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The Founding of the Court

1867–1879

The founding of the Supreme Court of Canada began in ambiguity. At the end of almost three years of Confederation debates and sporadic negotiations, three British colonies joined together on 1 July 1867 to form the Dominion of Canada. No one would claim that the British North America Act, the legislative instrument of unification, was without vagueness or apparent contradiction; it seemed to leave much to ongoing development and change. Among the elements of the political structure that were not detailed in the act was the new dominion's judicial system.

Instead, the existing courts of civil and criminal jurisdiction were maintained; provincial governments were given legislative jurisdiction over 'the Constitution, Maintenance, and Organization' of those courts, as well as over civil procedure (criminal procedure being the responsibility of the central government). Although the provinces controlled the courts, the central government was given authority over the judiciary. Six brief sections of the act, under the general heading 'Judicature,' set out the jurisdiction over the judiciary. Most innovative was the last of those clauses, section 101: 'The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.' By this clear-cut allocation of legislative authority, the central government too could establish courts. But the clause is strikingly vague and of little help in leading to an

understanding of the prospective aims and purposes of any such 'General Court of Appeal.' It is clear that the role and functions of such a court were not particularly well thought out at the time.

The architects of Confederation had for some time assumed that the new dominion would require a central appellate court. The Canadian proposals of 1858 envisaged 'a Federal Court of Appeal,' and both the Quebec (1864) and London (1866) resolutions called for the establishment of a 'General Court of Appeal.' The records of some of the discussions behind these statements suggest that at least some politicians recognized the need in a federal structure for judicial review – that is, they accepted the idea, somewhat foreign to British practice, that courts would be needed to arbitrate among the various governments of Canada. Both the Judicial Committee of the Privy Council in England and the existing colonial courts were expected to fill that role.[1] Little concrete discussion of the proposed appellate court actually took place; nevertheless, an examination of the sections of the British North America Act dealing with the courts is suggestive of the thinking behind the provision for a general court of appeal.

The fathers of Confederation clearly envisaged a dominion in which there would exist considerable uniformity in law and jurisprudence; this would be one means by which a broader, extraprovincial focus or identity would be created. Section 96 gave the central government the exclusive authority to select the judicial personnel at the county court level and above; those judges would be paid by the central government, and superior court judges could be impeached only by an address from Parliament to the governor-general (sections 99 and 100). At the same time, a centralized jurisdiction over the law was contemplated. Ottawa was given exclusive legislative jurisdiction in the field of criminal law (section 91 (27)). Sections 94 and 97 anticipated that in the future 'the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts of those Provinces' would be 'made uniform' upon provincial agreement. Since property and civil rights were purportedly areas of exclusive provincial jurisdiction (section 92 (13)), the most obvious and consistent way in which this uniform body of law could be articulated was through a unitary system of courts. Given the explicit statements and the implicit attitudes of these clauses, section 101 of the constitution is both appropriate and fitting. It was surely natural that 'a General Court of Appeal for Canada' would be established to co-ordinate the pivotal work of the various provincial-level courts. The call for such a central court, however poorly articulated, was no mere afterthought.

In the decade following the birth of the dominion, there was basic agreement between the two major political parties that section 101 ought to be taken up and a central court of appeal constituted. Such a court was seen as an essential element in establishing the credibility, authority, and status of the polity of the new nation. S.M. Lipset has described the establishment of national authority as the first, essential task facing any new nation.[2] The adherence of the economic élites to the new Confederation was assured by the evolving national policy, which also underlined the prominent role of the central government in the new political structure. A supreme court would have several similar functions. It would force the members of the country's legal fraternities to shift their focus beyond provincial boundaries to a new central court, located in the capital, which would establish a common body of jurisprudence for the whole dominion. Such a court was part of the trappings of nationhood, a means of emphasizing the legitimacy and the power of the young central government. As Alexander Mackenzie put it, a supreme court 'was a necessary complement to our system of self-government in this country ... it [was] desirable that there should be a Canadian tribunal of the highest character, to which our people would appeal ...' One commentator portrayed the court's proponents as arguing that a central court of appeal 'was necessary to complete Confederation, to put the keystone to the arch of Confederation.'[3] These covert functions were important factors in the efforts of the Macdonald and Mackenzie governments to create a supreme court.

Less than a year after Confederation, Sir John A. Macdonald, who was then both prime minister and minister of justice, took the initiative regarding the creation of a supreme court. He entrusted the task of drafting the first legislation to a friend and legal adviser, Henry Strong of Toronto. Throughout the summer of 1868 the two men discussed various ideas as to what the bill should contain. Strong's task was not as easy as he had first expected. Because he found the model of the United States Supreme Court useful, he copied several items from that court's establishing legislation and unsuccessfully sought funds from the prime minister for a trip to Washington to study the work of the American Supreme Court and circuit courts.[4] The model proved to be of limited help, however.

Part of Strong's problem lay in the confusion regarding the character and jurisdiction of the proposed Canadian court. Section 101 of the British North America Act was too vague to provide any guidance. Macdonald himself, for example, complained that 'this provision is very important; very brief; and not a little obscure.' Some legal authorities argued that a

supreme court could hear only those cases arising out of the laws of the central government; the court could have no jurisdiction over provincial law. This view was unacceptable to Macdonald. At one point he considered abolishing provincial courts of appeal and providing for appeal directly from the lower courts to a supreme court, but reluctantly concluded that the provincial governments would not consent to such an arrangement.

Macdonald had high hopes for the central court: 'I think this new Court should stand as regards the Provinces in a position analogous to that of the Queen in Council as regards the Colonies generally: and that the procedure should be assimilated as far as possible to that of the Judicial Committee.'[5] This was vintage Macdonald: the imperial government was to the Ottawa government as the Ottawa government was to the provincial governments, and this relationship was to be replicated in the judicial structure.

By February 1869 Henry Strong had finished drafting the legislation; it was submitted to the second session of the First Parliament in May. The bill described a court with a wide range of duties to be performed by seven justices, with no required distribution between those trained in the common law and those trained in the civil law. The court would hold appellate jurisdiction in all civil and criminal cases across Canada. As well, the court would have 'exclusive original jurisdiction' to determine the constitutionality of provincial statutes, decide any question involving enforcement of dominion revenue statutes, hear disputes arising out of treaty obligations, and deal with admiralty matters. The court would be allowed to exercise its original jurisdiction only during special sittings, which would be held in the capitals of the four provinces.[6]

Macdonald seems to have used this bill as a means of engendering discussion. He explained that this first bill 'was rather more for the purpose of suggestion and consideration than for a final measure which [the] Government hoped to become law.' When objections to the bill were raised, the legislation was withdrawn from the House, but the proposal was not allowed to die. Macdonald sent copies of the bill to various judges in the four provinces during the summer of 1869, seeking comments and suggestions for improvements.[7]

Among the responses was one from Oliver Mowat, at that time a member of the Ontario Court of Chancery and a future premier of Ontario. Mowat expressed a common reaction when he objected to the clauses involving original jurisdiction. Given the central government's power to disallow provincial legislation and to appoint lieutenant-governors and

judges of provincial superior courts, it was unnecessary, Mowat argued, to limit constitutional and other matters to the new court; surely the central government already had enough influence in this area.[8]

That Macdonald (and Strong) would project such a powerful role for the new court is indicative of the essential function anticipated for the institution. In the same way, the prime minister's revised supreme court bill presented to Parliament in March 1870 (just ten months after introduction of the first legislation) is a sign of his commitment to the court. The new bill contained a number of changes, many of which were of only minor consequence; for example, the justices of the court would now be required to live in or near Ottawa. But there were several major revisions. There was now an explicit statement that the establishment of the court did not interfere with any subject's right to appeal to the foot of the throne. The scope of the reference procedure was expanded from consideration of provincial statutes to include any matters whatsoever submitted by the governor-in-council.[9] Exempted from possible reference, however, were acts or bills of the Parliament of Canada; Macdonald clearly intended the court to be an instrument in overseeing the provinces but not the central government. Nevertheless, the prime minister accepted Mowat's pointed comments and dropped the court's exclusive original jurisdiction in constitutional issues and several other matters.[10]

The supreme court envisaged by this second bill remained a powerful institution (if less so than in 1869) and fitted well into Macdonald's constitutional scheme. There was still no special protection for Quebec's civil-law tradition, nor was there protection for areas of law coming under exclusive provincial jurisdiction. This court was designed to deal with an inferior level of government and to be used as an instrument of homogenization and centralization. In the end, despite its complementary role in Macdonald's constitutional plans, this bill too was withdrawn.[11] Although the prime minister was committed to the establishment of a supreme court, for the next three years his government was too busy with other matters to return to the problem.

However, the Liberal party was also interested in establishing such an institution. The Liberals formed a government late in 1873; provision for a central court of appeal was part of the party's campaign platform in the ensuing 1874 election. The court was mentioned in the speech from the throne in the subsequent session of Parliament. Although the proposal was not introduced in that 1874 session, the department of justice was actively preparing the legislation.[12]

The Supreme Court Bill was introduced by Télesphore Fournier, the

minister of justice, in February 1875. The legislation actually proposed to establish two courts with one stroke: a supreme court and an exchequer court. Fournier explained that the Mackenzie government hoped to remove the objections to original jurisdiction that had beset Macdonald's two earlier bills. The 1875 bill provided for 'two courts, one of appellate jurisdiction, the Supreme Court of Appeal; and another, a tribunal of first instance, composed of the same members but being a totally different court.'[13] Any one of the six judges – the chief justice or a puisne justice – would sit alone as judge of the Exchequer Court; appeals from this institution would proceed to the Supreme Court sitting as a panel of the remaining five judges.

Fournier's bill severed the Supreme Court's original jurisdiction in revenue matters; that area was now the responsibility of the Exchequer Court. The jurisdiction of the Supreme Court of Canada was to be strictly appellate. Subject to some limitations, 'an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction ... in such cases in which the Court of original jurisdiction is a Superior Court.'[14] Such a broad jurisdiction combined with relatively easy access gave the Court considerable scope for judicial review. Implicit as well was the Court's responsibility to supervise courts at the provincial level.

It is worthy of note that the bill recognized Quebec's difference in certain areas of law. The bill stated that 'no appeal shall be allowed from any judgment rendered in the Province of Quebec, in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars.' No other province was accorded the same or an equivalent monetary factor in appeals at that time. The bill also contained an explicit provision requiring that at least two members of the Supreme Court be chosen from the bar of Quebec.[15]

One of the most controversial features of the 1875 Supreme Court bill was the continuation of appeals to the Judicial Committee of the Privy Council. Fournier drew attention to the absence of any mention of appeal to the Judicial Committee. He denied a desire 'to put any unnecessary obstacle in the way of exercising the right of appeal.' However, he expressed the hope that appeals beyond the new Supreme Court of Canada would soon end. One reason for such a hope was the recent passage by the imperial Parliament of a Supreme Court of Judicature Act, which proposed to transfer the Judicial Committee's authority over colonial appeals to the new Court. This change, said Fournier, would constitute a major and undesirable innovation; the Supreme Court of

Judicature would be a court of law and not a court of prerogative, as the Judicial Committee was.[16]

The 1875 bill retained the right of the governor-in-council to refer provincial acts for advisory opinions, but now specified the right of the provinces or other interested parties to appear before the Supreme Court in any such case. The governor-in-council was given the power to seek advisory opinions on 'any matter whatsoever as he may think fit.' In addition to making special provision for minority opinions in such cases, the final legislation permitted the Senate or the House of Commons to send private bills or petitions for private bills to the Supreme Court.[17]

As Fournier explained at length upon introducing the bill, the government was intent on making good its throne-speech claim that a supreme court was especially desirable for the settlement of constitutional questions. There is evidence that some federal politicians were becoming unhappy with disallowance as an instrument of constitutional arbitration (dealing only with provincial legislation) and felt the need to establish a new instrument of greater perceived impartiality. Fournier pointed to the provisions that permitted in some cases and required in others that any matter touching the constitutionality of a federal or provincial law should be sent as soon as possible to the Supreme Court for a ruling. The important change, of course, was that the Court was no longer designed simply to keep a consitutional check on the provinces; it now had jurisdiction to examine the legislation of the central government as well.[18]

In general terms, appeal to the Supreme Court of Canada was permitted from the court of last resort in any province. Appeals in a case arising for or upon a writ of habeas corpus (other than in a criminal case) or a writ of mandamus, or in a case in which a municipal by-law had been quashed by a court or a rule for quashing it had been refused, could go on appeal to the Supreme Court as of right. In criminal matters the court was given concurrent jurisdiction with provincial judges to grant writs of habeas corpus.

The parliamentary criticisms directed against the bill by Conservatives and a few Liberal backbenchers were brief compared with the more sustained attacks that began in 1879. The 1875 debates did reveal some basic concerns, however. Some critics were disturbed by the growth and increasing complexity of the judicial system and procedure as part of a more general concern regarding the expansion of government. 'There is not much public sympathy,' it was said 'for measures tending to promote additional litigation.' It was felt that if the government had so much money to spend, it could be put to better use. One future Conservative

cabinet minister, J.-A. Mousseau, 'considered the Supreme Court was entirely unnecessary ... This court would cost from $80,000 to $100,000; and he thought it would be much better to husband our resources, and employ them in carrying on and completing our great public improvements, such as the enlargement of the Welland and St.Lawrence Canals, the building of the Pacific Railway.'[19] Other members feared that provincial control over property and civil rights and Quebec's distinct system of law would be undermined; amendments were moved to reduce judges' salaries, to remove jurisdiction over property and civil rights, and to require ratification by the Quebec legislature. More basic still was the concern about the character and nature of the Canadian political structure; some felt that such powerful centralization as embodied in the bill was going beyond the terms of Confederation. Other politicians were disturbed by the prospect of a court capable of reviewing federal legislation and thus challenging directly the supremacy of Parliament. All these criticisms were to be heard again in the near future and in more detail. In the meantime, they were not enough to defeat the bill.

Once introduced, the 1875 Supreme Court Bill received bipartisan backing, although support from the Conservative opposition was somewhat limited. In fact, the Conservatives were badly split over the issue of establishing a supreme court; perhaps this is the explanation for the surprising withdrawal of Macdonald's 1870 bill. In 1875 the proposed legislation faced five roll-call votes, and on those votes the Conservatives divided sharply. Anywhere from 33 to 45 per cent of the Conservatives voting were out-of-step with their party colleagues (see table 1). What is more, on all but the last vote the majority of Conservatives demonstrated that they were opposed to the sort of powerful institution envisaged by the bill. This opposition was concentrated in central Canada; on the second motion, for example, the thirty-two affirmative votes were distributed as follows: sixteen from Quebec, fourteen from Ontario, and one each from New Brunswick and Nova Scotia. The split within the federal Conservative party over the Supreme Court may represent a major division within the party over the basic character of the dominion constitution; it certainly helps to explain some of the problems and responses regarding the Court in the 1880s.

The Conservative leadership still supported the creation of the Supreme Court of Canada. That support was probably essential to the successful founding of the institution. Both parties had worked toward establishing a central court of appeal, and if the measure was Liberal in its final initiation, it was Conservative in its base – Fournier himself admitted

TABLE 1
1875 support in the House of Commons for the Supreme Court

Motion	Conservatives		Liberals		Totals	
	Yeas	Nays	Yeas	Nays	Yeas	Nays
For a six-month hoist	30	25	8	96	38	121
For removal of jurisdiction over property and civil rights	32	23	8	95	40	118
For reduction of justices' salaries	32	20	17	79	49	99
For clause 47	17	34	95	6	112	40
For ratification by the Quebec legislature	17	24	3	82	20	106

that the bill was founded on the extensive work done by the Macdonald government.[20]

One proposal to amend the bill succeeded in 1875. A motion to end appeals to the United Kingdom and to make the Supreme Court the final court of appeal for Canada was adopted, after much acrimonious debate, as clause 47 of the bill. Here was a threat, both explicit and implied, to those constitutional ties to Great Britain so essential to Canada and so dear in the minds of many Canadians. The clause would soon lead to a confrontation between the Canadian and British governments.[21]

The establishment of the Court seems to have been well received by the public. Some questions were raised, particularly regarding the Court's jurisdiction in cases arising under provincial legislation, but the positive benefits were clear. The *Canada Law Journal* spoke for many: 'It has long been a rule of national policy that, for the security of private rights and the administration of the public laws, there should be a judicial department in every well organised government ... This being so, a supreme constitutional authority becomes a necessity as a department of the public government of the nation; and for this, as a part of its high functions, the Supreme Court of Canada comes into existence.'[22] It was, however, up to the political authorities to support the Court and to the justices to conduct themselves so as to fulfil public expectations.

The selection of the initial personnel was crucial. Given the need to establish the legitimacy of the Court in the public eye and to gain its acceptance in all sectors of the young nation, it was natural that various major groups and regions would be represented and that the existing

bench would be a major source of recruitment. Regional representation in bodies of the central government had already become a major criterion. Sir John A. Macdonald established the practice in naming his first cabinet, and Alexander Mackenzie entrenched the procedure. In the case of the Supreme Court, however, flexibility in seeking high-quality jurists who also met necessary regional, ethnic, or religious criteria was severely limited by the small number of posts available.

Of the six seats, two were allocated by law to the province of Quebec, leaving four to be distributed elsewhere. The historic regional attitudes in the country, and especially in Ontario, made it essential to give Ontario at least as many seats as Quebec. This left two seats, at most, to be filled from outside central Canada. There is no evidence that the government gave any serious consideration to appointing a western representative, a fact that is not surprising given the population of the west and the Mackenzie government's strained relations with British Columbia. Instead, the unimaginative (and therefore politically safe) decision was made to appoint one justice from each of the two major maritime provinces. The emphasis on provincial representation was balanced by one other factor – political affiliation – as two Liberals, three Conservatives, and one bipartisan were named to the Court.

About the Ontario appointments there seemed to be little debate. As compensation for accepting the same number of seats as Quebec, there was pressure to give the chief justiceship to an Ontarian. Edward Blake, the brilliant lawyer and forceful Liberal politician, was first offered the post. He declined, accepting the justice portfolio instead, thereby acquiring control over Court appointments.[23] The chief justice of Ontario, William Buell Richards, was an attractive second choice. He had been a moderate Reformer in the provincial assembly (1848–53) and attorney-general of Canada West (1851–3); he had been on the bench for twenty-two years and had served as chief justice of the Court of Queen's Bench since 1868. He was considered 'a man of large common sense and an able Judge,' but had only recently recovered from a serious illness. Less attractive was another motivation behind his promotion. He had been 'at open feud in Court for along time' with a colleague; the minister of justice sought to end the conflict by separating the two men.[24] Although Richards at age sixty added status and respectability to the Ottawa bench, the appointment of Samuel Henry Strong was probably more important. Just fifty years old, Strong was the youngest and most vigorous of all of the initial members of the Court. At the bar he had demonstrated

particular ability in equity and as defence counsel. Having been intimately involved in early discussions regarding the establishment of a supreme court, he was clearly committed to such an institution in principle. After drafting the first Supreme Court bill, Strong was rewarded in 1869 with appointment to the Court of Chancery, followed in 1874 with promotion to the Ontario Supreme Court. He was regarded as 'a scientific lawyer and one of the best Appeal judges we have – but he is blessed with a shocking bad temper.' Over the next twenty-seven years the Supreme Court of Canada would benefit from his considerable abilities, but would also suffer from his several pronounced faults. In the meantime, he was reported in 1875 to be 'extremely anxious' to join the Court in Ottawa.[25]

From New Brunswick came William Johnston Ritchie, who had been a judge for twenty years and provincial chief justice since 1865. In the New Brunswick Supreme Court he had developed a considerable reputation for his knowledge and insight into commercial law. Ritchie's appointment to the Supreme Court of Canada brought several advantages. Apart from his own merits, he had ties to Samuel Tilley, an important Conservative politician, and to a commercial élite committed to progressive economic expansion. Writing in 1870 in response to Macdonald's first Supreme Court bill, Ritchie criticized many of the details but was forthright in his support for the idea of such an institution:

> An efficient appellate tribunal as a Court of *dernier ressort*, and whose precedents would be a rule of decision for the Courts of all the Provinces, is without much doubt much required. It should, I think, be so constituted as to secure its being at all times presided over by Judges in whose learning and character the Profession and Public have, from experience, confidence. It should be easy of access – speedy in its action – and, with a view to dispatch and cheapness, simple in its procedure. It should deal only with cases of sufficient magnitude, either in the amount or principle involved, to warrant further investigation and expense; and then, with the substance of the matter in controversy on broad principles of law and justice, to the discouragement of mere formal or technical objections which do not affect its merits.

Although Ritchie's commitment to the Supreme Court of Canada was unquestioned, in New Brunswick he had shown an unfortunate tendency toward lengthy, over-elaborate judgments, some of which were much delayed before being handed down.[26]

For Nova Scotia the choice was less straightforward. A number of

names were put forward by interested local parties, but no one individual stood out. The minister of justice is reported to have sent an emissary to Halifax to enquire into the capabilities of the local candidates. The post eventually fell to William Alexander Henry, who, like many other pro-Confederate politicians in Nova Scotia, had been defeated in the 1867 election and had returned to private law practice. Henry was a competent barrister, but no more than that. By 1874 all of the Nova Scotian fathers of Confederation except Henry had achieved some reward through the dominion government. The Mackenzie government rectified that situation early in 1874 by appointing Henry a judge ad hoc to hear Nova Scotia petitions concerning controverted elections; less than two years later he was called to Ottawa. He owed his Supreme Court appointment to his political career, to his pro-Confederation sacrifices, and to his considerable support among members of the local bar and provincial members of Parliament. Henry's lack of judicial experience was a weakness, as was his level of intellectual ability.[27]

The official offers of appointment to these four English Canadians were made on 11 September,[28] but the offers to the two Quebec members were delayed because the second Quebec member had not yet been chosen. One position had already been promised to Télesphore Fournier, who as minister of justice had piloted the Supreme Court bill through the House of Commons. Over the years Fournier had been repeatedly distracted from his legal career by his political interests, but his achievements as a lawyer were such that he had become a leader of the Quebec bar.[29]

The second Quebec position was subject to considerable manoeuvring as the Mackenzie government sought to gain various political advantages. It was cabinet's view that the two ablest legal minds in the province were A.-A. Dorion, chief justice of the Court of Queen's Bench, and Rodolphe Laflamme, a capable lawyer and member of Parliament. It was decided that Laflamme, who was interested in joining the bench, could not be spared from the government and that he should therefore be offered an appointment in such a way that he would not accept. Dorion refused the proferred post, apparently feeling that a puisne justiceship on the Supreme Court would be a decline in status.[30] Several other names were considered, and the position was finally offered to Jean-Thomas Taschereau in the expectation that he would decline. It was felt that he would not want to move to Ottawa; once the post was rejected and a political advantage gained from having offered the position to a Conservative, the government planned to name either Joseph Doutre or Louis Sicotte, both long-time Reformers.[31] Taschereau accepted, however,

although by the time he resigned in 1878 many observers must have wondered why. Taschereau was the only original member of the Supreme Court to have undertaken advanced study of the law at the university level, in his case in Paris. When he joined the Court in 1875, he was sixty years old and had been on the bench for ten years, most recently on the Court of Queen's Bench.[32]

The original six-man panel reflected several important characteristics. Five were Canadian-born, a relatively high figure in the light of the immigrant nature of much of English Canada; the sixth, Strong, had arrived from England at age ten. It was of some advantage to the Court that five members had been active politically (Taschereau being the exception). The Canadian élites in this period were small and overlapping; to appoint long-standing members of those élites (Ritchie's grandfather, for example, had been a judge in Nova Scotia) was to ensure the acceptance of the Court and its compatibility with the government. That two provincial chief justices were among the members was important for the Supreme Court's prestige and for the fulfilment of its covert functions. The median age at appointment was fifty-nine. At this stage of the dominion's history, when the various regions were still in the process of accommodating themselves to a federal system, it was probably wise to establish a regional selection criterion. The Mackenzie government should be given credit for its bipartisan appointments, which assured the Court the support of both political parties (although this did not prevent partisan complaints[33]). In general the appointments were well received in the press and by members of the bar, with the exception of W.A. Henry. It was unfortunate that several able people, such as Blake and Dorion, had refused appointment – the intellectual strength of the Court clearly suffered as a result. Such refusals and the consequent weakness of the Court were to be frequent problems throughout the coming years.

Ritchie and Strong brought to the Supreme Court a strongly centralist understanding of the British North America Act. Early in 1875 a case had come before Ritchie in New Brunswick challenging the right of provincial officials, directly or indirectly, to prohibit the manufacture or sale of alcoholic beverages or to limit their use. In his judgment Ritchie adopted a broad definition of the central government's power to regulate trade and commerce and declared the provincial legislation ultra vires:

> The power thus given to the Dominion Parliament is general, without limitation or restriction, and therefore must include traffic in articles of merchandize, not only in connection with foreign countries, but also that which is internal between

different Provinces of the Dominion, as well as that which is carried on within the limits of an individual Province ... Under the British North America Act, 1867, the Local Legislatures have no powers except those expressly given to them.[34]

The decision is of interest because it reveals a strongly centralist leaning on the part of Ritchie, and because Henry Strong relied on this judgment in a similar case in Ontario before being appointed to the Supreme Court.[35]

With the judicial panel selected, the Supreme Court of Canada could get down to the work of preparing to commence operations. One major obstacle remained, however. Colonial Office concerns over the constitutionality of clause 47 of the Supreme Court bill had caused the bill to be reserved by the governor-general, and it now awaited approval from the queen-in-council.[36] While discussion and consideration of this legal problem continued, the Supreme Court remained in limbo.

This state of suspended animation was frustrating to the prime minister and his colleagues. In the summer of 1875, Alexander Mackenzie had conferred with British officials in Whitehall, and he believed that agreement had been reached regarding the legislation: the Court would be allowed to get under way, but if British law officers agreed that clause 47 was unconstitutional, the Canadian cabinet pledged to modify the clause so that the objections were satisfied. This does not appear to have been the Colonial Office's understanding of the consultations. This disagreement became apparent late in September when the dominion government sought royal assent to the orders-in-council appointing the justices and the registrar. The cabinet put pressure on the Colonial Office and on the administrator in Canada, General O'Grady Haly, to proceed with these initial steps in organizing the Court.[37]

Why was the Canadian government so insistent on immediate establishment of the Supreme Court? First, the cabinet was trying to manoeuvre the Colonial Office into a position where rejection of the Supreme Court bill would be very difficult. Genuinely worried that the legislation might be turned back at Whitehall, the government hoped that by empanelling the Court and by filling the vacated positions on the provincial benches considerable confusion within the dominion judicial system might ensue if the Court were not allowed to stand. Second, the government was experiencing a series of confrontations with British officials, especially the forceful and newly arrived governor-general, Lord Dufferin, over several matters, but particularly over British Columbia's complaints against the central government. The Canadian politicians

were becoming increasingly resentful of what they considered to be British interference. Third, the Supreme Court Act allowed for a two-stage establishment of the institution. The governor-in-council could order the appointment of judges and officers to facilitate the organization of the Court, but a second order was required for the Court to exercise its judicial functions. When General Haly delayed the first order, Ottawa officials saw further signs of British interference. Fourth, Edward Blake was creating internal problems for the cabinet. When he became minister of justice in May 1875 he was already convinced that the government had failed to stand up sufficiently to British authorities. By September Blake was prepared to push back against Downing Street and to force the cabinet to do likewise.[38] Blake's argument that numerous important cases awaited appeal to the Supreme Court was simply a ploy, as indicated by the paucity of appeals in the early sessions of the Court. It is true that once the process of appointment began, any delay could throw into chaos the judicial calendars in the various provinces, but that situation was of the government's deliberate making.

Finally, under the Mackenzie government's insistent pressure, General Haly assented to the order-in-council and on 8 October 1875 administered the oath of office to the chief justice and to the registrar.[39] On 8 November the five puisne justices were sworn into office. Arrangements for the Court's functioning were taken in hand. Staff members were appointed, including a capable young registrar, Robert Cassels Jr. Law books were ordered. Temporary accommodations were made available in the Senate wing of the Parliament building, while plans were made to provide permanent quarters elsewhere. Rules and procedures began to be considered.

The governor-general went out of his way to give prestige to the Court. 'I think,' wrote Blake to one of his colleagues, 'the Governor's idea is that we ought to give the occasion [of swearing in the puisne justices] all possible eclat.' Lord Dufferin followed this up by acting as host at a state dinner on 18 November in honour of the Supreme Court members; he called for 'social, moral, and ... material recognition proportionate to their arduous labours, weighty responsibility, and august position.' At least partly at Dufferin's suggestion, the justices adopted the stately scarlet and ermine robes of the English bench.[40]

The early support for and status of the Supreme Court should not be overstated, however. When the minister of justice outlined the physical requirements of the Court, he allocated only four rooms on a permanent basis (a courtroom, a judges' consulting room, an office for the staff, and a

room for counsel); a fifth room would be needed for the library until construction of the parliamentary library had been completed. Here was a beggarly institution. No offices were planned for the justices; all the staff were to share just one room; and there was to be no separate permanent library. At first the government planned to build an extension to the West Block in order to house the Court. But when the estimate of $120,000 for construction was presented, the plans were set aside. Instead, the Court continued its 'temporary' use of the Parliament buildings. It occupied rooms around the House of Commons; a converted reading room was used as a courtroom and a few surrounding offices were placed at the disposal of the justices and staff.[41]

The government's refusal to spend much money on the Court was a reflection, among other things, of an emerging tendency to downgrade the institution. Appeal to the Judicial Committee had been maintained, relegating the Supreme Court to subordinate status. The Court's appellate jurisdiction began to be narrowed,[42] and its workload was not expected to be substantial. Blake commented that the registrar's prospective duties would be 'very light.' When J.-T. Taschereau discussed the possibility of resigning because of ill health early in 1876, the minister of justice responded, 'The Council are hopeful that the comparative ease which may be expected in your new position [at the Supreme Court] will act favourably upon your health.'[43] The establishment of a central appeal court was becoming at least as much a matter of status and form as it was of real substance.

Prior to the Court's first official sitting, some essential items of business had to be disposed of. Court attire had to be ordered. One set each of scarlet and black robes, as well as a three-cornered hat, was required for each justice. There was some question as to the exact design – which British court robes were to serve as the model? Would the chief justice's robes differ from the others? When these questions had been answered and each justice had been measured, the orders were sent off to London to be filled by the 'Robe Makers to Her Majesty.'[44] More important than court costume were the rules of the Court. Draft regulations were drawn up by Chief Justice Richards, Justice Strong, and Registrar Cassels and then submitted for consideration and alteration first to Justice Taschereau and then to the other justices. By mid-January 1876 the Supreme Court rules were prepared, and before the end of February the rules of the Exchequer Court were approved, although additions and changes were made thereafter.[45]

One characteristic of these minor decisions stands out. As the Supreme

Court was being established, there was a strong tendency to adopt, copy, or emulate the practices found in Ontario courts. When a court seal was ordered, the seal of the Ontario Court of Queen's Bench served as a model. When a policy was adopted regarding requisitions, the practice of the same court was followed. When regulations were needed regarding the copying of documents for the public, the procedure of the same court was again copied. The rules of the Ontario Court of Appeal were adopted for use in the Supreme Court.[46] These minor examples of Ontario's influence are perhaps illustrative of the way in which Ontario was slowly but steadily shaping the structure of the central government (and other sections of the country) in its own image.[47]

As the rules of practice for the Supreme Court were being drawn up, amendments to the Supreme Court Act were being drafted. In 1876 changes were made in the rules of evidence, in matters concerning the Exchequer Court, and in habeas corpus proceedings. The premier of Ontario requested and received an amendment emphasizing that provincial judges had discretion to refer questions to the Supreme Court. Minor alterations were made to the act in 1877. In 1878, possibly to attract more work for the Court, a government bill increased the number of Court terms from two to four, established a monetary minimum in cases appealable from the maritime provinces, and clarified the rules respecting the right of appeal from various provincial courts; the bill was dropped when it was emasculated by Senate amendments.[48]

Predictably, the early work of the Court was light. The Supreme and Exchequer Court Act was not proclaimed until 10 January 1876. In *Brewster* v *Chapman* (unreported), it was held that the right of appeal to the Supreme Court did not exist in respect of any judgment rendered prior to that date. Therefore, at the first official sitting of the Court, on 17 January, there was no business to deal with and the justices immediately rose. The deputy minister of justice wrote at this time, 'I think the Supreme Court will be a good institution – and work well, & that they will soon have abundance of work.'[49] That abundance of work was not, however, immediately forthcoming. In April the first case was heard by the Court – a reference from the Senate of a private bill. Did this legislation (An Act to incorporate the Brothers of the Christian Schools in Canada) fall within exclusive provincial jurisdiction, under either section 93 (education) or section 92 (11) (incorporation of companies with provincial objects), the senators asked? The four justices present (Taschereau and Henry were absent) considered the problem, although there is no evidence that argument by counsel was heard. Justices Ritchie, Strong,

and Fournier found, without giving reasons, that the bill was within an area of exclusive provincial jurisdiction; Chief Justice Richards abstained from concurring in this judgment because he doubted that, in the Supreme Court Act, Parliament had intended that judges should, on reference of a private bill, express their opinion as to the constitutional right of Parliament to pass such a bill.[50]

In June three appeals were heard by a panel of five justices (Henry was again absent). The Court sat for just one week and then rose; it was not to sit again until the following January, when the number of appeals increased. With all members of the Court finally together, eleven cases were heard in the winter term of 1877, and a further twelve were heard in June; the Court sat for a total of seven weeks. By the winter term of 1878, the Court calendar had expanded to include twenty-one appeals, heard in just three weeks. The work of the Court was expanding in quantity, but there were problems. Of the forty-seven appeals heard by the start of the second sitting in June 1878, judgments had been delivered in only thirteen instances – a pace that would soon cause a good deal of concern and one that is difficult to explain.[51]

What work the justices did perform was not done impressively. Their early judgments manifest a diffuseness and prolixity that are disturbing for their apparent commentary on the justices' intellectual discipline. At the same time, however, the judgments are generally reflective of the quality and character of decisions then being written in the lower courts of Canada. R.C.B. Risk's description of the Ontario courts of the time aptly depicts the Supreme Court of Canada:

> In Ontario the courts seemed to assume that the common law was composed of rules firmly settled by authority, primarily English authority. It was almost never expressly justified, beyond the justification implicit in its mere existence and the internal authority of courts in a hierarchy ... The process of making decisions seemed usually to be simply finding facts and applying rules. If the law was obscure or uncertain, the court simply had to look harder to find it. This process of finding almost never included any reasoning, even to deduce implications from the rules. The judgments contain virtually no discussions of the functions of courts, especially their responsibility for the common law or interpreting statutes, but a basic and pervasive article of faith was apparent: their function was only to apply the law in an impartial way.[52]

The Court was also showing some early indications of difficulty in adjusting to the bilingual character of its field of jurisdiction. The

language of administration was English – even French-speaking personnel corresponded with each other in English.[53] In the Charlevoix by-election case of 1877, Justice Henry issued a pre-trial order to have the record translated into English and forty-five copies printed. Henry had decided that under section 133 of the British North America Act the right existed to use either French or English in any pleading or process before the Supreme Court that issued from the province of Quebec; further, the cost of translation of the papers for the use of the Court could not legally be imposed on the parties to the proceeding. The problem was that the Supreme Court had no means of coping with such a contingency in the short time available. The staff was insufficient for the task and no money was provided to hire special translators. The Department of Justice was at first unwilling to release any additional funds for the purpose; the minister had adopted a policy of keeping 'to the lowest practicable point the expenditures in connection with the Court' – presumably because of the economic recession and in fear of encouraging attacks on the institution. The department refused the registrar's request that an official translator be added to the Court staff. Instead, the hiring of a translator in this special instance was authorized by order-in-council, but in the future the registrar and the reporter would be expected to add translation to their other duties. Perhaps stimulated by this case, early in 1877 the Court set about translating into French the year-old rules of the Exchequer Court. The Supreme Court Reports usually published the various reasons for judgment in their original language (and untranslated); this meant that the Reports were less useful to most of the profession than they might have been.[54]

A large proportion of the cases with which the Supreme Court would deal in the coming years – in fact, for most of its history – were civil or commercial cases involving minor issues of law or of law and fact. Such appeals dominated the work of the Court in both public and private law. A good example of this can be found in *Johnston* v *The Minister and Trustees of St Andrew's Church* (1877), which reached the Supreme Court early in 1877.[55]

James Johnston was an elder of the congregation of St Andrew's Church in Montreal and had been a pew-holder in the church continuously from 1867 to 1872, leasing the pew from the church. In December 1872 the trustees notified Johnston that they would not let him lease a pew for the following year. Johnston responded by an immediate attempt to pay the next year's rental fee in advance; he continued to occupy his pew but was 'molested and disturbed in his use and occupation' of the pew by

church elders and other members of the congregation. The trustees finally placed a sign on the pew stating that it was now 'For Strangers'; they took Johnston's books and cushions from the pew and firmly dispossessed him of his seat. Johnston brought suit against the trustees of the church claiming $10,000 damages.

Johnston's suit was dismissed by the Quebec Superior Court. The judgment was upheld in the court of Queen's Bench (appeal side). Nevertheless, the disgruntled church-goer had claimed in excess of $2,000 in damages, an amount large enough to ensure access to the Supreme Court of Canada as of right. In January 1877 a full panel of six justices heard the case. Five months later the decision was handed down, upholding Johnston's appeal 4–2.

The Court majority, led by Justice Ritchie, ruled in Johnston's favour on the ground that having tendered the rent in advance he was, under the by-laws, custom and usage, and the constitution of St Andrew's Church, entitled to a continuance of the pew for the year 1873. The Court allowed 'reasonable but not vindictive damages' in the amount of $300. Each of the four justices in the majority wrote a separate judgment (Fournier in French), covering a total of some forty pages.

Chief Justice Richards and Justice Strong dissented in separate judgments. Strong showed great sensitivity in the first civil-law case to come before the Supreme Court. Unlike Richards, who defined the issue as a leasehold dispute in accordance with common-law doctrine, Strong saw no implicit renewal in the act of pre-payment of rental fees. In his view the trustees of St Andrew's fulfilled the terms of their charter and in doing so caused no actionable tort to Johnston. Strong reached this conclusion after a careful consideration of the civil-law authorities. He concluded that 'as a matter of law it is out of the question to say that a lease having been made for a fixed term of one year, such a lease can be prolonged indefinitely by the proof of any usage or custom.'

The Supreme Court's settlement of an internal dispute between a church and a member of its congregation is a telling example of the trifling issues the Court was to consider in the coming years. That the justices would spend their time and energy writing six different judgments, covering sixty-three pages of the Supreme Court Reports, is striking. Like the Canadian judiciary elsewhere, the justices appear to have been content to do the work that came before them; no matter how unimportant the case, most of the judges tended not to distinguish among the appeals. In this there is already a hint of a passive institution that accepted its subordinate and limited position.

The justices' status and that of the Supreme Court itself were quickly perceived to be lower than was desirable. Lord Dufferin advanced various artificial techniques to redress the problem. He first suggested that 'the title of Lords Justices' be conferred on the Court members; it had already been determined, he pointed out, that the justices should be addressed by the bar as 'my Lords,' and he believed the queen would sanction the broader 'dignity.' This idea was followed several months later by the proposal from the governor-general and the colonial secretary that W.B. Richards be named a knight in the queen's honours list. The British officials felt a title to be appropriate for the chief justice as the senior judicial personage in the dominion and as the deputy of the governor-general whenever the latter was absent. Similarly, care was taken to assure the justices a high place in the table of precedence within the dominion.[56]

But the causes of the Supreme Court's relatively low prestige were much deeper than Dufferin's proposals recognized. Neither the bar nor the government itself had much respect for the young institution. Early indications that the Court was perceived to be of only limited importance have already been noted. Late in 1877, R.G. Haliburton, one of the lawyers for the appellant in *Lenoir* v *Ritchie* (1878), wrote to the minister of justice suggesting that the government put pressure on the Supreme Court members to agree to hear the case. The government rejected outright Haliburton's request, but the deputy minister of justice's memorandum on the proposal was more equivocal: any intimation to the justices of the government's views at this time was 'rather premature.'[57]

There were several fundamental causes of this low regard for the Court. First, the Supreme Court was an intermediary court that could be completely bypassed by appellants. Second, those who favoured strong provincial rights and those who feared any impairment of ties with the mother country viewed the Court with distrust if not disdain. Third, the Supreme Court of Canada directly confronted a basic, persistent perception held by central politicians. One historian writing about the late 1840s pointed to the 'considerable suspicion of the legal system and profession [that was] a traditional factor in Canadian politics.' Politicians, he continued, distrusted 'a centralized and complex system of justice. A recurring theme in early nineteenth century Canadian experience was the attempt of the legal profession to assert its special right to design the legal system and the challenge of this right by individuals fearful of being exploited by the profession and distrustful of professional expertise.'[58] The way in which the Supreme Court of Canada had been designed and

the character of its jurisprudence had seriously violated this image. The Court was thus faced with a pre-existing hostility even before commencing work. It would take a particularly able group of justices to overcome this problem; unfortunately, this was one major area of immediate deficiency.

Both the quality and conduct of the Court's members contributed to the institution's weak image. The commitment of the justices themselves to the institution can be questioned. W.A. Henry absented himself from Ottawa in the spring of 1876 and for three months in the fall of 1877, in the latter instance taking a leave of absence to visit England 'on urgent private business.' S.H. Strong took a six-month leave in the winter of 1877–8. Strong's absence was serious, since it came during a sitting of the Court and caused resentment among members of the bar. In a letter to the editor of the *Canada Law Journal*, one barrister complained,

> there are several important cases from Ontario in which judgements are to be given, and others set down to be heard next January, and though we have the utmost confidence in the learned Chief Justice, suitors, or at least their counsel, will not have the same confidence in some other members of the Court, who are not familiar with our [Ontario] laws. And the absence of so able a lawyer as Mr. Strong will weaken the effect of the decisions.

This narrow provincial viewpoint was echoed by Désiré Girouard, a future member of the Supreme Court, who grumbled to Sir John A. Macdonald that Strong had undoubtedly been given leave by the government so as to influence the decision in an upcoming electoral disputes case.[59]

Two other justices were disappointments. J.-T. Taschereau had been a problem for the government since he first came to Ottawa. It had been expected that he would not accept the initial appointment because he would not want to leave his home in Quebec City. In January 1876 he asked for an exemption, on the ground of poor health, from the statutory requirement that he live within five miles of Ottawa; Taschereau intimated that any refusal by the government would force his resignation. The government was unwilling to grant the exemption, but the prospect of such a precipitate resignation so early in the Court's life disturbed the minister of justice. It was decided that if Taschereau wished to resign, he would be offered a pension based on his income on the provincial bench; in the meantime the problem would be treated as a 'profound Cabinet secret.' Negotiations continued by letter over the next several months,

while the reluctant justice stayed in Quebec City. Taschereau's request for leave during the June 1876 sitting was refused; since Justice Henry would be absent, Taschereau's presence was mandatory if a quorum was to be obtained. The very thought of the Supreme Court lacking a quorum at its first sitting to hear appeals must have caused trepidation among the government leaders. Taschereau made his way to Ottawa, but obviously none too happily. The prime minister described the result:

> The Supreme Court Session passed off all right. They rose on Saturday at 1-30 and Taschereau was off on the train at 2: He tried on Friday Evening to get the Court to sit until 10 pm to enable him to leave at 10-50. Richards refused and Taschereau told him angrily he would be revenged for that. Fournier left on Monday. Strong is very angry and insists on both men doing *some* work. Neither of the Frenchmen opened their mouths in Court from first to last but both *looked* very wise which probably had the same effect on the audience as if they were wise.[60]

This unattractive picture of the Court's first full sitting is complemented by Taschereau's obvious lack of commitment to the institution.

The aversion to Ottawa so pronounced in Justice Taschereau was shared by others. Some, such as Henry Strong, apparently returned to their home towns when they were not required at the Court for extended periods. Advising a prospective member of the Court in 1879 who hesitated to accept because of the need to move to Ottawa, J.R. Gowan (an Ontario County Court judge himself) commented, 'There may be some disadvantages in a residence in Ottawa but then there are advantages[,] obvious ones, also. Moreover judging from the past the judges need not spend a very long time in the year at the Capitol. Do not be in a hurry to move[;] take your time about that. You have a right to consult your personal & domestic convenience in the matter.'[61] Clearly, Taschereau was not the only jurist who found the federal capital unattractive.

The problems with the Quebec justice continued. He maintained a permanent residence only in his home town throughout his three years on the Supreme Court bench. By 1878 complaints began to appear in the legal press regarding Taschereau's violation of the Supreme Court Act's residency requirements. Finally, in the summer of 1878, Taschereau decided to resign. He used ill health as his explanation, but it is clear that his heart had never been in the Ottawa job.[62]

In contrast, Chief Justice Richards' problem was not a lack of interest or of devotion to the Court or to his duties, but genuine ill health, which affected his leadership of the Supreme Court. He was able to deal with the

pressures of the position during 1876 when there was not much Court business, but when the number of cases increased in 1877 Richards began seriously to consider retirement. His health so influenced his work that he went abroad in the fall of 1878 in the hope of regaining his strength. Richards was in Europe when Taschereau submitted his resignation. The letter of resignation informed Prime Minister Mackenzie that the Quebec justice would be unable to sit during the fall term of the Court and that his resignation should be dated any time prior to that sitting, some six weeks hence. With Richards absent, Taschereau's replacement could not be sworn into office, and with both Richards and Taschereau absent the Supreme Court would lack a quorum. In the confusion it was necessary to delay the opening of the fall sitting and to summon the chief justice home from overseas to administer the oath of office to the new justice.[63]

Within two months the chief justice too had retired under pressure from the Macdonald government.[64] As the first leader of the Supreme Court of Canada, W.B. Richards had performed well below expectations and short of the essential needs of the nascent institution. He had failed to take active control of the business of the Court, and he was unable to blend the disparate personalities and abilities on the bench into an effective, co-operative unit. Several contemporary accounts credit the chief justice with an able legal mind, breadth of thought, and practical common sense, but his brusqueness of manner and his lack of physical vigour prevented him from taking effective charge of the Court.[65] His shortcomings were especially unfortunate because it was vital to the effectiveness of the Supreme Court as a national body that it establish its right to the respect and approbation of the Canadian people.

Two vacancies thus appeared on the bench. Taschereau was replaced by Henri-Elzéar Taschereau, a nephew. Elzéar Taschereau had been a Bleu member of the legislative assembly from 1861 to 1867 and had been defeated in the 1867 election. He returned to his private law practice, and was appointed in 1871 at age thirty-five to the Quebec Superior Court. Once on the bench, Taschereau found time to develop his interest in criminal law; he wrote a two-volume reference guide to the criminal law in the dominion. The work was a useful compilation of existing statute law and procedure, and the young judge went beyond his basic task by suggesting a number of possible improvements in the law – most notably the assimilation and consolidation of criminal law across the country. Taschereau also demonstrated a strongly centralist interpretation of the British North America Act.[66] Two days before leaving office in 1878 and