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Dispensing Speedy Justice: The Supreme Court of Canada & Decisions from the Bench

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Recently, I was asked to comment on the recent Supreme Court of Canada decision on *R v Stephan*, 2018 SCC 21. The decision, given from the Bench immediately after the argument of the appeal, took many media outlets by surprise. The media, and to a large extent, lawyers, are not accustomed to speedy decision-making from the Supreme Court. We collectively expect the Court to reserve judgment and then, after months of diligent research and writing, the Court issues an unassuming missive that the judgment will be rendered on X date at Y time. I have often waited at my computer close to the appointed hour in order to immerse myself in the expectation of a new judgment release. For instance, I eagerly awaited the release of *R v Marakah*, [2017] 2 SCR 608 and *R v Jones*, [2017] 2 SCR 696, at 9:45 a.m. EST to be first in line to the lines of decision-making, which would, we all hoped, reveal the answers to the perplexing issues raised by the s. 8 issues surrounding the seizure of text messages found on a 3rd party's smart phone. True, the Supreme Court could disappoint as reality often does not live up to expectations. But at least we had 200 paragraphs on which to mull over how we should have or ought to have known better. So, when the *Stephan* decision was rendered so quickly, I began to wonder if this was a trend on the part of the Supremes or whether it was merely my own biases coming into play. I was determined, therefore, to see if in fact the Supreme Court is rendering from the Bench more often than in the past and if so, why.

First, I need to reveal my bias. This bias is based on a self-made presumption on the differing roles of a trial court and an appellate court and on the hierarchal stature of those courts as ingrained into me through law school and legal practice. The baggage I come with is this: that trial courts are a messy affair where the hubbub of provincial court requires speed over judicial consideration in contrast with the quiet decorum of the sparsely populated appellate courts filled with robes and lacking in lay observers. This perception of justice is overlaid with a leap in logic that in retrospect may be an improper inference: that the noisy and boisterous trial court, which dispenses speedy justice is not engaging the law writ big but is merely applying the law given to it by the bigwigs. This kind of decision making doesn't take long does it? The idea of a reserve in the trial courts is not as welcome as in the appellate arena as it spells unconscionable delay for a client with the charge hanging over her head or, even worse, it has some ominous meaning which cannot possibly result in a good outcome. But, the appellate courts, struggling with the law, now they should take their time to render a true and just decision. We want them to read, contemplate, to hear and consider and then to write so we can all take it in. Of course, we have the hybrid superior court where the pace is less frenetic and more scholarly – we will except *some* delay there but only for trial matters, applications and such must be dealt with summarily.

As outlined, this bias may result in the impermissible inference that what happens in provincial court doesn't matter but what happens in the hallowed halls of the Supreme Court must matter

because, well, they take so long. Or do they? After the release of *Stephan*, I was determined to find out.

I started with an analysis of 2018 from January 1 to May 21. There are 12 criminal law judgments rendered by the Supreme Court with 8 of those decisions given from the Bench, orally, immediately after the hearing of the appeal. Out of those 8 oral decisions, 3 of the appeals (*R v GTD*, 2018 SCC 7, *R v Black*, 2018 SCC 10, *R v Stephan*, 2018 SCC 21) are allowed resulting in new trials. Two of 3 appeals allowed are from the Court of Appeal of Alberta.

A Bench decision, does not mean unanimity; 3 of the 8 decisions have dissenting positions from one member of the panel (*R v GTD*, 2018 SCC 7 with Chief Justice dissenting, *RA v Her Majesty The Queen*, 2018 SCC 13 with Justice Gascon dissenting, *R v Cain*, 2018 SCC 20 with Justice Côté dissenting). Seven of the 8 Bench decisions, are from appeals as of right, as appeals, not requiring leave, on a question of law arising from a dissent in the lower appellate court. Only 1 decision *R v Seipp*, 2018 SCC 1, was a dismissal after receiving leave to appeal. On the civil side, there are 10 judgments released thus far this year with only 1 judgment dismissing the appeal from the Bench but with a dissenting decision (*International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence*, 2018 SCC 11). Of note, 1 of the judgments released with reasons, *R v Magoon*, 2018 SCC14, was an appeal heard and dismissed, with the co-accused's appeal *R v Jordan*, 2017 CanLII 80438 on November 27, 2017, but with an indication by the Court that reasons would follow.

As an aside, of the 4 criminal appeals with written reasons, 2 cases are from the Court of Appeal of Alberta. In *R v Canadian Broadcasting Corp*., the Court considered whether the CBC must delete publicly accessible information on a case for which a publication ban was issued after the publishing of that information. The Supreme Court allowed the appeal, unanimously reversing the majority decision of the Court of Appeal and upheld the decision of the chambers judge who dismissed an application for a mandatory interlocutory injunction to order the deletion of the information. The other written decision, is the previously mentioned *R v Magoon*, which was dismissed unanimously. Of the 12 decisions rendered on criminal cases this year, half of those are from the Court of Appeal of Alberta.

What does all of this mean? At first blush, there appears to generally be a large number of appeals going to the Supreme Court from Alberta. The reason for this is due to s. 691, which gives an offender the right to appeal to the Supreme Court on a question of law where a judge of the court of appeal dissents. Four of the 8 oral judgments are from Alberta as appeals as of right under s. 691(1)(a) based on a dissenting decision on a question of law. The other 3 as of right appeals with an oral decision are from the Ontario (with 2 cases) and Nova Scotia appellate courts. What we can infer from this that there are a large number of dissenting decisions, on a question of law, from the Court of Appeal of Alberta. This can then lead to an inference that this higher number of dissenting decisions in Alberta are leading to a larger criminal case load in the Supreme Court. As the majority of the appeals are as of right and are not heard on the basis of leave involving issues of national importance or due to conflicting decisions from province to province, they do not engage the deep analysis needed from the Supreme Court as the final court of appeal.

This propensity to deal with the higher caseload by rendering immediate decisions from the Bench, may also however be directly connected to a new cultural shift in the post-*Jordan* era. The Supreme Court must administer their court, as they admonished the lower courts to do, efficiently and effectively. Timeliness is a key feature of the s. 11(b) unreasonable delay decisions of *R v Jordan*, [2016] 1 SCR 631 and *R v Cody*, [2017] 1 SCR 659 and that timeliness depends upon the administration of justice and court management. In many ways, the Supreme Court by setting an example of a hard-working court who reviews written material in advance, who is able to retire after hearing argument to make a final determination on legal issues, is signalling to the lower courts, including the appellate courts, that efficiencies can be found.

In an effort, therefore to dispose of the volume of appeals, heard as of right, in a timely manner, the Supreme Court is dispensing their decisions on these cases more readily from the Bench. In so doing, they are essentially choosing "sides" by indicating whether they substantially agree with the majority or the dissent. They are, however, not only leaning on the lower court decisions in these oral judgments, but are often adding brief oral reasons, highlighting the basis for their decisions. For instance, in the most recent decision of *R v Stephan*, the Court agreed with the dissent of Justice O'Ferrall but briefly particularized the basis of that agreement. More substantial oral reasons were given in *R v GTD*, 2018 SCC 7, again from Alberta, but on the issue of a breach of the Appellant's right to counsel under s. 10(b) of the *Charter* and whether the violation should result in the exclusion of the statement under s. 24(2). Here, the majority of the Supreme Court allowed the appeal against conviction and reversed the majority decision of the Court of Appeal of Alberta This was a significant decision as it found a right to counsel violation when the police officer fails to "hold off" in questioning the accused where the accused indicates a desire to exercise their right to speak to a lawyer. The statement in that case was given after the Appellant was read his right to counsel with an indication he wanted to exercise that right, but the officer immediately proceeded to ask if he had anything to say, a usual question asked at the end of the standard caution. This "standard" practice was not only a violation but one in which the Court found was serious enough to require the statement given to be excluded under s. 24(2). Although a brief oral judgment, this was an important one.

However, this rush to judgment may not always be satisfactory. Although, *R v GTD* oral decision is clear enough, the oral reasons in the *Stephan* case seem to leave us wanting more. In that case, the Appellants were convicted by a jury of a failure to provide the necessaries of life to their young child under s. 215 of the *Criminal Code*. The majority of the Court of Appeal for Alberta found no error in the instructions to the jury, relying on the familiar case law tropes which urge appellate courts to view the so-called error in the context of the whole charge to the jury, to not be blinded by formulaic instructions but to look at content over form and to keep in mind that a jury charge need not be error free or "perfect" (paras 43 to 44, 86 to 87 & 105, 108 & 135).

In contrast, the dissenting Justice O'Ferrall found much wrong and little right in the instructions to the jury. At paragraph 212, he calls the instructions on the essential elements of the offence "confusing, misleading, and deficient." The charge was so "problematic" (para 212) that it gave the jury 'little choice but to convict" (para 214). Specifically, Justice O'Ferrall commented on the failure of the trial judge to explain what would constitute a "failure" to provide the necessaries of life and whether that so-found "failure" would amount to an endangerment of the child's life (paras 226 to 243). These concepts were key to proving the *actus reus* elements of the

offence and needed clear and separate attention rather than the collapsed discussion of those elements offered to the jury. He also identified an error in the trial judge's lack of explanation of the *mens rea* requirement of the offence, which required proof that the Appellants conduct was a marked departure from the standard of a reasonably prudent parent (paras 244 to 272). The trial judge failed to not only explain the meaning of the term but also failed to connect to that term the relevant trial evidence on the issue.

The Supreme Court agreed with the dissent of Justice O'Ferrall by stating from the Bench in a decision given by Justice Moldaver, known as the 'criminal law judge' on the Court, that

> "In particular, we agree that the learned trial judge conflated the *actus reus* and *mens rea* of the offence and did not sufficiently explain the concept of marked departure in a way that the jury could understand and apply it."

Considering the issues raised by Justice O'Ferrall, this case would have benefited from a written decision on what the legal meaning of "failure" is in the context of s. 215 specifically but also generally in the context of offences that require an omission to act rather than a commission. Additionally, an analysis of the meaning of the term "marked departure" would further clarify an area of law, namely objective *mens rea* offences, which calls out for clarity. Although the Supreme Court in *R v Beatty*, [2008] 1 SCR 49, went a long way in ending a decades long argument in the Supreme Court on what form of liability criminal negligence is (objective) and that no personal characteristics are imported to the reasonable person construct, it did not provide a meaningful description of what a marked departure, in reality, would be. The best Madam Justice Charron, speaking for the majority, could do was to articulate what "marked departure" was not. It is not a form of civil negligence. It is *blameworthy* conduct that amounts to penal negligence (para 6). That may help but whether that would in reality help a jury decide is another matter.

In fact, I often explain "marked departure" in class spatially, showing the difference between being off the standard civilly and being off the standard markedly as a difference in space between my outstretched hands. That usually garners a giggle or two in the class, but there are more than giggles when I then demonstrate the "marked and substantial departure" standard for s. 219 offences. The laughter is often short-lived when the students struggle to articulate the differing standards on an exam. Even with an application of facts to the standard, which should assist in the discussion, the students feel a sense of vertigo when trying to apply the law to the facts. The *Stephan* case would have been a perfect opportunity for the Court to set things right and give those who must apply the law a meaningful standard on which to base their decisions.

This brief foray into the 2018 bench decisions has revealed some interesting possibilities as to why lately there just seems to be so many oral decisions rendered from the Supreme Court bench. Those reasons may be procedural (appeals as of right), may be jurisdictional (large number of dissenting decisions from the Court of Appeal of Alberta), may be a push to become aligned with the post-*Jordan* era or may be a combination of all three. Certainly, there is a need to go further in this analysis to determine what 2017 looked like and whether this is the 'new look' of this new court now lead by a new Chief Justice. There is also a need to determine if this change did indeed happen after the release of *Jordan* or whether this a hiccup due to dissension

in the Alberta appellate court. Whatever the true reason is, there will still be a need for the Supreme Court to act as the final arbiter of the law to give clarity in those areas where we need direction and to not just speak the words of justice but to dictate them as well.

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