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ABOLITION OF APPEALS TO THE PRIVY COUNCIL A SYMPOSIUM

Attorney-General for Ontario and Others v. *Attorney-General for Canada and Others:* [1947] 1 D.L.R. 801; [1947] A.C. 127.

In 1939, Bill 9, entitled "An Act to amend the Supreme Court Act", was introduced in the Parliament of Canada, and received first reading in the House of Commons on January 23rd, 1939. This amendment purported to abolish all appeals from any Canadian court whatsoever to the Judicial Committee of the Privy Council, and to confer upon the Supreme Court of Canada exclusive final appellate civil and criminal jurisdiction in Canada.

On April 14th, 1939, the debate on the motion for the second reading of the Bill was adjourned in order that a judicial determination of the competence of the Parliament of Canada to enact the provisions of the Bill might be obtained. This question was accordingly referred to the Supreme Court of Canada, which held by a majority of four to two that the Bill was entirely within the legislative competence of the Parliament of Canada. This opinion was rendered on January 19, 1940.

The Attorneys-General of Ontario, British Columbia and Quebec appealed, by special leave, from this judgment, and the Attorneys-General of Canada, Manitoba and Saskatchewan contested the appeal. It was decided, however, to postpone the hearing of the appeal until the conclusion of the war. Hearings commenced accordingly on October 23rd, 1946.

I

I feel that the Privy Council's decision in *Attorney-General for Ontario* v. *Attorney-General for Canada,*[1] holding that Dominion legislation may abolish all appeals to the Privy Council, is a

[1] [1947] 1 D.L.R. 801.

decision based on policy rather than on law, in a matter in which the Privy Council dared give no other decision in view of recent political trends both in Great Britain and in the Dominions.

But the Privy Council sat on this matter as a court of law and it is a perilous matter for any court to depart from purely legal standards. Here the Privy Council, in its anxiety to disclaim imperialistic tendencies offensive to the *zeitgeist*, proved its generosity at the expense of the provinces.

It is true that the Privy Council only arrived at the same conclusion as the majority of the Supreme Court of Canada. But that court was judging its own cause and, even so, two of its six members reached conclusions at variance with the Privy Council's.

My own feeling is that Davis J. reached the right conclusion, *viz.* that the Dominion cannot abolish appeals in matters over which the provinces are given exclusive jurisdiction by section 92 of the British North America Act, 1867.[2]

I concede that Davis J. in his reasons rather over-simplified the issues and that there are formidable difficulties involved, which he hardly recognized. But I think his view can be carried to its logical conclusion without producing absurdity and without any need to resort to sophistry, whereas it seems to me that the Privy Council and the majority of the Supreme Court of Canada have been forced to take positions that are logically untenable and to assign meanings to language that it cannot bear.

I may say at the outset that to my mind section 3 of the Statute of Westminster, 1931, which purports to give the Dominion power to pass laws having extra-territorial operation, was inserted out of excess of caution and is pure tautology. If the statute has the effect of making the Dominions autonomous, then this power follows as a matter of law. And by section 7(3) the provinces have the same power, though no doubt they are restricted to the extent that they cannot intrude on each other's spheres.

In the course of this case, many hares were started that need not be pursued to their lairs. The real crux of the matter is whether the majority of the Supreme Court of Canada and the Privy Council were justified in holding that section 101 of the B.N.A. Act, by authorizing the Parliament of Canada to

> provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada,

[2] [1940] S.C.R. 49 at p. 99.

empowered Parliament to give that court an exclusive and final jurisdiction.

I cannot feel that anyone has given a convincing reason for so construing this language. The language in itself is very cautious and restricted and it seems to me impossible to say that section 101 is to be read as giving the Dominion power to legislate on every aspect of a Court of Appeal for Canada. If the framers of the B.N.A. Act had meant that, they would simply have added "a Court of Appeal for Canada" as a 30th subject-matter for Dominion legislation under section 91.

Even conceding that power to constitute or create a court necessarily implies power to define its jurisdiction, I deny that this necessarily implies power to give it exclusive jurisdiction. To make any court's jurisdiction exclusive is really not to give it anything, but to take away powers from other courts. It seems to me sophistry to say that mere power to define one court's jurisdiction implies power to deprive other courts of powers. Such an implication could only be justified where the specified jurisdiction could not possibly co-exist with the others. But legal history makes it impossible to contend that the Supreme Court's jurisdiction and the Privy Council's jurisdiction cannot co-exist.

I have no quarrel with the decisions of the Privy Council holding that Parliament can give the Supreme Court final and exclusive jurisdiction as to certain matters such as criminal law; but that power arises from section 91 and not from section 101 of the B.N.A. Act. It may be noted that neither in *Nadan* v. *The King*[3] nor in *British Coal Corporation and others* v. *The King*[4] did the Dominion try to invoke section 101.

The Lord Chancellor, following Duff C.J.C.'s lead, says that section 101 in itself gives the power to set up a Supreme Court with final and exclusive jurisdiction. But the only language in section 101 from which this power can possibly be implied is the words "Court of Appeal for Canada". If, however, they give those words that implication, then the Lord Chancellor and Duff C.J.C. say that any Court of Appeal set up for Canada will necessarily have final and exclusive jurisdiction, unless the governing act cuts this down.

But if this view were sound, not only would the present amendment to make the jurisdiction final and exclusive be unnecessary, but since section 101 was passed by the Imperial Parliament, it would have repealed or abrogated any law incon-

[3] [1926] A.C. 482.
[4] [1935] A.C. 500.

sistent with it, including all Imperial law and the prerogative giving the Privy Council power to hear Canadian appeals, just as soon as the Canadian Court was set up. For though section 101 does not mention the prerogative, if it authorizes a final and exclusive appeal in Canada, it abrogates the prerogative by necessary implication. This view of section 101 then means that Privy Council appeals have been illegal since 1875, when the Supreme Court of Canada was set up.

This inevitable conclusion from the reasoning of the Lord Chancellor and Duff C. J. C. is so directly at variance with legal history and legal views that no one has questioned until now, that the conclusion must be based on untenable premises. It seems to me impossible to justify the view that section 101 implies either final or exclusive jurisdiction in the Supreme Court or the power of the Dominion Parliament to give it. So far as exclusive and final jurisdiction may be conferred, as to particular matters, I contend the power must come from section 91.

So in my view the Dominion cannot give the Supreme Court of Canada final and exclusive jurisdiction as to matters over which the province has exclusive legislative powers.

Maintenance of my position is not without its difficulties; but I think that this can be achieved.

I recognize that I must claim that if no right of appeal to the Privy Council now existed, a province could nevertheless now set it up. I am prepared to go this far, provided the appeals are limited to matters enumerated in section 92 and the Privy Council is willing to act. I think this right can be found in the power over "property and civil rights in the province". Opponents of this view have claimed that the hearing of Privy Council appeals outside the province is inconsistent with the words "in the province". But this inconsistency is more apparent than real. I think the province's cognizance is of all rights operative in the province and that it is irrelevant whether these rights are determined by machinery within or without. The Privy Council's judgments would be enforced within the province, through the provincial courts.

It may be objected that if the province could give an appeal to one body outside the province, then it could give it to any, *e.g.* the English Court of Appeal or the Supreme Court of the United States, assuming that either of those courts would agree to act. This possible objection requires me to concede that it would be unworkable for any province to authorize appeals to any outside tribunal other than the Privy Council. For the

appellate judgment must be one to which the Supreme Court of Canada owes judicial deference. If, for example, the English Court of Appeal, acting under a provincial statute, were to reverse a provincial court, then the provincial court would have to enter a new judgment vacating the judgment reversed, whereupon the respondent could appeal from the new judgment to the Supreme Court of Canada, which would have jurisdiction as the "Court of Appeal for Canada", even though not exclusive jurisdiction, according to my theory. A right to go to any court outside Canada could thus be nullified, unless the reversing tribunal was one which the Supreme Court recognized as its superior. Probably it need not defer even to the House of Lords; but the Privy Council is in law the King in Council, and the sovereign remains the fountain of justice, even subsequent to the Statute of Westminster.

The Lord Chancellor stated, as one reason why the right to legislate on appeals should not be governed by their subject matter, that this could have the result that

> from the same Court an appeal might lie in one suit to the Supreme Court of Canada only, but in another to that Court or to His Majesty in Council, nor is it impossible that in the same suit two or more questions might be raised in which different rights of appeal might arise.

This however seems a weak argument. To a certain extent, these anomalies, if anomalies they are, have always existed and they have never been felt to be serious. It is common enough for a would-be appellant to have alternative appeals, even to provincial courts. And the practical result is simply that he weighs the advantages of one course against the other and elects accordingly.

Again the Lord Chancellor stated:

> It is in fact a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens.

But this view ignores the fact that Canada is not a simple entity with one legislature; it is a federation with many legislatures. When the Imperial Parliament passed the B.N.A. Act, and by section 92 gave each province power to make its own law on many subjects, it furnished a complete answer to the suggestion that it intended

> That the law should be one and the same for all [Canadian] citizens.

Another expression of the Lord Chancellor's also seems to me misleading. He says that as a result of the Statute of Westminster

there arises a new power in the Legislatures both of the Dominion and the Provinces.

But actually he is holding that the provinces lose power rather than gain anything new. Yet the object of the act obviously was to give any new power to the Dominion at the expense of the Imperial Parliament, not at the expense of the provinces.

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II

In a recent judgment the Privy Council has itself given sanction to its own death warrant as a Canadian court. The Judicial Committee, in agreement with the Supreme Court, has declared it to be within the legislative competence of the Canadian Parliament to enact that the Supreme Court shall be the exclusive final Court of Appeal for Canada, and that all appeals to the Privy Council shall be abolished.

The discussion falls into three divisions:

(1) Is the judgment sound in law?

(2) The reasons given by the Judicial Committee as affecting the future interpretation of the B.N.A. Act and the statute of Westminster.

(3) The power to abolish being settled, should the power be exercised immediately?

(*1*) *Is the judgment sound in law?*

As to the first question, there seems little object in any extended discussion. To the practising lawyer it is a *fait accompli*. To the citizen it is an assurance that Canada really has all the attributes of a sovereign nation. Its academic interest alone remains. It had been settled already in the British Coal Corporation case[1] that since the Statute of Westminster the Dominion has had jurisdiction to abolish appeals in criminal cases. The effect of this decision is that the Dominion can abolish appeals in all cases in relation to any subject matter within the legislative competence of the Federal Parliament. In the present case the Privy Council found the solution in section 101 of the B.N.A. Act, which empowers the Dominion to "provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada". The real controversy arose over

[1] [1935] A.C. 500.

the right of the Dominion to abolish appeals in relation to classes of subjects within the exclusive jurisdiction of the provinces. The Judicial Committee considered that the legislative and judicial spheres of jurisdiction, federal and provincial, are not coterminous and for that reason rejected the view of Davis J. in the Supreme Court that section 101 did not give jurisdiction to make the Supreme Court exclusive and final in appeals as to purely provincial matters. Their Lordships pointed out that the words "notwithstanding anything in this Act" in Section 101, along with the attributes of national sovereignty and extra territorial jurisdiction conferred on Canada by the Statute of Westminster, necessarily imported an authority in Parliament to establish a court having final and exclusive appellate jurisdiction.

Strong arguments have been made in the courts against the reasons given for the judgment in this case and students of constitutional law may find it of academic interest to continue the controversy. For my part, I find the judgment in its results reasonable and practicable. It is in accord with the intention of the Statute of Westminster and the wishes of the Canadian people. The controversy for practical purposes is now a closed issue.

(2) *The reasons given by the Privy Council as affecting the future interpretation of the B.N.A. Act and the Statute of Westminster. This is always a profitable subject of enquiry, particularly in authoritative cases.*

It is of interest to note the statement of the Board that "their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instrument, the authors of which did not contemplate the possibility of either meaning". This shuts the door to any interpretation based on the intention of the Imperial Parliament when the B.N.A. Act was enacted in 1867. Their Lordships proceed to give an interpretation to Section 101 which admittedly would not have applied prior to the Statute of Westminster. The decision is based on the ground that the B.N.A. Act is an organic statute to which such flexible interpretations must be given as changing circumstances require, and that it would be alien to the spirit of the Statute of Westminster to concede anything less than the widest amplitude of power to the Dominion to establish a court having final and exclusive appellate jurisdiction in Canada.

This brings the interpretation of Section 101 up to date and is an application of the rule advocated by Vincent MacDonald in 1935 for a "progressive construction of the *words* of the text as

if directed to present conditions . . . the correct approach . . . is to the terms of the Constitutional Charter to be construed as always speaking in the language of current thought and need".[2]

(3) *The power to abolish appeals being settled, should the power be exercised immediately?*

On this question there is something to be said on both sides. The fact that the power exists is not of itself a reason for putting it into effect. The Privy Council has been a useful institution to Canada and has contributed much to our jurisprudence both directly and as a powerful influence in our legal and judicial growth and development. England has been the cradle of the common law and the high traditions of our profession are deeply embedded in the judicial soil of that country. To say now that because we are grown up we should demonstrate our new status by abolishing Privy Council Appeals is a *non sequitur* which would indicate our continued adolescence. It is true that Canada is now big enough to have her own Court of Appeal. In fact, she is big enough to have any court she considers in her best interest. If the appeals are to be abolished, let us be sure the reasons are sensible and realistic and not merely the first flutterings of the wings of the bird newly dropped from its nest.

There are substantial reasons advanced for ending the Privy Council which might be effectively met by remedying the criticized conditions without resorting to the extreme measure of abolition. One of the criticisms is that the costs are excessive. It is true that today only the wealthy or the very poor can afford an appeal to London. A man of moderate means, involved in a suit for a few thousand dollars in which he is successful here, may be dragged to the Privy Council and find himself burdened with costs out of proportion to the amount involved.

This condition should be and can be remedied. I suggest amendments or changes in procedure so that appeals as of right or by special leave would be restricted to the following cases:

(1) To constitutional cases: provided that if the Crown is appellant and the respondent a private litigant the condition is imposed that the appellant must pay the costs unless for good reason otherwise ordered.
(2) Cases between parties where the amount involved is large. I would suggest a minimum of $25,000, or even $50,000.
(3) Cases for lesser amounts where the appellant is put on terms to pay all the costs, win or lose.

[2] [1935], Can. Bar Rev. 615 at pp. 632-3.

(4) Cases where both parties stipulate in advance that the loser below shall have the right to appeal to the Privy Council. If both sides can afford the luxury of an appeal regardless of the amount involved, and so stipulate, there is no hardship.

There is criticism that it is inconsistent with our present status as a nation that we are dependent on a court which is paid for by Britain. This is easily corrected. Canada should insist on paying its own way and that the share of maintenance costs of the Privy Council proportionate to the amount of work connected with Canadian appeals should be paid by Canada. In this connection I suggest that some Canadian judges of recognized ability should be members of the Judicial Committee and that they should be asked to sit from time to time while yet young enough to qualify for service in Canada.

In favour of continuing appeals to the Privy Council, or at least in favour of postponing the abolition of such appeals, I offer the following reasons:

(1) The judgments are a useful contribution to our common jurisprudence.

(2) The Judicial Committee of the Privy Council is one of the last remaining links of Empire. This is more than mere sentiment. The intellectual contacts are stimulating and worthwhile. I believe that they promote better understanding and will continue to be a beneficial influence in maintaining our high legal standards and ideals of justice.

In conclusion let us bear in mind that the Commonwealth Nations are now going through most difficult and trying post-war experiences. There are inevitable forces tending to pull us apart. These forces should be countered and resisted. Action by Canada at this time declaring against our long established institution of Privy Council appeals will be interpreted in many quarters as a significant step in a process of Empire dissolution. My advice is to proceed with caution and not to forget that Canada's present stature has grown out of our past associations and that benefits may still come from a continuance of the tie that binds.

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III

From the first visit of Jacques Cartier to the present day, a period of over 400 years, Canada has been in some sort of colonial relationship to a European state. The power in the Judicial Committee of the Privy Council to overrule Canadian courts is the only operative part of that external authority still in existence. Executive subordination to an overseas government has disappeared; legislative subordination has equally gone, but judicial subordination remains. The King, in respect of Canada, acts only on the advice of his Canadian Ministers; the Imperial Parliament, in respect of Canada, acts only on the advice of the Canadian Parliament; but the Judicial Committee does not act on the advice of any Canadian court, but independently and with most telling effect upon the Canadian constitution and thus upon the life and habits of the Canadian people. Because of the appeal, a prime element of Canadian sovereignty is impaired, for, as Lord Jowitt puts it, "at the will of its citizens recourse could be had to a tribunal in the constitution of which it (Canada) had no voice." Consequently the importance of the recent decision regarding the abolition of the appeal can scarcely be overestimated, and in stating clearly and unequivocally that the legal power to end it rests exclusively in the Canadian Parliament the Judicial Committee has greatly contributed to the final rounding out of Canadian nationhood.

This is not to imply that the decision was rendered on other than legal grounds; it merely reminds us that constitutional law and political practice are inseparably intertwined. Every important judgment interpreting the B.N.A. Act has political implications and political effects. All constitutions are adopted after political controversy and are designed to achieve a political purpose. The judge-interpreter cannot escape the role of statesman, however much he may try to cling to the letter of the law. There are few cases in courts of appeal so clear that an alternative decision is not possible, and where there is a choice of constitutional alternatives there is necessarily a choice also of political ends. The great constitutional jurists are those whose interpretation harmonizes the political spirit of a constitution with its formal framework, and who recognize that law is not a thing of words only but also of the underlying principles and high governmental purposes which the wording of a written document never expresses completely and exactly, and which are themselves subject to growth and development. Such a view of the law is more "legal" than the supposedly "strict" inter-

pretation, for a strict view, especially in constitutional matters, is usually a narrow and incomplete view.

When, therefore, we find references in the Privy Council decision to a solution "consonant with the status of a self-governing Dominion", to the "high political objects concerning the self-government of the Dominion" (a citation from the Supreme Court judgment of Sir Lyman Duff), to the "natural attribute of sovereign power", and to "the political conception which is embodied in the British Commonwealth of Nations" — all phrases indicative of a sense in the Board of the political consequences of their finding — we should not feel ourselves in the presence of non-legal factors. These are elements in the case which are as "legal" as the words of the B.N.A. Act itself, and neglect of which would be open to valid criticism. While the express and clear words of a statute can never be disregarded, there were no such words in the B.N.A. Act in conflict with the Dominion claims to exclusive jurisdiction. On the contrary, the *prima facie* meaning of the relevant sections of the B.N.A. Act and the Statute of Westminster favoured the Dominion case.

For the heart of the problem lay, as the decision makes clear, in section 101 of the B.N.A. Act. The Parliament of Canada, "notwithstanding anything in this Act", as the section reads, was empowered to "provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada." *Prima facie*, therefore, the jurisdiction over appeals lay in federal hands and nowhere else, and since it was to be a "General" Court, unrestricted in the type of case brought before it, the prohibition of appeals to any other Court would seem well within the section unless by some clear rule or more specific words it was taken out. Prior to the Statute of Westminster there was such a clear rule, applied in Nadan's case — a rule which rested on the doctrine of repugnancy and the Colonial Laws Validity Act. This rule was external to the B.N.A. Act;[1] it limited the powers of the Parliament of Canada under Section 101, since the right of appeal to the Judicial Committee rested on Imperial prerogative and Imperial statute. In addition there was the uncertain limitation on colonial legislative powers arising from the extraterritorial effect of laws regulating these appeals. The Statute of Westminster removed these limitations[2] and allowed

[1] It appeared by implication only in the excepting clauses found in sections 12, 65 and 129.

[2] We must now consider that sections 12, 65 and 129 of the B.N.A. Act have been amended by the Statute of Westminster, by the removal of the excepting clause.

Section 101 full play. Unless there were further limitations inside the B.N.A. Act itself, the Dominion claim to an exclusive jurisdiction would have to prevail — and regardless of political considerations.

Where might such internal limitations exist? The only two judges who recorded their dissent, Crocket and Davis JJ., found them mainly in section 92–14, giving the provinces the exclusive power over

> The Administration of Justice in the province including the Constitution, Organization and Maintenance of Provincial Courts, both of Civil and Criminal jurisdiction, and including Procedure in Civil Matters in those Courts.

But *prima facie* this section is overborne by the *non obstante* clause of section 101, so that the word "exclusive" in section 92 as applied to subsection 14 does not mean exclusive as far as appeals are concerned. Moreover provincial jurisdiction is limited to action taken "in the province". Appeals beyond the province cannot properly be considered part of the administration of justice "in the province" despite Crocket J's. ingenious argument to this effect. And the Supreme Court of Canada is not a "General" Court of Appeal, but only a partial, special and particular court of appeal, if it does not have the exclusive right to hear and decide every kind of case that may ever enter any provincial court. The contention of Crocket and Davis JJ., that federal jurisdiction could only confer finality of appeal in matters which are competent subjects of Dominion legislation under section 91, such as Criminal law, would eliminate the concept of generality from section 101. It would be strange if provinces were found to have sufficient authority to provide that appeals from their courts could go direct to the Privy Council, but not sufficient authority also to prevent them being heard in the Supreme Court of Canada; and strange indeed that the Parliament of Canada could lawfully open the doors of the Supreme Court to all cases whether under Sections 91 or 92 but could not close the doors to another non-Canadian court. The seeds of the present decision were planted in *Crown Grain Co.* v. *Day*,[3] which laid down the rule that no province can bar appeals to the Supreme Court. That the *per saltum* appeal has in fact existed up to now is surely much more easily explained by pre-Confederation practice and by the limitations on Canadian sovereignty arising from the pre-Statute of Westminster position than by any inherent right in provincial legislatures to choose the direction in which appeals shall go beyond the province.

[3] [1908] A.C. 504.

Once the full sovereignty came to Ottawa in 1931 the full competence under section 101 emerged. And how logical that the national government which alone has power to veto any provincial law under section 90 of the B.N.A. Act should alone have power to establish a final court of appeal to interpret all provincial laws which are not vetoed.

Even on the strictest legal view, therefore, the Dominion argument was a most powerful one. It is perhaps worth recalling certain historical facts which, while not referred to in the judgments since they are not directly of legal importance, nevertheless strengthen the Dominion claim. In both the Quebec and London Resolutions the clause providing for a general court of appeal was listed among the exclusive enumerated powers of the Parliament of Canada. Had it remained in this context it would have appeared as an enumerated head of section 91 of the B.N.A. Act with the added authority which the courts have been inclined to ascribe to federal legislation thus supported. In removing the clause from the enumerated powers and placing it as section 101 under the appropriate heading of "Judicature", it would be unlikely that any lesser jurisdiction was being contemplated. The *non obstante* clause maintains the exclusive competency that the Resolutions conferred by the inclusion among the enumerated heads.

Another historical argument also assists the Dominion case —an argument which appears in the decision rather as a matter of practical convenience than as constitutional history. One clear and positive aim at confederation was the creation of a unified judiciary for the whole Dominion, in sharp contrast to the dual form of court structure in the United States. While the provinces were permitted to create courts and regulate their procedure (save in criminal matters) both the appointment of judges and the allowing of appeals to a single Canadian Court of Appeal were basic ideas which the Fathers wrote into the constitution. Even appeals from the Province of Quebec, whose civil law was exempt from the uniformity provisions of Section 94, were to be taken to this national court.[4] To allow provinces the power to permit appeals from their courts direct to the Judicial Committee, when Parliament desires to abolish the appeal, would break the structural unity of the Canadian judiciary, and thus change the nature of the 1867 scheme. The present decision upholding Ottawa's exclusive jurisdiction is in

[4] See remarks of Georges Etienne Cartier, Confederation Debates, 1865, p. 576.

complete harmony with the shape and pattern of the judiciary which the Fathers contemplated. While it is true the Fathers did not at that time intend to do away with the appeal to His Majesty in Council (though many of them voted to bar the right of appeal from the Supreme Court in 1875), all the evidence points to a linking of the whole question of higher appeals with those matters of national importance and concern which are quite outside the area of "matters of a merely local or private nature in the province", covered by section 92.

In my view, therefore, this decision is entirely in conformity with the letter and the spirit of the Canadian constitution. Not the least of its services to Canada is the fact that it adopts again the liberal view of the B.N.A. Act. "To such an organic statute the flexible interpretation must be given that changing circumstances require", said the Lord Chancellor. This approach, so essential to good legal interpretation of constitutions, has been sadly lacking on other important occasions, notably in relation to the treaty-making power. If it is consonant with Canada's status as a fully sovereign state that she should have the power to establish a final and ultimate court of appeal, it is surely also consonant with that status that she should have the power fully to implement all treaties and conventions with foreign countries. And the one power seems just as great an overriding of provincial autonomy as the other. Indeed, the judicial power of constitutional interpretation can be a great deal more potent in shaping future Dominion-provincial relations than the legislative power to carry out treaties. There is an inconsistency between the two approaches, but the present one, it is submitted, is the closer to the Confederation agreement. It is striking to observe how the preamble and provisions of the Statute of Westminster, "this Act of transcendent constitutional importance", have become a guide to the interpretation of the B.N.A. Act, and the clothing of the Canadian state with the "attributes of sovereignty" has become, in effect, a leading canon of construction.

So much for the legal considerations. The real issue is now before us — when shall we abolish the appeal? When shall we use the power which we know we possess? At present though we pose as an important world power, we are minus a prime element of sovereignty. Nowhere is Canadian hesitancy, timidity and irresponsibility more clearly shown than in this matter of the Privy Council appeal. Australia abolished it in constitutional matters nearly half a century ago; Ireland has totally abolished

it; it has nearly died out for the other Dominions. Yet we in Canada drag it along, neither believing in the appeal nor doing anything about it. If it be thought that Quebec desires its retention, the answer is that Quebec, like other provinces, has no single view on the point. It was a Minister of Justice from Quebec, the Hon. Télésphore Fournier, who in introducing the bill to establish the Supreme Court in 1875 said "he wished to see the practice put an end to altogether",[5] and we know that the late Ernest Lapointe shared that view. The perpetuation of the appeal, apart from the injurious delays it occasions and the unjust advantages it affords to wealthy litigants, perpetuates in Canada that refusal to shoulder responsibility, that willingness to let some one else make our important decisions, which is a mark of immaturity and colonialism. Surely our period of political adolescence has been unconscionably long already.

There will still be some people, no doubt, who feel that this "link of Empire" should not be broken. There is a mystical quality about the appeal "to the foot of the throne" which somehow arouses deep emotion. But whether or not the appeal was ever a link of Empire, it is certainly not a link of Commonwealth, and Canada is a member of the Commonwealth and not of the Empire. If the Judicial Committee itself can tell us, as it does in this judgment, that the establishment of our Supreme Court as a final court of appeal is a mark of Canada's new status in the Commonwealth, it would be odd for us to tell them, by our clinging to the ancient ways, that they were wrong. Are we to be more imperialist than this ancient imperial institution?

In recent years a new argument in support of the appeal has appeared. England has now embarked upon a great socialist experiment, and one which, because it seeks to preserve the democratic process, may have a more profound repercussion upon the world than even the Russian revolution. The Judicial Committee of the Privy Council lives, breathes and operates in that social climate. The Canadian Supreme Court, on the other hand, is engulfed in the tide of post-war reaction which is now running strongly in North America, Canada included. So far from experimenting afresh, we are scrapping and undoing the public enterprises and social controls which were necessary to win the war, and which raised our productivity and standard of living to unprecedented heights. The attacks upon labour,

[5] House of Commons Debates, Canada, 1875, 286. See the article on "The Establishment of the Supreme Court of Canada", by Frank MacKinnon, in Canadian Historical Review, Sept. 1946, Vol. xxvii, p. 258

upon co-operatives, and upon civil liberties are frightening many people, and the association of two justices of the Canadian Supreme Court with the espionage investigation has brought sharp criticism from responsible quarters. Many grave social and economic problems are facing Canada, and legal interpretation will play a major part in shaping the evolving Canadian society. Which of these two courts is the more likely to render the better service to the democratic cause in these future conflicts? Which of them is the more likely to appreciate the new role of the state in our increasingly industrial society? Which of these is best fitted to give us that "flexible interpretation of the constitution which changing circumstances require?" And since, if the appeal were abolished, our Supreme Court would remain bound by previous Privy Council decisions, whereas the Judicial Committee itself is more free to distinguish and overcome them, which of the two courts is the more able to free us from the restrictive decisions which have so hampered the role of our federal government in the past?

These are weighty questions. The answers given will often depend on the ideological preferences of the individual concerned. Yet no such considerations, in my opinion, justify the retention of the appeal. They suggest again that Canadians are not yet qualified for complete self-government. They imply an inferiority in Canadian judicial institutions. Even if that implication were plausible — and it can never be proven — it should still not weigh against the fundamental principle of national responsibility. If our Supreme Court should show itself incapable of shouldering the new duties and the heavy responsibilities which the abolition of the appeal will bring, then Canadians will have to deal with that problem in their own way. No one else can do it for us. The judicial authority of and over Canada, like the executive and legislative authority, should be vested in Canada, and entrusted to the General Court of Appeal whose establishment was one of the high purposes of Confederation.

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