



# THE UPDATE

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## DANGEROUS DRIVING - TEST - SPEED ALONE

*R. v. B.J.C.* - Oct. 6, 2008 ABCA 331 per Costigan, Ritter, Rowbotham, JA - T. Judge: Filice, PCJ:

Crown appeal from acquittal on two charges of dangerous driving causing death. Accused travelling at approximately 50 km/hr over the limit on a highway while passing prior to losing control and flipping. No other indicators of bad driving. Excessive speeding was brief.

### **Held: Appeal dismissed.**

Trial judge correctly applied the marked departure test. Speed alone can constitute dangerous driving, but a fact driven analysis is required. Trial judge considered all of the circumstances and had a reasonable doubt regarding proof of a marked departure. The only verdict available was not one of culpability based upon excessive speed.

**W. Tatarchuk** - Defence Counsel

## IMPAIRED DRIVING - 254(2) CC - REASONABLE SUSPICION

*R. v. Kimmel* - Oct. 9, 2008 ABQB 594 per Marceau, J:

Crown appeal from acquittal on over .08 charge. Trial judge found that arresting officer did not have the necessary reasonable suspicion to make a screening demand. Indicia included: failing to yield, speaking slowly and an admission of consumption of "two drinks." No odour of alcohol.

### **Held: Appeal allowed, new trial.**

Reasonable to infer that when a motorist responds to police questions by saying "two drinks", that the motorist is referring to alcohol: *Ambrose* 1999 ABQB 447. *Hnetka* 2007 ABPC 197 and *Neuberger* 2007 ABPC 66 distinguished. "The answer 'two drinks' in this case was in answer to the question whether the Respondent had anything to drink. In context, it is not an ambiguous answer." In the absence of some indication to the contrary, officer entitled to assume that the consumption was recent enough to justify the suspicion.

**S. Prithipaul** - Defence Counsel

## SENTENCE - ASSAULT - DOMESTIC - DISCHARGE

*R. v. Aymont* - Oct. 1, 2008 ABPC 285 per Ogle, PCJ:

Accused pled guilty to assaulting his spouse. Both parties were intoxicated and were fighting about the complainant stating that the marriage was over. Accused pushed his wife down, choked her and slapped her several times. No record. Accused had taken counselling to address substance abuse. Accused and complainant involved in counselling in an effort to save the relationship.

### **Held: Conditional discharge.**

"Mr. Aymont's own rehabilitation is now largely accomplished ... To now saddle him with a criminal record accomplishes no further purpose in this particular case, and in fact may well be detrimental to his continued rehabilitation, and to the best interests of the family unit he and his spouse are working to salvage." Authorities reviewed.

**A. Iovinelli** - Defence Counsel

**SENTENCE - DRUGS - CSO - COCAINE TRAFFICKING**

*R. v. Powland* - Sept. 18, 2008 ABPC 273 per LeGrandeur, PCJ:

30 year old accused pled guilty to possession of \$8,000 worth of cocaine for the purpose of trafficking. Accused had a lengthy youth court record and had served jail sentences a number of times. However, accused had been on very strict bail for 3 years, had complied with all conditions, had made “positive life changes” and “had grown up.”

**Held: 2 year less 1 day CSO.**

Accused had no previous drug record and given the changes made in his life he represented no threat of recidivism. Exceptional case. “It may be said, without much risk of criticism, that it would take a very unusual situation for any sentence other than one of imprisonment to be imposed upon a trafficker of cocaine.”

**G. White** - Defence Counsel

**SENTENCE - SEXUAL ASSAULT - SERIOUS ASSAULT - CSO**

*R. v. White* - Oct. 3, 2008 ABCA 328 per Berger, Lewis, Graesser, JA - T. Judge: Paul, PCJ:

Crown appeal from 2 year conditional sentence imposed following accused’s conviction for sexual assault. 44 year old accused placed his penis in the mouth of the 26 year old complainant (family friend) who he had escorted home after a party. Complainant was highly intoxicated (alcohol and pills) and was in a stupor at the time of the assault.

**Held: Appeal dismissed.**

*Kain* 2004 ABCA 127 ought to have the same precedential value as other sentencing judgements from the Court of Appeal, even though it was not a “Judgment Reserved.” “The Court in *Kain*, alive to the ‘tremendous deference’ that must be accorded sentencing judges ... made clear that it was an error to hold that ‘a conviction for sexual assault involving sexual intercourse with the victim should never result in a conditional sentence.’ Authorities reviewed.

**C. Davison** - Defence Counsel

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

*R. v. Lonechild* - Sept. 12, 2008 ABPC 263 per Fradsham, PCJ:

Accused pled guilty to offences including sexual assault, choking and confinement. 20 year old Metis accused with no record assaulted a night security officer who was working alone in an isolated area. Very serious assault including repeated vaginal penetration, threats and the banging of the victims head into the ground. Accused confessed to police, explaining that he was “horny and needed to get laid.”

**Held: 8 years jail.**

Deterrence and denunciation paramount. Nothing about the accused’s aboriginal background justified a reduction in sentence. Authorities reviewed.

**T. Roulston** - Defence Counsel

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

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