

Watt's Criminal Law and Evidence Newsletter

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Case Law Highlights

****Text Messages and General Warrants***

Section 487.01(1)(c) limits the availability of general warrants to circumstances in which no other statutory provision furnishes authority for what investigators seek to do.

Text messages are private communications and, even if they are stored on a service provider's computer, their prospective production requires authorization under Part VI of the *Criminal Code*. Acquiring the substance of a private communication, a text message, from a computer maintained by a telecommunications service provider is an interception of a private communication (LeBel, Fish and Abella JJ.)

Police are entitled to a general warrant only where they can show that "no other provision" in a federal statute would provide for the investigative technique, including a substantively equivalent technique, for which authorization is sought.

Acquisition of text messages stored on a telecommunication service provider's computer is substantively equivalent to an "intercept" under Part VI (even though it is not necessary to decide whether what happened here was an "intercept" under s. 183), thus cannot be authorized by a general warrant. (Moldaver and Karakatsanis JJ.)

R. v. TELUS Communications Co., March 27, 2013. (S.C.C. #34252)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 183 "Intercept"

s. 487.01 *The Absence of Other Provisions*

Statutory Ambiguity and Differences of Opinion

Disagreement among trial judges about the meaning of “if the circumstances justify it”, in particular about the meaning of “circumstances”, does *not* demonstrate legal ambiguity. Claims of statutory ambiguity must be evaluated after undertaking a contextual and purposive interpretive analysis of the provision.

R. v. Summers, March 12, 2013. (Ont. C.A. #C53913)

See, *Tremear’s Annotated Criminal Code, Criminal Code*, s. 719 *Time Spent in Custody: s. 719(3)*

Reductions of Sentence on Compassionate Grounds

Any reduction in sentence on compassionate grounds must be based on current, clear, and convincing evidence.

R. v. B. (G.), March 13, 2013. (Alta. C.A. 1201-0212-A)

See, *Tremear’s Annotated Criminal Code, Criminal Code*, s. 718

s. 718.2 *General Principles*

Serious Personal Injury Offences and “attempted use of violence”

An objective assessment of the seriousness of the predicate offence is *not* required in considering whether the criteria for a SPIO have been met. Some degree of physical action must be part of a threat for it to constitute the “attempted use of violence”. In other words, there must be some indication of imminent apparent danger to a person, or some overt act directed towards the actual use of violence against a person for a threat of violence (for example, in robbery under s. 343(a)), to also constitute the “attempted use of violence”.

R. v. Steele, March 13, 2013. (Man. C.A. AR11-30-07625)

See, *Tremeeear’s Annotated Criminal Code, Criminal Code*, s. 343 *Uses Violence or Threats of Violence: s. 343(a)*
 s. 752 *Serious Personal Injury Offence*

Establishing a Basis for Enhanced Credit

Enhanced credit is *not* available to every remand offender on the basis of absence of remission and parole eligibility. There must be some basis in the evidence or information before the sentencing judge to support the conclusion that this factor merits enhanced credit for a particular offender in a given case.

Section 719(3.1) permits a sentencing judge to award enhanced credit for pre-sentence custody where, on consideration of all relevant circumstances, including (but not limited to) ineligibility for remission and parole, enhanced credit is necessary to achieve a fair and just sanction in accordance with the scheme for sentencing and punishment in the *Criminal Code*.

R. v. Summers, March 12, 2013. (Ont. C.A. #C53913)

See, *Tremeeear’s Annotated Criminal Code, Criminal Code*, s. 719 *Time Spent in Custody: s. 719(3)*

Necessity in Child Abduction Cases

The necessity defence under s. 285 has three elements:

- i. that from D's point of view, but applying a modified objective test, there was a danger of imminent harm to the child;
- ii. that, according to D's perception, but applying a modified objective test, D had no reasonable legal alternatives to taking the child in breach of the custody order; and
- iii. that, viewed objectively, the harm to the child by taking the child in contravention of the custody order was proportional to the potential harm to the child that was being avoided.

R. v. Z. (P.), March 15, 2013. (Alta. C.A. 1101-0290-A)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 285 *Necessity: Protection from Danger of Imminent Harm*

The Role of the Trial Judge in Adoptive Admissions

A trial judge should hold a *voir dire* to determine the admissibility of a statement tendered as an adoptive admission. As a gatekeeper, the judge must be satisfied that D

- i. had the state of mind to hear and comprehend the accusatory statement; and
- ii. adopted the statement in some verbal or non-verbal way.

The trial judge must determine, after consideration of all the circumstances, whether there is sufficient evidence from which a jury might reasonably infer that D adopted the statement. Even where sufficient evidence exists, the trial judge should also balance the probative value of the evidence against its prejudicial effect before determining whether to allow the statement to go to the jury.

R. v. Scott, January 25, 2013. (Man. C.A. AR11-30-07553)

See, *Watt's Manual of Criminal Evidence*,

§ 36.04 *The Role of the Trial Judge in Adoptive Admissions*

Consolidated Documents under CEA s. 30(3)

The two document language in *CEA* s. 30(3) does *not* prohibit consolidation of the information in a single document.

R. v. Jahanrakhshan, March 20, 2013. (B.C. C.A. CA039768)

See, *Watt's Manual of Criminal Evidence, CEA*

s. 30

Affidavit: s. 30(3)

Pre-Hearing Conferences as Inherent Time Requirements under s. 11(b)

The time required to schedule, prepare for, and conduct prehearing conferences should be considered an inherent time requirement of the case for the purposes of a s. 11(b) *Charter* analysis.

R. v. Nguyen, March 20, 2013. (Ont. C.A. #C54526)

See, *Tremear's Annotated Criminal Code, Charter*,

s. 11

Trial Within a Reasonable Time under s. 11(b) Governing Principles

Private Citizens as Persons in Authority

A person in authority may also include someone whom D reasonably believes is acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her. For a person to be a “person of authority” as a private citizen, D must subjectively believe that the person

- i. has the ability to influence or control the proceedings; and
- ii. is allied with the police or prosecuting authorities.

D’s belief must also be reasonable.

R. v. Glessman, March 11, 2013. (Alta. C.A. 1203-0036-A)

See, *Watt’s Manual of Criminal Evidence*,

§ 37.02 *General Principles:
the Test Applied*

*Persons in Authority:
the Test Applied*

Confirmatory Evidence and Collusion

Confirmatory evidence must be independent of the suspect witness, but this independence is not nullified simply because the witness is also suspect. For independence to be lost, there must be some taint arising from collaboration or collusion.

R. v. McCann, February 6, 2013. (B.C. C.A. CA039482)

See, *Watt’s Manual of Criminal Evidence*,

§ 33.01 *Unsavoury Witness
Warnings: the
Nature of
Confirmatory
Evidence*

*Unsavoury Witness
Warnings: Mutual
Confirmation*

Similar Acts and Numbers

The admissibility of evidence of similar acts is *not* determined simply by adding up the number of similarities between the offences charged and the allegedly similar acts. The qualitative force of the evidence is critical.

R. v. W. (J.), February 14, 2013. (Ont. C.A. #C54469)

See, *Watt's Manual of Criminal Evidence*,

§ 34.01 *Admissibility of Evidence of Similar Acts: General Principles*

The Test for Admissibility: Balancing Probative Value and Prejudicial Effect

Acts of Confinement and Proof of Kidnapping

Aspects of V's confinement that shed light on the purpose of the taking are also relevant evidence that tends to prove the offence under s. 279(1)(c).

R. v. Tse, March 19, 2013. (B.C. C.A. CA038423)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 279

The Essential Elements of Kidnapping: s. 279(1)

The Cogency of Recantation Evidence

Evidence of a trial witness' recantation may satisfy the cogency requirement of fresh evidence on appeal in either of two ways: it may be sufficiently cogent in the sense that

- i. it is reasonably capable of belief, thus admissible as substantive evidence that D did not commit the offence of which she or he was convicted; or
- ii. it can be used to impeach the witness' testimony at trial.

Even a recantation that is false may have impeachment value in some circumstances.

R. v. Kassa, March 8, 2013. (Ont. C.A. #C51984)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 683 *New Evidence About Trial Conduct: Recantation Cases*