Date: 20010209
Docket: CAC162408

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. Chisholm*, 2001 NSCA 32]

Glube, C.J.N.S., Roscoe and Saunders, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

CHRISTOPHER BERNARD CHISHOLM

Respondent

REASONS FOR JUDGMENT

Counsel: Peter P. Rosinski for the appellant
Stanley W. MacDonald for the respondent

Appeal Heard: January 30, 2001

Judgment Delivered: February 9, 2001

THE COURT: The appeal is dismissed, per reasons for judgment of Saunders, J.A.; Glube, C.J.N.S. and Roscoe, J.A., concurring.

<u>Saunders, J.A.</u>:

[1] The Crown appeals Mr. Chisholm's acquittal in Provincial Court on charges of refusing the breathalyser and impaired driving following the trial judge's conclusion that Mr. Chisholm's right to counsel, guaranteed by s. 10(b) of the **Canadian Charter of Rights and Freedoms**, had been violated.

<u>Factual Background</u>

[2] Mr. Chisholm was charged on a two-count Information that on October 22, 1998, he operated a motor vehicle while impaired, contrary to s. 253(a) of the **Criminal Code** and further, that he, without reasonable excuse, failed to provide a breath sample, upon demand, contrary to s. 254(5). The charges proceeded summarily before Judge Digby of the Nova Scotia Provincial Court on February 7, 2000.

[3] Mr. Chisholm had given proper written notice of a **Charter** application, stating his intention to apply for an order excluding evidence pursuant to s. 24(2) of the **Charter**. Specifically, Mr. Chisholm alleged that the Halifax Police failed to provide him with the informational component of his right to counsel, including the availability of free, immediate legal advice. Consequently, he sought to exclude all evidence arising out of that alleged breach, including observations made by the Halifax Regional Police Officers and any utterances attributed to him.

[4] The trial began with a *voir dire* to determine the alleged **Charter** breach as a preliminary matter. Counsel had agreed that if the evidence during the *voir dire* were ultimately ruled admissible, it would be adopted as evidence at the trial without repetition.

[5] During the *voir dire* two witnesses testified: the investigating officer, Cst. Kevin Copage , and the accused, Christopher Chisholm. The only exhibits introduced during the *voir dire* were an empty beer can and five full cans of beer seized at the scene by Cst. Copage from within the accused's car.

[6] I will summarize the material facts leading up to the charges against Mr. Chisholm. He and other motorists were pulled over at 11:45 p.m. on October 22, 1998, during a routine roadside check on Robie Street in Halifax. Police were stopping vehicles checking for expired license plates or inspection stickers, and drivers suspected of being impaired. Constable Copage noted that Mr. Chisholm's inspection sticker had expired. He asked him to pull over and park.

[7] The officer approached Mr. Chisholm's vehicle and, while speaking to him, observed the smell of liquor on his breath and that his eyes appeared bloodshot. He also noticed that a liquid had been spilled on the floor of the

car right below Mr. Chisholm’s feet. The officer asked Mr. Chisholm to step out of the car and walk towards the front of the vehicle. Mr. Chisholm appeared somewhat unsteady on his feet. Copage looked underneath the front seat and saw what looked and smelled to be beer, freshly spilled. The liquid was still on top of the carpet and had not soaked in. Beside the liquid was an open can of beer. In the back, directly behind the driver’s seat, were five full cans of beer, all connected by a plastic carrier handle which had rings for eight cans.

[8] After speaking to Mr. Chisholm, Cst. Copage suspected that he may have been under the influence of alcohol. He issued an ALERT demand at 12:02 a.m. Mr. Chisholm understood the request and agreed to take the roadside screening test. He failed the ALERT. The police officer then concluded that Mr. Chisholm was impaired. He read him the breathalyser demand. Once the officer explained to him that he was under arrest for impaired driving, and after he was given his **Charter** rights and police caution, Mr. Chisholm was handcuffed and taken by police cruiser to the station, arriving there at about 12:20 a.m. There he was given certain information - which is the essence of this appeal - with respect to his right to counsel and how he might communicate with a lawyer, should he choose to do so.

[9] At 12:26 a.m. Mr. Chisholm informed the police that he refused to provide a sample of his breath. He was then charged with refusal and driving while impaired and subsequently released pending his trial.

[10] During the *voir dire* Cst. Copage was questioned closely with respect to what exactly he said when informing Mr. Chisholm of his right to counsel. The officer admitted that he had lost the card from which he read when advising Mr. Chisholm on the night of his arrest. He said he could not be sure that the wording of the right to counsel which he stipulated during the *voir dire* was identical to that which he provided to Mr. Chisholm on October 22, 1998.

[11] Mr. Chisholm took the stand during the *voir dire* and testified that he was never advised by Cst. Copage that he could obtain immediate legal advice, free of charge. From previous experience as a real estate agent, he knew that obtaining legal advice usually cost money. He said he was also going through a matrimonial separation at the time. These financial concerns prompted him to decide not to consult with counsel about his situation while in police custody that morning.

[12] After having had the benefit of detailed submissions from counsel, Judge Digby reserved overnight and returned to court the next afternoon to render an oral judgment. Judge Digby found it was clear that Constable Copage did not provide Mr. Chisholm with the phone number for duty counsel, nor was he convinced that the existence of full duty counsel was clearly explained to Mr. Chisholm. He was satisfied on a balance of probabilities that Mr. Chisholm had not been clearly and adequately informed of his **Charter** rights and, accordingly, the evidence of refusal would be excluded. Following Judge Digby's decision on the *voir dire*, the Crown confirmed that it would offer no other evidence and closed its case. The accused elected to call no evidence. After further submissions, Judge Digby was left with a reasonable doubt as to whether Mr. Chisholm's ability to operate a motor vehicle was impaired by alcohol that night. In the result, he was acquitted on both charges.

Analysis and Reasons

[13] The appellant advances two grounds of appeal

> 1. That the Provincial Court Judge erred in law in ruling that the words "right to duty counsel immediately and without charge" were insufficient to satisfy the informational component of the advice of the right to counsel under s. 10(b) of the **Canadian Charter of Rights and Freedoms**, and in ruling that the respondent's right to counsel under s. 10(b) of the **Charter** had thus been infringed or denied;
>
> 2. That the Provincial Court Judge erred in law in excluding under s. 24(2) of the **Charter** the evidence of the respondent's refusal to provide samples of his breath in accordance with the demand made to him by the peace officer under s.254(3) of the **Criminal Code**.

[14] At the outset it is important to clearly define the issue raised in this appeal. I agree with the respondent that the issue is <u>not</u> whether the trial judge found as a fact that Mr. Chisholm had been told by the police officer that "a lawyer can be contacted on your behalf to provide legal advice immediately without charge". Clearly, that finding was made by Judge Digby. Instead, the real issue in this appeal is whether the trial judge erred in his determination that Mr. Chisholm "was not clearly informed of his **Charter** rights and [that] the informational components set forth in the four cases" cited by counsel were found to be deficient. Thus, the focus of this appeal should be on whether Mr. Chisholm was clearly and fully informed of his right to counsel.

[15] In the circumstances of this case, where a duty counsel system exists and is accessible at the time of arrest or detention, the law is governed by the decision of the Supreme Court of Canada in **R. v. Bartle** (1994), 92 C.C.C. (3d) 289. The governing principles are set out at pages 307-308 by Lamer, C.J.C. as follows:

> Summary of s. 10(b) principles
>
> A detainee is entitled under the information component of s. 10(b) of the Charter to be advised of whatever system for free, preliminary legal advice exists in the jurisdiction and of how such advice can be accessed (e.g., by calling a 1-800 number, or being provided with a list of telephone numbers for lawyers acting as duty counsel).

[16] In the later case of **R. v. Latimer** (1997), 112 C.C.C. (3d) 193, the Supreme Court of Canada explained those principles in further detail at page 207:

> The informational component of s. 10(b) is of critical importance because its purpose is to enable a detainee to make an informed decision about whether to exercise the right to counsel, and to exercise other rights protected by the *Charter*, such as the right to silence. In *R. v. Brydges*, [1990] 1 S.C.R. 190, 53 C.C.C. (3d) 330 (S.C.C.), this Court engrafted two requirements upon the informational component: first, information about access to counsel free of charge provided by provincial Legal Aid where an accused meets financial criteria with respect to need, and second, information about access to duty counsel, who provide immediate and temporary legal advice to all accused, irrespective of financial need.
>
> However, *Brydges* only required that information be provided about the existence and availability of duty counsel; there is no doubt that the appellant was told about duty counsel here, and so *Brydges* is satisfied. *Bartle* imposed the additional requirement that persons be informed of the means necessary to access such services. However, whether the police have met this burden in a particular case, must always be determined with regard to all the circumstances of that case, including the duty counsel services available at the time of arrest or detention.
>
> For example, in *Bartle*, this Court held that s. 10(b) required that persons be informed of toll-free telephone numbers to access duty counsel. But it only imposed that requirement where such numbers were in operation.

[17] The informational component of the right to counsel must be provided to detained or arrested persons in a clear and comprehensive manner. This

point was emphasized by Lamer, C.J.C. in **Bartle**, **supra** at pages 301-302 as follows:

> Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner: *R. v. Dubois* (1990), 54 C.C.C. (3d) 166 at p. 190, 74 C.R. (3d) 216 [1990] R.J.Q. 681 (C.A.). Unless they are clearly and fully informed of their rights *at the outset*, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence: *Hebert*. Moreover, in light of the rule that, absent special circumstances, indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, <u>it is important that the standard caution given to detainees be as instructive and clear as possible:</u> *R. v. Baig* (1987), 37 C.C.C. (3d) 181 at p. 183, 45 D.L.R. (4th) 106; [1987] 2 S.C.R. 537, and *Evans*, at p. 305.
> (Underlining mine)

[18] I am satisfied that Judge Digby was well aware of these principles and carefully applied them during his assessment of the evidence led on the *voir dire*. In fact, after citing the immediately preceding quotation from **Bartle, supra**, Judge Digby made the following findings of fact:

1. That Cst. Copage told Mr. Chisholm that "a lawyer can be contacted on your behalf to provide legal advice immediately without charge";

2. That Cst. Copage did not provide Mr. Chisholm with the number for duty counsel which was available to him;

3. That, given the wording of the right to counsel in this case, Mr. Chisholm may well have taken an incorrect meaning from what he was told by Cst. Copage;

4. That the incorrect meaning that Mr. Chisholm may have taken from Cst. Copage was not corrected by any clarity which would have been available by providing Mr. Chisholm with the specific telephone number to access duty counsel;

5. That the evidence suggested that there was no notice next to the telephone in the holding room containing the number for Legal Aid or explaining what it was about;

6. That Cst. Copage did not understand the difference between Legal Aid counsel and duty counsel and, as a result, the trial judge was not convinced that Cst. Copage had "clearly explained" to Mr. Chisholm that duty counsel was available free of charge;

7. That Mr. Chisholm persuaded him on a balance of probabilities that he was not clearly informed of his **Charter** rights and, in particular, that the informational components of his right to counsel were not clearly and fully provided to him.

[19] After carefully considering the record before us, I am satisfied that the trial judge's findings of fact are all supported by the evidence.

[20] The thrust of the appellant's argument is that having accepted the evidence of Cst. Copage, Judge Digby implicitly found it to be credible. Thus - so it is argued - a **Charter** breach based on the conclusion that Mr. Chisholm was not clearly and fully informed of his right to free, immediate legal advice, was illogical and erroneous in light of his finding that the police officer told the accused:

> ...a lawyer can be contacted on your behalf to provide legal advice immediately without charge.

[21] With respect, I disagree. Before any obligation falls upon an arrested or detained person, he/she must first be fully and clearly informed of the informational component of the right to counsel, including provision of the telephone number for duty counsel. At no time during his testimony did Cst. Copage say that he provided Mr. Chisholm with the duty counsel telephone number. At no time did he say the telephone number for duty counsel was written on any notice next to the telephone. As the trial judge found, the evidence established that the number was written down at the booking counter. This evidence is important because it clearly shows that Cst. Copage did not have the telephone number for duty counsel written on any document from which he read to Mr. Chisholm his right to counsel.

[22] Further, Cst. Copage openly admitted during cross-examination that he was not aware of any difference between "Legal Aid" and "duty counsel". Any confidence in Cst. Copage's evidence with respect to the informational component of the right to counsel was undermined by his testimony in relation to the card from which he read on the night of Chisholm's arrest. He admitted losing the card. He could not be sure his words advising the accused of his right to counsel about which he testified at trial, were identical to those spoken on October 22, 1998. He could not recall whether

the card he read from on October 22, 1998, had a 1-800 number on it. The evidence showed that these cards change over time. The significance of this evidence lies in the police officer's uncertainty as to the contents of the card from which he advised Mr. Chisholm of his right to counsel.

[23] The officer's testimony was very carefully considered by Judge Digby in his decision. For example, he said:

> The only reference in the demands I can find to legal counsel without cost to him is in the phrase which I have previously quoted, "A lawyer can be contacted on your behalf to provide legal advice immediately without charge." That certainly can be taken to mean free lawyer. The charge also in a legal context has other meanings. I find in the absence of providing the number for duty counsel it is very possible that Mr. Chisholm took an incorrect meaning from that phrase. It wasn't corrected by any clarity as to accessing legal aid through specific numbers. There is no evidence that there was any notice next to the phone in the holding room with the number for legal aid and explaining what it was about. In fact, the evidence would suggest otherwise.
>
> With respect to Cst. Copage's evidence about offering to call a lawyer later, I find as a result of the cross-examination, I'm not convinced that it was clearly explained that that was free duty counsel because, as Mr. MacDonald pointed out, he had earlier been told that he had the right to apply for legal aid.
>
> At the end of the day, I am satisfied that Mr. Chisholm has persuaded me on a balance of probabilities that he was not clearly informed of his Charter rights and the informational components set forth in the four cases which I mentioned were not met according to (sic) the evidence <u>is excluded</u>.

[24] Judge Digby's conclusions were also supported by Mr. Chisholm's own evidence. He testified that he was never advised by Cst. Copage that he could obtain immediate legal advice, free of charge. His experience in having to pay for legal advice through his employment as a real estate agent and his on-going financial difficulties due to his marital separation, were critical concerns. He swore that had he been advised that free legal advice was available, he would have availed himself of it.

[25] In his assessment of the evidence, Judge Digby directed his mind to whether Mr. Chisholm had been "clearly informed" of his **Charter** rights in accordance with the applicable case law. His findings were completely supported by the evidence. In turn, his findings of fact adequately supported his ultimate conclusion.

[26] The standard of review by this Court in this case is one of error of law. The appellant challenges certain conclusions reached by Judge Digby as being illogical, or unsupported by the evidence presented at trial. This, in effect, is to allege that Mr. Chisholm's acquittal was unreasonable and, therefore, constitutes an error of law. It must be recalled that in an appeal from an acquittal, an appellate court has no jurisdiction to consider the reasonableness of a trial judge's verdict. (**R. v. Kent** (1994), 92 C.C.C. (3d) 344, per Major, J. at 352 (SCC)). However, the Crown alleges other legal errors on the part of the trial judge when he determined that Mr. Chisholm's **Charter** rights were violated and, further, chose to exclude the evidence of Mr .Chisholm's refusal to provide a sample of his breath.

[27] Here the trial judge found that Mr. Chisholm was not *clearly and fully* informed of his right to duty counsel. Neither was he advised clearly that it was free. Nor was he provided with the number of duty counsel. Further, the trial judge found that Mr. Chisholm may have been under the impression that legal aid would be available *in future*, given Cst. Copage's lack of appreciation of the difference between Nova Scotia Legal Aid and duty counsel.

[28] The appellant cites and relies upon the decision of the Supreme Court in **R. v. Latimer**, **supra.** In my view, the **Latimer** decision does not support the appellant's argument. Rather, it brings home the importance in this case of the failure of Cst. Copage to provide Mr. Chisholm with the phone number of duty counsel. The major distinguishing factor in **Latimer, supra,** is that at the time of his arrest, Legal Aid counsel was available during normal business hours. Latimer was arrested at 8:32 a.m. Thus, once he had been advised of the availability of Legal Aid counsel and that he could call counsel immediately, his right to counsel had been satisfied. The Court observed that the number for Legal Aid was readily available, both from the telephone book and from Directory Assistance. In fact, Latimer was seated in front of a telephone that had the number for Legal Aid on it.

[29] Latimer was arrested during business hours whereas Mr. Chisholm's detention was after midnight. In this case, Mr. Chisholm could not have known the number for counsel on duty that night. He could not look it up in the telephone book. He could not obtain it from Directory Assistance. It was not written on the wall or the telephone in the holding room.

[30] Thus, a crucial difference between **Latimer** and this case is the availability of that telephone number. In cases where available legal counsel are on duty, only the police can provide that telephone number to the detained person.

The Supreme Court in **Bartle**, and later in **Latimer**, imposed a duty upon the police to provide this telephone number as part of the informational component of the right to counsel. Because Cst. Copage did not provide that number to Mr. Chisholm, this omission, among other factors, led the trial judge to conclude that Mr. Chisholm was not clearly and fully informed of his right to counsel. I find that the learned trial judge did not err in his determination that Mr. Chisholm's s. 10(b) **Charter** rights had been breached. Given the circumstances I have reviewed at some length, there is no merit to the appellant's argument that Judge Digby erred in failing to analyze whether Mr. Chisholm was reasonably diligent in exercising his right to counsel.

[31] Counsel for the appellant also placed considerable reliance on the decision of the British Columbia Court of Appeal in **R. v. Poudrier**, [1998] B.C.J. 738, leave to appeal to the Supreme Court of Canada dismissed, without reasons [1998] S.C.C.A. 190. With respect, I find that the reasoning in **Poudrier** has no application here as the facts in that case are easily distinguishable from the circumstances surrounding Mr. Chisholm's arrest. In **Poudrier,** the accused was advised of the existence of 24-hour legal advice and there was no evidence that the accused was legitimately confused by any ambiguous advice received from the arresting officer. Those critical distinctions, coupled with the lack of a telephone number; no notice confirming the number for Legal Aid next to the phone in the holding room; nor any information adequately explaining what it meant, are enough to take this case beyond the "common sense" theme espoused by the Court in **Poudrier** and in **Bartle**.

[32] As its second ground of appeal, the appellant argues that Judge Digby erred in law by excluding the evidence of Mr. Chisholm's alleged refusal to provide breath samples. The appellant takes the position that counsel were not given an opportunity to address the issue of what the proper remedy would be in the event of a violation of s. 10(b) of the **Charter**. I cannot agree. At no time did the trial judge preclude counsel from making submissions on this issue. The notice of **Charter** application filed by Mr. Chisholm's lawyer prior to trial explicitly stated that the applicant sought an order excluding evidence pursuant to s. 24(2). Counsel had every opportunity to make submissions in this regard.

[33] In any event, the real issue is whether, in the absence of such submissions, Judge Digby erred in excluding the evidence of the alleged refusal after

finding a breach of the right to counsel. A review of the Supreme Court's four contempora- neous decisions on this subject provide ample justification for the trial judge's conclusion in this case. See, for example, **R. v. Prosper** (1994), 92 C.C.C. (3d) 353; **R. v. Pozniak** (1994), 92 C.C.C. (3d); **R. v. Bartle, supra**; and **R. v. Cobham** (1994), 92 C.C.C. (3d) 333.

[34] The most compelling support for exclusion of the evidence of refusal is found in **R. v. Cobham**. In that case, the trial judge found that the accused had been properly afforded his right to counsel and, consequently, found no breach of s. 10(b). Thus, at trial the issue of exclusion of evidence pursuant to s 24(2) of the **Charter** was not addressed. However, in the Supreme Court of Canada, a determination was made that the accused had not been fully informed of the informational component of the right to counsel. The Court found that the accused's right to counsel had been breached. The Court went on to consider the issue of excluding the accused's refusal to comply with the breathalyser demand, in the following terms at pp. 341-2:

> (b) Section 24(2)
>
> In light of the violation of the appellant's s. 10(b) Charter right to counsel, it is necessary to decide whether the evidence of his refusal to comply with the breathalyser demand should be admitted under s. 24(2) of the Charter. In my view, this is a clear case in which admission of the evidence would negatively affect the fairness of the trial. The appellant's refusal is self-incriminating evidence of a particularly serious nature in that it is evidence which itself constitutes the crime. That is, unlike a confession which may only be *some* evidence upon which a conviction is based, a refusal to blow is itself commission of the offence of refusing to "blow" under s. 254(3)(a) of the *Code*. The direct connection between the incriminating refusal evidence and the offence creates a strong presumption that its admission would render the trial unfair. This is because the appellant may not have refused to take the breathalyser test if he had been properly advised under s. 10(b) of his right to duty counsel. What would have happened thereafter is not a matter upon which I am prepared to speculate.
>
> Moreover, there is no basis in the evidence on which to conclude that the appellant would have persisted in refusing to take the test even if fully informed of his s. 10(b) rights. Rather, he testified that he did not know free legal advice was available to him 24 hours a day and that, had he known it was, he would have exercised his right to contact duty counsel. The Crown did not cross-examine or otherwise challenge him on this assertion.

> Accordingly and notwithstanding the undoubted good faith of the police officer in this case and the seriousness of impaired driving offences, I am of the opinion that it is in the better interests of the administration of justice not to admit the evidence of refusal under s. 24(2) of the Charter.

On the same basis, I would conclude, as did the trial judge, that the evidence of Mr. Chisholm's alleged refusal must be excluded.

<u>Disposition</u>

[35] The Crown proceeded summarily. No appeal was taken to the Supreme Court as a summary conviction appeal court. As such, this appeal is brought pursuant to s. 830 of the **Criminal Code.** The appeal must be based upon an error of law. The appellant has failed to persuade me that the trial judge committed any reversible error in acquitting the respondent on the charges of impaired driving and refusing the breathalyser.

[36] The appeal is dismissed.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.
Roscoe, J.A.