VIGNETTES FROM THE END OF EMPIRE

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Today, commentators writing about English, Canadian or American cases assume that the personalities of the judges are relevant to their decisions. It was not always so. The English tradition of substantive formalism, for most of the twentieth century, had a pervasive influence not only on the English legal culture but the Canadian as well.[1]

If today the Supreme Court of Canada sometimes still seems a prisoner of the earlier decisions of the Judicial Committee of the Privy Council, it is appropriate to consider how that latter court was staffed as life ebbed out of it (at least as far as Canada was concerned) in the late 1940s and early 1950s. For a court that was revered by some as a vital link in the Imperial chain, the composition of the Committee was surprisingly amateur. Both Canada and Sri Lanka (Ceylon) provide illustrations of this.

While the Privy Council decisions on the Bennett "New Deal"[2] legislation and the *O'Connor Report*[3] had apparently spelled the end of Canadian appeals to London, Jowitt, who became Lord Chancellor in the Attlee administration in London in 1945, still had a faint hope that Ottawa might retain its appeals to the Judicial Committee.[4] In furtherance of this end, events occurred which emphasized on the one hand the British mechanistic approach to the Judicial process and, on the other, the vague approach to staffing the Court which was so vital to overseas members of the Commonwealth and Europe.

Retention of the Canadian link was not a totally unrealistic hope since many of the provinces were reluctant to see the abolition of appeals. In a *Canadian Bar Review* symposium, for instance, it was argued that the Privy Council, "in its anxiety to disclaim imperialistic tendencies offensive to the *zeitgeist*, proved its generosity at the expense of the provinces." The Dominion, it was argued, could not abolish appeals with respect to provincial powers, despite the *Statute of Westminster*.[5] Moreover, Prime Minister Mackenzie King, always concerned about

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[1]R. Stevens, Law and Politics: The House of Lords as a Judicial Body 1800-1876 (Chapel Hill: University of North Carolina Press, 1978).

[2]*A.G. Canada* v. *A.G. Ontario*, [1937] A.C. 326.

[3]Ottawa, Senate of Canada,"Report on the British North America Act" (1939).

[4]R. Stevens, "The Role of the Judiciary: Lessons From the End of Empire" in P. Cane and J. Stapleton, eds., *Law Policy and Legal Theory: Essays in Honour of Patrick Atiyah* (forthcoming, 1992).

[5]S.M. Gordon, "Abolition of Appeals to the Privy Council: A Symposium" (1947) 25 Can. Bar. Rev. 557 at 558.

"the British vote," had doubts about whether appeals to London should be abolished.[6]

Jowitt was anxious to save the system of appeals from the "Old Commonwealth." As Labour Attorney-General in the 1929-31 administration, he had fought tenaciously to keep the Irish Free State from abolishing appeals. Now, in the post-war period, he visited Canada and persuaded Attlee to appoint Chief Justice Thibaudeau Rinfret[7] as one of the Commonwealth judges entitled to sit on the Privy Council, hoping this might undermine the Canadian enthusiasm for abolishing appeals to the Judicial Committee.[8] The ruse failed, and appeals to London were abolished in 1949.[9] Rinfret, however, remained a member of the Privy Council, and even after abolition of Canadian appeals, lobbied to be allowed to sit on the Judicial Committee. Indeed, his relations with the Privy Council Office and the Lord Chancellor's Office provided further evidence that the English approach to the judicial process was, by the standards of final appeal courts in other jurisdictions, casual.

The Rinfret situation became something of a *cause célèbre* which tried Simonds' patience after he became Lord Chancellor in the Churchill administration of 1951. Rinfret regularly invited himself to London and Jowitt, by

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[6]J.G. Snell and F. Vaughan, The Supreme Court of Canada: History of the Institution (Toronto: University of Toronto Press, 1985) at 190.

[7]Rinfret, educated both at Laval and McGill had been appointed to the Supreme Court of Canada in 1924: I-J Deslauriers, La Court superieure du Québec et ses juges, 1849-1er janvier 1980 (Québec: Bibliothèque nationale du Québec, 1980) at 221. By 1950, he "tended to show his impatience in Court": Snell & Vaughan, *supra*, note 3 at 197. He did not have a good reputation in civil liberties cases: P. Weiler, In The Last Resort: A Critical Study of the Superior Court of Canada (Toronto: Carswell, 1979) at 187-8.

[8]"I was myself responsible for suggesting the appointment of Chief Justice Rinfret, and my reason for making the suggestion was that I hoped – rather against hope – that the fact that the Canadian Chief Justice was so appointed might influence the Canadian Government against the abolition of the appeal": Lord Jowitt to G. Walker, 7 February 1951: L.C.O. [Lord Chancellor's Office] 2/5227, P.R.O. [Public Record Office].

[9]The British High Commissioner in Ottawa reported on the dinner to celebrate the confirmation of the Supreme Court of Canada as the final court of appeal:

> From the standpoint of the U.K., the proceedings could not have been happier or more gratifying. Every speaker was at pains to make it clear that there was nothing but the highest admiration and respect in Canada for the Judicial Committee of the Privy Council and for the work which it had done for Canada over the years. The change now being made had certainly not come about from any sense of dissatisfaction; on the contrary, there was no Court in the world which had a higher standing than the Judicial Committee and no Court in the world which surpassed it in wisdom, integrity and professional competence; the present change had merely arisen, as it was bound to do in time, in the course of Canada's natural evolution and development.: Sir A. Clutterbuck to Dominions Office, 12 October, 1950. L.C.O. 2/5227, P.R.O.

then out of office, observed of the 1952 visit: "Rinfret is here and seems to be enjoying himself very much. I meet him at all sorts of dinners. He is sitting on a case from Mauritius, and as this involves French law and practice, it's right up his street."[10] As late as May 1954, Rinfret wrote to Simonds saying he planned to sit on the Canadian appeals which were in the pipeline in 1949 and were to be heard by the Judicial Committee that autumn.[11] Simonds now faced a constitutional problem, for he did not want Rinfret to sit, but was unsure with whom to deal: the Canadian Government via its representative, the High Commissioner, or the representative of the Queen in Ottawa, the Governor-General? He chose to summon the Canadian High Commissioner in London, N.A. Robertson, who subsequently reported to Ottawa:

> The Lord Chancellor feels it is somewhat inappropriate for a Supreme Court Justice who is retiring by reason of age to return to sit in a Court of Appellate Jurisdiction on cases that might have come before him as Chief Justice of the Supreme Court of Canada. I think it is quite improper, given the abolition of Privy Council appeals, for a Canadian member of the Judicial Committee to volunteer his services to the Judicial Committee. If the initiation and invitation had come from this side, I myself would not have thought it appropriate in the circumstances for a Canadian members of the Committee to accept.[12]

Robertson's letter, however, was too late. The Canadian Government had already agreed to pay Rinfret's way, and it would have been "awkward" for the Canadian Prime Minister to intervene. The Canadian Government's advice, given via the Secretary of State, was that Simonds invite Rinfret to a farewell party in London in June, which would mean he could not decently sit in October and the Canadian Government would pay his way to the party.[13] Simonds, for his part, had already written to Rinfret saying there was no need for him in October since there were five Law Lords available, a not entirely truthful statement.[14] Rinfret, however, ignored the communication and cheerfully replied that he would be arriving to sit in September-October.[15] Simonds then tried another tack. After clearing his reply with the Canadian High Commissioner, he reluctantly wrote to Rinfret saying that, while he could not invite him to sit on any Canadian appeals, he might find him a few colonial appeals.[16]

The next news of the retired Chief Justice was a note received by Dallas

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[10]R.F.V. Heuston, *Lives of the Lord Chancellors, 1940-1970*, (Oxford: Claredon Press, 1987) at 132.

[11]Rinfret to Simonds, 22 May 1954: L.C.O. 2/2559, P.R.O.

[12]N.A. Robertson to J.W. Pickersgill, *ibid.*

[13]J.W. Pickersgill to N.A. Robertson, 1 June 1954: *ibid.*

[14]Simonds to Rinfret, 26 May 1954: *ibid.*

[15]Rinfret to Simonds, 25 June 1954: *ibid.*

[16]Simonds to Robertson, 16 June 1954: Simonds to Rinfret, 16 June 1954: *ibid.*

Waters, Registrar of the Privy Council, on September 18, from Rinfret's private secretary, asking that his papers in the pending Canadian appeals be sent to the Savoy Hotel where Rinfret was staying.[17] The Secretary of the Judicial Committee, Paterson, replied that the Lord Chancellor did not find it possible for Rinfret to sit on Canadian cases, but offered, by way of consolation, five petitions and a Ceylonese appeal.[18] Behind the scenes, however, Simonds told the Canadian High Commissioner: "Emphatically I do not want him."[19]

In the following year, 1955, there was an encore. This time, however, the *dramatis personae* were different. Sir George Coldstream had replaced Sir Lewis Napier as Permanent Secretary of the Lord Chancellor's Office, and Viscount Kilmuir had taken over from Simonds as Lord Chancellor. Coldstream warned Kilmuir that Rinfret had written to Paterson at the Privy Council Office, asking to be allowed to sit.[20] Coldstream further warned that Rinfret "has already caused much embarrassment to your predecessors... . First because all the Law Lords agree that he is nowhere near good enough to sit on the kind of strong Board which you take pains to ensure for Canadian Appeals. Second, because Canadian judicial and other legal opinions are unanimous in the view that he is not good enough."[21] Kilmuir was more direct with the Canadians, partly because he was much more aware of the political role of the judiciary than his predecessor.[22] He told Rinfret that "much as I appreciate your offer to sit, I shall not find it possible to accept it."[23] Rinfret cancelled his London visit but cheerily warned the Lord Chancellor that "I am now free to go to London not only in June, but equally for any other of the sittings during the year. I therefore put myself at your entire disposal."[24] Kilmuir, however, confided to the Canadian High Commissioner that "it should be easier in the future to deal with the applications which I have no doubt will continue to arrive."[25]

When the British election of 1951 brought in the Conservatives, they were faced with a similar Privy Council problem: what to do about he Privy Council's best customer, Ceylon. It was not an issue handled with style. Lord Soulbury

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[17]18 September 1954: *ibid.*

[18]Paterson to Rinfret, 21 September 1954: *ibid.*

[19]Simonds to Robertson, 20 September 1954: *ibid.*

[20]He had heard there were four cases. "I must confess I should be anxious to form part of the Board which will be formed to hear these appeals." Rinfret to Patterson, 8 April 1955: *ibid.*

[21]Coldstream to Kilmuir, 19 April 1955: *ibid.*

[22]R.B. Stevens, *supra*, note 1 at 421-423.

[23]Kilmuir to Rinfret, 21 April 1955: L.C.O. 2/2559, P.R.O.

[24]Rinfret to Kilmuir, 10 May 1955: *ibid.*

[25]Kilmuir to Robertson, 14 May 9155: *ibid.*

(better known as Ramsbottom, wartime President of the Board of Education), the Governor-General, reported that the Prime Minister of Ceylon wanted a semi-permanent judge in London along the lines of the old salaried Indian judges. He put forth a candidate, thought he should be paid £4,000 p.a. and announced Ceylon's willingness to pay half.[26] Jowitt was in favour of the arrangement, but knew there was not "the slightest prospect of our Treasury agreeing to pay half the salary."[27] Napier noted that Dingle Foot Q.C. had said: "Ceylon is a great devotee of the Privy Council and have [sic] no intention whatever of stopping appeals. The Treasury might think that they have been paying £4,000 a year for years (for the salaried Indian judges). They might think it worthwhile to pay £2,000."[28]

The minuet between the future of the Commonwealth on the one hand and Treasury's parsimony on the other continued. Jowitt's final words to Gordon Walker before he left office were:

> On political grounds it may well be very desirable to fortify that attitude (loyalty to the Privy Council) by adopting Soulbury's proposal... . [T]he judicial and political arguments together might be strong enough to warrant the payment of £2,000... . The proposal, however, would have a much greater chance of success if Ceylon were prepared to pay the whole of the salary.[29]

Viscount Simonds, the new Lord Chancellor, was more judge than politician. He confided to the new Commonwealth Relations Secretary, Ismay, "to some doubts" about the proposed arrangement. Will we get a judge "who makes the grade?" Would he be useful in Colonial appeals as East and West Africa develop? "[T]here may be some objection." His appointment might lead to "demands" from other new Commonwealth nations, but the objections "are outweighed by the importance of any strengthening of the link between this country and Ceylon."[30] Ismay hastened to assure Soulbury that he thought "it" was a good idea, but Britain by then ran its Empire on the cheap. He suggested that Ceylon pick up the whole tab although "the selection would be made by the Lord Chancellor, who would naturally take into consideration any recommendation which you and your Prime Minister might make."[31] The good news reached

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[26]Soulbury to G. Walker, 7 September 1951: *ibid.*

[27]Jowitt also observed, however, that "I feel it essential that we should not let down the reputation and standing of the Court and he obviously could not sit on appeals from Dominions other than Ceylon." This was apparently before Jowitt knew Ceylon had a Roman-Dutch system. Jowitt to Waters, 13 October 1951: *ibid.*

[28]Memorandum from Napier, n.d.: *ibid.*

[29]Jowitt to Gordon Walker, 22 October 1951: *ibid.*

[30]Simonds to Ismay, 29 November 1951: *ibid.*

[31]Ismay to Soulbury, 4 December 1951: *ibid.*

London in December 1951: "The gentleman that the Prime Minister has in mind to recommend possesses very considerable private means and might therefore be inclined to accept a moderate salary provided by the Ceylon government."[32] It turned out to be L.M.D. De Silva, a former Acting Supreme Court Justice, and the rumour the following month was that he would be prepared to serve without salary.[33]

All seemed to be settled. Yet, at this very moment, all kinds of crises broke out. De Silva unwisely asked what his tax status would be, while the Clerk to Privy Council asked under what statutory authority De Silva was being appointed.[34] Both questions caused embarrassment. Lord Salisbury, by then at the Commonwealth Relations Office, sent a dispatch to Lord Soulbury, which, in addition to warning the Governor-General that "we see no prospect of the passage of legislation providing for a contribution from U.K. funds," also enclosed a note from Sir Eric Bamford of the Inland Revenue warning that De Silva would be taxed on his remittances from Ceylon.[35] Meanwhile, Salisbury protested to R.A. Butler, the Chancellor of the Exchequer:

> If the position as to taxation is as stated in Sir Eric Bamford's letter... (it) would be deplorable from a Commonwealth point of view. We all want to maintain the Privy Council as a Commonwealth link and we ought therefore to do all in our power (and) ...we ought not to do anything which might lead her [Ceylon] to take such a step [abolish appeals].[36]

Meanwhile, Coldstream, at the Lord Chancellor's Office, was trying to persuade Willis of the Inland Revenue that, in the next Finance Act, there ought to be a tax exemption for Ceylonese members of the Judicial Committee.[37] Willis eventually agreed that the matter could be settled outside of statute. If the Ceylon government would appoint De Silva a judge in Ceylon, he would then take advantage of the double taxation treaty as a civil servant.[38] Coldstream thought the "Revenue proposal has a somewhat hole-in-the-corner flavour to it."[39] but the Inland Revenue refused to change its position.[40] De Silva was thus appointed a

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[32]Soulbury to Ismay, 15 December 1951: *ibid.*

[33]Soulbury to Ismay, 4 January 1952. *ibid.*.

[34]Waters to Napier, 8 April 1951: *ibid.*

[35]Salisbury to Soulbury, 25 April 1952: *ibid.*

[36]Salisbury to P.A. Butler, 16 May 1952: *ibid.*

[37]Coldstream to files, 27 May 1952: *ibid.*

[38]Willis to Dixon, 4 June 1952: *ibid.*

[39]Coldstream to Napier & Simonds, 10 June 1951: *ibid.* Napier agreed the whole thing was silly. Napier to Simonds, 10 June 1952: *ibid.*

[40]Willis to Dixon, 25 June 1952: *ibid.*

Supreme Court judge on 1 October 1952.[41] The idea was that he would sit in Ceylon until Christmas and then move to London.

At this point, Simonds got cold feet, remembering the "Colliery Explosion" in 1871-2. The 1871 *Judicial Committee Act* allowed the appointment of paid judges to the Privy Council: one of the qualifications having been prior experience as a Superior Court judge in England. Collier was made a judge of the Court of Common Pleas for two days and then appointed to the Privy Council.[42] There were violent attacks on Gladstone, none more vigorous than that from Lord Salisbury's grandfather. The Commonwealth Relations Secretary was defensive; his grandfather had attacked "jobs for the boys" but all the same, De Silva would have sat for only three months.[43] When "Bobbity" Salisbury was beset with guilt, however, it was always a problem.[44]

Simonds was also beset with guilt. It was true that it was not a case of jobs for the boys, but it was a violation of the spirit of the Act and very close to the Collier situation. "I should eternally blame myself if, through my default, you were the target for any attack." He consoled himself with the thought that "the Bing boys are unlikely to have heard of the Collier Case."[45] His final thought

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[41]C.R.O. [Commonwealth Relations Office] Incoming cable, 29 September 1952: *ibid.*

[42]Stevens, *supra*, note 19, at 50.

[43]Salisbury to Simonds, 8 October 1950: L.C.O. 2/5227, P.R.O.

[44]For Harold Macmillan's view of Salisbury's style, see A. Horne, *Macmillan*, Vol. II, 1957-1986, (1989), at 37-39.

[45]Geoffrey Bing, Q.C. was a left-wing Labour M.P., associated with the Tribune Group. He later served as Attorney-General of Ghana. Platts-Mills, "Geoffrey Henry Cecil Bing", *Dictionary of National Biography 1971-1980*, (Oxford: Oxford University Press, 1986) at 57.

Interestingly enough, when Bing was Attorney-General of Ghana, he lobbied to have two Ghanian judges put on the Privy Council. Under the mistaken impression De Silva was paid, he wanted them treated in the same way. Kilmuir wrote to Lord Home at the Commonwealth Office, "I am a protagonist of the view that we should maintain the commonwealth link by every means in our power and that the Judicial Committee is an apt instrument for this purpose if it can be fitted to suit the new Commonwealth arrangements." 2 April 1957: L.C.O. 2/5243, P.R.O.

Eventually, the British Government agreed to one Ghanian member (Sir Henley Coussey). Home wrote to Kilmuir (April 18, 1957), "In order to avoid any question of discrimination (racial or other) against Ghana, it might well be to make the point to him (President Nkrumah of Ghana) that all the overseas members of the Commonwealth who use the Privy Council object to appeals from their courts being heard by judges from any other member of the Commonwealth except the United Kingdom": Home to Kilmuir, 18 April 1957, *ibid.*

In the end, Nkrumah withdrew Couseey's name. The reasons were not clear. Officially it was said to be because Coussey refused to serve as Speaker of the Assembly. Nkrumah to High Commissioner, January 3, 1958. Unofficially, the British Government believed it was because

reading." [46] Salisbury apparently read it, and it inspired him to cable the Governor-General explaining that things must not be rushed and that De Silva would not be made a Privy Councillor until 1953.[47] Therefore, the shortage of judicial manpower continued to disrupt both the Privy Council and the English courts.[48]

Finally, in January 1953, the hapless De Silva, having served his three months on the Supreme Court, arrived in London.[49] Waters at the Privy Council Office reported that De Silva was upset over being allowed to sit only on Ceylonese appeals, "through the sordid reason that the U.K. Government refuses to pay any part of De Silva's salary."[50] The truth behind De Silva's underemployment was not the parsimony of the UK government but the threatened taxation, by the Inland Revenue, of De Silva's remittances if he sat in non-Ceylonese cases.[51] De Silva, in turn, reported that D.S. Senanayake, the outgoing Ceylonese Prime Minister, had said he would suffer "political embarrassment" if De Silva's salary were to be paid wholly by the Ceylonese government, especially if he heard non-Ceylonese cases. De Silva, however, planned to ask the new Prime Minister if he might sit as a "volunteer" in such cases.[52] Once again, the ugly spectre of the Inland Revenue appeared,[53] but in April 1953, they agreed to allow such volunteer work and still treat his remittances as tax-free.[54] As Coldstream observed in the best tradition of Civil Service understatement: "There has been a certain maladroitness in this business."[55]

The De Silva 'problem' however, would not go away. He became vital to the

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Nkrumah was not prepared to have any other Ghanian made a Privy Councillor before he was. *ibid.*

[46]Simonds to Salisbury, 9 November 1952: L.C.O. 2/5227, P.R.O.

[47]Cable, Commonwealth Relations Office to Governor-General, 13 October 1952: *ibid.*

[48]When Gerald Gardiner Q.C. protested to Coldstream that his clients suffered extra losses and expenses because Sir Lionel Leach, the Official Referee, was always taking off to the Privy Council, Coldstream explained that it was for an important murder appeal from Ceylon with the possibility of re-instituting the conviction, and there was a danger of the Committee being deadlocked 2-2. Gardiner to Coldstream; Coldstream to Gardiner, 21 November 1952: L.C.O. 2/5950, P.R.O.

[49]A. Rose to Simonds, 13 January 1953: L.C.O. 2/5227, P.R.O.

[50]Waters to Napier, 30 January 1953: *ibid.*

[51]Napier to Coldstream, 9 February 1953: *ibid.*

[52]De Silva to Simonds, 23 March 1953: *ibid.*

[53]Napier Minute, 23 March 1953: *ibid.*

[54]E.R. Brooks to Privy Council Office, 23 April 1953: *ibid.*

[55]Coldstream to Napier, 9 February 1953: *ibid.*

functioning of the Judicial Committee.[56] Although he did not sit on Canadian, Australian or New Zealand cases,[57] Simonds thought him "a cautious and patient judge, and with a good mind...up to the standards of the Judicial Committee... . [H]is understanding of the Oriental mind might be valuable for other appeals as well."[58] De Silva, however, still wanted to be paid.[59] The Lord Chancellor's Office felt he should be, but the Treasury could find nothing "unfair" in the situation.[60] Eventually he was paid £5 a day for expenses.

The Rinfret and De Silva cases show either the English genius for compromise or an ability to find *ad hoc* solutions which defied all principle. The only clear principles that may be drawn from the episodes are that, in the English legal custom of the time, the notion that the judicial process was a mechanical one, and thus the personage of the judges relevant only as to 'quality', was a profound one. The very reason that made the Judicial Committee a less than ideal court for the purposes of constitutional adjudication made it possible for both Labour and Conservative administrations to engage in imperial politics which have about them some of the aura of Gilbert and Sullivan. The behind-the-scenes look, possible through an examination of the Lord Chancellor's papers, suggests that the decision of the vast bulk of Commonwealth countries to abandon the appeal was not an inappropriate one.

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[56]By 1955, he had sat in 65 appeals (14 from Ceylon) and 86 petitions (9 from Ceylon). He had written 14 opinions. Paterson to Coldstream, 29 September 1955: L.C.O. 2/2558, P.R.O.

[57]Coldstream to Kilmuir, 1 December 1955: *ibid.*

[58]Coldstream to files, 6 October 1955: *ibid.*

[59]He went to see Simonds with his demands on September 28, 1955. He wanted to be given a permanent appointment to the Privy Council. He was currently having a dispute with Sir John Kotelawala, the Prime Minister of Ceylon, who had denied De Silva a knighthood and was said to be interested in replacing him on the Privy Council. Minute, Sir Cecil Syers, High Commissioner to Ceylon: 29 November 1955: *ibid.*

[60]Dixon called on Coldstream. Coldstream to files, 24 November 1955: *ibid.*