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COMPARATIVE JUDICIAL STYLES: THE DEVELOPMENT OF THE LAW OF MURDER IN THE QUEBEC AND ONTARIO COURTS OF APPEAL

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Article abstract

En 1978, Monsieur le juge Jules Deschênes, juge en chef de la Cour supérieure du Québec, dénonçait le « séparatisme juridique » au Canada. Il convient de se demander s'il n'existe pas des différences de culture juridique qui rendent ce phénomène inévitable. Les jugements rendus par les Cours d'appel du Québec et de l'Ontario, au cours des dix dernières années dans les causes de meurtre, semblent attester de ces différences. Les causes du Québec portent en grande majorité sur des questions de preuve et de procédure. Les causes d'Ontario traitent presqu'exclusivement de droit substantif.

Les deux cours semblent aussi utiliser différemment les sources du droit pénal. La Cour d'appel du Québec est plus avide de doctrine. L'analyse de la jurisprudence est beaucoup plus élaborée en Ontario. Les dispositions du Code – particulièrement les articles 212 et 213 – sont analysées en profondeur en Ontario; elles le sont beaucoup moins au Québec.

II ne fait aucun doute que la Cour d'appel d'Ontario constitue un forum judiciaire où prend forme et se développe la doctrine pénale. Ce phénomène n'est pas seulement attribuable aux juges de la Cour d'appel; les avocats y jouent un rôle important. La qualité des criminalistes en Ontario est indiscutable. Pendant les dix dernières années, les trente-huit avocats qui ont plaidé une cause de meurtre devant la Cour d'appel d'Ontario ont publié cinq livres et cinquante-trois articles de périodique sur des sujets se rattachant au droit pénal. Pendant la même période, parmi les quarante-huit avocats qui ont comparu devant la Cour d'appel du Québec dans une affaire de meurtre, un seul, maintenant juge, a publié deux articles. Un autre, également élevé à la magistrature depuis, était le rédacteur pour le Québec des « Criminal Reports ». De plus, dans deux causes de meurtre, la Cour d'appel du Québec a commenté défavorablement le travail d'un avocat.

De façon générale, la Cour d'appel du Québec semble se restreindre à disposer de cas d'espèce, confiante qu'un nouveau procès soit la meilleure façon d'assurer que justice soit rendue. En contraste, la Cour d'appel d'Ontario agit vraiment comme tribunal intermédiaire; préoccupée par le développement de la doctrine pénale, elle impose des standards très exigeants au juge de première instance à l'égard des directives à donner au jury et présente à la Cour suprême du Canada un exposé stipulant des questions que cette dernière doit trancher.

Les causes des divergences de style et de méthodologie entre les deux cours sont probablement nombreuses. Une véritable codification du droit pénal pourrait servir à réconcilier ces divergences.

Commentaires

COMPARATIVE JUDICIAL STYLES: THE DEVELOPMENT OF THE LAW OF MURDER IN THE QUEBEC AND ONTARIO COURTS OF APPEAL*

by Louise ARBOUR**

En 1978, Monsieur le juge Jules Deschênes, juge en chef de la Cour supérieure du Québec, dénonçait le "séparatisme juridique" au Canada. Il convient de se demander s'il n'existe pas des différences de culture juridique qui rendent ce phénomène inévitable. Les jugements rendus par les Cours d'appel du Québec et de l'Ontario, au cours des dix dernières années dans les causes de meurtre, semblent attester de ces différences. Les causes du Québec portent en grande majorité sur des questions de preuve et de procédure. Les causes d'Ontario traitent presqu'exclusivement de droit substantif.

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avocats qui ont comparu devant la Cour d'appel du Québec dans une affaire de meurtre, un seul, maintenant juge, a publié deux articles. Un autre, également élevé à la magistrature depuis, était le rédacteur pour le Québec des "Criminal Reports". De plus, dans deux causes de meurtre, la Cour d'appel du Québec a commenté défavorablement le travail d'un avocat.

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Les causes des divergences de style et de méthodologie entre les deux cours sont probablement nombreuses. Une véritable codification du droit pénal pourrait servir à réconcilier ces divergences.

Commenting upon the work of the Supreme Court of Canada on its centennial, Professor Weiler said:

> "I believe there is a direct relationship between a nation's philosophy of law and the character of its judicial decision-making. (By philosophy I do not mean a logically worked out system, but rather a cast of mind, a point of view about what our judges are and should be doing)."[1]

If the style of judicial decision-making in the Supreme Court of Canada may reflect on the Canadian legal community, and indeed, on the community at large, the provincial courts of appeal are likely to provide an even closer image of the cultural differences amongst canadians. Despite the unifying effect of common legislation and a common appellate court whose decisions are binding upon them, the Quebec and Ontario courts of appeal have produced, in the last ten years, a body of criminal jurisprudence so strikingly different that it calls for closer examination.

In 1978, Mr. Justice Jules Deschênes, C.J. S.C.Q.,[2] denounced legal separatism in Canada; his concern was primarily to show the apparent lack of interest in English Canada in the development of federal law in Quebec. Since he did not notice a reciprocal isolation within Quebec from the state of law in the rest of the country, he attributed this "one-way lack of communication between our two legal communities" to language difficulties. The situation condemned by Mr. Justice Deschênes was not limited to criminal law; indeed, criminal law appeared to be the least afflicted by this insidious form of separatism. This could be explained by the fact that criminal law is a pure product of the common law; there would be therefore less reasons for English Canada to doubt the applicability in their respective provinces of a Quebec judicial decision on the defence of intoxication, for instance, than there would be in other areas of federal law more intermingled with matters of private law such as family law or bankruptcy. Still, in the field of criminal law, there is little doubt that language difficulties have served to limit access by the rest of the country to cases and legal writing produced within Quebec. However, the problem may be as much one of biculturalism as of bilinguism, or the lack thereof. Could there be a genuine and fundamental difference of approach to

1. Paul C. WEILER, "Of Judges and Scholars: Reflections in a Centennial Year", (1975) 53 *Can. B. Rev.* 563 (at 563).

2. Jules DESCHÊNES, *On Legal Separatism in Canada, an Address Delivered at the Judges Night Dinner of the Toronto Lawyers Club*, Toronto. January 9th, 1978; since published in (1978) Law Society Gazette 1-10.

the study and the application of criminal law principles between jurists trained in two different legal traditions? The easy answer of course is to say that Quebec jurists are formed in both the civil law and the common law systems and when working in a field of federal law, they behave as common lawyers.

It seems more likely that the Quebec mixed legal culture would have had its effects on the local development of federal law in the same way that it has permitted the growth of a genuine Quebec civil law.

In an effort to trace the effects of legal biculturalism in criminal law, I have examined the development of the law of murder in the Quebec and Ontario courts of appeal in the last ten years. I have chosen to look at murder cases for numerous reasons. It is an area of criminal law which has a complex statutory base, intermingled with fundamental unwritten common law principles of *mens rea* and open to the application of both statutory and common law defences. In addition, homicide cases, aside from their legal significance, are important cases. They are therefore more likely to be well prepared by lawyers, seriously considered by judges, frequently appealed and less likely to go unnoticed.[3]

The law of murder is as well documented — by English textbooks,[4] foreign and national articles in periodicals — as any area of Canadian criminal law. I have not felt a need to go beyond the past decade since the composition of both courts has changed sufficiently during the last ten years to prevent confusing the qualities or talents of individual judges with traits that should be attributed to their legal formation or culture.

In 1971, the Quebec Court of Appeal was composed of 12 judges, only 6 of whom were still sitting in 1979 — one of them, Mr. Justice Casey, retired that year; in 1979, the Court was composed of 18 judges — including an "ad hoc" justice: Jacques J., and Mr. Justice Casey. By virtue of the *Courts of Justice Act 1964,* ch. 20, 5, 6 (am. 1979 ch. 17) the Court shall be composed of 16 judges and up to 16 supernumerary judges.

In 1971 the Ontario Court of Appeal was composed of 7 judges, only one of whom, Mr. Justice Arnup was still sitting in 1979. By then, the Court's membership had been increased to 13 — (*Judicature Act,* R.S.O. 1970, Ch. 228, s. 4(1) as am.).

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3. See below, on reporting of cases.

4. The only Canadian one, MEWETT and MANNING, *Canadian Criminal Law* was published in 1979. It was cited in *R.* v. *Sirard,* (1979) C.A. 94.

For the same reason, it appeared futile to examine Supreme Court of Canada decisions in homicide cases. Since there are only 3 "civil law" judges on the court and since there are infrequent changes in the composition of the court, a civil law influence could not seriously be claimed on such a basis. A much broader range of decisions over a much longer period of time would be necessary.

I have therefore examined 28 Quebec Court of Appeal decisions and 24 cases from the Ontario Court of Appeal going back to the beginning of 1971.[5] These cases are all, except two, "murder appeals" in the sense that the case involved a trial on a charge of murder, although the outcome of the trial — and therefore the issue on appeal — could have been the appropriateness of a verdict of manslaughter. The Quebec case of *St-Germain*[6] is worthy of examination since it deals with the vexing problem of causation, although it merely arises out of a charge of criminal negligence causing death rather than murder. In the same way, the Ontario case of *Campbell,*[7] although based on a charge of attempted murder, deals with the defence of provocation, and its effect upon the reduction of murder to manslaughter.

All the Ontario cases that I have examined are reported in either (or sometimes both) the Canadian Criminal Cases or the Criminal Reports.[8] 6 of the 28 Quebec cases are also contained in these specialized national reports; the rest, however, appear only in the C.A. (Rapports de Jurisprudence du Québec; Cour d'Appel); indeed 8 of the 28 appear only in summary form in the C.A. reports.

It appears that during that period of time, and although handling more or less the same number of cases, the two courts have dealt with very different legal issues. In Quebec, murder appeals tend to involve mostly matters of evidence and procedure.[9] Insofar

5. See cited cases *infra*.

6. *St-Germain,* (1976) C.A. 185.

7. *Campbell,* (1978) 1 C.R. (3d) 309.

8. I have not specifically searched the O.R. (Ontario Reports) for a murder appeal that would have escaped national attention. I trust that there are none. It is probably no coincidence that in 1971, Mr. Morris Manning was an associate editor of both the O.R. and the C.C.C.; from then on Mr. Edward Greenspan has been an associate editor of both sets of reports; indeed he is the editor-in-chief of the C.C.C. since 1976; these two prominent Ontario criminal lawyers have no doubt provided adequate national coverage to the Ontario Court of Appeal.

9. See *Sellars* v. *R.*, [1979] C.A. 94; *R.* v. *Séguin,* [1977] C.A. 420; *Parenteau* v. *R.*, [1975] C.A. 56; *Laurin-Potvin* v. *R.*, [1975] C.A. 353; *Descroiselles* v. *R.*, [1974] C.A. 8; *Potvin* v. *R.*, [1974] C.A. 338; *Potvin* v. *R.*, [1977] C.A. 414; *R.* v. *Gagnon,* [1971] C.A. 86; *R.* v.

as substantive law is concerned, there is a clear emphasis on the question of diminished responsibility and its relationship with the defence of insanity.[10]

Ontario cases, on the other hand, deal overwhelmingly with questions of substantive law, and more specifically with the doctrine of constructive murder embodied in the *Code*.[11] Some cases deal primarily with "affirmative defences."[12] Only two cases deal exclusively with questions of procedure or evidence.[13]

There is an equally distinctive divergence between the two courts in the style of reasoning and writing. Overall, the Quebec judgments are slightly shorter; out of 18 cases, 11 are of less than 5 pages long, and only 2 are more than 20 pages. Out of 23 Ontario cases, 8 are less than 5 pages and 5 are more than 20.

The methodology followed by the two courts carries traces of the traditional areas of divergence between the civil law and the common law traditions, and yet not consistently. These features peculiar to each tradition have been conveniently canvassed by the Law Reform Commission in the study paper on codification of the criminal law.[14] Historically, the civil law has always considered legislation as the primary source of law and "la doctrine" — treatise

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Vezeau, [1971] C.A. 682; *Quesnel* v. *R.*, [1974] C.A. 260; *R.* v. *Cormier*, [1975] C.A. 370. Dealing mostly with evidentiary problems. *Regina* v. *Lavoie*, [1976] C.A. 327; *Lavoie* v. *R.*, [1977] C.A. 157; *Rose* v. *R.*, 12 C.C.C. (2d) 273; 22 C.R.N.S. 46, [1973] C.A. 579; *Connearney* v. *R.*, [1975] C.A. 19; *Gagné* v. *R.*, [1977] C.A. 146; on questions of procedure.

10. See *R.* v. *Meloche*, (1977) 34 C.C.C. (2d) 184; *Lechasseur* v. *R.*, (1978) (7) 1 C.R. (3d) 190, 38 C.C.C. (2d) 319; *Theriault* v. *R.*, 5 C.R. (3d) 72.

11. See *R.* v. *Tennant and Naccarato*, (1976) 23 C.C.C. (2d) 81; *R.* v. *Quaranta*, (1976) 24 C.C.C. (2d) 109; *R.* v. *Baker*, (1976) 28 C.C.C. (3d) 490; *R.* v. *Desmoulin*, (1977) 30 C.C.C. (2d) 517; *R.* v. *Ritchie*, (1977) 31 C.C.C. (2d) 208; *R.* v. *DeWolfe*, (1977) 31 C.C.C. (2d) 23, on section 212 (c); *R.* v. *Govedarov, Popovic and Askov*, (1974) 16 C.C.C. (3d) 238, 25 C.R.N.S. 1, affirmed by S.C.C. 25 C.C.C. (2d) 161, 32 C.R.N.S. 54; *R.* v. *Riezebos*, (1976) 26 C.C.C. (2d) 2; *R.* v. *McLean*, (1977) 31 C.C.C. (2d) 140; *R.* v. *Swietlensky*, (1979) 5 C.R. (3d) 324; *R.* v. *Paquette*, (1975) 19 C.C.C. (2d) 154, 39 C.R.N.S. 257 (SCC) rev. by S.C.C. 30 C.C.C. (2d) 417, on section 213.

12. *R.* v. *Paquette*, (1975) 19 C.C.C. (2d) 154, 39 C.R.N.S. 257 (SCC) rev. by S.C.C. 30 C.C.C. (2d) 417, on duress; *R.* v. *Squire*, (1977) 31 C.R.N.S. 314, on provocation; *R.* v. *Sweitlensky*, (1979) 5 C.R. (3d) 324; *R.* v. *Reynolds*, (1979) 44 C.C.C. (2d) 131, on drunkenness; *R.* v. *Ward*, (1978) 4 C.R. (3d) 190, on self-defence.

13. *Desmarais and the Queen*, (1979) 42 C.C.C. (2d) 287, where a committal for trial on a charge of first degree murder was quashed on the ground that there was no evidence of planning and deliberations; *R.* v. *Torbiak and Gilles*, (1978) 40 C.C.C. (2d) 194, on joint trials.

14. L.R.C., *Criminal Law — Towards a Codification*, Study Paper Ottawa, 1976.

— as a primary source of interpretation. Case law has never meant judge made law. In the common law tradition, legislation and case law seem to have been in constant competition for the lead in the hierarchy of legal sources. Scholarly writing has been content to assist the development of both. In recent history, and certainly in Canada since the revision of the Code in 1954, the primacy of legislation is unquestionable. But when called upon to interpret the Code's provisions the Quebec Court of Appeal will turn to "la doctrine" — or its closest equivalent: annotated codes and textbooks — while its Ontario counterpart will immediately engage in a survey of the case law. The Quebec court seems definitely more avid for doctrinal material — in the civil sense — than the Ontario one. The first Canadian textbook in criminal law, by Mewett and Manning[15], has already been quoted by the Quebec Court of Appeal in a manner that did not question its autority.[16] Indeed, the passage is not cited "with approval". The quote is offered as a clear expression of the law, exactly in the fashion in which a common lawyer would refer to the ratio of a case. The work of Lagarde, *Droit Pénal Canadien*,[17] is used frequently, not merely for a rapid survey of the case law[18] but for the authority of the proposition of law — both in substantive law and in evidence — expressed by its author.[19] In contrast, when the Ontario Court of Appeal referred to Glanville Williams and Cross in *R.* v. *Campbell*[20] it was merely to make clear that even the endorsement by these eminent authors of the English case of *Miller* v. *Minister of Pensions*[21] did not alter the fact that the case ought not to be followed.

In the same way, the Quebec court often appears to use the case law not so much in search of the correct opinion but in support of an opinion already arrived at by the interpretation of the Code with the assistance of unofficial commentaries. Cases are treated in a much more cavalier fashion. The court will be found to rely and refer to Lagarde for a review of case law on a given point[22] or to refer to a

15. MEWETT and MANNING, *Canadian Criminal Law*, Butterworths, 1979.

16. *R.* v. *Sirard*, [1979] C.A. 94.

17. LAGARDE, *Droit pénal canadien*, Wilson & Lafleur, Montréal, 1974 (2nd ed.).

18. As in *R.* v. *Quintal*, [1975] C.A. 45.

19. See *R.* v. *Séguin*, [1977] C.A. 420; *Laurin-Potvin* v. *R.*, [1974] C.A. 338; *R.* v. *Meloche*, (1977) 34 C.C.C. (3d) 184.

20. *R.* v. *Campbell*, (1978) 1 C.R. (3d) 309.

21. *Miller* v. *Minister of Pensions*, (1947) 2 All E.R. 373, as cited in *Campbell*, (1978) 1 C.R. (3d) 309.

22. *R.* v. *Quintal*, [1975] C.A. 45.

Supreme Court of Canada decision as summarized in the headnote.[23] In *Lechasseur* v. *R.*[24] the court declined to pursue at any length the analysis of the Supreme Court decision in *More* v. *R.*, although it was clearly distinguishable on its face, being obviously satisfied that it ought to be followed.

In *Lechasseur,* the appellant sought a new trial on the ground that the possibility of a verdict of manslaughter had not been left to the jury. The appellant had presented a defence of insanity and he argued on appeal, contrary to the position taken by his counsel at trial, that "while the evidence may have fallen short of what is required for the defence of insanity it may have been sufficiently strong to create a reasonable doubt as to his capacity to formulate the specific intent of Code section 212."[25] Having thus stated the ground of appeal, Mr. Justice Casey goes on to quote from the judgment of Cartwright, J. in *More* v. *R.*,[26] a passage that clearly indicates that the issue dealt with by the Supreme Court was significantly different. In *More,* the evidence falling short of establishing a defence of insanity was being used not to attack the formation of a specific intent in murder, but to challenge the element of planning and deliberation which raises the crime to first degree murder. Mr. Justice Casey did not pursue the analysis. He simply stated that the case "supported" his conclusion. No reference was made to the 1977 decision of the court in *Regina* v. *Meloche*[27] where the same issue was decided in the same cursory fashion.

Opinions delivered by Mr. Justice Kaufman, for instance his dissents in *Sellars*[28] and in *Theriault*[29], often resemble Ontario judgments in the length of analysis and the reference to English and American authorities. Two English cases were referred to in *Potvin,*[30] and the classic English authorities on drunkenness were mentioned in *R.* v. *Quintal.*[31] In Ontario, English authorities appear

23. *R.* v. *Meloche,* (1977) 34 C.C.C. (3d) 184.

24. See *Lechasseur* v. *R.*, (1978) 1 C.A. (3d) 190, 38 C.C.C. (2d) 319, referring to *More* v. *R.*, (1963) S.C.R. 522; for a detailed analysis of Supreme Court decisions, however, see *R.* v. *Séguin,* [1977] C.A. 420.

25. *Lechasseur* v. *R.*, (1978) 1 C.A. (3d) 190, 191.

26. *More* v. *R.*, (1963) S.C.R. 522.

27. *Regina* v. *Meloche,* (1977) 34 C.C.C. (3d) 184.

28. *Sellars* v. *R.*, [1978] C.A. 469.

29. *Theriault* v. *R.*, (1979) 5 C.R. (3d) 72.

30. *Potvin* v. *R.*, [1974] C.A. 338.

31. *R.* v. *Quintal,* [1975] C.A. 45.

to be more frequently consulted, both for the understanding of the Code provisions, as in *R.* v. *Govedarov et al,*[32] and for the development of uncodified defences as in *Swietlensky, Campbell, Squire* and *Paquette.*[33]

The traditional areas of divergence between civil law and common law methodology become blurred when it comes to the interpretation of the Code. "Common law courts," said the Law Reform Commission, "had a tendency to consider statutes emanating from Parliament a restriction on their creative power and accordingly favoured literal and restrictive interpretation as an additional method, along with notions of fairness expressed in the so-called "principle of legality", of assuring adequate protection of the accused's rights."[34] The Ontario Court of Appeal has made much greater use of the Code than the Quebec Court and has indeed very closely examined the provisions based on the doctrine of constructive murder. In interpreting s. 213, the Court has demonstrated a clear unwillingness to accomodate the spirit of the text when it would have led to an expansion of the constructive responsibility of the accused. For instance in *R.* v. *Govedarov et al*[35] the court refused to corrolate the expression "burglary" use in section 213 with all forms of breaking and entering elsewhere prohibited by the Code. In *Swietlensky,*[36] Mr. Justice Martin has once again found reliance on common law principles to prevent the implacable effect of s. 213(d). However, in interpreting, and indeed in reviving section 212(c), the court appears to have achieved exactly the opposite: the reasoning could not have stayed closer to the spirit of the provision and the obvious "literal" arguments advanced to restrict its application have been rejected. For instance, in *Tennant and Naccarato*[37] the court ruled that an assault may be the unlawful object pursued by the accused provided that another act has caused death. Section 212(c) reads as follows:

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32. *R.* v. *Govedarov et al.,* (1974) 16 C.C.C. (2d) 238, 25 C.R.N.S. 1, affirmed by S.C.C. 25 C.C.C. (2d) 161, 32 C.R.N.S. 54.

33. *R.* v. *Sweitlensky,* (1979) 5 C.R. (3d) 324; *R.* v. *Campbell,* (1978) 1 C.R. (3d) 309; *R.* v. *Squire,* (1977) 31 C.R.N.S. 314; *R.* v. *Paquette,* (1975) 19 C.C.C. (3d) 154, 39 C.R.N.S. 257 (SCC) rev. by S.C.C. 30 C.C.C. (3d) 417.

34. L.R.C., *Criminal Law — Towards a Codification,* Study Paper, Ottawa, 1976, p. 10.

35. *R.* v. *Govedarow et al.,* (1974) 16 C.C.C. (2d) 238, 25 C.R.N.S. 1, affirmed by S.C.C. 25 C.C.C. (2d) 161, 32 C.R.N.S. 54.

36. *R.* v. *Swietlensky,* (1979) 5 C.R. (3d) 324.

37. *R.* v. *Tennant and Naccarato,* (1976) 23 C.C.C. (2d) 81.

> "Culpable homicide is murder...where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being."

The court disagreed with both Australian and New Zealand authorities which had ruled that the latter part of the section indicated that an assault could not be the unlawful object pursued by the accused. The Ontario court preferred an interpretation reinforced by the French version of the Code and concluded that these words merely indicate that the section is applicable "in spite of the fact" that the offender did not want to hurt anyone. Having explored the consequences of the contrary interpretation, the court went on to state: "We cannot think that Parliament would have intended such a result."[38] This style of reasoning would be very familiar to a civil law magistrate who will spare no effort to ascertain and enforce the legislative will.

In the Quebec cases, on the other hand, the Code provisions are rarely referred to in any detail; occasional references are made to "the Crown's theory", particularizing the applicability of a Code definition of murder.[39] In *Gagné* v. *R.*, [40] a case which provides an original and important precedent on a question of procedure[41] the treatment of the question of substantive law is disconcerting. The facts are briefly stated that the accused deliberately set fire to a building in which two men were killed. The court then goes on to state that all the elements of the *actus reus* of murder as defined in s. 212(c) have been established. No mention is made of what unlawful object, different from the act which caused death, the accused was pursuing. Mr. Justice Bernier then continues to state that a defence of intoxication was offered to deny the specific intent required under that subsection. No further mention is made of the effect of drunkenness on the *mens rea* of murder under s. 212(c).

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38. *Infra*, p. 212.

39. See for example, *Regina* v. *Lavoie, Gérard, Linteau & Laferrière*, (1976) 32 C.C.C. (2d) 244, particularizing s. 213 (b).

40. *Gagné* v. *R.*, [1977] C.A. 146.

41. In that case, the court ruled that if the accused wanted to avail himself of the provisions of s. 534(b) [now 534(4)] and plead guilty to manslaughter in the course of a trial by jury on a charge of murder, his plea had to be accepted by the jury which — in combination with the judge — constituted the court having sole jurisdiction to receive the plea.

The mechanics by which all forms of constructive murder may be reduced to manslaughter by the effect of a defence of intoxication is a front-line question in Canadian criminal jurisprudence. In the case of *Gagné*, that issue is completely overshadowed by a disposition of the appeal on a question of procedure. This, in itself, is not without significance. Beyond questions of methodology and style of reasoning which may be inherited from different legal traditions, the receptivity of the courts of appeal to a given type of argument is illustrative of the view that the court takes of its function as an appellate tribunal.

The Ontario example is striking. In 1976, in a judgment per curiam, the Ontario Court of Appeal in *Tennant and Naccarato*[42] single-handedly revived section 212(c). It is worth noting that it was an appeal by the accused against a conviction for murder in which the Court of Appeal ordered a new trial. The applicability of section 212(c) had not been raised by the Crown in the original trial, neither had it been put to the jury. The case was immediately followed in *Quaranta*.[43] From then on, crown attorneys and trial judges obviously followed the lead provided by the Court of Appeal, thereby generating more litigation in that Province on the scope of that section and its relationship with the law of complicity and defences. All this activity in the Ontario courts has had its shortcomings. The 1976 initiative has led to four further murder appeals in which new trials had to be ordered because of a misdirection by the trial judge on the applicability of that subsection.[44] It became clear, in the fourth case that the blame did not rest on overzealous crown attorneys or on ill-informed trial judges. In *R.* v. *DeWolfe*, the court recognized the increase in the use of s. 212(c) at trial and explained that the earlier cases were "the high water marks of the construction and application of this sub-section and should not be construed as points of departure."[45]

That particular performance of the Ontario Court of Appeal may be used to illustrate a trait that Professor Goutal[46] attributes to English courts. In comparing judicial styles in France, Britain and

42. *R.* v. *Tennant and Naccarato*, (1976) 23 C.C.C. (2d) 81.

43. *R.* v. *Quaranta*, (1976) 24 C.C.C. (2d) 109.

44. *R.* v. *Baker*, (1976) 28 C.C.C. (2d) 490; *R.* v. *Desmoulin*, (1977) 30 C.C.C. (2d) 517; *R.* v. *Ritchie*, (1977) 31 C.C.C. (2d) 208; *R.* v. *DeWolfe*, (1977) 31 C.C.C. (2d) 23.

45. *R.* v. *DeWolfe*, (1977) 31 C.C.C. (2d) 23.

46. J.L. GOUTAL, "Characteristics of Judicial Style in France, Britain, and the U.S.A.", (1976) 24 *Am. J. Comp. Law* 43.

the U.S., Goutal observes that the legitimacy of the courts has never been challenged in England. Indeed, he claims, since judges are expected to make law, in a society which praises reasonableness, they cannot drop a rule like an oracle. They lecture. This, in my view, may describe quite adequately what is happening in the Ontario Court of Appeal.

It is difficult to ascertain whether the impulse for the emergence of a judicial forum for the development of legal doctrine comes from the court itself or from the Bar. It is certain that it could not happen without the interaction of both and with a broader source of scholarship which is generated by and finds its echo in the work of the Court.

Once again, a closer look at the advocacy in the Quebec and Ontario courts is revealing. The 23 Ontario cases that I have selected were argued by 27 defence counsel. One of them argued three cases. The Crown on the other hand, was represented by only 11 different lawyers. One of them, David Watt, argued 9 cases, three of which, including *Tennant and Naccarato,* involved the application of section 212(c).

In the 27 Quebec cases, 24 lawyers appeared for the Crown; four of them argued 2 cases, and everybody else appeared just once. On the defence side, the situation is closer to its Ontario counterpart; 21 lawyers appeared; one of them argued 3 cases and 2 others appeared in 2 appeals.[46a]

The specialization in the Crown's office in Ontario must have contributed to the development of a strong criminal jurisprudence. Much more significant, however, is the fact that the 38 or so Ontario lawyers who have argued a murder appeal in the last ten years have produced a total of five books and 53 articles related to criminal law,[47] during that period of time. The books have been written by four different authors and include the only Canadian textbook in criminal law, co-authored by a practioner, Morris Manning. The articles have been written by eleven different authors, including Edward Greenspan, who is also the editor of Martin's Criminal Code and the editor-in-chief of the Canadian Criminal Cases. One of

46a. The case of *Rose* v. *R.* ([1973] C.A. 579; 12 C.C.C. (2d) 273, 22 C.R.N.S. 46), an extremely well researched and reasoned case on jury challenge is reported in the C.C.C. and the C.R.N.S. with a mention that Robert Lemieux appeared for the accused. In the C.A. the mention is to the effect that the accused was unrepresented on appeal.

47. I have consulted R. BOULT, *A Bibliography of Canadian Law,* C.L.I. new ed. 1977 and the Index to Canadian Legal Periodical under name of authors.

them, Professor Desmond Morton, is a faculty member of the University of Toronto Law School and some are engaged in part-time teaching of criminal law or procedure. The quality of advocacy in Ontario may have a bearing on the ability of the Court of Appeal to deliver oral judgments. Nine out of 23 Ontario judgments were delivered orally. One of them is nine pages long.

Of the 45 Quebec lawyers who appeared in the 27 cases that I have examined, only one of them, who is now a judge, had written two articles related to criminal law during the relevant period of time. One other, also now a judge, was the Quebec editor of the Criminal Reports. In two instances, the Quebec Court of Appeal expressed its dissatisfaction with the work of the prosecution. In *R.* v. *Meloche*,[48] the Court chastized the Crown for a last minute replacement of counsel coupled with a memorandum that the Court found of no assistance. In *Lavoie* v. *R.*,[49] the Crown was not allowed to argue since it could not advance sufficient reason for not having yet produced a factum. In addition, the Crown could not state its position on a suggestion by the defence, on appeal from a conviction for murder, that a conviction for manslaughter be substituted. The Court ordered a new trial.

Against the Ontario model, the Quebec Court of Appeal, in its interactions with the criminal bar, does not appear to provide a forum for scholarly dissertations on the state of criminal law.

This also seems to be reflected in the image that the Court projects of its function as a court of appeal. The Quebec Court of Appeal appears to view itself mostly as an instrument for the proper administration of criminal justice. The demands made by the litigants on the Court often seem restricted to getting an opportunity for a new trial. For instance, while the Court is showing a distinct interest in the question of the reduction of murder to manslaughter through evidence of mental disorder falling short of providing a defence of insanity, it has contributed little to the clarification of the law on that issue. Twice in *Meloche*[50] and *Lechasseur*,[51] the Court was content to order a new trial without ever providing the foundations for the case to become authority by its compelling legal reasoning. The cases are very fact oriented; grounds of appeal are often phrased in very general language, such

48. *R.* v. *Meloche*, (1977) 34 C.C.C. (2d) 184.

49. *Lavoie* v. *R.*, [1977] C.A. 157.

50. *R.* v. *Meloche*, (1977) 34 C.C.C. (2d) 184.

51. *Lechasseur* v. *R.*, (1978) 1 C.A. (3d) 190, 38 C.C.C. (2d) 319.

as whether or not a verdict of manslaughter should have been left to the jury; the legal proposition is then no further particularized and rests on a claim that anything that is not murder, whatever the reason, as long as it relates to *mens rea,* is manslaughter. The criminal bar and the Court appear to trust that a just result is more likely to be achieved if an accused is tried by 24 of his peers than if a legal proposition is set up for testing by the Supreme Court of Canada.

It could be said that the Court is much more oriented towards dispute resolution and procedural safeguards than engaged in a serious exposition of abstractions and general principles and, in that sense at least, not behaving in a "civilian" fashion. Yet on the other hand the same attitude could be characterized as an example of judicial restraint, a so-called typical civil law feature, where the more creative work is left to Parliament or to the court of last resort whose decisions are diffidently followed.[52]

In contrast, the use of the Ontario Court of Appeal as a powerful forum for the development of criminal law doctrine seems reinforced by the view that the court itself takes of its role as an intermediate court of appeal. In *R.* v. *Paquette*[53] the court had to examine the availability of the defence of duress to a person charged with murder as an accomplice under s. 21(2) of the Code. The Court admitted being bound by the Supreme Court case of *Dunbar*[54] to rule against the accused, but took great care in expressing its disagreement with that case and in laying the reasoning in support of the opposite conclusion. The Supreme Court adopted the conclusion preferred in the Court of Appeal and overruled *Dunbar.*[55] In *Riezebos*[56] and in *McLean*[57] the Court had to deal with the degree of foreseeability necessary to engage the responsibility of the accomplice to a constructive murder, under the combined provisions of s. 21(2) and 213 (a) and (d) of the Code. Dealing with s. 213 (d), the court followed the very letter of the Supreme Court decision in *Caouette*[58] stating that it was safe to say, "until the Supreme Court rules again", that

52. See, for instance, *Lechasseur* v. *R., ibid.* and *Sellars* v. *R.*, [1978] C.A. 469.

53. *R.* v. *Paquette*, (1975) 19 C.C.C. (2d) 154, 39 C.R.N.S. 257 (SCC) rev. by S.C.C. 30 C.C.C. (2d) 417.

54. *Dunbar* v. *The King*, (1936) 67 C.C.C. 20 (S.C.C.).

55. *Paquette* v. *The Queen*, (1977) 39 C.R.N.S. 257.

56. *R.* v. *Riezebos*, (1976) 26 C.C.C. (2d) 2.

57. *R.* v. *McLean*, (1977) 31 C.C.C. (2d) 140.

58. *R.* v. *Caouette*, (1972) 9 C.C.C. (2d) 449, 32 D.L.R. (3d) 185, [1973] S.C.R. 859.

foreseeability of the use, and not merely of the possession of a weapon by the perpetrator is necessary to engage the liability of his accomplice. It is with great subtlety that the Court of Appeal makes it clear that it prefers to follow what may appear as a flaw in the implacable logic which can only lead to an expansion of the constructive murder rule. Finally, in *R.* v. *Swietlensky,*[59] which was scheduled for hearing this spring before the Supreme Court of Canada, Mr. Justice Martin has presented the Supreme Court with a coherent and skillful reconciliation of the contradictory propositions that drunkenness is a defence to murder but not a defence to a crime of general intent, where the Crown's theory is that the accused has used a weapon while committing an indecent assault thereby committing murder with no further specific intent required. The small price to pay for the Supreme Court in simply confirming that learned exposition of the law is that it would require the Court to admit what it has managed so far to leave unstated,[60] which is that some rules are rooted in policy, not just in logic.

These cases illustrate the self-image that the Ontario Court of Appeal seems to have of its role in the development of criminal law theory. In its interactions with the Supreme Court, it appears to be looking merely for specific binding rulings which will then be incorporated in its scholarly analysis and exposition of the law. In turn, it imposes on trial judges very demanding standards in the giving of instructions to juries; if infringed upon, these standards then provide opportunity for further refinements in the ongoing dialogue between the Court and the Criminal Appeal Bar, an exercice in which all involved, except possibly the trial judge, seem to rejoice.

The mere existence of a Canada-wide legal system, such as it exists in criminal law, can obviously not provide, and arguably was not designed to provide, a uniform delivery of justice. The comparison between murder appeals in two provinces can barely be used as a basis for general comments on styles of judicial reasoning and appellate advocacy at large. However, it allows for some conclusions.

The divergences between the two courts can be easily be accounted for by several factors. The provincial competence over the administration of justice obviously allows for a reflection in the workload of the provincial courts of appeal of current public

59. *R.* v. *Swietlensky,* (1979) 5 C.R. (3d) 324.

60. For instance, in *R.* v. *Leary,* (1977) 37 C.R.N.S. 60.

concerns. The demands for criminal justice need not be a priority across the country. Indeed, within the criminal justice system, concerns for substantive law may be outranked by problems of procedure and evidence for reasons peculiar to that province only, such as the quality of police work in the investigative process, the allocation of resources by the provincial Ministry of Justice for the prosecution of crimes and the actual functioning of trial courts.

Other factors of divergence are more speculative, such as the state of legal education and the delivery of legal services, although they are all reflected in the work of the courts. An attempt was made by a political scientist to relate judicial attitudes with the form of legal education received by the judges. He failed to observe any statistically significant differences between judges formed with the case method and judges educated in institutions which profess a departure from that method.[61] In the same way, Quebec and Ontario have a sufficiently different legal aid system that it has likely had some bearing on the handling of murder cases.

At the same time, other factors have failed to have the unifying or standardizing effect that could have been expected of them for the reinforcement of standards of criminal justice. The Supreme Court of Canada has very unevenly provided the intellectual leadership that could have made it the prime forum for the development of criminal theory.

Interactions between provincial courts, the provincial bars and scholars, which was described as deficient almost 15 years ago in a brief presented by the Canadian Association of Comparative Law to the Royal Commission on Bilingualism and Biculturalism[62] still need improving.

Finally, the call for reform of the Canadian criminal law, through proper codification, should not be left unanswered as a purely academic concern. The peculiar state of our substantive criminal law which is largely statutory and yet not all contained in the Code, while resting on a few unwritten common law principles, is not conducive to coherence in the best of either the civil law or the common law traditions. A genuine Canadian legislative instrument may reconcile the two traditions, if only in bringing together all Canadian jurists to its conception.

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61. A.P. MAHONE, "Legal Education and Judicial Decisions: Some Negative Findings", (1974) 26 *J. Legal Ed.* 566.

62. (1966) 1 *Can. Leg. Studies* 166.