THE REFORM OF REMEDIES IN THE CRIMINAL PROCESS

Judicial Seminar on Remedies
Canadian Institute for the
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1. Introduction

As I am appearing on behalf of the Law Reform Commission, maybe I should clarify my status, especially for those of you who know me and may wonder if I now work for the L.R.C.. I still work for the Quebec Department of Justice and A G's office. But I have been asked by the L.R.C. to provide some assistance in the field of remedies in the criminal process and to participate in this week's conference.

2. Scope of the L.R.C.'s Work on Remedies

As you probably know, the L.R.C. has undertaken the task of reforming the remedies in the criminal process. The Commission's mandate may be found in the Government of Canada's policy document on The Criminal Law in Canadian Society (1982) where it is stated as a guiding principle that «any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure». As the Government has further elaborated: «This principle requires systematic attention to be paid to the various forms of remedies, including, but not

limited to judicial appeal and review, that could be provided for citizens who believe they have been aggrieved by any process or official of the criminal justice system. This would be consonant with the spirit of the Charter of Rights and Freedoms and could go beyond it in considering a wide range of possible remedies.». The L.R.C. intends to look at the existing means of correcting wrongs or alleged wrongs whenever and wherever they are committed during that process. By no means is this task free from difficulties as you probably have ascertained during this conference.

There are all sorts of wrongs and they are not always committed at a convenient time, if, indeed there ever can be a convenient time. They may be committed at an early stage of the process and may call for immediate relief. We all know the case of Laporte[1] in Quebec. In that case, the police believed Laporte to be the armed robber they had shot on the scene of a robbery and that he had a slug in his shoulder as X-rays showed a metallic object of the size and shape of a 38-calibre slug. They obtained a search warrant to probe for a bullet in Laporte's body and authorizing extraction of the bullet by qualified doctors. The warrant was quashed on a certiorari application.

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1. (1972) 18 C.R.N.S. 357.

The victim of a wrongful act just like the wrongdoer also varies from time to time. Therefore all sorts of remedies are to be found depending on who is the victim, who is the wrongdoer, and the time of commission.

For instance, the victim of a crime is the victim of a wrong committed by the alleged accused. Under s. 653 and the following sections of the Criminal Code, he may, as an aggrieved person, get compensation for loss or damage suffered to property or regain possession of his property. This is done at the sentencing level. A person who has an interest in a thing seized and detained may, under s. 446(5) of the Criminal Code, get an order from the court authorizing him to examine it. He may challenge the court's decision ordering the forfeiture of the thing seized (s. 446(3)). In such case, the victim, to put it in legal terms, is asking for judicial review of judicial action.

In some instances, the victim suffers from police behaviour or from the exercise of prosecutorial discretion. One need only think of an illegal or abusive search without a warrant. This calls for a judicial review of executive action. Obviously the review of executive action does not conform to the same rules as the review of judicial action and demands different considerations. The

separation of powers between the legislative branch, the judiciary and the executive does put limits to judicial review.

The victim may also complain of wrongs committed by Parliament. This occurs when he challenges the constitutional validity of a law either under the new Charter of Rights and Freedoms or under the constitutional distribution of powers between federal and provincial authorities. The victim, then, is asking for judicial review of legislative action. Here again the scope of judicial review is subject to the separation of powers although, with the new Charter of Rights and Freedoms, the judiciary has seen its powers of review both over legislative and executive action greatly increased.

To sum up, the victim of a wrong may be an innocent and law-abiding citizen, a witness, the accused or the Crown. The accused may want to complain about the behaviour of his own counsel. (There has been a stream of such complaints recently in Quebec.)(See Dumont v. R., C.A.M., 17 May 1984; Lamoureux v. R., C.A.M., 14 May 1984; Antoine v. R., C.A.M., 8 June 1984; Toussaint v. R., C.A.M., 16 April 1984.) Or his complaint may be directed against the behaviour of the police, the Crown, decisions of a judge (see the case of Toussaint v. R., supra), or the use, or misuse, of legislative powers by legislative

bodies. But the prosecution may also have complaints to make. Even the court may be the victim of a wrong, for instance, in cases of an acquittal or of a conviction obtained by fraud upon the Court.

Actually when one speaks of remedies in the criminal process, one immediately, and rightly so, thinks of the right to appeal, the right to resort to a prerogative writ and the new remedies under the Charter of Rights. But there are other remedies. A motion to quash or for particulars is a remedy to a defective indictment. So is a motion to amend. Sometimes, it is even a counter remedy. A motion for separate trials is also a remedy to a prejudice likely to occur from a joint trial. A change of venue is also a remedy to ensure the right to a fair trial.

I give these examples only to highlight the fact that the word remedy is of wide meaning and to suggest that, in its undertaking to reform the field of remedies, the L.R.C. may have to proceed carefully one step at a time and leave, for the time being, some of the remedies out of the ambit of its reform.

3. Proposed Research Plan

It may be appropriate, as a beginning, to deal with

the judicial remedies most clearly associated with the criminal process and to exclude from consideration such things as civil redress, disciplinary action, complaint procedures, compensation procedures - all of which were envisaged by the Government in its policy paper on Criminal Law in Canadian Society.

For research purposes, and we would certainly be happy to have comments from this learned audience, it has been suggested that the study of remedies within the criminal process be divided into three parts:

1- Pre-trial remedies
2- Trial remedies
3- Post-trial remedies.

In dealing with pre-trial remedies, we should be concerned with judicial review of judicial action, such as the issuance of a warrant of arrest, judicial review of executive action prior to trial as in illegal arrest and detention by the police, judicial review of legislative action such as the ultra-vires of a provision, and judicial review of defence action as in delaying the proceedings. Of paramount importance will be the question as to which type of pre-trial action demands review

at the pre-trial stage and which type is more suitable for review at a later stage. If justice requires that an offender be treated fairly, it also requires in the public interest that the administration of criminal justice be expeditious. Indeed, justice is sweetest and safest when it is freshest. Powerful and wealthy offenders should not be given the means of averting or postponing prosecutions to the extent that the criminal law is effectively choked off.

For obvious reasons, a major topic of discussion, especially at the pre-trial stage, will be the use of extraordinary remedies. At one time, Professor Davis, dealing with the writs in English law, said that «Parliament ... should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again».[1] If need be, I am sure we could use the St. Lawrence River for that purpose. I am also sure we could find among Crown prosecutors a generous donor of sinkers. But should we retain the extraordinary remedies, I am also confident that we could improve their effectiveness even if only by reducing their number to one or two.

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1. Davis, The Future of Judge - Made Public Law in England: A Problem of Practical Jurisprudence (1961), 61 Colum. L.R. 201, at p. 204.

Of course in dealing with remedies at every stage of the criminal process, very special attention will be paid to s. 24 of the Charter which has fundamentally altered the field of remedies. It is not my intent, at this stage, to undertake a comprehensive treatment of the problems that arise under and because of s. 24 of the Charter. I am sure Mr. Justice Ewaschuk and Professor Morel will address that issue with much more ability than I can. But I can give an overview of some of the problems that the reform will be facing.

Under s. 24(1) of the Charter, «anyone» whose rights or freedoms have been denied or infringed may apply for a remedy. This raises the question of standing. While one Court has held that some kind of personal injury was required by s. 24(1) and therefore that s. 24(1) was not available to a publisher challenging s. 12(1) of the Juvenile Delinquents Act[1], another has given standing to a reporter who had been denied access to juvenile delinquency proceedings[2]. It would appear that, in both cases, the applicants would have had legal standing to

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1. In re Edmonton Journal and A.G. of Alberta (1983) 4 C.C.C. (3d) 49 (Alta. Q. B. Court).

2. In re Southam Inc. (No. 1) (1982) 70 C.C.C. (2d) 257 (Ont. C.A.).

apply for declaratory judgment for, in view of the decision of the Supreme Court of Canada in Minister of Justice of Canada v. Borowski[1], it need only be shown that an applicant has a genuine interest as a citizen and that there is no other reasonable or effective remedy.

It seems under s. 24(1) that a court cannot act proprio motu. The use of the words «may apply» seems to indicate that there must be an application. Yet no formal procedure is set out. Should the application be made orally or in writing? Should there be notice given to the Crown, to the Court, to the Attorney General of the Province or to the Attorney General of Canada? Though the issue of the requirement of notice has not been definitively settled, it seems that a distinction is to be drawn between proceedings where the validity of an enactment is questioned, and proceedings where there is an infringement of rights but no challenge of the legislative authority, as in cases dealing with admissibility of evidence or unreasonable delay in bringing an accused to trial.[2]

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1. (1981) 64 C.C.C. (2d) 97.

2. Stanger (1984) 7 C.C.C. (3d) 337; Crate (1984) 7 C.C.C. (3d) 127; Re Koumoudouros and Municipality of Metropolitan Toronto (1982) 67 C.C.C. (2d) 193; Leggo (1982) 69 C.C.C. (2d) 443; Balian, Gharakhanian (1982) 2 C.R.R. 284; Vermette (no 4) (1982) 1 C.C.C. (2d) 477, (1983) 30 C.R. (3d) 129.

S. 24(1) has also given rise to conflicting views on what is meant by a «court of competent jurisdiction». According to one potential interpretation, recourse must be had to the court having jurisdiction to grant the remedy sought, which in turn raises the question of what type of remedy may be sought. Still according to that interpretation, it would seem that the range of remedies has not been enlarged by the Charter and, therefore, the appropriate court in which to make application would be determined by pre-Charter law. In other words, the phrase «court of competent jurisdiction» requires that the court possess either inherently or by statute a remedy that it considers appropriate in the circumstances, apart from the provisions in the Charter. As stated by a judge of the Quebec Court of Appeal, «however general the terms of s. 24(1) may be, they do not have the effect of modifying the jurisdiction of the courts constituted by virtue of provincial laws, nor to attribute to judges of these courts a jurisdiction which the Charter does not specifically grant them».[1] Thus, according to some decisions, a Provincial Court judge would not be a court of competent jurisdiction when presiding over a preliminary enquiry, in contrast to sitting as a trial judge.[2]

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1. ACL Canada Inc. v. Hunter (1984) 8 C.C.C. (3d) 190, at p. 192.

2. Sensenstein (1982) 2 C.R.R. 296, Re Lamberti (1983) 26 Sask. R. 213.

A more liberal approach would see s. 24 in separate terms from the traditional remedies and, therefore, the court could fashion or create new remedies. In Zaluski[1], the Provincial Court judge took an expansive view of the Charter: if a right has been infringed, there must be a remedy available in Provincial Court. The Provincial Court then granted a stay of proceedings which was later quashed on a certiorari application.

Though the Superior Court have shown reluctance to intervene at an early stage[1], the fact remains that s. 24(1), in its present state, leaves the choice of remedies open. In Quebec Association of Protestant School Boards et al v. A.G. of Quebec et al (No. 2), the Quebec Superior Court held a declaratory judgment to be a remedy authorized by s. 24(1), and that a declaration may be sought by those who apprehend future violations of their rights, as well as by victims of past infringements[2].

Though a citizen may apply under s. 24(1) for a remedy that the court considers «appropriate and just in the circumstances», there is uncertainty as to the appropriate trial remedy for breaches of the Charter. In Vermette (no. 4)[3], the Quebec Superior Court held that a remedy

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1. See Anson (1983) 35 C.R. (3d) 179. By contrast, see S.B. (1983) 1 C.C.C. (3d) 13.

2. (1982) 140 D.L.R. (3d) 33, upheld by the S.C.C., 26 July 1984.

3. (1983) 30 C.R. (3d) 129.

under s. 24(1), in addition to being appropriate and just, must also be effective and, therefore, that the court is entitled to innovate with regard to the remedy to be ordered if the ordinary criminal law does not provide for one that the court considers just, appropriate and effective.

There is also uncertainty as to the appropriate post-trial remedy. For instance, is a stay of proceedings granted under the Charter tantamount to an acquittal or not? Should a decision ordering a stay be reviewed by prerogative writs, or is appeal the appropriate procedure? The issue is now pending before the Supreme Court of Canada[1].

Generally speaking, the following remedies may be or have been available under s. 24(1):

a) declaration of invalidity of legislation[2]

b) stay of proceedings[3]

c) quashing of indictment or process[4].

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1. R. v. Jewitt (1983) 34 C.R. (3d) 193, (1983) 35 C.R. (3d) XXVIII.

2. Oakes (1983) 32 C.R. (3d) 193, Re Boyle (1983) 5 C.C.C. (3d) 193, Southam Inc. v. Hunter (1983) 32 C.R. (3d) 141.

3. Vermette (No. 4) (1983) 30 C.R. (3d) 129, Jewitt (1983) 34 C.R. (3d) 193.

4. Holmes (1983) 32 C.R. (3d) 322, Dennis (1984) 8 C.C.C. (3d) 141.

d) quashing of parole revocation and revocation of an unescorted temporary absence program[1]

e) prerogative writs[2]

f) granting of bail or variation of bail terms[3]

g) an order expediting trial[4]

h) the return of illegally seized items[5]

i) the imposition of minimum or lenient sentence[6]

j) the exclusion of evidence[7]

k) injunctive relief[8]

l) Crown's disclosure[9]

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1. Lowe (1983) 5 C.C.C. (3d) 535, Re Dumoulin (1984) 6 C.C.C. (3d) 190, Mason (1983) 35 C.R. (3d) 393, Cadieux, Fed. Ct., Tr. Div., 8 May 1984.

2. Re Potma (1983) 31 C.R. (3d) 231, Holmes (1983) 2 C.C.C. (3d) 573, Anson (1983) 32 C.R. (3d) 372.

3. Lee (1982) 1 C.R.R. 241, Fraser (1982) 1 C.R.D. 175.10-01 But see Re Brooks (1983) 1 C.C.C. (3d) 506.

4. Balderstone (1983) 2 C.C.C. (3d) 37, Barudin (1983) 2 C.R.D. 725. 301-36.

5. Southam Inc. v. Hunter (1983) 32 C.R. (3d) 141, Re Trudeau (1983) 1 C.C.C. (3d) 342, Batsos v. Laval (1983) 35 C.R. (3d) 338.

6. Pasemko (1982) 17 M.V.R. 247, Johnson (1983) 2 C.R.D. 200.30-10.

7. Therens (1983) 33 C.R. (3d) 204, Ahearn (1983) 4 C.C.C. (3d) 454, Inuvik Costal Airways (No. 1) (1983) 11 W.C.B. 249.

8. Re Gittens (1982) 68 C.C.C. (2d) 438, Southam Inc. v. Hunter (1983) 32 C.R. (3d) 141, Morgentaler (1983) 42 O.R. (2d) 659.

9. Rosamond (1983) 24 Sask. R. 129.

m) the return of fingerprints and criminal record[1]

n) tortious damages[2], and

o) costs[3].

The list is not exhaustive and the categories of available remedies may not altogether be closed.

4. CONCLUSION

It is trite to say that the Charter has an overriding effect on any provision that is inconsistent with the fundamental rights that it guarantees.[4] This calls for a revision of substantive, procedural and evidentiary laws to ensure that they conform to the Charter. Parliament, in making use of its legislative powers, can enact rules of procedure to implement the rights given in broad terms by the Charter. For instance, it can establish the procedure to be followed by someone who wants to claim the benefit of the exclusionary rule, be it at a voir dire during the trial or at a pretrial «suppression» hearing. However, Parliament cannot

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1. Laplante v. A.G. of Quebec (1983) 32 C.R. (3d) 94, Rancourt v. Montreal Urban Community and A.G. of Quebec (1983) 35 C.R. (3d) 162.

2. Collin v. Lussier (1983) 6 C.R.R. 89, Esau (1983) 4 C.C.C. (3d) 530, Lambert v. A.G. Que. (1982) 31 C.R. (3d) 249; but see Sybrandy (1983) 9 W.C.B. 328.

3. Halpert (1983) 6 C.R.R. 136, Batsos v. Laval (1983) 35 C.R. (3d) 338.

4. Constitution Act 1982, s. 52.

unduly restrict any of the rights guaranteed by the Charter. In enacting rules of procedure to implement the Charter, Parliament will have to be careful not to overstep the thin border between rules that implement and reasonably restrict and rules that deny. For instance, s. 10 of the Charter gives to everyone who is arrested or detained the right to retain and instruct counsel without delay. But it does not say how long that right lasts. How many attempts to retain counsel should an arrested person be entitled to? S. 10 is also silent as to the behaviour of the police while a person waits for or tries to reach counsel. Rules designed to regulate the number of attempts might be found to be unduly restrictive and, therefore, a denial rather than an implementation of the right to counsel.

In the field of remedies, any attempt at reform will be faced with the same limitation. Parliament has the power to «priorize» the pre-charter remedies such as appeal and prerogative writs. Such legislative power can probably be found with respect to s. 24(1) remedies in s. 1 of the Charter. Common sense dictates a need for «priorization». Yet the last word belongs to the judiciary, and certain rules of procedure designed to implement the rights given by the Charter, including the right to remedies, are bound to be challenged in court. This, however, should not deter an attempt at

reform for, in the long run, common sense will prevail as it has done in the past, and the enacting of reasonable rules of procedure should clarify the situation and prevent useless litigation. While reformists may relish the present time, I am afraid the supporters of certainty will remain on the tight-rope for still many years to come.