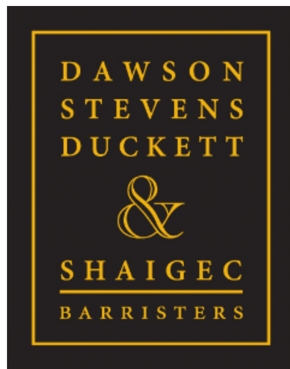

THE UPDATE

Issue #21   October 24, 2008

ADMINISTERING NOXIOUS THING - 245 CC - TEST

R. v. Clark - August 6, 2008 ABCA 271 per Hunt, O'Brien, MacLeod, JA - T. Judge: Erb, J:

Appeal from conviction on charges including administering a noxious thing contrary to s. 245(b) CC. Accused held complainant's head back and poured a partial container of motor oil on her face.

Held: Appeal dismissed.

245(b) requires an only an intent to "aggrieve or annoy."
"Administer" ought to be given its ordinary dictionary meaning of: "give, apply." As per ***Burkholder*** (1977), 34 CCC (2d) 214 (ABCA), "noxious" means: "injurious, hurtful, harmful, unwholesome." Nothing in s. 245(b) suggests that the accused must intend that the substance be taken internally. The intent portion of the subsection is concerned only with aggrieving or annoying the victim. Authorities reviewed.

H. Wolch - Defence Counsel

BAIL - BAIL REVIEW - REASONS FOR JUDGMENT

R. v. Patton - August 14, 2008 ABQB 502 per Veit, J:

Bail review on charges including aggravated assault of a police officer. At the bail hearing, after the police set out the allegations, the accused stated that he had blacked out, and the JP then stated: "Denial on the secondary ground." No reasons were given.

Held: Bail granted.

A judge at a bail hearing is required to give reasons. This requirement is imposed by s. 515(5) CC and ***Sheppard*** 2002 SCC 26. "In my view, [the ***Sheppard***] standards not only apply ... to bail judges, but, for two reasons, apply with even more pertinence to decisions denying bail: the explicit statutory requirement in s. 515(5) to give reasons is a highly unusual requirement for judges, and, a decision to deny a constitutional right is an extremely serious decision." Accused had no record and was entitled to reasonable bail.

R. Morin - Defence Counsel

IMPAIRED DRIVING - .08 - TECHNICIAN'S EVIDENCE

R. v. Bhardwaj - August 15, 2008 ABQB 504 per Lee, J:

Appeal from conviction on over .08 charge. Crown elected to rely upon the *viva voce* evidence of the breath technician. Technician testified that accuse blew 140 "milligrams percent." In answer to a leading question by the Crown, he then agreed that he meant milligrams of alcohol per 100 millilitres of blood.

Held: Appeal dismissed.

Crown was entitled to lead as this was a noncontentious issue. "The evidence was no more contentious than evidence that there are 1000 meters in a kilometer, 1000 grams in a kilogram or some other known conversion of a unit of measure ... the question removed the possibility of mistake by the witness, which could have given rise to a technician argument completely divorced from the truth." Authorities reviewed.

M. Moughel - Defence Counsel

IMPAIRED DRIVING - 254(2) CC - SCREENING TEST

R. v. Heeps - August 19, 2008 ABPC 224 per Myers, PCJ:

Trial on charge of failing to provide a screening sample. Odour of alcohol noted and screening demand made. Accused then asked the officer what his options were, and was told that the police needed a "yes or no." Accused said no, and was then arrested and chartered. Accused taken to the detachment were he spoke to counsel, and then told the officer that he wanted to blow. Police told him that "it's too late."

Held: Acquittal entered.

Klontz 2007 ABPC 311 followed. The words of refusal were obtained as a result of a 10(b) infringement. Further, the refusal was not unequivocal. The accused equivocated, and then said "no" upon being pressed by police. Only 29 minutes later after being afforded his 10(b) rights, he requested an opportunity to blow. The accused wanted to know his rights, and upon being advised of the same, he offered to blow.

B. McGlashan - Defence Counsel

SENTENCE - ROBBERY - GAS STATION - 1 YEAR JAIL

R. v. Covey - August 18, 2008 ABPC 235 per Stevens-Guille, PCJ:

27 year old accused with no record pled guilty to robbery of a gas station. Accused was looking for money to fund a cocaine addiction. Accused demanded money while displaying a rock in his hand. No disguise. Positive PSR.

Held: 1 year jail and 18 months probation.

"A proper reading of ***Johnas*** makes it clear that it did not purport to establish a minimum sentence for a convenience store robbery in Alberta. That could only be done by Parliament ... a CSO is available for any offence other than those precluded by the legislation." Conditional sentence considered, but found to be inappropriate. Accused's record of cocaine use related relapse made him a danger to the community. Authorities reviewed.

G. Gerhart - Defence Counsel

YOUTHS - SENTENCE - MURDER - LIFE SENTENCE

R. v. D.E. - August 15, 2008 ABPC 231 per Koshman, PCJ:

17 year old accused pled guilty to second degree murder. Accused stabbed the victim six times while the victim's arms were being held back by others. No record. Issues regarding whether accused to be sentenced as a youth or adult, and the appropriate sentence.

Held: Adult sentence imposed. Life sentence 7 year parole eligibility period.

Although the onus re: seeking an adult sentence rests with the Crown, "the onus is not a heavy one ... It is to be determined by balancing this factors listed in the YCJA." Given the seriousness of the offence, and the age/character of the accused, an adult sentence was necessary and appropriate. A Youth Court sentence would not provide a reasonable assurance that the accused would upon expiry be safe to return to society."

C. Davison - Defence Counsel

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