



THE UPDATE

Issue #17 October 21, 2005

DNA - YOUTHS - DNA DATA BANK - TEST - YCJA

R. v. T.S.R. - August 30, 2005
Alta. C.A. per Hunt, Berger and Costigan, J.A. - Trial Judge: Witten, P.C.J.:

Appeal from Youth Court order to provide DNA sample following conviction for offences including assault causing. Issue regarding test to be applied re: DNA data bank requests under the YCJA.

Held: Appeal dismissed.

DNA order appropriate given the facts. "Although the Crown argued that this Court determined in *S.(O.S.)* (2002), 317 A.R. 163 (C.A.) that no distinction should be made between adults and young persons for the purposes of s. 487.051 C.C., it is unnecessary to decide that point here ... there was no evidentiary foundation for exempting the young person from a mandatory DNA order ... the question of whether s. 487.051 applies differently to young persons ... does not arise".

L. Sax - Defence Counsel

EVIDENCE - IDENTITY - DOCK ID NOT NECESSARY - ADVERSE INFERENCE FROM FAILURE TO TESTIFY

R. v. Ouellette - August 29, 2005
Alta. C.A. per Cote, Russell and Picard, J.A. - Trial Judge: Creagh, P.C.J.:

Appeal from impaired driving conviction. Issue regarding proof of identity. No dock ID. An "identification card" in the accused's name was produced upon arrest. No evidence as to whether the card had a picture.

Held: Appeal dismissed.

Dock identification not necessary: *Nicholson* (1984), 12 C.C.C. (3d) 228. Reasonable to conclude that man arrested was the man in court. Adverse inference drawn from accused's failure to testify. "It would be remarkable that an accused would spend considerable time over a period of years on various court appearances without protest, if he was not the man arrested".

P. Royal - Defence Counsel

IMPAIRED DRIVING - CARE OR CONTROL - RUNNING VEHICLE - CONVICTION ENTERED

R. v. Gettis - August 26, 2005 Alta. Prov. Ct. per Meagher, P.C.J.:

Accused charged with care or control. Accused found passed out in running vehicle. Gross impairment – blew 250 mg%. Accused testified that he was living in his vehicle after being kicked out of an alcohol recovery centre.

Held: Conviction entered.

Presumption rebutted. Actual care or control proven. Accused's arms were draped over the steering wheel, radio and heater were on. Accused's final intention was not settled. "Therein lies the risk that the Court of Appeal refers to in *Gent* [1997] A.J. No. 72." Authorities reviewed.

L. Hursh - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY - CERTIFICATE CONSIDERED - CONVICTION

R. v. Jones - August 26, 2005 Alta. Prov. Ct. per McDonald, P.C.J.:

Impaired driving trial. Evidence to the contrary. Accused blew 150 mg%. Moderate signs of impairment noted, and accused lied to police regarding amount of alcohol consumed. Expert evidence put accused at 6 mg% at time of driving.

Held: Conviction entered.

Accused's evidence regarding alcohol consumption not accepted. Readings as set out in the Certificate of Analyses considered a factor to be weighed in assessing the evidence to the contrary: **Generoux** [2005] A.J. No. 302. Authorities reviewed.

B. Der - Defence Counsel



SENTENCE - PRE-TRIAL CUSTODY - CREDIT TO BE GIVEN FOR REMAND TIME

R. v. Chan - August 12, 2005 Alta. Q.B. per McIntyre, J.:

Accused found guilty of selling 56 grams of heroin for \$7000. Appropriate sentence determined to be 7 ½ years less credit for pre-trial custody. 26 months pre-trial at Calgary Remand Centre. Issue regarding appropriate credit to be given for pre-trial custody time.

Held: 3:1 credit given for pre-trial custody time.

1 year sentence imposed. Detailed review of conditions at Calgary Remand Centre. Harsh treatment of accused included denials of vegetarian meals requested for religious reasons, strip searches, and the wearing of a baby-doll in disciplinary segregation. "Given the description I have heard about the conditions in remand, I am doubtful that many defendants would want to delay their trials in hopes of earning extra credit." Authorities reviewed.

T. Engel - Defence Counsel



SENTENCE - FRAUD - EMPLOYMENT INSURANCE FRAUD - \$13,291 - SUSPENDED SENTENCE

R. v. Ahmed - August 31, 2005 Alta. Prov. Ct. per McDonald, P.C.J.:

Accused pled guilty to defrauding Employment Insurance of \$13,291. Accused had received social assistance benefits because he had fraudulently understated his income. No record. Good employment history. Restitution paid prior to sentencing. Joint submission for a conditional discharge.

Held: 12 month suspended sentence.

Joint submission outstanding of appropriate range. Prevalent and serious offence. No "exceptional circumstances" in present case. **Hust** [2004] A.J. No. 856 (Prov. Ct.) distinguished. In **Hust** the fraud was committed under circumstances of "extreme pressure from a manipulative spouse". But for payment of full restitution, appropriate sentence would have been a conditional sentence. Authorities reviewed.

B. Popovic - Defence Counsel



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