



THE UPDATE

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CHARTER - 10(B) - CHANGE IN JEOPARDY - TEST

R. v. S.E.V., 2009 ABCA 108 per Cote, McFadyen, Verville, JA - T. Judge: Graesser, J:

Appeal from sexual assault conviction. Video-taped statement provided by accused to police. Accused was advised of his 10(b) rights, but was told that he was not under arrest or detention. Accused chose not to call a lawyer and signed a waiver. The interview ultimately became confrontational, and led to a inculpatory statement.

Held: No 10(a) or 10(b) breach.

Failure to inform a suspect that he is arrested or will be charged does not violate 10(a), provided that there is an understanding as to the basis for his apprehension and hence extent of his jeopardy: *Latimer* [1997] 1 SCR 217.. "There is no suggestion in the case law submitted that changes in interrogation strategy alone, for example from coaxing to confrontational, give rise to a need to re-caution." A change in jeopardy requiring a re-caution, "involves a fundamental and discrete change in the purpose of the investigation."

A. Tralenberg - Defence Counsel

CHARTER - 24(2) - GUN - PUBLIC SAFETY - ADMITTED

R. v. Styles, 2009 ABCA 98 per Cote, McFadyen, Watson, JA - T. Judge: Burgess, PCJ:

Appeal from conviction on firearms related offences. In the course of an argument the accused pointed a pen gun before fleeing the scene. Upon being apprehended, the accused was questioned regarding the location of the gun. The questioning violated the right to counsel. Trial judge admitted the pen gun discovery. Issue regarding 24(2) analysis.

Held: Appeal dismissed.

Although the pen gun was non-conscriptive, the manner in which it was located involved conscriptive action on the part of the police. However, the police acted in good faith. "The priority given to finding the gun was reasonable. Although this was probably an intentional Charter breach to acquire the pen gun, the sincere and imminent public safety concerns held by the police help determine the magnitude of infringement ... In a case involving a missing firearm in an area where children play, the impression of a reasonable observer ... would hardly be irrelevant."

G. Johnson - Defence Counsel.

IMPAIRED DRIVING - 254(2) - "APPROVED" DEVICE

R. v. Redstar, 2009 ABPC 79 per Rosborough, PCJ:

Impaired driving trial. Issue regarding whether Crown had proven that the screening device used was "approved." In the course of the arresting officer's evidence she described the device as: "a 400 D roadside screening device", a "400 D approved screening device", a "roadside screening device", an "approved screening device" and a "400 D Delta."

Held: Conviction entered.

"In *R. v. Yurechuk* (1983) 42 AR 176 (CA), the Court held that it was not incumbent upon the prosecution to prove that the device ... was an approved screening device." The officer's evidence was not challenged by defence. "In *R. v. Balogh* 2009 ABPC 10, Matchett PCJ dealt with a similar case of misdescription and concluded that the evidence sufficiently established that an approved screening device had been used. I adopt his reasoning."

D. Lightning - Defence Counsel

IMPAIRED DRIVING - 254(3) - REASONABLE GROUNDS

R. v. Fouquette, 2009 ABPC 78 per Anderson, PCJ:

Impaired driving trial. Police responded to an accident scene. Accused was lying on the floor of a pickup cab that had sustained heavy front end damage. After being released from hospital, a breath demand was read.

Held: Section 8 breach. Certificate excluded.

The arresting officer had “no memory nor any note as to when he was dispatched nor how long it had taken him to respond. The officer gave no evidence as to when he believed the accident had occurred nor did he give any evidence that he ever asked about or turned his mind to the time of the collision.” Accordingly, reasonable grounds for a valid demand under s. 254(3) CC did not exist. *Stene* 2007 ABPC 147 followed.

O. Cooper - Defence Counsel

SEARCH WARRANTS - 487.3 CC - SEALING ORDERS

R. v. Twitchell, 2009 ABPC 81 per Wheatley, PCJ:

Accused charged with murder. 11 search warrants issued during the investigation and were sealed. The warrants were subsequently unsealed for disclosure purposes. Crown application to re-seal the warrants. Issue regarding whether Provincial Court had jurisdiction to entertain re-sealing application.

Held: Provincial Court having jurisdiction.

Dagenais does not limit the jurisdiction with a superior court judge. Jurisdiction arising under both the common law and 487 CC. Section 487.3 CC grants a supervisory function and jurisdiction to the granting court. The fact that the Court of Queen’s Bench has a concurrent jurisdiction does nothing to “reduce or abrogate the jurisdiction of this Court.”

D. Cunningham - Defence Counsel

SENTENCE - SEXUAL INTERFERENCE - 3 YEARS

R. v. H.C., 2009 ABPC 73 per Valgardson, PCJ:

75 year old accused pleaded guilty to sexual interference. Assaults occurred over a 14 year period, 1993-2007. Victim was the granddaughter of the accused’s common law partner. Assaults started when the victim was 3, and included kissing, rubbing of the child’s vagina and digital penetration. Accused confessed, entered an early plea and was considered a low risk to re-offend.

Held: 3 years jail.

4 year starting point applicable. A sentence in excess of 4 years would be appropriate but for the presence of the mitigating factors: age of the accused, accused’s health problems, no record, early plea and cooperation with police.

G. Smith - Defence Counsel

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