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### **Ruling on Self-Incrimination Divides Supreme Court**

The use of prior inconsistent but non-incriminating evidence (from a civil examination for discovery) to impeach an accused's credibility at his criminal trial did not violate his s.13 *Charter* right against self-incrimination according to a majority of the court in [R. v. Nedelcu](#), 2012 SCC 59.

The court was unanimous in finding that statements made during an examination for discovery are compellable, but they did not agree on the question of whether the statement in this instance was incriminating. The majority found it was not, since it did not "prove or assist in proving one or more of the essential elements of the offence" (para.9). The minority disagreed, finding that the majority's interpretation of s.13 and misconstrual of the [Henry](#) decision will lead to confusion and unpredictability. These articles discuss the decision:

- [\*R v Nedelcu: The Right Against Self-Incrimination and the Return to the Unworkable Distinction\*](#), The Court;
- [\*Decision in R. v. Nedelcu, 2012 SCC 59\*](#), Barbara's blog on The Advocates' Society website.

## **Carter Defence Officially Eliminated: SCC**

The Supreme Court upheld the 2008 amendments to s.258 of the *Criminal Code* limiting challenges to breathalyzer test results in [\*R. v. St-Onge Lamoureux\*](#), 2012 SCC 57, but found that the amendments do not apply retrospectively in [\*R. v. Dineley\*](#), 2012 SCC 58. The court confirmed that "(i)n order to rebut the presumptions of accuracy and identity applicable to breathalyzer test results, which favour the Crown, an accused can no longer simply rely on an expert opinion that the amount of alcohol he or she consumed is inconsistent with the test results - what is known as the 'Carter defence'" (para. 2 *Dineley*). The Court article [\*R v St-Onge Lamoureux: The Supreme Court of Canada upholds most of Parliament's new "over 80" drunk driving law\*](#) comments on the *St-Onge Lamoureux* decision.

## **Existence of Realistic Risk of Danger a Matter of Fact: SCC**

In [\*R. v. Boudreault\*](#), 2012 SCC 56 SCC a majority of the Supreme Court restored the impaired care or control acquittal of an accused who had fallen asleep in the driver's seat of his running vehicle while waiting for a taxi in the cold. The case turned on the court's interpretation of the expression "care or control" in [s. 253\(1\)](#) of the *Criminal Code*. The majority found that a realistic risk of danger is an essential element of the offence of care and control, and that "conduct that presents no such risk falls outside the intended reach of the offence." (para. 32) The trial judge's conclusion that there was no risk that the accused would intentionally set the vehicle in motion ("however unsatisfactory or unreasonable it may appear") was not reviewable on appeal, said the court.

## **Instructing a Jury on Failure to Testify: SCC**

[Section 4\(6\)](#) of the *Canada Evidence Act* does not prohibit a trial judge from affirming an accused's right to silence or from instructing the jury that the accused's silence cannot be used as an indicator of guilt according to the court in [\*R. v. Prokofiew\*](#), 2012 SCC 49. The majority and minority agreed on this purposive interpretation of the section, but not on the result. The majority dismissed the accused's appeal, finding that the trial judge's failure to instruct the jury that no adverse inference could be drawn from the accused's silence did not mislead the jury. This [article](#) from The Court discusses the decision.

## **Cuerrier Test Clarified: SCC**

In [R. v. Mabior](#), 2012 SCC 47 and [R. v. D.C.](#), 2012 SCC 48 the Supreme Court confirms and clarifies the test set out in *Cuerrier* as to when failure to disclose HIV-positive status amounts to fraud vitiating consent. The court summarized its findings at para. 104 of the *Mabior* decision:

A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used. However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.

Many people have commented on the decision:

- [R v. Mabior; R v. DC](#), Slaw;
- [The SCC in D.C. and Mabior Part I: Incremental Change and Some Troubling Loose Ends](#) and [The SCC in D.C. and Mabior Part II: Divisive Reactions and Significant Social Implications](#), The Court;
- [Rulings on HIV non-disclosure raise concerns](#), *Lawyers Weekly*.

## **Paying More Than Lip Service to the *Gladue* Principles and Requirements: MBCA**

The court upheld the break and enter/sexual assault conviction in [R. v. L.L.D. G.](#), 2012 MBCA 106, but not the 10 year sentence imposed on the young aboriginal offender. An unhelpful *Gladue* report, mischaracterization of the offence as a home invasion, and too little reliance on the prospect of rehabilitation were all factors contributing to the imposition of an unfit sentence said the court, which substituted a sentence of 5 years.

## **Deception Not Relevant in Pre-trial Custody Credit Assessment: MBCA**

It is inappropriate for a judge to take into account an accused's attempted deception when determining pre-trial custody credit according to the Court of Appeal in [R. v. Davis](#), 2012 MBCA 98. The court granted the accused leave to appeal the erroneous decision, but dismissed the appeal since there was other evidence to justify the 1:1 credit award.

## Error in Certificate of Analysis Correctable Only by Testimony of Technician: MBQB

A deficient certificate of analysis cannot be corrected by the evidence of a witness who was not the signing technician according to the court in [R. v. Rosenberg](#), 2012 MBQB 304. The court overturned the care and control conviction and acquitted the accused, finding that:

The *Criminal Code* does not permit the Crown to prove its case by a combination of the certificate of analysis and the evidence of a witness who is not the technician.

To allow a witness other than the technician to give *viva voce* evidence to correct a material error in the certificate of analysis would be tantamount to encouraging administrative sloppiness or negligence on the part of technicians who perform what are normally referred to as breath tests. I am not prepared to provide that type of encouragement (paras.42 and 43).

## Legislative Update

The final changes to the *Criminal Code* arising from the enactment of [Bill C-10](#), *The Safe Streets and Communities Act*, came into force November 20, 2012, ending the availability of conditional sentences involving house arrest for property and other crimes. Amendments to the *Controlled Drugs and Substances Act* to increase the penalties for serious drug crime came into force November 6, 2012 and amendments to the *Youth Criminal Justice Act* concerning violent and repeat young offenders came into force October 23, 2012. This Department of Justice [backgrounder](#) discusses the amendments in more detail.

[Bill C-37](#), *Increasing Offenders' Accountability for Victims Act*, was recently reported without amendment by the standing committee on justice and human rights. The purpose of the bill (according to the [legislative summary](#)) is to increase accountability of offenders by doubling victim surcharges and making them mandatory for all offenders convicted of a criminal offence. The Criminal Justice section of the CBA expressed its concerns with the bill in its submission [Bill C-37 - Increasing Victim Fine Surcharges](#). This [Law Times article](#) discusses how victim surcharges will complicate sentencing.

[Bill C-43](#), the *Faster Removal of Foreign Criminals Act*, has passed second reading and the [committee report](#) was presented to the House of Commons on November 29, 2012. The CBA opposes many of the changes proposed by the legislation, as outlined in their November 2012 [submission](#). In particular, the CBA is concerned about the elimination of Ministerial powers to grant relief from the one-size-fits-all denial of appeal rights based on humanitarian and compassionate factors.

[Bill S-209](#), An Act to Amend the *Criminal Code* (prize fights), was referred to committee on November 28, 2012 after second reading in the House of Commons. The bill proposes updates to s. 83 of the *Criminal Code* to expand

the list of permitted sports under the prize fighting provisions. The Criminal Justice section of the CBA supports the proposed modernization of the section as noted in its submission [Bill S-209 - Criminal Code Amendments - \(prize fights\)](#).

## Recommended Reading

These publications may be of interest to criminal lawyers:

- [Presumption of Guilt?](#) - this Canadian Civil Liberties Association report on the retention and disclosure of non-conviction records in police background checks is a comprehensive critique of the current system regulating disclosure of records.
- The December 2012 edition of [Voir Dire](#), the CBA National Criminal Justice section newsletter, contains an article on how the Supreme Court decision in *Gladue* has been applied and how it could be better used to serve aboriginal clients, and an article on how to write a meaningful *Charter* notice. It also discusses the section's efforts to oppose Bill C-10.
- [Defence urged to think broadly in domestic violence cases](#) - this *Law Times* article discusses the issues at stake in the intersection of family and criminal law cases and why criminal lawyers need to take greater heed of family law issues in domestic violence cases.
- [Plea conversation vulnerable to error](#) - this article, by LawPro writer Nora Rock, discusses how poor lawyer-client communication (especially regarding plea instructions) can result in insurance claims against criminal lawyers. It also outlines how to avoid that situation.
- [Legal aid lawyers start job action](#) - Legal Aid lawyers in BC are protesting funding cuts by refusing to take out-of-custody criminal harassment cases according to the author of this *Lawyers Weekly* article.
- [Intercepting Text Messages in R v Doroslovac: An Unreasonable Search or Seizure?](#) - this article from The Court discusses [R. v. Doroslovac](#), 2012 ONCA 680, in which the Ontario Court of Appeal found the manner in which text messages were intercepted did not offend s.8 of the *Charter*.
- [Government looks at making inmates even poorer](#) - this *Law Times* article discusses private member [Bill C-350](#), currently before the Senate. If it passed the bill would amend the *Corrections and Conditional Release Act* to provide that any monetary amount awarded to an offender pursuant to a legal action against the government would be paid to victims and other designated beneficiaries.
- [Amici Curiae: US States Legalize Marijuana](#) - Washington and Colorado voted to legalize marijuana on the same day harsher penalties for possession came into force in Canada. This article from The Court discusses the American initiatives.

## **Last Chance to Complete Mandatory CPD Hours**

If you haven't completed your mandatory CPD activity hours for 2012 you are running out of time. The [2012 requirements](#) are outlined on the Law Society website. To check the list of Law Society CPD activities you participated in or to track or record your non-Law Society CPD activities for 2012 enter the [Members Portal](#) on the website and click on the CPD Tab. If you need more hours consider registering at [cpdonline](#), the Law Society's virtual classroom, where you can access professional development resources from your computer.

## **2013 MBA Mid-Winter Conference**

The Manitoba Bar Association's [Mid-Winter Conference](#) will be held January 24-26, 2013 at the Fort Garry Hotel. Continuing professional development sessions are scheduled all day Thursday and Friday. For further details see the [registration form](#) or [brochure](#).

## **Save These Dates**

The National Criminal Justice Conference will take place June 15, 2013 in Vancouver and the FLSC's 40th Annual National Criminal Law Program will be held July 8-12, 2013 in Ottawa, Ontario.

## **Honouring Chief Justice Richard Scott on His Retirement**

Manitoba's legal community is invited to participate in two events honouring Chief Justice Richard Scott on his retirement. An educational forum [Courting Change: The Changing Role of Courts](#) will be held February 8, 2013 and a [gala dinner](#) is planned for February 9, 2013. See [www.scottretirement.org](http://www.scottretirement.org) for further information.

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