



THE UPDATE

Issue #10 June 20, 2008

CHARTER - 10(A) - REASONS FOR DETENTION - TEST

R. v. Carrier - Apr. 2, 2008 ABCA 134 per Hunt, JA:

Application for leave to appeal from impaired driving conviction. 10(a) issue. "It is suggested that a police officer must specifically inform a person that he is being investigated for a drinking and driving offence, rather than being able to rely on context to determine whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest."

Held: Leave denied.

Evans [1991] 1 SCR 869 remains good law. The law has not been modified by *Mann* 2004 SCC 52 or *Orbanski* 2005 SCC 37. The accused was stopped while driving, there was an odour of alcohol in the vehicle, and the accused was asked about drinking before having to exit his car. In all of the circumstances the reason for detention would have been "perfectly clear to the accused."

M. Gottlieb - Defence Counsel

CHARTER - 10(B) - CHOICE OF COUNSEL - DUTY COUNSEL

R. v. Willier - Apr. 3, 2008 ABCA 126 per Ritter, Slatter, Bielby, JA - T. Judge: Gill, J:

Appeal from acquittal on charge of murder. Accused's statement excluded on the basis of a 10(b) breach. 10(b) rights asserted upon arrest. Accused called duty counsel and had a 3 minute conversation. The next morning the accused again requested to speak to counsel, and named a particular lawyer. Accused was unable to reach that lawyer (one call made). Accused then had a 1 minute conversation with duty counsel at the 1-866 #.

Held: Appeal allowed, new trial.

Accused never expressed dissatisfaction with advice received. No evidence that proper advice could not have been communicated by duty counsel in less than 4 minutes. Police did not discourage accused from speaking with counsel of choice. No evidence that the inability to speak with counsel of choice prejudiced accused. There is a "strong presumption and [duty] counsel's conduct fell within the wide range of reasonable professional assistance": *GDB* [2000] 1 SCR 520.

L. Stevens - Defence Counsel

PRELIMINARY INQUIRIES - DUTY TO CALL WITNESSES

R. v. Big Sorrel Horse - Apr. 9, 2008 ABPC 108 per Jacobson, PCJ:

Preliminary inquiry on charges including possession of stolen property. Form A filed by defence. No pre-preliminary inquiry conference held. Crown took the position that they were not required to call all of the witnesses listed on the Form A.

Held: Crown not required to call all witnesses listed on a Form A.

Crown has a full discretion regarding what witnesses are to be called, and the Court will not interfere in the absence of evidence of an oblique motive: *Lemay* [1952] 1 S.C.R. 232. However, Crown is obligated to advise defence which witnesses listed on a Form A are not being called. Defence may then decide whether to issue subpoenas or request a s. 536.4 CC focus hearing.

I. Hess - Defence Counsel

**SENTENCE - ARSON
CAUSING HARM - CSO**

R. v. Sharpe - Apr. 4, 2008 ABPC
100 per Brown, PCJ:

Accused pled guilty to arson causing bodily harm. Accused set fire to a mattress in the complainant's bedroom. Accused and complainant were common law partners, and had been arguing after a day of drinking. Serious injury caused, including burns to arms and back that required skin grafts. \$100,000 damage to the house. 52 year old accused, no record, took immediate responsibility, cooperated with police, positive PSR.

Held: 20 month CSO and 3 years probation.

Appropriate range of sentence, given accused's low level of moral blameworthiness, was 20-24 months: CSO appropriate given accused's circumstances. Authorities reviewed.

C. White, K. Beyak -
Defence Counsel

**SENTENCE - ASSAULT -
PRISON GUARD - 2 YEARS**

R. v. Daviau - Apr. 9, 2008 ABPC
103 per Dunnigan, PCJ:

Two accused pled guilty to assault upon a prison guard. Guard was jumped from behind. Weapons used. Guard left lying on the floor bleeding.

Held: 2 years jail.

Assaults committed while incarcerated, whether against fellow prisoners or guards, should attract longer than normal sentences.

Deterrence of other inmates from engaging in such behaviour is the paramount consideration. "The overriding impetus in sentencing is the maintenance of order in penal institutions." Aggravating factors included: two on one attack, use of weapons, and the fact that it was not an impulsive attack. "Both corrections officers and inmates must know for a certainty that assault by one upon the other will be swiftly and severely dealt with": *Brighteyes* [1984] AJ No. 108 (CA).

T. Roulston, H. Silver -
Defence Counsel

**SENTENCE - THEFT -
BREACH OF TRUST - 2 YEARS**

R. v. Conners - Apr. 3, 2008 ABPC
99 per Brown, PCJ:

Accused pled guilty to stealing from two employers. Total thefts exceeded \$45,000. 56 year old accused with a related record, including four earlier instances of trust thefts. Psychological assessment put accused at a moderate to high risk to re-offend.

Held: 2 years jail.

Denunciation and deterrence paramount for a "near incorrigible offender." Aggravating factors included: amount stolen, length of time over which offences occurred, lack of restitution and a "continued deceptive conduct about the explanation for her behaviour."

C. White, K. Beyak -
Defence Counsel

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