



THE UPDATE

Issue #19 September 26, 2008

CHARTER - 7- DISCLOSURE - POLICE DISCIPLINARY FILE

R. v. Hoeving - August 7, 2008 ABQB 479 per Burrows, J:

Trial on charges including resisting arrest. Disclosure application regarding police disciplinary records from previous allegations of excessive force made against the arresting officer. Issue as to whether the officer had a privacy interest in the records.

Held: Application denied.

A privacy interest exists in relation to all discipline process materials created where a complaint is disposed of prior to a hearing. Where the complaint progresses to a hearing, the privacy interest depends upon whether the hearing was private or public. In the present case, there was no hearing in any of the disciplinary files concerning the arresting officer. The privacy interest not outweighed by right to make full answer and defence.

T. Engel - Defence Counsel

CHARTER - 24(2) - SEARCH OF A HOME - DRUGS EXCLUDED

R. v. Huynh - July 7, 2008 ABQB 415 per Macklin, J:

Trial on drug related charges. Search warrant executed at accused's residence. Statements taken from accused found to violate 10(b). Statements excised from search warrant information. Section 8 violation. Issue regarding exclusion of drugs and stolen property.

Held: Evidence excluded.

Seizure of real evidence not rendering the trial unfair. Other evidence regarding the accused's place of residence would have been available to police. However, the questioning of the accused in violation of 10(b) rights was flagrant and there was no urgency in obtaining confirmation as to her primary residence. A search of a person's home is obtrusive. "The fact the information was easily obtainable otherwise and the search could have been conducted legally renders the violation even more egregious." Evidence excluded notwithstanding that it was essential to proof of the Crown's case.

D. Sprake, M. Danyluik -
Defence Counsel

IMPAIRED DRIVING - 258 CC - AS SOON AS PRACTICABLE

R. v. Smarzewski - August 7, 2008 ABPC 220 per Barley, PCJ:

Impaired driving trial. Checkstop. Accused failed a screening test and was arrested. Checkstop bus was not yet present. The accused was taken to her vehicle to obtain documents and for the officer to arrange for the vehicle's removal, however, there was no evidence as to how long this took. Approximate 15 minutes of unexplained delay between arrest and the taking of breath samples.

Held: Samples not taken as soon as practicable.

"I appreciate that the term 'as soon as practicable' means 'within a reasonable time'. *R. v. Squires* (2002), 166 CCC (3d) 65. This allows the officer to deal with other necessary police issues. However, there must be evidence as to what did in fact cause the delay from 10:05 pm to 10:20 pm."

J. Virk - Defence Counsel

POLICE - ARREST POWERS - FEENEY WARRANT

R. v. Ewatski - July 8, 2008 ABPC 200 per Myers, PCJ:

Three police officers charged with assault. Police were executing outstanding warrants at a private residence. Police believed that the subject of the warrants opened the door, but then retreated inside pretending to be someone else. Police then entered to the kitchen, where they were instructed by the owner (a third party) to leave. Police pushed the home owner out of the way, who responded with force.

Held: Two officers convicted, one acquitted.

Police became trespassers upon being told by the owner to leave. Homeowner was entitled to use reasonable force. Given that the warrant arrest did not occur at the doorway of the home, a *Feeney* warrant was required for the police to have lawfully entered the residence in order to further pursue the arrest.

K. MacDonald, L. Stevens, M. Duckett - Defence Counsel

SENTENCE - ARSON & MANSLAUGHTER - 20 YEARS

R. v. Ellahib - August 13, 2008 ABCA 281 per Rowbotham, Kent, Nation JA - T Judge: Hughes, J:

Defence appeal from 20 year sentence imposed in relation to arson causing bodily harm and two counts of manslaughter. Accused arranged for the firebombing of a home. Two young children were killed and their mother burned. The firebombing was in retaliation for a feud. Accused found to be the instigator who then hired two others to commit the crime. Co-accused received 15 year sentences.

Held: Appeal dismissed.

As the instigator, the accused could expect a more severe sentence. “The range for manslaughter is broad and covers a broad range of circumstances.” Sentencing judge did not err in finding that the accused’s moral culpability was at the highest end of the range.

J. Ruttan - Defence Counsel

SENTENCE - SEXUAL ASSAULT - CHILD VICTIM - 18 MONTHS

R. v. S.P.C. - August 12, 2008 ABCA 280 per Rowbotham, Kent, Nation, JA - T Judge: Schriar, PCJ:

Crown appeal from 9 month sentence imposed following accused’s guilty plea to sexual assault. 7 year old victim. Accused was friends with victim’s mother. Digital penetration.

Held: Appeal allowed.

“It is not necessary for us to characterize this offence as ‘major’ or ‘serious’, as this sentence is demonstrably unfit on any characterization. The starting point for a sexual assault of a child by a person in a position of trust is four years ... *R. v. Watson* (1994), 157 AR 80 (CA), which confirmed that digital penetration is a serious violation of the integrity of the victim and within the four year guideline range.”

A. Sanders - Defence Counsel

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