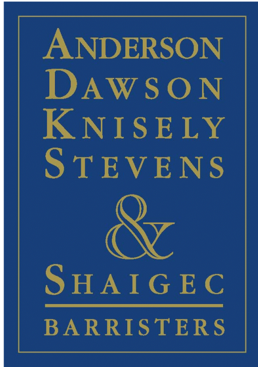

THE UPDATE

Issue #6 February 10, 2006

CHARTER - 8 - PLAIN VIEW DOCTRINE - TEST TO APPLY

R. v. Jackson - Dec. 12, 2005 ABCA 430 per Paperny, O'Brien, Macklin, JA - Trial Judge: Hughes, J:

Appeal from second degree murder conviction. Killing occurred at a work camp. Upon attendance at the camp, police checked on the residents. After knocking, the police were invited by the accused into his bunkhouse. Once inside police noted a pair of boots on the floor with a similar tread pattern to the pattern impression in blood in the deceased's room. Blood also seen on the tip of one of the boots. Trial judge found no s. 8 breach.

Held: Appeal dismissed.

Plain view doctrine applied. As per ***Spindloe*** (2001), 154 C.C.C. (3d) 8 (Sask. C.A.), police were in the room with the accused's consent, the officer was in the execution of his duty, and the similarity in tread pattern was immediately seen. Warrantless seizure of the boots justified under common law and s. 489(2) CC.

S. Tarrabain - Defence Counsel

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CHARTER - 9 - VEHICLE STOP - STOP TO DETERMINE IDENTITY VIOLATING S. 9

R. v. J.M.C - Dec. 8, 2005 ABPC 369 per Tousignant, PCJ:

Youths charged with possession of break-in instruments. Police conducted a vehicle stop at 3:40 a.m. in a 7-11 parking lot. Police saw two young people in the vehicle and conducted the stop because they wanted to "identify the driver". Various house breaking instruments found.

Held: Breach of s. 9, all evidence excluded pursuant to 24(2).

Police did not have articulable cause. As per ***Simpson*** (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), there existed no "constellation of objectively discernable facts" which could have given the police cause to suspect criminal activity. The seizure was conscriptive in nature, given that the accused had been arbitrarily detained and required to exit from the vehicle: ***Griffith*** 2003 ABPC 46 . Serious breach.

N. Cush - Defence Counsel

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FRAUD - MENS REA - KNOWING THAT CONDUCT COULD CAUSE DEPRIVATION

R. v. Aggarwal - Dec. 12, 2005 ABCA 434 per Paperny, O'Brien, Macklin, JA - Trial Judge: Sanderman, J:

Defence appeal from fraud conviction. Accused arranged for the "cosmetic" repair of a written off vehicle, and then sold the same at an auction to an unknowing purchaser for $42,000.

Held: Appeal dismissed.

Ample evidence to support the findings of directing repairs intended to disguise deficiencies. "Whether or not deceit has been established, there is no doubt that any reasonable person would consider such conduct dishonest: ***Theroux*** [1993] 2 S.C.R. 5 ... Morever, the mens rea ... of fraud requires only clear evidence that the appellant intentionally engaged in the prohibited act knowing such conduct could result in deprivation. Whether the appellant may have intended to dupe the purchaser is irrelevant."

A. Yaggey - Defence Counsel

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IMPAIRED DRIVING - CHARTER - 10(B) - POLICE DIALLED PHONE - NO BREACH

R. v. Burak - Dec. 2, 2005 ABPC 353 per Van de Veen, PCJ:

Impaired driving trial. Uncooperative accused who refused initially to respond to the 10(b) warning. Ultimately the accused dialled the Legal Aid 1-800 number, and then told police that she could not get through. She then asked for police assistance. The officer dialled the phone, got through, handed the phone to her and left the room.

Held: No 10(b) breach.

Not every case of police dialling of the phone constitutes a 10(b) breach. As per ***Watson*** [2005] A.J. No. 1167: "A review of the case law does not satisfy me that there is any rigid rule to be applied in every case prohibiting a police officer from dialling a lawyer's phone number for an accused or suggesting the name of a lawyer to call." Police in present case simply responded to accused's request for assistance. Authorities reviewed.

T. Sturgeon - Defence Counsel

SENTENCE - CHILD PORNOGRAPHY - MAKING - 14 MONTH JAIL SENTENCE

R. v. Fulton - Dec. 6, 2005 ABCA 423 per Conrad, Lutz, Nation, JA - Trial Judge: Maloney, PCJ:

Defence appeal from 14 month jail sentence plus 18 months probation, imposed after accused pled guilty to making child pornography. One month pre-trial custody. 39 year old accused with no record. 14 year old complainant. Accused took 41 erotic photos of the complainant, paying her $40. Accused and complainant were virtual strangers, having originally met at a store where the complainant asked the accused to buy her cigarettes. Accused told the complainant that she could make thousands of dollars on the internet with the photos.

Held: Appeal dismissed.

Jail necessary – predatory crime. Sentencing judge committed no error in declining to impose a conditional sentence. As per ***Hewlett*** 2002 ABCA 179 and ***Hunt*** 2002 ABCA 155, the sentencing judge weighed the number of photos, the degree of planning, the predatory nature of the act, the vitiation of consent through fraudulent representations of modelling, and the financial inducement as aggravating.

M. Bates - Defence Cousnel

SENTENCE - IMPAIRED DRIVING CAUSING BODILY HARM - SERIOUS INJURIES - 3½ YEAR JAIL SENTENCE

R. v. Bockman - Dec. 5, 2005 ABQB 918 per Clark, J:

Accused pled guilty to impaired driving causing bodily harm and leaving the scene. Accused struck a motorcyclist causing serious injury, including: closed head injury, significant burns, fractured femur and humerus, amputation of fingers and some brain damage. Accused blew 150 mg%. One previous conviction: 1987 over .08.

Held: 3½ years jail.

Only mitigating factors were early guilty plea and "very real remorse". Accused left the scene while the victim was burning, engulfed in flames, on his motorcycle. Accused lacked insight re: drinking problem. Thorough review of case law. "A conditional sentence ... would not meet the fundamental purpose and objectives enunciated in s. 718 CC. A conditional sentence would not be a strong enough denunciation or deterrence to Mr. Bockman or to the public at large." 2½ years for impaired causing, with one year consecutive for leaving the scene.

J. Thornborough - Defence Counsel

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