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Leaving A Paper Trail: A Comment on Bill C-75

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Legislation Commented On: Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*

Receiving the newest Bill tabled in the House on proposed changes to the criminal justice system brings to mind the image of opening gifts at a birthday party. Each gift is scrupulously wrapped in an array of cheerful paper with shiny ribbons. As each bundle is displayed, there is a jostling amongst the party goers – each eager to see the gift unwrapped to reveal the prize inside. The image goes only so far when it comes to the government's proposed amendments to the *Criminal Code* tabled last week under the auspices of Bill C-75. Underneath the wrapping, over 300 pages of paper, is no prize but a maze of amendments and changes – a patchwork of pieces – some of which significantly change the criminal justice system. Although some of these amendments are welcome, others signal a significant shift in our criminal justice system. Change can be good and can improve our concept of justice. However, even the smallest change must be calibrated toward a goal we all share: maintaining the fine balance between protection of the public and protection of the individual within that system who is faced with a potential loss of liberty. We must not sacrifice one for the other. Change must be viewed not as a piece of a maze but as a part of a whole through long-term strategic vision. Unfortunately, this omnibus Bill in many respects fails to be visionary. Rather, short-term administrative efficiency seems to be the prize under the mountain of paper.

To be sure, there are changes we can all agree upon such as the repealing of some decidedly dead offences disabled by the application of the *Charter*. The best Albertan example of the danger in leaving things unchanged that have been changed is found in the original decision of *R v Vader*, 2016 ABQB 505 (CanLII). In that decision, s 230, unconstitutional since 1987 as a result of the seminal decision of Justice Lamer, as he then was, in *R v Vaillancourt*, [1987] 2 SCR 636, 1987 CanLII 2 (SCC), was resurrected to convict the accused of murder. That error was easily and quickly undone as, in Pandora Box fashion, the lid was slammed shut with the s 230 conviction adroitly converted into the constitutional manslaughter conviction (see *R v Vader*, 2016 ABQB 625 (CanLII)). Bill C-75 explicitly repeals s 230, and that is a good change.

In C-75, there are also some expected changes, such as the abolishment of peremptory challenges to jury members under s 634 to be replaced by the more meaningful challenge for cause procedure. Although these changes are for good public policy reasons (see my earlier post on the Stanley / Boushie case here), such changes, which turn an automatic process into a discretionary one, still require thoughtful and mindful decisions by all those involved, counsel included. Changes can provide better and more equitable outcomes, but changes do not, in and of themselves, guarantee there will be change, they only make change possible.

There are also some unexpected changes or at least changes some of us feared but doubted would occur. For further comment on the efficacy, purpose and reason for retaining, in some form, the preliminary inquiry, see my previous post on the issue as part of a case commentary written in April of 2015, "Does the *Stinert* Decision Signal the End of the Preliminary Inquiry?". The abolishment of the preliminary inquiry, except for the most serious offences, is one change we feared for years and are still probably in a state of denial about as our fears have become a reality. I suppose we should be relieved that the process was not entirely eradicated but perhaps that was the plan; to lull us with a sense of false security.

Another, smaller change, yet completely unexpected and unwanted is an important evidentiary change under the soon to be added s 657.01, permitting the admission of the "routine" evidence of a police officer at trial in affidavit format, without the hearing of that evidence. This evidence is not given in real time. It is not even given orally. It is proffered as affidavit evidence. In other words, it is tendered on paper. This effects a precarious step, a paper-thin one, toward the potential future of trials by paper in the criminal court.

As mentioned earlier, part of the difficulty with this government's approach to *Criminal Code* revision is the lack of long-term strategic vision. Reading these amendments, there is a sense that some of these changes were made without thinking them through to their ultimate end and without mentally testing them in a real trial scenario to determine how they will ultimately play out in court. For these changes to be meaningful and workable, yet still upholding the principles of fundamental justice, we rely on our government, before they change the law, to ask themselves why they are in fact changing it. We want the government to think before acting and ask whether the contemplated change is for the better. Finally, we rely on the government to make these changes in an effort to enhance the criminal justice system while preserving the protections of those whose liberty is at risk. I emphasize to *enhance*, not to make the system more efficient. Efficiency cannot be and has never been the only reason for reform. Efficiency is not what we want from our justice system. That is not what the *R v Jordan*, 2016 SCC 27 (CanLII) and *R v Cody*, 2017 SCC 31 (CanLII) decisions are all about. Cultural change involves a bundle of values not a bundle of paper being efficiently pushed about.

As is typical with omnibus Bills, instead of stopping at what needs to be done, the government went above and beyond by also adding under the proposed s 644(3), an ability to convert a jury trial in mid-trial into a trial by judge alone, in the event the number of jurors fall below the number required to continue the trial. Although this can only be done by consent of both parties and therefore appears innocuous and not worth commenting on, my question is – why? A decision to have a jury trial is an accused's *Charter* protected right. Why would the loss of that right as a result of the inability of the jury to continue logically mean that the accused is good to go without one? Why incentivize a change which should not occur for that reason? Why not, instead, permit a jury trial to continue with less jurors than presently permitted? It seems that this change as with the admission of routine police evidence, sworn but not tested through *viva voce* evidence, is for one reason only – expediency.

I harken back to Justice Lamer's comments on the role of expediency in criminal law in *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) (at para 85). This decision is an early *Charter* case on the unconstitutionality of an absolute liability regulatory offence where there is a potential loss of liberty through a term of imprisonment or probation. An absolute

liability offence requires no proof of a mental element and is therefore, where there is a potential loss of liberty, contrary to the principle of fundamental justice, "from time immemorial", that an innocent person not be punished (para 85). Justice Lamer recognized that administrative efficiency is the driving force behind such regulatory offences, as the regulatory regime could be enforced quickly and efficiently through proof of the prohibited act only. To climb into the mind of the regulatory defendant, often a corporate one, would prove to be too difficult and contrary to the overarching objective of regulation, which is protection of the public from unsafe regulatory practices. However, where a criminal law sanction is used, Justice Lamer opined that only in exceptional circumstances, such as "natural disasters, the outbreak of war, epidemics," would such administrative efficiency "successfully come to the rescue" of such a breach of s 7 (at para 85). Otherwise, life, liberty and security of the person should not be "sacrificed to administrative efficiency" (at para 85). These sage words written thirty-three years ago still have meaning. The principles underlying the *Charter* and indeed "from time immemorial" cannot be thrust aside in circumstances where the government has alternatives or simply, in a rush to please, has not given careful consideration to those changes. The justice system may be bending under its own weight, but the answer is not to shore it up with a quick and easy fix.

The admission of "routine police evidence" in paper format, as mentioned earlier in this post, serves as another prime example of the government giving all due consideration to administration without considering the rationale or "end game". Presently, through our rules of evidence, we can make judicial or formal admissions at a criminal trial pursuant to s 655 of the *Criminal Code*. The section reads very broadly and confers a discretionary right on the defence to "admit any fact ... for the purpose of dispensing with proof". Typically, such admissions are made in a written and signed agreed statement of fact or agreed admissions, depending on the nature of such admissions. They are often used to admit continuity of an exhibit which a police officer has seized in order to relieve the Crown and the officer from minute descriptive recitation of exactly where the exhibit was located at every point in time of the investigation. Such admissions can save court time and are efficient. They are to be used as indicated – to dispense with proof. This signals to all parties that if a fact is not admitted, the Crown must prove it. Easy and simple to use. Fair and efficient. Enter, the proposed s 657.01, permitting police evidence be admitted at trial in affidavit format. The first question to be asked is why? Why do we need such a paper heavy process when the accused already has the use of s 655?

Let's go through a faux question and answer period to illuminate the point. The response to those "why" questions may be as follows: admissions under s 655 are formal and therefore binding and conclusive. The new proposed section permits admissions of fact informally, permitting the accused to lead evidence contrary to those affidavit facts, leaving the trier of fact to make the final determination of the issue. I see. Good point. However, so the response may be, if this form of evidence is to be treated like all evidence, in that it is subject to the assessment of the trier of fact, then what exactly is the point? Aha. Clever. But, the responder responds, the point is to relieve the police officer from attending court. A police officer's attendance, if not required, costs the government time and money. Oho, is the response to that salvo. So, the reason for this is administrative efficiency. Not quite, is the response. An accused can also request an officer attend. Really? So, says the responder. So now the burden is on the accused to speak up and ask for an officer to attend court, to give evidence as is his or her duty, and to present themselves for cross-examination only upon request despite the principles engaged in full answer and defence. When once the *status quo* was the Crown shouldering the responsibility to present in court

testable evidence as part of their obligation to prove guilt beyond a reasonable doubt, now the accused must request it. What was a given is now a discretion. Another point in time for the possible exercise of judicial discretion. Another addition to the now enhanced gatekeeper function of the trial judge. Another point in time where a self-represented accused might be overcome by an overly cumbersome process. Hmm. This seems awfully familiar. Isn't this what happened to the preliminary inquiry? Once it was a default position to have one unless the accused waived it. Then, it became a request. Now, it will be virtually gone, but for exceptional penalty circumstances. But this is mere process – relax, is the final word from the government. The final response may be – look at what happened with expert evidence – complacency in its admission and a failure to test the evidence resulted in miscarriages of justice until courts were forced to recalibrate the focus.

Finally, we have the *Charter* statements on these new amendments so crucial to the governmental approach. These statements, according to the government website on the issue, "are intended to provide legal information to the public" on "some of the key considerations that inform the review of a proposed bill for consistency with the *Canadian Charter of Rights and Freedoms*." In this instance, the government provides justifications for the amendments, couched in *Charter* speak, relying on a broad range of rights, such as s 7 in its various forms, the s 11(b) right to a trial within a reasonable time, the s 11(d) presumption of innocence, and the right to equality under s 15. However, when viewing the admission of "routine police evidence," for instance, this concern for the *Charter* feels ingenuine. Despite the government's *Charter* statements to the contrary, a sacrifice of one *Charter* right, such as limiting s. 7 full answer and defence, for another *Charter* right, such as using administrative expediency to temper s. 11(b) unreasonable trial delay, is not consistent with the spirit and vision of the *Charter*. Balancing may be needed but balancing requires a proper weighing of these rights in light of our case law. As Justice Iacobucci remarked in the majority decision in *R v Oickle*, 2000 SCC 38 (CanLII), the *Charter* represents the "bare minimum below which our law must not fall" (at para 31). Indeed, "the *Charter* is not an exhaustive catalogue of rights" (para 31). From "time immemorial" we have assiduously protected due process rights as a reflection of our rule of law. Our government may want us to accept the bare minimum but we in Canada deserve more. We see the government's attitude in those carefully crafted *Charter* statements, which on the surface advance transparency but are so carefully polished, they reflect rather than reveal. Self-serving in nature, these statements publicly maintain the proposed changes are consistent with or advance *Charter* rights, but it is more by the saying that these changes do this than by the fact they truly do. In other words, by saying so, the changes become so. So, it is written, so it is or must be. Whether written in stone or merely on paper, those statements should not be the outward public face of these changes. Again, Canadians deserve better – we deserve to hear the rationales and the potential outcomes. Hear it, not find it in the trail of papers.

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