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Supreme at Last

1949

The years immediately following the Second World War witnessed a number of significant changes in the Supreme Court of Canada. The construction and occupation of a massive new courthouse was paralleled in law by the termination of appeals to the Judicial Committee of the Privy Council. Now truly supreme in Canada, the Court's new prestige was mirrored in an expansion of its membership to enable it to fulfil more effectively its new national functions.

In 1882, it will be recalled, the Supreme Court had finally moved into its own quarters. Though refurbished at that time and expanded in 1890, the courthouse, on the northeast corner of Bank and Wellington streets, had soon proved inadequate. The registrar complained in 1897 that

> nothing has been done to the Building. The walls in the new part, in which are situated the Judges' Chambers and officers' rooms, have never been whitewashed or the cracks made from the settling of the building, filled in. I think I am not using language at all too strong, when I say that the present condition of the building is filthy and quite unfit for the purpose for which it is used. Even the walls of the Court room are water stained, dirty and cracked, and some of the Judges' rooms look as if they were positively going to pieces so large and numerous are the cracks.[1]

Over the next ten years complaints of this sort were echoed repeatedly by members and officers of the Court and by members of the bar.

Fire was a major concern. The building had no fire walls and was constructed partially of flammable materials. Gas lighting was used until 1898, when it was replaced by electricity. A number of sheds had been built against the back of the building, and there were assorted piles of lumber near or against the courthouse. Inadequate storage space inside the building resulted in dangerous stacking of materials, and, of course, the library was crowded and its contents highly flammable.[2]

The crowded library was a second problem. By the turn of the century some 20,000 volumes had been acquired and 1,000 new volumes were being added annually. Already every foot of shelf space in the libary room itself was being utilized, and further shelving had been placed in four other rooms to accommodate the books. The resulting inefficiency was clearly frustrating to librarians, to library users, and to those whose offices were used to store books.[3]

Sanitary conditions were a third concern. Much of the furniture was moth-eaten, and the pests had begun to spread elsewhere in the building. In some of the justices' rooms, reported the registrar in 1900, 'moths have so destroyed the chairs that a person's fist can be shoved through the covering at many points and the material which has been used in the upholstering is alive with these insects. The result is that the judges' robes have been in some cases ruined.' The conditions that bred such an infestation were described in a 1904 letter from the registrar: 'The rooms are so badly ventilated that every morning the Judges require to open their windows for an hour or two, whatever the temperature or condition of the atmosphere may be outside, before it is possible to occupy them. The corridors and the rooms are constantly filled with bad odours, particularly in the morning, evidencing an unsanitary condition of the plumbing.'[4] Our present awareness of the potential harmful effects of such poor conditions suggests that over time the courthouse environment may have had a seriously deleterious impact on the health and mental alertness of both staff and justices.

The presence of the Exchequer Court was another problem. The Supreme Court facilities were shared by the Exchequer Court. The latter Court was perceived as inferior to the Supreme Court, and there was conflict over the two courts' use of the crowded facilities. Exchequer Court judges could use the courtroom and other facilities only when they were not being used by the Supreme Court. One result of this shared usage was occasional friction.[5]

Repeated attempts were made to persuade the Laurier government to take action. A new building was the obvious solution; at the least, major

improvements to the existing building were needed. Two ministers of justice (Mills and Fitzpatrick) took up the cause of a new building. Fitzpatrick persuaded the minister of public works to visit the existing structure with him, and both seemed to agree that a new building was needed. Fitzpatrick informed the House of Commons that 'we agree that no improvements of any value could be made and that the whole building would have to be reconstructed.' The leader of the opposition concurred, saying that 'to spend any money on the present building is in my opinion a waste of money.'[6]

In 1906, however, the government agreed to pay only for minor renovations. Improvements were made to the washrooms and the plumbing, new shelving and lighting were provided for the library, and a number of chairs were repaired. In the same year a one-storey extension to the library was built, adding some additional 2,500 square feet.[7]

Not surprisingly, the renovations did little to solve the basic problems. A reporter for *Maclean's Magazine* was surprised by 'the unexpected humbleness' of the courthouse, suggesting on a visit in 1914 that its unpretentious appearance and its location at the foot of Parliament Hill resembled 'to a certain extent the lodge at the gate of some great man's estate.' Complaints continued to be received about the building's quality and about the failure to provide the Court with a new home.[8] By the 1920s the quarters had again become cramped. The physical structure was deteriorating – the floors were warped and the walls had not been painted for a long time. In 1925 and 1927 further minor alterations were made to the building, improving the lawyers' consulting rooms and providing additional office space in the attic. The concerns regarding the hazard of fire remained, and although fire escapes were added in 1930, the library was still considered to be in serious danger.[9]

Perhaps the most telling description of the courthouse's inadequacy was given by Arthur Cannon immediately after his appointment to the Supreme Court in 1930. Returning home from his first visit to his new office, Justice Cannon wrote:

> Now that I am back to my room in Quebec I feel more vividly the difference with the small quarters you showed me on Wednesday. I fear that I will not be able to work comfortably in that hole. Evidently the Government when they increased to seven the number of justices of the Supreme Court forgot to provide accommodation for the seventh judge. I think we should draw the attention of the authorities to this abnormal situation.

I must find room for one safe, thirty book shelves, one revolving library, besides the desk and chairs.

If no suitable quarters are available in the building, perhaps the Registrar of the Court could make arrangements for an office near the Court House. This might involve personal inconvenience, but would be better than trying to do my work in inadequate quarters.[10]

During the tenure of the Bennett government, the Public Works Department went so far as to consider possible sites and costs for a new building, but no substantive proposals resulted.[11] Not until the King government returned to office in the fall of 1935 did any real progress take place.

Approximately coincident with the government's reference of the New Deal legislation to the Court, building and health inspectors were instructed to examine and report on the state of the courthouse. Before the year was out a devastating report had been submitted regarding conditions in the building. The inspectors documented fire hazards, rotting floors, deteriorating library books, and cramped quarters. Most shocking, however, was the assessment of the sanitary conditions and the occupational environment. Almost every room was badly lighted and poorly ventilated; there were signs of rodent and insect infestation; washroom facilities were bad for men, appalling for women ('The toilet for the women consists of one bowl placed in a dark corner underneath the stairway. It should be condemned forthwith.') The 'worst features' of the building were the justices' offices:

Practically all of these rooms have insufficient air space and are very badly lighted, the windows being placed in such a position as to render it almost impossible for the Judges to work without artificial lighting most of the time. If a desk is placed in a position where a sufficient amount of lighting is available, the occupant is placed in a draught, which is injurious to health. All of the rooms occupied by the Judges are thoroughly inadequate and injurious to the health of the occupants.

The inspectors recommended that the courthouse 'should be condemned as being injurious to the health of the occupants and totally inadequate for the purpose for which it is used.'[12]

With broad support across party lines and in the press, the government responded quickly. Early in 1936 the minister of justice formally requested cabinet approval for a new building to house the Supreme Court. The prime minister threw his support behind the project, and Parliament

passed an appropriation facilitating preliminary planning of a structure projected to cost between $1 million and $2 million.[13]

As has been seen, the courthouse had been in shocking condition for several decades. That action was finally taken in the late 1930s was the result of a combination of several circumstances. First, the role of the Supreme Court was changing. In late 1935 it had been asked to pass judgment on the principal components of the legislative package of the outgoing Conservative government, a previously unheard-of intrusion into the political arena. In addition, discussion of termination of appeals to the Judicial Committee was increasing. Second, the United States Supreme Court in the fall of 1935 moved into its prestigious new headquarters on Capitol Hill, and the contrast with the Canadian Court's circumstances was marked and commented upon. Third, and more important, the new prime minister was interested in the redevelopment of Ottawa as a federal capital. He personally hired a French planner, Jacques Gréber, whose views coincided with the prime minister's on creating an aura of grandeur in Ottawa; erection of a Supreme Court building would give Mackenzie King an opportunity to put some of his ideas into effect.[14]

It is not surprising that the prime minister became directly involved in the overall plans for a new courthouse. In June 1936, accompanied by seven cabinet members, he conducted a tour of proposed sites, walking west from Parliament Hill along the cliff overlooking the Ottawa River. Within two days the government architect received instructions from King to draw up plans for a new three-building complex. The central building would be the executive centre of government, housing the Privy Council, External Affairs, and the Department of the Secretary of State. On either side (and thus in a junior or peripheral position) would be a judicial building (for the Supreme Court and the Exchequer Court) and a building to accommodate various commissions (Civil Service, Tariff, and Radio Broadcasting). Only the judicial building was to be erected immediately.[15] The overall plan was a reflection of the court's new-found central yet subsidiary position within the Canadian polity.

It was now necessary to engage an architect to draw up plans for the buildings. Although the Royal Architectural Institute of Canada lobbied for a nationwide competition to select an architect and a design, the government rejected the idea, preferring at first to use architects in the Public Works Department.[16] Later, probably under the influence of Gréber and in keeping with the grandiose plans for national capitol development, it was decided to hire a private architect. The minister of

public works selected Ernest Cormier of Montreal for the lucrative and prestigious task.

Cormier was one of Canada's first architects of international training and stature. His initial training was as a civil engineer at the Montreal École Polytechnique. In 1908 he commenced six years of study in Paris at l'École des Beaux-Arts (where Gréber also had studied), and won a British scholarship for two years' study in Rome. After working in Paris for a few years Cormier returned to Canada in 1919. In Montreal he joined the faculty of McGill University and later taught at l'Ecole Polytechnique. His private practice flourished. By 1937 he had designed a number of important and impressive structures: the Montreal Palais de Justice (1922), churches in Montreal (1924) and Rhode Island (1926), and the main building at the University of Montreal. In 1931 he built his own home, a masterpiece of art deco style on Pine Avenue in Montreal. Cormier designed not only the house's structure and interior detail but also its furnishings. The Montreal architect later erected further major works: the National Printing Bureau in Hull, Quebec, the Laval Seminary in Quebec City, and several churches, hospitals and schools in various North American centres. In 1947 Cormier was selected as one of ten architects to serve on the planning board overseeing the design of the United Nations building in New York City, and he designed the main entrance doors, Canada's gift to the building.[17]

Sometime in 1937 Cormier set to work on the Supreme Court project. He consulted with the chief justice and registrars of the Supreme and Exchequer Courts and with representatives of the bar. Sir Lyman Duff, while emphasizing that the American example far exceeded Canadian needs, urged that a visit be paid to the new Supreme Court Building in Washington, and he himself did so. The chief justice hoped to combine in the new accommodation both the limited needs of the Court and an expression of its new stature. Cormier, on the other hand, had a somewhat more aesthetically pleasing building in mind. Both men agreed that the building ought to be impressive, pointing particularly to the desirability of an imposing foyer. Duff insisted on a small, intimate courtroom on practical grounds of acoustics and need. He failed, however, in his attempt to gain exclusive use of the new building – the Exchequer Court would continue to share the accommodations. The representatives of the bar were concerned about facilities for counsel and access to and user accommodation within the library.[18]

By early 1938 Cormier had prepared his initial designs, which were finalized by the fall of that year. The building had already grown in size

and therefore in projected cost. Visually the new edifice would be powerful, dominating, even intimidating. It was set well back from the public thoroughfare it faced, as though well removed from the mundane concerns of society. In shape and style, the building was very powerful. The size of the marble and granite blocks, the entrance steps, and the doors proclaimed the building's latent strength. On entering the building a visitor found himself in a huge foyer (108 feet long, 56 feet wide, and 40 feet high); its scale and elaborate materials reduced the visitor to a level of virtual inconsequence – clearly it was the institution that was important, not the individual. From the foyer the visitor's attention was drawn toward the courtroom, which occupied the central position in the building. The courtroom itself was somewhat disappointing for its failure to focus attention on the bench; despite its rich black walnut walls, the courtroom does not seem to follow through on the building's statement of the Supreme Court's significance.

The Supreme Court building, particularly its roof, was designed to reflect both the style of existing parliamentary and government buildings (but with cleaner lines) and the Court's new stature. In the amount of accommodation and the improved environment and in its modern fire-prevention techniques, the new structure solved the problems that had existed in the old building. But it seems unfortunate that in order to underline the Court's new role and prestige it was necessary to be so overpowering, so intimidating, so removed. The answer to the complaints of later observers about the Supreme Court's lack of public exposure may lie here – it seems to have been deliberately designed as a characteristic of the institution; aloofness was confused with stature.

Public perceptions of the building mirrored its awesome character. It was variously described as 'breathtaking,' 'an architectural spectacle,' and 'a truly humbling experience.' A stenographer working there in 1940 commented that the structure was so grand that every time she came to work she felt as though she was on her way to meet an Egyptian emperor.[19]

The contract for construction of the building had been let in the fall of 1938. By May 1939 work was far enough advanced that the foundation stone was laid by Queen Elizabeth during her visit to Canada with King George VI. Completion of the building in 1941 was approved by the government on condition that space be assigned to the burgeoning war-related Ottawa bureaucracy for the duration of the conflict. Thus it was that the Supreme Court building for its first four years was occupied not by the judiciary but by employees of National War Services, National Revenue, and National Defence.[20]

In January 1946 the Supreme Court of Canada finally moved into its new quarters, although three years later various war-services agencies still occupied third-floor offices. As befitted the occasion, the official opening of the new courthouse was marked by a ceremony patterned after the 1882 opening by Queen Victoria of the Royal Courts of Justice.

But the Supreme Court building was still not complete. First, the building was largely unfurnished, and the old furniture had been brought over from the old courthouse. Ernest Cormier applied in 1945 for authority to design new furnishings. Not until 1947 was he able to begin repairing damage, improving lighting, and designing furniture suitable to the building. Second, it quickly became clear that the library was poorly located and designed. Access to it from the courtroom was difficult and caused a good deal of inconvenience. It was decided to move the library to the third floor, thus making use of space originally designed for storage.[21] The result was a spacious and relatively convenient – if not aesthetically pleasing – library. By 1949 the Supreme Court of Canada was housed in its new structure, an impressive reflection of its national position and role.

For the first seventy-five years of its history the Supreme Court of Canada was not truly supreme. It was possible to appeal decisions of the Court to the Judicial Committee of the Privy Council, which meant that the Supreme Court could be overruled by the British law lords; similarly, the Canadian Court was bound to accept and apply precedents established by the Judicial Committee. In fact, appeals could go directly from provincial superior courts to the Judicial Committee without ever being heard by the Supreme Court. All of these factors seriously undermined the stature and authority of the Court.

This weakness was apparent as early as 1875, and particularly alarmed the Liberal member of Parliament for Hamilton, Ontario, Aemilius Irving. Irving had proposed an amendment to the Supreme Court Act preventing appeals going directly from provincial courts to England; the proposal was defeated. He then put forward a second amendment, which made the Supreme Court of Canada the final court of appeal and prohibited any appeal of its decisions to any court in the United Kingdom. This provision was adopted after considerable debate, and became clause 47 of the act. The clause caused problems for the imperial authorities, who held that a colonial legislature had no power to terminate any British subject's right to appeal to the foot of the throne. Finally, after much negotiation between Canadian and British officials, clause 47 was interpreted as not

applying to that right.[22] Any hope of making the Supreme Court truly supreme was thus dashed by British officials.

In 1887 the Canadian legislature returned to the issue by terminating appeals to England in criminal cases. The bill terminating appeal was not reserved or disapproved of by British officials, and remained on the books until it was challenged in 1926. With this one exception in the criminal field, the inferior role of the Supreme Court was not challenged further in the nineteenth century.

The Judicial Committee attempted to restrict Canadian use of the overseas appeal procedure. As early as 1877, in *Johnston* v *St Andrews*, their lordships held that where small amounts of money were in dispute and no general principle was involved, leave to appeal to the committee from the Supreme Court would be refused. Similarly, in 1883, in both *Canada Central Railway Company* v *Murray* and *Prince* v *Gagnon*, leave to appeal was refused on the ground that appeal would be permitted only 'where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.'[23] In petty matters or on minor points the decision of the Supreme Court of Canada would be final.

The presence of the Supreme Court, however, did have a substantial impact on appeals to the Judicial Committee. Once the Court was established there was a noticeable drop in the number of *per saltum* appeals (those which bypassed the Supreme Court) in the 1880s, especially from Quebec (see table 4). At the same time, 48 per cent of the appeals from the Supreme Court were upheld in London.

The total number of appeals to the Judicial Committee held steady in the 1880s and began to increase in the 1890s. Canadian officials therefore decided to work within this appeal procedure to improve it or make it more acceptable or useful to Canadians. By 1888 the Macdonald government had begun to consider the appointment of Canadians to the Judicial Committee.

At this time Canadians were seeking to play a greater role within the British Empire in general – as seen, for example, in Canadian support for the Imperial Federation movement and the British Empire League. This Canadian support for the empire can be interpreted as a manifestation of Canadian nationalism, as a means by which Canadians could play an important role on the world stage through a gradual assumption of a share of the leadership of the empire.[24] The minister of justice explicitly pointed

TABLE 4
Appeals from Canada to the JCPC by number and per cent upheld

Jurisdiction appealed from	1870–80	1881–9	1890–9	1900–9	1910–19	1920–9	1930–9	1940–9	1950–5
SCC	2 (–)	21 (48)	16 (50)	35 (43)	48 (48)	52 (31)	41 (37)	24 (25)	14 (43)
PEI	–	–	–	–	–	–	–	–	–
NS	3 (100	5 (60)	5 (60)	2 (–)	1 (–)	4 (25)	2 (–)	–	–
NB	2 (100)	1 (–)	1 (–)	–	–	3 (–)	–	–	–
PQ	48 (36)	22 (45)	21 (29)	27 (37)	12 (42)	22 (50)	9 (22)	1 (100)	–
ONT.	1 (100)	4 (–)	10 (30)	26 (35)	31 (48)	18 (33)	16 (38)	7 (29)	–
MAN.	–	1 (–)	3 (33)	1 (–)	7 (43)	4 (25)	1 (–)	–	–
NWT	–	–	–	–	–	–	–	–	–
SASK.	–	–	–	–	3 (33)	3.(–)	–	1 (100)	–
ALTA.	–	–	–	–	5 (40)	4 (50)	4 (25)	2 (–)	2 (–)
BC	–	–	6 (50)	7 (71)	26 (46)	13 (38)	9 (33)	1 (100)	3 (100)
Other	–	–	–	–	–	2 (–)	2 (50)	–	–
TOTAL	56	54	62	98	133	125	84	36	19
% avoiding SCC	96.4	61.1	74.2	64.3	63.9	58.4	51.2	33.3	26.3

Source: SCC subject file no. 66

to Canadian membership on the committee as a means of thwarting those who advocated 'the judicial independence of Canada.'[25] Instead, the measure would enable Canadians to share in the formulation of imperial law.

The Conservative governments of the 1890s certainly pushed for Canadian representation on the Judicial Committee.[26] There was considerable discussion of the proposal in Canadian legal journals, particularly because, for some proponents, the reform was connected with criticism of the Judicial Committee's recent constitutional decisions (especially *Hodge* v *the Queen*, 1883). Publications such as the *Legal News* and the *Canada Law Journal* sought to defend the committee and to question the need for change, while the *Canadian Law Times* and *Saturday Night* challenged the committee's lack of knowledge of and contact with the colonies. In 1895 the British government adopted the reform, and within two years senior justices from Australia, South Africa, and Canada had joined the committee.

From that date forward until 1954 at least one Canadian was always a member of the Judicial Committee. Every chief justice of Canada in the period was appointed to the committee, though sometimes after a few years' delay. In addition, one puisne justice, Duff, was named to the Committee. No Canadian outside the Supreme Court of Canada was ever named to the committee, although the Laurier government contemplated nominating Edward Blake.[27] Appointment of a justice to the Judicial Committee became a means by which the Canadian government reinforced the Supreme Court's position at the apex of the national judicial structure.

It is not clear how significant the reform was. Several of the Canadian members attended only occasionally – for example, Strong, Fitzpatrick, and Davies. During the 1920s and 1930s Anglin and Duff took turns on the Committee, each attending in alternate years. Moreover, Canadian participation on the committee was limited to the summer months when the Supreme Court was in recess. Though the reported cases considerably understate the justices' total work when in London, they nevertheless give an indication of the rather limited number of important cases in which this appointment involved the various justices. Sir Henry Strong sat on twenty-eight reported appeals, Sir Elzéar Taschereau on twenty, Fitzpatrick on nine, Davies on three, Duff on forty-four, Anglin on nine, and Rinfret on thirteen. Only four of the justices ever wrote a reported opinion for the committee (which handed down only one opinion in each case). Strong wrote eight, Taschereau one, Duff eight, and Anglin two; the others wrote none.[28] Though the exposure of the Supreme Court

leaders to some of the great legal minds of Britain and to a wide variety of legal problems and traditions could only have been beneficial intellectually, its importance and extent can easily be exaggerated. Canadian membership on the committee was only significant as a means of tightening the legal and judicial structure of the empire and of making the Judicial Committee's authority more acceptable to Canadians.

The appointment of Canadians did not end debate over the Judicial Committee. In 1901–2 an imperial conference was held to discuss establishment of an imperial Court of Final Appeal, combining the jurisdictions of the House of Lords and the Judicial Committee. The idea was discussed again from time to time (for example, at the 1911 imperial conference), but nothing came of the proposal. Canadians continued to debate, largely in the legal press, the problems associated with appeal to an overseas judicial body: high costs, inappropriate procedural requirements, unnecessary delay.

The Laurier government accurately reflected Canadian ambivalence regarding appeals to London. In 1906 the prime minister asked both the minister of justice and the chief justice to read over the 1875–6 correspondence regarding the limitation of appeals; the government probably was considering a move to terminate appeals to the Judicial Committee. The following year the government discussed informally a proposal to facilitate appeals from the Supreme Court: if appeals from the Court became a matter of right rather than of royal prerogative, then special leave would not be required to appeal each case.[29]

This ambivalence was also demonstrated in public debate. Supporters of the Judicial Committee pointed to the high calibre of its personnel and to its neutrality on emotive Canadian issues. Detractors argued that the committee did not understand Canadian needs or conditions and made poor decisions, and that until the Supreme Court became truly supreme it could not command the authority and respect normally due a country's highest court. The answer offered to this last criticism was that until the calibre of the Supreme Court was equal to that of the committee, it was silly to speak of altering the imperial system of appeals. As one Ontario lawyer put it,

> There is no sense in giving up something that is the greatest boon any country can have, an unequalled appellate court, unless we can adequately fill its place. The Supreme Court of Canada seems never to have occupied, in our mind the place it should properly fill ... those that ask that all these [legal] matters shall be finally settled in Canada ought to turn their attention to providing an adequate equivalent for the brilliant court they wish to supersede.[30]

He was right, but for the most part Canadians seemed quite capable of separating the twin issues of the Supreme Court's quality and of overseas appeals.

In the first two decades of the twentieth century, Canadian appeals to the Judicial Committee increased noticeably, though the proportion of *per saltum* appeals from provincial courts levelled off at about 64 per cent (see table 4). Part of the reason for this increase was that the committee was becoming more lenient in granting leave to appeal. Earlier cases had established the grounds on which leave to appeal would be denied; a corollary to those grounds became apparent in 1903–4. In two separate cases, *Clergue* v *Murray* (1903) and *Canadian Pacific Railway* v *Blain* (1904), the committee restated the barriers to appeal from the Supreme Court, but in doing so seemed to encourage *per saltum* appeals. According to the committee, once an appellant had exhausted avenues of appeal within the appropriate province, he could appeal either to His Majesty in Council or to the Supreme Court: 'But where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance [to appeal to the Committee] except under special circumstances.' The Judicial Committee was laying down rules whereby appeal to London was being presented, perhaps even encouraged, as an alternative to the Supreme Court. In 1913 the chief justice complained of the problem to Lord Haldane, who agreed that at times leave 'has been too freely given' and promised a stricter regime – a promise he fulfilled.[31] But as the numbers indicate, appeal to the Judicial Committee remained a vital aspect of the Canadian legal and judicial system (see table 5).

As a result of Canadian experiences during the First World War, nationalism increased noticeably in the dominion during the last years of the war and during the 1920s. One of the manifestations of this increasing pride in Canada was growing discussion of and support for the termination of appeals to the Judicial Committee. As Canada came to be seen by many of its people as self-governing and independent, the judicial tie to Great Britain came to be viewed as a sign of inferiority, a colonial fetter. Concomitant with the 1926 imperial declaration of equality among the dominions and the United Kingdom, it was argued, should be an end to the colonial character of our judicial structure. Chief Justice Anglin sent Prime Minister King a memorandum reflecting many of these sentiments. 'My "Canadianism,"' Anglin wrote, 'leads me to the opinion that we should finally settle our litigation in this country. If we are competent to make our own laws, we are, or should be, capable of interpreting and administering them.' At the very least, the Supreme Court of Canada ought to be the only route by which appeals could go overseas; but it

TABLE 5
Appeals from the Supreme Court of Canada to the JCPC 1876–1913

Year	Total no. of appeals from SCC	Leave denied	SCC judgment affirmed	SCC judgment reversed or varied	Appeals pending or not prosecuted	Per cent of SCC judgments appealed
1876–9	3	3	–	–	–	2.8
1880–9	53	27	9	9	8	7.8
1890–9	43	25	7	8	3	4.8
1900–9	94	50	21	19	4	9.7
1910–13*	72	19	19	18	16	19.5

Source: SCC subject file no. 66
* Information for the years after 1913 is unavailable.

would be best to terminate all appeals to London, and if that demanded an 'improved' Supreme Court, it was up to the government to take steps to improve it.[32]

The sense of Canadianism was strengthened in 1926 when the Judicial Committee struck down a federal statute barring appeals in criminal matters. That decision, following a 1925 decision striking down the federal Industrial Disputes Investigation Act, 1907, and the 1927 award of the Labrador interior to the Dominion of Newfoundland, caused Canadian frustrations to mount. In none of these disputes had the Supreme Court of Canada had an opportunity for adjudication. Growing Canadian self-esteem was also reflected in the beginning of a decline in the number of appeals carried to London and a decline in the proportion of cases appealed directly from provincial courts (table 4).

Nevertheless, despite the doubts as to the appropriateness of appeals to England and the rising sense of Canadian self-sufficiency, there was also a recognition of the negative consequences of termination of appeals. The Judicial Committee of the Privy Council was an able court, containing some of the best legal minds in the common-law system; the same could not be said for the Supreme Court of Canada. Even as ardent an advocate of judicial independence as C.H. Cahan, a Montreal lawyer and a Conservative member of Parliament, admitted in 1927 that the time for termination had not yet come. The Supreme Court must first be prepared.

> We must ... perfect the machinery of our own courts of justice. We must give to our own Supreme court a higher standing, and create greater confidence in its decisions on the part of the people of this country before we can abrogate the right

of appeal to the Privy Council ... I confess that the people have not sufficient confidence in our own Supreme Court to-day to abrogate entirely ... appeals to the Privy Council.[33]

Though Canadian independence seemed to demand termination of appeals, a realistic appraisal of the quality and stature of the Supreme Court demanded a delay. Yet even that did not fully brake the movement for termination.

In the negotiations leading to the Statute of Westminster of 1931, both the King and Bennett governments opted not to push for a formal end to appeals to the Judicial Committee. Nevertheless, with the passage of that statute Canada gained the authority to terminate appeals in the future. In 1933 the Bennett government re-enacted section 1025 of the Criminal Code formally ending appeals to London in criminal cases, the same section that had been struck down in the 1926 decision. Two years later, in *British Coal Corporation* v *The King* (1935), that statute was upheld by the Judicial Committee.[34]

But criminal appeals had never been more than a minor element in Canadian appeals to the Privy Council. The broader movement for judicial independence remained. Aided both by the depression of the 1930s and by the difficulty of appealing overseas during the Second World War, the number of appeals to London and the proportion of *per saltum* appeals continued to decline. By the 1940s the total number of appeals had fallen to just thirty-six for the decade, only a third of which had come directly from the provinces (table 4). Was this a sign of rising Canadian respect for the Supreme Court? Certainly the number and character of appeals were changing more quickly than the regulations themselves.

The value of the Judicial Committee was beginning to be questioned. The rising number of influential centralists of the 1930s and early 1940s could point easily to the committee's emphasis on the decentralist character of the Canadian constitution. In a seminal article, F.R. Scott challenged the anti-repealers' argument that the Judicial Committee was essential as the defender of minority rights in Canada. By examining various linguistic and schools controversies before the Supreme Court and the Judicial Committee, Scott was able to demonstrate that minority groups had received treatment in the Supreme Court equal to and perhaps better than what they would have received in London. 'What the Privy Council had done in our constitution is to safeguard, not minority rights, but provincial rights,' Scott concluded. 'It is submitted that the belief in the Privy Council as a safeguard for minority rights is a popular myth,

devoid of any foundation in fact. If so, a principal ground for maintaining the appeal disappears.'[35] In an Ottawa environment where increasingly centralized power was seen as the answer to the country's political problems and needs,[36] such arguments operated powerfully among the influential in favour of termination of appeals.

During the 1930s and 1940s the subject continued to be debated – in Parliament, in private letters, at legal conventions, in schools. The most prominent reason for termination was the developing sense of Canadian self-worth. As Ernest Lapointe, the former Liberal minister of justice, put it in 1932, 'Je ne puis trouver une seule raison justifiant le Canada d'être le seul pays au monde de son rang, sa population et son intelligence, à confesser son incompétence à décider lui-même ses conflits judiciares.'[37] Gradually, proponents of such a viewpoint came to argue that the colonial character of the Canadian appeal system was the explanation for the Supreme Court's mediocre quality. It would not do to await the improvement of the Court because it would never mature until it was freed from the colonial yoke. Abrogation of appeals to England would not only reflect Canadian national independence but would lead to the emergence of a first-class appellate court of last resort. Neither the opponents nor the proponents of termination of appeals defended the Supreme Court of Canada or used it as a positive factor in the debate.

In 1937 the demands for termination increased after the Judicial Committee reversed some of the Supreme Court opinions on Bennett's New Deal legislation. The issue was brought directly before the House of Commons at that time by C.H. Cahan. He returned the following year and again in 1939 with a bill to abolish appeals to London. The bill met with considerable support in Parliament, but Canadians were still not ready for the change. The minister of justice, Ernest Lapointe, counselled delay in 1938. The following year he moved to suspend consideration of the bill while it was referred to the Supreme Court to test Parliament's jurisdiction.

In June 1939 counsel representing the attorneys-general of Canada and six provinces (Quebec, Saskatchewan, and Alberta being absent) met before a six-man panel of the Court to argue the issue. Seven months later the justices handed down their decision. Led by Chief Justice Duff, a majority of four held that the legislation was intra vires, Justices Crocket and Davis dissenting. All six members of the Court wrote reasons for judgment.

The only justice to reject entirely the termination bill was Justice Crocket. He pointed out that the bill affected the relationship between the

provinces and the crown. Quebec, for example, in its Code of Civil Procedure, had assured access to the Judicial Committee from the final judgments of the Court of King's Bench in all cases involving $12,000 or more. Ontario and the other provinces enjoyed similar, if less explicit, access to the foot of the throne. The proposed bill to terminate appeals by making the Supreme Court of Canada the ultimate judicial tribunal for all Canadian cases entailed a major rupture of the lines of royal prerogative. It also meant an implicit repeal of the Quebec and Ontario statutes and the other orders-in-council granting appeal to the Judicial Committee.

Striking as it did at the very heart of the relationship between the crown and its subjects, the bill (despite its seemingly simple objectives) effected the most profound alteration in the Canadian constitutional process, short of formal amendment, prior to the Constitution Act, 1982. Justice Crocket was the only member of the Court sensitive to these developments. From the strictly legal point of view, Crocket asserted that the bill 'would amount to an attempt on the part of the Parliament of Canada to arrogate to itself the complete control of the administration of justice in all the Provinces ... in so far as the finality of judgments in civil as well as in criminal cases [was] concerned.'[38] To Crocket's mind the subject matter of the bill fell within the provincial authority over property and civil rights and the administration of justice in the province. The federal residuary power under section 91 of the British North America Act simply could not be construed so as to grant such authority to Parliament.

Justice Crocket was on firm legal ground when he challenged the source of federal authority to terminate *per saltum* appeals from the provinces to the Judicial Committee. He could not accept the proposition that by 'the simple expedient of amending the *Supreme Court of Canada Act*' the Parliament of Canada could bring about a major realignment of the judicial process in Canada.

The majority, led by Chief Justice Duff, took a different tack and in doing so avoided the full force of Crocket's objections. For the majority the issue was settled principally on the authority of the Statute of Westminster. The hurdle that was present in 1926 (in *Nadan* v *The King*) preventing termination in criminal cases was removed by the statute. Duff's reasoning on the meaning of the constitutional provisions empowering the Parliament of Canada to make provision 'for the constitution, maintenance, and organization of a general court of appeal for Canada' is weak when contrasted with the objections of Crocket. Duff failed to address the essential issue: how do those terms of the British North America Act acquire, under the Statute of Westminster, the authority to transform a

general court of appeal into a *final* court of appeal with the correlative power to terminate a long-enjoyed process of royal prerogative? The chief justice appeared content to rest his case on the ambit or scope of the authority vested in Parliament under peace, order, and good government, hardly an unchallengeable foundation.

It was clear that the Supreme Court's opinion would have to be appealed to the Judicial Committee in order to remove any doubts. But the Second World War intervened, inhibiting appeal overseas. Throughout the war only fourteen Canadian cases were reported in London on appeal. The 1940 Supreme Court opinion on termination of appeals did not reach the Judicial Committee until the fall of 1946.

There can be no doubt that the British government attached great importance to this appeal, for the highest judicial officers in Britain were empanelled to sit on the board. For this occasion the board was made up of seven members: in addition to Lord Jowitt as lord chancellor, Viscount Simon, Lord Macmillan, and Lord Wright, Lord Greene (master of the rolls), Lord Simmonds, and the lord chief justice (Lord Goddard) were present. It would be difficult to imagine a gathering in one place of more judicial stature than that assembled in the Privy Council chambers on those late October days in 1946. The Judicial Committee heard arguments in the appeal for a full six days, an extraordinary event in itself. Counsel were heard for the attorneys-general of Canada and of New Brunswick, Ontario, Quebec, British Columbia, Manitoba, and Saskatchewan. The last two provinces joined with the federal government in supporting the bill; the other four provinces opposed it.[39]

The Judicial Committee viewed the issues involved as being of 'transcendent constitutional importance' and disposed of them one by one. The first issue settled was the authority of Parliament to transform the Supreme Court of Canada into a final and ultimate court of appeal under section 101 of the British North America Act. The board had little trouble agreeing that Parliament had such authority, especially in light of the statute of Westminster. 'No other solution,' the Lord Chancellor concluded, 'is consonant with the status of a self-governing Dominion.'

The committee had more trouble validating that portion of the bill which proposed to end the provincial right of appeal to the Privy Council. The members of the board found themselves in sympathy with the reasons for judgment of Sir Lyman Duff. They adopted the essentials of Duff's line of argument and claimed that section 101 of the British North America Act 'intended to endow Parliament with power to effect high political objects concerning the self-government of the Dominion.' These words, taken

directly from Duff's judgment, might not meet the demands of the more rigorous legal mind, but they were the stuff of which Judicial Committee judgments were made when the niceties of the law tended to impede their 'judicial statesmanship.' The board concluded that the terms of the British North America Act authorizing the establishment of a 'General Court of Appeal for Canada' ought, in the light of the Statute of Westminster, to be read more expansively so as to encompass the notions of 'ultimate' and 'final.' The Judicial Committee concluded that it would be an anomaly to permit two avenues of final appeal, one to the Supreme Court and the other to the Privy Council; the result would be a lack of uniformity at the highest levels of law.

But the heart of the Judicial Committee's opinion is in the conviction that the power of establishing a final, ultimate court of appeal was an aspect of self-government, especially since 1931. The lord chancellor concluded, 'It is ... a prime element in the self-government of the Dominion that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens.' This, of course, makes eminent good sense in a unitary state like Great Britain, but does it make sense in a federal system? Counsel for the provincial attorneys-general pleaded strenuously against the bill in the name of provincial autonomy. They also wished to retain their pre-Confederation right of appeal to the foot of the throne. But the Judicial Committee found the termination bill intra vires under section 101 of the British North America Act.

By January 1947 the way was clear to pass legislation formally declaring the Supreme Court of Canada the final court of appeal. But the government continued to hesitate, a good indication that public opinion was still ambivalent. A private member's bill put forward in the spring of 1947 failed to hurry the government. Most of the provinces were opposed to unilateral action by the federal government making a court, which that government exclusively controlled, the final and ultimate judicial body in Canada on all questions, including constitutional matters. In the context of federal-provincial relations in the immediate post-war years, the federal Government was clearly unwilling to antagonize the provinces over such an issue as the judicial system.

Beginning in the fall of 1945, negotiations were conducted and proposals circulated concerning fiscal and economic planning in Canada. Federal-provincial conferences were held in 1945 and 1946 to discuss proposed social security and taxation schemes. Provincial co-operation was being sought by Ottawa, particularly in the field of taxation, where

the federal government supported 'tax rental' agreements. These agreements were still being negotiated in 1947, and this likely affected the federal government's decision to delay provoking the provincial governments.[40] The federal government signalled this delay in the fall of 1947 by arranging the appointment of Chief Justice Rinfret to the imperial Privy Council and thus to the Judicial Committee.

In addition, the federal government was having difficulty making up its own mind on the issue. In the first three months of 1948 the problem was debated in Liberal caucus and in cabinet. While the minister of justice, J.L. Ilsley, supported termination and presented draft legislation to that effect, others were less certain. The wily old prime minister, Mackenzie King, feared alienating anglophile Conservatives who were supporting the Liberal party, recalling Sir Wilfrid Laurier's advice about pro-British feeling among Canadians. Other cabinet members indicated that such a bill would jeopardize Liberal support in their region. Louis St Laurent reported that Quebec Liberal members of Parliament would vote for abrogation of all appeals except in constitutional cases involving a federal-provincial dispute. As discussion continued it became apparent that the cabinet was divided. Mackenzie King's solution, typically, was to defer the issue: the matter would be put to the upcoming Liberal convention in August 1948.

> I then put forward the idea that we were having a Liberal Convention in August, among other reasons, to frame a programme for the Liberal Party; by that time I said the Provincial elections will be over and I saw no reasons why the Party should not insert in its programme the abolition of appeals if that was in accord with the view of Liberals throughout the country. That would serve for purposes of election, any good that taking up the matter earlier would render.[41]

The political advantages of delay were clear.

Following the adoption of a convention resolution favouring complete termination,[42] the Liberal government, now led by Louis St Laurent, indicated its intention to adhere to the pledge by introducing legislation early in the next session of Parliament. Following the re-election of the government in June 1949, the legislation was reintroduced and finally passed. The statute provided that the Supreme Court of Canada 'shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction' in Canada and that its judgments 'shall, in all cases, be final and conclusive.' In case there was any doubt about the meaning of this clause, an additional section specifically denied that the royal prerogative

or any United Kingdom statute permitted appeals to any overseas tribunal.[43]

What effect this change would have on the Supreme Court remained to be seen. Certainly the Department of Justice was ambivalent. Late in 1948 an internal memorandum listed the pros and cons of abolition of appeals. Among the advantages cited was an old standby: appeal to the Judicial Committee 'is regarded as a mark of inferiority which affects the respect held for the Supreme Court, the calibre of men who will accept appointment to that Court, and the quality of the judgements of the persons who do accept such appointments.' That, however, was countered by the argument 'that the very fact that the Supreme Court judgements are subject to an appeal has the effect of causing the judges to put forth a greater effort to be right.'[44] Time would soon show that appeal to the Judicial Committee had had an important impact on the quality and character of the Supreme Court's work. Placed in a position of inferiority, the Supreme Court justices had quickly accepted the binding precedents from above and had adopted the common-law concept that if new directions were to be enunciated they would come from the highest court. This deference and subordination helped to entrench a conservatism in the jurisprudence of the Supreme Court of Canada. It would take more than simple termination of appeals to alter the Court's approach to the law.

The new legislation did, however, make the Supreme Court of Canada a more prominent and influential institution in the national legal system and political structure. Its new status brought the Court into the line of fire more frequently than in the past. The St Laurent government foresaw this, at least in part, and attempted to deal with the problem in advance.

As many contemporary observers pointed out, it was inappropriate to terminate appeals overseas without adjusting the structure of the new court of last resort. The Liberal governments of the late 1940s agreed with this, and at least as early as February 1948 serious consideration began to be given to possible changes to the Supreme Court. The now retired Sir Lyman Duff was interviewed regarding several proposals, and the deputy minister of justice (F.P. Varcoe) and an Edmonton lawyer (G.H. Steer) organized a meeting in Ottawa to discuss policies and problems related to the Supreme Court. Leading lawyers from all ten provinces were invited, and provincial law societies and the Canadian Bar Association were asked to make representations.[45]

Notes from the meeting reflect the general concerns of persons in close touch with the Supreme Court. It was agreed that the bench ought to be

expanded to nine members, but Varcoe's suggestion that the additional two justices be appointed '" at large" without reference to geography' was not adopted by the lawyers present. Five men would continue to constitute a quorum, but the lawyers recommended that no even-numbered panels should sit. The salaries of the justices would have to be raised substantially; $25,000 was suggested as an appropriate remuneration for puisne justices. A majority of the lawyers felt that the Court should continue to sit only in Ottawa rather than go on circuit. As well, a majority held that although stare decisis ought to obtain, the legislation should not mention the subject – though both the federal Conservative party and the Canadian Bar Association were calling for statutory entrenchment of stare decisis with respect to Judicial Committee precedents.

Two further points urged by the deputy minister were apparently not adopted by the lawyers, though that does not necessarily reflect disagreement. First, Varcoe sought to control and streamline the argument of counsel and the decision-making of the Court. Each point of fact or law ought to be fully discussed and authorities analysed as to their relevance ('and not merely referred to for future reference by the judges'). It was hoped that this would reduce the number of authorities referred to and improve the general quality of argument in court. The justices would endeavour to reach a decision at a conference immediately following argument, 'as is always done in the Privy Council.' The overall effect of this, Varcoe anticipated, would be the handing down of judgments more quickly and an improvement in the quality of argument (because 'counsel lacking in experience and capacity would give way to more competent men'). Second, the deputy minister sought to enhance the Court's image:

> Some consideration might be given to the problem of developing the good name and reputation of the Court with the public generally. The Canadian Bar Association might even establish a special permanent committee to work on this from year to year. The Canadian Club and service clubs might be persuaded to run a few luncheons along this line commencing say in October. Periodical Press might be willing to publish some articles. The Canadian Bar Association might seek some way to encourage the publication of a book relating to the history of the court and its functions along the lines of the numerous works published in the United States with reference to their Supreme Court.[46]

These plans never reached fruition. The meeting and the recommendations produced were soon lost in a sea of other commentaries and

schemes, but they do indicate a genuine sense of concern for the future and quality of the Supreme Court. Coming as it did both from leading members of the bar and from the civil servant responsible for the Court, the initiative is an important sign of the immediate – and, one hopes, long-range – impact of the termination of overseas appeals.

These meetings and the resultant proposals ignored, either deliberately or otherwise, the central concern regarding the Supreme Court. The final arbiter of all legal questions, including all constitutional issues and matters of both federal and provincial law, would now be controlled by just one level of government in Canada. The members of the Court were selected and appointed exclusively by the federal government; they were required to reside in the national capital; and the structure and jurisdiction of the Court were under the exclusive legislative control of the federal Parliament. An 'impartial umpire,' a court that both deserved and commanded the trust and respect of all parties must not only be impartial but must be seen to be impartial. In the case of the Supreme Court of Canada it was difficult to perceive the institution as other than 'an Ottawa court.'[47] Ever since the proposals for termination of overseas appeals took substance after 1946, this had been a central problem for the Supreme Court of Canada. Suggestions were made at the time and would continue to be made almost every year thereafter to deal with the issue, but no acceptable solution was found.

One suggestion put forward in 1949 was that the Supreme Court be brought within the British North America Act, giving the Court greater status and removing it from the legislative control of Parliament. This could be done by expanding section 101 of the act effectively to include the Supreme Court Act. The Barristers' Society of New Brunswick, for example, resolved that a constitutional amendment should be passed providing that no changes in 'the constitution, maintenance or organization' of the Court could be made by Parliament without the approval of a majority of provincial legislatures. The Law Society of British Columbia passed a similar resolution.[48] Constitutionally enshrining the Court was an idea that posed many problems. Over the years, as social needs and circumstances changed, it had been necessary to amend the Supreme Court Act frequently.[49] Judging from past experience, some legislature had to have authority over at least some aspects of the structure and jurisdiction of the Court.

Another alternative involved radical restructuring of the Court. Apart from infrequent suggestions that a new Canadian court be created to take on the Judicial Committee's functions, there were proposals for changes

to the existing Supreme Court, such as division into two branches, one for common law and one for civil law. The government took seriously a plan for a new court to deal solely with constitutional cases, comprising four Supreme Court justices and four ad hoc members; when Sir Lyman Duff commented unfavourably on the scheme, however, the impractical proposal was dropped.[50]

A less drastic change involved altering the method of selection of the justices. One idea was that the Senate, whose members represented the regions of the country, could be asked to approve nominations to the Court. Given the role of the Senate in the Canadian political structure and given the principle of responsible government, this plan was not useful; it was merely a thoughtless copying of the United States practice. The House of Commons also considered a suggestion that four of the Court's puisne justices be selected from among those proposed by each lieutenant-governor-in-council; each province would be required to propose at least three candidates, and one of the four justices would have to be chosen from among the candidates put forward by the lieutenant-governor-in-council of Quebec.[51] This idea too was rejected.

What tampering there was with the membership was far more modest: the number of justices was increased to nine. In part this was a reflection on the ad hoc replacements. Despite the addition of a seventh permanent member to the Court in 1927, ad hoc justices had been used frequently throughout the following two decades. This did not make for an effective bench. In Sir Lyman Duff's long experience, '*ad hoc* judges are not a success for the reason that they rarely adopt an attitude of full responsibility'; they detracted from 'the quality of solidarity' so essential to an appellate court. As well, a larger bench was felt to be essential because of the increased caseload the Court could now expect and because the change would allow civil-law cases to be heard by a panel the majority of which had been trained in that legal tradition.[52] The legislation added two new puisne justices to the Supreme Court, one of whom was required to come from the bar of Quebec.

Some other changes were made to the Court at the same time. Judicial salaries were raised in 1949; the chief justice would now receive $25,000 annually and his colleagues $20,000. The jurisdiction of the Court was also altered. The wording of several clauses in the Supreme Court Act was tidied up and the Court's authority to grant leave to appeal from judgments of the highest court of final resort in a province was expanded to cover an area where appeal had previously lain only to the Judicial Committee. As well, the Court was now enabled to grant leave to appeal

in forma pauperis.[53] In short, in keeping with the Court's new role, potential appellants now enjoyed expanded access to the Supreme Court of Canada.

By the end of 1949, the highest court in the Dominion of Canada had acquired a new lease on life. In new and impressive accommodations, the Supreme Court of Canada exercised a broad jurisdiction over the law of the land and its rulings were truly supreme. This new position had been acquired not because of the Court's own merits but because of national developments. Like the First World War, the Second World War had given a further stimulus to Canadian nationalism, or at least to a Canadian sense of self-worth. The new position of the Supreme Court should be regarded as one aspect of a series of changes in these post-war years – the Canadian Citizenship Act (1946), the accession of Newfoundland to Confederation (1949), the passage of a procedure for amending within Canada sections of the British North America Act (1949), and the selection of a Canadian-born governor-general (1952). The Supreme Court of Canada was simply one of several beneficiaries of these developments. It was up to the Court to take advantage of its new stature so as to earn the respect and trust of Canadians.