Final Word on Final Appeal

Reviewed by Patrick J. Ducharme* and Edward W. Ducharme*

The 18th-century sage, Dr. Samuel Johnson, once observed that there is little point in wasting precious time discriminating between a louse and a flea. In *Final Appeal: Decision-Making in Canadian Courts of Appeal*,[1] the authors expend considerable time and energy performing a similarly wasteful exercise. So the book fails, finally, to appeal, not because it is not well-researched but because it aspires after and achieves so little.

After all the analysis, after all the dutiful recording of statistical data, the authors produce conclusions such as these:

1. The justices of the Supreme Court of Canada in the landmark case of *R. v. Morgentaler*[2] disagreed among themselves about what decision on abortion legislation was the correct one;

2. What judges determine to be the "right" or "correct" answers to legal issues is a function of their personalities, values, educations, and socio-cultural backgrounds;

3. Different judges attach different weight to facts and law, and in doing so their privileging of one --facts or law--affects the decisions at which they arrive;

4. Given the same law and the same or similar facts, some judges take a "strict" or conservative approach to the granting of appeals, while others are more liberal.

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*Patrick J. Ducharme, B.A. (Hons.) Windsor, LL.B. (Windsor) is Counsel for criminal matters to the firm of Gignac, Sutts, Windsor, Ontario.
*Edward W. Ducharme, Ph.D. (Michigan), LL.B. (Windsor) is Head of the Employment and Labour Law Department at the firm of Gignac, Sutts, Windsor, Ontario.

[1] James Lorimer & Company Ltd., Publisher: Toronto, 1998.
[2] *Morgentaler, Smoling and Scott v. The Queen* (1988) 37 C.C.C. (3d) 449 (S.C.C.).

Good authors always have in mind an audience whom they seek to engage and inform or please. To the public-at-large, the information contained in *Final Appeal* may well be new and interesting, but it is otherwise for anyone remotely aware of the legal and judicial process and hardly worth the painstaking academic gymnastics to which the authors resorted in order to produce it. What, after all, does it all come down to? The answer seems to be that judges are, well, human.

Evidence of their humanity is developed at length in Chapter 2 where we learn that the various appellate judges have a particularly notable trait of personality. They are, we are told, "high achievers", especially in relation to "average Canadians and elected parliamentarians." We know some elected parliamentarians, and we consider it prudent not to say anything further on that subject. But one thing we have wondered about all our adult lives is "average Canadians." Who are they anyway? Do they like or abhor, for example, the game of hockey? Okay, what about lacrosse, or curling? *Final Appeal* at last provides this insight: average Canadians are not judges.

Not all of the research reported in this text is as helpful or as interesting even as the discovery that judges tend to be "high achievers." Consider, for example, these observations:

1. Our appellate judges "report" that they have not remarried at a rate as high as the national average (p. 35);
2. More of them than the national average have had a political affiliation (p. 36).

What is the relevance of these facts? The authors do not say. Will an appellate review go more smoothly because the members of the appellate bench are "happily married" and/or politically affiliated? The analysis apparently does not go that far. The authors also conclude that appellate judges are older than average Canadians. Is this a good thing or bad? Are appellate judges less capable or more capable because they are older? You will not find any answers here.

The authors also discover that the appellate *process* is slow and that Ontario and British Columbia appellate courts are slower than most others because of the volume of cases they handle, while Quebec's appellate court is the slowest. Quebec's appellate justices appear to decide cases similarly to Quebec's trial judges and in conformity to the Quebec Code of Civil Procedure. The Code requires written reasons after trial. This, the authors speculate, leads to delays at the appellate level because Quebec's appellate judges more often reserve their decision to give written reasons. (p. 169). Each of the appellate court's processes vary from one to the other, leading the authors to a single overarching conclusion. Are you ready? Judges in a jurisdiction adapt over time to the norms and expectations of their courts. This, we learn, is the "legal culture" of a court and its community.

The sixth chapter is devoted exclusively to the Supreme Court of Canada. The two fundamental differences between the penultimate appellate courts and the Supreme Court of Canada are these: a high percentage (approximately 80%) of the cases that

the Supreme Court of Canada hears annually are “chosen” by committees composed of three Supreme Court members, and reference cases can be sent to the Supreme Court from the federal cabinet (p. 101). Here are the key observations:

1. The average age of the judge is 65;
2. He or she was a judge of a provincial appellate court;
3. He or she is most concerned with qualities of fairness and impartiality and the ability to write in a concise and timely fashion;
4. He or she feels some isolation and some pressure to get each decision “right”, and
5. After oral argument when the judges retire to a conference room to discuss the case that has been argued, each is called upon to offer an opinion in the reverse order of his/her seniority.

The disclosure that the judges are called upon to express their views in reverse order of seniority affords at least one fascinating glimpse into the Supreme Court’s normally very private protocol. The practice of having the less senior members of the bench proffer opinions first is meant to ensure equal, fair and full consideration to all the justices. It is a practice which is apparently the very reverse of the method used in the United States Supreme Court. Regrettably, though, there are few such shining moments in *Final Appeal* and virtually no hard interpretive analysis. As a result, the book is not likely going to have any lasting impact upon the legal profession or its processes.