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Charter Fallout Misjudged

By Submitted Article

Sunday, August 09, 2009 04:23 AM

by:

Justice Wallace Gilby-Craig (retired)

According to mythology, Themis, goddess of justice, had the ability to foresee events.

Sadly, few judges have the ability to see the future consequences of their jurisprudence.

The Canadian Charter of Rights and Freedoms was proclaimed in force April 17, 1982. A torrent of Charter decisions soon reached the Supreme Court of Canada and the Court began fleshing out

Charter jurisprudence with decisions emphasising the significance of the Legal Rights sections including a criminal's right to counsel, a right against unreasonable search, and a right to remain silent. Ostensibly, these existed to safeguard innocent, law abiding citizens from the same encroachments.
This actualization of individual legal rights soon turned a reasonably effective criminal justice system into a happy-hunting ground for defendants and their charter-sharp lawyers.

When the common law was supplanted by the Charter, truth took a backseat to rights, and trials of criminals morphed into trials focussed on the way police had investigated suspects.

With her acumen, Themis would have warned the Court that a mishmash of decisions making the rights of criminals paramount would have a sclerotic effect on criminal justice, followed by erosion of the public's confidence in the judiciary.
In a quartet of judgments released on July 17, the Supreme Court of Canada revisited two important and contentious areas of Charter jurisprudence: the definition of "detention," and the test for exclusion of evidence tainted by a Charter violation.
This rare act of judicial introspection was fated by four separate appeals: R. v. Grant, R. v. Suberu, R. v. Harrison, and R v. Shepherd.

The cases demonstrated that existing case law was difficult to apply and could lead to "unsatisfactory results." Buried in the middle of the decision in R. v. Grant is an explanation by the majority of the Court of such "unsatisfactory results" as they relate to Section 24 of the Charter (which deals with evidence obtained in a way that infringes on an individual's rights).

"The greatest difficulty is … physical evidence discovered as a result of an unlawfully obtained statement. The cases refer to this evidence as derivative evidence (a handgun) …at issue in this case.

"The common law's automatic exclusion of involuntary statements (was) based on a sense that it is unfair to conscript a person against himself and, most importantly, on a concern about the unreliability of compelled statements. However, the common law drew the line of automatic inadmissibility at the statements themselves and not the physical or "real" evidence (a handgun) found as a result of information garnered from such statements. The public interest in getting at the truth through reliable evidence was seen to outweigh concerns related to self-incrimination.

"Section 24 (2) of the Charter implicitly overruled the common law practice of always admitting reliable derivative evidence. Instead, the judge is required to consider whether admission of derivative evidence obtained through a charter breach would bring the administration of justice into disrepute."

When I look back on 20 years of judicial experience with the Charter I realize that wherever a charter violation was established, derivative evidence was almost invariably excluded. It was horse-

and-carriage reasoning: that you can't have one without the other. In R. v. Grant the Court has rearranged existing criteria to be considered by trial judges in deciding whether derivative physical evidence obtained in the course of an unlawful arrest/detention should be excluded.

But the Court has not grounded its rearrangement of the criteria on the public's perception that too-frequent exclusion of derivative evidence has already brought disrepute and disrespect to the criminal law and the criminal justice system.

Justice Deschamps delivered partially concurring reasons including his observation that the new test proposed by the majority was problematic and inconsistent.

Deschamps proposed that trial judges consider only two disparate and competing objectives: the public interest in protecting Charter rights and the public interest in having all criminal cases tried on their merits, saying that "it is by striking a fair balance between these two societal interests that this result will be attained."

Deschamps emphasised the importance of the public interest in having cases tried on their merits; that exclusion of reliable evidence without good reason is an abdication of the institutional role of the courts; and that "the importance of the factor of the seriousness of the offence must be recognized, given society's strong interest in being protected from the commission of serious crimes."

The Court seems finally to have realized that continuation of exclusionary rulings involving derivative evidence will sweep away the last vestiges of faith that Canadians once had in our system of criminal justice.

There was a time when the essence of our criminal law was its public nature; a time when it was the particular responsibility of police, prosecutors, and judges to enforce it fairly and impartially; a time when we had peace and order in our communities.

It was a solemn constitutional trust responsibly carried out on behalf of law abiding Canadians.

It is no more.

wallace-gilby-craig@shaw.ca

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Comments

Posted by: charles on August 9 2009 7:23 AM

http://www.cbc.ca/news/story/1999/03/19/bc_killer990319.html

Posted by: Eagleone on August 9 2009 8:00 AM

Just for the record, in ancient times people didn't actually believe, 'Themis, goddess of justice, had the ability to foresee events'.

Well maybe some people, but they were irrelevant to history. For most people of education in those times they knew the various gods more in the metaphorical terms as a customary 'guideline' from the gods for a type of human behavior or activity. It was considered bad karma (in modern terms) to go against these customary beliefs, as well as the fact it meant you were now an outsider in your community that identified their community with their local customs to the deities.

So being associated with Themis for example would be a recognition that you were one considered to possess similar qualities to that of the god or goddess being compared to. Caesar likened himself to a descendant of Jupiter because he thought he possessed the qualities to shape civilization... Caesar was the law in Rome at his zenith.

IMO Justice Wallace is no Themis, because the 'justice' takes a vastly complicated issue and boils it down to a single extreme case. We have a Charter of Rights for a reason, and we have a legislature for a reason as well. Between the two of them is where the solution will be found to any gaps in the law, and not in a court room full of lawyers.

Judges should only interpret the law, and not make the law. Sometimes this will have a cost and hopefully we have politicians that can address those problems with the system for the sake of the systems integrity.

I also think there are far bigger problems with criminal law than the police right to search an individual without a solid reason (which I think is a police state tactic). You could probably find the problem right in the law schools themselves.

Posted by: Eagleone on August 9 2009 8:13 AM

Charles that was a sick sick case and not sure why you would post that link without some kind of commentary on how that relates to the subject at hand. There was a family involved that Wayne got in the middle of, so the term his 'wife' is offensive to those who know a bit more to the true story. That case was a huge example of the complete failure of the judiciary system. If you have suggestions on how to improve it then great.

The way I see it the right of an unwarranted search would have had no bearing on the Wayne Sullivan case. His was a case of an abuse by our judiciary and the medical profession to allow people to use medical conditions to excuse their criminal behavior. I would think we need a law to stop that as we seen in the recent Grayhound case... and bring back the death penalty for anyone that claims that as their defense.

Posted by: Eagleone on August 9 2009 8:20 AM

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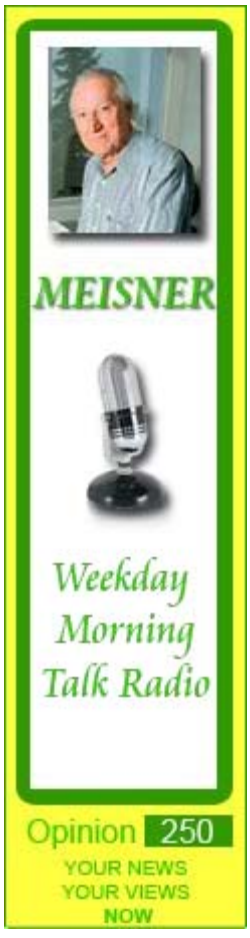

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the problem right in the law schools themselves.

Posted by: Eagleone on August 9 2009 8:21 AM

computer glitch again....

Posted by: diplomat on August 9 2009 8:40 AM

Just one thing that caught my eye right at the beginning of the essay: "...including a criminal's right to counsel, a right against unreasonable search, and a right to remain silent."

A person who gets arrested is to be considered INNOCENT by law until proven guilty, in a court of law. Only THEN does the person's status change from innocent to criminal!

Therefore, the above quote is illogical, because a presumably innocent person, just being arrested (not proven guilty yet) has rights, such as against unreasonable search, right to counsel, right to remain silent.

And so it should be.

Posted by: downnotout on August 9 2009 8:45 AM

Is there nothing in the charter that covers the victim's rights to see that the person who stole, raped or destroyed their lives get punished. Should have a law that makes the punishment fit the crime.

Posted by: gus on August 9 2009 8:56 AM

Exactly diplomat!!!!!

The author is very consistent in his opinions. It is a wonder he ever held the position of judge in our justice sytem.

I imagine that the thought it was people like him that caused the Charter to be put in place by parliament never crosses his mind.

Posted by: MrPG on August 10 2009 10:52 AM

"computer glitch again...."

The 'glitch' has to do with people hitting their refresh button after posting. If you just click on the site link directly, the problem won't happen.

Posted by: Eagleone on August 10 2009 3:37 PM

No I got it from going back trying to get to the main page again,

and not by hitting refresh? Not sure why it happened from hitting the back button though.... You're right though clicking on the main page button is probably a safer bet to avoid the clitch.

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