LITIGATION TRENDS IN 1997 SUPREME COURT JURISPRUDENCE

BY DEBRA M. MCALLISTER

INTRODUCTION

There are two significant litigation trends in the Supreme Court's 1997 constitutional jurisprudence. First, the Court has made a serious effort to move beyond and resolve the confusion left by the 1995 equality rights trilogy of *Miron* v. *Trudel*, *Egan* v. *Canada*, and *Thibaudeau* v. *Canada*. In *Eaton* v. *Brant County Board of Education*, *Benner* v. *Canada (Secretary of State)*, and *Eldridge* v. *British Columbia (Attorney General)*, the Court delivered unanimous decisions that leave open questions, but that also make a genuine contribution to the development of equality rights.

The second significant litigation issue is the further expansion of evidence that the Court will accept in constitutional cases. While this trend has been developing for some time, the decision in *Delgamuukw* v. *British Columbia* takes an important step forward. Indeed, this case should prompt a re-examination of procedural rules to clarify the process for presenting non-traditional forms of evidence in constitutional cases.

EQUALITY RIGHTS DECISIONS

In March of 1996, Professor Hogg spoke at the Toronto Department of Justice Charter Conference on the volume and complexity of the Supreme Court's *Charter* decisions, referring in particular to the 1995 equality rights trilogy and the *RJR-MacDonald* case. He noted the daunting length of the decisions, and the problems that arise from having many sets of reasons. Not only does this make it difficult to determine who stands where on a specific issue, it can even be unclear whether the legislation withstood the constitutional challenge.

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Concise summaries of the positions which emerged from the 1995 trilogy are now available, but it is worth recalling the initial decisions themselves. First, the cases are quite lengthy, taking up 300 pages in the Supreme Court Reports. Second, there is extensive cross-referencing between sets of reasons and between cases, so all three decisions must be read together. Third, there is no clear majority position in these cases: four judges led by Gonthier J. took one approach; another four judges advanced a second approach as stated by Cory J. and McLachlin J.; and L'Heureux-Dubé J. took yet another path. These were not simply differences in form, but they also illustrated a divergence in the judges' understanding of the essence of discrimination.

We no doubt want the judges of our highest court to analyze and reflect upon the law; if their conclusion is that the law must be interpreted in a particular direction, they should say so. Giving content to *Charter* rights is not easy; it is a complex, value-laden, and subtle process. Finally, debate drives the law forward, and we need dissents to foster that debate.

However, we also need clear majorities on significant issues, or the law will founder. The 1995 trilogy may have been an unavoidable step in the development of section 15, but it was not particularly helpful and did leave considerable uncertainty in its wake.

The 1997 equality rights cases are a welcome change, first because all three are unanimous decisions. They acknowledge that there has not been unanimity among members of the Court, but at least there is an attempt to establish agreement on general principles. *Eaton* and *Benner* hold that the reasons of McLachlin J. in *Miron* and Cory J. in *Egan* set out essentially the same test and methodology. Both *Benner* and *Eldridge* hold that the same result as was reached would have been reached, regardless of which approach of the 1995 trilogy was applied. The result is that we still have different approaches on fundamental section 15 issues, although the Court has not engaged in the debate as it did in 1995. Instead it has built consensus and has given guidance where it can.

Second, there is a real sense of purpose in these judgments, particularly in *Eaton* and *Eldridge*, which deal with difficult issues of recognizing differences in order to achieve equality. These decisions may not tell us the precise shape or contours of section 15, but they do tell us the texture of the right, and that the Court is committed to breathing life into the promise of equality.

EVIDENCE IN CONSTITUTIONAL CASES

The second significant litigation trend is the expansion of evidence in constitutional cases. In a March 1997 address to the Toronto Department of Justice Charter Conference, Dean Pilkington advocated changing procedural rules to better accommodate non-traditional forms of evidence in constitutional litigation. Her suggestions should be revisited in light of the decision in *Delgamuukw*.

The Supreme Court stated in one of its earliest *Charter* decisions, *Hunter* v. *Southam Inc.*, that the purpose of a constitutional *Charter of Rights* is "the unremitting protection of individual rights and liberties . . . It must, therefore, be capable of growth and development over time to meet new social, political and historical realities". This kind of protection and growth simply cannot be achieved by relying on the traditional rules of procedure and evidence.

There is an impressive body of literature on evidentiary requirements in constitutional cases. Much of it is premised on the statement in *R.* v. *Danson* that "[a]djudicative facts are those that concern the immediate parties . . .who did what, where, when, how and with what motive or intent . . . Such facts are specific, and must be proved by admissible evidence."

However, "[l]egislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements . . ." They do not fit neatly into rules developed in non-constitutional litigation, and they raise

unique issues of admissibility, weight, and form of presentation.

The Supreme Court has taken a broad approach to admissibility of extrinsic evidence since *Re B.C. Motor Vehicle Act*, where the Minutes of a Parliamentary Committee were admitted as an aid to the interpretation of section 7 of the *Charter*, but were not given much weight. The presentation of extrinsic evidence is a more controversial issue that has generated considerable debate among practitioners.

The controversy flows from the use of "Brandeis briefs" in the United States, which consist of social-scientific material submitted without formal proof. The theory is that formal methods of proof that ensure that evidence is reliable are not necessarily helpful for material such as historical documents. The problem is that courts may need the assistance of experts, presented and tested through formal means, to interpret social scientific materials.

The practice of briefing extrinsic evidence has been used repeatedly in *Charter* cases, although with very little comment by the Supreme Court. For example, in *R.* v. *Hufsky* and *R.* v. *Thomsen*, seven volumes of material on impaired driving established justification under section 1, but the Court did not comment on the form of presentation. Similarly, in *Ford* v. *Quebec (Attorney General)*, material on language policy had been appended to a factum, but did not take the opposing parties by surprise. The Court stated that the material was similar to that considered in other section 1 cases without the evidentiary testing of the adversary process.

Essentially, the Supreme Court has accepted Brandeis briefs of legislative facts, so long as the parties have adequate notice. However, this has not always been the approach of lower courts. For example, in *Canada (Canadian Human Rights Commission)* v. *Taylor*, the Federal Court of Appeal refused to consider briefed extrinsic material, because "[t]he Rules provide means for this Court to receive evidence. The means do not include bootlegging evidence in the guise of authorities." Although this material was important in the Supreme Court's section 1 analysis, this passage continues to resurface in arguments on admissibility of extrinsic evidence.

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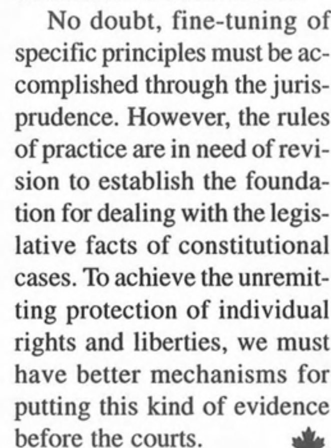
Delgamuukw adds a new dimension to the debate. The plaintiffs tendered oral histories, personal recollections, and affidavits of territorial holdings to establish occupation and use of land to which they claimed aboriginal title. Despite 374 days of trial and many years in litigation, Lamer C.J.C. ordered a new trial because the trial judge improperly rejected, or did not give sufficient weight to, the plaintiffs' evidence.

He reiterated that "first . . . trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims, and second . . . trial courts must interpret that evidence in the same spirit." The second principle "requires the courts to come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past."

Lamer C.J.C. concluded that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents . . . This process must be undertaken on a case-by-case basis."

Aboriginal rights cases raise unique evidentiary issues, since oral histories may be the primary evidence of the claim. *Delgamuukw* is also significant for non-aboriginal litigation: first, it points out the weakness in the distinction between adjudicative facts and legislative facts. Lamer C.J.C. treated oral histories as equivalent to historical documents. However, they were not just legislative facts of a general nature which established a social, economic, and cultural context. They also established the adjudicative facts concerning the immediate parties, or the "who did what, where, when, how and with what motive or intent" facts. As well, these oral histories were placed on the same footing as legislative records with less stringent admissibility standards. This is a sensible approach where oral histories are the primary evidence of aboriginal claims, and an important step in giving real substance to aboriginal rights. However, equating oral histories which establish adjudicative facts with legislative facts, which establish context, blurs the distinction between these categories and indicates that they are not as helpful as we originally thought.

Second, Lamer C.J.C. held that the adaptation of the laws of evidence to accommodate oral histories must be undertaken on a case-by-case basis. That is what we are currently doing with legislative facts, dealing with evidentiary and procedural issues on a case-by-case basis because the ground rules are not firmly established. This is not the most effective method of litigating constitutional rights, since a considerable amount of time and expense is often consumed in these disputes before the merits of the claim themselves are considered.



No doubt, fine-tuning of specific principles must be accomplished through the jurisprudence. However, the rules of practice are in need of revision to establish the foundation for dealing with the legislative facts of constitutional cases. To achieve the unremitting protection of individual rights and liberties, we must have better mechanisms for putting this kind of evidence before the courts.

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