



# THE UPDATE

Issue #4 January 26, 2007

## CHARTER - 10(B) - RIGHT TO COUNSEL AT TRIAL

**R. v. Villella** - Nov. 24, 2006  
ABCA 359 per Fraser, Paperny, Ritter, JA - Trial J: Hughes, J:

Appeal from conviction for drug trafficking. Accused was unrepresented at trial. Accused had unsuccessfully applied at trial for state-funded counsel.

### Held: Appeal dismissed.

Trial judge correctly applied factors set out in *Rain* (1998), 130 CCC (3d) 167. Trial judge made findings that accused was able to represent himself and that he had not been diligent in attempted to obtain legal aid. The accused "had the ability to retain counsel but chose not to, the matter was not unduly complex and [the trial judge] assisted him at each stage to represent himself ... there was no unfairness in this trial".

**D. Andrews** - Defence Counsel

## EVIDENCE - UNSAVOURY WITNESS - CORROBORATION

**R. v. Yatchotay** - Nov. 29, 2006  
ABQB 852 per Macklin, J:

Manslaughter trial. Crown's case rested upon the evidence of an eyewitness, who was essentially a co-accused, and who had a trial on the same charge scheduled to start one week later.

### Held: Acquittal entered.

Unsavory witness who testified that she had been told that if she cooperated that her charges would "go away". Question being whether or not confirmatory evidence strengthened trial judge's belief that the suspect witness was telling the truth?: *Kehler* [2004] 1 SCR 328. "Corroboration need not be found only in evidence that directly implicates the accused but may also be found in evidence that does not implicate the accused ... In considering the corroborative evidence, I may consider circumstantial evidence and must consider the cumulative effect of the evidence": *Michaud* [1996] 2 SCR 458.

**P. Solotki** - Defence Counsel

## IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

**R. v. Rhyason** - Nov. 30, 2006  
ABCA 367 per McFadyen, Hunt, Slatter, JA - Trial J: Lee, J:

Appeal from conviction on charge of impaired driving causing death. Primary issue being whether trial judge erred in finding that reasonable grounds to seize breath existed.

### Held: Appeal dismissed.

As per *Bernshaw* [1995] 1 SCR 254, whether subjective reasonable grounds existed to demand a breath sample is mainly a question of fact. No appellate intervention absent a palpable and overriding error, or an error in law or principle. Factors which trial judge weighed included: smell of alcohol on breath, the fatal accident, the bloodshot eyes and a blank stare. Test for reasonable grounds as set out in *Bernshaw* at para. 48 followed by trial judge. Slatter, JA dissented.

**S. Prithipaul** - Defence Counsel

**IMPAIRED DRIVING - 10(B) - REASONABLE OPPORTUNITY**

*R. v. Callahan* - Nov. 24, 2006 ABPC 330 per McDonald, PCJ:

Impaired driving trial. Accused injured in collision and taken to hospital. Accused given opportunity to exercise 10(b) right from hospital bed on her way to the operating room. Phone books not provided to accused and police officer dialled the phone and called the 1-866 number.

**Held: No 10(b) breach.**

Accused did not request to speak with any particular lawyer, merely stating that she wanted legal advice. "The police were not required to go and fetch the phone books and place them in proximity to the accused, absent a request by her". While in the majority of the cases it is improper for a police officer to dial the phone, there is not an inflexible rule preventing this from happening in every case: *Watson* [2005] AJ No. 1167 (QB). Given accused's medical condition, police actions facilitated, rather than limited, the right to counsel.

**K. Beyak** - Defence Counsel

**IMPAIRED DRIVING - 10(B) - REASONABLE OPPORTUNITY**

*R. v. Ward* - Dec. 5, 2006 ABPC 351 per Creagh, PCJ:

Accused charged with refusing to provide breath samples. Accused asserted 10(b) right upon arrest and was taken to Check Stop van. Accused left in phone room for 4 minutes and was then seen to hang up the phone. Accused then asked "Are you done with the phone?" and he replied: "Yeah".

**Held: No 10(b) breach.**

Although accused was only in phone room for 4 minutes, the police did nothing to interrupt him or limit his time with the phone. As per *Top* [1989] AJ No. 351 (CA), the police are not required to "play 20 questions". The accused did not seek assistance from the police re: his 10(b) rights. "There is no obligation on the police to ask a detainee whether or not he or she has contacted counsel or requires more time": *Jones* [2005] AJ No. 1325 (CA).

**D. Song** - Defence Counsel

**SENTENCE - DOMESTIC VIOLENCE - 4 YEARS JAIL**

*R. v. P.B.H.* - Dec. 5, 2006 ABCA 374 per Martin, Veit, Lee, JA - Trial J: Chromka, PCJ:

Defence appeal from 4 year global jail sentence. Accused charged with assaulting his former wife on 3 separate occasions. On the last 2 occasions the accused was on bail and was subject to a no-contact order. Very serious offences including break and enter into the complainant's residence, threats with a knife and robbery. 23 year old accused with a youth conviction for robbery.

**Held: Appeal dismissed.**

Trial judge did not err by overemphasizing accused's future dangerousness, notwithstanding the absence of a significant record. "The appellant completely ignored court orders to stay away from his wife ... his persistent violent misconduct, in the face of court orders and while on bail, is strong evidence that he is likely to re-offend if released".

**D. Hatch** - Defence Counsel

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

All updates can be found at: [www.dsscrimlaw.com](http://www.dsscrimlaw.com)

**By clicking on the heading of any of the cases in THE UPDATE,  
the reader will immediately be linked to the full text of the case.**