented by Parliament to reduce the incidence of impaired driving, is to give those results a weight consistent with their scientific value (*St-Onge Lamoureux*, at paras. 29 and 31). In order to rebut the presumptions of accuracy and identity applicable to breathalyzer test results, which favour the Crown, an accused can no longer simply rely on an expert opinion that the amount of alcohol he or she consumed is inconsistent with the test results — what is known as the “*Carter* defence” (*R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)).

[3] There are no transitional provisions that provide express guidance as to whether the Amendments apply retrospectively, that is, to conduct which occurred before the Amendments came into force. Resort must be had to general principles and to the effect of the Amendments. For the reasons that follow, I conclude that the Amendments do not apply retrospectively. I would allow the appeal and restore the acquittal entered at trial.

I. Facts and Judicial History

[4] On July 22, 2007, a vehicle driven by the appellant, Samuel Dineley, struck a parked vehicle. He was asked to submit to breathalyzer tests. The instrument registered 99 and 97 mg of alcohol per 100 ml of blood. He was charged with impaired driving and driving with a blood alcohol level over the legal limit of 80 mg of alcohol in 100 ml of blood.

[5] At the beginning of the trial, on June 19, 2008, counsel for Mr. Dineley advised the judge that he would not be able to complete the case for the defence that day. He intended to tender a toxicology report in support of a *Carter* defence in order to challenge the accuracy of the breathalyzer test results; Crown counsel had asked to cross-examine the toxicologist on his report, but the latter was not present. The hearing started that day on the common understanding that the case for the defence would be continued on July 15, 2008 to enable the Crown to cross-examine the toxicologist. Both Crown and defence counsel were or ought to have been aware that the Amendments would come into force on July 2, 2008. Section 258(1)(c) of the

Criminal Code, as amended by the Amendments, establishes a presumption of accuracy of breathalyzer test results and a presumption of identity of those results with the blood alcohol level of the accused at the time of the alleged offence. Under s. 258(1)(c), these presumptions will now be rebutted only if the accused leads evidence tending to show that the instrument malfunctioned or was improperly operated. The effect of that provision, together with s. 258(1)(d.01), is to eliminate the *Carter* defence as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results.

[6] The trial judge did not allow the Crown to argue that the Amendments applied to preclude a *Carter* defence. In his opinion, it was improper for the Crown to obtain an adjournment for purposes of cross-examining the toxicologist and then invoke the Amendments which came into force in the interim without having first warned defence counsel that it intended to do so. He accepted the *Carter* defence and acquitted Mr. Dineley.

[7] The summary conviction appeal judge held that it was not improper for the Crown to raise the issue of the applicability of the Amendments. However, he was of the view that the Amendments virtually eliminated the *Carter* defence, that they were substantive in nature and not procedural, and that they therefore applied only prospectively.

[8] The Court of Appeal reversed that decision. It held that the Amendments were merely evidentiary and that they therefore applied to the case. According to

MacPherson J.A., writing for the court, the *Carter* defence had not been eliminated: it had been changed, but survived in a different form (2009 ONCA 814, 98 O.R. (3d) 81, at para. 26). The court ordered a new trial to proceed on the basis of s. 258(1) of the *Criminal Code* as amended.

II. Analysis

[9] Whether the Amendments apply retrospectively has been a hotly contested issue. As MacPherson J.A. mentioned in the instant case, a large number of provincial and superior court judges across the country have expressed conflicting opinions in this regard.

[10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which

rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331).

[11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions “procedural” or “substantive”, but in discerning whether they affect substantive rights.

[12] Moreover, a further factor may be relevant to the determination of whether the Amendments apply retrospectively. It is whether they require evidence that the accused had no reason to gather under the former legislation.

[13] It will be helpful to reproduce the relevant portions of the Amendments, which came into force while Mr. Dineley’s trial was under way:

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

...

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if [list of conditions to be met],

evidence of the results of the analyses so made is conclusive proof that the the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

...

(d.01) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

- (i) the amount of alcohol that the accused consumed,
- (ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or
- (iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed;

(It should be noted that the temporal application of the second presumption of identity provided for in s. 258(1)(d.1) *Cr. C.* is not at issue in this case.)

[14] In *St-Onge Lamoureux*, I conclude that the first requirement that the approved instrument was malfunctioning or was operated improperly, as set out in

s. 258(1)(c) and qualified by s. 258(1)(d.01), infringes the right to be presumed innocent protected by s. 11(d) of the *Canadian Charter of Rights and Freedoms*, but that the infringement is justified under s. 1. I also find in that case that the other two requirements of s. 258(1)(c) — (1) that a causal connection be demonstrated between the malfunctioning or improper operation of the instrument and the determination that the blood alcohol level of the accused exceeded the legal limit, and (2) that further evidence be submitted to demonstrate that the blood alcohol level of the accused did not exceed the legal limit — unjustifiably infringe s. 11(d) of the *Charter*. All the other constitutional challenges in that case are rejected. Since only the first requirement of s. 258(1)(c) survives the Court’s decision in *St-Onge Lamoureux*, I will address the Amendments only as they stand following that decision.

[15] Although I will not engage in the impossible task of reconciling all the decisions in which the courts have grappled with whether new legislation affects substantive rights, references to a few cases will be helpful. The following statements of La Forest J. in *Angus*, at pp. 265-66, are particularly relevant to the issue before us :

Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. ... Alteration of a “mode” of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. [Emphasis in original.]

[16] The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected. I cannot accept the approach adopted by the Court of Appeal in the instant case, according to which legislation that alters the evidentiary content of a defence applies retrospectively (para. 27).

[17] The first question is thus whether, in imposing a new requirement for rebutting the presumptions of accuracy and identity applicable to breathalyzer test results, Parliament has affected the existence or content of a defence. As a result of the Amendments and the decision in *St-Onge Lamoureux*, the only evidence that can be tendered to raise a reasonable doubt about the reliability of breathalyzer test results is now evidence that the instrument was malfunctioning or was operated improperly. It is clear from s. 258(1)(d.01) that the *Carter* defence is no longer sufficient on its own to rebut the presumptions of accuracy and identity. The burden on the accused has thus been increased, as he or she can no longer ask the judge to draw an inference of malfunction or improper operation from indirect evidence by raising a *Carter* defence. Evidence related directly to the instrument itself is now required.

[18] The fact that the *Carter* defence is no longer sufficient on its own to rebut the presumptions established in s. 258(1)(c) makes it difficult to accept MacPherson J.A.'s opinion that the defence has not been eliminated, neutered or abolished and that it survives in a different form. In fact, this opinion is in sharp contrast with the very words of s. 258(1)(d.01), according to which "evidence tending

to show that an approved instrument was malfunctioning or was operated improperly” does not include the evidence that would be tendered in raising the *Carter* defence. Unlike MacPherson J.A., I must conclude that the *Carter* defence has been eliminated as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results. This, in my view, indicates that the provisions are not merely procedural; they affect a defence open to an accused and are therefore subject to the presumption against the retrospective application of new legislation. I agree with Mayrand J.A. in *R. v. Gervais* (1978), 43 C.C.C. (2d) 533 (Que. C.A.), that the right of an accused to rely on a defence is a substantive right and that new legislation has to be interpreted so as not to deprive the accused of a defence that would have been open to him or her at the time of the impugned act (p. 535).

[19] In *St-Onge Lamoureux*, I conclude that precluding the use of the *Carter* defence to raise on its own a doubt about the accuracy of breathalyzer test results does not violate s. 7 of the *Charter*. However, the fact that Parliament could exclude evidence of alcohol consumption does not change the fact that a defence which on its own enabled an accused to avert conviction has been eliminated.

[20] This brings me to my second reason for finding that the Amendments affect substantive rights of the accused. The broad scheme put in place by Parliament is based on presumptions that the results of the breathalyzer analyses are accurate and that they are identical to the blood alcohol level of the accused at the time of the alleged offence. As discussed in *St-Onge Lamoureux* (at para. 27), these statutory

presumptions infringe the constitutionally protected right to be presumed innocent, as they relieve the Crown of the requirement of proving the guilt of the accused beyond a reasonable doubt before he or she need to respond. The legislated means to rebut these presumptions are relevant to the determination of whether the infringement of the right to be presumed innocent is justified under s. 1. This is where the *Carter* defence comes into play. Under the former legislation, the *Carter* defence enabled the accused to discharge his or her burden of rebutting the statutory presumptions, which favour the Crown, by relying on an expert opinion that the amount of alcohol he or she consumed is inconsistent with the breathalyzer test results. As a result of the Amendments, this is no longer the case. Instead, the accused must now present direct evidence about the use or operation of the instrument in order to rebut the presumptions.

[21] The possibility for the accused of rebutting the statutory presumptions by means of a *Carter* defence (under the former legislation) or by adducing evidence related to the instrument (under the Amendments) is determinative of whether the infringement of the right to be presumed innocent is justified. However, the conclusion that the infringement is justified in the context of the new legislation does not alter the fact that constitutional rights are affected. This is a further indication that the new legislation affects substantive rights, since constitutional rights are necessarily substantive. When constitutional rights are affected, the general rule against the retrospective application of legislation should apply.

[22] In addition to the impact on the substantive rights of the accused, there is another reason why the Amendments should not be found to operate retrospectively. As a result of the Amendments, the evidence the accused may present to rebut the presumptions is limited to evidence that the instrument was malfunctioning or was operated improperly. The nature of that evidence is not defined in the Amendments, but it presumably has to relate to the instrument that was used to test the accused and not to the functioning of such instruments generally. This means that the accused may need to have access to information concerning the instrument used in his or her case or to operating records that would enable him or her to determine whether the instrument was functioning properly and was operated correctly. It is difficult to conceive how such an examination could take place months or even years after the tests were conducted. There is no indication that the instruments are isolated after being used in a given case. Parliament has not provided for the preservation of evidence for cases that began before the Amendments came into force.

[23] In *St-Onge Lamoureux*, one of the arguments put to the Court was that the Amendments violated the s. 7 rights of the accused because the defence required by the new legislation was so difficult to present that it was practically illusory. This argument was rejected on the basis that there are no limits on the evidence the accused can reasonably tender, provided that it relates to the malfunctioning or improper operation of the instrument. However, where, as in the case at bar, the parties did not know at the time of the breathalyzer tests that such a defence would be

required, and years elapsed between the tests and the trial, it may be impossible to present evidence to rebut the presumptions.

[24] There are similarities between the situation in the instant case and the one before the Court in *R. v. Ali*, [1980] 1 S.C.R. 221. In that case, amendments to the *Criminal Code* authorized the police to request more than one breath sample and made the taking of two samples a condition of application of the presumptions attached to breathalyzer test results. Because the former provision had not authorized the police to take two samples, prosecutions commenced before the new provision came into force would be frustrated by the new requirement if the amendments were held to apply retrospectively. The Court held that Parliament could not have intended such a result. Both in *Ali* and in the present case, Parliament added a requirement related to the evidence a party must adduce. In the case at bar, the new requirement is a condition for the rebuttal of the presumption provided for in s. 258(1)(c), whereas in *Ali* the new requirement was a condition for the application of the presumption.

[25] *Ali* supports the view that, where the former legislation did not contemplate the gathering of evidence that is required by the new legislation, the new legislation can only be prospective. In the instant case, the accused cannot adduce evidence that he had no reason to gather before the Amendments. This is an additional reason for concluding that the Amendments do not apply to cases that were commenced before the Amendments came into force. I therefore disagree with MacPherson J.A. that the difficulty for an accused of obtaining evidence on the

functioning of the instrument used in his or her case after years have gone by is speculative. Rather, I agree with the following comment by Bich J.A. (dissenting) in *R. v. Loiseau*, 2010 QCCA 1872, [2010] Q.J. No. 10487 (QL), at para. 56:

[TRANSLATION] Because the law makes the requirements for the gathering of evidence more stringent and, due to the state of the law at the time, ensures that the accused will not have sought evidence that would now be indispensable to him to mount a defence, the amended provisions should not apply to this situation.

[26] For these reasons, I would allow the appeal and restore the acquittal entered by the trial judge.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[27] Paragraph 253(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, makes it an offence to operate (or to have care and control of) a motor vehicle with a blood alcohol content of more than 80 mg of alcohol in 100 ml of blood. To facilitate proof of this offence, the Crown has for many years had the benefit of certain factual presumptions. These presumptions arise once it is proven that breath samples were

taken and analyzed by a breathalyzer device in accordance with detailed statutory requirements. Putting aside some points of detail, one of these presumptions is that the readings obtained under the statutory conditions are accurate (the presumption of accuracy); another presumption is that the readings at the time of testing represent the accused's blood alcohol content at the time of the alleged offence (the presumption of identity).

[28] For many years, an accused could rebut these presumptions by pointing to any sort of evidence that would raise a reasonable doubt in the mind of the trier of fact about the existence of the presumed facts. However, in 2008, Parliament enacted the *Tackling Violent Crime Act*, S.C. 2008, c. 6, which amends the *Criminal Code* by imposing some new rules about what sorts of evidence could be used to rebut these presumptions.

[29] The issue on the appeal is when these new evidentiary provisions apply. Do they apply, as the Court of Appeal held, to trials that are held on and after the day the new rules came into force, or, as the appellant contends, do they apply only to trials relating to events alleged to have occurred after they came into force?

[30] In my view, the holding of the Court of Appeal is correct and I would dismiss the appeal.

II. Brief Overview of the Issue

[31] Before the 2008 amendments, the presumption of accuracy (and therefore also the presumption of identity) could be rebutted by any evidence that raised a reasonable doubt that the actual blood alcohol level at the time of testing was below 80 mg of alcohol per 100 ml of blood: see, e.g. *R. v. Crosthwait*, [1980] 1 S.C.R. 1089. The presumption of identity itself could be rebutted by evidence tending to show that the accused's blood alcohol level at the time of the offence and at the time of testing had changed, provided that the effect of normal biological processes of absorption and elimination could not, of itself, constitute rebutting evidence: *R. v. St. Pierre*, [1995] 1 S.C.R. 791, at paras. 44 and 59-61.

[32] Often evidence to the contrary was offered in the form of "consumption and elimination" evidence – sometimes referred to as "*Carter*" evidence (*R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)). This typically consisted of evidence from the accused and perhaps other witnesses about how much the accused had to drink and when, as well as evidence from a toxicologist indicating that if the accused had consumed the amount claimed, his or her blood alcohol level at the time of the offence would have been below the legal limit. Sometimes the introduction of this evidence has been referred to as the "*Carter* defence", but it really is not a defence at all. It is simply the presentation of evidence that could be relied on to raise a doubt about whether the breathalyzer device had accurately determined the accused's blood alcohol content and whether that reading reflected the accused's blood alcohol content at the time of operation, care or control.

[33] The appellant in this case presented this sort of evidence and was acquitted at trial. The driving in question occurred before the 2008 amendments came into force, but his trial continued after they had. His breathalyzer readings were 99 and 97 mg of alcohol per 100 ml of blood and there was nothing to indicate that the device was operating improperly. However, the appellant testified that he had only had three beers over a roughly two-hour period and his toxicologist testified that if that were so, his blood alcohol level would have been between 0 and 40 at the time of testing and between 20 and 52 at the time of driving. The judge believed the appellant and found that he was not satisfied beyond a reasonable doubt that the appellant's blood alcohol concentration at the time of driving exceeded 80.

[34] The 2008 amendments, if applied at the appellant's trial, would have limited in two respects the type of evidence that he could have relied on to rebut the presumptions of accuracy and identity. First, by virtue of the amended s. 258(1)(c), evidence to rebut the accuracy of the readings at the time of testing must raise a doubt with respect to whether the device malfunctioned or was improperly operated, about whether the malfunction or improper operation resulted in an over 80 reading and, as well, about whether the appellant's blood alcohol concentration at the time of driving was below 80 (these last two requirements have been eliminated in this Court's decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57). Second, by virtue of the amended s. 258(1)(d.01), so-called *Carter* evidence cannot be relied on to raise a doubt about whether the approved instrument was malfunctioning or was operated improperly. These amended provisions are based on the idea that breathalyzer results

obtained in accordance with the statutory requirements should be taken to be accurate, absent evidence to think otherwise, and that *Carter* evidence is too unreliable to be admitted to cast doubt on the accuracy of such readings. These ideas find impressive support in the scientific literature. The amended provisions, in effect, define what types of evidence are *not* sufficiently probative to be used to undermine the accuracy of the breathalyzer readings.

[35] There are three principles of statutory interpretation that are potentially relevant to the issue of when the 2008 amendments apply. The question is which of these principles governs in this case. One principle is that the legislature is presumed not to intend legislation to change the legal character or consequences of actions that occurred before its enactment. Another is that the legislature is presumed not to intend to interfere with vested rights. A third is that the legislature intends an enactment dealing with exclusively procedural matters, including matters of evidence, to apply immediately to all proceedings, whether commenced before or after the enactment comes into force. These are all principles of interpretation and yield to clear statutory language to the contrary.

[36] The appellant's position is that the first principle applies. He submits that the amended provisions are not simply matters of procedure but affect the content of a defence to the charge. Alternatively, the appellant's position is that even if the amended provisions are procedural, Parliament did not intend them to apply to trials arising out of past events and therefore the operation of the third principle of

interpretation is ousted by clear parliamentary intent. The Crown on the other hand supports the conclusion of the Court of Appeal that the third principle applies because the amended provisions are procedural in nature.

[37] To resolve the appeal, we must answer two questions:

1. Are the amended provisions procedural in nature so that they are presumed to apply to all trials occurring or continuing after they came into force?
2. If so, is this presumption rebutted by an indication of legislative intent that they should not so apply?

[38] I will address these two questions in turn, after a brief account of the facts and proceedings.

III. Facts and Proceedings

[39] In the early hours of July 22, 2007, after a night spent with friends at a nightclub, the appellant, Samuel Dineley, drove his parents' car into a parked vehicle. Police administered two breath tests, which revealed blood alcohol concentrations of 99 and 97 mg in 100 ml of blood. The administration of the tests was videotaped. The appellant was charged with impaired driving and driving over 80 mg under s. 253(1)(a) and (b) of the *Criminal Code*.

[40] His trial before a provincial court judge began on June 19, 2008, and the Crown completed its case on that day. However, the trial was adjourned to July 15 so that the Crown would be able to cross-examine the appellant's toxicologist. On July 2, that is between the trial's adjournment and continuation, the 2008 amendments came into force. These had the effect of rendering the appellant's expert evidence incapable of rebutting the presumptions set up in s. 258(1)(c). The Crown argued that the newly amended s. 258(1) applied immediately to all s. 253 offences, regardless of the timing of their underlying facts. The trial judge did not decide the issue, and instead decided that it was improper for the Crown to attempt to rely on the new amendments when the trial resumed. After the trial's resumption, the trial judge found the appellant not guilty.

[41] On a summary conviction appeal, a judge of the Ontario Superior Court of Justice found the 2008 amendments to be substantive in nature, and so subject to the presumption against the alteration of the legal character or consequences of past actions. In his view, the amended provisions applied only to offences alleged to have been committed after they came into force, and so did not apply to the charges against the appellant: (2009), 86 M.V.R. (5th) 34. (I should add that the judge concluded that it had not been improper for the Crown to attempt to rely on the new amendments when the trial resumed. The appellant did not contest that conclusion in the Court of Appeal or in this Court.)

[42] The Ontario Court of Appeal reversed this decision, and sent the matter back for a new trial to be conducted on the basis that the new version of s. 258(1) applied to the appellant's case: 2009 ONCA 814, 98 O.R. (3d) 81. The court held that the amended provisions were procedural in nature and therefore applied to all trials occurring after they came into force.

IV. Analysis

[43] I will first give a brief outline of the interpretive principles relevant to this case. I will then explain that the 2008 amendments at issue are purely procedural. It follows that at the moment of their coming into force, they became applicable to all s. 253(1) charges, including those against the appellant, regardless of the timing of those charges' underlying facts. I will then set out my reasons for concluding that the presumption of immediate application is not rebutted by clear legislative intent to the contrary.

A. *The Presumptions of Legislative Intent*

[44] Statutory interpretation aims to ascertain legislative intent, which is “a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used”: *R. v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349 (H.L.), at p. 396; *R. v. Monney*, [1999] 1 S.C.R. 652, at para. 26. The courts ascertain legislative intent by reading legislative language in context and in its grammatical and ordinary sense,

harmoniously with the scheme and purpose of the legislation at issue: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 27. When the legislator's words permit it, the courts will take the legislature not to have intended to work injustice or unfairness. The presumptions against the alteration of the legal character or consequences of past acts and against the interference with vested rights, as well as the presumption supporting the immediate application of purely procedural changes, are all manifestations of this posture of respect.

[45] Under the first of these presumptions, the court presumes that the legislature did not intend to change the legal character or consequences of actions that occurred before the legislation in question came into effect: *West v. Gwynne*, [1911] 2 Ch. 1 (C.A.), at pp. 11-12; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at p. 262; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 118. Under the second, the court presumes that the legislature did not intend to interfere with vested rights that came into being before the legislation came into effect: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 282; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 32-36.

[46] These two presumptions of legislative intent are closely related. Both aim to protect parties' reliance on the law as it was at the time of acting: *Angus*, at

p. 268-69; *Ciecierski v. Fenning*, 2005 MBCA 52, 195 Man. R. (2d) 272, at para. 29; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413. Despite the presumptions' similar motivating concerns, this Court has consistently considered them to be distinct: *Gustavson Drilling (1964) Ltd.*, at pp. 279-83; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 741-47; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at pp. 906-7; *Dikranian*, at paras. 29-31. However, this case does not require an examination of the nice distinctions between them.

[47] This is because neither presumption of legislative intent operates with respect to purely procedural law. And so the third presumption is that, in the absence of legislative indication to the contrary, procedural law is presumed to operate from the moment of its enactment, regardless of the timing of the facts underlying a particular case: *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, at p. 96, quoted with approval in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 62.

[48] The significance of the distinction between substantive and procedural provisions for statutory interpretation is reflected in the *Interpretation Act*, R.S.C. 1985, c. I-21. On the one hand, proceedings commenced under a now-repealed provision are to continue under the procedures set out in the new provisions. On the other, the repeal of an enactment does not affect any right acquired under it. I will briefly describe the relevant provisions.

[49] The first is s. 44. It provides that where a former enactment is repealed and a new enactment is substituted for it, proceedings taken under the former enactment are to be continued in conformity with the new enactment. It further provides that “the procedure established by the new enactment shall be followed as far as it can be adapted thereto . . . in the enforcement of rights, existing or accruing under the former enactment, and . . . in a proceeding in relation to matters that have happened before the repeal”: s. 44(c) and (d)(ii) and (iii). As Professor Sullivan puts it, “[t]hese provisions call for the immediate application of new procedural law to all actions, including those that were pending when the legislation came into force”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 698.

[50] The second provision is s. 43. It provides that the repeal of an enactment does not affect any “right, privilege, obligation or liability acquired, accrued, accruing or incurred” under it: s. 43(c). As Professor Sullivan puts it, the repeal does not destroy any right or liability arising under the repealed enactment, i.e. “the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law”: Sullivan, at p. 708.

[51] Professor Sullivan sums up the cumulative effect of these two provisions as follows: “... the application of new substantive law is delayed by the survival of repealed law [but] the application of new procedural law is not” (p. 698).

B. *Substantive and Procedural Law*

[52] The question is how to determine whether an enactment is substantive or procedural. A provision is substantive if it alters the legal effect of a transaction, or if it interferes with vested rights. While there have been many attempts to define what sorts of provisions interfere with substantive or vested rights, a good starting point is the statement of Duff J. in *Upper Canada College*, at p. 417, citing with approval *Moon v. Durden*, [1848] 2 Ex. 22, 154 E.R. 389, *per* Rolfe B. (at p. 396) and *per* Parke B. (at p. 398): “... it would not only be widely inconvenient but ‘a flagrant violation of natural justice’ to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time” (emphasis added). The same point is captured by the idea that a provision affects substantive or vested rights if “an act legal at the time of doing it should be made unlawful by some new enactment”: *Midland Railway Co. v. Pye* (1861), 10 C.B. (N.S.) 179, 142 E.R. 419, at p. 424, cited with approval by Duff J. in *Upper Canada College*, at p. 419. Yet another way of putting it is to ask whether, if applied, the provision “would impair existing rights and obligations”: *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), at p. 563, approved in *Martin v. Perrie*, [1986] 1 S.C.R. 41, at pp. 48-49. Most recently, the Court accepted that a vested right is one that results from a legal situation that is tangible, concrete and sufficiently constituted at the time of the enactment of the new provision: *Dikranian*, at para. 37.

[53] Procedural provisions, on the other hand, “govern . . . the methods by which facts are proven and legal consequences are established in any type of proceedings”: Sullivan, at p. 698; they relate only to the method of conducting

litigation, not to the removal of rights of action or defences: *Upper Canada College*, at p. 442, *per* Anglin J.; *Angus*, at p. 265. Included among such provisions are legislative prescriptions of “what evidence must be produced to prove particular facts”: *Wright*, at p. 230, *per* Pollock, C.B., approved in *The Ydun*, [1899] P. 236 (C.A.), at p. 245, *per* Smith L.J. and in *Upper Canada College*, at p. 444, *per* Anglin J.; see also *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.

[54] Underlying the distinction between substantive rights and matters of procedure is the idea that a change in procedure does not deprive anyone of rights acquired by transactions perfectly valid and regular according to the law at the time they were undertaken: *Upper Canada College*, at p. 417, *per* Duff J. In *Upper Canada College*, at p. 423, Duff J. quoted with approval the words of Mellish L.J. in *Republic of Coast Rica v. Erlanger*, [1876] 3 Ch. D. 62 (C.A.), at p. 69: “No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided, of course, that no injustice is done.” Sometimes, the test is expressed negatively: a provision is not procedural if it “creates or impinges upon substantive or vested rights”: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.

[55] A key point arising from the jurisprudence is that the courts do not classify a provision as substantive or procedural by looking simply at its form, but also at its function and effect: *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Yew Bon Tew*, at p. 563; *Angus*, at

p. 265. This applies to rules of evidence as much as it does to other procedural provisions. If a rule of evidence “either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect”: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57. It will be helpful to review a few examples from the Court’s jurisprudence. I will begin with three cases that deal with the substantive/procedural distinction in more general terms.

[56] *Upper Canada College* is a good early example of a functional analysis. In issue in that case was a provision preventing the bringing of an action for payment of a commission for the sale of real property unless the agreement on which the action was based was in writing and signed by the party to be charged: *Statute of Frauds*, R.S.O. 1914, c. 102, s. 13. The question was whether this provision applied to actions on oral contracts for commissions entered into before the provision came into force. It was argued that it did because the provision was purely procedural: it did not take away the right but simply the procedure for enforcing it. The majority of the Court rejected this argument and held that the provision did not apply to contracts entered into before the provision was enacted. The Court looked to the effect of the provision rather than simply to its form. While in form, the provision related to the legal remedy available, in effect, the provision “abrogate[ed] a right of action which otherwise a party to a contract might have asserted” and therefore should be seen as “prejudicially affecting an ‘existing legal right or status’”: p. 431, *per* Duff J.

[57] *Angus* provides another good example of the focus on function over form. The question there was whether legislation abolishing spousal immunity in tort should be applied to allegedly tortious conduct occurring before its enactment.

[58] The Court answered this question in the negative and characterized the provisions as dealing with substantive rights. La Forest J. for the Court stated, at p. 265, that “[n]ormally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use” (emphasis in original). As he noted, it was difficult to see how the provisions in issue affected procedure at all (p. 265). They did not regulate what evidence was or was not admissible or what fact should be presumed upon proof of other facts. Rather, the provisions did away with what at the time of the conduct in question had been a complete exemption from tort liability.

[59] In *Application under s. 83.28 of the Criminal Code (Re)*, the question was whether new provisions of the *Criminal Code* permitting judicial investigative hearings, under which a person could be ordered to attend and compelled to answer questions, could be invoked in relation to events that occurred prior to their enactment. The Court concluded that the provisions did apply because they were exclusively procedural in nature: para. 61. As Iacobucci and Arbour JJ. put it, at para. 60, “while the judicial investigative hearing may generate information pertaining to an offence . . . the hearing itself remains procedural. In the manner of other

procedural tools such as DNA and wiretap authorizations, s. 83.28 provides a mechanism for the gathering of information and evidence in the ongoing investigation of past, present, and future offences.” In other words, the appellant did not have a substantive right not to be examined in accordance with this procedure: para. 66.

[60] I turn now to the jurisprudence of this Court that relates more specifically to evidentiary matters. In *Howard Smith Paper Mills Ltd.*, the question was whether an amended provision of the *Combines Investigation Act* applied in a prosecution for a conspiracy alleged to have been completed before the amendment came into force. The effect of the provision was to make admissible in evidence documents described as “inter-office memoranda” and to deem them to be *prima facie* evidence against the corporation in whose possession they were found and also against the persons named in them: *Combines Investigation Act*, R.S.C. 1927, c. 26, s. 41, as enacted by S.C. 1949 (2nd Sess.), c. 12, renumbered and amended by S.C. 1952, c. 39. The Court unanimously held that this provision was procedural and therefore applied to a trial held after it came into force. As Cartwright J. put it, at p. 420: “While [the provision] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only . . .” (emphasis added). Thus, evidence that before the enactment would not have been cogent evidence of guilt became such evidence as a result of the enactment, yet the Court concluded nonetheless that the enactment was procedural in nature and applied

to the proceedings. Simply making inculpatory evidence admissible that was previously inadmissible did not “take away” a defence.

[61] *Howard Smith* is also helpful in defining the scope of what is meant by rules of evidence. Cartwright J., at p. 419, approving a passage from the 9th edition of *Phipson on the Law of Evidence* (1952) (at p. 1), referred to substantive law as defining rights, duties and liabilities and adjective law as defining procedure, pleading and proof by which the substantive law is applied in practice. The passage from *Phipson on Evidence* quoted by Cartwright J. further refers to proof as “the establishment of such facts by proper legal means to the satisfaction of the Court”.

[62] Further guidance is offered by *Wildman v. The Queen*, [1984] 2 S.C.R. 311. At issue there was whether a new provision in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, would apply at the accused’s trial relating to events that had arisen before its enactment. Section 4(3.1) of the *Canada Evidence Act* made the spouse of an accused a competent and compellable witness for the prosecution where the complainant or victim was under 14 years of age. Lamer J. (as he then was) held for the Court that the incompetence and non-compellability of witnesses is “not the result of a substantive right to confidentiality and is merely procedural”: p. 332. He also noted that one test of whether a provision is substantive or procedural is whether it is [TRANSLATION] “independent of the existence of an issue” and whether it is “not affected by the fact that there is litigation in progress”: pp. 331-32, citing P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1960), at p. 237.

[63] Lamer J. recognized, however, that some presumptions could be substantive. He gave the example of the presumption of advancement which was held by the Court in *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548, at p. 557, to be substantive. The presumption of advancement is a rebuttable presumption that when a conveyance is made from a husband to his wife, the consideration given by the husband is intended to advance the wife. It therefore must be seen as affecting the legal rights as between the husband and wife at the time of the conveyance and as not being in any way affected by the fact that there is litigation in progress.

[64] The result of the decision in *Wildman* was that the new provision applied at the trial even though at the time of the alleged offence, the accused's spouse would not have been a compellable witness for the Crown. As in *Howard Smith*, potentially important evidence of guilt was inadmissible at the time of the events giving rise to the trial but was nonetheless held to be admissible at trial by virtue of the new rules of evidence.

[65] I turn next to *E. (A.W.)*. The issue relevant for our purposes was whether the repeal of the corroboration requirement for a child's unsworn evidence applied to trials occurring after the repeal but in relation to events that occurred before. Lamer C.J. (in dissent, but not on this point) concluded that the corroboration provision was part of the law of evidence and that it is "the law of evidence at the time of trial that prevails": p. 189. Thus, potentially important inculpatory evidence which would not

have been admitted without corroboration at the time of the alleged crime would be admissible without it under the new rules in effect at the time of trial.

[66] From this review of the case law, we may conclude:

1. Substantive provisions “alter the character or legal effect of any transaction” (*Howard Smith*, at p. 420). This includes taking away a previously-available defence (*Upper Canada College; Howard Smith; Angus*). The operation of such provisions is not affected by the fact that there is litigation in progress (*Wildman*).
2. Procedural provisions “gover[n] the methods by which facts are proven and legal consequences are established” (Sullivan, at p. 698). Their operation is generally dependent on the existence of litigation.
3. Rules of evidence are considered to be procedural in nature unless in effect they impact on substantive rights: *Application under s. 83.28 of the Criminal Code (Re)*, at para. 57.
4. Rules of evidence are concerned with “the establishment [or disproof] of ... facts by proper legal means”: *Howard Smith*, at p. 419, citing Phipson, at p.1.

5. Provisions which make evidence admissible that was previously inadmissible or change the conditions under which evidence may be admitted are procedural. This is true even if the new provisions make admissible important incriminating evidence that was formerly excluded. Examples include provisions which: make a revolutionary change in the admissibility and effect of documentary evidence (*Howard Smith*); make a previously non-compellable witness compellable for the Crown (*Wildman*); and repeal the corroboration requirement for a child's unsworn evidence: *E. (A.W.)*.

C. *The Provisions Are Procedural*

[67] In my view, the provisions in issue here are purely procedural. They meet all of the tests enunciated in the Court's jurisprudence for determining whether a provision is procedural and they have none of the characteristics of provisions which are properly characterized as substantive.

[68] The provisions deal with factual presumptions and what is required to rebut them. To use the words approved by Cartwright J. in *Howard Smith*, these provisions deal with the "establishment of... facts" by proper legal means. Evidentiary provisions like these are ordinarily considered to be procedural. Procedural provisions generally depend for their operation upon the existence of litigation. The provisions in question here do not operate unless there is a trial in which the blood alcohol level as indicated by the breathalyzer is contested: they are

irrelevant unless and until there actually is litigation. The provisions do not “render criminal any course of conduct which was not already so declared before [their] enactment” (*Howard Smith*, at p. 420); the elements of the offence which must be established have not changed. They do not affect the content or existence of an action or defence; they regulate the types of evidence required to rebut factual presumptions. Provisions such as these that alter the mode of procedure in the conduct of a defence are still procedural: *Angus*, at p. 266. The provisions in issue thus have all the hallmarks of procedural provisions.

[69] Moreover, the provisions have none of the hallmarks of substantive provisions. They do not attach new consequences to past acts or change the substantive content of a defence. They do not change the existence or content of a right. The elements of the offence have not changed and it remains open to the accused to point to evidence raising a reasonable doubt about the existence of those elements. The provisions do not make conduct unlawful that was lawful at the time it occurred.

[70] My colleague Deschamps J. writes that the provisions have eliminated or neutered a defence. I respectfully disagree. The provisions limit the scope of admissible evidence which could formerly have been adduced in order to attempt to raise a reasonable doubt about one of the essential elements of the offence. The so-called “*Carter* defence” in reality is a particular type of evidence adduced in order to raise a reasonable doubt. If these provisions are characterized as taking away a

defence, then any evidentiary provision that increases the risk of conviction would have to be so characterized. The jurisprudence of this Court, reviewed above, makes clear in my view that this is not the case.

[71] The Court has held in *St-Onge Lamoureux* that limiting the admissibility of *Carter* evidence does not infringe an accused's s. 7 *Charter* right to make full answer and defence. If the limitation on the availability of *Carter* evidence does not take away a defence for the purposes of the *Charter*, it cannot be that the same limitation is substantive because it somehow does take away a defence.

[72] The decision of the Quebec Court of Appeal in *R. v. Gervais* (1978), 43 C.C.C.(2d) 533, is of no assistance to the appellant. *Gervais* concerned a change to rights of appeal. The jurisprudence from this Court has long made clear that the right of appeal is a substantive right, not a matter of procedure: see, e.g., *R. v. Taylor* (1876), 1 S.C.R. 65; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038, at pp. 1041-42; *R. v. Puskas*, [1998] 1 S.C.R. 1207, at p. 1212.

[73] I cannot accept the suggestion that the fact that the provision is found to limit an accused's right to be presumed innocent under s. 11(d) of the *Charter* supports the conclusion that the provision is substantive. There are two points. First, procedural provisions may limit *Charter* rights or indeed violate the *Charter* just as readily as substantive ones. The *Charter* analysis says nothing about the nature of the provisions for the purposes of applying the presumption that procedural provisions have immediate effect. Second, I agree with my colleague Deschamps J. (at para. 14)

that we must assess the temporal application of these provisions on the basis of the provisions as they stand following the Court's decision in *St-Onge Lamoureux*. The provisions in that form do not violate the *Charter*. I respectfully do not accept that the fact that they have been found to be reasonably justified as opposed to not limiting the rights in question at all has anything to do with whether the provisions interfere with substantive rights.

[74] I conclude that the provisions relate only to the rules of evidence which apply at trial and that they are therefore purely procedural. As I have explained earlier in these reasons, the standard position on the temporal applicability of procedural provisions is that they operate with immediate effect.

D. *The Presumption of Immediate Application Is not Rebutted*

[75] That brings us to the second question on the appeal: even if the provisions are procedural, do the surrounding circumstances or the language of the provisions rebut the presumption that they are to be applied immediately?

[76] The appellant submits that the legislation does not indicate that Parliament intended any part of the amended provisions to apply with respect to events that occurred before their enactment. The answer to this point, as I see it, is that the provisions are purely procedural and therefore their temporal application is well settled by the common law and reinforced by the provisions of the *Interpretation Act*. Parliament is deemed to know the law.

[77] The appellant also submits that, had it been Parliament's intent that these provisions should have immediate application, it would have taken steps before they came into effect to ensure that evidence crucial to the defence, such as video-recordings of breath testing, was preserved and that disclosure practices were modified accordingly. Respectfully, these considerations do not point to parliamentary intent that these procedural provisions should not take immediate effect. Video-recordings, disclosure and evidence about how the device performed on the occasion in question were all important and highly relevant to the defence before as well as after these provisions came into effect. The limitation on the admissibility of *Carter* evidence in these provisions did not suddenly render this other evidence relevant or important. It was always relevant and important. Furthermore, Parliament has made no provision for these matters for any cases, whether they arose before or after the amendments came into effect. I cannot see how Parliament's inaction in this regard before the amendments' enactment can reveal legislative intent against immediate application, given that Parliament has been similarly inactive after the amendments have come into force. It is therefore difficult for me to understand how the absence of these sorts of provisions supports the view that they were not intended to have immediate effect.

[78] The Court's decision in *R. v. Ali*, [1980] 1 S.C.R. 221, is not in my view of assistance to the appellant. In that case, this Court considered the applicability of amendments that required a certificate to be based on two breath samples — not only one as in the previous legislation — to give rise to the presumption of accuracy. This

amendment was accompanied by another amendment allowing peace officers to take more than one sample. Pratte J., writing for the majority, assumed but did not decide that the first-mentioned amendment was procedural. However, he decided that this amendment did not apply to events that occurred before its coming into force, since before the amendment, it was not legally possible to obtain the required two breath samples, but after the amendment it was. The amendment to the amount of samples required for a valid certificate “cannot be taken to refer to samples of breath that could not be legally demanded at the time of the offence”: p. 239. The changes to the legislative scheme as a whole demonstrated that, for cases arising before the amendments, Parliament intended the old law to remain effective. I respectfully do not see any parallel between that situation and the present one. As mentioned in the previous paragraph, the amendments in issue here were not accompanied by other amendments changing the legal availability of relevant evidence. Nor did they make evidence relevant that was not equally relevant before their enactment. The questions of whether the breathalyzer device malfunctioned or was improperly operated were highly relevant to an accused before as well as after the amendments. It cannot be said, in my respectful view, that the effect of the amended provisions was to require an accused to adduce evidence that he or she had no reason to gather before the provisions came into force. An accused had every reason to gather such evidence before as well as after the enactment of these provisions.

E. *Conclusion*

[79] I am therefore of the view that the amendments to s. 258(1) were purely procedural. They did not bring about any substantive right. Nor did they alter the facts with respect to which a reasonable doubt must be raised in order to rebut the presumptions that s. 258(1) creates. The amendments are subject to the presumption of immediate application, and there is nothing to rebut the presumption. I am reinforced in this view by the fact that in addition to the Ontario Court of Appeal in this case, the courts of appeal for Alberta, British Columbia and Quebec have reached the same conclusions: *R. v. Gartner*, 2010 ABCA 335, 490 A.R. 268; *R. v. Truong*, 2010 BCCA 536, 296 B.C.A.C. 248; *R. v. Loiseau*, 2010 QCCA 1872, [2010] Q.J. No. 10487 (QL).

[80] The amended version of s. 258(1) is therefore applicable to all s. 253 charges, whether the facts that ground them occurred before or after the amendments' enactment. This includes the charges against the appellant.

V. Disposition

[81] I would dismiss the appeal and uphold the Court of Appeal's order for a new trial. This trial should apply the amended provisions, as severed in this Court's concurrently released decision in *St-Onge Lamoureux*.

*Appeal allowed, MCLACHLIN C.J. and ROTHSTEIN and CROMWELL JJ.
dissenting.*

*Solicitors for the appellant: Burstein Bryant, Toronto; J. Thomas Wiley,
Brampton.*

Solicitor for the respondent: Attorney General of Ontario, Toronto.

*Solicitor for the intervener the Attorney General of Canada: Attorney
General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Quebec: Attorney
General of Quebec, Montréal.*