

## THE TOO LIMITED JURISDICTION OF THE SUPREME COURT OF CANADA

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With all criminal jurisdiction of the Privy Council already abolished and moves now afoot to end civil appeals also, we may shortly find the Supreme Court of Canada as the final tribunal for all Canadian cases. Before the right of appeal to the Judicial Committee is entirely abandoned it is important to examine the jurisdiction of the Supreme Court of Canada to determine if its powers will allow it to fill the legal needs which have up to this time been provided by the Privy Council. This is not to suggest that the bench of the Supreme Court is in any sense less able than the learned law lords in London, but simply to point out that, as the law now stands, the Judicial Committee has jurisdiction over cases which the Supreme Court cannot hear.

In the final analysis no court can be effective save where it has jurisdiction to determine the important and contentious questions that are brought before it. The Supreme Court has no general jurisdiction whatever, but its power to admit cases is limited by the terms of the oft-amended Supreme Court Act.<sup>1</sup> As it is presently drawn the Act excludes many cases which presently or formerly were admissible to the Privy Council, and which are of considerable public importance.

The basic jurisdiction of the Supreme Court is found in sections 36 and 37 of the Act. Even if the appeal is within these provisions, it cannot reach the Supreme Court unless it also qualifies pursuant to sections 39 and 41. Section 39 says that cases may only be admitted to the highest Canadian tribunal (a) if the amount in controversy is more than two thousand dollars and (b) if special leave is obtained under section 41. Any litigant whose case does not involve over \$2,000 must get leave pursuant to section 41 before he can enter the Supreme Court.

The basic jurisdiction under section 36 is defined as follows:

Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the *highest court of final resort* now or hereafter established in any province of Canada pronounced in a judicial proceeding, *whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge or in any case or proceedings for or upon a writ of*

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<sup>1</sup> R.S.C., 1927, c. 35.

*habeas corpus* arising out of any claim for extradition made under any treaty) . . .<sup>2</sup>

## I

*The Highest Court of Final Resort*

The provision of appeal "from the highest court of final resort . . . whether of appeal or of original jurisdiction" is deceptive. The term "of original jurisdiction" would seem to make a case appealable whether from the provincial court of appeal or from some inferior tribunal, provided the lower court is the court of last resort for the particular case. The Supreme Court has held, however, that there is no appeal under section 36 save from the highest court in the province, the court of appeal, if there is one.<sup>3</sup> If a case cannot be appealed to the provincial court of appeal then appeal to the Supreme Court is also denied. Under a number of provincial statutes no appeal to the provincial court of appeal is allowed. Though such statutes often give rise to important questions, these cannot be determined by the Supreme Court because the decisions would not be of the highest court of final resort in the province.

The mischief resulting from this situation became apparent in the recent case of *Furlan v. Recorder's Court of Montreal et al.*<sup>4</sup> The proceeding began by complaint in the Recorder's Court for the collection of a municipal tax. From the Recorder's judgment no appeal lies. Limited review may be obtained by means of *certiorari* before a single judge of the Superior Court, but his opinion is final. The question was whether non-commercial distributors of Bible leaflets could, as a condition precedent to the right to disseminate opinion, be required to obtain a permit as commercial tradesmen. The Recorder held the permit was required, and on *certiorari*, the court refused to review the merits. The Recorder's decision, demanding an impossible tax, simply meant that the taxation statute was being employed as a means of prohibiting rather than taxing. The *Furlan* case was one of hundreds of similar cases pending in the provincial courts.

<sup>2</sup> Italics mine.

<sup>3</sup> *International Metal Industries Limited v. The Corporation of the City of Toronto*, [1939] S.C.R. 271; *James Bay Rly. Co. v. Armstrong*, 1909 A.C. 624; *Furlan v. Recorder's Court of the City of Montreal* (judgment March 18, 1947 — as yet unreported) the court discussed the meaning of "original jurisdiction": "In our opinion all that section 36 does is to make it immaterial whether 'the highest court of final resort' has appellate or original jurisdiction, or both. In either event there is to be no appeal except from such highest court and not merely from a court which may be the court of last resort in any particular proceeding".

<sup>4</sup> As yet unreported.

It is highly probable that a ruling of the highest tribunal would have been to the advantage of both sides.

The Supreme Court of the United States had previously considered the same issue and held that the application of such laws to the distribution of religious pamphlets was an unconstitutional invasion of the right of freedom of the press. The judgment of the American Supreme Court said also that the decision of the State courts requiring the purchase of a commercial permit (same conclusion as the Recorder) was a "distortion of the facts of record".<sup>5</sup>

Here then is a very important question of civil liberty that cannot even be appealed out of the municipal court. The Supreme Court of Canada refused to hear an appeal from the dismissal of the *certiorari* and obviously could not hear an appeal from the Recorder. The citizen is left without remedy. This is in sharp contrast to the American Supreme Court which can allow appeals from any court in the land provided (a) all remedy in the state courts has been exhausted and (b) a question of constitutional right is involved. In one instance appeal was allowed to the Supreme Court directly from a Texas trial court in a prosecution wherein no more than a five dollar fine was involved.<sup>6</sup> It is the issues arising, not the amount of money or form of procedure, that renders a case of sufficient moment to be determined by the highest tribunal.

Provided a litigant has exhausted all his remedies in the provincial courts, and appeal to the provincial court of appeal is not allowed, there seems no real reason to debar him completely from the Supreme Court. If the latter body were given an omnibus power to grant leave to appeal in cases which were deemed to raise sufficiently important questions of law, this problem could be overcome without at the same time leaving the door open to appeals in cases of no general interest. As this section now stands it places in the hands of the provinces a way of limiting the power of the Supreme Court. All they have to do is limit appeals under their statutes to courts below the provincial courts of appeal, and the jurisdiction of the Supreme Court can be denied. With the provinces and the Dominion finding themselves from time to time in heated disagreement, it is not in the public interest to have the authority of the Supreme Court open to be circumscribed.

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<sup>5</sup> *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>6</sup> *Jamison v. Texas*, 318 U.S. 413 (1943).

## II

*Criminal Causes or Arising Out of a Criminal Charge*

. . . appeal shall lie to the Supreme Court . . . except in criminal causes and in proceedings for or upon a writ of *habeas corpus*, *certiorari*, or prohibition arising out of a criminal charge . . .

When dealing with criminal law or the use of the term "criminal" in relation to legal proceedings, most people think of the Criminal Code and conclude that sufficient legal remedies are available under it. The Code, however, only covers a very small branch of what is considered "criminal" within the meaning of section 36 of the Supreme Court Act.

"Criminal" within the meaning of the Act does not mean something that is criminal in substance but criminal from the standpoint of procedure. A traffic violation begins with a charge in the Magistrate's Court in the same manner as a theft charge and is therefore criminal in form and hence inadmissible to the Supreme Court. If a fine or imprisonment may be imposed, then the case is criminal. The Privy Council has held that a charge for failure to have a licence to sell potatoes was criminal.<sup>7</sup> The Supreme Court of Canada decided that prosecution for failure to supply information demanded by the Minister of Finance under the Income War Tax Act was criminal.<sup>8</sup> It recently decided that a *habeas corpus* appeal arising out of a conviction under a municipal by-law was "arising out of a criminal charge" and quashed the appeal.<sup>9</sup>

The basis of these decisions is made clear from the judgment of Anglin C.J.C. in the *King v. Bell* case:

We think it clear that s. 8 of the Income War Tax Act imposed a duty in the public interest; that default in performing that duty constituted an offence against the public law; and that Parliament provided for the infliction of a prescribed punishment by a tribunal which ordinarily exercises criminal jurisdiction and by procedure enacted by the Criminal Code.

But, although a civil liability might be imposed, if Parliament provides for its enforcement by a proceeding in its nature criminal, that that proceeding would be a criminal cause within the purview of Sec. 36 of the Supreme Court Act would seem to follow from the judgment of the English Court of Appeal in *Seaman v. Burley*.<sup>10</sup>

In the last-mentioned case there was an application before justices to enforce payment of a poor-rate. The fact that it

<sup>7</sup> *Chung Chuck v. The King*, [1930] A.C. 244.

<sup>8</sup> *The King v. Bell*, [1925] S.C.R. 59.

<sup>9</sup> *Saumur v. Recorder's Court of Quebec* (as yet unreported).

<sup>10</sup> [1896] 2 Q.B. 344.

could also be a civil liability did not prevent it from being criminal since this proceeding was criminal in form. It is also immaterial whether the charge is based on a provincial or Dominion statute. If it is enforceable by process in the Magistrate's Court and fine or imprisonment may be imposed, then the case is "criminal" irrespective of the nature of the substantive law upon which the case rests.

The case of *In re McNutt*<sup>11</sup> involved an attempt to appeal to the Supreme Court by way of *habeas corpus* and *certiorari* from conviction under a provincial liquor statute. It was held that the jurisdiction of the Supreme Court was debarred on the ground that the case was arising out of a criminal charge. The former Chief Justice of Canada (Duff J. as he then was) mentioned briefly the problem of the multitude of modern statutes enforceable by penalty in the criminal forum:

In modern times a vast number of statutes affecting the conduct of people in a great variety of ways have frequently given rise to questions whether the summary proceedings taken with a view to punishing offenders or delinquents are or are not to be regarded as criminal proceedings for the purpose of applying some rule of law or some statutory provision.

What was described in the *McNutt* case as a "vast number" of statutes enforceable by summary penalty is now multiplied manifold, and the number is still growing very rapidly. Sometimes it seems that almost every phase of life is subject to regulation of one kind or another.

The sum of the matter is that we are now getting a tremendous body of illegitimate law that is neither completely criminal or completely civil. Statutes and regulations of both the Dominion and the provinces are the basis of it. It does not have the criminal rights of appeal which we find under the Criminal Code, as it is often not even governed by the statute. It is, nonetheless, criminal in form and hence the Supreme Court has no jurisdiction in appeal or even to review decisions on the prerogative writs of *habeas corpus*, *certiorari* and prohibition. As this type of quasi-criminal law is increasing and coming to govern more and more fields of what would normally be described as purely civil rights, there comes an ever-widening gap in our rights of appeal and enforcement of law by the Supreme Court of Canada. Prior to the enactment of section 1024 (4) the Privy Council had power to grant leave to appeal in these quasi-criminal proceedings, but this right of review has been abolished.

<sup>11</sup> (1912), 47 S.C.R. 259.

During the war years the government found it advisable to pass a special order-in-council to allow appeals from summary proceedings to enforce regulations under the War Measures Act. From summary convictions the order allowed appeal with leave to the provincial court of appeal and from there, also with leave, there could be an appeal to the Supreme Court of Canada. This provision made it possible for the provincial courts of appeal to correct a number of lower court decisions and would be a very proper addition to the right of appeal at the present time in all quasi-criminal proceedings whether based on Dominion or provincial statutes. In view of the fact that a Dominion statute could not give an appeal under provincial law to the provincial court of appeal, the problem of review could only be solved by leaving it open to the Supreme Court itself to hear appeals from the final court in a province entitled to consider that particular case. The requirement of leave as a condition precedent to appeal would prevent cases of little import from getting into the Supreme Court while at the same time protecting the citizen and the Crown from errors in the courts below.

In view of the vast body of quasi-criminal law at the present time it is most illogical to have the power of the Supreme Court confined to what is "criminal" under the Code or what is purely civil. Human rights and important questions of law are of equal merit irrespective of the procedural form used to bring them before the courts. The present policy of excluding from the Supreme Court any cases which are "criminal" within the meaning of section 36 of the Supreme Court Act is the means of creating a steadily increasing body of law subject to no control by either the Supreme Court or the Privy Council. Changing times bring changing needs and the developments of the past half century require corresponding remedies to be made available in the Supreme Court if that body is to remain as an effective court of final resort for this country.

### III

#### *Prerogative Writs Arising Out of a Criminal Charge*

Under the bracketed part of section 36, the prerogative writs, *habeas corpus*, *certiorari* and prohibition, are denied recourse to the Supreme Court if they are "arising out of a criminal charge." This provision as it is now interpreted, coupled with section 57, creates a situation that could hardly have been contemplated by the original drafters of the Supreme Court Act.

As indicated above, the words "arising out of a criminal charge" have been construed to mean any case wherein a charge is laid and a fine or imprisonment may be the penalty, whether the case is based on Dominion or provincial law. Appeals by way of *habeas corpus*, *certiorari* and prohibition are denied admission to the Supreme Court if they arise out of a criminal charge. Prior to the enactment of section 1024 (4) of the Criminal Code, appeals from decisions based on the prerogative writs could be taken to the Privy Council.<sup>12</sup> This right of review is now removed without any corresponding right in the Supreme Court to replace it.

Section 57 of the Supreme Court Act gives the Supreme Court original jurisdiction to issue a writ of *habeas corpus* on behalf of any person held by virtue of a Dominion statute. If the prisoner is not held under a Dominion statute, he cannot have a prerogative writ heard in the Supreme Court even on appeal. When liberty of the subject is given such importance under section 57 in the case of a Dominion Statute, it is most illogical to deny recourse to the Supreme Court absolutely for any of the prerogative writs where a provincial statute or common law offence causes the detention. Is the liberty of a subject of any less importance to His Majesty because the imprisonment is in virtue of a different statute?

Section 36 of the Statute excludes from the Supreme Court appeals in *habeas corpus*, *certiorari* or prohibition "arising out of a criminal charge." This limitation would seem to contemplate that appeals in *habeas corpus* could be admitted to the Supreme Court provided the matter were not "criminal". Should it be desired to appeal such a non-criminal *habeas corpus* proceeding it would first be necessary to seek leave to appeal pursuant to sections 39 and 41. Section 39 says that (in such a proceeding) no appeal shall lie without leave under section 41. The supreme contradiction of the entire statute then makes itself apparent from section 42 where it is provided that sections 39 and 41 shall not affect appeals in cases of *mandamus* and *habeas corpus*.

Section 36 expressly contemplates non-criminal *habeas corpus* appeals and you are then directed to sections 39 and 41 for procedure. As soon as you get your procedure completed, section 42 says the procedural sections shall not affect *habeas corpus* in any event! Section 42 could have the effect of meaning that you cannot get leave under section 41 in any *habeas corpus* proceeding.

<sup>12</sup> *Nat Bell Liquors v. The King*, [1922] 2 A.C. 128.

However, it does not only provide that section 41 shall not affect *habeas corpus* but also says that section 39 shall not effect it either. It is only as a result of section 39 that any leave is required at all. If it does not apply then *habeas* proceedings may revert to section 36 and be appealable without any leave whatever. Such a conclusion, however, would be contrary to the entire spirit of the Statute.

A parallel collection of ambiguities and repugnancies would be hard to find in any statute. As a foundation on which to rest the jurisdiction of our highest tribunal it is indefensible.

The prerogative writs, *habeas corpus*, *certiorari* and prohibition offer very limited protection at the best of times. They are prerogatives of the Crown for the protection of the citizen. It is only if the imprisoning tribunal is without jurisdiction that they will serve to rectify proceedings that are a nullity in law. It is highly desirable that this age-old authority of the King in his courts should be subject to the jurisdiction of the highest tribunals regardless of where or how the case originally began. It is submitted that the interests of justice would be better served by allowing appeals in such proceedings whether they are considered civil or "criminal".

#### IV

#### *Jurisdiction Under the Criminal Code*

It is not only in proceedings under the Supreme Court Act but also under the Criminal Code that the appellate jurisdiction of the Supreme Court should be enlarged. The Supreme Court can only hear appeals under the Code provided there has been a dissent in the court appealed from, or the judgment of the provincial court of appeal is in conflict with that of another court of appeal.<sup>13</sup> These grounds are very narrow and often are absent in cases wherein an appeal to the Supreme Court would be of real value. No matter how important a case may be, the Supreme Court cannot hear it unless the foregoing conditions are satisfied.

Parliament should consider the criminal appellate jurisdiction that was abolished when the appeals to the Privy Council were ended and see that the Supreme Court has power to replace the part the Judicial Committee formerly played in the criminal law. The latter was not a general court of criminal appeal but did exercise a jurisdiction that could well have been

<sup>13</sup> Criminal Code, ss. 1023, 1025.

transferred to the Supreme Court. Viscount Cave defined the powers which the Privy Council was wont to exercise in criminal appeals:

It has for many years past been the settled practice of the Board to refuse to act as a Court of Criminal Appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.<sup>14</sup>

In discussing the same point Sir John Coleridge said:

It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision.

These powers which the Privy Council formerly exercised in criminal matters will demonstrate what valuable appellate jurisdiction has been abolished and not replaced. Surely no one would object to a power to review cases where natural justice has been denied.

The artificiality and inefficiency of the present right of appeal to the Supreme Court in criminal matters was brought poignantly to the public view during argument on the notorious case of *Rex v. Dick*<sup>15</sup> in the Ontario Court of Appeal. The Crown was appealing against an acquittal for murder. As the Attorney-General desired to have the question of admissibility of confessions settled by the Supreme Court, Crown counsel suggested to the Court of Appeal that one of the members might dissent and so give a right to appeal to the Supreme Court. Such a request is tantamount to an admission that the provisions for appeal to the Supreme Court are inadequate. He was really asking the Court to co-operate in avoiding the impractical and unworkable provisions of the Criminal Code with respect to appeal. It is eminently proper that counsel should try to get a case into the nation's highest tribunal for a decision on an important point of law. It is, however, highly improper that Parliament should place law officers in the position where they

<sup>14</sup> *Nadan v. The King*, [1926] A.C. 482, at p. 495.

<sup>15</sup> *Reg. v. Bertrand*, [1867] L.R.P.C. 520, at p. 530.

<sup>16</sup> As yet unreported.

are obliged to make such a request of any court. A reasonable general power vested in the Supreme Court to grant leave in important cases would avoid such a situation.

It may be questioned by some whether there is anything to be gained by enlarging the criminal appellate powers of the Supreme Court. The advantage would not be in more convictions or acquittals but rather in increased public confidence in the administration of justice. There are times, such as labour disputes, when the entire administrative hierarchy in a province may be concentrated on accomplishing a certain purpose, *i.e.* abolition of picketing, limitation of over-aggressive action by unions, etc. The objects of the authorities may be quite laudable and carried out strictly in accordance with the law; at other times they may not be. In either event, an appeal to the Supreme Court would give a corrective power where abuse was evident, and at the same time would vindicate the authorities in the eyes of the public when their actions were legitimate.

## V

### *Limitations on Jurisdiction Under Section 41*

The Supreme Court itself has outlined the principles upon which cases should be given leave to come before it.

Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted.<sup>17</sup>

Instead of following principles that would allow important cases to be appealed, the Act simply makes a number of rigid rules, allowing for very little discretion in their application. The only *de plano* appeal to the Supreme Court is under the provisions of section 39 (a) of the Act in cases where the amount in controversy exceeds two thousand dollars. If the proceeding is not admissible to the Supreme Court on this basis, leave must be obtained under section 41. The powers of the Supreme Court to grant leave are confined almost exclusively to cases where financial interests are in controversy.

To make the jurisdiction of the Supreme Court depend on financial questions alone is unsound. Many of the most vital issues of civil liberty and human relations arise from cases of small or no monetary value. The Privy Council recognized this

<sup>17</sup> *Lake Erie and Detroit River Rly. v. Marsh*, (1904), 35 S.C.R. 197, at p. 200.

more than one hundred years ago when it rejected with some vigour the contention that discretion should not be exercised to grant leave to appeal in a case involving a decision on the legitimacy of a child. Lord Brougham described it as "monstrous" to argue that leave should be granted in cases involving a thousand pounds but not in a question of legitimacy.<sup>18</sup> The Judicial Committee has recognized for this long period that a number of civil rights are so important that they are beyond pecuniary value. In a closely parallel issue the Supreme Court held that custody of a child was not a "future right" that would give it jurisdiction.<sup>19</sup>

The Supreme Court has, however, granted leave in cases involving no more than twenty-five dollars damages,<sup>20</sup> and in another case thirty-three dollars damages.<sup>21</sup> The House of Lords has written a very learned judgment on the right of chase of a swarm of bees.<sup>22</sup>

The American Supreme Court has heard many cases involving matters of civil liberty of no ascertainable monetary value at all.

These cases demonstrate that the major courts of the democratic world have recognized the legal importance on occasions of cases involving small sums of money. It would appear untenable, therefore, to continue to confine the powers of the Supreme Court so it can grant leave only in cases where financial interests will be determined.

Very often cases disputing questions of fact over a broken arm, or a motor negligence case of no moment whatever to anyone but the parties, will raise a monetary question of over \$2,000. Such issues mean nothing to the life of the nation; yet the Supreme Court Act gives them a *de plano* appeal, a preferred position over cases of difficulty and importance, where a judgment of the Supreme Court would be of general value. Many such important cases are even prohibited from the Supreme Court since there is not even power to grant leave.

When it becomes necessary to seek leave to appeal, the provisions of section 41 of the Statute show a singular lack of either logic or of concern for basic civil liberties. Leave to appeal to the Supreme Court from a judgment of a provincial court of appeal must first be sought of the court from which you wish

<sup>18</sup> *D'Orliac v. D'Orliac*, (1844), 4 Moo. 374.

<sup>19</sup> *Bland v. Agnew*, [1933] S.C.R. 345.

<sup>20</sup> *Christie v. York Corporation*, [1939] S.C.R. 50.

<sup>21</sup> *Le Comite Paritaire v. Dominion Blank Book Co.*, [1943] S.C.R. 566.

<sup>22</sup> *Kearry v. Patkinson*, [1939] 1 A.E.R. 65.

to appeal. This places counsel in the awkward position of being obliged to tell the court of appeal that its decision is erroneous and he desires to take it further. Often the court of appeal does not take kindly to being told that its decision does not bear careful scrutiny. If counsel succeeds in convincing the provincial court of appeal that leave to appeal should be granted, this court has unlimited discretion to allow the case to go higher, whether it is worth five dollars or five cents. At times the Supreme Court has expressed disapproval over the trivial nature of the cases that provincial courts have allowed to be appealed.<sup>23</sup>

The Supreme Court itself, however, is not granted powers as broad as those of the provincial courts of appeal in connection with granting leave. It has no power to grant leave unless the case comes under one of the headings of section 41. If it does not, then irrespective of the importance of the case, the Supreme Court must reject it. It is paradoxical that the provincial courts have more control over the cases that can come before the Supreme Court than has the latter body itself. Can it be that the legislature did not have as much confidence in the Supreme Court as it had in the provincial courts? Clearly it did not grant it as much discretion.

One type of problem that has aroused much public interest in recent years is the question of civil liberty. Yet none of the heads of section 41 are sufficiently broad to admit cases because of the important civil rights involved. Section 41 (c) is a head that at first blush appears to include many important cases: "the taking of any annual rent, customary or other fee, or, other matter by which rights in future of the parties may be affected". However, "rights in future" have been limited to mean future economic or pecuniary rights. This conclusion may sound as a construction of the existing statute but it is certainly not a desirable limitation from the standpoint of administration of justice.

The matter of "future rights" was argued in some detail in the recent judgment of *Greenlees v. Attorney-General*.<sup>24</sup> There was involved in the case a question of civil liberty but nothing of economic or pecuniary value. During the argument for leave to appeal some members of the Supreme Court agreed the legal issues were important, yet leave was refused because no monetary rights were in controversy and the Court was without jurisdiction. Concerning this case the *Fortnightly Law Journal*<sup>25</sup> had this to say:

<sup>23</sup> *Girard v. Roberval*, (1921), 62 S.C.R. 234.

<sup>24</sup> [1946] S.C.R. 462.

<sup>25</sup> (1946), 16 *Fortnightly Law Journal* 38. Anomalies of Appeal to the Supreme Court.

The judgment makes some interesting comments on the subject of "future rights": *Bland v. Agnew*, (1933) S.C.R. 345, decided that future rights must involve pecuniary rights and no special leave could be granted in a child custody case. It was contended on behalf of Greenlees that the principle had been broadened by the case of *Christie v. York Corp.*, (1939) S.C.R. 50, and *Le Comite Paritaire v. Dominion Blank Book Co.*, (1943) S.C.R. 566. The *Christie* case involved the right of a Negro to buy beer in a Montreal tavern and damages in the sum of \$25.00. The latter case was a question of the authority of some trade union inspectors and damages of \$33.80.

In answer to this argument Kerwin, J., said: 'In the *Christie* case there was an economic interest involved as the plaintiff claimed, among other things, damages, while in the third case, the judgment at the trial was finally restored . . . wherein, besides other relief, damages in the sum of \$33.80 had been ordered to be paid. None of these decisions made any inroads on *Bland v. Agnew*.'

When the Supreme Court begins to reject admittedly important questions of law because they do not involve twenty-five or thirty-three dollars in damages, absurdity reaches completion.

The recent discussion in the House of Commons over the proposed Bill of Rights brings sharply in issue the inadequacy of our law with respect to civil rights. In debate the Minister of Justice took the position that the rights demanded are already part of our law as exemplified *inter alia* by the Magna Carta. No law is stronger than the means of enforcing it. Basic constitutional rights are peculiarly matters for the Supreme Court of this or any other country. If, in fact, our Supreme Court has no jurisdiction over important questions of civil liberty it is high time some amendment was made to the Supreme Court Act to give it jurisdiction.

It is submitted that section 41 of the Supreme Court Act should be amended to give the Supreme Court discretion at least as wide as that of the provincial courts in allowing leave to appeal. This would mean that the Court would have power to decide what cases raise important questions of law instead of Parliament laying down pre-ordained rules. Litigation is too uncertain for any predetermination of what cases will or will not require decision on legal issues of general interest.

## VI

### *Conclusion*

In order to make our Supreme Court a tribunal which would be of general value to the Canadian people it is submitted that the following enlargements of its jurisdiction should be made:

1. It should be possible to appeal to the Supreme Court from courts other than the provincial court of appeal. Provided appeal has been taken to the final court in the

province to which recourse may be had, there is no reason why the Supreme Court or a judge thereof should not have power to grant leave to appeal a case raising sufficiently important questions of law.

2. The appeals under the Criminal Code should be broadened to give the Court power to grant leave in cases of general importance irrespective of the decisions of the provincial courts.
3. The exclusion of "criminal causes" (which includes quasi-criminal and "provincial" criminal law) from the jurisdiction of the Supreme Court pursuant to section 36 should be ended and such cases given a right of review with leave granted as suggested for the Criminal Code.
4. Appeals should be permitted on prerogative writs even when they do arise out of what are construed to be "criminal charges."
5. The Supreme Court should be allowed under section 41 unlimited powers to grant leave to appeal the same as the provincial courts already have.

The foregoing submissions suggest, for the most part, enlargement of the rights of appeal to the Supreme Court. This is not with the object of increasing the volume of litigation, but rather of<sup>1</sup> having this country's highest tribunal vested with more power in cases where it appears to be in the public interest to use it.

What Lord Hewart said of courts of law generally applies to what is said here of the Supreme Court:

The real triumph of Courts of Law is when the universal knowledge of their existence, and universal faith in their justice, reduce to a minimum the number of those who are willing so to behave as to expose themselves to their jurisdiction . . . The knowledge that the machinery exists, and that when it is employed it is employed with skill and without favour, has the effect of rendering its employment unnecessary, save only in the exceptional case . . .

To apply reflection of this kind to the present matter, it is obvious that the critics of departmental despotism desire, not litigation, but that fairness of decisions which, while it renders litigation in general unnecessary, is enormously encouraged and fostered by the prevailing knowledge that, in case of need, there is a Law Court in the background.<sup>26</sup>

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<sup>26</sup> Hewart, Lord Chief Justice of England: *The New Despotism*, pp. 160, 161.