

# 2012-02 — Segal’s Motor Vehicle and Impaired Driving Newsletter

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## Case Law Highlights

1. — ***Impaired operation causing bodily harm; Sentencing; Head-on collision; 287 BAC; Guilty plea; Serious injuries; Multiple repeat offender; 55-year-old aboriginal female on reserve; 2 years less 1 day and 5 year prohibition; Criminal Code, s. 255(2).***

*R. v. Littlecrow*, 2011 SKQB 393, 2011 CarswellSask 748 (Sask. Q.B.), Gabrielson J.: A 55-year-old aboriginal woman living on a reserve blew 287. She was involved in a head-on collision causing severe injuries to the other driver. She had 4 priors and some other convictions. She pleaded guilty. She had the custody of her grandchildren. She received 2 years less 1 day and a 5 year prohibition.

2. — ***Certiorari; Availability of remedy; Chambers judge finding calibration logs for ASD first party disclosure; Certiorari available to Crown and Chief of Police.***

***Impaired operation; “Over 80”; Calibration logs for ASD; Calibration logs for ASD third party records.***

***Impaired operation; “Over 80”; Calibration logs for ASD; Not relevant to charges; No disclosure required; Criminal Code, s. 253(1)(a), (b).***

*R. v. Black*, 2011 ABCA 349, 2011 CarswellAlta 2041 (Alta. C.A.), reversing 2010 ABQB 461, 2010 CarswellAlta 1257, 97 M.V.R. (5th) 254 (Alta. Q.B.): A request had been made for the calibration logs of the Approved Screening Device on charges of impaired operation and “over 80”. The trial judge ruled that the records for the 3 months prior and 2 months after the test was relevant. The Chambers Judge upheld the ruling. On further appeal, the appeal was allowed. The records were subject to the third party regime and were not relevant. *Certiorari* was available to the Crown and the Chief of Police to challenge the trial ruling.

3. — ***“Over 80”; “Evidence to the contrary”; Can driver raise as “evidence to the contrary” that body temperature was elevated at time sample was taken; Increased body temperature causing over estimation of BAC; Expert could not say what body temperature was; No evidence to the contrary; For expert evidence of BAC to be accepted, body temperature would be at fatal levels; Criminal Code, ss. 253(1)(b), 258(1)(c)[A], [B], [C].***

*R. v. Kasim*, 2011 ABCA 336, 2011 CarswellAlta 1966 (Alta. C.A.), reversing 2010 CarswellAlta 947, 95 M.V.R. (5th) 110 (Alta. Q.B.): The respondent had

fever and flu at the time of the tests. The uncontradicted expert evidence was that the test results could be impacted by increased temperature readings. The trial judge acquitted and the summary conviction appeal court dismissed the Crown appeal. On further appeal by the Crown, the appeal was allowed and a conviction entered. Arguably, the respondent met the requirements of s. 258(1)(c)[A] and [B], that the approved instrument was malfunctioning or was operated improperly and that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood. The issue was whether it could be said that the concentration of alcohol in the blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed. The respondent sought to establish this precondition through the expert's evidence of his average elimination rate. That method was foreclosed by s. 258(1)(d.01) but only with respect to "evidence tending to show that the instrument was malfunctioning or was operated improperly." Here the expert could not testify what the respondent's actual body temperature was. Further, if the BAC was at the level the expert believed, his body temperature would have to be at a level that would likely be fatal. The overestimation of the BAC was of an unknown basis and could not result in an acquittal. The appeal was allowed and a conviction was entered.

**4. — Sentencing; Failing to remain; Willful obstruct justice by threatening witnesses; Impaired operation; 39 months global sentence less 3 month credit for pre-trial custody, DNA order and 3 year prohibition at trial; Crown appeal; Striking jogger; Fleeing scene; Disguising car; Threatening witnesses; One prior; 21-year-old aboriginal offender; Majority increasing sentence to 51 months jail; Criminal Code, ss. 139(2), 252(1.3)(b).**

*R. v. Yuzicapi*, 2011 SKCA 134, 2011 CarswellSask 761 (Sask. C.A.), varying 2010 SKQB 138, 2010 CarswellSask 227 (Sask. Q.B.): The accused, a 21-year-old aboriginal offender, pleaded guilty to failing to remain and willfully obstructing justice. He was also found guilty of impaired operation. He struck a jogger, seriously injuring him. He fled and removed the badly damaged windshield. He threatened passengers in his vehicle as well as a friend's if they came forward. He had a minor record including one prior drinking and driving conviction. A 39 month global sentence less 3 months for pre-trial credit and a DNA order and 3 year prohibition were imposed at trial. The sentence was increased to 51 months jail by the majority.

**5. — Refusal to provide sample; Whether power to detain accused in private parking lot; Traffic Safety Act (Sask.); “Highway”; Requesting driver information; Section 209.1 Highway Traffic Act (Sask.) applies to private parking lots; Stop not arbitrary; Criminal Code, s. 254(5); Charter of Rights, ss. 9, 24(2); Traffic Safety Act (Sask.), ss. 2(k), 209.1.**

*R. v. Lux*, 2011 SKQB 424, 2011 CarswellSask 774 (Sask. Q.B.): The respondent was stopped at 1 a.m. pulling out of a parking lot near a hotel and bar. An investigation into drinking and driving occurred. The trial judge ruled that the parking lot did not come within the definition of “highway” under the *Traffic Safety Act* (Sask.) and ultimately excluded the evidence as the stop was arbitrary. While a private parking lot is not within the definition of a “highway” in s. 2(k) of the Act, there is no such limitation in s. 209.1 of the Act permitting check stops. The Crown appeal was allowed and a new trial was ordered.

**6. — Sentencing; Dangerous driving causing bodily harm; Guilty plea; 29-year-old male speeding, losing control; Prior record; 25 days pre-trial; 6 months jail, 2 year prohibition; Criminal Code, s. 249(3).**

*R. v. Sparkes*, 2011 CarswellNfld 386 (N.L. Prov. Ct.), Gorman Prov. J.: The accused, age 29, pleaded guilty to dangerous driving causing bodily harm. He was speeding and lost control. The accused was not at the scene. He had two drinking and driving charges in 2002 and 2011. He served 25 days in pre-trial custody. He was sentenced to 6 months jail and a 2 year prohibition.

**7. — Dangerous driving; Flight from the police; Remedies; Police dog aggressively pursuing non-compliant driver who was on foot; Refusal to enter stay upheld on appeal; Criminal Code, ss. 249, 249.1; Charter of Rights, s. 24(1).**

*R. v. Gangl*, 2011 ABCA 357, 2011 CarswellAlta 2059 (Alta. C.A.), affirming 2010 ABPC 105, 2010 CarswellAlta 645, 94 M.V.R. (5th) 300 (Alta. Prov. Ct.): The accused was convicted of dangerous driving and flight. After a prolonged chase that ultimately resulted in a helicopter becoming involved, the accused fled on foot. A police dog grabbed him by the seat of his pants, and after being ordered to stand down re-engaged with the accused. A stay was not warranted.