



In this issue:

1. [Spousal Evidence Exclusion: SCC](#)
2. [Use of a Firearm: SCC](#)
3. [Lawful Investigative Detention: SCC](#)
4. [Eyewitness Testimony and Subsequent Identification: C.A.](#)

1. Spousal Evidence Exclusion: SCC

The rule against spousal testimony was considered and upheld by the Supreme Court in [R. v. Couture](#), 2007 SCC 28. A slim majority (5-4) considered and applied [s.4](#) of the *Canada Evidence Act*, and rejected the Crown's position that the out-of-court statement made by the wife of the accused could be admitted under the principled exception to the hearsay rule. The result was that both convictions for second degree murder were overturned. For more on the case, read [Top court excludes man's murder confession to wife](#) from the June 29, 2007 issue of The Lawyers Weekly.

2. Use of a Firearm: SCC

The accused in [R. v. Steele](#), 2007 SCC 36 broke into a home and verbally threatened the occupants with a gun, but there was no evidence as to whether or not a gun had actually been brought into the home. The issue before the court was whether, pursuant to [s. 85\(1\)](#) of the *Criminal Code*, the accused was guilty of "use" of a firearm in commission of the offence of break and enter. The court considered what constituted "use" and found that:

In the absence of a statutory definition, I would therefore hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the *actual presence or immediate availability* of a firearm. The weapon must then be in the physical possession of the offender or readily at hand.

Where two or more offenders are acting in concert, the usual rules of complicity apply: *McGuigan*, at pp. 307-8. It will therefore be sufficient, where one of the offenders is in physical possession of a firearm or has immediate access to it, for another to utter the firearm-related threat.

3. Lawful Investigative Detention: SCC

In [R. v. Clayton](#), 2007 SCC 32 the Supreme Court considered whether results of a search conducted during an investigative detention could be admitted into evidence, or whether the search and detention were conducted in breach of ss. 8 and 9 of the [Charter](#). The majority affirmed the decision in [R. v. Mann](#), 2004 SCC 52 regarding the common law of investigative detention, stating that:

The determination [of whether a detention is lawful] will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the

detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

4. Eyewitness Testimony and Subsequent Identification: C.A.

The accused in [R. v. Klyne](#), 2007 MBCA 100 (CanLII) appealed his convictions, raising questions about the frailties of the police eyewitness identification and subsequent identification evidence which formed the basis for the trial judge's finding. The court allowed the appeal, overturned the convictions and found that:

A consideration of the totality of the circumstances both before and at the time of an identification made subsequent to an initial observation of a suspect may reveal factors which either strengthen or weaken the reliability of the Crown's proof as to identification....The uncertainty as to whether a subsequent police identification (after an initial eyewitness observation) will be sufficiently reliable in the particular circumstances of a given case should not require police officers in all cases to terminate their involvement in a police pursuit for fear of later seeing an earlier observed suspect about whom the police may be required to give eyewitness testimony....The "proximity" of such a subsequent identification in terms of time and place could potentially, in many cases, provide a supporting or strengthening component to the police eyewitness identification. However, in the particular circumstances of this case, that potentially confirmatory evidence is deprived of much of its value.

[Go to the eLaw Archive](#)

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.