



THE UPDATE

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CHARTER - 8 - SEARCH OF RESIDENCE - NO WARRANT - DOMESTIC VIOLENCE - EXIGENT CIRCUMSTANCES

R. v. Al Jamail - Mar. 10, 2006 ABPC 73 per Semenuk, PCJ:

Accused charged with possession of cocaine for the purpose of trafficking. Police called to a domestic dispute by a neighbour. Upon police arrival the door to the accused's apartment was wide open. Police saw some evidence of a struggle, and then saw accused enter the bathroom and slam the door. Police followed and found accused flushing drugs down the toilet. No warrant.

Held: No s. 8 breach.

Police entitled to assume an emergency situation within the apartment given the evidence of a domestic disturbance: *Godoy* (1998) 131 CCC (3d) 129 (SCC). "Going into the bathroom [was] in the interest of officer safety and the safety of all those in the apartment. The police were in the lawful execution of their duty ... the drugs were found by them in plain view in the bathroom".

J. Ruttan - Defence Counsel

FAILURE TO APPEAR - 145(5)(B) v. 145(2)(B) CC - TEST TO BE APPLIED

R. v. Wesley - Mar. 7, 2006 ABPC 75 per Brown, PCJ:

Accused charged with failing to appear in Court contrary to s. 145(5)(b). Accused released on promise to appear. Accused appeared at first appearances, but failed to appear for trial. Issue as to whether accused charged under correct section of Criminal Code, or whether the offence charged ought to have been under 145(2)(b).

Held: Acquittal entered.

Ambiguous as to whether 145(5)(b) applies to more than failure to appear for a first appearance. Ambiguity to be resolved in favour of accused. "This ambiguity is one of several issues to be considered by the Court of Appeal, as a result of ... the Chambers decision in *Charles* [2005] AJ No. 1587 ... Justice O'Leary granted the Crown leave on ... 'Whether the ... judge committed an error by ruling that failure to attend court on a subsequent appearance may only create an offence under s. 145(2)(b)'".

K. Beyak - Defence Counsel

IMPAIRED DRIVING - SCREENING TEST - "FORTHWITH" - PROOF OF "APPROVED" DEVICE

R. v. Neitsch - Mar. 7, 2006 ABQB 180 per Binder, J:

Appeal from conviction on over .08 charge. Accused failed screening test. Screening demand did not include the word "forthwith". Officer testified that screening device was an Alco-Sensor IV. "Alco-Sensor IV" not specifically listed in Criminal Code as "approved".

Held: Appeal dismissed.

While inclusion of the word "forthwith" is appropriate in a screening demand, a demand is still lawful where the circumstances convey the need for immediate compliance: *Cardinal* (1993), 19 WCB (2d) 430 (ABCA). Crown must prove that screening device is "approved". *Dhillon* (2006) ABQB 109 reviewed. Question of fact. Facts in present case were, officer referred to the device as approved, was shown to be a qualified operator, provided a serial number for the machine, and none of this evidence was challenged at trial.

T. Kantor - Defence Counsel

**IMPAIRED DRIVING - 258(7) -
CERTIFICATE OF ANALYSES
- PROOF OF SERVICE**

R. v. Duplessis - Mar. 9, 2006
ABQB per Murray, J:

Crown appeal from acquittal on 253(b) charge. Issue regarding proof of service of Certificate of Analyses. Evidence was that officer compared original Certificate with copy, reviewed the Certificate with the accused, slid the Certificate across the table, and did not see what the accused did with the Certificate or whether or not he took it with him.

Held: Appeal dismissed.

Strict proof of service required. "The whole certificate hierarchy is an extension of the hearsay rule and it must be carefully followed with exactness": *Northcott* (1995). 177 AR 94 (QB). Trial judge correct in finding that doubt existed regarding proof of service. "[T]he law as I understand it to be, it is necessary for the officer to physically hand over the Certificate and Notice to the accused and to indicate that the document is for him to take with him when he leaves". Authorities reviewed.

A. Kay - Defence Counsel

**SENTENCE - ABANDONMENT
- 218 CC - 4 YEAR OLD LEFT
ALONE FOR EXTENDED
PERIODS - 9 MONTHS JAIL**

R. v. G.K.J. - Mar. 8, 2006 ABPC
72 per Fradsham, PCJ:

Accused pled guilty to abandonment contrary to s. 218 CC. Accused mother left her 4 year old daughter home alone for 6-8 hours 10 times while she went to work. On each occasion the child's ankle was tethered to the couch by a thin rope. 28 year old accused with no record.

**Held: 9 months jail plus 12
months probation.**

Very serious crime. The child was left at severe risk in the event of a fire, choking etc. Deterrence and denunciation paramount. As per *Cholod (W.M.)* (1995), 169 AR 153 (CA): "We are not prepared to say that a custodial sentence should generally be imposed for child abandonment ... the circumstances of the offence ... and the impact on the victim vary widely". Conditional sentence inappropriate in present case. "Her conduct was reprehensible in the extreme. No amount of house arrest and restrictive conditions could adequately denounce her conduct".

G. Reiten - Defence Counsel

**SENTENCE - SEXUAL
OFFENCES - S. 161 CC -
SEXUAL OFFENDER ORDERS -
FACTORS TO CONSIDER**

R. v. R.K.A. - Mar. 10, 2006 ABCA
82 per Paperny, O'Brien, Sulatycky,
JA - T. Judge: Mason, J:

Accused convicted of 3 sexual offences involving a 5 year old boy, and received a 6 year jail sentence. In addition, under s. 161 CC a lifetime prohibition involving children under 14 (not to attend at swimming pools, playgrounds etc) was imposed. Appeal from lifetime s. 161 order.

Held: Appeal dismissed.

Purpose of s. 161 is to protect children. As per *Heywood* [1994] 3 SCR 761, the "legislative history makes clear that in some situations, a lifetime ban for sex offenders is necessary to minimize the risks of repeat offences against children". A prior record regarding offences against children is not a prerequisite to a valid lifetime prohibition. Present offences were planned and deliberate, with little remorse being shown. Authorities reviewed.

A. Sanders - Defence Counsel

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