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Toward Centre Stage

1933–1949

The early years of the Great Depression witnessed considerable ill health and personal problems among the justices of the Supreme Court of Canada. In Decemberr 1931 E.L. Newcombe died, and in the following year all other members of the Court (with the exception of Arthur Cannon) were unwell. The leader of the opposition recorded the general public concern: 'Had a pleasant talk with Aimé Geoffrion, K.C. he discussed the great weakness of the Supreme Court, Duff ill, Anglin ill, Rinfret overdone & ill, Lamont & Smith not too well or up to much – 4 vacancies probable, – difficult to fill.'[1] A genuine problem existed. Most serious was the ill health of Chief Justice Anglin. Early in 1929 he applied for a leave of absence in the hope that a prolonged rest in the Caribbean would restore him to vigour, but the cure was unsuccessful. In the fall Prime Minister King found the chief justice 'to be failing, to have lost all his brightness, has little to say for himself.' In each of the next four years Anglin found it necessary to apply for further leaves. On the first three occasions the government acceded to his requests, but by early 1933 some other response was called for.[2] Mackenzie King, as leader of the opposition, was quite disturbed by the chief justice's condition: 'C.J. Anglin ... called here this afternoon. He could not speak & I felt he was going to pass away when he took a seat. He will not last long ... Saw Judge Anglin about resigning [;] advised him to do so, he can hardly speak ... It is quite sad to see a man give up his life work. Anglin is only 68 [67], – a fine intellect, but too vain. I shall be surprised if he lasts long.'[3]

Should a man in such physical condition have been on the bench at all, much less have been serving as the head of the highest court in the country? Rumours of Anglin's impending resignation had been circulating publicly for the past two years, and the government decided that now was the time for decisive action. The chief justice was threatened with an investigation into his capacity to hold the position.[4] Early in February he tendered his resignation to take effect on the last day of the month; three days after that he was dead.

The government of R.B. Bennett was now faced with the problem of selecting a new head of the Supreme Court of Canada. There is no evidence that anyone other than Lyman Duff was seriously considered for the post, but Bennett did have some qualms. Duff had been seriously ill in 1928 and had undergone abdominal surgery for cancer in 1931. In 1932, following his strenuous work on the Transportation Commission, he had suffered a severe nervous breakdown. Each of these illnesses threatened his life and his ability to remain on the bench. His capacity for recovery was impaired by his alcoholism. Late in 1932 Duff seemed to have rebounded, and order and companionship had been brought to his domestic life by his sister.[5] Bennett discussed the problems of the Court with Duff and voiced his misgivings about the justice's future role there. Duff responded by offering to resign if doing so would facilitate government policy regarding the Supreme Court. Still Bennett hesitated. Finally, in mid-March he confirmed the elevation of Duff.[6] Once decided, Bennett threw his full support behind the new chief justice, naming Duff a knight (KCMG) in 1934.

The selection of the new chief justice was a popular one. His elevation had been widely predicted and met with considerable approval. Several newspapers and magazines compared Duff to the most 'distinguished judicial luminaries in the world,' while others judged him to have the best legal mind in the modern history of Canada.[7]

With the leadership of the Court finally stabilized, two vacancies had to be filled. Newcombe's death in 1931 had left the Court with no representative from the maritimes. The position had tended to rotate among the three eastern provinces, particularly between Nova Scotia and New Brunswick. It is therefore not surprising, given that no one from the latter province had been on the Court since 1901, that both the prime minister and members of the local bar turned to that province for a candidate. For the last several years Bennett had called for an improvement in the quality of judicial appointments. Over a month after Newcombe's death, the prime minister wrote a thoughtful letter to the

premier of New Brunswick explaining the difficulties of finding an able candidate from his native province. 'To be perfectly frank with you,' he wrote,

> we have no one in New Brunswick fitted by training and experience to become a member of the Court of last resort, in this Dominion. We certainly have several that are as good as some members that now sit on the Bench ... I really find myself in a most difficult position. When you think that New Brunswick has been represented in the Supreme Court of Canada by Chief Justice Ritchie and Mr. Justice King, you can readily understand how hesitant I am to become a party to appointments that will make the contrast so apparent.

There were no outstanding barristers in the province, Bennett decided; an unidentified judge was rejected as too old. Judge Oswald Smith Crocket also had a serious weakness. 'I have a very high opinion of Mr. Justice Crocket. He is a friend of mine. We sat in the House together. But the truth is, for eighteen years he has been a Trial Judge, and to suddenly transfer him to the Court of last resort in Canada, and expect him within a reasonable time to acquire the habit of an Appellate Judge, is asking a very great deal.'[8]

The prime minister pondered the problem for eight more months (at least tentatively offering the post first to the unnamed older judge) before finally (and presumably reluctantly) asking Justice Crocket to join the Court. Crocket had been born and raised in New Brunswick, the son of the chief superintendent of education. He was called to the bar in 1891, and thereafter supplemented a none-too-extensive legal practice by court and sports reporting for local newspapers. By 1896 he was active in local politics, transferring his allegiance to the Conservative party in 1898 and eventually sitting in the House of Commons (1904–13). Crocket had never seemed particularly interested in the law; he had left much of the work of his practice to his partner in Fredericton. Nevertheless, he accepted his due reward from the Conservative government in 1913, joining the Supreme Court of New Brunswick, King's Bench division. Three years later he accepted the additional post of sole judge of the provincial Court of Divorce and Matrimonial Causes. In these two judicial capacities Crocket remained until his move to Ottawa in 1932.[9]

Crocket was not a strong candidate. His experience at the bar was limited, and his years as a trial judge, as Bennett recognized, had not developed in him the mental attitudes and perspectives required of an appellate judge. At age sixty-four it was probably a little late to expect

Crocket to acquire a different judicial training, particularly with his reputation for inflexibility and a steadfast commitment to the security of traditional methods and approaches.[10] His judicial limitations probably were a major factor in Chief Justice Duff's patronizing and disdainful attitude toward him.[11]

One term after Crocket's appointment, another vacancy was created by Anglin's resignation. The minister of justice selected a native of his own constituency as the replacement. Frank Evans Hughes had been called to the bar in 1911. The law firm Hughes helped to establish in Toronto soon began to specialize in insurance law, particularly in motor-vehicle litigation, though the firm also had a wide general practice. Although he did a good deal of trial work, Hughes became best known as appeal counsel. The young lawyer also had experience as assistant crown attorney in York County. At age forty-nine Hughes brought vigour and a first-class legal ability to the Supreme Court. Hughes was a Catholic, and his appointment upheld the tradition of allotting one of the common-law seats to a member of that church.[12]

Hughes's appointment was arguably a good one. His lack of judicial experience was compensated for by his considerable work as appeal counsel. Unfortunately, after accepting the position, the Toronto lawyer soon found that it was not at all to his liking. He suffered a heart attack in 1933, and the move to Ottawa had a serious effect on his family. After a year in the new environment, he decided to leave, explaining: 'I have found it quite impossible to adjust myself and my family in a home outside of Toronto, in which I have lived so long.' In August 1934 he tendered his resignation, but stayed on through the fall sittings until early 1935.[13]

Hughes's departure created a problem for the government. There was already one vacancy on the Court; Justice Smith had retired in December 1933 and his seat had remained empty throughout 1934. The nature of the government's trouble in filling the post is unclear, since no documentation is extant. The rumour that Hugh Guthrie, minister of justice, was interested in the post seems unlikely. Finally, in January 1935, Henry Hague Davis was named to the position. Davis, the son of a Brockville, Ontario, merchant, had been called to the bar in 1911. Davis's legal practice included corporate law and criminal defence work. In 1933, after over twenty years in practice, Davis went to the Ontario Court of Appeal. On the Ontario bench he developed a reputation for a perceptive, discriminating mind and for judgments that were 'lucid and convincing.' He came to the Supreme Court at the age of forty-nine with two years' judicial experience. His appointment was so highly regarded that one law journal predicted Davis would eventually become chief justice.[14]

In July 1935 Guthrie selected a second resident of his constituency to join the Supreme Court of Canada. Patrick Kerwin, after being called to the bar in 1911, had formed a partnership in Guelph with Donald and Hugh Guthrie. Donald Guthrie died in 1915 and Hugh Guthrie was in the House of Commons continuously throughout this period, so that much of the work fell to Kerwin, giving him experience in a varied general practice. In the fall of 1932 his partner appointed him as a trial judge of the Ontario Supreme Court. He gained three years' judicial experience there before his promotion to Ottawa at age forty-five. Kerwin's appointment seemed to confirm two tendencies: he had no major political claims to the post, and, as a Catholic, he further entrenched the tradition begun by Anglin and maintained by Hughes.[15]

The Bennett government had now appointed four new members of the Supreme Court and promoted one other member to the position of chief justice. The government had been surprisingly slow in naming replacements; there was no acceptable excuse for leaving Robert Smith's seat vacant for almost fourteen months. But at the same time the government showed an impressive thoughtfulness regarding the process. Even though those selected were not all outstanding jurists, the Bennett government had tried to do the best it could for the Court. The traditions of regional and religious distribution of seats were not challenged, despite the lack of strong candidates in the maritimes. Except in the case of Crocket, politics – that is, reward for political service – played a more limited role in the choice of the new justices. This was not a pattern to which the incoming King government would adhere.

Justice Lamont's health began to deteriorate in the fall of 1935, apparently owing to heart disease. He was granted leave in November and died four months later. Lamont had had a history of ill health, and the vacancy came as no surprise; recommendations for the post were being received in Ottawa for two months prior to Lamont's death. It was taken for granted by all concerned that the new justice would come from the prairies. Several members of the provincial benches received strong and influential support, but one barrister, A.B. Hudson, had the backing of T.A. Crerar, the federal minister of the interior, and of the president of the Manitoba Liberal Association. Strong claims were also made that Manitoba deserved a representative on the Supreme Court.[16] It took the government only two weeks after the vacancy was created to select Hudson as the replacement.

Albert Blelloch Hudson had lengthy political experience. He was called to the Manitoba bar in 1899. The details of his private law practice are unclear, but it must have been extensive; he became a member of the bars

of Alberta and Saskatchewan in 1906. In 1914 he turned to politics. He was elected to the provincial legislature as a Liberal and served as attorney-general from 1915 to 1917. Hudson left the provincial political scene in 1920 and was elected as a Liberal-Progressive in the federal general election of 1921. Over the next four years he was influential in maintaining links between the Liberal and Progressive members of the minority Parliament; at least twice he rejected offers to enter the King cabinet. In 1925 Hudson returned to his private law practice, and remained án important force in Manitoba Liberal circles. He did not actively solicit appointment to the Supreme Court, but he did let it be known that he was available. He joined the Court at age sixty, with no judicial experience.[17] He was probably not the strongest candidate available for the post, but his political ties were strong enough to overcome his liabilities.

Hudson's appointment was favourably received, especially in the west, where he was considered a solid and respected spokesman for the prairies. That perception became important in the next few years when the Court judged legislation passed by the Alberta government. His genuine concern for the Supreme Court of Canada had been demonstrated in 1923–4 when he and others had tried hard to have Eugène Lafleur appointed to the Court as a means of strengthening the institution.[18] Finally, Hudson knew his way around the corridors of power in Ottawa and in the Liberal party – and in some respects that was beneficial for the Court.

With Hudson's membership, the Court evinced a healthy range of age and experience. Lyman Duff, aged seventy-one, had thirty-two years' experience in the judiciary, thirty years of which had been on the Supreme Court. At the other end of the scale, Justice Kerwin was the youngest at forty-six, and Justice Hudson had no judicial experience. The average age of the Court members was fifty-eight, and the average amount of time spent on the bench was twelve years. The maritimes had one representative, Quebec two, Ontario two, the prairies one, and British Columbia one. Three justices were Roman Catholic, two were Presbyterian, and two were Anglican.

The one member of this Court who was not active was Arthur Cannon. Though he was only fifty-nine, his health had begun to deteriorate, necessitating leaves of absence in 1936, 1937, and 1939. During this last leave the Quebec jurist died. Six weeks later a replacement was named. Though he was not the government's first choice for the position, Robert Taschereau was a prominent representative of Quebec's ruling élite. Related to four previous members of the Court, he was the son of the

long-time premier of Quebec, L.-A. Taschereau. Robert Taschereau had been called to the bar in 1920. He joined his father's large law firm in Quebec City, where he acquired a broad legal experience. He taught criminal law at Laval University (1929–40) and civil law at the University of Ottawa (1935–40). Taschereau also turned to politics, and sat as a Liberal in the Quebec legislative assembly from 1930 to 1939. At the age of forty-three, he joined the Supreme Court with no judicial experience.[19] His appointment was surprising; the strength of his ties to the ruling élite and to the Liberal party could not hide the fact that there was nothing outstanding about his career in law to this point.

In 1943 Justice Crocket retired at the age of seventy-five. His place was taken by one of the most outstanding legal minds ever to come out of the maritimes. Ivan Cleveland Rand read law in a leading Moncton office before proceeding to Harvard Law School, from which he graduated cum laude. Rand then joined the bar of New Brunswick in 1912 and entered private legal practice, first briefly in Moncton and then in Medicine Hat, Alberta. In 1920 he returned to Moncton and turned to politics. Late in 1924 he was appointed attorney-general in the provincial Liberal government; subsequently he was defeated in one by-election, successful in another, and defeated in a general election, all within the space of nine months. In 1926 Rand left his private law practice and joined the Canadian National Railway, first as Atlantic regional counsel and then as commission counsel. He moved to Ottawa in 1943, just before his fifty-ninth birthday.[20]

There was little debate within the government as to the appointment of Rand.[21] The new justice brought to the Court a wide range of experience, with highly developed knowledge in corporate, labour, and administrative law. This and the quality of his intellect more than compensated for his lack of judicial experience. Rand's appointment brought to three the number of justices named to the Supreme Court since the King government's return to office who had come directly from the bar and who also had given service to the Liberal party.

In the meantime, Chief Justice Sir Lyman Duff had reached retirement age. In fact, he had passed the point of mandatory retirement in January 1940. The government waived compulsory retirement and extended Duff's term for three years. The reasons for the only retirement waiver in the history of the Court are unclear, except that it reflected Duff's standing and reputation. The prime minister recounted one of the government's considerations: 'Discussed with Lapointe position of the Supreme Court, Duff's time being up in January. Four of the judges are anything but well.

Court very weak. He could think of no one suitable being appointed Chief Justice – from B.C., or to take Duff's place on the Supreme Court Bench. I agreed to having Duff's term extended a year if he were agreeable.' To move for the extension well in advance of the time required must have given the Court additional stability. While this extension gained all-party support in 1939, the same was not true early in 1943 when the government sought to add a further year to Duff's term. Opposition members pointed to the chief justice's age and lack of vigour – he was now seventy-eight – and both directly and indirectly to his chairing of the politically contentious 1942 royal commission on the dispatch of Canadian troops to Hong Kong. This time the extension of his term was resisted by the opposition and others.[22]

The government held the chief justice in high esteem; the prime minister considered appointing him the first Canadian-born governor-general in 1940. Duff continued to lead the Supreme Court as effectively as always, but by 1943 he was feeling his age. To a friend he wrote that he was experiencing 'the sort of lethargy which seems to come over me in fits, and when I feel as if I were utterly drained of energy and capacity for the simplest sort of action.'[23] The chief justice was allowed to retire in January 1944.

In his speech to the Court at the end of his career, Duff summed up his years on the bench. Though his personal influence had been considerable, it was limited by the Court's definition of the judicial function. The Supreme Court of Canada was 'engaged ... in administering and applying in practice rules of law founded on the principles' of the common law and the civil law.[24] The crucial words were 'administering and applying.' No mention was made of developing those rules or principles, or of altering them to changing circumstances, or of using his own considerable intellectual talents to mature the law. Duff had seen his task as administering and applying the rules and principles of others.

The selection of a successor was not difficult. Thibaudeau Rinfret, the senior puisne justice, had been at the Court since 1924, and his French-Canadian background made him an attractive candidate to a government that was trying to subdue ethnic tensions and animosity in the midst of war. It was rumoured that J.L. Ralston, minister of national defence, wanted the post, but King was unwilling to disrupt his cabinet and was attracted by the idea of appointing someone from Quebec. King commented on his choice:

Though he is not strong I do not see how Rinfret could be passed by at this time. It

was more or less understood since Duff's term was extended that it would not prevent Rinfret succeeding him. I shall be surprised if Rinfret lasts any length of time, once he has this additional responsibility ...

My own feeling is that Rinfret is a little on in years [sixty-four years old] for the appointment and is not very strong ... However I think it is due to the P[rovince of].Q[uebec]. to have a Chief Justice, and to Rinfret himself for having stood aside for Duff in the last couple of years.[25]

A few months after Duff's retirement, a second vacancy was created when Henry Davis died at the age of fifty-eight. By tradition these vacancies would be filled by representatives of the west and of Ontario. The government delayed the new appointments until the fall of 1944. First named was Roy Lindsay Kellock of Ontario, who had been called to the bar twenty-four years earlier. Kellock had been a member of a major Toronto law firm and had an excellent reputation as litigation counsel. He was appointed to the Ontario Court of Appeal late in 1942, where he remained until his elevation to Ottawa in 1944 at age fifty.[26]

There was some competition for the western vacancy. The contest was among the three provinces without a spokesman on the current Court. Since British Columbia had been represented by Duff for almost forty consecutive years, its claims to the seat were not strongly voiced. No resident of Alberta had ever been a member of the Supreme Court of Canada. In making this point, one western senator cited Alberta's rich natural resources, its development projects, and its increasing population, arguing that it was potentially one of the country's most prosperous provinces and it deserved representation. The status attached to a place on the Supreme Court bench is reflected in the senator's comment that he expected the prime minister to respond favourably, 'knowing that your sense of equity will incline you to correct a situation which puts Alberta in a condition of inferiority among the other provinces.'[27]

But Alberta lacked a strong influence in cabinet or in the Liberal party caucus to counter the impact of the Saskatchewan Liberal members of Parliament led by the powerful minister of agriculture, James G. Gardiner. The issue was discussed at a meeting of Saskatchewan MPs, and Gardiner made it clear that he felt his province's claims were persuasive. Justice Lamont was from Saskatchewan, but when he died, 'for reasons which do not need to be discussed now that appointment was transferred elsewhere [Manitoba]. I think that every consideration should be given to the possibility of having one of the present vacancies filled from Saskatchewan.'[28] Most frequently suggested were T.C. Davis (of the provincial

Court of Appeal), W.M. Martin (chief justice of the same court), and the recently defeated provincial attorney-general, J.W. Estey. In the end, Estey was chosen.

A maritimer by birth, James Wilfred Estey had been trained in law at Harvard. In 1915 he moved to Saskatoon, where he became a lecturer in economics and law at the University of Saskatchewan (1915–25), was called to the bar (1917), and entered private practice. Estey was involved in several law firms and partnerships, and developed a special expertise in litigation. From 1915 to 1921 he was assistant to the local crown prosecutor, and from 1921 to 1929 acted as the local agent for the provincial attorney-general. He was elected as a Liberal to the provincial legislature in 1934, where he sat for the next ten years; he served as minister of education (1934–41) and attorney-general (1939–44) until he and his government were defeated in June 1944. He was available to take on some new task when the call came from Ottawa three months later.[29] Though there is no doubt as to the intellectual qualifications of Estey, his appointment is a further indication of the King government's criteria for selection: no preference for judicial experience, considerable weight to service to the Liberal party, some minimum level of ability, and influential friends.

One final appointment to the Supreme Court was made by the King government. Justice Hudson died early in 1947, and once again there was debate as to which western province should provide the new justice. On this occasion most of the support seemed to be for someone from British Columbia, but it seemed difficult to find a qualified person who would accept the appointment. Prime Minister King commented on the problem in his diary:

> Ilsley [the Minister of Justice] was anxious to appoint Mr. Locke, of Vancouver, B.C., as a Justice of the Supreme Court. I urged that another effort be made to secure Colonel [Brigadier Sherwood] Lett. There is real difficulty in obtaining qualified men for the Supreme Court Bench. A choice had to be made from one of the four western provinces. Several of those who have been invited to come to the Supreme Court have declined.

Brigadier Lett turned down the proferred appointment, as, apparently, did others.[30] One is presented with the disturbing picture of the country's Supreme Court, at a time when it was about to be placed on a new and higher level of responsibility and stature, being unable to attract the most desirable candidates (as judged by the government).

One of the difficulties in attracting new members to the Court was the justices' remuneration. Salary levels had not risen since 1920. In 1932 the justices' salaries were subjected to a special 10 per cent additional income tax, and again during the Second World War the high general taxation rates fell heavily on the justices' income. A further problem was the absence of pensions for widows; when a justice died, his pension rights (or annuity) died with him. The salary and pension questions were constantly raised by the legal profession during this period, especially through the Canadian Bar Association. Some judges from other courts, including Justices Cannon and Lamont, registered their complaints against the level of remuneration and taxation by allowing their taxes to fall in arrears.[31] Progress in dealing with these problems was finally made toward the end of the war. In 1944 provisions, though by no means generous, were made regarding annuity payments to widows. Salaries were increased in 1946 to $20,000 for the chief justice and $16,000 for each puisne justice, and then in 1949 to $25,000 and $20,000 respectively. While these levels of remuneration would have been attractive to lawyers located outside the country's major economic centres, such as James Estey, they were apparently well below the expectations of leading members of the bar in the big cities.[32] But there were still problems in attracting new justices. One western member of Parliament pointed out, for example, that many western Canadians found the prospect of moving to Ottawa unappealing;[33] this was not a problem unique to western Canadians or to this period.

The post on the Supreme Court eventually went to Charles Holland Locke. The son of a county court judge, he was the last member of the Court to receive his basic legal training in law offices rather than in a university setting. Called to the Manitoba bar in 1910, he began practice in Winnipeg. In 1928 Locke joined a law firm in Vancouver. There he became a leader of the provincial bar and acquired a reputation for considerable ability. His appointment to the Supreme Court at age fifty confirmed the government's lack of interest in judicial experience, but was an exception to the strong tendency to reward past political service to the party in power – Locke had been active in the Progressive Conservative party.[34]

This does not mean that party service had been abandoned as a major criterion of selection. Mackenzie King was reluctant to appoint Charles Locke to the Court, and in fact two other men were being considered for appointment as a reward for cabinet service. In 1948 King toyed with the idea of offering the chief justiceship (which was not vacant) to Louis St Laurent as recompense for having stayed on in politics. In 1947 and again

in 1948, serious consideration was given to allowing J.L. Ilsley to retire to the Court. Ilsley had performed major service in the cabinet since 1935, and was very interested in spending his remaining public years on the bench. To make room for Ilsley, King contemplated expanding the number of justices at the Court or shifting Justice Rand back to New Brunswick as chief justice (or even back into private practice).[35] That the prime minister could have considered removing one of the best judicial minds on the Court to make room for a political colleague is revealing. The Supreme Court of Canada was still viewed as an institution open to partisan political exploitation on the same level (and no higher, except perhaps in status) as the array of government agencies and boards that now proliferated.

This tendency to partisan use of judicial appointments (not only to the Supreme Court) caused a good deal of concern in this period. Protest against it was, of course, an old refrain within the legal profession. To his credit, R.B. Bennett had repeatedly spoken out against such a selection process,[36] and during his time in office political service was not a major criterion for appointment to the Supreme Court. With the return of the practice under Mackenzie King protests increased, especially in the 1940s, though with little apparent impact.[37] If the position of the judiciary within the political structure was changing, it was not doing so very quickly.

Not surprisingly, the justices' involvement in nonjudicial tasks continued. In 1934 Chief Justice Duff agreed to act as sole commissioner of a federal royal commission to inquire into allegations regarding the manner in which former Prime Minister Arthur Meighen had discharged his duties as commissioner of the Ontario Hydro-Electric Power Commission. The federal inquiry was cancelled when the Ontario government appointed a parallel royal commission, but his acceptance of the assignment does point to Duff's continued willingness to allow himself to become involved in partisan issues. In the fall of 1935 Justice Davis acted as the sole commissioner to investigate the longshoremen's industrial dispute on the Vancouver waterfront. In 1937 Justice Rinfret was named to the famous Royal Commission on Dominion-Provincial Relations. Ill health combined with the extra duties forced Rinfret to resign the appointment within three months.[38] A year later Justice Davis was again persuaded to lead a one-man royal commission to investigate what is known as the Bren-gun scandal. Members of the Conservative party had charged that the contract to manufacture the gun had been improperly handled by the government. Davis, a member of the Court, was placed in the uncomfortable position of having to assess government policy and to weigh partisan charges.

A similar task cropped up in 1942. Again members of the Conservative party alleged that the government had made serious errors in judgment and management in dispatching Canadian troops to Hong Kong shortly before Japanese forces had captured the colony. Once again the King government called on a member of the Supreme Court, Chief Justice Duff, to conduct a one-man commission of investigation. The chief justice claimed to have been pressured into the assignment; 'I dislike intensely going on with the government job,' he wrote to Justice Davis, 'but it was put to me in such a way that I could not refuse.' Duff's report, which generally absolved the government of all charges, aroused considerable reaction among elements within the Conservative party. His biographer makes it clear that the chief justice did not conduct this inquiry in a thorough, balanced, or impartial manner. When the chief justice's extension of term was debated in the House a few months later, his handling of this partisan affair was one of the grounds on which he was attacked.[39] Duff's role in this commission, predictably, brought him (and with him the Supreme Court) into the direct firing line between the Conservative and Liberal parties. Once again the Court and its members could be seen as a political instrument to be used without apparent constraints in partisan controversies.

The use of the justices for such purposes as the Hong Kong inquiry had obvious advantages for the prime minister. He needed a commissioner whom the public trusted, and 'no one,' King recorded, 'would give the same sense of security, of impartiality and of wisdom, in a matter of this kind as the chief justice of Canada.' He needed to make use of Duff's image of neutrality; if that image suffered as a result, for King that was a matter for the future – the problems of the present were more important. Partisan political problems were also considered more vital than the character and stature of the Supreme Court of Canada. The prime minister's priorities and the place of the Court in the political system were made apparent when he instructed Duff: 'I really felt it might be a help rather than a burden to him if he would get an ad hoc Judge to act in the courts and forget about the courts for a time, and just interest himself in that [Hong Kong] question which was one of importance to the British Government as well as to our own. One which was an important war matter.'[40]

The war and the solution of an immediate political crisis were top priorities; the Supreme Court ranked so low that its own leader was told to forget about it for a while. From a political point of view and in terms of the immediate national interest King may have been correct in his priorities,

but the Court was exploited so frequently that it was often seen as a subordinate institution.

Three years later, in 1945, Justice Kellock was named to head a royal commission on the Halifax VE-day riots. In contrast with this rather innocuous assignment was the 1946 royal commission on espionage. Early in February two Supreme Court justices, Taschereau and Kellock, were appointed to investigate espionage in Canada as a response to the revelations of a Russian defector, Igor Gouzenko. The commission worked in secrecy, and no public announcement of its existence was made until nine days after it had commenced work. All of its hearings were held in camera. Various persons appeared before the commissioners to give evidence, including many who were implicated in some of the charges and some who had been arrested without charges being laid. The commission operated in a quasi-judicial manner, but violated judicial norms and individual civil liberties. Much of the evidence heard was unsubstantiated and would not have stood up in a court of law; persons arbitrarily detained were kept in solitary confinement and were denied the right of habeas corpus and access to counsel. These practices were justified as being in the national interest, and are a reflection of the growing cold-war atmosphere.[41] It had been the government's decision to give the commission the power to detain persons and refuse them the right to counsel. That two members of the highest court in the land could easily and repeatedly violate civil rights and judicial norms is as appalling as it is indefensible.

Royal commissions were not the only way in which Supreme Court justices were used for non-judicial purposes. In 1932 Justice Rinfret was appointed to a government committee respecting the administration of the Pension Act within the civil service. In 1947 Justice Rand was the Canadian representative on the United Nations' Special Committee of Observation in Palestine. Two years later Justice Kellock was named to head an inquiry into the fire that destroyed the *Noronic*.

More common than these assorted tasks were labour arbitrations assigned to the Court. In 1941 Justice Kerwin was named chairman of two conciliation boards dealing with Canadian railway employees. Ivan Rand's arbitration of the 1945 Ford strike led to his compromise (now known as 'the Rand Formula'), obligating non-union workers to pay union fees without joining the union, a practice that became standard in North America.

The period was marked by little intrusion by the justices into the policy-making process of government. It is true Chief Justice Duff seemed

to have no compunctions about recommending various acquaintances for judicial appointments.[42] Duff also took advantage of his position and his experience during the First World War to warn the prime minister in 1941 about the potentially disastrous result of conscription. Mackenzie King did not need much persuading in this regard; in 1944, when the cabinet was in the midst of a tense debate over the adoption of compulsory overseas military service, the prime minister wrote, 'I said every member of Cabinet should talk with ex-Chief Justice Duff about what he felt about enforcing conscription in the last war and what he thought it might lead to in this.'[43] It is possible that advice was offered more frequently than this and that the evidence is simply not extant. But even without such advisory activity, the justices' wide-ranging duties, outside their official Court responsibilities, are significant in their extent and number.[44]

These non-judicial activities undoubtedly impaired the Supreme Court in fulfilling its judicial functions, at least by taking justices (and staff) away from their Court work and exposing the Court to additional public criticism. However, the service of the Court and its members to the country should be recognized and appreciated. For various reasons and at various times minor and major extrajudicial duties were carried out in the service of the country. In this sense the Supreme Court of Canada was becoming a useful institution within the Canadian political system, and some of these activities helped to enhance the Court's prestige. But was political activity appropriate for a supreme court in a federal system?

One of the problems the Supreme Court faced in this period was not new but was becoming more noticeable: regional discontent. The western provinces, having finally gained a second seat on the Court in 1927, struggled not so much over retention of the two seats as over their distribution. Because Sir Lyman Duff held one of the seats for a long period, during his tenure only one western seat was available for new appointments. Alberta especially felt its lack of representation on the bench. In 1933 the Calgary Bar Association passed a resolution calling for the elevation of any one of Alberta's judges;[45] in 1936, 1944, and 1947 similar missives reached Ottawa; Justice Frank Ford was a favourite candidate. In any case, it remained difficult to persuade prospective judicial candidates to move east to Ottawa.[46]

Complaints regarding distribution had always been largely about status. A seat on the Supreme Court of Canada was viewed as a reflection of a province's stature and importance within the dominion. Lack of representation could develop into a feeling of alienation, a sense that the

Supreme Court was removed or aloof. The editor of the *Manitoba Bar News* suggested in 1930 that the Supreme Court go on circuit to various provincial capitals once a year.[47] This proposal was followed up in more detail a few years later by a leading Edmonton solicitor, P.G. Thomson, in a letter to the minister of justice, Hugh Guthrie:

> *Presumably your intimate knowledge of matters legal and judicial is largely centred round Toronto and Ottawa and for that reason you may not appreciate as thoroughly as we do out here the disadvantage, upon occasions, of being so far removed from the Judicial centre of the Dominion. To the ordinary litigant here as well as his solicitor, 'East is East and West is West,' particularly in matters judicial and often where an appeal to the Supreme Court at Ottawa would be advisable the expense as well as the time involved so far as the Western lawyer is concerned is prohibitive.*

The Supreme Court was so far away that an appeal of a western case would require a western lawyer to be away from his office for at least three weeks. Thus, it was 'almost compulsory' to employ eastern counsel. To an eastern lawyer the case was simply 'another Western brief but to the Western lawyer it means bread and butter through the loss of a substantial fee.'

As a solution, Thomson proposed that the Supreme Court hold sittings once a year in each of the four western provinces. Other judicial or quasi-judicial bodies went on circuit – the Exchequer Court, the Board of Railway Commissioners, and royal commissions – so why not the Supreme Court?

The benefits would be considerable, Thomson argued. Apart from improving the financial lot of western lawyers in the midst of the depression and acting as a mental stimulant to the western bench and bar, appeals that were barred solely because of expense would now be facilitated. Better still, 'the mingling and comingling of East and West would all make for a better understanding' across the nation. Finally, in the west where so many residents were of non-British background, it was necessary,

> especially in these times not only to tell them but to show them what is meant by British Justice and the spectacle of the highest Court in the land sitting in all its dignity out in the West in order to enable the poorest subject in the Dominion to obtain redress would be one to conjure with and would bring home to these people in a way nothing else could the advantages of living in this country and the

benefits to be derived if they become good citizens as well as the disadvantages should they fail to do so.

Such a change in the Court's procedure would be 'a landmark in the progress of the Dominion which will long survive and point the way to greater things.'[48]

The minister, after consulting law officers and members of the Supreme Court, rejected Thomson's proposal for a number of reasons. First, if the Court 'were to become a peripatetic institution,' the existing system of rotating justices among cases in order to give them time to deliberate and write would be 'quite impracticable.' Second, the system would be expensive, especially since the maritime provinces were certain to demand equal treatment. Third, the chief justice or the senior puisne justices would be unavailable to perform their duties as deputies to the governor-general. Fourth, the members of the Court would not have access to the libraries of the Supreme Court. Finally,

> it is not *prima facie* likely that the spectacle of seeing the Judges of the Supreme Court of Canada moving, bag and baggage, from one Provincial capital or centre to another with all the attendant inconveniences would be calculated to enhance the dignity and prestige of the Court. Nor is there any evidence of any considerable popular demand in the Provinces for such a change in the settled mode of conducting the business of the Court.[49]

The presence of the Supreme Court in provincial capitals might tend to overshadow provincial superior courts and reduce their authority and prestige without enhancing its own. It had long been British practice that the highest appellate tribunal be fixed and stationary at the national capital.

Despite the firmness of Guthrie's rejection, Thomson replied in detail to each of the minister's arguments. The Edmonton solicitor also sought to provide Ottawa with a positive reason for the reform. Provincial autonomy had gone too far, he contended; Ottawa ought to be more active in trying to bind the country together. 'Were the Supreme Court to move around as suggested it would be a practical example of that unity we all speak of but seldom practice and bring home, to the West in particular, in a way that nothing else would the realisation [that] we are in fact as well as in name a solid united Nation.'[50]

Thomson set out to refute Guthrie's charge that there was no popular support for the reform. In the early summer of 1934 the benchers of the

Alberta Law Society were sent a copy of his letter to the minister, and Thomson asked Guthrie's permission to circulate copies of the correspondence among other interested parties. The minister eventually agreed, providing that the material not be published in newspapers or periodicals. In April 1935 the Alberta legislature passed a resolution in support of Thomson's reforms.[51] Nothing more was heard of these proposals. They were not realistic and did not coincide with the incoming King government's ideas of the awesome and majestic power that ought to characterize the Supreme Court. Nevertheless, Thomson's suggestions served to point up important weaknesses in the Court. In the days before efficient air travel, the Supreme Court of Canada was not readily accessible to many appellants and solicitors. As well, the Court was perceived as aloof and lacking in an understanding of the law and the environment outside central Canada. But while the complaints about the court may have been well founded, they ignored its original and ongoing purpose: the institution was designed not to cater to regional differences but to reduce those differences and to articulate a common body of law for the entire country.

The timing of the complaints is important. They were voiced before many of Bennett's New Deal reforms were struck down, before the Alberta Social Credit legislation was found ultra vires in 1938, and before discontent broke out in the early 1940s regarding the high rate of reversals of Manitoba Court of Appeal decisions at the hands of the Supreme Court.[52]

All of these developments in the late 1930s and early 1940s could have encouraged regional discontent in the west regarding the Supreme Court, had that discontent not already existed.

The workload of the Supreme Court of Canada was declining in the 1930s and 1940s, presumably owing largely to the limitation of *de plano* appeals to amounts over $2,000. Tables 2 and 3 detail this decline and the distribution of the appeals by type of law. Except in the category of references, there seems to be no reason to question the representative character of these statistics of all cases heard, not just those reported.

Most of the justices went about their work in a typically private fashion. There can be little doubt that a good deal of correspondence and exchange of views occurred, but most justices, presumably because of concern for confidentiality, did not retain any records of their discussions. Fortunately, the papers of Chief Justice Duff provide some glimpses into the process of judgment.

TABLE 2
Volume of cases* at ten-year intervals

Type	1910	1920	1930	1940
Reference	1	1	3	–
Civil	83	114	74	64
Criminal	–	3	6	4
TOTAL	84	118	83	68

*Reported and unreported

TABLE 3
Volume of cases,* 1944–8

Type	1944	1945	1946	1947	1948
Reference	–	–	1	1	1
Civil	55	39	52	50	59
Criminal	6	5	3	10	12
Habeas corpus	–	1	–	–	–
TOTAL	61	45	56	61	72

Source: PAC, RG13, A5, vol. 2073, no. 156794
*Reported and unreported

Duff plainly took seriously his responsibilities as head of the Supreme Court. Illness, resignation, and political assignments repeatedly kept justices away from the Court during the 1930s, necessitating the use of ad hoc replacements. Duff went out of his way to welcome these temporary members and to make good use of their talents, encouraging them to rewrite draft judgments and to participate fully in the decision-making process. At the same time he kept a careful watching-brief on these justices and on the Court itself. The frequently changing composition of the Court, he explained privately in 1935, 'necessitates, especially on my part, a very severe scrutiny of every one of the appeals and really makes it impossible for me to indulge myself in extraneous arrangements [commitments].'[53]

The various Court members seemed to get along fairly well with one another. The tension of Duff's relations with Anglin was no longer a problem. Indeed, with the accession of Henry Davis to the Court, the chief justice had acquired a good friend and close collaborator. But Duff,

who could be quite testy at times, did not get along well with Oswald Crocket. The chief justice had little respect for Crocket's ability or knowledge, and patronized him. One anecdote survives to illustrate the relationship: after considering one appeal, Crocket (hoping to please Duff) approached Duff with the news that Crocket had decided to adopt the chief justice's views in the case and to enter a concurrence; in that case, snapped Duff, he would change his decision.[54]

It is not clear whether there was a standard procedure for dealing with cases once argument had been heard. Certainly there were exchanges of draft judgments and of opinion thereon; some of these exchanges occurred surprisingly close – sometimes less than a week – to the actual handing-down of the judgment. On other occasions formal or informal conferences provided the opportunity required to refine some reasons and discard others, but Duff was unable to convince his colleagues that regular conferences would be beneficial.[55] These exchanges of information were, of course, no guarantee of higher-quality judgments. Justice Davis, for example, commented that 'Cannon suggested that I should accept his view of the Quebec law because it was a Quebec case but I told him frankly that I did not concur in that view of [the] disposition of Quebec cases.'[56] Any hope that exchanges of draft judgments would lead to greater agreement (and thus to fewer multiple judgments in a case) was futile. In *Chapdelaine* v *The King* (1935), the five-man panel unanimously upheld the appeal and ordered a new trial. Justice Hughes wrote the leading judgment (nine pages long); Justice St Germain ad hoc added a second opinion (two pages long); and Chief Justice Duff contributed a four-page judgment concurring with the two justices and which he privately admitted 'adds nothing of substance to what you [St Germain] and Hughes have already said.' Justice Cannon concurred with Duff, but took one page to elaborate on a minor point. Only Justice Crocket was content with a simple concurrence.[57] The tendency toward writing unnecessary multiple judgments, to which Duff was a major contributor, smacks of a lack of intellectual discipline and rigour.

One important trend in the type of cases handled by the Supreme Court was the continuing increase in number and importance of reference cases. In 1934, for example, three references were sent forward by the Bennett government. In one the jurisdiction of the Tariff Board was found to be restricted; in two others dominion legislation (the Companies Act and the Companies' Creditors Arrangement Act) was upheld as intra vires.[58] These last two opinions, combined with recent judgments in the Judicial Committee of the Privy Council, encouraged Prime Minister Bennett to

introduce early in 1935 what is known as 'the Bennett New Deal.'[59] Aimed at dealing with some of the social and economic problems of the depression, the legislation covered such issues as unemployment insurance, minimum wages, commodity marketing boards, and agricultural credit. The constitutional validity of much of this legislation was doubtful. The opposition Liberal party, confident of victory in the approaching general election, opted not to challenge the New Deal in Parliament for fear that by doing so they would appear to be anti-reform; instead, the courts would be allowed to assess, and presumably to strike down, the statutes.[60] In this way any adverse public reaction would be directed at the courts rather than at the politicians.

Within two weeks of taking office in October 1935, the Liberal cabinet referred to the Supreme Court some eight statutes of the outgoing government. Counsel was the same for all the references: for the attorney-general of Canada, Newton W. Rowell and Louis St Laurent; for the attorney-general of Quebec, Aimé Geoffrion; for Ontario and British Columbia, the provincial attorneys-general in person. Other counsel represented the attorneys-general of New Brunswick, Manitoba, Alberta, and Saskatchewan. The proceedings were a major political event, with the Supreme Court of Canada the centre of attention. The excitement and sense of occasion were evident. The chief justice, for example, commented privately just days before the hearings began: 'Things are warming up around the court in anticipation of the references.'[61]

Though the references were important in focusing public attention on the Court, they exposed in the most dramatic fashion the potential for political exploitation in the reference system. To ask the Supreme Court to rule on the entire legislative package of a recent government was to require the Court to perform more a political than a judicial function. As one writer put it, 'in a New Deal type situation the reference device singularly lends itself to imposing upon the courts a role approximating that of a political decision maker. Almost inevitably, in such a situation, the courts must weight factors of political policy along with legal factors before rendering their decisions.' To judge a government's policies was a task for the electorate, not the Supreme Court. The potentially dangerous, partisan political elements of the process were revealed in several ways. R.B. Bennett, for example, attempted to defend the legislation by supplying the justices, through an intermediary, with additional information outside the courtroom. The intermediary reported 'that the atmosphere of the Court was saturated with politics' and that the justices were talking of little else.[62]

The references were heard, as required by statute, by a full panel of six justices (one seat being vacant). But when the justices rendered their opinions four months later, the results were not fully satisfactory to any of the interested parties. Viewed as a package, the opinions of the Court did not indicate whether a new constitutional direction had been taken. In two instances the federal legislation was found intra vires, in two instances ultra vires, and in one instance partially intra vires; on the last three statutes the Court divided evenly. Of the individual justices, Sir Lyman Duff was particularly active, writing opinions in every reference – twice for the entire Court and twice for the majority; only once did Duff find himself in dissent. The chief justice was strongly supported by Henry Davis, both in conference and in court. Both justices showed a marked tendency to uphold or extend the powers of the central government. Duff seemed more willing to take into account contemporary social and economic circumstances, and his decisions stand in contrast to his earlier constitutional jurisprudence and to that of the Judicial Committee. Justice Cannon demonstrated an equally strong inclination to maintain provincial powers. Any suspicion that the Court was taking a centralist direction was dispelled after the references were dealt with by the Judicial Committee in London. The Supreme Court was upheld in every instance but one, in which the holding was varied somewhat; in the case of the three statutes on which the Canadian justices had divided evenly, the committee awarded a solid victory to those defending provincial jurisdiction.

In immediate terms any import on the law from these decisions was limited. The references had, however, emphasized the potential constitutional role of the Court – so much so that when candidates for the vacant seat were being discussed, one ex-cabinet minister told Prime Minister King, 'It is clear that the Court from now on will be called upon to deal with constitutional questions more and more and it would be desirable to have on the Court those whose natural views would be inclined to view sympathetically the standpoint of our people.'[63] The references had also attracted public attention to the Supreme Court, and this in itself was unusual enough to be significant. It was no coincidence that an article about the Court soon appeared in *Maclean's Magazine* (1 April 1936). The writer exclaimed 'The Supreme Court of Canada! Truly a term to conjure with. The highest tribunal in our country. It awes one. Even the shoddy little [Supreme Court] building cannot rob the institution of that peculiar reverence one automatically feels.'

This public attention came at an important time. The handling of the

references gave prominence to the Court and substance to its national role. The stature of the Court was further enhanced two years later, in 1938, when the federal government referred three prominent pieces of Alberta legislation.

In 1937, under considerable pressure from his Social Credit party, Premier William Aberhart had pushed through the legislature a series of bills to give effect to social credit theory. Three acts were quickly disallowed by the Ottawa government on the grounds that they were invalid and would seriously disrupt the financial system. Three other bills were reserved by the lieutenant-governor – the Bank Taxation Bill, the Credit of Alberta Regulation Bill, and the Accurate News and Information Bill (the so-called Press Bill) – after passage by a special session of the legislature. An atmosphere of direct confrontation between Alberta and the central government had been created. With some relief the senior politicians involved reached a compromise: the federal powers of disallowance and reservation would be tested by a reference to the Supreme Court, accompanied by a reference of the three reserved bills.[64]

Again, a six-man panel (Rinfret being absent) heard the arguments of counsel. This time, however, the atmosphere was not as charged as it had been in 1936. In the reference regarding disallowance and reservation, only two provincial attorneys-general (from Alberta and British Columbia) were represented by counsel, and only the former was heard. Perhaps this lack of provincial challenge can be explained by the relatively straightforward nature of the issue. The justices found unanimously that the federal powers were unimpaired in law, constitutional practice or usage being deemed irrelevant, and that they were subject only to minor limitations.[65].

The reserved bills were struck down unanimously by the justices. On the grounds that they were themselves ultra vires and/or that they were dependent upon another act that was ultra vires, the banking and credit acts were found to be invalid. Similarly, the Press Bill was struck down; in that instance the reasoning was more varied, but there was agreement that it depended on an act which was itself ultra vires. Beyond that, Duff (writing for himself and Davis) argued that the 'right of public discussion' could be interfered with only at the national level; Cannon agreed, adding that the bill tended to nullify 'political rights.' Kerwin (writing for himself and Crocket) and Hudson declined entirely to discuss the civil-liberties aspect of the issue.[66] The Court was maintaining its conservative tradition with respect to questions of civil liberties. The weakness of the Court's 'defence' of freedom of public discussion was recognized by the chief justice himself:

[W]e concluded the Press Bill to be ultra vires because the effective operation of its essential provisions necessarily depended upon the validity of the Social Credit Act which we held to be beyond the powers of the provinces. You will see that I went beyond this in applying the principles, partly expressed and partly implicit, in Haldane's judgment in the Great West Saddlery case and the principle upon which the limitation of Dominion powers under Trade and Commerce has mainly been based as explained in Bank of Toronto v. Lambe, and held that the capacity of the Province to restrict public discussion on public affairs must necessarily find some limitation by reference to the admitted fact that the parliamentary institutions of the Dominion necessarily pre-suppose for their effective working such public discussion. Davis and I, however, express no opinion on the point whether the Alberta bill offends against this principle. The application of the principle in particular cases, if they arise, might be a very difficult and delicate job. We thought, however, that the statement of the principle would be of some value for two reasons: first, it would probably appeal to moderately sensible people as indicating a restraint which provincial legislatures ought to impose upon themselves; and, second, it might fortify the Dominion in respect of disallowance if any flagrant case arose.[67]

Despite (or perhaps because of) the weakness of this aspect of the decision, the Supreme Court's opinions in these references were roundly applauded. The *Canadian Bar Review* spoke of 'the widespread satisfaction and acclaim' with which the news was received across the country, and suggested that the favourable public reception of the Court's opinions 'furnishe[d] material support' for the developing movement to abolish appeals to the Judicial Committee. The *Vancouver Province* headlined its editorial, 'A Common Sense Judgment,' and the Montreal *Star* stated that the justices had done the people of Alberta a favour.[68]

During the Second World War the reference process continued, and several federal statutes, federal regulations, and Alberta statutes were tested before the Court. Although one of the Alberta acts was upheld in 1943, in general justices tended to support or extend the jurisdiction of the central government. For example, it was held that federal courts had jurisdiction in criminal matters over American military personnel stationed in Canada.[69]

A number of observers were disturbed by the failure of the central government to test, by way of a reference, the validity of the contentious Padlock Law passed by the Quebec legislature in 1937. That legislation seemed to involve a clear violation of civil liberties and to be invalid. Yet the federal cabinet chose neither to disallow the statute nor to refer it to

the Supreme Court, much to the disgust of some liberal spokesmen who expected even-handed treatment of doubtful provincial legislation whether from Alberta or from central Canada. Such criticisms were naïve. The reference procedure was a political instrument to be used in a calculated fashion; in the Quebec case the political disadvantages of reference far outweighed any advantages.[70] Laymen easily forgot that the Supreme Court was a passive institution; until an issue was brought before them, the justices could say nothing about it.

The years following the Press Bill opinion underlined the Supreme Court's reluctance to come out strongly in defence of civil liberties. In 1939 Justice Rinfret, writing for the majority of the Court, upheld the right of a tavern-keeper to refuse service to non-whites: 'Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either.' Only Justice Davis dissented.[71]

Some seven years later a civil-liberties issue arose in the 1946 reference of federal orders-in-council (issued under the authority of the War Measures Act) facilitating the deportation to Japan of Japanese-born residents of Canada or Canadian-born citizens of Japanese extraction. A further order-in-council authorized the establishment of a commission to inquire into 'the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada.' Major portions of the orders were upheld by the seven-man panel of justices, which thereby implicitly condoned government treatment of Japanese Canadians during the war.[72]

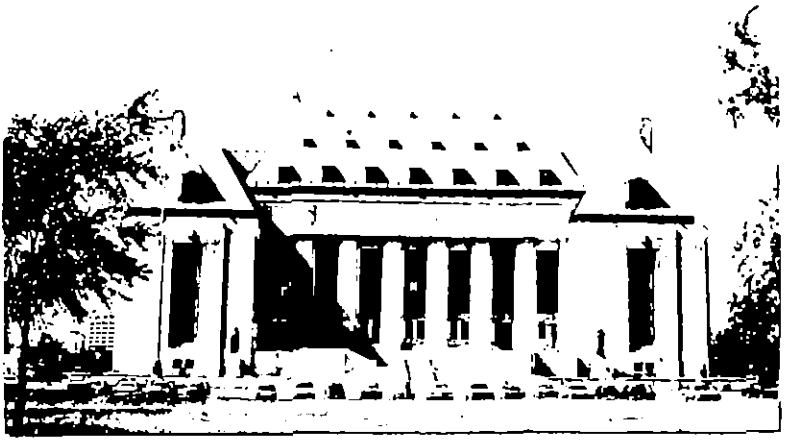
The Court as a whole felt bound by Supreme Court and Judicial Committee precedents upholding the unrestricted right of Parliament to take action deemed 'necessary for the security, defence, peace, order and welfare of Canada.' The fact that there were five judgments in this case reveals the Court's uncertainty about the legality of various parts of the orders. For example, a few of the justices, led by Rand, recoiled at the provision in one of the orders which required the deportation of wives and children (Canadian nationals) of husbands and fathers who were Japanese aliens resident in Canada or Canadians of Japanese extraction who had requested repatriation. Justice Rand was offended at the prospects of a natural-born Canadian of Japanese ancestry being forcibly deported; such a person deported to Japan could not claim Japanese citizenship and would in law retain his Canadian citizenship. In separate judgments, Justices Hudson, Kellock, and Estey agreed with Rand that

the deportations were illegal. Most of the orders, however, were upheld by the Court.

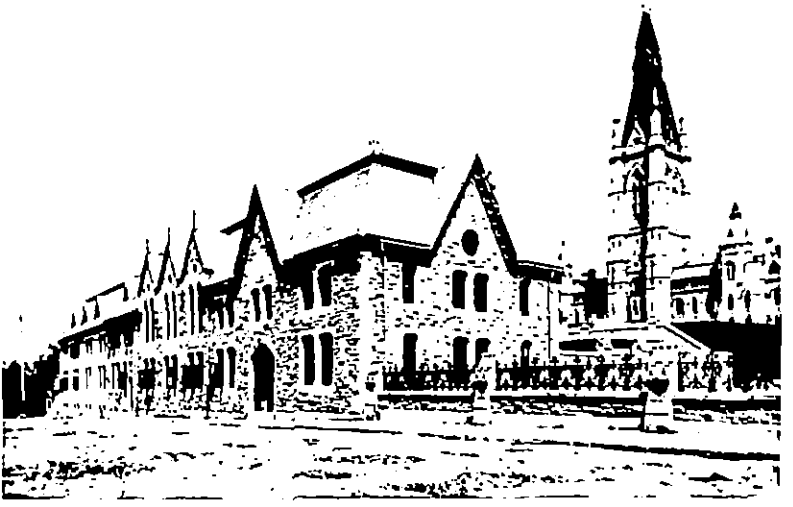
Between 1933 and 1949 the broader non-judicial functions of both the Court and its members expanded. Constitutional controversies had focused national attention on the institution. The chief justice was well known and highly respected. All in all, the stature and prestige of the Supreme Court were rising, as reflected in the changes in the institution's jurisdiction and even in its accommodation. The *Financial Post* carried this front-page editorial on the Court on 4 May 1946:

> Parliament and our Supreme Court are our two key institutions. The value and strength of our Supreme Court, the contribution which it makes to our national stability and unity, depends on the reputation for integrity, skill and wisdom which it wins for itself.
>
> Canada's national stature has done a lot of growing in recent decades. The Supreme Court ought to make sure [that] growth of its stature keeps pace.
>
> The Supreme Court's place in men's minds, its value to the strength and development of this nation, depends solely on the skill, patience and objectivity with which its members hear each and all of the cases before them; on the depth and quality of human understanding reflected in their judgments.[73]

There is no question that the institution was perceived to be potentially important. What was in doubt, as intimated by the *Post*, was whether the Court *by itself* could realize that potential. The immediate answer seemed to be that it would be given considerable assistance in that respect by the political leaders of the nation.



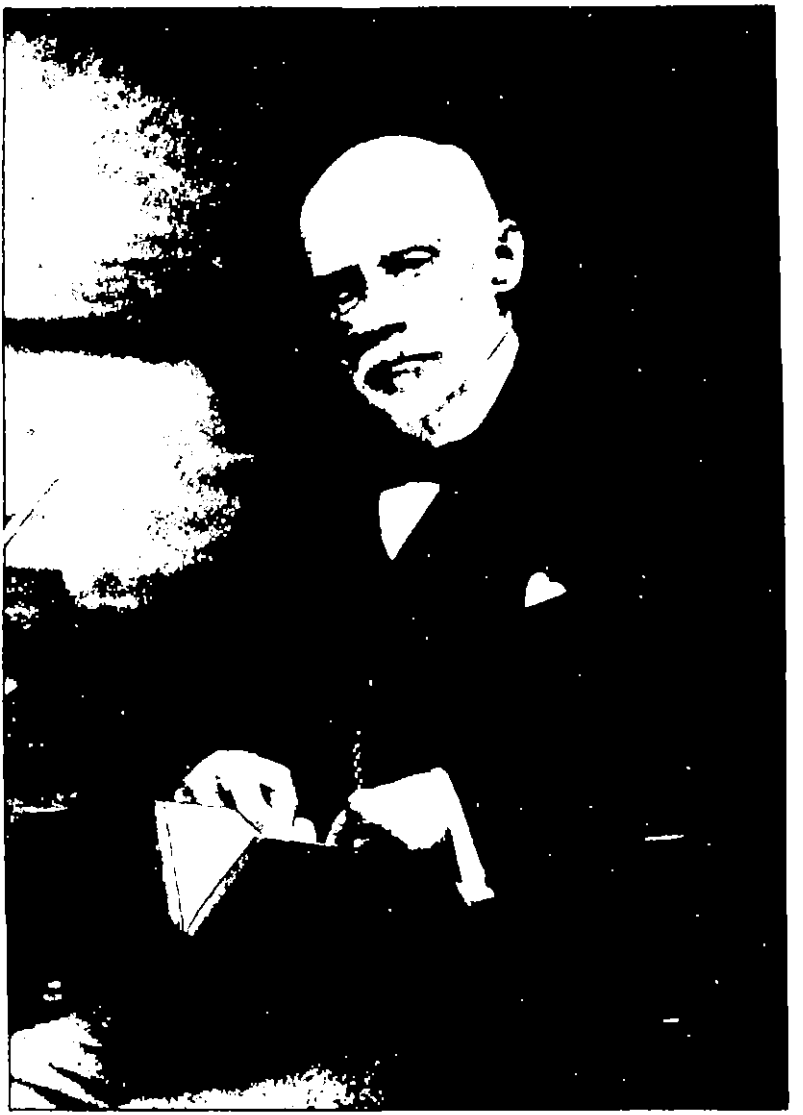
The Supreme Court of Canada building, 1939, Ernest Cormier, architect



The old Supreme Court building, at the foot of Parliament Hill, used by the Court between 1876 and 1946. The building was demolished in the 1950s to make room for a parking lot.

Sir William Buell Richards, chief justice 1875–9

Sir William Henry Strong, member of the Court from 1875, chief justice 1892–1902

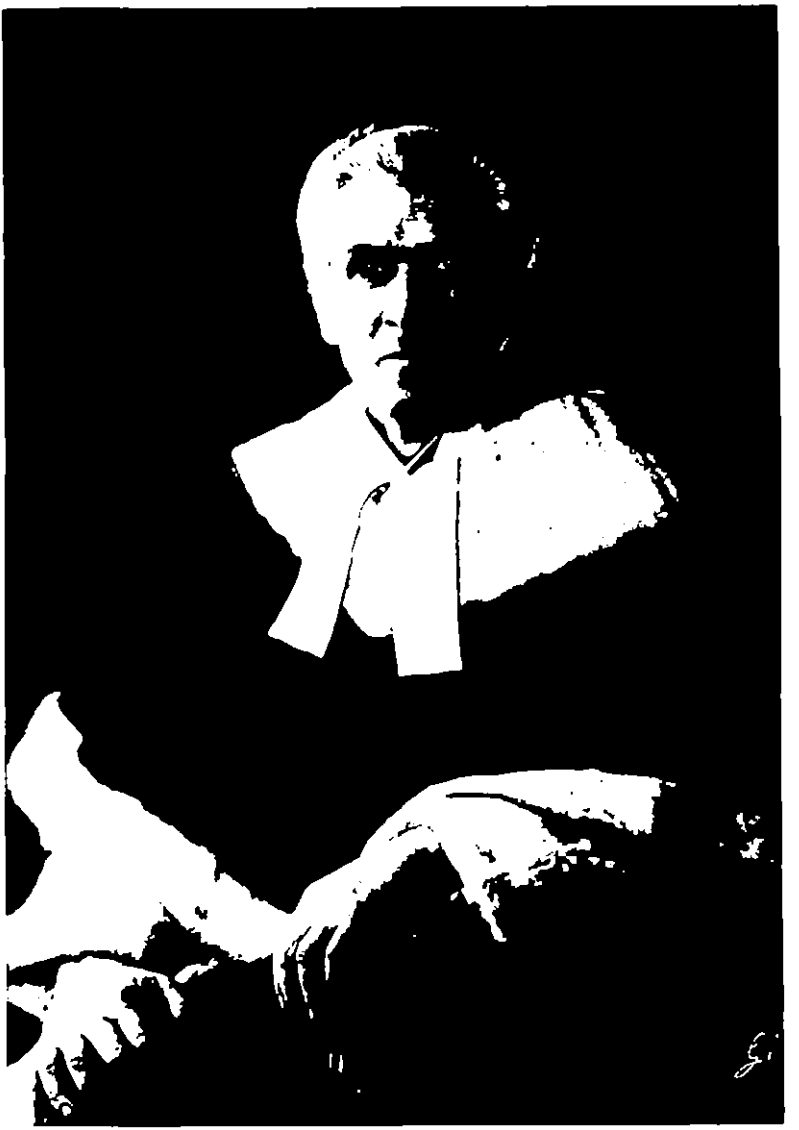


Henri Elzéar Taschereau, member of the Court from 1875, chief justice 1902–6

Pierre Basile Mignault, member of the Court 1918–29

Sir Lyman Poore Duff, member of the Court from 1906, chief justice 1933–44

Ivan Cleveland Rand, member of the Court 1943–59



Bora Laskin, member of the Court from 1970, chief justice 1973–84

Brian Dickson, member of the Court from 1973, chief justice 1984 to present