

Watt's Criminal Law and Evidence Newsletter

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Case Law Highlights

Detention of Seized Items under s. 490

The combined effect of ss. 490(2) and (3) limits the authority of a provincial court judge or justice to order seized items detained for a term of one year.

If no proceedings have been instituted, but police wish to detain the seized items for more than one year, the police or P must apply to a judge of a superior court of criminal jurisdiction or a judge as defined in s. 552.

Where proceedings have been instituted in which the item seized may be required as evidence, no further detention order or extension of it is required after the date on which proceedings have been instituted.

R. v. Taylor, November 15, 2011. (NL. C.A. 11/37)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 490 *Jurisdiction*

"No contact" Terms and Criminal Harassment

The mere fact that D was not found to be in contempt of court for breaching a "no contact" term of a divorce decree does not preclude a prosecution for criminal harassment based on repeated communication with the former spouse and unwanted watching and besetting of the couple's daughter. Violating a court order and criminal harassment are different things.

R. v. Katzenback, November 15, 2011. (Alta. C.A. 0803-0023-A)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 264 *Essential Elements*
 s. 264 *Harassed*

Telephone Records Orders Under s. 492.2(2)

An order requiring production of telephone records may be made with or without a contemporaneous order authorizing installation of a number recorder.

R. v. Mahmood, November 9, 2011. (Ont. C.A. #C51398; C51151; C51168)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 492.2

When "Proceedings are Instituted" for the Purposes of s. 490

Proceedings are instituted when an information in writing is laid under oath before a justice of the peace.

R. v. Taylor, November 15, 2011. (NL. C.A. 11/37)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 490 *Jurisdiction*

Home Invasion as an Aggravating Factor on Sentence

Under s. 348.1 a home invasion is an aggravating factor on sentence. The extent to which home invasion will be an aggravating factor on sentence depends on the circumstances of each case, including but not only:

- i. the nature of the offence listed in s. 348.1 that D commits;
- ii. D's motive for unlawfully entering the home; and
- iii. the degree of violence associated with the commission of the offence.

R. v. Janvier, October 7, 2011. (Sask. C.A. CACR1949)

See, *Tremeeear's Annotated Criminal Code, Criminal Code*, s. 348.1 *General Principles*

Aggravating Factors

****Adverse Impacts and Serious Personal Injury Offences***

The definition of "serious personal injury offence", broadly stated, involves violence, attempted violence or conduct endangering or likely endangering the life or safety of another. The definition includes psychological or likely psychological injury. Terms like "attempt", "conduct endangering" and "likely to endanger" demonstrate that no actual adverse physical or psychological impact on V need occur for an offence to come within the definition of "serious personal injury offence".

R. v. Griffin, November 22, 2011. (N.S. C.A. CAC334772)

See, *Tremeeear's Annotated Criminal Code, Criminal Code*, s. 752 *Serious Personal Injury Offence*

Crown Immunity and its Application

Courts need not apply the Crown immunity rule in s. 17 of the *Interpretation Act* systematically. Where a case can be decided without recourse to Crown immunity, the court should generally give preference to the other grounds raised by the parties.

Québec (Attorney General) v. Canada (Human Resources and Social Development), December 8, 2011. (S.C.C. #33511)

See, *Tremear's Annotated Criminal Code, Interpretation Act*, s. 17 *Scope of Provision: Common Principles*

The Institution of Proceedings and Authority Over Seized Property

Once proceedings have been instituted, the court that has jurisdiction over the proceedings in which the thing detained is required as evidence has jurisdiction over further detention or other disposition of the seized property.

R. v. Taylor, November 15, 2011. (NL. C.A. 11/37)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 490 *Jurisdiction*

Threats of Violence in Robbery

Overt threats are not necessary to constitute robbery under s. 343(a). An implied threat accompanied by reasonable apprehension of physical harm on behalf of V is sufficient. Display of a knife, together with a disguise and a demand for money, amount to a threat of violence.

R. v. Griffin, November 22, 2011. (N.S. C.A. CAC334772)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 343 *Uses Violence or Threats of Violence: s. 343(a)*

Increased Body Temperature and Evidence to the Contrary

An increase in body temperature can cause an over prediction by a breath testing device of blood alcohol concentration. To defeat the presumption of accuracy requires more than a mere possibility that the readings are inaccurate. The degree of error must be sufficient to demonstrate “in fact” that D’s blood alcohol was below 80mg percent. Where increased body temperature is relied upon to defeat the presumption of accuracy, evidence of D’s actual body temperature would seem essential.

R. v. Kasim, November 28, 2011. (Alta. C.A. 1003-0147-A)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 258 *Presumption of Alcohol Concentration: s. 258(1)(c)*

s. 258 *Evidence to the Contrary*

Provincial Courts and Federal Tribunals

Parliament did not intend to deprive provincial superior courts of *habeas corpus* jurisdiction over federal tribunals, a jurisdiction that includes the power to compel production of the tribunal's record to assist in determining whether a deprivation of liberty is unlawful, resulting in an applicant's release.

Khela v. Mission Institution, November 9, 2011. (B.C. C.A. CA038224)

See, *Tremeeear's Annotated Criminal Code, Criminal Code*, s. 774 *Habeas Corpus and the Availability of other Rights of Review*

The Intent to Deprive and Deprivation in s. 282(1)

The deprivation of access to which a parent is entitled under a custody order falls within s. 282(1).

R. v. Neundorf, November 23, 2011. (Ont. C.A. #C49385)

See, *Tremeeear's Annotated Criminal Code, Criminal Code*, s. 282 *The External Circumstances*
The Mental Element

Proportionality and the Gravity of an Offence

The gravity of an offence involves three considerations:

- i. the nature and comparative seriousness of the offence;
- ii. the circumstances surrounding the commission of the offence; and
- iii. the harm caused by the offence.

R. v. Yuzicapi, November 10, 2011. (Sask. C.A. 1839-CR)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 718.1 *The Principle of Proportionality*

Federal and Provincial Courts and Their Jurisdiction Over Federal Tribunals

Three main distinctions exist between the jurisdiction of the Federal Court of Canada and provincial superior courts over federal tribunals:

- i. the Federal Court can quash orders and decisions of these tribunals, but provincial superior courts cannot do so;
- ii. the remedy in the Federal Court is discretionary and the release of someone deprived of liberty unlawfully is not; and
- iii. in the Federal Court, the onus is on the applicant to establish that a decision or order should be quashed, whereas once a *habeas corpus* applicant establishes a deprivation of liberty, the onus shifts to the opposite party to establish the lawfulness of that deprivation.

Khela v. Mission Institution, November 9, 2011. (B.C. C.A. CA038224)

See, *Tremear's Annotated Criminal Code, Criminal Code*, s. 774 *Habeas Corpus and the Availability of Other Rights of Review*