



# THE UPDATE

Issue #22 October 31, 2008

## CHARTER - 7 & 10(B) - CHOICE OF TRIAL COUNSEL

*R. v. Karmis* - August 25, 2008 ABQB 525 per MacLeod, J:

Appeal from pre-trial order disqualifying defence counsel. Assault causing trial. Incident took place at a Christmas party attended by defence counsel, although defence counsel was not a witness to the alleged assault. Crown not intending to call defence counsel.

**Held: Section 24(1) remedy granted, accused entitled to be represented by counsel of choice.**

The decision to remove counsel is interlocutory and therefore not subject to appeal under ss. 813 or 830 CC. However, the disqualification order violated the accused's right to choice of counsel under ss. 7 and 10(b). A disqualification order requires "very compelling reasons": *McCallen* [1999] OJ No. 202 (CA). The Crown must establish a realistic risk that a conflict will arise. "The mere fact that counsel for the accused has direct knowledge that might possibly become relevant in the course of the trial is not sufficient." Authorities reviewed.

**M. Bloos** - Defence Counsel

## CHARTER - 7 - RIGHT TO SILENCE - ACCIDENT REPORT

*R. v. Lynch* - August 19, 2008 ABQB 506 per Kent, J:

Public mischief trial. Accused was the registered owner of an abandoned vehicle that had hit a light standard. Accused was contacted by police and compelled to provide a collision report. Accused stated that the vehicle was stolen. Further investigation led to an additional interview of the accused and a second accident report wherein the accused admitted that he had lied. Trial judge excluded each of the statements on the basis of a breach of s. 7. Crown appeal from acquittal.

**Held: Appeal dismissed.**

Trial judge erred in excluding the first statement. The first statement constituted the actus reus of the mischief charge, and therefore the reasoning in *White* [1999] 2 SCR 417 was not applicable. However, the subsequent statements (wherein the lie was admitted) were the product of a statutory duty to report pursuant to s. 71(3) TSA, and the use of that evidence to incriminate violated s. 7.

**M. Bates** - Defence Counsel

## CHARTER - 8 - SEARCH - MARIHUANA ODOUR

*R. v. Evers* - September 26, 2008 ABQB 592 per Burroughs, J:

Trial on charges of possession of psilocybin and marihuana for the purpose of trafficking. Speed trap vehicle stop. Odour of raw marihuana noted by police. Accused was arrested and a vehicle search resulted in the discovery of drugs.

**Held: Section 8 violated, evidence not excluded.**

The initial arrest was for possession of marihuana – a summary conviction offence. Accordingly, s. 495(1)(b) CC applied, allowing for arrest only where the police find a person committing the offence. Further, expert evidence established that the smell of marihuana can persist for 3-5 days after the drug has been removed from a location. The case law does not say "that the smell of fresh marihuana necessarily indicates the presence of marihuana." However, police acted in good faith, the evidence seized did not affect trial fairness and the charges were serious.

In Person

**CHARTER - 10(B) -  
INFORMATION REQUIRED**

*R. v. Marston* - August 20, 2008  
ABCA 289 per Watson, JA:

Application for leave to appeal from conviction under s. 253(b). Issue regarding compliance with informational component of 10(b). Arresting officer did not have the 10(b) card with him in court that he had read to the accused, and was not prepared to rely on his memory as to what he told the accused in this regard. However, the evidence established that full access to the right to counsel was provided at the detachment, and that the accused did in fact speak to a lawyer.

**Held: Leave denied.**

“Through the arresting officer’s words and actions, the Appellant received information about free duty counsel, immediate advice, and advice from a lawyer of his choice.” The onus on the accused to prove Charter breach had not been discharged. “One does not speculate about Charter violations.”

**S. Tarrabain** - Defence Counsel

**LEAVING AN ACCIDENT  
SCENE - 252 CC - TEST**

*R. v. McColl* - August 18, 2008  
ABCA 287 per Conrad, Hunt, Park,  
JA - T. Judge: Hogan, PCJ:

Appeal from acquittal on charge of leaving the scene of an accident, contrary to s. 252 CC. Single vehicle accident resulting in injuries to all of the occupants including the accused. Trial judge found that 252 (1)(a) did not apply to the accused because it was a single vehicle accident.

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

“Parliament intended to include single vehicle accidents when a passenger is injured and needs medical assistance. Use of the term ‘another person’ [in 252(1)(a)] includes passengers in the same vehicle as the accused driver. This conclusion is bolstered by the clear language in subsection 1.2 and by other cases which have interpreted the provision contextually.” Conrad, JA dissented. Authorities reviewed.

**SENTENCE - MANSLAUGHTER  
- SHOOTING - 12 YEARS**

*R. v. Wharry* - August 26, 2008  
ABCA 293 per Watson, Clackson,  
Ross, JA - T. Judge: Greckol, J:

Defence appeal from 12 year manslaughter sentence, plus 2 years consecutive for possession of a restricted firearm. From his vehicle the accused fired a handgun into a group of young people after a hostile verbal exchange. 18 year old girl shot in the head.

**Held: 12 year sentence upheld.**

Sentence varied slightly regarding calculation of pre-trial custody time, and the 743.6 CC parole eligibility order varied to apply only to the manslaughter sentence. Accused’s conduct fell into the most serious category set out in *Laberge* (1995), 165 AR 375. Even though the sentence imposed was higher than cases that were provided to the trial judge, “the approach in *Laberge* does not fix any numbers for any of the categories ... *Laberge* proposes a careful consistency in approach, not arithmetic.”

**C. Davison** - Defence Counsel

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