

COURT OF QUEBEC

CANADA
PROVINCE OF QUEBEC
DISTRICT OF HULL
TOWN OF GATINEAU
Criminal and Penal Division

No: 550-61-011519-085

DATE: April 16, 2009

PRESIDING BY CHRISTINE AUGER MAGISTRATE JUSTICE OF THE PEACE

**DIRECTOR OF PUBLIC PROSECUTION
PROSECUTOR**

v.

**YASSER, RASHWAN
DEFENDANT**

**RULING ON CHARTER MOTION FOR DISCLOSURE
(Art. 7 and 24 (1) of the Charter)**

[1] The defendant is accused of having driven at a speed of 130 km/h in a 100 km zone on February 2nd 2007 in virtue of section 328 of the Québec Highway Code.

[2] A plea of not-guilty was entered by the Defendant to the charge;

[3] On May 5th 2008, Mr. Rashwan presents an application for disclosure of evidence in which he asks for the following documents from the Crown attorney, to wit:

- a) "both sides of the officer's copy of the ticket;
- b) the make, model and serial number of the radar unit, and its owner's manual;
- c) the officer's training record specific to the said radar unit;

- d) the calibration record and repair history of the said radar unit;
- e) the records of any calibration equipment such as tuning forks;
- f) the officer's log on the alleged offence day, including all tickets he/she had written on that day;

and any document the Crown may rely on at trial."

[4] The Defendant received from the Crown a copy of the ticket "constat d'infraction" and the back side of the ticket called "Rapport d'infraction abrégé sur constat".

[5] The Defendant presented once again an application for complementary disclosure on October 5th 2008, to wit:

- a) "the officer copy of the ticket in English or an English translation;
- b) What is the model of the laser unit that was used to record my speed;
- c) Picture evidence showing the speed recorder for my vehicle;
- d) When the said laser unit named in the officer ticket with serial no. 23221 was put in service;
- e) Officer's training record specific to the said laser unit model and when was his last training of the said laser unit model;
- f) The calibration record and repair history of the said laser unit with serial no. 23221;
- g) The records of the any calibration equipment if applicable;"

[6] The Crown attorney's position concerning the Defendant's application was that the disclosure evidence was complete and that any other demand would have to be made in front of a Judge.

POSITION OF THE PARTIES

[7] The Defendant submits that refusal of the Crown to furnish the requested disclosure should be sanctioned by a stay of proceedings.

[8] The Defendant contends that only the appropriate disclosure as requested in the Application can ensure his right to a full defense.

[9] The Crown's position is that the disclosure was complete and that the Defendant did not demonstrate the pertinence or an "air of reality" as to the justification of the additional disclosure;

ANALYSIS

[10] At the outset, as a general principle, in *R. c. Stinchcombe*¹, the Supreme Court held that *'the Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done'*.

[11] The Crown's failure to disclose all relevant information impedes the ability of the accused to make full answer and defence².

[12] Secondly, this being said, this principle has been contained, in sort, by Justice Sopinka in the *Stinchcombe* case as relates to the actions of the Court in statutory offences in particular, to wit:

"The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of the practice may eliminate the necessity for a decision on the issue by this Court. (underlined by the undersigned)

[13] As well, it is also an entrenched principle that the Courts apply a contextual approach to the interpretation of Charter related issues. In fact, on the very point of discovery, the Supreme Court³ has stated that:

"It is now clear that the Charter is to be interpreted in light of the context in which the claim arises. Under the contextual approach, the constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences."

[14] Thirdly, in *R. c. Chaplin*⁴, the Supreme Court says *"the initial onus of demonstrating the relevance to their case of the requested information was on the accused."*

¹ (1991) 3 S.C.R. 326

² Section 7 Canadian Charter of Rights and Freedoms
Dersh c. Canada (Attorney General) (1990) 2 S.C.R. 1505

³ *R. v. Wholesales* (1991) 3 S.C.R. 154

⁴ (1995) 1 S.C.R. 727

[15] On the question of relevancy, the Court reiterates with the *Choplin* case as follows::

"The Crown need not disclose what is clearly irrelevant to the accused's right to make full answer and defence." (p. 157) "Where the Crown's statement of no relevance is challenged by an accused, the accused must establish a reasonable possibility that the accused's right to make full answer and defence will be impaired."

[16] Again, in the *Chaplin* case, the Court states that "*there must be some evidence adduced which gives an air of reality to what is otherwise pure speculation*", thus imposing an evidentiary burden of the Defendant to submit evidence that there is a reasonable possibility that the accused's right to make full and defence will be impaired.

[17] In the *R. vs. O'Connor*,⁵ of the Supreme Court, justice L'Heureux-Dubé, said the following:

"The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on 'recent complaint' or the 'kind of person' the witness is. Similarly, the applicant cannot simply invoke credibility 'at large', but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular material issue at trial."

[18] Consequently, evidence based on a theoretical or hypothetical possibility based on conjecture of relevancy is not sufficient to trigger to disclosure obligations as set forth on the *Stinchcombe* decision. The evidence must contain assertions with an 'air of reality'. The Courts must assess on these criteria such requests and reject those based on speculation and conjecture that serve as fishing expeditions.⁶

[19] The Defendant has presented his Motion as a preliminary measure submitting that is not possible for him to cross-examine the police officer without the benefit of all of the items he has requested. This is the reasoning behind the relevancy argument. Has the Defendant proven the impairment of his defence as to the cross-examination of the police officer without the required discovery?

[20] As concerns the both sides of the officer's copy of the statement of offence as well as the English translation, this information is disclosure as a rule and is part of normal procedure.

[21] As to the translation of the documents, Justice Georges Benoit had the opportunity to visit this issue in the case *D.P.P. vs. John Semenoff* ⁷ and stated the following:

⁵ *R. vs. O'Connor*, 1995 CanLII 51 (C.S.C.)

⁶ *R. c. Ténascon*, C.Q. Maniwaki 565-61-000550-008, le 15 avril 2004, juge Réal Lapointe

⁷ *Director of Public Prosecution vs. John Semenoff*, Court of Québec, Gatineau, 550-61-011483-086, February 26, 2009

"Moreover, this is an unbroken line of precedents that decides that disclosure does not have to be translated. Documents have to be disclosed in their original form without any alteration despite the fact that the Defendant is not in a position to understand the documents. In *R. v. Standnick*⁸, Justice Paul noted in his judgment "The right is a right to the disclosure of the evidence as it exists, not the right to have the assistance of the prosecution in the sense of enhancing the ability of counsel for the defence, or of the accused himself, to assess and evaluate the significance or the weight that could be attached to a certain item of evidence."

[22] This being said, this Court has allowed the Defendant assistance by the Court translator numerous hours to translate case law and the Crown evidence to ensure that he was fully aware of the evidence disclosed to him, as required.⁹

[23] The make, model and serial number of the laser unit used is also information that are contained in the statement of offence disclosed.

[24] As to the pictures or evidence showing the speed recorder for Defendant's vehicle, evidence was lead to the effect that this information does not exist.

[25] The Defendant has at all times during the hearing the opportunity to question the police officer as to any notes taken by him, the officer's training record, the dates of his latest training on the laser unit and the officer's log. Given this possibility to obtain the information directly from the police officer. The Defendant has not proven the air of reality required to obtain this disclosure. The argument that cross-examination on these issues will not be possible without all the required disclosure is not credible nor convincing.

[26] Disclosure is also requested for the calibration record and repair history for the unit, records of the calibration equipment, putting into service of the unit and the owner's manual. Once again, the essential question is how is this information necessary to ensure a reasonable capacity to advance the Defendant's answer. The Defendant will have the opportunity to cross-examine the police officer on the calibration method used, the equipment used and the functioning of the unit on that day. Should the cross-examine reveal any abnormality in the preparation or calibration of the unit on that day, then the Defendant could be justified in requiring additional information in order to lead further evidence. Without this evidence to date, the Defendant has failed to show an air of reality to the discovery sought.

[27] This systematic request for this type of disclosure without any basis or relevance is tantamount to a fishing expedition and contrary to all of the basis principles as set forth by the Supreme Court to date¹⁰.

⁸ *R v. Standnick*, REJB 2001-27515

⁹ *R. v. Cody* (2006) A.Q., no.6670 Superior Court of Québec

R. v. Rose (2002) A.Q. no., 8339 Superior Court of Québec.

R. v. Cameron (1999) A.Q. no. 6204 Court of Québec

¹⁰ *R. v. Stinchcombe*, see note 1; *R v. Chaplin*, see note 3; *R v. O'Connor*, see note 5 ;

[28] The Defendant is also challenging the Court's competence to take judicial notice of the reliability of the laser device. He submits that in order for the Crown to establish its case beyond a reasonable doubt, it needs to prove the reliability of the laser unit in question.

[29] In the *Ville de Joliette v. Corinne Delangis*¹¹ case, the Court of Appeal responded to exactly this question as to whether or not a Court may take judicial notice of a laser unit which is used to measure the speed of a moving vehicle.

[30] The Court of Appeal concluded as to the reliability of the laser unit and made a finding that the trial courts must take judicial notice of the scientific accuracy of this speed measuring device. Deciding otherwise would contravene with established case law of the upper Court.

[31] The fact the Court takes judicial notice of the scientific accuracy of the laser unit's technology does not in any way prevent a Defendant accused of a speeding infraction of his means of defence, to lead evidence, for example, that the operator was not competent or that the unit was not in good working order that day, the general circumstances of the interception and other relevant facts. The evidence is possible through the testimony of the police officer as well as the Defendant himself.

FOR ALL THE REASONS, THE COURT:

REJECTS the Applicant's Motion for Additional Disclosure.

Without costs.

CHRISTINE AUGER
MAGISTRATE JUSTICE OF THE PEACE

Me Marie Josée Genest
Prosecutor

Mr. Yasser Rashwan
Defendant

Date of hearing: January 20, 2009

¹¹ *Ville de Joliette c. Corinne Delangis*, Court of Appeal of Québec, November 5th, 1999, 500-10-000933-976