Court File No. 37395

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

BETWEEN:

KEVIN PATRICK GUBBINS

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

Court File No. 37403

AND BETWEEN:

DARREN JOHN CHIP VALLENTGOED

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO APPLICATIONS FOR LEAVE TO APPEAL
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Part I: Overview / Statement of Facts

A. Overview

1. The Crown responds to the leave applications brought by Kevin Patrick Gubbins (37395) and Darren John Chip Vallentgoed (37403) on the issue of whether approved instrument records that are not fruits of the investigations should be subject to *Stinchcombe* disclosure, contrary to the procedure established by this Court for the production of records in police possession.

2. The Applicants do not raise an issue of national importance. This Court recently addressed the production of records in police possession in *R v McNeil*, 2009 SCC 3 and *R v Quesnelle*, 2014 SCC 46. It is well settled that only the fruits of the investigation in police possession are subject to *Stinchcombe* disclosure. All other records in police possession are third party records, subject to the *O'Connor* procedure. The only exception to this is for "obviously relevant" records. The Alberta Court of Appeal has merely applied the principles set out in *McNeil* and *Quesnelle* to the facts of this case.

3. There is nothing in this case that merits a departure from the established procedure for obtaining records in police possession. The applicants were provided a standard disclosure package, which contained the fruits of the investigation and all the records that are relevant to assessing the proper functioning and operation of the approved instrument at the relevant time. The records in question are not fruits of the investigation and the uncontradicted expert evidence before the court is that the requested records have no relevance and are of no use in making full answer and defence.

4. There is also nothing to suggest that the production procedure for maintenance records was in any way inadequate in this case. The records sought, could have been obtained through an *O'Connor* application had they been likely relevant. It was not the procedure that prevented production, it was the lack of any relevance. As noted by the majority in this case, "[t]he respondent in these appeals are confronted with the stubborn fact that the uncontradicted expert evidence is that the maintenance records are irrelevant to making full answer and defence."

5. This Court recently denied leave to appeal on this issue in *R v Jackson*, 36829, SCC (June 30, 2016). There is nothing about the facts of these cases or the evidence before the court that would justify granting leave here. Unlike *Jackson*, the defence in these cases did not even present evidence to support their position. There is also no discord at the provincial appellate court level or any apparent discord in the law following *R v Jackson*, 2015 ONCA 832 or this case.

6. As this Court observed in *R v McNeil*, 2009 SCC 3, "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." Requiring an accused to establish the likely relevance of records that are not the fruits of the investigation 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."

7. The departure from the procedure set out in *McNeil* in Alberta, by the summary conviction appeal courts, caused the very mischief that this Court sought to avoid by limiting *Stinchcombe* disclosure to the fruits of the investigation. Regardless of what material the Crown provided, additional requests for more records were made until the Crown ran out of time before trial or was unable to provide the record requested and stays were granted for late or non-disclosure or delay. The pursuit of every conceivable record related to the approved instrument became an effective way to manufacture a defence and avoid a trial on the merits, regardless of whether the records sought had any relevance to the accused's case.

8. The Applicants suggest that this Court in *R v St. Onge-Lamoureux* decided that maintenance records are subject to *Stinchcombe* disclosure. That simply isn't so. The majority expressly states that because the nature and scope of evidence that might be considered relevant was not argued it would be inappropriate to rule on the specific limits of the evidence that must be produced.[1] This is consistent with Justice Cromwell's statement in his dissent that he did not understand the majority reasons to be establishing any new principle in relation to the Crown's disclosure obligations.[2]

9. In any event, this Court did not consider the *R v St. Onge-Lamoureux*, 2012 SCC 57 decision to be a sufficient reason to grant leave to appeal in *R v Jackson*, 36829, SCC (June 30, 2016) It is similarly not a reason to grant leave to appeal here.

B. Statement of Facts

1. *R v Vallentgoed*

10. Vallentgoed was stopped driving. Approved instrument breath testing showed he had a blood alcohol concentration over the limit. He was charged with driving impaired and with a blood

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[1] ***R v St-Onge Lamoureux***, *supra* note 54 at paras 41-42
[2] *Ibid.* at para 136

alcohol concentration over 80 mg%.

11. Vallentgoed was provided the standard disclosure package, which included all records related to his breath tests.[3] It included a printed 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 performed before Vallentgoed's breath testing, the test record produced by the approved instrument from the standard alcohol solution change, 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.

12. Vallentgoed further demanded:

- Records of maintenance, or annual inspection, for the approved instrument for the past two years, showing how maintenance was conducted, the results obtained during the maintenance procedure, and any part replacements, modifications or software update, other than conclusory certificates.

- 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.

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

13. The Crown provided a further maintenance log that was in RCMP possession for the approved instrument and approved screening device, which documented dates of service.

14. Vallentgoed then made a further request for detailed reports of the work performed on the dates listed on the maintenance log going back to July 17, 2012. He repeated his request for records

[3] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 21

related to standard alcohol solution changes done after his investigation and all maintenance records for the prior two years.

15. The Crown refused on the grounds that the additional records were third party records subject to *O' Connor* production and moreover irrelevant. A production hearing was held in which the Crown tendered an expert on the relevance of the requested records. Vallentgoed called no evidence.

16. The trial judge following the principles set out in *R v McNeil*, found that because the additional records were not fruits of the investigation and irrelevant they were not subject to *Stinchcombe* disclosure or production as third party records. Vallentgoed was convicted after a trial on the merits. He appealed to the summary conviction appeal court alleging *inter alia* that the trial judge erred in finding maintenance records are not subject to *Stinchcombe* disclosure. Vallentgoed's summary conviction appeal was joined with a Crown appeal dealing with the same issue in *R v Gubbins*, 2014 ABPC 195.

2. *R v Gubbins*

17. Gubbins was stopped driving. Approved instrument testing showed he had a blood alcohol concentration over the legal limit. He was charged with driving impaired and with a blood alcohol concentration over the legal limit.

18. The Crown provided Gubbins the standard approved instrument disclosure package, which included all records made in respect of Gubbins breaths tests.[4]

19. Gubbins further demanded maintenance records for the approved instrument showing the history of repairs and modifications, since it was put into use, including any repairs completed.

20. 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 perform repairs and maintenance on approved instruments. The only maintenance record in police possession was a maintenance log kept for the approved instrument documenting dates of service.[5]

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[4] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 21
[5] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 23

21. The Crown refused the request for additional records and offered 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. A *voir dire* was held in which the Crown tendered the same expert report used in *Vallentgoed*. In addition, the Crown's expert also provided *viva voce* evidence. Gubbins did not call any evidence in support of the production of the records.

22. The trial judge found she was bound by *R v Kilpatrick*, 2013 ABQB 5, a summary conviction appeal decision, which ruled that all maintenance records were subject to *Stinchcombe* disclosure and presumptively relevant. The trial judge rejected the uncontradicted expert evidence, because it was contrary to "instinct and intuition."[6] In light of the deliberate decision of the Crown not to produce the requested records the trial judge entered a stay.

23. The Crown appealed the decision to the summary conviction appeal court where it was joined with *R v Vallentgoed*.

3. *Expert Evidence*

24. The Crown called uncontradicted evidence showing that the requested records are irrelevant and of no use in making full answer and defence.

25. Kerry Lynn Blake provided the Crown's expert evidence. She is employed as a Forensic Alcohol Specialist in the Toxicology Service Program with the RCMP National Center for Forensic Service Alberta. She is also a member of the Alcohol Test Committee of the Canadian Society of Forensic Science.[7]

26. Ms. Blake's evidence is detailed in the lower court decisions and paragraphs 16-19 of the Alberta Court of Appeal decision and can be summarized as:

- Maintenance records cannot be used to assess whether the approved instrument was working properly at the time of any specific test.

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[6] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 8

[7] The Alcohol Test Committee advises the Federal Minister of Justice on all aspects of forensic blood and breath testing, including the evaluation of approved instruments and recommendations as to the best practices for the forensic use of approved instruments

- The only way to detect if an approved instrument was malfunctioning or not operated properly at the time of a specific test is to examine the records made at the time of that test.

- All of the necessary information to assess proper functioning is recorded by the approved instrument in the printed test record and also by the qualified technician on his check sheet prepared at the time of the breath test.

- In 2012 the Alcohol Test Committee recognized that it needed to clarify what records are relevant to an assessment of the functioning of the approved instrument at the time of an accused's breath tests. It accordingly published a position paper. The paper states that data collected both prior to and after the subject test, or an examination of the approved instrument after the subject test, do not assist in determining the accuracy and reliability of the approved instrument at the time of the subject test. Further, its operational recommendations are only provided to foster the development of a quality breath testing program and are not proposed as required elements of proof extra to what is required by the *Criminal Code*. Finally, the only records of use in assessing the working order of an approved instrument at the time of a specific test are those records produced at the time of the specific test.

- Periodic maintenance is not concerned with the detection of error, but the prevention of it. The Alcohol Test Committee maintenance guidelines are strictly preventative in nature and are only best practices aimed at ensuring that police have working instruments when they require them. Although maintenance records should be kept to encourage a robust breath testing program, they cannot be used to assess whether an error has or will occur on any given test.

- Performance or absence of periodic maintenance and inspection does not provide any information about the functioning of an instrument at the time of any given breath test.

- Approved instruments and the breath testing procedure are designed so that any error affecting the accuracy of the breath test is recorded at the time of testing and

will be readily apparent from a review of those records made at the time of testing.

- The most significant assurance of proper function comes from a calibration check that is performed on an external alcohol standard of known and independently verified concentration immediately prior to each of the accused's breath tests, which provides direct evidence of the approved instrument's proper functioning at the time of the accused's breath tests.

27. The majority of the Alberta Court of Alberta held that it follows from Ms. Blake's uncontradicted evidence that the records sought by Gubbins and Vallentgoed are clearly irrelevant.[8]

4. *Summary Conviction Appeal Decision*

28. The SCA judge followed existing Alberta summary conviction appeal decisions and found that approved instrument maintenance records are relevant and subject to *Stinchcombe* disclosure.

29. The summary conviction appeal judge allowed *Vallentgoed's* appeal and ordered disclosure of the maintenance records and a new trial. She dismissed the Crown's appeal on *Gubbins*.

30. The Crown obtained leave to appeal the decision on the questions of whether maintenance records unrelated to the accused investigation are presumptively relevant and whether there records are subject to *Stinchcombe* disclosure.

5. *Alberta Court of Appeal decision*

31. The Alberta Court of Appeal applying *R v McNeil*, 2009 SCC 3, allowed the Crown's appeal and held that because the records sought by Gubbins and Vallentgoed were not fruits of the investigation and irrelevant, they are third party records not subject to *Stinchcombe* disclosure.

32. The majority observed that:[9]

> If all maintenance records were subject to *Stinchcombe* disclosure, 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

[8] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 19
[9] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 122

> created in relation to the approved instrument. This is the sort of mischief that the *O' Connor* procedure was meant to guard against…
>
> …
>
> … as the Crown notes in its factum, disclosing a portion of the records often leads to avalanching requests for even more and more historical maintenance records. Requiring disclosure of the maintenance logs will only generate requests for more irrelevant records, and arguments about whether the logs are in the approved form…

33. The majority reviewed the records in dispute and observed: "[a] significant portion of this material is clearly irrelevant consisting, for example, of invoices from the contractor that performs the maintenance, packing slips, copies of the test results from other accused persons, and the like."[10]

34. The Court of Appeal also reviewed a number of Alberta decisions that illustrate the mischief caused by not following the production procedure set out by this Court in *R v McNeil*, 2009 SCC 3 and *R v Quesnelle*, 2014 SCC 46. It observed:[11]

> The Crown cited a number of reported and unreported trial decisions showing that overly broad requests for disclosure of maintenance records are being made. Some of the trial courts involved have too readily ordered disclosure without having regard to whether the records are truly relevant to making full answer and defence, have denied Crown requests for adjournments to call expert evidence, and have summarily directed stays of prosecutions where the records are not produced.

[10] *Ibid.* at para 24 and 78

[11] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 77

Part II: Points in Issue

A. Issues

35. The Applicants seeks leave to appeal on the issue of whether maintenance records for the approved instrument are subject to *Stinchcombe* disclosure.

B. Response

36. The issue is well settled. Records in police possession that are not fruits of the investigation are third party records unless obviously relevant. The records sought are not fruits of the investigation and the uncontradicted expert evidence before the court is that they are not relevant. There is no reason to create a different production regime for approved instrument records.

37. This Court recently denied leave on this issue in *R v Jackson*, 36829, SCC (June 30, 2016). There is no reason that leave should be granted in this case. The Applicants did not even present evidence to show that the records are relevant or that the *McNeil* framework for production is in any way deficient. The reality is that the records sought could have been obtained through an *O'Connor* application had they had any relevance.

38. The Applicants seek leave not because the Alberta Court of Appeal decision impairs the ability to make full answer and defence. They seek leave because the decision eliminates the ability to manufacture a defence and avoid a trial on the merits by demanding production every conceivable record related to the approved instrument.

Part III: Argument

A. The process for obtaining records in police possession was recently addressed by this Court in *R v McNeil* and affirmed in *R v Quesnelle*

39. As set out in *R v McNeil*, 2009 SCC 3 and affirmed in *R v Quesnelle*, 2014 SCC 46, records in police possession that are not the fruits of the investigation unless they are obviously relevant. As summarized in *R v Quesnelle*:[12]

> For the 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.

40. The only exception is for records "obviously relevant to the accused's case," which police have an obligation to provide to the Crown even if not fruits of the investigation.[13]

41. The Alberta Court of Appeal in these cases merely applied this settled law to records for the approved instrument. The records sought are not fruits of the investigation and they are not relevant, let alone "obviously relevant" records. They are clearly third party records and there is no basis to treat them otherwise.

B. There is no reason to create a special exception for the maintenance records of approved instruments

42. There is nothing about the maintenance records for approved instruments that requires they be treated differently from any other record in police possession.

43. The Crown provides all records related to the breath test of the accused under its *Stinchcombe* disclosure obligation. According to the ATC and the uncontradicted evidence before the court, these are the only records that are required to assess whether the approved instrument was functioning and operated properly at the time of the accused's breath testing. The maintenance records sought are irrelevant.

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[12] ***R v Quesnelle***, 2014 SCC 46 at para 11
[13] *Ibid.* at para 12

44. It is not the production procedure that precludes the production of the maintenance records sought. It is the fact that they are irrelevant. If these records were "obviously relevant" the Crown would provide them as *Stinchcombe* disclosure. If the records were "likely relevant" the Crown would make inquiries of the police and likely provide them as third party records and if not would be ordered to provide after an *O' Connor* application.

45. As the majority said: "[t]he respondent in these appeals are confronted with the stubborn fact that the uncontradicted expert evidence is that the maintenance records are irrelevant to making full answer and defence."

46. Under the process for production set out in *R v McNeil*, 2009 SCC 3 an accused is readily able to obtain all records necessary to make full answer and defence to a charge of driving with a blood alcohol concentration over 80 mg%.

C. The departure from the *McNeil* procedure in Alberta caused the very mischief *McNeil* sought to avoid

47. Limiting *Stichcombe* disclosure to the fruits of the investigation, strikes the appropriate balance of ensuring the accused will receive the presumptively relevant material from the police investigative file, while not creating an undefined scope of disclosure that is impossible for the Crown and police to discharge.

48. Placing the onus on the accused to establish the likely relevance of records that are not the fruits of the investigation, serves an important screening function that prevents unmeritorious requests for production: [14]

> … 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

[14] ***R v McNeil***, 2009 SCC 3 at paras 28 and 29

> 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*…

49. The classification of all maintenance records as first party *Stinchcombe* disclosure in Alberta, resulted in the substantial mischief that this Court has sought to avoid by limiting *Stinchcombe* disclosure to the fruits of the investigation.

50. Regardless of what the Crown provided, the accused demanded further records related to the approved instrument; if these records were provided, additional records were requested. If anything requested was not produced or was produced late, the accused brought a *Charter* application at trial for a stay or exclusion of evidence alleging late or non-disclosure. Because the records were deemed relevant, stays were routinely granted, regardless of the nature of the record and in absence of evidence the record had any impact on the ability to make full answer and defence. The Crown was frequently denied the opportunity to call evidence to justify non-production and if granted an adjournment were faced with a further *Charter* application for a stay for unreasonable delay.

51. The majority reviewed a number of provincial court decisions illustrating the mischief caused by removing the requirement for defence to justify requests for production of records that are not the fruits of the investigation. It concluded:

> The Crown cited a number of reported and unreported trial decisions showing overly broad requests for disclosure of maintenance records are being made. Some of the trial courts involved have too readily ordered disclosure without having regard to whether the records are truly relevant to making full answer and defence, have denied Crown requests for adjournments to call expert evidence, and have summarily directed stays of prosecutions where the records are not produced…

52. The removal of the requirement for defence to show the likely relevance of records that are not fruits of the investigation, eliminated all protection against unmeritorious production requests and the pursuit of every conceivable record related to the approved instrument become an effective way to avoid a trial on the merits. A few examples are provided below.

53. In *R v Howie*,[15] the Crown provided all records for all approved instruments Calgary Police

[15] ***R v Howie***, 2013 ABPC 288

Service (CPS) possession. The accused demanded the following additional information:

- Annual Certificated for 2004, 2007, 2008, 2009;
- Install Sheets for 2007, 2008;
- Worksheets for 2004, 2007, 2009 and 2011;
- Details related to various entries in the maintenance log saying that the approved instrument was taken out of service or repaired between 2001 and 2008
- Various information and records related to the breath simulator used with approved instrument
- All notes, records, invoices and any other document showing the repair/changes/updates to the machines and whether there has been an repair/maintenance/update to the instrument hardware or software

When not provided, the accused applied for a stay alleging non-disclosure at the start of trial. Production of the additional records was ordered and the trial adjourned. The Crown discovered it could not comply with the production order because the requested records did not exist nor ever existed. The accused 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 consider its non-disclosure application seeking exclusion of evidence as a remedy instead of a stay. The application was heard and dismissed. The Crown then learned its CPS affiants were not be available for trial because of a scheduling error and a family tragedy. The accused filed another *Charter* notice alleging non-disclosure and unreasonable delay under s. 11(b) of the *Charter*. The court found a breach of ss. 7 and 11(b) and granted the application for a stay, in the absence of any evidence that the additional records existed or that they had any impact on the accused's ability to make full answer and defence.

54. In *R v Oler*,[16] the Crown provided a standard disclosure package with all records related to

[16] ***R v Oler***, 2014 ABPC 130

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 format, 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.

55. In *R v Tweedie*,[17] 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 because of the late disclosure and it excluded the approved instrument results as a remedy, effectively terminating the s. 253(1)(b) prosecution.

56. In *R v Sakal*,[18] 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 record as disclosure, despite the fact that on its face the letter is irrelevant, because it is not the manufacturer that determines whether an instrument is suitable for use as an approved instrument but the ATC.

57. The Alberta experience demonstrates that following *McNeil* for the production of records

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[17] ***R v Michael Alexander Tweedie***, unreported Calgary, May 27, 2013, #121267397P1
[18] ***R v David William Sakal***, unreported Calgary, May 3, 2013, #120457916P1

related to the approved instrument is necessary to prevent the mischief associated with unmeritorious requests for production.

D. The issue raised is moot since the records in issue are clearly irrelevant

58. The issue raised by the Applicants in this case is also moot, since the records in issue are clearly irrelevant[19] and are not producible as either *Stinchcombe* disclosure or third party records.

E. The issue raised is not of national importance

59. As described above, the Alberta Court of Appeal merely applied the canonical principles set out by this Court in *R v McNeil*, 2009 SCC 3 and *R v Quesnelle*, 2014 SCC 46. With the exception of fruits of the investigation and other obviously relevant records, documents in possession and control of the police are third party records. There is no reason to depart from this for records related to the approved instrument.

60. There is no conflict in the law at the provincial appellate level of court. This decision agrees with the Ontario Court of Appeal's decision in *R v Jackson*, 2015 ONCA 832. And any conflict that once existed in the lower courts has been resolved by this and the *Jackson* decisions.

61. It is also not an appropriate case to consider the issue, since the Applicant have tendered no evidence that the records in issue are necessary to make full answer and defence. Nor have the Applicants provided any evidence that production procedure set out in *R v McNeil*, 2009 SCC 3 is in any way inadequate, such that an alternative procedure should be established for records related to approved instruments.

62. It does not appear that the Applicants have a legitimate concern about whether an accused is able to make full answer and defence. Rather it appears the real complaint is that they have lost what was a very effective means of avoiding a trial on the merits through the pursuit of records related to the approved instrument.

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[19] Reason for decision of the Court of Appeal of Alberta, dated November 15, 2016 at para 19

Part IV: Submission on Costs

63. The Respondent makes no submissions as to costs.

Part V: Nature of Order Requested

64. The Respondent asks that the applications for leave to appeal be dismissed.

All of which is respectfully submitted.

Dated at Edmonton, Alberta February 14, 2017.

JASON R. RUSSELL
Counsel for the Respondent

Part VI: Table of Authorities

Part VII: Statutes Relied Upon

Canadian Charter of Rights and Freedoms	*Charte Canadienne Des DesDroits Et Libertés*
Life, liberty and security of person **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.	Vie, liberté et sécurité **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.
Proceedings in criminal and penal matters **11.** Any person charged with an offence has the right (*a*) to be informed without unreasonable delay of the specific offence; (*b*) to be tried within a reasonable time; (*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence; (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (*e*) not to be denied reasonable bail without just cause; (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found	Affaires criminelles et pénales **11.** Tout inculpé a le droit : *a*) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche; *b*) d'être jugé dans un délai raisonnable; *c*) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche; *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; *e*) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable; *f*) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave; *g*) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

guilty and punished for the offence, not to be tried or punished for it again; and (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	*h*) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni; *i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.