The Role of Facts in Charter Cases

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The State of the State Tree

- Norms and Facts
  - In his famous treatise*, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1992) Habermas argues law, and only law, has the ability to integrate the tension between facts and norms in modern (secular) societies
- How are constitutional rights* doing after 30 years of the Charter?
- Key: are norms and facts adequately integrated so law can perform its function of securing social agreement/consent to power?
- Is our tree living, flourishing, out of control, stunted, near death, dead?

*Excluding criminal process/fair trial cases

Culture of Justification*

- Norms
  - Explicit and informed debate about ideas of law and justice
  - Honest best bet about best theory of rights**

*See Etienne Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32:

"If the new Constitution [of South Africa] is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion".

**See Frank Michelman, *How Can the People Ever Make Laws? A Critique of Deliberative Democracy*, in DELIBERATIVE DEMOCRACY (James Bohman and William Rehg eds., 1998) at pgs. 145-171.

Classic Rights Cases - Low Hanging Fruit

- Big normative claims and big decisions with expansive reasons sourced in any of philosophy, political theory, rule and role of law concepts, comparative and international law.
- Reliance on primarily normative decisions in which the norms relied on for accepting or rejecting the claims are generated outside of facts of the particular case.
- Examples of classic rights cases:
  - Equality: *Andrews/Kapp*
  - Expression: *Irwin Toy/Ford*
  - Religion*: Big M*
  - Substantive Due Process: *Ref Re s. 94(2) of BCMVA*

Structural Cases: Tree Roots

- Structural cases: decisions that are about the institutional preconditions for rights litigation itself.

- Separation of Powers – apples not oranges
  - Judicial remuneration: *Ref. Re PEI Judges*
  - Parliamentary privilege: *Vaid*
  - Validity of references: *Same Sex Marriage*
- Membership of the polity
  - Prisoner voting rights: *Sauve*
- Basic Interpretive Doctrines
  - No framers' intent: *Ref re s. 94(2) BC MVA*
  - Purposive and contextual: *Hunter*, *Edmonton Journal*
  - Onus and Standard: *Oakes*
  - Need for evidence: *Danson;* and acceptability of judicial notice: *Spence*
  - s. 33 procedure only: *Ford*

Relative Stability of Content of Rights

- Once decided - stable jurisprudence - focus is not on what the norm is, but on whether norm triggered by the facts: e.g. freedom of religion *Multani, SL*

- Horizontal normative fights over whether content of already defined right should or shouldn't be extended to new claimant: e.g. *Same Sex Marriage Reference* (equality*); Little Sisters* (sexual expression of sexual minorities)

- Exception: remarkable jurisprudential confusion over a few basic normative issues
  - Equality jurisprudence (reviewed in *Kapp)*
  - Labour association rights (reviewed in *Fraser)*
  - Incredibly convoluted journey re jurisdiction of tribunals: *Martin*, *Conway*

New Norms – Rights Claims

- If a new normative claim, unlike old ones, claimant must have facts to help SCC justify decision

- Thesis: Claimants who are advancing a new norm that is outside settled limits risk loss if case is not adequately grounded in facts

Difference Between Normative and Fact Based Litigation

- In the early cases, the claim is often one that amounts to: the government cannot have as a purpose X where X is contrary to the norm. These were largely ‘purpose of the right’ cases: *Hunter*; *Ref Re s. 94(2); Big M.*

- As a result of normative stability (at the level of concept), cultural adhesion to the Charter’s basic doctrines, and accepted institutional legitimacy of the Court as part of a democratic structure, litigation is now more and more about facts.

Fact Fights

- Dealt with on a case by case basis by judges in trial or application or hybrid or summary proceedings.
- Four recent cases that illustrate counsel mounting fact-heavy cases
- Is there a need to revise civil procedure and evidence rules?
- Criminal rules: strict and careful: e.g. *Trochym*
- Civil rules: the cerlox* rule

*Quoting Professor Hamish Stewart, University of Toronto Law Faculty

To Succeed: Need to Show Harm

- Claimants of rights need strong factual evidence of harm to litigant to succeed with a new norm claims
- Harm is factual, not merely conceptual: must generate empathy not be merely logical.
- Claimants of rights need strong factual evidence of harm to support a claim with express and significant redistributive effect
    - Strong facts*: Chaoulli*, *Insite* (elemental physical well-being cases: why make people suffer needlessly?)
    - Weak facts: *Gosselin* (right to welfare); *Christie* (funded counsel in all cases)*; Mitchell* (commercial trade in all products across US border); *Pamajewon* (self-government)

Canada (A.G.) v. PHS Community Services Society, 2011 SCC 44 [*Insite*]

- whether possession provisions in the *Controlled Substances and Drugs Act* (CDSA) contravene s. 7 to the extent that they operate to prevent addicted injection drug users from accessing critical health care in the form of the supervised injection services

- whether the Federal Minister of Health contravened s. 7 by refusing to renew/reissue a statutory exemption from the CDSA provisions to enable the continued operation of “Insite”, a supervised injection site that had been operating since 2003 in Vancouver’s notorious Downtown Eastside

Insite

- **Hearing Procedure**
- affidavits alone - no cross-examination on affidavits
- no objections raised to any of the affidavits filed
- weight addressed in main arguments

Insite

- **Evidence**
- summary trial: appeal books comprise 20 volumes (almost 4000 pages)
- affidavits from site users (individual plaintiffs: Shelly Tomic & Dean Wilson)
- affidavits from Health Authority officials regarding drug use in the Downtown Eastside, related disease and deaths, descriptions of historical attempts to address the problem and of the current health strategy and the role of Insite in that plan
- expert affidavits re addiction (e.g., recognition as disease, compulsion to use)
- expert affidavits re injection drug use and spread of disease (e.g., HIV and hepatitis) and related serious heath risks (e.g., infection)
- more than 30 academic articles based on studies of Insite **itself** as an operating facility (e.g., demographics of clientele, impact on users, impact on neighbourhood)
- expert evidence regarding supervised injection sites in other jurisdictions

Insite

- **Noteworthy**
- Canada raised a preliminary objection to the summary trial procedure, but Pitfield J. reserved on the motion and ultimately concluded the procedure was appropriate
- unique in that between 2003 and 2010, Insite had been the subject of numerous serious academic studies, resulting in a favourable and credible body of expert work specific to the disputed operation being available to the plaintiffs as social science evidence

Bedford v. Canada (A.G.) 2010 ONSC 4264 (Himel J); 2012 ONCA 186

- whether the *Criminal Code* prohibitions against communicating for purposes of prostitution, keeping a common bawdy house, and living off the avails of prostitution individually and/or in tandem contravene s. 7 to the extent that they endanger prostitutes by preventing them from taking steps that would protect them from violence, such as having security personnel or engaging in client screening

- Appeal reserved at SCC

Bedford

- **Hearing Procedure**
- application pursuant to rule 14.05(3)(g.1) of the *Ontario Rules of Civil Procedure*
- evidence was entered without objections by either party, leaving the application Judge to determine what, if any, of the entered evidence should be admitted:

- 104 The procedure used in this application was to place large volumes of expert opinion on the record. Simply placing this evidence before the court does not automatically render it admissible. In a trial, any inadmissible information would be distilled and segregated. The application process is not generally amenable to that same process. It can facilitate a litigation strategy where parties may be more concerned with placing potentially important information on the record, as opposed to engaging in a rigorous admissibility analysis. As an impartial adjudicator, an application judge cannot disregard his or her role as gatekeeper simply because there is no jury. [per Himel J.]

Bedford

- **Evidence**

- 84 Evidence in this case was presented by way of a joint application record and a supplementary joint application record. Over 25,000 pages of evidence in 88 volumes, amassed over two and a half years, were presented to the court. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents. [per Himel J.]

Bedford

- **Noteworthy**

- On appeal, Canada submitted that the application judge erred by failing to properly exercise the role of “gatekeeper” regarding the admissibility of the expert evidence. The OCA held that Canada had agreed to the procedure below and, further, that her reasons demonstrated both that she was alive to the proper principles and that she had carefully assessed the evidence (paras. 136-138)

*Carter v Canada (A.G.)**

- whether the *Criminal Code*'s absolute prohibitions against assisted suicide and consensual homicide contravene s. 7 to the extent the provisions prevent grievously and irremediably ill persons from accessing physician-assisted dying to relieve suffering

- whether those *Criminal Code* provisions contravene s. 15 by reason of their disproportionate impact on the materially physically disabled (i.e., those whose disability renders them unable to act on their own to end their lives), whereas others may legally act to end their lives whenever they so choose

*presently on reserve at BCCA

Carter

Evidence

- **Plaintiffs**
- 15+ lay affidavits (individual plaintiffs, ill persons, friends and family members of ill or dead persons)
- 70+ expert affidavits (e.g., general medicine, neurological, psychiatric, ethics, palliative care, legal re foreign jurisdictions, social science re foreign jurisdictions)
- out of court cross-examination of two Government affiants
- in court cross-examination of five Government affiants
- **Governments**
- 30+ lay and expert and lay affidavits (e.g., personal experience, palliative care, suicide prevention, legal and social science re foreign jurisdiction)
- out of court cross-examination of six Plaintiff affiants
- in court cross-examination of five Plaintiff affiants

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- **Hearing Procedure**
- hybrid: summary trial on affidavits + cross-examination of selected affiants, including two weeks of cross-examination held in court (selection of affiants for cross-examination and determination of which affiants cross-examined in court by agreement of the parties)
- some affidavits challenged under separate motions (2011 BCSC 1371):
- Canada bringing preliminary application to strike all non-individual plaintiff lay affidavits as irrelevant, unnecessary or prejudicial, and to strike one lay affidavit for hearsay (result: one lay affidavit struck for hearsay);
- Canada applying to strike four expert affidavits as inadmissible (result: one expert affidavit struck as irrelevant)
- Plaintiffs applying for order permitting affidavit of affiant testifying as to own participation in assisted deaths to be filed anonymously (application dismissed).
- *voir dire* held at time of cross-examination with respect to Canada's objection to expert called for cross-examination before the court (result: witness qualified);
- objections to portions of affidavits of affiants cross-examined in court made at time of cross-examination (ruling reserved);
- several days argument held regarding objections (by Plaintiffs and Canada) to admissibility of affidavits given by witnesses not called for cross-examination in court (allowed in part) and on Canada's objections to some reply affidavits as improper reply (allowed in part) (ruling issued by court memorandum prior to arguments);
- weight addressed in main arguments.

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- **Noteworthy**
- trial proceeded on an expedited basis in light of the deteriorating health of one of the individual plaintiffs (Gloria Taylor)

- Canada and BC objecting to summary trial procedure; Trial Judge reserving on objection and also indicating that, should she conclude during deliberation that the evidentiary record was insufficient, the parties should be prepared to provide further evidence.

Polygamy Reference, 2011 BCSC 1588

- whether s. 293 of the *Criminal Code* [prohibition against polygamy] is consistent with *Charter* ss. 2(a) and 7

- clarifying the elements of the offence and, in particular, whether s. 293 requires that "the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence"?

Polygamy Reference

- **Hearing Procedure**
- reference by AGBC to the BC Supreme Court under the *Constitutional Question Act*
- the first time a constitutional reference was referred for hearing under a trial process in Canada
- AGBC sought a court-appointed *amicus curiae* to defend the provision. AGBC's nominee was appointed as Reference *Amicus*.
- Supreme Court concluding that the Rules of Court apply to the reference, except where the *Constitutional Question Act* provides otherwise
- 12 applicants granted interested person standing on terms including the right to adduce affidavit evidence, expert reports and "Brandeis brief" materials, and to participate in the evidentiary phase as permitted by the Court
- one expert's evidence was challenged as inadmissible; the point was argued in the evidentiary phase and the evidence was ruled admissible (paras. 77-78)
- the Court admitted all evidence tendered in order to "maximize the trial reference's potential in terms of creating an evidentiary record" (para. 46)
- the Court stated that because all of the evidence in a reference is evidence of "legislative facts", less stringent admissibility requirements applied, including to evidence entered by means of judicial notice (paras. 62-63)

Conclusion

- Facts matter more now because the controversial claimants are seeking new normative ground. Unlike the rights that are understood as definitional to a free life in a constitutional democracy and the celebrated outcome of social and intellectual struggles past, new normative claims have to fight for legal legitimacy. They must do so in an evidentiary framework that was not designed for such cases and while trial judges have been innovative in response, and empathetic to claimants, we will need to see how the Supreme Court of Canada *feels* and reasons in justifying outcomes.