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SENTENCING AND THE IMPACT OF THE CONSTITUTION

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Sentencing and the Impact of the Constitution

The most important sentencing case in the country is Smith¹, presently before the Supreme Court of Canada. It raises questions concerning the independence of the judiciary and what it means to be a Judge in ways that are both subtle and important.

You recall Smith. The argument was made that the minimum seven year imprisonment provided for importing a narcotic² is contrary to the Canadian Charter of Rights and Freedoms. On appeal, the reasoning of the trial Judge -- who incidentally imposed an eight year sentence in any event -- that s.5(2) was of no force and effect because it authorized "cruel and unusual" punishment was the easiest position to dismiss. Justice Craig and Justice MacDonald, for the majority, concluded that the minimum sentence provisions were not "so excessive as to outrage standards of decency" in reliance

on the dictum to that effect of the late Chief Justice Laskin³. Clearly "cruel and unusual" is a difficult horse to ride; the concept is inherently vague and it is difficult to foresee much future for it in Canadian jurisprudence.

But a minimum penalty may meet the standards of a number of sections of the Constitution, and yet run afoul of others. "Cruel and unusual" seems too high a hurdle to overcome for Judges who were trained in a system without entrenched constitutional rights. There is too much of the "slap in the face" to establish authority perceived in striking down legislation under that ground. The barest hint of this reluctance can be seen in the statement of Justice Craig:

"A court should not categorize such legislation as 'arbitrary' or 'cruel and unusual' unless it is clearly satisfied that this conclusion is beyond doubt."

But the suggestion that the minimum punishment in

this case violated the guarantee against arbitrary imprisonment in s.9 of the Constitution is more difficult to deal with. Justice Craig defined arbitrary as "capricious", "not determined by rule or principle". He accepted that weighing the needs of punishment on the one hand and reform and rehabilitation of the offender on the other is part of what a Judge must do in sentencing, but he noted that the Court was not bound to give effect to rehabilitative considerations in every case. For example, in a number of crimes of violence the punishment may reflect little, if any, weight given to the rehabilitation of the offender either because he is a danger to the public or seems to be beyond rehabilitation; deterrence is simply the overriding consideration in the case.

"The fact that a Court considers that the primary consideration in imposing sentences is deterrence to others and that rehabilitation is not a factor or that Parliament limits a Judge's discretion when imposing a sentence for a particular offence does not make the

sentence imposed arbitrary punishment."

And it is true that parliamentary maximums, as Justice MacDonald who concurred pointed out, have always been used to constrain Judges in the sentences they can pass.

But let us focus for a moment on this formulation. Leaving aside cases -- I have difficulty imagining them -- where a Court could say that the maximums provided by Parliament are so insufficient as to not allow justice to be done, (bearing in mind the dangerous offender legislation,) what Justice Craig has slipped into this formulation is a shift of players.

I am willing to concede that the sentencing function is not sacrosanct, as Justice MacDonald pointed out. Indeed, I am prepared to concede that Parliament could take the sentencing function away from Judges entirely and repose it in some other tribunal or even have the sentence (for the purposes of this argument

only!) flow automatically in a series of fixed tariffs imposed by law. But the difficult question is whether Parliament may simultaneously put the decision in the hands of a Judge, and at the same time bind those hands to the extent, that in the view of the courts, justice can then no longer be done. I say that it cannot. Bear in mind that we are not speaking here of the idiosyncrasies of a single Judge with peculiar views; Crown appeals exist to correct this sort of error. We are speaking in practice of the view of the judges collectively acting through the Court of Appeal of a province, and in any important case, the views of the judiciary expressed through the Supreme Court of Canada.

Justice Craig said:

"Parliament may properly consider the importation of drugs, even in small quantities, as an offence which should be severely punished and try to curb the importation by circumscribing a Judge's discretion somewhat to impose a penalty." (my italics)

This passage too requires analysis. Circumscribe a Judge's discretion "somewhat" makes it sound as if we are not doing much that is significant. But if the "somewhat" is the difference between doing justice and doing injustice, this mere trifle strikes at the essence of judging and the role of the judiciary. Second, it is not a question whether importation of drugs, even a single joint of marijuana, is an offence which "should be" severely punished. Perhaps in many cases that is correct. But what of the case where it should not be severely punished? The case where it absolutely must not be severely punished in order to avoid injustice? For it is indeed a mistake to use this sort of language: He doesn't mean "should be" at all. What he means is "must be" punished severely -- by a seven year penalty -- regardless of the circumstances or insignificance of the case: That is a case that "should not be" severely punished. That is exactly what is arbitrary about the minimum penalty when applied to such a case.

A lucid dissent by Justice Lambert touches again on the nature of traditional judicial decision-making.

"I think that means that each case must be individually considered and a process of reasoning applied to that individual case. A sentence of imprisonment must be a sentence that is rationally imposed on the particular individual to be imprisoned."

The dissent is also remarkable for its intriguing discussion canvassing the many things we do not know about the exercise of prosecutorial discretion. In light of Operation Dismantle⁴, exercise of executive power has become subject to judicial scrutiny through the constitutional lens. The effect of a minimum sentence is clear: a shifting of power from the judiciary to the executive. It is the prosecutor who then exercises discretion and makes the decision as to what the length of imprisonment will be by deciding whether or not to prosecute the offence carrying the minimum penalty or

whether to invoke any preconditions to its exercise. The practical result is noted by Justice Lambert:

"The lesson of history is that mandatory minimum sentences put an improper burden on prosecutors, and give rise to perverse verdicts of acquittal."

Insofar as the meaning of the word "arbitrary" is concerned, Justice Lambert utilizes a definition rooted in judicial experience:

"But let us suppose that a Judge who convicted someone of importing a narcotic then sentenced him to serve a term of seven years imprisonment. Let us suppose, further, that in his reasons the sentencing Judge said that general deterrence was so important that he proposed to disregard the circumstances of the offence, the circumstances of the offender, and any consideration of remorse or rehabilitation, and instead intended always to impose a sentence of at least seven years imprisonment for a first offence of importing a narcotic. I would have no hesitation in saying that the sentencing Judge had acted arbitrarily in imposing the sentence of imprisonment. He might have reached the right result, but he would have done it in an arbitrary way.... I think that Parliament in this case is doing what the sentencing Judge

did in the example I have given. The result is no less arbitrary."

Of significance in the dispute between majority and minority in the case, is the entire scope of s.1 of the Charter as related to the substantive rights in it. The majority decision circumscribes the meaning of the word "arbitrary" by importing into it (to use an inapposite phrase in the context of this case) the weighing of social policy and the importance of according an appropriate place to the role of Parliament in judicial decision-making concerning the Charter. This hornny issue has been avoided by the Courts. In McDonald⁵ Justice Morden for the Ontario Court of Appeal -- in the context of the equality clause s.15 -- refrained from deciding whether the Charter guaranteed freedom from inequality or only from "unreasonable" inequality, so that the social values involved would in effect be weighed twice: once in the substantive right itself, and once again, if breach be found, pursuant to s.1 of the Charter. Justice

Lambert comes down firmly on one side:

"There is no basis for shading the meaning of the word 'arbitrary' in order to try to give effect to any balancing of competing social interests. In my opinion, the constitutional intention is that the balancing of competing social interests must be done through the application of s.1, which expressly permits and circumscribes the power to carry out such a balancing, and not through the shading of the meaning of the words used to express the constitutional intention in the substantive sections of the Charter,...."

Once again, it is hard to understand why the government should be given two bites of the apple especially since this involves, in Justice Craig's view of matters, a reversing of the onus of proof established under s.1. One is not to categorize legislation as "arbitrary" unless the Court is "clearly satisfied" this conclusion is beyond doubt. Yet under s.1 of the Charter, the onus is on the prosecution to establish on a balance of probabilities that the minimum penalty statute is "a reasonable limit" prescribed by law as can be

demonstrably justified in a free and democratic society.

I am reminded, reviewing Smith, of the Ontario case⁶. The Ontario Court of Appeal held that the section of the Criminal Code requiring a Judge, on application from the prosecutor, to ban the publication of the names of a victim in a sexual case is unconstitutional. It violated the guarantee of freedom of the press in s.2 of the Charter. In short, the reasoning was as follows: this section undoubtedly infringes the freedom of the press guarantee. The question is, is it a reasonable limit? Can it be demonstrably justified in a free and democratic society? The answer came back a resounding no. One can envision circumstances -- not necessarily the case then before the Court -- where a Judge might wish to exercise his discretion the other way, in favour of publicity for the victim's name, rare though this might be. If the right to make a decision such as that was required in order to do justice between the parties,

then Parliament could not take that right away. It was not a reasonable limit to insist that the Judge must always make his ruling in the same way. His hands could not be so fettered in that context.

Now, clearly, Judges' hands are fettered by law in a number of areas all the time. No one, I think, would argue that this is wrong. Judges do not make up all the law themselves; in modern society they operate within a statutory framework so far as it extends. That distinction marks the difference between a Judge and Don Quixote.

It is almost as if the trick in these cases is to find a breach of a Charter right that is simple enough that the Court will not be tempted to read the process of social balancing into that right itself instead of into s.1. That was the "trick" with freedom of the press in the Canadian Newspapers case. But in groping for a

parallel right, one does not have a great deal of difficulty. For example, freedom of association, guaranteed in absolute terms by s.2 of the Charter, of the candidate. No matter how one defines that concept, a prisoner serving a seven year minimum term does not have it. So even if the minimum penalty in the Narcotic Control Act escaped judicial scrutiny as "unusual" punishment or as "arbitrary" imprisonment, this right -- and, incidentally, freedom of expression -- is affected. The question then becomes only one of the proper application of s.1. It does seem that any minimum penalty is going to have difficulty surviving s.1 if the reasoning in the Canadian Newspapers case applies, and if one can jump the hurdles to get to s.1 of the Charter.

There are a number of areas in which minimum penalties are available in our Criminal Code. Section 47 (high treason), s.83 (using a firearm or committing or attempting to commit an indictable offence), s.218

(murder) and s.234-236 (drinking and driving offences). How strong a Crown case could be made for the necessity of imposing minimum penalty of life imprisonment in all cases of murder is suspect; one must bear in mind that excessive force in self-defence counts for nothing in Canada these days and the quality of moral culpability in some murders may be not very far off the mark of complete innocence. How strong a case can be made for the proposition that every third offence of drinking and driving requires three months imprisonment? How important is the principle of proportionality to our administration of justice, after all? Do we really care if the punishment fits the crime -- the particular crime before the Court?

A second area that concerns me very much is related to this problem. It is the exercise of Crown discretion in minimum penalty cases. The traditional way of avoiding any examination of this problem can be seen in

Hanlan⁷ where Mr. Justice McDonald carved the entire field of prosecutorial discretion from the ambit of s.7 of the Constitution.

"The fundamental principles of justice of which s.7 speaks relate, in my view, to the proceedings before the Court or other tribunal. Those words, that require that a person not be deprived of 'the right to liberty... except in accordance with the principles of fundamental justice', do not govern the manner in which a prosecutor decides whether to prosecute by indictment or summary conviction procedure, or whether to seek a higher sentence because of previous convictions, or, as in this case, whether to seek a minimum sentence by virtue of a previous conviction."

Without, I think, significant exception, our Courts had become quite comfortable with this rationalization of refusing to examine prosecutorial actions. The distinction between the courtroom door, where fair play commenced, and the wide world beyond was convenient for judges, if not for the public. And allied to it was the traditional notion that the Attorney-General was answerable to the legislature and therefore ought not to

be answerable to the Courts. Of course, the notion that he was answerable to the legislature is yet another polite fiction. As a measure for imposing meaningful checks and balances in particular cases, it rivals the arresting figure which I take from Lady Wootton: if one is convinced of the efficacy of water as a cure for cancer, then if the patient fails to respond to moderate draughts, the solution is to prescribe more water! This position parallels a reluctance on the part of our Courts to examine police misconduct in the context of a criminal trial; that reluctance has had to give way to the clear language of the Charter in a number of areas. So too, the decision of the Supreme Court of Canada in Operation Dismantle makes it clear that where there is an allegation that executive action infringes constitutional rights, the Courts have no choice but to examine and rule upon the conduct in question. The course of justice does not begin at the courtroom door and never did in the real world; we should not be alarmed at the fact that it is

now going to reach -- in appropriate cases -- into the prosecutor's office. There was a certain contented futility about the traditional judicial stance in this area which we will all be better-off without:

"It does not lie within the province of a trial Judge to question the prosecution's election to seek increased penalties."⁸

I do not think we will be very quick to stay proceedings or enter acquittals on grounds of prosecutorial breach of constitutional rights, but I think a re-evaluation of the whole line of cases which rely upon the supposed inability of a Court to examine executive action long overdue and ripe for rethinking. Quite simply, it discloses a value that is inconsistent with the values expressed in the Constitution, it is a value we no longer need, if ever we did. A prosecutor who has acted in a manner sufficiently shameful that it violates constitutional rights, has created a situation

where we really ought not to let a prosecution proceed. To close ones eyes to the possibility of injustice in one portion of the fabric of the law, is to imperil the strength of the fabric as a whole.

It is not often I get a chance to criticize cases that I have myself lost -- except when I periodically revise my text on sentencing -- but let me take a moment to comment briefly on a case called Petrovic⁹

In Petrovic an interpreter had been called as a witness on the sentencing part of a trial; while in the witness box she had failed to translate everything that she was saying to the Court. Accordingly there was a violation of s.14 of the Charter. In effect the accused was absent from Court during part of the proceedings. If this had happened in the conviction part of the trial, unqualified precedent would have required a finding that the trial was a nullity.¹⁰ That being the case the

sentence could not stand; but, more interestingly, the Court of Appeal may have had no power to "vary" it pursuant to s.614 because no valid sentence had been imposed in the first place that could be varied. The case would then have to be remitted for a new trial or a new sentencing to the trial Court. The Court, of its own motion, faced with this unpalatable alternative, invoked s.24(1) of the Charter. It held that the Court of Appeal was validly constituted hearing a sentence appeal and therefore was a "Court of Competent Jurisdiction" within the meaning of s.24 of the Charter and the appropriate remedy was to in fact impose the proper sentence pursuant to the authority of s.24(1). This they did, reducing the sentence substantially over the objections of the appellant who wanted a re-trial.

The difficulties with the notion that they were then a "Court of Competent Jurisdiction" is that the Court of Appeal is not a Court of original jurisdiction

for Charter purposes¹¹ and could only become a Court of competent jurisdiction if the then appeal was lawfully before them. It was on that footing that they acted but if the court below had no jurisdiction to sentence in the first place, then a sentence appeal would not lie, and therefore s.24 could not be invoked. Interesting, but now quite academic, and, withall, an inovative use of the Charter.

I do not want to leave the impression that there is not a great deal of scope for use of the Charter in the area of sentencing. I think there is. Some examples. A number of Canadian Bill of Rights cases are going to have to be re-litigated. In Negrudge¹² the argument was made that the Canadian Bill of Rights s.1(b), providing for equality before the law and the protection of the law, was violated by the failure of a number of provinces, including Ontario, to enact s.234(2) of the Criminal Code allowing for a conditional discharge

for curative treatment on a charge of impaired driving.
The inequity was upheld based on legislative purpose:

"It is equally evident that Parliament contemplated that the necessary treatment facilities and staff would be provided by the provinces. It is, therefore, entirely reasonable for Parliament to postpone the coming into force of s.234(2) in a province until that province made the necessary arrangements to provide appropriate facilities and staff for the treatment envisaged by its provision.

Legislation enacted by the Parliament of Canada does not infringe s.1(b) of the Canadian Bill of Rights by reason of the fact that it does not apply to all areas of Canada, where Parliament in enacting legislation was seeking to achieve a valid federal objective: see Regina v Burnshine, [1975] 1 S.C.R. 693 at p.701 and 705..."

The "valid federal objective" test was, I thought, convincingly laid to rest in a subsequent case by Mr. Justice McIntyre¹³ who pointed out that to apply that test is to apply nothing: if federal legislation does not seek to achieve a valid federal objective, it is not valid legislation pursuant to the British North America

Act. There is therefore no occasion to go further and test its propriety by the Canadian Bill of Rights; under that test no court is required to give any content at all to the quasi-constitutional document.

But what of a case such as this, where it is now clear the provinces do not intend to make "the necessary arrangements". Any delay is due to political opposition to the wisdom of the legislation, and not to any supposed difficulty in arranging personnel and facilities. Should the Courts ignore a delay for five, ten or fifteen years or do we continue to pretend (forever perhaps?) that the provinces are having difficulty making the "necessary arrangements"?

The second area that troubles me is the making of compensation orders pursuant to s.653 of the Criminal Code. In Ghislieri¹⁴ the Alberta Court of Appeal reversed a trial Judge who was reluctant to make such an

order for compensation to a victim of crime because the accused was prepared to dispute the claim. In upholding the constitutionality of this provision, in Zelensky¹⁵ the Chief Justice held that such a hearing did not not preclude:

"...an enquiry by the trial Judge to establish the amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial or into a reference in a civil proceeding....It must be obvious, therefore, that s.653 is not the platform upon which to unravel involved commercial transactions in order to provide monetary redress to those entitled thereto as against an accused. The latter, too, may have a proper interest existing that civil proceedings be taken against him so that he may avail himself of procedures for discovery and production of documents, as well as other proper trial issues which go to the merit of monetary claims against him. Again, the Criminal Court cannot be expected to nor should it act under s.653 if it would be required to interpret written documents in order to arrive at a sum of money sought through an order of compensation."

The Alberta Court noted that evidence of experts and the taking of lengthy involved accounts or the examination

and interpretation of documents were rarely features of Small Claims Court process, and that the amount of money involved -- the difference between \$710.00 and \$595.00 -- was not large (to them). They therefore directed the trial Judge to enter into a hearing to determine the actual amount to be awarded pursuant to s.653.

I have considerable disquiet over this. Justice Laskin could not have been expected to anticipate the entrenchment of Charter rights when he wrote in 1978, but it seems to me the direction given in this case to the trial Judge to proceed with what is essentially a civil matter in the context of a criminal sentencing hearing entrenches on fundamental rights. I do not think it meets the strictures of s.7 of the Constitution. In cases where the trial has been before a Judge alone, as most are, the accused who has to testify under oath stands at a marked disadvantage before the same Judge who may have previously disbelieved his evidence on the

merits of the criminal charge. The sentencing phase of a hearing can rarely be a satisfactory context to determine civil claims; at a minimum what is required is an atmosphere where the offender believes he will be treated fairly. After all, the Judge has just convicted him and is about to impose a penalty. It is bad enough when he has to judge matters of aggravation or mitigation. But any Judge who has presided over a trial alone and convicted will have great difficulty fairly judging an allegation only tangentially related to the criminal trial. If an adverse finding of credibility has been made, surely actual bias exists. In any event, s.7 of the Charter would be violated.

Section 98(1) of the Criminal Code provides for a mandatory order prohibiting possession of a firearm or ammunition or explosive substance for five or ten years (for a first or subsequent conviction, respectively) upon conviction of an offence punishable by ten years or more"

in the commission of which violence against the person is committed, threatened or attempted. This language is exceedingly broad. A first offender committing a break and enter while unarmed, coupled with threats of violent consequences if the homeowner who attempted to apprehend him in the act did not let him go, would qualify. For those of us who live in the cities, such a disqualification means little, perhaps. But in the northern, more remote parts of Canada, the right to carry a firearm may mean the difference between going hungry and feeding one's family or not, being secure from predators or not. Lower courts have found that in appropriate circumstance the imposition of such a mandatory penalty violates s.7 of the Charter. The Northwest Territories Court of Appeal has left the question open to be determined in a case where an appropriate factual basis has been established. But once again, the mandatory nature of the penalty is the key to a s.12 Charter violation; a hunter or trapper who knows

no other skills is placed in an impossible position. In cases where the violence involved did not involve the use of any weapon; the rationale for the prohibition may well dissolve.

One difficult question is an assessment of the factual basis for marking the shift between what is a privilege in an urban context and yet turns into a right -- indeed a necessity -- in the Far North.

Finally, I want to consider the relationship between an intermittent sentence in s.663(1)(c) -- which applies to a sentence that does not exceed ninety days -- and the minimum three month penalty imposed under s.236 of the Criminal Code for a third offender of impaired driving¹⁶. It is all about February. An intermittent sentence will of necessity exceed three months if the sentence is handed out between December and April of any given year. What this means is that "three time losers"

under the impaired driving sections are eligible for intermittent sentences during part of the year, but because of the vagaries of the Gregorian calendar, are ineligible for it at other times. If anything is arbitrary, it must be this. Any rational social policy that could demand this result totally escapes me. And yet the result is clearly significant for the individual offender. Whatever meaning is ultimately ascribed to the equality guarantees in the Charter, it is hard to say that equal justice is maintained in these circumstances.

There is one small measure of reassurance in this survey. There has been relatively little attack upon sentencing procedures under the Charter because, by and large, our procedures do accord with fundamental fairness. Sentencing is largely problematic. We do not achieve what we wish to, we probably are not even doing what we think we are doing; we are in all essential respects acting with fundamental blindness to the social

realities about us; but solution to these grave problems
will not be found in the test of the Constitution.

FOOTNOTES

1. Regina v Smith (1984), 8 C.R.R. 113 (B.C.C.A.)
2. Narcotic Control Act, R.S. 1970 Ch. N-1, s.5(2)
3. Miller and Cockriell (1977), 31 C.C.C. (2d) 177 (S.C.C.)
4. Operation Dismantle Inc. et al. v The Queen et al., Unreported decision of the Supreme Court of Canada, May 9, 1985.
5. Regina v Anthony McDonald, Unreported, Ontario Court of Appeal, August 6, 1985.
6. Canadian Newspapers Co. Ltd. v Attorney-General for Canada (1985), 17 C.C.C. (3d) 385
7. Regina v Hanlan (1984), 36 Alta. L.R. (2d) 49 (Alta. S.C.)
8. Regina v Wood (1983), 60 N.S.R. (2d) 181 (N.S.C.A.)
9. Regina v Petrovic (1984), 13 C.C.C. (3d) 416 (Ont. C.A.)
10. The Queen v Meunier, [1966] S.C.R. 399
11. Regina v Morgentaler, Smoling and Scott (1984), 16 C.C.C. (3d) 1
12. Regina v Negridge (1980), 6 M.V.R. 255 (Ont. C.A.)
13. Mackay v The Queen (1981), 54 C.C.C. (2d) 129
14. Regina v Ghislieri (1981), 56 C.C.C. (2d) 4
15. Regina v Zelensky, [1978] 2 S.C.R. 940
16. Dombeck, C.F. and Chitra M.W. "The Intermittent Sentence in Canada - The Law and Its Problems" (1984), Can. J. of Criminology, p.43