



# THE UPDATE

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## APPEAL - REASONS - CREDIBILITY FINDINGS

**R. v. W.R.P.** - June 1, 2007 ABCA 187 per Conrad, Ritter, Ross, JA - T. Judge: Goodson, PCJ:

Appeal from sexual assault conviction. Oath against oath trial. Trial judge rejected accused's evidence as internally inconsistent. Issue regarding adequacy of reasons for judgment.

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

Upon review, accused's evidence was only once inconsistent, and on a matter of little consequence. "It is not enough to use generic reasons, that is to utter the words 'internally inconsistent', when discounting the credibility of any witness. Unless it is obvious on the face of the record, trial judges must identify what it is they find to be internally inconsistent, and they must then perform analysis of the accused's person's testimony, both alone and in the context of the evidence as a whole. An accused person is entitled to know why his denials were disbelieved": *Stamp* 2007 ABCA 140.

**R. Marceau** - Defence Counsel

## BAIL - PUBLICATION BAN - 517 CC - CONSTITUTIONALITY

**R. v. White** - June 5, 2007 ABQB 359 per Brooker, J:

Accused charged with murder. He had applied for a mandatory publication ban of his bail hearing under s. 517 CC. Media challenged the constitutionality of 517 CC as a violation of free speech rights.

### **Held: 517 CC violates s. 2(b).**

Mandatory publication ban upon request of accused overly broad, as the legislation applies even where a jury trial is not possible. "I think something specifically targeted at the items listed in s. 517, is required to establish a rational connection between the s. 517 mandatory publication ban and its purpose of avoiding jury contamination". Phrase "and shall on application of the accused" declaration unconstitutional, however, declaration suspended for 12 months to allow time for Parliament to draft alternative legislation. Declaration adding to s. 517 the phrase "where a jury trial is possible" taking place immediately. Authorities reviewed.

**L. Stevens** - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - TEST

**R. v. Ogrodnick** - May 16, 2007 ABCA 161 per Costigan, Paperny, Watson, JA:

Appeal from acquittal on care or control charge. Accused found in the driver's seat of a running vehicle.

### **Held: Appeal allowed, conviction.**

"The second error of the appeal judge is ... his further analysis led him to effectively install, as part of the Crown's burden of proof ... an obligation to prove that the respondent would form an intent to set the vehicle in motion ... As this Court has said, the intent to set a vehicle in motion is not an essential element of the concept of *de facto* care or control ... While the Crown has to show involvement with the motor vehicle that could create a risk, such a risk may arise in many combinations of an alcohol influenced individual and a motor vehicle ... Efforts to state tests of probability or prospect of future intent in an attempt to define the risk contemplated by Parliament inject uncertainty into a settled area of law."

**R. Prithipaul** - Defence Counsel

**IMPAIRED DRIVING -  
REFUSAL - SCREENING TEST**

**PARTIES - 21 CC - MERE  
PRESENCE AT CRIME SCENE**

**SENTENCE - MURDER - 17  
YEAR PAROLE INELIGIBILITY**

*R. v. Liptak* - May 24, 2007 ABCA 177 per Watson, JA:

Application for leave to appeal from conviction on charge of refusal to provide a screening test, contrary to s. 254(2) CC. Defence argued that police ought to tell accused: (1) that a roadside test is only used to determine reasonable grounds, and is not evidence at a trial; (2) that the consequences of refusal to comply are the same as impaired driving.

**Held: Leave to appeal denied.**

No authorities supported defence contention. Police are not required to provide disclosure to individuals prior to their making of decisions during police investigations: *Fitzsimmons* (2006), 216 CCC (3d) 141 (Ont CA). Police need not attempt to persuade or negotiate with a person regarding his or her jeopardy. Authorities reviewed.

**T. Kantor** - Defence Counsel

*R. v. Cutarm* - June 1, 2007 ABCA 186 Conrad, Ritter, Ross, JA - T. Judge Acton, J:

Appeal from conviction by jury on aggravated assault charge. Issue regarding instruction to jury on the law of parties (s. 21 CC).

**Held: Appeal dismissed.**

Regarding mere presence at the scene of a crime, the trial judge stated: "... if a person knows that someone intends to commit an offence and goes to or is present at a place where the offence is committed to help the other person commit the offence, the person is an aider". Although it would have been preferable for trial judge to expressly state that an aider must in fact do something to aid, the instruction on a whole made this clear. In other parts of the charge, the jury was told that the aider must do something, or fail to do something, to assist in the commission of a crime.

**C. Davison** - Defence Counsel

*R. v. Gordon* - May 16, 2007 ABQB 329 per Greckol, J:

Accused convicted of second degree murder. Issue regarding parole ineligibility period. Accused and his girlfriend left a party with another couple. "Tension was palpable in the car". Accused held a handgun to the back of the victim's head and shot him at close range. Accused then dumped the body in a ditch and, in days following, tried to cover up the crime.

**Held: 17 year parole ineligibility.**

"This shooting was an unprovoked cold blooded act of murder". 25 year old accused with a serious record, including convictions for aggravated assault and robbery. Parole ineligibility periods of 15-20 years relate to cases at the highest end of moral culpability or dangerousness: *Van Osselaer* (2004), 181 CCC (3d) 322 (BC CA).

**W. Raponi** - Defence Counsel

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