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Effective Investigation or Privacy Intrusion?: SCC

Debate surrounding the Supreme Court of Canada decision in *R. v. Gomboc*, 2010 SCC 55 is as divided as the opinions of the many judges who heard the case, a classic contest pitting privacy concerns against the public interest in effective law enforcement. The Supreme Court restored the trial convictions on drug related charges, finding that the accused's right to be secure from unreasonable search had not been violated by police use of electrical power consumption data obtained without a warrant. (The police, after observing signs of possible grow op activity, had asked the local power utility to install a digital recording ammeter (DRA) on the accused's property. The data collected was then used to obtain a search warrant for the premises, resulting in drug and theft of electricity charges). A divided majority disagreed on the characterization of the DRA evidence and on what circumstances make an expectation of privacy objectively reasonable, but concurred in the result. The dissenting judges disagreed, noting that to do otherwise would be "to take an incremental but ominous step toward the erosion of the right to privacy guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*." (para.97) As the authors of the following articles suggest, we likely haven't heard the last word on this controversial topic:

- *Gomboc - A Powerful Debate on DRA Evidence and Section 8*, posted February 1, 2011 on The Court;
- *Privacy in Power Consumption Data: R. v. Gomboc*, posted December 12, 2010 on IPilogue;
- *Is R v Gomboc really only about a homeowner's expectation of privacy or is there more to it?*, posted January 12, 2011 on ABlawg.

Serious Violent Offence Designation Requires Application and Evidence: MBCA

In *R. V. K.I.*, 2011 MBCA 11 the Court of Appeal overturned the sentencing judge's finding that a robbery involving the use of masks and knives was a serious violent offence under s. 42(9) of the *Youth Criminal Justice Act.* The court found that the trial judge had failed to consider the principles related to the determination of a serious violent offence designation and may have based his decision on an incorrect fact (the erroneous assumption that the accused had held the knife to the victim's face). While the offence was both serious and violent, in the absence of evidence of serious bodily harm (there were no physical injuries and the victim did not testify so there was no finding of psychological harm) it did not meet the requirements for a "serious violent offence" as defined in s. 2 of the YCJA and used in s. 42(9). The court also found that while the Crown's application for the designation does not have to be in writing it must be clear and it should be given in a timely manner so as to avoid unnecessary adjournments.

Signs of Cocaine Trafficking: MBQB

The court convicts the accused in *R. v. Traimany*, 2011 MBQB 15 of trafficking and possessing property obtained by crime when a search of his property following surveillance revealed cocaine and money buried in the backyard. Knowledge and control were in issue since none of the officers observed what went on inside the fenced yard, there was no fingerprint evidence connecting the accused to either the drugs or the money, and no cash, weapons, paraphernalia or drugs were found in the house. The judge placed significant weight on the opinion evidence of an expert concerning the use, distribution, and trafficking of cocaine, including packaging, distribution methods, anti-detection methods used by traffickers, tools of the trafficking trade, the value and pricing of cocaine, the payment for cocaine, and the proceeds of crime in drug trafficking. His opinions can be found at paras. 23-31 of the decision.

Cross-examining a Recanting Witness: MBQB

The Crown made a successful application under s.9 (2) of the *Canada Evidence Act* to examine its own witness on a prior inconsistent statement in *R. v. C.L.S.*, 2011 MBQB 12. The court found that the fourteen year old witness was not telling the truth when he testified that he did not remember the conversations he had previously described in his statement to the police. The judge summarizes the s.9(2) procedure and conducts a detailed analysis of both the test and the burden of proof to be applied in determining whether to permit such a cross-examination. She concludes that "the "ends of justice" favour permitting cross-examination except in relatively rare circumstances that will usually require more than that the statement was not voluntary" (para.38) and explains at para.34:

> The combination of the trend in favour of the admissibility of relevant evidence and the importance of cross-examination to determine the admissibility of prior inconsistent statements militates in favour of reducing or narrowing the circumstances in which cross-examination will be refused. This would permit greater use of sworn video statements where otherwise found to be reliable, thereby admitting more relevant evidence for the consideration of the trier of fact. This, in turn, would promote the interests of justice.

Government Proposes to Eliminate Accelerated Parole

Public Safety Minister Vic Toews introduced Bill C-59, *An Act to Amend the Corrections and Conditional Release Act* on February 9, 2011. The bill proposes to eliminate accelerated parole for non-violent offenders.

Recommended Reading

In *Juror Behaviour in the Information* Age. published December 26, 2010 on LLRX, author Ken Strutin examines how social media and the internet have impacted juror behaviour and trial management. The article presents recent examples of online misbehaviour by jurors and highlights scholarship and practice resources concerning its implications for *voir dire*, trial management and the administration of justice. Although the examples and articles are American based, the issues they identify will undoubtedly affect Canadian criminal law practice.

New Code of Professional Conduct - Training Session for Defence Counsel

Don't forget to register soon for the training session on the new Code of Professional Conduct to be held May 18, 2011 from 5:00 - 7:00 p.m. at the Law Society classroom. The new Code came into effect on January 1, 2011, providing 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.

2011 National Criminal Law Program

The 38th annual Federation of Law Societies' National Criminal Law Program is on Criminal Procedure, Ethics and The *Charter*. It will be held in Québec City, Québec, from July 4 to 8, 2011. As noted in the brochure, Justice Richard Saull of the Manitoba Court of Queen's Bench is a faculty member. He will chair the session on Jury Selection and speak on Confidential Informants, Agents and Other Police Sources.