

THE ROLE AND FUNCTIONS OF  
FINAL APPELLATE COURTS:  
THE SUPREME COURT OF CANADA\*

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I

The theme of this symposium raises questions which every judge of a final appellate court is called upon to answer on almost a daily basis. It is part of our philosophy of adjudication—and we are not unique in this—that each judge may put his own questions and supply his own answers. Nonetheless, he does so as a member of a collegium, independent of the other members but sharing responsibility with them for the integrity of the institution. Judgment is involved; judgment not only in the disposition of a particular case but also in the method of disposition, in the character, length or brevity of written reasons, in the use of authorities or other sources of reference, in the decision to concur and whether to do so without additional or supplementary reasons, and in the decision to dissent and whether to limit the grounds of the dissent.

All of this is part of the anxiety that is constantly, if sometimes also unconsciously, with a judge of a final appellate court. Judges of courts lower in the hierarchy may look over their shoulders, and find some comfort perhaps in knowing that there is someone there, some back-up of a higher court. The judge of a final appellate court like the Supreme Court of Canada who looks over his shoulder for any comfort will find no one there, unless it be his law clerk who, in my experience, cannot always be relied on to be comforting. There is something of the loneliness of the long distance runner in every judge of a final appellate court as he reflects on his work and makes decisions in particular cases, decisions which either expressly or implicitly tell the reader how the judge views the functions and role of the court of which he is a member.

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I look upon the functions of the Supreme Court of Canada as those that arise out of its jurisdiction; the definition of its role depends on how that jurisdiction is exercised, how it uses its final appellate authority having regard to the kind and range of cases that come before it. The interaction between jurisdiction and role is obvious; and, inevitably, the judges' view of their role is bound to undergo definition and redefinition in the day-to-day grind of the court's business and in the periodic changes of its membership. One can envisage judges of the Supreme Court having some differences of opinion, probably slight ones, on the court's functions; any differences about its role are likely to be more serious.

## II

The starting point for any consideration of the Supreme Court's functions and its role is the fact, a surprising one I am sure to foreign students of federalism, that the Supreme Court of Canada has no constitutional base. This marks it off immediately from such kindred courts as the Supreme Court of the United States and the High Court of Australia. The Supreme Court of Canada is a statutory creation of the Parliament of Canada under the power given that Parliament by section 101 of The British North America Act<sup>1</sup> to constitute, maintain and organize "a general Court of Appeal for Canada". The size of the court, its jurisdiction, its procedure, indeed all questions touching its operation as a general court of appeal, an appellate court in short without any declared right to original jurisdiction, were left to the Government and Parliament of Canada to prescribe.

The size of the court, originally composed of six judges, with a seventh added in 1927 and two more added in 1949 upon the abolition of all appeals to the Privy Council from any appellate court in Canada, testifies both to population and regional growth in Canada, to the expansion of the business of the court and to its ultimate grave responsibility as a final appellate court. Of significance in its structure and operations was the provision of a quorum for sittings of the court, the number being fixed at five upon the creation of the court and remaining constant despite increase in its overall size. There could not, and even today there cannot be more than one Bench for the hearing of appeals; and I am thankful that this precludes having two Supreme Courts of Canada. Perhaps the only power a Chief Justice has is to assign the Bench for the hearing of appeals. Since my personal preference is to have the full court sit, and since the recent change

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<sup>1</sup> 1867, 30 & 31 Vict., c. 3 (U.K.), as am.

in our jurisdiction enables the court to be selective in the cases that it will hear, I will not view with any regret the surrender of the power of assignment which, in any event, has been exercised with regard to the opinions of the other members of the court as to whether a panel of five or the full court should be assigned in any particular appeal.

The jurisdiction of the court, the scope of its appellate authority, was undoubtedly the most important matter that faced the Government and Parliament of Canada in creating the court in 1875. A number of models were available for consideration. There was the model of a national appellate court, functioning like an English appellate court, or like the House of Lords, with a general jurisdiction (be it as of right or by leave) not limited to any class or classes of cases. There was, second, the model of a purely federal court, with an appellate jurisdiction limited to matters within or arising out of the exercise of federal legislative powers, including the validity of that exercise, but excluding constitutional issues arising under provincial legislation in view of the fact that appeals then lay directly to the Privy Council from provincial courts of appeal. There was, third, the model of a federal appellate court having also comprehensive appellate jurisdiction in all constitutional matters as ultimate Canadian expositor of the constitution, albeit there was a further appeal to the Privy Council. This was the model offered by the Supreme Court of the United States. There was, fourth, the model of a purely constitutional court and, fifth, the model of a federal and a constitutional court, with separate chambers for each of these functions, in adaptation of the chamber system found today in the *Cour de Cassation* of France.

Happily, in my view, the first model was chosen, thus adapting to federal Canada a system of appellate adjudication operative in unitary Great Britain but familiar to Canadians of Bench and Bar. To have adopted the federal model represented by the Supreme Court of the United States or some other such model, would have required at least consideration of, if not actual establishment of a system of federal courts of original jurisdiction. A dual court system such as obtains in the United States was resisted in Canada, save for the establishment of an Exchequer Court with a limited jurisdiction, and of Admiralty Courts. It was in the character of concurrent appointment as Exchequer Court judges that the judges of the Supreme Court of Canada were invested with original jurisdiction but this ceased when the Exchequer Court was set up on a separate base in 1887,<sup>2</sup> ending a

<sup>2</sup> S.C., 1887, c. 16.

short first life and beginning a second one with a judge wholly its own, but with more added over the succeeding years.

Although the jurisdiction of the Exchequer Court was extended considerably when it was translated into the Federal Court of Canada in 1970,<sup>3</sup> the latter is still a court of limited jurisdiction in federal matters. A serious and, in my view unfortunate as well as an unnecessary upheaval in our Canadian system of judicature would result if the Government and Parliament of Canada moved now to federalize it at the level of original and intermediate appellate jurisdiction by withdrawing such jurisdiction in all federal matters from the provincial courts and reposing it in a federal court structure.

The Parliament of Canada has power to that end under section 101 of the British North America Act, the same section which authorized the creation of the Supreme Court of Canada. In authorizing as well (in its words) "the establishment of any additional Courts for the better administration of the laws of Canada", the section may be said to reflect some incongruity. On the one hand, it enabled Parliament to establish a "general", a truly national court of appeal whose authority was not limited to federal matters—the telling word is "general"—and, on the other hand to establish federal courts limited to jurisdiction in federal matters. To have exercised both grants of authority to the full, in the light of the fact that at Confederation in 1867 there were developed provincial courts habituated to adjudicate on matters that after Confederation were in terms of legislative power distributed between the central and provincial legislatures, would have created, and would now certainly create great tensions in federal-provincial relations. We can do without adding to those that already exist, although I am bound to add that tension to some degree is a by-product of federalism.

Parliament did exercise its authority to the full in establishing the Supreme Court of Canada in 1875<sup>4</sup> and in reconstituting the court in 1949 upon the abolition of all appeals in Canadian causes to the Privy Council.<sup>5</sup> This makes good sense to me so long as the provincial courts are left, as they now are, to administer federal law as well as provincial law, indeed federal common law as well as provincial common law, save to the limited extent that judicial jurisdiction in federal matters has been reposed in the Federal Court of Canada, which has both a trial division and an appeal division in respect of those matters.

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<sup>3</sup> R.S.C., 1970, 2nd Supp., c. 10.

<sup>4</sup> S.C., 1875, c. 11.

<sup>5</sup> S.C., 1949 (2nd sess.), c. 37.

If there was any thought-out rationale for investing the Supreme Court of Canada with appellate authority from all provincial appellate courts, and in respect of provincial as well as federal matters cognizable in those courts, it was posited and, in my view, may be said to rest today on the following factors. First, there was and is the fact that particular litigation frequently involves issues that engage both federal and provincial matters which provincial courts have continued to handle without difficulty, and forum problems are, in general, avoided notwithstanding the hived off jurisdiction of the Federal Court. Its jurisdiction is, on the whole, fairly distinct and has hitherto not created any intractable difficulties in forum selection, although some such questions have arisen. Second, there was and is the fact that the common law is largely the same in all the provinces outside of Quebec and that, subject to legislative changes, it ought to have a uniform operation in all those provinces, thus avoiding some possible conflict of laws problems; and, moreover, even in Quebec there are branches of the common law, as for example in the field of public law, that were and are common to it and to the other provinces of Canada. Third, there was and is the fact that many important branches of law, such as the criminal law, the law of negotiable instruments, the law of bankruptcy, the law of shipping, railway law, the law of patents and copyright have a national operation because they fall within exclusive federal competence; and even though they may interact in some respects with some aspects of the common law their interpretation and application must necessarily be uniform, and perhaps all the more so because of the interaction. Fourth, constitutional adjudication, involving the resolution of disputes as to the scope and reach of federal and provincial legislative powers must necessarily end in a court that can speak authoritatively for the whole of Canada, and I may add here that there is equally a case to be made for final uniform resolution of questions touching the operation of public authorities.

Thus it was that upon the establishment of the Supreme Court of Canada we had in the main a one-stream two-tier system of appeals like that in Great Britain, although that country did not have to contend with federalism as we know it in Canada. To some extent, there is a three-tier system in respect of Ontario cases by reason of the recent establishment there of an intermediate appellate court, with a limited jurisdiction, operating between courts of first instance and the Ontario Court of Appeal.<sup>6</sup>

<sup>6</sup> S.O., 1971, c. 57.

Should this innovation spread to other provinces it would not alter the force of the considerations which led to the establishment of the Supreme Court of Canada as a national court. Its character does not depend on the system of appeals within the judicial structure of any one or more provinces but, rather on how far beyond adjudication on federal matters and on constitutional matters its jurisdiction should extend.

The Government and the Parliament of Canada saw no need to water down the broad authority given to establish "a general Court of appeal for Canada"; and Parliament emphasized the breadth of its power by generous scope, especially in civil cases, for appeals as of right, appeals which the Supreme Court of Canada was obliged to hear, however local or private were the issues that they raised. This was appellate review in a traditional sense as distinguished from what I would term supervisory control.

Until the beginning of this year when appellate review was replaced by supervisory control (leave now being required in all non-criminal cases and in most criminal cases before an appeal will be entertained on the merits),<sup>7</sup> appeals as of right in civil cases formed a large part of the Supreme Court's case load. I think this was one of the factors that led some scholarly students of the Supreme Court's work to urge federalization of its jurisdiction. Other factors were also raised in support of this position, such as the virtue of allocating judicial power along the same lines as legislative power, and the merit of leaving to final adjudication in the provincial courts legal issues reflecting local conditions and those based on provincial or municipal legislation.

I think that the amendments recently made to the Supreme Court's jurisdiction, making a previous requirement of leave (whether from the Supreme Court or the provincial appellate court) the general rule, has blunted the case that could formerly have been made and was made for limiting the Supreme Court of Canada to federal and constitutional issues. The four-pronged rationale which I mentioned earlier in this address as supporting a final appellate court with a general national jurisdiction is not, in my opinion, cogently answered by those who would reduce the court to a federal and constitutional institution. Still less is it answerable now that the Supreme Court is a supervisory tribunal rather than an appellate tribunal in the traditional sense. As a supervisory tribunal, it is fully able and would be expected to

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<sup>7</sup> S.C., 1974-75, c. 18, s. 5.

resist interference in purely local or private issues, and it is in fact enjoined to do so by the statutory formula which prescribes the requirements that must be met in order to obtain leave. The case for leave must be one with respect to which "the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".<sup>8</sup>

The discretion given to the court under the foregoing formula is obvious, but it is a necessary control over the flow of cases that have already been before two courts. Now, even more in its supervisory role than in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of Canada, to give guidance in articulate reasons and, indeed, direction to the provincial courts and to the Federal Court of Canada on issues of national concern or of common concern to several provinces, issues that may obtrude even though arising under different legislative regimes in different provinces. This is surely the paramount obligation of an ultimate appellate court with national authority. It is only under this umbrella that it can, in general, be expected to be sensitive to the correctness of the decisions in particular cases, whether they be between private litigants only or involve some government as a party.

I think I can risk saying that the mere fact that any level of government or any government agency is involved in a particular case is no more telling in favour of leave to appeal than the fact that litigation is private necessarily tells against the granting of leave. The issues in contention and, indeed, the issues which will be determinative of the appeal, however there may be others of importance in the case, and not the character of the parties, will guide the court in the exercise of its power to grant or refuse leave. Even where the court may be disposed to grant leave, it may do so, not at large, but by defining the specific question or questions on which it is prepared to have the case come forward.

### III

I turn now to more debatable questions respecting the Supreme Court's exercise of its jurisdiction, questions going to its role as Canada's highest and final court on all justiciable matters: Two

<sup>8</sup> *Ibid.*

considerations affect any assessment of that role. One has to do with the kind of business that comes and will come before the court; the second has to do with the collegiality of the court, with the blend of individual independence of the judges *inter se* and their institutional responsibility. The bulk of the court's business is, and is likely to continue to be, the interpretation and application of statutes, some of which, as for example, parts of the Criminal Code and of the Quebec Civil Code, to take two illustrations, have long ago taken on what I may term a common law appearance. Two statutes, one, the British North America Act (and its amendments), only formally of that character (since it is Canada's chief written constitution), and the second, the Canadian Bill of Rights,<sup>9</sup> a quasi-constitutional enactment are not, for interpretative purposes "statutes like other statutes" (to adopt well-known phraseology); and there is little doubt, certainly none in my mind, that the judicial approach to them, compelled by their character, has been different from that taken with respect to ordinary legislation. The generality of their language and their operative effect compel an approach from a wider perspective than is the case with ordinary legislation, especially legislation that is more precisely formulated.

The collegiality of the court touches a matter that may have a greater interest for the academic component of this assembly than for the practising Bar or members of the judiciary. It is theoretically open to each member of the Supreme Court of Canada, as it is theoretically open to each member of any appellate court, to write reasons in every case in which the member sits. Practical and institutional considerations militate against this; and so it is that when bare concurrences are filed with reasons proposed by a colleague, they may suggest some shift of position by the concurring judge who does not choose to write separate reasons, a shift on some matter subsidiary to or connected with the disposition of the main issue to which the concurrence was given.

Bare concurrences ought not to be taken as representing unqualified endorsement of every sentence of the reasons concurred in. Contextual approval, yes; and approval of the result, of course. After all the scrutiny and conferring on a set of proposed reasons are over, and after changes have been made in language and organization by the writer so far as he is willing to accommodate himself to the views of his colleagues, there may still remain in some colleague some questions about some parts of the reasons. However, he may decide on balance that

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<sup>9</sup> R.S.C., 1970, Appendix III.

there is no point in writing his own. In short, it is far safer and surer, if one would assess how a judge discharges his duties and how he regards his role and the role of the court, to assess him on what he himself writes and not on all of what is written by a colleague with whom he concurs in some particular case or cases.

There is no question that seems to have been as continuously and as strenuously considered, in relation to all courts and judges, and more particularly in relation to judges and courts of ultimate authority, as their law-making role. The Supreme Court of Canada began life at about the time Langdell and his case-law approach to the discovery of the "true legal rule" revolutionized legal studies in the United States. On the English side, before the nineteenth century was out the House of Lords had sanctified its own position as the expositor of the one true rule which, once declared, was alterable only by legislation. A quarter of a century later Cardozo was to tell us that at its highest reaches the role of the judge lay in creation and not in mere discovery. In this country, and perhaps in England too, we were inclined to think that creativity applied to what had not been previously considered and determined but, that accomplished in the highest court, creativity was spent and change was only for the legislature or for the constitutional amending process, as the case might be.

The distinguished poet, the late W. H. Auden had something to say on this subject in a short poem entitled *Law Like Love*.<sup>10</sup> It is as follows:

Law, says the judge as he looks down his nose,  
 Speaking clearly and most severely,  
 Law is as I've told you before,  
 Law is as you know I suppose,  
 Law is but let me explain it once more,  
 Law is the law.

Yet law-abiding scholars write:  
 Law is neither wrong nor right,  
 Law is only crimes  
 Punished by places and by times,  
 Law is the clothes men wear  
 Anytime, anywhere,  
 Law is Good morning and Good night.

Controversy has now ceased on the law-making role of judges, especially of judges of a final appellate court. Laymen may beg the question by consoling the dissenting judges of a divided court with the remark, "too bad the law was against you", but judges and lawyers know better. The late Lord Reid helped to bury

<sup>10</sup> Collected Shorter Poems, 1927-1957 (1966), p. 154.

the declaratory theory by remarking in a speech delivered in 1971 that law is not some known and defined entity secreted in Aladdin's cave and revealed if one uses the right password. We do not believe in fairy tales any more, said Lord Reid,<sup>11</sup> and Lord Diplock did not doubt, when speaking for the Privy Council in an Australian appeal in 1974, that "when for the first time a court of final instance interprets [a statute] as bearing one of two or more possible meanings . . . the effect of the exercise of its interpretative role is to make law".<sup>12</sup> Such controversy as there is today in judicial law-making in a final court concerns the appropriateness of the occasion or of the case for enunciating a new rule of law and, even more important, the appropriateness of the occasion or of the case for upsetting an existing rule and substituting a different one in its place.

Neither here nor in any of the countries whence come our distinguished guests is *stare decisis* now an inexorable rule for our respective final courts. In this country, what appeared to be at times an obsessiveness about it came partly at least from our link with English law which also involved the ascendancy of English courts, so that *stare decisis* amounted to a form of ancestor worship. We are now able to view it as simply an important element of the judicial process, a necessary consideration which should give pause to any but the most sober conclusion that a previous decision or line of authority is wrong and ought to be changed. Such a conclusion is not likely to be arrived at by any judge or number of judges without serious reflection on its conformity or consistency with other principles that are part of the institutional history or the institutional patterns of the court. None of us operates without constraints that are both personal and institutional, born of both training and experience and of traditions of the legal system of which the court is a part.

When everything considered relevant has been weighed and an overruling decision commends itself to a judge, he ought not at that stage to stay his opinion and call upon the legislature to implement it. This is particularly true in respect of those areas of the law which are judge-made, and to a degree true in respect of those areas where legislation is involved which is susceptible of a number of meanings. A final court must accept a superintending responsibility for what it or its predecessors have wrought, especially when it knows how little time legislatures today have (and also, perhaps, little inclination) to intrude into fields of

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<sup>11</sup> *The Judge as Lawmaker* (1972), 12 *J. Soc. Pub. Teachers L.* 22.

<sup>12</sup> *Geelong Harbour Trust Commissioners v. Gibbs Bright & Co.*, [1974] A.L.J.R. 1, at p. 4.

law fashioned by the courts alone, although legislatures may, of course, under the prodding of law reform agencies and of other public influences, from time to time do so.

The role of the courts, the role of a final court, in the interpretation of legislation, bringing into play the relation between the legislative and the judicial arms of government, is of a different dimension, in my view, than the role played in the promulgation of judge-made law. The dimension comes from the dominant political and legal principle under which our courts operate, which is that, constitutional issues apart, Parliament and the provincial legislatures are the supreme, certainly the superior law-making bodies. On constitutional issues, issues concerning the division or distribution of legislative power, the courts, and ultimately the Supreme Court of Canada, have the final word (subject to constitutional amendment). This is a critical role, so critical for exercises of legislative and governmental power at both the central and provincial levels as to put every Supreme Court decision in this field, whatever it be, into the political mill. Yet it is a role which the court cannot eschew if we believe in constitutional order; any more than can any final court with constitutional jurisdiction in a federal state. There is no other instrument with final authority available for this role. It is of course possible (and indeed there are known examples) for the central and provincial governments to avoid constitutional determinations in the Supreme Court of Canada by entering into co-operative arrangements which do not call for any test of constitutional competence. In this way they may hold some of the tensions in their relations in equilibrium, so long as those arrangements last. The fact that such arrangements exist at all underlines the delicate nature of the Supreme Court's constitutional jurisdiction. Of course, it must proceed with caution in that field but, that having been said, it brings the same independent judgment to bear on constitutional questions as on other matters that are brought before it, fully conscious, however, that there are no more important public issues submitted to its adjudication than those that arise out of alleged conflicts of legislative authority.

The stakes in interpretation and application of ordinary legislation may not be as high because here the courts play not an ascendant role but rather more of a complementary one. The judges, no less than others in society, owe obedience to legislation which they may be called upon to interpret and apply; they have a duty to respect the legislative purpose or policy whatever be their view of its merit. Judges subscribe to this proposition, and then may be seen to proceed to differ on what the purpose

or policy is, or to differ on whether the legislation or some part of it is apt to realize the purpose. This is not the time nor the place to enlarge on the variety of approaches to legislative interpretation which in close cases can lead to different results in respect of the same piece of legislation. In the majority of cases where legislation is a factor in the litigation, there is no such difficulty in interpretation as to require the particular expertise of a lawyer or a judge. Where that special competence is necessary, the judges owe it to the enacting legislature as well as to the litigants to expose the legal reasoning which underlies their decision.

The public expectation is, I suspect, of a somewhat different order. Since so much of the legislation that comes before the courts and before the Supreme Court of Canada involves controls or limitation of the social conduct or business behaviour of persons or classes of persons or corporations, either by direct penal sanction or by supervision of administrative agencies, those affected may look to the courts for some wider exposition than a strict regard for legal issues would warrant. Is the policy a desirable or a workable one? Is the administrative structure fair? Is the procedure fair, are the decisions supported by reasons that are disclosed to the affected persons? There is no invariable stance that a court takes on these questions. Where it has deemed it proper to pronounce on policy (as it has on occasion) it has done so with prudence, and, generally, when prompted by difficulties that reside in the interpretation and application of the legislation. Fairness of administrative procedure is more confidently dealt with by the courts because what is compendiously called "natural justice" has long been regarded as involving legal issues for their consideration.

Natural justice, embracing the right to notice of possibly adverse action, the right to be heard or to make representations before being adversely affected, and the right to be judged by an impartial tribunal, is a central feature of an evolved political and legal tradition which sees the courts as wielders of protective authority against an invasion of the liberty of the individual by government or its agencies. Text books, periodical literature and the every-day press reinforce this tradition, and thus strengthen the public expectation that the courts, and especially the Supreme Court of Canada, will speak out on the matter. The enactment of the Canadian Bill of Rights as a federal measure, and operative only at that level, has fed that expectation. It is well to recall that judges of the Supreme Court spoke strongly on aspects of

individual liberty in the *Alberta Press* case,<sup>13</sup> the *Switzman* case,<sup>14</sup> the *Roncarelli* case,<sup>15</sup> and in other cases too, without the back-up or the direction of the Canadian Bill of Rights, which became effective only in 1960. It was able to do so because the avenues for recognizing individual rights or civil liberties had not been closed by competent legislation, nor did any relevant legislation as interpreted by the judges of the Supreme Court preclude them. Legislation may however appear to be preclusive in some areas of civil liberties, and if interpreted with that result the judicial duty of fidelity to legislation as superior law must be acknowledged whatever be the consequences, although the acknowledgment may be accompanied by an expression of regret or even of remonstrance that the legislation went so far.

The Canadian Bill of Rights has now provided a legislative measure and standard of protection of civil liberties but, in the generality of some of its language, it adds to the dilemmas of interpretation which are so often evident in civil liberties cases. Its direction may be clearer in some cases than it is in others, or clearer to some judges in some cases than to others. Each charts his own course here, as in the other roles that he is called upon to play in the discharge of his judicial duties and, indeed, in determining what roles he should take on.

This, however, is simply another aspect of the wide discretion open to a judge of a final appellate court. There may be differences about the scope of the discretion, but there cannot be any dispute about its existence. As I said at the beginning of my remarks, each judge puts his own questions and supplies his own answers and, in yielding ground to institutional considerations, he does so according to his own assessment of what they demand.

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<sup>13</sup> *Reference re Alberta Statutes*, [1938] S.C.R. 100.

<sup>14</sup> *Switzman v. Elbling et al.*, [1957] S.C.R. 285.

<sup>15</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121.