



eLaw - Criminal Law Update

September/October 2012 - No. 57

ISSN 1916-3916

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Shocking Mistreatment Merits Stay of Proceedings: SCC

In [*R. v. Bellusci*](#), 2012 SCC 44 the Supreme Court upheld the trial judge's decision to grant a stay of proceedings on a charge of intimidating a prison guard (by uttering threats), where the guard had recklessly provoked the shackled accused and then assaulted him, breaching his s.7 *Charter* rights. And, although it was unnecessary to do so given their decision on the stay issue, the court went on to provide guidance on the issue of whether a court of appeal, in setting aside a stay, is bound to order a new trial rather than a continuation. On this issue the court found that a court of appeal has the discretion under [ss. 686\(4\) and 686\(8\)](#) of the *Criminal Code* to remit a matter for continuation.

Probation Orders Not Invalidated by Prior or Subsequent Sentences: SCC

"Section [731\(1\)\(b\)](#) does not invalidate probation orders imposed on prior occasions" said the court in [R. v. Knott](#), 2012 SCC 42. The court rejected the appellants' argument that probation orders made against them were retroactively invalid as they had been sentenced to further terms of imprisonment which collectively exceeded two years. The court agreed with the Crown that the phrase "imprisonment for a term not exceeding two years" in s.731(1)(b) relates only to the actual term of imprisonment imposed by a sentencing court at a single sitting. It does not refer to the aggregate of the custodial term imposed by the sentencing court and all other sentences then being served or later imposed on the offender.

Instructing Juries on the Common Sense Inference: SCC

Commentators are questioning whether the ruling in [R. v. Walle](#), 2012 SCC 41 (upholding the use of the common sense inference to convict the developmentally delayed and intoxicated accused of second degree murder) signals the end of subjective intention. These articles discuss the decision:

- [R. v. Walle: Impaired and Delayed, but still "Sane and Sober"](#) - an Ontario Bar Association Criminal Justice section commentary; and
- [Is This The End of Subjective Intention? The Supreme Court of Canada and the Walle case](#) - Ideablawg.

Kidnapping a Continuing Offence: SCC

Kidnapping is a continuing offence that includes the victim's ensuing confinement according to the Supreme Court in [R. v. Vu](#), 2012 SCC 40. While the crime of kidnapping may be complete in law when the victim is initially apprehended and moved, the crime will not be complete in fact until the victim is freed. Thus latecomers who join the kidnapping enterprise while the victim remains unlawfully confined may be found guilty as parties to the offence of kidnapping if they otherwise meet the requirements for party liability under [s. 21\(1\)](#) of the *Code*. [Defining the Legal Limits of Kidnapping: R. v. Vu](#), an article from The Court, discusses the decision.

The Limits of Issue Estoppel: SCC

The court examines the application of the doctrine of issue estoppel in the context of a multi-issue jury trial in [R. v. Punko](#), 2012 SCC 39. The Crown was not estopped from seeking to prove that a chapter of the Hell's Angels was a criminal organization even though there had been a previous adverse decision on that issue in a prior jury trial. The case is analysed in [R. v. Punko: Issue Estoppel and the Bridge between Provincial and Federal Criminal Offences](#), a recent post on The Court.

The Attributes of a Criminal Organization: SCC

You don't have to be a member of a criminal organization to commit an offence on its behalf under [s.467.12](#) of the *Criminal Code*. According to the court in [R. v. Venneri](#), 2012 SCC 33, "the phrase "in association with" captures offences that advance, at least to some degree, the interests of a criminal organization - even if they are neither directed by the organization nor committed primarily for its benefit." (para. 54) [Of Guns and Gangs: R. v. Venneri](#), a post on The Court, discusses the decision in more detail.

Revisiting Dangerous Driving

Three recent Manitoba cases ([R. v. Garnham](#), 2012 MBQB 231, [R. v. Carleton](#), 2012 MBPC 54, and [R. v. Davidson](#), 2012 MBQB 202) have cited last June's Supreme Court of Canada decision in [R. v. Roy](#), 2012 SCC 26, in which the court set aside a dangerous driving causing death conviction and entered an acquittal. The decision confirmed that only driving that constitutes a marked departure from the norm may reasonably support the inference that the accused departed from the standard of care of a reasonable person. The accused drivers were acquitted in both *Garnham* and *Davidson*. In *Carleton*, the young driver who killed a pedestrian in a cross walk pled guilty and was sentenced to 30 days incarceration followed by two years supervised probation and substantial community service.

Multiple Offence Sentencing Principles: MBCA

The Manitoba Court of Appeal was divided on the issue of whether the sentencing judge misapplied the sentencing principles with respect to multiple offences in [R. v. P.K.](#), 2012 MBCA 69. The majority disagreed with the minority judge's position that "the "no free ride principle" applies only to an individual who has received a concurrent sentence, not to situations where a judge, when imposing a consecutive sentence, is applying the totality principle." The court said:

...while I agree that the "no free ride principle" applies as such when concurrent sentences are imposed, the reasoning underlying that principle can become relevant when a court, as in this case, imposes concurrent sentences in its application of the totality principle.

The court increased the 30 month sentence by six months to give effect to the offence against the second victim.

Court of Appeal to Rule on Reasonable Suspicion for ASD Demand: MBCA

The court granted leave to appeal an impaired driving acquittal in [R. v. Mitchell \(R.\)](#), 2012 MBCA 59, noting that the question of whether the police officer breached the accused's s.8 *Charter* rights when he made an approved screening device demand is a question that affects the administration of justice on a daily basis. There are few Court of Appeal decisions on this issue said the court, and

The appeal will be an opportunity for this court to provide at least some guidance to police, counsel and the courts on what constitutes a reasonable suspicion for an ASD demand. Importantly as well, the court can address any confusion that may arise from what appears to be two conflicting decisions from this province's summary conviction

Mere Relationship With Law Firm Not Grounds for Disqualification: MBQB

The judge declined to recuse herself from hearing a second degree murder trial in [R. v. Trunzo](#), 2012 MBQB 211, finding that the fact that her son was articling with the law firm representing the accused did not meet the high threshold to establish a reasonable apprehension of bias. There was no evidence that the son had any contact with the file in question. In these circumstances, "a judge's impartiality is presumed and the test requires demonstration of serious grounds on which to base the allegation of an apprehension of bias." (para. 33)

Gladue Handbook

The [Gladue Project](#), an initiative of the Centre for Human Rights Research to improve Manitoba's implementation of the *Gladue* decision on aboriginal sentencing, has just launched [The Gladue Handbook](#), an invaluable resource for those tasked with implementing s.718.2(e) of the *Criminal Code*.

Crime Statistics

Statistics Canada has issued several [Juristat](#) reports on crime in the last few months, including: [Police-reported crime statistics in Canada, 2011](#) and [Adult criminal court statistics in Canada, 2010/2011](#). These stats are particularly interesting in light of the current get tough on crime agenda.

In Force Legislation

Sections 52 to 107 and 147 of the *Safe Streets and Communities Act*, S.C. 2012, c. 1 came into force June 13, 2012 and ss. 10 to 31 and 35 to 38 came into force August 9, 2012. Other sections will come into force in October and November, as indicated in the [Coming Into Force](#) summary on LEGISinfo.

Court Notices

On June 15, 2012 the Provincial Court commenced a pilot project allowing lawyers to request case management conference waivers. The project, described in this [notice](#), will run until December 15, 2012. Both Crown and defence lawyers must agree to the waiver and a request for waiver form must be completed electronically and emailed to the Associate Chief Justice.

Effective September 1, 2012, all criminal matters in Thompson will require a pre-trial before the setting of trial dates according to this [Court of Queen's Bench notice](#). Counsel are expected to attend at pre-trial conferences prepared to set trial dates.

As of June 12, 2012, judges of the Court of Queen's Bench of Manitoba (General Division) are designated to hear Applications for Authorizations pursuant to s.188(1) of the *Criminal Code*, as confirmed by this [court notice](#).

Publications on Criminal Law Topics

These articles may be of interest to criminal lawyers:

- [*R. v. Lewis: Just how 'Mandatory' Should Mandatory Minimums be?*](#) - this post from [The Court](#) critiques the sentencing reform provisions of the *Safe Streets and Communities Act* and reviews recent cases that have invalidated mandatory minimums, including [R. v. Lewis](#), 2012 ONCJ 413.
- [*R. v. Maybin: A Sweeping Test of Accountability or a Standardless Sweep?*](#) - the common law test of causation is now not only a "test of sweeping accountability", but an increasingly standardless one, says the author of this post, who calls the decision in [R. v. Maybin](#), 2012 SCC 24 "unfortunate for several reasons."
- [*Much more to say on the gun registry*](#) - this *Canadian Lawyer* article is a sombre reflection on the polarized debate surrounding the elimination of the gun registry.
- [*Judge calls foul on "three-strikes" law*](#) - an Ontario judge found the reverse onus provision in s.753(1.1) of the *Criminal Code* (dealing with dangerous offenders) to be unconstitutional in [R. v. Hill](#), 2012 ONSC 5050. This *Law Times* article discusses the decision.
- [*Do police need wiretaps to obtain texts?*](#) -- this *Law Times* article discusses the upcoming appeal of [R. v. Telus Communications Company](#), 2011 ONSC 1143, in which the Supreme Court will rule on the constraints on obtaining and using text messages in criminal investigations.

Fall CPD Programs and Webinars: LSM

- [The New Mental Health Court](#) - Find out what you need to know to help your client use the new Mental Health Court at this late afternoon session on October 10, 2012. Judge John Guy and other presenters will review how the program works, qualification criteria, the application process, and the role of counsel. [Register](#) now to attend in person from 4:00 to 5:30 p.m. at the Law Society classroom or by teleconference.
- [Practical Ethics: Real Problems, Real Solutions](#) - [register](#) soon to attend either the morning or afternoon session of this live repeat of last winter's popular program on practising ethically. The sessions take place on December 10, 2012 and feature leading legal ethics instructor Paul Paton and local panellists Vivian Rachlis, Bill Gange and Anita Southall.
- [Everything You've Ever Wanted to Know About the Professional Liability Insurance Claim Process, But Were Afraid to Ask](#) - Law Society insurance department staff will review insurance coverage and reporting obligations in this lunch hour webinar on October 17, 2012. Groups of two or more people will receive a fee discount.

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