



THE UPDATE

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APPEAL - REASONS - W.D. - REASONABLE DOUBT

R. v. D.P.B. - Nov 21, 2006 ABCA 344 per Berger, Costigan, Watson, JA - Trial J: Goodson, PCJ:

Appeal from sexual assault conviction. Accused testified. Trial judge stated that he believed "a large portion of both" the accused and complainant's evidence. In preferring the complainant's evidence, however, he found the accused's evidence to be "self-serving".

Held: Appeal allowed, new trial.

"The reasons for judgment are not only unclear about significant aspects of the trial judge's reasoning ... a fair reading of the trial judge's decision is that he was measuring the evidence of the complainant and the appellant against each other ... A conclusory statement that [the accused's] evidence is self-serving testimony is almost a tautology".

K. Teskey - Defence Counsel

BAIL - APPEAL - MURDER - "NOT FRIVOLOUS" - TEST

R. v. Effert - Nov. 22, 2006 ABCA 352 per Berger, JA:

Application for bail pending appeal from a second degree murder conviction. Accused convicted by jury of the killing of an infant. Alleged errors with respect to jury instruction concerning the expert evidence.

Held: Bail granted.

"In *Passey* (1997), 121 CCC (3d) 444 (Alta CA) the Court ... concluded that the 'not frivolous' requirement in s. 679(3)(a) requires that the Applicant show only that his or her ground of appeal would not necessarily fail". Test met. Surrender of accused not in issue. Authorities reviewed.

P. Royal - Defence Counsel

IMPAIRED DRIVING - APPROVED SCREENING TEST

R. v. Gillis - Nov. 14, 2006 ABPC 323 per LeGrandeur, PCJ:

Accused charged with care or control. Issue as to whether Crown had proven that roadside breath samples were taken by an "approved screening device". Officer read a screening demand to accused, and a fail sample was received. The nature of the device used was not identified in the evidence. The phrase "approved screening device" appeared only in the wording of the demand read.

Held: Acquittal entered.

Judicial notice cannot be taken that the device used was "approved" by Parliament. As per *Tessier* (2006) AJ No 1266, "a roadside screening device is not proven to be 'approved' unless there is evidence that is approved". Accordingly, Crown failed to prove that objective reasonable grounds to make the subsequent breath demand existed. Authorities reviewed.

J. Dziadyk - Defence Counsel

**IMPAIRED DRIVING -
CERTIFICATE - SERVICE**

R. v. Cunningham - Nov. 22, 2006
ABCA 345 per McFadyen, Berger,
Ritter, JA:

Appeal from impaired driving conviction. Issue regarding proof of service of Certificate of Analysis. Officer could not recall serving the document, but was able to give detailed evidence regarding his standard practice in this regard. "This appeal raises the question as to whether evidence of standard practice, standing alone, can ever constitute sufficient proof of service".

Held: Appeal dismissed.

Case by case analysis required. In the present case, "there was a sufficient guarantee of reliability so that the evidence of standard practice met the evidentiary burden placed upon the Crown".

S. Prithipaul - Defence Counsel

**PRISONER'S RIGHTS -
CHARTER - 7 - TRANSPORT
VANS**

*Trang v. Alberta (Edmonton
Remand Centre)* - Nov. 21, 2006
ABQB 834 per Marceau, J:

Application seeking a declaration that the transport of prisoners from the Edmonton Remand Centre, while shackled and handcuffed, in transport vans without seatbelts and adequate safety precautions, violated ss. 7 and 12 of the Charter.

Held: Application granted.

Transport of the prisoners in the security vans "threatened the security of their person and their life". Deficiencies included: protrusions; sharp corners and edges; seating configurations; no handholds or seatbelts; and the fact that the prisoners were shackled and handcuffed. Authorities reviewed.

T. Engel - Defence Counsel

**TRAFFIC SAFETY ACT -
REGISTERED OWNER -
IMPLIED CONSENT**

R. v. Richardson - Nov. 16, 2006
ABQB 828 per Macklin, J:

Appeal from conviction as registered owner of a vehicle that failed to remain at an accident scene. Accused testified at trial that she did not give the driver (with whom she was living) permission to drive. Trial judge accepted the evidence, but found that the living relationship proved an implied consent.

Held: Appeal allowed, acquittal.

A trial court may draw an inference of implied consent in appropriate cases. However, in the present case the evidence was that although the driver possessed a set of keys, permission to drive had to be sought on a case by case basis. Accordingly, accused's evidence ought to have overcome the inference of implied consent.

P. Shipanoff - Defence Counsel

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