



# THE UPDATE

Issue #2 January 18, 2008

## CHARTER - 11(B) - DELAY - 3 YEAR DELAY - NO STAY

*R. v. Munoz* - Nov. 16, 2007 ABPC 328 per Creagh, PCJ:

Aggravated assault trial. *Askov* application. Total delay of almost 3 years and 3 months from the date of alleged offence to date scheduled for conclusion of trial. Trial was split over 3 trial continuation dates separated by several months.

### **Held: Stay application dismissed.**

No prejudice to accused as a result of the delays. Part of the delay was attributable to “novel and complex” disclosure requests. “Is seven months ... too long to wait for a day long continuation? I can not say that it is ... counsel did not put any evidence before the court to applicable time frames in other jurisdictions. I understand from the decision of our court of Appeal in *R. v. Holt* [1991] AJ No. 901 ... In the absence of that type of evidence, I am unable to say that the seven month delay is too long.”

**T. Engel** - Defence Counsel

## CHARTER - 24(2) - DRUGS AND A GUN - NO EXCLUSION

*R. v. Petrin* - Nov. 15, 2007 ABQB 687 per Belzil, J:

Accused was unlawfully arrested for careless driving, and a search of his person and vehicle revealed drugs and a handgun. Violations of ss. 8 and 10. Issue regarding exclusion application under 24(2).

### **Held: Evidence not excluded.**

Evidence not affecting trial fairness. Investigating officer had candidly admitted his prior ignorance of the law, and that he had since been educated in Charter principles. No abusive conduct by police. As per *Buhay* [2003] 1 SCR 631, 24(2) is not an automatic exclusionary rule. “Recent Canadian jurisprudence has highlighted the disturbing trend towards increasing gun-related crimes in Canada, and that there is growing and justified public concern about the prevalence of gun crime.”

**C. Millsap** - Defence Counsel

## IMPAIRED DRIVING - 10(B) - SCREENING TEST - DELAY

*R. v. Harper* - Nov. 20, 2007 ABPC 330 per Van de Veen, PCJ:

“The issue before me is whether the section 10(b) Charter right to counsel must be given to an accused immediately after a demand for a roadside sample pursuant to s. 254(2), in circumstances where the officer is required to wait 15 minutes before administering the test in order to ensure the accused’s breath sample is not contaminated.”

### **Held: No 10(b) breach.**

The 15 minute delay was to ensure that the sample was not contaminated (i.e. for the accused’s benefit). The informational and implementational components of 10(b) cannot be accomplished at the roadside, nor could they be accomplished in 15 minutes. If any 10(b) obligations arose, the failure to afford the right at the roadside was saved by s. 1.

**T. Kantor** - Defence Counsel

**IMPAIRED DRIVING - 10(B) - SCREENING TEST - S.1**

**R. v. Good** - Nov. 16, 2007 ABQB 696 per Hillier, J:

Appeal from conviction on charge of refusal to provide a screening sample. Accused arrested on warrants. While being transported to detachment, officer noted an odour of alcohol, stopped the vehicle and made a screening demand forthwith. 10(b) rights not provided. Accused refused to blow. Issue as to whether accused entitled to 10(b) advice given that he was being held in custody on other matters (i.e. the warrants).

**Held: Appeal dismissed.**

The 10(b) right was suspended for the purposes of the screening demand, given that the demand was made forthwith and the police were properly exercising their investigative powers under s. 254(2) CC. Section 1 limitation continued to exist, notwithstanding that a telephone would be readily available at the detachment that the accused was being taken to. Authorities reviewed.

**C. Luchak** - Defence Counsel

**MURDER - INTENT - 229(a) CC - ANGER IS NOT A DEFENCE**

**R. v. Walle** - Nov. 7, 2007 ABCA 333 per Picard, Paperny, Ritter, JA - T. Judge: Rowbotham, J:

Crown appeal from acquittal on murder charge but conviction for lesser offence of manslaughter. Issue at trial was intent required under s. 229(a) CC. Trial judge found that accused's state of extreme anger was relevant to question of intent.

**Held: Appeal allowed, new trial.**

*Parent* [2001] 1 SCR 761 applied. "Anger is not a stand-alone defence. It may form part of the defence of provocation, but anger short of provocation and on its own cannot negative intent and reduce murder to manslaughter. It is difficult to see how, if anger alone is an irrelevant consideration to the question of intent, it can become relevant when considered in combination with other factors."

**A. Fay** - Defence Counsel

**SENTENCE - CHARTER BREACH - REDUCED PENALTY**

**R. v. Nasogaluak** - Nov. 14, 2007 ABCA 339 per Cote, McFadyen, Martin, JA - T. Judge: Sirrs, J:

Crown appeal from conditional discharge imposed following convictions for impaired driving and flight from police. Sentencing judge reduced the sentence given breaches of ss. 7 and 11(d) resulting from excessive force used by police upon arrest. Issue as to whether reduction of sentence constitutes an appropriate Charter remedy.

**Held: Appeal dismissed on evading charge. Impaired sentence varied to \$600 minimum.**

24(1) must be an "effective and meaningful remedy": *974649 Ont. Inc.* [2001] 3 SCR 575. "We agree with the reasoning of the Ontario Court of Appeal in *Glykis* that a reduction in sentence may be granted as a remedy for a Charter breach where the breach mitigates the seriousness of the offence, or imposes some form of punishment on the individual." Authorities reviewed. Cote, JA dissented.

**L. Stevens, G. Johnson** - Defence Counsel

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