SCC File No.: 37395

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

BETWEEN:

KEVIN PATRICK GUBBINS

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE APPELLANT
(KEVIN PATRICK GUBBINS, APPELLANT)
(Pursuant to S.42 of the *Supreme Court Act*, R.S.C. 1985,c.S-26)

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PART I-OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is an Appeal that turns on the application of *stare decisis*.

Improper Maintenance as Evidence to the Contrary

2. The Crown argues that whether the instrument has been properly maintained is completely irrelevant to assessing the reliability of the breath test results, based on the evidence of Kerry Blake and a Position Paper issued by the Alcohol Test Committee.

3. The Appellant disagrees, and says that the recent decision of this Court in *R v St-Onge Lamoureux,*[1] makes it clear that maintenance is relevant in prosecutions under s. 253 because the accused can rebut the presumptions of identity and accuracy by raising a reasonable doubt about whether the instrument has been properly maintained.

4. The Crown says that the statements in *St-Onge* are obiter dicta, and should not be followed.

5. The Appellant says that the statements in *St-Onge* are part of the *ratio decidendi* of the decision, or at a minimum are part of the wider circle of analysis which is obviously intended for guidance and which should be considered as authoritative.

Disclosure of Maintenance Records

6. The Crown argues that the only documents which need be disclosed are those which are created in the investigation of the accused. As a result, no maintenance records need ever be disclosed, even if they were somehow relevant.

7. The Appellant disagrees, and says that this Court has clearly stated in *St-Onge* that some maintenance records need be disclosed.

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[1] *R v St-Onge Lamoureux,* 2012 SCC 57 ("*St-Onge*").

8. Further, although this Court did not define the limits of what must be disclosed, they did specifically include the Certificate of Analyst, which is not created as part of the investigation of an accused.

9. Further, this Court specifically referred to a "maintenance log" which showed that the instrument was not maintained properly as an example of how evidence to the contrary could be raised.

10. The Crown says that these statements are also dicta and need not be followed.

11. The Appellant states that these statements are part of the *ratio decidendi*, or at a minimum are part of the wider circle of analysis which is obviously intended for guidance and which must be considered authoritative.

Bridging the Gap Between the Crown and the Investigating Police Force

12. The Crown argues that these statements are inconsistent with the law relating to disclosure and third-party production. Although the decision in *R v McNeil*,[2] provided for bridging the gap between the Crown and the investigating police force, that decision is limited to police disciplinary records rather than having a broader application, in accordance with the Alberta Court Of Appeal's decision in *R v Black*.[3]

13. The Appellant states that *McNeil* has a broad application, as discussed in *R v Quesnelle*,[4] and that *Black* has been overruled on this point by *St-Onge*.

Modifications of the Instrument

14. The Appellant states that a further rationale justifying disclosure of the Maintenance records is that without those records the defence would never be able to know whether the instrument has been modified since the initial inspection and approval by the Alcohol Test Committee. If it is modified without proper approval, is that not relevant in deciding whether the instrument was functioning properly?

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[2] *R v McNeil*, 2009 SCC 3 ("*McNeil*").
[3] *R v Black*, 2011 ABCA 349 ("*Black*")
[4] *R v Quesnelle*, 2014 SCC 46, *infra*, at Note 92.

15. The Appellant points to the evidence of Kerry Blake that although she was a member of the ATC and the Program Director responsible for supervising breath testing in Alberta since 2004, she was not aware that the police in Alberta were using a software version in their breath testing instruments for 14 years until she was cross examined in *R v Sutton*,[5] on disclosure received in the middle of that trial.

16. This is a real issue, not just speculation.

B. Relevant Factual Background

17. The Appellant was charged with offences contrary to s. 253(1)(a) impaired driving and s. 253(1)(b) Over 80 alleged to have been committed on March 10, 2014. He entered pleas of not guilty and a trial date was set at the earliest opportunity for September 12, 2014.

18. General disclosure requests were sent on March 18 and April 2, 2014. The Appellant then retained new counsel, who then sent a specific disclosure request for a number of items including the maintenance logs on July 7, 2014. This new request specifically included a request for "disclosure of maintenance logs for the Approved Instrument showing the history of repairs and modifications since the machine was first put into use, including details of any repairs completed."

19. On July 9, the Crown advised by telephone that they would not produce the requested disclosure. On July 21 counsel for the Appellant send a subsequent identical request, and on July 29 the Crown advised in writing that they would not produce the requested disclosure. After several pretrial conferences, the Crown and defence agreed to a pre-trial hearing to in order to determine whether the refusal to disclose the maintenance log breached the Appellant's rights under s. 7 of the *Charter* to make full answer and defence.

20. The parties were in the process of attempting to schedule a hearing date when the August 14 date suddenly became available. The Appellant filed a *Charter* Notice on August 13, 2014 and the parties agreed to proceed with the hearing on August 14, 2014.

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[5] *R v Sutton*, 2013 ABPC 308 ("*Sutton*").

C. Judicial History

i. The Matter at Trial – Provincial Court of Alberta

21. There was no actual trial in this matter, as the learned Trial Judge directed a stay of proceedings on the s. 253(1)(b) charge at the conclusion of the pre-trial hearing, and the Crown directed a stay of proceedings on the impaired driving charge under s. 253(1)(a).

22. As part of the pre-trial hearing, the Crown called two witnesses in a *voir dire*. The learned Trial Judge summarized Cpl. Palfy's testimony as follows: Cpl. Palfy was a member of the Grande Prairie RCMP detachment and a Qualified Technician for the Intox EC/IR II, the type of instrument which was used in the Appellant's case. He testified that all service, maintenance and modifications are contracted to a third party, Davtech. The instrument is sent to the service provider when it is due for annual maintenance or when it shows an error message. The only documents retained in the Grande Prairie detachment are an invoice for billing purposes and a certificate of annual maintenance. The RCMP does not receive a detailed record of what was done to the instrument. Cpl. Palfy testified that if he wanted to obtain that information he could call Davtech, however he had not done so.[6]

23. Cpl Palfy testified that the RCMP detachment does maintain a maintenance log which is a sign in/sign out sheet stating when the instrument leaves and when it comes back. He testified that it was his understanding that the K Division of the RCMP had determined that the maintenance logs kept by the RCMP would be this sign in/sign out sheet. Cpl Palfy also testified that the Intox EC/IR II required software to run properly.[7]

24. Kerry Blake was also called as a witness by the Crown. The learned Trial Judge summarized her evidence as follows: Ms. Blake is a forensic alcohol specialist with the National Center for Forensic Services and the Program Director for breath testing in Alberta. She is a member of the Alcohol Test Committee which is responsible for evaluation breath testing instruments to determine whether they will be recommend to be approved instruments for use in Canada. The ATC also makes recommendations for best practices for the use of the equipment.

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[6] *R v Gubbins*, 2014 ABPC 195 [Gubbins' Appellant's Record ("GAR"), Part I, Tab A] at para. 11 ("*Gubbins ABPC*").
[7] *Ibid*, at para. 11 [GAR Part I, Tab A].

Ms. Blake testified that all instruments must be approved by the Attorney General of Canada prior to use by a police service. The breath testing instruments are subject to rigorous testing by the members of the ATC and only instruments that pass this process are recommended to the Minister of Justice to be designated as an Approved Instrument. One of the criteria for approval is that the instrument be failsafe, which means that when a failure occurs the instrument must produce an exception message, stop working and not produce a result. The instruments are designed with a complex series of interlocking tests, checks and procedures which ensure accuracy, including a five step breath testing sequence which is then repeated 15 minutes later. The results of the blank checks, alcohol standard test and breath results are recorded on the qualified technicians check sheet and the subject test report.[8]

25. With respect to maintenance and repairs, Ms. Blake acknowledged that the ATC authors a document entitled *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*,[9] Can. and Soc. Forensic Sci. J. Vol. 46. No. 1 (2013) which includes a recommendation that maintenance records be kept:[10]

> **Modifications**
>
> Any modification to Approved Instruments or Approved Screening Devices must be approved by the Alcohol Test Committee. Installation of approved modifications shall be performed only by person authorized by the Program Director. Following any modification, the equipment shall not be returned to active use in the program until it has successfully passed the equivalent of an initial inspection.
>
> **Maintenance Logs**
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> A maintenance log shall be kept for each Approved Instrument, Approved Screening Device and accessory equipment in active use in the program. Logs should include the result of all inspections; documentation of the maintenance history including records of parts replaced and approved modifications to hardware or software.

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[8] *Ibid,* at para. 12 [GAR Part I, Tab A].
[9] *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*, Can. and Soc. Forensic Sci. J. Vol. 46. No. 1 (2013) [GAR Part IV, Tab 1.B] ("*Recommended Standards 2013*").
[10] *Ibid,* at para. 14 [GAR Part I, Tab A].

26. Ms. Blake testified that the RCMP detachments have been instructed to maintain a maintenance log which is only a sign in/sign out document that records when the instrument came into operation and when it goes off-site for maintenance and repairs. The balance of the information that the ATC has recommended be maintained is recorded and maintained by the third-party service provider.[11]

27. Ms. Blake testified that while the ATC has established guidelines dealing with maintenance, those recommendations are concerned with program integrity not instrument accuracy. Periodic maintenance is a best practice for the prevention of error rather than detection of error.[12]

28. Ms. Blake was unequivocal in her testimony that maintenance records are not relevant in determining the proper functioning of an Approved Instrument at the time of breath testing. She stated in her Affidavit, "It is my opinion and the consensus of the ATC that the only records that can establish proper operation at the time of testing are those listed above and produced during the time of testing itself."[13]

29. For ease of reference, those documents include the Certificate of Analyst for the standard alcohol solution, the Operational Checksheet used by the Qualified Technician, and the paper work automatically generated by the Approved Instrument, including a Subject Test report when the Intox EC/IR II is used (as per the affidavit of Ms. Blake, para 26)

30. Ms. Blake further stated that as an ATC member, she could confirm that the firmware and software versions that are printed on the subject test report are versions that she knows have been found to be approved by the ATC, so this Intox EC/IR II is an approved instrument.[14]

31. In cross examination, Ms. Blake agreed that records of maintenance are completely irrelevant to assess whether or not the instrument was reliable on the day in question,[15] and that

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[11] *Ibid,* at para. 15 [GAR Part I, Tab A].
[12] *Ibid,* at para. 16 [GAR Part I, Tab A].
[13] *Ibid,* at para. 16 [GAR Part I, Tab A].
[14] *R v Gubbins* Trial Transcripts, at Page 29, Lines 36-40 [GAR Part V, Tab A].
[15] *Ibid,* at Page 44, Line 20 [GAR Part V, Tab A].

whether the instrument has been maintained properly is not a relevant inquiry in assessing the reliability of the results.[16]

32. Ms. Blake testified that the Qualified Technicians in Alberta were never provided with a manual from the manufacturer of the EC/IR II. The manual they are provided with was written by the RCMP Forensic Laboratory, which she then changed to match what the Alberta version of the software does. Although she wrote part of the manual for use in Alberta, and was responsible for training the qualified technicians in Alberta, she has never received a manual from the manufacturer, only a binder of training notes and Power Point presentations from attending a training course. She was not aware of any other members of the ATC who had been provided manuals, although the manual produced by the RCMP contains technical information from the manufacturer.[17]

33. With respect to maintenance, she confirmed that she did not know how to fix the instruments or maintain them, but that Intoximeters would supply manuals to the service personnel and they would have information as to how to repair and maintain and inspect the instruments.[18] She further stated that she knows the service providers have been qualified by Intoximeters, and that they use Intoximeter manuals and materials in doing these inspections and repairs. She testified that she had been to the service center in Airdrie and observed the manuals sitting on a shelf. She has also received documentation to show he has been appropriately certified by Intoximeters to do this work.[19]

34. She further admitted that she did not know what Intoximeters said about when maintenance must be done for these instruments,[20] nor did she know what maintenance must be done at what intervals.[21] Further, she did not know what the manufacturer says about the importance of the maintenance that is to be provided.[22]

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[16] *Ibid,* at Page 44, Lines 30-33 [GAR Part V, Tab A].
[17] *Ibid,* at Page 38, Line 11 to Page 40, Line 27 [GAR Part V, Tab A].
[18] *Ibid,* at Page 40, Line 29 to Page 41, Line 7 [GAR Part V, Tab A].
[19] *Ibid,* at Page 43, Lines 18-22 [GAR Part V, Tab A].
[20] *Ibid,* at Page 42, Line 34 [GAR Part V, Tab A].
[21] *Ibid,* at Page 43, Line 3 [GAR Part V, Tab A].
[22] *Ibid,* at Page 43, Line 21 [GAR Part V, Tab A].

35. Ms. Blake testified that she was responsible for training the qualified technicians to operate the Intox EC/IR II, and that the maintenance log that they were provided was a simple sign in/sign out sheet. Ms. Blake eventually conceded that there must be a documented maintenance history, parts replaced, modifications to software, and all of the things required by the Recommended Standards, but that as of the introduction of the Intox EC/IR II, that information was kept by Davtech.[23]

36. She agreed that what had been set up was a system whereby the RCMP keep the maintenance log and Davtech keeps the actual records as to what was done.[24] She admitted that the decision to have the maintenance records kept by a third party was made by a committee that included herself and RCMP Traffic Services and representatives from the Edmonton and Calgary police alcohol units as well as Robert Palser from the Crown Prosecutor's Office.[25] The Committee discussed what records were required to be kept and determined that only the Certificate of Annual Maintenance was required to be disclosed, because the police would not have any knowledge as to what was done.

37. Ms. Blake then stated that the newest version of the Recommended Standards and Procedures just talks about maintenance documents that need to be kept on the file, without stating who should keep them or where. She acknowledged that such documents need to exist but that as of May 2014 they are no longer kept in a maintenance log, and the Recommended Standards no longer refer to a log of any kind.[26]

38. Further, despite the Alberta Court of Queen's Bench decision in *R v Kilpatrick,*[27] which decided that maintenance logs as defined at that time were required to be disclosed as first party disclosure, the committee that included Robert Palser, herself and the RCMP Traffic Services member and the alcohol unit counterparts in Edmonton and Calgary, issued a directive listing what documents were necessary for disclosure purposes in the standard disclosure package which excluded the maintenance log. That directive came from Robert Palser and was

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[23] *Ibid*, at Page 57, Lines 27-30 [GAR Part V, Tab A].
[24] *Ibid*, at Page 58, Lines 25-28 [GAR Part V, Tab A].
[25] *Ibid*, at Page 59, Lines 20-39 [GAR Part V, Tab A].
[26] *Ibid*, at Page 64, Line 39 to Page 65, Line 10 [GAR Part V, Tab A].
[27] *R v Kilpatrick*, 2013 ABQB 5 ("*Kilpatrick ABQB*"), leave to appeal denied 2013 ABCA 168.

disseminated from the Crown Prosecutor's office, and was in place in Alberta for years until the new directive in July 24, 2014.[28,29]

39. This new directive states that the "maintenance log" which is now a sign in/sign out document is not part of the standard disclosure package but can be disclosed upon receiving a specific request.[30]

40. Ms. Blake testified that she had currently been involved in the training and rollout for the new evidentiary instrument, the Intox EC/IR II.[31] Those Instruments were shipped to the various detachments in Alberta in May through July of 2013.[32]

41. The Appellant did not call any evidence, but relied upon the decisions in *Kilpatrick 2013,* which stated that the maintenance log for the approved instrument was required to be disclosed as part of first-party disclosure, and *St-Onge,* which had specifically referred to a maintenance log as a document that could be relied upon by an accused to rebut the presumptions under section 258(1)(c).

42. The learned Trial Judge issued a written decision on September 5, 2014, prior to September 12, 2014, the date on which the trial was scheduled to commence. The learned Trial Judge noted that the Accused had alleged a breach of his *Charter* rights under s. 7 by reason that the Crown had failed to disclose "copies of the maintenance logs for the approved instrument showing the history of repairs and modifications since the machine was first put into use, including details of any repairs completed."[33]

43. Judge Schaffter noted that the Appellant was relying on the decision of Mr. Justice Graesser in *Kilpatrick ABQB* as the current law in Alberta. In his judgment, Justice Graesser had stated "approved instrument maintenance logs are first party disclosure. They are inherently

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[28] *R v Gubbins* Trial Transcript, at Page 61, Lines 2-29 [GAR Part V, Tab A].
[29] *R v Gubbins* Trial Exhibit 4, *Impaired Disclosure Requests Faxed Copy* [GAR Part IV, Tab 4].
[30] *R v Gubbins* Trial Transcript, at Page 63, Lines 32-39 [GAR Part V, Tab A].
[31] *Ibid,* at Page 18, Line 25 [GAR Part V, Tab A].
[32] *Ibid,* at Page 66, Line 17 [GAR Part V, Tab A].
[33] *Gubbins ABPC*, *supra*, at para. 3 [GAR Part I, Tab A].

relevant to the issue of the proper functioning of the approved instrument and must be disclosed to an accused on request."[34]

44. Judge Schaffter found that the Appellant had requested the records and that the Crown admitted that they had refused to disclose them, subsequent to the decision in *Kilpatrick ABQB.*[35] (para 9)

45. She further noted that the Appellant's position relied in part on obiter from the decision of *St-Onge,* and quoted paragraphs 25-26, 41 and 48 of that decision. She then stated:

> 24. … Although these comments of Deschamps J. are obiter they are compelling because they form the basis for the Court's decision and the ratio decidendi that the first requirement of s. 258(1)(c) is justified under s. 1 of the Charter. St-Onge, in deciding that the first component of s. 258(1)(c) did not offend the Charter relied upon an accused being able to obtain as part of first party disclosure or through an *O'Connor* hearing the material concerning the maintenance of the approved instrument."

46. She then referred to paragraph 78 of *St-Onge*, which states that "[t]he accused can request the disclosure of any relevant evidence that is reasonably available in order 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)."[36]

47. She stated that in her view the reference to *O'Connor* did not mean that the accused was required to have an *O'Connor* hearing to obtain disclosure of the maintenance records, but that the presumption was that the Crown will provide as first party disclosure all relevant evidence, and that if the accused requires more information then the accused may resort to the *O'Connor* procedure.[37]

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[34] *Kilpatrick ABQB, supra*, at para. 97.
[35] *Gubbins ABPC*, *supra*, at para 9 [GAR part I, Tab A].
[36] *St-Onge*, *supra*, at para. 78.
[37] *Gubbins ABPC*, *supra*, at para 26 [GAR Part I, Tab A].

48. Judge Schaffter then cited *McNeil*,[38] as authority that material which is not part of the fruits of the investigation and which is in possession and control of the police or other Crown agency can compromise first party records and be subject to *Stinchcombe* disclosure if the materials are obviously relevant to the accused's ability to make full answer and defence.[39] She further noted that Justice Graesser had ruled that *McNeil* could be extended to situations other than police discipline records, and that this was a statement of law that she was bound to follow.[40]

49. She concluded that the disclosure requested by the accused was first party disclosure according to *Kilpatrick ABQB*, and that the Crown had not proven that the records were clearly irrelevant or privileged. She noted that the strong opinion evidence of Ms. Blake was, as noted in *Kilpatrick ABQB*, expert opinion and not a conclusion of law. She stated that she was aware that not all experts agree with Ms. Blake on this issue, and that on at least one occasion, "human error or oversight resulted in a modification being made to approved instruments in Alberta without fully complying with the approval process."[41]

50. Judge Schaffter ruled that the accused must have access to the maintenance records in order to be able to rebut the presumption in s. 258(1)(c).[42] She noted that Cpl. Palfy had testified that the maintenance log as defined by the RCMP now was simply a sign in/sign out sheet, which would be of little assistance to the accused in rebutting the presumption. Cpl. Palfy testified that all other maintenance records as to repairs and modifications made on the instrument are held by a third-party service provider, and that those are the records which would be useful to the accused. She noted that Cpl. Palfy testified that he could have access to those records by simply telephoning the service provider, and that Ms. Blake had testified that the Edmonton and Calgary police forces do all of their maintenance in house and do not use third-party contractors.[43]

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[38] *McNeil*, *supra*.
[39] *Gubbins ABPC*, *supra*, at para 29 [GAR Part I, Tab A].
[40] *Ibid*, at para. 33 [GAR Part I, Tab A].
[41] *Ibid*, at para. 49 [GAR Part I, Tab A].
[42] *Ibid*, at para. 52 [GAR Part I, Tab A].
[43] *Ibid*, at para. 53-54 [GAR Part I, Tab A].

51. Judge Schaffter referred to this Court's decision in *R v Chaplin,*[44] which stated that the Crown must prove that the information requested is beyond its control in order to avoid disclosure.[45] Further, she cited the Alberta Court of Queen's Bench decision in *R v Curran,*[46] which held that the Crown cannot simply contract out of its disclosure obligations.[47]

52. Judge Schaffter concluded that the Appellant's rights under s. 7 of the *Charter* had been breached, and that the proper remedy was a stay of proceedings, on the basis that the Appellant's driving license had been suspended by law since the date of the offence and would continue to be suspended till the matter was finally adjudicated, and that the Appellant had set the trial date at the earliest opportunity and requested disclosure early in the proceedings.[48]

53. She noted that the conduct and intention of the Crown can be taken into account, and noted that the non-disclosure was not due to any oversight, but that the Crown had deliberately refused to provide disclosure and chosen to attempt to distinguish *Kilpatrick ABQB.*[49]

54. Judge Schaffter concluded that that even if the records could be provided quickly, the Appellant would have to review them, retain the services of an expert if appropriate, and prepare for a new trial. An adjournment of the trial would extend the period of suspension and the Appellant would clearly be prejudiced.[50]

55. In conclusion, Judge Schaffter directed a stay of proceedings on the s. 253(1)(b) charge. As noted above, the Crown directed a stay of proceedings on the accompanying s. 253 (1)(a) charge.

ii. Summary Conviction Appeal – The Alberta Court of Queen's Bench

56. The Crown appealed the decision by the learned Trial Judge to the Court of Queen's Bench, where the matter was heard in conjunction with the related appeal in *R v Vallentgoed*. Robert Palser on behalf of the Crown argued that the trial judge had erred in finding that

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[44] *R v Chaplin*, [1995] 1 SCR 727.
[45] *Gubbins ABPC*, *supra*, at para. 54 [GAR Part I, Tab A].
[46] *R v Curran*, 2013 ABQB 194 ("*Curran*").
[47] *Gubbins ABPC*, *supra*, at para. 55 [GAR Part I, Tab A].
[48] *Ibid*, at para. 60 and 62 [GAR Part I, Tab A].
[49] *Ibid*, at para. 61 [GAR Part I, Tab A].
[50] *Ibid*, at para. 63 [GAR Part I, Tab A].

maintenance records were first party records, that non-disclosure had an effect on the accused's right to make full answer and defence, and that the appropriate remedy for the alleged breach was a stay of proceedings.[51]

57. Justice Kenny noted that there had been a wave of litigation in this area, including many decisions at the Provincial Court level and at least five other decisions from the Court of Queen's Bench of which she was aware, and that the matter needed to move on to the Court of Appeal.[52]

58. She summarized the Crown position as follows:

> 3. The Crown takes the position that the results of the approved breath test machines speak for themselves. No evidence is required to show that the machines were operating properly. If it displays results, it is operating properly. If it does not display results, it is not operating properly. The results of the tests are presumptive evidence before the court as to the level of alcohol in one's system.

59. She noted that the defence position was that the complete maintenance logs of the machine must be disclosed to the defence as first party records, as the relevance of the records had been established by this Court in *St-Onge*. The only avenue available to the defence to rebut the presumption of accuracy is to show that the instrument was not properly operated or properly maintained.[53]

60. Justice Kenny considered *Kilpatrick ABQB* where the Crown did not disclose the maintenance records. The accused had been convicted at trial and appealed. Justice Graesser held that the maintenance log was a first party record that must be disclosed to the defence. The Crown sought leave to appeal to the Court of Appeal, but was denied due to a lack of an evidentiary foundation to support the position of the Crown.[54]

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[51] *R v Vallentgoed*, 2015 ABQB 206, at para. 16 [GAR Part I, Tab B] ("*Vallentgoed ABQB*").
[52] *Ibid*, at para. 2 [GAR Part I, Tab B].
[53] *Ibid*, at para. 4 [GAR Part I, Tab B].
[54] *Ibid*, at para. 7 [GAR Part I, Tab B].

61. Justice Kenny considered another decision by Justice Graesser in *R v Proctor*,[55] where the crown refused to disclose the maintenance log. The trial judge found a s. 7 breach, but had declined to order a stay or exclude evidence, and instead directed the Crown to disclose the maintenance log. The Crown then advised that the maintenance log did not exist. The trial proceeded and the accused was convicted of the "over 80" charge. On appeal, Justice Graesser reaffirmed that maintenance logs were first party disclosure unless the Crown satisfied a judge that they were irrelevant, and stated "[t]he situation apparently espoused by the RCMP and the Attorney General that selective disclosure of some maintenance records will be done ignores a clear Court of Queen's Bench decision." [56]

62. Justice Graesser found that the Crown intended to violate the s. 7 Charter rights of the accused, considered that his driver's licence was suspended pending the outcome of the trial, and directed a stay of proceedings.

63. Justice Kenny also considered the decision of Justice McIntyre in *R v Sinclair*,[57] where he heard two appeals together from stays of proceedings entered at trial. The Crown conceded in those appeals that the maintenance logs were first party records, but appealed on the basis that they were denied the opportunity to lead evidence that maintenance records are irrelevant and therefore not subject to disclosure.

64. The difficulty with this argument, as noted by Justice McIntyre, is that the Crown would be required to call this evidence in every case in order to withhold disclosure. Justice McIntyre stated "[t]he Supreme Court of Canada has held these maintenance logs to be relevant in *R. v. St-Onge Lamoureux*, 2012 SCC 57 (S.C.C.) There is no room to argue that they are not relevant. It is a waste of court time and the accused's money to fight preliminary battles of relevance of these records."[58]

65. Justice Kenny concluded as follows: "I agree with the decisions of Justices Graesser and McIntyre. The driver's licence of an individual charged with these offence is suspended pending resolution of the matter. The maintenance logs of the breathalyzer machine are relevant first

[55] *R v Proctor*, 2015 ABQB 97 ("*Proctor*").
[56] *Vallentgoed ABQB, supra*, at para. 9 [GAR Part I, Tab B].
[57] *R v Sinclair*, 2015 ABQB 113 ("*Sinclair*").
[58] *Vallentgoed ABQB, supra*, at para. 12 [GAR Part I, Tab B].

party records. They must be disclosed to the accused person in the first instance. No disclosure voir dire is required. In the event that the defence calls expert evidence relating to the functioning of the machine, the Crown can respond at that time."[59]

66. In dealing with the facts of the Appellant Gubbins' case, Justice Kenny adopted the analysis from *Kilpatrick ABQB, Proctor* and *Sinclair* rather than engaging in a full review of the issues on disclosure. She stated that the maintenance records are first party records and failure by the Crown to disclose those records does affect the right of the accused to make full answer and defence.[60]

67. On the issue of remedy, the Crown had argued that an adjournment and production order was the appropriate remedy. The licence suspension did not give rise to a constitutional remedy, and an adjournment would not breach the s. 11(b) rights of the Appellant. The defence restated their argument at trial, that the Crown had deliberately refused to disclose the maintenance records, and that any adjournment would prejudice the Appellant by extending his licence suspension. It was submitted that the learned trial judge had properly exercised her discretion in this regard. The appeal was dismissed with respect to the Appellant Gubbins and the stay of proceedings remained in effect.

iii. Application for Leave to Appeal – Alberta Court of Appeal

68. The Crown sought leave to appeal on two issues: whether the Summary Conviction Appeal Court erred in finding that historical maintenance records of approved instruments are presumptively relevant, and whether the maintenance records for an approved instrument unrelated to the accused's investigation are subject to *Stinchcombe* disclosure. The Crown did not appeal the decision to direct a stay of proceedings as a remedy for non-disclosure.

69. The Appellant conceded that those were questions of law, and acknowledged that the issues were of sufficient importance to merit a second level of appellate review.

70. Justice Wakeling found that the questions of law were arguable, based on four considerations.

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[59] *Ibid*, at para 13 [GAR Part I, Tab B].
[60] *Ibid*, at para 18 [GAR Part I, Tab B].

71. First, Justice Deschamps had expressly declined in *St-Onge* to rule on the specific limits of what evidence might be relevant.

72. Second, Justice O'Brien in denying leave in *Kilpatrick ABCA*, had observed that the issues raised may well have met the criteria for granting leave to appeal if there had been an appropriate evidentiary foundation, which was now present.

73. Third, Justice Kenny had expressed a desire in her decision for appellate intervention.

74. Fourth, Judge Henderson in *Sutton* had pointed out that *St-Onge* was not a disclosure case, and that it would not be expected that the Supreme Court would modify a carefully constructed disclosure regime in a case that did not relate to disclosure.

75. In the end, Justice Wakeling agreed to grant leave to appeal on the two issues sought by the Crown.[61]

iv. Intervenor Applications – Alberta Court of Appeal

76. Once leave to appeal was granted, both the Edmonton Police Service and the Calgary Police Service sought to intervene on the appeal. Justice Veldhuis dismissed both applications.[62]

v. The Matter on Appeal - Alberta Court of Appeal

77. The Court of Appeal heard this matter together with related appeal *R v Vallentgoed*. The Court noted that the two appeals were developed, at least in part, as test cases.

78. The majority found that the lower courts had erred in failing to accept the uncontradicted testimony of Kerry Blake that maintenance records were irrelevant to making full answer and defence. Justice Slatter, who authored the majority opinion, allowed the appeal and directed a new trial for the Appellant.[63]

79. With respect to the *St-Onge* decision, Justice Slatter noted that the Supreme Court had not specified the specific limits of the evidence that might be disclosed as the matter had not been

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[61] *R v Vallentgoed*, 2015 ABCA 202 [GAR Part I, Tab C].
[62] *R v Vallentgoed*, 2016 ABCA 19 [GAR Part I, Tab D].
[63] *R v Vallentgoed*, 2016 ABCA 358 [GAR Part I, Tab E] ("*Vallentgoed ABCA*").

argued. Justice Slatter further stated that the Court in *St-Onge* assumed that maintenance logs would not be fruits of the investigation as the accused can invoke the rules on non-disclosure under the *O'Connor* regime.

80. Justice Slatter noted as well that the Supreme Court may have proceeded on a misunderstanding of the position of the ATC, as it was subsequently clarified.

81. Justice Slatter states that "*St-Onge Lamoureux* does not hold that maintenance records are relevant and therefore disclosable, it assumes that they might be relevant."[64] Justice Slatter then concluded that it was the combination of *Stinchcombe* and *O'Connor* procedures that would allow the defence to obtain any maintenance records that are relevant and probative, that results in the defence not being illusory.[65] However, Justice Slatter stated that merely arguing that there likely are maintenance records and that the instrument likely underwent maintenance from time to time is not sufficient to justify disclosure under *O'Connor*.[66] Further, Justice Slatter then stated that production of maintenance records is rarely required under either the *Stinchcombe* or *O'Connor* procedures, that it will be rare for the defence to ever establish a right to disclosure under *O'Connor*, and that historical records will rarely if ever be relevant to making full answer and defence.[67]

82. Justice Slatter stated:[68]

> 69. It must be emphasized that the only lines of defence contemplated by s. 258(1)(c) of the *Criminal Code* and *St-Onge Lamoureux* are that the approved instrument was malfunctioning or was operated improperly. Specifically, it is not a defence to prove that the instrument was "improperly maintained", nor that maintenance records were kept in an improper format. …

83. In conclusion, Justice Slatter stated:[69]

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[64] *Ibid*, at para. 53 [GAR Part I, Tab E].
[65] *Ibid*, at para. 54 [GAR Part I, Tab E].
[66] *Ibid*, at para. 70 [GAR Part I, Tab E].
[67] *Ibid*, at para. 70, 75, and 78 [GAR Part I, Tab E].
[68] *Ibid*, at para. 69 [GAR Part I, Tab E].
[69] *Ibid*, at para. 81 [GAR Part I, Tab E].

> 81. The respondents on this appeal are confronted with the stubborn fact that the un-contradicted evidence is that the maintenance records are irrelevant to making full answer and defence… It was an error for the lower courts to disregard this evidence on the assumption there was binding authority on the question of relevance.

84. Justice Rowbotham, in a minority dissent, noted that the pronouncement by this Court in *St-Onge* that "the prosecution must of course disclose certain information concerning the maintenance and operation of the instrument" was an integral part of its reasons. She therefore concluded that this Court's discussion of maintenance records in *St-Onge* was not peripheral to the main issue, but was "intended for guidance …and should be accepted as authoritative: *R. v. Henry* [2005] 3 SCR 609, 2005 SCC 76 at para 57."[70]

85. Justice Rowbotham stated that the decision in *St-Onge* had" opened the door" to a finding that an approved instrument's maintenance records are relevant, and that the Crown must routinely disclose the maintenance log for the approved instrument. She noted that the maintenance log "should include the results of all inspections and documentation of the maintenance history including records of parts replaced and approved modifications to hardware and software" as per the *Recommended Standards 2013*. If the maintenance log reveals information that the accused considers relevant to his or her defence, the accused must bring an *O'Connor* application for further records.[71]

86. Justice Rowbotham noted that three aspects of the decision in *St-Onge* are relevant to this appeal. First, this Court's statements in paragraph 48 in *St-Onge* that the instrument and the people who maintain it are under the control of the prosecution, leads to the reasonable inference that the approved instruments are under the control of the Crown. Second, when it reached its conclusion on the constitutional compromise of the provisions, this Court appeared to suggest in paragraph 42 that the accused will have access to some records, "including" those currently disclosed. Finally, she noted that this Court did not hear argument or decide precisely what evidence was necessary to rebut the presumption of accuracy.[72]

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[70] *Ibid*, at para. 84 [GAR Part I, Tab E].
[71] *Ibid*, at para. 86 [GAR Part I, Tab E].
[72] *Ibid*, at para. 92 [GAR Part I, Tab E].

87. Justice Rowbotham referred to several passages from *St-Onge* that the defence relied upon for the proposition that the relevance of maintenance records have already been decided by the Supreme Court and that "the expert's evidence on this point strays into the realm of usurping the role of the court."[73] She then cited paragraph 25, 26 41, 42, 48, 72, and 78 and concluded that although disclosure of records was not the main issue in *St-Onge*, the discussion of the importance of proper maintenance formed an integral part of the reasoning, and is thus intended to be authoritative.[74]

88. Justice Rowbotham then cited Justice Deschamps referring to further specific quotes in *St-Onge* in the discussions about whether the provisions infringed the right to be presumed innocent, specifically:[75]

a. "calibration and maintenance of instruments were essential to the integrity of the breath program; *St-Onge* para 25; and

b. the Alcohol Test Committee report on which the prosecution relied referred to the importance of proper maintenance: *St-Onge* para 26.

89. She then stated**: Fundamentally, in discussing the effect of the provisions on the accused's right to be presumed innocent, [Justice Deschamps] noted that Parliament had recognized the importance of following the proper operation and maintenance practices and procedures contained in the Committee's report "since the accused can rebut the presumptions by showing that the instrument was not properly maintained or operated: para 26."**[76]

90. Justice Deschamp concluded that the provision minimally impaired the right to be presumed innocent because the disproving the test results was not impossible and "there might be deficiencies in the maintenance of the instruments: *St-Onge* para 41.[77]

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[73] *Ibid*, at para. 94 [GAR Part I, Tab E].
[74] *Ibid*, at para. 95 [GAR Part I, Tab E].
[75] *Ibid*, at para. 96 [GAR Part I, Tab E].
[76] *Ibid*, at para. 96 [GAR Part I, Tab E].
[77] *Ibid*, at para. 98 [GAR Part I, Tab E].

91. Justice Rowbotham noted that in considering the proportionate effects *Oakes* principle, Justice Deschamps stated that the **"prosecution must of course disclose certain information concerning the maintenance and operation of the instrument but it is free to establish procedures for tracking how such instruments are maintained and operated. Moreover, the prosecution has control over the people who maintain and operate the instruments": *St-Onge* para 48**."[78]

92. Justice Rowbotham noted that the Court in *St-Onge* had conducted a similar section 1 Oakes analysis with respect to the right to make full answer and defence, where she referred to the importance of the maintenance of the approved instruments: *St-Onge* paras. 72, 73 and 78.[79]

93. Justice Rowbotham concluded that in view of the analysis in *St-Onge*, it could not be said that the discussion of the relevance of the maintenance records was peripheral to the court's conclusion:

> [101] In light of Deschamps J's analysis, it cannot be said that the discussion of the relevance of maintenance records was peripheral to the court's conclusion. The only two means of rebutting the presumption of accuracy are by adducing "evidence tending to show" that the approved instrument was malfunctioning or was operated improperly. With this in mind, the Supreme Court specifically referred to maintenance of the instrument. Maintenance is distinct from operation. Operation refers to what occurs at the time of the breath test. Maintenance suggests matters prior to or after the operation. The Supreme Court's use of the two terms reinforces the view that the relevance of the maintenance records was an integral part of its analysis. It follows that I cannot agree with the conclusion reached by the Ontario Court of Appeal in *R v Jackson*, 2015 ONCA 832 (CanLII), 128 OR (3d) 161, leave to appeal refused, 36829 (June 30, 2016).

94. Further, although the issue in *St-Onge* was not disclosure, there were some arguments specifically addressed to that issue. One of the intervenors had argued that the provisions were unconstitutional because the defence was illusory as the Crown would not provide access to the records which may demonstrate errors. The Court rejected that argument, stating that "the accused can request the disclosure of any relevant evidence that is reasonably available in order

[78] *Ibid*, at para. 99 [GAR Part I, Tab E].
[79] *Ibid*, at para. 100 [GAR Part I, Tab E].

to be able to present a real defence… [and] might rely, for example on a **maintenance log** that shows that the instrument was not properly maintained or on admissions by the technician that there had been erratic results…": *St-Onge* para 78."[80]

95. Justice Rowbotham also noted that the Crown's position that the maintenance records are irrelevant is contrary to the position of the Alcohol Test Committee before the *Standing Senate Committee on Legal and Constitutional Affairs*, where its representative specifically stated that the maintenance records should be provided.[81,82]

96. Justice Rowbotham, having found that the decision in *St-Onge* had opened the door to the disclosure of some maintenance records, then considered which maintenance records were required to be disclosed, and noted that the courts below had used the terms maintenance records and maintenance logs interchangeably.

97. Justice Rowbotham noted that the ATC had recommended that the maintenance logs "**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."**[83]

98. Justice Rowbotham referred to the police duty as discussed in *McNeil* to disclose to the Crown all information pertaining to its investigation of the accused, and noted that for the purposes of fulfilling this obligation, the investigating police force is not a third party, but rather a first party. This included documents which could reasonably impact on the case against the accused.[84]

99. Justice Rowbotham noted that this Court had summarized *McNeil* in *R v Quesnelle*[85] as follows:[86]

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[80] *Ibid*, at para 102 [GAR Part I, Tab E].
[81] *Ibid*, at para 104 [GAR Part I, Tab E].
[82] *Standing Senate Committee on Legal and Constitutional Affairs*, Wednesday, February 20, 2008, at Page 8:75 [GBA Tab 1].
[83] *Vallentgoed ABCA*, *supra*, at para. 109 [GAR Part I, Tab E].
[84] *Ibid*, at para. 115 [GAR Part I, Tab E].
[85] *R v Quesnelle*, [2014] 2 SCR 390.

> [116] The Supreme Court summarized *McNeil* this way in *R v Quesnelle*, [2014] 2 SCR 390, 2014 SCC 46 (CanLII) at para 12 (citations omitted):
>
> > 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 to the prosecution or the defence. This Court also recognized that police have a duty to disclose, without prompting, "all material pertaining to its investigation of the accused" as well as other information "**obviously relevant to the accused's case**".
> >
> > (emphasis added)

100. Justice Rowbotham noted that there is some difficulty reconciling the comments in paragraph 48 of *St-Onge* which refers to the instrument and people who maintain it as being under the control of the prosecution, with the later comment in paragraph 78 where this Court refers to the accused being able to rely on a maintenance log, but states that if the Crown refuses disclosure he can rely on the remedies for non-disclosure, **citing *O'Connor***.[87]

101. She then states that she agrees with the respondents that this is an appropriate circumstance for the bridging the gap principle from *McNeil*, which applied to this appeal means that **"at least some maintenance records would become first party records because the instrument is only reliable if properly maintained. Records pertaining to maintenance would be relevant to the reliability of the approved instrument**."[88]

102. She then states that whether applying paragraph 48 from *St-Onge* (under prosecution's control) or the bridging the gap principle, the logical result is that the Crown is required to disclose the maintenance log as first party disclosure. She notes that the maintenance log is a short document and that there are fewer than 200 approved instruments in Alberta. She noted that it may be that the maintenance log could be maintained and updated electronically, and made available as required.[89]

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[86] *Vallentgoed ABCA*, *supra*, at para. 116 [GAR Part I, Tab E].
[87] *Ibid*, at para. 118 [GAR Part I, Tab E].
[88] *Ibid*, at para. 119 [GAR Part I, Tab E].
[89] *Ibid*, at para. 120 [GAR Part I, Tab E]. Also, please see the following successful examples: *Florida Department of Law Enforcement* - DUI Disclosure Web Access: http://www.fdle.state.fl.us/cms/Alcohol-Testing-Program/Intoxilyzer-8000-Records.aspx;

103. Justice Rowbotham then states that depending on what information is disclosed by the maintenance log, assuming it is properly completed, the accused might have a basis for making an *O'Connor* application. She states that if all maintenance records must be disclosed under *Stinchcombe*, the pursuit of every record has the potential to derail criminal proceedings, which is the Crown's public policy concern. This is the sort of mischief that the *O'Connor* procedure was meant to guard against.

104. Justice Rowbotham summarized her conclusions follows:

> [123] *St-Onge Lamoureux* posited the relevance of maintenance records of an approved instrument as a means by which an accused might find evidence to rebut the presumption of accuracy. I am bound by *St-Onge Lamoureux* and conclude that when it held that the "prosecution must of course disclose certain information concerning the maintenance and operation of the instrument" (para 48), it opened the door to a finding that an approved instrument's maintenance records are relevant. The Supreme Court's discussion of maintenance records was not peripheral to the main issue and in my view was intended for guidance.
>
> [124] However, I am not persuaded that the entire history of an instrument's maintenance records ought to be subject to first party disclosure. I conclude that the Crown's obligation is to disclose the maintenance log of the approved instrument as part of the standard disclosure. The log should be properly kept in accordance with the Alcohol Test Committee's recommendation that it "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". If the log reveals information that may be of assistance to the accused's defence, he or she must apply to the court and establish that the records are "likely relevant" in accordance with *O'Connor*. It may be that there are instances (such as those in *Vallentgoed*) when the Crown might concede the likely relevance of the records because that is evident on the face of the log. This would accord with *McNeil*, that is "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 to the prosecution or the defence.": *Quesnelle* at para 12.

Ohio Department of Health – Breath Instrument Disclosure Web Access: http://publicapps.odh.ohio.gov/BreathInstrument/.

105. With reference to the Appellant, she states that the Trial Judge found that the limited information recorded on the maintenance log "would be of little assistance in rebutting the presumption" and entered a stay because she concluded that the Crown's failure to disclose all of the requested records was a breach of his s. 7 rights. The Court of Queen's Bench Justice did not distinguish between maintenance logs, which are first-party disclosure, and other maintenance records, which are third-party documents, so it followed that she erred in upholding the stay. The stay was overturned and a new trial should be directed for the Appellant.

PART II – QUESTIONS IN ISSUE

106. The sole issue in this case is whether the Crown is required to disclose the maintenance log for the approved instrument as first-party disclosure.

PART III - STATEMENT OF ARGUMENT

107. There are two subsidiary questions that must be resolved in order to determine whether the Maintenance Log was required to be disclosed in this matter.

A. Is Improper Maintenance Relevant to Making Full Answer and Defence?

108. The Crown states, based on Kerry Blake's testimony and the ATC Position Paper, that whether an Approved Instrument has been properly maintained is completely irrelevant to reliability and therefore completely irrelevant in rebutting the presumption of accuracy and identity.

109. The Appellant states that *St-Onge* found that the approved instruments are only reliable if they are maintained properly[90] and that an accused can rebut the presumptions by showing that the instrument was not properly maintained.[91] The Appellant states that the discussion about the importance of maintenance to reliability was an integral part of the Court's reasoning and is intended to be authoritative. Justice Rowbotham agreed with this proposition.

110. Justice Slatter, for the majority, did not refer anywhere in his judgment to the statement in *St-Onge* that the Accused could rebut the presumptions by showing that the instrument had not

[90] *St-Onge*, *supra*, at paras. 41 and 72.
[91] *Ibid*, at para. 26.

been maintained properly: *St-Onge* at para. 26. To the contrary, he specifically stated that "it is not a defence to prove that the instrument was improperly maintained."[92] This is clearly an error of law.

B. If the Accused can rebut the presumption by showing that the instrument has not been properly maintained, what records are required to be disclosed to the Accused by the Crown?

111. The Crown's position is that the Crown is not required to disclose any maintenance records to the accused because they are all irrelevant to the question of reliability and they are irrelevant as far as rebutting the presumptions.

112. The Crown states that the only documents that are required to be disclosed are those created at the time of testing. Justice Slatter, for the majority in the Court of Appeal, agreed with this position.

113. The Accused states that, generally speaking, the Crown must disclose whatever records are required in order to ascertain whether the instrument has been properly maintained.

i. Three Kinds of Disclosure Procedures

114. There are three kinds of disclosure in criminal cases, generally speaking. In *R v Quesnelle*, this Court summarized the three different procedures:[93]

> [11] The Crown has a broad duty to disclose relevant evidence and information to persons charged with criminal offences. *Stinchcombe*, at pp. 336-40, provides that the Crown is obliged to disclose all relevant, non-privileged information in its possession or control so as to allow the accused to make full answer and defence. For purposes of this "first party" disclosure, "the Crown" does not refer to all Crown entities, federal and provincial: "the Crown" is the prosecuting Crown. All other Crown entities, including police, are "third parties". With the exception of the police duty to supply the Crown with the fruits of the investigation, records in the hands of third parties, including other Crown entities, are generally not subject to the *Stinchcombe* disclosure rules.

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[92] *Vallentgoed ABCA, supra,* at para. 69 [GAR, Part I, Tab E].
[93] *R v Quesnelle, supra*, at Note 4 [not provided].

> [12] In *R. v. McNeil*, 2009 SCC 3 (CanLII), [2009] 1 S.C.R. 66, this Court recognized that the Crown cannot merely be a passive recipient of disclosure material. Instead, 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 to the prosecution or the defence. This Court also recognized that police have a duty to disclose, without prompting, "all material pertaining to its investigation of the accused" (para. 14) as well as other information "obviously relevant to the accused's case" (para. 59).
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> [13] In *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at paras. 15-34, this Court established a separate disclosure regime for records in the hands of "third parties" that are "likely relevant" to an issue at trial. Under *O'Connor*, an application is made to the court and the judge determines whether production should be compelled in accordance with a two-stage test. At the first stage, the applicant has an onus to establish the likely relevance of the record. At the second stage, the judge examines the record and determines whether, and to what extent, it should be produced for the accused: in the case of relevant information, privacy interests yield to the right to a full answer and defence.

ii. Under the Crown's Control: R v Stinchcombe

115. As first party disclosure, pursuant to *Stinchcombe*, includes all relevant information in its possession **or control**, it is submitted that the prosecution must provide first party disclosure of the maintenance records of the approved instrument because, as was stated in *St-Onge*, the instruments and the people who maintain it are under the control of the prosecution.[94]

iii. Bridging the Gap: *McNeil*

116. In the alternative, the bridging the gap principle outlined in *McNeil* applies: the Crown has a duty to make reasonable inquires when put on notice of material in the hands of the police that is potentially relevant to the prosecution or the defence. The investigating police force has a duty to disclose to the Crown, without prompting, "all material pertaining to its investigation of the accused" as well as other information "**obviously relevant to the accused's case**."[95]

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[94] *St-Onge*, *supra*, at para 48.
[95] *McNeil*, *supra*, at Note 2.

117. In *McNeil*, this Court stated that where information is obviously relevant to the defence case, it should be part of the first party disclosure provided to the Crown without prompting.[96]

118. If the accused can rebut the presumption by showing the instrument was not properly maintained, then disclosure must be made of all documents which are relevant to determine whether the maintenance has been done properly

iv. What is Proper Maintenance?

119. This gives rise to the question, what is proper maintenance?

120. One would reasonably expect that the manufacturer of an approved instrument would supply manuals specifying proper operational procedures, as well as what maintenance should be done to ensure the proper functioning of the approved instrument and to preserve warranty eligibility.

121. However, this is not the case. According to Ms. Blake, who had been the program director responsible for the breath testing program in Alberta for 10 years and was a member of the ATC, neither she, nor any other member of the ATC, have been provided such a manual.

122. Ms. Blake was personally responsible for overseeing the roll out of the Intox EC/IR II, the approved instrument in use in Alberta since early 2013. She was also responsible for overseeing and participating in training the qualified technicians in relation to the Intox EC/IR II. Despite this, she has never seen a manufacturer's manual for the instrument. She did attend a training course and has a binder with some notes and a PowerPoint presentation, but has never been provided with a manual.

123. She states that the actual person who does the servicing of the Intox EC/IR II has manuals from the manufacturer and has been certified by Intoximeter to perform service and maintenance, however, she has never obtained these manuals and does not know what they require. Ms. Blake, under cross-examination, did not know how frequently the manufacturer required that the Intox EC/IR II be maintained, nor what maintenance should be performed on each occasion.

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[96] *Ibid*, at para. 59.

v. The ATC Recommended Standards and Procedures

124. The only available to determine proper maintenance is the *ATC Recommended Standards and Procedures*, which have consistenlty recommended that maintenance be performed at one-year intervals.[97]

125. This Court in *St-Onge* noted that the ATC Recommended Standards had not been adopted by Parliament,[98] but later referred to those Recommendations and stated "It can be inferred from the Recommendations that the instruments may not function optimally if the suggested procedures are not followed."[99]

126. In other words, failure to follow the Recommended Standards will result in the inference that the instrument was not maintained properly, not operated properly, or otherwise malfunctioned.

vi. The Maintenance Log is Required to be Disclosed

127. In response to an argument that the statutory provisions created a defence that was so difficult to attain as to be practically illusory, this Court stated that "the accused can request disclosure of any relevant evidence that is reasonably available in order to present a real defence…In short, the accused might rely on a maintenance log that shows the instrument was not maintained properly."[100]

128. At the time *St-Onge* was decided, the ATC Recommended Standards in effect was the 2009 version, which states the following with respect to maintenance and modification:[101]

D. Modifications

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[97] See *Recommended Standards 2013*, *supra*, [GAR Part IV, Tab 1.B], and *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*, Can. Soc. Forensic Sci. J. Vol. 42. No 1 (2009) pp 1-29 [GBA, Tab 2] ("*Recommended Standards 2009*").
[98] *St-Onge, supra,* at para. 27.
[99] *Ibid,* at para. 43 [GBA Tab 1]
[100] *Ibid,* at para. 78.
[101] *Recommended Standards 2009, supra.*

> Any modification to Approved Instruments or Approved Screening Devices must be approved by the Alcohol Test Committee. Installation of approved modifications shall be performed only by persons authorized by the Program Director. Following any modification, the equipment shall not be returned to active use in the program until it has successfully passed the equivalent of an initial inspection.
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> **E. Maintenance Logs**
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> A maintenance log shall be kept for each Approved Instrument, Approved Screening Device and accessory equipment in active use in the program. Logs should include the results of all inspections, documentation of the maintenance history including records of parts replaced and approved modifications to hardware or software.

129. From the ATC materials, it appears that the maintenance log is supposed to include substantially all the information that might be required to determine whether the instrument had been maintained properly.

130. The leading case of *Kilpatrick ABQB*, which stated that the maintenance log was to be disclosed as first party disclosure, was issued in January of 2013. Shortly thereafter, the ATC, which included Ms. Blake, Robert Palser from the Crown, and Alcohol Section Members from Edmonton Police, Calgary Police and the RCMP, amended the maintenance log used in Alberta to be a simple "sign in/sign out' which did not contain any of the information that the previous maintenance log had contained. That information was now held by the service provider. The right of accused persons to disclosure of the maintenance log information was potentially eviscerated as the Crown was able to argue, as they did in this case, that the information that was previously part of first party disclosure was now held by a third party, requiring an *O'Connor* application.

131. The learned Trial Judge specifically found that the maintenance log now kept by the RCMP would be of little use to the accused and found that those records which were previously part of the maintenance log, but now kept by DavTech, were still required to be disclosed as first party disclosure. She relied on *R v Curran*, which stated that the Crown could not contract out of its disclosure obligations.

132. Justice Rowbotham referred to the *Recommended Standards 2013* which define the contents of the maintenance log,[102] in wording identical to the 2009 version in place at the time of *St-Onge*. She stated that the maintenance log was required to be disclosed and that it should be properly kept in accordance with the ATC recommendations.[103] Although the 2014 version of the Recommended Standards no longer contains the phrase "maintenance log," or the word "log," it still requires that the same information regarding maintenance be kept.[104]

vii. Relevance of Modifications

133. It is apparent that modifications to either hardware or software can affect the functioning of approved instruments and approved screening devices. If unapproved modifications are made, that should raise a doubt as to whether the instrument or device was functioning properly. For example, there are numerous references in the case law to unauthorized modifications to approved screening devices being made by the manufacturer when they were sent in for maintenance.[105]

134. Further, the evidence in this case and the previous case of *Sutton*[106] had disclosed that Ms. Blake, a member of the ATC and the Program Director responsible for oversight of all Breath Testing in Alberta since 2004, was unaware until 2013 that the Edmonton Police Service had been using software version 269.14 since 2000.

135. Justice Slatter found that there was no evidence that the use of this new software had any effect on the reliability of the reading produced by the approved instruments. He noted that the ATC formally confirmed in 2014 that instruments using that software version were considered to be "approved instruments." He noted the Appellant's argument that instruments using this software prior to 2014 may not have been approved instruments, but stated that this was not an issue on which leave had been granted. He further stated that "there is nothing on the record to

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[102] *Vallentgoed ABCA*, *supra*, at para. 109 [GAR, Part I, Tab E].
[103] *Ibid*, at para. 124 [GAR, Part I, Tab E].
[104] *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*, Can. Soc. Forensic Sci. J. Vol. 47. No 4 (2014) pp 179-188 [GBA Tab 3] (*Recommended Best Practices 2014*") and *Recommended Standards 2009, supra*, [GBA Tab 2].
[105] *R v Olesiuk*, 2013 ONCJ 50; *R v Pillipow*, 1994 CanLII 5066 (SKQB); *R v Trumble*, 1993 CanLII 5544 (ONSC).
[106] *Sutton, supra*.

demonstrate that the use of this software version was relevant to demonstrate any malfunctioning, and therefore within the proper scope of the requested disclosure."[107]

136. With respect, Justice Slatter missed the point. The Appellant never alleged that 269.14 was the software version used in the approved instrument in his case.

137. The *ATC Recommendations* specifically state that all modifications must be approved prior to being put into use, and that after being modified the instrument may not be returned to use unless it had passed the equivalent of an initial inspection. If this software version was used for 14 years without having been approved nor noted in the Approved Instrument Modifications Sheet maintained by the ATC, does that not raise a reasonable doubt about whether the test results from those approved instruments are reliable?

138. Further, if the Program Director who is responsible for all Breath Testing in Alberta is unaware that this software version is in use, does that not raise a doubt about the reliability of the Breath Test Program itself? If apparently no one in the entire Breath Testing Program in Alberta noticed that they were using an un-approved software version, what else have they missed?

139. It is apparent that whoever installed the unimproved software versions in the approved instruments in Alberta did so without any proof that the software modification had been approved (as it had not been). It is a fair question to ask whether other unapproved modifications have been installed in a similar fashion.

140. In addition, whoever is responsible for monitoring the use of approved software modifications obviously failed to do so for 10 years. It is also a fair question to ask whether there are, in fact, any quality assurance controls at all being exercised in the Breath Testing program in Alberta.

141. The point is that the Crown position is demonstrably flawed. By saying that there is nothing in the maintenance records which is relevant to the reliability of the breath test process, the Crown experts ignore their demonstrated failure to comply with their own rules. As the

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[107] *Vallentgoed ABCA*, *supra*, at para. 29 [GAR, Part I, Tab E].

Court stated in *St-Onge*, "it can be inferred from these recommendations that the instruments may not function optimally if the suggested procedures are not followed."[108]

viii. Reference to O'Connor in St-Onge

142. The trial judge took the reference in paragraph 78 of *St-Onge* to *R v O'Connor* to indicate that the Crown must provide first-party disclosure of all relevant evidence, and that if the accused required more information, then the accused could resort to the *O'Connor* procedure for production of third-party records.[109]

143. Justice Slatter, for the majority in the Court of Appeal, took the reference to *O'Connor* to mean that the accused must use the third-party procedure to obtain maintenance records.

144. Justice Rowbotham, in dissent in the Court of Appeal, found that the reference to *O'Connor* was to the third-party procedure, and noted that it was difficult to reconcile this statement with paragraph 48, where this Court referred to the approved instrument and people who maintain it as being under the control of the prosecution.[110]

145. Justice Rowbotham made an arbitrary decision to limit first-party disclosure to the maintenance log, with an *O'Connor* application required for all other records.

146. The problem with this approach is that if the maintenance log is disclosable as first-party disclosure, because either the instrument is under the control of the prosecution or by virtue of bridging the gap, as per *McNeil*, and the maintenance log discloses further evidence that would be relevant to maintenance, such evidence would be exactly on the same principled footing as the maintenance log itself.

147. It is submitted that Justice Rowbotham was driven to this unsatisfactory conclusion by her interpretation of the reference to *O'Connor* as referring to third-party production.

148. Two of the issues that were dealt with in *O'Connor* were remedies for non-disclosure of first-party records and the procedure for obtaining records from third-parties. It is submitted that

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[108] *St-Onge*, *supra*, at para. 43.
[109] *Gubbins ABPC*, *supra*, at para 26 [GAR Part I, Tab A].
[110] *Vallentgoed ABCA*, *supra*, at para 118 [GAR Part I, Tab E].

the more reasonable interpretation of the reference to *O'Connor* in *St-Onge* is that it means exactly what it says: if the prosecution denies a request for disclosure, "the accused can invoke the rules of non-disclosure and the available remedies for non-disclosure (see *R v O'Connor*…)." Properly understood, the reference to *O'Connor* in *St-Onge* is a reference to the portion of the judgment that dealt with remedies for non-disclosure of first-party records, rather than reference to the third-party procedure.

ix. Unfair Burden on the Crown

149. Justice Slatter, for the majority in the Court of Appeal, referred to the "extravagant requests" by the Appellant for all maintenance records pertaining to the instrument since the date it was first put into use.[111] The evidence reveals that the instrument would have been first put into use sometime between May and July 2013, and this request was made in July 2014. It would be reasonable to expect that the Maintenance Log would be a one-page document.

150. Similarly, Justice Slatter stated that it is impractical to require the Crown to produce expert evidence on the operation of breathalyzer instruments in every breathalyzer prosecution simply because the defence asserts that the maintenance records are relevant. The Appellant submits that in fact the only time the Crown would be required to call expert evidence would be in those circumstances where the defence had already established that the instrument had not been properly maintained. The Appellant states that this is not an unfair burden on the Crown.[112]

PART IV SUBMISSION ON COSTS

151. The Appellant makes no submissions on costs.

PART V – ORDER SOUGHT

152. The Appellant Gubbins respectfully requests an order allowing this appeal, setting aside the decision of the Court of Appeal of Alberta, and restoring the stay of proceedings directed at trial.

[111] *Ibid*, at para. 34 [GAR, Part I, Tab E].
[112] *Ibid*, at para. 58 [GAR, Part I, Tab E].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2017.

Timothy E. Foster, Q.C.
Counsel for the Appellant Gubbins

PART VI – TABLE OF AUTHORITIES

Reference Materials	**Paragraphs**
Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee, Can. Soc. Forensic Sci. J. Vol. 42. No 1 (2009) pp 1-29.	124, 128, 132
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