



THE UPDATE

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CHARTER - 7 - COSTS - POLICE MISCONDUCT

R. v. Luipasco - August 17, 2006
ABPC 223 per Lefever, PCJ:

Accused charged with intoxicated in a public place, s. 115 GLA. Charge dismissed at trial. Defence then brought an application for costs on the basis of police misconduct. "It is submitted that the Court should award costs where ... the misconduct in relation to laying charges with no legal basis ... descended to the level of 'serious misconduct'". Issue as to whether Court having jurisdiction to entertain post-acquittal costs application.

Held: Court having jurisdiction.

Defence relying upon trial evidence in support of s. 7 application. As per *Deroose* [2002] AJ No. 478 (QB), threshold evidentiary test met given that the defence adduced the evidence upon which they intended to rely in the costs application in the course of a trial voir dire. Merits of costs application adjourned. Authorities reviewed.

T. Engel - Defence Counsel

EVIDENCE - HEARSAY - PROOF OF IDENTITY

R. v. Sahota - August 25, 2006
ABQB 622 per Romaine, J:

Appeal from conviction for breach of recognizance. Alleged breach was contact with co-accused. Co-accused not called at trial. Police officer testified that he satisfied himself of the co-accused's identity by comparing his appearance to the picture on a drivers license in the co-accused's name.

Held: Appeal allowed, new trial.

Information set out on the face of the drivers license was hearsay, as it was relied upon by the Crown for the truth of its contents. Concerning principled exception to the hearsay rule, although reliability threshold likely met, necessity criterion not established. The Crown failed to establish that the co-accused was deceased, or out of the jurisdiction, or otherwise unavailable to testify. Authorities reviewed.

G. Dunn - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Kelly - August 22, 2006 ABPC
226 per Malin, PCJ:

Impaired driving trial. Issue regarding alleged s. 8 breach, i.e. reasonable grounds to arrest. No driving pattern. Symptoms of impairment were: "heavy smell of liquor ... eyes were glossy, his speech was slightly slurred". Police noted no evidence of impaired motor skills, accused was responsive and cooperative.

Held: Section 8 breach, Certificate excluded.

"To draw the inference that any indicia of impairment of the accused's functional ability meant that his ability to drive was impaired would require disregarding the critical distinction between slight impairment, generally, and slight impairment of the ability to operate a motor vehicle, as articulated by the Alberta Court of Appeal in *Andrews*". Police observations did not support an objective finding of reasonable grounds. Authorities reviewed.

B. McGlashan - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Johnson - August 31, 2006
ABPC 129 per Daniel, PCJ:

Impaired driving trial. Issue as to whether police had reasonable grounds to arrest. Vehicle stopped because rear lights were not working. Before stopping, the vehicle was seen to drift over the centre line 3 times. Indicia of impairment included: strong smell of alcohol, bloodshot eyes and trouble retrieving documents.

Held: No s. 8 breach.

"I find the constable in the instant case had reasonable and probable grounds to form the opinion the accused's ability to operate a motor vehicle was impaired by alcohol and to arrest her for that reason. Like Justice Johnstone in *Sheck* [1999] AJ No.1341 (QB), it is not necessary for me to embark upon a consideration or make a ruling on the application of *Rilling*."

P. Horner - Defence Counsel

SENTENCE - IMPAIRED DRIVING - 15 MONTHS JAIL

R. v. Fanjoy - August 31, 2006
ABPC 235 per Semenuk, PCJ:

Accused pled guilty to multiple offences, including 3 impaired driving charges. Two of the 3 impaired charges were laid while the accused was on judicial interim release for related charges. Accused also failed to appear for trial 3 times. Previous record included 4 prior impaired driving convictions, with the last one being in 1997.

Held: 15 months jail plus 2 years probation.

Sentence reduced to 12 months given pre-trial custody time. 5 year driving prohibition imposed. "The range of sentence for recidivist drinking drivers, not involving death or bodily harm, in my view, is well established by recent appellate authority in Alberta to be somewhere between 12 months and 2 years imprisonment": *Beecher* (2005) ABCA 416.

A. Fay - Defence Counsel

SEXUAL ASSAULT - CONSENT - 273.1(2) CC - TEST TO APPLY

R. v. Ashlee - August 23, 2006
ABCA 244 per Conrad, Paperny,
Lee, JA:

Sexual assault. Complainant did not testify at trial. Witness saw 2 accused lying on a sidewalk, fondling complainant's breasts. Police arrived within 5 minutes, complainant's breasts were exposed and she was unconscious. Both accused were intoxicated. Summary Appeal Justice found: "there is absolutely nothing to suggest that she (the woman) did not consent to the activity at a time when she was still conscious".

Held: Appeal allowed, conviction entered.

Any possibility of prior consent would have been vitiated by the unconsciousness of the complainant. "The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent": *Esau* [1997] 2 SCR 777. Conrad, JA dissented.

P. Royal - Defence Counsel

Anderson Dawson Knisely Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

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