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The Role of the Court in Shaping the Relationship of the Individual to the State The Canadian Supreme Court

*by Professor Douglas A. Schmeiser**

THE POSITION OF the individual as a focal point of judicial concern did not substantially emerge in jurisprudence until after the Second World War. In the late 1940's, revulsion to the excesses of the War, at home and abroad, the establishment of the United Nations, and the adoption of the Universal Declaration of Human Rights combined to arouse public concern for individual rights, and Courts mirrored that concern. In the intervening thirty years the Canadian approach to individual rights has varied considerably, and this paper will attempt to describe how the Supreme Court of Canada views the position of the individual in relation to the larger community, and the evolution of that position.

The conclusion to be drawn from examination of cases which follows is that the Supreme Court of Canada no longer attaches primary importance to the role of the individual in conflict with the state. In the 1970's there has been a sharp reversal of the Court's approach in the 1950's. The Court today is more concerned with the collective good of society, whether expressed in terms of needs of the State, administrative efficiency, or law and order. This does not mean that the individual always loses before the Court; it does mean that in case of doubt the common good usually wins out over the individual good. It also means that the main thrust for the protection of individual rights has come from the legislatures, which generally have been more liberal than the courts.

In advancing this theme, reference will be made to leading cases in the areas of administrative law, criminal law, evidence, the Canadian Bill of Rights, and civil liberties. References to the opinion of the Court will refer to the ruling of the majority. The cases selected are not exhaustive, but have been carefully selected on the basis that they could easily have been decided differently. They have usually been accompanied by very strong dissents but no implication is intended that all of them were decided wrongly.

In order to put the present position of the Court in perspective, reference to its earlier position is necessary. The 1950's were halcyon days for the human rights advocate. In that period the Court was probably the

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most progressive court in the English speaking world. It was imaginative and innovative. It did not have human rights legislation at its disposal to protect individual rights. Armed only with the responsibility of dividing legislative power between Parliament and the Provinces and with the development of common law principles it took individual rights to an undreamed of level in Canadian jurisprudence.

In *Noble and Wolf v. Alley*¹, the Court invalidated restrictive covenants based on race because they were an unwarranted restriction on alienation of land. In *Boucher v. R.*², the Court enunciated the most liberal test for sedition ever adopted by a common law court, requiring an intention to incite to rebellion. In *Winner v. S.M.T. (Eastern) Ltd.*³, Justice Rand talked of the rights of a Canadian citizen, including the right to work, to use the highways, and to travel. In *Smith & Rhuland Ltd. v. R.*⁴, the Court denied the right of a provincial Labour Relations Board to reject certification because the union was Communist dominated. In *Saumur v. City of Quebec*⁵, the Court would not apply a municipal by-law restricting the distribution of pamphlets on city streets without police permission to religious pamphlets, and members of the Court talked of an implied Bill of Rights because of constitutional provisions concerning Parliament and denominational schools. In *Henry Birks & Sons Ltd. v. Montreal*⁶, the Court struck down a provincial statute authorizing municipal by-laws for the closing of stores on religious holidays. In *Chaput v. Romain*⁷ and in *Lamb v. Benoit*⁸, the Court granted damages against police officers who had violated the religious rights of the plaintiffs, despite statutory provisions absolving the police from liability. In *Switzman v. Elbling and A.G. Quebec*⁹, the Court struck down a provincial statute making it illegal to use a house for the propagation of Communism. Justice Abbot expressed the view that Parliament itself could not pass such legislation, and Justice Rand stated that "Liberty [of communication] is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship."¹⁰ In *Roncarelli v. Duplessis*¹¹, the Court awarded damages against a provincial premier for the improper cancellation of an annual liquor license, holding that there was no such thing as absolute or untrammelled discretion in public regulation. In the area of criminal law, the Court emphasized the mental requirement of a crime, ruling in a se-

¹ [1951] 1 D.L.R. 321.

² [1951] 2 D.L.R. 369.

³ [1951] 4 D.L.R. 529.

⁴ [1953] 3 D.L.R. 690.

⁵ [1953] 4 D.L.R. 641.

⁶ [1955] 5 D.L.R. 321.

⁷ [1955] 1 D.L.R. 2d 241.

⁸ 17 D.L.R. 2d 369 (1959).

⁹ 7 D.L.R. 2d 337 (1957).

¹⁰ *Id.* at 358.

¹¹ 16 D.L.R. 2d 689 (1959).

ries of cases that it would not convict someone of a criminal offence who was operating under a mistake of fact.¹²

This truly remarkable record was not to last. It waned in the 1960's, and by the 1970's, protection of the individual no longer was a prime concern of the Court. In the area of administrative law, the Court abandoned the notion, espoused in *Labour Relations Board of Sask. v. R. ex rel. F. W. Woolworth Co.*¹³, that it would intervene in the operation of an administrative board which was refusing to perform its duties, in favour of the rule that a decision of an administrative tribunal acting within its jurisdiction is not subject to judicial review, even though it involves an error of fact or law.¹⁴ It has held that revocation of parole is an administrative act and that the Parole Board is not bound to act judicially.¹⁵ It also will not review a decision of the Inmate Disciplinary Board made under the Penitentiary Act R.S.C. 1970, c. P-6, even though directives issued by the Commissioner of Penitentiaries require the Board to act judicially.¹⁶ Most recently, in *Harelkin v. University of Regina*¹⁷, it refused to quash a University committee decision expelling a student whom it had not heard, despite a statutory obligation to do so, because there was a further right of appeal to the Senate. The Court also expressed a strong predisposition not to interfere with the running of University affairs.

Subject to a few exceptions, the Supreme Court has had a very negative influence on the development of individual rights in criminal law. In *R. v. Carker*, the Court¹⁸ took a restrictive view of the defense of duress. In *Lemieux v. R.*¹⁹, the Court stated that the defense of entrapment did not exist in Canada, but a later decision has called this into question.²⁰ In *R. v. Biron*,²¹ the Court ignored the clear words and symmetry of the Criminal Code, holding that the power of a peace officer to arrest a person found committing a criminal offence gives the right to arrest someone "apparently" committing an offence. In *R. v. Kundeus*²², the Court held that belief that a less serious drug was being trafficked would not provide

¹² See *R. v. Rees* 4 D.L.R. 2d 406 (1956); *Beaver v. R.* (1957) S.C.R. 531; *R. v. King* 35 D.L.R. 2d 386 (1962).

¹³ [1955] 5 D.L.R. 607.

¹⁴ See *Farrell v. Workmen's Compensation Board*, 31 D.L.R. 2d 177 (1961); *Noranda Mines Ltd. v. R.*, 7 D.L.R. 3d 1 (1969); *Service Employees International Union v. Nipawin District Staff Nurses Ass'n*, 41 D.L.R. 3d 6 (1973).

¹⁵ See *Howarth v. National Parole Board*, 50 D.L.R. 3d 391 (1974); *Mitchell v. R.*, 61 D.L.R. 77 (1975).

¹⁶ See *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, 74 D.L.R. 3d 1 (1977).

¹⁷ 26 N.R. 364, 3 W.W.R. 676 (1979).

¹⁸ [1967] S.C.R. 114, 2 C.R.N.S. 16.

¹⁹ 63 D.L.R. 2d 75 (1967).

²⁰ See *R. v. Kirzner*, 81 D.L.R. 3d 229 (1977).

²¹ 59 D.L.R. 3d 409 (1975).

²² 61 D.L.R. 3d 145 (1976).

a defense. In *Schwartz v. R.*²³, the Court ruled that an accused who knew that an act was legally wrong would not qualify for the insanity defence thereby rejecting a substantial body of Canadian law holding that the word "wrong" meant "morally wrong." In *Leary v. R.*²⁴, the Court restricted the defense of drunkenness to crimes of specific intent. In *Rourke v. R.*²⁵, the Court stated that the defence of abuse of process does not exist in Canadian law. In *Moore v. R.*²⁶, the Court convicted an accused of the Criminal Code offence of wilfully obstructing a peace officer, after he had infringed a minor municipal by-law and would not identify himself to the police, even though there was no duty on the accused to identify himself. In *R. v. Guimond*²⁷, the Court restricted the defence of inconsistent verdicts by holding that when two alleged co-conspirators are tried separately, the acquittal of one co-conspirator does not necessarily invalidate the conviction of the other.

On the positive side, the Court has fashioned a rule against multiple convictions for the same matter, not merely the same offence, out of the aegis of the doctrine of *res judicata*²⁸. It has created a three-tiered classification of offences where mistake of fact has occurred, establishing a category of strict liability regulatory offences where the accused may avoid liability by proving that he took reasonable care.²⁹ The Court has converted what was essentially a mistake of law into a mistake of fact, giving a defense to someone charged with driving while disqualified when he did not know of a law which automatically suspended his license.³⁰ This year, in a decision uncharacteristic of *Biron* and *Moore*, the Court granted damages for a false arrest by a police officer, ruling that for a policeman to have reasonable grounds for believing someone has committed an offence, his belief must take into account all the information available to him.³¹

The evidence cases are even more restrictive of individual rights. In *DeClerq v. R.*³², the Court held that on a *voir dire* to determine the voluntariness of an accused's statement, the accused may be asked if the statement is true. In *R. v. Wray*³³, the Court ruled that evidence obtained as a result of an involuntary confession is admissible and that generally a trial judge does not have discretion to exclude unimpeachable evidence even though it has been unfairly obtained. In *Hogan v. R.*³⁴, it was held that

²³ 67 D.L.R. 3d 716 (1976).

²⁴ 74 D.L.R. 3d 103 (1977).

²⁵ 76 D.L.R. 3d 193 (1977).

²⁶ 90 D.L.R. 3d 112 (1978).

²⁷ 8 C.R. 3d 185 (1979).

²⁸ *Kienapple v. R.*, 44 D.L.R. 3d 351 (1974).

²⁹ *R. v. Sault Ste. Marie*, 85 D.L.R. 3d 161 (1978).

³⁰ *R. v. Prue*; *R. v. Baril*, 8 C.R. 3d 68 (1978).

³¹ *Chartier v. A.G. Quebec*, 27 N.R. 1 (1979).

³² 70 D.L.R. 2d 530 (1968).

³³ 11 D.L.R. 3d 673 (1970).

³⁴ 48 D.L.R. 3d 427 (1975).

evidence obtained in violation of the Canadian Bill of Rights is admissible. *Faber v. R.*³⁵, held that a person suspected of murder, but not yet charged, can be forced to testify at a coroner's inquest. This decision was rendered in spite of the earlier decision in *Batary v. A.G. for Sask.*³⁶, holding that a person charged with murder is not a compellable witness at a coroner's inquest. *Morris v. R.* (1978)³⁷, upheld the cross-examination of an accused on his juvenile record, even though the Juvenile Delinquents Act R.S.C. 1970, c. J-3, provides that the trial of a juvenile shall take place without publicity and that no report shall be published of a delinquency committed by a child. Such cross-examination is, however, only for the purpose of attacking credibility. A series of cases have also permitted the prosecution easy admissibility of similar fact evidence.³⁸ The only respite from this dour list of cases is a group of cases applying the rule that no statement made by an accused to a person in authority is admissible unless its voluntariness is proven.³⁹

The Canadian Bill of Rights R.S.C. 1970, App. III, was first adopted on August 10th, 1960. It is a legislative document, not a constitutional document, but decisions subsequent to its enactment have not turned on this distinction. Only one decision of the Supreme Court has attached fundamental importance to the Bill. *R. v. Drybones*⁴⁰, held that special liquor offences for Indians were inconsistent with the Canadian Bill of Rights and that a law inconsistent with the Bill was inoperative. Justice Ritchie stated that "an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty."⁴¹

The practical effect of the *Drybones* decision was mitigated by the later decision of the Court in *A.G. Canada v. Lavell; Isaac v. Bedard*.⁴² Section 12(1)(b) of the Indian Act R.S.C. 1970, c. I-6, provides that a woman who marries a non-Indian loses her status as an Indian; the Act contains no similar disqualification for a man. The Court held that this provision did not violate the guarantee against sexual discrimination contained in the Bill of Rights, and adopted a very narrow attitude toward the construction and application of the Bill. On the question of the general approach to the Bill, Justice Ritchie stated:

What is at issue here is whether the Bill of Rights is to be construed as rendering inoperative one of the conditions imposed by Parliament for

³⁵ 65 D.L.R. 3d 423 (1975).

³⁶ 52 D.L.R. 2d 125 (1965).

³⁷ 6 C.R. 3d 36 (1978).

³⁸ See *Leblanc v. R.*, 68 D.L.R. 3d 242 (1975); *Alward and Mooney v. R.*, 76 D.L.R. 3d 577 (1977); *Hewson v. R.*, 5 C.R. 3d 155 (1978); *Guay v. R.*, 6 C.R. 3d 130 (1978).

³⁹ See *Erven v. R.*, 92 D.L.R. 3d 507 (1978); *Horvath v. R.*, 93 D.L.R. 3d 1 (1979); *Ward v. R.*, 94 D.L.R. 3d 18 (1979).

⁴⁰ 9 D.L.R. 3d 473 (1969).

⁴¹ *Id.* at 484.

⁴² 38 D.L.R. 3d 481 (1973).

the use and occupation of Crown lands reserved for Indians. These conditions were imposed as a necessary part of the structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown lands situate thereon, they were thus imposed in discharge of Parliament's constitutional function under s. 91(24) and in my view can only be changed by plain statutory language expressly enacted for the purpose. It does not appear to me that Parliament can be taken to have made or intended to make such a change by the use of broad general language directed at the statutory proclamation of the fundamental rights and freedoms enjoyed by all Canadians, and I am therefore of opinion that the Bill of Rights had no such effect.⁴³

Development of the meaning of the Bill was frowned on in the following conclusion:

In my view the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in light of the law existing in Canada at that time.⁴⁴

The phrase "equality before the law" was denuded of substantive content when the Court stated:

In considering the meaning to be attached to "equality before the law" as those words occur in s. 1(b) of the Bill, I think it important to point out that in my opinion this phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the Courts of that country: see *R. v. Smythe* (1971), 19 D.L.R. (3d) 480, 3 C.C.C. (2d) 366, [1971] S.C.R. 680 *per Fauteux, C.J.C.* at pp. 482 and 484-5. I think rather that, having regard to the language employed in the second paragraph of the preamble to the *Bill of Rights*, the phrase "equality before the law" as used in s. 1 is to be read in its context as part of "the rule of law" to which overriding authority is accorded by the terms of that paragraph.

* * *

In my opinion the phrase "equality before the law" as employed in s. 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land. This construction is, in my view, supported by the provisions of paras. (a) to (g) of s. 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before the law".⁴⁵

The Bill of Rights was also utilized in *Brownridge v. R.*,⁴⁶ where the

⁴³ *Id.* at 490.

⁴⁴ *Id.* at 494.

⁴⁵ *Id.* at 494-95.

⁴⁶ 28 D.L.R. 3d 1 (1972).

accused was charged with failing, without reasonable excuse, to provide upon demand a sample of his breath for analysis. The accused had been denied the opportunity to speak to his lawyer to determine whether he had to comply with the demand, and the Court held that this was a reasonable excuse for failing to comply.

In other decisions concerning the Bill of Rights the Court has held that the Bill does not render inoperative the Lord's Day Act, R.S.C. 1970, c. L-13⁴⁷; that the denial by police to an accused of his right to retain and instruct counsel without delay cannot nullify the subsequent proceedings⁴⁸ and that evidence obtained in violation of the Bill is still admissible.⁴⁹

In the area of civil liberties, the Court has substantially extended the rules of standing to allow constitutional challenges of legislation. *Thorson v. A.G. Canada (No. 2)*,⁵⁰ held that where all members of the public are equally affected by legislation and no person or class of persons has any special interest in the matter and where the legislation is not regulatory but declaratory and creates no offences, but does involve the expenditure of public money, the Court has discretion to permit a taxpayer to test the validity of the legislation, particularly where the federal Attorney General has refused to bring action. *Nova Scotia Board of Censors v. McNeil*,⁵¹ extended the *Thorson* rules to allow private challenge of regulatory provincial legislation (in this case, movie censorship legislation) where the legislation directly affects members of the public and there are no other practical means of testing its constitutionality, even though certain business enterprises are more directly affected than the public.

Where action has once been brought, however, the claim of alleged violation of rights has usually been denied. *Walter and Fletcher v. A.G. Alberta*,⁵² upheld a provincial statute restricting the acquisition of land as communal property and specifically referring to Hutterites, on the basis that the legislation was property legislation and did not interfere with religious freedom. *Re Nova Scotia Board of Censors and McNeil*⁵³ held that a provincial censorship board may establish and enforce a local standard of morality despite federal jurisdiction over criminal law. It further held that the question of the validity of provincial legislation is to be approached on the assumption that it is validly enacted, even though it is couched in very general terms. *A.G. Canada v. Dupond*⁵⁴, laid to rest the notion of an implied Bill of Rights in our Constitution. The Court upheld a municipal by-law prohibiting all assemblies, parades and gatherings on

⁴⁷ *Robertson and Rosetanni v. R.*, 41 D.L.R. 2d 485 (1962).

⁴⁸ *O'Connor v. R.*, 51 D.L.R. 2d 123 (1966).

⁴⁹ *Hogan v. R.*, 48 D.L.R. 3d 427 (1974).

⁵⁰ 43 D.L.R. 3d 1 (1974).

⁵¹ 55 D.L.R. 3d 632 (1975).

⁵² 3 D.L.R. 3d 1 (1969).

⁵³ 84 D.L.R. 3d 1 (1978).

⁵⁴ 84 D.L.R. 3d 420 (1978).

city property for a period of thirty days. In the course of judgment, Justice Beetz stated:

1. None of the [fundamental] freedoms is so enshrined in the Constitution as to be above the reach of competent legislation.
2. None of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence.
3. Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city . . . Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.
4. The right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass against the urban authority in whom the ownership of the street is vested even though no one is obstructed and no injury is done; it may also amount to a nuisance.⁵⁵

Gay Alliance Toward Equality v. Vancouver Sun,⁵⁶ involved the Human Rights Code of British Columbia, S.B.C. 1973 (2nd sess.), c. 119, which prohibits the denial of any service customarily available to the public unless reasonable cause exists for such denial. A newspaper which reserved the right to control the content of classified advertising refused to accept a classified advertisement for a homosexual publication. A Board of Inquiry established under the Code found that bias against homosexuals was not a reasonable cause for refusal, but the Supreme Court upheld the reversal of the Board's ruling.

What, then, can we learn from this brief survey of Supreme Court decisions? Certainly the individualistic, sympathetic and imaginative approach to human rights problems of the 1950's has given way to a generalized and mechanical approach today. Certainly the Court is more concerned about public power and orderly administration than it is about individual claims of rights. The same trends are found in all areas of public law.

Explanations for the change vary. Some suggest the radicalism of the 1960's, other suggest declining economic expectations, still others suggest the exaggerated emphasis on rights and the neglected emphasis on responsibilities. On occasion lawyers have been at fault: often the cases where human rights issues were raised were bad cases and were the last refuge of a hopeless defence. This survey has only attempted to chronicle the fact of change; the explanation for that change must be left to others.

Let me end with an apology. It would have been very comforting for

⁵⁵ *Id.* at 439.

⁵⁶ 27 N.R. 117 (1979).
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me to praise the Canadian Supreme Court in a foreign setting, but intellectual honesty makes that impossible. Liberty is no less prized in Canada. I often think that in many areas it is more prized and more effectively achieved in Canada than it is in the United States.

For example, many of the things which Mr. Justice Mosk described as ideal do in fact exist in Canada. What one must understand, however, is that the role of the legislature and the role of the courts are different in Canada. Often the legislatures have corrected the excessive conservatism of the Court.

If I were to describe the Canadian situation by way of an illustration I would suggest that an idealistic picture of the Canadian situation would be the courts and the legislatures walking hand in hand towards the common goal of human rights. In that walk unfortunately our courts are presently lagging behind.