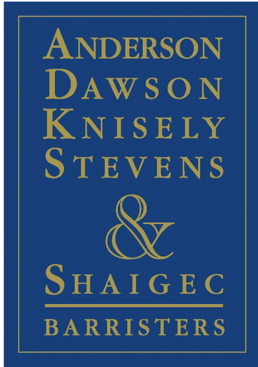


# THE UPDATE

**Issue # 19 May 12, 2006**

## IMPAIRED DRIVING - CHARTER - 10(B) - FULL OPPORTUNITY TO CONTACT COUNSEL

***R. v. LaCasse*** - Mar. 24, 2006 ABPC 91 per Fradsham, PCJ:

Impaired driving trial. After arrest accused taken to Checkstop van and shown the telephone. Police then told accused: "This is the time, if you want to call a lawyer, this is your opportunity to do so ... If you want to call a lawyer do it now". 10(b) right declined and accused provided breath samples.

**Held: 10(b) breach. Certificate of Analyses excluded**.

The language used by the police conveyed the idea that the 10(b) right was time limited, and would be lost if not exercised at that moment. The right to counsel is ongoing, and may be exercised at any time while the accused is detained or under arrest: ***Mastin*** (1991), 65 CCC (3d) 204 (BCCA). "The officer did not fulfil the informational duty which section 10(b) of the Charter imposed on him." Authorities reviewed.

**M. Dalidowicz** - Defence Counsel

## IMPAIRED DRIVING - SCREENING TEST - PROOF OF POLICE OFFICER'S QUALIFICATIONS

***R. v. Morin*** - Mar. 22, 2006 ABPC 89 per Hamilton, PCJ:

Impaired driving trial. Screening device used. Officer testified that the device used was an Intoxilyzer 400D, on which he had received training as a police recruit and had "received a pass". Issue as to whether Crown had proven officer's qualifications for the use of the screening device.

**Held: Conviction entered**.

Unlike s. 254(3) CC which requires proof of samples being taken by a "qualified technician", 254(2) CC requires only that screening samples be taken by a "peace officer". In *obiter* in ***Bernshaw*** (1995), 95 CCC (3d) 193 the SCC spoke of a police officer's use of a screening device "based on his or her training".

**I. Savage** - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - TEST

***R. v. Dmyterko*** - Mar. 22, 2006 ABCA 94 per Berger, JA:

Accused originally acquitted of care or control. Summary conviction appeal court entered a conviction. "The central ground of appeal proffered is whether evidence placing an impaired accused, wearing a seat belt, in the driver's seat ... with keys in the ignition and the radio on, inevitably gives rise to a conviction even in the face of accepted trial evidence of moral innocence." Defence application for leave to Court of Appeal.

**Held: Leave granted**.

"The trial judge was not persuaded that the Crown had identified any act of the Applicant which involved the use of the car or its fittings and equipment ... The summary conviction appeal justice held otherwise. I grant leave to appeal to this Court".

**K. Haryett** - Defence Counsel

## JURIES - JURY DEADLOCK - WHETHER JURY SECRECY BREACHED BY THE JURY PROVIDING A VOTE TALLY

***R. v. Lysak*** - Mar. 10, 2006 ABCA 85 per Picard, Ritter, Sulyma, JA - T. Judge: Germain, J.

Attempted murder trial. During deliberations, the jury indicated that they might be deadlocked. Trial judge told them that they were not required to indicate any leanings, but that if they did reveal numbers they had to do so in a way that protected jury secrecy. A note was then sent indicating that the jury was 11-1. Further deliberations led to conviction.

**Held: Appeal dismissed**.

The trial judge never told the jury that they had to reveal a vote tally. "He further emphasized the importance of maintaining confidentiality, and specifically reminded the jury about the law regarding jury secrecy ... the resulting note from the jury did not indicate the numbers for acquittal or conviction but merely stated the jury was 11-1". No miscarriage of justice, and no demonstration of a reasonable possibility that absent any error the verdict would have been different.

**P. Royal** - Defence Counsel

## SENTENCE - MANSLAUGHTER - SHOOTING - CO-ACCUSED - 9 ½ & 11 ½ YEARS JAIL

***R. v. McLeod*** - Mar. 23, 2006 ABQB 217 per Slatter, J.:

Two accused charged with first degree murder, but convicted by a jury of manslaughter. Issue regarding appropriate sentence. Gang related allegations involving the illegal drug trade. Victim shot 6 times in the back and then burned. Verdict meant that the jury did not believe that either accused was the shooter, but that they were present at the time of the offence and were parties. Accused Chung had a lengthy record including convictions for aggravated assault and possession of a sawed-off shotgun. Accused McLeod had a shorter record which included an assault with a weapon. Crown sought sentences in the range of 25 years to life.

**Held: Chung 11 ½ years, McLeod 9 ½ years**.

Sentences then reduced to give credit for time in custody. Aggravating factors included: use of a handgun, both accused being subject to weapons prohibitions, both accused were engaged in some form of "criminal enterprise that was planned and deliberate", and "group violence". Authorities reviewed.

**L. Anderson, M. Daneliuk** - Defence Counsel

## SEX OFFENDER REGISTRY - 490.012 CC - TEST TO APPLY

***R. v. Redhead*** - Mar. 13, 2006 ABCA 84 per Russell, Picard, Costigan, JA:

Crown appeal from two cases involving a trial judge's refusal to compel entry into the Sex Offender Registry as per s. 490.012 CC. First accused received a 30 month jail sentence in relation to a sexual assault upon a mentally challenged complainant. Second accused received a 4 year sentence for a sexual assault against a prostitute.

**Held: Appeals allowed**.

Test under 490.012(4) CC being whether the impact of the order on the liberty and privacy interests of the offender would be grossly disproportionate to the public interest. "Under s. 490.012(4), the offender bears the evidentiary burden of establishing that the impact of a SOIRA order on him or her would outweigh the public interest": ***Casaway*** (2005) NWTSC 37. The phrase "grossly disproportionate" means a "marked and serious imbalance": ***J.D.M.*** (2005) ABPC 264. Absent disproportional impact, the legislation requires that "anyone convicted of a prescribed offence is subject to the prescribed reporting period". Both accused ordered to comply with 20 year SOIRA orders. Authorities reviewed.

**K. Alyluia** - Defence Counsel

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