



# THE UPDATE

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## CHARTER - 8 - VEHICLE SEARCH - STANDING

*R. v. Dhuna* - Nov. 14, 2007 ABPC 325 per Semenuk, PCJ:

Trial on various drug and weapons charges. Warrantless vehicle search conducted following arrest of accused. Accused was the driver. Issue as to whether accused had standing to raise s. 8 argument.

### Held: No standing.

Accused had no reasonable expectation of privacy vis-a-vis the vehicle. Test set out in *Edwards* (1996), 45 CR (4<sup>th</sup>) 307 (SCC) followed. Accused was not the registered owner of the vehicle, nor was there any evidence as to how the accused came to be in possession of the vehicle.

*Belnavis* (1998), 10 CR (5<sup>th</sup>) 65 (SCC) distinguished. In *Belnavis* there was evidence that the accused was driving the vehicle with the permission of the owner. *TTH* (2006) ABPC 320 followed.

**A. Ouellette** - Defence Counsel

## IMPAIRED DRIVING - 9 - POST ARREST DETENTION - STAY

*R. v. Korecki* - Nov. 9, 2007 ABPC 321 per Ogle, PCJ:

Impaired driving trial. Application for a stay of proceedings on the basis of a s. 9 violation – post arrest detention. Accused arrested for impaired driving and refusal. Accused then held in police cells for approximately 9 hours. She was handcuffed behind her back for the first 2 hours. Evidence heard that it was highly unusual to have a prisoner handcuffed behind their back while held in police cells.

### Held: Stay of proceedings.

Handcuffing of the accused while she was alone in cells led to “significant discomfort”, was arbitrary, and “was despotic and capricious.” Last resort test for a stay as per *Weaver* (2005), 363 AR 253 met. For the last 7 hours of detention, there was no evidence that the accused was unable to care for herself or represented a risk to herself or others, or would commit other offences.

**D. Inglis** - Defence Counsel

## SENTENCE - CARELESS DRIVING - DEATH - FINE

*R. v. Josan* - Nov. 9, 2007 ABPC 300 per Barley, PCJ:

Accused pled guilty to careless driving – s. 115(2)(b) TSA. Accused was driving a transport truck on Highway 2. Accused drove over the fog line, which separated the shoulder from the traffic lane, sideswiping another transport truck. Driver of the parked truck was killed. Accused immediately stopped. No alcohol or drugs. Accused was not speeding. No prior bad driving record.

### Held: \$2000 fine.

Wide range of case law reviewed. “These cases confirm that a non-custodial sentence is appropriate for some cases of careless driving that results in death, although it is also clear that jail is also sometimes appropriate.” Primary mitigating factors: lack of driving record, early guilty plea, and “the fact that the driving offence was not blatant or deliberate.”

**D. Yanko** - Defence Counsel

**SENTENCE - DRUGS - COCAINE TRAFFICKING**

**R. v. Wong** - Nov. 15, 2007 ABPC 317 per Bascom, PCJ:

43 year old accused pled guilty to trafficking in cocaine. Related criminal record, including 40 month sentence for trafficking in 2003. 9 transactions with an undercover police officer, ranging from the sale of 3 grams to 12.2 grams.

**Held: 5 ½ years jail (less pre-trial custody).**

“Although the trafficking is ‘wholesale’, the amounts trafficked are in the gram weights rather than kilograms. In a ‘wholesale’ operation, the amount and value of the drug must be considered.” As per *Henderson* (2002) 313 AR 182, accused found to be trafficking “one level above the street trafficker”. Authorities reviewed.

**J. Kelly** - Defence Counsel

**SENTENCE - SEXUAL ASSAULT - INCEST - 8 YEARS JAIL**

**R. v. A.C.S.** - Nov. 23, 2007 ABCA 367 per Martin, Mahoney, Martin JA - T. Judge: Debow, PCJ:

Crown appeal of 6 year jail sentence imposed after accused pled guilty to incest, aggravated assault and sexual assault. “The respondent engaged his biological daughter in sexual intercourse approximately 150 times for more than a decade. That resulted in the birth of three children – two of whom are significantly mentally retarded.” 54 year old accused with a dated criminal record. Accused had a very difficult upbringing and was of borderline intelligence.

**Held: Appeal allowed, 8 year jail sentence imposed.**

“Even taking into account the sad circumstances of the respondent’s life and his borderline intelligence, a sentence of less than eight years imprisonment is unfit.”

**I. Hess**- Defence Counsel

**SEX OFFENDER REGISTRY - EXEMPTION GRANTED**

**R. v. Lajoie** - Nov. 19, 2007 ABPC 329 per Brown, PCJ:

Accused convicted of attempting to purchase the sexual services of a minor. \$1000 fine imposed. Encounter lasted mere minutes. Accused offered payment for an act of masturbation. Offer declined, and the complainant got out of the car. Crown sought a SOIRA order.

**Held: Application denied.**

Court has a narrow discretion to decline a SOIRA application. Effect upon privacy was grossly disproportionate to the public interest. 52 year old accused with no record. Low risk to re-offend. Accused lived in a small community, and he was “extremely fearful that his appearance at the RCMP [for SOIRA compliance] ...would brand him and have a devastating effect on his business and home life.”

**A. Pearse** - Defence Counsel

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