STRUCTURAL REFORM:

The Creation of Provincial Supreme Courts

A View from Alberta

(A paper delivered at the Seminar on The Future Role of Appellate Courts sponsored by the Canadian Institute for the Administration of Justice, Montreal, August 17-19, 1988)

INTRODUCTION

Let me say at once that the opinions expressed in this paper are mine alone. They will reflect my years as a trial judge, as an appellate judge and, perhaps above all, my experience as the first chief justice of the Court of Queen's Bench of Alberta.

As the topic indicates, our panel this morning is dealing with structural reform and the creation of provincial supreme courts. Since the seminar is concerned with the future role of appellate courts, I take it we are dealing with the question of whether, and how, existing provincial courts of appeal, (or appellate divisions as they are known in some provinces) should be replaced by two courts - an intermediate

court of appeal and a final court of appeal. In his Report of the Ontario Courts Inquiry (1987) Mr. Justice Zuber has proposed the creation of two such appellate courts for his province. The intermediate court, to consist of a chief justice and 24 judges, would be called the Court of Appeal. The final court, to be known as the Supreme Court of Ontario, would have seven members including the Chief Justice of Ontario.

In examining this subject one must bear in mind that the Zuber recommendations for appellate courts are only part of a complete reconstruction of the entire Ontario court system. The Report does not, however, propose a merger of the District and High Courts. Since we have had such a unified trial court in Alberta since 1979, it is hard for me to measure the Zuber proposal which, if adopted, would lack the element of flexibility which I suggest is now an essential feature of the Alberta court system. In saying this I recognize of course that Ontario has a much greater population (9,101,000) than my province (2,366,000). Nevertheless, my experience is that the more courts you have, the less flexibility and less efficiency you also have.

THE ROLES OF A COURT OF APPEAL

There is agreement that a court of appeal performs two principal roles. Firstly, the court resolves differences between the parties by reviewing and, if necessary, correcting errors made at the trial. Secondly, the court of appeal settles the law of the province. By far the greatest number of appeals fall into the first category. Since the correction of errors is primordial, I tend to view this function as the more important of the two.

In my opinion it is essential that there be at least one level of appeal. Such a step is needed to ensure that dissatisfaction by a litigant with the decision of the trial court, and, if not more important, dissatisfaction with the conduct of the proceedings themselves, can be reviewed and, if necessary, corrected. Except in rare cases it seems to me one appeal should be sufficient. Indeed my impression is that far too many matters routinely go through two levels of appeal. Take, for example, summary conviction appeals which are heard in the first instance by a judge of our Court with an appeal to the Court of Appeal with leave by that Court on any ground that involves a question of law alone. Although it is frequently difficult to decide if something is or is not a question of law, I believe these kind of appeals ought to be rigorously

screened by one, or possibly, two judges. Surely a consideration of such cases by no less than three different judges is more than sufficient in any kind of society.

I am not suggesting that the second function of the court of appeal - its jurisprudential role - is not important. We trial judges in Alberta have seen good and helpful instances of this function in recent years - sentencing guidelines, Charter decisions, opinions governing foreclosure and insolvency law, to mention but a few.

The Court of Appeal of Alberta performs both roles and, if I may say so, performs them well. I see no need to add another level of court in our province so that the two functions can be separated, as they are in many states of the USA, and as is proposed for Ontario.

TWO CONCEPTS OF AN APPEAL COURT

There seem to be two concepts of what an appeal court ought to be. For want of a better term I will refer to them as English and American.

(a) England and Wales

The appeal system in England and Wales is one in which great use is made of trial court judges who are *ex officio* members of the Court of Appeal. These two countries have a combined population some 49,000,000. On reading reports of important appeals in *The Times* of London I am constantly amazed to see how many are decided by benches of two or three judges - only one of whose members is usually a Lord Justice of Appeal.

For example, and as I understand it, the Criminal Division of the Court of Appeal sits in four panels. Each panel normally consists of a Lord Justice of Appeal and two judges from the Queen's Bench Division. All assignments to the panels are made by the Lord Chief Justice.

A key element to the criminal appeal system is that both appeals from sentence and conviction require leave from a single member of the Queen's Bench Division. Applications are made on the basis of written material and without counsel or the appellant being present. A rigorous screening process seems to be the result.

(b) The United States of America

The Zuber Report looks to American experience for a solution to the problems faced by the Ontario Court of Appeal. Indeed, the Report makes no reference at all to the situation in England and Wales. In most of the American states there are now two levels of appeal. Beyond the county courts in such states lies the intermediate court of appeal. More often than not its decisions are final, although it is, of course, possible to go up from there to the final level since it is an intermediate appellate court. Some states, such as New York, have an elaborate system. The appellate structure in California enabled Caryl Chessman, over a period of 12 years, to file 14 appeals to which were added 28 appeals to the federal courts.

At the top of each state system lies its final court of appeal which hears appeals on major questions originating from the courts below, usually from the intermediate appeal level. This highest state court is usually, but not invariably, called the Supreme Court. Its main purpose is to find the law. Access to the court is almost always by leave.

In states having two levels of appeal courts, the intermediate court is often unlimited in size and can be

enlarged to handle an increased volume of work. On the other hand, because of the need for leave, the number of cases reaching the final state court of appeal can be limited to its capacity.

Americans have never accepted the English system. They seem to feel there is a reasonable apprehension of "institutional basis" when trial judges sit in appeal of fellow trial judges. There appears to exist a belief that appellate work requires a special perspective and that trial judges do not take an "appellate point of view", particularly in cases where the law must be settled. Finally, it is said that the use of part-time judges undermines the collegiality of an appeal court.

This kind of approach has been criticized by no less a figure than Dean Wigmore, who said:

> "The peculiar American separation of the trial judge from the appellate judge has tended to make the latter more and more of a legal monk, immured in a Carthusian cell and cultivating his little plot of the law's logic."

THE ALBERTA EXPERIENCE

(a) *Ex Officio* judges

In Alberta all members of the Court of Queen's Bench are, *ex officio*, members of the Court of Appeal and receive commissions of appointment to that effect from the Governor General in Council. For their part the judges of the Court of Appeal hold similar patents for the Court of Queen's Bench.

This practice reflects a long tradition of equal status in Alberta. From the early days of the province the judges of the Supreme Court sat *en banc* to hear appeals. In due course, when the Court exercised an appellate role it became known as the Appellate Division. In 1919 the province divided the Supreme Court of Alberta into the Trial and Appellate Divisions. The legislation provided that every judge of the Supreme Court was made *ex officio* a judge of the Division of which he was not a member.

In 1979 there was a major reorganization of the Alberta courts having federally appointed judges. The District Court was abolished. Its members and those of the Trial Division of the Supreme Court became judges of a new court. The enabling legislation (1978c51s2) provided that the Trial

Division "... is continued as a superior court of civil and criminal jurisdiction styled the Court of Queen's Bench of Alberta". Similarly, on the appeal side, the legislation (1978 c50s2) says that the Appellate Division ..." is continued as a superior court of civil and criminal jurisdiction styled the Court of Appeal of Alberta."

The legislation says that each judge of the court is, by virtue of his or her office, a judge of the other court.

Section 9 of the *Court of Appeal Act* reads as follows:

> 9 A judge of the Court of Queen's Bench may sit or act
>
> (a) in place of a judge who is absent
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> (b) when an office of a judge is vacant, or
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> (c) as an additional judge,
>
> on the request of a judge of the Court of Appeal.

It will be noted that there is no limit to the number of Queen's Bench judges who can sit as members of the Court of Appeal at the request of an appellate judge.

I will deal only briefly with the constitutional basis for the relationship that exists between the Court of Appeal and the Court of Queen's Bench. Firstly, under s. 92(14) of the *Constitution Act*, 1867, the provinces have the power to define the jurisdiction of provincial courts presided over by federally appointed judges, and of the judges who constitute such courts: *Scott v. A. G. Can.* [1923] 3 W.W.R. 929 (P.C.); *A.G. Ont. v. A.G. Can* [1925] A.C. 750 (P.C.); *A.G. B.C. v. McKenzie* [1965] S.C.R. 490; *S.11 of the Judicature Amendment Act, 1970 (No.4)* [1971] 2 O.R. 521 (CA).

Secondly, the Governor General in Council has the authority to appoint a judge of one division an *ex officio* judge of another. This is a valid exercise of the appointing power under s. 96 of the *Constitution Act, 1987*. *Scott v. A.G. Can.* The *obiter* comments as to the use of *ad hoc* made by Madam Justice Wilson in *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education* [1986] 1 S.C.R. 549, 644 are interesting:

> While there was little discussion in this case of the acceptability of either simultaneous translation or the practice mentioned in *Towards Equality of the Official Languages in New Brunswick* at p. 320 of taking a bilingual judge from the trial division to sit *ad hoc* on the appellate bench, it would seem to me that such mechanisms might, from the purely language point of view, provide a more

> satisfactory interim measure than reliance on a judge who cannot fully participate in the proceedings. However, there may be other disadvantages to the use of trial judges sitting *ad hoc* on appeal. Counsel and the public may be concerned over the fact that appellate adjudication is significantly different from trial adjudication. They may also be under the misguided impression that trial judges will inevitably be disposed to favour the views of their colleagues in the courts below.

The use of *ad hoc* judges in Alberta is not, of course, unique. There is provision for this practice in several provinces and, indeed, in the Supreme Court of Canada itself [R.S.C. 1970, c. S-19, s. 30(1)]. Nevertheless, I doubt whether this procedure is as extensively employed elsewhere in Canada.

(b) The relationship between the Court of Queen's Bench and the Court of Appeal

The Court of Queen's Bench of Alberta currently has a Chief Justice, an Associate Chief Justice, 54 regular judges and five supernumerary judges. Two members live in Red Deer and two in Lethbridge. The rest are divided about equally between Edmonton and Calgary.

The Court of Appeal has 11 regular members, including the Chief Justice. There are four supernumerary judges. Eight of the appellate judges began their judicial careers in the

former District Court of Alberta. Half of the appellate judges live in Calgary: the other half in Edmonton. Sittings of the Court are divided between the two major centres.

In practice, the trial judges and the appellate judges in Alberta have always maintained close contact. To most lawyers in Alberta the affinity between the members of the trial and appellate courts is neither unusual nor surprising. Before the reorganization of the courts in 1979 the judges of the Supreme Court of Alberta assumed precedence from the date of their appointment to the Court, regardless of the Division. This practice (it is not spelled out in the legislation) continues to this day.

Since early times in the province trial judges have sat as appellate judges on an *ad hoc* basis, usually when a regular appellate judge is sick or, occasionally, when some conflict of interest arises. Trial judges benefit from this experience by getting an idea of how the appeal court works. At the same time they bring with them their experience which can be especially helpful in cases involving questions as to the conduct of a trial. For their part, appellate judges have occasionally taken trials. This has, for instance, helped to preserve the image of justice in cases where a trial judge or a member of his family has been involved in litigation.

When the courts were reorganized in 1979 the practice of having Queen's Bench judges sit from time to time with the Court of Appeal was formalized. A trial judge now sits for one week with a panel of the Court of Appeal at each of its monthly sittings. The assignment is rotated among experienced trial judges. To ensure continuity in procedure an appellate judge always presides. All types of appeals, other than sentences, are involved.

It seems to me the interchange between the trial and appellate courts will be especially helpful to both courts in dealing with bilingual trial and appeals.

I should note here that supernumerary judges of the Court of Appeal do not preside when they are sitting. Otherwise, they are considered full members of the court, as are supernumeray judges of the Court of Queen's Bench. The Zuber Report (p. 122) recommends that judges of the proposed Supreme Court of Ontario (the final court of appeal) who elect supernumerary status should be assigned to the intermediate court. The concept of supernumerary status was created to encourage judges who have reached at least age 65 after a substantial period of service to take a less active role in the work of their court. Is it not possible that the Zuber proposal will encourage older judges to remain as full-time

members of the final court of appeal? Such a result would, I believe, run counter to the reason why the office of supernumerary judge was created.

(c) Sentencing appeal panels

Two and half years ago, after consultation by the late Chief Justice of Alberta with the Minister of Justice for Canada and the Attorney General of Alberta, a system of panels to deal with sentence appeals was introduced on a regular basis. I think it fair to say the system is fashioned after the practice in the Criminal Division of the Court of Appeal of England. I would, however, note that our policy in Alberta has been for the Court to hear the application for leave to appeal, and the appeal, at the same time. The decision of the panel is of course final.

A sentence appeal panel consists of two very experienced trial judges and a member of the Court of Appeal, who presides. The panel sits every month in Calgary and Edmonton. Some 40 sentence appeals are dealt with each month in each city. About 75% of the appeals are from the Provincial Court.

A very small group of Queen's Bench judges - supernumeraries are not involved - normally undertake this work

for a period of several months, if not longer. It is, of course, only one of their regular assignments.

I would estimate that the services provided by the Court of Queen's Bench on the sentencing panel and by way of another judge sitting for a week each month provide the Court of Appeal with about 15% of its manpower.

The new system is efficient. Sentence appeals can easily be heard within 60 days. There is no backlog. The fact that all sentence appeals in the province are dealt with by the same judges over a substantial period of time contributes to uniformity and certainty in sentencing, objectives of a fair sentencing system.

The implementation of the new sentence appeal system was not without incident. A constitutional challenge to the composition of the panels was launched in November, 1986 in the case of *R. v. Myhaluk* (Edmonton Appeal #8603-0797). Soon afterwards, and with similar inspiration, the Edmonton Criminal Trial Lawyers Association wrote to the Institute of Law Research and Reform of Alberta to request that a study be conducted to determine whether s. 9 of the *Court of AppealAct* needed revision. In his letter the president of the Association said that the practice of drafting Queen's

Bench judges to sit on Court of Appeal panels "is contrary to the fundamental principle that an appeal requires a review by a separate and independent judicial tribunal".

The *Myhaluk* challenge never proceeded. As far as I know, neither did the rquest to the Institute.

No institutional bias has in fact been observed. An analysis was done to compare the work of the "new" sentencing panel during its first six months of operation with that of the "old" sentencing panels. The number of sentence appeals allowed was to all intents and purposes the same. A study was also made of the disposition of appeals from Queen's Bench as compared with those from Provincial Court. The "new" court allowed 3% more appeals from Queen's Bench and 2% fewer appeals from Provincial Court. So much for institutional bias.

As to "appellate perspective", another criticism often advanced concerning the use of trial judges to hear appeals, I have already mentioned that, in fact, only a very few Queen's Bench judges are assigned to this task. Although the work only takes about a quarter of their sitting time, the Queen's Bench judges are not casual or occasional participants. They bring to this important assignment a wealth of sentencing experience which is especially helpful when one remembers that sentencing

guidelines are, for the most part, still to be found in the traditions of the court. Indeed, if I had a criticism to make of the new sentence appeal system it would be that the panels do not issue enough guideline decisions.

DO WE NEED AN INTERMEDIATE COURT OF APPEAL IN ALBERTA?

The goals of a two-tiered system of appeals in a state court system are to decrease backlog and to make the judicial process readily accessible. (State Intermediate Appellate Courts, Marlin O. Osthus and Mayo H. Stiegler, American Judicature Society, 1980.)

In my opinion these goals are being met in Alberta and we do not need an intermediate court of appeal in this province. Our present system, based as it is on an excellent long standing and harmonious relationship between the members of the Court of Appeal and of the Court of Queen's Bench, provides the flexibility needed to carry out the two roles of an appellate court - the correction of errors at trial and the settling of law for the province.

I reject the notion that, as a matter of principle, trial judges have no place in an appeal system. In my

experience there are many wonderful trial judges who do not want to do full time apppellate work and, in fact, have turned down the opportunity to do so. That does not mean, however, that they are not prepared to assume an appellate role for a determinate period or periods of time.

If necessary, I see an expanded role for trial judges in appellate work that has to do with the correction of errors at trial, especially, perhaps, in the criminal cases. Has there been a fair trial? Has there been a miscarriage of justice? Who better, it seems to me, than senior trial judges who have sat all over the province to help provide answers to these questions.

As to settling law for the province this is a function that, for the most part, ought to be exercised by the regular members of the Court of Appeal. In many instances I see no reason why that function cannot be done by three judge panels of the Court. There are of course, exceptional matters that should be considered by five or, perhaps seven, judges. These kinds of cases will be determined by the Chief Justice, in consultation with other members of the Court. Examples might include unsettled issues arising out of the Charter, the interpretation of confusing legislation, sentencing precedents in matters of widespread provincial concern or reconsideration

of earlier decisions that may no longer be relevant because of changed times.

Let me make it clear that I do not consider the amount at stake in civil litigation to be, of itself, a reason for having an appeal considered by other than a regular panel. Indeed, I sometimes wonder why our citizens ought to finance the expensive apparatus needed to resolve such time consuming and costly quarrels.

The bulk of the Court of Appeal's work would continue to be done by panels of judges. It is said that such a practice leads to inconsistencies. Should such inconsistencies arise - and it can happen - the problem can be resolved by an expanded court.

There is, I suggest, little reason why such inconsistencies need arise. I would assume most appellate tribunals follow the practice of our Court of Appeal in circulating draft opinions to all members of the Court before they are issued. This common sense procedure is primarily aimed at eliminating inconsistency, especially with respect to matters currently before different panels of the Court. I would think that doctrinal inconsistency would only present a real problem in courts that operate in separate districts,

without personal contact between all members of the court or, particularly, in large courts without a system for circulating opinions before they are issued.

The American Bar Foundation study "Internal Operating Procedures of Appellate Courts" by Robert A. Leflar, published in 1976, has this to say at p. 66:

> "Whether an intermediate court is needed depends on how well the top court can handle with fairness and efficiency the appellate business of the state."

If I may say so, the appeal system now functioning in Alberta provides a flexible structure for dealing with appeals in a fair and efficient way. An intermediate court of appeal in our province would serve no useful purpose and is not needed.

The Honourable William R. Sinclair
The Court of Queen's Bench of Alberta

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