



THE UPDATE

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CHARTER - 8 - PERSONAL SEARCH - GUN COMPLAINT

R. v. Peters - May 28, 2007 ABCA 181 per Cote, McFadyen, Picard, JA - Trial Judge: McDonald, PCJ:

Appeal from conviction on drug charge. Marihuana found upon search of accused's knapsack. Police responded to a hotel on a handgun complaint. Accused matched the suspect description. Investigative detention and protective search then conducted.

Held: No s. 8 breach, appeal dismissed.

Standard of review on Charter matters is correctness. Trial judge did not err in law in applying the test for investigative detention. Police had a reasonable basis to suspect the commission of a crime. Test in *Mann* 2004 SCC 52 met. "In 2007 it is obvious that a member of the public, who in a public place, has a gun, is a potential threat to the public." Therefore, scope of the search was justified.

J. Ruttan - Defence Counsel

DANGEROUS DRIVING - SPEED - MARKED DEPARTURE TEST

R. v. Farrell - June 1, 2007 ABPC 137 per Bascom, PCJ:

Dangerous driving trial. Unmarked police car travelling at 80 km/hr (speed limit) was passed by accused's vehicle that was travelling at a very high rate of speed. Police accelerated to 170 km/hr. Officer estimated accused's speed to be 200 km/hr. Accused stopped without incident.

Held: Conviction entered.

Although the officer was an experienced traffic officer, his estimate of a speed of 200 km/hr lacked the circumstantial guarantee of reliability necessary for criminal prosecutions. Accused's speed of travel found to be in the range of 170 km/hr. "Under certain circumstances, evidence of excessive speed, in itself, can constitute the offence of dangerous driving": *Richards* 174 CCC (3d) 154 (Ont CA); *Cowan* (2004) ABCA 397. Accused's excessive speed, within city limits, at 11:45 a.m., constituted a manner of driving markedly below the acceptable standard of care.

V. Russell - Defence Counsel

IMPAIRED DRIVING - 10(B) - REASONABLE DILIGENCE

R. v. Murnaghan - June 7, 2007 ABPC 149 per Daniel, PCJ:

Impaired driving trial. Alleged 10(b) breach. Upon arrest accused asserted her right to counsel. Accused used the phone at the detachment. A few minutes later accused told police that she only wanted to speak to her parents' lawyer, but because her parents were on vacation, they could not be reached and she did not know the lawyers name. Accused then given an additional 30 minutes in the phone room, but she did not use the phone. Breath demand refused.

Held: No s. 10(b) breach.

Police were not required to read a waiver to the accused. Reasonable for police to assume that accused had terminated her efforts to contact a lawyer. As per *Jones* (2005), 201 CCC (3d) 268 (Alta CA), the accused must prove on a balance of probabilities that she was reasonably diligent in exercising the 10(b) right. Only where reasonable diligence is shown does the *Prosper* waiver requirement arise.

R. Muenz - Defence Counsel

**SENTENCE - FRAUD -
BREACH OF TRUST - CSO**

R. v. Heffernan - June 7, 2007
ABPC 153 per Van de Veen, PCJ:

Accused convicted of defrauding Labour Ready Ltd. through a scheme involving the issuance of payroll cheques to fictitious employees. Amount of the fraud was in the range of \$37,000 to \$52,000. 57 year old accused with no record. His motivation was to pay suppliers and workmen in order to complete a work project.

Held: 12 month Conditional Sentence.

Aggravating factors included the degree of planning and deliberation, and that the scheme was relatively sophisticated. Positive pre-sentence report. Sentence included 3 months of house arrest followed by a curfew.

D. Chow - Defence Counsel

**TRIALS - PROCEDURE - RIGHT
TO PRESENT ARGUMENT**

R. v. Graham - May 10, 2007 ABCA
153 per Ritter, Martin, Rawlins, JA -
Trial Judge: Reilly, PCJ:

Crown appeal from acquittal on aggravated assault trial. At the end of the evidence the Crown sought an adjournment to get a transcript. Trial judge declined the adjournment request and went on to state that he was inclined to acquit as the complainant was "one of the most unbelievable witnesses that I have heard in my judicial career." Counsel had not yet argued the case.

Held: Appeal allowed, new trial.

"It is trite law and common ground that at trial parties have the right to present argument before judgment is pronounced. That principle was stated by this court in **R. v. Jahn** [1982] AJ No. 745 ... Failure to grant that opportunity is a fatal omission."

A. Sanders - Defence Counsel

**YOUTHS - CHARTER -
DETENTION - STATEMENTS**

R. v. L.M. - June 12, 2007 ABPC
150 per Lipton, PCJ:

Youth charged with offences including possession of cocaine. Accused approached by police in a shopping mall due to his suspicious behaviour. Police told accused that "we need to have a chat". Police then asked accused if he was dealing drugs, to which accused responded "yes". Charter rights then provided.

Held: Breach of ss. 8 and 10(b), and s. 146 YCJA. Statements excluded.

Accused was detained upon being stopped by police. Strict interpretation of s. 146 YCJA required as per **I(LR)** [1993] 2 SCCR 504. "The rights that accrue to young persons under young offender legislation are to be liberally construed and aggressively enforced": **L(DJG)** 2003 ABCA 198.

I. McNish - Defence Counsel

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