Criminal Update

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1. Straddle Evidence Considered: S.C.C.

The Supreme Court of Canada in *R. v. Gibson*, 2008 SCC 16 considered:

> ...the question of whether expert opinion evidence which says that the accused's blood alcohol concentration may have been over or may have been within the legal limit at the material time, depending on the accused's actual rates of absorption and elimination on the day in question, is capable of rebutting the statutory presumption set out in s. 258(1)(d.1) of the *Criminal Code*, R.S.C. 1985, c. C46. This type of evidence will be referred to as "straddle evidence" because the range of possible blood alcohol concentrations straddles the legal limit of 80 mg of alcohol per 100 ml of blood.
>
> LeBel J. concludes that depending on a number of factors, straddle evidence may or may not provide a sufficiently probative evidentiary basis to rebut the presumption arising from the accused's failure of the breathalyzer test. These factors may include evidence about the accused's own rate of elimination as tested post-offence. I agree with LeBel J. that the straddle evidence adduced in both cases under appeal failed to rebut the presumption and that consequently both appeals should be dismissed. However, I arrive at this conclusion for different reasons.
>
> As I will explain, it is my view that in all cases straddle evidence merely constitutes an attempt to defeat the statutory presumption itself and, as such, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence within the meaning of s. 258(1)(d.1). I also conclude, on the basis of the undisputed scientific fact that absorption and elimination rates vary continuously, that post-offence testing of the accused's own elimination rate will rarely, if ever, add anything of value to the expert opinion evidence and, for obvious policy reasons, should not be encouraged, let alone required.

The majority (7-2) dismissed the appeal but for disparate reasons (4/3 split) as noted above.

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2. Parity, Totality & Concurrent Sentences: C.A.

The court in *R. v. Reader*, 2008 MBCA 42 (CanLII) considered an appeal of sentence where a co-accused's sentence resulted from a joint recommendation. In coming to the conclusion that the total length of sentence was appropriate, the court reviewed the principles of parity and totality as

well as the question of whether the sentences should have been concurrent or consecutive.

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3. Use of Pre-Sentence Reports: C.A.

In *R. v. Bird*, 2008 MBCA 41 (CanLII) the court dismissed the appeal as to conviction on one count of assault cause bodily harm, but allowed the appeal of sentence, substituting a sentence of 6 months in custody followed by 18 months probation for the trial judge's sentence of 12 months in custody. In doing so, the court discussed the proper use of pre-sentence reports where a conviction has resulted from a trial.

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4. Reporting Gunshot & Stab Wounds

The Province recently introduced Bill 20, *The Gunshot and Stab Wounds Mandatory Reporting Act* that would make it mandatory for health care facilities to report all gunshot wounds and specified stab wounds to the police. For further information and background to the Bill, see the April 15, 2008 news release.

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5. Keeping Up with the *Criminal Code*

The Manitoba Bar Association's Criminal Justice Section will meet on Wednesday, May 14, 2008 at 4:30 p.m. to review recent changes to the *Criminal Code*. Featured presenters are Rekha Malaviya, Sheldon Pinx, Q.C., Jacqueline St. Hill and Josh Weinstein. For more information and to register, contact the Manitoba Bar Association.

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