

CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
NATIONAL SEMINAR ON THE FUTURE ROLE OF APPELLATE COURTS

THE ONTARIO VIEW

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There's not too much difficulty in stating the position of the Ontario Court of Appeal on its future. It's all there in the Zuber Report on Court Reform. The portion of that Report dealing with reform of the Court of Appeal had its origin in a report of a Committee of the Court of Appeal chaired by the late Associate Chief Justice Bert MacKinnon. That report was passed on to Tom Zuber -- himself of course a member of the Court of Appeal -- as the unanimous view of the court. The report in essence calls for a new enlarged intermediate Court of Appeal which will replace and take over most of the work of the Divisional Court and the present Court of Appeal and will be the Appellate Court of first

instance for almost all appeals both civil and criminal. Then there will be a Supreme Court of Ontario consisting of the Chief Justice of Ontario and six others which will sit in banc and will, with rare exceptions, hear appeals only with leave from the new intermediate Court of Appeal. It is frankly modelled on what has developed in most of the states of the United States.

Now Bill Sinclair was good enough to send me some weeks ago a copy of his paper prepared for delivery here. He is not only a great judge, a French scholar and handsome and rich as well but he is also no procrastinator like some judges I know. I prepared this one over the weekend. He, that is Bill, clearly does not want the Zuber solution for Alberta. I would like to make it clear that I -- and I think all my colleagues -- entirely agree with him. It is not appropriate for Alberta -- or at least not yet.

It's all a question of numbers. It is our view that the number of people in Ontario and the number of appellate cases that they have generated demand this solution. Please remember that our complement now is 14 judges and 2 chiefs and 3 supernumeraries for a total of 19 against Alberta's 10 judges, 1 chief and 4 supernumeraries for a total of 15. Our population is four times that of Alberta and our caseload is more than 1,600 cases per year. As I explained yesterday, the backlog is building up and we are becoming a little paranoid about reserving decisions. In the result, we are falling behind and we are not writing judgments and giving the guidance to trial judges perhaps that we should.

There are solutions of course other than Zuber's, the most obvious being to increase the size of the court. We considered that but we just don't think it will work for several reasons.

(1) We will need shortly double the number of judges we now have unless we make generous use of High Court judges to sit ad hoc. There is much opposition to that course within the Court of Appeal itself and even more from those responsible for High Court administration. There just aren't enough judges in that Court -- somewhere around 50 is the present complement -- to handle High Court business (and Divisional Court business) now. If 1, 2 or 3 or 10 had to sit weekly in the Court of Appeal the situation would become critical -- indeed, I think, impossible without an increase in the complement of that court. I appreciate it is a solution that we may well require if the implementation of Zuber is long delayed.

(2) Collegiality and more important consistency would suffer. Even now we run into cases, despite our best efforts to keep informed, where different panels reach different

results. This can be disastrous for the law of the Province particularly now where the Supreme Court of Canada and the Supreme Court overloaded with Charter cases takes very few other cases from this Province. Indeed, they take very few cases from Ontario at all. In 1987, the court heard 97 appeals from the whole country, 25 of which were from Ontario. In the same year, there were 66 applications for leave from Ontario, but only three were granted. Perhaps it should be a matter of some pride that of the 1987 appeals that were heard from Ontario, none was allowed. That is bound to change in 1988 and later years because some of the appeals in which I played a part will be before the court.

(3) It seems elitist -- and it is -- but if you increase the number, inevitably you at least run the risk of diluting the quality. We like to think immodestly that we have a good reputation in Canada and we would like to keep it. With a

Supreme Court of Ontario consisting of only 7 or perhaps 9 judges and with recruits coming from proven judges in the new intermediate Court of Appeal, we think that reputation should only improve.

Another solution of course is to divide the court by subject matter and create a separate Court of Criminal Appeal as in England. Some people favour that idea. I don't. It's hard to articulate. I have nothing but respect for the vast knowledge and scholarship of some of our judges whose training and experience has been exclusively in the criminal field but sometimes criminal justice and the development of criminal law requires the injection of some other legal thought and experience. I have one qualification. If it could be guaranteed that the Court of Criminal Appeal would always be presided over by someone like Arthur Martin, I would withdraw my objection. But Arthur is no longer with

us. Last May he offended s.99(2) of the Constitution Act.

He turned 75. I do not see on the horizon -- nor do I expect to see on any horizon -- his likes again.

If we reject both expansion and a Court of Criminal Appeal, and if we are to realize our goal of eliminating the backlog and giving our province a highest court which will be able to give full consideration and full expression to the more complicated cases and to the law of the province, there appears to us to be no other solution but the smaller Supreme Court of Ontario to be reached only by leave and a larger and expandable intermediate Court of Appeal. The Zuber Report shows how this can be done using and converting the courts now available and how with the new structure it is believed the public will be better served.

It is a solution for us, for our Province. It may be something that other provinces now, or as their population increases, can consider. It is certainly not recommended now or at any foreseeable future date for the smaller provinces. We feel the time is now for our Province. Let us try it out. There are constitutional problems which may not be overcome but we hope there will be no opposition from the other provinces. I do not see how it can adversely affect the course of justice in any other province. It may not be the appropriate time for you now or indeed ever. But if and when that time comes or appears to come you may profit from our experience.