August 25, 2015

The Authority of Law?

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Case Commented On: *R v L.L.* 2015 ABCA 222

In *R v L.L.* 2015 ABCA 222, the Alberta Court of Appeal reversed an award of costs made against the Crown at trial. In an earlier blog post I had strongly criticized the trial judge's costs award, and the Court of Appeal's reversal indicates it shared my concerns. The costs award amounted to improper second-guessing of counsel (at para 13) and also an improper interference with prosecutorial discretion given the trial judge did not find that the Crown had abused the court's process (at para 11).

I am not going to revisit those issues here. Rather, I want to consider a question that the trial judgment raises and, somewhat surprisingly, so does the Court of Appeal's: why do courts get the law wrong? To be clear, I don't mean – "why do they interpret the law in a way that I don't agree with" (although obviously I sometimes think that too). I mean – what ought we to make of the fact of judicial error?

To begin let me note the mistakes here. As the Court of Appeal's judgment sets out, it is clear that the trial judge simply did not appreciate the Supreme Court's definition of prosecutorial discretion or the very high standard the Supreme Court has imposed for reviewing matters of prosecutorial discretion. In its own judgment, the Court of Appeal erred in a statement of law – although not on an issue of real materiality to its decision. The Court stated that the "Crown has a constitutional obligation to lay before the jury all relevant and available legal proof of the facts" (at para 14), citing *Boucher v The Queen* [1955] SCR 16 at 23. But in a more recent decision , *R v Cook* [1997] 1 SCR 1113, the Supreme Court said that the Crown's obligation is only to discharge its burden of proof; once that point has been passed it "is up to the accused to call evidence or face conviction" (at para 39). Writing for the majority in *Cook*, Justice L'Heureux-Dubé said "I fail to see why the defence should not have to call witnesses which are beneficial to its own case" (at para 39). Given *Cook*, the Crown simply does *not* have an obligation to put before the jury "all relevant and available legal proof."

As I said, the Court of Appeal's error was not especially significant in the context of its judgment. And the Court of Appeal of course corrected the error of the trial judge. But both errors nonetheless lead me to reflect on the fact of mistakes in legal decision-making.

At one level, the existence of such mistakes is hardly surprising. Judges are human and so are lawyers; they write decisions, and advocate cases, with finite resources and within the limits of their own knowledge and competence. I happen to know that the Court of Appeal made a mistake because I have taught the *Cook* case for years in my legal ethics course, but it's not exactly the Carbolic Smoke Ball of judgments; not every lawyer would be familiar with it. Judges are sometimes going to get things wrong, and so are the lawyers who appear before them.

At the same time, when we think about judgments we don't think about them as fallible in the way we might, say, think about cooking dinner – that sometimes a dish is going to work out and sometimes it isn't, because people sometimes screw stuff up when they cook. We – and even more so our students – think of judgments as authoritative, as reflecting what the law is, not just how the judge thought about the law that day, including her bloopers and mistakes. There's a sense that if in its judgment we may not agree with it, but it's unlikely to just be *wrong*.

We also tend to think that they *ought* not to be wrong. That whatever decision a judge makes, it shouldn't contain an error, such as a failure to appreciate that two decades ago the Supreme Court reversed its decision of six decades ago. The system, and the expertise and wisdom of judges, should ensure that mistakes like that don't occur.

Yet, as these cases demonstrate, those perceptions are erroneous. Judges may not make major mistakes all that often, and the system *is* designed to prevent them, but sometimes judges will just get stuff wrong. Further, not all the mistakes they make will be corrected. Some will just be there, existing errors in published decisions.

I honestly don't think there's any way that errors like this can be eliminated from law. I am confident that if I ever became a judge I'd makes mistakes too. I'd miss things, or not know them, or not have them brought to my attention, and I'd get it wrong. I'd do the judicial equivalent of forgetting to add the baking powder to the cookies.

So what does that mean? I don't think it means that we should abandon our belief in judgments as authoritative. My sense would be that true errors like these tend to be infrequent, small or corrected on appellate review. On the other hand, I do think that they are an important reminder of the human imperfection inherent in our legal system. Our laws and judgments are only ever as good as the people and systems that create them; and as a result they will never be as good as they ought to be. Everyone who participates in the system needs to remember that, to have the humility to recognize that mistakes are inevitable. None of us is entitled to believe that because we have an authority or court in our corner that we are bound to be in the right. We may be right, but we may not be – whether because of mistakes like these or other errors that are subtler and harder to see. And if one is a judge, or in any position of authority, it's a good idea to remember that you are likely making mistakes – and given that as a judge you don't get the baker's clue of the flat cookies from the missed baking power, you may not realize you have made them.

Ultimately, I think that the errors help to humanize judges and the legal system. They remind us that the judges are people, not machines or automatons, and that the ideal of judging is the exercise of the empathy and wisdom of a human being, even if that brings with it the inevitability of an occasional error.