

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

GURDEV SINGH

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE E.A. READY
on March 30, 2016, at BRAMPTON, Ontario

APPEARANCES:

C. Sibian

Counsel for the Crown

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Counsel for Gurdev Singh

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1.
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Reasons for Judgment - Ready J.

WEDNESDAY, MARCH 30, 2016

R E A S O N S F O R J U D G M E N T

Ready J. (Orally):

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Gurdev Singh is charged with operating a motor vehicle with over the legal limit of alcohol in his system on March the 4th, 2014, at Brampton, Ontario, contrary to 253(1)(b) of the *Criminal Code*.

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The only issue on the trial was whether the defence evidence had the ability to rebut the presumption of accuracy and identity under Section 258(1)(c) of the *Criminal Code*.

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The facts as I find them leading up to the evidence to rebut the presumption is as follows, and it for the most part is not in dispute.

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On the 4th of March, 2014, Constable Simmonds of Peel Regional Police Force was operating a mobile sobriety check at or near the LCBO store in 80 Peel Centre Drive, in Brampton. It was around 9:08 p.m. and the accused was seen exiting the LCBO with a single bottle of alcohol in hand. He went to a motor vehicle, got into the driver's seat with the alcohol still in hand and eventually started up the motor vehicle and left the parking lot and P.C. Simmonds followed.

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5 The accused's motor vehicle went onto
Knightsbridge Road, in Brampton. The officers
followed to assess sobriety, but as the officer
indicated, signs of impairment were not noted at
that time as the accused drove down the road.

10 At Knightsbridge and King Cross Road the
accused's motor vehicle was stopped for purposes
of a sobriety check on the accused. The police
officer indicated he approached the motor
vehicle, advised of the reasons for the stop in
respect to a sobriety check and asked if the
individual had consumed alcohol. And Mr. Singh
responded, "a little bit". The officer detected
15 a strong odour of alcohol on his breath. His
eyes were red-rimmed and watery, and his entire
face was flushed. He was asked of the time of
his last drink, and the accused indicated two
hours prior to the stop.

20 At 9:10 p.m., the officer formed the suspicion
that he, Mr. Singh, was operating a motor
vehicle with alcohol in his system and he read
him the ASD demand. An ASD was used. A fail
was registered by the accused. This instrument
25 is calibrated to fail at 100 milligrams of
alcohol in 100 millilitres of blood.

30 At 9:11 p.m. he was arrested for excess blood
alcohol. Rights to counsel, caution, breath
sample demands were read, and P.C. Simmonds was
also a qualified breath technician, and he

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conducted the accused's test on an Intoxilyzer 8000C, which is an approved instrument. He testified that he operated this instrument in accordance with training and manufacturer specifications. He indicated that the approved instrument was in proper working order when Mr. Singh's tests were done, and at 9:51 p.m. the first sample was obtained of 146 milligrams percent. A second sample at 10:13 p.m. of 140 milligrams percent. Both tests appear to have been taken within the two hour period.

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A certificate of the qualified breath technician and notice to the accused were filed on the trial, as well as a number of test record cards as they relate to accused Singh's test and this Intoxilyzer 8000C, and as the evidence indicates these test record cards indicated that there were no errors in respect to what appeared to be on those printouts on that occasion. So in other words, based upon the test record cards for Mr. Singh's test, everything appeared, on its face, to be in order.

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The defence had applied for, and received, as part of disclosure such documents as maintenance logs, historical data, Cobra records, periodic inspection reports, all in respect of this particular Intoxilyzer 8000C used in Mr. Singh's tests.

The defence had an individual, Mr. Joseph, a

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former employee of the Centre of Forensic Sciences, and a former forensic toxicologist with them review these documents and prepare a first report, and then a supplemental report in respect to his findings.

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The Crown called Dr. Langille, a forensic toxicologist with CFS, of long standing, in reply, and he as well testified and reported his findings.

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Mr. Joseph was qualified, with the consent of the Crown, as an expert in the absorption and elimination of alcohol in the human body, the theory and operation of the Intoxilyzer 8000C and accessory equipments, including the significance and interpretation of historical data, including maintenance documents, COBRA data and periodic inspections. That was what
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was agreed upon and that is the basis on which this matter proceeded.

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There was no issue that he was not so qualified in respect to the interpretation of COBRA data, or that he should not be heard from because he was testifying to junk or novel science. Accordingly, his evidence was admissible and subject to what weight the court would give to
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it at the end of the day.

In midstream of this trial the decision in R. v. Jackson was released [2015] O.J. No. 6274, and

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it came out and the Crown counsel on a
continuation date made submissions and wanted it
to be applied to this case, with the result that
I would be asked to entirely strike Mr. Josephs'
evidence from the record.

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Because we were in midstream and because it was
already agreed that Mr. Joseph was so qualified
and he was going to give evidence in respect to
his findings, and that I would deal with his
evidence on the basis of what weight I would
give to it, I declined to follow that request
and determined that in fairness the matter
should proceed and continue the trial based upon
what was originally agreed upon.

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As to the novel or junk science aspect of the
argument, this was never in issue when it was
agreed Mr. Joseph was an expert and his evidence
was admissible, subject to weight. The time and
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place I find to argue this issue of junk or
novel science is before an expert is qualified,
not in midstream of a trial or by the time his
evidence is being assessed for weight in the
submission stage of this proceeding.

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Mr. Joseph testified and was still testifying
when the trial was adjourned for further
evidence. During this interval Mr. Joseph was
able to look at the balance of the COBRA data
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for this particular machine, and gleaned further
information which was disclosed to the Crown.

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Upon return, during the *Jackson* issue, the defence then indicated that they wanted to re-open the defence to allow Mr. Joseph to advise the court what he had found in the balance of the COBRA data. I declined this request on the part of defence at this particular point in the trial.

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As it turned out, a question asked by the Crown to Mr. Joseph on cross-examination opened the door for Mr. Joseph to give his added evidence. The Crown then proceeded to call Dr. Langille in reply, and this trial really has come down to a trial of the evidence of two experts with the court to determine what is to be believed or not to be believed, what can raise doubt and what cannot, and essentially what weigh to be given to the respective evidence that I have heard on this trial in respect to very technical matters.

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The law that is relevant to the issues that were addressed on this trial appears to have been addressed most recently in the decision of *R. v. Lam*, 2015 ONSC 2194, a decision of Justice Goldstein of the Superior Court of Justice. This decision is binding on this court. That decision, if you refer to paragraph 34 of that decision, appears to indicate that recommendations for yearly inspections are not rules. Non-compliance does not amount to improper maintenance of the Intoxilyzer. And

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under Section 258(1)(c) of the *Criminal Code*, the accused can rebut the presumption of accuracy and identity under 258(1)(c) with evidence tending to show the instrument was malfunctioning or improperly operated. And the accused bears the onus on a balance of probabilities.

Again, *R. v. Lam* supra at paragraph 35:

Regrettably, this led the trial judge to err by finding that a freestanding violation of inspection recommendations is enough, by itself, to raise a reasonable doubt. This is contrary to the words of *St. Onge* at para. 41:

It should also be mentioned that the new provisions do not make it impossible to disprove the test results. Rather, Parliament has recognized that the results will be reliable only if the instruments are operated and maintained properly, and that there might be deficiencies in the maintenance of the instruments or in the test process. What the new provisions require is that evidence tending to cast doubt on the reliability of the results relate directly to such deficiencies.

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At paragraph 36 of the *Lam* decision, the Justice states:

In other words, there must be a link.
Neither of the experts in this case
could make that link. See also *So* at
para. 36.

The key to rebutting the presumption herein is
the evidence of the two experts I find, as well
as the evidence they gave and the exhibits that
were filed, as well as the evidence of two
qualified breath technicians who did an
inspection three months before Mr. Singh's test,
and one inspection done after Mr. Singh's test,
the day after, as well as the evidence of
qualified Breath Technician Simmonds who
actually administered the test proceedings with
the accused, Mr. Singh.

The defence called it the battle of the experts,
and that is an accurate depiction of what has
occurred here. At the end of the day it will be
for the Justice to determine the weight to be
given to this evidence.

A brief synopsis of the defence expert and Crown
expert's positions are set out as follows:

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The Defence. The cumulative effect of:

5 1) No yearly inspections as set out by the ATC and no recalibration of the instrument and accessories at least yearly;

10 2) No uncertainty of measurement associated with this Intoxilyzer 8000C and accessory equipment as required by law, making the breath readings incomplete;

15 3) No use of a NIST thermometer every two weeks, or even better, before each test as opposed to on an annual inspection to confirm the digital thermometer on the simulator is accurate when it says 34 degrees centigrade;

20 4) The COBRA data showing a large number of aberrations pre and post Mr. Singh's tests without documentation showing why it happened and what was done to rectify it, as is recommended to qualified breath technicians in their training so that, as the defence indicates, the instrument and the accessories are not being properly maintained, and police continue to use that Intoxilyzer and accessory that would appear, from the evidence, to be imprecise, inaccurate, and there is no documentation indicating that anything was done to rectify this situation, thereby casting doubt on the accuracy and reliability of the readings

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in this particular instance of Mr. Singh's tests.

And the defence position is that although the test records cards appear to be in order on their face, that is based on the assumption that the qualified breathalyzer technician is using an accurate and precise instrument and accessory equipment. And it's the defence position that here, given the history of the COBRA data, and no corresponding maintenance logs, that the qualified breath technician is using an inaccurate and imprecise instrument.

The Crown expert's position is as follows:

All that is important is to look at the test record for the accused Singh's test. If they are in order, it does not matter that, one, there is no recalibration of the instrument and accessories; there is no annual inspection of this instrument; there is no certificate of uncertainty of measurement attached to this instrument; and four, there is no NIST thermometer used to check the simulator thermometer temperature; and five, that there are a number of aberrations before and after the accused's tests that are undocumented as to cause, and what done to repair and rectify the situation.

From these test records, the Crown witness

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indicates that are without error, you can assume that the instrument is operated properly by the qualified breath technician, that it is in proper working order, and that the test records are accurate and test results are accurate and reliable. If the COBRA data shows aberrations, but if in tests, or one test, or tests following, the aberration you get good cal checks, then Dr. Langille is of the opinion you can assume that the problem has been resolved.

My conclusions in respect to the evidence of Dr. Langille and Mr. Joseph

Mr. Joseph was a former CFS employee and a forensic toxicologist for 10 years. He is now a medical student. He has a good familiarity with the recommendations of the CFS and the ATC. And when I say CFS, I mean Centre of Forensic Science; and ATC is a short form for Alcohol Test Committee and their recommendations. He has a good knowledge of the breath testing equipment, their operation and the theory involved in this equipment, and he has good knowledge of the breath test program in Ontario, as overseen by the CFS.

He has indicated during his last few years at CFS in the northwest area that he taught police officers as well in respect to the theory and use of the breath test equipment. His evidence was, I find, presented in a thoughtful calm

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fashion, and overall he was a credible witness I find, with the exception of evidence in respect of simulator thermometer temperature.

Presently he consults for the defence and since he has left CFS, has had, he indicated, rethought his approach to the maintenance program in Ontario in respect of the Intoxilyzer and its accessory equipment.

First of all, he had, as he indicated, extra time that would allow him to relook at the whole situation, including reviewing COBRA data; and secondly, he was able to look at and consider COBRA data, which he was never presented with at the CFS for consideration prior to a report being generated. So none of his present concerns in respect to proper operation of the machine, or its proper working order would have found their way into his reports that he would have generated when he was at CFS.

His thinking at the time, and also the thinking of the ATC, was that historical data was irrelevant to whether the Intoxilyzer or its accessories equipment were working properly on the date of the subject test. He had a change of mind, he indicated, and has presented his point of view ably on this trial.

I accept that there is no need, as he said, to be an expert in respect to COBRA data to look at

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it and to review it. All that is necessary and is needed is some understanding of the breath test equipment and the breath testing regime in Ontario. He has that, as shown by his experience as a forensic toxicologist at the CFS.

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It is not difficult, he indicated, to pick out from the data, which is in great quantity, that there are low or zero cal checks being generated, or that there are issues with the simulator temperature from the COBRA data.

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As he indicated, he knows from his training at CFS and as his training as a forensic toxicologist that a zero cal check showing up on the records, or a low cal check are serious malfunction issues in respect to an Intoxilyzer and its accessories that, he indicated, should call for the machines to go out of service for repair and/or call for immediate rectification if that can be done by the qualified breath technician.

But as he indicated, regardless of what is done, regardless of what the problem is, the qualified breath technicians are requested that whatever they do, it should be documented, and that is clear even as well from the evidence of Dr. Langille. If there is a problem, document it. If there is a rectification, document it.

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He is really, as he indicated, self-taught in respect to this area of COBRA data. It is, as he indicated, a work in progress which has been assisted by a computer program that helps him to sift through massive amounts of data that are generated by this specific Intoxilyzer 8000C.

I am satisfied that he had looked at all of the COBRA data on this machine eventually and generated a report or reports as to its relevance to the operation and maintenance of the Intoxilyzer 8000C, and the link ultimately to the status of subject test results and their accuracy and reliability. I find that this could hardly be considered novel or junk science as opposed to scientific evidence from a former forensic toxicologist.

Dr. Langille in his testimony described that when he was dealing with how helpful COBRA data is in respect to the Intoxilyzer and its accessories, he indicated in his testimony that police officers who head the breath programs at various police detachments often rely and look at COBRA data. He indicated that the police heads of the program find it valuable to determine where there are low and zero cal checks occurring in respect to the instrument, and why they are occurring. Is it operator error, or something else? Is it random or something more?

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If, as I say, they, as police officer, with some knowledge of the breath testing programs at their division, if they analyze and use it in this fashion, there is no reason that Mr. Joseph could not analyze it and use it in this fashion as well. Dr. Langille indicated that the police heads of the breath programs at the various Divisions do this to ensure the integrity of the maintenance program in Ontario, and when these officers at the division are using the Intoxilyzer machines.

As Mr. Joseph testified, very much like the police heads of the breath programs, he looks for an error as disclosed by COBRA. He looks for a corresponding inspection log, a maintenance log in respect to the errors and in order to determine if it was a trivial or major problem, and what was done about it. The fact of an error without corresponding documentation showing how it was rectified casts doubt, he feels, on the machine's overall maintenance during the use of this machine by Peel Regional Police Force in various accused's person's tests, and suggests, as testifies Mr. Joseph, that there is a likelihood of accuracy and reliability of Singh's tests being in doubt as a result of this.

The nexus therefore between the deficiencies he found in maintenance and the accuracy and reliability of the subject test is that the Peel

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Regional Police Force appear to continue to use a machine which experienced a number of aberrations before and after Singh's test, without documentation as to how it was rectified. These aberrations disclosed that this Intoxilyzer was both unstable, imprecise and it was without documented repairs and, as Mr. Joseph indicated, without some indication that something was being done to repair and maintain these instruments. They appear to have remained so for every test throughout its use.

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He indicated that they continued to use the machine that was not properly maintained. Therefore, there is a high likelihood that the subject test, Mr. Singh's tests are unreliable and inaccurate.

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The Crown submitted that Mr. Joseph's testimony was circular and evasive. I did not find it to be so for the most part. Mr. Joseph's use of an analogy I find was his way of explaining a technical area for the court to understand. In answering questions in some very important areas, he repeated that yes, test cards and records for Mr. Singh's tests appear to be accurate, but that is based on assuming that you have an accurate and precise instrument, which he has suggested by his testimony that Mr. Singh's instrument was not. I did not find his reasoning to be faulty or unsound or circular for the most part.

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5 His evidence was no more amazing to the court than a position that was taken by Dr. Langille that the integrity of the breath program is important in Ontario, but the accuracy is of no matter at all, or it matters not what is happening with the machine as long as the accused's test record cards are without error, or that yearly inspections means calendar year, 10 which could amount to two years going by before an inspection is done.

15 In conclusion, as is always the case when assessing weight to be given to the evidence, if there are inconsistencies arising in the testimony of Mr. Joseph's evidence, I can accept all, some or none of it.

20 Dr. Langille was the Crown expert. He is a forensic toxicologist with CFS in Toronto and of long standing. He also is an educator and teacher or qualified breath technicians, and is a former member of the ATC, and has a depth of knowledge in respect of the Intoxilyzer 8000C and the breath test regime in Ontario. And he 25 understands the theory of these machines and their operation as well.

30 He has testified hundreds of times for the Crown and provided as many reports as to his findings, always with the same opinion. The Intoxilyzer 8000C is generally reliable, an accurate

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instrument, if operated properly. If the test record cards or the subject tests are without error, then the accuracy and reliability of the instrument and the readings can be presumed.

He testified in great depth and with a great deal of thought with respect of the various issues that arose on this trial. His position remained the same throughout, that all that matters is that the test record cards for the subject's test, Mr. Singh's test, that they are being in good order.

He also gave an opinion as to why it is possible to rely on results of a subject test when there is evidence that this particular instrument before and after Mr. Singh's test had a number of aberrations. For example, zero cal checks, meaning instrument failure, and yet no corresponding documentation to indicate anything done to rectify the situation either by trouble shooting by the qualified breath tech, or by putting it out of service to send it back to the service provider for maintenance. He indicated that if a good cal check follows the bad ones, then obviously something had to have been done to rectify the problem. It did not matter that there was no documentation as long as there was a good cal check following, then one could assume that everything was okay.

He was, as I indicated, overall a credible

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5 witness and gave testimony in a thoughtful, thorough fashion. At times it was difficult to accept this position that regardless of a machine's past history of problems, and problems after Mr. Singh's tests, that all that really matters is that the subject test records are without error.

10 In the end, as with Mr. Joseph, I can accept all, some or none of his evidence.

15 I will now deal with the areas of concern as raised by the defence through Mr. Joseph as to maintenance, proper operation of this particular machine.

1. Maintenance of the Intoxilyzer and accessory equipment.

20 Mr. Joseph indicated that yearly annual inspections are necessary for good quality practice. The ATC says yearly annual inspections are recommended. I accept Mr. Joseph's position on those inspections and the need to stick to them.

25 These yearly inspections can check calibration, but they cannot recalibrate to the original setting from the manufacturer. The inspections without recalibration do not protect against drift, which occurs with all instruments over time, and in some instances can be problematic.

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Inspections only check parameters. They do not readjust the accuracy of the instrument. Mr. Joseph said that even with annual inspections, instruments can malfunction; and even without them, instruments can continue to operate and might not fail. But inspections should be done for good quality assurance and the integrity of the breath testing program in Ontario.

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Mr. Joseph went on as far as to say without yearly inspection and recalibration, it is highly unlikely that the readings generated are accurate and reliable.

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To the contrary, Dr. Langille testified that he said the ATC, the governing committee of the breath testing program in Ontario and pursuant to the provisions of the *Criminal Code*, recommends yearly annual inspections. But he argued that means in a calendar year, and both Qualified Breath Technician Scobie who also does annual inspections seemed to think that the CFS teachings tell them that annual really means calendar year.

I find that from common sense perspective, yearly means every 12 months and not within a calendar year, which could equate to a two year period. The case law appears to say, however, that yearly inspections are recommendations only. And that is the law. They are not rules of law, and in that regard see the *Lam* decision.

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However, looking at the history of this instrument and the evidence agreed to that it was calibrated by the manufacturer before it was delivered to Peel Regional Police Force in June of 2011, that it went into service on August 3rd, 2011. At the time of Mr. Singh's test this instrument was in use for two years, seven months. The periodic inspection was done and performed, and passed on February the 24th, 2012, And that appears to be early, before 12 months; June 30th, 2012, early before 12 months; January 31st, 2013, early before 12 months; March the 5th, 2014, one year, one month, five days after the last inspection; and on October 6th, 2014, the instrument went out of service.

The evidence that I accept from what occurred in respect to the actual maintenance and inspections of this machine is that there is only one inspection that is done one month, five days late. Annual inspections are not rules, only recommendations. Here one inspection was one month, five days late. Common sense says that just because it is one month, five days late, that does not equate to evidence of improper maintenance.

In addition, given the history of the instrument inspections, which appear from the evidence that I have before me to be done quite regularly, accordingly I cannot say this is a systematic

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disregard for the recommendations of the ATC by the Peel Regional Police Force.

As to the fact that Mr. Singh's instrument over a two year, seven month period of use was not recalibrated to its original setting on an annual basis, I conclude and accept that there are no recommendations by the ATC in respect to maintenance of the instrument and its accessories, of which calibration is a very important part. It is maintenance as needed. If maintenance occurs, the ATC provides it must be documented.

Mr. Joseph says the lack of yearly recalibration is a result of cost cutting. He says that it used to happen automatically when the service provider used to do the annual inspections. Now, qualified breath technicians are trained to do the annual inspections, but do not know how to recalibrate an instrument. It would have to be sent back to the service provider or manufacturer. In that regard, see the evidence of Constable Scobie.

Accordingly, Mr. Joseph's evidence is that the importance of annual recalibration is ignored by the ATC and the CFS and by Peel Regional Police Force. They are only sent out for recalibration when a problem arises, not as a preventive measure; and it only occurs if something happens with the instrument that cannot be fixed by the

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5 qualified breath technician. Mr. Joseph said this instrument was not properly maintained by lack of regular recalibration. And he also indicated that by not recalibrating this particular instrument, Peel Regional Police and the ATC and the CFS are overlooking drift occurring, which affects accuracy and reliability of readings ultimately.

10 Dr. Langille, on the other hand, testified about the need for recalibration. He provided detailed information about the various checks and balances that the Intoxilyzer goes through, as reflected in the subject test record cards. The ATC does not recommend recalibration. It is
15 silent on a maintenance, just as needed is their recommendation.

20 In this regard I accept the evidence of Dr. Langille that the various calibration checks show if the instrument is properly calibrated or if it is drifting out of calibration. I found his evidence on this point about calibration and drift and the need for recalibration more than
25 as on an as needed basis. I found it to be compelling.

30 And from his evidence, which I accept, he indicated that if calibration checks show a range of tolerance of 90 to 110 milligrams percent, this shows the instrument is properly calibrated and it has not drifted out of

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calibration. The rigorous process that the instrument and accessories are put through each time there is a subject test would detect drift to an unacceptable degree. Drift will always occur. It is a natural phenomenon and it is to be expected. Normally drift causes an underestimation of results, not an overestimation of results. Drifting out of calibration is not instantaneous. It is a long process. The instruments do not drift in and out of calibration.

The drift will not be detected or seen if calibration checks are close to the target values, but when they get lower values in the low 90s, once this happens this reflects the instrument is not in proper working order, and I accept this evidence of Dr. Langille.

Therefore, I conclude that the fact of no annual recalibration of this instrument is of no concern. There is no need to recalibrate the instruments automatically every year when the instrument is still properly calibrated. Proper calibration is evidenced by the various checks done by the instrument internally and during the subject test. If, in addition, an ITP fail shows up on the instrument, and/or if consistent cal checks are outside of tolerance, this means recalibration is needed. If the calibration issues happen during a subject test, the instrument stops and no further steps can be

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taken until the problem is resolved. The instrument will detect when drift is so bad as to take the instrument out of calibration.

On Mr. Singh's test records and on Mr. Singh's tests, if unacceptable drift had occurred, this would show up on low cal checks. The test record cards display no such problems existed at the time of Mr. Singh's tests.

Dr. Langille provided similar evidence in respect to the simulator temperature and recalibration. Again, the ATC gives no guidelines, just maintenance as needed, but if needed, document what is done. He testified there is no need to recalibrate regularly until the simulator thermometer started to give values outside of, and his testimony is, 34 plus or minus .2 degrees centigrade, which he referred to as the important thing, the operating range.

He was not seriously challenged on this, and on the other hand I found Mr. Joseph's evidence on the point unconvincing and not persuasive, and at times contradictory. In-chief, Mr. Joseph only dealt with operating range. No mention of tolerance. Only in the 11th hour I find did he start to factor in tolerance as an issue. I can give little or no weight to his testimony on this point. I accept on the other hand, Dr. Langille's evidence on this point.

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As to the issue of recalibration of the instrument and accessories yearly as part of proper maintenance in order to properly have quality control and assurances and the integrity of the program upheld, I am persuaded by the evidence given by Dr. Langille and I accept it, and apply it here, that yearly recalibration of the instrument and accessories is not needed, nor is it stipulated by the ATC as a rule. They are quite silent on maintenance. Only as needed, and if so, document it.

Accordingly, this area of concern of maintenance of the instrument and accessories through annual inspections and a regular, as least once yearly, recalibration of the equipment is not an issue in respect to this prosecution.

2. The NIST Thermometer and Proper Operation of the GUTH simulator.

Dr. Joseph testified that the calibration checks check the accuracy of the instrument. If the simulator is not measuring a proper temperature, you cannot assume that the cal check is working properly, or is accurate and reliable. He based this on operating temperature of 34 plus or minus .2 degrees centigrade.

As in the other area, the ATC appears to have no recommendations in respect to verifying the temperature on the thermometer of the simulator

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with the NIST thermometer. There only appears to be training slides generated by the Centre of Forensic Sciences that recommend, and this is only since December 2013, that the simulator thermometer be verified using a NIST thermometer at least annually.

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Mr. Joseph stated that by not using a NIST thermometer to test until March 5th, 2014 inspection, that they were not complying with the recommendations as to annual checks on the simulator thermometer.

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Dr. Langille testified that CFS, based on a study they did, concluded that the thermometer built into the simulator is very stable. This piece of evidence was not contradicted. This would cast doubt on Mr. Joseph's assertion that the NIST thermometer should be used every two weeks or, even better, before every test. Dr. Langille said that it made sense therefore, given the stability of this thermometer on the simulator, that it made sense to confirm the accuracy of the simulator thermometer with each annual inspection as of December, 2013. I
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accept and apply this evidence of Dr. Langille that, again, CFS recommends that the check be done annually on the inspection date.

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In any event, in this particular instrument and the history of this particular instrument, it would appear that a NIST thermometer was used on

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Mr. Singh's instrument on January 31st, 2013, one year, one month, five days before Mr. Singh's test. And it was done by P.C. Haramis on January the 2nd, 2014, before Singh's test; and it was done on the day after Mr. Singh's test on March 5th, 2014. That was a date of an inspection, as was the date of January 31st, 2013. That was an inspection as well.

Based upon that evidence, which I accept, it is clear there are no rules in respect to the use of the NIST to check the simulator thermometer temperature. In any event, since December, 2013, NIST has been used on Mr. Singh's accessory, and has been used quite regularly, and accordingly there was no issue taken about simulator temperature on Mr. Singh's test as indicated by the test record cards.

And I conclude that it could, the evidence that at least one month and five days outside of the annual inspection where no NIST was used, amount to doubt that the instrument to the accessory was properly maintained and that the cal checks are accurate and reliable. And I would have to say, no, that that is not possible. What is the likelihood of that? Highly unlikely I find that this use of the NIST is accordingly a non-issue and cannot be related to the issue of whether Mr. Singh's instrument was actually properly maintained.

3. Uncertainty of Measurement

I accept the evidence of Mr. Joseph in the area of uncertainty of measurement. Dr. Langille was contradicted in respect of uncertainty of measurement in respect to the Intoxilyzer, and conceded that there was no uncertainty of measurement for this Intoxilyzer and its accessory equipment, its simulator.

Mr. Joseph testified that proper maintenance and operations of Intoxilyzer and their accessories may involve including an uncertainty of measurement. And, as I say, on that point again, Mr. Joseph was not contradicted. Uncertainty of measurement is doubt that is present with any measurement. It is the give and the take involved in any measurement. All instruments used at CFS, if it measures a number, must have an uncertainty of measurement associated with it. It is required by law, and I accept this evidence from Mr. Joseph.

The CFS, from the evidence of Mr. Joseph, became accredited with the ISO, and therefore it needed to set up standards and practices to qualify and maintain that accreditation. If they do not maintain standards, they risk losing their accreditation.

As Mr. Joseph indicated, uncertainty of measurement is one of these standards. In 2003,

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he was privy to conversations and discussions at Centre of Forensic Sciences that it became aware of the concern to be addressed by CFS in respect to this uncertainty of measurement issue.

There is no uncertainty of measurement from Mr. Singh's instrument or the simulator. Dr. Langille conceded this. Nor does it appear that there is any uncertainty of measurement for any Intoxilyzer or its simulators used in the Province of Ontario. CMI, the manufacturer, did not attach a certificate of uncertainty of measurement with this instrument, that is Mr. Singh's instrument. The ATC has no position at all on the uncertainty of measurement.

Mr. Joseph testified that uncertainty of measurement for all the Intoxilyzers out there in the Province of Ontario posed a dilemma and a logistical problem. How do they assign uncertainty of measurement to them, and including Mr. Singh's machine.

I accept Mr. Joseph's information and evidence on this point, that he was privy to discussions that were occurring at CFS about this problem, and that this concern about what they're going to do about all of these pieces of equipment out there in the Province of Ontario, and yet, the CFS who oversees the breath testing program in Ontario has virtually ignored the lack of uncertainty of measurement associated with each

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machine, including the machine of Mr. Singh's and the accessory.

I accept his evidence that a calibration, which is key to accuracy and reliability of readings, is not complete until the expanded uncertainty of measurement is determined and reported. Calibration is of little or no value without uncertainty of measurement accompanied to it. This is again evidence that was not contradicted.

Dr. Langille tried to explain that variability of the instrument, which can be determined by a series of cal checks, is a form of uncertainty of measurement. I, however, accept the evidence of Mr. Joseph that that is variability and it has nothing to do with uncertainty of measurement and attaching any figure as to uncertainty of measurement to a particular instrument.

In the end I have evidence of variability of the Intoxilyzer and how it could be ascertained from Dr. Langille and in respect to accessories, but I have no uncertainty of measurement associated with Mr. Singh's instrument and can conclude that without such an uncertainty of measurement on Mr. Singh's instrument and being included on his test record cards, that his readings are not complete.

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Mr. Joseph testified, and I accept this, that the accused Singh's results are a value or a number. Without knowing the uncertainty of measurement associated with the instrument, we cannot evaluate what that uncertainty is. Is it a plus? Is it a minus? Is it a plus or minus 10 percent? We just do not know, he testified to. And, again, this is not challenged.

As it was not contradicted or challenged, I accept this. Also, Dr. Langille confirmed uncertainty of measurement is required by law. He conceded that the series of tests done by the qualified breath technician on the annual inspections were to determine precision, not uncertainty of measurement. The qualified breath technician, Scobie and Darcy, who also do annual inspections had no idea what uncertainty of measurement was or meant or how you could determine it. Dr. Langille conceded that there was no uncertainty of measurement set out on Mr. Singh's test card records, or on any document associated with this instrument and simulator.

I was satisfied by the evidence of Dr. Langille that a qualified breath technician can determine variability of an instrument by a series of checks, but this is not the same as determining uncertainty of measurement. Dr. Langille said even though there was no uncertainty of measurement associated with this Intoxilyzer or simulator, that the precision of the instrument

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is well known in Canada and over estimation is not likely from the Intoxilyzer to exceed 10 percent.

However, contrary to this, I am satisfied the evidence of Mr. Joseph that without an uncertainty of measurement figure for this Intoxilyzer, how can you even be satisfied that the value of the readings are within this plus or minus 10 percent, which is a very important figure in the breath testing procedure and regime.

Accordingly, I find that by not having an uncertainty of measurement associated with this Intoxilyzer and this simulator, that there is evidence that this Intoxilyzer and simulator is not properly maintained and operated and is not providing complete results. Therefore, this evidence is relevant and linked to Mr. Singh's breath test results because without uncertainty of measurement, how can it be said that the results are complete, or that they are within the 10 percent plus or minus range.

4. The significance of Cobra historical data and records casting doubt on the accuracy, reliability of the instrument and the corresponding readings produced.

Dr. Langille stated that the COBRA historical data is a useful in determining the status of

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5 the instrument at other times, not at the time
of the subject test. What matters, he testified
to, are the test record cards from the subject
test being without error. From this record you
can assume the machine is in proper working
order and the readings are accurate and
reliable.

10 He indicated that test record cards would show
the instrument has picked up on errors and
problems and malfunctions. Tests cannot proceed
on an instrument until the problems are
rectified. Dr. Langille suggested that in the
15 COBRA data, if in subsequent cal checks, they
were good following a low or zero cal check,
that one could conclude without anything further
that something was done about a serious problem
with this machine, and it is no longer a
20 problem. And you do not need to have
corresponding maintenance logs.

25 This is Dr. Langille's position, and it appears
to be the position at the CFS and the ATC
position. Mr. Joseph's position on the
relevance of COBRA data, et cetera, both post
and pre Mr. Singh's tests is that it relates
directly to proper working order of this
instrument and its proper maintenance, and
ultimately the accuracy and reliability of the
30 subject test readings on that date.

As Mr. Joseph testified to, and I accept, you do

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not need to be an expert on COBRA data to pick out low and zero cal checks being generated from the instrument. There were 41 failed cal checks, for example, eight exception messages, and what he indicated were 12 failed simulator temperature readings, I will deal with that issue later, from the material that the Intoxilyzer records and prints out in this COBRA data.

He indicated that any person with a knowledge of the breath testing equipment and the breath testing program can see the questionable results generated by the instrument. For example, a zero or low cal checks, you do not need to be an expert to then go to corresponding maintenance logs to determine what the problem was and how it was rectified. Could the qualified breath technician fix it, or did it need to be sent out to service and why?

The Crown argued that Mr. Joseph's analysis of COBRA was cherry picking and out of context. It is true that this evidence could be said to be a form of focusing, of cherry picking, and the evidence considered could be said to be out of context. However, Mr. Joseph said that when he first testified he had only reviewed about 50 percent of the COBRA data, but by continuation date, with the help of a computer program, he was able to complete the balance of the COBRA data. So he had virtually looked at all of this

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data.

It is difficult to see how the defence could be presented in any other fashion than picking out these aberrations, so to speak, and analyzing them. Certainly one can assume that there are these aberrations, but one could also assume that there are results that did not draw the attention of Mr. Joseph.

Certainly Dr. Langille was able to anticipate this and the Crown could have examined in this area. Dr. Langille pointed out that for every bad cal check there were good ones before and after these bad cal checks. He also pointed out that good cal checks after a problem could indicate that there was an indication that the problem had been rectified and that the machine was properly functioning.

In the end, I am not persuaded that the defence approach to, and the presentation of the evidence with COBRA was improper. I rely upon it and can give it weight in the analysis of the issues before the court.

Both Dr. Langille and Mr. Joseph agree a properly operating machine should not give a zero cal check. There were seven such zero cal checks for this machine. This zero cal check is serious. Dr. Joseph said that, and he indicated that as well in his report, that this machine,

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Mr. Singh's machine, should have gone out of service and back to the service provider. There is no indication that it did except a period of time after Mr. Singh's test.

Dr. Langille said not so fast, the qualified breath technician can troubleshoot to determine if the matter is trivial and fixable, or catastrophic and needs to go out of service. He did concede, however, that qualified breath technicians are trained to document their actions as per ATC and CFS training. Dr. Langille testified, and I accept, that there are a number of reasons for zero cal checks, not just failed instruments, but due to operator error. If a qualified breath technician can rectify the problem, he can continue to test and use this instrument.

Mr. Joseph agrees, but says without any maintenance logs for the various aberrations, as reviewed above, on Mr. Singh's Intoxilyzer machine, how can you be satisfied as to what the problem was and how it was rectified, if at all? Was it trivial? Was it serious? Was anything done, or was nothing done? Was it turned off and started again and it appeared to be working and everything was fine and they carried on? One just is left in a doubt as to what was done to maintain this machine properly in light of these aberrations, and totally contrary to what is taught by the ATC and the CFS about

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documentation, proper maintenance records.

Therefore, was this machine properly maintained and operated? This to Mr. Joseph is important and relevant, the importance and relevance of COBRA. Not that machines break down and need to be recalibrated, but that proper steps are taken to assess and deal with problems, and records are kept to assure the quality and reliability of test results and of these various machines.

Dr. Langille felt that COBRA data was only valuable to a police officer who was in charge of the breath tech program at his division. It can be looked at, as he said, to see if over time cal checks go down and the instrument needs to go out to service to be recalibrated. Also if zero cal checks appear, can the police officer who is the head of the breath tech program there see a simple explanation? Is it only randomly i.e., when a qualified breath tech forgets to plug in all the tubing correctly, or is it a crack in the jar? It is important, he testified, to ensure the police division are maintaining their instruments in good condition and on a regular basis. That is what the police department itself uses COBRA data for.

This testimony, which I accept, from Dr. Langille leads to a common sense conclusion that in order to determine if the instrument needs to be out of service, or if there is an explanation

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for the problems, that there must be records kept of the maintenance steps taken or what found. Without maintenance records, how can this happen?

It makes no sense that what occurred with the machine, and what steps were taken should be hidden away in a reference in a qualified breath technician's notes. They are, in this court's estimation based upon what the COBRA data is there for, there should be maintenance records referable to this instrument, not to the qualified breath technician, which maintenance records stay with this instrument for everyone to see and to be educated from, as is recommended by the ATC and the CFS.

This is exactly what Mr. Joseph is saying. Without proper maintenance logs it is impossible to conclude that the Intoxilyzer was maintained properly and working properly. If police office heading the breath tech program at the Division could not refer to maintenance logs, how can they effectively determine if an instrument is a problem, or if it is operator error, or if the Division is properly maintaining these machines.

On cross-examination, Mr. Joseph was asked by the Crown, question, "Singh's test card show readings of 146 and 140. Are you actually saying that there is real doubt that these readings are even accurate?" Answer, "Yes."

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Question, "Why?" Answer, "Because the instrument has now changed its precision and accuracy. The instrument has had significant drift and there have been aberrations that cannot be explained, including zero cal checks."

Mr. Joseph maintained, given the history of the machine as reflected by the COBRA data, its accuracy and precision of this instrument has changed and we are not dealing with an accurate and precise instrument. I accept Mr. Joseph's evidence on this point that COBRA data showed that this instrument was littered with zero or low cal checks, meaning instrument failure before and after Mr. Singh's tests.

The important evidence is that the aberrations are without corresponding maintenance logs showing what the problem was and how it was rectified. The record is silent on this point. The machine appears to have been used again and again.

Therefore, I conclude that one cannot be satisfied that this Intoxilyzer is precise and stable. Machines do break down. Operators make errors. This is expected, but it is important that actions be taken to rectify the problem, and that the problems and the actions be documented to ensure proper maintenance of these instruments. Without this, how can I conclude anything was done about the problems with Mr.

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Singh's instrument and that it was properly maintained, and that steps were taken to return this machine to its proper precision and stability, especially before Mr. Singh's tests?

I cannot conclude that on Mr. Singh's test date, a stable, precise, properly maintained instrument was used for his test. Dr. Langille testified that the history before or after is irrelevant. All that really is important are the test record cards showing no error on the subject tests. From this, one can assume accuracy and reliability of the readings. He stated these instruments are stable.

However, on cross-examination he conceded, due to at least the issue of low or zero cal checks littering the history of Mr. Singh's instrument, without documentation as to the reason and the fix for them, that the stability of this instrument was in question in these proceedings. That is what he has said in his cross-examination. He could have said it was not in question if he was satisfied that, point blank, this instrument was stable. But in these circumstances he went as far as to agree that the stability of this instrument was in question on these proceedings.

I conclude that the test record cards that appear accurate and reliable, and the two inspections that were in order can only be

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relied upon if the instrument that generates these results is precise and stable. From the evidence that I have on this hearing, this instrument appears not to be so.

Therefore, there is a high likelihood that the instrument is not generating accurate and reliable readings on the date of Mr. Singh's test. My decision in respect to the COBRA data being evidence that can cast doubt on the accuracy and reliability of the subject test readings is based upon the evidence of the numerous zero and low cal checks and exception messages.

As to the issue raised from COBRA as to the failed simulator temperature tests, I accept the evidence of Dr. Langille on this point. The aberrations noted by Mr. Joseph were failed tolerance tests. They were outside of tolerance, i.e., the temperature that the machine strives for, but these temperature readings, as disclosed by COBRA, were not outside of operating range for the Intoxilyzer, which I am satisfied is the important consideration, at least from the evidence that I have heard on this proceeding.

Faced with the failed tolerance test the qualified breath technician, Dr. Langille said when questioned, need do nothing. Just note the temperature and carry on with the test. As long

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as the operating temperature is in range of 34, plus or minus .2 degrees centigrade, that is fine. It can be noted and the qualified breath technician can carry on.

I accept this evidence because Mr. Joseph's evidence in-chief, he never mentioned tolerance. Only operating temperature. At page 90 of the February 20th, 2015, transcript he was questioned as follows:

"Let's deal finally with the basis of verifying proper operating temperature of GUTH simulator with NIST thermometer. What's the importance of verifying the operating temperature of the simulator?" Answer, "It is determining whether the simulator is measuring a solution at an accurate temperature of 34 plus or minus .2 degrees centigrade. That goes to the integrity of the cal check, as the cal checks check the accuracy of the instrument. If the simulator is not measuring a proper temperature, then we cannot assume that the cal check is working properly and is accurate and reliable."

It was only on cross-examination that he started to mention tolerance, 34 plus or minus .05 degrees centigrade for the first time. And that the inspections that are done by the qualified technicians and the figures that they put down, what they are really looking for are tolerance of a simulator, not operating range.

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On re-examination defence counsel attempted to redeem his client's evidence. He said the tolerance of 34 plus or minus .5 degrees (note: should have said .05 degrees) centigrade is what is looked for on an inspection done, yet this whole issue was never put to Qualified Breath Technician Scobie or Darcy who did two annual inspections, nor even to Dr. Langille, the expert.

Mr. Joseph's evidence on this point is compromised and confused, and I cannot rely upon it. In the end, I am left without knowing the significance of tolerance in this whole proceeding and it is certainly cannot be said to be a basis of finding doubt.

Accordingly, I do not accept that the issue of failed simulator temperature is an aberration in respect to the history of Mr. Singh's Intoxilyzer, or that the documentation needed to exist to explain what was done about it.

The last concern to address is should I consider COBRA data and historical data and its review by Mr. Joseph in light of the Jackson decision, really saying it is not relevant for disclosure, therefore, by application, how could it be relevant to the issue of reasonable doubt?

This case I find is distinguishable from

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Jackson. Here Mr. Singh's counsel applied for and received COBRA data, maintenance logs, inspection reports, et cetera, the historical documentation for this machine. The defence expert, Mr. Joseph, reviewed it, made reports striking at the precision, stability and proper functioning of this instrument based upon that. And the Crown had its own expert to respond to Mr. Joseph's allegations based upon that data.

The factual situation to establish relevance for disclosure on Jackson was different from what occurred on this prosecution. On this case, two experts providing their opinion as to its relevance and relevance to the accuracy and reliability of Mr. Singh's tests. I therefore conclude it is the very type of evidence that was contemplated that defendants could bring by the St. Onge decision. Mr. Joseph testified about its relevance and its link to Mr. Singh's test results.

In conclusion, I find the evidence of Mr. Joseph as to the number of aberrations pre and post Singh's test without documentation as to what problems were, and how they were fixed, as required by training, demonstrate that Peel Regional Police Force overlooked serious problems of malfunction with this instrument that led to its imprecision and instability, and it would appear from the evidence continued to use this instrument in this state without

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rectifying these problems. There is no documentation attached that would indicate that anything was rectified.

In addition, there was a systematic failure of documentation, what the problem was and how it was fixed, so as to ensure quality and integrity of the breath test program and breath testing equipment.

In addition, the absence of the uncertainty of measurement for this Intoxilyzer and its simulator made the accused Singh's results incomplete.

The combination of these two factors, to me, leaves me in reasonable doubt that this Intoxilyzer was properly maintained and working properly when it received two samples from Mr. Singh. It also leaves me in reasonable doubt that the accused Singh's breath readings were accurate and reliable.

The evidence presented by the accused Singh has met the onus and rebuts the presumption under 258 of the *Criminal Code*. There is no evidence then as to what his readings were at the time that he drove his motor vehicle away from the LCBO store on the date in question.

The charge is dismissed.

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...END OF EXCERPT REQUESTED

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Certification

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, Ryan Easson

(Name of Authorized Person)

certify that this document is a true and accurate transcript of the recording of

R. v. Singh

(Name of Case)

in the Ontario Court of Justice

(Name of Court)

held at 7755 Hurontario St., Brampton, Ontario

(Court Address)

taken from Recording 3111-405-20160330-091114, which has been certified in Form 1.

April 25/16.

(Date)

[Signature]

(Signature of Authorized Person(s))