

**THE JOINT STUDY INSTITUTE 2010 CONFERENCE**  
**“Diversity, Culture and Contrasts: Canada’s Legal Kaleidoscope”**  
**Hosted by the Canadian Association of Law Libraries**  
**Hotel: OPUS, Teluq Amphitheatre, 1150 Sherbrooke Street West, Montréal, QC**  
**June 20-23, 2010**

**THE HONOURABLE MR. JUSTICE HARRINGTON**  
**THE HONOURABLE JULIE A. THORBURN**

**OUTLINE OF REMARKS:**  
**CANADA’S COURTS**

**Tuesday, June 22, 2010 from 9:00 to 10:15 a.m.**

**I. OVERVIEW OF OUR LEGAL SYSTEM**

Canada is a federalist state. We have both federal and provincial courts each with their own jurisdiction.

Canada’s legal culture is neither French nor English, neither civil nor common law.

The Canadian legal system is bijural: it is one of the few countries in the world that operates under two systems of law: the English common law (based on precedent) and statutory and Roman law (a comprehensive statement of rules, many of which are framed as broad general principles.)

Nine provinces are based in English common law. In Quebec, in matters of private law, the Quebec Civil Code applies but in matters of public law on the other hand, the common law applies.

Canada enacts legislation in both official languages: English and French.

**II. THE CONSTITUTION**

**THE CONSTITUTION ACT, 1867**

**Section 92:** “In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.”

**Section 96:** “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”

**Section 101:** “The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time 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.”

Prior to 1982, Parliamentary supremacy reigned in Canada. *The Constitution Act 1867* set the division of powers between Parliament and the provincial legislatures. Each legislature was supreme within its jurisdiction and no other institution had the jurisdiction to declare its laws unconstitutional.

With the enactment of the Constitution Act 1982 (The Charter of Rights and Freedoms), Canada ceased to be a country of parliamentary supremacy and became a country of constitutional supremacy. Pursuant to section 52 (1) of the *Constitution Act 1982*, the courts have the right to strike down legislation that is unconstitutional.

## **THE CONSTITUTION ACT, 1982 (THE CHARTER OF RIGHTS AND FREEDOMS)**

### **Protected Rights:**

**Sections 7 to 14** protect individual rights including the right to life liberty and security of the person, protection from unreasonable search and seizure protection from arbitrary detention and rights upon being charged with an offence.

**Section 15** protects the rights to equal protection before and under the law.

**Sections 16 to 22** protect the right to speak and conduct affairs in either French or English while **section 23** protects the education rights of French or English language minorities where numbers warrant.

**Part II** provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed and are guaranteed equally to male and female persons.

### **Limits that Can be Imposed:**

**Section 1** of the Charter sends a message that on occasion, it is appropriate and necessary to limit Charter rights to protect Canadian society as a whole. The limitations clause precedes the enumeration of individual rights. The Supreme Court has prescribed a single standard that the government must satisfy to justify limiting a Charter right: does the challenged law have the effect of limiting one of the guaranteed

rights and it so, is that limit a reasonable one that can be demonstrably justified in a free and democratic society? This process is similar to the process found in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

The Charter is subject to an override clause which allows provinces to override a provision of the Charter. This override is not subject to judicial review. The notwithstanding clause has been used only rarely and by three provinces.

### III. IMPERIAL COURTS

Appeals to the Judicial Committee of the Privy Council abolished through amendments to the *Supreme Court Act* in 1949.

Vice-Admiralty Courts (abolished by (U.K.) *Colonial Courts of Admiralty Act, 1890*)

### IV. PROVINCIAL COURTS

#### PROVINCIAL SUPERIOR/SUPREME COURTS

**Superior Courts:** These are courts of *inherent jurisdiction*, meaning that they do not derive its existence from legislation as the other courts of the province do. Judges are appointed by the federal government and derive their *inherent jurisdiction* from their appointments under section 96 of the *Constitution Act*.

The number of Superior Court judges varies from province to province depending on the population and caseload. In Ontario there are approximately 240 Superior Court Judges.

**History:** The Superior Court system is based on English common law. The common law and equity courts were merged in 1881 to create the new Supreme/Superior Court of each province.

**Administration:** Provincial courts are administered by the province in which they are located. Provinces are responsible for the engagement of court staff, building construction and upkeep, etc. Judges in smaller centres circuit within their region. In some larger centres like Toronto, judges do not circuit. In the larger centres, specialized teams are established to do with areas such as long trial criminal, commercial matters, and appeals from administrative tribunal decisions.

**Jurisdiction:** The Superior Court of Justice in Ontario has inherent jurisdiction over criminal, civil and family cases. The Court has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario. The Superior Court's inherent jurisdiction gives it authority to hear any

matter that is not specifically assigned to another level of court. The Court also has authority over matters granted to it by federal and provincial statutes.

### **CRIMINAL**

- *The Criminal Code* codifies the Superior Court's power to try any indictable offence. The Superior Court generally tries only the most serious offences. These include aggravated assault, manslaughter, murder, drug trafficking, treason and other offences against the security of the state. An individual accused of these offences is tried by a judge of the Superior Court, with or without a jury.
- The Superior Court also has appellate authority over summary conviction criminal cases heard in the Ontario Court of Justice.

### **CIVIL**

- The Court hears matters involving bankruptcy and insolvencies, torts, contract claims, commercial, personal injury, and estates matters. The Court has some appellate jurisdiction under various statutes.
- The **Small Claims Court**, a branch of the Superior Court, offers a forum to bring or defend civil claims involving \$25,000 or less in money or property. The Rules of the Small Claims Court provide for streamlined procedures. Cases in Small Claims Court are usually determined at a lower cost and much more quickly than cases in the Superior Court.
- A Small Claims Court proceeding is usually presided over by a deputy judge.
- In Ontario, the **Divisional Court** is also a branch of the Superior Court. However, it is not a trial court. It hears judicial reviews of government action in Ontario, statutory appeals from Ontario administrative tribunals, and some civil appeals from orders not exceeding \$50,000. The Divisional Court includes the Chief Justice, the Associate Chief Justice and other Superior Court judges designated by the Chief Justice. A proceeding is usually heard and decided by a panel of three judges. However, hearings may be held before a single judge in urgent matters and in certain other circumstances.
- The Divisional Court sits regularly in Toronto throughout the year and schedules sittings in all other regions of the province at various times.

## **FAMILY**

- All family matters are heard, including divorce, division of property, support, custody and access, child protection and adoption. Since family law involves both federal and provincial statutes, family proceedings are divided between the Superior Court of Justice and the Ontario Court of Justice in most locations. Child protection and adoption cases, which fall under provincial law, must be commenced in the Ontario Court. Both courts have jurisdiction over child and spousal support as well as child custody and access.

## **COURTS OF APPEAL**

**General:** Each province has a court of appeal to hear appeals from Superior/Supreme Court decisions and sometimes from lower court and/or tribunals/

The Ontario **Court of Appeal** is the largest in Canada. The Court is composed of 23 judges, supplemented from time to time by additional supernumerary and Superior Court judges. The Ontario Court of Appeal hears over 1000 appeals and over 1000 motions each year. Appeals are heard by panels of three or sometimes five judges. Motions are usually heard by one judge but up to 25% of the motions heard in any year are dealt with by panels of three judges.

**Jurisdiction:** The court's jurisdiction includes consideration of both civil and criminal appeals from decisions of Ontario's two trial courts, the Superior Court of Justice and Ontario Court of Justice.

**Subject-Matter of Appeals:** Civil appeals deal with such subject areas as commercial disputes, property disputes, negligence claims, matrimonial and other family disputes, bankruptcies and corporate reorganizations and Charter (or constitutional) cases.

The court has considered issues such as the definition of marriage, the determination of aboriginal rights, the valuation of shares in an initial public offering, the right to governmental funding for programs for disadvantaged persons and the resolution of property line disputes between neighbouring cottagers.

Criminal law matters include consideration of correctness of acquittals, convictions and the fitness of sentences under the *Criminal Code*, provincial legislation, and constitutional claims.

## V. THE SUPREME COURT OF CANADA – GENERAL COURT OF APPEAL

**General:** The Supreme Court of Canada hears appeals from less than 3% of the decisions of the Courts of Appeal. The Supreme Court of Canada hears appeals from provincial or territorial courts of appeal or the Federal Court of Appeal.

**Source of Appeals:** Cases come from three sources:

**Leave to Appeal:** a party who wishes to appeal the decision of another court (usually a provincial or territorial court of appeal or the Federal Court of Appeal) must obtain permission from a panel of three judges of the Court. Such permission is given if the panel concludes that the case involves a question of public importance or an important issue of law.

The majority of applications for leave to appeal are determined by the Court on the basis of written submissions filed by the parties. The Court considers over 500 applications for leave to appeal each year. By tradition, reasons for decision are not given when the Court announces its decision on an application for leave to appeal.

**Appeals “as of right”** are appeals for which leave to appeal is not required. These include certain serious criminal cases, and appeals from provincial references. (for example, where one judge in the court of appeal dissents on a point of law.)

**References from the federal government:** Federal references require the Court to give an opinion on the questions of law referred to it by the Governor in Council such as the constitutionality or interpretation of federal or provincial legislation and to give its opinion.

**Hearing Appeals:** An appeal is heard once the parties and any interveners have prepared and filed all of the required documents.

**Sittings:** The Supreme Court holds three sessions a year during which it hears some 80 appeals. Each session lasts three months.

The Court sits only in Ottawa, although litigants can present oral arguments from remote locations by means of a video-conference system. The Court’s hearings are open to the public, and most hearings are recorded for delayed telecast in both official languages. A quorum consists of five members, but most appeals are heard by a panel of seven or nine judges.

**Judgments of the Supreme Court of Canada:** The decision of the Court is sometimes rendered at the conclusion of the hearing, but more often, judgment is reserved to give written reasons. Decisions of the Court need not be unanimous; a

majority may decide, with dissenting reasons given by the minority. Each judge may write reasons in any case if he or she chooses to do so.

## **VI. THE FEDERAL COURTS**

**Four courts:** Court Martial Appeal Court, Tax Court of Canada, Federal Court, and Federal Court of Appeal.

**Administration:** All administered by the Courts Administration Service.

Judges must reside within 40 km of the National Capital Region.

All itinerant courts – no districts, no circuits.

All subject to the *Official Languages Act*.

**Jurisdiction:** Superior courts have jurisdiction over all matters, except those removed by legislatures or Parliament.

Federal courts only have such jurisdiction as confided by Parliament.

Tri-partite test: a) there must be a federal legislative class of subject; b) there must be existing and applicable federal law, be it statute or common law; and c) administration of that law must be expressly confided.

Federal courts do not apply provincial laws, except if incidentally relevant, unless referentially incorporated, *e.g. Crown Liability and Procedures Act*.

(*ITO - International Terminal Operators v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752)

### **Federal Non-Statute Law**

- Common law (*R. v. Rhine*, [1980] 2 S.C.R. 442).
- Canadian maritime law:

2. (1) In this Act,  
[...]

“Canadian maritime law” means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada,

1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

(*Federal Courts Act*, s. 2)

**A. COURT MARTIAL APPEAL COURT**

- Hears appeals from courts martial established under the *National Defence Act*.
- Applies the *Code of Service Discipline*, which incorporates most of the *Criminal Code*, and other federal laws.
- Around 60 judges, none full-time. Current Chief Justice is a judge of the Federal Court. All Federal Court of Appeal and Federal Court judges are members of the Court, as are certain provincial court judges.
- Appeals to the Supreme Court of Canada.

**B. TAX COURT OF CANADA**

- 22 full-time judges.
- Chief Justice or Associate Chief Justice must be from Quebec.
- Exclusive original jurisdiction arising under various federal financial statutes including the *Income Tax Act*, the *Canada Pension Plan* and the *Excise Tax Act*.
- Appeals to the Federal Court of Appeal.

**C. FEDERAL COURT:**

- Successor to the Exchequer Court, established in 1875.
- 33 full-time judges, 10 from Quebec.
- For most part, jurisdiction is concurrent with provincial courts, but exclusive jurisdiction over certain causes of action.
- Concurrent original jurisdiction in actions against Crown.

- Exclusive jurisdiction to judicially review decisions of federal boards, commissions or other tribunals, except those confided to the Federal Court of Appeal; including decisions of Cabinet, of Indian band councils, of the Canadian Human Rights Commission and Tribunal, and of the Immigration and Refugee Board.
- Citizenship appeals.
- Intellectual property.
- Navigation and shipping.
- Inter-provincial works and undertakings.
- No diversity of citizenship jurisdiction.
- Appeals to the Federal Court of Appeal.

(*Federal Courts Act*, s. 17-23 and various other statutes)

#### **D. FEDERAL COURT OF APPEAL**

- 13 full-time judges, 5 from Quebec.
- Hears appeals from the Tax Court of Canada and the Federal Court.
- Original jurisdiction in judicial review over certain federal boards, commissions or tribunals, including the Canadian International Trade Tribunal, the Pension Appeals Board, the Canadian Radio-Television and Telecommunications Commission, the National Energy Board, the Canadian Transportation Agency, and decisions of umpires appointed under the *Employment Insurance Act*.

(*Federal Courts Act*, s. 27-28 and various other statutes)

### **VII. BIJURALISM**

- *Interpretation Act*, s. 8.1 and 8.2.
  - *Bouchard v. Canada (Attorney General)*, 2009 FCA 321, affirming 2009 FC 249.
- *Federal Law/Civil Law Harmonization Acts* no. 1 and no. 2.

- Canadian maritime law is often used as vehicle by the Supreme Court to develop the common law by introducing civilian concepts.
  - Claims in tort for pure economic loss (*Canada National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021).
  - Proportionate fault (*Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210).
  - Third-party beneficiary of contract (*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108).

## VIII. NATIONAL COURT - ADVANTAGES AND DISADVANTAGES

### Advantages:

- Writ runs nation-wide.
- Defendants in different provinces.
- Class actions.

### Disadvantages:

- Jurisdictional limitations.
- Stays (*Federal Courts Act*, s. 50(2)).

## IX. JUDICIAL INDEPENDENCE

The Supreme Court has recognized that three characteristics are fundamental to judicial independence:

- i. **Security of tenure:** a judge may only be removed for cause. Cause must be subject to an independent review where the judge is afforded a full opportunity to be heard;
- ii. **Financial security:** This includes the right to salary and pension established by law and free from arbitrary interference by the executive; and
- iii. **Administrative independence:** The judiciary has control over assignment of judges, sittings of the court and court lists. It also has control over the allocation of court rooms and the direction over administrative staff engaged in carrying out these functions.

## X. THE APPOINTMENT OF JUDGES

**Application for Judicial Appointment:** In order to be appointed to the Bench, candidates must submit an Application to the Commissioner for Federal Judicial Affairs Canada.

**Personal History Form:** basic data for assessment by the advisory committee.

**Authorization Form:** statement of standing with the law society.

**Background Check Form:** if the Minister of Justice wants to appoint you to a judicial position.

Qualifications for appointment are set out in the *Judges Act*, the *Federal Courts Act* and the *Tax Court of Canada Act*. (Generally, they require 10 years at the bar of a province or territory, or a combination of 10 years at the bar and in the subsequent exercise of powers and duties of a judicial nature) Appointments may be made only from among members of the bar of that province, as required by the *Constitution Act*.

**Judicial Appointments Committee:** Eight member committee representing the bench, the bar, law enforcement associations and the general public:

- i. a nominee of the provincial or territorial law society;
- ii. a nominee of the provincial or territorial branch of the Canadian Bar Association;
- iii. a judge nominated by the Chief Justice or senior judge of the province or territory;
- iv. a nominee of the provincial Attorney General or territorial Minister of Justice;
- v. a nominee of the law enforcement community; and
- vi. 3 nominees of the federal Minister of Justice representing the general public.

**Appointment by the Minister of Justice:** Federal judicial appointments are made by the Governor General acting on the advice of the federal Cabinet. A recommendation for appointment is made to Cabinet by the Minister of Justice with respect to the appointment of *puisne* judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.

The recommendation to Cabinet is made from amongst the names which have been previously reported by the committees to the Minister.

## **XI. CASES TO WATCH**

The Federal Court of Appeal determined that it is a condition precedent to action for damages against the Crown arising from an administrative decision that a judicial review be first commenced. The Ontario Court of Appeal disagreed. Awaiting decision from the Supreme Court.

- *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892;
- *Manuge v. Canada*, 2009 FCA 29.

Section 99 of the *Constitution Act, 1867* requires judges to retire at 75 years of age.

- *Felipa v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 89, says s. 99 only applies to s. 96 judges, not s. 101 judges. Currently before the Federal Court of Appeal.

## **XII. CHALLENGES FACING THE COURT**

The four key challenges facing the courts are access to justice, length of trials, delays in the justice system, and social problems.

### **A. Access to Justice**

The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have significant funds. The second have access because, with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment. To the second group should be added people involved in serious family problems, where the welfare of children is at stake; in such cases the Supreme Court has ruled that legal aid may be a constitutional requirement<sup>2</sup>.

Many middle-class Canadians have some income but few assets. This makes them ineligible for legal aid.

The result may be injustice.

Self-represented litigants impose a burden on courts. Trials and motions in court are conducted on the adversary system, wherein the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. The trial judge may try to assist, but this raises the possibility that the judge may be seen as “helping”, or partial to, one of the parties. The proceedings often adjourn, adding to the public cost of running the court.

The bar and the bench are attempting to improve the situation. Some modest progress is being made. Lawyers are organizing themselves to give free service to needy clients. Clinics have been set up by governments and legal groups to help self-represented litigants. Rule changes to permit contingency fees – the lawyer is paid out of the proceeds of the litigation, if any – and class actions provide ways for people of modest means to litigate some tort and consumer actions. Thought is being given to coverage for legal services within specified limits as an endorsement to home insurance policies. Justice groups are working to simplify procedures and thus reduce costs or assist the unrepresented litigant.

## **B. Long Trials:**

**Criminal** - Prior to the enactment of the Charter of Rights and Freedoms, it was not uncommon for murder trials to be over in five to seven days. Now, many last at least five to seven months. Charter pre-trial motions regularly last two to three times longer than the trial itself. Changes in the law of evidence have also increased litigation and lengthened trials.

**Civil Trials:** The length of civil trials is also increasing. (For example, in 1996, the average length of a trial at the Vancouver Law Courts was 12.9 hours. Six years later, the average length of a trial had doubled, to 25.7 hours.)

Although Canadian rules of procedure impose limits on examinations for discovery, some argue they still allow parties to canvass issues that are not relevant and material to the issues in the litigation. This results in longer, and more expensive discoveries, and a larger volume of evidence being placed before the trier of fact at trial. The expanded use of expert witnesses has also lengthened trials.

**C. Delays in the Justice System:** Delays in the processing of cases afflicts both criminal and civil cases. On the criminal side, delays in proceedings may result in serious cases being stayed, since the Charter guarantees a trial within a reasonable time. Delays may also result in lengthy periods of incarceration for the accused person prior to trial. Witnesses are less likely to be reliable. As the delay increases, swift, predictable justice, which is the most powerful deterrent of crime, vanishes.

On the civil side, when delay becomes too great, the courts are no longer an option. There has been a big increase in the use of mediation and arbitration outside the court system in civil and family cases.

**D. Endemic Social Problems:** Endemic social problems, including drug addiction and mental illness are serious problems for the courts.

One response has been the development of specialized courts – such as mental health courts and drug courts.

The Ottawa Mental Health Court is an example of a progressive movement within criminal justice systems in North America and elsewhere in the world to create “problem-solving courts”. These courts, with collaborative interdisciplinary teams of professionals and community agencies, attempt to identify and to deal with some of the underlying factors contributing to criminal activity, which have often not been very well-addressed by the conventional criminal justice process. The goal is to satisfy the traditional criminal law function of protection of the public by addressing in individual cases the real rather than the apparent causes that lead to conflict with the law. Mental health courts have opened in Ontario, New Brunswick and Newfoundland.

Other problem-solving courts include drug treatment courts and Gladue courts, that deal with aboriginal offenders.