New and Problematic Restrictions on Constitutional Remedies: R. v. Demers

Although remedies such as the exclusion of evidence are staples for criminal lawyers, finer remedial points may on occasion be relevant to them and their clients. The Supreme Court's recent decision in R. v. Demers (2004), 185 C.C.C. (3d) 257, is a case in point. In that decision, the majority of the court imposed new restrictions on constitutional remedies that ignored its previous precedents and could result in significant periods of detention under unconstitutional laws. The case should raise real concerns about rights without immediate remedies.

The case involved a person who was unfit to stand trial for sexual assault because of a permanent mental disability (Down's syndrome). He brought a Charter challenge to provisions of the Criminal Code that allow those found unfit to stand trial to be subject to control until they are either found fit to stand trial or until the Crown is unable to establish a prima facie case. The court found that these provisions violated s. 7 of the Charter because they were overbroad. They could keep a person who was permanently unfit to stand trial in the system forever even if that person was not a danger to the public. So far, so good.

It was at the remedies stage that the court injected new and problematic restrictions. First, the court found that reading in was not an appropriate remedy because it would require "detailed and complicated consequential amendments to the existing legislation" (ibid., at para. 58). This conclusion may overstate the difficulty of fixing the overbroad law. The real problem may be that s. 672.54(a) of the Code is underinclusive. It allows an absolute discharge for a non-dangerous accused but only if that a person is found not criminally responsible on account of mental disorder. It would not have been impossible for the court to have used a reading-in remedy to include permanently unfit accused who do not present a significant danger to the public in this section, to allow them to receive an absolute discharge.

The court's unwillingness to fix the legislation itself may be related to its concerns that the existing provisions do not provide courts and review boards
with adequate powers to order psychiatric evaluations. It may also be related to
the court's continued reluctance to sanction constitutional exemptions from
overbroad laws. The former concern may be warranted when applied to statu-
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ness in cases such as Canadian Foundation for Children, Youth and the Law
v. Canada (Attorney General), [2004] 1 S.C.R. 76, to save overbroad laws
with quasi-legislative forms of reading in and reading down.

Fashioning an exemption from the technical provisions of the Criminal
Code that relate to the treatment of those found unfit to stand trial should be
a less daunting proposition than the redrafting of s. 43, which authorized the
use of corrective force against children. To be sure, the "unfit to stand trial"
provisions are complex and technical, but they are addressed to legal experts
who can be expected to be familiar with the court's remedies. In contrast, par-
ents, babysitters and anyone who does not have a new annotated Criminal
Code may miss the court's new restrictions on the use of corrective force.

After rejecting the reading-down remedy, the court decided that it could
not immediately strike down the impugned provisions for keeping unfit
accused in the system because of concerns about public safety. It issued a 12-
month suspension of the declaration of invalidity. This approach in itself was

But then the majority of the court held that restrictions on combining remedies
under s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982 that
were developed in the context of damage claims applied with equal force to the
criminal case at hand. A stay of proceedings could not be ordered under s.
24(1) during the 12-month suspended declaration of invalidity fashioned under
s. 52(1). If anything, the court's new rule about combining remedies seems
more absolute in the criminal context than in the damage context where the
court recognized that governmental misconduct could justify damages.

Although 12 months may not be a long time for Parliament to fix an uncon-
stitutional law, it is a long time for someone detained or restrained under an
unconstitutional law. The accused in Demers was fortunately not detained
under the unconstitutional law. He was discharged subject to the condition
that he live with his family, keep the peace and establish a consensual treat-
ment regime together with his parents and medical professionals.

The refusal to contemplate exempting the successful Charter applicant
from a suspended declaration of invalidity in a criminal case and the exten-
sion of the presumption against combining s. 52 and s. 24 remedies to the
criminal and non-pecuniary context are extremely unfortunate developments
that could produce a situation in which people are detained under unconstitu-
tional laws during the long periods — between 6 and 18 months — during
which declarations of invalidity are suspended.

The new rule in Demers can deprive a successful Charter applicant of an
effective and meaningful remedy for the duration of the suspended declaration
of invalidity. It puts judges in an unnecessary and difficult position of either
not suspending a declaration of invalidity when necessary to protect public
safety and to allow Parliament to enact comprehensive reforms or of denying
the successful accused a meaningful remedy.

The rule against combining remedies under s. 52 and s. 24 is formalistic
and artificial; at best it protects the public against indeterminate financial lia-
bility. It should not be used to restrict access to remedies such as habeas corpus.
Prior to Demers, the rule had never been applied in criminal cases and it was
often avoided in civil cases. There is nothing in the drafting of the Charter to
suggest that there must be two watertight remedial tracks. If anything the
lesson of the drafting of the Charter is that we should not have rights without
meaningful remedies.

The approach taken by LeBel J. in a sole judgment was much more sensitive
to the vital liberty interests at stake in the criminal context and the need
to provide successful Charter applicants with effective and meaningful reme-
dies. He would also have employed a 12-month suspended declaration of
invalidity, but he would have made a stay of proceedings under s. 24(1) avail-
able after 30 days for both Mr. Demers and others similarly situated. He
reasoned that "Corrective justice suggests that the successful applicant has a
right to a remedy. There will be occasions where the failure to grant the
claimant immediate and concrete relief will result in an ongoing injustice.
That is the case here." (ibid., at para. 101). Justice Le Bel concluded that legit-
imate social interests in protecting the public could be satisfied by the 30-day
period that would enable provincial health authorities to pursue committal
proceedings against dangerous persons who are unfit to stand trial. He per-
suasively concluded: "There is no sound policy reason, particularly on the
basis of safety, to delay a stay for one year for those permanently unfit
accused who do not pose a significant danger to society." (ibid., at para. 107).

Justice Le Bel's dissenting approach is supported not only by concerns
about ensuring effective and just remedies, but also by the court's approach in
R. v. Swain. In that case, the court delayed the declaration of invalidity for six
months, but also limited the effects of the suspension by suggesting that both
the accused and others like him could only be detained for 30 to 60 days under
the terms of the unconstitutional law that provided for automatic and indefi-
nite detention of those found not guilty by reason of insanity. The court in
Swain also did justice to the individual by staying proceedings.

Under Demers, an accused who successfully challenges his detention
under the Charter now might have to wait for a year or more before he or she
receives a s. 24(1) remedy, including the remedy of habeas corpus. Although
it is understandable why the court might want to suspend the declaration of
invalidity, it cannot be right to detain or restrain a person who is not a danger
to the public for a year under an unconstitutional law.

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