

CRIMLNWS 2021-06
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— **Watt's Criminal Law and Evidence Newsletter**

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Case Law Highlights

[CL 1] — Summary Dismissal and Appellate Deference

A decision to summarily dismiss motions for non-compliance with notice requirements or patent lack of merit is ordinarily entitled to deference on appeal: *R. v. Greer* (December 14, 2020), Doc. CA C65783, 2020 CarswellOnt 18329 (Ont. C.A.)

See, *Watt's Manual of Criminal Evidence*, §41.02, "Entitlement to a Voir Dire", "Procedural Requirements".

[CL 2] — Tactical Decisions on Admissions

A decision is tactical when it involves a balancing of the advantages and disadvantages of different courses of conduct. Where D makes a decision about their defence because they perceive that there are advantages to one option, but fewer or no advantages

to another option, the decision is tactical. D will not be permitted to withdraw a formal admission for tactical reasons: *R. v. Eliasson* (December 8, 2020), Doc. Edmonton 1903-0315-A, 2020 CarswellAlta 2399 (Alta. C.A.)

See, *Watt's Manual of Criminal Evidence*, §36.01, "Admissions: Criminal Code, s. 655", "Withdrawal of Formal Admissions".

[CL 3] — Authenticating Electronic Documents

Common law principles respecting the admissibility of evidence and *CEA* provisions govern the admissibility of electronic documents. For the purpose of admissibility under *CEA*, s. 31.1, authentication of electronic documents is established by meeting the low standard of some evidence that the tendered document is what it purports to be: *R. v. Martin* (January 4, 2021), Doc. 201901H0008, 2021 CarswellNfld 2 (N.L. C.A.)

See, *Watt's Manual of Criminal Evidence*, *CEA* §31.1, "Authentication".

[CL 4] — Appellate Review of Circumstantial Evidence Verdicts

On appeals from verdicts based on circumstantial evidence rendered by trial judges, a court of appeal defers to the findings of fact made by the trial judge. The court considers whether the trier of fact could reasonably be satisfied that D's guilt was the only reasonable conclusion available on the totality of the evidence: *R. v. Buckels* (December 11, 2020), Doc. AR 20-30-09423, 2020 CarswellMan 518 (Man. C.A.)

See, *Tremear's Annotated Criminal Code*, *Criminal Code*, s. 686, "Unreasonable Verdict: The Role of the Appellate Court under s. 686(1)(a)(i)".

[CL 5] — Prejudicial Evidence

Evidence is *not* prejudicial simply because it bolsters P's case and increases the risk of conviction. Evidence *is* prejudicial only if its reception would threaten the fairness of the trial or where there is a real risk that the jury will misuse the evidence or be unable to properly assess the evidence regardless of the trial judge's instructions: *R. v. McMorris* (December 29, 2020), Doc. CA C63072, 2020 CarswellOnt 19036 (Ont. C.A.)

See, *Watt's Manual of Criminal Evidence*, §7.0, "The Meaning of Prejudice".

[CL 6] — Proving the Offence of Section 286.1

To obtain a conviction of obtaining sexual offences for consideration, P must prove beyond a reasonable doubt either that a text sent by D was for the purpose of obtaining sexual services for consideration, or that D obtained sexual services for consideration: *R. v. Coburn* (January 5, 2021), Doc. C.A.C. 495770, 2021 CarswellNS 2 (N.S. C.A.)

See, *Tremear's Annotated Criminal Code*, *Criminal Code*, s. 286.1, "Essential Elements of Offence".

[CL 7] — The Meaning of "obtained in a manner" in Charter Section 24(2)

Even though evidence might have been discovered by entirely lawful police conduct, where there is a sufficient temporal and contextual link between the evidence and either prior or subsequent police breaches of D's *Charter* rights, the evidence has been "obtained in a manner" that infringed D's *Charter* rights: *R. v. Reilly* (December 17, 2020), Doc. Vancouver CA46220, 2020 CarswellBC 3250 (B.C. C.A.)

See, *Watt's Manual of Criminal Evidence*, §41.01, "Evidence "obtained in a manner": General Principles".

[CL 8] — Alternative Explanations for Gaps in the Evidence

A jury instruction that invites jurors to consider "plausible theories" and "reasonable possibilities" arising from the "absence of evidence" makes it clear that alternative explanations to guilt need not be based on proven facts: *R. v. Roulette* (December 8, 2020), Doc. AR 20-30-09452, 2020 CarswellMan 519 (Man. C.A.)

See, *Watt's Manual of Criminal Evidence*, §9.01, "Jury Instructions on Circumstantial Evidence".

[CL 9] — The Humaid Caveat and Threshold Reliability

The *Humaid caveat* is an exception to the general rule that excluding a declarant's hearsay statement based on the reliability of the narrator is an error where the narrator testifies. The circumstances giving rise to the *caveat* will be relatively rare. The decision to rely on the *caveat* falls within the discretion of the trial judge: *R. v. McMorris* (December 29, 2020), Doc. CA C63072, 2020 CarswellOnt 19036 (Ont. C.A.)

See, *Watt's Manual of Criminal Evidence*, §28.03, "The Reliability Factors: Credibility Factors".

[CL 10] — Re-incarceration on Appeal

In determining whether an offender should be re-incarcerated as a result of a successful appeal by P against a sentence already served, an appellate court should consider:

- i. the seriousness of the offence;
- ii. any rehabilitative efforts and the impact of re-incarceration on those efforts;
- iii. the length of time since release;
- iv. the differences between the sentence imposed at trial and on appeal; and
- v. the availability of measures rather than re-incarceration that would serve to denounce and deter yet still promote rehabilitation.

R. v. Noseworthy (January 5, 2021), Doc. 201901H0024, 2021 CarswellNfld 1 (N.L. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 687, "Appellate Review: Re-incarceration after Sentence Served".

[CL 11] — Section 21(2) and Aggravated Assault

D may be convicted of aggravated assault under s. 21(2) when D is a part of a common intention to commit assault: *R. v. Strathdee* (December 9, 2020), Doc. Edmonton Appeal 1903-0190-A, 2003-0014-A, 2020 CarswellAlta 2352 (Alta. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 268, "The Liability of Parties".

[CL 12] — The Degrees of Similarity in Evidence of Similar Acts

The degree of similarity required to have evidence of similar acts admitted into the trial or across counts depends on the issues at work in the case and the purpose for which the evidence is sought to be admitted: *R. v. Norris* (December 31, 2020), Doc. CA C65226, 2020 CarswellOnt 19067 (Ont. C.A.)

See, *Watt's Manual of Criminal Evidence*, §34.01, "Admissibility of Evidence of Similar Acts: General Principles", "Admissibility of Evidence of Similar Acts: The Need for Similarity".

[CL 13] — Credit for Time Spent in Pre-trial Custody

Section 719(3.1) caps the credit for pre-trial custody. The credit includes both qualitative and quantitative considerations relating to remand custody: *R. v. Sheppard* (December 11, 2020), Doc. Calgary Appeal 1901-0259-A, 2020 CarswellAlta 2404 (Alta. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code, s. 719, "Time Spent in Custody: Limitations on Credit under s. 719(3.1)"*.

[CL 14] — Reliability, Credibility, and the Burden of Proof

A finding that V is both reliable and credible is *not* sufficient to satisfy the burden of proof beyond a reasonable doubt: *R. v. T.A.* (December 11, 2020), Doc. CA C67552, 2020 CarswellOnt 18856 (Ont. C.A.)

See, *Tremear's Annotated Criminal Code, Criminal Code, s. 558, "The Sufficiency of Reasons: Credibility", "The Sufficiency of Reasons: Reliability"*.

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