



# THE UPDATE

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## APPEAL - WRITTEN REASONS RELEASED AFTER JUDGMENT - WHETHER COURT *FUNCTUS OFFICIO*

**R. v. Haver** - Apr. 20, 2006 ABQB 287 per Wilson, J - T. Judge: Creagh, PCJ:

Appeal from conviction on refusal charge. Upon conviction, trial judge provided truncated oral reasons, with written reasons released some weeks later. Some discrepancy between the oral and written reasons.

### **Held: Appeal dismissed.**

Court not *functus officio*, as judge was not seeking to vary or reverse a decision already made. Subsequent reasons should not change the earlier reasons substantively: **Bowles** (1985) 21 CCC (3d) 540 (ABCA). No such substantive changes made in present case. "The fact that the reasons were provided after the deadline for filing an appeal is not relevant ... since the appeal is from the judgment".

**R. Prithipaul** - Defence Counsel

## APPEAL - REASONS FOR JUDGMENT - ABSENCE OF REASONS - NEW TRIAL

**R. v. Evans** - Apr. 13, 2006 ABCA 123 per Cote, O'Brien, Martin, JA - T. Judge: Perras, J:

Appeal from conviction on charge of sexual assault. Trial judge's reasons failed to deal in detail with the evidence of an independent witness, and offered "no reconciliation or explanation of the obvious contradiction of the Crown's case".

### **Held: Appeal allowed, new trial.**

Either the trial judge overlooked various discrepancies in the evidence, or he considered them but did not record the same in his reasons. "If the former is the case, this is a skipped issue under **Harper** [1982] 1 SCR 2. The evidence accepted clashed. If the latter, then these reasons for decision are silent on a key point and ... preclude meaningful appellate review, under **Sheppard** [2002] 1 SCR 869.

**L. Stevens** - Defence Counsel

## IMPAIRED DRIVING - 10(B) - SCREENING TEST - NEARBY TELEPHONE - WHETHER 10(B) RIGHT AVAILABLE

**R. v. Quong** - Apr. 18, 2006 ABPC 111 per Fradsham, PCJ:

Impaired driving trial. Screening demand made of accused at Checkstop location. No 10(b) right given prior to screening test. Checkstop van (with telephone and phone numbers) only 50 feet away.

### **Held: No 10(b) breach.**

**Mitchell** (1994) 162 AR 108 (CA) continues to be good law. 10(b) right at roadside screening stage only arising in circumstances where sample cannot be received "forthwith". If sample not provided "forthwith", then the demand under s. 254(2) is no longer valid, and as per **Thomsen** the 10(b) right is no longer suspended. Present sample provided "forthwith" and certainly prior to the accused having "any realistic opportunity ... to consult with counsel": **Latour** (1997) 101 OAC 108 (Ont CA.).

**A. Kay** - Defence Counsel

**IMPAIRED DRIVING - 258(7) -  
CERTIFICATE OF ANALYSES  
- PROOF OF SERVICE**

*R. v. Nitschke* - Apr. 13, 2006  
ABPC 116 per Lamoureux, PCJ:

Impaired driving trial. Issue regarding proof of service of Certificate of Analyses. Officer testified that he served a true copy of the Certificate upon the accused, however, he conceded that he did not see where the accused put the Certificate or what he did with it.

**Held: Conviction entered.**

“It is not necessary for the Crown to establish where the accused put the Certificate of Analysis after it was served upon him”. *Northcott* [1995] AJ No. 1015 (QB) requires proof only of the fact that the Certificate was given to the accused. “What the accused does with the document after it is served upon him is immaterial”.

**R. Snukal** - Defence Counsel

**SENTENCE- DRUGS -  
TRAFFICKING IN  
METHAMPHETAMINE**

*R. v. Buzzell* - Apr. 19, 2006  
ABQB 272 per Burrows, J:

Accused pled guilty to trafficking in methamphetamine. Two 5 ounce sales to undercover police officer for \$5000 each. 38 year old accused with extensive record, including 7 prior drug offences.

**Held: 3 ½ years jail.**

Expert evidence proved that “methamphetamine is every bit as serious a drug as cocaine”. However, the drug was listed in Schedule III. Accordingly, cocaine staring points not applicable, and the sentence must reflect the distinction drawn by Parliament between cocaine and methamphetamine: *Eichmuller* [2005] AJ No. 138 (QB). 6 month sentence imposed after credit given for pre-trial custody.

**T. Lloyd** - Defence Counsel

**SENTENCE -  
MANSLAUGHTER -  
FIREBOMBING - 20 YEARS**

*R. v. Ellahib* - Apr. 13, 2006  
ABQB 277 per Hughes, J:

Accused convicted of 2 counts of manslaughter. Firebombing of a residence at night, killing 2 children. Accused hired 2 others to carry out the crime in an effort to extract revenge arising from an ongoing feud. Prior record for violence.

**Held: 20 years jail.**

Planned and deliberate acts. Firebombing of a residence at night extremely aggravating. “Protection of society demands that individuals who are instigators and hire others to commit criminal acts must be dealt with sternly”. As per 743.6 CC, one half parole eligibility order made. Authorities reviewed.

**A. Hepner** - Defence Counsel

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