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Court Can Order Counsel to Work for Free: SCC

A court has the authority to require defence counsel who seeks to withdraw due to non-payment of legal fees to continue representing the accused according to the Supreme Court of Canada in [R. v. Cunningham](#), 2010 SCC 10. There are two qualifiers to the exercise of this general rule of authority, however: that it must be used sparingly, and only when necessary to prevent serious harm to the administration of justice. The court sets out the factors a court should consider in exercising its discretion at para.50 of the decision. Reaction to the decision has been mixed, as reflected in these two articles from [The Court](#):

[R. v. Cunningham = old law](#) by Ahsan Mirza, posted April 5, 2010; and

[R. v. Cunningham: New Solutions for Legal Aid?](#) by Benjy Radcliffe, posted April 1, 2010.

Intrusive Computer Search Illegal: SCC

A "carelessly drafted, materially misleading, and factually incomplete" search warrant caused the Supreme Court of Canada to overturn the accused's conviction for possession of child pornography in [R. v. Morelli](#), 2010 SCC 8. The controversial decision has divided not only the court (three dissenting judges upheld the warrant), but public opinion as well, which is not surprising given the competing values at play (protecting vulnerable children from sexual exploitation versus upholding everyone's right to be secure against unreasonable search and

seizure). For a flavour of the arguments on both sides see:

[*Tracking the Trends in the Supreme Court's Engagement with Internet-Based Child Sexual Exploitation: Reconciling the Recent Decisions in Morelli and Legare*](#) by James Yap and [*R. v. Morelli: Understanding Criminal Possession of Digital Property*](#) by Ahsan Mirza, both from The Court;

[*Child-porn conviction overturned on bad search warrant*](#), *The Globe and Mail*; and

[*The SCC on searches of personal computers and web use*](#) by David Cheifetz on [Slaw](#).

Discomfort Sufficient to Constitute Bodily Harm: MBCA

Functional impairment is not a necessary component of the offence of bodily harm according to the Court of Appeal in [*R. v. Moquin*](#), 2010 MBCA 22. "Pain causing discomfort, if it is more than trifling and transient, is sufficient, even if it does not impair a person's ability to function." (para.31) Applying this standard, the court found that the physical injuries sustained by the complainant (a sore scalp from hair pulling, a sore throat from choking, and bruising) met the definition of "bodily harm" under s.267(b) of the *Criminal Code*. The court overturned the acquittal and convicted the accused on the charge of assault cause bodily harm. A recent post on The Court discusses the decision:

[*Moquin: Definition of "Bodily Harm"*](#) by Ankur Bhatt.

Identification Evidence Where Complainant Knows Assailant: MBCA

In [*R. v. Geary*](#), 2010 MBCA 33, the court rejects the accused's argument that the trial judge did not give sufficient consideration to the frailties inherent in eyewitness evidence in convicting him on two counts of sexual assault against sex trade workers who recognized him from previous encounters. The court found that the fact that both complainants knew and recognized the appellant when he assaulted them, afterwards, and in court, meant it was not a "typical case of 'eyewitness' identification." As such, possible problems with the photo pack and slight deficiencies in the identification evidence were not factors and failure to mention them did not render the judge's verdict unreasonable.

Sentencing Offenders with FASD: MBCA

In [*R. v. Draper*](#), 2010 MBCA 35 the court considers the appropriate sentence for multiple counts of robbery committed by a first offender suffering from fetal alcohol spectrum disorder and addicted to crack cocaine. The court reduced the six year sentence imposed at trial to three years, finding that "the judge erred in failing to adequately consider the significant mitigating factors...and overemphasized the aggravating factors, as well as overemphasizing deterrence and denunciation..." (para. 29) The court's examination of FASD as a mitigating factor and comments on the totality principle are instructive.

Leave to Appeal Granted in Manslaughter Case

The Supreme Court has granted leave to appeal the Manitoba Court of Appeal decision in [*R. v. Sinclair \(T.\)*](#), 2009 MBCA 71, discussed in our September 2009 eLaw. This was the case where a beating victim left on the road was subsequently run over by a car and killed, resulting in manslaughter charges against the accused attackers.

Provincial Court Notices

The provincial court recently issued two new notices concerning case management conferences:

[Case Management Conferences: Non-Resident Judge Assigned to Preliminary Inquiry or Trial](#), issued March 22, 2010; and

[Case Management Conference Coordinator's Docket](#), issued March 30, 2010.

Stats on Crime

Statistics Canada has released several reports dealing with criminal law issues in recent months. See, for example,

[Legal Aid in Canada: Resource and Caseload Statistics](#) published March 18, 2010. It details, mostly in table format, the numbers on legal aid plans across Canada. Highlights of the report are summarised [here](#).

[Child and Youth Victims of Police-reported Violent Crime, 2008](#), published March 2010, analyzes the nature and extent of police-reported violence committed against children and youth, examining differences in victimization based on sex and age of victims, type of offence, prevalence across the provinces and territories, relationship to the perpetrator, weapon used and level of injury. It also looks at trends over time. Highlights of the report are summarised at p.5.

Does Impaired Driving Problem Need a Fix?

A recent post on Slaw proposes a provocative solution to the "problem" of impaired driving: take it out of the courts. In [Tackling Impaired Driving...By Decriminalizing It](#), author Edward Prutschi argues that protracted trials are virtually guaranteed by the "draconian mandatory minimum penalties now imposed." He suggests dealing with first time drunk drivers who cause no injury or accident outside of the *Criminal Code*, perhaps under provincial regulations imposing a fine and obliging the convicted driver to install an ignition interlock system.

2010 National Criminal Law Program

The Federation of Law Societies of Canada is presenting its 37th annual National Criminal Law Program, [Substantive Criminal Law, Advocacy and the Administration of Justice](#), from July 12 to 16, in St. John's, Newfoundland. As noted in the [brochure](#), Richard Saull of Manitoba Justice is a faculty member and will present a lecture on The "Defence" of Third Party Suspects and Inadequate Police Investigation.

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