eLaw - Criminal Law Update
October/November 2011 - No. 52 ISSN 1916-3916

In This Issue

The Limits of Informer Privilege: SCC

The near absolute privilege protecting police informants does not prohibit a defence investigation into an informant's identity according to the Supreme Court in *R. v. Barros*, 2011 SCC 51. Not all attempts to identify an informant are protected by s. 7 of the *Canadian Charter of Rights and Freedoms*, however. Some may amount to obstruction of justice or extortion, depending on the manner in which the enquiries are carried out and their intended purpose and the totality of the circumstances of the case. In this case, the court ordered a new trial to consider whether the actions of the defendant (a private investigator hired by an alleged drug dealer to identify the person who had informed on him) amounted to obstruction of justice or extortion. For commentary on the case see:

- *The Supreme Court of Canada Narrows Informer Privilege*, posted November 10, 2011 on The Court;
- *Informant privilege*, posted October 27, 2011 on Morton's Musings;
- *Supreme Court Constrains Informer Privilege*, Slaw post, October 27, 2011.

Nature and Scope of the Child Pornography Defences: SCC

The court ordered a new trial on a possession of child pornography charge in *R. v. Katigbak*, 2011 SCC 48, finding that neither the trial court which acquitted nor the appeal court which convicted got it right. The trial judge's interpretations of both the pre and post 2005 versions of the s.163.1(6) defence were wrong and the appeal court was correct to set aside the acquittal, but it did not have the jurisdiction to substitute a conviction because the trial judge had not made the necessary findings of fact to support a conviction beyond a reasonable doubt. Details of the decision are discussed in *Child Pornography, 'Undue' Harm, and the Clapham Omnibus: A Case Comment on R. v. Katigbak*, posted November 1, 2011 on The Court.

Serious and Systemic Disregard for *Charter* Rights: SCC

Defence counsel are applauding the Supreme Court's decision to restore an acquittal on a second degree murder charge in *R. v. Côté*, 2011 SCC 46, seeing it as a strong condemnation of police misconduct and an extension of the principles outlined in *Grant* concerning when to exclude evidence under s.24 of the *Charter*. The court found:

> The trial judge drew the line where the police had continually shown systematic disregard for the law and the Constitution. The trial judge did not err in concluding that the courts must not tolerate this sort of behaviour by those sworn to uphold the law. He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour. (para. 4)

The decision is also viewed as a "surprisingly strongly worded - and very welcome - message to appeal courts to show appropriate deference to trial judges' decisions as to whether the admission of unconstitutionally-obtained evidence would bring the administration of justice into disrepute," according to a law professor cited in the *Lawyers Weekly* article *SCC reins in police misconduct*. These articles also discuss the decision:

- *R. v. Côté: An Interpretation and Extension of Grant*, The Court, October 25th, 2011;
- *That decision (maple) tree again*, Don Mathias's Criminal Law Blog, October 27, 2011.

Adequacy, Not Perfection, the Standard in Jury Charge Reviews: MBCA

A divided court upheld a first degree murder conviction in *R. v. Kociuk (R.J.)*, 2011 MBCA 85, a 20-year-old murder/sexual assault cold case revived by DNA evidence. The court rejected defence arguments that the verdict was unreasonable and that the accused was unable to make full answer and defence due to missing evidence. On the third issue, the adequacy of the judge's jury instructions, the majority disagreed with the dissenting judge's conclusion (on an issue she raised) that the trial judge had not adequately put the theory of the defence to the jury. In considering this issue the court underscored that the role of appellate courts is to review for error, not search for it. (para.69) The court also stressed that such reviews require a functional, not formulaic, approach, to ensure that jurors adequately understand the issues, the law and the applicable evidence. In this case, said the majority, the trial judge had not erred by failing to put to the jury speculative fact scenarios which, if believed, would raise a reasonable doubt regarding an element of an offence. Recognizing that "trial judges are often faced with the delicate balancing that occurs between charging on available defences or fact scenarios, even though not raised by counsel, and giving appropriate deference to counsel's trial strategy," the court declined to interfere with the trial judge's discretionary decision.

What You Need to Know About Bill C-10

Bill C-10 (*Safe Streets and Communities Act*), the government's omnibus crime bill released September 20, 2011, has passed second reading and is now before the standing committee on justice and human rights. The bill, which incorporates several bills introduced but not passed during the Conservative minority, proposes wide-reaching changes to sentencing and incarceration, among other things. Its contents are set out in the legislative summary, in the Department of Justice backgrounder, and in these parliamentary speeches. Not surprisingly, opposition to the bill has been strong in parliament and elsewhere. These articles give a flavour of the debate: *5 reasons to oppose the omnibus crime bill* (Liberal press release), *The Conservatives' crime obsession is not magnificent* (*Globe and Mail*, September 20, 2011), *Lawyers gearing up for assault on omnibus bill* (*Law Times*, September 26, 2011), *Victims of terrorism: compensation legislation likely ineffective*, (*Lawyers Weekly*, October 21, 2011) and *Quebec balks at Ottawa's law-and-order agenda*, (*Globe and Mail*, November 1, 2011).

The Canadian Bar Association's critique of Bill C-10, Submission on Bill C-10, was released October 17, 2011. It provides a detailed review of all aspects of the proposed legislation.

In Force Legislation

- Bill C-21, *Standing Up for Victims of White Collar Crime Act*, S.C. 2011, c. 6 came into force November 1, 2011. It cracks down on white collar crime by creating a two year mandatory minimum sentence for fraud over $1million and adding sentencing alternatives. See this legislative summary and the *National* magazine article *Cracking down on white-collar crime Will Ottawa's anti-fraud legislation make a difference?* for further details.
- *The Highway Traffic Amendment Act (Accident Reporting Requirements)* came into force October 10, 2011. It 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.
- *The Civil Remedies Against Organized Crime Amendment Act*, S.M. 2010, c. 11 came into force on September 15, 2011. It creates a new director position to replace the police chief in bringing applications under the act and sets out the powers and responsibilities of that director.

Court Notice

The Provincial Court has given notice of changes to the Case Management Conference Coordinator's Docket effective October 31, 2011. The changes affect the setting of preliminary hearing and trial dates and approval of remands on the case management docket.

First Reporting Condition: Manitoba Corrections

Following the report and recommendations of the committee struck to complete a jurisdictional review of Manitoba's breach of probation policies (see the executive summary of the report titled Probation Breach Criteria), Manitoba Corrections will be adding a "first report" condition to all probation, conditional sentence, and youth deferred custody orders. The new condition will direct that first reports be made on the Corrections' Intake and Records reporting line at 1-800-334-8792. The proposed implementation date for the initiative is December 5, 2011. Court staff will continue to produce a handout directing individuals on how to make their first report.

Recommended Reading

The following publications may be of interest to criminal lawyers:

- The September 2011 edition of *Voir Dire*, the National Criminal Justice section newsletter, contains the article *The Section 10(b) trilogy* by local lawyer Josh Weinstein, which discusses the trilogy of Supreme Court cases on right to counsel.
- The *Law Times* articles *Should court give credit for strict bail conditions?* and *Man gets credit for House-arrest-like bail* both discuss the Ontario Superior Court decision in *R. v. Magno*, 2011 ONSC 5552, which dealt with the rarely adjudicated issue of pretrial credit for house-arrest-like bail conditions.
- The *Law Times* article *Aboriginal jury issues shaking up court* discusses a series of Ontario cases challenging the racial makeup of juries where there are aboriginal defendants.
- The Summer Edition of *National* magazine contains the feature article, A different kind of justice, on how the justice system deals with people affected by fetal alcohol spectrum disorder.
- *The Growing Legal Implications of Tasers: A primer on the development, uses, and consequences of Tasers*, an LLRX article, summarizes the emerging area of law on use of tasers in law enforcement.

CPD: LSM

Upcoming programs in the Criminal Law Expert Evidence Series include:

- **Fingerprint Evidence** - a forensic identification specialist will review the history of fingerprint identification and the national and international fingerprint databases at this November 30, 2011 program which takes place from 12:00 noon to 2:00 p.m.
- **Arson Evidence** - learn about the methodology of fire investigation from the perspective of a Winnipeg Police Service arson expert at this January 12, 2012 evening program.

All programs take place at the Law Society of Manitoba classroom. Save money by registering for more than one program.