CASE LAW UPDATE

AMCTO - Municipal Licensing & Law Enforcement Forum
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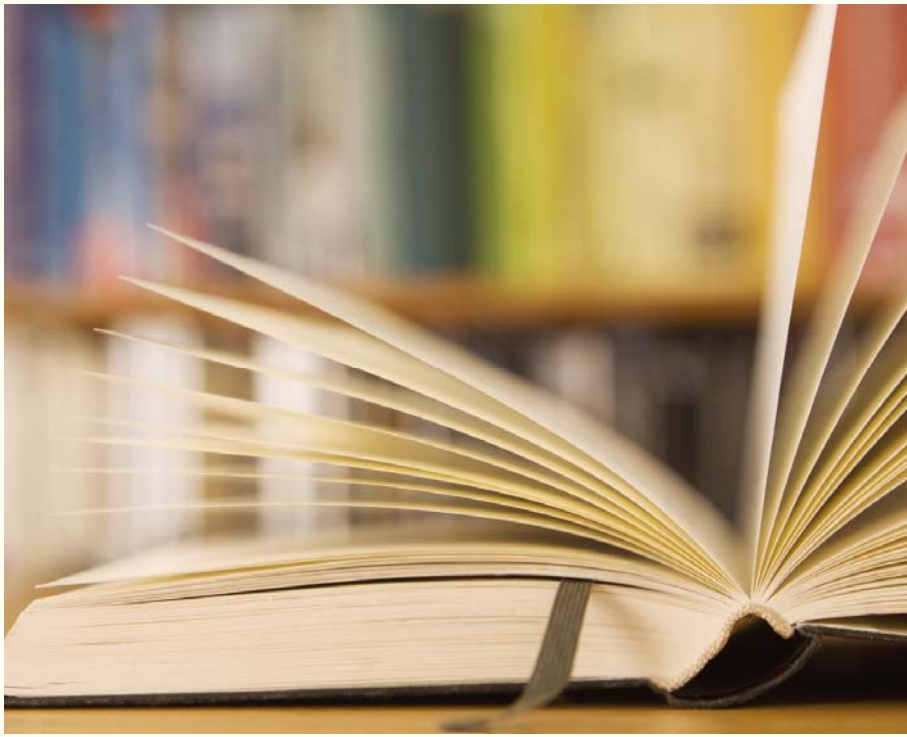

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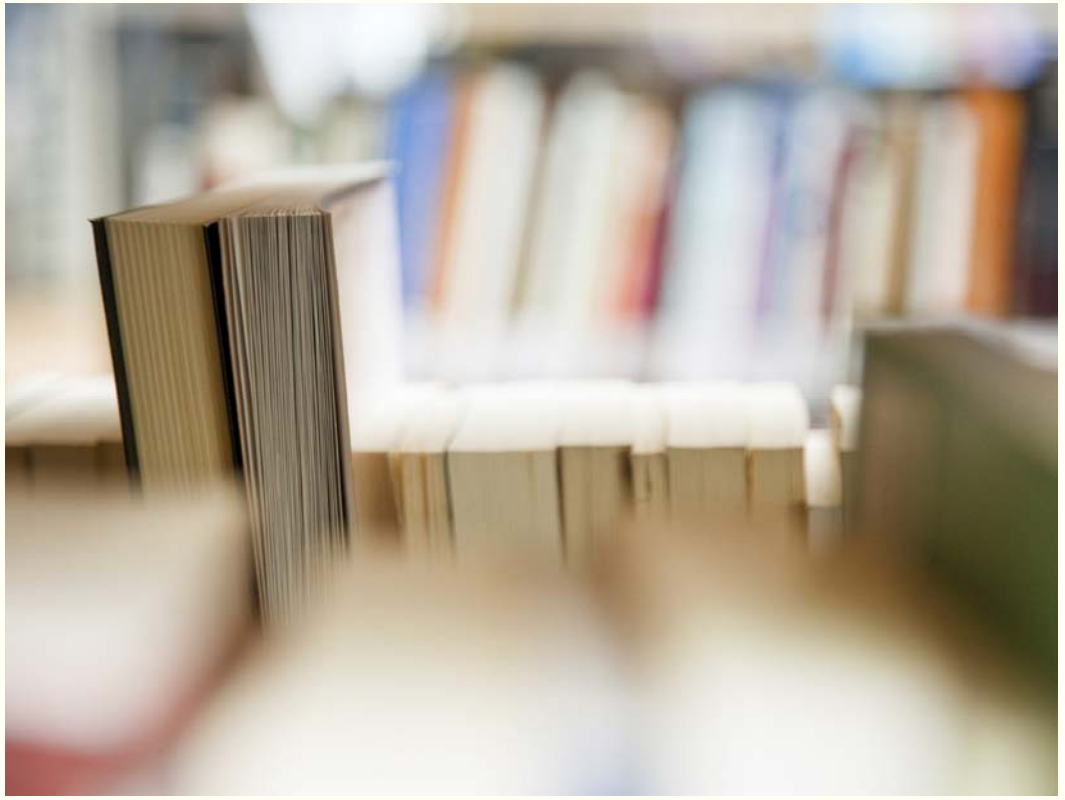


R. v. Debono, [2019] O.J. No. 2099

- Issues:
  - 11(b) presumptive ceiling for *POA* trials
  - Dismissal of applications where frivolous
- Facts:
  - Series of cases where net delay ranging from 11-13 months were summarily dismissed by the trial court
  - Defendants appeal

R. v. Debono, [2019] O.J. No. 2099

- Appropriate presumptive ceiling for Part I *POA* matters is 18 months.
- Appeal court rejects findings in *Tomovski* and *El-Nasrallah*
  - did not properly take into account the lack of prejudice for Part I *POA* matters
- Appellants argue
  - Filing 11(b) = meaningful steps, sustained effort
  - Filing 11(b) = onus on prosecutor to bring forward
- Both arguments are rejected

R. v. Debono, [2019] O.J. No. 2099

- Defendant can get earlier dates
- Summarily dismiss frivolous applications
  - Courts should summarily dismiss applications that are frivolous (*Cody)*

R. v. Beatty, [2018] O.J. No. 7050 (Ont. C.J.)

- Beatty was issued two statements under s.161 of the *POA*
- Owner of a dog that had bitten or attacked a person or domestic animal
- Brings 11(b) application
- Prosecutor position
  - Charter does not apply
- Defendant position
  - s. 161 statement is accompanied by a summons failure to attend could result in an offence (s. 24 of the *POA*)

R. v. Beatty, [2018] O.J. No. 7050 (Ont. C.J.)

- Issue is not the summons but "a person 'charged with an offence'"
- Not alleged that Beatty committed an offence
- Section 11(b) of the *Charter* does not apply to DOLA statements
  - Part III informations?

Mississauga (City) v. Chudzicki, [2018] O.J. No. 6456.

- C, a tow truck driver committed the offence of obstructing an inspector from carrying out an inspection
- C was successful on a *Charter* application alleging breach of s.8 (unreasonable search and seizure)
- *Jarvis*

> "Whenever the predominant purpose of an inquiry is the determination of penal liability, criminal investigative techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply."

Mississauga (City) v. Chudzicki, [2018] O.J. No. 6456.

- The following questions arise in this case.
  1. Did the inspectors have reasonable and probable grounds to lay a charge under the by-law before they conducted the inspection of the tow truck
     i. The answer to this question is clearly no. there is no evidence that the inspectors had any basis to believe that Mr. C was violating the by-law *before* they approached his truck.
  2. Was the conduct of the inspectors consistent with the pursuit of a criminal investigation?
     i. There was no criminal purpose to the actions of the inspectors. They were clearly seeking to determine whether Mr. Chudzicki and the owner of the truck were in compliance with the Bylaw. There was no criminal purpose nor, practically speaking, any criminal or penal exposure to Mr. Chudzicki or to the owner the vehicle
  3. Had there been any transfer of information from the inspection side of the bylaw to the investigatory side?
     i. There is no evidence that there was a transfer of information, however even if there was, there was no penal purpose to the investigatory steps taken in this case.
  4. Was the evidence sought relevant to Mr. C's regulatory liability or some penal liability?
     i. Clearly the information sought by the inspectors was with a view to ensuring that Mr. C and the owner of the truck were in compliance with the by-law.

Mississauga (City) v. Chudzicki, [2018] O.J. No. 6456.

"Section 8 had no application on the facts of this case and the application of the principles laid down in Jarvis makes that clear. In the same way that a mechanic inspecting a tow truck under section 26 of the Bylaw could "look under the hood", an inspector operating under section 25 could look into the console or glove compartment of the tow truck provided they were doing so with a view to ensuring compliance with the bylaw as was the case here." at paragraph 35

Ontario (Ministry of Labour) v. New Mex Canada Inc., [2019] O.J. No. 227. ONCA.

- Employee dies while on the job in horrible circumstances
- Three defendants plead guilty under *OHSA*
- Fines of **$250,000** against New Mex (the Crown asked for no less than $100,000) and **25 day intermittent sentences** of incarceration and **12 months probation** for the directors.
- All three appealed to a provincial offences appeal court. The appeal judge allowed the sentence appeals and varied the sentences to **$50,000** against New Mex and **$15,000** total fines on each of the directors.
- Ministry appeals to ONCA

Ontario (Ministry of Labour) v. New Mex Canada Inc., [2019] O.J. No. 227. ONCA.

- Justice of the Peace sentencing,
  - Aggravating factors: 1) directors failed to educate themselves about the duties and responsibilities re workplace safety and 2) lack of common sense, unacceptable conduct leading to situation leading to death
- *POA* appeal judge,
  - Deterrence is the guiding principle, jail should be rarely imposed because high fines achieve deterrence.
  - *R. v. Wu* a Supreme Court decision, stating that "genuine inability to pay a fine is not a proper basis for imprisonment."

Ontario (Ministry of Labour) v. New Mex Canada Inc., [2019] O.J. No. 227. ONCA.

- Moral blameworthiness spectrum
- In the regulatory sphere, the short incarceration sentences do not carry the same stigma or dangers. Incarceration for first time offenders in the regulatory context may serve as a good deterrent in sentencing.
- "There may be room in a given case for reasonable people to disagree over whether a sentence of incarceration is required in spite of the principle of restraint. In such cases it is for the sentencing judge to determine whether this is so."

Ontario (Ministry of Labour) v. New Mex Canada Inc., [2019] O.J. No. 227. ONCA.

- Director are separate entities from corporation
- Wrong to consider post-offence compliance. Not a mitigating factor
- Proper analysis to consider the size and type of corporation, "a fine imposed on a corporate regulatory offender should meaningfully take into account the size and economic activity of the corporation."

Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999

- Defendant corporation charged with "discharging…a material into a watercourse or in any waters…which said discharge may impair the quality of the water…". This offence carries a minimum fine of $25,000.00 for corporations
- At trial, the trial judge fined the corporation $600.00 by applying section 59(2) of the *POA*
- On appeal, the *POA* appeal court imposes a fine of $5,000
- The ministry appeals to the ONCA

Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999

- The following issues were before the Ontario Court of Appeal:

1. How should Section 59(2) of the *POA* be interpreted?
2. Did the appeal judge err in providing relief under section 59(2) to the Respondent Corporation?

59 (1) No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

Relief against minimum fine

(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence. (emphasis added)

Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999

- 'exceptional circumstances' does not refer to exceptionality of circumstances of the case, but refers to the determination that the fine is either unduly oppressive or otherwise not in the interests of justice
- A reason other than “the fine is high”, will be required to establish that imposing the minimum fine will be unduly oppressive.
- Unduly oppressive will rarely be applied to corporate defendants

Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999

- On the issue of "interests of justice", ONCA provides general principles

1. Trial judge's discretion cannot be exercised arbitrarily
2. Discretion must be applied in line with the purpose of the legislation and the purpose of the discretion
3. Trial judges to consider the interests of the community and the individual defendant

- "unfairness" is not sufficient

Weisdorf v. Toronto (City), [2019] O.J. No. 403

- Toronto by-Law No. 799-2017, establishes an administrative penalty system for certain parking tickets.
- Before 2017, these parking tickets were prosecuted under the *Provincial Offences Act* before a Justice of the Peace through the court system.
- *City of Toronto Act* gives the City the authority to enact by-laws to regulate among other things, the parking, standing, or stopping of motor vehicles in the City.
- COTA also gives the City the authority to impose an administrative penalty in respect of the failure to comply with parking by-laws.

Weisdorf v. Toronto (City), [2019] O.J. No. 403

- City's path towards APS (2015-2016)
  - Review of studies and reports
  - Review of other municipalities' experiences
  - City staff report, May 24, 2016 recommending APS for parking
  - Report considered at Government Management Committee and at a public meeting of City Council.
- For By-Law 799-2017, the City has developed standards relating to the administration of APS.

Weisdorf v. Toronto (City), [2019] O.J. No. 403

- Weisdorf applies to the Superior Court of Justice for the following

1. the quashing By-Law 799-2017;
2. the restoration of the Ontario Courts of Justice system for parking, standing, and stopping offences and the *Provincial Offences Act*, Part II;
3. c. the cancellation of all parking violation notices, retroactively, of every defendant who has ever appeared before a screening officer and had their penalty affirmed for any reason pursuant to s. 24(1) of the *Charter*, including the ticket issued to the Applicant; and
4. the return of all monies taken by the City from every defendant who has ever appeared before a screening Officer and had their penalty affirmed for any reason pursuant to s. 24 (1) of the *Charter*.

Weisdorf v. Toronto (City), [2019] O.J. No. 403

- Among other arguments, Mr. Weisdorf suggests that

1. The Tribunal and APS breaches sections 7 and 11(d) of the *Charter*
2. The Tribunal and APS are illegal and in systemic breach of several acts;
3. The Tribunal and APS are in systemic breach of established common law duties (such as disclosure)
4. The dominant purpose of APS is to generate and maximize revenues and profits and is, therefore *ultra vires* from its statute and mandate;

Weisdorf v. Toronto (City), [2019] O.J. No. 403

- Section 7 does not apply to APS (no penal consequence)
- Section 11(d) does not apply to APS (not a "person charged with an offence")
- By-Law 799-2017 does not breach Acts that do not apply to it.
  - does not conflict with the *Statutory Powers Procedure Act* because it is expressly made compliant with that Act, and the by-law does not conflict with the *City of Toronto Act,* which is the empowering statute authorizing the City to enact the by-law.

Weisdorf v. Toronto (City), [2019] O.J. No. 403

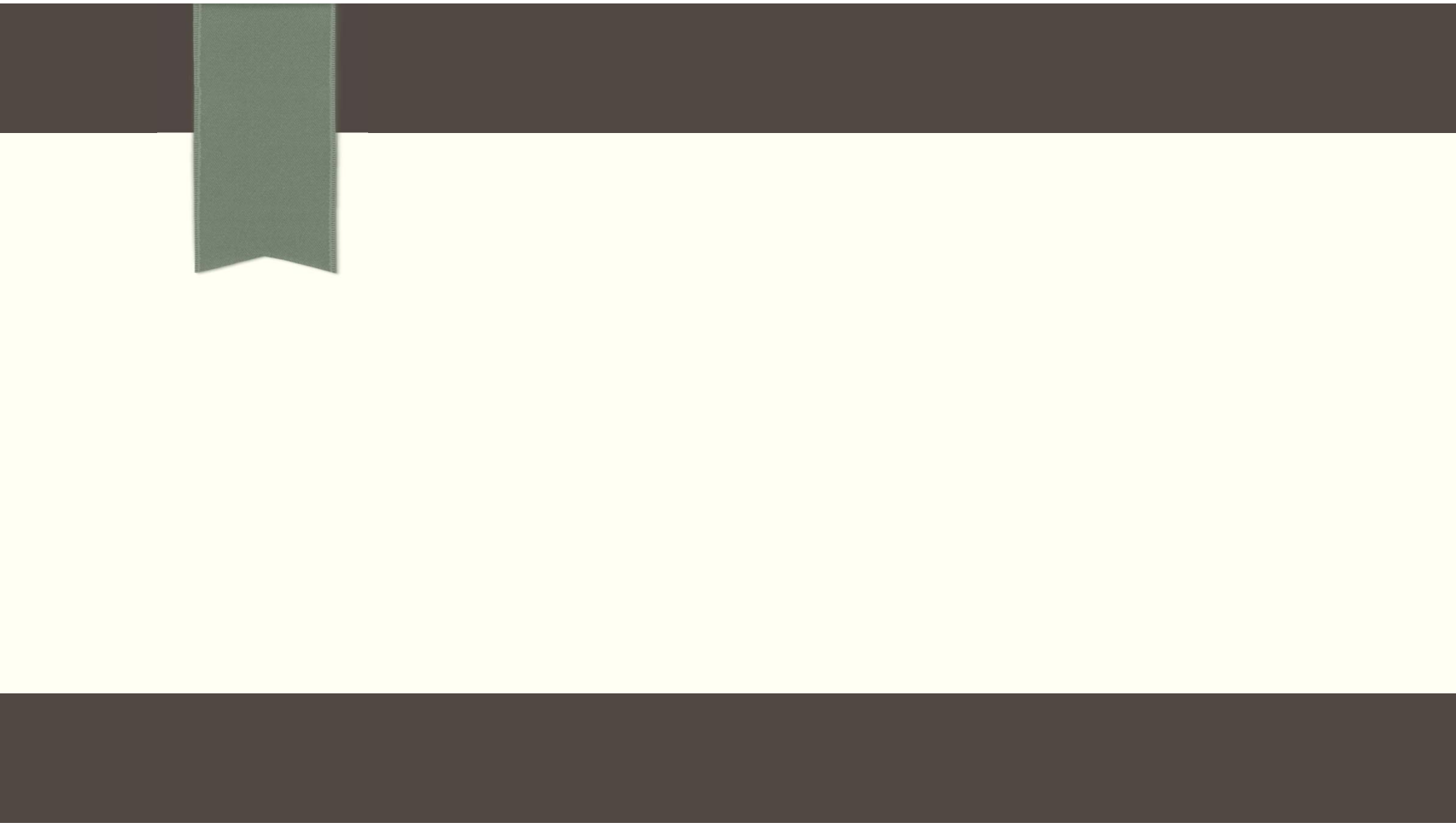
- To establish bad faith, it must be shown that the City acted other than in the public interest.

  "bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest." *Equity Waste Management of Canada v. Halton Hills (Town)*

- Revenue does not equal bad faith.
- Mr. Weisdorf's arguments miss the point

Legislative updates

- Bill 100 - *Protecting What Matters Most Act (Budget Measures), 2019*
- Bill 107 – *Getting Ontario Moving Act*
  - APS for HTA
- Bill 108*, The More Homes, More Choices Act, 2019*



York (Regional Municipality) v. McGuigan, 2018 ONCA 1062

- *"Where a prosecutor is relying on a speed measuring device to prosecute an offence, it must, on request, disclose the testing and operating procedures set out in the user manual for that device. It is up to the prosecutor to hand such information over on request. The person charged need not bring an application or obtain a court order. This is first party disclosure, not third party disclosure."* At para 5.

York (Regional Municipality) v. McGuigan, 2018 ONCA 1062

- Analysis: First Party vs. Third Party disclosure
- First party disclosure will encompass the "fruits of the investigation“
- “obviously relevant” does not mean a higher degree of relevance but “represents a comment on the obvious nature of the relevance of the record in the case”. Relevance exists if evidence has some logical tendency to make a material proposition more or less likely, “*this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under Stinchcombe because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence.” Gubbins*

York (Regional Municipality) v. McGuigan, 2018 ONCA 1062

- The court also clarifies several often used arguments:

1. Prior disclosure of the manual to an agent does not satisfy disclosure obligations.
2. Inspection of the manual at the prosecutors' office is not sufficient.
3. The prosecutor may post the relevant contents on its website, the prosecutor should not be able to contest the authenticity of the web printout.

York (Regional Municipality) v. McGuigan, 2018 ONCA 1062

- Issues:
  - Disclosure
    - *McNeil*
    - *Gubbins*
  - *Certiorari*
    - *R. v. Awashish (SCC)*
    - *Toronto v. Riddell (ONCA)*

R. v. Boudreault, [2018] S.C.J. No. 58

- *Criminal Code* victim surcharge unconstitutional
- Section 737 of the *Criminal Code*
  - Discharged, pleads guilty, found guilty (*CC, CDSA*)
  - 30% of fine, or where no fine, $100 per summary, $200 per indictable
  - Historically courts had discretion to lower VS, that discretion taken away by amendments in 2013

R. v. Boudreault, [2018] S.C.J. No. 58

- SCC views the vulnerabilities of those that often are involved in justice system
  - Poverty, addiction or other mental health issues, disadvantaged and marginalized.
- If unable to pay surcharge
  - Indeterminate sentence
  - Police custody
  - Imprisoned for default
  - Prevented from seeking pardon
  - Targeted by collection agencies

R. v. Boudreault, [2018] S.C.J. No. 58

- SCC issues
  - Does s.737 of the *Criminal Code* violate
    - Section 12 – cruel and unusual punishment, or
    - Section 7 – Life, liberty, security of the person
  - If yes,
    - Can it be saved by Section 1
  - If can not be saved
    - What should the outcome be

R. v. Boudreault, [2018] S.C.J. No. 58

- Section 12 – Cruel and unusual punishment
  1. Is a consequence of conviction that forms part of the arsenal of sanctions for which an accused may be liable
  2. And either:
     a. Is imposed in furtherance of the purpose and principles of sentencing, or
     b. Has a significant impact on an offender's liberty or security interests

R. v. Boudreault, [2018] S.C.J. No. 58

- Section 12 – Cruel and unusual punishment
  - The impugned punishment must be more than merely disproportionate or excessive. Rather, "[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society." *R. v. Lloyd* (2016).
- Court must determine
  1. What would constitute a proportionate sentence for the offence
  2. Is the mandatory punishment grossly disproportionate when compare to the fit sentence for the claimant or reasonable hypothetical person

R. v. MacKinnon, 2019 ONCJ 301

- Victim fine surcharge *POA*, released May 9, 2019
- Several live issues before courts (Mississauga)
- Significant differences between the *Criminal Code* scheme and the *POA* one:
  1. Regulation vs. part of section
  2. No jurisdiction to raise surcharge
  3. Only payable if there is a fine
  4. Surcharge is administrative
  5. Does not apply to all *POA* proceedings
  6. Not punishment