



THE UPDATE

Issue #26 December 23, 2005

AGENTS - 802.1 CC - REPRESENTATION BY A LEGAL AGENT - TEST

R. v. Spiry - Oct. 28, 2005 ABPC 309 per Fradsham, P.C.J.:

Accused charged with assault and forcible confinement. Crown proceeded summarily. Accused applied to be represented by a legal agent.

Held: Application denied.

Application governed by s. 802.1 CC, which prohibits the appearance by agent where the maximum sentence with respect to any particular set of counts in an Information exceeds 6 months. Accused in present case could have been sentenced to 12 months jail if convicted of both offences charged. "The power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice ... The accused's right to choose representation by an agent must be respected unless that choice is clearly incompatible with the proper administration of justice": *Romanowicz (J.)* (1999), 124 O.A.C. 100 (Ont. C.A.). Authorities reviewed.

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EVIDENCE - 9(2) CEA - COURT MAY PROHIBIT CROSS - EXAMINATION ON PREVIOUS INCONSISTENT STATEMENT

R. v. A.(M.) - Oct. 28, 2005 ABPC 316 per LeGrandeur, P.C.J.:

Accused charged with assault with a weapon. Complainant was accused's 9 year old son who testified under a promise to tell the truth. Crown brought s. 9(2) CEA application to cross-examine 9 year old with respect to a previous inconsistent statement.

Held: Application denied.

Witnesses evidence was wholly unreliable. No purpose to the cross-examination. "Section 9(2) is permissive, not mandatory and the trial judge may in considering all circumstances, including how the statements were taken and the judge's opinion of the reliability of the statements, refuse permission to cross-examine": *Carpenter (No.2)* (1983), 1 C.C.C. (3d) 149 (Ont. C.A.). Authorities reviewed.

M. Dietrich - Defence Counsel

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IMPAIRED DRIVING - CARE OR CONTROL - RUNNING VEHICLE - ACQUITTAL

R. v. Stephenson - Sept. 14, 2005 ABPC 263 per Fraser, P.C.J.:

Accused charged with impaired care or control. RCMP found accused sleeping in his running vehicle at 7:00 a.m. parked outside his friends home. Accused had last driven at 9:30 p.m.. Advanced symptoms of impairment. Accused was lying across the front seat, with his head at the passenger door. No intention to drive.

Held: Acquittal entered.

Accused's driving of vehicle at 9:30 p.m. the night before not relevant to the care or control issue: *Pendleton* (1982), 1 C.C.C. (3d) 228 (Ont. C.A.). No danger that accused could have unintentionally or accidentally put the vehicle in motion. "It was properly parked and not a danger to other traffic on the road". Authorities reviewed.

J. McBeth - Defence Counsel

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**SENTENCE - DRUGS -
TRAFFICKING IN COCAINE -
CONDITIONAL SENTENCE**

R. v. Thompson - Oct. 28, 2005
ABPC 282 per Brown, P.C.J.:

20 year old accused pled guilty to trafficking cocaine three times to an undercover police officer and to possessing cocaine for trafficking. Early guilty pleas, positive PSR, strong family support. Each sale involved an amount just under an “8-ball”, and each transaction was of the “dial-a-doper type”.

**Held: 2 years less one day CSO
plus 2 years probation.**

Kamoh 2005 ABPC 281 followed. Denunciation and deterrence paramount, and the starting point for low end commercial trafficking in cocaine continues to be 3 years jail. “Drug trafficking is one of the most serious offences in the criminal law, carrying a maximum penalty of life imprisonment”. Conditions included 240 hours of community service work with “some of those hours [to] be spent working in treatment facilities for people whose addictions have ruined their lives”. Authorities reviewed.

P. Horner - Defence Counsel

**SENTENCE - THEFT FROM
EMPLOYER - \$4,194.27 -
CONDITIONAL DISCHARGE**

R. v. Pepper - Oct. 26, 2005 ABPC
294 per Brown, P.C.J.:

Accused pled guilty to stealing \$4,194.27 from her employer of 18 years. While working at London Drugs accused completed 9 false return transactions resulting in the theft. Immediate confession. Accused sought assistance for gambling addiction, and made provision for payment of restitution. Extremely remorseful.

**Held: Conditional discharge, 2
years probation.**

“Of the cases that I reviewed, I found those that bore the greatest resemblance to the situation of Ms. Pepper were *Brink* [1983] B.C.J. No. 364 and *Mand* [1993] B.C.J. No. 2637. *Brink* concerned an EMT who defrauded the British Columbia government, his employer, in the amount of \$4,400, to feed a drug addiction ... granted a conditional discharge. *Mand* ... a trust theft in excess of \$9,000. Mand received a conditional discharge. Authorities reviewed.

L. Ross - Defence Counsel

**SENTENCE - THEFT FROM
EMPLOYER - \$26, 800 - 12
MONTHS JAIL**

R. v. Jones - Nov. 1, 2005 ABPC
310 per Fradsham, P.C.J.:

Accused pled guilty to theft of \$26,800 from her employer. No restitution paid. Accused was employed as a bookkeeper and wrote a number of unauthorized cheques from the company to herself. 38 year old accused with no record. Diagnosed as a “pathological gambler”. Conditional sentence application.

**Held: 12 months jail plus 12
months probation.**

“One can find an occasional appellate decision which approves a conditional sentence for embezzlement, but the great majority do not. Those which do invariably involve special circumstances and a first offender. The great majority of appellate decisions send embezzlers to jail. That a few Provincial Court decisions have ignored such principles is at best regrettable, not precedential”: *McKinnon* [2005] A.J. No. 12 (Alta. C.A.). Conditional sentence would not be consistent with the fundamental purposes of sentencing set out in s. 718 CC.

P. Flynn - Defence Counsel

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