



# THE UPDATE

Issue #16 April 20, 2007

## CHARTER - 10(B) - PRIVACY - "HOLD OFF" REQUIREMENT

*R. v. Briscoe* - Feb. 28, 2007  
ABQB 135 per Burrows, J:

First degree murder trial. Issue regarding admissibility of accused's statements. Alleged 10(b) breach. Accused testified that while he was in the phone room, the officer stood outside the door, and that the accused thought that the officer could hear parts of the conversation. Later, during questioning by police, the accused stated "Shouldn't I have my lawyer here?" Officer did not respond to accused's question.

**Held: No 10(b) breach.**

No violation of accused's right to consult with counsel in private. Accused's evidence largely rejected. No evidence that police could hear, or were attempting to hear, the conversation. Regarding accused's question about having his lawyer present, the accused had spoken on the phone with his lawyer just a few minutes earlier, and had expressed satisfaction with the advice received. Police were entitled to move forward with the interview.

**L. Wood** - Defence Counsel

## DRUGS - TRAFFICKING - AGENT FOR THE PURCHASER

*R. v. Wood* - Mar. 2, 2007 ABCA 65  
per Cote, McFadyen, Martin, JA - T.  
Judge: Philp, PCJ:

Crown appeal from acquittal on charge of trafficking in cocaine. Agent for the purchaser case. "When someone buys illegal narcotics through an intermediary, when is that intermediary guilty of trafficking?" After receiving buy money from an undercover officer, accused approached a vehicle and then returned with the drugs, and was then given a small piece of cocaine for facilitating the transaction.

**Held: Appeal allowed, conviction entered.**

*Greyeyes* [1997] 2 SCR 825 and *Poitras* [1974] SCR 649 reviewed. "The Supreme Court of Canada says that aiding the buyer is not trafficking if the accused personally commits none of the acts defined as trafficking. But if he commits those acts, the fact that he is helping the buyer is no defence ... Whom the accused assisted or intended to assist, is irrelevant where the accused personally committed forbidden acts". Authorities reviewed.

**G. Davies** - Defence Counsel

## IMPAIRED DRIVING - 10(B) - REFUSAL - SCREENING TEST

*R. v. Rybak* - Mar. 14, 2007 ABQB  
169 per Veit, J:

Appeal from conviction on charge of refusal to provide a screening sample. Alleged 10(b) breach. Police told accused that if he blew over on the screening test it would be a "criminal charge". Issue as to whether 10(b) right ought to have been provided in view of accused's subjective belief (given what he had been told by police) that he was in criminal jeopardy if he failed the test.

**Held: Appeal dismissed.**

10(b) rights suspended at the roadside as per *Orbanski* 2005 SCC 37. Nothing in the circumstances took the case outside of the section 1 justification. "There is no officially induced error here: the police officer's statement to the appellant that he would be charged if he blew a 'fail' was, in fact, correct. Although the statement omitted the steps that would be taken between blowing a 'fail' and the laying of an impaired driving charge, there was nothing erroneous about the information given to the appellant".

**P. Northcott** - Defence Counsel

**IMPAIRED DRIVING - 9 -  
POST BREATH TEST  
DETENTION**

*R. v. Simms* - Mar. 1, 2007 ABCA 75 per Berger, JA:

Application for leave to appeal from impaired driving conviction. Remedy under s. 24(1) sought at trial on the basis of post breath sampling detention. Advanced impairment. Trial judge found that the detention was not arbitrary and was necessary in the public interest to prevent the commission of another offence.

**Held: Leave to appeal granted.**

“No member of the constabulary, including the investigating officer, told the Applicant or his wife that the Applicant could be released to a sober adult ... [the defence] contends the police have an obligation to inform the accused or a family member of that alternative ... the cross-examination at trial of the investigating officer reveals that, arguably, the factors recited in s. 497.(1.1)(a) of the Criminal Code do not appear to have been carefully considered by him”.

**S. Prithipaul** - Defence Counsel

**SENTENCE - SEXUAL  
INTERFERENCE & CHILD  
PORNOGRAPHY - 18 MONTHS**

*R. v. T.L.B.* - Feb. 21, 2007 ABCA 61 per Fraser, CJA, Belzil, Read, JA - T. Judge: Moreau, J:

Crown appeal from 2 year less one day conditional sentence. 36 year old accused with cerebral palsy pled guilty to sexual interference and distribution of child pornography. Accused largely confined to a wheelchair. Accused accessed a bondage-discipline chat room, and in her role as the “submissive” one, she ultimately agreed to engage in sexual contact with her 6 year old son, and sent sexually exploitive photos of her son over the internet.

**Held: Appeal allowed, 18 months jail imposed.**

Denunciation and deterrence paramount. Accused’s personal circumstances mitigated personal culpability. “The fact that a custodial sentence will have a disproportionate impact on a person with disabilities may well be legitimate factor ... in determining the length of [a] custodial sentence”.

**L. Stevens** - Defence Counsel

**SENTENCE - PAROLE - 743.6  
CC - ELIGIBILITY ORDER**

*R. v. Lam* - Mar. 7, 2007 ABCA 83 per Fraser, CJA, Belzil, Read, JA - T. Judge: Burrows, J:

Crown appeal from trial judge’s refusal to make a one-half parole eligibility order, as per s. 743.6 CC. Accused sentenced to 10 years for conspiracy related offences. “The Crown argument reduces to this. Because Lam was found to be the head of the conspiracy and is likely to return to a life of crime ... the s. 743.6 order ought to have been granted.

**Held: Appeal dismissed.**

As per *Zinck* [2003] 1 SCR 41, parole ineligibility orders ought not go as a matter of routine. “Automatic sentencing reflex for ‘heads’ of conspiracies is contrary to the spirit and intent of the delayed parole legislation: *Zinck*. Therefore, this ground of appeal fails”.

**L. Stevens** - Defence Counsel

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