INTRODUCTION:
THE SUPREME COURT OF CANADA 1875-1975

The Canadian Parliament established the Supreme Court of Canada on April 8th, 1875; the Court heard its first case on June 5th, 1876. Yet, for one hundred years, the institution has remained a "quiet Court".[1] Its decisions are not widely read; the press coverage is meagre, and often inaccurate. The names of its Judges are known by few Canadians: there have been no books and only a handful of biographies about the men who have sat on the Court. A typical occurrence was the Supreme Court of Canada centenary symposium, held in Ottawa on September 26th and 27th, 1975, and attended by Canadian jurists and foreign luminaries, including the Lord High Chancellor of Great Britain, the President of the French Court of Cassation (Cour de Cassation) and an associate Justice of the Supreme Court of the United States: the local press virtually ignored this historic event.[2]

But it is not only the laymen who have been remiss. Our legal periodicals, unlike their American counterparts, attempt no sustained or systematic coverage of our highest appellate Court. Admittedly, the *Osgoode Hall Law Journal* has annually, since 1963, devoted one issue to the Supreme Court; but in recent years the number of articles and comments dealing directly with the Court has been dwindling. The Editorial Board of the *Ottawa Law Review* has noted this deficiency and, in consequence, has dedicated this issue of the *Review* to the Supreme Court of Canada, not only in commemoration of its first century, but as tribute to the Court today, and in recognition of its profound responsibility for shaping the Canada of the future.

One can understand, by analyzing its history, why the Supreme Court of Canada has only recently begun to acquire the status and attention that a country's ultimate appellate tribunal deserves. Under the thumb of the Privy Council until 1949, the Supreme Court was merely an intermediate appellate Court; its decisions were subject to review, and many disputes proceeded directly from the provincial courts to the Judicial Committee. Therefore, the Court was forced to become simply an articulator and inter-

[1] Cheffins, *The Supreme Court of Canada: The Quiet Court in an Unquiet Country*, 4 OSGOODE HALL L.J. 259 (1965).

[2] For example, the *Ottawa Citizen's* coverage was less than 20 lines in a single column.

preter of the law as authoritatively announced by the Privy Council. And, further, the Committee itself disguised the creative aspects of its adjudications: reared in Austinianism, their Lordships purported to interpret the B.N.A. Act as any other statute, fastening on the accepted and time honoured canons of statutory interpretation, and ignoring the dynamics and realities of Canadian federalism. Politicians and legal academics became increasingly upset by the Committee's constitutional opinions, but there was little in the judgments themselves to capture the imagination of the Canadian people generally.

In 1939, Her Majesty Queen Elizabeth laid the cornerstone of the new Supreme Court building. The war intervened, and the Court first occupied the premises in 1946. Some counsel lamented losing the friendly atmosphere and fine acoustics of the old building; most however had found the old facilities which had been built as a workshop and storehouse (and, it is said, as a stable), quite inadequate. More importantly, the new quarters were a symbol of the imminent liberation from the debilitating influence of the Privy Council. Earlier attempts to free the Court had almost destroyed the institution itself; the reservation of the appeal to the Privy Council had not only impeded the development of a distinctively Canadian jurisprudence, but has also prevented the Court from attracting public notice. [3]

In 1949, with the abolition of the Privy Council appeal, the Supreme Court of Canada became truly supreme, and it is therefore not surprising to find the Court today an important and thriving domestic institution. The case load is becoming a serious problem. Prior to 1972, the number of cases decided by the Court hovered around the 125 mark; during the last four years (1972-1975), the average number of cases has soared to 163. Similarly, the number of applications for leave to appeal has been mounting steadily, accelerating in recent years: in 1971 there were 127 applications, while in 1975 there were well over twice that number. Before 1972, the Court granted leave on proportionately fewer and fewer of such applications, thus maintaining the absolute number of leaves granted at about twenty-two. However, it seems that the current bench has abandoned this technique of controlling its case load. During the last four years the proportion of leaves granted has stabilized at twenty-eight per cent; in consequence the number of applications coming before the Court for full adjudication has jumped to well in excess of fifty per term. [4] But despite the burgeoning case load, I agree with Professor Weiler that the Court is neither as prolific nor as proficient as one would expect. The judgments lack the breadth of research

[3] See the lead article, *infra*, by Professor Herman, *The Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council.*

[4] All statistics come from three sources: *The Report of the Special Committee of the Canadian Bar Association on the Case Load of the Supreme Court of Canada* (unpublished); Herman, *Report to the Chief Justice* in CASES AND MATERIALS ON THE SUPREME COURT OF CANADA at 36 (M. Herman, 1975); and an interview on Friday, January 30, 1976, with Benoit Godbout, Executive Secretary to the Supreme Court.

and the felicity of expression that are charactertistic of the writings of the American Supreme Court. [5]

To alleviate the work load, the Supreme Court Act was amended to abolish all future civil appeals as of right; [6] hereafter, the Court will be able to control the size of its civil docket. This revision not only frees the Court from pedestrian appeals, but more importantly, allows the Court to carefully select those cases that merit its time and attention. During this process of selection, the Court will necessarily reconsider and redefine its own role.

But there are other devices that could also improve the Court's performance. In the early 1970's, only about twenty to twenty-five per cent of the cases were heard by the full bench, the Court usually sitting in panels of five, and occasionally seven. By 1975, forty-four per cent of the appeals were argued before the full Court. This increase is consistent with Chief Justice Laskin's known preference for using the full complement of Judges. [7] This approach is laudable: if the case is important enough to be at the Supreme Court level, then it deserves the consideration of the full Court. Besides, judgments of a panel are open to the criticism that the decision reflects only the views of the particular Judges who participate; the authority of these decisions is suspect.

The Judicial Conference should be formalized and regularized (which would be much easier were each Justice sitting on every appeal); relatedly, more judicial time should be spent debating draft judgments and rewriting them to improve their quality and to obtain the concurrences of other Judges. Following a week's hearing, the American Supreme Court confers on two occasions for a total of about six hours. Each case is carefully considered, often provoking heated argument. Draft judgments are prepared, circulated, scrutinized, redrafted, recirculated. [8] The process is long and difficult; but the opinions that emerge from this crucible are usually well-tempered. Moreover, the American Court is ordinarily able to come down with an opinion of the Court (the dissents are usually consolidated as well). In contrast, little is known about the Judicial Conference at the Supreme Court of Canada; but it is common knowledge that their Lordships convene less frequently, and it can be inferred that their scrutiny of the draft reasons is less intense. The English tradition of individualistic opinion writing, still characteristic of the House of Lords, accounts for this lack of collegiality at the Canadian Supreme Court. The 1950's were the heydays of the *seriatim* opinions; there is fortunately today more collective writing at the Supreme Court. However, there are still numerous instances of unnecessary con-

---

[5] P. WEILER, IN THE LAST RESORT 14-15 (1974).

[6] Can. Stat. 1974-75 c. 18 (effective January 27, 1975).

[7] Laskin, *The Role and Functions of Final Appellate Courts: The Supreme Court of Canada*, 53 CAN. B. REV. 469, at 470 (1975).

[8] Two recent popular accounts are Weaver, *The Supreme Court at Work: A Look at the Inner Sanctum*, The New York Times, February 6, 1975, and Totenberg, *Behind the Marble, Beneath the Robes*, The New York Times Magazine, March 16, 1975.

currences (either with the majority or in dissent) which are at best repetitive and at worst confusing.

Further, the Judges should reconsider the use of their legal secretaries (law clerks). Not only should these assistants be asked to prepare bench memoranda (brief synopses of the facts, law and arguments) and to do supplementary research; they should be requested to thoroughly edit and revise the draft judgments, subject to the Judge's ultimate approval. Indeed, the American Judges have found it useful on occasion to have the clerks prepare the draft reasons and submit these to the Judges for revision. While the quality of *justice* is the sole responsibility of the Judge, the quality of the *judgment* should be the joint effort of Judge and clerk. The high calibre of the judgments emanating from the California and New York courts has been attributed in part to the large number of clerks employed. At the Supreme Court of Canada, each Justice currently employs only one clerk. These clerks have too much work to do, and in consequence are unable to perform all their tasks adequately. Each Judge at the American Supreme Court has at least three clerks; a minimum of two clerks for each Justice on the Canadian Supreme Court is required. [9]

The final recommendation is more contentious. During the 1975 term the average hearing lasted 110 minutes. A considerable amount of this time was wasted on the narration of facts and evidence, and in the argument of uncontentious or subsidiary matters. The Court appeared at times to be excessively patient with counsel. While recognizing the paramount importance of oral argument, I would suggest that the Court take a more active hand in directing the hearing. During a pre-hearing conference the Judges could identify the points in issue that deserve the Court's time; counsel would then be instructed to address themselves primarily to these matters. To accomplish this saving of court time, the nature of the factum would have to be altered. Modelled on the English memorandum, the Supreme Court of Canada factum need presently contain little more than a series of legal propositions and a list of authorities. By way of contrast, the American brief includes a full blown exposition of the argument. I am not endorsing the adoption of the American format (in fact, many of the factums filed in the Canadian Supreme Court approximate the American brief); but a fuller and better written factum in all instances would aid the Court in narrowing and defining the issues in dispute.

During the 1974-1975 academic year, many important and interesting cases were heard and decided by the Supreme Court of Canada. The decision in *Nova Scotia Board of Censors v. McNeil*, analyzed below by Professor Mullan in his article entitled *Standing After McNeil*, allowed the Court to reconsider the question of *locus standi* in constitutional cases. The result is gratifying to those who advocate the citizen's right to challenge legislative

[9] See generally Herman, *Law Clerking at The Supreme Court of Canada*, 13 OSGOODE HALL L.J. 279 (1975).

incompetence; [10] but Professor Weiler must feel misgivings, having argued that constitutional adjustments are better made through the political process, and that interference by private litigants detracts from the smooth functioning of co-operative federalism. [11] *Hodgins v. Hydro-Electric Commission*, noted below by Patricia Spice, gave the Supreme Court the opportunity to explore the *Hedley Byrne* [12] doctrine of tortious liability for negligent statements. There are currently two other cases, one just decided and the other one pending before the Court, [13] that require declarations on the limits of liability under this new head.

Morgentaler v. The Queen, noted below by Wanda Noel-McHale, remains a cause célèbre, and has received more press coverage than any other case in recent Canadian history. Another Bill of Rights case, *Mitchell v. The Queen*, noted below by Margaret Bloodworth, which considered once again the breadth of powers given the National Parole Board, also received considerable newspaper attention. *Barnett v. Harrison*, noted below by Ken Webb, reaffirmed the earlier decisions of the Court that attempted to define the nature and the operation of the "true condition precedent". *The Queen v. Kundeus*, noted below by Eugene Oscapella, grappled with the problem of transferred intent, and may well be the most important judicial pronouncement on the doctrine of *mens rea* since *Beaver v. The Queen.* [14] There is a unifying motif running through the latter four cases: each of them contains a strong dissent by Chief Justice Laskin. In *Morgentaler* and *Mitchell* the judgments of the Chief Justice are both imaginative and novel; contrariwise, in *Harrison* and *Kundeus* His Lordship proceeds more traditionally, canvassing many common law jurisdictions and relying on the expositions of the leading, authoritative texts.

The Editorial Board does not claim to have selected the six most important decisions rendered by the Court during this period. We have consciously overlooked the constitutional decisions in *Morgan v. Attorney-General of Prince Edward Island*, [15] which adjudged provincial efforts to control non-resident land ownership constitutional, and *MacDonald v. Vapor Canada Ltd.*, [16] which signified the first time that the Supreme Court of Canada has, since the abolition of the appeal to the Privy Council, held a federal statute unconstitutional. *Harrison v. Carswell* [17] is a valuable jurisprudential opinion: Mr. Justice Dickson and Chief Justice Laskin disagree over the creative role of the Court and the operation of the doctrine of *stare*

---

[10] B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA ch. 5 (1968).

[11] *See, e.g.*, Weiler, *Of Judges and Scholars: Reflections in a Centennial Year*, 53 CAN. B. REV. 563, at 571-74 (1975), and P. WEILER, *supra* note 5, at ch. 6.

[12] Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575.

[13] The Town of the Pas v. Porky Packers Ltd., January 30, 1976 (as yet unreported); and Haig v. Bamford.

[14] [1957] Sup. Ct. 531, 118 Can. Crim. Cas. Ann. 129.

[15] 5 N.R. 455, 55 D.L.R.3d 527 (Sup. Ct.).

[16] January 30, 1976 (as yet unreported).

[17] 75 C.L.L.C. 15306 (Sup. Ct.).

decisis. La Reine v. Biron [18] has, perhaps, drastically altered the police arrest powers as defined by the Criminal Code. We can only hope that other reviews and periodicals will see fit to comment on these decisions, and thereby help to focus well deserved attention on the Supreme Court of Canada.

As the Court enters into its second century, there are indications that the institution will become the centre of new study and controversy. Professor Weiler's *In The Last Resort* is a brilliant polemic that will intrigue all serious students of the judicial process. The two recent issues of the *Canadian Bar Review* are an excellent introduction into the history, traditions and development of the Court. Interested readers are referred to the bibliography on the Supreme Court of Canada included in this issue of the *Review*.

But, most importantly, the recent decisions of *Murdoch*, [19] *Lavell*, [20] *Canard* [21] and *Morgentaler* have caught the attention of the populace. The citizenry is beginning to realize that the traditional juridical posture belies the nature of the judicial process, and that the Court is essentially a political institution, necessarily making policy adjudications and purposely adapting the law to meet the changing times. It is no coincidence that three of these now famous decisions involve the application of the Canadian Bill of Rights. Whether a statute affords "equality before the law" (or "due process of law") is manifestly a question that transcends a narrow, legalistic analysis. The people feel, quite properly, that they can validly voice their opinions on these matters, and feel some confidence in evaluating the Court's performance. As one observer puts it: "A strange thing happened to the Supreme Court of Canada on the way to the celebration of this, its centennial year: the public discovered that the court exists." [22]

MICHAEL JOHN HERMAN*

---

[18] 30 Can. Crim. (n.s.) 109 (Sup. Ct.).

[19] Murdoch v. Murdoch, [1975] 1 Sup. Ct. 423, [1974] 1 W.W.R. 361.

[20] Attorney-General of Canada v. Lavell, [1974] Sup. Ct. 1349, 38 D.L.R.3d 481 (1973).

[21] Attorney-General of Canada v. Canard, [1975] 3 W.W.R. 1, 52 D.L.R.3d 548 (Sup. Ct.).

[22] Weiler, *Of Judges and Scholars*, *supra* note 11, at 563.

* Special Faculty Editor for this issue commemorating the Supreme Court of Canada centenary.