THE CRUMBLING PYRAMID: CONSTITUTIONAL APPEAL RIGHTS IN CANADA

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Introduction: The Pyramid Builders

The architects of the Canadian Constitution were pyramid builders, so far as the judicial system was concerned. There was nothing unique in that, since most court systems are organized pyramidically, from a broad base of trial courts to a single appellate pinnacle. What was distinctive about the system envisioned by the *Constitution Act, 1867*, was its scale. The framers of the Canadian Constitution sought to erect a much grander edifice for example, than, anything to be found in the country to the south.

In the United States there were numerous judicial pyramids in 1867--as there are now: one for each state, and another, culminating in the United States Supreme Court, for matters of national or interstate significance. Canada, by contrast, was to have a single, monolithic, judicial structure, involving the courts of all the provinces, as well as those that were federally created, and culminating in a common apex. That apex was described by Section 101 of the *Constitution Act* as a "General Court of Appeal for Canada."

Section 101 did not create the Supreme Court of Canada directly; it merely empowered the Parliament of Canada to create such a court if it chose. Parliament did not choose to do so until 1875.[1] Nevertheless, the grand pyramid had a single pinnacle from the outset: the Judicial Committee of the Privy Council. As George Etienne Cartier, Attorney-General of pre-Confederation Canada, said during the Confederation Debates of 1865: "[T]he power conferred. . . is only that of creating a Court of Appeal at some future day. . . . At present the several provinces which are to form part of the Confederation have the same court of final appeal. As long was we keep up our connection with the mother country, we shall always have our court of final appeal in Her Majesty's Privy Council."[2]

The purpose to be served by this all-encompassing judicial pyramid was the harmonization of the laws of the various confederating provinces--at least of the common law provinces. The desire for uniformity in the laws of the common law provinces was made obvious by section 94 of the *Constitution Act, 1867*:

> **Uniformity of Laws in Ontario, Nova Scotia and New Brunswick**
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> 94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and

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[1] J.G. Snell and F. Vaughan, *The Supreme Court of Canada--History of the Institution* (Toronto: University of Toronto Press, 1985) c. 1.

[2] *Parliamentary Debates on Confederation of The British North American Provinces*, Quebec, 1865 at 576, [hereinafter *Confederation Debates*].

> Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Although section 94 was never acted upon,[3] its importance in the eyes of those who framed the *Constitution* can be inferred from the fact that John A. MacDonald stated in the Confederation Debates that its implementation would be "the first act of the Confederate Government."[4]

There is considerable reason to believe that section 101, providing for a "General Court of Appeal," was regarded by the drafters of the *Constitution* as playing a similar role--even with respect to the Province of Quebec. In the Quebec Resolutions of 1864, which embodied most of the fundamental principles upon which Confederation was eventually based, the provision that finally became section 101[5] followed immediately after the provision that became section 94.[6] John A. Macdonald's speech discussed the two items in the same breath.[7] Cartier's speech about the "General Court of Appeal" during the Confederation Debates used the term "universal jurisprudence," in apparent reference to the harmonizing influence that such a court would exert.[8]

Some participants in the Confederation Debates, such as A.A. Dorion and H.E. Taschereau, objected to the proposed General Court of Appeal, precisely because of the danger that it would create a "universal jurisprudence" reflecting the common law principles with which the majority of the judges would be most familiar.[9] Cartier contended (not very convincingly) that there would be nothing to be concerned about, since the persons appointed to such a court would be unusually well-qualified judges (as good as those who sat on the Privy Council) and would be "profoundly versed in those principles of equity, which are identical with those of our Civil Code."[10] While Cartier felt that it would be unwise to create a Canadian "General Court" immediately, there seems little doubt that he, and presumably the government for which he spoke, favoured an eventual Canadian judicial apex capable of performing the same harmonizing function as the Judicial Committee of the Privy Council.

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[3] F.R. Scott, "Section 94 of the British North American Act" (1942) 20 Can. Bar Rev. at 525.

[4] *Confederation Debates*, *supra*, note 2 at 317.

[5] Resolution 29 (34).

[6] Resolution 29 (33).

[7] *Confederation Debates*, *supra* at 317.

[8] *Confederation Debates*, *supra*, note 2 at 576.

[9] *Confederation Debates*, *supra*, note 2 at 690 (Dorion) and 896 (Taschereau).

[10] *Confederation Debates*, *supra*, note 2 at 576.

When appeals to the Judicial Committee of the Privy Council finally ended, the Supreme Court of Canada found itself at the summit of the pyramid. It was a "General Court of Appeal" having jurisdiction over final appeals from the courts of every province, as well as from federal courts, in all types of legal dispute, both civil and criminal. From the 1950's onwards the Supreme Court played an important role in harmonizing the laws of at least the common law provinces. Mr. Justice Pigeon described the Court as: "*a common forum* having unifying authority over all superior courts."[11] In *Reference Re Residential Tenancies Act*[12] Mr. Justice Dickson referred to this function of the Supreme Court of Canada as one which the founders of the *Constitution* "conceived as a strong constitutional base for national unity, through a unitary judicial system." Concern that this system not be "undermined" was one of the determining factors in that case.

Some commentators have suggested that the predictions of early critics like Dorion and Taschereau have been borne out over the years by a tendency of the Supreme Court's "universal jurisprudence" to influence the civil law of Quebec detrimentally.[13] Whatever one may think of that influence, it is submitted that the consequences of Supreme Court's harmonization of private law have been highly desirable so far as the common law provinces are concerned. The Supreme Court of Canada has been responsible for considerable modernization and reform of tort law, for instance.[14] Similar, if less sweeping, contributions have been made by the Court in other areas of private law, such as contract law.[15] In at least one area--restitution--rulings of the Supreme Court in relation to Quebec's civil law have been used as a basis for development of common law principles. Mr. Justice La Forest did so, as a member of the New Brunswick Court of Appeal, in *White* v. *Central Trust Co.*,[16] commenting that a "universal principle" like

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[11] *Interprovincial Cooperatives Ltd.* v. *The Queen*, (1975) 53 D.L.R. (3d) 321 at 358 (S.C.C.), emphasis added.

[12] (1981) 123 D.L.R. (3d) 554 at 566-7 (S.C.C.).

[13] See, for example, P. Azard, "La Cour Supreme du Canada et l'Application du Droit Civil de la Province de Québec" (1965) 43 Can. Bar Rev. 553, and the authorities cited in P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969) at 27-32. Professor Russell, who expressed support for abolishing the grand pyramid, and leaving the provincial Courts of Appeal to be the final arbiters of all questions concerning provincial law, denies that there was any original intention to harmonize Quebec law with that of the common law provinces: "[I]t was never contemplated by the framers . . . that Quebec would be interested in subjecting its laws relating to property and civil rights to such a homogenizing process." (*Ibid.* at 218).

[14] E.g.: The "damages trilogy" (*Andrew* v. *Grand and Toy, Alberta Ltd.* (1978) 3 C.C.L.T. 225: *Thornton* v. *Board of School Trustees* (1978), 3 C.C.L.T. 257; *Arnold* v. *Teno* (1978), 3 C.C.L.T. 272.) The "fourth case of the trilogy" is also significant: *Lewis* v. *Todd* (1981), 115 D.L.R. (3d) 257 (S.C.C.). See also *The Queen* v. *Saskatchewan Wheat Pool* (1983), 143 D.L.R. (3d) 9 (S.C.C.), which abolished the "tort of statutory breach."

[15] Professors B.J. Reiter and J. Swan, writing in the first issue of the Supreme Court Law Review, commented that they were "encouraged" by a review of the past five years' performance in the contract area by the Supreme Court, and that the Court's work showed "a sensitive awareness of the importance" of the Court's responsibility for the reform of contract law, as well as for the just disposition of individual cases: "Developments in Contract Law: The 1978-79 Term" (1980) 1 *Sup.Ct L.Rev.* 137 at 182. Interestingly, both they and subsequent editors of the "contract law" section of the Supreme Court Law Review have been rather consistently critical of the Court for not being more active in carrying out its reform tasks in that area since then, however.

[16] (1984), 17 E.T.R. 78 at 95 (N.B.C.A.). I am indebted to my colleague, Professor M. Litman, for bringing this example to my attention.

restitution "affords an excellent opportunity for cross-fertilization between Canada's two legal systems."

Erosion of the Summit

Unfortunately, the apex of the pyramid is now crumbling, so far as private law is concerned. The Court's public law responsibilities, hugely expanded by the advent of the *Canadian Charter of Rights and Freedoms*, have robbed it of the time necessary to perform adequately its role as "General Court of Appeal" for the private law systems of the provinces. Tort law, which in the writer's opinion still stands in need of major judicial reform, has been largely abandoned by the Supreme Court since the *Charter* cases began to crowd the Court's agenda.[17]

Professor Bushnell has published statistics showing the impact of the *Charter* on private law appeals. Before the *Charter* came into effect, private law cases comprised 23% of the total applications to the Court for leave to appeal, and 22% of those applications were granted. Since the *Charter* came into force, private law cases have accounted for approximately the same proportion (22%) of the applications for leave, but now only 12% of those applications are being granted.[18]

The 1985-86 statistics on leaves to appeal show a striking disparity between civil and constitutional cases. Of the civil cases, which constituted 60% of the leaves to appeal that year, only 13% were granted leave. Constitutional cases, on the other hand, which made up only 23% of the leave applications, were granted leave in between 28% and 30% of the cases.[19] The Court is becoming less of a "General Court of Appeal" with every passing year. If the trend continues, we will soon reach the point where in fact, if not in theory, Canada's grand judicial pyramid will have ceased to exist. It will have been replaced by a multiplicity of smaller provincial pyramids like those of the American system which the Fathers of Confederation consciously rejected in 1867.

Not everyone would consider the collapse of the grand pyramid to be a misfortune. Professor Peter H. Russell, for example, in a 1969 study for the Royal Commission on Bilingualism and Biculturalism, recommended

> . . . federalist reform of the Supreme Court's jurisdiction which would make the provincial appeal courts the final courts of appeal in provincial law matters leaving the supreme court with an appellant jurisdiction confined to federal law matters only, but one which would, of course, include constitutional disputes. . . .
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> No doubt the removal of the Supreme Court's jurisdiction in provincial law matters would eliminate the use of the federal judiciary as an instrument for

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[17] See the writer's annual laments on this subject in the tort law sections of Volumes 7, 8, 9, and 10 of the Supreme Court Law Review.

[18] S.I. Bushnell, "Leave to Appeal Applications: The 1985-86 Term" (1987) 9 *Sup.Ct L.Rev.* 467 at 477.

[19] *Ibid.* at 474.

> bringing about a greater uniformity of laws in Canada. But the proper instrument for achieving such uniformity in those areas of law subject to provincial jurisdiction is through the device of federal/provincial legislative cooperation as clearly envisaged in Section 94 of the (Constitution) Act.[20]

In this writer's opinion, the loss of the harmonizing influence of the Supreme Court of Canada with respect to common Law principles of private law, and the interpretation of common or similar provisions of provincial statute law, would be regrettable. The purpose of this article is not, however, to join issue with Professor Russell and others who prefer the American model. Its object is, rather, to ask whether there are any constitutional tools that might be pressed into service by those of us who prefer the 1867 model to prevent or retard the crumbling of our common judicial apex.

Two such constitutional arguments come to mind. Both support the view that Canadians have a constitutional right to have the Supreme Court of Canada at least consider, on a case-by-case basis, the desirability of hearing appeals from provincial courts of appeal in private law disputes.

Protecting the Pinnacle: (a) Section 101

The first of these arguments is based on the wording of section 101 itself:

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

This provision has been held to provide constitutional protection from provincial erosion of the right to appeal to the Supreme Court of Canada. In *Crown Grain* v. *Day*[21] the Judicial Committee of the Privy Council struck down a section of a Manitoba statute preventing appeals beyond the provincial Court of Appeal in a certain type of lien litigation. The Privy Council held that since s.101 empowered the Parliament of Canada to create a General Court of Appeal, and since it had exercised that power by enacting the Supreme Court of Canada Act, provincial legislation purporting to restrict appeals to the Court was beyond the constitutional jurisdiction of the provinces.

That decision affects only provincially-created restrictions, of course; it would not be applicable to limitations on the right to appeal created by the Parliament of Canada itself. It is nonetheless arguable that s.101 provides constitutional protection against even federally-created barriers to appeal in certain circumstances.

If--to take an extreme hypothetical--the Supreme Court of Canada Act were amended, perhaps in response to the Court's growing backlog, to deny *all* appeals

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[20]Russell, *supra*, note 13 at 218.

[21][1908] A.C. 504 (P.C.).

in purely private law matters, the Supreme Court could no longer be considered a 'General Court of Appeal." There is nothing in the Constitution authorizing the Parliament of Canada to establish a "Partial" Court of Appeal for Canada.

What, then, would be the constitutional basis for the Supreme Court of Canada Act? The only obvious possibility (apart from resort to the federal Parliament's residual "peace, order and good government" power under the opening words of section 91, which power was clearly not relied upon when the Court was created) would be that the Court should thereafter be considered one of the "additional courts for the better administration of the laws of Canada" under s.101. If that were its constitutional basis, the Court would, of course, be restricted to matters of federal law.[22] Although litigation would probably be required to establish the limits of the category "laws of Canada" for this purpose, it seems likely that it would exclude appeals from decisions dealing with provincial legislation, whether public or private. All issues of constitutional law might still be open for determination by the Supreme Court, but even this would not be a foregone conclusion; it could be contended that a federal "additional court" would be restricted to hearing appeals from cases originating in federally-created courts. It is submitted, in short, that the elimination of private law from the jurisdiction of the Supreme Court of Canada would risk depriving it of *any* appellate jurisdiction whatsoever from courts established by the provinces.

If the Parliament of Canada could not remove substantial private law jurisdiction from the Court by legislation without undermining its constitutional basis as a "General Court of Appeal for Canada," the same impediment would apply to a similar general policy adopted by the Court itself relating applications for leave to appeal. The Court, being a creature of statute, cannot be empowered to do anything that the Parliament creating it could not do itself.

Would this also be the case if the Court, rather than adopting a policy of *absolute* rejection of private law appeals, simply imposed such stringent selection criteria for such cases that *in practice* they received leave in only rare circumstances? While it is not as easy to express a confident opinion about the constitutional effect of such a situation, it is submitted that the result would probably be the same if the consequence of discriminatory selection criteria were to prevent the Court from exercising a general appellate role. *Effect* plays at least as important a role as intent in determining the constitutional validity of governmental actions.[23] If, therefore, the effect of the Court's selection practices was to abandon private law to the mercy of provincial courts of appeal, it is submitted that the Court's constitutional underpinnings would be affected as seriously as if there were an absolute abolition of such appeals.

The strength of this line of argument will be greatly augmented if the Meech Lake Accord takes effect. Section 6 of the Accord would result in the addition to the Constitution of a new section reading, in part, as follows:

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[22] *Quebec North Shore Paper Co.* v. *The Canadian Pacific Ltd.* (1977), 71 D.L.R. (3d) 111 (S.C.C.).

[23] See D.Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 52.

"Supreme Court of Canada

101 A (1): The Court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada . . ."

This would give constitutional status for the first time, to the Supreme Court of Canada. Until now, section 101 of the *Constitution Act, 1867*, has simply *empowered* the Parliament of Canada to create such a court; there is no obligation to do so. The Meech Lake provision, if adopted, would *require* the continued existence of a single[24] final court of appeal for all legal matters.

The writer is no friend of the Meech Lake Accord. If it should be adopted, however, one of the compensations I would welcome to offset what seem to me to be its several evils, would be the possibility that it would constitutionalize the right of Canadians to appeal their legal disputes to the Supreme Court of Canada.

Protecting the Pinnacle: (b) Charter Considerations

A second constitutional argument supporting the continuance of the Supreme Court of Canada as a final court of appeal for the country in all matters can be based upon sections 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*. Since it is an argument that applies as well to intermediate courts of appeal, and has received some judicial consideration in that context, it will be examined first in relation to intermediate courts before its application to the Supreme Court of Canada is considered.

Intermediate Courts of Appeal

Is there a constitutional right of Canadians to appeal the decisions of trial courts to intermediate courts of appeal? Mr. Justice Huband, of the Manitoba Court of Appeal, has held in *Re Sutherland and Halbrick*[25] that no such right exists. The question raised by that case was whether a provincial statute relating to the recovery of wages, which stated that decisions of County Court judges in such matters would be final, was constitutionally valid. Mr. Justice Huband held that it was valid, and struck out a notice of appeal to the Court of Appeal in a dispute covered by the legislation. He pointed out that although section 101 of the *Constitution Act, 1867*, has been held to prevent provincial restriction of appeals to the Supreme Court of Canada, there is no equivalent constitutional impediment to restricting appeals to any other courts. He interpreted the legislation in question as not being intended to prevent appeals to the Supreme Court of Canada.

Although difficult to fault on its conclusion, the *Sutherland* case is subject to at least three important provisos.

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[24]Note the use of the definite article: "*The* General Court of Appeal for Canada" (emphasis added).

[25](1982), 134 D.L.R. (3d) 177 (Chambers): Approved in *Armstrong* v. *Quest* [1985] 37 Man.R. 93 (C.A.).

First, the outcome might well have been different if the litigation had concerned a subject, such as bankruptcy or criminal law, under the constitutional jurisdiction of the Parliament of Canada. While it is possible that the responsibility of the provincial Legislatures for "administration of justice in the province"[26] might include the authority to restrict appeals in matters under federal jurisdiction, there is a strong likelihood that such measures would be regarded as relating, in "pith and substance" to the subject under federal jurisdiction.

The second proviso is that it is unlikely the courts would uphold legislation denying the right to appeal an issue of constitutional law to intermediate courts of appeal. The Supreme Court of Canada held in *Amax Potash Ltd.* v. *Government of Saskatchewan*[27] that provincial legislation purporting to grant immunity to authorities relying upon unconstitutional provincial legislation was, itself, unconstitutional. Mr. Justice Dickson, who wrote the Court's reasons, based his decision on what he referred to as the "inability of the provinces to limit judicial review of constitutionality." While it could be contended that this "inability" applies only to attempts at preventing *every* form of judicial review, rather than simply to restrictions on appellate-level review, the logic of the principle would seem to require that *any* legislative obstacle to full judicial consideration of the constitutionality of legislation would itself contravene the Constitution. It should also be noted that the Supreme Court held in *Attorney General Canada* v. *Law Society of British Columbia*[28] that Parliament lacks the constitutional power to prevent the constitutional validity of federal legislation being determined by any Provincial superior courts. There is no reason why this impediment should not apply equally to restrictions directed only at Provincial Courts of Appeal.

The third--and most important--proviso to the *Sutherland* ruling is based upon the *Canadian Charter of Rights and Freedoms*, which was not in force when that case was decided.

So far as cases which themselves involve *Charter* issues are concerned, section 24(1) of the *Charter* provides a strong basis for attacking legislation that would prevent appeals to intermediate courts of appeal. It empowers a court to grant "such remedy as the Court considers appropriate and just in the circumstances," whenever a *Charter* guarantee has been infringed or denied. Where a trial decision failed to recognize or to adequately remedy an alleged *Charter* violation, an appeal to the appropriate intermediate court of appeal might well be a "just and appropriate remedy," in spite of legislative provisions to the contrary.

Even in non-*Charter* cases, however, it is possible that the *Charter* guarantees an appellate opportunity in certain circumstances. Section 7 of the *Charter* requires that "principles of fundamental justice" be observed before anyone is deprived of life, liberty, or security of the person. It is doubtful that a system which denied litigants the right to have the determinations of trial courts affecting

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[26] *Constitution Act, 1867*, section 92(14).

[27] (1977), 71 D.L.R. (3d) 1 at 11 (S.C.C.).

[28] (1982), 137 D.L.R. (3d) 1 at 16-17 (S.C.C.).

such matters reviewed by at least one level of appellate tribunal could be said to satisfy the requirement of "fundamental justice."

The Preamble to the *Constitution Act, 1867*, speaks of Canada having a "Constitution similar in principle to that of the United Kingdom." The Preamble to the *Canadian Charter of Rights and Freedoms* refers to the fact that Canada is founded upon principles that recognize "the rule of law." One aspect of the rule of law, as it has developed in the British context, is that trial courts must adhere to law. Without the existence of appellate mechanisms there is no way of ensuring that trial courts will do so. While the particular type of appeal procedure that is common in most jurisdictions today is a relatively new development, *some* form of review mechanism for important judicial rulings has been a common feature of the British legal tradition for a long time. As Mr. Justice Cameron of the Saskatchewan Court of Appeal has said: "The idea of appeal from a final order is just too well founded to be denied."[29]

This argument has been rejected by both the Ontario Court of Appeal and the British Columbia Court of Appeal. In *R.* v. *Morgentaler, Smoling and Scott*[30], and in *Re Ritter and The Queen*[31] it was held that because courts of appeal are creatures of statute, their jurisdiction is restricted to that which is bestowed by the statute creating them, or by other parallel legislation. The *Charter* was therefore held not to expand existing jurisdictional limits. In *Re Meltzer and The Queen*[32], which reached a similar result, Mr. Justice Hutcheon commented that in his opinion the guarantee of "fundamental justice" in section 7 of the *Charter* does not include a right to appeal at least in matters involving mixed questions of law and fact. There are, moreover, statements by judges of the Supreme Court of Canada in *Mills* v. *The Queen*[33] to the effect that section 24(1) of the *Charter* does not create any new appellate jurisdiction not already granted by statute.

These decisions have not foreclosed the question completely, however. Each of them, including the *Mills* case, involved interlocutory matters--appeals from rulings made on interim questions arising during the course of proceedings. In the *Higgins and Beare* case,[34] the Saskatchewan Court of Appeal held that section 24(1) of the *Charter does* authorize an appeal, in cases concerned with *Charter* issues, from *final* trial court decisions. Mr. Justice Cameron, after examining the above cases thoroughly, concluded that, because they involved interlocutory issues, they did not prevent such an appeal. While the *Higgins and Beare* decision was reversed on its merits by the Supreme Court of Canada, the reasons for judgement of the Supreme Court did not deal with the "right to appeal" issue.[35]

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[29] *R.* v. *Higgins and Beare* (1987), 40 D.L.R. (4th) 600 at 639 (Sask. C.A.).

[30] (1984), 14 D.L.R. (4th) 184 (Ont. C.A.). The Court did not consider an argument based on section 7 in this case, however.

[31] (1984), 7 D.L.R. (4th) 623 (B.C.C.A.).

[32] (1986), 29 C.C.C. (3d) 266 (B.C.C.A.).

[33] (1986), 29 D.L.R. (4th) 161 (S.C.C.).

[34] *Supra*, note 29.

[35] (1987), 61 C.R. 303 (S.C.C.).

Leave has been granted to appeal the *Meltzer* decision[36] to the Supreme Court of Canada. This may give the Supreme Court an opportunity to settle the question.

Supreme Court of Canada

If the Supreme Court of Canada does eventually accept the argument that sections 7 and/or 24(1) of the *Charter* grant a private law right to appeal at least in some circumstances, to intermediate courts of appeal, it is not unlikely that the reasoning could be carried a step further, and used to establish a right to appeal to the Supreme Court itself. If "fundamental justice" requires the availability of at least one level of appeal, why should it not also require the availability of an appeal to the nation's ultimate court of appeal? Given that a "General Court of Appeal for Canada" is contemplated by the Constitution, does not "fundamental justice" demand that litigants have access to such a Court? How else can it be assured that the "rule of law" will be applied uniformly across Canada?

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[36] *Supra*, note 32.