



THE UPDATE

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FAILURE TO APPEAR - 145(5) CC - PROOF OF OFFENCE

R. v. Brown - May 23, 2007 ABPC 109 per Bascom, PCJ:

Accused charged with multiple failures to appear in Court contrary to s. 145(5) CC. None of the appearance dates were first appearances. Issues as to whether an offence under 145(5) made out.

Held: Acquittals entered.

“From the decisions of *Vachon* 2004 ABPC 83 and *Wesley* 2006 ABPC 75, as well as a careful reading of section 145(5) I come to the conclusion that section 145(5) deals with the accused’s first appearance and not subsequent appearances. I note the words ‘appearance notice’, ‘promise to appear’”. The Alberta Court of Appeal decision in *Charles* (2006), 210 CCC (3d) 289, did not overrule *Vachon* and *Wesley*, as *Charles* deals only with the interplay between sections 145(2)(a) and (b) CC.

J. Taylor - Defence Counsel

IMPAIRED DRIVING - 8 - CHARTER - GROUNDS

R. v. Stene - May 29, 2007 ABPC 147 per Creagh, PCJ:

Impaired driving trial. Section 8 issue. Police responded to a motor vehicle collision and found the accused in the rear of an ambulance. Some indicia noted, accused arrested and breath demand made.

Held: Breach of s. 8.

Arresting officer had no grounds to believe that the accused “is” committing an offence under s. 253. Accordingly, issue being whether reasonable grounds to believe that an offence had been committed within the last 3 hours. Although upon the officer’s arrival there likely would have been a “constellation of facts” that made it obvious that the offence had been committed within the last 3 hours, there was no evidence that the officer ever turned her mind to the issue, nor did she mention any of the “facts” in her evidence. Authorities reviewed.

R. Prithipaul - Defence Counsel

IMPAIRED DRIVING - “AS SOON AS PRACTICABLE”

R. v. Budgell - May 31, 2007 ABPC 138 per Fradsham, PCJ:

Impaired driving trial. Issue as to whether breath samples taken as soon as practicable. Arresting officer waited 25 minutes at the roadside for a tow truck to tow the accused’s car. After the tow truck arrived, 8 more minutes passed before they took the 3 minute trip to the nearby Checkstop van.

Held: Acquittal entered.

25 minute wait for tow truck unreasonable in the circumstances, given that the officer made no inquiry as to whether or not other police members could have attended to the scene and watched over the accused’s vehicle. No reason given for the officer’s failure to make these inquiries. As per *Catling (LE)* (2001), 295 AR 93 (PC): “The scheme of the legislation is that samples from an accused are to be obtained as quickly as possible”.

P. Kay - Defence Counsel

**INDECENT ACT - 173(1)(A) CC
- PROOF - RECKLESSNESS**

R. v. Summers - May 15, 2007
ABPC 104 per Barley, PCJ:

Accused charged with committing an indecent act in a public place, contrary to 173(1)(a) CC. Accused masturbating on a park bench. Accused would make a conscious effort to stop and cover his penis as individuals approached. Complainant saw accused through his office window 100 feet away.

Held: Conviction entered.

As per *Miceli* (1977), 36 CCC (2d) 321, Crown need not prove that the indecent act was done intentionally in the sight of others, only that it was seen by others. "Watching out for others and hoping that you see them before they see you is so reckless that it must be proscribed". Indifference or recklessness as to the presence of others is sufficient proof of wilful conduct.

P. Ward - Defence Counsel

**SENTENCE - SEXUAL
TOUCHING - 27 MONTHS JAIL**

R. v. Skwarchuk - June 13, 2007
ABCA 195 per Watson, Moreau,
Clackson, JA:

Defence appeal from 27 month jail sentence imposed following accused's guilty plea to sexual touching. 18 year old accused placed his penis in 13 year old complainant's mouth 4 times for the purposes of fellatio. Accused and complainant were living together as a parent of each of them was involved in a relationship.

Held: Appeal dismissed.

Breach of trust as the complainant was a *de facto* family member. Serious sexual assaults. Alberta guidelines regarding starting points still in effect: *Lyons* (2006), 371 AR 74. 4 year starting point applied, and accused given credit for guilty pleas and a favourable pre-sentence report. "Abusers are most often those who have easy access to children in a protected environment": *Deck* (2006) 206 CCC (3d) 341.

S. Beaver - Defence Counsel

**SEX OFFENDER REGISTRY -
CONSTITUTIONALITY - 11(i)**

R. v. Lajoie - May 25, 2007 ABPC
135 per Brown, PCJ:

Accused convicted of attempting to buy the sexual services of a minor, and was subject to a 20 year SOIRA order. Issue as to whether SOIRA registration constituted a form of punishment within the meaning of s. 11(i) of the Charter.

Held: No Charter violation.

In *Cross* (2006), 205 CCC (3d) 289, Nova Scotia Court of Appeal found that s.11(i) not infringed by SOIRA. Leave to SCC denied. "I have concluded that the proper interpretation of the Supreme Court's refusal of a further appeal in *Cross* is that the Nova Scotia Court of Appeal was right in its decision ... even if I am wrong in my interpretation ... I view the Alberta Court of Appeal's reference to *Cross* in *Owusu* [2007] AJ No. 314 (CA), as tacit acceptance of the Nova Scotia Court's holding".

A. Pearse - Defence Counsel

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