

CODIFICATION AND THE CHARTER: WHO'S IN CHARGE OF THE REFORM OF CRIMINAL LAW?

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[This paper, prepared for the twentieth anniversary conference of The International Society for the Reform of Criminal Law in Vancouver, June 22-26, 2007, has been drawn from my book, *My Life in Crime and Other Academic Adventures*, which will be published by the University of Toronto Press and the Osgoode Society for Canadian Legal History in the fall of 2007. In the book I examine from a personal and a theoretical perspective a number of the public policy issues that I have worked on over the past fifty years and include chapters on the Law Reform Commission of Canada, codification of the criminal law, and the Charter.]

Codification

On February 16, 1970, Minister of Justice John Turner introduced a bill in the House of Commons to establish the Law Reform Commission of Canada. The objects of the Commission, the press release stated, 'are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform.' There would be six members of the Commission: four would be full-time, including the chair and vice-chair, and two would be part-time.

The bill was given second reading a week later and Turner told the Commons that the first task of the commission would be a complete rewriting of the Criminal Code. Turner said that he wanted 'young tigers – young enough to have some juice, old enough to have made their mark.'¹ Justice Patrick Hartt from the Supreme Court of Ontario was appointed chair and Antonio Lamer from the Quebec Superior Court vice-chair. I was included as one of the 'tigers.'

Our first task was to develop a program of work, which had to be submitted to the minister of justice for his approval. It was clear to everybody that tackling criminal law and procedure was to be our main task. By the third meeting in mid-October we had more or less decided on our subjects of inquiry. There would be six major projects: evidence, general principles of criminal law, substantive offences, criminal procedure, sentencing and other dispositions, and administrative law.

¹*Globe and Mail*, 23 February 1970 ('It's a big carcass waiting'); John Turner, House of Commons, February 23, 1970, at p. 3996. See generally, Martin L. Friedland, 'The Work of the Law Reform Commission of Canada' (1972), 6 *Law Society of U.C. Gazette* 58.

Excellent staff were hired, studies were undertaken, well-thought-out working papers and reports were published. There were, however, few legislative results to show for this activity. By the end of the decade a new Criminal Code still seemed far off. During the 1980s there was an attempt by the federal government to expedite the development of a new code. In October 1979, when the government of Joe Clark was briefly in office, federal and provincial ministers responsible for the various aspects of the criminal justice system in Canada met in Ottawa and unanimously agreed that ‘a thorough review of the Criminal Code should be undertaken as a matter of priority’ and that ‘the review should encompass both substantive criminal law and criminal procedures.’²

This ‘comprehensive and accelerated review’³ was centred in the Department of Justice, which worked closely with the solicitor general’s department and the Law Reform Commission. I was involved in the review, doing work for all three bodies in the 1980s. The process of codification was gaining momentum.

An excellent document emerged from the Department of Justice in 1982, *The Criminal Law in Canadian Society*.⁴ There was a lot of activity in the Department of Justice and other departments, as well as in the Law Reform Commission under Justice Allen Linden, and the government announced that a code would be ready in 1992 for the one hundredth anniversary of the enactment of the first Canadian Criminal Code. Unfortunately, the date passed without the appearance of a new code.

Coincidental with the anniversary of the first code, however, the government took the extraordinary step of shutting down the Law Reform Commission of Canada. In late February 1992, the federal minister of finance, Don Mazankowski, announced in his budget speech that the Law Reform Commission of Canada, along with a number of other federal agencies, would be eliminated for financial reasons.⁵ The chances of a new code therefore decreased significantly.

I am sure that one of the themes that will be discussed at this conference – the twentieth anniversary of the formation of the International Society for the Reform of Criminal Law – is the strategy that should be used for trying to enact a criminal code. In my view it is desirable to enact the criminal code in stages. The problem with putting a whole code before Parliament as a package is that it is not likely to be enacted. There are many controversial issues in any criminal code: police powers, abortion, gun control, and hate literature, to name only a few. Special-interest groups will mount campaigns against the provisions that they dislike and it will be difficult to gain acceptance of the package as a whole.

² Canada, Department of Justice, *The Criminal Law in Canadian Society* (Ottawa, 1982).

³ See Law Reform Commission of Canada, *Tenth Annual Report 1980-81* (Ottawa: Minister of Supply and Services, 1982) at p. 13.

⁴ *The Criminal Law in Canadian Society*.

⁵ See M.L. Friedland, ‘Reforming Police Powers: Who’s in Charge?’ in R.C. Macleod and David Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) at p. 101.

A gradual process is the best approach for the Canadian government to follow. In the mid-1990s the government brought in some good sections on sentencing, based in part on the report of the sentencing commission. The next important step is to enact a new general part, followed by a code of procedure, and then a new code of evidence. It is important to have a new code, as will be discussed below, for the sake of the effectiveness of the criminal-justice system. Well-thought-out provisions in all of these areas will cut down on the complexity and therefore the length of trials and will play a significant role in improving the administration of criminal justice in Canada.

Canada is not the only country to have experienced difficulty in bringing in a new criminal code. This also happened in the United States. In 1966 the Johnson administration established through congress a powerful National Commission on Reform of Federal Criminal Laws. The commission, under the chairmanship of the governor of California, Edmund G. Brown, produced a *Final Report on a Proposed New Federal Criminal Code* in 1971.⁶ It could not make it through Congress – it was not right-wing enough for President Richard Nixon – although various subsequent attempts have been made over the years to have a new code enacted. In 1990 this society ran an international conference in Washington designed to put pressure on governments, including the American government, to develop new criminal codes.⁷ Thus far, a new U.S. federal code has not been enacted.

England has been equally unsuccessful in developing a new comprehensive code. The Law Commission in England started working on a new criminal code in 1968, but a code has still not been produced. The project was turned over to a group of legal academics in the 1980s, without great success. In the early 1990s England decided that a more gradual approach was needed, and since then the Law Commission and the government have been chipping away at the task of bringing in separate parts of a new code. The process may now be speeding up because in July 2002 the government produced a white paper, *Justice for All*,⁸ in which it again stated its intention to codify the criminal law.

The Charter

Let us turn to the *Canadian Charter of Rights and Freedoms*, enacted as a constitutional document in 1982. There have been some positive results of the Charter in the area of criminal justice. In other respects, however, it has held back the development of the criminal law, for at the very time that the Department of Justice, the solicitor general's department, and the Law Reform Commission of Canada were attempting to expedite the development of a new code of criminal law and procedure, the Supreme Court of Canada seized the initiative to reform the criminal law, forcing the government to react to what the Court was actively doing. As I will argue below, lawmaking through the legislative route is generally far superior to lawmaking by the judiciary. If the Supreme Court had not been as aggressive as it had been, it is likely that Canada would now have a well-

⁶ United States, *Final Report of the National Commission on Reform of Federal Criminal Laws* (Proposed New Federal Criminal Code) (Washington: U.S. Govt. Print. Off., 1971).

⁷ For the conference papers see (1990), 2 *Crim. L. Forum* 111-76.

⁸ U.K., H.C., *Justice for All*, Cm. 5563 (London: The Stationery Office, 2002).

thought-out, balanced code like the 1962 American Law Institute's Model Penal Code, which, with various changes, has been adopted by the majority of states in the United States.

My comments here are restricted to the role of the Canadian courts in the area of criminal law and procedure. I have few complaints about the Supreme Court's decisions on the sometimes more contentious issues such as aboriginal rights, equality rights, and electoral rights. Indeed, I welcome the Court's involvement in those difficult subjects. These are areas where, in the words of Chief Justice Beverley McLachlin, the courts can provide 'protection against the tyranny of the majority.'⁹ Further, I have few complaints about the actual results reached by the Supreme Court in the field of criminal justice. My complaint is that its overly ambitious approach to reforming the criminal law has in fact held back rational development of the law through the legislative route. In this regard, it would, in my view, have been preferable for the Supreme Court to have been more deferential to Parliament and to have encouraged Parliament to take the lead. This is not a question of legitimacy, but, as I will argue below, of institutional competency.

The activism of the United States Supreme Court in the 1960s and 1970s no doubt became a role model for Canada's Supreme Court. One of the Court's first Charter decisions, *Hunter v. Southam*,¹⁰ delivered in 1984, adopted an American-style approach to search and seizure. The U.S. Supreme Court, as is well known, had been active in those decades in developing the criminal law, although as Robert Harvie and Hamar Foster have shown, it was less aggressive than the Supreme Court of Canada became.¹¹ The U.S. Supreme Court had, of course, been forced to play an active role because in the United States the criminal law is, for the most part, a state responsibility, and only the Supreme Court could impose minimum standards on a system that cried out for standards. But in Canada the constitution gives the federal government exclusive legislative authority over criminal law and procedure. The legislative route was open in Canada and the structure was in place for developing a new comprehensive code.

The fault has to be equally shared by Parliament, which allowed – and perhaps even encouraged – the initiative to be seized by the Supreme Court by not continuing to pursue the legislative agenda aggressively. There are few votes to be gained in changing the criminal law, unless the legislation advances a law-and-order agenda. Every contentious provision, particularly those involving law and morality, such as abortion and homosexual conduct, will alienate a significant number of voters, whatever the government decides to do. Better to have that anger directed at the courts, the government of the day might think.

⁹ Rt. Hon. Beverley McLachlin, 'Judging, Politics, and Why They Must Be Kept Separate', unpublished luncheon address to the Canadian Club of Toronto, June 17, 2003.

¹⁰ [1984] 2 S.C.R. 145.

¹¹ Robert Harvie and Hamar Foster, 'Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter' (1990), 28 Osgoode Hall L. J. 729 and Harvie and Foster, 'Different Drummers, Different Drums: the Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter' (1992), 24 Ottawa L. Rev. 39.

Like most persons who had been involved in thinking about criminal justice, I did not expect that the Charter would have such a dramatic effect on the development of the criminal law. In the year and a half after the Charter was enacted, I gave a number of talks on it to various groups of judges and lawyers across the country, taking the view that ‘the Charter will help protect us from tyranny, but will not replace Parliament as the body to develop the criminal law.’ I then added: ‘It is suggested that this is the proper use of the Charter.’¹²

I applauded the approach that had been taken up until then by the provincial courts of appeal, noting that ‘changes that have been made by the courts have been of a marginal nature,’ and then adding that ‘the changes have been important, taking some of the harshness out of some laws and further individualizing the criminal justice system.’ I concluded by stating: ‘A broad, but careful, approach has been given by the appeal courts so far, and undoubtedly a similar approach will be taken by the Supreme Court to the *Canadian Charter of Rights and Freedoms*.’¹³ At that point, the Supreme Court of Canada had not decided any Charter cases. My prediction of the approach that the Court would take was, of course, wrong.

Advantages of Legislation

I prefer that change come through legislation, if that route is possible. Perhaps my earlier active involvement with legislative solutions in areas such as bail, legal aid, securities regulation, and gun control influenced my view. There are clear advantages in using the legislative route. I am not going to give much weight to the often-heard argument that judges are not elected and so it is undemocratic to have judges take over the role that legislatures are intended to fulfil, except to note that the Charter was also designed to protect democratic rights and that taking over the traditional role of Parliament as a lawmaker interferes with those rights. Here, I am going to deal with more practical arguments, stressing the institutional competence of each body.

Through the parliamentary committee system, for example, the legislature will have available a better system of consultation than the judiciary has and, unlike the judiciary, such committees can produce interim reports and draft legislation for comment. In the well-known 1990 *Askov* case¹⁴ on unreasonable delay, for example, which resulted in about 50,000 pending cases later being dismissed, no interveners appeared before the Supreme Court to assist in the development of the law. No interveners apart from two provincial attorneys general appeared in *Duarte*,¹⁵ decided in the same year, where the Court said that a listening device required judicial approval in advance, even if one of the parties consented. Further, Parliament has better access to statistical and social-science research than has the Supreme Court. Again, using the *Askov* case as an example, the

¹² Martin L. Friedland, ‘Criminal Justice and the Charter’ in *A Century of Criminal Justice* (Toronto: Carswell Legal Publications, 1984) 205 at p. 208.

¹³ *Ibid.* at p. 231.

¹⁴ *R. v. Askov*, [1990] 2 S.C.R. 1199.

¹⁵ *R. v. Duarte*, [1990] 1 S.C.R. 30.

Supreme Court gathered some of its own statistical data, but that data turned out to have been used incorrectly.¹⁶

With a comprehensive legislative bill, one section can be placed in the context of other provisions, and trade-offs can be made to keep a proper balance in the system. Courts understandably concentrate on the particular issue with which they are dealing.

Moreover, legislation is normally prospective and not retrospective, applying only to future cases,¹⁷ whereas court decisions – again, the *Askov* case is an example – are normally both prospective and retrospective, thus creating problems for the administration of justice and, in many cases, unwarranted windfalls for cases tried under the former law that are still subject to appeal. I have been told that some counsel appeal convictions simply hoping that a new decision may give them a ground of appeal while the case is in the system. The American approach of determining which constitutional decisions are prospective only would be better than the present Canadian system.

However difficult it may be to interpret a legislative provision, at least the legislature speaks with one voice. Supreme Court decisions, in contrast, are often lengthy, with multiple opinions, some concurring and some dissenting, and are often difficult for non-lawyers – and indeed for lawyers – to comprehend. They usually require very close analysis and complex arguments. Recent judgments do not appear to be getting much shorter or less complex, although it seems the Court is trying to do better.

Moreover, Supreme Court judgments often necessitate further clarifying judgments by the Court because of matters overlooked in the earlier judgment. The recent series of cases on the reasonable doubt rule is a good illustration.¹⁸ It would have been better to have developed this area of law outside traditional judicial decision-making. In England, the courts sometimes use extra-judicial ‘practice directions’ to guide future practice, while the United States federal courts adopt evidentiary rules through regulations.

I am particularly concerned about the fact that courts, unlike legislatures, do not like drawing fixed lines, but normally try to determine on which side of an imaginary line a case falls. A court-developed imaginary line normally requires trial judges to examine a large number of factors to determine the outcome of the cases before them, often resulting in long legal arguments and lengthy proceedings at the trial level. Look at most Supreme Court of Canada decisions – both Charter and non-Charter cases – and you will see that a decision at trial requires that a host of factors be taken into account by the trial judge in deciding an issue. Rather than a simple factual determination for the law of entrapment, for example, as suggested by the McDonald Commission on national

¹⁶ See generally, Michael A. Code, *Trial within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States* (Toronto: Carswell, 1992).

¹⁷ See generally, M.L. Friedland, ‘Prospective and Retrospective Judicial Lawmaking’ (1974), 24 U.T.L.J. 170.

¹⁸ See *R. v. Lifchus*, [1997] 3 S.C.R. 320, *R. v. Starr*, [2000] 2 S.C.R. 144, and *R. v. Russell*, [2000] 2 S.C.R. 731.

security in the early 1980s,¹⁹ the Supreme Court has imposed a legal test that requires the examination of a large number of factors. In the *Mack* case²⁰ on entrapment, the Court lists nine factors that should be considered and then adds that ‘this list is not exhaustive.’²¹ Similarly, in order for a judge to decide whether hearsay evidence should be admitted or an expert should be heard, he or she has to take a list of factors into account.

Sometimes a simpler rule is better. An example, familiar to all law students, is the development of the law of civil negligence. Before the British House of Lords decided *Donoghue v. Stevenson*²² in 1932, each case of civil negligence in England and Canada required a careful analysis of earlier cases dealing with the law of causation. In *Donoghue v. Stevenson*, however, the House of Lords produced a simpler rule involving a finding of a reasonable person’s standard of care, which is much easier for a judge or jury to understand. Such simplification tends to turn a legal issue into a factual issue. This approach does not eliminate all the problems, but I believe that it helps to decrease them.

In a recent speech, Chief Justice Beverley McLachlin warned the Canadian Bar Association that ‘proceedings in criminal cases are crumbling under the weight of pre-trial motions.’²³ Ontario Court of Appeal Justice Michael Moldaver, in an even stronger speech to the Criminal Lawyers’ Association annual conference in 2005, stated that ‘long criminal trials are a cancer on our criminal justice system and they pose a threat to its very existence.’²⁴ To a considerable extent, the judiciary has created the problem.

The judicial process can be costly in terms of appellate decisions, which often involve a large number of state-financed lawyers as interveners, but more importantly in the time taken in the later application and interpretation of those decisions by trial judges. How many adjournments are sought with an eye to arguing ‘delay’ and how many subsequent lengthy arguments are the direct result of the *Askov* decision? How much of the available legal-aid budget is now used to develop the law through the judicial process and then apply it in individual cases?

Having comprehensive legislative, rather than judicial, solutions to search and seizure, entrapment, double jeopardy, disclosure, hearsay, and speedy trial procedures – to mention only a few areas that could have been, and in most cases were being developed through the legislative route – would have created fewer problems in the administration of criminal justice than having the rules developed by the courts. The *Askov* case, for example, might not have been necessary if Parliament had enacted speedy trial laws, as

¹⁹ Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, *Freedom and Security Under the Law* (Ottawa, 1981) at p. 1053.

²⁰ *R. v. Mack*, [1988] 2 S.C.R. 903.

²¹ *Ibid.* at p. 966.

²² *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562.

²³ Remarks to the Council of the Canadian Bar Association in Montreal on August 16, 2003, at p. 2; Kirk Makin, ‘McLachlin urges overhaul of criminal-justice system’, *Globe and Mail* (August 18, 2003).

²⁴ Michael Moldaver, John Sopinka Lecture on Advocacy, Criminal Lawyers' Association Conference, October 21, 2005.

was attempted, without success, in 1984.²⁵ Most American jurisdictions have time limits that, with good cause, can be departed from. Moreover, Parliament would likely not have said that a stay was the *only* remedy available for unreasonable delay. To have a complete stay gives the accused too great an advantage. A comprehensive legislative scheme could help ensure compliance by a whole series of intermediary orders, preventing delay long before the draconian remedy of a retrospective stay of proceedings becomes necessary.

It is also important to note that legislation can be changed by Parliament. In contrast, court decisions which rely on the Charter become part of the Constitution and limit what Parliament can do. There has, of course, been what is called a ‘dialogue’²⁶ between the courts and Parliament, but Parliament enters the debate with one hand loosely tied behind its back. Parliament cannot change a constitutional decision unless it exercises its power of override, which for political reasons it is reluctant to do, or gets a constitutional amendment, which is an unrealistic prospect, or eventually wears down the will of the Supreme Court, as it did in the 2002 *Hall*²⁷ case relating to the grounds for denying bail.

Constitutionalizing decisions tends to hinder change and experimentation, which might improve the system of criminal justice. In my various talks in the early years of the Charter I urged the courts not to rush to constitutionalize the criminal law, unless it was absolutely necessary. Why not reach the same result, if one can, I asked, by developing ordinary criminal law concepts, such as the doctrine of abuse of process? I recall Chief Justice Dickson sitting in the front row listening to a talk I was giving to the Canadian Bar Association in 1963. We chatted afterwards, and it was apparent to me that my arguments had not persuaded him.

Two Crucial Cases: *Oakes* and the *BC Motor Vehicle Act* Case

It was the combination of the interpretations of sections 7 and 1 that caused the major shift in the development of criminal justice from Parliament to the courts. The interpretation of section 7 broadened the scope of rights that would be protected, while section 1 put a burden on the government to justify any limitation of them.

Section 7 of the Charter states: ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’ And section 1 provides: ‘The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

²⁵ See generally, Code, *Trial within a Reasonable Time*.

²⁶ See, for example, Kent Roach, *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) and ‘Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures’ (2001), 80 Can. Bar Rev. 481, and Peter W. Hogg and Allison A. Bushell, ‘The Charter Dialogue Between Courts and Legislatures’ (1997), 35 Osgoode Hall L.J. 75.

²⁷ *R. v. Hall*, [2002] 3 S.C.R. 309.

The Supreme Court of Canada did not *have* to take such an activist stance in the criminal law area. Let me give two examples, the *Oakes*²⁸ and the *BC Motor Vehicles Act*²⁹ cases, probably the two most important criminal-law judgments delivered under the Charter.

In the 1986 *Oakes* case, the Supreme Court, without the benefit of a full discussion of the issue by counsel in the case, placed a heavy onus on the government to uphold a law under section 1 that was found to have breached a substantive section of the Charter. (The issue was whether a section in the Narcotic Control Act, placing the onus on the accused found in possession of a narcotic to prove that he or she was not in possession for the purpose of trafficking, was a violation of the presumption of innocence section of the Charter. The Court held that it was and then turned to examine whether it could be upheld under section 1.) Canadian courts have tended to give a very literal meaning to the Charter's substantive section and then turn quickly to section 1. It would have been preferable, in my view, for the courts to first do the balancing under the substantive section, as the American courts do, and as Canadian courts now tend to do under section 7, where there is therefore no onus on the government. Chief Justice Brian Dickson's judgment in *Oakes* provides a series of tests which require, among other things, that the government action be shown to 'impair "as little as possible" the right or freedom in question.'³⁰ Moreover, Dickson stated, the onus on the government 'must be applied vigorously.' The passages in the judgment relating to section 1 are rightly identified by Robert Sharpe and Kent Roach in their recent fine biography of Dickson as 'five of the most important pages ever written in Canadian constitutional law.'³¹

The vast majority of cases decided against the government have turned on the 'minimal impairment' aspect of the *Oakes* test. Section 1, however, had been designed to help the government, not to impede its legislative abilities. As Roy Romanow, one of the principal architects of the Charter, and his co-authors have written: 'The clause was designed to encourage judicial deference to legislative choices even though they affected civil liberties.'³²

Chief Justice Dickson was determined to use the Charter to develop the law through the judicial process. In *Hunter v. Southam*,³³ the year before the *Oakes* decision, Dickson had shown, according to Sharpe and Roach, that he was 'determined to play a leading role in defining the scope and impact of the Charter generally.'³⁴ Indeed, shortly after the Charter was enacted, Dickson had signalled that he would take a bold approach, stating in a talk at Dalhousie's faculty of law: 'When the occasion cries out for new law, let us dare to make it.'³⁵

²⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103.

²⁹ *Reference re: Section 94(2) of the BC Motor Vehicle Act*, [1985] 2 S.C.R. 486.

³⁰ *Oakes* at p. 139.

³¹ Robert J. Sharpe and Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press and Osgoode Society, 2003) at p. 334.

³² Roy Romanow, John Whyte, and Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at p. 243.

³³ [1984] 2 S.C.R. 145.

³⁴ Sharpe and Roach at p. 312.

³⁵ Remarks of October 29, 1983, *ibid.* at p. 310.

In the *BC Motor Vehicle Act* case, decided in 1985, the Supreme Court gave a very broad meaning to section 7 of the Charter. (The issue in the case was whether a legislative provision in British Columbia that provided for ‘absolute liability’ for driving without a valid license was contrary to the principles of fundamental justice.) The section in the *BC Motor Vehicle Act* case did not have to be so broadly interpreted and – according to most of those involved in the creation of the Charter – was not intended to be so interpreted. Not only did the Court expand the words ‘fundamental justice’ to include what the Americans call ‘substantive due process,’ but the Court gave a very expansive and vague meaning to the phrase. ‘[T]he principles of fundamental justice,’ Justice Lamer wrote, ‘are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system... Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.’³⁶

It is hard to think of a standard that would give the courts greater scope to develop the law in almost any way they think it should be developed. Shortly after he retired from the Court, Chief Justice Lamer told the *Lawyers Weekly* that the *BC Motor Vehicle Act* case was his ‘most satisfying moment’ on the Court.³⁷ The case, he said, ‘announced that a majority of the court, at least, would take a post-modernist approach – a contextual approach – to interpreting the Charter and applying it,’ whatever that means. Lamer wanted to use the Charter to make changes in the criminal law. He had been the vice-president and then the president of the Law Reform Commission of Canada throughout the 1970s and had been frustrated by the lack of progress in bringing forward and implementing the commission’s recommendations.

The Supreme Court has used section 7 in a surprisingly large variety of cases. In a recent edition of his book *Charter Justice* Don Stuart devotes over 170 pages – almost one third of the book – to section 7.³⁸ Decisions using section 7 include the *Stinchcombe*³⁹ decision involving disclosure by the Crown, *Morgentaler*⁴⁰ on the right to an abortion, *Hebert*⁴¹ on self-incrimination, *Swain*⁴² on the consequences of being found not guilty by reason of mental disorder, *Ruzic*⁴³ on the defence of duress, and the many cases requiring the accused to have a certain mental state before being convicted. And there are many more.

³⁶ *BC Motor Vehicle Reference* at pp. 309-10.

³⁷ *Lawyers Weekly* (March 29, 2002).

³⁸ Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough: Thomson Carswell, 2005) at pp. 51-229.

³⁹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

⁴⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁴¹ *R. v. Hebert*, [1990] 2 S.C.R. 151.

⁴² *R. v. Swain*, [1991] 1 S.C.R. 933.

⁴³ *R. v. Ruzic*, [2001] 1 S.C.R. 687.

After I completed my book on the history of the University of Toronto⁴⁴ in 2002 and went back to the field of criminal justice, I systematically went through all the cases in the *Canadian Criminal Cases* over the previous five years. I was struck by the increasing number of decisions that rely on section 7 of the Charter, which has certainly become the workhorse for the development of criminal-law policy. In the *O'Connor* decision⁴⁵ in 1995, the Supreme Court even held that section 7 encompassed abuse-of-process cases. Thus, areas that were traditionally part of ordinary criminal law, such as entrapment and aspects of double jeopardy, would now seem to have been constitutionalized under fundamental justice.

The Supreme Court has also been constitutionalizing the law of evidence under section 7. Of course I knew about the cases involving self-incrimination, but until I did a report in 2005 on a judicial conduct case for the Canadian Judicial Council – requiring me to relearn the law of evidence, which I had not taught for forty years – I had not realized how many evidence matters are now covered by section 7. One can see its operation, for example, in the solicitor-client privilege rules. The application of the Charter in an evidentiary matter was first used in 1991 in the *Seaboyer* case,⁴⁶ in which the Court said that a law which interferes with the accused's 'right to present full answer and defence' violates section 7. In that case, the Court struck down a provision in the Criminal Code limiting the use of the prior sexual conduct of the complainant. 'In short,' Justice McLachlin stated, 'the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.' Moreover, it is an infringement of section 7, she went on, to 'exclude evidence the probative value of which is not substantially outweighed by its potential prejudice.'⁴⁷ Both statements in the *Seaboyer* case give great scope to permit counsel to introduce Charter arguments with respect to evidentiary issues.

The result of the movement to make the rules of evidence responsive to the needs of the particular case, David Paciocco and Lee Stuesser argue in their book on evidence, has not come without a cost: 'Flexibility is being achieved at the expense of certainty. The rules of evidence have never been easy to apply. Yet many of those rules of evidence now require more detailed evaluation and produce less predictable results than ever before.'⁴⁸

Cruel and Unusual Punishment

On the other hand, the interpretation by the Supreme Court of Canada of the 'cruel and unusual punishment' provision of the Charter has had the very positive effect of helping prevent Parliament from going down the American route of harsh penalties and the overuse of incarceration. In 1987 the Supreme Court held, for example, in the *Smith* case⁴⁹ that the minimum penalty of seven years' imprisonment set out in the *Narcotic*

⁴⁴ Martin Friedland, *The University of Toronto: A History* (Toronto: University of Toronto Press, 2002).

⁴⁵ *R. v. O'Connor*, [1995] 4 S.C.R. 411.

⁴⁶ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p. 608.

⁴⁷ *Ibid.* at p. 612.

⁴⁸ David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005) at p. 6.

⁴⁹ *R. v. Smith*, [1987] 1 S.C.R. 1045.

Control Act for trafficking in narcotics was ‘cruel and unusual’ punishment under section 12 of the Charter. The test, the Court stated, is whether ‘the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.’⁵⁰ Seven years would now be just a routine sentence in the United States. The law-and-order sentencing schemes there – at both the state and federal levels – have resulted in many mandatory penitentiary sentences. As a result, as Tony Doob and Cheryl Webster have recently shown, the U.S. incarceration rate has risen from roughly 100 persons per 100,000 in 1963 to over 650 per 100,000 today, by far the highest rate in the world.⁵¹ In contrast, the Canadian incarceration rate, which had been the same as the American rate in 1963 – around 100 per 100,000 – is still almost exactly that rate today. The crime rate in the two countries is about the same. It is unlikely that the Canadian parliament would have taken the American path, but the Supreme Court has made it constitutionally difficult to do so.

Let me stress the point. The U.S. and Canadian incarceration rates were about the same in 1963, but the U.S. rate is now about six times higher than the Canadian rate. In my opinion, the fact – which I applaud – that Canada did not follow the American lead is one of the most important developments – or more accurately, non-developments – in criminal justice in Canada in the past fifty years.

The Supreme Court of Canada could, however, have given this liberal interpretation of the cruel and unusual punishment provision of the Charter without giving a wide expansion of section 7.

Conclusion

My overall conclusion, therefore, is that criminal law reform in Canada would probably have made greater progress if the Supreme Court of Canada had shown more restraint. Still, I have to acknowledge that a new criminal code may not have been produced, even if the Court had not intervened as vigorously as it did. The contentious nature of many of the issues would have made the introduction of a comprehensive new code politically difficult.

The federal government should again take the initiative and take up the task of producing a new code of criminal law, criminal procedure, and evidence. Furthermore, the Supreme Court should encourage the government to do so. The foundations have been laid by the Supreme Court. A well-developed code, sensitive to the decisions of the Court, would likely survive Charter challenges more or less intact. The Court would probably respect the choices made by Parliament as part of a comprehensive criminal code.

⁵⁰ *Ibid.* at 1072.

⁵¹ Anthony N. Doob and Cheryl M. Webster, ‘Looking at the Model Penal Code Sentencing Provisions through Canadian Lenses’ (2004), 7 *Buffalo Crim. L. Rev.* 139. Tony Doob points out (correspondence of April 27, 2007) that the American data for city jails was not included in the statistics until the 1970s, and when included showed an incarceration rate of 130-150 per 100,000.