



eLaw - Criminal Law Update

March/April 2011 - No. 48

ISSN 1916-3916

In This Issue

Post Offence Conduct Ruling Divides Court: SCC

Jury Instructions Adequate: SCC

Three Year Old Sentence Appealable: MBCA

Recent Manitoba Cases

New Legislation In Force

Recommended Reading

Upcoming CPD: LSM

Code of Professional Conduct Training Session for Defence Counsel

Online Program on FASD: CBA

2011 National Criminal Law Program

The Ninth Annual Crown Defence Conference

Post Offence Conduct Ruling Divides Court: SCC

The Supreme Court's decision in [R. v. White](#), 2011 SCC 13 does little to clarify how courts should treat post offence conduct evidence. The court ruled 6-3 in favour of upholding the second degree murder conviction, but disagreed on a 4-2-3 basis on the legal principles at play. The issue at trial was whether the accused had the requisite intent for murder. The accused claimed that the shooting was accidental, but the Crown argued that his lack of hesitation or shock when the gun went off (he immediately fled the scene) suggested otherwise. On appeal, the accused argued that the trial judge should have specifically instructed the jury that the evidence concerning the circumstances of his flight had no probative value in relation to the issue of intent, because that evidence was consistent with both manslaughter and second degree murder. The minority agreed, finding that "such evidence does not provide a safe hook on which to hang a conviction for second degree murder" and that "the jury should not be invited to draw unequivocal inferences from equivocal conduct based on attributed motives and subjective interpretations (or misinterpretations) of (in this case) physical reactions." (para. 190) The majority disagreed, however, finding that the evidence was an objective fact "more consistent with an intentional shooting than with an accident" and it would "have been wrong for the trial judge to instruct the jury that this evidence had no probative value in determining intent." (para. 79)

Jury Instructions Adequate: SCC

By a narrow (4-3) majority the Supreme Court upheld a second degree murder conviction in [R.](#)

[v. Miljevic](#), 2011 SCC 8, a case in which the intoxicated accused admitted to manslaughter but denied having the requisite intent for murder (he threw a baseball bat into a crowd of people). The appeal turned on whether the trial judge erred in not providing a definition or examples of manslaughter as requested by the jury. The majority found "no reasonable possibility that the jury could have misunderstood what had to be proved in order for them to return a guilty verdict on the charge of second degree murder", but the minority disagreed, finding the instruction to be "plainly inadequate."

Three Year Old Sentence Appealable: MBCA

The weight of authority and the circumstances of the applicant were in favour of the court exercising its broad discretion to extend the time for filing an appeal of a three year old sentence in [R. v. Arganda](#), 2011 MBCA 24. The applicant, a non-citizen, had been sentenced to a two year jail term, resulting in an automatic deportation order. A one day reduction in the sentence would allow the applicant to appeal the deportation. The court granted leave to appeal on an expedited basis.

Recent Manitoba Cases

[R. v. Goodman](#), 2011 MBCA 22 - the court quashed the accused's conviction for aggravated assault and ordered a new trial, finding that "the trial judge's failure to analyze the evidence in the manner suggested by *R. v. W.(D.)*, [1991] 1 S.C.R. 742, let alone failing entirely to even refer to the principles involved in the *W.(D.)* three-step process, was... an error in law."

[R. v. Frieberg](#), 2011 MBQB 58 - the court excluded evidence of 850 ecstasy pills, finding the police wilfully disregarded the accused's s. 8 *Charter* rights when they conducted a warrantless search of her vehicle. Of particular concern were the fact that the police officers knew (or should have known) that they required a warrant and the fact that a search warrant was readily obtainable.

[R. v. Bedernjak](#), 2011 MBQB 47 - the court dismissed the accused's appeal of his impaired driving conviction finding that the failure to obtain an informed consent to the conduct of a standardized field sobriety test breached s.8 of the *Charter* but was saved by s.1. The court said:

In dealing with a roadside stop, the informational component of a consent to search under s. 8 largely mirrors in purpose and effect the informational components of right to counsel under sections 10(a) and 7. The enactment of the authorization to conduct an SFST for the important public purpose of permitting police officers to detect impaired drivers provides the justification under s. 1 to override the informational requirement under s. 8 in the limited situation where the purpose of the test is not to directly produce breathalyzer evidence against the driver, but rather to form the basis of a test to determine whether there are reasonable and probable grounds to require him to take the breathalyzer test. (para. 22)

New Legislation In Force

The [Abolition of Early Parole Act](#), S.C. 2011, c. 11 (Bill C-59) came [into force](#) March 28, 2011, with the exception of ss.14 and 15. The act provides for the elimination of accelerated parole review for all those who had not received that review upon the coming into force of the bill. See the [legislative summary](#) for further details.

The [Tackling Auto Theft and Property Crime Act](#), S.C. 2010, c.14 will come into force April 29, 2011, other than s.12 which came into force on assent. The act amends the *Criminal Code* by providing for four new offences: a separate offence for motor vehicle theft, the offence of tampering with a vehicle identification number and the offences of trafficking in property obtained by crime and possession of property obtained by crime for the purpose of trafficking. It also allows the Canada Border Services Agency to prevent the cross border movement of property obtained by crime, including stolen vehicles. See the [legislative summary](#) for further details.

Recommended Reading

For those who missed the MBA Criminal Law section meeting on April 6, 2011, Mr. Justice

Richard Chartier has kindly provided a copy of his paper [Standards of Review on Criminal Appeals: Your Sword or Your Shield](#). The paper defines standard of review and summarizes the case law on recognized standards for 19 specific questions. It's a must-read for criminal law practitioners.

And, the Scottish Council of Law Reporting has recently published the latest article from its Macfadyen Lectures, a scholarly paper by The Honourable Thomas A. Cromwell on [The Challenges of Scientific Evidence](#).

Upcoming CPD: LSM

The Law Society and the Criminal Law section of the Manitoba Bar Association are presenting a series of [one hour criminal law teleseminars](#) this spring. Register for one or both (at a discount) of the following seminars:

- DNA Evidence: Current Issues - Join moderator Antonio Cellitti and presenters Brian Bell and Saul Simmonds for a topical discussion of such DNA evidence issues as contamination of DNA, cold cases, expert evidence and databases. The teleseminar takes place May 4, 2011 from 12:00 noon to 1:00 p.m.
- Section 10(b) of the **Charter** (Right to Counsel): Recent Developments - Lisa Cupples and Josh Weinstein will discuss the import of Supreme Court of Canada cases *Willier*, *Sinclair* and *McCrimmon*, which elaborate on the nature and limits of the right to counsel. This teleseminar takes place on June 8, 2011 from 12:00 noon to 1:00 p.m.

Code of Professional Conduct Training Session for Defence Counsel

A special [training session](#) for criminal defence counsel on the new [Code of Professional Conduct](#) will be held May 18, 2011 from 5:00 - 7:00 p.m. at the Law Society. [Register](#) soon to ensure your spot at this free program. All lawyers must complete some form of training on the Code by December 31, 2011.

Online Program on FASD: CBA

The Criminal Justice section of the Canadian Bar Association is presenting the online program [Addressing Fetal Alcohol Spectrum Disorder in the Criminal Justice System](#) on May 18, 2011 from 11:00 a.m. to 12:30 p.m. Judge Mary Kate Harvie is on the panel.

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.

The Ninth Annual Crown Defence Conference

Mark your calendars to attend the next Crown Defence conference which will take place September 22 and 23, 2011 at the Winnipeg Convention Centre. Guest speakers include Justice Marc Rosenberg and journalist Christie Blatchford. For further details contact Heather Reay at 985-8189.

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.