THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. LIII SEPTEMBER 1975 SEPTEMBRE NO. 3

THE SUPREME COURT OF CANADA: THE FIRST ONE HUNDRED YEARS A CAPSULE INSTITUTIONAL HISTORY

BORA LASKIN*

Ottawa

I

The Supreme Court of Canada celebrates this year the centenary of its establishment as the highest court in Canada, but it has been Canada's highest court in all causes for only the past quarter-century. Its origin and its history after its creation on April 8th, 1875[1] are intertwined with the Judicial Committee of the Privy Council, and this brought it, doctrinally, under the authority of the House of Lords as well.[2] It took decisions of the Judicial Committee, in 1935[3] and in 1947[4] respectively, to validate federal legislation which, in 1933, abolished Privy Council appeals in criminal cases and, in 1949, capped the introduction of a bill in 1940 (held over for Privy Council consideration until the end of World War II) to abolish appeals in all causes, civil as well as criminal, from any Canadian appellate court.[5]

* The Right Hon. Bora Laskin, Chief Justice, Supreme Court of Canada, Ottawa.

[1] S.C., 1875, c. 11.

[2] *Robins* v. *National Trust Company Limited*, [1927] A.C. 515.

[3] *British Coal Corporation* v. *The King*, [1935] A.C. 500.

[4] *Attorney General for Ontario* v. *Attorney General for Canada*, [1947] A.C. 127.

[5] S.C., 1949 (2nd sess.), c. 37, s. 3.

Had these decisions gone against the federal policy of abolition of appeals, thus pointing to a constitutional amendment to achieve it, this year's centennial observance might properly have been delayed for such number of years as would have been necessary to persuade this country of the incongruity of maintaining judicial dependence with political independence as certified in 1931 by the Statute of Westminster.[6] There might also have been a delay for that period in the reconstitution of the Supreme Court by the enlargement of its membership from seven to nine judges, done concurrently with the abolition of appeals to the Privy Council.

The Supreme Court of Canada began life as a court composed of six judges, each of them constituted also as a judge of the Exchequer Court of Canada, a court of original jurisdiction established at the same time. This conjoint function lasted until 1887 when the Exchequer Court was reconstituted with its own judiciary. Two of the judges of the Supreme Court (under an amendment to the Supreme Court Bill after it was introduced) were to come from the Bar or Bench of Quebec, and this number was increased to three when the court was enlarged to nine in 1949.

The judges of the Supreme Court were given tenure during good behaviour under the original Act, and this prescription lasted until 1927 when provision was made for their retirement at age seventy-five, and at the same time a seventh judge was added to the complement.[7]

As is well known, the Supreme Court had a somewhat uncertain beginning. Its constituent Act, as provided by section 80, required activation by proclamation before the judges and supporting officers could be appointed and before its other provisions could take effect. Indeed, the Governor General, Lord Dufferin, hesitated to assent to the Act, but (as he said in a dispatch to Lord Carnarvon, the Colonial Secretary, on April 9th, 1875, the day following assent) "having talked the matter over with my Ministers, I have concluded that the measure is within the competence of the Canadian Parliament, and have assented to it, my Law Officers being of that opinion".[8]

The main sticking point seemed to be section 47 of the Act (also introduced into the original Bill after its presentation to the House of Commons) which denied appeals to the Privy

[6] 22 & 23 Geo. 5, c. 4 (U.K.).

[7] S.C., 1926-27, c. 38.

[8] Dufferin-Carnarvon Correspondence, 1874-1878, edited by de Kiewiet and Underhill (1955), p. 143.

Council, saving however the royal prerogative. Notwithstanding royal assent, there was still the danger of disallowance, and Edward Blake, who became Minister of Justice after the Supreme Court Act was passed, went to England in the summer of 1876 to confer directly with Carnarvon and with Lord Cairns, the Lord Chancellor, who objected strongly to section 47.

The desirability of a visit by Blake, and how it should be handled, were discussed between Dufferin and Carnarvon at some length. Carnarvon wrote to Dufferin on January 20th, 1876 as follows:[9]

> I have conferred with Cairns again as to the Canada Supreme Court Act, and I have made him, I think, understand (not an easy matter to put into the head of a Lord Chancellor who though very learned in the Law is not equally appreciative of the distinctions of large and small Colonies) that this must be a compromise, and that if he will when Blake comes to England take a little pains to explain and discuss the several points, there will be no real difficulty in coming to a conclusion. You may depend on my doing everything in my power.

The issue as to section 47 concerned a difference of opinion on whether there were in fact two forms of appeal to the Privy Council, one as of right and the other by leave of the Privy Council itself. It was, of course, possible to make this distinction under appropriate British legislation and, indeed, it existed in respect of appeals from the provincial courts. It was not, however, a distinction that the Parliament of Canada could itself make without British concurrence, and hence it was that Cairns insisted that as to the Supreme Court of Canada the appeal to the Privy Council was one and indivisible. This position was ultimately accepted by Blake and the dispute was resolved on that basis.[10]

In short, section 47 left the Privy Council as free as it would have been without that provision to admit appeals from the Supreme Court of Canada. Since at that time appeals could be taken both as of right and by leave directly from the provincial appellate courts to the Privy Council, thus by-passing the Supreme Court, the latter was left in the ambiguous position where it could not command appeals to it nor effectively control appeals from it.

By the time of the conclusion of the dispute about Privy Council appeals, the Supreme Court had embarked upon its duties. The necessary proclamations to enable the Chief Justice and the five other judges to be appointed and to enable the court to

---

[9] *Ibid.*, p. 182.

[10] See Underhill, Edward Blake, The Supreme Court Act and The Appeal to the Privy Council (1938), 19 Can. Hist. Rev. 245.

exercise its judicial functions had been issued on September 17th, 1875 (with effect from September 18th, 1875) and on January 10th, 1876 (with effect from January 11th, 1876) respectively. The first Chief Justice, Sir William Buell Richards, who was at the time Chief Justice of Ontario, was sworn in on October 8th, 1875 and the other five judges on November 8th, 1875. There was a ceremonial session on that day in the Senate Chamber for the purpose of reading the commissions of the judges and administering to the five puisne judges the oaths of allegiance and of office. The Chief Justice, having been sworn in a month earlier by the Governor General (and this prescription has continued), administered the oaths to his colleagues (and this too is the prescription still in force).

In view of the controversy as to appeals to the Privy Council as of right and under the Royal Prerogative, Blake had agreed to hold off the opening of the court "until after Christmas".[11] So wrote Dufferin to Carnarvon on November 3rd, 1875, and hence the delay in the proclamation enabling the court to exercise its judicial functions. There was no doubt about Blake's feeling on the matter of the subjection of Supreme Court decisions to further review by the Privy Council. In the same dispatch, Dufferin told Carnarvon that "Blake evinced a great capacity for ill temper on the subject should he be thwarted in his present views". And the dispatch added:

> Among other things that he [Blake] hinted at was the fact that there was a legal clique in England whose peculiar interest was to promote a supply of Canadian law suits in the English Courts of Justice.

Blake's views appeared to have changed after he became a member of the British House of Commons. A speech he delivered in 1900 on the second reading of the Commonwealth of Australia Constitution Bill indicated that he now saw merit in an external tribunal like the Privy Council removed from internal passions,[12] a position that may have been influenced as well by his experience as counsel in Canadian appeals to the Judicial Committee.

The Supreme Court convened for its first session on January 17th, 1876, which was within a week after the date on which it could lawfully function. It appears that the session was formal only because the court did not then have any rules to govern its proceedings, these not being promulagated until February 7th, 1876. The note in the court's record for January 17th, 1876, a Monday, reveals that the court met in the Parliament Buildings

[11] Dufferin-Carnarvon Correspondence, *op. cit.*, footnote 8, p. 160.

[12] See MacKinnon, The Establishment of the Supreme Court of Canada (1946), 27 Can. Hist. Rev. 258.

at 12:00 noon for the purpose of hearing appeals. Five of the six judges were present, the absentee being Mr. Justice Samuel Henry Strong. The minute concludes: "There being no business to dispose of the Court rose." When the court next met on Monday, June 5th, 1876, "in the Court Room in the Parliament Buildings (formerly the reading room of the Senate)", the five judges present (Mr. Justice William Alexander Henry did not sit) began to hear the appeal in *Taylor* v. *The Queen*,[13] the second reported case in the new *Supreme Court Reports*. The reasons reflect the court's immediate concern with its jurisdiction and, indeed, the appeal was quashed for want of jurisdiction, although the court heard it on the merits as well and reserved judgment because it was not prepared to dispose of it peremptorily on jurisdictional grounds.

II

Ten days after the members of the Supreme Court had all been sworn in, the Governor General feted them at a dinner. Lady Dufferin noted in her journal under date of November 18th, 1875 that "we had a great dinner for the Judges of the Supreme Court (sixty-two guests), and had a large T-shaped table spread in the ballroom for it".[14] About seventy-five years later, on October 9th, 1950, the court held a special session at 3:00 p.m. "to inaugurate the new status of the Supreme Court of Canada" (to use the words of the invitation), that is, to celebrate the establishment finally of the Supreme Court as the ultimate appellate court in all Canadian causes. The Chief Justice, the Right Honourable Thibaudeau Rinfret, gave a dinner that evening for some seventy guests including the Governor General, the Prime Minister, the Chief Justices of the provincial Superior Courts, and leaders of the Bar as well as members of the Supreme Court. Also included and present was the retired Chief Justice, Sir Lyman Duff, whose period of distinguished service on the court, extending over thirty-seven years, is not likelly to be exceeded.

Now, twenty-five years after that dinner, the Supreme Court celebrates not only its centenary but the coincidental enactment of legislation which certifies clearly to its ultimate authority. The amendments to the Supreme Court Act,[15] effective January 27th, 1975, give the court unfettered authority to determine what non-criminal causes it will hear on the merits. The application of the legislative standards for admission of an appeal (that "any

[13] (1876), 1 S.C.R. 65.
[14] Lady Dufferin, My Canadian Journal (1891), p. 236.
[15] S.C., 1974-75, c. 18.

question involved . . . is by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, 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") is for the court itself. Its jurisdiction in criminal matters continues to depend largely, as it has for many years, on leave being first obtained to argue questions of law; appeals as of right in criminal causes are limited. It may be said, therefore, that it took seventy-five years before the court gained independence from external control and one hundred years for it to attain overall ultimate appellate control of its docket.

The Dufferin-Carnarvon correspondence, to which I have already referred, reveals a number of other aspects of the court's institutional character which are of interest. Consideration was given to the title of judges of the Supreme Court, and Carnarvon indicated that if the Canadian authorities were willing "there would be no difficulty in designating the members of the Canadian Supreme Court as 'Lords Justices' ".[16] Blake felt the constituent Act would have to be amended for this purpose and said that the matter should be left until the issue of section 47, referable to Privy Council appeals, was resolved. Dufferin himself appears to have raised the question of designating the judges of the Supreme Court as Lords Justices. He wrote to Carnarvon on November 12th, 1875 that "it would be well on many accounts to give these judges some higher designation than that which is enjoyed by members of the several Provincial High Courts. Even these are addressed by the Bar, at all events in Ontario, as 'Your Lordship' ".[17] Nothing further was done on this question after Blake had indicated it should be left in abeyance.

Writing to Carnarvon on December 23rd, 1875, Dufferin told him that "I have put the judges into red robes and ermine, which has hitherto been a dress unheard of in Canada. This will be only for red letter days. On ordinary occasions they will wear black robes trimmed with miniver".[18] The red robes with ermine(?) trim are still worn, but only at the opening and closing days of a session, and at the opening of a new Parliament or a new session of Parliament. In the past they were also worn when capital murder appeals were heard and for the duration of the hearings. This is no longer the case, although capital murder appeals still come to the court. The black robes are the general style, and

---

[16] Dufferin-Carnarvon Correspondence, *op. cit.*, footnote 8, p. 174.
[17] *Ibid.*, pp. 163-164.
[18] *Ibid.*, p. 174.

are worn unadorned. The first Registrar of the Court, Robert Cassels, wrote in an article in 1893 that the judges had miniver (white fur) trim on their black robes but this has long been discontinued.[19]

In the same article, the Registrar described the building which the Supreme Court came to occupy and continued to occupy until it moved into its present premises. The records of the court show that until late 1881 the court sat in the Parliament Buildings where a Court Room was provided. There is, for example, an entry that reads as follows : "On Monday, 15th January A.D. 1877, the Supreme Court of Canada met in their Court Room in the Parliament Buildings at 12:00 noon". By early 1882 the court met in a building which was not built for it but which became its own and was occupied by it until it moved into its present premises, built to house it and the Exchequer Court of Canada, now the Federal Court. The court's minute book for Wednesday, January 11th, 1882 reads that "the Supreme Court of Canada met in their Court Room on Bank Street at 11:00 a.m.". This building stood on the north side of Wellington Street to the west of the West Block of the Parliament Buildings and fronting on Bank Street.

There is a plaque in a wall at the original location of the court's former building which reads as follows:

> This wall is built of stone formerly in the building which housed the Supreme Court of Canada, 1881-1945. It was erected for use of government workshops in 1873 and demolished in 1956.

The old building, of which there are photographs extant, may be seen in replica in relief on a bronze plaque which was presented to the court by the Canadian Bar Association on June 23rd, 1975 to mark the court's centenary. The plaque is affixed to the face of the grand staircase in the foyer of the Supreme Court Building, being the staircase leading to the main Court Room. Although the new building was completed by the time World War II broke out, it was occupied by the federal Government to house a number of wartime agencies for the duration of the war. The first case heard by the court in the present building was the Japanese Deportation case, the hearing of which began on January 24th, 1946.[20]

---

[19] Cassels, The Supreme Court of Canada (1893), 2 Green Bag 256.

[20] *Reference re Validity of Orders in Council in relation to Persons of the Japanese Race*, [1946] S.C.R. 248, aff'd [1947] A.C. 87.

III

Under its original Act, the Supreme Court was to hold two sessions anuually, the first to begin on the third Monday in January, and the second to begin on the first Monday in June, each session to continue until the business before the court was disposed of. In 1879, provision was made for three annual sessions to begin, respectively, on the third Tuesday in February, on the first Tuesday in May and on the fourth Tuesday in October. In 1891, the commencement of the third session was moved to the first Tuesday in October. In 1913 the date of the first session was advanced to the first Tuesday in February and the date of the third session was postponed to the second Tuesday in October but it was changed back again in 1925 to the first Tuesday in October. In 1928 the date of the second session was advanced to the fourth Tuesday in April. The prescriptions now in force were enacted in 1952 and provide that the first session shall begin on the fourth Tuesday in January, the second on the fourth Tuesday in April and the third on the first Tuesday in October in each year.

The Supreme Court heard only three cases in its June session of 1876. The records of the court show that sixty-one cases were heard in 1887, the highest annual number to that date. The Registrar of the court in the article on the court previously mentioned wrote that during the first eleven years of its existence the court heard one hundred cases. In 1900, seventy-six cases were heard; and, to take a few other dates at random, one hundred and three were heard in 1925, a record number, and in 1950, just before any impact of the abolition of Privy Council appeals was felt, the court heard sixty-four cases.

The present work-load is much heavier. It has run consistently over one hundred cases per year from 1956 on, reaching a figure of one hundred and seventy-three in 1974, the highest number of cases ever heard by the court in any one year (one hundred and seventy-one were heard in 1972); and, in addition, the number of applications for leave to appeal increased from fifty-three in 1961 to one hundred and one in 1969, and in each of the past few years has been close to or more than one hundred and fifty. In its October term for 1974 the court heard sixty-three appeals, the largest number ever heard in one session. It is not a figure that gives any sense of pride, serving only to reflect the unremitting labours of a court that sat every week day during the session which began on October 1st and ended about a week before Christmas.

The volume of work has also brought about unavoidable delay, in some cases, of bringing down reserved judgments since reasons have to be carefully considered by each judge who participates in the case, whether or not he writes. There has also been an increase in the number of cases disposed of from the Bench after argument. The number of cases in which this has occurred has now risen above twenty-five per cent. It is too early, at this time of writing, to judge the effect of the recent amendments to the Supreme Court Act which carried out the recommendations of a Special Committee of the Canadian Bar Association in giving the court complete authority to determine what civil cases it will hear.

What is likely is that with the disappearance of rights of appeal based on a monetary standard, applications for leave, in cases where the quantum of damages is the issue or lies behind the issue, will be reduced to a trickle. The result of the previous generous latitude for appeals as of right in civil cases was to increase the number of remanets carried over by the court from one session to the succeeding one. The court finds itself today with more than a full session's work having to be carried over to its next session, for which there will be appeals inscribed (leave having been granted) which cannot be heard in the session of inscription. It will take some time to become completely current. With the court now in a position to choose the cases to be heard (subject only to limited classes of appeals as of right in criminal cases), it is probable that the full Bench will sit very often and, indeed, there has been a decided increase in the number of cases heard by the full court over the past few years.

Relief for the court in the number of sitting days is also necessary if it is to have adequate time for reflection. That is, of course, a matter for the court in its internal administration, but it has always been concerned and remains concerned about its obligation to attend to its pending business. At the present time, the court hears motions for leave every first and third Monday of the month (or first Tuesday when it is the opening of a session), and no cases are called for hearing on those days. This gives little or no relief because it has not been often, in the past year or so, that the motions (heard by three panels of three judges) can be disposed of in one day. The time limitation on oral argument on motions is tolerantly applied but it may become necessary to enforce it more rigorously despite the best efforts of counsel to co-operate in saving time. The only relief from daily sittings now self-provided by the court is on the second and fourth Fridays of the month; no cases are called

for those days, but it has not been unusual for cases called for the previous Thursday to carry over to the Friday. I add here only this, the court has not yet considered it necessary to limit oral argument on an appeal, and although this is a possibility it is not a remedy which the court would approve with any relish.

To date, and including the present Bench, fifty-four persons have served as members of the Supreme Court, and there have been fourteen Chief Justices, including the present incumbent. Apart from the first Chief Justice, only one of the Chief Justices came to the position from outside the court. The statutory provision for the appointment of three judges from Quebec has been associated with a practice of appointing three from Ontario, two from the Western Provinces and one from the Atlantic Provinces.

IV

In this brief narrative of the court as an institution I have avoided any discussion of its doctrine, of its influence as a law-maker, of its role as constitutional adjudicator. These and other related matters are the subjects of the series of articles by which the *Canadian Bar Review* has thought fit to commemorate the court's centenary. The articles, whether expository only or critical only, or both, are of a range, according to their titles, which appears to me to reflect an appreciation by the writers of the truly national character of the court. It is a character which I may be allowed to hope the court never loses. What this means is that every justiciable issue that arises in Canada is potentially open for ultimate determination by the Supreme Court of Canada. It matters not that the issue is one in the field of private law or public law, that it be a civil matter, either under the common law or under the Quebec Civil Code, or that it be a criminal matter; it matters not that the issue is one that invites consideration of federal legislation or provincial legislation or that it arises under municipal by-laws or regulations; it matters not that it involves a constitutional question or a question of the limits of executive or administrative authority. Subject to the effect of competent legislation, which itself is open for judicial interpretation, the Supreme Court ultimately determines the law of each province as well as the law of Canada as a whole. It is a function which now carries a greater responsibility than ever before.

I express here my personal appreciation and convey the appreciation of the court as a whole to the Editor of the *Canadian Bar Review* and to the Canadian Bar Association, the publisher of the *Review*, and to the contributors to the special issues for providing so appropriate a tribute to the court in its centennial year.