



Law Society
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TAB 19

The Six-Minute Criminal Court Judge 2020

Recent Charter Cases Dealing with Impaired Driving

The Honourable Amit Ghosh
Ontario Court of Justice

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- Recent *Charter* Cases Dealing with Impaired Driving -

Amit A. Ghosh
Ontario Court of Justice

S.10(b) Counsel of Choice and Tools to Search

Trends in the Ontario Court of Justice expecting police to do more re: s.10(b)

- *R. v. Ali*, [2018] O.J. No. 1662 (O.C.J.); *R. v. Manuel*, [2018] O.J. No. 2955
- The concern was that the police controlled access to contact counsel of choice; instead they should be *Charter*-bound to offer and provide means to identify, contact and consult counsel of choice (i.e. friends, family, the internet and phone directories). Binary choice of duty counsel or identified counsel.

Summary Conviction Appeals in Ontario go the other way:

- *R. v. Ruscica*, [2019] O.J. No. 2021; *R. v. Mumtaz*, [2019] O.J. No. 229
- Both decisions focused on the current language of the police-issued right to counsel as *Charter*-compliant, and that reasonable diligence is expected in the pursuit of counsel of choice; what if the detainee asserts they would like to search for a counsel of choice.

S.8: seizure of Blood / Urine from Hospital for Blood Alcohol Concentration

- *R. v. Canavan*, [2019] O.J. No. 3491 (Ont.C.A.): Hospital staff collected blood according to hospital protocol; police only inquired about preservation after the fact in pursuit of a warrant; hospital staff not acting as state agents);
- *R. v. Culotta*, [2018] O.J. No. 3946 (Ont.C.A.): Collection of samples not at the direction of police, but at the direction of ER physician; No s.8 breach;
- *R. v. Campbell*, [2019] O.J. No. 1638 (Ont.C.A.): In violation of s.8, officer asked nurse about BAC before applying for warrant; In preserving bodily fluids; s.24: Breach of s.8 privacy interest serious; sensitive medical information must attract heightened privacy protection.

S.8 Facts for Grounds; s.10(a) Right to be Informed of Reason for Arrest

- *R. v. Roberts*, [2018] O.J. No. 2279 (Ont.C.A.):
- *R. v. Soules* statutorily compelled statements: See now s.320.31(9)
- s.10(a) right to be informed of detention: temporal / informational
- S.8: Informal Roadside sobriety testing (walk/talk) for grounds only

s.9: Arbitrary Stop, HTA and Investigative Detention

- *R. v. Gardner* [2018], O.J. No. 3404 (C.A.): police received a complaint of suspected impaired driver, but stopped the wrong car;
- The appellant happened to display signs of alcohol consumption;
- Failed ASD demand; CA found TJ and SCAJ erred in finding a s.9 arbitrary detention, as sobriety check was permitted under s.48 HTA
- Sobriety checks / inquiries: See *Orbanski / Elias*, 2005 SCC 37

Disclosure of Drug Recognition Experts Rolling Logs

- *R. v. Stipo*, [2019] OJ No 28 (CA): Status of drug recognition and disclosure of “rolling logs” as first party disclosure;
- “Rolling logs” of DRE constitute a record documenting every eval DRE has done or observed, including that re: this accused;

S.9: Racial Profiling and s.24(2) Exclusion

- *R. v. Le*, [2019] S.C.J. No. 34; modern approach to racial profiling
- *R. v. Dudhi*, [2019] OJ No 4333 (Ont.C.A.);
- May be more challenging in the driving context; regulated activity and amendments to the CCC afford heightened police powers to stop and test for sobriety;
- Racial profiling has attitudinal component and causation component
- Can be established inferentially, but the racially infected thinking must have informed the suspect identification or treatment to any degree, mindful of the *Charter* standard and burden of proof