



THE UPDATE

Issue #40 October 12, 2007

CHARTER - 10 - DETENTION - IMPAIRED DRIVING - 10(B) - TEST - JETWAY PROJECT

R. v. Makhmudov - July 25, 2007
ABCA 248 per O'Brien, Martin,
Slatter - JA - T Judge: Mahoney, J:

Jetway Program case. RCMP at Calgary bus depot smelled the zipper area of two duffle bags, smelling marihuana. Police then implemented an undercover operation by posing as Greyhound employees and telling passengers that bags had to be re-taged. When the accused approached his bags he was asked about them, and upon admitting that they were his, he was arrested. Conviction appeal.

Held: Appeal dismissed.

No error in trial judge's finding that accused was not detained. Neither physical nor psychological detention established. "The hypothetical possibility that the appellants would have been detained if they tried to flee, does not establish that they were detained ... The appellants were not in the coercive power of the state just because the officers had resolved to arrest them at some future point."

G. Dunn, J. Antonio -
Defence Counsel

CHARTER - "FORTHWITH"

R. v. Megahy - June 28, 2007 ABQB
436 per Eidsvik, J:

Appeal from acquittal on charges of impaired driving and over .08. Checkstop. Screening demand read inside of Checkstop van which was equipped with 2 phone booths. Demand read 4 minutes after accused initially stopped. Trial judge found breaches of ss. 8 and 10(b) (demand not forthwith). Certificate excluded.

Held: Appeal allowed, new trial.

4 minute delay not giving rise to concerns regarding "forthwith". 11 minute delay found to be acceptable in *Kachmarchyk* [1995] AJ No. 343 (CA). As per *Oduneye* (1995)169 AR 353 (CA): "some short delay will always be necessary ... [the police] must be allowed at least a brief period of observation to ensure that his/her suspicion is reasonable." Regarding the telephones in the van, *George* [2004] OJ No. 3287 (CA) followed: "...the detainee does not have the right to delay the production of the breath sample in order to consult counsel by virtue of the ready availability of a telephone."

R. Batting - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO CONTRARY

R. v. Hughes - June 29, 2007 ABPC
180 per Lamoureux, PCJ:

Impaired driving trial. Evidence to the contrary. Straddle case. Range of probable blood-alcohol concentration at time of driving expressed as between 48 - 104 mg%.

Held: Acquittal entered.

"There are a number of concerns with respect to the *MacDonald* (2006), 209 CCC (3d) 481 (ABCA) decision. First and foremost is the fact that the Court was presented with an inaccurate transcript ... Dr. Malicky is purported to have said: 'I've guessed rates of elimination'" whereas he in fact testified that "tests" rates of elimination. Further *MacDonald* appears to be in conflict with *Boucher* [2005] 3 SCR 499. "The obiter dicta in *MacDonald* suggesting that Dr. Malicky should be required to replicate the pattern of drinking ... and the exact events that occurred on the night of arrest, is to place the onus on the Defence which again goes far beyond the requirement of simply raising a reasonable doubt."

T. Foster - Defence Counsel

**IMPAIRED DRIVING -
EVIDENCE TO CONTRARY**

R. v. Rockey - August 10, 2007
ABPC 219 per Fraser, PCJ:

Impaired driving trial. Evidence to the contrary. Range of probable blood-alcohol concentration at time of driving expressed as 0 - 67 mg%. Alcohol elimination rate testing did not attempt to replicate the events of the night in question (i.e. type of alcohol and food consumed) as suggested by *MacDonald* (2006), 209 C.C.C. (3d) 481 (ABCA).

Held: Conviction entered.

MacDonald has application outside of straddle case scenarios. “The reasoning in *MacDonald* applies to all such expert evidence to the contrary, that does not attempt to measure the personal tolerance levels to alcohol, and the absorption and elimination rates at the material time of accused and does not replicate the critical factors set out in *MacDonald* ... if the testing does not simulate all these factors at the material time, then the expert’s evidence cannot estimate with any degree of specificity what the accused’s blood-alcohol content was at the material time.”

G. Dunn - Defence Counsel

**SENTENCE - DRUGS - ECSTASY
TRAFFICKING - DISCHARGE**

R. v. Idris - August 3, 2007 ABPC
211 per Brown, PCJ:

Accused pled guilty to trafficking 6 ecstasy pills. Sale to undercover police officer. Accused was 28 at the time of the offence. No record. Application for a conditional discharge.

Held: 30 months conditional discharge plus a \$5,000 charitable donation.

Exceptional circumstances included: summary conviction offence, involving a small amount of the drug, offence was out-of-character, “one-time offence”, and a criminal record would have a negative impact on the accused’s work as a computer technician, work that was valued by his employer and clients. “The 1980 Alberta Court of Appeal decision in *Burchnall and Dumont* (24 AR 17) recognized that exceptional trafficking cases can escape custodial sentences.” Authorities reviewed.

R. Snukal - Defence Counsel

**SENTENCE - BANK ROBBERY -
6.5 YEARS JAIL**

R. v. Kim - July 3, 2007 ABQB 445
per Hughes, J:

Accused pled guilty to bank robbery. Accused, and 2 other men, robbed the commercial accounts section of the CIBC in Banff, stealing over \$300,000. The men were masked, and 2 of them held replica handguns. The bank employees wrists and ankles were bound, and after the vaults were emptied smoke grenades were released. The victims inside the bank thought that the building had been set on fire. 23 year old accused with no record.

Held: 6.5 years jail.

5 year starting point as per *Hung* (1990) AJ No. 1074 (CA). “Exceedingly sophisticated, organized and well planned out crime.” Mitigating circumstances included: early guilty plea, confession to police, age of accused, family support, and the fact that some of the money had been recovered.

J. Lutz - Defence Counsel

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