Court File Nos. 37395; 37403

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 -

THE ATTORNEY GENERAL OF ONTARIO

Intervener

AND BETWEEN:

DARREN JOHN CHIP VALLENTGOED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF ONTARIO
LE DIRECTEUR DES POURSUITES CRIMINALLES ET PÉNALES DU QUÉBEC

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PART I: OVERVIEW

1. This case asks whether certain police records relating to the past maintenance of an approved instrument constitute first-party disclosure such that the Crown must disclose them as a matter of routine in every case in which breath samples were taken. The issue confounded lower courts in Ontario for well over a decade before it was settled by the recent Court of Appeal decision in *R. v. Jackson*. And yet, even now, requests for similar records continue to plague drinking and driving prosecutions.

2. Ontario intervenes in this important appeal to highlight its experience with these disclosure requests and suggest a way forward. In its view, the existing framework governing the Crown's disclosure obligations vis-à-vis police records offers direction. The analysis turns on two questions: do the records constitute the "fruits of the investigation" subject to the Crown's *Stinchcombe* obligations; and, even if not, are the records "relevant" such that the police should provide them to the Crown for disclosure without prompting or upon request.

3. Lower courts have struggled to answer these questions owing to their varying approaches to what constitute "fruits" and "relevant" records in the impaired driving context. The Court should use this appeal to provide a clear, workable definition of both concepts. "Fruits of the investigation" means the police investigative file. Records are "relevant" if they are capable of raising a real doubt about the reliability of an accused's breath tests as a result of improper operation or instrument malfunction. The proposed definitions follow from the applicable law and offer well-defined rules that leave little room for doubt or inconsistent interpretation. They are simple, useful, categorical. Police can rely on them to achieve a predictable and consistent approach to disclosure.

PART II: POINTS IN ISSUE

4. As noted above, the question presented is whether documents referring to the past maintenance of an approved instrument fall within the "fruits of the investigation" and, as a result, constitute first-party disclosure. It is Ontario's position that they do not.

PART III: BRIEF OF ARGUMENT

I. ONTARIO'S EXPERIENCE

5. For decades, those accused of drinking and driving introduced specious evidence to undermine the evidentiary validity of their breath test results. The *Carter* defence permitted accused persons to testify about their alcohol consumption and try to explain how it raised doubts about their guilt.[1] Not only was the defence incompatible with the scientific basis for breath testing in Canada but it also eroded the efficiency intended by the statutory shortcuts permitting the Crown to rely upon an accused's test results in proving his or her guilt.[2]

6. With time, Parliament responded to the problem. It amended the *Criminal Code* and re-established the primacy of the science behind breath testing.[3] Today, breath samples are conclusive proof of the accused's blood alcohol content at the time of the alleged offence in the absence of evidence tending to show that the approved instrument used to analyze those samples malfunctioned or was operated improperly.[4]

7. The *Carter* problem was not altogether cured in Ontario, however. After the legislative change those accused of impaired driving offences took to marshalling questionable expert evidence and initiating prolonged disclosure applications in support of requests for an array of historical instrument data — from "maintenance records" and "calibration logs" to so-called "COBRA data."[5] Accused persons argued that the records could help mount a successful defence

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[1] See *R. v. Carter* (1985), 19 C.C.C. (3d) 174 at pp. 177-80 (Ont. C.A.).

[2] See *R. v. St-Onge Lamoureux*, [2012] 3 S.C.R. 187 at paras. 5-13; see also *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 at para. 16 (Ont. C.A.); *R. v. Powichrowski*, 2009 ONCJ 490 at para. 23 (stating that under *Carter* "the very legislation that was designed to facilitate proof of the prohibited condition in order to help combat the menace of drinking and driving had become an obstacle to be avoided by the prosecution").

[3] See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 258(1)(*c*), (*d.1*), as amended by the *Tackling Violent Crime Act*, S.C. 2008, c. 6.

[4] *Ibid*. See also *St-Onge Lamoureux*, *supra* note 2 at paras. 10-17, 33-36, 53, 101; *R. v. Dineley*, [2012] 3 S.C.R. 272 at para. 2 ("The objective of the Amendments, which form part of a broader scheme implemented by Parliament to reduce the incidence of impaired driving, is to give those results a weight consistent with their scientific value." [citations omitted]).

[5] See e.g. *R. v. Thompson*, 2016 ONCJ 600; *R. v. Ocampo*, 2014 ONCJ 440; *R. v. Coughlin*, 2013 ONCJ 776; *R. v. Oleksiuk*, 2013 ONSC 5258; *R. v. Neville*, 2013 ONCJ 500; *R. v. McIvor*, 2013 ONCJ 757; *R. v. Parsons*, [2013] O.J. No. 3100 (Ct. J.); *R. v. Bensette*, 2011 ONCJ 30; *R. v. Da Costa*, [2011] O.J. No. 3942 (Ct. J.); *R. v. Ahmed*, 2010 ONCJ 130; *R. v. Batenchuk*, [2010] O.J.

by calling into question the validity of their breath samples.

8. Ontario disagrees. In its view, the argument harkens back to the time when non-scientific evidence was allowed to erode the statutory scheme designed to govern impaired prosecutions. For support, it need look no further than the body of scientific experts responsible for providing technical advice to the Minister of Justice on breath testing in Canada, the Alcohol Test Committee, which takes the position that historical instrument records of the sort described above have ***no use whatsoever*** for assessing the proper operation or functioning of an approved instrument at the time it is used to measure an accused's blood alcohol content.[6] Also, so far as Ontario is aware, no accused has been able to explain with evidentiary backing ***how*** historical information will assist in making a full answer and defence.[7]

9. Nevertheless, these types of frivolous disclosure requests became a source of delay. Trial courts split on whether production was appropriate and disclosure practices varied throughout the province. Some jurisdictions wound up hearing lengthy disclosure applications with dueling experts[8]; in others police services produced the material only to have it go unused or result in protracted litigation over its ultimate probative value.[9] Confusion grew and began to permeate impaired prosecutions.[10]

No. 2302 (Ct. J.); *R. v. Lenti*, 2010 ONCJ 554; *R. v. Gubins*, 2009 ONCJ 80; *R. v. Pfaller*, 2009 ONCJ 216; *R. v. Robertson*, 2009 ONCJ 388; *R. v. Jemmett*, 2009 ONCJ 741; *R. v. McCaughey*, [2009] O.J. No. 5785 (Ct. J.); *R. v. Muzuva*, 2009 ONCJ 574; *R. v. Shrigley*, 2009 ONCJ 615.

[6] Alcohol Test Committee Position Paper: Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results (2012), 45:2 Can. Soc. Forensic Sci. J. 101 at pp. 101-03, online: Canadian Society of Forensic Science <https://www.csfs.ca/wp-content/uploads/2016/06/atc_position_paper_2012.pdf>.

[7] *Cf. R. v. Jackson*, 2015 ONCA 832 at para. 136 (stating that "the expert evidence about potential relevance of the [historical records sought by the accused] failed to ascend above the speculative"); *Oleksiuk*, *supra* note 5 at paras. 10-14, 30-31; *Gubins*, *supra* note 5 at para. 24.

[8] See *supra* note 5 (citing cases).

[9] See e.g. *R. v. Singh*, 2016 ONCJ 248 at paras. 9-11, rev'd Sup. Ct. Case No. 1538/16; *R. v. Portelance*, 2016 ONCJ 394 at paras. 41-52; *R. v. Tonkin*, 2016 ONCJ 360 at paras. 1-3, 8, 17-22. *Cf. World Bank Group v. Wallace*, [2016] 1 S.C.R. 207 at para. 130 ("[B]road third party production requests can derail pre-trial proceedings. . . . Sweeping disclosure requests are a common cause of delays. The same can be said of third party requests." [citations omitted]).

[10] *Parsons*, *supra* note 5 at para. 6 ("[T]here are some 260 or so judges in the Province and each one of us is being asked in these types of cases to provide the type of disclosure . . . and different views are taken by different judges on this bench.").

10. Then came *R. v. Jackson*.[11] The decision clarified the governing framework and held that historical Intoxilyzer records like the ones at issue in the present appeals are third-party records subject to the *O'Connor* regime.[12] The Ontario Court of Appeal also suggested that the disclosure application under review was "unmeritorious" and capable of "devour[ing]" a trial court's "limited resources" in much the same way as recent section 11(*b*) jurisprudence labels other frivolous applications.[13] In *Jackson*'s words: "A fishing expedition. Season closed."[14]

II. THE GOVERNING FRAMEWORK

11. It is Ontario's position that *Jackson* is correct and ought to apply nationwide. The Court of Appeal's analysis follows from a straightforward application of the canonical principles set out by this Court in cases like *R. v. McNeil*[15] and *R. v. Quesnelle*[16] to define the disclosure obligations of the Crown vis-à-vis police and other third-party records.

12. The existing framework provides for the following: The Crown has a broad obligation to disclose all relevant, non-privileged information in its possession or control unless the disclosure is otherwise governed by law.[17] The Crown's "possession or control" does not extend to information held by other arms of the state, however. Rather, "[w]ith 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."[18]

13. This separation of Crown entities for disclosure purposes means that an accused is asking for a third-party record if he or she wants non-fruits disclosure from the police or any other Crown

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[11] 2015 ONCA 832, leave to appeal to refused, [2016] S.C.C.A. No. 38.
[12] *Ibid.* at paras. 90-106.
[13] *Ibid.* at paras. 135, 139. See also *R. v. Cody*, 2017 SCC 31 at paras. 28-30, 38, 41-42 (noting the harmful effects of frivolous and illegitimate motions on the efficient operation of the criminal justice system).
[14] *Jackson*, *supra* note 7 at para. 135.
[15] [2009] 1 S.C.R. 66.
[16] [2014] 2 S.C.R. 390.
[17] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at pp. 336-40.
[18] *Quesnelle*, *supra* note 16 at para. 11; see also *McNeil*, *supra* note 15 at para. 22 ("The notion that all state authorities amount to a single 'Crown' entity for the purposes of disclosure and production must be quickly rejected."); *ibid.* at paras. 13-14, 25, 48.

entity. To obtain it, the accused must reach out to the record holder (either through the prosecution or a direct request) or bring a third-party records application under *O'Connor* and establish the "likely relevance" of the material in court.[19]

14. At the same time, both the Crown and the police cannot take a passive or disinterested approach to the production of third-party records. The Crown has a "duty to inquire" and make reasonable efforts to obtain all relevant records when put on notice of the material's existence[20]; the police have a duty to provide the Crown with all information that they know has obvious relevance to an accused's case.[21]

15. But these positive obligations do not transform third-party records into first-party disclosure. If, upon the Crown making inquiries, the police or any other third party refuses to turn over a document that does not constitute the "fruits of the investigation," the appropriate response is an *O'Connor* application, not a *Stinchcombe* disclosure request.[22]

16. Also, the burden to ensure fair disclosure is not the Crown's alone. Disclosure is a time-consuming and resource-draining process, and Crown and police efforts to ensure completeness in one case do not occur in a vacuum. Time and energy spent in one matter impacts the timely resolution of all others. In the post-*Jordan* era, all justice system participants must work together to ensure an accused's right to trial within a reasonable time,[23] and cooperation in the disclosure process is no exception. Frivolous and tactical disclosure motions have no place in the litigation culture embraced by *Jordan* — if they ever were acceptable — and courts should summarily reject unreasonable demands.[24]

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[19] *Quesnelle*, *supra* note 16 at paras. 11, 13; *McNeil*, *supra* note 15 at para. 13.
[20] *Quesnelle*, *supra* note 16 at para. 12; *McNeil*, *supra* note 15 at paras. 13, 47-52.
[21] *Quesnelle*, *supra* note 16 at paras. 12, 18; *McNeil*, *supra* note 15 at paras. 14, 52, 54, 59.
[22] *Quesnelle*, *supra* note 16 at paras. 11-13; *McNeil*, *supra* note 15 at paras. 13-15, 23, 49, 59.
[23] See e.g. *Cody*, *supra* note 13 at para. 1 ("[E]very actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time."). See also *ibid.* at para. 35; *R. v. Jordan*, [2016] 1 S.C.R. 631 at paras. 86, 112, 116.
[24] See *Cody*, *supra* note 13 at para. 38; *Jordan*, *supra* note 23 at para. 63; *Jackson*, *supra* note 7 at paras. 135, 139.

III. FRUITS OF THE INVESTIGATION

17. The first question that arises under this framework is whether historical instrument records constitute first-party disclosure. As noted, the records will qualify for disclosure under *Stinchcombe* if (1) they fall within the prosecuting Crown's possession or control; or (2) the records are held by the police and qualify as the "fruits of the investigation."[25] It is with respect to this second category that a dispute lies between the parties.

18. The disagreement coupled with the numerous split decisions on the very issue before the Court highlights an area of law in critical need of clarification, namely, the precise meaning of the phrase "fruits of the investigation."

19. This Court has suggested that the term is intended to capture all information and material pertaining to an accused's case that is gathered through the investigation of the charged offence and as a consequence makes its way into the police investigative file.[26] At the same time, those accused of criminal offences and some lower courts have interpreted isolated passages in the governing law as stating that the term is synonymous with "all relevant information"[27] or any police material "relating" or "pertaining" to an accused's case.[28] Indeed, even post-*Jackson*, Ontario courts have seized upon this language to apply a broad, all-encompassing definition of the

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[25] See *ibid.* at para. 91 ("Two principal factors determine the disclosure/production regime that will apply when an accused seeks disclosure of something the Crown has not provided. The first has to do with the nature of the information of which disclosure/production is sought. The second concerns who is in possession or control of that information.").

[26] See *World Bank*, *supra* note 9 at para. 134 (stating that, as a general matter, an accused has the right to access "the investigative file under *Stinchcombe* disclosure"); *Quesnelle*, *supra* note 16 at paras. 59, 61; *McNeil*, *supra* note 15 at paras. 22-25; *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343 at para. 26.

[27] See *Stinchcombe*, *supra* note 17 at pp. 333-43.

[28] See e.g. *McNeil*, *supra* note 15 at para. 22 ("[T]he *Stinchcombe* disclosure regime only extends to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly referred to as the 'fruits of the investigation.'"); *ibid.* at paras. 14, 17, 52; *Quesnelle*, *supra* note 16 at para. 12 ("[P]olice have a duty to disclose, without prompting, 'all material pertaining to its investigation of the accused.'"). See also Factum of the Appellant (*Vallentgoed*) at paras. 38-66.

term in important cases concerning the Crown's disclosure of police records.[29]

20. It is a concerning trend. Ontario believes that the narrow definition is essential and supported by law, and it urges this Court to again make clear that "fruits of the investigation" is linked to the investigative file. There are at least four reasons why that approach is necessary.

21. ***First***, it is consistent with the literal language of the phrase. The term "fruits of the investigation" is descriptive of what it covers. It "posits a relationship between the subject-matter sought and the investigation that leads to the charges . . . ."[30] ***It includes all relevant, non-privileged information or material in police possession so long as that material is created, reviewed, or gathered by the police during the investigation of the criminal occurrence to which the proposed disclosure relates.***[31] Put another way, "fruits of the investigation" captures all information in the police investigative file for a specific incident — a bright-line rule that provides clear guidance to police on what they need to turn over to the Crown.

22. ***Second***, the approach aligns with the *McNeil* court's seminal discussion of the police duty to furnish the Crown with the "fruits of the investigation." The suggestion of a link between the "fruits" and information gathered during the investigation runs throughout the judgment even if it is not stated explicitly. The following passage provides an example:

> The fruits of the investigation . . . ***will generally have been gathered, and any resulting criminal charge laid, by the police***. . . . The means by which the Crown comes to be in possession of the fruits of the investigation lies in the corollary duty ***of police investigators*** to disclose to the Crown all relevant material in their possession. The police's obligation to disclose all material ***pertaining to the investigation of an accused*** . . . was recognized long before *Stinchcombe*. The state of the law was well summed up [as follows]: ***It is well settled and accepted by all . . . that the police . . . have a duty to disclose to Crown counsel all relevant information uncovered during the investigation of a crime . . . .***[32]

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[29] See e.g. *R. v. Stipo*, 2017 ONSC 5208 at paras. 19-20 ("The police have a duty to provide to the Crown all relevant material in their possession.").

[30] *Jackson*, *supra* note 7 at para. 93.

[31] *Ibid.* at paras. 82, 92-95. See also *McNeil*, *supra* note 15 at paras. 22-25; *Quesnelle*, *supra* note 16 at paras. 59, 61; *R. v. McKay*, 2016 BCCA 391 at para. 73; *R. v. Black*, 2011 ABCA 349 at paras. 29-40; *R. v. Thompson*, 2009 ONCA 243 at paras. 6, 11.

[32] *McNeil*, *supra* note 15 at para. 23 [emphases added]. See also *ibid.* at paras. 22-25.

23. ***Third***, the narrow definition accords with the way in which this Court has applied the concept to police records and maintains the recognized separation between the prosecuting Crown and the police. In *McNeil*, for example, the Court made clear that, as a general matter, police disciplinary records and unrelated criminal investigation files are subject to the *O'Connor* regime.[33] In *Quesnelle*, it held that police occurrence reports prepared in the investigation of unrelated incidents are third-party records.[34] In both cases, the records could "relate" or "pertain" to the accused's case — yet they did not take on first-party status.

24. ***Fourth***, linking the "fruits of the investigation" to the police investigation at hand makes good practical sense. Requiring the police to disclose, as a matter of routine, material that falls outside of the investigative file is not a workable rule.

25. It is easy to see the menace. Any rule that demands the "police" writ large make proactive efforts to seek out material from the various police services spread across the country in search of information that might "pertain" to an accused's case would represent a sea change in the way disclosure works and wreak havoc on the criminal justice system.[35] It amounts to little more than a demand that police embark on a fishing expedition. The Court has already rejected that approach to disclosure.[36]

26. By contrast, subjecting police records outside of the investigative file to the third-party production regime is sensible. The rule that the Crown must produce the "fruits of the investigation" is premised upon the belief that such records are relevant and the material will comprise the case against the accused.[37] The assumptions do not hold for material that the police have not gathered, created, or reviewed. To the contrary, the relevance of such material is at best

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[33] See *ibid.* at paras. 15, 25.
[34] See *Quesnelle*, *supra* note 16 at paras. 1-2.
[35] *Cf. McNeil*, *supra* note 15 at para. 48 ("[T]he prosecuting Crown does not have to inquire of every department of the provincial government, every department of the federal government and every police force whether they are in possession of material relevant to the accused's case.").
[36] See *ibid.* at para. 28 (stating that "it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in 'fishing expeditions' for irrelevant evidence"); see also *ibid.* at paras. 22, 48.
[37] See *ibid.* at paras. 19-20, 25, 28; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 12.

unknown — the police have not looked at it — and the Crown should not have to justify the non-disclosure of such material (as they would under *Stinchcombe*).

IV. RELEVANCY

27. The second question raised by this appeal asks whether historical maintenance records are "relevant." If they are obviously so, then the police must produce them regardless of their third-party status[38]; and if relevance is disputed, it is always open to an accused to seek access to the material by bringing an *O'Connor* application.

28. Relevance is a context-sensitive concept.[39] Here, it casts a wide net. The appellants say maintenance records bear on their guilt or innocence. They seek access to them pre-trial in order to assist with making a full answer and defence. In most (if not all) cases, that will mean attempting to use the material to rebut the presumption of accuracy applicable to the breath test results.[40] Both appellants state this is why they need the documents in their respective cases.[41]

29. The appellants also both contend that, to rebut the presumption of accuracy, an accused need only show that the testing instrument was maintained improperly — and therefore an instrument's historical maintenance is relevant.

30. With respect, Ontario disagrees. The law on this issue is capable of a succinct summary. It reveals that an accused must do two things.

31. ***First***, he or she must offer evidence tending to show that the approved instrument was malfunctioning or operated improperly at the time of the accused's breath tests.[42] Historical

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[38] See *McNeil*, *supra* note 15 at para. 59; *Quesnelle*, *supra* note 16 at para. 12.
[39] See *World Bank*, *supra* note 9 at paras. 116-24, 130-33.
[40] See *O'Connor*, *supra* note 37 at para. 22 (noting that relevance in the third-party production context means that there is a "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" [emphasis omitted]); see also *McNeil*, *supra* note 15 at paras. 27, 33.
[41] See e.g. Factum of the Appellant (*Gubbins*) at paras. 116-18; Factum of the Appellant (*Vallentgoed*) at para. 97.
[42] *Criminal Code*, *supra*, s. 258(1)(*c*).

records that detail past maintenance or servicing, without more, will not meet this threshold. Improper maintenance (whatever that might be) is not improper operation or malfunction.[43]

32. ***Second***, the accused has to demonstrate a link between the alleged malfunction or improper operation and the test in issue by showing that the error is capable of raising a real doubt about the reliability of the breath tests.[44] "[E]vidence to the contrary is limited to the real issue: whether the test results are reliable."[45] The doubt has to be real, not frivolous or trivial, and based upon objective indicators. In the end, the ultimate focus remains on the scientific reliability (or lack thereof) of the accused's test results — not peripheral matters like whether the instrument was serviced a few hours late or brand new out of the box.

33. Ontario urges the Court to adopt this framework explicitly. It follows from accepted law and the simple two-step approach will provide much-needed clarity for the myriad impaired driving prosecutions heard nationwide each year by giving an accused attempting to rebut the presumption of accuracy clear guidance on how he or she might succeed.

PART IV: COST SUBMISSIONS

34. The Attorney General of Ontario makes no submissions as to costs.

PART V: ORDER REQUESTED

35. The Attorney General of Ontario respectfully requests that the Court take these submissions into account when determining the legal issue in this case.

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[43] *Dineley*, *supra* note 4 at para. 17 ("[T]he only evidence that can be tendered to raise a reasonable doubt about the reliability of breathalyzer test results is now evidence that the instrument was malfunctioning or was operated improperly."). See also Alcohol Test Committee Position Paper, *supra* note 6 at pp. 101-03; *Jackson*, *supra* note 7 at paras. 114, 134-39; *R. v. Lam*, 2015 ONSC 2194 at paras. 35-36, leave to appeal refused, 2016 ONCA 850.

[44] *St-Onge Lamoureux*, *supra* note 2 at para. 48; see also *ibid*. at paras. 41, 52-53; *Jackson*, *supra* note 7 at paras. 114, 134-39; *R. v. Sergalis*, 2014 ONCA 624 at paras. 1-3; *R. v. So*, 2014 ABCA 451 at paras. 30-45; *Lam*, *supra* note 43 at paras. 2, 31-36, 42-43; *R. v. Ketler*, 2014 ONSC 4344 at paras. 35-37; *Tonkin*, *supra* note 9 at paras. 15-16; *Portelance*, *supra* note 9 at paras. 43-46, 53, 60.

[45] *St-Onge Lamoureux*, *supra* note 2 at para. 48.

ALL OF WHICH is respectfully submitted this 1st day of November, 2017, by

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PART VI: AUTHORITIES CITED

Case Law **Para(s)**

Secondary Authorities

PART VII: RELEVANT STATUTORY PROVISIONS

Legislative Provision **Para(s)**