

2017

# The 'Atlantic Seat' on the Supreme Court of Canada: An Endangered Species?

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## Repository Citation

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# “The ‘Atlantic Seat’ on the Supreme Court of Canada: An Endangered Species?”

Philip Girard\*

## I. Introduction

The sigh of relief on the Atlantic coast could be heard all the way to Ottawa on October 17, 2016. On that day, Prime Minister Justin Trudeau announced the nomination of Justice Malcolm Rowe of the Newfoundland and Labrador Court of Appeal to the Supreme Court of Canada seat vacated by Justice Thomas Cromwell. Justice Cromwell’s replacement was to be the first appointed pursuant to a new process put in place by the Trudeau government. When that process was unveiled on August 2, 2016, Trudeau announced that the position would be open to any qualified Canadian lawyer or judge who was functionally bilingual and “representative of the diversity of our great country.” A further clarification stated that “[a]pplications are being accepted from across Canada in order to allow for a selection process that ensures outstanding individuals are considered for appointment to the Supreme Court of Canada,” confirming that Atlantic Canadians did not have a lock on the position.<sup>1</sup>

People on the east coast generally take most things in stride, but this proposed change created a considerable outcry. The New Brunswick Law Society wrote to the Prime Minister on August 3, 2016 questioning whether the convention could be legally ignored.<sup>2</sup> Constitutional expert Wayne MacKay of Dalhousie’s Schulich School of Law called the move “a really big mistake” on August 10, observing that “to have no Atlantic voice [on the Supreme Court] would be contrary to the basic principles of Confederation.”<sup>3</sup> Premier Stephen McNeil of Nova Scotia issued a statement on September 17 urging that the convention not be changed, while the Atlantic Provinces Trial Lawyers Association (APTLA) stated two days later that it would seek an order from the Nova Scotia Supreme Court declaring that the “proposed departure from the constitutional convention of regional representation” constituted an amendment to the constitution engaging s. 41(d) of the *Constitution Act, 1982*.<sup>4</sup> By the end of September, it

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\* Professor, Osgoode Hall Law School. The author and Professor Cromwell, as he then was, were colleagues at Dalhousie Law School (now the Schulich School of Law) from 1984 until Justice Cromwell’s appointment to the Nova Scotia Court of Appeal in 1997. The author would like to thank Shainah MacFarlane and David Sworn for research assistance and Richard Devlin, Sonia Lawrence and Lorne Sossin for comments on an earlier version of this paper.

<sup>1</sup> Jean Paul Tasker & Catherine Tunney, “Justin Trudeau outlines selection process for new Supreme Court justices”, *CBC News* (August 2, 2016), online: <<http://www.cbc.ca/news/politics/supreme-court-canada-justices-selection-1.3703779>>.

<sup>2</sup> Adam Huras, “Law Society questions constitutionality of leaving Atlantic Canada without Supreme Court Judge”, *Telegraph-Journal [of Saint John, NB]* (August 23, 2016), online: <<https://www.telegraphjournal.com/greater-saint-john/story/48244412/law-society-questions-constitutionality>>.

<sup>3</sup> Peter Cowan, “Ottawa stripped Atlantic Canada of inclusion on Supreme Court with barely a peep”, *CBC News* (August 10, 2016), online: <<http://www.cbc.ca/news/canada/newfoundland-labrador/supreme-court-appointments-justin-trudeau-policy-atlantic-canada-1.3713759>>.

<sup>4</sup> “Atlantic Canada lawyers challenge Trudeau on changes to Supreme Court appointment process”, *CBC News* (September 19, 2016), online: <<http://www.cbc.ca/news/politics/atlantic-lawyers-supreme-court-1.3769108>>.

appeared that the pushback was having some effect. On September 27, opposition justice critic and former Minister of Justice Rob Nicholson put forth a motion in Parliament urging the government to respect the “custom” of regional representation in Supreme Court appointments, “in particular, when replacing the retiring Justice Thomas Cromwell, who is Atlantic Canada’s representative on the Supreme Court.” The motion received unanimous support, including that of the Prime Minister.<sup>5</sup>

Perhaps by this point it was clear to the government that the selection committee had found a suitable candidate from Atlantic Canada, and that there was no point in letting this controversy simmer any longer. Perhaps the announcement on August 2 was only a trial balloon, and the government had never really intended to appoint a candidate from outside Atlantic Canada. Or perhaps the political optics of departing from tradition when every single MP from Atlantic Canada was a Liberal were a little too unfavourable. In any case, the new process did have the salutary effect of beginning a national conversation about the value and purpose of the conventions of regional appointment on the Supreme Court of Canada, and their relationship to other forms of diversity such as race, gender, disability, and so on. The conversation is bound to recur, and the government’s acquiescence in the Nicholson motion does not necessarily mean it will decline to seek and consider candidates from across Canada for Supreme Court vacancies that arise in the future, other than those relating to the mandated Quebec seats.

The purpose of this article is not to answer the question of whether there is a justiciable convention relating to appointments from Atlantic Canada. That is a matter of constitutional law upon which others are better equipped to express an opinion. Rather, it takes the retirement of Justice Cromwell as an opportunity to explore the issue by conducting a historical analysis of Atlantic Canadian representation on the Supreme Court of Canada, with a view to providing context for the debate the next time it occurs. In particular, Justice Cromwell’s origins in and strong legal ties to Ontario stimulate some reflection on whether the concept of region applied to Supreme Court appointments needs to be more flexible in order to make the Court more representative of the Canada of the twenty-first century.

Scholars of constitutional conventions generally agree that either precedent or agreement of the parties may give rise to conventions.<sup>6</sup> Geoffrey Marshall proposed a third route: “the basis of some acknowledged principle of government which provides a reason or justification” for the alleged convention.”<sup>7</sup> Marshall also provides some nuance to the notion of agreement: he defines conventions as “the rules of behaviour that *ought* to be regarded as binding by those concerned in working the constitution when they have correctly interpreted the precedents and the relevant constitutional principles.”<sup>8</sup>

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<sup>5</sup> Katie Simpson, “MPs unanimously support regional representation for Supreme Court”, *CBC News* (September 27, 2016), online: <<http://www.cbc.ca/news/politics/mps-vote-in-favour-of-regional-representation-scc-custom-1.3781520>>.

<sup>6</sup> Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), at 10-12.

<sup>7</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Oxford University Press, 1984), at 9.

<sup>8</sup> *Id.*, at 10 (emphasis added).

Whichever route one chooses, there is no substitute for an examination of the factors at play each time the appointment of a judge from Atlantic Canada was made. If one found, for example, that upon the retirement of Justice A from Atlantic Canada, the seat was offered to others outside Atlantic Canada, who declined, before an offer was made to Justice B from Atlantic Canada, who accepted, the existence of an alleged convention of an “Atlantic seat” might be undermined. Thus, the body of this article examines each of the twelve appointments prior to Justice Rowe’s in turn, using the available evidence from the correspondence and memoirs of the relevant prime ministers and ministers of justice, newspapers and legal journals, and existing scholarship. Along the way I also consider the calibre of the appointments from Atlantic Canada. What contributions have they made to the jurisprudence of the Supreme Court? How do they “stack up” against judges from other provinces? Whether Atlantic Canadian representation on the highest court is a convention or merely a custom or tradition, has it proved its worth?

## II. Perspectives on regional representation

It is surprising how little serious literature there is on the conventions of regional representation on the Supreme Court. The matter is discussed episodically in Snell and Vaughan’s institutional history of the Supreme Court, but obviously as one of myriad themes in the history of the Court.<sup>9</sup> J.G. Snell went on to publish a fine history of the attribution of seats to Western Canada in a 1985 article, but there is to date only a partial study of the Atlantic seat(s) on the Court, covering the first four decades or so of its existence.<sup>10</sup> These works take the conventions more or less for granted, and are concerned to explain and document their historical development. Snell orients his article on the Western seats around the twin themes of regional difference and regional importance, as articulated by the historical actors. Regional *difference* was expressed as a claim that western law was distinctive (the Torrens system of land title registration usually stood in for a number of other less clearly articulated legal differences), and the Court needed judges familiar with it to do their job properly. Regional *importance* was expressed as a claim that it was only fair and just that a region that formed a substantial proportion of the Canadian population (by the turn of the twentieth century) and contributed significantly to the Canadian economy should have one or more places on the Supreme Court. The Maritimes, by contrast, seemed to acquiesce in the reduction of their seats from two to one in 1906, even though individual Maritimers and their lawyers were enthusiastic users of the Court.<sup>11</sup> Among constitutional lawyers, William Lederman is one of the few to have advocated enhanced regional representation, and the entrenchment of that representation in the constitution. To achieve this, Lederman urged an expansion of the Court to eleven members, of whom two would come from the Atlantic provinces and three each from Quebec, Ontario, and the West. He was more articulate than most about why such representation was necessary, avoiding both of the principal claims made by

<sup>9</sup> James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press for the Osgoode Society, 1985).

<sup>10</sup> James G. Snell, “The West and the Supreme Court of Canada: The Process of Institutional Accommodation of Regional Attitudes and Needs” (1984-85) 14 *Man. L.J.* 287; “Relations between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years” in Peter Waite, Sandra Oxner and Thomas Barnes, *Law in a Colonial Society: the Nova Scotia Experience* (Toronto: Carswell, 1984).

<sup>11</sup> Snell, “Patterns of the Early Years”, *supra*, note 10, at 159-61.

advocates of additional Western seats in the early twentieth century. For Lederman, the most important regional differences were sociological, not specifically legal. Thus, there should be

available within the Court collective experience and background knowledge of all parts of Canada. [During] judicial conferences ... the judges [should be] able to inform and educate one another on essential facts and background from their respective parts of Canada. This is the vital factor of relevant native judicially-noticed knowledge that ... was missing in the judges of the Judicial Committee of the Privy Council.<sup>12</sup>

While all advocates of regional representation point to the legitimacy factor as an important rationale for the tradition, Lederman is the clearest about the basis for that legitimacy. For him, it resides not in population figures<sup>13</sup> or economic clout, but simply in a general familiarity with the conditions of life and outlook of the inhabitants in each part of Canada. One might call it the “law and society” approach to regional representation. Writing in 1970, Lederman was unconcerned with the representation of other forms of diversity, such as race or gender, on the Court, though his approach would not be hostile to their inclusion.

Peter Russell, writing in 1987, did not hesitate to label the tradition of regional representation a constitutional convention, though he conceded that its exact terms “cannot be stated with mathematical precision.”<sup>14</sup> For Russell, the convention’s purpose is primarily symbolic, though he does not elaborate on the purpose or nature of this symbolism. And he notes the irony that even though regional legal expertise is, outside Quebec, a much less salient factor in the Court’s decision-making than formerly, “the strains in the confederation have become such that it has become more essential than ever to secure the allegiance of political elites in the various regions of Canada.”<sup>15</sup> We might thus call his view the “political accommodation” approach to regional representation. This insight may have some explanatory force today, albeit in the contrary direction. It is surely significant that the first occasion on which the government of Canada expressed publicly a willingness to break with the tradition of regional representation on the Supreme Court (i.e., in searching for Justice Cromwell’s replacement) occurred during a time of much reduced regional tensions in Canada, with western and eastern alienation, as well as the popularity of Quebec separatism, all at historic lows.

More recently, and in a very different Canada than the one in which Lederman wrote almost fifty years ago, writers such as Lorne Sossin and Sonia Lawrence have deplored the continuing ethno-cultural homogeneity on the Supreme Court while recognizing that a diversity of life experience is not the preserve of particular minorities or disadvantaged groups.<sup>16</sup> Both seem to regard the current pattern of regional representation as justifiable, though Sossin

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<sup>12</sup> W.R. Lederman, “Thoughts on Reform of the Supreme Court of Canada” (1970) 8 Alta. L. Rev. 1, at 12.

<sup>13</sup> Lederman’s suggested reform would have considerably over-represented Atlantic Canada and resulted in a corresponding under-representation of Ontario, with regard to population.

<sup>14</sup> *The Judiciary in Canada: the Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at 167.

<sup>15</sup> *Id.*, at 168-69.

<sup>16</sup> Lorne Sossin, “Should Canada Have a Representative Supreme Court?” (2009), online: <[http://digitalcommons.osgoode.yorku.ca/all\\_papers/250](http://digitalcommons.osgoode.yorku.ca/all_papers/250)>; Sonia Lawrence, “Reflections: On Judicial Diversity and Judicial Dependence” in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law, 2010).

observes that “[b]ecause regional representation has been valued so highly, other forms of representation may have received too little attention.”<sup>17</sup> Even there he notes that identity characteristics related to language and religion have traditionally featured prominently in Supreme Court appointments, in the allocation of seats as between Catholics and Protestants down to the end of the twentieth century, and in the tradition of one judge having roots in the francophone community outside Quebec.<sup>18</sup> Neither explicitly pursues the question as to whether a relaxation of the traditions of regional representation, which addresses one kind of legitimacy, would enable the Court to become more diverse on identity grounds—another kind of legitimacy.

This brief review reveals that a commitment to a “representative” Supreme Court can arise from different concerns. For Lederman, the main goal of a regionally representative Court is to reach better *legal outcomes*, because a group of judges fully aware of differing ways of life in various parts of the country will be able to craft decisions reflective of those differences. For Russell, a regionally representative Court is not mainly about legal outcomes; it is primarily a *symbolic political exercise* designed to reduce regional tensions and ensure continued commitment to the federation by regional elites. The concerns of more recent advocates of differing forms of diversity, such as Sossin and Lawrence, reflect a combination of these considerations. They believe that the presence of a more gender-balanced and culturally representative Court will lead to better legal outcomes, à la Lederman, and have a positive effect at the level of symbolic politics with regard to the groups in question, though not necessarily, as Russell would have it, only on the part of their “elites.” As will be seen, Russell’s view probably best reflects how the historical actors understood their own practice with regard to regional appointments. But more recent appointments, especially those of Justices La Forest and Bastarache, also reflect some of the concerns raised by Lederman, Sossin and Lawrence.

### III. The “Atlantic” seat

#### 1. Two “Atlantic” seats: 1875-1906

The first thing to note about the “Atlantic seat” is that initially there were two, not one.<sup>19</sup> As will be seen, however, even during this period the two-seat practice was not stable; it was departed from on two occasions before the Atlantic “quota” dropped to one in 1906, never to rise again. From the 1890s the claims of the East and of Ontario competed with those of an increasingly populous and vocal West, giving a certain fluidity to the practice of regional representation as a whole, not just that involving the eastern provinces.

When the Supreme Court was created with six seats in 1875, the populations of Manitoba and British Columbia were minuscule, and no serious consideration was given to naming a judge

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<sup>17</sup> Sossin, “Representative Supreme Court”, *supra*, note 16, at 6.

<sup>18</sup> This tradition seems to have been suspended since the 2011 retirement of Justice Louise Charron, an Ontario francophone, possibly as a result of the growing bilingualism of anglophone appointees to the Court.

<sup>19</sup> From this point on, down to 1949, I will refer to the seat(s) in question as “Maritime” rather than “Atlantic,” in view of the fact that “Atlantic Canada” refers to the three Maritime provinces plus Newfoundland and Labrador.

from either province.<sup>20</sup> The four founding provinces thus divided up the initial six seats on the Court among themselves, two for Ontario, two for Quebec, and one each for Nova Scotia and New Brunswick. The Maritime appointees were both Fathers of Confederation, William Johnstone Ritchie and William Alexander Henry. Ritchie was born and raised in Nova Scotia but had crossed the Fundy to make his career as a lawyer in New Brunswick. After a long legal, political and judicial career in that province, he proved to be a strong judge on the Court, and served as the second chief justice of Canada from 1879 to 1892.<sup>21</sup> Henry had had a long political career but his reputation as a lawyer was weak and his reputation as a judge even weaker.<sup>22</sup> His colleague Justice Strong complained to the prime minister in 1880 that Henry's judgments were "long, windy, incoherent, masses of verbiage, interspersed with ungrammatical expressions, slang, and the veriest legal platitudes inappropriately applied, [which when published would] stand for all time ... as proof of the incompetency of the Supreme Court."<sup>23</sup> Strong was known for his astringent critiques of all and sundry, but even John S.D Thompson, a more even-handed observer and fellow Nova Scotian, found it difficult to laud Henry's legal talents. When, as Minister of Justice, he was seeking a replacement for Henry after the latter's death in office in 1888, he observed of a possible candidate, the incumbent Chief Justice of Nova Scotia, that "[h]e is vastly better than Henry ever was—but that is saying nothing."<sup>24</sup>

Upon the vacancy opened up by Henry's death, Thompson and the Prime Minister considered that there were no suitable candidates for the top court from the Maritimes, and even spoke of using the occasion to "break up the system" of regional representation.<sup>25</sup> Thompson did think highly of Halifax lawyer Wallace Graham, who had just been with him in Washington presenting the British case before a joint commission appointed to solve an international fishing dispute. But Graham did not get the offer.<sup>26</sup> It was rumoured that the position was first offered to Chief Justice Thomas Wardlaw Taylor of the Manitoba Supreme Court, who declined.<sup>27</sup> In any event, the Prime Minister and his Minister of Justice believed that Ontario offered a more promising candidate pool, and the position went to Christopher Patterson of the Ontario Court of Appeal. Snell reports that this "loss" of a Maritime seat was greeted with "the apparent indifference of the people in the region, [from whom] there was little or no public outcry."<sup>28</sup> As of 1888, then, Maritime representation on the Supreme Court descended from two seats to one.

<sup>20</sup> Snell and Vaughan, *supra*, note 9, at 12.

<sup>21</sup> Gordon Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991).

<sup>22</sup> Phyllis Blakeley, "Henry, William Alexander", *Dictionary of Canadian Biography [DCB]* online, provides a somewhat laudatory assessment of Henry's lawyering skills, but Snell, "Relations between the Maritimes and the Supreme Court of Canada", *supra*, note 10, at 150, provides what is probably a more realistic opinion that "Henry was a competent barrister, but no more than that." All *DCB* references can be found online: <www.biographi.ca>.

<sup>23</sup> Library and Archives Canada, Sir John A Macdonald Papers, Strong to Macdonald, February 9, 1880, 148624-39.

<sup>24</sup> *Id.*, Thompson to Macdonald, August 20, 1888, at 125096-97.

<sup>25</sup> *Id.*, A. Palmer to Macdonald, 21 July 1888, 229959.

<sup>26</sup> The Macdonald government named Graham to the Nova Scotia Supreme Court the next year, and Prime Minister Borden elevated him to the chief justiceship of the province in 1915: Philip Girard, "Graham, Sir Wallace Nesbit", *DCB* online, *supra*, note 22.

<sup>27</sup> Snell and Vaughan, *Supreme Court*, *supra*, note 9, at 272, n. 68.

<sup>28</sup> Snell, "Relations between the Maritimes and the Supreme Court of Canada", *supra*, note 10, at 155.

In September 1892 Chief Justice Ritchie died, but the naming of his replacement was delayed by the turmoil over the prime ministership. John Abbott had succeeded Sir John A. Macdonald upon the latter's death in 1891, but Abbott's own health was precarious. He sailed for London in October 1892 to consult with expert medical opinion; the doctors demanded his instant resignation, which was received in Ottawa on November 20, 1892. Thompson was sworn in as Prime Minister on December 7. He served as his own Minister of Justice and hence had a free hand in choosing Ritchie's replacement. There being now no judge with Maritime roots on the Court, it is not surprising that Thompson turned to the region to fill Ritchie's seat, having elevated Samuel Henry Strong of Ontario to the chief justiceship in the first week of his prime ministership. Thompson did not have to look far: he named his deputy minister, Robert Sedgewick, to the Court in February 1893.

Thompson and Sedgewick had been fellow lawyers in Halifax, and were associated in founding the Dalhousie Law School in the 1883. In 1888, a few years after Thompson became federal Minister of Justice, he called Sedgewick to Ottawa as his Deputy Minister. Sedgewick's greatest achievement in that capacity was the drafting of the Criminal Code of Canada, which Thompson managed to get through Parliament in 1892. Sedgewick probably left more of a mark as Deputy Minister than as a judge, and may have found the transition difficult as he had no judicial experience. His judicial output was less than might have been expected, but there is no doubt he was a suitable appointee to the Supreme Court.<sup>29</sup>

Only five months after Sedgewick's swearing in, the issue of a second Atlantic seat had to be revisited upon the death of Justice Christopher Patterson. This time, Thompson felt there was a suitable candidate from the Maritimes in the person of George Edwin King, a well regarded commercial lawyer from Saint John, New Brunswick who had been successively Attorney General and Premier of the province, and a judge on its Supreme Court since 1880. Thompson lost little time replacing Patterson, appointing King to the Court on September 21, 1893. Chief Justice Strong, never lavish with compliments, observed on King's death in 1901 that he was "a great lawyer, especially in the department of commercial law. He was probably the best commercial lawyer in the Dominion."<sup>30</sup>

One may pause here to observe that King's name was mentioned in 1888 as a successor to Henry; if the government had been committed to the idea of maintaining two Atlantic seats he should have been as obvious a choice in 1888 as he was in 1893. The choice can be interpreted as demonstrating that the government did not replace Henry with an Ontario candidate for lack of suitable Maritime candidates, but rather because it did not wish to be bound by a convention of two Maritime judges on the Court; or perhaps, did not wish to be bound by regional representation at all.

From 1893 to 1901 there were again two judges from the Maritimes on the Supreme Court, Sedgewick and King. On the latter's death, Prime Minister Wilfrid Laurier appointed his Minister of Marine and Fisheries, Sir Louis Davies of Prince Edward Island, to fill the vacancy.

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<sup>29</sup> Philip Girard, "Sedgewick, Robert", *DCB* online, *supra*, note 22.

<sup>30</sup> (1901) 21 Can. L.T., at 285. See also T.W. Acheson, "King, George Edwin", *DCB* online, *supra*, note 22.

The legal journals were not impressed. The Canada Law Journal hoped “that this appointment will give strength to the Court of highest resort in the Dominion ... but doubt[ed] if it can be said that due effort has been made in the direction indicated,” hardly a ringing endorsement of the new judge.<sup>31</sup> While a politician, Davies had helped to solve the island’s two biggest problems: the land question and the school question.<sup>32</sup> The original distribution of virtually all land on the Island in a few dozen large estates worked by tenants had led to underdevelopment and demands for expropriation of the proprietors, with their lands to be turned over to the tenants. After Prince Edward Island joined Confederation, Davies strongly supported the *Land Purchase Act* of 1875, which did exactly that. Then, when the proprietors successfully challenged the Act’s validity in Island courts, he argued the provincial government’s appeal to the newly created Supreme Court of Canada, which upheld the Act.<sup>33</sup> On the school question, Davies led the “Free School” party in the 1870s which aimed to abolish the Island’s denominational schools and create a non-sectarian system. Becoming premier after the 1876 election, which was fought on this issue, he was able to implement his desired solution.

Davies had also been called to the bar of the Inner Temple in England, albeit at a time when the calibre of English legal education was at a low ebb. Notwithstanding his political skills and English legal education, he had little experience in the practical side of law and no judicial experience, deficits which showed during his nearly quarter-century-long career at the Supreme Court. When Chief Justice Charles Fitzpatrick resigned in 1918 to take up the lieutenant-governorship of Quebec, Davies lobbied hard for the position. Aside from being the senior judge, he had no claim to the position based on merit, being infirm and not especially talented. He advised Prime Minister Borden that if appointed he would resign in three years, after twenty years’ service on the Court, when his pension rights would be improved. Borden reluctantly decided to recommend him, and barely got the appointment through cabinet.<sup>34</sup> Then, at the appointed time, Davies did not retire, but stayed on another three years, finally dying in office on May 1, 1924.

By this point, Davies was the only Maritime appointee on the Court, the second Maritime seat having been earmarked for the West upon the death of Robert Sedgewick in 1906. The Western bars had begun to agitate for a Western presence on the Supreme Court of Canada in the 1890s, on the basis of both fairness and the specificity of Western law.<sup>35</sup> They initially achieved some success with the appointment of Chief Justice Albert Killam of Manitoba to fill the vacancy on the Supreme Court provided by the sudden death of Justice J.D. Armour, formerly Chief Justice of Ontario, in 1903. Killam’s background had a little something for everyone. Born and raised in Nova Scotia, he went to Ontario as a young man and qualified as a lawyer in Toronto before moving to Winnipeg to set up practice there. After joining the Manitoba bench in 1885 he “earned an excellent reputation both for his manner and for the quality of his

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<sup>31</sup> (1901) 37 Can. L.J., at 677.

<sup>32</sup> On what follows, see J.M. Bumsted, “Davies, Sir Louis Henry”, *DCB* online, *supra*, note 22.

<sup>33</sup> *Kelly v Sullivan*, [1876] S.C.J. No. 1, (1876) 1 S.C.R. 3 (S.C.C.).

<sup>34</sup> Snell and Vaughan, *Supreme Court*, *supra*, note 9, at 117.

<sup>35</sup> Snell, “The West and the Supreme Court of Canada”, *supra*, note 10.

judgments.”<sup>36</sup> Perhaps because of the Ontario connection and his perceived competence, there was little grumbling from that province when one of “its” seats was given to a westerner, reducing its complement on the Court to one.

Unfortunately for Westerners, this state of affairs did not last. Killam was persuaded to head up the Board of Railway Commissioners after only a year and a half at the Court, leaving the West again deprived of representation when Killam’s seat went to John Idington, who had been on the Ontario High Court for less than a year.<sup>37</sup>

After Idington’s appointment in 1905, the West recommenced its campaign for a Supreme Court seat. The death of Robert Sedgewick the following year thus coincided with these renewed aspirations. With Alberta and Saskatchewan having acceded to provincehood in 1905, and the West in general experiencing an economic and population boom during the Laurier years, the absence of a westerner on the Supreme Court seemed less and less justifiable. The West’s proportion of the Canadian population doubled from 12% to 24% in the decade between 1901 and 1911 as immigrants poured into the prairies, while that of the Maritimes declined from 16.6% to 13% over the same period.<sup>38</sup> It was thus not very surprising that Sedgewick was replaced with a westerner. Lyman Poore Duff would put his stamp on the Supreme Court as no other judge had since the founding of the Court, partly through his longevity (his thirty-eight years of service will likely never be surpassed), but also through the clarity and force of his analysis, even if his ideas and methods are no longer in vogue today.<sup>39</sup> Duff’s trans-Canadian trajectory mimicked Killam’s in many respects. Born in Ontario, he spent his childhood in Nova Scotia when his clergyman father took up a position with a congregation in Liverpool. Returning to Ontario as a young man, he was called to the bar and practised law there before moving to Victoria, British Columbia in 1894. He rapidly made a name for himself, and achieved a promotion to the Supreme Court of the province a decade later. For the *Canadian Law Times*, his appointment proved to be the happy coinciding of the merit principle with the need for regional representation.<sup>40</sup> It appears, however, that there was little outcry from Maritime politicians as a result of the loss of the second Maritime seat to the West.

Pausing here, we may note that regional representation was somewhat fluid in the first three decades after the founding of the Supreme Court. As early as 1888, the Prime Minister and Minister of Justice spoke of “breaking up” the “system” of regional representation which had characterized the initial appointments to the Court, and did in fact depart from it by appointing an Ontario lawyer in place of the deceased Justice Henry. The second Maritime seat was “regained” in 1893, only to be lost, permanently, in 1906. Meanwhile, a seat formerly earmarked

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<sup>36</sup> *Id.*, at 293.

<sup>37</sup> The period of Killam’s tenure, from August 1903 to February 1905, was thus the only period in the Court’s history when the eastern provinces had more representation (2 judges, Davies and Sedgewick) than Ontario (one judge, Wallace Nesbitt).

<sup>38</sup> Figures are calculated from Statistics Canada provincial decadal census data, Table A2-14, online: <<http://www.statcan.gc.ca/pub/11-516-x/sectiona/4147436-eng.htm>>.

<sup>39</sup> David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: UBC Press for the Osgoode Society, 1984); Blake Brown, “The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff” (2002) 47 *McGill L.J.* 559.

<sup>40</sup> (1906) 26 *Can. L.T.*, at 701-02.

for Ontario was given to a Manitoban in 1903, even though he did not occupy it for long. It would thus be hard to demonstrate the rigorous observance of a convention of regional representation in this early period, even if one can point to the continuous presence of one judge from the Maritimes during this time.

## 2. One “Atlantic” seat, 1906-2016

The long-awaited vacancy of the seat belonging to Chief Justice Louis Davies in 1924 provided the occasion for something of a showdown between easterners, who claimed the seat by tradition and who would otherwise have no representation on the Court, and westerners, who strongly claimed entitlement to a second seat given their new and important place in Confederation. Both wings of the country were experiencing considerable alienation from the centre, as attested by the strength of third parties in prairie politics and the emergence of the protest phenomenon known as the Maritime Rights Movement in the 1920s.<sup>41</sup> Yet Mackenzie King was prepared to stare down both east and west, and indeed Ontario, to appoint the man he had his heart set on as the best candidate for Chief Justice of Canada. Even though King was not successful, his actions in 1924 are the strongest evidence we have that the federal government did not consider itself bound by considerations of regional representation as of this date.

The man at the top of King’s list was Montreal lawyer Eugene Lafleur, who was generally viewed as the best lawyer of his day in Canada. A fluently bilingual protestant of Swiss and French-Canadian background, he was one of the rare figures who moved easily between Montreal’s anglophone and francophone elites. Founder of the firm that came to be known as McCarthy Tétrault, Lafleur began his career as a trial lawyer but gravitated to appeal work. He became so successful at it that, according to his biographer, during the 1910s and 20s “there was hardly a case of consequence concerning constitutional law or freight rate litigation that did not involve him.”<sup>42</sup> He argued before the Supreme Court at least 300 times and before the Judicial Committee dozens of times.<sup>43</sup>

In the fall of 1923 Justice Brodeur of Quebec resigned and Davies’s death or resignation was expected shortly. However, King’s plan was to offer the chief justiceship to Lafleur, who could occupy the vacant Quebec seat and leave Davies’s seat available for someone else. He recorded with satisfaction that every member of cabinet but one approved of this plan, and congratulated himself that “[t]his will be an excellent appointment & win general approbation.”<sup>44</sup> But when King offered the expectancy of the chief justiceship to Lafleur by telephone on

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<sup>41</sup> E.R. Forbes, *The Maritime Rights Movement: A Study in Canadian Regionalism, 1919-1927* (Montreal: McGill-Queen’s University Press, 1979).

<sup>42</sup> David R. Williams, “Lafleur, Eugene”, *DCB* online, *supra*, note 22.

<sup>43</sup> *Ibid.*

<sup>44</sup> William Lyon Mackenzie King Diaries, September 19, 1923, online <<http://www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/william-lyon-mackenzie-king/Pages/diaries-william-lyon-mackenzie-king.aspx>> [hereafter “King Diaries online”].

January 4, 1924, he declined. Disappointed, King filled Brodeur's seat with Justice Albert Malouin at the end of the month.

Not to be deterred, just three days after Louis Davies died on May 1, King raised the matter again with his cabinet. The discussion as recorded in his diary is key to any assessment of conventions regarding regional representation.

Attended meeting of Council at noon discussed appmt. of Chief Justice and got Council to agree to Lafleur being offered the position anew, the Maritime province men agreeing to let their chance for nominee pass if Lafleur would accept. Quebec to wait re her further nomination. Ont. to let chance go by.

King went on to note that he called Lafleur to his office at 5 pm that day and tried to persuade him to "fill the position to strengthen the bench & uphold Br[itish] conception of Justice."<sup>45</sup> With tears in his eyes, Lafleur responded that he was not insensitive to the demands of public service, but that he was getting too old for the position (he was 68), and that the Court needed younger men. King let the position remain open over the summer and made one last try to recruit Lafleur in the fall of 1924, even enlisting the governor general, Lord Byng, to put pressure on him; but the Montreal advocate would not be moved, and King could delay no longer before naming a new chief justice.<sup>46</sup>

King's powerful Quebec lieutenant, Minister of Justice Ernest Lapointe, favoured his deputy, Edmund Newcombe, for the post. Newcombe was a Nova Scotian who had practised law there for ten years before accepting John Thompson's invitation to become deputy minister in succession to Robert Sedgewick upon the latter's elevation to the Supreme Court. Newcombe would become Canada's longest serving Deputy Minister of Justice, having served over thirty years in the office by 1924, during which time he developed a formidable reputation as a skilled and authoritative administrator.<sup>47</sup> King held Newcombe's Conservative past against him, however, and would not promote him to Chief Justice (though he would later relent and appoint Newcombe a puisne judge of the Supreme Court).<sup>48</sup> In a sense by default, the chief justiceship went to Justice Francis Anglin, a New Brunswicker by birth whose legal career prior to his appointment to the Supreme Court in 1909 had been in Ontario. Two judges were senior to him, Idington and Duff, but the reluctance of the 83-year-old Idington to retire hugely irritated King, while Duff, considered a more able jurist than Anglin, had developed a serious drinking problem and was not always reliable in point of attendance at court.<sup>49</sup>

By referring to "Maritime province men" in his diary, King was referring to the Maritimers in his cabinet, both Nova Scotians, Minister of Finance W.S. Fielding and Minister of Defence E.M. Macdonald. What role King thought they should have in these events is directly

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<sup>45</sup> *Id.*, at May 4, 1924.

<sup>46</sup> Snell and Vaughan, *Supreme Court, supra*, at 120-21. Lafleur's appeal transcended party lines. Prime Minister Borden considered adding a seventh judge to the Supreme Court in 1918 purely in order to add Lafleur: Robert Laird Borden diary, typescript, October 22, 1918, York University Archives, F0267.

<sup>47</sup> Philip Girard, "Newcombe, Edmund Leslie", *DCB* online, *supra*, note 22.

<sup>48</sup> King Diaries online, May 1, 1924.

<sup>49</sup> Williams, *Duff: A Life in the Law, supra*, note 39, at 117-18.

relevant to the issue of the existence of any convention. On the one hand, the fact that the two men were prepared to “let their chance for nominee pass by” seems to signal that King viewed the Maritimes as having a legitimate expectation of one seat on the Court. The language of agreement suggests that we may be in the presence of a contractually-based convention. On the other hand, the fact that this expectation might be overlooked in the case of a particularly exceptional candidate, even if that left the Maritimes with no representation on the Court, is also worthy of note. The language of agreement is also slippery, and does not necessarily indicate a convention. In noting the agreement of his Nova Scotian cabinet ministers to his proposed scheme, King may have been simply expressing satisfaction that they agreed with his position, not that he actually required their assent. As Chief Justice Laskin observed in the *Patriation Reference*, the federal government might well seek provincial approval for a particular constitutional amendment, “as a matter of good politics rather than as a constitutional requirement.”<sup>50</sup>

The language used by King—“their chance”—is equivocal with regard to any sense of obligation. He does not use stronger words such as “right,” “claim,” or “entitlement,” or state that they would “let their seat go” or “waive their claim” if Lafleur accepted. It is true that this is not an official document, and one should not over-interpret language King used for his own purposes in his private diary. In any case, King’s own perception of whether the Maritimes or any other region had, by convention, a claim to a seat or seats on the Supreme Court cannot be determinative on its own. But it is certainly relevant evidence for those seeking to establish such a claim, upon whom the burden of proof rests. Describing the potential convention as the Maritime provinces’ “chance for a nominee” suggests that, as of 1924 at least, it may have lacked the requirements of regularity and certainty normally associated with a convention.

It is less clear what King meant when he observed, a propos of his plan to elevate Lafleur, that “Ont. to let chance go by.” Ontario already had two members on the Court: Idington and Anglin. By convention the province had no claim to a third, though perhaps some were arguing for such a position. The “chance” seems more likely to refer to the chief justiceship. The Ontario legal community may have felt somewhat aggrieved that ever since Chief Justice Strong’s retirement in 1902, three successive Chief Justices had come from outside the province. First, Laurier had appointed Henri-Elzéar Taschereau as Chief Justice in succession to Strong; he thus became the first French-Canadian Chief Justice of Canada.<sup>51</sup> When Taschereau retired in 1906, Charles Fitzpatrick of Quebec, Laurier’s Minister of Justice, was named directly to the chief justiceship; and as we have seen, on his retirement, Louis Davies of Prince Edward Island managed to press his claim to the top job. In light of these events, Ontario lawyers might have considered that they had a moral claim to the chief justiceship; even so, the province’s cabinet representatives were not prepared to press this point if Lafleur would accept the post. They

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<sup>50</sup> [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753, at 866 (S.C.C.) [hereinafter “*Patriation Reference*”]. Chief Justice Laskin partially dissented in the *Patriation Reference*, but not on this point.

<sup>51</sup> On the significance of this appointment, see Philip Girard, “Politics, Promotion, and Professionalism: Sir Wilfrid Laurier’s Judicial Appointments,” in Jim Phillips, R. Roy McMurtry & John T. Saywell, eds., *Essays in the History of Canadian Law, vol. X, A Tribute to Peter N. Oliver* (Toronto: University of Toronto Press for the Osgoode Society, 2008), at 188-90.

would “let [their] chance go by” and acquiesce in a third Quebecer becoming Chief Justice. Clearly, whatever is being referred to here, whether it relates to a puisne position or the post of Chief Justice, can only be a moral claim on Ontario’s part, and in no way a claim arising from any sort of convention.<sup>52</sup> The fact that King used the same word, “chance,” to describe both the expectations of the Maritime cabinet ministers and those of Ontario, when the latter clearly had only a moral claim to any further position on the Court, is additional evidence against the existence of a constitutional convention regarding an “Atlantic seat” on the Supreme Court.

The elevation of Justice Anglin meant that Davies’s seat remained to be filled. King lifted his objection to Newcombe and thus, on the surface at least, the tradition of a Maritime seat continued. With Newcombe, one may begin to question the minimum eligibility requirements for a candidate for the “Maritime seat” on the Supreme Court. Certainly Newcombe was born and raised in Nova Scotia and had become a lawyer there. But he had exercised his profession in Ottawa for over three times as long as he had in his native province, and had not lived in the Maritimes for over three decades; indeed he was the classic “Ottawa insider” by the time of his appointment. Nonetheless, he did bring some eastern expertise to the Court. His colleagues were content to let him write in almost all the maritime law cases that came before them during his tenure (he had taught marine insurance at Dalhousie).<sup>53</sup> Otherwise, he was a somewhat unimaginative and traditional jurist, though these qualities were by no means in short supply during these years, on the Supreme Court or elsewhere. On the matter of whether women could be appointed senators, for example, in 1921 he advised the government as deputy minister that in light of existing authority they could not. As a result of preparing this opinion, he quite properly did not sit on the “Persons case” when it arrived at the Supreme Court, but clearly would have joined in its opinion if he had.<sup>54</sup> On the matter of Aboriginal title in British Columbia, however, his views were more progressive. He advised the Laurier government in 1910 that the vast unsurrendered portions of the province “cannot be open for settlement until competent arrangements are made to secure the rights of the Indians,” and prepared a reference on the issue to the Supreme Court. With the change in government in 1911, however, the Borden government let the matter drop.<sup>55</sup>

The western provinces, or more precisely the prairies, continued to press their demand for more representation on the Court. They succeeded in 1927, when a seventh seat was finally added to the Supreme Court. A contemporaneous amendment to the *Supreme Court Act* provided for a compulsory retirement age of 75, for incumbents as well as new appointees.<sup>56</sup> King’s nemesis, the now 86-year-old Justice Idington, was out of a job the day the amendment came

<sup>52</sup> See the discussion in Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society, 2005), at 512-13.

<sup>53</sup> See, e.g., *Canada Steamship Lines, Ltd. v. John B. Ketchum II (The)*, [1924] S.C.J. No. 55, [1925] S.C.R. 81 (S.C.C.); *Strandhill (The) v. Walter W. Hodder Co.*, [1926] S.C.J. No. 49, [1926] S.C.R. 680 (S.C.C.); *Canada v. Sincennes-McNaughton Line Ltd.*, [1927] S.C.J. No. 81, [1928] S.C.R. 84 (S.C.C.).

<sup>54</sup> *Edwards v. Canada (Attorney-General)*, [1928] S.C.J. No. 19, [1928] S.C.R. 276, rev’d [1929] J.C.J. No. 2, [1930] A.C. 124 (J.C.P.C.).

<sup>55</sup> Girard, “Newcombe”, *supra*, note 47 ; Hamar Foster, “Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927” in John McLaren and Hamar Foster, eds., *Essays in the History of Canadian Law, vol. VI, British Columbia and the Yukon* (Toronto: University of Toronto Press for the Osgoode Society), 1995), at 50-52.

<sup>56</sup> R.S.C. 1927, c. 35, s. 9.

into effect on March 31, 1927, thus opening up a second position. One of these went to John Lamont of the Saskatchewan Court of Appeal, the other to Robert Smith of the Ontario Court of Appeal. With the addition of a second westerner, the proportion of western judges on the Supreme Court now reflected their proportion of the Canadian population almost exactly. From 1927 on, there would always be two judges from western Canada on the Court, except from 1979-82, when there were three. Normally one of these was from the prairies and one from British Columbia, but that pattern was interrupted when Charles Locke of British Columbia retired in 1962 and was replaced by Emmett Hall of Saskatchewan at a time when Ronald Martland of Alberta was already on the Court.<sup>57</sup>

Newcombe's death in office in 1931 provided Prime Minister R.B. Bennett with the chance to make his first appointment to the Supreme Court. A New Brunswicker himself, and graduate of Dalhousie Law School, Bennett was probably disposed to appoint a fellow Maritimer to Newcombe's old seat. Given Newcombe's Nova Scotia roots, his replacement would probably hail from New Brunswick according to tradition. The problem, as Bennett saw it, was finding someone of the same intellectual rank as former New Brunswick appointees such as Chief Justice William Ritchie and George King. He wrote frankly to Premier C.D. Richards of New Brunswick, a fellow Conservative, that there was "no one in New Brunswick fitted by training and experience to become a member of the Court of last resort, in this Dominion."<sup>58</sup> That was patently wrong: Bennett clearly knew of the intellectual and highly regarded Ivan Cleveland Rand, then Atlantic regional counsel to the Canadian National Railway (CNR) in Moncton. In fact, Rand later said that he had been offered the position on the Supreme Court in 1931 and accepted it, but that the Prime Minister's Tory cabinet would not hear of it.<sup>59</sup> Reluctantly, Bennett backed down and settled on Oswald Smith Crocket, a trial judge on the New Brunswick Supreme Court who had been appointed by the Borden government in 1913 after nine years' service as MP for the New Brunswick riding of York<sup>60</sup>

Crocket remained on the Court for 10.5 years, until he reached compulsory retirement age. It could not have been easy for him, as Chief Justice Duff, who succeeded Anglin in 1933, disdained his intellectual abilities and made no secret of it. He used to lecture Crocket on the law, leading him on one occasion to storm out of the Chief's office complaining, "who does he think I am, a student?"<sup>61</sup> Academics have generally agreed with Duff's low opinion of Crocket,<sup>62</sup> and even Bennett himself worried that, after eighteen years as a trial judge, to elevate him to the

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<sup>57</sup> British Columbia's sense of grievance at not having a representative on the Supreme Court had reached such a pitch by 1978 that upon the retirement of Wishart Spence of Ontario, it was agreed that the position would be "mortgaged," such that William McIntyre of British Columbia would be appointed on January 1, 1979, and upon the retirement of Ronald Martland, the position would "revert" to Ontario, which it did upon the appointment of Bertha Wilson to succeed Martland.

<sup>58</sup> Libraries and Archives Canada, R.B. Bennett Papers, Bennett to C.D. Richards, January, 28, 1932, at 251760-61.

<sup>59</sup> William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press for the Osgoode Society, 2009), at 93, though Kaplan has some doubts about the veracity of the story.

<sup>60</sup> Judges of the Supreme Court of Canada, "The Honourable Oswald Smith Crocket", online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=oswald-smith-crocket>>.

<sup>61</sup> Williams, *Duff*, *supra*, note 39, at 165.

<sup>62</sup> Williams, *ibid.*; Snell and Vaughan, *Supreme Court*, *supra*, note 9, at 147-49; Kaplan, *Canadian Maverick*, *supra*, note 59, at 93.

Supreme Court “and expect him within a reasonable time to acquire the habit of an Appellate Judge, is asking a very great deal.”<sup>63</sup> After Justice Henry, it is hard to think of a representative of Atlantic Canada who has left less of a mark on the Supreme Court bench than Oswald Crocket.

After Crocket’s retirement in 1943, Ivan Rand would finally get his turn. In 1933, he had been made counsel for the entire CNR, which required him to spend most of his time in Montreal. During his long career with the railway Rand argued many cases before the Supreme Court of Canada and the Board of Railway Commissioners, and went to London four times to argue appeals before the Judicial Committee. This was in addition to the massive amount of solicitorial work he oversaw for the largest corporation in Canada, whose workforce reached 100,000 at times.<sup>64</sup> But Rand was not just a lawyer’s lawyer. He had graduated *cum laude* from Harvard with his LLB in 1912 and maintained a strong intellectual interest in the law. For Mackenzie King, who had had his eye on Rand for a long time, the choice was a no-brainer; King had asked him to run for the Liberals federally in 1925, and even considered bringing Rand into his wartime cabinet at one point.<sup>65</sup> Of course, Rand’s Liberal credentials were the icing on the cake. With Duff on the way out—his term had been extended past retirement age by Parliament to January 1944—the Court would need someone who could provide strong intellectual leadership. While there seems to have been no debate that Crocket’s successor would come from the Maritimes, there was some considerable lobbying for a Nova Scotia candidate, given the usual rotation between the two major Maritime provinces. Minister of Justice Louis St-Laurent strongly supported Rand, but cabinet powerhouses J.L. Ralston and J.L. Ilsley, Ministers of Defence and Finance respectively, supported fellow Nova Scotian Francis David Smith, a member of Ralston’s old Halifax law firm. With the strong backing of King and St-Laurent, however, the Rand appointment made it through cabinet.<sup>66</sup>

Rand is generally regarded as having made the most significant contribution to the Supreme Court’s jurisprudence by anyone prior to Bora Laskin, for whom he was an icon. His biographer is thoroughly alive to Rand’s personal defects — “his first-rate mind accompanied a third-rate temperament” — but lauds his “great, enduring and inspirational contribution to Canadian law.”<sup>67</sup> His civil liberties decisions of the 1950s, which foreshadow many of the themes later picked up in *Charter* jurisprudence, are all the more remarkable for the fact that there was so little in the Canadian constitution of the day upon which to ground them.

When Rand reached the age of compulsory retirement in 1959, the long reign of the Liberals in twentieth-century Canada had come to an end and the Diefenbaker government was in power. It had no particular reason to question existing traditions of appointment, and looked to what was now Atlantic Canada (Newfoundland having joined Confederation in 1949) to fill Rand’s seat. The past two occupants having come from New Brunswick, there was probably not much opposition to the post going to a Nova Scotian. Diefenbaker did have a Member of Parliament from Newfoundland in his cabinet, but whether there was any consideration of

<sup>63</sup> As cited in Snell and Vaughan, *Supreme Court*, *supra*, note 9, at 147.

<sup>64</sup> Kaplan, *Canadian Maverick*, *supra*, note 59, ch. 3.

<sup>65</sup> *Id.* at 95.

<sup>66</sup> *Id.* at 93-95.

<sup>67</sup> *Id.* at 430.

Newfoundland candidates is unknown. Nova Scotia's cabinet representative, George Nowlan, the Minister of National Revenue, was the one to phone Roland Almon Ritchie with the offer of a Supreme Court post.<sup>68</sup> As was noted in a later study of judicial appointments, Diefenbaker's seemed primarily motivated by patronage.<sup>69</sup> Ritchie came from a legal dynasty with deep Conservative roots in Nova Scotia (Chief Justice William Ritchie was from the same clan), and had been actively involved in party matters in the postwar years. In particular, he campaigned for Nowlan, whose victory in a 1948 federal by-election in the Annapolis Valley heralded the revival of Conservative fortunes in the province.

Ritchie obtained a Bachelor of Arts in jurisprudence at Pembroke College, Oxford, the main attraction of which was that it had no entrance exam. He began to practice with a Halifax firm in the late 1930s, then joined the armed forces, suffering serious injuries in a motorcycle accident shortly after the invasion of Normandy. While Ritchie returned to the practice of law after the war, his professional profile was no better than average: he appeared before the Supreme Court of Nova Scotia with very modest frequency and possibly never before the Supreme Court of Canada. Diefenbaker did not seem unduly troubled by Ritchie's lack of judicial experience, nor a similar lack on the part of Ronald Martland, appointed to the Supreme Court the year before. The two men had been at Oxford at the same time, though at different colleges and it is not clear whether they knew each other. Anglophile, Oxford-educated and Conservative, their views on law were so similar that their concurrence rate on the Court neared 100% according to the calculations of Ritchie's biographer.<sup>70</sup> During the turbulent 1960s their views were often out of step with an increasingly liberal public opinion, and with the emerging liberal wing of the Court. Nonetheless, Ritchie is remembered as the author of the Court's decision in *Drybones*, wherein the Court employed the *Canadian Bill of Rights* for the first and virtually the only time, to declare inoperative a section of the *Indian Act* making it an offence for an "Indian" to be found "unlawfully intoxicated off a reserve."<sup>71</sup> His dissent, along with Martland, on the federal government's legal power to patriate the constitution without provincial consent also attracted some positive attention at the time.<sup>72</sup> On the whole, however, Ritchie's judgments are dry, undistinguished applications of precedent, especially English precedent, unleavened, aside from *Drybones*, by any policy analysis or sense of responsibility for developing the law.<sup>73</sup>

By the time Ritchie was approaching the age of 75, which he would reach in 1985, the Canadian legal world had been transformed by the adoption of the *Canadian Charter of Rights and Freedoms*. Martland having retired in 1982, Ritchie was the last remnant of another era. He had various health problems during his final years on the Court, but made no move to depart

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<sup>68</sup> This and other biographical information on Ritchie comes from Thomas Stinson, "Mr. Justice Roland Ritchie: A Biography" (1994) 17 Dal. L.J. 509.

<sup>69</sup> William H. Angus, "Judicial Selection in Canada: The Historical Perspective" (1966) 3 Can. Legal Stud. 220.

<sup>70</sup> Stinson, "Roland Ritchie", *supra*, note 68, at 520-21. The actual concurrence rate varied between 93% and 97% over time.

<sup>71</sup> *R. v. Drybones*, [1969] S.C.J. No. 83, [1970] S.C.R. 282 (S.C.C.).

<sup>72</sup> *Patriation Reference*, *supra*, note 50.

<sup>73</sup> This is the conclusion of Stinson, "Roland Ritchie", *supra*, note 68, at 528-33, with which I agree.

until Chief Justice Brian Dickson encouraged him to think about stepping down.<sup>74</sup> That he delayed announcing his retirement until the month after the federal election of 1984 leads one to speculate that he may have wanted to allow a new Conservative government, should one be elected, to name his successor. That successor, albeit appointed by Prime Minister Brian Mulroney's government, could just as well have been appointed by any Liberal government. Gérard La Forest came from a francophone (but not Acadian) background in New Brunswick, his parents having migrated there from Quebec. However, he completed all of his post-secondary education in English, including a law degree at the University of New Brunswick, a stint as a Rhodes scholar at Oxford, and masters and doctoral degrees in law at Yale.<sup>75</sup> He had a varied career in the public service and in academe, including a period as dean of law at the University of Alberta, and wrote important books on natural resources law, extradition, and taxation among other topics.<sup>76</sup> His pan-Canadian career as a public intellectual had few parallels, then or now. His profile might have suggested a place on the Federal Court of Canada, but in 1981 the Trudeau government appointed him to the New Brunswick Court of Appeal.

Ritchie's replacement would be Brian Mulroney's first appointment to the Supreme Court, and according to his memoirs the lobbying began immediately. On being informed of the vacancy, he asked his principal secretary for "views on the very best judges/lawyers (men and women) from Atlantic Canada ... on an urgent basis," suggesting that he never considered candidates from elsewhere. Mulroney reports that he "didn't give a hoot about [candidates'] political background," and that was certainly proved with the appointment of Gérard La Forest (whom Mulroney refers to as Gerald). Mulroney noted in his journal on January 16, 1985 (reproduced in his memoirs) that the main criticism of La Forest was that he was "too close to Trudeau, Liberal persuasion, etc." However, unlike R. B. Bennett, Mulroney overruled such objections from his cabinet. He also overruled "John [Crosbie]'s legitimate wish to appoint a fellow Newfoundlander," because, in the Prime Minister's view, the "leading candidate" was clearly Justice La Forest.<sup>77</sup> The wishes of Crosbie, his Minister of Justice, to appoint a candidate from Newfoundland were sufficiently well known to be reported on in the media.<sup>78</sup> Mulroney made nine Supreme Court appointments during his two terms. The only judge he did not replace, Antonio Lamer, he elevated to the role of Chief Justice.<sup>79</sup> While Mulroney's reminiscences on the quality and non-partisanship of his Supreme Court appointments may appear somewhat self-serving, they are also broadly speaking accurate.

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<sup>74</sup> Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society, 2003), at 296-97.

<sup>75</sup> It is curious that the Maritime law schools have so far produced only one judge each on the Supreme Court of Canada, in spite of their nineteenth-century foundations: Gérard La Forest in the case of the University of New Brunswick, and Bertha Wilson in the case of Dalhousie University.

<sup>76</sup> Among his best known works are *The Allocation of Taxing Power under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 1967); *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969); *Water Law in Canada: the Atlantic Provinces* (Ottawa: Information Canada, 1973); *Extradition to and from Canada* (Toronto: Canada Law Book, 1977).

<sup>77</sup> Brian Mulroney, *Memoirs: 1939-1993* (Toronto: McClelland & Stewart, 2007), at 346-47.

<sup>78</sup> "PM, Crosbie disagree on SC appointee", *Ottawa Citizen* (January 10, 1985).

<sup>79</sup> Mulroney made two appointments to the "prairie" seat on the Supreme Court: William Stevenson (1990-92) and his successor John Major (1992-2005).

Justice La Forest outlined his judicial philosophy in a lecture delivered soon after his appointment to the Supreme Court, and it could not have been more different from that of Roland Ritchie. La Forest described his enjoyment “in writing judgments, particularly where one can move the law forward for the better . . . [W]henever I come across a case where the law can be refashioned for the public good and private justice, I shall continue to do so—with relish!”<sup>80</sup> Many of La Forest’s decisions in public and private law continue to be cited regularly, and his contributions to the law were memorialized in a festschrift.<sup>81</sup> However, this seismic shift from Ritchie to La Forest was not unique: the pattern was repeated time and time again in the 1980s as, for example, Claire L’Heureux-Dubé replaced Julien Chouinard, or Bertha Wilson replaced Ronald Martland. In view of the Supreme Court’s vastly enhanced mandate, the government of Canada could no longer rely on judges who were “good enough.” It had to find men and women capable of venturing into the unknown, using new techniques to find answers to questions never before posed in Canadian law.

A less high profile but equally important change from the previous decades was the shift in the way the federal government went about seeking candidates for judicial vacancies. Consultation processes were extended and made more structured, if not exactly formalized, and the Department of Justice developed its own institutional capacity for gathering information about potential candidates with the appointment of Ed Ratushny as the first adviser to the Minister on Judicial Appointments in 1973.<sup>82</sup> The remarkably casual and patronage-ridden process followed in earlier times became rather more professional, although it would be going too far to say that political and partisan considerations disappeared altogether.<sup>83</sup>

Another feature of the La Forest appointment that represented a shift from past practice was his thorough bilingualism. Familiarity with the French language had never featured prominently on the résumé of previous holders of the Atlantic seat. Probably Ritchie and possibly Rand read French, but it is unlikely that they spoke it or understood it well enough to follow oral argument. The government of Pierre Trudeau began to put more of a premium on bilingualism for Supreme Court judges after passing the *Official Languages Act*, and successive governments followed suit.<sup>84</sup> This gave New Brunswick, with a higher proportion of bilingual jurists than the other Atlantic provinces, an edge in future appointments to the Supreme Court. And so it transpired with La Forest’s successor, Michel Bastarache.

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<sup>80</sup> Sharpe & Roach, *Brian Dickson*, *supra*, note 74, at 297.

<sup>81</sup> Rebecca Johnson & John P. McEvoy, eds., *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, 2000). La Forest’s most widely cited decisions include: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.J. No. 83, [1989] 2 S.C.R. 574 (S.C.C.) (commercial law—cited over 1300 times); *Norberg v. Wynrib*, [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.) (tort law—cited over 500 times); *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.) (constitutional/criminal law—cited over 700 times); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.) (constitutional/environmental law—cited over 700 times); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.) (constitutional law/equality rights—cited over 500 times).

<sup>82</sup> Ed Ratushny Osgoode Society interview, 2014, online: <<https://www.osgoodesociety.ca/oral-history>>, at 74-89.

<sup>83</sup> *Id.*, at 88.

<sup>84</sup> R.S.C. 1970, c. O-2.

Born in Quebec City to parents of Acadian descent, Michel Bastarache moved with his parents to Moncton at a young age and did his bachelor's degree at the Université de Moncton. However, he returned to Quebec for his civil law degree, which he obtained from the Université de Montréal. He later obtained a degree in common law from the University of Ottawa and a graduate degree in law from the University of Nice. The first Acadian named to the Supreme Court, Michel Bastarache was the founding Dean of the Université de Moncton law school, the first law school in the Commonwealth to teach the common law in French. With his proficiency in both official languages and in both of Canada's European legal traditions, Justice Bastarache represented the ideal type of the Trudeauvian vision of Canada. Overall, his career profile was similar to that of his predecessor, featuring a variety of posts in academe and the public sector in different provinces, including the authorship of major legal texts (on language rights and the interpretation of bilingual legislation), and a stint on the New Brunswick Court of Appeal.<sup>85</sup> The two profiles differ only in that Michel Bastarache spent more time in private practice and the business sector than did Gérard La Forest. On the Court, their contributions were also similar in that both left a legacy of important and well-reasoned decisions on a variety of topics, sufficient to have inspired numerous scholars to engage in a critical analysis of their oeuvre.<sup>86</sup>

Just as the Minister of Justice happened to hail from Atlantic Canada when Justice La Forest was appointed, so did she when the government of Jean Chrétien named Justice Bastarache to the Supreme Court in 1997. This time it was Anne McLellan, who, while representing an Edmonton riding in the House of Commons, was raised in Nova Scotia, completed her law degree there and taught at the University of New Brunswick before moving west in 1980. Again, one would not expect this minister to have been receptive to departing from the prevailing tradition regarding the Atlantic seat. But her personal background aside, the Chrétien government was not disposed to break with the conventions of regional representation in any case. It did come under considerable pressure from the province of Newfoundland to name the first Newfoundlander to the Court, but decided that in Michel Bastarache it could not only recognize a historically under-represented community within Atlantic Canada—the Acadians—but also gain a perfectly bilingual and bijuridical candidate of excellent reputation.<sup>87</sup>

Finally we come to Justice Cromwell. He is the only occupant of the Atlantic seat who was not born in the region. A native of Kingston, Ontario, he attended Queen's University and engaged in private practice before taking up a professorship at Dalhousie Law School in 1982. With some absences—notably three years from 1992-1995 spent as the Executive Legal Officer to Chief Justice Antonio Lamer—he remained in Nova Scotia until his appointment to the

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<sup>85</sup> *Les droits linguistiques au Canada* (Montreal: Yvon Blais, 1986); *The Law of Bilingual Interpretation* (Markham: LexisNexis, 2008).

<sup>86</sup> Nicolas C. G. Lambert, *At the Forefront of Duality/À l'avant-garde de la dualité: Essays in Honour of Michel Bastarache* (Cowansville, QC: Yvon Blais, 2011). For the tribute volume for La Forest, see *supra*, note 81. Justice Bastarache's decisions include: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) (administrative law/judicial review—cited over 13,000 times); *Dunmore v. Ontario (AG)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) (constitutional/labour law—cited over 200 times); his decisions on language rights include: *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.); *Arsenault-Cameron v Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3 (S.C.C.); *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada*, [2008] S.C.J. No. 15, [2008] 1 S.C.R. 383 (S.C.C.)

<sup>87</sup> Interview with Hon. Anne McLellan, January 3, 2017.

Supreme Court in 2008, having served on the Nova Scotia Court of Appeal for eleven years prior to that. Fluently bilingual, Thomas Cromwell is, like his two immediate predecessors, a legal scholar of some renown, having published widely on the law of evidence and standing in particular.<sup>88</sup> On the Court, following his pattern at the Court of Appeal,<sup>89</sup> he was a jack of all trades, writing clear and compelling judgments across the spectrum of public and private law that will be cited for many years to come.<sup>90</sup>

Before Thomas Cromwell was appointed, there was considerable speculation that the Harper government would appoint a candidate from Newfoundland. The very combative relationship between premier Danny Williams and the Prime Minister probably suffices to explain why such predictions did not prove correct. They did show, however, that there was little perception that the Harper government would go outside Atlantic Canada to fill the seat of Michel Bastarache, and it did not. The Minister of Justice, Rob Nicholson, represented the riding of Niagara Falls and had no ties to Atlantic Canada. Neither did the Prime Minister, who in a widely quoted remark made in the House of Commons just after becoming leader of the opposition in 2002, had referred to a “culture of defeatism” in Atlantic Canada, a statement that did not endear him to residents of the region.<sup>91</sup> The two men were nonetheless willing to follow the existing custom, which would have resonated with Harper’s vision of classical federalism. And, as noted earlier, Nicholson, now in opposition, led the parliamentary charge challenging Prime Minister Justin Trudeau’s decision to open up the Cromwell position to candidates from anywhere in Canada. With regard to the emerging custom of questioning Supreme Court nominees before a parliamentary committee, Justice Cromwell was spared this process as a result of the tumultuous political circumstances that prevailed in the fall of 2008. He was nominated on September 5, 2008, just two days before the general election was called, but the Order-in-Council naming him to the Court was not passed until December 22, almost four months later.<sup>92</sup>

The most recent occupant of the Atlantic seat on the Court, Justice Malcolm Rowe, displays broad similarities with some of his immediate predecessors, having been appointed from his province’s court of appeal after a stint on its trial court. As a Newfoundlander who made his career in central Canada, he is the obverse of Justice Cromwell, an Ontarian who made his career in the east. But Justice Rowe’s career had a more international flavour than perhaps any other Supreme Court justice to date. A foreign service officer from 1980-84, he then went into private

<sup>88</sup> *Locus standi: a commentary on the law of standing in Canada* (Toronto: Carswell, 1986); *Evidence and the Canadian Charter of Rights and Freedoms* (Toronto: Butterworths Canada, 1989) (co-authored with William H. Charles and Keith B. Jobson).

<sup>89</sup> For a listing of some of Justice Cromwell’s most significant decisions while on the Nova Scotia Court of Appeal, see online: <<http://www.slaw.ca/cromwell/judgments>>.

<sup>90</sup> To name only a few examples, *Fullowka v Pinkerton’s of Canada Ltd.*, [2010] S.C.J. No. 5, [2010] 1 S.C.R. 132 (S.C.C.) (tort law—cited over 100 times); *Kerr v Baranow*, [2011] S.C.J. No. 10, [2011] 1 S.C.R. 269 (S.C.C.) (family law—cited 800 times); *Canada (Attorney-General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524 (S.C.C.) (civil procedure/public interest standing—cited over 100 times); *Canada (Prime Minister) v Khadr*, [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44 (S.C.C.) (constitutional law—cited nearly 100 times).

<sup>91</sup> “Harper plans to battle ‘culture of defeatism’ in Atlantic Canada”, *CBC News* (May 30, 2002), online: <<http://www.cbc.ca/news/canada/harper-plans-to-battle-culture-of-defeatism-in-atlantic-canada-1.306785>>.

<sup>92</sup> These events, not directly relevant to this paper, are detailed in Peter Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada” (2009) 47 S.C.L.R. (2d) 413.

practice, where he was associated with files on maritime boundaries and fisheries disputes, and worked with the UN Food and Agriculture Organisation. While Justice Rowe admits that his spoken French is not perfect, he garnered praise from parliamentarians, including the interim leader of the Bloc Québécois, who questioned him in that language.<sup>93</sup> It is of course too early to assess what kind of impact he will have on the Court, or vice versa.

#### IV. Conclusion

The first thing to note about the occupants of the “Atlantic seat,” in terms of the quality of their contributions to the work of the Court, is that collectively they have been neither better nor worse than their colleagues from other regions of Canada. If there were some marked under-achievers, such as Henry, Davies and Crocket, there were also quite a few of the same from elsewhere in Canada, especially prior to the Second World War. There were average performers by the standards of their day, such as Sedgewick, Newcombe and Roland Ritchie, and then there were highly talented individuals such as William Ritchie, King, Rand, La Forest, Bastarache, and Cromwell. Thus, there is no argument to be made that candidates from Atlantic Canada have not “pulled their weight” at the Supreme Court. Although they are drawn from the smallest population base of any regional group, they have provided some of the Court’s very best judges over the course of its existence.

As to the existence of a convention requiring there to be a judge from Atlantic Canada on the Supreme Court, the evidence is more mixed than one might have thought. Had Eugene Lafleur accepted Mackenzie King’s offer of the chief justiceship in succession to Louis Davies in 1924, Newcombe would not have been appointed, and the Court would have had no Maritime judge for some years. Whether this is fatal to the existence of a convention is not clear. The first Prime Minister who seemed to feel some sense of obligation to appoint a candidate from the Maritimes was R.B. Bennett. He appointed Crocket even though he was not impressed with his legal ability; in other words, he appointed him even when he could likely have found candidates of better calibre elsewhere in Canada. It is really only since Bennett that the “tradition” of appointing an Atlantic Canadian may arguably have ripened into a “convention.” However, even if one counts only from Crocket forward, six appointments over 85 years may well be enough to constitute a convention.

The national governments of other large federations such as the United States<sup>94</sup> and Australia<sup>95</sup> do not display nearly the same commitment to regional appointments on their highest

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<sup>93</sup> John Paul Tasker, “Supreme Court nominee Malcolm Rowe grilled on French, diversity and Aboriginal rights”, *CBC News* (October 25, 2016), online: <<http://www.cbc.ca/news/politics/malcolm-rowe-committee-questions-1.3820318>>.

<sup>94</sup> From its creation until 1891, the U.S. Supreme Court went on circuit around the nation, so the question of regional representation was not as acute. In the twentieth century, the Court has increasingly been dominated by judges associated with the northeast, especially Boston, New York and Washington. During the Obama presidency, seven of the nine justices usually hailed from the northeast, and nineteen states have never had a resident on the Supreme Court. See Sharon E Rush, “Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias”

courts as does Canada's. Then again, most other federations are not as decentralized as Canada. The pattern of appointments to the Supreme Court, whether amounting to a convention or not, is definitely a reflection of the role played by regionalism in the construction of Canadian identity and in Canadian federalism. But whether the current pattern of appointments should continue will be influenced by one's views on why it exists in the first place. Here, it is useful to contrast Lederman's "law and society" view of regional appointments with Peter Russell's "political accommodation" view. If one takes the law and society view, there is no reason that the eligibility requirements for any of the non-Quebec seats could not be applied with considerably more flexibility. For example, why could Thomas Cromwell, born, raised, and legally educated in Ontario, not have been eligible for an Ontario seat on the Court as well as the Atlantic seat? He would amply satisfy Lederman's test of possessing the kind of knowledge derived from lived experience, with regard to Ontario as well as Nova Scotia. Or take a fictional candidate: let us imagine Alethea, a Mi'kmaq woman and member of Membertou First Nation in Cape Breton. She goes to Cape Breton University, then law school at Ottawa and makes her legal career in British Columbia for some decades. According to Lederman, she should be eligible for the Atlantic seat as well as a British Columbia seat.

Neither Thomas Cromwell nor Alethea would likely satisfy the political accommodation view, however. The Ontario political-legal elite would likely not have welcomed a Cromwell appointment to an Ontario seat on the Supreme Court, while the Atlantic provinces' political and legal elites might not embrace Alethea as a candidate for an Atlantic seat. In an age when the idea that individuals possess multiple and overlapping identities has become commonplace, it is hard to see why Canadians who have lived in multiple provinces should be restricted to claiming only one as the basis for potential eligibility for a seat on our highest court. If the Supreme Court is ever to display the kind of personal diversity that will enable it to reflect more accurately the Canada of 2017, rather than 1875, then a more flexible approach to the notion of "region" may assist in achieving that goal. To some extent the appointment of Thomas Cromwell already marked a shift in that direction: if a "come from away" can be named to the "Atlantic seat" on the Supreme Court of Canada, then we have already entered a more fluid period in the conventions of regional representation.

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(2014) 79 Mo. L. Rev. 119, at 177. Interestingly, Rush supports an emerging trend in U.S. scholarship advocating more secure regional representation on the Supreme Court.

<sup>95</sup> In Australia, New South Wales has dominated High Court appointments to an extent inconceivable in Canada. From the Court's founding in 1903 down to 2012, over half of all appointees came from that state (26/48). As recently as 2007, five justices came from New South Wales, one from Queensland and one from Victoria, although recent appointments have provided more geographic balance; see Andrew Lynch, "[Attorney-General] Roxon's High Court Dilemma", *Inside Story* (July 9, 2012), online: <<http://insidestory.org.au/roxons-high-court-dilemma>>.