



SUPREME COURT OF CANADA

CITATION: R. v. Gubbins, 2018 SCC 44

APPEAL HEARD: February 6, 2018

JUDGMENT RENDERED: October 26, 2018

DOCKETS: 37395, 37403

BETWEEN:

Kevin Patrick Gubbins

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario

Intervener

AND BETWEEN:

Darren John Chip Vallentgoed

Appellant

and

Her Majesty The Queen

Respondent

- and -

**Attorney General of Ontario and
Director of Criminal and Penal Prosecutions**

Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 60)

Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,
Gascon, Brown and Martin JJ. concurring)

DISSENTING REASONS:
(paras. 61 to 90)

Côté J.

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R. v. GUBBINS

Kevin Patrick Gubbins

Appellant

v.

Her Majesty The Queen

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and

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Darren John Chip Vallengoed

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v.

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**Attorney General of Ontario and
Director of Criminal and Penal Prosecutions**

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Indexed as: R. v. Gubbins

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File Nos.: 37395, 37403.

2018: February 6; 2018: October 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law — Evidence — Disclosure — Breathalyzer maintenance records — Scope of Crown’s disclosure obligations — Crown refusing disclosure of maintenance records for breathalyzer devices to accused charged with impaired driving and driving with blood alcohol level over limit — Whether maintenance records subject to first party disclosure rules or third party disclosure rules — Criminal Code, R.S.C. 1985, c. C-46, s. 258(1)(c).

V and G were each charged with impaired driving and with driving “over 80”. Their breath samples were obtained and analyzed using approved instruments and standard procedures. At each step of the process, the breathalyzers performed internal and external diagnostic tests to ensure accuracy of the results and generated printed results. The printouts indicated that the instruments functioned properly. The Crown disclosed a standard package of documents related to the process. Both V and G requested additional disclosure, namely of the maintenance records for the

breathalyzers used to obtain their breath samples. The Crown produced a basic maintenance log to V but otherwise refused to provide the requested disclosure. V applied for an order compelling disclosure and G applied for a stay of proceedings on the basis that his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* had been breached. V's application was dismissed and he was subsequently convicted of both charges, but G was granted a stay of proceedings. The Court of Queen's Bench jointly heard appeals by V and by the Crown in G's case. It held that maintenance records are first party records and should have been disclosed by the Crown, and upheld G's stay of proceedings and ordered a new trial for V. A majority of the Court of Appeal allowed the Crown's appeals, holding that the maintenance records are third party records that are not to be disclosed routinely. It reinstated V's conviction, and set aside G's stay of proceedings and remitted his case for a new trial.

Held (Côté J. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, **Rowe** and Martin JJ.: The breathalyzer maintenance records are subject to the rules applicable to the disclosure of third party records. As such, in order to obtain disclosure of the records, V and G were required to show that the records were likely relevant in this case, which they failed to do.

The disclosure of first party records is subject to the *Stinchcombe* regime. The Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. The duty, which is

triggered upon request and does not require an application to court, applies only to the prosecuting Crown. However, the Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant. The police have a corresponding duty to disclose the fruits of the investigation, and any other information obviously relevant to an accused's case. The "fruits of the investigation" refers to all material pertaining to the investigation of the accused, that is, the police's investigative files, as opposed to operational records or background information. The phrase "obviously relevant" describes information that is not within the investigative file but that relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence.

The disclosure of third party records is subject to the *O'Connor* regime. To obtain disclosure of such records, an accused must make a court application. The burden is on the accused to show that the record is likely relevant. Information will be likely relevant where there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify. Where the accused discharges this burden, the judge will examine the record to determine whether, and to what extent, it should be produced to the accused.

To determine which regime is applicable, the following must be considered: (1) whether the information that is sought is in the possession or control of the prosecuting Crown, and (2) whether the nature of the information sought is such that the police or another Crown entity in possession or control of the

information ought to have supplied it to the prosecuting Crown. This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these questions will call for the application of the first party disclosure regime. Otherwise, the third party disclosure regime applies.

The requested breathalyzer maintenance records in the instant case are not part of first party disclosure. They were not in the possession or control of the Crown, as they were held both by the RCMP and by other third parties. They are not part of the fruits of the investigation; rather, they are created as operational records that are not specific to any particular investigation. Furthermore, the maintenance records are not obviously relevant. The Court's decision in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, did not conclusively determine that all maintenance records are obviously relevant. The majority expressly declined to determine what evidence was relevant to determining the proper functioning and operation of the breathalyzer instrument. Moreover, the Court in *St-Onge Lamoureux* did not have the benefit of the Alcohol Test Committee's current position that records relating to periodic maintenance or inspections cannot address the working status of an approved instrument at the time of a breath test procedure. Further, the language of the presumption of accuracy set out in s. 258(1)(c) of the *Criminal Code*, which contemplates receiving evidence that the approved instrument was malfunctioning or was operating improperly, makes no reference to maintenance. Parliament therefore did not expressly contemplate that the presumption of accuracy will be rebutted based

on evidence as to the maintenance of the approved instrument. In addition, the expert evidence in this case supports the view that the maintenance records are not obviously relevant to the reliability of the approved instruments or to determine whether the instrument malfunctioned. The breathalyzer machines are designed to produce a fail reading where they malfunction. Maintenance records cannot indicate whether any particular result is a false positive. The existence of maintenance records and the fact that the instrument underwent maintenance from time to time is not sufficient to justify the disclosure requested by the accused.

Applying the *O'Connor* standard for third party disclosure, the maintenance records have not been shown to be likely relevant in this case. The Court in *St-Onge Lamoureux* contemplated that rebutting the statutory presumption of accuracy in s. 258(1)(c) would likely require expert evidence. In the instant case, expert evidence was only presented by the Crown. In the absence of any evidence by the accused rebutting the statutory presumption, the expert evidence of the Crown is persuasive that the maintenance records are not relevant. The conclusion that the maintenance records are subject to third party disclosure rules does not put the constitutionality of s. 258(1)(c) in jeopardy. A defence is not illusory simply because accused persons will rarely succeed in raising a reasonable doubt by using it. The time-of-test records along with testimony from the technician or the officer involved are evidence that the accused may use to rebut the presumption of accuracy. Maintenance records may also be available to the defence where it can show that such records are likely relevant to a material issue in the case.

Per Côté J. (dissenting): The appeals should be allowed. Maintenance records should be subject to first party disclosure rules. They are obviously relevant to rebutting the statutory presumption of the accuracy of an approved instrument established by s. 258 of the *Criminal Code*. Disclosing maintenance records ensures that the defence has a minimum evidentiary basis upon which it may attempt to establish that an instrument was malfunctioning. This opportunity is guaranteed by the *Criminal Code* and underlies the majority's reasons in *St-Onge Lamoureux*.

The Court's reasoning in *St-Onge Lamoureux* was dependent in large part on two assumptions: (1) that one means available to an accused to raise a doubt as to the functioning of an instrument was by raising deficiencies in its maintenance; and (2) that the evidentiary basis for such a defence would be readily available to that accused. The Court should not depart from these assumptions on the basis of the Alcohol Test Committee's current position on the relevance of maintenance records. The Committee continues to endorse the standards and procedures that were before the Court when it decided *St-Onge Lamoureux*. Caution should be exercised when considering the extent to which the Committee's updated recommendations are determinative of the relevance of maintenance records, a question of law that is to be decided by the courts. The fact that only one expert opinion is before the Court, while the position of experts that may disagree on the relevance of maintenance records is notably absent from the record, is further cause for caution.

In *St-Onge Lamoureux*, it was assumed on the basis of a fulsome evidentiary record that maintenance records were relevant to rebutting the presumption at issue and the impugned scheme's constitutionality was confirmed on this basis. No new evidentiary basis calls those assumptions into question. The Court assumed that the accused would be provided with an evidentiary basis to raise a reasonable doubt as to the instrument's functioning on the basis of its maintenance. Deciding that maintenance records are not available under first party disclosure will upset the delicate balance struck in *St-Onge Lamoureux* and put the constitutionality of s. 258(1)(c) back into question.

Holding that only time-of-test records produced by the instrument can demonstrate malfunctioning effectively assumes that the machine is infallible. This confines the defence to arguments raising a doubt as to the instrument's operation, contrary to Parliament's intent to make malfunctioning and improper operation two distinct grounds for rebutting the presumption of accuracy. Recourse to third party disclosure will, in practice, be illusory. For an accused to have a real opportunity to show that an instrument was malfunctioning, an expert must have an evidentiary basis either to opine as to the possibility that the instrument malfunctioned or to establish the likely relevance of other information to be sought through third party disclosure. Providing nothing by way of first party disclosure forces accused persons and their experts to resort to conjecture and speculation.

Finally, disclosing maintenance records as first party records also serves the interests of justice. Where maintenance records reveal no issues, their disclosure may compel the accused to plead guilty. Where they reveal certain issues and an expert is of the opinion that these issues may prove that the instrument malfunctioned, the maintenance records provide a basis for the accused to raise such a defence or to make subsequent *O'Connor* requests in a grounded, non-speculative manner.

Cases Cited

By Rowe J.

Applied: *R. v. O'Connor*, [1995] 4 S.C.R. 411; **considered:** *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; **referred to:** *R. v. Kilpatrick*, 2013 ABCA 168; *R. v. Kilpatrick*, 2013 ABQB 5, 42 M.V.R. (6th) 92; *R. v. Sutton*, 2013 ABPC 308, 576 A.R. 14; *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Jackson*, 2015 ONCA 832, 128 O.R. (3d) 161; *R. v. Black*, 2011 ABCA 349, 286 C.C.C. (3d) 432; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207; *R. v. Gubins*, 2009 ONCJ 80; *R. v. Lo*, 2009 ONCJ 307, 86 M.V.R. (5th) 284; *R. v. Klug*, 2010 ABPC 88, 500 A.R. 293; *R. v. Kristianson*, 2011 ABPC 309, 24 M.V.R. (6th) 298; *R. v. Turnbull*, 2012 ABPC 45, 32 M.V.R. (6th) 162; *R. v. Hudye*, 2013 SKPC 122, 425 Sask R. 302; *R. v. Pankiw*, 2013 SKPC 47, 416 Sask. R. 206; *R. v. Martens*, 2013 ABPC 349; *R. v. Carter*, 2014 ABPC 291, 603 A.R. 366; *R. v.*

Oleksiuk, 2014 ONCJ 313; *R. v. Sinclair*, 2015 ABQB 113, 75 M.V.R. (6th) 252; *R. v. Timmons* (1994), 132 N.S.R. (2d) 360; *R. v. Anutooshkin* (1994), 92 C.C.C. (3d) 59; *R. v. Williams*, 2000 BCSC 207, 1 M.V.R. (4th) 288; *R. v. Keirsted*, 2004 ABQB 491; *R. v. Singleton*, [2004] O.J. No. 5583 (QL); *R. v. Nicolle*, 2005 ONCJ 346, 27 M.V.R. (5th) 206; *R. v. Coopsammy*, 2008 ABQB 266, 68 M.V.R. (5th) 226; *R. v. Balfour*, 2009 ONCJ 308, 86 M.V.R. (5th) 278; *R. v. Ahmed*, 2010 ONCJ 130, 253 C.C.C. (3d) 378; *R. v. Duff*, 2010 ABPC 250, 497 A.R. 16; *R. v. Worden*, 2014 SKPC 143, 68 M.V.R. (6th) 141; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Lam*, 2014 ONCJ 247; *R. v. Awashish*, 2018 SCC 45.

By Côté J. (dissenting)

R. v. Stinchcombe, [1991] 3 S.C.R. 326; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Drolet*, 2010 QCCQ 7719; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Sutton*, 2013 ABPC 308, 59 M.V.R. (6th) 89; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Awashish*, 2018 SCC 45.

Statutes and Regulations Cited

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

Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1), 254(1), 258(1), (7), 278.1 to 278.9.

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

Authors Cited

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Canadian Society of Forensic Science. "Alcohol Test Committee Position Paper: Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results" (2012), 45 *Can. Soc. Forensic Sci. J.* 101.

Canadian Society of Forensic Science. "Canadian Society of Forensic Science Alcohol Test Committee Recommended Best Practices for a Breath Alcohol Testing Program" (2014), 47 *Can. Soc. Forensic Sci. J.* 179.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, Slatter and Rowbotham JJ.A.), 2016 ABCA 358, 344 C.C.C. (3d) 85, 33 C.R. (7th) 359, 3 M.V.R. (7th) 40, 44 Alta. L.R. (6th) 248, [2017] 4 W.W.R. 8, [2016] A.J. No. 1180 (QL), 2016 CarswellAlta 2195 (WL Can.), setting aside a decision of Kenny J., 2015 ABQB 206, 608 A.R. 197, [2015] A.J. No. 360 (QL), 2015 CarswellAlta 584 (WL Can.), which affirmed the stay of proceedings entered by Schaffter Prov. Ct. J., 2014 ABPC 195, 596 A.R. 351, 13 Alta. L.R. (6th) 45, [2014] A.J. No. 989 (QL), 2014 CarswellAlta 1594 (WL Can.), and remitting the matter to trial. Appeal dismissed, Côté J. dissenting.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, Slatter and Rowbotham JJ.A.), 2016 ABCA 358, 344 C.C.C. (3d) 85, 33 C.R. (7th) 359, 3 M.V.R. (7th) 40, 44 Alta. L.R. (6th) 248, [2017] 4 W.W.R. 8, [2016] A.J. No. 1180 (QL), 2016 CarswellAlta 2195 (WL Can.), setting aside a decision of

Kenny J., 2015 ABQB 206, 608 A.R. 197, [2015] A.J. No. 360 (QL), 2015 CarswellAlta 584 (WL Can.), which ordered a new trial for the accused, and restoring the accused's conviction entered by Golden Prov. Ct. J. Appeal dismissed, Côté J. dissenting.

Timothy Foster, Q.C., and *Katherin J. Beyak*, for the appellant Kevin Patrick Gubbins.

Stephen M. Smith, for the appellant Darren John Chip Vallentgoed.

Robert J. Palser and *Jason R. Russell*, for the respondent.

Michael Fawcett and *Philip Perlmutter*, for the intervener the Attorney General of Ontario.

Nicolas Abran and *Justin Tremblay*, for the intervener the Director of Criminal and Penal Prosecutions.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

ROWE J. —

I. Overview

[1] These appeals deal with the scope of the Crown's disclosure obligations with respect to maintenance records of breathalyzer instruments. These instruments are used to determine the blood alcohol content of suspected drunk drivers. It is important that these instruments provide accurate results. These cases deal with what information is relevant to assessing the reliability of these instruments. Are the maintenance records part of first party disclosure, subject to inclusion in the Crown's standard disclosure package? Or, are these records third party records, which require the defence to demonstrate their likely relevance before an order for disclosure can be made?

[2] Courts have provided inconsistent answers to the foregoing questions. These reasons deal with two appeals in which the two trial judges came to different conclusions as to whether breathalyzer maintenance records should be disclosed by the Crown. For the reasons that follow, I find that such records are subject to third party (rather than first party) disclosure. On the evidence in both cases, the defence failed to show that the maintenance records meet the requisite threshold for third party disclosure. Accordingly, I would dismiss the appeals.

II. Facts

[3] Both accused in this appeal were charged with impaired driving and with driving "over 80", contrary to s. 253(1)(a) and (b) of the *Criminal Code*, R.S.C. 1985, c. C-46. Mr. Vallentgoed and Mr. Gubbins provided breath samples. Mr.

Vallentgoed's samples showed blood alcohol readings of 130 mg/% and 120 mg/%. Mr. Gubbins' samples showed two readings of 120 mg/%.

[4] Each of these breath samples was analyzed using an "approved instrument", as required by s. 254(1) of the *Criminal Code*. The Crown led expert evidence that described in detail the operation of the instruments, including that they perform internal and external diagnostic tests at the time each breath sample is taken in order to ensure accuracy of the results. When a breath sample is obtained, the procedure is as follows:

- a) Air Blank: The instrument purges any alcohol remaining in it. It then tests the alcohol content of the ambient air. The result of this test should be zero, but if it is different, the instrument sets a baseline that eliminates the effect of any ambient alcohol on the test results. If there is an excessive amount of ambient alcohol, the instrument will stop and the test will be cancelled.
- b) Calibration Check (or Alcohol Standard Test): The instrument is tested against an alcohol vapour of known concentration from a certified sample. The sample generally has a concentration equal to 100 mg/% of alcohol in the blood. The instrument must accurately measure the concentration within 10% (i.e., the result must be between 95 mg/% and 105 mg/%). If the instrument fails to perform within this range, the test will be cancelled.

- c) Air Blank: The instrument performs a second air blank test in order to purge any residual alcohol vapour left from the sample used in the Calibration Check.
- d) Breath Sample, First Test: The accused provides a deep lung breath sample into the instrument, which measures the concentration of alcohol present. The instrument is designed to (slightly) underestimate blood alcohol concentration.
- e) Air Blank: The instrument performs another air blank check to purge any alcohol vapour.
- f) Breath Sample, Second Test: After fifteen minutes, the process (steps (a) through (e) above) is repeated. The readings from the two breath samples are rounded down to the lowest 10 (i.e., a reading of 99 mg/% is recorded as 90 mg/%). The results of the two samples must be within 20 mg/% of each other; the lower of the two results will be used: s. 258(1)(c) of the *Criminal Code*. If the two results are not within the foregoing range, further breath samples will be taken.

[5] Each step in this sequence generates printed results. A “fail” in any step is indicated in the printouts. For both Mr. Vallentgoed and Mr. Gubbins, the instruments indicated no problems. None of the internal controls were triggered; the results were within the accepted ranges indicated above. The printouts generated at the time of the tests indicated that the instruments functioned properly.

[6] The Crown provided Mr. Vallentgoed with a disclosure package that included documents created during the investigation, as well as other documents certifying that various components used in the testing process had been tested, maintained and certified. The documents included in this package were: (a) the Intoxilyzer 5000C Operational Check Sheet, (b) the Intoxilyzer 5000C Test Record, and (c) the Certificate of Analyses. These records provide details of the test results of the breath samples, as well as the results of the calibration checks. Also included was information about the officers involved, the date and time of the tests, and particulars of the instrument used. The Check Sheet includes the analyst's handwritten notes of his or her observations of the accused's condition at the time of testing. The Test Record is the printout from the instrument, signed by the technician who operated it. The Certificate of Analyses is the official record of the test results; it indicates the blood alcohol reading. The Certificate of Analyses also gives notice that it will be used as evidence in court: s. 258(1)(e) and (g) and s. 258(7) of the *Criminal Code*.

[7] Other documents in the Crown's disclosure package included: (a) the Intoxilyzer 5000C Simulator Alcohol Solution Log; (b) the Intoxilyzer 5000C Test Record for alcohol solution change; (c) the Certificate of Annual Maintenance; (d) the Certificate of Annual Maintenance for the standard alcohol solution breath simulator; (e) the Intoxilyzer 5000C Use and Calibration Check Log; and (f) the Certificate of an Analyst (Alcohol Standard). These documents provide particulars of the alcohol solution (when its use commenced, when it was changed, as well as when it was

tested and found to be suitable) and the instrument itself (when it was sent for annual maintenance and the details of each time the instrument was calibrated).

[8] In addition, the Crown indicated that it would provide, on request, the RCMP Operational Manual for the instrument, as well as the Qualified Technician's designation.

[9] Mr. Gubbins was provided a disclosure package as described above, save that it did not include any documents relating to the maintenance of the instrument in question.

[10] Both Mr. Vallentgoed and Mr. Gubbins requested additional disclosure. Mr. Vallentgoed requested: (1) maintenance records for the breathalyzer instrument for the past two years; (2) maintenance and inspection records for the external simulator; and (3) records showing the cumulative uses of the alcohol standard for a one month period before testing. The Crown produced a basic maintenance log. Upon inspecting the records, Mr. Vallentgoed noted that the machine had been sent for repairs the day after he was charged, two months before that, and again two months before that. Mr. Vallentgoed requested detailed reports of the work performed on these dates. The Crown refused, on the basis that these maintenance reports were third party records and were not relevant. In response, Mr. Vallentgoed applied for disclosure in the Alberta Provincial Court.

[11] Mr. Gubbins demanded disclosure of all maintenance records for the instrument from the time it was imported into Canada and first put into use. The Crown refused to provide the requested disclosure, on the basis that these were third party records held by the contractor that maintained the equipment and they did not meet the required threshold of relevance. Mr. Gubbins brought an application for a stay of proceedings, arguing that his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were infringed by the Crown's refusal to provide the additional disclosure that he had requested.

III. Judicial History

A. *Provincial Court of Alberta — R. v. Vallentgoed, March 11, 2014*

[12] In dealing with Mr. Vallentgoed's disclosure application, Golden Prov. Ct. J. noted there was disagreement in the case law regarding disclosure of maintenance records. The Alberta Court of Appeal in *R. v. Kilpatrick*, 2013 ABCA 168, dismissed an application for leave to appeal from a decision which held that maintenance records were subject to first party disclosure: 2013 ABQB 5, 42 M.V.R. (6th) 92. Golden Prov. Ct. J. noted that the Court of Appeal decided *Kilpatrick* without evidence being adduced as to the relevance of the maintenance records. By contrast, the Alberta Provincial Court in *R. v. Sutton*, 2013 ABPC 308, 576 A.R. 14, had received expert evidence. The judge in *Sutton* concluded that the maintenance records were not relevant; thus, they did not meet the threshold for first party disclosure. Golden Prov. Ct. J. favoured the approach in *Sutton*. He concluded that the

maintenance records were not relevant. Accordingly, he dismissed the application for disclosure. Mr. Vallentgoed was later convicted.

B. *Provincial Court of Alberta — R. v. Gubbins, 2014 ABPC 195, 596 A.R. 351*

[13] Schaffter Prov. Ct. J. dealt with Mr. Gubbins' application for a stay of proceedings under s. 7 of the *Charter* based on the Crown's refusal to provide additional disclosure. Schaffter Prov. Ct. J. took the view that she was bound by *Kilpatrick*. As well, she noted that in *R. v. McNeil*, [2009] SCC 3, [2009] 1 S.C.R. 66, the Court held that police discipline records were first party records, as they are relevant to assessing the credibility of the officer, despite not being "fruits of the investigation". By analogy, the maintenance records are relevant to the reliability of the approved instrument. The requested disclosure was, therefore, first party. Accordingly, the Crown should have disclosed the records sought. Schaffter Prov. Ct. J. concluded that a breach of s. 7 was made out. Given that Mr. Gubbins' driving license was suspended pending the outcome of the trial, and that this suspension would continue if she ordered an adjournment, Schaffter Prov. Ct. J. was satisfied that Mr. Gubbins would be prejudiced. She entered a stay of proceedings.

C. *Court of Queen's Bench of Alberta — 2015 ABQB 206, 608 A.R. 197*

[14] Mr. Vallentgoed appealed his conviction. The Crown appealed Mr. Gubbins' stay of proceedings. The appeals were heard jointly before Kenny J., sitting as summary conviction appeal judge. In her view, it was problematic for the Crown to

have to tender expert evidence in every case to demonstrate that the maintenance records are irrelevant. These records may or may not meet the threshold for relevancy. In Kenny J.'s view, it is a waste of judicial resources to re-litigate this issue repeatedly, especially given that the Court's ruling in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, determined conclusively (in her view) that maintenance records are first party records. She dismissed the Crown's appeal of Mr. Gubbins' stay of proceedings and ordered a new trial for Mr. Vallentgoed.

D. *Court of Appeal of Alberta — 2016 ABCA 358, 344 C.C.C (3d) 85*

(1) Per Slatter J.A. (Berger J.A. concurring)

[15] Slatter J.A., with Berger J.A. concurring, allowed the appeals. He took the view that the maintenance records are not “fruits of the investigation” to be disclosed routinely. Rather, they are third party records subject to the procedure set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411. Maintenance records differ from time-of-test records; the latter show how the device was operating when the breath sample was taken. Time-of-test records are relevant; they can also be the basis for an argument for further disclosure. Based on the expert evidence on behalf of the Crown, Slatter J.A. concluded that a “fail” reading is not evidence of a malfunction in the instrument. Rather, a “fail” indicates that the instrument is functioning properly by alerting the technician that there is a problem. Thus, a “fail” on an earlier or later occasion (than the test of the breath samples of the accused) that leads to maintenance of the instrument tells us nothing about whether the instrument was functioning

properly on the occasion when the breath samples of the accused were tested. Rather, what is relevant is whether a “fail” occurred in the test sequence (described above in para. 4) that produced the results for the breath samples of the accused; no “fail” indicates the instrument was functioning properly. In the result, Slatter J.A. reinstated Mr. Vallentgoed’s conviction; he set aside Mr. Gubbins’ stay of proceedings and remitted his case for a new trial.

(2) Per Rowbotham J.A. (dissenting)

[16] In Rowbotham J.A.’s view, this Court’s decision in *St-Onge Lamoureux* provided authoritative guidance that maintenance records are relevant and should form part of the standard disclosure package. The maintenance records could be the basis for an application to obtain further, and more detailed, maintenance records. In Mr. Vallentgoed’s case, the trial judge erred by not ordering disclosure of the maintenance records. Rowbotham J.A. would have dismissed the Crown appeal in Mr. Vallentgoed’s case. With respect to Mr. Gubbins, Rowbotham J.A. would have allowed the appeal in part, as Mr. Gubbins had (later) received disclosure of the complete service records that he had sought. Accordingly, she would have lifted the stay and remitted Mr. Gubbins’ case to trial.

IV. Issues

[17] These appeals require the Court to consider which disclosure regime applies to maintenance records of breathalyzer instruments. The Court must then decide whether the requisite threshold for disclosure has been met in these cases.

V. Analysis

A. *Stinchcombe and O'Connor: Two Disclosure Regimes*

[18] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, this Court held that the Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. This is referred to as first party disclosure. The Crown's duty to disclose corresponds to the accused's constitutional right to the disclosure of all material which meets the *Stinchcombe* standard: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para 22. The purpose of disclosure is to protect the accused's *Charter* right to full answer and defence, which will be impaired where there is a "reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence": *ibid.*

[19] The Crown's duty to disclose is triggered upon request and does not require an application to court: *Stinchcombe*, at pp. 342-43. The duty is ongoing; new information must be disclosed when it is received: *ibid.* The Crown's duty to disclose is not absolute. The Crown considers relevance and the rules of privilege. Where the Crown refuses to disclose evidence for reasons of privilege or irrelevance, the

defence can request a review; in such an instance, the burden is on the Crown to justify its refusal to disclose by showing that the information is “clearly irrelevant” or privileged: *Stinchcombe*, at pp. 339-40.

[20] The “Crown” for the purposes of *Stinchcombe* does not refer to all Crown entities, but only to the prosecuting Crown: *McNeil*, at para. 22; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 11. All other Crown entities, including police, are third parties for the purposes of disclosure. They are not subject to the *Stinchcome* regime. This is because the law cannot impose an obligation on the Crown to disclose material that it does not have or cannot obtain: *McNeil*, at para. 22.

[21] In *McNeil*, this Court clarified that “the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown”: para. 24. The Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant: *McNeil*, at para. 49. As well, the police have a corresponding duty to disclose “all material pertaining to its investigation of the accused”: *McNeil*, at paras. 23 and 52. Such material is often referred to as “the fruits of the investigation”: *McNeil*, at paras. 14, 22-23. As well, the police may be required to hand over information beyond the fruits of the investigation where such information is “obviously relevant to the accused’s case”: *McNeil*, at para. 59.

[22] The “fruits of the investigation” refers to the police’s investigative files, as opposed to operational records or background information. This information is

generated or acquired during or as a result of the specific investigation into the charges against the accused. Such information is necessarily captured by first party/*Stinchcombe* disclosure, as it likely includes

relevant, non-privileged information related to the matters the Crown intends to adduce in evidence against an accused, as well as any information in respect of which there is a reasonable possibility that it may assist an accused in the exercise of the right to make full answer and defence. The information may relate to the unfolding of the narrative of material events, to the credibility of witnesses or the reliability of evidence that may form part of the case to meet.

In its normal, natural everyday sense, the phrase “fruits of the investigation” posits a relationship between the subject matter sought and the investigation that leads to the charges against an accused.

(*R. v. Jackson*, 2015 ONCA 832, 128 O.R. (3d) 161, at paras. 92-93)

[23] In addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is “obviously relevant” to the accused’s case. The phrase “obviously relevant” should not be taken as indicating a new standard or degree of relevance: *Jackson*, at para. 125, per Watt. J.A. Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence. *McNeil* requires the police to hand such information to the Crown.

[24] These qualifiers are significant, as they contemplate that not all police records will be subject to first party disclosure. For example, as this Court noted in *McNeil*, “not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused’s case”: para. 59. Similarly, as the Alberta Court of Appeal stated in *R. v. Black*, 2011 ABCA 349, 286 C.C.C. (3d) 432, at paras. 37-38:

All *McNeil* established is that disclosure of police misconduct records where they are obviously relevant is a matter of first party disclosure. In reaching that conclusion, the Supreme Court likened those types of records to records relating to convictions for perjury for Crown witnesses. Only records of misconduct that are obviously relevant form a part of first party disclosure. If the record of police misconduct is not obviously relevant, an accused person can still gain access to it relying on the *O’Connor* process for third party disclosure.

For all other records held by a public body, including the police, the *Stinchcombe-O’Connor* distinction continues to be the rule. The police are required to disclose the investigative file as first party *Stinchcombe* disclosure and other files or records in the hands of the police are subject to the *O’Connor* process. This would include files relating to complaints of criminal activity by Crown witnesses and the operational records of the police force or government body from whom records are sought. [Emphasis added.]

From the foregoing, it is evident that there is an important role for third party disclosure where the records are neither part of the investigative file nor obviously relevant, therefore not part of first party disclosure: *McNeil*, at para. 60.

[25] Third party disclosure is dealt with in *O’Connor*. To obtain disclosure of such records, an accused must make a court application. First, the burden is on the accused to show that the record is “likely relevant”. Second, where the accused

discharges this burden, the judge will examine the record to determine whether, and to what extent, it should be produced to the accused.

[26] Information will be “likely relevant” where there is “a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify”: *O’Connor*, at para. 22 (emphasis deleted). The “likely relevant” threshold has been described as significant, but not onerous: *O’Connor*, at para. 24; *McNeil*, at para. 29. The reason that the relevance threshold is “significant” is to allow the courts to act as gatekeepers, preventing “speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming” requests for production: *O’Connor*, at para. 24, quoting *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32.

[27] Nevertheless, the burden on the accused is not onerous. “Likely relevance” is a lower threshold than “true relevance”, and has a “wide and generous connotation” that “includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence”: *McNeil*, at para. 44; see also *O’Connor*, at para. 21. Only after information has been shown to be likely relevant will the courts assess the actual relevance of the record sought. The courts then consider competing interests at the second stage of an *O’Connor* application: *McNeil*, at para. 39. It may be apparent “upon inspection by the court that the claim of likely relevance established at the first stage of the *O’Connor* application is simply not borne out”: *McNeil*, at para. 40.

[28] There are two reasons why the threshold in an *O'Connor* application is not onerous. First, the only issue at this stage is likely relevance. The application judge is not determining the admissibility of records, nor has the judge reached the point at which he or she considers competing interests: *O'Connor*, at para. 24. Second, the accused at this stage is in the difficult position of having to make submissions without knowing the contents of the records being sought: *O'Connor*, at para. 25. The likely relevance threshold is a first-step inquiry designed to prevent fishing expeditions, but nothing more.

[29] To summarize, two different regimes govern disclosure in criminal cases. First party disclosure, as set out in *Stinchcombe* and supplemented by the duties on the Crown and the investigating police in *McNeil*, requires disclosure of all relevant information upon request. If the Crown refuses disclosure, it bears the burden to show that the information is “clearly irrelevant”. Third party disclosure per *O'Connor* requires an application to the court for third party disclosure (where the records sought do not fall under first party disclosure) for which the defence bears the burden to show that the record is “likely relevant”. In both instances, the purpose is “[to protect] an accused person’s right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required”: *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 115. Such limits include avoiding fishing expeditions.

B. *Which Disclosure Regime Applies?*

[30] Canadian courts have differed as to which disclosure regime applies to breathalyzer maintenance records. Some courts have decided that maintenance records are first party records and have ordered disclosure: *R. v. Gubins*, 2009 ONCJ 80; *R. v. Lo*, 2009 ONCJ 307, 86 M.V.R. (5th) 284; *R. v. Klug*, 2010 ABPC 88, 500 A.R. 293; *R. v. Kristianson*, 2011 ABPC 309, 24 M.V.R. (6th) 298; *R. v. Turnbull*, 2012 ABPC 45, 32 M.V.R. (6th) 162; *Kilpatrick*; *R. v. Hudye*, 2013 SKPC 122, 425 Sask. R. 302; *R. v. Pankiw*, 2013 SKPC 47, 416 Sask. R. 206; *R. v. Martens*, 2013 ABPC 349; *R. v. Carter*, 2014 ABPC 291, 603 A.R. 366; *R. v. Oleksiuk*, 2014 ONCJ 313; *R. v. Sinclair*, 2015 ABQB 113, 75 M.V.R. (6th) 252, at para. 11 (although the Crown in this last case conceded that the records were first party records). The reasoning in this line of cases is that maintenance records are both relevant and easy to produce.

[31] Other courts have disagreed with this analysis, taking the view that maintenance records are third party records as they are not always held by the police as part of the investigatory records, nor are they obviously relevant as to whether an instrument malfunctioned or was operated improperly: *R. v. Timmons* (1994), 132 N.S.R. (2d) 360 (C.A.); *R. v. Anutooshkin* (1994), 92 C.C.C. (3d) 59 (B.C.C.A.); *R. v. Williams*, 2000 BCSC 207, 1 M.V.R. (4th) 288, at para. 24; *R. v. Keirsted*, 2004 ABQB 491; *R. v. Singleton*, [2004] O.J. No. 5583 (QL)(Ont. C.J.); *R. v. Nicolle*, 2005 ONCJ 346, 27 M.V.R. (5th) 206; *R. v. Coopsammy*, 2008 ABQB 266, 68 M.V.R. (5th) 226; *R. v. Balfour*, 2009 ONCJ 308, 86 M.V.R. (5th) 278, at para. 24; *R. v. Ahmed*, 2010 ONCJ 130, 253 C.C.C. (3d) 378, at paras. 134 and 139-40; *R. v. Duff*,

2010 ABPC 250, 497 A.R. 16; *Black* (this case dealt with ASD records not AI records); *Sutton*; *R. v. Worden*, 2014 SKPC 143, 68 M.V.R. (6th) 141.

[32] How should the courts determine whether a record in the possession or control of a state entity is subject to first party or third party disclosure? Relevance alone is not determinative. A record may be relevant to the case against an accused and still be a third party record.

[33] Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the “fruits of the investigation” or “obviously relevant”. An affirmative answer to either of these questions will call for the application of the first party disclosure regime.¹ Otherwise, the third party disclosure regime applies. For the reasons that follow, the maintenance records are subject to third party disclosure.

(1) Is the Information in the Possession or Control of the Prosecuting Crown?

¹ Out of an abundance of caution, nothing in these reasons should be seen as detracting from the *Mills* regime which requires an application to obtain records “relating to a complainant or a witness” even if those records are in the possession or control of the Crown: see *Criminal Code*, ss. 278.1-278.9; *R. v. Mills*, [1999] 3 S.C.R. 668.

[34] In these cases, the information sought is not in the possession or control of the Crown. Rather, the maintenance records are held both by the RCMP and by other third parties. The RCMP keep certificates of annual inspection, as well as a record indicating when the instrument was sent out for repair. The repairs, however, are done offsite; more extensive records relating to such repairs are kept by third party service providers. Even in those police departments where repair work is done on-site, this information is not held by the prosecuting Crown, so the answer to the first question is no.

(2) Is the Nature of the Information Sought Such That the Police or Another Crown Entity in Possession or Control of the Information Ought to Have Supplied it to the Prosecuting Crown?

(a) *Is the Information Part of the “Fruits of the Investigation”?*

[35] The maintenance records are not part of the “fruits of the investigation”. Rather, they are created as operational records that are not specific to any particular investigation: *Black*, at para. 17. On this point, I respectfully differ from the Court of Queen’s Bench of Alberta, which held in *Kilpatrick* that there is no difference between a police officer’s notes and a breathalyzer instrument’s maintenance records: para. 81. When the former are specific to the particular investigation at issue, they are clearly part of the investigative record and must be disclosed to the accused. Nonetheless, records that are not part of the “fruits of the investigation” may nonetheless be subject to first party disclosure under *Stinchcombe* disclosure if they are “obviously relevant” to the accused’s case.

(b) *Is the Information “Obviously Relevant”?*

[36] Recall that the phrase “obviously relevant” does not create a new standard of relevance. Rather, it simply indicates to police that there will be times when they have to disclose information that is outside of the investigative file, due to the nature of the information in question.

[37] Some lower courts have found that maintenance records meet the obviously relevant threshold by analogy with this Court’s ruling in *McNeil*. In other cases, lower courts read this Court’s ruling in *St-Onge Lamoureux* as having conclusively determined that maintenance records are relevant. Properly read, I do not take *McNeil* and *St-Onge Lamoureux* to stand for these propositions. As well, I am persuaded by the expert evidence in this case which indicates that the maintenance records are *not* relevant to determine whether the instrument malfunctioned. I will turn now to each of the foregoing.

(i) Relying on the Analogy in *McNeil* Is Unhelpful

[38] Lower courts have often relied on the language in *McNeil* suggesting an analogy to perjury. For instance, in *Kilpatrick* (Q.B.), the court stated:

In this respect, I consider that there is an analogy between the approved instrument and an investigating police officer. If the credibility of an officer who is expected to provide significant evidence against the accused is of obvious relevance, then the credibility of the approved instrument which is expected to provide presumptively conclusive

evidence against the accused must be equally relevant. Indeed, the credibility of a machine whose reliability is given statutory presumptiveness is much harder to challenge than the credibility of an individual who is entitled to no similar presumption. [para. 68]

I would agree with Slatter J.A. that this analogy is not apt (C.A. reasons, at para. 44; see also *Black*, at para. 39, for an analogy to perjury cases). The credibility of human witnesses is not commonly assessed by way of expert evidence. It is a matter of common sense that a person may lie. Whether a “mechanical witness” might “lie”, by contrast, is a technical and scientific matter; expert evidence may show that certain evidence is not relevant to a machine’s reliability.

(ii) *St-Onge Lamoureux Did Not Determine Whether or Not Maintenance Records are Relevant*

[39] The constitutionality of the statutory presumptions in s. 258 of the *Criminal Code* was the issue in *St-Onge Lamoureux*. Under s. 258, once certain statutory preconditions are met, the results of the breathalyzer analyses used in impaired driving-related prosecutions are presumed to be accurate and are presumed to correspond to the accused’s blood alcohol content at the time of the alleged offence. The accused can rebut these presumptions with evidence tending to show instrument malfunction or operator error. Properly read, *St-Onge Lamoureux* did not determine that all maintenance records are obviously relevant. In *St-Onge Lamoureux*, this Court *assumed* the records *may* be relevant, but made no final determination on this point. As well, to the extent that *St-Onge Lamoureux* relied on

evidence from the Alcohol Testing Committee in stating this assumption, this no longer reflects the position taken by the Committee.

[40] Moreover, neither the questions posed by the judges of this Court nor the answers given in response shed much light on whether an issue was dealt with in the disposition of a case. This Court may decide not to address a particular issue, even if individual members of the Court showed interest in it during the hearing. Rather, one must look to the reasons for the decision. In *St-Onge Lamoureux*, the majority of this Court expressly declined to determine what evidence was relevant to determining the proper functioning and operation of the breathalyzer instrument (para. 42):

Since the nature and scope of the evidence that might be considered relevant has not been argued on this appeal, it would not be appropriate to rule on the specific limits of that evidence. I will merely note that, in light of the evidence accepted by the trial judge, there are several pieces of evidence that can be provided to a person who is charged under s. 253(1)(b) *Cr.C.*, including the breathalyzer readings, the qualified technician's certificate and the analyst's certificate concerning the sample of the alcohol standard. [Emphasis added.]

[41] Later in *St-Onge Lamoureux* (at para. 78), the majority reasons note that:

Although Parliament now requires evidence tending to establish a deficiency in the functioning or operation of the instrument, this does not mean that there are limits on the evidence that can reasonably be used by the accused to raise a doubt in this regard. The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence. If the prosecution denies such a request, the accused can invoke the rules on non-disclosure and the available remedies for non-disclosure (see *R. v. O'Connor*, [1995] 4 S.C.R. 411). In short, the accused might rely, for example, on a maintenance log that shows that the instrument was not

maintained properly or on admissions by the technician that there had been erratic results, or he or she might argue that health problems had affected the functioning of the instrument (see *R. v. Kasim*, 2011 ABCA 336, 515 A.R. 254). [Emphasis added.]

This paragraph must be read in context. First, it states that only relevant evidence may be requested. There is no indication that the Court intended for defence counsel to be able to make unwarranted requests for irrelevant documents. Second, the passage must be read in light of the Court's earlier statement in para. 42 that the scope and nature of relevant evidence had not been argued in the case. Third, the citation to *O'Connor* indicates that the Court contemplated that materials such as the maintenance logs might be available as *third party* records. While this was not settled in *St-Onge Lamoureux*, in my view the foregoing passage indicates an awareness that the defence might have to make an application for the production of such records.

[42] Further, the presumption of accuracy in s. 258(1)(c) of the *Criminal Code* reads:

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

(i) [Repealed, before coming into force, 2008, c.20, s.3]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that

time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that 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 . . . that the approved instrument was malfunctioning or was operated improperly . . .²

[43] The language of s. 258(1)(c) contemplates receiving evidence that the approved instrument “was malfunctioning or was operated improperly”. There is no reference to maintenance. Parliament did not expressly contemplate that the presumption of accuracy will be rebutted based on evidence as to the maintenance of the approved instrument. As the majority of the Court of Appeal correctly noted, “it is not a defence to prove that the instrument was ‘improperly maintained’, nor that maintenance records were not kept in a particular format”: para. 69. The majority reasons of this Court in *St-Onge Lamoureux* should not be read as creating a new defence beyond those provided in the statutory scheme. What matters is whether evidence as to the maintenance of the instrument is relevant to its functioning or proper operation on the occasion when the accused's breath samples were tested.

² These portions of the text that have been removed (and are replaced by ellipses) were ruled unconstitutional by this Court in *St-Onge Lamoureux*. What remains above is the legal version of the text. For the original version, see C.A. reasons at paras. 48-50, per Slatter J.A.

[44] This brings me to the second point. This Court did not have the benefit of the Alcohol Test Committee's current position on the relevance of maintenance records to instrument reliability. In *St-Onge Lamoureux*, this Court considered the Alcohol Test Committee's recommended standards and procedures, which included, *inter alia*, annual maintenance: para. 25.

[45] In 2012, the Alcohol Test Committee updated their recommendation. In a position paper published by the Canadian Society of Forensic Science, on the documentation required for assessing the accuracy and reliability of approved instruments, the Committee stated:

Records relating to periodic maintenance or inspections cannot address the working status of an AI [Approved Instrument] at the time of a breath test procedure and are intentionally absent from the requirements listed above. Thus, while a failure to adhere to such quality assurance measures could lead to instrument malfunction, this occurrence will be detectable by the quality control tests done during the breath test procedure. Similarly, data collected both prior to and after the subject test, or an examination of the approved instrument subsequent to the subject test, do not further assist in determining the reliability and accuracy of an AI during a specific breath testing procedure.

(Canadian Society of Forensic Science, "Alcohol Test Committee Position Paper: Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results" (2012), 45 *Can. Soc. Forensic Sci. J.* 101, at p. 102).

Thus, to the extent that this Court relied on the ATC's recommended standards for the Court's assumption that maintenance is relevant to the test results' reliability, this evidence has since been qualified.

(iii) The Expert Evidence Indicates That the Maintenance Records Are Not Obviously Relevant

[46] The introduction of expert evidence to assist the court in determining relevance in these appeals is a key factor distinguishing the present cases from some earlier authorities that held that the maintenance records were relevant (and thus subject to *Stinchcombe* disclosure). For example, in *Kilpatrick*, which was decided after *St-Onge Lamoureux*, the Court of Appeal of Alberta denied leave to appeal, upholding a decision in which it was found that the maintenance records were relevant. However, the court noted that the evidentiary record was “sparse” and that it contained “no expert evidence, nor any other evidence, relative to the operations of the Breathalyzer; nor [was] there any evidence regarding the multiple internal tests carried out by the approved instrument which it is argued make production of [records] irrelevant”: para. 4 (CanLII). This suggests that appellate courts did not consider *St-Onge Lamoureux* to have conclusively determined the issue of relevance, as they were asking for more evidence on this point. I read *St-Onge Lamoureux* similarly, as I indicate above.

[47] The expert evidence in this case supports the view that the maintenance records are not relevant to the reliability of the approved instruments. As outlined in para. 4 above, breathalyzer machines are subject to a number of internal and external controls. The records that are obviously relevant to the functioning of the instrument are the time-of-test records. The statutory presumption of accuracy refers to the specific results generated by the instrument at that time. The only question that must

be answered is whether the machines were operating properly at the time of the test — not before or after. The time-of-test records directly deal with this. The maintenance records, according to the expert evidence, do not.

[48] The machines are designed to produce a “fail” reading where they malfunction. Indeed, a fail reading indicates that the machines are reliable — not unreliable — in that they indicate when they are malfunctioning. The spectre looming over this case is the possibility of false positives. In other words, might the machines be malfunctioning when they appear to be working properly, in that they passed all of the internal and external controls? I agree with Slatter J.A. that this is highly unlikely. And, in any case, the maintenance records cannot tell us whether any particular result is a false positive. As Ms. Blake, a Forensic Alcohol Specialist, testified: “[A]lthough maintenance records should be kept they cannot be used to determine whether an error has or will occur on any given test or at any given time” (A.R. (Gubbins), p.98, at para. 35). Even if there is a real, and not merely speculative, risk that the instruments may malfunction, the evidence in this case is that such errors would be discernible as a result of the controls built into the instruments themselves.

[49] The appellants suggest that Ms. Blake’s evidence should be rejected, as it was by the trial judge in *Gubbins*. In drawing this conclusion, the trial judge relied on the fact that conflicting expert evidence was introduced in other cases, including *Sutton* and *R. v. Lam*, 2014 ONCJ 247. The trial judge cited *Sutton* for the proposition that “instinct and intuition” led her to believe that the maintenance records may be

relevant: para. 44. To the extent that the trial judge in *Gubbins* relied on evidence not before her to assess the accuracy of the expert's opinion, this was an error. It is also an error to rely on "instinct and intuition" in the face of unequivocal expert evidence to the contrary, *a fortiori*, where one is dealing with a technical or scientific question. The existence of maintenance records and the fact that the instrument underwent maintenance from time to time is not sufficient to justify the disclosure. This is even more apparent when one considers the sweep and scope of the records sought in these cases. Can the fact that an instrument was sent for annual maintenance a decade earlier be relevant to its functioning on a particular occasion on which it passed all of the required internal and external checks? The answer, logically and analytically (rather than instinctively and intuitively), must be no.

[50] My colleague suggests that expert evidence would only have to be called by the defence after disclosure, since *St-Onge Lamoureux* establishes the relevance of these records: paras. 69 and 84. I would respectfully disagree. While the maintenance records are certainly *relevant* to whether the instrument was properly maintained, the expert evidence is that the maintenance of the instrument on a given day is not *material* to the instrument's functioning or proper operation at the time of testing. Thus, the requested records are not obviously relevant to a material issue in the present case.

[51] Defence counsel for Mr. Vallentgoed argued that they did not have an opportunity to cross-examine Ms. Blake on her affidavit evidence, so her evidence

should not be accepted. However, the trial judge and the summary conviction appeal judge both noted that it is not accurate that the defence had no opportunity to cross-examine Ms. Blake. Rather they chose not to delay the proceedings in order to do so, given their client's license suspension. That was the choice made by defence counsel.

(3) Conclusion

[52] From the foregoing, I conclude that the requested records are not part of first party disclosure. They are not in the possession or control of the prosecuting Crown. They do not form part of the "fruits of the investigation"; and the evidence in this case is that the maintenance records are not "obviously relevant" to the cases of the accused Mr. Gubbins and Mr. Vallentgoed. It follows that the standard to be met is that set out in *O'Connor*; the maintenance records are subject to the third party disclosure regime.

[53] This conclusion is consistent with the purpose of the overall disclosure regime, which is to provide the accused with relevant information while preventing fishing expeditions and other dilatory requests for information. The companion case to this appeal, *R. v. Awashish*, 2018 SCC 45, originally involved a defence request for 50 additional pieces of disclosure. My colleague's reasons do little to address these problems. The implication of this would be that fishing expeditions would continue. In many other cases, the accused has obtained a stay of proceedings on the basis of the Crown's refusal to disclose maintenance records, even though the accused blew "over 80" and the breathalyzer instrument did not register a fail. Such a result fails to

respect the intention of Parliament to create a statutory presumption of accuracy in the instruments.

C. *Applying the O'Connor Standard*

[54] Having determined that the applicable regime is that set out in *O'Connor*, the question now is whether the maintenance records have been shown to be likely relevant in this case. Based on the evidence before the courts below, the answer is no.

[55] It is worth noting that the expert evidence in both *Vallentgoed* and *Gubbins* was presented only by the Crown. Its expert evidence was not countered by any defence expert. I would note the following statement in *St-Onge Lamoureux*, at para. 47:

The limits that flow from the requirement have a significant effect on the defences available to the accused, as it is now more difficult to rebut the presumptions. The evidence to be adduced is more complex. The accused must retain a technician or an expert to determine whether the instrument malfunctioned or was operated improperly. It is impossible for a layperson to do this. However, it should be borne in mind that the *Carter* defence also required the accused to retain an expert.³ [Emphasis added.]

[56] And at para. 57:

³ The *Carter* defence is the name of the defence that was commonly used to challenge driving “over 80” charges before the statutory amendments that introduced s. 258(1)(c) of the *Criminal Code*. The effect of these amendments was to preclude the defence from using evidence of alcohol consumption, combined with an expert opinion on the effect this would have on the accused’s blood alcohol level, as a way to challenge the reliability of the breathalyzer test results. The introduction of s. 258(1)(c) created a presumption of accuracy.

The scheme that has existed since the statutory amendments came into force is designed to require the prosecution to adduce technical evidence to counter an attempt to rebut the presumption of accuracy An accused who produces evidence to rebut one of these presumptions will do so by calling an expert, and the prosecution will have to call a technician, and possibly an expert. [Emphasis added.]

[57] The majority of this Court contemplated in *St-Onge Lamoureux* that rebutting the statutory presumption of accuracy in s. 258(1)(c) would likely require expert evidence. No such evidence was put forward in this case. Neither accused attempted to provide an expert opinion on how maintenance records might be relevant to the key material issue in this case: determining whether an instrument was malfunctioning or operated improperly. In the absence of any such evidence, the expert evidence of the Crown is persuasive that the maintenance records are not relevant. By its nature, this is a technical and scientific question, not a matter of doctrine. If in some future proceeding an accused leads persuasive evidence that maintenance records are “likely relevant”, then disclosure may be ordered.

[58] One final argument raised by the accused should be addressed. My conclusion that the maintenance records are subject to third party disclosure does not put the constitutionality of s. 258(1)(c) in jeopardy, as my colleague argues. As indicated in *St-Onge Lamoureux*, a defence is not illusory simply because accused persons will rarely succeed in raising a reasonable doubt by using it: para 79. There are records that are obviously relevant to the malfunctioning of the instrument — the “time-of-test” records. These, along with testimony from the technician or the officer involved, are evidence that the accused may use to rebut the presumption of accuracy.

As well, as indicated above, maintenance records may be available to the defence, where it can show that such records are likely relevant to a material issue in the case. The majority of this Court in *St-Onge Lamoureux* was aware of the possibility that such records might be obtained by way of an *O'Connor* application (*St-Onge Lamoureux*, at para. 78). This did not affect the constitutionality of the provision.

VI. Conclusion

[59] In *Vallentgoed*, the trial judge did not err when he held that the records sought were subject to third party disclosure, and that the threshold of likely relevance was not met. I would affirm Mr. Vallentgoed's conviction. In *Gubbins*, the trial judge erred in granting a stay. I would dismiss the appeal and remit the matter for a new trial.

[60] I would dismiss the appeals.

The following are the reasons delivered by

CÔTÉ J. —

[61] While I accept my colleague Rowe J.'s statement of the law as it pertains to the two disclosure regimes set out by this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and *R. v. O'Connor*, [1995] 4 S.C.R. 411, I disagree on its application.

[62] I am of the view that maintenance records are “obviously relevant” to rebutting the statutory presumption of accuracy established by s. 258 of the *Criminal Code*, R.S.C. 1985, c. C-46. The maintenance of approved instruments was central to this Court’s reasoning in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, in which the constitutionality of this provision was upheld. To conclude that maintenance records are not available under first party disclosure would upset the delicate balance struck by this Court in determining that the infringement of the right to be presumed innocent until proven guilty guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms* was justified. Since such records are “obviously relevant”, they are subject to first party disclosure. In my view, this ensures that the defence has a minimum evidentiary basis upon which it may attempt to establish that an instrument was malfunctioning. This opportunity is guaranteed by the *Criminal Code* and underlies the majority of this Court’s reasons in *St-Onge Lamoureux*.

[63] My analysis will proceed as follows. I will begin by providing an overview of *St-Onge Lamoureux*. While I recognize that the main issue in that appeal did not pertain to the disclosure of records, I will show that the Court’s reasoning is highly relevant to the matter before us. In my view, central to this Court’s decision upholding the constitutionality of the provisions at issue in that case was the

assumption that an approved instrument's maintenance history was relevant to rebutting the presumption that it produced accurate results. I will continue by comparing the submissions and evidentiary record before the Court in *St-Onge Lamoureux* and in the present appeal. Though this Court in *St-Onge Lamoureux* did not have the benefit of the updated position of the Alcohol Test Committee ("ATC"), on which the respondent now relies, it did have before it the *substance* of that position. Even so, the majority's justificatory analysis assumed the relevance and availability of maintenance records. My colleague's approach, which requires the defence to request maintenance records by way of an *O'Connor* application, risks making the possibility of raising a doubt as to an approved device's functioning illusory. This approach is contrary to Parliament's intent and, in my view, upsets the balance achieved in *St-Onge Lamoureux*.

I. Analysis

[64] In *St-Onge Lamoureux*, this Court considered the constitutionality of certain provisions of the scheme applicable to prosecutions for driving with a blood alcohol level over the legal limit. The challenge related to s. 258 of the *Criminal Code*, which establishes presumptions of accuracy and identity for the results of breath alcohol testing, and, more particularly, to the constitutionality of the amendments limiting the type of evidence that could be adduced to rebut these statutory presumptions. Before going further, I note that the disclosure requested in this appeal is meant to aid the defence in rebutting the presumption of accuracy.

According to these amendments, in order to succeed in rebutting the presumption of accuracy, the defence was required to produce evidence tending to (1) raise a doubt that an instrument was functioning or was operated properly, (2) show that the malfunction or improper operation of the instrument resulted in the determination that the accused's blood alcohol level exceeded the legal limit, and (3) show that the accused's blood alcohol level would not in fact have exceeded that limit at the time when the offence was alleged to have been committed (*St-Onge Lamoureux*, at para. 17).

[65] The Court's decision, which affirmed in part the constitutionality of this scheme, was largely predicated on striking a balance between Parliament's pressing and substantial objective — giving breath alcohol testing results a weight consistent with their scientific value — and the minimal impairment of the accused's rights.

[66] The Court began by considering whether the three requirements were consistent with the right to be presumed innocent. It relied on expert evidence to the effect that “the possibility of an instrument malfunctioning or being used improperly when breath samples are taken is not merely speculative, but is very real” and that “the calibration and maintenance of instruments are essential ‘to the integrity of the breath test program’” (para. 25). The Crown had been unable to demonstrate that “the rate of failure attributable to improper maintenance or operation is insignificant” (para. 27). In light of these findings, the Court was of the view that a trier of fact could entertain a reasonable doubt about the validity of test results but “nevertheless

remain bound by the statutory presumptions” and “be required to convict the accused unless the accused rebuts those presumptions in accordance with the [statutory] requirements” (para. 27). On this basis, the Court found that s. 258(1)(c) and s. 258(1)(d.01) infringed s. 11(d) of the *Charter*.

[67] The Court then turned to the important question of whether the infringement was justified. It framed its analysis by expressly stating that “the means available to the accused to rebut the presumption” (para. 30 (emphasis added)) and, more particularly, “whether it is possible, and how easy it is, for the accused to rebut the presumption” (para. 31 (emphasis added)) were relevant to its determination at this stage. In other words, the Court’s primary concern was ensuring that accused persons retained a viable means of rebutting the statutory presumptions in spite of the limits imposed on the evidence that could be adduced for that purpose.

[68] In light of the “ample” proof of the reliability of approved instruments (para. 35), the Court acknowledged the pressing and substantial objective of giving their results a weight consistent with their scientific value (para. 36). That being said, the Court found only the first requirement of s. 258(1)(c) (evidence of the malfunction or improper operation of the instrument) to be justified. The Court struck down the second and third requirements on the basis that the second imposed an “excessive burden” on the accused (para. 56) and that the third was not rationally connected with Parliament’s objective (para. 62).

[69] In upholding the first requirement, the Court considered both the means available to the accused to rebut the presumption of accuracy and how difficult it was for the accused to do so. First, the provisions did not make it impossible for an accused to disprove the test results. This could be accomplished by raising deficiencies in either the operation *or the maintenance* of an instrument:

It should also be mentioned that the new provisions do not make it impossible to disprove the test results. Rather, Parliament has recognized that the results will be reliable only if the instruments are operated and maintained properly, and that there might be deficiencies in the maintenance of the instruments or in the test process. What the new provisions require is that evidence tending to cast doubt on the reliability of the results relate directly to such deficiencies. [Emphasis added; para. 41.]

In addition to finding that the accused could rebut the presumption by identifying deficiencies in an instrument's maintenance, the Court assumed that information permitting the accused to raise such a concern would be readily available to him or her. It found that, "in light of the evidence accepted by the trial judge, there are several pieces of evidence that can be provided" to the accused (para. 42) and that though the accused "must retain a technician or an expert to determine whether the instrument malfunctioned or was operated improperly" (para. 47 (emphasis added)), "[t]he prosecution must of course disclose certain information concerning the maintenance and operation of the instrument" (para. 48 (emphasis added)). In my view, the only possible reading of these passages is that the Court considered maintenance records to be included in the Crown's disclosure obligation *without* the defence needing to put forward expert evidence to that effect. It seems to me that the

Court considered such expert evidence to be required *only* to address the substantive issue of whether the instrument malfunctioned or was operated improperly.

[70] Having concluded on this basis that only the first requirement imposed a justified limit on s. 11(d) of the *Charter*, the Court went on to consider the validity of that requirement in relation to the right to make full answer and defence guaranteed by s. 7 of the *Charter*. Notably, the defence argued that the new provisions created a defence that was so difficult to attain as to be practically illusory (para. 77). The Court rejected this argument. It found that the requirement did not limit the evidence that could be used to establish a deficiency in the functioning or operation of the instrument and that “[t]he accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence” (para. 78). It is noteworthy that, when it made this statement, the Court had already stated that the prosecution “must of course” disclose certain information concerning the maintenance of approved instruments (para. 48), which it reaffirmed in disposing of the s. 7 argument by indicating that the accused might rely “on a maintenance log that shows that the instrument was not maintained properly” (para. 78).

[71] I agree with what Rowbotham J.A., dissenting, states at para. 101 of her reasons: “In light of Deschamps J.’s analysis, it cannot be said that the discussion of the relevance of maintenance records [in *St-Onge Lamoureux*] was peripheral to the court’s conclusion” (C.A. reasons, 2016 ABCA 358, 344 C.C.C. (3d) 85). In my view, the Court’s reasoning in *St-Onge Lamoureux* was dependent in large part on

two assumptions: (1) that one means available to the accused to raise a doubt as to the functioning of an instrument was by raising deficiencies in its maintenance; and (2) that the evidentiary basis for such a defence would be readily available to the accused. As I explain below, this is confirmed by an examination of the record and the submissions before the Court in *St-Onge Lamoureux*.

[72] Importantly, these assumptions emerged from an extensive evidentiary record. As noted at para. 35 of *St-Onge Lamoureux*, the parties to the appeal had consented to the filing of the evidence adduced in *R. v. Drolet*, 2010 QCCQ 7719, a case heard by Judge Chapdelaine, who also presided over the trial of Ms. St-Onge Lamoureux. In *Drolet*, the Attorney General of Quebec and the interveners, the Barreau du Québec and the Association québécoise des avocats et avocates de la défense, had each filed extensive expert evidence pertaining to the functioning and operation of approved instruments. The fact that the parties consented to the use of the expert evidence adduced in *Drolet* does not surprise me given how detailed and balanced it was.

[73] My colleague Rowe J. would depart from the assumptions underlying *St-Onge Lamoureux* on the basis that “[t]his Court [in *St-Onge Lamoureux*] did not have the benefit of the Alcohol Test Committee’s current position on the relevance of maintenance records to instrument reliability” (para. 44). I respectfully disagree.

[74] In 2009, the ATC published the “Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee”

(2009), 42 *Can. Soc. Forensic Sci. J.* 1. This was the version of the recommended standards and procedures for alcohol testing that was before the Court when it decided *St-Onge Lamoureux*. It addressed the question of maintenance as follows:

Proper calibration and/or calibration check procedures are the primary means of assuring accuracy of the Approved Instrument, Approved Screening Device and accessory equipment at the time of use. Calibration of Approved Instruments shall be done with a wet-bath simulator. In addition to these calibrations and/or calibration checks, formal maintenance procedures are essential to the integrity of the breath test program. [p. 14]

The ATC continues to endorse this statement, on which the Court relied at para. 25 of *St-Onge Lamoureux*. As my colleague acknowledges (at para. 45), the ATC has only qualified this statement in its updated publication:

Proper calibration and/or calibration check procedures are the primary means of assuring accuracy of the Approved Instrument, Approved Screening Device and accessory equipment at the time of use. Calibration of Approved Instruments and Approved Screening Devices shall be done with an aqueous alcohol standard. In addition to these calibrations and/or calibration checks, formal maintenance procedures are essential to the integrity of the breath test program. Records relating to periodic maintenance or inspections cannot address the working status of an Approved Instrument at the time of a breath test. The required quality control information which must be reviewed to assess the working order of an Approved Instrument is produced during the subject breath testing procedure. [Emphasis added.]

(Canadian Society of Forensic Science, “Canadian Society of Forensic Science Alcohol Test Committee Recommended Best Practices for a Breath Alcohol Testing Program” (2014), 47 *Can. Soc. Forensic Sci. J.* 179, at p. 187)

[75] Just as the courts subject experts to special scrutiny before allowing them to opine on the “ultimate issue” in a dispute (*R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 25), so should this Court exercise caution, in this case, when considering the extent to which the ATC’s updated recommendations are determinative of the relevance of maintenance records, a question of law that is to be decided by the courts. Such caution is particularly warranted in light of the ATC’s composition, as explained by Judge Henderson in *R. v. Sutton*, 2013 ABPC 308, 59 M.V.R. (6th) 89:

I caution myself that the Alcohol Test Committee is not a truly independent body of scientific experts who offer purely objective opinions on topics relating to breath testing instruments. The Alcohol Test Committee is comprised of scientists who have direct connections with, and are employed by, policing services and Government Agencies. Five of the ten members of the Committee are employed by R.C.M.P. labs across the country. Four of the remaining five members are employed by Government agencies. [Emphasis added; para. 137.]

The fact that the expert opinion of a member of the ATC, Ms. Blake, is the *only* one before this Court in the present appeal, while the position of experts that may disagree with her on the relevance of maintenance records is notably absent from the record, is further cause for caution. I note that Ms. Blake and another witness tendered by the Crown have, in the past, admitted that “not all experts agree with them on this issue” (*Sutton*, at para. 152).

[76] In my respectful view, such caution is not reflected in an approach that relies on the ATC’s updated recommendations to conclude that maintenance records are not relevant. In *St-Onge Lamoureux*, it was assumed on the basis of a fulsome

evidentiary record that maintenance records were relevant to rebutting the presumptions at issue, and the impugned scheme's constitutionality was confirmed on this basis. Aside from the updated statement from the ATC, which has not been shown to be the product of new scientific evidence of any kind, there is no new evidentiary basis in the present case for calling the Court's assumptions in *St-Onge Lamoureux* into question. In light of this context, I remain unconvinced that the wisdom of our recent jurisprudence should be so easily swept away.

[77] Moreover, I am persuaded that although the ATC's updated recommendations were not published until after *St-Onge Lamoureux* was decided, their substance, to the effect that only time-of-test controls are capable of showing that an instrument was malfunctioning, was considered by this Court and the lower courts in *St-Onge Lamoureux*. In *Drolet*, Judge Chapdelaine accepted the evidence of the Crown's experts that "[i]n principle, the diagnosis and control procedures for [the] instruments ensure their proper functioning and the reliability of their results" (para. 79 (CanLII)). A similar expert opinion was put forward by Randy Prokopanko, himself a member of the ATC, before the Standing Senate Committee on Legal and Constitutional Affairs on February 20, 2008, when it was considering Bill C-2, (*the Tackling Violent Crime Act*, S.C. 2008, c. 6). Asked how an accused could discharge his or her burden of proving that an instrument had malfunctioned, Mr. Prokopanko stated: "... I have confidence not that it cannot malfunction, but if it does that that will show up in our test procedure and you will not have gotten to the point of accepting a breath sample" *Proceedings of the Standing Senate Committee on Legal*

and Constitutional Affairs, No. 8, 2nd sess., 39th Parl., February 20, 2008, at p. 8:75.

I note that Mr. Prokopanko admitted before the Senate Committee that maintenance records should be disclosed to the accused. In *St-Onge Lamoureux*, a similar position was taken by the Attorney General of Quebec in oral submissions before this Court:

[TRANSLATION] But the cornerstone, what permits to determine whether the instrument is not functioning properly, is the control test; it's the test that determines this; it's the test that is the cornerstone and the guarantee we have that the instrument is functioning reliably. [Emphasis added.]

(*St-Onge Lamoureux*, transcript, at p. 12)

[78] In both *Drolet* and *St-Onge Lamoureux*, the relevance of maintenance records was assumed *despite* such submissions. In *Drolet*, Judge Chapdelaine, having accepted that control mechanisms should ensure the reliability of instruments “in principle”, noted that “one of the experts stated that the degree of reliability, or even infallibility, that people seem to want to attribute to instruments . . . does not take sufficient account [of] the degree of overall compliance with usage procedures and protocols” (para. 80 (emphasis added)). This led him to find that “[t]he validity of the process by which breath samples are obtained for reliable testing depends in large part on competent, adequately trained staff and a regular preventive maintenance program” (para. 81 (emphasis added)).

[79] Similarly, despite submissions before this Court in *St-Onge Lamoureux* to the effect that internal and external controls are the cornerstone of the reliability of these instruments, members of the Court expressed concerns during the hearing about whether the accused would have access to maintenance records:

[TRANSLATION]

MR. JUSTICE LEBEL: Could the accused have access to these maintenance records through a disclosure request?

MR. DÉOM: That is an excellent question which – and I’ll admit this to you candidly – I have avoided before trial judges because – in fact, for one basic reason: because the question of disclosure is one that arises in a very, very specific context with – well, I’m going to answer it – but with specific information. My answer: if the maintenance record exists, the accused should have access to it. It isn’t something –

MR. JUSTICE LEBEL: You say if it exists. Wouldn’t this system presuppose, in order to operate with a minimum of, say, fairness for accused persons, that the record does in fact exist and that the accused can have access to it? Because you say, for example – I am quite prepared to accept your position on this – you say that maintenance is done in such a way; that standards are in place; that all of this guarantees not the infallibility but, let’s say, the reliability of the instrument. But if there’s no record, what can establish these factors?

MR. DÉOM: You’re referring to the factors that may cause the court to have a reasonable doubt?

Well, it is because I would say that, in itself, the maintenance record is certainly relevant evidence under a disclosure request. What is its real probative value? That’s a different matter, since it depends on a set of circumstances.

MR. JUSTICE LEBEL: Let’s say, for example, if the maintenance record, if the examination of the maintenance record shows in fact that there is no maintenance, that the scheduled checks are not being done. And does the record indicate who operates the instruments?

MR. DÉOM: In fact, the maintenance records I’ve seen – and I’ve seen a number of them – do not all have the same content. Many

municipal police forces actually have no maintenance records; the records are with the distributor responsible for maintaining the instruments. The distributor keeps records on this. Some police forces have maintenance records designed around several parameters, but I would like to stress one point, Justice LeBel: if, for instance, my instrument was maintained last February or even last September, this does not guarantee that it is functioning properly today, apart from the control test being acceptable or not.

MADAM JUSTICE DESCHAMPS: And how can accused persons have access to these control tests?

MR. DÉOM: The control test, or rather the printout made by the instrument, gives the result of the control test; gives the result of the blank test – because there is a blank test used to purge the system – it gives the result from the sample taken. The accused is generally given this information a short time after blowing into the instrument. [Emphasis added.]

(*St-Onge Lamoureux* transcript, at pp. 12-14)

[80] This passage is significant. First, it shows that certain members of the Court were concerned about ensuring that the accused had an evidentiary basis for rebutting the presumption of accuracy. Second, it shows that the Attorney General of Quebec insisted that all that was needed to show that an instrument was functioning was the time-of-test records printed by the instrument itself. Third, it shows that despite taking this position, the Attorney General of Quebec conceded that maintenance records were relevant (“certainly relevant evidence”) and subject to either the *Stinchcombe* or the *O’Connor* disclosure regime. As mentioned, this is something Mr. Prokopanko also admitted before the Senate Committee considering Bill C-2, at p. 8:75.

[81] At para. 40 of his reasons, my colleague questions the utility of referring to these passages. Though it goes without saying that they do not carry the authority of the Court's reasons, they can assist us in understanding these reasons by providing context. It is within this context, and in light of the extensive factual record in *Drolet*, that the Court's comments on the importance of maintenance and the availability of maintenance records in *St-Onge Lamoureux* must be understood. Despite the Attorney General's position that only time-of-test records were relevant to the question of whether an instrument had functioned properly, the Court concluded that the impugned scheme was constitutional *on the assumption that* the accused would have an opportunity to raise a reasonable doubt as to the instrument's functioning on the basis of its maintenance and would "of course" be provided with an evidentiary basis to do so.

[82] My concern is that, by deciding at this point that maintenance records are irrelevant and therefore not available under first party disclosure, my colleague would upset the delicate balance struck in *St-Onge Lamoureux* and put the very constitutionality of s. 258(1)(c) back into question.

[83] I am also concerned that my colleague's approach, which accepts that *the only* records that are "obviously relevant to the functioning of the instrument are the time-of-test records" (para. 47), effectively denies the accused the opportunity to rebut the presumption of accuracy by raising a doubt as to the *proper functioning* of the machine. The *Criminal Code* provides that the presumption of accuracy may be

rebutted by evidence tending to show “that the approved instrument was malfunctioning or was operated improperly” (s. 258(1)(c)). Holding that *only* time-of-test records produced *by the instrument* can demonstrate that the instrument was malfunctioning effectively assumes that the machine is infallible. With respect, I find this difficult to reconcile with this Court’s reasoning in *St-Onge Lamoureux*, which recognized that “the possibility of an instrument malfunctioning . . . is not merely speculative, but is very real” (para. 25; see also paras. 27-28). Furthermore, this approach limits the defence’s opportunity to rebut the presumption of accuracy by confining it to arguments raising a doubt as to the instrument’s *operation*. It is reasonable to assume that if there are any deficiencies in the time-of-test records produced by the machine, the Crown will not press charges. In these circumstances, if evidence other than the time-of-test results is irrelevant, the accused will never be able to successfully defend against a charge on the basis that the instrument *malfunctioned*. This runs contrary to Parliament’s intent to make malfunctioning and improper operation two *distinct* grounds for rebutting the presumption of accuracy. It also upsets the balance struck by this Court in *St-Onge Lamoureux* in determining that the violation of the right to be presumed innocent guaranteed by s. 11(d) of the *Charter* was justified.

[84] My colleague concludes that requests for the disclosure of maintenance records fall under the *O’Connor* regime (para. 52). I respectfully disagree. Saying that maintenance records are available under third party disclosure ignores the fact that this recourse would, in practice, be illusory. In my view, it is difficult to understand

how an expert could opine on the “likely relevance” of maintenance records without first examining them and identifying specific deficiencies that may be used to prove that an instrument malfunctioned. As stated by my colleague, the *O’Connor* standard is “not onerous” but is nevertheless “significant” (para. 26). It is meant to allow courts to act as gatekeepers, avoiding speculative requests for production (*O’Connor*, at para. 24, quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 744). In my view, requiring the disclosure of maintenance records to be sought under the *O’Connor* regime opens the door to the very “fishing expeditions” we are seeking to avoid (see para. 53 of my colleague’s reasons). Although *St-Onge Lamoureux* made it clear that expert evidence would be needed “to determine whether the instrument malfunctioned” (para. 47 (emphasis added)), it did not suggest that expert evidence would be needed for disclosure purposes, since it assumed that maintenance records would (“of course”) be disclosed. For an accused to have a real opportunity — and not only a theoretical one — to show that an instrument was malfunctioning, an expert must have an evidentiary basis either to opine as to the possibility that the instrument malfunctioned or to establish the “likely relevance” of other information sought through additional third party disclosure. Providing nothing by way of first party disclosure forces accused persons and their experts to resort to conjecture and speculation and undermines the promise of *St-Onge Lamoureux*.

[85] This is in no way inconsistent with para. 78 of *St-Onge Lamoureux*. With respect, my colleague gives this passage, which cites *O’Connor*, too much weight. It certainly does not say that maintenance logs will *only* be available as third party

records, and it should not be held out as supporting this conclusion. It simply reaffirms that *any* evidence tending to establish a deficiency in the functioning or operation of an instrument will be available to the accused according to the established rules of disclosure: first party records will be disclosed as per the Crown's duty under *Stinchcombe* and third party records may be requested by the accused under *O'Connor*.

[86] Finally, it is my view that disclosing maintenance records as first party records is not only consistent with *St-Onge Lamoureux* but also serves the interests of justice. Where maintenance records reveal no issues, their disclosure may compel the accused to plead guilty. Where they reveal certain issues *and an expert is of the opinion that these issues may prove that the instrument malfunctioned*, the maintenance records provide a basis for the accused to raise such a defence or to make subsequent *O'Connor* requests in a grounded, non-speculative manner.

II. Conclusion

[87] For all these reasons, I would conclude that maintenance records are subject to first party *Stinchcombe* disclosure. I agree with Rowbotham J.A., dissenting (para. 124) that maintenance records “should include the results of all inspections and documentation of the maintenance history including records of parts replaced and approved modifications to hardware or software”, as per the ATC's 2014 recommendation (p. 188). Any further disclosure arising from information in the maintenance records must be sought through an *O'Connor* application.

[88] Contrary to what my colleague argues at para. 53 of his reasons, this approach *would* prevent fishing expeditions and other dilatory requests for information. It clearly defines the scope of first party disclosure, where prior jurisprudence was ambiguous. Moreover, it requires that the accused set out an evidentiary basis for any further third party disclosure. To use my colleague's example, the request for additional pieces of disclosure in *R. v. Awashish*, 2018 SCC 45, would have failed insofar as the requested information fell outside the scope of "maintenance records" and the accused failed to put forward any evidentiary basis for the request.

[89] For these reasons, I would allow the appeals.

[90] In *Vallentgoed* (37403), the trial judge erred in not ordering the production of the requested records insofar as they fell within the scope of "maintenance records" as defined by the ATC's recommended standards. I would order the disclosure of the requested records falling within this scope, quash the conviction and remit the matter for a new trial following such disclosure. In *Gubbins* (37395), the stay of proceedings should be restored.

Appeals dismissed, CÔTÉ J. dissenting.

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