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The Strong Court

1892–1902

The structure and practice of the Supreme Court of Canada have always been such that the chief justice has not had the power to impose his authority on his fellow justices; instead, the chief justice's leadership on the Court has been dependent on the force of his personality. Only one chief justice has ever truly dominated the Supreme Court of Canada – Sir Henry Strong. But his dominance was not leadership. Strong's irascible and argumentative temperament facilitated his control over the Court and created problems among his colleagues and with members of the bar. Despite Strong's overweening hand, however, there were several (sometimes subtle) signs that the Court was improving.

After several years of stability in the Court's personnel, the 1890s proved to be a period of change and controversy. Chief Justice Ritchie, in his seventy-ninth year, had been suffering from ill health and had applied for an extended leave of absence; his previous vigour had begun to ebb and the quality of his judgments had been publicly perceived to be slipping.[1] In September 1892 Chief Justice Ritchie died, followed ten months later by the most recent recruit, C.S. Patterson.

The Conservative government now had a chief justiceship and two vacancies to fill. Rumours and suggestions abounded regarding the chief justiceship. It was frequently mentioned, with approval, that Sir John Thompson himself (who did not become prime minister until December 1892) was attracted by the post. But it was difficult for Thompson to

abandon a party and a government that lacked an alternative leader. Thompson's appointment to the Court would have pleased several commentators who argued that promotion by seniority should not be allowed to become an entrenched practice. Others pointed to the Supreme Court's weak image and hoped that an appointment from outside the Court might be used to bolster the institution's stature and to strengthen its position.[2] One of the chief Conservative advisers in legal matters, Senator J.R. Gowan, was particularly opposed to the automatic promotion of the most senior puisne justice, S.H. Strong. Soon after Ritchie's death, Gowan wrote to Thompson:

> I suppose Strong will be looking for the place [of chief justice]. He at one time expressed anxiety to retire. It might be expedient to allow him to leave, with a better retiring allowance. If he could be *trusted to come down* at the proper time – I mean when his ability for work was on the down grade, but like the Archbishop of Gil Blas, – he might not be easy to convince in that direction –
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> I do not myself see that the public interests could suffer, if the appointment of a new Chief was postponed for a season. Gwynne and Patterson are great workers any way.

Two weeks later, the senator returned to the same theme. 'The Supreme Court needs badly no doubt a general accession of working men, but unless Strong has turned over a new leaf his appointment as CJ would not help much I think. I have no faith in the man in any way. Why not leave things as they are for a time.'[3] Gowan was a former county court judge of excellent reputation, and his assessment of the Supreme Court and some of its members carried weight. In particular, his emphasis on the weakness of the work ethic at the Court stands out.

Gowan's advice was not followed, however. One week after assuming the office of prime minister, Thompson promoted Henry Strong to be the Court's third chief justice. Over the following decade it became apparent that the selection was a poor one. No one could question Strong's intellectual capacity or his interest in the civil law and the French language, but some of his personality characteristics were decidedly abrasive. Gowan's concern regarding the new chief justice's industriousness was only part of the problem.[4]

Two vacancies remained to be filled. With Ritchie gone there was no longer a maritimer on the Court, and it is not surprising that Thompson, a Nova Scotian, moved to fill that void. Robert Sedgewick had had a long-

standing association with the prime minister as a Nova Scotia Conservative, as a Halifax lawyer, and as deputy minister of justice in Ottawa from 1888 to 1893. Raised in Nova Scotia, Sedgewick commenced a successful legal practice there in 1873. A specialist in equity law, he held a lectureship in this field at the Dalhousie law school. A supporter of the Conservative party (and of John Thompson in particular), Sedgewick had been active in municipal, provincial, and federal politics. In 1885 he became recorder for Halifax, and shortly thereafter began to solicit from the new minister of justice a position on the Nova Scotia Supreme Court. Instead, Thompson brought him to Ottawa to be deputy minister of justice. In that position Sedgewick became familiar with the Canadian Supreme Court through his administrative duties and through his appearance as counsel before the Court.[5] Aged forty-four at his appointment, Sedgewick, it was hoped, would bring new vigour to the bench. Now three of the four common-law justices were specialists in equity.

The vacancy created by Patterson's death went to a maritimer despite growing rumblings from the west about lack of representation. George King, the son of a local shipbuilder, had been born and raised in Saint John, New Brunswick. In 1865 he joined a law practice in his native city and soon began to turn his attention to political affairs. As a Conservative member of the provincial assembly from 1867 to 1878, King joined the provincial cabinet in 1869, serving as attorney-general (1870–8) and premier (1872–8). Defeated in the federal election of 1878, he was appointed two years later to the Supreme Court of New Brunswick. On the bench he earned an excellent reputation for the soundness and quality of his judgments. King was mentioned as a possible appointment to Ottawa as early as 1888, and thus his promotion in 1893 came as no surprise – indeed, he had carefully let the prime minister, with whom he was on friendly terms, know that he was not averse to joining the Supreme Court. King was a specialist in commercial law as well as criminal law. Sir Henry Strong, a man not easily given to the distribution of compliments, praised King's ability: 'He was a great lawyer, especially in the department of commercial law. He was probably the best commercial lawyer in the Dominion, especially familiar with shipping law and commercial law generally in its larger sense.'[6]

Despite this infusion of new blood, the government remained concerned about the personnel of the Supreme Court. Age and infirmity were becoming apparent. Every one of the four standing members of the Court took at least one leave of absence during the 1890s; some took

several. Though the justices were not remarkably old (except for Gwynne, who turned eighty in the spring of 1894) they were definitely slowing down. This was, of course, in an age when retirement at a prescribed age was still uncommon.[7] The Thompson government approached the matter indirectly, using the carrot rather than the stick. A motion was introduced into the House of Commons, and passed despite Liberal opposition, to allow any justice of the Supreme Court of Canada who had reached age seventy and served in the judiciary at least fifteen years (including at least five at the Supreme Court) to retire with a lifetime pension equal to 100 per cent of his salary.[8] The effect of the resolution was to make Gwynne eligible for the special pension immediately; Fournier would become eligible within two months, and Strong within fourteen months.

This alone, however, was not enough to stir these justices. Early 1895 the new minister of justice, Sir Charles Hibbert Tupper, began to apply the stick. The chief justice (with whom Tupper had already spoken) was informed that both Gwynne and Fournier would be asked to retire, possibly at full salary. Tupper added, 'Writing to you in strict confidence I am prepared, I may say, in the event of a refusal to bring in a Bill next session, which would enable the Government to prevent [the] possibility of the present state of things, to the great injury of commerce and of justice.' At the same time the justice minister instructed the Supreme Court registrar to supply information as to the age, attendance record, and cases delayed by absences of the two oldest justices.[9]

The search for ammunition against Gwynne and Fournier was fairly successful. During the six Court sittings of 1893 and 1894, Gwynne had been absent owing to illness on twenty days as well as on leave for five and a half months (including a further half of one sitting). These absences had necessitated adjournment of the Supreme Court for lack of a quorum on four separate occasions, for a total of eleven sitting days. Fournier had not been absent, except for a leave of absence covering one full term.[10] In these responses, the registrar answered the questions posed but went no further. The chief justice, although not called upon to respond, went out of his way to approve of and co-operate with the justice minister's actions, thus abetting a direct violation of the supposed institutional independence of the judiciary. Fournier, Strong pointed out, had been absent in 1891–2 and in 1894, both times on official leave. Moreover, the Quebec jurist, who was clearly 'in very bad health' and was reportedly suffering from Bright's disease, was unlikely to be able to withstand the heavy work of the upcoming session. Strong testified as to Fournier's value to the

Court: 'He is very amiable and courteous and is popular with his colleagues ... I miss him very much as he has an excellent knowledge of his own law, that of Lower Canada in which he had great experience.'[11] Justice Gwynne, however, was a different story. Strong was not concerned about the number of Gwynne's absences and the adjournments caused by them; apart from attacks of gout, Strong reported, Gwynne's health and level of activity were good for his age. It was Gwynne's personality that was impaired:

> What I complain of is the quality of his work – his extreme senile irritability and constant attacks upon myself even in Court. Further he has refused to attend conferences and his method of doing his work, is to write his judgements without any consultation and then call on the other judges to agree with him, shewing much wrath if they venture to differ. I am afraid he and I cannot get on together and if he will not or cannot be made to give way I am afraid I must.[12]

Given this picture of an aged, quarrelsome Court, it is no wonder that the Conservative governments of the day sought to alter the personnel.

Strong felt that Tupper's means of forcing retirement would not work.[13] Rather than holding out the mere possibility of a 100 per cent pension (which the chief justice estimated would not be strong enough temptation for either justice), he recommended that they be forced off the bench outright. 'I do not think it would be unreasonable that a law should be passed compelling retirement at 80. Although the Statute does not say so it is implied that a judge will take his retirement when from age he becomes incapacitated and no man is fit for judicial work after 80. The same may be said of a man who is disabled by chronic illness.'[14] With this carte blanche from the chief justice, the minister of justice was free to proceed. Tupper immediately communicated with both Fournier and Gwynne. The Quebec justice was clearly amenable to retirement. He lasted through the winter sitting of 1895, even though he was operating at reduced capacity,[15] and was given a leave of absence until September on the understanding that he would resign at that time. Seriously ill (he died in May 1896), Fournier had little choice but to retire. Money was clearly the one factor that made the decision difficult. In September Fournier sent a pathetic note from his home, asking that his salary be extended one more month. The government refused.[16]

The Quebec vacancy on the Supreme Court bench was reportedly first offered to A.R. Angers, who had recently resigned from the cabinet in protest over the handling of the Manitoba schools question. The Con-

servatives' traditional strength in Quebec was weakening, and an attempt to regain the public loyalty of one of the more important Quebec leaders made political sense. Angers, however, though he would have made a respectable appointee, was not to be enticed.[17]

The government then turned to the long-time Conservative member of Parliament, Désiré Girouard. Born in 1836, he had received his formal legal education at McGill University, where he had worked with an outstanding corporate lawyer and future prime minister, J.J.C. Abbott. After being called to the bar in 1860, Girouard established his practice in Montreal. He also demonstrated an interest in legal scholarship; he published a number of articles, particularly on marriage law, bankruptcy, and bills of exchange, and he was a founding editor and a major contributor to the *Revue Critique de Législation et de Jurisprudence du Canada* (1871–4). Girouard wrote two books on the law, one on bankruptcy in 1865 and one on bills of exchange in 1890.[18] In the 1870s he turned to politics to supplement his legal activities and served as a Conservative representative for Montreal in the House of Commons from 1878 to 1895. In Parliament he attacked the Supreme Court in its early years. How he was able to rationalize joining an institution that he had so opposed is unknown. Since those early attacks, he had rejected offers of appointment to lower courts, and had stood out in the House for his impartial handling of the hearings in the McGreevy–Langevin scandal in 1891.[19] Girouard brought to the Supreme Court a good legal reputation and a wide knowledge of the law, particularly in the commercial sphere, but he had no judicial experience.[20]

Retiring and replacing Justice Gwynne was not easy. In February the justice minister wrote to Gwynne as he had to Fournier. The Ontario justice apparently agreed to step down. Seven months later Tupper asked Gwynne to continue work for the time being because the Ontario members of cabinet had been unable to supply a suitable nominee to the Court. A few days later it was clear that at least two names had been put forward – Judges Rose and Ferguson of Ontario – and that the latter had been offered and had declined the promotion. Tupper once again asked Gwynne to stay on at the Supreme Court. The minister of justice did attempt to deal with some of the immediate problems raised by Chief Justice Strong's presence. Gwynne was asked to attend the judicial conferences so that newspaper comment would cease. 'It will not be long before you have relief,' continued Tupper, 'and meanwhile I pray you do all you can to pour oil on the trouble[d] water.'[21]

The manoeuvrings that took place during 1895 show the Conservative government of Sir Mackenzie Bowell in a new light. Some positive and forceful steps were taken in attempts to improve (as the government viewed it) the Supreme Court of Canada. General accounts of political affairs in that year portray the cabinet as so caught up in its own internal divisions and in the quandary of how to deal with the Manitoba schools question that it had no time or energy for dealing with other, minor problems. These incidents reveal activist elements within the cabinet, in this case led by Sir C.H. Tupper. Quebec-based personnel within the Conservative Party were obviously willing and able to co-operate with his initiatives, while Ontario-based leaders were not. The failure of the justice minister's activities relating to the Ontario post on the bench reveals further the serious divisions in the government (which would soon erupt in open revolt) and the debilitating effects of those divisions on the government's ability to govern.

The attempts to force retirement, the repeated absences of several justices, and the problems caused by Chief Justice Strong's personality naturally resulted in instability on the Court. Equally unfortunate was the entrenchment of the public's generally negative perception of the institution. A Toronto law journal commented in 1896 that 'this Court has long lacked the confidence of the Bar, both in the English-speaking provinces and in Quebec, and the present state of affairs will minimize what confidence still exists.'[22]

The Laurier government, which took office in the summer of 1896, was much more cautious in its dealings with Supreme Court personnel than the Bowell government had been. In 1898, when a vacancy on the bench occurred, effective action was quickly taken. On the death of Robert Cassels, the first registrar and an influential figure in helping the Court achieve what stability and stature it had, Edward Cameron was promptly named to the post.[23] But without a death or a voluntary retirement on the bench itself, the Laurier government was not about to risk any political strength in trying to force retirements.

The new government was active, however, in lining up its nominees for prospective vacancies. David Mills, a prominent member of the Liberal party, was promised Gwynne's post whenever it became available. As several years passed and the seat remained occupied, the government became frustrated; Mills quoted the prime minister as saying, 'He [Gwynne] must retire. We will impeach him if he does not.'[24] But this was bluster. The cabinet was willing to use such posts to reward friends, but not to create enemies. Justice Gwynne apparently was still willing to

consider retirement, and his health was somewhat poor, necessitating a leave of absence in the spring of 1896. Nevertheless, the government was unwilling to pursue the matter or to make retirement financially more attractive to the Ontario justice. Laurier wrote late in 1900, '[Gwynne] is now nearly ninety years of age, & really his usefulness is gone through physical weakness.' Because of Gwynne's age and his physical frailty the government expected that death or voluntary retirement would soon remove the justice.[25] Until then no action would be taken.

At the same time the retirement of the chief justice began to be discussed. Strong had been chief justice for five years and had recently been appointed to the Judicial Committee of the Privy Council; the government hoped that with this newly enhanced stature Strong would be willing to retire from the Supreme Court at the convenience of the government. The cabinet wanted Edward Blake to be the new chief justice. Offers of appointment were made in the fall of 1896 and of 1897, but the eminent Canadian counsel was unwilling to accept.[26] Blake's refusal was unfortunate, for the Supreme Court would have benefited from Strong's retirement.

The chief justice was continuing to create a number of problems both in and for the Court. He 'overshadowed everybody' on the bench, as one contemporary observer put it,[27] but he dominated without leading. His temper was quick and at times uncontrolled. A legal journal recounted one confrontation brought on by Strong's irascibility. An Ottawa barrister was arguing a habeas corpus case which the justices were not inclined to hear:

> ... the lawyer remarked that the Statute imposed certain duties upon Supreme Court judges which they could not endeavor to shirk. 'I am not going to sit here and listen to language of that sort,' remarked Mr. Justice Strong in a rather angry tone. 'What is that, Mr. Strong?' queried the lawyer, who had not apparently heard his lordship's remark. 'Mr. Strong:' roared the judge, now thoroughly enraged. 'Is that the way to address a judge of the Supreme Court? I leave the bench.' And with these words he left for the library. The lawyer tried to go on, but as there had only been five judges sitting, there was no quorum. At last Mr. Strong was sent for, and when he took his seat the lawyer apologized for his *faux pas*.[28]

A London, Ontario, barrister also complained of Strong's courtroom behaviour. The lawyer had been so incensed by Strong's handling of *The King* v *Love* (1901) that an unemotional interview with the minister of justice was impossible. Instead, he made a written complaint, asserting

that the 'conduct of the Chief Justice, silently acquiesced in by the rest of the Court, was brutally despotic.' Not content with Canadian channels, the lawyer informed the colonial secretary at Westminister about Strong's behaviour, but of course nothing came of it.[29]

Strong's intemperate behaviour was further illustrated in a 1901 incident in which an Ottawa lawyer laid assault charges against the chief justice. He alleged that Strong had used violent language in court and had later accosted and assaulted the barrister in the hallway outside the courtroom. (The fact that the lawyer was currently leading a campaign to compel the justices to wear wigs may have had something to do with the altercation.) The chief justice denied the allegations, and when the story appeared in the press urged the government to prosecute the newspaper for criminal libel.[30] The government chose to ignore the affair. Whether or not the assault actually occurred, the incident is indicative of the problems Strong's behaviour created.

Potentially more damaging, both for the government and for the court, was an 1898 cause célèbre. Sir Henry had long been known for his intolerant attitude toward the unskilled workers employed at the Supreme Court. The messengers and ushers in particular had frequently suffered from his sharp tongue, and on several occasions he had registered official complaints with the registrar and the justice department, sometimes resulting in a dismissal. One worker, who was lame and partially blind by the late 1890s, drew Strong's repeated ire; presumably it was this messenger who was involved in the following incident. In the fall of 1898, while sitting on the case of *Chicoutimi* v *Price*, the chief justice asked counsel for the names of judges who had heard the case in the courts below. As counsel was answering, Justice Taschereau called Strong's attention to the conduct of one of the court officers; the chief justice reacted by stating, in a voice loud enough to be heard in the courtroom, that the worker was evidently incapable and ought to be dismissed. Not having heard Taschereau's comment, those in attendance in court assumed that Sir Henry's criticism referred to the judge in the court below.[31] Any such statement would, of course, have been completely inappropriate. That Strong's comment was given credence was in turn a reflection of the existing image of the chief justice. He was already well known for his intemperate, crotchety behaviour and his injudicious conduct. The incident was made more serious because the case was on appeal from Quebec; it was assumed that the attack was being made by an arrogant English-speaking judge against a French-Canadian jurist. The

French-speaking lawyers reacted quickly and forcefully. The Quebec bar voiced its anger and called for the censure and retirement of the chief justice. The incident prompted other similar complaints. Ottawa counsel, for example, joined in the chorus of protest. As the Ottawa *Citizen* reported,

> Yesterday morning it leaked out in the court house that some of them [Ottawa lawyers] had great grievances to utter against the treatment they received from Chief Justice Strong while arguing their cases before the court. They say that as a rule they were treated by the chief justice in anything but a polite manner, and this week more than ever. While pleading a case one of the lawyers referred to the opinion of a certain judge of this district, whereupon the chief justice, it appears, remarked that he was only a local judge, and when the opinions of three other judges were given, the chief justice is reported as having said that it would be better for them to leave the bench.[32]

Such conduct was intolerable on the bench, and the stature of the Supreme Court was not so great that such revelations would do no harm.

Unfortunately, this incident in the fall of 1898 came on the heels of another episode in May of that year. The details are complicated, but the essence of the affair was that the timing of the hearing of cases at the Court had unexpectedly speeded up and counsel in Toronto and Chatham, Ontario, were given less than twenty-four hours' warning that their presence was required in Ottawa; counsel's inability to reach Ottawa in time and the chief justice's stringent application of procedural rules resulted in the dismissal of the appeal and the rejection of a motion to rehear the case. The appeal was lost unheard, and the public and the Ontario bar were scandalized. Injustice had been done; the essential purpose of the Supreme Court had been ignored by insistence on a rigid interpretation of procedural rules and 'because a Judge loses his temper.' The justices, it was pointed out, should consider the obligations of counsel occasionally rather than simply their own convenience.[33]

The bar showed its anger much more effectively than did the newspapers. Resolutions attacking the Court's conduct were passed and forwarded to the minister of justice; lawyers communicated directly with the minister, and a movement began within the Ontario bar, led by the highly respected B.B. Osler, to persuade the government to retire both Strong and Gwynne and to rejuvenate the Supreme Court. The minister, David Mills, summoned Justice H.-E. Taschereau before him to discuss the case; that the

interview was with Taschereau rather than with Strong himself is an indication that at least part of the responsibility for the incident lay with the chief justice and that the government considered that the affair could not be easily remedied simply by approaching Strong. Mills was upset, and threatened the Court with legislative action:

> [I] pointed out to him [Taschereau] that unless the Supreme Court took a proper view of their duty towards clients and counsel, it would be absolutely necessary to legislate upon the subject, to prevent the miscarriage of justice by proceedings so arbitrary and so capricious as those adopted in the case of Hall vs. Moore. Judge Taschereau deprecates legislation, and says he hopes we may be able to adopt some rule that would have the effect of meeting the convenience of counsel, and doing justice to litigants, without Parliament intervening to coerce the court against the abuse of this power.[34]

Effective leadership of the Court was, at least at times, passing from Strong's hands.

The reaction against Sir Henry Strong in the summer and fall of 1898 revealed an existing and long-standing discontent. The specific incidents that occurred in that year merely provided an opportunity for the bar to express its vexation with the chief justice. But the calls for new blood and for a more effective Court were becoming a constant refrain.

It was not merely Strong's bad temper that caused problems for the Court; at times he acted in a petty manner and against the best interests of justice. In the case of *Stephens* v *McArthur*, for example, argument was heard in January 1890, but judgment was not handed down until November. Since the case involved questions affecting the validity of every chattel mortgage and bill of sale issued in the prairies, lawyers in the west were naturally eager to learn the reasons for judgment. The Law Society of Manitoba telegraphed to the Supreme Court for a copy of the judgments, which it planned to have printed immediately in the *Western Law Times*. Henry Strong, who wrote the majority judgment, refused to allow it to be copied until it had been printed in the Supreme Court Reports.[35] What purpose could be served by such a refusal is unknown. To decline to make available its judgment was directly contrary to the function and purpose of the Supreme Court of Canada. Strong did great disservice to the efficient functioning of the law and to the Court. Perhaps the real reason for his refusal to release the judgment was that it was not yet written, since this was so typical of his work habits; if true, it would have been far better for him to have said so.

The need for a replacement for Strong was becoming increasingly apparent. The Ontario justice had long suffered from bouts of illness, which may have caused him to proffer his resignation in 1887. Through the 1890s he soldiered on, but found it necessary to absent himself from the Court because of illness in 1892, 1893 (six months' leave), 1897 (six months' leave), 1898, 1900, 1901 (two months' leave), and 1902 (three months' leave). His health problems were varied. In 1897 Strong's doctor 'certified that he greatly needed rest and change; that he had no organic trouble; but that his nervous system was seriously out of order – that in fact it has been more or less for years.' To Edward Blake, such a vague ailment was not sufficient justification for these extended absences:

> I cannot conceive that it is for the interest of Canadian suitors, or accordant with the spirit of the law, that the head of the Supreme Court should, when not incapacitated by illness, be absent from his Court. It seems that the Chief Justice absented himself during the whole of the last Sittings, and is absenting himself during the whole of these [Fall 1897] Sittings, under leave, though perfectly well. It is supposed by some that this leave was granted with reference to his appointment to the Judicial Committee; but, surely, Canadian suitors have a right to the benefit of the services of the head of the Court in the Supreme Court of Canada.

Later, Sir Henry was reported to be suffering from 'Rheumatic Gout,' from insomnia, and from injuries received in an accident involving a runaway horse.[36]

Whatever the medical cause, Blake was quite right in saying that the Supreme Court was severely weakened when its chief was repeatedly absent. His comings and goings and the uncertainties caused by his sporadic disposition to resign must have created a great deal of instability and unrest within the Court. Strong did not get along with Justice Gwynne; he informed the new Liberal minister of justice that one reason retirement was attractive was Gwynne's continued presence. There is, however, some evidence of friendship between the chief justice and Justice Girouard.[37]

Even when he was on the job, physical frailties hindered Strong in his work. He was still the major cause of delay in publishing the Supreme Court Reports; an 1892 account indicated that in fifteen judgments delay was caused by the justices, and in all but one of these it was Strong who was at fault. In 1893 Sir Henry persuaded the Department of Justice to hire a temporary stenographer to help him catch up with his work. The new

employee soon became a permanent secretary to the chief justice, but before long Strong needed even more assistance. By 1901 Strong was objecting to dictating his reasons for judgment to the secretary, because he now found it impossible to draft his decisions if anyone else was in the room; could he instead have a phonograph for dictation purposes, since his rheumatism made writing quite painful?[38]

According to one minister of justice, Strong had considerable difficulty in judging personalities. The chief justice had commented on the abilities of several maritime justices; in the minister's opinion, 'Strong however knows very little of the men — probably never saw any of them and must be very defective in his judgement of men for he has been known to praise our Judge James who is simply a dangerous fool.'[39] Such weakness in assessing the competency of others must have seriously impaired Sir Henry's effectiveness in dealing with his fellow justices and with counsel, and helps to explain the various contretemps in which he frequently found himself.

It is unfortunate that the Laurier government did not act to replace the chief justice. Strong was apparently willing to leave, and at the government's convenience, provided a larger income could be secured from some source – for example, from sitting on the Judicial Committee of the Privy Council. The chief justice suggested Elzéar Taschereau as his successor, but in 1897 the government was obviously not enamoured of the idea of promoting the senior puisne justice. When Edward Blake declined appointment, the government apparently looked no further, and asked Sir Henry to remain as chief justice until a successor could be found.[40]

Such an arrangement could not go on forever. For one thing, Justice Taschereau was losing his patience. Frequently required to assume the workload and responsibilities of a chief justice, he received no recompense, tangible or otherwise. In 1897 he requested extra pay while he was acting chief justice, and was unsuccessful. Four years later he was more forceful; he asked that next time Strong went away, someone else on the Court – Gwynne, for instance – be named to shoulder the extra duties.

> A Court not presided over by its Chief, it has well been said, is a disabled court. May I be allowed to take this opportunity to submit to your consideration, should in the future the Chief Justice be unfortunately again prevented from sitting, that, as it has been my lot to so often replace him for years past, it would be fair that Mr.

Justice Gwynne, as the next senior, should in his turn be asked by you to do so. Extra unremunerated duties should, when possible, be divided among us.[41]

This growing pressure from the bench to take action was reflected politically. Early in 1901, when Strong sought another six months' leave of absence, the cabinet initially rejected the request as not 'in the public interest'; later a two-month leave was granted. Questions were asked in the House.[42]

Finally, late in 1902, after several years of rumours that his departure was imminent, Sir Henry Strong took his leave of the Supreme Court of Canada. An active, effective, and influential minister of justice, Charles Fitzpatrick, had apparently found the appropriate incentive: Sir Henry would receive remuneration in addition to his pension through his appointment as chairman of the commission to revise and consolidate the public statutes of Canada.

Since 1901 the government had been actively considering various prospective replacements for Strong. What was needed, wrote the prime minister, was a 'man who could give to the Court a prestige and authority which, unfortunately, it has not.' Edward Blake's name was brought forward again, as were those of Chief Justice Armour and Chancellor Boyd, both of Ontario.[43] But in the end, Elzéar Taschereau, as the senior puisne justice, received the honour.

The details of the attempts to retire some of the Supreme Court members make clear how important money was. The point was made repeatedly that a justice could be eased out only if the financial blow of his reduced income could be cushioned. That John Gwynne never did retire, preferring to remain in office at full salary until he died early in 1902 (at age eighty-seven), is illustrative of the problem. Supreme Court salaries, on which pensions were based, had not altered since the founding of the institution. By the 1890s, public opinion was beginning to hold that judicial salaries in the dominion were no longer adequate. One legal journal published a table indicating that throughout the self-governing colonies of the British Empire only two (Tasmania and Natal) paid their chief justice and puisne justices less than the dominion; the Australian colony of Victoria offered salaries more than twice as large.[44] The general price index had declined during the last three decades of the nineteenth century, so that the purchasing power of the justices' fixed income actually improved slightly. By 1900, however, prices had begun to rise and the justices' income gradually fell behind.[45] It is possible that lawyers'

incomes were rising in the 1880s and 1890s; this would help to explain some of the problems in recruiting men to the bench. Weak pension benefits, in particular the lack of protection for a justice's widow, were also a problem.[46] Yet the governments of the day were either unwilling or politically unable to do anything about such issues.

The annual costs of the Supreme Court had been steadily rising, from $54,530 in 1880, to $60,840 in 1890, to $66,087 in 1900. The staff had slowly increased; by the turn of the century there were eleven employees (six more than in 1880) – a registrar, a reporter, an assistant reporter, a librarian, two clerks in the registrar's office, one secretary for the justices, one caretaker, and three messengers.[47] Expenses associated with the Court came under careful scrutiny by the opposition (no matter which party) and were frequently the subject of partisan complaint. In 1900 the minister of justice made it clear that the objections to an expensive Supreme Court were still influential in the House. 'The difficulty in connection with the Supreme Court,' David Mills confided privately to a fellow cabinet member, 'is that I find our friends ready to kick at every suggestion of any additional expense, maintaining that it costs altogether too much for what it does.'[48]

The Supreme Court seemed to be caught in a vicious circle. Its weak reputation persuaded many that little money should be spent on it. Any attempts to improve the institution were met by that objection. Yet the Court's perceived failure to improve was a justification for refusal to implement any innovative changes that might increase its budget.

One example of the inhibiting effect of this attitude will suffice. The Court had long been troubled by the small number of justices. The availability of only one justice beyond the number needed for a quorum gave the Court too little flexibility. Given the personal and health problems that regularly appeared among men of the justices' age group, the potential for conflict of interest necessitating withdrawal, and the growing tendency to use the justices for extra-Supreme Court functions, it was often difficult, if not impossible, to raise a quorum. The obvious answer to this was to appoint one or more additional justices, a proposition made even more attractive by the increasing demand in western Canada for representation on the Supreme Court bench. But at no time in this period does any government appear to have considered seriously any such proposal. To suggest an increase in the number of puisne justices would be to risk public debate about the costs and value of the Supreme Court as an institution. No government was willing to accept the risk.

Instead, both the Liberal and Conservative governments of the day sought to deal with the problem of too small a bench 'on the cheap.' It has already been seen that in 1882 the Macdonald government tentatively put forward and then withdrew a proposal to co-opt justices from lower courts in Quebec. In 1888 the same government suggested that the quorum be defined as four justices in cases of temporary absence or incapacitation; this bill was withdrawn when the immediate problem at the Court was solved.[49] A similar solution came from Justice Taschereau in 1892 but was quickly quashed by Strong on the ground that Ontarians would object to a court that might be composed of 'two French judges and two from other Provinces,'[50] evidence that provincialism was still strong in sections of the country. One year later Sir Henry Strong made a proposal of his own to deal with the problem: when necessary the Exchequer Court judge could be permitted to sit on the Supreme Court as a judge ad hoc. The chief justice, on his own authority, approached the judge of the Exchequer Court to gain his approval,[51] but nothing further came of the idea.

Finally, early in 1896 the Conservative government submitted a bill stipulating that any four of the justices could constitute a quorum and could hold court where the parties consented to be heard by such a court. The measure passed through the Senate and the House of Commons without debate and became law.[52] But this did not seem to solve the problem, and further solutions continued to be proposed.

In 1896 the Laurier government introduced a bill to appoint ad hoc judges from the provincial superior courts when necessary. The bill passed through the Senate, but was withdrawn before debate in the House of Commons. Reaction in the legal journals was definitely mixed, and the government anticipated some problems in gaining the approval of the House.[53] Six years later the government put forward a new bill to name assistant judges to the Supreme Court when necessary, but this too was withdrawn.[54] The cautiousness of the Laurier government regarding retirement and new appointments was paralleled by its reticence in dealing with the general problems faced by the court regarding personnel.

A minor factor that exacerbated the problem of an insufficient number of justices was the first appointment of a member of the Supreme Court to extrajudicial duties. In 1896 George King was named to an Anglo-American arbitration commission to settle Canadian claims for damages caused by American seizures of west coast sealing vessels in the Bering Sea. Though the duties took King away from the Court only for a short

time, the appointment was both a sign of things to come and a commentary on the Supreme Court. In the coming years members of the Court would be called upon to perform various political and quasi-judicial functions outside their assigned Court responsibilities. That the members of the Supreme Court of Canada were now being included among the possible appointees for such tasks is a sign of a slowly growing respect for some of its members and thus for the Court itself.

There were other indications of enhanced status, many artificially imposed by the government in attempts to bolster the Supreme Court's image. In 1881 and 1893, following the practice established with W.B. Richards, the incumbent chief justice was knighted. This was indeed a plum to be sought after, as revealed by Justice Taschereau's comments while holidaying in India. 'Je n'ai pas besoin de vous dire que, sous tous les rapports,' he informed Prime Minister Laurier, 'la position des Juges de cette Cour [Supreme] devrait être entourer de tout le prestige possible et mise sur un pied qui la feront ambitionnier par les plus hautes sommites [sic] de la profession.' This was the original intention of Sir John A. Macdonald, Taschereau assured the new government leader, and could now be accomplished by recommending to the queen that the puisne justices 'devraient être knighted'; the chief justice ought to be made KCMG, and the puisne justices given the lesser KB.[55]

While knighthoods were not handed out as readily as some might have wished, the Conservative government of Sir Mackenzie Bowell did alter the title of the chief justice. Henceforth the head of the Supreme Court of Canada would be known as the chief justice of Canada, 'as a distinguishing mark.'[56] The change underlined Ottawa's feeling that the Court ought to occupy the central position in the judicial system of the entire dominion.

A more substantial change in the prestige of the Supreme Court members was associated with the Judicial Committee of the Privy Council. The idea of colonial representation on the committee had been discussed for several years prior to the passage of the Judicial Committee Amendment Act in 1895. By that legislation it became possible for the monarch to summon a limited number of colonial justices to her imperial Privy Council; the justices sat on the Judicial Committee. In 1897 the first three jurists from the self-governing colonies joined the committee; the chief justice of Canada was the Canadian representative. Sir Henry Strong was delighted with the honour,[57] and took it seriously enough to contemplate resignation from the Supreme Court and a move to England to take up full-time duties there. It soon became clear that the latter step was

impracticable, because no salary was attached to the appointment. Indeed, money became a significant barrier to Strong's fulfilling his committee duties. In 1897 and 1898 the Canadian government gave the chief justice an allowance of $1,000 to cover travelling expenses to London. Strong, however, found the sum inadequate, and was forced to spend an additional $1,000 of his own each year.[58] The chief justice's pleas for more money fell on the sympathetic ears of the solicitor-general, Charles Fitzpatrick, who in arguing Strong's case reflected the Anglo-Canadian tradition of a mutually supportive judiciary and government.

> With reference to the application for travelling allowance to the Chief Justice, I would like to draw your attention to the fact that in England the highest judicial officer in the realm, the Lord Chancellor, has always been a member of the Cabinet and delivers up his seals of office when his party goes out of power. Sir William Anson speaks of him as 'a necessary party to the innermost councils of the Crown'. We have no such officer, it is true, in Canada, but occasions arise with every Government when it is most important to obtain the advice and assistance of the most skilled judicial officer in the country. This makes it very advisable that the utmost good feeling should exist between the Government and the Chief Justice of the Supreme Court so that his services may be obtained when required. I am sure that you will agree with me that valuable assistance of a confidential nature can be rendered by the Chief Justice which would fully justify the granting of a liberal provision for his expenses in attending the sittings of Her Majesty's Privy Council in England.[59]

Fitzpatrick demonstrated a similarly political perception of the chief justice's position when he himself occupied the post not many years later. In the meantime, Strong attended the committee from 1897 to 1900, and remained a member until his death in 1909.

The selection of the chief justice of Canada for membership on the Judicial Committee was intended as a compliment, as a recognition of the pre-eminence of the position. There was, from time to time, discussion of naming particularly prominent provincial chief justices, but this never occurred. The honour was reserved for the members of the highest court in the land.

Another position of status and prestige was that of deputy governor-general. In the temporary absence of the governor-general, the chief justice of the Supreme Court (or in his absence the senior puisne justice) took on some of the essential or formal duties associated with the head of state. Oaths of office were administered, bills were given royal assent, and Parliament was opened by the deputy on occasion. In 1898 H.-E.

Taschereau took advantage of the swearing-in of the Earl of Minto as governor-general to complain that the task had fallen to the senior puisne justice because the chief justice was absent (again). Two years later Taschereau, in his capacity as deputy governor-general, forwarded to the colonial secretary a complaint about the position of the puisne justices within the table of precedence in Canada. The Quebec justice's repeated complaints in this matter over the next few years show how important such visible signs of status were to many people.[60]

The Supreme Court staff also were given public recognition. Some were named queen's counsel or were given special invitations to state dinners and functions. The registrar, after some manoeuvring, was raised to the rank of deputy head within the civil service. Both Taschereau and Fitzpatrick were active in pushing this promotion; the former argued that 'such a distinction conferred by the Executive Power upon the first officer of the Court would reflect upon the Court itself and add to its prestige and dignity.'[61]

All of these honours were awarded at the government's discretion and largely reflected the perceived need to underline the Supreme Court's position as an institution rather than to reward meritorious service. One other sign of recognition, however, acknowledged the higher status and visibility of the court. In the fall of 1893 the Colonial Office inquired whether a member of the Court would be available to conduct an investigation in Jamaica into charges against the local attorney-general. Chief Justice Strong was asked to undertake the commission; when he found it necessary to refuse, Chief Justice James Macdonald of Nova Scotia was chosen.[62] In 1902 the chief justice of Canada was chosen as the president of a three-man board of arbitration to settle a minor claim between the Republic of San Salvador and the United States. Sir Henry Strong travelled to Washington to hear arguments and sided with the American commissioner in his award. The chief justice once again gave evidence of his none-too-diplomatic personality. The *New York Times* reported that a 'stormy sequel' to the award had occurred; the Salvadorian representative on the commission 'said he had been offensively treated by his fellow members. He declared he had not received the respect due to him. Sir Henry Strong, Chief Justice of Canada, who is President of the commission, told Dr. Pacas in plain language that he was under a misapprehension and made a scathing criticism of the Salvadorian member's course.'[63]

The wide variety of non-judicial tasks performed by members of the Supreme Court demonstrated the institution's close involvement in the

political life of the nation. The justices' occasional service as commissioners or as deputy governor-general was paralleled from time to time by more direct association with government affairs. Chief Justice Strong's ties with the minister of justice, Sir Charles Hibbert Tupper, offer one example. In January 1896, in the midst of tense political negotiations in Ottawa, Chief Justice Strong had to plead with Tupper not to publish a letter in which the chief justice had lavishly praised Tupper's performance. Three months later Strong became closely involved in the restructuring of the Conservative cabinet. Both through Tupper and directly to prospective cabinet members, the chief justice offered advice as to who should represent Ontario and what policy should be adopted regarding the contentious Manitoba schools question.[64] Strong obviously did not regard his activities as incorrect, but his concern that his letter to Tupper not be published indicates, perhaps for the first time, a sense that public standards of judicial behaviour were beginning to change: the public would not wish to be presented with evidence of overt connections between the chief judicial officer and cabinet ministers at the height of a partisan political controversy. But that sense did not stop him from maintaining close relationships behind the scenes.

A further indication of the line now beginning to be drawn between partisan involvement and a broad political role for the judiciary comes from the activities of Elzéar Taschereau. The Quebec justice had a long-standing interest in the criminal law. In 1875–6 he had published a two-volume study of Canadian criminal law, followed by a revised edition in 1888, well after he joined the Supreme Court. Judging from contemporary book reviews, the volumes were well received:

> The work before us is a valuable compendium of criminal law. It contains a mass of information collected with the greatest care from a number of sources, English, American and original ... Whenever the author has found it necessary to express his own views on any point, or to criticise enactments or authorities, he lays down his propositions with clearness, and treats them in a way which shows him to be master of his subject. The country is under a great debt of gratitude to Mr. Justice Taschereau for his most successful effort to clear up difficulties in this most important branch of the law.[65]

As an acknowledged authority on criminal law, Taschereau approached the minister of justice in 1889 to offer his services in drawing up a draft criminal code for submission to Parliament. Taschereau's offer was not

accepted, though the government soon set about drafting the country's first criminal code, which passed Parliament in 1892.[66] After passage (and therefore after any amendments could be immediately made), the Quebec justice publicly attacked the legislation. Saying that he now questioned the desirability of a criminal code, Taschereau proceeded to complain that the new code omitted various crimes; it was poorly written; and it was not comprehensive enough. The letter, addressed to the attorney-general, was made public, according to Taschereau, because the Chief Justice of England had followed a similar procedure in 1879.[67]

This public criticism of government policy met with little disapproval. Most journals ignored the issue of a jurist publicly dealing with a matter of government. Only the *Canada Law Journal* condemned Taschereau for acting publicly and for not offering his suggestions earlier and in private. The *Toronto World* pointed out that the deputy minister of justice, Robert Sedgewick, was directly responsible for drafting the legislation and was now joining the Supreme Court; how would relations be between Taschereau and his new brother justice?[68] There is no evidence that the Quebec justice's actions harmed either himself or the Supreme Court. The Liberals made weak attempts in the House of Commons to use the issue to embarrass the government, but the prime minister effectively dismissed what was potentially a damaging letter: '[T]he views of the learned judge are contrary to the professional opinion of both Houses of Parliament, and utterly condemned by nearly every judge of the United Kingdom who has expressed an opinion on the subject.'[69] Clearly there was no public or political perception that such activities by a judge were improper. Taschereau was dealing with matters on which he had acknowledged expertise. That his role in the affair was a public one and involved government policy was accepted and acceptable. Having presented his case, the Quebec justice quickly turned to revising his now outdated book on the criminal law; a new edition was published by the summer of 1893.[70]

Perhaps Taschereau's reactions to the new code can be partially explained by his frustration that his expertise in criminal law was being little used at the Supreme Court. In various statutes between 1876 and 1892, the Supreme Court of Canada's jurisdiction in criminal matters was increasingly restricted: 'There shall be no appeal from a judgement in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge ... and, there shall be no appeal in a criminal case except as provided in the Criminal Code.'[71] Sections 742 and 743 of the 1892 Criminal Code restricted appeals to the

Supreme Court from decisions of the provincial appeal courts to those criminal cases in which there had been not only an affirmation of a conviction but also a dissent among the judges in the court of appeal.[72]

These restrictions appeared to fly in the face of other plans to have the Supreme Court of Canada play a prominent role in criminal law. It was the clear intention of at least some fathers of Confederation that the Supreme Court should render the criminal law of the new nation uniform throughout Canada. If the Court was to hear criminal appeals, the law would be interpreted nationally, rather than by several provincial judges issuing different decisions on the same matter. John A. Macdonald had drawn attention to the importance of a national criminal law when he defended the terms of union in 1865.[73] He viewed the multiplicity of state criminal jurisdictions in the United States as a source of disunity and injustice, and wanted to ensure against a similar development in Canada. This potential national role for the Court in criminal law was underlined by the Macdonald government in 1887 and 1888 when criminal appeals to the Judicial Committee were terminated.[74]

This apparent contradiction in the role of the Supreme Court of Canada regarding criminal law continued until the 1960s. The restricted access to the Court made it virtually impossible for the justices to fulfil their national responsibility in criminal law. As late as 1967 one writer observed that appeals to the Supreme Court of Canada were so restricted that in the majority of cases the final court of appeal on questions of law was the provincial court of appeal.[75] As a result a large body of criminal law developed at the provincial appeal court level that was beyond the reach of the Supreme Court of Canada. There was a clear intention to enact a uniform and relatively comprehensive national criminal code, and the parallel movement to deprive the Supreme Court of an influential role in this area is perplexing.[76]

A number of basic problems remained with the Supreme Court throughout the 1890s. The Supreme Court Reports continued to be the subject of numerous complaints. The selection of reported cases was criticized, as were the style and length of dissenting judgments. Most frequent were objections regarding the tardiness of publication.[77] In 1895 the original reporter, Georges Duval, retired. The new team of C.H. Masters, reporter, and L.H. Coutlée, assistant reporter (for Quebec cases), improved the efficiency of the reporting process. The Justice Department agreed that cases could be reported without waiting for a judgment from

any dilatory justice. The result was that in volume 25 (1895), in six instances the decision of a justice was reported but with no reasons given; two unanimous decisions were reported, but with no reasons given; two unanimous decisions were summarized from the oral reasons for judgment; and in four cases the result alone was given, with no reasons and no indication of the justices' votes. While this speeded up the reporting process, the quality of the reporting was questionable; recording a decision without any findings on the points of law involved rendered the report useless to the profession.

Nevertheless, the Reports were improving. In 1891 a Toronto legal journal urged the Upper Canada Law Society to re-establish members' automatic subscription to the Supreme Court Reports, a proposal that was adopted a few years later. More extensive circulation was highly desirable, and would help to solve a new problem that was arising: an overrun of almost one thousand copies of each volume had begun to accumulate at the courthouse, creating serious storage difficulties.[78]

Another problem area for the Supreme Court was the library. In the early years provision of funds for a law library had been delayed because there was little room for a library until the 1891 building addition has been completed. Prior to that time counsel in attendance at Court had had recourse to the parliamentary library. Although there was a small judges' library, presumably the justices also had to use the parliamentary library from time to time. What books there were at the courthouse were cared for by an employee who doubled as caretaker for the building. When questioned in the House about the government's policy regarding a law library, Sir John A. Macdonald replied, 'I do not know that the Government have seriously considered their policy on the subject.'[79] In the late 1880s the original librarian-caretaker was replaced temporarily by the registrar of the newly independent Exchequer Court. By the end of the 1880s the limited library facilities had been opened to counsel, who made considerable use of the holdings. So busy was the library during the Supreme Court terms that the hours were extended until 10:00 P.M.; when a catalogue was first being prepared in 1889, a major hindrance was that barristers 'were using the books day and night during the recent terms.'[80] Thus, although government policy was undeveloped, the need and demand for a full law library clearly existed.

Approximately coincident with the opening of the new extension of the courthouse in 1892, a search for a librarian 'well educated (professionally if possible), having at least some knowledge of French' was undertaken.

In the fall of 1892 H.H. Bligh, a legal scholar with two books to his credit as well as extensive legal experience, was named to the post. By selecting an individual as accomplished as Bligh, the government seemed to be making a solid commitment to maintaining and enlarging what was by then a 14,000-volume library.[81] Moves were made to fill several weaknesses in the holdings. Efforts were made to acquire a more extensive and complete series of American reports, both state and federal. Arrangements were made with an American book supplier in Boston. Particular attention was paid to enlarging the civil-law and French-language holdings.[82] In 1894 Prime Minister Thompson made plain his government's desire for a good library: 'The Supreme Court Library, of course, inasmuch as it is a resort for barristers from all the provinces of Canada, ought to be a first-rate library. It is very far from being so, good as it is, and it will take a grant of $30,000 or $40,000 to make it anything as good as the best state libraries in the United States. As it is now, it ranks less than a third among the libraries of Canada.'[83] But neither Thompson's nor succeeding governments were ever able to carry out this policy successfully. Requests for funds were scaled down to avoid heavy attack in Parliament, and even then faced frequent criticism.

The workload of the Supreme Court continued to grow during the 1890s. For the period 1893–1902 875 cases were dealt with by the court; the annual average of 87.5 cases was up appreciably from the period of Sir W.J. Ritchie's leadership (71.9 per cent). In the cases the justices manifested a stronger tendency to affirm lower court decisions: 55.3 per cent were confirmed and 31.8 per cent were overturned (most of the remainder were disposed of on preliminary motions). Perhaps the tendency to reject appeals helps to explain the smaller number of appeals carried from the Supreme Court of Canada to London (43 in the 1890s, or 4.8 per cent of all Supreme Court decisions).[84] That figure could also be taken to reflect a growing satisfaction with or confidence in the judgments of the Court.

The feeling was growing at the Court that too many appeals were going to Ottawa. In response to one suggestion that intermediate stages of appeal be reduced and access to the final domestic court of appeal made speedier, Chief Justice Strong responded that such a step would be inadvisable: 'There has been a great abuse of the right of appeal to the Supreme Court. Many appeals, especially in cases in which judgments had been given against municipal corporations and joint stock companies

sued by poor men have appeared vexatious and oppressive and have been spoken of from the Bench in terms of condemnation both by Mr. Justice Taschereau and myself.'[85] Such appeals abused the Court and undermined its function and hoped-for stature.

It is unclear how much co-operation and intellectual exchange occurred among the justices. Judicial conferences were certainly held, but their frequency is unknown; and because Justice Gwynne refused to participate, the effectiveness of the conferences must have been impaired. Two letters in the Girouard Papers suggest that other forms of intellectual exchange must have been stimulating and productive. First, draft judgments were circulated and discussed by at least some of the justices. Early in 1896 Gwynne complemented Girouard on 'your admirable judgement' in *St Louis* v *The Queen*.

> It has given me much pleasure and edification so much so that I have revived [revised ?] my former views and have written a few lines in concurrence with you. I have seen Taschereau J. and he wishes you to leave out all reference to him as now he will adopt your judgement when you change it so as to omit all reference to him. I return you yours with many thanks and think you had better see Taschereau and alter your judgement so as to be the judgement of the court.

Second, private discussions took place between individual justices. This is obvious from the letter quoted above and from an 1897 note from Gwynne giving his excuse for being absent from a meeting of the justices: 'Let me see you if you can after conference,' he continued. 'You know my views in all cases.'[86] Co-operation and intellectual exchange seem to have been part of the judicial process at the Supreme Court. But this could accomplish only so much. In *St Louis* v *The Queen*, Gwynne concurred with Girouard (and took two pages to say so); Taschereau submitted a separate judgment. The degree of co-operation can be exaggerated; the legal profession had the impression that 'full and free consultation and exchange of opinion between the judges' did not, at this time, occur.[87]

One series of cases brought the Supreme Court of Canada directly into the political limelight. In 1890 and 1891 the Manitoba legislature passed several acts terminating public financial support for denominational schools and effectively ending the official status of the French language. Appeal of the language legislation did not reach the Supreme Court until 1979,[88] but the schools legislation quickly became a major political issue in the tense atmosphere of rising cultural conflict in the first half of the 1890s.

Sir John A. Macdonald rejected requests to disallow the legislation, preferring to avoid the issue by leaving it to the courts. In the same way some had advocated in 1889 the use of the courts (through reference to the Supreme Court) to rule on the validity of the contentious Jesuit Estates Act.[89] In the politicians' attempts to avoid dealing with such potentially damaging issues or to devolve onto someone else at least part of the political blame or responsibility, it was perhaps inevitable that the courts would become involved.

In 1891 the case of *Barrett* v *the City of Winnipeg*,[90] which involved the Manitoba Public Schools Act of 1890, reached the Supreme Court of Canada. The act had been upheld by Justice A.C. Killam and by the full Court of Queen's Bench, but at least some western observers anticipated an unfavourable response to the legislation from the Ottawa-based Court. The *Western Law Times* noted that almost every case ('nearly ninety per cent') from Manitoba was overruled by the Supreme Court: 'If reports are to be credited, our school case is to suffer a like fate. Fortunately we still have the Privy Council to rely upon.' This expectation was confirmed when the Supreme Court handed down a unanimous judgment (5–0, with Gwynne absent) allowing the appeal. The same journal suggested that the two French-Canadian jurists had been swayed simply by their Roman Catholicism; as for the others,

> The judgment of Chief Justice Ritchie impresses us rather as an argument in favour of Separate Schools than a judicial finding. Mr Justice Patterson's is far more satisfactory as a judicial opinion, but it is undeniably apologetic in tone, and conveys the idea that it was arrived at after a consideration of matters somewhat extraneous to the statutes which do, or do not, confer the privilege in dispute. We would not be at all surprised to see the finding of the Supreme Court reversed by the Judicial Committee. If Mr. Justice Strong had delivered a separate judgment we feel sure it would have been of much assistance in determining the grave interests at issue in this matter.

The opinions of Ritchie and Patterson were directly compared on specific points with a view to determining the intellectual merits of the Supreme Court decision.[91] When the Judicial Committee reversed the Supreme Court ruling and restored the decision of the Manitoba court, the *Western Law Times* gloated: 'We were not at all surprised to find the Supreme Court itself over-ruled, and in truth such an event is nothing new to that body, the confidence of the public in which as an exponent of constitutional

questions has long been on the wane, and it is difficult after this last reversal to say what weight that Court will in future carry in such questions, if any.'[92]

But this was not the end of the issue. Discussion soon commenced regarding the right of denominational schools supporters to appeal to the governor-general-in-council for remedial action under section 93 (3) and (4) of the British North America Act. The federal government referred to the Supreme Court the question of the validity of such appeals and of the government's power to take remedial action. Here, as in the case of *Barrett* v *the City of Winnipeg*, the government was using the judicial system in an attempt to avoid a difficult and contentious decision.[93] Conveniently, the Supreme Court held, 3–2, that the federal government was relieved of all responsibility to act further in the Manitoba schools question. Though such an opinion was what most western spokesmen wanted, there was still considerable discontent on the prairies over the Court's handling of the reference. Counsel appeared for the province of Manitoba but declined to argue the case; Chief Justice Strong appointed a leading Toronto barrister, Christopher Robinson, to present a case on behalf of Manitoba. The *Western Law Times* was furious, contending that since the province had counsel present Strong had no power to name an additional representative and that the province had a right to determine its own conduct of its case (that is, a right not to argue the case). Strong, however, refused to listen to such complaints, saying that the reference process must not be weakened by such conduct.[94]

Strong's leadership in this and other cases was effective. But the Reports reflect a chief justice who sometimes was intellectually lazy and frequently irresponsible. In *Fraser* v *Drew* (1900), for example, he used one of his favourite techniques – handing down an oral judgment that was never followed by a written version. He thus avoided the work of writing out the judgment and the rigorous task of developing a rationale for the decision. Strong informed the parties, 'We are all of the opinion that the appeal must be dismissed with costs. If some English decisions favour the appellant's case, the weight of Canadian and American decisions are the other way. We decide this appeal on the principle that the question of fact was left to and dealt with by the jury in such a manner that we cannot interfere with their findings.'[95] Strong made no attempt to reconcile the divergent authorities to explain why he found the English decisions less weighty, and counsel and lower court judges received no guidance or explanation of the law.

In another case, *the Ontario Mining Company* v *Seybold* (1901), this same

laziness was demonstrated. Chief Justice Strong, orally and for the four-man majority, stated that 'for the reasons given by the learned Chancellor in this case, and more particularly for the reasons given by the Judicial Committee of the Privy Council in *St. Catharines Milling Co.* v. *The Queen*, by which we are bound, and which governs the decision in this case, the appeal must be dismissed.' This is the majority judgment in toto; no further reasons were given. This contrasts with the dissenting judgment of Justice Gwynne. In a twenty-page opinion, he effectively analysed the legal issues at hand and argued strongly that the *St Catharines* precedent was not applicable. Rather than dealing with Gwynne's points and explaining the disagreements, Strong ignored the dissent. It is also disturbing that the chief justice carried the majority of his colleagues with him, not just in the decision but in the failure to explain their thinking.[96] Strong's personality, his intellect, and the problems he created dominated the Supreme Court of Canada in this period.

By the turn of the century, the Supreme Court of Canada was twenty-five years old. It had acquired experience and procedures that helped it to fulfil its purposes and responsibilities, but many problems still existed. That of personnel has already been discussed at length. The Court's reputation remained poor; the editor of the *Canada Law Journal* wrote privately that the Supreme Court 'is held in Contempt by the profession.' Though it is fair to say that reputations, once acquired, are hard to shake off, the justices were partly to blame for the Court's problems. Some incidents, particularly those involving Chief Justice Strong, have survived to help explain some of the Supreme Court's disrepute. The justices' manner of hearing cases also drew criticism. Donald McMaster, a respected Montreal lawyer, noted: 'The hearings are not always models of judicial investigation, and there is too much disposition to plunge into general dissertation before Counsel has opportunity to explain what the particular case is and what the Judges below thought about it.' This tendency of the judges to interrupt counsel's argument was 'so frequent, and [of] such a character,' added a law journal, 'that unless the counsel engaged has unusual courage, determination and skill, his argument may never be fairly presented to the Court.' The justices often conversed on the bench 'in a tone loud enough to be heard at the back of the court room, on subjects entirely foreign to the arguments.' The chief justice's objection to the reading of passages from authorities and reports or of excerpts from the evidence also drew criticism. This rule was felt to be particularly hard on Quebec counsel who perceived the need to inform the common-law

justices as to the nature and meaning of the French-language sources. The *Canadian Law Times* concluded, 'All these matters are most unpleasant to the counsel engaged before the Court, and tend to shake public confidence in the Court. It has unfortunately become such a common subject of conversation when the Court is sitting that it is impossible not to notice.'[97]

In 1902 the legislative and public attacks on the Supreme Court were renewed. L.-P. Demers, Liberal member of Parliament for St Jean d'Iberville and a distinguished legal figure in Quebec, introduced a bill to end the Court's jurisdiction over provincial law. The proposal was not heard of again after first reading. In the same session a member recalled the early attacks on the Court and judged there had been no improvement over the succeeding twenty years. In 1903 Demers introduced his bill again; after some debate it was defeated.[98] Public discussion of the Court's problems was taking place in both the press and legal journals. The *Canada Law Journal* in 1902 chastised the government for its lack of action in redressing the weaknesses apparent in the Supreme Court. News of further conflict among the justices had just become public, and this time, it was pointed out, Chief Justice Strong had not even been present.

> The spirit of discord and misrule which has been a characteristic of this court is somewhat remarkable where many of its members are models of courtesy and kindness. Every one knows perfectly well where the blame lies for this miserable condition of things. The attention of the Government has been called to it time and again, and the Government, of course, must be held responsible. It is idle to say that nothing can be done. Something must be done. The court cannot be a success, but must be a discredit to the country, until some change is made which will supply or remove any discordant element, and cause its business to be conducted with proper regard to the respect due to itself, as well as to the feelings and rights of those whose duty calls them to assist in its deliberations.

The journal echoed the complaints of the 1880s. How could an adjudication ever be considered satisfactory when one or two justices from a province were overruling the judgments at the provincial level of up to five 'men of at least equal attainments, and having special knowledge of the law affecting their various provinces'? The journal concluded by demanding a reorganization of the personnel '[i]f the Court is to be continued (the wisdom of which may be questioned).'[99] The signs were clear. The Supreme Court of Canada had not yet been able to place itself in

a position where it was well accepted as a basic, necessary, and valued component of the Canadian political system.

It was unfair, however, to say that the Court had not improved during its first twenty-five years. If, for example, its stature was not as great as some might wish, the Court and some of its members were much more highly regarded. In 1898 the *Canada Law Journal* sent a photograph of the Supreme Court justices as a New Year's greeting to its subscribers. In 1902 the *Canadian Law Review* featured a series of photographs of the individual justices.[100] Both of these initiatives were signs of a growing interest in and respect for the Court. The personnel of the Court had been improving in quality; the scholarly publications of Taschereau and Girouard, as well as of the staff, are proof of increased intellectual activity. Strong's membership on the Judicial Committee exposed him to new jurists and to a complex set of different legal problems. Justice Taschereau's 1901 visit to Washington to study the American Supreme Court is another indication of a more inquiring intellectual atmosphere.[101]