—AND ONE STEP BACKWARD: THE SUPREME COURT AND CONSTITUTIONAL LAW IN THE SIXTIES

DALE GIBSON*

Winnipeg

Introduction

Nostalgia for the 1950's is currently fashionable. The reverence with which so many students of the Supreme Court of Canada regard that decade in the court's history is no mere fad, however. During those first ten years as Canada's ultimate court of appeal, the Supreme Court displayed unusual vigor and imagination, and an unprecedented determination to adapt the law to Canadian conditions, even if this meant departing from paths previously trodden by the Judicial Committee of the Privy Council.

These characteristics were particularly evident in constitutional matters.[1] The court's consistently activist approach to constitutional questions during the 1950's produced a rich legacy of landmark decisions which brought about profound changes in two key areas of Canadian constitutional law: the scope of federal jurisdiction,[2] and the protection of fundamental freedoms.[3] The federal Parliament's previously stifled powers to make laws concerning "trade and commerce"[4] and "peace, order and good government" of Canada[5] were resuscitated, and extensive federal jurisdiction over extra-provincial transportation operations was

* Dale Gibson, of the Faculty of Law, University of Manitoba, Winnipeg. Valuable assistance with the statistical data for the article was provided by Lee Gibson.

[1] The term "constitutional" as used in this article is intended to embrace the subject of civil liberties as well as issues of jurisdiction and governmental powers.

[2] See V. C. MacDonald, Legislative Power and the Supreme Court in the Fifties, Lectures Delivered at Osgoode Hall Law School, March, 1960 (1961).

[3] See F. R. Scott, Civil Liberties and Canadian Federalism, Alan B. Plaunt Memorial Lectures, Carleton University, March, 1959 (1959).

[4] *Murphy* v. *C.P.R. et al.*, [1958] S.C.R. 626.

[5] *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292.

confirmed.[6] Even more striking was a monumental series of civil liberties decisions establishing such fundamental principles as the freedom to express one's religious and political opinions without governmental harrassment,[7] and the citizen's right to sue even the most high-ranking government officials for unlawful conduct.[8] Although most of these decisions were based on rather technical grounds, the reasons for judgment left little doubt that the court's chief concern was for the civil liberties issues that lay in the background. The opinions reverberated with libertarian manifestos:

> Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre.[9]
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> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has . . . become the stuff of daily experience. . . . . [B]ut our compact of free society accepts and absorbs these differences . . . . [T]hey and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.[10]

It is unlikely that anyone will ever feel nostalgic about the Supreme Court's performance during the 1960's. One reason for this was a marked change in the court's style. The open activism of the fifties was succeeded by cautious pragmatism. Terse and technical exposition replaced declamation. Even more disappointing to many observers was a growing reluctance by the court during the 1960's to uphold fundamental freedoms. The newly enacted Canadian Bill of Rights[11] fared poorly in the court, and although some civil liberties claims were upheld during the period, the success rate of such claims was sharply reduced. A low point was reached in 1969 when the full court unanimously

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[6] *Winner* v. *S.M.T. (Eastern) Ltd., et al.*, [1951] S.C.R. 887, varied [1954] A.C. 542 (P.C.); *Campbell-Bennett Ltd.* v. *Comstock Midwestern Ltd., et al.*, [1954] S.C.R. 207; *Stevedoring Reference*, [1955] S.C.R. 529; *A. G. Canada* v. *C.P.R. & C.N.R.*, [1955] S.C.R. 285.

[7] *Boucher* v. *R.*, [1951] S.C.R. 265; *Smith* v. *R.*, [1953] 2 S.C.R. 53; *Saumur* v. *Quebec*, [1953] 2 S.C.R. 299; *Chaput* v. *Romain, et al.*, [1955] S.C.R. 834; *Switzman* v. *Elbling et al.*, [1957] S.C.R. 285; *Lamb* v. *Benoit*, [1959] S.C.R. 321.

[8] *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

[9] Per Taschereau J. in *Chaput* v. *Romain et al.*, *supra*, footnote 7, at p. 840.

[10] Per Rand J., in *Boucher* v. *R.*, *supra*, footnote 7, at p. 288.

[11] S.C., 1960, c. 44, R.S.C., 1970, Appendix III.

refused to interfere with Alberta legislation restricting the land-holding rights of Hutterite colonies.[12]

The aim of this article is to examine the work of the court in the field of constitutional law during the 1960's, to attempt some explanation of the apparent contrasts between that decade and the previous one, and to make some observations about the significance of those changes. The discussion will be based on a study of ninety-five cases selected from the two periods.[13]

I. *General Characteristics.*

The most obvious stylistic difference between the court's record in the 1950's and that of the 1960's was its greatly increased efficiency in the latter period. While the number of judges assigned to constitutional cases was identical for both periods (7.6 judges per case), the number of written judgments declined sharply in the 1960's (from 59% of all judicial participations to 30%). During the 1950's, especially in the first five years, most judges felt obliged to record their personal views on most of the constitutional issues that came before them. Multiple opinions were written by majority judges in 90% of the constitutional cases decided during that decade.[14] This wasteful and often confusing practice was criticized by Mr. Justice V. C. MacDonald in 1960:[15]

> The present practice makes it very difficult for even an acute lawyer to estimate the net effect of the several Opinions which reach the same result, (particularly where a Justice concurs in two Opinions which are far from identical in their reasoning), for often there is no clearly articulated common ground to which the majority or dissenting Opinions, as such, can be related.
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> Accordingly it seems to me that the Court as a whole should accept as one of its greater functions the duty to make explicit the *ratio* of every decision, whether it be a majority or a unanimous decision. Whatever leeway should be extended to Justices to dissent, in solitude or in groups, on varying grounds, there is a special responsibility on those writing the several Opinions which in sum constitute the judgment of the Court, to proceed, if possible, to the common conclusion by

[12] *Walter et al.* v. *A.-G. Alberta, et al.*, [1969] S.C.R. 383.

[13] See Table 1. The cases were chosen from the Supreme Court Reports for the years 1950 to 1969 inclusive. The selection of cases was unavoidably arbitrary, since opinions vary as to what constitutes a "constitutional" decision or a "civil liberties" decision. This is particularly true of the latter category which, in its broadest sense could include most of the criminal cases appealed to the Supreme Court of Canada. It is hoped, however, that there was enough consistency in the selection of cases from the two decades to permit valid comparisons to be made.

[14] See Table 2.

[15] *Op. cit.*, footnote 2, p. 23.

reasoning which has a common basis in principle, and which is more patent than tacit.

Whether from a desire to follow Mr. Justice MacDonald's advice or from a need to conserve judicial energy in the face of growing case dockets (probably a combination of both), the court changed its ways in the 1960's. Concurring majority opinions were written in only 26% of the constitutional cases decided during that period, and there seems to have been a conscious attempt by most judges to relate their opinions to those of their colleagues. The change can be demonstrated even more clearly by contrasting the first half of the 1950's, when there were concurring majority opinions in 95% of the cases to the second half of the 1960's, when they were written in only 15% of the cases.[16] There was even a brief experiment with anonymously authored "joint opinions" in 1967 and 1968, although it was quickly abandoned.[17]

Another change of style that one notices in comparing the decisions of the two decades is that the opinions written in the sixties contain less open discussion of policy considerations. Although there has never been a time when many judges of the Supreme Court frequently articulated policy arguments to support their conclusions, there was a greater tendency to do so during the 1950's than at any other time. This trend was largely abandoned in the 1960's, however. The opinions of that period offer little justification for the court's decisions beyond formal legal reasoning.[18]

The decline in the number of concurring opinions may indicate more than just increased efficiency on the part of the court; it may also point to an increasing uniformity of opinion among the various members of the court during the 1960's. An examination of the frequency of dissenting opinions in the two periods tends to confirm that suspicion. While the Supreme Court of Canada has never had a very high incidence of dissenting opinions, the rate diminished significantly in the 1960's. Whereas there were dissenting opinions in 45% of the constitutional cases during the 1950's, the rate fell to 34% in the following decade, and whereas 14% of all judicial participations were dissents in

[16] See Table 2.

[17] There were only three attempts at joint opinions in all, two of which were in constitutional cases: *Offshore Mineral Reference*, [1967] S.C.R. 792, and *R.* v. *Board of Transport Commissioners*, [1968] S.C.R. 118. Mr. Justice MacDonald had warned against such an experiment: *op. cit.*, footnote 2, p. 23.

[18] For a trenchant criticism of this reversion to the formal style, see P. Weiler, In the Last Resort (1974), pp. 186 *et seq.*

the first period, only 10% were such in the second period.[19] While these rates of dissent were understandably somewhat higher than those for other types of litigation, their generally low level coupled with the fact that they declined somewhat between the 1950's and the 1960's, indicates a high and growing degree of commonality among the judges of the court on fundamental issues of constitutional law.

If the judges of the Supreme Court demonstrated increased confidence in their brethren during the sixties, they showed an even more dramatic increase in respect for their colleagues on the provincial courts of appeal and other courts appealed from. The court reversed the courts appealed from in 61% of the 1950's cases, but it did so in only 35% of the 1960's cases.[20] And while it was willing to overturn concurring decisions of both a trial court and court of appeal 36% of the time in the first decade, it refused to do so in all but 16% of the 1960's cases.[21] Where the trial court and court of appeal were divided, there was a strong preference for the court of appeal in the second period (73% C.A., 27% Trial), whereas there had been an even stronger preference for the trial courts in the first period (18% C.A., 82% Trial).[22]

The court also exhibited greater confidence in governments during the 1960's. This represents little change so far as the federal government was concerned. The court was equally reluctant in both periods to reject jurisdiction asserted by federal authorities, rejecting a federal claim to jurisdiction only once in the entire twenty years,[23] and never holding a federal statute to be *ultra vires*. But in the case of provincial governments, a change of attitude was evident. Asserted provincial jurisdiction was rejected in 53% of the cases during the 1950's but in the sixties the rejection rate dropped to 30%.[24] This apparent increase in the court's confidence in governments shows up even more markedly in the statistics for cases where private individuals or corporations were pitted against government: the government won only 36% of the time during the earlier decade, but 71% of the time during the 1960's.[25]

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[19] See Table 3.
[20] See Table 4.
[21] See Table 5.
[22] See Table 6.
[23] *Agence Maritime Inc.* v. *Conseil Canadien des Relations Ouvrières, et al.*, [1969] S.C.R. 851.
[24] See Table 7.
[25] See Table 8.

The sixties appear, in short, to have been a time when both the Supreme Court as a whole and its individual judges grew increasingly reluctant to "become involved" in constitutional issues, and increasingly willing to trust the judgment of others, whether their fellow Supreme Court judges, the members of other courts, or the governments whose actions were being called in question before them.

Governments, on the other hand, seem to have had rather less confidence in the court's ability to deal adequately with constitutional problems than was the case during the 1950's. This is indicated by a sharply reduced use of the "constitutional reference" technique to bring cases before the courts. Mr. Justice MacDonald complained about excessive use of this procedure in the 1950's:[26]

> One third of the cases of the decade (including some of the most important) came to the Court as References of Questions submitted by the Executive. . . . In many of the cases the Judges obviously felt embarrassed by the Terms of Reference or the matters recited therein and above all, by the absence of such concrete evidence as would be before them in ordinary litigation. . . . It is not surprising that Answers based so largely on speculation, rather than experience, have often been conceptual in nature, or couched in such terms of assumption or qualifications as to destroy much of their value as authorities. . . . This type of adjudication has also the disadvantage of requiring immediate declarations as to conclusions normally reached by gradual stages of evolution in relation to specific fact-situations. It may well be that in the matter of statutory validity "deliberate speed" is preferable to "majestic instancy".

As in the case of concurring opinions by majority judges, Mr. Justice MacDonald's words seem to have been heeded. Whereas government references accounted for 29% of constitutional cases in the 1950's, they accounted for only 9% during the sixties.[27] Clearly, the Supreme Court was not alone in believing that the judiciary should play a less active role than in the past in directing the development of the Canadian constitution.

Although this "hands off" attitude was evident in most aspects of the court's constitutional work, it will be seen that it operated somewhat differently in the cases involving jurisdictional issues than in the civil liberties cases.

II. *Jurisdictional Issues.*

A considerable expansion of provincial legislative jurisdiction took place during the 1960's. This did not occur at the expense of

[26] *Op. cit.*, footnote 2, p. 25.
[27] See Table 9.

federal jurisdiction, however. It took the form, rather, of an increased willingness by the Supreme Court to permit the provinces to employ concurrent powers in areas where potential federal jurisdiction had not yet been exercised. To put it another way, the court adopted a "hands off" tendency with respect to provincial statutes unless they came into actual conflict with federal enactments. During the fifties a consistent "hands off" approach had been taken to federal legislation, but not to provincial legislation. Every attack on asserted federal jurisdiction had been rejected during that period, while provincial jurisdiction had been successfully attacked in 53% of the cases.[28] In the 1960's the court began to show almost as much confidence in provincial governments as in the federal authorities.

The court continued to uphold federal jurisdiction almost every time it was asserted, of course. Ownership of offshore minerals on the west coast was found to be federal,[29] the "peace, order and good government" clause was held to justify federal land expropriation for the purpose of beautifying the national capital,[30] authority to make laws respecting juvenile delinquency was ruled to fall within the federal "Criminal Law" power, even though the laws were not cast in the traditional language of criminal law,[31] and federal transportation authorities were held to have jurisdiction over a provincially owned commuter rail service operating entirely within the province in question on trackage of a national railroad.[32]

Occasionally, too, assertions of provincial jurisdiction were denied by the court even though the federal Parliament had not yet entered the field in question. A long-standing scheme of personal insolvency legislation in the prairie provinces was overturned in 1960, for example, on the ground that it concerned "Bankruptcy and Insolvency", which are federal responsibilities.[33] It therefore became necessary for federal legislation to be passed reinstating this very useful scheme. A Saskatchewan Act was held incapable of compelling persons accused of causing death criminally to testify at coroners' inquests because to do so would encroach on the federal "Criminal Law" power.[34] An attempt by British Columbia to prevent the export of iron ore by means of a heavy tax on mineral ownership coupled with a "bounty" for

[28] See Table 7.
[29] *Offshore Minerals Reference, supra,* footnote 17.
[30] *Munro* v. *National Capital Commission,* [1966] S.C.R. 663.
[31] *A.-G. British Columbia* v. *Smith,* [1967] S.C.R. 702.
[32] *R.* v. *Board of Transport Commissioners, supra,* footnote 17.
[33] *Reference Re Orderly Payment of Debts Act,* [1960] S.C.R. 571.
[34] *Batary* v. *A.-G. Saskatchewan,* [1965] S.C.R. 465.

smelting ore in the province was held to be an improper export tax, rather than taxation within the province.[35] And a telephone company with extraprovincial connections was found to be immune from provincial labor legislation.[36]

However, in the great bulk of jurisdictional cases decided during the 1960's, provincial legislation was upheld. The rejection rate of jurisdictional assertions by the provinces dropped from 53% in the previous decade to 30%.[37] A manufacturer of processed milk with a national market was held to be subject to provincial price controls in its purchases of raw milk.[38] An earlier tendency to permit provincial careless driving provisions to coexist with similar federal legislation was extended.[39] Provincial securities legislation was upheld on two occasions despite probable concurrent federal jurisdiction under the "Criminal Law" power.[40] The Ontario Unconscionable Transactions Relief Act was ruled *intra vires* in spite of its undoubted effect on matters of "Interest" and "Bankruptcy and Insolvency".[41] Provincial legislation relating to the winding up of insurance companies was found to relate primarily to "insurance" rather than "Bankruptcy and Insolvency".[42] In all three cases in which provincial taxes were challenged on the ground that they were "indirect" the tax was upheld.[43] In four out of five cases accusing provincial administrative officers of exercising the duties of federally appointed judges under section 96 of the British North America Act, the attack failed.[44] And on the two occasions when powers delegated

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[35] *Texada Mines Ltd.* v. *A.-G. British Columbia, et al.*, [1960] S.C.R. 713.

[36] *Commission du Salaire Minimum* v. *Bell Telephone Co.*, [1966] S.C.R. 767.

[37] See Table 7.

[38] *Carnation Co. Ltd.* v. *Quebec Agricultural Marketing Board et al.*, [1968] S.C.R. 238.

[39] *O'Grady* v. *Sparling*, [1960] S.C.R. 804; *Mann* v. *R.*, [1966] S.C.R. 238.

[40] *Smith* v. *R.*, [1960] S.C.R. 776; *Duplain* v. *Cameron, et al.*, [1961] S.C.R. 693.

[41] *A.-G. Ontario* v. *Barfried*, [1963] S.C.R. 570.

[42] *A.-G. Ontario* v. *Wentworth Insurance Co.*, [1969] S.C.R. 779.

[43] *Crawford & Hillside Dairy Ltd. et al.* v. *A.-G. British Columbia, et al.*, [1960] S.C.R. 346; *Cairns Construction Ltd.* v. *Saskatchewan*, [1960] S.C.R. 619; *Nickel Rim Mines Ltd.* v. *A.-G. Ontario*, [1967] S.C.R. 270. The first of these decisions is regarded by many observers as virtually overruling the Privy Council decision in *Lower Mainland Dairy Products Board* v. *Crystal Dairy Ltd.*, [1933] A.C. 168.

[44] *Brooks* v. *Pavlick*, [1964] S.C.R. 108; *A.-G. British Columbia* v. *McKenzie*, [1965] S.C.R. 490; *Procureur Général, Québec* v. *Barreau, Québec*, [1965] S.C.R. 772. The case in which the attack succeeded was *A.-G. Ontario, et al.* v. *Victoria Medical Ltd., et al.*, [1960] S.C.R. 32.

to provincial authorities by the informal delegation techniques sanctioned by the court in the previous decade were challenged, the powers were upheld.[45]

In summary, although there were very few momentous jurisdictional contests during the 1960's, the court's increased willingness to place the same confidence in provincial governments that it had earlier shown for the federal government brought about significant jurisdictional shifts. Rather than stressing the exclusivity of federal powers, the court tended to encourage jurisdictional co-existence, with federal priority reserved chiefly for situations of actual conflict.

III. *Civil Liberties.*

It is in the area of civil liberties where the contrasts between the fifties and the sixties are most dramatic. The rampant activism on behalf of fundamental freedoms that had marked the fifties came to an abrupt halt during the sixties.

It should not be supposed that the court rejected every civil liberties claim advanced during this period. In fact, it upheld such claims on several occasions, at least two of which involved very important issues. The law of obscenity was significantly liberalized, for example by the court's ruling that *Lady Chatterley's Lover* is not an obscene book.[46] On another occasion the court held that federal election advertising is immune from regulation by municipal or provincial laws.[47] In other cases a men's magazine was found not to be obscene,[48] a provincial statute prohibiting hunting with night lights was held not to apply to Indians,[49] and the Immigration Department was denied the power to invoke a three-year-old deportation order against a person in whose presence the Department had previously acquiesced.[50]

Generally speaking, however, the Supreme Court was very unsympathetic to civil liberties claims during the 1960's. Arguments based on the newly enacted Canadian Bill of Rights

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[45] *Lieberman* v. *R.*, [1963] S.C.R. 643; *Coughlin* v. *Ontario Highway Transport Board, et al.*, [1968] S.C.R. 569.

[46] *Brodie* v. *R.*, [1962] S.C.R. 681. The court divided 5 to 4.

[47] *McKay* v. *R.*, [1965] S.C.R. 798. The court again divided 5 to 4.

[48] *Dominion News* v. *R.*, [1964] S.C.R. 251.

[49] *Prince & Myron* v. *R.*, [1964] S.C.R. 81.

[50] *Violi* v. *Superintendent of Immigration, et al.*, [1965] S.C.R. 232. The court divided 6 to 3.

were rejected in six out of seven cases,[51] and even in the seventh case[52] the Bill of Rights was peripheral to the main issues involved. Special recognition for native hunting rights was denied in four out of five cases,[53] and arbitrary deportation procedures were upheld in two out of three cases.[54] A provincial statute prohibiting the assessment of union dues for political purposes (an obvious attempt to undermine financial support for the New Democratic Party) was upheld.[55] The federal Lord's Day Act was held not to contravene the Canadian Bill of Rights with respect to adherents of non-Christian religions.[56] The news media were denied the right to invoke the defence of privilege in defamation proceedings, on the ground that while they have a "right" to publish news and comment, they have no "duty" to do so.[57] Provincial legislation providing for the confinement of persons thought to need mental treatment was upheld.[58] A federal radio licensing statute was interpreted to apply retroactively.[59] And Alberta legislation restricting the land-holding rights of Hutterites and similar communal groups was held to be valid.[60]

While the court had upheld libertarian claims in 94% of the cases heard in the previous decade, it did so in only 24% of the 1960's cases.[61] The contrast between the first half of the first period and the second half of the second period is especially spectacular: from 100% to 18%.

This abrupt about-face by the court is particularly startling when considered in the light of general social trends throughout the sixties. It was a decade of liberalism and civil rights militancy. In the United States substantial progress was made to improve

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[51] *Yuet Sun* v. *R.*, [1961] S.C.R. 70; *Rebrin* v. *Bird, et al.*, [1961] S.C.R. 376; *Robertson & Rosetanni* v. *R.*, [1963] S.C.R. 651(4 to 1); *Guay* v. *La Fleur*, [1965] S.C.R. 12(8 to 1); *R.* v. *Randolph*, [1966] S.C.R. 260; *O'Connor* v. *R.*, [1966] S.C.R. 619.

[52] *Violi* v. *Superintendent of Immigration, et al., supra*, footnote 50. The court divided 6 to 3.

[53] *Sikyea* v. *R.*, [1964] S.C.R. 642; *R.* v. *George*, [1966] S.C.R. 267(6 to 1); *Sigeareak* v. *R.*, [1966] S.C.R. 645; *Daniels* v. *White, et al.*, [1968] S.C.R. 517(5 to 4).

[54] *Yuet Sun* v. *R., supra*, footnote 51; *Rebrin* v. *Bird, et al., supra*, footnote 51.

[55] *Oil, Chemical & Atomic Workers* v. *Imperial Oil Ltd.*, [1963] S.C.R. 584. The court divided 4 to 3.

[56] *Robertson & Rosetanni* v. *R., supra*, footnote 51.

[57] *Banks* v. *The Globe & Mail Ltd., et al.*, [1961] S.C.R. 474.

[58] *Fawcett v. A.-G. Ontario, et al.*, [1964] S.C.R. 625.

[59] *Procureur Général, Canada* v. *La Presse*, [1967] S.C.R. 60(4 to 1).

[60] *Walter, et al.* v. *A.-G. Alberta, et al., supra*, footnote 12.

[61] See Table 10.

the condition of Blacks and other oppressed or underprivileged groups. The United States Supreme Court which had been comparatively complacent during the 1950's[62] carried on a dramatically activist crusade in the cause of civil liberties by means of a series of historic pronouncements on such matters as racial discrimination,[63] equality of representation at the polls,[64] and the rights of criminally accused.[65] In Canada, the decade began with the enactment of the Canadian Bill of Rights,[66] and several provinces passed Human Rights Acts during the period. The need to strengthen the language rights of French Canadians came to be widely accepted, and Canadian Indians and other minority groups found increasing support for improvement of their situations.

Yet the Supreme Court of Canada chose this moment in history to curtail its support for libertarian causes. Possible explanations for this curious development will be discussed in the next section.

IV. *What Caused the Change?*

The contrast between the court's performances of the fifties and the sixties are easier to identify than to explain. No single factor appears to be responsible. Rather, it is submitted, the changes were brought about by the interaction of several different factors.

Case selection

It is sometimes contended that the alleged differences between the two periods are chiefly attributable to "accidents of litigation". The court's statistics for the 1950's, for instance, are heavily influenced by a group of cases[67] which all arose from a single situation: the campaign of Quebec's Duplessis government to

[62] See P. G. Kauper, Civil Liberties and the Constitution (1962). There were some notable exceptions, however, such as *Brown* v. *Board of Education* (1954), 347 U.S. 483, which ruled that racial segregation in public schools was unconstitutional.

[63] See A. Cox, The Warren Court: Constitutional Decision as an Instrument of Reform (1968).

[64] *Baker* v. *Carr* (1962), 369 U.S. 186. See Cox, *op. cit., ibid.*

[65] *Gideon* v. *Wainwright* (1963), 372 U.S. 335; *Escobedo* v. *Illinois* (1964), 378 U.S. 478; *Miranda* v. *Arizona* (1966), 384 U.S. 436. See Cox, *op. cit., ibid.*

[66] *Supra,* footnote 11.

[67] *Boucher* v. *R., supra,* footnote 7; *Saumur* v. *Quebec, supra,* footnote 7; *Chaput* v. *Romain, supra,* footnote 7; *Switzman* v. *Elbling et al., supra,* footnote 7; *Roncarelli* v. *Duplessis, supra,* footnote 8; *Lamb* v. *Benoit, supra,* footnote 7.

stamp out the activities of Jehovah's Witnesses in that province. Apart from those cases, it is argued, the court's record was not nearly so radical. Similarly, the high percentage of pro-federal jurisdictional decisions during that period might be attributable to the large number of governmental references to the courts.

Yet the fact is that even if all these cases were removed from consideration, the court's performance for the 1950's would remain impressively pro-federal and libertarian. Moreover, the facts that the court chose to engage in a running battle with the Duplessis government and that governments frequently chose to refer constituitional questions to the court during the fifties are surely significant in themselves. While it is possible that the selection of cases was to some extent responsible for the sharpness of the contrasts between the two periods, the chief factors we seek were far from accidental.

Personnel changes

Changes in the personnel of the court undoubtedly had an important bearing on changes of direction. Of the eight new appointments made during the entire twenty-year period under review three very significant ones occurred between January, 1958, and May, 1959.[68] Commenting in 1960 on the court's civil liberties record during the fifties, Mr. Justice V. C. MacDonald forecast that the new appointments might influence the court's approach:[69]

> . . . [B]ecause of recent changes in the Court, it is uncertain to what extent such far-ranging opinions, based upon the "fundamental postulates" of an "open society", or on some sort of natural law, will influence the Court in future.

This observation can now be seen, in light of the court's performance during the 1960's, to have been prophetic.

All the 1958-1959 changes brought to the bench judges who were less favourably disposed to libertarian claims and more likely to uphold provincial legislation than their predecessors.[70]

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[68] Martland J. for Nolan J. (who had replaced Estey J. only a short time earlier) in January 1958; Judson J. for Kellock J. in February 1958; and Ritchie J. for Rand J. in May 1959.

[69] *Op. cit.*, footnote 2, p. 19.

[70] See S. M. Shuler. Realist Needles in a Positivist Haystack: A Study of Attitudes Operative in the Decisions of Supreme Court Justices (1974), 32 U.T. Fac. L. Rev. 1. The voting records of the various judges of the Supreme Court are discussed in the light of scalogram analysis in D. E. Fouts, Policy-Making in the Supreme Court of Canada, 1950-1960, in G. Schubert and D. J. Danelski (eds), Comparative Judicial Behavior (1969), p. 257. See also S. R. Peck, The Supreme Court of Canada, 1958-1966;

Their styles were also markedly different, showing a much greater tendency to concur silently and to employ the "formal manner" of reasoning with no indication of the policy considerations underlying their decisions. Two of the individuals involved in the personnel changes—Mr. Justice Rand and Mr. Justice Martland —were especially significant in this regard.

It has been said that ". . . the 'golden moments' of the civil liberties decade . . . ended with the late Mr. Justice Rand's departure from the Bench".[71] Although his style was highly personal, and he seldom wrote the majority opinion for the court, Mr. Justice Ivan C. Rand could fairly be said to have embodied the spirit of the 1950's court, at least on questions involving fundamental freedoms. His record of support for libertarian claims—fourteen out of sixteen cases (88%) was only slightly less impressive than the court's (16/17—94%). He wrote opinions in 89% of the constitutional cases in which he participated during the fifties, and his opinions commonly articulated the policy considerations that influenced his thinking. He was unquestionably the most quotable Supreme Court judge of the period. His replacement by Mr. Justice R. A. Ritchie, whose 27% support of civil liberties during the 1960's exactly matched that of the court, and whose opinions, written in only 23% of his participations, almost never departed from formal legal reasoning, was highly representative of the court's altered approach in the 1960's.

If Mr. Justice Rand embodied the spirit of the fifties, Mr. Justice Ronald Martland seems to have been the archetypal judge of the sixties. Replacing Mr. Justice Estey,[72] who had upheld civil liberties claims 100% of the time, Martland J. did so in only 25% of the 1960's cases, which was very similar to the court's overall record. His percentages of reversals and of jurisdictional claims upheld were also extremely close to the statistics for the court generally. While his record is similar to that of Mr. Justice Ritchie in many respects, he appears to have had a much greater influence over his brother judges, since his dissent rate (6%) was considerably lower than that of Ritchie J. and of the court generally (both of which were 10%), while he wrote the leading opinion of the court in a higher percentage of his participations (15%, as opposed to 6% for Ritchie J.).

A Search for Policy Through Scalogram Analysis (1967), 45 Can. Bar Rev. 666, and S. R. Peck, A Scalogram Analysis of the Supreme Court of Canada, 1958-1967, in Schubert and Danelski, *op. cit,. ibid.*, p. 293.

[71] M. Cohen, The Judicial Process and National Policy—A Problem for Canadian Federation (1970), 16 McGill L.J. 297, at pp. 301-302.

[72] The intervening tenure of Nolan J. was not long enough to establish any significant trends.

Although the third judge appointed in 1958-1959, Mr. Justice Wilfred Judson, also wrote a high percentage (17%) of leading opinions during the 1960's his influence appears to have diminished over the period, while that of Martland J. seems to have increased correspondingly. Whereas the leading opinions of Judson J. dropped from 23% to 10% between the two halves of the decade, those of Martland J. rose from 8% to 21%.

The significance of this shift is chiefly in the area of civil liberties, where Mr. Justice Judson had a considerably more liberal record (48%) than Mr. Justice Martland (25%). Indeed, Mr. Justice Martland wrote the leading opinion in 38% of the civil liberties cases in which he participated during the second half of the sixties—a much higher proportion than any other judge. That he played an increasingly activist role in civil liberties matters during that period is also indicated by his percentage of written opinions, which rose from 10% to 50% for civil liberties cases between the two halves of the 1960's, compared to an overall rate of 23% for the decade.

What should be disturbing to civil liberties advocates about this increasing interest and influence of Mr. Justice Martland in the subject is the fact that it is inversely proportional to his support for libertarian claims. During his first two years on the court, 1958 and 1959, Mr. Justice Martland voted to uphold fundamental freedoms in all three cases on which he sat, while in the next five years he supported civil liberties in only 30% of the cases. During the last half of the sixties, when his interest and influence in the subject were highest, he upheld libertarian claims in only 13% of the cases.

Changes in the Supreme Court's behavior during the 1960's cannot be attributed completely to the altered composition of the court. This fact is best illustrated by examining the civil liberties records of judges who served on the court during both decades, most of whom seem to have acquiesced in the change of direction.

Chief Justice Kerwin's record provides a particularly telling example. During the fifties Kerwin C.J. voted to uphold civil liberties in 100% of the cases he heard (15/15), but during the next three and one half years before his retirement in July, 1964, he voted *against* libertarian claims in 100% of the cases he heard (5/5). Mr. Justice Locke, who had a support rate of 77% in the first decade also rejected all three claims with which he subsequently dealt. The performance of Mr. Justice Abbott shows a similar though less startling reversal. For the 1954-1959 period Abbott J. supported civil liberties 75% of the time, but his

support rate dropped to 30% in 1960-1964 and to 11% in 1965-1969.

The statistics for only the two judges who sat on the court for the entire twenty-year period, Cartwright C.J., and Fauteux C.J., also provide evidence of the same phenomenon. While it is not surprising that Chief Justice Fauteux supported the change of direction, inasmuch as he had frequently differed with the majority of the court during the 1950's, the extent of the shift is dramatic even in his case. Whereas he voted to uphold civil liberties claims in 57% of the 1950's cases, he did so in only 10% of the 1960's cases. Chief Justice Cartwright seems to have been less influenced by the change, but even he went along with it to some extent. His support rate for civil liberties was only 57% for the 1950's, but this was chiefly because of his marked anti-libertarian approach during the first five years. In the second five years he voted to uphold civil liberties in 78% of the cases. This dropped to 45% in both halves of the 1960's.

The only judge who does not seem to have been much affected by the court's change of direction was Chief Justice Taschereau, who dissented most frequently from the court's libertarian views in the 1950's, supporting civil liberties claims only 42% of the time, but who surprisingly continued to support them 35% of the time in the second decade—a significantly higher rate than that of the court generally.

Age and experience

To what can these changes in the views of individual judges be attributed? Age no doubt played a part. The average age of the judges rose somewhat during the twenty-year period: from 60 in 1950 to 66 in 1969. In terms of five-year averages the age rose from 61.8 (1950-1954) to 63 (1955-1959) to 63.2 (1960-1964) to 65.2 (1965-1969). While this average rise is probably not very significant, the conservatism of age may well have been an important influence for some individual judges. The sharp decline in the willingness of Chief Justice Kerwin, Mr. Justice Locke, and Mr. Justice Abbott to uphold fundamental freedoms came, for example, at the end of their respective judicial careers. Jadedness may also have been a factor. Chief Justice Kerwin served the court for twenty-nine years, and Justices Locke and Abbott had sat for well over ten years each when their apparent changes in attitude about civil liberties took place. Moreover, by 1960 the court had been Canada's court of final resort for ten years. The novelty had worn off, and with it, perhaps, disappeared some of the court's enthusiasm for judicial activism.

Public opinion

Another possible explanation for the judges' change of heart is that it merely represented a return to normalcy after an extraordinary period of post-war idealism. Historically the end of wartime regimentation has often been followed by an era of unusually strong liberalism. The failure of this phenomenon to occur in the United States until the 1960's could be explained by that country's deep involvement in the Korean and "cold" wars internationally and the attendant communist scare at home. What makes that explanation difficult to accept is that the reaction set in at a time when Canadian public opinion, stimulated by developments south of the border, was becoming more liberal rather than less so. It is true that a Conservative government was in power in Ottawa, but it did not remain there long, and in any event it was led by a man who had earned a reputation as a defender of civil liberties, and had just persuaded Parliament to pass the Canadian Bill of Rights. The judges must have been motivated by something other than a desire to give effect to public opinion.

Perhaps they had the opposite intent. A defensible pattern for judicial behavior on questions such as civil liberties which are strongly affected by shifts in public opinion is to act as a leveller of attitudes. By this theory a court should always be on guard against popular extremism of all types by consistently leaning *away* from public opinion. The civil liberties decisions of the Supreme Court of Canada during the 1950's and 1960's could be explained in terms of such a "compensatory" or "reactive" model. In the fifties, when public opinion was generally insensitive to minority rights, the court reacted by offering them wide protection. Later, when the opinion pendulum had swung in the opposite direction and libertarian militancy was rampant, the court shifted its support to the interests opposed to civil rights. This would perhaps explain the interesting fact that although on jurisdictional issues the Supreme Court judges showed greater confidence in their brethren and in lower court judges during the 1960's, both the dissent and reversal rates remained higher where civil liberties were concerned. Whereas they had reversed lower courts for denying civil liberties in the fifties, they reversed them for upholding them in the sixties.[73] According to this theory, the court must check even those swings of public opinion which it helped to set in motion; progress occurs in a "two steps forward, one step backward" manner. If this theory is correct, one would expect another wave of pro-libertarian decisions from the Supreme

[73] See Tables, 3, 4 and 5.

Court before long to compensate for current trends in public opinion. It will be interesting to see whether they materialize.

Conclusion

During the 1950's the Supreme Court of Canada adopted a rather creative approach to constitutional questions. The chief products of this creativeness were enlarged federal jurisdiction and increased protection for fundamental freedoms. The court's style, though generally quite formal, was characterized by a somewhat more open discussion by some judges of the policy realities underlying their legal reasoning than had been the case in the past. A multiplicity of individual opinions required a heavy expenditure of judicial energies, and led to considerable confusion as to the meaning of some decisions.

In the 1960's the court appeared to exercise much more self-restraint. Lower courts were reversed less frequently, especially on jurisdictional questions. Provincial legislatures were given much freer jurisdictional rein when their activities did not run afoul of federal legislation. Civil liberties were afforded substantially less protection than in the previous decade. Stylistically, the opinions of the judges were much less numerous and considerably better co-ordinated. They also exhibited a marked preference for the formal style, with little or no discussion of policy.

These changes seem to be attributable partly to the replacement of certain key judges by others of a more conservative persuasion, and partly to a more conservative attitude being adopted by most of the remaining judges. The reason for the changed views of individual judges was probably a combination of aging and reactive response to libertarian militancy.

It is often said that as a result of these changes the court of the 1960's was less "activist" than it had been during the 1950's. The writer believes that this is a mistaken view. A court which ignored policy considerations in attempting to adapt a century-old and difficult-to-amend constitution to modern circumstances would be courting disaster. The ship of state would be rudderless. It is submitted that the Supreme Court did not adopt so irresponsible an approach during the sixties. Although it may have given the appearance of being less activist during those years the court was in fact actively implementing quite consistent policies with respect to both jurisdictional and libertarian issues. While it did not interfere with lower courts on jurisdictional matters as frequently as in the 1950's, this was, it is

submitted, simply because it agreed with the direction being taken by the lower courts. Where it disagreed with the lower courts, as on questions of civil liberties, the statistics show that the Supreme Court was quite "active" in reversing their decisions. By hiding behind a formal style, however, the court pretended to eschew policy goals.

A more important issue is whether the *type* of activism in which the court chose to engage was desirable. This requires consideration of two distinct but intertwined questions: were the substantive changes brought about by the court during the sixties beneficial? Was its refusal to engage in open policy discussions justifiable?

On the substantive issues the writer is divided. The court's tolerance of greater jurisdictional concurrency between the federal and provincial governments seems commendable. The stress which was placed on federal powers in the 1950's was an understandable delayed reaction to the excessive provincialism shown by some of the Privy Council's earlier decisions. The war years had demonstrated the virtues of national unity and of federal government efficiency, so it was not surprising that the court should have sought ways to avoid a return to the strong provincialism of the thirties once the wartime emergency had passed. But by the end of the 1950's the pendulum had begun to swing too far in the other direction. In order to exercise the autonomy on local matters that Confederation was designed to give them, the provincial governments required greater legislative scope than the Supreme Court seemed willing to grant in the fifties. The concept of concurrency offered a technique which would permit provincial authorities to experiment with a broader spectrum of legislation without relinquishing ultimate federal priority in the case of operational conflicts between federal and provincial laws. This was in accord with the notion of "co-operative federalism" that was so popular at the time.

The Supreme Court's approach to civil liberties during the 1960's does not appeal to the writer. It is very difficult to criticize, however, because the court chose not to explain why it felt it necessary to alter its attitudes on the question. One is forced to speculate.

If, as suggested above, the court was simply trying to balance current public opinion, it misconstrued its role. It is true that courts should be prepared to resist public opinion if necessary to *protect* individuals from the ill-considered wrath of the multitude; one of the most important functions of law is to provide the weak with at least temporary haven from the will of the strong.

But what justification can there be for resisting tides of popular opinion which *favour* individual rights?

Another possible basis for the change in the court's stance on civil liberties might be that it perceived a need for greater governmental involvement in the daily lives of private citizens in order to deal effectively with the increasingly complex social and economic problems of modern times, and feared that excessive concern for individual rights would unduly hamper such governmental action. This rationale would explain the court's approach to both the jurisdictional and civil liberties questions during the sixties. It is also borne out by the court's consistently pro-government decisions when citizens were in direct confrontation with governments during that decade.[74] But if that is what motivated the court, it is submitted that it does not justify its actions; there is very little objective evidence to support the view that civil rights militancy in the late 1950's threatened to interfere significantly with any important government programme.

The speculative nature of this discussion demonstrates one of the most unfortunate consequences of the court's repudiation of the few timid steps toward open discussion of policy considerations that it had taken in the 1950's. This, it is submitted, was the worst feature of the Supreme Court's constitutional decisions in the sixties.

It is not especially distressing that the court's substantive holdings should differ from one's own views, or that they should change direction occasionally. The court must decide these matters in accordance with its assessment of Canada's constitutional needs from time to time, and it is inevitable that other observers will often disagree with its assessment. The fact that the court sometimes changes its mind holds out the hope that those who disagree with it may eventually triumph.

However, if the court fails to disclose its true assessment, and instead offers empty exercises in formal logic, it becomes extremely difficult for those who differ with its views to engage in intelligent criticism. Without such frank and informed criticism, the ability of the Supreme Court to continue making wise decisions is dangerously weakened. Moreover, counsel who appear before the court are at a great disadvantage if the outcome of their cases is in any way dependent upon policy factors which they are prevented from dealing with openly in argument because of the court's refusal to acknowledge their significance. It is one of the touchstones of democracy that satisfactory progress requires

[74] See Table 8.

the uninhibited clash of competing ideas. This is as true in the judicial arena as in all others. If litigants and the general public are deprived of the opportunity to know and debate any of the factors which actually affect the determination of cases, the quality of justice will suffer.[75]

[75] See the perceptive discussions of the Supreme Court's style in P. Weiler, *op. cit.*, footnote 18.

TABLE 1

TABLE OF CASES

1950–59

Jurisdictional

[1950]	S.C.R.	124	*Reference re Wartime Leasehold Regulations*
[1950]	S.C.R.	608	*Reference re Bowaters Pulp and Paper Mills*
[1951]	S.C.R.	31	*A.-G. of N.S.* v. *A.-G. for Canada*
[1951]	S.C.R.	190	*C.P.R.* v. *A.-G. for Saskatchewan*
[1951]	S.C.R.	887	*Winner* v. *S.M.T.*
[1952]	1 S.C.R.	292	*Johannesson* v. *Municipality of West St. Paul*
[1952]	2 S.C.R.	231	*C.P.R. v. A.-G. for Saskatchewan*
[1952]	2 S.C.R.	392	*P.E.I. Potato Marketing Board* v. *Willis*
[1953]	1 S.C.R.	345	*Western Minerals* v. *Gaumont*
[1953]	2 S.C.R.	273	*Industrial Acceptance* v. *The Queen*
[1954]	S.C.R.	127	*Johnson* v. *A.-G. for Alberta*
[1954]	S.C.R.	207	*Campbell-Bennett* v. *Comstock Ltd.*
[1954]	S.C.R.	404	*Phillips and Taylor* v. *Sault Ste. Marie*
[1955]	S.C.R.	43	*A.-G. for Saskatchewan* v. *Whiteshore Salt & Chemical Co. & Other*
[1955]	S.C.R.	309	*Klein* v. *Bell*
[1955]	S.C.R.	454	*City of Toronto* v. *Olympia Edward*
[1955]	S.C.R.	529	*Validity and Applicability of the Industrial Relations and Disputes Investigation Act*
[1956]	S.C.R.	31	*Canadian Bankers' Association and Dominion Mortgage and Investments Association* v. *A.-G. for Saskatchewan*
[1956]	S.C.R.	137	*A.-G. for Ontario* v. *Scott and A.-G. for Canada*
[1956]	S.C.R.	303	*Goodyear Tire and Rubber Company of Can. Ltd.* v. *The Queen*
[1957]	S.C.R.	198	*Reference re Farm Products Marketing Act, R.S.O. 1950, Chapter 131*
[1958]	S.C.R.	285	*A.G. for Canada v. C.P.R. and C.N.R.*
[1958]	S.C.R.	535	*Dupont and MacLeod* v. *Inglis, Biron and Mann*
[1958]	S.C.R.	608	*Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*
[1958]	S.C.R.	626	*Murphy* v. *C.P.R.*
[1959]	S.C.R.	497	*Lord's Day Alliance of Canada* v. *A.-G. of B.C. et al.*

Civil Liberties

[1951]	S.C.R.	64	*Noble* v. *Alley*
[1951]	S.C.R.	265	*Boucher* v. *The King*
[1951]	S.C.R.	762	*Williams* v. *Aristocratic Restaurants*
[1953]	2 S.C.R.	18	*Toronto Newspaper Guild* v. *Globe Publishing Co.*
[1953]	2 S.C.R.	95	*Smith & Rhuland* v. *The Queen*
[1953]	2 S.C.R.	140	*Alliance des Professeurs Catholiques de Montréal* v. *Quebec Labour Relations Board*
[1953]	2 S.C.R.	299	*Saumur* v. *City of Quebec*
[1955]	S.C.R.	263	*Masella* v. *Langlais*
[1955]	S.C.R.	344	*Mehr* v. *Law Society of Upper Canada*
[1955]	S.C.R.	799	*Birks* v. *City of Montreal*
[1955]	S.C.R.	834	*Chaput* v. *Romain*

[1957] S.C.R. 285 *Switzman* v. *Elbling & A.-G. for Quebec*
[1958] S.C.R. 177 *Beatty & Mackie* v. *Kozak*
[1959] S.C.R. 58 *Vic Restaurant Inc.* v. *City of Montreal*
[1959] S.C.R. 121 *Roncarelli* v. *Duplessis*
[1959] S.C.R. 321 *Lamb* v. *Benoit et al.*

1960–69
Jurisdictional

[1960] S.C.R. 32 *A.-G. for Ont. and Display Service Co.* v. *Victoria Medical Building et al.*
[1960] S.C.R. 346 *Crawford et al.* v. *A.-G. for B.C.*
[1960] S.C.R. 571 *Validity of Orderly Payment of Debts Act, 1959 (Alta)*
[1960] S.C.R. 619 *Cairns Construction Ltd.* v. *Government of Saskatchewan*
[1960] S.C.R. 713 *Texada Mines Ltd.* v. *A.-G. for B.C.*
[1960] S.C.R. 776 *Smith* v. *The Queen*
[1960] S.C.R. 804 *O'Grady* v. *Sparling*
[1960] S.C.R. 823 *Stephens* v. *The Queen*
[1961] S.C.R. 383 *Government of Canada* v. *Government of Newfoundland*
[1961] S.C.R. 693 *Duplain* v. *Cameron et al.*
[1962] S.C.R. 331 *Nykorak* v. *A.-G. for Canada*
[1962] S.C.R. 487 *Troup Limited et al.* v. *Royal Bank of Canada*
[1963] S.C.R. 144 *Esso Standard (Inter-America) Inc.* v. *J.W. Enterprises et al. and M.A. Morrisroe*
[1963] S.C.R. 570 *A.-G. for Ontario* v. *Barfried Enterprises Ltd.*
[1963] S.C.R. 643 *Lieberman* v. *The Queen*
[1964] S.C.R. 108 *Brooks* v. *Pavlick and Pavlick*
[1965] S.C.R. 465 *Batary* v. *A.-G. for Saskatchewan*
[1965] S.C.R. 490 *A.-G. for B.C.* v. *McKenzie*
[1965] S.C.R. 772 *Re Cour de Magistrat de Québec*
[1966] S.C.R. 238 *Mann* v. *The Queen*
[1966] S.C.R. 663 *Munro v. National Capital Commission*
[1966] S.C.R. 767 *Commission du Salaire Minimum* v. *Bell Telephone Co. of Canada*
[1967] S.C.R. 270 *Nickel Rim Mines Ltd.* v. *A.-G. for Ontario*
[1967] S.C.R. 503 *La Reine* v. *Breton*
[1967] S.C.R. 697 *Tremblay et al.* v. *Commission des Relations de Travail du Québec et al.*
[1967] S.C.R. 702 *A.-G. for B.C.* v. *Smith*
[1967] S.C.R. 792 *Re: Offshore Mineral Rights of British Columbia*
[1968] S.C.R. 118 *The Queen in the Right of the Province of Ontario* v. *Board of Transport Commissioners*
[1968] S.C.R. 238 *Carnation Company Ltd.* v. *Quebec Agricultural Marketing Board et al.*
[1968] S.C.R. 569 *Coughlin* v. *Ontario Highway Transport Board et al.*
[1969] S.C.R. 779 *A.-G. for Ontario* v. *Policyholders of Wentworth Ins. et al.*
[1969] S.C.R. 851 *Agence Maritime Inc.* v. *Conseil Canadien des Relations Ouvrières*

Civil Liberties

[1961]	S.C.R.	70	*Louie Yuet Sun* v. *The Queen*
[1961]	S.C.R.	376	*Rebrin* v. *Bird and Minister of Citizenship and Immigration*
[1961]	S.C.R.	474	*Banks* v. *The Globe and Mail Limited and Dalgleish*
[1962]	S.C.R.	48	*Farrell et al.* v. *Workmen's Compensation Board*
[1962]	S.C.R.	681	*Brodie, Dansky, Rubin* v. *The Queen*
[1963]	S.C.R.	584	*Oil, Chemical and Atomic Workers, International Union* v. *Imperial Oil Limited et al.*
[1963]	S.C.R.	651	*Robertson and Rosetanni* v. *The Queen*
[1964]	S.C.R.	81	*Prince and Myron* v. *The Queen*
[1964]	S.C.R.	251	*Dominion News & Gifts (1962) Ltd.* v. *The Queen*
[1964]	S.C.R.	625	*Fawcett* v. *A.-G. for Ontario*
[1964]	S.C.R.	642	*Sikyea* v. *The Queen*
[1965]	S.C.R.	12	*Guay* v. *Lafleur*
[1965]	S.C.R.	232	*Violi* v. *Superintendent of Immigration et al.*
[1965]	S.C.R.	798	*McKay et al.* v. *The Queen*
[1966]	S.C.R.	260	*The Queen* v. *Randolph et al.*
[1966]	S.C.R.	267	*The Queen* v. *George*
[1966]	S.C.R.	619	*O'Connor* v. *The Queen*
[1966]	S.C.R.	645	*Sigeareak El-53* v. *The Queen*
[1967]	S.C.R.	60	*Procureur général du Canada* v. *La Compagnie de Publication La Presse, Ltée*
[1968]	S.C.R.	517	*Daniels* v. *White and the Queen*
[1969]	S.C.R.	383	*Walter et al.* v. *A.-G. for Alberta et al.*

TABLE 2

CASES WITH CONCURRING MAJORITY REASONS

	Jurisdictional		Civil Liberties		Total		All Cases	
1950–4	12/13	92%	7/7	100%	19/20	95%		
1955–9	11/13	85%	8/9	89%	19/22	86%		
1950–1959	23/26	88%	15/16	94%	38/42	90%		
1960–4	8/16	50%	2/11	18%	10/27	37%	87/399	22%
1965–9	2/16	13%	2/10	20%	4/26	15%	54/441	12%
1960–1969	10/32	31%	4/21	19%	14/53	26%	141/840	17%

TABLE 3

DISSENTING OPINIONS (WRITTEN AND UNWRITTEN)

		Jurisdictional				Civil Liberties				Total				
	Number of Dissents	No. of Cases		No. of Opinions		No. of Cases		No. of Opinions		No. of Cases		No. of Opinions		
1950–4	1	3		(3)		1		(1)		4		(4)		
	2	0		(0)		2		(4)		2		(4)		
	3	1		(3)		1		(3)		2		(6)		
	4	0		(0)		2		(8)		2		(8)		
	Total	4/13	31%	6/96	6%	6/7	86%	16/51	31%	10/20	50%	22/147	15%	
1955–9	1	0		(0)		2		(2)		2		(2)		
	2	2		(4)		0		(0)		(2)		(4)		
	3	1		(3)		3		(9)		4		(12)		
	4	1		(4)		0		(0)		1		(4)		
	Total	4/13	31%	11/96	11%	5/9	56%	11/65	17%	9/22	41%	22/161	14%	
1950–1959		8/26	31%	17/192	9%	11/16	69%	27/116	23%	19/42	45%	44/308	14%	All Cases
1960–4	1	2		(2)		1		(1)		3		(3)		
	2	3		(6)		0		(0)		3		(6)		
	3	1		(3)		1		(3)		2		(6)		
	4	0		(0)		1		(4)		1		(4)		
	Total	6/16	38%	11/125	9%	3/11	27%	8/81	10%	9/27	33%	19/206	9%	90/399 23%
1965–9	1	1		(1)		3		(3)		4		(4)		
	2	1		(2)		0		(0)		1		(2)		
	3	0		(0)		1		(3)		1		(3)		
	4	1		(4)		2		(8)		3		(12)		
	Total	3/16	19%	7/118	6%	6/10	60%	14/76	18%	9/26	35%	21/194	11%	128/441 29%
1960–1969		9/32	28%	18/243	7%	9/21	43%	22/157	14%	18/53	34%	40/400	10%	218/840 26%

TABLE 4

REVERSALS OF COURT APPEALED FROM

	Jurisdictional		Civil Liberties		Total			
1950–4	5/10	50%	5/7	71%	10/17	59%		
1955–9	5/10	50%	7/9	78%	12/19	63%		
1950–1959	10/20	50%	12/16	75%	22/36	61%	All Cases	
1960–4	3/15	20%	4/11	36%	7/26	27%	148/399	37%
1965–9	5/15	33%	6/10	60%	11/25	44%	184/441	42%
1960–1969	8/30	27%	10/21	48%	18/51	35%	332/840	40%

TABLE 5

REVERSALS OF TWO LOWER COURTS

	Jurisdictional		Civil Liberties		Total	
1950–4	1/5	20%	3/7	43%	4/12	33%
1955–9	1/7	14%	5/9	56%	6/16	38%
1950–1959	2/12	17%	8/16	50%	10/28	36%
1960–4	0/13	0%	3/11	27%	3/24	13%
1965–9	1/11	9%	3/9	33%	4/20	20%
1960–1969	1/23	4%	6/20	30%	7/44	16%

TABLE 6

PREFERENCE FOR COURT OF APPEAL OVER TRIAL COURT

	Jurisdictional		Civil Liberties		Total	
1950–4	0/2	0%	1/3	33%	1/5	20%
1955–9	0/3	0%	1/3	33%	1/6	17%
1950–1959	0/5	0%	2/6	33%	2/11	18%
1960–4	4/7	57%	3/4	75%	7/11	64%
1965–9	6/7	86%	3/4	75%	9/11	82%
1960–1969	10/14	71%	6/8	75%	16/22	73%

TABLE 7

ASSERTED JURISDICTION REJECTED ON JURISDICTIONAL GROUNDS

	Jurisdictional				Civil Liberties				Total			
	Fed.		Prov.		Fed.		Prov.		Fed.		Prov.	
1950–4	0/3	0%	4/7	57%	0/0	0%	1/1	100%	0/3	0%	5/8	63%
1955–9	0/4	0%	3/9	33%	0/0	0%	2/2	100%	0/4	0%	5/11	45%
1950–1959	0/7	0%	7/16	44%	0/0	0%	3/3	100%	0/7	0%	10/19	53%
1960–4	0/1	0%	3/13	23%	0/0	0%	0/1	0%	0/1	0%	3/14	21%
1965–9	1/4	25%	4/11	36%	0/0	0%	1/2	50%	1/4	25%	5/13	38%
1960–1969	1/5	20%	7/24	29%	0/0	0%	1/3	33%	1/5	20%	8/27	30%

TABLE 8

PREFERENCE FOR CITIZEN OVER GOVERNMENT

	Jurisdictional		Civil Liberties		Total	
1950–4	3/8	38%	5/5	100%	8/13	62%
1954–9	1/4	25%	7/8	88%	8/12	67%
1950–1959	4/12	33%	12/13	92%	16/25	64%
1960–4	3/11	27%	3/9	33%	6/20	30%
1965–9	4/12	33%	2/10	20%	6/22	27%
1960–1969	7/23	30%	5/19	26%	12/42	29%

TABLE 9

GOVERNMENTAL REFERENCES TO THE COURTS

	Jurisdictional			Civil Liberties			Total			
	Prov.	Fed.	Total	Prov.	Fed.	Total	Prov.	Fed.	Total	
1950–4	4	2	6	0	0	0	4	2	6	
1955–9	4	2	6	0	0	0	4	2	6	
1950–1959	8	4	12	0	0	0	8	4	12/42	29%
1960–4	2	0	2	0	0	0	2	0	2	
1965–9	2	1	3	0	0	0	2	1	3	
1960–1969	4	1	5	0	0	0	4	1	5/53	9%

TABLE 10

CIVIL LIBERTIES UPHELD

	Jurisdictional		Civil Liberties		Total	
1950–4	0/0	0%	7/7	100%	7/7	100%
1955–9	1/1	100%	8/9	89%	9/10	90%
1950–1959	1/1	100%	15/16	94%	16/17	94%
1960–4	0/1	0%	3/9	33%	3/10	30%
1965–9	1/1	100%	2/10	20%	3/11	27%
1960–1969	1/2	50%	5/19	26%	6/21	29%