Bringing justice into the modern age

Inside **Queen's Park**

By Ian Harvey

I have a friend who describes his boating hobby as a "hole in the water into which you throw money."

And like most comedy, there's a little bit of pain and truth underlining the laugh; not so funny, however, is the deep sinkhole of the Ontario courts system which has been voraciously consuming more funds over the years but doesn't seem to have made proportional strides forward in efficiency.

Ontario Auditor General Jim Carter in his 2008 report released in December, says despite upping spending, the Ministry of the Attorney General still doesn't really have a handle on why the courts continue to get backlogged, whether the measures they've undertaken are returning dividends on their investment while also inexplicably failing to take advantage of digital technology and communication to streamline the process.

The most glaring shortfall is the 106,000 criminal cases which have been pending more than eight months, says Carter, driven mostly by a 50-per-cent increase in the number of court appearances each accused makes before trial — from 5.9 appearances in 1997 to 9.2 appearances in 2007 — many logged under the catch-all code of "to be spoken to," which as the report rightly points out, means exactly what?

With some dismay, Carter also acknowledges an increase in operating funding of $100 million — half in the last year alone — yet the backlog still grows. At least some of it is attributable to a lack of facilities and resources but much is also blamed on the shortfall in legal aid certificates since unrepresented participants cause delays.

Both the criminal courts and family courts are exploding at the seams, the latter especially in cases involving children in need of protection, with nearly half beyond the mandated 120-day completion. And in that case it seems the government is the victim of its own success, having boosted funding to Children's Aid agencies, it now finds there are more cases being filed by those agencies.

Increased police action against guns and gangs also has triggered a rise in cases at the criminal courts.

Civil cases, on the other hand, fare a little better with the average case length declining, though it still takes 18 months to resolve. There is some hope the changes under Rule 76 to allow the threshold under the simplified rules to rise to $100,000 from $25,000 will divert cases. At the same time raising the Small Claims threshold to $25,000 from $10,000 may also shift cases, but as I pointed out in my last column, is that system prepared for the deluge?

Overall, Carter says to be comparable with other provinces, "Ontario would have to hire significantly more judges and justices of the peace, as well as providing additional court facilities and support staff."

To be fair, new judges are being appointed — three alone last week — but there are other solutions that should also be pressed into play.

For example, Ontario has not ramped up the use of video for court appearances. Video is used in only 35 per cent of in-custody court appearances, well below the targeted 50 per cent. Partly it's because defence counsel like their clients to come to them rather than travel to the often far-flung jails and partly because there's no requirement to increase the usage.

Yet Carter says the savings would be even greater than a consultant's estimate of $10 million if video were fully embraced, saving $5 million in just the Toronto area alone from the $44 million spent, since correctional institutions, local police, and court staff don't have to process custodial accuseds' comings and goings. Calgary, for example, uses video 80 per cent of the time.

The list goes on; computers aren't used enough as the emphasis is still on paper, a digital single-case integrated management system has yet to be decided on "with further study needed," despite the fact other jurisdictions have already implemented them. This in turn prevents cross-indexing of criminal and family court matters and electronic document filing. Finally, analog recording is still in use in 146 courtrooms with no real timetable to convert to digital.

The report is detailed and thorough, as you'd expect an audit to be, but the government's response is largely that they recognize the problem and are working on it, pretty much what you hear when you call your local cable company to ask why the signal's out.

It's not what you'd expect when the scope of the problem and some of the solutions have been on the table for a decade or more waiting for someone to take decisive action.

Carter also alludes to foot dragging by the ministry in passing on the information his auditors asked for, some of it coming too late. It's not the kind of transparency we expect or deserve. They may fund and manage the court system but the ministry is not beyond reproach and answers to the public like any other government body.

It's not funny and it's time we had some more forthcoming answers and action.

To read the entire 31 pages and nine recommendations and report: *http://www.auditor.on.ca/en/reports_en/en08/ar_en08.pdf* LT

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Times, they are a'changing

Speaker's **Corner**

BY PETER BRIO
For Law Times

An employer's duty to accommodate the legitimate needs of employees from a human rights standpoint — whether based on religious belief, illness, disability or some other factor — has long been established. What's been difficult to establish is the extent to which employers must go to accommodate these needs. In recent years, employers have often had to demonstrate that it was virtually impossible to accommodate the employee in order to establish that accommodation would result in undue hardship for the employer, thereby relieving the employer of the accommodation requirement.

Well, "the times, they are a'changing!" The recent Supreme Court of Canada decision in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (July 17, 2008) reflects a reconsideration of the prevailing orthodoxy on the undue hardship test and has infused it with a renewed reasonableness standard. The case (this one out of Quebec) is the latest in a string of Court of Appeal and Supreme Court decisions — *Mulvihill v. Ottawa*, *Honda v. Keays*, and *Evans v. Teamsters* — that reflect an unmistakable shift in judicial attitude towards a more practical and reasonable approach to the interpretation and application of the rules of engagement in the historic bargain between master and servant.

Duty to accommodate based on illness: In the *Hydro-Québec* case, the complainant employee had an employment history marked with many physical and mental health problems, from tendonitis and hypertension on the physical side, to a significant personality disorder on the mental health side that affected her relationship with supervisors and co-workers. These problems resulted in extensive absences from work. In the final seven and a half years of her employment, she had missed 960 days of work.

Hydro-Québec had adjusted the employee's working conditions on several occasions in an attempt to accommodate her limitations. These included actions ranging from assigning lighter duties to providing a gradual return to work following a depressive episode. None of the actions improved the complainant's ability to report to work regularly and she was eventually dismissed.

At the time of her dismissal, the complainant had been absent from work for over five months, the employer had obtained a psychiatric assessment that confirmed that the employee would not be able to work regularly without extended absences, and the complainant's own doctor had recommended that she stop working for an indefinite period.

The employee grieved the dismissal, and her grievance was dismissed by both the arbitrator and by the Quebec Superior Court on appeal. The union appealed again to the Quebec Court of Appeal and won its case, with the court stating that the employer had to prove that it was impossible to accommodate the complainant's characteristics.

More moderate standard emerges: The Supreme Court disagreed with the Court of Appeal's approach. In a unanimous decision, Justice Marie Deschamps stated that, "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."

Deschamps further went on to state that: " . . . the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work.

"The purpose of the duty to accommodate is to ensure that persons who are otherwise fit for work are not unfairly excluded where working conditions can be adjusted without undue hardship."

Deschamps further said, "However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration."

The Supreme Court allowed Hydro-Québec's appeal, finding that if an employee's condition hampers business operations or prevents an employee from working in the foreseeable future — even though the employer has tried to accommodate them — the employer will have satisfied the undue hardship test and the dismissal will be non-discriminatory.

Assess the facts on a case-by-case basis: The Supreme Court's acknowledgement that proof of undue hardship can take as many forms as there are circumstances reaffirms the fact that each case must be judged on its own merits – with the standard for proving undue hardship now far short of proving that accommodation is impossible.

For these reasons, consultations between your organization's human resources professionals and internal or external counsel can be invaluable in helping you assess the limits of any accommodation requirements, if and when such a situation arises. LT

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Past year more subdued

Continued from page 6

most dramatic constitutional case of 2007, the McLachlin court overruled certain aspects of the 1987 Labour Trilogy to find that the right to bargain collectively was protected under section 2(d) of the Charter (*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia).*

This past year was more subdued but with several important constitutional decisions (those readers interested in an overview of all SCC decisions should consult Eugene Meehan's *2008 Year-in-Review SCC Newsletter*).

The court continued its re-evaluation of the framework for analyzing equality claims in *R. v. Kapp* with a concurrence by Bastarache, notable for its rare analysis of s. 25 of the Charter. In *Dunsmuir v. New Brunswick*, it finally abandoned (or did it?) the flexible and pragmatic approach to standards of review that had been frustrating administrative lawyers for years.

On national security issues, the Supreme Court played a small but not insignificant role in the continuing saga over Omar Khadr. In *Canada v. Khadr*, the SCC ordered the government to disclose videotapes of Canadian officials' interviews of Khadr at Guantanamo Bay.

On the criminal front, the court dealt a heavy blow to the government's crime agenda by striking down a provision of the Youth Criminal Justice Act whereby youths charged with certain offences like manslaughter are presumed to face adult sentences (*R. v. D.B.*). In a tandem of cases from Alberta and Ontario, the court held that the police practice of using "sniffer dogs" to ferret out drugs constituted a search under s. 8 of the Charter, however a school principal could not invite the police to bring such dogs to hunt for drugs at a school (*R. v. A.M.*) and the police cannot simply use them at bus stations without sufficient grounds (*R. v. Kang-Brown*).

Finally, the court held that the federal government had been unconstitutionally collecting certain unemployment insurance premiums for years . . . but did not have to pay back those sums (*Confédération des syndicats nationaux v. Canada*).

Those eager for a more in-depth review and analysis will have to wait until Osgoode's annual Constitutional Cases conference in April and the Canadian Bar Association's conference on "The McLachlin Court's First Decade" in June in Ottawa. LT

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