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CRIMINAL PLEADINGS AND PRACTICE IN CANADA

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What's New in this Update:

- Searches performed at the "*investigation* and *evidence-gathering stage*" are aimed at investigating and gathering evidence of "potential criminality", *not* at proving allegations and securing a conviction in court. This function does *not* include "investigating and deciding whether the essential elements of an offence are made out"; that role belongs to the courts: *R. v. Vice Media Canada Inc.*, 2018 SCC 53, at **3:0040**.
- What is *relevant* as to an "anonymous tip" is whether the nature of the "confirmatory evidence" is such that it is reasonably open to the authorising judge or justice to infer that, because the confidential informant is proven correct on some details, it is "safe in the circumstances to *rely* on 'other information' provided": *R. v. Pilbeam*, 2018 MBCA 128, at **3:1060**.
- A superior court judge may issue a warrant, authorization or order in respect of "journalistic communications" *only* if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that: (a) there is "no other way by which the information can

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reasonably be obtained"; *and* (b) the public interest in the investigation and prosecution of a criminal offence *outweighs* the journalist's right to privacy in gathering and disseminating information: *Criminal Code*, s. 488.01(3), at **3:1166**.

- "Tracking data" emitted by a tracking device may be *admissible* to prove the truth of the information gathered by the device: *R. v. LeBlanc*, 2018 NBCA 65, at **3:1175**.

- Police officers are *not* required to "articulate a specific offence" at the time they arrest a suspect so long as the police officers articulate the "substance of the offence" that they have in mind to the suspect. Where those offences are "hybrid *or* indictable offences", the officers' arrest of the accused, without a warrant but on reasonable grounds, will be valid: *R. v. S. (W.E.Q.)*, 2018 MBCA 106, at **5:0030**.

- The "Crown" for the purposes of *disclosure* does *not* refer to all Crown entities, but *only* to the "prosecuting Crown". All "other Crown entities", including *police*, are "third parties" for the purposes of disclosure and are *not* subject to the *Stinchcome* regime: *R. v. Gubbins*, 2018 SCC 44, at **13:3017**.

- The scope of the Crown's "disclosure obligations" with respect to "maintenance records of breathalyzer instruments" used in drinking and driving cases are subject *only* to "third party disclosure". The maintenance records are *not* part of the "fruits of the investigation" and are *not* relevant to determine whether the instrument malfunctioned: *R. v. Gubbins*, 2018 SCC 44, at **13:3020**.

- Where the Parole Board of Canada orders "expungement of a conviction" in respect of an offence, the person convicted of the offence is *deemed* "never to have been convicted of that offence": *Expungement of Historically Unjust Convictions Act*, s. 5, at **14:3377**.

- The "calling of evidence" on an application for a witness to "testify behind a screen" or outside the court is *not* always required. While a judge's exercise of *discretion* must be properly exercised, and must have some proper basis, it can be properly exercised on the basis of the record before him or her and submissions made: *R. v. Hoyles*, 2018 NLCA 46, at **16:2086**.

- An admission by defence counsel that the requirements of s. 715.1 of the *Criminal Code* — video-recorded evidence —— are met is "*not* an admission of fact". While the trial judge is entitled to consider defence counsel's submission of law and mixed fact and law, defence counsel's opinion *cannot* usurp the "trial judge's duty to ensure the requirements of s. 715.1 are met" before admitting video statements: *R. v. P.W.M.*, 2018 PECA 24, at **16:2600**.

- "Parliamentary privilege" grants the "legislative branch of government" the *autonomy* it requires to perform its constitutional functions. Parliamentary privilege *also* plays an important role in our democratic tradition because it ensures that elected representatives have the freedom to vigorously debate laws and to hold the executive to account. Decisions falling within the scope of

parliamentary privilege *cannot* be reviewed by an external body, including a court: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, at **16:14062**.

- The *complainant's* "prior consistent statement" is *not*, in itself, admissible even if it is recorded in a "business record" which is normally admissible, pursuant to s. 30 of the *Canada Evidence Act*: *R. v. Breaker*, 2018 ABCA 424, at **16:15030**.
- While generally inadmissible, an accused's out-of-court statement is *admissible* under the *Edgar* exception *only* "if the accused testifies": *R. v. Beaulieu*, 2018 MBCA 120, at **16:15037**.
- "Video recordings of a confession" may provide either an "adequate explanation" as to why some persons involved in an interrogation need *not* be called as witnesses, *or*, in some cases, video recordings may even "obviate the need to apply the general principle from *Thiffault*": *R. v. Lavallee*, 2018 ABCA 328, at **16:15070**.
- "DNA transfer" may occur in three ways: (1) innocently *before* the crime, (2) during the commission of the crime, *or* (3) innocently *after* the crime. The possibility of an "innocent DNA transfer" may be ruled out by the factual matrix of the evidence. In respect of a DNA case, the "jury should be instructed" in the usual way about the use and limits of expert evidence; instructed *not* to be overwhelmed by the aura of scientific infallibility associated with scientific evidence; and instructed to use their common sense in their assessment of all of the evidence on the DNA issue and determine if it is *reliable* and valid as a "piece of circumstantial evidence": *R. v. Hall*, 2018 MBCA 122, at **16:17085**.