



# THE UPDATE

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## JURY TRIAL - CONDUCT OF CROWN COUNSEL - UNFAIR CONDUCT - NEW TRIAL

**R. v. Kwandahor-Mensah** - Feb. 16, 2006 ABCA 59 per Cote, O'Leary, Martin, JA - T. Judge: Macklin, J:

Appeal from conviction on charges including evading police. Jury trial. Accused testified and was cross-examined by the Crown as to why "he had failed to tell the police" his version. In her address, Crown counsel argued to the jury that the defence had violated the rule in *Browne v. Dunn*.

### Held: New trial ordered.

Cross-examination violated the right to silence and transformed the police caution "into a trap": *Turcotte* (2005), 200 CCC (3d) 289 (SCC). If rule in *Browne v. Dunn* had been breached (which it had not), Crown obligated to raise the issue with the trial judge. "It was an accusation of wrongdoing by defence counsel, and a suggestion [by the Crown] that the jury's verdict be used to redress the misconduct".

**C. Davison** - Defence Counsel

## SENTENCE - BOOKMAKING - 202 CC - DISCHARGE DENIED - \$1500 FINE

**R. v. Lam** - Feb. 17, 2006 ABPC 57 per Allen, PCJ:

45 year old accused with no record pled guilty to bookmaking contrary to s. 202 CC. Discharge application. Undercover police officers made bets on pro sports through accused who was working at the time as a bartender. Winning bets were paid out, while losing bets lost the amount of the bet plus a 10% commission.

### Held: \$1500 fine.

General deterrence an important factor in bookmaking cases. Deterrence generally achieved through imposition of high fines: *Snider* (1977), 37 CCC (3d) 189 (Ont CA). Discharge contrary to public interest. Offence was not impulsive, and was motivated by financial gain. "Potential bookmakers must be deterred from wishing to profit from those who wager." Authorities reviewed.

**A. Fong** - Defence Counsel

## SENTENCE - DRUGS - COCAINE TRAFFICKING - ACCUSED ON PAROLE - 56 MONTHS JAIL

**R. v. Ly** - Feb. 14, 2006 ABQB 136 per Sullivan, J:

Accused pled guilty to possession of cocaine for the purpose of trafficking. Vehicle stop. Accused in possession 14.3 grams of crack cocaine (individually wrapped) and \$300 cash. Accused on parole from a 4 year sentence for cocaine trafficking. Defence sought conditional sentence.

### Held: 56 months jail.

3 year starting point for commercial trafficking in cocaine. As per *Ostertag* (2000) ABCA 232, accused's crime was a "crime of calculation, of planning and deliberation, rather than a crime of opportunity". Aggravating factors outweighed mitigating factors. Primary aggravating factor being that accused was on parole: *Mahari* (1996), 187 AR 35 (CA). Crown request for delay of parole eligibility as per s. 743.6 CC denied.

**M. Stephensen** - Defence Counsel

**SENTENCE - DRUGS -  
MARIHUANA TRAFFICKING  
- CONDITIONAL SENTENCE**

*R. v. Nguyen* - Feb. 14, 2006  
ABCA 56 per Paperny, O'Brien,  
Mason, JA - T. Judge: Daniel, PCJ:

Appeal from 12 month jail sentence imposed following accused's guilty plea to possession of marihuana for the purpose of trafficking. Search warrant resulted in the discovery of a grow operation – 217 plants with a possible street value of \$300,000. Accused was not the directing mind, rather she simply had knowledge and control over what others were doing in her residence. Joint submission for 18 month CSO overruled.

**Held: Appeal allowed.  
Conditional sentence imposed.**

Trial judge erred in her findings of fact and inferences that went beyond the facts admitted to by the accused. The joint submission was within an acceptable range. "A number of cases were cited in which conditional sentences had been directed in circumstances reasonably comparable to those existing here": *Dostaler* (2004) ABQB 304; *Smith* (2004) ABQB 756 et. al..

**A. Sanders** - Defence Counsel

**SENTENCE - PRE-TRIAL  
CUSTODY - CREDIT -  
FACTORS TO CONSIDER**

*R. v. Groves* - Feb. 16, 2006  
ABPC 51 per Fradsham, PCJ:

Accused pled guilty to 4 bank robberies. 50 year old accused who suffered from agoraphobia, panic disorder and alcohol dependence. Accused also suffered from a significant metal allergy Record included 1981 convictions for robbery. Accused in pre-trial custody since Dec. 16, 2003. Evidence called regarding poor access to medical services, overcrowding etc. within remand facilities.

**Held: 14 years jail global,  
sentence reduced to 5 ½ years  
jail after pre-trial custody credit.**

2 ½ :1 credit given for pre-trial custody time. In-depth review of case law regarding pre-trial custody calculation. Given accused's medical / psychiatric condition, overcrowding at remand facilities, and frequent transfers, a credit greater than the usual 2:1 was appropriate. "I am satisfied that Mr. Groves has endured while on remand some conditions which are materially worse than those which he would have endured if he had been in a post-sentencing facility."

**A. Archer** - Defence Counsel

**SENTENCE - SEXUAL  
ASSAULT - TOUCHING OF 16-  
17 YEAR OLD VICTIMS - 3 1/2  
MONTHS JAIL**

*R. v. Samia* - Feb. 16, 2006 ABQB  
140 per Sulyma, J - T. Judge: Peck,  
PCJ:

Crown appeal from \$3000 fines imposed following accused's conviction on 3 sexual assault charges. Accused touched 16 and 17 year old participants in a fashion show. Accused not arrested for 10 years, as he had left the country to live in Lebanon for an extended period.

**Held: Appeal allowed, 3 ½  
months jail imposed.**

Accused touched the complainant's under their clothing in both the breast and vaginal area. Offences were not simply a "minor" or "inappropriate" touching as found by the trial judge. Trial judge under-emphasized gravity of offences. Given the complainant's age, offences constituted a breach of trust. "I agree with the Crown that the lowest end of the range of sentence for these offences is probation". Authorities reviewed.

**S. Tarrabain** - Defence Counsel

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