Table of Contents

Supreme Court of Canada Criminal Cases:

October 1st, 2016 – October 30th, 2017

SCC - Charter of Rights and Freedoms

R v Rowson, 2016 SCC 40

Heard: October 17th, 2016

Judgment: October 17th, 2016

Criminal law --- Charter of Rights and Freedoms — Arbitrary detention or imprisonment [s. 9] — Arrest or detention [s. 10] — Right to counsel [s. 10(b)] — Right to retain and instruct counsel without delay

Facts:

Rowson's vehicle struck another vehicle that had the right of way at an intersection resulting in serious injury to three passengers and killing the family dog. Alcohol was smelt by police on Rowson's breath. Rowson was put under investigative detention in the back of a police vehicle. He was not advised of his right to counsel. When Rowson was found texting, he was placed under arrest and his phone seized. He was advised of his right to counsel but was told he could not contact a lawyer at that time due to privacy concerns. Rowson was not immediately transported to the police station. Another officer checked for the smell of alcohol on Rowson's breath and did not smell any. However, once transported to the police station, another officer did smell alcohol on Rowson's breath. Upon request Rowson was given a phone book to call a lawyer and then his cell phone. His lawyer did not answer and he was given 6 minutes to wait for

his lawyer to call back. When the lawyer failed to call back, Rowson phoned two different legal aid numbers until he was able to speak briefly to a lawyer. Rowson then took a roadside screening test and failed. He again tried and was unsuccessful at contacting his lawyer. He then gave a breath sample and was over the legal limit. He was charged with impaired driving and dangerous driving causing bodily harm and blowing over 0.08.

ABQB: Breathalyzer evidence allowed and Rowson convicted of impaired driving and dangerous driving causing bodily harm.
TJ found that there were breaches of Rowson's *Charter* rights by various police officers. TJ found breach to s.9 right against arbitrary detention, and four breaches to s.10(b) right to retain and instruct counsel and right to be informed. TJ found that none of the breaches warranted excluding the breathalyzer evidence. The *Charter* breaches did not engage Rowson's s.7 *Charter* right protection against self-incrimination because the only evidence elicited from the breaches was observational evidence.

ABCA: Accused appealed. Appeal dismissed.
Breathalyzer test results should not have been excluded because it was not established that the admission of the results would bring the administration of justice into disrepute. Impact on Rowson's *Charter* protected interests was low because little to no causal connection between protected interest and the obtaining of the evidence.

SCC: Accused appealed.

Held (Majority -3 Dissent -2): Appeal dismissed.

For the same reasons as ABCA.

***R v Diamond,* 2016 SCC 46**

Heard: October 12th, 2016

Judgment: November 3rd, 2016

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Reasonable expectation of privacy —Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Reasonable grounds for belief that indictable offence about to be committed

Facts:

Diamond was pulled over for speeding. Police officer noticed wads of cash and an unsheathed hunting knife in Diamond's truck. Diamond was arrested for possession of a dangerous weapon. He was given a pat down and a bag of cocaine fell out of his clothes. Diamond was then strip searched and another 28 bags of cocaine were found.

NLPC: Accused convicted of unlawful possession of weapon dangerous to public peace and unlawful possession of cocaine for purposes of trafficking.

Voir dire hearing was conducted on the admissibility of evidence under s.8 *Charter* with regard to an alleged search leading to discovery of the knife and cocaine and under s.9 *Charter* with respect to whether detention was lawful. The

initial stop was based on a clear statutory violation, speeding. The finding of the knife was inadvertent. All the evidence was allowed.

NLCA: Accused appealed. Appeal dismissed.
Arrest was lawful since the arresting officer had reasonable and probable grounds to believe the accused had committed an indictable offence. The totality of the circumstances and not only the presence of a knife supported TJ's conclusion.

SCC: Accused appealed.

Held (Majority- 3 Dissent- 2) : Appeal dismissed.
For same reasons as NLCA.

R v Aitkens, 2017 SCC 14_; R v Peers,_ 2017 SCC 13

[Appeal from judgment reported at *R v Peers*, 2015 ABCA 407]

Heard: February 14th, 2017

Judgement: February 24th, 2017

Criminal law --- Charter of Rights and Freedoms — Right to trial by jury [s. 11(f)]

Securities --- Constitutional issues

Facts:
Accused charged with offences under the *Securities Act*. S.11(f) of *Canadian Charter of Rights and Freedoms* grants right to trial by jury where max punishment for the offence is five years in prison or more severe punishment. Accused was facing potentially five years less a day plus $5 million fine under

s.194 of the *Securities Act* and argued this was a "more severe punishment" entitling him to jury trial. Provincial court judge did not allow.

ABQB: Appeal dismissed.

ABCA: Appeal dismissed.
Five years less a day did not become "more severe punishment" just because some collateral negative consequences were added. And even if a constitutional problem with s.194, it would simply be read down to ensure no person would receive a more severe punishment than five years imprisonment through s.718.3 of the *Criminal Code* and in accordance with s.24(1) of the *Charter*.

SCC: Accused appealed.

Held: Appeal dismissed.
Accused not entitled to trial by jury for the same reasons as CA concluded.

***R v Paterson,* 2017 SCC 15**

Heard: November 2nd, 2016

Judgment: March 17th, 2017

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Authorized by law— Reasonable expectation of privacy— Charter remedies [s. 24] — Exclusion of evidence

Facts:

Officers responding to 911 call made by Paterson's girlfriend, were directed to Paterson's apartment. Paterson opened the door to his apartment and they smelt marijuana. Paterson admitted to having marijuana roaches and agreed to hand it over to police on a "no case" basis. The officers followed Paterson into his apartment for fear of him destroying the roaches, where they saw handguns and drugs in plain view. Paterson was arrested and convicted of four counts possession of a prohibited restricted firearm, three counts possession of a controlled substance for the purpose of trafficking and two counts possession of a controlled substance. When the warrant was executed, the required report was not filed within the required time period and was incomplete.

BCSC: Accused convicted.
Voir dire to determine admissibility of evidence obtained by the police as a result of their search. TJ concluded that the CL duty on police to protect life and public safety and the exigent circumstances within s.11(7) CDSA justified entry and search. Late and incomplete filing of the report was a breach of Paterson's s.8 *Charter* right against unreasonable search and seizure, but TJ refused to exclude the evidence under s.24(2) since the breach was inadvertent, not serious, impact on Paterson's rights was limited and evidence was highly reliable and crucial to Crown's case.

BCCA: Accused appealed. Appeal dismissed.

SCC: Accused appealed.

Analysis:

Confessions rule should not apply to statements tendered in the context of a voir dire under the *Charter.* Crown not required to prove the voluntariness of Paterson's statement regarding the marijuana in his residence prior to its admission at a *Charter* voir dire. Exigent circumstances in s.11(7) denotes urgency arising from circumstances calling for immediate police action to preserve evidence, officer or public safety. Those circumstances must render it impracticable to obtain a warrant. s.24(2) analysis: The nature of the *Charter* infringing state conduct was sufficiently serious to favour exclusion of the evidence. The impact of the warrantless entry on Paterson's s.8 *Charter* rights was significant and favours exclusion. The evidence is highly reliable and essential to the Crown's case so society's interest in adjudication of the case on its merits favours admitting the evidence.

Held (Majority – 5 Minority -2): Appeal allowed. Set aside the convictions and enter acquittals.

The prospect of Paterson destroying the roaches, which police hoped to seize on a no case basis with no legal consequence to Paterson, did not remotely approach s.11(7)'s threshold of exigency. Under a s.24(2) analysis, the evidence should be excluded as its admission would bring the administration of justice into disrepute.

***R v Hunt,* 2017 SCC 25**

Heard: April 25th, 2017

Judgment: April 25th, 2017

Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-charge delay — Life, liberty and security of person [s. 7] — Abuse of process

Facts:

Hunt and three others charged with various fraud related offences ten years after the opening of police investigation. Hunt applied for stay of proceedings on basis that the pre-charge delay breached their s.7 *Charter* rights. Stay was granted.

NLTD: Crown appealed. Appeal dismissed.

NLCA: Crown appealed. Appeal dismissed.

Issue: Did applications J err in finding the respondent's s.7 *Charter* right to life liberty and security of the person was breached and that a stay of proceedings was the appropriate remedy?

Analysis:

Majority: Applications J provided ample basis for concluding that the pre-charge delay in this case amounted to an abuse of process. There is no basis on which to conclude that he erred in determining that Hunt's rights under section 7 of the *Charter* were breached. Applications J applied the necessary elements of the *Babos* 3 stage test and he did not err in finding that a stay of proceedings was the appropriate remedy.

Minority: Applications J did err in finding that the Respondents' s.7 *Charter* rights were breached and in staying their charges. To meet the test for residual

category abuse of process, egregious Crown conduct distinct from, although including, misconduct which tarnishes the integrity of the judicial system must be demonstrated. There was no oppression and the lengthy pre-charge delay does not undermine the integrity of the justice system. Disagree that exacerbation of Hunt's stress as a result of delay was not in accordance with the principles of fundamental justice. The delay was due to the massive and complex investigation legitimately carried out.

SCC: Crown Appealed.

Held (Majority –6 Minority -1): Appeal allowed.
For the same reasons as the minority NLCA.

***R v Antic,* 2017 SCC 27**

Heard: December 2nd, 2016

Judgment: June 1st, 2017

Criminal law --- Charter of Rights and Freedoms — Unreasonable denial of bail [s. 11(e)]

Facts:

Antic arrested in Ontario and charged with several drug and firearm offences. Antic is a resident of Ontario but spends a lot of time in Michigan and has no assets in Canada. At bail hearing Antic's release was denied because he had no significant ties to the local community and his release plan did not adequately address the substantial flight risk he posed. On bail review, Antic offered a pledge or deposit of money and two additional sureties to satisfy the flight risk concerns.

Antic's new plan rejected. Bail judge noted s. 515(2)(e) of the Criminal *Code* permits a cash-plus-surety release only if the accused is from out of the province or does not ordinarily reside within 200 km of the place in which he or she is in custody. As an Ontario resident living within 200 km of the place in which he was detained, Mr. Antic did not qualify for this. Antic sought another bail review and bail was rejected. Upon a third review, Antic's bail was granted. Bail judge found s.515(2)(e) *Criminal Code* violates the right not to be denied reasonable bail without just cause under s.11(e) of the *Charter.*

SCC: Crown Appealed.

Issue: Does s.515(2)(e) *Criminal Code* infringe the right not to be denied reasonable bail without just cause under s.11(e) of the *Charter?*

Held: Appeal allowed.
Bail review judge erred by requiring cash deposit with surety, even though Antic had offered surety with monetary pledge. If bail review judge had applied bail provisions properly, Antic could have been granted reasonable bail. s.515(2)(e) did not have the effect of denying Antic bail, thus it does not trigger a violation of s.11(e) *Charter*.
Guidelines to adhere to when applying the bail provisions in a contested hearing: (A) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail. (B) S.11(*e*) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms. (C) Save for exceptions, an unconditional release on an

undertaking is the default position when granting release: s. 515(1). (D) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds" must be adhered to strictly. (E) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused (*sic*). (F) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms. (G)A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate. (H) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable. (I) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order. Justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case. (J) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to

the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person. (K) Where a bail review is applied for, the court must follow the bail review process set out in *St-Cloud*.

R v Cody, 2017 SCC 31

Heard: April 25th, 2017

Judgment: June 16th, 2017

Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-trial delay

Facts:

Cody was charged with drugs and weapons offences and had to wait five years for his five day trial. This was due to an impasse between Crown and Cody's first counsel over disclosure, a change in counsel, misconduct allegations pursuant to *R v McNeil*, availability of defence counsel, an error in an agreed statement of facts, a recusal application.

NLTD: TJ found a breach of Cody's s.11(b) *Charter* right and stayed the proceedings.

The delay exceeds the *Morin* guideline of 16-18 months for a superior court case. Cody suffered "real and substantial actual prejudice" due to the bail conditions which affected his liberty, his employment and his mental state. There could also be prejudice to Cody's fair trial interests due to the passage of time. Nothing in Cody's conduct suggested he was deliberately delaying the proceedings. The

prejudice suffered by Cody due to the delay outweighed society's interest in trial on the merits.

NLCA: Crown appealed. Appeal allowed. Reversed TJ's decision and ordered a new trial.
Jordan decision was released by SCC which would allow certain deductions to be accounted for. This lead the net delay to be well below the presumptive ceiling.

SCC: Accused appealed.

Analysis:
Jordan framework directs that after total delay is calculated, delay attributable to the defence gets subtracted. Defence delay divided into 1) Delay waived by defence: can be explicit or implicit but is informed clear and unequivocal 2) Delay that is caused solely by the conduct of the defence: any defence conduct that has solely or directly caused the delay. Goal is to prevent the defence from benefitting from its own delay-causing action or inaction. The only deductible delay is that which a) is solely or directly caused by the accused and b) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. If the delay is over the 30 month (superior court) or 18 month (provincial court) ceiling, it is presumptively unreasonable subject to exceptional circumstances. Two categories of exceptional circumstances 1) discrete events, reasonably unforeseeable or unavoidable 2) particularly complex cases. Potentially a third category of transitional considerations.

Held: Appeal allowed. Stay order restored.

Even after accounting for the two periods of time deducted as defence delay [1. Cody's change in counsel 2. Cody's recusal application alleging reasonable apprehension of bias] and for the discrete events [the *McNeil* disclosure], the net delay still exceeds the 30 month ceiling.

SCC - Evidence

***R v Awer,* 2017 SCC 2**

Heard: January 17th, 2017

Judgement: January 17th, 2017

Criminal law --- Offences — Sexual assault — General offence — Evidence — Miscellaneous --- Opinion — Opinion evidence in particular matters — Identification — DNA evidence

Facts:

Complainant was sexually assaulted at a party. Complainant identified Awer as her assaulter. Complainant's DNA was found on Awer's penis. Sperm found on complainant did not match Awer. Crown and defence each called their own DNA expert to give evidence. TJ convicted Awer of sexual assault noting that the sperm found on complainant's body was from unidentified Male #1 and Awer was the second assailant. TJ noted he accepted Crown's DNA expert's evidence and preferred it over defence's expert. TJ found Awer was not a credible witness and did not believe his evidence.

ABCA: Accused appealed. Appeal dismissed.

TJ was entitled to compare quality of Awer's suggested inference (that there were many innocent explanations for the presence of complainant's DNA on him) with the direct testimony and to find his testimony to be "incredible, self-serving, unbelievable and illogical". TJ was entitled to attribute weight to Crown's DNA expert's opinion.

SCC: Accused appealed.

Held: Appeal allowed. Conviction quashed, new trial ordered.
TJ subjected testimony of the defence DNA expert to intense scrutiny, while accepting at face value evidence of Crown's DNA expert, without subjecting it to any scrutiny and used it as an important piece of evidence in finding guilt. The materially different levels of scrutiny was unwarranted and tended to shift the burden of proof onto Awer.

***R v Brown,* 2017 SCC 10**

Heard: February 20th, 2017

Judgement: February 20th, 2017

Criminal law --- Offences — Murder — Second degree murder — Evidence — Post-trial procedure — Evidence — Fresh evidence — Factors to be considered — Availability at trial

Facts:

Brown attended a casino with friends. They got into a fight with another group which included the victims. After the fight, the victims were shot with two

different guns which were never recovered. Brown and his friend Reid were charged. No eyewitnesses. No direct evidence. Brown's conviction solely on statements made by him after the shootings contained in Brown's friend Sander's KGB statement which was recanted at trial.

ABQB: TJ accepted the KGB statement and convicted Brown.

ABCA: Upheld the conviction. Supreme Court remanded the appeal back down to ABCA.
New evidence was allowed: Witness Sahal's KGB statement. New trial ordered.

SCC: Crown appealed.

Held: Appeal dismissed. Sahal's KGB statement was reasonably capable of belief and could reasonably have affected the outcome.

***R v Bingley,* 2017 SCC 12**

Heard: October 13th, 2016

Judgment: February 23rd, 2017

Evidence --- Opinion — Experts — Admissibility — Miscellaneous

Facts:
Bingley seen driving erratically and hit a car. Police noted signs of impairment and conducted a roadside screening test which Bingley passed. A DRE then conducted a field sobriety test which Bingley failed. He was arrested for driving while impaired by a drug. At police station the DRE conducted a drug recognition

evaluation and Bingley admitted he had smoked marijuana and taken two Xanax in the previous 12 hours. DRE concluded Bingley was impaired by a drug. At trial, TJ said no voir dire due to s.254(3.1) *Criminal Code of Canada*. DRE testified as an expert regarding results of the evaluation. However, accused was acquitted. Crown appealed. Appeal allowed, new trial ordered. At second trial, TJ said s.254(3.1) does not allow for automatic admissibility of DRE's evidence and held that DRE could not be a qualified expert because not trained in the science underlying the procedure. DRE evidence was not allowed. Accused acquitted. Once again Crown appealed. Appeal allowed, new trial ordered.

ONCA: Accused appealed. Appeal dismissed.
DRE's expert evidence admissible without a voir dire.

SCC: Accused appealed.

Analysis:
Common law rules of evidence apply to s.254(3.1). Test for expertise is merely knowledge outside the experience and knowledge of the trier of fact.

Held (Majority-5 Dissent-2): Appeal dismissed. Order for new trial confirmed. DRE has expertise outside the experience and knowledge of the trier of fact. The scope of DRE's expertise is in the application of the 12-step evaluation, not in its scientific foundation.

R v B(S), 2017 SCC 16

Judgment: March 22nd, 2017

Evidence --- Examination of witnesses — Cross-examination — Collateral facts — Previous statements — Countering allegation of recent fabrication —Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Right of appeal of provincial Attorney-General — Judgment or verdict of acquittal

Facts:

SB charged with 10 offences in total including five counts of assault, two counts of sexual assault and one count of assault with a weapon on the complainant CM with whom SB was in a relationship at the time. SB applied to cross-examine CM on prior sexual activity under s.276 *Criminal Code of Canada*. TJ allowed the application in part, allowing text messages concerning an affair by CM during her marriage to SB; and the transcript of the complainant and SB's sex video.

NLTD: Accused acquitted of all charges.

NLCA: Crown appealed. Appeal dismissed.

Majority: In the circumstances of the case, the text messages had the effect of conjuring up the myth that due to her prior sexual activity, CM is more likely to have consented to sexual intercourse with SB being a woman of "easy virtue". TJ erred in a) permitting the degree of cross-examination of the complainant with respect to the text messages and sex video b) refusing the Crown the right to recall the complainant and to examine other witnesses with a view to rebutting a suggestion of recent fabrication. Notwithstanding the serious errors made by the TJ the jury verdict should not be set aside. CM, by her untruthfulness and the

inconsistencies in several areas of her testimony, gravely undermined her credibility which could properly give rise to a reasonable doubt.

Minority: Agreed with the majority's conclusion about where TJ erred. Credibility of CM appears to have been central to the verdicts. Had the jury not been exposed to the impugned evidence and had they been entitled to consider the recent fabrication rebuttal evidence, they might well have reached the opposite conclusion.

SCC: Crown appealed.

Held: Appeal allowed, new trial ordered.
For same reasons as NLCA dissent.

***R v Bradshaw,* 2017 SCC 35**

Heard: November 3rd, 2016

Judgement: June 29th, 2017

Evidence --- Hearsay — Principled approach — Reliability

Facts:

Two victims killed. Police suspected Thielen and ran a Mr. Big operation targeting him. Thielen first confesses he shot both victims then later claimed Bradshaw shot one of the victims. Bradshaw was recorded on audio telling Thielen he participated in both murders. The day after Thielen was arrested he described the murders and directly named Bradshaw. He then re-enacted the murders implicating Bradshaw in both. Bradshaw and Thielen initially both charged with 2

counts first degree murder. Thielen plead guilty to second degree murder before trial. Thielen refused to give testimony at Bradshaw's trial.

BCSC: TJ admitted hearsay statement (the re-enactment video) of Thielen. Found the statement was necessary and sufficiently reliable to be admitted. The re-enactment was voluntary, incriminating, made after Thielen received legal advice and was corroborated by extrinsic evidence.

BCCA: Accused appealed. Appeal allowed, vacated the convictions and ordered new trial.
TJ erred in admitting hearsay statement for failing to meet reliability threshold.

SCC: Crown appealed.

Issue: When can TJ rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?

Analysis:

To determine whether corroborative evidence is of assistance in the substantive reliability inquiry TJ should: 1) Id material aspects of the hearsay statement that are tendered for their truth. 2) Id the specific hearsay dangers raised by those aspects of the statement in the particular circumstance of the case. 3) Based on the circumstances and dangers, consider alternative, even speculative, explanations for the statement. 4) Determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules

out these alternative explanations and the only likely explanation left is the declarant's truthfulness about the material aspects of the statement.

The circumstances in which Thielen made the hearsay statement that TJ relied on as corroborative evidence, while relevant, do not provide a circumstantial guarantee of trustworthiness. Thielen had motive to lie, he was able to plead to a lesser charge.

Held (Majority- 5 Dissent- 2) : Appeal dismissed. New trial ordered.
The corroborative evidence relied on by TJ was of no assistance in establishing threshold reliability.

***R v Alex,* 2017 SCC 37**

Heard: December 8, 2016

Judgment: July 6th, 2017

Criminal law --- Offences — Driving/care and control with excessive alcohol — Presumption of alcoholic content at time of offence — Reasonable and probable grounds — Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Reasonable grounds—Charter remedies [s.24 — Exclusion of evidence

Facts:

Alex failed a roadside screening test for drinking and driving, breath sample was significantly over the legal limit. Alex charged with driving "over 80" contrary to s.253 of the *Criminal Code of Canada.* Alex argued the breath sample demand was unlawful because police lacked reasonable grounds to make it, and absence of reasonable grounds for the demand deprive the Crown of the s.258 evidentiary

shortcuts. TJ agreed there was an absence of reasonable grounds but applied *Rilling* and allowed Crown to file certificate of analysis as proof of Alex's blood-alcohol.

BCSC: Accused appealed. Appeal dismissed. *Rilling* is binding.

BCCA: Accused appealed. Appeal dismissed. *Rilling* is binding.

SCC: Accused appealed. Argues that *Rilling* is no longer good law.

Analysis:
No need to determine whether *Rilling* is good law. According to modern principles of statutory interpretation Crown need not prove the demand was lawful in order to take advantage of the evidentiary shortcuts. A lawful demand is not a pre-condition to the s.258 evidentiary shortcuts. Evidentiary shortcuts were designed by Parliament to simplify and streamline drinking and driving proceedings. A lawful demand requirement does not further Parliament's intent, rather it serves to frustrate it.

Held (Majority-5 Minority- 4) : Appeal dismissed.

***R v Durham Regional Crime Stoppers Inc. and Keenan Corner,* 2017 SCC 45**

Heard: January 20th, 2017

Judgment: September 22nd, 2017

Criminal law — Evidence — Informer privilege — Anonymous informer — Whether informer privilege applies to anonymous tip made to Crime Stoppers by caller with intention of interfering with administration of justice — Procedure for court to follow when Crown challenges claim of informer privilege over anonymous tip made to Crime Stoppers.

Facts:

Following a fatal shooting, Crime Stoppers received an anonymous tip from a caller reporting he observed 4 men in the backyard of a house neighbouring the crime scene, throw things into a lake. Corner was later charged with second degree murder for the shooting. Crown brought application to introduce evidence of the anonymous tip to show that it was made by Corner to divert attention away from himself during the investigation. Corner denied making the call. Corner and Crime Stoppers submitted the call was covered by informer privilege. At an in camera hearing, judge found the privilege did not apply.

SCC: Accused and Crime Stoppers appealed.

Analysis: Where the Crown challenges the validity of a privilege claim over a tip, the court must consider whether privilege in fact exists at an *in camera* hearing. The assumption that privilege exists also means that this *in camera* hearing will likely require an *ex parte* proceeding, in which the accused and defence counsel are excluded. Whether the privilege exists will often turn on what the caller said, and whether it conveyed an intention to further criminal activity or interfere with the administration of justice. Application judge has wide discretion when it comes

to procedure and a reasonable determination in that regard should be accorded considerable deference.

Held: Appeal dismissed.
It was reasonable for the application judge to find, on a balance of probabilities, that Corner had made the call and that he had done so with the intention of diverting attention away from himself during the investigation.

SCC - Manslaughter

***R v Natewayes,* 2017 SCC 5**

Heard: January 19th, 2017

Judgment: January 19th, 2017

Criminal Law

Facts:
Natewayes' boyfriend involved in ongoing dispute with CV over drug deal. Natewayes drove her boyfriend and his friends to CV's house and waited in the car as they injured CV and killed his cousin. Natewayes was charged with manslaughter and breaking and entering with intent to commit indictable offence.

SKQB: Accused acquitted of manslaughter and convicted of breaking and entering with intent.

TJ found Natewayes knew her passengers were going to break into CV's home with intent to assault. She intended to assist them. But she could not have foreseen the death of CV's cousin as he was not the target.
SKCA: 1) Crown appealed the manslaughter acquittal: Appeal allowed. 2) Accused appealed the B&E conviction: Appeal dismissed. →B&E conviction was set aside and verdict of manslaughter was directed.
TJ erred by proceeding on basis that Natewayes had to have foreseen risk of harm to deceased before she could be convicted of manslaughter. Criminal liability as party under s.21 *Criminal Code of Canada* does not require the harm be foreseeable in relation to the specific individual.

SCC: Accused appealed.

Held: Appeal Dismissed.
For the same reasons as SKCA.

SCC - Officially Induced Error of Law

***R c Bédard,* 2017 SCC 4**

Heard: January 19th, 2017

Judgment: January 19th, 2017

Criminal Law

Facts:
Two accused who worked for the department of wildlife caught Mr. Murray breaking some sort of fish law. They went into Murray's house, there was an

altercation, and somehow Mr. Murray was injured. Issue of whether they were within their powers granted by law and the force used was reasonable or if they acted outside of their powers, could they use the defence of officially induced error of law.

SCC: Accused appealed.

Held: Appeal dismissed.
The defence of officially induced error of law was intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her. Reservations about the possibility of a government official raising this defence in relation to the performance of his or her duties. The conditions under which this defence is available were not met, particularly the 3rd and 4th conditions, that advice obtained came from an appropriate official and that the advice was reasonable.

SCC - Perjury

***R v Robinson,* 2017 SCC 52**

Heard: October 30th, 2017

Judgment: October 30th, 2017

Criminal law --- Offences — Perjury — Elements — Intention to mislead

Facts:

Robinson was one of four officers involved in death of man at airport who was tasered. Robinson and the other officers were alleged to have misled investigators as to the deceased's actions in order to justify their own. Accused was charged with 8 averments of perjury and found guilty of two.

BCCA: Accused appealed. Appeal dismissed.
TJ was unable to accept differences between Robinson's testimony and actual timeline of events. TJ properly rejected Robinson's testimony. TJ's conclusions were supported by evidence and was entitled to reject alternative inferences proposed by defence. TJ not bound by conclusions reached in trials of other officers. Criminal responsibility was individual even if stemming from the same incident. TJ properly found that Robinson had motive to lie, supported by finding that officers discussed evidence and tailored stories.

SCC: Accused appealed.

Held (Majority -6 Minority -1): Appeal dismissed.
For the same reasons as BCCA.

***R v Millington,* 2017 SCC 53**

Heard: October 30th, 2017

Judgment: October 30th, 2017

Criminal law --- Trial procedure — Adjudication — Conviction — Sufficiency of reasons for conviction — Adjudication regarding evidence --- Offences —

Perjury — Elements — Knowledge of falsity of statement — Preliminary matters — Powers of court — Stay of proceedings — Miscellaneous — Evidence

Facts:

Millington one of four officers involved in death of man at airport who was tasered. Millington repeatedly fired a taser at the deceased who only spoke Polish. At the hearing all four officers provided testimony that was materially inaccurate as proven by a civilian video. Millington was convicted of perjury with respect to his statements about what he perceived and whether he discussed details of the incident with other officers.

BCCA: Accused appealed. Appeal dismissed.

Question of whether Millington lied about what he perceived in his encounter was a question of fact to be decided on the basis of all evidence. TJ made no palpable and overriding error in making findings of fact rejecting arguments that Millington could have misperceived what was happening. Cases on making allowance for the possibility of police officers misjudging situations in the exigency of the moment are of limited use where the issue is not reasonableness of force used, but whether the accused was telling truth at the inquiry about his perception. TJ relied on precedent as framework for analyzing whether the only reasonable inference to be drawn from the similarities in officers' statements and notes was that they colluded. Findings regarding the other officer in other proceedings did not amount to a positive finding of fact that the officers did not discuss details of the incident. TJ did not misapprehend evidence on the motive to lie or in concluding that the officers had incentive to have a brief discussion before giving statements.

SCC: Accused appealed.

Held (Majority -6 Minority -1): Appeal dismissed.

For the same reasons as the BCCA.

SCC - Post Trial Procedure

***R v Clark,* 2017 SCC 3**

Heard: January 18th, 2017

Judgment: January 18th, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Right of appeal of Crown —Pre-trial procedure — Search with warrant — Duty of justice— Information — Substantive requirements — Miscellaneous

Facts:

RCMP officer working the night shift applied for a warrant to investigate theft of electricity. As it was 2am and the Kelowna Court House was closed, the officer applied for a telewarrant. The judicial justice phoned the officer asking why he was seeking to utilize the telewarrant process and after hearing the officer's reasons, he advised the officer to include them in the information to obtain. During execution of the warrant police discovered a large marijuana grow-operation. Clark was charged with production of marijuana, possession of marijuana for the purposes of trafficking and theft of electricity.

BCSC: Accused acquitted of all charges.

TJ held a voir dire and found the telewarrant invalid due to the fact that the JJ had inappropriately assisted the RCMP officer in the preparation of the ITO.

BCCA: Crown appealed. Appeal allowed. New trial ordered.

Issue: 1) Was the impartiality of the JJ compromised by a conversation he had with a police officer seeking a telewarrant? 2) Was the impracticability requirement met with respect to the telewarrant that was issued?

Analysis: 1) The JJ did no more than advice the officer to fully set out his reasons for using the telewarrant procedure. No reason to believe the presumption of judicial impartiality had been displaced because of it. 2) The impracticability requirement of the telewarrant procedure is concerned with whether it is practicable to make an in-person application at the time the application is brought and does not require an immediate need for a warrant be demonstrated. Court House was closed, obvious a JJ would not be available in-person. Impracticability requirement was met. Telewarrant was properly issued.

SCC: Accused appealed.

Held: Appeal dismissed.
For the same reasons as BCCA.

***R v Oland,* 2017 SCC 17**

Heard: October 31, 2016

Judgment: March 23, 2017

Criminal law --- Post-trial procedure — Release pending appeal — Successive applications — Indictable offence — Factors considered — Public interest

Facts:

Oland, no prior criminal background, educated, husband and devoted father, bludgeoned his father to death. He was arrested and charged with second degree murder. Following a contested hearing, Oland was released on bail pending trial. At trial Oland was convicted of second degree murder and was sentenced to life imprisonment with no chance of parole for 10 years. Oland filed a notice of appeal from conviction and applied under s.697(3) *Criminal Code of Canada* for bail pending the determination of his appeal.

NBCA: Dismissed the application for release pending appeal.

Appeal J found Oland discharged his onus on the first two criteria for release s.679(3)(a) and (b) *Code:* his appeal was not frivolous and he would surrender into custody as required. S.679(3)(c) *Code* Public Interest criteria J divided into 1) Public safety: Oland posed no danger to the public at large. 2) Public confidence in administration of justice: gravity and brutality of the offence weighed in favour of Oland's detention.

NBCA Review Panel: Accused applied under s.680(1) *Code* for a review.

Application for review dismissed.

Panel adopted a deferential approach to the review. Oland failed to show any error in the reasons of the appeal J that warranted interference and did not persuade them that his detention was clearly unreasonable.

SCC: Accused appealed.

Analysis:

Potential issue of mootness since Oland's appeal from conviction was allowed, a new trial was ordered and he was granted bail pending the re-trial. However, all agreed that the Court would proceed to hear the appeal on its merits.

Appeal J should balance public interest in reviewability with public interest in enforceability. In assessing enforceability consider seriousness of the crime (the more serious, the greater risk to public confidence if accused released on bail). In assessing reviewability interest, determine the strength of an appeal and whether the grounds clearly surpass the minimal standard required to meet the "not frivolous" criterion. Where public safety or flight concerns are negligible and the grounds of appeal clearly surpass the "not frivolous" criteria, the public interest in reviewability may well overshadow enforceability interest even in the case of a serious offence.

Panel reviewing a decision of a single judge should 1) in the absence of a palpable and overriding error, show deference 2) intervene and substitute in their decision where the judge erred in law or principle and the error was material in the outcome 3) in the absence of legal error, intervene and sub in their decision where the decision of the judge was clearly unwarranted.

Chief Justice should consider a review where it's arguable the judge committed material errors of fact or law in arriving at the decision or that the decision was clearly unwarranted in the circumstances.

Held: Appeal allowed.

Oland was not a flight risk, his offence leaned more towards manslaughter, there were no public safety concerns and his grounds of appeal were "clearly arguable".

***R v Bourgeois,* 2017 SCC 49**

Heard: October 13th, 2017

Judgment: October 13th, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Appeal from unreasonable verdict

Facts:

Bourgeois and complainant met at a bar and began texting back and forth. They went to a party together and as Bourgeois was driving the complainant home, he stopped and sexually assaulted her. The texts were introduced as evidence of consent. TJ rejected the suggestion that the text from complainant's mother calling her a liar should result in the conclusion that the complainant was lying when she said she did not consent to have sex with Bourgeois. TJ concluded that the texts showed Bourgeois was not willing to take no for an answer.

ABCA: Accused appealed. Appeal dismissed.

The verdict of TJ was not unreasonable.

SCC: Accused appealed.

Held: Appeal dismissed.

TJ did not reach his decision by an illogical or irrational reasoning process and his verdict was not unreasonable within the meaning of s.686(1)(a)(i) *Criminal Code.*

SCC - Sentencing

***R v Anthony-Cook,* 2016 SCC 43**

Heard: March 31st, 2016

Judgement: October 21st, 2016

Criminal law --- Offences — Manslaughter — Sentencing — Adult offenders — Miscellaneous — Sentencing — Sentencing hearing — Joint submissions

Facts:

Accused A-C attended a drop-in center for people with mental health and addictions issues. The victim Gregory was also present. A-C was asked to leave for causing a disturbance and encountered Gregory outside the center. They got into a verbal argument which then got physical. A-C punched Gregory who fell, fractured his skull and died. A-C was arrested and held at a mental health facility for 2 months. He was then charged with manslaughter. He was released on bail but breached his curfew condition. He was then held in custody for 11 months. He plead guilty following an agreement with the Crown in which he would serve 18 months more and no probation. A-C has a criminal record and suffers from refractory psychotic disorder.

BCSC: TJ rejected the joint submission.

TJ noted he had serious reservations about the joint submission and invited A-C to withdraw his guilty plea, which A-C declined. Joint submission did not "give adequate weight to the principles of denunciation, deterrence, and protection of the public." 1) TJ noted council had mistakenly overestimated the amount of credit to which A-C was entitled for time spent in pre-sentence custody by 6 months. 2) TJ concerned that without a probation order the sentence would not adequately protect the public. Thought it important that A-C should refrain from using non-medical drugs.

BCCA: Accused appealed. Appeal dismissed.

It was unnecessary to decide the test for departing from a joint submission. TJ did not err in his assessment of the appropriate range of sentence and it was open to him to decline to give A-C credit for time spent in the mental health facility.

SCC: Accused appealed.

Issue: Did TJ err in departing from the joint submission proposed by the parties? What legal test should TJs apply in deciding whether it is appropriate in a particular case to depart from a joint submission?

Analysis:

Considered four different tests and concluded the "public interest test" is the proper test to measure acceptability of a joint submission. A joint submission should not be rejected lightly, it is a high threshold. TJ should not depart from

joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. 1) TJs should approach joint submissions on an "as-is" basis. If parties have not asked for a particular order TJ should assume it was considered and excluded from the submission. If counsel did not include a mandatory order, TJ should inform counsel. 2) TJ should apply public interest test when they are considering "jumping" or "undercutting" a joint submission. 3) The greater the benefits obtained by the Crown and more concessions made by the accused, the more likely it is that TJ should accept the joint submission despite appearing very lenient. Crown and accused must provide TJ with a full description of the facts relevant to the offender and the offence. 4) If TJ not satisfied with the proposed sentence, an opportunity must be afforded to counsel to make further submissions in attempt to address TJ's concerns before the sentence is imposed. 5) If TJ's concerns are not alleviated, TJ may allow the accused to apply to withdraw their guilty plea. 6) TJs must provide clear and cogent reasons for departing from the joint submission.

Held: Appeal allowed. A-C's sentence brought to conform with the joint submission.

There was no basis for TJ to sub his opinion for the agreement of counsel. The sentence was not one that would bring the administration of justice into disrepute, nor was it contrary to public interest. TJ's deviation from the recommended sentence by only 6 months was little more than tinkering.

SCC - Sexual Offences

***R v George,* 2017 SCC 38**

Heard: April 28th, 2017

Judgement: July 7th, 2017

Criminal law --- Offences — Sexual interference — Specific defences — Belief that complainant over fourteen years of age

Facts:

Accused Ms. George (35 years of age) had sex with Complainant C.D. (14 years of age). Sexual activity was apparently consensual, both were willing participants. C.D. initiated contact. Ms. George asked him to stop several times, however, later consented. The RCMP found out about the incident through Ms. George when she applied to join the force. Ms. George believed C.D. to be around 17 because he looked that age, acted mature, smoked and bought cigarettes, hung out with her son's crew who were 17+. Ms. George was charged with 1) sexual interference and 2) sexual assault. Ms. George argued mistake of age s.150.1(4) *Criminal Code of Canada* which required Ms. George take "all reasonable steps" to ascertain the complainant's age.

SKQB: Acquitted Ms. George of both offences.

The reasonable steps inquiry is contextual. TJ considered C.D.'s physical appearance, behavior, activities, age and appearance of C.D.'s social group and circumstances in which Ms. George observed C.D. TJ also considered the level of comfort with which C.D. approached the sexual encounter which suggested a level of maturity.

SKCA: Crown appealed. Appeal allowed, quashed the acquittals and ordered a new trial.

SCC: Accused appealed.

Issue: 1) Did the TJ make any legal errors in his reasonable step analysis? 2) If yes, were those errors sufficiently material to justify appellate intervention?

Analysis: TJ made no legal errors.
1) When determining the relevance of evidence in this context both its purpose and its timing must be considered. Evidence demonstrating steps taken after sexual activity to ascertain age is irrelevant to the reasonable steps inquiry but evidence properly informing the credibility or reliability of any witness even if it arose after the sexual activity may be considered. Evidence demonstrating the reasonableness of the accused's perception of age before sexual contact is relevant. TJ considered other evidence that did not precede the encounter. Evidence an accused tenders does not have to precede the encounter. 2) TJ drew factual inference that C.D.'s appearance had not changed between age 14 and 17 despite Ms. George not providing physical evidence. Factual inferences are necessary means through which triers of fact consider all evidence before them. Even if the inferences TJ made amounted to legal errors they would not have justified appellate intervention.

Held: Appeal allowed. Ms. George's acquittals restored.

***R v Olotu,* 2017 SCC 11**

Heard: February 21st, 2017

Judgment: February 21st, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Appeal from unreasonable verdict — Offences — Sexual assault — Sexual assault causing bodily harm — Evidence — Miscellaneous

Facts: Olotu engaged in anal intercourse with M.M. who has no memory of the event due to intoxication. Crown's case composed of M.M.'s assertion that she would never engage in such an act, a series of texts and conversations between Olotu and M.M. indicating it was not consensual, M.M's testimony as to her condition after the event, photos of her bruised body and doctor's evidence. Olotu testified that M.M. initiated.

SKCA: Accused appealed. Appeal dismissed.

1) TJ did not misapprehend the evidence or fail to consider the totality of the evidence. It was not inconsistent to find that the complainant did not consent and also to find that the accused did not stop when the complainant asked him to. 2) TJ did not allow the burden of proof to shift from the Crown to the accused. No evidence TJ impermissibly believed M.M. and then discredited Olotu.

SCC: Accused appealed.

Issue: 1) Did TJ misapprehend the evidence of fail to consider the totality of the evidence resulting in a miscarriage of justice under s.686(1)(a)(iii) of the *Criminal*

Code of Canada? 2) Was there an alleged Beaudry error in that TJ reached his decision by an illogical or irrational reasoning process leading to an unreasonable verdict within the meaning of s.686(1)(a)(i) of the *Criminal Code*?

Held: Appeal dismissed.

For the same reasons as SKCA: 1) No 2) No.

SCC - Trial Procedure

***R v K(C),* 2016 SCC 41**

Heard October 18th, 2016

Judgment: October 18th, 2016

Criminal law --- Trial procedure — Charging jury or self-instruction — Review of evidence — Review of particular evidence — Credibility of witnesses

Facts:

Complainant, AY, claimed that when she was 12, her step-mother's nephew, KC, sexually assaulted her. She tried to phone her father and after a few tries her father picked up. AY did not mention the assault but simply asked when her father was coming home. 10 months later AY sent an email to her father describing what had happened. At the time of the trial AY was 17. AY's email differed from her video evidence at trial. KC was charged with sexual assault and sexual interference and was convicted of sexual interference with the sexual assault charge being stayed by the rule. At trial, the credibility of AY was brought under question by KC. In her instructions to the jury, TJ stated that "it is the memory of a 12-year-old you are really considering."

ONCA: Accused appealed. Appeal allowed. Conviction set aside, new trial ordered. TJ erred in law in her instructions to the jury on AY's memory and that those instructions could have created confusion for the jury in assessing AY's credibility.

SCC: Crown appealed.

Held: Appeal allowed. Convictions restored.
TJ's charge to the jury, as a whole, conveyed the correct instruction on the proper approach to assessing AY's evidence and credibility.

***R v Clifford,* 2017 SCC 9**

Heard: February 17th, 2017

Judgement: February 17th, 2017

Criminal law --- Trial procedure — Charging jury or self-instruction — Direction on alibi evidence — Trial procedure — Adjudication — Conviction — Sufficiency of reasons for conviction — Adjudication regarding evidence

Facts:
Clifford fathered a child of complainant Dearden's daughter Diana and had a nasty custody battle. Clifford accused of setting Dearden's garage on fire which destroyed trees in his orchard as well. Clifford was charged with 1) arson and 2) mischief.

BCSC: TJ convicted Clifford

TJ looked at evidence from emails sent by Clifford to Diana illustrating hostility towards the family; an incident of spikes being scattered on Dearden's driveway; graffiti insulting Dearden in a nearby park; evidence that Clifford had given a false alibi to the RCMP.

BCCA: Appeal dismissed.
TJ allowed to place some weight on false alibi given by Clifford as evidence of guilt. Also, not inappropriate for TJ to consider whether it was possible that Clifford wrote graffiti and placed caltrops on the driveway. Was not similar fact evidence supporting conviction.

SCC: Accused appealed.

Held: Appeal dismissed.
Re-examination is not warranted in this case, particularly where neither party has asked to depart from jurisprudence.

Manitoba Court of Appeal Criminal Cases:

October 1st, 2016 – October 30th, 2017

MBCA - Charter of Rights and Freedoms

***R v Kuzyk,* 2016 MBCA 97**

Heard: October 3rd, 2016

Judgment: October 3rd, 2016

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Stay of proceedings

Facts:

Kuzyk was charged with possession of cocaine for purpose of trafficking and possession of proceeds of crime. A search warrant for his residence was obtained by an officer based on information provided by confidential informant. After preparing information to obtain a warrant, the officer destroyed notes he'd made of his conversation with the informant. At trial, Kuzyk sought judicial stay of proceedings under s. 24(1) *Canadian Charter of Rights and Freedoms* on the basis that the officer's actions breached his right under s. 7 *Charter* to make full answer and defence. TJ found breach of s. 7 rights, but did not grant stay of proceedings and convicted Kuzyk.

MBCA: Accused appealed convictions.

Issue: Did TJ err by concluding that this was not one of the "clearest of cases" in which the extraordinary remedy of a stay of proceedings should be granted?

Held: Appeal dismissed.

In determining whether to grant stay, TJ correctly applied *R. v. O'Connor* test. TJ turned her mind to deficiencies in Crown's case, including strengths and weaknesses in officer's evidence, and weighed evidence appropriately. Given evidence before her and overall context of case, TJ made reasonable findings of fact and credibility that could not be described as palpable and overriding errors. TJ made no misapprehensions of fact or law, nor was her decision so clearly wrong as to amount to an injustice. No basis for appellate intervention.

R v Willis, 2016 MBCA 113

Heard: May 4th, 2016

Judgment: November 30th, 2016

Criminal law --- Defences — Duress, compulsion or coercion — Excluded offences— Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Moral involuntariness— Overbreadth--- Trial procedure — Charging jury or self-instruction — Direction on onus and reasonable doubt — Specific defences — Intoxication--- Offences — Murder — First degree murder — Planned and deliberate

Facts:

Willis getting death threats over drug debt. Dealers who were threatening him also wanted young woman killed for unrelated reasons. To avoid threat, Willis took MDMA and stabbed the woman 30 times in parking lot, killing her. At trial

for first degree murder, Willis sought to put forward defence of duress based on claim that it was situation of "kill or be killed". S.17 of *Criminal Code* prohibited reliance on defence of duress for principal or co-principal charged with murder. Willis brought unsuccessful challenge to this law on basis of s. 7 of *Canadian Charter of Rights and Freedoms*. He was convicted.

MBCA: Accused appealed.

Held: Appeal dismissed.

No persuasive authority or reasonably foreseeable hypothetical that raised concern that Parliament's decision to remove defence of duress from offence of murder would make it inevitable that person facing sufficiently grave threat would have no realistic choice but to succumb to threat and murder innocence third party. TJ was correct in deciding that murdering an innocent person can never satisfy proportionality requirement of moral involuntariness, and thus allow for offence of murder committed by principal or co-principal to be excused. TJ did not err by considering proportionality in evaluating the constitutionality of the statutory exclusion. Object of law was to prohibit balancing life against life. Law was not too broad in its effect. Because it was limited to principals and co-principals, it did not capture conduct that bore no relation to its purpose. It was difficult to see how certain death was a proportionate response to uncertain threat from another. It was unrealistic to evaluate law of duress on assumption that amoral tyrant, prepared to compel murder, would piously keep their word once innocent person was murdered. Huge gap between harm inflicted and benefit accrued.

Issue over instructions on common sense inference and intoxication. There was no objection to jury instructions on effect of evidence of intoxication as to common sense inference jury could draw in deciding Willis's state of mind from his actions for purposes of deciding whether he had requisite state of mind to be convicted of murder. Defence was content with proposed jury instructions before trial judge gave them. Evidence jury heard about Willis's intoxication at time of offence was not extensive or seemingly compelling. TJ properly explained that common sense inference was not a conclusion jury "must reach", or the only method they could use to determine whether Willis had requisite intent for murder. TJ properly explained that if they had reasonable doubt about Willis's intent due to consumption of MDMA, they could not rely on common sense inference.

TJ did not make "unwarranted disparagement" of evidence that had effect of withdrawing defence to first degree murder from jury. TJ repeated his explanations as to difference in law between meanings of planning and deliberation and requirement that each must be separately proven for first degree murder.

R. v. Grant 2017 MBCA 84

Judgment: September 5, 2017

Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-trial delay

Facts:

The accused charged with a speeding offence applied for leave to appeal the decision of the summary conviction appeal judge, who determined that a delay of near 18 months did not infringe her section 11(b) *Charter* right.

Analysis:
A Motion Judge entered a stay of proceedings because of the delay. Between the time that the matter was decided in provincial court and the time that it was before the summary conviction appeal judge, the Supreme Court of Canada released its decision in *R. v. Jordan*, in which the Court set a ceiling of 18 months' delay from the time a charge is laid until the time of the trial for offences prosecuted in provincial court. Applying *Jordan*, the summary conviction appeal judge held that the delay in this case was not unreasonable, noting that the trial date was scheduled within the presumptive ceiling of 18 months.

The MBCA noted that the criteria for granting leave to appeal from a summary conviction appeal are: (1) the ground of appeal must involve a question of law alone; (2) it must raise an arguable matter of substance; and (3) the arguable matter must be of sufficient importance to merit the attention of the full Court. The Court found that all criteria were met in this case.

The Court noted that *Jordan* is a recent decision and its application in the context of this case, and cases similar to it, "involves a matter of substance that is of sufficient importance to merit the attention of this Court", and that one of the roles of this Court is to settle the law.

Conclusion:
The Court granted the accused leave to appeal on the following questions:

(1) Did the summary conviction appeal judge err in law in applying the framework established in *Jordan* for determining whether there has been a breach of section 11(b) of the *Charter*?
(2) Did the summary conviction appeal judge err in law in applying the transitional provisions in *Jordan* including his consideration of the institutional delay that was reasonably acceptable under the *Morin* framework?

R v. Ackman 2017 MBCA 78

Judgment date: August 28, 2017

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Declaration of invalidity

Criminal law --- Offences — Prostitution and related offences — Living on avails of prostitution — Miscellaneous

Criminal law --- Trial procedure — Charging jury or self-instruction — Direction on corroboration — Accomplices and witnesses of disreputable character — Requirement for warning

Criminal law --- Sentencing — Sentencing for multiple convictions

Facts:

The accused operated an escort business in which he found young females, including complainants, to perform sexual services for financial gain. A Jury convicted him of living on the avails of prostitution of person under age of 18, living on avails of prostitution, making child pornography, sexual assault, invitation to sexual touching, and possession of proceeds of crime.

Analysis:

(1) **Did the Case Management Judge Err In Dismissing the Accused's Section 24(1) Charter Application?**

Prior to trial, the accused filed a motion requesting a judicial stay of proceedings for charges of living on the avails of prostitution and the charge of possession of proceeds of crime pursuant to section 24(1) of the *Charter.* He asserted that the prosecution of the charges breached his s. 7 *Charter* right, and relied on the *Bedford* decision, wherein the SCC declared section 212(1)(j) of the *Code*, living on the avails of prostitution, to be invalid.

The Court dismissed this ground of appeal, finding that Parliament enacted corrective legislation within the period of the suspension in response to the

overbreadth concerns raised in *Bedford*. The Court also found that the facts in this case did not fall within the categories of overbreadth contemplated by *Bedford*, and that the accused was charged within the timeframe of the suspension and that the rule of law thus justified his continued prosecution.

(2) **The Vetrovec Application**

The accused also asserted that the trial judge erred in his instructions to the jury by failing to provide a *Vetrovec* warning regarding the evidence of a complainant, who he essentially contended was an unindicted co-accused.

The Court noted that the decision of whether to issue a *Vetrovec* warning is discretionary and to be reviewed on a deferential standard. It concluded that while the trial judge did not go so far as to tell the jury that it would be dangerous to convict the accused on the evidence of the complainant alone, and that they should look to evidence to corroborate her testimony, his cautions were sufficient to alert the jury to the care with which they should have approached her evidence. The accused did not show that the trial judge misdirected himself nor was his decision so clearly wrong as to amount to an injustice.

(3) **The Sentence Appeal**

The trial judge sentenced the accused to 15 years' imprisonment minus the credit for pre-sentence custody for a go-forward sentence of 10 years and eight months' imprisonment. The Court concluded that given that the accused committed numerous and serious crimes and that his moral culpability was high, the accused had not shown that he had an arguable case that the sentence was unfit (in fact, the trial judge found that, consecutively considered, the total sentence for all of the offences would be 22 years, and reduced it to 15 years based on the totality principle).

Conclusion:
The Court dismissed the accused's appeal as to conviction and denied leave to appeal the sentence imposed.

R. v. Spence 2017 MBCA 26
Judgment date: February 17, 2017

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence

Facts:
The accused and three co-accused brutally beat the deceased and carried him out to a bush where he was stabbed and left undiscovered for over a month.

While in custody on unrelated charges, the accused admitted to another inmate that he had killed the deceased. This inmate contacted the RCMP, which led to the accused being arrested for murder. Once arrested, the accused requested to speak to a lawyer, but the lawyers he requested were initially unavailable. The accused was then placed in a cell already occupied by an undercover officer (posing as an inmate). After speaking to counsel, the accused had lengthy police interviews that led to a detailed confession. Upon returning to the cell, the accused made inculpatory statements to the undercover officer (stating: “I just fuckin' confessed" and "So me and one a my buddy's tied him up, broke his arms, carried him to the bush, killed him.").

The accused appealed his conviction for first degree murder and sought a new trial. The accused argued that the trial judge erred in failing to find that the inculpatory statements were obtained in a manner that infringed his section 10(b) *Charter* right to retain and instruct counsel without delay and, further, that he erred in failing to exclude the statements under section 24(2) of the *Charter* on the basis that their admission would bring the administration of justice into disrepute.

Analysis:
The Crown conceded that there was a section 10(b) breach, so the issue was whether the trial judge correctly applied section 24(2) in deciding not to exclude the statement to the undercover officer.

The Court outlined the process to determine whether the remedy of exclusion of evidence should be granted under section 24(2), and concluded that the trial judge applied the correct legal test to determine the question of whether the statement was obtained in a manner that infringed the accused's *Charter* rights.

The Court found that the trial judge made no errors in his factual findings, all of which were supported by the evidence. The trial judge rejected the accused's argument that the statement was contextually linked to his initial conversation with the undercover officer (e.g. before the accused spoke to counsel), and found that there was no causal connection between the *Charter* violation and the statement. The trial judge's finding that the statement was not obtained in a manner that infringed the accused's *Charter* rights was open to him and there was no basis for appellate intervention.

The Court concluded by noting the trial judge's ruling under section 24(2) (e.g. that the statement would not bring the administration of justice into disrepute) was entitled to deference. The trial judge considered the proper factors and that his findings of fact were reasonable and supported by evidence.

Conclusion:
Appeal dismissed.

MBCA - Defences

***R v Monias,* 2016 MBCA 111**

Heard: November 24th, 2016

Judgment: November 24th, 2016

Criminal law --- Offences — Murder — Second degree murder — Miscellaneous---

Defences — Necessity — No reasonable alternative--- Examination of witnesses —

Judicial intervention

Facts:

Monias convicted of second degree murder.

MBCA: Accused appealed.

Issues: 1) Did TJ err when he found that there was no air of reality to Monias' claim that he was simply assisting his brother who was being attacked by the victim? 2) Did TJ's numerous interventions in the proceedings deprive him of a fair trial or the appearance thereof?

Held: Appeal dismissed.

1) TJ did not err in finding that there was no air of reality to Monias' claim that he was simply assisting his brother. TJ did not err in finding there was no air of reality to third essential element of defence: that Monias' conduct was reasonable in the circumstances. When any element of defence lacks air of reality it should not be put to jury. Evidence before TJ was troubling. Monias argued with victim and made comments suggesting intention to return and seek revenge. He did return and immediately joined the ongoing attack on the victim, just after victim had been stabbed in the back. Victim was outnumbered three to one and unarmed. After attack, Monias made comments stating intention to kill the victim. Under these circumstances there was no basis upon which a properly instructed jury could have reasonable doubt as to whether Monias reasonably believed that it was necessary for him to act as he did to stop the unarmed victim from continuing his assault on Monias' brother.

2) TJ's numerous interventions in the proceedings did not deprive Monias of fair trial or appearance thereof. Interventions were mostly valid. Some of interventions were required because TJ sought clarification, or because questions being posed were compound questions which could be and were confusing to the witness. Other times, TJ intervened to protect jury from hearing evidence it was not entitled to hear. Some of TJ's interventions and comments imparted sense of

undue impatience and discourtesy towards Monias' counsel and that conduct was injudicious and should not be repeated, but did not deprive Monias of fair trial.

***R v Seymour,* 2016 MBCA 118**

Heard: September 16th, 2016

Judgment: December 9th, 2016

Criminal law --- Defences — Entrapment — Stay as abuse of process--- Offences — Firearms and other weapons — Weapons trafficking

Facts:

Police received tip from confidential informant that Seymour, owner of hunting and fishing supplies business, was selling firearms illegally. Undercover officer posed as hunter, said he did not have firearms licence, and asked Seymour if he could fix a hunting rifle or sell him one to allow him to continue hunting that day. Seymour agreed to lend the officer a rifle with ammunition, and later that day sold the officer a used hunting rifle for parts. Seymour was found guilty of weapons trafficking. TJ stayed proceedings after entrapment hearing on the basis that police engaged in "random virtue-testing".

MBCA: Crown appealed.

Held: Appeal dismissed.

TJ was correct in concluding that Crown had an evidentiary burden it failed to meet, while Seymour had the ultimate burden of establishing entrapment. TJ applied correct standard of proof of reasonable suspicion. TJ did not hold police to a higher standard of reasonable grounds to believe. Though TJ misspoke in

saying that the burden of proof shifted, this did not vitiate the essential conclusion that the Crown had the evidentiary burden that it failed to meet in terms of establishing reasonable suspicion or bona fide inquiry. TJ was correct in concluding that stay of proceedings was warranted upon proof of entrapment without specific finding that this was the "clearest of cases". Reasonable suspicion is a very low threshold, but where, as here, there was nothing placed before TJ to explain why police believed the informant was reliable, it was open to TJ to conclude that this was the clearest of cases.

MBCA - Evidence

***R v Hyra,* 2017 MBCA 1**

Heard: October 28th, 2016

Judgment: January 3rd, 2017

Evidence --- Documentary evidence — When production required—Criminal law --- Post-trial procedure — Evidence — Fresh evidence — Factors to be considered—Miscellaneous

Facts:

Hyra was convicted of criminal harassment for events that occurred between December 2000 and August 2004. Following dismissal of Hyra's appeal, he sought leave to appeal to SCC, however, application was denied. Hyra applied under s. 696.1 of *Criminal Code* for ministerial review but was denied. Hyra pursued several avenues to address wrongful accusation and conviction including applying for post-conviction disclosure but all were dismissed except for having protection order vacated. In dismissing Hyra's application for further disclosure, judge referred to TJ's assertion that Hyra was convicted on his own evidence, that no

amount of disclosure would change that and what accused proposed went far beyond scope of any prosecutorial duty.

MBCA: Accused Appealed 1) post-conviction disclosure 2) change of venue and to adduce fresh evidence to properly advance appeal

Held: Appeal dismissed.
1) J provided cogent and well explained reasons and no error was committed in denying accused's request for post-conviction disclosure. Appeal ground was devoid of merit. 2) Hyra did not offer evidence to support assertion that he could not obtain unbiased hearing and there was no statutory authority to permit what he wanted. As for fresh evidence and following submissions, Hyra's request was adjourned pending hearing of his substantive appeal on further disclosure. Fresh evidence Hyra wanted to adduce was 21 documents in two volume affidavit which either i) predated trial and was not relied on through the alleged incompetency of counsel or ii) documents created for his proceedings post-conviction. None of the evidence Hyra wished to adduce met requirements in *Palmer*.

***R v M(DK),* 2017 MBCA 5**

Heard: January 9th, 2017

Judgment: January 9th, 2017

Evidence --- Witnesses — Competence and compellability — Child witnesses — Videotaped evidence --- Character — Similar fact evidence — To show propensity

Facts:

MDK convicted of sexual interference with his daughter.

MBCA: Accused appealed.

Appealed on two grounds: 1) TJ erred in admitting complainant's videotaped statement: that it was not made within a reasonable time. 2) TJ erred in admitting similar fact evidence: two incidents involving complainant's sister.

Held: Appeal dismissed.

After considering reason for delay and impact it had on complainant's ability to recall, TJ found that the videotaped statement made on same day she disclosed the abuse, but 1-2 years after abuse occurred, met threshold criteria of s. 715.1 of *Criminal Code of Canada.* TJ's assessment was owed deference and it was open to her to admit the statement. TJ relied on four specific similarities to admit similar fact evidence involving complainant's sister. The two incidents involving the sister were reported to police years before the incident at trial. Opportunity for complainant to collude with the sister but no evidence that that had any impact on what the complainant ultimately told police. It was open to TJ to find they were not simply generic similarities and that they had probative value.

MBCA - Offences

***R v Cushnie,* 2016 MBCA 100**

Heard: October 17th, 2016

Judgment: October 17th, 2016

Criminal law --- Offences — Conspiracy — Evidence — Miscellaneous— Murder — First degree murder

Facts:

Cushnie's friend wanted her husband murdered. Cushnie's son and two others broke into husband's home and beat him to death. The friend, the son and the two others were all convicted of various offences in relation to murder. Cushnie was alleged to have agreed to the plan conceived by her friend to kill the husband and also to have participated directly in his murder by encouraging her son, relaying messages and destroying evidence. Cushnie argued the evidence supported two conspiracies, one to commit murder, the other to only burgle his home. Cushnie argues she was not party to the conspiracy to commit murder that night. Cushnie was convicted of first degree murder and conspiracy to commit murder.

MBCA: Accused appealed.

Held: Appeal dismissed.

J's reasons satisfied that she properly understood the theory of the defence that there were multiple conspiracies. Evidence J accepted reasonably supported the convictions. It was open to J to accept evidence of various witnesses as being

confirmatory of each other and there was no concern as to independence of evidence from those witnesses. There was no suggestion that Cushnie withdrew from conspiracy to commit murder prior to the husband being killed. Cushnie could therefore be properly convicted of first degree murder as a party on the evidence J accepted by virtue of either ss. 21(1) or 21(2) *Criminal Code*.

***R v M(JJ),* 2016 MBCA 101**

Heard: October 21st, 2016

Judgment: October 21st, 2016

Criminal law --- Offences — Murder — Second degree murder — Elements --- Youth offenders — Youth Criminal Justice Act — Statutory interpretation

Facts:

M (15 years old) and another attacked victim while intoxicated, beating him to death. By all accounts the beating was decisive and brutal. M convicted of second degree murder.

MBCA: Accused appealed.

Held: Appeal dismissed.

TJ did not err by interrupting counsel to contradict statement that policy behind *The Liquor and Gaming Control Act* recognized the difference between an adult who was intoxicated by consuming alcohol and a young person under same circumstance. No suggestion of bias or that TJ was overly interventionist. Decision to intervene is discretionary and absent reversible error of fact or law, it is owed deference. TJ properly stated there was no evidence of the social policy behind

the *Act* or its relevance in the trial. M was not denied opportunity to make full answer and defence. Closing submission of counsel clearly and repeatedly emphasized youth of M in relation to contention that M lacked intent based on his intoxication and speed at which the event unfolded.

***R v Houle,* 2016 MBCA 121**

Heard: November 30th, 2016

Judgment: November 30th, 2016

Criminal law --- Offences — Disobedience — Disobeying court order — Elements — Misleading justice — Obstructing justice — Elements — Failure or refusal to testify — Sentencing — Adult offenders

Facts:

Houle was convicted of attempting to obstruct justice and failing to comply with condition of recognizance and was sentenced to 1 year concurrent on each offence, less credit for pre-sentence custody. He was Crown witness at his cousin's trial for break, enter and theft of business premise in off hours. He was under subpoena and was subject to recognizance with the condition that he attend court on the day in question and thereafter as directed. At conclusion of his direct examination, he asked for permission to use the washroom, left the courtroom, rushed to elevators of courthouse and never returned despite being paged through the intercom system.

MBCA: Accused appealed 1) his conviction and 2) his sentence.

Held: Conviction appeal dismissed. Sentence appeal allowed, varied to 6 months already served by pre-sentence custody.

Guilt was the only reasonable inference for both offences available on evidence or its absence. Houle's argument that facts were open to the inference that he believed that he did not have to return was without merit. He did not testify at his trial and there was no other evidence to support that speculative assertion. Submission was based on a faulty assumption: it is not up to the witness to decide when he or she is done testifying. Houle's legal obligation to appear and remain to give evidence pursuant to his subpoena did not expire until he was excused from doing so by the presiding judge, which never occurred.

Given unchallenged finding of TJ that Houle was being sentenced only for absconding after his direct examination, proportionate sentence would be one that punished what was in essence only an aggravated form of failure to appear in court. One-year sentence, even for an accused with a lengthy related record, was demonstrably unfit. Historically, Houle had received sentences of 30-90 days for offences involving breaches of court orders. Taking into account gravity of the offence and his degree of responsibility, relevant personal and systemic factors (residential schools impacting his mother and grandparents), applicable sentencing principles and objectives, and range of sentence for more egregious cases of attempting to obstruct justice, a fit sentence would be one of six months' imprisonment.

R v Sanderson, 2016 MBCA 116

Heard: December 6th, 2016

Judgment: December 6th, 2016

Criminal law --- Offences — Assault — Aggravated assault — Elements — Intent— Sentencing — Adult offenders — General principles

Facts:

Sanderson and CK lived together for many years but they were separated when incident occurred. CK was awakened by Sanderson knocking on her front door. She woke up CB and told him to leave quickly to avoid Sanderson but they encountered each other and got into fight. During fight Sanderson grabbed barbecue fork and struck CB in left ear and below chin. Sanderson then came after CK and caught her and hit her. CB came to her rescue and hit Sanderson with board. Sandersno returned with board and RS stepped in front of CK and told Sanderson to leave her alone. Sanderson's response was to hit RS in face with board. Sanderson then came after CK and stabbed her several times with knife. He denied that he caused CK's injuries and he claimed he acted in self-defence. Sanderson was convicted of aggravated assault of CK, mother of his two children; assault with weapon, barbecue fork, of CB whom CK had permitted to sleep on couch in her home; assault with weapon, board, on RS, who resided across hall from CK; and breach of probation for failing to keep peace. CK testified that she permitted CB to sleep on couch because he was unable to get into his apartment. Sanderson had been on probation at the time. TJ found CK was most reliable witness, she gave her evidence reluctantly but fairly and carefully in very credible demeanour. TJ found Sanderson's evidence was contrived and rehearsed and he lied to police several times when he chose to answer their questions. TJ found no

evidence to support Sanderson's claim of self-defence. CB and RS were believed for much of what they said. Sanderson violated probation when he committed the offences.

MBCA: Accused appealed sentence and conviction.

Held: Conviction appeal dismissed. Sentence appeal adjourned.
Findings were dependent on credibility, which TJ properly considered.
Constitutionality of certain relevant portions of *Criminal Code,* s.753, regarding the sentence currently under appeal at SCC in unrelated proceedings. Sentencing appeal adjourned pending result of proceedings at SCC.

***R v Fenske,* 2016 MBCA 117**

Heard: June 7th, 2016

Judgment: December 7th, 2016

Criminal law --- Offences — Driving/care and control with excessive alcohol — Presumption of alcoholic content at time of offence — Sample taken as soon as practicable

Facts:

At border crossing, customs officer smelled alcohol coming from Fenske's vehicle, and he admitted to consuming beer. Fenske failed roadside screening test and RCMP officer demanded breath sample pursuant to s. 254(3) of *Criminal Code*. Fenske provided a breath sample one hour and 45 minutes after initial encounter with customs officer. TJ found that breathalyzer tests were conducted "as soon as practicable" and convicted Fenske of driving with excessive alcohol. Fenske's

appeal was allowed on basis that the breathalyzer tests were not taken "as soon as practicable". Fenske was acquitted.

MBCA: Crown appealed.

Held: Appeal allowed. Conviction confirmed

Phrase "as soon as practicable" in s. 258(1)(c)(ii) *Criminal Code* means nothing more than that breath samples be taken within a reasonably prompt time under the circumstances. Appeal J erred in overturning TJ's finding that breathalyzer tests were administered "as soon as practicable". RCMP officer made no attempt to contact local police forces to see if breathalyzer tests could be conducted by them, but instead transported Fenske to nearest RCMP detachment. Delay of 1 hour and 45 minutes before taking of first breath sample was within proper time frame of s. 258(1)(c)(ii). RCMP officer's actions were reasonable as it was questionable whether breathalyzer technician would be at local police stations. TJ did not err in finding that there was no unreasonable delay or reverse burden of proof. Appeal J applied wrong test when he said that Crown was required to explain why it was not reasonable to request assistance of local police. Breath tests were carried out reasonably promptly and, therefore, "as soon as practicable" in the circumstances.

R v. Douglas 2017 MBCA 63

Judgment date: June 29, 2017

Criminal law --- Pre-trial procedure — Search with warrant — Search warrant — Solicitor-client files

Facts:

The applicant worked in in real estate transactions, including as a mortgage broker. As part of a investigation into certain activities of the applicant, the RCMP obtained search warrants in relation to his home and business. The warrants authorized the seizure of evidence relating to specific real estate transactions, including legal correspondence. The applicant was not charged at that time and filed an application pursuant to section 24(1) of the *Charter* requesting: a) an order quashing the warrants; b) an order for the recovery of property that was seized; and c) an order prohibiting the prosecution of any of the charges described in the warrants. He claimed that the legal correspondence seized was subject to solicitor-client privilege. This appeal concerned the dismissal of his application for relief under section 24(1). Since he was charged post-application, the accused also requested that the charges be stayed.

Analysis:

The applicant relied on three grounds of appeal.

(1) **Did the application judge err in finding that the warrants were restricted to transactional real estate correspondence passing between the applicant and his solicitors?**

The Court dealt with this first ground of appeal summarily, and found that the authorization to seize legal correspondence only referred to correspondence relating to the transactions specified in the warrants and not all legal correspondence.

Grounds two and three were dealt with together:

(2) **Did the application judge err in finding that the legal correspondence authorized for seizure was not protected by solicitor-client privilege?**

(3) Did the Application Judge err in finding that the applicant's section 8 *Charter* right to be free from unreasonable search and seizure was not infringed?

The Court first reviewed the importance of solicitor-client privilege.

The application judge considered that the documents were not privileged on the basis that: 1) they did not include the provision of legal advice; and 2) that they represented acts reflected in the transactional documents that are not confidential. The Court examined the evolution of each of these concepts.

(i) Legal Advice:

The Court noted that there is a line of case law evidencing an expansive approach to the interpretation of what constitutes legal advice. This supported for a finding that a reporting letter is protected by solicitor-client privilege for the reason that it falls within the definition of legal advice.

(ii) Distinction Between Facts and Communications:

The Court concluded that the historical distinction between "actions and objective facts" as opposed to solicitor-client communications has eroded over time, and that a reporting letter is within that class of interactions that fall between communications that arise out of the solicitor-client relationship.

Presumption of privilege:

The Court found that the trial judge relied on jurisprudence that is no longer representative of the law of privilege as it has evolved, and that the legal correspondence authorized for seizure by the warrants was subject to a rebuttable presumption that it was protected by solicitor-client privilege.

Jurisdiction:

The Court found that the issuing justice acted outside of her jurisdiction when issuing the warrants for legal correspondence. Since the issuing justice acted without jurisdiction, a breach of section 8 of the *Charter* was also established.

Remedy:

The Court denied the applicant's request to quash the warrants, but the term "legal correspondence" was excised from the warrants. The applicant's request for a stay of proceedings was also denied.

The Court found that an injunction was appropriate in this case. All documents seized by the RCMP were sealed, and neither the RCMP nor the Crown could view seized documents prior to the determination of solicitor-client privilege by a judge. The documents protected by privilege were returned to the accused, and RCMP officers who viewed any presumptively privileged documents were prohibited from disclosing or using their knowledge of them in any fashion.

Conclusion:
Appeal allowed (to the extent described above).

R. v. C.A.M. 2017 MBCA 70
Judgment date: July 21, 2017

Criminal law --- Offences — Sexual assault — General offence — Evidence — Miscellaneous

Facts:
The accused was charged with several offences related to complaints made by his ex-wife in 2005 and 2012. The judge acquitted the accused of sexual assault and choking to overcome resistance to commit an offence in 2005. She convicted him of the offences relating to the four incidents in 2012, namely: sexual assault with a weapon, two counts of sexual assault, assault with a weapon and eight counts of uttering threat.

Analysis:
The main issue on appeal was whether the judge erred by subjecting the accused's testimony to a stricter level of scrutiny than that of the complainant. The other ground of appeal was that the verdicts for the 2012 incidents were unreasonable in light of the acquittal for the 2005 incident.

(1) Uneven Scrutiny of the Evidence

The Court noted that applying a stricter standard of scrutiny to the evidence of an accused than that of a Crown witness is an error of law that undermines the fairness of a trial, but that the mere fact that a trial judge believes the evidence of a Crown witness over that of a witness for the defence does not establish that there has been an uneven scrutiny of the evidence.

The Court found that the trial judge gave the proper effect to the absence of visible injuries as a factor in her decision. It also concluded that the judge properly looked at the evidence, as opposed to myth and stereotypes, and accepted that the complainant's motivation for staying with the accused after being raped, and not telling the police.

The Court concluded that no palpable and overriding errors were made and that the judge's assessment of the credibility of the complainant and the accused's evidence was fair and balanced.

(2) **Unreasonable Verdict**

The court dismissed this ground of appeal, finding that the verdicts for the 2012 incidents were ones that a properly instructed trier of fact could reasonably have rendered. There was nothing illogical or irrational about the judge's reasoning that made her verdicts irreconcilable.

Conclusion:
Appeal dismissed
Notice of Appeal to SCC filed

R. v. L. (J.J.G.) 2017 MBCA 19
Judgment date: January 27, 2017

Criminal law --- Offences — Sexual interference — Evidence

Criminal law --- Offences — Invitation to sexual touching — Evidence

Facts:
When the complainant (the accused's niece) was eight years old she disclosed to her mother that the accused had touched her genitals. The accused denied the allegations and was not charged with the offences until years later when the complainant disclosed to a counsellor that the accused had committed repeated significant sexual acts against her, including vaginal sexual intercourse, when she was between six and eight years of age.

The accused appealed his convictions for sexual interference and invitation to sexual touching on three grounds.

Analysis:
First, he argued that the trial judge misapprehended evidence that played an essential part in the reasoning process resulting in his convictions. The accused contended that he had a meeting with his father to tell him about the accusations of the complainant, and not the recantation. The trial judge rejected this and stated that the accused went to his father's house to tell him about the recantation. The Court found that there was evidence from which the trial judge could infer this, and that whether the trial judge had stated that the accused went to tell his father of the allegation, as opposed to the recantation, would not have affected his overall finding that the accused was not credible

For the second ground of appeal, the Court disagreed that the trial judge erred by preventing the accused from cross-examining the complainant on her failure to tell others about the abuse during the time between her first disclosure and her later disclosure. The Court noted that the SCC has been clear that the timing of a disclosure will not give rise to an adverse inference against the credibility of the complainant, and that inferences of such a nature are based on stereotypes. The trial judge rejected the theory of the accused that each of the disclosures occurred at a time when the complainant was feeling abandoned and when her life was in

turmoil. The decision to intervene in cross-examination is discretionary and entitled to deference. The Court was of the view that there was no error that was so clearly wrong as to amount to an injustice.

Third, the accused asserted that the trial judge erred in applying a greater degree of scrutiny to his evidence as compared to that of the complainant. The Court found that the trial judge's assessment of credibility was entirely reasonable in light of the record and was subject to deference.

Conclusion:
The convictions appeal was dismissed.

The accused also applied for leave to appeal and appealed the portion of his sentence that consisted of an order made pursuant to section 161(1)(c) of the *Criminal Code*. With the consent of the Crown, the Court granted leave to appeal and allowed his sentence appeal, thereby striking the order made against the accused pursuant to section 161(1)(c).

R. v. Kakeeway 2017 MBCA 40
Judgment date: April 4, 2017

Criminal law --- Offences — Murder — Second degree murder — Evidence

Facts:
The accused was convicted of second degree murder. The deceased was shot twice while walking down a back lane in Winnipeg. At trial, the theory of the Crown was that the accused shot the deceased because he believed the deceased belonged to a rival gang. Three affiliates of the accused's gang identified the accused as the shooter. The accused appealed his conviction.

Analysis:
The trial judge cautioned herself in accordance with *R. v. Vetrovec* to ensure that the evidence of the affiliates was given special scrutiny as required by the legal principles governing unsavoury witnesses. Ultimately, she found that the evidence

of the affiliates was sufficient to satisfy her beyond a reasonable doubt that the accused was the shooter and was therefore guilty.

The trial judge considered independent evidence that tended to support that of the affiliates. The trial judge gave careful consideration to the evidence of collusion, and her finding that the evidence was independent was subject to deference. The Court found that the accused did not show her conclusion was unreasonable.

Conclusion:
Appeal dismissed.

R. v. Allen 2017 MBCA 88
Judgment date: August 29, 2017

Criminal law --- Offences — Fraud — Elements — Fraudulent intent

Facts:
This appeal was about the misapprehension of an alibi defence. The accused appealed his conviction for fraud exceeding $5,000 after a trial in Provincial Court. It was alleged that he falsely reported the theft of his vehicle for insurance purposes to cover up the fact that, while intoxicated, he was involved in an accident.

Analysis:
The case against the accused was entirely circumstantial, and the main factual dispute at trial was the identity of the driver of the vehicle at the time of the accident. The accused answered the case against him in two ways. (1) First, he said he had an alibi. (2) Second, the accused raised the suggestion that a motivated thief, who knew the vehicle's identification number, could have used that information with the assistance of a corrupt employee working at any General Motors' dealership to have a duplicate key made with the applicable encryption code.

The trial judge made an adverse inference in assessing the accused’s credibility, which he drew from the accused's failure to call what he referred to as his “principal alibi witness.”

While the evidence allowed for a properly instructed trier of fact to be satisfied beyond a reasonable doubt that the Crown had refuted the alibi raised, and the defence's theory of premeditated theft bordered on conjecture, the trial judge misapprehended the evidence by considering the witness as an alibi witness, which met the stringent test for a reversible error. The error played an essential part in the reasoning process that resulted in conviction.

Conclusion:
Appeal allowed, the conviction was set aside and a new trial was ordered.

MBCA - Procedure

R. v. Zamrykut 2017 MBCA 24
Judgment date: February 16, 2017

Criminal law --- Trial procedure — Rights of accused — Right to make full answer and defence — Actions of counsel

Facts:
The accused was convicted of sexual assault. The evidence was very limited, consisting of testimony of the complainant and the accused, together with text messages. The accused appealed his conviction on the ground that he failed to receive effective assistance of counsel. In support of his application, the accused filed a motion for the Court to admit fresh evidence.

Analysis:
Trial counsel filed an affidavit to explain his trial strategy, which was to avoid any cross-examination on inconsistencies. Following this strategy, trial counsel did not cross-examine the complainant on any inconsistencies between her first statement to the police made in the presence of her boyfriend, her testimony at the preliminary inquiry and her testimony at the trial, notwithstanding that some related to the "how" of the alleged sexual assault.

The fresh evidence consisted of materials that were disclosed to the trial counsel but not used during the trial, and evidence of the accused's friend that was

available and known to trial counsel but not used. The Court found that the evidence met the test for admissibility of fresh evidence for the limited use of determining the claim of ineffective assistance of counsel.

Trial counsel had urged the trial judge to find the complainant not reliable, but his strategy left no basis upon which the trial judge could come to that conclusion. The strategy was doomed to fail and, could only be described as unreasonable, which led to a miscarriage of justice.

The Court found that the accused established his claim of ineffective assistance of counsel on a balance of probabilities.

Conclusion:
Appeal allowed → Motion for fresh evidence allowed, conviction quashed and new trial ordered.

R. v. Ducharme 2017 MBCA 50
Judgment date: April 25, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Factors considered — Plea of guilty

Facts:
The accused pleaded guilty to one count of break and enter to commit robbery, one count of break and enter to commit theft, and other offences. The accused appealed her convictions for the break and enter offences and sought to withdraw her guilty pleas. The accused brought a motion to admit fresh evidence in support of her appeal.

Analysis:
The record showed that counsel for the accused and the sentencing judge took appropriate steps to ensure that the accused's guilty pleas were voluntary, unequivocal and informed.

The fresh evidence included the accused's affidavit, an affidavit of the accused's former counsel, and medical records consisting of doctors' assessments. The

accused's position was that the fresh evidence showed that her guilty pleas were not voluntary, unequivocal and informed, because she was confused and unable to express herself sufficiently to make her wishes known to her counsel and the sentencing judge.

The Court found that the accused did not meet the applicable criteria for the admission of fresh evidence as set out in *R. v. Palmer*. The affidavit of the accused's former counsel was not such that it could have affected the result of the guilty plea. The medical evidence failed to meet the *Palmer* criterion of relevancy. The affidavit evidence of the accused was not reliable in support of her claim that her guilty pleas were not voluntary, unequivocal and informed.

Conclusion:
Fresh evidence was inadmissible. Appeal dismissed.

R. v. Thomas 2017 MBCA 23
Judgment date: February 13, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Procedure on appeal — Permitting withdrawal or change of plea

Facts:
The accused filed a motion seeking to extend the time to appeal from her conviction on a charge of second degree murder following a guilty plea to that charge. After the initial application, it transpired that what the accused was seeking was to withdraw her plea of guilty.

Years after her conviction, the accused deposed through affidavit evidence that she had only agreed to plead guilty because her lawyer told her she'd end up with 25 years to life, and because she was drunk and had mental health issues.

Analysis:
The Court noted its inclination to dismiss the application for an extension of time, as there was little evidence of the accused's intention to appeal from the time that she plead guilty to the time that she filed her application, and minimal evidence as

to the reasons for the delay. The Court also expressed reservations as to whether there were reasonable grounds of appeal. However, the Court was alive to the fact that the accused was acting on her own behalf and that the issue she wanted to raise was that of ineffective counsel at the time of her plea. It noted that if her application were denied, it would be extremely difficult for her to put this matter before the Court.

The Court reviewed what must be addressed in an application to withdraw a plea because of ineffective assistance from counsel. It granted the accused an extension of 60 days for her to pursue her application to withdraw her plea. The Court did so based on the interest of justice, and based on the particular circumstances of the case and of the accused.

Conclusion:
Application granted.

R. v. Burnett 2017 MBCA 16
Judgment date: January 30, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Time limitations — Extension of time to appeal

Facts:
This was a motion by the accused to extend the time to file a notice of appeal. The accused admitted during trial that he stabbed the deceased in the chest, but argued that he did not have the requisite intent for murder; that he was acting in self defence and should, therefore, be acquitted; or, if not, that he was provoked. The jury convicted the accused of second degree murder.

The accused appealed on the basis that the trial judge erred by failing to adequately explain the offence of manslaughter to the jury, and in particular, the *mens rea* requirement of manslaughter.

Analysis:
One factor for determining whether to extend the time for filing an appeal is whether there are arguable grounds of appeal. The Court found that the accused raised no arguable ground of appeal.

(1) Instructions on Murder and Manslaughter

The trial judge did not instruct the jury on the state of mind required for manslaughter; rather, he told the jurors that, if they were not satisfied beyond a reasonable doubt that the accused had the state of mind for murder, then he was guilty of manslaughter. Both the Crown and trial defence counsel were satisfied with this charge. Further, during the deliberations, the jurors asked a clarification question about the state of mind required for murder. The trial judge reviewed the question and his proposed reply with trial counsel and all were content.

The Court concluded that both the original charge and the answer to the question were correct and did not constitute an error on the part of the trial judge They concluded this based on the SCC decision *Miljevic* (in that case, the jury asked for an explanation of manslaughter, and the SCC held that it was not an error to refuse to provide that explanation and that the explanation of the mental element for murder was sufficient).

(2) Did the Trial Judge Err by Failing to Tell the Jury That It Could Ask Further Questions?

The accused also argued that the trial judge erred in his answer to the jury by leaving it with the impression that it could not ask any further questions about the law. The jury asked to be provided with a copy of the Criminal Code and the trial judge said no.

The Court noted that it might have been preferable if the trial judge had advised the jury that it could ask further questions, but that this was not a requirement. It found that the trial judge's answer responded to the jury's questions and did not foreclose further questions. Thus, the Court concluded that there was no air of reality to this as a ground of appeal.

<u>Conclusion:</u>
Motion to extend the time to appeal dismissed as accused raised no arguable ground of appeal.

R v WDT 2017 MBCA 94

Judgement date: September 26, 2017

Criminal law --- Trial procedure — Adjudication — Conviction — Sufficiency of reasons for conviction — Miscellaneous

Facts:
The accused appealed his convictions on two counts of sexual interference, two counts of assault with a weapon and one count of assault. The Crown appealed a finding of not guilty on counts of sexual assault and assault and a judicial stay on a count of sexual assault.

Analysis:
The Court found that the trial judge's reasons for admitting a statement made by the accused to police into evidence and his reasons for his findings at trial on each of the charges were wholly inadequate. The reasons did not inform the parties of the basis for the verdict, provide public accountability or permit meaningful appellate review. As such, the trial judge erred in law.

A further legal error was that it was unclear on what basis the trial judge convicted the accused of sexual interference involving a victim, and acquitted him of sexual assault. The verdicts regarding these two charges could not be reconciled and raised questions regarding the reasonableness of the verdict.

Conclusion:
Both appeals allowed and a new trial ordered.

R. v. Rule 2017 MBCA 86

Judgement date: September 11, 2017

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Where leave to appeal required — Court of Appeal

Facts:
The accused was convicted of driving with alcohol blood level over the legal limit. The police officer observed a car weaving slightly within its lane and pulled the car over. Two people were in the car. The accused was the driver. The officer noticed

that the accused exhibited signs of impairment, and noticed an odour of liquor. To determine whether the passenger was the sole source of the odour, the officer requested to smell the accused's breath by asking him to blow in his face. After the accused blew, the officer arrested him for impaired driving and made the breathalyzer demand, which the accused failed.

At trial, the accused argued that the officer's request to smell his breath was a violation of his section 8 *Charter* rights. On appeal, the summary conviction appeal judge upheld the trial judge's ruling and dismissed the accused's appeal. The accused applied for a second-level appeal (pursuant to s. 839 of the *Criminal Code*). He reframed his grounds to the following questions: (1) Did the SCAJ err in law by concluding that the officer's request to smell his breath fell under the ambit of *The Highway Traffic Act*, and was thereby authorized by law? And (2) If the officer's request was authorized by law, did the SCAJ err in law by failing to conclude that it constituted an unreasonable search?

Analysis:
The criteria to be met before leave to appeal can be granted are as follows: (1) The ground(s) raised must involve a question of law alone. (2) Even if a question of law does arise, leave should only be granted if the matter raises an arguable case of substance. (3) There must be something exceptional about the arguable case warranting a second appeal hearing.

The Court found that accused failed to raise an arguable case of substance. The argument that the request made by the police officer to smell his breath was fundamentally different than conducting a sobriety test or asking if he had been drinking was “distinction without difference”. The Officer's screening measure was minimally intrusive and speedily performed at roadside and therefore was reasonable.

Conclusion:
Leave to appeal denied.

R v. Catcheway 2017 MBCA 87

Judgment date: September 13, 2017

Criminal law --- Post-trial procedure — Appeal from sentence — Leave to appeal — General principles

Facts:

The accused applied for leave to appeal against an eight-year sentence for manslaughter

Analysis:

The threshold for assessing the leave question is whether the ground of appeal has arguable merit. This must be done in light of the standard of review, which is highly deferential on the judge's determination of the appropriate sentence. Appellate courts should not intervene unless the judge made a material legal error or imposed a sentence that is demonstrably unfit.

A sentence is demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender, and the acceptable range of sentence for similar offences committed in similar circumstances.

Conclusion:

The threshold for granting leave was not met in this case. Application for leave to appeal dismissed.

R v. Vincent 2017 MBCA 73

Judgment date: August 3, 2017

Criminal law --- Post-trial procedure — Appeal from sentence — Factors to be considered — Miscellaneous

Facts:

The accused was convicted of dangerous driving causing bodily harm and assault. The trial judge sentenced him to 90 days' incarceration for the dangerous driving. For the assault, he received a consecutive six-month conditional sentence, followed by one-year probation. The accused appealed.

Analysis:
After his dangerous driving conviction was set aside in 2012, the accused's appeal from his sentence for assault was adjourned. The dangerous driving charge was stayed when the accused pleaded guilty to careless driving

Given the change of circumstances, passage of time and lack of re-involvement by accused, the parties agreed that the six-month conditional sentence, followed by one year probation, was harsh and excessive, and that the interests of justice would be served by setting it aside and replacing that with the nine days that the accused had already served under the conditional sentence order before it was suspended.

Conclusion:
The Court accept the written joint submission. Accordingly, leave to appeal was granted and the appeal of sentence with respect to the assault was allowed. The accused's conditional sentence order and probation order was set aside and replaced with a sentence of nine days that he served under the conditional sentence order.

R. v. McDonald 2017 MBCA 72
Judgement date: July 31, 2017

Criminal law --- Trial procedure — Charging jury or self-instruction — Review of evidence — Review of particular evidence — Previous statements

Facts:
After a trial before judge and jury, the accused along with a co-accused, were convicted of first degree murder. At trial, the Crown was allowed to put an excerpt from a prior statement under issue to an informant witness, and have the witness read it to the jury as part of the record. The excerpt was about the accused carrying the victim to a bush and finishing him off. The accused appealed his conviction.

Analysis:
The accused raised two grounds of appeal: (1) He submitted that the trial judge erred in refusing his motion to sever his trial from the co-accused. (2) He argued that the trial judge erred in admitting portions of a prior consistent statement of a jailhouse informant and failing to properly instruct the jury to prevent its improper

use in their deliberations. The Court concluded that the appeal should be allowed on the basis of the accused's second ground of appeal and so it did not deal with the question of severance.

The Court found that the prior consistent statement, such as made by the informant, was generally not to be admitted. The prejudicial effect of the statement, which went directly to the issue of the accused's participation in the premeditation aspect of the murder, could not be ignored and rendered that aspect of the trial unfair to the accused.

As well, the Court found that the trial judge erred by failing to include a limiting provision in his charge. Even if the excerpt could be admitted, it was only for the limited purpose of assessing the informant's credibility. It could not be tendered for the truth of it.

The Court concluded that the incendiary nature of the excerpt pertained to a critical issue of the trial and could not be considered harmless or of a minor nature. There was a reasonable possibility that the verdict would have been different. The evidence implicating the accused in the murder was not of such an overwhelming nature so that a conviction would be inevitable. The fact that defence counsel did not ask for a limiting instruction was not fatal to the accused's argument.

Conclusion:
The appeal should be allowed and a new trial ordered for the accused.

R v. Fries 2017 MBCA 58
Judgment date: June 2, 2017

Criminal law --- Trial procedure — Charging jury or self-instruction — Direction on onus and reasonable doubt — Miscellaneous

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Appeal from unreasonable verdict

Facts:

The accused was convicted after trial by judge and jury of second degree murder. The allegation was that he stabbed the male victim at a house party they both attended. The case against the accused was circumstantial.

Analysis:

(1) Adequacy of the Jury Instructions

The accused appealed the conviction on the basis that jury instructions on issues of circumstantial evidence and assessment of reliability of key witness were inadequate. While the trial judge denied the defence's request mid-charge to change the instruction on reasonable doubt to emphasize that doubt can arise from lack of evidence, she had explained to the jury twice in her opening comments, twice again after Crown's opening address, and three times in her jury charge that the law allowed for the jury to find reasonable doubt based on absence of evidence. The Court was not persuaded that the jury was not properly instructed on the relevant law in light of the evidence and the positions of the parties.

(2) Unreasonable Verdict — Section 686(1)(a)(i) of the Code

The accused also appealed on the basis that the verdict was unreasonable because the absence of evidence provided for an alternative inference of someone else committing the murder. The Court rejected this argument, noting that a jury's verdict will not be disturbed merely because the appellate court takes a different view of the evidence ("more is required"). The Court was satisfied that a properly instructed jury could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of evidence.

The accused advanced a defence through counsel that someone else had stabbed the deceased, and that police had focused their investigation on the accused alone. The Court noted that this was an improbable scenario in the realm of conjecture, and that the jury's rejection of this defence did not make the verdict unreasonable.

<u>Conclusion:</u>
Appeal dismissed.

R. v. Schenkels 2017 MBCA 62

Judgment date: June 29, 2017

Criminal law --- Trial procedure — Charging jury or self-instruction — Direction on onus and reasonable doubt — Miscellaneous

Criminal law --- Charter of Rights and Freedoms — Right to be tried within reasonable time [s. 11(b)] — Pre-trial delay

Facts:

The accused appealed her conviction, by a jury, for aggravated sexual assault by endangering life arising from her failure to disclose her HIV positive status to a sexual partner (the complainant), who was diagnosed with HIV soon after their last sexual activity.

First, she asserted that the delay in getting this case to trial should have resulted in a stay of proceedings for breaching her right under section 11(*b*) of the *Charter.* Second, she asserted several grounds of appeal related to her conviction for aggravated sexual assault.

Analysis:

(1) Delay

A recent SCC case, *Jordan,* set out the analytical framework for delay and established two presumptive ceilings: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts. The total delay in this case was 30 months and 19 days.

The Court found that defence delay does not count towards the presumptive ceiling, and that the trial judge's finding of defence waiver of 45 days was entitled to deference and should be subtracted as defence delay. The record showed that defence counsel was offered a range of dates for the case management conference, but preferred the latest one. Further, the Court found that the period of time for setting trial dates that the trial judge found to be institutional delay was appropriately considered as defence delay under *Jordan* because it is a

circumstance where "the court and the Crown are ready to proceed, but the defence is not" (this amounted to approximately a further two months of delay).

Because the delay was presumptively reasonable, the accused could rebut the presumption by establishing two criteria (1) defence initiative and (2) the case took markedly longer than it reasonably should have. Because this was a transitional case, these factors had to be applied contextually, sensitive to the parties' reliance on the previous state of the law.

Putting aside the two deductions for defence delay, the delay would only be 19 days over the presumptive 30-month ceiling. Given that this was a transitional case, the Court concluded that it was not an unreasonable delay that warranted a stay of proceedings.

(2) Conviction

The accused raised five grounds of appeal on the conviction. The two most important one related to the absence of evidence concerning the complainant's HIV status prior to his sexual activity with the accused. She argued that (1) The trial judge erred in law by failing to instruct the jury that, for the Crown to prove beyond a reasonable doubt that the accused exposed the complainant to significant risk of serious bodily harm and endangered his life, the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative when he first had unprotected sex with the accused; and (2) The verdict was unreasonable.

The Court concluded that the trial judge was **not** required to instruct the jury that the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative before he engaged in sexual activity with the accused. Rather, she was required to instruct the jury that the onus on the Crown was to establish beyond a reasonable doubt that the unprotected sexual activity with the accused exposed the complainant to a realistic risk of transmission of HIV and that such activity endangered his life. The Court concluded that her instructions were “more than adequate in this regard.” The trial judge even highlighted for the jury that there was an absence of direct evidence about when the complainant acquired HIV. The Court found that the trial judge also appropriately instructed the jury as to the included offence of attempted aggravated sexual assault.

The Court also concluded that the weakness of the defence was that there was no evidence as to other possible ways in which the complainant could have contracted HIV, and that without such evidence, the accused was asking the jury (and now the Court) to speculate. Thus, the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.

The Court found that the other grounds were "without merit" and dismissed them with brief comment (see paras 118-125).

Conclusion:
Appeal dismissed.
Notice of Appeal to SCC filed in.

MBCA - Sentencing

***R v Roopchand,* 2016 MBCA 105**

Heard: October 25th, 2016

Judgment: October 25th, 2016

Criminal law --- Offences — Theft and related offences — Theft — Sentencing — Adult offenders— Evidence

Facts:

Over a period of three and a half years Roopchand stole more than $54,000 from her employer. She had prior criminal record including a 2009 related offence involving breach of trust for which she received nine-month conditional sentence. She pleaded guilty to theft over $5,000. While awaiting sentence for offence, Roopchand was also pending on an untried offence relating to another charge of theft from a different employer. TJ sentenced Roopchand to 12 months' imprisonment and three years' supervised probation and restitution. Aggravating factors included that it was a breach of trust situation involving an employer,

money stolen was not a small amount, offence was carried out in a purposeful way in that Roopchand had to manipulate business records to conceal theft, theft occurred repeatedly over period of approximately three and one-half years and she had a recent prior related criminal record. Mitigating factors included that Roopchand took responsibility by pleading guilty, showed remorse, and made serious efforts to pay back stolen money. TJ ruled that general and specific deterrence required particular emphasis. TJ found that while custodial sentence of less than two years was appropriate, he was not prepared to impose a conditional sentence in circumstances where the accused had benefited from the court's trust in past.

MBCA: Accused appealed the sentence.

Held: Appeal dismissed.
TJ did not err by taking into account the pending charge for the untried offence when imposing the sentence. While evidence could not be used for the purpose of punishing her, it was admissible for the purpose of shedding light upon some aspect of Roopchand's character and background which is relevant to objectives of sentencing. The pending charge was relevant to her risk to reoffend which was relevant appropriateness of conditional sentence. The untried related charge demonstrated noticeable lack of understanding into harm done by her actions and why it should not be repeated. TJ concluded a conditional sentence was inappropriate as there was real risk that Roopchand would reoffend. That finding was not made in error. TJ did not improperly use evidence of the untried related offence to impose greater punishment. While TJ did repeatedly refer to the

existence of the pending charge, he also mentioned in his reasons that he could not use it for the purpose of formulating quantum of sentence. Twelve-month sentence was not harsh and excessive, and was not demonstrably unfit given Roopchand's circumstances and history.

***R v Park,* 2016 MBCA 107**

Heard: September 12th, 2016

Judgment: November 10th, 2016

Criminal law --- Sentencing — Principles — Miscellaneous— Restorative justice — Aboriginal offenders--- Post-trial procedure — Appeal from sentence — Types of orders — Sentence substituted or varied

Facts:

Park was sentenced to eight years of imprisonment for impaired driving causing death. While on parole, he failed to return to assigned halfway house in time for his curfew which led to his arrest. Park was in possession of drugs upon arrest, which led to him pleading guilty to that offence and receiving a sentence of 30 days to be served consecutive to the impaired driving sentence. Park also was convicted of being unlawfully at large and sentenced to 10 months' imprisonment, consecutive to prior sentences.

MBCA: Accused appealed sentence.

Held: Appeal allowed, sentence reduced to six months' imprisonment, consecutive to prior sentences.

In applying the totality principle, sentencing J should have looked to unexpired sentence still to be served by Park. Most of time, this factor would not affect "last look" significantly. Sentencing J's failure to refer to totality principle might constitute error in principle but did not in itself render sentence unfit or impact the sentence imposed. When Park was sentenced for being unlawfully at large, impaired driving sentence was to expire only a few months later.

Consideration of Gladue factors is mandatory for all cases involving Aboriginal offenders unless there is express waiver by the offender. Sentencing J had to consider whether information presented was sufficient and adequate for consideration of Gladue factors and, if it was, to make consideration of Park's Aboriginal background explicit. The statement by Park's counsel that there were Gladue factors but that she was focusing on other arguments did not amount to express and clear waiver of consideration of Gladue factors. At minimum, sentencing J had duty to clarify Park's reliance on Gladue factors. Sentencing J's error in not considering Gladue factors had impact on sentence.

Several factors that substantiated sentencing J's view that Park posed a high risk to the community, namely his significant criminal record and revocation of his first statutory release due to consumption of drugs while on release. Consistent feature of all of Park's offending was alcohol and drugs. Lower sentences of 3 months or less generally imposed where the circumstances point to an accused "overstaying" a pass or curfew. Sentences of 4-6 months usually given in circumstances where the accused has been at large for a longer period and/or escaped minimal custodial facility. Sentences over 6 months are generally reserved for those accused persons with a prior record for being unlawfully at large, or where an accused has committed a serious crime while at large.

Accused's case was most similar to *Wolfe* where accused sentence was six months.

***R v Thiessen,* 2016 MBCA 110**

Heard: November 21st, 2016

Judgment: November 21st, 2016

Criminal law --- Sentencing — Miscellaneous

Facts:

Thiessen plead guilty to possession of narcotics for purposes of trafficking. On joint submission, Thiessen was given conditional sentence of two years less one day. Sentencing J was advised that accused was in remand custody awaiting disposition on other charges and was also advised that conditional sentence would commence once accused had disposed of his other charges, served his sentence on those charges and was released. However, under s. 719(1) *Criminal Code*, sentence commences when it is imposed. After sentencing, Thiessen was taken back into remand custody, but because his conditional sentence had begun, he was not credited for any time in custody towards his other pending charges. He also did not receive any earned remission for time he was serving, once again because he was serving conditional sentence, albeit within correctional institution.

MBCA: Accused appealed.

Held: Appeal allowed. Custodial sentence of eight and one-half months to begin as of date of sentencing.

Sentencing J committed an error in principle. Result was not within spirit of joint submissions, and sentence was unfit. Crown consented to the appeal.

***R v S(GG),* 2016 MBCA 109**

Heard: September 7th, 2016

Judgment: November 24th, 2016

Criminal law --- Offences — Sexual assault — General offence — Sentencing — Adult offenders— Spouse or common law partner— Forcible confinement or seizure— Assault — Assault with weapon or causing bodily harm — Types of sentence — Suspended sentence — Miscellaneous

Facts:

S forced complainant, his common law partner, face down on bed and burned her lower back in two places with lighter, restrained her hands and ankles and forced vaginal and anal intercourse on her. S was convicted of sexual assault, assault with weapon and forcible confinement. Crown mistakenly advised TJ that none of S's prior convictions for offences of violence were related to complainant but in fact S had dated prior conviction for assault with weapon relating to complainant and conviction for assault that post-dated charges before court. TJ sentenced accused to suspended sentence of two years' imprisonment and three years' supervised probation. TJ characterized incident as spontaneous act and took into account delay, Gladue factors, and that S was involved in parenting of children he had with complainant. TJ also noted that S worked, had attended anger management course and was preparing to attend residential treatment program for alcohol and substance abuse. TJ found that S had become productive member of community and placed significant weight on S's rehabilitation. TJ ruled that

time spent in pre-sentence custody adequately addressed need for denunciation and deterrence.

MBCA: Crown appealed the sentence.

Held: Appeal allowed. Sentence varied to 48 months for sexual assault, less 13.5 months credit, and 12 months concurrent each for assault with weapon and forcible confinement.
TJ was misinformed as to nature of S's prior criminal record and his convictions for domestic violence offences against same complainant. Misinformation led TJ to conclude that incident did not occur in context of ongoing, abusive, domestic relationship which affected her approach to sentencing and weight that she placed on rehabilitation of S which resulted in unfit sentence. Sexual assault committed by S was major sexual assault and finding fit sentence had to start with taking into consideration starting point for such major sexual assault. Abuse of spouse was aggravating circumstance. Circumstances of S did not constitute unusual circumstances. S did express remorse and significant Gladue factors were present. S also had previous record for violence, including violence against this complainant, which disentitled him to leniency. Sentence was illegal. Canadian courts cannot fix sentence and then suspend it. Suspension is related to passing of sentence, not sentence itself. TJ did not merely misspeak, she clearly intended to impose sentence of two years' imprisonment and then order its suspension. Under s. 731(1) *Criminal Code*, supervised probation can be ordered to follow period of imprisonment for term not exceeding two years.

***R v Brown,* 2016 MBCA 115**

Heard: December 1st, 2016

Judgment: December 1st, 2016

Criminal law --- Narcotic and drug control — Offences — Trafficking — Possession for purpose of trafficking— Sentencing

Facts:

Brown pleaded guilty to trafficking in heroin, possession of heroin for purposes of trafficking, and possession of restricted firearm. Sentencing J found that Brown was mid-level drug trafficker and sentenced him to six years' imprisonment concurrent for two drug offences, less two years and one month for time spent in pre-sentence custody, plus three years consecutive for firearm offence, for total of nine years.

MBCA: Accused appealed sentence.

Brown argued the sentencing J erred in finding him to be a mid-level drug trafficker and that the total effective sentence was unfit.

Held: Appeal dismissed.

Sentencing J's reasons demonstrated that she was clearly alive to, and carefully considered, arguments regarding Brown's level of involvement in trafficking heroin. Her finding that Brown was mid-level drug trafficker was open to her on the facts, and Brown had not shown that she committed palpable and overriding error in that regard. Sentencing J gave comprehensive reasons justifying sentence she imposed. She rejected Brown's contention that he was merely dealing drugs to fuel addiction and importantly, considered jurisprudence regarding sentencing

for offences similar to that for which he was convicted. Having imposed consecutive sentence for weapons offence, sentencing J considered totality and correctly exercised her discretion by declining to reduce total sentence. If, as sentencing J concluded, Brown was mid-level dealer, then sentence imposed fell within range and was not demonstrably unfit. There was no basis for appellate intervention.

***R v Ballantyne,* 2017 MBCA 4**

Heard: January 9th, 2017

Judgment: January 9th, 2017

Criminal law --- Youth offenders — Youth Criminal Justice Act — Sentencing — Adult sentence and election — Imposition of adult sentence --- Trial procedure — Charging jury or self-instruction — Direction on corroboration — Accomplices and witnesses of disreputable character — Requirement for warning

Facts:

Ballantyne, youth, convicted of first degree murder.

MBCA: Ballantyne appealed sentence.

Issue: Whether a Vetrovec warning was necessary for one of the Crown's witnesses.

Held: Appeal dismissed.

No merit to the ground. Counsel for Ballantyne did not request Vetrovec warning nor did she object to it not being in jury instructions. There was tactical reason for

experienced trial counsel not to request the warning. Sentencing J carefully reviewed all sentencing material and specifically turned her mind to Gladue factors. Evidentiary record showed that Ballantyne had a deeply entrenched history with gangs and there was no credible evidence that he had disassociated from it. It was open to sentencing J to find that Ballantyne's rehabilitative progress was wanting. Sentencing J found that a youth sentence would not be long enough to reflect the seriousness of the offence and Ballantyne's role in it and to provide a reasonable assurance of his rehabilitation where he could safely be reintegrated into society. Sentencing J's outlook with respect to Ballantyne was reasonable in the circumstances and appellate intervention was unjustified.

***R v Delacruz,* 2017 MBCA 10**

Heard: January 11th, 2017

Judgment: January 11th, 2017

Criminal law --- Narcotic and drug control — Offences — Trafficking — Sentencing — Possession for purpose of trafficking

Facts:

Delacruz was sentenced to five years for trafficking and possession of methamphetamine for purpose of trafficking.

MBCA: Crown appealed sentence, primarily on ground that sentencing J erred in finding that Delacruz should be sentenced as a mere courier rather than as an operator of a stash house, which would attract higher penalty.

Held: Appeal allowed in part, with respect to the victim fine surcharge.

If Delacruz was accorded a higher level of trust than a mere courier, he should fall within higher sentence range of 5-8 years. Sentencing J's apparent misapplication of sentencing range did not call for appellate intervention. A fair reading of his reasons establishes that he sentenced Delacruz as someone trusted with some decision-making responsibility in the trafficking network. He was more than a "mere courier" in the network and was afforded an "extremely high level of trust." He should be sentenced in the higher range. Sentencing J recognized that. Sentencing J held that denunciation and deterrence were key sentencing principles, but that Delacruz's rehabilitative prospects were high. Sentencing J gave comprehensive reasons for the sentence imposed, which ultimately fell within the range reserved for those who have greater involvement and responsibility in a trafficking network than a mere courier. Sentence was not demonstrably unfit. Sentencing J erred with respect to amount of victim fine surcharge imposed

***R v J(R),* 2017 MBCA 13**

Heard: January 13th, 2017

Judgment: January 13th, 2017

Criminal law --- Sentencing — Sentencing for multiple convictions--- Post-trial procedure — Appeal from sentence — Grounds — Miscellaneous

Facts:

JR plead guilty to 3 counts sexual interference and one count child pornography and was sentenced to 14 years imprisonment. JR committed numerous offences against his step-son, his daughter and her friend. JR had a dated criminal record with related offences. JR had professed his desire to control his sexual impulse

issues towards children but admitted that he had minimized the extent of his problem when participating in sex-offender treatment. His STATIC-99R score put him at moderate-high risk to commit another sexual offence. Aggregate sentence for all counts was 19 years but a reduction of the sentence was necessary to account for the totality principle.

MBCA: Accused applied for leave to appeal and appeal the sentence asserting it was demonstrably unfit.

Held: Application granted. Appeal dismissed.
The correct starting point was used to arrive at individualized sentences that fit circumstances of each count of sexual interference, circumstances of accused and relevant sentencing objectives and principles. The sentence imposed for making child pornography, where content included penetration between adults and children, was within range for an accused whose purpose in making child pornography was limited to personal use. There was no basis to interfere with the assessment and all relevant factors were considered when the totality principle was applied in light of JR's high degree of moral culpability.

R v BS 2017 MBCA 102
Judgment date: October 17, 2017

Criminal law --- Youth offenders — Youth Criminal Justice Act — Sentencing — Review of sentence — Miscellaneous

Facts:
The Crown appealed a six-month deferred custody and supervision order (DCSO), followed by 12 months of supervised probation imposed on a young person who

pled guilty to a major sexual assault (forced sexual intercourse) on a teenage victim. The Crown had sought a five-month custody and supervision order (CSO).

Analysis:
Leave to appeal the sentence was allowed as the sentencing judge erred in principle by not concluding that the victim had suffered "serious bodily harm**"**.

The Crown submitted that a five-month open CSO balanced the youth sentencing principles including rehabilitation and accountability, and acknowledged extensive mitigating circumstances (including low risk to reoffend, remorse, victim empathy and pro-social lifestyle, as well as the repercussions in his community). The young person argued that this is one of those rare cases where exceptional circumstances exist to warrant a non-custodial sentence of probation.

The Court concluded that the five-month CSO requested by the Crown would have been a fit sentence at the time of the sentencing hearing before the sentencing judge. However, given further mitigating factors (including time served, judicial interim release, delay, and the young person having been fully compliant with the conditions and undertaking) and the fact that the Crown did not oppose stay of sentence, the Court found that placing the young person in custody would not be in the interests of justice and stayed the five-month CSO.

Conclusion:
Appeal allowed. Sentence was varied and replaced with a 5-month custodial sentence imposed; sentence stayed.

R v. Shahnawaz et al 2017 MBCA 93
Judgment date: September 22, 2017

Criminal law --- Offences — Firearms and other weapons — Careless use of firearm — Sentencing — Adult offenders

Facts:
Two drive-by shootings at two residential addresses in Winnipeg led to two accused pleading guilty to two counts each of intentionally discharging firearm into place, knowing or being reckless as to whether another person was present. They were

sentenced to two five years' imprisonment, to be served consecutively. The two accused sought leave to appeal and, if granted, appeal sentence.

Analysis:
The sentencing judge erred in two respects. First, he erred when he determined the overall sentence before deciding whether the sentences should be consecutive or concurrent. However, the error had no impact on the sentences since the sentencing judge made it clear that the sentences would have been the same even if he had imposed concurrent sentences. Second, he erred when he said that he did not agree that house arrest, while on bail, should have bearing on time to be served. However, once again, the Court found that the error had no impact on the sentences**.** There was no evidence that the bail terms were unduly harsh, and given the seriousness of the offence, the sentences imposed were not unfit.

Conclusion:
Leave to appeal sentence was granted but the appeals were dismissed.

R v. Waddell 2017 MBCA 91
Judgment date: September 13, 2017

Criminal law --- Sentencing — Types of sentence — Conditional sentence — Breach — Penalties

Facts:
The accused was sentenced to two years less one day to be served conditionally and a driving prohibition of three years, on two counts of dangerous driving. The accused breached a condition not to attend any licensed establishment primarily engaged in the sale of alcohol (he was observed at the casino one month after being sentenced). He was sentenced to serve the remaining portion of his sentence in custody. He appealed on the grounds that the termination of the conditional sentence was harsh and excessive, that it was contrary to the recommendation of the conditional sentence supervisor and that the sentencing judge did not consider all other options before terminating the conditional sentence.

Analysis:

Substantial deference is owed to the sentencing judge. In this case, the sentencing judge found that the actions of the accused showed his continuing lack of maturity and his failure to understand the seriousness of his actions. The underlying facts related to the initial charges were quite serious. The sentencing judge had made it clear that if any of the conditions were breached, it would likely result in the termination of the conditional sentence.

The sentencing judge rejected the accused's explanation for attending the casino (that he was just getting some food) and concluded that it would be contrary to the public interest to allow the accused back into the community.

While a supervisor supported the accused returning to the community, this recommendation was not determinative. As well, the sentencing judge needed to consider a variety of objectives besides the rehabilitation of the accused, such as deterrence and denunciation.

Evidence was presented with respect to difficulties accused encountered while being incarcerated which was unfortunate, but it did not mean sentencing judge erred in his disposition.

Conclusion:
Appeal dismissed.

R. v. Gardiner 2017 MBCA 57
Judgment: May 31, 2017

Criminal law --- Offences — Assault — Common assault — Sentencing — Adult offenders — Spouse or partner

Facts:
The accused was charged with several crimes in connection with incidents of domestic violence (including choking partner with a leather belt to prevent her from fleeing). He entered a guilty plea to assault with a weapon, and was found guilty after trial of an additional charge of assault. The accused was sentenced to a conditional discharge with two years of supervised probation, concurrent on both charges. The Crown appealed the sentence.

Analysis:
The Court concluded that while the sentencing judge's decision was entitled to a high degree of deference, he committed an error in principle by failing to give sufficient weight to general deterrence, and that this error resulted in a sentence that was demonstrably unfit. The court noted that the circumstances of the offence were serious, and that the principle of general deterrence was not satisfied in this case by a discharge.

Because of mitigating factors (including the fact that more than four years passed since the offences occurred) the circumstances did not warrant reincarceration.

Conclusion:
Appeal allowed (sentence imposed set aside and substituted with a two-year suspended sentence with supervised probation on the same terms imposed by the sentencing judge).

R. v. Sinclair 2017 MBCA 9
Judgement date: January 16, 2017

Criminal law --- Offences — Breaking and entering and related offences — Unlawfully in dwelling house — Sentencing — Adult offenders

Facts:
The accused went to the victim's home with an unnamed accomplice to enforce a drug debt of the victim, a crack cocaine addict. The victim was beaten, robbed and threatened with steel object, and a female housemate who is cognitively impaired and has mental health issues was also threatened.

The accused received the following concurrent sentences, for a total sentence of seven and one-half years: Unlawfully being in a dwelling-house with intent (seven and one-half years), robbery (five years), utter threats of death/bodily harm (two years), fraudulent personation with intent to gain advantage (one year). The accused appealed the seven and one-half-year sentence for unlawfully being in a dwelling-house contrary to section 349 of the *Criminal Code*.

Analysis:
The accused argued that this was not a home invasion that attracted the seven to ten-year range, given that there was no break and enter or forcible entry of a dwelling-house. The trial judge found that the facts supported a finding of a home invasion that warranted a sentence within the seven to ten-year range.

The Court concluded that while the sentence was significant, it was entitled to deference, given the offences committed by the accused, his background and the entirety of the circumstances. Appellate intervention was not warranted in this case. There was no error in principle by the trial judge. The Court concluded that the sentence for these offences and this offender was fit.

Conclusion:
Leave to appeal was granted, but the appeal was dismissed.

R. v. Genaille 2017 MBCA 38
Judgment date: April 5, 2017

Criminal law --- Offences — Assault — Aggravated assault — Sentencing — Adult offenders — General principles

Facts:
The accused and four co-accused, viciously beat a man for a prolonged period of time. They kicked, stomped and struck the victim, sometimes with objects. The victim suffered serious permanent injuries. The accused appealed his sentence of two years' incarceration, followed by two years' supervised probation, for aggravated assault.

Analysis:
The accused was 54 years old and had a lengthy criminal record including acts of violence. A video showed that the accused had taken a leading role in the assault. The trial judge properly evaluated *Gladue* factors, rehabilitation and the principle of restraint. The sentence was not unfit and could be considered lenient (the trial judge found that *Gladue* factors warranted a sentence less than the "reasonable

position" of four years sought by the Crown). The trial judge did not place too much weight on principles of parity, denunciation and deterrence.

Conclusion:
Appeal dismissed.

R. v. Langille 2017 MBCA 25

Judgment date: February 17, 2017

Criminal law --- Sentencing — Types of sentence — Probation — General principles

Facts:
The accused pleaded guilty to two counts of sexual assault. On joint submission, the accused was sentenced to two years' incarceration less eight months' time in custody, with balance going forward of one year and four months, to be followed by three years' supervised probation on first count, and three years' incarceration concurrent less eight months' time in custody, with balance going forward of two years and four months on the second count. The Crown appealed.

Analysis:
The parties were in agreement that, as the custodial sentence imposed is for two years and four months, the probation order was made in error. This is as a result of the application of section 731(1) of the *Criminal Code*, which indicates that a probation order is not available if a period of incarceration exceeding two years is imposed.

Conclusion:
Leave to appeal granted and appeal allowed. Sentence varied to delete the probation order. All other aspects of the sentence are confirmed and remain the same.

R. v. McKay 2017 MBCA 55
Judgment date: May 30, 2017

Criminal law --- Sentencing — Sentencing for multiple convictions

Facts:
The accused pleaded guilty to theft under $5,000, breaking and entering, armed robbery, wearing disguise with intent, and robbery while armed with an offensive weapon. The accused was sentenced to a global sentence of 30 months' incarceration, followed by a period of probation of two years. The Crown appealed. The grounds of appeal were that (i) the sentencing judge erred in his treatment of the aggravating and mitigating factors; and (ii) the sentence that he imposed was unfit. The accused had a lengthy criminal record with 34 convictions at the time of these offences.

Analysis:
The Court concluded that the sentencing judge erred in stating that the lack of injuries to the victims was a mitigating factor (it was “at best” a neutral factor), but that the error did not have an impact on the sentence. The Court was of the view that the sentencing judge erred in principle in his treatment of the accused's degree of intoxication and that this error had an impact on the sentence that he imposed. It was also of the view that the sentence was demonstrably unfit.

The Court agreed that factors which would justify a sentence lower than the range of seven to ten years' incarceration were the accused's youthful age, his significantly disadvantaged Aboriginal background, his almost immediate confession and early guilty plea and the low level of planning.

However, the Court concluded that the sentence imposed did not give sufficient weight to the significant aggravating factors, including the accused's lengthy criminal record, the serious nature of the offences and the fact that he sprayed one of the victims with the pepper spray three times. While the accused was intoxicated, the first robbery was planned, including wearing a disguise and taking a weapon.

The Court found that the sentence did not hold the accused accountable for multiple offences to which he pleaded guilty, and the sentence was increased by

two years, to a sentence of four and one-half years' incarceration (from this 17 months pre-custody credit was deducted).

Conclusion:
Leave was granted and the appeal was allowed.

R. v. Rennie 2017 MBCA 44
Judgment date: April 28, 2017

Criminal law --- Sentencing — Principles — Restorative justice — Aboriginal offenders

Facts:
The accused sought leave to appeal and appealed a sentence of 30 months' incarceration less seven months' credit for pre-sentence time in custody, imposed following pleas of guilty to charges of mischief, assault of a peace officer with a weapon and flight from police. The accused appealed his sentence on the basis that the sentence is demonstrably unfit due to the sentencing judge's failure to accept that the *Gladue* principles applied to his case.

Analysis:
The accused waived the preparation of a formal *Gladue* report, but asserted that his counsel placed before the sentencing judge the systemic and background factors that contributed to him being disadvantaged due to being an Aboriginal person of Métis background.

The sentencing judge accepted that the accused had some intellectual deficits which lessened his moral culpability, but did not accept that this related back to *Gladue* factors. The Court noted that a sentencing judge cannot ignore the fact that an offender has an Aboriginal background, but that he is not bound to find that such a background will automatically lead to a conclusion that the offender has been disadvantaged because of that background.

The Court found that the sentencing judge could have phrased his comments in a less negative way, but was not convinced that he out-and-out rejected the consideration of *Gladue* factors and, therefore, was not in error. It also noted that

even if the sentencing judge had declined to consider the applicability of *Gladue* to this accused, that the sentence he imposed was fit and proper.

The Court concluded by noting that when counsel elects not to have a *Gladue* report prepared regarding an accused's Aboriginal heritage, it becomes more difficult to later claim that the sentencing judge failed to properly consider those issues.

Conclusion:
Grant leave to appeal but appeal dismissed.
Application for leave to SCC dismissed.

R. v. Frost 2017 MBCA 43
Judgment date: March 24, 2017

Criminal law --- Offences — Sexual exploitation — Elements

Criminal law --- Offences — Sexual exploitation — Sentencing — Adult offenders

Facts:
The accused was 48 years old at the time of his conviction on one count of sexual exploitation involving a then 17-year-old female complainant. The complainant worked part time for accused's wife and eventually became their helper at home He was sentenced to 18 months' incarceration followed by three years of supervised probation. He was also ordered to perform 150 hours of community service work. The accused appealed against his conviction and the Crown sought leave to appeal the sentence.

Analysis:

(1) Conviction:

The issue for the conviction was whether the accused stood in a relationship of trust towards the complainant. The Court was satisfied that the judge correctly stated and applied the legal principles regarding the notion of "position of trust".

His characterization was largely a factual finding which was owed deference and could not be interfered with unless there was palpable and overriding error.

(2) Sentence application:

The issue on the sentence appeal was whether the judge erred by failing to treat the sexual misconduct as a major sexual assault thereby resulting in a sentence that was demonstrably unfit. The Court concluded that the sentence imposed was not unfit for this offender. The accused had no criminal record, was 48 years old, had been married for 17 years with two children and was steadily employed. A pre-sentence report outlined the accused's remorse and found him to be at very low risk to reoffend generally and at low risk for re-involvement in sexual offences.

Conclusion:
The conviction appeal was dismissed and, and while leave to appeal the sentence was granted, the Crown's sentence appeal was also dismissed.

R v. Wenaus 2017 MBCA 61
Judgment date: June 16, 2017

Criminal law --- Narcotic and drug control — Sentencing — Types of sentence — Suspended sentence

Facts:
The accused was growing 19 marijuana plants and was convicted of production of marijuana. He was sentenced to a one year conditional discharge including 50 hours of community service. The Crown sought leave to appeal and appealed the sentence.

Analysis:
The reason for the appeal was that the conditional discharge was an illegal sentence and was not available in light of the *Controlled Drugs and Substances Act* and the *Criminal Code* (Conditional discharges are not available for an offence where the maximum sentence is 14 years to life imprisonment, and the maximum sentence for the offence of production of marihuana is 14 years).
The accused acknowledged the illegality of the sentence.

Conclusion:
Leave to appeal was granted and appeal allowed. The conditional discharge was set aside and substituted with a suspended sentence of nine months with 50 hours of community service.

R. v. Gurske 2017 MBCA 46
Judgment date: May 3, 2017

Criminal law --- Offences — Theft and related offences — Theft — Sentencing — Adult offenders

Facts:
The accused was the supervisor of a credit union and stole $917,750 from 2007 to 2013. The accused appealed a custodial sentence of 42 months for one count of theft over $5,000.

Analysis:
The accused argued that the sentence was harsh and excessive and submitted that the offences resulted from an undiagnosed mental illness and a gambling addiction. Other mitigating factors included the absence of a prior criminal record, a guilty plea with an indication of remorse, and restitution of $315,000. She argued that there should have been a finding of exceptional circumstances and submitted that time served (five months and four days) would be a fit and proper sentence.

The Court found that the sentencing judge did not err in declining to find that there were exceptional circumstances. The facts did not support an inference that a mental disorder was the reason for the accused's criminal conduct (she was not diagnosed until after the arrest). While the sentencing judge accepted the diagnosis of two psychiatrists that the accused was a pathological gambler, it was open to him to find that this played a limited role in the overall assessment of the sentence. The sentencing judge gave appropriate consideration to the accused's mental health issues, and the sentence imposed was within the range for large-scale financial crimes involving a breach of trust.

Conclusion:
Appeal dismissed.

R. v. Anderson 2017 MBCA 31
Judgment date: March 9, 2017

Criminal law --- Offences — Driving/care and control with excessive alcohol — Sentencing — Miscellaneous

Criminal law --- Sentencing — Principles — Restorative justice — Aboriginal offenders

Facts:
The accused drove his vehicle on the wrong side of the highway towards oncoming traffic, colliding with another vehicle and seriously injuring its driver and two passengers. His blood alcohol content (BAC) was over twice legal limit. The accused pleaded guilty to one count of driving over 80 mg causing bodily harm. Taking into account *Gladue* principles, the sentencing judge imposed a 90-day intermittent sentence, followed by three years of supervised probation and 100 hours of community service. The Crown appealed the sentence.

Analysis:
The Court agreed with the sentencing judge that the appropriate sentence is one that balances denunciation and deterrence, but also rehabilitation (especially when *Gladue* factors are at play). However, the Court found the sentencing judge minimized or mischaracterized the following aggravating factors:

- The sentencing judge correctly referred to the accused's BAC as being aggravating, but failed to further consider his gross intoxication. The judge also wrongly considered the fact that the accused slammed on his brakes at the last second as a mitigating factor.
- Staying at the scene of the accident is not a mitigating factor, it is an absence of an aggravating factor. It is a criminal offence to leave the scene of an accident.
- The accused did not enter an early guilty plea as a result of being remorseful. He pleaded guilty 18 months after the offence, after failing to attend his preliminary inquiry. He then further delayed matters by failing to participate in the preparation of his pre-sentence report. He was charged with failing to attend court and spent five days in jail.

- The sentencing judge noted that being detained for a week in 2015 brought home to the accused the need to begin addressing his alcohol consumption, yet, while the collision occurred in 2013, the accused continued to drink and never sought treatment prior to 2016

The Court found that it would result in an injustice to reincarcerate the offender. While the offence was serious, the accident happened almost four years prior, and the accused had finished serving his sentence. He had permanent employment and continued his alcohol treatment. He had made connections with his indigenous background and he and his family had integrated themselves into the community in Winnipeg. The Court noted that reincarceration would have a negative impact not only on him, but on his family too (loss of income). The accused continued to express his remorse about the accident. The Court concluded that reincarcerating him could only adversely affect his progress towards rehabilitation and could serve no purpose for society.

Conclusion:
Leave to appeal granted. Appeal allowed in part. The 90-day intermittent sentence was substituted with one of six months' incarceration. Remaining custodial portion of the sentence was stayed.

R v. Okemow 2017 MBCA 59
(also listed as *R v J.M.O.*)
Judgment: June 20, 2017

Criminal law --- Youth offenders — Youth Criminal Justice Act — Sentencing — Review of sentence — Miscellaneous

Criminal law --- Youth offenders — Youth Criminal Justice Act — Sentencing — Types of sentence — Committal to custody

Facts:
The accused pleaded guilty to 14 offences that occurred when he was 14 years old. The most serious of the offences related to two armed robberies (one resulted in serious injuries to one a victim). The accused expressed no remorse for the crimes to his probation officer (he described them as “fun”).

Extensive material was filed at the sentencing as to the young person's background and psychological profile, as well as a *Gladue* report. The report included information about the accused living in the child welfare system, his cognitive impairments (including FASD), and his alcohol and drug problems. According to his probation officer, the accused presented as a very high risk to reoffend. A doctor noted that he was not a good candidate for either community-based supervision or correctional programming.

The accused was sentenced as an adult for armed robberies and as youth for other charges — he was sentenced to 36 months imprisonment, less 29 months already served, and 3 years probation. Both the Crown and the accused sought leave to appeal and sought to appeal the sentence.

Analysis:

(1) The Accused's Appeal

The accused claimed that he should have been sentenced as a youth on all charges.

The Court outlined the test for imposing an adult sentence. The Crown must rebut the presumption of diminished moral blameworthiness. The sentencing judge found that the accused was highly blameworthy for the crimes, despite cognitive limitations. The accused had turned to crime and violence despite a supportive home environment. The sentencing judge's findings that the accused planned, instigated and was the leader in the two armed robberies were reasonably supported on the record. The Court concluded that in light of the record, the sentencing judge did not err.

The second aspect of the inquiry relates to accountability, and the relationship between the concepts of proportionality and rehabilitation. The sentencing judge was concerned about the serious nature of the offences. It was unrealistic, given the record, to place much weight on rehabilitation and reintegration. The Court found that the judge's prediction as to the accused's future behaviour was reasonably supported by the record. The factors of proportionality outweighed those of rehabilitation, so the Court did not interfere with the judge's decision.

(2) The Crown's Appeal

The Crown claimed that the accused's adult sentence should have been increased.

Three aspects of the sentence imposed were illegal (not in compliance with the *Youth Criminal Justice Act*) It was therefore necessary for the Court to re-sentence the accused. Further, the sentencing judge used the improper mitigating factor of the accused's mental state in reducing the sentence. The accused's post-sentence misconduct was also a proper aggravating factor.

The Court found that a fit sentence for the adult crimes was 4.5 years, and reduced this sentence by 6 months. A cumulative assessment of the relevant factors favoured reincarceration of the accused for the remainder of the sentence.

Conclusion:
Leave to appeal on both appeals was granted. The sentence appeal of the accused was dismissed. The sentence appeal of the Crown was allowed and the sentence of the accused was varied accordingly.

MBCA - Miscellaneous

R v. Ostrowski 2017 MBCA 80
Judgment: August 29, 2017

Criminal law --- Trial procedure — Miscellaneous

Facts:

A key witness applied to be excused from testifying on compassionate grounds, due to physical and mental health issues. As an alternative, he suggested that his testimony be taken by way of video link. Both applications were opposed by both the accused and the Crown.

Analysis:

The Court was of view that the medical evidence that was provided did not support a finding that the witness could not testify. Further, the Court was not satisfied that testifying by way of video link was an acceptable alternative to having the witness testify in person. It found that the witness's evidence was key to the determination of the issues arising in the appeal, and as such should be presented and subjected to cross- examination. It concluded that necessary accommodations could be made by way of further submissions.

Conclusion:

The Court dismissed the witness's motion to be excused from testifying and the request that he be allowed to testify by video link.

R v. Gowenlock 2017 MBCA 79

Judgment date: August 28, 2017

Criminal law --- Trial procedure — Costs — Miscellaneous

In the course of criminal proceedings, Counsel for the accused failed to comply with a court-imposed deadline for filing motion brief. The Counsel was ordered to pay $1,000 costs personally under the *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*. The Defence counsel began appealing proceedings. A hearing was held to determine who should present responding case to appeal. The Court concluded that Amicus curiae should be appointed to present the response appeal, as Crown counsel must not become the prosecutor of defence counsel.

R. v. Gowenlock 2017 MBCA 82

Judgment date: August 31, 2017

The Court appointed amicus curiae to make arguments in proceedings involving a new provision of the *Criminal Proceedings Rules* of the MBQB. The Chair of Legal Aid Council declined to approve funding because "the appointment of counsel in this instance is not for a purpose contemplated in the *Act*." The Court ordered the appointment of *amicus* and funding.

Canadian Broadcasting Corp. v. Morrison 2017 MBCA 36
Judgment date: April 7, 2017

Criminal law --- Extraordinary remedies — Certiorari — Miscellaneous

Evidence --- Hearsay — Miscellaneous

Facts:

The applicants faced a private prosecution for one count of publishing a defamatory libel and one count of publishing a defamatory libel known to be false. The charges arose from an episode of "the fifth estate" about the business practices and personal life (including allegations of sexually inappropriate behavior) of Peter Nygård (chairman of international women's fashion company) was broadcasted nationally on CBC and later made available on the Internet.

A Provincial Court judge (PCJ) conducted a pre-enquete hearing and decided to issue summonses against each of the applicants for them to attend court to answer to both charges. The applicants moved for a writ of *certiorari* to quash the PCJ's decision and the summonses that were issued. The reviewing judge dismissed the request for *certiorari*, finding that the PCJ had not made a jurisdictional error.

Analysis:

(1) Can a television broadcast be an act of publication of a defamatory libel?

The Court discussed the distinction between "libel" and "slander" at common law.T he Court found that the evidence presented at the pre-enquete hearing supported the finding that defamatory libel was published. The episode created by the applicants was permanently recorded into a video that was broadcast nationally on the television network of the CBC on several occasions.

The Court also found that CBC had a legislative mandate to make its programming available throughout Canada, and that the accepted fact that the episode was broadcast nationally on the CBC's television network on multiple occasions was evidence of publishing to a third party within the meaning of section 299 of the *Code*. Based on the record before the PCJ, the Court concluded that there was some evidence that a defamatory libel relating to Nygård was published by each of the applicants.

(2) Is it a jurisdictional error if hearsay evidence is admitted and relied on at a pre-enquete hearing under section 507.1 of the *Criminal Code* to decide whether process should issue for a private prosecution?

Virtually all of the evidence presented was effectively hearsay. The applicants argued that a jurisdictional error occurred in the PCJ admitting and relying on hearsay to make his decision. Their submissions were policy based and relied on principles of statutory interpretation.

The Court found that the issue of whether hearsay evidence could be accepted at a pre-enquete hearing was not necessary to decide, as the alleged error was not jurisdictional. It noted that what does or does not constitute evidence for the judge's decision is a legal issue within the judge's jurisdiction. An error by a judge as to the admission or exclusion of evidence, or the application of the rules of evidence to a question a judge has jurisdiction to decide, is not a jurisdictional error.

The Court found that what evidence the PCJ could or could not receive and the form it had to take in deciding whether to issue process was a subject within his jurisdiction. The correctness of the judge's decision was irrelevant for the purposes of a certiorari review because the misconstruction of a statute or misdirection on the law on a subject within the PCJ's jurisdiction is not a jurisdictional error.

Conclusion:

Appeal dismissed.

R v. Ross 2017 MBCA 77

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Jurisdiction — Court of Appeal

Accused was convicted of two counts of fraud — Accused became aware of additional evidence — Accused applied for ministerial review of convictions — Minister directed dual reference to this Court — First part of reference referred three questions to Court concerning whether new information would be admissible as fresh evidence on appeal — Second part stated that if Court concluded that any of information was admissible as fresh evidence, matter was referred to Court to determine case as if it were appeal by accused — Accused sent letter raising

concerns about narrow scope of reference, and Director/General Counsel at Criminal Conviction Review Group, Department of Justice ("Director"), replied by letter — Attorney General contended that Director's letter purported to expand scope of reference — Attorney General brought motion for directions, seeking order that scope of reference be limited to three stated questions — It was determined that Director's letter did not affect scope of reference — Director's letter opined that Court should not be limited in considering any important evidence if Court considered it appropriate — Despite discretion given to Court to receive evidence, wording of reference was clear: unless Court was of view that any of three listed items would be admissible as fresh evidence on appeal, Court did not have jurisdiction to proceed to appeal stage — Extraordinary policy nature of decision to order reference supported view that this power must be exercised personally by Minister.

***R v Van Wissen,* 2016 MBCA 108**

Heard: November 17th, 2016

Judgment: November 21st, 2016

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Procedure on appeal — Miscellaneous

Facts:

Van Wissen convicted of first degree murder. Accused appealing conviction.

MBCA: Motion to increase length of factum from limit of 30 pages to 60 pages.

Held: Motion dismissed.

Number of issues raised in appeal is excessive (20). His request to double the size of his factum arises essentially because of the unfocussed nature of his appeal. That fact, in and of itself, is not reason to grant motion. Van Wissen can either

focus his arguments on those issues which have the best chance to succeed on appeal or be left with less expansive arguments which deprive the Court the benefit of a more comprehensive argument on the most significant issues.