**Podcast 7 – A Court for All Seasons**

**Professor Forcese**

Welcome back to the virtual orientation Podcast for the University of Ottawa JD program. In this podcast I discuss with Professor Vanessa MacDonnell a very complicated and perplexing question about the structure of the Canadian court system. We’ve already heard a little bit about courts and their role in the Canadian legal fabric. But who are these courts, what are their names, how are they structured, what do they do, where do they lie in relation to one another? These are all questions that we address in the following conversation. I began by asking professor MacDonnell to describe her professional background and teaching.

**Professor MacDonnell**

I’m Vanessa MacDonnell. I am a law professor at the University of Ottawa. I teach evidence and criminal law. I joined the faculty in 2012. Before that I was at the University of New Brunswick for two years teaching similar subjects. Before that I practiced a little bit and clerked for Justice Charron at the Supreme Court of Canada.

**Professor Forcese**

Wonderful. We’re going to talk about one of the perplexing questions students have when they enter law school. Who are these courts and how are they structured and how are they related to one another?

**Professor MacDonnell**

There are different aspects to the Canadian court system. Probably the most useful place to start is with the court systems that exist in every province. Every province has a system of courts, starting out with the provincial courts and then the provincial superior courts and the provincial appellate courts. Those are all what we might think of together as courts that exist within the province. We also have a system of courts created by the federal government. The federal courts, the tax court of Canada and they have specific jurisdiction. There’s also the military court system and then finally, we have a system of administrative tribunals both provincially and federally. Administrative tribunals are creatures of the Executive. Created by the Executive but they function like courts in many contexts. You might think for example about human rights tribunals in the provinces. They perform functions that are akin to the functions that courts perform.

**Professor** **Forcese**

If administrative tribunals are created by the Executive, then who creates the courts? Where do the courts spring from?

**Professor MacDonnell**

The constitution has something to say about the creation of courts in Canada. You will have heard from Professor Dodek about the constitution generally. *The Constitution Act, 1867* divides authority for the court system between the federal government and the provinces. The federal government has authority to appoint judges to the provincial superior court and they have to pay them as well. The province has jurisdiction over the administration of justice within the province. When we think about the courts that exist within the province, some of those courts are provincially appointed. Some are appointed by the federal government.

We have that aspect of the court system that is regulated by the constitution. We also have a section 101 of the *Constitution Act, 1867,* which vests authority for the creation of a general court of appeal for Canada in the federal government. That’s where the feds got the jurisdiction to create the Supreme Court of Canada. As well, through that same section, the federal government has authority to create other courts for the administration of justice within Canada. Using that jurisdiction, they created the federal courts.

**Professor Forcese**

Let’s focus on the provincial side of the ledger. It sounds like there are two sorts of courts on the provincial level. The ones that have judges that are appointed and paid by the federal government. And ones that are appointed, presumably paid by the provincial government. Who decides what architecture these courts will have? Will they have the same design in every province? Do they mimic each other across the country?

**Professor MacDonnell**

In the provinces, there are two kinds of courts. Courts where judges are appointed and paid by the federal government and then, courts where the judges are appointed and paid by the provincial government. Let’s start with what we call the provincial court. The terminology here is a bit confusing because we can talk about the courts that exist within the province and there we need both the provincial courts and the superior courts. The term provincial courts is being used twice there. We’ll start with what we call the provincial courts. These are the lowest level of courts in the province. They have jurisdiction that’s determined by statute. They hear mostly criminal cases, some family law cases, provincial offence cases. These are busy, high volume courts and I encourage you once you get to Ottawa and get settled in to go over to the courthouse on Elgin Street. Go to the bottom court where the provincial courts are located. Sit in the court room and you’ll see these are very active courts. Things move very quickly in those courts. They deal with the bulk of criminal law matters, particularly.

Next we have the provincial superior courts. These are located in the structure of the court system above the provincial courts. In Ontario, lawyers in these courts are robed. They don’t wear wigs. But they are robed. These courts are called different things across the provinces. In British Columbia for example, the provincial superior court is called the BC Supreme Court. In Ontario we call it the Ontario Superior Court. In New Brunswick in the New Brunswick Court of Queen’s Bench. They’re called different things, but they all perform a similar function.

They have what’s called inherent jurisdiction. What that means is that they have full authority to decide any case. Some of their jurisdiction can be carved out and given to another court, but in general they have unlimited jurisdiction.

Those are what we would call courts of first instance. They are where trials are conducted, matters are heard for the first time. From there we have appeals.

**Professor Forcese**

Let’s come back to who is appointing whom. Are the provincial courts where the provincial governments are doing the appointing and paying?

**Professor MacDonnell**

Yes.

**Professor Forcese**

So the superior courts are where the province may create them, but it’s the feds who are appointing the judge and paying the judges

**Professor MacDonnell**

Exactly.

**Professor Forcese**

Is there another name for the superior courts that students may encounter?

**Professor MacDonnell**

You may see the provincial superior courts referred to as section 96 courts. They’re called this because section 96 of the *Constitution Act, 1867* is the provision that provides the federal government power to appoint judges to those courts and pay them.

**Professor Forcese**

Turning now to appeals.

**Professor MacDonnell**

Again, we’re still thinking about the courts that exist in the province. If you want to think about the provincial courts, the lowest level courts…Their decisions can be appealed to the Superior court in some circumstances and to the court of appeal and others. Without getting into any detail there, the relevant rules are found in the Criminal Code in terms of if you’re dealing with a provincial court decision, what court that decision can be appealed to.

Decisions of the provincial superior court are appealed to the provincial court of appeal. These judges are also appointed and paid by the federal government. What’s different about the court of appeal, other than their function, is that they sit as a panel of three. What you have is a number of judges who are sitting together and who will deliberate at the end of a case. Sometimes they agree, sometimes they don’t. You may get a unanimous opinion, but you may also have concurring opinions or dissenting opinions. I know you’re going to learn about how to read a case, you’ll have an opportunity to think about all of these kinds of decisions.

Those are the provincial courts of appeal. Court of appeal decisions can be appealed to the Supreme Court of Canada. The rules of the Supreme Court of Canada are a little bit different in terms of how appeals proceed. Judges of the Supreme Court of Canada sit as a panel of 9 justices. In order to appeal a decision to the Supreme Court of Canada, it’s not just a matter of filing documents. For the most part, to get your case to the Supreme Court of Canada, you need to be granted leave. You need permission. There is an automatic right of appeal in a limited number of cases. In cases where there’s been a dissent in the court of appeal about a question of law. For the most part, you need permission.

In the last few years, the court has heard between 70 and 80 cases a year. About 25 percent of those cases are appeals as of right and the rest of those cases are where the court has granted leave or permission for the appeal to be heard. Another interesting feature of cases that we sometimes see at the Supreme Court of Canada is that the statute that creates the Supreme Court, the *Supreme Court Act*, says that the federal government might refer certain legal questions to the court and ask for the court’s opinion. These are sometimes called references or advisory opinions. They usually deal with constitutional questions. Those are an interesting part of the Supreme Court’s docket that we see from time to time.

**Professor Forcese**

Do you want to say a few words about the mechanics of how proceedings work in the superior courts and the idea of trials?

**Professor MacDonnell**

Generally, when a case is heard, when a case is going to trial, the evidence in that case is brought forward through the testimony of live witnesses. That’s what we call *viva voce* evidence. Most trials involve evidence that’s tendered through the testimony of witnesses. Typically, what happens is a party will call witnesses and they’ll examine that witness. The opposing party will then cross examine the witness. Once all the evidence is in… Of course there can be documentary evidence. The lawyers make legal submissions. They present the court with legal arguments about how they believe the case should be resolved, what the relevant legal principles are. If you’re dealing with a jury trial, what happens next is that the trial judge who controls the proceedings and instructs the jury as to the relevant law. Because juries are what we call triers of fact. They get to decide what the relevant facts of the case are and they apply the law to the facts. But they don’t have any choice about what the relevant law is. The trial judge instructs the jury about what the relevant law is and then the jury goes off and deliberates.

When you’re talking about a trial by judge alone, what happens depends on the kind of court and matter they’re dealing with. In the criminal context, sometimes you get the judgement on the spot. If you’re in one of these busy courts and the matter is straightforward. Sometimes the judge will recess for 15 minutes and come back with a decision. When you’re dealing with a more complex trial though, usually what happens is that the judge will “reserve” and then issue reasons for a decision later.

**Professor Forcese**

Where are jury trials more likely? You mentioned criminal cases. Do they also arise in civil causes of action?

**Professor MacDonnell**

Jury trials are a feature of both criminal and civil matters. Although really jury trials are most prominent in criminal trials. We still see the jury plays a very important role in criminal cases; it’s less common in civil matters, but in general it’s just less common for civil matters to go to court. We really see the jury used still with some frequency in criminal cases.

**Professor Forcese**

What about on appeal, how’s the process different?

**Professor MacDonnell**

The process is different. In the context of an appeal the court of appeal doesn’t start all over again when they hear an appeal. They essentially proceed on the basis of the record that was created at trial. When we talk about the record, what we mean is all of the evidence that was heard at trial. Usually, what appeal courts are doing is examining the decision maker, the judge at first instance, to determine whether that judge correctly applied the law in the particular circumstance of the case. Did the judge describe the law correctly and the apply that law correctly? In that process, the court of appeal is performing a review function, which is limited. They’re focussed, usually, on the legal issues that were raised by the case and if the judge dealt with those legal issues properly.

**Professor Forcese**

It sounds like it’s very difficult to appeal fact.

**Professor MacDonnell**

There’s basically a different standard for appealing questions of fact and questions of law. In fact, it’s very difficult to overturn factual determinations that were made at trial. Appeal courts, in general don’t have a lot of time for arguments that rest on trying to convince the court to take a different view of the facts. At the same time, it’s not impossible. If there was a grave factual error made by the trial judge, that could be the subject of a successful appeal. For the most part we’re confined to looking at legal questions because the view in our legal systems is that you have to get the law correctly. That’s the reason why appellate courts are focused on how the trial judge applied the law.

**Professor Forcese**

One final question before we end. You teach in the area of evidence where of course matters of trials come up all the time. That’s an upper year course. Maybe for the purpose of our listeners you could describe what we mean by the rules of evidence.

**Professor MacDonnell**

When we talk about the rules of evidence, we’re talking about a few things. Primarily the rules that govern the admissibility of evidence. The rules that determine whether evidence is heard by the trier of fact, by the judge or jury or not. The overarching principle is that any evidence that’s relevant and material should be admitted in evidence, but the second rule is that certain types of evidence are presumptively inadmissible. Because their admission might cause the trial judge or jury to draw the wrong conclusions about certain aspects of the case. These are rules that govern whether that evidence gets into the record. Whether judges or trier of fact can ultimately hear and rely upon evidence. Most of the law of evidence is concerned about questions of admissibility.

It’s also concerned with what you do with this evidence once it’s admitted. There are a bunch of peripheral issues that we deal with. Issues around the calling of witnesses for example. Are there certain kinds of witnesses that we need to be particularly careful with? Are there certain types who shouldn’t be allowed to testify? Should a spouse be allowed to testify against his spouse in a particular matter? Issues around witnesses also come up. Since 1982, when we got the Charter, the Charter has had a real influence on the development of the rules of evidence and our understanding of whether evidence that’s been obtained in violation of the Charter should be excluded. Whether it should be heard by the trier of fact or not. The constitution also figures prominently in that discussion.

**Professor Forcese**

Thank you very much .

**Professor MacDonnell**

Ok, thanks.