



THE UPDATE

Issue #20 May 25, 2007

BAIL - KIDNAPPING - TEST TO BE MET - BAIL GRANTED EVIDENCE - *BROWNE v. DUNN* - FAILURE TO CROSS-EXAMINE CHARTER - 8 - ARREST - MENTAL HEALTH ACT

R. v. Hussein - April 3, 2007
ABPC 110 per LeGrandeur, PCJ:

Accused charged with numerous firearms offences and kidnapping. Alleged that accused participated with two others in abducting, and threatening an individual, travelling from Calgary to Lethbridge. Accused's record included convictions for aggravated assault and breach.

Held: Bail granted.

"It would be convenient to keep him in custody. That would remove any and all risk, but it would not, in the circumstances, be a proper recognition of the right to liberty and the strict bail requirements." As per *Morales* [1992] 3 SCR 711, "strict application of the bail principles" is the method by which the presumption of innocence is protected. Present case not one of the "narrow set of circumstances" under which bail could be denied in order to maintain confidence in the administration of justice: *Hall* [2002] 3 SCR 309.

C. Giles - Defence Counsel

R. v. Werkman - April 17, 2007
ABCA 130 per Cote, O'Brien,
Watson, JA - T. Judge: Read, J:

Appeal from convictions including importing cocaine. Convictions based largely on the evidence of two witnesses who worked for the accused transporting cars between Canada and the US. Accused's evidence not accepted. Trial judge found various breaches of the rule in *Browne v. Dunn* and weighed the breaches against the accused's credibility.

Held: Appeal dismissed.

Defence failure to cross-examine related to material issues. Trial judge did not err in using the breaches of the rule in assessing credibility, as opposed to granting leave to call witnesses in reply: *Lyttle* [2004] 1 SCR 193. A trial judge has a number of remedies available when the rule has been breached. "When weighing the evidence as a whole, the judge logically could not ignore the gap in evidence. It is itself a fact.": *Herman* [1994] 3 SCR 758. Authorities reviewed.

P. Royal - Defence Counsel

R. v. Wittman - March 29, 2007
ABPC 89 per Van de Veen, PCJ:

Accused charged with possession of cocaine. Police responded to a possible attempted suicide call at accused's residence. Call made by accused's wife. Upon arrival at the residence, given what police had been told and observed, police took custody of accused pursuant to a Form 10 *Mental Health Act* warrant. 10(b) rights not provided. Accused then taken to hospital and turned over to hospital security. In keeping with hospital "security procedures", clothing seized and accused given a hospital gown. Cocaine found while cataloguing accused's possessions.

Held: No s. 8 breach.

Police acted lawfully within provisions of s. 12 *Mental Health Act*. Therefore Charter rights suspended. This suspension continued until the investigation extended beyond the *Mental Health Act* and into a criminal investigation, which did not occur until after the inadvertent finding of drugs.

J. Brunnen - Defence Counsel

**PRELIMINARY INQUIRIES -
PROOF OF POSSESSION**

R. v. Williams - April 30, 2007
ABPC 98 per Ogle, PCJ:

Preliminary inquiry on charge of possession of cocaine for purpose of trafficking. Issue regarding proof of possession. Accused drinking in a tavern well known for low level trafficking. Accused sitting on a vinyl covered bench. Where accused was sitting there was a tear in the vinyl in which cocaine was found.

Held: Accused discharged.

As per *Arcuri* [2001] 2 SCR 828, preliminary inquiry judge entitled to engage in some limited weighing of the evidence. "In my view there is simply no evidence of any knowledge by the accused of the presence of drugs inside the Kleenex ... this Kleenex in the tear in the bench was not readily visible to a casual observer."

M. Takada - Defence Counsel

**SEX OFFENDER REGISTRY -
RETROACTIVE APPLICATION**

R. v. Owusu - March 23, 2007 ABCA 95 per Conrad, Fruman, Ritter, JA - T. Judge: Romaine, J:

Accused convicted of sexual assault and received a 3 year jail sentence. Crown appeal from trial judge's refusal to order compliance with SOIRA. Offence took place before SOIRA was proclaimed, but accused convicted afterward.

Held: Appeal allowed.

Case law now clear that a SOIRA order may be made retroactively: *Aberdeen* 2006 ABCA 164. Court of Appeal may "order a new hearing, quash the order or make an order". New hearing ordered. "From the record, it is apparent that counsel made brief submissions, but did not fully argue the merits of the SOIRA application. They did not address the factors that are now set out in *Redhead* 2006 ABCA 84.

H. Silver - Defence Counsel

**YOUTHS - 30(4) YCJA -
TRANSFER TO ADULT JAIL**

R. v. S.D.F. April 10, 2007 ABPC 103 per McLellan, PCJ:

Application brought by Provincial Director pursuant to s. 30(4) YCJA to transfer a prisoner, who was now over 18 and on remand, from Calgary Youth Centre to a adult jail. Young person had a lengthy record, had been incarcerated 19 times, was "unresponsive to all intervention" and was "posing a threat to others".

Held: Application granted.

Detailed judgment setting out the respective roles of Crown and defence counsel and the Provincial Director on the application. 30(4) hearing is not similar to a transfer hearing, as the issue is only one of temporary placement. Hearsay admissible. "The court needs as much information as possible". Test involving a balancing of the best interests of the young person and/or the public interest.

B. McLaren - Defence Counsel

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