4

The Court in Decline

1902–1918

During the first decade of the twentieth century, particularly in the early years, the Supreme Court of Canada experienced the heaviest turnover in the personnel on the bench in the history of the institution. Within less than two years (1901–3) five vacancies occurred. In May 1901 George King died, followed in January 1902 by John Gwynne. Late in 1902 Chief Justice Strong retired, and in 1903 two of the new appointees died. The instability caused by this turnover in personnel had serious consequences for the Court.

In the ten years between 1901 and 1911, the Laurier government had the greatest opportunity of any administration in Canadian history to shape the character and direction of the Supreme Court to the extent that it could be influenced by the quality of members of the bench. Sir Wilfrid Laurier and his ministers of justice appointed ten new puisne justices and two chief justices. Yet the early results were disappointing. The government's selection criteria seemed mainly to reflect a mixture of such considerations as merit, political patronage, and the interests of the government rather than the Court.

The tone of the appointments was set with the first. Some four and a half months after the death of Justice King, Sir Louis Davies was named to the Court. Replacing a maritimer, Davies was the only member in the history of the Court to come from Prince Edward Island. Born in 1845 on the Island and educated there, he had received his legal training at the Inner Temple in London. Davies was admitted to the provincial bar in

1867 but soon turned to politics. He was a member of the provincial assembly from 1872 to 1879, and quickly became an influential leader, serving as premier and attorney-general from 1876 to 1879. Defeated provincially in 1879, Davies served in the House of Commons (1882–1901) and as a member of the Laurier cabinet (1896–1901). In addition to his political activities, Davies was the president of a printing company and of a local bank. He lacked wide experience in the law. He had been a member of the bar only five years before assuming electoral office; his practice had been limited, and of course he had no judicial experience. In 1892 the Conservative minister of justice had privately commented in scathing fashion on Davies' legal knowledge: 'Mills is well read, Laurier far from it and Davies a mere gabbler of phrases which he has picked up in a very inferior practice.' It is true that Davies had earned his appointment to the Supreme Court solely through his service to the Liberal party and government.[1]

Davies' nomination was not well received by the legal profession. The *Canada Law Journal*, for example, hoped that the new justice would add strength to the Supreme Court, but doubted that he would: 'That this has been an unsatisfactory tribunal in many ways, and much so of late years, is well known to the profession, and is much to be deplored. The attention of the Government should be directed to making this Court, what it is not, the strongest and best thought of Court in the Dominion. There are of course great difficulties in the way, but we doubt if it can be said that due effort has been made in the direction indicated.' If Davies' appointment was an indication of the government's efforts to improve the Court, then the government was not trying very hard. A month later the same journal argued that the quality of the Canadian judiciary had been declining lately, and if the government did not act soon to stop the deterioration, perhaps the country would be better off with a direct electoral system of selecting judges.[2]

This discontent and the government's willingness to make weak appointments to the Supreme Court were both confirmed less than five months later with the elevation of David Mills to replace Justice Gwynne. Mills had had a varied and impressive career. After earning a law degree at the University of Michigan, he taught school for several years. From 1867 to 1896 he was a member of Parliament and an influential Ontario member of the Liberal party, serving as minister of the interior in the Mackenzie cabinet and as minister of justice (sitting in the Senate) in the Laurier government. Mills also had newspaper and commercial experience, but his legal experience was at least as limited as Davies'. Although

he received his law degree in 1855, Mills did not begin to practise law until the 1880s. Only in 1883 did he gain admission to the Ontario bar; thereafter his legal practice, which was in London, Ontario, was limited. His interest in the law was theoretical or scholarly, and in 1888 Mills was appointed professor of constitutional and international law at the University of Toronto. Later he lectured on medical jurisprudence in the university's medical faculty. Mills's practical legal experience was concentrated in constitutional law.[3]

David Mills owed his judicial appointment to his political career. He had faithfully served his party in the House of Commons for twenty-nine years, and on his electoral defeat in 1896 expected and sought his reward as a natural consequence of that service. As a result of the representations he made at that time, Mills was promised the first Ontario vacancy to occur on the Supreme Court. There is no evidence that consideration was given to his appointment to a lower court. He accepted both his nomination to the Senate and his post as justice minister apparently in order to protect this pledge of appointment.[4] As the minister directly responsible for the Supreme Court, Mills found himself in a conflict of interest, caught between what was best for the Court and his own aspirations to the bench.

Mills repeatedly had to beat back other applicants for the prospective vacancy and to turn aside various attempts to have him accept a lesser post. This task became the more necessary when rumours of his imminent appointment to the Court became public and were subjected to considerable criticism.[5] In 1900, for example, the prime minister tentatively suggested the elevation of Justice McMahon of Ontario to the Supreme Court. Mills would have none of it. McMahon could have a provincial chief justiceship, but he could not move to the Supreme Court of Canada. After all, McMahon had become a Liberal only in 1873 and had joined the bench long ago. 'I don't think that after 34 years' public service to my own pecuniary detriment that I should prefer one who has made no sacrifice at all, especially when he is already on the Bench,' declared Mills. He also warded off attempts to appoint him as an ad hoc justice: 'It was not what was proposed to me, and I will not take it.'[6]

Finally, with Gwynne's death early in January 1902, Mills's path was open, and he took it. But he could not avoid considerable public criticism. The attacks were based on several grounds. At age seventy, it was felt, he could not be expected to retain his vigour and health for long. The legal profession was distressed at Mills's almost complete lack of practical legal experience. Both the public and the bar were upset at the patronage

nature of the appointment. The *Canada Law Journal* pointed to the existing weaknesses of the Supreme Court and to the real difficulties of forming a satisfactory Court in the dominion.

> But certainly the task can never be accomplished by the present laissez faire policy, or by the appointment of men because they have a political 'pull,' or by appointing those who for some reason it is desirable to shelve ... As a writer in the lay press has recently expressed it: 'To treat the bench as a mere place of reward for political service, and appoint men to it whose only claims are those of political services, is little short of a crime.'[7]

These were fair criticisms. The concerned public was beginning to articulate new standards regarding the bench. Judicial appointments that were perceived to be based merely on political service were no longer acceptable.[8] The quality of the Supreme Court bench had in some respects reached bottom. Of the six justices, only two (Strong and Taschereau) had had previous judicial experience, and they were both growing old. The remaining four (Sedgewick, Girouard, Davies, and Mills) had come directly from the bar, and only Girouard had had an active practice at the time of his appointment. The last three appointees to the Court had come directly from Parliament. 'The composition of the tribunal has never been regarded by lawyers as satisfactory,' commented the *Canadian Law Times*, 'but there can be no doubt that it is less so now than at any former period in its existence.'[9]

Perhaps in response to such criticism, the Laurier government over the next few years took steps to improve the character of appointments to the Court. Immediately upon the retirement of Sir Henry Strong, John Douglas Armour was elevated to the Supreme Court. The new justice had had a distinguished legal and judicial career: twenty-four years at the bar; a member of the Ontario Court of Queen's Bench from 1877 to 1901 and chief justice from 1887 to 1901; chief justice of Ontario and of the Court of Appeal from 1901 to 1902. Armour was one of the few provincial chief justices after 1875 who agreed to leave his high position for a puisne justiceship in Ottawa.[10]

At the same time, it was necessary to appoint a new chief justice. There is no evidence extant of any debate within the government over this problem; once again the senior puisne justice was promoted. Elzéar Taschereau had been at the Court for twenty-four years, and was one of the few justices to give substantial evidence of an ongoing interest in legal scholarship outside the requirements of his position. He had published

two further editions of his work on criminal law, and in 1895 he had become dean of the faculty of law at the University of Ottawa.[11] More than that, however, the continuing opposition to the Court emanating from Quebec and the political problems the Liberal party was beginning to experience there made the appointment of the first French-Canadian chief justice an attractive move. Taschereau's elevation met with general approval. A Toronto legal journal, for example, remarked, 'Sir Henri Taschereau is persona grata to the Bar, and is deemed the best lawyer in a weak Court, which will now, however, be strengthened by the addition of Mr. Justice Armour.'[12] In contrast to the two earlier appointments to the Supreme Court, the two in November 1902 were based on solid grounds and had potential advantages for the institution.

In 1903 the Laurier government detracted from the immediate advantages of a good judicial appointment by naming Justice Armour, aged seventy-two and in failing health, as one of the two Canadian commissioners on the Alaska Boundary Commission. This political use of a member of the Court was unfortunate, but it is clear that the government was less concerned with the Supreme Court itself than with the national interest as defined by the cabinet. Armour sailed for England in May, having participated in only two Court terms, and died overseas shortly after briefs to the commission commenced. His death, coming so soon after the death of Justice Mills in May, was a real blow to the Court, and the cabinet had now to search out two more new members.

With Armour absent overseas, Mills's sudden death necessitated naming a new member of the Court almost immediately if the spring sitting was to be held. The replacement was in several respects a good choice. Wallace Nesbitt had practised law for some twenty years, first in Hamilton and then in Toronto. At the relatively young age of forty-five he was prepared to abandon a lucrative practice for the bench. Though lacking judicial experience, Nesbitt had an outstanding reputation as counsel, and his nomination to the Supreme Court was widely acclaimed. What was remarkable about the appointment was that he was a known Conservative supporter, and his selection was surprising given the highly partisan nature of most of the Laurier government's appointments.[13]

In choosing the replacement for Justice Armour, the government sought to respond to the rising pressure from the west for representation on the Supreme Court bench. Demands for such an appointment had become more insistent in the 1890s. When no western jurists were promoted

either then or when the vacancies were filled in 1901–2, western pressure increased. Western lawyers met to pass resolutions; western members of Parliament raised the matter in the House. In response, the government was able to persuade another provincial chief justice to replace Armour,[14] and Manitoba Chief Justice Albert Clements Killam was appointed to the Supreme Court in 1903.

The selection of a westerner was dictated by the Court's need for judicial experience and for greater prestige as well as by western appeals for recognition. Killam was chosen not simply because he was a westerner but also because he was an able jurist of long experience. He had practised law for eight years in Toronto and Winnipeg, and had served briefly as a Conservative member of the Manitoba legislature. In 1885 Killam had been appointed to the Court of Queen's Bench, one of the first Manitobans to be named to the local bench. In 1899 he had become chief justice of that court. As a jurist, Killam had earned an excellent reputation both for his manner and for the quality of his judgments. His lectures to Manitoba law students on equity jurisprudence were highly regarded. Killam was only fifty-three years old, and could be expected to have an extended impact on the Supreme Court.[15]

On the one hand, it seems that Killam's appointment to the Court may have been planned in advance, for in the winter of 1903 he was called to Ottawa for discussions with Clifford Sifton and the minister of justice. On the other hand, there were rumours that both Chief Justice Charles Moss of Ontario and A.B. Aylesworth had rejected the post.[16] In any event, Killam joined the Supreme Court less than a month after Armour's death. Commentators in both the east and the west viewed Killam's appointment as 'a recognition of the growing importance of the west' and of the man's own abilities.[17] Perhaps surprisingly, Ontario journals did not seem upset by the apparent loss of one of their province's positions on the court, possibly because of Killam's ties to Ontario.

With the appointment of J.D. Armour, W. Nesbitt, and A.C. Killam to the Supreme Court, it seemed that the Laurier government was turning its back on the practise of patronage appointments. But it was not so. After just eighteen months on the Supreme Court, Justice Killam was persuaded to resign and to accept nomination as head of the Board of Railway Commissioners for Canada. The board had been established in 1903 to take over the various regulatory powers of the government regarding railways. A quasi-judicial body and one designed, among other things, to answer western grievances concerning freight rates and handling, the board would gain much credibility from the appointment of such a man as

Killam.[18] However, for Killam to accept the new post and for the government to select him was a strong blow to the Supreme Court. This was the only occasion on which a member of the Court stepped down in order to assume another government position. The resignation occurred in a period of turnover in Court personnel and when the prestige of the Supreme Court and the respect for it as a judicial institution were low. The Laurier government had seemed in 1903 to have the best interests of the Court at heart; in 1905 the truth appeared to be otherwise. Moving a judge to another governmental body caused the Supreme Court to be lumped together with the slowly rising number of government boards and commissions. Rather than being seen as an institution apart, enjoying special status at the peak of the national judicial structure, the Court was shown to be what it really was in this period: a political body subject to the partisan political manoeuvrings of the government.

In that same year, 1905, the Supreme Court witnessed one of the few premature resignations in its history, further compounding its instability. For 'reasons purely private,' Wallace Nesbitt informed the government of his wish to resign less than two years after he had joined the Court. Nesbitt does not seem to have been suffering from poor health; a position on the bench simply turned out not to be the sort of career he wanted.[19] Four of the Laurier government's first five appointees to the Court had now left within two years of joining.

The post vacated by Justice Killam reverted to Ontario. John Idington of the Ontario High Court of Justice was promoted to the Supreme Court. After joining the bar in 1864, Idington established his practice in Stratford, where his became one of the leading law firms in western Ontario. In 1879 he became crown attorney for Perth County. Over some forty years at the bar he was known for his industry and for his knowledge of criminal and municipal law. In 1904 Idington was appointed to the Ontario bench, and less than a year later was called to Ottawa. He thus joined the Supreme Court with almost no judicial experience. In Ottawa he was known as the teller of occasional jokes, and bore 'the reputation of being the wit of the Court.'[20]

Idington's appointment was a surprise both in Ontario and the west. Those in Ontario had expected someone with greater judicial experience to be named; those in the west had anticipated the appointment of someone from the bench of British Columbia or Manitoba. One law journal stated that the selection of Idington was an indication of how difficult it was to persuade jurists to accept 'promotion (so called)' to Ottawa. This explained why only one current member of the Supreme

Court (Taschereau) had had substantial judicial experience before moving to the federal Court. One solution, the editorial continued, was to raise the salaries of the justices.[21]

In the meantime there was a second vacancy to fill. In the fall of 1905 Wallace Nesbitt was replaced by Justice James Maclennan. A specialist in equity law, the new justice had had twenty-one years' experience at the bar, most of it in Toronto in partnership with Oliver Mowat. After unsuccessful attempts at a political career, Maclennan joined the Ontario Court of Appeal in 1888 and remained there until 1905.[22]

It seemed as though the changes on the Supreme Court bench would never stop. In 1906 there were two further vacancies. Chief Justice Sir Elzéar Taschereau was in only his seventieth year, but he had been on the bench for over forty-four years, most of them at the Supreme Court. In 1904 he had been appointed to the imperial Privy Council (and thus to the Judicial Committee thereof), according to Taschereau, on the 'condition ... that I should vacate the Chief Justiceship.' Without a substitute selected, however, the government was in no rush to hold him to his pledge. In 1905 Taschereau let it be known that he would not be averse to retiring. Such hints escalated into a 'repeatedly expressed desire' as his health worsened.[23] Taschereau's energy had declined. He had in the past few years seemed as much concerned with status as with the real purposes of the Court. Early in May 1906 he stepped down. Just three months later the senior puisne justice, Robert Sedgewick, died after a year-long illness.[24]

In searching for a successor to the chief justice, the government actively canvassed outside candidates. Once again the Laurier cabinet approached Edward Blake. Offering him the post, the prime minister indicated his awareness of the Court's weakness and of the potential of strong appointments as a means of dealing with the problem: 'You are aware, no doubt, that our Supreme Court does not at this moment command that respect and confidence so essential to the proper discharge of the high functions with which it is entrusted. It would be needless to seek causes for this unfortunate condition of things. At the same time, the feeling is universal that nothing would so strengthen the Court, as your acceptance of its presidency as Chief Justice.' Blake was already seventy-one years of age and in poor health; realizing the heavy demands that would be made on him if he were to make a real effort to redress the Court's image, he rejected the offer.[25]

In the meantime the minister of justice, Charles Fitzpatrick, had his eye on the post. Rumours suggested that he was considering the move as early as 1904, but the prime minister opposed his appointment on the

ground that it would hurt the cabinet: 'I still hope [Fitzpatrick] may be induced to give up his intentions. Fitz knows my views on this subject. I have done all I could to dissuade him from it, and more I cannot do.'[26] But in the end Laurier capitulated, and for the only time in its history the chief justiceship of the Supreme Court of Canada was filled from outside the judiciary.

The son of a Quebec lumber merchant, Charles Fitzpatrick had been educated at Laval University. At different periods he had been crown prosecutor in the Quebec District, but he had acquired far greater experience as defence counsel in criminal cases. Among his more notable clients had been Louis Riel (1885), Thomas McGreevy (1891), and Honoré Mercier (1893), whose cases all involved political matters. For a time Fitzpatrick had put his growing legal experience to use as a professor of criminal law at Laval. He entered politics in 1890, first as a Liberal member of the Quebec legislature (1890–6) and then as a member of Parliament (1896–1906). With the election of the Liberal party in 1896 he was appointed solicitor-general, at that time a position outside the cabinet. Fitzpatrick had been unusually active as solicitor-general, taking a leading role, for example, in dealing with the Supreme Court. In 1902 he was promoted to the influential position of minister of justice. Fitzpatrick was the first English Canadian from Quebec to join the court and the first English-speaking Catholic. Exactly why he chose to leave the government in 1906, at fifty-two years of age, is unclear. Unlike other cabinet ministers who joined the Supreme Court, Fitzpatrick never gave up his involvement in politics.[27]

In contrast to the appointments of Davies and Mills, there was no public reaction against Fitzpatrick's nomination to the Court despite his prominent political career.[28] Though his actual legal experience was somewhat narrow and dated, his role as defence counsel in notable cases had created a public perception of a successful legal career. The concerned public did not, apparently, object to the naming of politicians to the bench; the emphasis was now on legal experience, and it was precisely in that area that Davies and Mills had been weak.

The other vacancy on the Court was filled by the most famous justice in the history of the institution, Lyman Poore Duff.[29] Called to the bar in Ontario in 1893, he practised briefly there before moving to the west coast, where he established a solid practice in Victoria. Duff was active in the Liberal cause in British Columbia, and first rose to national prominence in 1903 as junior counsel for Canada before the Alaska Boundary Commission, of which the current minister of justice had been a member. In the

following year (1904) Duff joined the Supreme Court of British Columbia, where he acquired two years' experience before the move to Ottawa. Despite his short legal and judicial career and his relatively young age (forty-one), Duff's appointment was greeted with strong approval. It is clear that his name had already become well known across the dominion and that his reputation was good.

> In choosing a western instead of an eastern man to fill the vacancy at Ottawa caused by the death of Mr. Justice Sedgewick, we think no mistake has been made. If there must be representation of the various provinces or groups of provinces upon the Bench of the Dominion Court, it is time for the western group to have its turn; and if it be contended that for material to make up the highest Court in the country, distinguished jurists should be chosen irrespective of locality ... there is reason to believe that in the new Judge of the Supreme Court a rara avis has been secured for the Ottawa cage ... Mr. Justice Duff in his two years on the provincial Bench has gained a reputation both for learning and sound sense, and we look to see him increase it in his new surroundings.[30]

The appointment pleased many because it seemed to meet the standards for judicial appointment. With the 'reassignment' of a post from the maritimes to the west, the territorial distribution of seats was firmly realigned. The maritimes would never again have more than one justice on the Supreme Court, and the west would never have less than one. The Court was young in judicial experience: Girouard had been on the bench for eleven years (all at the Supreme Court), Idington for two (one in Ottawa), Maclennan for seventeen (one in Ottawa), Duff for two, and Fitzpatrick, the leader, not at all. There were not many national courts of appeal around the world that had such junior justices, and this judicial inexperience was a reflection of the Laurier government's system and criteria for appointment.

Two and a half years later, the justice with the longest judicial experience left the Supreme Court. James Maclennan chose to retire just one month short of his seventy-sixth birthday. He had recently completed twenty years on the bench, and opted to take his pension (at full salary).[31] The vacancy was first offered to Featherstone Osler, senior puisne justice of the Ontario Court of Appeal. The leading law journal of the day regarded such an offer as natural and proper, implying that the senior puisne justice in the provincial appellate court was the candidate ex officio best suited and most favoured by the profession.[32] Osler, who was now close to retirement, rejected the offer, as he had in 1888.

The new member of the Supreme Court was Francis Alexander Anglin. The son of a politician, Anglin followed his father's path in supporting the twin causes of the Liberal Party and Irish Catholics. He had been in practice in Toronto for sixteen years, specializing in corporate and civil work, and because of his Liberal connections he handled a large amount of work for the crown. Anglin's interest in the law had led him to write several articles and a book on trusts and trustees, which was well received.[33] After petitioning and manoeuvring for a position on the bench over a period of some seven years, Anglin was named in 1904 to the High Court of Ontario, Exchequer Division. His conduct there earned the approbation of the legal profession, and early in 1909, at the age of forty-three, he joined the Supreme Court of Canada.[34]

The last appointment of the Laurier government was made after the death of Désiré Girouard in March 1911. The senior puisne justice died at the age of seventy-five from injuries received in a sleighing accident in Ottawa. His replacement was Louis-Philippe Brodeur. Called to the bar of Quebec in 1884, Brodeur found time outside his law practice in Montreal (with Honoré Mercier) to dabble in politics. Occasional newspaper articles led to a deeper involvement, and he campaigned successfully for election to Parliament in 1891; he was a Liberal member until 1911. For three years he was Speaker of the House of Commons (1901–4), and between 1904 and 1911 he held three different minor portfolios in the cabinet. A close friend of Sir Wilfrid and Lady Laurier, Brodeur was a popular individual, but he had shown no great skill in politics or in law.[35]

By the standards of the day, the government had made several good appointments to the Supreme Court, notably Armour, Killam, Duff, and Anglin. But these were spoiled by the use of Court vacancies to reward partisan followers, too often with weak credentials in their legal knowledge and experience. With inconsistent government support, the Supreme Court had little hope of improving its reputation or quality. All of the appointees had given political service to their party before joining the Supreme Court. But those who had worked in non-elected roles, such as Duff, Idington, and Anglin, had been active lawyers prior to joining the bench, and they tended to make good judges. Those who had served in elected capacities, such as Davies, Fitzpatrick, and Brodeur, had not, in the years immediately preceding appointment, had much time for the law; they were not up-to-date, had given no evidence of a commitment to the law, and did not seem to have as well-developed a legal cast of mind; as justices of the Supreme Court of Canada they did not make as useful a contribution to the law as did those judges who had come from a full-time legal career.

Given the political nature of the appointments and the actively partisan background of many of the personnel, it is not surprising that in the first two decades of the twentieth century the Supreme Court justices became more heavily and directly involved in national politics. Reference cases, though by no means frequent, were of such a character as to make the Court particularly vulnerable to political involvement and partisan attack. In 1903 two questions involving the redistribution of parliamentary seats were referred to the Court, in part because of the insistence of the opposition Conservative party.[36] In 1912 the Court was forced to express its opinion regarding the emotional issue of the *ne temere* decree, involving the power of the provincial legislature to put into legislation a papal decree dealing with mixed marriages. When the justices divided evenly along denominational lines (three Roman Catholics versus three Protestants) as to whether Protestant clergy in Quebec could officiate at the marriages of Roman Catholics, the impartiality of the Court was brought into question – though not many observers thought to challenge the inappropriateness of the reference system that had placed the justices in that invidious position.[37] In 1902, in a different reference, the government found itself caught in a complex web spun by its own political machinations. While still minister of justice, David Mills had advised the cabinet on a legal matter. Sir Louis Davies, also still in the government, had disagreed with Mills's view and had insisted upon a reference of the issue to the Supreme Court, carrying a majority of the cabinet with him. By the time the reference had been prepared for argument, both Mills and Davies were on the bench. The deputy minister of justice, E.L. Newcombe, moved to have Mills excluded from the panel, allegedly because he disagreed with the point of view most favourable to the government, and to replace him with Davies, who was known to support the opposite view. This 'attempt to pack the Court' was 'all wrong,' argued Mills. 'You see this proposal of your deputy is an attempt to exclude only those whom he thinks adverse to his opinion. This is not consistent with his duty. No member of the Government who advised this reference against its Law Officer should sit.'[38] The outcome of this reference was not reported, but it serves to reveal some of the dangers of the reference system and the dangers of the Supreme Court's being too closely connected with the government.

The close ties between the Court and the government were known, and attempts were made to exploit them. As in 1877, counsel continued from time to time to ask the department of justice to exert pressure on the Court to hear a motion, or speed up judgment, or give some other considera-

tion.[39] There is no evidence that any pressure was actually exerted by the department. Sometimes the ties were simply reflected in shared political gossip or in social interchange.[40] It was the natural tendency of the justices who came from active political positions to maintain their lifelong interest in partisan political affairs. A few months after joining the Court, David Mills received a letter full of political news from an old associate; he responded, 'I thank you for your letter of the 5th inst. as I feel that I have entered stagnant waters since I have gone out of public life, and the interest awakened by an occasional letter from an old friend is the only ripple upon its surface.'[41] After long political careers, the absence of the stimulation and challenge of politics left a gap that some sought to fill by giving advice to active politicians on how to handle various problems. This was true of Sir Louis Davies and particularly of Sir Charles Fitzpatrick.[42]

Fitzpatrick's involvement was extensive, but his public role had a non-partisan appearance. Any activities regarding policy advice or partisan affairs took place behind the scenes, unknown to the public. In 1906 the newly appointed chief justice carefully declined to sit on contested election cases, but such scruples seemed to be short-lived. Less than three months after joining the Court, Fitzpatrick wrote the prime minister asking 'as [a] personal favour' that the vacancy at the Court created by Justice Sedgewick's death be filled by Judge Cannon of Quebec. One of the chief justice's ties to the government was a $5,000 personal debt to Sir Wilfrid Laurier.[43] Nor did Fitzpatrick limit himself to dealings with his late Liberal colleagues. Shortly after the Conservative victory in 1911, involving the defeat of a reciprocity treaty with the United States, the chief justice was approached by Elihu Root, a former American secretary of state and currently a senator, to give a speech in New York explaining the rejection of reciprocity and emphasizing Canada's ongoing friendship with its American neighbour. This the chief justice did, with the approval of Robert Borden, the new prime minister. Soon Fitzpatick was recommending legislation and offering specific political advice on handling Senate appointments, on responding to the Manitoba schools issue, and especially on affairs in Quebec (where the Conservative party was noticeably weak). In his native province Fitzpatrick stepped into a sensitive local situation in mid-1913 by dispensing patronage in the Quebec City region; and while chief justice he acted as Borden's personal agent to the provincial Conservative party.[44] By the time the war commenced, the chief justice had become an important adviser to the government, particularly on matters relating to minority rights and to

Quebec. In 1916, at the request of the prime minister and T.C. Casgrain, the leading French-Canadian cabinet minister, Fitzpatrick drew up a memorandum offering advice on the disallowance of the most recent schools legislation in Manitoba and on the larger problem of French-language rights in the dominion. He spoke out publicly in defence of French as an official language. As racial tension mounted in 1916 and 1917, the chief justice did his best to keep the government in touch with the concerns and resentments of his Quebec compatriots. He spoke at military recruitment meetings in his native province. He even went so far as to pass on to the minister of justice some private notes of judgment that touched on federal legislation.[45] It is not surprising that in the fall of 1918 Sir Charles Fitzpatrick left the Supreme Court of Canada to become the lieutenant-governor of Quebec.

It is possible to defend the political involvement of Fitzpatrick and others as being in the broader national interest. But it is important to realize that such ties to the political arena simply maintained Canadian governments' view that the Court and its members were political instruments to be used whenever and however it was necessary or desirable to do so.

Much of the evidence makes clear that the close connections between the government and the Supreme Court were encouraged by many of the justices. Neither they nor the politicians viewed the judges' activities as incorrect or inappropriate. Indeed, as Fitzpatrick himself made clear in 1900, the judiciary continued to be perceived in the long-standing British tradition of working closely and co-operatively with the government.[46] Lyman Duff, for example, not long after joining the Court, was prepared, after consulting with government members, to visit British Columbia on behalf of the government to help to deal with a political problem there in the provincial Supreme Court. As well, his abilities and his Liberal interests were well enough recognized that his name was considered in a proposed cabinet shuffle in 1907.[47] While activities such as Duff's took place behind the scenes, those of others did not. Chief Justice Taschereau seemed bent on repeating his 1893 direct intrusion into the political arena. That earlier intrusion had involved a policy matter on which the justice had some expertise; in 1904 that was far from the case. In London to sit on the Judicial Committee, the chief justice spoke out publicly on the Dundonald affair;[48] according to newspaper reports, Taschereau criticized British press accounts as 'being loaded up by Ottawa Tory sources' and advised that the imperial government would be wise to recall Lord Dundonald before the end of the week. Taschereau's conduct was the

subject of debate in the Canadian House of Commons. Within two days the chief justice had left for Canada, apparently summoned home by an embarrassed cabinet (though the government denied it).[49] Such open involvement in partisan matters was becoming less acceptable.

Another non-judicial activity was the justices' participation in various boards and commissions. The growing tendency to employ members of the judiciary as arbitrators and commissioners was a matter of considerable controversy and complaint among the legal fraternity at the time. Sir Henry Strong (retired) and E.R. Cameron, the registrar, were both appointed members of the statute-revising commission from 1902 to 1906; in 1905 these same two were asked to prepare a revised and amended Criminal Code.[50] In 1903 John Armour was named to the Alaska Boundary Commission. In 1907 Chief Justice Fitzpatrick was appointed to the Pecuniary Claims Arbitration Commission of Great Britain and the United States; he was actively involved until 1912 in negotiations and hearings dealing with the settlement of outstanding Canadian-American disputes. The experience gained in this post led to the chief justice's appointment to the International Claims Commission involving the United States and France, and in 1915 to the International Peace Commission as the Canadian representative.[51]

More sensitive, because of the partisan and emotional character of the issues involved, was Lyman Duff's acceptance of two special tasks from the Borden government. In 1916 a serious scandal was brewing, allegedly involving the illegal letting of munitions contracts, the minister of militia and defence, Sir Sam Hughes, and the use of contracts to benefit the officials of the Shell Commission.[52] The charges were laid by the Liberal party, now in opposition, which sensed an opportunity to deliver a mortal wound to a weak and vulnerable Conservative government. To investigate these allegations and to relieve the political pressure, Sir Robert Borden appointed a two-man royal commission, the junior member of which was Justice Duff. Although the prime minister's desire to exploit the prestige and supposed neutrality of the judiciary is understandable, Duff's decision to become involved in such an obviously partisan wrangle exposed himself and the Supreme Court to the risk of political attack and diminished reputation.

Less than a year after Duff had finished this task, the government called on him to become the sole central appeal judge. The Military Service Act of 1917 had imposed conscription on adult Canadian males. Both the legislation and the principle of compulsory military service were highly contentious, involving powerful currents of ethnic animosity. Under the

act individuals were allowed to apply for exemptions, and an extensive administrative staff was set up to review the applications – local tribunals, appeal tribunals, and finally a central appeal court. The amount of work demanded of Duff in this post was considerable; the entire system dealt with nearly four hundred thousand applications for exemption. The nature of the appeals exposed the justice to pleas for special consideration – Sir Wilfrid Laurier, for example, requested favoured treatment for several persons. The work was laborious and emotionally draining, as indicated by Duff's later recollection: 'After the last war, he could not bear the thought of having the conscription records placed anywhere where the public could reach them. The papers of the local tribunals and appeal bodies in Quebec were full of hatred and bitterness and would have been a living menace to national unity. He had, therefore ... burned them and he was glad to say no real record of conscription existed.'[53] By the end of the war Duff was suffering from nervous exhaustion, and took a leave of absence for recuperation.[54]

There can be no doubt that Justice Duff accepted these onerous assignments out of a sense of public duty. He was being criticized for agreeing to act on the Shell Commission, he knew, but in the face of changing public standards for judicial behaviour Duff declined to alter his own view of the judicial role. In writing the prime minister, Duff made it clear that he had no regrets about his non-judicial activities: 'I have a perfectly clear conscience on the score. it is possible to carry the notion of judicial retirement from the world to the point of the ridiculous, and I have no doubt I should have done wrong had I not acted upon your request [to join the royal commission].'[55] This sense of commitment to the national interest in wartime, as well as Justice Duff's position above the domestic field of partisan political conflict, led to the frequent rumours in 1917 that he was being seriously considered as cabinet material, even as the head of a new Union government. How much Duff himself encouraged such speculation is unclear, but it is true that through his willing involvement in non-judicial tasks outside the Supreme Court he had allowed his name to be associated with national political affairs. In the special political circumstances that existed in the summer of 1917, it was natural that he would attract attention from those looking for a new type of national leader.[56] Justice Duff's sincere national commitment is revealed by his refusal to accept any honorarium, either as royal commissioner or as central appeal judge; it was against the provisions of the Supreme Court Act, he argued, to accept any payment beyond his regular salary plus expenses, and no amount of government pleading could change his

mind.[57] This was one decision by which other justices did not feel bound.

The individual justices were active outside the Court in supporting the state, and so was the Court itself. In the summer of 1918, for example, the Court dealt with a case involving several urgent issues of great national importance, not all of which were legal in character. *In Re Gray* (1918) concerned an application for habeas corpus and had been referred to the full Court by Justice Anglin in chambers.[58] George Edwin Gray, a young, unmarried homesteader and farmer in northern Ontario, had lost his exemption from conscription in April 1918 when an order-in-council cancelled exemptions granted by the Military Service Act of 1917. His claim for exemption had been disallowed by the local tribunal but allowed by the appeal tribunal; an appeal of this ruling had been taken to the central appeal judge by the military authorities but had not yet been heard. Without waiting for the appeal to be heard and on the ground that the statutory exemption had now been removed by the order-in-council, the military authorities ordered Gray to report for duty and, when he refused to do so, seized him and held him in custody. Gray then applied for a writ of habeas corpus on the ground that Parliament's delegation of its legislative powers to the cabinet, under the War Measures Act of 1914, was ultra vires and that the order-in-council of 1918 was therefore invalid.

The case involved several important issues. A major section of the War Measures Act was being challenged, potentially invalidating scores of orders and regulations issued by the cabinet under that authority. More immediately, much of the military conscription could be brought to a halt and the statutory exemptions reinstated. This threat was made even more real by an almost precisely similar case in which the Supreme Court of Alberta had found the 1918 order-in-council ultra vires.[59]

With these issues at stake, the Supreme Court of Canada moved quickly into action. The deputy minister of justice, E.L. Newcombe, arranged with the chief justice and the staff for a special session of the Court to be called to hear the case. Newcombe then went before Anglin in chambers and suggested that the application be referred to the whole Court in order to obtain an authoritative ruling binding on lower courts, and assured Anglin of the prior approval of the chief justice. The extraordinary session was held on 18 July 1918, all six justices sitting.

The decision upheld the power of the legislature to delegate its legislative powers (Idington and Brodeur dissenting). In their reasons, the justices were obviously impressed with the import of the issue in question and with the win-the-war attitude pervasive at the time. In refusing to undermine the War Measures Act, the chief justice commented:

'Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.' Justice Duff also demonstrated his emotional commitment to the war effort:

> [T]his Act of Parliament supervened upon a decision which was the most significant, indeed the most revolutionary decision in the history of the country, namely – that an Expeditionary Force of Canadian soldiers should take part in the war with Germany as actual combatants on the Continent of Europe; a decision which would entail, as everybody recognized, measures of great magnitude; requiring as a condition of swift and effective action, that extraordinary powers be possessed by the executive.

As explanations of the wartime mood and decisions these statements contained much accuracy, but as legal judgments they were weak.

In *In Re Gray*, the Supreme Court demonstrated its important role as an instrument of the state. A hearing was needed, and needed quickly; it was willingly arranged. Judgment was handed down just one day later, on 19 July. Special care was taken to make the reasons quickly available. Anglin's judgment appeared in the Toronto *Globe*; the chief justice sent a draft copy of his decision to the *Canada Law Journal* before a final revision of the judgment had been completed. The Court was eager to have the reasons published officially as soon as possible.[60] The judges' vulnerability to the emotional wartime environment may have led them to issue too sweeping a judgment. Peter Hogg has commented:

> In effect the War Measures Act transferred to the federal cabinet virtually the whole legislative authority of the Parliament for the duration of the war. The court held that even a delegation as sweeping as this one was valid. However, the four opinions each contained indications that the power of delegation was not absolute, and that an 'abdication', 'abandonment' or 'surrender' of the Parliament's powers would be invalid. But since none of the majority judges regarded the War Measures Act as an unconstitutional abdication, abandonment or surrender, it is not easy to imagine the kind of delegation which would be unconstitutional.[61]

Judicial power was thus an integral part of the system through which the war was prosecuted.

The close ties between the judiciary and the political executive had the potential for influencing judicial decisions handed down by the Supreme

Court of Canada. *In Re Gray* makes clear the potential for indirect influence. Another case reveals just how loosely defined the standards of behaviour were and, in the existing judicial culture, how vulnerable the Court was to direct interference. There is strong evidence that in 1911 Mackenzie King, then minister of labour, directly interfered in the judicial process in a case that was important to him emotionally because it affected the reputation of his grandfather. While *Morang and Company* v *LeSueur* (1911) was before the Supreme Court, King and his cousin 'made a direct attempt [wrote one of the justices involved] to influence the decision of the members of the Court by communicating facts which afterwards came out in another litigation.' As deplorable as this interference was, the justices' decision to say nothing of 'the offence' was equally unfortunate. There seems to have been a tacit acceptance by the Court of political interference.[62]

Nevertheless, the Court's work carried on. The number of appeals continued to rise, and the Court became much more efficient in its handling of cases. In the fall of 1903, for example, fifty-six appeals had been inscribed for hearing: ten from Ontario, thirteen from Quebec, eighteen from the maritimes, and fifteen from the west – a healthy balance among the various regions. By the time the Court adjourned in mid-December, argument had been heard and judgment given in all but eleven cases. Of the eleven, eight stood for judgment and only three had been deferred for hearing in the next term. This was, as a law journal pointed out, 'a thoroughly satisfactory state of affairs.' By 1913 the total number of appeals had risen to 176, the largest number to date, including thirty-four from British Columbia and twenty-eight from the prairies. By the fall session alone of 1918, the number of cases inscribed had reached seventy-four, a number the chief justice found 'alarming.'[63]

And the Court sought to become even more proficient. In 1907 a new rule was adopted limiting the number of counsel to be heard for each side (two) and the amount of time for argument (three hours).[64] This rule ought not to be seen as evidence of a declining emphasis on oral presentation, but rather as an attempt to gain the potential advantages of brevity and succinctness. Particularly under the influence of Charles Fitzpatrick, genuine attempts were made to deal more effectively with French-language and civil-law appeals. The library was notably improved, and in 1908 a French-language stenographer was appointed to the Court staff.

The internal environment at the Supreme Court also seemed to be improving. Personality conflicts had declined, owing particularly to the departure of Sir Henry Strong. The more co-operative atmosphere was the

product of the efforts of many justices; the recently resigned Wallace Nesbitt, for example, gave an informal dinner at the Rideau Club to welcome Lyman Duff to the Court.[65] Sir Charles Fitzpatrick, however, appears to deserve much of the credit in advancing a more collegial spirit. He thoughtfully solicited some recognition, such as a knighthood, for his senior puisne justice, Désiré Girouard, as Girouard neared the end of his career. When conflicts occurred at judicial conferences, as they inevitably did, quarrels were not prolonged. After one such confrontation, Justice Brodeur quickly apologized and pledged that he would always be disposed to co-operate 'à ce résultat afin que nous pouissions rechercher efficacement une solution équitable des problèmes qui nous soul sommes [?] & afin que nous pouissions remplir d'une manière [?] satisfaisante nos fonctions qui sont d'une responsibilité si terrible.'[66] An atmosphere now existed in which a justice sought quickly to express his regrets and his willingness to work with his colleagues in the future.

The practice of circulating draft judgments for comments was maintained during this period and perhaps even increased. Fitzpatrick, at least at times, consulted not only his fellow justices, but also some of the Court staff, including his secretary and the registrar. According to a 1914 report in *Maclean's Magazine*, judicial conferences were held at various times as well as at a regular meeting on Saturday afternoons.[67]

The intellectual environment at the Supreme Court remained active. More articles and digests were being published, and staff members had begun to write commentaries (never unfavourable) regarding some of the Court's decisions.[68] But the quality of the intellectual environment, particularly among the justices, should not be exaggerated. Mills, after all, had referred to the Court as 'stagnant waters.' More indicative of the intellectual level of the Court, perhaps, is the conservative nature of some of the decisions. The Supreme Court justices of the early twentieth century were even more thorough than their predecessors in searching for precedents as a sure and secure way through the tangle of legal problems. In fact, the Court at this time handed down the strongest judgment it would ever render in support of stare decisis. In the leading case of *Stuart* v *Bank of Montreal* (1909) four justices (Fitzpatrick, Duff, Davies, and Anglin, Idington dissenting) adopted a formalistic approach to the issues and chose to be bound by a previous decision despite available grounds for distinguishing that decision and despite testimony from the appellant indicating that no injustice had been done her. Nevertheless, the Court, led by Justices Duff and Anglin, adopted the precedent explicitly on grounds of stare decisis. Justice Duff underlined

the influence of the predominantly British judicial culture and of the Supreme Court's subordinate position:

> Some question is raised, whether or not we are entitled to disregard a previous decision of this court laying down a substantive rule of law. This court is, of course, not a court of final resort in the sense which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the Lords Justices, sitting in appeal ... have felt themselves at liberty to depart from one of their own previous decisions. That is also the principle upon which the Court of Appeal now acts ... and the Court of Appeal, in any province where the basis of the law is the common law of England, would act upon the same view.[69]

Here is solid evidence of the jurisprudential constraints placed on the judges' approach to the law by the Supreme Court of Canada's position as an intermediate appellate body. The justices felt themselves to be simply unable to develop the law in significant new directions; any such initiative lay with the senior appellate body. In the meantime, precedents would be binding for the Canadian judges. The advantage of such a line of reasoning was the stability and security that it gave to the law.

In 1908, in *Iredale* v *Loudon*, the ends to which such rigidity could lead were demonstrated.[70] A majority of the Court held that by adverse possession title had been acquired to the second floor of a Toronto building; but at the same time a different majority held that the owner of the second floor, James Iredale, had acquired no proprietary right in the supports to the building (and in particular the support to the second floor). Iredale's request for an injunction to prevent the owners of the rest of the building from tearing down their portion of the building was rejected. The practical absurdity of such a ruling left the Supreme Court open to ridicule.

Another example of the narrowness of the justices' thinking is the case of *Cameron* v *Cuddy* (1914).[71] The two parties were disputing a timber contract in British Columbia. One side claimed that there had been a major shortfall from the amount of timber contracted for, but through a technical defect arbitration had failed. Both parties admitted that a shortfall existed, but the lower court declined to take that into account and ordered full payment of the purchase price. The Supreme Court upheld this ruling, finding that the point at issue was one of procedure rather than of substance, thus perpetuating a clear injustice. The Judicial Committee pointed out to the Canadian courts that it had been their responsibility to

step in and adjust the arbitration process so that the parties involved might gain their rights. Instead, the provincial court and ultimately the Supreme Court had taken a very restricted view of the judicial function and a narrow interpretation of the law involved.

In the area of civil liberties the Supreme Court justices in this period combined the safety of stare decisis with an unquestioning acceptance of long-standing racist attitudes in Canada by upholding the power of the state to pass discriminatory legislation aimed at particular racial groups. In 1902 the Judicial Committee upheld on jurisdictional grounds a British Columbia statute disqualifying Canadians of Chinese, Japanese, and North American Indian descent from voting.[72] The 1914 case of *Quong-Wing* v *The King* tested Saskatchewan legislation prohibiting the employment of white female labour in places of business or amusement kept or managed by 'Chinamen.'[73] In the face of an applicable precedent and in a racist Canadian environment, it would have been unrealistic to have expected the Canadian Supreme Court to do other than confirm the legislation.

Four justices (Fitzpatrick, Davies, Duff, and Anglin) refused to distinguish the case from earlier decisions and opted to uphold the state's right to violate Quong-Wing's basic civil liberties. In three separate judgments the majority refused to discuss any such principles, insisting instead on a simple jurisdictional test of the legislation. The chief justice opined that this statute was no different from any other factory or employment legislation: 'There are many factory Acts passed by provincial legislatures to fix the age of employment and to provide for proper accommodation for workmen and the convenience of the sexes which are intended to safeguard the bodily health, but also the morals of Canadian workers, and I fail to understand the difference in principle between that legislation and this.' The intellectual depth of this argument was matched by Davies (with whom Anglin concurred) and Duff. Davies concluded that since the provincial legislature had authority to legislate as to civil rights, the statute must be valid; it was as simple as that. Provincial powers in the field were absolute and unqualified ('plenary'). It was not for the Supreme Court to employ any other criteria in assessing the use of those powers. Duff, the westerner, tried to argue that the special circumstances of the western population required such protective legislation:

> In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable numbers not infrequently raises ques-

tions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals.

Such rationalizations accurately reflected popular Canadian attitudes. But the justices' refusal to view the issue as anything other than one of the distribution of powers is striking, as is their inability to rise above popular attitudes.

Only Justice Idington, in dissent, stood out against his colleagues, finding the legislation an abrogation of a naturalized citizen's rights. He condemned the statute as 'but a piece of the mode of thought that begot and maintained slavery,' but his arguments swayed neither his fellow justices nor the majority of Canadians. The Supreme Court of Canada thus became part of a system maintaining legalized racial discrimination in Canada.

Finally, the Court also dealt with areas of law that involved various aspects of the process of industrialization, which by the turn of the century was already well advanced. The administrative state was rising in the early twentieth century as one means by which economic expansion could be facilitated and directed.[74] The first governmental regulatory agency to serve this function was the Board of Railway Commissioners, to which Albert Killam had been transferred in 1905 as chief commissioner. The board's mandate was to enforce government railway regulations and to assist railway expansion and efficiency. Though the Supreme Court over the next several decades generally upheld the board's regulatory authority, the justices did not easily accommodate the wishes of the quasi-judicial board. In a 1909 case,[75] for example, the Court affirmed a board order for the erection and maintenance of fences by the Canadian Northern Railway along rail lines which passed through lands that were settled or improved but not yet enclosed. The board's authority was upheld, but the justices accompanied their decision with warnings that the board's powers would be closely scrutinized by the Court; as Chief Justice Fitzpatrick wrote, 'each individual case is to be considered before an order is made.' In restraining the regulatory agency, the Court acted to control economic development to a degree.

This is even more apparent in cases where industrialization and economic growth invaded private property rights.[76] Jennifer Nedelsky points to *Canada Paper Company* v *Brown* (1922)[77] as a useful example of this. A.J. Brown brought suit to restrain the pulp and paper company's local sulphite plant from emitting 'nauseous and offensive odors and fumes.' In decisions that were not particularly well reasoned, the justices unanimously held that the constraint on Brown's ability to enjoy his private property was sufficiently extensive and distinct to warrant granting a perpetual injunction against the Canada Paper Company. Justice Idington, for example, weighed Brown's occupation of his ancestral summer home, which had been in his family for over one hundred years, with the company's pollution of the air 'for mere commercial reasons'; in such a contest, the rights of private property took precedence. The justices chose to believe that the injunction would not necessarily lead to the cessation of the company's operations in the area. But Duff warned that in every case the Court would compare the common good of the community with individual claims – where sufficient harm to the former would be done by such an injunction, it would not be granted. While an awareness of the need for a balanced perspective existed, the Supreme Court was nevertheless active in restraining corporations and economic development in the interest of private property rights. Given this traditional common-law approach, it is not surprising that business and political leaders sought to restrict the juridiction of Canadian courts in such matters.[78]

Nor was the Supreme Court of Canada willing to break new ground in the interests of industrial workers. Led by Justice Girouard, the Court reversed decisions in provincial appeal courts which had held employers negligent in the case of industrial accidents. It was not enough to find that employers had failed to create a safe workplace, held the Court; the employer's negligence must also be proven to be the cause of the worker's injury. For proof, substantial evidence was needed, not 'mere conjecture.' In the absence of such evidence, a strict construction of the law would be applied.[79] It would not be through the Supreme Court of Canada that the law would be adjusted to meet the new circumstances of the workplace.

The judicial conservatism of the Supreme Court justices is attributable to a number of factors. One was the judicial inexperience of the justices. There was inconsistency in some rulings and a general reticence in others. The justices were learning on the job, and the quality of their decisions suffered. Lyman Duff, for example, was slow to

join in a full share of the Court's intellectual work. As his biographer relates:

Duff, however, did not plunge into the work of the court as he did into Ottawa society. There was in him a certain diffidence about taking an active part in the deliberations of his fellow judges, an understandable reaction from a relatively young westerner suddenly finding himself a member of the highest court in the land. He did not, as Anglin did after his appointment in 1909, start writing judgements in important cases at once, choosing rather to side with one or another of his colleagues. Not until he had been on the court for two months did he write a judgement, and even then it was an uncharacteristically short one. And not until he had been four months on the court did he write his first judgement to express the views of the court as a whole. In fact, Duff used this whole prewar period to develop his judicial talents.[80]

By these calculations, Duff spent his first eight years on the Court developing his judicial abilities to the level of which he was capable. During those eight years he was not yet at his best. Such learning, ideally, should be done in the courts below; the highest court in the land ought to consist of experienced, skilled jurists.

The judicial conservatism of the Court was apparent not just in the reasoning in specific cases but also in the overall tendencies toward various dispositions of appeals. For the period 1903–13 (for which the complete statistics for all cases are available), the Supreme Court of Canada affirmed lower-court decisions in fully 60.2 per cent of all decisions, reversing just 24.2 per cent.[81] Could it be that, unsure of their own abilities and knowledge and aware of the lack of respect for the Supreme Court, its justices subconsciously tended not to challenge decisions from senior provincial courts–either to avoid being challenged themselves or to reach for acceptance among members of the legal community?

As part of his work on the Statute Revising Commission, the registrar, E.R. Cameron, undertook to revise the Supreme Court Act. Less than two months after his appointment to the commission late in 1902, Cameron on his own authority decided that something more drastic was needed than a simple collation of recent amendments concerning the Supreme Court Act. He wrote to the minister of justice:

I may say that I am re-drafting the Supreme Court Act, as I find it impossible to do

justice to the subject, as it appears to me, in any other way. As soon as it is type-written I would like to go over it with you, before having it finally printed. There will be so many alterations in many of the sections that you may think it advisable that the Bill, as revised and approved by the Commission with all the amendments considered necessary and advisable, should be passed at the next session of the House.[82]

The registrar decided to take advantage of his opportunity to amend the legislation with a view to removing various anomalies or problems in the Supreme Court's jurisdiction, as indicated by various rulings on practice over the past several decades.

The initiative and the first decision to proceed with the revision came from the administrative head of the Court, operating under the cloaking authority of the Statute Revising Commission. But the registrar was completely open about the work being undertaken. Cameron quickly involved the minister to whom he was responsible (bypassing the deputy minister) and gained at least the tacit approval of Fitzpatrick. Over the next year the various changes were ironed out and approved, at least tentatively, by both the commission and the Justice Department. In 1904 the proposed amendments were circulated, on authority of the minister, to the bar associations and the provincial attorneys-general. As well, a copy of a memorandum outlining the proposals reached the *Canadian Law Review*, which reprinted it for the benefit of the profession as a whole.[83] Cameron's explanations of the various changes were detailed and precise, citing the rulings where problems had arisen and giving the intent of the alterations. Reactions and suggestions to these changes were solicited and received before the final draft was drawn up. At the end of this legislative drafting process the minister chose not to submit separately to Parliament the new Supreme Court Act; instead, it was adopted simply through the general authority of the legislation approving the revised statutes.

The basic thrust of the amendments was reinforced by a new set of rules drawn up in 1907 largely by Cameron and Chief Justice Fitzpatrick. The overall aim of all these changes was twofold: to clarify the jurisdiction of the Supreme Court and to increase its efficiency. In the ten years from 1893 to 1903, there had been a considerable rise in the number of motions to quash for want of jurisdiction. The Reports noted fifty such successful motions in the period, and even more had been unsuccessful.[84] With greater precision and clarity in the phrasing of the act and with the response to specific rulings, it was hoped that the amount of time spent by

the Court on jurisdiction would decrease considerably. The new rules reinforced this by directing that every appeal required, at an early stage, an order from a judge of the Supreme Court in chambers confirming jurisdiction. This new procedure would make heavy use of the registrar (who in 1887 had been given the authority to act as judge in chambers) and aimed at saving the Court time and effort and saving the appellants large sums spent in what might turn out to be improper appeals.[85] The increased efficiency that would accrue from this change was reinforced by a move to end what were regarded as frivolous appeals. From the beginning, appeals from Quebec had been limited generally to cases where the amount in controversy was at least $2,000, but no such limits were applied to the other provinces or territories. In 1897 legislation limited appeal from Ontario generally to cases where the amount in controversy was at least $1,000. In 1902 legislation was adopted for the Yukon Territory requiring a minimum sum in controversy of $2,000.[86] Cases involving minor sums continued to be appealed from elsewhere, however. In 1900, in a Nova Scotia appeal concerning goods worth $80, Justice Taschereau quoted an earlier complaint by Chief Justice Strong concerning the easy access of unimportant cases, and added: 'The Maritime Provinces enjoy the costly privilege of bringing appeals to this court upon such paltry amounts ... That such appeals should be possible is a blot upon the administration of justice. I hope the bar from the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things.'[87] In keeping with the legislative tendency and the justices' pleas, Cameron took the initiative in proposing monetary minima for appeals from every province and territory. The original suggestion of $500 was reduced eventually to $250 and was applied to appeals from British Columbia and the maritimes.[88]

The use of monetary criteria to determine access to the Supreme Court of Canada came under serious attack in later years. It should be noted, however, that no such criticisms were voiced in the period when the new limitations were adopted. When comments were made, they concerned the level of the monetary limit, but not the philosophy behind a limit of this character. Some in the maritimes, including members of the Nova Scotia bar, sought a lower sum; there was some pressure from Ontario for a higher sum.[89] Monetary criteria reflected accurately the Canadian climate of opinion.

One other change was discussed regarding the court's basic structure. This was the recurrent issue of expanding the number of justices on the Supreme Court bench, either through creating a seventh permanent

position or by the occasional naming of ad hoc members. Illnesses and leaves of absence continued to cause problems – as, for example, in 1906, when Chief Justice Taschereau was granted a leave of absence and all but one of the appeals from Quebec were delayed until a second civil-law justice could be present. Taschereau himself called for the naming of ad hoc justices or a reduction of the quorum to four. In 1910, after only a year on the Supreme Court, Frank Anglin submitted, without consulting any of his colleagues, a draft bill allowing appointment of ad hoc justices.[90] The government took no action.

Finally, in 1918, after almost forty years of off-and-on discussion, the government guided through Parliament a measure allowing the appointment of ad hoc justices, to be chosen either from the Exchequer Court or from provincial superior courts. Late in the winter term of 1918 the Supreme Court had been forced to suspend sittings, since Duff was unavailable owing to his duties as central appeal judge and Davies was ill. The legislation permitted the chief justice to ask the senior judge of the Exchequer Court to sit as judge ad hoc; if the latter was unavailable, the chief justice could then ask a provincial chief justice to designate a superior court justice from that province to sit in Ottawa temporarily. Perhaps surprisingly, there was no requirement that a justice from Quebec should be replaced by a civil-law jurist.[91] The legislation was immediately put into effect, and over the next ten years it worked well. And yet it was a temporary solution. Before the year was out the prime minister was contemplating the expansion of the Court to seven members.[92]

Their perceived status remained important to the incumbent justices. The adverse image of the Court itself rendered the justices quite sensitive and vulnerable personally.[93] Several of them reacted by placing disproportionate emphasis on visible signs of status. The issue of the justices' position in the Canadian table of precedence was raised once again by both Taschereau and Davies.[94] As usual, knighthoods were awarded to the new chief justices – to Taschereau in 1903 (KB) and to Fitzpatrick in 1907 (KCMG). The latter had caused a fuss over the honour. Originally the Colonial Office had arranged for him to receive a knight bachelorhood, but through the prime minister and the governor-general protests were lodged and a rejection of the lesser title was threatened until the more prestigious honour was agreed upon.[95] In 1901 the Canadian cabinet had refused to accept as administrator, in the absence of the governor-general, the general officer commanding in Halifax; the cabinet suggested instead the appointment of the chief justice of Canada.

This change was agreed to by the governments involved, but it resulted in several problems. Sir Henry Strong pointed out that when performing these additional duties the general officer commanding had always received a per diem allowance equal to one-quarter of the governor general's salary; on principle, he claimed, the same payment should be made to the chief justice when acting in a similar capacity.[96] A few years later, Sir Elzéar Taschereau chose to make a public issue out of his claim that the title 'Excellency' was due him when he was acting as administrator. Taschereau took it as a deliberate slight to Canadians that the title had been dropped when Strong first assumed the office, and he pressed hard in asserting his right to the title – a right that was eventually acknowledged by the Colonial Office and by a reluctant Sir Joseph Pope, Canadian clerk of the Privy Council. Sir Joseph was similarly none too gracious in meeting the demands of Strong and Fitzpatrick to be known as 'chief justice of Canada.'[97]

In 1904 Chief Justice Taschereau was named to the imperial Privy Council, and he attended the summer sittings of the Judicial Committee five times (1904, 1906–8, 1910). Fitzpatrick, however, could not be appointed to the committee immediately. Two was the maximum number of Canadians allowed, and although Sir Henry Strong never attended after 1900, he declined to resign. By 1909, however, Fitzpatrick was named both to the imperial Privy Council (a position he wanted badly) and to the Permanent Court of Arbitration at the Hague as one of the British members. The chief justice enjoyed this latter position so much that he went to particular lengths to arrange his reappointment in 1913.[98]

Problems with the Supreme Court Reports continued. There were delays in printing and in publishing the reasons for judgment,[99] though the difficulties were much less serious than in the 1880s. An attempt was made to solve the printing problems by shifting the work in 1905 to a private publishing firm. Delays caused by the justices were less frequent, but they still existed. The registrar explained that

> the whole trouble arises from the fact that *all* the reasons for judgment of the Judges are not handed down when judgment is pronounced. It is sometimes weeks afterwards before I have the complete number in my hands. The result of my discussion with Mr. Newcombe [deputy minister of justice] was that there is only one way of improving the situation and that is either by direction of the Justice Department or an amendment of the Supreme Court Act requiring that the reasons should be handed down at the same time as the judgments.[100]

In the registrar's opinion, the problem was not in the system of distribution or publication, but rather in the justices' practices.

One explanation of the justices' failure to prepare reasons for judgment immediately may have been that of efficiency: if the case was not reported, no reasons need ever be prepared. The procedure of delaying preparation of judgments was thus a time-saving measure. But when the case was significant enough to report, reasons ought to have been published, and such was not always the case. One example is *The King* v *Stewart* (1902). A panel of four (Gwynne having died) handed down a 3–1 decision dismissing the appeal and the cross-appeal. No reasons were given by the majority (Strong, Sedgewick, and Girouard); Taschereau wrote a detailed explanation of his dissent. Similarly, in *McKee* v *Philip* (1916) no report of the case was apparently planned until Justice Duff complained to the Justice Department. The deputy minister, who had been one of the counsel in the case (acting in a private capacity), pushed the registrar to have the case reported. The result was decidedly less than satisfactory: the four judges in the majority each provided a few very brief, general comments, totalling three pages in length, while Duff in dissent explained his reasoning for fourteen pages. Readers of the Reports were thus left with little explanation as to why these cases were decided the way they were. The deputy minister expressed his frustration: 'We have a similar case which occurred recently of the King v. Stewart, where the government has gone to great expense in bringing questions affecting the contracts before the court of appeal and in which although the appeal has been dismissed we have succeeded in obtaining only the reasons of the dissenting judge.'[101] Such reporting was obviously less helpful to the profession than it might have been. It is apparent that in the reporting of cases both leadership and clear criteria were lacking.

These complaints fitted in with criticism of two other tendencies reflected in the Reports. One was the ongoing debate as to the usefulness of dissenting judgments. The second was the frequent attack against the multiplicity of judgments. O.M. Biggar, a leading member of the Ontario bar, analysed volume 45 of the Reports in this latter regard. For the twenty-four appeals reported in that volume, there appeared a total of eighty-nine written opinions, including seventeen in dissent and seventy-two in favour of the majority. Although thirteen of the judgments had been unanimous, in only two of those cases had there been just a single judgment. Of the twenty-four appeals reported, two had one judgment, three had two judgments, four had three judgments, eight had four judgments, five had five judgments, and two had a full six judgments.

The justices' inability to concur with one another and their adoption of a variety of grounds had a bewildering effect: 'The result, as will appear by a most cursory glance at some of the headnotes, is a confusion out of which the editor is with difficulty able to drag some semblance of principle.'[102] Collegiality among the justices was not yet strong enough to affect the number of judgments written. As well, the justices exhibited little sense of moderation or control over the extent to which multiple judgments were issued.

There was one other area of complaint regarding the Supreme Court Reports, and that was the selection of cases to be reported and the actual process of reporting. Any justice could ask that a case be reported, but for the most part the decision-making was handled by the chief justice and the reporter. At times the Department of Justice would become involved, either when consulted by the registrar or when requesting (not always successfully) that a particular case be reported. As for the process of reporting, a suggestion was made in 1917 by the deputy minister that a transcript of notes of oral argument should be taken by the reporters to help them prepare their notes to the case; this is another indication that oral argument was taking on an increasingly important role.[103]

The staff continued to be active. The greatest area of improvement within its responsibilities was the library. E.R. Cameron solicited additional funds, lobbied for political support among influential cabinet members, and made detailed arrangements for acquisitions to improve the holdings. He addressed himself particularly to the major gaps in works on the civil law, which had been the subject of complaint from a Quebec lawyer: 'The lack of standard French legal works had been the subject of complaint ever since I knew the Supreme Court.' Cameron consulted with two leading Montreal counsel, Eugène Lafleur and Pierre Mignault, and drew up a list of some 5,500 volumes needed.[104] The requested sum of $25,000 was not directly provided, but the library expenditures were allowed to increase markedly; from around $4,000 at the turn of the century, purchases rose to around $10,000 annually before the end of the first decade. The consequent increase in the size of the holdings led to serious accommodation problems and to an expansion of the library staff.

Indeed, the entire Court staff was growing. By 1918 the Court employed sixteen people (plus two on military duty overseas): a registrar, two reporters, four librarians, seven secretaries and clerks, and four messengers. Salaries rose for both staff and justices. After years of complaint, the level of remuneration was raised in 1906 to $10,000 for the chief justice and $9,000 for each puisne justice. This pleased many,

though some thought it was still not enough to attract the very best members of the bar. In 1903 pensions had been placed on a more generous footing, but only for the lifetime of the judge;[105] no benefits were available for a justice's widow.

The long-standing tendency to undermine the Supreme Court's authority and to challenge its position in the nation continued during the period from 1902 to 1918. In 1911 rumours circulated that the Court might be divided in some way, perhaps along geographical lines – one court for the west, and one for central and eastern Canada. That such a suggestion could be taken seriously is an indication of the ongoing disillusionment with the Supreme Court. In 1915 Sir Wilfrid Laurier, by then leader of the opposition, supported a political doctrine that would have undercut the essence of the Supreme Court's judicial position as originally intended. Laurier objected to an amendment to the Supreme Court Act on the ground that any such change would 'violate the principle which should be inviolate – that provincial laws shall be interpreted by provincial courts and federal laws by federal courts.' Here once again was the basic challenge offered in the early 1880s: would this be a centralizing court, designed to provide a unified, coherent jurisprudence in all areas of law for the entire country, or would the Supreme Court of Canada deal simply with the much more limited field of federal law? The question was raised again in 1917 when a bill was introduced in the Senate to remove disputes involving property and civil rights or merely local or private matters of provincial jurisdiction.[106] Just as the tensions involving Confederation itself would not fade away, so too the debate over the role of the Supreme Court of Canada was to continue – both because of the weakness of the Court and because of its role as a symbol of centralization.

Over the first two decades of the twentieth century the Supreme Court of Canada had shown few signs of improvement. Indeed, if appeals taken to the Judicial Committee are an indication of lack of respect for the Court, this period was probably the weakest in the Court's history. In the period 1903–13 (for which the complete statistics are available) 14.5 per cent of all decisions were taken to London, a dramatic increase from the period under Sir Henry Strong's leadership, when only 5.1 per cent of decisions went to the Judicial Committee.[107] Those disturbed by the increased tendency to allow the Court to be used as a political instrument in the hands of the government would likely agree that this period was one of decline for the Court. In general, public assessments of the Supreme Court pointed to its weaknesses. An American observer in 1916 noted

the lack of respect for the Court and the selection of less-than-the-best judicial candidates:

> And to one accustomed to appreciate the regard in which the highest Court in the United States is held both at home and abroad, it is puzzling that a people so clear headed and progressive as those of the Canadian Dominion, should not realize that its conditions require and demand as the keystone of its national arch a Court possessing its highest esteem and confidence, strengthened by its best and brightest legal intellects and honoured by its country.[108]

Among the various explanations for the Court's failure to become 'the keystone' of the national political structure, one answer stood out at this time because it was a relatively new explanation and because it was beginning to be offered fairly frequently. The Supreme Court of Canada 'is supreme only in name,' said the Ottawa *Citizen*. The Court's judgments could be appealed to and overruled by the Judicial Committee of the Privy Council; was this consistent with Canadians' perceptions of themselves and of their country?

> It is surely rather a strain on Canada's national self-respect to be thus placed. Canada must depend upon the opinion of an exterior court, so far as law and the interpretation of it are concerned. Her power to decide for herself is not complete. So long as this is the case, it is hardly consistent to talk of 'Imperial partnership,' or of the possession of local autonomy. It may have been necessary for a colony in its earlier stages, but for Canada in the year 1913 one may well doubt its need or its tolerance.[109]

The nationalism arising from the First World War and increasingly articulated in the 1920s would serve to extend and deepen such feelings.

The Supreme Court itself did not share the perceived failure of the institution. For the Ottawa justices the Court already was a key national institution. As stated in a 1904 decision, the Supreme Court of Canada

> was established, as far as possible, to be a guide to provincial courts in questions likely to arise throughout the Dominion. We think it was the intention of the framers of the Act creating this court that a tribunal should be established to speak with authority for the Dominion as a whole and, as far as possible, to establish a uniform jurisprudence, especially within matters falling within section 91 of the B.N.A. Act, where the legislation is for the Dominion as a whole, or, as I have said, where purely provincial legislation may be of general interest throughout the Dominion.[110]

The power and influence implied in this ideal had yet to be realized.