



# THE UPDATE

Issue #7 April 16, 2010

## CHARTER - 7 & 12 - POLICE - USE OF EXCESSIVE FORCE

*R. v. Steele* 2010 ABQB 191 per  
Macklin, J:

Trial on charges including possession of a weapon and obstruction. While being pursued by police, the accused stabbed a police dog. Accused was then shot 4 times, suffering serious injury. Stay application based upon excessive police force.

### **Held: Stay granted.**

“The affront to fair play and decency by allowing the prosecution to proceed on these two charges would be disproportionate to the societal interest in their effective prosecution. Irreparable prejudice would be caused to the integrity of the judicial system by the Court’s seeming condonation of both the use of excessive force by the police and the unacceptably negligent investigation by the same police into the use of that force.”

T. Engel - Defence Counsel

## IMPAIRED DRIVING - 254(2) CC - “APPROVED” DEVICE

*R. v. Stafford* 2010 ABPC 85 per  
Shriar, PCJ:

Impaired driving trial. Issue as to whether Crown had proven that the screening device used was an approved device. Officer described the device in various ways: including a “roadside screening device” and a “400D”. The phrase “approved screening device” was not used, although she did agree with the Crown suggestion that the device used was “approved.”

### **Held: Screening test admissible.**

The Crown need only prove that the officer held a reasonable belief that the device used was in fact an ASD: *Graham* 2009 ABQB 100. As per *Latulippe* [2005] 26 MVR (5<sup>th</sup>) 97, the Court may rely upon a police officer’s testimony agreeing with a Crown suggestion that the device used was approved. Sufficient basis to conclude that the officer had reasonable and probable grounds to believe that the screening device was an ASD.

R. Sawers - Defence Counsel

## IMPAIRED DRIVING - RILLING IS GOOD LAW

*R. v. Urban* 2010 ABPC 81 per  
Sully, PCJ:

Impaired driving trial. Defence raised the issue of reasonable grounds to make a breath demand given the Crown’s failure to prove that the screening device used was an approved device. However, no Charter remedy was sought.

### **Held: Certificate admissible.**

“In *Rilling v. The Queen* (1976), 24 CCC (2d) 81, the Supreme Court of Canada ruled that the absence of reasonable and probable grounds does not prevent the admissibility of a Certificate of Analysis of a breath technician. Furthermore, *Rilling* is still binding authority at the present time: *R. v. MacLeod*, 2001 ABPC 7; *R. v. Catling* 2001 ABPC 98.

C. Zilinski - Defence Counsel

**SENTENCE - DOMESTIC  
ASSAULT - DISCHARGE**

*R. v. Sumyk* 2010 ABQB 217 per Burrows, J:

Crown appeal from a conditional discharge imposed after accused pleaded guilty to assault. While driving the accused hit the complainant's knee with his fist and then later pushed her up against the vehicle. Accused and complainant had been in a volatile common law relationship, and the assault occurred during a dispute regarding access to their son.

**Held: Appeal dismissed.**

Aggravating factors included: accused had a recent record, there was a domestic element to the assault, and their 18 month child was present during the assault. Sentencing judge committed no error in principle. The sentence imposed was available to the court and was not unfit.

M. Duckett - Defence Counsel

**SENTENCE - IMMIGRATION  
STATUS - WEIGHT TO AFFORD**

*R. v. Belenky* 2010 ABCA 98 per Cote, Ritter, McDonald, JA - T.  
Judge: Anderson, PCJ:

Crown sentence appeal. Accused pleaded guilty to two counts of cocaine trafficking, and was sentenced to 2 years less one day jail plus probation. Accused had a previous related record. Sentencing judge gave weight to the accused's immigration status, namely that he would be unable to appeal a deportation order if he received a penitentiary sentence.

**Held: Appeal allowed, 2.5 year sentence imposed.**

As per *Morgan* [2008] NWTJ 61 and *Leung* 2004 ABCA 55, "the factor of the collateral consequences of deportation can be given at most very limited weight. It cannot by itself remove a sentence from what would otherwise be the appropriate range. At most, it can serve to move the sentence a small amount, nothing more."

M. Duckett - Defence Counsel

**SENTENCE - HISTORIC  
SEXUAL ASSAULT - NO CSO**

*R. v. F.H.A.* 2010 ABCA 99 per Costigan, Paperny, Ritter, JA - T.  
Judge: Reilly, PCJ:

Crown appeal from conditional sentence imposed in relation to historic charges of sexual assault and gross indecency. Accused was a junior high school teacher (mid 1980s) who assaulted male students, including masturbating the victims and performing oral sex. Accused now 65 years old with no record. Sentencing judge's reasons spoke of his "skepticism as to the principles of denunciation and deterrence."

**Held: Appeal allowed, 3 year jail sentence imposed.**

In view of s. 718.01 CC, and the guideline judgements of the Court of Appeal, denunciation and deterrence are the primary sentencing objectives in cases of breach of trust sexual assault. The conditional sentence was demonstrably unfit.

B. Der - Defence Counsel

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