



THE UPDATE

Issue #13 March 30, 2007

COURT RECORDS - 28 CEA - ADMISSIBILITY - NOTICE

R. v. Reid - Jan. 29, 2007 ABPC 34 per Semenuk, PCJ:

Breach of recognizance trial. At commencement of trial, Crown sought to introduce a certified copy of the Information and Endorsements along with the recognizance that bound the accused. Defence objected to admissibility on the basis that no notice of the Crown's intention to rely on the documents had been provided.

Held: Documents admissible.

Although ss. 23 and 28 of the CEA require reasonable notice to be given re: reliance on copies of Court records, the Information and Endorsements were admissible at common law, without notice. As per *Tatomir* (1990), 51 CCC (3d) 21: "At common law, judicial documents must be proved by the production of the original record or an exemplification under the seal of the court to which the record belongs. No notice is required".

J. James - Defence Counsel

EVIDENCE - DEMEANOR - ACCUSED SIGNALLING WITNESS - JUDGE'S DUTY

R. v. Salai - Jan. 26, 2007 ABCA 30 per Berger, Costigan, Watson, JA - T. Judge: Trussler, J:

"What is a trial judge to do when she observes that which appears to be an exchange of signals between an accused and a witness on the stand?" Appeal from drug trafficking conviction. Defence denial disbelieved. In her Reasons trial judge placed emphasis upon "signalling" that she observed between the accused and [a defence] witness while the witness testified. No comment was made of the "signalling" by the judge until her final Reasons for Judgement.

Held: Appeal allowed, new trial.

"What exactly did the trial judge observe that led her to conclude that there had been ... 'signalling' ... Who else in the courtroom observed the 'signalling'? The record is silent ... the judge's conclusory statement regarding 'signalling', in my view, undermines the ability of this Court to engage in meaningful appellate review of the conclusion: : *Sheppard* [2002] 1 SCR 869".

C. Davison - Defence Counsel

IDENTIFICATION EVIDENCE - POLICE EYEWITNESS

R. v. Clarke - Jan . 26, 2007 ABCA 29 per Cote, McFadyen, Martin, JA - T. Judge: Marshall, J:

Appeal from conviction on drug trafficking charges. Sale to undercover police officer. Officer took detailed notes regarding accused's physical characteristics and clothing. Accused arrested less than 4 hours later, and was in possession of the buy money. Less than 2 hours after the transaction, officer selected accused from an 8 person photo line-up.

Held: Appeal dismissed.

In reviewing the findings of the *Sophonow Commission*, trial judge found that although the 8 person photo line-up procedure was "not ideal" it was nonetheless fair. Not a case of an unsupported, untested, dock identification. "There was strong corroborative evidence of the police officer's identification which had been tested by a photographic line-up and which, without a plausible explanation, made a conviction almost inevitable".

S. Tarrabain - Defence Counsel

**IMPAIRED DRIVING -
INDICIA - PARKINSON'S
DISEASE - PROOF**

R. v. Kennedy - Jan. 24, 2007
ABCA 25 per Cote, JA:

Application for leave to appeal from impaired driving conviction. Two grounds of appeal: (1) that the police would not allow the accused to give a breath sample; (2) that the constable who was arresting for impaired driving only, "seemed not interested in inquiring into the statement by the accused that she had Parkinson's Disease, and that that was accounting for any coordination problems".

Held: Leave to appeal denied.

Question as to whether a person arrested for impaired driving has the right to demand a breath sample, found to be a "very interesting question", but one that did not arise on the facts. Regarding the accused's Parkinson's Disease, "it is very difficult to see any arguable ground for saying that the constable had a duty to the accused to research, uncover, and preserve evidence of innocence". Police not required by statute or common law to investigate possible defences.

S. Prithipaul - Defence Counsel

**IMPAIRED DRIVING - CARE
OR CONTROL - SINGLE
TRANSACTION**

R. v. Martins - Jan. 26, 2007 ABPC
33 per Anderson, PCJ:

Care or control trial. Accused initially seen driving at 12:30 am, at which time he struck and became hung up on a median. Accused then seen trying to reverse the car unsuccessfully. Police arrived at 1:00 am, accused was still seated behind the wheel, but had abandoned any intent to drive. Crown particularized the care or control to encompass the entirety of the events from 12:30 - 1:00 am.

Held: Conviction entered.

As per *Ogrodnick* (2006), 393 AR 6, no risk of the vehicle being set in motion at 1:00 am. However, accused had care or control when he initially drove into the median. The entire incident formed a single transaction. *Larin* (1997), 215 AR 117 distinguished, given that the accused's evidence of prior driving was not being used to convict. Re: the issue of the vehicle being inoperable, "it would be ironic if the fact of having an accident during the course of care or control, causing the vehicle to become inoperable, negated culpability".

T. Kantor - Defence Counsel

**IMPAIRED DRIVING - 9 & 10(A)
- RANDOM STOP - EXCLUSION
OF INDICIA**

R. v. Nelson - Jan. 24, 2007 ABPC
30 per Semenuk, PCJ:

Care or control trial. Alleged breaches of ss. 9 and 10(a). Accused found passed out in the driver's seat of a running vehicle. Random police approach to vehicle and removal of accused. Indicia of impairment noted after accused placed in police cruiser, accused then arrested.

Held: No breach of s. 9, 10(a) breach, indicia excluded.

Under the Traffic Safety Act, and s. 254 Criminal Code, police have a residual authority to conduct a lawful investigative detention on a suspected impaired driver, in the absence of advising of s. 10 rights: *Orbanski* (2003) 173 CCC (3d) 203. No s. 9 breach, and 10(b) rights were properly suspended. However, police failure to promptly advise accused as to why he was being asked to step from his vehicle, violated s. 10(a): *Clarke* (1992) AJ No. 656, *Herter* (2006) 40 CR (6th) 351. As per *Orbanski* at para 31: "I suspect every motorist would fully expect to be informed promptly of the reasons why he ... is being stopped". Indicia gathered during 10(a) breach excluded.

I. Savage - Defence Counsel

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