

*THE WEST AND THE SUPREME COURT OF CANADA:
THE PROCESS OF INSTITUTIONAL ACCOMMODATION
OF REGIONAL ATTITUDES AND NEEDS**

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In the very early years of Confederation national political leaders moved purposefully towards the establishment of a general court of appeal for Canada, as provided for in section 101 of the *British North America Act*. The new Supreme Court, founded in 1875, was designed as the apex of the national judicial structure. But that judicial structure was a unitary one in a federal state, and the Supreme Court of Canada as the "keystone" of that structure was intended to play an important role in articulating a common body of law for the Dominion of Canada.¹ This centralizing or national function, not surprisingly, brought the Supreme Court at times into a position of confrontation with the various regions of Canada, each of which responded in a distinctive way. In the case of the Canadian west (both the prairies and British Columbia) a series of confrontations and regional responses revealed a process of institutional and local accommodation as the inherent conflicts of a unitary judicial system in a federal state were worked out, at least structurally.

For the first 28 years of its history the Supreme Court of Canada was without representation from the west, either the prairies or British Columbia. Given the proportion of the total population (according to the 1881 census, the west held 3.2 per cent)² and the lack of depth and sophistication in what was a very young legal fraternity, this absence of representation was perhaps understandable. On the other hand, there had been established (with one exception in 1888) a tradition of regional distribution of the justiceship on the Supreme Court bench. Of the six posts originally available in 1875, two were allocated to each of the three major regions — the Maritimes, Quebec (a statutory requirement) and Ontario — in much the same fashion as the Senate seats had been apportioned. There is no evidence that the Government of the day gave any consideration whatsoever to naming a westerner to the new Supreme Court. During the debate in the House of Commons regarding the establishment of a supreme court, Arthur Buns-ter (Conservative; Vancouver) moved an amendment which would have required that one of the justices be from the bench or bar of British Columbia. Buns-ter's arguments are interesting in that they gave early indication of the nature of such complaints in the future. Judges from elsewhere, he argued, knew little about local, west coast affairs, especially regarding mining titles or the management of Indian lands; as well, such an appointment

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1. For a more detailed analysis, see J.G. Snell and F. Vaughan, *The Supreme Court of Canada: the history of an institution* (forthcoming, 1985), chapter 1. Certainly the existence of the Judicial Committee of the Privy Council in England challenged the symmetry of this proposed structure. This was realized both in 1875 and thereafter; as discussed below, the Judicial Committee was made use of by elements in Canada who sought to thwart the Supreme Court's centralizing function.

2. *Census of Canada 1880-81* (Ottawa, 1882), I, 97.

was a matter of justice to British Columbia, "inasmuch as injustice had been done to it in many other matters." The proposal was defeated.³

For the next two decades, little was heard of the issue. It was reported in the press that the Ottawa Government in 1888 was seriously considering appointing a western justice. Allegedly, Chief Justice Taylor of the Supreme Court of Manitoba rejected such an offer at that time,⁴ but there is no confirmation of this. Nor is there evidence to indicate that westerners were yet particularly disturbed by the eastern monopoly on Supreme Court of Canada appointments.

In July 1893 Justice C.S. Patterson died. His was what might be called a 'swing seat' on the Supreme Court bench. Originally occupied by a Maritimer, Justice Henry, this was the post which in 1888 had been, perhaps, offered to Chief Justice Taylor of Manitoba and had then been accepted by Patterson of Ontario. The seat had thus been moved out of the grasp of the Maritimes. Since there were already two other Ontario justices (Henry Strong and John Gwynne) on the Ottawa court in 1893, it seemed reasonable that the now vacant post might once again be offered to someone in the west. It was in this context that the local western bar associations moved into action.

In the first week of August, 1893, less than two weeks after Patterson's death, meetings occurred in Winnipeg, Regina, Calgary and Vancouver. Held within just a few days of each other, the meetings had seemingly been coordinated. However, while all the resolutions passed called for appointment of a western justice to the Supreme Court of Canada, the rationale varied. The Winnipeg Law Society argued that such a representative through "his local knowledge of the Laws and circumstances of these provinces would materially assist the Supreme Court in the consideration of appeals therefrom . . ."⁵ This sense that easterners simply did not very well understand western conditions and circumstances had been one of Bunster's 1875 points. Though the resolutions from Manitoba did not say so, and there is no extant record of the discussion at the meeting, the Winnipeg barristers may well have been disturbed by the Supreme Court's recent treatment of appeals from Manitoba courts. In 1891 the *Western Law Times*, the spokesman for the prairie legal profession, had pointed out that "nearly ninety per cent" of the decisions from Manitoba were reversed. This record led the journal to predict, accurately, that later in the year the Court would also overturn the Manitoba Court of Queen's Bench in *Barrett v. the City of Winnipeg*,⁶ involving the famous and emotional Manitoba schools question. When the Judicial Committee of the Privy Council reversed the Ottawa decision and restored the Manitoba judgment in the case, the *Western Law Times* could not resist jeering at the federal court:

3. Canada, House of Commons, *Debates*, 1875, 974. British Columbians were particularly upset at this time because the federal government had failed to meet its commitments in the 1871 terms of union by which the west coast province joined Confederation.

4. *Halifax Morning Herald*, Oct. 29, 1888.

5. Public Archives of Canada [hereafter PAC], RG 13, A5, vol. 2043, #706, W.D. Taylor to Sir J.S.D. Thompson, Winnipeg, Aug. 5, 1893, and enclosure.

6. (1892), 19 S.C.R. 374.

As will be evidenced by a reference to our previous remarks on this subject, we were not at all surprised to find the Supreme Court itself over-ruled, and in truth such an event is nothing new to that body, the confidence of the public in which as an exponent of constitutional questions has long been on the wane, and it is difficult after this last reversal to say what weight that Court will in future carry in such questions, if any; but of this more in another article.⁷

Westerners had some reason to feel that the Supreme Court of Canada had lost touch, assuming that it had once had it, with prairie society.

A second rationale for the passing of the Manitoba resolution was a feeling that the Court, composed solely of easterners, was incapable of acting fairly toward the west. This attitude was certainly conveyed in the *Western Law Times*, and it was furthered by an incident in the fall of 1893. The Manitoba schools legislation having been upheld, the federal Government was faced with demands for remedial action to assist supporters of denominational schools (under sub-sections 93(3),(4) of the B.N.A. Act). The Government chose first to test the legality of its authority to take remedial action, referring the issue to the Supreme Court. At the hearing of this reference the Manitoba government was represented by F.C. Wade as counsel. On being asked by the Chief Justice if he proposed to argue the case, Wade replied that he did not. This attempt to undermine the credibility of the Supreme Court's opinion on the reference was frustrated by the Chief Justice's decision to appoint counsel (Christopher Robinson, a distinguished Toronto lawyer) to argue the case on behalf of the province. The *Western Law Times* was incensed at the Court's arbitrary ruling in this matter.⁸

This sense of injustice was echoed in the 1893 resolutions emanating from the meetings of the Calgary Bar Association and of a group of Regina lawyers. In Vancouver, on the other hand, the local bar association manifested a somewhat different attitude: lawyers there announced that Supreme Court justices could be appointed from any city — Toronto, Winnipeg, or Montreal — as long as one was also chosen from Vancouver.⁹

The aim of these meetings and resolutions, obviously, was to put pressure on the federal Government. To this end it was helpful, for example, that the mover of the Regina resolution was the most powerful politician in the North West Territories, F.W.B. Haultain. Copies of the resolutions were forwarded to the Minister of Justice, to the leading western representative in the federal Government (Senator J.A. Lougheed), and to various local law societies and lawyers.¹⁰ Nothing came of this pressure, however, and the position on the Supreme Court bench was given to a Maritimer.

But this time the issue did not die away. In mid-1895 the question was raised again. Knowing that at least one vacancy (and perhaps two others) were about to occur on the Ottawa bench through resignations, demands

7. (1891), 2 *Western Law Times* [hereafter W.L.T.] 88, 175, 189; (1892), 3 W.L.T. 82; [1892] A.C. 445.

8. (1893), 4 W.L.T. 123.

9. PAC, RG 13, A5, vol. 2043, #706, F. Jones to Sir J.S.D. Thompson, Regina, N.W.T., Aug. 4, 1893; *ibid.*, J.A. Bangs to Sir J.S.D. Thompson, Calgary, N.W.T., Aug. 3, 1893; *Manitoba Morning Free Press*, Aug. 10, 1893.

10. *Regina Leader Post*, Aug. 24, 1893; (1893), 4 W.L.T. 112.

were again voiced for a western selection. The local legal journal reported a rumour that Justice Killam of the Manitoba Court of Queen's Bench was about to be elevated to the Supreme Court of Canada. This selection would be particularly praiseworthy, added the journal, and the Court above would benefit in many ways, not the least of which would be having a justice who understood the special character of prairie real estate law (under the Torrens Land System) and who handed down such intelligent constitutional interpretations.¹¹ As it turned out, the only opening occurred through the retirement of a Quebec justice, and by statute his replacement had to be from that same province. There was thus no opportunity to select a western jurist, but the reactions of the Ontario legal fraternity to the western clamour are interesting. An Ontario barrister responded, in a letter to the editor, that it was alright to add a western representative to the Court provided it was not done at the expense of Ontario; only if a Maritimes post was switched over would such a change be acceptable. *The Canada Law Journal*, published in Toronto, was even less agreeable:

We entirely dissent from this proposition of adding a western jurist. Without discussing the merits of the very able judge suggested as a representative from Manitoba, there can be no question that the very best available man should be selected from the English speaking Provinces, without any reference whatever to territorial representation. This miserable political necessity of appointing men to the Bench because they represent some sect or section has been, and ever will be, disastrous to the best interests of the Dominion. Surely our highest court should be the strongest of all our courts, and should command the greatest confidence.¹²

What the *Journal* was eager to ignore was that 'merit' was not the only means to command confidence.

The Ontario spokesmen would have been better served if they had not so easily dismissed western complaints. The problem with the argument about merit, responded the *Western Law Times*, was that it was always applied to Manitoba. The Prime Minister had used just such reasoning when explaining the appointment of yet another Ontarian to a Manitoba post (in this case J.C. Patterson was named Lieutenant-Governor in September 1895). The prairie journal replied to the appointment:

Patriotic reasons must always be given to support such an appointment when made to what is now regarded in Ontario as its Western Reserve. Sending an able man as Lieutenant-Governor from Manitoba to Ontario would not be listened to, vice versa, it is forsooth patriotic. An appointment of a Manitoban to the Supreme Bench must not be hinted at. Ontario alone has a mortgage on it. New Brunswick, no doubt, has some right to one, but Manitoba and British Columbia, never. They belong to the Western Reserve. It is a poor rule that will not work both ways.¹³

Such a response indicates the depth of feeling and of rising animosity associated with the apparent refusal to allow the west to control its own affairs or to play a role on the national scene more reflective of western pride and sense of self-worth.

Indeed, these cries for western participation in the affairs of the nation as an equal partner were reflected in the coincident struggles for 'respon-

11. (1895), 6 W.L.T. 75.

12. (1895), 15 C.L.T. 315; (1895), 31 C.L.J. 525; (1896), 32 C.L.J. 27.

13. (1895), 6 W.L.T. 6 W.L.T. 81.

sible government', as L.H. Thomas has termed it in the 1890s, and for provincial autonomy in the first years of the twentieth century.¹⁴ The appeals for representation on the Supreme Court thus represented not a demand that westerners should have their share of federal patronage but rather a two-part cry: first, that the west was different and therefore an effective governmental system required participants who knew of and could deal with these differences; secondly, that the west was an important part of the Dominion and therefore fairness and justice dictated that sons of the west should be brought into the national councils. For easterners such points apparently were difficult to appreciate.

One westerner did join the Supreme Court unnoticed in 1895. Louis W. Coultée was named assistant Reporter in that year. Born and raised in the Ottawa Valley and educated at McGill University (B.C.L., 1873), Coultée had become a member of both the Quebec and Ontario bar. In 1882 he had moved west to Winnipeg where he had joined the provincial bar and become Law Clerk of the Legislative Assembly (1883-1888), Deputy Attorney General (1883-1887), and Registrar General of Manitoba (1887-1890). While in the west he had written a guide to the registration of real estate titles and had lectured on real estate law to Manitoba law students. As a member of the militia, Coultée had joined in the military suppression of the 1885 rebellion, but had eventually felt the call to return to Ottawa.¹⁵ No notice of his appointment at the Supreme Court was taken in the west; though presumably welcome, this was not the sort of representation that was being sought.

With no vacancies occurring on the Supreme Court bench in the second half of the 1890s the cry for representation subsided. Nor was any discussion generated when two openings arose in 1901 and early in 1902. However when the two new appointments to these posts were made, the traditional distribution of seats was confirmed — two for the Maritimes, two for Quebec, and two for Ontario. This stimulated reaction in the west.

Within a week of the second appointment a meeting of the Manitoba bar was held to consider the issue. A month later a meeting of the Benchers of the Law Society of British Columbia similarly addressed the question. Both meetings passed almost identical resolutions calling for the appointment of a justice of the Supreme Court from west of the Manitoba — Ontario border, on the basis of the large and increasing population there and because of "the rapidly growing importance" of the region.¹⁶ In the House of Commons, attention was drawn to the resolutions and to the issue by W.F. McCreary (Liberal; Selkirk). Rather than claiming such a post because the west now held a little over 11 per cent of the national population, the Liberal member reverted to the other basic argument for a western

14. L.H. Thomas, *The Struggle for Responsible Government in the North-West Territories* (Toronto: University of Toronto Press, 1956); C.C. Lingard, *Territorial Government in Canada: The Autonomy Question in the Old North-West Territories* (Toronto: University of Toronto Press, 1946).

15. (1890), 1 W.L.T. 112, 235; L.W. Coultée, *A Manual of the Law of Registration of Titles to Real Estate in Manitoba and the Northwest Territories* (Toronto: Carswell, 1890); *Ottawa Citizen*, July 30, 1907.

16. PAC, RG 13, A5, vol. 2047, #173; *ibid.*, vol. 2048, #601.

justice: the law of the region was different from that elsewhere and thus required a jurist who understood its special nature:

Most lawyers in this House will agree with me when I say that the legislation of Manitoba, the Territories, and British Columbia, is very dissimilar to that of Ontario, and especially to that of the Maritime Provinces and Quebec; and some of the litigants who go to the Supreme Court have complained bitterly, not that the judges of the Supreme Court were not men of ability, but that they were not in touch with the laws of the western portion of Canada, and consequently they considered their cases had not been dealt with as well as they might have been had there been on the Bench a judge who had some knowledge of the laws of the western provinces.¹⁷

The twin themes of regional differences and of regional importance had once again been articulated.

If the *Western Law Times* had not folded in 1896, its editorial pages would likely have been filled with cries of despair and anger when the reply of the Justice Minister was heard. Charles Fitzpatrick, who would arrange for his own appointment to the Supreme Court in just four years' time, responded to Mr. McCreary and the resolutions with the 'merit' answer: the Court needed the best men possible, and to this end "we should endeavour to eliminate the question of boundaries and take the best men, wherever we can get them . . ."¹⁸

Ottawa seemed not to be listening to the west. The various 'plums' at the government's disposal seemed to be disproportionately at the disposal of the east. Following the spate of protests early in 1902 two further appointments were made to the Court over the next fifteen months, and both confirmed the traditional distribution.

However, with the sudden death of Justice J.D. Armour, late Chief Justice of Ontario, in the summer of 1903 another position on the Supreme Court fell vacant. The Court and particularly the recent appointments to it had come under much general criticism during this period; the Laurier Government's nomination of two Cabinet ministers with weak legal backgrounds had especially disturbed the public and the legal profession. Thus the accession of Armour with his extensive judicial experience and prestige had been very important. With Armour's death less than eight months after his appointment, the Government was left with a Court lacking in judicial experience. This was then more true since shortly before Armour's death another Ontario had been named to the Court directly from his practice at the bar.

It was therefore fortunate that the Government was able to persuade another provincial chief justice to replace Armour. Such a move was unusual. A provincial chief justice gained little by giving up the prestige and influence of his post in exchange for the inconvenience of moving to Ottawa and of reverting to the junior position of a puisne justice. The nomination of Chief Justice Killam of Manitoba in 1903 was the last one of a provincial chief justice until 1977.

17. Canada, House of Commons, *Debates*, 1902, 221-222. McCreary went on to argue that lawyers from Manitoba were best acquainted with the laws of the entire region, pointing to the British Columbia bar's dependence on Manitoba for half its members and for the training of many of its leaders.

18. *Ibid.*, 223.

The selection of a westerner for the Supreme Court was dictated by the Court's need for judicial experience and for greater prestige, as well as by western appeals for recognition. Albert Clements Killam was chosen not simply because he was a westerner but also because he was a very able jurist of long experience. Born in Nova Scotia, he had been educated at the University of Toronto (B.A., 1872) and trained in law in the Ontario capital. He practised briefly in Ontario before moving west to Winnipeg to establish his own practice. For a brief time he had been a Conservative member of the Manitoba legislature (1883-1885). In 1885 Killam had been appointed to the Court of Queen's Bench, one of the first Manitobans to be named to the local bench, and in 1899 he had become Chief Justice of that Court. As a jurist, Killam had earned an excellent reputation both for his manner and for the quality of his judgments. His lectures to Manitoba law students on equity jurisprudence were highly regarded. Since he was just fifty-three years old, Killam could be expected to have an extended impact on the Supreme Court (in contrast to such older, recent appointees as David Mills and Armour).¹⁹

Killam's appointment to the Court may well have been planned in advance, for in the winter of 1903 he was called to Ottawa for discussions with Clifford Sifton and the Minister of Justice, Fitzpatrick.²⁰ Whether this planning occurred or not, Killam joined the Supreme Court less than a month after Armour's death. The appointment was well received. Commentators both in the east and in the west viewed Killam's elevation as "a recognition of the growing importance of the west" and of the man's own excellent abilities.²¹ Perhaps surprisingly, Ontario journals did not seem upset by the apparent loss of one of "their province's" positions on the Court — possibly because of Killam's ties to Ontario.

With the appointment of jurists such as J.D. Armour and A.C. Killam to the Supreme Court, it seemed that the Laurier Government was turning its back on its tendency toward patronage appointments that had been obvious earlier. But it was not so. After just one and one-half years on the Court, Justice Killam was persuaded to resign and to accept appointment as head of the Board of Railway Commissioners for Canada. The Board had been established in 1903 to take over the various regulatory powers of the government regarding railways. As a quasi-judicial body, and as one designed, among other things, to answer western grievances concerning freight rates and handling, the Board could gain much credibility from the appointment of such a man as Killam.²² However, for Killam to accept the new post and for the Government to select him was a strong blow to the Supreme Court. The resignation occurred in a period when the composition of the Court personnel was unstable and when the prestige of the Supreme Court and the respect for it as a judicial institution were very low.

19. (1902-3), 2 C.L.R. 656; (1885), 2 Manitoba Law Journal 32; (1890), 1 W.L.T. 235.

20. PAC, Sir C. Fitzpatrick Papers, #1851-52, A.C. Killam to Fitzpatrick, Winnipeg, Dec. 23, 1902; *ibid.*, #1918-20, Montreal, Jan. 27, 1903; *ibid.*, #1921, Fitzpatrick to Killam, Ottawa, Jan. 28, 1903; Montreal *Star*, Aug. 10, 1903.

21. *Manitoba Free Press*, Aug. 10, 11, 1903; Montreal *Star*, Aug. 10, 1903; Toronto *Globe*, Aug. 10, 1903.

22. J.C. Hopkins, ed., *The Canadian Annual Review of Public Affairs 1903* (Toronto, 1904), 430-431; R.S.C. 1906, C. 37, ss. 10(2), 13(2). If for no other reason, Killam may well have been attracted by the salary — \$10,000, compared with \$7,000 for a puisne justice of the Supreme Court of Canada.

The post vacated by Justice Killam reverted to Ontario, but it was not long before the West regained a seat. In August 1906 Justice Sedgewick of Nova Scotia died. Judging from the rumoured candidates, the federal Government was clearly determined to replace him with someone from the West. Reports in the press indicated that the position had been declined by E.P. Davis, a Vancouver lawyer, and that the Government had considered appointing J.S. Ewart, a prominent Winnipeg lawyer.²³ In the end, however, it was Lyman Poore Duff of the Supreme Court of British Columbia who joined the Supreme Court, and who went on to become one of the most famous justices in the history of the institution. An Ontario law journal welcomed Duff to the Court, though with a somewhat grudging acceptance of regional representation:

In choosing a western instead of an eastern man to fill the vacancy at Ottawa caused by the death of Mr. Justice Sedgewick, we think no mistake has been made. If there must be representation of the various provinces or groups of provinces upon the Bench of the Dominion Court, in the country, distinguished jurists should be chosen irrespective of locality . . . there is reason to believe that in the new Judge of the Supreme Court a *rara avis* has been secured for the Ottawa cage . . . Mr. Justice Duff in his two years on the provincial Bench has gained a great reputation both for learning and sound sense, and we look to see him increase it in his new surroundings.²⁴

It was a reputation which he would increase in the future.

With Duff's accession to the Supreme Court of Canada, that Court never again lacked a representative from the West. For the following 37 years the British Columbian served well both the Supreme Court and the national political structure. But by the 1920s pressure began to develop for further Western representation on the Court. One cause of this was simply that a prestigious post was closed to ambitious Western members of the bar as long as Duff remained on the Court — unless another seat was made accessible. A second factor was the size of the West. By 1921, the four western provinces had grown to represent slightly over 28 per cent of the Dominion's population (compared with just 11 per cent in 1901.)²⁵ Surely, it was felt, the size and importance of the West justified greater influence in Ottawa. Finally, there was of course resentment and suspicion of the East and of the central government, a suspicion manifested by the west in so many ways but most obviously in its support for the Progressive Party at this time.

When an opening at the Supreme Court occurred in 1924 Westerners began to press their claims. Various local Liberals appealed to their federal leaders to give the prairies representation on the Supreme Court. A British Columbia jurist was now no longer adequate; the prairies wanted its own man. Some had forgotten Killam's brief interlude on the Court, arguing that the prairies had never been represented. One influential Ontario Liberal in 1924 warned the Prime Minister of western demands:

23. *Vancouver Province*, Oct. 3, 1906; *Ottawa Valley Journal*, Sept. 28, 1906; PAC, Sir L.P. Duff Papers, file D, Duff to G. Davis, n.p., April 6, 1940.

24. (1906), 26 C.L.T. 701-2.

25. *Census of Canada 1921* (Ottawa, 1922), I, 3.

I met a number of Western men among others Dunning and Judge Martin and they are strong for another man from the West in the Supreme Court. They pointed out that Nova Scotia had McLean in the Exq. Ct. When I said that the East was entitled to a man and the number was fixed. They all seemed to be so strong about it that I would write you and prepare you, but you probably have it long ago.²⁶

But in 1924 neither of the two vacancies could be used to meet prairie demands — one was Quebec's by law and the other was the Maritimes' by tradition. Western representatives had little sympathy for east coast claims, but Mackenzie King was too astute a politician to be persuaded to alienate the Maritimes, particularly at a time when eastern sensitivities were more than usually acute.²⁷

The King Government did nothing to discourage such western claims; in the context of 1924 it was simply not possible to meet them. Rumours, however, continued to circulate that Justice Idington's Ontario seat would be transferred to the prairies. To cope with the continuing pressure from the West, and as a minor tactic in Mackenzie King's ongoing efforts to satisfy western discontent and to undermine prairie support for farmers and progressive parties, the King Government decided in 1927 to increase by one the number of seats on the Supreme Court bench.²⁸ This would facilitate the appointment of a prairie representative. The federal Liberals hoped that through such political use of the Supreme Court the widespread western political alienation from the federal government would be weakened (particularly as it applied to the Liberal Party).²⁹

Based on the several names put forward from the West as candidates, it is clear that provincial affiliation was an important criterion in the selection process. The only prairie province where the Liberal Party had withstood the onslaught of the third parties in the 1920s was Saskatchewan. Liberals there thus dominated the prairie Liberal voices, drowning out any claims from Alberta or Manitoba. One Saskatchewan Liberal lawyer, for example, attacked the suggestion that Judge A.H. Clark of Alberta might be promoted to Ottawa. The Albertan, it was argued, had deserted the Party in 1917 over conscription and had been appointed to the bench by the Conservatives in 1921. More to the point:

... I think the recognition would be coming to Saskatchewan much more than to Alberta. It has been a much more consistently Liberal Province, both with regard to the proposition of the support which it sent to Ottawa, in former days, and in the adherence of our people to the Liberal Party in Provincial matters.

The point was seemingly not to appoint the most able judge, but rather the best representative of the most deserving Liberals. In the case Justice J.H. Lamont of the provincial Court of Appeal ought to be elevated to Ottawa, according to the Saskatchewan lawyer.³⁰

26. PAC, W.L.M. King Papers, MG 25 J2, vol. 57, file Y-2600, J.H. Spence to King, n.p., Aug. 4, 1924.

27. On the Maritime rights movement in the 1920s, see E.R. Forbes, *The Maritime Rights Movement, 1919-1927* (Montreal: McGill-Queen's University Press, 1979).

28. Statutes of Canada, 17 George V, c. 38, S.1.

29. A useful survey of this political alienation is W.D. Young, *Democracy and Discontent* (Toronto: McGraw-Hill/Ryerson, 1969). The response of Prime Minister King is detailed in R.M. Dawson, *William Lyon MacKenzie King, 1874-1923* (Toronto: University of Toronto Press, 1958) and H.B. Neatby, *William Lyon MacKenzie King, 1924-1932* (Toronto: University of Toronto Press, 1963).

30. PAC, W.L.M. King Papers, MG 26 J2, vol. 57, file Y-2600, W.E. Knowles to King, Moose Jaw, Sask. July 2, 1925.

Lamont's name in fact dominated western discussions of the issue in the period 1924-1927. The Prime Minister's Ontario informant advised:

If you should think of it [appointing a westerner] I believe Judge Lamont of the Court of Appeal in Saskatchewan is the strongest man out there and besides he is one of ourselves, was Attorney General in Premier Scott's Cabinet. As far as I could find out he was the man they [prairie Liberals] wanted and I am of the opinion he would be a good man in the Supreme Court.³¹

With Justice Lamont's appointment in April 1927 a second seat at the Supreme Court (along with Duff's) was permanently allotted to the west.

With this increase to two seats, the western provinces acquired representation at the Supreme Court proportional to their population. The west contained 28.2 per cent of the national population in 1921 (29.4 in 1931);³² western jurists now filled 28.6 per cent of the Supreme Court seats. Thus the allocation of these positions at the judicial centre of the country paralleled the redistribution of House of Commons seats (which by the 1925 election had finally caught up with the western share of the national population — the west accounted for 27.8 per cent of the Commons constituencies).³³

Having increased the region's Supreme Court representation, the struggle over the issue now degenerated into a scramble among the western provinces as to the distribution of those two seats. This was a contest from which British Columbia was virtually removed, first because of the presence of Justice Duff at the Court until 1944 and then because of the deliberate selection of another justice from that province (C.H. Locke) just three years later. In the competition for the other seat, Alberta was consistently the loser. A Manitoban (A.B. Hudson) replaced Justice Lamont in 1936 when he died, and another jurist from Saskatchewan (J.W. Estey) joined the Supreme Court in 1944, replacing Lyman Duff. Alberta, with its weak voice in the Liberal Party, was left out in the cold — unfortunately paralleling the fate of a reference to the Supreme Court of several important pieces of Social Credit legislation from that province in the late 1930's.³⁴ In 1933 the Calgary Bar Association passed a resolution calling for the elevation of any one of Alberta's judges;³⁵ in 1936, 1944 and 1947 similar missives reached Ottawa, usually a little more specific as to who should be appointed — Justice Frank Ford was a favorite candidate. But it was not until 1956 that an Albertan, H.G. Nolan, finally joined the Supreme Court of Canada.

But this gradual process of western representation did not fully satisfy at least some spokesmen for the four western provinces. With or without western justices the Supreme Court of Canada was felt to be still too far removed from the West to understand its problems. As well, given the cost

31. *Ibid.*, J.H. Spence to King, n.p., Aug. 4, 1924.

32. Calculated from *The Canada Year Book 1955* (Ottawa, 1955) 135. The western proportion of Court seats fell in 1949 to 22.2 percent, but this followed a declining western share of the national population (26.5 per cent in 1951).

33. Calculated from J.M. Beck, *Pendulum of Power: Canada's Federal Elections* (Scarborough: Prentice-Hall, 1968) 174.

34. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

35. PAC, R.B. Bennett Papers, #251858, J.C. Mahaffy to Bennett, Calgary, Alta., Feb. 15, 1933.

in time and money for western counsel to attend the Court sittings, argument before the Court was felt to be the near monopoly of eastern counsel — a parallel within the legal profession of a widely perceived problem within the political and economic structure in general. The western bar, it was argued, ought in all fairness to have access to the prestige and monetary benefits to be derived from such appellate work. The obvious solution was to send the Supreme Court of Canada on circuit.

Early in 1919 the Benchers of the Law Society of Saskatchewan passed the following resolution:

That is it most desirable in the interests of litigants and especially in order to avoid the expense and loss of time now incident to the attendance of Counsel at Ottawa from the Provinces of Canada far distant there from for the hearing of Appeals by the Supreme Court of Canada, that there should be sittings of the said Supreme Court held once annually at each of three convenient points to be selected, namely, one in British Columbia, one in one of the three Prairie Provinces and one in the Maritime Provinces, and that all possible steps be taken to obtain same.³⁶

Five months later in Winnipeg at the annual meeting of the Canadian Bar Association, a similar resolution was adopted, this time calling for just one sitting for the four western provinces.³⁷ But nothing came of the proposal at this time — perhaps because economic conditions began to improve or perhaps because greater representation was a more attractive demand. Once the latter aim had been achieved, however, and once economic conditions began to deteriorate, the proposal was resurrected.

In 1930 the editor of the *Manitoba Bar News* suggested that the Supreme Court of Canada go on circuit to various provincial capitals once a year.³⁸ This proposal was followed up in more detail a few years later by a leading Edmonton solicitor, P.G. Thomson. Writing to the Minister of Justice Hugh Guthrie, the western spokesman commented:

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

The Supreme Court was so far removed that if an appeal of a western case was warranted, it was "almost compulsory" (given expenses plus three weeks' absence from his office for any lawyer coming from the west) to employ eastern counsel. In such cases for eastern counsel it was simply "another Western brief but to the Western lawyer it means bread and butter through the loss of a substantial fee."³⁹

As a solution, Thomson proposed that once a year the Supreme Court hold sittings in each of the four western provinces. Other judicial or quasi-

36. PAC, RG 13, A2, vol. 236, #1138, J.K. Hunter to C.J. Doherty, Ottawa, April 15, 1919.

37. *Proceedings of the Fourth Annual Meeting of the Canadian Bar Association, 1919* (Winnipeg: Douglas-McIntyre, 1920) 54.

38. (1930), 8 Can. Bar Rev. 675-6.

39. PAC, RG 13, A2, vol. 401, #614, P.G. Thomson to H. Guthrie, Edmonton, Alta., May 21, 1934.

judicial bodies went on circuit — the Exchequer Court, the Board of Railway Commissioners, and royal commissions — so why not the Supreme Court? The benefits would be considerable, Thomson argued. Apart from improving the financial lot of western lawyers in the midst of the Depression and apart from acting as a mental stimulant to the western bench and bar, appeals which were barred simply because of expense would now be facilitated. Better still: “The mingling and comingling of East and West would all make for a better understanding” across the nation. Finally, in the west where so many residents were of non-British background, it was necessary:

... especially [sic] in these times not only to tell them but to show them what is meant by British Justice and the spectacle of the highest Court in the land sitting in all its dignity out in the West in order to enable the poorest subject in the Dominion to obtain redress would be one to conjure with and would bring home to these people in a way nothing else could the advantage of living in this country and the benefits to be derived if they become good citizens as well as the disadvantages should they fail to do so.

Such a change in the Court’s procedure, Guthrie was assured, would be “a landmark in the progress of the Dominion which will long survive and point the way to greater things.”⁴⁰

The Minister’s reply, after consulting law officers and members of the Supreme Court, rejected Thomson’s proposal. A series of detailed reasons for the rejection was offered. First, if the Court “were to become a peripatetic institution”, the existing system of rotating justices among cases in order to give them time to deliberate and write would be “quite impracticable”. Secondly, the system would be very expensive, especially since the Maritime provinces could certainly be expected to demand equal treatment. Thirdly, the Chief Justice or senior puisne justices would be unavailable to perform their duties as deputies to the Governor-General. Fourthly, the members of the Court would be removed from access to the high quality libraries of the Supreme Court. Finally,

it is not *prima facie* likely that the spectacle of seeing the Judges of the Supreme Court of Canada moving, bag and baggage, from one Provincial capital or centre to another with all the attendant inconveniences would be calculated to enhance the dignity and prestige of the Court. Nor is there any evidence of any considerable popular demand in the Provinces for such a change in the settled mode of conducting the business of the Court.⁴¹

For the Supreme Court to visit various provincial capitals might tend to overshadow provincial superior courts and to reduce their authority and prestige without enhancing its own. Rather, it had long been British practice that the highest appellate tribunal be fixed and stationary at the political centre of the nation.

Despite the firmness of the rejection Thomson was not yet ready to admit defeat. He responded to each of Guthrie’s objections, rejecting the first as silly; nothing in his proposal interfered with the justices’ system of rotation among cases. Expenses, he argued, would be limited since the staff

40. *Ibid.*

41. *Ibid.*, H. Guthrie to P.G. Thomson, Ottawa, July 23, 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, Ottawa, July 26, 1934.

of provincial courts could be used in each city visited; besides, if the principle was right, the means of dealing with costs could be found; it was the principle that ought to be discussed, not expenses. As for the duties as deputy Governor-General, leave a senior puisne justice in Ottawa, Thomson suggested, and replace him with an *ad hoc* judge in each province as visited. "This might prove not only beneficial but also helpful in the expedition of the business of the court." Regarding library facilities, if western law libraries were below standard, then the provincial judiciary was handicapped in its administration of the law and action ought to be taken to remedy this situation as soon as possible. There was no evidence that going on circuit impaired the dignity of provincial supreme courts or local courts, so the fear would seem groundless regarding the Supreme Court. As for popular demand for the reform, the idea had been discussed by the Canadian Bar Association, and once carried out, approval would be universal. What Guthrie had failed to meet were Thomson's complaints regarding costs of appeals for westerners, the Edmonton solicitor pointed out. But the Minister was also missing an opportunity of great proportions. Whether sincerely or not is difficult to tell, but Thomson concluded by arguing that provincial autonomy was going too far and that Ottawa ought to be more active in trying to bind the country together.

Were the Supreme Court to move around as suggested it would be a practical example of that unity we all speak of but seldom practice and bring home, to the West in particular, in a way that nothing else would the realisation that we are in fact as well as in name a solid united Nation.⁴²

The point was perfectly designed to appeal to the heart of any Ottawa politician.

Nor did Thomson rest content with simply refuting the Minister's case. He tried as well to raise influential support for his reform. In the early summer of 1934 the Benchers of the Alberta Law Society were sent a copy of his letter to the Minister of Justice. The Edmonton lawyer also asked Guthrie's permission to circulate copies of the correspondence among interested parties. The Minister eventually replied, agreeing with the proviso that there be no publication of the material in newspapers or periodicals. Not long thereafter, in April 1935, the Alberta legislature passed a resolution in support of Thomson's reforms.⁴³

Nothing more was heard of these proposals. They were not politically realistic and certainly did not coincide with the incoming King Government's idea of the awesome and majestic power that ought to characterize such a court. Nevertheless the suggestions did point to important weaknesses in the Court. In the days before easy air travel, the Supreme Court of Canada was not readily accessible to many appellants and solicitors in the west, though the same was not so true for the Maritimes. As well, the Court was perceived not simply as removed from sections of the country, but as aloof and, through that, as lacking in sufficient understanding of the

42. *Ibid.*, P.G. Thomson to H. Guthrie, Edmonton, Alta., Aug. 7, 1934.

43. *Ibid.*, *passim*.

law and the environment outside central Canada. While these perceptions may well have been partially accurate, they ignored the original and ongoing central purpose of the Supreme Court of Canada. The institution was designed not to cater to regional differences but rather to reduce those differences and to articulate a common body of law for the entire country. Nevertheless, western cities (if they thought about it) could readily see the special protection granted Quebec in the Supreme Court's structure and practice. The point might well be made that a more effective means to a uniform body of jurisprudence was through a court perceived to be representative of all sectors of the country. The Supreme Court in the hands of the federal government was a somewhat 'blunt instrument', rather than a subtle mechanism, for accomplishing a generally acceptable end.

The timing of Thomson's complaints is important. They were voiced before many of the 'New Deal' reforms were struck down, before the Alberta Social Credit legislation was found *ultra vires* in 1938. They were made even before discontent broke out in the early 1940s regarding the very high rate of reversals suffered by the Manitoba Court of Appeal at the hands of the Supreme Court — though in this case most of the public criticism seems to have been leveled not at the Supreme Court but at the quality of the Manitoba Court. These latter 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 Ottawa Court. By the 1940s however, the Supreme Court was perceived as a neutral, accurate and valued arbiter of the law — it must be the poor quality of the Manitoba bench causing high reversal rate. Over the years the Ottawa Court had acquired a respected place in the eyes of western lay observers.

All of these developments in the late 1930s and early 1940s could have encouraged regional discontent in the west regarding the Supreme Court. But that discontent already existed in some respects; to some the Court was already too aloof, too removed, and too expensive.

Western complaints about the Supreme Court were not dependent upon the fate of western cases before the Court. Regional spokesmen were consistently concerned about the structure of the institution, rather than the quality of its work. What westerners wanted was the appearance of influence and the recognition of the West as a rising regional partner within the Dominion. As one author has pointed out, "even the character of western estrangement from the national government must be carefully qualified in that the major thrust of western sentiment has been for greater participation in and recognition by the national government."⁴⁴ It was this desire to be full-fledged participants in the federal system which was central to western demands concerning the Supreme Court and other federal institutions. But the grudging nature with which 'concessions' were made to western demands and the lengthy delays involved, not to mention the absolute rejection of the circuit proposal, followed a pattern already established regarding other

44. R. Gibbins, *Prairie Politics and Society: Regionalism in Decline* (Toronto: Butterworths, 1980) 167.

elements of the national polity.⁴⁵ It thus helped to feed existing western resentment and suspicion regarding central Canada and its perceived control over the national instruments of power.

It is therefore not surprising that these western attitudes were reflected in some of the patterns of litigation emanating from the region. An analysis of the Supreme Court of Canada's handling of western (and other) appeals is hampered by the fact that a complete record of cases entered before the Court has not been maintained. In 1913 the last complete compilation was drawn up by the Registrar; for the period thus tabulated (1875-1913), the figures indicate that, of all the regions in the Dominion, decisions emanating from central Canada (especially from Ontario) were more likely to be accepted at the Supreme Court of Canada than were those from the outlying regions. Western cases were second only to the Maritimes in the likelihood of reversal (see Table One). With such chances of reversal western counsel must have been attracted to the prospects of appealing to Ottawa. Such a judicial environment had several implications. An institution located in central Canada and numerically controlled by central Canadian justices was telling western counsel and judges that the quality of decision-making in western courts was not very high. The stature of local courts was likely undermined as a corollary of this perception, and the Supreme Court of Canada placed on higher ground.

If this was in fact what happened, one could hypothesize two different possible reactions. First, Westerners could accept this implication of a high reversal rate. In this case the local courts might increasingly conform to Supreme Court rulings, thereby lowering the reversal rate, following *stare decisis*, and raising their own stature. In fact this seems to be just what happened. The statistical records kept by the Supreme Court Registrar allow the generation of only one useful sub-set of regional statistics. It is possible to separate the statistics in the fall of 1903 and report the results regionally for the two periods, 1875-1903 and 1903-1913. A comparison of the two periods shows that the Supreme Court's influence changed over the full period. The only two consistent political jurisdictions for the full period, British Columbia and especially Manitoba, both experienced a marked drop in the reversal rate at Ottawa; that is, the decisions being handed down by these western benches increasingly conformed to the judicial thinking of the members of the Supreme Court of Canada.⁴⁶ The Supreme Court had been founded in 1875 to articulate a uniform body of law for the Dominion, and some respects at least it was clearly being successful.

The second reaction one could hypothesize based on the overall high reversal rate for western cases is the increase in western resentment. It is not difficult to imagine, in the context of repeated rejection of western judicial decisions, a rising regional frustration and resentment — a sense that it was the Supreme Court which was wrong, rather than local judges

45. Thomas, *Responsible Government*, *supra* n. 14.

46. For the West as a whole the reversal rate at the Supreme Court dropped from 39.1 per cent prior to 1903 down to 35.1 per cent for 1903-1913. For British Columbia and Manitoba, the reversal rates for the two periods respectively were 37.5 per cent: 32.6 per cent and 46.8 per cent: 28.9 per cent. (Calculated from Supreme Court of Canada, Subject File #66).

(even if many of those, especially in the early years, were themselves from central Canada, as the lawyers often were as well). In this case one would anticipate western attempts to alter the structure of the central Court, which, as has already been seen, is exactly what happened. One would also anticipate western attempts to subvert the Supreme Court's 'negative' influence by avoiding its jurisdiction.

Until 1949 appeals could be carried from the highest available court at the provincial level directly to the Judicial Committee of the Privy Council in London, by-passing the Supreme Court of Canada. Such a tactic, whenever adopted, obviously undermined the influence and stature of the central Court in Ottawa. Over the years, particularly after the various provinces had begun to reach at least a minimal level of maturity and development, the West had a noticeably high tendency to take appeals directly to 'the foot of the throne'. Led by British Columbia, western counsel clearly found the prospect of avoiding the Supreme Court an attractive tactic. Here too is a reflection of western resentment and suspicion of the intrusions by the judicial centre of the country. It is not surprising that westerners were the last Canadians to cease using this judicial avenue (see Table Two).

In this second type of reaction to the Supreme Court of Canada the West stands in considerable contrast to the Maritimes. Though the Maritimes had an even higher overall reversal rate than did the West, there is no evidence of eastern resentment of or attacks on the central Court. Maritimers were particularly active in making use of the Supreme Court; they tended to avoid by-passing the Court's jurisdiction, and they demanded no major structural changes. In short, Maritimers showed much less evidence of being alienated by the centralizing judicial system of the country.⁴⁷

For the West however the Supreme Court of Canada fitted into an already established perception of the character of the national polity. Any resentment of the Supreme Court simply strengthened, and was in turn reinforced by, irritation and even animosity, regarding central Canada's (or Ottawa's) treatment of the West in a wide variety of more pressing areas: provincial status; railways and transportation; resources; tariff policy; immigration. Since World War Two the Supreme Court of Canada has gradually declined as an issue of friction for the West. The rising stature of the Court and the presence of a relatively able group of justices representing the West have both been influential in this process. Perhaps too the changes in regional distribution of seats allowed the Court's image slowly to alter and to fulfill more easily its role as a centralizing force in the national political structure.

Despite the record of long-term regional alienation, the evidence makes it clear that western attacks and criticism were largely structural in their orientation. Except for rather vague charges regarding the Supreme Court's lack of local knowledge and law, there were no comments on the quality of

47. On the regional response of the Maritimes, see J.G. Snell, "The Nova Scotia Influence on the Supreme Court of Canada" in *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984), eds. P.B. Waite, S.E. Oxner and T.G. Barnes.

the Supreme Court of Canada. Western spokesmen, so far from fighting the system, instead struggled largely to be part of it. In this way the Court operated as an important institution in accommodating regional and national interests and in imposing a national focus on the western legal profession. The termination of appeals to England in 1949 was thus the last of a series of steps combining accommodation of regional interests and acceptance of a centralized, national judicial structure.

Roger Gibbins, in his recent perceptive analysis of prairie regionalism, argues that, while political regionalism has long been a significant phenomenon among the three prairie provinces, in the last several decades it has been weakening; that prairie regionalism is, in fact, in decline. At the level of national politics, that regionalism in the early twentieth century was manifested in a rise of third parties which reflected the low level of national political integration on the prairies; in these third parties (such as the Progressive Party or the Co-operative Commonwealth Federation) the prairie voters isolated their members of Parliament and themselves from the instruments of national power.⁴⁸ Gibbins is undoubtedly correct in this and in his explanation of the gradual decline of these political expressions of regionalism. But perhaps the examination here of the interaction between the Supreme Court of Canada and the west can supplement our understanding of the process which Gibbins describes.

In the late nineteenth and early twentieth centuries various representatives of the four western provinces fought for fair representation and influence at the national centre. While they were relatively unsuccessful in Parliament, that should not blind us to the large number of other federal institutions where similar pressure was exerted. By successfully gaining representation and power on such national bodies as the Supreme Court, the Board of Railway Commissioners, and others, political regionalism was recognized and legitimized.⁴⁹ But at the same time these appointments to central institutions helped to bring about national integration. It is worth noting, for example, that once the west had gained a second seat on the Supreme Court in 1927, inter-regional criticism soon broke down into intra-regional conflict, pitting prairie province against prairie province.

In short it is suggested that to Gibbins' electoral or behavioral dimension and attitudinal dimension might be added an institutional dimension. Though undoubtedly of secondary importance in explaining the decline of regionalism, these national institutions may have played an influential role in shifting regional attention to the political centre; in facilitating regional influence earlier; and in facilitating regional influence in particularly significant areas (such as the Board of Railway Commissioners). In this regard such judicial or quasi-judicial bodies, given their symbolic stature and their potential power, may have been especially important.⁵⁰

48. Gibbins, *Prairie Politics and Society* 45, and *passim*.

49. *Ibid.*, 212.

50. At the same time, however, it is probably fair to say that to the extent that western regionalism is a persistent phenomenon, the national or centralizing functions of institutions like the Supreme Court preclude them from acquiring an effective role in meeting continuing regional needs.

TABLE ONE
DISPOSITION OF APPEALS TO S.C.C., 1875-1913

Regional Jurisdiction Appealed From	Total Appeals	# Dismissed	% Dismissed	# Upheld	% Upheld
West	321	200	62.3	121	37.7
[B.C.	159	104	65.4	55	34.6
N.W.T.	19	11	57.9	8	42.1
Manitoba	99	62	62.6	37	37.4
Sask.	14	10	71.4	4	28.6
Alberta]	30	13	43.3	17	56.7
Ontario	780	551	70.6	229	29.4
Quebec	705	449	63.7	256	36.3
Maritimes	584	349	60.8	225	39.2

Source: Supreme Court of Canada, Subject File #66

TABLE TWO
PER SALTUM REPORTED APPEALS TO THE J.C.P.C.:
NUMBERS AND (%)

Jurisdiction Appealed From	1881-89	1890-99	1900-09	1910-19	1920-29	1930-39	1940-49	1950-55
West*	1(3.0)	9(19.6)	8(12.7)	41(48.2)	24(33.8)	14(34.2)	4(33.3)	5(100)
[Man.	1	3	1	7	4	1	0	0
Sask.	—	—	0	3	3	0	1	0
Alberta	—	—	0	5	4	4	2	2
B.C.]	0	6	7	26	13	9	1	3
Ontario	4(12.1)	10(21.7)	26(41.3)	31(36.5)	18(25.4)	16(39.0)	7(58.3)	0
Quebec	22(66.7)	21(45.7)	27(42.9)	12(14.1)	22(31.0)	9(22.0)	1(8.3)	0
Maritimes	6(18.2)	6(13.0)	2(3.2)	1(1.2)	7(9.9)	2(4.9)	0	0

*There were no reported appeals from the N.W.T.

Source: *Appeal Cases*, 1880-1955