



THE UPDATE

Issue #9 March 7, 2008

CHARTER - 7 - LATE DISCLOSURE - REMEDY

R. v. Bjelland - Dec. 21, 2007
ABCA 425 per Hunt, Martin,
Brooker JA - T. Judge: Langston J:

Crown appeal from acquittal on drug related charges. "At issue is the trial judge's decision, a few days before the start of the trial, to exclude the evidence of two potentially key witnesses because the Crown had made unjustifiably late disclosure."

Held: Appeal allowed, new trial.

Trial judge characterized the late disclosure as misfeasance rather than malfeasance. Trial judge did not err in finding that the right to make full answer and defence had been compromised. However, assessment of trial fairness must be made from the point of view of the community and complainant, not just the accused. Relevant evidence should generally form part of the trial process. The exclusion order was an "overly radical remedy." A disclosure order and adjournment can often best balance the interests at stake. Brooker, J dissented.

C. Hooker - Defence Counsel

CHARTER - 10(B) & 24(2) - REASONABLE OPPORTUNITY

R. v. Thomas - Dec. 28, 2007 ABPC
355 per Creagh, PCJ:

Trial on charges including possession of cocaine and assaulting a police officer. Accused became combative upon arrest and then allegedly swallowed cocaine. Accused not advised of 10(b) rights for 44 minutes following arrest.

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

No evidence gathered during the 44 minute delay while the accused remained in the police vehicle. Defence argument that evidence of the original assault ought to be excluded rejected. Evidence of the assault was in no way obtained in a manner that infringed or denied the right to counsel. After accused refused medical assistance he said to police: "I'm sorry I hit you." Although 10(b) right not yet afforded to accused, evidence admissible as the statement was not elicited: *Gitsadig* (2003), 327 AR 107 (CA).

R. Morin - Defence Counsel

FAILURE TO APPEAR - PROOF - COURT RECORDS

R. v. Sinclair - Dec. 21, 2007
ABPC 353 per Bridges, PCJ:

Accused charged with failure to appear in court. Failure to appear charge dealt with at same time as substantive charge (an assault). Crown relied upon the Information and endorsements re: assault charge as proof of the failure to appear. No notice given to defence. Issue as to "whether or not the Court can take judicial notice of its own original record or whether section 145(9) and (11) of the Criminal Code require that the Crown provide the defence with seven days notice."

Held: Conviction entered.

R. v. Epsilon (1976) Alta. SC relied upon. Original court records are prima facie evidence of their contents. The records formed part of the trial. The reasonable notice provisions (145(9) CC) may have had application if the Crown had sought to bring forward documents from another court or jurisdiction.

D. Royer - Defence Counsel

**SENTENCE - IMPAIRED
CAUSING HARM - 1 YEAR**

R. v. Veitch - Jan 10, 2008 ABPC
4 per Malin, PCJ:

40 year old accused with no record pled guilty to impaired and dangerous driving causing bodily harm. Upon leaving an Edmonton bar the accused was asked by the manager not to drive. The accused protested and got into his vehicle and attempted to flee. The manager's arm got stuck in the driver's window and he was dragged over a short distance. Injuries included cracked ribs, severe abrasions and multiple lacerations. Accused described as being "totally impaired."

Held: 1 year jail.

"Impaired driving differs from most crimes. Most who commit this crime ... come from a respectable milieu": **Rhyason** 2007 ABCA 119. Accused knew that the complainant was trapped. Rather than offering assistance, accused simply rolled down his window, and then after the complainant fell to the ground he continued on his way. Denunciation and deterrence paramount. Authorities reviewed.

A. Pringle - Defence Counsel

**SEVERANCE - CO-ACCUSED -
APPLICATION DENIED - 591 CC**

R. v. Agarwal - Dec. 20, 2007 ABQB
775 per Bielby, J:

Accused charged with mortgage fraud. Co-accused charged with 60 counts, while accused facing only 19 counts. Evidence against accused seen as weaker than against co-accused, with the accused's participation occurring during only 6 weeks of the 18 month period spanned by the Indictment. Application for severance.

Held: Application denied.

"The accused was unable to discharge the onus on him to show that the interests of justice, assessed by balancing the interests of all stakeholders in the administration of justice, required severance. He had not discharged the presumption of a joint trial arising when criminal charges are laid in circumstances of a joint enterprise. In particular, he did not have a defence which was antagonistic to the defence of either of his remaining co-accused; any potential prejudice which might arise against him from the strength of the Crown's case against his co-accused could be met with adequate instructions to the jury."

B. Beresh - Defence Counsel

**YOUTHS - SENTENCE -
SECOND DEGREE MURDER**

R. v. T.W.T. - Dec. 14, 2007 ABPC
346 per Goss, PCJ:

Accused pled guilty to second degree murder. Road rage argument between two vehicles occupied by young people. Victim got out of his car, at which time he was run down by accused. Accused was 15 at the time of the offence. Unstable childhood, history of drug and alcohol use, diagnosed with ADHD and an extensive criminal record.

Held: 7 year sentence (4 years secure custody).

Secure custody sentence reduced on a 1:1 basis for time spent in pre-trial custody. Maxim that maximum sentence applies to the worst offence / offender having no application in youth court. "The maximum available penalty under the YOA must be seen to be somewhat artificially truncated in view of the need to preserve the jurisdiction of the youth court." Authorities reviewed.

W. Raponi - Defence Counsel

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