SUPREME COURT OF CANADA

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Case in Brief: *R. v. Gubbins*

Judgment of October 26, 2018 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2018 SCC 44

Breathalyzer maintenance records don't have to be disclosed unless an accused person can show they are likely relevant to his or her defence, the Supreme Court has ruled.

Mr. Gubbins and Mr. Vallentgoed were charged with having blood alcohol "over 80" in separate incidents. As part of their defences, they asked for copies of the maintenance records for the breathalyzer devices used to test their blood alcohol levels.

Mr. Vallentgoed received some records showing that the breathalyzer used to test him had been sent for repair the day after he was charged, and twice more in the previous four months. His lawyer asked for more information about the repair work. The Crown (the prosecution) refused. It said the repair records belonged to third parties, and that they weren't relevant anyway. The summary conviction judge agreed with the Crown, and convicted Mr. Vallentgoed of driving with blood alcohol "over 80." The summary conviction appeal judge ruled for Mr. Vallentgoed, saying the case should go back to trial after the Crown gave him the records.

Mr. Gubbins also asked for maintenance records for the breathalyzer used to test him. The Crown said the records were held by a third party (the contractor who maintained the device). An expert witness testified that maintenance records weren't relevant to whether a *particular* test was accurate, so they weren't relevant to Mr. Gubbins' defence. The trial judge ruled for Mr. Gubbins and ordered the trial stopped until the Crown gave Mr. Gubbins the records. The summary conviction appeal judge agreed.

Mr. Vallentgoed's and Mr. Gubbins' appeals were heard together before the Court of Appeal because they dealt with the same issue: what records an accused person has a right to when defending a criminal charge. The Court of Appeal agreed with the Crown. It restored Mr. Vallentgoed's conviction and sent Mr. Gubbins' case back for trial. It said the breathalyzer maintenance records were "third-party" records and didn't have to be disclosed.

This case turned on the difference between "first-party" and "third-party" records in a criminal case. When a person is charged with a crime, the Crown has to share information related to the person's defence. There are some exceptions, for example if the information is "privileged" or protected by law. Some police records will be considered "first-party" records (like anything created or gathered by police during the investigation). First-party records have to be disclosed when the accused person asks, unless the Crown can show they are privileged or obviously not relevant to the case. Other police records will be considered "third-party" records (like documents related to police administration or operations). Documents that aren't part of the investigation and do not belong to the police, such as medical records belonging to a hospital, are also considered third-party records. Third-party records will only be disclosed if the accused person can show they are likely relevant to the case. The problem in these cases was that some courts had said breathalyzer maintenance records were first-party records, while others had said they were third-party records. The law was not clear.

The majority at the Supreme Court said breathalyzer maintenance records were third-party records. They didn't need to be disclosed unless the accused person could show they were likely relevant to his or her defence. The majority looked at the relevance of the maintenance records and who controlled them. While they would be relevant to whether a breathalyzer device was *maintained* properly, they wouldn't be relevant to whether it was *working* on a given day. (Breathalyzers do self-tests each time they are used; those records were relevant and had already been shared.) The records weren't held by the Crown because they belonged to the RCMP and other third parties, such as contractors. They were not part of any RCMP investigation file since they were just general operational records. The majority upheld Mr. Vallentgoed's conviction and sent Mr. Gubbins' case for a new trial.

In this case, the Supreme Court decided how much information about breathalyzer maintenance records prosecutors have to share with someone accused of an "over 80" offence. This settled a disagreement among lower courts about how these records should be treated. *R. v. Awashish*, released on the same day, also dealt with breathalyzer records and an "over 80" driving offence. It was originally appealed for different reasons.

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Breakdown of the Decision: ***Majority:*** Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, and Martin JJ. in agreement) | ***Dissenting:*** Côté J.

More information (case # 37395 & 37403): Decision | Case information: 37395 & 37403 | Webcast of hearing

Lower court rulings: Court of Appeal of Alberta, Court of Queen's Bench of Alberta, Provincial Court of Alberta (37395; 37403 not available online)