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Peter M. Neumann

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## Charter Justice in Canadian Criminal Law

Don Stuart

Scarborough, Ont.: Carswell, 1991, 436 pp.

Reviewed by Peter Neumann\*

Empirical studies measuring the impact of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> on judicial proceedings confirm that the *Charter* has been particularly influential in the area of criminal law. Morton and Withey's 1987 statistical analysis of *Charter* decisions, for example, found that some two-thirds of all reported *Charter* cases have been challenges to the conduct of police charged with enforcing the *Criminal Code*<sup>2</sup> and other federal and provincial statutes.<sup>3</sup> More recently, Morton's study of judicially nullified statutes<sup>4</sup> reveals that, among federal statutes, the *Criminal Code* has been the most affected by the *Charter*, followed by the quasi-criminal *Narcotics Control Act*<sup>5</sup> and the *Food and Drugs Act*.<sup>6</sup> Moreover, the *Charter* rights that most frequently serve as the basis for annulling statutes are the "legal rights" set out in ss. 7-12. Of the 89 successful *Charter* arguments against federal and provincial legislation between 1982 and 1988, 49 were based on these legal rights.<sup>7</sup>

The *Charter* has thus proved to be fertile jurisprudential soil for the re-interpretation and constitutional "re-alignment" of criminal law doctrine in Canada. Don Stuart's *Charter Justice in Canadian Criminal Law* is an important attempt to examine and assess this constitutional re-alignment.

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\* Dalhousie Law School, LL.B. anticipated 1994.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>2</sup> R.S.C. 1985, c. C-34.

<sup>3</sup> F.L. Morton and M.J. Withey, "Charting the Charter, 1982-1985: A Statistical Analysis" (1987) *Canadian Human Rights Yearbook* 65, at 72-74.

<sup>4</sup> F.L. Morton, G. Solomon, I. McNish and D.W. Poulton, "Judicial Nullification of Statutes Under the Charter of Rights and Freedoms, 1982-1988" (1990) 28 *Alta. L.R.* 396, at 406.

<sup>5</sup> R.S.C. 1985, c. N-1.

<sup>6</sup> R.S.C. 1985, c. F-27.

<sup>7</sup> *Ibid.*

Criminal law, as Stuart notes, has become constitutionalized "to an extent that demands careful study and knowledge by the legal profession."<sup>8</sup> Perhaps the most obvious consequence of this "constitutionalization" is that students and practitioners of criminal law must also become fluent in the substantive and interpretive principles of *Charter* litigation. If a defence to a criminal charge rests on arguing successfully the unconstitutionality of the charge, then it is clear that criminal law can no longer be considered in a constitutional vacuum.

Moreover, by elevating many of the fundamental principles of criminal law to the status of "the supreme law of Canada"<sup>9</sup> – principles such as the right to be presumed innocent until proven guilty, or the right not to be arbitrarily detained or imprisoned – the *Charter* has simultaneously breathed new life and meaning into them. It has also authorized the judicial refashioning of significant aspects of the criminal law in Canada. As Madame Justice McLachlin has observed:

A legal rule [formerly] relevant to a fundamental right may be too narrow to be reconciled with the philosophy and approach of the *Charter* and the purpose of the *Charter* guarantee.<sup>10</sup>

*Charter Justice* traces the central authorities and arguments in the interpretation of these fundamental rights and principles in order to provide the reader with a practical understanding of how they function in Canadian courts today.

Structurally, *Charter Justice* is subdivided into chapters according to the *Charter* sections with which the book is primarily concerned, namely ss. 1, 7 - 15 and 24. This structure is logical given the aim of the text; Stuart is not concerned with revisiting basic criminal law doctrine, except as it has been affected by or is relevant to, the *Charter*. Rather than using basic criminal law principles as points of departure and then analyzing them in light of the *Charter*, Stuart in effect does the reverse. Each *Charter* right serves as a window through which he explores and assesses the jurisprudential history, and the impact on challenged criminal law provisions and doctrines.

This approach is particularly well-suited to criminal lawyers and to students who wish to make *Charter* arguments and require a practical guide to understanding both general and specific principles of *Charter* criminal litigation. *Charter Justice* was written following a sabbatical year during which Stuart worked full-time as a prosecutor in the busy trial courts of Toronto. Given the great volume of *Charter* case law that has accumulated, and the complexity of

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<sup>8</sup> D. Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough: Carswell, 1991) at vi [hereinafter *Charter Justice*].

<sup>9</sup> See s. 52 (the "supremacy clause") of *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>10</sup> *R. v. Hebert*, [1990] 2 S.C.R. 151 at 164.

*Charter* issues – many of which, as Stuart notes, are yet to be resolved decisively by the courts – there is clearly a need for a text that will allow the practising lawyer to sift quickly and thoroughly through the pertinent law. *Charter Justice* is both sufficiently broad in scope, and practically structured, to meet this need.

In substance, too, *Charter Justice* offers a great deal to either the interested reader or the practising lawyer. The book is well-researched, comprehensive, and succinct. For each *Charter* right examined, Stuart thoroughly canvasses the relevant case law and provides the reader with footnoted secondary sources for further discussion. Where the law appears problematic or inconsistent, he critically assesses it and suggests alternative solutions. Stuart quotes from court decisions, but only if these are authoritative and provide the reader with the substantive meaning of the right in question or the *ratio* of the case. If the case contains a passage that has become well recognized due to frequent citing, Stuart appropriately includes it as well. For example, the reader is reminded that Viscount Sankey referred to the constitution as a “living tree capable of growth and expansion,”<sup>11</sup> but also that, as per Mahoney, J.A., “even the liveliest of living trees takes time to grow – it is a tree, not a weed.”<sup>12</sup> While these *dicta* are not always precise statements of the law, they are nonetheless important because they familiarize the reader with the broader discourse that has evolved from the cases. They also enliven the reading.

The first chapter addresses the basic principles of any litigation utilizing *Charter* argumentation. Included are the principles relating to purposive interpretation,<sup>13</sup> waiver,<sup>14</sup> jurisdiction,<sup>15</sup> onus and standard of proof,<sup>16</sup> and extrinsic evidence.<sup>17</sup> The chapter also provides a critical review of s. 1 analyses by the Supreme Court in a number of recent cases since the “authoritative blueprint” case, *R. v. Oakes*.<sup>18</sup> Stuart argues that the formalistic approach laid down by the Supreme Court in *Oakes* has since steadily and dangerously moved to a more flexible, but inconsistent approach, including the “test of effectiveness” expounded in *R. v. Chaulk*.<sup>19</sup> Rather than requiring *Charter*

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<sup>11</sup> *Charter Justice*, *supra* note 8 at 4; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.).

<sup>12</sup> *Ibid.* at 6; *Public Service Alliance of Canada v. The Queen*, [1984] 2 F.C. 889 at 894 (Fed. C.A.).

<sup>13</sup> *Charter Justice*, *ibid.* at 4-8.

<sup>14</sup> *Ibid.* at 21-22.

<sup>15</sup> *Ibid.* at 23-31.

<sup>16</sup> *Ibid.* at 32-33.

<sup>17</sup> *Ibid.* at 33-35.

<sup>18</sup> (1986), 50 C.R. (3d) 1 (S.C.C.).

<sup>19</sup> (1991), 2 C.R. (4th) 1 at 32 (S.C.C.).

limitations to be as minimally intrusive as possible, *Chaulk* asks "whether a less intrusive means...would achieve the same objective as effectively."<sup>20</sup> Stuart argues that, given the criminal context, this test inappropriately relaxes the burden of justification on the state. He further argues that it is out of step with other judicial rulings, including those on constructive murder and the rape shield law.

The subsequent chapters address individual *Charter* rights, reviewing the issues and the law surrounding each right. The rights examined are those falling under the "legal rights" heading of the *Charter*, ss. 7-14, and the "equality rights" in s. 15. Section 24 remedies are analyzed in the final chapter of the book. Again, Stuart provides insightful critical commentary where the courts have been indecisive or have produced, in his opinion, bad law. For example, he criticizes the current uncertainty surrounding the pre-trial right to silence under s. 7, and the extent to which the courts permit undercover police to try to extract incriminating evidence from persons under arrest.<sup>21</sup> In the same vein, he argues that the police should be required to advise accused persons of their right to silence.<sup>22</sup> With respect to s. 8, Stuart points out the need for a comprehensive legislative scheme to clarify police search and seizure powers.<sup>23</sup> In each of these areas, greater certainty in the law, Stuart notes, is in the interest of both the police and the policed; the uncertainty of the common law is incompatible with the immediate and often dangerous demands of policing and threatens the civil liberties of citizens.

Other sections of the *Charter*, including s. 2 (fundamental freedoms), s. 19 (language rights), and, although technically not part of the *Charter*, s. 35 (aboriginal and treaty rights), would have merited examination because the criminal courts are also faced with litigation on these sections. This is clearly a shortcoming of the book, particularly in view of the high profile nature and political significance of some of the issues being "resolved" under these sections. Three such cases come to mind: *R. v. Zundel*,<sup>24</sup> *R. v. Keegstra*<sup>25</sup> (freedom of expression, s. 2(b)), and *R. v. Sparrow*<sup>26</sup> (aboriginal and treaty rights, s. 35). These cases have forced the courts to redirect policy-making away from traditional criminal law principles, into less certain areas of the law. To be fair, however, because of the paucity of the case law and the indecisiveness of

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 8 at 94-95.

<sup>22</sup> *Ibid.* at 95.

<sup>23</sup> *Ibid.* at 141.

<sup>24</sup> (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

<sup>25</sup> (1990), 61 C.C.C. (3d) 1 (S.C.C.).

<sup>26</sup> (1990), 56 C.C.C. (3d) 263 (S.C.C.).

the courts in adjudicating some of these issues, there is no meaningful body of law under these rights and guarantees. Nonetheless, these matters are before the criminal courts and should, therefore, be included in any book such as Stuart's that seeks to clarify *Charter* jurisprudence in Canadian criminal law.

A second shortcoming is Stuart's tendency to rely principally on judicial decisions to explain and assess the meaning of *Charter* rights. Although he points to additional critical commentary in his footnotes, these arguments could be incorporated to a greater extent in the body of the text, providing the reader with a broader perspective of the issues that have arisen around each *Charter* right. The separation of case law from critical commentary, however, apart from Stuart's own discussion, allows the book to maintain a sharper focus while also providing readers who require additional critical observations with the relevant secondary sources.

Overall, *Charter Justice* provides the reader with a very useful and thorough introduction to the application of the *Charter* in Canadian criminal courts, and to the principles which have emerged from the constitutionalization of criminal law doctrine. The book is a welcome addition to Canadian criminal legal literature.