



# THE UPDATE

Issue #3 March 5, 2010

## DRIVE DISQUALIFIED - PROOF OF OFFENCE

*R. v. Zinyk* 2010 ABPC 40 per Creagh, PCJ:

Accused charged with drive while disqualified (court ordered prohibition). Crown tendered two documents: (1) original Information and endorsements setting out s. 253 CC conviction; (2) original driving prohibition order signed by court clerk.

### **Held: Conviction entered.**

Defence argument that s. 260(5) CC precludes proof of the existence of the prohibition order by a method other than the one set out in the section rejected.

*Tatomir* (1990), 51 CCC (3d) 321 “removes any doubt that these documents are admissible to prove the truth of their contents.” Regarding the driving prohibition order, the procedure in Alberta is to delegate to the clerk the responsibility of recording the findings of the court on the Information. “That function is properly delegated to the Clerk and the document is no less the original order of the Court.”

T. Dunlap - Defence Counsel

## FAIR TRIAL RIGHT - UNREPRESENTED ACCUSED

*R. v. White* 2010 ABCA 66 per Berger, O’Brien, Rowbotham, JA - T. Judge: Thomas, J:

Appeal from second degree murder conviction. Accused testified, providing an alibi and blaming the murder on his girlfriend. Following his evidence, counsel withdrew citing “irreconcilable differences.” New counsel was appointed, but soon thereafter withdrew. Accused asked for a further adjournment to obtain counsel, but adjournment denied. While unrepresented, the accused called two witnesses (his girlfriend and his brother). New counsel appointed for final argument.

### **Held: Appeal allowed, new trial.**

Accused was poorly prepared and lacked any real knowledge of the trial process and rules of evidence. The girlfriend’s evidence (admitting to the murder) was critical, but due to the accused’s “ineptitude”, her testimony was “fractured” and “difficult to follow.” As per *Beals* (1994) 126 NSR (2d) 130, “representation by counsel at trial is generally essential to a fair trial if an accused is charged with a serious offence and a complex trial can be anticipated.”

L. Stevens - Defence Counsel

## IMPAIRED DRIVING - AS SOON AS PRACTICABLE

*R. v. Bowman* 2010 ABPC 47 per Barley, PCJ:

Impaired driving trial. Issue as to whether breath samples taken as soon as practicable. 22 minutes between the accused finishing his call to counsel and the first breath test. Investigating officer testified that he could not recall exactly what happened during this period, but that the checkstop bus was very busy and he would have had to wait some time for the technician to be ready.

### **Held: Conviction entered.**

Test being whether samples taken “within a reasonably prompt time under the circumstances.” As per *Vanderbruggen* (2006) 206 CCC (3d) 480 (Ont CA), “while the Crown is obligated to demonstrate that the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody.”

I. McKay - Defence Counsel

**IMPAIRED DRIVING - 10(B) - TIMING OF 10(B) ADVICE**      **IMPAIRED DRIVING - 24(2) - CERTIFICATE OF ANALYSIS**

*R. v. Pinchak* 2010 ABPC 44 per Dunnigan, PCJ:

Impaired driving trial. Accused failed a screening test and was arrested for impaired driving. 10(b) rights read to accused, and accused spoke to counsel. The breath demand was not read until after accused finished exercising his right to counsel.

**Held: No 10(b) breach.**

Timing of the breath demand was “unusual.” However, as per *Schmautz* [1990] 1 SCR 398, “there was a close factual connection between the reasons given for the arrest and the advice of the right to counsel and ... the demand for breath samples.” The arrest, right to counsel and breath demand all formed part of one transaction.

D. Chow - Defence Counsel

*R. v. Valliere* 2010 ABPC 54 per Maher, PCJ:

Impaired driving trial. Section 8 breach – objective reasonable grounds to arrest found not to exist. Issue regarding application to exclude Certificate pursuant to s. 24(2).

**Held: Certificate admitted.**

Not a serious breach. Arresting officer had a subjective belief that the accused’s ability to drive was impaired. “No hint of any wilful or reckless disregard of the accused’s Charter right.” As per *Grant* (2009), 245 CCC (3d), “breath sample evidence ... collection is relatively non-intrusive.” Adjudication on the merits analysis favoured admission. “[T]he higher the breath sample analysis readings might be ... the greater the negative impact on the repute of the administration of justice in having the results of the analysis excluded.”

G. Worobec - Defence Counsel

**SENTENCE - SEX ASSAULT - BREACH OF TRUST - 5 YEARS**

*R. v. A.G.A.* 2010 ABCA 61 per Cote, Costigan, Slatter, JA - T. Judge: Read, J:

Crown appeal from 3 year sentence following sexual assault conviction. 18 year old accused, 5 year old complainant. Multiple acts over several years, including one act of anal penetration. Complainant was a foster child in the accused’s parents’ home. Sentencing judge found that accused was not in a position of trust over the child.

**Held: Appeal allowed, 5 years jail.**

“Trust” means “confidence in or reliance on some quality or attribute of a person”: *Audet* [1996] 2 SCR 171. “Error in principle to conclude that the respondent was not in a position of trust ... The respondent was an adult brother who babysat the complainant and coached his soccer team.”

D. Royer - Defence Counsel

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