



THE UPDATE

Issue #16 October 14, 2005

BAIL - BAIL PENDING - YOUTH - SENTENCE APPEAL - BAIL GRANTED

R. v. D.C. - August 25, 2005 Alta.
C.A. per Berger, J.:

Application for bail pending sentence appeal. Youth convicted of "serious sexual assault offences" received a sentence of 6 months closed custody. Issue as to whether sentencing judge erred in imposing a jail sentence.

Held: Bail granted.

Arguable merit as to whether or not a custodial sentence was necessary. "The need for careful supervision cannot be over-estimated. I am persuaded that a s. 31 YCJA undertaking, coupled with strict house arrest, and subject to RCMP spot checks, will, in all of the circumstances, best achieve the objects and purposes of the YCJA."

R. Stroppel, P. Yuzwenko -
Defence Counsel

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EVIDENCE - IMPROPER CROSS-EXAMINATION BY CROWN OF ITS OWN WITNESS - NEW TRIAL

R. v. Situ - August 23, 2005 Alta.
C.A. per McFadyen, Fruman, J.A.
and Mahoney, J. - Trial Judge:
Hembroff, J.:

Appeal from conviction on charges of break and enter. Crown's case hinged on evidence from a co-conspirator. In the course of examination of this witness, the Crown put to him a number of inconsistencies arising from evidence given at the preliminary inquiry. No application under s. 9 CEA was ever made.

Held: Appeal allowed. New trial.

"Improper cross-examination by Crown counsel of his own witness may result in a new trial where credibility findings by the judge or jury would have been influenced by the cross-examination, causing prejudice to the accused":
Nicholson (1998), 223 A.R. 82 (C.A.).

N. O'Brien - Defence Counsel

IMPAIRED DRIVING - REFUSAL - MEDICAL EXCUSE - MENS REA

R. v. Nelson - July 19, 2005 Alta.
Prov. Ct. per Horrocks, P.C.J.:

Accused charged with impaired driving and refusal. Accused unable to initiate the tone on the Intoxilyzer. Technician opined that the accused was sucking on the mouthpiece. The accused, a 23 year old Tae Kwon Do champion, testified that he suffered from asthma and allergies, and was unable to blow hard enough. No medical evidence called.

Held: Conviction entered.

Medical evidence necessary in the circumstances. "Any person involved in the legal system must be aware of ... the millions of [breath tests] done over the years. It is difficult to conceive that the operation of these devices occasions such difficulty as to be beyond the ability of an ordinary person, never mind an athlete and Provincial Champion".

G. Nickless - Defence Counsel

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**SEXUAL TOUCHING -
MISTAKE OF AGE - STEPS
TO BE TAKEN BY ACCUSED**

R. v. M.G.B. - August 23, 2005
Alta. Prov. Ct. per Lamoureux,
P.C.J.:

24 year old accused charged with sexual touching. Accused paid complainant to engage in fellatio. Accused testified that he asked the complainant - who he met at a bus stop - how old she was, and that she told him that she was 16. Complainant was in fact 13. Issue regarding defence of mistake of age.

Held: Convictions entered.

Large discrepancy between the age of the accused and complainant. "Nothing in the attire or physical appearance of the complainant that would cause the accused to form a reasonable belief that she was sixteen years of age". Given that the accused did not know the complainant, further inquiry was necessary prior to agreeing to engage in sexual activity".

R. Haynes - Defence Counsel



**SEX OFFENDER REGISTRY -
RETROACTIVE OPERATION
- S. 11(i) OF CHARTER**

R. v. Aberdeen - August 3, 2005
Alta. Prov. Ct. per LeGrandeur,
P.C.J.:

Crown application pursuant to s. 490.012(1) CC for placement of accused into the Sex Offender Registry. Accused convicted of sexual assault. Sex Offender Registration Act came into force 11 days after the commission of the offence.

Held: Application denied.

The provisions of the Act were intended to be retrospective in application, and apply to any convicted offender sentenced after the coming into force of the legislation: **Rouschop** [2005] O.J. No. 1336. However, entry into the Registry constitutes a form of punishment within the meaning of s. 11 of the Charter. "The intent of the legislation may be a factor to consider in a s.1 analysis but it does not, at this stage of analysis, make that which is effectively unconstitutional, constitutional. To do so is to ignore the purpose of s. 11(i)." Authorities reviewed.

C. Connolly - Defence Counsel



**YOUTHS - SENTENCE -
AGGRAVATED ASSAULT - 18
MONTHS PROBATION**

R. v. P.K.K. - August 12, 2005 Alta.
Prov. Ct. per Carruthers, P.J.C.:

16 year old accused pled guilty to aggravated assault. Serious case. "The complainant ... was severely injured ... was hospitalized ... and has slowly been recovering. Accused and complainant attended at Community Conferencing Program. Positive PSR.

Held: 18 months probation.

Strict probation designed to rehabilitate accused. Sections 3 and 38 YCJA create "an almost impossible task ... the requirement is to balance the just sanctions and the meaningful consequences, and at the same time promote the offenders's rehabilitation."

K. Ross - Defence Counsel



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