



Supreme Court of Canada

2009 Year in Review

In This Issue

	page
Appeal Judgments	1
Leaves to Appeal Granted	11
Oral Judgment.....	15
Last Word: (SCC) Judges as Ordinary People.....	16

This special year-end review is a complete legal snapshot of *all* the law from the S.C.C. in 2009, and includes:

- Appeal Judgments
- Leaves to Appeal granted
- Oral judgments

Each Appeal judgment (and each Leave to Appeal granted) is arranged in alphabetical order by area of law – that way you can more easily find the area of law you’re litigating/advising/supervising, or more easily find any particular case. Every Appeal Judgment is followed by the electronic source for that judgment in case you wish to read the full case.

If you would like an electronic copy of this Year in Review with all the hyperlinks “live,” either for yourself or to patch over to colleagues, e-mail Eugene at: emeehan@langmichener.ca.

Appeal Judgments

Aboriginal Law: Management of Oil and Gas Royalties; Fiduciary Duties; Section 15

Ermineskin v. Canada (Fed. C.A., May 22, 2008)(31875, 31869) Feb. 13, 2009

In the context of investment by the federal government of oil and gas royalties from First Nation lands, the S.C.C. held that “A fiduciary is not required to provide the beneficiary, out of the fiduciary’s own resources, what could have been obtained had legislative or contractual limits on its discretion not existed.”

scc.lexum.umontreal.ca/en/2009/2009scc9/2009scc9.html

Administrative Law: Standard of Review

Canada (Citizenship and Immigration) v. Khosa (Fed. C.A., Jan. 30, 2007)(31952) Feb. 26, 2009

Two key points in this case:

- *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focused on substance, particularly on the nature of the issue before the tribunal (here the Immigration Appeal Division [“IAD”]);
- whether “sufficient humanitarian and compassionate considerations” (to warrant relief from a removal order) was a decision Parliament confided to the IAD, not to the courts.

scc.lexum.umontreal.ca/en/2009/2009scc12/2009scc12.html

Bankruptcy and Insolvency: Tax Priorities

Quebec (Revenue) v. Caisse populaire Dejardins de Montmagny, (Que. C.A., Dec. 18, 2007)(32486)(32489)(32492) Oct. 30, 2009

The S.C.C. held as follows:

- the G.S.T. and Q.S.T. are similar types of taxes on consumption;
- they are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them;
- taxes are collected, and credits apply, at each step of the manufacturing and marketing chains;
- in principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes;

- nothing in the legislation respecting the G.S.T. and the Q.S.T. requires suppliers to keep the taxes they collect separate;
- until a bankruptcy occurs, only the deemed trusts established by statute give tax authorities a right to equivalent amounts from the suppliers' assets;
- Canadian tax authorities are bound by the choice of legislative policy now expressed in the federal *Bankruptcy and Insolvency Act*, which is also binding on the Quebec tax authorities.

scc.lexum.umontreal.ca/en/2009/2009scc49/2009scc49.html

Banks: Forged Cheques

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia
(B.C.C.A., Sept. 30, 2003)(31930) Apr. 2, 2009

The law does not dictate the result that a bank pay damages to customers for debits made from their accounts when reversing credits that have been entered in relation to a forged cheque. Where money has been transferred and it can still be identified, tracing is permitted.

scc.lexum.umontreal.ca/en/2009/2009scc15/2009scc15.html

Charter: Arbitrary Detention and Right to Counsel

R. v. Grant (Ont. C.A., Jun. 2, 2006)(31892) Jul. 17, 2009;
R. v. Suberu (Ont. C.A., Jan. 31, 2007)(31912) Jul. 17, 2009;
R. v. Harrison (Ont. C.A., Feb. 11, 2008)(32487) Jul. 17, 2009;
R. v. Shepherd (Sask. C.A., Mar. 14, 2007)(32037) Jul. 17, 2009

The *Grant* case is the main case in this group, where the S.C.C. held:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established *either* where the individual has a legal obligation to comply with the restrictive request or demand, *or* a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. Where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained, and courts may consider the following factors:
 - circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

- nature of the police conduct, including the language used; use of physical contact; place where the interaction occurred; presence of others; duration of the encounter.
- particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Where a court decides whether "in all the circumstances" admission of evidence obtained by a *Charter* breach would "bring the administration of justice into disrepute," there are three lines of inquiry:

- the seriousness of the *Charter*-infringing state conduct
- the impact of the breach on the *Charter*-protected interests of the accused
- the societal interest in an adjudication on the merits.

The S.C.C. also said: "[W]here the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination."

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Charter: Equality; Limitation Periods

Laura Ravndahl v. Her Majesty the Queen in Right of the Province of Saskatchewan as represented by the Government of Saskatchewan, et al. (Sask. C.A., Jun. 14, 2007)(32225) Jan. 29, 2009

A widow's pension benefit was lost on remarriage, pursuant to the Saskatchewan *Workers Compensation Act*, where the marriage occurred prior to coming into force of s. 15 of the *Charter*. Instead of applying for a special lump sum payment, the Appellant brought a constitutional action in 2000 based on s. 15 of the *Charter*, which the S.C.C. held was statute barred under the Saskatchewan *Limitation of Actions Act*.

scc.lexum.umontreal.ca/en/2009/2009scc7/2009scc7.html

Charter: Freedom of Expression; Political Advertising

Greater Vancouver Transportation Authority v. Canadian Federation of Students (B.C.C.A., Nov. 28, 2006)(31845) Jul. 10, 2009

Transit authority regulations that permitted commercial but not political advertising on the sides of busses are contrary to the *Charter*.

scc.lexum.umontreal.ca/en/2009/2009scc31/2009scc31.html

Charter: Freedom of Religion; Photo ID

Alberta v. Hutterian Brethren of Wilson Colony
(Alta. C.A., May 17, 2007)(32186) Jul. 24, 2009

There is no *Charter* breach of religious freedom in requiring that drivers' licences contain a photograph.

scc.lexum.umontreal.ca/en/2009/2009scc37/2009scc37.html

Charter: Mature Minors

A.C. v. Manitoba (Director of Child and Family Services)
(Man. C.A., May 14, 2007)(31955) Jun. 26, 2009

Where a young person accesses medical care:

- the more a court is satisfied that person is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion;
- in some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor;
- if, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems necessarily to follow that the adolescent's views ought to be respected;
- such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity;
- scrutiny of a child's maturity in a best interests analysis will require, by definition, an individualized assessment, having regard to the unique situation of the particular child, including the nature of the treatment decision and the severity of its potential consequences;
- in those most serious of cases, where a refusal of treatment carries a significant risk of death or permanent physical or mental impairment, a careful and comprehensive evaluation of the maturity of the adolescent will necessarily have to be undertaken to determine whether his or her decision is a genuinely independent one, reflecting a real understanding and appreciation of the decision and its potential consequences.

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Civil Procedure: *Forum Non Conveniens* Where Parallel Litigation in Different Countries

Teck Cominco Metals Ltd. v. Lloyd's Underwriters
(B.C.C.A., Apr. 30, 2007)(32116) Feb. 20, 2009

Policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor. To adopt this approach would encourage a first-to-file system, and delaying proceedings in the less-preferred jurisdiction. Prior assertion of jurisdiction by (as here) the U.S. District Court is merely one factor to be considered, among others. It is still the case that the proper forum is the one most closely connected with the litigation.

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Class Actions: Parallel Proceeding in Different Provinces

Canada Post Corp. v. Lépine (Que. C.A., Aug. 10, 2007)(32299) Apr. 2, 2009

Canada Post marketed, then terminated, a lifetime Internet service. A Quebec customer filed a motion for authorization, then the Ontario Superior Court of Justice certified, then approved a National settlement (excepting B.C.). The next day Quebec authorized. The Quebec Superior Court dismissed Canada Post's application to have the Ontario judgment recognized in Quebec. The S.C.C. held:

- Ontario had jurisdiction because the defendant's head office was in Ontario;
- The Ontario procedure to notify Quebec residents contravened Quebec principles of procedure and cannot be enforced;
- *Lis pendens* precluded judicial recognition in Quebec of the Ontario judgment.

Justice LeBel: "...provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space."

scc.lexum.umontreal.ca/en/2009/2009scc16/2009scc16.html

Constitutional and Labour Law: Division of Powers and Jurisdiction of Boards and Tribunals

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters
(Alta C.A., Jul. 27, 2007)(32290) Nov. 26, 2009

A freight-forwarding company whose operations were entirely interprovincial (even though one branch picked up and consolidated freight within the originating province and another branch deconsolidated and delivered in the receiving province) falls within provincial, not federal jurisdiction.

scc.lexum.umontreal.ca/en/2009/2009scc53/2009scc53.html

Constitutional Law: Division of Powers; “Criminal” Forfeiture

Chatterjee v. Ontario (Attorney General) (Ont. C.A., May 30, 2007) (32204) Apr. 17, 2009

Provincial legislation forfeiting seized money as proceeds of unlawful activity is constitutional, and not *ultra vires* because of encroachment on the federal criminal law power.

scc.lexum.umontreal.ca/en/2009/2009scc19/2009scc19.html

Contracts and Employment Law: Restrictive Covenants

Shafroon v. KRG Insurance Brokers (Western) Inc.

(B.C.C.A., Feb. 12, 2007)(31981) Jan. 23, 2009

In the context of an employment contract, can the doctrine of severance be invoked to resolve an ambiguous term in a restrictive covenant or render an unreasonable term in the covenant reasonable. The Court held:

- severance, when permitted, takes two forms: “notional” severance involves reading down a contractual provision so as to make it legal and enforceable; “blue-pencil” severance consists of removing part of a contractual provision;
- notional severance is not an appropriate mechanism to cure a defective restrictive covenant;
- blue-pencil severance can only be resorted to in rare cases where the part being removed is trivial, and not part of the main purport of the restrictive covenant.

scc.lexum.umontreal.ca/en/2009/2009scc6/2009scc6.html

Criminal Law: Abandonment

R. v. Bird (Alta. C.A., Feb. 10, 2009)(33054) Dec. 18, 2009

In the context of a gang rape and homicide, the S.C.C. agreed with the dissenting judge in the Court of Appeal that the evidence was incapable of supporting the defence of abandonment.

scc.lexum.umontreal.ca/en/2009/2009scc60/2009scc60.html

Criminal Law: Conditional and Intermittent Sentences

R. v. Middleton (Ont. C.A., Jul. 25, 2007)(32138) May 22, 2009

Intermittent and conditional sentences can be combined “to take appropriate advantage of their complementary purposes” (Justice Fish at page 20).

scc.lexum.umontreal.ca/en/2009/2009scc21/2009scc21.html

Criminal Law: Delay

R. v. Godin (Ont. C.A., Jun. 12, 2008)(32740) Jun. 4, 2009

The delay of 30 months (where “the delay was virtually entirely attributable to the Crown or institutional delay and was largely unexplained”) exceeds the guidelines in *R. v. Morin*, [1992] 1 S.C.R. 771.

scc.lexum.umontreal.ca/en/2009/2009scc26/2009scc26.html

Criminal Law: Disclosure

R. v. Bjelland (Alta. C.A., Dec. 21, 2007)(32446) Jul. 30, 2009

After the Crown had indicated that disclosure was substantially complete, it subsequently provided the accused with evidence from two alleged accomplices, both of whom were to be called at trial. It is a reviewable error by a trial judge to fail to consider whether prejudice to the accused can be remedied without excluding the evidence. The appropriate remedy would be an adjournment and disclosure order.

scc.lexum.umontreal.ca/en/2009/2009scc38/2009scc38.html

Criminal Law: Disclosure and Production

R. v. McNeil (Ont. C.A., Nov. 30, 2008)(31852) Jan. 16, 2009

The S.C.C. clarified and confirmed its prior decisions in *Stinchcombe* and *O'Connor*, making the following points:

- disclosure extends only to material in the possession or control of the Crown; there is no obligation on the Crown to disclose material which it does not have or cannot obtain;
- the notion that all state authorities amount to a single “Crown” entity for the purposes of disclosure and production is rejected;
- the *Stinchcombe* disclosure regime only extends to material relating to the accused’s case in the possession or control of the prosecuting Crown entity;
- police investigators have a duty to disclose to the Crown all relevant material in their possession;
- the Court set out a five-part procedure to be followed on an *O'Connor* application;
- it is not only material admissible at trial that has to be produced, but also material that would not, on its own, be admissible if useful to the defence, such as in cross-examining a witness on matters of credibility or in pursuing other avenues of investigation;
- to ensure that only relevant material is produced and that no unwarranted invasion of privacy interests occurs, the court may find it necessary to make a production order subject to redactions or other conditions;
- the court may impose restrictions on the dissemination of the information produced for purposes unrelated to the accused’s full answer and defence or prosecution of an appeal.

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Criminal Law: Extradition; Hearsay

United States of America v. Anekwu (B.C.C.A., Apr. 1, 2008)(32646) Sept. 24, 2009

In extradition proceedings:

- adherence to the strictures of the hearsay rules would result in expensive time-consuming hearings that would disable Canada from complying with its international obligations in a prompt and efficient manner, and this should be avoided;
- a flexible approach that does not insist that evidence take a particular form, but still ensures the person sought may challenge the admissibility of evidence under the *Charter*, or its content according to Canadian evidentiary rules, is more consistent with the purpose of an extradition hearing;
- the record of the case going to the extradition judge should contain sufficient information to enable both the person sought and the extradition judge to ascertain whether any item of evidence has been gathered in Canada and, when that is the case, information should also be provided on how it was obtained;
- there is no reason to reverse the usual rule that puts the onus of proving a *Charter* breach on the person who claims it.

scc.lexum.umontreal.ca/en/2009/2009scc41/2009scc41.html

Criminal Law: Forfeiture

R. v. Craig (B.C.C.A., Apr. 24, 2007)(32102) May 29, 2009

R. v. Nguyen (B.C.C.A., Sept. 29, 2007)(32359) May 29, 2009

R. v. Ouellette (Que. C.A., Mar. 29, 2007)(32057) May 29, 2009

While the rest of an accused's sentence is governed by principles set out in the *Criminal Code*, forfeiture of offence-related real property is governed by s. 19.1(3) of the *Controlled Drugs and Substances Act*, and the proportionality set out therein is different, and independent, from sentencing.

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Criminal Law: Garbage Out, Garbage In (Evidence)

R. v. Patrick (Alta. C.A., Oct. 18, 2007)(32354) Apr. 9, 2009

In this s. 8 *Charter* challenge of a police search of garbage bags outside a residence suspected of being an ecstasy lab, the S.C.C. held:

- the resident intended to abandon his proprietary interest in the physical objects when the garbage was placed at the lot line for collection;

- there was no reasonable continuing privacy interest in the information discovered in the police search of the garbage bags;
- therefore, taking the garbage did not constitute a search and seizure within the scope of s. 8 and the evidence (and the fruits of the subsequent search warrant obtained to search the house) was properly admissible.

scc.lexum.umontreal.ca/en/2009/2009scc17/2009scc17.html

Criminal Law: 'Hybrid' Offences

R. v. Dudley (Alta. C.A., Mar. 4, 2008)(32603) Dec. 17, 2009

The S.C.C. held:

- where the Crown elects to proceed by way of summary conviction, the offence is treated in all respects as a summary conviction offence;
- the proceedings must be instituted within six months unless the parties otherwise agree;
- where the trial has proceeded before a summary conviction court without an express election by the Crown, it will be presumed the Crown has elected to proceed summarily;
- where it is discovered before adjudication on the merits that the proceedings were instituted more than six months after the alleged offence, a mistrial should be declared unless the parties agree to waive the limitation period;
- where an appeal by the accused is allowed on the sole ground that the proceedings were statute-barred and conducted without consent, a conviction at trial should be set aside;
- in either instance, the Crown may proceed afresh by indictment, except where the court is satisfied that this would amount to an abuse of process;
- an appeal by the Crown against an acquittal on the ground that the proceedings were statute barred will not lie, since it was the Crown's responsibility to ensure that the proceedings were properly instituted.

scc.lexum.umontreal.ca/en/2009/2009scc58/2009scc58.html

Criminal Law: Informer Privilege

R. v. Basi (B.C.C.A., Jul. 10, 2008)(32719) Nov. 19, 2009

"Informer privilege" prohibits disclosure of the identity of a confidential informant, and in this regard the S.C.C. held:

- whenever an informer privilege is claimed, or the court of its own motion considers that the privilege appears to arise, its existence must be determined by the court in camera at a "first stage" hearing;

- even the existence of the claim cannot be publicly disclosed;
- ordinarily, only the putative informant and the Crown may appear before the judge;
- in determining whether the privilege exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant;
- if the claim of privilege is established, the judge must give it full effect; trial judges have no discretion to do otherwise;
- the informer privilege belongs jointly to the Crown and to the informant; neither can waive it without the consent of the other;
- where a hearing is required to resolve a Crown claim of privilege, the accused and defence are to be excluded from the proceedings only when the identity of the confidential informant cannot be otherwise protected – but only to the necessary extent;
- trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence, and they have broad discretion to craft appropriate procedures in this regard.

scc.lexum.umontreal.ca/en/2009/2009scc52/2009scc52.html

Criminal Law: Investigative Hearsay and Police Opinion Testimony

R. v. Van (Ont. C.A., May 14, 2008)(32681) May 28, 2008

Where a statement made during trial (here by a police officer) constitutes hearsay and opinion evidence (in this case including a statement that the police officer believed the accused to be guilty) the trial judge has to give the limiting instruction on the permissible and impermissible uses to which that evidence can be put. Where defence counsel fails to object, and registers no complaint following the trial judge's jury charge (which contained no limiting instruction):

- that may suggest that the error was not serious or did not result in an unfair trial;
- but the error might still be considered serious despite the absence of an objection at trial.

scc.lexum.umontreal.ca/en/2009/2009scc22/2009scc22.html

Criminal Law: Joint Trials of Youths and Adults

R. v. S.J.L. (Que. C.A., Aug. 16, 2007)(32309) Mar. 27, 2009

A 16 and 17 year old were arrested with adults for drug trafficking by a gang. After the trial judge dismissed a pro-

secution motion for a preliminary inquiry for all accused, the Crown preferred a direct indictment for all. The S.C.C. held that the Crown could do so, but the youths could not be tried jointly with the adults.

scc.lexum.umontreal.ca/en/2009/2009scc14/2009scc14.html

Criminal Law: Judges' Responses to Jury Questions

R. v. Layton (Man. C.A., Oct. 16, 2008)(32883) Jul. 23, 2009

Where a jury requests clarification on the reasonable doubt section of a charge to the jury, it is not appropriate for the trial judge to simply repeat the original charge almost verbatim, nor to add:

- every attempt to explain the words 'reasonable doubt' leads to more confusion as opposed to clarity;
- there was very little that the trial judge could add to clarify reasonable doubt.

However, a verbatim reiteration of the initial charge would not have been fatal had the judge made it absolutely clear to the jury that it was welcome to return with further questions.

The S.C.C. also said: "When judges follow the *Lifchus* suggested charge or the model jury instructions issued by the Canadian Judicial Council, their charges on the question of reasonable doubt are unassailable."

scc.lexum.umontreal.ca/en/2009/2009scc36/2009scc36.html

Criminal Law: Mental State of Deceased; Circumstantial Evidence; Limiting Instructions

R. v. Griffin (32649); *R. v. Harris* (32650)(Que. C.A., May 2, 2008) Jun. 18, 2009

Judges must instruct juries on circumstantial evidence, such that the jury must understand that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. This message to the jury can be achieved in different ways. Where there is any ambiguity, trial judges are wise to recharge the jury.

scc.lexum.umontreal.ca/en/2009/2009scc28/2009scc28.html

Criminal Law: Post-Offence Conduct

R. v. Jaw (Nunavut C.A., 2008, May 20, 2008)(32706) Sept. 25, 2009

In the context of an accused being charged with first degree murder of a police officer during a domestic dispute, and the accused admitting at trial to having shot the officer, but claiming he lacked the intent to kill, the following charge by the trial judge to the jury is not reversible error:

"The Crown says you should conclude that the accused knew he shot [the officer] because he did not even bother to check

[his condition] before deciding, as he said, to kill himself. So, if you accept this evidence, you may conclude that at the moment [the officer] was shot, the accused intended to kill [him], or at least intended to cause bodily harm that he knew was likely to kill [him], and he was reckless about whether the [officer] died or not.”

The accused was convicted at trial.

The S.C.C. held:

- read in isolation, the impugned portion of the charge could be understood to suggest that the appellant’s post-offence conduct might be used to infer that he intended to kill the officer;
- however, a charge to the jury must be read in its entire context;
- on the whole, the judge did not put this inference to the jury and the charge contained no identifiable error;
- even if there had been an error in the charge, this is a case in which the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code* would apply, since no substantial wrong or miscarriage of justice would have occurred.

scc.lexum.umontreal.ca/en/2009/2009scc42/2009scc42.html

Criminal Law: Prior Consistent Statements

R. v. Ellard (B.C.C.A., Sept. 5, 2008)(32835) Jun. 12, 2009

The S.C.C. in this case stated:

- prior consistent statements are presumptively inadmissible;
- the rationale for excluding them is that repetition does not, and should not be seen to, enhance the value or truth of testimony;
- because there is a danger that similar prior statements, particularly ones made under oath, could *appear* to be more credible to a jury, they must be treated with caution;
- certain exceptions have nevertheless developed in the jurisprudence; in particular, where a party has made an allegation of recent fabrication, the opposing party can rebut the allegation by introducing prior statements made *before* the alleged fabrication arose, that are consistent with the testimony at trial;
- the allegation need not be express – it is enough if “in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance”;

- to be “recent,” the fabrication need only have been made after the event testified about;
- a mere contradiction in the evidence is not enough to engage the recent fabrication exception;
- however, a “fabrication” can include being influenced by outside sources;
- to rebut an allegation of recent fabrication, it is necessary to identify statements made prior to the existence of a motive or of circumstances leading to fabrication;
- in all cases, the timing of the prior consistent statements will be central to whether they are admissible;
- where an error is made by the trial judge in admitting statements, the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* can be used where the error is harmless, or if serious, is counterbalanced by evidence so overwhelming against the accused that no substantial wrong or miscarriage of justice resulted;
- because there is a danger that the repetition of prior consistent statements may bolster a witness’s reliability, a limiting instruction will almost always be required where such statements are admitted;
- delineated exceptions to the “generally stringent rule” include: where the defence itself relies on the prior statement; where the prior statement was not offered as proof of the underlying fact; where the concern over self-corroboration and thereby bolstering the witness’s reliability is not present;
- where defence counsel fail to ask for a limiting instruction, such is not determinative, as the responsibility for the jury charge ultimately falls on the trial judge.

scc.lexum.umontreal.ca/en/2009/2009scc27/2009scc27.html

Criminal Law: Severance

R. v. Last (Ont. C.A., Aug. 21, 2008)(32809) Oct. 15, 2009

It is incumbent upon the trial judge to consider and weigh cumulatively all the relevant factors to determine whether the interests of justice require severance:

- general prejudice to the accused;
- legal and factual nexus between the counts;
- complexity of the evidence;
- whether the accused intends to testify on one count but not another;

- possibility of inconsistent verdicts;
- desire to avoid a multiplicity of proceedings;
- use of similar fact evidence at trial;
- length of the trial having regard to the evidence to be called;
- potential prejudice to the accused with respect to the right to be tried within a reasonable time;
- existence of antagonistic defences as between co-accused persons;
- benefit enuring to the administration of justice from holding a joint trial.

In this particular case, the factual and legal nexus between the two sets of counts was extremely thin, such that the case was remitted back to be retried separately.

scc.lexum.umontreal.ca/en/2009/2009scc45/2009scc45.html

Criminal Law: Sexual Luring

R. v. Legare (Alta. C.A., Apr. 10, 2008)(32829) Dec. 3, 2009

The criminal law offence of sexual luring comprises three elements: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence – that is, abduction or one of the sexual offences in s. 172.1(1) (c) – with respect to that person. In addition, intent of the accused is to be determined subjectively.

scc.lexum.umontreal.ca/en/2009/2009scc56/2009scc56.html

Criminal Law: The *I-Look-Like-Him-But-I'm-Not-Him* Defence to Dealing Crack

R. v. Burke (Que. C.A., Jan. 19, 2009)(33031) Dec. 4, 2009

A police officer arrested an accused without a warrant and, following a search incidental to arrest, found a bag of crack in the accused's pocket. The arresting officer did not investigate the accused's claim that he was the brother of the person sought by the arrest warrant at the time of the arrest. At the police station, however, the accused was confirmed not to be the person sought by the warrant. The S.C.C. upheld the courts below that the search was unreasonable and that the evidence should have been excluded, such that the accused was acquitted.

scc.lexum.umontreal.ca/en/2009/2009scc57/2009scc57.html

Criminal Law/Torts: Malicious Prosecution

Miazga v. Kvello Estate (Sask. C.A., May 30, 2007)(32208) Nov. 6, 2009

A plaintiff must prove the following to succeed in an action for malicious prosecution:

- initiated by the defendant;
- terminated in favour of the plaintiff;
- undertaken without reasonable and probable cause;
- motivated by malice or a primary purpose other than that of carrying the law into effect.

Crown prosecutors are immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process, being (quoting from the *Nelles* decision): “an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve.”

scc.lexum.umontreal.ca/en/2009/2009scc51/2009scc51.html

Criminal Law: *Vetrovec* Warnings

Khela v. R. (B.C.C.A., Jan. 29, 2007)(31933) Jan. 22, 2009

Sahota v. R. (B.C.C.A., Jan. 29, 2007)(32325) Jan. 22, 2009

In a trial by judge and jury, it is of the utmost importance for the jury to understand *when* and *why* it's unsafe to find an accused guilty on the unsupported evidence of witnesses who are “unsavoury,” “untrustworthy” or “unreliable.” The S.C.C. made the following key points:

- the crafting of a caution appropriate to the circumstances of the case is best left to the judge;
- no single formula can be expected to produce an appropriate instruction for every foreseeable – let alone *unforeseeable* – situation at trial;
- there are four main foundation elements to the framework for *Vetrovec* warnings:
 - (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny;
 - (2) explaining *why* this evidence is subject to special scrutiny;
 - (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true;
 - (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence

from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused;

- where the caution has the above characteristics, appellate courts (in the absence of some other flaw in the instructions) will generally be expected to find the caution adequate;
- but failure to include any of the characteristics noted above may not prove fatal where the judge's charge read as a whole otherwise serves the purposes of a *Vetrovec* warning.

scc.lexum.umontreal.ca/en/2009/2009scc4/2009scc4.html

Criminal Law: *Vetrovec* Warnings

Smith v. R. (N.S.C.A., Mar. 28, 2008)(32323) Jan. 22, 2009

James v. R. (N.S.C.A., Feb. 13, 2007)(31980) Jan. 22, 2009

These two appeals are companion appeals to *Khela* and *Sabota* above, and the S.C.C. adopted the reasons therein.

scc.lexum.umontreal.ca/en/2009/2009scc5/2009scc5.html

Debtor-Creditor: Debtor-Creditor Relationship/Fiduciary Relationship

Galambos v. Perez (B.C.C.A., Feb. 27, 2008)(32586) Oct. 23, 2009

Where an office manager of a law firm voluntarily advances cash to the law firm to resolve cash flow problems, often without informing the firm's founder, this is a debtor-creditor relationship, and recovery of funds paid cannot be by way of negligence or fiduciary duty: "it is fundamental to ad hoc fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party."

scc.lexum.umontreal.ca/en/2009/2009scc48/2009scc48.html

Defamation: "Responsible Journalism" Defence

Quan v. Cusson (Nov. 9, 2006)(32420) Dec. 22, 2009

The S.C.C. held that there is a "responsible journalism" defence in Ontario law, including for bloggers, the Chief Justice writing: "The judge decides whether the publication was on a matter of public interest. If so, the jury then decides whether the standard of responsibility has been met."

scc.lexum.umontreal.ca/en/2009/2009scc62/2009scc62.html

Defamation: "Responsible Journalism" Defence

Grant v. Torstar Corp. (Nov. 28, 2008)(32932) Dec. 22, 2009

See summary above.

scc.lexum.umontreal.ca/en/2009/2009scc61/2009scc61.html

Extradition: Double Criminality Principle

Canada (Justice) v. Fischbacher (Ont. C.A., Aug. 1, 2008)(32842) Oct. 16, 2009

Extradition is permitted when the conduct underlying the foreign offence, if it occurred in Canada, would constitute an offence in Canadian law, however named or characterized. And, so long as the offence also falls in the category of extraditable offences (as defined by the *Extradition Act*), the "double criminality" principle is fulfilled.

scc.lexum.umontreal.ca/en/2009/2009scc46/2009scc46.html

Family Law: Separation Agreements

Rick v. Brandsema (B.C.C.A., Nov. 28, 2008)(32098) Feb. 19, 2009

A separation agreement can be reviewed by the court on grounds of unconscionability where a spouse exploits the mental instability of the other during negotiations and deliberately conceals or undervalues assets.

scc.lexum.umontreal.ca/en/2009/2009scc10/2009scc10.html

Insurance: "Accident" Benefits

Co-operators Life Insurance Co. v. Gibbens

(B.C.C.A., Apr. 15, 2008)(32677) Dec. 18, 2009

A trade union member was employed as a high-pressure water blaster, and became a member of the International Brotherhood of Painters and Allied Trades, whereby after a threshold number of hours were performed he was covered by Policy No. G.6639 issued by the Co-operators Life Insurance Company. A term of the policy stated in part that the Applicant pay a benefit for paraplegia or loss of use of both legs upon proof that the loss results "directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means." The Respondent had unprotected sex with three women during January and February of 2003 and became infected with Herpes Simplex, initially causing "pelvic discomfort," later transverse myelitis (inflammation of the spinal cord), resulting in paralysis mid-abdomen down. The B.C.S.C. ordered Co-operators to pay \$200,000. The B.C.C.A. let his award stand. The S.C.C. had to decide between: getting paid for getting laid *or* the screwing you get for the screwing you got, and determined it should be the latter, overturning the award.

scc.lexum.umontreal.ca/en/2009/2009scc59/2009scc59.html

International Trade: Jurisdiction to Bring Complaints in Canada

Northrop Grumman Overseas Services Corp. v. Canada (Attorney General) (Fed C.A., May 22, 2008)(32752) Nov. 5, 2009

A potential supplier for a government procurement that is not a Canadian supplier does not have standing before the

Canadian International Trade Tribunal to bring a complaint alleging an unfair bidding process based on the Agreement on Internal Trade.

scc.lexum.umontreal.ca/en/2009/2009scc50/2009scc50.html

Labour Law: Business Closures

Plourde v. Wal-Mart Canada Corp. (Que. C.A., Sept. 14, 2007) (32342) Nov. 27, 2009

A complaint to the Quebec *Commission des relations du travail* requires “the existence of an ongoing workplace” and, there being none here (the store having been closed by Walmart), the necessary foundation of a complaint under s. 15 of the *Quebec Labour Code* was absent.

scc.lexum.umontreal.ca/en/2009/2009scc54/2009scc54.html

Labour Law: Business Closures

Desbiens v. Wal-Mart Canada Corp. (Que. C.A., Feb. 6, 2008) (32527) Nov. 27, 2009

Same summary as above.

scc.lexum.umontreal.ca/en/2009/2009scc55/2009scc55.html

Language Rights in Quebec

(2 appeals, joint reasons)

Nguyen v. Quebec (32229); *Bindra v. Quebec* (Que. C.A., Aug. 22, 2007)(32319) Oct. 22, 2009

The (Quebec) *Charter of the French Language* establishes French as the official language of instructions in schools, but students who received/are receiving the major part of their instruction in English in Canada can receive instruction in English in Quebec in a public or subsidized private school. Paragraphs 2 and 3 were added to s. 73 of the *Charter* in response to concerns regarding “bridging schools,” whereby parents were enrolling children in unsubsidized private schools so they could then be eligible for publicly funded English schools, paragraphs 2 and 3 saying that time at bridging schools is to be disregarded. The S.C.C. held that paragraphs 2 and 3 infringe s. 23(2) of the *Canadian Charter of Rights and Freedoms*, and are thereby unconstitutional.

scc.lexum.umontreal.ca/en/2009/2009scc47/2009scc47.html

Municipal Law and Class Actions in Quebec

Marcotte v. Longueuil (Que. C.A., Jun. 13, 2007)(32213); *Usinage Pouliot Inc. v. Longueuil* (Que. C.A., Jun. 13, 2007)(32214); *Breslaw v. Montreal (City)*(Que. C.A., Nov. 6, 2007)(32369) Oct. 8, 2009

These three appeals emanate from municipal amalgamations in Quebec that occurred in 2000. The Quebec National Assembly established a scheme to gradually equalize tax burdens of the amalgamated sectors over a period of 20

years. Ratepayers applied for authorization to institute class actions to quash municipal by-laws imposing property taxes and business taxes, and also contested resolutions of the municipal council related to those by-laws. The Quebec Superior Court and Court of Appeal denied authorization, and the S.C.C. dismissed the appeals. The S.C.C. held that the judge hearing the motion for authorization must check whether:

- there are sufficiently similar questions of fact and law;
- the facts alleged seem to justify the conclusions sought, or in other words there is a *prima facie* case;
- the composition of the group makes it difficult to use articles 59 and 67 of the *Civil Code*;
- the representative has the qualities needed to represent the group members.

In the two first appeals (in which there were joint reasons, and which became the main appeal) the Court went on to say:

- it is undisputed that there are common questions and that the representatives are qualified to represent the groups;
- but problems remain in respect of the existence of a *prima facie* case and the composition of the groups, having regard to the nature of the conclusions being sought.

scc.lexum.umontreal.ca/en/2009/2009scc43/2009scc43.html

scc.lexum.umontreal.ca/en/2009/2009scc44/2009scc44.html

Official Languages

Desrochers v. Industry Canada (Fed. C.A., Nov. 17, 2006)(31815) Feb. 5, 2009

When a language complaint is filed, the relevant time for determining the merits of the application is the date of the complaint. Here no remedy other than costs was appropriate, since corrective measures had been taken.

scc.lexum.umontreal.ca/en/2009/2009scc8/2009scc8.html

Pensions: Employer Contribution “Holidays”

Nolan v. Kerry (Canada) Inc. (Ont. C.A., Jun. 5, 2007)(32205) Aug. 7, 2009

Employers can take a contribution “holiday” by using accumulated surpluses when fiscally appropriate, and the appropriate standard of review (of the Ontario Superintendent of Financial Services) is reasonableness. With regard to costs: “The Court should adopt a deferential standard of review to the tribunal’s decision.”

scc.lexum.umontreal.ca/en/2009/2009scc39/2009scc39.html

Telephone Rates: Jurisdiction of C.R.T.C.;

Use of Unexpended Revenues

Bell Canada v. Bell Aliant Regional Communications

(Fed. C.A., Mar. 7, 2008)(32607/32611) Sept. 18, 2009

The C.R.T.C. is within its jurisdiction to order telephone companies to establish deferral accounts as separate accounting entries in their ledgers to record funds representing the difference between rates actually charged and those otherwise determined under a rate-setting formula, and to also determine how those funds are to be allocated, including rebates to the customers.

scc.lexum.umontreal.ca/en/2009/2009scc40/2009scc40.html

Tax: Federal Deemed Trusts

Caisse populaire Desjardins v. Canada (Que. C.A., Nov. 8, 2006)

(31787) Jun. 19, 2008

The definition of “security interest” in s. 224(1.3) of the *Income Tax Act* is wide, and it is federal law that is to be used for that definition, not any differing provincial law, so that federal deemed trusts are valid.

scc.lexum.umontreal.ca/en/2009/2009scc29/2009scc29.html

TAX: G.A.A.R. (General Anti-Avoidance Rule)

Lipson v. Canada (Fed. C.A., Mar. 16, 2007)(32041) Jan. 8, 2009

At issue was the tax status of a transaction whereby a loan from a bank to finance the purchase of shares in a family corporation, when mortgage loan funds were used to repay a share loan. The transaction was not permitted as an indirect way to deduct interest on a mortgage loan on a family residence.

scc.lexum.umontreal.ca/en/2009/2009scc1/2009scc1.html

Tax: G.S.T. Overpayment by Taxpayers

United Parcel Service Canada Ltd. v. Canada

(Fed. C.A., Feb. 7, 2008)(32546) Apr. 23, 2009

G.S.T. overpayments due to errors by UPS or its customers have to be reimbursed by the federal government.

scc.lexum.umontreal.ca/en/2009/2009scc20/2009scc20.html

Leaves to Appeal Granted

Aboriginal Law: Consultation

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, British Columbia

Utilities Commission (B.C.C.A., Feb. 18, 2009)(33132) Nov. 5, 2009

What is the appropriate level of aboriginal consultation in water and related resources with regard to a hydro project.

Aboriginal Law: Duty to Consult

Beckman, et al. v. Little Salmon/Carmacks First Nation, et al.

(Y.T. C.A., Aug. 15, 2008)(32850) Jan. 29, 2009

What is the duty to consult with regard to a proposed agricultural land grant on Crown land where a First Nation has right of access for subsistence harvesting.

Aboriginal Law: Immunity from Taxation

Alexandre Dubé v. Her Majesty the Queen (Fed. C.A., Apr. 8, 2009)

(33194) Oct. 29, 2009

What is the tax status of an aboriginal person who uses a Caisse Populaire on a different reserve.

Aboriginal Law: Immunity from Taxation

Rolland Bastien Succession v. Her Majesty the Queen

(Fed. C.A., Apr. 8, 2009)(33196)(33194) Oct. 29, 2009

What is the tax status of an aboriginal person who uses two credit unions, one on his reserve, and one on another reserve.

Access to Information

Information Commissioner of Canada v. Minister of Transport Canada

(Fed. C.A., May 27, 2009)(33296) Dec. 17, 2009

Can the Minister of Transport’s itinerary and/or meeting schedules be accessed.

Access to Information

Information Commissioner of Canada v. Commissioner of the Royal

Canadian Mounted Police (Fed. C.A., May 29, 2009)(33297)

Dec. 17, 2009

Can the Prime Minister’s daily agenda be accessed.

Access to Information

Information Commissioner of Canada v. Prime Minister of Canada

(Fed. C.A., May 29, 2009)(33299) Dec. 17, 2009

Same summary as above.

Access to Information

Information Commissioner of Canada v. Minister of National Defence (Fed. C.A., May 27, 2009)(33300) Dec. 17, 2009

Can minutes or documents produced for management meetings with the Minister of National Defence be accessed.

Administrative Law: Arbitrations

R.W.P. v. Her Majesty the Queen (B.C.C.A., Jun. 25, 2009)(33288) Nov. 26, 2009

In the context of a pipeline constructed on Alberta farmland, what can be dealt with (including costs) in an arbitration under the *National Energy Board Act*, and what cannot.

Administrative Law: Crown Agency Liability

Parrish & Heimbecker (Fed C.A., Nov. 21, 2008)(33006);
TeleZone Inc (Ont. C.A., Dec. 24, 2008)(33041);
Fielding Chemical Technologies (Ont. C.A., Dec. 24, 2008)(33042);
James Blackler (Ont. C.A., Dec. 24, 2008)(33043);
Dennis Manuge (Fed. C.A., Feb. 3, 2009)(33103);
Canadian Food Inspection Agency (Que. C.A., Sep. 12, 2008)(32880) Jun. 18, 2009

A group of six leaves to appeal were granted on the issue of to what extent, and in what circumstances, can a Crown agency be liable. A subsidiary, though important, issue is the jurisdiction of the Federal Court.

Bankruptcy and Insolvency: Crown Priority for G.S.T.

Century Services Inc. v. Attorney General of Canada et al. (B.C.C.A., May 7, 2009)(33239) Nov. 5, 2009

Does the federal Crown have a priority for G.S.T. where a debtor assigns itself into bankruptcy.

Charter: Damages

Vancouver and B.C. v. Ward (B.C.C.A., Jan. 27, 2009)(33089) Jun. 18, 2009

Is there a *Charter* breach, and if so are damages payable, where a protester is arrested and then later released without charges.

Charter: Freedom of Expression

Toronto Star Newspapers Ltd. et al. v. Her Majesty the Queen in Right of Canada et al. (Ont. C.A., Jan. 26, 2009)(33085) May 28, 2009

There is a publication ban in this case where the main issue is whether the mandatory publication ban on bail hearings at the request of an accused under s.517 of the *Criminal Code* is constitutional.

Charter: Freedom of Expression; Freedom of The Press

C.B.C. v. Quebec (Que. C.A., Oct. 10, 2008)(32920) Apr. 2, 2009

What should the rules be for journalists (both camera and print) in Quebec court houses.

Charter and Labour Law: Freedom of Association

Attorney General of Ontario v. Michael J. Fraser et al. (Ont. C.A., Nov. 17, 2008)(32968) Apr. 2, 2009

What labour law regime should apply to agricultural workers.

Charter: What is a Court of Competent Jurisdiction; Conditions of Detention

Paul Conway v. Her Majesty the Queen, et al. (Ont C.A., Apr. 29, 2008)(32662) Feb. 26, 2009

Are mental health review tribunals courts of competent jurisdiction, and can courts rule on conditions of continued detention for someone found not guilty by reason of insanity.

Charter: Section 7; Alleged Terrorism by Canadian Nationals; Repatriation

Prime Minister of Canada, Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police v. Omar Ahmed Khadr (Fed. C.A., Aug. 14, 2009)(33289) Sept. 4, 2009

Mr. Khadr, is a Canadian citizen who was taken prisoner in Afghanistan as a juvenile and detained by U.S. forces since 2002 at Guantanamo Bay, Cuba, where he faces murder and other terrorism-related charges. The Government of Canada asked, through diplomatic channels, for consular access and other assurances, but its policy is not to request repatriation until the conclusion of the prosecution. The Federal Court granted the application for judicial review, and the Fed. C.A. dismissed the appeal.

Charter and Class Actions: Discrimination

Hazel Ruth Withler and Joan Helen Fitzsimonds v. Attorney General of Canada (B.C.C.A., Dec. 23, 2008)(33039) May 28, 2009

Are the supplementary death benefit payments in the *Public Service Superannuation Act* and *Canadian Forces Superannuation Act* discrimination contrary to s. 15 of the *Charter*.

Civil Procedure in Quebec: Actions Against Estates

de Montigny, et al. v. Brossard (Que. C.A., Aug. 26, 2008)(32860) Apr. 2, 2009

Where a husband kills his family then himself, in what circumstances and for what can the husband's estate be sued.

Civil Procedure: Limitation Periods on Foreign Arbitration Awards

Yugraneft Corporation v. Rexx Management Corporation
(Alta C.A., Aug. 5, 2008)(32738) Feb. 26, 2009

Do provincial limitation periods apply to foreign arbitration awards where there is an application for provincial enforcement (here under the Alberta *International Commercial Arbitration Act*).

Civil Procedure: Mareva Injunctions; Anton Piller Orders; Rowbotham Applications

A.G. B.C. v. Ripudaman Singh Malik et al.
(B.C.C.A., May 7, 2009 (33266) Dec. 10, 2009

In the context of the 1985 Air India bombing, should Mr. Malik be granted a *Rowbotham* funding order, and should the A.G.B.C. be granted a Mareva injunction and Anton Piller order.

Class Actions and Defamation in Quebec: What is Defamatory

Malhab v. Arthur (Que. C.A., Oct. 17, 2008)(32931) Apr. 2, 2009

A broadcaster made offensive remarks about Montreal's "Arab and Haitian" taxi drivers, who applied to authorize a class action. Was individual prejudice caused to each driver, and was what was said defamatory.

Class Actions: Arbitrate or Litigate

Michelle Seidel v. Telus Communications Inc.
(B.C.C.A., Mar. 13, 2009)(33154) Nov. 5, 2009

Is the arbitration clause in a cell phone contract enforceable.

Class Actions: Share Prospectus Disclosure

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd. et al.
(B.C.C.A., May 22, 2009)(33280) Dec. 17, 2009

Should a class action on the basis of a fiduciary duty being owed to investors be permitted to proceed.

Common Law: Asset Division; Support; Compensation for Unjust Enrichment

Vanasse v. Seguin (Ont. C.A., Jul. 29, 2009)(33358) Dec. 17, 2009

On the facts of this case (a common law relationship that lasted from 1994 to 2005 with two children) what is the appropriate asset division, child and spousal support, as well as compensation for unjust enrichment.

Constitutional Law and Labour Law: Division of Powers

C.E.R.P. Union v. Native C.F.S. Toronto (Fed. C.A., Oct. 31, 2008)
(32908) Apr. 2, 2009

Is an aboriginal child and Family Services Society governed by federal or provincial labour law.

Constitutional Law and Municipal Law: Taxes

Montreal v. Montreal Port Authority (Fed. C.A., Sept. 19, 2008)
(32881) Apr. 2, 2009

Do federal corporations to which the *Payments in Lieu of Taxes Act* applies have to pay a post-municipal reorganization tax increase.

Constitutional Law and Municipal Law: Taxes

Montreal v. C.B.C. (Fed. C.A., Sept. 19, 2008)(32882) Apr. 2, 2009
Same summary as above.

Constitutional Law and Labour Law: Division of Powers

NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union (B.C.C.A., Aug. 27, 2008)(32862)
Jan. 29, 2009

Is a First Nation-based Child and Family Services Society governed by provincial or federal labour law.

Costs: Interim Funding Orders

Alberta v. Caron (Alta. C.A., Jan. 30, 2009)(33092) Aug. 27, 2009

In what circumstances should interim funding orders be granted.

Criminal Law: Abandonment of Common Unlawful Purpose

R. v. S.R.B. (Alta. C.A., Feb. 10, 2009)(33054) Jul. 9, 2009

There is a publication ban in this case, where the issues include: unequivocal notice of intention to abandon a common unlawful purpose.

Criminal Law: Aiding and Abetting

R.W.P. v. Her Majesty the Queen (B.C.C.A., Jun. 25, 2009)(33288)
Nov. 26, 2009

There is a publication ban in this case where the main issue is the trial judge's instructions to the jury with regard aiding and abetting, and similar fact evidence.

Criminal Law: Broadcasting Related Material

Canadian Broadcasting Corporation v. Her Majesty the Queen and Stéphan Dufour (Quebec Superior Court, Dec. 3, 2008)(32987)
Apr. 30, 2009.

Can a statement made by an accused person to a person in authority before he was indicted be broadcast.

Criminal Law: Child Testimony

J.Z.S. v. Her Majesty the Queen (B.C.C.A., Oct. 10, 2008)(32942) May 7, 2009

There is a publication ban in this case where the issues concern the constitutionality of s.486.2 of the *Criminal Code* and s.16.2 of the *Canada Evidence Act*; is a promise to tell the truth sufficient.

Criminal Law: Confessions

R. v. S.G.T. (Sask. C.A., Sept. 18, 2008)(32890) Apr. 2, 2009

There is a publication ban in this case where the main issue is the voluntariness/admissibility of an apology/confession.

Criminal Law: Fresh Evidence

J.R.W. v. Her Majesty the Queen (Ont. C.A., Apr. 23, 1996)(33330) Dec. 3, 2009

There is a publication ban in this case where the main issue is whether fresh evidence can be admitted in a sexual assault case where the accused was a residential counsellor at a centre for adults with developmental disabilities.

Criminal Law: Publication Bans

C.B.C., et al. v. R., et al. (Alta. C.A., Sept. 3, 2008)(32865) Jan. 29, 2009

Is s. 517 of the *Criminal Code*, which restricts the publication of criminal proceedings, unconstitutional.

Criminal Law: Right to Silence; Right to Counsel

D.R.M. v. Her Majesty the Queen (B.C.C.A., Nov. 21, 2008)(32969) Mar. 17, 2009

There is a publication ban in this case where the issues include right to counsel and right to silence. Both the motion to expedite and the leave to appeal were concurrently granted.

Criminal Law: Search and Seizure

Nolet and Vatsis v. R. (Sask. C.A., Jan. 21, 2009)(33032) Jun. 18, 2009

Should two truck drivers have been acquitted when evidence regarding \$115,000 in cash and 392 pounds of marijuana was excluded.

Criminal Law: Terrorism

R. v. F.A. et al. (Ont. S.C.J., Jan. 15, 2009)(33066) Jun. 18, 2009

There is a publication ban in this case where the issue concerns the validity of the *Canada Evidence Act* provisions to protect national security information.

Criminal Law: Wilful Blindness

M. E. B. v. Her Majesty the Queen (Alta. C.A., Sept. 30, 2008) (32912) Feb. 19, 2009

There is a publication ban in this case of alleged sexual assault and murder, where the main issue is whether willful blindness can satisfy all or part of the *mens rea* of murder.

Extradition

Németh v. Canada (Que. C.A., Jan. 22, 2009)(33016) Jun. 18, 2009

Should a Roma family (granted refugee status in Canada) be extradited to Hungary on the basis of alleged fraud.

Extradition

M.J.C.K. v. Minister of Justice for Canada (B.C.C.A., Jan. 7, 2009) (32500) May 28, 2009

There is a publication ban in this case, which concerns extradition from Canada to a country with the death penalty.

Extradition

Tiberiu Gavrilă v. Minister of Justice of Canada (Que. C.A., Jun. 30, 2009)(33313) Nov. 27, 2009

The main issue here is whether someone would be at risk of being mistreated after being extradited, and if so, should they be given refugee status in Canada.

Family Law: Common Law Spouses

Kerr v. Baranow (B.C.C.A., Mar. 13, 2009)(33157) Aug. 27, 2009

Who should get what, and why, where both parties are 67 years of age after a 26 year common law relationship, and where one of the parties has suffered a massive stroke leaving her with partial paralysis and unable to work, and is now living in an extended-care facility.

Insurance: Duty to Defend

Progressive Homes Ltd. v. Lombard General Insurance (B.C.C.A., Mar. 26, 2009)(33170) Aug. 27, 2009

Is there a duty to defend with regard to water penetration of a condominium project pursuant to comprehensive general liability insurance policies.

International Litigation: Jurisdictional Immunity; Enforcement of Foreign Judgments

Kuwait Airways v. Republic of Iraq and Bombardier Aerospace (Que. C.A., Apr. 15, 2009)(33145) Aug. 27, 2009

In what circumstances is a judgment obtained in England by Kuwait Airways against Iraqi Airways (owned by the Republic of Iraq) enforceable in Quebec.

Labour Law in Quebec: Jurisdiction of Arbitrator

Syndicat des professeurs v. Denis Tremblay
(Que. C.A., Jun. 2, 2008)(32776 and 32771–3) Jan. 29, 2009

Is the appropriate forum for deciding a complaint of dismissal without cause in Quebec under s. 124 of the *Act respecting labour standards*, a grievance arbitrator or the Commission des relations du travail.

Media Law: Confidential Sources

Globe and Mail, a division of CTVglobemedia Publishing Inc. v. Attorney General of Canada and Groupe Polygone Éditeurs Inc.
(Que. C.A., Jan. 30, 2009)(33097) Jun. 25, 2009

Do journalists have to disclose confidential sources.

Media Law: Confidential Sources

Globe and Mail, a division of CTVglobemedia Publishing Inc. v. Attorney General of Canada and Groupe Polygone Éditeurs Inc.
(Que. C.A., Dec. 15, 2008)(32975) May 21, 2009

Confidentiality of journalist sources.

Pensions: Corporate Sale of A Division

Peter Christopher Burke et al. v. Hudson's Bay et al.
(Ont. C.A., May 20, 2008)(32789) Oct. 29, 2009

In the context of employees who became employed by a purchaser who established a pension plan for them, could contribution holidays, pension plan expenses, and a surplus be taken from the former pension plan.

Oral Judgment

Anton Hooites-Meursing v. Her Majesty the Queen
(B.C.C.A., June 20, 2008)(32799) January 12, 2009

Binnie J.: “Mr. Fitch, it will not be necessary to call upon you. We understand the concerns expressed by Mr. Heller, but in the view of the panel the applicant has not raised a question of law of public importance which is the test we are bound to apply under the *Supreme Court Act* and the leave application will therefore be dismissed.”

Pharmaceuticals: Notices of Compliance

Nu-Pharm Inc. v. R. (Fed. C.A., Jul. 3, 2008)(32830) Jun. 18, 2009

When is a notice of compliance required, and in what circumstances can it be overturned on judicial review.

PPSA: Priorities

Bank of Montreal v. Innovation Credit Union
(Sask. C.A., Mar. 12, 2009)(33153) Aug. 27, 2009

What is the appropriate priority arising from a general security agreement in agricultural equipment under the provincial Personal Property Registry and the federal *Bank Act*.

PPSA: Priorities

Royal Bank of Canada v. Radius Credit Union Limited
(Sask. C.A., Mar. 12, 2009)(33152)

Same summary as above.

Torts: Libel

Peter Grant, et al. v. Torstar Corporation, et al.
(Ont. C.A., Nov. 28, 2008)(32932) Feb. 18, 2009

What is encompassed in the “responsible journalism” defence.

Last Word: (SCC) Judges as Ordinary People

“Last week I opened a can of tuna fish, and threw the empty can in the garbage. Next morning, my wife sent me an e-mail in the office: ‘Rules: One, wrap all fish products before putting in garbage; Two, close blinds in living room. Sun bleaches couches; Three, put toilet seat DOWN.’ We are ordinary people.

One thing that comes from that parliamentary hearing process is that it creates a lot of publicity for the nominee. A couple of months after I was appointed, I called Air Canada on a personal matter. After the agent completed the process, she said ‘Rothstein. So you are the guy they appointed to the Supreme Court?’ I said, ‘Yes.’ She said, ‘I have a problem. I have to come to work very early, and I leave my house at 5 a.m. when it is dark. And some mornings on my way to the

bus, I run into a raccoon. I don’t like that raccoon; it scares me.’ And she said, ‘Can I kill the raccoon?’

I paused for a moment, thinking there were probably laws against killing wild animals in the city, and then wondering about self-defence and whether that would be an exception, and I end up saying, ‘Well, I don’t know.’ She said, ‘You don’t know? You are a judge of the Supreme Court! Can I or can’t I?’ Well, I retreated to the judge’s safe harbour, and explained to her that as a judge I couldn’t give legal advice. [I suspect] my answer did nothing to enhance her confidence in the administration of justice.”

Thank you: “Some Appellate Advocacy Advice”
The Advocates Journal, September 2008, page 6
Justice Marshall Rothstein, SCC



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