

July 26, 2010

LAW BRIEF

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**R. V. TREMBLAY,
ON CA, 2010 June 29
CRIMINAL LAW -- CHARTER --
FREEDOM OF EXPRESSION**

Appeal from a decision that upheld a conviction on a charge of mischief. HELD: Appeal allowed, acquittal entered. The Summary Conviction Appeal Judge ("SCAJ") correctly held that the trial judge erred by restricting the scope of the s. 430(7) defence to the communication of information "in order to persuade by rational argument." Not all communication consists of persuasion by rational argument, and it does not follow that just because the communication of information for that purpose is protected "see R. v. Dooling (1994) 94 C.C.C. (3d) 5245 (Nfld. S.C.)" communication that is not made to persuade by rational argument is not protected. Respectfully, however, the SCAJ made two errors that require the finding of guilt to be set aside. First, in holding that the appellant did not attend at or near the complaints' house only for the purpose of communicating information, the SCAJ erroneously conflated an act of attendance for the purpose only of communicating information with the consequences of that act. Secondly, the SCAJ erred in failing to recognize the ambiguous nature of the phrase "for the purpose only of communicating information," and therefore the need to adopt an interpretation that is consistent with the s. 2(b) Charter value of freedom of expression.

**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 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 à 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

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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 farther 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 farther 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.

**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 subss. (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.

**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

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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. JOHNSON,
AB CA, 2010 July 19**

**CRIMINAL LAW -- DNA EVIDENCE --
INFERENCES -- JURY CHARGE**

Appeal from conviction on charges of kidnapping, aggravated sexual assault and forcible confinement. HELD: Appeal dismissed. Whether the trial judge employed the proper test when assessing the appellant's motion for a directed verdict is a question of law, subject to a correctness standard on review: R. v. Hutchinson, 2010 NSCA 3, 251 C.C.C. (3d) 51; R. v. Mazur, 2009 ABCA 263, 464 A.R. 347. In reviewing a trial judge's jury charge, an appellate court must ask whether it "give[s] rise to the reasonable likelihood that the jury misunderstood the correct standard of proof": R. v. Rhee, 2001 SCC 71, [2001] 3 S.C.R. 364 at para. 21, citing R. v. Lifchus, [2997] 3 S.C.R. 320, 216 N.R. 215. As noted by the Supreme Court of Canada in R. v. Daley, 2007 SCC 53, [2007] 3 S.C.R. 523 at para. 30: The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case. As to unreasonable verdict, appellate courts must ask whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered: R. v. Yebes, [1987] 2 S.C.R. 168, 78 N.R. 351 at para. 23, citing R. v. Corbett, [1973] 2 S.C.R. 275, 1 N.R. 258 at para. 14. This is also a question of law: R. v. Biniaris, 2000 SCC 15, [2000] 1 S.C.R. 381 at para. 23. In the case of an appeal from a jury's verdict, the appellate court does not have the benefit of written reasons, which might reveal a defect; therefore, a more thorough analysis of whether the verdict was reasonable and the jury was acting judicially may be necessary. Even if the trial judge has reservations about the evidence, the proper approach is to express those reservations in the jury charge, rather than removing the case from the jury. If accepted, the appellant's argument would mean that DNA evidence would never be probative in any case. With the exception of full siblings, everyone has a different set of "close relatives". If the database used has to include close relatives of the individual whose DNA has been matched with crime scene DNA, then just about as many databases as there are people on Earth



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would have to be maintained. That is a practical impossibility. There is no case law supporting the proposition that DNA probability evidence is irrelevant because the database used did not include close relatives. Weighing of evidence at the directed verdict stage of a trial is a limited exercise. Once the threshold of some evidence on which a properly instructed jury acting reasonably could convict is reached, the trial judge's role in weighing of evidence ends. In this case this threshold was reached. The trial judge cautioned the jury that regardless of the expert's opinion as to scientific certainty, it was for them to decide whether they were sure that the appellant was the perpetrator. In doing so, they were to consider all the evidence to determine whether the Crown had overcome the appellant's presumed innocence. At no point in his charge did the trial judge suggest that the possibility of a random match was to be equated with the probability of the appellant's guilt. These instructions were sufficient to convey to the jury that they could still entertain a reasonable doubt regardless of scientific evidence. During his closing submissions, defence counsel urged the jury to entertain a doubt based on the expert's failure to include close relatives in the database used. In his final instructions to the jury, the trial judge also reminded them of the expert's The trial judge then directed the jury to consider whether there was some other inference that could be drawn which was consistent with an attacker other than the appellant. The trial judge then



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summarized evidence that the jury should consider when analysing the evidence relating to identity. The accepted method of countering the possibility that the jury will abdicate its ultimate issue task to the expert is by way of appropriate jury instructions. The trial judge did what was required of him. The trial judge instructed the jury in a general sense with respect to expert evidence. With respect to the DNA expert's testimony, the trial judge told the jury that the expert stated that the probability that someone else would match the suspect DNA was 1 in 890 billion and that this equated with "scientific certainty". He also told the jury that the expert agreed that a database consisting of the appellant's close relatives would result in a reduced number, so that another match would be more likely. He further added that the expert could not quantify the reduced number. The trial judge also reminded the jury that the appellant had no full siblings, but had male relatives some of whom would have been teenagers at the relevant time. Most importantly, the trial judge reminded the jury that regardless of the expert's opinion it was for the jury to be sure of the appellant's guilt. Finally, the trial judge told the jury that, since the expert's opinion evidence was crucial to the Crown's proving identity, it must be satisfied beyond a reasonable doubt that the opinion and inference are proper. These instructions were sufficient to overcome concerns regarding misuse of any opinion given by the expert on the ultimate issue

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