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Severance of Counts a Balancing Act: SCC

The Supreme Court reviews the law on severance in [R. v. Last](#), 2009 SCC 45, an Ontario case in which the accused was charged in one indictment with several counts related to sexual assaults on two different victims. After examining the factors to be considered in an application for severance (accused's intent to testify, nexus, prejudice to the accused, benefit to the administration of justice) and the weighing exercise conducted by the trial judge, the court concludes that the significant risk of prejudice to the accused clearly outweighed any benefits to the administration of justice in trying the counts together. The court set aside the convictions and referred the matter back to the Superior Court for the counts to be tried separately.

Caution Must be Exercised in Using Limited **Rowbotham** Orders: MBCA

In [R. v. Dew](#), 2009 MBCA 101 the court considers the use of limited [Rowbotham](#) orders, concluding that while limited legal representation may be appropriate in some circumstances, the accused must still receive a fair trial, as well as the appearance of one. In this case, where the original order was limited to the cross-examination of one witness in a complicated drug trafficking trial, the fairness test had not been met. Given the complexity of the case, the direct indictment, the voluminous disclosure and the fact that the accused was incarcerated throughout, piecemeal representation was insufficient and could not be cured by expansion of the order done in hindsight. The accused's conviction appeal was allowed and a new trial

ordered.

Crime Spree Sentencing: MBCA

The recent Court of Appeal decision in [R. v. Arbuthnot](#), 2009 MBCA 106 highlights the factors to be considered in imposing an appropriate sentence on an offender who commits multiple related offences in a short period of time to feed a drug addiction. The court overturns the sentence imposed by the trial judge, substituting the same sentence but for different reasons. On the issue of when it is appropriate to order consecutive instead of concurrent sentences the court finds:

...in light of the fact that there were a series of similar, continuous and recurring offences with the same gravamen within a sustained and relatively short period of time, the accused's offending conduct with respect to the robbery offences can be viewed as sufficiently interconnected to form a single criminal transaction or crime spree and thereby attract concurrent sentences. (para. 24)

The court concludes with some pointed comments on the principles at play in sentencing young first offenders, but makes it clear that a 32 year old cannot be considered for this special treatment.

Collecting DNA by Chewing Gum Survey Not Unfair

The Supreme Court recently denied leave to appeal the Alberta Court of Appeal decision in [R. v. Delaa](#), 2009 ABCA 179, which held that the accused's s.8 *Charter* rights had not been violated by a covert police operation to obtain castoff DNA. The accused was tricked into providing DNA samples by participating in a fake chewing gum survey. The Court of Appeal rejected his argument that he had not abandoned the gum (and his expectation of privacy) when he spit it into a cup proffered by the undercover police officer. The court agreed with the conclusion of the trial judge that "while the operation was a trick, it was passive and not an unfair or dirty trick and not a trick that would shock the community."

Court has Inherent Jurisdiction to Determine Appropriate Testimonial Aids: MBQB

[R. v. C.T.L.](#), 2009 MBQB 266 concerns the proposed use of testimonial aids in a sexual assault case involving an underage complainant/witness. The court rejects the defence assertion that s. 486.2 of the *Criminal Code* contemplates that the court use a testimonial aid that most minimally departs from the usual circumstances of an accused being able to face his accuser, and that it employ more intrusive testimonial aids or screening techniques only when warranted by the specific considerations of the situation and as established by the crown. Following the approach taken in [R. v. P. \(G.A.\)](#), 2007 MBQB 127 the court finds it has inherent jurisdiction to determine the optimal testimonial aid for the specific case, which in this case was a screen and CCTV in a child friendly courtroom.

Criminal Code Amendments Concerning Identity Theft Pass

[Bill S-4](#), *An Act to amend the Criminal Code (identity theft and related misconduct)*, received royal assent on October 22 and will come into force upon proclamation. The legislation creates several new offences targeting identity theft, including a new *Code* section (402.2) that makes it an offence to knowingly obtain or possess another person's identity information for fraudulent purposes. Background information and the details of the bill can be found in the [legislative summary](#) and in the June 2009 [submission](#) of the National Criminal Justice Section of the Canadian Bar Association.

New Drug Strategy on the Horizon

[Bill C-15](#), *An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts*, has been passed by the House of Commons and is now before the Legal and Constitutional Affairs committee of the Senate. The controversial bill proposes to introduce mandatory minimum sentences under the *Controlled Drugs and Substances Act* and the *Criminal Code*. The [legislative summary](#) details the changes and the history of this new drug strategy. The article [Stiff Sentences](#), from the October/November issue of the *National* magazine, highlights the concerns of those who oppose the new system.

Truth in Sentencing Act Receives Royal Assent

[Bill C-25](#), *An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)*, was given royal assent by Parliament on October 22, 2009. The Act will limit judges' discretion in awarding credit for time spent in pre-sentence custody when it comes into force upon proclamation. See the [background information](#) and [legislative summary](#) for further details.

Use of Video Equipment in Provincial Court

Associate Chief Judge leMaistre advises counsel who require the use of video equipment in Provincial Court to telephone Marla Cleland (945-6073), Melody Fleury (945-6072), or Pam Seidlitz (945-0105) or send an email request to all three at the following addresses: marla.cleland@gov.mb.ca, melody.fleury@gov.mb.ca, pam.seidlitz@gov.mb.ca. DVD players and monitors are available for both Crown and defence counsel to use, but where the DVD is FTR encrypted counsel must bring their own laptop and submit an advance request for the necessary plasma monitor or projector.

Winter Continuing Professional Development Programs

Plan to attend these upcoming education programs offered by the Law Society:

[Annual Solo and Small Firm Forum](#) - This practical half-day session looks at topics of interest to practitioners in small firms who are just starting out or are keen to re-invent. It's scheduled for January 8, 2010 from 1:00 to 4:00 p.m. at the Law Society classroom.

[Advanced Cross-examination Techniques](#) - co-sponsored by the Law Society and Seminar Partners Inc., this program will be held January 25, 2010 at the Delta Winnipeg. Acclaimed presenters Larry Pozner and Roger Dodd will cover leading questions, controlling witnesses, cross-examination sequences, loops and trilogies, and the chapter method of cross-examination in this intensive day long seminar.

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