

***Charter* Issues Update:**

A. Right to Counsel

Prepared For: Legal Education Society of Alberta
Impaired Driving – The Changing Landscape

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RIGHT TO COUNSEL IN ALBERTA 2011-2012

1. How have the courts in Alberta recently interpreted s. 10(b) of the Charter? The answer, as one would expect, comprises a mix of delights and horrors. This paper explores some of the more interesting cases which were decided in the last year or two.

A. CHANGE IN INVESTIGATION

2. In its recent decision, *R. v. Pearson*, 2012 CarswellAlta 1325, the Alberta Court of Appeal addressed the issue of how right to counsel needs to be respected when a traffic stop for a provincial offence evolves into a criminal investigation. In her concurring judgment, Madame Justice Hunt held at paragraph 79:

When the purpose of the detention shifted to criminal activity the officer was required to immediately inform the appellant of that fact and advise him that he had a right to counsel; *R. v. Suberu*, 2009 SCC 33 at para. 42, [2009] 2SCR 460. Contrary to what the trial judge said at paragraph 58 and 59, this obligation arose before the officer detected the smell of marijuana. It follows that the appellant subsection 10(a) and 10(b) rights were breached a short time before that point and therefore somewhat sooner than the trial judge found.

3. The majority of the Court of Appeal accepted the trial judge's s. 24(2) analysis. Madame Justice Hunt's decision implicitly disagrees with the trial judge's analysis of section 24(2). The Court recognized that his conclusions were owed "considerable deference on appellant review" (para. 37) but also found that there were errors in fact-finding which resulted in errors about whether, or when, Charter rights were breached. The appellate court deferred to the trial judge's decision and reasoning on the first step of the *Grant*¹ analysis. Madame Justice Hunt, however, found error in the trial judge's analysis of the impact on the Charter-protected interests of the accused. Finally, it is not clear whether the Court agreed or disagreed with the trial judge's ruling on the third branch of the grant test but did conclude that the line of inquiry would favor inclusion of the evidence. Ultimately, though, the Court held that the cocaine evidence ought to be admitted.
4. The principles enunciated in *Pearson*, temper somewhat the Court's harsher judgment the year before in *R. v. M. (A.R.)*, 2011 CarswellAlta 2501 (leave to appeal to the Supreme Court of Canada recently denied) in which the change in the investigation was deemed not to be sufficient to warrant re-reading the respondent his right to counsel

¹ R. v. Grant, 2009 CarswellOnt 4104 (S.C.C.).