



# THE UPDATE

Issue #32 August 17, 2007

## IMPAIRED DRIVING - CARE OR CONTROL - ACQUITTAL

*R. v. Baumber* - July 19, 2007 ABPC 203 per Shriar, PCJ:

Care or control trial. Impaired accused found asleep in the driver's seat, parked in a gas station parking lot. Keys were in the ignition, but vehicle not running. Accused was driven to the gas station by another person.

### Held: Acquittal.

"What the Court of Appeal said in *Ogrodnick* ... is that the intent to drive is not the issue. The purpose of this section ... is to deter the danger posed by impaired individuals being behind the wheel. Parliament's intention is to protect the public from the risk of the vehicle being set into motion ... I find that [the accused] took steps to minimize the risk he posed ... and though the keys were left in the ignition ... I am satisfied there was no real risk of the vehicle unintentionally being set in motion."

## IMPAIRED DRIVING - 10(B) - "EVENTUALLY"- HOLD-OFF

*R. v. Irwin* - July 9, 2007 ABPC 126 per Brown, PCJ:

Impaired driving trial. Motor vehicle collision. Accused identified to police as the driver. Indicia of impairment noted and accused arrested. When accused was asked whether she wanted to contact counsel, her answer was "eventually". A short conversation then followed, during which the accused stated that she had consumed 5 drinks.

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

"At the time Ms. Irwin was advised of her right to counsel, she was also properly cautioned. Her reply to the question of whether or not she wished to contact counsel, "Eventually", did not require police to stop all questioning, given that she had also been cautioned that information she provided could be used as evidence against her."

**I. Savage** - Defence Counsel

## IMPAIRED DRIVING - 254(2) - DEMAND - "FORTHWITH"

*R. v. Neitsch* - July 6, 2007 ABCA 226 per Hunt, Watson, Slatter, JA:

Impaired driving conviction appeal. Issue: "when a roadside test demand ... does not contain the word 'forthwith' ... may a court, in deciding whether the demand for forthwith compliance was made, review all of the evidence from the start to the finish of the investigation, or should the court be restricted to evidence that is contemporaneous with the making of the demand?"

### Held: Appeal dismissed.

"When all the critical events occur within a few minutes, it would be highly artificial to consider only the initial conversation between the officer and the driver in deciding whether immediacy has been conveyed ... the appropriateness of looking at the broader circumstances to determine whether immediacy has been conveyed is reinforced by *Higgins* (1994), 50 MVR (2d) 24.

**T. Kantor** - Defence Counsel

**SENTENCE - AGGRAVATED ASSAULT - 2 YEAR CSO**

**R. v. Puckett** - July 6, 2007 ABCA 227 per O’Brien, Sulatycky, Bensler, JA - Trial Judge: Peterson, PCJ:

Crown appeal from 2 years less 1 day conditional sentence imposed following accused’s guilty plea to aggravated assault. Accused stabbed her former husband in the neck with a homemade knife, as the victim was at the accused’s home attempting to enforce a court order awarding him custody of their daughter. No record. Positive PSR. Victim was not opposed to a community sentence.

**Held: Appeal dismissed.**

As per **Proulx**, a conditional sentence can achieve both punitive and restorative objectives. Appellate courts are not to “second- guess” sentencing judges unless the sentence is demonstrably unfit. Sentence not unfit.

**A. Sanders** - Defence Counsel

**SENTENCE - MANSLAUGHTER - SHOOTING - 14 YEARS JAIL**

**R. v. Wharry** - July 6, 2007 ABQB 462 per Greckol, PCJ:

Accused was convicted of manslaughter and possession of a loaded firearm (originally charged with murder). Accused, while driving, fired 3 shots from a .45 calibre handgun in the general vicinity of a group of youths walking down the street. 18 year old girl was struck by one of the bullets and was killed. 21 year old accused at the time, who had offered an early guilty plea to manslaughter. Genuine remorse.

**Held: 14 year global sentence.**

Sentence reduced to credit pre-trial custody time. Primary aggravating factor being that the accused was driving the streets of Edmonton with a loaded handgun. “This conduct is reprehensible in a civilized society and represents a tragedy waiting to happen.” Case law regarding manslaughter sentencing reviewed.

**N. Rauf** - Defence Counsel

**SENTENCE - PRINCIPLE - OVER EMPHASIS OF RECORD**

**R. v. Steinhauer** - July 9, 2007 ABCA 229 per Slatter, Sulyma, Verville, JA - Trial Judge: Day, PCJ:

Appeal from 361 day jail sentence imposed after accused pled guilty to shoplifting. \$237 of meat stolen from Superstore. 93 prior convictions, 21 of which were theft related.

**Held: Appeal allowed, sentence reduced to 6 months.**

Undue emphasis placed by sentencing judge on criminal record. As per **LeBlanc** (2002) ABCA 115, sentence range for theft for accused with a lengthy record is 3-6 months.

**K. Teskey** - Defence Counsel

Also Released:

**R. v. Callihoo** - July 9, 2007 ABCA 224 per Slatter, Sulyma, Verville, JA - Trial Judge: LeReverend, PCJ:

2 year less 1 day jail sentence for disturbing phone calls reduced to time served plus probation. Accused was unable to answer questions at original sentencing about remorse. “As a result of his being unable to answer questions and being unrepresented, the trial judge put the sentence at the high end of the range.”

*Dawson Stevens & Shaigec*  
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4  
Tel: (780) 424-9058 Fax: (780) 425-0172

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