

SCC File No.: _____

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

BETWEEN:

KEVIN PATRICK GUBBINS

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(KEVIN PATRICK GUBBINS, APPLICANT)
(Pursuant to s.40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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PART I: STATEMENT OF FACTS

OVERVIEW

1. This case provides this Honourable Court with an opportunity to resolve the controversial question of whether the Crown must disclose maintenance records for the Approved Instrument as part of first party disclosure. This had been a hotly contested issue across Canada, and Leave to Appeal on a similar point was previously denied by this Court in *R. v. Jackson*¹.
2. In the seminal case of *R. v. St-Onge Lamoureux*², this Honourable Court considered the constitutional validity of certain amendments to s. 258(1)(c) of the *Criminal Code*³ of Canada dealing with driving with a blood alcohol level over the legal limit. The amendments in question limited the means by which an accused person could rebut the presumptions of accuracy and identity that attached to breath test results.
3. The Court specifically stated that Parliament's resort to the presumptions of accuracy and identity to combat the problems of drinking and driving were not at issue in *St-Onge*. Rather, what was at issue was the means available to the accused to rebut those presumptions.
4. The Court referred to the expert evidence filed by consent and to the expert evidence that had been accepted by the courts over the past few years, and found that breathalyzer tests were very reliable, provided that the instruments were operated and maintained properly.
5. The Court found that Parliament was justified in requiring that any evidence adduced to cast doubt on breath test results be directed at the functioning or operation of the instrument. As the instruments were only reliable if they were operated and

¹ *R. v. Jackson*, 2015 ONCA 832, leave to appeal dismissed without reasons 2016 SCCA 38 (“*Jackson*”)

² *R. v. St-Onge Lamoureux* 2012 SCC 57, (“*St-Onge*”)

³ *Criminal Code of Canada*, RSC 1985 c. C-46 (the “*Code*”)

maintained properly, the Court stated that the accused could rebut the presumptions by showing that the instruments were not properly maintained.

6. Without defining the specific limits of disclosure, the Court also stated that some maintenance records must be disclosed, noting that the Approved Instruments and the people who operate and maintain them are under the control of the prosecution. The Court specifically referred to a maintenance log as the type of evidence an accused person could rely upon in arguing evidence to the contrary.
7. While the issue in *St-Onge* was the constitutionality of the evidence to the contrary provisions, the discussions regarding proper maintenance and disclosure were intended for guidance and should be accepted as authoritative. As stated above, the issue in *St-Onge* was the means available to the accused to rebut the presumption, including raising a doubt about whether there had been improper maintenance.
8. Subsequently, the Alcohol Test Committee (ATC) issued a position paper saying that historical maintenance records were irrelevant in determining the reliability of any particular breath sample.
9. This position paper and subsequent testimony from Crown experts in accordance therewith directly contradicts the Supreme Court statements in *St-Onge*, and the issue for the trial courts across Canada thus became whether to follow the decision of the Supreme Court or the testimony of the Crown experts.
10. In the present case the Crown refused to disclose the maintenance log for the Approved Instrument used to analyze the Applicant's breath samples. In a pre-trial hearing, the defence argued that pursuant to *St-Onge*, the maintenance log was relevant and must be disclosed as first party disclosure. The Crown called Kerry Blake, a member of the ATC, who testified that all maintenance records were irrelevant to reliability of the breath samples. Based on this testimony, the Crown argued that the maintenance log was not required to be disclosed as first party disclosure.

11. The Trial Judge found that the Applicant's rights under s. 7 had been breached by the Crown's refusal to disclose the maintenance log, and directed a stay of proceedings on the "over 80" charge under s. 253(1)(b).
12. The Crown appealed to the Court of Queen's Bench of Alberta, where this appeal was heard together with the Appeal in *R. v. Vallentgoed*⁴. Justice Kenny dismissed the appeal, citing with approval the prior decision in *R. v. Sinclair*⁵, where Justice McIntyre stated that the SCC had held these maintenance logs to be relevant in *St-Onge*, and that it was a waste of court time to keep re-litigating the issue.
13. On further appeal, the Alberta Court of Appeal, Justice Slatter for the majority held that maintenance records were neither relevant nor required to be disclosed as first party disclosure, and ordered a new trial. Justice Rowbotham in dissent, found that *St-Onge* had decided that the maintenance log was relevant first party disclosure but that all other maintenance records were third party.
14. The remaining provision in s. 258(1)(c) which limits evidence to the contrary was found to be constitutional in *St-Onge* on the basis that the accused could rebut the presumptions by showing, inter alia, that the instrument had not been properly maintained. The effect of the Court of Appeal decision in this case is that accused persons will not receive any maintenance records as part of first party disclosure.
15. Further, if this decision is not overturned, it will be rare for the defence to establish a right to production of maintenance records under the *O'Connor* procedure, as stated by Justice Slatter.⁶
16. The ability to rebut the presumptions by showing improper maintenance will remain theoretical, unless the Court chooses to intervene.

⁴ Judgment of the Court of Queen's Bench [Tab 2B]

⁵ *R. v. Sinclair*, 2015 ABQB 113 ("*Sinclair*");

⁶ Judgement of the Court of Appeal, at paragraph 78 [Tab 2E]

History of the Proceedings

17. The Applicant was charged with offences under s. 253(1)(a) and (b) of the *Code* commonly referred to as impaired driving and over 80. Pursuant to case management, the parties agreed to a pre-trial hearing to determine whether there had been a breach of the Applicant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. The parties agreed that the Applicant had requested disclosure of the Maintenance Log for the Approved Instrument used to analyze breath samples provided by the Applicant, and that the Crown had refused to disclose.
18. In Alberta, the Administrative Licence Suspension program operates to suspend the driving privileges of a person charged under s. 253 until the trial is completed, so the usual remedy of an adjournment of the trial together with an order for disclosure would in all circumstances prejudice the accused by significantly prolonging his administrative suspension. As a result, there have been a number of trial court decisions in Alberta which have granted defence applications for a stay of proceedings or exclusion of breath test results by reason of the deliberate policy of the Crown to refuse to disclose maintenance records.

Trial in Provincial Court

19. The parties agreed that the only issue was whether the Crown refusal to disclose the maintenance log was a breach of s. 7. The Crown called an ATC member, Kerry Blake who testified that all maintenance records are irrelevant. As a result the Crown argued that the maintenance log need not be disclosed. The Appellant did not call any evidence but argued that *St-Onge* and the Alberta Court of Queen's Bench decision in *R. v. Kilpatrick*⁷ were binding authority in Provincial Court for the proposition that the maintenance log is relevant first party disclosure.
20. The Trial Judge found that the Maintenance Log was relevant first party disclosure and that the deliberate refusal to disclose it despite clear and binding authority

⁷ *R. v. Kilpatrick*, 2013 ABQB 5, ("*Kilpatrick*")

breached the Appellant's right to a fair trial under s. 7 of the *Charter*. The Trial Judge directed a stay of proceedings on the s. 253(1)(b) charge.

Summary Conviction Appeal in Court of Queen's Bench

21. The Crown's Summary Conviction Appeal to the Court of Queen's Bench was dismissed. In keeping with all five other Queen's Bench of Alberta cases on point⁸, Justice Kenny agreed with the reasons in *Sinclair*, where Justice McIntyre stated, "The Supreme Court of Canada has held these maintenance logs to be relevant in *R. v. St-Onge Lamoureux*, 2012 SCC 57 (S.C.C.). There is no room to argue that they are not relevant. It is a waste of court time and the accused's money to fight preliminary battles of relevance of these records."⁹
22. After noting that the accused's driver's licence was suspended pending resolution of the charges, Justice Kenny stated that the proper time for the Crown to argue that the maintenance records were irrelevant would be if the defence raised the issue at trial.

The Alberta Court of Appeal

23. The Crown was granted Leave to Appeal to the Alberta Court of Appeal, where Justice Slatter for the majority accepted the "un-contradicted" testimony of the Crown expert witness and found that maintenance records are irrelevant to making full answer and defence¹⁰.
24. As a result, he found that they were not sufficiently relevant to be part of first party disclosure and that the third party procedure under *O'Connor* would be required. The majority of the Court of Appeal overturned the stay order and directed a new trial.
25. Justice Rowbotham in dissent found that the Maintenance Log was a first party record and should have been disclosed, but that all other maintenance records were third party. She also ordered a new trial.

⁸ *R. v. Bassett*, 2014 AJ No. 1504 (QB), ("*Bassett*"); *R. v. Proctor*, 2015 ABQB 97 ("*Proctor*"); *Kilpatrick*; *Sinclair* (heard with companion case of *R. v. Kilpatrick*, reported under *Sinclair*, supra no relation to *R. v. Kilpatrick* 2013 ABQB 5).

⁹ *Sinclair*, supra at paragraph 12.

¹⁰ Judgment of the Court of Appeal, at paragraph 81 [Tab 2E]

PART II: STATEMENT OF THE QUESTION IN ISSUE

26. The only issue in this case is whether the Maintenance Log for the Approved Instrument is relevant first party disclosure.

PART III: STATEMENT OF ARGUMENT

What did the SCC decide in *St-Onge* concerning maintenance?

27. The legislation in issue in *St-Onge* was s. 258(1)(c), 258(1)(d.01) and 258(1)(d.1). The relevant portion for our purposes is the discussion by the Court in relation to s. 258(1)(c) only. That provision has been reproduced in PART VII: Legislation.

28. Further, the Court referred to the *Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee (2009)*¹¹. The relevant provisions are reproduced at PART VI: Authorities. The provisions in effect at the time of the Applicant's arrest are identical.

29. In the *ATC Recommendations* a Maintenance Log is defined as follows¹²:

E. Maintenance Logs

A maintenance log shall be kept for each Approved Instrument, Approved Screening Device and accessory equipment in active use in the program. Logs should include the results of all inspections and documentation of the maintenance history including records of parts replaced and approved modifications to hardware or software.

30. References below to the "provision" refer to s. 258(a)(c) which reads "that the approved instrument was malfunctioning or was operated improperly."

Infringement of right to be presumed innocent – Charter s. 11(d)

31. In applying the *Oakes* test to this legislation, the first issue addressed in *St-Onge* was whether the impugned provisions were inconsistent with the right to be presumed innocent. The Court stated that the presumptions will violate the right to be presumed

¹¹ Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee, Can. Soc. Forensic Sci. J. Vol. 42 No.1 (2009) pp.1-29, ("*ATC Recommendations*")

¹² *ATC Recommendations*, *supra* at page 15

innocent if they can result in the conviction of an accused in spite of a reasonable doubt that he is in fact guilty¹³.

32. The Court stated that it was necessary to enquire into the effect of the presumptions of accuracy and identity, and stated that the expert evidence filed in the present case revealed that the possibility of an instrument malfunctioning or being operated improperly was not speculative but very real. The Court noted that according to the ATC, calibration and **maintenance** of instruments was essential to the integrity of the breath test program¹⁴.
33. The Court then noted that human error can occur when samples are taken and at various steps in the **maintenance** of the instruments and referred to Hodgson's report as stressing the importance of proper operation and **maintenance**. The Court then stated that Parliament had recognized the importance of following such procedures "since the accused can rebut the presumptions by showing that the instrument was **not properly maintained** or operated"¹⁵. This is a statement of law.
34. The Court then noted that Parliament had not adopted the *ATC Recommendations*, nor had the prosecution referred to any alternative mechanisms that would enable the court to find that the instruments are generally **maintained** and operated properly, or that "the rate of failure attributable to **improper maintenance** or operation is insignificant."¹⁶ As a result, the presumptions infringed the presumption of innocence because the trier of fact would have to convict even if she had a reasonable doubt about the validity of the test results.
35. In other words, Parliament has recognized that the instruments can malfunction [if improperly maintained] or be operated improperly, therefore the trier of fact could

¹³ *St-Onge, supra* at paragraph 24

¹⁴ *St-Onge, supra* at paragraph 25

¹⁵ *St-Onge, supra* at paragraph 26

¹⁶ *St-Onge, supra* at paragraph 27

have a reasonable doubt if provided only with the test results, but would still be required to convict. This infringes the right to be presumed innocent.¹⁷

Whether the infringement is justified under s.1

36. The Court stated that a statutory presumption which infringes s. 11(d) of the *Charter* may nonetheless be justified under s. 1 of the Charter, and in this context the Court must examine the means available to the accused to rebut the presumptions. The Court stated that it was relevant to consider the importance of the legislative objective, how difficult it would be for the crown to prove the substituted fact, and whether it is possible and how easy it is for the accused to rebut the presumptions.¹⁸

37. The Court further stated that what was at issue in this appeal was not Parliament's decision to resort to the presumptions of accuracy and identity, but the means available to rebut those presumptions.¹⁹

Valid Objective

38. The Court referred to the expert evidence which had been filed by consent and found that the objective of the amendments was to give the breath test results a weight consistent with their scientific value was pressing and substantial.²⁰ In other words, there was a valid objective.

Rational Connection

39. The Court then considered that the *Oakes* test requires a rational connection between the objective and the means chosen to attain it, and that there was a rational connection in this case, as the results should be reliable if the instrument functions properly and all of the relevant procedures are followed. It was therefore logical that

¹⁷ *St-Onge, supra* at paragraph 28

¹⁸ *St-Onge, supra* at paragraphs 30-31

¹⁹ *St-Onge, supra* at paragraph 33

²⁰ *St-Onge, supra* at paragraph 36

the results could only be challenged by pointing out deficiencies in the instrument or the procedure followed in operating it.²¹

Minimal Impairment

40. In this context, the Court referred to Hodgson's report, the testimony of various expert witnesses, including Kerry Blake, and the evidence filed in the case below, and noted that the reliability of breath testing was supported by scientific evidence. The Court also noted that it was not impossible to disprove the test results, as Parliament has recognized that the results will **only be reliable if the instruments are operated and maintained properly**, and that there may be deficiencies in the **maintenance** of the instruments or in the test process. In order to rebut the presumptions, the evidence tending to cast doubt on the reliability of the test results must relate directly to such deficiencies.²²

41. The Court declined to rule on the specific limits of such evidence as that had not been argued, but did note that there were several specific pieces of evidence that could be provided to an accused, including the breathalyzer readings, the qualified technician's certificate, and the analyst's certificate concerning the sample of the alcohol standard. [This is not a document created at the time of testing].²³

42. Further, in this context, the Court noted that the *ATC Recommendations* (discussed above including maintenance) suggested mechanisms for ensuring the instruments function properly and for assuring the quality of breath alcohol analysis, and stated that it can be inferred that the instruments may not function optimally if the suggested procedures are not followed.²⁴

43. Further, in response to the suggestion that Parliament could have simply amended the legislation to allow the breath test result to be considered in assessing the accused's testimony as to consumption, the Court referred to the scientific data which had been

²¹ *St-Onge, supra* at paragraph 38

²² *St-Onge, supra* at paragraphs 40-41

²³ *St-Onge, supra* at paragraph 42

²⁴ *St-Onge, supra* at paragraph 43

presented at the enactment of the new provisions and stated that it was appropriate to spare the Crown the burden of calling expert testimony in every case.²⁵

44. The Court concluded that requiring evidence aimed at establishing that the instrument malfunctioned or was operated improperly satisfied the minimal impairment test.²⁶

Whether advantages outweigh the disadvantages

45. The Court stated that it was necessary to examine the consequences of the measure, and noted that the limits which flow from the requirement has a significant effect on the defences available to the accused, as it is now more difficult to rebut the presumptions.²⁷

46. The Court noted that the prosecution gains a clear but limited advantage from the requirement since evidence to the contrary is limited to the real issue, which is whether the test results are reliable. The Court then stated “**The evidence to be tendered relates directly to an instrument that is under the prosecution’s control. The prosecution must of course disclose certain information concerning the maintenance and operation of the instrument, but it is free to establish procedures for tracking how such instruments are maintained and operated.**”²⁸

Second Requirement: Whether the deficiency resulted in the reading exceeding .08

47. The Court considered that this second requirement was an excessive burden on the accused in the context of a statutory scheme where the evidence must relate directly to the functioning or operation of the instrument.²⁹
48. The Court noted that this provision significantly increased the burden on the accused without reducing the expense to the prosecution, and that having to prove there is no

²⁵ *St-Onge, supra* at paragraph 45

²⁶ *St-Onge, supra* at paragraph 46

²⁷ *St-Onge, supra* at paragraph 47

²⁸ *St-Onge, supra* at paragraph 48

²⁹ *St-Onge, supra* at paragraph 56

connection between the deficiency and the result did not impose a significant additional burden on the prosecution.³⁰

49. Requiring the accused to prove not only a malfunction or improper operation of the instrument that is serious enough to raise a reasonable doubt about the reliability of the tests, but also a causal connection between the deficiency and the determination that the blood alcohol level of the accused exceeded the legal limit was a serious infringement of the right to be presumed innocent which cannot be justified.³¹

Third requirement: Evidence that the blood alcohol level did not exceed .08

50. The Court pointed out that the imposition of this requirement in circumstance where the accused has already raised a reasonable doubt about the reliability of the breath test results, amounted to requiring the court to convict despite a reasonable doubt unless the accused can prove he is innocent. This requirement could not be justified under s. 1 of the Charter.³²

Conclusion regarding the first requirement under s. 258(1)(c)

51. The Court then considered whether the sole remaining provision was proportional to Parliament's objective, and concluded that in view of the objective, certain other guarantees that protect the presumption of innocence (reasonable suspicion, reasonable grounds, qualified technician, approved instrument, time requirements for presumptions) and the scientific evidence in the record, the first requirement was a justified infringement of the right to be presumed innocent.³³

Infringement of the Right to make Full Answer and Defence – Charter s.7

Excluding the *Carter* defence

52. The first argument considered in this context is whether the exclusion of the *Carter* defence infringed s.7 rights. The Court referred to the expert evidence accepted by

³⁰ *St-Onge, supra* at paragraph 57

³¹ *St-Onge, supra* at paragraph 59

³² *St-Onge, supra* at paragraph 63

³³ *St-Onge, supra* at paragraph 67

the courts over the last few years had established that breathalyzer tests are very reliable, “provided that the instruments are operated and **maintained** properly”. In contrast, numerous studies have shown that the testimony of accused persons regarding their alcohol consumption is unreliable, and that the high rate of acquittals in these cases is not justified in light of the probative value of the test results.³⁴

53. The Court found that in the circumstances, the exclusion of the Carter defence did not infringe rights protected by s. 7

Whether Defence Illusory

54. The second argument considered in this context was whether the remaining provision created an illusory defence or one which is so difficult to attain as to be illusory. The Court stated³⁵:

Although Parliament now requires evidence tending to establish a deficiency in the functioning or operation of the instrument, this does not mean that there are limits on the evidence that can reasonably be used by the accused to raise a doubt in this regard. The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence. If the prosecution denies such a request, the accused can invoke the rules on non disclosure and the available remedies for non disclosure (see R. v. O’Connor, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411). **In short, the accused might rely, for example, on a maintenance log that shows that the instrument was not maintained properly** or on admissions by the technician that there had been erratic results, or he or she might argue that health problems had affected the functioning of the instrument (see R. v. Kasim, 2011 ABCA 336 (CanLII), 515 A.R. 254).

(Emphasis added)

55. As a result, the Court found that the remaining provision in s. 258(1)(c) did not infringe the right to make full answer and defence as the defence was not so difficult as to be practically illusory

³⁴ *St-Onge, supra* at paragraph 72-73

³⁵ *St-Onge, supra* at paragraph 78, emphasis added

Whether the Discussions in *St-Onge* about Improper Maintenance are Meant to be Authoritative

56. The Court specifically stated that Parliament's resort to the presumptions of accuracy and identity to combat the problems of drinking and driving were not at issue in *St-Onge*. Rather, what was at issue was the means available to the accused to rebut those presumptions.³⁶ One of those means is by showing there has been improper maintenance.
57. To summarize, the Court found that the provision infringed the right to be presumed innocent because the possibility of malfunction or improper operation of the instrument was very real. The Court noted that **proper maintenance** was essential to the integrity of the breath testing program, and that the instruments were **only reliable if maintained properly**.
58. As a result, the Court restated the evidence to the contrary provision as requiring evidence to show that "**the instrument was not properly maintained or operated,**" as opposed to the actual wording which reads "was malfunctioning or was operated improperly."
59. This discussion was an integral part of the reasoning that led to the conclusion that the provisions in s. 258 (1)(c) infringed the presumption of innocence, as the trial judge was required to convict even if she had a reasonable doubt about the validity of the test results because the risk of failure attributable to **improper maintenance** was very real and there was no assurance that this had not happened.
60. In determining that the provision resulted in a minimal impairment of the accused's right to be presumed innocent, the Court noted that it was not impossible to rebut the presumptions, as the results **were only reliable if the instrument was maintained properly**, and there were specific pieces of evidence including the analyst's certificate for the alcohol standard that could be provided to the accused. It is important to note that the analyst's certificate pre-exists the investigation of the

³⁶ *St-Onge*, *supra* at paragraph 30

accused and is not created at the time of testing, in view of the Court of Appeal decision that only documents created at the time of testing are disclosable.

61. In considering whether the advantages of the new provisions outweighed the disadvantages, the Court specifically addressed the relative advantages by stating that while the instrument and the people who operated and maintained it were under the control of the prosecution, they must “of course” disclose certain information concerning maintenance and operation of the instrument.
62. It is submitted that the discussions concerning the importance of proper maintenance are an integral part of the reasoning process of the Court and were intended to be authoritative.
63. In *R. v. Prokofiew*³⁷, the Ontario Court of Appeal stated:

...In *R. v. Henry*, [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, Binnie J., writing for a unanimous court, recognized that stare decisis commands compliance not only with the ratio decidendi, but some of the obiter from the Supreme Court of Canada. He put it in these terms, at para. 57:

All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

(Emphasis added)

The question then becomes the following: how does one distinguish between binding obiter in a Supreme Court of Canada judgment and non-binding obiter? In *Henry*, at para. 53, Binnie J.

³⁷ *R. v. Prokofiew*, 2010 ONCA 423, at paragraphs 18-21

explains that one must ask, "What does the case actually decide?" Some cases decide only a narrow point in a specific factual context. Other cases -- including the vast majority of Supreme Court of Canada decisions -- decide broader legal propositions and, in the course of doing so, set out legal analyses that have application beyond the facts of the particular case.

Obiter dicta will move along a continuum. A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. Obiter that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive.

Lower courts should be slow to characterize obiter dicta from the Supreme Court of Canada as non-binding. It is best to begin from the premise that all obiter from the Supreme Court of Canada should be followed, and to move away from that premise only where a reading of the relevant judgment provides a cogent reason for not applying that obiter. The orderly and rational development of the jurisprudence is not served if lower courts are too quick to strike out in legal directions different than those signalled in obiter from the Supreme Court of Canada. ...

Reference to the O'Connor decision

64. The SCC referred to the *O'Connor* decision in paragraph 78. For ease of reference, the relevant portion is as follows:

The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence. If the prosecution denies such a request, the accused can invoke the rules on non-disclosure and the available remedies for non-disclosure (see *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411).

65. The majority of the Court of Appeal interpreted this comment as a reference to the procedure described in *O'Connor* for production of third party documents, and relied upon this portion to find that the SCC viewed maintenance records as third party document.³⁸

³⁸ Judgement of the Court of Appeal, at paragraph 52 [Tab 2E]

66. The main issue in *O'Connor* was failure by the Crown to make first party disclosure, and whether the remedy of a stay of proceedings was warranted in the circumstances.

The headnote to *O'Connor* reads in part as follows:

This appeal raises the issues of (1) when non disclosure by the Crown justifies an order that the proceedings be stayed and (2) the appropriate procedure to be followed when an accused seeks production of documents such as medical or therapeutic records that are in the hands of third parties.

67. The SCC drew a distinction in *O'Connor* between first party disclosure and third party production. If Justice Slatter is correct, one would logically have expected the Court in *St-Onge* to have referred to production rather than disclosure. The phrase “third party production” does not appear in *St-Onge*, nor is it ever discussed in the decision by the Court.

68. Further, para 78 refers to the accused being able to “request disclosure” rather than “seek an order for third party production.”

69. Further, to suggest that the accused’s remedy if first party disclosure is denied must be to bring an application for third party records confuses two completely different procedures, applicable to two completely different types of evidence. If this were so, the Crown could simply deny disclosure in every single criminal case in order to force the accused to assume the burden of proving the likely relevance of each piece of evidence that forms part of first party disclosure.

70. Finally, the discussion in *St-Onge* about the prosecution having control over the instruments and the persons who operate and maintain them is significant. First party disclosure by definition only applies to materials in the possession or control of the Crown. By emphasizing that the instruments and the persons who operate and maintain them are under the control of the prosecution, the Court is making it very clear that the records pertaining to the maintenance of the instrument are subject to first party disclosure. Indeed, the Court says exactly that in the same paragraph: the prosecution must of course disclose certain information concerning the maintenance and operation of the instrument.

71. The Alberta Court of Appeal distinguishes between information concerning the operation of the instrument, which must be disclosed, and information concerning maintenance which requires a third party production application, doomed to failure because maintenance records are irrelevant.³⁹ The SCC made no such distinction in *St-Onge*.

Whether Improper Maintenance provides a Defence

72. Strictly speaking, raising a reasonable doubt about malfunction, improper maintenance or improper operation does not provide a defence to the charges, it simply rebuts the presumptions of accuracy and identity. However with that proviso, Justice Slatter for the majority of the Court of Appeal, stated as follows⁴⁰:

It must be emphasized that the only lines of defence contemplated by s. 258(1)(c) of the Criminal Code and *St-Onge Lamoureux* are that “the approved instrument was malfunctioning or was operated improperly”. **Specifically, it is not a defence to prove that the instrument was “improperly maintained”,** nor that maintenance records were not kept in a particular format. It is not suggested that the historical maintenance records could demonstrate whether the instrument was being “operated improperly”. Their only relevance can be to whether it was “malfunctioning”. The uncontradicted expert evidence is that the recommended maintenance is preventative in nature, and would give no evidence of whether the instrument malfunctioned in any particular instance. Properly maintained instruments can malfunction on a particular occasion, and unmaintained instruments can operate properly: *R. v Biccum*, 2012 ABCA 80 (CanLII) at paras. 25-30, 522 AR 310. Likewise, whether the recommended form and content of the maintenance records was followed is irrelevant to malfunctioning. **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 the breath of the accused was tested.**

73. In contrast, *St-Onge* states⁴¹:

³⁹ Judgement of the Court of Appeal, at paragraph 78 [Tab 2E]

⁴⁰ Judgement of the Court of Appeal, at paragraph 69 [Tab 2E]

⁴¹ *St-Onge, supra*, at paragraph 26

[t]he accused can rebut the presumptions by showing that the instrument was not properly maintained.

Relevance of Software Modifications

74. The evidence in this case and the previous case of *R. v. Sutton*⁴² had disclosed that Kerry Blake, a member of the ATC and the Program Director responsible for oversight of all Breath Testing in Alberta since 2004, was unaware until 2013 that the Edmonton Police Service had been using software version 269.14 since 2000.
75. Justice Slatter found that there was no evidence that the use of this new software had any effect on the reliability of the reading produced by the approved instruments. He noted that the ATC formally confirmed in 2014 that instruments using that software version were considered to be “approved instruments.” He noted the Applicant’s argument that instruments using this software prior to 2014 may not have been approved instruments, but stated that this was not an issue on which leave had been granted. He further stated that “there is nothing on the record to demonstrate that the use of this software version was relevant to demonstrate any malfunctioning, and therefore within the proper scope of the requested disclosure.”⁴³
76. Again, with respect, Justice Slatter missed the point. The Applicant never alleged that 269.14 was the software version used in the approved instrument in his case.
77. The *ATC Recommendations* specifically state that all modifications must be approved prior to being put into use, and that after being modified the instrument may not be returned to use unless it had passed the equivalent of an initial inspection. If this software version was used for 14 years without having been approved nor noted in the Approved Instrument Modifications Sheet maintained by the ATC, does that not raise a reasonable doubt about whether the test results from those approved instruments are reliable?

⁴² *R. v. Sutton*, 2013 ABPC 308, at paragraph 59

⁴³ Judgement of the Court of Appeal, at paragraph 29 [Tab 2E]

78. Further, if the Program Director who is responsible for all Breath Testing in Alberta is unaware that this software version is in use, does that not raise a doubt about the reliability of the Breath Test Program itself? If apparently no one in the entire Breath Testing Program in Alberta noticed that they were using an un-approved software version, what else have they missed?
79. The point was that the Crown position is demonstrably flawed. By saying that there is nothing in the maintenance records which is relevant to the reliability of the breath test process, the Crown experts ignore their demonstrated failure to comply with their own rules. As the Court stated in *St-Onge*, “it can be inferred from these recommendations that the instruments may not function optimally if the suggested procedures are not followed.”⁴⁴

Conclusion

80. The decision in this case by the majority of the Alberta Court of Appeal completely negates the possibility that an accused person could ever have access to the maintenance records, as it would be impossible to show relevance given the findings of the court. As Justice Slatter stated, merely arguing that maintenance was likely conducted will not suffice in an *O’Connor* application⁴⁵ and it will be rare for the defence to establish a right to production of third party records under *O’Connor*.⁴⁶
81. The discussion in *St-Onge* makes it clear that an accused person may theoretically rebut the presumptions of accuracy and identity by showing improper maintenance. As both the instruments and the people who operate and maintain them are under the control of the prosecution, the accused will never be able to raise this defence unless the Crown is required to disclose the maintenance records, and this type of rebuttal will always be theoretical.

⁴⁴ *St-Onge, supra*, at paragraph 43

⁴⁵ Judgement of the Court of Appeal, at paragraph 45 [Tab 2E]

⁴⁶ Judgement of the Court of Appeal, at paragraph 78 [Tab 2E]

82. This case provides a perfect opportunity for this Honourable Court to settle the question of whether the maintenance records are relevant first party disclosure, as the very narrow question at trial was whether the maintenance log was relevant first party disclosure, a document which this Court has already found to be specifically relevant.
83. The applicant respectfully asks that leave to appeal to this Honourable Court be granted on this issue.

PART IV: SUBMISSIONS CONCERNING COSTS

84. The Applicant makes no submissions on costs.

PART V: ORDER SOUGHT

85. The applicant respectfully requests that leave to appeal the decision of the Court of Appeal of Alberta be granted on the stated questions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF JANUARY, 2017.

for: 

TIMOTHY E. FOSTER, Q.C.
Counsel for the Applicant

PART VI: TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraphs</u>
<i>R. v. Bassett</i> , 2014 AJ No. 1504 (QB) (QL)	21
<i>R v Jackson</i> , 2015 ONCA 832 (CanLII) leave to appeal dismissed without reasons 2016 SCCA 38 Online: CanLII: http://canlii.ca/t/gmblf	1
<i>R. v. Kilpatrick</i> , 2013 ABQB 5 (CanLII) Online: CanLII: http://canlii.ca/t/fvshl	19, 21
<i>R. v. O'Connor</i> , 1995 CanLII 51 (SCC) Online: CanLII: http://canlii.ca/t/1frdh	
<i>R. v. Proctor</i> , 2015 ABQB 97 (CanLII) Online: CanLII: http://canlii.ca/t/gg6p8	21
<i>R. v. Prokofiew</i> , 2010 ONCA 423 (QL)	63
<i>R. v. Sinclair</i> , 2015 ABQB 113 (CanLII), Online: CanLII: http://canlii.ca/t/ggcbs	12, 21
<i>R v St-Onge Lamoureux</i> , 2012 SCC 57 (CanLII) Online: CanLII: http://canlii.ca/t/ftl1g/	2, 31-52, 54, 56, 73, 79
<i>R. v. Sutton</i> , 2013 ABPC 308	74
 <u>Reference Materials</u>	
<i>Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee</i> , Can. Soc. Forensic Sci. J. Vol. 42 No. 1 (2009) pp.1-29	28

PART VII: LEGISLATION

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

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Criminal Code, 1985 RSC c. C-46

Proceedings under [section 255](#)

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

...

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

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

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

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

Loi constitutionnelle de 1982 s. 7, 11(d)

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Tout inculpé a le droit :
d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Code Criminel, LRC (1985), Ch. C-46

Poursuites en vertu de l'[article 255](#)

258. (1) Dans des poursuites engagées en vertu du [paragraphe 255\(1\)](#) à l'égard d'une infraction prévue à l'[article 253](#) ou au [paragraphe 254\(5\)](#) ou dans des poursuites engagées en vertu de l'un des [paragrophes 255\(2\)](#) à [\(3.2\)](#) :

...

c) lorsque des échantillons de l'haleine de l'accusé ont été prélevés conformément à un ordre donné en vertu du [paragraphe 254\(3\)](#), la preuve des résultats des analyses fait foi de façon concluante, en l'absence de toute preuve tendant à démontrer à la fois que les résultats des analyses montrant une alcoolémie supérieure à quatre-vingts milligrammes d'alcool par cent millilitres de sang découlent du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest approuvé et que l'alcoolémie de l'accusé au moment où l'infraction aurait été commise ne dépassait pas quatre-vingts milligrammes d'alcool par cent millilitres de sang, de l'alcoolémie de l'accusé tant au moment des analyses qu'à celui où l'infraction aurait été commise, ce taux correspondant aux résultats de ces analyses,

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

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

lorsqu'ils sont identiques, ou au plus faible d'entre eux s'ils sont différents, si les conditions suivantes sont réunies:

(i) [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

(ii) chaque échantillon a été prélevé dès qu'il a été matériellement possible de le faire après le moment où l'infraction aurait été commise et, dans le cas du premier échantillon, pas plus de deux heures après ce moment, les autres l'ayant été à des intervalles d'au moins quinze minutes,

(iii) chaque échantillon a été reçu de l'accusé directement dans un contenant approuvé ou dans un alcootest approuvé, manipulé par un technicien qualifié,

(iv) une analyse de chaque échantillon a été faite à l'aide d'un alcootest approuvé, manipulé par un technicien qualifié;

(emphasis added)