



THE UPDATE

Issue #5 March 19, 2010

CHARTER - 8 - REASONABLE NOTICE REQUIREMENT GROUNDS - VEHICLE STOP

R. v. Hillgardener 2010 ABCA 80 per Ritter, Watson, Graesser, JA
- T. Judge: Sanderman, J:

Crown appeal from acquittal on cocaine possession charges. Evidence excluded at trial under 24(2). Police received a detailed tip from a reliable informant, identifying a young female driving a black SUV in downtown Fort McMurray selling cocaine. Police located the vehicle, stopped it and arrested the driver. Cocaine found in the driver's purse. Trial judge found that reasonable grounds to arrest as contemplated by 495 CC and described in *Debot* [1989] 2 SCR 1140 did not exist.

Held: Appeal allowed, new trial.

"The controlling authority for this province is found in *Debot* ... The law does not mandate confirmation of the offence itself in all cases before effecting an arrest. The trial judge's reasons reveal that he regarded confirmation of the offence itself as being required in law before the arrest, and not merely as a factual deficiency as to reasonable and probable grounds."

J. Chadi - Defence Counsel

CHARTER APPLICATIONS -

R. v. Bull 2010 ABPC 68 per Rosborough, PCJ:

Drug related charges originally scheduled for trial. Trial had to be adjourned, as defence counsel failed to provide timely notice of Charter application. Requirement to give timely notice examined by the court.

Held: Timely notice mandatory.

Compliance with the *Constitutional Notice Regulation* (like the *Judicature Act*) is a condition precedent in the Provincial Court to the hearing of a s. 24 Charter application. Where proper notice is not given, and an adjournment is sought to perfect notice, the following factors (plus others) ought to be considered: the usual practice of the court will be to refuse such applications; the explanation for the failure to give notice must be examined in the context of the principles of natural justice; where the reason for failing to give notice is the lack of due diligence, an adjournment will likely be denied; the seriousness of the charge; steps taken by the defence to attempt to avoid prejudice to the Crown and court; and the apparent strength of the Charter issue.

J. Chadi - Defence Counsel

IMPAIRED CARE OR CONTROL - PRIOR DRIVING

R. v. Stewart 2010 ABPC 66 per Barley, PCJ:

Care or control trial. Engine running. Accused testified that he had pulled over because he knew he ought not to be driving, and that he was going to wait until he was sober. Crown witnesses established prior driving.

Held: Conviction entered.

Regarding the prior driving, *Toews* indicates care or control may be established whether the vehicle "is in motion or not." Further, as per *Pitcher* [1988] 6 MVR (2d) 51, "proof of operation furnishes the evidence to establish care or control." ABCA decision in *Wynnychuk* [1962] 132 CCC 227 distinguished. "The Court of Appeal accepted that the evidence of driving did establish the act of being in care and control. However, the act of driving [in *Wynnychuk*] was not part of the Crown's case, and only came out of the accused's own evidence. The Crown being bound by the case it presents, could not rely upon the accused's own evidence of an earlier distinct act, that of driving."

G. Dunn - Defence Counsel

JURIES - EXHORTATION

R. v. L.A.C. 2010 ABCA 76 per Costigan, Ritter, Watson, JA - T.
Judge: Marceau, J:

Second degree murder trial, accused convicted of manslaughter. Issue regarding content of trial judge's exhortation to the jury after receiving report of a deadlock.

Held: Appeal allowed, new trial.

"The trial judge gave the jury a legally incorrect exhortation ... the exhortation contained elements which contravened the policy set out in *R. v. G(RM)* [1996] 3 SCR 361. Those elements involved reference to the need to re-try the case with its associated inconvenience, expense and hardship for the Crown and defence, and the association of that negative result with 'the unwillingness of one or more of their number to listen to the arguments of the rest.'"

P. Royal - Defence Counsel

SENTENCE - CURATIVE DISCHARGE - 255(5) CC

R. v. Taylor 2010 ABPC 77 per Dunnigan, PCJ:

Accused plead guilty to impaired and disqualified driving, as well as breach of probation. Two prior impaired convictions in the last 8 years, having received a curative discharge for the first and a fine for the second. Intensive rehabilitative steps taken.

Held: Curative discharge granted.

As per *Soosay* (2001) 160 CCC (3d) 437, medical evidence established that the accused was well motivated and that he had a reasonable chance of overcoming his alcoholism. "I was referred to no case law which might stand for the proposition that an accused person is disentitled from a curative discharge on the basis that he has been granted such discharges in the past. Indeed, in *R. v. Brown* (2003) 345 AR 190 ... the Court granted a third curative discharge on being satisfied that the prerequisites in *Storr* were fulfilled.

I. Pielecki - Defence Counsel

STATEMENTS - W(D) - EXCULPATORY EVIDENCE

R. v. Philip 2010 ABCA 79 per Ritter, Watson, Graesser, JA - T.
Judge: Sulyma, J:

Defence appeal from jury conviction on second degree murder charge. Crown introduced various statements made by accused, some of which were exculpatory. Trial judge instructed the jury that they were to decide whether they "accept" the statements and what weight to give to the statements they found to be "true."

Held: Appeal allowed, new trial.

"These instructions are wrong in law as a jury should know that they do not have to be satisfied that the defendant's statements put in evidence by the Crown were made or are true before they can consider them on doubt: *R. v. W(D)* [1991] 1 SCR 742, and *R. v. Miller* (1991) 68 CCC (3d) 517.

M. Duckett - Defence Counsel

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

All updates can be found at: www.dsscrlaw.com

By clicking on the heading of any of the cases in THE UPDATE, the reader will immediately be linked to the full text of the case.