



# THE UPDATE

Issue #5 July 29, 2005

## APPEAL - TRAFFIC OFFENCE - CONVICTION IN ABSENCE - NEW TRIAL ORDERED

**R. v. Sehn** - June 7, 2005 Alta. C.A. per Fraser, C.J.A.; Ritter, J.A. and Smith, J.:

Crown appeal from Q.B. decision to extend time to file an appeal from conviction in absence for careless driving.

### **Held: Appeal dismissed.**

“In finding that the conviction in absence provisions do not meet the basic standards of the criminal justice system ... the Summary Conviction Court Justice erred ... However [there was] jurisdiction to set aside the conviction under s. 38 of P.O.P.A.. We agree that given the finding that Sehn had communicated to his lawyer an intention to challenge the traffic ticket and through an error in his lawyer’s office this did not occur, this is an appropriate case in which to invoke s. 38.”

**C. Moustarah** - Defence Counsel

## EVIDENCE - VETROVEC WARNING - DISCRETION OF TRIAL JUDGE

**R. v. Chandra** - May 31, 2005 Alta. C.A. per McFadyen, Costigan, J.A. and Acton, J. - Trial Judge: Ouellette, J.:

Appeal from second degree murder conviction. Jury trial. Crown witness was an admitted liar with a substantial record who was with the accused around the time of the killing. No *Vetrovec* warning given to jury.

### **Held: Appeal dismissed.**

Neither trial counsel asked the Court for a *Vetrovec* warning. The decision as to whether to give the warning is within the discretion of the trial judge. “Credibility problems were dealt with in some detail in cross-examination by both counsel. The problems with his evidence were also specifically reviewed by the trial judge in his charge to the jury.” Authorities reviewed.

**L. Stevens** - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - PROOF OF OFFENCE

**R. v. Armstrong** - May 31, 2005 Alta. C.A. per Berger, J.A.:

Application for leave to appeal from care or control conviction. Proposed ground of appeal: “... the seeming conflict between the Sask. C.A.’s reasoning in *Shuparski* [2003] 6 W.W.R. 428 and the Alta. C.A.’s decision in *Green* 19 M.V.R. (2d) 58.”

### **Held: Leave to appeal denied.**

“Mindful of the differing factual underpinnings ... there is no conflict between ... *Shuparski* and the decisions of this Court in *Green* and *Gent*. The principles articulated ... in *Toews* are rigorously adhered to ... As McIntyre, J. made clear in *Toews* ‘each case will depend on its own facts and circumstances in which acts of care or control may be found will vary widely’”.

**P. Moreau** - Defence Counsel

**IMPAIRED DRIVING - MENS REA - INVOLUNTARY INTOXICATION**

*R. v. Macdonald* - May 27, 2005 Alta Prov. Ct. per Allen, P.C.J.:

Accused charged with impaired driving and blowing over. Accused testified that he remembered consuming two drinks in combination with heart medicine, and was then unable to remember any of the events leading to his arrest. No expert evidence called.

**Held: Convictions entered.**

Involuntary intoxication means impairment brought about “without any act [of the accused’s] own will”: *King* (1962), 133 C.C.C. 1 (S.C.C.). Test not met. “There is nothing in the evidence to rebut the presumption that he operated his motor vehicle after he voluntarily consumed two drinks. Moreover, in view of the lack of any expert evidence testimony I cannot make a finding he was suffering from automatism”. Authorities reviewed.

**J. McPike** - Defence Counsel



**SENTENCE - ROBBERY - GAS STATION ROBBERY - 14 MONTHS JAIL UPHELD**

*R. v. Yarham* - May 30, 2005 Alta. C.A. per Conrad, J.A.; Kent and Hawco, J. - Trial Judge: Sirrs, J.):

Defence appeal from 14 month jail sentence for robbery. Gas station robbery while armed with a knife and masked. Accused never entered the store but drove the get away car. Defence had sought conditional sentence.

**Held: Appeal dismissed.**

Sentencing judge “wanted to send a message that using masks and weapons in convenience store robberies will, as confirmed by this Court in *Christie* [2004] A.J. No. 1045, generally result in jail time”. Denunciation and deterrence paramount.

**A. Sanders** - Defence Counsel



**SENTENCE - THEFT FROM EMPLOYER - \$95,000 THEFT - 18 MONTHS JAIL**

*R. v. Sevcik* - June 6, 2005 Alta. C.A. per Conrad, J.A.; Kent and Hawco, J. - Trial Judge: Cioni, P.C.J.:

Defence appeal from 18 month jail sentence plus 3 years probation regarding accused who stole \$95,000 from his employer. No restitution. Accused had no record. Theft motivated by a gambling addiction. Money stolen from a charitable organization designed to provide aid to autistic children. Defence had sought a conditional sentence.

**Held: Appeal dismissed.**

Fit sentence. Sentencing judge committed no errors.

**S. Davis** - Defence Counsel

