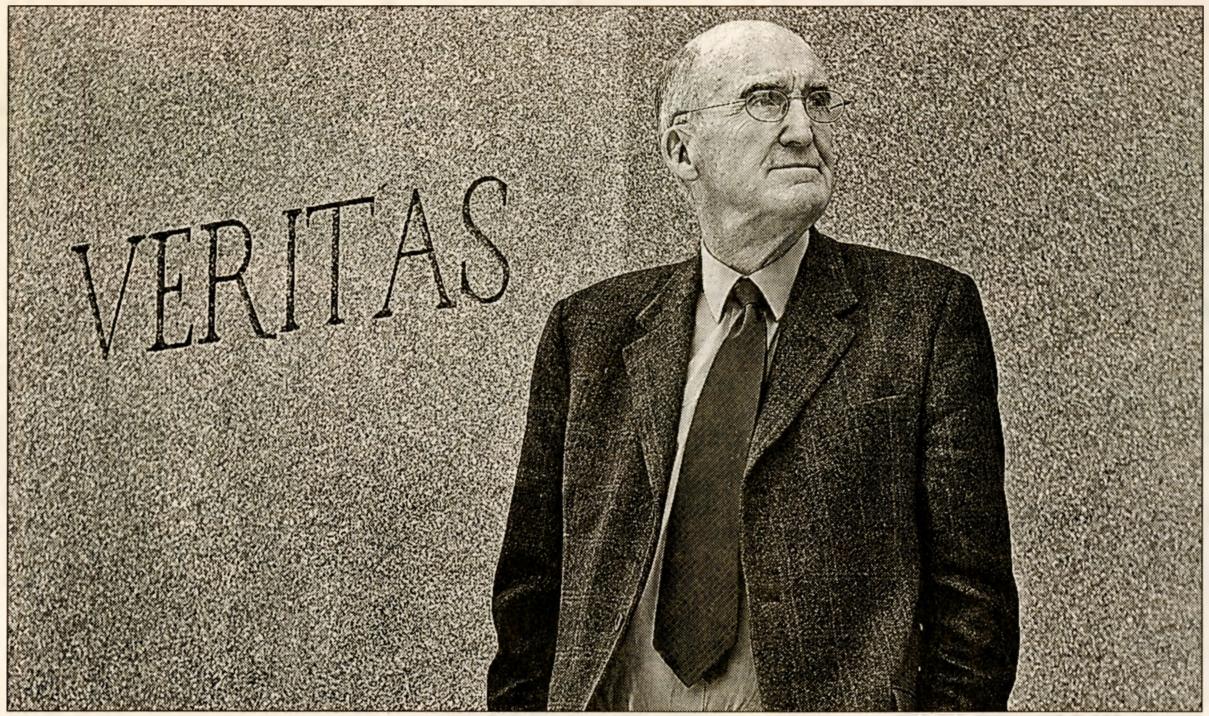
Trial judges usually get last word, Air-India shows

Crown bowed to legal reality in its decision not to appeal acquittals

BY KIRK MAKIN, JUSTICE REPORTER



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Shown here standing outside the Supreme Court of Canada next to the Latin word for truth, Mr. Justice John C. (Jack) Major says that when appellate courts can too easily overturn a trial judge's decision, it encourages the wealthy who didn't like the original ruling to roll the dice again with an appeal.

By throwing in the towel and declining to appeal acquittals on murder charges in the Air-India case, the B.C. Crown bowed to a modern-day legal reality — trial judges almost always get the last word.

Fuelled by a series of increasingly emphatic, and controversial, decisions from the Supreme Court of Canada, this major change has gradually permeated the legal landscape.

Collectively, the rulings state that up to the level of the Supreme Court itself, appellate judges cannot interfere with a broad spectrum of trial rulings, regardless of whether they think the results were wrong.

In a case known as H.L. released just last Friday, the court again stressed that trial judges are in the best position to assess witnesses, and to separate fact from fiction. It said these findings cannot be altered unless a trial judge has "committed a palpable and overriding error, or made findings of fact — including inferences of fact — that are clearly wrong."

This constitutes a tremendously high legal hurdle, legal experts say.

"If the trial judge calls a witness a liar based on some evidence, then the witness is a liar — and there is very little that he or she can do about it," said David Stratas, a lawyer with the firm of Heenan Blaikie.

"For all practical purposes, an appellate court won't touch it, even if it would have weighed the evidence differently. Findings of fact, especially findings of fact based on live witnesses, are practically immune from review."

The H.L. judgment is directly linked to a seminal Supreme Court ruling in 2002 — Housen v. Nikolaisen — where a 5-4 majority delineated the broad powers of a trial judge. It was not the first ruling to do so, but Housen constituted an unyielding declaration to the legal world that there would be no turning back.

"Previous rulings were not always obeyed," Mr. Stratas said. "Housen, by its clarity and force, seems to have finally driven the point home to appellate courts. "Housen is also the starting point for any appellate lawyer. Ignore it at your peril. Very seldom is there a ruling that is quoted this often. I wouldn't say it is the only reason, but it is a big reason for the virtual explosion of deference."

A veteran Bay Street litigator, who asked to remain anonymous, said the trend has worrisome elements. "I see this Housen tidal wave of one-size-fits-all, increased deference as having overwhelmed the search for truth; for the right answer," he said. "It is frequently misplaced. All judges are not created equal."

Even decisions made by administrative tribunals are now being granted unwarranted deference, he said. "Courts of appeal don't want to be retrying cases, but at the same time, we shouldn't be meting out justice based on the economy or efficiency."

Ottawa lawyer Eugene Meehan said that the Housen decision was the Supreme Court's attempt to bring a sense of finality to litigation at the same time as it slapped down those appellate courts that consistently usurped the role of trial judges.

"It confirms in a very explicit way that trial judges conduct trials, and courts of appeal sit primarily on questions of law — and never the twain shall meet," he said.

In a recent interview, Mr. Justice John C. (Jack) Major of the Supreme Court said that when appeal courts could too easily overturn trial decisions, it encouraged wealthy litigants to roll the dice and try to appeal any adverse decision.

"To the extent that you can bring certainty, it's a good thing," he said. "Lawyers need to be able to instruct their clients."

However, Mr. Stratas said that the growing power of trial judges makes appointment procedures critically important. "You want to be sure that the right person with the right judgment is in place, because he or she will have the last word on many issues that drastically affect people's lives," he said.

"Deference . . . can also be a tool of injustice," Mr. Stratas said.

Mr. Meehan noted that given the 5-4 split in Housen, more changes could be in order. "A single appointment could change the role of the trial judge in courts throughout Canada," he said. "That would be a legal earthquake in Canada's judicial system."