

Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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SPECIAL ISSUE: SUPREME COURT OF CANADA IN 1997

THE SUPREME COURT AND THE CHARTER: QUANTITATIVE TRENDS—CONTINUITIES AND DISCONTINUITIES

BY PETER H. RUSSELL

Statistics about courts and judges can at best give only an indication of broad trends in the work of the courts and the inclinations of judges. They certainly cannot tell us much about the major developments in the Supreme Court's constitutional jurisprudence or about the impact its decisions are having on the country. Statistics cannot even give us a very useful snapshot of one year's constitution decisions of the Supreme Court.

The statistical data provided by the organizers of this conference on 1997 Supreme Court of Canada cases involving constitutional challenges are a case in point. For my

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THE VAGARIES OF REVIEW AT THE SUPREME COURT OF CANADA

BY JAMIE CAMERON

VAGARIES

It is disheartening to watch the Supreme Court of Canada at work. For some time now, there have been complaints, some muted and some not, that the jurisprudence is confused and unpredictable, that the judges are divided, and that there are gender gaps between its seven male and two female members. Decision-making is often a riddle, because the Court can be fragmented, and can also spring unanimous decisions on unwitting academics when they least expect them.

This year "activism", which gratuitously decides an issue or notably expands judicial power, co-exists alongside "deference", where the judiciary backs away from the enforcement of rights or withdraws from an issue. In discussing that pattern, an initial caveat should be entered: labels that are based on certain assumptions about principles of constitutional interpretation are themselves somewhat unhelpful.

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"PRINCIPLES"

The criminal justice jurisprudence might be considered a case in point. There the Court appears activist, and its decisions in *R. v. Feeney*, *R. v. Carosella*, and *R. v. Stillman* reinforce a pattern of favouring the rights of the accused over the social interest in law enforcement. Whether such "activism" is principled or not, however, is a question of perception. Cases that ask whether the authorities acted reasonably or unreasonably are highly fact-sensitive, and it is not surprising in those circumstances that the answers given by members of the Court have differed.

[T]he wisdom of expanding section 7's indeterminate concept of "fundamental justice", when section 8 explicitly protects individuals from unreasonable search and seizure, is surely open to question.

Beyond difficult facts, the criminal justice decisions raise issues of interpretation. There, *Carosella* and *Stillman* should both be noted. Although prior to *Carosella* it was accepted that the *Charter* only binds the government, a majority in that case held that a third-party custodian's failure to produce clinical and counselling records could violate an accused's section 7 right of full answer and defence.

In *Stillman*, the majority decision read a privilege against self-incrimination into section 7 to protect an ac-

cused whose bodily samples had been taken for DNA testing without his consent. As McLachlin J. pointed out in dissent, however, self-incrimination is a testimonial privilege which has never applied to real evidence. As well, the wisdom of expanding section 7's indeterminate concept of "fundamental justice", when section 8 explicitly protects individuals from unreasonable search and seizure, is surely open to question. Finally, not only was the majority's hard line on the exclusion of evidence absolutist, but the discussion in *Stillman* compounded the confusion surrounding section 24(2) and the *Collins* test.

The criminal justice jurisprudence lends itself to an argument, as dissenting voices claim in these cases, that the Court's activism is unprincipled. Yet any conclusion will depend on the relative merits of due process and crime control values. Leaving aside the relative merits of those two models, "principled decision-making" also raises questions about how cases are adjudicated, and whether the Court applies its canons of constitutional interpretation consistently from case to case.

JUDGES AND THE HOW AND WHY OF DECISIONS

In that regard, the Court's decisions on judicial independence and impartiality are telling. Such delicate issues demand careful responses from a Court that is unavoidably placed in a position of some conflict of interest.

The *Judges' Remuneration Case* consolidated a team of cases from provinces which, stripped down, posed the question of whether provincial court judicial salaries could be altered without violating section 11(d) of the

Charter. As Justice La Forest noted in his dissent, section 11(d)'s promise of an independent and impartial tribunal applies only to proceedings in which individuals are charged with offences. The difficulty in articulating a principle of independence for provincial courts generally was that sections 96-100 of the *Constitution Act, 1867* deal only with the status of superior courts and judges, and that section 92(14) assigns jurisdiction over provincial courts and judges to the provinces.

[In the Judges' Remuneration Case], Chief Justice Lamer discounted what sections 96-100 of the Constitution Act, 1867 "actually say", and read section 11(d) "up" to constitutionalize a principle of independence for all courts, "no matter what kind of cases they hear". Not only did he incorporate that principle into the Constitution from outside its text, he held that to comply, the provinces must establish independent, effective, and objective commissions to regulate remuneration.

Undeterred by those obstacles, Chief Justice Lamer dis-

counted what sections 96-100 of the *Constitution Act, 1867* "actually say", and read section 11(d) "up" to constitutionalize a principle of independence for all courts, "no matter what kind of cases they hear". Not only did he incorporate that principle into the Constitution from outside its text, he held that to comply, the provinces must establish independent, effective, and objective commissions to regulate remuneration. Any changes or freezes to their salaries that are made without prior recourse to such bodies would, in his view, be unconstitutional.

Justice La Forest wrote separately and found fault with the Chief Justice's opinion, in the first instance because the case on appeal had been limited to section 11(d) and proceedings in which individuals are charged with an offence. In his view, it was inappropriate for the Court to ignore that constraint and create a general principle of independence. La Forest J. was rightly alarmed that the Court had decided a question which had not been fully argued and, in doing so, had imposed substantial obligations on the provinces, without canvassing section 92(14) and other aspects of the issue.

He also questioned the Chief Justice's creative use of the 1867 preamble to divine a principle of independence for provincial court judges. To do so against the text and the historical record, to support a requirement of independent commissions, was in La Forest J.'s view "tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d)." La Forest J. was all the more troubled by the Court's activism because the judges "can hardly

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seem to be indifferent" in a case that "concerns their own remuneration."

Prior to Eldridge, it had been accepted that hospitals were not bound by the Charter. In concluding that decisions about the provision of health care services are subject to section 15, Eldridge, like Carosella, greatly expanded the Charter's reach. In doing so, the decision created the anomaly that some parts of a hospital's operations, such as the delivery of services, are now bound by the Charter, while others, including employment policies on mandatory retirement, are not.

As he observed, there is "virtually no possibility" that the independence of individual judges would be compromised by negotiations on remuneration for the institution as a whole. To elevate independence to a dogma, however, the Chief Justice raised the spectre of "political interference". Yet the spectre of interference there was far more abstract than in *Tobiass v. Minister of Citizenship and Immigration*, where a lawyer from the Department of Justice held a meeting with the Chief

Justice of the Federal Court of Canada, specifically to discuss the course of proceedings in a sensitive war crimes case. The meeting was held in the absence of defence counsel. Despite having found that judicial independence could be undercut by salary negotiations, the Court held in *Tobiass* that the meeting was improper, but that the Federal Court's impartiality to continue the case was not compromised. In a second case, *R.D.S. v. The Queen*, the Court divided, but a majority held that a judge's comments about the biases of white police officers did not compromise her impartiality to decide a charge against a black defendant.

The point is not to argue against judicial independence or to take sides on the facts in the cases on bias and impartiality; it is, instead, to raise questions about the way decisions are made and the consistency of the Court's jurisprudence from one case to another.

CHARTER HIERARCHIES

The themes above can be tracked in two key cases on sections 15 and 2(b), which both appear "Charter-activist". In *Eldridge v. British Columbia*, the Court unanimously held that section 15's guarantee of equality was violated by the hospitals' and health care service's failure to provide sign language interpretation for deaf patients. Meanwhile, *Libman v. A.-G. Quebec* unanimously invalidated Quebec's referendum legislation because it placed unjustifiable constraints on expressive freedom.

There the comparison ends. Though *Eldridge* is unquestionably activist, *Libman* is an example of deference posing as activism. Once

again, it bears mentioning that whether either or both results are "principled" on their merits depends on one's point of view. Rather than engage that question, the analysis here focuses on the way issues are raised and decided, as well as on the Court's differential treatment of equality and expressive freedom.

[A]s the process for leave to appeal does not include reasons, Court watchers are left guessing what preferences might explain why the Court hears some section 15 claims and not others.

Prior to *Eldridge*, it had been accepted that hospitals were not bound by the *Charter*. In concluding that decisions about the provision of health care services are subject to section 15, *Eldridge*, like *Carosella*, greatly expanded the *Charter's* reach. In doing so, the decision created the anomaly that some parts of a hospital's operations, such as the delivery of services, are now bound by the *Charter*, while others, including employment policies on mandatory retirement, are not.

In addition, the Court's unanimous conclusion that it is unconstitutional for hospitals not to provide sign language interpretation generated further confusion about the applicable principles of review under section 1. Previously, the Court had maintained, albeit inconsistently, that decisions about the allo-

cation of scarce resources ought to reside with the legislators and their delegates. Against that orthodoxy, the Court in *Eldridge* discounted the government's pleas that these are policy choices, and that it would be highly problematic to constitutionalize a claim for sign language services, and not others. Whether the judiciary should be setting constitutional standards for the provision of services in circumstances of fiscal stress in the health care system is, of course, a question of competing values.

Thus the result in *Eldridge* is important in its own right, but also as compared to others. Why the Court valued that claim and then denied leave to appeal in *Schaefer v. A.-G. Canada* is at least curious. There the issue was whether the unequal allocation of maternity benefits under federal employment insurance legislation violates section 15. Following *Schacter*, which created equality in employment benefits for biological fathers, Parliament altered the scheme, which had entitled adoptive mothers to the same benefits as biological mothers. Its new, *Charter*-adjusted legislation granted biological mothers up to 25 weeks of benefits, and dropped adoptive mothers to 10 weeks. One might have thought that a case involving equality rights under federal legislation applicable across the country would warrant the Court's attention, especially given the discrepancy, and the fact that the inequality between statutory degrees of motherhood arose from a *Charter* challenge brought by biological fathers. However, as the process for leave to appeal does not include reasons, Court watchers are left guessing what preferences might explain why the Court hears

some section 15 claims and not others.

[T]hough none of the parties had been heard on the issue [in Libman], the Supreme Court of Canada stated, unequivocally, that the Alberta Court of Appeal was wrong and that the federal legislation was constitutional. It is difficult to imagine a more flagrant breach of "due process" than the Court's unqualified statement, in such circumstances, that "we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion."

Further puzzles arise when *Eldridge* is considered alongside *Libman*. On its face, *Libman* also appears activist, because the decision there unanimously and anonymously invalidated Quebec's mandatory scheme for referendum campaigning. In fact, though, *Libman* is more like an ode to deference.

It is peculiar, initially, that invalidating provincial referendum legislation became a pretext in *Libman* for the validation of a federal election law which was not even before the Court. By the time of *Libman*, La Forest J.'s quibble about the way the issue was framed and decided in the *Salaries Case* had been published in his dissenting opinion. Shortly

thereafter, however, the Court treated the *Referendum Case* as an opportunity, effectively, to reverse the Alberta Court of Appeal in *Somerville v. A.-G. Canada*.

There, the provincial appellate court struck down third-party spending limits in the *Canada Elections Act*. The decision was not appealed, and neither the record nor the evidence was therefore before the Supreme Court in *Libman*. Moreover, though none of the parties had been heard on the issue, the Supreme Court of Canada stated, unequivocally, that the Alberta Court of Appeal was wrong and that the federal legislation was constitutional. It is difficult to imagine a more flagrant breach of "due process" than the Court's unqualified statement, in such circumstances, that "we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion."

A second point concerns the hierarchy among *Charter* rights that has become increasingly entrenched in the jurisprudence. Section 2(b) cases have consistently drawn a distinction between low- and high-value expression, to justify an attenuated standard of review under section 1 for low-value expression. The logic of that approach suggests that expressive activity at the core of section 2(b), like participation in democratic elections, would to the contrary receive strong protection under section 1.

Libman regrettably demonstrates that no expression is valuable enough to warrant a stringent standard of justification. There the Court said that "while the impugned provisions in a way restrict one of the most basic forms of expression . . . the legislature must be accorded a certain deference" [my emphasis]. In the result, *Libman* invalidated

limits on political expression but signalled quite clearly that fresh legislation ameliorating the minimal impairment problem, perhaps by following the federal example, would be sufficient to pass *Charter* muster.

Giving full faith and credit for the problematics of Charter adjudication and interpretation, the Court must nonetheless be encouraged to develop a code of principles to explain its decisions and improve confidence in its mandate of review.

It is significant that the Court explicitly endorsed deference to the legislature in a case implicating political expression. Significant, not only because that says something about section 2(b) and how it is regarded, but also because of what it says about the relative value of *Charter* rights, which are equal as a matter of constitutional text. Thus *Libman's* deference should be measured against the Court's willingness to compel the provinces to establish commissions to review judges' salaries, and to direct choices between competing health care services. The problem is not necessarily that *Eldridge* is "wrong"; the true difficulty is that the cases do not stand together for any visible set of standards for judicial review. Without any foundation in principle, decisions look like little more than bald preferences.

APLEA

The Supreme Court of Canada's task is not easy, and this

comment certainly does not claim the magic of elixir of principle for itself. Giving full faith and credit for the problematics of *Charter* adjudication and interpretation, the Court must nonetheless be encouraged to develop a code of principles to explain its decisions and improve confidence in its mandate of review. One of the current romanticisms is that the *Charter* engages a process of dialogue between institutions. It is unfortunate that some academics feel compelled to browbeat the Court to catch its attention, because dialogue is unquestionably more pleasant, and probably more fruitful, than confrontation. So by all means reject the critique, but please listen to it first. 🍁

Jamie Cameron is a Professor of Law at Osgoode Hall Law School, York University.