

2020

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Citation Information

Cunliffe, Emma. "Charter Rights, State Expertise: Testing State Claims to Expert Knowledge." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/14>

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Charter Rights, State Expertise: Testing State Claims to Expert Knowledge

Emma Cunliffe*

I. INTRODUCTION

This article considers the individual and collective significance of two decisions issued by the Supreme Court of Canada in 2018: *Ewert v. Canada*¹ and *R. v. Gubbins*.² At first glance, these decisions appear to have relatively little in common with one another. In *Ewert*, the Court considered the accuracy of diagnostic and risk assessment tools used by the Correctional Service of Canada (CSC) when making decisions about offenders. In *Gubbins*, the Court was concerned with pre-trial disclosure rules regarding approved breath alcohol analyzers. *Ewert* and *Gubbins* interpret different statutes and consider different Charter rights. The cases reach different conclusions about whether the State had met its responsibilities when dealing coercively with individuals in different corners of the criminal legal system.

Both decisions, however, address the quality and impartiality of the information used by the State when it engages in processes that deprive individuals of liberty. When read together, *Ewert* and *Gubbins* raise systemic questions about the adequacy and limits of judicial processes that evaluate the quality of specialist knowledge generated by or for the ends of coercive State institutions. By specialist knowledge, I refer to techniques and practices that draw upon scientific principles or

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¹ [2018] S.C.J. No. 30, 2018 SCC 30 (S.C.C.) [hereinafter “*Ewert*”].

² [2018] S.C.J. No. 44, 2018 SCC 44 (S.C.C.) [hereinafter “*Gubbins*”].

systematic research, but that are specifically developed to address a governance challenge. For example, risk assessment tools such as those considered in *Ewert* were largely developed by psychiatrists and psychologists working within state institutions using actuarial techniques and psychiatric research.³ They respond to the challenges of predicting recidivism and maintaining safety and security, within and beyond coercive state institutions. Similarly, modern breath alcohol analyzers operate through an automated analytical process that draws upon principles of physics and chemistry. Since at least 1950, the development and application of those methods has been motivated by the challenges of detecting and prosecuting inebriated operators of vehicles.⁴ Access to the data, software and other information necessary to study and monitor these devices is carefully guarded by the companies, State regulators, and law enforcement agencies who develop, approve and use them.

In focusing particularly on the reliability of specialist knowledge generated within or for State institutions, I am responding to Shoshana Pollack's call — particularly to white settler academic researchers — to eschew our tendency to focus on the behaviour and subject identity of over-criminalized groups in favour of studying the work performed by “state actors in the criminalization process”.⁵ Pollack argues that it is productive to explore how processes such as racialization and the classification of violence “function to shape and regulate social marginality”, particularly within the criminal legal system.⁶ I am also mindful of Rachel Roth's observation that state power manifests differently in different sites of governance and her argument that analyses of state power should attend to conflicts and differences across state institutions.⁷ When studying state practices of generating, applying

³ Eric Silver & Lisa Miller, “A Cautionary Note on the Use of Actuarial Risk Assessment Tools for Social Control” (2002) 48 *Crime & Delinquency* 138-161.

⁴ A.W. Jones, “Fifty Years On: Looking Back at Developments in Methods of Blood and Breath Alcohol Testing” (2000) *Proceedings of the 15th International Conference on Alcohol, Drugs and Traffic Safety, T-2000 Stockholm* 9 – 15; A.W. Jones, “Measuring Alcohol in Blood and Breath: A Historical Overview” (1996) 8 *Forensic Science Review* 13-44.

⁵ Shoshana Pollack, “Therapeutic Programming as a Regulatory Practice in Women's Prisons” [hereinafter “Pollack, ‘Therapeutic Programming’”] in Gillian Balfour and Elizabeth Comack, eds., *Criminalizing Women: Gender and (In)Justice in Neo-Liberal Times*, 1st ed. (Halifax: Fernwood Publishing, 2006), 236-49, at 246. As Jeffery Hewitt says, it is time to “flip the question” — instead of studying Indigenous people and communities, study why the State keeps producing the same result. Jeffery Hewitt, “Indigenous Research Methodologies”, paper presented at Canadian Association of Law Teachers Conference, June 4, 2019.

⁶ Pollack, “Therapeutic Programming”, at 247-48.

⁷ Rachel Roth, “Searching for the State: Who Governs Prisoners' Reproductive Rights?” (2004) 11:3 *Social Politics* 411-438, at 417.

and defending specialist knowledge, I take Roth's caution that it is important to attend to the specificity of institutional context and purpose.

In this article, I analyze *Ewert* and *Gubbins* against the context of, respectively, evidentiary records regarding risk assessment algorithms and breath alcohol analyzers. The premise that underlies my broader research project is that focusing upon the relatively unexamined, routine practices of state specialist knowledge may illuminate some of the ways in which structural racism and gendered harms flourish within state practices. As the Native Women's Association and Canadian Association of Elizabeth Fry Societies argued in their joint intervener factum in *Ewert*, ostensibly neutral state practices can "have a disproportionately negative effect on the most marginalized."⁸ The analysis supplied by these interveners suggested that, "[t]he multiplier effect of race and sex creates a more clearly discriminatory impact [of apparently neutral state practices] when it comes to federally sentenced Indigenous women."⁹ However, the record in *Ewert* demonstrates the difficulties faced by rights-holding litigants when they seek to unsettle the ostensible neutrality of the State's specialist knowledge.

Collectively, *Ewert* and *Gubbins* illuminate the relationship between the work of generating an evidentiary record, burdens of proof, and the practical value of constitutional rights. These two cases illustrate that the Supreme Court of Canada's (SCC) approach to Charter adjudication places a demanding evidentiary burden upon rights holders who seek to challenge the State's specialist knowledge. They also suggest that the Court has largely failed to grapple with the consequences of this allocation for the practical value of constitutional rights.

In Part II, I describe Jeffrey Ewert's challenge to the validity of diagnostic and risk assessment tools that CSC uses when making decisions such as security classification and recommendations regarding parole. The SCC ultimately held that CSC had failed to meet its statutory obligation to ensure that these tools are accurate when used for Indigenous prisoners. However, Ewert failed to establish a breach of his sections 7 and 15 rights under the *Canadian Charter of Rights and Freedoms*.¹⁰ In Part III, I explore the judicial history of and reasoning in *Gubbins*. The Court took the opportunity in this case to clarify the test

⁸ Native Women's Association of Canada and Canadian Association of Elizabeth Fry Societies, Factum in *Ewert v. Canada*, S.C.C. file 37233, at para. 32.

⁹ *Id.*, at para. 5.

¹⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

for first party disclosure, previously set out in *R. v. Stinchcombe*¹¹ and *R. v. McNeil*,¹² and the relationship between first party and third party disclosure.¹³ Part III reviews the approach set out in Rowe J.'s majority reasons and the application of that approach to disclosure of maintenance records for approved breath alcohol analyzers. I then turn to Côté J.'s dissent in *Gubbins*, and the strong argument that she makes that the Court should exercise caution when it is asked to change disclosure standards on the basis of a sparse, largely state-generated evidentiary record.

In Part IV, I consider the collective significance of *Ewert* and *Gubbins*. Each of these cases represents a moment in a longer campaign that is characterized by rights holders as seeking to hold the State accountable for the quality of its specialist knowledge; and by state actors as seeking to protect the State against frivolous or even vexatious efforts to undermine evidence-based policies that promote public safety. In this Part, I suggest that reading these two cases alongside one another foregrounds questions and concerns about the work of generating an evidentiary record that are largely overlooked within the majority reasoning within the SCC decisions.

II. *EWERT v. CANADA*: CULTURAL BIAS IN PSYCHOLOGICAL AND RISK ASSESSMENT

Ewert v. Canada represents a significant milestone in Ewert's 20-year campaign to challenge CSC's approach to risk assessment and psychological assessment for Indigenous offenders. As Wagner J. (as he then was) explained, CSC is entrusted with making significant decisions about inmates:

the CSC must make numerous decisions about each inmate in its custody. For example, it is required to assign a security classification of maximum, medium or minimum to each inmate The CSC also decides whether to recommend to the Parole Board of Canada whether an inmate be released on parole.

If the CSC is to effectively assist in the rehabilitation of inmates while ensuring the safety of other inmates and staff members and the

¹¹ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) [hereinafter "*Stinchcombe*"].

¹² [2009] S.C.J. No. 3, 2009 SCC 3 (S.C.C.) [hereinafter "*McNeil*"].

¹³ *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.) [hereinafter "*O'Connor*"].

protection of society as a whole, it must base its decisions about inmates on sound information. This is explicitly recognized in s. 24(1) of the *CCRA*,¹⁴ which requires the CSC to ‘take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible’.¹⁵

Ewert, a Métis man, challenged CSC’s institutional practice of relying on diagnostic and risk assessment tools that have not been validated for Indigenous offenders.¹⁶ Ewert’s challenge to the impugned tools was advanced on several grounds. He contended that:

1. CSC had breached its obligation under section 24(1) of the *CCRA* by failing to take all reasonable steps to ensure the accuracy of the impugned tools when applied to Indigenous offenders;
2. CSC’s reliance on the impugned tools constituted an unjustified interference with his section 7 Charter rights;
3. CSC’s reliance on the impugned tools constituted an unjustified interference with his section 15 Charter rights.

The evidence at trial established that CSC had “long been aware of concerns regarding the possibility of psychological and actuarial tools exhibiting cultural bias.” In order to explain the significance of these concerns, Ewert relied upon expert evidence from academic psychologist Dr. Stephen Hart.¹⁷ Hart’s evidence was accepted by Phelan J. at trial and ultimately proved important to Wagner J.’s reasoning. Hart defined “cultural bias” as a phenomenon by which “the reliability or validity of an assessment tool varies depending on the cultural background of the individual to whom the tool is applied.”¹⁸ He defined validity as “a term of art in psychology that refers to ‘the accuracy or meaningfulness of test scores’ [so] that ‘with respect to a violence risk assessment tool, the accuracy would be the ability of the test scores to forecast future violence’”.¹⁹

Hart testified that:

because of the significant cultural differences between Indigenous and non-Indigenous Canadians, the impugned tools – which were

¹⁴ *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [hereinafter “*CCRA*”].

¹⁵ [2018] S.C.J. No. 30, 2018 SCC 30, at paras. 2-4 (S.C.C.).

¹⁶ *Ewert v. Canada*, [2018] S.C.J. No. 30, 2018 SCC 30, at para. 49 (S.C.C.).

¹⁷ Hart’s testimony was based upon his peer-reviewed scholarly work. See, e.g., Stephen Hart, Christine Michie and David J. Cook, “Precision of Actuarial Risk Assessment Instruments: Evaluating the ‘Margins of Error’ of Group v. Individual Predictions of Violence” (2007) 190 *British Journal of Psychiatry* 60-65.

¹⁸ *Ewert v. Canada*, [2018] S.C.J. No. 30, 2018 SCC 30, at para. 13 (S.C.C.).

¹⁹ *Id.*, at para. 44, citing trial testimony, Dr. Stephen Hart.

developed for and validated by studies on predominantly non-Indigenous populations – [were] more likely than not to be cross-culturally variant in some degree when applied to Indigenous individuals.²⁰

However, it was not possible to state in the absence of research whether the degree of variance was large or small.²¹ The trial judge accepted this testimony and this information proved significant in Wagner J.’s reasoning.

This article considers the quality of specialist knowledge that is generated and relied upon by the State to guide coercive interactions with individuals, while also attending to legal mechanisms for evaluating that specialist knowledge when it becomes expert opinion evidence. In *Ewert*, Canada called psychologist Dr. Marnie Rice to give evidence about the validity of the impugned psychological and risk assessment tools with respect to Indigenous offenders. Rice spent much of her career as a researcher and clinician in a forensic psychiatric facility. She co-developed two of the risk assessment tools Ewert challenged.²² The essential thrust of her testimony was “that the impugned tools are valid and are not affected by cultural bias with respect to Indigenous offenders.”²³

Justice Wagner largely passed over the trial judge’s finding with respect to Rice’s expert evidence, stating only that the trial judge found her evidence “of little assistance and [that it] could not be relied upon, except where it was consistent with that of Dr Hart.”²⁴ The trial judgment provided more information about Rice’s evidence. Justice Phelan was very critical of Rice’s work.²⁵ For example:

[Dr Rice] failed to disclose in her Report as required by s 3(k) of the *Code of Conduct for Expert Witnesses* that she was one of the authors of the VRAG and SORAG manuals. She was aware of this disclosure requirement.

...

²⁰ *Id.*, at para. 13.

²¹ *Id.*

²² See V.L. Quinsey *et al.*, *Violent Offenders: Appraising and Managing Risk* (Washington DC: American Psychological Association, 2d ed. 2006; 3d ed. 2015) (2d ed. re Violence Risk Appraisal Guide and Sexual Offender Risk Appraisal Guide which applied at the time relevant to Ewert’s case; 3d ed. re Violence Risk Appraisal Guide – Revised and Sex Offender Risk Appraisal Guide – Revised).

²³ *Ewert v. Canada*, [2018] S.C.J. No 30, 2018 SCC 30, at para. 15 (S.C.C.).

²⁴ *Id.*

²⁵ *Ewert v. Canada (Correctional Service)*, [2015] F.C.J. No. 1123, 2015 FC 1093 (F.C.).

In the end, Dr. Rice’s evidence was of little assistance, particularly to the Defendant [Canada]. It is unnecessary to quote some of Dr. Rice’s more controversial statements about the political reasons behind the use of scientific tests. However, it was her view that the test scores are reliable and immutable. She eschewed the various rehabilitation programs run by CSC as distractions or something akin to giving prisoners something to do while in prison. In that regard, her evidence and central thesis runs contrary to the statutory purpose and the operational goals of CSC.²⁶

The trial judge also criticized Rice for what he characterized as her “selective reliance” on academic studies of the predictive value of the impugned tools, including studies of questionable validity.²⁷ In short, in the assessment of this trial judge, the State’s only expert evidence addressing the accuracy of the impugned tools was seriously deficient across a number of important measures — including independence and reliability. Indeed, the trial judge implied that he considered excluding Rice’s evidence pursuant to *White Burgess Langille Inman v. Abbott & Haliburton*,²⁸ but noted: “[h]ad her evidence been struck, the Defendant would have had no expert evidence before this Court.”²⁹

Justice Phelan’s insinuation that the State’s expert evidence on the central question in the *Ewert* litigation was so deficient that it courted inadmissibility should in itself be cause for concern about the State’s capacity for principled, evidence-based decision-making in an adversarial context. However, the evidentiary record in *Ewert* also hints at a deeper story about how coercive State institutions generate and use specialist knowledge. As noted above, the trial judge concluded that Rice — who co-developed two of the impugned tools — gave evidence that ran “contrary to the statutory purpose” of CSC. The tools that Rice helped to develop are widely used, not just within corrections but also for sentencing and particularly with respect to dangerous offender and long-term offender applications. Judges frequently characterize them as accurate and objective predictors of risks of recidivism.³⁰ In *Ewert*, the

²⁶ *Id.*, at paras. 45, 47.

²⁷ *Id.*, at paras. 49-51.

²⁸ [2015] S.C.J. No. 23, 2015 SCC 23 (S.C.C.).

²⁹ *Ewert v. Canada*, [2015] F.C.J. No. 1123, 2015 FC 1093, at para. 46 (F.C.).

³⁰ See, e.g., *R. v. Veysey*, [2010] O.J. No. 2737, 2010 ONSC 3704, at para. 56 (Ont. S.C.J.); *R. v. Hogg*, [2009] O.J. No. 397, 2009 CanLII 2919, at para. 39 (Ont. S.C.J.); *R. v. G.W.*, [2002] O.J. No. 5317, 2002 CanLII 2669, at para. 6 (Ont. S.C.J.). Compare *R. v. D.A.L.*, [2014] B.C.J. No. 2513, 2014 BCSC 1854 (B.C.S.C.), for a more detailed judicial consideration of the reliability of algorithmic risk assessment and diagnostic tools.

trial judge found that these tools are not validated for Indigenous people, who are vastly over-represented within coercive state institutions and for whom coercive state institutions are disproportionately likely to produce adverse outcomes. Furthermore, the trial judge concluded that an author of two of these tools held a perspective on rehabilitation that ran counter to the statutory purposes of the corrections system.

The trial judge held that CSC had indeed breached its statutory obligation under section 24(1) of the *CCRA* by failing to take reasonable steps to ensure the validity of the impugned tools.³¹ He also held that this reliance upon the impugned tools breached Ewert's section 7 Charter rights because it adversely impacted his liberty and security interests in a manner that was arbitrary and overbroad.³² Ewert had also argued that the court should recognize a new principle of fundamental justice: "the contravention of an express statutory direction may constitute a breach of fundamental justice." Justice Phelan held that it was unnecessary to address this "interesting" argument.³³ Finally, Phelan J. held that the evidentiary record was insufficient to permit him "to usefully engage in the nuanced analysis called for in s. 15" of the Charter.³⁴

A majority of the S.C.C. upheld Phelan J.'s conclusions that CSC had breached its statutory obligation³⁵ and that Ewert had failed to prove a breach of his section 15 Charter equality rights.³⁶ However, Wagner J. reversed Phelan J. on the question of whether CSC's reliance on the impugned tools breached section 7 of the Charter. Justice Wagner held that while the CSC's unqualified reliance upon the impugned tools was "troubling", "the onus was upon Mr Ewert to prove that CSC's impugned practice was arbitrary or overbroad; he has not done so in this case."³⁷

Ewert's claim succeeded because a majority of the SCC held that the obligation set out in section 24(1) of the *CCRA* (to take all reasonable steps to ensure the accuracy of information used in respect of an offender) applies to CSC's use of the impugned tools.³⁸ Justice Wagner

³¹ *Ewert v. Canada*, [2015] F.C.J. No. 1123, 2015 FC 1093 at paras. 81-85 (F.C.) [hereinafter "*Ewert* (F.C.)"].

³² *Id.*, at paras. 97-105.

³³ *Id.*, at paras. 107-108. Justice Wagner characterized this as an argument for a new principle of fundamental justice "that the state must obey the law", *Ewert v. Canada*, [2018] S.C.J. No 30, 2018 SCC 30, at para. 20 (S.C.C.).

³⁴ *Ewert* (F.C.), *id.*, at para. 109. This conclusion was characterized by the SCC as a finding that Ewert had failed to prove a breach of s. 15. *Ewert, id.*, at paras. 20-21.

³⁵ *Ewert, id.*, at para. 67.

³⁶ *Id.*, at para. 79.

³⁷ *Id.*, at para. 74.

³⁸ *Id.*, at para. 45.

provided a detailed analysis of the statutory language, context and purpose of section 24(1) to justify this conclusion. The conclusion that the statutory obligation in section 24(1) governs CSC's use of risk assessment and psychological evaluation tools led him, in turn, to consider whether CSC had discharged this responsibility. In this portion of his analysis, Wagner J. held that CSC's responsibilities were informed by section 4(g) of the *CCRA*, which provides that the principles that guide CSC in achieving its statutory purpose include:

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups... .

Noting that *Ewert* marked the first occasion on which the SCC had interpreted section 4(g), Wagner J. held:

the principle set out in s. 4(g) of the *CCRA* can only be understood as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders. Section 4(g) represents an acknowledgement of the systemic discrimination faced by Indigenous offenders in the Canadian correctional system. This is a long-standing concern and one that has become more, not less, pressing since s. 4(g) was enacted. In these circumstances, it is critical that the CSC give meaningful effect to s. 4(g) in performing all of its functions. In the context of the present case, giving meaningful effect to s. 4(g) means, at a minimum, *addressing the long-standing and credible concern that continuing to use the impugned [tools] in evaluating Indigenous inmates perpetuates discrimination and contributes to the disparity in correctional outcomes between Indigenous and non-Indigenous offenders.*³⁹

Justice Wagner identified that the legislative history supported his conclusion that section 4(g) was enacted to pursue substantive equality in correctional outcomes.⁴⁰ The widening gap in correctional outcomes demonstrated the continuing importance of this principle.⁴¹ Accordingly, the failure to take “reasonable steps” to ensure that the impugned tools are valid — or, if necessary, to make them so — constituted a breach of CSC's statutory duty under section 24(1) of the *CCRA*. Justice Wagner observed:

³⁹ *Id.*, at para. 53 (emphasis added).

⁴⁰ *Id.*, at paras. 55-59.

⁴¹ *Id.*, at para. 60.

Although this Court is not now in a position to define with precision what the CSC must do to meet the standard set out in s. 24(1) in these circumstances, what is required, at a minimum, is that if the CSC wishes to continue to use the impugned tools, it must conduct research into whether and to what extent they are subject to cross-cultural variance when applied to Indigenous offenders. Any further action the standard requires will depend on the outcome of that research.⁴²

The SCC declared that the CSC had breached its statutory obligation under section 24(1).⁴³ Emphasizing that such a declaration is both discretionary and exceptional, Wagner J. held that it was nonetheless appropriate in the context of this case. The majority decision records that Ewert commenced his first grievance against the use of the impugned tools in April 2000 and that his grievance was first judicially reviewed by the Federal Court in 2007 and by the Federal Court of Appeal in 2008. At that time, CSC assured the Court that “it was reviewing its intake assessment tools used for Indigenous offenders” and this assurance was an important factor in the original dismissal of Ewert’s complaint.⁴⁴ However, Wagner J. observes, the trial judge found in 2015 “that there was no evidence that the CSC had ever completed the research referred to by the Federal Court in 2007 and anticipated by the Federal Court of Appeal in 2008”.⁴⁵ Given that almost two decades had now passed since Ewert filed his original grievance, Wagner J. held that he should not be required to renew that grievance to determine whether the statute had been breached. This declaration did not invalidate any decision made by CSC, including any decision made in reliance on the impugned tools.⁴⁶ Justice Wagner held that the assessment of any such decision would be left to future applications for judicial review.

III. *R. v. GUBBINS*: ASSESSING THE RELIABILITY OF BREATH ALCOHOL ANALYZERS

When *Gubbins* was heard before the Alberta Court of Appeal, Slatter J.A. observed: “since 2012 there has been considerable uncertainty and inconsistency in trial court decisions on the obligation of the Crown to disclose maintenance records for breathalyzer

⁴² *Id.*, at para. 67.

⁴³ *Id.*, at para. 80.

⁴⁴ *Id.*, at para. 85.

⁴⁵ *Id.*, at para. 86.

⁴⁶ *Id.*, at para. 88.

instruments.”⁴⁷ Justice Slatter details some of the judicial history to this state of uncertainty, before explaining that *Gubbins* and its companion case *Vallentgoed* “were developed, at least in part, as test cases.”⁴⁸ When these cases came to the SCC, Rowe J.⁴⁹ took the opportunity to clarify the test for first party disclosure and the relationship between first- and third party disclosure in criminal cases. Justice Côté wrote a heated dissent that accepted Rowe J.’s statement of the law regarding disclosure but disagreed with how the legal principles should be applied in these cases. Each of these sets of reasons identified the 2012 SCC decision in *R. v. St-Onge Lamoureux*⁵⁰ as a case that provided important context for the dispute regarding the disclosure of maintenance records. In this part, I will set out the SCC’s approach to first and third party disclosure, before turning to its analysis of the relevance of maintenance records.

The section 7 Charter right of an accused to receive disclosure from the Crown upon request was first recognized in *R. v. Stinchcombe*.⁵¹ Justice Sopinka referenced the *Royal Commission on the Donald Marshall Jr Prosecution* when he observed that “... [r]ecent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person.”⁵² *Stinchcombe* imposed a duty on the prosecutor to disclose “all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory.”⁵³ This obligation applies to *all* non-privileged information in the Crown’s possession, even where the Crown does not propose to adduce that information and whether favourable to the accused or not.⁵⁴ In a much-cited passage, Sopinka J. explained,

the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a

⁴⁷ *R. v. Vallentgoed*, [2016] A.J. No. 1180, 2016 ABCA 358, at para. 2 (Alta. C.A.) [hereinafter “*Vallentgoed*”].

⁴⁸ *Id.*

⁴⁹ Majority *per* Rowe J. with Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Brown and Martin J.J., Côté J. dissenting.

⁵⁰ [2012] S.C.J. No. 57, 2012 SCC 57 (S.C.C.) [hereinafter “*St-Onge Lamoureux*”].

⁵¹ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) [hereinafter “*Stinchcombe*”].

⁵² *Id.*, at 336, citing Nova Scotia, *Royal Commission on the Donald Marshall Jr, Prosecution* Vol. 1 “Findings and Recommendations” (Halifax: The Commission, 1989).

⁵³ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 18 (S.C.C.).

⁵⁴ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326, at 338-39.

conviction but the property of the public to be used to ensure that justice is done.⁵⁵

In the years since *Stinchcombe* was decided, the duty to make disclosure has been clarified a number of times.⁵⁶ Perhaps most significantly for present purposes, *McNeil* explains that the obligation to make disclosure rests upon the Crown prosecutor, not police or other State representatives. However, a prosecutor “who is put on notice of the existence of relevant information” held by other Crown agencies or departments must inquire further and obtain “the information if it is reasonably feasible to do so.”⁵⁷ “[T]he police have a corollary duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused.”⁵⁸ In *McNeil*, the SCC considered whether first party disclosure extended to police records regarding police misconduct. The Court held that “where the disciplinary information is relevant, it should form part of the first party disclosure package, and its discovery should not be left to happenstance.”⁵⁹ This duty arises whether or not police misconduct is directly related to the investigation in which the accused is implicated.

I read *McNeil* as a very clear statement that the duty to disclose records arises where those records are obviously relevant, regardless of whether or not the information arose out of the investigation that led to charges being laid against the accused. However, confusion had crept into the jurisprudence, with some courts seeming to hold that the duty of first party disclosure extended only to the “fruits of the investigation” and others using relevance as the touchstone. Accordingly, in *Gubbins*, the SCC seized the opportunity to clarify the scope of first party disclosure. Justice Rowe suggested that the duty to make first party disclosure operates through a two-part analysis. First:

[t]he ‘fruits of the investigation’ refers to the police’s investigative files, as opposed to operational records or background information. This information is generated or acquired during or as a result of the specific

⁵⁵ *Id.*, at 333.

⁵⁶ *R. v. Egger*, [1993] S.C.J. No. 66, [1993] 2 S.C.R. 451 (S.C.C.); *R. v. Chaplin*, [1994] S.C.J. No. 89, [1995] 1 S.C.R. 727 (S.C.C.); *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244 (S.C.C.); *R. v. McNeil*, [2009] S.C.J. No. 3, 2009 SCC 3 (S.C.C.) [hereinafter “*McNeil*”]; *R. v. Quesnelle*, [2014] S.C.J. No. 46, 2014 SCC 46 (S.C.C.).

⁵⁷ *McNeil*, *id.*, at para. 49.

⁵⁸ *Id.*, at para. 52.

⁵⁹ *Id.*, at para. 53.

information into the charges against the accused. Such information is necessarily captured by first party/*Stinchcombe* disclosure.⁶⁰

Justice Rowe cited the Ontario Court of Appeal decision in *R. v. Jackson*⁶¹ to explain that information generated in the course of the investigation “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.”⁶² All of this information, to the extent that it is not privileged, must be disclosed.

Secondly, Rowe J. held that in “addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is ‘obviously relevant’ to the accused’s case.”⁶³ Justice Rowe explained that the phrase “obviously relevant” does not indicate “a new standard or degree of relevance.” Instead,

this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence.⁶⁴

Therefore, affirming *McNeil*, information which is not part of the “fruits of the investigation” but which is *relevant* to the accused’s right to make full answer and defence must also be given by police to the prosecutor, and (to the extent that it is not privileged) disclosed by the prosecutor to the defence. Where the prosecutor refuses to disclose evidence because it is irrelevant, the burden is on the prosecutor to demonstrate that the information is “clearly irrelevant”.⁶⁵

When information is held by a state agency including police, third party disclosure processes may still be important if that information is neither part of the fruits of the investigation nor *obviously* relevant to the accused person’s case.⁶⁶ In order to obtain third party disclosure, an accused must apply to court for an order requiring production to the court. In this instance, the accused bears the burden of showing that the

⁶⁰ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 22 (S.C.C.).

⁶¹ [2015] O.J. No. 6274, 2015 ONCA 832 (Ont. C.A.).

⁶² *Id.*, at paras. 92-93, cited in *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 22 (S.C.C.).

⁶³ *Gubbins, id.*, at para. 23.

⁶⁴ *Id.*

⁶⁵ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 at 339-40 (S.C.C.); *Gubbins, id.*, at para. 19.

⁶⁶ *Gubbins, id.*, at para. 24; *R. v. O’Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

record is “likely relevant” to the proceeding against him or her.⁶⁷ Where the accused meets that threshold, the judge will examine the records to decide whether the record is actually relevant, and to weigh competing interests.⁶⁸ The third party disclosure regime is intended to prevent fishing expeditions and to protect third party privacy and equality rights, among other values, but the SCC has emphasized that likely relevance should be given “a wide and generous connotation” that “includes information in respect of which there is a reasonable possibility that it may assist the accused in the right to make full answer and defence.”⁶⁹

In the post-*Gubbins* Ontario Court of Appeal decision *R. v. Stipo*,⁷⁰ Watt J.A. usefully explained that in order to be “obviously relevant” for first party disclosure, “the relevance of the records must be ‘obvious’ without” the judicial examination contemplated in the second step of the *O’Connor* process.⁷¹ However, in the absence of statutory principles to the contrary, “any evidence that has a tendency to cast doubt on the reliability of” the State’s expert evidence is obviously relevant and should be shared as part of the first party disclosure.⁷²

Having clarified the relationship between “the fruits of the investigation”, “obvious relevance” and “likely relevance”, *Gubbins* addresses the question of whether maintenance records for approved breath alcohol analyzers should be disclosed at all; and if so, under which regime. It is here that the distinctive legislative context for breath alcohol analyzers, the associated case law, and the history of policy-making in this area, become important.

Section 258(1)(c) of the *Criminal Code*⁷³ provides that evidence of the results of a breath sample taken with an “approved instrument” constitute, under certain circumstances, “conclusive proof of the concentration of alcohol in the accused person’s blood” at relevant times.⁷⁴ This statutory presumption limits how the reliability of the result recorded by an approved breath alcohol analyzer may be challenged. An “approved instrument” is defined in section 254(1) (repealed by S.C.

⁶⁷ *Gubbins, id.*, at para. 25; *O’Connor, id.*, at para. 22.

⁶⁸ *Gubbins, id.*, at para. 27; *R. v. McNeil*, [2009] S.C.J. No. 3, 2009 SCC 3, at paras. 39, 40 (S.C.C.); *R. v. Stipo*, [2019] O.J. No. 28, 2019 ONCA 3, at para. 89 (Ont. C.A.).

⁶⁹ *McNeil, id.*, at para. 44; see also *R. v. O’Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.) at para. 21; *Gubbins, id.*, at para. 27.

⁷⁰ [2019] O.J. No. 28, 2019 ONCA 3 (Ont. C.A.).

⁷¹ *Id.*, at para. 86.

⁷² *Id.*, at para. 107.

⁷³ R.S.C. 1985 c. C-46. Repealed S.C. 2018, c. 21, s. 14, effective December 18, 2018.

⁷⁴ Subsection 258(1)(d.01).

2018, c. 21, s. 21, effective December 18, 2018; and now in s. 320.11) to mean a breath alcohol analyzer which is approved by the Attorney General of Canada as suitable for the purpose of section 258. In this article, I refer to devices that are “approved instruments” under section 254 (currently under section 320.11) as approved breath alcohol analyzers. (The commonly used terms “Breathalyzer” and “Intoxilyzer” are brand names for particular analyzers.)

The Attorney General of Canada has appointed the Alcohol Test Committee of the Canadian Society of Forensic Science (ATC) to evaluate breath alcohol analyzers and recommend whether they should be approved under section 254 (currently under section 320.11) of the Code.⁷⁵ ATC publications position ATC as a scientific body:

the determination of blood alcohol concentrations (BACs) by means of breath tests is a scientific process and, for that reason, must be performed according to proper scientific practices and standards established by scientists with specific knowledge of the subject.⁷⁶

The ATC publications that I have reviewed do not specify what training or credentials are required in order to be a member of that Committee. Hodgson reported in 2012 that the ATC include “individuals who possessed a scientific background of at least an undergraduate science degree from a recognized university.”⁷⁷ A search for the credentials of past and present members suggests that some hold doctorates in toxicology, although doctorate degrees are not universal among those members I could find, and I could not find information about the qualifications of some members.

In her dissenting opinion in *Gubbins*, Côté J. cast further light on the composition of the ATC.⁷⁸ She adopted the following passage from *R. v. Sutton*:

the [ATC] is not a truly independent body of scientific experts who offer purely objective opinions on topics relating to breath testing instruments. The [ATC] is comprised of scientists who have direct connections with, and are employed by, policing services and

⁷⁵ Brian T. Hodgson, “The Validity of Evidential Breath Alcohol Testing” (2013) 41 *Canadian Society of Forensic Science Journal* 83-96, at 87-88.

⁷⁶ Canadian Society of Forensic Science Alcohol Test Committee, *Recommended Best Practices for a Breath Alcohol Testing Program* (CSFS, December 2018), online: <<https://www.csfs.ca/wp-content/uploads/2018/12/2018-12-18-Best-Practices.pdf>>.

⁷⁷ Brian T. Hodgson, “The Validity of Evidential Breath Alcohol Testing” (2013) 41 *Canadian Society of Forensic Science Journal* 83-96, at 87-88.

⁷⁸ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 75 (S.C.C.).

Government Agencies. Five of the ten members of the [ATC] are employed by RCMP labs across the country. Four of the remaining five members are employed by Government agencies.⁷⁹

Justice Côté suggested that, given this composition, courts should be cautious about determining scientific questions that arise with respect to the reliability of breath-testing programs solely on the basis of evidence from the ATC.⁸⁰ She pointed to instances, both in litigation and in legislative debates, where claims made by ATC members had been contested by other reputable experts.⁸¹

Policy efforts to reduce the harms of intoxicated driving have focused on developing (and refining) breath alcohol analyzers to reliably produce accurate results under realistic operating conditions.⁸² In *Gubbins*, Rowe J. described how a contemporary device operates, emphasizing that the device will “perform internal and external diagnostic tests at the time each breath sample is taken in order to ensure accuracy of the results.”⁸³ Broadly speaking, breath alcohol analyzers cycle through control procedures before and after taking the true breath sample to ensure accuracy.⁸⁴ These control procedures test the ambient air and samples of known alcohol concentration, and purge the device of vapour that could affect the results. Each step in these procedures generates a printed record.

In *St-Onge Lamoureux*, a majority of the Court held that the statutory presumptions in section 258(1)(c), (d.01) and (d.1) infringe section 11(d) of the Charter, but that this infringement is demonstrably justified after severance of certain words from section 258(1)(c).⁸⁵ Justice Deschamps held that the purpose of these statutory presumptions is “to give the results [recorded by approved breath alcohol analyzers] a weight consistent with their scientific value.”⁸⁶ She held that information before Parliament when it passed these provisions and the evidence adduced in

⁷⁹ *R. v. Sutton*, [2013] A.J. No. 1266, 2013 ABPC 308 (Alta. Prov. Ct.), cited in *Gubbins*, *id.*, at para. 75.

⁸⁰ *Gubbins*, *id.*, at paras. 75-80.

⁸¹ *Id.*, at paras. 76-80.

⁸² For a history of these efforts in Canada, see Brian T. Hodgson, “The Validity of Evidential Breath Alcohol Testing” (2013) 41 *Canadian Society of Forensic Science Journal* 83-96, at 87-88.

⁸³ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 4 (S.C.C.).

⁸⁴ *Id.*

⁸⁵ *R. v. St-Onge Lamoureux*, [2012] S.C.J. No. 57, 2012 SCC 57, at para. 101 (S.C.C.), *per* Deschamps J., Cromwell J. dissenting in part with Rothstein J.

⁸⁶ *Id.*, at para. 36.

St-Onge Lamoureux established that this was a pressing and substantial objective.⁸⁷

In the wake of *St-Onge Lamoureux*, a dispute over disclosure of maintenance records played out across Canada. Broadly speaking, Crown prosecutors in many jurisdictions resisted disclosing maintenance records on the premise that they are not relevant to the accuracy of the results obtained using breath alcohol analyzers. Defence counsel pointed to the language of the *Criminal Code* and *St-Onge Lamoureux* (both discussed in more detail below) to support the argument that maintenance records can be significant to the statutorily relevant question whether a breath alcohol analyzer malfunctioned. Perhaps the clearest articulation of the position that maintenance records are relevant to the defence in an “Over 80” case came from Paciocco J. (as he then was) in *R. v. Fitts*.⁸⁸ Judge Paciocco held:

[such records are] created and preserved to enhance the accuracy of the breath testing program so that the performance of approved instruments in accurately securing blood alcohol readings is known. This information is therefore about the reliability of results. It strikes me that, logically, accuracy verifying information derived from the very machine being relied upon by the Crown to generate ‘conclusive’ evidence of the subject’s blood alcohol content is *prima facie* relevant.
...

[Pursuant to the language of section 258(1)(c) of the Code], ‘clear irrelevance’ is not demonstrated by showing that the contested information does not bear on the accuracy of the results. It is demonstrated by showing that the information has nothing to do with whether the machine was ‘malfunctioning or operated improperly.’⁸⁹

In short, Paciocco J. drew a line from information that documented the performance of approved instruments over time to the statutorily relevant consideration of whether the machine was malfunctioning at a given time. However, Paciocco J. expressed dissatisfaction with this result, observing that if maintenance records indeed have no bearing on the

⁸⁷ *Id.* Specifically, testimony in committee and speeches made in Parliament identify a significant problem with the *Carter* defence (*R. v. Carter*, [1985] O.J. No. 1390, 7 O.A.C. 344 (Ont. C.A.)), in which an accused was able to rebut the presumption of accuracy by giving testimony about his or her alcohol consumption and supplying toxicology evidence that suggested a “true” blood-alcohol content based on self-reported consumption. See also, *R. v. Dineley*, [2012] S.C.J. No. 58, 2012 SCC 58 (S.C.C.).

⁸⁸ [2015] O.J. No. 2431, 2015 ONCJ 262 (Ont. C.J.).

⁸⁹ *Id.*, at paras. 9 and 11.

accuracy of a particular reading, the Crown was being put to unnecessary effort and expense.⁹⁰

Gubbins and Vallentgoed were charged in separate proceedings under the post-*St-Onge Lamoureux* regime. In each of these cases, printouts generated at the time the tests were performed indicated that the breath alcohol analyzers were functioning properly.⁹¹ Vallentgoed and Gubbins sought disclosure of the maintenance records with respect to the relevant breath alcohol analyzers, on the premise that these maintenance records were relevant to the accuracy of the instruments. *Gubbins* and *Vallentgoed* were tried separately, but the appeals were heard together.⁹²

When the two cases were heard before the Alberta Court of Queen's Bench, Kenny J. criticized the Crown for continuing to resist first party disclosure of maintenance logs in the wake of *St-Onge Lamoureux*. She adopted the view expressed by McIntyre J. in *R. v. Sinclair*:

The Supreme Court of Canada has held these maintenance logs to be relevant in *R. v. St-Onge Lamoureux*, 2012 SCC 57 (S.C.C.). There is no room to argue they are not relevant. It is a waste of court time and the accused's money to fight preliminary battles of relevance of these records.⁹³

In the Alberta Court of Appeal, Slatter J.A. (Berger J.A. concurring) reviewed the evidentiary record, including expert testimony given by Ms. Kerry Blake. Blake is "a Forensic Alcohol Specialist [in the Toxicology Service Program] with the [RCMP] National Centre for Forensic Service Alberta"⁹⁴ and a member of the ATC. Justice Slatter also noted that Blake is a co-author of the ATC's 2012 standards for assessing the accuracy and reliability of breath alcohol analyzer results.⁹⁵ He accepted Blake's evidence that one "can form no conclusions concerning the proper operation of an instrument based on maintenance records. ... [T]he only records that can establish proper operation at the

⁹⁰ *Id.*, at para. 14.

⁹¹ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 5 (S.C.C.).

⁹² *R. v. Vallentgoed*, [2015] A.J. No. 360, 2015 ABQB 206 (Alta. Q.B.) [hereinafter "*Vallentgoed* (Q.B.)"]; *R. v. Vallentgoed*, [2016] A.J. No. 1180, 2016 ABCA 358 (Alta. C.A.); *Gubbins*, *id.*

⁹³ *R. v. Sinclair*, [2015] A.J. No. 192, 2015 ABQB 113, at para. 15 (Alta. Q.B.), quoted in *Vallentgoed* (Q.B.), *id.*, at para. 12.

⁹⁴ *R. v. Gubbins*, [2014] A.J. No. 989, 2014 ABPC 195, at para. 12 (Alta. Prov. Ct.).

⁹⁵ Alcohol Test Committee, "Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results", (2012) 45:2 *Canadian Society of Forensic Sciences Journal* 101.

time of testing are those ... produced during testing itself.”⁹⁶ Noting that Blake’s evidence was uncontradicted at the disclosure hearing, Slatter J.A. concluded that it follows from her evidence that maintenance records for breath alcohol analyzers are “clearly irrelevant”⁹⁷ and thus not subject to first party disclosure.⁹⁸ Turning to *St-Onge Lamoureux*, Slatter J.A. held that this case “never categorically states that all maintenance records are always disclosable.”⁹⁹ In the result, Slatter J.A. held that maintenance logs are not subject to first party disclosure and that the “likely relevance” of these logs had not been established for third party disclosure.

In the SCC, Rowe J. agreed that maintenance logs for breath alcohol analyzers need not be disclosed pursuant to the first party disclosure regime.¹⁰⁰ Similarly, Gubbins and Vallentgoed had not discharged the burden of demonstrating “likely relevance” for the purposes of the third party disclosure process.¹⁰¹ Justice Rowe concluded that Deschamps J.’s references to disclosure of maintenance records in *St-Onge Lamoureux* did not establish the relevance of these records.¹⁰² He also pointed to a change in the position taken by ATC with respect to the relevance of maintenance logs.¹⁰³ In *St-Onge Lamoureux*, Deschamps J. had observed:

... The expert evidence filed in the instant case reveals that the possibility of an instrument malfunctioning or being used improperly when breath samples are taken is not merely speculative, but is very real. The [ATC] has made a series of recommendations concerning the procedures to be followed by the professionals who operate the instruments and verify that they are properly maintained. ... According to the Committee, the calibration and maintenance of instruments are essential ‘to the integrity of the breath test program’.¹⁰⁴

Justice Rowe explains in *Gubbins* that the ATC changed its position on “the documentation required for assessing the accuracy and reliability of approved instruments” after *St-Onge Lamoureux* was decided.¹⁰⁵ He

⁹⁶ *R. v. Vallentgoed*, [2016] A.J. No. 1180, 2016 ABCA 358, at para. 18 (Alta. C.A.).

⁹⁷ *Id.*, at para. 19.

⁹⁸ *Id.*, at paras. 45-47.

⁹⁹ *Id.*, at para. 52. See also the discussion *id.*, at paras. 53-54.

¹⁰⁰ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 52 (S.C.C.).

¹⁰¹ *Id.*, at para. 54.

¹⁰² *Id.*, at para. 50.

¹⁰³ *Id.*, at paras. 44-45.

¹⁰⁴ *R. v. St-Onge Lamoureux*, [2012] S.C.J. No. 57, 2012 SCC 57, at para. 25 (S.C.C.)

(citations omitted).

¹⁰⁵ *R. v. Gubbins*, [2018] S.C.J. No. 44, 2018 SCC 44, at para. 45 (S.C.C.).

observes that this change in position “qualified” the evidence that was before the Court in *St-Onge Lamoureux*, as the ATC now stipulates that maintenance logs do not bear upon the accuracy of test results given by breath alcohol analyzers in the field.¹⁰⁶ Justice Rowe accepted Blake’s evidence that false positive results are “highly unlikely” to occur and that “maintenance records cannot tell us whether any particular result is a false positive.”¹⁰⁷ Accordingly, these records are “not obviously relevant” to the breath alcohol analyzer’s functioning or proper operation at the time of testing.¹⁰⁸

Justice Côté expressed alarm at the majority’s approach. She observed that the view expressed by the majority in *St-Onge Lamoureux* regarding the relevance of maintenance records was based on a far more “detailed and balanced” evidentiary record than that which was present in *Gubbins*.¹⁰⁹ Justice Côté regarded the expectation that maintenance records would routinely be disclosed as central to the majority’s reasoning in *St-Onge Lamoureux*.¹¹⁰ Furthermore, Côté J. noted that the updated ATC position statement relied upon by the majority in *Gubbins* “has not been shown to be the product of new scientific evidence of any kind”.¹¹¹

Ultimately, Côté J. cautioned:

Just as the courts subject experts to special scrutiny before allowing them to opine on the ‘ultimate issue’ in a dispute, so should this Court exercise caution, in this case, when considering the extent to which the ATC’s updated recommendations are determinative of the relevance of maintenance records, a question of law that is to be decided by the courts. Such caution is particularly warranted in light of the ATC’s composition...¹¹²

Indeed, Côté J. noted, Blake herself had acknowledged in testimony in other cases that not all experts agree with the ATC position on the relevance of maintenance records.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, at para. 48.

¹⁰⁸ *Id.*, at para. 50.

¹⁰⁹ *Id.*, at paras. 71-72.

¹¹⁰ *Id.*, at para. 71.

¹¹¹ *Id.*, at para. 76. Noting that the ATC position statement does not cite any research or scientific evidence, I e-mailed the present Chair of the ATC to ask whether new scientific evidence had in fact informed the ATC’s change in position. I also conducted a literature search to look for such evidence. Neither avenue yielded additional research or scientific evidence.

¹¹² *Id.*, at para. 75 (citations omitted).

¹¹³ *Id.*

In the end, however, Côté J.'s dissent stands as a lone voice of caution. It remains open to a future litigant to amass an evidentiary record that raises the "likely relevance" of maintenance logs to the accuracy of approved breath alcohol analyzers in the context of an application for third party disclosure. Unless (or until) that step is successfully taken and a new evidentiary record prompts a change in the present approach, maintenance logs will not form part of the standard disclosure package in "Over 80" cases.

IV. CHARTER RIGHTS, STATE EXPERTISE

What happens when specialist knowledge generated to meet the needs of coercive state institutions enters courtrooms as expert evidence? In the absence of information to the contrary, courts tend to presume that such specialist knowledge is neutral, well-grounded in research, and suitable for judicial purposes. As the evidentiary records in *Ewert* and *St-Onge Lamoureux* suggest, however, these presumptions may not withstand careful scrutiny.

It took *Ewert* almost 20 years to establish that CSC was breaching its statutory duty to Indigenous prisoners. *Ewert*'s victory was, unquestionably, secured by the expert testimony of Dr. Stephen Hart, an academic psychologist who has spent much of his career assessing the validity of diagnostic and risk assessment techniques. It is sobering to observe that, if Hart's research had not been available, the State's expert evidence may well have gone unchallenged and the shortcomings of that evidence would have been far more difficult to establish. Of course, the State's evidence would have been no more reliable in the absence of Hart's testimony — but it would most likely have been accepted.

State institutions have vastly greater resources at their disposal than rights-holding litigants, including greater capacity to generate and use specialist knowledge. As repeat players within Charter litigation and the criminal legal system,¹¹⁴ state institutions have the capacity to be strategic about which cases they pursue. When one conceives of state institutions as repeat players, Côté J.'s dissent in *Gubbins* raises disquieting questions. Her account of the scientific debate in *St-Onge Lamoureux* suggests that the case-by-case obligation to establish an evidentiary record enabled the Crown and ATC to persuade the Court to

¹¹⁴ Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law & Society Review* 95=160, at 98-104.

alter the previous parameters of first party disclosure. As Côté J. points out, the ATC was not obliged by the Court to identify any material change in research or technology that would warrant its change in position between *St-Onge Lamoureux* and *Gubbins*.

Recent SCC and appellate decisions have emphasized that trial judges should play an active gatekeeping role with regard to expert evidence.¹¹⁵ In theory, the party who proffers expert evidence must prove that this evidence is reliable for the purposes for which it is offered. Even where this presumption is statutorily altered — as it has been for breath alcohol analyzers — it remains possible to challenge scientific reliability. However, across the criminal legal system, the reliability of the state’s specialist knowledge is routinely taken for granted. Legal aid caps and other resource constraints place very real limits on the capacity of rights-holding litigants to challenge routine, state-generated expert evidence. Indeed, it is the very routine nature of some specialist knowledge generated by the state — such as risk assessment tools and breath alcohol analyzers — that may cause judges and lawyers to overlook the need for vigilance with respect to *all* expert evidence, including that which has effectively been grandfathered under our previous, more *laissez-faire* approaches to admissibility.¹¹⁶

The evidentiary record in *Ewert* suggests that we may be too complacent about the validity of the state’s routine forms of specialist knowledge and about the independence of expert witnesses who, in many cases, spend their careers working within state institutions. Justice Côté argues that a similar lesson emerges from the evidentiary record in *St-Onge Lamoureux*. When routine expert techniques are subjected to careful scrutiny, troubling value judgments and blind spots can become apparent. In a criminal legal system in which the over-representation of Indigenous people and Black Canadians continues to grow and Indigenous women are the fastest growing population of prisoners, it is entirely possible that the unexamined reliance upon routine expert techniques generated by and for coercive state ends perpetuates structural racism and gendered harms. The record in *Ewert* gives real heft to that concern.

¹¹⁵ For a thorough discussion, see Emma Cunliffe, “A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence” in Paul Roberts and Michael Stockdale, eds., *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Cheltenham: Edward Elgar, 2018), 310-32.

¹¹⁶ See *R. v. Trochym*, [2007] S.C.J. No. 6, 2007 SCC 6 (S.C.C.). I am grateful to the anonymous reviewer who suggested that I specifically address this question.

Read together, *Ewert* and *Gubbins* suggest that the practical value of constitutional rights depends on maintaining a generous approach to disclosure of information that bears upon the independence and reliability of the state's specialist knowledge. I was therefore pleased to see that when the Ontario Court of Appeal recently considered *Gubbins*, it held that a record of the performance of a drug recognition expert in other cases was obviously relevant to the reliability of the expert's opinion in the instant case, and therefore subject to first party disclosure.¹¹⁷

However, I am troubled that the SCC did not subject the testimony given by the State's expert witness in *Gubbins* to the careful judicial evaluation that is anticipated within cases such as *White Burgess Langille Inman v. Abbott and Haliburton Co.*¹¹⁸ and *R. v. Sekhon*.¹¹⁹ Blake's testimony was *ipse dixit*, drawing only on the authority of the ATC — whose publications similarly fail to cite any scientific evidence for its position. While Rowe J. is quite correct to point to the fact that Blake's evidence was not answered by an opposing expert, this observation does not substitute for the careful assessment of reliability that should precede any judicial reliance upon an expert's testimony, particularly where the scope of a constitutional right is in play. Indeed, given the imperative of judicial independence from other branches of the state, the need for such an assessment is heightened when liberty is at stake and the record is confined to specialist knowledge generated by or for an arm of the executive state.

Read together, *Ewert* and *Gubbins* also illustrate the very real equality concerns that arise from the imbalance of state and rights claimants' access to specialist knowledge. The Charter places the burden of proving a breach of Charter rights upon the rights holder. The practical significance of this burden of proof is vividly illustrated by *Ewert*. *Ewert's* case was essentially a challenge to the validity of tools largely developed by CSC and State employees for the ends of coercive State institutions. CSC was held to have breached its statutory duty to pursue substantive equality by failing to take reasonable steps to ensure that these tools are accurate with respect to Indigenous people, but not to have breached *Ewert's* section 15 Charter right to substantive equality. Given this distinction, one wonders how a rights holder — in *Ewert*, an

¹¹⁷ *R. v. Stipo*, [2019] O.J. No. 28, 2019 ONCA 3 (Ont. C.A.).

¹¹⁸ [2015] S.C.J. No. 23, 2015 SCC 23 (S.C.C.).

¹¹⁹ [2014] S.C.J. No. 15, 2014 SCC 15 (S.C.C.).

incarcerated Indigenous man — might ever generate the evidentiary record that would positively establish that Indigenous offenders are systematically over-classified using these tools. Not the least impediment to such an undertaking arises from the structural control of information; the information that would be required for such an analysis is largely held and controlled by CSC.

The failure of section 15 litigation to advance substantive equality is widely documented.¹²⁰ However, the relationship between the “primordial status of substantive equality”¹²¹ and access to justice is, as Melina Buckley has observed, under-theorized within Canadian rights jurisprudence.¹²² *Ewert* demonstrates some of the practical consequences of the allocation of evidentiary and persuasive burdens for the vindication of constitutional rights within a system of asymmetric and heavily constrained resources. As *Gubbins* also illustrates, until Canadian courts address these consequences, individual rights holders will continue to face an uphill battle when seeking to challenge the state’s specialist knowledge.

¹²⁰ See, e.g., Sonia Lawrence, “*R. v. Kapp*” (2018) 30 *Canadian Journal of Women & the Law* 268-291; Judy Fudge, “Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution” (2007) 23 *South African Journal on Human Rights* 235-252.

¹²¹ Melina Buckley, “Constitution Cases 2007 Searching for the Constitutional Core of Access to Justice” (2008), 42 S.C.L.R. (2d) 567-593, at 578.

¹²² *Id.*