



# THE UPDATE

Issue #27 July 28, 2006

## APPEAL - STRIKING OF GUILTY PLEA - FACTORS

*R. v. Smulski* - May 29, 2006  
ABQB 271 per Thomas, J:

Unrepresented accused originally pled guilty to theft under and received a conditional discharge. Accused later learned that he would have been eligible for AMP. Application to strike guilty plea and apply for AMP.

### **Held: Application granted.**

Crown obligated to review files at the first instance re: eligibility for AMP, to propose referral of eligible cases to AMP and to ensure that individuals who are referred to AMP are dealt with expeditiously. "That all of this did not happen has worked an unfairness on Mr. Smulski ... There is a legal basis to set aside this plea and that basis is found in a very broad sense in statements made by the Alberta Court of Appeal in *Lavoie* (1986), 73 AR 72.

**B. Leebody** - Defence Counsel

## IMPAIRED DRIVING - SCREENING TEST - REASONABLE SUSPICION

*R. v. Sawchuk* - May 29, 2006  
ABQB 392 per Watson, J:

Appeal from acquittal on charge of blowing over. Trial judge found that the reasonable suspicion required for the making of a screening demand was lacking (or not properly expressed by the officer) and as per *Woods* [2005] 2 SCR 205, the Intoxilyzer results were inadmissible.

### **Held: Appeal allowed, new trial.**

Very low threshold required to satisfy the screening demand standard of reasonable suspicion of alcohol in the body: *Gilroy* (1987) 79 AR 318 (CA). Trial judge erred on focussing on whether there was an "expression" by the officer of the appropriate grounds for the demand, rather than assessing whether there was the "existence" of the grounds required by s. 254(2). Authorities reviewed.

**G. Neil** - Defence Counsel

## SENTENCE - CRIMINAL HARASSMENT - 42 MONTHS

*R. v. Stuart* - May 25, 2006 ABCA  
168 per Costigan, Agrios, Bielby,  
JA - Trial Judge: Perras, J:

Appeal from global 42 month jail sentence imposed in relation to 3 counts of criminal harassment, as well as charges of breach of undertaking. Serious case. Accused made a total of 771 phone calls to the 3 complainants. The phone calls were described as "manipulative, demeaning, belittling, and punctuated with vulgar and grossly obscene name calling". Record for assault as against his ex-spouse and one of the complainants. "The complainants were in fear of the appellant. The appellant was physically and emotionally abusive to each complainant".

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

Denunciation and deterrence paramount. Sentence not unfit.

**L. Anderson** - Defence Counsel

**SENTENCE - DANGEROUS DRIVING - POLICE CHASE - 15 MONTHS JAIL**

*R. v. Pratt* - May 25, 2006 ABCA 169 per Costigan, Agrios, Bielby, JA - Trial Judge: White, PCJ:

Accused originally pled guilty to 3 offences: evading police, possession of a stolen vehicle, and over .08. After time in custody was considered, a global 12 month jail sentence was imposed. 15 months originally imposed for the high speed police chase. 10 minute police chase on Highway 2. "He slammed into a guardrail, he was driving all over and finally it was only a spike belt ... that stopped him ... There was extensive damage to the vehicle. The appellant has never had a driver's license". Blood-alcohol reading of 200 mg%. 31 prior convictions.

**Held: Appeal dismissed.**

Sentence was fit.

**P. Lister** - Defence Counsel

**SENTENCE - DRUGS - TRAFFICKING IN COCAINE AND METHAMPHETAMINE**

*R. v. Snow* - May 25, 2006 ABCA 167 per Costigan, Agrios, Bielby, JA - Trial Judge: Peck, PCJ:

Defence appeal from 7 year jail sentence imposed following guilty pleas to charges including possession of cocaine and methamphetamine for the purpose of trafficking. Accused found in possession of 53 spit balls of cocaine, 12 ounces of hard cocaine, 2 ounces of cocaine powder, 6 spit balls of methamphetamine, and one ounce of methamphetamine. Accused pled guilty at first appearance with duty counsel.

**Held: Appeal allowed, sentence reduced to 5 years.**

Insufficient credit given for early guilty plea. Also, trial judge "erred in principle in increasing the starting point sentence by two and a half years on the basis of denunciation and deterrence". Starting points themselves already take denunciation and deterrence into account.

**L. Anderson** - Defence Counsel

**SEX OFFENDER REGISTRY - CHARTER - 11(i) - RETROSPECTIVE EFFECT**

*R. v. Aberdeen* - May 23, 2006 ABCA 164 per Cote, O'Leary, Paperny, JA - Trial Judge: Legrandeur, PCJ:

Crown appeal from refusal to make an order for entry into Sex Offender Registry. Accused pled guilty to sexual assaults that occurred before the legislation came into effect, but was sentenced after. On his own motion the trial judge held that the application of the Registry in the present case would offend s. 11(i) of the Charter, as it constituted a form of punishment.

**Held: Appeal allowed. Registry Orders made.**

Trial judge erred in law in raising the constitutional issue in the absence of Judicature Act notice. "The issue of constitutional notice in relation to s. 11(i) of the Charter ... was recently considered by this court in *Redhead* (2006) ABCA 84 ... The court noted in *Redhead* that its practice is strictly to adhere to the notice provisions."

**A. Sanders** - Defence Counsel

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