

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Chisholm

REGINA

v.

LOUIS-PHILIPPE BEAUCHAMP

Appearances:  
Joanna Phillips  
Richard S. Fowler

Counsel for the Crown  
Counsel for the Defence

**RULING ON APPLICATION**

[1] CHISHOLM J. (Oral): Mr. Louis-Philippe Beauchamp faces charges contrary to ss. 253(1)(a) and (b) of the *Criminal Code* for driving while impaired and for driving with a blood alcohol level that exceeded the legal limit.

[2] Mid-trial, the Crown disclosed to defence counsel the presence of an unanticipated police witness as well as the notes of this officer, who has material evidence to provide with respect to the incident. The Crown became aware just prior to the commencement of trial of the scope of involvement of this officer in the investigation.

[3] The defence applies to exclude the officer's evidence on the basis of Mr. Beauchamp's inability to make full answer and defence.

[4] The Crown argues that an adjournment is a sufficient remedy in all of the circumstances.

[5] The alleged offences occurred on December 27, 2015, in the downtown area of Whitehorse. The accused entered a not guilty plea on February 17, 2016 and an August 29, 2016 trial date was scheduled soon thereafter.

[6] The Crown's first witness, the lead investigating officer, testified as to his involvement in this matter, including making a traffic stop and subsequently giving Mr. Beauchamp the breathalyzer demand.

[7] During the morning break, the Crown advised defence counsel that Cst. Tower was the second witness. The officer had unexpectedly shown up before trial, despite not having been notified nor subpoenaed to testify. The Crown also provided defence counsel with a copy of Cst. Tower's notes and advised that he had taken three photographs.

[8] Defence counsel could not have been expected to anticipate Cst. Tower giving evidence. The officer is mentioned in neither the report to Crown counsel nor the general occurrence reports prepared by the investigator. The only mention of Cst. Tower is in the notes of the lead investigator who wrote "alerted to driving by Cst. Tower". In his general occurrence report, the lead investigator wrote that he had been:

...alerted to the vehicle by members who had observed it travelling at a high rate of speed. Believed to have been involved in a hit and run...

[9] The Crown's intention is to have Cst. Tower testify in regards to the driving pattern of a truck he observed prior to relaying information to the lead investigator, who subsequently initiated a traffic stop.

[10] The Crown submits that Cst. Tower's evidence is relevant to the s. 253(1)(a) charge. The Crown argues that this is important information that the Court should hear. The Crown acknowledges that the late disclosure impacts the case that Mr. Beauchamp has to meet, but that the appropriate remedy is an adjournment. The Crown adds that it would be appropriate to have the lead investigator available for further cross-examination by the defence if the defence chooses to do so.

[11] The defence submits that this is a case in which the evidence the Crown seeks to lead should be excluded pursuant to s. 24(1) of the *Charter*, based on a breach of Mr. Beauchamp's ability to make full answer and defence. The lack of disclosure has prejudiced Mr. Beauchamp. Prior to the mid-trial revelation regarding Cst. Tower, the defence argues that little evidence existed with respect to the impaired driving charge. The defence made certain decisions prior to the commencement of trial based on what was understood to have been full disclosure. Although some of those decisions may be reconsidered during the trial's adjournment, other decisions are not clearly remedied by an adjournment, thus negatively impacting Mr. Beauchamp's right to a fair trial.

[12] The defence also argues that the integrity of the administration of justice is brought into question when significant disclosure is not made in a straightforward case. There was a serious breakdown between the officers which led to this non-disclosure. The defence submits that the integrity of the administration of justice is further brought

into question due to the Crown prosecutor not advising him before the trial started as to its new witness and new disclosure.

[13] An accused is entitled to complete and timely disclosure from the Crown of all relevant information in its possession (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, paras. 28 and 29). The disclosure of such material is constitutionally entrenched in the right of the accused to make full answer and defence pursuant to s. 7 of the *Charter* (*R. v. McNeil*, 2009 SCC 3, para. 14).

[14] The Crown's duty to disclose all relevant information in a full and timely fashion necessarily creates a corollary obligation on the police to provide all relevant information to the Crown (*McNeil*, para. 14).

[15] The burden is on the accused to demonstrate that late disclosure has resulted in a *Charter* breach. Courts may grant remedies for late disclosure pursuant to s. 24(1) of the *Charter* (*R. v. Bjelland*, 2009 SCC 38, paras. 16 - 19). The Supreme Court of Canada affirmed in the *Bjelland* decision that remedies pursuant to s. 24(1) of the *Charter* are "flexible and contextual" (para. 18).

[16] The possible remedies available in a case of late disclosure which breaches the right of the accused to make full answer and defence include:

- an adjournment and a disclosure order (*Bjelland*);
- a mistrial (*R. v. Calder*, 2010 NSSC 146);

- an order excluding the evidence which is the subject of the late disclosure (*R. v. Bittershingham*, 2015 ONSC 8138);
- a stay of proceedings (*R. v. Canadian National Railway*, 2012 BCPC 330).

[17] The exclusion of evidence is a remedy that will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system (*Bjelland*, para.19).

[18] The exclusion of evidence by a trial judge should only occur in the clearest of cases, specifically as set out in *Bjelland*:

[24] ...(a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. ...

[19] In coming to a decision of this nature, a court must balance the accused's right to a fair trial and society's interests in having a judicial determination made based on all available evidence. The Court must assess all the circumstances, including the seriousness of the alleged offence.

[20] Mr. Beauchamp's right to full and timely disclosure has been clearly breached. Unfortunately, there has been no explanation for the non-disclosure. At the same time, I should point out that there is no suggestion that the police intentionally withheld this information.

[21] Nonetheless, this is a straightforward case without a significant amount of disclosure where the lead investigator would be expected to document in the report to

Crown counsel or in his general occurrence reports, all relevant information about the matter. If this had occurred, the absence of Cst. Tower's notes and photographs would undoubtedly have been apparent to the Crown and the defence. The parties would have been aware of any observations the officer made with respect to Mr. Beauchamp's driving pattern.

[22] Had the police reports documented such pertinent information, the parties would also have been aware that after Cst. Tower's radio contact with the lead investigator, he attended at the scene and seized evidence, and that he took photographs of the snow where the suspect vehicle may have gone off the road. All of this evidence may well be significant.

[23] The non-disclosure of Cst. Tower's full involvement in the case is complicated by the Crown's decision not to advise the defence of this late received information until the middle of the trial. The Crown could have easily done so as soon as it became aware of Cst. Tower's full involvement just prior to the commencement of trial.

[24] Before this mid-trial disclosure was made, the defence was of the view that there was no requirement to provide a substantive defence to the impaired driving charge. This was so, according to defence counsel, because of the lack of evidence supporting this alleged offence. This resulted in the defence making certain decisions. One of the decisions, for example, was not to discuss the possibility of Mr. Beauchamp testifying with respect to his driving pattern on the night in question.

[25] It must be remembered that the alleged offence took place approximately eight months ago. A discussion between Mr. Beauchamp and his counsel soon after the

alleged offence regarding his driving pattern and the road conditions would have been more beneficial to the defence than doing so eight months down the road. In my experience, a witness' recollection of details normally diminishes with the passage of time.

[26] I have also been advised of the spontaneous utterance made by Mr. Beauchamp to the lead investigator. The lead investigator documented the defendant as having stated, "I spun out and she grabbed the wheel." Based on the lack of disclosure to the defence before trial of alleged bad driving, this statement was of little significance in preparing the defence. That has changed. The Crown now wishes to lead evidence regarding Mr. Beauchamp's driving pattern to buttress its case with respect to the impaired driving charge. If Mr. Beauchamp had known of this information through timely disclosure, the defence would likely have interviewed the passenger while her memory was fresh.

[27] In my view, Mr. Beauchamp has established that the late disclosure creates some prejudice to his ability to make full answer and defence. At the same time, the incident, including the arrest of Mr. Beauchamp, was undoubtedly a significant event for both him and his passenger. Despite the passage of time and its potentially negative affect on recollection of detail, I am of the view that both Mr. Beauchamp and his passenger would still be able to adequately discuss Mr. Beauchamp's driving pattern with his lawyer in order to properly prepare for the officer's evidence. In other words, this prejudice may be remedied by an adjournment, a disclosure order and an order for costs against the Crown.

[28] Turning to Mr. Beauchamp's second argument, that exclusion is necessary to maintain the integrity of the justice system, I again note that this is not a situation where the Crown has intentionally withheld evidence. However, the incident, as a whole, also reflects poorly on the administration of justice. Significant disclosure regarding one of the two charges Mr. Beauchamp faces was not made in a timely fashion. This has occurred in a straightforward summary conviction matter in which the disclosure is not voluminous and the number of police officers involved is limited. Despite this, there has been an unexplained breakdown in the disclosure system on which the judicial system relies. This is serious and it is troubling.

[29] The other factor that impacts negatively on the integrity of the justice system is the Crown's lack of action when confronted with the last-minute disclosure. Instead of immediately advising the defence of the situation, the Crown remained silent and commenced leading evidence in the trial.

[30] During submissions on this application, the Crown indicated that it was not clear from Cst. Tower's notes what he actually saw and that the Crown would not really know what his evidence would be until he was put on the stand. The Crown went so far as to suggest that Cst. Tower's evidence might turn out to be exculpatory. In my view, the Crown misconstrues its obligations of disclosure. The Crown has an obligation, when confronted with a last-minute development such as this, to advise the defence immediately. An adjournment could be sought from the Court in order to get to the bottom of what occurred. It was improper to commence leading evidence while, at the same time, remaining silent as to this significant development.



[31] Having considered both the unexplained breakdown of the disclosure process and the decision of the Crown to not immediately disclose the significant change in circumstances occasioned by Cst. Tower's unexpected last-minute appearance, in my view, this is one of those clear cases where evidence must be excluded in order to maintain the integrity of the justice system.

[32] Applications with respect to late disclosure will often result in court-ordered adjournments after which time the Crown is permitted to lead the information in question. Such a result is clearly in the best interests of getting at the truth of the matter, while, at the same time, providing the accused with procedural fairness.

[33] However, it is also necessary at times to take action to ensure that the integrity of the justice system is maintained. In my view, the totality of state inaction raises this matter to one of the clear cases where evidence must be excluded in order to uphold the integrity of the justice system.

[34] As a result, the evidence of Cst. Tower is excluded from the trial.

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CHISHOLM T.C.J.