Interrogating the prosecution process: The Charter and the Supreme Court of Canada in 1998

BY DIANNE L. MARTIN

Dianne Martin is an associate professor at Osgoode Hall Law School, York University.

It is now trite to observe that the Charter has had considerable impact on the law of evidence. As we all know, the structures of the adversary system have been transformed, both procedurally and substantively over the past 15 years. Styles of advocacy have changed and the processes of fact finding have been refined–some would say complicated unnecessarily. The impacts have been cumulative, as counsel have become more adept at litigating constitutional questions and the court has developed confidence and a corpus of jurisprudence. Although most changes have made prosecutions easier[1] (contrary to popular opinion) the practice that also permits accused persons to "interrogate the prosecution process," which I identified in 1995, has continued. In this regard, the 1998 term generated significant judgments in a number of key areas: *R. v. Williams*, [1998] 2 S.C.R. 1128, on ensuring the impartiality of juries; *R. v. Rose* (1999), 129 C.C.C. (3d) 449, on the order of jury addresses; and the suite of decisions that follow *R. v. Dixon*, [1998] S.C.R. 244, yet another attempt to resolve the content of a constitutionally protected right to disclosure of the prosecution case.

However, in keeping with the by now fairly well-established trend of deference to prosecutorial prerogatives, and reliance on a presumption of prosecutorial propriety, only *Williams* was decided in a manner that might be said to "favour" the accused. The "benefit" was to facilitate measures to ensure a jury free from systemic racism (which must surely also "favour" a prosecution seeking a just result?)

In *Rose*, the trend to an uncritical support for prosecutorial prerogatives continues. The court confirmed that the *Criminal Code* provisions that require the accused to address the jury first if any defence evidence is called[2] are constitutional. This provision has troubled defence counsel for some time. The decision whether to call a defence is fraught with peril on many counts, most the product of concern about how one's client will perform. Until the decision in *Corbett v. The Queen* (1988), 41 C.C.C. (3d) 385 (S.C.C.), it meant the accused was exposed to prejudicial cross-examination on prior convictions as well as losing the right to address the jury last. The court acknowledged the dilemma, and the cost, in *Corbett*, but in a close 5-4 judgment, in *Rose*, they fell back on a distinction between "preferable" procedures and unconstitutional ones. It is a troubling decision on many counts, not the least of which is its tendency to reinforce the trial as a exercise for the demonstration of guilt, which must conform to certain rules of "fair play."

Rose was charged with killing his mother by strangulation. His defence was that she committed suicide and that his subsequent conduct in disposing of the body was the result of panic and not guilt. It appears from the judgment to have been a close case. Ms. Rose had a history of severe mental illness marked by suicide attempts and recurring suicidal thoughts, although she was in apparently good spirits in the weeks preceding her death. Both the Crown and defence pathologist concurred that the "soft strangulation" that caused her death could as readily be explained as suicide as homicide. The accused testified and admitted that shortly before her death he had struck his mother and then left her. He admitted disposing of her body when he returned home and found her strangled with a coaxial cable. Rose clearly had opportunity, and it was possible to construct motive from the known tension between them. A close case.

The controversy over the order of jury addresses and the related issue of whether the defence should have a right to reply to the Crown address was triggered by the forensic evidence. The last defence witness (Rose testified first, following the usual practice) was a leading pathologist, Dr. Frederick Jaffe. Although the issue was not raised with the prosecution pathologist, nor put to the accused, the Crown elicited from Dr. Jaffe the evidence that in the case of soft strangulation, a blue colouration would mark the victim's face until the ligature was removed. In Dr. Jaffe's words, "a reasonably skilled observer" would notice it. The defence did not re-examine on the point. The defence lost a motion to address the jury last (not surprisingly given the case law) and did not address the "blue face" evidence in his remarks.

It was, however, an important aspect of the Crown's address. He invited the jury to conclude that Rose did not notice the blue face on the basis that he did not testify about it, and thus that it did not exist. In a close case, this argument, unanswered, could well be pivotal. It certainly concerned the defence who asked for a right to reply to it, or for a comment/clarification in the judge's charge. Both were denied.

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Justice Binnie, for Lamer C.J.C., Mclachlin, and Major JJ., in an elegantly written dissent, put his finger on the heart of the problem:

> While it would be comforting to think that in a criminal trial facts speak for themselves, the reality is that "facts"emerge from evidence that is given shape by sometimes skillful advocacy into a coherent and compelling prosecution. The successful prosecutor downplays or disclaims the craftsmanship involved in shaping the story. Such modesty should be treated with skepticism. ... [T]he fact remains that in an age burdened with "spin doctors" it should be unnecessary to belabour the point that the same underlying facts can be used to create very different impressions depending on the advocacy skills of counsel. In the realities of a courtroom it is often as vital for a party to address the "spin" as it is to address the underlying "fact." (Paras. 18 and 19)

The minority are arguing from first principles. Their judgment also notes that the majority of common law jurisdictions around the world either permit a right of reply (the "three address system"), or allow the defence the option of going last. Given this evidence, if the provision offended a Charter guarantee, it clearly could not survive s. 1.

That much of the rest of the world has viewed this Crown prerogative as unfair, along with a significant number of judges over the years, was not sufficient for the majority however. In a disappointing judgment written by Mr. Justice Cory for Iacobucci and Bastarache JJ. with Justice Gonthier concurring, and Justice L'Heureux-Dubé writing separate reasons concurring in the result, the court opted for reliance on stale and untested social "science" and anecdote to buttress their view that establishing innocence cannot be allowed to unduly interfere in an orderly demonstration of guilt. Defend, in other words, but not too much:

> As suggested by Sopinka J. for the majority of this Court in *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, 60 C.C.C. (3d) 132, 77 D.L.R. (4th) 473, however, the right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case. As stated by Sopinka J., at p. 1515:
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> > The right to full answer and defence does not imply that an accused can have, under the rubric of the Charter, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence. (Para. 99)

This is a chilling proposition when examined. In essence, it is a claim that a Crown prerogative of dubious provenance and little support throughout the common law world should survive because it is not enough to justify its change that it might tend to prove innocence. Surely, the test should be that it can only survive if it serves a greater purpose. The very real risk of wrongful conviction that reliance on the way things have always been done was amply demonstrated in the dissent by reference to Justice Kaufman's report on the wrongful conviction of Guy Paul Morin. The dissent might also have noted that the use of prior inconsistent statements to hold Crown witnesses to their police versions, reliance on so-called consciousness-of-guilt evidence, and inappropriate reliance on science and social science, all factors in this case, have contributed to all of the well-known wrongful convictions in Canada, and to many lesser-known ones as well. In a justice system with real commitment to constitutional values, that a change might permit an accused person the chance to demonstrate innocence should indeed justify "an overhaul of the whole law of evidence." A relatively minor procedural change that has been adopted in England and in most states in the United States surely qualifies.

The judgment is troubling as well in its unexamined reliance on anecdote and dated social science evidence to support its reluctance to change. The majority accepts with little examination the unsupported assertions of some appellate judges that:

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> It is well known that many learned and experienced defence counsel prefer to address a jury first. ... Many defence counsel are of the opinion that there is an advantage in addressing the jury first, shortly after the evidence ... is tendered, when it is fresh in the jury's mind. (Para. 110)

The only support for this "well-known" bit of lore, are three psychological studies from the 1960s and one from 1978 on the issue of which speech is more persuasive—the first or the last. These studies do not, of course, deal with the dilemma experienced in *Rose*. That is, that the prosecution is able to exploit a "late-breaking spin" by speaking last, with no fear of reply.

Justice L'Heureux-Dubé is even more unquestioning. She recognizes that a bias favouring the Crown would be unconstitutional, but baldly asserts that:

> The social science evidence tendered shows that there is no particular advantage to speaking last, and this, combined with the fact that many experienced counsel prefer to speak first, demonstrates that speaking last does not provide the Crown with an inherent advantage. (Para. 60)

This is simply not good enough. Constitutional litigation has compelled counsel and courts alike into somewhat novel territory, as the traditional role of a trial, which is the adjudication of an historical event, has given way to the legislative and predictive decision making that is required to resolve constitutional issues.[3] Presentation and assessment of social science evidence and experts have become common if not routine. This court had its first bad experience with this type of evidence 10 years ago in *R. v. Askov*, [1990] 2 S.C.R. 1199. There is simply no longer any excuse for "cherry picking" bits from the social science literature to bolster an opinion. If one intends to rely upon what counsel do or do not do, find out what it is they do. If one is concerned with questioning the need to reply to an argument—test it. Otherwise, rely on first principles alone.

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1 For example, vulnerable witnesses, particularly children and complainants in sexual assault cases, have received protection and support, and the hearsay rule has been reformed and now permits the use of prior inconsistent statement—such as recanted allegations to police—to be used for the truth of their contents.

2 *Criminal Code*, s. 651.

3 See M. Pilkington, "Equipping Courts To Handle Constitutional Issues: The Adequacy of the Adversary System and Its Techniques of Proof," in Special Lectures of the Law Society of Upper Canada, *Applying the Law of Evidence: Tactics and Techniques for the Nineties* (Toronto: Carswell, 1991), at 51-96.