File Number: 37395

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

KEVIN PATRICK GUBBINS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener

File Number: 37403

AND BETWEEN:

DARREN JOHN CHIP VALLENTGOED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO
DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS

Interveners

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

Page No.

Part I – Overview and Statement of Facts

A. Overview

1. This Court has recognized it is necessary to limit the scope of *Stinchcombe* disclosure so that it does not become an impossible burden to discharge, and to protect against abusive or obstructive requests for production. This is even more important since *R v Jordan*[1] and *R v Cody*,[2] which emphasize the need to be vigilant against unnecessary and meritless proceedings that derail the trial on the merits.

2. The purpose of disclosure is to allow an accused to make full answer and defence, not to cripple the prosecution with excessive requests for irrelevant material.

3. To this end, this Court in *R v McNeil*[3] carefully crafted a framework for the production of records in police possession that ensures an accused can obtain all records required to make full answer and defence, while ensuring disclosure obligations are not undefined and impossible to discharge and protecting against abusive or meritless production requests.

4. There is no reason this framework should not be applied to approved instrument records in police possession. It will provide the accused all relevant records including the presumptively relevant fruits of the investigation and obviously relevant records as *Stinchcombe* disclosure. It further allows an accused to also obtain any other record that while not relevant in most cases, is relevant in the circumstances of his case through the *O' Connor* process, provided the accused person can establish the records are likely relevant.

5. As stated in *McNeil*, "it is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources not be squandered in 'fishing expeditions' for irrelevant evidence."[4] Requiring an accused to establish the likely relevance of third party records serves a gate-keeper function that screens applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production."[5]

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[1] 2016 SCC 27
[2] 2017 SCC 31
[3] 2009 SCC 3
[4] *Ibid*. at para 28
[5] at para 29

6. The Appellants' inability to obtain the additional maintenance records in these cases is not due to a flaw in the *McNeil* framework for production, it is because the requested records are not relevant.

7. In Alberta, the classification of maintenance records unrelated to the accused person's investigation as first party records caused the very mischief that *McNeil* sought to avoid. The undefined scope of disclosure became an impossible burden to discharge. The pursuit of every conceivable record related to the approved instrument became an effective way to manufacture a defence and avoid or delay a trial on the merits. In some cases, requests for decades old records were being made.

8. In some cases, regardless of what records were provided, additional requests for records were made until the Crown ran out of time before trial or was unable to provide the records. The accused would then bring a *Charter* application at trial alleging non-disclosure, late disclosure or delay. In many cases, because maintenance records were deemed to be relevant, stays were granted regardless of the nature of the record and in the absence of any evidence the record had any use in making full answer and defence. The Crown was frequently denied the opportunity to call evidence on relevance on the ground the issue had been decided. Ironically the decisions cited as having decided the relevance issue were cases in which there was no evidence on the relevance of maintenance records. If an adjournment was granted to allow the Crown to justify non-production, further *Charter* applications seeking a stay for unreasonable delay were made. A tremendous amount of judicial resources were expended litigating the sufficiency of historical police and third party record keeping, despite the lack of any evidence the records are relevant.

9. According to the *McNeil* framework, the maintenance records in issue are third party records. They are not related to the Appellants' investigations and not obviously relevant.

10. The records have no relationship to the Appellants' investigations. The maintenance records existed before or were created after the Appellants' investigations. They would have been created regardless of whether the Appellants were ever investigated. They contain no information related to or details about the Appellants' investigations. They played no role in gathering any evidence against the Appellant. They are not relied upon by the police or the Crown as part of the cases against the Appellants.

11. The records are also not obviously relevant. There is not a single reported case in which maintenance records have been used to challenge the accuracy of an approved instrument's results. The Appellants in these cases called no evidence to establish relevance or explain how maintenance records can raise a reasonable doubt about the accuracy of the approved instrument results. In *R v Jackson*, the Ontario Court of Appeal characterized the evidence called by defence about the potential relevance of maintenance records as speculative.[6]

12. The uncontradicted evidence shows that the maintenance records at issue are not relevant to assessing the proper functioning of the approved instrument at the time of their breath testing. This is because the approved instruments and breath testing procedure were specifically designed so that the proper functioning of the approved instrument is tested prior to each subject test and the results of that testing is recorded in the records made at the time of testing. In short, they are designed so that any malfunction will be readily apparent from a review of the records made at the time of the specific breath test.

13. To permit this direct evidence of functioning to be undermined by speculation that the approved instrument may not have been functioning properly because of past or subsequent malfunction or missed maintenance is antithetical to the central finding in *R v St-Onge Lamoureux ("St-Onge")*,[7] that because of the nature of approved instruments and breath testing it is constitutionally permissible to require challenges to approved instrument results to be based upon actual evidence of malfunction and improper operation of the instrument at the time of the accused's breath tests. As this Court observed in *R v Alex*, the scientific reliability of the results of properly administered approved instrument tests is firmed established in *St-Onge*.[8]

14. Challenging approved instrument results on the basis that it may have been malfunctioning because of past or future error, missed maintenance or repair, is as speculative as the *Carter* defence that was limited by the amendments at issue in *St-Onge*.

15. If such speculation could be used to challenge approved instrument results, it would be necessary to replace the approved instrument after any malfunction or missed maintenance,

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[6] 2015 ONCA 832 at para 136
[7] 2012 SCC 57
[8] *R v Alex*, 2017 SCC 37 at para 42

because any malfunction or missed maintenance raising a reasonable doubt it one case would raise a reasonable doubt in all cases involving the instrument.

16. Performance or absence of periodic maintenance, inspection, or repair does not say anything about the functioning of an approved instrument at the time of a given breath test and cannot be used to assess the functioning of an approved instrument at a given time. Periodic maintenance is not concerned with detecting error but preventing it. The Alcohol Test Committee (ATC)'s maintenance guidelines are strictly preventative in nature and are only best practices aimed at ensuring police have working instruments when needed. Although maintenance records should be kept to encourage a robust breath testing program, they cannot be used to assess instrument functioning at the time of a specific test and they are not kept to establish or dispute functioning of the instrument in specific criminal cases.

17. An instrument with a poor service record and no maintenance may nonetheless operate properly, while a perfectly maintained instrument with no prior history of failure may nonetheless fail suddenly during a subject test. It is for this reason that the functioning of the approved instrument is tested before each of the accused's breath samples.

18. The most significant test of functioning is the calibration check using an independently verified alcohol standard that produces alcohol vapour of known concentration. Prior to each of the two subject's breath samples, the approved instrument analyzes the concentration of the standard and prints the result on the test printout generated during an accused's test. The approved instrument is known to be working properly if it correctly measures the alcohol concentration of the alcohol standard.

19. The argument that maintenance records may be relevant to assessing the functioning of the approved instrument rests upon an incomplete understanding of approved instruments, the breath testing procedure, and the ATC's recommendation that maintenance records be kept. The Appellants' argument rests upon an incorrect interpretation of this Court's decision in *St-Onge*. That decision did not rule that all maintenance records are subject to *Stinchcome* disclosure. It did not rule that all maintenance records are relevant. It did not rule that maintenance records can be used to rebut the presumption of accuracy.

20. Rather, the decision found that an accused can obtain the records relevant to assessing the proper functioning of the approved instrument to rebut the presumption of accuracy through

Stinchcombe disclosure and the *O'Connor* process. The court did not rule on the relevancy of any records or their ability to rebut the presumption of accuracy in s. 258(1)(c) of the *Criminal Code*, nor did it rule on which records are subject to *Stinchcombe* disclosure.

21. There is simply no constitutional basis to require the Crown to provide every record related to the approved instrument as *Stinchcombe* disclosure, regardless of the nature or relevance of the record. Doing so does not advance an accused's ability to make full answer and defence, but it does permit mischief undermining the efficiency of the court process and distracts from resolving impaired driving trials on their merits.

B. Statement of Facts

1. Vallentgoed

22. On May 11, 2013, Vallentgoed was charged with impaired driving and driving with a blood alcohol concentration (BAC) over the limit. An approved instrument showed he had a BAC over the limit.

23. Vallentgoed requested disclosure. The Crown provided the standard impaired driving disclosure package, which contained all records produced during Vallentgoed's breath testing. [9] It included: the test record produced by the approved instrument, the qualified technician's checksheet, the certificate of analyses, a simulator alcohol solution log showing the details of the standard alcohol solution change done before Vallentgoed's breath testing, the test record from calibration checks done on the new alcohol standard, a certificate of annual inspection showing the approved instrument passed an annual inspection on January 22, 2013, a certificate of analyst certifying the suitability of the standard alcohol solution used, a certificate of inspection for the alcohol wet bath simulator showing it was inspected on January 18, 2013, a use and calibration check log showing the uses of the standard alcohol solution in the period immediately before Vallentgoed's breath testing.

24. Despite this, Vallentgoed asked for the following additional records:

i. Records of maintenance, or annual inspection, for the approved instrument for the past two years, showing how maintenance was conducted, the results obtained

[9] [Vallentgoed's Appellant's Record ("VAR") Tab 17 p. 129-139 and 142]

during the maintenance procedure, and any part replacements, modifications or software updates, other than conclusory certificates.

ii. A copy of the maintenance or annual inspection log for the past two years for the external simulator used in conjunction with the approved instrument, other than a conclusory certificate.

iii. A copy of the record for the approved instrument showing the cumulative uses of the alcohol standard for a one-month period before the accused's investigation.

25. The Crown provided a further maintenance log that was in RCMP possession for the approved instrument and approved screening device.

26. Vallentgoed made a further request for detailed reports of the work performed on July 17, 2012, January 30, 2013, March 12, 2013 and May 12, 2013. He also repeated his request for records related to the alcohol standard changes for a period after Vallentgoed's investigation and all maintenance records for the prior two years.

27. The Crown replied that it would not provide the additional records because they were third party records to be obtained through an *O'Connor* application and moreover irrelevant. The Crown asked that if Vallentgoed was going to bring an *O' Connor* application, he notify the Crown well in advance because the Crown intended to call expert evidence on the relevance of the records.

28. Just under two months prior to trial, Vallentgoed requested a hearing to address the issue. However, the Crown's expert was not available prior to trial and the Crown told defence it would tender its expert evidence through affidavits pursuant to s. 657.3 of the *Criminal Code* instead.

29. The trial judge gave defence counsel an opportunity to provide her position on the Crown's evidence. Defence counsel said that upon receipt of the affidavits she would be in a position to determine whether to apply to cross examine the expert on the affidavits and that submissions on the affidavits could be made in writing. Defence counsel filed written submissions on the affidavits. Vallentgoed did not object to the admission of the expert evidence. He further elected not to cross-examine on the affidavits and proceed to trial on the trial date.

30. The trial judge ruled the requested records were not subject to *Stinchcombe* disclosure. The court then heard a trial on the merits and convicted Vallentgoed of the over .08 offence. Vallentgoed appealed his conviction to the summary conviction appeal court on the ground, among

others, that the trial judge erred in finding the maintenance records were not subject to *Stinchcombe* disclosure. The appeal was joined with Gubbins's summary conviction appeal.

2. Gubbins

31. On March 10, 2014, Gubbins was charged with impaired driving and driving with a blood alcohol concentration over the legal limit. An approved instrument showed Gubbins had a BAC over the limit.

32. Gubbins asked for disclosure and received the standard impaired driving disclosure package, which included all breath test records created at the time of Gubbins's breath testing.[10]

33. Despite this, Gubbins asked for the maintenance log for the approved instrument showing the history of repairs and modifications since it was put into use, including any repairs completed. These records date back to 2010.[11]

34. These records were not in the possession of either the Crown or police, but rather a third party service agency, approved by the manufacturer to repair and maintain the approved instrument.[12] The only log in police possession was a log showing when the annual maintenance was done and when the approved instrument was sent out and when it returned.[13] The records requested were not made in relation to Gubbins's investigation and are not used by the qualified technician in the performance of breath testing or in any other way in an impaired driving investigation.[14]

35. The Crown told Gubbins it would not provide the requested records and agreed to arrange a hearing prior to trial to determine the issue. Gubbins instead applied for a stay, alleging a breach of s. 7 of the *Charter*, arising from non-disclosure.

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[10] [Respondent's Appeal Record ("RAR") Tab 1, pp. 2-11]
[11] [RAR Tab 1, pp. 13-159]
[12] *Voir dire* evidence of Corporal Palfy, *R v Gubbins* transcript, August 14, 2015 [Gubbins's Appellant's Record ("GAR") Tab 5, 143/5 – 144/35]
[13] *Ibid*.
[14] *Voir dire* evidence of Corporal Palfy, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 145/12-16]

36. At the *Charter* application, the Crown called expert evidence on the relevance of maintenance records to an assessment of the proper functioning of an approved instrument at the time of a specific test. Gubbins did not call any evidence.

37. The trial judge found the maintenance records were subject to *Stinchcombe* disclosure and not providing them was a breach of disclosure. The court stayed the over .08 charge.

38. The Crown appealed to the summary conviction appeal court where it was joined with Vallentgoed's appeal.

3. Expert Evidence

39. The Crown called uncontradicted expert evidence that records unrelated to the accused's breath testing cannot be used to assess approved instrument functioning at the time of an accused person's breath tests. They are not relevant because approved instruments and the breath testing procedure are designed to provide evidence of functioning at the time of testing and ensure that any error potentially affecting accuracy is recorded and will be readily apparent from a review of those records. This includes a calibration check performed on an external alcohol standard of known and independently verified concentration immediately prior each of the accused's breath tests. It provides direct evidence of functioning at the time of the accused's breath tests.

40. The Crown's expert evidence was provided by Kerry Blake by way of an affidavit,[15] entered as an exhibit in both Gubbins and Vallentgoed. Ms. Blake also testified in Gubbins.

41. Ms. Blake is employed as a Forensic Alcohol Specialist in the Toxicology Service Program with the RCMP National Center for Forensic Service Alberta. She is also the Breath Test Program director for Alberta, responsible for ensuring compliance, oversight and support for Alberta's breath testing programs. She is also a member of the Alcohol Test Committee of the Canadian Society of Forensic Science (ATC). The ATC advises the Federal Minister of Justice on all aspects of forensic breath and blood alcohol testing, including the evaluation of approved instruments and recommendations as to the best practices for the forensic use of approved instruments.

42. Ms. Blake testified that the performance or absence of periodic maintenance and inspection does not say anything about the functioning of an approved instrument at the time of a given breath

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[15] Affidavit of Kerry Blake, sworn February 22, 2014 [VAR Tab 16 pp. 92-125; GAR pp. 93-126]

test and cannot be used to assess functioning at the time of a specific breath test. Periodic maintenance is not concerned with detecting error but preventing it. The maintenance recommendations established by the ATC are strictly preventative in nature and are only best practices aimed at ensuring that police have working instruments when they require one.[16] Although maintenance records should be kept to encourage a robust breath testing program, they cannot be used to determine whether an error has or will occur on any given test.[17]

43. Ms. Blake explained:[18]

> As a forensic scientist I can form no conclusions concerning the proper operation of an instrument based on maintenance records. These records do not contain any information that can assist in the assessment of proper operation at the time of testing. An instrument with a poor service record and no maintenance may nonetheless operate properly during a subject test, while a perfectly maintained instrument may fail suddenly during subject testing. Neither the best maintenance record nor the worst would indicate whether the instrument was working properly at the relevant time. Historical records cannot verify instrument function.

44. An assessment of approved instrument functioning the time of a specific breath test can only be done through a review of the records made at the time of the specific test. All of the necessary information to assess whether the approved instrument was working at the time of an accused person's tests is recorded by the approved instrument in the printed test record made by the approved instrument and also by the qualified technician on his check sheet prepared at the time of the breath testing.[19] The necessary information about air blank results, the alcohol standard used and the results of the calibration checks and breath test results are recorded by the approved instrument on the printed test record.[20]

45. By analogy, maintenance records for a car do not say anything about whether it started at a given time. It is the starting of the car that is determinative, regardless of whether the car has

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[16] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 183/30-37]
[17] Affidavit of Kerry Blake, sworn February 22, 2014, at para 34-35 [GAR Tab 4, p. 98][VAR Tab 16, p. 97]
[18] *Ibid*. at para 36
[19] Affidavit of Kerry Blake, February 22, 2014 at para 26 [GAR Tab 4, p. 97][VAR Tab 16, p. 96]
[20] *Ibid*.

received its scheduled oil changes or not.[21] The proper functioning of the approved instrument is shown by the fact that it accurately measured the alcohol vapour produced by the alcohol standard during the calibration check.

46. Ms. Blake further testified that in 2012 the Alcohol Test Committee recognized it needed to clarify what records are relevant to an assessment of approved instrument functioning instrument at the time of an accused person's breath tests. The ATC accordingly published a position paper addressing the issue.[22] Ms. Blake was an author of the paper and agrees with it.

47. The paper expressly states that data collected before and after the subject test, or an examination of the approved instrument after the subject test, do not assist in determining the accuracy of an approved instrument result during a specific breath testing procedure.[23] Further, the ATC operational recommendations[24] are only "provided as a means of fostering the development of a quality system within a breath test program and are not proposed by the ATC as required elements of proof extra to those already provided in the *Criminal Code*." It also says that the only records useful for assessing approved instrument functioning are those produced during the breath testing.

48. Maintenance records do not assist because approved instruments are designed so that if a failure occurs during operation, the error will be evident from a review of the documents produced at the time of breath testing.[25] As a prerequisite for approval, approved instruments must be designed so that any failure during operation that can affect the validity of the result will be recorded at the time of testing. An approved instrument may record an error message or abort the testing sequence in the event of an error that could affect the accuracy of the result. The fail-safe

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[21] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 174/33-175/18]
[22] *Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results*, Can. Soc. Forensic Sci. J. Vol. 45. No. 2 (2012) pp. 101-103, Exhibit C to Kerry Blake's Affidavit [GAR Tab 4, p. 126-129][VAR Tab 16, p. 125-128]
[23] *Ibid*.
[24] *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*, Can. Soc. Forensic Sci. J. Vol. 46. No. 1 (2013) pp. 1-23 , Exhibit B to Kerry Blake's Affidavit [GAR Tab 4, p. 103-125][VAR Tab 16, p. 102-124]
[25] Affidavit of Kerry Blake, sworn February 22, 2014 at para 16 [GAR Tab 4, p. 95][VAR Tab 16, p. 94]

design does not prevent failures, but rather ensures that when an instrument fails, the failure is readily detected.[26]

49. Ms. Blake also testified that all approved instruments are rigorously tested by two independent laboratories and the results reviewed by the ATC to ensure that it complies with all ATC requirements, before it is recommended to the Federal Minister of Justice for inclusion in the *Criminal Code* as an approved instrument. The requirements for approval are set out in the *Recommended Standards and Procedures of the Canadian Society of Forensic Alcohol Test Committee*.[27] The ATC also designed the breath testing procedure used for approved instrument testing. It is also set out in the ATC's recommended standards and procedure.[28]

50. The approved instruments used in Alberta follow an automated breath testing sequence for each subject breath test. It is designed to ensure the accuracy of each breath test.

51. First, the approved instrument performs an air blank or blank check. The approved instrument draws in ambient room air, which ensures the approved instrument is purged of any alcohol vapour prior to testing. The approved instrument also tests the room air for the presence of alcohol. The approved instrument then establishes a zero baseline by subtracting any alcohol detected in the room air from the next reading to ensure there can be no possibility that residual alcohol in the room affected the breath test result.[29] If an excessive amount of alcohol is detected in the ambient room air, the approved instrument will abort the test. The results of the air blank is recorded by the approved instrument on a printed test record at the time of the test.

52. Second, the approved instrument performs a calibration check in which the approved instrument analyzes the alcohol vapour produced by an alcohol standard of known concentration. The concentration of the alcohol standard is tested by the solution manufacturer and then independently verified by two different analysts who are designated pursuant to the *Criminal Code*. Certificates of Analyst accompany each batch of alcohol standard confirming it is of the

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[26] *Ibid*.
[27] *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee*, Can. Soc. Forensic Sci. J. Vol. 46. No. 1 (2013) pp. 1-23 at p. 4 Exhibit B to Kerry Blake's Affidavit [GAR Tab 4, p. 106]
[28] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 163/35-164/10]
[29] Affidavit of Kerry Blake, sworn February 22, 2014, at para 20 [GAR Tab 4, p. 96][VAR Tab 16, p. 95]

right concentration.[30] The alcohol standard has a concentration equivalent to a blood alcohol concentration of 100 mg%.[31] The approved instrument is known to be working properly if it accurately measures the alcohol standard to within 10%.[32]

53. Third, the approved instrument performs a second air blank, which purges the approved instrument of any residual alcohol vapour from the calibration check. It again measures the alcohol concentration in the room air and deducts any alcohol detected from the following subject breath test. If an excessive amount of alcohol is detected during the air blank the approved instrument will abort the breath test. The result of this air blank is recorded by the approved instrument on the printed test card.

54. Fourth, the approved instrument requests, accepts and analyzes the test subject's breath sample. The subject provides a sample of deep lung air and the approved instrument measures the concentration of alcohol present in the breath sample. It then calculates the blood alcohol concentration that would produce the breath alcohol concentration measured using an empirically determined fixed ratio. [33] The conversion ratio used in Canada underestimates actual blood alcohol concentration. The result of the subject breath test is recorded on the printed test record by the approved instrument.

55. Fifth, the approved instrument performs a final air blank / blank check.

56. The same breath testing sequence is repeated again for the second breath test, which is done at least 15 minutes after the first breath sample was taken. The breath testing procedure in Canada requires that the two breath samples be taken at least 15 minutes apart. The 15 minute deprivation periods before the first sample and between the first and second sample ensure there has been no recent alcohol consumption and any residual mouth has fully dissipated.[34] The two samples results must agree within 20 mg% after truncation (all readings are rounded down to the lower ten, ie. 99 mg% would be recorded as 90 mg%) and the lower of the two test results is used.[35] If the two

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[30] *Ibid*. at para 23
[31] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 166/1-11]
[32] Affidavit of Kerry Blake, sworn February 22, 2014, at para 21 [GAR Tab 4, p. 96][VAR Tab 16, p. 95]
[33] *Ibid*. at para 27-28 [GAR Tab 4, p. 97][VAR Tab 16, p. 96]
[34] *Ibid*. at para 30 [GAR Tab 4, p. 97-98][VAR Tab 16, p. 96-97]
[35] *Ibid*. at para 25 [GAR Tab 4, p. 97][VAR Tab 16, p. 96]

samples do not sufficiently agree, additional samples are taken at least 15 minutes apart until there is the requisite agreement between two samples. The agreement between samples ensures that neither sample was influenced by an interferent, such as mouth alcohol, which has a short lived transient effect.

57. In addition to the calibration check, approved instruments used in Alberta have a number of other fail-safe features. They perform internal diagnostic tests and monitoring. Errors or deviations occurring during these diagnostics result in the approved instrument shutting down and aborting the breath test. Diagnostic errors are recorded by the approved instrument on the printed test record and also documented on the qualified technician's operational checksheet.[36]

58. The Intox EC/IR II performs internal diagnostic tests at the outset of the breath testing sequence and if there is a problem with the diagnostic test there will be a fail message and the instrument will abort the breath test.[37] The Intox EC/IR II also monitors the external alcohol standard to ensure that it is not used more than 50 times without being changed or used for more than 15 days without being changed as required by the ATC recommendations.[38] If mouth alcohol is detected the Intox EC/IR II will suspend testing for 15 minutes before a subject sample can be taken to ensure that any mouth alcohol that could potentially affect the result will have dissipated. In addition, both approved instruments are designed to detect mouth alcohol and if detected will abort the breath test.[39] Both are also protected against radio frequency interference (RFI) by a faraday cage and have RFI detectors that will abort the breath test if radio frequency interference capable of interfering with the result is detected.

59. The Intox EC/IR II records all errors that can occur during a subject's breath test on a printed subject test report and also displays an error message on its display screen for the qualified technician.[40] The software and firmware versions used by the Intox EC/IR II are also recorded on

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[36] *Ibid*. at para 24 [GAR Tab 4, p. 96][VAR Tab 16, p. 95]
[37] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 164/33-36]; Affidavit of Kerry Blake, A124 at para 24 [GAR Tab 4, p. 96][VAR Tab 16, p. 95]
[38] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 166/38-167/21]
[39] Affidavit of Kerry Blake, at para 29 [GAR Tab 4, p. 97][VAR Tab 16, p. 96]
[40] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 164/24-20]; Affidavit of Kerry Blake [GAR Tab 4, p. 96][VAR Tab 16, p. 95]

the printed test record. Any failure on the part of the Intox EC/IR II during a test is detected and recorded at the time of testing.[41] Some examples include:

(a) If the Intox EC/IR II fails the calibration check it will abort the test and shut down the testing procedure and record a message saying the alcohol standard test was out of range on the printed test record.[42]

(b) If the Intox EC/IR II detects excessive residual alcohol during an air blank it will display "check ambient conditions" and record the result on the printed test card.

(c) If mouth alcohol is detected the Intox EC/IR II will display this and record it on the printed test card.

4. Records in issue

60. The Alberta Court of Appeal was provided with copies of the records that were provided to Gubbins and Vallentgoed as part of the standard disclosure package and also the additional maintenance records available for each approved instrument. The majority provides a detailed description of these records.[43]

61. The standard disclosure package in Vallentgoed included:

(a) The Intoxilyzer 5000C Operational Check Sheet, which provides details of Vallentgoed's breath testing such as: the instrument used, the officers involved, times the samples were taken, the test results, calibration check results, the alcohol standard used and the temperature of the alcohol standard used.[44] It also includes the technician's handwritten notes of his observations of the tests such as the accused person's physical condition and the nature and quality of the samples given.

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[41] *Voir dire* decision, ***R v Gubbins***, 2014 ABPC 195 at para 45 [GAR Tab 1, p.11]; *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 164/24-30; 167/23-28; 168/11-13]

[42] *Voir dire* evidence of Kerry Blake, *R v Gubbins* transcript, August 14, 2015 [GAR Tab 5, 164/24-30]

[43] *R v Vallentgoed*, 2016 ABCA 358 at para 20-29 [GAR Tab 1E, pp.48-52][VAR Tab 7, p. 42-46]

[44] [VAR Tab 17, p. 131]

(b) The Intoxilyzer 5000C Test Record produced by the approved instrument during Vallentgoed's tests.[45] It also records details of the breath testing including the test readings, calibration check results, results of the air blank tests and confirmation that its internal standards check passed.

(c) The Certificate of Analyses referred to in s. 258(1)(g) of the *Criminal Co*de, which is the official record of the results of Vallentgoed's breath tests.[46]

(d) The Affidavit of Service of the Certificate of Analyses.[47]

(e) Intoxilyzer 5000C Simulator Alcohol Solution Log.[48] It is signed by a qualified technician and provides particulars of standard alcohol solution used for the calibration checks used in Vallentgoed's breath test. It records when the alcohol standard was last changed, identifies the manufacturer and lot number of the alcohol standard used, when the alcohol standard expires and the results of two calibration checks performed on the alcohol standard after it was changed.

(f) The Intoxilyzer 5000C Test Record from calibration checks done after the alcohol solution was changed, signed by the technician. It records the results of the calibration checks done on the changed alcohol standard.[49]

(g) A Certificate of Annual Maintenance, which is a certificate from the contractor retained to maintain the instruments, certifying that the instrument was tested on January 22, 2013 (4 months before the respondent Vallentgoed's tests), and that it is "in proper working order and continues to meet the manufacturer's specifications".[50]

(h) A Certificate of Annual Maintenance for the alcohol standard breath simulator, which is a similar certificate for the breath simulator used with the standard alcohol solution.[51]

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[45] [VAR Tab 17, p. 132]
[46] [VAR Tab 17, p. 133]
[47] [VAR Tab 17, p. 134]
[48] [VAR Tab 17, p. 135]
[49] [VAR Tab 17, p. 136]
[50] [VAR Tab 17, p. 137]
[51] [VAR Tab 17, p. 138]

(i) An Intoxilyzer 5000C Use and Calibration Check Log. This is a handwritten document specific to the instrument used for Vallentgoed's breath testing, which records details of the calibration checks performed by the approved instrument.[52]

62. A similar disclosure package was provided to Gubbins.[53]

63. In addition to the "standard disclosure package" the Crown advised it would also provide the RCMP Operational Manual for the instrument and the Qualified Technician's designation.

64. Vallentgoed also requested and was provided the RCMP Maintenance Log for the approved instrument, even though the Crown maintained that the maintenance log was a third party record and that it was irrelevant.

65. The RCMP Maintenance Log is a chart maintained for each approved instrument. It records the serial number of the instrument and dates of service. The log for the instrument used in Vallentgoed's case documents service going back to 2006.

66. The maintenance records in Gubbins consist of 148 additional records. The maintenance records in Vallentgoed consist of 22 additional records. [54] However, the RCMP has not done a document audit of the records kept by the third party service provider for the Intoxilyzer 5000C used in Vallentgoed's case and is unable to say whether the third party service provider has additional maintenance records beyond the 22 records produced. These additional records consist of a variety of documents related to the maintenance of the approved instruments.

C. Reasons on whether maintenance records subject to *Stinchcombe* disclosure

1. Trial Judge Ruling Vallentgoed

67. The trial judge employed the *McNeil* framework for classifying the maintenance records. He found that since the records were not related to Vallentgoed's investigation and were not relevant, let alone obviously relevant, they were not subject to *Stinchcombe* disclosure.[55]

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[52] [VAR Tab 17, p. 139]
[53] [RAR Tab 1, p. 2-11]
[54] [VAR Tab 17, pp. 145-166][RAR Tab 1, pp. 12-159]
[55] Reasons, *R v Vallentgoed*, March 11, 2014 [VAR Tab 1 p. 3-5]

2. Trial Judge Ruling Gubbins

68. Despite the expert evidence that maintenance records are not relevant, the judge found he was bound by the summary conviction appeal decision *R v Kilpatrick*, 2013 ABQB 5, which found that maintenance records are subject to *Stinchcombe* disclosure.[56]

69. The judge described the Crown's expert as a strong witness; however she did not accept the expert evidence because it was contrary to her instinct and intuition.[57] Despite the expert evidence, she surmised that maintenance records might be the only records of the functioning of the approved instrument.[58] The judge admitted she did not know whether the additional records could be used to challenge the accuracy of the approved instrument results,[59] but nonetheless found the failure to provide them was a breach of disclosure and stayed the over .08 charges as a remedy because the Crown deliberately chose not to provide the records.

3. Summary Conviction Appeal Decision

70. Despite the expert evidence to the contrary the summary conviction appeal judge found that *St-Onge* ruled that maintenance records are relevant.[60] She adopted the reasoning from *R v Kilpatrick,*[61] *R v Proctor*,[62] and *R v Sinclair*,[63] other Alberta summary conviction appeal decisions on the issue, and further ruled that maintenance records are subject to *Stinchcombe* disclosure.[64]

4. Alberta Court of Appeal Decision

71. The majority of the Alberta Court of Appeal applied the *McNeil* framework and ruled that maintenance records unrelated to an accused's investigation and not obviously relevant are third party records.

72. The majority reviewed *R v McNeil*, 2009 SCC 3, *R v Quesnelle*, 2014 SCC 46 and *World Bank Group v Wallace*, 2016 SCC 15 and concluded:

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[56] *R v Gubbins*, 2014 ABPC 195 at para 42 [GAR Tab 1A, p. 10]
[57] *Ibid*. at para 46 [GAR Tab 1A, p. 11]
[58] *Ibid*. at para 49 [GAR Tab 1A, p. 12]
[59] *Ibid*. at para 52
[60] *R v Vallentgoed*, 2015 ABQB 206 at para 12 [GAR Tab 1B, p. 17]
[61] 2013 ABQB 5
[62] 2015 ABQB 97
[63] 2015 ABQB 113
[64] *R v Vallentgoed*, 2015 ABQB 206 at para 13 [GAR Tab 1B, p. 17]

(a) police are third parties for many disclosure purposes;[65]

(b) police have a collateral *Stinchcombe* duty to provide the Crown the "fruits of the investigation;"[66]

(c) the Crown has a duty to request the "fruits of the investigation" from the police and disclose it;[67]

(d) police must also provide the Crown other information "obviously relevant to the accused's case;"[68]

(e) records that are not "fruits of the investigation," nor "obviously relevant" are third party records subject to *O'Connor* production.[69]

73. The majority found that the requested maintenance records are not fruits of the investigation.[70] The majority also found that historical maintenance records are not obviously relevant.[71]

74. The majority noted that it is not a defence to prove that the approved instrument was "improperly maintained," or that maintenance records were not kept in a particular format. The uncontradicted expert evidence is that recommended maintenance is preventative in nature and provides no evidence about whether an instrument malfunctioned at any particular instance.[72] Properly maintained instruments can malfunction and unmaintained instruments can operate properly. Whether the recommended form and content of the maintenance records was followed is irrelevant to instrument functioning. Merely proving an absence of maintenance or maintenance records, or alternatively that routine maintenance was performed is not relevant to whether the instrument malfunctioned at the time an accused was tested.

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[65] *R v Vallentgoed*, 2016 ABCA 358 at para 37 [GAR Tab 1E, p. 55][VAR Tab 7, p. 49]
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*. at para 40 [GAR Tab 1E, p. 56][VAR Tab 7, p. 50]
[69] *Ibid*. at para 41
[70] *Ibid*. at para 45 and 47 [GAR Tab 1E, p. 57-58][VAR Tab 7, p. 51-52]
[71] *Ibid*. at para 40 [GAR Tab 1E, p. 56][VAR Tab 7, p. 50]
[72] *Ibid*. at para 69 [GAR Tab 1E, p. 64][VAR Tab 7, p. 58]

75. The majority found that this Court in *St-Onge* did not rule on the relevance of maintenance records, nor did it find that all maintenance records are subject to *Stinchcombe* disclosure.[73] The constitutional validity of s. 258(1)(c) was not dependent on irrelevant maintenance records being provided to the accused as disclosure, but rather an accused being able to obtain all relevant maintenance records either as *Stinchcombe* disclosure or through the *O' Connor* process:[74]

> The true effect of *St-Onge Lamoureux* (whether it be described as *obiter dictum* or *ratio decidendi*) is that the combination of the *Stinchcombe* and *O'Connor* procedures would permit the defence to obtain any maintenance records that were relevant and probative, and would thus enable the defence to meet the requirements of s. 258(1)(c)(i). It is the availability of the disclosure procedure that makes the provisions constitutional, not an artificial duty on the Crown to produce irrelevant evidence. *St-Onge Lamoureux* only requires that the disclosure regime be applied to the maintenance records for the instruments so that the malfunction defence is "not rendered illusory".

76. As a result, police have no *Stinchcombe* obligation to provide the Crown historical maintenance records and the Crown has no *Stinchcombe* obligation to disclose them to defence.[75]

77. The majority found that the fruits of the investigation include time-of-test records and other records that are contemporaneous with the criminal charge. These records are subject to *Stinchcombe* disclosure. All other records are third party records not subject to *Stinchcombe* disclosure. The standard disclosure package that was provided to Gubbins and Vallentgoed contained the "fruits of the investigation" and satisfied the Crown's disclosure obligations.[76] The balance of the maintenance records are not fruits of the investigation and are subject to third party *O'Connor* production.[77] An accused seeking to challenge the Crown's assessment of a record being "clearly irrelevant" or seeking production through the *O'Connor* process has a burden of establishing the likely relevance of the record sought.[78]

78. The dissenting Justice agreed with the *McNeil* framework and found that as a general principle, records in police possession that are not fruits of the investigation and unrelated to the

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[73] *Ibid.* at para 53 – [GAR 1E, p. 60][VAR Tab ,p. 56]
[74] *Ibid*. at para 54
[75] *Ibid*. at para 41 and 45 [GAR Tab 1E, p. 56-57][VAR Tab 7, p. 50-51]
[76] *Ibid*. at para 66 and 76 [GAR Tab 1E, p. 63 and 66][VAR Tab 7, p. 57 and 60]
[77] *Ibid*. at para 67 [GAR Tab 1E, p. 64][VAR Tab 7, p. 58]
[78] *Ibid*. at para 68

accused person's specific investigation are not subject to *Stinchcombe* disclosure, unless they are obviously relevant.[79]

79. The dissenting Justice further recognized that classifying all records related to the approved instrument as *Stinchcombe* disclosure had the potential to lead to the mischief that the *McNeil* framework sought to guard against:[80]

> If all maintenance records must be disclosed under *Stinchcombe*, the pursuit of every record related to the approved instrument has the potential to unduly protract criminal proceedings. It can divert the court's focus from trying an offence on its merits into an inquiry as to whether police and third party service providers have preserved and produced every record created in relation to the approved instrument. This is the sort of mischief that the *O'Connor* procedure was meant to guard against. This outcome addresses the Crown's public policy concerns.

80. However, the dissenting judge found that *St-Onge* ruled that some maintenance records are relevant and subject to *Stinchcombe* disclosure. She accordingly ruled maintenance logs kept in accordance with the ATC's recommendations are subject to *Stinchcombe* disclosure. All other maintenance records are producible through the *O'Connor* process.[81]

[79] *Ibid*. at para 112-113 [GAR Tab 1E, p. 77][VAR Tab 7, p. 71]
[80] *Ibid*. at para 122 [GAR Tab 1E, p. 79][VAR Tab 7, p. 73]
[81] *Ibid*. at para 124 [GAR Tab 1E, p. 79][VAR Tab 7, p. 73]

Part II – Respondent's Position on Questions in Issue

81. The Crown submits that these appeals raise the sole question of whether maintenance records unrelated to an accused's investigation and not obviously relevant are subject to *Stinchcombe* disclosure. The Crown already provides all records related to the accused's investigation and obviously relevant records as *Stinchcombe* disclosure. The records in dispute in these cases are unrelated to the Appellants' investigations and are not obviously relevant to an issue at trial.

82. The Crown position on this issue is that:

(a) The *McNeil* framework for the production of these records should be applied to all records related to the approved instrument.

(b) Applying the *McNeil* framework, maintenance records are not subject to *Stinchcombe* disclosure but rather *O'Connor* production. The records at issue are not related to the Appellants' investigations and are not obviously relevant.

(c) There is no reason that maintenance records should be subject to *Stinchcombe* disclosure.

Part III – Argument

A. It is necessary to limit the scope of disclosure

83. This court has recognized that it is necessary to limit the scope of *Stinchcombe* disclosure so that it does not become an impossible burden for the Crown and police to discharge and so that the right to disclosure is not abused.[82] Sweeping disclosure and third party production requests are recognized as a common cause of trial delays.[83] This Court has also repeatedly observed that it is necessary to take steps to prevent "'"speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production requests.[84]

84. Most recently this Court in *World Bank v Wallace* affirmed that the *Stinchcombe* and *O'Connor* regimes fulfil the fundamental purpose of protecting an accused person's right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure.[85]

85. In *McNeil*, this court similarly observed "it is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources are not squandered in 'fishing expeditions' for irrelevant evidence."[86]

86. Recently this Court in *R v Jordan* and *R v Cody* similarly emphasized that an efficient criminal justice system is of utmost importance and all justice participants must be vigilant to prevent unnecessary or meritless proceedings from derailing a trial on the merits.[87]

87. The purpose of disclosure is to allow an accused to make full answer and defence, not to cripple the prosecution with excessive requests for irrelevant material.

88. Making all maintenance records subject to *Stinchcombe* disclosure transformed impaired driving trials into lengthy time consuming inquiries into the record keeping practices of the police and third party service providers completely divorced from the accused's ability to make full answer and defence.

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[82] *R v McNeil*, 2009 SCC 3 at para 22 and 29
[83] *World Bank v Wallace*, 2016 SCC 15 at para 130
[84] *World Bank v Wallace*, 2016 SCC 15 at para 130; *R v McNeil*, 2009 SCC 3 at para 29; *R v Chaplin* (1994), [1995] 1 SCR 727 at para 32; *R v O'Connor*, [1995] 4 SCR 411 at para 24;
[85] 2016 SCC 15 at para 115
[86] 2009 SCC 3 at para 28
[87] *R v Jordan*, 2016 SCC 27 at para 2-3, 19-28 and 114; *R v Cody*, 2017 SCC 31 at para 37, 60

B. The *McNeil* framework ensures an accused will obtain all relevant information while also protecting against meritless requests for production

89. This Court in *R v McNeil* carefully crafted a framework for the production of records in police possession that ensures an accused can obtain all records necessary to make full answer and defence, while not creating an impossible burden and protecting against abusive production requests. To achieve this, the scope of *Stinchcombe* disclosure is limited to the fruits of the investigation, being those records related to the specific investigation of the accused.[88] All other records in police possession records fall under the *O'Connor* regime.

90. The fruits of the investigation are the "material relating to the accused's case."[89] The Crown's *Stinchcombe* obligation to provide the fruits of the investigation rests on the assumptions that (1) this material is relevant to the accused's case, (2) this is the material that will comprise the case against the Crown.[90] There is no such assumption of relevancy for records that are not related to an accused's investigation.[91]

91. As a result, the court noted that investigative files involving third parties and police disciplinary records usually fall under the *O'Connor* regime, unless the information is in some way related to the accused's case.[92] This is because records unrelated to the accused's case are not fruits of the investigation and not subject to *Stinchcombe* disclosure.

92. Vallentgoed has suggested that fruits of the investigation are not limited to material related to the investigation of the accused. However, such an interpretation renders the *McNeil* framework nonsensical or meaningless. There would be no point in limiting the police obligation to provide records to the fruits of the investigation and obviously relevant records if police must provide all relevant records in its possession. Moreover, such an interpretation would be unworkable. It would require police to review all information in its possession and assess whether any records are relevant for each and every accused person. The failure to provide any record that was not "clearly irrelevant" would breach the accused's right to disclosure.

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[88] *R v McNeil*, 2009 SCC 3 at para 22-23
[89] *Ibid*. at para 22
[90] *Ibid*. at para 20
[91] *Ibid*. at para 28
[92] *Ibid*. at para 25

93. Limiting *Stichcombe* disclosure to the fruits of the investigation, being those records related to the accused's investigation, strikes the appropriate balance of ensuring the accused will receive the presumptively relevant material from the police investigative file, while not creating an overly broad and undefined scope of disclosure that is impossible for the Crown and police to discharge.

94. Placing the onus on the accused to establish the likely relevance of records that are not the fruits of the investigation and thus not presumptively relevant, serves an important screening function that prevents against unmeritorious or abusive requests for production: [93]

> … it is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.
>
> It is important to repeat here, as this Court emphasized in *O'Connor*, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (*O'Connor*, at para. 24; quoting from *R. v. Chaplin* (1994), [1995] 1 S.C.R. 727 (S.C.C.), at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*…

95. It is because no assumption of relevance can be made about records that are not the fruits of the investigation, that an accused seeking such records is required to show "likely relevance" as a prerequisite to production.[94]

96. *McNeil* also established that the Crown has a duty to make reasonable inquiries of other Crown entities when informed of potentially relevant evidence to determine whether they are in possession of material relevant to the accused's case.[95] It does not impose an obligation on the Crown to obtain material that is not relevant to the accused's case.

97. *McNeil* also established that police have a duty to provide any obviously relevant material they are aware of even if it is unrelated to the investigation of an accused. The court noted: "[o]bviously, the accused has no right to automatic disclosure of every aspect of a police officer's

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[93] *Ibid*. at paras 28 and 29
[94] *Ibid*. at para 28
[95] *Ibid*. at para 48

employment history, or to police disciplinary matters with no realistic bearing on the case against him or her."[96] It is only information that is "obviously relevant" that should form part of a first party disclosure package.[97]

98. This framework was subsequently affirmed by this court in *R v Quesnelle*:[98]

> … 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.
>
> … 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).

99. The *McNeil* framework guarantees that an accused automatically receives the fruits of the investigation and other obviously relevant material and further offers an accused the means to obtain records likely relevant to his or her case should there be circumstances making other material in police possession relevant. At the same time, it does not permit an accused to make demands for irrelevant material and allege breach of disclosure if the material demanded is not provided. It also does not require the police and Crown to provide material that is typically irrelevant to every accused in every case.

C. According to the *McNeil* framework the maintenance records are not subject to *Stinchcombe* disclosure

100. According to the *McNeil* framework, the maintenance records in issue are third party records not subject to *Stinchcombe* disclosure because they are not fruits of the investigation and they are not obviously relevant.

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[96] *Ibid*. at para 53
[97] *Ibid*. at para 59
[98] 2014 SCC 46 at para 11 and 12

1. The records are not fruits of the investigation

101. As described above, *Stinchcombe* disclosure obligations are necessarily limited to the presumptively relevant fruits of the accused's investigation, being "all material pertaining to its investigation of the accused."

102. The maintenance records in issue have no relationship to the Appellants' investigations. The maintenance records existed before or were created after the Appellants' investigations; the records would have been created regardless of whether the Appellants had ever been investigated; the records contain no information related to or details about the Appellants' investigations; the records played no role in the acquisition of any evidence against the Appellants; the records are not relied upon by the police or the Crown as part of the cases against the Appellants. They are entirely unrelated to the investigations of the Appellants and are not fruits of their investigations.

103. The mere fact that the records relate to the approved instrument used in the Appellants' investigations does not make the records the fruits of the investigation. An analogy can be drawn to the police report in issue in *R v Quesnelle*. It did not relate to the accused's investigation or charges, but did involve the same complainant. The fact that the other file involved the same complainant did not make it a fruit of the investigation subject to *Stinchcombe* disclosure.

2. The records are not obviously relevant

104. The uncontradicted evidence is that maintenance records are not relevant. They cannot be used to assess the functioning of the approved instrument at the time of a specific breath test. Approved instruments and the breath testing procedure are designed so that if a malfunction affecting the result occurs during a breath test, it will be recorded in the records made at the time of testing and it will be readily apparent from a review of those records. Thus, when a malfunction has occurred, an accused can readily rebut the presumption of accuracy with the test records produced during his or her testing. The proper functioning of the approved instrument is confirmed before the taking of each subject breath sample through a calibration check, where the approved instrument analyzes an external alcohol standard solution of known and independently verified concentration. This provides direct evidence that the approved instrument was functioning properly immediately prior to each of an accused's breath tests.

105. This means that even if maintenance records definitively show that an approved instrument has never received maintenance, has had prior or subsequent malfunctions or has received

numerous prior or subsequent repairs, we nevertheless know it was working properly at the time of a given test if it accurately measured the concentration of the alcohol vapour produced by the alcohol standard. The measurement of a known standard is the manner in which all measuring devices are evaluated for accuracy and how measuring instruments are calibrated. It is the calibration check that tells police when an approved instrument is no longer functioning properly and it is the calibration check that tells service providers when the approved instrument has been sufficiently repaired or recalibrated.

106. It is this calibration check that renders all attacks based on lack of maintenance or past or future repair speculative. We know that any past maintenance, repair, software changes or other modifications of the approved instrument did not affect its functioning if the instrument accurately measured the alcohol standard. The argument that something might have been done to the instrument that could have affected its accuracy is wholly rebutted by the instrument's ability to accurately measure the concentration of the alcohol standard.

107. In some cases defence counsel have asked for maintenance records related to the Intoxilyzer 5000C going back to 1995 when it was first put into use. On its face, even intuitively, it is difficult to see how records of what repairs or maintenance the approved instrument received 20 years ago could be relevant. And if these records are truly capable of raising a reasonable doubt about the accuracy of breath results taken 20 years later, then the logical extension is that police cannot use any approved instrument that has missed scheduled maintenance or that has received repairs at any point in the past, since if these records raise a reasonable doubt about accuracy in one case they do so in all cases.

108. The majority correctly observed that it is an analytical error to conclude that a "fail" reading on the instrument at some other time, is evidence of a malfunction at a time when the approved instrument does not register a "fail" result.[99] Rather, the "fail" result shows the internal control systems were working when it showed a "fail." If the instrument was working normally on one day but registered a "fail" on the next, the logical inference is that it was working the day before.

109. There is no evidence before the court to suggest that maintenance records unrelated to the accused person's investigation are relevant. The Appellants' did not call any evidence to rebut the

[99] *R v Vallentgoed*, 2016 ABCA 358 at para 73 [GAR Tab 1E, p. 65][VAR Tab 7, p. 59]

Crown evidence on relevance. There are no reported cases in which maintenance records have been used to successfully challenge the results of an approved instrument. In *R v Jackson*, the evidence called to establish the relevance of maintenance records was described as having "failed to ascend above the speculative."[100]

110. It is telling that prior to *St-Onge*, when it was well settled that maintenance records were third party records,[101] defence counsel did not try to obtain these purportedly relevant records.

3. St-Onge did not rule maintenance records are relevant and subject to Stinchcombe disclsoure

111. The Appellants argue *St-Onge* ruled that maintenance records are relevant and subject to *Stinchcombe* disclosure. That is not so. Gubbins further argues that *St-Onge* also ruled that maintenance records can rebut the presumption of accuracy in s. 258(1)(c) of the *Criminal Code*. That is also not so.

112. The relevance and disclosure of maintenance records unrelated to the accused's investigation was not in issue in *St-Onge*. Neither evidence nor argument was presented on whether the presumption of accuracy could be rebutted with maintenance records unrelated to the accused's investigation. The majority decision in *St-Onge* expressly states that since the nature and scope of relevant evidence was not argued it would be inappropriate to rule on the limits of that evidence. Further, maintenance records are not mentioned in the list of material the court noted was available to an accused to rebut the presumption of accuracy: [102]

> 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.

113. Justice Cromwell in the dissenting judgment said that he did not understand the majority reasons to be establishing any new principle regarding disclosure obligations.[103] Prior to *St-Onge*,

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[100] *R v Jackson*, 2015 ONCA 832 at para 136
[101] *R v Keistead*, 2004 ABQB 491, *R v Coopsamy*, 2008 ABQB 266; *R v Scurr*, 2008 ABQB 127
[102] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 42
[103] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 136

maintenance records unrelated to the accused's investigation were not subject to *Stinchcome* disclosure.[104]

114. The central argument of defence in *St-Onge* was that the elimination of the *Carter* defence made it impossible to rebut the presumed accuracy of the approved instrument results. In rejecting this argument the majority found that the evidence showed the accused could obtain relevant records capable of demonstrating an error if an error had occurred. The court did not rule specifically on what records would do that or whether those records are producible under *Stinchcombe* or *O'Connor*. The constitutional validity of the amendments did not depend on the Crown having to provide all maintenance records as *Stinchcombe* disclosure, but rather upon the accused being able to obtain relevant records able to rebut the presumption of accuracy. The majority of the Alberta Court of Appeal correctly concluded that:[105]

> The true effect of *St-Onge Lamoureux* (whether it be described as *obiter dictum* or *ratio decidendi*) is that the combination of the *Stinchcombe* and *O'Connor* procedures would permit the defence to obtain any maintenance records that were relevant and probative, and would thus enable the defence to meet the requirements of s. 258(1)(c)(i). It is the availability of the disclosure procedure that makes the provisions constitutional, not an artificial duty on the Crown to produce irrelevant evidence…

115. Although the court in *St-Onge* surmised that an accused might rely on a maintenance log showing that the instrument was not properly maintained to challenge the presumption of accuracy[106] it did so in the absence of evidence about whether such a record could be used to raise a reasonable doubt about the proper functioning of the approved instrument.

116. The majority's conclusion in *St-Onge* that maintenance records might be relevant was based not on evidence before the court that maintenance records are relevant but an inference drawn from existence of the ATC's recommendation that maintenance records be kept:[107]

> ... The Committee also recommends that approved instruments be inspected on an annual basis to ensure that they continue to meet the manufacturer's technical specifications. According to the Committee, the calibration and maintenance of instruments are essential "to the integrity of the breath test program" (p. 14).

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[104] *R v Keistead*, 2004 ABQB 491, *R v Coopsamy*, 2008 ABQB 266; *R v Scurr*, 2008 ABQB 127
[105] *R v Vallentgoed*, 2016 ABCA 358 at 54 [GAR Tab 1E, p. 60][VAR Tab 7, p. 54]
[106] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 78
[107] *Ibid.* at para 25-26 and 43

> The Committee's recommendations shed light on the circumstances that might explain how an instrument malfunctioned or was used improperly. Thus, human error can occur when samples are taken and at various steps in the maintenance of the instruments, which, it should be mentioned, are used Canada-wide. Hodgson's report, which the prosecution itself relied on as a source of the statutory amendments, refers to the importance of proper operation and maintenance:
>
> > [T]o achieve scientifically sound results in operational use, user agencies must ensure that approved instruments are operated by qualified personnel using procedures based on good laboratory practice. [p. 83]
>
> …
>
> In its recommendations, the CSFS Committee also suggested mechanisms for ensuring that the instruments function properly and for assuring the quality of breath alcohol analyses. It can be inferred from these recommendations that the instruments may not function optimally if the suggested procedures are not followed.

117. After *St-Onge* was argued, the ATC published a position paper on what records are relevant to assessing the functioning of an approved instrument. The ATC explained that records related to periodic maintenance and inspection are of no use in assessing proper functioning at the time of any given breath test. The ATC also explained that its recommendation that maintenance records be kept relates only to the best practices for a breath test program and are not related to ensuring or establishing the accuracy of a specific breath test.

118. Had this evidence been available to the court in *St-Onge*, it would not have drawn the inference that maintenance records may be relevant to assessing the proper functioning of the approved instrument and a possible record through which an accused could challenge the accuracy of the approved instrument results.

119. The central finding in *St-Onge* is that Parliament was constitutionally justified in limiting the evidence capable of rebutting the presumption of accuracy to evidence "related directly to the functioning or operation of the instruments."[108] It further affirmed that such evidence must raise a real doubt about whether the instrument was functioning or operated properly and that it is not enough for an accused to simply show that a deficiency is possible.[109]

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[108] *Ibid*. at para 3, 41 and 74
[109] *Ibid*. at para 52-53

120. The evidence in these cases is that maintenance records are not relevant to whether the approved instrument was functioning properly. Maintenance records offer no information about whether the instrument was operated properly at the time of the accused's breath testing. Evidence of mere improper maintenance or evidence that maintenance records were not kept in a particular format are not able raise a real doubt about the proper functioning of the approved instrument at the time of the accused's breath testing.

121. To permit direct evidence of approved instrument functioning to be undermined by speculation that the approved instrument may not have been functioning properly because of past or subsequent malfunction or missed maintenance or repair is antithetical to the central finding in *St-Onge*, that having regard to the nature of approved instruments and the testing procedure, it is constitutionally permissible to require challenges to approved instrument results to be based upon evidence of actual malfunction and improper operation raising a real doubt about the accuracy of the results. As this Court observed in *R v Alex*, the scientific reliability of the results of properly administered approved instrument tests is firmly established in *St-Onge*.[110]

122. The majority in *St-Onge* found that the admission of consumption evidence to challenge the accuracy of the results entailed a real risk of perverting the fact-finding process.[111] A challenge to the results with an inference that the instrument may have been malfunctioning because of past or future error or missed maintenance, is every bit as speculative as the *Carter* defence limited by the amendments at issue in *St-Onge*.

123. As the majority of the Alberta Court of Appeal observed the constitutional validity of the presumption of accuracy in s. 258(1)(c) of the *Code* does not depend upon the Crown having to provide the accused with irrelevant records as *Stinchcombe* disclosure.[112] The *St-Onge* decision provides no basis for doing so.

D. The classification of all maintenance records as first party records has resulted in substantial mischief

124. The classification of all maintenance records as first party *Stinchcombe* disclosure has caused the mischief that *McNeil* sought to avoid. It created an undefined scope of disclosure and

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[110] *R v Alex*, 2017 SCC 37 at para 42
[111] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 74
[112] *R v Vallentgoed*, 2016 ABCA 358 at para 54 [GAR Tab 1E, p. 60][VAR Tab 7, p. 54]

removed all protection against abusive or meritless requests for production. As a result, the pursuit of every conceivable record related to the approved instrument became an effective way to avoid a trial on the merits.

125. Regardless of the records that were provided, defence asked for more. In some cases requests were made for decades old records. If anything requested was not produced or was produced late, the accused applied for a stay or exclusion of evidence for non-disclosure. Because all records related to the approved instrument were presumed relevant, stays were granted in the complete absence of evidence that these additional records had any relevance or impact on the accused's ability to make full answer and defence. All safeguards against abusive requests for production were effectively removed and abusive requests for disclosure became a common defence strategy to avoid a trial on the merits.

126. The following cases illustrate this mischief. In *R v Howie*,[113] the Crown provided all records for all approved instruments in Calgary Police Service (CPS) possession. Despite this Howie further demanded a long list of additional records dating back to 2001 (12 years prior to Howie's investigation). When these records were not provided, Howie applied for a stay alleging non-disclosure at the start of his trial. The judge ordered production of the additional records and adjourned the trial. The Crown discovered that these additional records did not exist and had never existed and notified defence counsel. Howie filed another *Charter* application alleging non-disclosure. The Crown provided affidavits about the non-existence of the records two weeks prior to trial. The trial was adjourned. Defence counsel asked the court to consider its non-disclosure application seeking exclusion of evidence as a remedy instead of a stay. The application was heard and dismissed. Defence claimed the affidavits were incomplete and the Crown arranged to call the affiants at trial. However, the Crown affiants were unable to attend the trial because of a scheduling error and a family tragedy. Howie filed another *Charter* notice alleging non-disclosure and unreasonable delay. The court found a breach of ss. 7 and 11(b) and granted a stay in the absence of any evidence that the requested records existed, were relevant or that not producing them had any impact on Howie's ability to make full answer and defence.

127. In *R v Oler*,[114] the Crown provided a standard disclosure package with all records related

[113] 2013 ABPC 288
[114] 2014 ABPC 130

to the accused's breath testing. Defence further asked for the maintenance records and manuals for three different Intoxilyzer 5000C instruments. The Crown provided a CD containing all maintenance records for every Intoxilyzer 5000C used in Calgary since 1995. Defence brought a *Charter* application seeking a stay alleging a breach of timely disclosure because some handwritten records had been transcribed into typed format and did not contain information that defence counsel was already aware of. Defence also took issue with police having created the maintenance log in Word, which could be altered and police did not create an audit trail in the storage of ongoing Word documents. Although the court in *R v Oler*, did not grant the *Charter* application, the case shows that a considerable amount of court resources are used in addressing meritless ever expanding requests for approved instrument records.

128. In *R v Tweedie*,[115] the Crown provided the office of defence counsel a disk containing maintenance records for all approved instruments used by the Calgary Police Service. Despite this, Tweedie demanded the Crown provide another disk specifically for his case. He also requested the operator's manual for the approved instrument. The Crown provided another disk five days prior to trial. At trial, Tweedie brought a *Charter* application alleging non-disclosure because he wanted disclosure of the original documents. The approved instrument used had just been brought into service and there was only a single document with 2 entries on it related to its maintenance. Despite this the court found a violation of s. 7 for late disclosure and excluded the approved instrument results, effectively terminating the over .08 prosecution.

129. In *R v Sakal*,[116] defence counsel after receiving disclosure demanded a letter from the approved instrument manufacturer confirming that its design allowed it to be used in mobile checkstop operations. When the letter was not provided, defence applied for a stay or exclusion of evidence for non-disclosure. The court found the Crown should have provided the letter as disclosure, even though the letter on its face was irrelevant because it is the ATC not the manufacturer that determines whether an approved instrument is suitable for use.

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[115] *R v Tweedie (Michael Alexander Tweedie)*, unreported Calgary, May 27, 2013, #121267397P1
[116] *R v Sakal (David William Sakal)*, unreported Calgary, May 3, 2013, #120457916P1

130. In *R v Eastman*, [117]the Crown provided the standard disclosure package. Defence counsel requested further maintenance records. The Crown provided a disk containing all maintenance records for approved instruments in CPS possession. Defence counsel brought an application for non-disclosure because he believed there should be more records for the approved instrument in question than were on the disk and he should have received the records earlier. The judge granted a stay as a remedy for non-disclosure in the absence of evidence that the records actually existed or that they impacted the accused's ability to make full answer and defence.

131. In *R v Farmer*, the Crown provided the standard disclosure package. Defence made further requests for historical maintenance and repair records for the approved instrument. The Crown took the position the requested records were third party records and asked defence counsel to bring an *O' Connor* application for production. Defence counsel instead brought a *Charter* application at trial seeking the exclusion of evidence for non-disclosure. The Crown sought an adjournment to have a disclosure hearing in which it could call expert evidence on the relevance of the requested records. The court denied the adjournment request and excluded the evidence of the approved instrument as a remedy for non-disclosure, without any evidence the records impacted the accused's ability to make full answer and defence.[118]

132. In *R v Finn*, defence counsel asked for maintenance records and a manual for the approved instrument. The Crown provided a 2002 manual for the approved instrument and offered to provide maintenance records for the past year on a without prejudice basis. Defence counsel rejected the offer. The Crown then provided a disk containing all available records for all approved instruments used by the Calgary Police Service when it was received from the police three days prior to the trial date. Defence at trial brought a *Charter* application seeking exclusion of the breath test results alleging late and non-disclosure, because defence wanted a more recent version of the approved instrument manual and because some records provided were typewritten transcriptions of handwritten records. The court found the Crown breached s. 7 as a result of late disclosure and stayed the charges.[119]

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[117] *R v Eastman (Derek Cameron Eastman)*, unreported Calgary, August 28, 2013, #130574718P1
[118] *R v Farmer (Thomas Allen Farmer)*, unreported Calgary, March 18, 2013, #120416623P1
[119] *R v Finn (Liam John Finn)*, unreported Calgary, May 10, 2013, #120685490P1

133. In *R v Grasley*, the Crown provided disclosure. Defence counsel made a further demand for maintenance records. The Crown in an attempt to avoid unnecessary delay provided on a without prejudice basis maintenance records going back to the most recent annual inspection of the approved instrument. Defence brought a *Charter* application alleging non-disclosure. The Crown requested an adjournment to call evidence on the relevance of the requested records. The court denied the adjournment and the Crown accordingly invited a stay of proceedings.[120]

134. The records at issue in the above cases are totally irrelevant to assessing the functioning of the approved instrument and do not assist an accused in making full answer and defence, yet non-production resulted in a termination of the prosecution. Even when the *Charter* applications for non-disclosure were unsuccessful, the pursuit of every record related to the approved instrument unduly protracted the criminal proceedings and diverted the courts' focus from a trial on the merits. It converted the trial process into an inquiry of whether police and third party service providers have preserved and produced every record ever created in relation to the approved instrument. This is the very mischief the *McNeil* framework sought to avoid.

135. As a result of classifying all maintenance records as first party records, defence counsel in the above cases were able to obtain stays simply by alleging that some records related to the approved instrument were not provided. In no case was defence required to show the existence or relevance of the alleged missing records.

136. The Crown was effectively prevented from exercising its right to litigate the production issue and prosecute these offences on the merits. If the Crown refused to provide a requested record, the accused brought a *Charter* application alleging non-disclosure at the start of trial on two weeks' notice instead of bringing an *O' Connor* application to justify production well in advance of the trial. If the Crown asked for adjournment to call evidence on the existence or relevance of the records, the request was denied and the matter stayed on the basis that the disclosure issue was decided and the Crown was deliberately violating its disclosure obligations. Even when the Crown attempted to provide all maintenance records in police possession, defence

[120] *R v Grasley (Byron Douglas Grasley)*, unreported Calgary, February 4, 2013, #120295100P1

counsel asked for ever more records and were granted stays for non-disclosure, without having to establish the existence or relevance of the records sought.

137. The other problem caused by the ruling that maintenance records are subject to *Stinchcombe* disclosure is that maintenance records are loosely defined without regard to their nature or relevance and encompasses every record related to the approved instrument. Even if some maintenance records could be said to be relevant, it is clear that the vast majority are not relevant. Yet because they were classified as first party records, these irrelevant records must be produced to every accused charged with an over .08 offence and the failure to do so is a violation of the Crown's *Stinchcombe* obligations, which permits defence counsel to bring a *Charter* application for non-disclosure.

138. Impaired driving has been consistently recognized by courts as one of the most pressing social concerns. It is the number one criminal cause of deaths in Canada and costs Canadians billions of dollars every year. Impaired driving trials also take up a large and disproportionate amount of court time in comparison to other criminal offences. The public has a strong interest in having over .08 charges efficiently addressed on their merits. Yet as a result of classifying all maintenance records as *Stinchcombe* disclosure, the Crown was greatly impaired in its ability to do so and scarce court and police resources were squandered dealing with inquiries into the record keeping practices of the police and third party approved instrument service providers. And all in the absence of any evidence maintenance records are relevant, and despite expert evidence that maintenance records are not relevant.

E. There is no reason to make maintenance records unrelated to the accused's investigation subject to Stinchcombe disclosure

139. There is no reason that that the *McNeil* framework should not be applied to records related to the approved instrument. It ensures that an accused will receive all records required to make full answer and defence, while protecting against abusive requests for production. In the Appellants' cases and the vast majority, if not all, impaired cases, maintenance records are not relevant. There is simply no basis to require the Crown to provide maintenance records to all accused in all cases as *Stinchcombe* disclosure and create unnecessary litigation over whether every record has been provided.

140. In the Appellants' cases, they received the fruits of the investigation, which included all records produced at the time of their respective breath tests. According to the uncontradicted evidence, these are the only records relevant to assessing whether the instruments were functioning properly at the time of the Appellants' breath tests. The Appellants received the records needed to make full answer and defence as disclosure, being the fruits of the investigation and obviously relevant records. These records showed that the requirements for a valid breath test were met: acceptable air blank test results, accurate calibration checks with the standard alcohol solution, lack of error messages and agreement between two breath samples taken at least 15 minutes apart.

141. The Appellants requested additional records unrelated to their investigations. The Crown made inquiries of the police and determined that the requested material was not relevant to an issue in their trials. According to the *McNeil* framework these records are third party records because they are not related to the Appellants' investigations and they are not obviously relevant. Had the requested records been obviously relevant they would have been provided to the Appellants as *Stinchcombe* disclosure.

142. If there are particular circumstances in an accused's case that make otherwise irrelevant maintenance records likely relevant that accused can obtain them through the *O'Connor* process. This ensures that accused persons will obtain all records needed to make full answer and defence without creating the mischief caused by making all maintenance records subject to *Stinchcombe* disclosure regardless of their nature or relevance.

143. The Appellants' inability to obtain the additional records is not the result of a deficient production framework, but because the requested records are not relevant. The Appellants provide no evidence or explanation as to why the maintenance records in issue are required to make full answer and defence. The Appellants' arguments rest entirely upon the comments made about maintenance records in *St-Onge*, which as described above were made in the absence of evidence of the relevance of maintenance records.

144. The fact that Gubbins and Vallentgoed were unable to establish there was a malfunction through the records provided is because there was no malfunction. No maintenance record will assist in raising a reasonable doubt about the proper functioning of the approved instrument in these cases, because the records made at the time of the test show all of the requirements for a valid accurate test were met.

145. The majority in *St-Onge* recognized the fact accused persons will rarely succeed in raising a reasonable doubt that the instrument was functioning or operated properly does not render the defence to the presumption of accuracy illusory.[121]

146. The court in *R v Duff* similarly observed, the fact that there are a limited number of cases where malfunction can be demonstrated from the breath test records speaks more to the efficacy of breath alcohol testing than an impairment of an accused's ability to make full answer and defence:[122]

> … I am not satisfied, however, that the defence cannot adduce evidence of instrument malfunction or operator error. Either or both may be demonstrated by reference to disclosure materials or by cross-examination of the QT. The fact that there may be a limited number of cases where malfunction or error can be demonstrated speaks more to the efficacy of the breath/alcohol testing protocol than it does to an unacceptable limitation on the accused's ability to make full answer and defence. It is also apparent from the judgment in *Kasim* that the 'possibility' of evidence tending to show acting as a defence has already been demonstrated…

147. There is simply no constitutional basis to require the Crown to provide every record related to the approved instrument as *Stinchcombe* disclosure, regardless of the nature or relevance of the record. Doing so does not advance an accused's ability to make full answer and defence, but it does permit mischief undermining the efficiency of the court process and distracts from resolving impaired driving trials on their merits.

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[121] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 79
[122] *R v Duff*, 2010 ABPC 319 at para 155

Part IV – Submissions on costs

148. There is no basis to award costs in respect of these appeals.

Part V – Order Sought

149. The Respondent asks that the appeals be dismissed.

All of which is respectfully submitted.

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PART VI - TABLE OF AUTHORITIES

Tab	Case Law	Cited at Paragraph No.
	R v Alex, 2017 SCC 37	13, 121
	R v Chaplin (1994), [1995] 1 SCR 727	83
	R v Cody, 2017 SCC 31	1, 86
	R v Coopsamy, 2008 ABQB 266	110, 113
	R v Duff, 2010 ABPC 319	146
1	*R v Eastman (Derek Cameron Eastman)*, unreported Calgary, August 28, 2013, #130574718P1	130
2	*R v Farmer (Thomas Allen Farmer)*, unreported Calgary, March 18, 2013, #120416623P1	131
3	*R v Finn (Liam John Finn)*, unreported Calgary, May 10, 2013, #120685490P1	132
4	*R v Grasley (Byron Douglas Grasley)*, unreported Calgary, February 4, 2013, #120295100P1	133
	R v Howie, 2013 ABPC 288	126
	R v Jackson, 2015 ONCA 832	11, 109
	R v Jordan, 2016 SCC 27	1, 86
	R v Kirstead, 2004 ABQB 491	110, 113
	R v Kilpatrick, 2013 ABQB 5	68, 70
	R v McNeil, 2009 SCC 3	3, 5, 7, 72, 83, 85, 89, 90, 91, 94, 95, 96, 97, 124
	R v O'Connor, [1995] 4 SCR 411	83
	R v Oler, 2014 ABPC 130	127
	R v Proctor, 2015 ABQB 97	70