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CASE COMMENT
R. v. SHeldon S.

Leonard Marvy*

A vision of Canada incorporates equality values – reflected in the Canadian Charter of Rights and Freedoms¹, (hereinafter referred to as the Charter) and federal values – reflected in the whole of our Constitutional documents. While these values may live together in harmony, they are often discordant. When legislative attempts at balancing these values result in legal cacophony, the appellate courts are called upon to make significant interpretive decisions. One such decision was R. v. Sheldon S² (hereinafter referred to as Sheldon).

BACKGROUND

In Sheldon the court decided that the Ontario government’s decision not to implement alternative measures under the Young Offenders Act³ (hereinafter referred to as the Y.O.A.) infringed Section 15 of the Charter. Sheldon was charged with possession of stolen property. Before entering a plea, Sheldon’s counsel brought a motion that the failure of the Attorney General of Ontario to authorize a program of alternative measures violated his client’s Section 15 equality rights. The trial judge held that this failure resulted in discrimination on the basis of residence contrary to Section 15 of the Charter and the charge against Sheldon was dismissed.

On appeal the majority of the Ontario Court of Appeal not only held in favour of Sheldon but stayed proceedings of young people (who might reasonably be eligible for alternative measures) under the

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2 (17 March 1988), #761/86 (Ont. C.A.).

3 S.C. 1980-81-82-83, c. 11.
Y.O.A. until the Province implemented an alternative measures program. The Attorney General of Ontario responded by informing the public of Ontario's intention to appeal the decision to the Supreme Court while implementing an alternative measures program in the interim.

The Y.O.A., proclaimed in 1984, replaced the Juvenile Delinquents Act as criminal legislation aimed at young people in trouble with the law. Although there was a major shift in policy from an emphasis on paternalism to more of an emphasis on accountability and responsibility, the Y.O.A. did continue to recognize the special needs of young people through its Declaration of Principles set out in Section 3. Additionally the Y.O.A. included a section on alternative measures which, in part, states:

4 (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

(a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;

At the time of the case all provinces except Prince Edward Island and Ontario had implemented some form of alternative measures program.

At first blush Sheldon appears to ring a resounding victory for the equality rights of young offenders in Ontario. On further analysis however, the effect of the decision is unclear. This lack of clarity is due in the first instance to the circular reasoning used by the majority. Should, however, the decision be upheld, the effect of the 'victory' must still be considered illusory.

4 (24 March 1988), "Statement to the Media" by the Honourable Ian Scott, Attorney General, on Ontario's Response to the Ontario Court of Appeal's Decision Regarding the Young Offenders Act.

SECTION 15 OF THE CHARTER

The majority\(^6\) of the Court of Appeal began by examining the Section 15 issue and subsequently decided what the law is “which results in a denial of equal benefit to young persons in Ontario.”\(^7\) When considering the law that contravened the Charter the majority examined Section 4 (in the context of the Declaration of Principles) and concluded the designation of alternative measures programs was “required by the Young Offenders Act.”\(^8\) If the conclusion is correct, the question of a Charter infringement disappears. The Attorney General has (simply) broken the law! Once the Court decides the law “requires” alternative measures programs (viz., the Attorney General has no discretion) the inquiry should be over. The incongruity of the reasoning becomes more apparent when one examines two specific parts of the decision.

First, the majority entertained a Section 1 inquiry to see if the Attorney General’s decision could be ‘saved’. It is not clear how this is possible given the conclusion. If, somehow, Ontario’s decision were ‘saved’ by Section 1, then Section 4 of the Y.O.A. must not require alternative measures programs. Yet, the court had already ruled that alternative measures programs are required. Put another way, the Attorney General is given authority to act from law. Either the Attorney General is required to implement alternative measures programs or the Attorney General has a choice. If the proper construction of the statute requires the Attorney General to implement alternative measures programs, then no Charter inquiry is necessary. If, however, the Attorney General may implement and that decision brings forth a Charter challenge, it is the law which may contravene the Charter, not the decision. The minority basically argued in this manner.\(^9\) The point is: if the majority has construed the statute correctly, there appears to be no need for a Charter inquiry.

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\(^6\) Tarnopolsky and Krever JJ.A.

\(^7\) Sheldon, Supra, note 2 at 49.

\(^8\) Ibid. at 52.

\(^9\) Ibid. at 19. Robins, J. A. in his minority judgement stated that: "Section 4 properly construed leaves the decision of alternative measures authorization to the discretion of each province" and supported that with ordinary statutory interpretive techniques (the words are plain and unambiguous; Parliament could have used "shall" had they intended that). Once it was established that Section 4 allowed provincial discretion (and this was supported by extrinsic material) the question was whether this discretion violated Section 15. Robins J.A., in short, concluded that the Attorney General’s decision cannot be the ‘law’and hence violate Section 15. If anything does, it must be Section 4 itself:
Second, during the second step of the Section 15 inquiry the majority acknowledged that it was possible that Prince Edward Island young offenders might not be similarly situated to young offenders in other provinces. That seems to suggest that it would be possible for the Prince Edward Island Attorney General not to implement alternative measures programs and that this would not contravene Section 15 of the Charter. However, as noted, the court concluded that alternative measures programs are required. It is not clear how one condition can coexist with the other. Either Attorneys General have discretion or they do not. If the majority is correct in saying that Section 4 (supported by Section 3) requires the implementation of alternative measures programs and the Attorneys General only have discretion with respect to “a young person”, then the Prince Edward Island Attorney General must abide by the same law. It is difficult to understand how the same federal law could be read ‘shall’ for Ontario, and ‘may’ for Prince Edward Island.

EQUALITY OF BENEFITS

It must be noted that the basis of the original motion – that the Attorney General’s failure to implement alternative measures contravened the Charter – dictated the subsequent argument. The apparent circularity in the reasoning (if it is so) no doubt arose due to the nature of the original motion and the primary arguments.

It is hoped that on appeal to the Supreme Court the issue of whether Section 4 contravenes the Charter is decided. That would raise a spe-

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"The Charter cannot be invoked to compel the establishment of programs which parliament left to provincial discretion. To do so would be to rewrite the legislation."

10 The court used the 3-step test developed in R. v. Ertel (1987), 58 C.R. (3d) 252 (Ont. C.A.). The 3 steps are: 

1) an identification of the class of individuals who are alleged to be treated differently; 
2) a consideration of whether the class purported to be treated differently from another class is similarly situated to that other class in relation to the purpose of the law; and 
3) a determination as to whether the difference in treatment is "discriminatory" in the sense of a pejorative or invidious or disadvantageous purpose or effect of the law or action impugned.

11 The Court did have counsel return to argue whether Section 4 contravened the Charter, but the case was not decided on this point.
cific example of the more general complex problem which has been recently described:

The extent to which diversity is permitted in laws applicable either across the country or within a particular jurisdiction (federal or provincial) will be a difficult problem under the equality rights guarantee. Governments make different choices and have different priorities in their regulatory policies, and some jurisdictions have more funds to extend their programmes and benefits than do others.\footnote{12 K. Swinton, "Competing Visions of Constitutionalism: Of Federalism and Rights (Draft)" in M. Chandler and K. Swinton eds. Advanced Constitutional Law: Federalism and Public Policy, Vol II (Toronto: 1988) at 591.}

Surely the question to be argued (and decided) is whether Section 4 is valid legislation. That is, does this specific federal criminal law, aimed at providing alternative measures program with young offenders, and permitting discretion and therefore diversity amongst the provinces, contravene the\footnote{13 For a thorough discussion on distribution points of equal benefits see A. Bayefsky "Defining Equality Rights" in A. Bayefsky and M. Eberts eds. Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 1 at 23.} Charter? The federal law is really at issue here, not the Attorney General's decision.

If the Supreme Court simply upholds the decision (that is, Section 4 properly construed reads 'shall' and the discretion exists with respect to 'a' young person), then the victory for equality rights for young people is illusory. The purported illusion becomes more apparent when one examines the theory of equality of benefits.

Two distribution points for benefits have been discussed when considering questions of equality. These are access to the benefit and effect of the benefit. If we assume that alternative measures programs are a benefit (and this was a finding of fact), then the Court of Appeal's decision has only ensured that an alternative measures program exists in each province. By the court's own reasoning the Attorneys General would still have discretion with respect to which young offenders qualify for these programs. Therefore a young offender in British Columbia charged with an offence might have access to alternative measures programs, whereas one in Ontario charged with exactly the same offence may not. Young offenders who have access to this benefit may vary widely across provinces, since Section 4 provides no criteria.
Case Comment

169

with respect to which offenses are appropriate for entry into the alternative measures programs.14

If alternative measures programs are a benefit substantial enough to attract equality rights Charter attention, then at least equality of access should be granted. Otherwise by allowing each province to set its own levels for which young offenders meet the criteria an illusion of equality is created. Merely having an alternative measures program in each province does not even guarantee equality of access. If young offenders in one province can have access to an alternative measures program where the same class of young offenders in another cannot, that situation appears just as counter to the Charter as one province having a program and another no program at all.15 The difference is one of quantity, not principle.

While equality of access to the benefit was not really strengthened by the decision, equality of effect of the benefit has not even been addressed. Even if the criteria were standardized across the provinces for access to these alternative measures programs, the programs themselves, of course, would be far from equal. This situation, of course, seems much more congruent with the concept of federal values. Different provinces having different resources and policies provide a different quality of benefit to people. It is not even clear that Section 15 of the Charter attracts that kind of equality for benefits. Perhaps, though, this is an appropriate place to draw a line when equality values meet federal values on matters of benefits. True equality of access could meet Charter guarantees and appropriate (in)equality of effect could incorporate federal values and regional realities.

Sheldon has raised an important question about the degree of diversity that will be permissible, given the equality provisions of the Charter. When the Supreme Court brings down its first case on Section 15 the task of answering this question will have just begun. Sheldon is not an "easy"

14 It seems that if the validity of Section 4 is directly challenged on appeal to the Supreme Court and if Section 4 is found to contravene Section 15, then it cannot be saved under Section 1. The total lack of any criteria would not pass the 'prescribed by law' part of Section 1.

15 This exact point was recently substantiated in R. v. Gregory S. (8 July 1988) Toronto Reg. #805290 [unreported] (Ont. Prov. Ct. Fam. Div.), where King, J. decided that Gregory's Section 15 Charter rights had been violated since he had been denied equal protection of the law vis-a-vis other provinces (and vis-a-vis other young offenders in Ontario).
case like *Re: An Act to Amend the Education Act* 16 which pitted Section 2(a) of the *Charter* against Section 93 of the *Constitution Act, 1867.* 17 Federal constitutional values clearly prevailed over *Charter* values in that instance. In *Sheldon* a much more subtle balancing is required. While the federal government has the power to enact legislation which permits provincial disparity in the criminal law, Section 15 of the *Charter* has surely brought any such attempts under strict judicial scrutiny.

The Supreme Court should consider and decide whether Section 4 contravenes the *Charter*. Only then will the difficult and salient policy issue (the extent of provincial diversity which should be allowed given the equality values in the *Charter*) be addressed. Once alternative measures programs are deemed a benefit, then young offenders across Canada should have, at least, a right to equal access to this benefit. The very difficult policy issue is how to provide equal access to this benefit. If the federal government were to amend Section 4 to provide standard criteria for admission to alternative measures programs, then on its face there would be equality of access. However, the special needs of young offenders may then not be able to be recognized (which is counter to the principles of the *Y.O.A.*). On the other hand if the discretion is left to the Attorneys General (even bound by the spirit and purpose of the *Y.O.A.* as expressed in the Declaration of Principles), there will continue to be wide provincial disparity. The decision in *R. v. Gregory S.* 18 suggests that the Attorney General must exercise his discretion for every young offender (that is, exclusionary criteria with respect to alternative measures program fetter the Attorney General's discretion). This solution however does not bring us any closer to guaranteeing equality of access (which must be the ultimate policy goal). There is no guarantee that, even if the Attorneys General use their discretion with every young offender that their interpretation of the "protection and interests of society" (which by law they must consider when using their discretion) might not be very different depending upon which 'society' one is acting for.


17 The court basically held that Section 93 was insulated from *Charter* review since the incorporation of the *Charter* into the *Constitution Act, 1982* did not change the original Confederation bargain with respect to the plenary power of the provinces in relation to denominational, separate or dissentient schools.

18 *Supra,* note 15.
In my opinion this brings us full circle to the inadequacy of the federal legislation in the first instance. The federal government should amend Section 4 and provide standard criteria for access to this benefit. While these criteria may limit access to alternative measures programs to some young offenders, they will provide national uniformity with respect to young offender's access to this benefit. In this way the equality rights of the Charter will be recognized in a significant manner and there will still be ample room for acknowledging provincial interests, given that the (effect of the) benefit will be controlled through the resources and policies of the provinces.