



THE UPDATE

Issue #12 March 23, 2007

CHARTER - 8 & 9 -

INVESTIGATIVE DETENTION

R. v. McCargar - Jan. 19, 2007
ABQB 30 per Thomas, J:

Trial on charges of possession of ketamine and marijuana for the purpose of trafficking. Police monitoring a suspected drug house. Accused was the driver of a vehicle that stopped briefly in front of the house, a passenger got out, and after a short time in the house, the passenger returned to the vehicle. Accused's vehicle was then pulled over upon leaving the area, accused arrested and drugs found.

Held: Breach of ss. 8 & 9, evidence excluded.

Reasonable grounds to arrest and search found not to exist upon Court's objective review of police belief: *Storrey* [1990] 1 SCR 241. Informant information regarding the house was "not particularly compelling", and the informant was of untested reliability. Police acted on a "mere hunch". Detention and search in the absence of reasonable grounds constituting a serious Charter violation: *Calder* 2006 ABCA 307. Authorities reviewed.

W. Tatarchuk - Defence Counsel

CORROBORATION - RULE IN *HODGE'S CASE* - TEST

R. v. Kruper - Jan. 19, 2007 ABCA
17 per Picard, Hunt, Veit, JA - Trial
Judge: Greckol, J:

Appeal from conviction on charge of assault causing bodily harm. Photographs taken of complainant's alleged injuries. No medical evidence called re: the dating of the injuries. Trial judge found the photos to be "graphic evidence of the injuries sustained".

Held: Appeal dismissed.

Rule in *Hodge's Case* having little to no application, as the rule applies only where the entire case is circumstantial. "Moreover ... 'the so-called 'rule' in *Hodge's Case* was always ... merely a branch of the fundamental rule of criminal law that the guilt of an accused person must be proven beyond a reasonable doubt'": *Cardinal* (1990), 106 AR 91. Trial judge entitled to rely on the "real, circumstantial" evidence of the photographs as corroborative of the complaint, as the photographs were merely an adjunct to the complaint's direct evidence.

K. Teskey - Defence Counsel

IMPAIRED DRIVING - 10(B) - DUTY TO EXPLAIN 10(B) RIGHT

R. v. Lauinger - Jan. 22, 2007 ABPC
28 per Meagher, PCJ:

Impaired driving trial. Issue regarding alleged 10(b) violation. 10(b) rights read, and accused then asked by officer: "What are your rights?", to which accused responded: "I can contact my lawyer or you guys can give me a lawyer". Accused then asked by police if he wanted to call "a free lawyer or any other lawyer", and accused declined. Issue as to whether accused's statements proved a lack of understanding of the right to counsel.

Held: No 10(b) breach.

As per *Bartle*, although police have a duty to make a reasonable effort to explain the 10(b) right, in most cases, reading the appropriate caution satisfies this obligation. "Absent circumstances that reveal that an accused does not understand the Charter rights ... the peace officer is not required to assure himself that the accused fully understands those rights". Nothing in accused's answer "I can contact my lawyer or you guys can give me a lawyer", revealed a misunderstanding of the 10(b) right.

E. Wilson - Defence Counsel

PROBATION - BREACH - NON-PAYMENT OF RESTITUTION

R. v. Mills - Jan. 19, 2007 ABPC 23 per Fradsham, PCJ:

Breach of probation. Failure to pay \$900 restitution. Young accused who had lost his employment. Accused kept his probation officer advised of his financial difficulties. Mens rea issue.

Held: Acquittal entered.

Section 733 CC was amended in 1995, removing the word "wilfully", and adding the phrase "without reasonable excuse". "The mens rea of the offence of breach of probation consists of the accused having voluntarily performed ... the act or omission which constitutes the actus reus. The Crown no longer has to prove that the accused intended to breach the probation order": *CDC* [2004] NJ No. 159. Whether an inability to pay constitutes a reasonable excuse depends upon the circumstances leading to the inability to pay. Authorities reviewed.

M. Stephensen - Defence Counsel

SENTENCE - MURDER - PAROLE ELIGIBILITY

R. v. Song - Jan. 22, 2007 ABQB 37 per Burrows, J:

Accused convicted following jury trial of second degree murder. Issue regarding parole eligibility period. Single stab wound to the chest. 26 year old accused (22 at time of incident). Previous drug trafficking record. While at the Remand Centre awaiting trial accused was severely beaten and suffered permanent brain injury.

Held: 12 year parole eligibility.

"Mr. Song's character has significantly changed since the offence. But the nature and circumstances of the offence ... remain the same". Senseless and vicious attack with a knife.

M. Bloos - Defence Counsel

SENTENCE - SEXUAL TOUCHING - 4 YEARS 8 MONTHS JAIL

R. v. R.J.R. - Jan. 22, 2007 ABPC 26 per Wilkins, PCJ:

Accused pled guilty to sexual touching of a child, contrary to s. 151 CC. Accused was living with the complainant's mother. Mother found the accused performing oral sex on the child. Accused confessed to having assaulted the complainant on two occasions. At the time of the offence accused was on parole for robbery. 8 months pre-trial custody. 41 year old Metis accused who come from a dysfunctional family with domestic violence. Non-related criminal record.

Held: 4 years 8 months jail.

Sentence reduced to 4 years given pre-trial custody. 4 year starting point for a single major sexual assault of a child. Authorities reviewed.

J. Blumer - Defence

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