CANADIAN JUDGES PONDER THEIR FUTURE

CANADIAN JUDGES PONDER 21ST CENTURY

Quebec City was founded in 1608 by Samuel de Champlain, although the St Laurence River, which it straddles, had been first explored seventy years earlier by Jaques Cartier. Dominating a high cliff overlooking the narrows of the river is Chateau Frontenac, now a hotel - the successor to the French forts which guarded la Nouvelle France in North America. Nearby the Plains of Abraham mark out the battleground where British and French troops, under Generals Wolfe and Montcalm respectively, fought out the future of Canada. Both generals died in the battle. An obelisk commemorates their courage for their respective causes.

Between 12-15 September 1990, at Chateau Frontenac, representatives of the 900 Provincial and Territory Court judges of Canada, and of the Court of Quebec, gathered for their annual conference. Keynote speeches at the meeting were given by the Chief Justice of Canada (Chief Justice Antonio Lamer), Justice Michael Kirby, President of the New South Wales Court of Appeal and Justice Walter Tarnopolsky of the Court of Appeal of Ontario.

Chief Justice Lamer was appointed to the Supreme Court of Canada in 1980. He succeeded Chief Justice Brian Dickson in July 1990. At the conference he addressed the Provincial Court Judges in his new capacity for the first time. Like Justice Kirby, he was in the 1970s President of the national

Law Reform Commission. He came to the conference in Quebec City immediately following participation in an internationalmeeting of Chief Justices held in Washington, DC. That meeting was also attended by the Chief Justice of the High Court of Australia, Sir Anthony Mason and more than 150 Chief Justices from all parts of the world.

In his address to the Quebec City conference, Chief Justice Lamer recounted subject matter of a panel of the Washington conference in which he had participated. The panel had been asked to decide the most important right which required protection in a free society. Various rights were nominated by the participants. But Chief Justice Lamer said that, in his view, the right to come before an independent judge and to be represented by members of the independent legal profession was the primary right which a free society should defend. He made this assertion of the primacy of the rule of law, and of the role of the courts in protecting it, the theme of his address to the assembled judges.

The judges participating in the Quebec City conference represented those appointed by Provincial and Territory governments throughout Canada. Approximately 300 of them took part in the sessions of the conference. Under the Canadian Constitution, Judges of the Superior Courts of Canada are appointed by the Federal Government. In recent years, there have been moves in most of the Canadian Provinces to amalgamate the Supreme and District Courts. Shortly before the conference opened, the Superior Court of

Ontario had been established combining the High Court, District Court and Surrogate Court of that Province. Topics for consideration included the requirements of robing before the new court and the mode of address for the judiciary. Judges of superior courts in Canada have, until now, been addressed as "My Lord" or "My Lady".

Judges of the Provincial Courts of Canada perform approximately 90% of the judicial work of Canada. The work they perform is roughly equivalent to that performed by magistrates throughout Australia. In moving towards a two-tier system of courts, Canada is following reforms introduced more than a decade ago in New Zealand. In addition to the Superior Courts, however, all Canadian Provinces have permanent Courts of Appeal. In Ontario, the largest Province, the appellate work has been so heavy that a further appellate level has been proposed. The Supreme Court of Canada, comprising nine Justices, three of whom are women, hears appeals by leave in a manner similar to the general superintendence of Australian courts by the High Court of Australia.

In his conference address, Chief Justice Lemar emphasised the importance of the trial judge in the administration of justice in Canada. He acknowledged that appellate judges were aware of the reactions sometimes caused where the conviction of an offender was reversed on appeal, on legal grounds, so that an apparently guilty person went free. He said that he could understand the frustration which

such reversals, in criminal and civil cases, sometimes caused for the judge who had presided at the trial. However, especially since the commencement of the Canadian Charter of Rights and Freedoms in 1982, but even before - it was the function of appellate courts to keep their eyes on the longer term implications of their decisions. He hoped that trial judges would understand the function of appellate courts - particularly of the Supreme Court - just as appellate judges should seek to understand the prospective of problems of the trial courts. Chief Justice Lamer said that the Canadian judges now had the Charter "for better or for worse". It was their duty to apply it. but in many ways it merely collected the principles which had been laid down over the centuries by judges of the common law. If there are strong and independent judges of the common law tradition, a Charter would be unnecessary.

In an interesting suggestion, Chief Justice Lemar said that the forensic technique adopted in the courts of law was not always well adapted to the consideration of the implications of striking down a law on constitutional or charter grounds. Like Australia, Canada has a facility equivalent to that under the Judiciary Act 1903 (Cth) s 78B which requires notice to Federal and Provincial law officers if constitutional questions are raised by a case. However, in many important cases, the right of intervention had not been exercised. In any case, the Chief Justice pointed out, the Executive did not always speak for Parliament - or for

the legislators who had enacted the law which was challenged. Even a law is entitled to be defended and to have its "day in court", said Chief Justice Lemar.

Justice Kirby delivered the keynote address to the conference on the theme of the Judge in the 21st Century. Delivering part of his address in French, he reviewed the remarkable changes in technology which had occurred in legal practice in the lives of the judges present. He suggested that further technological changes were around the corner including voice-to-print word processing and the adaptation of substantive law to the technology of artificial intelligence. He even suggested the possibility of an implanted microchip which could enhance judicial capacity and come to the rescue of failing judicial memory of legislation or legal authority. He said that it was difficult, in the light of recent technological changes which had affected legal practice, to over-estimate the impact of technology on the law and on the judiciary.

Justice Kirby said that the unique feature of the legal systems of Canada and Australia was the will of the judge to do justice in the particular case. No computer could supplant that will to justice. Especially in a Federation, judges held the balance of legal power in many cases between the citizen and the State. In Canada's current constitutional controversies, this assigned to judges, at every level of the judicial hierarchy, a role of critical importance.

Justice Kirby said that the assertion of group or peoples' rights, including in Quebec, was to be seen as a species of a wider international movement. Other manifestations could be observed in Eastern Europe, the Soviet Union and parts of Asia. He praised the Canadian commitment to a pluralist, multi-cultural society and quoted former Canadian Prime Minister Pierre Trudeau's idea of "a form of Federalism that could be a brilliant prototype for the moulding of tomorrow's polyethnic civilisation; a better model even than the American melting pot. Rather than forging a new alloy, the Canadian model would preserve the characteristic of each group in a mosaic of cultural coexistence". Justice Kirby said that Australia was also following similar objectives of multiculturalism, supported by law, because it was recognised that diversity was "a protectress of freedom".

A subject touched upon by Justice Kirby and other participants at the conference were the moves towards a "unified Criminal Court" in Canada. The establishment of a unified Court of Quebec provided a model which was being studied by the other provinces. A unified trial court for criminal cases in a country having a uniform national criminal law would permit the better deployment of judicial and other resources. On the other hand, it was pointed out that, as in any other profession, members of the judiciary displayed different skills and capacities. However imperfectly, this was partly recognised in the acceptance of

a judicial hierarchy, whether in Canada, Australia or other countries.

The business sessions of the Quebec City conference turned to a number of legal issues of topical importance to the Canadian judicial scene. Justice Walter Tarnopolsky reviewed a decade of decisions both in the Supreme Court and other courts of Canada on the application of the Charter. He also chaired a session at which the participants considered the question: "Is gender bias alive and well in your courtroom?" Mme Justice Louise Arbour of Ontario said that it was important for judges never to tolerate examples of "sexist" behaviour in their courtroom, whether exhibited by lawyers, parties or witnesses. She said that it was essential for the judiciary itself to set a high standard. It was generally concluded that much progress had been made in the past decade; but much remained to be done. As in Australia, there is now a majority of women in the first year intake of most Canadian law schools. The profound effect which this would have on the future practice of the law was the subject of much debate. Justice Kirby chaired a well attended session of the conference with panels addressing the legal problems presented by the advent of HIV/AIDS and the controversy concerning euthanasia. Participants in these panels included some of the leading jurists and medical experts in Canada.

In his keynote address, Justice Kirby pointed to the differences which had emerged in the Canadian and Australian

federations. Australia was remarkably homogeneous; whereas the special linguistic and cultural features of Quebec had given the Canadian confederation its unique character and provided the "imperative need for internal sensitivity". Nevertheless, because of the shared tradition of the common law in a federation, it was important for Canadian and Australian lawyers to get to know more of the "treasure-house of jurisprudence" which existed in each country. This would only be done under the leadership of the judiciary. Whenever comparative law material is cited, such as an English decision on a case of local importance, Justice Kirby urged the Canadian judges to ask counsel to produce also Australian, New Zealand and other common law material. He said that this was now happening much more frequently in Australia and in England. It would greatly benefit the law and ensure the survival of the common law as an international system of basically coherent principle.

The Quebec City conference was also addressed by Mr Nabil Antaki, President of the International Centre for Commercial Arbitration of Quebec. He assured the appreciative judicial audience that, such was the growth of commercial arbitration, that there would be much work for retired judges in that field in the future. The Minister of Justice of Quebec, Professor Gil Remillard spoke at the final banquet and paid tribute to the success of the conference which was also closely covered by the Canadian media.