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An Instrument of Politics

1918–1933

In the fall of 1918 Sir Charles Fitzpatrick resigned as chief justice of Canada. The resignation was unexpected. In 1915 Fitzpatrick had taken leave on doctor's orders. In the spring of 1918 he again took leave because of poor health. By the fall his health was used as the official explanation for his retirement; he described himself as having a 'permanent infirmity disabling me from the due execution of my office of Chief Justice of Canada.'[1] But this was not the real reason for Fitzpatrick's departure.

Fitzpatrick had begun to lose some interest in his judicial functions, but at the same time a political problem increasingly attracted his attention. The conscription crisis of 1917–18 was playing havoc with Canadian unity. French Canadians felt alienated from the federal system and from the central government, which by December 1917 had become the almost exclusive preserve of English-speaking Canadians. Two manifestations of this alienation occurred early in 1918: a motion was put forward in the Quebec legislative assembly offering to withdraw Quebec from Confederation, and violent anti-conscription riots took place. Fitzpatrick's retirement must be viewed in the light of the problems of national unity and of his own lifelong commitment to politics as a representative of the people of Quebec. There can be no doubt of his increasing involvement in politics in 1916–18, nor of his genuine concern about the alienation of French Canadians. The lieutenant-governorship of Quebec was about to become vacant, and the chief justice felt that by accepting that post he could aid the cause of national unity. 'I want to help you and my people,'

he wrote the prime minister, 'and for that purpose I will make the sacrifice of my position.' The intent was sincere, but the method of ameliorating the problem was embarassingly naïve. C.J. Doherty, the minister of justice and the leading Quebec Conservative, was very doubtful of the wisdom of the move and had to be persuaded – an indication of Fitzpatrick's commitment to the task.[2] Finally, all was agreed and arranged. On 21 October 1918 the fifth chief justice in the history of the Court stepped down from office to become lieutenant-governor of Quebec.

While the rationale for Fitzpatrick's departure is admirable from some points of view, it served to reinforce the Supreme Court's ties to the broader political system. In this it was a fitting climax to the most actively political era in the history of the Court. Indeed, even after retiring Fitzpatrick continued to involve the court in partisan political wrangling.

Since members of the Supreme Court had begun to attend the meetings of the Judicial Committee of the Privy Council in 1897, the annual estimates had contained a sum intended to defray expenses of travelling to and staying in London. By 1913 the allowance was $2,500 annually. In that year Fitzpatrick put in no claim for the money because he did not attend the Judicial Committee sittings. In 1914 he did claim the money, though (despite the prime minister's statement to the contrary) there is no evidence that Fitzpatrick actually attended any hearings of the Judicial Committee in that year. In 1915 and 1916 the description of the allowance was changed slightly in the estimates; instead of being called a travelling allowance, it was simply referred to as an allowance 'to cover expenses in connection with Judicial Committee of the Privy Council.' The chief justice promptly claimed and was paid the full $2,500 each year, though because he stayed in Canada he presumably had no actual expenses 'in connection with' the committee. In 1917 the description of the allowance was again altered slightly so that attendance was explicitly required, and consequently Fitzpatrick made no claim for the money.[3]

No public notice was taken of this until May 1918 when a Conservative Unionist member of Parliament from eastern Ontario, J.W. Edwards, accused the chief justice of 'deliberately stealing from the treasury of the country and putting the money in ... [his] own pockets.' The Ottawa press followed up on the question and quoted Fitzpatrick as saying that he took the money only when he went to London. The prime minister, however, read to the House a statement from Fitzpatrick outlining the terms of each allowance voted and when he had claimed the money. A week later the issue was raised again, this time by W.F. Nickle, Conservative Unionist member for Kingston. The government was asked for its policy and

intentions regarding the payments. The government replied that the payments had been made legally and, despite the chief justice's offer to return the money, the government did not intend to try to recover the funds. As part of this response, a lengthy letter from Fitzpatrick to the prime minister was read to the House, justifying his acceptance of the funds as within the letter of the law.[4] There the matter rested for almost a year.

In March 1919 Edwards returned to the fray. He moved in the House of Commons that Fitzpatrick should repay the $5,000 paid him in 1915 and 1916. A lengthy debate ensued; the motion was 'talked out,' and adjournment of the House occurred before a vote could be taken. Five days later a brief letter from the now lieutenant-governor of Quebec was read to the House. In view of the government's explicit statement that his conduct in the matter had been legal and that he had acted in good faith, and in view of the misunderstanding on the part of some members of the House as to what they had voted for, the $5,000 was returned.[5] There the matter ended.

It was a sordid little affair. Fitzpatrick had acted legally, but his conduct was hardly ethical. He had demeaned the position of chief justice, and he had jeopardized the entire procedure by which members of the Supreme Court were encouraged to participate in the Judicial Committee.[6]

With serious national and international problems at hand, the government of Sir Robert Borden had little time to deliberate over the selection of Fitzpatrick's replacement as head of the Supreme Court. Publicly it was anticipated that either Lyman Duff or Frank Anglin, more likely the former, would be given the post; no public support existed for John Idington, a more senior puisne justice.[7] There is little evidence as to how seriously the government canvassed these or other potential candidates, but none of those named was selected. Instead, Sir Louis Davies was named chief justice of Canada. Seventy-three years old, he was the most senior puisne justice, having served for seventeen years on the Ottawa bench. Though he had been in poor health, Davies wanted the post. He telegraphed Borden on 1 September applying for the promotion and listing his credentials. When he received a noncommittal reply, he telegraphed again, adding that if promoted he would resign at the end of three years when twenty years' service on the bench had been completed (and his pension rights strengthened). The prime minister decided to take Davies' name forward to cabinet, but its agreement was not easily won. Borden commented in his diary, 'Much discussion [in council] as to appointments to the Supreme Court. I carried Davies by a narrow

majority.'[8] Davies was not a strong selection. He had not stood out during his years on the Court, he was old, and he had demonstrated no leadership abilities.

The vacancy on the Supreme Court at the puisne level had to be filled from the province of Quebec. According to rumours in the press, consideration was given to appointing C.J. Doherty (the minister of justice) or Eugène Lafleur, a leading Montreal lawyer; it is also likely that Justice L.P. Pelletier of the Quebec Court of Appeal turned down the appointment.[9] The man finally selected was Pierre Basile Mignault, and his appointment was as strong as Davies' was weak.

Born in Massachusetts where his French-Canadian father practised medicine, Mignault had moved to Montreal for his higher education. By 1918 he had practised law for forty years in Montreal and had become a leader of the provincial bar. His stature had been recognized by his being hired by the crown to appear in important cases, such as the 1912 marriage reference, and by his appointment in 1914 to the International Joint Commission. Most impressive, however, were Mignault's scholarly achievements. His list of publications was outstanding. He was a man dedicated to a study and analysis of the law, before, during, and after his tenure on the Supreme Court. His greatest work was a nine-volume study of the Quebec civil law, which began to appear in 1895, was completed in 1916, and remains an essential reference work today. Mignault held a chair in civil law at McGill from 1912 to 1918. His was a good appointment, combining a first-rate scholarly mind with extended and practical legal experience. At the time of his joining the Court, he was sixty-four years old and lacked any judicial experience.[10]

Following these appointments, the personnel of the Supreme Court remained constant for the next five years. That semblance of stability is somewhat misleading, however; discussion of Sir Louis Davies' projected retirement was frequent and public from 1922 onward.

The first justice to leave the Court in the 1920s was Louis Brodeur. By the fall of 1923 he was only sixty-one years old, but his health was poor and his arthritis made it difficult for him to write his judgments. There was little opposition to his retirement, but the new prime minister, W.L. Mackenzie King, did not want the justice to leave unrewarded. King considered himself to be particularly close to Brodeur; in his diary he referred to the jurist as being 'like a brother or a father.' The prime minister arranged for Brodeur to replace Sir Charles Fitzpatrick as the new lieutenant-governor of Quebec.[11] Four months later the vacancy at the Court was filled by Arthur Cyrille Albert Malouin of the Quebec Superior Court.[12]

The appointment of Albert Malouin was probably the least thoughtful in the history of the Supreme Court of Canada. It was not that he was a weak judge; rather, he did not regard the move as a 'promotion.' Malouin simply did not wish to serve. Another member of the Court described the new justice's attitude and the process of appointment:

> Our latest recruit, Mr. Justice Malouin, tells me that the first suggestion he heard of his appointment was a telephone message from the Minister of Justice informing him that the Order-in-Council had been passed, though not yet signed by the Governor. He was not at all anxious to come. He has been for years an invalid, and was rescued from a lingering diabetic end by insulin. The true inwardness of the thing is, as I am informed by two friends high in the politics of Quebec, that the Minister of Justice [Sir Lomer Gouin] is coming himself at the earliest possible opportunity. Moreover, I am also told that it was the disposition shewn by the Prime Minister to act upon the recommendations of the Minister of Marine [Ernest Lapointe] rather than his own, with regard to this very appointment, which was the immediate occasion of Gouin's resignation. Gouin's nominee was [Thibaudeau] Rinfret, of Montreal, and in the alternative [Louis] St. Laurent, whom you know, either of which would have been a most suitable appointment ... Malouin makes no secret of the fact that his health does not permit him to exert himself.[13]

That the government would choose to appoint a seriously ill man, without his approval, is disturbing. The impression is gained that Malouin was named to create an obstacle to the demands of Sir Lomer Gouin, rather than to secure a strong candidate for the court.

At this time a struggle was taking place within the Quebec wing of the federal Liberal party between 'conservative,' big business interests (led by Gouin) and 'liberal' forces (led by Lapointe).[14] The Supreme Court was caught in the middle of this contest. Further evidence of the political nature of the decision-making is seen in a letter from Malouin's wife. A month before her husband heard of his appointment Madame Malouin wrote, not to solicit the post for her husband, but rather to object to the possible naming of a Conservative to the Court. Emphasizing her Liberal background – as a daughter of Senator Louis Lavergne and a long-time friend of the Lauriers – she complained of rumours circulating that Ferdinand Roy, the law partner of the Liberal premier of Quebec and a pro-conscription Conservative, would be named to the Supreme Court. It was unthinkable that such a man should be appointed to 'one of the most envied position[s] in the Dominion of Canada – there are splendid men in Montreal and Quebec good liberals – true friends good lawyers, who

would be delighted to accept the position – why should a nasty Conservative – get the best position a liberal government can give? – Just think of it – my blood is boiling –'[15] The partisan character of such wrangling is not surprising, but it is important to emphasize that these partisan criteria were active and were hindering the selection of the best possible candidates for the Supreme Court. Rumour had it that St Laurent, Roy, and Rinfret were being considered for the post.[16] Instead, an unwilling Malouin was selected out of the blue – only to resign eight months later.

On 1 May 1924 Sir Louis Davies died, just before his seventy-ninth birthday. He had genuinely intended to retire in 1921, but was inhibited from doing so by a disagreement over the amount of his pension. The disagreement had dragged on without resolution. Lately his health had been poor and he had not been active on the bench. The minister of justice reported that Davies by the end of 1923 was 'no longer in a position to perform his duties.' The prime minister privately accused Davies of 'holding on to office too long,' something that was as much the government's fault as the chief justice's.[17]

The willingness of Davies to retire encouraged the government to plan for his successor. Indeed, as early as September 1923 consideration was given to a major injection of new blood into the Supreme Court by combining Davies' resignation with that of Brodeur, thus providing two openings. This is the explanation for the offer of the chief justiceship in December 1923 and again in January 1924 to Eugène Lafleur.[18] After Davies' death, Lafleur was approached again. Mackenzie King described the cabinet meeting and his interview with the Montreal lawyer:

> Attended meeting of Council at noon discussed appmt. of Chief Justice and got Council to agree to Lafleur being offered the position anew, the Maritime province men agreeing to let their chance for nominee pass if Lafleur would accept. Quebec to wait re her further nomination. Ont. to let chance go by – I sent for Mr. Lafleur at 5 & talked with him in my office, the tears came into his eyes as I spoke to him of the confidence of the Govt. & the bar in his ability & of our desire to have him fill the position to strengthen the bench & uphold Br[itish]. conception of Justice – he spoke of not being indifferent to a desire to be of public service, but of getting on in years, that what the Supreme Court needed was younger men. I agreed except as regards the Chief Justice who must be of authority & experienced in his profession. I spoke of his going to Imp. Privy Council to take part with Law Lords there. He promised to reconsider, but did not give me any assurance. The Imp. P.C. may be the means of securing him.

The prime minister asked the governor-general, Lord Byng, to see Lafleur and urge him to accept.[19]

Despite repeated rejections, the post was kept open in the hope that Lafleur would change his mind. Pressures were exerted over the summer and one last effort was made early in September 1924. The prime minister emphasized the Court's requirement of a highly regarded leader.

> I need not tell you of the need which exists in Canada today to place at the head of our judiciary one whose pre-eminence in his profession would gain for the Supreme Court the place it should hold in the respect of the bench and the bar not only of our own country but also of the British Isles. Nor need I assure you of the unanimity with which members of the profession, and all classes in Canada would welcome your appointment ...
>
> You are the one man in Canada who can meet what today is our country's most imperative need, and it is on this ground that I feel justified not only in urging upon you the acceptance of the post, but of going as far as may be possible in the meeting of your wishes to have you accept it.

Again, Lafleur declined, saying that he was too old: 'I have long thought that what the Court needs most is to be rejuvenated, and it is not by appointing men who are nearing the 70 mark that you will really strengthen it.'[20] The government had to admit defeat. The fall term was approaching and the appointment of a chief justice could no longer be delayed.

The attempts to place Eugène Lafleur at the head of the Supreme Court of Canada in 1924 are interesting in several respects. One striking element in all of the discussions and correspondence extant is the overwhelming agreement among officials, candidates, and observers that the Ottawa bench was badly in need of improvement.[21] Another important feature of the 1924 movement was the high quality of the man chosen to help lead the Supreme Court out of the wilderness. By 1924 Lafleur had enjoyed almost forty-two years at the bar and was quite likely the most eminent counsel in all of Canada. He had published frequently on legal matters and had lectured at the McGill law school. He had appeared frequently before the Supreme Court and the Judicial Committee, and his international reputation was such that he was invited to chair an arbitration commission to settle a Mexico–United States border dispute. In earlier years his Protestantism allegedly stood in the way of his elevation to the bench.[22] One is struck by the wide-ranging support for Lafleur's appointment.[23] Interested Canadians genuinely wanted a

strong Supreme Court; once in a while they were even willing to do something about it.

The chief justiceship remained to be filled. Many names were suggested, names such as Sir Robert Borden, Justice W.R. Riddell of Ontario, Chief Justice Sir W. Mulock of Ontario, and E.L. Newcombe, deputy minister of justice. Mulock would have accepted the post to round off his career, but he was too old (eighty years of age). Newcombe was backed by the powerful minister of justice, Ernest Lapointe, but the prime minister rejected the suggestion: 'I opposed strongly because of his being a Tory thro' life. It wd. make our friends very much annoyed, & there are plenty of good men in our own ranks.'[24] Other outsiders were not seriously considered.

The choice in fact centred on the three most senior justices already on the Supreme Court – John Idington, Lyman Duff, and Frank Anglin. Idington was never a strong contender. His age was against him; the prime minister referred in his diary to the justice as '86 & senile.' He was actually only eighty-three years old, but his retirement was considered to be imminent.[25] Idington's position as senior puisne justice was by no means sufficient to overcome this weakness at a time when the government was intent on rejuvenating the Court.

Lyman Duff had all the credentials necessary for a chief justice of Canada. He was regarded by most of the legal profession across the dominion as the most able jurist on the Supreme Court. His merit had been recognized in 1919 by his appointment to the Judicial Committee of the Privy Council, the only Canadian puisne justice ever to be so honoured. He had also accepted an official connection, as Visitor, with the Harvard Law School, a further sign of his rising international reputation. As well, Duff wanted the chief justiceship and apparently co-operated with lobbying attempts to promote his candidacy.[26]

Unfortunately, in the eyes of the King government the British Columbia justice had two fatal flaws. First, he had co-operated with the Conservative and Union governments in 1917–18 and, as central appeal judge, he had been directly associated with the politically explosive issue of conscription. Some commentators, including a biased Arthur Meighen, leader of the Conservative party, felt 'that Quebec's opposition was entirely responsible for [Duff's] not getting [the promotion].'[27] Second, and probably more important, Duff had a drinking problem, and perhaps had even become an alcoholic. All of the specific evidence of his heavy drinking comes from the early 1920s, and it may be that his resort to alcohol was a by-product of his nervous exhaustion at the end of the war.

In the summer of 1918, Sir Charles Fitzpatrick wrote: 'I hear that Duff has broken down under the strain. Do you know where he is?' This problem was compounded when Duff was passed over for the chief justiceship in the fall of 1918; he allowed his disappointment to show. [28] Whatever the cause, there can be no doubt as to the result and the effect in 1924. The governor-general expressed a hope that Duff would not be appointed, saying that the justice had been intoxicated both at the opening of Parliament and at a state dinner. Douglas Abbott recalled appearing as junior counsel in a case around this time. The argument was to be presented one afternoon before a panel including Duff; the chief justice informed counsel that since Duff could not be present the hearing would have to be postponed until the next term. Duff, it turned out, had been at a country club the night before and had imbibed too freely – he was absent from the Court for over a week.[29] These and other examples disturbed the abstemious prime minister greatly. He tried to investigate the problem; in the end he came to the conclusion that such a man ought not to be chief justice.

Frank Anglin was junior to Duff in seniority and, though he had his supporters, he lacked the reputation for outstanding ability that Duff enjoyed. Anglin was, however, a better-than-average member of the Court, spoke French well, and had a reputation as a writer of literate judgments. He had carefully maintained his Liberal credentials, refusing to accept extrajudicial tasks from the Union government and maintaining useful social connections with Mackenzie King.[30] The prime minister himself described the process of elimination by which Anglin was selected:

> I have tried very hard to secure Lafleur as Chief Justice, but in vain. It leaves the choice between Duff & Anglin, the former is probably the abler but is dissipated, gets off on sprees for weeks at a time. Was intoxicated at last opening of prlt. & at Sir Louis Davies' funeral. I regard him too as a bit of a sycophant where the tories are concerned & more or less the favourite with the big interests. Anglin is narrow, has not a pleasant manner, is very vain, but industrious steady and honest, a true liberal at heart. Both are personal friends. I imagine the bar as a whole prefer Duff, some do not know his habits. I think I am doing the right thing in appointing Anglin ... While I wish we could have secured Lafleur & I do not altogether like appointing Anglin because of the feeling of the bar against him, I nevertheless think in the interests of justice and the dignity of the bench, his appointment is preferable to any other all circumstances considered.[31]

The appointment of Frank Anglin as the seventh chief justice of Canada caused internal problems at the Supreme Court. The government had been aware of the potential for such conflict; an outside appointment had appealed, according to one cabinet minister, because of 'the difficulty which we are all aware exists as to the competition for the place [of chief justice] among the present Judges.' Lyman Duff was deeply hurt at being passed over and so resented Anglin's elevation to the post that he seriously considered resigning. Though some attempts were made to soothe Duff's feelings, rumours that Anglin had written to the Justice Department advising against Duff's elevation likely made remote any prospect of reconciliation. From this point on relations between the two were frosty.[32]

Anglin's promotion and Malouin's retirement left the government with two vacancies. Sir Louis Davies' death had left the Court without a representative from the maritimes, and it was to be expected that one of the new appointments would be from that region. The choice was Edmund Leslie Newcombe, the long-time deputy minister of justice. Called to the bar in 1883, he practised law first in Kentville and then in Halifax, where he earned a good reputation, particularly as a trial lawyer. In 1892 he was appointed lecturer in marine insurance at Dalhousie. In 1893 he accepted the post of deputy minister of justice, just vacated by his fellow Nova Scotian, Robert Sedgewick. Newcombe served in this post for a little over thirty-one years, becoming one of the most influential members of the civil service in that period. As deputy minister he acquired extensive experience in the drafting and interpretation of statutes, in constitutional law, and in litigation before the Supreme Court and the Judicial Committee. Although much of his work as deputy minister had been administrative, Newcombe had nevertheless been able to retain many ties to his original profession. He had even found time to appear, in a private capacity, as counsel before the Supreme Court and the Judicial Committee from time to time.[33] He was sixty-five years old when he joined the Court.

Newcombe's appointment was supported by the leading cabinet ministers from the maritimes and by his immediate superior, Ernest Lapointe, who had pushed for Newcombe's consideration as chief justice. The deputy minister had expected to receive the senior post, and there was some concern about the impact of his disappointment. Always careful to assess the political advantages in any appointment, the prime minister had ruled out Newcombe as chief justice on the ground of his life-long affiliation with the Conservative party. However, given the broad

support for him within the Cabinet, Mackenzie King was prepared to agree to the deputy minister's assuming the puisne justiceship; the prime minister even saw political benefits in it: 'Our [Liberal] friends will not like it, but it will please the Tories & will offset not appointing Duff. It will, too, be a good apptmt.' By and large the appointment was well received, although the prime minister's old mentor and current chief justice of Ontario, Sir William Mulock, penned a scathing denunciation of Newcombe's fitness for the position, emphasizing his weak legal experience and his dogmatic nature; the 'Supreme Court requires strengthening, not weakening.'[34]

The second vacancy went, by law, to a member of the Quebec bar. Here too there does not seem to have been much debate. Thibaudeau Rinfret had been strongly recommended for the position when Justice Malouin was chosen. Now, eight months later, with internal party conflict more subdued, it was possible to revert to the much more able candidate. A member of the bar since 1901, Rinfret had early joined a Montreal law firm with strong ties to the Liberal party. There his legal career flourished, and he accepted appointment as professor of comparative law and the law of public utilities at McGill University. He busied himself as well with Liberal affairs and was twice defeated as a Liberal candidate. Though Rinfret had real ability, his brother's influential position in the Liberal party and his own Liberal credentials were undoubtedly helpful in gaining his appointment first to the Superior Court in Montreal in 1922 and then to the Supreme Court. On the Superior Court, Rinfret had earned a reputation for ability and hard work. The prime minister reflected in his diary that the new justice was 'a young promising man ... [who] will strengthen the bench materially.' At age forty-five Rinfret would provide some useful energy to a court the average age of whose members was now over sixty-five.[35]

Though the government's decisions regarding appointments had been and would continue to be much influenced by partisan political considerations, it is fair to point out that the political leaders of the day genuinely sought an overall improvement in the quality of the Supreme Court of Canada. This was reflected in two amendments made to the Supreme Court Act in 1927. The one, a long time in the making, finally increased the number of permanent members of the Court to seven. The second established compulsory retirement at age seventy-five and applied the provision not just to future members but to all current members of the Supreme Court, one of whom, John Idington, was eighty-six years old by the time the legislation became law.[36]

The Mackenzie King government was convinced that age had become a negative factor for some members of the Supreme Court in the 1920s. Sir Louis Davies, in his seventy-ninth year, had been felt to be incapable of performing his duties and simply to be waiting for an appropriate pension. At the same time, Idington had been described by the prime minister as 'senile.' Action concerning statutory compulsory retirement was delayed by the general elections of 1925 and 1926 and by the special circumstances of the minority governments of 1925–6. There is little doubt, however, that the Liberal government was coming to support some such policy at least by 1924. Justice Idington's ill health and consequent extended absences simply hastened legislation and gave the measure both substance and a sense of urgency. Idington had been absent for the entire spring 1925 term and for all but one day in each of the two succeeding terms. In 1925 he missed a total of fifty-eight days, in 1926 thirty-eight days, and in the first term of 1927 twenty-two days. What was worse, he failed first to request a leave of absence. In February 1926 the minister of justice asked him to resign.[37] Idington's reply is not extant, but he obviously refused, necessitating the legislation of the following year.

The entire affair was unfortunate. The attachment of a sick old man to his office (and to his full salary), despite his obvious incapacity even to attend Court sittings, is pathetic. It is surprising that there is not more evidence of public outcry at the presence of such an ineffective judge on the court. Idington's behaviour was, however, influential in gaining bipartisan support for the compulsory retirement of Supreme Court justices.

The other amendment affecting the personnel of the Court was at least as necessary as that regarding retirement. Within a few years of the Court's creation, it had become clear that in view of the frailties of old age, an excess of one justice above quorum did not give the Court sufficient flexibility in meeting its duties. By the turn of the century the growing tendency to appoint some of the justices to other posts outside the Court simply put greater pressure on the members. Various solutions to this basic problem had been posed over the years, the most popular being either a reduction in the quorum or the provision of extra justices on a temporary basis. Both solutions had been tried at different times; in 1918 legislation had been passed allowing the use of ad hoc justices. By 1927 the need for additional Court members had been fully proved; since 1918 twelve different ad hoc justices had served on at least 125 cases.[38] In some respects the use of different temporary justices had worked well. Justice Mignault, for example, pointed to the intellectual advantages of the

interchange that this system facilitated.[39] But the instability of the system was a crucial weakness, and there was little debate when the amendment was introduced to increase the number of justices by one. Indeed, the only question that is difficult to answer was why the increase had not been authorized earlier. Perhaps the delay was caused by financial considerations. The federal government had always been somewhat niggardly in matters concerning the Supreme Court, and there was the fear that any dramatic increase in expenditure would attract attention and criticism to a vulnerable institution. The old adage 'let sleeping dogs lie' had likely worked to the disadvantage of the Supreme Court by inhibiting discussion and change.

With the forced retirement of John Idington and the addition of a sixth puisne justice, the King government once again had two vacancies to fill. It was certain that one of these would go to a man from the prairie provinces. During the debates in the House of Commons one argument put forward for creating the additional seat on the bench was the difficulty in providing representation for the west. As well, Mackenzie King was still busy undermining prairie support for farmers' and progressive parties and attracting errant Liberals back into the fold. Various local Liberals appealed to their federal leaders to give the prairies representation on the Supreme Court. Lyman Duff's presence on the Court was no longer adequate; the prairies wanted their own man. Some, forgetting Killam's brief interlude on the Court, argued that the prairies had never been represented. In 1924 one influential Ontario Liberal informed the prime minister of western demands: 'I met a number of Western men among others Dunning and Judge Martin and they are strong for another man from the West in the Supreme Court. They pointed out that Nova Scotia had McLean in the Exq. Ct. When I said that the East was entitled to a man and the number was fixed. They all seemed to be so strong about it that I [thought I] would write you and prepare you, but you probably have [heard] it long ago.'[40] But in 1924 neither of the two vacancies could be used to meet prairie demands – one was Quebec's by law and the other was the maritimes' by tradition. Western representatives had little sympathy for east-coast claims, but Mackenzie King was too astute a politician to risk alienating the maritimes, particularly at a time when eastern sensitivities were more than usually acute.[41]

The King government did nothing to discourage western claims. In the context of 1924 it was simply not possible to meet them. Rumours, however, continued to circulate that Idington's Ontario seat would be transferred to the prairies. Though several names were put forward in the

period from 1924 to 1927, one name dominated discussions, and it was no surprise when John Henderson Lamont was appointed to the Supreme Court two days after Idington retired. He had practised law in Toronto for four years before moving west in 1899, setting up practice in Prince Albert and soon becoming crown prosecutor. Before long he found himself heavily involved in the local affairs of the Liberal party, becoming a member of Parliament (1904–5) and a member of the provincial assembly (1905–7). As attorney-general he was a member of the first provincial cabinet. Two years later, at the age of forty-one, Lamont left politics and joined the Saskatchewan Court of Queen's Bench, transferring in 1918 to the provincial Court of Appeal. By the spring of 1927 he had acquired over nineteen years' experience on the bench, though his practice of law had been limited. He was sixty-one years old when he was appointed to the Supreme Court.[42] On the provincial bench he had acquired a reputation as an excellent jurist, but his Liberal credentials were important. While other candidates were attacked for their weak party loyalty, Lamont's claims could be championed by the party faithful. The prime minister's Ontario informant wrote, 'If you should think of it [appointing a westerner] I believe Judge Lamont of the Court of Appeal in Saskatchewan is the strongest man out there and besides he is one of ourselves, was Attorney General in Premier Scott's Cabinet. As far as I could find out he was the man they [prairie Liberals] wanted and I am of the opinion he would be a good man in the Supreme Court.'[43] So it was that a seat on the Supreme Court bench was permanently allotted to the prairies.

The other vacancy went to an Ontario representative, since with Idington's departure only one Ontario justice remained on the Court. Several names were mentioned for the post, and Justice John Orde of the Ontario Supreme Court, Appeal Division, felt that he had been promised the position as early as the summer of 1924.[44] Possibly this was true, but three years later circumstances had changed. The son of Robert Smith, one of the other candidates, had been elected to the House of Commons in 1926, and he exerted pressure on behalf of his father. This influence, combined with Robert Smith's obvious abilities, was sufficient to lead to his selection as the newest member of the Supreme Court of Canada. Called to the bar in 1885, he had practised law in Cornwall, Ontario, for many years, acting also as a director and secretary-treasurer of the Montreal and Cornwall Navigation Company. He was also active in local Liberal party affairs and sat as a member of Parliament from 1908 to 1911. In 1922, when a judgeship became vacant in Ontario, one of the cabinet ministers chiefly concerned with patronage prepared a memorandum

'regarding three of our friends whose names have been most constantly pressed upon us by a large number of Liberals in different parts of the Province.' At the top of this list stood the name of Robert Smith, whose toils as a Liberal were detailed and who was described as 'a lawyer of excellent standing with a varied town and country practice and experience in the Courts.' In 1922 Smith was appointed to the High Court Division, Supreme Court of Ontario. Less than a year later he was transferred to the Second Appellate Division of the same court, and early in 1924, at the request of the chief justice, he was promoted to the First Appellate Division. No less a legal mind than Newton Rowell privately recommended Smith's elevation to the Supreme Court in 1927: 'If Mr. Justice Smith would accept the position I do not think a better appointment could be made from Ontario. He is very highly regarded both by the bench and the bar. He has been a great success as a judge and his appointment would give universal satisfaction.'[45] In Smith the Supreme Court of Canada acquired a man with extensive legal experience (over thirty-six years at the bar). Though he had been on the bench for less than five years, his abilities had quickly attracted attention and promotion. He was sixty-seven years of age, too old to qualify for a pension by the time he reached seventy-five. But Smith wanted the promotion to Ottawa very much, and after a brief attempt to negotiate a special pension agreement he accepted a vague government pledge to look after him when the time came.[46]

Two points can be made about these appointments and the selection process. First, though it is clear that meaningful prior activity on behalf of the government party was an essential factor, the government at the same time sought out highly qualified candidates, by the standards of the day. The partisan element in the selection process was clearly not a barrier to merit; the private praise given to such appointments as Rinfret, Lamont, and Smith makes this obvious. Second, though religious affiliation was declining as a factor in the increasingly secularized society of twentieth-century Canada, it was still there. Since the appointment of Frank Anglin in 1909, the Court had contained an even number of Protestants and Roman Catholics. Although Roman Catholics made up almost 39 per cent of the country's population, almost all were concentrated in the province of Quebec; outside that province less than 4 per cent of the population was Roman Catholic. On those grounds it was possible to argue that Protestants were underrepresented, and such reasoning was advanced from time to time.[47] There is no evidence as to what effect such pressure had on the selection process.

In the fall of 1929 P.B. Mignault became the second member of the Supreme Court to be forced into retirement owing to the new age limit. The example of John Idington made a strong case for compulsory retirement; Mignault demonstrated the weakness of setting an arbitrary date. At seventy-five he was still active and pulling his weight in the Court. Throughout the 1930s he continued to publish useful scholarly articles. However, particularly in the early stages of the new regulation, it would have been difficult for the government to make an exception in Mignault's case – there is, in fact, no evidence that such an exception was either requested or considered.[48]

Given his scholarly interests and training, it is not surprising that Justice Mignault had emerged at the Supreme Court as the first great defender of the civil law. Prior to this period no firm pattern had emerged for handling civil-law cases; some common-law justices, particularly Henry Strong, proved to be quite adaptable and sympathetic to the different perspectives and tradition involved, while other such justices (Gwynne and Henry, for example) tended to adhere to a common-law treatment of the cases.[49] None of the early Quebec members of the Supreme Court were militant upholders of the civil law. Taschereau, Fournier, Girouard, and Brodeur were vigilant on behalf of the civil-law tradition, but appear not to have seen any great threat to that tradition from a close working proximity to common-law influence.

The presence of only two Quebec justices on the Court meant that they were always in a numerical minority on any panel in these years. But in the absence of any perceived threat to the Civil Code, the justices were not noticeably defensive and showed no strong signs of deliberately working together. When Désiré Girouard first arrived at the Court, for example, his Quebec colleague was frequently absent; without any prior judicial experience, Girouard was left to write either the majority or the unanimous judgment in the ten reported civil-law cases heard in 1896–7. During their ten years on the bench together, Girouard and Taschereau frequently went their separate ways, even in majority. Taschereau dissented from the majority, of which Girouard was a part, five times; Girouard dissented from Taschereau's majority judgment four times; Girouard frequently wrote a separate judgment when in the majority with Taschereau. On only one occasion did the two justices dissent together in a civil-law case.[50]

This trend continued with the accession of Charles Fitzpatrick. In his five years that overlapped with Girouard's tenure, twenty-two civil-law cases were reported. In six of these one of the Quebec justices was absent;

in six more appeals they were on opposite sides in the decision. In only ten cases did they stand together in the majority, and never in dissent. In many cases, however, Fitzpatrick revealed a disturbing tendency toward an inappropriate reliance on precedent for some of the issues involved, particularly in his defence of the sanctity of private property.[51]

The appointment of Mignault to the Supreme Court in 1918 brought the foremost authority on the civil law to the Ottawa bench. It was not long before the new justice criticized members of the Quebec bar and judiciary for relying on principles of English common law instead of the Civil Code. Pointing to the fate of civil codes in South Africa and Louisiana, he warned that the intrusion of common law would subvert the distinctive character of the Quebec civil law tradition.[52] With a learned and articulate defender of that tradition now in an influential position and with an increasing sensitivity in Quebec to English-Canadian ascendancy, it is not surprising that a new response to civil law cases began to emerge.[53]

In two early cases Mignault's influence on the construction of the Civil Code was apparent. In the first, *Desrosiers* v *The King* (1920),[54] Brodeur and Mignault were in the majority led by Justice Anglin. The Court ruled that English decisions should not be cited as authorities in cases from the province of Quebec that did not depend upon doctrines derived from English law. In the second case, *Curley* v *Latreille* (1920),[55] the majority (including Mignault but excluding Brodeur) ruled that English decisions could be of value in deciding Quebec cases under certain circumstances. The justices held that English decisions could be used in civil-law cases only when it had been ascertained that the principles upon which the subject matter dealt were the same and were given a like scope in their application. Even here, however, the Court ruled that English precedents could not be used as binding authorities but as *rationes scriptae*. Mignault expressed his admiration of Anglin's grasp of the civil law in this case, and lectured the Quebec lower court and Justice Brodeur on the limited place of precedent in civil-law cases.[56]

Mignault's presence on the Court at this time did much to enforce the status of the Civil Code. Anglin's consistent backing was crucial; without the support of a common-law justice, Brodeur and Mignault could never have prevailed in civil-law cases.

Justice Rinfret arrived in 1924; now Mignault had an effective co-defender of the Civil Code, a position Rinfret maintained for the next thirty years, long after Mignault's retirement. The two Quebec justices participated in all fifty-nine reported civil-law cases that came to the Court during their tenure together. They were in the majority in all but two of

the judgments.[57] Of the fifty-nine judgments, Rinfret wrote twenty-two opinions for the Court or for the majority; Mignault wrote fifteen. On only three occasions did Rinfret dissent from Mignault on a civil-law case; Mignault never dissented from Rinfret.[58] Again their common-law supporter was Chief Justice Anglin, who tended to join with Mignault in other areas of law as well. Justice Duff showed a marked uninterest in civil-law cases. He rarely wrote an opinion in such cases; he gave the leading judgment only twice in this period (1925–9) and dissented four times.

Mignault's legacy at the Supreme Court was a new sensitivity to the civil law. Quebec justices had begun to work together consistently and were able to command the support and respect of their common-law colleagues. This was a pattern Rinfret maintained in the following years.

The government allowed a full term of the Court to pass after Mignault's departure before naming his replacement. Without two Quebec justices present, tradition required that civil-law cases be postponed. Both the chief justice and the solicitor-general, Lucien Cannon, urged the minister of justice to fill the vacancy quickly, but the minister, Ernest Lapointe, would not be hurried. From England his telegraphed response indicated his commitment to making an effective appointment and to strengthening the nation's courts:

> Appointment most important essential Supreme Court being made exceptionally strong STOP Would prefer leave it until I return STOP Chief Justice [of the provincial] Appeal Court unable working might be persuaded retiring both appointments could be made together possibly facilitating matters STOP Please tell Anglin help us in making delay unobjectionable STOP vacancy occurring while I am away surely sufficient excuse for postponement.[59]

Finally, in January 1930, after the post had allegedly been turned down by Louis St Laurent and possibly by Justice Philippe Demers,[60] Lawrence Arthur Dumoulin Cannon was named to the Supreme Court of Canada.

The son of a Quebec Superior Court justice, Arthur Cannon had taken up legal practice in Quebec City in 1899. Among his law partners over the years were such leading figures as Sir Charles Fitzpatrick and L.A. Taschereau, the premier of Quebec. Cannon was a leading member of the city council, from 1908 to 1916, and followed his brother into the provincial assembly when he served from 1916 to 1923. By the 1920s Cannon had become a leader of the Quebec bar. He joined the Quebec Court of King's Bench, Appeal Division, in 1927, and less than three years

later was promoted to the Supreme Court.[61] His judicial experience was limited, but he had practised before the bar for some twenty-eight years. He also had excellent political connections: he had married the daughter of Sir Charles Fitzpatrick and his brother was the solicitor-general of Canada.

Individual members of the Court continued to carry out non-judicial functions. Purely formal duties, such as acting as administrator in the absence of the governor-general, occasionally fell to the chief justice or a senior colleague. These are of little note except that they provide an example of the ongoing tension between Duff and Anglin.

In 1932, Chief Justice Anglin was out of the country, and the governor-general authorized Lyman Duff to act as deputy in Ottawa during a vice-regal tour of the western provinces. The chief justice returned earlier than anticipated and took serious umbrage at Duff's acting in a position Anglin thought should be his own. The government received a formal letter of protest from Anglin challenging (mistakenly) Duff's standing and the governor-general's right to appoint anyone other than himself.[62] The pettiness of the problem underlines Anglin's sense of competition (or perhaps jealousy) regarding Duff and the chief justice's genuine thirst for status and the symbols of power. Mackenzie King perceived vanity to be an important if unfortunate motivating force behind many of Anglin's activities as chief justice.[63]

Appointments to royal commissions added to the justices' duties. In 1919 Prime Minister Borden sought to name two Court members, Davies and Anglin, to conduct an inquiry into the 1918 military police raid on the Jesuit seminary in Guelph, Ontario. Both wisely declined the appointment and thus avoided being drawn into a bitter ethnic and religious controversy centring on conscription. Davies explained, 'After reading the discussion in the House of Commons which led up to the promise of the enquiry being made I concluded that this enquiry would almost certainly develop into a politico religious controversy which I felt it was undesirable the Chief Justice of Canada should be mixed up with.'[64] This sense of separation between the judiciary and political controversies was not yet fully shared by the other justices.

Less sensitive commissions continued to be readily accepted. Sir Charles Fitzpatrick, E.L. Newcombe, and the registrar were all members of the 1923–7 Statute Revising Commission. Lyman Duff clearly felt it was his obligation as a public servant to accept such tasks. As a result, in 1926 he became chairman of the commission to apportion church properties

between the assenting and dissenting congregations of the newly formed United Church of Canada. In 1931 Duff was named chairman of the Royal Commission into Railways and Transportation in Canada. So exhausting was this work that when the commission's report was finally submitted in 1932 Duff collapsed, suffering a 'complete nervous breakdown,' and it was expected that he would 'not likely ever sit on the bench again.'[65] Though he recovered, his illness illustrates the potential demands of such work and how much the Court was affected by being deprived of various justices' labour, often for extended periods. Nevertheless, as Duff himself would have argued, such public service was of value to the country.

As well, the Supreme Court justices continued to offer political and legal advice to the political executive. Some of this was solicited. Justice Mignault, for example, was asked to investigate and prepare a memorandum on an article of the Boundary Waters Treaty. In 1923 the attorney-general of Ontario solicited Lyman Duff's views regarding a proposed piece of legislation. On another occasion Prime Minister Borden sought the chief justice's advice concerning the vacant lieutenant-governorship of his native province.[66] In none of these instances did the justice involved object to the request; each time the justices co-operated with the politicians.

On other occasions the initiative lay with the justices, particularly in matters pertaining to their legal expertise. Justice Rinfret recommended changes in the Code of Civil Procedure to the premier of Quebec. Amendments were also made to the Supreme Court Act or the Judges Act. Several minor changes were passed in this period – in 1920, for example, the minimum amount in controversy required in a *de plano* appeal was standardized across the country at $2,000 – and in many of these the justices were closely involved.

What is interesting about this practice is the justices' easy direct access to the political executive or to the legislative process. In the era after the Second World War, such direct contact became much less common; with the growing sense of separation between the judiciary and the executive or legislative functions, justices in recent decades communicated such suggestions only through an intermediary, the registrar. But in the 1920s there were no qualms about direct contact. The justices, usually jointly but on occasions individually, put forward almost annually various proposals for Supreme Court reform, sometimes as general suggestions and other times in polished legislative drafts.[67] This direct contact between the justices and the executive is further evidence that there was

only limited separation between the judiciary and other elements of the national government. It is also apparent that this situation was as much due to actions and attitudes of the members of the Court as it was to the politicians.

One substantial legislative change regarding the Supreme Court affected salaries. In 1920 the salary of the chief justice was raised to $15,000, and the salary of a puisne justice was raised to $12,000. By the late 1920s pressure again began to mount for further increases. Canada paid its Supreme Court members less than almost every other comparable common-law jurisdiction in the world.[68] Public spokesmen pointed to the importance of an attractive salary level in persuading able legal minds to accept appointment to the Court. There was little disagreement on this point; none the less, no further increases were authorized until after the Second World War.

By 1930 the annual Supreme Court budget was a little over $150,000; the staff now consisted of twenty-one people.[69] The character of the staff was changing somewhat, partly as a result of changes in the civil service and partly as a result of the Court's growing workload. During the 1920s, as retirements and resignations occurred, older employees who had exhibited scholarly interests and a devotion to the law were replaced by bureaucrats. Many of the senior staff were lawyers who happened to be civil servants; now the staff was dominated by civil servants who happened to work at the Court. The result was a loss of scholarly enthusiasm on the one hand and increased efficiency on the other. Men like Edward Cameron, Charles Masters, and even the young T.L. McEvoy departed at the end of the decade, taking with them a devotion to the law which had been a special feature of the first five decades of the Court's life.

Despite its subordinate position to the Judicial Committee of the Privy Council, the Supreme Court played an influential role as constitutional umpire in Canada. This role was manifested in two major ways: the development of a significant jurisprudential position under the leadership of Lyman Duff, and an increased emphasis on the reference system.

Following a precedent set by the Judicial Committee Act, 1833, the framers of the Supreme Court Act, 1875, had included section 52, which empowered the governor-in-council to refer to the Court 'any matters whatsoever as he may think fit' in order to ascertain the opinions of the learned judges. The justices could at any time be called upon to give their opinions on often abstract legal problems lacking the normal adversarial,

circumstantial, and factual context of regular cases. These references were outside the judicial norm and were disliked by many of the justices. In the *McCarthy Act Reference* (1885) the members of both the Supreme Court and the Judicial Committee declined to give reasons for their conclusion that a federal statute regulating the liquor trade was ultra vires; without reasons it was difficult for legislative planners to ascertain the probable limits of federal power.[70] As a result of the judicial reluctance to make the system useful, and as a reflection of the Court's stature, few references were sent to the Court in the early years.

In 1891 political leaders, pushed by Edward Blake, amended the Supreme Court Act to correct defects in the system. Provision was made for the representation of different interests before the justices in a hearing; the right of appeal to the Judicial Committee was made explicit; and, most important, the justices were required to give reasons for judgment. The government rejected proposals by Blake to limit references to questions involving the federal power to disallow provincial legislation or the federal appellate power regarding education. Instead, the government authorized references on the constitutionality of any provincial or federal statute or 'any other matter.'[71]

Nevertheless, the justices continued to balk at the reference system, and there were only a small number of references prior to the end of the First World War.[72] In 1894 Elzéar Taschereau challenged the constitutional authority of the Parliament of Canada to make the Supreme Court a court of first instance and an advisory board to the federal executive.[73] The Judicial Committee refused to comment on 'hypothetical questions' in a 1903 reference, adding: 'It would be extremely unwise for any judicial tribunal to attempt to exhaust all imaginable or hypothetical circumstances which might have a bearing on concrete cases.'[74]

Finally, in 1910 the Laurier government referred a question to the Supreme Court on the validity of references.[75] A full panel held 5–1 (Idington dissenting), that it was within the power of the governor-in-council to refer cases to the Court, but the range of opinions in the decision revealed the justices' uncertainty on the issue. Justice Idington wrote the only judgment to confront directly one of the basic issues involved: by adding an advisory role to the court's duties the government was seriously affecting the nature of the judicial function of the Supreme Court by imposing a political function. The only common thread running through all six judgments was that reference decisions were opinions only and were not to be taken as judicial judgments or as binding on any courts. This may have comforted the justices, but in reality all lower courts

throughout Canada have viewed reference judgments as judicially authoritative.[76]

Political interest in the reference process continued to grow. Between 1902 and 1910 eight issues were referred to the Court under the auspices of the Laurier government. A procedure similar in some respects to the reference system was also instituted in this period. The Railway Act, 1903, empowered the Board of Railway Commissioners to 'state a case in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law' – a power the board quickly took advantage of.[77] The usefulness of the Court to the political and administrative process was obviously increasing. This use of the Supreme Court illustrates the desire for increased efficiency. Referring a question to the law officers of the crown would provide legal guidance, but reference to the Court would provide an opinion that would effectively be binding; the state could then act within those legal parameters.

While the governments of Sir Robert Borden and Arthur Meighen (1911–21) used the reference system infrequently (only three references were reported during those years), they built on the idea of direct access to the Court by government agencies. The Board of Commerce Act, 1919, empowered the board to refer questions of law 'in a stated case' to the Supreme Court, which it soon did.[78]

By the 1920s the perception of the Court's usefulness as a political instrument was well entrenched. An amendment to the Supreme Court Act in 1922 specifically permitted appeals of provincial references to reach the Supreme Court from the provincial courts of appeal. One provincial reference was heard, and for the first time members of the public sought to use the reference process through a petition to the government.[79] But it was left particularly to that consummate politician, Mackenzie King, to make extensive use of the politically advantageous reference system. Avoiding issues of federal-provincial dispute by referral to the Court was an attractive political solution to potentially contentious and politically costly wrangling. Time or the Court's opinion or both might alter the circumstances so that an acceptable answer to the issue would be more apparent. In 1927, for example, at the dominion–provincial conference, questions on jurisdiction over civil aviation and over water-power on navigable waterways were referred, and it was debated whether other problems ought to be dealt with similarly.[80] In all, fourteen references went to the Court from the King administration during these years.

The advantages of the reference tactic were made clear in the water-

powers question. First, delay was gained. The issue was a difficult one for the King government, which was being pushed by several different governments and interest groups. Reference to the court temporarily removed the issue from the political arena and postponed disagreeable debate with the premiers of Ontario and Quebec, and at the same time enabled the government to avoid taking a specific stand on the question.[81] Second, the government initiating the reference had the authority and ability to structure the questions posed to the Court in such a way as to direct the responses. In the case of the water-powers reference the bench, both during argument and in the judgment, pointed to the unsatisfactory and manipulative character of the questions presented. Writing for a unanimous Court, Justice Duff felt constrained to remind those involved of the advisory nature of the opinions handed down, and added, 'when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed.'[82] Apart from its obvious legal disadvantages, the reference procedure was expensive[83] and inflexible; while the reference was underway, debate was constrained and finding a political solution to the issue was difficult.

The impact of this political use of the Supreme Court had been made even more apparent a few years earlier. In 1921 an appeal called into question the constitutionality of the Canada Temperance Act in Alberta. Justice Duff recounted the political interference in the case:

> The temperance people were making a row about it, and the Minister of Justice [C.J. Doherty], being anxious to ascertain the probable result of the appeal then pending, sent for two members of the Court, Anglin and Mignault, and obtained from them information as to their own opinions and the opinions of their colleagues and the probable result of the appeal, and as a consequence legislation [11-12 Geo. v, c. 20] curing the defect was introduced before our judgment was delivered. Doherty felt safe in that case, because he and the two judges mentioned were educated at the same Jesuit college in Montreal, wth, as you may imagine, very close reciprocal affiliations.

Within two weeks of the argument's having been heard (and well before a decision was rendered), the minister introduced the curative legislation in Parliament. The majority of the Court held that this remedy was retroactively effective; only Justice Idington argued that such action by Parliament 'cannot retrospectively affect the civil rights of [the] appellant.'[84]

The reference system drew the Court directly into constitutional law, as did many ordinary cases. By the 1920s the Court had developed an extensive constitutional jurisprudence, particularly under the forceful leadership of Lyman Duff. Both in Ottawa and in London, as a member of the Judicial Committee (after 1918), Duff was in an influential position.[85]

By this time the Judicial Committee had articulated a strongly decentralist perception of the British North America Act. Duff's view, even before he joined the committee, meshed easily with this constitutional jurisprudence, and his concern for the 'federal character of the Union' fell on sympathetic ears.[86] His own appreciation of the constitution and of the Judicial Committee was made apparent in a letter written in 1925:

> The B.N.A. Act endows the Dominion with very great powers indeed, and in the early days the Supreme Court of Canada was so impressed with the sweeping character of the language employed in defining the powers of the Dominion that it proceeded to give a series of decisions, the effect of which, if they had stood, would have been to take away from the provinces all but the slightest trace of political autonomy. What the Privy Council did was to protect the Constitution of Canada from this kind of judicial assault, and it has not gone beyond this. You and I, and everybody else who knows anything about the subject, know that according to the original design of the B.N.A. Act, great communities like Ontario and Quebec were intended to possess individually a high degree of self-government ... Now the Canadian courts, if left to themselves, it is not too much to say, had they stood, would have thrown our constitutional law into a state of chaos which would have required, before the exit of the nineteenth century, an entire revision of the whole position, but this was averted by the Privy Council.[87]

With such views Duff easily reinforced the constitutional jurisprudence of the Judicial Committee. That committee, he felt, had employed great 'statesmanship' in interpreting the British North America Act, and Duff hoped that it would be 'many a long year' before appeals to London were terminated.[88]

It is no exaggeration to say that until very recently Lyman Duff was the dominant force in constitutional matters on the Supreme Court of Canada.[89] During the Duff years the Supreme Court heard close to two hundred constitutional cases. And while Duff and his colleagues were obliged to follow the constitutional jurisprudence set down by the Judicial Committee, they were not simply subservient to the jurisprudence. Indeed, in several matters the Duff-led Court drew implications from Judicial Committee decisions; but those new implications tended in the basic provincial directions established by the Judicial Committee. Among

these new directions, Duff and the Court contributed significantly to the interpretation of the federal power to regulate trade and commerce, but only after reaffirming the Judicial Committee judgments on peace, order, and good government.

Lyman Duff plainly shared the Judicial Committee's fear of the unchecked use of the federal power in matters relating to peace, order, and good government. In the *Insurance Reference* (1913),[90] for example, Duff led the Court majority in defeating the federal government's attempt to set national standards for the insurance industry. While acknowledging the national importance of insurance, the justices feared the long-term implications of granting such power to the federal Parliament. For Duff, the Court was obliged to prevent the thin edge of the wedge from intruding into provincial matters. If the Court condoned the use of the federal power in this case, Duff argued, there would be no end to its use in other related matters in the future. He concluded, 'The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great public importance it is for that reason a matter which is not substantially local in each of the provinces.' Duff's judgment in this case illustrates the extent to which he was in sympathy with the constitutional philosophy of Lord Watson as expressed in the *Local Prohibition* case (1896), which gave formal judicial status to the 'autonomy of the provinces.'[91]

Lord Watson's judgment in *Local Prohibition* did not end the controversy over the scope of the federal general power. During Duff's tenure on the Supreme Court, the Judicial Committee – principally under Viscount Haldane – went further in restricting the power of the federal Parliament. In *In re Board of Commerce Act* (1922),[92] the committee ruled that the federal Parliament would not intrude on the 'quasi-sovereign authority' of the provinces over matters relating to 'property and civil rights'. The Parliament of Canada could invade provincial territory, Haldane wrote, only 'in highly exceptional circumstances' such as war or famine. The committee ruled that since the matter of fair prices did not meet the test, the acts of the federal Parliament were ultra vires.

For its part, the Supreme Court had deadlocked in this case: three justices (Davies, Anglin, and Mignault) voted to uphold the federal statute, while Duff, Idington, and Brodeur voted against the legislation.[93] Duff's judgment shows that he was as adamantly opposed to easy federal intrusion into provincial areas of jurisdiction as were Watson and Haldane. He feared that if the federal Parliament was permitted control over the 'scarcity of necessaries of life, the high cost of them, the evils of

excessive profit taking,' then there would be no saying where this would end; it could conceivably lead to 'nationalization of certain industries and even compulsory allotment of labour.' Duff's position was a judicial domino theory applied to construction of the British North America Act. 'In truth if this legislation can be sustained under the residuary clause,' he wrote, 'it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions ... may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures.' In order to prevent such a scenario from becoming reality, the federal Parliament must be stopped at the very beginning of the process.

The Judicial Committee was obviously impressed with Duff's line of reasoning when it ruled against the federal act. It is plain from Duff's judgment that he was not binding himself unduly by a narrow or unwilling acceptance of Watson's jurisprudence in *Local Prohibition*. Duff emerges in *Board of Commerce* as a jurist with his own views on the development of Canadian constitutional jurisprudence. That those lines happened to be strongly in favour of the provincial legislatures and hence compatible with the line of jurisprudence developed by the Judicial Committee was, for him, additionally persuasive. The *Board of Commerce* case shows that at least one justice of the Supreme Court of Canada *influenced the Judicial Committee in important constitutional matters.*[94]

The number of overall cases coming before the Supreme Court in these years appears to have remained steady.[95] The judicial conservatism of the Court and its members continued to predominate. The best example in this period can be found in the famous *Persons* case, in which on reference the Supreme Court ruled unanimously that women were not 'qualified persons' eligible for appointment to the Senate. The restricted views by the five justices, the narrowness of the definitions involved, and the unexpressed but apparent insistence of the justices that change be instituted through legislatures rather than courts stand out in the reasoning of the justices. This is particularly true when the opinions are contrasted with the opinion of the Judicial Committee, which reversed the Court's judgment.

The Court adopted a strict constructionist view of the issue. There can be no doubt that the term 'person' as used in 1867 in the British North America Act referred to men, since only men qualified for public office at that time. The Court was asked to interpret the terms of the act in the light of modern conditions. The justices could have looked at the act with a view to seeing whether women were formally excluded from assuming a role in the government of the country, but they chose not to do so. Chief Justice

Anglin explicitly rejected as irrelevant the social and political implications of the issue. The justices, in short, failed to view the British North America Act as a living constitutional document; they interpreted the act as an ordinary statute and restricted its terms to the context of 1867. The members of the Court effectively froze the terms of the British North America Act to a specific period of history. In so doing, the Court retreated from its common-law tradition of applying constitutional statutes in the light of recent developments.

The Judicial Committee dismissed the Supreme Court's opinion with a pointed observation: 'Their Lordships do not conceive it to be the duty of this Board ... to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.' It is difficult to imagine a clearer rejection of the Supreme Court's strict constructionism in constitutional matters.

Chief Justice Anglin, writing for himself and Justices Mignault, Lamont, and Smith, relied on the common-law disqualification of women to hold office. Justice Duff chose narrower grounds, limiting himself to the terms of the British North America Act. Their reasons indicate a desire to reaffirm the status quo. Stability and order were to be upheld by the courts; it was for the legislature to initiate change. This deliberate eschewing of judge-made law is an accurate reflection of the Court's long-standing perception of the judicial function; nevertheless, in the context of the late 1920s, as the *Ottawa Evening Journal* pointed out, the decision made not only the law but the Supreme Court appear an ass.[96] For this the government must accept some responsibility. Rather than deal with the problem directly, it chose to allow the issue to be resolved by the court. The reference system encouraged a perception that the courts were a proper venue for dealing with political problems. This led to an expanding role for the courts where essentially political problems were seen to be justiciable.

The evidence is sparse as to how the justices handled these cases once argument had been heard. Under Chief Justice Davies there was some exchange of draft judgments among the judges and there seem to have been judicial conferences.[97] But the impression remains that Davies was not over-efficient in co-ordinating judicial reasoning, nor very concerned with improving the intellectual quality of the decisions.

Frank Anglin took a more active role as leader of the Court. He tried to encourage the writing of single majority judgments – something for which the Canadian Bar Association was pushing – and for a time he was successful. However, a chief justice's powers in such matters are limited to

persuasion, and soon the force of individual personalities led the Court away from the practice.[98] Sometimes one justice would offer to write a draft judgment for the majority. This draft was then circulated, discussed, and altered if necessary. More often, and in cases where initial agreement was not apparent, individual drafts were exchanged, stimulating argument and reconsideration. Discussions were held by mail, in private meetings, and at conferences the frequency of which is unclear.[99]

The reporting of decisions seemed to improve, although the Supreme Court Reports continued to suffer from some weaknesses. The citation policy, for example, omitted references to private reports series if a public series was available; thus, the citation of the Dominion Law Reports was less frequent than it should have been, making the Supreme Court Reports less useful to the profession.[100] In addition, the Supreme Court Reports failed to report a number of cases some observers thought were of note; in 1924, for example, the Dominion Law Reports reported seventeen cases that did not appear in the Supreme Court Reports. But despite these omissions the quality of the Supreme Court Reports was reasonably good. Most of the early problems had been solved; in particular, justices were less slow in drafting their reasons for judgment. By now the normal time between the handing down of the decision and the submission of formal reasons was only four weeks,[101] facilitating a much more rapid communication of the information to the profession.

The improvement in the Supreme Court Reports was reflected in a growing circulation. In 1920 the government took over publication from a private publisher and made the Reports available on a mass subscription basis at a heavily subsidized rate. The registrar visited provincial bar associations to solicit subscriptions. By 1922 every provincial bar association in the country had contracted to provide each member with a subscription. The decisions of the leading court in the land now reached every practising lawyer in Canada. The print run soared, and issues quickly went out of print. By the late 1920s the average print run was 6,500 copies, of which 5,500 circulated on a subscription basis to members of various Canadian bar associations.[102]

The growth in circulation was part of a broader expansion planned by the registrar, E.R. Cameron. Cameron saw the Supreme Court as the apex of the Canadian judicial system, a position that created for the Court a unifying and co-ordinating role, a task of drawing the country together into one great nation. Just as the justices handed down decisions binding on the whole country, the Court staff could perform a service by producing an all-Canada reports series. In 1923 the reports of the

Supreme Court and the Exchequer Court were combined in a new series, the Canada Law Reports. Informing the profession of the change, Cameron commented, 'It is believed that this wide distribution of the Reports will further the aim of the Fathers of Confederation in providing by the British North America Act for the establishment of Dominion Courts, to institute thereby a legitimate centralizing agency for the promotion of National Unity.'[103] The new series was the first step in the registrar's plan to centralize the publication of all provincial law reports under the editorship of the staff of the Ottawa courts. In the years 1926–9 Cameron travelled to several provincial bar associations and the annual conventions of the Canadian Bar Association advocating the proposal, but the idea never gained sufficient support to be adopted.[104]

The Supreme Court staff was infused with and acting upon a sense of the potential power and influence of the central level of the federal political structure. This sense of national mission or purpose affected the Supreme Court as a whole. Discussion increased in these years regarding the possible termination of appeals to the Judicial Committee. This was partly the result of Canadian opposition to colonialism and of Canadians' pride in their own self-sufficiency; it was also a result of decisions handed down in London in 1925 and 1926, striking down long-standing Canadian legislation, and in 1927, rejecting Canadian territorial claims to Labrador. Abolition of appeals was proposed in Parliament, in various meetings, and in private correspondence.[105] Many still disagreed with any such suggestion, however, and even the favourable discussions were almost always negative toward the Judicial Committee rather than complimentary toward the Supreme Court. The unfavourable discussions were frequently strongly condemnatory of the Supreme Court.[106]

The national role of the Court was also reflected in the activities of Chief Justice Anglin. As a means of fostering goodwill between the bench and the bar, attracting the attention of those in high political places, and underlining the Court's position at the top of the Canadian judicial structure, Anglin gave a series of dinners in Ottawa. He invited the governor-general, lieutenant-governors, the provincial premiers and attorneys-general, federal cabinet ministers and members of the Privy Council, several members of the diplomatic corps, the provincial chief justices, leading civil servants, leading members of the bar, and, of course, the puisne justices of the Supreme Court.[107] Anglin's effort to raise the profile of the court was probably a product of his own desire for status, but in magnifying his own position he also emphasized the position and role of the Supreme Court.