



THE UPDATE

Issue #19 November 4, 2005

ABUSE OF PROCESS - CONDUCT OF CROWN COUNSEL - STAY ENTERED

R. v. Hobson - August 23, 2005
Alta. Prov. Ct. per Sully, P.C.J.:

Impaired driving trial. On the date of trial (8 months after alleged offence) Crown counsel arranged to have a new 6 count Information sworn, alleging offences including impaired and dangerous driving causing bodily harm. Issue regarding abuse of process.

Held: Stay of proceedings in relation to 6 count Information.

To allow Crown to proceed on the new Information would amount to an abuse of process. Only explanation for the delay was that Crown counsel did not look at the file until the day before the scheduled trial. "The prejudice to the accused included the element of surprise, the problems in making full answer and defence, and the further inevitable delay in the holding of the trial."

G. Johnson - Defence Counsel

DNA - DATA BANK ORDER - PRIMARY OFFENCE - DNA ORDER OUGHT TO ISSUE

R. v. Wigley - September 15, 2005
Alta. C.A. per Hunt, Berger, Ritter,
J.A. - Trial Judge: Legrandeur,
P.C.J.:

Crown appeal from trial judge's refusal to grant a DNA order following accused's conviction for assault causing bodily harm.

Held: Appeal allowed.

As per *North* (2002), 303 A.R. 321 (C.A.) accused has a reduced expectation of privacy following conviction for primary designated offence. Section 487.051(2) provides that the data bank order "shall" be made. "A trial judge has no discretion to refuse a DNA order where the offender has not established a grossly disproportionate impact on his privacy and security of the person: *Isbister* (2002), 303 A.R. 22 (C.A.)".

IMPAIRED DRIVING - SCREENING TEST - MOUTH ALCOHOL - 15 MINUTE WAIT

R. v. Szybunka - September 12,
2005 Alta. Q.B. per Agrios, J.:

Appeal from 253(b) conviction. Screening test. Police officer conducting test did not inquire of accused as to timing of last drink. Upon later questioning at detachment, accused told the breath technician that his last drink was at 11:00 p.m., while the screening test was performed at 11:13 p.m..

Held: Appeal dismissed.

"Waiting 15 minutes is not mandatory unless the investigating constable has reasonable and articulable reason to believe the accused has consumed alcohol within that time and knew the results of the approved screening device could not be relied upon": *Bernshaw* (1995) 95 C.C.C. (3d) 193.

R. Prithipaul - Defence Counsel

**JURY SELECTION -
CHALLENGE FOR CAUSE -
INTERFERENCE BY TRIAL
JUDGE - NEW TRIAL**

R. v. Cardinal - September 23, 2005 Alta. C.A. per Ritter, O'Brien, J.A., Trussler, J. - Trial Judge: Hart, J.:

Appeal from conviction on charge of second degree murder. Jury selection involved a challenge for cause. Twice the trial judge entered into the challenge for cause by suggesting to the triers that a potential juror ought to be dismissed.

Held: Appeal allowed, new trial.

“When the trial judge usurped the triers’ function he erred legally such that a new trial is warranted ... **Barrow** [1987] 2 S.C.R. 694 affirmed that the challenge for cause provisions ... remove any power of the judge to decide issues of partiality ... the language in **Barrow** provides no room to apply s. 686 ... ‘Usurpation of this sort is so severe an error of law by the judge that it mandates a new trial, even if no prejudice to the accused can be shown’”.

L. Stevens - Defence Counsel



**SENTENCE - IMPAIRED
DRIVING CAUSING HARM -
CONDITIONAL SENTENCE**

R. v. Wood - September 14, 2005 Alta. Prov. Ct. per Semenuk, P.C.J.:

Accused pled guilty to two charges of impaired driving causing bodily harm. Accident occurred as accused travelled the wrong way on a one way. Minor indicia. Accused blew 160 mg%. 29 year old accused with no record. Accused enrolled in AADAC. Two young children (who were in another vehicle) injured in the collision. Serious back and leg injuries. One of the children was confined to a wheelchair as a result of the collision

Held: 15 month CSO.

Deterrence and denunciation achieved through a conditional sentence. Sentence range for impaired driving causing bodily harm is probation to 30 months jail: **Poffenroth** (2005) ABPC 22. Sentence included 4 months of house arrest and 100 hours of community service work.

J. Ruttan - Defence Counsel



**YOUTHS - S. 3(1)(B) YCJA -
RIGHT TO A SPEEDY TRIAL**

R. v. J.O.B. - September 15, 2005 Alta. C.A. per Hunt, Berger, Ritter, J.A. - Trial Judge: Flatters, P.C.J.:

Crown appeal from stay of proceedings entered in Youth Court. 13 month delay to trial. Delay caused by one Crown adjournment and systemic factors. On trial date Crown sought additional adjournment due to ongoing disclosure problems. Trial judge declined to grant an adjournment and entered a stay.

Held: Appeal dismissed.

Sections 3(1)(b)(iv)(v) YCJA mandate “timely intervention” of the justice system and “promptness and speed” in bringing young people to trial. Trial judge entitled to grant a stay. “Unreasonable delay resulting in prejudice to this young person was made out”.

J. Conway - Defence Counsel



Also Released:

R. v. Ashlee 2005 ABCA 287

Crown application for leave to appeal granted on the following question: “If consent to sexual activity is given, but unconsciousness comes to the person who consented before the consent is acted on, is the consent still operative in law?”

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