



# THE UPDATE

Issue #6 February 15, 2008

## CHARTER - 8 - SEARCH WARRANT - RESIDENCE

*R. v. Caissey* - Dec. 5, 2007 ABCA 380 per McFadyen, Picard, Martin, JA - T. Judge: LeReverend, PCJ:

Appeal from conviction on drug charges. Search of a private dwelling. Issue as to whether the search warrant could have issued. Information supporting the warrant provided by a confidential informant. Police officer concluded his affidavit by stating: "every piece of information [the informant] has provided has been verified as true and accurate." In fact, not all of the details had been corroborated, including the fact that marijuana could be found in the residence.

### **Held: Appeal dismissed.**

No attempt to deliberately misled the authorizing judge. Police officer guilty of poor draftsmanship. Erroneous information excised as per *Araujo* [2000] 2 SCR 992. Information provided by informant was compelling, recent, and based on personal knowledge: *Debot*. (1986), 30 CCC (3d) 207 (Ont CA). Martin JA dissented.

**D. Royer** - Defence Counsel

## CHARTER - 8 - CONSENT SEARCH - DNA SAMPLE

*R. v. Karras* - Nov. 27, 2007 ABCA 362 per Pucard, Ritter, O'Brien, JA - T. Judge: Marceau, J:

Appeal from first degree murder conviction. Male DNA found on deceased's body. Police approached men in the community, asking for DNA samples. Police requested that accused attend at detachment. Accused advised that he could contact a lawyer and that he did not have to provide a sample. Accused was reluctant to provide DNA. "The constable persisted in requesting a sample, suggesting he would continue to do so until Karas consented." Sample provided and DNA matched.

### **Held: Appeal dismissed.**

Consent means that the accused was aware of his choices, and possessed sufficient information to make a meaningful choice: *Borden* [1994] 3 SCR 145. Trial judge found no threat and no quid pro quo. Trial judge properly considered the issue of voluntariness. As per *Oickle* [2000] 2 SCR 3, "a finding regarding voluntariness is essentially a factual one, and should only be overturned for some palpable and overriding error."

**C. Davison** - Defence Counsel

## DNA - DATABANK - ASSAULT WITH A WEAPON - 487.051 CC

*R. v. Goodstriker* - Dec. 5, 2007 ABPC 334 per LeGrandeur, PCJ:

Accused convicted of assault with a weapon and uttering threats. Conditional discharge imposed. Primary designated offence. Crown sought a DNA sample. Assault described as a "minimal infraction."

### **Held: Application denied.**

"Although the public interest is presumed to outweigh privacy interests in the case of primary designated offences, the exception in s. 487.051(2) recognizes that this is a rebuttable presumption": *C.(R.)* (2006), 32 CR (6<sup>th</sup>) 201 (SCC). 45 year old accused with a very dated minor criminal record. No real risk if recidivist tendencies. Impact upon privacy and security of the person would be grossly disproportionate to any public interest served by a DNA order. "If Parliament intended the public interest ... to outweigh the impact on the offender's privacy and security of the person, then the legislation would have left no discretion to the Courts."

**G. White** - Defence Counsel

**IMPAIRED DRIVING -  
SCREENING DEMAND - TEST**

*R. v. Nieradka* - Dec. 7, 2007  
ABPC 340 per Daniel, PCJ:

Impaired driving trial. Checkstop. Strong smell of alcohol on accused's breath and accused stated that he had consumed one bottle of beer an hour earlier. Screening demand did not contain the word "forthwith", but the officer stated that his standard practice was to tell the driver that the test would be done quickly. Issue regarding lawfulness of screening demand.

**Held: Screening demand lawful.**

"The admission of consumption of alcohol, absent of all other indicia of alcohol in the body, is sufficient to ground a reasonable suspicion." No requirement in law for the officer to cross-examine the accused regarding alcohol consumption. Use of the word "forthwith" in the demand is not required if the circumstances conveyed the need for immediate compliance: *Cardinal* (1993), 19 WCB (2d) 430 (ABCA).

**I. McKay** - Defence Counsel

**SENTENCE - EXTORTION AND  
CONFINEMENT - CSO**

*R. v. Rode* - Dec. 5, 2007 ABCA 393  
per Watson, Hillier, Gill, JA - T.  
Judge: Watson, PCJ:

Crown appeal from 2 years less 1 day conditional sentence imposed upon youthful offenders who pled guilty to offences including: extortion, assault causing and confinement. Drug debt collection. 17 year old victim. Victim beaten a number of times and was ultimately released upon arranging to pay the \$500 debt.

**Held: Appeal dismissed.**

"General deterrence against vigilante actions in drug debt enforcement does require strong censure from the court, including actual incarceration in most cases. We may not have reached the same conclusion on these facts but a term of 2 years less a day is within the low end of the range available." Watson JA dissented.

**M. Bloos, L. Stevens** -  
Defence Counsel

**SEX OFFENDER REGISTRY -  
EXEMPTION - 490.23(2) CC**

*R. v. C.C.* - Nov. 30, 2007 ABPC  
337 per Allen, PCJ:

Accused originally found NCR in relation to offences including sexual assault with a weapon. Serious offences. Victim was accused's wife. Accused suffered from bipolar affective disorder. Accused currently subject to a conditional discharge imposed by the AB Board of Review. Crown application to have accused subject to SOIRA for a 20 year period.

**Held: Exemption granted.**

Impact on offender would be grossly disproportionate to the public interest: *Redhead* (2006) 206 206 CCC (3d) 315 (AB CA). "The Board of Review has been taking positive steps to rehabilitate Mr. CC and reintegrate him into society over a long period of supervision. The imposition of a twenty year reporting scheme does not enhance his reintegration and rehabilitation."

**K. Teskey** - Defence Counsel

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