



THE UPDATE

Issue #29 August 11, 2006

APPEAL - REASONS FOR JUDGMENT - DELAY

R. v. Teskey - June 20, 2006
ABCA 191 per Hunt, Berger, Costigan, JA - Trial Judge: Kerby, PCJ:

Conviction appeal. Following conviction, court advised that Reasons would be filed within a "short" time. Reasons not provided for 14 months. In the interim Notice of Appeal was filed. Issue: whether there was an apprehension that the Reasons were crafted to respond to the appeal.

Held: Appeal dismissed.

Judge not *functus* until after sentencing. "The test is whether a reasonable person, informed of all the relevant circumstances, including the traditions of integrity and impartiality, would conclude there is a reasonable likelihood that the written reasons were issued ... in response to issues raised on appeal." Test not met. However, delay in issuing reasons "discouraged in the strongest terms". Berger, JA dissented and would have ordered a new trial.

K. Wilberg - Defence Counsel

FIREARMS - 99(1)(A) CC - TRAFFICKING - TEST

R. v. Sinclair - June 16, 2006
ABQB 438 per Bielby, J:

Accused charged with trafficking in firearms, contrary to s. 99(1)(a) CC. 4 deactivated handguns were sold to an undercover police officer. The missing firing pins needed to make the guns operational were provided with 2 of the guns sold. Each of the guns was subsequently made operational by a police expert using tools, equipment and replacement parts.

Held: Acquittals entered.

The sale of an un-operational gun can constitute the offence of trafficking if the gun is "capable of conversion to an operating weapon within a relatively short period of time and with relative ease": **Sinclair** [2005] ABCA 443. Test not met. Proof of failure to comply with the Registry Guidelines for Deactivation not determinative. Special training and tools used by police to make guns operational.

P. Royal - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY

R. v. MacDonald - June 15, 2006
ABCA 177 per Fraser, Ritter, O'Brien, JA:

Appeal from conviction on over .08 charge. Evidence to the contrary "straddle case". Defence expert relied upon statistical average alcohol elimination rates of 10-20 mg% per hour, meaning that at the time of driving he opined that the accused's blood-alcohol concentration was in the range of 64-109 mg%.

Held: Appeal dismissed.

"Expert evidence concerning the difference in blood alcohol levels attributable to the absorption of alcohol between the time of driving and the time of testing that fails to consider the personal characteristics and tolerance levels of the accused at the time of the breathalyzer test is to be regarded as an attack on the fictional nature of the presumption of identity and is inadmissible". Authorities reviewed.

T. Sturgeon - Defence Counsel

**SENTENCE - ASSAULT
CAUSING - CHILD VICTIM**

R. v. M.J.S. - June 7, 2006 ABCA 176 per Fruman, MacLeod, Park, JA - Trial Judge: Fradsham, PCJ:

Defence appeal of jail sentence of 2 years less a day plus probation following accused's guilty plea to assault causing bodily harm as against his son who was 1 to 3 months old at the time. In an effort to stop the child from crying, the accused would squeeze his rib cage to the point of hearing popping. Fractures to both legs and 11 rib fractures caused.

Held: Appeal allowed, sentence reduced to 18 months jail plus probation.

Trial judge erred in concluding that the offence was fuelled by anger, given that anger was disavowed by accused and not asserted by the Crown. Offence fit within second category of *Evans* (1996) 182 AR 21: "... application of force where a parent was immature and unskilled and acting out of emotional upset". Jail sentence necessary as deterrence and denunciation paramount in cases of child abuse: *Tate* (2005) ABCA 217.

A. Sanders - Defence Counsel

**SENTENCE - CHILD
PORNOGRAPHY - 15
MONTHS JAIL**

R. v. Shelton - June 14, 2006 ABCA 190 per Fruman, MacLeod, Park, JA - Trial Judge: Maloney, PCJ:

Crown appeal of conditional sentence imposed following accused's guilty pleas to possession and distribution of child pornography. 4,000 - 10,000 images possessed. "Highly disturbing images of real children". Accused's website visited 3,915 times, over 75,000 trades with people in at least 52 countries. 23 year old accused with no record.

Held: Appeal allowed, 15 months jail plus probation.

Conditional sentence failed to give weight to numerous aggravating factors, including: extreme nature of the images, volume of material, planning and sophistication, and worldwide distribution. "In both *Hunt* (2002) ABCA 155 and *Hewlett* (2002) ABCA 179, this Court has described the seriousness of such offences, the societal harm caused by mere possession of child pornography and the additional menace posed by distribution".

M. Bates - Defence Counsel

**SENTENCE - THEFT -
CREDIT CARD DATA**

R. v. Singh - June 8, 2006 ABPC 156 per Fradsham, PCJ:

Accused pled guilty to 3 charges of theft of debit card data, contrary to s. 342 CC. Accused installed debit card skimming device, digital cameras and video recorder hard drives in 3 Calgary gas stations. Devices designed to capture account data and pin numbers. Financial institutions defrauded of \$92,052. 22 year old accused with no record. Positive PSR.

Held: 20 months jail.

Jail sentence reduced to 9.5 months in view of pre-trial custody. Evidence revealed that in 2003 \$44 million was stolen as a result of debit card fraud. In 2004 this figure increased to 66 million. "At a minimum, debit card fraud shakes consumer confidence in the use of modern banking technology. This risk and potential harm increase exponentially when one considers that criminals often share the success of their schemes on readily accessible bulletin boards". Conditional sentence inappropriate. Denunciation and deterrence paramount.

A. Fay - Defence Counsel

Anderson Dawson Knisely Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

All updates can be found at www.adkscrimlaw.com

**By clicking on the heading of any of the cases in THE UPDATE
the reader will immediately be linked to the full text of the case.**