



THE UPDATE

Issue #23 December 2, 2005

ABORIGINAL RIGHTS - FISHING - CHARTER - S. 35

R. v. Lefthand - Oct. 14, 2005
ABQB 748 per Phillips, J.:

Appeal from conviction under AB Fishery Regulations. Treaty 7 aboriginal accused caught fishing with live bait at a time when live bait fishing on the river was closed.

Held: Appeal allowed. Acquittal.

Applying the *Sparrow* [1990] 1 S.C.R. 1075 infringement test, trial judge erred in failing to find a constitutional violation. There was no evidence of any consultation between the Crown and Treaty 7 members regarding the Regulation at issue. In the absence of evidence of consultation, Court could not find that the constitutional infringement was “as little as possible” as weighed against the conservation objective. “Contrary, to ... *Sparrow* [et. al.] the activities of purely recreational catch and release fishers were given priority over the interests of Aboriginal food fishers”. Authorities reviewed.

A. Hunter - Defence Counsel

CHARTER - 10(B) - REASONABLE DILIGENCE - PROSPER WARNING - TEST

R. v. Jones - Oct. 17, 2005 ABCA
289 per McFadyen, Berger, Ritter,
J.A.:

Appeal from conviction on s. 253(b) charge. Accused advised of 10(b) rights and left in the phone room. Accused had told police that he wanted to contact a specific lawyer. Police told accused to knock on the door when he was done. 7 minutes later accused knocked on door, and told police he could not reach his lawyer. Accused declined invitation to attempt to contact any other lawyer, no *Prosper* waiver read, and breath samples provided.

Held: Appeal dismissed.

Police did nothing to interfere with the right to counsel. Accused could have remained in the phone room, or could have asked for help. Police not obligated to ask for the reasons regarding the inability to contact choice of counsel. Berger, J.A, dissented.

R. Prithipaul - Defence Counsel

EVIDENCE - POSSESSION - FIREARMS - KNOWLEDGE AND CONTROL

R. v. Budden - Oct. 14, 2005 ABQB
757 per Lee, J.:

Accused charged with weapons offences including possession of a handgun. Firearm found in a gym bag in the backseat of the vehicle that the accused was driving. While the accused was spoken to by police, he “repeated reached for the bag”.

Held: Conviction entered.

Inference drawn that accused had actual knowledge of the contents of the bag. Accused was the sole occupant of the vehicle, the bag was partly open, and the accused obviously knew that it was there. *York* (2005), 193 C.C.C. (3d) 331 (B.C.C.A.) followed. Authorities reviewed.

C. Millsap - Defence Counsel



GUILTY PLEAS - STRIKING OF GUILTY PLEAS - TEST

R. v. Rollinmud - Oct. 13, 2005 ABPC 206 per Wilkins, P.C.J.:

Accused pled guilty to assault with a weapon. Matter put over for PSR. PSR revealed that accused in fact denied the offence to which he had pled guilty. Counsel withdrew and filed an affidavit largely in support of accused’s application to strike the guilty plea. Not a sophisticated accused. Accused’s evidence on the application to strike the plea found to be “exceedingly confusing”.

Held: Application granted.

Moser (2002), 163 C.C.C. (3d) 286 (Ont. S. Ct.) followed. “While the quality of the evidence prompting the striking or withdrawal of a guilty plea cannot be speculative, suspect, or lacking in credibility and reliability, I would hesitate to place the burden of persuasion at a point threatening adjudicative fairness. Whatever the standard for appellate intervention, I am content that where a trial judge has a real doubt as to the plea’s validity, the court should strike the plea and sent the case to trial”. Authorities reviewed..

A. Saunders - Defence Counsel



SENTENCE - AGGRAVATED ASSAULT - CHOKING OF VICTIM THAT CAUSED A STROKE - 5 YEARS JAIL

R. v. Hewitt - Oct. 13, 2005 ABPC 334 per Paperny, J.A.; Bensler, Erb, J. - Trial Judge: Brown, P.C.J.:

Defence appeal from 5 and a half year sentence imposed for aggravated assault. Accused was a 37 year old homeless man who, while being escorted out of a seniors complex, grabbed and tightly held the complainant by the throat. Choking caused a stroke that left the 63 year old complainant paralysed and unable to care for himself. Remorseful accused with “a long history of violence and drug problems”.

Held: Appeal dismissed.

Sentence not unfit. Notwithstanding the guilty plea and remorse, gravity of the offence necessitated the lengthy jail sentence imposed.

J. Lutz - Defence Counsel



YOUTHS - CHARTER - 11(B) - DELAY - S. 3(1)(B)(V) YCJA - 18 MONTH DELAY - STAY

R. v. A.P.- Oct. 13, 2005 ABPC 299 per Tousignant, P.C.J.:

Application for stay of proceedings on the basis of delay. 18 month delay between the time of charge and trial. 16 Court appearances. One trial date was adjourned due to problems with Crown disclosure, while a second was adjourned because the assigned Crown was ill.

Held: Stay of proceedings.

Both trial adjournments weighed against Crown. With respect to the adjournment due to missing disclosure, “the defence is entitled to rely on the Crown’s assertion as to completeness. There is no obligation on the defence, except where there is a glaring deficiency, to review disclosure for internal completeness”. Prejudice arose as conditions, and had served time in custody as a result of breaches of those conditions. S. 3(1)(b)(v) YCJA emphasizes the need for “promptness and speed with which persons’ responsible for enforcing the Act must act”. Authorities reviewed.

I. McNish - Defence Counsel



Anderson Dawson Knisely Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780)424-9058 Fax: (780) 425-0172
All 2005 updates can be found at: www.adkscrimlaw.com