



# THE UPDATE

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## CHARTER - 7 - DISCLOSURE - CHARTER - 7 & 24(1) - STAY - EPS COMPLAINT RECORDS - POLICE LOST DISCLOSURE

*R. v. Hoeving* - September 13, 2007 ABQB 561 per Burrows, J:

Trial on charges including resisting arrest. Defence sought disclosure of records relating to complaints against the arresting officer regarding investigations other than the current prosecution. Reason to believe that at least one previous such complaint had been made.

### Held: Disclosure ordered.

Evidence potentially relevant to the question of whether the accused was “resisting” or “self-defending” as per *Scopelliti* (1981), 63 CCC (2d) 481 (Ont CA). Regarding whether the records ought to be treated as third party documents, “I do not find the fiction upon which that analysis is founded to be helpful. If the materials in police possession are relevant ... that the police possess them because of some process other than the specific investigation that lead to the charges against the accused provides little basis on its own for treating them as third party records or for withholding them from the accused.”

**T. Engel** - Defence Counsel

*R. v. Svekla* - September 11, 2007 ABQB 557 per Germain, J:

Aggravated assault trial. Police lost the audio recorded statements of the complainant and the only eye witness to the alleged crime. Vague notes kept by police regarding these interviews. Eye witness account seemed to exonerate the accused. Witnesses never re-interviewed.

### Held: Stay of proceedings.

Lost evidence was critical to accused’s right to make full answer and defence. “Unacceptable level of negligence” found regarding the loss of the evidence: *La* [1997] 2 SCR 680. As per *Antinello* (1995), 165 AR 122 (CA): “what [the accused] must show on a balance of probabilities is that he lost a realistic opportunity to garner evidence, or make decisions about the defence.” Stay being the only meaningful remedy. “Although the officers acted in good faith throughout this investigation the simple reality is that insufficient effort was taken to preserve this very important evidence. As the import of the evidence increases, so too in my view does the duty to preserve and protect it.”

**R. Shaigec** - Defence Counsel

## CHARTER - 8 - VEHICLE SEARCH - 24(2)

*R. v. Dykhuizen* - August 23, 2007 ABQB 534 per Graesser, J:

Accused charged with drive while disqualified and cocaine trafficking. Vehicle search. Vehicle searched after first being stopped, and drugs found. Search found to violate s. 8. Issue regarding s. 24(2). Because accused charged with drive while disqualified, the vehicle was seized and would have been searched in accordance with police policy.

### Held: Evidence admitted.

Given the seizure of the vehicle, the drugs would have inevitably been discovered during the inventory search. Charter breach was at the lower end of seriousness. Lower expectation of privacy vis-a-vis a motor vehicle. The search in question was a non-intrusive search of a vehicle that was subject to seizure. “But for the evidence of ... the inevitability of discovery of the baggies ... I would have excluded the baggies and their contents from evidence. Those are the factors on which I distinguish *Logan* (2005), 388 AR 255, *Carlson* (2002), 313 AR 319 and *Arabi* 2007 ABQB 303.

**D. Vigen** - Defence Counsel

**IMPAIRED DRIVING - CARE OR CONTROL - ONE ACT**

*R. v. Martins* - August 21, 2007  
ABCA 270 per Watson, JA:

Defence application for leave to appeal from dismissal of summary conviction appeal. Care or control. Accused seen in control of the vehicle by civilians at 12:30 am and again by the police at 1:00 am. Crown particularized offence as a one continuing over the half hour period.

**Held: Leave denied.**

“The trial judge held that the Crown was entitled to allege a continuous act of care or control ‘is not restricted either in law or in logic to a precise moment in time.’ He also held that the fact that the Appellant had gotten into and out of the vehicle during the time of alleged care or control did not necessarily create two separate offences or transactions ... The finding that there was a single ongoing transaction was matter of fact is reasonable and supported by the evidence.” Appeal did not raise a question of law.

**T. Kantor** - Defence Counsel

**INFORMER PRIVILEGE - TEST - “INNOCENCE AT STAKE”**

*R. v. Barros* - September 7, 2007  
ABQB 546 per Veit, J:

“The Crown alleges that Mr. Barros attempted to extort a stay of criminal proceedings against one Qureshi by threatening a police officer with disclosure of the name of that police officer’s informant.” At trial, defence asked officer about a bail arrangement regarding the accused (exchange of guns for bail) and the officer declined to answer the questions on the basis of informer privilege.

**Held: Application to compel police officer to answer questions denied.**

Accused did not meet the very high burden of establishing that his innocence was at stake. Even if the police officer approved an arrangement whereby bail was agreed to in exchange for guns, “that is essentially irrelevant to the issue of whether, when Mr. Barros later told the same police officer that he knew who that officer’s informant was, Mr. Barros was attempting to extort a stay of the charges against Mr. Qureshi.” Not established that the disclosure was necessary to raise a reasonable doubt regarding accused’s guilt.

**H. Wolch** - Defence Counsel

**SENTENCE - FRAUD - BREACH OF TRUST - \$1,254,844 - CSO**

*R. v. Cremer* - September 7, 2007  
ABQB 544 per Burrows, J:

Accused pled guilty to fraud over \$5000 (\$1,254,844.82). Money stolen while accused worked as a case manager with WCB. Frauds ended when accused suffered a stroke. 48 year old accused who was a drug addict at the time of the offences. Psychiatric evidence established that since his strokes, the accused “has a hollow existence ... He is cognitively, neurologically, physically, and emotionally impaired.”

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

In the ordinary case, an employee who systematically breaches trust ought to go to jail: *McKinnon* 2005 ABCA 8. Exceptional circumstances. Court entitled to take accused’s health into account in assessing whether jail is necessary: *Zabor* [1982] OJ No. 186 (Ont CA). “He will never again be in a position of trust. There is no need for specific deterrence ... there is no need to separate him from society ... There is no need to rehabilitate him.”

**A. Pringle** - Defence Counsel

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