



# THE UPDATE

Issue #18 September 19, 2008

## BAIL - CROWN REVIEW - DISPUTED ALLEGATIONS

*R. v. Coupal* - July 30, 2008  
ABQB 463 per Wittmann, J:

Crown bail review on impaired driving related charges. As per *Broadbent* (1996), 182 AR 74 (QB), bail judge found that because the accused denied striking the pedestrians (and the Crown called no evidence), the allegation of flight could not be considered.

### Held: Review dismissed.

Granting of bail was justified. The Crown is not required in all cases to call evidence regarding disputed facts at a bail hearing. "Section 518(1)(a) ... allows the court at a bail hearing ... to rely on the results of inquiry on oath *or otherwise* ... If all an accused person need do is to state 'I deny everything', the Crown would be forced to lead evidence at bail hearings in respect of every material fact, and the entire system ... would break down. That is not to say that there will never be cases where the *Broadbent* principle is applicable to the issue of the apparent strength of the prosecutor's case. But something more may be required than a general denial."

**S. Wojcik** - Defence Counsel

## CHARTER - 7 - FAIR TRIAL - UNREPRESENTED ACCUSED

*R. v. Tymco* - July 17, 2008 ABQB 445 per Verville, J:

Appeal from impaired driving conviction. Accused was unrepresented at trial. Adjournment request to obtain counsel had been denied by trial judge due to history of the case. Issue as to whether accused received a fair trial.

### Held: Appeal dismissed.

As per *Phillips* 2003 ABCA 4, the issue is whether or not an unrepresented accused received enough guidance from the trial judge to properly bring out any defences. Although in the present case the trial judge could have been "more thorough in his assistance and explanations", the question is whether the trial was fair, not whether it was "ideal." The case was not complicated, and on two occasions defence lawyers in the courtroom assisted the accused as a friend of the court. "Any lack of guidance by the trial judge in the circumstances of this case did not render the trial unfair."

**D. Sprake** - Defence Counsel

## CHARTER - 7 & 11(B) - DELAY - REMEDIES

*R. v. Underwood* - July 18, 2008  
ABCA 263 per Hunt, O'Brien, MacLeod, JA - T Judge: McMahon, J:

Appeal from first degree murder conviction. Third trial, given two previous successful conviction appeals. 13 years had passed since accused's original arrest. By the time of the third trial two potential witnesses had died, and another had suffered memory loss. Trial judge declined a defence stay application. Issue as to whether trial judge erred in not granting a lesser remedy, given his finding of a s. 7 breach.

### Held: Appeal dismissed.

Trial judge did not err in finding that the accused had not suffered irreparable prejudice. Although the witnesses had died, the judge allowed the reading-in of their previous trial testimony. "The extent of prejudice is a relevant factor to consider in fashioning a Charter remedy ... there was no injustice in this case."

**P. Royal** - Defence Counsel

**IMPAIRED DRIVING - 8 -  
REASONABLE GROUNDS**

*R. v. Tulk* - July 23, 2008 ABPC  
222 per Bascom, PCJ:

Impaired driving trial. Reasonable grounds argument. Accused stopped for speeding. Officer noted “an overwhelming odour of an alcoholic beverage.” Accused’s movements appeared slow and he had bloodshot eyes. Upon making the above observations, the officer immediately read a breath demand.

**Held: Section 8 breach, breath samples excluded.**

Strict compliance with 254(3) CC required given that the seizure of breath constitutes a search without judicial authorization. “The constable relied, in part, on his experience as a member of the traffic unit. This subjective conclusion is of little help to the Court in its objective analysis.”

**I. McKay** - Defence Counsel

**IMPAIRED DRIVING - 9 -  
MEANING OF DETENTION**

*R. v. Johnson* - July 23, 2008 ABPC  
225 per Daniel, PCJ:

Impaired driving trial. Alleged s. 9 breach. Accused’s vehicle seen by police to stop next to a suspected prostitute. Police pulled up next to accused and asked “Are you waiting for someone sir?” When accused responded, symptoms of impairment were noted and the accused was detained for further investigation.

**Held: No section 9 breach.**

As per *H(CR)* (2003), 164 CCC (3d) 67 (Man CA), “the mere fact of a conversation between a citizen and a police officer does not raise a presumption of detention ... There must be something more. There must be a deprivation of liberty.” Accused was not stopped by police, as he was already stopped. The single question posed by police was minimally intrusive, and no police control was assumed over his movements.

**R. Munenz** - Defence Counsel

**IMPAIRED DRIVING - 10(B) -  
TELEPHONE DIRECTORIES**

*R. v. Niedergesaess* - July 29, 2008  
ABQB 460 per Streckf, J:

Appeal from conviction on over .08 charge. Issue regarding alleged 10(b) breach. Offence occurred in Banff. RCMP phone room had the Banff phone directories, and the 1-866 poster, but not the Calgary phone books or duty counsel list. Accused said nothing to police at the time, but testified at trial that he wanted to speak to a Calgary lawyer who specialized in impaired driving.

**Held: Appeal dismissed.**

“I do not accept the Appellant’s submission that the failure to make a duty counsel list and the Calgary telephone directories available would necessarily deprive a person arrested in Banff of the detainee’s constitutional right ... He did not express dissatisfaction with the resources made available to him.”

**I. Savage** - Defence Counsel

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