INTERVIEW TO FRANK IACOBUCCI, FORMER JUSTICE OF THE SUPREME COURT OF CANADA*

Florencia Ratti: —*In your opinion, which are the strengths and weaknesses of the doctrine of precedent in Canada?*

Former Justice Iacobucci: —We have inherited the English legal system (except for Quebec, it has a civilian system). That system —the English one— comes with the doctrine of precedent and *stare decisis*.[1] Originally it was for the cases, the *common law*.[2] But it spread to everything: when you interpretate a statute you are not interpreting the *common law*, but there is still precedent that applies to that interpretation.

To me, the doctrine of precedent has advantages. One wishes to seek justice through the law; in our system you don't go to justice without any kind of discipline of applying the law. And in applying the law you look to previous decisions, which is important to have a coherence to the jurisprudence.

Now, that coherence should not be inflexible, because law is organic. As Roscoe Pound said once, "The law must be stable, and yet it cannot stand still".[3] So, it is stability to law that precedent helps, but there has to be a flexibility for the development and growth of the law. If you just say: "That decision should never be changed", then it would be rigidity, and it would take away from the evolution of law.

*This interview was carried out by Florencia Ratti in March 2020 and took place during a research fellowship on precedent in Canada that the interviewer developed at Osgoode Hall Law School, funded by the Justice Studies Center of the Americas (JSCA) in March 2020.

1. Note from the Interviewer (NI): *Stare decisis et quieta non movere* is a Latin aphorism, which means things should stand still. As far as precedent is concerned, it demands judges to respect what has already been resolved, to follow previous judicial decisions whenever the same issues are litigated. *Cfr.* Garner, Bryan A., et al, *Black's Law Dictionary*.

2. NI: Note that here the expression "common law" does not refer to the legal tradition or family of systems —as opposed to the *civil law* tradition—, but to the "case law" or "unwritten law", as opposed to the "statute law". On this distinction, see Blackstone, *Commentaries on the Laws of England*, p. 63; Cueto Rúa, Julio C., *The common law. Its normative structure, its teaching*, pp. 20-23.

3. *Cfr.* Pound, R. *Interpretations of Legal History*.

Things change, we learn more about the issue or we see that what was decided by the court lead to bad consequences. Judges do not have a crystal ball, they cannot predict. And that is a good reason to allow changes to precedent, reversal to precedent, when that is called for.

Florencia Ratti: —*So you think overruling is necessary sometimes. When might it proceed and who should be in charge of it?*

Former Justice Iacobucci: —When I said precedent has to be followed, I meant if the case involved has the same issue, the same evidence, with no different facts. Then you have to follow the Supreme Court or higher court. But overruling should be left for the Supreme Court or higher court. It should not give license to the lower courts to overrule Supreme Court decisions. That would make it chaotic.[4]

There are interpretive rules that have been developed for overruling each of the different kinds of questions: constitutional, statutory, common law. Common law is the easiest, because it is judge-made law, so judges can change it without legislation approval. But there is still *stare decisis*. If I am on the trial court and the court of appeals has decided a case, I have to follow it, unless I can distinguish it.

Let me go now to the disadvantage of overruling a precedent. When you overrule precedent too easily, you give a message to the people that the personalities of the bench have changed, not the principles or the underlying considerations. Such an overrule means that different people are deciding the case, not different evidence, not different principles, or different considerations. And over time that does harm to the integrity of the judicial administration of the law.

In Canada, we have examples of overruling precedents even when the precedent was decided five years early. I remember a case that had to do with capital punishment.[5] When an American charged with murder in the United States came up to Canada, there was a request for his extradition to the United States. As you know, many States in the US allow capital punishment. In the first case, the Government consented to the extradition of the individual to the United States even though that individual was exposed to

4. NI: He is not referring to a "proper" overrule, but to the "anticipatory overruling" that sometimes takes place in Canada by inferior courts. See Parkes, "Precedent Revisited: Carter v Canada (AG) and the Contemporary Practice of Precedent".

5. NI: He is referring to: SCC "United States v. Burns", that overruled SCC "Kindler v. Canada".

capital punishment. I couldn't sit on that case, because I had been Deputy Minister of Justice and was involved in the matter.

But in a subsequent case, five years later, the Court overruled that precedent. The Court said we will only extradite on condition that the individual would not receive capital punishment. We decided that because our law would otherwise be instrumental in his receiving capital punishment and consequently our extradition law should be interpreted in a way to prevent capital punishment. Even if he was not a Canadian citizen, our law was applicable.

Florencia Ratti: —*And which were the grounds for overruling there?*

Former Justice Iacobucci: —The ground for overruling was a reconsideration of the law and how it should apply. So, you could say the first decision was "wrong in law". But, as I said, you don't want to overrule too often. Because if you start doing that you are basically laying yourself open to: "Aha, the judges have changed". Fortunately, in both cases it was mostly the same judges. The judges changed their minds, they did not change their personalities. In other words, an overruling with the same judges is sort of more genuine, but you have to be very careful to provide the reasons that can stand up to criticism.

Florencia Ratti: —*Do you think overruling a constitutional precedent should be different from overruling a precedent in other areas?*

Former Justice Iacobucci: —One has to remember that it is very difficult to amend the Constitution in our country. As you know, when you give an interpretation of the Constitution, it is not a legislative amendment, but it is a form of an amendment of the Constitution. Because you give meaning to a section and when you give meaning to a section, you read the Constitution —you read the words of the provision of the Constitution—, according to the meaning decided by the Court. So henceforth, it is like being part of the Constitution.

Similarly, with a statute. When you have a statute and a court says "Oh, this dispute raises the question of what that sections means", once the court gives its ruling and it is not appealed is like adding another section to that statute, right? The Court's decision has said this is how the section is to be interpreted.

However, the reason I give these two examples is that it's very easy to amend the statute. If the government feels that the court's interpretation is wrong and it has good reasons, it can call on the legislature to amend the statute to overturn the interpretation by the Court. And that is proper if they

are doing it genuinely. It is proper if they say "Look, we have evidence to suggest the court's interpretation will lead to bad results". But they can't do that with constitutional interpretation, unless they can amend the Constitution, which is very difficult to do. The only other way that can be done is if the Court overturns sometime later of that constitutional interpretation.[6]

In constitutional cases, one has to be very careful when one interprets the Constitution. With the constitutional interpretation you will invariably get academics who will criticize, and that is good; that is why we need academic commentary.

Florencia Ratti: —*Do you think collegiality is important in a Supreme Court?*

Former Justice Iacobucci: —Judges to be officially appointed take oath at office to do their best. That's their paramount: to do the best they can. But as a collegiate court, as an appellate court and as the Supreme Court, what one must have is a collegiate exchange of views and discussion. When we had a case, I felt, "Am I able to go on with the majority position?". I must ask myself: "Do I agree with the majority?". I express my opinion as to what I think the decision should be and my reasons for that, in conference. If I still believe that, after listening to my colleagues, I can't agree with the majority, then I'll say: "I will write a dissent". Or I might say, "If you can adopt two points of my argument, then I would go along with it". Or I might say "I agree with the result, but I don't believe I can accept the reasoning of the Court to get to that result". So, there I would write a concurrent judgment, concurring in the result, but disagreeing in the reasoning. Those are the options. Collegiality is enhanced by all three, but the first question must be: "Can one agree with the majority view?". If you don't ask that question, that's unfortunate.

Florencia Ratti: —*It seems that your dynamic always includes deliberation, some kind of conference where judges discuss the point. I think, at some point, that it could be a presumption about something that not always exists within courts. Not every court has a real deliberation, at least as far as I am concerned...*

Former Justice Iacobucci: —Oh, yes, at the Canadian Supreme Court we conference. I didn't even mention it because it's a given. We

6. NI: This idea is strongly related to Justice Brandeis' dissent in: SCOTUS "Burnet v. Coronado Oil".

conference immediately after we hear the arguments. And sometimes, we have more than one conference. On the secession of Quebec case,[7] we must have had about ten conferences. In my time there was a lot of discussion. Of course, usually you don't spend the rest of the day discussing, maybe an hour or so for the case.

We discuss every case. I don't know if an appellate Court could effectively act without that. The product of the Court should be collaborative even if it is not unanimous. The important perspective is that we are members of a court. It is the court that is the permanent institution, judges are temporary occupants of seats on the bench. What is important is the institution, and not the occupants of the bench. They are there for a period of time and they serve the interest of the institution for which they are rendering justice to the people of Canada. That to me is what collegiality is about. If only one judge doesn't share that, you may have problems. Because if one judge thinks too much only of his or her role, his or her legacy, in my view collegiality is weakened. Justice Powell, referring to the US Supreme Court, said "It is the last citadel of individualism. To a great extent we operate like nine independent law firms".[8] That is not to me a model of collegiality.

Florencia Ratti: —*So, as you were saying before, from your experience it could happen that in the conference judges finally agree...*

Former Justice Iacobucci: —Yes! And you then circulate reasons where you can get even more comments. Because you never get the full final version until you complete a written draft. Writing is the discipline to clarify your thinking and to finalize your thinking. That's the collegiate work. I received comments on some of my work that were very important, and I also wrote comments that were relevant additions to the opinion.

I was one who sought reactions from my colleagues, known for going from one office to another asking "Can we do this? Can we do that?". Not to make the wine water but to see if we can have more unity for the benefit of the system of jurisprudence, which means more guidance that is clear to

7. SCC, "Reference re Secession of Quebec".

8. NI: The complete reference is that the Supreme Court "is perhaps one of the last citadels of jealously preserved individualism (…) (F)or the most part (…) we function as nine small, independent law firms". He said it on a speech to the American Bar Association in 1976 and was quoted in Richard L. Williams, "Supreme Court of the United States", *Smithsonian*, 1977, p. 89.

the lower courts who have to follow us. But more important than that it is more of a service to the people of our country.

Florencia Ratti: *—I found it interesting that you mentioned you always have oral argument before judgment. How is that dynamic?*

Former Justice Iacobucci: —Every case that goes to the Supreme Court has a hearing, and I would never abandon oral arguments. Let me give you some reasons:

1. Oral hearing can change your mind. You go into that case prepared and say, "This case is going to be dismissed". But the arguments of the lawyer may change your mind. You couldn't find that in the written argument, but the lawyer comes up with very good oral arguments. Not very often, but that can happen.
2. It confirms your opinion. This is an important case. We wouldn't be hearing if it we didn't think it is important. And legal decisions need confirmation. No one is a paragon of knowledge or a genius. It is helpful for a legal determination to have confirmation of your views. And that hearing and discussion provide that confirmation.
3. There is a legitimacy optic. The clients, both who win and lose, at least can say "Well, they had a hearing. My lawyer had the chance to make the argument, they didn't accept it, but the process was legitimate".

Florencia Ratti: *—And when do you deliver the judgment? Right after the oral argument?*

Former Justice Iacobucci: —Sometimes we give a judgment "from the bench". When we all agree it's clear that the decision was properly made in the court below, we say "Appeal is dismissed, substantially for the reasons of the court below". The Court also can allow the appeal from the bench, but this I think is less frequently the case. After we conference, we come back, lawyers are still there, and we give that oral judgment from the bench. Or we can say "The appeal is dismissed. Reasons to follow". Or we would say "Judgment is reserved", which is the normal result. Then you go back, discuss it, and reasons come out in an average of three months.

Florencia Ratti: *—Returning to precedent, what value do you think obiter dictum should have?*

Former Justice Iacobucci: —There are some who say that *obiter dictum*[9] is binding. I wouldn't go that far; I am not as convinced of that. In my mind an *obiter* judgment from the Supreme Court is really important to consider. But if a lower court judge looks at that very seriously and gives reason why he or she departs from that, because maybe the case the lower court is looking at facts that illuminate a departure from the *obiter* statement, that to me is the proper role of the lower court.

I did this in a case when I was on the Federal Court of Appeal, before I went to the Supreme Court. In that case I said, "I believe I am bound by a decision of the Supreme Court". That case went to the Supreme Court. The judge writing the judgment of the Supreme Court said I wasn't bound by that and therefore reversed my decision. I think that is a fair disposition, he can say that with more authority than myself.

I made a conscientious effort to study that case, my colleagues on the court below agreed with me. It is almost having a conversation with the higher court and in that conversation, you come to an expression of views in which obviously the Supreme Court makes the final decision.[10]

Quite often what the Supreme Court can say is "This case deals with X, Y and Z, it doesn't deal with A, B and C". There is guidance in the reasons of the court to get away from an *obiter* statement. Sometimes the majority judgment might say "We don't want to add that, we want to leave it as an open question". And the concurrent judgment can say "I want also to make A, B and C quite clear". Or the other way around. All these are ways of expressing different outcomes. Obiter to me has a yellow light around it. Not a green light, not a red light, but a yellow one.

9. NI: *Obiter dictum* is usually defined as everything that is not part of the *holding*, not necessary or indispensable to solve the case. On the different types of *obiter dictum* and their value, I suggest seeing Kozel, "Scope of applicability*"*, pp.70-71.

10. NI: The conversation to which the former judge speaks refers to the difficult technique of determining the scope of a precedent, how broadly or concrete its *holding* is identified and, consequently, to which cases a precedent is applicable. Two positions stand out on this: minimalism and maximalism. *Cfr.*Magaloni, "Las dos caras de la doctrina del precedente: maximalistas vs. Minimalistas*"*, pp.162-194

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