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CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

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SPECIAL DOUBLE ISSUE: SUPREME COURT OF CANADA IN 1996

THE SUPREME COURT OF CANADA'S 1996 CONSTITUTIONAL CASES: THE END OF CHARTER ACTIVISM?

BY PATRICK J. MONAHAN & MICHAEL J. BRYANT

If analysis of Supreme Court of Canada jurisprudence were truly an empirical science, then based on the 1996 statistics one could confidently predict a dismal future for those making constitutional challenges before the Court. For the statistics for last year are rather arresting. *Charter* claims succeeded in only 3 of 27 *Charter* cases decided during the 1996 term. This 1996 "success rate" of 11% is less than one-half of the comparable success rate for *Charter* claims in 1995, and only one-quarter of the 1994 success rate. It is also significantly lower than the comparable figures for the 1987 to 1991 period, when *Charter* claims succeeded on average in approximately one of four cases decided by the Court. (See Figure 1 at p. 43.) These numbers seem to confirm the analysis offered by many of the commentators in this *Canada Watch* special issue to the effect that the Court is now in full retreat from the much-vaunted activism of its first years under the *Charter*. On the other hand, as we argue below, focusing on the numbers alone may not give a complete picture of the manner in which the Court is currently approaching its responsibilities under either the *Charter* or the constitution more generally.

Meanwhile, in arguably the most significant year yet for Aboriginal rights claims under section 35 of the *Constitution Act, 1982*, the numbers in 1996 betray an impressive success rate of close to 1 in 2. Such a success rate could not be more misleading, however, as the Court significantly narrowed the scope of such claims in comparison with the highly activist approach of the Dickson Court in *Sparrow*.

Finally, the 1996 term did not produce any pointed trend in federalism cases, where one out of two constitutional challenges were upheld.[1] The significance here, perhaps, lies in the minuscule number of federalism claims which are being granted leave to appeal by the Court, in contrast with the overwhelming proportion of *Charter* claims making up the constitutional docket. Whereas the first ten years after the *Charter* was entrenched saw nearly one-third of constitutional cases argued on federalism grounds, last year the proportion rested at

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THE CHARTER AND CRIMINAL LAW IN 1996

BY DIANNE L. MARTIN

As David Beatty reminds us (see his article at p. 67), the Supreme Court has had a less-than-bold record of upholding and preserving the constitutional rights of Canadians against infringement by agents of state, particularly in matters of social service entitlement. Beatty would exclude criminal justice from this poor record but, as Alan Young points out, 1996 is the year when the Court seems to be backing away from its commitment to due process safeguards as well. If this is correct, and there is every reason to believe it to be so, the future is somewhat bleak for people facing criminal sanctions. The concern is that as courts become

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less generous in granting *Charter* remedies (or state agents become more skilful at apparently avoiding infringement circumstances), accused persons will have fewer supports. Legal aid plans across the country are cutting back harshly and more people are facing ever more complex prosecutions without the effective aid of counsel. Thus the question becomes what, if anything, might we expect from the *Charter* guarantee of right to counsel.

To date, the Court has primarily dealt with cases that raise issues concerning information about and right of access to counsel. However, assuming that legal aid cutbacks continue, it will not be long before entitlement-to-counsel cases will be before the Court as well. Both questions are reflected in the small number of right-to-counsel judgements delivered in 1996 and there is reason for concern. The pattern seems to be a willingness to continue to support the right to counsel in principle, but there is no evidence of an enduring operational concern for the unrepresented and, as yet, no entitlement to representation has been clearly articulated or acknowledged.

In this small group of cases, the only reasoned judgement of significance on right to counsel is *R.* v. *Calder*, (1996) 105 C.C.C. (3d) 1. The key issue in *Calder* was whether exclusion under section 24(2) of a statement taken from the accused in a violation of his section 10 (b) rights must be exclusion from use in the trial for all purposes. The majority rejected the position of Mr. Justice Doherty in the Ontario Court of Appeal (92 C.C.C. (3d) 97) on the issue. The Court of Appeal held that a material change in circumstances might justify a variation in a section 24(2) ruling on admissibility. The decision turns on the question of whether the use the prosecution might make of the statement should influence or indeed determine its admissibility. That is, in a case when to permit admission of a statement as part of the prosecution's case would bring the administration of justice into disrepute, the same disrepute would not necessarily arise if the statement were simply used to impeach the accused when he testified. At the Supreme Court, the majority acknowledged that a "material change in circumstances" could justify re-opening a ruling on admissibility (or indeed on any other matter) but held it would be in very limited circumstances that any change could affect the ruling made in regard to an excluded confessional statement.

[D]enial of section 10(b) rights, even in the most technical sense of failing to advise someone who does not need the information, continues to be seen as inherently prejudicial to respect for the administration of justice.

On the facts of this case, this position is difficult to reconcile with the truth-seeking function of a trial, a difficulty that is the basis of the dissent by Madame Justice McLachlin. Calder, an experienced police officer, was charged with attempting to purchase sexual services from a person under 18, extortion, and breach of trust. When he was questioned about his involvement with the young prostitute, he was cautioned that his answers might be used against him in court, but was inexplicably not advised that he had a right to counsel. The trial judge ruled that this infringement of section 10(b) must result in the exclusion of his (false) statement to investigators. It is literally inconceivable that Calder did not know that he had the right to a lawyer in the circumstances he was in, that is, as a person cautioned concerning a serious criminal offence. In this context, McLachlin J. could find no disrepute in using his false statement to impeach.

On the other hand, it is equally difficult to imagine that use of the statement to challenge credibility constituted a change in circumstance or one that was unanticipated by the prosecution (as they argued on their motion to reconsider the section 24(2) ruling). When Calder testified in his own defence, he no longer denied being with the underage prostitute as he had done

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in his statement to investigators, but gave an exculpatory explanation. As the only purpose the prosecution ever had in regard to the statement was to use it to demonstrate that Calder had lied, the claim of a material change was not very strong. It is this lack of merit in the prosecution's position that seems to have swayed the majority. In the result, denial of section 10(b) rights, even in the most technical sense of failing to advise someone who does not need the information, continues to be seen as inherently prejudicial to respect for the administration of justice.

[T]he right to counsel is not only not a right to counsel of choice, but is also now a right that must be asserted "reasonably" (in the view of a court anxious to process cases expeditiously).

A similarly mechanical view of section 10(b) was offered as the basis for restoring an acquittal in *R.* v. *Paternak*, (1996) 110 C.C.C. (3d) 382, from the Alberta Court of Appeal reversal (101 C.C.C. (3d) 452). The trial judge gave detailed, complex reasons concerning the impact on the accused of a lengthy and sophisticated interrogation, reasons which the Alberta Court of Appeal found to be in error both on the question of voluntariness and on admissibility under section 24(2). However, the oral judgement of the Court delivered by Mr. Justice Sopinka makes no reference to these issues. The Court simply restored the acquittal entered by the trial judge on the (unexplained) ground that the *Charter* right to counsel should have been given again when the interrogating officer concluded that the accused was indeed responsible for the offence (a manslaughter). Once again, it appears to be a mechanical application of the exclusionary rule for breach of the informational component of the right to counsel.

The substantive right to counsel is not given anything like as much protection. In a very brief judgement upholding the majority decision of the Nova Scotia Court of Appeal, *R.* v. *Howell*, (1996) 110 C.C.C. (3d) 192, the right is clearly seen as contingent. The unrepresented accused, Howell, is portrayed unsympathetically as deliberately divesting himself of counsel as a device to delay and obstruct his trial. Unfortunately, this characterization in effect becomes an exception to section 10(b) rights. Because of limits imposed by Legal Aid in Nova Scotia, Howell's usual lawyer could not represent him and Howell ultimately dismissed the lawyer provided to him instead. This is the heart of the conduct characterized as obstruction. In the result the right to counsel is not only not a right to counsel of choice, but is also now a right that must be asserted "reasonably" (in the view of a court anxious to process cases expeditiously). This is an ominous sign of how a more cleanly raised entitlement case might be handled. One can only hope that the Court will take more care when actually faced with this most fundamental right to counsel issue.

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THE RISE AND FALL OF THE CHARTER EMPIRE

BY ALAN N. YOUNG

The past year 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.

In my opinion, the Supreme Court of Canada has not broken any new ground since the 1995 decision in *Daviault* (1995) 93 C.C.C. (3d) 21, in which the Court constructed a new defence of extreme intoxication in order to ensure that the approach to the liability of intoxicated offenders was consistent with the principles of fundamental justice. Even this groundbreaking decision was short-lived as Parliament quickly responded by effectively overruling it with the enactment of a restrictive intoxication defence in section 33.1 of the *Criminal Code*. In a similar fashion, the Supreme Court of Canada decision in *O'Connor* (1996) 103 C.C.C. (3d) 1, with respect to the production of sensitive third-party records, was the subject of swift and critical Parliamentary response (Bill C-46 is currently before the House of Commons). Perhaps the Supreme Court has read the writing on the wall suggesting that Canadians and their elected representatives do not want the Court engaged in activist judicial review and, as a result, the Court has decided to adopt a fence-sitting, moderate approach to *Charter* litigation. If the Court can return to its pre-*Charter* position of relative anonymity, it can effectively insulate itself from public criticism.

When one reviews the 21 criminal process cases from the past year, one is struck by the gap between the rights rhetoric of the Court (which still retains its vibrant and passionate qualities), and the absence of effective remedies for lack of compliance with the constitutional imperatives. One case stands out as representative of the parsimonious approach of the Court to remedies for rights violations. In *R.* v. *Evans* (1996), 104 C.C.C. (3d) 23, the police obtained a tip concerning a hydroponic marijuana-growing operation and, in order to corroborate this tip, attended at the residence in order to employ their "heightened" olfactory sense to determine whether the pungent aroma of marijuana could be detected while standing at the front door. The