The Supreme Court of Canada: A Final Court of and for Canadians

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I. *Introduction*

In 1894 a judge of the Supreme Court of Canada, later to be its first French-Canadian Chief Justice, lamented that "constitutional questions cannot be finally determined in this Court. They never have been and can never be under the present system."[1] The system of which he spoke has now come to an end. It was a system under which Canadian judicial dependence on Imperial authority was of a piece with Canadian subservience in both the legislative and executive areas of government. And just as the action of Imperial legislative and executive organs was necessary to bring that subservience to a proper constitutional termination,[2] so was the action of another Imperial organ, the Judicial Committee of the Privy Council, necessary to bring to a close judicial dependency.[3] A colony may outgrow but it does not escape its origins without revolution. Constitutional change in Canada has been far from revolutionary. It has been piecemeal, protracted and accomplished with propriety. Even today, one badge of colonialism remains — the formal amendment of the British North America Act by the Parliament of Great Britain. It will disappear, of course, as soon as representatives of the Dominion and provincial governments can agree on formulas and procedures for amendment by Canadian action alone.[4] But the matter is not beset by urgency: *solvitur ambulando.*

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[1] Taschereau J. in *A.-G. Can.* v. *A.-G. Ont.* (1894), 23 S.C.R. 458, at p. 472.

[2] See Reports of Imperial Conferences of 1926 and 1930; Statute of Westminster, 1931 (Imp.), c. 4.

[3] *A.-G. Ont.* v. *A.-G. Can.*, [1947] A. C. 127.

[4] Proceedings of Constitutional Conference of Federal and Provincial Governments, 1950; Proceedings of Constitutional Conference of Federal and Provincial Governments (second session), 1950.

As of December 23rd, 1949, the Supreme Court of Canada has become a significant part of the machinery of Canadian self-government.[5] The purpose of this article is to focus attention on a tribunal which for seventy-five years has had an uncertain rôle in the development of Canadian law. Where its governing statute gave no appeal, the judgments of provincial appellate courts necessarily prevailed, subject only to review by the Privy Council. Where an appeal lay, the Supreme Court might be by-passed in favour of a direct appeal to the Privy Council. Even if a Supreme Court appeal was taken, a further appeal to the Privy Council by the latter's leave was a continuing possibility.[6]

The Supreme Court of Canada, unlike the Supreme Court of the United States and the High Court of Australia, is not a constitutional court in the sense of having its existence and its jurisdiction guaranteed by fundamental law.[7] Its being, as well as its organization and jurisdiction, has depended on the exercise by the Dominion Parliament of the legislative power conferred by section 101 of the British North America Act. Nevertheless, constitutional considerations have dogged the Supreme Court since its establishment in 1875.[8] They nearly stifled it at birth and gave it an uneasy infancy.[9] It was, in fact, an intermediate appellate court which could neither compel resort to its facilities nor control further appeals from its decisions.

Legal and sentimental ties between Great Britain and Canada involved the Court in controversy about appeals to the Privy Council even before its first panel of judges was appointed.[10] Its

[5] Supreme Court Act amendment of 1949 (Can. 2nd sess.), c. 37.

[6] The Privy Council had stated from time to time (*e.g.* in *In re Initiative and Referendum Act*, [1919] A. C. 935, at p. 939) that it preferred to have the opinion of the Supreme Court in cases on appeal.

[7] See U. S. Constitution, article III, sections 1 and 2. S. 1 declares that "the judicial power of the United States shall be vested in one supreme court . . ."; s. 2 deals with jurisdiction. And see Commonwealth of Australia Constitution Act, 1900 (Imp.), c. 12, ss. 71 and 73. By s. 71, "the judicial power of the Commonwealth shall be vested in a federal supreme court, to be called the High Court of Australia . . ."; s. 73 deals with jurisdiction. On the other hand, s. 101 of the B.N.A. Act declares merely that "the Parliament of Canada may . . . provide for the constitution, maintenance and organization of a general court of appeal for Canada . . .".

[8] Supreme Court Act, 1875 (Can.), c. 11. The Act was proclaimed on September 17th, 1875.

[9] See MacKinnon, The Establishment of the Supreme Court of Canada (1946), 27 Can. Hist. Rev. 258.

[10] The story is told in a collection of official correspondence entitled "Correspondence confidentially printed for the use of the Privy Council respecting the Supreme and Exchequer Court of Canada". It covers the period from October 6th, 1875, to August 29th, 1876. The controversy centered around a clause of the Supreme Court bill, introduced by way of amendment, making the Court the final appellate authority. It was apparently not immediately realized that the Dominion could not then abolish the appeal to the Privy Council by grace. When this became clear, the threat of disallowance disap-

federal origin and auspices roused suspicion of what the Court might do in attenuating provincial interests. The Court's slow beginning, and friction among some of its judges, prompted a number of attempts to secure its abolition.[11] Yet its initial organization and its survival appear today to have been an inevitable concomitant of Canadian nationhood.

How far the intermediate position of the Court tended to its obscurity is difficult to estimate. I do not refer to any obscurity in a professional legal sense. The Court made itself felt whenever the opportunity offered. But it is clear that the Court has not hitherto been regarded by the public at large as a potent element in Canadian self-government. Perhaps this is a rôle which a national tribunal can essay only if it has ultimate judicial authority. But the legal profession cannot escape some of the responsibility for public neglect of the Court. It is a fact that hardly anything has been written about its doctrine, and only recently has there been any professional curiosity manifested about its jurisdiction.[12] It has had nine chief justices (inclusive of the present incumbent of that office) and none has yet been the subject of any published biography.[13] Indeed, neither the Court itself nor (with a few exceptions) its judges have been subjected to appraisal in any book or article.[14] It is a pity that this has been so because the Court has had able and devoted men on its roster and, wherever *stare decisis* has left it relatively free, it has given adequate proof of responsible utterance.[15]

It is an easy prophecy that professional and non-professional apathy will disappear now that the Supreme Court has become the final court in all Canadian causes. The membership of the Court, its pronouncements, its administrative organization for the despatch of business, are now matters of grave import for lawyers and non-lawyers alike. This would be so even if Canada were not wrestling with problems of federalism. The problems, challenging enough when they were faced by the Privy Council which did not have to live with its own solutions, are even more challenging to a court which must experience them as well as help to decide what to do about them.

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peared. See Underhill: Edward Blake, the Supreme Court Act and the Appeal to the Privy Council (1938), 19 Can. Hist. Rev. 245; Cannon, Some Data relating to the Appeal to the Privy Council (1925), 3 Can. Bar Rev. 455.

[11] See *op. cit., supra*, footnote 9.

[12] Cf. W. Glen How, The Too Limited Jurisdiction of the Supreme Court (1947), 25 Can. Bar Rev. 573.

[13] See appendix 1 to this article.

[14] See, for example, E. R. Cameron, Sir Louis Davies (1924), 2 Can. Bar Rev. 305.

[15] See *infra* the reference to the Supreme Court's constitutional doctrine.

II. *Supreme Court Membership*

Inclusive of the present complement of judges, forty-two persons have served on the Supreme Court of Canada.[16] It is worthy of notice that more than half of these appointees came to the Court with previous judicial experience in provincial courts. Worthy of note, too, is that three appointees had been federal ministers of justice and two had been deputy ministers in the department of justice. Five other appointees had served as provincial attorneys-general. On its establishment in 1875 the Court was composed of six judges, of whom two had to be from Quebec.[17] It remained a six-judge court until 1927 when provision was made for a seventh judge.[18] At the close of 1949, with the abolition of appeals to the Privy Council, the Court became a nine-judge tribunal.[19]

Whether one regard it as inevitable or not, it is a fact that membership on the Court has from the beginning been affected by sectional and religious considerations in the same way as has the composition of all federal cabinets since Confederation.[20] The French-Canadian and English-Canadian components of the population, the Protestant and Roman Catholic persuasion of most of the citizenry, the sectional (and provincial) pressure for representation in central organs of government, were factors to which appointments to the Court gave expression. Until the turn of the century, the Supreme Court was an all-eastern affair. Chief Justice Killam of Manitoba, the first appointment from the western provinces, joined the Court on August 8th, 1903, but he resigned within two years to become head of the Board of Railway Commissioners. The next western appointee was Mr. Justice Duff of British Columbia, who assumed his office on September 27th, 1906, and retired after a memorable and distinguished career extending over thirty-seven years, the last ten to eleven of which he served as Chief Justice. The new province of Newfoundland aside, there have been one or more appointees from every prov-

[16] Appendix 1 lists all the judges to date and indicates their tenure, their previous experience and province of origin.

[17] The first panel of judges was appointed on October 8th, 1875. There was no separate Exchequer Court until 1887 (Can.), c. 16, and until that time the judges of the Supreme Court also constituted the Exchequer Court. It should be noted that while Parliament agreed that two of the judges should come from Quebec (s. 4 of the Act of 1875), it rejected a proposal requiring that one of the judges should be from British Columbia: see footnote 9, *supra*.

[18] 1927 (Can.), c. 38.

[19] 1949 (Can. 2nd sess.), c. 37. This amendment also restored the one-third proportion of Quebec appointees which had been reduced when a seventh judge was added in 1927.

[20] Cf. Rogers, Federal Influences on the Canadian Cabinet (1933), 11 Can. Bar Rev. 103.

ince save Alberta. In truth, however, and for reasons unique to Canadian federalism, the Court has always been numerically dominated by Ontario and Quebec appointees. If precedent in judicial appointments means anything — and it has governed for a long time already — there will be only three places in the present nine-judge court to distribute among eight provinces. On a basis of existing proportions of population, this division is not particularly outrageous. But population ratios are not the only factors to be considered. The present statutory requirement of three appointees from Quebec means that it is Ontario that will have to forego its traditional equality with Quebec to permit a larger selection of Supreme Court judges from outside the two central provinces. One may well cavil at concessions to political federalism in the selection of persons to staff a final court of appeal which is supposed to represent high professional competence and, I hope, mature social understanding. It is not, of course, demonstrable that a purely merit system of appointments would or could raise the calibre of Supreme Court judges. But the greater freedom of choice which such a system permits should reasonably conduce to such a result. Be that as it may, Canadian practice in appointments has been to assume that merit is equally served in the recognition of sectional and religious qualifications. It is a practice that is not likely to change.

III. *Organization of the Court for the Despatch of Business*

While the Supreme Court Act specifies the number of judges constituting a quorum, the number of sittings to be held annually and their respective dates of commencement, the number of appeal lists, and gives directions for setting down appeals, including the time limitations and security requirements,[21] it gives no clue to the actual administrative operation of the Court in hearing and disposing of cases. Nor do the rules promulgated by the Court[22] cast much light on its day to day functioning and the professional inter-relation of its members. There is no such public knowledge of the Court's internal procedures as there is, for example, in the United States relative to the work of its Supreme Court.[23] Practitioners before the Supreme Court of Canada (and there is no separate bar distinct from membership in a provincial

[21] Supreme Court Act, R.S.C., 1927, c. 35, as amended, ss. 25, 32, ss. 63 and 64, ss. 66-72, and s. 85, as enacted by 1949 (Can. 2nd sess.), c. 37, s. 5. S. 65 was repealed by 1949 (Can. 2nd sess.), c. 37, s. 4.

[22] Consolidated Rules of Practice, 1945, as amended.

[23] Cf. Freund, The Supreme Court of the United States (1951), 29 Can. Bar Rev. 1080.

bar[24]) no doubt get to know something of the Court's methods of handling its work. But it is a fair conclusion that no specific conventions have grown up in connection with the Supreme Court's operations. Its system is characterized by freedom from system.

When the Court consisted of six judges (with five required for a quorum), it was customary for the full panel to sit on cases on appeal. With the enlargement of the Court to seven members, it was difficult to say that any principle other than that of convenience and desire to avoid an equal division dictated whether five judges should sit on a case or seven judges should sit. Since the enlargement of the Court and from the time that nine judges were available for judicial duty, the reported cases in the 1950 volume of the Supreme Court reports show that in nine cases there was a five-judge court; in six cases, a seven-judge court (one of the cases involved constitutional issues) and in one case a nine-judge court (this being a re-hearing of a criminal appeal).[25] Two questions may be asked: Should the whole bench be required to sit in every case? Is a judgment of the Court when composed of five judges as weighty as a judgment of the Court when composed of nine judges? The theory of the Supreme Court Act requires an affirmative answer to the second question.[26] The first question must be related to three important considerations: (1) the Court, as will appear later, has a diversified and extensive appellate jurisdiction, and in many instances it has no control over the cases that litigants may wish to bring before it; (2) the Court is generous in allowing full oral hearings and its members are not under any established collective discipline in the disposition of cases and the writing of opinions, so that the burden of appeal work is shared by having, from time to time, different combinations of judges on the various appeals; and (3) the judges of the Court have, on occasion, been asked by the federal government

[24] Supreme Court Act, R.S.C., 1927, c. 35, ss. 22 and 23.

[25] Forty-one cases are reported in [1950] S.C.R., but of these, twenty-five were cases heard before nine judges became available for service. Of the twenty-five cases, only one (the rent control reference, [1950] S.C.R. 124) was heard by the full court of seven judges. It is of some interest to note that there were three instances of re-hearings of cases reported in [1950] S.C.R. They were *L'Hôpital St. Luc* v. *Beauchamp*, [1950] S.C.R. 1; *Dastous and Rose Canned Food Products* v. *Matthew Wells Co. Ltd.*, [1950] S.C.R. 261; and *Welch* v. *The King*, [1950] S.C.R. 412 (re-heard by the full bench of nine after an original hearing before a bench of five). In these cases there were no published judgments after the first hearing. The situation was different in the *Boucher* case (see footnote 167, *infra*) where judgments were delivered after a hearing and the Court later granted a motion for a re-hearing, which was followed by other judgments replacing those first delivered.

[26] There has been no change in the Supreme Court Act provision that any five judges may constitute the court (s. 25).

to assume special duties such as those of royal commissions.[27] It is, hence, understandable that a full complement cannot be assured for every case. Whether it should be so assured — whether, in other words, the Supreme Court Act should be amended to that effect — is a question that has no categorical answer when there has for so long been a different practice. It should be indisputable, however, that the full bench must sit in all constitutional cases and, perhaps, also in all capital cases.[28]

The Supreme Court Act and the rules of court require the filing of the "case"[29] (the transcript of all proceedings and the reasons for judgment below) in connection with an appeal, and the rules also require the filing of a factum or points for argument in the appeal.[30] Whether the factum is a mere skeleton of propositions of fact and law or whether it is a piece of legal research into the issues depends on the individual preferences of counsel in the case. Since oral argument is not limited as to time (as it is, for example, in the United States Supreme Court), the belief is common that the Court has hitherto been guided more by what it learns on the oral hearing than by the written brief. But, since the members of the Court have presumably read the case and written argument before the oral hearing, they should be in a position to shorten the oral proceedings by requiring counsel to confine their arguments to particular points. No generalization is possible, however, on the conduct of the oral hearing of cases.

The Court's rather leisurely and courteous conduct of appeals is related to its volume of work. There has been no indication that it has been unable to keep up with the volume of appeals. In this connection, the practice of staggering the judges in the constitution of the Court has, no doubt, had some value. Of course, a mere count of cases which come before the Court does not reveal how hard the individual judges work. The duration of oral argument, the lucidity of counsel, the completeness of the briefs and accuracy in both oral and written presentation are equally impor-

[27] See The Judges Act, 1946 (Can.), c. 56, s. 36, requiring the consent of the Governor in Council before judges may take on extra-judicial duties such as commissions.

[28] Hitherto there has been no such practice either in constitutional cases or in capital cases. The full court did not sit in *In re Bowater's Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, which raised constitutional issues in connection with Newfoundland's entry into Confederation; perhaps the case was heard too soon after the enlargement of the Court so that the two new appointees were not quite ready to enter on their judicial duties.

For instances of capital cases heard by less than a full court, see *Deacon* v. *The King*, [1947] S.C.R. 531; *Henderson* v. *The King*, [1948] S.C.R. 226.

[29] Supreme Court Act, R.S.C., 1927, c. 35, as amended, ss. 68 *et seq;* Rules 6 and 7.

[30] Rules 29 and 30.

tant factors bearing on the burden of their work. There is no way of knowing, unless the judges tell us, whether style and content in judgment writing bow from time to time to pressure of work. The United States system of attaching law clerks to the justices — usually the top graduates of the leading law schools — finds no place in the administrative organization of Canada's Supreme Court. Professional assistance in devilling, and in research generally, would certainly give the judges more time for reflection. It is for them to say, however, whether they need it or want it. It ought to be said that until recent years the Court's administrative officers did not keep any statistics of the work load of the Court. This neglect of an elementary technique has now been remedied and records are being searched to provide data on the number and kinds of cases brought before the Court and their disposition.[31] As might be expected, most of the appeals come from Ontario and Quebec. Further details may be found in appendix 2.

Argument of an appeal, whether it be written or oral, raises for the new Supreme Court and for counsel who will appear before it an important question as to the materials of decision. In common law cases the Supreme Court, after becoming subjugated to Privy Council and House of Lords authority, rarely cited other than English decisions. This unnecessary, though understandable, parochialism carried over to an expressed distaste for periodical literature.[32] While English texts and English works like Halsbury were freely received as expositions of English decisions, there is very little evidence that the Supreme Court (or, should I say, counsel appearing before it?) had or desired any acquaintance with United States decisions or writings, or even with legal developments in the sister state of Australia.[33] It is a paradox that Australia, which is more "English" than Canada and less "Ameri-

[31] I am indebted to the present registrar of the Court, Mr. Paul Leduc, K.C., for supplying me with the material which appears in appendix 2. Under his supervision a beginning has been made in keeping an orderly and classified record of the court's work.

[32] The reference is to the instance which provided the occasion for an article by G. V. V. Nicholls, Legal Periodicals and the Supreme Court of Canada (1950), 28 Can. Bar Rev. 422. This single instance is not too misleading because even a cursory examination of the decisions of the Court reveals that references to periodical literature are almost non-existent; it was not worthwhile to go through all the cases to get the exact picture. Perhaps counsel or the Court (1) do not read periodical literature; or (2) do not find anything worthwhile in such literature; or (3) do not feel it necessary to admit that they were assisted by such literature; or (4) perhaps there is no periodical literature which is worth the attention of counsel or the Court.

[33] This statement may be now unfair: see the reference by Kellock J. to an Australian case in *Reference re Wartime Leasehold Regulations*, [1950] S.C.R. 124, at p. 153.

can", has been influenced more by "American" decisions and less by "English" decisions. While the nature of its constitution may explain its interest in United States decisions — and this reason has some application to Canada as well — it can also point to a body of legal doctrine which is much more its own than the legal doctrine expounded in this country. Of course, the High Court of Australia has been freer of Privy Council control than has the Supreme Court of Canada, but this is not a complete answer to the absence in Canada of an independent judicial tradition like that in Australia.[34] Part of the answer also lies in the conservative tradition of the Canadian legal profession reinforced by the awe and timidity of a colonial outlook, and in the late development of university law schools where free inquiry grounded in Canadian experience now gives promise of distinctively Canadian contributions to the common law system.[35] This development — and it is still regarded with suspicion in some quarters[36] — is long overdue when one considers that in art, in literature, in drama and in science Canadians have already shown that they can do better than merely copy: they can be original. It is well to add that in civil law cases from Quebec the customary references to writings in accordance with the civil law tradition has contrasted strongly with the rigid English case-law approach to common law appeals.

Now that the Supreme Court is a free court subject only to self-imposed limitations,[37] it is reasonable to expect that it will explore the entire common law world and not only that part which is called Great Britain. Moreover, the stock in trade of this world includes not only decisions of courts but also conclusions of scholars whose meditations on particular problems are not the result of the chance of litigation but the product of attempts to see the legal system as an integrated whole. This is the Supreme Court's task today in relation to Canada. It will be unfortunate

[34] See the Commonwealth of Australia Constitution Act, 1900 (Imp.), c. 12, s. 74.

[35] I do not overlook the respectable university tradition of the Faculty of Law at Dalhousie University, which has a history dating back to 1883. Unfortunately, its influence, save for some graduates who settled in the west, has been largely confined to the maritimes, insulated as it was from other common law provinces by Quebec. Nor do I overlook the century old Faculty of Law at McGill University; it did not, however, have any influence on the common law tradition. For a period lasting well into the 20th century, most common law lawyers, if they attended a law school at all, were trained at Osgoode Hall Law School operated by the Ontario legal profession under a policy of regarding the school as a mere adjunct of office apprenticeship. This policy has been recently abandoned.

[36] See Wright, Should the Profession Control Legal Education (1950), 3 J. Leg. Ed. 1.

[37] This conclusion is developed in the last part of this article dealing with *stare decisis*.

if the Court's vision is limited by the range of existing case-law, whether it be English, or Australian, or whether it comes from the United States or from some civil law country.[38] A final court, like a legislature, may be expected to make its own assessments of our current social problems and to give us its own solutions.

The mechanics of case dispositions deserves some mention. One recent improvement which may be noted is that when judgment is handed down by the Supreme Court in any case, copies are at the same time available to counsel and other interested persons. The more important question here, however, is the method of producing the judgment. The Supreme Court of the United States regularly holds weekly conferences at which cases are discussed, a justice is given the assignment of writing the opinion of the Court, and a draft is then circulated among the justices for approval and comment. Any dissenting justice may give his separate reasons and justices who join in the Court's opinion but have something more to add may express separate views in concurrence.[39]

There is no such practice in the Canadian Supreme Court. Judicial conferences when held are on an informal basis and may amount merely to a consultation among a few rather than among all the judges. Some of the cases reported in 1950 would indicate that from time to time there is a serious effort to arrive at an opinion of the Court in the sense of having one judge speak for all.[40] But there are enough other cases reported in the same year which indicate — if I may so say, with respect — a conspicuous waste of time and an unnecessary cluttering of the reports with separate reasons by individual judges amounting to mere repetition. A perusal of three recent cases — the rent control reference,[41] the inter-delegation case[42] and the margarine reference[43] — reveals that, aside from the dissenting judgments in the last case, the judges of the majority could easily have said once what is set out several times to the same effect. Conservation of judicial

[38] See *Frey* v. *Fedoruk*, [1950] S.C.R. 517 (a "peeping tom" case) where the Supreme Court seemed concerned about the absence of precedent although in that case it had a perfectly good reason for its concern in light of the principle *nulla poena sine lege*.

[39] This practice of the United States Supreme Court is described with more particularity in Hughes, The Supreme Court of the United States (1928), at p. 58; Stone in (1928), 14 A.B.A.J. 428, at p. 435.

[40] See, for example, *Frey* v. *Fedoruk*, [1950] S.C.R. 517; *Yeats* v. *General Mortgage and Housing Corp.*, [1950] S.C.R. 513.

[41] *Reference re Wartime Leasehold Regulations*, [1950] S.C.R. 124.

[42] This was an appeal from a decision on a reference: *A.-G N.S.* v. *A.-G. Can.*, [1950] 4 D.L.R. 369, [1951] S.C.R. 31.

[43] *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1950] 4 D.L.R. 689.

energies through some regular method of general consultation would be a greater benefaction to the country and to the legal profession than the present fairly haphazard system of individual and group performances. The advantages of a system of consultation in terms of time for reflection, of preliminary reconciliation of positions, and of clarification of principles, of providing a group opportunity for assessing immediate and long-range consequences — in other words, of enabling the Court to act as an entity — are beyond dispute. The precious right to dissent which is inherent in the constitution of the Supreme Court would, when exercised, then bring into sharper focus the area or nature of the differences between the decision of the Court and the views of those judges who are in disagreement. The result would be a more orderly process of growth.

IV. *The Jurisdiction of the Supreme Court: Admission of Appeals*

Coincident with abolition of Privy Council appeals and with the enlargement of the Supreme Court to nine members, the Parliament of Canada made extensive changes in the Court's appellate jurisdiction.[44] The changes have drawn the sting of criticism which was justly levelled at the former provisions of the Supreme Court Act governing appeals.[45] Now as before there are appeals as of right, appeals by leave of the highest court of final resort in a province and appeals by leave of the Supreme Court itself. The defect of the old provisions was not so much that appeals as of right were determined by the financial stake in the litigation, but that the highest court of final resort in the province had wider powers to admit an appeal to the Supreme Court than did the Supreme Court itself. The latter's powers to admit an appeal (where because of the amount in controversy there was no appeal as of right) were confined to specified cases which covered in the main real property and monetary matters although including also constitutional issues. Moreover, leave could not be sought from the Supreme Court unless it had first been refused by the provincial court. This was surely a case of the tail wagging the dog. The amendments made in 1949 have corrected this topsy-turvy situation and have given the Supreme Court a wide and independent power to admit an appeal.

The history of the Supreme Court's appellate jurisdiction deserves more detailed consideration than is possible in a general

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[44] 1949 (Can. 2nd sess.), c. 37.
[45] W. Glen How, *op. cit., supra,* footnote 12.

article.[46] There appeared to be considerable uncertainty until after the turn of the 20th century whether or not the provincial legislatures could limit appeals to the Supreme Court, at least in relation to matters within their legislative authority. Thus, in 1881 the province of Ontario in its Judicature Act of that year purported to limit appeals to the Supreme Court from the Ontario courts.[47] Some years later British Columbia purported to allow an appeal to the Supreme Court.[48] In both cases, the Supreme Court itself had no doubt that only Parliament could limit or allow appeals to be brought[49] but the matter was not finally settled until the Privy Council in *Crown Grain Co.* v. *Day*,[50] a Manitoba case, sustained the views of the Supreme Court. More than legal considerations were involved, however, because in 1897 the Parliament of Canada gave effect to Ontario's views on limitation of appeals from Ontario judgments.[51] Appeals were permitted only in specified cases, and it is an interesting sidelight that it was substantially that group of cases to which, later on, appeals by leave of the Supreme Court itself were confined.[52] It should also be noted that special provisions were introduced early in the history of the Supreme Court Act respecting Quebec appeals.[53] The particular provisions governing appeals from the two central provinces, and other provisions of lesser importance governing appeals in specified cases from other provinces,[54] emphasized the sectional influences which made a hodge-podge of the Supreme Court's appellate jurisdiction. In part this could be attributed to the local suspicion attaching to a central judicial body which was under federal legislative control; in part, it marked the weight which such sectional influences carried at Ottawa. Measurement of the Supreme Court's jurisdiction in the early days in "political" terms was also a result of the failure to give the Court a constitutional status. In the circumstances of 1867, this was perhaps

[46] The course of decision on the jurisdiction granted in 1875 and on subsequent amendments up to the close of the 19th century is set out in case-digest form in Cassels, Supreme Court Practice (2nd ed. 1899).

[47] 1881 (Ont.), c. 5, s. 43.

[48] 1891 (B.C.), c. 5, declaring that an opinion on a reference shall be deemed to be a judgment and appealable as such.

[49] As to the Ontario statute, see *Forristal* v. *McDonald*, Cassel's Dig. S.C. Decisions, p. 422; *Clarkson* v. *Ryan* (1890), 17 S.C.R. 251. As to the British Columbia enactment, see *Union Colliery Co. of B.C.* v. *A.-G.* B.C. (1897), 27 S.C.R. 637.

[50] [1908] A.C. 504.

[51] 1897 (Can.), c. 34.

[52] See Supreme Court Act amendment of 1920 (Can.), c. 32, s. 2, enacting a new s. 41. Note, however, that some of the specified cases were included in the special provisions enacted earlier with respect to appeals from Quebec.

[53] See Supreme Court Act, R.S.C., 1906, c. 139, ss. 37(a), 40 and 46.

[54] See Supreme Court Act, R.S.C., 1906, c. 139, ss. 37(b) (c).

too much to expect. Another three decades made a considerable difference, however, to a sister dominion, because when the Commonwealth of Australia Constitution Act was passed in 1900, the High Court got an assured status involving as well a constitutional limitation on appeals to the Privy Council.[55]

At the present time the Supreme Court has, in two cases, what might be called original jurisdiction. The Court's opinion may be sought in the first instance on a reference of constitutional or other matters by the Governor in Council,[56] and every judge of the Court has power to issue *habeas corpus* in connection with any commitment under Dominion criminal legislation.[57] Otherwise the Court's jurisdiction is purely appellate. The principal terms of its appellate authority are in the Supreme Court Act[58] and in the Criminal Code[59] but there are also special instances of appellate jurisdiction in particular statutes such as the Bankruptcy Act,[60] Dominion Controverted Elections Act,[61] Exchequer Court Act,[62] National Defence Act,[63] Railway Act[64] and Winding-up Act.[65] It is unnecessary to enter into any discussion of these particular grants of appellate authority. Further, I shall not attempt here any appraisal of the Court's appellate jurisdiction under the Criminal Code[66] but will confine myself to a short elaboration of the new appellate authority conferred by the amended Supreme Court Act.

An appeal as of right under the Supreme Court Act now lies to the Supreme Court from a final judgment, or a judgment granting a nonsuit or directing a new trial, of the highest court of final resort in a province, or a judge thereof, pronounced in proceedings where the amount or value of the matter in contro-

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[55] See *supra*, footnotes 7 and 34.

[56] Supreme Court Act, R.S.C., 1927, c. 35, s. 55. Mention may be made here of s. 56 under which the Court or any two judges thereof may be required, under rules or orders of the Senate or House of Commons, to report on any private bill or petition for such a bill presented to the Senate or House. I do not know whether this section has ever been utilized.

[57] *Ibid.*, s. 57.

[58] Supreme Court Act, R.S.C., 1927, c. 35, ss. 36 to 44, as enacted by 1949 (Can. 2nd sess.), c. 37.

[59] R.S.C., 1927, c. 36, s. 1023, am. 1935, c. 56, s. 16; am. 1947, c. 55, s. 30; s. 1024, am. 1932-33, c. 53, s. 17; am. 1943, c. 23, s. 33; s. 1025, am. 1931, c. 28, s. 15; am. 1935, c. 56, s. 17; am. 1947, c. 55, s. 31; am. 1948, c. 39, s. 42.

[60] 1949 (Can. 2nd sess.), c. 7, ss. 140(3), 151.

[61] R.S.C., 1927, c. 50, s. 63.

[62] R.S.C., 1927, c. 34, s. 82, as enacted by 1949 (Can. 2nd sess.), c. 5, ss. 83 and 84.

[63] 1950 (Can.), c. 43, s. 196.

[64] R.S.C., 1927, c. 170, s. 52.

[65] R.S.C., 1927, c. 213, ss. 105, 108.

[66] See Tremeear's Criminal Code (5th ed.), at pp. 1342 ff. and 1949 supplement at pp. 226 ff.

versy in the appeal exceeds $2,000 or in habeas corpus or mandamus proceedings.[67] There are, however, two qualifications. No appeal as of right lies from a judgment in a criminal cause or in habeas corpus, certiorari or prohibition proceedings arising out of a criminal charge or in habeas corpus proceedings arising out of a claim for extradition under a treaty.[68] Secondly, there is no appeal as of right from discretionary orders unless made in equity proceedings originating elsewhere than in Quebec or in mandamus proceedings. Some of the terms used to delineate the appeal as of right have a long history. Thus, "the highest court of final resort in a province" goes back to the beginnings of the Supreme Court and it has been uniformly interpreted to mean the highest court in the provincial judicial hierarchy and not the highest court in which redress could be had in the particular case or class of case.[69] Again, "criminal cause" and "criminal charge" — excepted as indicated from appeals as of right — have also been long associated with the Supreme Court's jurisdiction and have been consistently interpreted to cover not only what is criminal in the constitutional sense of federal criminal law but also provincial penal law.[70] An appeal as of right also lies from an opinion of a provincial court of highest resort on a reference where by provincial legislation the opinion is deemed a judgment and appealable as such.[71]

A second class of appeals under the Supreme Court Act is the appeal with leave of the highest court of final resort in a province from a final judgment thereof "where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision".[72] This provision for appeal by leave is subject, however, to the same two qualifications already noted in connection with appeals as of right. In result, there has been no material curtailment of the previously existing power of a provincial final court to admit appeals to the Supreme Court.

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[67] R.S.C., 1927, c. 35, s. 36, as enacted by 1949 (Can. 2nd sess.), c. 37, s. 2.

[68] This qualification does not, of course, affect rights of appeal under the Criminal Code or any other statute.

[69] S. 11 of the original Supreme Court Act, 1875 (Can.), c. 11, spoke of the "court of last resort"; for interpretation, see *Danjou* v. *Marquis* (1879), 3 S.C.R. 251. S. 17 of the Act spoke of "highest court of final resort".

[70] See s. 23 of the Act of 1875. For a recent interpretation see *Saumur* v. *Recorder's Court*, [1947] S.C.R. 492.

[71] R.S.C., 1927, c. 35, s. 37, as enacted by 1949 (Can. 2nd sess.), c. 37, s. 2. And cf. footnotes 48 and 49, *supra*.

[72] *Ibid.*, s. 38. Note that s. 39 provides for an appeal *per saltum* on the conditions, *inter alia*, of leave of the provincial court and consent of the parties.

The most important change in the Supreme Court's appellate jurisdiction is in the power which it itself now has to admit an appeal. It may, subject to two qualifications mentioned in a moment, give leave to appeal "from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed . . . , whether or not leave to appeal . . . has been refused by any other court".[73] The two qualifications are: (1) no appeal may be admitted in respect of indictable offences, and in respect of non-indictable offences an appeal may be admitted on a question of law or jurisdiction only (there are, of course, special provisions in the Criminal Code governing appeals in criminal cases); and (2) no appeal may be admitted from discretionary orders unless made in equity proceedings originating elsewhere than in Quebec, or in mandamus proceedings.

It is, of course, entirely proper that the Supreme Court itself should have the widest power to entertain any kind of appeal, regardless of other provisions for appeal. The appeal to the Supreme Court by its leave is also reinforced by a power to allow appeals *in forma pauperis* by leave.[74] It is too early to say how broadly or narrowly the Supreme Court regards its wide powers to hear an appeal. By and large, it is open to the Court to give symmetry and uniformity to Canadian law, regardless of the terms of provincial statutes governing appeals or review in the provincial courts.[75] For the Supreme Court (let it be emphasized again) is not confined to the admission of appeals from final judgments of the highest court in the provincial judicial hierarchy: it is within the Court's power to hear an appeal from any judgment (subject to the qualifications mentioned) of the highest provincial court of final resort in which judgment can be had in the particular case.

Major v. *Beauport*[76] gives one or two indications of the Court's attitude to its newly-conferred powers. The application was for leave to appeal from a summary conviction by a Quebec magistrate for infraction of a municipal by-law prohibiting the distribution of circulars unless under conditions which were here unfulfilled. No appeal lay from the magistrate's decision, but, in view of accused's contention that the by-law and the authorizing pro-

[73] *Ibid.*, s. 41.

[74] R.S.C., 1927, c. 35, s. 104(aa), as enacted by 1949 (Can. 2nd sess.), c. 37, s. 6.

[75] The Supreme Court's rôle in uniformity is discussed by Willis, Securing Uniformity in a Federal System — Canada (1944), 5 U. of Tor. L.J. 352, at pp. 355 *et seq.*

[76] [1951] S.C.R. 60, [1951] 1 D.L.R. 586.

vincial statute were *ultra vires*, prohibition or certiorari could be invoked. Application for leave was sought on the ground that the magistrate's conviction was a final judgment of the highest court of final resort in which judgment could be had in the particular case. The Supreme Court straddled this issue by saying that if it was not such a judgment there was no jurisdiction to give leave; and, if it was, the Supreme Court would nevertheless like to have the opinions of the highest courts of the province and they were obtainable here through use of the prerogative writs. It would appear, then, that in the exercise of its discretion the Supreme Court is likely to insist on exhaustion of any local remedies available to challenge a judgment which is not directly appealable.

The would-be appellant also urged that leave should be given under the Court's power in that behalf where a question of law or of jurisdiction is raised in respect of a conviction for a non-indictable offence. The Court refused to consider this question on the present application save to say that any question of law must be one of law alone and not a mixed question of law and fact. It appears to be fairly clear that the Court will be guided here by its decisions on a comparable right of appeal on a question of law given by the Criminal Code.[77]

The absence of constitutional definition of the Court's powers may well prove to be a benefit to unification of Canadian law even in those matters which are within provincial legislative authority. This is especially relevant for the common law provinces. The Supreme Court, by the very fact of being entitled to hear an appeal from provincial courts, may establish the law to be followed in those courts. It is thus in a stronger position to develop a unified common law than is the Supreme Court of the United States which, constitutional cases aside, accepts state law as determined by state courts, and has also declared that United States federal courts exercising jurisdiction on a diversity of citizenship basis must be guided in applying state law by the decisions of the state courts.[78] Local policy will govern in Canadian law only where there are statutory variations in the laws of the provinces. In other cases, whether in matters of common law or in matters governed by Dominion legislation, it is the Supreme Court's voice that will speak with final authority. This will also be true in con-

[77] The distinction between a question of law alone and a question of mixed law and fact must also be made under Cr. Code, s. 1013(4), giving the Crown a right of appeal from an acquittal on a question of law alone; and see, too, Cr. Code, ss. 1023(2) and 1025(1).

[78] See *Erie R.R.* v. *Tompkins* (1938), 304 U.S. 64, overruling *Swift* v. *Tyson* (1842), 16 Pet. 1; and see Freund, The Supreme Court of the United States (1951), 29 Can. Bar Rev. 1080.

nection with Quebec cases, although the fact that the civil law obtains only in that province may well warrant a greater deference by the Supreme Court to local views.

Appeals with leave invite comment on two points. There is clearly an overlapping in the provisions for appeal with leave of the provincial court of final resort and the provisions for appeal with leave of the Supreme Court. It is arguable that the provincial court, jealous of its own reputation, will be loath to admit that there is an appealable question which should be determined by the Supreme Court. However, if the recent judgment of the Ontario Court of Appeal on an application for leave in *Maynard* v. *Maynard*[79] is indicative, there should be no fear that the provincial courts will be unnecessarily harsh in dealing with applications for leave. Although the refusal of a provincial court to give leave will not be controlling for the Supreme Court, the latter will inevitably have to make some formal concession to the views of a provincial court that its opinion on a disputed matter should not be re-argued. The Supreme Court can hardly give leave *ex debito justitiae* where it has been refused below. If the provincial court takes a narrow view of its power to give leave and appellants find that they have to go to Ottawa for leave, the saving of time and money which is involved in permitting local applications for leave becomes illusory: one might just as well go to Ottawa directly. There is, of course, the opposing consideration that counsel for an appellant may want the two bites of the cherry which the amended Supreme Court Act permits. Whether this will become a matter of playing the provincial court and the Supreme Court against each other is something which the Supreme Court itself will have to settle. It is doubtful whether the Supreme Court can properly lay it down that it will not entertain an application for leave unless an application has been refused by the provincial court: the statute excludes so general a limitation.[80] It may, however, be wise to establish a limitation in defined cases, as where the litigation involves purely local policy. Whatever the position which the Supreme Court takes, the public and the legal profession ought to be informed with as much certitude as is possible in what cases leave will be given and in what cases denied. The Court has already stated in *Major* v. *Beauport* that it views

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[79] [1950] 2 D.L.R. 221. This case did not turn on the new provisions governing appeals having been begun before their enactment, but it was decided after they came into force.

[80] S. 41 as enacted by 1949 (Can. 2nd sess.), c. 37, s. 2, explicitly authorizes the Supreme Court to admit an appeal whether or not leave to appeal has been refused below.

the statutory power to give leave as permissive and hence as a matter of discretion. This, however, is not incompatible with the feasibility of making administrative regulations by which litigants may be warned against wasting the time of the Court on such things as, for example, appeals on the quantum of damages or appeals on findings of fact, whether by a judge or jury.

Some of the foregoing considerations apply equally to applications for leave made to the provincial court of final resort. In *Gill* v. *Ferrari,*[81] the British Columbia Court of Appeal, construing the new provisions for appeal for the first time, refused to give leave in a matter arising under a provincial statute involving the closing of a lane and also an issue of *res judicata.* The three-judge court properly characterized the issue as one of local interest. In so far as it indicates a cautious approach to the granting of leave (in view of the paramount power of the Supreme Court itself to give leave), the judgment gives a sound lead to provincial appellate courts.[82]

The second point I would like to make in connection with appeals by leave relates to the self-organization of the Supreme Court. Under the Supreme Court Act, a quorum consists of any five judges and (save in exceptional cases where four judges are sufficient) they may properly hold the court. From the time that the Court consisted of seven judges, it has been the practice to have a bench of five or seven judges to avoid an equal division. Now that there is a nine-judge Court, presumably the practice will be to have a five or seven or nine judge bench as circumstances or convenience or the desires of the Court or chief justice dictate. It is clear from the Supreme Court Act, as amended, that, although a single judge of the Court may extend the time for obtaining leave to appeal, the granting or refusing of leave

[81] [1951] 1 D.L.R. 647.

[82] Far from sound, however, is part of the opinion of O'Halloran J.A. who purported in the *Gill* case to re-open the question of the legislative power of the Dominion to vest appellate authority in the Supreme Court in "provincial" matters. It is difficult to understand why the learned judge should seek to re-open an issue which has been settled for more than forty years and, in my view, settled properly. True, he does not cite *Crown Grain Co.* v. *Day,* [1908] A.C. 504, but I assume he was aware of it. We can get along without the judicial balkanization of the country which Mr. Justice O'Halloran's misreading of s. 101 of the B. N. A. Act would involve. Now that appeals to the Privy Council are gone, is Mr. Justice O'Halloran trying to find some constitutional protection against the ultimate judicial authority of a federally appointed and constituted Court? Or, is his view in *Gill* v. *Ferrari* merely a projection of a distaste for federal legislative "interference" with the decisions of his court previously evidenced by him in *Rex* v. *Hess* (*No. 2*) (1949), 94 Can. C. C. 57? The decision in *Rex* v. *Hess* purporting to invalidate Cr. Code, s. 1025A (authorizing detention of an accused who had been acquitted on appeal where a further appeal is being taken to the Supreme Court) is, with respect, far-fetched.

itself is a matter for the Court, that is, for a bench of at least five judges. How many judges will now sit on applications for leave? Will it depend on the particular case or will the Court establish a uniform practice of having, say, only a five-judge court? Will the Court require a majority decision before giving leave or will it suffice that two out of five or three out of seven or four out of nine—as the case may be—are in favour of giving leave? Heretofore, so far as appears, a majority of the bench had to be in favour of leave, but since the practice has been for judgment granting or refusing leave to be delivered by one of the judges on behalf of all, it is uncertain what the real situation is. Again, a five-judge court has been usual in applications for leave, but that is easily understood when the Court has hitherto consisted of six and, latterly, seven judges. In *Major* v. *Beauport*, which arose after enlargement of the Court and its jurisdiction, seven judges sat on an application for leave which was disposed of through one spokesman. No deductions can properly be drawn from this single instance.

It is worth while comparing the practice of the nine-judge Supreme Court of the United States in exercising its certiorari jurisdiction—the chief method of review by that Court. It will entertain a case if four justices agree that it should be heard. Moreover, it may be noticed that the application to the Supreme Court of the United States for certiorari is always on written argument.[83] The enormous volume of work which comes to that court makes time very precious.[84] Moreover, save where a judge is disqualified or disqualifies himself in a particular case, the whole bench sits in every case. The practice of having written argument on applications for certiorari is certainly not motivated by any thought of saving expenses; rather it is designed to conserve the time and energy of the Court. It is perhaps understandable that a court should lean far in favour of entertaining an appeal when it makes its decision on written argument. The Canadian Supreme Court may, for a long time yet, be able to enjoy and confer the luxury of oral applications for leave and unlimited time for oral argument on the merits.[85] If pressure of work interferes with adequate time for reflection and study of cases, the Court may well

[83] See Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction (1946), 46 Col. L. Rev. 255. Occasionally, oral argument will be directed on whether certiorari should be granted.

[84] Cf. Freund, The Supreme Court of the United States (1951), 29 Can. Bar Rev. 1080.

[85] *Quaere* whether the Court could properly, of its own motion and without legislative authority, decide to eliminate oral hearings of applications for leave!

consider some such system of processing appeals as obtains in the Supreme Court of the United States.

V. *The Constitutional Doctrine of the Court*

It is beyond the scope of this article to appraise the Supreme Court's decisions, during the seventy-five years of its existence, in the various branches of law which they cover. Something deserves to be said, however, about its work in constitutional interpretation since it is this work, which is beyond simple legislative change, that will hereafter mark the Court as at least a co-ordinate branch of government with the legislature and the executive. A preliminary issue may be posed. Is it worthwhile or useful to review decisions of a court which have hitherto had no conclusive impact on constitutional law? Must not the Supreme Court, in the new rôle which it now enjoys, start off with the Privy Council decisions? I propose to say more about this problem further on in this article. For the moment, it will suffice to say that it is not only the actual Privy Council decisions themselves with which the Supreme Court must reckon: there is also the important inquiry into the attitude which animated the Privy Council in coming to its particular conclusions. It is hardly credible that the Supreme Court will seek to walk in the shadow of the Privy Council, asking itself not only what Privy Council decisions are controlling but striving to reflect the Privy Council's approach to problems of interpretation. Such a final court would be merely a judicial "zombie", without soul or character.

Any estimate of the Supreme Court's constitutional doctrine must be related to the period during which it had not yet felt the authoritative effect of the Privy Council's views. There were, in fact, two such periods. One, ending with the *Local Prohibition* case in 1896,[86] was concerned with fixing the relationship between sections 91 and 92, adjusting the powers conferred on the Dominion to those conferred on the provinces. The second period, ending with the *Board of Commerce* case in 1921[87] (or, perhaps, with the *Snider* case in 1925[88]), involved elaboration of the content of the respective powers in the relationship in which they had previously been fixed. Essentially, this was a matter of weighing, on the federal side, the peace, order and good government clause and the trade and commerce clause against the property and civil rights clause on the provincial side.

[86] *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348.
[87] *In re Board of Commerce Act*, [1922] 1 A.C. 191.
[88] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

The Supreme Court of Canada which decided *Severn* v. *The Queen* in 1878,[89] *Valin* v. *Langlois* in 1879,[90] *Fredericton* v. *The Queen*[91] and *Citizens Insurance Co.* v. *Parsons* in 1880,[92] was composed of judges for whom Confederation was a personal experience with an evident meaning. This was certainly not the case with the Privy Council. The latter could not be expected to display the sensitivity for the British North America Act that is found in the early pronouncements of the Supreme Court. The disagreements among members of the Supreme Court in its early days were on the question whether the provinces could be permitted to enact legislation which might prove obstructive to a prospective federal programme. Those of the judges who would have permitted local legislation had no doubt that federal legislation, if enacted to meet a national problem on a national level, must prevail. The judges who denied provincial power were unwilling to permit local experiments even in the absence of federal legislation. This is a far cry, indeed, from the Privy Council philosophy, which was the antithesis of the Supreme Court's approach, subordinating the central power to local autonomy without regard to the size or quality of problems which were susceptible of uniform treatment through national legislation.

The first judgment of the Supreme Court of Canada on a constitutional point, *Severn* v. *The Queen*, exhibited an appreciation of comparative federal constitutional law in its references to decisions of the Supreme Court of the United States. Of especial interest, for comparative purposes today, is the comment on the commerce power in the United States as reflected in *Gibbons* v. *Ogden*,[93] and the conviction that the Dominion's power under section 91(2) of the B.N.A. Act was much broader. "Our constitution", said Fournier J., "does not acknowledge as in the United States, a division of power as to commerce."[94] Strong J., who dissented in the *Severn* case in favour of sustaining provincial legislation, was equally emphatic: "That the regulation of trade and commerce in the provinces, domestic and internal as well as foreign and external, is by the B.N.A. Act exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit".[95] It remained for the

[89] 2 S.C.R. 70.
[90] 3 S.C.R. 1.
[91] 3 S.C.R. 505.
[92] 4 S.C.R. 215.
[93] (1824), 9 Wheat. 1.
[94] 2 S.C.R. 70, at p. 121.
[95] *Ibid.*, at p. 104. See also Henry J. (at p. 138): "Every constituent of trade and commerce and the subject of indirect taxation is . . . withdrawn from the . . . local legislatures".

Privy Council to give an ironic response. Not only did it deny, in *Bank of Toronto* v. *Lambe*[96] the relevance of American decisions, but it purported, earlier in *Citizens Insurance Co.* v. *Parsons*,[97] to find support for its interpretation of the Dominion's commerce power in the Act of Union of England and Scotland of 1707. It is an easy inference that an Imperial judicial tribunal, dealing with a colonial constitution formally promulgated by Imperial authority, would tend to interpret it in imperial terms. In one of its last independent utterances, a member of the Supreme Court in *In re Prohibitory Liquors Laws* sought to remind the country, and perhaps the Privy Council too, that the B.N.A. Act was a Canadian instrument fashioned by and for Canadians. Said Mr. Justice Sedgewick: "In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act, to interpret it correctly reference may be had to the phraseology and nomenclature of pre-confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment and surroundings of the Canadian people at the time. In the British North America Act it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given."[98] Gwynne J. in the same case also reminded the Privy Council that if any comparative constitutional doctrine was represented in the distribution of legislative power in the B.N.A. Act, it was more properly related to United States experience than to that of Great Britain.

It is a notable feature of the Supreme Court's early decisions that there was no separation of the federal general power under section 91 of the B.N.A. Act from the specific enumerations which illustrated its reach.[99] The latter were given their full effect as qualifying the scope of provincial heads of power. This interpretation had an interesting application — in the light of later Privy

[96] (1887), 12 App. Cas. 575.
[97] (1881), 7 App. Cas. 96.
[98] 24 S.C.R. 170, at p. 231.
[99] As is well known, this was the result reached by the Privy Council in *A.-G. Ont.* v. *A.-G. Can.*, [1896] A. C. 348. Compare, however, the statement by Ritchie C.J. in *Valin* v. *Langlois* (1879), 3 S.C.R. 1, at p. 14: "In determining the question of ultra vires, too little consideration has, I think, been given to the constitution of the Dominion, by which the legislative power of the local assemblies is limited and confined to the subjects specifically assigned to them while all other legislative powers, including what is specifically assigned to the Dominion Parliament, is conferred on that Parliament; differing in this respect entirely from the constitution of the United States of America, under which the state legislatures retained all the powers of legislation which were not expressly taken away".

Council views — in *Severn* v. *The Queen*. Here, a manufacturer of liquor, licensed under Dominion excise legislation, was charged under an Ontario statute with selling liquor by wholesale without a provincial licence. A majority of the Supreme Court invalidated the provincial Act. Two of the six-judge court dissented on the ground that the provincial licensing power — section 92(9) of the B.N.A. Act — should be permitted to operate in relation to sale when the Dominion had confined its licensing control to manufacture. Fournier J., of the majority, answered this argument as follows: "The power to authorize the manufacture of an article must necessarily imply, as does the right to import, the right to sell".[100] The members of the majority were concerned about provincial interference with Dominion revenues. The Privy Council discounted the *Severn* case in *Bank of Toronto* v. *Lambe* and destroyed its effect with finality in *A.-G. Man.* v. *Manitoba License Holders Association*,[101] where it was held (reversing the Manitoba Court of Appeal) that it was no answer to provincial legislation that it interfered with the sources of Dominion revenues. Recently, the Ontario Court of Appeal in *Rex* v. *Pee-Kay Smallwares Ltd.* applied the *Manitoba License Holders* case to a prosecution under an Ontario liquor statute against a company licensed under federal excise legislation.[102]

The Supreme Court felt the impact of Privy Council decisions within a decade after the *Severn* case. Thus, Strong J., who had dissented in the *Severn* case, commented in *Pigeon* v. *Recorder's Court* that the *Severn* case had turned on the subordination of the provincial power under section 92(9) to the federal trade and commerce power. And, he asserted further, that "even as regards this construction of the 9th subsection [of s. 92], if the decision in *Severn* v. *The Queen* has not been overruled observations not in accordance with it are certainly to be found in later decisions of the Privy Council".[103] These "later decisions" included, of course, *Bank of Toronto* v. *Lambe* as well as the *Parsons* case and *Hodge* v. *The Queen*.[104] Shortly after the *Lambe* case, the Supreme Court was compelled, as a matter of *stare decisis*, to swallow the views which it had promulgated in *Severn* v. *The Queen*. In *Molson* v. *Lambe*, which raised an issue similar to that in the *Severn* case, the Court was able to base its decision on a procedural point connected with the writ of prohibition, but Ritchie C.J. added a con-

[100] 2 S.C.R. 70, at p. 130.
[101] [1902] A.C. 73.
[102] [1947] O.R. 1019.
[103] (1890), 17 S.C.R. 495, at p. 505.
[104] (1883), 9 App. Cas. 117.

stitutional pronouncement: "In view of the cases determined by the Privy Council since the case of *Severn* v. *The Queen* was decided by this Court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licences for the sale of intoxicating liquors by wholesale and retail belong to the local legislature, we are bound to hold that the Quebec License Act of 1878 and its amendments are valid and constitutional".[105] Only Gwynne J. struggled to hold the authority of the *Severn* case by distinguishing the legislation there involved as compared with that in the *Molson* case.

Any discussion of constitutional power in relation to liquor legislation would not be complete without mention of *Fredericton* v. *The Queen* and *In re Liquor License Act, 1883*, the McCarthy Act case. In the *Fredericton* case, the Supreme Court, unlike the Privy Council in the later *Russell* case, sustained the Canada Temperance Act of 1878 under the trade and commerce power. "The right to regulate trade and commerce", said Ritchie C.J., "is not to be overridden by any local legislation in reference to any subject over which power is given to the local legislature".[106] The reasoning of the Supreme Court and its attitude towards the trade and commerce power is in marked contrast to the views expounded by the Privy Council in cases like the *Board of Commerce* and *Snider* decisions. While the Privy Council sought in the *P.A.T.A.* case[107] to redeem section 91(2) from the subordinate (and ancillary) function assigned to it previously, the redemption has had no effect by way of adding anything to the strength of section 91(2) as a source of Dominion legislation.[108] The *Fredericton* case met head on the argument that section 91(2) could not support a prohibitory enactment. "The power to prohibit is within the power to regulate", said Ritchie C.J.[109] "A prohibition is a regulation" said Taschereau J.[110] The Judicial Committee rejected this view of section 91(2) in the *Local Prohibition* case, founding its opinion on a municipal by-law case, *Toronto* v. *Virgo*.[111] Equating a federal constitution with a municipal by-law is one of the Privy Council's more serious lapses. Besides being at odds with common sense, it is in conflict with the Privy Council's own assertion

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[105] (1888), 15 S.C.R. 253, at p. 259. Fournier J. came to the same conclusion on the basis of the Supreme Court's views in *In re Dominion Liquor Licence Act, 1883*, Cassel's Dig. S. C. Decisions 279.

[106] 3 S.C.R 505, at pp. 540-1.

[107] [1931] A.C. 310.

[108] Cf. the marketing reference, *A.-G. B.C.*, v. *A.-G. Can.*, [1937] A.C. 377.

[109] 3 S.C.R. 505, at p. 537.

[110] *Ibid.*, at p. 559.

[111] [1896] A.C. 98.

in *Hodge* v. *The Queen* that the provincial legislatures — and, it follows, the Dominion Parliament — are not delegates. A municipal corporation undoubtedly is. Nonetheless, the attenuated meaning so given to section 91(2) by the *Local Prohibition* case has prevailed ever since. There was a suggestion of disapproval by the Supreme Court in *Gold Seal Ltd.* v. *Dominion Express Co.*[112] but it was only recently in the *Margarine* reference that Rinfret C.J.C., in a dissenting judgment, flatly refused to accept the proposition that the power to prohibit is excluded from a power to regulate.[113]

The *McCarthy Act* case represented an overreaching of power by Parliament in the eyes of a court which had sustained federal prohibitory legislation and thrown out provincial regulatory (licensing) legislation. The change of opinion — if there was one — was in line with the Privy Council's judgment in *Hodge* v. *The Queen*. The McCarthy Act — the Dominion Liquor License Act — was enacted in May 1883 and proclaimed to come into force on January 1st, 1884. Its preamble indicated an attempt at conformity to the views of the Judicial Committee in *Russell* v. *The Queen* in 1882. Thus, there was a reference to the desirability of regulating traffic in the sale of intoxicating liquor and an assertion of the expediency of having a uniform law throughout Canada and for the better preservation of peace and order. At the close of 1883, the Judicial Committee gave its judgment in the *Hodge* case sustaining a provincial licensing enactment and enunciating the aspect doctrine. This opinion, added to the earlier Privy Council judgment in the *Parsons* case, established a rather formidable bar to any federal regulatory (as opposed to prohibitory) legislation dealing with local sales of intoxicating liquor. The federal Act of 1883 was an enactment of that character. It provided for the establishment of municipal boards of commissioners to which licensing authority was granted. There was no provision for centralized administration which, had it been provided, might have suggested a national rather than a local aspect to the problem. In the circumstances, the Supreme Court's decision invalidating the Act on a reference in 1885 was hardly a major shift of opinion.[114]

The constitutional story of Dominion-provincial liquor enactments ended, so far as the Supreme Court was concerned, in the *Local Prohibition* case which came before the Court in 1894 as a

[112] (1921), 62 S.C.R. 424.
[113] [1949] S.C.R. 1.
[114] (1885) Cassel's Dig. S.C. Decisions 279, aff'd by Privy Council without written reasons.

reference entitled *In re Prohibitory Liquor Laws.*[115] The case is notable for the split of opinion on the Court notwithstanding the compulsion of Privy Council decisions which for a decade up to 1894 had moved decisively towards a greater recognition of provincial legislative authority. The reference concerned *inter alia* the validity of Ontario liquor legislation which was then before the Supreme Court in the case of *Huson* v. *Norwich.*[116] The legislation empowered municipalities, in the circumstances there set out, to pass prohibitory by-laws respecting the retail sale of liquor. Because of the reference, the Court in *Huson* v. *Norwich* reserved judgment until after argument was heard in the reference. A majority of the Court in the *Huson* case (Strong C.J. and Fournier and Taschereau JJ.) held that the provincial enactment was valid; Gwynne and Sedgewick JJ. dissented. The hearing on the reference was before a court differently constituted: King J. replaced Taschereau J. and he sided with Gwynne and Sedgewick JJ. The result was that a majority on the reference held invalid the same enactment which the Court differently constituted had sustained in *Huson* v. *Norwich.* It is well known that the Judicial Committee on appeal in the reference reversed the Supreme Court.[117] It is instructive, however, to compare the views of the majority and minority of the Supreme Court in the *Huson* case and in the reference. There was no disagreement on the paramount power of the Dominion: the difference in their views was simply on the question whether there was any room for provincial legislation even in the absence of conflicting Dominion legislation. The majority in the *Huson* case was careful to point out that the provincial Act was restricted to retail sales. They were still of opinion that such matters as importation and manufacture belonged exclusively to the Dominion under its trade and commerce power. The reasons given by the Privy Council for its answers in the reference were not only at variance with the majority view of the Supreme Court in that case but were equally at variance with the majority views in the *Huson* case.

The Privy Council in the *Local Prohibition* reference placed the provincial "property and civil rights" power on a solid footing as against the uncertain future presaged for the federal general power and the federal commerce power. The problem was one which the Supreme Court had faced earlier in *Valin* v. *Langlois,* where the potentialities of "property and civil rights in the pro-

[115] 24 S.C.R. 170.
[116] 24 S.C.R. 145.
[117] [1896] A.C. 348 (the *Local Prohibition* case.)

vince" were discussed with the realization that it could not be given full rein in the face of the terms of section 91 of the B.N.A. Act.[118] The collocation argument against the federal commerce power used by the Privy Council in the *Parsons* case was turned against the property and civil rights power by Sedgewick J. in the *Local Prohibition* reference.[119] He ventured to suggest that material considerations affecting the interpretation of the B.N.A. Act were not presented to the Privy Council in the *Parsons* case. Far from the "property and civil rights" power controlling the federal commerce power, the reverse was true. This was almost the last time that the federal commerce power got such respectful treatment. Less than twenty years later, another Supreme Court judge, in sympathy with the position taken by Sedgewick J., could only remark that "The Judicial Committee has never yet expressly assigned to this power over trade and commerce any Dominion legislation which has come before it".[120] In 1920 a less sympathetic judge of the Supreme Court dismissed the federal commerce power as "the old forlorn hope, so many times tried unsuccessfully upon this court and the court above".[121]

The *Local Prohibition* case, as decided by the Privy Council, was not merely a decisive case on legislative power in respect of liquor control. It also fixed the relation of the component clauses of section 91 to those in section 92 in such a manner as to make the latter the stable point of reference. The result, as has so many times been pointed out, was that only the enumerated powers in section 91 were withdrawn from provincial legislative authority; and the general power of the Dominion became a purely secondary ("supplementary" in the Privy Council's words) source of authority to be invoked in cases falling neither within the enumerations of section 92 nor within those of section 91. It has so remained to this day.[122] A noteworthy feature of the legislative scheme so

[118] 3 S.C.R. 1. Thus, for example, Ritchie C.J. said (at p. 15): ". . . The terms 'property and civil rights' must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, of which the first two items in the enumeration [in section 91] are illustrations, viz., 1. the public debt and property; 2. the regulation of trade and commerce". And Henry J. remarked (at p. 67): "The right of the local legislatures to legislate as to civil rights . . . is subordinated to those civil rights not affected by Dominion powers of legislation and to those *in the province*, and not including matters of a *general* character".

[119] 24 S.C.R. 170, at p. 238.

[120] *In re Canadian Insurance Act, 1910* (1913), 48 S.C.R. 260, at p. 270, *per* Davies J.

[121] *In re Board of Commerce Act* (1920), 60 S.C.R. 456, at p. 488, *per* Idington J.

[122] The promise of a revitalization of the general power, held out in *A.-G. Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193, was abruptly dismissed in the margarine reference appeal, [1950] 4 D.L.R. 689.

worked out by the Judicial Committee was that its elaboration occurred in a series of cases concerned with the validity of provincial rather than Dominion legislation.

In the second phase of constitutional interpretation referred to — giving content to the various heads of power — the Supreme Court played a less independent rôle. This was, of course, understandable because the cases up to and including the *Local Prohibition* case had decided particular issues of legislative power besides establishing general principles of interpretation. The particular issues of legislative power were connected with particular legislation. Hence, where the same legislative subject matter came before the Supreme Court it would be difficult to escape a conclusion, on legislative power, similar to that previously reached by the Privy Council. An apt illustration is provided by *In re Sections 4 and 70 of the Canadian Insurance Act, 1910*, better known, after being appealed to the Privy Council, as the *Insurance Reference* case.[123] The Supreme Court was faced with an application of the Judicial Committee's views on insurance legislation in the *Parsons* case. Those views were formulated in a case involving the validity of provincial legislation which merely prescribed standard conditions in fire insurance contracts. The Dominion Act of 1910, now before the Court, was a general licensing statute. Must it fall under the decision in the *Parsons* case or was it legislation in a different aspect? In other words, could the Dominion legislation be supported by the federal trade and commerce power or the federal general power?

The *Parsons* case had gone to the Privy Council from the Supreme Court, where a majority upheld the validity of the Ontario statute which was in question. The grounds for so holding provide an interesting contrast to the fate of the case in the Privy Council and to the subsequent course of Privy Council rulings on insurance legislation.

Nothing in the *Parsons* case called for a pronouncement on the limits of federal authority in relation to insurance. The legislation dealt only with statutory conditions. There was no inconsistent Dominion legislation. In such circumstances, it seemed harsh to deny to a province power to fix the terms of a contract of indemnity respecting property in the province where the contract was made. Yet that is what a minority of the Supreme Court would have done. Thus Taschereau J., dissenting, said:[124]

> Insurance business is a trade, and to the federal authority belongs the

[123] 48 S.C.R. 260, aff'd [1916] 1 A.C. 588.
[124] 4 S.C.R. 215, at p. 316.

> exclusive power of regulation of that trade in each and every province in the Dominion. . . . This power to regulate excludes necessarily the action of all others that would perform the same operation on the same thing. . . . One of the great benefits of confederation would be lost if the rules on trade and commerce were not uniform all through the Dominion.

And Gwynne J., dissenting, spoke in more portentous terms:[125]

> The logical result of a contrary decision [that is, a decision sustaining the provincial Act] would afford just grounds to despair of the stability of the Dominion.

The majority view was grounded on a strict view of the provincial Act. Said Chief Justice Ritchie:[126]

> I do not understand that by the Act now assailed any supreme legislative power to regulate and control the business of insurance in Ontario is claimed. . . . In my opinion this Act has no reference to trade and commerce in the sense in which these words are used in the B.N.A. Act.

And almost as if to answer the forebodings of Gwynne J., the Chief Justice remarked:[127]

> I am happy to say I can foresee and I fear no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision recognizes and sustains the legislative control of the Dominion Parliament over all matters confided to its legislative jurisdiction, it at the same time preserves to the local legislatures those rights and powers conferred on them by the B.N.A. Act and which a contrary decision would in my opinion in effect substantially or to a very large extent sweep away.

In the *Insurance Reference* case there is little resemblance in the Supreme Court judgments to the views propounded by predecessor members of the Court in the *Parsons* case. A majority of the Court declared that the Dominion Act of 1910 was invalid for reasons expressed in Privy Council decisions, and especially for reasons given by that tribunal in the *Parsons* case. Only Fitzpatrick C.J., who dissented, placed the *Parsons* case in the same frame of reference as had the Supreme Court when it decided the case in 1880:[128]

> In short it may be safely stated that the whole report of the *Parsons* case shews that it was assumed by both sides it was within the power of the Parliament of Canada to grant licences.

Of the majority judgments in the Supreme Court, that of Mr. Justice Duff requires particular notice for several reasons. In the first place, the learned justice was just nicely settled in his long

[125] *Ibid.*, at p. 347.
[126] *Ibid.*, at p. 244.
[127] *Ibid.*, at p. 248.
[128] 48 S.C.R. 260, at p. 264.

tenure of office and in a career which was to be the most distinguished of any Supreme Court member. Secondly, the *Insurance Reference* case was the first of several occasions on which he propounded ideas which the Privy Council later took up. Thirdly, the case gave a clue to his constitutional philosophy as expressed through the succeeding thirty years, although it appears that his premises were dictated to him by prior Privy Council judgments. Fourthly, Mr. Justice Duff became the rationalizing agent of Privy Council pronouncements in the two areas which counted most, namely, the scope of the general power and the scope of the trade and commerce power.

Mr. Justice Duff rejected the attempt to support the Insurance Act under the federal general power because, save for its territorial operation, it could be enacted by any province. It is interesting to find that this idea made its appearance about twelve years later in Lord Haldane's judgment in the *Snider* case striking down the federal Industrial Disputes Investigation Act. "I do not think", said Duff J., "that the fact that the business of insurance has grown to great proportions affects the question in the least".[129] Here we have a position to which the learned justice returned when he invalidated the Canada Grain Act, 1912, in *The King* v. *Eastern Terminal Elevator Co.*[130] Equally did he reject the attempt to support the Insurance Act as in relation to the regulation of trade and commerce. According to him, this power "does not embrace the regulation of occupations as such", and "the various kinds of business which are comprehended under the term 'insurance' as used in the Act [of 1910] can [not] be said to be part of the trade and commerce of the country".[131] "Property and civil rights" carried the day here as it did in the notable judgment delivered by Chief Justice Duff, as he then was, almost a quarter century later in *Reference re Natural Products Marketing Act.*[132]

As instructive as the *Insurance Reference* case on the Supreme Court's narrowed rôle in constitutional interpretation is *In re Board of Commerce Act* in which the Supreme Court split equally on the validity of federal anti-profiteering legislation designed to cope with a post-war economy.[133] The *Board of Commerce* case, dealing as it did with general legislation respecting the price of

[129] *Ibid.*, at p. 304.
[130] [1925] S.C.R. 434.
[131] 48 S.C.R. 260, at p. 302. See, however, another view of the "trade and commerce" power taken by Duff C.J. in *Reference re Alberta Statutes*, [1938] S C.R. 100.
[132] [1936] S.C.R. 398.
[133] (1920), 60 S.C.R. 456.

necessities, as contrasted with the particular legislation involved in the *Insurance Reference* case, provided an excellent opportunity for assessing the attitude of the Supreme Court judges on the content of the federal general power and the commerce power. It was to be expected that Mr. Justice Davies, now Chief Justice, who had dissented in the *Insurance Reference* case, would support the general legislation in the *Board of Commerce* case. Anglin J., who had been with the majority in the earlier case, was won to the support of the federal legislation because of its generality and importance. Not only did he depart in some measure from his views of the "trade and commerce" power in the *Insurance Reference* case but he sought to give some elasticity to the general power by recognizing its appropriateness whenever an economic problem outgrew provincial proportions. He remained faithful to this view, as is evident in his dissent in *The King* v. *Eastern Terminal Elevator Co.*[134] In this he opposed Duff J.

The latter adhered to his "civil rights" view of the "trade and commerce" power as expressed in the *Insurance Reference* case. There was no difference so far as legislative power was concerned between regulating the contracts of a particular occupation, namely, insurance, and regulating the contracts (through price control) of a variety of traders dealing in various commodities. Could the Board of Commerce legislation rest on the federal general power? Said Mr. Justice Duff:[135]

> There is no case of which I am aware in which a Dominion statute not referable to one of the classes of legislation included in the enumerated heads of sec. 91 and being of such a character that from a provincial point of view it should be considered legislation dealing with 'property and civil rights' has been held competent to the Dominion under the introductory clause.

This view prevailed in the Privy Council and it represents a theme which ran through Lord Haldane's judgments in a number of Privy Council cases. It was a view which rejected social and economic considerations, and which led to the war emergency conception of the general power as finally worked out in the *Fort Frances*[136] and *Snider*[137] cases. In the latter of these cases Lord Haldane purported to destroy once and for all the standing of *Russell* v. *The Queen*. The way for doing this was paved by Duff J. in his strictures on the *Russell* case in *In re Board of Commerce Act*. It was perhaps only proper that Chief Justice

[134] [1925] S.C.R. 434, at p. 439.
[135] 60 S.C.R. 456, at p. 508.
[136] *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press*, [1923] A.C. 695.
[137] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

Duff's summation of the general power in *Reference re Natural Products Marketing Act* should be accepted as definitive by the Privy Council.[138]

Although by the turn of the century the Supreme Court was clearly a court subordinate to a higher authority, there was still the occasional opportunity for independent evaluation of the limits of various heads of power.[139] The Court as a whole appeared loath to strike out in new directions except where the Judicial Committee itself had given a lead. Differences of opinion among Supreme Court justices rarely reached the delicate stage of dependence on the vote of one justice for a decision, as was and is so often the case in the United States. As Privy Council decisions multiplied, the Supreme Court became engrossed in merely expounding the authoritative pronouncements of its superior. The task of the Supreme Court was not to interpret the constitution but rather to interpret what the Privy Council said the constitution meant. Here and there it might influence the Privy Council, but the direction and initiative in constitutional interpretation belonged to the Privy Council alone. With the abolition of Privy Council appeals, the Supreme Court must now discharge a duty which it assumed, if at all, only for the first decade or so of its existence.

VI. *The Supreme Court and Stare Decisis*

Abolition of Privy Council appeals makes it possible for the first time to contemplate deviation of Canadian law from English law in all its branches. The Colonial Laws Validity Act, 1865, verified the right to differ in and by legislation even before Confederation unless English legislation was made applicable expressly or by necessary intendment;[140] and this qualification of complete legislative independence has since been removed by the Statute of Westminster.[141] The authorized abolition of appeals to the Privy Council, first in criminal cases,[142] and later in all causes and in all matters,[143] and whether from judgments of provincial courts or from Supreme Court judgments, will now force a decision on deviation from English judicial decisions as well.

[138] In the *Labour Conventions* case, *A.-G. Can.* v. *A.-G. Ont.*, [1937] A.C. 326.

[139] A conspicuous example was *Reference re Privy Council Appeals*, [1940] S.C.R. 49.

[140] 1865 (Imp.), c. 63.

[141] 1931 (Imp.), c. 4.

[142] Cr. Code, s. 1024(4), as enacted by 1933 (Can.) c. 53, s. 17; and see *British Coal Corp.* v. *The King*, [1935] A.C. 500.

[143] *Supra*, footnotes 3 and 5.

Three generalized propositions may serve to highlight the problems which abolition of appeals raises relative to the continuing authority of Privy Council decisions and of English law generally. First, the Privy Council is not formally bound by its previous decisions.[144] Secondly, the Supreme Court of Canada is formally bound by its previous decisions.[145] Thirdly, the Privy Council is bound on matters of English common law by the House of Lords which is itself committed to *stare decisis*.[146] What significance do these propositions have now that the Supreme Court is an ultimate appellate court?

A distinction must first be made between constitutional and non-constitutional litigation because only in the former did Privy Council decisions stand above challenge by any other judicial authority. In this field, however, the Privy Council adhered in practice to past decisions notwithstanding its theoretical freedom to change its mind. The Judicial Committee has never overruled any of its constitutional decisions although it has distinguished and explained a number of them, mainly in order to preserve consistency of interpretation.[147] In so doing it has pursued a concept of constitutional certainty from which it was not to be diverted by the profound social and economic changes that have taken place since its assumptions about Canadian federalism first took form in the late 19th century. In one of its last Canadian appeals, the *Margarine* case,[148] it gratuitously shut the door on the possibility of re-examining the federal general power, a possibility held out by the *Canada Temperance Federation* case.[149] It was, however, in the latter case that the Judicial Committee asserted that "on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects".[150] The formal reasonableness of such a policy cannot hide the rigidity which it has produced and which has forced the Dominion and provinces into a search for make-shift expedients to escape its consequences.[151] It is, of course, well known that in

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[144] See *Tooth* v. *Power*, [1891] A.C. 284, at p. 292.
[145] *Stuart* v. *Bank of Montreal* (1909), 41 S.C.R. 516.
[146] *Robins* v. *National Trust Co.*, [1927] A.C. 515; *London Street Tramways Co.* v. *London County Council*, [1898] A.C. 375.
[147] Cf. *P. A. T. A.* case, [1931] A.C. 310, at p. 326; *A.-G. Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193.
[148] *Canadian Federation of Agriculture* v. *A.-G. Que.*, [1950] 4 D.L.R. 689.
[149] [1946] A.C. 193.
[150] *Ibid.*, at p. 206.
[151] See Gouin and Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces (Appendix 8 to Report of Royal Commission on Dominion-Provincial Relations, 1940).

the case of the Canadian Constitution the Privy Council has never recognized the temporary validity of its interpretations, founded, as they were, on impermanent social and economic considerations which it rarely articulated. Yet in a recent Australian constitutional appeal, the Judicial Committee made this revealing assertion:[152]

> The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law, for where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the court that can decide the issue: It is vain to invoke the voice of Parliament.

This is equally true about problems of legislative authority under the B.N.A. Act even though the Privy Council has never expressly said so. Instead, it has sought to apply a legal logic, itself predicated on an accepted social pattern, and has continued to push that logic while seemingly disregarding the fact that its social underpinning has disappeared.

In non-constitutional cases, the Privy Council in *Robins* v. *National Trust Co.* deliberately subordinated itself to the House of Lords.[153] Although there was no necessary relation between the two bodies — one being essentially a court for the Dominions and colonies and the other a court for Great Britain — the British statutes governing the composition of the Privy Council and House of Lords made it practically impossible for a group of men in business suits to ignore their own decisions when dressed in gowns and wigs.[154] Now that appeals to the Privy Council from Canadian courts are abolished, what is the position of House of Lords' decisions? Were they binding on Canadian courts only through the connection of the Privy Council or did they have a force independent of that tribunal? Since the House of Lords, as such, was not part of the Canadian judicial hierarchy, its authority could be binding in Canada only through the link of the Privy Council or the dictate of a competent legislative authority. The link is now gone and the Parliament of Canada, the competent legislative authority, has directed that final appellate authority should reside in the Supreme Court of Canada.

It might be urged that a caveat should be entered because in *Stuart* v. *Bank of Montreal* in 1909, Anglin J., after speaking of the authority of Privy Council decisions, stated that "a decision

[152] *Commonwealth of Australia* v. *Bank of N. S. W.*, [1950] A.C. 235, at p. 310.

[153] See *supra*, footnote 146.

[154] See Appellate Jurisdiction Act, 1876 (Imp.), c. 59, s. 6; and see amendment of 1887 (Imp.), c. 70, and of 1913 (Imp.), c. 21.

of the House of Lords should likewise be respected and followed though inconsistent with a previous judgment of this court".[155] We are not told why, but it may be for the reasons just given after the reference to *Robins* v. *National Trust Co.*, or because of the inferior status of Canada in 1909 (an inferiority attaching to its courts as well) or simply because the Supreme Court felt that the House of Lords possessed a superior wisdom as the highest court in the mother-land of the common law. None of these reasons has any present-day validity. The Supreme Court is now by statute a final appellate court and this involves a responsibility which it alone must discharge. If it chooses to find help or inspiration in House of Lords decisions, it is open to it to turn to these decisions as it might turn for the same reasons to decisions of final courts in other common law or civil law countries.

Stuart v. *Bank of Montreal* is the case — the only case so far — where the Supreme Court reviewed and announced its attitude to *stare decisis* in respect of its own decisions. There had been dicta in earlier cases where judges of the Court asserted a freedom to reconsider views previously held.[156] But in *Stuart* v. *Bank of Montreal* it was categorically asserted that the Supreme Court is bound by its previous decisions save, as both Duff and Anglin JJ. declared, in very exceptional circumstances. Both judges considered the matter by analogizing the then intermediate position of the Supreme Court to that of the English Court of Appeal; and the latter's current line of decision on the matter was that it was bound by its previous decisions. Duff J. added, however, that "quite apart from this, there are . . . considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decisions of this court".[157] Several comments are in order. The Supreme Court could not have been expected to list the exceptional circumstances which would justify a departure from previous decisions where such decisions were deliberately made and were not the result of some slip or inadvertence. It was enough to leave open the door to a possible reversal of opinion. One can guess that the considerations of public convenience which Duff J. had in mind were the certainty and predictability of judicial decision and the reliance on them by the citizenry in their transactions and relationships. The "will of the wisp" nature of these considerations, even in the narrow range where *stare decisis* operates, when it operates at all,

[155] (1909), 41 S.C.R. 516, at p. 548.
[156] See the cases cited by Anglin J. in the *Stuart* case, 41 S.C.R. 516, at pp. 541-2.
[157] (1909), 41 S.C.R. 516, at p. 535.

has been well analyzed by others and need not be re-stated here.[158] And, finally, it is only right to point out that the analogy to the English Court of Appeal, even if still apt, would apply only to civil cases, since the English Court of Criminal Appeal has decided that it is not bound by its own decisions.[159]

The cardinal point today is, of course, that the Supreme Court is no longer an intermediate appellate court. Having regard to its present status, there are three ways in which its relation to *stare decisis* can be approached. First, the Supreme Court has succeeded to the position formerly occupied by the Privy Council and, like the latter, is not bound by its previous decisions. This view is quite artificial because it ignores the substantial reason why the Privy Council could not formally admit the application of *stare decisis*.[160] Secondly, the Supreme Court is now an ultimate court for Canada in the same sense as is the House of Lords for Great Britain, and hence like the latter it should continue to be bound by its own decisions. The analogy is imperfect because the House of Lords can afford the luxury of *stare decisis* knowing that Parliament can always supply the correctives for anachronistic rules when moved to do so. In constitutional matters at least, neither the Dominion nor the provinces can overcome ultimate decisions on the distribution of legislative power. Unless the ultimate court is prepared to reconsider outmoded views, we are left only with what has aptly been called "the heroic process of constitutional amendment".[161] The third approach is to adopt a simple rule of adult behaviour and to recognize that law must pay tribute to life; and that in constitutional litigation, especially, *stare decisis* cannot be accepted as an inflexible rule of conduct. It is hardly to the point to say that the House of Lords has proved that strict adherence to *stare decisis* can be a workable rule for an ultimate court.[162] The problems of a unitary state do not bear comparison with those of a federal system. An ultimate court under such a system must take its *stare decisis* diluted so as to be free, as the

[158] See Paton and Sawer, Ratio Decidendi and Obiter Dictum in Appellate Courts (1947), 63 L. Q. Rev. 461; Von Moschzisker, Stare Decisis in Courts of Last Resort (1924), 37 Harv. L. Rev. 409.

[159] *Rex* v. *Taylor*, [1950] 2 All E. R. 170.

[160] The theory of the Privy Council as a body, not strictly a court, to advise His Majesty who must not be subjected to conflicting advice is today (and has been for long) just too romantic. The Privy Council itself no longer believes in this myth: see *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348, at p. 370; *British Coal Corp.* v. *The King*, [1935] A.C. 500, at p. 511.

[161] Freund, On Understanding the Supreme Court, at p. 72.

[162] The House of Lords has been very circumspect in its obedience to its previous decisions. Even such notable decisions as *Donoghue* v. *Stevenson*, [1932] A.C. 562, do not, strictly speaking, represent a departure from previous views. Of course, comparatively few cases go to the House of Lords.

occasion warrants, to modify particular views. This has been the case in Australia where the High Court holds to the formal rule that it will follow its own decisions except where manifestly wrong.[163] The Supreme Court of the United States, on the other hand, has refused to accord to *stare decisis* anything more than a limited application in constitutional cases, taking the position that here (notwithstanding that there is a procedure for constitutional amendment) legislative correction is practically impossible. "The Court", said the late Mr. Justice Brandeis, "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function".[164] In non-constitutional cases, too, changes of opinion may well be warranted by the lessons of experience and the force of better reasoning. Despite the possibility of legislative correction, it may be difficult to achieve in a day and age when the trend is to legislate a general policy and not to bother with the minutiae of private relationships. Not only the pressure of time and events but good sense dictates that in the area of so-called private law the legislature should expect the Supreme Court to discharge a creative rôle of law-making through constant re-examination of previously accepted doctrine. It will suffice to refer to a recent judgment of Mr. Justice Jackson retreating from a position which he took when he was Attorney-General; he said, in *McGrath* v. *Kristensen*:[165]

> Precedent, however, is not lacking for ways by which a Judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, License Cases, 5 How. 504, recanting views he had pressed upon the Court as Attorney-General of Maryland in *Brown* v. *State of Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' *Andrew* v. *Styrap*, 26 L.T.R. (N.S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no ground for its being adopted by this Court . . .' *U.S.* v. *Gooding*, 12 Wheat. 460, 478. If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.

Since, in my submission, the Supreme Court is now free to

[163] See *Rex* v. *Commonwealth Court of Conciliation & Arbitration and Australian Tramways Employees' Association* (1914), 18 C.L.R. 54; and cf. Stone, A Government of Laws and Yet of Men, Being a Survey of Half a Century of the Australian Commerce Power (1950), 25 N.Y.U.L.Q. Rev. 451, at pp. 455 ff.

[164] *Burnet* v. *Coronado Oil & Gas Co.* (1932), 285 U.S. 393, at pp. 405 ff. See also *St. Joseph Stock Yards Co.* v. *U.S.* (1936), 298 U.S. 38, at p. 94.

[165] (1950), 71 Sup. Ct. 224, at p. 233.

adopt its own canons of judicial behaviour, the question arises as to how it will deal with the accumulated body of Privy Council and House of Lords doctrine. Even if it should choose to pay homage to *Stuart* v. *Bank of Montreal*, what are Supreme Court decisions within the meaning of the rule in that case? Sensibly, it could hardly be said that decisions of the Supreme Court which were reversed are now automatically restored because of *stare decisis*. Further, since neither the Privy Council nor the House of Lords can dictate to the Supreme Court for the future, is the Court none the less going to hold itself bound by the decisions of those tribunals given in the past? At the best or worst, it can treat these decisions as its own, and we are thus back to our starting point, namely, whether the Supreme Court will continue to subscribe to *stare decisis* in respect of its own decisions.[166] There is also the subsidiary question of how ready it will be to break a three-fourths century habit of obedience and uncritical deference to English decisions, regardless of the removal of compulsion to that end.

It is worth remembering that for a final court consistency in decisions is merely a convenience and not a necessity. No one expects the Supreme Court to break out in a rash of reversals of previous holdings, even if it should formally dissociate itself from *stare decisis*. In my view, such a dissociation, whether formally expressed or not, is imperative if the Court is to develop a personality of its own. It has for too long been a captive court so that it is difficult, indeed, to ascribe any body of doctrine to it which is distinctively its own, save, perhaps, in the field of criminal law.

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[166] The recent judgment of the Supreme Court in *Woods Manufacturing Co. Ltd.* v. *The King*, [1951] 2 D.L.R. 465, supports the suggestion that the Supreme Court will regard Privy Council decisions as governing decisions although subject to such interpretation or exposition as the Supreme Court may choose to give them. The case involved issues of valuation in expropriation proceedings and the seven-judge Supreme Court, speaking through Rinfret C.J.C., declared that the Exchequer Court had failed to apply the relevant law as declared by Privy Council decisions and followed by the Supreme Court. Rinfret C.J.C. concluded his judgment as follows: "It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it is undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee." It may be noted that since this case was commenced before the abolition of appeals, the Privy Council was still competent to entertain a further appeal.

What is required is the same free range of inquiry which animated the Court in the early days of its existence, especially in constitutional cases where it took its inspiration from Canadian sources. Empiricism not dogmatism, imagination rather than literalness, are the qualities through which the judges can give their Court the stamp of personality. In *Boucher* v. *The King*,[167] a recent case on sedition, the Supreme Court conceded the inconclusiveness of its reasoning after a first hearing by granting a rehearing; and Mr. Justice Kerwin gave a welcome illustration of open-mindedness by modifying his conclusion about the case. In the result, an acquittal was directed rather than a new trial. Only the Court can tell us, by its conduct in the cases that lie ahead, whether this signalizes the spirit of its new status.[168]

[167] (1950), 96 Can. C. C. 48; on rehearing, (1951), 99 Can. C. C. 1.

[168] Since the enactment by the Dominion of the statute abolishing Privy Council appeals, the Supreme Court has delivered judgment in at least two cases where new principles could be expounded. One of these, the *Boucher* case, has been referred to in the text. The judgment of the majority (and of the minority, too, on some points) was clearly a desirable advance and a modernization of the law of sedition: see Brewin, Comment (1951), 29 Can. Bar Rev. 193. The second case, *A.-G. N.S.* v. *A.-G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369, involved the constitutional point of inter-delegation between Dominion and provinces. The Court held that this was not permissible. The policy of this decision appears to me to be perfectly understandable and I cannot share the views of those (*e.g.*, Comments (1951), 29 Can. Bar Rev. 79 and 93) who see it as a symptom of a static Supreme Court. *Reference re Validity of Wartime Leasehold Regulations*, [1950] S.C.R. 124, is not worth mentioning with the two cases aforesaid because it represents nothing new and is in a well-established tradition. If the Supreme Court had invalidated the leasehold regulations, there would have been occasion to bring out the sack-cloth and ashes.

This article was written for publication in the summer of 1951. A number of cases reported since then have some bearing on the views and discussions in the article. *Johannesson* v. *West St. Paul*, [1951] 4 D.L.R. 609, is an important judgment by the Supreme Court of Canada which may well lead to a reinvigoration of the federal general power. *Winner* v. *S.M.T. (Eastern) Ltd. and A.-G. N.B.*, [1951] 4 D.L.R. 529, another judgment of the Supreme Court of Canada, is valuable as much for its negation of provincial power to interfere with mobility of citizens and others throughout Canada as for its recognition of federal authority in relation to interprovincial bus transport. *Rowe* v. *The King*, [1951] 4 D.L.R. 238, contains an oblique re-affirmation of *stare decisis* by Cartwright J. in a dissenting judgment. In *Aristocratic Restaurants Ltd.* v. *Hotel and Restaurant Employees International Union, Local 28*, [1951] 3 D.L.R. 211, and *Smith* v. *Smith and Smedman*, [1951] 4 D.L.R. 593, the British Columbia Court of Appeal admitted appeals to the Supreme Court of Canada over the dissenting views of O'Halloran J. A., who appears to be persisting in a determination to reduce the work load of that court.

APPENDIX 1

JUDGES OF THE SUPREME COURT

	Name	Province	Previous Experience	Date of Appointment	End of Tenure
1.	William B. Richards	Ontario	Chief Justice, Ontario Court of Queen's Bench	October 8, 1875	r. January 10, 1879
2.	William J. Ritchie	New Brunswick	Chief Justice of N.B.	October 8, 1875	d. September 25, 1892
3.	Samuel H. Strong	Ontario	Judge, Ontario Court of Error and Appeal	October 8, 1875	r. November 18, 1902
4.	Jean T. Taschereau	Quebec	Judge, Que. Superior Court	October 8, 1875	r. October 6, 1878
5.	Telesphore Fournier	Quebec	Minister of Justice	October 8, 1875	r. September 12, 1895
6.	William A. Henry	Nova Scotia	Nova Scotia Q.C. (Attorney-General 1864-67)	October 8, 1875	d. May 4, 1888
7.	Henri E. Taschereau	Quebec	Judge, Que. Superior Court	October 7, 1878	r. May 2, 1906
8.	John W. Gwynne	Ontario	Judge, Ontario Court of Common Pleas	January 14, 1879	d. January 7, 1902
9.	Christopher S. Patterson	Ontario	Judge, Ont. Court of Appeal	October 27, 1888	d. July 24, 1893
10.	Robert Sedgewick	Nova Scotia	Deputy Minister of Justice	February 18, 1893	d. August 4, 1906
11.	George E. King	New Brunswick	Judge, N.B. Supreme Court	September 21, 1893	d. May 8, 1901
12.	Désiré Girouard	Quebec	Quebec Q.C.	September 28, 1895	d. March 22, 1911
13.	Louis H. Davies	P.E.I.	Federal cabinet minister	September 25, 1901	d. May 1, 1924
14.	David Mills	Ontario	Minister of Justice	February 8, 1902	d. May 8, 1903
15.	John D. Armour	Ontario	Chief Justice of Ontario	November 21, 1902	d. July 11, 1903
16.	Wallace Nesbitt	Ontario	Ontario K.C.	May 16, 1903	r. October 4, 1905
17.	Albert C. Killam	Manitoba	Chief Justice of Manitoba	August 8, 1903	r. February 6, 1905
18.	John Idington	Ontario	Judge, Ont. High Court	February 10, 1905	ret. March 31, 1927
19.	James Maclennan	Ontario	Judge, Ont. Court of Appeal	October 5, 1905	r. February 12, 1909
20.	Charles Fitzpatrick	Quebec	Minister of Justice	June 4, 1906	r. October 21, 1918
21.	Lyman P. Duff	British Columbia	Judge, B.C. Supreme Court	September 27, 1906	ret. January 7, 1944
22.	Francis A. Anglin	Ontario	Judge, Ont. Exchequer Div.	February 26, 1909	d. March 2, 1933
23.	Louis P. Brodeur	Quebec	Quebec Q.C. (federal cabinet minister)	August 11, 1911	r. October 10, 1923
24.	Pierre B. Mignault	Quebec	Quebec Q.C.	October 25, 1918	ret. Sept. 30, 1929
25.	Arthur C. Malouin	Quebec	Judge, Que. Superior Court	January 30, 1924	r. October 1, 1924
26.	Edmund L. Newcombe	Ontario	Deputy Minister of Justice	September 20, 1924	d. December 9, 1931

—Continued on following page

	Name	Province	Previous Experience	Date of Appointment	End of Tenure
27.	Thibaudeau Rinfret	Quebec	Judge, Que. Superior Court	October 1, 1924	——
28.	John H. Lamont	Saskatchewan	Judge, Saskatchewan Court of Appeal	April 2, 1927	d. March 10, 1936
29.	Robert Smith	Ontario	Judge, Ontario First Divisional Court	May 18, 1927	ret. Dec. 17, 1933
30.	Lawrence A. Cannon	Quebec	Judge, Que. Superior Court	January 14, 1930	d. Dec. 25, 1939
31.	Oswald A. Crocket	New Brunswick	Judge, New Brunswick King's Bench	September 21, 1932	ret. April 13, 1943
32.	Frank J. Hughes	Ontario	Ontario K.C.	March 17, 1933	r. February 13, 1935
33.	Henry H. Davis	Ontario	Judge, Ont. Court of Appeal	January 31, 1935	d. June 30, 1944
34.	Patrick Kerwin	Ontario	Judge, Ontario High Court	July 20, 1935	——
35.	Albert B. Hudson	Manitoba	Manitoba K.C. (Attorney-General, 1915-17)	March 24, 1936	d. January 6, 1947
36.	Robert Taschereau	Quebec	Quebec K.C.	February 9, 1940	——
37.	Ivan C. Rand	New Brunswick	New Brunswick K.C. (Attorney-General 1924-25)	April 22, 1943	——
38.	Roy L. Kellock	Ontario	Judge, Ont. Court of Appeal	October 3, 1944	——
39.	James W. Estey	Saskatchewan	A.-G. of Sask.	October 6, 1944	——
40.	Charles H. Locke	British Columbia	British Columbia K.C.	June 3, 1947	——
41.	John R. Cartwright	Ontario	Ontario K.C.	December 22, 1949	——
42.	J. H. Gérald Fauteux	Quebec	Judge, Que. Superior Court	December 22, 1949	——

CHIEF JUSTICES OF CANADA

	Name	Date of Appointment	End of Tenure
1.	William B. Richards	October 8, 1875	r. January 10, 1879
2.	William J. Ritchie	January 11, 1879	d. September 25, 1892
3.	Samuel H. Strong	December 13, 1892	r. November 18, 1902
4.	Henri E. Taschereau	November 21, 1902	r. May 2, 1906
5.	Charles Fitzpatrick	June 4, 1906	r. October 21, 1918
6.	Louis H. Davies	October 23, 1918	d. May 1, 1924
7.	Francis A. Anglin	September 16, 1924	d. March 2, 1933
8.	Lyman P. Duff	March 17, 1933	ret. January 7, 1944
9.	Thibaudeau Rinfret	January 8, 1944	

r.—resigned d.—died ret.—retired.

APPENDIX 2*

VOLUME OF WORK IN SELECTED YEARS

	References	Civil Appeals	Criminal Appeals	Total
1910	1	83[1]	0	84
1920	1	114	3	118
1930	3	74	6	83
1940	0	64	4	68
1944	0	55	4	59
1945	0	40	5	45
1946	2	50	4	56
1947	1	45	7	53
1948	1	59	10	70
1949	1	59[2]	7[3]	67

[1] Includes three appeals re-argued owing to the death of Girouard J.
[2] Includes appeal from Board of Transport Commissioners.
[3] Includes re-argued appeal.

PROVINCIAL BREAKDOWN 1944-1949[1]

	1944	1945	1946	1947	1948	1949
Alberta						
Civil Cases	2	5	8	6	3	4
Criminal Cases	1	0	0	0	0	0
British Columbia						
Civil Cases	6	6	5	2	8	3
Criminal Cases	1	2	0	3	4	0
Manitoba						
Civil Cases	1	1	0	2	2	3
Criminal Cases	0	0	1	1	1	2
New Brunswick						
Civil Cases	1	1	8	2	1	1
Criminal Cases	0	0	0	0	0	1
Newfoundland[2]	—	—	—	—	—	—
Nova Scotia						
Civil Cases	1	4	3	1	2	1
Criminal Cases	0	1	0	0	0	0
Ontario						
Civil Cases	15	9	11	12	28	25
Criminal Cases	1	1	3	2	3	2
Prince Edward Island						
Civil Cases	0	1	0	1	1	0
Criminal Cases	0	0	0	0	0	0
Quebec						
Civil Cases	28	12	13	16	12	21
Criminal Cases	1	1	0	1	2	2
Saskatchewan						
Civil Cases	1	1	2	3	2	0
Criminal Cases	0	0	0	0	0	0

[1] It should be remembered that a true picture of the volume of appeals from the provincial courts would require inclusion of cases taken directly to the Privy Council.
[2] Became province only in 1949.

* The material in this appendix was supplied by the Registrar of the Supreme Court, Mr. Paul Leduc, K.C.