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Criminal Update

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In this issue:

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1. Rare and Exceptional Circumstances: C.A.

In *R. v. Kozun*, 2007 MBCA 101 (CanLII), the court considered a crown appeal against a conditional sentence of 18 months plus 3 years probation on a guilty plea to one count of distributing child pornography. The court found that:

> There is little doubt that this type of offence is particularly despicable. The victims are helpless children. As indicated by the Crown and defence counsel in their sentencing submissions and by the judge in his reasons, it should normally attract a sentence of institutional incarceration…However, because of the passage of time between the time of arrest and the time of sentencing coupled with the extensive therapy undertaken by the accused during that period of time, what should otherwise be considered as being a usual sentence can be questioned…That extended period of time allowed the accused to undertake an extensive course of treatment with an achieved result that simply cannot be ignored. Partly because of the advantage of time and then no doubt due to some hard personal work, the accused is no longer the person he was when arrested. The intervening period of time between arrest and sentencing and the result of the therapeutic intervention during that period does in fact place this accused in what could properly be considered by the judge as rare and exceptional circumstances that justified the imposition of a conditional sentence for this offence.

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2. Extradition Challenge: C.A.

In *U.S.A. v. Gunn*, 2007 MBCA 103 (CanLII), the defendant challenged the Minister of Justice's decision to surrender him for extradition alleging that his first lawyer provided inadequate legal representation by not using evidence Gunn had given him to attack the strength of the American case for extradition. In dismissing the appeal, the court held that the information the first lawyer did not use was not material to the American case for extradition and the court was not satisfied that Gunn had established a miscarriage of justice had otherwise occurred.

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3. Bail is Not Jail: Ont. C.A.

The Ontario Court of Appeal, in *R. v. Panday*, 2007 ONCA 598 (CanLII) considered "whether a period of strict pre trial bail can be regarded as a "punishment of imprisonment" in the context of statutory minimum sentences so as to reduce the sentence below the statutory minimum if credit is given for pre trial bail." The court found that:

> The decision of this court in *Downes* stands for the proposition that a sentencing judge

can give credit for the time spent under strict pre trial bail conditions. The decision of the Supreme Court of Canada in *R. v. Wust* 2000 SCC 18 (CanLII), (2000), 143 C.C.C. (3d) 129, stands for the proposition that credit towards a minimum sentence may be given for time spent in pre trial custody. The question on these appeals is whether *Downes* plus *Wust* means that strict pre sentence bail conditions constitute a "punishment of imprisonment" within the meaning of ss. 346(1.1)(a) and 95(2)(a) of the *Criminal Code* and, therefore, can serve as part of the minimum sentences established by these provisions.

In my view, the answer to this question is 'No".

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4. Defining the Right to Counsel: B.C. C.A.

In *R. v. Osmond*, 2007 BCCA 470, the court considered whether the accused was denied his s. 10(b) Charter right to retain and instruct counsel without delay. The court summarized the case (at paras. 53-56) as follows:

> Stepping back from these circumstances and assessing them from a fair treatment perspective, here is a young, unsophisticated accused in custody with the benefit of a two-minute phone call, put against a skilled interrogator lawfully entitled to persuade him to ignore the lawyer's advice and to employ a range of techniques within the generous ambit permitted by ***R. v. Oickle***…and more recently, ***R. v. Spencer***...If that is all that s. 10(b) provides in a case of first degree murder, the Charter protection is largely illusory.
>
> In my judgment, the appellant was denied his s. 10(b) right to counsel. The judge was wrong to rule as he did.
>
> To summarize, a detainee under arrest has the right to remain silent. This integrates with the privilege against self-incrimination: s. 7. He is entitled to timely and effective access to counsel prior to police interrogation: s. 10(b). Immediate advice of counsel addresses not only the right to remain silent but also how to exercise that right. Police are obliged to facilitate access to counsel within reason - the implementational duty.
>
> These rights serve the principle of fair treatment of an individual under the control of the state. The ***Brydges*** line system failed in this case to meet the needs of the appellant's situation. It did not constitute access to counsel and since the police did not implement access in any other form, the appellant's s. 10(b) rights were denied.

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5. Conflicts of Interest

The upcoming Law Society CLE program, *Conflicts of Interest* will provide valuable insights into the current law of conflicts, recently addressed by the Supreme Court in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24. The program takes place on October 31 from 12:00-1:30 p.m. and will provide practical advice from a panel of practitioners that includes criminal defence lawyer Tim Killeen. Contact the Law Society to register.

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