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Criminal Update

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1. Novel Scientific Evidence: S.C.C.

The Supreme Court reviews the admissibility of novel scientific evidence (and in particular, post-hypnosis evidence) in *R. v. Trochym*, 2007 SCC 6. The court rejects the *Clark* guidelines (*R. v. Clark* (1984), 13 C.C.C. (3d) 117) and affirms the role of the court as gatekeeper in ensuring that "only scientific opinions based on a reliable foundation are put to the trier of fact" (*J.-L.J.*, 2000 SCC 51). The court ultimately finds that:

> In sum, it is evident, based on the scientific evidence on record, that post-hypnosis testimony does not satisfy the test for admissibility set out in *J.-L.J.* While hypnosis has been the subject of extensive study and peer review, much of the literature is inconclusive or highly contradictory regarding the reliability of the science in the judicial context. Unless a litigant reverses the presumption on the basis of the factors set out in *J.-L.J.*, post-hypnosis testimony should not be admitted in evidence.

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2. Limiting Instructions to a Jury: C.A.

In its decision in *R. v. Mousseau*, 2007 MBCA 5 (CanLII) the court considers the use of a limiting instruction in a jury charge. In this case, the defence elicited an exculpatory comment of the accused via another witness and the Crown did not object to the admission of this evidence. At the pre-charge conference, the trial judge advised counsel that a limiting instruction was to be given to the jury about how they could and could not use the statement of the accused testified to by the witness called by the Crown. Defence counsel did nothing and the instruction was given. It became a ground of appeal. The Court of Appeal dismissed the appeal and states that:

> Once the accused became aware at the pre-charge conference that the trial judge may be giving a limiting instruction to the jury, he could have applied to the trial judge to re-open his case…. The accused chose not to make the application and must now accept any adverse consequences of this decision.

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3. Follow the Rules!

A recent Notice from the Court of Appeal reminds counsel of a rule change that has been in effect since October 1, 2006, published in Manitoba Regulation 177/2006. The notice goes on to state that effective April 1, 2007 material that does not comply with the Rules will be rejected except in special circumstances at the discretion of the Registrar.

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4. Procedure on Application for 3rd Party Record: Q.B.

R. v. Monkman, 2007 MBQB 6 (CanLII) deals with procedure on an application pursuant to s.278.3 of the *Criminal Code* for the production of third party records relating to the complainant in a sexual assault trial. The court finds that:

- the accused may file an affidavit in support of the motion for production;
- where the accused has filed an affidavit, there is a right to cross-examine the accused on the contents of that affidavit; and
- the complainant has a right to cross-examine the accused on matters in issue in the hearing and the Crown may also have the right to cross-examine on issues directed to the Crown's interest in the matter.

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5. Timing on Breach of Conditional Sentence: P.C.

In *R. v. MacKenzie*, 2007 MBPC 5 (CanLII), the court considers whether the Crown has commenced the hearing for a breach of a conditional sentence within the timelines required by s. 742.6 (3) of the *Criminal Code*. The court finds that the hearing was not commenced within 30 days or "as soon thereafter as is practicable" and grants the defence application for dismissal.

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