



eLaw - Criminal Law Update

March 2013 - No. 59

ISSN 1916-3916

In This Issue

Restricted Availability for Defence of Duress: SCC

Uttering Threats Decision Divides Supreme Court

Jury Vetting Constraints: SCC

Manitoba Court of Appeal Weighs in on Enhanced Credit for Pre-sentence Custody

Trial Judge a Gatekeeper of Prejudicial Adopted Admissions: MBCA

Update on Legislation

Report on First Nations Representation on Ontario Juries

Provincial Court Notice

Publications on Criminal Law

Upcoming CPD Programs: LSM

Restricted Availability for Defence of Duress: SCC

The Supreme Court overturned the acquittal of a battered woman on a charge of counselling a third party to kill her abusive husband in [*R. v. Ryan*](#), 2013 SCC 3, but stayed any further proceedings against her. The court rejected her argument that she acted under duress, finding that the defence of duress is only available when a person commits an offence while under compulsion of a threat made for the purpose of compelling him or her to commit the offence. The court then went on to discuss the differences between duress and self-defence.

These articles comment on the decision:

- [*R v. Ryan and the Defence of Duress*](#), Canadian Legal Ease;
- [*Domestic Violence and Duress: In Search of a Contextual Approach*](#), ABlawg;
- [*Supreme Court Clarifies the Law of Duress, Ends Nicole Ryan's Tragic Ordeal*](#), The Court.

Uttering Threats Decision Divides Supreme Court

A divided Supreme Court upheld the Manitoba Court of Appeal decision in [R. v. O'Brien](#), 2013 SCC 2 dismissing a Crown appeal from the trial judge's finding that the incarcerated accused did not mean to be threatening when he repeatedly told his pregnant girlfriend he would kill her after she taunted him about aborting their baby. All judges agreed that it is not an essential element of the offence of uttering threats that the recipient of the threats feel intimidated by them or be shown to have taken them seriously. They disagreed, however, on whether the trial judge had erred in making the recipient's perception the determinative factor in assessing the accused's intent.

Jury Vetting Constraints: SCC

The Ontario Crown practice of conducting background checks on prospective jurors before the jury selection process led to the Supreme Court issuing three recent decisions on jury vetting. In [R. v. Yumnu](#), 2012 SCC 73 and [R. v. Emms](#), 2012 SCC 74 the court concluded that criminal record checks to determine eligibility under provincial legislation and under s. 638(1)(c) of the *Criminal Code* are not improper, provided any information obtained relevant to the jury selection process is disclosed to the defence. In [R. v. Davey](#), 2012 SCC 75, the court considered the narrower issue of "whether it was appropriate for the Crown to seek the opinion of local police officers as to the "suitability" of prospective jurors...and, if so, whether those opinions should have been disclosed." On this issue the court found that recourse to law enforcement resources that were not available and not disclosed to the defence...created an imbalance," and (i)t was inappropriate for the Crown to broadly canvas police services for comment on prospective jurors. However, in this case, given the limited consultation, there was no appearance of unfairness and no miscarriage of justice. This [article](#) from The Court discusses the *Davey* decision.

Manitoba Court of Appeal Weighs in on Enhanced Credit for Pre-sentence Custody

In [R. v. Stonefish \(S.T.\)](#) 2012 MBCA 116, the Court of Appeal considers what circumstances justify an award of enhanced credit for time spent in pre-sentence custody pursuant to [s. 719\(3.1\)](#) of the *Criminal Code*. The court concludes that while the circumstances justifying enhanced credit need not be exceptional, they do need to be individual to the accused, and the accused has the onus of proving that the circumstances warrant deviation from the general rule. The court agreed that loss of ability to earn remission and statutory release might be factors to consider, but in this case the accused's egregious conduct while on remand disentitled him to the credit.

Trial Judge a Gatekeeper of Prejudicial Adopted Admissions: MBCA

The Court of Appeal reviews the seldom considered issue of adopted or implied admissions in [R. v. Scott](#), 2013 MBCA 7 and provides guidance on how trial judges should fulfil their "gatekeeper function" in such cases:

This type of statement should not be admitted into evidence and left with the jury until a sufficient evidentiary foundation has been laid for its admission by proof of facts from which, in the opinion of the trial judge, a jury might reasonably draw the inference that the accused had adopted the statement as his or her own. This factual underpinning will generally be assessed on a *voir dire* after a consideration of all of the circumstances under which the statement was made and possibly adopted by the accused.

Moreover, where there is some evidence from which a jury might infer that the accused adopted the accusatory statement, the trial judge is entitled to weigh that evidence and exclude the accusatory statement if its prejudicial effect outweighs its probative value.

The court ordered a new trial, finding that the judge erred in law by concluding that there was sufficient evidence from which a jury might reasonably draw the inference that the accused adopted the statement (that he "did it") by his silence.

Update on Legislation

Section 160 of the [Safe Streets and Communities Act](#), SC 2012, c1 came into force February 28, 2013. The section sets out terminology changes (National Parole Board to Parole Board of Canada) in related legislation.

The *Citizen's Arrest and Self-defence Act*, SC 2012, c 9 (formerly [Bill C-26](#)) will come [into force](#) March 11, 2013. The act amends the *Criminal Code* to enable citizens' arrests in relation to property offences and simplifies the procedures relating to the defences of property and persons. This [legislative summary](#) describes the changes in more detail.

Report on First Nations Representation on Ontario Juries

In his report on [First Nations Representation on Ontario Juries](#), released February 26, 2013, Frank Iacobucci concludes that "the justice system and juries process generally are in a crisis." He makes 17 recommendations to help ensure that the cultural values, laws, and ideologies of First Nations are better reflected in the Canadian justice system. For more information on the review see the [First Nations and Jury Review website](#).

Provincial Court Notice

In a Provincial Court [notice](#) dated January 8, 2013, the Chief Judge notes the problems with unnecessary movement of inmates and asks that personal appearances be waived when inmates are not going to be required in person for court.

Publications on Criminal Law

- The December 2012 issue of [*Voir Dire*](#), the CBA's National Criminal Justice section newsletter, contains articles on [*Drilling down: Data mining in Gladue*](#) and [*How to write a meaningful Charter notice*](#).
- [*Predictions: Crime & Punishment in 2013*](#) - the future isn't rosy for the practice of criminal law if the predictions set out in this Slaw post are even partly accurate. Prison overcrowding, legal aid cuts, tough-on-crime legislation, and a lack of court-certified interpreters make for a grim outlook in 2013 and beyond according to the author.
- [*A Charter Right to Search Google™?*](#) -- this Slaw post discusses an Alberta Provincial Court [*decision*](#) in which the judge found a s.10(b) *Charter* breach where the police failed to provide a 19-year-old accused with access to the internet in order to find a lawyer. "In the year 2013... all police stations must be equipped with internet access and detainees must have the same opportunities to access the internet to find a lawyer as they do to access the telephone book to find a lawyer," said the court at para. 21.

Upcoming CPD Programs: LSM

- [*Ethics & Civility in the Practice of Criminal Law*](#) - this joint presentation of the Law Society and the MBA Criminal Justice section will give you a practical framework to work through ethical dilemmas and civility issues arising in the practice of criminal law. It takes place from 5:00 to 6:30 p. m. on April 4, 2013 at the Law Society classroom. [Register](#) soon to attend in person or by teleconference.
- [*Criminal Defence Advocacy Skills Workshop - Dealing with Professional Witnesses & Expert Evidence*](#) - this hands-on workshop will use an impaired driving fact scenario to discuss case preparation and trial strategies, including cross-examination of professional witnesses. The all-day program, a joint presentation of the Law Society and the Criminal Defence Lawyers' Association, takes place May 4, 2013 at the Law Society classroom. Enrolment is limited, so [register](#) soon to ensure your spot.
 - [*The Leadership Challenge: Skill-Sets and Mind-Sets for Leading People*](#) - this day-long workshop will improve your ability to lead others through change. It takes place on April 30, 2013 at the Law Society classroom. Presenter Simon D'Arcy of Frank Sanitate Associates is also presenting the workshop [*Dealing with Difficult People: Leading Edge Communication Skills for Lawyers*](#), which takes place May 1, 2013, from 9:00 a.m. to 4:30 p.m. Save money by [registering](#) for both programs or by submitting your form before March 20, 2013.

Annual National Criminal Law Program: FLSC

The 2013 Annual National Criminal Law Program, [Substantive Criminal Law, Advocacy and the Administration of Justice](#), will take place from July 8-12, 2013 in Ottawa, Ontario. Check the [program schedule](#) and [faculty](#) for further details and [register online](#).

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.