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**Permitting the Truth to be Told: SCC Clarifies s. 16 of the Canada Evidence Act**

In a 6-3 split decision lauded by organizations representing women and the disabled, the Supreme Court set aside the acquittal in *R. v. D.A.I.*, 2012 SCC 5 and ordered a new trial on charges that the accused sexually assaulted his mentally disabled adult step daughter. The trial judge's decision (that the victim's testimony was unreliable because her mental age (3-6 years) affected her ability to understand the duty to tell the truth) was "a fundamental error of law in interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities" said the majority. The difficult balancing act in such cases is described in the first paragraph of the judgment:

Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society - children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

The Slaw article, *The Understanding Requirement in Testimony of the Mentally Disabled (R. v. D.A.I.)*, examines how the court treated the policy considerations behind s.16 of the *Canada Evidence Act* and includes a link to Professor Bala's 2005 [brief on Bill C-2](#).

The *Lawyers Weekly* article, *Split underpins new trial order*, points out that this case is yet another example of the philosophical divide on the current court, with the minority finding that "the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons." (para.91)

**Assessing Moral Blameworthiness: MBCA**

The court provides guidance on what "exceptional circumstances" will justify the imposition of a non-incarceratory sentence for impaired driving causing bodily harm in *R. v. Henderson*, 2012 MBCA 9. The court upheld the sentence of two years' probation, finding the trial judge had not erred in accepting uncontested medical evidence that the first time offender's compulsive drinking that day arose from the side effects of the drug Mirapex, thus reducing her moral blameworthiness.

**Expectation of Privacy in Venting Systems Can't Be Assumed: MBCA**

In *R. v. T.W.B.*, 2012 MBCA 7 the court overturned the lower court decision that a police search of a heating duct in the accused's bedroom violated his *Charter* rights, finding that there was no evidence for the judge's conclusion that the accused had a high expectation of privacy with respect to the venting system in his mother's house. The accused's mother had informed police of the whereabouts of the hidden gun and arguably consented to the warrantless search.

**Mens Rea Requirements for Uttering Threats: MBCA**

The court was divided on the question of whether the evidence of a complainant can be the determinative factor on the *mens rea* analysis in *R. v. O'Brien*, 2012 MBCA 6, a case where the accused was acquitted of uttering threats because the recipient of the threats, his former domestic partner, did not take them seriously. The accused repeatedly threatened to kill his pregnant ex-girlfriend during a telephone exchange from prison after she taunted him that she planned to abort their baby. She did not want the accused to be charged and she testified at trial that his words did not cause her any fear. The majority found that the judge did not err in finding that the ex-girlfriend's evidence negated the *mens rea* of the accused. The dissenting judge disagreed, finding that the trial judge had placed too much weight on the ex-girlfriend's evidence and should have considered instead "whether a reasonable person would consider that the words, when considered objectively, albeit in context, were uttered as a threat and meant to be taken seriously."

**Crown Can't Appeal Reasonableness of Acquittal Verdict: MBCA**

*R. v. R.G.B.*, 2012 MBCA 5 illustrates the jurisdictional difficulties the Crown faces and the onerous test that must be met in proving that a judge erred in assessing the evidence which resulted in an acquittal premised on reasonable doubt. The court summarizes the law on the Crown's limited right to appeal an acquittal at para.16:

...while it would be an error in law to convict in the absence of an evidentiary foundation on any essential element of the offence, it would not be an error in law to acquit in the absence of an evidentiary foundation for the reasonable doubt. It can also be said that, while appellate intervention in an acquittal is not permitted when the alleged error relates to whether the evidence is sufficient to raise a reasonable doubt (as that is not a question of law alone), it is permitted when it is alleged that the reasonable doubt is tainted by legal error (as that is a question of law).

In this case the appeal court found that none of the alleged errors put forward by the Crown raised questions of law.

**Dangerous Offender Analysis: MBQB**

The court undertakes a careful analysis of the issues at play in determining whether the accused is a dangerous or a long-term offender in *R. v. Davis*, 2012 MBQB 9. Finding neither a pattern of repetitive behaviour showing a failure to restrain nor a pattern of persistent aggressive behaviour, the court could not be satisfied beyond a reasonable doubt that the accused constituted a threat to the life, safety or physical or mental well-being of other persons and was a dangerous offender. He was found to be a long-term offender under s, 753.1 of the *Code*.

**Breathalyser Results Excluded Due to Sloppy Police Work: MBQB**

Two recent appeals of acquittals on impaired driving charges (one involving a snowmobile and the other a car) consider when breathalyser results should be excluded from evidence under s.24(2) of the *Charter*:

In *R. v. Kempthorne*, 2012 MBQB 45 the court found that the police officer's actions in pointing a firearm while "taking down" the accused in a snowy field constituted a brazen and flagrant disregard of the accused's *Charter* rights and that the trial judge was correct in excluding the breathalyser evidence obtained in these circumstances.

In *R. v. Mitchell*, 2012 MBQB 12 the court found that the results of a breathalyser test taken after a sloppy police investigation which breached the accused's right against self-incrimination should be excluded from evidence under s.24(2). Although the warrantless search did not constitute a serious intrusion upon the privacy, bodily integrity and human dignity of the accused, "the consequences of what transpired could be profoundly impacting on a young man with no experience relating to the criminal justice system," said the court, and "the long-term interests of justice cannot respect such a failure to acknowledge an accused's constitutional rights."

**Winnipeg Remand Centre Notice**

The Winnipeg Remand Centre will be using a 24-hour automated answering service effective March 1, 2012, meaning all calls to their main line (945-3540) will be routed to a nine item service menu. Concerns about the system may be directed to the Assistant Superintendent, Operations, at 945-0952 or to the Shift Operations Manager after hours.

**More on Internet Child Pornography Act and Regulations**

As noted in December's eLaw, the former Bill C-22, *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service*, SC 2011, c 4, came into force December 8, 2011, as did *Internet Child Pornography Reporting Regulations*, SOR/2011-292. The [legislative summary](#), [press releases and background documents](#), and [parliamentary speeches](#) set out the history and intent of the new law. The details of the regulations are discussed in the Slaw article *Internet Child Pornography Reporting Regulations*, posted January 12, 2012.

**Mabior Appeal Heard: SCC**

The Supreme Court [reserved judgment](#) after hearing the appeal in *R. v. Mabior (C.L.)*, 2010 MBCA 93 on February 8, 2012. Those following the case (in which the Manitoba Court of Appeal set aside four of six sexual assault convictions of an accused who had not disclosed his HIV status, on the basis that sexual intercourse either using a condom or when viral loads are very low does not place a sexual partner at significant risk of serious bodily harm) may want to look at the [factums](#) or [webcast](#) of the proceedings. Two recent posts from The Court discuss the import of the case:

- *Mabior and D.C.: Does HIV Non-Disclosure Equal Rape? (Part 1)*, posted February 7, 2012;
- *At the Court: Cuerrier and Antares/Amchem Products Revisited at the SCC*, posted January 28, 2012.

Mabior was [deported](#) to South Sudan on February 15, 2012.

**Criminological Research Materials**

The University of Toronto's [Centre for Criminology and Sociolegal Library](#) is a great source of information on the latest news and research in criminal law and the social sciences. Two useful resources for criminal lawyers are the [Crimbrary blog](#) (see this recent [post](#) on Bill C-30)) and *Criminological Highlights*, a publication summarizing the latest criminological research (among other things, the January 12, 2012 edition looks at whether longer sentences are more effective than shorter ones in reducing reoffending).

**Recommended Reading**

The following publications may interest criminal lawyers:

- *Crime & Punishment in 2012* - we need to prepare for "some serious sticker shock" in 2012 according to the author of this Slaw post, who argues that a large percentage of the cost of the federal government's get-tough-on-crime agenda will fall on individual provinces and municipalities. He also predicts more *Charter* challenges (see, for example, the *Smickle* case discussed below) and further clogging of the courts as fewer accused enter guilty pleas;
- *Pardons become record suspensions* - this *Law Times* article reviews the changes to the pardon system under Bill C-10 and Bill C-23A;
- *Blow over? Think twice before blaming it on the flu* - an ABlawg article concerning the Alberta Court of Appeal decision in *R. v Kasim*, 2011 ABCA 336, where the court overturned an acquittal on impaired driving charges after doing the math on how the accused's body temperature might have skewed his breathalyser results;
- *No win for default sentencing* - this *Lawyers Weekly* article discusses the controversial Ontario Superior Court decision (*R. v. Smickle*, 2012 ONSC 602) striking down the mandatory minimum (three year sentence for possession of firearms in a case where the accused posed for a Facebook photo holding a loaded illegal handgun).

**Upcoming CPD: LSM**

**Criminal Defence Advocacy Skills Workshops** - These limited-enrolment, all-day skills workshops, offered in partnership with the Criminal Defence Lawyers' Association and The Advocates' Society, will help you to master critical advocacy skills with the guidance of experienced faculty from the courts and the defence bar. The spring workshop, which takes place on Saturday, April 14, 2012, deals with **Building Your Defence**. It will look at pre-trial considerations and examination-in-chief. The fall program, scheduled for Saturday, November 3, 2012, will be on **Completing Your Defence**, and will cover cross-examinations and closing statements. Watch the LSM website for further details and to register.

**Presenting and Challenging Expert Witnesses at Trial** - Presenter Richard Shekter will use anecdotal stories and demonstrative aids to teach you the strategies you need to successfully examine and cross-examine expert witnesses at this half day program on May 3, 2012, from 9:00 a.m. to 12:00 noon. [Register](#) by March 22, 2012 to take advantage of the early bird price.

**Crossing the Border With a Record: MBA**

The Criminal Justice and Immigration sections of the MBA are jointly presenting the program [How Convictions Can Affect Border Crossings](#) on March 29, 2012, from 12:00 noon to 1:30 p.m. at the Law Society classroom. Officers from the Canada Border Services Agency and Immigration will discuss the immigration consequences of criminal convictions.

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