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Fresh Evidence and the Due Diligence Test: SCC

A decision on whether fresh evidence should be admitted in a sexual assault case divided the Supreme Court of Canada in [R. v. J.A.A.](#), 2011 SCC 17. The majority found in favour of allowing fresh expert evidence which contradicted the complainant's trial testimony concerning an alleged bite mark. The minority disagreed, finding that the accused could have introduced the evidence at trial and his lack of due diligence weighed against reception of the new evidence on appeal. As noted in the article [R. v. J.A.A.: SCC Splits Over "He Said, She Said" in Sexual Assault](#), the trial judge viewed the case as a close call, and this likely led the majority to err on the side of caution when it ordered a new trial.

Court Comments on General Deterrence in Gaming Appeal: MBCA

The sentencing judge made an error in principle when he found that general deterrence was the "primary principle of sentencing" in a case involving the very rare charge of keeping a common gaming house contrary to s. 201(1) of the *Criminal Code*. According to the Court of

Appeal in [R. v. Foianesi](#), 2011 MBCA 33, the judge's overemphasis on general deterrence caused him to rule out the discharge provisions, which were a more appropriate sentence in the circumstances than the hefty fine and forfeiture order which was imposed. The court found it was not contrary to the public interest to grant a discharge given the significant mitigating circumstances and the fact that there had not been a single reported case of this offence in 50 years. The precedential value of the decision is limited, though, as noted in the final paragraph:

However, two things must be said. First, it has long been a criminal offence to operate a gaming house and it is still against the law. Second, it must be understood that the precedential value of this decision is limited to these circumstances and this offender and must be viewed particularly in light of the fact that there had not been a single reported case of this offence in over 50 years. Should this type of offence begin to re-emerge, sentences may have to be harsher in order to address its increasing prevalence. (para.30)

Registrar, Not Courts, to Assess Driver Competence: MBCA

The court reduced the 10-year driving prohibition imposed on an accused who had pleaded guilty to two counts of dangerous operation of a motor vehicle causing death to 4 years in [R. v. Muthoka](#), 2011 MBCA 40, finding that the sentencing judge's overemphasis on public safety concerns did not square with the evidence. (para. 11)

The court also found that the Registrar of Motor Vehicles, not the courts, is charged with determining driver competence and, therefore, "the imposition of a lengthy driving prohibition to address the question of driving competence is not to be encouraged, and such a question is best left to the Registrar."

Court Split on Open v. Secure Custody: MBCA

A divided court ruled on the appropriate level of custody (open or secure) for a young offender convicted of criminal negligence causing death in [R. v. I.R.N.](#), 2011 MBCA 31. The majority agreed with the sentencing judge that open custody was not appropriate due to the seriousness of the offence and lack of faith in Probation Services. The minority judge disagreed, finding that "gradual integration into the community is preferable to jumping from secure custody to community supervision and is more in keeping with the principles of the *Youth Criminal Justice Act*, S.C. 2002, c. 1." (para.29)

Sex Offender Legislation In Force

The [Protecting Victims From Sex Offenders Act](#), S.C. 2010, c.17, passed last December, came into force April 15, 2011. It provides that sexual offenders are automatically registered in the national registry and samples of their DNA are taken for forensic analysis. It also allows police to alert other police services in Canada and abroad to the movements of sex offenders who are considered high risk within their jurisdictions. See the [legislative summary](#) for more details.

Crime Bills Receiving Royal Assent Before Dissolution of Parliament

A number of crime related bills were passed just before Parliament was dissolved at the end of March. They include:

[Bill C-475](#) - *An Act to amend the Controlled Drugs and Substances Act* will come into force 90 days after the date it received Royal Assent (March 25, 2011). It prohibits possessing, selling and importing substances used to produce methamphetamine or ecstasy;

[Bill C-30](#) - *An Act to amend the Criminal Code* received Royal Assent March 23, 2011 and will come into force on a day to be fixed by order of the Governor in Council. It responds to the SCC ruling in [R. v. Shoker](#) by amending the *Criminal Code* to allow judges to impose conditions requiring samples to be provided by individuals under probation orders, conditional sentences, and peace bond provisions.

[Bill S-6](#) - *An Act to amend the Criminal Code and another Act* (short title: *Serious Time for*

the Most Serious Crime Act) eliminates the "faint hope" clause in the *Criminal Code* which allowed those sentenced to life for murder or high treason to apply for parole after 15 years. It received Royal Assent March 23, 2011 and will come into force on a day to be fixed by order of the Governor in Council.

[Bill C-21](#) - *An Act to amend the Criminal Code* (sentencing for fraud) received Royal Assent March 23, 2011 and will come into force by order of the Governor in Council. It cracks down on white collar crime by creating a two-year mandatory minimum sentence for fraud over \$1 million and adding sentencing alternatives.

[C-22](#) - *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service* received Royal Assent March 23, 2011 and will come into force by order of the Governor in Council. It is intended to fight Internet child pornography by requiring Internet service providers and others to report incidents of child pornography.

[C-48](#) - *An Act to amend the Criminal Code and to make consequential amendments to the National Defence Act* received Royal Assent March 23, 2011 and, other than s.10, will come into force by order of the Governor in Council. It allows judges to make parole ineligibility periods for multiple murders consecutive rather than concurrent.

See the [Justice Canada](#) website or [backgrounder](#) or the news release [Legislation Standing up for Victims of Crime Receives Royal Assent](#) for more information.

Provincial Crime Bills

The province has also introduced several crime related bills in the last month. They include:

[Bill 16](#) - *The Safer Communities and Neighbourhoods Amendment and Criminal Property Forfeiture Amendment Act* was introduced April 13, 2011. Part 1 allows for safety orders shutting down buildings which have been used for criminal organization offences and Part 2 creates a rebuttable presumption that a property was used to engage in unlawful activity if a community safety order has been issued.

[Bill 18](#) - *The Highway Traffic Amendment Act* was introduced on April 15, 2011. It proposes changes to *The Highway Traffic Act* to ensure that those convicted of auto theft under the new *Criminal Code* provisions would receive an automatic driver's licence suspension ranging from one year to up to a lifetime suspension.

[Bill 29](#) - *The Child Sexual Exploitation and Human Trafficking Act*, introduced May 17, 2011, will allow victims of human trafficking and sexual exploitation to obtain protection orders against those who prey on them and to sue their abusers.

[Bill 31](#) - *The Manitoba Public Insurance Corporation Amendment Act*, introduced May 4, 2011, proposes amendments to the MPI Act to cancel compensation to accident victims who are convicted of criminal offences related to the accident.

[Bill 37](#) - *The Highway Traffic Amendment Act (Accident Reporting Requirements)*, introduced May 10, 2011, clarifies what information drivers involved in an accident are required to exchange and report and eliminates the requirement to make a police report if the only consequence is property damage.

Inter-provincial Criminal Property Forfeiture Agreements

The Manitoba government has signed agreements with six other provinces to share information regarding civil forfeiture of the proceeds of crime, according to this May 13, 2011 [news release](#). The agreement sets out the process for jurisdictions to share records and other information while respecting each province's privacy obligations.

Legal Aid Statistics

Statistics Canada's 2009/2010 report on [Legal Aid in Canada: Resource and Caseload Statistics](#), is available for download. It presents a broad analytical overview of legal aid in Canada and provides data tables and figures at both the provincial/territorial and national levels.

Recommended Reading

[The real truth in sentencing](#) is a recent *Canadian Lawyer* article concerning [R. v. Johnson](#), 2011 ONCJ 77, the first case to offer a detailed analysis of the new *Truth in Sentencing Act* provisions which came into effect February 2010. The court upheld the constitutionality of the *Criminal Code* amendments, but went on to suggest that judges could consider as a mitigating factor any particularly onerous conditions in remand centres:

...the assessment of a qualitative claim to hardship or oppression for which the state is said to be responsible is one of the many considerations, mitigative and aggravating, that factor into the calculus of crafting a just, appropriate and individualized sentence in any and every case." (para. 199)

Lawyers quoted in the article expect the *Johnson* case to be widely cited by courts across the country;

[An update on Fetal Alcohol Spectrum Disorder](#) - from the May 2011 issue of *Pulse*, describes the CBA's efforts to promote access to justice for those with FASD. It links to CBA Resolution 10-02-A (Fetal Alcohol Spectrum Disorder in the Criminal Justice System) and other resources and papers on the topic;

[E-Disclosure Pilot Project](#) - a *Slaw* article from May 10, 2011, discusses a new electronic disclosure pilot project introduced in several police divisions in Toronto in which the police disclosure data for a case (notes, crime photos, etc.) will be captured in a single PDF file accessible by both Crown and defence counsel. The new system is expected to reduce both paper costs and delay in obtaining disclosure;

[Lawyers, courts complicit in 'cannibalized procedure'](#) - a *Law Times* editorial, discusses the decision in [R. v. D.M.G.](#), 2011 ONCA 343, in which the appeal court ordered a new trial for a man who pled not guilty to sexual interference and was sentenced to serve 15 months without having an opportunity to tell his side of the story. The judge found that the proceedings were encumbered by procedural unfairness, resulting in a miscarriage of justice;

[A Criminal Mind: The cost of DUIs: taxis never looked so sensible](#) and [B.C. criminal lawyers driving new business](#) - both discuss the high cost of drunk driving convictions and the need for lawyers representing such clients to understand and communicate the myriad consequences of being found guilty.

Criminal Law Teleseminar: LSM

There's still time to register for the one hour teleseminar on [Section 10\(b\) of the Charter \(Right to Counsel\): Recent Developments](#), which takes place June 8, 2011, from 12:00 noon to 1:00 p.m. 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.

Upcoming Programs: MBA

The Criminal Justice section of the Manitoba Bar Association is hosting two upcoming programs for criminal lawyers:

[Welcome to the Practice of Criminal Law](#) - learn how to handle criminal cases and meet lawyers and judges involved in the criminal law field at this seminar designed for principals, articling students and summer students. It will be held in Room 413 of the Law Courts building, from 4:00 - 6:30 p.m. on June 22, 2011.

[Top S.C.C. Criminal Cases for 2010-2011 /Annual Wrap Up](#) - Crown counsel Nathaniel Carnegie will review the important *Charter* and criminal law decisions made by the Supreme Court of Canada in the past year and look ahead to the court's agenda in 2011/2012 at this lunch seminar on June 27, 2011. It will take place in the Law Society classroom, 219 Kennedy.

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 Sauls 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

The next Crown Defence conference 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.

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