



# THE UPDATE

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## CHARTER - 7 - ABUSE - CIVIL DEBT COLLECTION

*R. v. McAndrus* 2010 ABPC 151 per Rosborough, PCJ:

Accused charged with false pretences – NSF cheques. Defence sought a stay, alleging a common law abuse of process on the basis that the prosecution was designed to assist in collecting a civil debt.

### **Held: Application dismissed.**

Law regarding common law abuse of process largely overtaken by s. 7: *O'Connor* [1994] 4 SCR 411. Regarding civil debt collection, “this form of abuse of process is subsumed in the Charter, s. 7 and no longer remains an independent basis upon which to challenge the regularity of proceedings.” Court having no jurisdiction to grant a s. 24 remedy, as no Charter notice had been provided. Further, an abuse of process was not established, given that once the matter was reported to the police, the complainant lost control over the investigation and prosecution.

K. Sockett - Defence Counsel

## CHARTER - 8 - ARREST - REASONABLE GROUNDS

*R. v. Safi* 2010 ABCA 151 per Paperny, Ritter, O'Brien, JA - T. Judge: Gill, J:

Appeal from conviction on drug related charges. Police received a very detailed tip from an anonymous source setting out that the accused would be arriving in Edmonton via the Greyhound bus, carrying cocaine and a handgun. Police investigation revealed that the accused did in fact have a ticket for the bus, and had previously been the subject of a weapons complaint. Accused arrested upon disembarking. Trial judge rejected s. 8 argument.

### **Held: Appeal dismissed.**

“The police did not act on the basis of an uncorroborated tip. Here they did further investigation. That Safi disembarked from that very bus is also a part of that corroboration. The trial judge concluded that the tip was reliable and sufficiently detailed, coupled with the followup investigation to find reasonable and probable grounds. This conclusion is supported on the record.”

L. Rideout, A. Karbani - Defence Counsel

## CHARTER - TRIAL FAIRNESS - UNREPRESENTED ACCUSED

*R. v. Devera* 2010 ABCA 154 per Hunt, Costigan, Bielby, JA - T. Judge: Sullivan, J:

Conviction appeal on serious charges including extortion. Complex trial. Unrepresented accused. Original lawyer withdrew. Trial judge refused an adjournment request made by another lawyer who would have been able to assume conduct of the trial if it was re-scheduled. Accused proved to be disruptive and difficult to deal with throughout the trial.

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

As per *White* 2010 ABCA 66, the test for assessing whether or not the discretion in refusing an adjournment was exercised judicially is whether the judge gave weight to all relevant factors, including: the seriousness of the charges, the history, and the effect of any further postponement. “What followed was a trial replete with conflict between the judge and the appellants ... The resulting trial, at a minimum, precluded the appearance of a fair trial.”

K. Molle, A. Iovinelli - Defence Counsel

**IMPAIRED DRIVING - 24(2) - CERTIFICATE OF ANALYSES**     **JURY INSTRUCTIONS - ACCUSED'S STATEMENTS**

**R. v. Melnychuk** 2010 ABPC 132 per Kerby, PCJ:

Impaired driving trial. Section 8 breach found on the basis that objectively reasonable grounds to arrest did not exist. Issue regarding 24(2) analysis, and application to exclude Certificate.

**Held: Certificate admitted.**

Not a case where there were no grounds to stop and investigate the accused. No evidence of wilful or reckless disregard of Charter rights. Therefore, not a serious breach. Impact of the breach of the Charter protected interests was however serious. Serious intrusion on liberty interests. Regarding the final factor in *Grant*, the taking of breath samples was minimally intrusive, the evidence gathered was reliable, and society had a significant interest in an adjudication on the merits.

K. Haryett - Defence Counsel

**R. v. Ominayak** 2010 ABCA 152 per Cote, O'Brien, Gill, JA - T. Judge: Topolniski, J:

Appeal from jury conviction on sexual assault related charges. ID case. Jury was instructed that they could take into account the accused's failure to supply an adequate explanation for the fact that his palm print was found at the point of entry to the scene of the crime. When asked upon the print by the police, accused stated: "I don't know."

**Held: Appeal dismissed.**

Although accused had a right to remain silent, and if he had remained silent that fact could not be used against him, he chose to speak. "I don't know" does not equate to silence. "His statement was not inculpatory *per se*, but neither was it without probative value. At a minimum, the appellant's answer could have indicated the absence of an exculpatory explanation."

G. Johnson - Defence Counsel

**SENTENCE - DANGEROUS DRIVING - CSO**

**R. v. Starling** 2010 ABPC 149 per Malin, PCJ:

Accused originally charged with dangerous driving causing bodily harm, but entered a guilty plea to dangerous driving *simpliciter*. Accused lost control of his vehicle while travelling at approximately 40 km/hr over the limit. Serious multi vehicle collision caused. A person was ejected from accused's vehicle, and was rendered a quadriplegic. 18 year old accused with no record.

**Held: 20 month CSO imposed.**

Sentencing objectives of denunciation and deterrence met by imposition of a conditional sentence. 200 hours of community service work and 12 months of house arrest. Wide range of case authorities reviewed.

G. Smith - Defence Counsel

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