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Repudiation of Plea Agreement Upheld: SCC

A decision by the Alberta Attorney General to resile from a plea agreement and continue prosecuting the accused on a charge of dangerous driving fell within the scope of prosecutorial discretion and did not constitute an abuse of process under s.7 of the *Charter* according to the Supreme Court in [R. v. Nixon](#), 2011 SCC 34. "In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make" according to the court. (para. 68) In this case, the ADM's decision that it would not be in the public interest to terminate prosecution given the Crown's erroneous assessment of the strength of the evidence and the seriousness of the charges could "hardly be regarded as evidence of misconduct." The court cautioned, however, that the act of repudiation in this case "was indeed a rare and exceptional occurrence" and did not mean that "plea agreements can be overturned on a whim." These articles comment on the

decision:

- [Ruling could have disastrous impact on accuseds' rights](#) Law Times blog;
- [Crowns can renege on plea deals: SCC](#) Lawyers Weekly.

Seriousness of Trial Errors Divides Court: SCC

The Supreme Court of Canada restored trial convictions in two recent cases despite acknowledging failings in the conduct of both trials. In [R. v. O'Brien](#), 2011 SCC 29 the court found that the admission of improper character evidence was "a harmless error of law that caused no substantial wrong or miscarriage of justice." (para. 19). "Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts," according to the court. In this case, "the fact that the trial judge said in his reasons that he relied "entirely" on the DNA evidence...meant that he did not rely on the character evidence. Imputing such reliance into reasons that state the contrary creates a new, unchartable universe of appellate review where even if the reasons reveal a proper grasp of the facts and the law, the trial judge may nonetheless find the integrity of his or her decision undermined by the possibility that judicial silence on an issue will be interpreted as "unconscious" judicial error." (para.16)

In [R. v. E.M.W.](#), 2011 SCC 31 the majority found that while the trial was "far from perfect" the trial judge took the defects into account in his careful and detailed reasons and so there was no miscarriage of justice. (paras. 8 and 10).

Some suggest that strong dissents in both cases reflect a growing divide in the court concerning the rights of accused persons:

- [Judges in standoff over accused rights in Nova Scotia DNA conviction](#) Globe & Mail;
- [R. v. O'Brien: Can the End Justify the Means?](#) The Court;
- [R. v. E.M.W. and R. v. O'Brien: Playing with Words, Playing with Fire](#) The Court.

Supreme Court Rules on Consent

The Supreme Court's 6-3 ruling in [R. v. J.A.](#), 2011 SCC 28, that an unconscious person cannot consent in advance to sexual activity, has divided both the court and public opinion. The opposing arguments are documented in the decision and in these articles:

- [DiManno: Supreme Court's consent ruling infantilizes women](#) The Star;
- [Consent ruling sends a welcome and clear message](#) The Vancouver Sun;
- [R. v. J.A.: An Uncomfortable Truth](#) The Court;
- [Consciousness and Consent in Sexual Assault Cases](#) ABlawg;
- [Top court rules unconscious person cannot consent to sex](#) Law Times blog;
- [Crimes of \(Unconscious\) Passion](#) Slaw.

Reasons Must Explain Decision: MBCA

The court set aside a cocaine trafficking conviction and ordered a new trial in [R. v. Geddes](#), 2011 MBCA 44, finding that the trial judge improperly applied the *W(D)* principle and gave inadequate reasons for rejecting the accused's evidence. The court found that assessing the accused's evidence in light of the Crown's evidence led "to an inadvertent shifting of the burden from the Crown to the accused and, second, to the judge's failure to apply the principle of reasonable doubt to all of the evidence, including the accused's." (para. 16) In addition, considering the uncomplicated evidentiary basis, the analysis was "unnecessarily protracted and tortuous, making it virtually incomprehensible." (para.17)

Recent Q.B. Decisions

[R. v. Jolicoeur](#), 2011 MBQB 129 - in order to determine whether an offender has committed a "serious personal injury offence" within the meaning of s. 752 of the *Criminal Code*, the court must analyze the circumstances of the commission of the

offence of robbery and determine whether the use or attempted use of violence against another person has been established. (para. 24) In this case, the offender demanded cigarettes from a gas bar attendant, but did not brandish a weapon or make specific verbal threats. The court found he had not committed a serious personal injury offence and was therefore not precluded from seeking a conditional sentence for the robbery.

[R. v. McNabb](#), 2011 MBQB 116 - the court dismissed a manslaughter charge against a transgendered accused who pushed the victim to the ground causing him to fracture his skull. The court found the accused used no more force than was necessary in defending possession of her shoes.

[R. v. Shorting](#), 2011 MBQB 106 - the court reviews the criterion for a dangerous offender application under s. 753 of the *Criminal Code* and declines to consider a long term offender designation given the accused's record, pattern of behaviour and psychiatric diagnosis.

[R. v. N.R.R.](#), 2011 MBQB 90 - an aboriginal mother was sentenced to 12 years for the unlawful death of her 21 month old daughter. The court considered the unique systemic and background circumstances of the offender, but found her moral culpability and blameworthiness demanded a denunciatory and deterrent sentence that did not significantly differ between an aboriginal and a non-aboriginal offender. (para. 42)

Drug Legislation In Force

Legislation making it an offence to import substances into Canada which will be used in the production or trafficking of methamphetamine or ecstasy is now in force. [Bill C-475](#), amending *The Controlled Drugs and Substances Act*, received royal assent on March 25, 2011 and came into force 90 days after assent.

Changes to *The Victims' Bill of Rights Act* In Force

[Bill 3](#), *The Victims' Bill of Rights Amendment Act (Denying Compensation to Offenders and Other Amendments)*, and [Regulation 63-2011](#), *Victims' Rights Regulation, Amendment*, came into force May 30, 2011. The amendments clarify who may be eligible for compensation and the types of compensation available, and provide that victims who have been involved in past criminal activity may be denied compensation.

Stiffer Sanctions for Impaired Drivers

Drivers (including those operating boats, planes or trains) will soon face harsher penalties, as described in this government [news release](#). [The Highway Traffic Amendment and Drivers and Vehicles Amendment Act](#), which received royal assent December 9, 2010, and [Regulation 83/2011](#) were proclaimed by Order in Council 206/2011 and will come into force August 15, 2011.

Status of Provincial Crime Bills

Several crime related bills were passed before the provincial legislature adjourned on June 16, 2011. They include:

[Bill 16](#) - *The Safer Communities and Neighbourhoods Amendment and Criminal Property Forfeiture Amendment Act* received royal assent and came into force June 16, 2011. Part 1 allows for safety orders shutting down buildings which have been used for criminal organization offences and Part 2 creates a rebuttable presumption that a property was used to engage in unlawful activity if a community safety order has been issued.

[Bill 18](#) - *The Highway Traffic Amendment Act* received royal assent and came into force June 16, 2011. It makes changes to *The Highway Traffic Act* to ensure that those convicted of auto theft under the new *Criminal Code* provisions receive an automatic driver's licence suspension ranging from one year to a lifetime suspension.

[Bill 29](#) - *The Child Sexual Exploitation and Human Trafficking Act* received royal assent June 16, 2011 and will come into force on proclamation. It will allow victims of human

trafficking and sexual exploitation to obtain protection orders against those who prey on them and to sue their abusers.

[Bill 31](#) - *The Manitoba Public Insurance Corporation Amendment Act* received royal assent June 16, 2011 and came into force on that day except for the section pertaining to motor vehicle theft, which will come into force when ss. 333.1(1) of the *Criminal Code* is in force. The legislation amends the MPI Act to cancel compensation to accident victims who are convicted of criminal offences related to the accident.

[Bill 36](#) - *The Adult Abuse Registry Act and Amendments to the Vulnerable Persons Living with a Mental Disability Act* received royal assent June 16, 2011 and will come into force on proclamation. It establishes an adult abuse registry for persons who abuse or neglect vulnerable adults and creates procedures for reporting abusers.

[Bill 37](#) - *The Highway Traffic Amendment Act (Accident Reporting Requirements)* received royal assent June 16, 2011 and will come into force on proclamation. It clarifies what information drivers involved in an accident are required to exchange and report and eliminates the requirement to make a police report if the only consequence is property damage.

Mental-Health Court to Open in Winnipeg

As noted in this June 7, 2011 [news release](#), the province is establishing a special court to work with accused persons whose mental-health issues are the likely cause of their criminal behaviour. A multi-disciplinary team operated by the Winnipeg Regional Health Authority will provide supports and assessment of mental-health status and develop service and treatment plans. The court is expected to start hearing cases next winter.

Remand Report

The current issue of [Juristat](#) contains the article [Trends in the use of remand in Canada](#). Not surprisingly, the number of adults in remand has steadily increased in the last decade, and Manitoba reported the greatest increase at two and one half times the number from 2000/2001.

Recommended Reading

These articles may be of interest to criminal law lawyers:

[Breaking taboos only way to move drug policy forward](#) - a *Law Times* article from June 2, 2011, discusses the recommendations of the Global Commission on Drug Policy and contains a link to the Commission's June 2011 report.

[Do legal aid rates provide accused with a fair defence?](#) - from the June 7, 2011 edition of *Law Times*, discusses the always topical issue of legal aid rates and references a B.C. decision ([R. v. Bacon](#), 2011 BCSC 135) tackling the issue.

[A Criminal Mind: Judges show conflicting thoughts on enhanced credit](#), a *Law Times* article from June 20, 2011, looks at the contradictory case law concerning the new *Truth in Sentencing Act*. The author concludes that clients are more likely to receive enhanced credit if they have no criminal record, they consent to detention, they can show a specific impact of the detention, or if delays were outside of their control.

The Ninth Annual Crown Defence Conference

The next Crown Defence conference will take place September 22 and 23, 2011 at the Winnipeg Convention Centre. Guest speakers include Justice Marc Rosenberg and journalist Christie Blatchford. For further details contact Heather Reay at 985-8189.

