

July 26, 2010

# LAW BRIEF VANCOUVER

Serving North America's Legal Communities

For Subscriptions or Ad Information call 1-800-798-7176

R. v. JA, ON CA,

2010 July 9 (PUBLICATION BAN)  
CRIMINAL LAW -- SEXUAL ASSAULT -- CREDIBILITY -- FRESH EVIDENCE -- REASONABLE DOUBT

Appeal from conviction on a charge of sexual assault and sexual assault with a knife. HELD: (Winkler, CJO, dissenting): Appeal dismissed. The use of evidence relating to the post-event demeanour (perhaps better described as post-event emotional state) of a complainant was described by this court in R. v. Varcoe (2007), 219 C.C.C. (3d) 397. It was clearly permissible for the trial judge to admit the evidence relating to the complainant's post-event emotional state soon after the incident. Nor, can there be any suggestion that he gave this evidence too much weight. The key factor in the trial judge's reasons was his belief in the complainant's testimony on the witness stand; he called it "compelling, straightforward, credible." In support " but only in support " of this testimony, the trial judge relied on several other factors, including her post-event emotional state in several settings. This is a question of weight which, as Varcoe prescribes, is "a matter for the trial judge's discretion." The trial judge's description of the appellant's testimony as articulate, responsive and unshaken in cross-examination does not cast uncertainty on his ultimate finding that the appellant's version of events was not to be believed, and does not necessarily suggest that the appellant's testimony ought to have raised a reasonable doubt. The trial judge reasonably rejected the appellant's version of events insofar as the complainant's consent was concerned because, stacked beside the complainant's evidence, the evidence of her emotional state following the incident, the physical evidence, and the acknowledged state of their marriage and absence of sexual relations, the appellant's evidence "is not capable of belief". The fresh evidence should not be admitted as it would not make a difference. The trial judge listed five factors that in his view supported his conclusion that the complainant was a credible witness: the complainant's post-offence demeanour; the injury to the appellant's finger; the general condition of the home when investigated by the police, including the location of various items of clothing that was consistent with the complainant's evidence; the existence of the dull knife; and the general internal and

external logic and consistency of her description of the events. Dr. Wood's evidence, even if believed, could not reasonably be expected to have affected the result. The other evidence adduced at trial still compels the convictions entered by the trial judge.

R. V. LEVIGNE,  
SCC (Nine Justice Bench),  
2010 July 15

CRIMINAL LAW -- LURING ACHILD -- REASONABLE STEPS

Appeal from a decision of the Alberta Court of Appeal that overturned an acquittal on a charge of luring a child. HELD: Appeal dismissed. Read together and harmoniously with the overarching purpose of s. 172.1, the combined effect of subs. (3) and (4) should be understood and applied this way. Where it has been represented to the accused that the person with whom he or she is communicating by computer is underage, the accused is presumed to have believed that the interlocutor was in fact underage. This presumption is rebuttable: It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances. The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown. Such evidence will at once constitute "evidence to the contrary" under s. 172.1(3) and satisfy the "reasonable steps" requirement of s. 172.1(4). Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage. In this case, the accused's convictions must be upheld. The "reasonable steps" invoked by the accused were in fact neither "reasonable" nor "steps to ascertain the age" of the person with whom he was communicating by computer for the avowed purpose of his own sexual gratification. Rather, they were circumstances which explain why he in fact took no steps to ascertain the actual age of JG. And this despite the latter's repeated assertion that he was only 13.

TRACY v. INSTALOANS FINANCIAL SOLUTIONS CENTRES (B.C.) LTD. BC CA, 2010 July 21  
CLASS ACTIONS -- TRUST -- REMEDIES -- RESTITUTIONARY

Appeal from a decision that imposed a constructive trust remedy including an accounting in a class action suit. HELD: Appeal allowed only to the extent of refining the terms of the order appealed from, so as to clarify the points referred to at paras. 19 and 20 and in the "Tracing" section of these reasons, but otherwise dismissed. There is a misunderstanding that seems to have arisen between the parties as a result of how the 'remedy' order was framed. This Court will proceed on the basis that what the trial judge meant was that the plaintiffs were in a position to elect between damages on the one hand and on the other, a constructive trust and an

## LAWYER REQUIRED

### Davison Worden LLP

We have a position available for a lawyer with 3 to 10 years experience and a keen interest in corporate, commercial and oil & gas litigation.

Competitive salary and benefits commensurate with experience.

Please provide resume to:  
Attn.: G Brian Davison, Q.C.  
1710, 540 - 5 Avenue SW  
Calgary, AB T2P 0M2

All applications will be treated with confidentiality

accounting ancillary thereto. The tests for a constructive trust have been evolving over the past few decades as the doctrine of unjust enrichment has also evolved. In Canada, the three leading cases are Pettkus v. Becker [1980] 2 S.C.R. 834 and Peter v. Beblow in the family law area, and Soulos v. Korkontzilas in the commercial area. McLachlin J. noted that whereas in Pettkus v. Becker the Court had explored the prerequisites for a constructive trust based on unjust enrichment, Soulos required the Court to explore the prerequisites for a constructive trust based on wrongful conduct. She identified four conditions which should generally be satisfied in the latter category: (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands; (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff; (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and; (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [At para. 45.] The case at bar is of course one of unjust enrichment. The trial judge found that there was a sufficient connection to ground a finding of unjust enrichment against all the defendants. This finding was upheld. But whether it was also sufficient to establish a connection that meets the criteria for the imposition of a constructive trust vis a vis the defendants other than the Storefront Lenders is in doubt. However, if the plaintiffs successfully establish a proprietary entitlement to the Unlawful Finance Charges in the hands of the Storefront Lenders, they may trace those funds from there into the hands of other defendants, and even into the hands of third parties - subject always to the rules of court and the limitations of the tracing process. The plaintiffs would then be entitled to assert a constructive trust against the holder(s) of the funds or other property without the exercise of any further discretion by the court. In the present case, the analysis is perhaps less difficult, assuming that the granting of a

constructive trust falls under the "broad umbrella of good conscience" ( Soulos, para. 48). Here the plaintiffs assert a trust in order to pursue the very funds (and any funds or other assets into which they have been transformed) they paid to the defendants and the defendants received in contravention of the Criminal Code . Their claims are therefore qualitatively different from those of general creditors or other persons dealing with the defendants in the normal course. The unjust enrichment here is not only a private wrong, but arises from a criminal offence in respect of which it is in the public interest that neither the wrongdoers nor their ordinary creditors be permitted to retain the benefit. The plaintiffs had already adduced evidence from which the inadequacy of a monetary judgment could be inferred, and the trial judge was simply giving the defendants another opportunity to counter that evidence. Since they failed to do so, the obvious inference was drawn. The trial judge considered the correct legal "tests" in approving a constructive trust as a restitutionary remedy for the defendants' unjust enrichment. As mentioned above, however, it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants further up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The process by which the plaintiffs may 'follow' the Charges up the chain is tracing - the "process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property". Should the plaintiffs succeed in identifying the Charges or their proceeds further up the chain, on the other hand, they will be entitled to elect a proprietary remedy in the form of a constructive trust. There is no error in the trial judge's conclusion that the plaintiffs need not elect between the two until they are able to make an informed choice. Since an accounting is an obvious remedial measure where restitution for unjust enrichment is ordered, I agree with the trial judge that an order for an accounting was appropriate in this case. Since the accounting ordered in this instance extended to profits earned on the "benefit" received by the defendants, it was intended as ancillary to the constructive trust.



**Pimp My Yard**  
LANDSCAPING YARD MAINTENANCE INSTALLATIONS  
Pimp My Yard Landscape Services will take care of all your landscaping and lawn care needs. We provide a quality service at an affordable price. visit our Gallery at [pimpmyyard.com](http://pimpmyyard.com) 778-552-0638



**ROYAL TILING and RENOVATIONS**  
quality workmanship guaranteed  
[www.royaltiling.com](http://www.royaltiling.com)  
Affordable custom tiling and renovations  
FREE estimates!  
Contact Jeremy (604) 565-2751



**WHOLESALE DIAMOND**  
Replacement Experts  
Diamond Shippers  
1-800-798-7176



**BCL**  
BARTEK CONSTRUCTION LTD.  
15365 Pacific Avenue  
White Rock, BC V4B 1R3  
[BARTEK.CONSTRUCTION@TELUS.NET](mailto:BARTEK.CONSTRUCTION@TELUS.NET)  
GENERAL CONTRACTING  
PROJECT MANAGEMENT  
NEW CONSTRUCTION  
RENOVATIONS  
COMMERCIAL  
RESIDENTIAL  
P (778) 990-9663  
F (604) 531-4597