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Missed Limitations and Hybrid Offences: SCC

The Supreme Court reviews the governing principles where a hybrid offence is prosecuted by way of summary conviction beyond the six-month limitation period in [R. v. Dudley](#), 2009 SCC 58. Agreeing with the Court of Appeal that the original information remained valid and that the Crown could "re-elect" to proceed by indictment, the court concludes:

...the failure of the accused to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown's election and to the proceedings that ensue.

It is for precisely this reason that the Crown is free to proceed by indictment on the original information, if valid on its face, where the accused refuses to consent. Although the information remains valid, the initial election and all subsequent proceedings are a nullity. They can therefore have no effect on the Crown's ability to proceed by indictment. (paras. 42 and 43)

Pilot's Criminal Negligence Convictions Overturned: MBCA

Applying the analytical framework for all negligence-based offences set out by the Supreme Court of Canada in [R. v. Beatty](#), 2008 SCC 5, the Manitoba Court of Appeal set aside criminal negligence convictions against the pilot who crash landed a plane on a Winnipeg street killing one passenger and injuring several others. The issue in [R. v. Tayfel](#), 2009 MBCA 124 was whether the accused's conduct in fulfilling his duty to ensure that there was sufficient fuel for

the flight satisfied the elements of the negligence-based offences for which he was convicted. The court found that, while flawed, the pilot's conduct did not meet the very high threshold of wanton or reckless disregard for the lives or safety of other persons required to prove the *actus reus* of the offence of criminal negligence beyond a reasonable doubt. The appeal against conviction on the charge of dangerous operation of an aircraft was dismissed.

No Automatic Exclusion of Breathalyzer Test Results: MBCA

In [*R. v. Forsythe*](#), 2009 MBCA 123 the court restored the drive over .08 conviction imposed at trial, holding that the appeal judge erred in law by concluding that the requirement of s. 254(3) of the *Code*, that the police take an accused's breath samples "as soon as practicable," was a pre-condition to the admissibility of the test results. Evidence obtained in contravention of the s.254 requirements is not unassailable, but can and should be challenged by way of an application for exclusion under the *Charter*.

Production Orders Against the Media

In [*CBC v. Manitoba \(A-G\) et al.*](#), 2009 MBCA 122 the Court of Appeal upheld the decision of a reviewing judge quashing third party productions orders against two media outlets. The RCMP had sought production of audio and video recordings of a press conference related to a criminal investigation. In paragraphs 71 to 75 of the decision the court stresses the need to balance the competing interests of an independent press and effective law enforcement, concluding with the warning that:

The media should be the last rather than the first place that authorities look for evidence. There should be a clear, compelling, "demonstrated necessity to obtain the information" to avoid the impression that the media has become an investigative arm of the police.

Procedure to Submit Queen's Bench Assignment Court Forms

To eliminate the problem of forms not reaching the appropriate staff in time for court Dale Harvey, General Counsel, Manitoba Justice, Prosecution Services requests all firms to send their Queen's Bench Assignment Court consent and acknowledgement forms to the attention of Ms Karen Ferris at fax number 948-3376.

Challenging Breathalyzer Evidence Post-Bill C-2

Criminal lawyers are still debating Bill C-2's effect on impaired driving defences two years after the legislation was passed, as noted in the *Law Times* article '[Mr. Carter's not dead' Debate on contentious defence continues despite new law](#)' by Glenn Kauth, published December 14, 2009. Key areas of debate are the impact on breathalyser data disclosure obligations and whether the changes to the law are retrospective.

Upcoming Continuing Professional Development Programs: LSM

Plan to attend these winter CPD programs:

- [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.

- Preparation for Criminal Trials in Provincial Court and Queen's Bench - This program is part of our new [Bench & Beer Series](#) for junior lawyers, in which judges, masters and senior practitioners share their insights in an informal, after work setting complete with beer and pizza. It will take place March 18, 2010.

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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