



THE UPDATE

Issue #18 July 23, 2010

CHARTER - 11(B) - 32 MONTH DELAY - TRIAL JUDGE ILL

R. v. Asiala 2010 ABQB 450 per McIntyre, J:

Defence application for a stay. Provincial court impaired driving trial. 32 month delay from charges being laid. Trial ongoing, 18 month delay (without a decision) since Charter application made to exclude the certificate. Trial judge initially adjourned the trial as he needed more time to decide the issues, and then became ill.

Held: Stay of Proceedings.

As per *Godin* [2009] 2 SCR 3, “the general approach ... is not by the application of a mathematical formula but rather by a judicial determination balancing the interests which s. 11(b) is designed to protect.” Crown could have made an application to have a new trial judge appointed under 669.2 CC, but chose not to. Periods of delay attributable to the judge’s illness, also fell within the responsibility of the Crown: *Rahey* [1987] 1 SCR 588. Accused continually asserted 11(b) rights, and prejudice was inferred.

M. Gottlieb - Defence Counsel

IMPAIRED DRIVING - 7 - CALIBRATION RECORDS

R. v. Black 2010 ABQB 461 per Burrows, J:

Crown application for *certiorari* quashing a disclosure order regarding screening device calibration records. Provincial Court judge ordered disclosure of the records (on a *Stinchcombe* basis) for 3 months preceding and 2 months following accused’s arrest. Crown argument that trial judge failed to follow binding authority that required an *O’Connor* application.

Held: Application dismissed.

As per *McNeil* [2009] 1 SCR. 66 the “first party production obligation” extends to any information in respect of which there is a reasonable possibility that it may assist the accused. Trial judge did not exceed his jurisdiction. *Scurr* [2008] 8 WWR 546, *Keirsted* 2004 ABQB 491, *Coopsammy* (2008) 445 AR 160, are not binding authorities establishing that ASD records are not relevant, or that disclosure of the same in every case must be *via* a third party disclosure application.

R. Ziv - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Rokicki 2010 ABPC 241 per Stevens-Guille, PCJ:

Impaired driving trial. Reasonable grounds issue. Police attended upon the scene of a minor collision. Nothing untoward about accused’s driving. Accused remained at the scene and was cooperative. Police observed glossy eyes, light smell of alcohol and “some” slurring, but it was conceded that very few words were spoken by the accused.

Held: s. 8 breach, certificate excluded.

Training and experience of the officer must be considered: *Rajaratnam* 2006 ABCA 333. Very junior officer whose decision to arrest was “too early with too little, with no driving pattern and minor evidence of alcohol sufficient perhaps for a roadside screening demand.” Regarding 24(2), the arrest without grounds fell “far from the standard the Court must protect.”

L. Garcia - Defence Counsel

**IMPAIRED DRIVING - 8 -
REASONABLE GROUNDS**

R. v. Adhofer 2010 ABPC 235
per LeGrandeur, PCJ:

Impaired driving trial. Reasonable grounds issue. Officer was highly dependant upon his notes in the giving of evidence, however, the notes (for many reasons) were found to be unreliable.

Held: s. 8 breach, certificate excluded.

“There is a duty upon a peace officer to make timely, accurate and comprehensive notes”:

Murphy [2001] SJ No. 582. Court not satisfied that the indicia necessary to justify an arrest existed. Regarding 24(2), an unlawful arrest constitutes a serious violation. Officer demonstrated a lack of diligence regarding Charter rights. Concerning society’s interest in an adjudication on the merits, an unlawful arrest “is not just procedurally unfair, it is fundamentally unfair. Society does not condone such actions of the state even at the cost of truth seeking.”

S. Kennedy - Defence Counsel

**IMPAIRED DRIVING - ASD -
REFUSAL - 10(B) RIGHTS**

R. v. Baran 2010 ABPC 240 per Wenden. PCJ:

Accused charged with refusal to provide a screening sample. Suspicion of consumption formed and screening demand made at 2:13 am. Accused wanted to speak to a lawyer, was told that he could not, and ultimately refused to blow at 2:35 am. Defence argued as per *Klontz* 2007 ABPC 311 that 10(b) applied, and that the words of refusal could not be admitted to incriminate.

Held: Conviction entered.

Klontz not correctly decided, and has been overruled by *Heeps* 2009 ABQB 240. “The logical inference from *Thomsen* is that [the SCC] implicitly permitted prosecution of refusals to provide a breath sample that flowed from a roadside screening investigation, despite the fact that an accused made the refusal during a time when his s. 10(b) Charter rights were suspended, due to public policy.”

G. Grieco - Defence Counsel

**JURIES - W(D) WARNING -
NOT ALWAYS MANDATORY**

R. v. McClenaghan 2010 ABCA 222 per Cote, O’Brien, Gill, JA - T. Judge: Belzil, J:

Appeal from second degree murder conviction. NCR defence at trial. Accused testified to a total lack of memory of the incident. Trial judge erred in *W.(D.)* instruction, by inadvertently leaving out a part of the second branch of the test.

Held: Appeal dismissed.

“One cannot apply these rules mechanically to all criminal trials. If none of an accused’s evidence directly negates any of the essential elements of the crime (nor would found a freestanding defence), *D.W.*’s obligation to acquit would not apply. And Crown counsel suggests that that was the case here, because the appellant testified that he recalled none of the incident in question. Counsel’s legal point is valid.” Credibility was not in issue, and as stated in *W.(D.)*, the rules apply “In a case where credibility is important.”

C. Davison - 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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