



THE UPDATE

Issue #1 February 12, 2010

CHARTER - 24(2) - DRUGS - GRANT ANALYSIS

R. v. Ngai, 2010 ABCA 10, per Cote, McDonald, Kent, JA - T. Judge: Clark, J:

Conviction appeal from charge of production of marihuana – 1600 plants seized. Trial judge erred in finding no breach of s. 8, given that the police engaged in an unauthorized seizure of DRA information. Issue being whether evidence ought to be excluded.

Held: Appeal dismissed, evidence not excluded.

Grant [2009] SCR 353 analysis undertaken by Court of Appeal. Police acted in good faith. Case authorities had been divided as to whether a warrant was required to obtain DRA information. Not a “suspicion-based search”, and not a serious breach. The house in question was unoccupied. The information revealed by the DRA was neither private nor personal. No serious impact on the Charter protected interests. Society’s interest in adjudication of the merits also favoured admission.

K. Molle - Defence Counsel

CHARTER - 24(2) - IMPAIRED DRIVING - 10(B) - GRANT

R. v. Rolls, 2010 ABPC 41, per Johnson, PCJ:

Impaired driving trial. 10(b) breach found. Accused asserted 10(b) right, made diligent but unsuccessful attempts to contact both duty counsel and private lawyers, and ultimately agreed to proceed with breath samples. 24(2) analysis.

Held: Certificate excluded.

Grant [2009] SCR 353 analysis undertaken. Serious breach. “The overall circumstances - failure of resources and proceeding in the face of that failure are such as to call for disapproval of the Court.” Significant impact on the Charter protected interests. Although the third branch (adjudication on the merits) favoured admission, “weighing all the factors ... the administration of justice would be best served by exclusion.”

M. Clancy - Defence Counsel

IMPAIRED DRIVING - 258(1) CC - CONSTITUTIONALITY

R. v. Tidlund, 2010 ABPC 29, per Fradsham, PCJ:

Constitutional challenge to the 2008 amendments to the evidence to the contrary provisions. Issue regarding procedure – “the Crown has submitted that before the accused should be permitted to challenge the constitutionality of the provisions, the accused must first establish that he had a defence under the ‘evidence to the contrary’ provisions of section 258(1) as they existed prior to the amendments.

Held: Application dismissed.

Evidence had been called, and the trial was concluded, therefore *Iverson* 2009 ABPC 254 distinguished. “Whether Mr. Tidlund has an ‘evidence to the contrary’ defence available to him under the pre-amendment section 258(1) is irrelevant ... The pre-amendment section 258(1) exists no longer which means that the constitutional challenge to the amended section 258(1) provisions must be heard and determined since that is all that exists.”

I. Savage - Defence Counsel

PARTIES - 21 CC - EVIDENCE OF "JOINT VENTURE"

R. v. Smith, 2010 ABCA 46, per Watson, Slatter, Rowbotham, JA - T. Judge: LeReverend, PCJ:

Conviction appeal on charges including dangerous driving and possession of a stolen vehicle. Evidence of speeding, followed by a collision, with 3 males (one being the accused) then running from the scene. Trial judge convicted under 21 CC, finding that all of the males were involved in a "joint venture."

Held: Appeal allowed.

"The 'joint venture' theory is just a theory ... essentially speculation." Regarding the dangerous driving, no evidence that the accused was the driver, and no evidence that he did anything to aid or encourage the driver to drive dangerously. Proof of possession of stolen property requires evidence of knowledge and control. Although knowledge may be inferred from steering column damage or flight, given that there was no finding that the accused was anything more than a passenger, there was no evidence of control.

B. Leebody - Defence Counsel

REASONABLE DOUBT - W.(D.) - "EITHER/OR" APPROACH

R. v. Kristensen, 2010 ABCA 37, per Bergerm Watson, Rowbotham, JA - T. Judge: LeReverend, PCJ:

Conviction appeal on several domestic assault related charges. Accused testified and denied allegations. Issues as to whether trial judge erred by engaging in a credibility contest analysis prohibited by *W. (D.)*, and whether trial judge's assessment of the accused's credibility was contaminated by her finding that he was "controlling, foul mouthed and has a bad temper."

Held: Appeal allowed.

An "either/or" approach must be avoided in deciding credibility issues. "The trial judge repeatedly measured the appellant's evidence against that of the complainant." The Reasons did not "provide confidence" that the trial judge "appreciated that mere disbelief of the appellant did not terminate the assessment of the Crown's evidence let alone (by itself) resolve reasonable doubt." Regarding the trial judge's comments with respect to the accused's character, "her reasons suggest that she may have convicted him on various counts on that basis."

D. Hatch - Defence Counsel

SENTENCE - \$18,167 THEFT FROM EMPLOYER - CSO

R. v. Dennis, 2010 ABCA 36, per Paperny, Watson, McDonald, JA - T. Judge: Lamoureux, PCJ:

Appeal from 12 month jail sentence plus 2 years probation imposed after accused pleaded guilty to theft of \$18,167 from her employer. Sentencing judge overruled a joint submission for a 12 month CSO plus probation.

Held: Appeal allowed, 9 month CSO (given time served) imposed.

"The sentencing judge erred in rejecting the joint submission ... she committed a reviewable error in not considering whether a properly crafted conditional sentence order could satisfy the need for denunciation and deterrence ... Furthermore, she was in error in attempting to require restitution as a precondition to granting a conditional sentence order ... the sentence imposed is demonstrably unfit."

D. Bourdon - Defence Counsel

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

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