DOCUdavit Solutions
STORAGE PROBLEMS?
We scan them away!
1-800-653-0925 • www.docudavit.com

LAW TIMES

McK
McKELLAR GROUP
The Major Loss Specialists
1-800-265-8381
www.mckellar.com

$3.55 • Vol. 16, No. 27 September 12, 2005 www.lawtimesnews.com

Officer didn't know how to use breath test machine

BY KIRSTEN McMAHON
Law Times

A police officer's lack of familiarity with Alcotest equipment, particularly the readings, is a concern when the Crown is relying solely on the officer's opinion with respect to providing an appropriate breath sample, ruled the Superior Court.

In finding [redacted] not guilty of refusing to provide a breath sample, Justice Gary Hearn wrote: "Not only does [the officer] have difficulty with the meanings for various readings on the machine, he also indicates that although in his opinion recently consumed alcohol and a failure to wait 15 minutes from the consumption of same could 'throw off the machine,' he is at a loss for words as to how that may take place."

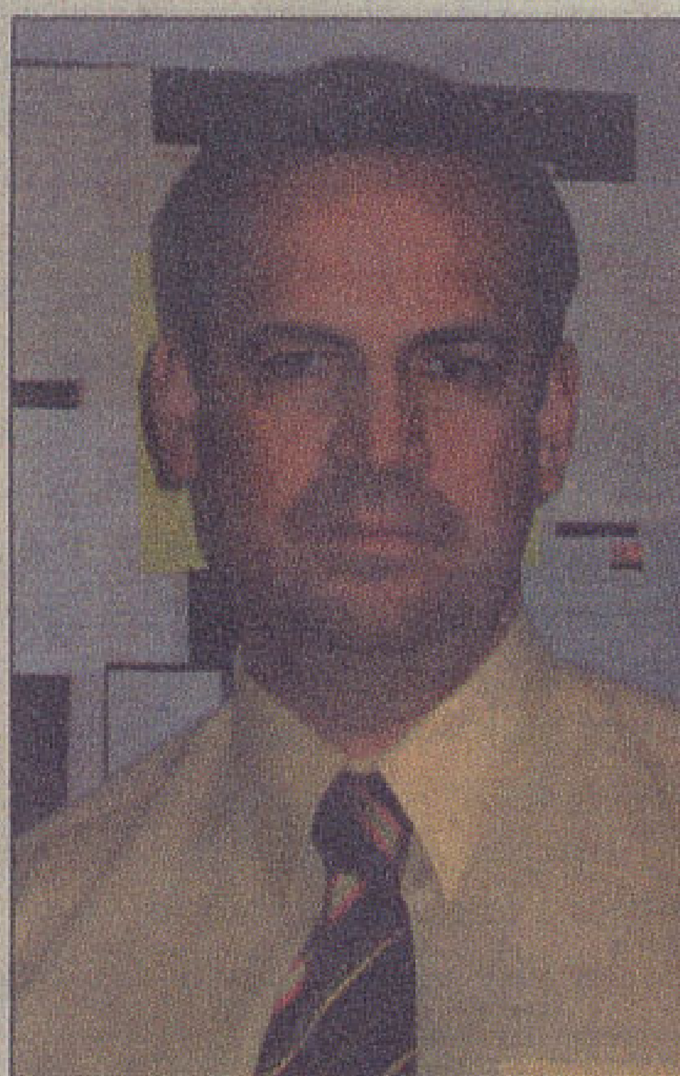
Counsel for [redacted] David Costa of Costa Law Firm in Toronto, said, "the whole message here is police need to be competent in the machines they are using if they are going to be laying charges.

"He knows how to turn it on and off, and I'm thinking 'My gosh, this guy's liberty is at stake, this guy's licence is at stake, criminal record, substantive fine, it's awful to think you have to go through all these obstacles and at the end of the day, there's nothing there to even move on.

"To think that the defence didn't have to even address the case is remarkable," he said.

[redacted] was pulled over in October 2003 by Const. Kevin Driscoll, after the officer found [redacted] driving well above the posted speed limit. Driscoll testified that as he approached [redacted] he detected a strong odour of alcohol and noted his eyes were glassy.

Driscoll read the demand for a breath sample and demonstrated on the Alcotest machine how to provide an adequate sample. According to the officer's notes, [redacted] had blown into the device five times, each time registering an "E" for error. After the fifth attempt, Driscoll cautioned [redacted] about the consequences of continuing to refuse to provide a breath sample.



Police need to be competent with the machines they use in order to make charges stick, says David Costa.

Driscoll changed the mouthpiece on the device and [redacted] blew for the sixth time, registering an "E" for error, according to the officer's notes. He arrested [redacted] and a search of his car turned up a cup containing liquid that had an alcoholic beverage odour to it and an open, partially full container of beer.

At trial during cross-examination, Driscoll confirmed that the machine was displaying an "E0" after the six attempts, although in his notes he had only written down "E." When asked why he didn't cite an "E0" reading, the officer replied, "I don't have an explanation for that."

"It is notable that in examination-in-chief, Const. Driscoll continued to refer to the readings as 'E readings,'" wrote Hearn. "This is consistent with his notes and it was only in cross-examination and reply that he mentioned that the reading was actually an 'E0 reading.' This causes the court concern whether or not his memory was actually triggered or his recollection may not be as good as he might have indicated to the court.

"One would have thought that if it was an E0 reading the court would have heard about it in chief or in the notes, but certainly not for the first time in cross-examination," ruled Hearn.

Costa said the officer did not test the second mouthpiece and couldn't determine what the various readings meant. He said police officers should take their task to heart and understand their machine to avoid situations like this one.

"He didn't know what an E2 means or an E3, he was just so used to E0, but he didn't even write that in his notes, just E. So his notes were defective," said Costa. "They weren't enough and he didn't have the recollection to assist in the difference. It was an unusual standoff it appeared between the judge and the Crown, where the judge is effectively saying 'You've got nothing here. What are you doing?'"

He said it's unfortunate when officers are in a position to discern both objective and subjective elements, pursuant to the Supreme Court of Canada decision in *Nelles v. Ontario*.

On occasion officers don't do so and it's expensive for the taxpayers and arduous for the accused to have a judge screen and establish that an officer didn't know how to operate the machine but claimed the accused refused the test.

Hearn cited 2002's *R. v. Farkas*, where Justice Leslie Pringle ruled that: "If the defendant has attempted to blow, but a sample is insufficient, there are only two possibilities about where the fault lies: either the problem is with the defendant or it is with the machine. . . . There is no presumption that an approved screening device will function properly.

"Moreover, the machine is one operated and owned by the state and it is not an onerous burden for the Crown to provide some evidentiary foundation upon which to infer that the machine was working properly."

Crown attorney Judith MacDonald could not be

GREAT WRITERS THINK SHAKESPEARE
GREAT LEGAL MINDS...
Think Martin's

Martin's Annual Criminal Code, 2006 Edition is the most current and authoritative resource available, accessing decisions from all court levels, including more reported and unreported cases than any other Code.

Gain insight into the latest amendments!

- S.C. 2004, c. 10 – amends the *Criminal Code* requiring the registration of certain information relating to sex offenders
- S.C. 2004, c. 12 – amends the *Criminal Code* respecting liability of corporations and imposes duties upon employers to prevent injury to their workers
- S.C. 2004, c. 14 – extends the protection of the hate propaganda provisions to persons identified by sexual orientation
- S.C. 2002, c. 13 – amends the *Criminal Code* to provide for changes to practice and

Martin's Annual