

XV

Development of Federal Legal and Judicial Institutions in Canada

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I. Slow Work

JULY 1, 1867 WAS A DAZZLING DAY. The summer sun danced with Confederation celebrants in every corner of the new Dominion of Canada. As dusk settled over the throng gathered in Ottawa, to witness a special evening illumination of the parliament buildings, their counterparts throughout British North America cheered completion of a monumental task. But Prime Minister Sir John A. Macdonald, labouring long after dark in parliament's interior gloom, knew otherwise.¹ The job of fashioning a functioning government and an efficacious legal and judicial system, which was his special responsibility as attorney-general and minister of justice, had barely begun.

The *British North America Act, 1867*² had settled the general outlines, as well as some of the details, of Canada's governmental and legal structures, but prodigious tasks remained. The government of Canada was given authority over a wide range of topics for which the pre-Confederation colonies, now provinces, had previously been responsible: trade and commerce, navigation and shipping, bankruptcy, banking and negotiable instruments, patents and copyrights, Natives and 'Indian lands,' marriage and divorce, criminal law, penitentiaries, and numerous other matters.³ But no federal laws on those subjects yet existed. Although s. 101 bestowed on parliament the power to create a general court of appeal for the country, as well as additional courts to administer federal laws, these tribunals would not exist until designed and created by federal statutes. Police authorities were lacking at the federal level, as was the bureaucratic infrastructure needed to administer all the other non-provincial aspects of the justice system.

When Macdonald stood before the inaugural session of the house of commons more than four months later, he was apologetic about the slowness of progress. He pointed out that very shortly after the federation came into existence:

... members had to devote their time to their own elections and elections of their friends. During that time, of course, they had no opportunity to prepare their measures and elaborate the details.⁴

1 The physical details come from Donald Creighton, *John A. Macdonald: The Young Politician* (Toronto: Macmillan, 1952), Epilogue.

2 30-31 Victoria, c. 3 (U.K.). subsequently re-named the *Constitution Act, 1867*.

3 *Ibid.*, s. 91. Certain other federal powers also resided in other parts of the *Act*, such as s. 95, relating to immigration and agriculture.

Another cause for delay, he reminded the House, was the need for arbitration to sort out the competing claims of Ontario, Quebec and the federal government to the assets and liabilities of the pre-Confederation colony of Canada. The constitution dictated that arbitration could not commence until both the federal and provincial legislatures had met,⁵ and until the arbitration process was complete the plans of federal authorities would be hampered by uncertainty about both their responsibilities and their resources. Because of these delays, Macdonald proposed that the first session of parliament be divided into two parts, with the bulk of the new legislation postponed until after a recess in early 1868, when legal drafting could be done and necessary administrative arrangements made.

Other factors also distracted the federal government from single-minded attention to creation of new governmental and legal régimes. Although the fear of annexation by the United States, which had been intense at the time the British North American Confederation was conceived in 1864, had waned, concern about the unofficial military incursions directed against Canada by the Irish-American Fenian Brotherhood was still high — so high that Macdonald announced shortly after parliament convened that he would seek an extension of emergency legislation, suspending the *Habeas Corpus Act* that had been in force at the time of Confederation.⁶ Railway construction, considered vital to the survival of the new Dominion, had to be dealt with on an urgent basis.⁷ Equally pressing was the need to counter anti-Confederation sentiments in Nova Scotia that were threatening to sunder that province's newly forged ties to Canada.⁸

In view of these and other powerful political and practical preoccupations, it was not surprising that even by the end of the second half of that first session of parliament on 22 May 1868, the task of creating a federal legal system was far from complete. The session had produced seventy-two public acts, a dozen or more of which related to "lawyer's law," but many important legal components were still missing. No attempt had been made to develop a general court of appeal or a federal court system, for instance,⁹ and although a consolidation of colonial criminal law had commenced, it was far from completed.¹⁰

4 *Debates of the House of Commons, Canada* [hereinafter *Debates*] 1867-68, 19 Nov. 1867, at 93-4.

5 *Supra* note 2, s. 142.

6 *Debates*, 1867-68 at 94. This was accomplished under the innocuous title of *An Act to Continue for a Limited Time the Several Acts Therein Mentioned*, S.C. 1867-8, c. 29, s. 1.

7 One of the statutes rushed to passage in the first part of the first session, along with two private Acts relating to railroads, was *An Act Respecting Construction of the Intercolonial Railway* (S.C. 1867-8, c. 13). The British Parliament also enacted that year a statute guaranteeing the financing of the railroad (30-31 Victoria, c. 16 (U.K.)).

8 Donald Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: Macmillan, 1955) chapter 1.

9 The question was raised early in the session by A.J. Smith from New Brunswick (*Debates*, 1867-8, 14 November 1867 at 79) and was answered non-committally by Macdonald (18 November 18 at 87). Toward the end of the session (27 April 1868 at 566) Macdonald told Edward Blake that although the matter would not be proceeded with that session, the government "certainly" intended to establish a general court of appeal and "hoped to have a satisfactory measure next session." See gen-

Fortunately, there was no necessity to put all the pieces in place immediately. To ensure an orderly transition from the four pre-Confederation régimes, the *British North America Act*, 1867 contained several “bridge” clauses that maintained pre-existing laws and institutions in operation until replacement by equivalent new ones. The most important of these bridges was s. 129:

Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.¹¹

Other provisions expressly ensured the continuity of election laws,¹² customs and excise laws,¹³ as well as pre-Confederation proclamations and proclamation powers.¹⁴ The constitutions of the Nova Scotia and New Brunswick legislatures were explicitly continued,¹⁵ as were the powers and responsibilities of certain officials in Ontario and Quebec.¹⁶ Incumbent civil servants with responsibilities falling within the sphere of the new federal government automatically became members of the federal bureaucracy,¹⁷ and the governor-general-in-council was empowered to hire such additional federal personnel as might be required.¹⁸ Even the perpetuation of the old names “Upper Canada” and “Lower Canada” in place of “Ontario” and “Quebec,” by reason of the temporary continuation of an old office, or the accidental use of a former designation, was legitimised.¹⁹ As new provinces would be added to the un-

erally: J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of an Institution* (Toronto: The Osgoode Society, 1985).

¹⁰ The Governor-General’s concluding message to Parliament (*Debates*, 1867-68, 22 May 1868, at 763) commented: “I must express my regret that the measures for the assimilation of the criminal law of the several Provinces of the Dominion, which were submitted by my direction to Parliament, have not been presented for the sanction of the Crown.” See: Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989) at 93.

¹¹ The effect of bracketed clauses concerning U. K. laws was nullified, except for constitutional amendments, when Canada, along with certain other former British colonies, was granted partial legal autonomy by the *Statute of Westminster*, 1931 (22 George V, c. 4, 2(2) (U.K.)), and was altogether removed when the *Constitution Act*, 1982, enacted by the *Canada Act*, 1982 (U.K., 1982, c. 11) bestowed complete constitutional amendment powers on Canadian federal and provincial authorities.

¹² Sections 41 and 84.

¹³ Section 122.

¹⁴ Sections 139 and 140.

¹⁵ Section 88.

¹⁶ Section 135.

¹⁷ Section 130.

¹⁸ Section 131.

¹⁹ Section 138.

ion over the years, similar bridging clauses would avoid institutional or legislative lacunae between the old and new régimes.²⁰

Another important bridging device lay in the residual power of the governor-general to deal with unattended matters. The preamble to the *British North America Act* stated that Canada's constitution was to be "similar in principle to that of the United Kingdom," and this ensured continuation of royal prerogative authority to carry out essential governmental functions if parliament were temporarily unable to do so. An illustration of this residual authority was in Governor-General Monck's first throne speech to the new parliament of Canada, 7 November 1867:

Gentlemen of the House of Commons:

The circumstances under which the Act of union came into operation rendered it impossible to obtain the assent of the legislature to the expenditure for carrying on the ordinary business of government.

The expenditure since the first of July has therefore been incurred on the responsibility of Ministers of the Crown.

The details of that expenditure will be laid before you, and submitted for your sanction.²¹

Parliament gave retroactive approval to that expenditure later in the session.²²

These various bridging provisions contained no time limitations; although the need to rely upon them diminished as new institutions began to exercise their responsibilities and, as new laws took effect, the bridges remained in existence (and continue to do so), as ongoing insurance against the risk of legal vacuums. The most notorious long-term reliance on s. 129 related to divorce which, although a federal responsibility under s. 91(26) of the constitution, was not made the subject of general federal legislation for over a century. Until parliament finally enacted the first *Divorce Act* in 1968, Canadians had to make do with the diverse divorce laws in effect in their particular provinces prior to Confederation, supplemented by private acts of parliament to deal with particular situations, chiefly from Quebec where divorce had not been possible before 1867. A pre-Confederation law of the Northwest Territories, inherited by the provinces of Saskatchewan and Alberta when they became provinces in 1905, was the basis for a 1988 ruling by the Supreme Court of Canada that those provinces had a continuing obligation to enact their statutes in both English and French.²³

²⁰ *Rupert's Land Act*, 1868, 31-32 Victoria, c. 105, s. 5; *Manitoba Act*, 1870, S.C. 1870, c. 3, s. 2 (adopts s. 129, *B.N.A. Act*); *Northwest Territories Act*, S.C. 1871, c. 16, s. 4 (laws) and s. 5 (offices); *British Columbia Terms of Union*, 1871, Term 10 (adopts s. 129, *B.N.A. Act*); *Prince Edward Island Terms of Union*, 1873 (unnumbered terms continue certain offices and adopt s. 129, *B.N.A. Act*); *Alberta Act*, 1905, S.C. 1905, c. 3, s. 3 (adopts s. 129, *B.N.A. Act*), s. 14 (election laws) and s. 16 (other laws and offices); *Saskatchewan Act*, 1905, S.C. 1905, c. 42 (same as for Alberta); *Newfoundland Terms of Union*, 1949 (Schedule to *British North America Act*, 1949, 12-13 George VI, c. 22 (U.K.)) Term 18 (laws and offices).

²¹ *Debates*, 1867-8, 7 November 1867, at 6.

²² S.C. 1867-8, c. 4, s. 1.

²³ *Mercurie v. The Queen* (1988), 48 D.L.R. (4th) (S.C.C.). The legislatures of Saskatchewan and Alberta subsequently enacted statutes, in French and English, relieving themselves of that responsibil-

II. Constitutional Deficiencies

Canada's most fundamental legal institution is its constitution. Section 52(1) of the *Constitution Act*, 1982, described the constitution as the "supreme law" of the country, and this was clearly always the case, even before it was expressly declared to be so.

On 1 July 1867 the Canadian constitution contained a number of large gaps. Looked at from a British perspective, that might not have been considered an accurate observation, since British authorities retained formal responsibility for all constitutional powers withheld from Canadian authorities; and they were prepared, as Canada gradually matured, increasingly to exercise those responsibilities in the manner requested by the Government of Canada. Considered as a self-sufficient juridical régime, however, the Canadian legal system suffered a shortcoming in the fact that Canada's constitution was a British statute, with virtually no provision for amendment by the people it governed.²⁴ Other constitutional deficiencies affected all parts of the parliamentary system: executive, legislative and judicial.

The entirety of the executive authority for Canada was placed by s. 9 in the hands of the queen. While provision was made in subsequent sections for most of that power to be exercised, in the name of the Queen by the governor-general or the governor-general-in-council, both the appointment and instruction of the governor-general remained a British prerogative. At the legislative level, royal assent of all federal legislation by the British appointed governor-general (and of provincial legislation by the governor-general appointed lieutenant-governors) was essential to render it operational.²⁵ Repugnancy of any Canadian legislation with provisions of English legislation would render it void under the terms of Britain's *Colonial Laws Validity Act*.²⁶ Even in the absence of repugnancy, the British Queen-in-Council was empowered by s. 56 of the *British North America Act*, 1867 to "disallow" any statute of the parliament of Canada at any time within two years of receiving a copy of it. British control over the Canadian judiciary was ensured by the fact that the Judicial Committee of the Privy Council in London remained the final appeal tribunal from all superior courts of final resort across Canada.

Some of these constitutional gaps, like certain of the other shortcomings of the Canadian legal system, would be filled relatively quickly, at least in a *de facto* sense; others would persist through the twentieth century.

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²⁴ Section 92.1 permitted amendment of provincial constitutions by the legislatures of the provinces in question, but the only way the provisions applicable to national institutions or responsibilities could be amended was by British legislation. The *British North America Act*, 1949, created a new head of federal jurisdiction (s.91(1)) by which the Parliament of Canada could amend aspects of the constitution relating to purely federal matters. That power was modified in the constitutional amendment provisions contained in the *Constitution Act*, 1982.

²⁵ Sections 55 and 90.

²⁶ 28 Victoria, c. 63 (U.K.).

III. Executive Matters

The executive aspects of Canada's federal justice system will be examined briefly in relation to five topics: (a) constitutional powers; (b) the department of justice; (c) the department of the solicitor-general; (d) police; and (e) corrections.

A. Constitutional Powers

The inadequacy and subservience of Canada's formal executive powers created few practical problems for the evolving legal system. The government of Canada was autonomous in practice from the beginning as to establishment and regulation of the federal civil service, and of federal agencies, boards and tribunals. Although the choice of governor-general remained a British responsibility for many years, the Canadian government was always consulted after about the mid-1820s, and after 1931 the Canadian choices were virtually rubberstamped by British authorities. Governors-general occasionally exercised personal discretion in the use of their powers during the early years of Confederation; but the convention that they must accept their Canadian ministers' advice was generally recognised relatively soon, and was forcefully confirmed in 1926 when Governor-General Lord Byng refused Prime Minister King's request to dissolve parliament and call an election, all of which was rejected by Canadian voters.²⁷ In 1947 new letters patent for Canadian governors-general were issued by the king, broadening their delegated powers to embrace all aspects of executive authority, and specifying that those powers could be exercised on advice of the Canadian government, without the need to consult British authorities. At the same time, the instructions previously issued by the British authorities to guide governors-general in the exercise of their powers were dispensed with, probably in order to avert potential conflicts between the wishes of the governments of Canada and the United Kingdom.²⁸

B. Department of Justice

Among the statutes enacted at the first session of the parliament of Canada was an act establishing the federal department of justice. It received royal assent 22 May 1868.²⁹ Although a short statute, which did not appear to have been debated significantly if at all in the House of Commons, it established an important model for subsequent legislation, both federal and provincial, concerning the administration

²⁷ E.A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968).

²⁸ *Letters Patent Constituting the Office of Governor General of Canada*, effective 1 October 1947 (signed "by His Majesty's Command" by Canadian Prime Minister W.L. Mackenzie King). See: W.P.M. Kennedy, "The Office of the Governor General in Canada" (1947-8) 7 *University of Toronto Law Journal* 44. A press release by the Prime Minister 1 October 1947, explaining the significance of the new letters patent, and stressing that they would not prevent the Canadian government consulting the monarch directly if it chose to do so, was recorded in the House of Commons' *Debates*, 12 February 1948, at 1126.

²⁹ *An Act Respecting the Department of Justice*, S.C. 1867-8, c. 39. See: D.H. Brown, "Ottawa and the Department of Justice in 1892" in D.H. Brown, ed., *The Birth of the Criminal Code* (Toronto: University of Toronto Press, 1995).

of justice.³⁰ The tasks assigned to the chief law officer in charge of the department divided in two categories: one group to be exercised as minister of justice, a political post with a seat in the cabinet,³¹ and the other to be performed as attorney-general, a more strictly professional position.³² The same person was to hold both offices. As minister of justice, he was the “official legal advisor of the Governor,” responsible to:

- (i) “see that the administration of public affairs is in accordance with law”;
- (ii) superintend “all matters connected with the administration of justice in Canada, — not within the jurisdiction of the Governments of the Provinces;”³³
- (iii) advise on [presumably the constitutionality of] provincial legislation;
- (iv) advise on all questions of law referred to him by the crown; and,
- (v) carry out other duties as assigned by the governor in council.

As attorney-general he was given all applicable powers and duties “which belong to the office of the attorney-general of England by law or usage,” as well as the applicable powers and duties of the pre-Confederation attorneys-general of the provinces. His responsibilities were specified to extend as well to:

- (i) advising the heads of governmental departments on relevant legal matters;
- (ii) approving all documents issued under the Great Seal of Canada;
- (iii) superintending “penitentiaries and the prison system of the Dominion”;
- (iv) regulating and conducting “all litigation for or against the Crown or any public department” in relation to matters under federal jurisdiction; and,
- (v) fulfilling any other duties assigned by the Governor-in-Council.

Some of these latter duties, notably those relating to the prison system, extended well beyond the traditional duties of the English attorney-general.

To perform all these functions, the minister of justice/attorney-general was initially provided with very limited human and financial resources. By 1872, toward the end of Sir John A. Macdonald’s dual tenure of this office and that of prime minister, the department of justice employed only eight persons: a deputy minister, five lawyers, and two messengers. It spent less than \$8,000 annually on salaries.³⁴ And by that time its duties extended to drafting legislation for the new Northwest

³⁰ Philip C. Stenning, *Appearing for the Crown*, (Cowansville: Brown Legal Publications, 1986) at 72.

³¹ *Supra* note 29, s. 2.

³² *Ibid.* at s. 3.

³³ Since “administration of justice” was a topic allocated “exclusively” to the legislatures of the provinces by s. 92(14) of the *British North America Act, 1867*, the import of this provision was unclear, unless it anticipated the future acquisition of the non-provincial territories for which the federal order of government would be fully responsible.

³⁴ Canada, Department of Justice, *A Legal Career with Justice*, [pamphlet] 1990, at 5.

Territories,³⁵ and responsibility for criminal prosecutions therein.³⁶ In 1990, by contrast, the department employed about 800 lawyers, assisted by a very large support staff, based in nine regional offices across the country, as well as at the department's Ottawa headquarters. In addition to the work done for their own department, these lawyers advise more than forty other departments and agencies of the government of Canada.³⁷

While the department's expansion over the years was attributable largely to unavoidable factors, such as the country's burgeoning and increasing complexity of law and government, it also stemmed in part from growing federal participation in the prosecution of offenses. The bulk of ordinary criminal prosecutions outside the northern territories has always been conducted at the direction of provincial attorneys-general. Section 92(14) of the constitution placed the provinces in charge of "administration of justice in the province." Although it was never entirely clear whether that expression was intended to include the prosecution of crime, there was a widespread assumption, until relatively recently, that it did. In any event, parliament ordained, in the landmark *Criminal Code* of 1892,³⁸ that prosecutions were to be controlled by the attorneys-general of the provinces, except in the territories, where the federal attorney-general did so. This arrangement continued until 1969, when an amendment was enacted to remove authority from provincial attorneys-general with respect to prosecutions under federal statutes outside the *Criminal Code*, long a federal responsibility in practice, and with respect to prosecutions for conspiracy to violate such statutes (a new role, since conspiracy was prohibited by the *Criminal Code*).³⁹ This initiative produced both provincial political concern, and several constitutional challenges by accused persons. The challenges resulted in confirmation by the Supreme Court of Canada that federal lawyers might prosecute offences under federal legislation, whether the legislation was based on parliament's jurisdiction over criminal law or on some other head of federal jurisdiction.⁴⁰ Some uncertainty remains as to whether the "administration of justice" power also bestows concurrent prosecutorial jurisdiction on provincial authorities;⁴¹ but, as a practical matter, the provinces continue to conduct most *Criminal Code* prosecutions, and the department of justice continues to deal with violations of other federal statutes.

³⁵ *Ibid.*

³⁶ Stenning, *supra* note 30 at 78.

³⁷ *Supra* note 34 at 6.

³⁸ S.C. 1892, c. 29, s. 3(b); Brown, *supra* note 29.

³⁹ S.C. 1968-1969, c. 38, s. 2(2).

⁴⁰ *Attorney General Canada v. C.N. Transportation Ltd. et al*, [1983] S.C.R. 206; *R. v. Wetmore*, [1983] 2 S.C.R. 284 (S.C.C.).

⁴¹ See: Stenning, *supra* note 30 at 188ff.; P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., (Agincourt: Carswell, 1992) at 511ff. Hogg remarks, that even if the provinces' constitutional jurisdiction over "administration of justice" was not sweeping enough to prevent federal usurpation of greater prosecution powers, "it is safe to conclude that a federal takeover of criminal law enforcement is adequately deterred by political forces" (*ibid.* at 514).

C. Department of Solicitor-General

A major alteration in responsibilities of the federal department of justice took place in 1966, when several of its former duties were transferred to the department of the solicitor-general.⁴² This was a culmination of efforts begun as long ago as 1878 to reduce the ever-increasing burden of the department of justice. It will be recalled that the justice department's founding statute created two distinct offices, minister of justice and attorney-general, with the stipulation that they would both be held by the same person. An attempt to separate the posts in 1878 was unsuccessful.⁴³ More than another decade passed before agreement was reached on a somewhat different method of relieving the hard-pressed department of justice: creation in 1892 (pursuant to an Act passed in 1887) of the department of solicitor-general for Canada.⁴⁴ Although new to the federal order of government in Canada, the office had existed in Quebec and Nova Scotia since the eighteenth century,⁴⁵ with antecedents in England. A "King's Solicitor," soon to be called "Solicitor-General," was first appointed in England in 1461, and continued thereafter to be recognised as one of the law officers of the crown.⁴⁶ The solicitor-general was historically subordinate to that of the attorney-general, serving as the latter's assistant, with power to act in the attorney-general's stead when necessary. This was also the role originally contemplated for the solicitor-general of Canada, empowered by the 1887 statute to "assist the Minister of Justice in the counsel work of the department of Justice," and carry out "such other duties as are at any time assigned to him by the Governor in Council."⁴⁷ The department remained a non-cabinet ministry until 1915, when Arthur Meighen became the first solicitor-general invited to join the cabinet, and it remained sporadically so until 1926, since when all solicitors-general have been cabinet members. Despite the growing importance of the office, its subordination to that of the minister of justice persisted; it was not until 1959 that the solicitor-general was empowered, like the English counterpart, to act in the absence of the minister of justice.⁴⁸

The 1966 amendments finally conferred autonomous responsibilities on the solicitor-general in some important areas that until then had been assigned to the department of justice, notably corrections and the Royal Canadian Mounted Police.⁴⁹

⁴² The discussion of this office draws heavily on the excellent study of Philip C. Stenning: *supra* note 30 at 95ff.

⁴³ J. L.L. J. Edwards, *Ministerial Responsibility for National Security*, (Ottawa: Commission of Inquiry Concerning Certain Activities of the RCMP, 1980) at 6-7.

⁴⁴ S.C. 1887, c. 14.

⁴⁵ Stenning, *supra* note 30 at 89.

⁴⁶ J.L.L.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 26ff.

⁴⁷ *Supra* note 44, s. 1.

⁴⁸ Edwards, *supra* note 43 at 23.

⁴⁹ *Government Organization Act*, S.C. 1966-7, c. 25, ss. 2-5.

D. Federal Policing

Canada's celebrated national police force, the Royal Canadian Mounted Police, had dual origins: one western, one eastern. The story of its western genesis, as a mounted constabulary intended to bring law and order to the unsettled western plains, is well known. Its eastern origins, though earlier, are less familiar.

Although precise moments of conception are rarely identifiable, it is possible that the first direct impulse to create a national police force was the discharge of an assassin's pistol from the shadows of Ottawa's Sparks Street in the early hours of 7 April 1868. D'Arcy McGee, a silver-tongued cabinet colleague of John A. Macdonald, was gunned down as he walked home from a late sitting of the resumed first session of Parliament. An outspoken critic, despite his Irish blood, of the Irish-American Fenian Brotherhood that had been harassing Canada's southern border, McGee was thought to have been killed by a Fenian sympathiser. Less than a month later, Macdonald announced to the House of Commons that his government was creating a Dominion Police Force to deal with the Fenian menace and other matters.⁵⁰ Two weeks after that, second reading was given to the *Police of Canada Act*, establishing a federal constabulary "for the purpose of carrying out the criminal laws and other laws of the Dominion only."⁵¹ Among its responsibilities was protection of public buildings and public figures.

Perhaps a Dominion Police Force would have been created in any event. Certain small national police organisations were already in existence, remnants of pre-Confederation forces. One was a body known as the Frontier Police, which had components in both Upper Canada and Lower Canada, as well as a secret service unit concerned primarily with penetrating the Fenian Brotherhood. Others (difficult to sort out from the Lower Canada segment of the Frontier Police), were the Quebec and Montreal River Police, which seemed to deal with matters beyond the jurisdiction of municipal police, because municipal jurisdiction did not extend to the St. Lawrence River.⁵² The status of these organisations was unclear, now that "administration of justice in the province" was a constitutional responsibility of provincial rather than federal authorities. The head of the Upper Canada and secret service branches of the Frontier Police, Gilbert McMicken, had expressed concern about this constitutional uncertainty, the reason perhaps why he had recently begun to call his organisation the "Provincial Police Force." He had requested in December 1867 that federal legislation be enacted to clarify the situation.⁵³ It was likely that these loose ends would have been tied up eventually, even if D'Arcy McGee had lived, but his murder seemed to speed up the process. Even while McMicken supervised

⁵⁰ *Debates*, 1867-8, 5 May 1868, at 634.

⁵¹ S.C. 1867-8, c. 73, s. 2. Royal assent was given 22 May 1868: *Debates*, 1867-8, at 762.

⁵² A short discussion of the role played by the River Police will be found in *Debates*, 1867-8, 16 April 1868, at 500.

⁵³ Archives of Ontario, R.G. 8, Series I, I, D, No. 30-Papers of Provincial Secretary, McMicken to Macdonald, 21 December 1867. For a discussion of McMicken's police work both before and after Confederation, see Dale and Lee Gibson, "Who was Gilbert McMicken?" [unpublished].

the initial search for McGee's killer, he assisted in preparations for what became the *Police Act of Canada*.

Others shared the constitutional doubts expressed by Gilbert McMicken, and they were not altogether dispelled by the *Police of Canada Act*. Given provincial responsibility over "administration of justice," it was not at all obvious that the federal parliament was entitled to create a police force for the purpose of carrying out the laws of Canada. Edward Blake, a tenacious member of the opposition and one of the strongest lawyers in the House, warned that the bill was "not within the competence of this Legislature, but [belonged to] the Legislatures of the different provinces," and predicted that it "would give rise to a constant source of jarring with the local governments."⁵⁴ His concerns turned out to be premature, by more than a century, and ultimately wrong. The constitutional "jarring" he prophesied did not occur until relatively recent times, and when it did the issue was resolved in favour of federal jurisdiction, as John A. Macdonald had assured Blake it would be.⁵⁵

The great advantage of the Dominion Police Force was that its mandate extended to all parts of the country. As crime became less localised, the locally rooted municipal police system that Canada had inherited from Britain experienced increasing jurisdictional obstacles, and a force that could easily follow offenders and investigations across jurisdictional boundaries had obvious advantages. These advantages had already been demonstrated, on a temporary basis, by measures adopted by the Province of Canada in the 1840s and 1850s to deal with certain riots and labour unrest by means of a mounted police force with province-wide authority.⁵⁶ That model was now followed by the Dominion Police Force at the federal level and would, before long, form a basis for the organisation of provincial police forces in certain provinces as well.⁵⁷

The Dominion Police Force remained in existence until 1920, when it amalgamated with its western counterpart, the North West Mounted Police, to form the R.C.M.P.⁵⁸ During its fifty-two year existence it had been involved in many sensitive matters. Initially, it continued the work of the dissolved Frontier Police, including investigation of D'Arcy McGee's murder and the Fenian espionage. It carried such work to new levels of sophistication and success after recruiting super-spy Henri le Caron.⁵⁹ Tracking down and assisting the extradition of fugitives from American justice was a common task in the early years, one that sometimes involved high adventure.⁶⁰ The force was employed from time to time to ensure safe passage of

⁵⁴ *Debates*, 1867-8, 19 May 1868, at 745.

⁵⁵ See *infra*, text associated with note 89ff.

⁵⁶ William H. Kelly and Nora Kelly, *Policing in Canada* (Toronto: Macmillan, 1976) at 17-18.

⁵⁷ Philip C. Stenning, *Legal Status of the Police* (Toronto: University of Toronto Centre of Criminology, 1981) at 40ff.

⁵⁸ In a formal sense it continues to exist, since its constituting legislation has never been repealed: *Dominion Police Act*, R.S.C. 1927, vol. V, at 4308.

⁵⁹ See: J.A. Cole, *Prince of Spies: Henri le Caron*, (London: Faber and Faber, 1984).

⁶⁰ See, for example: D. and L. Gibson, "Railroading the Train Robbers: Extradition in the Shadow of Annexation" in D. Gibson and W. Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991) at 71.

important individuals and groups, such as the delegation sent from rebel-held Manitoba in 1870 to discuss Manitoba's entry into Confederation.⁶¹ In later years, the Dominion Police Force engaged in wide-ranging activities, chiefly but not exclusively in eastern Canada, that included policing Parliament Hill, protecting naval bases, combatting counterfeiting, supervising a national fingerprint bureau, keeping an eye on enemy aliens, and continuing its secret service operations into suspected threats to national security.⁶²

The western roots of the R.C.M.P., and the influential role that its predecessor played in western Canadian development have been chronicled extensively.⁶³ Sir John A. Macdonald knew from an early stage about the need for, as well as the general nature of, policing arrangements essential to a peaceful transition on the Canadian prairies from frontier territory to agricultural settlement. Orderly evolution faced threats from both the south and the east. Below the 49th parallel, the embers of annexation fires, that had burned hotly not long before, were not yet fully extinguished. There was a need for Canada to exert its authority in the northwest in order to forestall annexation by default. Pernicious, if unofficial, incursions from the south were already being made by American whisky traders, intent on exploiting the Aboriginal inhabitants of the region. To the east loomed the prospect of a massive influx of non-Aboriginal immigrants, invited for the express purpose of radically altering its physical and social character. The Métis uprising at Red River in 1869 pre-figured the inter-ethnic hostility these developments would inevitably provoke further west.

As early as December 1869, Macdonald knew what was needed. Writing to Captain D.R. Cameron, military attaché to the ill-fated McDougall expedition, that was then holed up in Pembina, Dakota Territory, trying to find a way to put down the Red River insurrection and take control of the Northwest Territory on behalf of the Canadian Government, Macdonald outlined his ideas on the subject:

I have no doubt, come what will, there must be a military body, or at all events a body with military discipline at Fort Garry. It seems to me that the best Force would be *Mounted Riflemen*, trained partly as Cavalry, but also instructed in rifle exercise. They should also be instructed as certain of the Line are, in the use of artillery. This body should not be expressly military but should be styled *Police*, and have the military bearing of the Irish Constabulary.⁶⁴

⁶¹ W.L. Norton, *Manitoba: Birth of a Province*, (Toronto: University of Toronto Press, 1967), for Richot's Journal, April 1870.

⁶² Kelly and Kelly, *supra* note 56 at 19.

⁶³ See, for example: R.C. Macleod, "The North-West Mounted Police and Law Enforcement, 1873-1905" (Ph.D. thesis, Duke University, 1976); J.P. Turner, *The North-West Mounted Police* (Ottawa: King's Printer, 1950); N. and W. Kelly, *The Royal Canadian Mounted Police, A Century of History: 1873-1973* (Edmonton: Hurtig Publishing, 1973); R. Atkin, *Maintain the Right: The Early History of the N.W.M.P., 1873-1900* (New York: John Day, 1973); H.A. Dempsey, ed., *Men in Scarlet* (Calgary: Historical Society of Alberta, 1974); L.A. Brown, *An Unauthorized History of the R.C.M.P.* (Toronto: James Lewis, 1973); R.W.W. Robertson, *The Law Moves West: The N.W.M.P., 1873-1878* (Don Mills: Burns and MacEachen, 1970); S.W. Horrall, "Sir John A. Macdonald and the Mounted Police Force for the Northwest Territories," (1972) 53 *Canadian Historical Review* 179; C.F. Betke, "Pioneers and Police on the Canadian Prairies, 1855-1914" in R.C. Macleod, ed., *Lawful Authority* (Toronto: Copp Clark, 1988) at 98; D. Morton, "Cavalry or Police: Keeping the Peace on Two Adjacent Frontiers, 1870-1900" (1977) 12 *Journal of Canadian Studies* 27.

It took the Macdonald government until 1873 to put that vision into effect. Legislation authorising creation of the force finally received royal assent on 23 May of that year.⁶⁵ Reports of a large-scale massacre of Indians by whisky traders in the Cypress Hills, coupled with the prospect of the federal government's imminent defeat over the raging railroad scandal, caused an initially leisurely implementation timetable to be speeded up. The first contingents of North West Mounted Police left Ontario at the beginning of October, arriving at their temporary first headquarters in Manitoba about three weeks later. Sworn in early November, they spent the rest of the winter training and making other preparations for their trek further westward the following year.⁶⁶

That legendary "long march" of 1874, along an uncharted and ill-chosen route close to the international boundary, almost decimated the new force. It also taught hard lessons about the virgin prairies that would serve the force well in years to come. By winter, headquarters had been established at Fort McLeod, in the south of what is now Alberta, and at Fort Saskatchewan, not far from Edmonton. Additional posts were set up in the Cypress Hills and at Calgary the following year, and a dozen headquarters were created by 1881. Supplementing these major establishments were numerous other smaller detachments in outlying areas. By the end of its first decade of existence, the North West Mounted Police employed 557 men widely dispersed across the vast region for which it was responsible.⁶⁷

The duties carried out by the force were extremely varied and not always, or even primarily, legal in nature. The statute that brought the force into being described its duties in almost exclusively legal terms:

- (i) "preservation of the peace, the prevention of crime;"⁶⁸
- (ii) attending upon and assisting judges and magistrates, executing any warrants they might issue;⁶⁹
- (iii) escorting and conveying prisoners and lunatics to and from places of confinement;⁷⁰ and,
- (iv) acting as justices of the peace.⁷¹

⁶⁴ Macdonald to Cameron, 21 December 1869, National Archives of Canada [NAC], Macdonald Papers, vol. 516.

⁶⁵ *An Act Respecting the Administration of Justice and for the Establishment of a Police Force, in the North West Territories*, S.C. 1873, c. 35. The Act did not bestow an official title on the force, with the result that it was described by various names until "North West Mounted Police" was eventually settled upon. As the title of the Act indicates, it also provided for creation of a rudimentary judicial system. The appointment of stipendiary magistrates was authorised, as was the construction of gaols and the trial of very serious offences by Manitoba courts.

⁶⁶ N. and W. Kelly, *supra* note 63 at 21ff.

⁶⁷ Macleod, *supra* note 63 at 25-6.

⁶⁸ *Supra* note 65, at s. 19(1).

⁶⁹ *Ibid.* at s. 19(2).

⁷⁰ *Ibid.* s.19(3).

⁷¹ *Ibid.* at s. 16.

In reality, however, the North West Mounted Police did much more than that; their non-legal duties exceeded their legal ones in frequency and often in importance. R.C. Macleod has suggested that the main focus of the force's activities in the early years was the increasingly distressed situation of the Aboriginal population. The police assisted in the negotiation of Native treaties; helped Natives to exercise their hunting rights while attempting, however, to persuade them to settle on reserves and not exercise hunting rights outside reserves; and provided relief supplies and other assistance to Natives suffering from growing poverty, as bison disappeared from the plains. In addition to these responsibilities and those for the force's own sustenance, i.e., farming, ranching, wood-cutting and so on, the police acted from time to time as customs officers, postal carriers, quarantine officials, census takers, map-makers, recorders of meteorological and agricultural information, and dispensers of medical services.⁷²

The legal duties of the Mounted Police were not negligible, however. While the mere presence of the force had caused most American whisky traders to disperse,⁷³ the enforcement of temperance and customs laws was a major responsibility, as was general law enforcement and the gradual, usually gentle, education of the Aboriginal population about complying with the new legal order. As justices of the peace who, if sitting in pairs, could exercise the powers of a magistrate, constables (who were also J.P.s) also played a large judicial role. In fact, they themselves tried most of the persons they charged with crimes.⁷⁴ While this may seem strange and perhaps unfair, from a late twentieth century perspective, it was not generally so perceived at the time. It was common then for police organisations to be headed or supervised by judicial figures, although it was certainly unprecedented for every member of a police force to have judicial authority. In any event, the vastness of the area and the paucity of full-time judges left little alternative.

Although direct participation of the N.W.M.P. in suppressing the North West Rebellion of 1885 was relatively small, limited chiefly to a rather ignominious defeat in the first skirmish, the awareness of western problems that the Rebellion brought home to Canadian politicians resulted in greatly expanded resources being made available to the force for the next several years. It grew to a body of about 1,000 men shortly after the Rebellion, and remained that size until 1893, when the imposition of austerity measures caused severe cutbacks.⁷⁵ During that period, a network of police patrols was organised that systematically covered the entire North West Territories and extended as well to southern Manitoba and the Kootenai region of British Columbia. Both financial restraint and the demands of other duties gradually reduced the extent and impact of these patrols, but fortunately the need for them diminished as new settlements began to put local policing arrangements in place.⁷⁶

⁷² Macleod, *supra* note 63 at 26-36.

⁷³ *Ibid.* at 25.

⁷⁴ W.P. Ward, "Administration of Justice in the North-West Territories, 1870-1877" (M.A. thesis, University of Alberta, 1966).

⁷⁵ Macleod, *supra* note 63 at 44-46.

⁷⁶ *Ibid.* at 45-6.

Manitoba's expansion northward and westward in 1881 and 1912, the creation of Saskatchewan and Alberta in 1905, and eventual establishment of provincial police forces in each of those provinces, also gradually reduced the force's role in those areas. The transition from federal to provincial policing was slow, however. The Royal North West Mounted Police, so renamed in 1904, continued to provide province-wide policing for both Alberta and Saskatchewan until 1917, when provincial forces were finally established there.⁷⁷ Moreover, as the need for federal policing shrunk in the south, it burgeoned in the north. Canada secured its Arctic regions in 1880, and although that event did not have many immediate consequences for the force, it would have in time. The discovery of gold in the Yukon detonated a population explosion there with dangerous implications for law and order. The success of the force in maintaining order in those difficult circumstances is well documented.⁷⁸ In later years, the Royal North West Mounted Police and the Royal Canadian Mounted Police, its successor after 1920, played a central role in opening the far north.⁷⁹

Even after surrendering its general policing duties within the provinces to provincial authorities, the R.N.W.M.P. and the Dominion Police Force retained responsibility for certain special matters under federal jurisdiction. The breadth of this special 'federal law' jurisdiction increased after the eastern and western federal police forces were amalgamated in 1920. Statutes enacted the previous year changed the name of the R.N.W.M.P. to the Royal Canadian Mounted Police and extended its jurisdiction across the country excepting Ontario and Quebec.⁸⁰ Although the Dominion Police Force was never formally abolished, its members were discharged with the opportunity to join the R.C.M.P., which absorbed the former responsibilities of the Dominion Police Force. Headquarters were established in Ottawa and the former Regina headquarters were converted to a training facility.⁸¹

In September 1920, the combined force numbered 1,671, and by 1938 the number had risen to 2,598. This sharp increase reflected, in part, growing responsibilities for matters such as narcotic offences, liquor smuggling, immigration and national security violations, and taxation offences. It was also a result, in part, of contracts negotiated with provincial attorneys-general to replace provincial police organisations, in the early stages of the Great Depression of the 1930s. Saskatchewan gave up its provincial force in 1928, and Manitoba, Alberta, Nova Scotia, New Brunswick and Prince Edward Island followed suit in 1932. In 1950, the new province of Newfoundland gave over control of most of its provincial policing, and British

⁷⁷ Stenning, *supra* note 57 at 46.

⁷⁸ See for example: W.R. Morrison, "The North-West Mounted Police and the Klondike Gold Rush" (1974) 9 *Journal of Contemporary History*. 93; W.R. Morrison, "The Mounted Police on Canada's Northern Frontier, 1895-1940" (Ph.D. thesis, University of Western Ontario, 1973).

⁷⁹ N. and W. Kelly, *supra* note 63 at 121ff.; and see Graham Price's essay, *infra* at 382.

⁸⁰ *Royal Northwest Mounted Police Amendment Act*, S.C. 1919 (2nd Sess.), c. 28. The jurisdictional expansion was achieved by S.C. 1919 (1st Sess.), c. 69. For a discussion of the reasons for the amalgamation, the current activities of the force, and future expectations for it, see: *Debates*, 3 October 1919 at 828 ff, and 7 June 1920 at 3194ff.

⁸¹ Kelly and Kelly, *supra* note 56 at 22-3; Stenning, *supra* note 47 at 48-9.

Columbia disbanded its provincial force the same year, in favour of the R.C.M.P. By 1951 the size of the force had risen to almost 5,000,⁸² and by 1991 almost 21,000 person years were devoted to R.C.M.P. work.⁸³

During most of its history the R.C.M.P. and its predecessors enjoyed an enviable image in the public eye. Given the number of bitterly controversial operations in which it engaged over the years, that was remarkable. It helped to suppress the Northwest Rebellion, dealt with the 1919 Winnipeg General Strike and other labour unrest,⁸⁴ and combatted various other perceived threats to national security.⁸⁵ Public confidence in the force suffered a serious blow in 1977, however, when allegations surfaced that R.C.M.P. officers engaged in security service work in Quebec had committed a number of illegal acts.⁸⁶ A federal royal commission, chaired by Mr. Justice D.C. McDonald of the Alberta Court of Queen's Bench, conducted a detailed investigation of the allegations. The Royal Commission recommended, among other things, that a security intelligence agency distinct from the R.C.M.P. be established.⁸⁷ That recommendation led to creation of the Canadian Security and Intelligence Service (C.S.I.S.).⁸⁸ It, like the R.C.M.P., was placed under the supervision of the solicitor-general for Canada.

Apart from the changes to R.C.M.P. security operations that resulted from it, the controversy which brought the McDonald Royal Commission into being was also the cause of an examination by the Supreme Court of Canada of the constitutional basis for federal jurisdiction over the R.C.M.P. The Government of Quebec established its own Commission of Inquiry, headed by Jean Keable, to investigate both the allegations of illegal police activities in Quebec and the methods and organisational arrangements employed by the R.C.M.P. in that province. When the provincial commission ordered the solicitor-general of Canada to produce certain documents relating to the R.C.M.P., he refused, countering with a judicial challenge to the constitutional authority of the province to establish the Keable Commission. The Supreme Court of Canada produced a compromise ruling, which upheld the provincial commission's authority, as an aspect of a province's jurisdiction over the "administration of justice in the province," to enquire into allegations of specific criminal acts including those which the R.C.M.P. was alleged to have perpetrated; but the Court denied the provincial commission the power to examine the internal organisation or operational techniques of activities of the federal force. As a creature of the federal parliament, carrying out duties relating to parliament's constitutional responsibility for criminal law, the Court held that the R.C.M.P. was immune from

⁸² Kelly and Kelly, *ibid.*

⁸³ Solicitor General of Canada, *Annual Report 1990-91*, at 23.

⁸⁴ S.W. Horrall, "The Royal Northwest Mounted Police and Labour Unrest in Western Canada, 1919" in Macleod, *supra* note 63 at 133.

⁸⁵ John Sawatsky, *supra* note 63; Commission of Inquiry Concerning Certain Activities of the R.C.M.P., Second Report, vol. I: *Freedom and Security Under the Law*, 1981 at 54ff.

⁸⁶ Inquiry Commission Report, *ibid.* at vol. I, at 7ff.

⁸⁷ *Ibid.* at vol. II at 1067ff.

⁸⁸ *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21.

obligations imposed on it as an organisation by provincial authorities.⁸⁹ Subsequent rulings have made it clear that although provincial authorities may investigate complaints of particular wrongdoing by R.C.M.P. officers,⁹⁰ they may not inquire into the internal operations of the force or seek to impose discipline on individual officers, even in relation to provincial policing activities carried out by the R.C.M.P. under contract with a province.⁹¹

E. Federal Corrections

The 1867 Constitution explicitly divided responsibility for corrections, giving the Parliament of Canada jurisdiction over “penitentiaries” and the provincial legislatures jurisdiction over “public and reformatory prisons.”⁹² The distinction between penitentiaries and prisons was reasonably well understood at the time: the former involved imprisonment for periods in excess of two years, accompanied by hard labour,⁹³ and the latter provided less lengthy and onerous incarceration.⁹⁴ What was not clear was the reason for assigning the former to the federal government and the latter to the provinces. Early drafts of the constitution took a different approach. Both the Quebec Resolutions of 1864 and the London Conference of 1866 called for provincial jurisdiction over all penal institutions, and it is not known what caused the last-minute transfer of penitentiaries to federal authorities in the final text.⁹⁵ Perhaps representatives of Lower Canada, which did not have a penitentiary at the time,⁹⁶ became concerned about the cost of having to build one for the new province of Quebec. Another possibility, more consistent with the timing of the change, has been offered by Professor Friedland: that the British Colonial Secretary, Lord Carnarvon, who played a personal role in final stages of the drafting and who was a strong advocate of penal reform, pressed for federal control over penitentiaries in order to permit uniform implementation of stringent “modern” corrections measures, along the lines of those recommended by a House of Lords Select Committee he had recently chaired.⁹⁷

Whatever the original intent, it was not long before at least some provinces began to regret the 1867 division, not because federal authorities had too much authority but, on the contrary, because too much responsibility and attendant cost fell upon provincial shoulders. When the government of Canada constructed a new penitentiary at Dorchester, New Brunswick, to serve all three maritime provinces, access

⁸⁹ *Attorney General of Quebec and Keable v. Attorney General of Canada, et al.* (1978), 90 D.L.R. (3d) 161 (S.C.C.).

⁹⁰ *Scowby et al. v. Glendinning* (1986), 32 D.L.R. (4th) 161 (S.C.C.).

⁹¹ *Attorney General of Alberta et al. v. Putnam, et al.* (1981), 123 D.L.R. (3d) 257 (S.C.C.).

⁹² *Constitution Act, 1867*, sections 91(28) and 92(6) respectively.

⁹³ See, for example: *An Act Respecting Procedure in Criminal Cases*, C.S.C., 1859, c. 99, ss. 100 and 102.

⁹⁴ *Ibid.* at s. 105.

⁹⁵ M.L. Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984) at 61.

⁹⁶ See: *Confederation Debate*, Legislature of Canada, 1865, at 340.

⁹⁷ Friedland, *supra* note 95 at 61-2.

was restricted to prisoners sentenced to more than two years' hard labour. The New Brunswick government objected to the exclusion of shorter-term prisoners, who had until then been held in the now replaced St. John penitentiary. The Supreme Court of Canada ruled that the province had no legal basis to object, the Parliament of Canada being constitutionally free to decide who qualified for detention in federal penitentiaries.⁹⁸ Disputes have persisted ever since about the appropriateness of the two-year criterion.⁹⁹ Agreement was eventually reached in 1974 between federal authorities and some provinces permitting exchanges of prisoners between federal and provincial institutions without strict regard for the length of terms.¹⁰⁰ This arrangement was unsuccessfully challenged in the courts,¹⁰¹ and continues to operate on a negotiated basis ever since.

Three pre-Confederation penitentiaries passed into federal control in 1867: Kingston, Ontario; St. John, New Brunswick; and Halifax, Nova Scotia.¹⁰² The lack of a penitentiary in Quebec was remedied by construction of St. Vincent de Paul (later Laval) in 1873. The west was provided with a penitentiary at Stony Mountain, Manitoba in 1877, and another in British Columbia the following year. The New Brunswick and Nova Scotia institutions were replaced by the Dorchester Penitentiary in 1880. After the southern parts of the Northwest Territories attained provincial status, penitentiaries were built in Alberta (1906) and Prince Albert, Saskatchewan (1911).¹⁰³ In subsequent years some of these institutions closed, and others of gradually more varied types opened. By 1990 there were 13,675 persons detained in federal penal institutions. Their supervision, along with that of 6,770 parolees, required the efforts of 10,434 staff person years.¹⁰⁴

Correctional methods employed in the first penitentiaries operated by the Government of Canada were considered at the time to be reasonably progressive and humane. To a modern reader though, some features of the first *Penitentiary Act* might seem draconian. The hours of work, for example:

Except during sickness or other incapacity, he shall be constantly kept at hard labour ... every day not exceeding ten hours, exclusive of hours for meals, except Sundays, Good Friday and Christmas Day¹⁰⁵

⁹⁸ *In Re: New Brunswick Penitentiary*, (1880) Coutlee's S.C. cases, 24 (S.C.C.).

⁹⁹ H.G. Needham, "Historical Perspectives on the Federal-Provincial Split in Jurisdiction in Corrections" (1980) 22 *Canadian Journal of Criminology* at 298; Solicitor General of Canada, *Federal-Provincial Issues in Corrections*, Correctional Law Review Working Paper, No. 8, 1988.

¹⁰⁰ *Winnipeg Free Press*, 14 May 1974, at 8.

¹⁰¹ *Re: Anaskau and the Queen* (1977), 76 D.L.R. (3d) 351 (Ont. C.A.).

¹⁰² *Penitentiary Act*, S.C. 1967-8, c. 75, s. 11. The former "lunatic Asylum for Criminal Convicts" at Rockwood, near Kingston, was made a part of the Kingston Penitentiary: *ibid.* s.64.

¹⁰³ D. Curtis, A. Graham, L. Kelly, A. Patterson, *Kingston Penitentiary: The First 150 Years, 1835-1985* (Ottawa: Correctional Service of Canada, 1985) at 55 and 68.

¹⁰⁴ Solicitor-General of Canada, *Annual Report, 1989-90*, at 65 and 67.

¹⁰⁵ *Supra* note 102 at s. 31(1). The governor-general and the penitentiary directors could add to the list of holidays. Roman Catholics also had, by s.31(5) a right to be excused from work on certain church holidays. No provision was made for non-Christians.

Juvenile offenders would be arbitrarily moved from provincial to federal custody whenever the lieutenant-governor of the province certified them as "incorrigible."¹⁰⁶ Then there was the rule of silence:

[N]o convict shall be permitted to speak to another convict upon any pretence whatever, nor to any officer or guard, or other servant of the institution, except with respect to the work at which he is employed, and then only in the fewest words and in a respectful manner.¹⁰⁷

Women prisoners were housed within the same penitentiaries as men, though the statute required that they be "kept distinct and secluded from the male convicts."¹⁰⁸ At Kingston, the facilities for women were criticised by one inspector of penitentiaries for both their "objectional proximity to the male prison" and the placement of cells "underground in a gloomy and dismal compartment." A few years later, no improvement having been made, the same inspector described the facilities as "a wretched makeshift."¹⁰⁹ It would not be until 1913 that a separate prison for women was built, and even that remained within the main walls of Kingston Penitentiary.¹¹⁰ Women convicts were subjected to the same harsh restrictions as the men.¹¹¹

The 1868 legislation did contain some relatively enlightened provisions. It guaranteed, for example, that prisoners would be clothed at public expense, "fed on a sufficient quantity of wholesome food," and even provided with a "bed and pillow with sufficient covering."¹¹² Prisoners were protected from discharge during winter months if they preferred to receive prison hospitality until spring; and they had the right to a suit of clothes and a small quantity of money upon discharge.¹¹³ Not everyone agreed with even this modest level of charitableness. After a reform-minded warden was appointed to head Kingston Penitentiary in 1871, Prime Minister/Minister of Justice Macdonald let him know that he was uneasy about some aspects of the warden's approach:

Your ultimate success in making the penitentiary a school of reform, as well as a place of punishment, is worthwhile, but my only fear is that your natural kindness of disposition may lead you to forget that the primary purpose of the penitentiary is punishment and the incidental one reformation. There is such a thing as making a prison too comfortable and prisoners too happy.¹¹⁴

The evolution of Canadian corrections' policy since those first cautious attempts at correctional liberalism was too long and complex a story to be told here.¹¹⁵

¹⁰⁶ *Ibid.* at ss. 29-30.

¹⁰⁷ *Ibid.* at s. 32.

¹⁰⁸ *Ibid.* at s. 46.

¹⁰⁹ Quoted in Curtis, *et al.*, *supra* note 103 at 87. Although the reports were for the years 1889 and 1893, the conditions described had existed since 1867.

¹¹⁰ *Ibid.*

¹¹¹ S.D. Cooper, "The Evolution of the Federal Women's Prison" in E. Adelberg and C. Currie, *Too Few to Count: Canadian Women in Conflict with the Law* (Vancouver: Press Gang Publishers, 1987) at 127.

¹¹² *Supra* note 102, s. 31.

¹¹³ *Ibid.* at s. 40.

¹¹⁴ Curtis, *et al.*, *supra* note 103 at 57.

Milestones along the way included a number of public inquiries that periodically attempted to rationalise and improve the treatment of prisoners.¹¹⁶ Reports of those inquiries recorded a somewhat vacillating but generally steady movement toward leniency. The slow and grudging nature of this trend probably reflected the same tension in the collective conscience of Canadians, between humanitarian and retributive impulses, that Sir John A. Macdonald exhibited in his 1871 letter.

IV. Legislative Matters

A. Constitutional Powers

The power given to the parliament of Canada by the 1867 constitution to make laws binding on all Canadians was subject to three legal constraints: (a) residual British authority; (b) competing jurisdiction of the provincial legislatures, and (c) constitutional rights of individuals and groups under the 1982 Charter and earlier constitutional guarantees. The first of these three is now a virtual dead letter; the second has presented constant difficulties over the years and continues to do so; the significance of the third has grown vastly in recent times.

B. British Authority¹¹⁷

British interference with the work of the Parliament of Canada seldom created serious difficulties. A Canadian federal statute was disallowed under s. 56 of the 1867 Act on just one occasion, in 1873, and refusal or reservation at British behest of royal assent to legislation was equally rare. The requirement of the *Colonial Laws Validity Act* (1865), that laws of colonial states must not be inconsistent with British laws, posed few problems in practice and was formally abolished by the *Statute of Westminster*, 1931.¹¹⁸ The latter enactment legally recognised the independence of the senior dominions and provided that no future British law would apply to them unless requested by the dominion in question.¹¹⁹ There was an exception in Canada's

¹¹⁵ See in addition to works cited above: R.M. Zubrycki, *The Establishment of Canada's Penitentiary System: Federal Correctional Policy, 1867-1900* (Toronto: University of Toronto Press, 1980); D.B. Plecas and J. Broach, eds., *Federal Corrections in Canada: A Comprehensive Introduction* (Vancouver: Good 80s Enterprises, 1986); W.G. Dixon, *History of the Penitentiaries Branch of the Canadian Department of Justice* (n.p?: n.d.?); L. Goslin, *Prisons in Canada* (Toronto: Black Rose, 1982); W.A. Calder, "Convict Life in Canadian Federal Penitentiaries, 1867-1900" in Louis Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfred Laurier University Press, 1981) at 297.

¹¹⁶ E.g.: *Report of Royal Commission to Investigate the Penal System in Canada* (Archambault Report), 1938; *Report of Committee Appointed to Inquire Into ... the Remission Service ...* (Fauteux Report), 1956; *Report of the Canadian Committee on Corrections* (Ouimet Report), 1969; *Report of the Parliamentary Sub-Committee on Corrections*, 1977; *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991.

¹¹⁷ A valuable source of information about British surveillance and occasional interference in the work of the parliament of Canada in the early years is W.E. Hodgins, ed., *Correspondence Reports of the Minister of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895*, (Ottawa: Government Printing Bureau, 1896) at 5-60.

¹¹⁸ Section 2.

¹¹⁹ *Ibid.* at s. 4.

case with respect to constitutional amendments, because Canadians had not yet agreed to a satisfactory Canadian procedure for constitutional amendments.¹²⁰ That anomaly created serious embarrassment in 1981, when the British government studied the possibility of refusing a request by the Canadian federal government to amend the Constitution in ways which eight provincial governments disapproved; but the matter was ultimately resolved by a political compromise between the government of Canada and governments of all provinces except Quebec. After that agreement, the British parliament enacted at Canadian request the *Canada Act, 1982*, which provided, in s. 2, that:

No Act of the Parliament of the United Kingdom, passed after the *Constitution Act, 1982* comes into force, shall extend to Canada as part of its law.

Oddly, the arbitrary British power to disallow Canadian legislation remains in s. 56 of the *Constitution Act, 1867*, but the likelihood that it would ever be used at British initiative in the future remains next to nil.

C. Federal-Provincial Competition¹²¹

The fact that Canada's federal constitution bestowed on the legislatures of the provinces exclusive competence over certain areas of law-making imposed major restrictions on legislative powers of the parliament of Canada. Parliament's authority under s. 91 of the constitution to make laws for the "peace, order and good government of Canada" [P.O.G.G.] was limited to "matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." The scope of parliament's authority was thus dependent upon the breadth of provincial legislative jurisdiction.

To a certain extent, federal authorities were empowered to self-define their jurisdiction. They could arbitrarily declare selected provincial works to be "works for the general advantage of Canada," for example, and thereby acquire exclusive legislative jurisdiction over them.¹²² And if they disapproved provincial legislation on subjects within provincial competence, they could simply disallow it in roughly the same manner that British authorities could disallow federal legislation.¹²³ Both the declaratory power and disallowance of provincial legislation were exercised on numerous occasions by the government of Canada.¹²⁴ This eventually became politically unpopular, however, and neither power has been used since about World War II.¹²⁵

¹²⁰ *Ibid.* at s. 7.

¹²¹ Federal/provincial conflicts during Canada's formative years are the chief subject of Hodgins' illuminating compilation, *supra* note 117 at 61ff.

¹²² *Constitution Act, 1867*, s. 92(10)(c).

¹²³ *Ibid.* at s. 90.

¹²⁴ See G. V. LaForest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Queen's Printer, 1965); Andr e Lajoie, *Le Pouvoir D claratoire du Parlement* (Montreal: University of Montreal Press, 1969.)

¹²⁵ To an extent, however, the declaratory power still rules from the grave, since declarations made in the past continue to operate until repealed: *Jorgenson v. Attorney General of Canada et al.*

Apart from those special cases, the task of defining the federal and provincial realms fell to the courts. The history of judicial fulfilment of that task would require several volumes to document fully.¹²⁶ All that can be noted here are a few general considerations.

Numerous principles of interpretation have been created by the courts for resolving federal-provincial jurisdictional conflicts.¹²⁷ The most important were the "dual aspect" and "federal paramountcy" concepts. The "dual aspect" idea recognised that several of the heads of law-making jurisdictions granted by the constitution to both parliament and the provincial legislatures were so generally and broadly stated that they overlapped fields granted to the other order of government. The provincial fields of "property and civil rights" (s. 92(13)) and "matters of a merely local and private nature" (s. 91(16)), for example, overlapped federal areas such as "navigation and shipping" (s. 91(10)), "banking" (s. 91(15)), "interest" (s. 91(19)), "bankruptcy and insolvency" (s. 91(21)), "marriage and divorce" (s. 91(26)), and so on. Many topics of legislation might concern both "banking" and "property," or both "marriage" and "local and private" matters, for instance. Faced with this jurisdictional concurrency, the courts were forced to conclude that although both federal and provincial fields of competence were described as "exclusive" in the constitution, "subjects which in one aspect and for one purpose fall within s. 92 may, in another aspect and for another purpose fall within s. 91."¹²⁸ Where such a "dual aspect" was found to exist, both federal and provincial legislation might be enacted, but if there was inconsistency between the two the federal law prevailed in most matters.¹²⁹ This principle of "federal paramountcy" was stated explicitly in the constitution in respect to only a very limited number of matters.¹³⁰ But it was found in an 1881 Privy Council ruling to apply as well to most other heads of federal jurisdiction, by reason of the fact that the federal powers listed in s. 91 of the constitution were stated to exist "notwithstanding anything else" in the constitution.¹³¹

While jurisdictional overlap permitted a degree of flexibility as to respective legislative responsibilities of the two orders of government, even greater flexibility would have been possible if aspects of those responsibilities could have been delegated to or from the parliament of Canada by willing provincial legislatures. The idea of doing so arose in response to the lack until 1982 of an agreed general Canadian constitutional amending formula. Delegation seemed to offer an informal way of keeping the constitution abreast of the times until a formal amending formula could

(1971), 18 D.L.R. (3d) 297 (S.C.C.).

¹²⁶ See generally, Hogg, *supra* note 41.

¹²⁷ V.C. Macdonald, "Judicial Interpretation of the Canadian Constitution" (1935-36) 1 *University of Toronto Law Journal* 260.

¹²⁸ *Hodge v. The Queen* (1883), 9 A.C. 117, at 130 (P.C.).

¹²⁹ The exception is s. 94A, in which provincial legislation concerning pensions is given paramountcy.

¹³⁰ Section 95 (immigration and agriculture); s. 94A (pensions); s. 93(4) denominational schools), in rare circumstances; s. 92A(2) (resource exports).

¹³¹ *Citizens Insurance v. Parsons* (1881), F.A.D. 96, at 107-9 (P.C.); see also *Tennant v. Union Bank*, [1894] A.C. 31 (P.C.).

be found. When a proposal for delegation between parliament and the legislatures was put to the courts, however, the Supreme Court of Canada ruled that this would violate the allocation of powers set out in the constitution.¹³² That decision was heavily criticised, and a way around it was soon found in the form of delegation from parliament or a provincial legislature to an administrative agency of the other order of government. That kind of transfer was held to be constitutionally valid¹³³ and has become the pattern for numerous subsequent delegations.

Another informal method for shifting responsibilities between the federal and provincial governments was the "spending power."¹³⁴ Following World War II the government of Canada found itself with access to considerably greater tax revenues than it required to carry out its own constitutionally ordained functions. Provincial governments, on the other hand, were hard-pressed to raise sufficient funds to meet their responsibilities. It was an era when there was wide support for universal programs of social benevolence, and for the removal of regional economic disparities. When the government of Canada began to offer generous financial assistance for provincial social programs that met stipulated federal standards, most provinces accepted. The result was a national network of social, educational, and medical schemes which, although they formally fell within the constitutional competence of the provinces, were heavily funded and shaped by federal authorities. The classic illustration was medicare. Some constitutionalists were disturbed by the powerful influence the federal government might use with its spending power in areas of provincial responsibility, suggesting that such practices were unconstitutional.¹³⁵ Others asserted that parliament derived the authority to engage in spending programs in provincial area from its power under s. 91(1A) of the 1867 constitution to make laws respecting federally-owned property, since money is "property."¹³⁶ While the question has never been resolved conclusively, the latter view has attracted the preponderance of judicial support.¹³⁷ There has also been some judicial approval for the ability of provinces to spend in areas of federal concern.¹³⁸ Many proposals for reducing risks thought to be associated with abuse of the federal spending power have been advanced from time to time.¹³⁹ None has been approved. In the meantime,

¹³² *Nova Scotia Interdelegation Case* [1951], S.C.R. 31 (S.C.C.).

¹³³ *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392 (S.C.C.).

¹³⁴ D.V. Smiley, *Conditional Grants and Canadian Federalism* (Toronto: Canada Tax Foundation, 1963); K.G. Banting, *The Welfare State and Canadian Federalism* (Kingston: McGill-Queen's University Press, 1982) at 52ff.

¹³⁵ P. E. Trudeau, *Federalism and the French Canadians*, (Toronto: Macmillan, 1968), at 79ff. As Prime Minister, Mr. Trudeau, failed to act on the objections he had raised as a scholar.

¹³⁶ E.g., Government of Canada, *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Queen's Printer, 1969); G.V. LaForest, *Allocation of the Taxing Power Under the Canadian Constitution*, 2nd ed., (Toronto: Canada Tax Foundation, 1981). See also: Smiley, *supra* note 134.

¹³⁷ *Winterhaven Stables Ltd. v. Attorney-General Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.); *Brown, et al v. Y.M.H.A., et al* (1989), 59 D.L.R. (4th) 694 (S.C.C.).

¹³⁸ *Dunbar v. Attorney-General Saskatchewan* (1985), 11 D.L.R. (4th) 374 (Sask. Q.B.).

¹³⁹ The ill-fated Charlottetown Accord, 1992, proposed, for example, that the wishes of the gov-

shrinkage of federal revenues has meant that the matter will probably be resolved by economic forces rather than by constitutional amendment.

D. Constitutionally Guaranteed Rights.

The 1867 constitution contained few guaranteed constitutional rights of citizens, so there was little to impede the ability of parliament, acting within its allocated jurisdictional sphere, to legislate as it saw fit. The legislators were not entirely unhampered, however; their powers were subject from the outset to three important constitutional rights of Canadians:

- (i) the need to seek re-election at least every five years;¹⁴⁰
- (ii) the requirement that parliament meet at least annually;¹⁴¹ and,
- (iii) the obligation that federal laws be enacted in both English and French, and that parliamentary debate be permitted in both languages.¹⁴²

These guarantees created few difficulties in practice. When the need to extend a term of parliament beyond five years arose, due to the emergency caused by World War I, the British parliament quickly granted a temporary constitutional amendment permitting Canada the variation.¹⁴³ Section 4 of the *Canadian Charter of Rights and Freedoms* now contains a similar guarantee, subject to continuation of a parliament "in time of real or apprehended war, invasion or insurrection." The requirement of an annual session of parliament, now entrenched in s. 5 of the *Charter*, has not been the subject of significant controversy. The guarantee concerning bilingual laws and debates, now found in sections 17 and 18 of the *Charter*, has also been generally problem-free, although equivalent guarantees applicable to Quebec and Manitoba have been subject to litigation and judicial interpretation that could undoubtedly arise in the federal context in an appropriate dispute.¹⁴⁴

In 1960 the parliament of Canada enacted the *Canadian Bill of Rights*,¹⁴⁵ which proclaimed the existence of a wide array of civil liberty protections and purported to subject even parliament's own laws to those protections. The performance of the *Bill of Rights* in the courts was generally disappointing to those who valued the rights it recognised; but it achieved at least one major victory relating to legislation when applied by the Supreme Court of Canada to invalidate provisions of the federal *Indian*

ernments of the affected provinces be taken into account with respect to both new federal spending programs in provincial areas and the withdrawal of old ones.

¹⁴⁰ *Constitution Act, 1867*, s. 50.

¹⁴¹ *Ibid.* at s. 20.

¹⁴² *Ibid.* at s. 133.

¹⁴³ *British North America Act, 1916*, c. 19 (U.K.)

¹⁴⁴ *Attorney General Manitoba v. Forest* (1979), 101 D.L.R. (3d) 375 (S.C.C.); *Attorney General Quebec v. Blaikie et al.* (1979), 101 D.L.R. (3d) 394 (S.C.C.); *Attorney General Quebec v. Blaikie, et al.* (#2) (1981), 123 D.L.R. (3d) 14 (S.C.C.); *Reference Re: Language Rights Under Manitoba Act, 1870* (1985), 19 D.L.R. 1 (S.C.C.).

¹⁴⁵ S.C. 1960, c. 44.

Act, found to be inconsistent with the *Bill's* guarantee of racial equality. The *Bill* was held to have impliedly repealed the *Indian Act* provisions to the extent of the inconsistency.¹⁴⁶ The *Canadian Bill of Rights* continues to exist, and although most of its protections have been supplanted for practical purposes by broader and legally stronger provisions of the *Charter*, it could have future significance with respect to those aspects that the *Charter* does not duplicate. One such aspect of the *Bill* could be the protection it offers against deprivation of property except by "due process of law."¹⁴⁷ Another is the ongoing obligation it places on the minister of justice to examine all pending federal bills and regulations and report to parliament on any that offend the *Bill's* protections.¹⁴⁸ That obligation, which was extended to the *Charter* by a 1985 statute,¹⁴⁹ has resulted in only one negative report to parliament,¹⁵⁰ but it has led to significant drafting improvements before submission for enactment.¹⁵¹

The enactment in 1982, with full constitutional status, of the *Canadian Charter of Rights and Freedoms* placed much more severe civil liberties' restrictions on the law-making authority of the parliament of Canada than ever before. Legislation became susceptible to being struck down by the courts for offending the individual and group rights.¹⁵² The reluctance of courts to interfere with parliament's judgment, evident in *Bill of Rights* litigation, has been much less common in *Charter* cases. There were several reasons for this altered judicial attitude. The *Charter* possessed a constitutional status that the *Bill* did not. The fact that a generally narrow construction placed on the *Bill* by the courts was heavily criticised in the discussions and debates preceding adoption of the *Charter* was undoubtedly influential as well. Possibly the reservation in s. 33 of the *Charter* of the right by legislators to "opt out" of many of the guaranteed rights by a "notwithstanding clause," reduced judicial uneasiness about striking down laws inconsistent with the *Charter*. Whatever their motivation, the courts invalidated many enactments, federal as well as provincial, during the first decade of *Charter* litigation.¹⁵³

E. Structure, Composition and Powers of Parliament

The basic tripartite structure of the parliament of Canada was established by s. 17 of the *Constitution Act, 1867*:

There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons."

¹⁴⁶ *R. v. Drybones* (1970), 9 D.L.R. (3d) 473 (S.C.C.).

¹⁴⁷ *Supra* note 145, s. 1(a).

¹⁴⁸ *Ibid.* at s. 3.

¹⁴⁹ S.C. 1985, c. 36, s. 106.

¹⁵⁰ *Re proposed amendments to the Feeds Act. See: Report of Minister of Justice, 27 March 1975; Winnipeg Free Press, 8 April 1975, at 42.*

¹⁵¹ W.S. Tarnopolsky, *Canadian Bill of Rights* (Toronto: Macmillan, 1975) at 125-8.

¹⁵² Not all the entrenched rights are within the *Charter* itself. Aboriginal rights are separately guaranteed by s. 35 of the *Constitution Act, 1982*.

¹⁵³ D. Gibson, "A Decade of Charter Law" (1993) 72 *Canadian Bar Review* 417.

The role of the queen and her representative in Canada, the governor-general, has already been noted. The role of the Senate was legally identical to that of the House of Commons, except that bills to spend money or impose taxes must originate in the House of Commons;¹⁵⁴ but it was politically less significant because senators were appointed rather than elected, and thus has been controversial since 1867.¹⁵⁵ Intended as a means of ensuring that regional interests would be effectively represented in the central government, the Senate has consistently failed to achieve that purpose, largely because senators have displayed much stronger loyalty to the political party that appointed them than to the regions they represented. Scores of proposals to reform the Senate have been made over the years, but all have failed to attract sufficient support for adoption. The House of Commons therefore has remained the font of all real federal legislative power in Canada.

Designers of the constitution chose to distribute Senate seats on the basis of regional equality, rather than the equality of individual provinces the United States model suggested. There were originally three regional "Divisions" designated: (a) the Maritime Provinces (Nova Scotia and New Brunswick), (b) Quebec, and (c) Ontario. Each Division was given equal representation in the Senate, and the Maritime seats were divided equally between Nova Scotia and New Brunswick.¹⁵⁶ As the country grew, a fourth division was created to accommodate the western provinces, and additional seats were added for Prince Edward Island, Newfoundland and the northern Territories.¹⁵⁷ To provide a measure of protection against the risk of parliamentary deadlocks, if a change of governing party in the House of Commons left the Senate in the control of opposition party appointees, s. 26 of the 1867 constitution permitted a temporary increase in the size of the Senate, by the addition of either one or two seats to each division. This device has been employed only once: by the conservative Mulroney government in 1990.¹⁵⁸

Representation in the House of Commons has always been on a rough, but far from exact, "rep by pop" basis. Initially, there were 181 members, divided as follows: Ontario, 82; Quebec, 65; Nova Scotia, 19; New Brunswick 15.¹⁵⁹ The addition of new provinces and territories, as well as demographic shifts over time, have required regular changes to the number and distribution of House of Commons seats.¹⁶⁰ While these changes have reflected population distributions across the country in an approximate fashion, special accommodations have always been made to ensure

¹⁵⁴ *Constitution Act, 1867*, s. 53.

¹⁵⁵ R.A. MacKay, *The Unreformed Senate of Canada* (Toronto: McClelland and Stewart, 1963); F.A. Kunz, *The Modern Senate of Canada, 1925-1963* (Toronto: University of Toronto Press, 1965); Centre for Constitutional Studies, *The Canadian Senate: What Is To Be Done?* (Edmonton: University of Alberta, 1988).

¹⁵⁶ *British North America Act, 1867*, ss. 21-22.

¹⁵⁷ *Constitution Act, 1867*, ss. 21-22.

¹⁵⁸ The legal validity of the exercise was affirmed in *Re: Appointment of Senators*, (1991) 78 D.L.R. (4th) 245 (B.C.C.A.); *Singh v. Canada* (1991) 3 O.R. (3d) 429 (Ont. C.A.); *Weir v. Canada* (1991) 84 D.L.R. (4th) 39 (N.B.C.A.).

¹⁵⁹ *British North America Act, 1867*, 30-31 Victoria, c. 3, s. 37.

¹⁶⁰ *Constitution Acts, 1871 (Provinces) and 1886 (Territories)*.

fair representation for smaller provinces and sparsely populated areas. Although representation arrangements for the House of Commons were set out in the constitution, they are capable of modification, within limits, by the Parliament of Canada acting alone.¹⁶¹ The proportional principle must always be respected, however. The constitutional amending formula adopted in 1982 entrenched, for the first time, the “principle of proportionate representation” of the provinces in the House of Commons, requiring that the constitution not be amended in respect of that principle except by resolution of parliament and the legislatures of seven provinces, representing 50% of the population.¹⁶² This was not a guarantee of strict “rep by pop,” but only of ongoing adherence to the traditional rough balance between the principle of proportionality and the special needs of certain provinces and areas.¹⁶³

The legislative powers of parliament have already been discussed. Parliament was also given certain incidental powers and privileges worthy of mention. The basis for these prerequisites was s. 18 of the *Constitution Act, 1867*, which originally read as follows:

The Privileges, Immunities and Powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

This provision played a brief role in the infamous “Pacific Scandal” that brought down the first Macdonald Government in 1873, and it was later amended as a result.¹⁶⁴ When charges of governmental corruption in financing the proposed railroad to the Pacific coast were first raised in parliament, Macdonald proposed the creation of a parliamentary committee to investigate the matter. When others demanded that the Committee be given the right to examine witnesses on oath, an *Oaths Act* was passed giving it that power. Macdonald and others were doubtful that parliament could grant such authority to its committees, and they turned out to be right. Section 18 restricted the privileges it bestowed to those enjoyed by the British parliament in 1867. Although the British parliament gave itself the right to examine under oath in 1871, it had not possessed that power in 1867. The *Oaths Act* was accordingly disallowed by British authorities and an earlier statute, granting similar power to the Senate, was also declared to be unconstitutional. This was the first and only British disallowance of Canadian legislation. Its impact was temporary, as regards both the political scandal and the constitution. The scandal continued unabated, fuelled by newspaper disclosures, a royal commission inquiry which, as an executive rather than parliamentary emanation, had full examination powers, and a calamitous House of Commons debate. Future parliamentary privileges were expanded by an amendment in 1875 to permit granting any privilege enjoyed by the British parliament from time to time.

¹⁶¹ *Constitution Act, 1867*, ss. 40, 51.

¹⁶² *Ibid.*, s. 42(1)(a).

¹⁶³ *Campbell et al. v. Attorney General Canada* (1988), 49 D.L.R. (4th) 321 (B.C.C.A.).

¹⁶⁴ Hodgins, *supra* note 117 at 13-19.

The privileges of parliament have never been exhaustively articulated.¹⁶⁵ Apart from a few specific matters, such as the power to examine witnesses on oath granted in 1875, parliament's privileges are still determined by reference to British practice; it possesses those powers and immunities that the United Kingdom's Parliament holds from time to time, either by past tradition or by post-1867 legislation. These are diverse, and in some cases remarkably powerful. Individual members of parliament enjoy freedom from subpoena and certain other legal processes while parliament is in session, as well as for a reasonable period before and afterwards. They are immune from legal consequences for anything they say in parliament, regardless of how false or defamatory it might be. The individual houses of parliament, the Senate and the House of Commons, enjoy a variety of collective privileges which include: the right to prevent intrusions into parliamentary precincts by anyone, even the police, without the Speaker's permission;¹⁶⁶ expulsion or other discipline of its own members;¹⁶⁷ compulsion of citizens to appear before the House or one of its committees;¹⁶⁸ and arbitrary punishment for contempt of the House.¹⁶⁹ It has also been held that parliament is immune from labour relations legislation concerning its employees, unless made subject to the legislation by an explicit reference therein.¹⁷⁰ There is a school of thought, not yet conclusively affirmed or denied, that in the exercise of these collective rights, the houses of parliament are not even required to observe the requirements of the *Canadian Charter of Rights and Freedoms*.¹⁷¹

F. Legislation

The seventy-two sparsely drafted public statutes, along with twenty-one private acts, enacted at the first session of the parliament of Canada began a legislative process which had produced by 1985 a body of almost 400 Public Acts, some of gothic proportions and labyrinthine complexity, comprising thousands of pages of often turbid text. Regulations and other forms of secondary legislation, filling in details of regulatory schemes outlined in the statutes, have been correspondingly profuse.¹⁷² The annual accumulation of statutes has been consolidated and revised

¹⁶⁵ W.F. Dawson, *Procedure in the Canadian House of Commons* (Toronto: University of Toronto Press, 1962).

¹⁶⁶ E.g., "R.C.M.P. Denied Permission to Search M.P.'s Office" *Winnipeg Tribune*, 1 December 1979, at 18.

¹⁶⁷ E. Campbell, "Expulsion of Members of Parliament" (1971) 21 *University of Toronto Law Journal* 15. Canada's best known use of this power was the expulsion of Louis Riel, after his election as a member of parliament from Manitoba, in 1874: see G.F.G. Stanley, *Louis Riel* (Toronto: Ryerson Press, 1963), and Canada, *House of Commons, Journal*, viii, 1874, 67-71.

¹⁶⁸ N. Ward, "Called to the Bar of the House of Commons" (1957) 35 *Canadian Bar Review* 529.

¹⁶⁹ *Ibid.*; also, *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273; 113 *English Reports* 419.

¹⁷⁰ *Re: House of Commons and Canada Labour Relations Board* (1986), 27 D.L.R. (4th) 481 (F.C.A.).

¹⁷¹ See dissenting reasons for judgment in *New Brunswick Broadcasting Co. Ltd., et al. v. Donahoe et al.* (1991), 80 D.L.R. (4th) 111 [1993] 1 S.C.R. 319. The majority held the *Charter* to be binding on the House.

¹⁷² The Economic Council of Canada noticed with concern in 1978 the fact that federal regula-

at intervals of between 15 and 25 years: 1886, 1906, 1927, 1952, 1970 and 1985. Secondary legislation has not been as efficiently handled, but there were consolidations in 1889, 1949, 1955 and 1978.

For more than a century, parliament was content to trust the judgment of the administrative agencies to which it delegated authority to enact regulations and other subordinate legislation, supervised only by the possibility of judicial review if administrators departed so markedly from acceptable norms as to exceed their jurisdiction. In 1968, however, a special committee of the House of Commons, chaired by Mark MacGuigan, M.P., recommended a standing joint committee of the Senate and House of Commons be responsible to examine and report upon compliance of all federal regulations and other statutory instruments with constitutional rights and other norms of fairness and administrative propriety.¹⁷³ This step was eventually taken.¹⁷⁴

As the twentieth century progressed, the complexity of modern legislative problems, and the sheer volume of the statute books, posed increasing difficulties for the traditional parliamentary method of law-making. While the process was perhaps no more cumbersome than necessary, to ensure that relevant interests and points of view were adequately considered, the severe time pressures under which most members of parliament functioned, their limited expertise on many legislative topics, and their understandable pre-occupation with political questions, meant that ordinary law-making, the day-to-day enactment and revision of legislation needed to keep the legal system in line with social needs, received only short, sporadic attention. As law became more complicated, the problem grew more serious. In 1970 it was finally recognised that a permanent institution was needed to assist parliament with methodical law reform on an ongoing basis. The Law Reform Commission of Canada was established¹⁷⁵ with the mandate, in the words of Minister of Justice John Turner, to "give us a continuous, rather than episodic, review and reform of the law and the administration of justice in our country."¹⁷⁶ When it came into formal existence on 1 June 1971, the Law Reform Commission's primary task was to overhaul Canada's criminal law, though all other legal fields within federal competence were also within its purview.

tions filled approximately 12,000 pages in 15 volumes: *Winnipeg Tribune*, 14 October 1978, at 81.

¹⁷³ Canada, House of Commons, *Third Report of the Special Committee on Statutory Instruments*, 1968-9.

¹⁷⁴ *Statutory Instruments Act*, S.C. 1970-2, c. 38. This replaced the *Regulations Act*, R.S.C. 1952, c. 235, which had called for federal regulations to be published and laid before Parliament in certain circumstances, but was ineffective in certain respects: *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 50ff. The Standing Joint Committee did not come into being until 1974: *ibid.* at 80ff.

¹⁷⁵ *Law Reform Commission Act*, S.C. 1969-70, c. 64.

¹⁷⁶ Quoted in W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Jurileber, 1986) at 181. This book contains a concise account of the evolution of the federal commission against the background of developments in other jurisdictions, at 178ff.

The Law Reform Commission functioned vigorously for twenty years. During that period it produced 33 reports, 63 working papers and 78 published study papers.¹⁷⁷ Most of these concerned criminal law and related matters, such as police powers and evidence, though areas as diverse as cheques, administrative procedures and sterilisation of mentally disabled persons were also examined. The degree of influence exerted by the Commission is difficult to gauge. Its publications were frequently referred to in academic writings and by 1991 had been mentioned in 255 judicial decisions, including 48 Supreme Court of Canada cases.¹⁷⁸ It contributed to the manner in which justice was administered in Canada¹⁷⁹ and was often quoted abroad.¹⁸⁰ Relatively few of the Commission's recommendations were translated into legislation during its lifetime, however. The reason for that appeared to be that even when background research and initial drafting was done for it, parliament had difficulty finding the time and political inclination necessary to carry out routine law-making. The Mulroney government, as one of its most ill-advised austerity measures, abolished the Law Reform Commission of Canada in 1992.¹⁸¹ While it seemed likely that the need to reverse this unfortunate decision might eventually be recognised, the poor legislative record of the first Commission has made it clear that no future law reform mechanism will be fully effective unless it includes changes to the manner in which parliament itself deals with proposals for legislative change.

V. Judicial Matters

A. Constitutional Considerations

The 1867 constitution said little about a federal judiciary. "Administration of justice" within each province, including establishment of both civil and criminal courts, was bestowed on provincial authorities by s. 92(14). The parliament of Canada was merely given an optional power, under s. 101, to create, if it saw fit, a "general court of appeal for Canada" and "additional courts for the better administration of the laws of Canada." The governor-general was empowered by s. 96, however, to make all judicial appointments to "superior, district and county courts" in the country, including those created by the provinces.¹⁸² Section 100 empowered parliament to determine the remuneration for such judges. Security of tenure was provided all superior court judges by s. 99. Appointed during "good behaviour," they could only be removed by the governor-general on Address of Parliament.¹⁸³

¹⁷⁷ Law Reform Commission of Canada, Twentieth Annual Report, 1990-1991 at 3.

¹⁷⁸ *Ibid.* at 4.

¹⁷⁹ *Ibid.* at 5.

¹⁸⁰ *Ibid.* at 4.

¹⁸¹ The announcement was made 25 February 1992, as part of the government of Canada's budget presentation to parliament: press release, Federation of Law Reform Agencies of Canada: 26 February 1992.

¹⁸² Hogg, *supra* note 41.

¹⁸³ Hogg, *ibid.* at 167ff.; Eugene Forsey, "Removal of Superior Court Judges" in *Freedom and Order* (Toronto: McClelland and Stewart, 1974) at 148ff.

Federally selected judges were initially appointed for life, but this was reduced to age 75 by a 1960 amendment.¹⁸⁴

B. Judicial Committee of the Privy Council

At the time of Confederation, and for many years thereafter, the final appellate tribunal from all courts in British North America, as well as many other British possessions, was the Judicial Committee of the Privy Council in London. Strictly speaking, it was not a court but an “advisory” committee to recommend the manner in which the queen should dispose of prerogative appeals from courts to the crown as the residual font of justice. In practice, its “advice” had the same effect as any judgment of a final court of appeal. Although prerogative appeals by residents of the United Kingdom had been abolished long before, they had been preserved with respect to the decisions of colonial courts.¹⁸⁵

The relationship between this continuing appeal procedure and the “general court of appeal for Canada” contemplated by s. 101 of the 1867 constitution was a matter of controversy. Some wanted the new Canadian appeal court to be a tribunal of last resort; others thought that Privy Council appeals should be preserved, both as an alternative to any new court and as a tribunal for reviewing its decisions. An early intimation of this division of opinion came in 1870 when, in the House of Commons debate on a subsequently withdrawn Supreme Court bill, a member of parliament asked whether the new court would supplant the Privy Council, provoking a vigorously negative response from Sir John A. Macdonald.¹⁸⁶

The bill by which the government of Alexander Mackenzie eventually created the Supreme Court of Canada in 1875, without reference to the Privy Council when first introduced, was amended before passage to state that decisions of the Supreme Court would be “final and conclusive,” except with respect to prerogative court of appeals.¹⁸⁷ The exception was not expected to be significant, because the British government intended at the time to replace the Privy Council with a non-prerogative appeal. The “final and conclusive” provision aroused threats of disallowance from British authorities, but the dispute eventually subsided when the British decided not to create a new imperial appellate court, and the Canadian Government reluctantly acknowledged that prerogative appeals to the Privy Council would continue unabated.¹⁸⁸

In 1888 a Canadian statute abolished appeals to the Privy Council in criminal matters.¹⁸⁹ It has been suggested that this change was motivated by public resentment that it had been possible for leave to appeal to be sought from Louis Riel’s recent conviction for treason.¹⁹⁰ It was just as probable, however, that the change was a

¹⁸⁴ *Constitution Act, 1960.*

¹⁸⁵ G. Bale, *Chief Justice William Johnstone Ritchie*, vol. I: Supreme Court of Canada Historical Society (Ottawa: University of Carleton Press, 1991) at 173ff.

¹⁸⁶ *Debates*, 18 March 1870, at 570.

¹⁸⁷ *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 47.

¹⁸⁸ See Bale, *supra* note 185 at 157, 159 and 171-5.

¹⁸⁹ *An Act to Amend the Criminal Procedure Act*, S.C.C. 1888, c. 43, s. 1.

personal project of minister of justice J.S. Thompson, who introduced the measures in parliament.¹⁹¹ It was not, in any event, a development of major import. There had been no criminal appeals from British North America prior to Confederation,¹⁹² and leave to appeal was granted in only one Canadian criminal case during the first 25 years after Confederation.¹⁹³ This was partly a consequence of the great cost involved in carrying an appeal to London, and partly the result of a Privy Council policy to refuse leave to appeal from criminal convictions in normal circumstances. In the *Riel* case, for example, although a leave application was indeed launched, it was rejected by the Privy Council, with the comment that:

It is the usual rule of the Committee not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of justice is alleged to have taken place.¹⁹⁴

Even the small change brought about in 1888 was nullified, though temporarily, by a ruling of the Privy Council in 1926. It held that the parliament of Canada did not have the authority to interfere with Privy Council jurisdiction over appeals from Canada.¹⁹⁵ Parliament's power to make criminal laws was found not to extend to extraterritorial matters, such as prerogative appeals to the Crown; and because a British statute authorised such appeals the Canadian statute was void under the *Colonial Laws Validity Act*. That situation prevailed for only a few years. An imperial conference was held that same year, provoked in part by the ruling about Privy Council appeals, and it yielded the historic Balfour Declaration, which acknowledged that the senior British colonies were independent in fact, if not in law, and that steps would soon be taken to make the law correspond to reality.¹⁹⁶ The result, five years later, was the *Statute of Westminster, 1931*, granting formal independence and abolishing the legal restrictions previously placed on the autonomy of Canada and other Dominions by the *Colonial Laws Validity Act*.¹⁹⁷ Canada subsequently re-enacted the prohibition on criminal appeals to the Privy Council, and its authority to do so in its new constitutional status was, when challenged, confirmed by the Privy Council itself.¹⁹⁸

There had always been some sentiment, strongest in Quebec, that Privy Council appeals should be abolished for all types of litigation. This had been the goal of the ineffectual restriction included in the 1875 statute establishing the Supreme Court of Canada, and sporadic agitation to replace it with a workable measure continued

¹⁹⁰ C.G. Pierson, *Canada and the Privy Council* (London: Stevens, 1960) at 37.

¹⁹¹ The parliamentary debate was perfunctory: *Debates*, 19 April 1888, at 191.

¹⁹² *Ibid.* at 59.

¹⁹³ *Ibid.* at 68. The exception was *R. v. Coote* (1873), L.R.; 4 P.C. 599, in which a constitutional issue was alleged to be involved, though it was not ultimately ruled upon here.

¹⁹⁴ *R. v. Riel* (1885) 10 A.C. 675, at 677 (P.C.).

¹⁹⁵ *Nadan v. The Queen*, [1926] A.C. 482 (P.C.).

¹⁹⁶ See, generally, R.M. Dawson, *The Development of Dominion Status, 1900-1936* (London: Oxford University Press, 1937).

¹⁹⁷ *Supra* note 11 and associated text.

¹⁹⁸ *British Coal Corporation v. The King* [1935] A.C. 500 (P.C.).

over the years. When, for example, the Privy Council added fuel to a political firestorm in 1892, by overturning a unanimous decision of the Supreme Court of Canada striking down Manitoba legislation, which effectively abrogated constitutionally guaranteed protections for denominational schools in that province, a Montreal group angrily called for abolition of Privy Council appeals.¹⁹⁹ Another Quebec organisation was established in 1904 to pursue the same goal, and in 1916 the possibility was studied by the Senate.²⁰⁰ Apart from reinstating the ban on criminal appeals after the *Statute of Westminster*, however, parliament took no steps to end the judicial connection with the United Kingdom for many years.

Abolition finally came after a group of Privy Council rulings crippled the ability of the Canadian parliament to enact measures designed to alleviate economic and social devastation caused by the 1930s Depression. The government of R.B. Bennett, during its final months in power, caused parliament to pass a package of statutes relating to working conditions, social security and economic stimulation. These initiatives were inspired by Franklin Delano Roosevelt's controversial 'New Deal' measures, and came to be known as the "Bennett New Deal." The Liberal Party opposition, led by W.L. MacKenzie King, took the position that the new legislation, however desirable it might be, was beyond the constitutional competence of the parliament of Canada. After defeating Bennett's Conservatives at the polls, the Liberals referred the new legislation to the courts for a ruling on constitutionality.²⁰¹ The Privy Council decision in 1937 striking down most of the measures²⁰² triggered an outraged reaction from many Canadians, who felt the imperial appellate body was too remote from Canadian circumstances to interpret the Canadian constitution wisely. One result was the introduction in parliament in 1938 and 1939 of private members' bills seeking to abolish all Privy Council appeals.²⁰³

The constitutionality of these proposals became the subject of litigation which, after delay caused by World War II, concluded with a 1947 ruling of the Privy Council that its authority to hear Canadian appeals could be terminated by the parliament of Canada.²⁰⁴ Two years later, parliament enacted a statute, based on the earlier private bills, which did just that.²⁰⁵ Although abolition became effective in

¹⁹⁹ *Barrett v. City of Winnipeg* (1891), 19 S.C.R. 374 (S.C.C.); [1892] A.C. 445 (P.C.). The proposal to abolish Privy Council appeals, advanced by the Conservative League of Montreal, is quoted in (1894), 22 S.C.R. 577 at 620.

²⁰⁰ Mark MacGuigan, "Precedent and Policy in the Supreme Court" (1967) 45 *Canadian Bar Review* 627 at 629.

²⁰¹ W.H. McConnell, "Judicial Review of Prime Minister Bennett's New Deal" (1968) 6 *Osgoode Hall Law Journal* 39; F.R. Scott, "The Privy Council and Mr. Bennett's 'New Deal' Legislation" in *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) at 90.

²⁰² There were six distinct references in all, argued and decided approximately simultaneously, and reported in [1937] A.C. at 326, 355, 368, 377, 391 and 405 respectively. The best known of these were the *Labour Conventions Reference*, *ibid.* at 326, and the *Unemployment Insurance Reference*, *ibid.* at 355.

²⁰³ MacGuigan, *supra* note 200 at 629ff.

²⁰⁴ *Attorney General Ontario v. Attorney General Canada*, [1947] A.C. 127 (P.C.).

²⁰⁵ S.C. 1949 (2nd Sess.) c. 37, s. 3.

1949, the fact that litigation then pending was allowed to continue under the previous rules meant that the final Privy Council appeal from Canada was not concluded until 1960.²⁰⁶

The cumulative impact on Canadian jurisprudence of more than ninety years' supervision by the Judicial Committee of the Privy Council was profound. More difficult to determine is whether that influence was beneficial or harmful. Probably both. On the one hand, the often pre-eminent judges of the Judicial Committee brought a legal expertise and, in constitutional cases, an objectivity, from which Canada no doubt profited, especially in the struggle to maintain a balanced federalism.²⁰⁷ On the other, it was hard to dismiss remarks such as those made by Justice Strong during the course of argument in an early Supreme Court of Canada hearing:

The matter will be sure to go to the Privy Council. Our judgments will not make any difference there; as a matter of fact, they never do. They do not appear to be read or considered there, and if they are alluded to it is only for the purposes of offensive criticism²⁰⁸

While Justice Strong was especially bitter and outspoken, he was not alone in taking offence at the almost studied ignorance of Canadian conditions sometimes betrayed by a tribunal capable of stating:

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the Province of Montreal.²⁰⁹

It was little wonder that Canadians considered the Privy Council's finding in the "New Deal" cases, that the massive unemployment caused by the Great Depression, was not a "national emergency" sufficient to justify federal legislation,²¹⁰ to be the final straw.

VI. Supreme Court of Canada²¹¹

The first session of Canada's first parliament was only a week old when the question of creating a "general court of appeal for Canada" was first raised.²¹² Eight

²⁰⁶ *Ponoka-Calmor Oils v. Wakefield*, [1960] A.C. 18 (P.C.).

²⁰⁷ A.C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 *Canadian Journal of Political Science* 301. There are interesting insights, both positive and negative, about some of the Canadian decisions of the Privy Council in R.B. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (London: Wiedenfeld & Nicholson, 1978).

²⁰⁸ Quoted in Canada, House of Commons, *Sessional Paper 85(a)*, 1885.

²⁰⁹ *Attorney General Quebec v. Queen Insurance Co.* (1878), 3 A.C. 1090, at 1096 (P.C., per Jessel, M.R.).

²¹⁰ *Unemployment Insurance Reference*, *supra* note 202 at 366. Counsel for the government of Canada (Louis St. Laurent) admittedly conceded in argument that there was no emergency "in the strict sense" (at 358), and the Supreme Court of Canada had so ruled; but what created that "strict sense" definition of emergency were previous rulings of the Privy Council itself.

²¹¹ See generally: J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of an Institution* (Toronto: The Osgoode Society, 1985) On the early years, see: F. MacKinnon, "The Establishment of the Supreme Court of Canada" (1946) 26 *Canadian Historical Review* 260; G. Bale, *supra* note 185 at 147ff.

²¹² *Supra* note 9.

years elapsed however, before such a court came into existence. True to his 1868 promise to introduce appellate court legislation at the next session, Macdonald put before the House in 1869 a bill drafted by Strong J., an Ontario judge later appointed to the first Supreme Court of Canada. The bill attracted criticism for several reasons. It made Quebec lawyers nervous because it contained no assurance that the Court would include enough justices trained in civil law. It was also controversial because it proposed giving the Court exclusive original, trial-level jurisdiction to determine disputes over the constitutional validity of provincial legislation. The bill was later withdrawn, Macdonald explaining that it had been intended as a discussion draft rather than a final proposal. It was then circulated to prominent judges and lawyers for comment, and when Macdonald introduced a similar bill, in March 1870, it had been modified to meet some objections of parliamentary and other critics. Most notably, although the court was still to have significant original jurisdiction, it was no longer designated as the exclusive arbiter of the constitutionality of provincial laws. The problem of ensuring adequate Quebec representation on the Supreme Court remained, however. The 1870 bill was also withdrawn by the government, and although Macdonald planned to re-introduce it in 1873, the Pacific Scandal drove him from office before he could do so. The next bill, introduced in February 1875 by Téléphore Fournier, Minister of Justice in the government of Alexander Mackenzie, finally succeeded in winning parliamentary approval for creation of the Supreme Court of Canada.

The 1875 *Act*²¹³ followed the 1870 draft in several respects, but differed sharply from it by omitting any exclusive original jurisdiction for the Court. It created, instead, a federal trial-level court to be known as the Exchequer Court of Canada. It also dealt with the question of Quebec representation on the Supreme Court, by requiring two justices, one-third of the six person Court, to come from that province. The decision to give the Court an even number of members, albeit with a five-judge quorum, set the scene for not infrequent three-three splits.²¹⁴

The appellate jurisdiction of the Supreme Court was wide: almost any final decision, civil or criminal, of any court of last resort anywhere in the country could be appealed as of right, without leave to appeal. The only exceptions were that criminal matters could not be appealed if the decision of the provincial court of last resort was unanimous;²¹⁵ that noncriminal appeals from Quebec were not permitted unless the sum in dispute was at least \$2000;²¹⁶ and that exercises of judicial discretion, including decisions as to the weight of evidence, were not appealable.²¹⁷ The Court was given original jurisdiction, concurrent with that of provincial superior courts, to issue writs of *habeas corpus* in criminal and extradition matters,²¹⁸ to give

²¹³ *Supreme and Exchequer Courts Act*, S.C. 1975, c. 11.

²¹⁴ See Bale, *supra* note 185 at 241ff. When an appellate court divides evenly the decision appealed from is upheld.

²¹⁵ *Supra* note 213 at s. 49.

²¹⁶ *Ibid.* at s. 17.

²¹⁷ *Ibid.* at s. 22.

²¹⁸ *Ibid.* at s. 51.

its "opinion" on "any matter" referred to it by the Governor in Council,²¹⁹ to "report" on any proposed private bill of the Senate or House of Commons referred to it by these bodies;²²⁰ and, with the authority of provincial legislation, to determine disputes between the federal and provincial governments, or between provinces, or actions challenging the constitutional validity of federal or provincial legislation.²²¹

Although the Supreme Court has never been directly entrenched in the constitution, and theoretically could be abolished anytime by parliamentary enactment, the jurisdiction bestowed on it by legislation has been held to be constitutionally protected. When the Manitoba legislature attempted to deny Supreme Court appeals from decisions of provincial courts in relation to provincially-created grain liens, for example, it discovered that it could not override the provision of the *Supreme Court Act*, which permitted appeals from all final decisions of provincial courts.²²²

The six justices initially appointed to the Supreme Court of Canada were chosen with reasonable regard for both representativeness and competence.²²³ Liberal justice minister Edward Blake, for whom establishment of a strong and independent final Canadian appeal court was an important personal goal, selected three justices with Liberal backgrounds (Chief Justice W.B. Richards and Justices J.-T. Taschereau and W.J. Ritchie), and three Conservatives, (Justices T. Fournier, S.H. Strong, and W.A. Henry).²²⁴ In addition to the two members required to come from Quebec (Fournier and Taschereau), he appointed two from Ontario (Richards and Strong) and two Maritimers, Henry from Nova Scotia and Ritchie from New Brunswick. The absence of western representation, reflected the sparsely populated and politically less significant nature of the west. Five of the six justices had previous judicial experience, the exception being Henry who was a practising lawyer and defeated pro-Confederation politician. Three had roles in drafting the enabling Supreme Court legislation. Strong had written the 1868 draft, Ritchie had prepared a thorough critique of that draft, and Fournier had guided passage of the 1875 Act through parliament as minister of justice.

Chief Justice Richards was not in good health when appointed and this was one reason for his resigning in January 1879. His seat was filled by J.W. Gwynne, another Ontario Liberal with judicial experience, and the Chief Justiceship went to Ritchie. At about the same time, Justice J.-T. Taschereau also resigned due to ill health, being replaced by another Taschereau, Henri Elzéar, who was also a Quebec judge with Conservative links. Although these appointments were sharply criticised for having

²¹⁹ *Ibid.* at s. 52. The constitutionality of such references was upheld in *Attorney General Ontario v. Attorney General Canada*, [1912] A.C. 571 (P.C.). On the merits of the procedure, see B.L. St. Myer, "Constitutional References" (1984) *Law and Politics* 130; J.A.C. Grant, "Judicial Review in Canada: Procedural Aspects" (1964) 42 *Canadian Bar Review* 195.

²²⁰ *Supra* note 213 at s. 53.

²²¹ *Ibid.* at s. 54.

²²² *Crown Grain v. Day* [1908] A.C. 504 (P.C.).

²²³ Snell and Vaughan, *supra* note 211 at 15 were less charitable in assessing the appointments.

²²⁴ Henry had been a Reform politician at one point, but had shifted his allegiance to the Tories. Bale, *supra* note 185 at 647 quotes a complaint by a disgruntled Liberal about the degree of Tory representation on the Court.

been made by the Mackenzie government after its defeat at the polls, and before Macdonald's Conservatives took office again, the two new justices proved to be sound choices.

Until Henry's death in 1888, membership of the Court remained unchanged. That period of stability ought to have presented an opportunity for the Court to establish its leadership in Canadian legal matters, but in fact the years of Ritchie's chief justiceship (1879-1892) were intensely troubled. The Court was bitterly criticised, frequently circumvented, and riven by internal dissension. Almost every year from 1879 until 1886 private members' bills in parliament called either for the abolition of the Court or severe restrictions on its jurisdiction.²²⁵ While none stood much chance of passage, their persistence and the seriousness with which they were treated by the Macdonald government vividly illustrated the Court's problematical status during the first decade and more.

To some extent, the problems were inherent in the Court's mandate and structure. Inevitably a court with two-thirds of its members grounded exclusively in common law would have difficulty deciding civil law disputes from Quebec. Predictably the élite of the Ontario bar, who plied their trade in the professionally populous and sophisticated precincts of Osgoode Hall, would sneer at a court that attempted to direct Canada's legal system from the rough mill town of Ottawa, and would not happily entrust the interpretation of common law principles to a court composed even in part of Quebec civilians. It was also a foregone conclusion that the Court's prestige would be undermined by the possibility that cost-conscious litigants could leapfrog it entirely by the *per saltum* procedure for appeal directly from provincial courts to London's Privy Council. The Privy Council further eroded confidence in the Court by overruling it in numerous early decisions, most notably in constitutional matters, where British judges had difficulty understanding federalism. Chief Justice Ritchie and his colleagues could not control such factors.

Some of the blame for the Court's troubles rested with the justices themselves, however. For the most part, they carried out their duties competently, if uncoordinatedly,²²⁶ but the blunders of Justice Henry became notorious. Justice Strong in an 1880 letter to Prime Minister Macdonald, described Henry's judgments as "long, windy, incoherent, masses of verbiage, interspersed with ungrammatical expressions, slang and the veriest legal platitudes inappropriately applied."²²⁷ The "absurdity" of Henry's work, he complained, was proof of "the incompetency of the Supreme Court," and "nothing but his removal from it can save the unfortunate court."²²⁸ The mere fact that a Supreme Court justice could write such a letter about a colleague to a politician showed that these were dark days for the Court. Justice Strong's verbal attacks were by no means directed solely at Henry. Nor were they restricted to confidential letters; his loose and acrid tongue created much mischief for the Court.

²²⁵ Snell and Vaughan, *supra* note 211 at 28ff.

²²⁶ For a discussion of varying assessments of the quality of the Court's work, see Bale, *supra* note 185 at 247ff.

²²⁷ National Archives of Canada [NAC], Macdonald Papers, 148624-39, Strong to Macdonald, 9 February 1880.

²²⁸ *Ibid.*

The Strong-Henry feud was not the only internecine dispute among the Court's members; Ritchie and Gwynne also carried on a prolonged public debate, over the affairs of a church to which they both at one time belonged.²²⁹ A chief justice with conciliatory talents might have been able to contain or neutralise some of these corrosive rivalries; but Chief Justice Ritchie, though a strong lawyer and an energetic administrator, was too proud, too principled, and too stubborn to do so. When Strong succeeded him as chief justice, after Ritchie's death in 1892, his legendary testiness did nothing to improve the situation.

Gradually, the significance of the Supreme Court's role grew as an important intermediate court of appeal, and increasingly as a *de facto* court of final resort. It would be a long time, however, before the Court won the respect customarily accorded to a nation's highest judicial body. Even in 1950 when, after the abolition of Privy Council appeals, Chief Justice Rinfret attempted to organise some public, social or ceremonial event to celebrate the Supreme Court's new supremacy, the St. Laurent Government refused to ask parliament to provide the necessary funding since, as Rinfret put it, "they were afraid that that would give rise to too many difficulties, and possibly some unpleasantness."²³⁰ It was not until the Court was well into its fourth quarter-century that it began to be seriously regarded as a major component in the Canadian constitutional structure.

The size of the Court, its five-judge quorum requirement, and the fact that its members held lifetime appointments, combined to create difficulties in the early years. The illness or other indisposition of more than one justice at the same time, a not uncommon situation whenever the Court included elderly members, often made sittings impossible. The first respite came in 1896, when the quorum was reduced to four.²³¹ In 1918 the possibility of appointing *ad hoc* justices to fill gaps in the Court's establishment brought further temporary relief.²³² The size of the Court increased to seven in 1927, and at the same time its justices were required to retire at age seventy-five.²³³ Mandatory retirement did not eliminate all age-based problems, since justices such as Robert Taschereau suffered decline well before the age of seventy-five; but it did at least avoid pathetic situations like those of J.W. Gwynne and John Idington, who clung tenaciously to office until the ages of 87 and 86 respectively, long after they could serve the Court competently. In 1949, the year the Court finally became "supreme" in fact, it was expanded to nine justices,²³⁴ and in 1968 the Court's efficiency was significantly increased by authorisation to employ law clerks.²³⁵ In 1977 Chief Justice Laskin successfully obtained partial inde-

²²⁹ Bale, *supra* note 185 at 276ff.

²³⁰ Snell and Vaughan, *supra* note 211 at 196.

²³¹ S.C. 1896, c. 14. A previous amendment (S.C. 1889, c. 37, s. 1) had permitted four judge panels where a judge had been involved in previous proceedings.

²³² S.C. 1918, c. 7, s. 1.

²³³ S.C. 1926, c. 7, s. 1. The constitutionality of this change was open to doubt, since judges of "superior courts" had life tenure at that point under s. 99 of the *British North America Act, 1867*. While the legislation creating the Supreme Court of Canada did not designate it as a superior court, the nature of its jurisdiction and powers would suggest that it was such in fact.

²³⁴ S.C. 1949 (2nd Sess), c. 37, s. 1. Privy Council appeals were ended by s. 3.

pendence from the department of justice, which hitherto held total control over its funding and budgeting, while at the same time the Court's single most frequent litigant.

Growing case loads were chiefly responsible for a gradual shrinkage in the jurisdiction of the Court. Reference has already been made to removal in 1887 of the trial-level duties that justices originally had as members of the Exchequer Court. The power of individual justices to review criminal convictions by means of *habeas corpus* writs had been severely narrowed the previous year through interpretation by the Court itself, as a result of an unseemly jurisdictional tug-of-war between Justice Henry and the courts of British Columbia.²³⁶ Increasingly restrictive monetary and other limits on the right to bring appeals to the Supreme Court were enacted in ensuing years. Then in 1975 the Court secured authority to exercise extensive control over its own jurisdiction, by an amendment making most appeals subject to receiving leave to appeal from the Court, or from the court appealed from.²³⁷ To obtain leave, applicants had thereafter to persuade the Court that the case involved a question or issue of such "importance ... nature or significance as to warrant a decision by it." The power of the Governor-in-Council to refer questions to the Court remained, and the Court still had to hear appeals from decisions of provincial courts of appeal on questions similarly put to them by lieutenant-governors. The change nevertheless gave the Court substantial control over its future agenda.²³⁸

The influence of the Supreme Court of Canada on the country's private and public law, although minimal for many years, became increasingly profound. One consequence was that a legal system long dominated by British case law came to rely primarily on Canadian jurisprudence. Comparing the case law cited in arguments before the Supreme Court of Canada in 1949, the last year in which appeals to the Privy Council were still generally available, with that referred to in Court arguments in the first third of 1990 showed the change.²³⁹

Reporter	British Cases	Canadian Cases	United States Cases	Commonwealth and other caes	Total
[1949] S.C.R.	265 (59%)	170 (38%)	9 (2%)	2 (1%)	446
(1990) S.C.R.	90 (15%)	438 (72%)	78 (12%)	6 (1%)	612

²³⁵ Snell and Vaughan, *supra* note 211 at 223.

²³⁶ *Re: Sproule* (1886), 12 S.C.R. 140 (S.C.C.). See: Bale, *supra* note 185 at 233ff., and W.F. Bowker, "The Sproule Case" in Louis Knafla, ed., *Law and Justice in a New Land* (Toronto: Carswell, 1986) at 233.

²³⁷ S.C. 1974-6, c. 18, s. 5.

²³⁸ See: S.I. Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance" (1982) 3 *Supreme Court Law Review* 479.

²³⁹ It is worth noting that the cases listed for 1990 in this chart were taken from only one of three volumes of the *Supreme Court Reports* for the year. The total cases cited in Supreme Court judgments in 1990 were between three and four times as numerous as in 1949. A jurisprudence explosion had occurred.

Another sign of the Supreme Court's growing importance was establishment in 1980 of the *Supreme Court Law Review*, dedicated exclusively to the work of the Court and a rich resource for anyone interested in the institution.

The quality of Supreme Court law-making will always be a subject of considerable controversy, especially in the realm of private law.²⁴⁰ Its treatment of Quebec's Civil Code has been often criticised,²⁴¹ though some observers seem to have concluded that despite several notorious instances of civil law distortion by the Court's common law majority, especially in the early years,²⁴² such intrusions diminished in frequency in later years,²⁴³ and never had a serious impact on the civil law of Quebec.²⁴⁴ What is undeniable is that Professor Bale's observation, made in regard to the Court's first two decades, that the Supreme Court failed to grasp its "unique, early chance to foster cross-fertilization between our two great legal cultures,"²⁴⁵ continued to be true long after the Court's centenary had passed.

As the Supreme Court of Canada finally settled into a leadership role, it became increasingly clear that its function was "political" in nature: not in the narrow partisan sense, but in the "small p" sense of making policy choices concerning the type of society that should prevail in Canada. Although the most obvious instances of this phenomenon involved constitutional questions²⁴⁶ and other matters of public law,²⁴⁷ even the Court's choices of direction in private law areas, such as medical negligence²⁴⁸ or trespass,²⁴⁹ often called for a sophisticated weighing of social values.

Indicative of the modern Court's self-image, as a shaper and modifier of the law, has been its changed approach to judicial precedent. Whereas the Privy Council relied on the theory that it was merely an advisory body, rather than an adjudicative tribunal, to avoid having to follow undesirable precedents, the Supreme Court of Canada took the position prior to 1949 that it was obliged by strict rules of *stare decisis* to treat previous rulings of both the Privy Council and the Court itself as binding upon it.²⁵⁰ Not long after finding itself at the pinnacle of the Canadian legal

²⁴⁰ See generally: P.C. Weiler, *In the Last Resort* (Toronto: Carswell, 1974).

²⁴¹ P. Azard, "La Cour Suprême du Canada et l'Application du Droit Civil de la Province du Québec" (1965) 43 *Canadian Bar Review* 553; P. Patenaude, "Le Québec et la Cour Suprême" (1976) 14 *Alberta Law Review* 138.

²⁴² Snell and Vaughan, *supra* note 211 at 230ff.

²⁴³ D.J. Wheat, "Disposition of Civil Law Appeals by the Supreme Court of Canada" (1980) 1 *Supreme Court Law Review* 424.

²⁴⁴ J.-L. Baudouin, "L'Interpretation du Code Civil du Québec par la Cour Suprême du Canada" (1975) 53 *Canadian Bar Review* 715; G. Le Dain, "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level" (1967), 2 *La Revue Juridique Thémis* 107.

²⁴⁵ *Supra* note 185 at 260.

²⁴⁶ E.g.: *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.); *R. v. Morgentaler et al.* (1988), 4 D.L.R. (4th) 385 (S.C.C.).

²⁴⁷ E.g.: *R. v. Lavallee* (1991), 55 C.C.C.(3d) 97 (S.C.C.).

²⁴⁸ E.g.: *Hopp v. Lepp* (1981) 112 D.L.R. (3d) 67 (S.C.C.); *Reibl v. Hughes* (1981), 114 D.L.R. (3d) 1 (S.C.C.).

²⁴⁹ E.g.: *Harrison v. Carswell* (1976), 63 D.L.R. (3d) 68 (S.C.C.).

²⁵⁰ *Stuart v. Bank of Montreal* (1909), 41 S.C.C. 516 (S.C.C.).

system, however, the Supreme Court began to consider such precedents as merely persuasive authorities, entitled to serious and respectful consideration but capable of being departed from when circumstances indicated the need for a change in the law.²⁵¹ Examples of its exercise of that principle are now numerous.²⁵²

Legal trends rarely develop in a linear fashion. Like social trends generally, they exhibit pendular characteristics, swinging back and forth through cycles of reform and reaction while the fulcrum of the pendulum slowly advances. This was certainly true for the Supreme Court of Canada's gradual transformation from obedient intermediate court of appeal to reformer of the law. Its first decade or so as Canada's court of last resort brought considerable activism,²⁵³ such as in its consistent refusals to allow governmental authorities in Quebec to harass or suppress the efforts of Jehovah's Witnesses to proselytise their faith.²⁵⁴ The 1960s and 1970s were generally years of mild retreat,²⁵⁵ particularly disappointing to those who believed that enactment of the non-constitutional *Canadian Bill of Rights* in 1960 gave the Court an excellent opportunity to extend the libertarian initiatives it had authored in the previous decade.²⁵⁶ When the *Canadian Charter of Rights and Freedoms* was added to the constitution in 1982, accompanied by unmistakable signals that the politicians who created it intended the courts to take it seriously, the pendulum swung sharply back in the activist direction. It has currently returned to a more moderate position.²⁵⁷

It was not just in *Charter* litigation that the Court plunged back into "small 'p' politics" in the 1980s. In a 1981 challenge to the federal government's unilateral power to request the British parliament to make the constitutional amendments that created the *Charter*, as well as patriating the Canadian constitution and establishing a domestic amendment process for the future, the Supreme Court rendered a Solomon-like decision, political to its core. Legally speaking, the Court held, the Government of Canada was entitled to approach British authorities unilaterally; but to do so would violate a long-standing political convention by which such requests ought to be supported by substantial consent from the provinces, which consent did

²⁵¹ MacGuigan, *supra* note 200, writing in 1967, made the case for a more flexible approach, concluding that it was as yet uncertain whether the Supreme Court's attitude had changed. It would soon be clear that it had changed, influenced perhaps by a dramatic reversal by the British House of Lords in 1966 of its formerly rigid adherence to its own previous decisions: [1966] 3 All E.R. 77.

²⁵² E.g.: *Minister of Indian Affairs v. Rainville et al.* (1983) 139 D.L.R. (3d) 1 (S.C.C.), re: Supreme Court precedents; *Vetrovec v. The Queen* (1982), 136 D.L.R. (3d) 89 (S.C.C.), re: Privy Council precedents.

²⁵³ V.C. MacDonald, *Legislative Power and the Supreme Court in the Fifties* (Toronto: Butterworth's, 1961).

²⁵⁴ W. Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight For Civil Rights* (Toronto: University of Toronto Press, 1989); W. Kaplan, "The Supreme Court of Canada and the Protection of Minority Dissent: The Case of the Jehovah's Witnesses" (1990) 39 *University of New Brunswick Law Journal* 65; F.R. Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959).

²⁵⁵ D. Gibson, "And One Step Backward: The Supreme Court and Constitutional Law in the Sixties" (1975) 53 *Canadian Bar Review* 621.

²⁵⁶ W.S. Tarnopolsky, *supra* note 151.

²⁵⁷ Gibson, *supra* note 153.

not exist at that time.²⁵⁸ The Court's willingness to rule on the completely non-legal issue of political convention, a radical departure from its past practices, forced the federal government to postpone its solo mission to Westminster and convene instead the federal-provincial conference at which agreement was finally reached with nine out of ten provinces²⁵⁹ on a "patriation package" of constitutional amendments. That agreement, after many frustrating years of failed discussions, was unquestionably the result in large part of the political pressures exerted against federal and provincial negotiators by the Court's ruling.

The appointment of justices to the Supreme Court of Canada had always been a topic of considerable public interest, and as the Court's 'political' role became more pronounced and better understood, this interest intensified. Questions of the Court's 'representativeness' loomed especially large in the public's eye. To what extent did membership of the Court reflect the various segments and strata of Canadian society, and the range of ideological inclinations held by Canadians? Within certain rather narrow perimeters of orthodoxy, the selection of Supreme Court justices has always been made with an eye to representativeness. Some of the governing conventions have changed over time; others have remained relatively constant.²⁶⁰ As the inaugural appointments of the Mackenzie government indicated, regional factors were important from the beginning. The absence of western representation ended with appointment of Manitoba's Chief Justice A.C. Killam in 1903, and a second western position, eventually allocated to British Columbia, was added when the increased size of the Court permitted. Quebec's share of the posts became three, usually matched by three from Ontario, and the Atlantic provinces retained their allocation of two seats, despite the addition of Prince Edward Island and Newfoundland to the region.

A rough religious balance between Protestants and Roman Catholics, but with Protestant primacy, was considered important until about the 1960s. The elevation of Patrick Kerwin, a Catholic, to the chief justiceship in 1954, indicated a weakening of that factor, and appointment of Bora Laskin, a Jew, to the Court in 1970, signalled its demise. Other elements were added: a convention that the Chief Justiceship should alternate between Anglophones and Francophones,²⁶¹ and, after the appointment of Bertha Wilson in 1981, an acknowledgement that both genders ought to be represented on the Court. Gender equality is not yet a goal, however.

Political representativeness has always been significant, but there has been a shift over the years from the initial attempts to make the Court appear balanced between Liberals and Tories to a greater emphasis on the "small p" political inclinations of appointees. Appointment of the "liberal" Bora Laskin as Chief Justice of Canada by the Trudeau government in 1973, instead of "conservative" Ronald Martland who,

²⁵⁸ *Patriation Reference* (1981), 125 D.L.R. (3d) 1 (S.C.C.).

²⁵⁹ Quebec refused to concur, the Quebec delegation having been excluded from the crucial informal discussions upon which the agreement was based.

²⁶⁰ G. Adams and P.J. Cavalluzzo, "The Supreme Court of Canada: A Biographical Study" (1969), 7 *Osgoode Hall Law Journal* 61.

²⁶¹ Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1966).

as the senior puisne justice, was indicated by convention, illustrated this tendency; and selection of Anglophone liberal, Brian Dickson, over Francophone conservative, Jean Beetz, to succeed Anglophone Laskin as chief justice in 1984 may have been another, although it was rumoured at the time that Beetz had been offered the position and had declined for reasons of health. Fortunately, the risk that such attempts at forum-shaping could transform the Court to a stage for judicial puppetry has been kept to a minimum by factors beyond the managerial reach of politicians: their ever-changing political fortunes, the complexity and variability of justices' personalities (both Laskin and Dickson shifted markedly to the right in their final years on the bench), to say nothing of the integrity and commitment to judicial objectivity that most Supreme Court appointees have exhibited in at least partial measure.

To describe the Supreme Court of Canada as an "institution" is deceptive in an important sense. It is not an abstraction but a group of people charged with making important decisions affecting all Canadians. Like all other decision-making by human beings, the adjudicative process is heavily influenced by personal factors. This is especially true of a tribunal like the Supreme Court, because the group is so small and the personal dynamics between its members are so important. It is accordingly impossible to understand the Court as an institution without knowing a great deal about the individuals who have comprised it over the years. Students of the Court will find great illumination in biographical material concerning both the massive figures like Chief Justices Ritchie,²⁶² Duff,²⁶³ Laskin,²⁶⁴ and Dickson,²⁶⁵ and less well-known but nevertheless significant judges like Gwynne,²⁶⁶ Idington, H.E. Taschereau, Kerwin,²⁶⁷ Rand,²⁶⁸ Martland,²⁶⁹ Hall,²⁷⁰ Pigeon, Beetz,²⁷¹ and Wilson.²⁷²

²⁶² Bale, *supra* note 185.

²⁶³ D.R. Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984).

²⁶⁴ A symposium on the work of Laskin appears in (1985) 35 *University of Toronto Law Journal* at 320-727. For a bibliography of his work and an appreciation by Dickson, C.J.C., see: (1984) 6 *Supreme Court Law Review*, xxiff.

²⁶⁵ R.Penner, ed., *The Dickson Legacy* (Winnipeg: Legal Research Institute, 1992).

²⁶⁶ P. Romney, "From Railway Construction to Constitutional Construction: John Wellington Gwynne's National Dream" in Gibson and Pue, *supra* note 60 at 95.

²⁶⁷ R.P.H. Balcome, E.J. McBride, and D.A. Russell, *Supreme Court of Canada Decision-Making* (Toronto: Carswell, 1990) at 135ff.

²⁶⁸ *Ibid.* at 23ff.; W.R. Lederman, "Mr. Justice Rand and Canada's Federal Constitution" (1979-80) 18 *University of Western Ontario Law Review* 31.

²⁶⁹ Balcome, *et al.*, *supra* note 267 at 243ff.

²⁷⁰ D. Gruending, *Emmett Hall, Establishment Radical* (Toronto: Macmillan, 1985).

²⁷¹ K.E. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990).

²⁷² S. Gwyn, "Sense and Sensibility", *Saturday Night*, July 1985.

VII. The Exchequer Court and The Federal Court

Section 101 of the 1867 constitution authorised the creation by parliament, along with a “general court of appeal for Canada,” of additional courts “for the better administration of the laws of Canada.” The same statute that set up the Supreme Court of Canada in 1875 also established a court called the Exchequer Court of Canada.²⁷³ Given exclusive authority to entertain actions against the crown in the right of Canada,²⁷⁴ it also had jurisdiction concurrent with that of the provincially-created courts, in actions by the crown in the right of Canada.²⁷⁵ The Court was empowered to sit anywhere in the country,²⁷⁶ and all questions of fact or evidence were to be determined on the basis of the law of the province or territory where the matter originated.²⁷⁷

Initially, judges of the Exchequer Court were all members of the Supreme Court of Canada.²⁷⁸ This arrangement undermined the ability of the Supreme Court to manage its growing responsibilities, restricted the ability of the Exchequer Court to go on circuit, and created an awkward situation when Exchequer Court decisions were appealed to the Supreme Court, especially if the judge appealed from sat with his colleagues in appeal from his own decision.²⁷⁹ These difficulties ended in 1887, when Supreme Court justices ceased to sit in the Exchequer Court,²⁸⁰ and G.W. Burbidge,²⁸¹ former deputy minister of justice and an influential participant in the work that eventually produced the *Criminal Code* of 1892, was appointed to the Exchequer Court on a full-time basis. He served in that capacity until his death from overwork in 1908, following what one obituary described as “an almost unbroken itinerary from Ottawa to Dawson and thence to Charlottetown.”²⁸²

Jurisdiction of the Exchequer Court expanded on a piece-meal basis in ensuing years, embracing disputes over trademarks, copyrights and patents, maritime matters, anti-combines prosecutions, and even divorces, in some circumstances. To deal with its expanded responsibilities, the Court’s membership was gradually increased, reaching eight, seven puisne judges and a “President,” by 1970.²⁸³

²⁷³ *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 1; F. Iacobucci, “The Federal Court of Canada: Some Comments on its Origin, Traditions and Evolution” (1990), 11 *Advocate’s Quarterly* 318; Peter W. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) chapter 1.

²⁷⁴ *Ibid.* at s. 58.

²⁷⁵ *Ibid.* at ss. 58 and 59.

²⁷⁶ *Ibid.* at s. 62.

²⁷⁷ *Ibid.* at s. 63.

²⁷⁸ *Ibid.* at s. 63.

²⁷⁹ The latter phenomenon was analysed by Bale, *supra* note 185 at 218ff.

²⁸⁰ S.C. 1887, c. 16.

²⁸¹ Brown, *supra* note 10 at 108ff; D.H. Brown, “Burbidge, George Wheelock” *Dictionary of Canadian Biography*, vol. XIII (Toronto: University of Toronto Press, 1992).

²⁸² C.M., “The Late Mr. Justice Burbidge” (1908) 28 *Canada Law Times* 222.

²⁸³ Iacobucci, *supra* note 273 at 322.

In 1970 the Exchequer Court of Canada was replaced by a new tribunal, the Federal Court of Canada.²⁸⁴ The new Court had both trial and appellate functions. The new Federal Court of Appeal, though only an intermediate appellate body, relieved the Supreme Court of Canada of some of the burden of appeals in matters previously appealed directly to the Supreme Court. Its travelling nature was unique among appellate courts.²⁸⁵ The number of judges also increased in 1970 and continued to grow thereafter, reaching 27 by 1989.²⁸⁶ The Court's jurisdiction greatly expanded as well, with the addition of exclusive jurisdiction over challenges to all federal boards and agencies, as well as concurrent jurisdiction over litigation concerning matters under the constitutional jurisdiction of parliament.

The jurisdictional ambitiousness of the 1970 legislation caused concern in provincial circles and a number of constitutional challenges to certain aspects of the new Court's ambit were launched. The most important of these resulted in a ruling by the Supreme Court of Canada that the Federal Court could not be given jurisdiction over litigation merely because it arose from activities for which parliament has legislative authority, such as extra-provincial transportation. Because s. 101 of the constitution authorised only the establishment of "additional courts for the better administration of the laws of Canada," parliament could empower the Federal Court to deal with any matter unless that matter was determinable on the basis of "laws of Canada": a distinctive body of law under federal jurisdiction. This decision led to close judicial distinctions being made, such as between contract actions against the federal crown, which are referable to the Federal Court because there are special federal laws relating to crown liability, and contract actions by the federal crown, which are governed by ordinary provincial laws.²⁸⁷ Much similar hair-splitting has ensued.

IX. Conclusion

26 October 1992 was a gloomy day in most parts of Canada. Voters across the country showed up at the polls in remarkable numbers, under generally overcast skies,²⁸⁸ to cast ballots on a referendum about proposed constitutional amendments that would, if enacted, alter federal legal institutions in major ways. The "Charlottetown Accord," a political agreement to which the governments of Canada and all ten provinces subscribed in August, called for institutional changes that included:

²⁸⁴ S.C. 1970-1, c. 1. See: Government of Canada, *The Federal Court of Canada, A Manual of Practice* (Ottawa: Queen's Printer, 1971). [Editor's note: In 1983, the Tax Review Board received statutory recognition as the Tax Court of Canada, allowing for a chief judge, an associate chief judge and "not more than ten other judges," with original jurisdiction for all appeals from the *Income Tax Act*, *Canada Pension Plan*, *Petroleum and Gas Revenue Tax Act*, and Part IV of the *Unemployment Insurance Act*, and with itinerant sittings anywhere in Canada: 29-32 Elizabeth II, S.C. 1980-3, c. 158.

²⁸⁵ W.R. Jackett, "The Federal Court of Appeal" (1973), 11 *Osgoode Hall Law Journal* 253.

²⁸⁶ Iacobucci, *supra* note 273 at 323.

²⁸⁷ *McNamara Construction (Western) Ltd., et al. v. The Queen* (1977), 75 D.L.R. (3d) 273 (S.C.C.).

²⁸⁸ *The Edmonton Journal* reported on 27 October that of 22 cities across the country only two had been sunny the previous day!

constitutional entrenchment of the Supreme Court of Canada, with a mechanism permitting provincial involvement in the appointment of its justices; radical changes in the composition and function of the Senate; alterations to the House of Commons; and a toughening of constitutional amendment provisions concerning federal institutions. The voters frowned on the Accord, rejecting it by an average of about 54% nationally. It was approved only in Ontario, Newfoundland and the Yukon.²⁸⁹ Opinions about the long-term consequences of the referendum's rejection differed sharply. Some thought the nation in jeopardy; others predicted that the perceived crisis would dissipate. At the time of writing, it is still unclear which point of view will prevail. If the country survives, the institutional reforms proposed in the Charlottetown Accord will have to be addressed, as will numberless other demands for change, unpredictable as to content, but constant over time because governmental institutions never stop evolving. The work begun in 1867 must remain unfinished, so long as the country exists.

²⁸⁹ *Ibid.* at A1.