

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Jackson, 2015 ONCA 832

DATE: 20151202

DOCKET: C58751 & C58754

LaForme, Watt and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

The Ottawa Police Service

Appellant

and

David Jackson

Respondent

Michael Fawcett and Philip Perlmutter, for the appellant Crown

Vincent Westwick and Hugh O'Toole, for the appellant Ottawa Police Service

Howard L. Krongold, for the respondent David Jackson

Paul Burstein, Jonathan Rosenthal and Eric Neubauer, for the intervener
Criminal Lawyers' Association

Christopher Diana and Amal Chaudry, for the intervener Commissioner of the
Ontario Provincial Police

Heard: March 23, 2015

On appeal from the refusal of Justice John M. Johnston of the Superior Court of Justice, dated April 7, 2014 to quash the disclosure order made by Justice Jack D. Nadelle of the Ontario Court of Justice, dated August 6, 2013.

Watt J.A.:

[1] A police officer asked David Jackson to do something. Twice. Nothing complicated. Just blow into a device. So David Jackson did. The first time he failed. Then he talked to a lawyer. The second time, he provided evidence against himself.

[2] David Jackson was charged with impaired operation of a motor vehicle and operation of a motor vehicle having consumed alcohol so that the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[3] David Jackson got the usual disclosure provided by the prosecutor in alcohol-driving cases. But David Jackson wanted more. He wanted to find out about the history and performance of the device that measured his blood alcohol concentration. So he asked the trial judge to require the prosecutor to provide the records he sought.

[4] The trial judge ordered disclosure. A judge of the Superior Court of Justice refused to quash the trial judge's order. The police service that maintains the records and the Crown appeal even though the records have been disclosed.

[5] These reasons explain why I would allow the appeal and quash the disclosure order.

THE BACKGROUND FACTS

[6] The circumstances that gave rise to the apprehension of David Jackson and the demands made upon him by the arresting officer are commonplace in alcohol-driving prosecutions and warrant little attention here. For current purposes, I assume the applicable legal and constitutional requirements relating to the stop, demands and provision of samples were met.

The Apprehension

[7] A police officer saw a car drift into an adjacent traffic lane three times. The driver then slowed down, for no apparent reason. The officer signalled the driver to pull over to the side of the road.

[8] The driver was David Jackson. His eyes were glassy. His breath smelled of alcohol.

The ASD Demand

[9] The officer required David Jackson to provide a sample of his breath to enable its analysis by means of an approved screening device (“ASD”). David Jackson complied. He failed.

The Breathalyzer Demand

[10] The officer arrested David Jackson and demanded that he provide samples of his breath that would enable a proper analysis of it to determine the concentration of alcohol in his blood.

[11] David Jackson spoke to a lawyer. He provided samples of his breath into an Intoxilyzer 8000C. Both samples revealed blood alcohol concentrations in excess of 80 milligrams of alcohol in 100 millilitres of blood.

The Offences Charged

[12] David Jackson was charged with impaired operation of a motor vehicle and operation of a motor vehicle with a prohibited blood alcohol concentration. The Crown elected to proceed summarily.

The Disclosure Application

[13] David Jackson applied to the designated trial judge before trial for an order requiring disclosure of:

- i. service records;
- ii. usage and calibration records; and
- iii. downloaded data bracketing the breath tests of David Jackson

from the Intoxilyzer 8000C used in David Jackson's breath tests.

[14] The trial judge reviewed the affidavits and considered the *viva voce* testimony of two toxicologists. He heard argument from the Crown and trial counsel for David Jackson. The Ottawa Police Service (“OPS”), the holder of the records sought, did not participate in the application.

[15] The trial judge concluded that the records sought were governed by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and ordered their disclosure.¹

The Motion to Quash

[16] The Crown and the OPS asked a judge of the Superior Court of Justice (“the motion judge”) to quash the disclosure order made by the trial judge.

[17] The motion judge rejected the submission that the OPS was not entitled to participate in the motion because it had not appeared before the trial judge. The motion judge agreed that the *Stinchcombe* regime governed disclosure, found that the trial judge had committed no jurisdictional error and affirmed the decision ordering disclosure.

The Disclosure of the Records

[18] In accordance with the decisions of the trial and motion judge, the OPS disclosed the records to trial counsel for David Jackson.

¹ The trial judge reduced the request for downloaded data from 50 tests before and after the tests on David Jackson to 25 tests before and after.

THE GROUNDS OF APPEAL

[19] The OPS and Crown appeal. They allege that the motion judge erred in law in finding that the trial judge did not commit jurisdictional error:

- i. in ordering the requested disclosure;
- ii. by concluding that the requested records fell within the Crown's first party (*Stinchcombe*) disclosure obligations;
- iii. by concluding that the requested records were potentially relevant to the case against David Jackson; and
- iv. by violating the principles of fundamental justice.²

[20] The Chief Justice gave leave to the Ontario Provincial Police ("OPP") and Criminal Lawyers' Association ("CLA") to intervene on the appeal.

THE PRELIMINARY ISSUES

[21] David Jackson ("the respondent") raises two preliminary issues that require brief consideration. The first has to do with the right of the OPS to appeal the decision of the motion judge. The second concerns mootness.

Preliminary Issue #1: The Right of Appeal of the OPS

[22] A brief reminder of the procedural history of the disclosure request will set the stage for an assessment of this objection.

² The OPS particularizes this violation as a failure to hear the OPS on the motion. It also alleges error in the motion judge's finding that the OPS was properly served at trial and his failure to properly consider the resources implication argument advanced by the OPS.

The Disclosure Motion

[23] The OPS held the records that the respondent sought. Those records formed no part of the information provided by the OPS to the Crown for disclosure under *Stinchcombe*.

[24] The application to the trial judge was styled “O’Connor/*Stinchcombe* Application”. The style of cause made no reference to the OPS, the record holder. No *subpoena duces tecum* was served on the OPS as required by *R. v. O’Connor*, [1994] 4 S.C.R. 411.

[25] The Notice of Application was left with the Court Liaison section of the OPS. No proof of service was provided to the trial judge. The parties differ about the practice and effect of the service that occurred here.

[26] The OPS did not participate in the motion before the trial judge. No one mentioned their absence. In particular, the Crown did not query the absence of a *subpoena duces tecum* or suggest that the record holder should be represented.

The Motion to Quash

[27] The respondent took issue with the right of the OPS to move to quash the disclosure order. He contended that the OPS chose not to participate in the motion before the trial judge and, accordingly, was disentitled to apply for the discretionary remedy it sought before the motion judge.

[28] The motion judge was satisfied that the OPS had been properly served with the Notice of Application at trial. The motion judge held that the failure of the trial judge to hear submissions from the OPS did not entitle the police service to a new hearing before the trial judge. But the failure of the OPS to appear at trial did not disentitle it to seek to quash the disclosure order. As a third party, the disclosure order was final as far as the OPS was concerned. The OPS was therefore entitled to challenge that order by invoking the extraordinary remedy jurisdiction of the Superior Court of Justice.

The Positions of the Parties

[29] The respondent contends that little reason exists for entertaining an appeal by the OPS. The motion judge found as a fact that the OPS had been properly served with the *O'Connor/Stinchcombe* application. The failure of the OPS to attend the hearing of the application was of its own doing. And since the motion judge found that the documents sought fell within the first party disclosure regime, the OPS' complaints about the lack of service of a *subpoena duces tecum* are of no consequence.

[30] The respondent points out that the remedy the OPS sought before the motion judge is discretionary. Its purpose is to prevent unfairness to a third party who has no right of appeal from an order that is final so far as that third party is

concerned. But there is no scent of unfairness here and thus no basis on which to entertain the appeal.

[31] The position of the OPS is straightforward. It was a party before the motion judge, a third party record-holder entitled to challenge the jurisdiction of the trial judge to make the order by pursuing the extraordinary remedy of *certiorari*. The motion was dismissed. Section 784(1) of the *Criminal Code*, R.S.C., 1985, c. c-46, authorizes an appeal from a decision refusing the relief sought in proceedings by way of *certiorari*. Case closed.

The Governing Principles

[32] The principles that control the disposition of this objection are those that govern first instance disputes about disclosure and those that authorize review of decisions made at first instance.

[33] First, disputes about disclosure. The initial application before the trial judge invoked both *O'Connor* and *Stinchcombe* as the basis for the order sought.

[34] Where the disclosure dispute relates to information in the possession or control of the prosecuting agency, the *Stinchcombe* regime applies and requires service of the application and supporting materials on the prosecutor.

[35] Where the disclosure dispute concerns production of materials in the possession or control of a third party, *O'Connor* requires service of the application and supporting materials on the Crown, (where applicable) the person

who is the subject of the records, the third party record-holder and anyone else statutorily entitled to notice. A *subpoena duces tecum* must be served on the record-holder: *O'Connor*, at paras. 135-36. The purpose of service on the record-holder is to provide the record-holder with notice and the opportunity to be heard.

[36] Second, reviewability. Appeal routes in criminal proceedings vary depending on whether the appeal is being pursued by a party to the proceedings or by a third party.

[37] The parties – the accused and the Crown – must await the end of the trial to appeal the orders.

[38] Not so with third parties who can invoke two procedural avenues to appeal court orders affecting them before the end of the trial: *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536, at para. 23. Where the order is that of a provincial court judge, a third party may challenge it through an enlarged writ or an order in lieu of *certiorari*. Further appeals to the provincial appellate court and Supreme Court of Canada follow the regular channels of our judicial system: *L.L.A. v. A.B.*, at para. 24. Section 784(1) of the *Criminal Code* authorizes an appeal to this court “from a decision granting or refusing the relief sought in proceedings by way of...*certiorari*”.

[39] When a third party invokes the extraordinary remedy jurisdiction of the superior court and seeks an order in lieu of *certiorari*, the scope of review

includes not only jurisdictional error, but also error of law on the face of the record: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 864-65; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 57; *R. v. N.S.*, 2010 ONCA 670, 262 C.C.C. (3d) 4, aff'd 2012 SCC 72, 3 S.C.R. 726, at para. 23.

The Principles Applied

[40] I would not give effect to the respondent's submission that we should not entertain an appeal by OPS because of its failure to appear before the trial judge. I reach this conclusion for four reasons.

[41] First, the original application was styled "*O'Connor/Stinchcombe* Application" revealing some uncertainty on the part of the respondent about whether the records sought were subject to the first party disclosure regime of *Stinchcombe* or the third party scheme of *O'Connor*.

[42] Second, the respondent did not follow the procedure mandated by *O'Connor* for third party records. The respondent did not serve a *subpoena duces tecum* on the OPS as the third party record-holder. That the OPS chose to regard service upon it as deficient is neither here nor there to its status as a third party record-holder.

[43] Third, as the putative third party record-holder, the OPS was entitled to invoke the extraordinary remedy jurisdiction of the superior court of criminal

jurisdiction to quash the order made by the trial judge based on either jurisdictional error or error of law on the face of the record.

[44] Fourth, as an unsuccessful applicant before the superior court of criminal jurisdiction, the OPS is entitled to invoke s. 784(1) of the *Criminal Code* to appeal to this court.

Preliminary Issue #2: Mootness

The Positions of the Parties

[45] The second threshold issue put in play by the respondent is mootness. The records sought and ordered disclosed by the trial judge have been provided. No *lis inter partes* remains. No need for a decision.

[46] In brief submissions on the issue, the respondent acknowledges but urges us not to exercise our discretion to hear a moot appeal. The issue is bound to arise again in another prosecution for an alcohol-driving offence. Prosecutions of these offences are commonplace. They occupy a prominent place on dockets of the Ontario Court of Justice throughout the province.

[47] Here, the respondents continue, the appellants complain about the adequacy of the trial record to afford a proper foundation for a determination of the core dispute. What is more, the appeal relates to an interlocutory order that can and should await a decision after trial on the merits at which time an appeal can be taken by the Crown in the event of an acquittal.

[48] Further, the respondent adds, the appellants have invoked the extraordinary remedy jurisdiction of the superior court of criminal jurisdiction. These remedies do not issue as of right, but only through the exercise of discretion. All the more reason not to decide a moot appeal.

[49] The appellants say the interests of justice warrant a decision despite mootness. The root issue concerns the disclosure and relevance of records frequently sought from trial courts in alcohol-driving prosecutions. Decisions in the trial courts are conflicting. Alcohol-driving prosecutions predominate on trial lists in the Ontario Court of Justice. Appellate precedent is lacking, but essential for the due administration of justice.

The Governing Principles

[50] The doctrine of mootness, of general but not unyielding application, is an aspect of a general policy or practice that a court may decline to decide a case that raises a hypothetical or abstract question. The doctrine applies when a court's decision will not, in effect, resolve some controversy that affects or may affect the rights of the parties. A *lis inter partes* must exist not only when the proceedings commence, but also when the court is assigned the task of deciding it: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353; *Mental Health Centre Penetanguishene v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 35.

[51] From time to time, the doctrine of mootness surrenders, admitting of a discretion to depart from rigid application to permit a court to hear and determine a case in which the *lis inter partes* has dissolved: *Borowski*, at p. 353; *Mental Health Centre*, at para. 36.

[52] When one party urges mootness and seeks to disentitle another party to a hearing or decision, a court must determine first whether the essential tangible and concrete dispute – the *lis inter partes* – has disappeared and the issues have become academic. An affirmative response at this first step requires the court to determine next whether it should exercise its discretion to hear and decide the case: *Borowski*, at p. 353; *Mental Health Centre*, at para. 36.

[53] To decide whether to exercise its discretion to hear and determine an appeal that is moot, a court should consider the extent to which each of the three distinct rationalia for the mootness doctrine is present:

- i. that a court's competence to resolve legal disputes is rooted in the adversary system that helps guarantee that issues are well and fully argued by parties who have a stake in the outcome;
- ii. the concern for judicial economy; and
- iii. the need for the court to demonstrate an awareness of its proper law-making function and the limits of that function so as to avoid intrusions into the role of the legislative branch: *Borowski*, at pp. 358-62.

The Principles Applied

[54] Several factors persuade me that, despite its mootness, we should exercise our discretion to determine the substantive issues raised by the parties.

[55] First, the issues raised are of common occurrence in the prosecution of alcohol-driving offences. Proof that an accused's blood alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood is an essential element in every "over 80" prosecution. The usual mode of proof is by introduction of a Certificate of Analysis, a document that reports the results of an analysis of the accused's breath by an "approved instrument". The "approved instrument" is often, as here, an Intoxilyzer 8000C. In each prosecution involving this confluence of approved instrument and Certificate of Analysis, a disclosure or production request like that advanced here could be made.

[56] Second, the ruling is interlocutory, thus evasive of appellate review at the instance of either party – until the final adjudication on the adequacy of the Crown's proof.

[57] Third, the third party and intervener have a subsisting interest in clarifying which disclosure/production scheme governs these records. In the absence of a decision from this court, the conflicting decisions of trial courts afford no assistance to the record-holders who are left to the vagaries of judicial assignment.

[58] Fourth, we have had the benefit of full argument from the parties, the third party, and another record-holder which has been granted intervener status.

[59] Finally, despite some grumblings by the appellants, the record is adequate to make an informed decision on the critical issue in dispute.

ISSUES

Issue #1: Are the Records First Party Records Governed by *Stinchcombe*?

[60] This issue requires characterization of the records the respondent sought on the disclosure/production motion before the trial judge. A brief description of the records and reprise of the conclusions of the trial and motion judge will provide a suitable landscape for the discussion that follows.

The Records Sought

[61] The disclosure package initially provided to the respondent included records of the series of tests and checks executed by the Intoxilyzer 8000C to ensure that the instrument was in proper working order. The process includes:

- i. testing the ambient air for the presence of alcohol;
- ii. evaluating the integrity of the internal components of the instruments;
- iii. checking the calibration of the instrument against a standard alcohol solution; and
- iv. purging any lingering vapours.

Unless each quality control measure is completed successfully, the instrument will not permit a breath sample to be taken. The machine notifies the qualified technician conducting the breath test of any error. The problem must be resolved before a sample can be taken and reading provided.

[62] At trial, the respondent sought additional disclosure/production of:

- i. service records;
- ii. usage and calibration records; and
- iii. COBRA data – the results of previously and subsequently executed functions – relating to the 50 tests preceding and following the breath tests administered to the respondent.

These documents are not part of the initial disclosure package provided to those charged with alcohol-driving offences in which the Crown will be tendering a Certificate of Analysis as proof of an accused's blood-alcohol concentration at the time of the offence.

The Decision of the Trial Judge

[63] The trial judge received affidavit and *viva voce* evidence from two toxicologists, and submissions from trial counsel for the respondent and Crown. The OPS did not participate in this hearing.

[64] The trial judge concluded that production/disclosure of the records sought was governed by the first party disclosure regime of *Stinchcombe*. The trial judge, relying on passages in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3

S.C.R. 187, found that the approved instrument – the Intoxilyzer 8000C – was under the control of the Crown, which also maintained control over those who maintained and operated the instrument. Disclosure of the data requested was essential for the respondent to be able to challenge the Certificate of Analysis by adducing evidence to show a malfunction of the instrument or its improper operation. The respondent did not need to demonstrate a specific use of the records to obtain production/disclosure.

The Decision of the Motion Judge

[65] The motion judge affirmed the conclusion of the trial judge that production/disclosure of the records sought was governed by the first party disclosure regime of *Stinchcombe*. The motion judge considered production/disclosure necessary to permit the respondent to make full answer and defence for a variety of reasons, including to ensure that those in charge of the instrument were following best practices. The judge said that the records of tests administered to others could reasonably impact on the case against the respondent.

[66] The motion judge was also satisfied that the records sought were “likely relevant” although, having found them to be governed by *Stinchcombe*, he recognized that it was not necessary for him to consider, much less to find, “likely relevance” to confirm the trial judge’s order. The motion judge also rejected an

argument advanced by the OPS that the resources impact of the trial judge's decision was a relevant factor in determining the character of the records.

The Arguments on Appeal

[67] The appellants, supported by the intervener OPP, say that the trial judge and motion judge erred in characterizing the records sought as first party records subject to the disclosure regime put in place by *Stinchcombe*. They contend that the records should have been characterized as third party records governed by *O'Connor* and *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

[68] The Crown contends that the first party disclosure obligations imposed by *Stinchcombe* require that the information sought be in the possession or control of the Crown. By “the Crown” it is meant the Crown who prosecutes the case. All other state authorities, for these purposes at least, are third parties. This includes the police. Here, the records are in the possession of the police, thus not “the Crown” for the purposes of *Stinchcombe*. These are third party records governed by *O'Connor*.

[69] Further, the Crown says, the records sought would not fall within the Crown's *Stinchcombe* disclosure obligations even if they (the records) were in the Crown's possession or control. These records are *not* “fruits of the investigation” of the respondent. The records were not created or produced in connection with the investigation of the respondent or his offence. Neither the

investigating officer, who apprehended the respondent and made the ASD and approved instrument demands, nor the qualified technician, who administered the Intoxilyzer, created, consulted or even had access to the records. Indeed, some of the records were created during the investigation of others for offences similar to those allegedly committed by the respondent, but otherwise unconnected with them.

[70] In addition, the Crown points out, the motion judge applied the wrong standard in determining the nexus between the records sought and the malfunctioning or improper operation of the approved instrument when the tests were administered to the respondent. The standard was *not* whether the records could reasonably impact on the case against the respondent, the test applied by the motion judge, but whether the records were “obviously relevant” to that issue.

[71] The OPS characterizes the records sought as administrative records in the possession or control of a third party, not first party records in the possession of the prosecuting Crown. No correlative duty is imposed upon the OPS to deliver these records to the prosecuting Crown for disclosure because the records are not obviously relevant to the defence case. The mere fact that the records are in the possession of the OPS does *not* establish obvious relevance. Nor can any analogy to police misconduct records assist the respondent.

[72] The OPP adds that which disclosure/production regime governs should be decided based on principle, not expediency or wishful thinking about the utility of the information sought.

[73] The respondent, supported by the intervener CLA, resists any suggestion of error in the conclusion reached or reasoning undertaken by the trial and motion judges. The records sought are first party records governed by *Stinchcombe*. And that is the beginning and end of it.

[74] The respondent says that the first party disclosure regime applies to relevant non-privileged and otherwise disclosable information in the possession or control of the prosecuting Crown. In *St-Onge Lamoureux*, the Supreme Court of Canada held that the approved instrument, as well as the persons who maintain it, are under the *control* of the prosecuting Crown. It follows, according to the respondent, that records relating to the maintenance and operation of the improved instrument are also under the control of the prosecuting Crown. And so it is that the first party disclosure scheme of *Stinchcombe* governs, as the trial and motion judge correctly held.

[75] The respondent argues that the availability of these records as first party disclosure was integral to the decision in *St-Onge Lamoureux* upholding the statutory scheme that had been challenged as unconstitutional. The relevant passage is not *obiter* as the appellants suggest. The court held that an accused

could request disclosure of any relevant evidence reasonably available to present a real defence. The illustration of relevant evidence given by the court was the maintenance log for the approved instrument.

[76] Further, the respondent adds, the decisions of the trial and motion judges characterizing what was sought as first party records are consistent with the decision in *McNeil*. That decision requires the police and Crown to obtain and disclose information that meets the *Stinchcombe* standard once put on notice of its relevance, as was the case here. The material need not be “obviously relevant” for no such category exists. The term “obviously relevant” in *McNeil* was used to describe the relevance of the records sought there, not to impose a more stringent standard than would be the case with third party records.

[77] The intervener, CLA, supports the conclusions reached by the trial and motion judges. First party records are not limited to the fruits of the investigation or to records created by the investigating police agency. These records satisfy the relevance standard for disclosure purposes and are under the control of the prosecuting Crown. And that is enough to make them disclosable under *Stinchcombe*.

The Governing Principles

[78] To determine the applicable disclosure/production scheme depends on an application of the principles associated with each regime, as well as an

examination of the impact, if any, of *St-Onge Lamoureux* on those disclosure or production regimes.

First Party (Stinchcombe) Disclosure

[79] Under *Stinchcombe*, the Crown has a broad duty to disclose all relevant, non-privileged information in its possession or control to persons charged with criminal offences. Disclosure of this information allows the person charged to understand the case she or he has to meet and permits him or her to make full answer and defence to the charges: *Stinchcombe*, at pp. 336-40; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 11. The duty is triggered upon request without recourse to a court: *McNeil*, at para. 17.

[80] For the purposes of first party or *Stinchcombe* disclosure, the term “the Crown” refers to the prosecuting Crown only, not to all Crown entities, federal and provincial. All other Crown entities, including the police, are third parties: *Quesnelle*, at para. 11; *McNeil*, at para. 22. Apart from the police duty to supply the prosecuting Crown with the fruits of the investigation, records in the hands of third parties, including the police and other Crown entities, are generally *not* subject to the *Stinchcombe* disclosure rules: *Quesnelle*, at para. 11; *McNeil*, at para. 25.

[81] The assimilation of the police and Crown as a single entity for disclosure purposes is narrowly confined. Apart from the police duty to disclose to the

Crown the fruits of the investigation, the two are unquestionably separate and independent entities, not only in fact but also in law. The police investigate. The Crown decides whether, what, whom and how to prosecute: *McNeil*, at paras. 23, 25. Production of criminal investigation files involving third parties, at least as a general rule, falls to be determined on an *O'Connor* application. This is so at least in the absence of a nexus between the third party and subject investigation: *McNeil*, at para. 25.

[82] The *Stinchcombe* disclosure regime extends only to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly described as the "fruits of the investigation", that is to say, material gathered during the investigation of the offence with which the accused is charged: *McNeil*, at para. 23. Relevant information includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence: *McNeil*, at para. 17; *Stinchcombe*, at pp. 343-44.

Third Party (O'Connor) Production

[83] A separate disclosure/production scheme exists for records and information in the hands of third parties, strangers to the litigation. This scarcely surprises. After all, third parties are under no obligation and have no duty to

assist the parties in litigation or to disclose information to them: *O'Connor*, at para. 102.

[84] The third party scheme involves two steps or stages. It is initiated by service of a *subpoena duces tecum* on the third party record-holder, as well as a notice of application and supporting material on the record holder and prosecuting authority: *O'Connor*, at para. 134. The purpose of the *subpoena duces tecum* is to have the material requested brought to the trial judge who will determine whether and to what extent the material will be produced. The application sets out the grounds upon which production is sought. The supporting material seeks to establish the relevance of the material to an issue at trial including:

- i. the unfolding of the narrative;
- ii. the credibility of a witness;
- iii. the reliability of other evidence; or
- iv. the competence of a witness to testify: *O'Connor*, at para. 134; *McNeil*, at paras. 27, 33.

[85] For the purposes of this third party production regime, a record-holder need not be a complete stranger to the litigation. Recall that Crown entities, other than the prosecuting Crown, are third parties under this regime: *McNeil*, at para. 13. And this is so even though some records of the same entity may be subject to the first party disclosure scheme of *Stinchcombe*: *McNeil*, at para. 15.

The Decision in R. v. St-Onge Lamoureux

[86] At issue in *St-Onge Lamoureux* was the constitutional validity of certain amendments to *Criminal Code* provisions. Those amendments limited the evidence that could be adduced to rebut, or attempt to rebut, the presumptions of accuracy and integrity in connection with readings of blood alcohol concentrations contained in Certificates of Analysis tendered by the Crown to establish an essential element of an alcohol-driving offence.

[87] The amendments were enacted to fill what was perceived as a *lacuna* created by a previous decision that permitted an accused to adduce evidence of actual alcohol consumption, coupled with the expert opinion of a toxicologist about the implications of that consumption for the accused's blood alcohol concentration. This evidence was relied upon to rebut the presumptions of identity and accuracy.

[88] The amendments required the accused:

- i. to raise a doubt that the instrument was functioning and was operated properly;
- ii. to show that the malfunction or improper operation of the instrument resulted in the determination that the accused's blood alcohol level exceeded the legal limit; and
- iii. to show that the accused's blood alcohol level would not in fact have exceeded that limit at the time of the alleged offence: *St-Onge Lamoureux*, at para. 17

[89] The nature and scope of the evidence that might be considered relevant in rebuttal was not argued on the appeal in *St-Onge Lamoureux*. The court considered it inappropriate to rule on the specific limits of that evidence, but did suggest several pieces of evidence that could be provided to a person charged with operating or having the care or control of a motor vehicle with a prohibited blood alcohol concentration, including:

- i. the breathalyzer readings;
- ii. the qualified technician's certificate; and
- iii. the analyst's certificate concerning the sample of the alcohol standard: *St-Onge Lamoureux*, at para. 42.

The Principles Applied

[90] As I will explain, I would give effect to this ground of appeal. The records sought are third party records. Their production/disclosure is governed by *O'Connor*. They do not fall within the first party disclosure scheme of *Stinchcombe*. The reasoning that leads me to this conclusion involves several steps.

Factors Determining the Disclosure/Production Regime

[91] Two principal factors determine the disclosure/production regime that will apply when an accused seeks disclosure of something the Crown has not provided. The first has to do with the nature of the information of which

disclosure/production is sought. The second concerns who is in possession or control of that information.

[92] Turning first to the nature of the information. The descriptive “fruits of the investigation” accurately captures the subject-matter of first party/*Stinchcombe* disclosure. The term embraces relevant, non-privileged information related to the matters the Crown intends to adduce in evidence against an accused, as well as any information in respect of which there is a reasonable possibility that it may assist an accused in the exercise of the right to make full answer and defence. The information may relate to the unfolding of the narrative of material events, to the credibility of witnesses or the reliability of evidence that may form part of the case to meet.

[93] In its normal, natural everyday sense the phrase “fruits of the investigation” posits a relationship between the subject-matter sought and the investigation that leads to the charges against an accused. It refers to information acquired by means and in consequence of that investigation. The information includes, but is not co-extensive with, evidence, much less admissible evidence.

[94] The disclosure/production sought in this case falls beyond the boundaries of “fruits of the investigation”.

[95] In this case, a substantial component of the information sought consists of historical records of the operation of the same approved instrument during the

investigation of others for similar offences. These records have no association with the offence with which the respondent was charged and for which he faced trial. The information was not created, produced or even located during the investigation of the respondent and his alleged offences. The records played no role in the acquisition of any evidence available for proffer in the prosecution of the respondent. Indeed, much of it originates in the investigation of others for offences they are alleged to have committed at times and in places unrelated to the investigation of the respondent.

[96] Some support for this view that records created in investigations other than that relating to the offence charged are not “fruits of the investigation” may be found in *Quesnelle*. There, a police occurrence report not directly related to the charges against Quesnelle but involving the same complainant was held to be subject to the statutory third party records scheme known as the *Mills*³ regime.

[97] Next, it is necessary to determine *who* was in possession or control of the records.

[98] In this case, the records sought were *not* in the possession of the prosecuting Crown. The evidence is unequivocal. The records were generated by and in the exclusive control of the OPS. The OPS is a third party for these

³ *R. v. Mills*, [1999] 3 S.C.R. 668.

purposes. Their possession and control of the records sought does not engage the first party disclosure scheme of *Stinchcombe*.

The Impact of St-Onge Lamoureux

[99] The decision in *St-Onge Lamoureux* relied upon by the respondent and the intervener CLA does not mandate a different result. I reach this conclusion for several reasons.

[100] First, while it is fair to say that the *St-Onge Lamoureux* court considered the availability of additional disclosure about the reliability of the approved instrument as a relevant factor in its constitutional analysis, the court eschewed consideration of the nature and scope of evidence that might be considered in rebuttal and thus could be the subject of a disclosure request. Said in another way, *St-Onge Lamoureux* was not about disclosure.

[101] Second, *St-Onge Lamoureux* makes no reference to *McNeil* and thus to its clear distinction between information in the possession and control of the prosecuting Crown, which is critical to trigger the first party disclosure obligation, and information in the possession of other Crown entities that are third parties for disclosure purposes.

[102] Third, the paragraph of *St-Onge Lamoureux* upon which the respondents rely does not compel a finding that the records sought constitute first party disclosure. That passage states:

[48] The prosecution gains a clear, albeit limited, advantage from the requirement, since evidence to the contrary is limited to the real issue: whether the test results are reliable. The evidence to be tendered relates directly to *an instrument that is under the prosecution's control*. The prosecution must of course disclose certain information concerning the maintenance and operation of the instrument, but it is free to establish procedures for tracking how such instruments are maintained and operated. Moreover, *the prosecution has control over the people who maintain and operate the instruments*. [Emphasis added.]

[103] The underscored portions, which assign control over the approved instrument and those who operate and maintain it, do not sit comfortably with the distinction made in the disclosure context in *McNeil*, at para. 13, that “Crown entities other than the prosecuting Crown are third parties under the *O'Connor* production regime.”

[104] What is more, the conclusion expressed in paragraph 48 of *St-Onge Lamoureux* is flatly contradicted by the evidence in this case. Here, the records are in the exclusive possession and control of the OPS and *not* furnished to the Crown for disclosure or other purposes.

[105] Fourth, in a later passage in *St-Onge Lamoureux*, the court referred to *O'Connor*, the progenitor of the third party production regime, as the procedure to invoke to obtain remedies for non-disclosure:

[78] Although Parliament now requires evidence tending to establish a deficiency in the functioning or operation of the instrument, this does not mean that there are limits on the evidence that can reasonably be used by

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

[106] Finally, in its later decision in *Quesnelle*, the Supreme Court of Canada made it clear that for the purposes of “first party disclosure”, the term “the Crown” refers to the prosecuting Crown. All other Crown entities, including police, are “third parties for disclosure purposes.”

Issue #2: Are the Records “Obviously” or “Likely” Relevant?

[107] It is acknowledged that, as the trial and motion judges erred in their characterization of the records sought as first party rather than third party records, limited consideration was given to the “likely relevance” of the records in question. Nevertheless, it is important to consider whether what was sought was “likely relevant”, and thus capable of satisfying the first step of the *O'Connor* regime in warranting production to the trial judge.

[108] Satisfaction of the first step of *O'Connor* would not of course automatically entitle the respondent to production. Whether production would follow would depend on the trial judge’s assessment at the second stage of that test. And in

this case, the issue of whether production would have been ordered on application of the *O'Connor* regime is moot since the respondent obtained the records, albeit erroneously, under *Stinchcombe*.

[109] Despite the mootness of the issue, the parties acknowledge the conflicting state of the authorities in first instance courts and the desirability of some guidance on the disclosure/production issue to avoid needless protraction of proceedings that should be expeditious.

[110] The analysis below should also shed light on the role of the phrase “obviously relevant” within the disclosure context, a topic that was the subject of some disagreement in this appeal.

The Arguments on Appeal

[111] The appellants and the OPP say that motion judge applied the wrong standard to bring the records sought within the first party disclosure regime of *Stinchcombe*. To trigger the police duty to disclose to the Crown and the correlative obligation of the Crown to disclose to the defence, the records must have been “obviously relevant” to the respondent’s case. That such records “could reasonably impact on the case against” the respondent does *not* engage the first party disclosure obligations of the police and Crown.

[112] Further, the appellants and OPP submit that the records sought do not meet the “likely relevance” threshold under the *O'Connor* third party production

regime. The respondent has failed to establish any reasonable possibility that the records sought are logically probative to an issue at trial or to the competence of a witness to testify. The records have nothing to say about the unfolding of events, the credibility of any witness or the reliability of other evidence. Nothing said in *St-Onge Lamoureux* supports the conclusion that the records sought are “likely relevant”. And the report of the Alcohol Test Committee of the Canadian Society for Forensic Science, which ensures that all breath-testing equipment in Canada meets rigid specifications, makes it clear that what was disclosed, coupled with proper operation of the instrument, is conclusive evidence of a person’s blood alcohol concentration at the time of testing.

[113] The respondent and the CLA contend that the appropriate standard for first party disclosure is relevance. The phrase “obviously relevant” does not set a new, more demanding standard in relation to first party disclosure. To do so would make no sense since the standard would exceed the “likely relevance” standard at the first step of the third party production regime.

[114] The respondent and the CLA say that what was before the trial judge and motion judge provided a sufficient basis for each to find that what was sought was relevant. After all, *St-Onge Lamoureux* makes it clear that improper maintenance of an approved instrument, irrespective of its effect on the result, is sufficient to prove a malfunction or improper operation of the instrument.

Evidence to this effect satisfies the “likely relevant” threshold and should be produced.

The Governing Principles

[115] The term “relevant” is sprinkled throughout the disclosure/production context.

[116] In first party/*Stinchcombe* disclosure, “relevant” is characteristic of the material to be provided to an accused as “fruits of the investigation”. In addition, although it may not fall fairly within the ordinary sweep of “fruits of the investigation”, material that is “obviously relevant” to the defence case may need to be rustled up by the police, provided to the Crown and disclosed to the defence. Like the discipline records in *McNeil*. See *McNeil*, at para. 59.

[117] In the third party/*O’Connor* production setting, the phrase “likely relevant” designates the standard or threshold to be met at the first stage or step. Satisfaction of it entitles the applicant to have the records produced for review by the trial judge. Production to the applicant follows only where and to the extent that the trial judge considers it warranted after balancing several competing factors.

[118] A logical beginning is a consideration of the meaning of the terms “relevant” and “relevance”. And then its use in the disclosure/production schemes that control here.

The Meaning of “Relevant” and “Relevance”

[119] The terms “relevant” and “relevance” are old friends of the law of evidence. Familiar faces. Constant companions. We know them well enough to say several things about them without being critical in any way.

[120] Relevance is not a legal concept. It is a matter of everyday experience and common sense. It is not an inherent characteristic of any item of evidence. Some have it. Others lack it.

[121] Relevance is relative. It posits a relationship between an item of evidence and the proposition of fact the proponent of the evidence seeks to prove (or disprove) by its introduction. There is no relevance in the air: *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d) 16, at paras. 204-5.

[122] Relevance is also contextual. It is assessed in the context of the entire case and the positions of counsel. Relevance demands a determination of whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or non-existence of another fact more probable than it would be otherwise: *R. v. Cloutier*, [1979] 2 S.C.R. 709, at p. 731.

[123] The law of evidence knows no degrees of relevance, despite the frequent appearance of descriptives like “minimally, marginally or doubtfully”, “tangentially” and “highly” that tag along for the ride from time to time.

First Party Disclosure and “Obviously Relevant”

[124] The *McNeil* court uses the term “obviously relevant” to describe information that would not fall within the compass of “fruits of the investigation”, but would be of importance to the defence case. In *McNeil*, this information was police disciplinary records in the possession of a third party, the police department. Since it was “obviously relevant” to the credibility of the arresting officer and the reliability of his evidence, which was central to the prosecution’s case, *McNeil* imposed an obligation on the police to obtain these records and provide them to the prosecuting Crown. It imposed a correlative duty on the Crown to disclose them to the defence as part of the Crown’s *Stinchcombe* disclosure duty.

[125] It is difficult to tease out of the phrase “obviously relevant” a new standard or degree of relevance. A better fit would seem to be that the phrase represents a comment on the obvious nature of the relevance of the record in the case to the witness’ credibility.

Third Party Records and “Likely Relevant”

[126] In the third party/*O’Connor* production landscape, “likely relevant” occupies a prominent place. The term designates the standard or burden an applicant must meet to have the trial judge review the records to determine whether or to what extent production will be ordered.

[127] The standard “likely relevant” imposes a significant, but not an onerous, burden on an applicant: *O’Connor*, at para. 24; *McNeil*, at para. 29. This threshold plays a meaningful role in screening applications to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production: *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32; *O’Connor*, at para. 24; *McNeil*, at para. 29.

[128] The “likely relevant” threshold is not onerous because an applicant cannot be required, as a condition of accessing information that may assist in making full answer and defence, to demonstrate the specific use to which they might put information that they have not seen: *R. v. Durette*, [1994] 1 S.C.R. 469, at p. 499; *O’Connor*, at para. 25; *McNeil*, at para. 29. The trial judge does *not* balance competing interests to determine whether the “likely relevant” threshold has been met under *O’Connor*: *McNeil*, at para. 32.

[129] Under the third party/*O’Connor* production regime, “likely relevant” means that there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify: *O’Connor*, at para. 22; *McNeil*, at para. 33. An “issue at trial” includes not only material issues concerning the unfolding of the events which form the subject-matter of the proceedings, but also evidence relating to the credibility of witnesses and the reliability of other evidence: *O’Connor*, at para. 22; *McNeil*, at para. 33.

[130] Under *O'Connor*, an applicant who satisfies the “likely relevance” standard is entitled to have the records sought produced to the trial judge for inspection to determine whether, or to what extent, the records will be produced to the applicant: *McNeil*, at para. 34.

[131] The statutory scheme that was enacted after *O'Connor* also includes a provision that lists claims that do not, on their own, satisfy the “likely relevant” standard for “issues at trial or the competence of a witness to testify”. Section 278.3(4) of the *Criminal Code*, in its current form, is this:

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

- (a) that the record exists;
- (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
- (c) that the record relates to the incident that is the subject-matter of the proceedings;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complaint;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

The Principles Applied

[132] The issues raised here emerge in a thoroughly unremarkable alcohol-driving prosecution. Aberrant driving. Physical signs of alcohol consumption. An ASD demand. A failure. A breathalyzer demand. Legal advice. Provision of breath samples. A blood alcohol concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood. One count of impaired operation. Another of operation with a prohibited blood alcohol concentration. About as routine as it gets.

[133] Prior to trial, the respondent received the disclosure package typically provided to those charged in similar circumstances. A videotape of the respondent providing breath samples. The police officer's notes. The Intoxilyzer 8000C print out for the respondent's test. The Certificate of an Analyst attesting to the alcohol standard. The Intoxilyzer instrument log, diagnostic tests and

calibration checks. The certificate of the breath technician confirming the test results of 116 and 113 milligrams of alcohol per 100 millilitres of blood.

[134] In my respectful view, as I will explain, the respondent has failed to meet the “likely relevant” standard required as the first step in the third party/*O’Connor* production scheme.

[135] First, nothing on the face of the typical disclosure package provided to the respondent indicated any problem with the Intoxilyzer 8000C approved instrument or any error by the technician in its operation. No error in the test print outs. A new instrument, not due for its first annual inspection. No annual inspection or maintenance records. In short, nothing to imbue the claim of instrument malfunction or operator error with an air of reality. A fishing expedition. Season closed.

[136] Second, the expert evidence about potential relevance of the record sought failed to ascend above the speculative. In addition, the suggestion of unspecified relevance is contradicted by the report of the Alcohol Test Committee that belies the assistance of the records sought in determining whether the instrument functioned properly for a particular subject test.

[137] Third, the records sought have no relevance to the unfolding of the narrative of material events in this case. Historical data has nothing to say about

what gave rise to this prosecution, nor about the credibility of any party involved in the making of demands or the operation of the instrument.

[138] Fourth, the applicable standard in the third party/*O'Connor* production regime is more demanding than the “whether the information may be useful” criterion for first party/*Stinchcombe* disclosure. That a more stringent standard applies is consonant with the underlying policy considerations and the gatekeeper function assigned to the trial judge.

A Post-script

[139] It is critical for the efficient operation of trial courts, especially those in which alcohol-driving offences occupy a prominent place on the docket, that they be able to control their process. This includes the authority to discourage unmeritorious third party records applications that devour limited resources. A principled approach to the issue, akin to that enacted in the current s. 278.3(4) of the *Criminal Code*, may be of some assistance to trial judges confronted with applications such as the present:

Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to the issue of whether the approved instrument was malfunctioning or was operated improperly, within the meaning of s. 258(1)(c)(iv) of the *Code*:

(a) that the record exists;

(b) that the record relates to the instrument used in the incident that is the subject-matter of the proceedings;

(c) that the record relates to the qualified breath technician involved in the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior malfunctioning of the instrument; or

(e) that the record may relate to the credibility of the operator of the instrument.

CONCLUSION

[140] For these reasons, I am satisfied that the motion judge erred in law in failing to quash the first party/*Stinchcombe* disclosure order made by the trial judge for want of jurisdiction or error of law on the face of the record. I would allow the appeal and quash the disclosure order made and approved below.

Released: December 2, 2015 (HSL)

“David Watt J.A.”

“I agree H.S. LaForme J.A.”

“I agree Gloria Epstein J.A.”