



# THE UPDATE

Issue #4 January 27, 2006

## CHARTER - 7 - DISCLOSURE - "WILL-SAY" STATEMENTS

*R. v. Tran* - Sept. 2, 2005 ABPC  
244 per Lefever, P.C.J.:

Impaired driving trial. Defence had requested disclosure of a "will-say" statement from one of the investigating police officers. Disclosure not forthcoming. Defence application for: stay of proceedings, costs, an order for disclosure of a "will-say".

### **Held: Disclosure of "will-say" ordered.**

As per *England* (2000) ABPC 153, if the Crown intends to call a police witness, there is an obligation to seek a "will-say" from that witness. "In my opinion the following procedure should be followed: (a) defence counsel should first request [the "will-say"] ...; (b) Crown counsel has a duty of good faith to respond in a timely manner ...; (c) if defence counsel is of the opinion that the Crown has not addressed the perceived deficiency, defence counsel has a duty of due diligence to bring an application **in advance** of the set trial date before the trial judge".

**T. Engel** - Defence Counsel

## IMPAIRED DRIVING - "AS SOON AS PRACTICABLE" - FACTORS TO CONSIDER

*R. v. Cassidy* - Nov. 23, 2005  
ABQB 881 per Clark, J.:

Appeal from conviction on charge of over .08. Issue as to whether trial judge erred in finding that the breath samples were taken as soon as practicable as required by s. 258 CC. 25 minute delay at police detachment while 10(b) rights further explained to accused and while accused was left in phone room. Accused adamant throughout that she did not wish to contact counsel, and never attempted to do so.

### **Held: Appeal dismissed.**

Trial judge's findings not unreasonable. Trial judge's reasons not to be interfered with absent palpable error. "The 25 minutes is not unduly long ... the officer does have an obligation to delay taking the test to determine whether or not the waiver of a right to counsel was free voluntary, informed, clear ...".

**T. Sturgeon** - Defence Counsel

## IMPAIRED DRIVING - CHARTER - 8 - ROADSIDE TEST - 15 MINUTE WAIT - MOUTH ALCOHOL

*R. v. Kathol* - Nov. 22, 2005 ABPC  
335 per Dunnigan, P.C.J.:

Impaired driving trial. Primary issue regarding alleged s. 8 breach. Roadside test – mouth alcohol issue. Accused stopped by police leaving a bar at 0150 hrs. Accused told police that he had been drinking for 5 hours starting at 9:00 p.m.. Police did not wait 15 minutes before taking the roadside sample to allow for elimination of possible mouth alcohol.

### **Held: Section 8 breach. Certificate excluded.**

Accused's statements regarding the timing of alcohol consumption ought to have raised a red flag in the mind of the police. The officer knew that the accused's consumption had been recent. "The totality of the circumstances objectively point to recent consumption ... They are stronger than the 'mere possibility' deemed too tepid by Mr. Justice Cory in his reasoning in *Bernshaw*."

**T. Foster** - Defence Counsel

**PUBLICATION BANS -  
SEARCH WARRANTS -  
SEALING ORDER - S. 487.3 CC**

**R. v. White** - Oct. 7, 2005 ABPC  
per Caffaro, P.C.J.:

Accused charged with murder. Prior to accused's arrest police obtained a number of search warrants. The Informations in support of the warrants were sealed in accordance with s. 487.3 CC. Following accused's arrest, the CBC and Edmonton Journal applied to unseal the search warrant Informations and publish material set out therein.

**Held: Media application denied.**

Media allowed access to the Informations, but publication of any information set out therein prohibited until the conclusion of accused's trial as per *Flahiff* (1998), 157 D.L.R. (4<sup>th</sup>) Que. C.A.. *Toronto Star Newspapers* [2005] S.C.J. No. 41 confirms the need for openness in all stages of trial, including the search warrant stage. However, right to free expression to be balanced against accused's right to a fair trial. Material in the Informations highly prejudicial. "To allow immediate publication at this time would seriously impair the accused's right to a fair trial and eviscerate the provisions of s. 539(1) CC."

**R. Shaigec** - Defence Counsel

**SENTENCE - ASSAULT  
CAUSING - DOMESTIC  
VIOLENCE - APPEAL OF CSO  
- 18 MONTHS JAIL**

**R. v. Coulthard** - Nov. 23, 2005  
ABCA 413 per Russell, J.A.;  
McIntyre, Mahoney, J. - Trial J.:  
Wood, P.C.J.:

Crown appeal of 2 year conditional sentence imposed after accused plead guilty to assault causing bodily harm and wearing a mask. Accused assaulted his ex-girlfriend in the stairwell of her apartment. Assault included 3 kicks to complainant's stomach. Complainant was pregnant, and assault was motivated by her refusal to have an abortion. No harm done to the fetus, however, complainant suffered a cut to her head requiring 6 stitches.

**Held: Appeal allowed. 18  
months jail less credit for  
portion of CSO already served.**

Although accused was young and had no record, conditional sentence unfit. Trial judge erred in not reviewing ss. 718.2(a) to (e) CC which deems it aggravating to abuse a spouse and breach trust. "*Brown* [1992] A.J. No. 432 (C.A.) clearly states that where there is a serious assault in a spousal type relationship, denunciation and deterrence are the paramount sentencing principles."

**B. Der** - Defence Counsel

**SENTENCE - PRINCIPLE -  
APPEAL OF SENTENCE -  
WEIGHT TO BE AFFORDED  
TO INFORMATION IN POST-  
SENTENCE REPORT**

**R. v. Smith** - Nov. 23, 2005 ABCA  
404 per O'Leary, J.A.; Veit, Ross, J.  
- Trial J.: Tilley, P.C.J.:

Defence appeal of 15 month jail sentence imposed after accused was found guilty of aggravated assault upon a 2 year old boy. All parties agreed that the original sentence was fit. The appeal was founded solely on the evidence of the accused's post-sentence good conduct as described in the post-sentence report.

**Held: Appeal dismissed.**

As per *Fait* [1984] A.J. No. 2526 (C.A.) evidence of post-sentence good behaviour generally does not justify appellate intervention. The exceptions to this rule are: (1) where the post-sentence conduct goes to the seriousness of the offence (such as post-sentence restitution); (2) appeals by young offenders where rehabilitation is the primary goal of sentencing. Neither exception applied in present case. "A general acceptance of evidence of good post-sentence conduct as grounds for altering a fit sentence would undermine the finality of the sentencing process and the incentive of trial judges to diligently seek and impose sentences appropriate to the offence and the offender."

**D. Hatch** - Defence Counsel

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