DAWSON STEVENS DUCKETT & SHAIGEC BARRISTERS

THE UPDATE

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CHARTER - 24(2) - SEARCH WARRANT - EXCLUSION

R. v. Pham **2010 ABQB 278** per Hawco, J:

Drug trial. Search of a private dwelling with a warrant. Trial judge previously found a breach of section 8. Information in support of the warrant included an incomplete and incorrect account of the accused's prior drug related history. 24(2) issue regarding application to exclude evidence.

Held: Evidence excluded.

Review of ***Grant***, ***Harrison***, ***Suberu***, and numerous Alberta cases interpreting the same. "My difficulty with this case is that there was not full and frank disclosure. The information given was incorrect and misleading. That had the effect of tainting the whole warrant. This was not a deliberate case of misconduct, but it was a case of unacceptable police conduct given their duty to the courts. The search was improper. The evidence will be excluded."

C. Stewart - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Dunkle **2010 ABPC 137** per LeGrandeur, PCJ:

Impaired driving trial. Reasonable grounds issue. Only "reliable" evidence from arresting officer was that accused had an odour of alcohol on his breath, admitted to consumption, and took deliberate steps while walking to the cruiser.

Held: Section 8 breach, Certificate excluded.

As per ***Cuthbertson*** [2003] AJ No. 800, a weighing of the circumstances did not lend itself to conclusions of reasonableness and probability. Regarding 24(2), "the failure to meet the bar of reasonable and probable grounds for a demand of breath is in my view prima facie a serious breach." The seizure of breath in the absence of grounds constitutes a significant impact on the Charter protected interests. The breath samples were vital to the Crown's case. "That fact seems equivocal when one considers the long term interests of the administration of justice. Is the Charter to protect only against evidence that was gained improperly when it is not important to the Crown's case?

T. Foster - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Thiede **2010 ABPC 121** per Carminati, PCJ:

Impaired care or control trial. Reasonable grounds issue. Police found accused pulled over to the side of the road and vomiting. Accused admitted consumption, had dilated pupils and smelt of alcohol. Defence argued that the majority of the symptoms observed were equivocal, and equally consistent with "medical" issues.

Held: No Section 8 breach.

"It is neither necessary nor desirable to hold an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable": ***McClelland*** (1995), 98 CCC (3d) 509 (ABCA). "The standard for reasonable and probable grounds is clearly less than for a prima facie case, and far less than proof beyond a reasonable doubt. Accordingly, in ***R. v. Dwernychuk*** ... our Court of Appeal found reasonable and probable grounds where the accused had a slight sway and an odour of alcohol."

A. Vretenar - Defence Counsel

IMPAIRED DRIVING - 24(2) - CERTIFICATE - ADMITTED

R. v. Brochu **2010 ABPC 103** per Anderson, PCJ:

Impaired driving trial. Officer testified that he read an "ASD demand"to the accused, but did not offer any evidence as to the wording of the demand.

Held: Section 8 breach, Certificate admitted.

No basis before the Court to conclude that the demand was either proper or improper. However, Crown must prove validity of the demand: ***Hall*** 2003 ABPC 124. Regarding 24(2), not a serious breach. No evidence that accused was misled in any way, and not a case where accused's liberty was interfered with improperly. Reliable evidence, and society had an interest in an adjudication on the merits.

T. Dunlap - Defence Counsel

SOIRA - 490.019 CC - 7 - CONSTITUTIONALITY

R. v. Warren **2010 ABCA 133** per Berger, Costigan, Rowbotham, JA - T. Judge: Sirrs, J:

Issue as to whether or not ss. 490.019-490.02(1) CC (Sex Offender Registry) are contrary to s. 7, given their impugned retrospective application.

Held: Sections 490.019 - 490.02(1) constitutionally valid.

As per ***Youngpine*** 2009 ABCA 89, an SOIRA order does not breach 11(i) of the Charter preventing retrospective punishment, as a SOIRA order does not constitute a sentence. "While registration in accordance with the SOIRA may infringe an offender's liberty interest, the offender is not deprived of that liberty interest in a manner that contravenes the principles of fundamental justice. Accordingly, ss. 490.019 and 490.02(1) of the Criminal Code are not contrary to section 7."

G. Johnson - Defence Counsel

SOIRA - 490.019 CC - 11(H) & (I) - CONSTITUTIONALITY

R. v. C.L.B. **2010 ABCA 134** per Berger, Costigan, Rowbotham, JA - T. Judge: Ross, J:

Issue as to whether or not ss. 490.019 - 490.02(1) CC (Sex Offender Registry) are contrary to ss. 11(h) or 11(i), given their impugned retrospective application.

Held: Sections 490.019 - 490.02(1) constitutionally valid.

Application to reconsider ***Youngpine*** 2009 ABCA 89 dismissed. "Subsections 11(h) and (i) apply only where the real object of the legislation is to punish or where legislation imposes a true penal consequence ... ***Youngpine*** did not specifically address the retrospective application of the SOIRA provisions ... but it follows that as the registration does not constitute punishment, it cannot offend either subsections 11(h) or (i)."

G. Johnson - Defence Counsel

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