



# THE UPDATE

Issue #11 June 27, 2008

## CHARTER - 2 - PUBLICATION BANS - 686(8) CC - TEST

*R. v. McClenaghan* - Apr 14, 2008 ABCA 141 per Hunt, Costigan, Watson, JA:

Accused originally found not criminally responsible following a jury trial on a charge of murder. New trial ordered on appeal. Pursuant to s. 686(8) CC, Court of Appeal ordered a provisional publication ban on the written reasons for judgment. Application by media to vacate the ban.

### Held: Publication ban vacated.

Balancing process as set out in the *Dagenais / Mentuck* test did not show that a ban was necessary in order to prevent a real risk to the fairness of the re-trial. Jury selection process, including challenges for cause, ought to be effective to disqualify any prospective juror who may show bias. "Moreover, members of a jury – instructed that their oaths bind them to decide the case solely on the evidence before them ... – should be a sufficient safeguard for a fair trial.

**M. Duckett** - Defence Counsel

## EVIDENCE - CO-ACCUSED'S STATEMENT - 686(1)(b)(iii) CC

*R. v. Losing* - Apr 11, 2008 ABCA 140 per Cote, McFadyen, Watson, JA - T Judge: Paul, PCJ:

Appeal from conviction on assault causing bodily harm charge. Trial judge used the co-accused's statement as evidence against the accused at trial. Issue as to whether error curable by application of s. 686(1)(b)(iii) CC.

### Held: Appeal allowed, new trial.

"It is well established that the content of a statement by one accused at a trial is not admissible against another co-accused, even at the same trial." Curative proviso in 686 CC not applicable. Onus on Crown to satisfy the court that the verdict would necessarily have been the same. As per *S(PL)* [1991] 1 SCR 909, "it was not possible to assess the worth of the residual evidence after the improperly adduced evidence has been extracted from the record." Authorities reviewed.

**K. Teskey** - Defence Counsel

## IMPAIRED DRIVING - 254(2) CC - "FORTHWITH"

*R. v. Martens* - Apr 9, 2008 ABQB 223 per Macklin, J:

Crown appeal from acquittal on impaired driving related charges. 13 minute delay between formulation of the suspicion and the reading of the screening demand. Sample provided quickly after the demand was read. Issue: does s. 254(2) require the demand be made forthwith regardless of when the sample is taken?

### Held: Appeal allowed, new trial.

"It is the total period of delay which is of concern. As long as the test can be administered 'forthwith' after the peace officer reasonably comes to suspect that the driver has alcohol in his body, it does not matter 'whether the officer postpones making the demand or postpones administering the test after having made the demand' (*Dewald* (1994), 92 CCC (3d) 160 at para.21). The distinction is one without a difference in terms of its impact on the accused." Authorities reviewed.

**R. Prithipaul** - Defence Counsel

**SENTENCE - AGGRAVATED  
ASSAULT - 4 YEARS JAIL**

**R. v. Gunoff** - Apr 10, 2008 ABPC 104 per Grieve, PCJ:

25 year old accused pled guilty to aggravated assault. Group attack upon a helpless victim. Last kick was delivered by accused to victims head, and a audible crack was heard. Severe injuries, including “significant mental deficits.” The victim “will need supervised care for the rest of his life.” Joint submission for 4 years jail.

**Held: 4 years jail.**

Sentence reduced by 1 year given pre-trial custody time. **Gagliardi** (2000) 255 AR 346 (CA) and **Ervin** (2003) ABCA 179 “sent a clear direction to trial judges that where there is a brutal attack by a group on a helpless individual who is badly injured, there is a large measure of moral culpability because the risk of foreseeable harm in such action.” Sentence would have been longer but for joint submission.

**M. Stephensen** - Defence Counsel

**SENTENCE - IMPAIRED  
CAUSING DEATH - CSO**

**R. v. Carr** - Apr 10, 2008 ABQB 228 per Foster, J:

20 year old accused with no record pled guilty to charges of impaired and dangerous driving causing death (1 victim) and impaired and dangerous driving causing bodily harm (2 victims). Single vehicle rollover. Victims were close friends of accused. Accused travelling 100 km/hr or more in a 70 km zone when he lost control. 105 mg%. Positive PSR.

**Held: 2 years less 1 day CSO plus 1 year probation.**

Thorough review of sentencing case law re: impaired and dangerous driving causing death. **Rhyason** 2007 ABCA 119 distinguished. The accused in **Rhyason** had a previous impaired driving conviction and breached release conditions. Sentence included 15 months of house arrest.

**L. Goddard** - Defence Counsel

**SEXUAL EXPLOITATION - 172  
CC - LURING - ELEMENTS**

**R. v. Legare** - Apr 10, 2008 ABCA 138 per McFadyen, Martin, Watson, JA - T Judge: Agrios, J:

Crown appeal from acquittal on charges of invitation to sexual touching (152 CC) and internet luring (172 CC). Appeal re: 152 CC dismissed on the facts. Regarding the luring charge, the adult accused engaged in sexually explicit internet chat with a 12 year old girl in Ontario, including a request that she mail her underwear to him. Accused never intended to meet with the girl, nor did he make any efforts to meet with her.

**Held: Appeal allowed, new trial.**

“Parliament under s. 172.1(1)(c) has enacted an offence of communication, and not of physical contact, and ... its relationship with s. 152 does not convert it to an offence where intent to achieve physical contact between the communicator and specific recipient is an essential ingredient.”  
Authorities reviewed.

**L. Stevens, G. Johnson** -  
Defence Counsel

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