



# THE UPDATE

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## CHARTER - 9 - TRAFFIC STOP - RANDOM STOPS

*R. v. Dhuna* 2009 ABCA 103 per Picard, Hunt, Paperny, JA - T. Judge: Semenuk, PCJ:

Appeal from drug trafficking conviction. Traffic stop due to “suspicious driving manoeuvres”, and a police suspicion that the vehicle may be stolen. The accused exited the vehicle and was seen to throw something away in the snow. A bag was found and it contained cocaine. Accused was arrested, and vehicle searched. Trial judge found no breach of s. 9.

**Held: Appeal dismissed.**

Trial judge’s finding that the vehicle was stopped for traffic enforcement reasons entitled to a high degree of deference. “Police officers are empowered to stop vehicles at random (i.e. arbitrarily), even outside organized stop check programs, so long as they do so for ‘legal reasons’ related to driving a car, such as checking a driver’s license and insurance, sobriety and mechanical fitness of the car: *Ladouceur* [1990] 1 SCR 1257.

A. Sanders - Defence Counsel

## CHARTER - 24(2) - DRUGS - EVIDENCE EXCLUDED

*R. v. Dufault* 2009 ABCA 107 per Fraser, Conrad, Ritter, JA - T. Judge: Fradsham, PCJ:

Appeal from drug trafficking conviction. Accused was arrested without reasonable grounds in relation to an alleged robbery. A backpack search located drugs. Trial judge found a s. 8 breach, but did not exclude the evidence under 24(2).

**Held: Appeal allowed, acquittal entered.**

No urgency regarding the police search of the backpack. The search was an “intrusive violation of Dufault’s reasonable expectation of privacy ... Admitting the evidence in this case could be seen as the courts’ endorsement of an arrest based on a hunch in the hope that the evidence then found would be admitted in subsequent proceedings ... A majority of the Supreme Court of Canada has discussed the potential for abuse when evidence is obtained as a result of an unlawful search” – *Kang-Brown* [2008] 1 SCR 456.

D. Andrews - Defence Counsel

## SENTENCE - CSO - PRE-TRIAL CUSTODY CREDIT

*R. v. K.M.L* 2009 ABCA 71 per McFadyen, Hunt, O’Brien JA - T. Judge: McIlhargey, PCJ:

Crown sentence appeal. Accused received a 2 years less 1 day CSO after pleading guilty to robbery. 4 months pre-trial custody which the sentencing judge considered in imposing a conditional sentence.

**Held: Appeal allowed, 8 months jail imposed.**

“The majority in *Fice* [2005] 1 SCR 742, held that ‘a conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender spends in pre-sentence custody’. The court pointed out that pre-sentence custody should not be considered at the first stage with respect to sentence range, but is an appropriate factor to be taken into account in the second stage ... with respect to the duration of the sentence.” Penitentiary term was appropriate. Sentence reduced given time served plus CSO portion served.

M. Takada - Defence Counsel

**SENTENCE - CSO - 742.1 CC  
AMENDMENT - VIOLENCE**

**R. v. Ponticorvo 2009 ABCA 117** per McFadyen, Hunt, O'Brien, JA - T. Judge: Bascom, PCJ:

Crown appeal of 18 month CSO imposed following accused's guilty plea to assault causing. Sentence imposed following amendment to 742.1 CC, prohibiting imposition of a conditional sentence for "serious personal injury offences."

**Held: Appeal allowed, 30 months jail imposed.**

"In our view, the restrictive definition adopted by the Court in *Neve* 1999 ABCA 206, does not apply in the context of s. 742.1 which authorizes the imposition of a conditional sentence. The considerations that led the Court in *Neve* to adopt the restricted definition of serious personal injury offence are not present here. In the context of s. 742.1, the use or attempted use of violence suffices and does not require any overlay of objective seriousness."

A. Sanders - Defence Counsel

**SENTENCE - SEXUAL ASSAULT  
- CSO UPHELD ON APPEAL**

**R. v. P.A.L. 2009 ABCA 79** per McFadyen, Hunt, O'Brien, JA - T. Judge: Semenuk, PCJ:

Crown appeal from 2 years less 1 day CSO imposed following accused's guilty plea to sexual assault on his stepdaughter. 5 incidents over 7 years occurring when victim was between 8 and 14 years old. Touching of victim's chest under her clothing, and the placing of her hand on his penis under his clothing. Forensic report placed accused at a low risk of re-offending.

**Held: Appeal dismissed.**

The CSO included house arrest for the entire term. The sentencing judge heard expert testimony and gave careful reasons. The CSO was a punitive sanction and achieved the objectives of denunciation and deterrence. "As a general proposition, incarceration will normally be required for offences of the nature committed by the respondent in a familial relationship."

A. Hepner - Defence Counsel

**SENTENCE - SEXUAL  
INTERFERENCE - 15 MONTHS**

**R. v. D.A.P 2009 ABCA 72** per McFadyen, Hunt, O'Brien, JA - T. Judge: Brand, PCJ:

Crown appeal of 15 month jail sentence (plus probation) imposed following accused's guilty plea to sexual interference. Assault upon accused's granddaughter over a 2 year period while victim was between 7 and 9 years old. 5 incidents, including: squeezing her buttocks under her clothing, rubbing her vagina and rubbing her hand over his penis.

**Held: Appeal dismissed.**

15 months "at the extreme low end of the range" but not unfit. Mother's evidence was that the victim was "doing well ... no significant impact attributable to the assaults." Accused made an immediate confession, accepted responsibility and demonstrated real remorse.

G. Froese - Defence Counsel

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