



# THE UPDATE

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## IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

*R. v. Van Ulden* 2010 ABPC 269  
per Ayotte, PCJ:

Impaired driving trial. Issue regarding reasonable grounds to arrest. Indicia observed included: slurred speech, lack of balance and flushed face. No odour of alcohol was detected at any time by the investigating officer.

**Held: No s. 8 breach.**

Police not needing to demonstrate a prima facie case in order to justify the arrest. Absence of odour not fatal given the other symptoms observed. "To so hold would be to say in effect that a breath demand can never be made without the presence of an odour of alcohol ... nor do I think the average citizen would consider a conclusion that a person exhibiting those symptoms is intoxicated unreasonable simply because the observer does not detect the odour of liquor. How many of us have observed people in that condition without being or wanting to be close enough to smell the odour of liquor?"

J. Delgado - Defence Counsel

## IMPAIRED DRIVING - AS SOON AS PRACTICABLE

*R. v. Kucharishyn* 2010 ABPC 276  
per Daniel, PCJ:

Impaired driving trial. Issue as to whether breath samples taken as soon as practicable. 14 minute delay at roadside after screening test while investigator waited for backup. 7 minute delay after accused was off the phone, but before the first sample was taken, and a 24 minute gap between the two samples.

**Held: Samples taken as soon as practicable.**

At the scene, the investigator was dealing with uncooperative and belligerent passengers. "Where officer safety and a minimal delay compete, officer safety remains paramount." Likewise, the delay after use of the telephone was "very minimal." With respect to the 24 minutes between samples, "I have no evidence that this delay was materially out of the norm. Indeed, I note that the Alberta Court of Appeal in *Van der Veen* sanctioned a 40 minute wait for a breath technician."

B. Der - Defence Counsel

## IMPAIRED DRIVING - AS SOON AS PRACTICABLE

*R. v. Robinson* 2010 ABPC 272  
per Fradsham, PCJ:

Impaired driving trial. As soon as practicable issue. Where there is a delay in the taking of samples, and "where the proffered explanation is that the delay was occasioned by there being other individuals who were ahead of the accused in the queue to give breath samples, must the Crown call the qualified breath technician to give evidence of the stage at which the other individuals were in the testing process, and how that resulted in the accused's breath testing being delay?"

**Held: Samples not taken as soon as practicable.**

The adequacy of the explanation for the delay could only have been assessed if the Court knew the status of the stage of the testing procedure. Without the technician's testimony, "that information is not before me, and without it I cannot determine whether the explanation for the delay ... is adequate."

A. Kay - Defence Counsel

**IMPAIRED DRIVING - CARE OR CONTROL - RISK**

***R. v. Kowalik* 2010 ABQB 554** per Foster, J:

Appeal from care or control conviction. Vehicle was running with the headlights on. Accused testified that he did not intend to drive, and set out a number of deliberate acts required to put the vehicle into motion.

**Held: Appeal dismissed.**

“The finding of risk of the Appellant deliberately setting the vehicle in motion in the circumstances was not unreasonable. As stated by our Alberta Court of Appeal, the ultimate question is a factual one for the trial judge to decide, mindful of the fact that Parliament intended to protect the public ... I am also mindful of striking parallels between the facts of this case and ***R v. Ogrodnik* 2007 ABCA 161.**”

V. Eichhorn - Defence Counsel

**SENTENCE - SEXUAL ASSAULT - CHILD - 12 YEARS**

***R. v. Pretty* 2010 ABCA 246** per Cote, McFadyen, Martin, JA - T. Judge: Creagh, PCJ:

Defence appeal from 12 year global sentence imposed in relation to sexual offences against young children. In each case the accused befriended single mothers of limited means in order to gain access to the children. 60 year old accused. Previous related record. Defence position that insufficient credit given for early guilty pleas.

**Held: Appeal dismissed.**

Psychological report established that accused was “a manipulative ... and proficient sexual predator.” Regarding the little credit given for the guilty pleas, “We must protect children. In circumstances such as these, all of the other sentencing objectives are subordinate.”

K. Teskey - Defence Counsel

**YOUTHS - SENTENCE - SEXUAL ASSAULT - JAIL**

***R. v. R.G.P.* 2010 ABPC 286** per McLellan, PCJ:

19 year old accused (14-17 years old at the time of the offences) pleaded guilty to sexual assault of a child who was aged 3-5. During games of “Horsey” the accused (on multiple occasions) inserted his finger and penis into the child’s vagina, as well as his into her anus. Accused had no record, had low average range intellectual abilities, and was deemed to be at a low risk level for re-offending.

**Held: 100 days open custody, 50 days community supervision, and 19 months probation.**

Very serious offence. However, “... the seriousness of the offence does not relate solely to the seriousness of the consequences of a criminal action. It must as well relate to the moral blameworthiness of the act, and the offender’s intent”: ***A.J.* 2010 ABPC 23.**

D. Mah - Defence Counsel

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