

# Notes

AC	Appeal Cases
DLR	Dominion Law Reports
OAR	Ontario Appeal Reports
NR	National Reports
NBR	New Brunswick Reports
OR	Ontario Reports
PAC	Public Archives of Canada
QLR	Quebec Law Reports
SCC	Supreme Court of Canada, Records Section
SCR	Supreme Court Reports
UCCP	Upper Canada Common Pleas Reports
UCQB	Upper Canada Queen's Bench Reports
UWO	University of Western Ontario, Regional History Collection

## PREFACE

- 1 See J. Nedelsky 'Judicial Conservatism in an Age of Innovation' in *Essays in the History of Canadian Law* vol. 1, edited by D.H. Flaherty (Toronto: Osgoode Society 1982) 281.
- 2 A.C. Cairns 'The Judicial Committee and Its Critics' *Canadian Journal of Political Science* 4 (1971) 331
- 3 P. Home 'Legal Education in Ontario' *Canadian Bar Review* 1 (1923) 685-6
- 4 T.E. Brown 'Dr Ernest Jones, Psychoanalysis, and the Canadian Medical

- Profession, 1908-1913' in *Medicine in Canadian Society: Historical Perspectives* edited by S.E.D. Shortt (Montreal: McGill-Queen's University Press 1981) 322
- 5 Consultative Group on Research and Education in Law *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: The Council 1983)
- 6 B. Laskin, quoted in *Le Devoir* 26 August 1975; L.-P. Pigeon, quoted in *The Financial Post* 22 March 1980

## CHAPTER 1

- 1 O.D. Skelton *Life and Times of Sir Alexander Tilloch Galt* (Toronto: McClelland and Stewart 1966) 97; W.F. O'Connor *Report to the Senate Relating to the Enactment of the British North America Act, 1867* (Ottawa 1961 [1939]) annex no. 4, 52, 61; Province of Canada *Parliamentary Debates on Confederation* (Quebec 1965 [1865]) 690; PAC Sir J.A. Macdonald Papers, vol. 46, Quebec Conference minutes and notes taken at the Quebec Conference by A.A. Macdonald, 44
- 2 S.M. Lipset *The First New Nation* (New York: Basic Books 1963) 15-60
- 3 House of Commons *Debates* (1879) 1374; (1880) 248. The Conservative minister of justice referred to the Court as 'so essential a feature of our constitution': (1880) 237.
- 4 PAC Sir J.A. Macdonald Papers no. 64614-9, S.H. Strong to Macdonald 20 December 1868
- 5 *Ibid.* no. 64610
- 6 Library of Parliament, House of Commons Bills, Bill 80 (1869) 'An Act to establish a Supreme Court for the Dominion of Canada'
- 7 House of Commons *Debates* (1870) 523
- 8 PAC Sir J.A. Macdonald Papers no. 64622-41, O. Mowat to Macdonald 3 September 1869
- 9 The procedure was one by which the government could refer a legal issue, a question, or a proposed statute to the Supreme Court for the justices' considered opinion; see chapter 5 for a fuller discussion.
- 10 Library of Parliament, House of Commons Bills, Bill 48 (1870) 'An Act to establish a Supreme Court in Canada'
- 11 The reasons for withdrawal are unclear. The bill passed first reading on 18 March 1870, but seven weeks later (on 11 May) it was formally withdrawn by G.-E. Cartier. Three weeks after introduction (on 6 April) Macdonald moved that 'certain resolutions' regarding the court be considered the next day, but discussion of those resolutions and the bill itself never recurred, despite promises from time to time that debate would be forthcoming.

- 12 PAC RG7, G18, vol. 68, H. Bernard to Lord Dufferin 5 November 1874 and enclosure
- 13 House of Commons *Debates* (1875) 285
- 14 38 Vict. c. 11, s. 17
- 15 Ibid. ss 4, 17
- 16 House of Commons *Debates* (1875) 286
- 17 38 Vict. c. 11, ss 52-56
- 18 House of Commons *Debates* (1875) 286-7; J. Smith 'The Origins of Judicial Review in Canada' *Canadian Journal of Political Science* 16 (1983) 127-9. For a contrary view see *ibid.* 125-6, 129.
- 19 House of Commons *Debates* (1875) 751, 924-5
- 20 Ibid. 289
- 21 See chapter 8.
- 22 *Canada Law Journal* 11 (1875) 236; see also 64-5; uwo D. Mills Papers box 4283 clippings scrapbook 24-5.
- 23 PAC A. Mackenzie Papers no. 795-7, T. Hodgins to Mackenzie 29 April 1875; J. Schull *Edward Blake* vol. 1 (Toronto: Macmillan 1975) 144-7
- 24 PAC A. Mackenzie Papers no. 795-7, T. Hodgins to Mackenzie 29 April 1875; E. Blake to Mackenzie 12 November 1875; PAC E. Blake Papers reel M243, no. 234, W.B. Richards to Blake 14 September 1875
- 25 PAC A. Mackenzie Papers no. 795-7, T. Hodgins to Mackenzie 29 April 1875; PAC H.J. Morgan Papers, vol. 20, 7816-21; PAC E. Blake Papers reel M243, no. 235, T. Moss to Blake 14 September 1875; *Canada Law Journal* 11 (1875) 265-6
- 26 J. G. Snel 'The Nova Scotia Influence on the Supreme Court of Canada' in *Law in a Colonial Society: The Nova Scotia Experience* edited by P.B. Waite, S.E. Oxner, and T.G. Barnes (Toronto: Carswell 1984) 143-63
- 27 Ibid.
- 28 PAC E. Blake Papers reel M248, LB1, 395-402
- 29 T. Rinfret 'Le juge Télesphore Fournier' *Revue Trimestrielle Canadienne* 12 (1926) 1-16
- 30 PAC E. Blake Papers reel M239, no. 7, L.H. Holton to Blake 12 September 1875; no. 9, Blake to Holton 14 September 1875; reel M243, no. 269-70, R. Laflamme to Blake 23 September 1875; reel M248, LB1, 393-4, 465-74; PAC A. Mackenzie Papers no. 630, R. Laflamme to Mackenzie 22 September 1875
- 31 PAC E. Blake Papers, reel M241, no. 52, A. Mackenzie to Blake 25 September 1875; no. 284, September [1875]; no. 47, 22 September 1875; no. 49; no. 51, 23 September 1875; reel M248, LB1, 477, 553-6
- 32 *The Legal News* 16 (1893) 343-4
- 33 PAC A. Mackenzie Papers no. 1039-40; PAC E. Blake Papers reel M244, no. 956
- 34 *Regina v The Justices of the Peace of the County of Kings* (1873-5) 15 NBR 539, 541

- 35 *The Queen v Taylor* (1876) 36 UCQB 183
- 36 By reserving the bill the governor-general declined to give royal assent to the legislation; instead the bill was sent to London where it was up to the British cabinet to recommend royal assent by the queen.
- 37 PAC E. Blake Papers reel M241, no. 52, A. Mackenzie to Blake 25 September 1875; reel M248, LB1, 612–16; reel M249, LB2, 4–6, 587–626; reel M250, LB2, 746–8
- 38 J.D. Livermore 'Towards "A Union of Hearts": The Early Career of Edward Blake, 1867–1880' PhD thesis, Queen's University 1975, 283, 290–2; D.C. Thomson *Alexander Mackenzie, Clear Grit* (Toronto: Macmillan 1960) 245
- 39 The justices of the Supreme Court, their replacements on the provincial benches, and the registrar were all gazetted on 9 October 1875. Blake took some care in establishing the order of precedence among the justices; on a draft list, Strong's name had appeared in second place and Ritchie's in third, but the minister of justice reversed the order. The decision was important, given that the chief justiceship would be determined by seniority for the next three decades. See PAC E. Blake Papers reel M248, LB1, 607–9.
- 40 Ibid. reel M250, LB2, 826–9, Blake to R.W. Scott 5 November 1875; *Canada Law Journal* 12 (1876) 57; *Canada Law Journal* 20 (1884) 234
- 41 PAC E. Blake Papers reel M248, LB1, 511–14; idem, reel M250, LB2, 767; reel M249, LB1, 678–80; House of Commons *Debates* (1880) 249–50 and (1882) 1265–7
- 42 See chapter 3.
- 43 PAC E. Blake Papers reel M248, LB1, 541–2, Blake to R. Cassels 21 September 1875; reel M252, LB4, 98–100, Blake to Taschereau 27 January 1876
- 44 SCC Letterbook 1, 9–16, 20, 24
- 45 Ibid., 17, 23, 36, 50; Department of Justice, file no. 34/1869, W.J. Ritchie to E. Blake 25 April 1876; PAC E. Blake Papers reel M252, LB4, 234; reel 242, no. 43; reel M244, no. 467; reel M258, LB8, 643–4
- 46 Department of Justice, file no. 34/1869, R. Cassels to H. Bernard 12 November 1875 and 9 December 1875; R.J. Dalton to Bernard 6 December 1875; PAC RG13, A5, vol. 2038, no. 428, memorandum of Chief Justice Ritchie et al. 27 February 1882
- 47 Christopher Armstrong analyses some aspects of Ontario's impact on the dominion in *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867–1942* (Toronto: University of Toronto Press 1981).
- 48 PAC E. Blake Papers reel M242, no. 43, O. Mowat to Blake 17 December 1875; House of Commons *Debates* (1878) 1636–7, 2550–1
- 49 *Canada Gazette* 9 (15 January 1876), 906; *Canada Law Journal* 13 (1877) 133; PAC E. Blake Papers reel M244, no. 478; reel M251, LB3, 935; SCC Minute Book 1,

- 2; PAC Sir J. Gowan Papers reel M1897, H. Bernard to Gowan 5 January 1876
- 50 scc Reports on Bills 1-4; scc Letterbook 1, 58-9
- 51 scc Minute Book 1, 2-39
- 52 R.C.B. Risk "This Nuisance of Litigation": The Origins of Workers' Compensation in Ontario' in *Essays in the History of Canadian Law* vol. 2, edited by D.H. Flaherty (Toronto: Osgoode Society 1983) 449
- 53 scc Letterbook 1, 422, G. Duval to J.-T. Taschereau, 22 May 1878
- 54 scc subject file no. 14, E. Blake [to governor-in-council] 30 December 1876; scc Letterbook 1, 106-10, 115-16, 143, 185; PAC RG13, A2, vol. 38, no. 1339; *Canada Law Journal* 13 (1877) 341-2. It is regrettable that the linguistic abilities of the justices necessitated the translation of Court submissions. In 1880, it was alleged, only one of the four English-speaking justices '[knew] the French language': see House of Commons *Debates* (1880) 257
- 55 (1877) 1 SCR 235
- 56 PAC A. Mackenzie Papers no. 1081 d-e, Lord Dufferin to Mackenzie 16 December 1875; PAC E. Blake Papers reel M238, no. 11, Dufferin to Blake 2 March 1876; PAC Sir W. Laurier Papers no. 71286, Dufferin to Sir M.E. Hicks Beach 19 July 1878
- 57 PAC RG13, A2, vol. 40, no. 28, R.G. Haliburton to the minister of justice 15 December 1877; 2 January 1878; memorandum of Z.A. Lash to R. Laflamme 3 January 1878; A1, vol. 458, no. 28
- 58 W.N.T. Wylie, quoted in *Essays in the History of Canadian Law* vol. 1, edited by D.H. Flaherty (Toronto: Osgoode Society 1981) 142
- 59 PAC RG13, A2, vol. 39, no. 872, W.A. Henry to R. Laflamme 14 August 1877; A1, vol. 456, no. 872; PAC E. Blake Papers reel M261, LB10, 164-5; *Canada Law Journal* 13 (1877) 365; PAC Sir J.A. Macdonald Papers no. 159435-38, D. Girouard to Macdonald 23 November 1877
- 60 PAC E. Blake Papers reel M241, no. 134, A. Mackenzie to Blake 15 June 1876; no. 126; reel M252, LB4, 98-100, 107-8; reel M253, LB4, 314; reel M256, LB5, 664-7
- 61 PAC Sir J.R. Gowan Papers reel M1898, Gowan to J.W. Gwynne 14 January 1879
- 62 *Canada Law Journal* 14 (1878) 5, 307; *Quebec Mercury* 16 October 1878; PAC A. Mackenzie Papers no. 2082-3, J.-T. Taschereau to Mackenzie 18 September 1878. Two days before Taschereau's resignation took effect, his son was appointed to the Quebec Superior Court.
- 63 *Ibid.* no. 1580-1, W.B. Richards to Mackenzie 1 May 1877; *The Legal News* 1 (1878) 565; *Ottawa Citizen* 14 October 1878. For some reason H.-E. Taschereau did not take the oath of office for a further five months; see House of Commons *Debates* (1879) 505.

- 64 I. MacPherson 'Sir William Buell Richards' *Dictionary of Canadian Biography* 1881 to 1890 vol. 11 (Toronto: University of Toronto Press 1982) 731
- 65 *Canada Law Journal* 13 (1877) 285; *Canada Law Journal* 15 (1879) 40–1
- 66 In an 1875 decision concerning escheats, he held that in 1867 provincial governments had fully ceded to the central government their sovereignty and any privileges or prerogatives (including escheats) attached to that sovereignty. PAC F.-J. Audet Papers, vol. 28, 746–7; *Canada Law Journal* 11 (1875) 118; *Canada Law Journal* 12 (1876) 152–3; H.-E. Taschereau *The Criminal Law Consolidation and Amendment Act of 1869* vol. 1 (Montreal 1874) and vol. 2 (Toronto 1875). When the appointment was attacked in the House of Commons, it was on the grounds of the timing of the appointment and the privileged character of the Taschereau family; see House of Commons *Debates* (1879) 505–6. In *Church v Blake* (1875) 1 QLR 177, H.-E. Taschereau wrote: 'Avant la confédération, chacune des provinces était revêtue de ce caractère de souveraineté; mais, en joignant l'union fédéral, chacune d'elles a fait au gouvernement central une cession complète de cette souveraineté, des privilèges, prérogatives et attributs de cette souveraineté, comme des revenus provenant de l'exercice de ces privilèges, prérogatives et attributs.' A rumour circulated that if the Liberal government had been returned to office in September 1878, J.-T. Taschereau would have been named lieutenant-governor of Quebec and his place on the Court filled by Rodolphe Laflamme, the minister of justice; see House of Commons *Debates* (1879) 505.
- 67 *Canada Law Journal* 15 (1879) 41; *Re Niagara Election Case* (1879) 29 UCCP 261
- 68 PAC Sir J.R. Gowan Papers reel M1898, J.W. Gwynne to Gowan 13 January 1879

## CHAPTER 2

- 1 *Canada Law Journal* 15 (1879) 41
- 2 House of Commons *Debates* (1879) 1376. There were already signs of electoral discontent regarding the Supreme Court; see, for example, P.H. Russell *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Information Canada 1969) 17, 242, notes 85 and 86; and PAC Sir J.A. Macdonald Papers no. 165085–8, G.H. Perry to Macdonald 24 April 1879.
- 3 House of Commons *Debates* (1879) 1373
- 4 *Ibid.* 1387. It is possible that the bill did not return for second reading because the cabinet had acted behind the scenes to control Keeler; see *ibid.* 1373–4.
- 5 The second rationale was hinted at by the minister of justice in 1879; see *ibid.* 1380.
- 6 *Canada Law Journal* 15 (1879) 119; *Canada Law Journal* 16 (1880) 313–14; *McKay v Crysler* (1880) 3 SCR 436

- 7 PAC Sir J.A. Macdonald Papers no. 148652-60, H.-E. Taschereau to Macdonald [1882]
- 8 *Canada Law Journal* 19 (1883) 81-3, 121, 197; *Canadian Law Times* 3 (1883) 191-2; *The Legal News* 6 (1883) 89-90. In *Grant v Beaudry* (unreported) the grand master of the Orange Order sued the mayor of Montreal for false arrest. Though the point was not at issue on appeal before the Quebec Court of Queen's Bench, the judges gave as their opinion that the Orange Order (known for its hostility to Roman Catholics and French Canadians) was an illegal association. When the case came before the Supreme Court of Canada, Justice Gwynne commented in court that the judges' opinion was 'extra-judicial and unwarranted.' This in turn set the legal journals squabbling over Gwynne's remarks, which aroused Quebec sensitivities.
- 9 House of Commons *Debates* (1879) 1375-6. Two Ontario Conservatives broke in the opposite direction to support the Court. Russell *A Bilingual and Bicultural Institution* provides a useful account of Quebec complaints (at 20-1).
- 10 PAC Sir J.A. Macdonald Papers no. 165085-8, G.H. Perry to Macdonald 24 April 1879; no. 163176-80, D. Girouard to Macdonald, 2 January 1879
- 11 *The Legal News* 2 (1879) 161-2. See also A.I. Silver *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press 1982) 122-3.
- 12 PAC Sir J.A. Macdonald Papers no. 148644-7, F. Routhier et al. to Macdonald 24 February 1880 [1881]. Both internal and external evidence indicates that the petition was sent in 1881 rather than in 1880.
- 13 House of Commons *Debates* (1880) 240, 267-8. Among the twenty-nine men voting 'nay' were seven Liberals and twenty-two Conservatives; of the Conservatives, one was from Nova Scotia, seven were from Ontario, and twenty-one were from Quebec. See also *The Legal News* 3 (1880) 145-6.
- 14 House of Commons *Debates* (1881) 914-26; (1882) 950. In 1882 the bill received first reading only, but in 1881 the issue was deferred by a six-month hoist in a vote of 88-39. Those thirty-nine negative votes consisted of six Liberals and thirty-three Conservatives; twenty-three were from Quebec, fourteen from Ontario, and one each from British Columbia and Prince Edward Island. Keeler's sponsorship of the bill ended with his death early in 1881.
- 15 *Ibid.* 884. Girouard's solution was first mentioned early in 1879 in a letter to the prime minister; see PAC Sir J.A. Macdonald Papers no. 163176-80, D. Girouard to Macdonald 2 January 1879.
- 16 House of Commons *Debates* (1881) 1295; PAC Sir J.A. Macdonald Papers no. 148649-50, D. Girouard to Macdonald 10 March 1881
- 17 House of Commons *Debates* (1881) 1296; *The Legal News* 4 (1881) 65, 73-4, 97. The prime minister did claim, however, that his government was considering adoption of such legislation; see House of Commons *Debates* (1883) 29.
- 18 House of Commons *Debates* (1885) 168

- 19 House of Commons *Debates* (1879) 166
- 20 *Valin v Langlois* (1880) 3 SCR 1
- 21 J. Smith 'The Origins of Judicial Review in Canada' *Canadian Journal of Political Science* 16 (1983) 132. Sir John A. Macdonald, for one, had earlier explicitly rejected any claim that the Court could 'in any degree override the Parliament of Canada'; see House of Commons *Debates* (1875) 289.
- 22 *Canada Law Journal* 16 (1880) 99–100
- 23 See, for example PAC Sir J.R. Gowan Papers reel M1898, J.W. Gwynne to Gowan 18 July 1880.
- 24 SCC Letterbook 1, 421, G. Duval to S.H. Strong 22 May 1878
- 25 *Canada Law Journal* 14 (1878) 98–100; *Canada Law Journal* 16 (1880) 73–5, 154
- 26 House of Commons *Debates* (1880) 252–3
- 27 *Canada Law Journal* 13 (1877) 341–3; *Canada Law Journal* 16 (1880) 42; *The Legal News* 4 (1881) 137–8; *Canadian Law Times* 3 (1883) 195
- 28 *The Legal News* 7 (1884) 350–1
- 29 *The Legal News* 1 (1878) 140–1; *The Legal News* 7 (1884) 350–1; *Canadian Law Times* 1 (1881) 645, 649; *Canada Law Journal* 14 (1878) 3–4; *Canada Law Journal* 17 (1882) 87–8
- 30 PAC RG13, A2, vol. 47, no. 828, J. MacLennan to Z.A. Lash 11 May 1880; PAC Sir A. Campbell Papers reel M24, J.E. Rose to Campbell 17 October 1883 and 20 October 1883; Sir W.J. Ritchie to Campbell 23 November 1883
- 31 In 1886 the reporter noted that prior to 1880 thirty cases had been left unreported, some because the legal points involved were not important enough and others because the formal notes of the judges who had delivered judgments could not be obtained; see PAC RG13, A2, vol. 64, no. 531, G. Duval to G.W. Burbidge 19 April 1886.
- 32 See, for example, SCC Letterbook 1, 538, 803, 819; Letterbook 2, 60, 201, 340, 351; Letterbook 3, 24–6.
- 33 *Milloy v Kerr* (1884) 8 SCR at 486 (note); PAC RG13, A2, vol. 70, no. 450, G. Duval to R. Sedgewick, 10 April 1888
- 34 PAC RG13, A2, vol. 65, no. 886, G. Duval to G. Burbidge 25 June 1886; *The Legal News* 9 (1886) 129, 233; *Canada Law Journal* 17 (1881) 177
- 35 SCC Letterbook 1, 481–2, R. Cassels to Z.A. Lash 31 October 1878; *ibid.* 483; House of Commons *Debates* (1886) 890–1; PAC RG13, A2, vol. 70, no. 452; A1, vol. 472, no. 126
- 36 SCC Letterbook 1, 262–3; Letterbook 2, 88–9; PAC RG13, A2, vol. 60, no. 317
- 37 SCC Letterbook 2, 451–6; *ibid.* 88–9
- 38 PAC RG13, A2, vol. 60, no. 317; A1, vol. 462, no. 1166. As well, excess numbers of each volume were accumulating rapidly (there were 1,500 on hand in 1884), creating storage problems.



- 39 *In re Sproule* (1887) 12 SCR 140; D.R. Williams, '... *The Man for a New Country*': *Sir Matthew Baillie Begbie* (Sydney, BC: Gray's Publishing 1977) 261-2. Williams is incorrect in stating that both Henry and Strong issued the original writ.
- 40 *Milloy v Kerr* (1884) 8 SCR 474; the other cases cited are unreported.
- 41 PAC Sir J.A. Macdonald Papers no. 148624-39, S.H. Strong to Macdonald 9 February 1880
- 42 PAC Sir J.S.D. Thompson Papers no. 6040, S.H. Strong to D. McCarthy 11 May 1887
- 43 J. Travis 'Travis on Canadian Constitutional Law' *Manitoba Law Journal* 2 (1885) 43; *Canada Law Journal* 28 (1892) 484
- 44 PAC W.L.M. King Papers reel c2264, no. 84490, J.S. Ewart to King 6 May 1924
- 45 A picture of the courtroom is reproduced in *The Green Bag* 2 (1890) 241, and the room is described in *Maclean's Magazine* (March 1914) 13-14.
- 46 3 SCR 575
- 47 (1883) 5 SCR 538
- 48 4 SCR 215
- 49 (1881-2) 7 AC 96
- 50 (1881-2) 7 AC 829
- 51 (1883-4) 9 AC 117
- 52 14 AC 295
- 53 *Attorney-General of Ontario v Mercer* (1882-3) 8 AC 767
- 54 13 SCR 577
- 55 17 SCR 657
- 56 B. Laskin 'The Supreme Court of Canada: A Final Court of and for Canadians' *Canadian Bar Review* 29 (1951) 1057-65
- 57 8 SCR 1
- 58 7 SCR 216
- 59 14 SCR 392
- 60 A well-regarded Maritime lawyer, Wallace Graham, provided an interesting account of his appearance before the Court in 1884; see J.G. Snell 'The Nova Scotia Influence on the Supreme Court of Canada' in *Law in a Colonial Society: The Nova Scotia Experience* edited by P.B. Waite, S.E. Oxner, and T.G. Barnes (Toronto: Carswell 1984)
- 61 Calculated from SCC subject file no. 66; see also chapter 7
- 62 PAC RG13, A1, vol. 470, no. 372, 381, 1097; vol. 480, no. 3G, 3M; Sir J.S.D. Thompson Papers nos. 7676, 7717
- 63 PAC RG13, A1, vol. 460, no. 169; vol. 462, no. 1356; vol. 472, no. 308; vol. 480, nos. 31, 1200; vol. 482, nos. 3B, 3F; A5, vol. 2040, no. 705, S.H. Strong to Sir J.A. Macdonald 20 August 1888, and minute by Macdonald.

- 64 See, for example, *Manitoba Law Journal* 1 (1884) 140-1; *Canada Law Journal* 20 (1884) 177.
- 65 PAC Sir J.S.D. Thompson Papers no. 3007, C.H. Tupper to Thompson [1883]. We are indebted to P.B. Waite for this reference; the 'risk' referred to presumably concerns the attempts to abolish or weaken the Supreme Court.
- 66 PAC Sir J.A. Macdonald Papers no. 125096-7, Sir J.S.D. Thompson to Macdonald, 20 August 1888
- 67 Ibid.; no. 229953-62, A.L. Palmer to Macdonald 21 July 1888; PAC Sir J.S.D. Thompson Papers no. 8151, Macdonald to Thompson 7 August 1888
- 68 *Halifax Morning Herald* 29 October 1888; *Canada Law Journal* 45 (1909) 157; *Manitoba Daily Free Press* 6 and 27 October 1888. It seems that the post was rejected first by Chief Justice Taylor of the Manitoba Supreme Court and second by Justice Osler of the Ontario Court of Appeal. Patterson had been a member of the Ontario Court of Appeal since 1874. For biographical details, see *Canada Law Journal* 29 (1888) 546; *Ottawa Citizen* 29 October 1888; *Toronto Globe* 30 October 1888; *Canadian Law Times* 8 (1888) 277; *Ottawa Citizen* 25 July 1893. Patterson's pro-centralist leanings seemed confirmed by his decisions in *The Queen v Hodge* (1881-2) 7 OAR 246; *Attorney-General of Ontario v the International Bridge Company* (1880-1) 6 OAR 537; and *Doyle v Bell* (1884-5) 11 OAR 326. Compare *Edgar v the Central Bank of Canada* (1887-8) 15 OAR 193.
- 69 PAC Sir J.S.D. Thompson Papers, vol. 70, no. 7694, G.W. Burbidge to Thompson, 8 May 1888; PAC Sir J.R. Gowan Papers, Sir W.R. Richards to Gowan, 21 May 1888; *Halifax Morning Chronicle* 27 and 29 October, 1 November 1888; *Halifax Morning Herald* 29 and 31 October 1888; P.B. Waite to J.G. Snell, 13 June 1981
- 70 43 Vict. c. 34; *Canada Law Journal* 16 (1880) 71-2. Compare *Canadian Law Times* 10 (1890) 130-9.
- 71 In the 1882 speech from the throne the government renewed its pledge of legislation reforming the Court. No copy of the bill is extant; its content must be deduced from the commentary on it, especially the debates in the Senate (where the bill was introduced). It is not clear, for example, whether the common-law justices would have continued to sit on civil-law appeals.
- 72 *Senate Debates* (1882) 242-50; *The Legal News* 5 (1882) 99, 105, 153; PAC Sir J.A. Macdonald Papers no. 81748-52, Sir A. Campbell to Macdonald [1882]; *ibid.* no. 179329-30, J.A. Ouimet to Macdonald 29 March 1882
- 73 PAC RG13, A5, vol. 2038, no. 509, memorandum from Z.A. Lash to Sir A. Campbell 20 March 1882. In this memorandum, dated prior to the introduction of the 1882 bill, the deputy minister of justice indicates that in

- 1880–1 an amendment had been suggested to Sir J.A. Macdonald, 'but owing to the attack which had been made on the Court he thought it better to do nothing about it.'
- 74 PAC Sir J.A. Macdonald Papers no. 148652–60, H.-E. Taschereau to Macdonald [1882]; no. 148624–39, S.H. Strong to Macdonald 9 February 1880; PAC Sir J.S.D. Thompson Papers, LB6, 466, Thompson to Taschereau 27 April 1887; no. 21981, Strong to Thompson 8 February [1893]; PAC, RG13, A5, vol. 2038, no. 632, J.W. Gwynne to Sir A. Campbell 5 April 1883
- 75 Other examples of this use of the justices are Strong's close involvement in the drafting of a new Petition of Right Act; Blake's plans in 1876 to use the judges to consolidate Canadian statutes; Fournier's continuing assistance regarding seigneurial claims; and Richards' advice to the minister of justice in answering an opposition query. See PAC E. Blake Papers reel M244, no. 479, W.B. Richards to Blake 17 January 1876; no. 594, 9 March 1876; no. 467, S.H. Strong to Blake 11 January 1876; reel M251, LB3, 841–4; reel M255, LB5, 48–9.
- 76 PAC Sir A. Campbell Papers reel M24, Sir J.A. Macdonald to Campbell 28 June 1883
- 77 PAC Sir J.S.D. Thompson Papers no. 8040, H.-E. Taschereau to Thompson 9 July 1888; LB6, 960–2, Thompson to Sir W.J. Ritchie 19 July 1887.
- 78 PAC Sir J.S.D. Thompson Papers no. 3963, Sir J.A. Macdonald to Thompson 27 April 1886
- 79 G.V. LaForest *Disallowance and Reservation of Provincial Legislation* (Ottawa: Department of Justice 1955) 59–61
- 80 *Canada Law Journal* 22 (1887) 376–7; 51 Vict. c. 37; 52 Vict. c. 37
- 81 PAC RG13, A5, vol. 2038, no. 428, memorandum of Chief Justice Ritchie et al. 25 February 1882; *The Legal News* 5 (1882) 57; *Canada Law Journal* 28 (1882) 115–16
- 82 PAC RG13, A2, vol. 52, no. 60, F.H. Ennis to Z.A. Lash 23 January 1882; A1, vol. 466, no. 60; SCC Letterbook 2, 725–6, R. Cassels to Lash 2 January 1882
- 83 PAC RG11, vol. 4328, file no. 2994-1-c 'Excerpts from Reports of the Department of Public Works' 1
- 84 Most popular accounts incorrectly place the date of this move at approximately 1877.
- 85 House of Commons *Debates* (1882) 1265–6. At the same time some members of the House expressed approval that the Court had been moved and congestion relieved in the Parliament buildings and in the library.
- 86 PAC RG13, A5, vol. 2040, no. 568, R. Cassels to G.W. Burbidge 27 May 1887
- 87 PAC RG11, vol. 4328, file no. 2994-1-c 'Excerpts from Reports of the

Department of Public Works' 2. The explanations in the House of Commons regarding the purchase of the building to which the art gallery was moving carefully avoided stating the real purpose of the purchase, which was to provide more room for the two central courts; see House of Commons *Debates* (1887) 1183.

- 88 PAC Sir J.S.D. Thompson Papers no. 10302, Sir W.J. Ritchie to Thompson, 3 August 1889. See also no. 10266, T. Fournier to Thompson, 29 July 1889.
- 89 PAC RG13, A5, vol. 2040, no. 568; *Brassard et al. v Langevin* (1877) 1 SCR 145; *London Free Press* 15 March 1933; House of Commons *Debates* (1938) 2031; PAC Sir J.S.D. Thompson Papers no. 10324, R. Sedgewick to Thompson 9 August 1889
- 90 PAC RG11, vol. 3914, 8
- 91 *Ibid.* 6–32; vol. 4328, file no. 2994–1-c 'Excerpts from Reports of the Department of Public Works' 2; PAC RG13, A5, vol. 2042, no. 935

### CHAPTER 3

- 1 PAC RG13, A2, vol. 84, no. 30, Sir W.J. Ritchie to Sir J.S.D. Thompson 15 September 1892; *Canadian Law Times* 12 (1892) 242, citing the chancellor of Ontario.
- 2 *Canada Law Journal* 28 (1892) 481; *Toronto Globe* 27 September 1892; *Saint John Daily Telegraph* 27 September 1892; *Canadian Law Times* 13 (1893) 50
- 3 PAC Sir J.S.D. Thompson Papers no. 20348, J.R. Gowan to Thompson 29 September 1892; no. 20496, 13 October 1892
- 4 *Canada Law Journal* 28 (1892) 609; *Canada Law Journal* 11 (1875) 266
- 5 *Halifax Herald* 8 August 1906; *Legal News* 16 (1893) 95; PAC Sir J.S.D. Thompson Papers no. 4134, R. Sedgewick to Thompson 3 June 1886; no. 4305, 9 July 1886
- 6 *Saint John Daily Telegraph* 8 May 1901; *Saint John Daily Sun* 21 September 1893; House of Commons *Debates* (1901) 4672–4; PAC Sir J.S.D. Thompson Papers no. 21118, G.E. King to Thompson 5 December 1892; *Halifax Morning Chronicle* 29 October 1888; *Canadian Law Times* 21 (1901) 285
- 7 The cabinet did consider applying the idea to the justices: House of Commons *Debates* (1894) 4962.
- 8 *Ibid.* 4889–90, 4955–5013. The existing pension rights amounted to two-thirds of salary at retirement.
- 9 PAC Sir C.H. Tupper Papers no. 1376–7, Tupper to Sir S.H. Strong 15 February 1895; no. 1378, Tupper to R. Cassels
- 10 *Ibid.* no. 1379–84, R. Cassels to Sir C.H. Tupper, 16 February 1895

- 11 Ibid. no. 1385-9, Sir S.H. Strong to Sir C.H. Tupper, 19 February 1895
- 12 Ibid. One year later, when Tupper stepped down as minister of justice, Strong reiterated his support of 'the beneficial changes which ... you contemplated in the composition of the Court'; see *ibid.* no. 1636-8, 16 January 1896; no. 1639-41, 18 January 1896.
- 13 Tupper had suggested that the two men would retire with their two-thirds pensions, that the government would submit to Parliament with the next estimates a vote for the difference between pension and salary, and that if Parliament approved the vote the government would submit the item each succeeding year for Parliament's approval, 'Parliament being free, of course, to act regardless of the item being considered an ordinary item' in supply; see *ibid.* no. 1392-4, Tupper to T. Fournier, 24 February 1895.
- 14 Ibid. no. 1385-9, Sir S.H. Strong to Tupper 19 February 1895
- 15 Of the forty reported cases argued in the winter term of 1895, Fournier participated in only nineteen and wrote no judgments at all.
- 16 Ibid.; PAC RG13, A5, vol. 2044, no. 821, Tupper to Fournier 4 September 1895; no. 837, 10 and 11 September 1895; Fournier to Tupper 9 September 1895; Tupper to the governor-in-council 10 September 1895
- 17 *Quebec Daily Mercury* 28 September 1895. Angers had been solicitor-general of Quebec (1874-6), attorney-general of Quebec (1876-8), puisne justice of the Quebec Superior Court (1880-7), lieutenant-governor of Quebec (1887-92), and a member of the federal cabinet (1892-5, 1896). The best analysis of the government's political problems at this time is found in J.T. Saywell 'Introduction' *The Canadian Journal of Lady Aberdeen 1893-1898* (Toronto: Champlain Society 1960).
- 18 Favourable reviews of both books appeared in legal journals; see *The Lower Canada Law Journal* 1 (1865) 50-1; *The Legal News* 14 (1891) 146.
- 19 The McGreevy-Langevin scandal involved major charges of corruption and influence-peddling against an influential federal minister (Sir H.-L. Langevin) and a Conservative member of Parliament (Thomas McGreevy); see L. LaPierre 'Joseph Israel Tarte and the McGreevy-Langevin Scandal' *Canadian Historical Association Annual Report*, 1961 47-57.
- 20 *The Legal News* 18 (1895) 291-2; *Montreal Daily Star* 22 March 1911; PAC F-J. Audet Papers, vol. 14
- 21 PAC Sir C.H. Tupper Papers no. 1390-1, Tupper to J.W. Gwynne 23 February 1895; no. 1474, 27 September 1895; no. 1475, 30 September 1895. There were also rumours circulating that efforts were being made to persuade Justice Taschereau to resign, but no evidence was uncovered to confirm or deny this; see *Quebec L'Electeur* 27 September 1895.
- 22 *Canada Law Journal* 32 (1896) 648

- 23 Edward Cameron remained registrar until 1930. He was not only an effective and influential administrator, but a legal scholar committed to a national role for the Supreme Court.
- 24 PAC E. Blake Papers reel M247, no. 1860, J. Cameron to Blake 19 October 1896; *Canadian Law Times* 16 (1896) 271-3; uwo D. Mills Papers box 4282, undated material file, Mills to L.H. Davies [1900?]
- 25 PAC Sir C.H. Tupper Papers no. 1711-4, Tupper to J.W. Gwynne 10 April 1896; no. 1715, 15 April 1896; PAC RG13, A1, vol. 494, no. 3E; PAC Lord Minto Papers vol. 5, 66-7, Sir W. Laurier to Minto 26 November 1900
- 26 PAC E. Blake Papers reel 242, no. 175, Sir O. Mowat to Blake 24 November 1896; no. 182, 25 September 1897; no. 184, 30 September 1897; no. 183, Blake to Mowat 27 September 1897
- 27 *Halifax Herald* 6 August 1906. See also M. Bader and E. Burstein 'The Supreme Court of Canada 1892-1902: A Study of the Men and the Times' *Osgoode Hall Law Journal* 8 (1970) 509.
- 28 *Canadian Green Bag* 1 (1895) 1-2
- 29 PAC RG13, A5, vol. 2047, no. 35, W.H. Bartram to D. Mills 16 November 1901; Mills to the governor-in-council, 15 January 1902; *The King v Love* (unreported)
- 30 PAC RG13, A5, vol. 2047, no. 16; *Toronto World* 9 December 1901
- 31 scc Letterbook 14, 523-4, E.R. Cameron to C. Fitzpatrick 19 October 1898
- 32 *Ottawa Citizen* 17 October 1898. See also *Quebec L'Événement* 2 and 7 November 1898; and *Ottawa Free Press* 17 October 1898.
- 33 *Toronto Globe* 9 June 1898; *Canadian Law Times* 18 (1898) 143-4, 164-6
- 34 *Quebec L'Événement* 25 October 1898; uwo D. Mills Papers box 4287, Letterbook 3 279, Mills to C. Robinson 9 June 1898
- 35 *Stephens v McArthur* (1892) 19 SCR 446; *Western Law Times* 2 (1891) 188-9
- 36 PAC E. Blake Papers reel M242, no. 187, Sir O. Mowat to Blake 15 October 1897; no. 186, Blake to Mowat 14 October 1897; PAC RG13 A5, vol. 2046, no. 752; PAC Sir W. Laurier Papers no. 63728a, Sir S.H. Strong to the solicitor-general 16 March [1902]
- 37 PAC E. Blake Papers reel M242, no. 187, Sir O. Mowat to Blake 15 October 1897; PAC D. Girouard Papers vol. 1, Sir S.H. Strong to Girouard 22 April 1900; vol. 5, file 2, p. 213, no. 94
- 38 PAC RG13, A2, vol. 87, no. 883; vol. 89, no. 139; vol. 118, no. 309
- 39 PAC Sir J.A. Macdonald Papers no. 125096-7, Sir J.S.D. Thompson to Macdonald 20 August 1888
- 40 PAC E. Blake Papers reel M242, no. 187, Sir O. Mowat to Blake 15 October 1897; no. 175, 24 November 1896
- 41 PAC RG13, A1, vol. 496, no. 559; A2, vol. 117, no. 3A, H.-E. Taschereau to D. Mills 23 March 1901

- 42 Ibid. A1, vol. 503, no. 3A; uwo D. Mills Papers box 4287, Letterbook 7, 221; House of Commons *Debates* (1902) 2224-5
- 43 PAC Sir W. Laurier Papers no. 55288, [Laurier] to Sir O. Mowat 13 May 1901; no. 55285-7, Mowat to Laurier 11 April 1901; no. 62044-5, J.M. Gibson to Laurier 28 January 1902; PAC E. Blake Papers reel M242, no. 187, Mowat to Blake 15 October 1897
- 44 *Canada Law Journal* 26 (1890) 163. The chief justice of Victoria earned \$17,500 and the puisne justices \$15,000 each; in New South Wales, the figures were \$17,500 and \$13,000, and in New Zealand \$8,500 and \$7,500.
- 45 O.J. Firestone *Industry and Education* (Ottawa: University of Ottawa Press 1969) 261-2
- 46 PAC Sir J.S.D. Thompson Papers no. 26719, J.W. Gwynne to Thompson 20 June 1894. A successful lawyer in a major city could earn far more than the puisne justices' salary at this time (\$7,000). Robert Borden, senior partner in a Halifax law firm, had an annual income from his law practice in the early 1890s of approximately \$30,000; see R.C. Brown *Robert Laird Borden 1854-1914* (Toronto: Macmillan 1975) 86.
- 47 Canada Sessional Papers (1881) no. 8, 55; (1891) no. 1A, 18-19; (1901) no. 1, M8-9, 12
- 48 uwo D. Mills Papers box 4287, Letterbook 7, 29, Mills to C. Fitzpatrick 19 December 1900
- 49 House of Commons *Debates* (1888) 964, 1402
- 50 PAC RG13, A2, vol. 86, no. 524, R. Cassels to R. Sedgewick 2 May 1892; S.H. Strong to Sedgewick 2 May 1892
- 51 PAC Sir J.S.D. Thompson Papers no. 21981, S.H. Strong to Thompson 8 February [1893]; no. 22158, G.W. Burbidge to Thompson 21 February 1893; no. 22174, 22 February 1893
- 52 59 Vict. c. 14. In 1889, by 52 Vict. c. 37, s. 1, a four-judge Court was permitted if the fifth judge had taken part in earlier proceedings.
- 53 *Canadian Law times* 16 (1896) 246-7; *Canada Law Journal* 32 (1896) 647-8; *Legal News* 19 (1896) 257-8; PAC Sir W. Laurier Papers no. 224390, C. Fitzpatrick to Laurier 30 September 1896
- 54 PAC Sir C. Fitzpatrick Papers no. 1269, Fitzpatrick to Sir W. Laurier 6 March 1902; House of Commons *Debates* (1902) 1673-4, 4264-5, 5054. The chief justice had been consulted as to this bill; see PAC, RG13, A1, vol. 505, no. 245.
- 55 PAC Sir W. Laurier Papers no. 10086-9, H.-E. Taschereau to Laurier 27 December 1896
- 56 59 Vict. c. 14; Senate *Debates* (1896) 252
- 57 PAC Sir W. Laurier Papers no. 9230-1, Sir O. Mowat to Laurier 28 November 1896
- 58 PAC RG13, A5, vol. 2044, no. 279; uwo D. Mills Papers box 4287, Letterbook

- 3, 72, Mills to Sir S.H. Strong 25 April 1898; PAC Sir W. Laurier Papers no. 34766-7, Strong to C. Fitzpatrick 21 June 1899; no. 40632-4 [22 June 1899]
- 59 PAC Sir W. Laurier Papers no. 42207, C. Fitzpatrick to Laurier 9 February 1900
- 60 uwo D. Mills Papers box 4287, Letterbook 2, 600-2, 673-9; PAC Sir W. Laurier Papers nos. 47370-2, 71032, and 71283-5
- 61 See, for example, PAC Sir J.S.D. Thompson Papers nos. 24848, 22156; uwo D. Mills Papers box 4287, Letterbook 5, 147; J.G. Snell 'The Deputy Head in the Canadian Bureaucracy' *Canadian Public Administration* 24 (1981) 302-5.
- 62 PAC Sir J.S.D. Thompson Papers 1839, 470, Thompson to Sir S. H. Strong 24 October 1893; no. 23689, Strong to Thompson 31 October [1893]; no. 23764, 7 November [1893].
- 63 PAC RG13, A2, vol. 121, no. 3K; *The New York Times* 9 May 1902
- 64 PAC Sir C.H. Tupper Papers no. 1636-8, Sir S. H. Strong to Tupper 16 January 1896; no. 1639-41, 18 January 1896; no. 1726-30, 25 April 1896; no. 1731-4, [n.d.]. See also no. 1348 [n.d.].
- 65 *Canada Law Journal* 24 (1888) 391-2. See also *Canada Law Journal* 11 (1875) 118, and 12 (1876) 152-3; *Canadian Law Times* 8 (1888) 148; *Legal News* 11 (1888) 105-6; PAC Sir J.S.D. Thompson Papers no. 6854, H.-E. Taschereau to Thompson 2 November 1887; *ibid.* 188, 320-2, Thompson to Taschereau 21 November 1887
- 66 PAC Sir J.S.D. Thompson Papers no. 10758, H.-E. Taschereau to Thompson 23 October 1889
- 67 H.-E. Taschereau to Sir J.S.D. Thompson 20 January 1893, reprinted in *Legal News* 16 (1893) 36-45
- 68 *Canada Law Journal* 29 (1893) 94-5; PAC Sir J.R. Gowan Papers reel M1939, A5, draft memorandum in response to Justice Taschereau's open letter; *Toronto World* 18 February 1893. Compare for example: *Western Law Times* 4 (1893) 43; *Ottawa Free Press* 26 September 1893; *Legal News* 16 (1893) 66.
- 69 House of Commons *Debates* (1893) 723, 1550. There was no mention of the incident in the Senate.
- 70 Brief favourable reviews of the book can be found in: *Legal News* 16 (1893) 215-16; *Canadian Law Times* 13 (1893) 182; *Western Law Times* 4 (1893) 100. Justice Girouard was also busy writing books and articles in this period, but his interest was the history of the St Lawrence Valley; see, for example, *Review of Historical Publications Relating to Canada* 5 (1900) 30-2, and 7 (1903) 123-4.
- 71 RSC 1906, c. 139, s. 36
- 72 The Supreme Court took judicial notice of this provision in *Viau v The Queen* (1898) 29 SCR 90. See also *Rice v The King* (1902) 32 SCR 480.



- 73 Province of Canada *Parliamentary Debates on the Confederation of British North America* (Quebec 1865) 41
- 74 50–51 Vict. c. 50, s. 1; 51 Vict. c. 43, s. 1. See also chapter 7.
- 75 A.W. Mewett 'Criminal Law 1867–1967' *Canadian Bar Review* 45 (1967) 737
- 76 For an account of the origin of the Canadian Criminal Code, see G. Parker 'The Origins of the Canadian Criminal Code' in *Essays in Canadian Legal History* vol. 1, edited by D.H. Flaherty (Toronto: Osgoode Society 1981) 249–80; see also R.C. Macleod 'The Shaping of Canadian Criminal Law, 1892–1902' in Canadian Historical Association *Historical Papers* 1978 64–75.
- 77 See, for example, PAC, RG13, A2, vol. 83, no. 1373, R.L. Borden to R. Sedgewick 2 December 1891; *Canada Law Journal* 26 (1890) 34, 393–9; House of Commons *Debates* (1895) 3108–9, and (1896) 637–8.
- 78 *Canada Law Journal* 27 (1891) 573–4; PAC RG13, A2, vol. 92, no. 942; A1, vol. 498, no. 1013
- 79 House of Commons *Debates* (1883) 835
- 80 PAC RG13, A2, vol. 71, no. 784; vol. 72, no. 6
- 81 House of Commons *Debates* (1890) 479–81; (1892) 312–13; PAC RG13, A2, vol. 84, no. 179; vol. 89, no. 5
- 82 Ibid. vol. 73, no. 481; vol. 77, no. 416; SCC Letterbook 14, 512–13, 822–4, 868; House of Commons *Debates* (1894) 3345; (1900) 6436
- 83 House of Commons *Debates* (1894) 3345
- 84 Calculated from SCC subject file no. 66. See also chapter 7.
- 85 PAC RG13, A2, vol. 100, no. 20., S.H. Strong to E.L. Newcombe 16 January 1896
- 86 PAC D. Girouard Papers vol. 1, J.W. Gwynne to Girouard 22 January 1896, 11 January 1897
- 87 *Canada Law Journal* 30 (1894) 51. For a scalogram analysis of the Court's decisions in this period, see Bader and Burstein 'The Supreme Court of Canada 1892–1902' 503–47.
- 88 *Attorney-General of Manitoba v Forest* [1979] 2 SCR 1032
- 89 P.B. Waite *Canada, 1874–1896: Arduous Destiny* (Toronto: McClelland and Stewart 1971) 246; *Canadian Advance* 26 June 1889
- 90 (1892) 19 SCR 374
- 91 *Western Law Times* 2 (1891) 88, 175, 189–91. Strong had concurred with Ritchie; the comment on the value of a judgment written by Strong is a distinct compliment and a reflection of the man's perceived intellectual ability.
- 92 *Western Law Times* 3 (1892) 82
- 93 Saywell 'Introduction' 36–7; Waite *Arduous Destiny* 246
- 94 *Western Law Times* 4 (1893) 123–4; *In re Certain Statutes of the Province of Manitoba relating to Education* (1894) 22 SCR 577

- 95 *Fraser v Drew* (1900) 30 SCR 241
- 96 *Ontario Mining Company v Seybold* (1902) 32 SCR 1
- 97 PAC Sir J.R. Gowan Papers reel M1899, H. O'Brien to [Gowan] [189?]; D. McMaster 'The Supreme Court of Canada in' *Canada: An Encyclopedia of the Country* vol. 6, edited by J.C. Hopkins (Toronto: Linscott 1900) 341; *Canadian Law Times* 15 (1895) 108-10; *Legal News* 18 (1895) 91-3
- 98 House of Commons *Debates* (1902) 219-20, 225, 1063; (1903) 283, 2351-73
- 99 *Canada Law Journal* 38 (1902) 61-5; Bader and Burstein 'The Supreme Court of Canada 1892-1902' 508-9; *Queen's Quarterly* 10 (1902-3) 416
- 100 *Canada Law Journal* 34 (1898) 1; *Canadian Law Review* 2 (1902-3) 127, 527, 627; *Canadian Law Review* 3 (1904) 283, 485
- 101 PAC RG13, A1, vol. 503, no. 495; uwo D. Mills Papers box 4287, Letterbook 7 375

#### CHAPTER 4

- 1 *Ottawa Valley Journal* 24 September 1901; *Toronto Globe* 25 September 1901; PAC F.-J. Audet Papers vol. 10, 5-9; PAC H.J. Morgan Papers vol. 6, 2158, 2161; PAC Sir J.R. Gowan Papers reel M1900, Sir J.S.D. Thompson to Gowan 1 June 1892
- 2 *Canada Law Journal* 37 (1901) 677, 758
- 3 uwo D. Mills Papers box 4286, Clippings Scrapbook; box 4287, Letterbook 1897-8, 189; Letterbook 1898, 437-8
- 4 PAC E. Blake Papers reel M247, no. 1860, J. Cameron to Blake 19 October 1896; F. Landon 'A Canadian Cabinet Episode of 1897' *Royal Society of Canada Transactions* (3d series) 32 (1938) 49-56
- 5 See, for example, *Canadian Law Times* 16 (1896) 271-3; PAC Sir W. Laurier Papers no. 51389-98 'The Supreme Court and David Mills' by 'Q.C.' May 1897
- 6 uwo D. Mills Papers box 4287, Letterbook 1900, 940-1, Mills to Sir W. Laurier 4 December 1900; 815-16, Mills to J.V. Teetzel 14 November 1900; box 4282, file of undated material, Mills to L.H. Davies [early 1897?]
- 7 *Canada Law Journal* 38 (1902) 65; *Canadian Law Times* 22 (1902) 106; *Canadian Law Times* 23 (1903) 219; *London Daily Free Press* 7 and 13 February 1902
- 8 Changing public attitudes were beginning to affect not just the judiciary but also patronage-related posts in general, the civil service, and the character and experience of politicians; see J. English *The Decline of Politics* (Toronto: University of Toronto Press 1977) chap. 1.
- 9 *Canadian Law Times* 22 (1902) 107

- 10 PAC H.J. Morgan Papers vol. 18, no. 247; *Canadian Law Times* 23 (1903) 319-21; *Montreal Star* 11 July 1903. Armour was already seventy-two years of age, however.
- 11 J.G. Descôteux *Faculté de Droit Université d'Ottawa 1953-1978* (Ottawa; University of Ottawa Press 1979) 26, 33-4. Justice Fournier had been vice-dean of the law faculty from 1892 to 1895; see *ibid.* 16-17, 33.
- 12 *Canadian Law Times* 22 (1902) 428
- 13 *Fortnightly Law Journal* 2 (1932) 13-14; *Canada Law Journal* 39 (1903) 338; *Saturday Night* 23 May 1903; PAC Sir R.L. Borden papers no. 5980ff; nos. 24563 and 142056-7
- 14 *Toronto Star* 7 February 1905. Chief Justice Falconbridge of Ontario expressed the usual reaction of chief justices when he commented on rumours that he was moving to the Supreme Court: 'I would not take it if it were offered me. I am chief in my own court here while in the Supreme Court I would be junior judge. I would have to leave my home in Toronto to go to Ottawa and my salary, even, would not be increased.' It is presumably a credit to the Laurier government's powers of persuasion that it was able to prevail upon not one but two provincial chief justices to accept Supreme Court appointments. After Killam was nominated, no provincial chief justice moved to the Supreme Court until 1962.
- 15 *Canadian Law Review* 2 (1902-3) 656-7; *Manitoba Law Journal* 2 (1885) 32; *Western Law Times* 1 (1890) 235-6
- 16 PAC Sir C. Fitzpatrick Papers no. 1851-2, A.C. Killam to Fitzpatrick 23 December 1902; no. 1918-20, 27 January 1903; no. 1921, Fitzpatrick to Killam 28 January 1903; *Montreal Star* 10 August 1903
- 17 *Manitoba Free Press* 10 and 11 August 1903; *Montreal Star* 10 August 1903; *Toronto Globe* 10 August 1903; *Vancouver Province* 10 August 1903
- 18 *The Canadian Annual Review of Public Affairs 1903* edited by J.C. Hopkins (Toronto: The Canadian Review 1904) 430-1; RSC 1906, c. 37, ss. 10 (2), 13 (2). Killam may have been attracted to the new post by the salary - \$10,000, compared with the \$7,000 salary of a puisne justice of the Supreme Court of Canada.
- 19 PAC Sir W. Laurier Papers no. 95895, W. Nesbitt to Laurier 21 March 1905; PAC RG13, A5, vol. 2050, no. 1002, Nesbitt to C.Fitzpatrick 3 October 1905; *Canadian Law Times* 25 (1905) 517, 562-3
- 20 *Canadian Law Review* 3 (1904) 226; *Canada Law Journal* 40 (1904) 209-10; *London Free Press* 6 May 1944, 32; *Maclean's Magazine* March 1914, 14
- 21 *Canadian Law Times* 25 (1905) 164; *Canadian Law Review* 4 (1905) 209
- 22 *Ottawa Citizen* 29 October 1888; PAC Sir J.S.D. Thompson Papers no. 8434, Sir J.A. Macdonald to [Thompson] [October 1888]; *Canada Law Journal* 24

- (1888) 546-7; *Canadian Law Review* 4 (1905) 500. The assessments of Maclellan's judicial career to 1905 all emphasized his courteous behaviour and his industry; he too joined the Supreme Court at age seventy-two.
- 23 PAC Sir C. Fitzpatrick Papers no. 4088-9, memo from Sir H.-E. Taschereau [n.d.]; no. 4812, Fitzpatrick to Taschereau 30 April 1906; no. 4771, [Fitzpatrick] to D. Girouard 9 April 1906; PAC Sir W. Laurier Papers no. 103102-3, Laurier to E. Blake 11 November 1905
  - 24 PAC RG13, A5, vol. 2050, no. 1067, R. Sedgewick to C. Fitzpatrick 16 October 1905
  - 25 PAC Sir W. Laurier Papers no. 103102-3, Laurier to E. Blake 11 November 1905; no. 103482-4A, Blake to Laurier 20 November 1905
  - 26 Ibid. no. 99871, E.H. McAlpine to Laurier 21 July 1905; no. 99872 [Laurier] to McAlpine 24 July 1905.
  - 27 PAC F.-J. Audet Papers vol. 12, 842-4; *Revue du Barreau* 2 (1942) 371-3
  - 28 See, for example, *Canada Law Journal* 42 (1906) 409-10; *Canadian Law Times* 26 (1906) 436; *Montreal Star* 4 June 1906; *Quebec L'Événement* 4 June 1906; *Toronto Star* 4 June 1906
  - 29 Reports in the press indicated that the post had been declined by E.P. Davis, a Vancouver lawyer, and that the government had considered J.S. Ewart, a famous Winnipeg lawyer, as a candidate for the position; see *Vancouver Province* 3 October 1906; *Ottawa Valley Journal* 28 September 1906, 4; PAC Sir L.P. Duff Papers file D, Duff to G. Davis 6 April 1940.
  - 30 *Canadian Law Times* 26 (1906) 701-2; *Canada Law Journal* 40 (1904) 169; *Canada Law Journal* 42 (1906) 623; R. Gosse 'The Four Courts of Sir Lyman Duff' *Canadian Bar Review* 53 (1975) 484-91
  - 31 PAC RG13, A5, vol. 2050, no. 168, J. Maclellan to A.B. Aylesworth, 29 January 1909
  - 32 *Canada Law Journal* 45 (1909) 156
  - 33 F.A. Anglin *Limitation of Actions against Trustees and Relief from Liability for Technical Breaches of Trust* (Toronto: Canada Law Book 1900); F.A. Anglin 'Mortgagee, Mortgagor and Assignee of the Equity of Redemption' *Canadian Law Times* 14 (1894) 57-77, 98-115; *Canadian Law Times* 20 (1900) 49; *Canada Law Journal* 36 (1900) 144
  - 34 PAC F.-J. Audet Papers vol. 2 315-16; J.G. Snell 'Frank Anglin Joins the Bench: A Study of Judicial Patronage' *Osgoode Hall Law Journal* 18 (1980) 664-73; *Canadian Law Review* (1904) 226-7. Anglin had appeared as co-counsel in cases with A.B. Aylesworth, who by 1909 was minister of justice.
  - 35 *Saturday Night* 6 October 1923; P.-G. Roy *Les Juges de la Province de Québec* (Québec: R. Paradis 1933) 79; P.-B. Mignault 'Le Juge Brodeur' *Revue du Droit* 2 (1923-4) 241-7

- 36 *The Canadian Annual Review of Public Affairs* 1903 57
- 37 *In Re Marriage Laws* (1912) 46 SCR 132. On the background of the *ne temere* issue, see J. S. Moir 'Canadian Protestant Reaction to the *Ne Temere* Decree' Canadian Catholic Historical Association *Study Sessions* (1981) 79-90.
- 38 uwo D. Mills Papers box 4282, file 1902, Mills to [C. Fitzpatrick] 13 March 1902
- 39 See, for example, *ibid.* J. Willson (?) to Mills 14 November 1899.
- 40 See, for example, PAC D. Girouard Papers vol. 1, J.M. Kirkhoffer to Girouard 5 November 1902 and C. Fitzpatrick to Girouard 30 March 1903.
- 41 PAC M.J. Griffin Papers vol. 2, D. Mills to Griffin 9 July 1902
- 42 For examples of Sir Louis Davies' activities, see PAC Sir W. Laurier Papers no. 188648, Davies to Laurier 17 August 1911; House of Commons *Debates* (1906) 67.
- 43 Halifax *Herald* 3 October 1906; PAC Sir W. Laurier Papers no. 113203, C. Fitzpatrick to Laurier 28 August 1906; J.A. Charlebois to Laurier 4 May 1908; no. 141745, P.B. Dumoulin to Laurier, 20 June 1908
- 44 Halifax *Herald* 3 October 1906; PAC Sir R. L. Borden Papers no. 581; no. 8540-8613; *ibid.* vol. 25; PAC Sir W. Laurier Papers no. 113203. We are grateful to J. English for drawing some of this information to our attention.
- 45 PAC RG7, G21, vol. 579, no. 17943; *Saturday Night* 16 August 1913, 1; R.C. Brown *Robert Laird Borden* (Toronto: Macmillan 1980) vol. 2, 52, 91; PAC Sir C. Fitzpatrick Papers no. 7981
- 46 See chapter 3.
- 47 PAC Sir W. Laurier Papers no. 134486-7, L.P. Duff to Laurier [n.d.]; no. 134737-8; Gosse 'Four Courts of Duff' 493-4
- 48 Lord Dundonald, the general officer commanding the Canadian militia, had long chafed at the political control over himself and his forces. In June 1904 he took his complaints about 'political interference' before the Canadian public. Dundonald was dismissed by order-in-council and, supported by Canadian imperialists, for a time considered offering himself as a Conservative candidate in the upcoming federal election before leaving the country in July.
- 49 House of Commons *Debates* (1904) 7020-2, 7361-2
- 50 PAC RG13, A2, vol. 1914, no. 201
- 51 *Saturday Night* 31 May 1913; PAC Sir C. Fitzpatrick Papers no. 6836, Sir J. Pope to Fitzpatrick 28 June 1915
- 52 The Shell Committee was organized in the fall of 1914 by the Canadian minister of militia and defence to handle any munitions orders the British government wished to place in Canada.
- 53 7-8 Geo. v c. 19; J.L. Granatstein and J.M. Hitsman *Broken Promises: A*

- History of Conscription in Canada* (Toronto: Oxford University Press 1977) 83-98; D.R. Williams Duff: *A Life in the Law* (Vancouver: University of British Columbia Press 1984) 90-3
- 54 PAC Sir R. L. Borden Papers no. 135912-3, A. Meighen to Borden 17 June 1919. As a result of the demands of the appointment, Duff was frequently absent from the Supreme Court; in the second and third terms of 1918, for example, he was absent for a total of thirty-nine days while busy as Central Court of Appeal judge (see PAC RG13, A2, vol. 312, no. 754).
- 55 PAC Sir R.L. Borden Papers no. 39402, L.P. Duff to Borden 1 January 1917
- 56 Brown *Robert Laird Borden* vol. 2, 102-4; Gosse 'Four Courts of Duff' 494-8
- 57 PAC Sir R.L. Borden Papers no. 47377-9, L.P. Duff to Sir T. White 16 July 1916; no. 135912-3, A. Meighen to Borden 17 June 1919; PAC Sir L.P. Duff Papers file B2, Borden to Duff 1 January 1916 [1917]
- 58 (1918) 57 SCR 152
- 59 *Re Lewis* (1918) 41 DLR 1; *Canada Gazette* 20 July 1918, 252
- 60 PAC Sir C. Fitzpatrick Papers no. 7986, H. O'Brien to Fitzpatrick 29 July 1918; no. 7999-8000, G.H. Pownall to Fitzpatrick 1 August 1918; no. 8016, [Fitzpatrick] to E.R. Cameron 5 August 1918
- 61 Peter W. Hogg *Constitutional Law of Canada* (Toronto: Carswell 1977) 215-6
- 62 (1911) 45 SCR 95; PAC Sir L.P. Duff Papers file H [Duff to Lord Haldane (?) February 1925]; A.B. McKillop 'Introduction' in W.D. LeSueur *William Lyon Mackenzie: A Reinterpretation* (Toronto: Macmillan 1979). Duff held for the author, while Anglin in dissent supported the publishing company (and thus Mackenzie King). It is interesting to speculate as to whether this result influenced King, even subconsciously, in his selection of a chief justice in 1924.
- 63 *Canada Law Journal* 40 (1904) 1-2; PAC Sir C. Fitzpatrick Papers no. 8141, Fitzpatrick to F.A. Anglin 10 September 1918; *Maclean's Magazine* March 1916, 16
- 64 *Canada Law Journal* 43 (1907) 607. The registrar reported that the time limit on oral argument materially reduced the amount of time occupied by counsel in presenting their arguments; nevertheless the rule became inoperative in 1929. See E.R. Cameron *The Supreme Court of Canada, Practice and Rules* supplement to the 3rd ed. (Toronto: Carswell 1931) 104-17.
- 65 PAC D. Girouard Papers vol. 1, W. Nesbitt to Girouard 24 November 1906
- 66 PAC Sir W. Laurier Papers no. 167733, Sir C. Fitzpatrick to Laurier 3 March 1910; PAC Sir C. Fitzpatrick Papers no. 6502-3, L.P. Brodeur to Fitzpatrick 29 March 1913
- 67 PAC Sir C. Fitzpatrick Papers no. 8111, Fitzpatrick to G.H. Pownall 6 Septem-

- ber 1918; no. 7999-8000, Pownall to Fitzpatrick 1 August 1918; no. 8140, Fitzpatrick to Sir L. Davies 10 September 1918; no. 8153, [Fitzpatrick] to F.A. Anglin 16 September 1918; *Maclean's Magazine* March 1914, 15
- 68 See, for example, C.H. Masters 'Supreme Court Practice' *Canada Law Journal* 36 (1900) 324-5; L.H. Coutlée 'Drainage Works and the Supreme Court' *Canada Law Journal* 37 (1901) 221-2.
- 69 *Stuart v the Bank of Montreal* (1909) 41 SCR 516; *Canada Law Journal* 45 653-6; A. Joanes 'Stare Decisis in the Supreme Court of Canada' *Canadian Bar Review* 36 (1958) 178-83
- 70 (1908) 40 SCR 313; *Saturday Night* 3 January 1914
- 71 [1914] AC 651, unreported in SCR
- 72 *Cunningham v Tomey Homma* [1903] AC 152
- 73 (1914) 49 SCR 440
- 74 Administrative law was not a particularly active area of the Supreme Court's jurisdiction prior to the Second World War. In the period 1903-39 the Court heard forty-six reported appeals from the Board of Railway Commissioners or its successor, but otherwise few such cases came to it. For example, in the same period there were only twelve reported appeals from provincial boards or commissions.
- 75 *In Re Canadian Northern Railway* (1910) 42 SCR 443
- 76 J. Nedelsky 'Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance law 1880-1930' in *Essays in the History of Canadian Law* Vol. 1, edited by D.H. Flaherty (Toronto: Osgoode Society 1981) 281-322
- 77 *Ibid.* 295-8; 63 SCR 243
- 78 See R.C.B. Risk "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario' in *Essays in the History of Canadian Law* vol. 2, edited by D.H. Flaherty (Toronto: Osgoode Society 1983) 459-60.
- 79 *Montreal Rolling Mills Co. v Corcoran* (1897) 26 SCR 595; *Canadian Coloured Cotton Mills Co. v Kervin* (1899) 29 SCR 478. For an analysis of the law in Ontario in this matter, see Risk "'This Nuisance of Litigation'"
- 80 Williams *Duff* 150-1, 158, 175
- 81 Calculated from SCC subject file no. 66
- 82 Department of Justice file no. 110/1903, E.R. Cameron to C. Fitzpatrick 19 January 1903
- 83 *Canadian Law Review* 3 (1904) 377-83, 403-22; *Canadian Law Times* 24 (1904) 243
- 84 *Canadian Law Times* 24 (1904) 381-2
- 85 *The Rules of the Supreme Court of Canada* edited by E.R. Cameron (Toronto: Poole & Co. 1907) 1-8

- 86 60-61 Vict. c. 34, s. 1; 2 Edw. VII c. 35, s. 4
- 87 *Kent v Ellis* (1900) 31 SCR 113; *Gorman v Dixon* (1897) 26 SCR 91
- 88 Why Manitoba, Saskatchewan, and Alberta were left out is unclear; Manitoba seems to have been completely ignored, while it was explicit that no stated criteria were applied to the other two prairie provinces.
- 89 *Canadian Law Review* 3 (1904) 413; PAC RG13, A2, vol. 156, no. 834, J.J. Foy to A.B. Aylesworth 16 March 1909 and enclosure
- 90 PAC RG13, A5, vol. 2050, no. 953, Sir H.-E. Taschereau to Sir W. Laurier 8 January 1903 and 16 September 1906; A2, vol. 144, no. 3-H1, C. Fitzpatrick to E.L. Newcombe 18 October 1907; A.B. Aylesworth to governor-general in council 19 October 1907; vol. 2052, no. 563, F.A. Anglin to Aylesworth 15 March 1910 and enclosure; PAC Sir W. Laurier Papers no. 110221-2, E.R. Cameron to Fitzpatrick, 9 May 1906; House of Commons *Debates* (1906) 1103, 3068, 3910; (1907) 2978
- 91 There was a strong tendency, of course, to appoint geographically proximate jurists, that is, ones resident in Ontario and Quebec. Thus, in June 1918, when Fitzpatrick and Duff were absent, the chief justice of Ontario was asked to provide a replacement, though neither of the absent justice was from Ontario; see PAC RG13, A2, vol. 218, no. 3M.
- 92 PAC Sir R.L. Borden Papers no. 49412, Borden to Sir T. White 16 December 1918.
- 93 For an example of that sensitivity, see uwo D. Mills Papers box 4287, Letterbook 8 (1901-2), 471, Mills to Sir S.H. Strong 30 January 1902.
- 94 PAC Sir W. Laurier Papers no. 225739-41, Sir L.H. Davies to Laurier 7 June 1902.
- 95 PAC Sir C. Fitzpatrick Papers no. 5125-8
- 96 C. Miller *The Canadian Career of the Fourth Earl of Minto* (Waterloo: Wilfrid Laurier University Press 1980) 160; PAC Sir R.W. Scott Papers no. 2008-10, Sir S.H. Strong to Scott 21 November 1901
- 97 PAC Sir J. Pope Papers vol. 15, no. 11T; vol. 14, no. 3M; vol. 22, nos. 370, 376
- 98 PAC Sir C. Fitzpatrick Papers no. 5386, A. Shortt to Fitzpatrick 16 June 1908; no. 6359, Lord Grey to [Duke of Connaught] 23 May 1913; no. 6376, [Fitzpatrick] to R.L. Borden 30 June 1913; PAC Sir W. Laurier Papers no. 159490, Fitzpatrick to Laurier 3 September 1909
- 99 PAC RG13, A2, vol. 199, no. 146, R.J. MacLennan to C.J. Doherty 21 January 1916; Sir J. Aikins to Doherty 19 January 1916; A1, vol. 527, no. 840; House of Commons *Debates* (1905) 1398
- 100 PAC RG13, A2, vol. 197, no. 146, E.R. Cameron to W.S. Edwards 7 Febru-



- ary 1916. For an example of delay, see PAC Sir L.P. Duff Papers file c, A. Grenier to Duff 6 February 1918 and memorandum to Duff 22 April 1926.
- 101 *The King v Stewart* (1902) 32 SCR 483; *McKee v Philip* (1916) 55 SCR 286; PAC RG13, A2, vol. 123, no. 343, E.L. Newcombe to E.R. Cameron 8 April 1902
- 102 *Canadian Law Times* 32 (1912) 971–3. Although thirteen of the decisions had been unanimous, in only two of those cases had there been just a single judgment. Of the twenty-four total appeals reported, two had one judgment, three had two, four had three, eight had four, five had five, and two had a full six judgments.
- 103 PAC RG13, A2, vol. 123, no. 343, E.R. Cameron to E.L. Newcombe 20 March 1902, and enclosure; vol. 214, no. 1394, Newcombe to Cameron 18 and 31 August 1917
- 104 PAC Sir W. Laurier Papers no. 132246–7, Sir C. Fitzpatrick to Laurier 16 November 1907; no. 120860, H. Gervais to Laurier 1 March 1907; PAC RG13, A2, vol. 145, no. 311, E.R. Cameron to A.B. Aylesworth 21 February 1907; 6 March 1907
- 105 This did not prevent Sir H.-E. Taschereau, who had retired on a 100 per cent annuity, from attempting to increase his income by seeking to avoid paying municipal income taxes; see PAC Sir W. Laurier Papers no. 161367, Taschereau to Laurier 26 October 1909.
- 106 House of Commons *Debates* (1911) 547; (1915) 2055; Senate *Debates* (1917) 263–7; PAC RG13, A2, vol. 212, no. 791
- 107 Calculated from SCC subject file no. 66
- 108 *Canada Law Journal* 52 (1916) 420
- 109 *Ottawa Citizen* 21 January 1913. See also, for example, *Canada Law Journal* 52 (1916) 419; *Canadian Law Review* 2 (1903) 589; *Maclean's Magazine* March 1914, 137–8; House of Commons *Debates* (1949) 18. Early in 1920 the attorney-general of Ontario wrote to the minister of justice: 'Has your Government considered whether or not the time has now come for the abolition of that [prerogative] appeal [to the Judicial Committee]? Most Ontario people who have considered the subject are, I think, agreed that it ought to be abolished as to ordinary litigation. Some of our judges and lawyers, however, as you will be aware, still hold to the view that the right of appeal ought to be retained as to constitutional questions. My own view is that the appeal to the Judicial Committee of the Privy Council ought to be abolished altogether. I think the people of Canada are as competent to manage their own affairs, including their law

courts, as are the people of Great Britain or the United States.' See PAC RG4, C3, 1910/3876.

110 (1904) 35 SCR 197 at 200 (per Nesbitt J.).

#### CHAPTER 5 .

- 1 PAC RG13, A2, vol. 190, no. 3G, Sir C. Fitzpatrick to C.J. Doherty 19 March 1915; vol. 218, no. 3M, 31 May 1918; A5, vol. 2056, no. 2290, Fitzpatrick to Sir R. L. Borden 21 October 1918. Interestingly, though he had not completed the required fifteen years' service in the judiciary, Fitzpatrick was granted a pension of two-thirds of his salary, which pension he renounced for the duration of his term as lieutenant-governor; see PAC RG13, A5, vol. 2056, no. 2290.
- 2 PAC Sir R.L. Borden Papers no. 85809, Sir C. Fitzpatrick to Borden 20 June [1918]; no. 3598-99, memorandum [by Borden] 25 July 1918
- 3 House of Commons *Debates* (1918) 1976; PAC Sir R.L. Borden Papers no. 45855-74
- 4 House of Commons *Debates* (1918) (1896-7) 1976, 2478-9; (1919) 850. See also (1917) 6049-51.
- 5 House of Commons *Debates* (1919) 850-79, 977
- 6 PAC RG13, A5, vol. 2057, no. 293, Sir H. Drayton to C.J. Doherty 22 January 1920; Doherty to Drayton 30 January 1920; *Montreal Star* 27 March 1919, 4; PAC A. Meighen Papers no. 910-11, A.E. Barbour to Meighen 27 March 1919; no. 914, J.L. Johnson to Meighen 8 April 1919
- 7 *Ottawa Farm Journal* 22 October 1918; *Ottawa Citizen* 22 October 1918; *Toronto Star* 19 October 1918; *Montreal Star* 21 October 1918
- 8 PAC RG13, A2, vol. 183, no. 3C; PAC Sir R.L. Borden Papers no. 75953, Sir L.H. Davies to Borden 1 September 1918; no. 75955, 6 September 1918; no. 75954, Borden to Davies 3 September 1918; R. Gosse 'The Four Courts of Sir Lyman Duff' *Canadian Bar Review* 53 (1975) 498
- 9 *Toronto Star* 19 and 23 October; *Montreal Star* 21 and 23 October 1918; *Ottawa Citizen* 22 October; Gosse 'Four Courts' 499
- 10 A. Marin *L'Honorable Pierre-Basile Mignault* (Montreal: Fides 1946); *Revue du Barreau* 5 (1945) 503-12; *Revue du Barreau* 7 (1947) 61-6; P.-G. Roy *Les Juges de la province de Québec* (Quebec: R. Paradis 1933) 375; PAC F.-J. Audet Papers vol. 21, 676-7; *Montreal Star* 24 October 1918
- 11 PAC RG13, A5, vol. 2058, no. 1596, L.P. Brodeur to R. Dandurand 10 September 1923, and passim; PAC W.L.M. King Papers reel C2251, no. 71220-7, Brodeur to King 27 September 1923; *Diary* vol. 1924, 2 January, at 1

- 12 Malouin practiced law in Quebec City, where he was for a time crown prosecutor. A member of Parliament from 1898 to 1905, he joined the Quebec court in 1905. He was sixty-six years old at the time of his appointment to Ottawa. See Roy *Les Juges* 339; *The Canadian Directory of Parliament, 1867-1967* edited by J.K. Johnson (Ottawa: Public Archives of Canada 1968) 348-9.
- 13 PAC Sir L.P. Duff Papers file J, Duff to N. Jeffrey 7 February 1924. See also PAC W.L.M. King Papers reel C2252, no. 75320-1, Sir L. Gouin to King 31 December 1923. Early in March 1924 Malouin was reported to be severely ill and was forced to be absent for nine sitting days; see PAC RG13, A5, vol. 2058, no. 845.
- 14 R.M. Dawson *William Lyon Mackenzie King: A Political Biography, 1874-1923* (Toronto: University of Toronto Press 1958) 362, 387-8; F.W. Gibson 'The Cabinet of 1921' in *Cabinet Formation and Bicultural Relations* edited by F. Gibson (Ottawa: Information Canada 1970) 63-104
- 15 PAC W.L.M. King Papers MG26 J2, vol. 57, file Y-2600, M.L.L. Malouin to King 16 December 1923. In his diary the prime minister recounted a blatant example of a similarly partisan process associated with the Court (Diary vol. 1924, 18 January, at 18): 'This morning I spent clearing up correspondence ... Among appointments was a young man named Jones who came to ask if the next appt. to the Supreme Court Bench cld. not go to New Brunswick & to say he had been speaking in Eng.[land] on [tariff] preference was a student of economics at McGill, was deciding now which party he would belong to ... was at the "parting of the ways" & that decision of Govt. in apptg. his father to the Supreme Court would be the deciding factor. I never encountered such an insufferably conceited & arrogant & corrupt [?] young man.'
- 16 See, for example, *Montreal Star* 25 January 1924.
- 17 PAC W.L.M. King Papers, Diary vol. 1924, 1 May at 83; reel C2252, no. 73319, Sir L. Gouin to King 8 December 1923; reel C2701, C71115-6; reel C2244, no. 61311-5; MG26 J1, no. 72206-7, King to R. Dandurand 19 September 1923; no. 72224-6, Sir L. Davies to King 20 September 1923; *Montreal Star* 1 May 1924; PAC RG13, A5, vol. 2058, no. 845; vol. 2056, no. 2302; PAC A. Meighen Papers no. 18178-9, Davies to Meighen 30 March 1921, and enclosure; no. 18161-6, 25 February 1921
- 18 PAC W.L.M. King Papers, MG26 J1, no. 72206-7, King to R. Dandurand 19 September 1923; Diary vol. 1924, 4 January, at 4
- 19 Diary vol. 1924 5 May, at 85 and 11 May, at 88
- 20 PAC W.L.M. King Papers vol. 57, file Y-2600-Q-S-T, King to T. Eakin 28 July 1924; MG26 J1, no. 86521, King to E. Lafleur, 8 September 1924;

- no. 86523-4, 9 September 1924; no. 86522, Lafleur to King 9 September 1924
- 21 See, for example, *ibid.* no. 83811, R.R. Cromarty to King 1 May 1924; PAC A.K. Cameron Papers vol. 22, Cameron to A.B. Hudson 25 March 1936.
- 22 R. Brossard 'Eugene Lafleur' *Canadian Bar Review* 11 (1933) 367-75; Montreal *Star* 30 April 1930; Montreal *La Presse* 30 April 1930
- 23 See, for example, PAC A.K. Cameron Papers vol. 22, Cameron to A.B. Hudson 25 March 1936; PAC W.L.M. King Papers MG26 J1, no. 90964-5, N.W. Rowell to King 12 May 1924; 83872-3, J.A. Cross to King 12 September 1924; reel C2261, no. 81595-6, Sir J.A.M. Aikins to King 10 September 1924.
- 24 PAC W.L.M. King Papers, Diary vol. 1924, 1 May, at 83-4 3 May, at 83-4; reel C2263, no. 83268, E.R. Cameron to King 1 May 1924. Another candidate, W.N. Tilley, was ruled out because his Liberal credentials were weak and, as chief counsel for the Canadian Pacific Railway, he was felt to be too influenced by that politically active, Conservative-leaning company; see *ibid.* reel C2266, King to P.C. Larkin 6 September 1924.
- 25 *Halifax Herald* 2 May 1924; PAC C. Murphy Papers vol. 23, no. 10120-5, J.F. Orde to Murphy 26 February 1927; PAC W.L.M. King Papers MG26 J2, vol. 57, file Y-2600, L. Harstone to King 12 May 1924; reel C2267, E.M. Macdonald to King 28 August 1924; Diary vol. 1924, 12 September at 114
- 26 PAC Sir L.P. Duff Papers file s, T. Sweatman to Duff 5 September 1924.
- 27 *Ibid.* 26 September 1924; Gosse 'Four Courts,' 501
- 28 PAC Sir C. Fitzpatrick Papers no. 8018, Fitzpatrick to E.W. Beatty, 8 August 1918; no. 8023, Fitzpatrick to E.R. Cameron, 10 August 1918; no. 8026, Fitzpatrick to A.C. Hill, 10 August 1918; Gosse 'Four Courts' 498
- 29 PAC W.L.M. King Papers, Diary vol. 1924, 4 May, at 84; authors' interview with D.C. Abbott, 18 April 1980
- 30 *Toronto Globe* 18 September 1924; PAC W.L.M. King Papers reel C2261, no. 81835-6, Sir A.B. Aylesworth to King 1 May 1924; reel C1933, no. 37098-9, Mrs H.I. Anglin to King 19 August 1919; reel C1944, no. 49301-2 [December 1921]; no. 49299-300, F.A. Anglin to King 7 December 1921.
- 31 PAC W.L.M. King Papers, Diary vol. 1924, 12 September, at 114
- 32 *Ibid.* reel C2267, no. 88308-9, E.M. Macdonald to King 28 August 1924; Diary vol. 1925, 9 March, at 49; authors' interview with D.C. Abbott, 18 April 1980; Snell's interview with W.K. Campbell, 16 July 1980.
- 33 *Canada Law Journal* 36 (1900) 473-4; *Fortnightly Law Journal* 1 (1931) 134; PAC Sir J. Pope Papers vol. 31, no. 1002, W.W. Cory to Pope 14 October 1924; E.L. Newcombe *The British North America Acts, as Interpreted by the Judicial Committee of the Privy Council* (Ottawa: S.E. Dawson 1908); House of Commons *Debates* (1909) 254-5 and (1910) 1014-16

- 34 PAC W.L.M. King Papers reel c2267, no. 88308-9, E.M. Macdonald to King 28 August 1924; reel c2263, no. 83660; no. 83688, J. Connor to King 18 September 1924; Diary vol. 1924, 12 September, at 114, and 15 September, at 117; MG26 J1, no. 89618-21, Sir W. Mulock to King 1 July 1924
- 35 *Revue du Barreau* 22 (1962) 563-72; Roy *Les Juges* 463; PAC L. St Laurent Papers vol. 239, file 'Hon. T. Rinfret'; PAC W.L.M. King Papers, Diary vol. 1924, 12 September, at 114
- 36 Under section 99 of the British North America Act, 1867, Superior Court judges held office during good behaviour and could be removed by the governor-general on address of the Senate and House of Commons. Superior Court judges were thus protected from compulsory retirement until the British North America Act was amended in 1960. But this protection did not cover county court judges, who were affected by compulsory retirement legislation as early as 1903 (3 Edw. VII c. 29, s. 3), or the members of the Supreme Court of Canada.
- 37 PAC RG13, A5, vol. 2059, no. 278 [E. Lapointe] to J. Idington 20 February 1926, and passim; A2, vol. 312, no. 754; vol. 296, no. 624; A1, vol. 537, no. 278
- 38 The best list of these cases is contained in R. Boulton 'Ad Hoc Judges of the Supreme Court of Canada' *Chitty's Law Journal* 26 (1978) 289-95. However, a memorandum from the Justice Department lists fourteen cases not mentioned by Boulton; see PAC, RG13, A2, vol. 312, no. 755.
- 39 *Canadian Bar Review* 1 (1923) 211
- 40 PAC W.L.M. King Papers MG26 J2, vol. 57, file Y-2600, J.H. Spence to King 4 August 1924; J.H. Lindsay to King 9 June 1924; P.M. Anderson to King 4 July 1924; J.E. Friesen to King 27 June 1924
- 41 On the Maritimes' rights movement in the 1920s see E.R. Forbes *The Maritimes Rights Movement, 1919-1927* (Montreal: McGill-Queen's University Press 1979).
- 42 *Regina Leader-Post* 10 March 1936; *ibid.* 4 April 1927; *Canadian Directory of Parliament* 317; *Fortnightly Law Journal* 2 (1932) 28-9
- 43 PAC W.L.M. King Papers MG26 J2, vol. 57, file Y-2600, J.H. Spence to King 4 August 1924
- 44 PAC C. Murphy Papers no. 10120-5, J.F. Orde to Murphy 26 February 1927
- 45 *Canadian Directory of Parliament* 539; PAC W.L.M. King Papers reel c2248, no. 66762-3, C. Murphy to King 4 October 1922, and enclosure; reel c2259, no. 80512, R. Smith to King 21 December 1923; MG26 J1, no. 125703-4, N.W. Rowell to King 8 April 1927
- 46 PAC W.L.M. King Papers MG26 J2, vol. 15, file J-1100, A.N. Smith to King 21 October 1926; 17 February 1927; 25 March 1927; J1, no. 127176-7,

- R. Smith to King March 12 1927; reel c2301, no. 127179, 9 May 1927
- 47 Ibid. 12, vol. 15, file J-1100, A.N. Smith to King 21 October 1926; 17 February 1927. The population figures are calculated from the *Census of Canada*, 1921 vol. 1, 3 568.
- 48 There were letters discussing the retirement, but they have been lost and their contents are unknown: see PAC, RG13, A1, vol. 540, no. 989.
- 49 See, for example, *Dupuy v Ducondu* (1882) 6 SCR 425; *Canadian Pacific Railway v Robinson* (1888) 14 SCR 105; *Wadsworth v McCord* (1887) 12 SCR 466; *Ross v The King* (1902) 32 SCR 532.
- 50 *Montreal Street Railway v Boudreau* (1905) 36 SCR 329 involved a claim for negligence. The common-law justices (Davies, Nesbitt, and Idington) combined to view the case as a matter of tort law and disposed of it on the appropriate common-law precedents. The two Quebec justices agreed with the Court of Appeal that this as a strict Civil Code case and that damages should be awarded for negligence.
- 51 See, for example, *Saint Lawrence Terminal Company v Hallé* (1908) 39 SCR 47; *Audette v O'Cain* (1908) 39 SCR 103; *Tanguay v Canadian General Electric* (1908) 40 SCR 1.
- 52 P.B. Mignault 'L'Avenir de notre droit civil' *La Revue du Droit* 1 (1922) 104–16
- 53 For a useful account of Mignault's career as defender of the Civil Code, see J.-G. Castel 'Le juge Mignault défenseur de l'intégrité du droit civil québécois' *Canadian Bar Review* 53 (1975) 544–57.
- 54 60 SCR 105
- 55 60 SCR 131. Justice Duff does not take up the essential issue in either of these cases; he disposes of both cases with a single sentence and appears insensitive to or unaware of the importance of the matter.
- 56 Mignault elaborated on these issues five years later in 'The Authority of Decided Cases' *Canadian Bar Review* 3 (1925) 1–14.
- 57 Those two cases were *Kiërman v Metropolitan Life Insurance* [1925] SCR 600 and *Regent Taxi v Congregation des Petits Frères de Marie* [1929] SCR 650.
- 58 Those three cases were *Brilliant Silk Company v Kaufman* [1925] SCR 249; *Larue v Royal Bank of Canada* [1926] SCR 218; *Attorney-General of Canada v Attorney-General of Quebec* [1929] SCR 557.
- 59 PAC E. Lapointe Papers no. 1975, W.L.M. King to Lapointe 4 October 1929; vol. 19, file no. 49, Lapointe to King 7 October 1929
- 60 *Montreal Le Devoir* 1 October 1929. There had also been speculation that Lapointe himself was interested in the post, but this was likely just partisan gossip; see *Saturday Night* 8 September 1928.

- 61 Quebec *Le Soleil* 3 January 1930; *Ottawa Journal* 26 December 1929
- 62 PAC RG13, A2, vol. 374, no. 1562, memorandum to the minister of justice, 7 October 1932
- 63 PAC W.L.M. King Papers, Diary vol. 1929, 26 November, at 262; vol. 1933, 1 March at 70, and 3 March at 72
- 64 PAC Sir R.L. Borden Papers no. 53281, Sir L.H. Davies to Borden 31 July 1919; no. 53284, F.A. Anglin to Borden 3 August 1919; B.F. Hogan 'The Guelph Novitiate Raid' Canadian Catholic Historical Association *Study Sessions* (1978) 57-80
- 65 D.R. Williams *Duff: A Life in the Law* (Vancouver: University of British Columbia Press 1984) 156. Duff was used in a somewhat similar manner at the Judicial Committee, being involved in 1924 in the Irish Boundary Commission.
- 66 PAC Sir R.L. Borden Papers, nos. 104433-47, 104481-3; nos. 80396, 80407-8; PAC Sir L.P. Duff Papers file R-5 [Duff] to W.E. Raney 7 March 1923
- 67 See, for example, Department of Justice file no. 920/1919; file no. 157/1925; file no. 267/1927; file no. 779/1927; file no. 420/1930.
- 68 American Supreme Court justices were receiving \$20,000 (\$20,500 for the chief justice) by 1927, for example; see, House of Commons *Debates* (1927) 1561-2. In 1917 one member of Parliament estimated that 'a lawyer in a good practice in Canada can earn twice or three times as much as the salary of the Chief Justice, and a gentleman of the eminence of the Chief Justice could easily earn at the Bar from \$25,000 to \$50,000 per annum in the larger cities'; see House of Commons *Debates* (1917) 6051.
- 69 Annual Departmental Reports: Department of Justice 1929-30 (Ottawa 1930) vol. 1, part 1-5,7
- 70 B.L. Strayer *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press 1968) 183
- 71 *Ibid.* 183-4. This strengthening of the process was paralleled by provincial legislation at this time providing for references to the highest court of appeal within the provinces; see *ibid.* 186-7.
- 72 The federal Conservative governments of the 1890s sent five reported cases to the Court on reference, followed by a hiatus in the early years of the Laurier government.
- 73 *In re Certain Statutes of the Province of Manitoba Relating to Education* (1894) 22 SCR 677
- 74 *Attorney-General of Ontario v Hamilton Street Railway* [1903] AC 524
- 75 *In re References by Governor-General in Council* (1910) 43 SCR 561
- 76 Nevertheless, the justices continued to insist on the distinction between a reference and a stated case. See *In re Board of Commerce* (1920) 60 SCR 456;

- G. Rubin 'The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law' *McGill Law Journal* 6 (1959-60) 169-70. The Judicial Committee upheld the constitutionality of the reference system in 1912; see Strayer *Judicial Review* 185.
- 77 RSC 1906 c. 37, s. 55; *In re Branch Lines of Canadian Pacific Railway* (1905) 36 SCR 42
- 78 9-10 Geo. v c. 37, s. 32; *In re Board of Commerce* (1920) 60 SCR 456; Rubin 'Reference Cases' 169-70
- 79 Strayer *Judicial Review* 187-8; *Hirsch v Protestant Board of School Commissioners* [1926] SCR 246; *In re Meaning of the Word 'Persons'* [1928] SCR 276. Some popular accounts of the latter case contain erroneous assertions that section 60 of the Supreme Court Act (RSC 1906 c. 139) permitted any five interested persons to petition the government for such an order-in-council but section 60 actually included no such wording. See, for example, C.L. Cleverdon *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press 1950) 145.
- 80 *Toronto Globe* 4 November 1927. Water power refers to the energy source potentially convertible to electricity.
- 81 H.B. Neatby *William Lyon Mackenzie King: 1924-1932, The Lonely Heights* (Toronto: University of Toronto Press 1963) 255-63. A good example of the use of references as a delaying tactic is *In re the Constitutional Validity of Section 17 of the Alberta Act* [1927] SCR 364, where, despite a unanimous decision in the Supreme Court unopposed by any government, Ottawa chose to appeal the decision to the Judicial Committee.
- 82 *Saturday Night* 13 October 1928; *Reference re Waters and Water-Powers* [1928] SCR 200
- 83 In the *Water-powers Reference* the costs of the five counsel representing the attorney-general of Canada alone in the case were \$60,179.50, and eleven days were consumed in hearing argument. The cost of the eleven counsel representing six other parties is unknown.
- 84 PAC Sir L.P. Duff Papers file H [Duff to Lord Haldane (?) February 1925]; *Gold Seal Ltd v Attorney-General of Alberta* (1921) 62 SCR 424
- 85 As a member of the Judicial Committee Duff participated in sixteen reported Canadian constitutional cases and wrote the opinion in three of them.
- 86 Duff's views on the federal character of the British North America Act appear to have impressed the Judicial Committee in *City of Montreal v Montreal Street Railway* [1912] AC 333.
- 87 [L.P. Duff] to W.F. MacLean [early 1925]; letter in possession of David R. Williams.
- 88 L.P. Duff 'The Privy Council' *Canadian Bar Review* 3 (1925) 273-81



- 89 For a useful review of Duff's contribution in constitutional cases, see G. LeDain 'Sir Lyman Duff and the Constitution' *Osgoode Hall Law Journal* 12 (1974) 261-338.
- 90 *In the Matter of Sections Four and Seventy of the Canadian 'Insurance Act, 1910'* (1913) 48 SCR 260
- 91 *Attorney-General of Ontario v Attorney-General of Canada* [1896] AC 348
- 92 [1922] AC 191
- 93 *In re Board of Commerce* (1920) 60 SCR 456
- 94 For a discussion of Duff's judgment in *Board of Commerce*, See B. Laskin 'Peace, Order and Good Government Re-examined' *Canadian Bar Review* 25 (1947) 1054-87. Similarly federalist jurisprudence was developing in this period related to the trade and commerce power. Most of the justices readily accepted the leadership of the Judicial Committee and Duff in constitutional law. Chief Justice Anglin, however, perhaps spurred by his personality conflict with Duff, voiced some discontent in *The King v Eastern Terminal Elevator* [1925] SCR 434.
- 95 Since the Court kept no complete record of caseloads and since the Reports were still selective in their criteria for reporting, it is necessary to rely on outside or subjective observations for such comments. For the 1920s the absence of comment on workload leads us to assume that there was no significant change.
- 96 Williams Duff 146; *In re Meaning of the Word 'Persons'* [1928] SCR 276; *Edwards v Attorney-General of Canada* [1930] AC 125
- 97 PAC Sir L.P. Duff Papers file D, Duff to Sir L.H. Davies 28 April 1923; file M, P.B. Mignault to Duff 24 September 1924
- 98 *Proceedings of the Fifth Annual Meeting of the Canadian Bar Association, 1920* (Winnipeg 1920) 259; ... *Sixth ... 1921* (Toronto 1922), 250; ... *Seventh ... 1922* (Toronto 1923) 267; ... *Twelfth ... 1927* (Toronto 1928) 66-9, 250; *Canadian Bar Review* 4 (1926), 102-3
- 99 PAC Sir L.P. Duff Papers file Q-R, T. Rinfret to Duff 10 January [1925]; file A, F.A. Anglin to Duff 30 September 1926, 4 December 1926, and 24 January 1927; file M [Duff] to P.B. Mignault 20 September 1928; file Q-R [Duff] to Rinfret 20 September 1928. It is not known how often these judicial conferences were held.
- 100 PAC RG13, A2, vol. 215, no. 228 [E.L. Newcombe] to E.R. Cameron 6 February 1917, 14 February 1917; Cameron to Newcombe 8 February and 5 April 1917; PAC Sir L.P. Duff Papers file C, Duff to R.R. Cromarty 15 June 1923
- 101 PAC RG13, A2, vol. 222, no. 892
- 102 *Proceedings of the Seventh Annual Meeting of the Canadian Bar Association, 1922*

- (Toronto 1923) 71; PAC RG13, A2, vol. 283, no. 1944; vol. 341, no. 1068; Public Archives of New Brunswick, Barristers' Society of New Brunswick, *Council Minute Book* 9 April 1921. By way of contrast with the distribution in the 1880s, the provincial distribution in 1930 was as follows: Prince Edward Island 41, Nova Scotia 56, New Brunswick 182, Quebec 697, Ontario 2,513, Manitoba 689, Saskatchewan 608.5, Alberta 576.5, British Columbia 179.
- 103 *Canadian Bar Review* 1 (1923) 108
- 104 *Minutes of Proceedings of the Eleventh Annual Meeting of the Canadian Bar Association* 1926 (Toronto 1927) 61-63; ... *Twelfth* ... 1927 (Toronto 1928) 249; PAC Sir L.P. Duff Papers file c, R.R. Cromarty to Duff 24 March 1926; G.W. Howell 'A Slice of Canadian Legal History - 156 Years of Law Reporting in Ontario' unpublished paper 47-8, 56; PAC RG13, A1, vol. 535, no. 1166
- 105 House of Commons *Debates* (1925) 130-2, 283-341; (1927) 1054, 1755; (1929) 25; M. Prang N.W. Rowell (Toronto: University of Toronto Press 1975) 441-2; PAC Sir L.P. Duff Papers file H [Duff to Lord Haldane (?) February 1925]. See also chapter 7.
- 106 See, for example, PAC RG13, A2, vol. 316, no. 1610, A. McConnell to E. Lapointe 19 October 1927.
- 107 PAC Sir L.P. Duff Papers file A, F.A. Anglin to Duff 30 September 1926; *Canadian Bar Review* 8 (1930) 681-2

## CHAPTER 6

- 1 PAC W.L.M. King Papers, Diary vol. 1932, 11 January, at 339
- 2 *Ibid.* vol. 1929, 28 September, at 211; PAC RG13, A5, vol. 2063, no. 3A; vol. 2061, no. 3C
- 3 PAC W.L.M. King Papers, Diary vol. 1933, 2 January, at 3, and 11 January, at 14. In July 1930, Anglin was so incapacitated that he could not conduct his own correspondence; see Bodleian, Lord Sankey Papers, c507, no. 96, F.A. Anglin to Sankey 2 July [1930]; no. 97, H.I. Anglin to Sankey [circa July 1930].
- 4 PAC W.L.M. King Papers, Diary vol. 1933, 11 January, at 14; PAC RG13, A5, vol. 2063, no. 3 A.
- 5 D.R. Williams *Duff: A Life in the Law* (Vancouver: University of British Columbia Press 1984) 138-42, 153, 157-9, 316-17; *Saturday Night* 11 April 1931; PAC A. Meighen Papers no. 109480, E.H. Finlayson to Meighen 15 November 1932 Duff's alcoholism was exacerbated by the death of his wife in 1926.

- 6 Williams Duff 157-62. The selection was influenced by Duff's close friendship with W.D. Herridge, Bennett's brother-in-law and close adviser.
- 7 Windsor *Border Cities Star* 18 March 1933; *Ottawa Morning Journal* 21 March 1933; *Fortnightly Law Journal* 2 (1933) 285, 295-6; *Vancouver Province* 13 February 1933; PAC Sir L.P. Duff Papers file U, W.P.M. Kennedy to Duff 18 March 1933
- 8 PAC R.B. Bennett Papers no. 251760-1, Bennett to C.D. Richards 28 January 1932; *Toronto Globe* 18 May 1932
- 9 PAC A. Meighen Papers no. 103437-40, O.S. Crocket to Meighen 16 February 1932; University of New Brunswick, O.S. Crocket Papers box 7, file 10; *Saint John Telegraph-Journal* 13 April 1943, 3, 11; *Fortnightly Law Journal* 2 (1933) 106-7
- 10 PAC A. Meighen Papers no. 36240, O.S. Crocket to Meighen 14 March 1924; no. 42555-7, 31 August 1925; no. 103437-40, 16 February 1932, 4 April 1935; no. 141048-50 11 July 1936; no. 141042, Meighen to Crocket 22 September 1932; W.H. McConnell 'The Judicial Review of Prime Minister Bennett's "New Deal"' *Osgoode Hall Law Journal* 6 (1968) 53-4
- 11 Snell's interview with W.K. Campbell, 16 July 1980
- 12 *Fortnightly Law Journal* 2 (1933) 285-6, 310-11; *Winnipeg Free Press* 18 March 1933
- 13 PAC RG13, A5, vol. 2066, no. 135295, F.J. Hughes to H. Guthrie 27 August 1934; PAC Sir L.P. Duff Papers file H, Hughes to Duff 25 July 1935
- 14 *Ottawa Journal* 1 July 1944 5; *Maclean's Magazine* 1 April 1936 46-7; *Fortnightly Law Journal* 4 (1935) 209, 233-4
- 15 PAC A. Meighen Papers no. 120783, R.A. Reid to Meighen 19 May 1935; *Fortnightly Law Journal* 5 (1935) 55-6
- 16 PAC W.L.M. King Papers MG26 J2, vol. 158, files J-200 and J-200-H
- 17 *Fortnightly Law Journal* 5 (1936), 294-5; *Winnipeg Free Press* 26 March 1926 3, 6; PAC W.L.M. King Papers reel C2301, no. 127411, H.T. Symington to King 3 April 1927; R.M. Dawson *W.L.M. King, 1874-1923* (Toronto: University of Toronto Press 1958) 361-70, 450
- 18 PAC A.K. Cameron Papers vol. 22, Cameron to A.B. Hudson 25 March 1936
- 19 PAC W.L.M. King Papers MG26 J2, vol. 158, file J-200, R. Taschereau to King 16 February 1940; *Fortnightly Law Journal* 9 (1940) 247-8; B. Lee 'The Amazing Taschereaus' *The Globe Magazine* 2 November 1963, 6-8, 15; Department of Justice, file no. 141312 [W.S. Edwards], memorandum to the minister of justice, 29 January 1940
- 20 *Fortnightly Law Journal* 13 (1943) 6-7; *Canadian Bar Review* 47 (1969) 155-60
- 21 PAC W.L.M. King Papers MG26 J2, vol. 158, file J-200-7
- 22 *Ibid.* Diary vol. 1939, 9 March, at 300; MG26 J2, vol. 158, file

- J-200-1; House of Commons *Debates* (1939) 3104-5; (1943) 63-74, 107
- 23 PAC Sir L.P. Duff Papers file A, Duff to Sir D. Alexander 14 February 1943; J.W. Pickersgill *The Mackenzie King Record 1939-1944* (Toronto: University of Toronto Press 1960) 74
- 24 PAC L. St Laurent Papers, vol. 4, file 35-3, speech by Duff 15 December 1943
- 25 PAC W.L.M. King Papers, Diary vol. 1944, 5-7 January at 11, 13, and 16; MG26 J2, vol. 158, file J-200-1, A. de la Rochelle to [King] 27 November 1942; *Fortnightly Law Journal* 13 (1944) 177
- 26 *Toronto Globe and Mail* 13 December 1975
- 27 PAC W.L.M. King Papers MG26 J2, vol. 158, file J-200-1, Senator A. Blais to King 4 January 1943. See also files J-200-1 and J-200-7. Frank Ford of the provincial Supreme Court was recommended almost unanimously by those supporting Alberta's claims.
- 28 *Ibid.* file J-200-7, J.G. Gardiner to King 4 July 1944, and *passim*
- 29 *Saskatoon Star-Phoenix* 23 January 1956; *Regina Leader-Post* 23 January 1956; *Toronto Daily Star* 23 January 1956
- 30 PAC W.L.M. King Papers, Diary vol. 1947, 22 May; MG26 J2, vol. 436, file J-20, I. Mackenzie to King, 26 May 1947; authors' interview with D.C. Abbott 18 April 1980
- 31 PAC RG13, A1, vol. 544, nos. 634 and 953; R.M. Dawson *Constitutional Issues in Canada 1900-1931* (London: Oxford University Press 1933) 325-32
- 32 8 Geo. VI c. 45; 10 Geo. VI c. 56; 13 Geo. VI c. 27. It is estimated that a leading lawyer in Saskatchewan during the Second World War would have had an income of \$10,000-\$12,000; this made appointment to the Court economically attractive (W.Z. Estey to F. Vaughan 4 May 1983).
- 33 House of Commons *Debates* (1946) 2717; *Canadian Bar Review* 11 (1933) 27-40
- 34 *Winnipeg Free Press* 4 June 1947; SCC biographical directory, at 13, and judges' files; PAC A. Meighen Papers no. 103762, C.H. Locke to Meighen 15 August 1933
- 35 PAC W.L.M. King Papers, Diary 7 July 1947, 26 January 1948, 28 May 1948, at 5. According to Ilsley, Rand was either 'anxious to get back to N.B.' or considering a return to private practice.
- 36 *Proceedings of the Fifth Annual Meeting of the Canadian Bar Association, 1920* (Winnipeg 1920) 120-2; House of Commons *Debates* (1932) 2999
- 37 See, for example, *Fortnightly Law Journal* 12 (1942) 162; *Fortnightly Law Journal* 13 (1943) 33-4, 177, 226; House of Commons *Debates* (1947) 4927
- 38 PAC W.L.M. King Papers MG26 J4, reel C4279, NO. C141860-1
- 39 PAC Sir L.P. Duff Papers file D, Duff to H.H. Davis 18 February 1942; J.L. Granatstein *The Politics of Survival* (Toronto: University of Toronto Press

- 1967) 119-22; House of Commons *Debates* (1943) 63-74; Williams *Duff* 221-39, 255-61
- 40 House of Commons *Debates* (1942) 521; PAC W.L.M. King Papers, Diary vol. 1942, 4 February, at 115
- 41 J.L. Granatstein *A Man of Influence* (Ottawa: Deneau 1981) 177-9; J.W. Pickersgill and D.F. Forster *The Mackenzie King Record 1945-1946* (Toronto: University of Toronto Press 1970) 133-58; M.H. Fyfe 'Some Legal Aspects of the Report of the Royal Commission on Espionage' *Canadian Bar Review* 24 (1946) 777-84. In addition to the two justices, Gérald Fauteux was commission counsel.
- 42 See, for example, PAC Sir L.P. Duff Papers file A, Duff to C.H.A. Armstrong 15 March 1934, 8 June 1935; file G, Duff to H. Guthrie 15 March 1934, 20 May 1935, 16 February 1935; file K [Duff] to S.C.S. Kerr 20 September 1935; file L, E. Lapointe to Duff 29 May 1936.
- 43 Williams *Duff* 94-5; J.W. Pickersgill and D.F. Forster *The Mackenzie King Record 1944-1945* (Toronto: University of Toronto Press 1968) 222. Duff's membership in the Ottawa-based political élite is underlined by his leadership of the Dining Club in the early 1940s, an exclusive club in which leading Ottawa figures met monthly for good food and good gossip; see Granatstein *Man of Influence* 112 note.
- 44 Department of Justice file no. 137743, Sir L.P. Duff to W.S. Edwards 20 February 1937, and passim; file no 139048, Edwards to Duff 4 April 1938, and passim
- 45 PAC R.B. Bennett Papers no. 251858, J.C. Mahaffy to Bennett 15 February 1933
- 46 House of Commons *Debates* (1946) 2717
- 47 *Canadian Bar Review* 8 (1930) 675-6
- 48 PAC RG13, A2, vol. 401, no. 614, P.G. Thomson to H. Guthrie 21 May 1934
- 49 Ibid. Guthrie to Thomson 23 July 1934. This final point was rewritten within the Justice Department so as to avoid any implication that the Supreme Court was not held in the highest possible regard everywhere; see *ibid.* W.S. Edwards to Mr Plaxton 26 July 1934.
- 50 Ibid. Thomson to Guthrie 7 August 1934
- 51 Ibid.
- 52 In this case, however, most of the public criticism seems to have been levelled not at the Supreme Court but at the quality of the Manitoba court. These complaints offer an interesting contrast to the 1890s, when there were also criticisms of the rate of reversal suffered by Manitoba courts in Ottawa. In the earlier instance the criticism had pointed to bias and weakness in the Supreme Court; by the 1940s, however the

Supreme Court was perceived as a neutral, accurate, and valued arbiter of the law. Over the years the Court had acquired a respected place in the eyes of lay observers. The lead editorial of the *Winnipeg Free Press* of 15 February 1944 detailed the Manitoba Court of Appeal's 'incapacity,' weakness, and reversal rate; see also the issue of 17 February 1944.

- 53 PAC Sir L.P. Duff Papers, file M [Duff] to H. Mercier 5 March 1935. See also, for example, file D [Duff] to A.K. Dysart 16 January 1936; file Q-R, Duff to Justice Rivard 23 May 1933.
- 54 Authors' interview with D.C. Abbott 18 April 1980; Snell's interview with W.K. Campbell 16 July 1980
- 55 See, for example, PAC Sir L.P. Duff Papers file S, Duff to Justice St Germain 13 November 1934; W.K. Campbell 'The Right Honourable John Cartwright' *Law Society of Upper Canada Gazette* 12 (1978) 338.
- 56 PAC Sir L.P. Duff Papers file D, H.H. Davis to Duff 9 December 1935; compare *Fortnightly Law Journal* 5 (1936) 209.
- 57 PAC Sir L.P. Duff Papers file S, Duff to Justice St Germain 22 November 1934; [1935] SCR 53
- 58 *Reference re the Jurisdiction of the Tariff Board* [1934] SCR 538; *Reference re the Constitutional Validity of Section 110 of the Dominion Companies Act* [1934] SCR 653; *Reference re the Constitutional Validity of the Companies' Creditors Arrangement Act* [1934] SCR 659
- 59 J.R.H. Wilbur *The Bennett New Deal: Fraud or Portent* (Toronto: Copp Clark 1968) is the most useful work on this subject.
- 60 H.B. Neatby *W.L.M. King 1932-1939* (Toronto: University of Toronto Press 1976) 94-5; House of Commons *Debates* (1935) 157-8, 281, 2064-5
- 61 PAC Sir L.P. Duff Papers file D [Duff] to A.K. Dysart 10 January 1936
- 62 McConnell 'Judicial Review of Bennett's "New Deal"' 50, 82-3
- 63 PAC W.L.M. King Papers MG26 J2, vol. 158, file J-200-M, E.M. Macdonald to King 15 February 1936. These references to the Supreme Court and to the JCPC cost the federal government \$66,042.64; see House of Commons *Debates* (1943) 683.
- 64 Neatby *King 1932-1939* 225-31. On the contest between the Social Credit Government and Ottawa, see J.R. Mallory *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press 1954).
- 65 *Reference re the Power of the Governor-General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province* [1938] SCR 71
- 66 *Reference re Alberta Statutes* [1938] SCR 100
- 67 PAC Sir L.P. Duff Papers file Q-R [Duff] to N.W. Rowell 11 March 1938

- 68 *Montreal Star* 5 March 1938; *Vancouver Province* 9 March 1938; *Canadian Bar Review* 16 (1938) 215–16
- 69 *Reference as to Whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts* [1943] SCR 483
- 70 *Neatby King 1932–1939* 235–6, 267–8; C.P. Wright 'To Finance Padlock Appeals' *Canadian Forum* 14 (1939) 215–20; *House of Commons Debates* (1938) 3421
- 71 *Christie v York Corporation* [1940] SCR 139
- 72 *Reference Relating to Persons of the Japanese Race* [1946] SCR 248. See also *Fortnightly Law Journal* 16 (1946) 30–9.
- 73 *Financial Post* 4 May 1946

## CHAPTER 7

- 1 scc Letterbook 13, 200–2, R. Cassels to E.L. Newcombe 25 February 1897
- 2 *Ibid.*; scc Letterbook 15, 660–1, E.R. Cameron to E.L. Newcombe 11 December 1899
- 3 PAC RG13, A2, vol. 122, no. 263; PAC Sir W. Laurier Papers no. 83859–60, E.R. Cameron to C. Fitzpatrick 28 March 1904
- 4 scc Letterbook 1900–1, 3, E.R. Cameron to E.L. Newcombe 29 May 1900; PAC RG11, vol. 4327, file no. 2994-1-B, Cameron to C. Fitzpatrick 12 April 1904
- 5 PAC Sir W. Laurier Papers no. 225761-62, E.R. Cameron to C. Fitzpatrick 12 January 1903; PAC RG13, A2, vol. 122, no. 263
- 6 *House of Commons Debates* (1903) 3404; (1906) 7036
- 7 PAC RG11, vol. 4328, file no. 2994-1-C, 'Excerpts from Reports of the Department of Public Works'
- 8 *Maclean's* March 1914, 13; PAC RG13, A2, vol. 164, no. 1538
- 9 PAC RG11, vol. 4327, file no. 2994-1-B; vol. 4328, file no. 2994-1-C
- 10 scc Judges' Files, L.A.D. Cannon, E.R. Cameron to W.S. Edwards 23 January 1930
- 11 PAC RG11, vol. 4328, file no. 2994-1-C, T.W. Fuller, memo to the deputy minister 29 August 1931; *ibid.* Supplementary Public Works Estimates 1934–5
- 12 PAC Sir L.P. Duff Papers file c, J.J. Heagerty to Dr Woodhouse 9 December 1935; *ibid.* 'Report re Building Occupied by the Supreme Court of Canada'; PAC RG11, vol. 4328, file no. 2994-1-C, 'Report re Building Occupied by the Supreme Court of Canada'
- 13 PAC E. Lapointe Papers vol. 19, file no. 49, W.L.M. King to Lapointe 11 April 1936; PAC RG11, vol. 4328, file no. 2994-1-C

- 14 V. Tomovcik 'Reconstruction of Ottawa-Hull: The Gréber Era' MA thesis, University of Waterloo 1977
- 15 PAC RG11, vol. 4328, file no. 2994-1-C
- 16 Ibid. PAC W.L.M. King Papers MG26 J2, vol. 158, file J-200-s (1936); House of Commons *Debates* (1937) 292
- 17 *Montreal Gazette* 3 January 1980, 49; *Saturday Night* 28 August 1954, 25  
*Ottawa Citizen* 28 December 1979; W. Chevalier 'Entretien avec Ernest Cormier' *Vie des Arts* 20 (1975-6), 14-19, 87-9; 'Plans by Cormier' *Canadian Business* 24 (1951) 26-7, 84-7
- 18 PAC RG11, vol. 4328, file no. 2994-1-C-D-F; Snell's interview with W.K. Campbell, 16 July 1980; SCC building file
- 19 *Ottawa Journal* 23 November 1940; *Toronto Globe and Mail* 5 April 1980
- 20 PAC RG11, vol. 4331, file no. 2994-26
- 21 PAC W.L.M. King Papers MG26 J2, vol. 436, file J-15-7, E. Cormier to King 21 September 1945; SCC building file; PAC RG11, vol. 4330, file no. 2994-1-0
- 22 There is much literature on this controversy. See F.H. Underhill 'Edward Blake, the Supreme Court Act, and the Appeal to the Privy Council, 1875-6' *Canadian Historical Review* 19 (1938) 245-63, 292-4; F. Mackinnon 'The Establishment of the Supreme Court of Canada' *Canadian Historical Review* 26 (1946) 258-74; J.D. Livermore 'Towards "A Union of Hearts": The Early Career of Edward Blake, 1867-1880' PH D thesis, Queen's University 1975, 290-316.
- 23 *Johnston v St Andrews* (1877) App. Cas. 159; *Canada Central Railway Co. v Murray* (1883) 8 App. Cas. 574; *Prince v Gagnon* (1883) 8 App. Cas. 103
- 24 See especially C. Berger *The Sense of Power* (Toronto: University of Toronto Press 1970)
- 25 PAC Sir J.A. Macdonald Papers no. 125325-32, Sir J.S.D. Thompson to Macdonald 25 July 1890
- 26 Ibid.; PAC Sir J.A. Macdonald Papers no. 125387, 15 December 1890; no. 125838-41, 4 August 1890; no. 8151, Macdonald to Thompson 7 August 1888
- 27 Technically, two other Canadians also became members of the committee. On 1 January 1920, in recognition of their work at the Versailles Peace Conference, C.J. Doherty and A.L. Sifton were both appointed to the imperial Privy Council. Since both were retired judges, they were both ipso facto members of the Judicial Committee. Neither, however, ever sat on the committee, but their appointment inadvertently created some confusion about the number of colonial members on the committee.
- 28 R. Gosse 'Random Thoughts of a Would-Be Judicial Biographer' *University of Toronto Law Journal* 19 (1969) 604



- 29 PAC Sir W. Laurier Papers no. 115079, A.B. Aylesworth to Laurier 29 October 1906; PAC RG13, A2, vol. 146, no. 555, E.L. Newcombe to C. Russell & Co. 22 April 1907
- 30 Frank Hodgins in *Saturday Night* 23 March 1912
- 31 *Clergue v Murray* [1903] AC 521; *Canadian Pacific Railway Company v Blain* [1904] AC 453; PAC Sir C. Fitzpatrick Papers no. 6385-6, R.B. Haldane to Fitzpatrick 13 October 1913; *Albright v Hydro-Electric Power Commission* [1923] AC 169. In the period 1903-18, 'putting aside those cases settled by consent,' there were 192 petitions for leave to appeal from Supreme Court of Canada judgments, 97 of which were granted; see *Canada Law Journal* 56 (1920) 94-5.
- 32 PAC W.L.M. King Papers MG26 J2, no. 108215-20. The registrar of the Court made a similar case; *ibid.* J1, no. 109583-7, E.R. Cameron to King 29 September 1926.
- 33 House of Commons *Debates* (1927) 1055. See also, for example, PAC S.W. Jacobs Papers no. 1010 [Jacobs] to F.A. Anglin 19 September 1924.
- 34 [1935] AC 500
- 35 F.R. Scott 'The Privy Council and Minority Rights' *Queen's Quarterly* 37 (1930) 677-8
- 36 J.L. Granatstein *The Ottawa Men* (Toronto: Oxford University Press 1982) 273
- 37 *La Revue du Droit* 10 (1931-2) 379-80
- 38 [1940] SCR at 76
- 39 [1947] AC 127
- 40 R. Bothwell, I. Drummond, and J. English *Canada since 1945* (Toronto: University of Toronto Press 1981) 91-9 provides a useful survey of the developments.
- 41 PAC W.L.M. King Papers, Diary 30 January, 3 February, and 5 March 1948
- 42 D.O. Carrigan *Canadian Party Platforms 1867-1968* (Toronto: Copp Clark 1968) 185
- 43 13 Geo. VI c. 37, s. 3
- 44 Department of Justice file no. 159285, 'Abolition of Appeals to the Privy Council' 24 December 1948
- 45 *Ibid.* file no. 152966; PAC RG13, A5, vol. 2073, no. 156794. The lawyers' recommendations were largely repeated in a Canadian Bar Association resolution in the late summer of 1949.
- 46 *Ibid.* no. 156794
- 47 House of Commons *Debates* (1949) 2d session, 312-3
- 48 *The Advocate* 7 (1949) 97; Department of Justice file no. 157279; House of Commons *Debates* (1949) 2d session, 881-4; Montreal *Le Devoir* 20 Septem-

- ber 1949; *Saturday Night* reprinted in *Montreal Gazette* 4 February 1949
- 49 Since the first statute in 1875, apart from various amendments to the Judges Act, thirty-one different statutes had been passed containing many alterations of various clauses in the Supreme Court Act.
  - 50 PAC A. Meighen Papers no. 147899-900, Justice P.H. Gordon to Meighen 8 February 1949; *Saturday Night* 24 May 1947; Department of Justice file no. 153000-1
  - 51 Department of Justice file no. 153000-1; House of Commons *Debates* (1949) 2d session, 493
  - 52 Department of Justice, file no. 153000-1; R. Boulton 'Ad Hoc Judges of the Supreme Court of Canada' *Chitty's Law Journal* 26 (1978) 289-95; House of Commons *Debates* (1949) 2d session, 660-5
  - 53 Ibid 665-6; 13 Geo. VI c. 37, ss 2, 6; W.G. How 'The Too-Limited Jurisdiction of the Supreme Court of Canada' *Canadian Bar Review* 25 (1947) 573-86

## CHAPTER 8

- 1 scc Judges' Files, T. Rinfret, [P. Kerwin] to Rinfret 4 April 1950. Rinfret was able to organize a dinner in the fall of 1950, attended by representatives of the bench, the bar, and federal and provincial governments; see PAC, L. St Laurent Papers vol. 118, file J-20-S.
- 2 See Bora Laskin 'The Supreme Court of Canada: A Final Court of and for Canadians' *Canadian Bar Review* 29 (1951) 1038
- 3 Ottawa *Morning Citizen* 31 January 1950; I.N. Smith *The Supreme Court of Canada* (Ottawa: The Journal 1952)
- 4 PAC L. St Laurent Papers vol. 118, file J-20, memorandum 12 November 1949; authors' interview with D.C. Abbott 18 April 1980
- 5 scc Judges' Files, G. Fauteux; J.G. Descôteaux *Faculté de Droit, Université d'Ottawa 1953-1978* (Ottawa: University of Ottawa 1979) 85; Toronto *Globe and Mail* 17 September 1980
- 6 W.K. Campbell 'The Right Honourable John Cartwright' *The Law Society of Upper Canada Gazette* 12 (1978) 326-43; PAC W.L.M. King Papers MG26, J2, vol. 158, file J-200
- 7 W.K. Campbell 'The Right Honourable Lyman Poore Duff' *Osgoode Hall Law Journal* 12 (1974) 258; PAC L. St Laurent Papers vol. 187, file J-20-3, J.W. de B. Farris to St Laurent 7 June 1954
- 8 PAC D.C. Abbott Papers vol. 1, 'Biographical Sketches,' Toronto *Star Weekly* 16 July 1955; authors' interview with D.C. Abbott 18 April 1980
- 9 Toronto *Globe and Mail* 1 July 1954; *Ottawa Journal* 27 February 1954; PAC

- Abbott Papers vol. 22; PAC L. St Laurent Papers vol. 187, file J-20-3; Senator J.W. de B. Farris to St Laurent 7 June 1954
- 10 Department of Justice file no. 164045; *Chitty's Law Journal* 2 (1952) 138-9
- 11 *Montreal Gazette* 14 June 1954
- 12 PAC L. St Laurent Papers vol. 186, file J-20-1, W. Kirkconnell to St Laurent 1 February 1956 and *passim*
- 13 Another example of such criteria at work is the early 1960s proposal that academics be represented on the Supreme Court; one law professor recommended that the Pearson government begin a tradition of always having one legal scholar on the Court and put forward the names of Cecil Wright and Bora Laskin for consideration. See PAC L.B. Pearson Papers vol. 158, file 341.3, A.M. Linden to Pearson, 22 April 1963.
- 14 Harry Grattan Nolan, the first Supreme Court justice from Alberta, died suddenly sixteen months after his appointment: scc Judges' Files, H.G. Nolan
- 15 J.G. Snell's interview with W.K. Campbell 16 July 1980; *Ottawa Citizen* 7 November 1958 Kellock's fellow justices and the profession were upset that after returning to private practice he soon reappeared at the Supreme Court as counsel.
- 16 *Canadian Who's Who 1955-1957*, (Toronto: Trans-Canada Press 1957) 708; *Time Canada* 25 May 1959 13
- 17 See scc Judges' Files, R.A. Ritchie; *Who's Who in Canada, 1966-1968* (Toronto: International Press 1968).
- 18 scc Judges' Files, W. Judson; *Time Canada* 25 May 1959 13; *Toronto Globe and Mail* 19 June 1980
- 19 See F. Vaughan 'Emmett Matthew Hall: The Activist as Justice' *Osgoode Hall Law Journal* 10 (1972) 411-28.
- 20 scc Judges' Files, E.M. Hall; *Regina Leader Post* 24 November 1962; W. Stewart 'The Good Works of Emmett Hall' *Maclean's Magazine* July 1975, 35-9
- 21 The account of this offer is incorrectly reported in Peter Newman *Renegade in Power* (Toronto: McClelland and Stewart 1963) at 370-1. This proposal was raised on an earlier occasion. The authors are grateful to the Hon. Gordon Churchill for his diary notes relating to this event.
- 22 See House of Commons *Debates* (1949) 2d session, 193, where Drew raised this objection. For St Laurent's reply, see 196. A brief account of this debate is contained in a Publex from P.A. Clutterbuck, British high commissioner to Canada, to the Rt Hon. Noel Baker, MP, secretary of state for commonwealth relations, 21 March 1949 (no. 92) Privy Council Office pc 8-1639, Public Record Office, London.

- 23 *Report of the Royal Commission of Inquiry on Constitutional Problems* vol. 3, book 1 (Quebec: Province of Quebec 1956) 288-96
- 24 Peter H. Russell *The Supreme Court of Canada as a Bilingual and a Bicultural Institution* (Ottawa: Queen's Printer 1969) points to several of these proposals (43-55).
- 25 Department of Justice file no. 165858, F.P. Varcoe, 'Memorandum for the File Re: Supreme Court Reporters' 24 February 1953, and passim; *The 1961 Year Book of the Canadian Bar Association and the Minutes of Proceedings of the Forty-third Annual Meeting*, (Ottawa: National Printers 1961) 184-5
- 26 See *Boucher v The King* [1951] SCR 265; *Saumur v Quebec* [1953] SCR 299; *Switzman v Elbling* [1957] SCR 285; and *Roncarelli v Duplessis* [1959] SCR 121.
- 27 Peter H. Russell *Leading Constitutional Decisions* 3rd ed. (Ottawa: Carleton University Press 1982) 319
- 28 Paul Weiler *In The Last Resort* (Toronto: Carswell 1974) 191
- 29 *Toronto Daily Star* quoted in Penton *Witnesses* 222; Conrad Black *Duplessis* (Toronto: McClelland and Stewart 1977) 386
- 30 Weiler *In the Last Resort* 306
- 31 J. Hébert *I Accuse the Assassins of Coffin* (Montreal: Les Éditions du Jour 1964) 103
- 32 Frank Scott 'Administrative Law: 1923-1947' *Canadian Bar Review* 25 (1948) 268
- 33 See Peter W. Hogg 'The Supreme Court of Canada and Administrative Law: 1949-1971' *Osgoode Hall Law Journal* 11 (1973) 197
- 34 Bora Laskin 'Certiorari to Labour Boards: The Apparent Futility of Privative Clauses' *Canadian Bar Review* 30 (1952) 989
- 35 [1956] SCR 318
- 36 *Ex parte Brent* [1955] OR 480; 3 DLR 587
- 37 Hogg 'The Supreme Court and Administrative Law' 202
- 38 [1953] 2 SCR 18
- 39 [1957] SCR 531
- 40 [1959] SCR 513
- 41 [1962] SCR 681
- 42 *Ottawa Evening Journal* 4 April 1962

## CHAPTER 9

- 1 Vaughan's interview with W.K. Campbell 21 June 1974
- 2 PAC L.B. Pearson Papers vol. 136, file 343, Pearson to E. Marquis 28 August 1967
- 3 Snell's interview with W.K. Campbell 7 July 1980

- 4 scc Judges' Biographies 17
- 5 B. Laskin 'Our Civil Liberties: The Role of the Supreme Court' *Queen's Quarterly* 61 (1954) 471
- 6 Ibid.; 'The Supreme Court of Canada: A Final Court of an for Canadians' *Canadian Bar Review* 29 (1951) 1076
- 7 scc Judges' Biographies 17; *Toronto Daily Star* 29 December 1973; J. Gault 'Doing Justice to Bora Laskin' *Maclean's* July 1974, 19, 62-8
- 8 Contrast Laskin's 'An Inquiry into the Diefenbaker Bill of Rights' *Canadian Bar Review* 37 (1959) 77 with Trudeau's *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer 1968).
- 9 Vaughan's interview with W.K. Campbell 21 June 1974
- 10 Canadian Bill of Rights (1960) 8-9 Eliz. II c. 44
- 11 [1963] SCR 651
- 12 [1970] SCR 282
- 13 Despite the initial success in *Drybones* the Bill of rights has not been a significant aid to Canadian Indians before the Court.
- 14 *In the Matter of a Reference by the Governor-General in Council Concerning the Proclamation of Section 16 of the Criminal Law Amendment Act 1968-69* (1970) SCR 777
- 15 Bora Laskin *Canadian Constitutional Law* 3rd ed. (Toronto: Carswell 1966) 976
- 16 For an interesting comment on the Canadian judiciary's deference to the legislature under the Bill of Rights, see Peter W. Hogg 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights' *The Canadian Charter of Rights and Freedoms* edited by Walter Tarnopolsky and Louis Beaudoin (Toronto: Carswell 1982) 2. Hogg writes, 'The Canadian Bill of Rights was potentially capable, when enacted, of shielding civil liberties much more effectively than it has. The primary reason for the failure is the [failure of] the Canadian judiciary, steeped in the tradition of legislative supremacy, to make law-makers comply with the Bill.'
- 17 Hon. Ronald Martland to Vaughan 14 May 1984
- 18 D. Gibson 'Unobtrusive Justice' *Osgoode Hall Law Journal* 12 (1974) 339-55
- 19 Quebec *Le Soleil* 31 December 1973; *Halifax Chronicle World* 31 December 1973; Gault 'Laskin' 19
- 20 Snell's interview with L.W. Abbott 16 September 1980.
- 21 scc Judges' Biographies 19; *Who's Who in Canada, 1977-78* (Toronto: International Press 1977), 818-19; *Toronto Globe and Mail* 29 September 1981
- 22 *Who's Who in Canada, 1977-78* 2
- 23 Montreal *Le Devoir* 28 December 1973
- 24 Vaughan's interview with Pierre Patenaude 4 November 1976
- 25 *Maclean's* 15 October 1979, 34

- 26 House of Commons *Debates* (1973-4) 9098-9
- 27 The extent to which some elements of Canadian society were attracted to American developments is perhaps evidenced by the fact that following the successful procedure of Clarence Earle Gideon before the Supreme Court of the United States, a large number of Canadian prisoners began to file habeas corpus applications, written 'largely in an unintelligible form' and to complain about the unlawfulness of their incarceration. See Department of Justice, file no. 195183; for a complete account of Gideon's case, see Anthony Lewis *Gideon's Trumpet* (New York: Random House 1967).
- 28 Walter Tarnopolsky 'Civil Liberties during the Post-centennial Decade' in *Decade of Adjustment* edited by Julio Menezes (Toronto: Butterworths 1980)
- 29 *Toronto Daily Star* 29 July, 31 July, and 2 August 1967
- 30 *Time Canada* 1 April 1966, 10; *Toronto Daily Star* 20 April 1966
- 31 *Toronto Daily Star* 3 and 8 May 1967; *Toronto Globe and Mail* 5 May 1967; *Montreal Star* 5 May 1967; *Time Canada* 12 May 1967, 17-8
- 32 [1978] 1 SCR 988
- 33 See F. Vaughan 'Mr Justice Emmett Hall as Royal Commissioner' *University of Western Ontario Law Review* 17 (1978-9) 223. See especially the statistical account at 249.
- 34 Peter Newman *The Distemper of Our Times* (Toronto: McClelland and Stewart 1968) 286, 389; see *passim* for details of these scandals.
- 35 Edward McWhinney, quoted *ibid.* at 406

#### CHAPTER 10

- 1 *Canadian Who's Who 1981* (Toronto: University of Toronto Press 1981) 298. According to one report (*Maclean's* 15 October 1979, 35), Chief Justice Laskin took the extraordinary step of recommending the appointment of Justice Charles Dubin of the Ontario Court of Appeal to this seat.
- 2 *Canadian Who's Who 1981* 806; *Canadian News Facts* 9 (1975) 1487-8, 1495.
- 3 *Canadian Who's Who 1981* 806
- 4 Quebec air-traffic controllers resented the federal regulation making it mandatory for them to converse with French-speaking pilots in English. For a full account of this controversy, see Sanford Borins *The Language of the Skies* (Montreal: McGill-Queen's University Press 1983).
- 5 *Ibid.* 173; *Canadian Parliamentary Guide 1981* (Ottawa: Normandin 1981) 1007-8; *Toronto Globe and Mail* 29 September 1981
- 6 *Canadian Who's Who 1981* 544-5; *Toronto Globe and Mail* 29 March 1980
- 7 See, for example, *Kitchener-Waterloo Record* 14 March 1981; *Toronto Daily*

- Star 17 March 1981; *Toronto Globe and Mail* 13 January 1982; *Today Magazine* 2 January 1982, 7; Ontario Committee on the Status of Women 'Women and the Charter of Rights and Freedoms' (November 1980).
- 8 E. Ratushny 'Judicial Appointments: The Lang Legacy' *Advocates' Quarterly* 1 (1977-8) 2-17
- 9 3-4 Eliz. II c. 48, s. 1; 12 Eliz. II c. 8, s. 1; 14-15-16 Eliz. II c. 76, s. 1, 23-24 Eliz. II c. 48, s. 1; 29-30 Eliz. II c. 50, ss 9, 19.2
- 10 The authors are grateful to Mr Justice Estey for this information; Estey to Vaughan 17 April 1983.
- 11 Department of Justice file no. 195183
- 12 Paul Weiler *In the Last Resort* (Toronto: Carswell 1974) 8; PAC E.M. Hall Papers vol. 9, file 110; Bora Laskin 'The Supreme Court of Canada' *The Law Society of Upper Canada Gazette* 8 (1974) 251
- 13 18-19 Eliz. II c. 44, s. 1
- 14 Between 1975 and 1980 the Court heard 127 criminal appeals as of right. During this period the justices heard a total of 216 criminal cases: statistics compiled by the registrar, the Supreme Court of Canada. The authors are grateful to Mr Brian Crane, QC for making these statistics available to them.
- 15 In 1975, before the changes became operative, the Court heard thirty-one Civil Code appeals. By 1980 the number had dropped to four.
- 16 Interview with Mr Justice Estey 24 December 1979. We are grateful to Mr Justice Estey and the Osgoode Society for permitting us to use this material.
- 17 From 333 in 1976 to 419 in 1982
- 18 The number of appeals in 1975 was 160; in 1979, 107; in 1982, 129.
- 19 Authors' interview with Mr Justice Estey 24 December 1979, confirmed by registrar's statistics.
- 20 Authors' interview with D.C. Abbott 18 April 1980
- 21 L.-P. Pigeon 'The Human Element in the Judicial Process' *Alberta Law Review* 7 (1970) 301-21; Laskin 'Institutional Character' 329-48; E.M. Hall 'Law Reform and the Judiciary's Role' *Osgoode Hall Law Journal* 10 (1972) 399-409; Brian Dickson 'The Judiciary: Law Interpreters or Law-Makers' *Manitoba Law Journal* 12 (1982) 1-8
- 22 B. Amiel 'Nine Men in Search of Even-handed Justice' *Maclean's* 12 February 1979, 39
- 23 G. Bale 'Stare Decisis, the Supreme Court and Law Reform' *Chitty's Law Journal* 26 (1978) 337-40
- 24 [1977] 2 SCR 655
- 25 [1975] 1 SCR 423

- 26 Ibid. at 450-1
- 27 Cited by Paul Weiler in 'Of Judges and Scholars: Reflections on a Centennial Year' *Canadian Bar Review* 53 (1975) 568
- 28 *Time Canada* 24 March 1974 6
- 29 [1975] 2 SCR 574
- 30 For a good discussion of the exclusionary rule, see Malcolm Wilkey 'The Exclusionary Rule: Why Suppress Valid Evidence?' *Judicature* 62 (1978) 215, and Craig Bradley 'The Exclusionary Rule in Germany' *Harvard Law Review* 96 (1983) 1032.
- 31 See, for example, *The Queen v Pierce Fisheries Ltd.* [1971] SCR 5; and Weiler *In the Last Resort* 97-104.
- 32 [1976] 1 SCR 616
- 33 [1974] SCR 1349
- 34 *Montreal Le Devoir* 3 April 1975
- 35 [1978] 2 SCR 545
- 36 [1978] 2 SCR 1299
- 37 See the discussion of mens rea in chapter 8.
- 38 For a critical assessment of this judgment, see A.C. Hutchinson 'Sault Ste Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own' *Osgoode Hall Law Journal* 17 (1979) 415
- 39 [1976] 2 SCR 373
- 40 For two different legal assessments of this decision, see Albert Abel 'The Anti-Inflation Judgment: Right Answer to the Wrong Question' *University of Toronto Law Journal* 26 (1976) 409; and Pierre Patenaude 'The Anti-Inflation Case: The Shutters Are Closed but the Back Door Is Wide Open' *Osgoode Hall Law Journal* 15 (1977) 397.
- 41 [1979] 1 SCR 42
- 42 [1957] SCR 198
- 43 Chief Justice Bora Laskin 'Judicial Integrity and the Supreme Court' *Law Society of Upper Canada Gazette*, (1978) 116
- 44 Peter W. Hogg 'Is the Supreme Court Biased in Constitutional Cases?' *Canadian Bar Review* 57 (1979) 721
- 45 See *Dominion Stores v The Queen* [1980] 1 SCR 844; and *Labatt Breweries Ltd v A.-G. of Canada* [1980] 1 SCR 914.
- 46 Peter H. Russell *Leading Constitutional Decisions* 3d ed. (Ottawa: Carleton University Press 1980) 295
- 47 See, for example, *Canadian Annual Review* 1972 edited by J. Saywell (Toronto: University of Toronto Press 1974) 107.
- 48 (1981) 117 DLR (3d) 1
- 49 [1981] CA 80; (1981) 120 DLR (3d) 385



- 50 (1981) 118 DLR (3d) 1
- 51 *Re: Resolution to Amend the Constitution* [1981] 1 SCR 754
- 52 *Toronto Globe and Mail* 29 September 1981; the headline in *Le Devoir* read: 'Le projet de résolution est légal mais inconstitutionnel': 29 September 1981.
- 53 See Russell 'The Supreme Court Decision: Bold Statecraft Based on Questionable Jurisprudence' in Institute of Intergovernmental Relations *The Court and the Constitution* (Kingston: Queen's University 1982).
- 54 Richard Simeon *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press 1972) 30, 287
- 55 See David C. McDonald *Legal Rights in the Canadian Charter of Rights and Freedoms* (Toronto: Carswell 1983).
- 56 For an account of the Charter cases during the first year of its operation, see F.L. Morton 'Charting the Charter - Year One: A Statistical Analysis', paper prepared for the 1984 annual meeting of the Canadian Political Science Association held at Guelph, Ontario (June 1984).
- 57 Constitution Act, 1982, 41(d)
- 58 See Peter Russell's misgiving in 'The Political Process of the Canadian Charter of Rights and Freedoms' *Canadian Bar Review* 61 (1983) 30-54.
- 59 *Ibid.* 52

#### EPILOGUE

- 1 *Skapinker v Law Society of Upper Canada* [1984] 1 SCR 357
- 2 *Ibid.* at 366.
- 3 *Hunter v Southam* (as yet unreported)
- 4 For an account of the reaction to Le Dain's appointment, see David Vinneau *Toronto Daily Star* 30 May 1984
- 5 *Canadian Who's Who 1984* (Toronto: University of Toronto Press 1984) 659
- 6 *Towards a New Canada* (Ottawa: Canadian Bar Foundation 1978) 55
- 7 S.I. Bushnell 'Leave to Appeal Applications to the Supreme Court of Canada' *Supreme Court Review* 3 (1983) 479-558; P.H. Russell 'The First Two Years in Charter Land' paper presented to the 1984 annual meeting of the Canadian Political Science Association, Guelph, Ontario (June 1984) 5
- 8 *Ibid.* 4
- 9 *Ibid.* 6