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Balancing Informer Privilege and Disclosure Rights: SCC

A number of interesting issues are raised in [R. v. Basi](#), 2009 SCC 52, a recent Supreme Court decision overturning both lower courts to uphold the "nearly absolute" informer privilege. The controversial trial of three public servants charged with corruption and fraud in relation to the sale of B.C. Rail's freight operations by the government was put on hold until determination of the Crown's appeal on the procedural question of whether defence counsel could be present at the hearing concerning informer privilege. A secondary issue was whether the Crown even had a right to appeal a preliminary matter in an ongoing trial. On this point the court held that the trial judge's order was a ruling under [s.37](#) of the *Canada Evidence Act*, not a disclosure order as found by the Court of Appeal, and therefore appealable (paras. 19-33). Not surprisingly, given the two years it has taken to resolve this appeal and the lengthy investigation before charges were laid, the defence has brought a stay application for unreasonable delay under s.11(b) of the *Charter*. The B.C. Supreme Court will hear that application starting January 11, 2010. The following article discusses the wider implications of the case:

[R. v. Basi: \(I\) The Sanctity of Informer Privilege; \(II\) Preliminary Appeals in Criminal Trials](#) by Ahsan Mirza, posted November 23, 2009 on The Court.

Look Alike Accused Properly Acquitted: SCC

In [R. v. Burke](#), 2009 SCC 57, the court confirmed the accused's acquittal on trafficking charges laid following a warrantless search. The court upheld the trial judge's finding that the arresting officer did not have objective grounds for the arrest because he had not investigated the

accused's (valid) claim of mistaken identity at the time of the arrest. Two dissenting judges disagreed, finding that requiring police officers to be certain that the person they are arresting is the person against whom they have a warrant imposes a more onerous standard than the "reasonable grounds" required for a warrantless arrest under [s.495 \(1\)\(c\)](#) of the *Criminal Code*.

Shutting the Door on Predatory Adults

Both the Supreme Court of Canada and the Manitoba Court of Appeal have recently ruled in cases concerning [s.172.1](#) of the *Criminal Code*, the offence of Internet luring.

In [R. v. Legare](#), 2009 SCC 56, the court outlines the elements of the offence of luring a child under [s.172.1 \(1\)\(c\)](#) of the *Criminal Code*. Disagreeing with the narrow interpretation of the section imposed by the trial judge, the court finds it "creates an incipient or "inchoate" offence, that is, a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime. It criminalizes conduct that precedes the commission of the sexual offences to which it refers, and even an attempt to commit them." (para. 25) The court agreed with the Court of Appeal decision to set aside the acquittal and order a new trial.

In [R. v. Golden](#), 2009 MBCA 107 the accused was charged with both Internet luring and making child pornography in an incident involving three teenage girls. He successfully appealed his 30-month sentence on the basis that the trial judge, in not taking a comprehensive "last look" at the consecutive sentence imposed, had erred by not giving appropriate consideration to the totality principle. Considering the record and prospects of the accused, the court ordered that the sentences be served concurrently, thus reducing the overall sentence to 18 months.

Decision to Quash Photo-Radar Tickets Upheld

The Court of Appeal upholds the lower court decision in [R. v. Rémillard \(R.\) et al.](#), 2009 MBCA 112, quashing offence notices under *The Highway Traffic Act* for failure to comply with the [s.456 \(1\)](#) *City of Winnipeg Charter* requirement that they be in both official languages. Following the "limitation of obligation" provision found at s. 452(3), the court limits the decision "to offence notices issued within the framework of the image-capturing enforcement system to the residents of the designated area of Riel."

"Two-for-One" Formula Cannot Compromise Public Safety

In [R. v. Scott](#), 2009 MBQB 300 the sentencing judge details lengthy reasons for rejecting a joint recommendation in an aggravated sexual assault case. On the issue of the "two-for-one" pre-sentencing custody credit formula he says:

I will not, and ought not, be bound to a rigid arithmetic "two-for-one" calculation of his time spent in pre-sentencing custody if to do so would compromise public safety by acceding to a joint sentence recommendation that does not adequately address concerns that exist to this day. This would amount to nothing more than a math game and would bring the administration of justice into disrepute. It would be contrary to public interest to succumb to a type of false logic that premises his remaining sentence on an artificial "two-for-one" calculation, especially here given the nature of Mr. Scott's pre-sentencing custody and his deliberately delaying sentencing (para.47).

Legislative Updates

[Bill C-36](#), *An Act to Amend the Criminal Code* (the *Serious Time for the Most Serious Crime Act*), passed 3rd reading in the House of Commons and is now before the Senate. The bill proposes amendments to [s.745.6](#) of the *Criminal Code* to eliminate the faint hope clause allowing persons convicted of murder or high treason to apply for early parole. The [Legislative](#)

[summary](#) provides background information and analysis of the bill and includes commentary from both sides of the debate.

The provincial government has [announced](#) plans to take on organized crime. Anti-gang legislation currently being drafted will make gang armoured vehicles illegal, create a statutory list of criminal organizations and allow the province to apply to the courts to revoke licenses for businesses which are fronts for gangs.

Provincial Court Notices

Chief Judge Ken Champagne of the Provincial Court of Manitoba has recently issued two notices affecting criminal lawyers:

[Notice re Prisoner Transport: 9:00 a.m. Appearances](#) (regarding scheduling of custody cases); and

[Notice Re: Courtroom Decorum](#) (regarding expected courtesy in the courtroom).

Upcoming Continuing Professional Development Programs: LSM

Plan to attend these winter CPD programs:

[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. For a sneak preview of some of the program's content, check out Roger Dodd's newly released [article](#) on use of blackberries and other technological devices during cross-examination.

Mid-Winter 2010

The Manitoba Bar Association's [2010 Mid-Winter Meeting](#) takes place January 21-23 at the Fort Garry Hotel. Programs that may be of interest to criminal practitioners include:

- Detention and Section 24(2) of the **Charter**: Where do we go from here - leading experts in constitutional and criminal law will discuss the significance of the *Suberu* and *Grant* decisions.
- French Language Advocacy in Manitoba - a practical overview on invoking a client's language rights.
- Making Sense of Statutory Interpretation - a primer on the theoretical, practical and judicial perspectives on interpreting statutes.

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