DAWSON STEVENS & SHAIGEC BARRISTERS

THE UPDATE

Issue #39 October 5, 2007

CHARTER - 7 - COSTS - FAILED PROSECUTION

R. v. Luipasco - September 11, 2007 ABPC 250 per Lefever, PCJ:

Accused charged with public intoxication. Disclosure application resulted in a hearing that revealed that there was no evidence that the "public was disturbed by any displays of intoxication." The Crown then invited the Court to dismiss the charges. Defence applied for costs.

Held: Application dismissed.

No division between Crown and police for the purposes of disclosure: ***McKay*** [2003] AJ No. 807 (QB). However, "the current application seeks recompense for legal costs incurred ... for mounting a successful defence." Nothing that the Crown had in their possession prior to trial could have given rise to the conclusion that there was no reasonable likelihood of conviction. Crown's conduct did not lack fairness or objectivity. Authorities reviewed.

T. Engel - Defence Counsel

CHARTER - 10(B) - DELAY IN AFFORDING OPPORTUNITY

R. v. Qureshi - August 20, 2007 ABPC 236 per Malin, PCJ:

Trial in relation to various firearms offences. Accused arrested while search warrant being executed. Accused detained for over 2 hours prior to being allowed an opportunity to call counsel. Police withheld that opportunity given stated concerns for police safety reasons and ensuring the preservation of evidence. Although search of the residence was ongoing, no statements taken.

Held: 10(b) breach, evidence not excluded.

No evidence that the delay in affording the 10(b) right was necessary, as per ***Strachan*** (1988), 46 CCC (3d) 479 (SCC). However, exclusion of evidence not warranted. No causal connection between the 10(b) breach and the discovery of evidence upon search of a residence. Trial fairness not adversely affected. Authorities reviewed.

S. Tarrabain, W. Raponi - Defence Counsel

CHARTER - 10(B) - STATEMENTS - TAINTING

R. v. Free - August 28, 2007 ABPC 240 per Creagh, PCJ:

Drug trial. Issue regarding admissibility of statements made to police. First statement made upon the stopping of the accused's vehicle found to be inadmissible. Issue as to whether two subsequent statements were tainted. The subsequent statements were made after the accused had spoken to counsel.

Held: Only the third statement admissible.

Fact based decision. Review of law regarding 10(b) and tainted statements reviewed. Factors to consider include: (1) amount of time between the two statements; (2) whether the same officer was involved in each interview; (3) whether there was contact with counsel; (4) does the subsequent statement refer to the earlier statement; (5) the nature of the statement: ***Veness*** [2007] AJ 492 (QB); ***Wittwer*** [2007] BCJ No. 948 (CA).

L. Trach, J. Chadi - Defence Counsel

IMPAIRED DRIVING - CHARTER - 10(A)

R. v. Perret September 12, 2007 ABPC 258 per Allen, PCJ:

Care or control trial. Alleged 10(a) breach. Accused required to walk from his vehicle to police cruiser, and the officer took the opportunity to observe the manner of walk. Defence argued that police ought to have warned the accused that he would be relying upon his observations of the walk in his impaired driving investigation.

Held: No 10(a) breach.

Only 2 minutes elapsed between the initial detention and the police advice regarding the reasons for the detention. The accused was immediately questioned about drinking. "He, along with any other motorist in Canada, would be aware of the police duty to investigate" impaired driving. Accordingly, as per ***Orbanski*** [2005] 2 SCR 3, the accused had in effect been informally advised of the reason for his detention.

P. Shipanoff - Defence Counsel

PROCEEDS OF CRIME - 462.38 CC - FORFEITURE - TEST

R. v. Pinnock - October 5, 2007 ABQB 602 per Ouellette, J:

Crown application for forfeiture of money pursuant to s. 462.38 CC -- alleged proceeds of crime. Issue: "Is it appropriate to make a preliminary finding pursuant to s. 468.38(2)(a) that the property is, beyond a reasonable doubt, proceeds of crime, and then proceed with giving notice pursuant o s. 462.41 to a person who appears to have a valid interest?"

Held: Notice must first be given.

"Once the judge has ruled that he is satisfied beyond a reasonable doubt that the property is proceeds of crime, he is functus from making a contrary order. It would be contradictory for a judge to be satisfied on the highest burden of proof ... that the property is proceeds of crime, yet subsequently be satisfied on a balance of probabilities that the same property is not proceeds of crime."

D. Slaferek - Defence Counsel

SENTENCE - THEFT - TRUST - $1800 WORTH OF LIQUOR

R. v. Weiss - October 5, 2007 ABPC 280 per Ogle, PCJ:

Accused participated in the theft of $1800 of liquor from a liquor store that the accused worked at. The accused's benefit from the theft was worth approximately $200. 19 year old accused with no record. Accused lost her job as a result of the theft. She confessed.

Held: 1 year probation.

Conditional discharge not appropriate given breach of trust. Mitigating factors included, youthfulness, confession and early guilty plea. Accordingly, jail sentence of any form unnecessary.

M. Walters - Defence Counsel

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