



THE UPDATE

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CHARTER - 7 - DISCLOSURE - INTOXILYZER DATA

R. v. Duff 2010 ABPC 250 per Rosborough, PCJ:

Impaired driving trial. Application for disclosure of the 'random access memory' (RAM) stored in the Intoxilyzer 5000 for a time pre and post-dating the analysis of the accused's breath.

Held: Application dismissed.

As per *McNeil* 2009 SCC 3, the RAM material constituted a third party record, as the data did not relate *per se* to the accused's case, the investigation, or the breath samples that he provided. *Gubins* [2009] OJ No. 848 not followed. Likely relevance threshold as per *O'Connor* not met. Further, even if there had been some relevance to the material sought, there was no reasonable possibility that the RAM data could assist the accused in making full answer and defence.

K. Sproule - Defence Counsel

CHARTER - 10 - STATEMENTS - 24(2) - EXCLUSION

R v. Mahalik 2010 ABPC 253 per Gaschler, PCJ:

Drug possession trial. Police investigated a single vehicle rollover. Knapsack at the collision scene was searched and found to contain drugs. Police then asked accused "Is this your backpack?" and accused responded "Yes." No 10(b) rights.

Held: 10(b) breach, statement excluded.

Prior to the questioning, the drugs had already been located and the accused was the suspect. Therefore, this was not a "preliminary situation" as per *Suberu* [2009] 2 SCR 460, wherein some early stage questioning is allowed so as to eliminate individuals unconnected to the investigation. "The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak ... violation of these fundamental rights tends to militate in favour of excluding the statement": *Grant* [2009] 2 SCR 353.

W. Willier - Defence Counsel

IMPAIRED DRIVING - 10(B) - LANGUAGE PROBLEMS

R. v. Mwangi 2010 ABPC 243 per Henderson, PCJ:

Impaired driving trial. Alleged 10(b) breach. Accused testified that English was not his first language and that he did not fully understand the Charter advice read to him upon arrest.

Held: No 10(b) breach.

Although English was not the accused's first language, he had lived in Canada for 10 years and had received Canadian schooling. Accused's understanding of English was far beyond "rudimentary" as per *Bath* 2007 47 MVR (5th) 203. Test in *Vanstaceghem* (1987), 36 CCC (3d) 142, met: "The accused must understand what is being said to him or her and understand what the options are in order that he or she may make a choice in the exercise of the rights guaranteed by the Charter."

D. Holman - Defence Counsel

**NO INSURANCE - 54 TSA -
“IMPLIED CONSENT”**

***R. v. Charbonneau* 2010 ABQB
509** per Ross, J:

Conviction appeal on charge of operating an uninsured motor vehicle, contrary to s. 54 TSA. The owner had provided the vehicle to the accused for repair work, but the accused then used the vehicle for his own purposes. Issue as to whether the trial judge erred in failing to apply the doctrine of “implied consent” as set out in *Mugford* 2004 ABCA 145.

Held: Appeal dismissed.

Mugford had no application. “The agreed facts indicate that there was possession for the purpose of repair, not driving. If this did involve limited consent to drive (e.g., to test drive) this consent would have terminated when the vehicle was reported stolen.”

P. Lister - Defence Counsel

**SENTENCE - ASSAULT -
DISCHARGE**

***R. v. Martinuk* 2010 ABQB 514**
per Ross, J:

Trial judge suspended the passing of sentence and placed the accused on probation for 9 months following convictions on charges of being unlawfully in a dwelling house and assault. Minor incident wherein the accused was attempting to retrieve her 4 year old child from her mother-in-law.

Held: Appeal allowed, absolute discharge imposed.

Trial judge erred in stating that the discharge would have to be “in the public interest”. 730 CC requires only that the discharge not be contrary to the public interest. Further, trial judge’s analysis essentially excluded the availability of a discharge in cases of domestic violence. 730 CC applies to any offence where there is no minimum penalty. 9 months probation complete, therefore, no need for a conditional discharge.

K. Alyluia - Defence Counsel

**SENTENCE - 255(5) CC -
CURATIVE DISCHARGE**

***R. v. Smith* 2010 ABPC 244** per
McIlhargey, PCJ:

Application for a curative discharge following accused’s guilty plea to impaired driving. Medical evidence established alcoholism and several steps taken by the accused to overcome the addiction.

Held: Curative discharge granted.

As per *Beaulieu* (1980), 21 AR 120, accused was well-motivated and had a reasonable chance of overcoming his alcoholism. “It must be remembered that we are dealing with an addiction and a precise scientific determination of the likelihood of success is not possible ... What about one year without drinking, two years, or longer? Clearly there is no benchmark. So the issue in reality is one of motivation.”

J. Kelly - Defence Counsel

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