

THE SUPREME COURT OF CANADA

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INTRODUCTION

From a positivist point of view, and just looking at the bare bones of a court, there isn't very much interesting to say about the Supreme Court of Canada. It's a court. In the first place, when we speak of a court I wonder if we ever try to define a "court". What is a court? We all have some general idea that it's a place where justice is done or decisions are made. But that is the reaction of a sort of semi-emotional notion and it doesn't reach that precision that the lawyer's mind requires.

Now a court may mean an area. The early Anglo-Saxon courts would sit under a tree if necessary. There was no building constructed at that time in which all of the present adjuncts to courts were available. They simply decided things in the open and under the great oaks, I fancy, on many occasion. So, we have this word court and we also have a Supreme Court.¹ And that implies that there are gradations. You can't have something Supreme without something that is less than Supreme. It is rather interesting that from the beginning, certainly the beginning of the Norman series of courts established under Henry II and Edward I, you'll meet this expression in some of the records that a case was referred from what were looked upon as the ordinary official courts to the king and his wiser men. I think I'd be the last one to suggest that in the hierarchy of courts you have an ascending density or depth of wisdom. Sometimes you have. But at any rate we do recognise a gradation of some sort and we have this gradation universally accepted in the west.

The existence of a court may raise a question. Why do we have courts? I think the answer is largely this. What would we do without them? Well, without them the individual himself would settle his own affairs and in the early Anglo-Saxon period that was pretty much the case, that individuals did settle their own accounts. And then in the course of time we had the dooms of the kings forbidding them to settle their

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¹ In fact in Canada several courts are designated "Supreme", as in British Columbia, which is why references to the Supreme Court of Canada should always be by its complete name.

own disputes without first resorting to community opinion (*i.e.*, to having it decided by the community), as in the hundred courts and the county courts of those days. And there interposed a factor, which is perhaps difficult for us to understand today, that the average person had little confidence in his neighbour. He wasn't willing that his neighbour or any number of neighbours should decide any issue in which he asserted something which was denied by another. The result was the system of ordeals.

The ordeal was simply the appeal to a superior spirit to do what the individual would not trust men to do. So, the organisation of courts proceeded by slow advance over the centuries. The necessity for some mode of decision is obviously due to the fact that we are individuals each with his interests, each with his assertiveness, each with his aggressiveness, which may interfere with the equal assertion and aggressiveness of his neighbour. Somebody has to draw the line. There must be a law; there must be a determination of that law; and there must be a pronouncement and a decision. We must have some means of settling this clash of interests which is characteristic of every society. Whether you consider the tribes of Africa or the masses of the West, there are clashes of interests and we must have some means of determining one way or the other what the solution will be.

FROM THE SAXONS TO THE NORMANS

We derive our organisation from the English courts and the English courts in turn evolved from the Anglo-Saxon courts. One promise made by William the Conqueror was that he would respect the customs of England. For example, he would allow the child to inherit from his father; that was a fundamental obligation. His purpose was to change the organisation from that which obtained in Normandy and in France generally at that time. In that portion of Europe, the king was more or less a figurehead. The real affective persons were the dukes. William was the Duke of Normandy and he determined that in England he would have a single organisation of the then six kingdoms of England. He would have them loaded into one kingdom and that policy was followed by his successors. And you can see it in the organisation of the courts which proceeded very shortly after his death. Under the Saxons, the essential court structure consisted of the county courts, the hundred courts, and the Witan which was the final court to which there could be no resort until the other courts had been exhausted and unless the matter was of some importance. So, it was rather crude until the Normans. If Canadians, in our confidence as primarily Anglo-Saxon, Norman and French descendants, look back over the period of time that it has taken to reach the stage of rational government, of recognising the duties of the individual as well as the community, we will rather erase any conceit because it has taken about 1500 years to reach the stage that we now expect other countries to reach in a few generations.

The Normans happen to have been the best administrators in Western Europe. They exhibited that from the very beginning. In 1087, the Domesday Book was a

massive example of their administrative power, a record of every bit of property owned by any person in that country over which the sovereignty of the Normans had been established. And at the time the community courts determined any issue that remained in doubt. The community didn't decide upon the rights or wrongs of the issue. What the community did in the county court or the hundred court was to determine who should bear the onus in the application of the ordeal. But the ordeal was the judge; the ordeal was the means of determining guilt or innocence, one man's property or another man's property.² But that soon underwent a change.

The process of centralisation was implemented by a number of very able administrators who happened to be king. Consider, for example, Henry II from whom we trace back in a lineal descent the courts which we have today. Henry II had what now would be called the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. Later, the Chancery Court arose. These courts met the condition in England of different customs. The expression "common law" derived from the fact that the royal courts under Henry II [1154-1189] and Edward I [1272-1307] administered one custom. The word "common" is derived from the fact that a particular rule or precept or standard became common to the whole of England. Now, the determination of those rules was a determination in very simple and uncomplex, uncomplicated living. We forget that in England at that time there were no great roads except the Roman roads which had been left for centuries. It was not easy to get from one county to the other. Their lives were simple and issues would rarely be anything more than trespasses. That is to say, they did have the conception of property. If I had an animal, it was looked upon as mine and possession of it was nine-points of law. This simply meant that possession was *prima facie* evidence of ownership. And so complaints in the early stages were limited to the protection of property and the protection of a person. Each man had his value. His hand was worth so much, his arm was worth so much, his eye was worth so much and anybody who deprived him of those had to pay an equivalent as was prescribed by the royal dooms or by the customs.³

Our law is fundamentally custom. Custom is un-self-conscious acceptance of a course of action which is looked upon as more generally agreeable than any other or than its qualification. So these customs being established, they became the rules of the common law and are today the basis of our law. But in order to appreciate the spirit of that law we must look not only to the social conditions, which are of the utmost

² Ordeals were a method of proof, perhaps not unlike modern reliance on lie-detector machines or truth-serum (*i.e.*, sodium pentothal) injections. The ordeal by fire administered a red-hot rod to the hand, with the healed wound as proof of innocence; and in the ordeal by water, the guilty floated and the innocent sank when thrown into deep water.

³ The first extant itemised list was that of King Aethelbert of Kent, 604, and the modern equivalent is in the claims allowance lists in medical insurance.

importance, we must look also to the underlying assumptions in the minds of those who determined what the rules should be.

Now we do know that most judges at the time of the conquest were members of the clergy. They were the educated people. They were the people who could read. They were the people who represented whatever of the Roman civilisation was available to people in Western Europe and they gave leadership. One interesting act of William the Conqueror was to declare that there must be a separation between the ecclesiastical courts and the ordinary or common law courts. Thereafter, although the bishop or priest had sat in the county court and the hundred court in all previous times, from this decree onward the bishop was denied that privilege. The ordinary courts gained something from the presence of the bishop or priest and that was the procedure of the canon law.

There was no greater subtlety than existed a thousand years ago among the canonists. In large measure, the procedures of our courts derived from canon law because it had become many-sided; it dealt with an infinite number of situations; and royal ministers had become acquainted with it. The common law, which slowly developed by decisions of the courts, and by legislative action, beginning particularly in the eighteenth and nineteenth centuries, together constituted the “stuff” of our social regulation today.

HIERARCHY OF COURTS

There is the hierarchy of our courts. The office of justice of the peace originated in the reign of Edward III [1327-1377]. They were called conservators of the peace. There was a constable who, after a certain period, walked the streets at night to give the alarm if anything happened; but the organised police is a modern institution. There was a complex of regulation that needed by the nature of things a hierarchy. Starting with the local justice of the peace, we go through the gradations until we finally reach the Supreme Court of Canada. In the early days, the appeal was not as formal and precise as it is today. The king originally sat with some of his officers and they would decide questions submitted by petition or by other means of bringing the matter to the attention of the sovereign or his representative and members of his court or of his council. The word “court” originally, and even today in one aspect, meant the entourage of a sovereign and represented the powerful men of a community. Imagine a duke coming to England, claiming the title, maintaining himself by the support of powerful men – powerful physically, powerful mentally, powerful in their inheritance or in the chance or in the good luck that might have accompanied their course.

The *British Coal*⁴ case held that it was proper for Parliament to deny Canadian appeals in criminal matters to the Privy Council. The judgment referred to the ‘King in Parliament’, that is, among wiser men; and to the ‘King in Council’ which today represents the Judicial Committee of the Privy Council. In earlier days, the Lords looked with more or less disdain, if not contempt, upon the people who did the work of the kingdom, who collected the taxes, who saw that the laws were observed, who saw that the revenue of the country was properly accounted for. The sheriff, the other officers and the court officials were not of the highest social rank at all. The evidence of that is that a lord was not tried except by his peers. *Magna Carta* [1215] intended that you couldn’t try a man otherwise than by his peers, meaning his equals, and that rule was applied primarily to the lords, the barons, the dukes and the earls. They looked upon the ordinary courts with a great deal of contempt.

Appeals developed in the course of time. They were very informal in origin and might be referred to the “wise men”, an expression then used. They looked upon the lords and powerful barons as wiser than members of the working group that carried on the business of the kingdom. That evidence of wiser men found expression in this hierarchy of courts. So, in the Canada of today, we have a hierarchy. And it is in this connection that we must look upon the Supreme Court of Canada.

A court need not be composed of lawyers. We take it for granted that it will be because the members of the court should be familiar with the laws. They should be familiar with the training and the thinking of lawyers. They should be familiar with those underlying conceptions which form the basis of their assumptions and which are deeply imbedded in the subconscious but are effective in the action of the conscious. But it wasn’t always so, even in this province. If you look in the New Brunswick statutes of 1787 you’ll find provision for the creation of a court of divorce.⁵ But the court wasn’t composed of lawyers, even though they had some good lawyers and a supreme court at that time. The Divorce Court consisted of the governor and commander-in-chief, because the governor generally held both of those offices, and his council.

Now his council might be anybody. His council weren’t necessarily lawyers, I dare say that there were very few lawyers. There might have been some but in any event there was no necessity that they be. So, this court of 1787 consisted not of lawyers but of laymen. And, at that time, or certainly shortly before that, the Assembly was the final court of appeal, as for example in the state of New York. Now all of that looks in a very valuable direction to law students or scholars who are concerned with the history of law, because it looks upon law as a social rule; as a regulation which

⁴ *British Coal Corporation v. The King*, [1935] A.C. 500, [1935] 3 D.L.R. 401 (P.C.).

⁵ *An Act for Regulating Marriage and Divorce, and for Preventing and Punishing Incest, Adultery, and Fornication*, 27 Geo. III. (1787) (N.B.), repealed and replaced by 31 Geo. III., c. 5 (1791) (N.B.).

will fit best for the particular stage of civilisation which is in question. It is not at all to be accepted that lawyers have a much better idea of which is the more appropriate regulation than do laymen. They may, they should, they are students of the past. I take this as much as relevant to all lawyers, that really lawyers are walking through life backwards. They see the past. They work upon the past. Their weakness has been that they didn't sufficiently or frequently look about them, ahead of them and to the side to see what was changing in the conditions under which the rules with which they were familiar, and which they urged to be applied, were reconcilable with changed factors in any situation.

*Bourne v. Keane*⁶ (1919) was one decision the significance of which has been overlooked. That was decided by the House of Lords in relation to the question of superstitious uses. The judgment, given by Lord Birkenhead (at least he is credited with the judgment), had to consider the question about which for 200 years there had been no doubt at all in the courts of England. It was universally held that a bequest for a mass was illegal, that it was superstitious and would not be enforced by the courts of England. It had never reached the House of Lords but in all of the subordinate courts that rule had been followed with the utmost fidelity throughout nearly two centuries. Now *Bourne v. Keane*, in my opinion, went to the very essence of the judgment of the courts of England on what we call the common law. It examined the factors upon which that rule was based. Well, among the factors were several statutes dealing with the conflict between religious views and that members of one denomination were virtually outlawed from office. They could not hold office because they could not take the oath required. They were forbidden to practice in certain ways their own religion. Those were the conditions under which the decision, that this bequest was illegal, was made. But in 1919, all of that legislative basis had been removed and that seems to give us a good idea of the proper examination of common law decisions. If we could put on television the workings and ideas of the human mind, so that we would know all the assumptions that are made unconsciously – generally, all the things that are taken for granted; then all of the attitudes which the mind assumes by virtue of its training, by virtue of its surroundings and the social context in which it appears, would have a more scientific development of the common law than we have succeeded in doing.

Now, in relation to appeals, in the early stages there was no such thing as the formal appeal. The appeal developed by way of the writ of error, which was difficult to obtain. Generally speaking, it had to be authorised by the Attorney General and limited to the question of law arising on the record. There was a distinction made between civil and criminal appeals. It was 1585 in the reign of Elizabeth that express provisions were made by which the three courts, the Queen's Bench, the Common Pleas and the Exchequer, were more or less brought together for the purposes of appeal. And if there was an appeal from one it would be by the judges of the other two and so on. In 1830 this system ended; that is to say, that an appeal from one was

⁶ [1919] A.C. 815, All E.R. 167 (H.L.).

to a bench comprising the other two which were much the same as the first, only with certain differences of formality. At that time there was no court of appeal in England. There was always the appeal that could be made, if it were allowable, to the House of Lords, which was the 'King in Parliament' in origin. And, of course, there was the appeal from the colonies, such as the estates particularly in the West Indies and any other like colony. That appeal was made not to the 'King in Parliament', but to the 'King in Council', the Judicial Committee of the Privy Council. They were not considered the wisest men. The wisest men resided in the House of Lords. And that in 1949 presented itself to Canada in a rather striking way.

Prior to the Act that abolished Canadian appeals,⁷ you had the ordinary appeal within the province and then from the highest court of final resort in the province either to the Supreme Court of Canada, provided that was within the appealable matters mentioned in the *Supreme Court Act*, or directly (*per saltem*) to the Judicial Committee in London. There could also be an appeal from the court of appeal of the province to the Supreme Court of Canada and an appeal from the Supreme Court of Canada to the Judicial Committee. That anomalous condition of affairs was relevant to the origin of the Supreme Court of Canada and it might be interesting if I refer to one or two circumstances attending the creation of that court, because it was not created by the *British North America Act*, which simply gave power to Parliament to create a general court of appeal.⁸

CREATION OF THE SUPREME COURT OF CANADA

The first legislative bill on this subject was introduced by Sir John A. Macdonald in 1869. Apparently it was not intended to do more than sound out the opinion of the members of the House of Commons and the Senate regarding such an institution. It seemed that section 101 in the *British North America Act* had been more or less agreed to as a matter of course. The Framers concluded that, in a federation with provincial courts and Dominion courts, there must be a final court of appeal for the country. And that conception was accepted by the leaders of both parties, both John

⁷ *Supreme Court Act*, S.C. 1949 (2nd sess.), c. 37, s. 3, amending R.S.C. 1927, c. 35, s. 54; the reference to a statute enacted in 1585 is to *An Act for Redress of Erroneous Judgments in the Court Commonly Called the King's Bench*, 27 Eliz., c. 8 (1585) and that of 1830 is *An Act for the More Effectual Administration of Justice in England and Wales*, 1 Wm. IV, c. 70, s. 8 (1830). Judges of the royal courts also met regularly and on record in the Exchequer Chamber, consulting about points of law raised in specific cases; but the initiative was entirely juridical, never by the litigants, and decision in the case was rendered in the court of origin.

⁸ *The Constitution Act, 1867*, s. 101: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

A. Macdonald and Alexander Mackenzie, at that time leader of the opposition Liberal Party. But there was a great difference of opinion about the advisability of a Supreme Court of Canada. There were at that time a great many residents who were British subjects whose permanent residence was not in Canada and they, of course, would have preferred to have their disputes determined by a tribunal of their own people, with whom they were more familiar than the new men of North America. In Quebec, there was dissatisfaction arising from the fact that men of wealth would carry an appeal to London, or would threaten to do it, and their opponents were unable to meet the expense of travelling to London. And, there was also the political question in Canada of the danger of centralising too much, particularly with a Court from which there would be no appeal. The 1869 Bill, after a discussion, was withdrawn and then re-introduced in 1870, when it was again withdrawn after expressions of opinion from one group or another.

It seemed to have been quiescent until 1875 when Téléphore Fournier of Quebec was Canada's Minister of Justice. He apparently felt strongly that there should be a Canadian supreme court and he, as Minister of Justice, introduced the bill. In the course of its enactment, two interesting amendments were proposed and adopted. The first was to require expressly that two of the six members of this court should come from the province of Quebec. The reason for that was clear. In Quebec, the French code governed their local relations and was accorded from the beginning and specifically in the *Quebec Act* of 1774. That was the first amendment. There wasn't any serious objection to that. British Columbia made a claim in 1875 for a similar guarantee but it was considered by the Commons that there was a real distinction between allowing this to Quebec and not allowing it to British Columbia, and that amendment was defeated.

Another amendment was as significant and more important. That was an amendment to prohibit an appeal from the Supreme Court of Canada to any court created by statute in the Kingdom of Great Britain. That aroused considerable fury on the part of those who felt that it would be the first step towards destruction of the British Empire, so far as this country was concerned. Sir John A. Macdonald, although sympathetic to the bill, said this himself. There was a bitter debate but it carried by a substantial majority in the Commons. In the Senate, it was decided by the casting vote of the Speaker. So we had a bill that declared that no appeal would be available from the Supreme Court of Canada to a court created in England by statute but, at the same time, saved the exercise of the prerogative right to appeal to Her Majesty.

The question was whether or not the Judicial Committee was a court created by statute in Great Britain. There were two statutes dealing with the Judicial Committee of the Privy Council in 1833 and 1844.⁹ These Acts created the existing Judicial

⁹ *Judicial Committee Act*, 1833, 3 & 4 Wm. IV, c. 41. (U.K.); *Judicial Committee Act*, 1844,

Committee, provided for its membership and for the regulation of appeals. It was a question taken up in the *British Coal* case, whether or not the Judicial Committee was a statute-created court of England. There were considerations on both sides but it was decided, after considerable debate and after a great deal of opposition on the part of the Colonial Secretariat, to disallow that Act. So in the beginning the Act creating the Supreme Court of Canada did contain a prohibition against an appeal except by leave of Her Majesty; that is, the exercise of what they called the prerogative right – the exemplification of taking your case to the foot of the throne. Every British subject had a right to go to the Sovereign himself, as they had gone to King William I and Henry II and Edward I to obtain justice from the ‘King in Parliament’ or the ‘King in Council’.

Of course, the *British Coal* case was decided after the Statute of Westminster, 1931. The Judicial Committee held that the two grounds upon which a previous case had been decided¹⁰ had been dealt with in the statute of 1931. These grounds were: first, that it was an interference with a prerogative outside of Canada which Canada was powerless to deal with as an interference with a sovereign right; and secondly, it was beyond the power of Canada as being extra-territorial. Today [1965], the Dominion can legislate extra-territorially. If we take the statutes of 1833 and 1844 as creating that particular court, then the statute of 1931 gave Canada the power to repeal those provisions so far as they were the law of Canada. So, it was held in the *British Coal* case that the Dominion did have the power to abolish appeals to the Judicial Committee in criminal cases. That was followed in 1949 by the general repeal of that right applicable both to appeals from the Supreme Court of Canada, as well as appeals from the provincial courts.

A great deal of argument and controversy arose over the extension of that deprivation of appeals from a court of appeal or a supreme court in appeal from a province like New Brunswick. The Acts of 1833 and 1844 gave leave to appeal not only from the highest court, the court of final resort in the province, but from any court. I remember they took a great number of appeals from the board of transport commissioners in Canada because that board was declared to be a court of record by the *Railway Act*. As a court of record dealing with questions of law, there were available two avenues of appeal: to the Supreme Court of Canada and to the Judicial Committee. So, in 1949 we finally reached the stage which Macdonald thought had been reached in 1875. In 1949, we abolished the right of appeal from any judgment in Canada to the Judicial Committee. Instead of being the first, we can say that it was the last because all political connection was done away with by the Act of 1931, which embodied in legislative form the results of the Imperial Conferences in 1926 and 1930, held by the British government with the Prime Ministers of the different Dominions.

7 Vict., c. 69 (U.K.).

¹⁰ *R. v. Nadan*, [1926] A.C. 482, [1926] 1 W.W.R. 801 (P.C.) aff’d (1925), 21 *Alta. L.R.* 193, [1925] 1 D.L.R. 429 (C.A.).

EARLY YEARS OF THE SUPREME COURT OF CANADA

Canada then had a Supreme Court. It's early history was not happy. There was always the fact that parties did not have to come to the Court. They could bypass it, *per saltem*. To some extremists in the House of Commons, the Court got those cases which otherwise would have gone to London. It was not a very happy situation. The Court was not well established. It is rather interesting to see who were members of the first Court. The Chief Justice was [Sir William Buell] Richards from Ontario who had been Chief Justice of that province. Then there was Mr. Justice [Samuel Henry] Strong, who had also been in the Chancery Court, a very powerful mind undoubtedly. Then from Quebec, there was Mr. [Télesphore] Fournier who had introduced the bill and whose violent opposition to appeals to the Judicial Committee was primarily because of the expense which deprived poor people in Quebec of what he thought were their just rights. Then from New Brunswick, there was Chief Justice [William Johnstone] Ritchie and, from Nova Scotia, Justice [William Alexander] Henry, who had been Attorney General and Solicitor General. In view of the fact that it's been published and the actual letter or report is now in the archives at Ottawa, it is interesting to know that one of these judges gave a confidential report on the others.¹¹ Well, you can imagine the embarrassment of that but this did not prevent the expression of opinion; and it is rather amusing to see how freely Mr. Justice Strong rendered his opinion of some of his brothers. I'd hate to call them brethren in that atmosphere.

I can say this because it was published in a very interesting article by Dr. Frank MacKinnon, President of Prince of Wales College in Charlottetown, who derived his material from the [National] Archives at Ottawa.¹² It is a good thing because it showed the difficulties of establishing a new court of that nature where there was a large division of opinion. There was this difference of opinion about the advisability and the desirability of the Supreme Court of Canada and an indifference towards it. There was no pride in it. Macdonald looked forward to a great institution of which this country would be proud and so did Alexander Mackenzie. The leadership was first-class but the following didn't appreciate the vision of these two men. The result was these unfortunate descriptions contained in that publication. The Chief Justice from this province was said to be lazy and not concerned with getting his work done. Well, of course, getting your work done in the Court is important enough and you're accountable. I think there is a greater sense of responsibility.

¹¹ Gordon Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: The Supreme Court of Canada Historical Society and Carleton University Press, 1991) at 206 refers to a letter written by Justice Strong to Sir John A. Macdonald concerning the "judicial capabilities of Justice Henry".

¹² Frank MacKinnon, "The Establishment of the Supreme Court of Canada" (1946) 27 *Canadian Historical Review* 258, at 271. The two basic histories of the Court are James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) and Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992).

In those days and earlier, there was a sort of transcendental aura attributed to members of the courts which had basis in actuality and not much basis in any performance. It is true that in the nineteenth century the English speaking people both in Britain and in this country were favoured with having men of outstanding ability to man their courts. The exercise of judicial power is like the exercise of power of any sort. It tends to become personal and it tends to become more drastic and it may give rise to rather silly notions of a kind that we fortunately today are not troubled with in this country.

Now that being the unfortunate origin and rise of the courts, there was also the factor of the Colonial Office in London. At the beginning, the Colonial Office was rather sympathetic to the establishment of that court, to take some of the duties off hard pressed members of the Judicial Committee in England. But towards the eighties, the Colonial Department (in the view of Professor MacKinnon) rather changed its attitude towards the Court. It looked upon the tendencies of that time as antagonistic to consolidation of the Empire. Lord Watson was looked upon as a powerful innovator of the Judicial Committee. He undoubtedly was, and he possessed a first class mind. There's no doubt about that. But a first class mind doesn't necessarily mean that the judgment of that mind is always in accord with the materials upon which it is based or that it is the best kind of judgment. Many are familiar with the *Liquidators* case in Saint John in which it was held in part that the relation of the governor of a province to the King, in respect of provincial matters, is the same as the relation of the Governor-General to the Sovereign in Dominion matters.¹³ That decision was denounced very audibly by Sir John A. Macdonald, in his vision of a powerful Canadian political organisation. He was present in all debates that preceded formulation of the Terms of Union. He was Prime Minister of the province of Canada. At times, no man had this question nearer his heart, nearer his mind, nearer his power than Macdonald. And he was present when the language was used which expressed the position of the Governor of the province.

The first paragraph of section 58 of the *British North America Act*¹⁴ dealt with the executive power of the province and did not identify the Governor so-called of a province as a Governor with the power, the jurisdiction, and the character of the office of Governor of a colony. It stated that there shall be an "officer" appointed by the Dominion government and that officer shall be called a Lieutenant-Governor and he shall have all the powers that a lieutenant-governor had prior to Confederation. Now that was the basis of the Dominion's argument. It was said that this use of the word "officer" in section 9, respecting the executive power of the Dominion, declared

¹³ *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437; aff'g (1889), 20 S.C.R. 695, aff'g (1888), 27 N.B.R. 379 (C.A.).

¹⁴ *Constitution Act, 1867*, s. 58: "For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada."

that the executive power resided in the Sovereign, the Queen.¹⁵ The idea undoubtedly was that the Governor of a province would be a representative of the Dominion government. Whether we like it or not is not the question. The question was what that language meant. Now, the tendency of Lord Watson's view was demonstrated by a quotation which to me is most significant. It is a quotation from an article written by Lord Haldane, a brilliant mind undoubtedly and a tremendous thinker; but, like every other Scot, he was essentially a metaphysician. He was writing on the death of Lord Watson:

He was an Imperial judge of the very first order. The function of such a judge, sitting in the supreme tribunal of the Empire, is to do more than decide what abstract and familiar legal conceptions should be applied to particular cases. His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitution and laws that it has provided for the British Colonies.... He completely altered the tendency of the decisions of the Supreme Court of Canada, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and the other Provinces. He then worked out as a principle the direct relation, in point of exercise of the prerogative, of the Lieutenant-Governors to the Crown. In a series of masterly judgments he expounded and established the real constitution of Canada.¹⁶

With utmost deference to the mind of a man like Lord Haldane, I would say that to treat the constitution of Canada in that manner was not justified. In the present discussion about our constitution,¹⁷ may I interject something that hasn't been said and perhaps isn't as important as I think it is but is relevant. Nobody, certainly no real student of a constitution, is going to say that a constitution made today is to last forever. In the United States we have the supreme example of constitutional government in the sense of a written constitution. Every state has one and the federal authority has one but they have been subjected to innumerable modifications. Therefore, modification of a constitution is not an issue. Of course, if the conditions justify the change, the change ought to be made. But I suggest that, before certain people begin to talk about changes in the constitution of this country, they should be rather familiar with what the present constitution is. I'm sorry to say that they give, in many cases, too much evidence that they are not familiar with the constitution.

¹⁵ *Constitution Act, 1867*, s. 9: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

¹⁶ R. B. Haldane, "Lord Watson" (1899), 11 *Juridical Review* 278, at 279-80.

¹⁷ Justice Rand is referring to the discussion on the amending formula that was devised in 1964, *An Act to Provide for the Amendment in Canada of the Constitution of Canada*. The draft bill was accepted by the Prime Minister and Premiers of every province, but when one Premier withdrew his government's support, the federal government decided not to proceed with it. See Honourable Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965).

From the very words of Lord Haldane, it was as an imperial judge that Lord Watson acted and not as a judge determining what the parties who met in London in 1866 had agreed upon and expressed by their language. That is a criticism that we can make in this country now. The existence of appeals to the Judicial Committee handicapped the Canadian courts. First, the tendency of persons is not to venture beyond his own thinking where rules are laid down for him to follow. In the second place, the Judicial Committee occupies a position of importance in the apparatus of a great state like Great Britain; and finally, where there is the appearance and the determination of men of first class ability, there is a tendency to endeavour to fit oneself into the very pattern and mold of the language that is used. It cramps individual thinking; it prevents him from thinking. We have not developed Canadian jurisprudence because of it. I state on the authority of one who was a great Canadian, and whose value will be appreciated by lawyers at least, Sir Lyman P. Duff. At the beginning of this century it was the general opinion of members of the courts of Ontario that appeals to the Judicial Committee should be abolished. Now, once abolished the effort to maintain an Empire was futile. We're not today discussing the fact of Empire, or its desirability or undesirability; we know that there is no longer anywhere on this earth, almost, and except by force, an imperial sway. The British representatives at the United Nations cannot be quick enough to point out that they have had colonies for the purposes of freeing them. And that was something that Prime Minister Macmillan of Great Britain said within the last three years. When criticised by the Russians, he pointed out a dozen colonies representing themselves at the United Nations. As has been said by many Canadians, in much more forceful language than I will use, the distortion in the interpretation of the *British North America Act* was an error. The Court was handicapped from the beginning by this exercise in semantics, reinforced by high statesmanship, that had in mind not the interpretation of a constitution but the creation of an Empire.

JURISDICTION OF THE SUPREME COURT OF CANADA

The next question is: what is the jurisdiction of the Court? How do you get there? What happens when you do get there? I would say that today the jurisdiction of the Court is almost equivalent to that of the Judicial Committee. The only exception I can find is that, before certain cases reach the Supreme Court of Canada they must have travelled as far as they can in the courts of the province. That wasn't necessary under the *Judicial Committee Acts* of 1833 and 1844. For all practical purposes, we have as wide a jurisdiction as any person could ask, or any institution could deem to be necessary to this country. There are two sorts of appeal: one as a matter of right and the other a matter of leave. Originally and down to about 1956, parties involved in litigation which could be measured in dollars and cents, of a minimum value of \$2000.00, had a right to go to the Supreme Court of Canada. That meant that you went simply by following the rules, the procedure. In 1956 that amount was increased to \$10,000.00, but at the same time section 41 of the *Supreme Court Act*, gave that Court power to grant leave to appeal in almost any case, except some criminal cases.

The criminal appeals are provided for not by the *Supreme Court Act* but by the *Criminal Code*. Very extensive rights of appeal are allowed both on the part of convicted persons and on the part of the crown. In the *Supreme Court Act*, in cases of non-indictable offences, the Court may grant leave to appeal from any criminal conviction.¹⁸ We have a Court in which an appeal can be made from the lowest court if that's the final court in the province. You must go to the final court to which that particular case could reach; but, once you've gotten to that court (it may be an appeal from a Justice of the Peace which ends at the county court), whatever that may be, there is authority to grant leave to appeal to the Supreme Court of Canada. In the nature of such appeals, it depends upon the significance and importance of the issue in the case. The docket of the Court should not be crowded with minor matters. There is a good rule that as much as possible should be settled at the provincial level. The provincial courts are familiar with local conditions but sometimes in important cases those local conditions have an unconscious effect from which a more remote court is free. We cannot ignore the fact that men have what we call the subconscious. Sub-conscious, in the course of the study of psychology and psychiatry, is daily assuming more importance. We are not aware sometimes of the influences of our sub-conscious because we haven't reached that stage of self-examination which it requires. There's no doubt that that is one reason why we should associate with the administration of justice the collateral social agencies which look to the governance of civilised human beings.

The Court enjoys this broad jurisdiction and there is no more open court in Canada, particularly I should think to the young lawyer, than the Supreme Court of Canada in Ottawa. Formerly that was not the case. I don't know why it is but maybe it may have taken its nature from the general change in circumstances and attitudes of the last generation of people. At any rate, the young lawyer who thinks his case is important enough that it ought to go to the Court will find no court that will give more attention, that will listen to what he has to say, that will treat him more generously and in good manners, than that Court. I am proud to say that because it is essential in the administration of justice that we have no false elements of superiority governing human conduct. The duty of judges to listen is equal to the duty of counsel to speak. That is the condition that ought to obtain in every court.

¹⁸ The *Supreme Court Act*, R.S.C. 1985, c. S-26, no longer provides for an appeal as of right where the amount or value of the matter in controversy in a case exceeds a specific amount. Section 40(1) of the *Act* enables the Court to control its caseload by providing that the Court may grant leave when a case is 'of such a nature or significance' that it ought to be decided by the Supreme Court of Canada. The *Criminal Code* R.S.C. 1985, c. C-46, provides authority to the Court under ss. 691(1)(2) to grant leave for appeals in relation to indictable offences on a question of law when there is no dissent from a court of appeal.

INFLUENCE OF THE SUPREME COURT OF THE UNITED STATES

Consider for a moment the role that is being taken in the United States by the Supreme Court of that country. Four or five years ago, the Court pronounced its momentous decision that a Negro was entitled to all the rights of citizenship and could not be discriminated against because of colour.¹⁹ Well, you see I think the result of that decision shows the magnificent scholarship that is present today in American law schools. It shows the fine scholarship of the members of the courts. I think it is not many years since we looked upon the courts of the United States with a certain disdain. Now that probably can be excused because we didn't know very much about their work and, in fact, their work fifty, sixty years ago was not of the quality that it is today. Today, we are having an ever increasing reference to American decisions because socially, economically, politically we're passing through much of the same stages that the Americans passed through anywhere from seventy-five to one hundred years ago.

We find old decisions that bear directly upon questions that are now arising for the first time in Canada. What kind of decisions will we find? Well, I should say that if anybody has the notion that members of the great courts in the United States – its Supreme Court, the courts of Massachusetts, New York, Michigan and others – were judges of low calibre, that person will be mistaken. Just read today's reports. I remember reading a case from Oregon. Now Oregon has never been celebrated for its standing in scholastic matters, at least so far as my reading has gone, or in the soundness of its legal research; but I was amazed at the excellence of a particular judgment which I found. In a most cultivated way, in the most learned way, with excellent literary quality, this judgment was the product of a court which fifty years ago we would more or less have written off as not being worth the study that should be given to it.

I think unconsciously we are influenced by external matters that are rather interesting as a subject of psychology. We talk about men like Louis Brandeis and Oliver Wendell Holmes, Jr.; and those who have gone deeply into American history of law, and particularly of the Supreme Court of the United States, know that these were men of unusual mental power. I often ask myself whether the average person in this country or elsewhere would have thought more highly of Mr. Justice Brandeis or Mr. Justice Holmes if instead of being called 'Mr. Justice So and So', he had been called the Earl of Massachusetts. I really think that we would have been impressed by that. My purpose is not to engage in a controversy about the desirability of having these gradations in society marked by titles but I'm trying to find the psychological influence of a rather striking term of that sort – Lord this and Lord that, Viscount this

¹⁹ Building upon *Brown v. Board of Education*, 74 S.Ct. 686 (1954), the U.S. Supreme Court decided a number of cases of the similar nature which fall within the time frame referred to by Justice Rand, e.g., *Gomillion v. Lightfoot* 81 S.Ct. 125 (1960), *Monroe v. Pape* 365 U.S. 167 (1961), *Edwards v. South Carolina*, 372 U.S. 229 (1963).

and Viscount that. I think Sir John Simon would have been just as powerful and just as influential a jurist if he had been called simply Mr. Justice Simon rather than when he was called Viscount Simon. He was a very able man, yes. Did the name add anything to it? I think sub-consciously that it has and that this has led somewhat to the lower esteem which we have attributed to American courts than we should have.

FEDERALISM

In this country we have advanced some considerable distance in the cultivation of an understanding of our laws and the source of our laws. They had grown much like the judgment in the *Edwards* case, which was whether a woman was a person or not for the purpose of appointment to the Senate.²⁰ The judgment speaks of our constitution as a “living tree” full of life, expanding according to its nature. That has to be contrasted with what Lord Atkin said in one of the later cases, that we must always keep in mind the “water-tight compartments” that are provided by the *British North America Act*.²¹

Whether we like it or not, British judges were not acquainted with federalism. They had never had any experience of it. The Americans had and we have had. The Americans were the first federation of English speaking peoples; we were the second. Members of the Judicial Committee were seemingly free of any understanding that a federation was a bond, a compact between parties, with a division of jurisdiction which had to be consistent with itself in its administration and which had to enure to the benefit generally of the country at large.

So, we have the Supreme Court of Canada as one of our great institutions. I would like everybody to become more familiar with it, as they do in the United States. Everybody today in the United States is familiar with the fact that there is a Supreme Court and is familiar with its recent decision on citizenship. Now we haven’t reached that because we do not have those constitutional provisions out of which questions of that sort arise.²² But we do have and we will have more of social controversy and we want to be able to meet such issues as mature thinkers.

²⁰ *Edwards v. Attorney General of Canada*, [1930] A.C. 123, [1930] 1 D.L.R. 98 (P.C.). Better known as “The Persons Case”, for which now see, Robert J. Sharpe and Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, for The Osgoode Society for Canadian Legal History, 2007).

²¹ *Attorney General of Canada v. Attorney General of Ontario (Labour Conventions)*, [1937] A.C. 326 at 354, [1937] 1 D.L.R. 673 (P.C. (Fed)), aff’g [1936] S.C.R. 461, [1936] 3 D.L.R. 673.

²² With his usual far-sightedness, Justice Rand anticipated the *Constitution Act*, 1982 and specifically its *Charter of Rights and Freedoms*.

The most difficult thing we have is to grow up inside, to become mature, to see the necessity of the reconciliation of those interests which are bound together in a compact of this country. You see, this country has the possibilities of becoming an important – I don't like to use the word great because it has been depreciated too much by its frequent use – but an important country. We are recognised I think in the councils of the world today, in the parliament of the United Nations, as a country that in the first place seeks no other land. We don't want to encroach upon other people. This is a rather unique thing for the peoples of Europe, who are born with the idea that their neighbouring state is an enemy and they must look upon them as an enemy, not as a friend or a friendly neighbour. In the next place, we are a country that in some respects has attained the respect of nations generally. We are charged for being colourless. We are said to be a bit too sombre. It may be suggested that it is a result of our climate. I hope it is; it's a wholesome climate. I think we have probably as fine evidence of civilisation in Norway, Sweden, Finland and Denmark as the western civilisation can present. They all have this cold climate but we can be not puffed up. We can't become conceited about these things but we can feel that we do have a measure of good will that's based upon respect. I don't think that anybody can ask for much more. If we have achieved that, we must look to our institutions and among the important institutions is our Supreme Court of Canada.

CONCLUSION

I remember at the time of the First World War, after the Peace of Versailles and the beginnings of organisation under Hitler in Germany, that first signs of the destruction of the break-up of that country was the decay and the decadence of its courts. They ceased to be the courts as we understand them: administering law objectively, administering it without fear and without favour and without distortion. They became vehicles to carry out the whims and caprices of Hitler and his government. So you see how important it is that we maintain the rule of law by the highest tribunals of which we are capable. That is what we try to do in our Supreme Court of Canada; and I think it will pay us all to take time off occasionally to give some thought to these institutions which maintain the steadiness of our social condition. The absence of uproar and turbulence, which too frequently is present in others, is a matter about which we cannot become smug but we can become intelligent. We can understand their workings; we can understand their necessity; and we can act to keep them strong and worthy of our aim as the object of our civilisation.