THE POLITICAL ROLE OF THE SUPREME COURT OF CANADA IN ITS FIRST CENTURY

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The easiest statement to make about the Supreme Court's political impact in its first 100 years is to say that its political impact on the country has not been great. While few would contest this statement, I must hasten to add that it is a relative statement whose self-evidence depends on the fact that our Supreme Court, inevitably, is compared with the United States Supreme Court. Therein, I believe, lies one of the court's severest handicaps in understanding its own role in Canadian government and in being understood by the country. Increasingly, in the past decade or so, our image of what a national Supreme Court does and what it ought to do has been americanized. An American filter has been supplanting a British filter with the result that we have difficulty perceiving the Supreme Court of Canada on its own terms. Here, as in so many other areas of our national life, cultural independence is seriously undermined.

Let us try to take off these British and American filters for a brief moment and think about the role the court has actually played in Canadian politics. We can do this from two dimensions. First, the subjective dimension—how has the court been viewed politically? What hopes and fears has it aroused? What political forces have attacked or promoted it? Secondly, there is the objective side—what has the court actually done? How have its decisions affected the authoritative allocation of values[1] in Canada —or whatever else passes these days as a definition of *res politicae*? It is always important to distinguish these two dimensions of analysis, for with courts more so than with most other institutions of government the official and popular myths about what they do often change faster than the reality of what they really do.

At the beginning, the Supreme Court did not figure prominently in the nation-building scheme of our founding fathers. Provision for its eventual establishment was included in the

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[1] This is the definition of the realm of politics given in David Easton's classic work on the nature of political science, The Political System (1953).

constitution, so far as one can see, primarily for theoretical reasons as part of the paraphernalia of government which any self-respecting nation might require. The court was not felt to be urgently needed—the superior courts of the provinces and their Lordships in London were already in place and could provide an acceptable judicial service for the more serious trials and appeals.[2]

In 1875 when legislation to establish the court was finally enacted, the Supreme Court's purpose was more clearly defined, although there was no significant growth in the nation's sense of the court's importance. Canadians did not put up flags on its birthday—and still do not. It was to be an all-purpose appeal court, hearing appeals from provincial courts in all legal matters. Macdonald's original conception of a Supreme Court with a significant trial jurisdiction in federal matters had been abandoned.[3] Thanks to the intervention of the Colonial Secretary and some confusion on all sides about the capacity of colonial law to regulate the royal prerogative granting petitions to appeal to the foot of the throne, the Supreme Court would be an optional intermediate appeal court:[4] litigants could appeal from its decisions to the Judicial Committee of the Privy Council or could avoid it altogether and appeal from provincial courts directly to London. In constitutional matters it might serve a special function, not (perish the thought) as a neutral arbiter of the constitution imposing constitutional limits evenhandedly on both levels of government, but rather as a consulting agency to the new federal authority as it prepared to keep the provinces from exceeding their new constitutional boundaries.[5]

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[2] For a fuller account of discussions concerning a Supreme Court at Confederation see Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution (1969), Ch.I. (A).

[3] The Macdonald Government's Supreme Court Bill of 1869 would have given the court an original trial jurisdiction (in some instances exclusive) in all significant areas of federal concern. Public Archives of Canada, Macdonald Papers, p. 159, Bill No. 80.

[4] See Underhill, Edward Blake, The Supreme Court and the Appeal to the Privy Council (1938), 19 Can. His. Rev. 245 and Mackinnon, The Establishment of the Supreme Court of Canada (1946), 26 Can. His. Rev. 260.

[5] S.53 of Macdonald's first Supreme Court Bill gave the Supreme Court exclusive original jurisdiction to determine the constitutional validity of provincial laws and made no mention of judicial review of federal laws (Bill No. 80, 1869). Macdonald commenting on the special provisions of the 1875 Act concerning the Supreme Court's adjudication of constitutional issues, expressed the hope that these provisions "would not erect any Court which would in any degree override the Parliament of Canada". Canada, House of Commons Debates (1875), 2nd Sess. 3rd Parl., p. 289.

In the new court's adolescent years there was one, and only one, major political controversy connected with it. This was the strong hostility of some Quebec lawyers and politicians to the Supreme Court's jurisdiction in matters relating to Quebec's civil law. This opposition was based both on a political concern for the survival of Quebec's distinctive legal culture, as well as the professional opinion that the Supreme Court of Canada with only two out of six justices from Quebec was not competent (even as compared with the Judicial Committee) to review decisions of Quebec's courts on civil law. Quebec opposition to the Supreme Court was a factor in the 1878 election and did the Liberal regime, which had established the court, no good in Quebec. In the 1880's Quebec's distrust of the court inspired a series of Bills to abolish the court, to remove its jurisdiction over provincial law matters or to provide a special panel of Quebec jurists for hearing appeals dealing with laws peculiar to that province. The final gasp of this movement was L.P. Demers' Bill in 1903 to exclude provincial law matters from the Supreme Court's jurisdiction. But like all the earlier efforts in this direction it was totally unsuccessful.[6]

More recently in the post-1949 era there has been a slight revival of this traditional French Canadian opposition to the Supreme Court.[7] But this scarcely amounts to a "flutter" in political terms. The court's Quebec critics may have been somewhat appeased by the fact that after 1949 there were three justices from Quebec for the five-judge panels which hear most Quebec appeals.[8] Also most Quebec lawyers who might have

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Macdonald and the Liberal Government which introduced the 1875 Act came to doubt Parliament's power to rest an exclusive or original jurisdiction to decide constitutional cases in the Supreme Court. They settled for a general clause enabling the federal government to elicit advisory opinions from the court on "any matters whatsover". Supreme Court Act, S.C., 1875, c. 11, s. 52.

[6] For an account of these events see Russell, *op. cit.*, footnote 2, Ch.I(B) (C), p. 80.

[7] See, for instance, Mayrand, Le droit comparé et la pensée juridique canadienne (1957), 17 Rev. du Bar. 2, and Azard, La Cour suprême du Canada et l'application du droit civil de la Province de Québec (1965), 43 Can. Bar Rev. 553.

[8] From 1875 to 1927, 2 of 6 Supreme Court Justices were from Quebec and from 1927 to 1947, 2 of 7 were from Quebec. In 1949, the Supreme Court Act was amended to require that 3 of 9 Supreme Court Justices be from Quebec, S.C., 1949, (2nd Sess.), c. 37, s. 1. Even with this change Quebec justices constituted the court's majority in less than 75% of appeals concerning the Quebec Civil Code from 1959 to 1964. See Table IV, 31, in Russell, *op. cit.*, footnote 2, pp. 165-166.

cared may have recognized that by this time French civil law had been applied by English judicial institutions for over a century so that the survival, let alone the blossoming, of a distinctive legal culture in Quebec was truly a lost cause. Besides, by the 1950's and 1960's Quebec nationalists were finding much larger causes to espouse than the English common law domination of the Supreme Court of Canada.

Throughout the Supreme Court's history the concern of Quebec lawyers with this issue has probably been surpassed by the indifference of English-speaking lawyers. As a non-lawyer learning about this issue, and encountering the bored shrugs of some of the more humanist and cosmopolitan English-speaking lawyers, I felt I was experiencing yet another dimension of our two solitudes. I could not conclude that the Supreme Court of Canada has done very much to foster a genuine biculturalism in Canada.[9] Whatever this failure may have done in the short run to homogenize Canada's legal culture, it may not, in the long run, turn out to be a positive factor in the preservation of the Canadian federation.

Aside from these difficulties with its "French connection" the Supreme Court of Canada basked in relative obscurity until 1949. That is not to say that it was idle or altogether without political effect during this long period of subordination to the Judicial Committee. During this period it established its basic style and workload:[10] an aggregation of not very distinguished justices,[11] hearing some fifty to sixty appeals a year coming

[9] Since writing my Report for the Royal Commission on Bilingualism and Biculturalism, there has been some improvement in the court's bilingual capacities by virtue of the installation of facilities for the instantaneous translation of oral arguments. Prior to this, Francophone counsel who wished to argue before the court in French were usually at a distinct disadvantage. See Russell, *op. cit.*, footnote 2, Ch. III (B).

[10] All of the statistical data reported in this article derive from a survey of all the Supreme Court's *reported* decisions from the court's establishment in 1875 until the end of the 1969 volume of the Supreme Court Reports. The survey was made possible through a Canada Council grant to the Osgoode Hall Law School and was carried out by Professor Sidney Peck of Osgoode Hall and the author, assisted by several law students. A copy of the questionnaire which was applied to each reported decision is attached as an Appendix to this article. It should be noted that the number and nature of unreported decisions during this period are not known. Scholars who wish to examine this data should apply to either Professor Peck or the author. It is important to note that when classifying the court's decisions under different legal categories, we often identified several issues or types of law in a single case.

[11] In the early years there was a tendency for appointments to the Supreme Court to be blatantly political. Twenty-three of the first 49 ap-

mostly from the provinces, as of right,[12] each judge adjudicating the dispute according to his lights.[13] Table I sets out some of these basic features of the Supreme Court's work over the decades.

In the cases the court decided during its first seventy-five years, what would generally be characterized as private law matters were involved somewhat more frequently than public law matters: seventy-nine per cent of the court's reported decisions involved some matter of private law as a central issue, whereas public law issues were important in fifty-nine per cent of the court's reported decisions. On the private law side, as Table II shows, tort, contract and real property were the leading issues: they were important issues in roughly one-third of all the court's decisions. In public law, matters of jurisdiction and procedure lead the field, with, interestingly, railways and municipalities being the most frequent substantive public law matters to arise. Constitutional law was involved in just over four per cent of the court's reported decisions, a frequency which that subject has maintained all the way through the court's history.

I would suggest that we know rather little about how the court's resolution of these *apparently* rather mundane legal disputes affected the authoritative allocation of values in the country. The fact that neither the court nor its public perceived

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pointees at one time or another had been elected politicians. Three members of the court (Fournier, Mills and Fitzpatrick), in effect, exchanged the federal Justice portfolio for a position on the bench — in Fitzpatrick's case he took the Chief Justiceship. Such open use of political patronage by federal administrations in appointing judges has declined in recent years. The trend is carefully documented in William J. Klein, Judicial Recruitment in Manitoba, Ontario and Quebec, 1905-1970, Ph.D. Thesis, University of Toronto (1975). Of course this is not to deny that an ex-politician might make an excellent judge, but it is to suggest that recruitment for the Supreme Court bench has not always been a talent hunt. For an account of factors which in the past reduced the attractiveness of Supreme Court positions to outstanding Canadian lawyers see Biggar, Selection of Judges (1933), 11 Can. Bar Rev. 39 and Trueman, Judicial Appointments (1930), 8 Can. Bar Rev. 11.

[12] Overall, from 1875 to 1970, 77.2% of all the Supreme Courts reported decisions were made in cases in which a litigant had a right to appeal to the court, (rather than those in which a court grants leave to appeal).

[13] Judges on Canadian appeal courts have traditionally followed the more individualistic style of decision-making characteristic of British courts, rather than the more collegial style (with conferences, systematic designation of opinion-writing assignments, *etc.*) of U.S. courts. For an analysis of these contrasting styles see Delmar Karlen, Appellate Courts in the United States and England (1963), and Edward McWhinney, Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals (1953), 31 Can. Bar Rev. 595.

TABLE I: *Source of Supreme Court's Reported Decisions 1875-1969*

		1875–89		1890–99		1900–09		1910–19		1920–29		1930–39		1940–49		1950–59		1960–69		Totals	
Original (mainly references by Federal Government or Petitions for **Habeas Corpus**)		1	% 0.2	7	% 1.1	12	% 1.8	8	% 1.4	14	% 2.1	22	% 3.9	14	% 2.9	9	% 1.4	16	% 1.8	103	% 1.8
Appeals from Exchequer Court or Other Federal Tribunals		21	4.6	40	6.2	64	9.6	72	12.5	65	9.9	113	20.1	101	20.9	110	16.9	171	19.4	757	13.6
	Nfld.	—		—		—		—		—		—		—		2	0.3	3	0.3	5	0.1
	P.E.I.	10	2.2	5	0.8	1	0.2	1	0.2	1	0.2	3	0.5	4	0.8	4	0.6	1	0.1	30	0.5
	N.S.	65	14.2	80	12.3	90	15.5	33	5.7	33	5.0	3	0.5	4	0.8	4	0.6	1	0.1	371	6.6
	N.B.	53	11.6	41	6.3	25	3.8	11	5.0	27	4.1	19	3.4	14	2.9	19	2.9	14	1.6	223	4.0
	P.Q.	139	30.3	225	34.6	215	32.3	115	20.0	209	31.9	146	26.0	119	24.6	156	24.0	189	21.4	1513	27.1
Appeals from Provincial	Ont.	147	32.1	196	30.2	141	21.2	124	21.6	112	17.1	111	19.8	98	20.2	166	25.5	216	24.5	1311	23.5
or	Man.	14	3.1	18	2.8	25	3.8	35	6.1	24	3.7	21	3.7	21	4.3	23	3.5	39	4.4	220	3.9
Territorial Courts	Sask.	—		—		1	0.2	32	5.6	37	5.6	11	2.0	15	3.1	32	4.9	36	4.1	164	2.9
	Alta.	—		—		4	0.6	63	11.0	66	10.1	37	6.6	31	6.4	44	6.8	66	7.6	311	5.6
	B.C.	8	1.7	24	3.7	58	8.7	81	14.1	68	10.4	50	8.9	44	9.1	75	11.5	116	13.2	524	9.3
	N.W.T.	—		14	2.2	12	1.8	—		—		—		—		—		6	0.7	32	0.6
	Yukon	—		—		17	2.6	—		—		—		1	0.2	—		—		18	0.3
	Provincial Total	436	95.2	603	92.8	589	88.6	495	86.0	577	88.0	427	76.0	369	76.2	531	81.7	695	78.8	4722	84.6
Overall Total		458	100.0	650	100.0	665	100.0	575	100.0	656	100.0	562	100.0	484	100.0	650	100.0	882	100.0	5582	100.0

TABLE II: *Types of Law Dealt with Most Frequently by the Supreme Court of Canada*

	1875 — 1949			1950 — 1969	
	No. of cases in which issue arose	% of cases in which issue arose		No. of cases in which issue arose	% of cases in which issue arose
Tort	490	12.0	Criminal	220	14.4
Jurisdiction	469	11.4	Taxation	192	13.1
Contract	429	10.5	Tort	139	9.1
Real Property	409	10.0	Contract	111	7.2
Procedure (Public)	275	6.7	Procedure (Public)	105	6.9
Railways	235	5.7	Real Property	104	6.8
Insurance	215	5.2	Motor Vehicles	84	5.5
Municipalities	215	5.2	Jurisdiction	80	5.2
Taxation	202	4.9	Evidence	64	4.2
Criminal	194	4.7	Constitutional	60	3.9
Constitutional	176	4.3	Labour	59	3.9
Wills	155	3.8	Municipalities	57	3.7

The data reported in this Table are based on Questions VII and VIII in the Questionnaire shown in the Appendix. In answering these questions it was assumed that at least two major legal issues could be involved in a case.

it as having a major impact should not blind us to the possibility that in some areas its effect in shaping the law and effecting major social interests may have been substantial. The court's subservience to the Judicial Committee during this period has possibly been overemphasized. Although all of the court's decisions were appealable to London, so far as we could determine, leave to appeal was sought from less than ten per cent of the Supreme Court's decisions and less than two per cent of the Supreme Court's decisions were reversed in whole or in part. Of course, these statistics do not speak to the subservience of the court's jurisprudence to English authorities. A number of Canadian legal commentators complain of this subservience when reviewing the Supreme Court's work.[14] Even if these nationalist complaints are well founded, rather than proving that the Supreme Court had no influence on Canada's legal system, they would suggest that the court's influence tended to have a particularly colonial character—that the court acted as a transmission belt for the incorporation of English jurisprudence, (maybe a fairly raw understanding of English jurisprudence)[15] into the Canadian legal culture.

But, I doubt that the colonialist thesis could account for the court's contribution in all of the major fields of law which it handled. In deciding the 235 cases which deal with railways, the 215 cases which concern municipalities, not to mention the seventy-five cases involving controverted federal elections—the court was influencing the rights and interests of some major economic and political groups in Canada. Empirical research on the Supreme Court's decisions in these fields might disclose significant contributions to the development of Canadian law and public policy. Or, to consider another possible policy effect of the court's work in this period, it should be noted that just over one-fourth of the court's decisions dealt solely with provincial statutes or Quebec's Civil Code and Code of Civil Procedure.[16] We do not know

[14] See, for instance, Horace E. Read, The Judicial Process in Common Law Canada (1959), 37 Can. Bar Rev. 279; Gilbert D. Kennedy, Supreme Court of Canada — *Stare Decisis* — Role of Canada's Final Court (1955), 33 Can. Bar Rev. 340; Bora Laskin, The Supreme Court of Canada: A Final Court of Appeal of and for Canadians (1951), 29 Can. Bar Rev. 1038.

[15] The rather wooden or fossilized character of Canadian versions of English jurisprudence might, in part, be accounted for by Louis Hartz's general theory that new societies formed by migrations from European societies "evince the immobilities of fragmentation". Louis Hartz, The Founding of New Societies (1964), p. 3.

[16] Up to 1949, 26.2% of the court's reported decisions dealt exclusively with provincial statutes or Quebec's Civil Code and Code of Civil Procedure as did exactly the same proportion (26.2%) of its reported decisions after 1949 up to the end of 1969.

that the court has never, as a matter of law or policy, considered itself bound by the highest provincial court's holdings on matters of provincial law, so that there is ample opportunity here for the Supreme Court to introduce uniformity into the laws of the Canadian provinces.[17] Thus, the court's decisions on provincial law matters, including the Quebec Civil Code may have somewhat offset the effect of constitutional decisions upholding (some would say enlarging) provincial legislative power. To my knowledge this possibility has not been systematically investigated.[18]

In the field of constitutional law where I have studied a fair portion of the court's work, the colonialist explanation goes a long way to account for the Supreme Court's contribution. After a very brief independent fling, in which the majority of Supreme Court Justices gave evidence of as centralist an understanding of Confederation as John A. Macdonald could have asked for,[19] the court succumbed to the tutelage of the Judicial Committee.[20] In time, the Supreme Court became a fairly able student of the Privy Council, so much so that on occasion their Lordships would defer to the opinions of the Supreme Court on

[17] The United States Supreme Court's decision in *Erie R.R.* v. *Tompkins* (1938), 304 U.S. 64: "... put a period, with an explanation point, to the notion that the decisional rules of the state courts had a status inferior to state statutes in the spheres, whatever they were, in which state law governed." Henry M. Hart, Jr., The Relations between State and Federal Law, in MacMahon (ed.), Federalism Mature and Emergent (1962). The Supreme Court of Canada's unwillingness to accept the decisions of the highest provincial court as authoritative on provincial law matters is related to the fact that the Canadian judicial system is less dualistic than the American and the great scope of provincial jurisdiction especially over property and civil rights. Since the Judicial Committee's decision in *Crown Grain Co. Ltd.* v. *Day*, [1908] A.C. 504, it would require a constitutional amendment to permit a province to legislate that the decisions of the provincial court of appeal be final in any area of provincial law.

[18] For a review of the various ways in which the uniformity of law can be secured in Canada's legal system see John Willis, Securing Uniformity of Law in a Federal System — Canada (1944), 5 U. of T.L.J. 352.

[19] See especially *Severn* v. *The Queen* (1878), 2. S.C.R. 70 and *City of Fredericton* v. *The Queen* (1880), 3 S.C.R. 505.

[20] But not without some protests: Strong J. explained his reluctance to give reasons for his opinion in the 1885 *McCarthy Act Reference* as follows: "The matter will be sure to go to the Privy Council. Our judgments will not make any difference there; as a matter of fact they never do. They do not appear to be read or considered there, and if they are alluded to, it is only for the purpose of offensive criticism." Quoted in Alexander Smith, The Commerce Power in Canada and the United States (1963), p. 50, n.8.

important constitutional matters.[21] The Privy Council, to be sure, did play the creative policy-making role incumbent upon any supreme court which assumes the task of applying the general definitions of power in a complex constitutional instrument to the legislative enactments of a rapidly changing society.[22] The main thrust of the Judicial Committee's constitutional policy for Canada, as I understand it, was to establish as a first principle of the Canadian constitution the doctrine of classical federalism according to which sovereign power is divided between equal and co-ordinate levels of government[23] and to treat this principle as the only serious constitutional limitation on public authority in Canada.[24] It is extremely doubtful that a completely independent Supreme Court of Canada would have established at least the first of these principles as paramount in our constitutional law.[25]

One can speculate as to what the consequences of a more centralist interpretation of the British North America Act[26] might have been. My own surmise would be that it would not have made a great deal of difference. I believe that the most important effect of the Judicial Committee's constitutional decisions was to provide the legal component of a "federal ethic" (some might say a "federal fetish") which, despite Sir John A. Macdonald's intentions, has become an enduring feature of the Canadian political system. In a society such as Canada's which traditionally has attached great normative weight to the decisions of courts (especially, during its colonialist period, to the decisions of superior British courts) this legal contribution added an extra measure of legitimacy to the political forces of provincialism which were working against Macdonald's dream. An indication of the depth to which this federal ethic had penetrated the Canadian political psyche by the 1930's is the fact that a concern

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[21] See, for instance, The Judicial Committee's adoption of Chief Justice Duff's reasons in *A.-G. B.C.* v. *A.-G. Can.*, [1937] A.C. 377.

[22] The myth that there is a single, correct literal interpretation of the B.N.A. Act is well exploded by Alan Cairns in the Judicial Committee and Its Critics (1971), 4 Can. J. of Pol. Sc. 301.

[23] The clearest statement of this policy appears in *Liquidators of The Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, at pp. 441-442.

[24] The co-called "exhaustion" theory that "no point of internal self-government was withheld from Canada" is stated in *A.-G. Ont.* v. *A.-G. Can.*, [1912] A.C. 571, at p. 581.

[25] Although the Supreme Court did, on occasion, act independently and supported federal policy interests in settling constitutional controversies, as when it vetoed Alberta's controversial Social Credit legislation in 1938. See J. R. Mallory, Social Credit and the Federal Power in Canada (1954).

[26] 1867, 30 & 31 Vict., c. 3 (U.K.).

for maintaining federalism survived the centralist attack of the courts' New Deal decisions much more in Canada than the United States. Still, while acknowledging the Judicial Committee's contribution to the development of this "federal ...ic" in Canada, I doubt that the cultural, geographic, economic and political forces of provincialism would have been significantly resisted by a nationalist Supreme Court.

In 1949, when the Supreme Court became in fact supreme, its "political visibility" greatly increased. The court was now more important, even though most Canadians would have been hard pressed at the time to explain what it was important for. The nationalist sentiments that fostered the abolition of appeals to the Privy Council and which were shared by national leaders of the three major political parties did not focus positively on the merits of the Supreme Court but negatively on the inadequacies of the Judicial Committee as the judicial arbiter of Canada's constitutional disputes.[27] This criticism of the Judicial Committee created some confusing expectations with regard to the Supreme Court's future role as constitutional umpire. On the one hand, many members of the national policy-making elite clearly looked forward to a Supreme Court which placed far fewer restrictions on central government initiatives in social and economic policy. On the other hand, given the support for the Privy Council's constitutional traditions, especially in Quebec, and the ideals of judicial independence and *stare decisis,* it would have been embarrassing to advertise this expectation.[28]

Although Canadian discontent with the Privy Council concentrated on that small segment of Supreme Court adjudication which involves constitutional issues, the agitation for judicial autonomy in a general sense heightened Canadians' consciousness of the discretionary power of appellate courts. This consciousness was also fed by a new wave of legal scholars most of whom went south for further legal training and there imbibed deeply of American judicial realism and sociological jurisprudence. These scholars were much more aware of the important law-making

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[27] For a more detailed analysis of the abolition movement, see Cairns, *op. cit.*, footnote 22.

[28] Prime Minister St. Laurent, for instance, defending the legislation abolishing Privy Council appeals stated that he was "unable to see that it could have any effect upon provincial or minority rights". House of Commons Debates (1949) 2nd Sess., p. 198. On the Conservative side, the Leader of the Opposition, George Drew supported a Canadian Bar Association resolution requiring that the rule of *stare decisis* be applied to all past decisions of the Supreme Court and the Judicial Committee. *Ibid.*, pp. 193-194.

responsibilities of a country's highest court of appeal.[29] Their expectations for the newly emancipated all-Canadian Supreme Court were vaguely nationalist: they hoped that in major areas of decision-making, and not simply in constitutional matters, the court would adapt the law to Canadian needs and circumstances. Their hopes were soon paralleled by nationalist fears in Quebec that the Supreme Court would become an additional instrument for increasing English-Canadian domination and central government control.[30]

Thus the Supreme Court entered the new era of judicial independence midst a welter of vague and conflicting hopes and fears. The one thing it could count upon was that it would be operating under the scrutiny of a considerably more attentive and perceptive jury.

The court's performance since 1949 may seem somewhat anti-climactic. This is especially so for our journalists who constantly compare it with the United States Supreme Court, and wonder why it has failed to provide them with more exciting headline cases. But if we look a little more closely, I think we can see that changes have been taking place in the work of the Supreme Court which are making it in reality a more significant branch of our national government.

Since 1949 the case-load of the Supreme Court has increased in volume and in importance. By the early 1970's the number of applications for leave to appeal to the court and the court's overall volume of business had increased substantially.[31] This increase was the prime reason given for finally changing the court's jurisdiction in 1974. No longer will cases be heard before the Supreme Court merely because a litigant wishes to have a second appeal from a decision in which $10,000.00 or more is at stake. In the past, most of the Supreme Court's business was

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[29] I have described the implications of this change in Canada's legal culture more fully in Judicial Power in Canada's Political Culture, in M. L. Friedland (ed.), Courts and Trials: A Multidisciplinary Approach (1975).

[30] This concern is vigorously expressed in the Tremblay Report of 1956: Quebec, Royal Commission of Inquiry on Constitutional Problems Report (1956), Vol. III, Bk. 1, Ch. X.

[31] The Report of the Special Committee of the Canadian Bar Association on the Caseload of the Supreme Court of Canada (1974), traces the sharp increase in Supreme Court business in recent years. The Committee reports, *inter alia*, that over 100 cases were ready for hearing at the opening of the court's spring session in 1973 and that in addition, about 200 were awaiting documentation but would be entitled to be listed for full hearing.

generated by this monetary rule.[32] From now on litigants in civil suits will have to convince either a provincial court of appeal, the Federal Court of Appeal or the Supreme Court that their case involves a sufficiently important legal issue to merit Supreme Court attention.

The Supreme Court's congested docket was, as I have indicated, only the prime reason for making this change. There was also, finally, some acknowledgment in official circles that money is an inappropriate criterion for rationing access to the Supreme Court. This is remarkable for it means that the Canadian Bar Association's Committee in recommending the change and Parliament in enacting it, recognized that the Supreme Court does more than simply settle disputes between litigants. In the words of the Bar Association's *Special Report on the Supreme Court's Caseload,* the decisions of the Supreme Court "afford vital leadership to the country in the interpretations and development of the law on all subjects".[33] But the task of identifying the 100 or so legal issues in a year which are important enough to merit Supreme Court attention is to be shared by three-judge panels of the Supreme Court, provincial appeal courts and the Federal Court of Appeal. Apparently it is not anticipated that deciding what cases the Supreme Court should hear may become almost as important as deciding the cases themselves.

A modest change in the type of case the Supreme Court hears took place after 1949 even without any major jurisdictional changes. There has been a slight shift to public law: public law issues were involved in sixty-eight per cent of reported decisions as compared with fifty-nine per cent before 1949, while the frequency of private law matters declined from seventy-nine per cent to seventy per cent. As Table II shows, tort, contract and real property continue to be the major private law matters with motor vehicle cases rising to fourth on the private law list. The principal change is on the public law side where criminal law and taxation[34] have emerged as the issues most frequently arising,

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[32] The exact jurisdictional basis of Supreme Court cases is often difficult to identify, but by our calculations roughly 68% of the Supreme Court's reported decisions from 1875 to 1969 were in civil cases appealed on the basis of the monetary rule.

[33] Report of the Special Committee of the Canadian Bar Association (1970), I, p. 34.

[34] One reason for re-organizing the Exchequer Court as the Federal Court of Canada and establishing a Federal Court of Appeal in 1970 was to reduce the number of tax appeals which the Supreme Court was required to hear. The number of taxation cases before the Supreme Court should diminish in the 1970's.

and labour law has come on as an important new field of Supreme Court adjudication.

Supreme Court decisions in all of these cases can lead to major shifts in public policy. To take two examples from the major areas of the court's post-war docket—criminal law and taxation: the court's decision in the *Boucher*[35] case narrowed the definition of seditious libel, thus expanding the area of free speech in Canada precisely at a time when the American Supreme Court under the pressure of McCarthyism was weakening the constitutional protection of free speech in the United States of America;[36] similarly, the court acted decisively in *Harris* v. *M.N.R.*[37] to cut down an ingenious tax scheme which threatened to cut a large hole in the Income Tax Act. Professor Weiler's recent study of the Supreme Court's jurisprudence since 1949 demonstrates the policy-making potential of decisions in these non-constitutional areas of adjudication, including the field of torts.[38] Because the court's power is exercised so quietly in these areas, the scope of its decision-making authority may be all the greater.

In its noisier areas of activity, where the court is called upon to interpret the British North America Act or the Canadian Bill of Rights[39] it has encountered, politically, some heavier weather. In constitutional law, statistically, the Supreme Court's post-1949 record is not remarkably different from its pre-1949 box score. The absolute number of constitutional cases decided per year has risen slightly, although proportionately there is little change as constitutional law continues to be involved in about four per cent of the cases on the court's docket. It is notable that since 1949 the court has not found a federal law unconstitutional. But, lest too much importance is attached to this fact, we should also note that when we take into account the success of provinces in having their legislation upheld by the Supreme Court, we find that the federal victory ratio in constitutional disputes before the Supreme Court has risen only slightly from fifty point five per

[35] *Boucher* v. *The King*, [1951] S.C.R. 265.

[36] See, for example, *American Communications Association* v. *Douds* (1950), 339. U.S. 382, and *Dennis* v. *United States* (1950), 339 U.S. 162.

[37] [1966] S.C.R. 489.

[38] In the Last Resort: A Critical Study of the Supreme Court of Canada (1974).

[39] R.S.C., 1970, Appendix III.

cent before 1949 to fifty-four point seven per cent for the two decades following 1949.[40]

Canadian political scientists do not consider the Supreme Court to have been a major factor in shaping federal-provincial relations since 1949.[41] I would not contest this general assessment, but I would argue that the court's interpretation of the constitution has been a marginal influence and may be important in the future. The court contributed to the era of co-operative federalism by validating delegation from one level of government to agencies of the other[42] and by opening up areas of concurrent jurisdiction to the provinces in fields of activity which some had thought were exclusively assigned to the federal Parliament.[43] At the same time the Supreme Court has been relatively generous in its treatment of the major sources of federal power—peace, order and good government and trade and commerce.[44] These decisions have not significantly altered the balance of power in Canadian federalism. But they may well have encouraged the federal government to take stronger initiatives, especially with regard to energy policy. They have certainly alarmed some of the provinces—notably Quebec.[45] The demand of the provinces

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[40] This ratio is calculated in the following way:

$$\frac{\text{Number of cases in which federal law or rights upheld} + \text{Number of cases in which provincial laws found unconstitutional} \times 100}{\text{Number of constitutional cases}}$$

[41] See Richard Simeon, Federal-Provincial Diplomacy (1972), for an account of recent policy-making in this area which minimizes the Supreme Court's role.

[42] *P.E.I. Potato Marketing Board* v. *H. B. Wills Inc.*, [1952] S.C.R. 392; *Coughlin* v. *Ontario Highway Transport Board et. al.*, [1968] S.C.R. 569.

[43] For example, legislation limiting interest rates in *A.-G. Ont.* v. *Barfreid Enterprizes Ltd.*, [1963] S.C.R. 570, and legislation punishing dangerous driving in *O'Grady* v. *Sparling*, [1960] S.C.R. 804 and *Mann* v. *The Queen*, [1966] S.C.R. 238.

[44] On peace, order and good government see *Johanneson* v. *West St. Paul*, [1952] 1 S.C.R. 292; *Munro* v. *The National Capital Commission*, [1966] S.C.R. 663; *Reference re Offshore Mineral Rights*, [1967] S.C.R. 792; on trade and commerce see *Reference re Farm Products Marketing Act (Ont.)*, [1957] S.C.R. 198; *Murphy* v. *C.P.R. and A.-G. Can.*, [1958] S.C.R. 625; *A.-G. Man.* v. *Manitoba Egg and Poultry Association*, [1971] S.C.R. 689.

[45] The Supreme Court's decision in the *Offshore Mineral Rights Reference*, *ibid.*, provoked a particularly sharp reaction from Quebec. Following the decision, Premier Lesage was reported in the press as having stated that if French-speaking Canadians' constitutional rights are to be protected, the Supreme Court of Canada must be either changed or replaced. See Toronto Globe and Mail, March 14th, 1967.

at the Victoria Constitutional Conference in 1971 to participate in the appointment of Supreme Court justices indicates that the court's credibility as a reasonably impartial umpire of the federal system may have declined somewhat since 1949.[46]

If the undermining of the Supreme Court's legitimacy as a constitutional arbiter goes too much further it could pose certain dangers to the future of confederation. Those who point out, quite rightly, that federal-provincial differences are most frequently and effectively worked out through administrative or political processes, are wrong to conclude that therefore judicial arbitration of constitutional disputes can be dispensed with.[47] Judicial arbitration is apt to be most needed precisely to resolve those disputes about the division of powers which cannot be settled administratively or politically. Furthermore, the thought that there is a politically respectable and legitimate judicial umpire to which the other side might resort if demands are pressed too far can act as an important break on aggressive politicians. This is only an effective break so long as politicians fear the political consequences of ignoring the court's constitutional decisions.

I leave the hottest controversy concerning the Supreme Court until the end—its role in applying the Canadian Bill of Rights. Here the court has been sharply divided and its performance is a bitter disappointment to many who hoped that the enactment of the Bill of Rights in 1960 would usher in an era of vigorous judicial activism. The court's difficulties here have much to do with the fact that the American influence on popular attitudes and expectations is nowhere more marked than in the field of civil liberties. The 1954 school desegregation decision of the United States Supreme Court and subsequent decisions of the Warren court striking down state legislation for infringing the American Bill of Rights made a deep impression on Canadian opinion. In the 1950's these decisions of the American Supreme Court probably received much more publicity in Canada than did our own Supreme Court which during the same period, without any Bill of Rights, relying solely on common law, statutory interpretation and traditional constitutional restraints on provincial power, reversed a number of the more illiberal practices of the Duplessis regime in Quebec.[48]

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[46] Arts 25-32 of the proposed Constitutional Charter released at the Federal Provincial Conference at Victoria, June 17th, 1971 provided an elaborate set of alternative arrangements for enabling provincial Attorneys General to participate in the selection of Supreme Court Justices.

[47] For a provocative questioning of the necessity of judicial review in Canada, see Paul Weiler, *op. cit.*, footnote 38, Ch. 6.

[48] There were seven important decisions in this series: *Boucher* v. *The*

The Canadian Bill of Rights imposed a mammoth legislative task on any court which would take it seriously: to read into the Canadian statute book after nearly a century's evolution, a set of general standards or ideals, expressed for the most part in the language of the American constitution. It is no surprise that the Supreme Court of Canada responded reluctantly and unevenly to this challenge. Its response has been deeply and, ironically, political. Most of the judges, to put it mildly, do not seem anxious to assume the strong political role entailed in enforcing the standards of a comprehensive Bill of Rights on the popular branch of government. The Supreme Court's unwillingness to assume the power which, paradoxically, Parliament may have intended to thrust upon it, is fundamental in accounting for the court's strange, wavering path from *Robertson and Rosetanni,*[49] through *Drybones*[50] to *Lavell and Bedard,*[51] to the apparently fixed and conservative position of the court's current majority in *Burnshine*[52] and *Hogan.*[53] The court's hesitant treatment of The Bill of Rights does not necessarily signify a modest abdication of judicial power; it may well reflect a shrewd instinct for the conservation of judicial authority.

Canada's frustrating concentration on the Bill of Rights for the past fifteen years is regrettable in that it has deflected attention from the more appropriate Canadian approach to the law of civil liberty. That approach which is truest to our experience and most in keeping with our capabilities is that of Edmund Burke, not John Locke. Canadians—neither their judges, nor their politicians—are creatures of the Enlightenment. Their forte is not abstract, rationalist philosophising. The American Republic may be built on self-evident principles and universal natural rights, but Canadian political and legal thought is far more pragmatic and empirical. Our judges have been at their best in the field of civil liberties when, instead of being asked to theorise about such abstractions as "equality before the law" or "due process of law", they have been called upon to identify the rights implicit in the working of our basic institutions of gov-

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King, supra, footnote 35; *Saumur* v. *Quebec and A.-G. Que.,* [1955] 2 S.C.R. 299; *Birks & Sons (Montreal) Ltd. and Others* v. *City of Montreal and A.-G. Que.,* [1955] S.C.R. 799; *Chaput* v. *Romain et al.,* [1955] S.C.R. 834; *Switzman* v. *Elbling and A.-G. Que.,* [1957] S.C.R. 328; *Roncarelli* v. *Duplessis,* [1959] S.C.R. 121; *Lamb* v. *Benoit,* [1959] S.C.R. 321.

[49] *Robertson and Rosetanni* v. *The Queen,* [1963] S.C.R. 651.

[50] *The Queen* v. *Drybones,* [1970] S.C.R. 282.

[51] *A.-G. of Can.* v. *Lavell-Isaac* v. *Bedard,* [1974] S.C.R. 1349.

[52] *Regina* v. *Burnshine* (1974), 44 D.L.R. (3rd) 584.

[53] *Hogan* v. *The Queen* (1974), 26 C.R.N.S. 207.

ernment such as parliamentary government,[54] an independent judiciary[55] or, to go back to one of the Supreme Court's first and noblest decisions, the secret ballot "with the absence of all undue influence".[56] I would advise Canadians who wish to see their Supreme Court uphold fundamental constitutional rights with firmness and eloquence to look to this tradition for their model rather than to the importation of a pale imitation of the American experience.

(See Appendix on pages 594-595-596)

[54] The opinions of Duff C. J. and Cannon J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, derive the right to free public discussion of government policy from the clauses in the B.N.A. Act providing for a parliamentary system of government with a representative House of Commons. This doctrine, which, logically, constitutes a major modification of the Privy Council's exhaustion theory (see footnote 23, *supra*) has never been supported by a clear majority of the Supreme Court. Four judges referred to it sympathetically in *Saumur* v. *Quebec* and it received further support, especially from Abbott J. in *Switzman* v. *Elbling, Birks and Sons (Montreal) Ltd.* v. *Montreal, supra*, footnote 48, and *Oil Chemical and Atomic Workers International Union* v. *Imperial Oil Ltd. and A.-G. B.C.*, [1963] S.C.R. 584. Note that Rand J.'s approach to this doctrine in both the *Saumur* and *Switzman* cases, *ibid.*, tended to take on a more American "natural rights" hue, than what I have identified as the more Burkean-Canadian approach of identifying fundamental rights by discovering what rights are required for the effective functioning of those of our institutions which have stood the test of time.

[55] An eloquent, though rather rambling, elucidation of the independence of the judiciary, as a fundamental feature of our constitution was given by Idington J. in his dissenting opinion in *A.-G. Ont.* v. *A.-G. Can.*, [1912] A.C. 571. For an analysis of the constitutional status and history of judicial independence in Canada, see Lederman, The Independence of the Judiciary (1956), 34 Can. Bar Rev. 769, 1139.

[56] Taschereau J., in *Brassard et al.* v. *Longevin* (1877), 1. S.C.R. 145. In this, one of its very first decisions, the Supreme Court ruled that the political sermons of parish priests on behalf of the Conservative Minister, Hector Langevin, amounted to acts of undue influence in contravention of the Dominion Controverted Elections Act.

Appendix: Questionnaire applied to all reported Supreme Court decisions, 1875 - 1969.

Style & Citation .....

.....

Col. 1 Col. 2 3 4 5 6 Col. 7 8 9 10

Card No. [1] Case No. [ ][ ][ ][ ][ ] Judgment Date [ ][ ][ ][ ]

Q. I. Court appealed from Col. 11 [ ]

1 Original
2 Exchequer Court
3 Single Sup.Ct. Judge (not Exch.Ct.)
4 Other Fed.Ct. or Tribunal
5 Highest Prov. or Terr'l Ct.
6 Other Prov. or Terr'l. Ct.

Q. II. Place appealed from Col. 12 13 [ ][ ]

01 Fed. 08 Man.
02 Nfld. 09 Sask.
03 P.E.I. 10 Alta.
04 N.S. 11 B.C.
05 N.B. 12 N.W.T.
06 P.Q. 13 Yukon
07 Ont. 14 Not applicable

Q. III. Jurisdiction Col. 14 15 [ ][ ]

01 Ref. by Gov.-in-Cl.
02 Ref. by Senate or H. of C.
03 Prov. ref.
04 Special case removed
05 Petition for Habeas Corpus
06 Motion for leave to appeal
07 Per Saltum appeal
08 Leave granted by Sup. Ct.
10 Leave granted by other Fed. Ct.
10 Leave granted by Prov. Ct.
11 De Plano appeal-Non-Crim. Hab. Corp.
12 De Plano appeal-Mandamus proceedings
13 De Plano appeal
14 Doubtful
15 Motion to quash
16 Miscellaneous motions

Q. IV. Appeal to Privy Council Col. 16 [ ]

1 Not appealed
2 Allowed
3 Allowed in part
4 Dismissed
5 Juris. denied
6 Juris. aff'd & case sent back
7 Leave to appeal granted
8 Leave to appeal denied
9 Other

Q. V. Disposition of appeal Col. 17 [ ]

1 Allowed
2 Allowed in part
3 Dismissed
4 Sup. Ct. juris. denied
5 Lower Ct. juris. denied
6 Lower Ct. juris. aff'd & case sent back
7 Leave to appeal granted
8 Leave to appeal denied
9 Other
0 Sup. Ct. juris. upheld

Q. VI. Disposition of cross-appeal Col. 18 [ ]

Code as in Q. V.
0 = not applicable

Q. VII Legal issue — Public Col. 19 20 [ ][ ]

01 Admin.
02 Admir'ty
03 Aliens
04 B. of Rts
05 Civ. Lib.
06 Combines
07 Const'l.
08 Crim.
09 Educat'n
10 Elec'n
11 Exprop.
12 Immig.
13 Juris'n
14 Labour
15 Munic.
16 Proced.
17 Prof'ns
18 Rlwys
19 Tax, death
20 Tax, excise
21 Tax, income
22 Tax, municip.
23 Tax, other
24 Utilities
25 Wk. Comp.
26 Other
27 Stat. Interp.
28 Crown Rts.

Q. VIII. Legal Issue — Private Col. 21 22 [ ][ ]

31 Agency
32 Arbt'n
33 Banking
34 Bank'cy
35 Bls. & notes
36 Char.
37 Comm'l
38 Contr.
39 Corp'ns
40 Debt. & Cr.
41 Evidence
42 False impris.
43 Family
44 Fraud
45 Ind. Prop.
46 Insurance
47 Jury
48 L. & T.
49 Mal. Pros.
50 M. & S.
51 Mortg.
52 Mot. Veh.
53 Proced.
54 R. Prop.
55 Sales
56 Shipping
57 Spec. Writ
58 Tort
59 Trespass
60 Trust
61 Wills
62 Other
63 Pers. Pty.
64 Conflict of Laws

Q. IX. Other public issue Col. 23 24
Code as in Qs. VII and VIII.

Q. X. Other private issue Col. 25 26
Code as in Qs. VII and VIII.

Q. XI. Broad Legal Category Col. 27 28

01 Const.
02 Fed. Stat.
03 Prov. Stat.
04 Com. Law
05 Civ. Code
06 (01 + 02)
07 (01 + 03)
08 (01 + 04)
09 (01 + 05)
10 (02 + 03)
11 (02 + 04)
12 (02 + 05)
13 (03 + 04)
14 (03 + 05)
15 (04 + 05)
16 (mix of 3)
17 Other

Q. XII. Appelant Col. 29 30

01 Fed.
02 Nfld.
03 P.E.I.
04 N.S.
05 N.B.
06 P.Q.
07 Ont.
08 Man.
09 Sask.
10 Alta.
11 B.C.
12 N.W.T.
13 Yukon
14 Municip.
15 Board
16 Corpn.
17 Union
18 Church
19 Press. gp.
20 Public util.
21 Other org.
22 Individ.
23 Other
24 Trustee exec. & admin.
25 Fed. official
26 Prov. official
27 Municip. official

Q. XIII. Respondent Col. 31 32

31 Fed.
32 Nfld.
33 P.E.I.
34 N.S.
35 N.B.
36 P.Q.
37 Ont.
38 Man.
39 Sask.
40 Alta.
41 B.C.
42 N.W.T.
43 Yukon
44 Municip.
45 Board
46 Corpn.
47 Union
48 Church
49 Press gp.
50 Pub. util.
51 Other org.
52 Indvid.
53 Other
55 **Trustee,** exec. or admin.
56 Fed. official
57 Prov. official
58 Municip. official

Q. XIV. Additional Party Col. 33 34
Code as in Qs XII and XIII

Q. XV. Additional Party Col. 35 36
Code as in Qs XII and XIII
54 more than 4 classes of party

Q. XVI. Interventions Col. 37 38

01 Fed.
02 Nfld.
03 P.E.I.
04 N.S.
05 N.B.
06 P.Q.
07 Ont.
08 Man.
09 Sask.
10 Alta.
11 B.C.
12 N.W.T.
13 Yukon
14 Municip.
15 Private
16 Other

Q. XVII. Constitutional outcomes Col. 39 40

01 Fed. law valid
02 Fed. law valid in pt.
03 Fed. law inval.
04 Prov. law valid
05 Prov. law valid in pt.
06 Prov. law invalid
07 Fed. rts upheld
08 Prov. rts upheld
09 Fed. rts & Prov. rts. each upheld in prt.
10 One Province's rts. upheld against other prov's. rts.
11 Combination of above

Q. XVIII. Attendance of judges Col. 41 Col. 42

Number present
Number in Dissent

Q. XIX. **Voting of judges**

1. Wrote Opinion of Court. 2. Wrote Majority Opinion. 3. Concurred with Majority. 4. Wrote Dissenting Opinion. 5. Concurred with Dissenting Opinion. 6. Joined in Joint Opinion. 7. Absent.

	Col.			Col.			Col.	
Richards	43		Ritchie	44		Strong	45	
J. Tashereau	46		Fournier	47		Henry	48	
H. Taschereau	49		Gwynne	50		Patterson	51	
Sedgewick	52		King	53		Girouard	54	
Davies	55		Mills	56		Armour	57	
Nesbitt	58		Killam	59		Idington	60	
Maclennan	61		Duff	62		Fitzpatrick	63	
Anglin	64		Brodeur	65		Mignault	66	
Malouin	67		Newcombe	68		Rinfret	69	
Lamont	70		Smith	71		Cannon	72	
Crocket	73		Hughes	74		Davis	75	
Kerwin	76		Hudson	77		R. Taschereau	78	
Rand	79		Kellock	80				

CARD No. Col. 1 [2]

CASE No. Col. 2 3 4 5 6 [ ][ ][ ][ ][ ][ ]

Estey	7		Locke	8		Cartwright	9	
Fauteux	10		**Abbott**	11		Nolan	12	
Martland	13		Judson	14		Ritchie	15	
Hall	16		Spence	17		Pigeon	18	
Ad Hoc	19							

Volume Col. 20 21 22 23 [ ][ ][ ][ ]

Page Col. 24 25 26 27 [ ][ ][ ][ ]