Some Impressions on Judging

THE HON. GÉRARD V. LA FOREST*

The following represents the text of an address delivered on October 18, 1985, by the Honourable Gérard V. La Forest, Justice of the Supreme Court of Canada, on the occasion of the Ninth Annual Viscount Bennett Memorial Lecture. The Lecture series is designed to promote a greater appreciation of the role of law in modern society.

Texte de la conférence donnée le 18 Octobre 1985 par M. le juge Gérard V. La Forest, de la Cour suprême du Canada, à l'occasion de la 9me "Annual Viscount Bennett Memorial Lecture". Cette série de conférences vise à mieux faire comprendre l'importance du droit dans la société contemporaine.

I am greatly honoured to have been asked to give this, the Ninth Viscount Bennett Lecture. I am deeply conscious of the high calibre of those who have preceded me in this endeavour. When, therefore, Dean Dore approached me to undertake this task, I was very pleased. But there was the question of a subject. When I mentioned as one possibility that the business of judging might well be appropriate, he responded very enthusiastically. So much so, indeed, that I immediately informed him that I could only undertake to do this on the basis of my personal experience. And that, as you know, covers a rather short period as the law measures things. Besides I knew, and it became increasingly evident to me as I again skimmed the literature on the subject, that there remains little to say that has not been said about it. Nonetheless, some of you, I hope, will not have read all this material. Besides, it assists understanding to put ideas in a specific and personal context. So here I am delivering what is

*Justice of the Supreme Court of Canada.

very much a personal testament, not the last I would hope, and certainly not an *apologia pro vita sua*. These are impressions I gained, largely during my years on the New Brunswick Court of Appeal, because my experience on the Supreme Court of Canada is as yet very short.

Apart from the excitement of friends and family, the first thing you became aware of on being named a judge is that you are usually addressed by a title, even by your friends. "What does your lordship think of such and such?", they will say as you look over your shoulder to catch a glimpse of the personage they are addressing. But you get used to it. What these titles do, of course, is to set you apart — apart where the public wants you to be and where, to some extent, you must be if you are to do your job. While judges must not be uninformed about, or aloof from what is going on around them, they must be prepared to make judgments in contexts that not only seriously affect people's lives but society generally. So judges must be somewhat apart, dispassionate, subject to the compassion inherent in a properly functioning legal system, and always impartial. Yet at the same time, they must constantly strive to stay close to people and, in turn, to society.

There is another matter a judge soon learns: An important part of his job is to listen. The litigant is entitled to have his case heard in the way he or his counsel wish to have it presented. This task, it may seem strange to say, can be a difficult one. Boredom has been known to set in; if counsel is slow or rambling, one virtually dies to get involved, to get to the nub of the case. But the urge must be curbed. It was Bacon who said that "an over-speaking judge is no well-tuned cymbal".[1] The same feeling was expressed, though in more earthy tones, in a New Brunswick case. In that case — it may be apocryphal[2] — Chief Justice Tuck and Mr. Justice Hannington were members of the panel. The former at some stage began berating counsel, and continued to do so to the point where counsel could not adequately present his case. At this point Mr. Justice Hannington is reported to have bellowed: "Oh! for _____'s sake Tuck, lay off". (Those of you who understand New Brunswick's Christian heritage will readily have filled in the blank.)

But the caution about the judge's participation in proceedings must not be exaggerated. I speak here of the appellate level where my experience lies. Much time and effort can be saved by the court informing counsel that it knows the facts and what issues it thinks require special attention. This can also result in a much better hearing. As most cases are decided on a single point, or at most a very few, it is best for all concerned to concentrate on these. Many counsel will remain on the high ground. Safely ensconced on Olympus they will refrain from descending to the valley below where the battle must be won or lost. At trial, too, I frequently found the questions posed by the judge after counsel had had their say to be of critical importance.

Returning for a moment to titles, there is one in particular that goes beyond a mere polite or flattering way of addressing a judge. That is "The

[1] F. Bacon, *Essays of Judicature; I — Works of Francis Bacon* (Philadelphia: A. Hart, 1852) 58.

[2] I think, however, that it is true. It was told to me by the late Peter Hannington, Hannington J.'s grandson.

Honourable" or as it appears at other levels of courts, "Your Honour". This title goes to the essence of the office of the judge. It is as much a burden of office as it is a title. Whatever a judge's personal feelings may be, he must always deal with the matters before him with honour — that is, in accordance with the dictates of his conscience. Since he is, and must be, independent, the major factor governing how he does the job is his or her conscience.[3] I do not mean, of course, that the judge's job is to decide cases according to the dictates of his own conscience. What I mean rather is that he must do his job as dictated by his conscience. No one else can or should dictate to him.

And what is his job? Why, to do justice of course. And we need not, as Pontius Pilate did of truth, ask what justice is. The judge's oath of office gives the answer to that question. Judges who are heir to the English tradition are sworn to do justice according to law. So a judge must administer the law conscientiously, and that means impartially. For impartiality as between the parties is the first quality of the judge and an essential ingredient of the legitimacy of his position in our society.

But, you may say, all the judge is doing then is administering the law; so the expression "justice according to law" is just a flowery way of saying that he must do his job with integrity. For we all know that impartial administration of the law sometimes results in injustice in a particular case. And most of us would concede that this is inevitable because the primary reason for law is to maintain order. We must know ahead of time what the accepted and authoritative rules are if we are to have an orderly society. Where then does justice come in? It does so in many ways. To begin with, there is a world of difference between approaching a dispute as if all that was necessary was a mechanical application of rules, and doing so in a manner that attempts to apply those rules justly. It is because the latter approach is followed that we can say that the function of a judge in our judicial system is to administer justice according to law.

One of the things that has struck me most since I became a judge is the deep sense of justice of so many of my colleagues. With some it is innate; with others it is acquired. For most of us, I suspect, it is a combination of both: the response of our common humanity to human problems operating on a very wide spectrum, problems in which we have no personal interest but are called upon as instruments of society to resolve. It begins with the facts. I am by no means suggesting that judges as a rule distort facts so as to achieve a just result, though I would be surprised if it did not happen from time to time. Far more likely, though, is that the judge will unconsciously be affected by the justice of the case in appreciating the evidence.

But the role of justice goes much beyond the categorization of facts. Many legal rules are themselves attempts to deal justly, if generally, with particular situations. That is scarcely surprising. For while the primary purpose of law is order, justice is its secondary purpose. And that secondary purpose supports the first because just rules engender respect for the law.

[3]For a similar thesis, see E.J. Devitt, "Your Honor" in G.R. Winters (ed.), *Handbook for Judges* (American Judicature Society, 1975) 99.

In many cases, justice can be achieved by giving the judge a discretion. But what is more interesting is that judges have a considerable role in developing the law — to make law if you will. In the time remaining to me, I will especially focus on this matter, with particular reference to cases that came before me in the New Brunswick Court of Appeal.

The first thing that should be underlined in examing this question is the relatively small number of cases in which courts can legitimately exercise a law-making function, where it has, in Holmes' phrase, "the sovereign prerogative of choice"[4]. Some evidence of this phenomenon can be gleaned from the number of cases where trial courts are unanimous, and also where courts of appeal are unanimous, and unanimous too in rejecting an appeal. It becomes almost visual on a perusal of the New Brunswick reports now that the increased flow of cases has forced on the Court of Appeal, as on other courts, the device of brief "By-the-Court" judgments.

The second point I would draw attention to is the difference in the courts' role in moulding the law enacted by Parliament or the Legislature on the one hand and judge-made law on the other. The legislative branch is elected by the people; if it speaks clearly, the courts have a duty to follow its dictates. *L.E. Shaw Ltd.* v. *Berube-Madawaska Contractors et al.*,[5] decided in June 1982, neatly exemplifies this point. There, a mechanics' lien had been filed against a water and sewerage easement belonging to the City of Fredericton. It was argued that tying up the City's property in this way contravened public policy. This was not a case where the court was bound to decide which of two conflicting legislative expressions of policy should prevail. There was only one statute. The public policy relied on was more general. I explained that there were varying notions of public policy, the application of which is perfectly legitimate, if done with circumspection, in moulding judge-made laws to serve the ends of justice. I then said this:

> [T]hey [these judicial ventures in the realm of public policy] are attempts by the courts to shape the law of contract and of property (laws largely incrementally created by the judiciary over the years) so as to prevent such laws from being used by private individuals and corporations against what the courts perceive to be the public interest. Here, however, we are asked to apply our notions of public policy in the face of an Act of the legislature which, under our system of government, has the primary power to determine public policy. Under such circumstances the power of the courts to act on their own view of public policy must necessarily be of very narrow scope.[6]

How strongly courts will adhere to the principle of legislative supremacy is evident from *H.E. Carson & Sons Ltd.* v. *City of Moncton*[7] decided a few months later. There the City of Moncton was sued by the Carson Company for work done for an agreed price at the request of the City's deputy engineer. The work agreed upon was the installation of a sewer line to replace another which

[4]O.W. Holmes, "Law in Science and Science in Law" in *Collected Legal Papers* (New York: Harcourt, Brace & Co., 1921) 239.

[5](1982), 40 N.B.R. (2d) 374 (C.A.), 138 D.L.R. (3d) 364.

[6]*Ibid.*, 378 (N.B.R.), 367 (D.L.R.).

[7](1982), 42 N.B.R. (2d) 130 (C.A.), 138 D.L.R. (3d) 596.

had broken and caused flooding. The work had to be done promptly. There was no time to convene Council and Council never did give its approval. But the City took the benefit of the work. It refused to pay, however, because section 5(2) of the *Municipalities Act*[8] provides that no contract to which a municipality is a party has any force or effect unless it is sealed with the corporate seal of the municipality and is signed by the mayor and the clerk. The City won.

On the face of it, this result was unjust. But the court had to give effect to the statute. At common law there was a rule requiring municipal contracts to be under seal, but there were exceptions that covered situations akin to that in the *City of Moncton* case. So courts have reasoned that when the Legislature clearly spells out this requirement, then it must mean precisely what it says. This approach was reinforced in the *Carson* case by the fact that the Legislature had contemplated exceptions but had set forth a method for creating them — by regulations. We did not like the application of the law in this context, but the Legislature had clearly set forth its will and, as we saw it, our duty was to comply with it.

There are some areas, however, where judges have never blindly followed the Legislature. In the *L.E. Shaw* case, I alluded to this when I stated: "I leave aside for present purposes the traditional role of the courts ... of applying legislation so as not to interfere unduly with individual rights."[9] What I had in mind there was that the courts in interpreting legislation rely on a number of presumptions: for example, that the legislature does not seek to achieve an unreasonable purpose, or again, that it does not intend to interfere with vested rights. I had occasion to elaborate on the constitutional underpinnings of this approach in the *Fisherman's Wharf* case[10] in December 1982. There the Province sought to enforce a lien for sales tax owing by a vendor under the *Social Services and Education Tax Act*[11] against the landlord who leased the premises to the vendor. In other words, it was trying to collect taxes owing by one person out of the pocket of another. This seemed to us to be an unreasonable result. As the words of the Act were not crystal clear, we applied the presumption that the Legislature could not have intended such a result and refused the Province's claim.

Is this a usurpation of the Legislature's authority? I do not think so. In my judgment I noted:

> [L]egislative supremacy is not all there is to the Constitution ... Those who struggled to wrest power from the Stuart Kings and placed it in the hands of the elected representatives of the people were not of a mind to replace one despot by another. Rather they were guided by a philosophy that placed a high premium on individual liberty and private property and that philosophy continues to inform our fundamental political arrangements — our Constitution. ... [T]he original foundations of our

[8]R.S.N.B. 1973, c. M-22.

[9]*Supra*, footnote 5 at 378 (N.B.R.), 367 (D.L.R.).

[10]*Re Fisherman's Wharf Ltd.; New Brunswick, Province of* v. *Fisherman's Wharf Ltd. (defendant), Brunswick Bottling Ltd., Cook, Superior Propane Ltd. and McKay's Dairy Ltd. (claimants) and Melvin (applicant)* (1982), 44 N.B.R. (2d) 201 (C.A.), 144 D.L.R. (3d) 21.

[11]R.S.N.B. 1973, c. S-10.

> governmental organization remained as a legacy in a number of presumptions designed "as protection against interference by the state with the liberty or property of the subject. Hence, it was 'presumed' in the absence of clear indication in the statute to the contrary, that Parliament did not intend to affect the liberty or property of the subject". ... If the legisation is clear, of course, the intent of the Legislature must be respected. But what these presumptions ensure is that a law that appears to transgress our basic political understandings should be clearly expressed so as to invite the debate which is the lifeblood of Parliamentary democracy.[12]

Much, though not all, of this jurisdiction has recently been incorporated in the *Canadian Charter of Rights and Freedoms*. So that now, within the limits of the *Charter*, the courts will have the final say on issues governing basic rights, subject to their views being expressly overridden under section 33 of the *Charter* or by a constitutional amendment. This jurisdiction of the courts does not, however, create law. It simply puts a brake on excessive action by Parliament and the legislatures.

It is different with judge-made law. It is far beyond the scope of this lecture to speak of the history of judge-made law or its underlying rationale beyond resorting to the answer of one judge to the question of its propriety: "How could we do otherwise?" I do not think there is any serious question among informed commentators that judges do and must make law interstitially. Discussion really centres on how far they should go, and the appropriate occasions and methods of doing so.

Judges unavoidably adapt the law to the times. Sometimes the movement is almost imperceptible; often changes are not made consciously. We live in a society with certain basic values. Judges automatically respond to these and to the sense of justice that their function generates. To many a judge, his role in law-making seems to be an abstract question. But there are cases where there is nothing abstract or unconscious about it. It is a matter of choice, a conscious choice that may involve considerable effort in reworking principle and, sometimes, intellectual and moral courage. This choice will frequently be made in the face of precedent. A decision may have been suitable in the context of the society of the time, but it may have a completely different effect in a new setting. Or its governing rationale may have been overridden by some other principle in view of changing conditions.

The modern law of contract, for example, is slowly beginning to distance itself from the body of law developed to suit 19th-century needs and ideas. Oftentimes this movement will occur because of the different way judges now view facts and which of these they deem to be relevant. Our enquiry about relevant facts today ranges over a far broader area than a 19th-century judge would have engaged in. Theirs was a narrow focus with emphasis on the modes of offer and acceptance.

Enquiry into and characterization of facts is more especially the task of the trial judge. But the case that really brought home to me the changed way we now look at facts was one at the appeal level. That case was *Thomas Equip-*

[12] *Supra*, footnote 10 at 210-11 (N.B.R.), 28-29 (D.L.R.).

ment Ltd. v. *Sperry Rand Canada Ltd. et al.*[13] I shall give you a simplified version of the facts. Thomas Equipment, relying on the expertise of Sperry Rand, approached the latter with a view to obtaining hydrostatic transmissions to be mounted on front end loaders it proposed to market. Sperry recommended and agreed to supply a type of transmission suitable for the purpose. A supply was ordered each year by Thomas on a form that set forth conditions regarding Sperry's liability for defects. Among these conditions was one limiting Sperry's sole liability to the repair of the transmissions at its factory. This clause was known to Thomas which generally relied on it whenever it found defects.

Unfortunately for both sides there was a distressingly high number of breakdowns and failures in the components of the transmission. This, of course, resulted in no end of trouble for Thomas both at the mechanical and the marketing level. So much so that its continued existence was threatened. Finally, after long negotiations and arrangements, Thomas decided to sue Sperry for breach of contract. But what was the contract? Was it the individual orders, the only written part of the transactions between the parties that purported to be a contract? If so, Thomas could not succeed, for by its own action it had agreed that Sperry's sole liability for defects in the transmissions was to repair them.

It seemed to me, however, that realistically this was not all there was to the arrangement. The annual orders were made on the basis of a more general understanding that Sperry would supply a type of transmission suitable for Thomas' needs. This was the main purpose of the contract. It was this understanding that was breached. The clause limiting Sperry's liability merely referred to the situation where a particular transmission broke down. It had nothing to do with breaching the agreement that constituted the main purpose of the arrangement, namely, the supply of a type of transmission sufficiently free of defects to meet the known marketing needs of Thomas. Thomas, therefore, succeeded.

This case reflects no formal change in the law; but I venture to think earlier judges would probably have focussed narrowly on that part of the transaction relating to the supply of individual transmissions. Particularly with these on-going relationships, however, I think we were right to review the whole situation to determine precisely what it was the parties had agreed to. Certainly, that is what courts generally do now.

Another common technique to effect justice is by stretching the application of the law to its utmost. Some may look upon the "swimming pool case", *Storey and Storey* v. *Hallmark Pool Corporation et al.*[14] as an example, but I think that case fell within established principles. The Storeys bought a pool under representations and circumstances that would lead an ordinary person to think the pool, when constructed, carried a guarantee against damage from the winter's cold. But the company's written guarantee was narrowly restricted

[13](1982), 40 N.B.R. (2d) 271 (C.A.), 135 D.L.R. (3d) 197.

[14](1983), 45 N.B.R. (2d) 181 (C.A.), 144 D.L.R. (3d) 56.

to damage to the pool's components. The Storeys, however, had never seen the written guarantee. All they had been shown was a picture of the guarantee reproduced in a brochure. On these facts we concluded that insufficient attention had been brought by the vendor to the more than regrettably fine print (it was illegible for most) in the guarantee as it appeared in the brochure. So the Storeys won their suit.

When judges are continually stretching judge-made law in some area, it seems to me the courts should seriously consider reshaping the law. In the *Hallmark Pool* case, I noted that some commentators are suggesting the need for a doctrine of strict liability for misleading statements in advertising products. The proposal merits consideration. In New Brunswick, I am happy to say the Legislature has dealt with the situation.[15]

But if a judge is to opt for change, at least a change of some significance, it is, in my view, his duty to explain why on the basis of principle the change is desirable. For we are not legislators. We are not charged with making law by simple fiat. We do have a duty to administer justice according to law; and I have little doubt that we are expected to respond to the needs and values of the society we live in. So we have some mandate for effecting change. But it is incumbent on us to justify such changes in terms of that mandate. It goes to our legitimacy.

Sometimes the choice to be made is between conflicting judicial views, each of which has many adherents. Here too one must explain why one approach is selected over another. In *New Brunswick Telephone Company, Limited* v. *John Maryon International Limited*,[16] I went to considerable lengths to explain why it was more consistent with the underlying rationale of the law that a person who suffers damage from the negligent manner in which another performs a contract he has with him should be able to sue in both tort and contract, a determination that results in several advantages to the injured party. I not only attempted to justify this decision in terms of historical development, but in terms of its practical effect in a modern setting. Does it really make sense (in the absence of agreement to that effect) that a contractor injured through the negligence of another should be in a worse position than anyone else similary situated who has not entered a contract? Why, in the absence of statutory or contractual provision to the contrary, should he not be able to sue (or recover interest as was the question there) when any other person so situated could do so? Others may disagree with these views. There are countervailing arguments. But I attempted to justify our decision on rational grounds consistent with established legal principles in the context of our society. This appeal to reason helps give legitimacy to judicial law-making. That, among other reasons, is why one gives reasons for judgment.

A decision like *Maryon* obviously has important implications for related areas of the law, for example the measure of damages that may be awarded; for there are differences in the principles governing damages in tort and in con-

[15] *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1.

[16] (1982), 43 N.B.R. (2d) 469 (C.A.), 141 D.L.R. (3d) 193.

tract cases. A judge must, in developing the law, consider its implications. In *Maryon* I stated that the view there adopted might involve some reconsideration of the law regarding the measure of damages. For I was aware that there were what I considered anomalous situations in that area.

But a judge's concern is primarily and inevitably the case before him. He does not, and indeed cannot, see all the implications of his decision. He is not a legislator, or even less, an academic, who may deal with the whole field. So he moves step by step, leaving problems that do not directly arise for another day. He makes some forays into the adjoining areas to make certain the ground is firm; but he may have no real conception of the outer reaches of the path he has embarked upon, or just how other challenges will have to be met. He decides that case.

Thus I had not fully seen the challenge regarding the application of contributory negligence in contract with which the court was faced in *Doiron* v. *La Caisse Populaire d'Inkerman Ltee*,[17] though this resulted directly from the *Maryon* case. *Doiron* posed far greater intellectual and technical difficulties than *Maryon*. There were two well-trodden, if divergent, paths in *Maryon*. All one had to do was to select the one that seemed more consistent with principle and with present requirements. But in *Doiron*, there were no well-marked paths. What there was on one side was a strong assumption about what the law was, based on more than one hundred years of judicial development. The precise point had never been decided, but viewed from an historical perspective it was easy to assume that contributory negligence did not apply to contracts. On the other side was an impressive number of recent trial court decisions, with some appeal court support, which said it did. However, the rationale for these recent decisions was, as one writer put it, "sparse to the point of non-existence"[18].

Still, trial judges are on the front line of the judicial system. They are the ones who feel the full force of facts and their demands on justice in the society we live in. So one must be careful in assuming that trial judges are wrong when time after time they come to a particular conclusion even though a mechanical application of legal principle would at first sight lead one to think the opposite conclusion was called for. In such a case, it is important, I think, to trace the genesis of the principle to make sure it is sound or applicable.

In the *Doiron* case, I found that the principle that would have ruled out contributory negligence was rooted in 19th-century assumptions no longer accepted in our society and that its application to torts had, in consequence, been legislatively ended. It was probably pure chance that the principle had never been applied in contract; it had long been assumed that it did. We were thus free not to follow the traditional assumption that contribution had no place in allocating damages in contract. Accordingly I attempted to provide a rational base for the recent approach intuitively taken by trial judges.

[17](1985), 61 N.B.R. (2d) 123 (C.A.), 17 D.L.R. (4th) 660.

[18]*Ibid.*, at 150 (N.B.R.), 675 (D.L.R.). The writer referred to is M.G. Bridge in his article "Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain: *Lambert* v. *Lewis*" (1981-82), 6 *Can. Bus. L.J.* 184 at 197, n. 62.

In the case of the application of contributory negligence to contracts, the academic community, too, had been urging the courts to adapt the law to make it conform with the times. This brings me to another subject. There is little doubt that, unlike the situation a few years ago, judges today frequently rely openly on academic writings. Indeed, I cannot believe they have not always relied on them, albeit covertly. For my part, when I am thrown into a subject I know little about, I do the obviously sensible thing of picking up a book on the subject. Other judges do the same thing; some are less forthright in admitting their debt to the writer, others more so. What influence the writer has depends on the quality of the research and the cogency of thought the work displays. His or her reputation may help, but it is the reasoning that counts.

Now you may be saying: where does the rule of *stare decisis*, or the binding nature of precedent, come in? Well, I have already mentioned that there is little room in the bulk of cases for the exercise of a law-making function. Much of the time, judging involves performing the time-honoured function of sensitively and conscientiously fitting the facts to the law. The doctrine of precedent is important in maintaining stability in legal doctrine and the trust that people have in the law as a system of ordering society. But these remarks have, of course, really avoided the question. What does the court do when it feels a legal rule must be altered to meet present realities but there is a precedent on the point in that court or in a higher court?

Sometimes the precedent can be skirted. We did this in *Maryon*. Our court had obviously seen the matter differently a few years before, but it had really not had to confront the issue, so the previous case there was not a direct precedent. We did the same thing recently in *Clark* v. *C.N.R.*[19] in respect of a Supreme Court of Canada decision, but that is a somewhat more daring exercise. There, however, the Supreme Court decision was old and much had happened since it was made.

But what if the case is directly on point and cannot be avoided? Well, if it is a higher court decision one simply must follow it, sometimes with grumbling one hopes will lead the higher court to see the error of its ways. But what if it is the decision of one's own court? Here it depends in good measure on how old the decision is. I remember one counsel arguing that *St. Anne-Nackawic Pulp and Paper Ltd.* v. *Canadian Paperworkers Union, Local 219*[20] was wrong before the very panel that had decided the case one year before. That must rank as a classic example of a hopeless situation! But in the *Luana Turner* case,[21] where we applied the doctrine of frustration to an ordinary lease, we refused to follow a case that appeared to be on all fours with the one before us, decided by our court some 25 years before. But there had in the interval been intimations of a different view in higher courts. However, in the *Clark* case we expressly refused to follow a very old case in the predecessor of our court even though it had later received support in subsequent Supreme Court cases to which I have already referred.

[19](1985), 62 N.B.R. (2d) 276 (C.A.), 17 D.L.R. (4th) 58.

[20](1982), 44 N.B.R. (2d) 10, 142 D.L.R. (3d) 678.

[21]*Turner* v. *Clark* (1983), 49 N.B.R. (2d) 340 (C.A.).

A court of appeal deals largely with law; it is primarily for trial courts to make findings of fact. Indeed, unless a trial judge is clearly wrong, or has drawn an insufficiently grounded inference, appeal courts must not reverse a trial judge on a finding of fact. For my part, I deeply respect the findings of fact of trial judges. The rule that appeal courts should not lightly interfere with these is obviously sound. The trial judge has seen and heard the witnesses. The tone of voice, the manner in which something is said, the comportment of the witness generally — all of these must be given great weight. These factors are not apparent from the disembodied words in a transcript. Besides the rule makes administrative sense. It would be an extremely uneconomical use of time and resources for appeal courts to re-do the work of trial judges. However, I must, as an aside, confess to a great feeling of boredom when counsel cite copious cases to support this principle. I might perhaps add that an appeal court gets to know trial judges; it should therefore come as no surprise that it approaches some judgments with more confidence in their being right than others. That's good administration too.

Still, courts of appeal do have to deal with facts. I mentioned the *Sperry Rand* case earlier. There it was necessary to have a real appreciation of the facts in applying legal principle. It was true as well in the *Hallmark Pools* case. When facts become the dominant issue, as frequently happens, one must get as immersed in them as the reading of transcripts will permit. I try to get into the very skins of the parties. *Randall* v. *Nicklin,*[22] the case of the "dependant man", is an example. The plaintiff there would literally consult his lawyer about buying a pair of shoes. It was essential to understand the character of this person to decide whether in the context of the case he had meant to gratuitously convey his property to his niece, or whether he meant to create a trust to take care of him. This approach is often necessary in cases involving the equitable or other discretionary jurisdiction of the court.[23]

My remarks thus far must have revealed one further fact: that the public's perception of what judges do is somewhat skewed. Most people who give any thought to the matter usually focus on the most visible part of a judge's job — listening to counsel in court. As at trial, this is an important aspect of a court of appeal's work, but at that level especially, that is but the tip of the iceberg. There is the preliminary preparation. The written submissions of counsel are read before the hearing and often the transcripts too. In fact, I am one of those who, by and large, derives far more assistance from written submissions than from oral presentations.

Following discussions with one's colleagues after (and sometimes before) the hearing, there is the business of writing a judgment. Many a judge on appointment does not realize that one of the major parts of his job is to be a writer. Nothing in our law requires a written judgment; but tradition dictates it in most cases, certainly in those involving complicated legal or factual issues. Why do we do it? We do it (especially in courts of appeal) to give guidance to other judges and to lawyers, sometimes to students or the community or some

[22](1984), 58 N.B.R. 414 (C.A.).

[23]See *Davis* v. *Davis* (1982), 41 N.B.R. (2d) 590.

part of it. Often we do it to persuade our colleagues and sometimes to persuade ourselves. Frequently enough, one thinks one has the answer; but on sitting down one finds it will not write. It cannot be supported on principle. Always we write to persuade the unsuccessful litigant or his counsel; not that we can always persuade him that we are right, but that we have heard and understood his argument and attempted to resolve the issues to the best of our ability. One who goes to law cannot always expect to win; he has a right, however, to expect his arguments to be fairly heard and fairly considered.

How one writes judgments is very much a personal matter. The facts and issues must, of course, be set out, and these with clarity. Clarity is the hallmark of a good judgment. For the rest there are many styles and many purposes. I have a penchant for trying to make people see the human situation; and though some judges do not much favour this, I don't think it hurts to throw a little humour in where the situation permits. Humour can sometimes bring home a point far better than any other technique.[24] Apart from this, it does no harm to reveal that judges are human too; it also helps the reader who is forced to read a judgment — law students and the occasional lawyer. Humour, however, must never be at the expense of the losing party, especially where that party is an individual.

Finally, I should like to mention the comfort one get from the encouragment of one's colleagues whenever it is needed. And criticism too, which is often needed. Criticism, however, is usually gently administered. For judges, especially on courts of appeal, know there is a good chance that they will have to work together for what may be a long time.

It has been pleasant work. I enjoy the law and lawyers and the people one sees through the cases. I enjoy my colleagues. But most of all I enjoy writing judgments, particularly where one can move the law forward for the better. In this I sometimes follow my colleagues; sometimes they follow me. But, leader or follower, whenever I come across a case where the law can be refashioned for the public good and private justice, I shall continue to do so — with relish!

[24]See, for example, *McNair* v. *Collins* (1912), 6 D.L.R. 510 (Ont. Div. Ct.), 27 O.L.R. 44, where Riddell J. resorts to a dog's eye view in interpreting the meaning of "running at large" in a statute.