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## Child Testimony Ruling Confirmed: SCC

In an oral decision made after a partial hearing on January 19, 2010, the Supreme Court of Canada confirmed the B.C. Court of Appeal ruling in *R. v. J.Z.S.*, 2008 BCCA 401 that neither s.486.2 of the *Criminal Code* nor s.16.1 of the *Canada Evidence Act* (the statutory provisions governing the manner in which children testify) infringe s.7 or s.11(d) of the *Charter*. The accused, convicted of sexually assaulting his young children, challenged the validity of the provisions allowing them to testify against him from behind a screen. As noted by the Court of Appeal, the "impugned provisions are the latest in a long line of legislative reforms...implemented for the purpose of facilitating the giving of testimony by children and vulnerable witnesses while ensuring that the rights of the accused are respected." (para. 26) The court concluded that both s.486.2 and s.16.1 reflect the procedural and evidentiary evolution of our criminal justice system to facilitate the testimony of children as a necessary step in its truth-seeking goal. The following article discusses the case in more detail:

- *R. v. J.Z.S.: One Small Step for the Court, One Giant Leap for Child Testimony* by Benjy Radcliffe, posted January 21, 2010 on The Court.

## SCC Dismisses Leave to Appeal Applications in Gang Related Bystander Murder Case

The Supreme Court of Canada recently dismissed applications for leave to appeal in *R. v. S. (C. E.)*, 2009 MBCA 61 and *R. v. Cansanay*, 2009 MBCA 59. The cases arose from the same incident (a gang-related bystander murder), but the decisions appealed from involved different outcomes. In the first, the Court of Appeal upheld the trial judge's ruling to admit the out-of-court statements of three witnesses who had refused to testify at trial and the accused's

convictions and sentence. In *Cansanay*, the Court of Appeal ordered a new trial, holding that the trial judge had improperly determined that the witness statements should not be admitted (resulting in an acquittal). The new trial will now go ahead.

## Accused Gets Benefit of Change in Law

The Court of Appeal considers another drive over .08 conviction in ***R. v. McCorriston***, 2010 MBCA 3, a follow up to the *Forsythe* decision discussed in last month's eLaw. In this case the court dismisses the leave to appeal filed by the Crown, upholding the appeal judge's decision that the police did not have reasonable and probable grounds to demand a breath sample. While acknowledging that the appeal judge's decision might well have been different had either the *Grant* (SCC) or *Forsythe* (MBCA) decisions been available at the time, the court found that does not mean that leave to appeal should be granted every time there is a change in the law while a matter is still in the system:

> Thus, even though the accused is "still in the system," the change in law would not benefit the accused, and given the decision in *Forsythe*, an appeal in this case would not have any particular significance to the administration of justice. (para. 35)

## Recent Criminal Decisions: MBQB

Recent Manitoba Court of Queen's Bench criminal decisions include:

In ***R. v. Guimond***, 2010 MBQB 1, the tragic dangerous driving causing death case in which the accused struck and killed a 12-year-old walking on the highway, the court balances punitive and restorative sentencing objectives (including *Gladue* considerations) in assessing the appropriateness of a conditional sentence.

In ***R. v. Viznaugh***, 2010 MBQB 17 the accused received a conditional sentence on a cocaine trafficking charge, in part because it took five years to prosecute the case and rehabilitation had progressed during that time. In deciding not to incarcerate, the court said:

> It would, in my view, be a travesty of sentencing principles to incarcerate this particular accused. While punishment is a deterrence so is rehabilitation. To incarcerate this particular accused in the circumstances of this case would in effect be sending an inappropriate message. It would be telling this accused and the world at large that no matter what efforts one makes to change their ways and no matter how solidly one proves that they have changed, the justice system will not take that into consideration and incarcerate in any event. This is clearly not the law...

## ***Truth in Sentencing Act*** and Identity Theft Legislation in Force

Bill S-4, the identity theft legislation introduced in the senate, came into force January 8, 2010, by order of the Governor in Council. See the legislative summary for details of the new offences.

Bill C-25, the *Truth in Sentencing Act*, S.C. 2009, c. 29, assented to October 22, 2009, will come into force by order of the Governor in Council effective February 22, 2010. Its provisions will limit judges' discretion in awarding credit for time spent in pre-sentence custody. See the background information and legislative summary for further details.

## Constraining Conditional Sentences

The recent article ***Peters Out: How Parliament is Driving Judges Down*** by Ryan Clements,

posted February 3, 2010 on The Court, questions the wisdom of prescriptive sentencing legislation (like the limits on conditional sentences imposed by Bill C-9). The author and others argue that fettering trial judges' ability to exercise discretion in sentencing may force them to "sentence down" by choosing a less effective non-custodial alternative like probation.

## Upcoming Continuing Professional Development Program: LSM

Be sure to register soon for Preparation for Criminal Trials in Provincial Court and Queen's Bench, 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. The program takes place March 18 from 5:00 to 7:00 p.m.