Due Process & The Effects On Police Authorities

Ryan Venables
001803493
University of Western Ontario
Professor Belle-McQuillan & Radley
Sociology 253F/G: Administration of Criminal Justice
2007 June 22

Since the inception of the Canadian Charter of Rights and Freedoms, police officers are to ensure that individual due process rights are not fatally violated, while enforcing laws and protecting society. Fundamental questions in law have arisen questioning whether or not this can be successfully achieved. As a result of these seemingly opposite concepts, Charter arguments often arise from perceived violations of search and detention. Society must accept that some minor due process violations may occur in these areas when new laws are created by Parliament, case law dictates new procedures, and the rights of the individual are put aside in exigent circumstances. Violations of due process are often upheld by the numerous checks and balances of the Canadian legal system, which allows for the rights of society to outweigh the rights of the individual.

As real world situations unfold, it demands that the Canadian Parliament adapt and create new laws to ensure that once fatal violations in due process are covered and to ensure that the police are able to properly enforce laws that do not infringe on an individual's Charter rights. In 1985, the ability to obtain blood samples from impaired drivers was enacted by Parliament. The demands of the Canadian public had provoked new legislative focus on the killer drunk to outweigh that of due process (Roach, 1999, p. 72). Prior to 1985, there were very relaxed impaired driving laws. Justice Crosbie, a proponent of new impaired driving laws felt that they "did not privilege due process, but rather produced a countervailing concern with the rights of victims and potential victims, and the elevation of the societal interest in crime control to the status of a right" (Roach, 1999, p. 72). The introduction of section 256 in the Criminal Code now allows police officers to uphold

existing laws while violating due process rights by having a justice issue a warrant to seize blood from a suspected offender. This limited Charter arguments based on unreasonable search and seizure as it was now felt as if a minor violation in a person's due process rights did not outweigh the protection of the public.

The headlines that marked the front pages of almost every Canadian newspaper in February 1993 read that Paul Bernardo had been arrested for the murders of Kristen French and Leslie Mahaffy. The dangerous offender amendments in Bill C-55, allowed for an application under section 810.2 of the Criminal Code that now allows the court to issue recognizance orders for individuals who present a danger of committing a "serious personal injury" offence (Weinrath, 2004, para. 16). The police were usually the applicants for restrictions to be placed on newly released dangerous offenders. Where the situation dictates, conditions imposed on offenders ranged from restricted movement, curfews, to requiring the offender to register with the local police and report on a frequent basis. Constitutionally, the implementation of such restrictions seems like an extreme violation of an offender's due process rights.

The John Howard Society of Canada questions the police's ability to restrict the movements of newly freed offenders under section 810.2 of the Criminal Code, by stating that it "promotes the concept of minimum intervention in the applications of the sentence, and the correctional services shall not, through non-judicial action, increase the punishment beyond the sentence imposed by the court" (John Howard Society of Canada, n.d, para. 2.2). They maintain that a select few offenders need extra sanctions but by allowing the police to subjectively bring forth applications to place 810.2 restrictions on offenders, it violates their

rights and recriminalizes them for past offences. Although this appears to be true at first glance, the Supreme Court has ruled that these violations are necessary for the greater safety of the public. A former Solicitor General of Canada stated "if the dangerous offenders were treated as detention cases, they would eventually be released, without supervision, and perhaps with tragic consequences" (Bonta, Zinger, Harris, and Carriere, 1988, p. 397).

Just as the Canadian Parliament has created laws for warrants and dangerous offenders, new stringent aviation laws have been enacted since the terrorist attacks of September 11, 2001. On June 18, 2007, Canada implemented a very controversial no fly list. The law will target and blacklist people who are reasonably suspected of being a threat to aircraft, passengers, and crew members (MacCharles, 2007, para. 2). The two federal agencies responsible for supplying names to this list are the R.C.M.P. and C.S.I.S. The names supplied will be thoroughly screened and only when substantiated information is obtained will the names be forwarded. Critics argue that "denying an individual the right to fly based on suspicion erodes the cherished concept that a person is innocent until proven guilty (CBC News, 2007, para. 11). The R.C.M.P. and C.S.I.S. have outlined that a person shall not be added to the no fly list unless it has been established that they have participated in a terrorist group, convicted of a life threatening crimes against aviation, or a person who has been convicted of a serious offence and who may attack an air carrier (CTV.ca, 2007, para. 9). Stereotypical images of terrorists being Middle-Eastern have lead to concerns that due process will be violated by authorities simply based on name, religion, and skin colour. Checks and balances have been created to ensure that those who may appear on the list inadvertently have the ability to correct the errors and have their right to fly restored.

It is clear that Parliament is responsible for developing all new laws utilized by the police, but the largest factor in determining whether or not police authorities are expanded or limited lies within the court system itself. Case law is routinely created by all levels of court, placing parameters around what are considered acceptable practices for law enforcement officials and ensuring that due process rights are upheld.

The Supreme Court of Canada is currently being asked to place limitations on one of the tools available to police officers for gathering evidence to conduct a search. Cases arising out of Alberta and Ontario are challenging the police's search procedures through use of drug detection dogs. In Alberta, the courts found for the Crown when Gurmakh Kang Brown was charged with possession for the purpose of trafficking after a police dog alerted an officer, who then reasonably believed that he was in possession of a controlled substance (Supreme Court of Canada, 2006, para. 2). Also in 2002, Ontario acquitted a youth of similar charges when a police dog was used to check for controlled substances inside a local high school (Tyler, 2007, para. 4, 10). Due process arguments centre on whether or not the searches conducted by the police dogs amounted to an unreasonable search under section 8 of the Charter.

In the past, challenges have failed to limit the amount of technology police can use to uncover illicit activities. The courts have recently allowed the use of police helicopters to detect marihuana grow operations within residences by looking for heat emanating from their roof tops. The use of police dogs is no different. If the Supreme Court of Canada rules that random searches by police dogs constitute a breach of section 8 of the Charter it would severely limit this tool for police.

The ability for police officers to use their senses is an invaluable investigative tool, like helicopters and police dogs. When the Supreme Court of Canada upheld a decision allowing for minor detention and arbitrary stops to check for impaired drivers it stated that "spot-checks were justified in order to deter drunk driving, and because any detention would be short" (Roach, 1999, p. 54). This ruling, very controversial at the time, was the catalyst in the way that Canadian courts had now opted to view impaired driving. In 2002, almost twenty years following this decision, the rate of impaired driving incidents was down sixty five percent compared to 1981 (Impaired Driving Rates Declining, 2004, p. 30). It has been widely accepted that R.I.D.E. programs conducted by police officers are acceptable violations for the safety of all occupants in and around the highway. The Charter violations that officers commit in search and detention allowed the court "to make exceptions from due process only for reasons of traffic safety" (Roach, 1999, p. 55). Although certain limitations were now in place, case law continued to dictate that minor violations in due process were acceptable to ensure the safety of motorists.

With the unveiling of D.N.A. testing in the early 1990's, a host of new due process arguments were brought before all levels of courts. The police welcomed the new program as it allowed for thorough investigations and the quick elimination or determination of suspects. Proponents against D.N.A. cited gross personal violations at the hands of the police and the lack of tested case law. "An early Ontario Court of Appeal judgment suggested that the police could seize hair samples for D.N.A. testing as a part of their common-law powers of search incident to arrest" (14- Roach, 1999, p. 78), however this was quickly struck down by the Nova Scotia Court of Appeal in R. v. Legere. Due to the contrast in case law, Parliament was forced to act and created a section in the Criminal Code outlining the criteria needed to seek a warrant for D.N.A.

Although new D.N.A. laws were enacted, the police were still struggling with fatal violations of due process. In R. v.Stillman, bite impressions and swabs were excluded as an unreasonable search contrary to section 8 of the Charter. Justice L'Heureux-Dube argued in dissent:

> That the police should be able to take D.N.A. samples at least in the case of highly reprehensible crimes, such as murder or sexual abuse, where the identity of the person may be difficult to establish otherwise, considering the fact that such crimes may typically occur in private (Roach, 1999, p. 81).

Parliament, through case law, weighed in and quickly made provisions for allowing police officers to seek warrants for D.N.A. and body impressions. Once again due process had come head to head with police investigative tools, and although the intrusiveness appeared to be fatal in the past, the overall demand for protection of society outweighed that of the individual in serious offences.

Policing often involves very dynamic situations which are ever changing. Exigent circumstances and split second decisions appear to violate a person's right in order to protect life and to preserve evidence (Hemmens, 2006, p. 282). Such authority has been granted to police officers under section 487.11 of the Criminal Code of Canada. Incidents of domestic violence are frequently reported through what is known as a silent 9-1-1 call; which is when the phone line remains open and there is no interaction with the police communicator. The R.C.M.P. National Operational Policy Manual states "as articulated in Regina v. Godoy [SCC, 1998], Peace Officers can investigate a 9-1-1 call and, in particular, locate the caller and determine his or her reasons for making the call and provide such assistance as may be required (Ward, 2007,

para. 13). In R.v. Godoy, the Supreme Court of Canada upheld due process violations by the police by allowing entry into a dwelling against consent to ensure safety of potential victims as a result of a 9-1-1 call. In his charge Justice Lamer C. J. stated:

> The forced entry into the accused's home was justifiable considering all the circumstances of this case. The police had a duty to ascertain the reason for the 9-1-1 call and had the power, derived as a matter of common law from this duty, to enter the apartment to verify that there was in fact no emergency. The fact that the accused tried to shut the door on the police further contributes to the appropriateness of their response in forcing entry (Supreme Court of Canada, 1999, p. 3).

The ruling in Godoy, although viewed as a highly intrusive entry and a violation of due process rights, solidified the right for the public to rest assured knowing that the police could ascertain the reason why the original 9-1-1 call was placed.

Charter challenges surrounding exigent circumstances do not rest simply with search authorities. One of the largest limiting factors to police authority in the last twenty years was the ruling in R. v. Feeney. Officers believed that Feeney, a homicide suspect, was residing in a dwelling and subsequently entered, and effected the arrest. The Supreme Court ruled that Feeney's due process rights had been violated under sections 8, 10(b), and 24(2). Justice L'Heureux-Dube in dissent stated that the protection of the public from a murderer should outweigh good faith violations committed by the police (Roach, 1999, p.82-83). As a result of the verdict, Parliament once again had no choice but to enact law, which allowed for police to obtain a warrant to enter a residence to arrest a suspect.

The circumstances surrounding a public notification of an offender's release from an institution can be seen as an exigent act that violates the very core of due process. Pedophiles and serial sexual offenders prey upon some of the most helpless members of society, and it has demanded that as a result of their offences, notification outweigh the rights of the offender. Due to the sexual assault and subsequent murder of Christopher Stevenson by a convicted pedophile, Christopher's Law was created in 2000. As a part of Christopher's Law, it gives Chiefs of Police the authority to publish information about a sexual offender who poses a heightened risk to the community in exigent circumstances (Ministry of Community Safety and Correctional Services, 2004, para. 1). The John Howard Society of Alberta feels that at times community notification can "constitute cruel and unusual punishment and has been known to instigate vigilante justice" (John Howard Society of Alberta, 1997, para. 3). Section 12 of the Charter protects against this, however, it may be deemed that the offender is such a risk to the public that it is necessary for awareness to trump the offender's right to privacy. Superseding due process must be taken seriously; as a result the police are very careful when violating such individual rights.

Every person who is charged with an offence must have the guarantee that their due process rights will be upheld to ensure that the justice system will not be brought into disrepute. Society demands protection from the criminal element, but also demands that their rights are guaranteed by the Charter. Police officers often violate individual due process rights through the course of their duties during search and detention. Due process breaches can occur through creation of Parliamentary laws, case law, and exigent circumstances, and to uphold them can weigh against the greater good of society. As the police act in good faith breaches may occur. It

is through the checks and balances of the Canadian legal system that allow for the rights of society to trump that of the individual.

References

Bonta, Zinger, Harris, and Carriere. (1988). The Dangerous Offender Provisions: Are They Targeting The Right Offenders? *Canadian Journal of Criminology*, October 1998, p. 377-400.

CanLii: R. v. Godoy, 1999 CanLii 709 (S.C.C.). (1999, February 04). Retrieved June 18, 2007 from http://www.canlii.org/eliisa/highlight.do?text=r.+v.+godoy&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1999/1999canlii709/1999canlii709.html

CBC News: Critics Alarmed By Canada's No Fly List. (2007, June 18). Retrieved June 18, 2007 from http://www.cbc.ca/canada/story/2007/06/18/no-fly-list.html

CTV.ca: Gov't To Press Ahead With "No-Fly" List: Day. (2007, June 18). Retrieved June 18, 2007 from http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070617/nofly_list_070618/20070618?hub=TopStories

Hemmens, Craig. (2006). The Supreme Court and The Knock and Announce Rule: *Criminal Justice Review,* Volume 31 Number 3, September 2006, p. 281-300.

Impaired Driving Rates Declining. (2004). *Canadian Social Trends,* Issue 73, Summer 2004, p. 30.

John Howard Society of Canada: Core Statements, Values, and Principles. (n.d.). Retrieved June 18, 2007, from http://www.johnhoward.ca/jhsmiss.htm

MacCharles, Tonda. (2007, May 12). Canada To Launch No Fly List in June. *TheStar.com.* Retrieved from http://www.thestar.com/News/article/213185

Ministry of Community Safety and Correctional Services: Ontario Sex Offender Registry. (2004, April 05). Retrieved June 18, 2007 from http://www.mcscs.jus.gov.on.ca/English/police_serv/sor/community_notice.html

Roach, Kent. (1999). *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice.* Toronto: University of Toronto Press.

Supreme Court of Canada: Gurmakh Kang Brown v. Her Majesty The Queen. (2006, May 08). Retrieved June 18, 2007from http://cases-dossiers.scc-csc.gc.ca/information/cms/case_summary_e.asp?31598

Tyler, Tracey. (2007, May 22). Random Searches Tested in Court: Did Police Breach Student's Rights By Visiting School With Drug Sniffer Dog? *TheStar.com.* Retrieved from http://www.thestar.com/News/article/216319

Ward, John. (2007, April 25). Police Response To 911Calls. *RCMP Communications Section "E" Division.* Retrieved from http://www.rcmp-bcmedia.ca/strsrelease.jsp?vRelease=12388

Weinrath, Michael. (2004, July 08). Dangerous Offender FAQ. *CBC News*. Retrieved from http://www.cbc.ca/news/viewpoint/vp_weinrath