Citation: *R.* v. *Drummond,* 2017 YKTC 11

Date: 20170320
Docket: 15-00220
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JOHN ANDREW DRUMMOND

Appearances:
Leo Lane — Counsel for the Crown
Tam Boyer — Counsel for the Defence

RULING ON APPLICATION
(Disclosure of Maintenance Logs)

[1] In 2008, s. 258 of the *Criminal Code* was amended with respect to the presumption of accuracy in the results of analyses done by breathalyzer machines. The amendments created a presumption that require a trier of fact to rely on the results of breathalyzer testing as evidence in a prosecution under s. 253(1)(b), despite evidence to the contrary given by the accused about his or her alcohol consumption (the so-called ***Carter*** defence (***R.*** v. ***Carter*** (1985), 7 O.A.C. 344)). In order to defeat the presumption, section 258(1)(c), as it was passed by Parliament, placed an evidentiary burden on an accused to show that (i) the breathalyzer was malfunctioning or was operated improperly, (ii) that the malfunction or improper operation resulted in a reading

of over 80 mg%, and (iii) that the blood alcohol concentration of the accused would not have exceeded 80 mg% at the time of the offence.

[2] The Supreme Court of Canada considered the constitutionality of these provisions in ***R. v. St-Onge Lamoureux,*** 2012 SCC 57, and the majority struck down the latter two as being impermissible infringements of the presumption of innocence protected by s. 11(d) of the *Charter*. Accordingly, the law as it stands allows the presumption of accuracy to be rebutted by an accused providing evidence that the breathalyzer was malfunctioning or operated improperly.

[3] In the course of its decision in ***St-Onge Lamoureux***, the Court arguably elaborated on the type of evidence that an accused could use to show that a device was malfunctioning or was operated improperly. While the case was a *Charter* decision rather than a decision about evidence or disclosure obligations, the Court repeatedly referred to machine maintenance and maintenance logs as evidence by which an accused could rebut the statutory presumption in the read-down s. 258(1)(c) (see e.g. paras. 26, 41, 48, 72, 78).

[4] Mr. Drummond comes before the Court charged with driving while his blood alcohol concentration exceeded 80 mg% and is seeking disclosure relevant to the rebuttable presumption in s. 258(1)(c), relating to the possibility that the breathalyzer was operated improperly or malfunctioning. The issue to be resolved on this application is whether the maintenance log of the approved IntoxEC/IRII device used in the investigation of Mr. Drummond and sought by his counsel is subject to the disclosure regime for first-party records (***R. v. Stinchcombe****,* [1991] 3 S.C.R. 326*)* or the regime

for third-party records (***R. v. O'Connor***, [1995] 4 S.C.R. 411). It is clear from the caselaw provided that there has been significant litigation dealing with this issue since the Supreme Court decision in ***St-Onge Lamoureux*** and that the law remains, to a large extent, unsettled.

[5] On March 2, 2017, I provided brief oral reasons in court for my finding that the maintenance records being sought should be treated as first-party disclosure, and indicated to counsel that these written reasons would follow.

[6] First-party disclosure most commonly consists of information that can be described as the "fruits of the investigation". However, this category is broad enough to include not only material that forms the case against the accused, but also any information held by the police that is “obviously relevant” to that case and in respect of which there is a reasonable possibility that it may assist the accused in making full answer and defence (***R.*** v. ***Jackson***, 2015 ONCA 832 at para. 82). Disclosure falling into this category is assumed to be in the hands of the prosecuting Crown, and there is a corollary duty on the police to disclose it to them. For example, ***R. v. McNeil***, 2009 SCC 3, made it clear that this category could include the disciplinary records of police officers involved in the investigation of the accused, if those records were sufficiently serious or related to the conduct of the investigation. First-party disclosure must be provided to the accused as of right unless it is clearly irrelevant to the case.

[7] In contrast, when material is in the hands of a third party, including with a police service, there is an onus on the accused to show that it is relevant before it is potentially subject to disclosure. Even if relevant, policy concerns about the nature of the

information, whose control it is in, and any third-party privacy interests at stake must be weighed before material is ordered disclosed.

Positions of the Parties

Defence

[8] Mr. Boyar, on behalf of Mr. Drummond, asserts that the maintenance log of this particular machine is obviously relevant to a material issue in the case against his client and that it should be considered first-party disclosure. Because data from the device is being used against Mr. Drummond at his trial, he is entitled to information about whether it was functioning properly at the time the sample was taken, as well as over time.

[9] Mr. Boyar takes the position that the records are relevant to his client's ability to rebut the presumption of accuracy in s. 258(1)(c) rather than to raise a doubt about the reliability of the breath readings themselves. He asserts that the Court of Appeal decisions from Alberta (***R. v. Vallentgoed****,* 2016 ABCA 358*)* and Ontario *(**R. v. Jackson***) erred in their analysis by conflating these two things. As stated by the majority in ***Vallentgoed****:*

> [62] In the context of these appeals, "relevance" relates to whether the maintenance records of the breathalyzer instrument make the accuracy of the blood alcohol readings more or less probable than they would otherwise be. The Crown is attempting to prove the blood alcohol level of the accused, and the issue is the relationship between the maintenance records, the reliability of the blood alcohol readings from the instrument, and ultimately the blood alcohol level of the accused.

[10] Mr. Boyar's argument requires unpacking. The foundation is an apparent consensus among many experts that breathalyzer machines approved under the *Criminal Code* are designed to be so failsafe that they will self-diagnose any errors that take place during sample testing and will generate an error message rather than deliver a false positive (see e.g. ***R.*** v. ***Fitts***, 2015 ONCJ 262, ***Vallentgoed***). This evidence was used in ***Vallentgoed*** and ***Jackson*** to conclude that maintenance logs are clearly irrelevant to the reliability of the test results and therefore not subject to the first-party disclosure regime.

[11] Mr. Boyar accepts the failsafe nature of the machines and that maintenance records do not make the accuracy of his client's test results any more or less probable, but he says this is the wrong analysis. Rather than looking at the relevance of a maintenance log to the reliability of any given breath sample, courts should be concerned with whether the log is relevant to the presumption of accuracy and the operation and functioning of the machine.

[12] Mr. Boyar says that Parliament enacted the provision in the *Code* and, in so doing, considered whether improper maintenance could lead to unreliable results. He says Parliament can be taken as recognizing that there is a connection between improper maintenance and the reliability of a breath sample, and chose to address it by allowing for a rebuttable presumption. He says it is a matter of statutory interpretation (although I note that the term "maintenance" does not appear in the statutory provision). Mr. Boyar says it is not for his client to come to court to show the connection between maintenance and the reliability of the analysis of his breath samples. All Mr. Drummond has to do is show improper maintenance, and this will have the effect of rebutting the

presumption of accuracy and removing the Crown's evidentiary shortcut, such that it can no longer rely on the certificate and has to call direct evidence.

[13] Mr. Boyar says that ***St-Onge Lamoureux*** confirms that a deficiency in the maintenance of a breathalyzer will rebut the presumption of accuracy as a matter of statutory interpretation.

[14] Mr. Boyar also says that to ask his client to produce evidence that casts doubt on the reliability of his breathalyzer readings is to effectively reinvigorate a part of s. 258(1)(c) that the Supreme Court has found unconstitutional. He says that the Alberta and Ontario Courts of Appeal have advanced the law to a point where the accused has to demonstrate that improper maintenance would have affected the reliability of the results and are in effect reading back in requirements that the Court has struck down.

[15] Mr. Boyar states that the maintenance logs are critically important records because they are the only way an accused can rebut the presumption of accuracy, other than, of course, by showing improper operation. Accordingly, they should be first-party disclosure.

[16] Mr. Boyar argues that the Court of Appeal decisions effectively create a "Catch-22" situation, in which the records can never be retrieved. If they are clearly irrelevant, they not only will never be first-party disclosure, but defence will never be able to establish likely relevance in order to obtain them as third-party records. This places an unfair burden on the accused.

[17] Finally, while not relevant to the test for first-party disclosure, Mr. Boyar points to the fact that the record sought is held by the police, is not particularly lengthy and does not engage the privacy interests of any third party. He also says that it serves the interests of justice generally to allow the accused access to information that shows whether or not the instrument is working properly generally as it will enhance public confidence in the administration of justice and allow for appropriate and informed decisions by the accused about defending his or her case.

Crown

[18] Mr. Lane, for the Crown, says that the defence is wrong in its submissions in two respects. Firstly, it is not the case that a past maintenance issue will affect the accuracy of any given breath test, and secondly, defence cannot rely on ***St-Onge Lamoureux*** as setting out a disclosure obligation.

[19] Although the Crown here did not call expert evidence about the relationship between improper maintenance of a breathalyzer machine and the accuracy of its test results, Mr. Lane submits that I can rely on what was said by the experts in the cases that were filed to conclude that maintenance records are effectively irrelevant to any issue in this case and to over 80 cases generally.

[20] Mr. Lane says that I should rely on the Court of Appeal findings in ***Vallentgoed*** and ***Jackson*** that maintenance is designed to prevent errors rather than detect them, and that there is no link between improper maintenance and inaccurate results. Rather, all that is needed to assess accuracy in a given case are the printouts relating to the actual test as it was performed on the accused, as these include internal testing prior to

the breath samples. Any error at the time of testing will be caught by the internal tests and relayed either by an error message or no result.

[21] Mr. Lane says that the two Court of Appeal cases that determine maintenance logs are third-party records are the most persuasive authorities before me and points out that there is no equally persuasive authority going the other direction. He says it is significant that both Alberta and Ontario decided this issue in the same way.

[22] Mr. Lane disagrees with Mr. Boyar's description of Parliamentary intent. He says that Parliament set out two ways to rebut the presumption of accuracy, and these are to show that the machine was not operated properly or to show that it malfunctioned. In terms of proper operation, the Court should look to things like the steps taken to operate the machine and whether or not there was a proper observation period. In terms of malfunctioning, he says the defence fails to take into account expert evidence that maintenance and malfunction are two different things.

[23] Mr. Lane says that ***St-Onge Lamoureux*** does not create a disclosure obligation, as it is not a disclosure case. The reason the Court spoke at length about maintenance records was simply to illustrate that the section could be saved by section 1 because there is disclosure available to rebut the presumption. He says that the Court explicitly sidestepped the question of the types of records that are relevant by observing that "[s]ince the nature and scope of the evidence that might be considered relevant has not been argued on this appeal, it would not be appropriate to rule on the specific limits of that evidence" (para. 42). While maintenance logs are an example of material that could be disclosed, the Supreme Court is ultimately silent about whether they are

available through the first-party versus third-party regimes or whether they are relevant at all. Further, the Court clearly indicated a requirement for further litigation on this issue. The Supreme Court did not rule that irrelevant evidence must be disclosed to maintain the constitutionality of the section.

[24] Finally, with respect to the defence submission that disclosure of maintenance logs is not especially onerous, Mr. Lane argues that this is not a principled basis on which to compel disclosure. The inquiry should be into relevance.

The Law

[25] Although there is a considerable body of caselaw that considers the issue of whether maintenance logs are first- or third-party disclosure, counsel mainly relied on three cases: ***Jackson, Vallentgoed*** and ***Fitts,*** all of which are cited above. None of these are binding on me, although as the Crown points out, the two Court of Appeal decisions finding that the third-party disclosure regime is applicable are persuasive, and ***Fitts,*** which went the other way, is no longer good law in Ontario by virtue of ***Jackson.***

[26] I received further written submissions on the state of the law in Quebec following ***Jackson*** and ***Vallentgoed.*** Two Superior Court decisions (***R. c. Ruest***, 2016 QCCS 4104 and ***R. c. Paradis***, 2016 QCCS 115) followed ***Jackson***, while five provincial court decisions (***R. c. Lopez***, 2016 QCCQ 964, ***R. c. Vachon***, 2016 QCCQ 4605, ***R. c. Cloutier***, 2016 QCCQ 5957, ***R. c Momy***, 2016 QCCQ 9178 and ***Directeur des poursuites crimineles et penales*** c. ***Perron***, 2016 QCCQ 13794) found maintenance records to be subject to the first-party disclosure regime. In ***Cloutier*** and ***Vachon***, the Courts considered ***Jackson*** in deciding otherwise, and in ***Perron*** the

Court considered ***Ruest*** and ***Paradis***. In addition, I was provided the case of ***R. v. Worden,*** 2014 SKPC 143, a case in which expert testimony was adduced, in which it was held that the maintenance documentation that had been requested was not relevant and therefore not disclosable.

[27] It should be noted too that, while leave to appeal was sought in ***Jackson,*** it was denied without reasons. Leave has been applied for in ***Vallentgoed***.

[28] Finally, although I agree the ***St-Onge Lamoureux*** case is not a disclosure decision, it nevertheless has bearing on this issue, in the sense that it provides the legal context in which I must evaluate this issue.

[29] Given the different ways in which maintenance logs are approached in ***Jackson, Vallegoed, Fitts*** and in ***St-Onge Lamoureux,*** it is worth reviewing the analyses undertaken in each of them.

Jackson

[30] In ***Jackson,*** the accused was seeking service records, usage and calibration records and Computer On-Line Breath Records Archive ("COBRA") data from tests bracketing his own. He pursued his request through the avenues of both a first-party and a third-party application and was provided the records as part of first-party disclosure. There is no full trial record, as the case reached the Court of Appeal via an interlocutory *certiorari* application brought by the police record-holder who had not been properly served with third-party notice.

[31] Defence counsel objected to the appeal being heard, but Watt J.A., writing for the Court, found that the disclosure debate was an issue in which record-holders had a subsisting interest given the conflicting caselaw, that the record was adequate and that the Court had the benefit of full argument from the parties, the third-party police service, as well as the interveners the Criminal Lawyers' Association and OPP Commissioner.

[32] Watt J.A found that the records should be accessed through the third-party regime, and that there is an onus on the accused to establish relevance. He considered that the records sought were historical records with no association to the investigation of the accused and that they were in the exclusive possession of the Ottawa Police Service. He acknowledged that ***St-Onge Lamoureux*** considered that the availability of additional disclosure about the functioning of an approved instrument was relevant to the constitutionality of the saved provision, but he found that the Supreme Court eschewed consideration of the scope of evidence that could be the subject of a disclosure request. Watt J.A. found that overall the language used by the Supreme Court is more consistent with disclosure under a third-party regime than a first-party regime.

[33] Watt J.A. went on to find that the records requested failed to meet the “likely relevant” threshold of a third-party record application for four reasons.

[34] First, there was nothing on the face of the disclosure package that would indicate any problem with the instrument or error in its operation, however in that case, it was also a new machine that had not yet had its annual maintenance performed (para. 135).

[35] Second, the evidence adduced by defence about potential relevance did not ascend above the speculative, especially in the context of an Alcohol Test Committee report belying the assistance of the records in determining whether the instrument was functioning for a particular test.

[36] Third, the records were irrelevant to the narrative of events, in the sense that historical data says nothing about what gave rise to the prosecution or the credibility of anyone involved in the investigation.

[37] Fourth, policy considerations require a higher threshold for relevance.

Vallentgoed

[38] In ***Vallentgoed***, the Alberta Court of Appeal was considering two appeals. The accused in ***Vallentgoed*** had been convicted after a trial in which he was provided some, but not all, of the maintenance records for the breathalyzer used to analyse his samples. The accused in ***R.*** v. ***Gubbins,*** 2014 ABPC 195, had been granted a stay of proceedings on the basis that the Crown had failed to disclose all the historic maintenance records for the instrument. The same summary conviction appeal judge considered both cases and found that maintenance records were first-party disclosure, with the result that the conviction in ***Vallentgoed*** was overturned and the stay in ***Gubbins*** upheld.

[39] The Court of Appeal split about the disclosure regime applicable to maintenance records, with a two-person majority decision authored by Slater J.A. finding that they are

properly third-party disclosure. Rowbotham J.A. wrote dissenting reasons for concluding that the Crown's first-party disclosure obligations applied.

[40] The Court in ***Vallentgoed*** had the benefit of expert evidence from Kerry Blake, a Forensic Alcohol Specialist in the Toxicology Service Program with the RCMP National Centre for Forensic Service Alberta, who was called by the Crown in both cases. Her evidence was uncontradicted. She was clear that an examination of the maintenance records of a machine do not assist in determining the reliability and accuracy of a specific breath testing procedure (para. 17) and that earlier malfunctions do not take away from the fact that a machine is operating properly at the time of a given test. Slatter J.A. summarized her evidence as follows:

> [19] It would follow from Ms. Blake's evidence that the historical maintenance records of a breathalyzer instrument are "clearly irrelevant". All that the accused needs to make full answer and defence are the time-of-test results. Any malfunction of the instrument during the test will be disclosed on those records, or to put it another way, the chance of there being any malfunctioning that is undetected is so negligible as to be speculative.

[41] The machine used for the accused in ***Vallentgoed*** had been subjected to maintenance four months before his tests, two months before his tests, and the day after his tests. The Court found that the work done the day after his test, although recorded as a "repair" was more accurately routine maintenance and the installation of approved modifications. There had been what the Court considered "a true malfunction" approximately 10 months before the tests at issue, in which the machine was described as "[giving] a standard fail issue; but the failure is inconsistent. The instrument would alternate in between working and not working."

[42] In considering the disclosure regime that applied to maintenance logs, Slatter J.A. disagreed with a defence argument that analogized records relevant to the reliability of a witness with records relevant to the reliability of a machine. Rather, he accepted the expert opinion that only time-of-test records have any bearing on test result reliability, and concluded:

> [47] It follows that only maintenance records for the breathalyzer instrument that are contemporaneous with the criminal charge are part of the "fruits of the investigation", and must be included in the information provided by the police to the Crown. They are "in some way related to the accused's case". These are primarily the time-of-test results. The Crown has a duty to ensure that it receives those records from the police, and passes them on to the accused. However, maintenance records that are temporally remote from the actual charge, or relate only to the historical background of the particular instrument, are not "fruits of the investigation". They would be subject to the ***O'Connor*** process.

[43] The Court also considered a defence submission that it was bound by the declaration in ***St-Onge Lamoureux*** that maintenance records are relevant to full answer and defence, despite the reasons in ***Jackson*** and the expert evidence led by the Crown.

[44] Slatter J.A. conceded that the Supreme Court referred in several places to the possibility of proving malfunction of the equipment through maintenance records (para. 51), but found that the Court did not categorically state that maintenance records are always disclosable (para. 52). He wrote:

> [53] On a proper reading, ***St-Onge Lamoureux*** does not hold that maintenance records are relevant and therefore disclosable, it assumes that they might be relevant. The prospect of there being relevant information on malfunctioning of the instrument that the accused could use to raise a full answer and defence was sufficient to make the provision constitutional. If, in a particular case, it is demonstrated that the records

> are not relevant, or not sufficiently probative, they need not be disclosed. ***St-Onge Lamoureux*** found the section to be constitutional on the basis that the accused could prove malfunctioning of the equipment with relevant evidence. If the evidence turns out to be irrelevant, it could not raise a reasonable doubt, and it is therefore not necessary that it be disclosed in order to enable a full answer and defence. Irrelevant evidence cannot assist the accused. The Supreme Court did not intend to rule that, as a matter of law, irrelevant evidence must be disclosed in order to maintain the constitutionality of the section.
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> [54] The true effect of ***St-Onge Lamoureux*** (whether it be described as *obiter dictum* or *ratio decidendi*) is that the combination of the ***Stinchcombe*** and ***O'Connor*** procedures would permit the defence to obtain any maintenance records that were relevant and probative, and would thus enable the defence to meet the requirements of s. 258(1)(c)(i). It is the availability of the disclosure procedure that makes the provisions constitutional, not an artificial duty on the Crown to produce irrelevant evidence. ***St-Onge Lamoureux*** only requires that the disclosure regime be applied to the maintenance records for the instruments so that the malfunction defence is "not rendered illusory".

[45] In conclusion, Slatter J.A. wrote:

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

> [75] It must be conceded that the instruments are not infallible. But there are so many checks and balances built into the instruments themselves, and into the testing procedure, that the chances of an undetected malfunction are extremely remote. Any calibration or measurement errors will be detected by the control alcohol solution checks. Most other problems will generate a "fail". Maintenance records are, in any event, not relevant to identifying any malfunctions that are not detected in this way.
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> [76] The overall conclusion is that the Crown can discharge its disclosure obligations in breathalyzer prosecutions by delivering its "standard disclosure package". Production of historical maintenance records is rarely required under either the ***Stinchcombe*** or ***O'Connor*** procedures.

[46] In contrast, the dissent in ***Vallentgoed*** felt constrained by the Supreme Court's decision in ***St-Onge Lamoureux.*** Based on what Rowbotham J.A. called a "pronouncement" that "the prosecution must of course disclose certain information concerning the maintenance and operation of the instrument", she felt it beyond dispute that maintenance records were first-party records.

[47] Rowbotham J.A. pointed to various portions of the decision in which the Supreme Court referred to annual inspections, proper maintenance and maintenance logs, as well as the Court's pronouncement above. In her view, although ***St-Onge Lamoureux*** was not a disclosure case, "the discussion in relation to the importance of proper maintenance of the approved instrument formed an integral part of the reasoning".

[48] She concluded:

> [101] In light of Deschamps J's analysis, it cannot be said that the discussion of the relevance of maintenance records was peripheral to the court's conclusion. The only two means of rebutting the presumption of accuracy are by adducing "evidence tending to show" that the approved instrument was malfunctioning or was operated improperly. With this in

> mind, the Supreme Court specifically referred to maintenance of the instrument. Maintenance is distinct from operation. Operation refers to what occurs at the time of the breath test. Maintenance suggests matters prior to or after the operation. The Supreme Court's use of the two terms reinforces the view that the relevance of the maintenance records was an integral part of its analysis. It follows that I cannot agree with the conclusion reached by the Ontario Court of Appeal in *R v Jackson*, 2015 ONCA 832, 128 OR (3d) 161, leave to appeal refused, 36829 (June 30, 2016).

[49] Rowbotham J.A. commented on the extent to which the Alcohol Test Committee's position had apparently been modified since the ***St-Onge Lamoureux*** decision. She noted that the Crown was seeking to qualify the earlier evidence that calibration and maintenance of instruments was "essential to the integrity of the breath test program" by now taking the position that any maintenance records were in fact just best practice and had no bearing on ensuring the accuracy or reliability of a breath test (para. 103).

[50] She also observed that the Alcohol Test Committee had testified that maintenance records should be provided to accused persons before the Standing Committee on Legal and Constitutional Affairs (para. 104).

[51] Finally, Rowbotham J.A. observed that the Supreme Court specifically acknowledged that "the prosecution has control over the people who maintain and operate the instruments".

[52] Rowbotham J.A. found that this was an appropriate circumstance to require the Crown to "bridge the gap", by making reasonable inquiries of the police or other Crown agencies. She wrote that this obligation arose because records pertaining to maintenance are relevant to the reliability of the machine (para. 119).

[53] The disclosure obligation of the Crown does not, however, extend past a maintenance log containing the "results of all inspections and documentation of the maintenance history, including records of parts replaced and approved modifications to hardware or software". This information should be sufficient for counsel to determine whether there are other records potentially useful in a defence, which they would then be at liberty to pursue with a third party record application.

Fitts

[54] While no longer good law in Ontario, Paciocco J. in ***Fitts*** explicitly struggled with how to reconcile the reasons of the Supreme Court of Canada in ***St-Onge Lamoureux*** with more recent expert opinion.

[55] Like the accused in ***Jackson***, Mr. Fitts was seeking extensive disclosure, not only of the maintenance log but also of COBRA data and information relating to the "simulator" employed to heat a solution used for calibration to the temperature of a human body.

[56] There was evidence before the Court that maintenance logs had essentially no bearing on the reliability of the results of any given breath test. However, Paciocco J. also found that the disclosure of these logs is compelled by ***St-Onge Lamoureux****.* He captured the dilemma as follows:

> [14] I cannot but comment that if the evidence before me is correct, and generic Intoxilyzer information is not relevant to the reliability of specific test results, the law, as I understand it, is in an unsatisfactory state. The Crown is legally obliged to make disclosure of information that is not informative about the reliability of approved evidential breath instruments. Of more concern, if such evidence does disclose malfunctioning on other

> occasions, or improper operation or maintenance over time, it can rebut the presumption of accuracy of specific blood alcohol readings, making it necessary for the Crown to call expensive and time-consuming expert evidence.

[57] Apart from ***St-Onge Lamoureux***, Paciocco J. cited a number of reasons why maintenance logs (as well as the other records sought by the accused) should be dealt with as first-party disclosure, in part relying on a framework set out in the Alberta cases of ***Duff*** *v.* ***Alberta (Attorney General),*** 2010 ABPC 250 and ***R.*** *v.* ***Coopsammy,*** 2008 ABQB 266 (para 36).

[58] Firstly, maintenance records exist to enhance the accuracy of the breath testing program. This makes them presumptively relevant to an accused who is facing prosecution because of the evidence of an approved device.

[59] Secondly, the target information relates to the machine itself, and there is therefore a link between it and the investigation.

[60] Thirdly, privacy concerns of third parties, mostly arising in the context of COBRA data, could be addressed without depriving the accused of the records.

[61] Paciocco J. also found that both the structure of s. 258(1)(c) and the decision in ***St-Onge Lamoureux*** compelled an intention to take a generous approach to disclosure:

> [42] Moreover, I am persuaded by the conclusion of a number of courts that the very structure of the amendments to section 258(1)(c) appear to presume that a generous approach to disclosure will be taken. Those amendments house a presumption that requires courts to treat the results of a reliable but not infallible machine as conclusive, unless the accused presents evidence raising a reasonable doubt that the machine was

> "malfunctioning or was operated improperly." The implication of the rebuttable presumption is that accused persons will have access to relevant information to enable them to do so ….
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> …
>
> [43] Finally, while I do recognize that *R. v. St-Onge Lamoureux* [2012] 3 S.C.R. 187 is not a disclosure case, I am persuaded that this decision supports a "a strong disclosure obligation on the Crown in order to enable the accused to determine whether there may be a reasonable doubt about the proper functioning and operation of the machine": *R. v. Reeves*, (4 October 2013), (Unreported), (Ont.C.J.), at para 14, per Alder J. In *R. v. St-Onge Lamoureux* the majority found restrictions on the evidence that can be used to challenge the accuracy of an approved instrument to be constitutionally valid largely on the assumption that accused persons would have disclosure of information relating to its proper functioning and maintenance so that they could realistically mount permissible challenges. This is because of the monopoly the Crown has over the information required to challenge the reliability of a test result….

[62] Paciocco J. highlighted the difference between an onus on defence to rebut the presumption by raising a reasonable doubt about the accuracy of the results versus by showing that the machine had been malfunctioning or operated improperly, stating that "[i]n effect, if there is a reasonable doubt raised about the machine malfunctioning or being operated improperly, there is a sufficient *prima facie* case that the results may not be accurate, to displace the ability of the Crown to rely upon the presumption." (para. 46). When it comes to this presumption, relevant evidence is evidence that relates to the functioning and proper operation of the instrument (para. 48).

[63] Paciocco J. found that the Court in ***St-Onge Lamoureux*** expressly considered that records about maintenance at large would be relevant to rebutting this presumption (para. 53). He acknowledged that the Alcohol Test Committee had clarified its position on the relevance of regular maintenance to quality assurance and quality control after

St-Onge Lamoureux, and possibly in response to it (paras. 57, 68). He also accepted that improper maintenance cannot raise a reasonable doubt about the validity of individual test results (para. 67). However, he considered that the reasons of the Supreme Court in ***St-Onge Lamoureux*** were so clear about the relevance of maintenance records that he was bound by *stare decisis* to find them relevant to the accused's ability to rebut the presumption in s. 258(1)(c).

Analysis

[64] Given the many judgments with opposing points of view on this issue, the question of whether maintenance records of a breathalyzer machine are first- or third-party disclosure clearly requires further direction from either Parliament or the Supreme Court of Canada.

[65] If leave is granted in ***Vallentgoed***, then I would expect that the required clarity, at a national level, will be provided.

[66] In the interim, trial court judges in Canada, other than in Ontario and Alberta where ***Jackson*** and ***Vallentgoed*** are binding, are left to choose between the opposing points of view.

[67] For the following reasons, I have decided that maintenance records for IntoxEC/IRII are subject to the first-party disclosure regime.

[68] I accept the submission of Mr. Boyar that the issue before me is not that of determining obvious relevance of the maintenance records for the purpose of therefore

establishing that the IntoxEC/IRII was malfunctioning and the breath readings unreliable as a result.

[69] I accept that the purpose of the disclosure sought is to allow for defence counsel to rebut the presumption of accuracy in s. 258(1)(c).

[70] I do not have any expert opinion evidence on the record before me as to the impact of maintenance performed, or not performed, on the IntoxEC/IRII, with respect to the reliability of the breath readings that are obtained.

[71] This said, the evidence that was relied on in the cases of ***Jackson***, ***Vallentgoed*** and ***Worden***, is consistent in indicating that issues related to the maintenance of the breathalyzer machine in each particular case are irrelevant as to whether the readings obtained in each case are reliable and accurate.

[72] This is also consistent with the information in the Alcohol Test Committee Position Paper: Documentation for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results (published in the Canadian Society of Forensic Science (Journal Vol. 45 , Iss. 2, June 2012), which states:

> Records relating to periodic maintenance or inspections cannot address the working status of an AI (Approved Instrument) at the time of a breath test procedure and are intentionally absent from the requirements listed above. Thus, while a failure to adhere to such quality assurance measures could lead to instrument malfunction, this occurrence will be detectable by the quality control tests done during the breath test procedure.

[73] Assuming for the moment that I had the same evidence before me, or that I were to accept this evidence from other cases as being evidence in this case, this does not conclude the matter.

[74] The question before me is not whether the maintenance logs or equivalent information is first- or third-party disclosure for the immediate purpose of challenging the reliability of the IntoxEC/IRII readings.

[75] The question is whether this information is first or third-party disclosure for the purpose of rebutting the presumption of accuracy.

[76] There is a difference. The first prong of s. 258(1)(c) was held to be constitutional on the basis that there remained an ability of counsel for an accused to adduce evidence that the machine was not operated properly or was malfunctioning at the time the tests were taken.

[77] If the presumption of accuracy is rebutted, then the Crown must prove the reliability of the readings by calling expert evidence. The defence then has the option to adduce its own evidence that raises a reasonable doubt about the reliability of the readings.

[78] For such a defence, counsel does not need to establish that the machine was malfunctioning or was not operated properly. Counsel would be able to raise a reasonable doubt by adducing evidence of consumption, such as that used in the *Carter* defence (para. 69 ***St-Onge Lamoureux***).

[79] Obviously, Parliament in enacting s. 258(1)(c) contemplated that there would be a means by which a blood-alcohol reading in excess of .08 could be challenged by an accused.

[80] One way to rebut the presumption of accuracy is to show that the machine was not operated properly. That can be done through an examination of what took place at the time that the breath samples were obtained. For example, was the solution within its expiry period, did the operator comply with observation requirements and so forth.

[81] The other way was being able to show that the machine was malfunctioning. ***St-Onge Lamoureux*** repeated several times that access to maintenance logs was one way an accused could do so.

[82] I accept that the Court in ***St-Onge Lamoureux*** was dealing with a constitutional issue and was not primarily focused on disclosure issues and what exactly could cause a machine to malfunction. Nevertheless, the Court placed maintenance at the forefront of the kind of issue that could be relevant to whether the machine was malfunctioning and to the constitutionality of the provision.

[83] While given how the issue of maintenance of the machine was raised and discussed in ***St-Onge Lamoureux***, I do not believe that I am necessarily bound by *stare decisis* to therefore find that disclosure of maintenance logs as part of ***Stinchcombe*** disclosure was mandated by the Court, I am not inclined to so easily find that the Court was wrong in its comments on the relevance of maintenance logs, in particular with respect to their ability to rebut the presumption of accuracy.

[84] I am not satisfied that the Court would necessarily have stated otherwise were the issue before them today.

[85] I note that the ***St-Onge Lamoureux*** decision was argued in October 2011 and released in November 2012. The Alcohol Test Committee Position Paper was released several months prior to the Court releasing its decision. I have no information as to whether the Court was ever apprised of this additional information or whether, if so, it would have altered anything in the decision.

[86] So while perhaps differing from the dissent in ***Vallentgoed*** and the judgment in ***Fitts*** on the point of *stare decisis* in the strict sense, I am nonetheless strongly of the opinion that the current circumstances are not so differently informed that I would depart from the reasoning and conclusions in ***St-Onge Lamoureux***.

[87] Parliament obviously meant for the inclusion of the potential for the machine to malfunction to have meaning. If all that matters is the time of testing results as evidenced by the breath ticket printout (para. 49 ***Vallentgoed, Worden*** paras. 23, 24, 80), how could it ever be possible, on the expert evidence accepted in other courts, for the machine to malfunction and there nevertheless be a prosecution of a charge under s. 253(1)(b).

[88] According to this expert evidence, if there is a malfunction during testing the machine will detect the malfunction and therefore not provide a blood alcohol reading. The malfunction will be apparent on the breath ticket printouts.

[89] If Parliament wishes to amend s. 258(1)(c) to remove malfunctioning as a possible way to rebut the presumption, they are able to do so. That would then become an issue of constitutionality of the provision. Until such time however, it should be presumed that meaning, in a practical sense, should be given to the word.

[90] This is perhaps a simplistic view, but I am unable to conceptualize a circumstance where there could be a malfunction of the machine that nevertheless produced a purportedly valid breath sample, that was, in fact, inaccurate. Apparently, according to the evidence relied on by the majority in ***Vallentgoed*** and in ***Jackson***, and the Court in ***Worden***, that is impossible. There may, in fact, be such circumstances, but if there are I am not aware of them.

[91] On what basis could Crown counsel commence a prosecution for a s. 253(1)(b) charge if Crown was aware that the breath tickets and hence the Certificate of Analysis were clearly deficient?

[92] Counsel for Mr. Drummond submits that evidence of improper maintenance, in and of itself, rebuts the presumption of accuracy in s. 258(1)(c). I would think, however, that there would need to be some evidence before the Court, at a minimum, as to whether the maintenance was in fact improper.

[93] There remains the question as to whether improper maintenance in and of itself, can rebut the presumption, without some evidence from an expert that malfunctioning of the machine could have resulted from the improper maintenance. The evidence relied on in ***Jackson***, ***Vallentgoed*** and ***Worden*** is that improper maintenance will not impact upon the accuracy of the readings, assuming everything appears to be working properly

at the time of testing and the obtaining of the breath samples, assuming proper operation of the device. There nonetheless remains a question as to whether, however, improper maintenance could lead an accused to pursue other avenues of disclosure in efforts to raise a question as to whether the machine was malfunctioning.

[94] If I were to accept defence counsel's submission that improper maintenance will automatically rebut the presumption of accuracy, without any evidence that this improper maintenance could cause the machine to malfunction, notwithstanding the expert evidence in other cases pointing otherwise, effectively, I would be finding that there is a presumption of rebuttal upon any evidence of improper maintenance. This is concerning and I recognize the validity of the position expressed in ***Jackson***, ***Vallentgoed*** and ***Worden*** that doing so and requiring the disclosure of maintenance logs as first-party disclosure could actually result in a requirement to disclose irrelevant material as to the accuracy of the breath results.

[95] I cannot resolve these issues on the evidence before me. I do not believe, however, that I am required to do so.

[96] I find myself in general agreement with the dissent in ***Vallentgoed***, in particular, with paras. 84-86.

[97] I also find myself in agreement with much that was stated in ***Fitts*** and the conclusion Paciocco J. reached with respect to at least some maintenance records being subject to the first-party disclosure regime.

[98] The presumption of accuracy in s. 258(1)(c) was deemed constitutional because of the ability of an accused to raise issues related to whether the machine was operated improperly or was malfunctioning at the time that the breath samples were obtained.

[99] The Supreme Court in ***St-Onge Lamoureux*** stressed the ability of an accused to have access to maintenance records for the machine, in order to rebut the presumption of accuracy, as part of the right to make full answer and defence. The Court was not operating in a vacuum in regard to any potential relevance of maintenance information.

[100] I am not prepared to so readily set aside the reasoning of the Court in ***St-Onge Lamoureux*** in this regard, notwithstanding what the expert evidence was in other cases and what the Alberta and Ontario Appellate decisions of ***Vallentgoed*** and ***Jackson*** have decided.

[101] I believe that, as stated by Paciocco J. in ***Fitts***, a narrow interpretation of the disclosure requirements of the Crown should be eschewed in favour of a broad approach. I also agree with Rowbotham J.A., however, that there are limits to the disclosure that the Crown should be required to provide as first-party disclosure, and that the disclosure requirement should be limited to “the results of all inspections and documentation of the maintenance history including records of parts replaced and approved modifications to hardware and software”.

[102] This is the documentation I require the Crown to disclose as part of the first-party disclosure requirement in this case.

[103] The approach to disclosure should be a principled one. I would expect that the normal practice would be to keep a maintenance log with each breathalyser device and that this log would not normally be extensive in nature, thus making disclosure of the log not particularly onerous. The ease with which such disclosure could be provided is not, however, in and of itself, a reason to require disclosure of these logs. It is not the relative ease with which disclosure should be provided; it is whether the disclosure sought falls within the first-party disclosure regime.

[104] In my opinion, the reasoning of the Court in ***St-Onge Lamoureux*** provides the requisite foundation for a principled approach to require that the maintenance records that I have ordered be disclosed. Until either Parliament alters the relevant legislation to state otherwise, or the Supreme Court of Canada, the Yukon Court of Appeal or the Yukon Supreme Court state otherwise, I hold that the maintenance records for a breathalyzer machine in the Yukon, in particular the results of all inspections and documentation of the maintenance history including records of parts replaced and approved modifications to hardware and software, is first-party disclosure.

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COZENS T.C.J.