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CRIMINAL PLEADINGS AND PRACTICE IN CANADA

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What's New in this Update:

This release updates case law and commentary in Chapters 1 to 29.

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Highlights:

- An "IP address", itself, attracts a "reasonable expectation of privacy", thereby requiring a judicial warrant *or* valid consent in order to obtain that information. An IP address is the crucial *link* between an Internet user *and* their online activity: *R. v. Bykovets*, 2024 SCC 6, at **3:11.50**.
- Courts have a *duty* to "protect the integrity of the justice system" by dissociating themselves from state conduct that constitutes an abuse of the judicial process. "Abusive conduct" may take all sorts of forms. Nonetheless, a *stay of proceedings* is the "ultimate remedy" which may be ordered *only* where the situation meets the high threshold of being one of the "clearest of cases": *R. v. Brunelle*, 2024 SCC 3, at **12:113** and **12:116**.
- The "date of the order" to commit the accused for trial *or* discharge the accused of the charges *terminates* the preliminary inquiry. The "preliminary inquiry justice" becomes *functus officio* thereafter, subject to s. 550(1) *re* "witness recognizances": *R. v. Saitanis*, 2023 QCCA 1271, at **13:5**.
- It is necessary to *distinguish* between the Crown's "duty to *disclose* the fruits of the investigation", *and* the Crown's obligation to "seek *production* of evidence possessed by third parties". The "burden is on the Crown" to justify non-disclosure of "evidence it possesses". In *contrast*, the "burden is on the accused" to justify production of "evidence possessed by third parties": *R. v. Peets*, 2024 ABCA 48, at **13:95**.
- Section 23 of the *Criminal Code* (accessory after-the-fact) applies to a situation where the accessory's *purpose* is to assist a principal party to an offence to "escape the 'legal consequences' " of what he had done. Section 23(1) applies *both* to situations where the principal party has "yet to be arrested" as well as to situations where the principal party has been arrested *and* the accessory provides the "assistance *after* the arrest": *R. v. Taylor*, 2024 NSCA 50, at **15:128**.
- A rule against "ungrounded common-sense assumptions" is *incompatible* with the inextricable role "common-sense assumptions" play in credibility *and* reliability assessments. Testimonial assessment necessarily depends on the "life experience a trial judge" brings to their task, which, in turn, informs the "common-sense inferences" they draw from what they see before them. Testimonial assessment *requires* triers of fact to rely on "common-sense assumptions about the evidence": *R. v. Kruk*, 2024 SCC 7, at **16:188.30**.
- *Recognition evidence* is generally considered to be "inherently more reliable" and to generally carry "more weight" than *eyewitness identification* of someone with whom the witness was previously unacquainted. Nonetheless, recognition evidence remains "subject to frailties and risks", thereby requiring robust analysis as to its reliability: *R. v. Stevenson*, 2024 SKCA 40, at **16:366**.
- Confidential informant privilege admits of "no discretion". It is a "near absolute privilege". When it comes to protecting the identity of informants, the "*Crown* is without discretion". The Crown must *not* disclose "in any proceeding, at any time", information that may tend to identify a confidential informant: *R. v. A.B.*, 2024 ONCA 111, at **16:556**.
- A joint "submission" is made by both parties, *whereas* a joint "recommendation" is made by one party but which is joined in by the other party. Even though a "joint recommendation is *not* compelling, if a judge

intends to *impose* a sentence "higher than that *recommended* by the Crown", the parties must as soon as possible be given *notice*, "and" provided a reasonable opportunity to respond: *R. v. Kiley*, 2024 NSCA 29, at **18:452**.

- The term "colour of right" means an "honest belief in a state of facts" which at law, if those facts existed, would "justify *or* excuse" the act done. It is *distinct* from having a "moral conviction" that one is justified in breaking a law: *R. v. Soranno*, 2024 BCCA 5, at **21:268**.
- The 2015 *Criminal Code* amendment to the "partial defence of provocation" *narrowed* the kind of "conduct which is capable of triggering the provocation defence". Conduct which may have qualified as "a wrongful act" *or* "an insult" no longer triggers the provocation defence *unless* that *conduct* constitutes an "indictable offence" under the *Criminal Code* "punishable by at least five years' imprisonment". Once the full purpose of the amendment to s. 232(2) is properly understood, the *claims* of "arbitrariness and overbreadth" under s. 7 of the Charter must be *rejected*: *R. v. Brar*, 2024 ONCA 254, at **27:136**.

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