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SCC Rejects Provocation Defence

There was "no air of reality" to the accused's assertion that his estranged wife's affair with another man amounted to an insult sufficient to deprive him of his self-control and his murder appeal was therefore unsuccessful in [R. v. Tran](#), 2010 SCC 58. The court examines the history and development of the defence of provocation in the decision, concluding that while "personal circumstances may be relevant to determining whether the accused was in fact provoked - the subjective element of the defence -... they do not shift the ordinary person standard to suit the individual accused. In other words, there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose." (para. 35)

Failure to Disclose HIV Status Not Criminal In Circumstances: MBCA

The Court of Appeal overturned four of six sexual assault convictions of a man who failed to disclose his HIV-positive status to several women with whom he had sexual intercourse in [R. v. Mabior \(C.L.\)](#), 2010 MBCA 93, finding that

(t)he law with respect to aggravated sexual assault and the transmission of HIV, as developed by the Supreme Court of Canada in [Cuerrier](#), attaches criminal liability to the failure to disclose one's positive HIV status only when there is a "significant risk of serious bodily harm." That determination will vary depending on the scientific and medical evidence adduced in each particular case. (para. 4)

In this case, given his low viral loads and use of condoms, the court found that the accused's

failure to disclose did not create such a significant risk of serious bodily harm that the complainants' consent was vitiated. For commentary on the case see:

- [Mabior - HIV-Positive Accuseds, Non-Disclosure, & the Glaring Negatives of Cuerrier](#), posted November 23, 2010 on The Court.

Impaired Driving Causing Death Sentencing Review: MBCA

In [R. v. Ruizfuentes](#), 2010 MBCA 90 the court reviews the case law from across the country to determine what, if any, effect the elimination of the conditional sentence option and the increase in minimum sentences has had on the general range of sentences for impaired driving causing death. Appended to the decision is a synopsis of the sentencing decisions considered by the court, indicating the period of incarceration and the length of the driving prohibition imposed. The court concludes:

that the regular range of sentences for offenders who commit the crime of impaired driving causing death and who have no prior convictions for drinking and driving or serious personal injury offences should be increased to a range of two to five years. For those who are second or subsequent offenders, it moves upwards to a range of four to eight years. As for driving prohibitions, the cases show that for first offenders, the range is three to ten years and for second or subsequent offenders, from ten years to a lifetime ban. (para. 22)

The court goes on to find that the trial judge erred in treating the accused (who had many *HTA* convictions but no prior criminal record) as "anything but a first offender," and this was significant because the *Code* compels a harsher minimum punishment for second or subsequent offenders than for first offenders. In substituting its own sentence, however, the court found the moral blameworthiness of the accused (who was speeding and went through three red lights) to be at the high end and sentenced accordingly.

Recent Criminal Decisions: MBQB

[R. v. Calanza](#), 2010 MBQB 240 - The court sends a message to mid-level cocaine dealers that "if convicted, unless the case is exceptional, the sentence will almost invariably include a period of incarceration in a federal penitentiary." (para. 53) In this case, the relatively young, first offender was sentenced to three years, despite many mitigating factors.

[R. v. Cook](#), 2010 MBQB 237 - This decision contains an extensive review of the essential elements for a finding that the accused is a dangerous offender and requires imprisonment for an indeterminate period under [s. 753](#) of the *Criminal Code*.

[R. v. Lussier](#), 2010 MBQB 242 - The court upholds the provincial court decision that the 2008 changes to the impaired driving sections of the *Criminal Code* (s.258(1)) apply retrospectively (i.e. they apply to cases already in the stream when the legislation changed). The court follows the Ontario Court of Appeal decision in [R. v. Dineley](#), 2009 ONCA 814, currently on leave to appeal to the SCC.

Further **Criminal Code** Amendments Introduced

The Federal government introduced several new bills amending the *Criminal Code* between October 24th and November 4th:

- [Bill C-50](#), the *Improving Access to Investigative Tools for Serious Crimes Act*, concerning authorizations to intercept private communications and warrants and orders;
- [Bill C-51](#), the *Investigative Powers for the 21st Century Act*, adding new investigative powers in relation to computer crime;
- [Bill C-53](#), the *Fair and Efficient Criminal Trials Act*, allowing for case management judges; and

[Bill C-54](#), the *Protecting Children from Sexual Predators Act*, legislation to increase or impose mandatory minimum penalties for certain sexual offences with respect to children.

Legislation Allowing Licence Suspensions for Drug Traffickers Now In Force

[*The Highway Traffic Amendment Act \(Suspending Drivers' Licences of Drug Traffickers\)*](#) came into force December 1, 2010. Under the new provision those convicted of a drug-trafficking offence involving driving will have their driver's licence suspended for one year for a first conviction, five years for a second conviction, 10 years for a third conviction and for life on a fourth or subsequent conviction. Not all of the previous convictions would need to be for drug trafficking.

Recommended Reading

[*Actual Innocence and Freestanding Claims for Relief*](#), by Ken Strutin, is a collection of scholarly literature on the topic of "actual innocence" as a basis for contesting wrongful convictions and litigating post-conviction claims that go beyond the procedural metrics of the trial process. It was published November 25, 2010 on [LLRX](#).

New **Code of Professional Conduct**

The Benchers have approved a new *Code of Professional Conduct* which will come into effect on January 1, 2011. The new Code provides a clear, concise and updated set of rules by which lawyers will be expected to conduct themselves. All members of the profession will be required to complete some form of training on the Code within one year of its implementation. The Law Society will offer training in a number of formats, including in person training, online self-study, and teleseminars. There are free programs scheduled in Brandon on December 3, 2010 and Winnipeg on December 10, 2010, but the Winnipeg program is currently full and is accepting registrations for teleconference attendance only. A second teleseminar will be held on January 25, 2011 from 12:00 noon - 1:30 p.m.

The MBA 2011 Mid-Winter Meeting

The 2011 [Mid-Winter Meeting](#) will take place January 20-22, 2011 at the Fairmont Winnipeg, with professional development programs on January 21. Topics that may be of interest to business lawyers include:

- Interpreting Manitoba's New *Franchise Act* and Tips for Practitioners - from 9:30 - 11:30 a.m.; and
- The Impact of International Reporting Standards and the Changing Accounting Landscape on Audit Inquiries under the Joint Policy Statement - from 2:00 - 4:00 p.m.

Contact the [Bar Association](#) for further details.

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