



THE UPDATE

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CHARTER - 11(B) - DELAY -18 MONTH DELAY - NO STAY

R. v. Greatrix - Nov. 19, 2007 ABPC 332 per Creagh, PCJ:

Impaired driving trial. *Askov* application. 18 month delay from date of charge to trial. First trial date was adjourned due to unavailability of Crown. 8 month delay before second trial date. Accused did not contribute to delay, and no waiver of 11(b) right.

Held: Stay application dismissed.

No actual or presumed prejudice. No real impairment of the right to liberty, as the accused was released on an appearance notice following arrest. No suggestion of impairment of the right to make full answer and defence. The 8 month delay between the two trial dates was not long enough to give rise to an inference of presumed prejudice as per *Morin* (1992), 71 CCC (3d) 1 (SCC).

C. Rice - Defence Counsel

GUILTY PLEAS - APPLICATION TO WITHDRAW PLEA

R. v. Denny - Nov. 22, 2007 ABQB 709 per Macklin, J:

Accused pled guilty to possession of cocaine for the purpose of trafficking. Detailed facts admitted in Court. Section 606(1.1) CC reviewed directly with accused by the Court. Sentencing was then adjourned. Defence counsel was then discharged, and an application made to withdraw the guilty plea.

Held: Application denied.

As per *Adgey* (1973), 13 CCC (3d) 177 (SCC), "valid grounds" did not exist to vacate the plea. Facts set out did not support an argument that the accused was not guilty. Allegation that original counsel's representation of a co-accused (who had previously pled guilty) created a conflict, rejected. *Kim* 2007 BCCA 25 distinguished, given that in *Kim* defence counsel was still representing a co-accused at the time of the impugned guilty plea, and in *Kim* there had been an allegation of a threat by that same co-accused.

D. Paull - Defence Counsel

IMPAIRED DRIVING - 258 CC - ALCOHOL STANDARD

R. v. Barry - Nov. 5, 2007 ABPC 312 per LeGrandeur, PCJ:

Impaired care or control trial. Issue as to whether Intoxilyzer technician had determined the device to be in proper working condition by means of an alcohol standard. Certificate of Analysis indicated that the alcohol standard was suitable for use in the approved instrument. However, the viva voce evidence of the technician was that the alcohol standard "is not handled by me at all" and that it was "somebody else's job" to ensure that it was an approved standard.

Held: Acquittal entered.

Presumption of accuracy as set out in s. 258(1)(g)(i) CC rebutted by the evidence to the contrary of the technician. "If the qualified technician states in the s. 258(1)(g) certificate the things required by that section to be proven, then the simple making of the statements in the certificate is of itself proof of the truth of the statements, unless there is evidence to the contrary": *Boymook* (1998) AJ No. 1251.

A. Zebak - Defence Counsel

**IMPAIRED DRIVING -
EVIDENCE TO CONTRARY**

R. v. Bhinder - Nov. 15, 2007
ABPC 327 per Johnson, PCJ:

Impaired driving trial. Evidence to the contrary. Defence expert tested accused's elimination rate twice (18.5 mg% and 19 mg%). Using the tested rates, the accused's blood-alcohol concentration was "close to zero" at the time of driving. Using the slowest possible average rate of 10 mg%, the alcohol concentration at the time of the first test would have been 87 mg%, and 75 mg% 26 minutes later at the time of the second test.

Held: Acquittal entered.

Accused's evidence regarding consumption accepted. Not a straddle case within the meaning of **MacDonald** 2006 ABCA 177. "I do not treat this as a 'straddle' because where the results of the two tests are different, the Code would treat the lowest concentration [ie 75 mg%] as being the operative one (s. 258(c))".

P. Kay - Defence Counsel

**SENTENCE - DRUGS - COCAINE
TRAFFICKING - 2 YEARS JAIL**

R. v. Lyver - Nov. 23, 2007 ABCA
369 per Paperny, O'Brien, Martin, JA
- T. Judge: Brown, PCJ:

Crown appeal of 2 years less one day conditional sentence imposed for cocaine trafficking. The sentence was to be served consecutive to a penitentiary sentence from a conviction in Newfoundland on a similar offence.

Held: Appeal allowed, 2 year jail sentence imposed.

"The jurisprudence is clear that a conditional sentence may be imposed to be served consecutively to another sentence, but only if the aggregate sentence is less than two years." (See: **Ploumis** (2000), 150 CCC (3d) 424 (Ont CA); **MacIver** (2000) MBCA 82). Court of Appeal divided on the question of the applicability of s. 743.1 CC. "We will leave that issue to be decided on another day."

J. Ruttan - Defence Counsel

**SENTENCE - THEFT FROM
EMPLOYER - DISCHARGE**

R. v. Van Hees - Nov. 28, 2007
ABPC 333 per Wheatley, PCJ:

Accused pled guilty to stealing \$1500 from her employer. Accused worked as an inventory control manager. No record. Early guilty plea. Accused in a position to pay full restitution. Psychiatric report confirmed that accused had "considerable family difficulty" at the time of the offence. Conditional discharge application.

Held: Conditional discharge granted.

Hust 2004 ABPC 128 followed. As per **Hust** discharge in part appropriate as "the offence is out of character for this accused, and the accused is in the midst of some kind of mental or emotional turmoil or some unusual disturbance in life's routine." Authorities reviewed.

D. Knisely - Defence Counsel

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