



# THE UPDATE

Issue #3 July 15, 2005

## CHARTER - 8 - SEARCH WARRANT - DWELLING - KNOCK/NOTICE RULE

*R. v. Normore* - May 11, 2005 Alta. Q.B. per Clarke, J.:

Accused charged with possession of marihuana for purpose of trafficking. Search warrant. Police entered accused's residence through an unlocked door, and announced their presence only after entry. Issue as to whether breach of common law knock/notice rule warranted 24(2) exclusion.

**Held: s. 8 breach. Evidence not excluded.**

*Schedel* (1993), 175 C.C.C. (3d) 193 (B.C. C.A.) distinguished. Exclusion not warranted, where given the nature of the charge, "giving time by announcing their presence and waiting gives the occupant a chance to flush down the toilet any marihuana". Further, police did not know who was in the residence, and whether any occupant posed a potential threat to officer safety.

**B. Fish** - Defence Counsel

## CHARTER - 9 - DETENTION OF PASSENGER IN VEHICLE - ARBITRARY DETENTION

*R. v. Safadi* - May 13, 2005 Alta. Q.B. per Smith, J.:

Accused charged with possession of cocaine. Accused was a passenger in a vehicle in a routine traffic stop. Upon questioning of accused police saw a knotted spitball of cocaine in his mouth.

**Held: s. 9 breach. Evidence excluded.**

No nexus between detention of accused and any offence. Police had no grounds to question accused: *Guthrie* (1982), Alta. L.R. (2d) 1 (C.A.). Investigative detention test as per *Mann* (2004), 185 C.C.C. (3d) 308, not met. "A breach of this sort which turns on the conduct of the police by either ignoring or misunderstanding Charter rights on balance negatively affects the repute of the administration of justice."

**A. Attia** - Defence Counsel

## CHARTER - 11(B) - UNREASONABLE DELAY - SPEEDING TICKET - LEAVE TO APPEAL DENIED

*R. v. A.K.* - May 10, 2005 Alta. C.A. per Berger, J.A.:

Youth charged with speeding. Provincial Ct. entered an *Askov* stay that was reversed in Queen's Bench. Leave to appeal sought.

**Held: Leave denied.**

Total delay from date of charge to conclusion of trial was 13 months. Delay explained in part by accused's challenge to admissibility of evidence of the readings of the laser speed gun. No issue of importance raised justifying a further appeal.

In Person



**IMPAIRED DRIVING - S.8 - REASONABLE GROUNDS - MEANING OF "FAIL" ON SCREENING TEST**

*R. v. Lamont* - May 10, 2005 Alta. Prov. Ct. per Lamoureux, P.C.J.:

Impaired driving trial. Accused failed screening test. No evidence from investigating police officer as to the meaning of a "fail" on the test. Issue as to whether reasonable grounds to make breath demand established by the evidence.

**Held: No s. 8 breach.**

Judicial notice taken as to the meaning of a "fail" on a screening test. "Roadside screening devices are of such notoriety in the community that the ordinary individual of reasonable intelligence would have knowledge that a 'fail' on the screening device means that the level of alcohol in the human body likely exceeds the legal limit."

**I. Savage** - Defence Counsel

**SENTENCE - POSSESSION OF CHILD PORNOGRAPHY - OVER 3000 PICTURES - 8 MONTHS JAIL**

*R. v. Harlos* - May 11, 2005 Alta. Prov. Ct. per Skene, P.C.J.:

63 year old retired school teacher plead guilty to possession of over 3000 images and 763 videos of child pornography. Relatively favourable PSR and forensic assessment.

**Held: 8 months jail plus 3 years probation.**

Deterrence and denunciation paramount: *Hunt* (2002) ABCA 155. "As stated in *Sharpe* ... the protection of children, and the prevention of their victimization and exploitation ... is the paramount goal". Conditional sentence would have little effect. The accused "is a self admitted homebody".

**M. Birnbaum** - Defence Counsel

**SEXUAL ASSAULT - CONSENT - ELEMENTS OF OFFENCE**

*R. v. Gilmour* - May 12, 2005 Alta. Q.B. per Lee, J.:

Appeal from conviction on sexual assault charge. Accused leaned up against a female employee of a card shop, touched her hips with his groin area, and asked her whether she had a boyfriend. Part of defence argument was that the trial judge erred in not weighing the complainant's failure to object.

**Held: Appeal dismissed.**

"The full offence of sexual assault was made out when the accused pressed his groin into the complainant's hip. There can be no voluntary agreement to this specific act in the circumstances of this case. In *Ewanchuk* [1999] 1 S.C.R. 330, the Supreme Court specifically provided that implied consent is not a defence to sexual assault".

**C. Cousineau** - Defence Counsel

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