



THE UPDATE

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CHARTER - 7 - DISCLOSURE - DANGEROUS DRIVING - POLICE FILES - O'CONNOR PROOF - "DRIVING" / "OPERATING"

R. v. Hobbs - September 14, 2007
ABPC 273 per Lefever, PCJ:

Accused charged with assaulting a police officer. Incident occurred on Whyte Ave. during Edmonton Oilers playoff run. Accused saw police arresting a stranger. Accused put his hand on the officer's shoulders and said "you can't do that." Disclosure application regarding the following material: (1) video coverage of Whyte Ave. incident; (2) EPS "mass arrest protocol"; (3) names of all police on duty on Whyte Ave.; (4) investigative file re: the stranger being arrested; (5) records of complaints against police arising from Whyte Ave. celebrations.

Held: Disclosure ordered in part.

Video coverage disclosure ordered. Crown required to inquire as to whether a file exists re: arrest of the stranger. If so, defence then required to bring an *O'Connor* application. Remaining items deemed irrelevant. "*Stinchcombe* does not require the prosecution to disclose everything in its file": *Blank* [2006] 2 SCR 319.

L. Trach - Defence Counsel

R. v. M.L.M. - September 17, 2007
ABCA 283 per Picard, Paperny,
Ritter, JA - T. Judge: Lipton, PCJ:

Appeal from conviction on charges including dangerous driving. Issue as to whether accused was "driving" or "operating" a vehicle. Accused attempted to put his vehicle in motion in order to avoid police who had approached him. "The engine was accelerating. There was evidence that the vehicle did actually move backwards and strike a police van." Accused had been boxed in by police.

Held: Appeal dismissed.

The case law does not "stand for the proposition that a vehicle that may not move at one instant is not being operated. Indeed, a vehicle that may be temporarily stuck and is driven back and forth only a short distance, is being 'operated'": *Bui* [2006] OJ No. 2869 (QL). Accused's actions combined with the proximity of members of the public and surrounding police officers, demonstrated a marked departure from a reasonable standard of care.

A. Sanders - Defence Counsel

FORCIBLE ENTRY - 72 CC - ELEMENTS OF OFFENCE

R. v. Stoyke - September 11, 2007
ABPC 259 per LeGrandeur, PCJ:

Trial on charge of forcible entry, contrary to s. 72(1) CC. Non-suit application. Defence alleged no evidence of an essential element, namely: "that the accused intended to take possession of the real property."

Held: Application denied.

In *Kootney* (1998), 127 CCC (3d) 371, Judge Fradsham found that an intention to "take possession of the real property" was an essential element of an offence under s. 72 CC. However, the Ontario Court of Appeal came to a contrary view in *D.(J.)* (2002), 171 CCC (3d) 188. As Doherty JA stated: "An interpretation of the provisions which requires a taking of possession in the sense of an interference with the peaceful possession of the person in actual possession, but does not require an intention to take over possession is consistent with the French and English versions of the sections and the purpose of the section." *D.(J.)* preferred.

R. Rath - Defence Counsel

**GUILTY PLEAS -
APPLICATION TO VACATE**

R. v. K.D.H. - September 12, 2007
ABPC 264 per LeGrandeur, PCJ:

Application to vacate a guilty plea. Accused entered a guilty plea to sexual assault and sentencing was adjourned. The facts were not read in, and s. 606(1.1) CC was not canvassed. Accused asserted that the interaction with the complainant was consensual.

Held: Application granted.

Distinction to be drawn between present case and a case where guilty pleas that have been accepted by the Court (ie. the accused's admission of the essential elements of the offence). "If the Court has any reason to doubt the accused's ... acceptance of the facts upon which the charge is based, then the Court should not accept the guilty plea." As per **Corkem** 64 AR 354 (CA): "If those essential facts are not clearly admitted the plea of guilty should not be accepted."

B. Der - Defence Counsel

**SENTENCE - DRUGS - COCAINE
TRAFFICKING - CSO**

R. v. Lee - September 19, 2007
ABCA 288 per O'Brien, Sulatycky, Bensler, JA - T. Judge: Kirkpatrick, PCJ:

Defence appeal from 15 month jail sentence imposed following trial for possession of cocaine for the purpose of trafficking. The trial judge was advised by both the Crown and defence that an agreement had been reached that a CSO was appropriate.

Held: Appeal allowed, 2 years less 1 day CSO imposed.

Joint submission did not arise out of a plea bargain. "However, the lack of a plea bargain does not mean that the common submissions of experienced counsel should not have been accorded considerable weight." Further, sentencing judge erred in underestimating both the deterrence and denunciation provided by a conditional sentence: **Watkinson** 2001 ABCA 83. The only distinguishing feature between the present case and **Rahime** 2001 ABCA 203 was the absence of a guilty plea. "In our view, the common recommendation of counsel at sentencing was appropriate."

J. Antonio - Defence Counsel

**SENTENCE - MEDICAL
CONDITION OF ACCUSED**

R. v. Siik - September 25, 2007
ABCA 304 per Cosyigan, Marshall, Bielby, JA - T. Judge: Caffaro, PCJ:

Defence appeal from 1 year jail sentence imposed after accused pled guilty to fraud. Breach of trust. \$118,000 stolen from the Navy League for which accused acted as a treasurer. Accused suffered from a severe diabetic condition and osteomyelitis. Accused sought to enter new evidence on appeal, showing that the prison was unable to attend to his medical needs.

Held: New evidence not admitted, appeal dismissed.

New evidence did not bear on a potentially decisive issue because the entire matter of the accused's health, and the difficulties incarceration would pose, were placed before the sentencing judge. No reviewable error and sentencing judge properly considered the applicable principles.

B. Aloneissi - Defence Counsel

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