



THE UPDATE

Issue #15 October 7, 2005

BAIL - Q.B. CONDITIONAL SENTENCE BREACH - J.P. WITHOUT JURISDICTION TO ADDRESS BAIL

R. v. Gessleman - August 17, 2005
Alta. Q.B. per Watson, J.:

Conditional sentence breach allegation. Sentence originally imposed by a Q.B. Justice. Issue as to whether J.P. had jurisdiction to grant or deny bail.

Held: No Jurisdiction.

“The Provincial Court and the Justice of the Peace are a statutory court. While they have jurisdiction which can be necessarily incidental to the jurisdiction that exists by statute, statutory jurisdiction cannot be created by Parliament in this instance ... a Justice of the Peace does not have jurisdiction to deal with judicial interim release in connection with a person who has been apprehended for an alleged breach of a conditional sentence order that is issued by the Court of Queen’s Bench”. Authorities reviewed.

J. Radosh - Defence Counsel

CHARTER - 8 - DOG SNIFF - DOG SNIFF OF LUGGAGE IN PUBLIC AREA NOT CONSTITUTING A SEARCH

R. v. Kang-Brown - August 17, 2005
Alta. Q.B. per Romaine, J.:

Accused stopped by police at the Calgary Greyhound station as part of the Jetway project. Dog sniff of accused’s luggage proved positive for drugs. Alleged s. 8 breach.

Held: No breach.

Accused voluntarily brought the luggage into a public transportation facility. No reasonable expectation of privacy. Nothing about a dog sniff of luggage affects an individual’s dignity or autonomy. “I ... agree with the Crown that the principles of *Dinh/Lam* (2003), 178 C.C.C. (3d) 59 (Alta. C.A.) have been overruled by the Supreme Court in *Tessling* [2004] 3 S.C.R. 432.

J. Virk - Defence Counsel

CHARTER - 10(B) - IMPAIRED DRIVING - CHARTER READ BEFORE DEMAND - EXTENT OF JEOPARDY - NO BREACH

R. v. Drummond - August 17, 2005
Alta. Prov. Ct. per Daniel, P.C.J.:

Impaired driving trial. Alleged 10(b) breach. Issue as to whether police ought to have first read the breath demand to the accused, before the 10(b) rights, so that the accused could have known his full jeopardy prior to waiving his right to counsel.

Held: No breach.

Johnson (1990), 108 A.R. 108 (C.A.) is determinative of the issue. “In the words of the majority judgment in *Schmautz*, there was a close factual connection between the reason given for the arrest and the advice of the right to counsel, and between those facts and the demand for breath samples. They were all part of one transaction”. Authorities reviewed.

I. Savage - Defence Counsel

**EVIDENCE - RULE IN
BROWNE V. DUNN - TEST TO
BE APPLIED**

R. v. Melnick - August 17, 2005
Alta. Prov. Ct. per Allen, P.C.J.:

Accused charged with offences including dangerous driving. Issue regarding proof of driving. In course of trial, Crown alleged that rule in *Browne v. Dunn* breached as defence counsel did not put to police the possibility of a change of drivers.

Held: Convictions entered.

No breach of rule in *Browne v. Dunn*. To breach the rule it must be found that counsel’s failure to cross-examine with respect to the contested fact was a “type of egregious tactic” designed to undermine trial fairness. As per *Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.) the rule is designed to prevent “ambush” of a witness. “Defence counsel must be free to use his own judgement about how to cross-examine a hostile witness. Having the witness repeat ... everything he said in chief, is rarely the tactic of choice”. Authorities reviewed.

P. Moreau - Defence Counsel



**SENTENCE - FRAUD -
BREACH OF TRUST - \$3691
EMPLOYEE THEFT -
CONDITIONAL SENTENCE**

R. v. Threesuns - August 17, 2005
Alta. Prov. Ct. per Fradsham,
P.C.J.:

27 year old aboriginal male pled guilty to defrauding his employer (MoneyMart) of \$3691.52. Conditional discharge application.

Held: 5 month Conditional Sentence imposed.

Theft from employer still typically results in jail: *McIvor* (1996), 181 A.R. 397 (C.A.). Conditional discharges in cases of employer theft are rare. Nothing in the aboriginal heritage of the accused contributed to his commission of the offence. Serious and planned offence committed for personal gain to pay debts accumulated through substance abuse. Authorities reviewed.

D. Sherwin - Defence Counsel



**SENTENCE - SEXUAL
ASSAULT UPON A CHILD -
CHILD PORNOGRAPHY - 4
YEARS 10 MONTHS JAIL**

R. v. L.A.J.C. - August 18, 2005
Alta. Prov. Ct. per Daniel, P.C.J.:

Accused pled guilty to sexual assault upon his daughter and possession of child pornography. Sexual assault occurred over a 2 year period. Multiple touchings of breasts and vagina. Complainant was 13-15 at the time. 500 images of child pornography found on accused’s computer.

Held: 4 years, 10 months jail.

44 year old accused with minor, dated record. Sexual abuse of a father on a child constitutes a “grave breach of duty and an outrageous breach of that trust”: *W.B.S.* [1992] A.J. No. 601 (C.A.).

T. Godfrey - Defence Counsel



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