Criminal Update

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In this issue:

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1. Intermittent and Conditional Sentences Can Coexist: SCC

In *R. v. Middleton*, 2009 SCC 21 the Supreme Court considered whether the imposition of a conditional sentence of more than 90 days renders illegal an unexpired intermittent sentence imposed on the same offender but for a different offence. The majority found it did not, affirming the creatively crafted sentence of the trial judge which punished the accused for the assault against his wife, but did not disrupt his ability to pay support. The majority of the court dismissed the argument that s.139 of the *Corrections and Conditional Release Act* required that the 90-day intermittent sentence and the 18-month conditional sentences imposed be merged to form a single sentence of 18 months' duration. This would render the intermittent sentence illegal because it would exceed the 90-day maximum permitted by s. 732(1) of the *Code*. The court found that conditional sentences are not contemplated by either s. 732(1) of the *Code* or s. 139 of the *CCRA*. For a brief discussion of the case see:

- *R. v. Middleton - Never Again Must We Fear The Co-Mingling Of Intermittent and Conditional Sentencing!* by Christopher Bird, posted May 25, 2009 on The Court

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2. Admissibility of Opinion Evidence Divides Supreme Court

In a 5-4 split decision the Supreme Court restored the attempt murder, robbery and forcible confinement convictions imposed at trial in *R. v. Van*, 2009 SCC 22. The Ontario Court of Appeal had overturned the convictions, concluding that the trial judge's failure to give a limiting instruction on the permissible use of a police officer's hearsay and opinion evidence amounted to a serious error. The majority of the Supreme Court found that while an error was made, "its effect was sufficiently harmless in context that no prejudice was caused to the accused and the verdict would necessarily have been the same absent the error." Relevant considerations included the fact that most of the hearsay evidence was already properly before the court through other witnesses; the opinion evidence, while unwarranted, likely had an insignificant impact on the verdict; and the fact that defence counsel had not objected at trial. (paras.37-45) The following article reviews the facts and the majority opinion:

- *R. v. Van - A Closely Divided Court Allows Opinion Evidence Through* by Christopher Bird, posted June 3, 2009 on The Court

3. Forfeiture Provisions Clarified: SCC

In *R. v. Craig*, 2009 SCC 23, and companion cases *R. v. Ouellette*, 2009 SCC 24 and *R. v. Nguyen*, 2009 SCC 25, the Supreme Court considers whether a forfeiture order for offence-related real property under the *Controlled Drugs and Substances Act* should be considered as a distinct inquiry, or interdependently with terms of imprisonment or other aspects of a sentence. The latter "totality" approach was taken in prior proceedings in all three cases, leading to the conclusion that because forfeiture may have a punitive impact, one can take it into consideration in deciding whether, in combination with the imposition of a jail sentence, the total punishment would be unduly harsh. The majority of the Supreme Court rejects this approach as follows:

> Such a result troubles not only the conscience by inadvertently rewarding offenders with property available for forfeiture and penalizing those without, it offends our bedrock notions of fitness in sentencing since individuals with no property to forfeit are no more blameworthy than those with property. It would be unjust for them to receive more severe custodial terms simply because they have no property to forfeit. (para.35)

The majority also concludes that the plain language of s. 19.1(3) permits partial forfeiture.

- *R. v. Craig and the Equitable Underpinnings of Forfeiture* by Daniel Del Gobbo, posted June 8, 2009 on The Court

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4. What Constitutes Unreasonable Delay?

The Supreme Court restored the stay of proceedings granted at trial in *R. v. Godin*, 2009 SCC 26, holding that a 30-month delay violated the appellant's right to be tried within a reasonable time guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*. Following the protocol set out in *R. v. Morin*, [1992] 1 S.C.R. 771, the court found that the institutional and unexplained delay and its prejudicial effect on the accused outweighed the strong societal interest in having serious charges tried on their merits. See the following article for a summary of the facts and the guidelines used to assess unreasonable delay:

- *SCC protects individuals Charter right to be tried within "reasonable" time in Godin* by Sona Dhawan, posted June 5, 2009 on The Court

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5. Counsel Obliged to Discuss *Quid Pro Quo* in Plea Bargains: MBCA

In *R. v. Sharpe*, 2009 MBCA 50 the Manitoba Court of Appeal dismissed the accused's appeal of the sentence of six years' incarceration imposed by the sentencing judge who had rejected a joint recommendation of three years' time. Justice MacInnes concludes with some instructive comments on the practice of plea bargaining in Manitoba. He says:

> …it is essential to the proper operation of the practice of plea bargaining that counsel make full disclosure to the sentencing judge as to the facts and factors which underlie and support acceptance of the proposed plea agreement. Counsel must be sufficiently prepared and able to explain and support the rationale for the recommended disposition. As well, counsel must understand the fundamental importance of the relationship between the underlying *quid pro quo* and the proposed disposition as that is the prime determinant for the level of deference to be accorded by the sentencing judge to the proposed plea agreement. As well, counsel must be satisfied that the sentence proposed has a reasonable prospect for acceptance considering all of the circumstances. (para.61)
>
> While it is critical that sentencing judges respect the experience of counsel and what is normally their more intimate knowledge than that of the judge as to the facts and the

various factors that have gone into crafting the plea bargain and resulting joint recommendation, counsel's experience *per se* is not sufficient. It is counsel's experience plus their exposition of the circumstances underlying the plea agreement, including the *quid pro quo* for it, that will assist in persuading the sentencing judge that his/her reliance upon counsel is well placed and that the sentence proposed is fit and proper in the circumstances. This is also critical to public confidence in the administration of justice, as it will ensure sufficient transparency in the plea bargaining process to satisfy community concerns as to the sentencing of criminals. (para.62)

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6. Legislative Update

The federal government is proceeding apace with its get tough on crime agenda:

- Bill C-14, introduced February 26, 2009, was passed by the House of Commons April 24 and was referred to committee after second reading in the Senate on May 27. The bill targets organized crime by creating three new offences, making all murders connected to organized crime first degree, and extending the maximum duration of a recognizance to two years for a person previously convicted of an organized crime offence.
- Bill C-15, introduced February 27, 2009, has passed second reading and the committee report tabled May 28 in the House of Comments is currently being debated. The bill amends the *Controlled Drugs and Substances Act* to provide for minimum penalties for serious drug offences, such as dealing drugs for organized crime purposes or when a weapon or violence is involved. Currently, there are no mandatory minimum penalties under the *CDSA*. The bill also increases the maximum penalty for marihuana production.
- Bill C-25, the proposed legislation to limit credit for time spent in pre-sentencing custody, was introduced March 27, 2009 and received third reading in the House of Commons on June 8.

Several private member bills have also been introduced this session, including:

- Bill C-372 received first reading on April 29, 2009. Titled *An Act to amend the Criminal Code* (victim restitution), the bill proposes amendments to the *Criminal Code* to require courts to order that offenders make restitution to their victims in specified cases.
- Bill C-376 received first reading April 30, 2009. This bill authorizes a court that sentences or discharges an offender who has committed an offence in respect of a person under the age of sixteen years to prohibit the offender from being in the presence of such a person.
- Bill C-380 received first reading May 6, 2009. It expands the definition of "identifiable group" in relation to hate propaganda in the *Criminal Code* to include any section of the public distinguished by its sex.

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7. More on Bill C-25

Bill C-25, which proposes to restrict the use of two-for-one credit for time spent in remand prior to sentencing, continues to generate debate:

- *Lawyers assault Harper's 'dead time' bill* by Tim Naumetz, published June 1, 2009 in *Law Times*
- *Pre-sentence custody: give judges some credit* by Jason Gilbert, June 5, 2009 issue of *The Lawyers Weekly*

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8. Criminal Justice Resources

The article *Criminal Justice Reform Resources 2008-2009* by Ken Strutin, published May 14, 2009 on LLRX, gathers, summarises and links current (mostly American) publications on criminal justice reform. Due to the increasing volume of publications in this area, the report focuses on the

following themes: criminal justice, discovery, forensics, juvenile justice, prosecutorial misconduct, public defense, sentencing and wrongful conviction.

The International Criminal Court has published a set of Legal Tools, intended to serve as an electronic library on international criminal law and justice. The Legal Tools project includes repositories of key court documents and collections of legal research resources in international criminal law, and also incorporates flagship legal research tools developed by the ICC.

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