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When the Courts Close One Door, They May Open Many More: Maintenance Logs and the Potential Implications of an Appeal in *R v Vallentgoed*

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Case Commented On: *R v Vallentgoed*, 2016 ABCA 358 (CanLII)

Following the recent Alberta Court of Appeal decision in *R. v. Vallentgoed*, 2016 ABCA 358 (CanLII), it appears that Canada's impaired driving laws may be before the Supreme Court of Canada (SCC) once again – this time, only four years removed from the last major case to be decided by the SCC in this area: see *R. v. St-Onge Lamoureux*, 2012 SCC 57, (CanLII).

Vallentgoed featured two separate cases that were tried together as "test" cases: both Mr. Vallentgoed and Mr. Gubbins were charged with impaired driving and requested various maintenance records as part of their disclosure requests from the Crown. The question before the Court on both appeals pertained to the Crown disclosure obligations of certain maintenance records for the breathalyzer instruments (also called "approved instruments") used every day in impaired driving investigations across the country.

In a split 2-1 decision, with Justice Rowbotham dissenting, the Court of Appeal held that while time-of-test records of the approved instruments are clearly relevant and must be disclosed to an accused person, historical maintenance records of the instruments are not subject to the same disclosure obligations. Justice Rowbotham found that an instrument's maintenance log (which is a summary of all the work/repairs done on an instrument since it was brought into use) constitutes first party disclosure and must be disclosed as part of the standard disclosure package sent by the Crown. The majority (Justices Slatter and Berger) held it was third party disclosure, and not subject to the Crown's *Stinchcombe* disclosure obligations (see *R. v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 (SCC)). As the Court of Appeal was split in its decision, there will be an appeal as of right to the SCC, should the appellant wish to exercise that right.

Relevant Statutory Provisions

Canada's impaired driving legislation is set out in sections 253 to 258 of the *Criminal Code*, RSC 1985, c C-46. Section 253 states:

> **253 (1)** Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> > **(a)** while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

> **(b)** having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred milliliters of blood.

Section 253 sets out two separate offences for impaired driving (although an accused person cannot be convicted on both, based on the rule against multiple convictions for offences arising out of the same transaction, set out in *Kienapple v. R.*, [1975] 1 SCR 729, 1974 CanLII 14 (SCC)).

1. A court can find a person guilty if it is satisfied beyond a reasonable doubt that the person's ability to operate a motor vehicle is impaired (s 253(1)(a)); and
2. A court can find a person guilty if the person's blood alcohol exceeds eighty milligrams of alcohol in one hundred milliliters of blood, which is most often measured using an approved instrument at a police detachment (s 253(1)(b)).

The *Vallentgoed* decision, like many before it, is concerned with the instruments that are used to convict under section 253(1)(b) of the *Criminal Code*. The *Code* contains certain statutory provisions related to these instruments. In section 254, the *Code* defines an "approved instrument" as being any instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the person's concentration of alcohol in their blood.

In section 258, the *Code* states that if the Crown can prove that certain preconditions have been met, the "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 were 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…" Thus, the reading displayed by the instrument is presumptively reliable and is essentially incontrovertible, barring evidence being tendered to show that the machine was malfunctioning and that the malfunctioning caused the machine to give an inaccurate reading.

Thus, in understanding the statutory "shortcut" that the Crown is given through section 258 of the *Code*, and the underlying presumption of reliability of the instrument readings, one can see why the maintenance records of these instruments is relevant in criminal proceedings. If we are going to rely on these readings as being presumptively accurate, then we had better be sure that these machines are working properly.

The Long, Windy Road to *Vallentgoed*

As the Court noted in para 2, there has been considerable uncertainty and inconsistency in trial court decisions on the obligation of the Crown to disclose maintenance records for approved instruments, especially following the SCC's decision in *St-Onge Lamoureux*, which is discussed below.

By way of historical background, in 1969 Parliament made it a criminal offence to operate or have care or control of a motor vehicle while one's blood alcohol level exceeded .08 (over 80) and made it mandatory under the *Code* to provide breath samples for analysis. Parliament further introduced presumptions (of accuracy and identity) that would apply if certain preconditions were met. This had the effect of making it easier for the Crown to prove that a person had operated or had care or control of a motor vehicle while their blood alcohol exceeded .08.

The presumption of accuracy took the form of a certificate by the breath technician who was present when the samples were taken. The certificate, which contains the readings on the approved instrument, was presumed to provide an accurate determination of a person's blood alcohol content at the time the breath samples were taken. In 1997, Parliament established a second presumption that a blood alcohol level that exceeds .08 at the time of analysis is presumed to have exceeded .08 at the time when the offence is alleged to have been committed. This presumption was upheld in *R. v. Boucher*, 2005 SCC 72 (CanLII).

Prior to amendments to section 258 in 2008, the provision stated that the presumptions could be rebutted by producing "evidence to the contrary", which the Ontario Court of Appeal interpreted as meaning that the evidence of the accused person, in combination with an explanation by a toxicologist as to the implications of that accused person's consumption, could be tendered as "evidence to the contrary" in order to raise a reasonable doubt about the results of the breathalyzer readings: see *R. v. Carter*, 1985 CanLII 168 (ON CA). This came to be known as the "Carter defence", and was employed frequently to "beat the test."

The strategy for this approach was that an accused person would testify, for example, that alcohol had been consumed just prior to the test (known as "bolus drinking"), which would lead to a reading that was unrepresentative of their blood alcohol content at the time of driving. Moreover, a toxicologist would also testify that the blood alcohol content of the accused person given their consumption, weight, drinking habits, etc., was lower than the instrument displayed. The toxicologist would run a test with reproduced conditions in a controlled environment and the findings would be then tendered as "evidence to the contrary."

In 2008, Parliament largely cut out the "Carter defence" by amending section 258 to require an accused, who wishes to rebut the presumption of accuracy of the instrument reading, to (1) raise a reasonable doubt as to the malfunctioning of the instrument, (2) show that the malfunction affected the readings, and (3) show that their blood alcohol content would not have exceeded the legal limit at the time. Thus, while the "Carter defence" could still be relevant for point #3, an accused person still has the burden of presenting evidence on the first two points. But how could an accused person have information on the functional capabilities of the machine they blew into? In *St-Onge Lamoureux*, the Court held: "The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence." (at para 78)

Thus, following the decision in *St-Onge Lamoureux*, the maintenance records of these approved instruments were more frequently requested by accused persons to rebut the presumption of accuracy contained in section 258. In Alberta, the Court of Queen's Bench held in *R. v. Kilpatrick*, 2013 ABQB 5 (CanLII) at para 81 that the instrument's maintenance logs are "fruits of the investigation" and thus constitute first party disclosure that must be disclosed by the Crown where an approved instrument is utilized. The Court of Appeal denied the Crown's leave to appeal in *Kilpatrick*, (2013 ABCA 168 (CanLII)), because the evidentiary record in the case was sparse and there was a lack of expert evidence to challenge the findings in the court below.

The *Vallentgoed* Decision

What Records Were at Issue in this Case?

Following the *Kilpatrick* decision, Alberta Justice began regularly disclosing time-of-test records related to the instruments as part of their *Stinchcombe* disclosure obligations. These time-of-test

records are often voluminous, including documents that provide details of the actual breath samples conducted, test records, the certificate of analyses, an affidavit of service of the certificate of analyses, and certificates of annual maintenance, among other documents. At issue in *Vallentgoed* was whether the Crown was obliged to **also** disclose historical maintenance records of the approved instruments.

The Real Issue – Are Records Other Than Time-of-Test Ones First Party or Third Party Disclosure?

Both the majority judgment and dissenting opinion spent considerable time discussing whether historical maintenance records constituted first party disclosure – which must be disclosed as part of the Crown's *Stinchcombe* obligations – or third party disclosure, which are subject to a separate application by the defence.

The majority judgment confirmed that it has been clear since *Stinchcombe* that a person charged with a crime is entitled to disclosure of non-privileged documents that are relevant to making full answer and defence to the charge (at para 32). The appeals turned on whether these historical maintenance records constituted "fruits of the investigation", where the onus lies on the Crown to disclose the relevant documents. The majority held that: "It follows that only maintenance records for the approved instrument that are contemporaneous with the criminal charge are part of the "fruits of the investigation"…" (at para 47, emphasis added). The majority interpreted *St-Onge Lamoureux* as follows:

> 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 defense 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 defense. 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. (at para 53, emphasis in original)

Turning to the issues raised in these appeals, the majority held (at para 72) that the uncontradicted expert evidence was that the historical maintenance records were irrelevant to proving the accuracy or inaccuracy of any particular test. The majority was satisfied that the instruments contained so many checks and balances that were built into them that the chances of an undetected malfunction was "extremely remote" (at para 75). Thus, the majority dismissed the appeals and concluded that the standard disclosure package, which disclosed time-of-test records, was sufficient to discharge the Crown's *Stinchcombe* obligations.

I found Justice Rowbotham's dissenting opinion particularly interesting, as she seemed to disagree on two central findings made by the majority. The first related to what *St-Onge Lamoureux* actually decided. In relation to the relevance of maintenance records, Justice Rowbotham disagreed that the discussion of maintenance records was "peripheral" to the Court's opinion in *St-Onge Lamoureux* (at para 101). In her view, the SCC's specific reference to

"maintenance" of the instrument, which is distinct from "operation" insofar as maintenance suggests matters prior to or after the operation of the instrument, was a signal by the SCC that the relevance of the maintenance records was an integral part of its analysis. In *St-Onge Lamoureux*, the SCC held that an accused person may request the disclosure of any relevant evidence that could include a maintenance log that shows the instrument was not maintained properly or on admissions by a technician that there had been erratic results on that instrument (at para 78). Justice Rowbotham interpreted this passage to infer that the SCC's decision in *St-Onge Lamoureux* "opened the door" to the disclosure of some maintenance records (at para 105) that went beyond solely the disclosure of time-of-test records.

The second point related to statements made in para 78 of the majority judgment related to whether disclosure of historical maintenance records would create a slippery slope where "requesting disclosure of the maintenance logs will only generate requests for more irrelevant records…" In that same section, the majority rejected the argument that because the production of the historical maintenance records did not involve much effort on the part of the Crown, they should therefore be produced.

Justice Rowbotham examined both the *Stinchcombe* decision and the SCC's later ruling in *R. v. McNeil*, 2009 SCC 3 (CanLII), to find that the Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant to the prosecution or the defence. While the Crown argued that the historical maintenance records were in the possession of a third party and not the Crown, Justice Rowbotham stated (at para 120):

> It seems that whether applying paragraph 48 of *St-Onge Lamoureux* or the bridging the gap principle from *McNeil*, there is a logical result: the Crown is obliged to provide as *Stinchcombe* disclosure the maintenance log of the approved instrument. The maintenance log is a short document. There are fewer than 200 approved instruments in Alberta. The task is not monumental and, as the appeal judge noted, requiring an *O'Connor* application in each case "would entail delay and consume significant Crown and defence resources ... [which] cannot be in the interests of justice": para 39. It may be that the maintenance logs could be maintained and updated electronically, and made available as required.

In her dissenting opinion, Justice Rowbotham did not find that all historical maintenance records constituted first party disclosure, but that the maintenance log, which summarizes all the maintenance that has been done to the approved instrument in the preceding years, is relevant and required so that an accused person may try to rebut the presumption of accuracy contained in section 258 of the *Code*.

Where To From Here?

Based on Justice Rowbotham's dissenting opinion, there will be an appeal as of right for Mr. Vallentgoed, though she only allowed Mr. Gubbins' appeal in part, and therefore it remains to be seen whether there will be an appeal to the SCC. Earlier this year, the SCC denied leave to appeal from the Ontario Court of Appeal's decision in *R. v. Jackson*, 2015 ONCA 832 (CanLII), which dealt with the same issue of disclosure of maintenance records of an approved instrument in Ontario. The Ontario Court of Appeal rejected Mr. Jackson's appeal for similar reasons as the

majority used in *Vallentgoed*. On June 30, 2016, the SCC dismissed Mr. Jackson's application for leave to appeal with no reasons given: *David A. Jackson v. Her Majesty the Queen, et al.*, 2016 CanLII 41073 (SCC). It remains to be seen whether there will be an appeal to the SCC in *Vallentgoed* and whether the Court will flesh out what it meant in *St-Onge Lamoureux* regarding the relevance of various maintenance records in impaired driving cases.

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