



THE UPDATE

Issue #16 June 25, 2010

CHARTER - 7 - DISCLOSURE - ASD CALIBRATION RECORD

R. v. McNutt 2010 ABPC 190
per Valgardson, PCJ:

Impaired driving trial. Disclosure application for calibration and maintenance records for ASD used. Issue as to whether the application properly governed by *Stinchcombe* or *O'Connor*?

Held: O'Connor application.

As per *Scurr* 2008 ABQB 127, the following materials fall within the realm of Crown disclosure as per *Stinchcombe*: (1) the fruits of the investigation; (2) information prepared for the purpose of the investigation; (3) other information intrinsically linked to the investigation (a factual and evidentiary link and probative value in the proceedings is required). "The records sought are at best of potential evidentiary value."

T. Dunlap - Defence Counsel

IMPAIRED DRIVING - 8 - ASD - 254(2) CC - FORTHWITH

R. v. Mujcin 2010 ABPC 198 per Valgardson, PCJ:

Accused charged with failing to comply with a screening demand. Alleged s. 8 breach. 11 minute delay after the demand was read but prior to the arrival of the ASD. Issue as to whether forthwith requirement met.

Held: No s. 8 breach.

11 minutes spent interviewing accused, reading and explaining the demand, explaining how the device worked, and then properly checking the device for calibration upon its arrival. 11 minute delay reasonable. As per *Martens* 2008 ABQB 223, "it matters not whether the officer postpones making the demand or postpones administering the test after making the demand. The impact is the same. The total period of delay is of concern in determining whether the 'forthwith' requirement is met."

T. Dunlap - Defence Counsel

IMPAIRED DRIVING - 8 - ASD - REASONABLE SUSPICION

R. v. Pasichnyk 2010 ABPC 215
per Wenden, PCJ:

Impaired driving trial. Screening test. Reasonable suspicion issue. Accused told officer that he had consumed one drink.

Held: No. s. 8 breach.

Although the officer had no information regarding the timing of the accused's one drink, as per *Smith* [2009] SJ No. 724 (Sask CA), the accused had the unique ability to provide this information, and he chose to remain silent. Accused's failure to speak to police did not affect the *bona fide* suspicion held by the officer. "The Court is clear, in *Smith*, that this is another way of stating that the onus of proving a Charter breach lies with the person alleging the breach."

B. McGlashan - Defence Counsel

**IMPAIRED DRIVING - 8 - ASD
- REASONABLE SUSPICION**

R. v. Robideau 2010 ABPC 213
per Hougestol, PCJ;

Impaired driving trial. Issue as to whether officer had a reasonable suspicion to make a demand under 254(2) CC. Accused told police that he had consumed “a few drinks” but no timing was evident and none was elicited.

Held: No. s. 8 breach.

“What *Hnetka* 2007 ABPC 197 and *Kimmel* 2008 ABQB 594, stand for is that where there is a bare admission that the accused had some ambiguous amount to drink at some unknown time in the past this will not without more found the objective leg of the test ... Here the officer with great experience observed both unusual driving and the bizarre aggressive behaviour when he first approached. The combination of these facts with the ambiguous admission of having had a few drinks would create a suspicion in a reasonable person.”

B. Hurley - Defence Counsel

**IMPAIRED DRIVING - 254(2) -
APPROVED DEVICE**

R. v. Hansen 2010 ABPC 195 per
Semenuk, PCJ:

Impaired driving trial. Issue as to whether Crown had proven that screening test was provided into an approved screening device. Office testified that the device used was an Intoxilyzer 400. Defence counsel did not cross-examine the officer regarding the apparent mis-statement.

Held: No. s. 8 breach.

“Absent any challenge on cross-examination by Defence Counsel, and following *Balogh* 2009 ABPC 10 and *Redstar* 2009 ABPC 79, I am satisfied beyond a reasonable doubt that Constable Erhmantraut used an approved screening device in this case.”

I. Savage - Defence Counsel

**IMPAIRED DRIVING - 10(B) -
REASONABLE OPPORTUNITY**

R. v. Holowaty 2010 ABPC 191
per Kerby, PCJ:

Impaired driving trial. 10(b) issue. Accused placed in phone room for 18 minutes. No evidence that he actually contacted counsel. Although the evidence was unclear as to how he left the room, the officer believed that he was finished with the phone, and the accused never told him otherwise.

Held: No. 10(b) breach.

Absent unusual circumstances, there is no duty upon police to inquire as to whether or not the detainee was successful in contacting counsel: *Liew* 2002 ABCA 279. No evidence to support the argument that police had prematurely terminated the accused’s time in the phone room. “It cannot be said that an accused who does not indicate any difficulty in reaching counsel, absent a reasonable excuse, was acting reasonably diligent in exercising his right to counsel.”

B. Tralenberg - Defence Counsel

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