



# THE UPDATE

Issue #1 January 5, 2007

## DANGEROUS DRIVING - MENS REA - MISTAKE

**R. v. Brochu** - Nov. 6, 2006 ABPC  
305 per Malin, PCJ:

Trial on charges of impaired and dangerous driving. Convicted of impaired driving on the facts. Accused's pattern of driving (which included excessive speed and failing to stop at stop signs) was dangerous. However, accused testified that he did not know that the car pursuing him was an unmarked police vehicle, and that he drove the way he did because he thought that the occupants of the car were going to harm him.

**Held: Acquitted of dangerous driving.**

Mens rea not established. Accused's evidence that he feared for his safety accepted. **Kravshar** [2005] AJ No. 1539 followed. "The defence of mistake is simply a denial of mens rea. It does not impose any burden upon the accused".

**N. Kelm** - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - NECESSITY

**R. v. Heir** - Nov. 6, 2006 ABPC  
312 per Lamoureux, PCJ:

Care or control charge. Bizarre case. Accused's wife lost control of the vehicle while pulling into the garage at home. She then panicked and exited the vehicle while it was still moving. Accused, who was in the passengers seat, jumped over and took control of the vehicle which ultimately ended up on the next door neighbours front lawn. Impairment was admitted.

**Held: Acquittal entered.**

*De facto* care or control proven as per **Ogrodnick** [2006] AJ No. 340. However, defence of necessity open to accused. Because the vehicle was moving when the driver jumped out, it was reasonable for the accused to believe that there was imminent peril and no legal alternative but to assume control of the vehicle. There was "proportionality between the harm inflicted and the harm avoided":

**Perka**. [1984] 2 SCR 232.

**R. Batting** - Defence Counsel

## SENTENCE - ATTEMPTED MURDER - 17 YEARS JAIL

**R. v. Lysak** - Nov. 7, 2006 ABCA  
327 per Costigan, Hembroff,  
Sulyma, JA - T. Judge: Germain, J:

Defence appeal from 20 year sentence imposed following attempted murder conviction. Accused was a guest in the victim's home. For no apparent reason he approached her while she was organizing her fridge, threatened to rape her, and then shot her twice in the head. Shooting resulted in impairment of sight, smell, hearing and feeling. Sentence reduced to 17 years by trial judge in view of pre-trial custody.

**Held: Appeal allowed, 17 year sentence imposed and reduced to 14 years given pre-trial custody.**

Circumstances "place this case at the upper end of serious cases of this type ... nonetheless, the sentence ... significantly exceeds the range of sentences set out ... in the comparable cases".

**P. Royal** - Defence Counsel

## SENTENCE - "CRYSTAL METH" - JOINT SUBMISSION

**R. v. Whitnack** - Nov. 1, 2006 ABPC 302 per Ayotte, PCJ:

Accused pled guilty to possession of methamphetamine for the purpose of trafficking. Vehicle stop. 13.5 grams of crystal meth found plus \$1800 cash. Drug valued at \$1080 - \$1620. Accused had 4 trafficking related convictions. Evidence produced on sentencing established that crystal meth "is significantly more dangerous than any other agent in common use". Evidence also established "an elevated use" of crystal meth in Edson. Joint submission for 32 month sentence.

**Held: 4 years jail.**

4 year sentence necessary given aggravating factors. Regarding the law of joint submissions, "Parliament ... has significantly changed the Criminal Code since *G.W.C.* (2000) 277 AR 20. [In s. 606(1.1)] ...Parliament has chosen words which on their face contradict the existing case law by directing the court to advise the accused, *without qualification*, that it is *not* bound by *any* agreement on sentence".

**G. Collins** - Defence Counsel

## SENTENCE - SEXUAL ASSAULT - 4 YEARS JAIL

**R. v. T.L.G.** - Nov. 2, 2006 ABCA 313 per Paperny, Phillips, Brooker, JA - T. Judge: Semenuk, PCJ:

Crown appeal from 2 years less one day sentence plus probation. Accused pled guilty to break enter into a dwelling and commit sexual assault, and sexual interference. Accused entered a neighbours home through an unlocked door in the middle of the night. Complainant and her 10 year old daughter were sleeping together. Accused undressed and entered the bed. He touched the adults breasts and genitals. He rubbed the child's stomach and tried to kiss her.

**Held: Appeal allowed. 4 years jail.**

Serious sexual assault. In determining seriousness, court to consider factors including: where assault occurred, number of victim's, and any prior relationship between the parties. Assault within victims home extremely aggravating. 3 year guideline sentence for serious sexual assault as per *Sandercock* continues to be the law in Alberta: *Owusu* 2006 ABCA 239.

**J. Ruttan** - Defence Counsel

## YOUTHS - SENTENCE - SERIOUS VIOLENT OFFENCE

**R. v. D.A.K.** - Nov. 2, 2006 ABPC 247 per Cook-Stanhope, PCJ:

Accused pled guilty to break enter and assault with a weapon. Joint submission for a sentence of deferred custody and supervision. Crown did not apply pursuant to s. 42(9) YCJA for a serious violent offence finding. Issue: where the Crown does not seek a serious violent offence determination, and where the facts clearly bring the case within the definition of a serious violent offence, is the Court prevented from granting a sentence of deferred custody and supervision.

**Held: Deferred custody and supervision order unavailable.**

If an offence meets the definition of a serious violent offence, the Court is prohibited from imposed a deferred custody sentence, regardless of whether or not the Crown seeks a designation under s. 42(9). "In cases where the Crown exercises its jurisdiction not to obtain a judicial determination, this does not detract from the essential character of the offence ... it make the offence no less serious, no less violent."

**J. Bascom** - Defence Counsel

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