



# THE UPDATE

Issue #12 September 16, 2005

## BAIL - SURETY - CASH DEPOSIT AND SURETY BAIL NOT INTERCHANGEABLE

*R. v. C.R.P.* - July 21, 2005 Alta. Q.B. per Lee, J.:

Accused charged with drug related offences. Application by accused to vary bail order from \$5000 cash to a \$9000 surety in relation to a motor vehicle.

**Held: Application denied.**

“I conclude that there is a difference between a \$5,000 cash deposit, and a surety who puts up the security of his classic vehicle. The cash deposit is a direct charge that can be realized upon immediately in the event of default, unlike the surety which may not be defaulted at all. The status of the surety is different than that of an assignee, and it is more favourable to be a surety than to be an assignee”.

**L. Wood** - Defence Counsel

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## CHARTER - 8 - REASONABLE GROUNDS TO ARREST - 24(2)

*R. v. Payne* - July 26, 2005 Alta. C.A. per Berger, Costigan, and Ritter, J.A. - Trial Judge: Coutu, J:

Appeal from conviction on unstated charges following the discovery of evidence in a search incidental to arrest.

**Held: Appeal allowed. New trial.**

“The trial judge erred in law in concluding that the Appellant’s arrest was lawful when police did not subjectively have reasonable and probable grounds on which to effect an arrest: see *Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.) ... The trial judge invoked “good faith” in concluding that all evidence seized by the police during the investigating was admissible under s. 24(2) ... reliance upon “good faith” was misplaced”.

**G. Strangway** - Defence Counsel

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## IMPAIRED DRIVING - TEST - “MARKED DEPARTURE” STILL A GUIDELINE TO BE APPLIED

*R. v. Von Maldeghem* - July 20, 2005 Alta. Q.B. per Moore, J.:

Summary appeal from impaired driving conviction. Accident. Police officer testified that but for failure on the screening test, reasonable grounds to arrest the accused would not have existed.

**Held: Appeal allowed. Acquittal.**

The factors set out in *McKenzie* [1955] 111 C.C.C. 317 were adopted in *Andrews* [1996] A.J. No. 8. “Marked departure is simply a guideline that our Court of Appeal wants judges to apply to ensure that decisions about impaired driving are consistent and not arbitrary”. Conviction unreasonable given that screening test failure necessary to a lawful arrest. No proof of a slight impairment of ability to drive. Authorities reviewed.

**T. Sturgeon** - Defence Counsel

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**SENTENCE - ASSAULT  
CAUSING - ACCUSED HIT  
HIS MOTHER WITH A BAT -  
18 MONTHS FIT**

*R. v. Beckman* - July 26, 2005  
Alta. Q.B. per Lee, J.:

Accused with no record found guilty of hitting his 76 year old mother in the head with a baseball bat. No permanent injuries. Accused had a alcohol problem and “family” issues. Psychiatric assessment showed accused to be passive-aggressive and appeared to be “fighting the system as much as he could”.

**Held: 12 months jail.**

18 month sentence would have been fit but for accused’s completion of a residential alcohol program and the adverse media coverage that the trial had received, causing the accused to lose his job. No remorse. In *Etzkorn* [1998] A.J. No. 362 (C.A.) the accused assaulted his mother and received a 90 day sentence. Present case far more serious. “Vicious unprovoked attack”.

**E. O’Keeffe** - Defence Counsel



**SENTENCE - IMPAIRED  
DRIVING - APPEAL FROM  
FAILURE TO AUTHORIZE  
INTERLOCK DISMISSED**

*R. v. Reimer* - July 21, 2005 Alta.  
C.A. per Fruman, O’Brien, J.A.  
and Martin, J. - Trial Judge: Rolf,  
P.C.J.:

Accused originally pled guilty to impaired driving and received a 4 month jail sentence given his related record. No interlock recommendation was made. Appeal from refusal to authorize interlock participation.

**Held: Appeal dismissed.**

Counsel at the original sentencing did not ask for an interlock recommendation. Accused had a lengthy and related record. “There was an absence of evidence of ... the necessity to participate in the program to earn a living ... as well as evidence of the suitability of the candidate for such a program”.

**J. Blumer** - Defence Counsel



**SENTENCE - SEXUAL  
ASSAULT - CONDITIONAL  
SENTENCE OVERTURNED - 3  
YEARS JAIL FIT**

*R. v. Lyons* - July 22, 2005 Alta.  
C.A. per Fruman, O’Brien, J.A. and  
Martin, J. - Trial Judge: Hughes, J.:

Crown appeal from conditional sentence imposed following accused’s conviction for sexual assault. 54 year old accused had sexual intercourse with a passed out 14 year old complainant, after a night of crack cocaine and alcohol consumption. “The trial judge finding that he had both raped the complainant and placed his penis in her month.

**Held: Appeal allowed. 3 years  
jail imposed.**

Sentence reduced to 23 months given partial completion of conditional sentence. Notwithstanding *Kain* (2004), 348 A.R. 159 (C.A.), *Sandercock* (1985), 62 A.R. 382 (C.A.) remains the guideline authority. “*Sandercock* specifically provides that a fit sentence for sexual intercourse by a mature accused of previous good character and no criminal record is three years”. Authorities reviewed.

**A. Hepner** - Defence Counsel



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