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which provincial legislative jurisdiction should be protected.


It also makes impossible and oxymoronic any definition of "colourable". Furthermore, I cannot be convinced that the devolution of so much power to the executive under sections 34 and 35 does not bring the doctrine of vagueness into play. Nor can I imagine that a decision that even Chief Justice Lamer finds too centralizing could be any good for the provinces.

The potential danger of this decision lies in the doors it opens in the future, for other environmental purposes and, more generally, for other fields where this invasive combination of open-ended discretion might apply. The least one can say is that it appears to invest federal authorities with an indefinitely extensible jurisdiction and thus the power to amend unilaterally the structure of federalism—a power that, for some reason, has recently seemed more unreasonable when ascribed to some provincial authorities who will remain nameless.

**LEGITIMACY—THE ONLY EFFECTIVE LIMITATION ON DISCRETION**

However, it might not be by chance that the Interim Order has proven to be a particularly reasonable and acceptable use of the powers conferred: the often quoted definition of criminal prohibition in the *Margarine Reference* reads, in part: "enacted with a view to public purpose which can support it as being in relation to criminal law". If hermeneuticians and rhetoricians alike are right, the Court's discretion can only extend as far as it meets the expectations of its "audiences" and keeps public support.

Such is the basis of its legitimacy which, in a post-modern society, depends on the reception its decisions get from the specialized legal community, but even more on the coincidence of the values that the Court embodies in its decisions and those of the general public.

As long as it gives to "criminal law", "environment", and other assorted open-ended concepts a meaning that a majority of Canadians can support, the Court will keep its credibility and maintain the legitimacy of its decisions. A problem might arise when a broad consensus dissolves, or if, as might happen in other fields where constitutional questions are up for decision, a Canadian minority happens to form a provincial majority. 

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**THE CHARTER OF RIGHTS AS A MURDERER'S BEST FRIEND**

BY ALAN YOUNG

For the past two years I have been writing an obituary for the *Charter of Rights* on the basis that the Supreme Court of Canada has in recent years taken a rather parsimonious approach to providing remedies for constitutional violations. In 1995, I wrote that "to date, the Court has mastered the rhetoric of rights-adjudication, but more work is needed with respect to the practical exercise of creating or prompting necessary institutional adjustment" for the provision of effective remedies. In 1996, I suggested that the "living tree" we call the *Charter* is a unique tree which is capable of shrinking, but not necessarily dying, in the face of lack of nourishment: "The past year [1996] will not go down in history as an exciting one for *Charter* jurisprudence. In fact, 1996 was probably the most boring and pedestrian year of *Charter* jurisprudence since the enactment of the *Charter* in 1982. It appears that the love affair with the *Charter* is over and courts are beginning to take a sober, second thought with respect to the application of *Charter* rights in the criminal process".

The Court's performance in the 1997 term clearly indicates that my report of the death of the *Charter* is both premature and unfounded. Despite the fact that the 1995 decision in *O'Connor* (1995), 103 C.C.C. (3d) 1, left the distinct impression that a stay of proceedings would rarely be granted for prosecutorial non-disclosure, in 1997 the Court stayed two proceedings on the basis of

non-disclosure or lost disclosure (see *Carosella* (1997), 112 C.C.C. (3d) 289; *MacDonnell* (1997), 114 C.C.C. (3d) 145). In addition, the Court ordered new trials for two convicted murderers on the basis that probative evidence should have been excluded at trial (*Stillman* (1997), 113 C.C.C. (3d) 321; *Feeney* (1997) 115 C.C.C. (3d) 129).

This brief comment will focus on the windfall opportunity gained by these two murderers with a view to determining whether these rulings should be celebrated as due process triumphs or whether these two decisions are merely a reflection of a Court which is adrift in a sea of confusion.

In 1991, Pamela Bischoff was brutally raped and murdered by William Stillman. In the same year Frank Boyle was brutally beaten to death by Michael Feeney. Both accused were convicted at trial but, in 1997, the Supreme Court of Canada ordered new trials for both men; however, both new trials will likely result in acquittals as a result of the Court ordering the exclusion of critical pieces of evidence. In a nutshell, William Stillman received a new trial on the basis that bodily samples were seized from him for DNA testing in the absence of valid authority. The bodily samples constituted non-discoverable, conscriptive evidence and as such were excluded on the basis that the admission of the evidence would affect or impair the fair trial rights of the accused. Michael Feeney received a new trial on the basis

that he was unlawfully arrested in his home and as such various items of non-conscriptive evidence were excluded on the basis that the police conduct constituted a serious breach of the accused's right to privacy. In both cases the police exceeded the scope of the common law power to search incident to arrest and, as a result, two guilty murderers will apparently go free.

*At least at the level of rhetoric, the Supreme Court has consistently promoted an expansive perspective on the right to privacy in section 8 of the Charter, and these decisions may be seen as a strong warning to state officials that needless and unjustified intrusions upon privacy will not go unremedied.*

For the due process advocate, these decisions represent a high-water mark for employing constitutional legal rights to preserve and protect an individual's right to privacy and the right to bodily integrity. At least at the level of rhetoric, the Supreme Court has consistently promoted an expansive perspective on the right to privacy in section 8 of the Charter, and these decisions may be seen as a strong warning to state officials that needless and unjustified intrusions upon privacy will not go unremedied. It cannot be said that the state has been ambushed or surprised by the Stillman and Feeney deci-

sions, because the Court had without reservation signalled a protective approach to privacy and bodily integrity.

American courts and lower courts in Canada characteristically adopted an "assumption of risk" approach to privacy, in which vulnerability to intrusion and detection dictated the extent of constitutional protection. Until 1990, it appeared that privacy in Canada would become as moribund as it has become in the United States. One commentator graphically described the state of privacy protection in American jurisdictions in the following manner: "Anyone can protect himself against surveillance by retiring to the cell, cloaking all windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the fourth amendment, because if it were, the amendment's benefit would be too stingy to preserve the kind of open society we are committed to. What kind of society is that?"

Just as Canadian courts appeared to be adopting this Orwellian conception of privacy, the Supreme Court forged a new path by rejecting the restrictive "assumption of risk" approach to privacy (Duarte, [1990] 1 S.C.R. 30; Wong, [1990] 3 S.C.R. 36). With respect to participant monitoring, video surveillance, and beeper monitoring, the Court moved from a descriptive approach (i.e., what risks of detection does a person face) to a normative approach, in which the relevant question is not which risks of intrusion/detection an individual must be presumed to accept, but which risks the individual should be forced to assume in a free society. Although the Court has wavered somewhat by con-

cluding that the seizure of hydro records does not violate a reasonable expectation of privacy, it has remained resolute in ensuring that "informational privacy", "territorial privacy", and "privacy of the person" (Dyment, [1988] 2 S.C.R. 417) are fully respected.

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Although the normative and theoretical approach to privacy flourished, there remained some concern because of the mixed messages created by the application of the exclusionary rule to violations of the right to privacy. The Collins real/conscripted distinction appeared to relegate the privacy interest to playing second fiddle to violations of the right of the accused not to be compelled to be a testimonial source. Although flagrant violations of section 8 tended to attract exclusion (see, for example, Greffe, [1990] 1 S.C.R. 755; Genest, [1989] 1 S.C.R. 59), good faith violations (however defined) of privacy which yielded real evidence tended not to attract any remedy (see,

for example, Hamill, [1987] 1 S.C.R. 301; Simmons, [1988] 2 S.C.R. 495; Duarte, supra; Wong, supra; Wise, [1992] 1 S.C.R. 527; Silveira, (1995) 97 C.C.C. (3d) 450; Evans, (1996) 104 C.C.C. (3d) 23).

In Feeney, the Court gave the theoretical endorsement of the right to privacy as a real practical bite. Despite the fact that this same Court in 1986 ruled that the police had the right at common law to enter a private dwelling home to effect a warrantless arrest (Landry (1986), 25 C.C.C. (3d) 1), the Court in Feeney overruled its previous decision on the basis that the "emphasis on privacy in Canada has gained considerable importance" in the Charter era. Regardless of whether the suspect is living in a ramshackle hut (Colet, [1981] 1 S.C.R. 2) or a trailer (Feeney), the Court ruled that entry into a private dwelling home to effect an arrest could only occur upon the obtaining of judicial authorization. Only in cases of hot pursuit would the Court allow for a warrantless entry to effect an arrest.

Without question, the primary ruling in Feeney is both sensible and consistent with recognized Charter values. A warrant establishes the authority of the state to intrude and it serves to ensure that intrusions are objectively premised upon probable cause. The case law clearly establishes that warrantless entries to effect arrests lead to resistance and altercations between police and homeowners (see, for example, Landry, supra; Plamondon, [1997] B.C.J. No. 2757, unreported decision of the B.C.C.A., December 11, 1997). Nonetheless, the interesting question remains as to why Mr. Feeney would receive the benefit of

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the exclusionary remedy whereas in other cases of intrusions upon the privacy of a dwelling home the Court turned a blind eye to the violations.

*[O]ne must wonder how an exclusionary remedy which is purportedly designed to maintain and enhance the integrity of the judicial process can achieve this objective when it serves to allow guilty murderers to escape justice on a consistent and recurring basis.*

Prior to *Feeney*, the Court had admitted evidence in cases in which the police lied to secure entry into a home (*Edwards* (1996), 104 C.C.C. (3d) 136), in which the police entered and detained the residents prior to obtaining a search warrant (*Silveira, supra*), and in which the police employed a "knock on" olfactory search at the front door of a home despite the clarity of previous rulings forbidding warrantless perimeter searches of private property (*Evans, supra*).

Arguably, the violations in the previous three cases were as serious, if not more serious, than the violation in the *Feeney* case. In *Feeney*, the police were acting spontaneously in response to information received concerning a brutal homicide. Although the police did not follow proper procedures in gaining entry

into the suspect's dwelling, there was no suggestion of a concerted plan to disregard the demands of the Constitution. In the previous three cases, the police were not responding to an apparent emergency and they had ample time to determine the constitutionally proper way to effect an entry and a search. In the previous three cases, the Court upheld the conviction of guilty drug traffickers in the face of apparent *Charter* violations, whereas in *Feeney* a guilty murderer was the fortunate beneficiary of *Charter* violations which were arguably not as flagrant and serious as the violations in the three drug cases.

It is easy to rely upon some pedestrian cliché like Justice Frankfurter's famous statement, that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people" (*U.S. v. Rabinowitz* (1950), 339 U.S. 56 at 69, to justify the windfall benefit obtained by murderers like *Feeney* and *Stillman*. In fact, the Supreme Court of Canada relied upon its own rendition of the cliché by stating that "we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*" (*Feeney, supra* at 170). Nonetheless, one must wonder how an exclusionary remedy which is purportedly designed to maintain and enhance the integrity of the judicial process can achieve this objective when it serves to allow guilty murderers to escape justice on a consistent and re-

curring basis.

*There is no doubt that restricting Charter remedies solely to violations which occur in the course of the investigation of minor offences would trivialize the great majesty of the constitutional document; however, it must also be remembered that the exclusionary remedy was designed to be flexible and discretionary and that the Court has acknowledged that the "concept of disrepute involves some element of community views"* (Collins).

Prior to *Stillman* and *Feeney*, the Court had on numerous occasions excluded confessions made by arguably guilty murderers (see, for example, *Clarkson*, [1986] 1 S.C.R. 383; *Brydges* (1990), 53 C.C.C. (3d) 330; *Evans* (1991), 63 C.C.C. (3d) 289), without expressing the same compunction and reservations expressed by the Court in freeing an obviously guilty drug trafficker. There is no doubt that restricting *Charter* remedies solely to violations which occur in the course of the investigation of minor offences would trivialize the

great majesty of the constitutional document; however, it must also be remembered that the exclusionary remedy was designed to be flexible and discretionary and that the Court has acknowledged that the "concept of disrepute involves some element of community views" (*Collins* (1987), 56 C.R. (3d) 193).

The problem in a nutshell is that the Court, in its attempt to instantiate the concept of disrepute contained in section 24(2), has boxed itself into a framework of analysis which does not cohere with either community views or the intent of the drafters. In *Stillman*, the Court endorsed the *Collins* framework of analysis and added a refinement to the assessment of how and why conscripted evidence should be excluded. The Court provided a clear exposition of the approach to excluding conscriptive evidence:

"1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of

justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the *Charter* breach and the effect of exclusion on the repute on the administration of justice will have to be considered" (*Stillman, supra* at 364-65).

In *Stillman*, conscripted evidence was further defined as being constituted by "statements or the use as evidence of the body or bodily substances". Most of the evidence collected from Mr. Stillman was comprised of bodily substances and as such it was excluded as non-discoverable, conscripted evidence. The remedy of exclusion in this case appears justifiable as a response to the unauthorized intrusions upon the body of the accused; however, the framework of analysis is still fraught with inconsistencies which unfortunately have a tendency to inure to the benefit of persons charged with serious predatory crimes. This windfall occurs because bodily substances tend to exist as trace evidence only in crimes of personal violence.

At the outset, it should be noted that the characterization of the use of the body and bodily substances as conscripted evidence appears to be mistaken. Although the relationship between conscripted evidence and the fairness of a trial has never been clearly elucidated by the Court, presumably, the logic underpinning this association

is aptly summarized by Professor Paciocco: "What, then, is the theoretical basis for the 'unfair trial' characterization? One might surmise that it is a corollary of our notion that a fair trial is one in which the Crown must establish the guilt of the accused without calling him as a witness against himself. To compel the accused to answer before trial, and then use his words against him at the trial, would be tantamount to calling him as a witness against himself, thereby rendering the trial unfair. It would enable the Crown to do indirectly what it cannot do directly. This theoretical basis can even be stretched with some considerable generosity to include other evidence produced through the compelled participation of the accused: things like breath samples, or the enforced participation of the accused in police line-ups. In a broad sense, by assisting the Crown in furnishing evidence against himself, he is effectively a 'witness' against himself".

Statements obtained in violation of the *Charter* clearly constitute conscripted evidence because currently there is no lawful mechanism available to the state to compel the accused to provide testimonial evidence. However, with the exceptions of the use of the body for lineups, sobriety tests, and handwriting samples, there does exist (as of July 13, 1995; see sections 487.04-487.091 of the *Criminal Code*) lawful authority allowing the state to collect bodily substances from the accused prior to trial. Therefore, it is far from clear how bodily substances can constitute conscripted evidence in light of the fact that the state could, if proper procedures were followed, obtain this evidence for

use at trial. In the case of collecting bodily substances, the state is not doing indirectly what it is prohibited from doing directly.

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*Conscripted evidence should not be automatically excluded without some consideration of the seriousness of the offence and the seriousness of the violation, and the analysis of the seriousness of the violation for non-conscripted evidence should not be done in a factual vacuum which does not factor in the seriousness of the offence.*

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Second, the fact that lawful procedures now exist for the collection of bodily substances exposes another contradiction within the *Collins/Stillman* framework of analysis. Conscripted evidence will not affect the fairness of the trial if it was otherwise discoverable through lawful means. Accordingly, in most cases in which a lawful arrest has been effected, the police would invariably be entitled to apply for a DNA warrant to collect the types of bodily substances taken in *Stillman*. If in the ordinary course this type of evidence is discoverable, then the framework of analysis requires the Court to determine if the

seriousness of the violation warrants exclusion of discoverable evidence. Whereas the availability of constitutionally proper methods for collection of bodily substances removes the evidence from the category of virtually automatic exclusion, the availability of other lawful methods of collection tends to make the alleged violation more serious. As Lamer C.J.C. stated in *Collins*, "the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tends to render the *Charter* violation more serious". When exposed to careful scrutiny, it appears that the Court has constructed a test for exclusion which collapses under the weight of its own internal contradictions, as on the one hand discoverability militates in favor of exclusion, and on the other hand it is an aggravating factor with respect to the seriousness of the violation.

If the evidence is not conscriptive, as in *Feeney*, then the Court is directed to focus on the seriousness of the violation as the barometer for determining if exclusion is warranted. Once again, this determination is fraught with inconsistency and incoherence. One could argue that the police in *Feeney* were confronted with an urgent situation demanding an immediate response. In addition, it could be argued that the police acted in good-faith reliance upon the ruling in *Landry*, allowing then to enter a private dwelling to effect an arrest. Although it does appear that the police in *Feeney* arrogated to themselves a power not provided by law, it is difficult to draw an inference that this was a bad

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faith violation premised upon a deliberate attempt to circumvent *Charter* rights.

Ultimately, the results reached in *Feeney* and *Stillman* may be proper and justifiable; however, respect for the *Charter* will diminish if the pattern of readily providing remedies for guilty murderers continues to be the stock and trade of Supreme Court decisions. Beyond the inconsistencies which hover around the periphery of the *Collins/Stillman* test, the major shortcoming of this test is the failure to incorporate an element of proportionality into the framework of analysis. Conscripted evidence should not be automatically excluded without some consideration of the seriousness of the offence and the seriousness of the violation, and the analysis of the seriousness of the violation for non-conscripted evidence should not be done in a factual vacuum which does not factor in the seriousness of the offence. Professor

Paciocco explains how the principle of proportionality should be employed in the determination of whether to exclude probative evidence: "The principle of proportionality requires courts to make the decision whether to exclude evidence by comparing the severity of the breach and the seriousness of the consequences of excluding the evidence, given all of the circumstances and the long-range interests of the administration of justice. The attraction of the principle is that it enables the complex mix of competing interests to be measured on a case by case basis. This is of value because the exclusion of evidence has both costs and benefits. Sometimes the costs simply outweigh the benefits. Where this is so, the evidence should not be excluded. The exclusion of evidence should not become some kind of self-flagellation in which we, as a society, inflict disproportionate pain on ourselves to show the depth of our repentance

for having violated the *Charter* rights of the accused. The fact is that so long as proportionality is eschewed completely in 'fair trial' cases, even minor, technical violations will result in the loss of critical evidence against serious offenders. What public interest is there in doing that? The fair trial dichotomy is simply too rigid to allow for the rational assessment of the competing interest that are presented when exclusionary decisions come to be made".

Upon a review of the activist and progressive stand taken by the Supreme Court in the 1997 term, one can say with certainty that the reports of the death of the *Charter* were greatly exaggerated. As Shakespeare has said, "the law hath not been dead, though it hath slept". However, if 1997 represents the waking of this sleeping giant known as the *Charter*, we may have to confront a new problem regarding the ever-widening gap between the judicial approach to

rights violations and the community views as to when constitutional remedies are warranted.

Clearly, the views of the majority cannot and should not govern the approach to constitutional adjudication; however, failure to bridge the gap between reasonable community views and the *Collins/Stillman* test can only serve to foster contempt for *Charter* values. Although few people are naive enough to believe that the enactment of the *Charter* was the first step in creating a legal utopia, many people would believe that employing the *Charter* to protect Mr. Stillman and Mr. Feeney has already brought about a legal dystopia.



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## THE DISCLOSURE DILEMMA: 1997 DECISIONS ON EVIDENCE

BY DIANNE L. MARTIN

Assumptions about the truth, or not, of criminal complaints were particularly visible in the Supreme Court's 1997 decisions on evidentiary issues. This is so because of some longstanding trends in the jurisprudence which are now reaching their logical conclusions, but also because of the nature of the cases and the issues. Criminal cases have dominated the law of evidence for some time and this term is

no different. The key evidence decisions all concerned criminal prosecutions, with the exception of *M. (A.) v. Ryan*.<sup>1</sup> However, *Ryan*, although it is a civil case involving an action for sexual abuse brought by a patient against her psychiatrist, is an important decision in the criminal law context as well. The case itself, and the approach taken in the judgment, demonstrates the extent to which civil and criminal law

rules of evidence are merging, particularly in cases involving allegations of sexual abuse by persons in authority. It also advances the discussion of one of the more difficult issues to be decided by the Court, that is, resolution of the conflicting interests engaged by the issue of access to confidential records of therapy or counselling concerning a complainant/witness. That troubling issue is considered this term in the context of discovery of the prosecution case generally and, in particular, in terms of determining what the appropriate remedy should be when the Crown fails or is unable to make full disclosure.

Disclosure was not the only issue to be considered, however. Other decisions raise important questions about the admissibility of illegally obtained evidence,<sup>2</sup> eyewitness identification evidence,<sup>3</sup> and the obligation on the Crown to call particular witnesses.<sup>4</sup> Nonetheless, regardless of the primary issue involved, all of the decisions demonstrate a concern with preserving convictions or, more precisely, with supporting the choices of prosecuting agencies, in a way that demonstrates considerable confidence in the essential propriety of those choices. Although the tenets of the adversary process are fre-