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# Introduction: History and Development of the Court in National Society The Canadian Supreme Court

*by Professor Peter H. Russell\**

**M**AY I SAY how pleased I am to have been invited to take part in these proceedings of the Canada-United States Law Institute. Like so many other Canadians I have benefitted greatly over the years from the study of American laws and institutions. This is particularly true for those of us who study Supreme Courts. For I think I can safely say, as a foreign observer viewing the United States Supreme Court from the perspective of political science, that it has been the most powerful court in the history of the world. Indeed as a close neighbour my main complaint about your Supreme Court is that so dazzling is its light that we in Canada are too often blinded to the significant and distinctive features of our own Supreme Court. So, I am happy to be part of this meeting in which, for a change, the comparative viewing of Supreme Courts will not be all one way and some of you from your Roman heights may look out at and learn about the highest court of a nearby province.

My introduction to the Supreme Court of Canada and its historical development will be divided into three parts: first, what the Court does — its role in our system of law and government; second, how it does it — some distinctive features of its procedures; and finally, who does it — its judges and questions concerning their mode of appointment.

The central point to grasp about the role of the Supreme Court of Canada is that it was not established as a branch of government. In fact the Supreme Court was not established by our Constitution, the British North America (B.N.A.) Act of 1867. Section 101 of that Act simply empowered the federal parliament to establish, if and when it cared to, a General Court of Appeal. The scheme of government designed for the new Dominion was essentially parliamentary. Federalism was adopted as a necessary expedient principally to accommodate Quebec and was not expected to generate constitutional litigation. On the contrary, Sir John A. MacDonald declared optimistically that the division of powers in the new constitution had been so well drafted that “we have avoided all conflict of jurisdiction and authority.”<sup>1</sup> Aside from federalism the prime constitutional checks on the sovereignty of parliament were to be imperial and monarchical: the powers of reservation and disallowance vested in the Governor-General and the Queen in Council over the government of Canada and in the federally appointed Lieutenant Governors and the

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<sup>1</sup> CONFEDERATION DEBATES IN THE PROVINCE OF CANADA, 1865 (P.B. Waite ed. 1963) at 44.

Governor General in Council over provincial governments.

The founding of the Supreme Court in 1875 entailed no departure from this scheme.<sup>2</sup> Its principal function was that of an appellate tribunal with broad powers of review over provincial courts in both civil and criminal matters. Its original jurisdiction was limited to a concurrent jurisdiction to issue writs of habeas corpus (for the convenience of Ottawa residents). Nothing could better illustrate its subordinate role in Canadian government than the section of the Supreme Court Act which empowered the Governor in Council (*i.e.* the federal cabinet) to elicit advisory opinions from the Court "on any matters whatsoever."<sup>3</sup>

This new general court of appeal, established by an ordinary act of the federal parliament in 1875, did not at that time become Canada's final court of appeal. Until 1949, the Judicial Committee of the Privy Council remained the highest court to which Canadian litigants could resort. This had not been the intention of the Liberal administration which introduced the Supreme Court Act in 1875, although it was very much the desire of Sir John A. MacDonal'd's Conservatives who were the architects of the original Supreme Court bills and who held power federally through most of Canada's first three decades. Faulty draftmanship and the British colonial office's determination to retain the judicial link amongst the diminishing imperial ties resulted in the continuation of the Canadian's right to seek leave to appeal to the foot of the throne. Thus, the Supreme Court of Canada for its first three-quarters of a century was an intermediate general court of appeal in the sense that its own decisions could be appealed to the Privy Council and that its jurisdiction could be completely by-passed by the litigant who chose to appeal directly to the Privy Council from the court of last resort in a province.

How has it functioned in practice? Has the Supreme Court kept to the modest role originally envisaged for it? The answer to this is yes, it has performed more or less as originally planned, but not exactly. The principal changes and developments have come in the last thirty years since the abolition of the Privy Council appeal in 1949.

From 1875 to 1949 most of the cases heard by the Supreme Court concerned private law. Tort, contract and real property were the branches of law most frequently dealt with by the Court. In the domain of public law, the Supreme Court considered questions relating to the powers of municipalities more often than taxation, criminal or constitutional law.<sup>4</sup> The Supreme Court's opinions in these cases were on the whole of little consequence in shaping Canadian law. The Court had little power to select the cases it heard. In civil cases there was an appeal as of right from

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<sup>2</sup> See, F. Underhill, *Edward Blake, the Supreme Court and the Appeal to the Privy Council*, CAN. HIST. REV., vol. XIX, 245 (1938); F. McKinnon, *The Establishment of the Supreme Court of Canada*, CAN. HIST. REV., vol. XXVI, 260 (1946).

<sup>3</sup> 38 Vic., c.11, s.52.

<sup>4</sup> See P. Russell, *The Political Role of the Supreme Court of Canada in its First Century*, CAN. B. REV., Vol. LIII, 576 (1975).

the provincial court of last resort limited only by the sum of money in dispute.<sup>5</sup> In criminal cases there was an appeal as of right on questions of law in cases involving indictable offences where a difference had occurred amongst the judges of the provincial courts.<sup>6</sup> In addition, of course, the appeal to the Judicial Committee and the colonial cast of Canadian jurisprudence meant that the judges of the Supreme Court were extremely deferential to the decisions of English courts.

The fact that most of the Supreme Court's work concerned matters of private law should have meant, at least theoretically, that the Court would have a unifying effect on Canadian law. The B.N.A. Act assigns jurisdiction over "property and civil rights" to the provincial legislatures and this phrase was given a very wide interpretation by the Judicial Committee of the Privy Council in interpretation by the Judicial Committee of the Privy Council in interpreting the Constitution. Thus the Supreme Court's rulings on provincial law could be a centralizing force off-setting the decentralizing consequences of constitutional interpretations.

Certainly this feature of the Supreme Court's jurisdiction, in the early years, attracted stiff opposition from Quebec. Quebec's system of civil law stood, along with religion and language, as one of the three pillars of the distinctive culture the preservation of which was a key rationale for granting sovereign powers to provincial legislatures. Although Quebecers acquiesced in the final power of the Imperial Privy Council to interpret its laws, many of them bitterly resented the prospect of a Court dominated by English Canadians trained in the common law overruling the decisions of Quebec judges on Quebec's Civil Code and Code of Procedure. There were attempts to terminate appeals to the Supreme Court in provincial law matters or at least to ensure that a majority of judges trained in civil law heard appeals concerning Quebec's distinctive laws. These efforts were not successful.<sup>7</sup> Nor did the Supreme Court issue any self-denying ordinance along the lines of *Erie v. Tompkins*<sup>8</sup> and defer to the decisions of the highest provincial court in provincial law matters. In this respect the Supreme Court's practice reflects the remarkably unitary nature of the Canadian judicial system in which the judges of the provincial superior, county and district courts are federally appointed and provincial courts have jurisdiction in nearly all areas of federal and provincial law.

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<sup>5</sup> The amount required was gradually raised. It became \$10,000 in 1956 and remained at that level until the abolition of the right of appeal in civil cases in 1975.

<sup>6</sup> The right of appeal in criminal cases is governed by the Criminal Code of Canada. The Code gives a person convicted of an indictable offence the right to appeal from a provincial appeal court's decision confirming his conviction, providing that decision was not unanimous and from a provincial appeal court's decision setting aside an acquittal. The Attorney General has a right of appeal in converse circumstances.

<sup>7</sup> See, P. RUSSELL, *THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION* (1969).

<sup>8</sup> 304 U.S. 64 (1938).

But, as I have suggested, the unifying influence of the Supreme Court may have been more theoretical than real. The colonial mentality of its judges and the Court's intermediate status much reduced the possibility of judicial creativity. In Quebec civil law appeals there were certainly decisions, for instance some relating to the rights of parents or the precepts of the rule of law limiting public authority, in which the non-Quebec majority of the Supreme Court read their own social and legal values into Quebec's civil law. But these are not easy to find. My own belief is that the groundwork for the Anglicization of French civil law in Quebec had been established before 1867 through the influence of several generations of English judges who controlled the judicial system of Quebec in the century following the English conquest.<sup>9</sup>

Turning now to constitutional law — the field in which one expects to find the most dramatic exercise of judicial power in the work of a Supreme Court — the Court's role has expanded beyond original expectations. The path here was blazed by the Judicial Committee which in the nineteenth and early twentieth centuries assumed the task of umpiring the Canadian Constitution. The Fathers of Confederation like MacDonalld had not thought that Canadian federalism would require a lot of adjudication. Even less did they expect that the English Law Lords would find the B.N.A. Act provided for classical federalism with a finely balanced division of powers between sovereign legislatures. The Supreme Court of Canada as an intermediate appeal court soon suppressed the nationalism of its founding members and fell into line with the Privy Council's jurisprudence.

As a result of these developments, judge-made constitutional law became an enduring influence on the balance of power within Canadian federalism. Judicial interpretation of the Constitution has provided the legal foundation for a much less centralized federation than that envisaged by the governing alliance at the time of Confederation, although it may well be a system more in accord with the social and political fabric of the country.

When the Supreme Court became Canada's final court of appeal in 1949, popular political attention naturally focused on its role as constitutional arbiter. It is in this capacity that the Court has the greatest potential for becoming truly a branch of government. Until quite recently, the Supreme Court's performance in adjudicating federal disputes was not remarkable. The Court continued to hear a thin trickle of constitutional cases — two to three per year. Most of the action in shaping and adjusting the federal system occurred in the executive arena through negotiated agreements between the two levels of government. A few of the Court's early decisions expounded expansive constructions of the key federal powers of peace order and good government and trade and commerce.

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<sup>9</sup> For evidence to support this view see, L. Baudouin, *Conflicts nes de la coexistence juridique au Canada*, in *LA DUALITE CANADIENNE*, (Mason Wade ed., 1960).

Until 1977, none of its post-1949 decisions had ruled the exercise of federal power *ultra vires*. On the other hand, in a significant number of cases the Court dismissed challenges to provincial initiatives which appeared to encroach on fields traditionally reserved for the federal parliament.

Since 1975 a minor revolution has occurred in this aspect of the Supreme Court's work. The thin trickle of constitutional cases has become a veritable flood — four reported in 1975 and again in 1976, six in 1977 and last year — eleven.<sup>10</sup> Some of these decisions have overruled provincial laws notably in the fields of communication and resource management.<sup>11</sup> These decisions have been the subject of loud provincial protests. Much less acclaimed have been the Court's decisions in these same years restricting federal power and expanding provincial power especially in the field of criminal law.<sup>12</sup> The Supreme Court appears to me to have maintained a reasonably balanced approach to federalism.

But much more important than how the Court appears to me is how it appears to the country. An important implication of the quantitative leap in constitutional litigation may be the diminishing capacity of executive federalism to reach negotiated accommodations. If this is so and Canada is to rely much more on its Supreme Court to settle disputes about the division of powers, then the authority which the Court has in the eyes of the people and politicians to play such a role will be of great importance. I am not as confident as I would like to be that the Court commands the respect which is a political prerequisite for that authority.

Some Canadians — more accurately some law professors and law students and a few federal politicians — have yearned for a different type of Supreme Court in the field of constitutional law and indeed for a different kind of constitution. They have been "thrilled" — and I choose that word carefully — by the modern spectacle of the United States Supreme Court applying the abstract phrases of a constitutional Bill of Rights to the acts of state and national governments.<sup>13</sup> They denounce the Supreme Court for its cautious interpretation of the statutory Bill of Rights which John Diefenbaker gave the country in 1960. Many who expound such views strike me as terribly uncritical of American experience and

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<sup>10</sup> These figures refer to reported decisions in which the interpretation of the B.N.A. Act was a necessary part of the Supreme Court's decision. Cases dealing with the Bill of Rights are not included as it is an ordinary federal statute and, in that sense, not part of Canada's Constitution.

<sup>11</sup> See *Amax Potash Ltd., et al. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Capital Cities Communications Inc., et al. v. C.R.T.C.*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne and A.-G. Canada*, [1978] 2 S.C.R. 191; *A.-G. Quebec v. Kellogg Co. et al.*, [1978] 2 S.C.R. 211; *Central Canada Potash and A.-G. Canada v. The Government of Saskatchewan*, [1979] 1 S.C.R. 42.

<sup>12</sup> See *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Quebec North Shore Paper v. C.P. Ltd.*, [1977] 2 S.C.R. 1054; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 770.

<sup>13</sup> See P. TRUDEAU, *A CANADIAN CHARTER OF HUMAN RIGHTS* (1968).

unimaginative about alternative means of balancing the requirements of freedom and order or overcoming discrimination in Canada. I believe that federalism strictly interpreted can be a tremendous source of liberty. I would also observe that before the enactment of the Canadian Bill of Rights, the Supreme Court of Canada was well on the way to finding in the B.N.A. Act's provisions for parliamentary government a constitutional basis for fundamental political freedoms.

Finally, I should draw attention to one further recent change in what the Supreme Court does. Since 1949, public law matters have replaced private law matters as the dominant element in the Court's case load. Criminal law and taxation cases now outnumber tort, contract and real property cases. This trend has been accelerated by a very important change in the Court's jurisdiction. In 1975, the right of appeal in civil cases involving \$10,000 or more was abolished.<sup>14</sup> The Court now selects the civil cases it hears and the statute instructs it to choose cases according to the importance of the legal issue in dispute. This development coincides with the establishment and rapid growth of the Federal Court of Canada which in 1970 took over the jurisdiction of the only federal court of original jurisdiction, the Exchequer Court (confined mainly to claims against the federal treasury and patent cases) as well as the jurisdiction of the provinces' superior courts in federal administrative law. This created an expanded federal trial court with an appeal division, moving Canada one step closer to the American system of dual courts. Coupled with the 1975 jurisdictional change it will likely shift the Supreme Court's role to one which is principally concerned with the interpretation of federal statutes and the adjudication of citizen claims against federal administrative organs. This is a role which provides plenty of scope for judicial statesmanship in balancing the requirements of efficiency against those of due process.

Let me turn now to the Court's *modus operandi*. American observers would find the working methods and procedures of the Canadian Supreme Court considerably more individualistic and British than those of the United States Supreme Court. The Chief Justice's role in managing the work of the Court and the systematic use of conferences to sort out issues and assign opinion-writing responsibility have been much less developed in Canada. Too often Canadian lawyers could only ascertain the *ratio* of a decision by piecing together the reasons given by several judges on the majority side. However, there has been some change over the past decade or so. Conferences are now more frequent; seriatim opinion-writing has declined.

Further changes of this kind will be forced upon the Court by pressure of a growing case-load. Radical individualism is a luxury which only underworked appeals courts can afford. While the volume of reported decisions continues at about 100 per annum, the great pressure, as with the

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<sup>14</sup> STATUTES OF CANADA, 1974-75-76, c.18.

United States Supreme Court, comes from applications for leave to appeal. Since 1975 the Court's responsibility for being its own gate-keeper has greatly increased. Motions for leave are heard by the Court sitting in panels of three. This method of selecting cases may prove to be too time-consuming as an ever more litigious population seeks justice from the highest court in the land. Also, the fact that the system gives one third of the Court's judges the power to prevent a case from being heard may become unacceptable as greater awareness develops of the discretionary character of the leave-granting process. Still Canada, with one-tenth the population, has a long way to go before it faces the challenge to judicial engineering which confronts the United States in maintaining a small collegial court of nine judges for the selection and final adjudication of those legal issues which are most in need of resolution for the whole nation.

One factor which has made it easier for our Supreme Court to handle a larger case load is its practice of sitting most often with less than a full court. Most appeals since the Court's beginning have been heard by a panel of five judges. Although, once again, times are changing; Chief Justice Laskin has expressed his determination to have all nine judges hear the most important cases especially those involving constitutional law. The most recently obtainable statistics indicate that he is having his way in this regard.<sup>15</sup> As the legislative significance of the Court's decisions comes to be more widely acknowledged, there should be less tolerance for having cases decided by panels which do not contain all the shades of legal and social philosophy amongst the Court's membership.

Another noticeable procedural difference between the Canadian and American Supreme Courts is the continued importance of oral argument in Canada's Supreme Court. Written factums setting forth the arguments have always been submitted. The Court's willingness in the recent *Anti-Inflation Reference* case<sup>16</sup> at least to accept for consideration material prepared by social scientists on the practical implications of challenged legislation may encourage more American style Brandeis briefs. Since the late 1960's all of the Justices have acquired law clerks to assist them in mining the written materials. But despite these changes the Court at work still bears more resemblance to an adversarial arena than to a research institute. Presentation of arguments in open court without time limit and with plenty of opportunity for questions from the bench remains a hallmark of Supreme Court practice.

The emphasis on oral argument adversely affects French-speaking counsel. The only feature of the Supreme Court which is guaranteed by the Canadian Constitution is the right to use English and French in its proceedings.<sup>17</sup> While the right is clearly there in law, in practice the Court

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<sup>15</sup> *Statistical Analysis of [1976] S.C.R.*, OSOODE HALL L.J., vol. XIV, 695 (1978). However, it should be noted that there is still some way to go: in 1976 only 5 judges sat in 70 of the 94 cases reported.

<sup>16</sup> *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

<sup>17</sup> Section 133 of the B.N.A. Act provides that French or English may be used in the federal and Quebec legislatures and the federal and Quebec courts.

has not been fully bilingual. In part this is simply a consequence of the fact that unilingual English-speaking judges have always been in the majority and most of the French-speaking judges have been fluently bilingual. But this hardly explains the shameful fact that the Court's official reports until the 1960's did not provide translations of many of the Court's opinions. Not until the 1960's were facilities for the simultaneous translation of oral arguments introduced. Up until then a French-speaking lawyer who wished to argue in his mother tongue faced the very real risk that most of the judges could not follow him. In a Court where oral argument plays such a significant role in decision-making this was a grave handicap. In recent years English-speaking judges have made great efforts to develop their proficiency in French. Still, recent observations in the Court and interviews with French-speaking lawyers indicate that the Court has some way to go before it can claim to be truly bilingual.

It is worthwhile returning to one earlier point about procedure — the reference case. Earlier I pointed out that the Supreme Court Act empowered the federal government to refer questions to the Supreme Court for advisory opinions on any matter whatsoever. Since 1875 the reference case has blossomed into a distinctive Canadian institution. All of the provinces have adopted similar provisions for referring questions to their highest courts of appeal. In theory judicial answers to reference questions are only advisory. But in practice, with few exceptions, reference case decisions have been treated as regular judicial decisions. As a result, many of the Supreme Court's most important constitutional decisions have been rendered not in settling a case or controversy in the sense required by U.S. practice but in answering rather abstract (and sometimes hypothetical) questions put to it by government without any reference to particular fact situations.<sup>18</sup> I have always been intrigued by this process which enables leaders of the political branch of government to turn on the tap of judicial review whenever they wish. I doubt that it would have been tolerated had there been from the beginning in Canada a stronger sense of the Court as a separate branch of government.

A more criticized feature of Supreme Court practice has been the Court's self-imposed rule of *stare decisis*.<sup>19</sup> Since 1949 there have been declarations of independence from previous decisions of the Judicial Committee. But it was not until the Court's decision in *Paquette* in 1976<sup>20</sup> that the Court openly overruled one of its own previous decisions. The importance of this development is apt to be overrated. The Court has frequently distinguished or ignored previous decisions. The evolution of its constitutional jurisprudence since 1949 demonstrates flexibility more often than rigidity.

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<sup>18</sup> For a discussion of the reference case see, G. Rubin, *The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law*, MCGILL L.J., vol. VI, 168 (1959-60).

<sup>19</sup> See MacGuigan, *Precedent and Policy in the Supreme Court of Canada*, CAN. B. REV., vol. XLV, 627 (1967).

<sup>20</sup> R. v. Paquette, 70 D.L.R. 3d 129 (1976).

Perhaps a more telling criticism — although this depends much on the view one takes of the function of the decisions of a nation's highest court on second appeal — is the manner in which judges have written their opinions. Often opinions have failed to provide statements of the fundamental principles underlying the legal doctrines and precedents on which a decision turns.<sup>21</sup> This, I think, is a more serious charge than the Court's alleged lack of "activism". The Court has frequently rendered decisions that impose its own view of what the law requires on other branches of government. But most of its judges have adhered to a formalistic style of opinion-writing. As a result it has often failed to acknowledge its inescapable legislative role and provide persuasive reasons for its legislative contributions. Compared with the highest courts of Great Britain, Australia and the United States, the universal value of its contributions to legal reasoning have been unimpressive.

Let me turn now to the *dramatis personae* — the justices of the Supreme Court. The size of the Court has changed three times. Originally it was a six judge Court. A seventh justice was added in 1927. In 1949, when the Court became Canada's final court of appeal, it became a nine judge court. The Chief Justice and the eight ordinary or *puisne* judges are appointed by the Governor-in-Council (*i.e.* the federal cabinet). In practice the choice would be basically the Prime Minister's with advice from the Minister of Justice.<sup>22</sup> There is no ratification of the choice by any legislative or other body. To be eligible for appointment a person must have practiced law for ten years or else have served as a judge of a superior court. The judges hold office during good behaviour and can be removed only by the Governor General on address of both Houses of Parliament. Judges must retire on reaching the age of seventy-five.

So much for the dry legal facts. Who in fact is appointed and why? The most remarkable feature of Supreme Court appointments is the observance of regional quotas. There is only one statutory requirement for provincial representation and that is that three of the nine justices must come from the bar or bench of Quebec. Before 1949 the Supreme Court Act required that two of the seven justices, and before 1927, two of the six justices come from Quebec. This provision has been a concession to the need for qualified judges to hear cases involving Quebec's civil law. Of course it is only a token concession as until 1949 the Quebec justices were always a minority even in civil law appeals and since 1949 they are at best, but not always, three-fifths of the panel on a civil law appeal from Quebec. By virtue of custom rather than statute the other regions must also be represented. It is an iron law of Canadian politics that Ontario must always have as much if not more than Quebec. The requirements of this rule have been met except for two occasions. The first occasion was

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<sup>21</sup> This theme is most cogently developed in P. WEILER, IN *THE LAST RESORT* (1974).

<sup>22</sup> See Ratushny, *Judicial Appointments: The Lang Legacy*, in *THE CANADIAN JUDICIARY*, (A.M. Linden ed. 1976).

from 1903 to 1905 when the Ontario representation was lowered to one to make room for the first western judge and the second occurred last year when a place vacated by a retiring Ontario justice was filled by Mr. Justice MacIntyre from British Columbia, lowering the Ontario quota from three to two for the first time since 1949. The few places left over after Quebec and Ontario have taken their shares have been divided between the Atlantic and Western provinces, with the Western provinces getting the lion's share, two since 1927 and now three with Justice MacIntyre's appointment.

This regional pattern of appointments has little if anything to do with the functional needs of the Court. In the future, as the Court takes fewer cases in provincial law matters, any lingering functional rationale will be further diminished. The practice is of course a reflection of the sectionalism characteristic of Canadian political life. We could learn much about our two societies (although I suspect not much about our two Supreme Courts) by exploring why regional representation has been so essential for the Canadian Supreme Court while racial, ethnic and religious representation has been more important for the American Supreme Court.

In recent years the tendency to fill vacancies by promoting judges from the provinces' superior courts rather than appointing lawyers from private practice has increased. Another change is that fewer ex-politicians are to be found amongst Supreme Court appointees. Nearly half of the first fifty judges appointed had at one time or another been elected politicians at the provincial or federal levels, whereas only one of the judges appointed after 1949 has had this experience. As the Court moves into an era when its work deals more than ever with public law issues, this lack of political experience amongst its members may prove to be something of a handicap. I think it less of a handicap that in terms of economic and ethnic background, and sex the Court has consistently failed to mirror the Canadian population. As John Porter has well shown in these social and biological terms the Court represents Canada's governing elite.<sup>23</sup> Given the composition of the legal profession from which Supreme Court justices must come, this has not unduly restricted recruitment. Nor do I think the capacity for rendering reasoned and lawful justice depends on having the same social background as those to whom one is rendering justice. Nevertheless, symbolically the complete absence of women and the under-representation of religious and ethnic minorities may weaken the Court's authority in an age when these things have become so important.

It is at the level of political symbolism that the Supreme Court is now before the country as a matter of constitutional reform. There is, I think a consensus amongst federal and provincial politicians that the Court *appears* to be too much a creature of the federal government. A

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<sup>23</sup> J. PORTER, *THE VERTICAL MOSAIC* (1965).

Court which has the potential of playing such a crucial role in settling disputes between the two levels of government should be established by the Constitution and not by an Act of the federal parliament. Also there should be some provincial participation in the appointment of judges whether through ratification by a federal Senate transformed into a House of the Provinces or directly through the approval of provincial governments. I emphasize that the need for this is essentially symbolic.<sup>24</sup> It is foolish to think that there is a distinctive provincial or regional view on the legal subjects, including constitutional law, which constitute the Court's docket. It is worse than foolish to think that members of the Court should act as regional representatives.<sup>25</sup>

But there is a need for a Supreme Court that is respected by the leading politicians and the critically active public in all parts of the country. This need will become more acute if, as I think is likely, the Court is increasingly called upon to settle constitutional disputes arousing hot political passions. For this role it must become a separate branch of government with its own non-partisan political constituency of sufficient strength to withstand the assaults of warring politicians.

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<sup>24</sup> Recent proposals to amend the constitutional provisions relating to the Supreme Court of Canada would give the Supreme Court a constitutional basis and involve the provinces in the appointment of Supreme Court justices. See *The Constitutional Amendment Bill* (1978).

<sup>25</sup> Chief Justice Laskin's Address to the Seminar for Journalists (Ottawa, February 22, 1978) criticizes those in Canada who assume that Supreme Court justices should represent regional or governmental interests.