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Criminal Update

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1. New Trial: *R. v. McKay*

The Supreme Court, in *Ambroise Joseph McKay v. Her Majesty the Queen*, 2007 CanLII 8960 (S.C.C.) set aside the conviction entered by the Manitoba Court of Appeal and ordered a new trial. The court states that:

> By way of clarification, we should not be taken as endorsing the view that "defence of property alone will never justify the use of anything more than minor force being used against a trespasser" (para. 15) or that, in all cases, "the defence of property alone will not justify the intentional use of a weapon against a trespasser" (para. 23).

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2. Probation Order Too Vague: Q.B.

In *R. v. Kirton*, 2007 MBCA 38 (CanLII), the court deletes a condition in a probation order that the accused "not…associate or communicate either directly or indirectly with any person known to him to be a member or associate of a gang including the Hells Angels motorcycle club." The court finds that the condition is "unreasonable because it is vague and uncertain."

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3. Electronic Disclosure by Crown: Q.B.

The recent decision in *R. v. Piaskowski et al*, 2007 MBQB 68 (CanLII) deals with the question of whether the electronic disclosure provided by the Crown is sufficient to meet the Crown's disclosure obligations. In this case, multiple accused were charged with a variety of charges arising out of a large-scale investigation by the RCMP. The disclosure was voluminous and was provided to the accused in CD-ROM and DVD format. The accused filed a motion pursuant to s. 7 of the *Charter* alleging their right to disclosure was breached on the basis that the electronic format of the disclosure created difficulties for counsel who had limited computer skills or experience and argued they ought not to bear the financial costs associated with printing the disclosure. The court held that whether electronic disclosure complies with s. 7 of the *Charter* will depend upon the circumstances. Here, the accused did not meet the onus upon them of proving a breach. The Crown had offered computer training to assist counsel and those self-represented accused who lacked the requisite skills to access the disclosure. The court commented that once counsel were sufficiently competent in utilizing the electronic format, they would likely find it beneficial and of assistance to them. The issue of cost to be borne by the accused in printing out the materials could not be decided without further evidence and could be pursued at a later date.

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4. Sentence on Attempt Extortion: Q.B.

The court in *R. v. Chen*, 2007 MBQB 74 (CanLII) considers the appropriate sentence for a conviction of two counts of attempted extortion and finds that incarceration is warranted. A sentence of 18 months is imposed. Aggravating factors that the court considers are that the accused was a practicing lawyer at the time of commission of the offences, and that one of the complainants was a client.

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5. Informer Privilege: ON. C.A.

The Ontario Court of Appeal in *R. v. Omar*, 2007 ONCA 117 (CanLII) finds that informer privilege belongs to the informer, not to the police, and that neither the police nor the courts have the power to deny an informer protection. The court goes on to find that informer privilege is not qualified by the Stinchcombe disclosure obligation imposed upon the Crown by the *Charter*, stating that "It is not a legal right that can be balanced against other competing rights or interests."

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