

CRIMLNWS 2014-24
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— **Watt's Criminal Law and Evidence Newsletter**

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Case Law Highlights

[CL 1]— The Obligation to Edit Statements

Where D's statement admitted in evidence contains both evidence of bad character and evidence that is unobjectionable, a trial judge has a heavy duty to edit out the prejudicial aspects of the statement yet ensure that what remains is meaningful. Where it is impossible to edit the statement appropriately, the statement should *not* be admitted in evidence: *R. v. Oseguera* (September 15, 2014), Doc. CA 040044, 2014 CarswellBC 2669 (B.C. C.A.)

See, *Watt's Manual of Criminal Evidence*, §37.06, "Editing of Statements".

[CL 2]— Dispositions, Treatment and Consent

A court-ordered disposition that directs that treatment begin immediately cannot be made unless the hospital or treating physician consents to all the terms of the disposition. The consent requirement may be eliminated, however, in the rare case in which a delay in treatment would breach D's *Charter* rights and an order for immediate treatment is an appropriate remedy for the breach: *R. v. Conception* (October 3, 2014), Doc. 34930, 2014 CarswellOnt 13608, 2014 CarswellOnt 13609 (S.C.C.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 672.58, "General Principles".

[CL 3]— The Requirements for a Production Order under s. 487.012(3)(a)

The information in support of an application for a production order under s. 487.012(3)(a) need not always set out reasonable and probable grounds to believe that an offence *has been* committed. Such a requirement would give no effect to the words "or is suspected" in s. 487.012(3)(a): *R. v. Fedossenko* (September 25, 2014), Doc. 1303-0012-A, 2014 CarswellAlta 1704 (Alta. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 487.012.

[CL 4]— Threats of Violence as a "serious personal injury offence"

A threat of violence sufficient to support a conviction of robbery under s. 343(a) constitutes the use of violence against another person within subparagraph (a)(i) of the definition of a "serious personal injury offence" in s. 752: *R. v. Steele* (October 9, 2014), Doc. 35364, 2014 CarswellMan 589, 2014 CarswellMan 590 (S.C.C.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 752, "serious personal injury offence".

[CL 5] — Gladue and Dangerous Offenders

Gladue factors have *no* impact on the question of whether D falls within the definition of a dangerous offender under s. 753(1)(a) of the *Criminal Code*: *R. v. Peekeekoot* (September 23, 2014), Doc. 1796-CR, 2014 CarswellSask 579 (Sask. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 753, "General Principles (Dangerous Offenders)".

[CL 6] — Timing and Treatment Orders

The timing of a treatment order for an unfit accused is an element of the hospital's consent. This is so because, from the hospital's perspective, the time at which treatment is to be provided is inextricably linked to the hospital's ability to provide treatment safely and effectively. Consent under s. 672.62(1) includes timing: *R. v. Conception* (October 3, 2014), Doc. 34930, 2014 CarswellOnt 13608, 2014 CarswellOnt 13609 (S.C.C.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 672.58, "General Principles"; s. 672.62.

[CL 7] — Informed Pleas of Guilty

D need *not* be informed of every conceivable consequence of entry of a plea of guilty for the plea to be informed: *R. v. Singh* (October 1, 2014), Doc. CA 040886, CA 041000, 2014 CarswellBC 2872 (B.C. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 606, "Plea of Guilty — General Principles".

[CL 8] — Calibrating the Seriousness of Violence in DO Proceedings

Subparagraph (a)(i) of the definition of "serious personal injury offence" (SPIO) in s. 752 does *not* invite a court to assess the seriousness of the violence D used or attempted to use. Any level of violence is sufficient. Neither the purpose of the SPIO requirement nor that of Part XXIV warrants reading in a qualitative minimum level of violence: *R. v. Steele* (October 9, 2014), Doc. 35364, 2014 CarswellMan 589, 2014 CarswellMan 590 (S.C.C.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 752, "serious personal injury offence".

[CL 9]— Gladue and the DO/LTO Divide

Gladue considerations are relevant in determining whether D should be found to be an LTO rather than a DO: *R. v. Peekeekoot* (September 23, 2014), Doc. 1796-CR, 2014 CarswellSask 579 (Sask. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code, s. 753, "Relationship between Dangerous and Long-term Offenders: s. 753(5)".*

[CL 10]— Determining the Seriousness of Charter Breaches

Whether denial of access to counsel pending execution of a search warrant is a general policy of the policy department involved or a one-off decision said to be justified by exceptional circumstances is relevant to an assessment of the seriousness of the *Charter* breach: *R. v. Heng* (October 6, 2014), Doc. 1403-0053-A, 2014 CarswellAlta 1762 (Alta. C.A.)

See, *Watt's Manual of Criminal Evidence, §41.03, "The Seriousness of a Charter-infringing Conduct: General Principles".*

[CL 11]— Circumstantial Evidence, Inferences and Proof of Guilt

The assessment of circumstantial evidence does *not* require that inferences found to be inconsistent with guilt must arise from proven facts. Whether a reasonable doubt about guilt exists is to be assessed on the basis of the totality of the evidence, not simply on the basis of proven facts: *R. v. Defaveri* (October 3, 2014), Doc. CA 040980, 2014 CarswellBC 2899 (B.C. C.A.)

See, *Watt's Manual of Criminal Evidence, §9.01, "General Principles: Proof by Circumstantial Evidence", §16.01, "General Principles".*

[CL 12]— The Constitutionality of the Consent Requirement in s. 672.62(1)

The consent requirement in s. 672.62(1) does *not* deprive D of procedural fairness and is *not* arbitrary or unconstitutionally vague. A judge proposing to make a disposition is entitled to consider, in an appropriate case, whether a refusal of consent will have the effect of unconstitutionally limiting D's s. 7 rights in a way that does not accord with the principles of fundamental justice. In such cases, the judge could consider whether an order for immediate admission would constitute an appropriate and just remedy for the breach: *R. v. Conception* (October 3, 2014), Doc. 34930, 2014 CarswellOnt 13608, 2014 CarswellOnt 13609 (S.C.C.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. CA 672.62, "Charter Considerations".

[CL 13]— Control in Possession Cases

The control element of the *actus reus* of possession can be shared by more than one person or delegated by one person to another. For "control", D must be proven to be in a position to exercise a directing or restraining power over the subject-matter: *R. v. Dipnarine* (October 7, 2014), Doc. 1303-0234-A (Alta. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 4, "Possession: s. 4(3)", "Joint Possession: s. 4(3)".

[CL 14]— Adverse Inferences from Failure to Call Witnesses

Adverse inferences should only be drawn where the witness has relevant information pertaining to a material issue, rather than evidence that is collateral, peripheral, cumulative or inferior to other evidence called. The inference should only be drawn where there is no plausible explanation for the failure to call the witness: *R. v. Maxie* (October 1, 2014), Doc. CACR 2352, 2014 CarswellSask 605 (Sask. C.A.)

See, *Watt's Manual of Criminal Evidence*, §18.03, "Comment on Failure to Call Witnesses".