Focus CRIMINAL LAW

High court's decisions ease fears of political bias

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The nine judges who sit on the Supreme Court are the ultimate guardians of individuals' rights guaranteed under the *Charter*. Those judges define the contours of those rights and order remedies to vindicate breaches of those rights.

Five of the eight judges now sitting on the Supreme Court were appointed by Prime Minister Harper. Once the spot that was to be held by Justice Marc Nadon is filled, it will be six of nine. It is these judges who have had, and will continue to have, the final say over various aspects of the tough-on-crime approach implemented by the current Parliament.

Little wonder then that commentators have fretted over Prime Minister Harper's appointments, querying whether those newly appointed judges would be more deferential to the Conservative-majority Parliament's decisions and roll back established rights. As Kirk Makin wrote following the elevation of Justice Richard Wagner to the Supreme Court, "Mr. Harper is well on the way to refashioning the very bench that will ultimately rule on the legitimacy of several controversial aspects of his criminal-law reform package."

The spectre was raised, if rarely stated outright, of a Supreme Court filled with political appointees who would rubber-stamp wholesale a Conservative agenda. As it happens, that did not come to pass. To the contrary, the court has issued a series of rebukes to the positions supported by the Conservative government. Many of those decisions are well-known: the unanimous decision in *Canada (Attorney General) v. Bedford* striking down portions of Canada's prostitution laws; its 6-1 decision to invalidate the appointment of Justice Nadon to the Supreme Court; and its unanimous decision that the government's plans for unilateral Senate reform were impermissible.

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However, less highly publicized, though equally significant, is the Supreme Court's approach to criminal law reforms instituted by the government. Rather than implement wholesale various law and order reforms, the Supreme Court (including all of the judges appointed by Prime Minister Harper) has carefully scrutinized the government's reforms.

In some cases, the Supreme Court has struck down legislative changes by Parliament, including in the domains of criminal procedure and sentencing. For example, in *Canada (Attorney General) v. Whaling*, the court unanimously held that the retrospective application of provisions repealing early parole to offenders already sentenced was unconstitutional. Similarly, in *R. v. Tse*, in a unanimous decision, the court struck down s. 184.4 of the *Criminal Code*, which allowed police officers to conduct wiretaps without a warrant in certain circumstances. (Incidentally, that decision was jointly authored by Justices Michael Moldaver and Andromache Karakatsanis, the Prime Minister's third and fourth appointees. Symbolically, it was the first decision of the court authored by each.)

In other cases, the court has blunted the hard edges of Parliament's reforms. Perhaps most notable in this respect is its April decision in *R. v. Summers*. In that case, the court had to consider the effect of the 2009 *Truth in Sentencing Act*. That statute eliminated the previous common practice of granting 2:1 credit in sentencing for pre-sentence custody, purported to make 1:1 the norm, and allowed judges to grant 1.5:1 credit "if the circumstances justify it."

The accused in *Summers* had been granted 1.5:1 credit by the trial judge. The question before the court was whether the circumstances justified a grant of 1.5:1 credit. In a unanimous decision written by Justice Karakatsanis, the court held that while the *Truth in Sentencing Act* capped credit for pre-sentence custody at 1.5:1, it did not change the grounds on which enhanced credit could be ordered. Consequently, the court held that, as previously, the loss of eligibility for parole and early release were grounds for granting enhanced credit for pre-sentence custody. The court also noted that while the relative harshness of conditions could also provide a rationale for enhanced credit, "the loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1."

The effect of *Summers* is that, in most cases, 1.5:1 will likely become the new norm for taking pre-sentence custody into account in sentencing. While this decision does not strike down any aspects of the *Truth in Sentencing Act*, it does blunt its effect.

None of this is meant to suggest that the judges appointed to the Supreme Court by the Prime Minister share precisely the same legal views of those appointed by earlier Prime Ministers. There have been decisions where the court has been divided, based on the Prime Minister who appointed the judges (see, for example, *R v. MacDonald*). However, while there may be differences in judges' legal views, to date the judges appointed to the Supreme Court remain willing to carefully scrutinize legislation. Concerns about a wholesale erosion of rights have not materialized.

In hindsight, this should not be surprising. The judges appointed to the Supreme Court are all eminently qualified jurists, with ample experience as judges, in private practice, as law professors, and in the public service. While judges each bring their unique experience and perspectives to the bench, they adhere to and operate within a well-established legal framework. There should be no presumption that they will disregard that, simply on the basis of who appointed them.

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Alibis: Alternatives to coercive methods

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rendered the statements elicited involuntary, unreliable and therefore inadmissible. In his ruling, Justice Fletcher Dawson found that, notwithstanding that the *KGB* criteria (*R. v. B. (K.G.)* [1993] 1 S.C.R. 740) had been met, he was left with serious misgivings about the reliability of Cox's recantation of his alibi. He found that the disputed part of the Cox interview was inadmissible. He also excluded the Allison interview "for the truth of its contents" but he did permit the prosecution to use the statement for the limited purpose of testing the witness's credibility during examination, but with the jury being expressly prohibited from relying on the statement to make any findings of fact.

The Morgan case demonstrates that the Reid interrogation method can be used to extract inculpatory statements from eyewitnesses and retractions from alibi witnesses. Because the trustworthiness of such statements is compromised by the pressure tactics and threats used to procure them using the Reid Technique, the criminal justice system is ill-served by such methods. There are viable interviewing methods for suspects and witnesses that do not rely on oppressive or accusatory methods (e.g., the Cognitive Interview). Criminal defence lawyers should be alerted that using coercive interview practices could possibly imperil trial fairness.

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