

Case Name:

R. v. Chouinard

Between

**Her Majesty the Queen, and
Jennifer Leah Chouinard**

[2012] A.J. No. 1220

Action No.: A68567450Z, 110396926P1

Judicial Centre of Peace River

Alberta Provincial Court

J.R. McIntosh Prov. Ct. J.

Judgment: July 19, 2012.

(51 paras.)

Counsel:

M. Mastel, for the Crown.

Y.R. **Ziv**, for the Accused.

Ruling (Voir Dire)

1 J.R. McINTOSH PROV. CT. J.:-- The defendant is before me with Mr. Ziv.

2 Ms. Chouinard was charged on a two-count Information as follows: (as read)

On or about the 13th of March, 2011, at or near the Town of Peace River in the Province of Alberta, while her ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle.

3 And count 2: (as read)

Same date, location, having consumed alcohol in such quantity that the concentration thereof in her blood exceed 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle.

4 The defendant filed Charter notice alleging her right to make full answer in defence under section 7 was deprived because notwithstanding a request the Crown failed to disclose a copy of a sticker which was on the approved screening device at the time the defendant provided a sample of her breath into that instrument. The defendant has applied to exclude from evidence the result of the approved screening device breath test and the subsequent results of the Intoxilyzer breath tests.

5 The Crown responded to the defendant's notice by leading its evidence in a voir dire. The defendant elected to not call evidence. The defendant conceded the only issue on the 08 count is whether lack of disclosure is fatal to the Crown's case.

6 Constable Fletcher was the investigating officer. I find him to be credible. He noticed a particular motor vehicle parked outside a local lounge. Later he noticed the same vehicle travelling in the area. He followed it for some time until the vehicle returned to a location and stopped near where he had seen it earlier. Fletcher approached the driver's side door at 3:24 AM. The defendant was the operator and she had a male passenger. The defendant was crying.

7 Fletcher was initially concerned that he was dealing with a domestic issue. He wanted to isolate the defendant from the male passenger so he could have a conversation with her where she would not be intimidated by or influenced by the male passenger, so he asked her to exit the vehicle. He determined the defendant was not being abused. However, when he asked the defendant whether she had been drinking she responded she had consumed three drinks at Sharks, the location the vehicle had been parked at earlier.

8 The defendant's eyes were red and watery -- I'm sorry, red and glossy, but Fletcher could not determine whether that was because she had consumed liquor or because she was crying. The defendant, "was not stable in her step" but Fletcher could not determine whether that was because she had consumed liquor or because the defendant was wearing high-heeled shoes and the road surface was covered with snow and compacted ice.

9 However, because the defendant has admitted to having consumed three drinks, Fletcher was suspicious the defendant had alcohol in her body. He read to her the standard approved screening device demand at 3:30 AM. Fletcher was trained to operate the device. The defendant provided a sample of her breath into the instrument. The result was a fail. That result informed Fletcher that the defendant's blood alcohol's level was over .08. Fletcher read to the defendant the standard breath test demand, and other information.

10 The defendant was transported to the detachment where she provided two samples of her breath into an Intoxilyzer 5000C. The results of each analysis was 190 milligrams percent. The defendant was served with a true copy of the certificate of analysis and notice of intention to produce. She was released from custody at 5:32 AM. The affidavit of personal service was completed later. The three-part document was marked as a full exhibit in the voir dire.

11 Fletcher testified that when he administered the approved screening device breath test he was satisfied the instrument was working properly. He testified that he used a 400D instrument, serial number 046976D. There was a sticker on the instrument that informed him that the instrument had been calibrated and the calibration was current and the calibrating was set to expire 23 March, 2011. The sticker had Constable Voeller's initials on it. That informed Fletcher that Voeller was the officer who calibrated the instrument. Fletcher testified that he is not qualified to calibrated approved screening devices. The said sticker is the sticker referred to in the Charter notice.

12 Crown was not able to comply with the defendant's request for a copy of the sticker. Fletcher was not aware of what happened to the sticker. He could only guess or assume. The Crown elected to not call any evidence as to what happened to the sticker that had been on the approved screening device. The Crown asked Fletcher when during an investigation he would look at the sticker. Fletcher responded he looks at the sticker when he picks it up at the beginning of his shift and he looks at it again if he uses the approved screening device during his shift. When he looks at the sticker the second time, if he does, he records the serial number and expiry date. I understand he was describing his current practice which has been amended based on information he has received on this file.

13 On cross-examination Fletcher testified that he cannot recall his practice back on March 2011, but it has changed since then. He recalls that on March 2011, he would retrieve an approved screening device from the corporal's office at the beginning of a shift and return it at the end of the shift. Mr. Ziv suggested he may have used some approved screening device that had been left in the squad car from an earlier shift and he may have left the device in the squad car at the end of his shift. Fletcher said he could not be 100 percent sure whether there was a device in his car at the beginning of his shift, but he was more confident that he would take it out of his car and place it in the corporal's office for use for the next shift.

14 Ziv established on cross-examination that the defendant was released at 5:32 AM. He also established that the first entry in Fletcher's notes concerning the approved screening device was at 6:25 AM. That is after the defendant was released. Fletcher noted in his notebook the serial number of the device, the model number, and that Voeller's initials were on the sticker. He then -- and then on one line there appeared the word expired and the word was crossed out. On the next line Fletcher wrote the expiry date as 2011-03-23. I'm somewhat troubled by this apparent unexplained inconsistency. Ziv suggested Fletcher had returned the approved screening device to the corporal's office and when he was making his notes he returned to the corporal's office to confirm the date. Fletcher vehemently denied doing that.

15 I find that Fletcher's practice in March 2011 was that he would pick up the approved screening device from the corporal's office at the beginning of his shift. He would retain possession of the device until he had made his notes on a relevant file, and then he would return it to that office at the end of his shift. I find that his practice has been modified so that he now picks up the approved screening device from the corporal's office at the beginning of his shift. He checks the calibration date. If he used the device during his shift he would check and record the calibration date and he would then return the device to that office at the end of his shift. Further he now photocopies the sticker and includes it in his disclosure package.

16 Ziv has not argued that Fletcher's evidence is not credible. Ziv is concerned that absent a copy of the sticker the defendant cannot cross-examine Fletcher on the document to assist the court in determining the issue and the defendant cannot cross-examine the witness on objective reasonableness and assist the court in determining that issue. Ziv argues the Crown has a duty to disclose a copy of the sticker because it is relevant. He relies on Black. I agree with Mr. Ziv on this point.

17 The Crown has not offered any evidence as to what happened to the original sticker. The La case is relevant to the issue and I will leave all -- the citations haven't been spoken to on the record, but all of the cases will remain on file and the citations will be available that way.

18 I propose to read from the head-night -- head-note in the La case. Years ago I would be embarrassed to admit that I do this, but I attended a seminar when Chief Justice Lamar was the Chief Justice and he informed a group of judges that head-notes are vetted by the justice or justices who write the judgment and head-notes are -- are available and should be read by practitioners and the academics can read the rest of the case. I think he was joking somewhat, but he approved the reliance on head-notes because the justices vet the head-notes. I'm reading from the bottom of the first page. It's per Lamar C.J., Sopinka, Cory, Iacobucci, and Major: (as read)

The Crown's duty to disclose all relevant information in its possession gives rise to an obligation to preserve relevant evidence so when the prosecution has lost evidence that should have been disclosed the Crown has the duty to explain what happened to it. If the explanation satisfied the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence the duty to disclose has not been breached. The Crown fails to meet its disclosure obligation where it is unable to satisfy the judge and section 7 of the Charter is accordingly breached.

19 Going onto the next page: (as read)

Such a failure may also suggest that abuse of process has occurred. An accused need not establish

the abuse of process for the Crown to have failed to meet its section 7 obligation to disclose.

20 In this case, I do not even know whether the sticker -- the sticker was lost or destroyed.

21 It follows that I cannot rule out whether the loss or destruction was due to unacceptable negligence. Absent a satisfactory explanation I cannot rule out whether an abuse of process has occurred. In these circumstances I conclude that failure to disclose did have an effect upon the defendant's right to make full answer in defence. A breach of section 7 has been made out. The results of the approved screening device test is excluded. As a result Fletcher did not have the necessary reasonable and probable grounds to make the Intoxilyzer demand. The results of those breath tests are also excluded.

22 An application with respect to the evidence led in the voir dire?

23 MR. MASTEL: Whatever was admissible it may be applied to the trial proper.

24 THE COURT: Mr. Ziv, by consent?

25 MR. ZIV: No objection.

26 THE COURT: It is clear what has been excluded. The evidence led in voir dire, but for those exclusions would apply to the trial proper.

27 Is the Crown calling any further evidence?

28 MR. MASTEL: No, Your Honour. Thank you.

29 THE COURT: Defendant calling evidence?

30 MR. ZIV: No, Your Honour.

Reasons for Judgment

31 THE COURT: The -- obviously the certificate then remains an exhibit in the voir dire and not in the trial proper. There is no evidence with respect of breath test results. The over 08 is dismissed. The -- I've heard brief argument on the impaired charge. I find that the evidence falls short of that necessary for a conviction on the impaired and the impaired charge is also dismissed.

32 Left with the violation ticket. Ms. Chouinard was charged with fail to produce driver's licence.

33 MR. ZIV: She is pleading guilty to that, Your Honour.

34 THE COURT: Plea?

35 MR. ZIV: Is guilty.

36 THE COURT: I understand that Ms. Chouinard was stopped as part of an impaired investigation. The peace officer requested her driver's licence. She failed to produce it.

37 MR. MASTEL: Nothing further to add to those circumstances.

38 THE COURT: Is this a situation where she didn't have one or she didn't -- didn't produce one?

39 MR. MASTEL: The Crown, I think, as part of the charge is just alleging she didn't produce one.

40 THE COURT: Sorry?

41 MR. MASTEL: Just alleging she didn't produce one.

42 THE COURT: Any reason to interfere with the voluntary payment option?

43 MR. ZIV: No, Your Honour.

44 THE COURT: Propose the voluntary payment option \$172. Can she pay that today?

45 MR. ZIV: Yes, she could today.

46 THE COURT: She'll -- it's a part 3 ticket. She's got to pay as she -- if she goes out and if you don't pay it, a warrant won't issue, but there will be an administration fee of \$20 added onto this and if you apply to renew a driver's licence, or a licence plate, or something it won't happen until you pay this fine. I suggest you pay it right away.

47 I think that concludes the day.

48 MR. ZIV: Thank you.

49 MR. MASTEL: That is. Thank you, Your Honour.

50 MR. ZIV: May I be excused, Sir?

51 THE COURT: Let me just close court and I will gather this stuff up.

qp/e/qlcct/qllmr/qlcct