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Defence of Property Dispute Decided: SCC

A majority of the court found nothing wrong with a military court judge's conclusion that the accused had applied more force than necessary in defending his property and dismissed the accused's conviction appeal in *R. v. Szczerbaniwicz*, 2010 SCC 15. The accused, who pushed and injured his wife when she threw his mounted diploma on the floor, had argued that he was not criminally responsible for the assault because he used "no more force than was necessary" (s.39 (1) CCC) to protect his property (the diploma). The military judge concluded that the accused lost his self-control for a short period of time during which he "physically manhandled" his spouse, causing her to fall and suffer injuries. The Supreme Court agreed with his conclusion that the use of force in such circumstances was disproportionate. As noted in the following article, however, the minority found the trial judge's reasons to be inadequate.

- *The Defence of Property in Criminal Law: R. v. Szczerbaniwicz* by Christine Kellowan, posted May 10, 2010 on The Court.

New Trials Ordered in Senseless Murder Case: SCC

R. v. Laboucan, 2010 SCC 12 and *R. v. Briscoe*, 2010 SCC 13, two recent Supreme Court of

Canada decisions, stem from the same Alberta incident, the kidnapping, rape and murder of a 13-year-old girl by the two accused (L and B) and three youths. In *Laboucan,* the Crown successfully appealed the Court of Appeal decision that a new trial was necessary because the trial judge's reference to L's "very great motive to be untruthful" presumed his guilt. The Supreme Court found that "while some of the language used by the trial judge in his reasons may give cause for concern when viewed in isolation, when the reasons are read in their entirety and in the light of the context of the trial as a whole, they reveal that the trial judge properly assessed and weighed the evidence of all the witnesses, including the accused, without undermining the presumption of innocence or the burden of proof." In *Briscoe*, the court upheld the Court of Appeal decision to overturn B's acquittal and order a new trial due to the trial judge's failure to consider the doctrine of wilful blindness. The court also looks at the *mens rea* requirements for party offences, as discussed in the article *Prosecutorial Pragmatism in R. v. Briscoe*, by Allison MacIsaac, posted May 6, 2010 on The Court.

Finding the Balance Between Individual Liberty and Effective Crime Investigation: MBCA

The Manitoba Court of Appeal weighs in on the thorny issue of the limits of police investigative powers in *R. v. Schrenk (C.A.)*, 2010 MBCA 38, a case in which a routine traffic stop led to a conviction on trafficking charges. The court upheld the lower court finding that the police questioning of the accused was proportional to the traffic stop and did not stray into unfounded general inquisition. The eighteen minute roadside detention and dog sniff search were not arbitrary or unreasonable. On the issue of psychological detention the court said:

> (The *Grant*) definition of psychological detention gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their *Charter* rights relating to detention. It does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Rather, whether a reasonable person concluded that they no longer had the freedom to choose whether or not to cooperate with the police becomes an objective determination, made in light of the circumstances of an encounter as a whole. In cases such as the one at bar, where there is no physical restraint or legal obligation, a detainee-centred, objective inquiry must be undertaken as to whether there was psychological detention. (para.54)

Cansanay Convicted: MBQB

Jeffrey Cansanay has been found guilty of the second degree murder of an innocent bystander three years after he was acquitted on the same charges when the trial judge refused to admit the videotaped statements of uncooperative witnesses. His case has generated many reported decisions by all levels of court. Rulings arising from the most recent trial include:

- 2010 MBQB 48 - a ruling on challenges for cause relating to pre-trial publicity and allegations that the offences are gang related;
- 2010 MBQB 59 - the court grants a publication ban for the duration of the trial sought by Crown and supported by defence;
- 2010 MBQB 79 - a ruling on the admissibility of out-of-court statements made by Crown witnesses;
- 2010 MBQB 81 - a ruling regarding the admissibility of the evidence of a deceased Crown witness - evidence from first trial held admissible, but not evidence from co-accused's trial or police statements;
- 2010 MBQB 86 - dismissal of motion for mistrial based on Crown counsel revealing the outcome of co-accused's trial;
- 2010 MBQB 92 - the court rules that there in no air of reality to the defence of

self-defence.

Amendments to ***The Civil Remedies Against Organized Crime Act*** Introduced

The Manitoba government introduced Bill 13, *The Civil Remedies Against Organized Crime Amendment Act*, on March 25, 2010. It transfers applications currently brought by the police chief to the newly created position of director and sets out the powers and responsibilities of the director.

Criminal Justice Articles

The most recent issue of ***Juristat***, the Statistics Canada periodical on Canada's justice system, contains three articles that may interest criminal lawyers:

- *Knives and violent crime in Canada, 2008;*
- *Youth custody and community services in Canada, 2008/2009;*
- *Police-reported robbery in Canada, 2008*.

CPIC Records Maintenance Criticized

A recent *Lawyers Weekly* article, *Courts grapple with old CPIC data*, highlights the problem of out-of-date Canadian Police Information Centre records, which compromise informed decision-making in bail court, plea negotiations and sentencing hearings. The article cites *R. v Horne*, 2009 ONCJ 34, a sentencing decision in which the judge rejects an unpalatable joint sentencing recommendation and urges the Crown to "bring to the attention of the relevant authorities the deleterious consequences that out-of-date and incomplete CPIC records can have. It is apparent that if it takes a year and a half, or in many cases even longer, to enter a conviction and sentence on an individual's CPIC record, the Canadian Police Information Centre is not fulfilling its mandate." (para. 43)

Grant Revisited

In *Post-Grant: Does It Even Matter?* author Benjy Radcliffe examines how appellate courts (including the MBQB in *R. v. Watt*, 2009 MBQB 297), have applied the new s. 24(2) framework for exclusion of evidence set out in last summer's Supreme Court of Canada decision in *R. v. Grant*. He considers only appellate decisions involving the application of both the old and new tests, and concludes that courts appear to be increasingly willing to admit evidence post-*Grant.*

Annual Supreme Court of Canada Review

The Criminal Law section of the Manitoba Bar Association invites members and buddies to attend their next meeting, at which Crown counsel Diana Cameron will review the Top S.C.C. criminal cases for 2009-2010. The meeting takes place May 20, 2010 at 12:00 noon, 12th floor, Woodsworth Building, 405 Broadway.

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.

New Criminal Pardons Legislation Proposed

The Federal government introduced Bill C-23, *Eliminating Pardons for Serious Crimes Act*, on May 11, 2010. It amends the Criminal Records Act, R.S.C. 1985, c. C-47 to substitute the term "record suspension" for the term "pardon" and extends the ineligibility periods for record suspension applications. It also makes certain offences ineligible for a suspension.