



THE UPDATE

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CRIMINAL RECORDS - NATIONAL DEFENCE ACT - CROSS-EXAMINATION

R. v. White - Dec 7, 2006 ABQB 889 per Moreau, J:

Murder trial. Accused charged with killing his wife. Crown application pursuant to s. 12 CEA to cross-examine accused on theft related convictions entered against him under the *National Defence Act*, while accused was a member of the Armed Forces. Some of the convictions arose from a summary trial presided over by accused's commanding officer.

Held: Application granted.

Section 12 CEA permits cross-examination regarding convictions under all federal statutes and is not limited to convictions under the Criminal Code: *Watkins* (1992), 70 CCC (3d) 341. "The entries sought to be used by the Crown in cross-examining Mr. White are offences within the meaning of s. 12(1) of the Canada Evidence Act and do not lose that character where the member elects a summary mode of trial". Authorities reviewed.

L. Stevens, R. Shaigec -
Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY - *MACDONALD*

R. v. Mimnaugh - Dec. 11, 2006 ABPC 356 per Millar, PCJ:

Impaired driving trial. Evidence to the contrary. Defence alcohol expert tested accused's elimination, however, because of variance in elimination rates he had to rely upon average rates of 10 - 20 mg%. Relying upon these averages, the accused's blood-alcohol concentration at the time of driving ranged from 30 - 76 mg%.

Held: Acquittals entered.

"In *Sveahun* 2006 ABPC 275, Allen PCJ comes to the conclusion that, if the evidence of the expert, based on the accused's rate of elimination and the range for the general public, established the slowest eliminators would be below the legal limit, then there is a reasonable doubt that the reading taken by the police was accurate. Allen, PCJ finds the result in *MacDonald* is applicable, where an expert's opinion results in readings that straddle the legal limit for the elimination rate of the general population".

R. Muenz - Defence Counsel

POSSESSION - 4(3) CC - CONSTRUCTIVE POSSESSION

R. v. Diep - Dec. 7, 2006 ABPC 352 per McDonald, PCJ:

Multiple accused charged with various drug related offences. Regarding accused Truong, issue being proof of possession. Search of a home. Truong's passport and recognizance found in a bedroom. Truong admitted to having lived in the residence for about 2 weeks. Drugs found in the bedroom, and in common areas of the home.

Held: Convictions entered.

Three elements required for proof of personal possession: knowledge, intention to possess and control: *Nguyen* 2005 ABQB 544. Mere presence in a residence does not prove knowledge. Knowledge may be established by circumstantial evidence: *Pham* 2003 CCC (3d) 326.

Expert evidence established that the house was a "stash pad" where drugs were being sold preparatory to them being sold. Accused found to be in constructive possession of the drugs found in the bedroom and in the common areas of the home. Authorities reviewed.

A. Nguyen - Defence Counsel

ROBBERY - "VIOLENCE OR THREATS OF VIOLENCE" - TEST TO APPLY

R. v. Callihoo - Dec. 6, 2006
ABPC 347 per Allen, PCJ:

Robbery trial. Accused stole cash and cigarettes from an unoccupied kiosk at a gas station. The accused then attempting to flee, and she was detained by an employee. Accused resisted, and employee suffered serious injury. Trial judge accepted that the accused only wanted to flee, and that her acts of violence were in response to being detained.

Held: Acquitted of robbery, convicted of theft.

Accused's acts of violence constituted an assault within the meaning of s. 265 CC. "Section 343(b) requires something more than a technical assault to support the type of personal violence required in that section ... it is too simplistic to say that any assault would support a conviction of robbery under ss. (a). Had Parliament meant to make any assault the basis for conviction pursuant to ss.(a) it would have done so ... 'Violence' should be accorded its ordinary grammatical meaning an exercise of physical force so as to inflict injury on, or cause damage to persons or property".

K. Lieslar - Defence Counsel

SEX OFFENDER REGISTRY - 490.012(1) CC - EXEMPTION

R. v. Gosselin - Dec. 13, 2006
ABCA 395 per Paperny, O'Brien, Martin, JA - T. Judge: Reilly, PCJ:

Crown appeal from refusal by trial judge to make an order under s. 490.012(1) CC, requiring accused to comply with Sex Offender Registry. Accused originally convicted of sexual assault and received a sentence of 2 years probation. Assault upon 18 year old girl with cerebral palsy. Accused forced her to put her hand on his penis.

Held: Appeal allowed.

Trial judge refused the order without any evidence to support the granting of an exemption. "The court in *Redhead* held that in the absence of evidence of the impact of such an order on the offender, it is impossible to assess whether such impact would be grossly disproportional to the public interest. No exemption can be granted unless there is a finding of gross disproportionality". Matter not remitted to the trial court. "There is nothing in the record that would indicate any reasonable prospect for the granting of such an exemption". Sex Offender Registry Order made.

A. Sanders - Defence Counsel

TAKING A VIEW - 652 CC - FACTORS TO CONSIDER

R. v. White - Dec. 7, 2006 ABQB
890 per Moreau, J:

Murder trial. Accused charged with killing his wife. Defence application under s. 652 CC to allow the jury to take a view of 2 locations: where deceased's vehicle was found abandoned and a field where bloody clothing was recovered.

Held: Application denied.

Factors that weighed against the defence application included: (1) there had been extensive examination and cross-examination witnesses regarding the appearance of the locations at issue; (2) photographs and videotapes of the areas in question were before the jury; (3) 16 months had passed since the events in question, and the trial was in the winter while the police investigation occurred in the summer; (4) "There are concerns associated with the actual carrying out of the view. It would be necessary to take a great deal of care to protect the privacy interests of the members of the jury, having regard to the considerable media attention this case has attracted". Authorities reviewed.

L. Stevens, R. Shaigec -
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