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A Decade of Adjustment

1950–1962

When the newly paramount Supreme Court of Canada met for the first time early in 1950, nothing marked the occasion as special. It was typical of much of the institution's history and reflective of its continuing subsidiary status that the event would be allowed to pass without formal recognition. Chief Justice Rinfret had hoped to draw public attention to the Court's new position through another formal opening of the building, or a reception, or a dinner. But the government claimed that it could find no funds to cover the expenses; after discussing the matter, the cabinet decided not to ask Parliament for the money because it might give rise to a controversial debate over the Court. Justice Kerwin reported, 'They [the cabinet ministers] decided that they could not ask for a vote in Parliament in the estimates to cover such expenses as they were afraid that that would give rise to many difficulties, and possibly some unpleasantness.'[1] The considerable attention paid to the Supreme Court over the previous few years and the changes in its structure had opened broader debate on aspects of the Court than the federal government was willing to tolerate. The government accordingly avoided making the Court a subject of special attention, even on the important occasion of its independence. As a result, the Court reverted to a less prominent position in Ottawa, and the status quo ante was confirmed. But the desire to avoid debate about the Court discouraged the possibility of change (and potentially of improvement).

The St Laurent and Diefenbaker appointments during the first decade

following termination of appeals showed no apparent recognition of the Court's new status. Both prime ministers, distinguished members of the Canadian bar in their own right – the one as a corporate litigation lawyer, the other as a defence counsel – showed no special sensitivity or concern for the newly won independence of the highest court in the land. The criteria employed by both men in appointing new members to the Supreme Court followed the old established lines; regional considerations prevailed and candidates who demonstrated the traditional legal conservatism were sought. The fact that termination of appeals to the Judicial Committee constituted the end of judicial colonialism and potentially, at least, the beginning of a genuinely indigenous Canadian jurisprudence seems not to have entered the mind of either prime minister. Termination of appeals appears to have been seen as an end in itself rather than as a means to a new beginning. This view, however prominent throughout the Canadian bar, was confusing to the layman. Why abolish appeals if in doing so nothing was to change? The expectation that a truly Canadian final court of appeal might strike out in new directions was unquestionably naïve, for the Court was by now deeply entrenched in the conservative jurisprudence of the Judicial Committee and the House of Lords. Nevertheless, some members of the Canadian bar and the general public expressed the hope that a court free of the immediate institutional dominance of the Judicial Committee would be able to exercise a more independent role in keeping with the peculiar conditions of North America.[2]

Prime Minister St Laurent was confronted in 1950 with a Supreme Court led by Chief Justice Thibaudeau Rinfret, who had served over twenty-five years on the Ottawa bench and who tended to show his impatience in court. Robert Taschereau, the second justice from Quebec, was noted for his insistence on precision from counsel. The senior puisne justice was Patrick Kerwin, a kindly and able man who had been on the Supreme Court bench since 1935. Roy Kellock, who, like Kerwin, was from Ontario, was known for his industriousness and for the tenacity with which he held a viewpoint once arrived at. To all observers, Ivan Rand, the justice from the maritimes, was marked by his intellectual ability and his probing questions. Respect for his repeated and penetrating queries in Court led him to be the justice most feared by counsel; one observer reported that Rand 'uses the word "why" like a machine gun.' In 1944 the able J.W. Estey had come to the Supreme Court from the prairies. The most recently arrived justice was Charles Locke, 'a rugged, solid man who listened impassively' to counsel.[3] These seven justices were joined by two more judges in late December 1949.

According to the terms of the recently revised Supreme Court Act, one of these two new posts was to be filled from the Quebec bar. Since there were already two francophone justices from Quebec, some representatives of English Canadians in Quebec pressured Prime Minister St Laurent to make the appointment from among their members. The minister of finance, Douglas Abbott, suggested that the three civil-law posts be divided according to a ratio of two francophones to one anglophone, so that there would always be an English-speaking Quebec justice on the Supreme Court. But St Laurent would have none of the proposal:

> The Quebec Bar is the only one from which it can be expected that French speaking lawyers will ever be appointed to the Supreme Court. A proportion of 1/3 is not exaggerated. To appoint now one English speaking lawyer from Quebec would set a precedent that it then follows would be regarded as inviolate. At some later date it would be done not as a matter of right for English speaking residents of Quebec, but as a matter which happened to suit the conveniences of the moment. We should create the impression that there can be three French speaking members but that there need not always be three.[4]

It was thus certain that the third Quebec position would go in 1949 to a French Canadian.

The choice fell on Joseph Honoré Gérald Fauteux. Born in St Hyacinthe, Fauteux, though not active in politics himself, was well connected politically in the Quebec Liberal party. Between 1929 and 1944 he had served as a crown prosecutor and as a professor of criminal law at McGill. In 1947 he was appointed to the Quebec Superior Court; two years later he was elevated to the Supreme Court of Canada. The new Quebec justice brought with him a considerable expertise in criminal law, and at age forty-nine could look forward to a lengthy career on the bench.[5]

The second new position on the Court went to a representative of Ontario in order to balance the number of justices from that province and Quebec. John Robert Cartwright seemed to have been born to the law and to a position of social prominence. He was called to the bar in 1920 and entered private practice in Toronto, acquiring a wide experience in various types of law. After a distinguished career as trial counsel, Cartwright was appointed to the Supreme Court in 1949 at the age of fifty-four.[6] The average age of this first nine-man Court was fifty-nine; the eldest was Rinfret, aged seventy; the youngest was Fauteux, forty-nine. The justices had an average of eight full years of judicial experience, and the range of experience was considerable: Rinfret had been on the bench for twenty-seven years, while Cartwright was a judicial novice.

No further changes occurred in the membership of the Court until 1954. Thibaudeau Rinfret reached the age of mandatory retirement in June of that year and stepped down. The St Laurent government faced a serious problem in naming a new chief justice. By tradition, the post would go to the senior puisne justice, in this case Patrick Kerwin, aged sixty-four. An able judge and a capable administrator, Kerwin would serve the Court well, but his Roman Catholicism was felt to be a barrier to his elevation. Only once in the history of the Supreme Court had a Roman Catholic succeeded a co-religionist as chief justice (Fitzpatrick in 1906). There was a good deal of concern in political circles that Kerwin's appointment would raise Protestant ire, and the issue was discussed in the press. The prime minister consulted Sir Lyman Duff before deciding to promote Kerwin.[7] This concern over religious affiliation is a reminder of how important that criterion remained for many Canadians. The government hoped that its other choice to fill the vacancy among the puisne justices would mollify Protestants. The new justice from Quebec, Douglas Charles Abbott, was Anglican and English-speaking, and the government was clearly indicating in this appointment that a balanced representation could be maintained in various ways and that traditions were flexible.

When appointed to the Supreme Court, Abbott was already a major public figure in Canada, probably the best-known and one of the most highly regarded federal politicians after Louis St Laurent himself. After graduating in law from McGill and a year of graduate study in commercial law at the University of Dijon in France, he entered private practice in Montreal, where he gained a varied professional experience. In 1940 he was elected as a Liberal member of Parliament from Montreal. Five years later, in 1945, he joined the cabinet and soon took on the prestigious and onerous position of minister of finance. But by 1953 he had decided to leave politics, and, although he agreed to stay on briefly, he informed Prime Minister St Laurent of his intention to return to private practice in Montreal. He also hinted strongly that the prime minister might appoint him to the Senate. St Laurent responded with the suggestion that Abbott might prefer instead a place on the Supreme Court because there would soon be a Quebec vacancy. Abbott joined the Court in the summer of 1954 at the age of fifty-five, with no judicial experience and many years away from active legal practice.[8]

Abbott's selection caused a good deal of public reaction. The patronage nature of the appointment shocked many observers, indicating that the government was out of touch with public expectations of how one should be chosen for such an important judicial office.[9] Nomination directly from the cabinet to the Supreme Court of Canada had not occurred since 1911

(when Louis-Philippe Brodeur was appointed) and would not happen again, a clear sign that succeeding prime ministers got the message. Abbott's prominent partisanship was equalled only by that of Sir Charles Fitzpatrick before he joined the Court, and in this sense Abbott's appointment was out of step with trends that had been developing since the turn of the century. More surprising was the government's willingness to risk the wrath of Quebec public leaders. French-Canadian representation on the bench had been reduced; a known 'centralizer' who had directly challenged the provincial rights of Quebec Premier Maurice Duplessis had been appointed to the highest court in the land. Even apart from political considerations, it is disturbing that a lawyer who had been away from active practice for a decade should be named to the Court. Abbott's knowledge of case law must have seriously deteriorated since joining the cabinet, yet he almost immediately began work in chambers.

Finally, the selection of Abbott is surprising because there already existed a current of dissatisfaction regarding judicial appointments in general. In 1952 the president of the Canadian Bar Association had spoken out against the expedient and patronage character of the selection process and had drawn a good deal of support from the press.[10] As rumours spread of Abbott's imminent appointment to the Court, perhaps even to the chief justiceship, complaints increased. Though opinion varied, the Montreal *Gazette* spoke for many: the Court was now the final court of appeal, and appointments to it were even more important than previously. 'The responsibility of the federal Government has now become profoundly great. The judges of this court whom the federal Government appoints will have to sit in judgement not only as a court of last resort: they will have to give final judgement in cases in which the federal Government will itself be a party. For these reasons the principle of separation between the Cabinet and the Bench must be more than ever respected.'[11]

Though an exaggeration of the traditional extent of separation between politics and the judiciary, the comment is a reflection of changing Canadian views and expectations. Despite such attacks, however, once the appointment was made it was quickly accepted by the public and complimented by many. But its partisan nature did little to enhance respect for the Supreme Court. And, given the Court's challenges during the 1950s to the Duplessis government in Quebec and that government's record in civil liberties, the choice of Abbott caused some to question the Supreme Court's neutrality.

In 1956 the St Laurent government made its last appointment to the Supreme Court. Early in the year Justice Estey died. It was assumed by

most observers that the vacancy would be filled by someone from the prairies. Some advisers suggested that now was the time for 'new Canadians' to be represented on the Court. Immigration had been so heavy during the twentieth century, it was argued, that non-charter groups now made up a major portion of the Canadian population. Representatives of various ethnic groups were recommended for the post, and the president of Acadia University put the case well: 'May I suggest that if a non-English, non-French person can be found with the necessary qualifications, his appointment would be a matter of vast gratification to these newer communities. Judgements on contentious issues by our country's highest court of appeal would, moreover, be more readily accepted if all three of the major ingredients of our population were represented among the justices.'[12] The suggestion was not accepted by the government, but the idea of representation on the Court of identifiable groups is an important one. Throughout the history of the Supreme Court there have been frequent complaints that the best possible persons are not named to the bench, that as a criterion merit is only one alongside region, religion, ethnicity, and political service or affiliation. Whatever the validity of such a charge, Canadians have demanded that those criteria be used. The west fought to send a justice to Ottawa, or English-speaking Catholics argued for a seat on the bench, in the same way that 'new Canadians' in the mid-1950s and women in the late 1970s claimed the right of representation.[13] Representation of various social groups can be seen as a strength of the Supreme Court of Canada.

At this point the St Laurent government chose to satisfy the demands of Alberta and selected Henry Gratton Nolan to join the Court. In the summer of 1957 a new government took office. Caught up in the demands of administration after an absence from power for twenty years, the Conservative government of John Diefenbaker was too busy for several months to worry about the Supreme Court vacancy that had occurred with the sudden death of Justice Nolan.[14] It was not until January of the following year that action became imperative because a second vacancy occurred unexpectedly. Justice Kellock, aged sixty-four, suddenly resigned from the Court after over thirteen years' service. Officially, Kellock used poor health as an explanation, though rumour suggested that he was unhappy in a Court led by Patrick Kerwin rather than by himself. The uncertainty or instability created by these two vacancies was exacerbated by Chief Justice Kerwin's ill health in 1958 and by false reports that he too would be retiring soon.[15]

In making its appointments to the Supreme Court, the Diefenbaker government maintained existing traditions. The regional, religious, and

ethnic composition of the bench was not altered. Two of the four Diefenbaker appointments – Ronald Martland from Alberta and Roland Almon Ritchie from Nova Scotia – were drawn from the practising bar; neither had ever held judicial office. Martland was a prominent corporate lawyer expert in matters relating to natural resources. He joined the Court at age fifty-one without a record of major service to a political party.[16] He was the fourth successive justice (following Cartwright, Abbott, and Nolan) to come to the Court without regular judicial experience. Ritchie replaced a fellow maritimer, Ivan Rand, who had reached compulsory retirement age. After serving with the judge advocate-general's branch during the Second World War, Ritchie resumed private practice in Halifax. He was forty-eight years old in 1959 when he joined the Supreme Court.[17]

The two other Diefenbaker appointments – Wilfred Judson from Ontario and Emmett Matthew Hall from Saskatchewan – had judicial experience in their provincial superior courts. After two decades in private practice in Toronto, where he acquired a reputation as a specialist in the equity law of wills and estates, Judson was appointed to the Ontario Supreme Court in 1951. He went to the Supreme Court at age fifty-five with seven years' judicial experience.[18] Emmett Hall was chosen to replace Justice Locke, who had retired in September 1962. (Locke quickly incurred the displeasure of his former judicial colleagues by appearing before the Court as counsel, just as Kellock had five years earlier.) Hall was destined to be Diefenbaker's last selection to the Supreme Court. An old friend and law-school classmate of the prime minister, Hall enjoyed a long and distinguished private practice and had acquired a reputation as a trial counsel and as a champion of civil liberties before being appointed chief justice of the Saskatchewan Court of Queen's Bench in 1957. Hall's long-time interest in public affairs and support for the Conservative party had not been strongly manifested, though he had been defeated in the 1948 provincial general election. Ironically, once on the bench his interest in public affairs was given freer rein. In 1957 Hall became chairman of the Saskatchewan Law Reform Commission, and in 1960 he was named chairman of the federal Royal Commission on Health Services (on which he did not complete his work until several months after his appointment to the Supreme Court).[19] In 1961 he was promoted to chief justice of the Saskatchewan Court of Appeal. Hall's appointment to the Supreme Court in 1962 represented not simply the rewarding of a friend; he shared many of the prime minister's views on civil liberties, and his presence gave Diefenbaker an opportunity

to influence the makeup of the Court which soon would be ruling on the legal force of the 1960 Canadian Bill of Rights. The new justice joined the Supreme Court a few days before his sixty-fourth birthday and became the first western Roman Catholic member of the Court.[20]

Less than three months later, in the midst of a cabinet crisis and a parliamentary conflict that would bring down the government, Chief Justice Kerwin died suddenly. During frantic attempts to save the government through restructuring the cabinet, some cabinet rebels viewed the Supreme Court vacancy as a heaven-sent opportunity to remove the prime minister by offering him the post. Diefenbaker resolutely refused.[21] The willingness of cabinet members to use the Court vacancy for political purposes should surprise no one, and Diefenbaker's rejection of the offer does not alter the perceived usefulness of the Court for political purposes.

The same day that Diefenbaker rejected this offer of the chief justiceship, his government was defeated in the House. The vacancy was not filled until after a general election had confirmed the defeat and a new government had taken office. On the same day that Lester Pearson was sworn into office as prime minister, Robert Taschereau, the senior puisne justice, was elevated to preside over the Court. He was sixty-six years of age and had already served for twenty-three years on the Supreme Court bench. The fact that he was a French Canadian must have made his promotion attractive to Pearson, who was about to undertake a new initiative to give French Canadians a more meaningful role across the country and particularly in Ottawa.

The appointments under St Laurent and Diefenbaker during this first decade after termination of appeals to the Judicial Committee show no departures from previous practice. There is every reason to believe that the appointments would have been no different had appeals not been discontinued. Most of the new justices lacked prior judicial experience; traditional regional considerations were honoured; religious criteria (no more than three Catholics) were maintained. It would take another decade before a Jew was appointed to the high court despite the dramatic increase in the number of outstanding Jewish lawyers throughout Canada following the Second World War, and it would take even longer for a woman to claim a seat on the Supreme Court. The period following termination of appeals was not viewed by either government as a time for innovation. The impression is that federal politicians wanted a truly Canadian final court of appeal, but they were not sure why they wanted it. The only hint that a substantive issue prompted an appointment to the

Supreme Court was contained in Diefenbaker's selection of Emmett Hall. Civil liberties, and especially a statutory bill of rights, had long been the publicly expressed cause of John Diefenbaker. He had promised a bill of rights for Canadians in the 1957 and 1958 campaigns, and he delivered in 1960, two years before Hall's appointment. There is little doubt that Hall was chosen because he championed the same causes.

Not surprisingly, the provinces began to take a new interest in the Supreme Court during this period. The federal government had sought and obtained an end to the overseas appeal process without the consent of the provinces. When the opposition leader, George Drew, attempted to have the St Laurent government obtain provincial consent, the prime minister flatly and unequivocally refused.[22] This refusal did not lie easily with some provincial premiers, such as Maurice Duplessis. Quebec had long been comfortable with Judicial Committee decisions, the Labrador boundary decision notwithstanding. Indeed, all the provinces owed an enormous debt to the Judicial Committee for supporting their claims to strong legislative powers under the terms of the British North America Act. But now the Supreme Court was supreme in fact as well as in name. Above all, the Court was the final arbiter of all constitutional disputes between the two levels of government. Yet the Court was the creature of one of the dominant parties in such disputes; it was established and controlled by a simple statute of the federal Parliament; that statute could be altered at any time and in any way the federal government chose; the Court's membership was determined solely by the federal government, and a frequent criterion for selection, emphasized in 1954 by Douglas Abbott's appointment, was service to the governing federal party. The Supreme Court had long been regarded by provincial governments as being predisposed to favour a centralist or federal point of view. Now there was no recourse from the Court's decisions to any other judicial body, as there had been prior to 1949. The result of this situation and of the conflicts with the Quebec government in particular was an increased public concern regarding the constitutional status of the Court.

One expression of these concerns emanated, not surprisingly, from Quebec in the 1950s. The influential Tremblay Report offered a detailed criticism of the Supreme Court of Canada's position and called for three major reforms. First, the Court, the nature of its jurisdiction, and the manner of appointing its members should be entrenched in the British North America Act, after agreement had been reached on these points between both levels of government. Second, the Court should be 'a court of appeal exercising a right of supervision and reform over the provincial

courts of appeal' rather than 'a court dealing through appeal with all legal disputes in Canada.' The Supreme Court's jurisdiction should be limited to federal matters, but failing that it should by statute be required to hear any civil-law cases by a panel of five justices, three of whom must have acquired their legal training in Quebec; to reverse a decision of the highest Quebec court, the judgment of the three Quebec justices in Ottawa should be unanimous. Third, the manner of appointment to the Court must be altered to allow more direct provincial influence, or constitutional issues should be diverted to a separate tribunal designed to deal solely with such matters and whose members were appointed by the two major levels of government. Various formulae might be proposed, but the important point, according to the report,

> is that the provinces must not allow the present system to remain a permanent one, as if it were satisfactory. The federal government should understand, moreover, that it is of prime importance that the highest tribunal in the land be shielded from all criticism and enjoy the complete confidence of the people, which unfortunately cannot be said of the Supreme Court of Canada as at present established by Ottawa.[23]

Many of the report's comments and suggestions were fair, but it was unrealistic to expect to shield the Court from 'all criticism.'

In the 1950s and especially in the 1960s a variety of proposals on the constitutional status of the Supreme Court was put forward across the country.[24] However, since federal-provincial relations were at issue and since the extremely contentious and difficult matter of constitutional change was potentially involved, none of these plans came to fruition. The problems at the Court were not immediately serious enough to demand action, other issues, such as medicare in the mid-1960s, were already disruptive enough without opening a contentious debate over the status of the Supreme Court. At the government level, effective deliberation regarding the proposed changes to the Court was postponed indefinitely.

The government did not turn a completely blind eye to Court matters. It was responsive to some extent in the early 1950s when a good deal of concern had re-emerged regarding the Supreme Court Reports, which were becoming increasingly more important to the legal community and the lower courts. Two reporters, A.E. Richard and F. des Rivières, had both been appointed in October 1947. Partly because of their inexperience and lack of training and partly because of the rise in the

number of cases handled by the Court, the quality of the reporting was felt to be poor. This time the complaints came not from the public but from the justices themselves, especially the common-law justices. A government official stated that the justices were 'extremely dissatisfied' with the reporters' inability to write good headnotes. Another concern was the presentation of a summary of counsels' argument before the Court, an innovation in the reporting which the justices now sought. The chief justice requested the appointment of a third reporter, but others held that what was needed was one well-qualified reporter.

The problem of the reports was first raised in 1951, and it took a full five years to gain substantive action. Unwilling to remove the existing reporters, the government decided to wait until one of them requested a transfer. When this occurred it was possible to bring in the man who was regarded as the best law reporter in Canada. A.B. Harvey was persuaded to move from Toronto to Ottawa in 1956, enticed by a lucrative salary, a new position (deputy registrar and editor), and the apparent promise of the registrarship when it became vacant. By these actions the government showed itself concerned about the Supreme Court and willing to act in its betterment, but only in ways that would not rock the boat. With Harvey's untimely death in 1960, complaints about the quality of the reports returned, but in general the criticisms were minor.[25]

The actual work of the Court attracted increasing public attention during the 1950s and 1960s. Though sporadic, this attention was a reflection of public awareness that here was a significant Canadian institution which, when given an important public issue such as rights and freedoms, could have far-reaching influence. The post-war period was a time of rising consciousness of civil liberties, and English Canadians were attracted by a series of appeals impugning the record of the Quebec government in that area. Canadians were curious to know how their own Court would handle the important issues of human rights in the Canadian context. They had hopes that the Supreme Court would rise to challenge and emerge as a protector of Canadian citizens against the unlawful intrusion of governments or their agents.

Beginning in 1949 and continuing for the next ten years, a series of cases, generally but not exclusively associated with the Jehovah's Witnesses, came to the Supreme Court from Quebec.[26] At issue in these cases was the power of the state or its agents arbitrarily and without just cause to interfere with the civil liberties of individuals. The Supreme Court justices were asked to find the legal foundation for the protection of

individual rights. Their task was enormously complicated by the absence of any reference to civil liberties in the British North America Act. But despite the lack of an explicit statutory basis, the Court rose to the challenge in these cases and thwarted the efforts of the Quebec government to infringe the rights of Jehovah's Witnesses. In the process of reaching their conclusions the justices roamed widely over a broad legal terrain and proved unable to agree on a single legal foundation for the judicial protection of individual rights in Canada. The general result of the Court's judgement in *Saumur* v *Quebec*, for example, was one of considerable uncertainty if not confusion. As Peter Russell has observed, 'three sharply contrasting views were expressed on the general relationship of civil liberties to the division of powers and not one of these views could command the support of a majority.'[27] Little wonder that proposals for a statutory bill of rights clearing up the confusion over the status of fundamental rights and freedoms in Canada began to be voiced throughout the country as a result of the Court's ambiguous judgments involving press and religion.

Nevertheless, the Supreme Court's handling of these cases stands out for several reasons. First, the cases tended to give the impression that the Court was prepared to stake a claim for the judicial protection of civil liberties despite the inadequate statutory provisions covering these matters. That the Court was in tune with public expectations was confirmed by the widespread public acclaim that greeted the judgments. However unsettling this new activism of the 1950s was to many lawyers throughout Canada, it was a welcome development in the minds of most public commentators. Individual justices such as Ivan Rand were singled out for their willingness to assume leadership in this traditionally grey area of Canadian law.

At least as important was the rising intellectual quality of the decisions. Paul Weiler, for example, pointed out that in *Boucher* v *The King* the Court handled the substantive legal issue by 'subjecting the whole area [of seditious libel] to searching re-examination ... and carried it off with several opinions of great scholarship and wisdom'; the case was 'a text-book example of judicial craftsmanship and demonstrates that Canadian judges are perfectly capable of it.'[28] Coming so soon after the Supreme Court became the final court of appeal, these civil liberties decisions suggested that Canadians could expect more intellectually cogent judgments from the Court.

The disputes in Quebec regarding the Jehovah's Witnesses had long since ended by the time the cases were completed; the Supreme Court

merely confirmed the result. In the later cases of the 1950s there was an increasingly direct conflict between the provincial government of Maurice Duplessis and a centralist institution, the Supreme Court, as to the character of the state and the values that would prevail in the province of Quebec. This conflict was underlined by the tendency in these cases for the French-Canadian justices to be in dissent. The obvious differences of opinion between the two contestants and the power of the Court to impose its will on the province heightened the tensions already associated with Quebec's relations with Ottawa. The public attention attracted by these judicial contests simply underlined the tension and the sense of conflict. The *Toronto Daily Star* pointed to the conflict and to the Supreme Court's role in it: 'Premier Duplessis of Quebec said in effect: "I am the law." The Supreme Court of Canada ruled otherwise.' In Quebec, however, the judgments 'confirmed Duplessis in his autonomist position and lent credibility to his claim that Ottawa was meddling ignorantly and recklessly in Quebec's affairs.'[29]

The Supreme Court emerged from these civil liberties cases with an uncertain reputation. Most commentators throughout Canada applauded the justices for their results, but many, after close scrutiny of the supporting reasons, were critical of the quality of the jurisprudence. At best it was confusing and inconclusive. The justices appeared uncomfortable in such a public role; they also appeared unprepared by training and experience for the kinds of issues involved. The Court was being challenged to rethink its role and assume a greater public prominence, and it did not know how to cope. The temper of the times and the expectations of Canadians would not permit it to retreat to the old anonymity. Whether the justices liked it or not, the Supreme Court was the final and highest court in the land and it would have to adjust to its new position and the country's rising expectations.

Significant internal tension existed between Cartwright and Fauteux during this period. Cartwright, the former defence counsel, rarely saw eye-to-eye with Fauteux, the former crown prosecutor, in important matters of criminal jurisprudence. As early as 1956 the lines were drawn between the two justices. The central issue that divided them was the contentious matter of criminal intention, or mens rea. Fauteux avoided whenever possible any discussion of mens rea, whereas Cartwright resolutely insisted upon proof of criminal intention; where there was any doubt, Cartwright ruled in favour of the accused. Cartwright emerges from these cases as inflexibly determined to protect the criminal accused; Fauteux emerges as the staunch defender of public order.

Contained implicity in this tension was the clash of the two legal traditions. Fauteux tended to disregard precedent and applied the terms of the Criminal Code as if they were extensions of the Civil Code. He appeared unwilling to grant mens rea even in the most obvious circumstances. Cartwright appeared ready to extend the defence of mens rea to the most doubtful matters. Paul Weiler observed of a major criminal judgment, 'Fauteux J. does not debate with Cartwright J. the established legal significance of the principle of *mens rea*, nor does he meet the arguments relating to the word "knowingly" and the structure of section 138(1). He simply assumes that child protection legislation is an overriding goal which must be pursued to the exclusion of the claims of *mens rea*.'[30] The conflict between these two justices caused the Court to fail to meet the expectations of the legal community in an essential area of the criminal law. Criminal appeals increased considerably toward the end of this period owing principally to the Bill of Rights and the introduction of legal aid. Yet the Court appeared incapable of handling the new challenge; at times it appeared hopelessly locked in battle between the antithetical positions of two strong-minded justices. The result was a confusing criminal jurisprudence.

Most of these cases did not attract much public attention; the issues were difficult for laymen to grasp. But the trial of Wilbert Coffin caught the attention of the media and prompted the federal government to intrude into the normal judicial process, reviving the old fears of political intervention. The Coffin case attracted considerable public interest for over two years and continued long after his execution. Coffin, a Gaspé prospector, was convicted of murdering one of three American hunters in the Quebec bush in 1953 and was sentenced to be hanged. His conviction was affirmed unanimously by the Quebec Court of Queen's Bench. In the summer of 1954 an application for leave to appeal to the Supreme Court of Canada reached Ottawa; Justice Abbott, newly arrived from the cabinet – and thus with no judicial experience and with only limited recent legal experience – heard the application in chambers and dismissed it on the ground that no substantial issue of law was involved. That such a publicly contentious case should have fallen to Abbott was unfortunate and caused public doubts about the quality of justice in the high court. The new judge had admitted to a Toronto journalist shortly before the case arose that he had very limited experience in criminal matters and that he would therefore avoid writing judgments in this area until he had acquired more experience.[31] Many viewed this as a specific and substantive example of the weakness of patronage appointments to the Supreme Court. On appeal to the Court as a whole, Abbott's dismissal was upheld

on the narrow technical ground that the Court had no jurisdiction to change the decision of a justice when the original application had been properly heard.

Despite the seeming unanimity of the courts regarding the justice of Coffin's trial and conviction, public outcry continued. Interest was increased by the accused's escape from jail in 1955 and by rumours that some of the Supreme Court justices disagreed with Abbott's ruling. The minister of justice took the extraordinary step of asking the Supreme Court, on reference, to hear Coffin's appeal. This direct political intrusion into the criminal process was unprecedented and illustrates the vulnerability of the judicial process in general and the Supreme Court of Canada in particular to public pressure and political interference. In January 1956 the justices held, 5–2, that an appeal by Coffin would have been dismissed. With this advice the cabinet decided not to intervene further and to allow Coffin to be executed some three weeks later. While the Coffin case was not legally significant, it was instructive; it showed that the government would not hesitate to interfere directly in the criminal process at the highest level.

During this period the Court was confronted with a relatively new set of problems accompanying the rise of the positive state in the post-war period. As Frank Scott observed at the time, 'The wide and rapid growth in the functions and powers of public authorities ... and in particular the entrusting of judicial functions to government departments and agencies, have so enlarged the area of public administration, and so increased the daily relations between the individual and the state, that we now accept the body of applicable rules as a distinct legal category and recognize it as a major field of law.'[32] The Supreme Court soon found itself obliged to oversee the exercise of this new major field of law. In addition, it was required to superintend the fairness of the procedures employed by the new public boards and agencies. In these matters the Court emerges with a better reputation than it did in either civil liberties or mens rea cases.

The new function was embraced uneasily by the Court. Justices of the Supreme Court had been trained to give deference to the legislative authority; it was not an easy matter for many of them to resist the wishes of Parliament or provincial legislatures. Cartwright's rulings in several of the Quebec civil liberties cases, for example, can be explained as part of the traditional deference to legislative supremacy.

The first major contentious issue for the Court arose out of the attempt of legislatures and Parliament to restrict access to courts of law in certain matters. In an effort to prevent judicial review of certain kinds of

administrative decisions, Parliament and the provincial legislatures began to incorporate privative clauses in many statutes establishing administrative boards. Legislators attempted to do this in a variety of ways: by inserting a no-certiorari clause (a clause stating that certiorari and other forms of judicial review of administrative action were not available); by appending a clause declaring that the agency's decision was final; or by affirming that the agency had exclusive jurisdiction. While the language often varied, the legislative purpose was the same: to deny access to the courts.

That intention constituted a basic problem for the strict constructionism of many members of the Court. It had long been a central tenet of the common-law tradition that superior courts were obliged to oversee the exercise of administrative authority, but many academic commentators supported the new trend toward privative clauses.[33] Professor Bora Laskin, for example, wrote that the superior courts possessed no constitutional support for the claim that they are bound to review administrative board decisions. The courts, he said, 'must bow to the higher authority of a legislature to withdraw this function from them.'[34] The Supreme Court justices disagreed. Their new position as members of a final court of appeal encouraged a more activist view of the Court's role than they had previously contemplated. The justices tended to resist legislative encroachment on judicial review, thus causing some frustration. A good example was the case of *Attorney-General of Canada* v *Brent* (1956).[35] Shirley Kathleen Brent, an American citizen visiting Toronto, applied for permanent residence in Canada. Her application was heard by a special immigration officer, who ordered her deported. Brent appealed eventually to the Ontario Court of Appeal, where the deportation order was quashed.[36] The attorney-general of Canada appealed the order to the Supreme Court of Canada.

A unanimous Supreme Court, through Chief Justice Kerwin, dismissed the appeal on the ground that the Immigration Act did not delegate to immigration officers the authority to deport. The chief justice cited the explicit terms of the privative clause in the act but dismissed it with the observation that since the deportation order had not been validly made, the privative clause did not prevent the Court from reviewing the deportation order. This hardly exhausted the issues involved, but it did illustrate the clear unwillingness of the Supreme Court to abandon its traditional common-law responsibility to review administrative decisions.

Defenders of privative clauses claimed that the new character of administrative law demanded that the old common law be superseded by

a modern conception of administrative authority. They viewed privative clauses as the legitimate extension of parliamentary or legislative sovereignty. For the courts to deny force to privative clauses was viewed as tantamount to invading legislative jurisdiction. As Peter Hogg has written, 'the almost total futility of absolute privative clauses in the immigration and labour cases cannot be defended, for it is nothing short of defiance to the command of the legislature.'[37]

Justice Ivan Rand stands out as the most articulate if not the most influential judicial proponent of privative clauses in labour cases of the 1950s. He was frequently in dissent from a Court majority that ignored or circumvented privative clauses. In *Toronto Newspaper Guild* v *Globe Printing Co.* (1953),[38] for example, the Supreme Court majority quashed a decision of the Ontario Labour Relations Board; Justice Rand dissented on the ground that in such matters the privative clause should bar judicial review. The Labour Relations Board was a specialized board empowered by the legislature to perform a specialized function; its members were recognized experts in labour relations matters. Rand believed that the courts should only review decisions protected by privative clauses if the decisions were not 'within any rational compass that can be attributed to the statutory language.'

By the end of this period it was becoming clear to the Court that its judicial function had changed. Since the abolition of appeals to the Judicial Committee, the Supreme Court had acquired a greater responsiblity in public-law matters. However slow the justices were to respond to these new demands, it was clear that they could not avoid meeting their new responsibilities. It was evident to all observers that the post-1949 Court could not lapse back into the comfort of the old anonymity – sitting in judgment on private-law disputes, relying on the Judicial Committee for instructions. The members of the Court were now dependent on their own intellectual resources.

Thus, it was encouraging that the members of the Court in the 1950s occasionally demonstrated a refreshing, albeit sporadic, willingness to meet the challenges of their new position of primacy or to break new ground. *Boucher* (1951) was one example of this, and *Beaver* v *The Queen* (1957)[39] was similarly singled out for the quality of reasoning. In *Fleming* v *Atkinson* (1959),[40] a majority of the Court, led by Wilfred Judson, broke away from the traditional influence of the House of Lords and examined searchingly the legal principles of tort liability.

But this new activism was not destined to survive into the 1960s. The decline was manifested in *Brodie, Dansky and Rubin* v *The Queen* (1962),[41] a

case which involved *Lady Chatterley's Lover* and the definition of obscenity (newly defined in the 1959 Criminal Code). A full Court decided in a 5–4 decision that the book was not obscene. The reasoning of the majority was very restricted; in three separate judgments only one justice (Ritchie) chose to examine in a limited manner the definition of obscenity; the other four justices accepted the new statutory definition and ruled that the courts were controlled by a narrow interpretation of the statute in this manner.

One can only speculate on why the justices had uncharacteristically flirted with judicial activism in the 1950s. The separation from the Judicial Committee achieved in 1949 may have induced the justices to assert their intellectual independence to prove to themselves and others that they were now the dominant judicial force in Canadian law. The easiest way to do this was to strike out in new directions. At times the desire to establish the Court's separate identity became quite open. One reporter recounted hearing Chief Justice Rinfret early in 1952 interrupt counsel: 'You are citing English cases, Mr. Dorion. This is the Supreme Court of Canada and has been the final court of appeal in criminal matters since 1935. Why don't you cite Canadian cases in support of your contention.'[42] While there was a potential for intellectual parochialism in such a reaction, it had its positive side. By the end of the decade the motivation to establish judicial independence was weakening, and the inherent conservatism of the Canadian judiciary began to reassert itself.

Finally, the tendency toward judicial innovation evident in the 1950s can perhaps be understood as a result of the growing self-confidence of the justices. Throughout those years the Supreme Court contained men such as Rand and Kellock, who had by the end of the decade served many years on the bench. They were intellectually self-confident men prepared to insert that confidence into their work. One thing is certain: conservatism returned to the Court as these men were replaced by younger justices with limited judicial experience.