



THE UPDATE

Issue #16 September 5, 2008

APPREHENSION OF BIAS - FACTORS TO CONSIDER

R. v. Kaminsky - June 18, 2008 ABCA 230 per Hunt, O'Brien, Macleod, JA - T Judge: Lamoureux, PCJ:

Appeal from conviction on drug related charges. Issue being whether comments made by trial judge gave rise to a reasonable apprehension of bias. Trial judge questioned the Crown expert about the general problem with drug trafficking in downtown Calgary, asking (in part): "How come if it is such a problem we are not stopping it?" After entering convictions, trial judge stated (in part): "I don't want to sentence him today because I'm upset."

Held: Appeal allowed, new trial.

"The trial judge fell short of conducting a dispassionate and deliberate investigation into the facts ... Her interventions and comments ... would lead a reasonable and informed observer to conclude that she was neither neutral nor impartial when considering the activities alleged of the appellant in this area of the city."

M. Bates - Defence Counsel

CHARTER - TIMING OF CHARTER NOTICE

R. v. Clark - June 17, 2008 ABQB 368 per Lee, J:

Robbery trial. Pre-trial conference justice set a deadline for filing of Charter notice by defence counsel. Notice filed seven days late. Crown application to strike Charter motion due to late filing.

Held: Application denied.

Charter notice was filed more than 14 days before trial as required by s. 1(2) *Constitutional Notice Reg.* As per *MLK* 2004 ABQB 734, a trial judge has jurisdiction to proceed with motions even where deadlines set at a pre-trial conference have been missed. Discretion exercised in favour of allowing Charter application.

R. Morin - Defence Counsel

EVIDENCE - CHARACTER - CROSS-EXAMINATION

R. v. Towpich - June 25, 2008 ABQB 382 per Moen, J:

Trial on charges including assault police officer. Defence alleging excessive force used by police, and that accused acted in self-defence. Defence sought to cross-examine complainant, and call four witnesses, who claimed that they had also been assaulted by the same officer.

Held: Application to call character evidence denied.

"To permit the defence to enter evidence of the four witnesses ... will distract and probably confuse the jury ... The jury would have to consider each of the cases put before them by the defence separately and determine on a balance of probabilities if, in fact, the constable used excessive force in each of those cases." No prejudice to accused. Accused able to advance self-defence in absence of the calling of the independent evidence.

L. Trach - Defence Counsel

IMPAIRED DRIVING - .08 - EVIDENCE TO CONTRARY

R. v. Hughes - June 4, 2008 ABQB 336 per Wilson, J:

Crown appeal from acquittal on over .08 charge. Accused blew 140 mg%. Evidence to the contrary. Expert tested accused's elimination rate to be 18.5 %. Given that elimination rate, probable blood-alcohol concentration was 62 mg%. However, employing a range of possible elimination rates of 10-20 mg%, accused's blood-alcohol concentration would have been between 53 and 109 mg%.

Held: Appeal allowed, new trial.

As per *Gibson* 2008 SCC 16, the trial judge erred in admitting Dr. Malicky's straddle evidence. In the alternative, if the evidence was admissible, it ought not to have been afforded weight. Given the majority judgement of Charron J., "individualized testing evidence is valueless."

T. Foster - Defence Counsel

JURIES - CHARGE - INCONSISTENT EVIDENCE

R. v. Janvier - June 11, 2008 ABCA 223 per Costigan, Martin, Watson, JA - T Judge: Hawco, J:

Defence appeal from murder conviction. Jury trial. Primary issue concerning trial judge's charge to the jury regarding numerous witnesses who had provided inconsistent versions under oath. Charge included that "inconsistencies can easily and innocently occur."

Held: Appeal allowed, new trial.

"There was no guidance about the effect of inconsistency under oath on crucial evidence. Inconsistency is not routine when the inconsistency is between present testimony and prior testimony or between present testimony and prior formalized statements, where the witness should have understood the importance of telling the truth on both occasions." Authorities reviewed.

L. Stevens - Defence Counsel

SENTENCE - DANGEROUS OFFENDER - TEST

R. v. Desjarlais - June 20, 2008 ABQB 365 per Bielby, J:

Dangerous offender application. Accused convicted of offences including aggravated assault and kidnapping.

Held: Application denied, long-term offender designation made.

Although accused had over 60 prior convictions, only 7 involved crimes of violence. Evidence did not establish a pattern of repetitive behaviour or persistent aggressive behaviour as required by s. 753(1)(a) CC. "Had the Crown otherwise met the criteria for a dangerous offender, the Court would nonetheless have exercised its residual discretion to substitute a designation of long-term offender given the comparatively minor nature of the violent conduct in which this accused has engaged in the past."

K. Teskey - Defence Counsel

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