A COUNSEL LOOKS AT THE COURT

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It has been my privilege and good fortune to have appeared before the Supreme Court of Canada as counsel since the later years of Chief Justice Sir Lyman Duff. For counsel, appearance in an ultimate appellate court should be the most intellectually satisfying field of advocacy because by the time a case reaches that level it has been stripped of its non-essentials and the argument normally is confined to important and interesting questions of law.

The Supreme Court of Canada has had a tradition of being courteous to and considerate of counsel and for this reason my experiences before the court have been not only intellectually satisfying but pleasant. The court does not unduly confine counsel in oral argument and one feels that the court is generous in its allotment of time to counsel who are permitted to develop their submissions in their own way. This, of course, does not mean that the court, on the proper occasion, will not pointedly inform counsel that their points are irrelevant or that they are unduly repeating themselves and thus wasting the time of the court.

The Supreme Court of Canada is a general appellate court and hears appeals from the ten provincial courts of appeal and from the Federal Court of Appeal. It administers both federal and provincial laws and the cases that come before it cover a very wide spectrum of legal problems. The breadth of the jurisdiction of the Supreme Court of Canada has, with the increase of litigation, imposed an almost impossible task upon the court which in recent years has been badly overworked.

The court has always recognized the extreme importance of oral argument. Written briefs of argument to a tribunal can be helpful but too often they tend to be verbose and raise collateral points accompanied by a proliferation of authorities. The mere fact that oral argument is presented in the face of the court and in the presence of opposing counsel tends to discipline counsel to deal with the issues and not to wander. The real merit of oral argument is that in the cross fire of discussion the issues become crystalized and vivid.

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Particularly with the heavy workload of the Supreme Court of Canada, it is the duty of counsel in the presentation of oral argument to be as succinct as possible, to adhere to the real issues in the case and not to repeat oneself out of enthusiasm for one's case.

The factums in the Supreme Court are not intended to be briefs of argument. The written advocacy in the factum should be as attractive and concise as counsel's oral argument. Some factums are too long and counsel should remember that it is human nature to be repelled, whether one is reading a book or a factum, by long convoluted sentences, lengthy paragraphs and careless spacing. I have the impression that the part of the factum which is most helpful to the court is Part I dealing with the facts. So as to be of the greatest assistance to the court, counsel should attempt to state the facts as fully as possible, yet organized in a manner which will bring to the mind of a judge the issue with which he has to struggle. With the increased burden on the court, factums are becoming more important and care should be taken in their preparation.

There have been in recent years several interesting and significant changes in the court's practice and attitudes. Up until a few years ago counsel for the appellant was expected to open his argument by reading the reasons for judgment in the courts below. This was time consuming and the judges introduced the practice of themselves reading the reasons for judgment prior to oral argument. Counsel, of course, still is permitted to and should draw the court's attention to those portions of the reasons for judgment on which he may be specially relying particularly in cases where the trial judge has made specific findings of fact.

A minor, but to counsel a helpful, change is that the long two and one-half hours in the morning is now broken by a ten minute break shortly before twelve noon.

In the 1950's and early 1960's the members of the court in a number of cases each wrote a separate judgment often the same in substance and varying only in style or detail. Today it would seem that the court, where possible, is confining the reasons for judgment to one judgment in which the other members of the court will concur either in the reasons or the result. However, individual judges who may concur with the result can qualify their concurrence by pointing out portions of the principal judgment with which they are not prepared to concur at the time. Of course, dissenting judgments are written and they often are very useful as demonstrating sharply the nature

of the issues under discussion and, possibly, as pointing out an alternative path for future decisions. It is interesting to note that recently the Judicial Committee, which formerly spoke with only one voice to the Queen and suppressed any dissents, now permits a dissenting Law Lord to express his views freely to Her Majesty.

The court in the last two or three years has been sitting much more frequently with nine judges. The practice appears to be for nine judges to sit in any case of general public interest. Although this must create a problem for the judges of finding time to write their judgments, nevertheless it does mean that the court is speaking with the authority of its full complement of judges. The time element in relation to the preparation of judgments must be difficult for the members of the court particularly when one realizes that the court in each term sits continuously, unlike the Supreme Court of the United States which sits to hear oral arguments for about two weeks in each month of a term.

In the past few years the court has rather made it plain that counsel are expected to be fully familiar on any legal issue with the prior judgments of the court. The Supreme Court of Canada has been in existence for one hundred years and naturally in that period of time it has built up a body of jurisprudence on practically every subject that can come before it. Quite properly today the judges of the Supreme Court of Canada are insisting that counsel pay more attention to their own prior judgments than to the judgments of the Court of Appeal in England and of the House of Lords. Regrettably, because of the delay in the printing of the law reports, counsel are sometimes placed in an embarrassing position simply because they have not heard of a recent decision of the court which may throw some light on the matter being argued. It is becoming increasingly important therefore for counsel in the Supreme Court of Canada to be familiar with and to be able to remind the court of its own relevant decisions on the question of law under review.

By the recent amendments to the Supreme Court Act, appeals as of right in civil cases to the Supreme Court have been abolished.[1] On the disposition of motions for leave to appeal, the Supreme Court, like the House of Lords and the Supreme Court of the United States, does not give reasons for granting or refusing leave to appeal. It is said that all three courts grant permission for the argument of the appeal in important cases. Of

[1] S.C., 1974-75, c. 18.

course, this begs the question: what is important? In Canada, clearly constitutional cases and most administrative law cases; probably cases involving a question of law of general application; possibly cases involving a large amount of money; hopefully when the Supreme Court feels that the judgment of the court below may have caused a grave injustice where the liberty or property of the individual is involved. I would be surprised if the Supreme Court of Canada were to depart from its traditional passion for justice in each case and not grant leave when it discerns that the rights of an individual may have been improperly and unfairly dealt with in the provincial courts.

In the past the most important cases that the court has dealt with are constitutional cases and this will remain so in the future. The record of the Supreme Court of Canada in its decisions on constitutional issues has been consistently satisfactory and frequently brilliant. The court in the future will be confronted with the problem of selecting in constitutional cases between some inconsistent general views expressed both by the Judicial Committee and the Supreme Court itself. The court in its treatment of consitutional cases must consider and no doubt does consider the practical consequences of a decision. Thus, there is always the element of statesmanship in the decision of constitutional cases even in Canada where no powers are reserved to the people and the problems are mainly those of division of legislative powers between the Dominion and the provinces. The court has to consider the stress which their judgment may place on the delicate framework of a federal state and it is important to keep in mind that those stresses vary in intensity in different epochs. It may well be that the court in applying the doctrine of *stare decisis* to prior constitutional decisions will adopt a liberal attitude by using the techniques of selection, distinction and even overruling. The court no doubt will ponder that the amending procedure of the Canadian constitution is virtually non-existent and also that some prior decisions may have been rendered at a time when the stress on the constitutional machinery of government was substantially more slack or intense than it may currently be.

Be that as it may, the court is entering its second century with the expectation of confrontation with many important constitutional problems. One can see on the horizon for decision by the court issues as to provincial language laws, control of communications, the validity of novel provincial taxes on the production of natural resources, more farm marketing schemes and the all important question of the power of the Dominion

Parliament to implement by legislation purely Canadian treaties and conventions. I feel confident that the court will deal with these problems as it has in the past with a keen appreciation of the statesmanship involved and of the practical effect of its judgments on the strains and stresses of Confederation. One can fairly expect that the court will as in the past deal with these constitutional problems with satisfaction to the people of Canada.