



THE UPDATE

Issue #10 May 7, 2010

CHARTER - 8 - SEARCH WARRANTS - S. 11 CDSA

R. v. Anderson 2010 ABQB 263 per Bast, J:

Drug trial. Issue regarding validity of search warrant. Unsworn 14 page Information to Obtain Warrant left by police at judge's chambers, as no judge was available to meet with the officer. Later that day officer received a call to return to the Courthouse. The judge entered the waiting room, had the officer swear to the contents of the ITO, and then immediately signed the warrant. This meeting took no more than 2 minutes. The officer confirmed that it would have taken more than 15 minutes to read the ITO.

Held: No s. 8 breach.

Section 11 CDSA requires that a judge be "satisfied by information on oath" prior to issuing a warrant. However, no evidence establishing that the judge did not read the entire ITO. Therefore *Larson* (1997) 205 AR 344 distinguished. In the absence of evidence to the contrary, the judge is presumed to have acted judicially and presumed to have read the ITO.

P. Fagan - Defence Counsel

CHARTER - 8 - VEHICLE STOP - JURY TRIALS - CROWN ODOUR OF COCAINE - SEARCH REFUSAL TO RE-ELECT

R. v. Goerzen 2010 ABQB 289 per Hillier, J:

Drug trial. Issue regarding validity of a vehicle stop and subsequent search. Highway stop due to an alleged tinted windows violation. Police officer had extensive experience and training with respect to drug investigations. From within the vehicle the officer noted a very strong odour of what he believed to be cocaine. Accused arrested and vehicle searched.

Held: No s. 8 breach.

Police having wide powers under TSA to stop vehicles to ensure compliance with traffic laws. This was not an arbitrary stop as per *Harrison* 2009 SCC 34. A smell alone can constitute reasonable grounds where the odour is detected by an experienced officer who is able to justify the reasonableness of his or her belief: *Smith* (1998), 126 CCC (3d) 62 (ABCA). Vehicle search that followed was properly incidental to the arrest.

P. Moreau - Defence Counsel

R. v. Effert 2010 ABCA 144 per Picard, Watson, Slatter, JA:

Appeal from jury conviction on second degree murder charge. Accused wanted trial to proceed judge alone, but Crown refused to consent to dispensing with the jury, and gave no reasons for the refusal. Defence application to have CA reconsider *Ng* 2003 ABCA 1.

Held: Application to reconsider *Ng* denied.

As per *Ng*, prosecutorial discretion to withhold consent to a re-election for trial without jury is not subject to review by the court absent proof of an abuse of process. No basis demonstrated justifying a reconsideration of *Ng*. "The reasoning in *Ng* is itself based on a clear line of authority from the Supreme Court of Canada affirming the limited basis for reviewing prosecutorial discretion ... *Ng* is a relatively recent decision, and was itself refused leave by the Supreme Court."

P. Royal - Defence Counsel

**IMPAIRED DRIVING - 8 -
MOUTH ALCOHOL - GUM**

R. v. Goheen 2010 ABPC 146
per Rosborough, PCJ:

Impaired driving trial. ASD used. Accused was chewing gum immediately prior to the test being administered. Officer was cross-examined from the ASD manual regarding the possible need to wait 20 minutes prior to taking the sample given that gum may contain traces of alcohol. However, the officer maintained that he was not trained to wait, and that he believed that the fail reading obtained was valid.

Held: No s. 8 breach.

Onus on defence to prove s. 8 violation. The applicable standard is “reasonableness” not “scientific accuracy”: *Musurichan* 107 AR 102 (CA). “In this case there is no credible evidence that chewing gum did, or even could, retain any or sufficient alcohol to cause a ‘false fail’ reading on the ASD.”

K. Beyak - Defence Counsel

**IMPAIRED DRIVING - 253(1)(A) -
FATIGUE AND ALCOHOL**

R. v. Comte 2010 ABPC 131 per
Shriar, PCJ:

Impaired driving trial. Driving pattern and some indicia noted. Accused testified that he had not consumed alcohol for many hours prior to driving, and mostly was suffering from fatigue. Certificate entered in evidence, but over .08 charge dismissed as the samples were taken outside of two hours.

Held: Conviction entered.

“There is authority from across the country for the proposition that a person can be convicted of impaired driving where the ability to drive is impaired partly by fatigue and partly by alcohol.” (see: *Pelletier* (1989) 51 CCC (3d) 161 (Sask QB), *Campbell* [1981] BCJ 320). Although the Certificate could not be used to prove the over .08 charge, the court can infer from the Certificate that alcohol was present in the accused’s system: *Dinelle* [1986] 44 MVR 109, *Randell* [1994] SJ No. 14.

J. Brunnen - Defence Counsel

**SENTENCE - DOMESTIC
ASSAULT - 2 YEARS JAIL**

R. v. Martel 2010 ABPC 136 per
Fraser, PCJ:

Accused plead guilty to assault causing bodily harm and damage to property. Domestic assault. Injuries included: severe contusions and bruising to the face, numerous abrasions to the body, a fractured sternum and vertebrae. Medical evidence established that a fractured sternum could only be caused by significant blunt force trauma. Accused was a “well built iron worker ... the victim is petite.” Accused had a previous domestic assault conviction relating to a different partner.

Held: 2 years jail.

Only mitigating factor was the guilty plea. Denunciation and deterrence paramount given the breach of trust and severity of the assault.

R. Snukal - 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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