



# THE UPDATE

Issue #11 March 17, 2006

## CHARTER - 8 - STRIP SEARCH - WHETHER STAY APPROPRIATE

*R. v. Sandmaier* - Jan. 23, 2006  
ABQB 66 per Watson, J. - Trial  
Judge: Spence, PCJ:

Appeal from impaired driving conviction. Driving incident occurred in December, a warrant issued, and the accused was arrested in February. Upon arrest, accused was strip searched as part of a police policy. Trial judge found breach of s. 8, but declined to enter a stay of proceedings given the absence of a nexus between the original offence and the subsequent Charter violation.

### **Held: Appeal allowed, conviction quashed.**

Trial judge erred in focussing on the absence of a nexus. Court ought to focus on the issue of "just" remedy. "It is settled by *Weaver* (2005), 194 C.C.C. (3d) 27 (Alta CA) ... that a Court may enter a judicial stay of proceedings as a form of Charter relief to forestall an otherwise legitimate prosecution ... where the circumstances *require* it." Authorities reviewed.

**H. Brubaker** - Defence Counsel

## IMPAIRED DRIVING - PROOF OF IMPAIRMENT - TEST

*R. v. Rhyason* - Jan. 20, 2006  
ABQB 60 per Lee, J:

Accused charged with impaired driving causing death. Accused struck and killed a pedestrian. In addition to the collision, police observed accused to have bloodshot eyes, an odour of alcohol, and consumption was admitted. Accused's speech and walk appeared normal.

### **Held: Conviction entered.**

Test for impairment as set out in *Von Maldeghem* 2005 ABQB 558 adopted. "The accused failed to proceed with caution through the intersection ... *Andrews* itself states that a mere regulatory breach ... is not conclusive of impairment. However ... the manner in which the accused drove through the intersection at the accident site was a 'marked departure' from normal conduct. I am also satisfied that the alcohol consumption of the accused contributed more than *de minimis* to this marked departure".

**S. Prithipaul** - Defence Counsel

## INFORMATIONS AND INDICTMENTS - DATE OF OFFENCE - PREJUDICE - 601(4.1) CC

*R. v. Tarras* - Jan. 31, 2006 ABQB  
89 per Martin, J:

Appeal from public mischief conviction. On October 24<sup>th</sup> accused provided a false statement to police, claiming that she witnessed an assault on September 12<sup>th</sup>. The alleged offence date on the Information was September 12<sup>th</sup>, as opposed to the date of the false statement.

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

Trial judge was correct in finding that although the date on the Information was in error, the error was immaterial. As per s. 601(4.1) CC, no prejudice arose. "Prejudice is a frequently misunderstood concept. Thinking that a count on an Information that alleges a vague or incorrect date is a successful defence is not prejudice *per se*, just incorrect reasoning."

**C. Ouellette** - Defence Counsel

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**SENTENCE - IMPAIRED DRIVING CAUSING DEATH - 18 MONTHS JAIL**

*R. v. Rhyason* - Jan. 31, 2006 ABQB 86 per Lee, J:

Accused convicted of impaired driving causing death. Accused struck a pedestrian in a crosswalk. Young accused who had a 2003 impaired driving conviction. Accused blew 120 and 100 mg%.

**Held: 18 months jail, 4 year driving prohibition.**

Accused was a skilled tradesperson who was a productive member of society. However, as per *Cunningham* (1999), 43 M.V.R. (3d) 39 (Ont CA), a custodial term is called for. "The accused's conduct was directly contrary to the entitlement of drivers, passengers, and pedestrians". In mitigation, the accused remained at the scene of the accident, admitted he was the driver, and was on the lower end of the impairment scale. Interlock recommendation after two years. Authorities reviewed.

**S. Prithipaul** - Defence Counsel



**SENTENCE - JOINT SUBMISSIONS - ERROR TO REJECT JOINT SUBMISSION IN APPROPRIATE RANGE**

*R. v. Toner* - Jan. 26, 2006 ABCA per Ritter, Lewis, Binder, JA - Trial Judge: Chromka, J:

Appeal from rejection of joint submission for 4 months jail in relation to unstated offences. "The sentencing judge ignored the joint submission and indicated that he was imposing what he felt was an appropriate sentence, without giving an opportunity to the Crown or defence to make further submissions".

**Held: Appeal allowed, joint submission restored.**

"Having regard to the case law in Alberta, and the failure of the sentencing judge to follow the accepted procedure for rejection of joint submissions, we are satisfied that the sentencing judge erred. We are also satisfied that the proposed joint submission was within the appropriate range for the offences and that it should not have been rejected".

**L. Wood** - Defence Counsel



**SENTENCE - SEXUAL INTERFERENCE - BREACH OF TRUST - 3 ½ YEARS JAIL**

*R. v. M.J.L.* - Jan. 18, 2006 ABPC 20 per Allen, PCJ:

Accused pled guilty to sexual interference and sexual touching. Breach of trust. Victim was the accused's stepdaughter, who ranged in age from 7-15 at the time of the offences. Offences involved touching of the vaginal area, digital penetration, masturbation, oral sex and attempted vaginal intercourse. Early guilty plea, good community reputation, and accused diagnosed with a low to moderate risk to re-offend. Accused motivated to receive treatment. Conditional sentence application.

**Held: 3 ½ years jail.**

4 year starting point for breach of trust sexual offences still applicable. Conditional sentence inappropriate. "The Courts seek to protect children by denouncing this type of conduct. Moreover, deterrence is a high priority in such cases ... the only appropriate manner of expressing those important factors is a penitentiary term". Authorities reviewed.

**D. Sprake** - Defence Counsel



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