



# THE UPDATE

Issue #30 August 3, 2007

## CHARTER - 24(1) - COSTS - ABORIGINAL RIGHTS

*R. v. Nest* - June 27, 2007 ABPC 178 per Ayotte, PCJ:

Aboriginal accused originally charged in 1998 with Fish and Wildlife offences. Notices filed challenging the validity of the legislation by reason of treaty rights. Complex pre-trial developments over more than 4 years. Ultimately, 2 weeks prior to trial the Crown withdrew the charges. Court found that costs ought to be awarded to accused. Defence sought \$200,000 while Crown offered \$5000.

**Held: \$25,000 in costs awarded.**

Charges were withdrawn because a defect in the legislation was discovered that prevented the prosecution from proceeding (defect now cured). "The Crown must be diligent in assuring that the prosecutions it launches are brought pursuant to valid legislation." Accordingly, "some" negligence by the Crown. However, solicitor/client costs not warranted. Court funded counsel is designed to ensure a fair trial, but not necessarily "Cadillac" coverage: *Cai* 2002 ABCA 299.

**A. Hunter** - Defence Counsel

## IMPAIRED DRIVING - 254(2) CC "FORTHWITH" - 7 MINUTES

*R. v. McCullough* - August 3, 2007 ABQB 423 per Graesser, J:

Appeal from conviction on charge of blowing over. Issue regarding an unexplained lapse of 7 minutes between the reading of the screening demand and the taking of the sample.

**Held: Appeal allowed, s. 8 violation, matter remitted to trial judge for 24(2) analysis.**

Trial judge erred in finding that the Crown did not have a duty to explain the 7 minute delay. Warrantless seizure of breath. Therefore, onus shifting to Crown to prove that the taking of the sample was authorized by 254(2) CC. As per *Woods* [2005] 2 SCR 205, "forthwith" means immediately. "An unexplained delay of seven minutes between the time the demand is read and the sample is actually given does not satisfy the 'forthwith' requirement ... and it is palpable and overriding error to conclude otherwise ... Any sense of urgency, as noted in *Neitsch* 2007 ABCA 226, was lost by the unexplained seven minute delay." Authorities reviewed.

**D. Smith** - Defence Counsel

## IMPAIRED DRIVING - PROOF THAT BREATH TESTS TAKEN

*R. v. Corrigan* - June 26, 2007 ABPC 182 per Creagh, PCJ:

Impaired driving trial. Issue as to whether Crown had proven that breath tests were in fact taken. No direct evidence of the accused having blown into the Intoxilyzer. Arresting officer did testify that accused was "cooperative", "gave tests without contesting that", and "did some tests for breath samples."

**Held: Conviction entered.**

As per *Hruby* (1980), 19 AR 230 (CA), the two preconditions to the admission of the Certificate are: proof that breath samples were taken, and proof that the samples were taken pursuant to a valid demand. Given that the accused was placed in the room with the breath technician, there was sufficient evidence to draw the inference that breath tests were taken as required by *Hruby*.

**K. Haryett** - Defence Counsel

**IMPAIRED DRIVING - 254(2) - REFUSAL - VALID DEMAND**

*R. v. Harasym* - June 22, 2007 ABPC 166 per Fradsham, PCJ:

Trial on charge of refusal to provide a screening test. When accused was first read the screening demand (a proper demand) he indicated that he did not understand. Accordingly, officer provided a “simplified version”. Issue regarding validity of demand.

**Held: Acquittal entered.**

Formal demand could not be relied upon by Crown given accused’s statement of not understanding the same. Therefore, all of the elements of a valid demand had to be found in the simplified version. Demand invalid as the words “Criminal Code” were not used. A valid demand requires that the accused at least be made aware that the demand is being made pursuant to the Criminal Code: *Ackerman* (1972), 6 CCC (2d) 425 (Sask CA). Further, the word “forthwith” was not used, nor did anything about the demand communicate the forthwith concept: *Neitsch* (2006), 395 AR 202 (QB).

**I. McKay** - Defence Counsel

**YOUTHS - BAIL - TERTIARY GROUND - MANSLAUGHTER**

*R. v. L.M.* - June 22, 2007 ABPC 175 per Dalton, PCJ:

Four youths charged with manslaughter. Bail hearing. Crown opposed to release on the tertiary ground. Fight on a Edmonton City bus led to the death of the victim.

**Held: Bail granted.**

As per *White* [2006] AJ No. 179 (CA), “... it will be an unusual case where public confidence in the administration of justice is so imperilled that it requires an accused to be detained prior to trial, before being found guilty beyond a reasonable doubt, on the tertiary ground.” Serious facts, but far from the horrific facts found in *Hall* [2002] SCJ No. 65. If the accused were to be found guilty in youth court, the maximum sentence would be 2 years in custody plus 1 year of mandatory supervision.

**E. O’Neill, L. Trahan, R. Poyal, L. Stevens** - Defence Counsel

**YOUTHS - STATEMENTS - SCHOOL PRINCIPAL**

*R. v. J.Y.* - June 26, 2007 ABPC 133 per Lipton, PCJ:

Accused charged with sexual assault of a fellow school student. The two accused were interviewed by the school principal. It was understood that there “would have been consequences” if either student had refused to attend at the principal’s offence and speak to her.

**Held: Statements inadmissible.**

Factors set out in *Hodgson* [1998] 2 SCR 449 analysed. Principal was a person in authority. Accordingly, voluntariness in issue. Statements not made voluntarily. Further, principal was acting as an agent of the state within the meaning of *M(MR)* [1998] 3 SCR 393. Statements made in violation of s. 10(B) of the Charter and s. 146 YCJA. The principal’s strategy in her method of questioning the students “was designed to get a confessions”.

**N. Cush, H. Van Harten** - Defence Counsel

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