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Operations and Practice, A Comparison The Canadian Supreme Court

*by Justice Brian Dickson**

I. INTRODUCTION

PROFESSOR TRIBE, JUSTICE Stewart, ladies and gentlemen. Let me start not with a cartoon, such as Professor Tribe's, but with an issue of Time Magazine a month or so ago about "judging the judges" which indicated to me where the real power lies. Among the scholars who were quoted in the article was Professor Laurence Tribe of the Harvard Law School, so the real Supreme Court, I think, rests in the law schools. Perhaps the final judgments are to be found in the learned journals because, as I am sure Justice Stewart will agree, we pay a great deal of attention to what is written in the learned journals after we issue our judgments. We are fallible. We do make mistakes. We need other perspectives on some of the principles we are trying to develop and we get a great deal of assistance from what is written in the monographs which we look forward to reading as the months go by.

The topic which Justice Stewart and I were assigned is Operations and Practice. Such differences as exist in operations and practice of the Supreme Court of the United States and the Supreme Court of Canada are, I should think, largely attributable to: firstly, differences in the constitutional imperatives of the two nations; secondly, disproportionate populations; and thirdly, the bicultural and bilingual nature of our country.

Canada operates under the parliamentary system. That system carries with it, in legal theory, the concept of parliamentary supremacy and the subordination of the executive and the courts to the will of either the federal or provincial Legislatures, if acting within their proper constitutional spheres. That does not connote subservience. The courts are subordinate only to the extent that they must apply a statute after it has been validly made. The courts will respect the will of the people and the paramountcy of their elected representatives in exercise of the law-making function, but in the interaction between the organs of government the concept of judicial independence overrides all other considerations.

Although both of our countries are federal, the constitutional division of authority over courts in the two countries is quite different. Canada has essentially a unitary judicial system. There are no general federal trial courts: courts are provincially established and administered. In a given case, these courts may interpret and apply federal statutes, provincial

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statutes, or both. The superior court judges of the Supreme Court of Canada and of provincial trial and appellate courts, as well as the judges of the county and district courts, are appointed, and paid, by the federal government.

One feature of the Canadian constitutional system is worthy of special note. Our federal structure has modified the British principle of parliamentary supremacy by allowing a limited form of judicial review under the Canadian Bill of Rights. This is a federal enactment applicable to the laws of Canada, but not to provincial laws. Enforcement of the Bill of Rights may result in the Court holding otherwise valid federal law to be inoperative. A celebrated case in which this was done was *Her Majesty the Queen v. Joseph Drybones*. The charge against Drybones was that, being an Indian, he was unlawfully intoxicated off a reserve, contrary to s.94(b) of the Indian Act. Drybones was an Indian, and he was indeed intoxicated, on the premises of the Old Stope Hotel, in Yellowknife in the Northwest Territories. When first arraigned, Drybones, who spoke no English, pleaded guilty and was fined ten dollars and costs or three days in custody. But on appeal to the Territorial Court, Mr. Justice Morrow allowed Drybones to withdraw his plea and the appeal proceeded as a trial *de novo*. In due course, the case reached the Supreme Court of Canada. The important question raised in the appeal had its origin in the fact that in the Northwest Territories an Indian, intoxicated in his own home off a reserve, was guilty of an offence, whereas all other citizens in the Territories were free, if they saw fit, to become intoxicated, otherwise than in a public place, without committing any offence at all. A majority of our Court held that Indians in the Northwest Territories, by reason of their race, were denied "equality before the law" assured by the Bill of Rights, and s.94(b) of the Indian Act was declared to be inoperative. The *Drybones* case has, to date, represented the highwater mark. Subsequent Bill of Rights cases have reflected somewhat less judicial activism in striking down federal legislation.

Our constitutional arrangements do not endow our Court with wide authority to intervene as directly as the Supreme Court of the United States in social and economic issues. Our judicial power is limited to determination of whether exercises of legislative authority, by the central or provincial Legislatures, are within constitutional limitations. In this connection, it is important to note that, unlike the High Court of Australia or the United States Supreme Court, our Supreme Court does not have any constitutional base. The Constitution of 1867 did not itself create the Court, but gave the Parliament of Canada the power to do so. The only reference to a general appellate tribunal in the British North America Act is found in section 101, which gives Parliament power to provide for the "Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

Still another feature of Canada's legal structure, although perhaps as much a matter of history and culture as a matter of constitutional princi-

ple, is the existence or co-existence of two distinct legal systems — common law and civil law.

Canada, in a jurisprudential sense, is a pluralist nation with a duality of legal traditions. Our pluralism is reflected in the recognition of the two systems of law with which the Supreme Court of Canada deals. In the Province of Quebec, one finds the civil law and the civil code; in the other nine provinces, the common law prevails. Federal statutory law, such as the Criminal Code and the Income Tax Act, is common to all provinces.

Although the Supreme Court of Canada is now over one hundred years old, it is only since 1949 that it has ceased to be a captive court and has become the highest court of law in the country, standing at the top of the judicial system in every province and at the top of the system of federal courts. From 1875 until 1949, it was possible to take an appeal to the Judicial Committee of the Privy Council in London, either from a decision of the Supreme Court of Canada, or even directly from the decision of a provincial Court of Appeal. The political evolution that saw Canada, an English colony in 1867, gradually develop into a sovereign nation was paralleled by the evolution of the Supreme Court of Canada from a "way-station" *en route* to the Privy Council, to the court of final resort for all Canadians.

II. ORGANIZATION

A. Sessions

There are three sessions of the Court: a session which begins in January and which ends in early April; a spring session beginning on the last Tuesday in April and continuing until the end of June; and a fall session which commences on the first Tuesday in October and carries on until Christmas. The Court sits four days a week, but is often called upon to sit on Friday in order to finish a hearing which began earlier in the week.

The Court sits only in Ottawa and members of the Court must reside within twenty-five miles of Ottawa. A quorum consists of five members although the full Court of nine now sits in most of the cases. The Court then speaks with the authority of the full complement of nine judges. The Justices normally appear in black silk robes with wing collar and white tabs, though at the opening and closing of each session they wear robes of bright scarlet, trimmed with ermine, and tri-cornered, black hats of medieval design. The scarlet robes are also worn at the opening of each new session of Parliament when members of the Court are seated on the floor of the Senate immediately in front of the Governor General.

B. Appointment of Justices

The nine Justices of the Court are appointed by the federal cabinet. There is no official procedure governing the process. Aspirants do not undergo the rigours of political interrogation. No Senate or other hearing is

mandated for the purpose of confirming the appointment. Appointments are made from members of the professional bar with over ten years of service, or from those who may be or have been judges of superior courts of any of the provinces. Political considerations play little, if any, part in the process. Appointees serve during good behaviour until age seventy-five and presently receive \$65,000 per annum. Considering the prevailing prices for legal talent, the Justices are somewhat of a bargain! The Chief Justice is the administrative head of the Court, *primus inter pares*, with equal authority in making decisions.

Section 6 of the Supreme Court Act provides that at least three of the Justices shall be appointed from among the Superior Court judges or barristers of the Province of Quebec. This is another reflection of the duality of the cultural and legal heritage of our nation.

Should the Governor General of Canada die, become incapacitated, or be absent from the country for a period of more than one month, the Chief Justice of our Court or the senior associate judge becomes the Administrator of Canada. All Justices of the Court serve as Deputies of the Governor General for the purpose of giving Royal Assent to bills passed by Parliament, signing official documents, or receiving credentials of newly-appointed high commissioners or ambassadors. The associate Justices are referred to as "puisne" judges, a word with which I am not greatly enamoured. It does not refer to physical stature; rather, it is an amalgam of two French words, *puis* and *ne*, meaning "born later," and hence junior.

III. JURISDICTION

The Supreme Court of the United States I understand to be primarily a constitutional court, with the final word on the reach and application of the federal Constitution and upon litigated matters that are within the jurisdiction of Congress. In contrast, the Supreme Court of Canada is both a national court, in the sense that it may declare the law of all provinces, and a constitutional court. The Court possesses general appellate jurisdiction not limited to any class or classes of case. In the words of the Supreme Court Act: "The Supreme Court shall exercise an appellate civil and criminal jurisdiction within and throughout Canada." The Court adjudicates upon both federal and provincial laws, and hears appeals from the ten provincial courts of appeal and from the Federal Court of Appeal. The Federal Court, with both a trial division and an appeal division, has a limited, not a general, jurisdiction in federal matters. It deals with issues affecting federal interests, such as review of decisions of federal boards and other tribunals, actions against the Federal Crown, intergovernmental disputes, industrial property controversies, citizenship appeals, and income tax appeals.

The only important component of the original jurisdiction of the Supreme Court of Canada is found in sections 55 and 56 of the Supreme Court Act, whereby the Court is empowered to hear references by the

Governor-in-Council, or by the Senate or House of Commons, on important questions, such as interpretation of the Constitution, or determining the validity of a federal or provincial Act. Such references, though not frequent, are heard almost every year.

One of the most important functions of the Court is to interpret and apply the British North America Act, the written part of Canada's Constitution, which allocates Canada's law-making power between federal and provincial authority. In constitutional adjudication, the Court has been prepared to relax its rules as to the introduction of what would otherwise be extraneous materials. Reference is permitted to parliamentary debate on the Constitution and status is readily granted to those evidencing a serious interest in the litigation.

Another major function of our Court is to monitor decisions of the provincial courts of appeal. As an indication of the range of concerns which come before the Court, consideration is being given, during the current session, to a challenge to the constitutionality of language legislation enacted almost ninety years ago, by which English was established as the sole official language for the province of Manitoba. In another case, the constitutional validity of provincial legislation imposing a sales tax on liquor sold aboard jets crossing airspace above the lands of a province is contested. In other litigation, a native Indian band, aggrieved at the result of a rate hearing by a federal commission, petitioned the federal cabinet to vary the order. Invoking principles of natural justice, the group seeks a writ of certiorari to quash the cabinet's dismissal of the petition. In the criminal context, the Court is being asked to consider: the availability of intoxication as a defence to first degree murder; the question of honest belief in the complainant's consent in a rape case; and a controversial anti-competition criminal conspiracy case involving three prominent sugar companies.

The Court, in short, has a general jurisdiction in all areas of law, whether constitutional or administrative, public or private, criminal or civil, federal or provincial, common law or civil law, and the cases come to us in either of the two official languages, English or French. The Court deals with controversies between individuals (including corporations), between individuals and governments or government agencies, and between governments.

IV. RIGHT OF APPEAL

There are three routes by which an appeal will reach the Supreme Court of Canada. First, with leave of the highest court of final resort in a province from a final judgment of that court, that is to say, from the provincial appellate court whose judgment is sought to be questioned. Second, an appeal may come as of right in certain criminal cases, such as where an accused is convicted of an indictable offence and there is a dissenting judgment in the court of appeal, or where his acquittal has been set aside by a court of appeal. Third, our Court may grant leave, pursuant

to section 41 of the Supreme Court Act, which provides: "where . . . the Supreme Court is of the opinion that any question involved . . . is, by reason of its public importance . . ., one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it."

Provincial courts have, in the main, exercised sparingly their power to grant leave, with the result that leave granted by the Supreme Court itself is by far the most common route. The Supreme Court has therefore achieved a high degree of control over the flow of cases. This is an improvement over the pre-1975 situation when any piece of litigation with more than \$10,000 at stake could come as of right to the Court. Happily, the right of appeal no longer depends upon the amount of money in controversy, and the clogged docket of earlier days has been virtually eliminated.

The criteria for granting leave are supplied by the Act. These emphasize the nature of the case, its significance for the public and the degree of interest in the questions of law it involves. It is, however, I think, fair to say that the type of case standing the best chance of success when leave to appeal is sought is one which raises a constitutional issue, or a question of native rights or civil liberties, or an important question of criminal law or labour law or administrative law, or one which involves conflicting decisions of two provincial appellate courts. The chances are less than propitious when the issue is interlocutory or largely factual, or one which involves interpretation of a contract, or procedure within a provincial court system, or one which calls for construction of a local by-law or a provincial statute, the wording of which is peculiar to the locality or province.

The Court hears motions for leave to appeal on the first and third Monday in each month of each session. Motions for leave are heard by three judges. All nine Justices sit on motions, in three panels, among whom the motions inscribed for hearing are divided. The applicant files a written notice of motion, a copy of the judgment sought to be appealed, and a memorandum of argument. There is a time limit on oral argument of fifteen minutes for each side on a motion for leave, with five minutes for reply. The point to determine is whether there is an issue of general importance. The decision to grant or refuse leave is normally given immediately, and without reasons. There is rarely any difference of opinion on whether leave should or should not be granted, but if there is real doubt, leave is normally granted. There has been a steady growth in the number of applications for leave to the present level of approximately 400 motions per year, though the percentage allowed has fallen slightly from 30.0 percent in 1975 to 26.8 percent in 1978. Six months to a year may elapse between the date on which leave is granted and the date on which the parties return to argue the appeal.

V. THE HEARING

Cases are argued in our Court on the basis of both written and oral argument. The factum is reflected in the oral argument. One complements or, perhaps one should say, overlaps, the other. The written material consists of a factum from each party containing a concise statement of the facts, the points in issue and submissions thereon, and a list of the authorities relied on. The Court is also furnished with a transcript of the record, consisting of the evidence, exhibits, and judgments from the courts below. It is the practice to read the factums and the judgments below before the oral hearing, but there is no discussion of the case among the Justices prior to entering the court room. Oral argument is not limited by time restriction, only by relevance. Members of the Court question counsel on points of concern. In some cases, the oral presentation is relatively brief; in others, it may extend for two or three days. On the average, the oral presentation lasts a little over two hours. During argument, the Justices never leave the bench. The oral argument is not recorded.

Any lawyer entitled to practice in the province from which he comes may plead before our Court. We do not have, as one finds in France in the Cour de Cassation, a specialized bar, the practice of whose members is limited to appearing before that court.

In principle, our procedure does not allow for participation by representatives of the public. The *amicus curiae* brief is not part of our daily life. The rules of the Court do, however, allow any party interested in a dispute to intervene with leave, and this procedure makes it possible, on occasion, to give persons who did not appear before the lower courts access to the Court. Where the case involves a constitutional dispute, either between individual litigants or between governments, the provinces and the federal government are invited to participate in the hearing.

The decision of the Court is sometimes rendered at the conclusion of the argument, but generally it is reserved for further deliberation and the writing of considered reasons. Decisions need not be unanimous. Dissenting reasons may be given and this freedom is frequently indulged in. The dissent of today may become the orthodoxy of tomorrow. Each Justice may write reasons in any case if he chooses to do so, but the aim and tendency has been to avoid multiple opinions. Areas of agreement, as well as disagreement, are usually clearly delineated in specially concurring opinions. The practice is midway between the *seriatim* opinions of the House of Lords and the early practice of a unitary opinion in the Privy Council. Save for references from the government, no advisory opinions are written. If the *lis* has disappeared, so, in our view, has the need for adjudication, for the grounding in reality is lost.

Following argument, the judges retire to a conference room where the case is discussed, each judge expressing an opinion. I do not think it is a breach of confidence to say that the most junior judge is called upon to state his views first, the others following in order of seniority. There is then general discussion. In about sixty percent of the cases, the Court is

unanimous and the only question is as to who will write the reasons for judgment. This is determined by informal process rather than assignment. One of the Justices may volunteer if the case is one within a branch of law of which he has particular knowledge, or upon which he has previously written, or if it comes from his province of origin. On other occasions, the Chief Justice may request one of the Justices to write, or he may himself volunteer to write. If points of divergence emerge and there is division within the Court, the same informal process is followed in determining who will write majority reasons. When these are circulated, one of the judges in dissent may volunteer to write the minority reasons, or the judges in the minority will decide among themselves who will write to reflect their point of view. Following circulation of the draft reasons, there is an interchange of ideas among the members of the Court on a one-to-one basis in the Chambers of one of the judges, or on a collegial basis during one of the conferences held from time to time. There is no rigid pattern of organized conferring except at the beginning and end of each term. Judgments are delivered whenever ready and a Justice is free to change his mind, upon further consideration, up to the moment of delivery of the judgment. The brief, formal judgment is read by the Chief Justice in open court, and the supporting reasons are made available at that time to counsel and others, in both French and English.

There is a full range of possibilities open to the Court in its judgment: it can quash the lower court's decision; send the case back; rule on the merits; or order that additional information be provided. In most cases, however, the Court simply affirms or sets aside the lower court's decision.

Being at the apex of our Canadian judicial system, and constituting the second and final level of appeal in our country, the precedents made by the decisions of the Court are binding throughout the whole of Canada.

VI. CASELOAD

In recent years, there has been a significant decrease in the caseload of the Court. From the record high in 1974 of 173 cases heard, the caseload has fallen to the present level of some 125 cases yearly. This is not the result of any conscious effort to keep the number of cases to a predetermined figure. It just happens that at present the Canadian judicial process generates about 125 cases a year which are of such general public interest and importance as to warrant a second appeal. In between forty to fifty percent of the cases, the appeal is successful.

Appeals in criminal matters make up the largest portion of the caseload of the Court (twenty-five percent). This is, in part, a reflection of the existence of appeals as of right in certain criminal cases and, in part, a result of the spread of legal aid programs across the country.

Appeals in private law cases, including cases involving the interpretation of statutes and points of common law, are the next largest area of the caseload of the court (twenty-five percent). Appeals from the Province of

Quebec concerning the civil code form a fairly substantial portion of the caseload. By tradition, the three Justices appointed from the Province of Quebec will hear these cases together with two (or more) Justices from the common law provinces. In cases originating in Quebec, the court documents, including judgments, and the oral argument of counsel, are usually in French. Simultaneous translation is only made available in our Court on rare occasions, principally constitutional appeals, when lawyers from common law provinces, not familiar with the French language, may be present.

Constitutional cases, although they tend to have a high profile, are not particularly numerous, averaging around eight a year, or six percent of the total caseload.

VII. CONCLUSION

May I conclude this portion of my remarks by saying that during most of the first one hundred years of its existence the Court attracted little public attention; its judges were not well-known public figures; its decisions gave rise to little controversy or even attention; media coverage was meagre and often inaccurate. But that is changing. As constitutional, economic, and social problems reveal themselves in Canada in sharp relief, the relative anonymity and the tranquility which have hitherto characterized the Court and its operations seem to be vanishing. It now seems plain that in the resolution of those problems the Supreme Court of Canada, as a vital Canadian institution, will be met with the need for prodigious judicial statecraft in the years immediately ahead.