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THE JURISDICTION OF THE SUPREME COURT OF CANADA: ITS DEVELOPMENT AND EFFECT ON THE ROLE OF THE COURT

JOHN CAVARZAN*

PART I

THE HISTORICAL DEVELOPMENT OF THE JURISDICTION OF THE COURT

The Supreme Court of Canada is a court of common law and equity, and a general court of appeal for Canada.¹ It is a court of mixed jurisdiction, that is to say, it has both original and appellate jurisdiction.² Over a period of some ninety years since its founding, the Court has adjudicated a great variety of matters, involving both private law and public matters, from every part of Canada. An amendment to the Supreme Court Act in 1949³ abolished all appeals to the Judicial Committee of the Privy Council in England, and the Supreme Court became finally, the court of last resort for all matters. The Court's decision terminating a controversy is thus the last word and no one, save Parliament, can overrule it. This tribunal, what it is, and what it does, are matters which should therefore be regarded as being of vital importance to Canadians.

1. Origin and development.

Unlike the Supreme Court of the United States or the High Court of Australia, both of which exist because the written constitutions of those countries specifically make provision for them, the Supreme Court of Canada owes its existence to a statute.⁴ Parliament, acting under the permissive authority vested in it by section 101 of the *British North America Act*,⁵ enacted, in 1875, legislation to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada.⁶

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¹ Supreme Court Act, R.S.C., 1952, c. 259, s. 3.

² Objection was raised to the granting of any original jurisdiction to the Court: *Debates, House of Commons, Session 1875*, Mr. Palmer at p. 737; original jurisdiction for the Court was justified by the power of the federal government to appoint judges, B.N.A. Act, s. 96.

³ 1949 (Can. 2nd Sess.) c. 37, s. 3.

⁴ Canada: 1875 (Can.) c. 11; United States: U.S. Const. art III, s. 1, "The judicial power of the United States shall be vested in one Supreme Court . . ."; Australia: Austl. Const. c. III, s. 71, "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia. . . ."

⁵ Parliament is thereby empowered to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada. . . ." B.N.A. Act, 1867, c. 3, s. 101.

⁶ 1875 (Can.) c. 11.

During the confederation debates in 1865 it was observed that:

There are many arguments for and against the establishment of such a court. But it was thought wise and expedient to put into the Constitution a power to the General Legislature, that if after full consideration they think it advisable to establish a General Court of Appeal from all the Superior Courts of all the provinces, they may do so.⁷

Ten years later, the country's representatives in Parliament were still divided on the issue of the necessity for such a tribunal. Many feared that the right to appeal to the Crown in England would be lost. Indeed, it was the intent of those who favoured the creation of the Court, to make it supreme,⁸ but the Act which became law preserved the right of appeal to England.⁹ One alarmed member observed the plight of the "unfortunate" Americans:

In the United States they had established a Supreme Court, and they had established one from great necessity, because they foolishly committed national suicide by their severance from Great Britain.¹⁰

Another, regarding the establishment of the Court as a needless expenditure, would have traded the Court for a stretch of the Pacific Railroad or for deeper canals.¹¹ More substantial and enduring objections came from Quebec members who feared that the Civil Law would not fare well in a court where the majority of the judges had no training in the Civil Law.¹² The Court's supporters prevailed, however, and on the 8th of April, 1875, the Act establishing the Court was passed. A declaration on the 11th of January, 1876, brought into operation the judicial functions of the Court. The proponents of the bill regarded it as "a good law which had for its sole object the harmonious working of our young constitution".¹³

One of the very first cases heard by the Court, *Brassard v. Langevin*,¹⁴ raised "grave questions of constitutional law, in which all in this Dominion are deeply interested".¹⁵ Indeed, the case would undoubtedly

⁷ Waite, *The Confederation Debates in the Province of Canada 1865* quotes from an address given at Quebec City on February 6, 1865 by Hon. John A. Macdonald.

⁸ MacKinnon, *The Establishment of the Supreme Court of Canada*, (1946) 27 Can. Hist. Rev. 258.

⁹ *Supra*, footnote 6, s. 47.

¹⁰ *Debates, House of Commons, Session 1875*, Mr. Wilkes, at p. 752.

¹¹ *Id.*, Mr. White, at p. 908.

¹² *Id.*, Mr. Langlois, at p. 932.

¹³ *Id.*, Hon. Mr. Fournier, at p. 288, in a speech introducing the bill to the House for first reading.

¹⁴ [1876-77] S.C.R. 145. It was held in this case that the election of a member for the House of Commons, guilty of clerical undue influence by his agents, was void. The Catholic Church and the various parish priests in a Quebec riding had sided with a particular candidate, the parishioners being told that to vote otherwise would be a sin. The new Court was faced with grave issues of freedom of speech and the position of the clergy under the law. The French Catholic members of the bench faced a particularly difficult conflict as reflected by the opening remarks of the judgment of Taschereau J., at p. 188: "I acknowledge that it is with great misgivings as to my own powers, and with a deep feeling of regret that I find myself compelled to pronounce a decision as a Judge in a contestation of the nature of the present." The unanimous Court voided the election of the respondent.

¹⁵ *Id.*, per Ritchie, J. at p. 215.

be classified today as a "civil liberties" matter. Inevitably such decisions engendered controversy and since the Court lacked a solid constitutional foundation, attempts were made to legislate it out of existence.¹⁶

But the Court survived initial controversy and has grown and developed. The Act of 1875 is a slender statute and is devoted partly to provisions for a Court of Exchequer. The Act was amended frequently, apparently as the result of experience gained in the day-to-day workings of the Court, altering thereby the bare framework of the original Act and adding to its scope.¹⁷ A separate Exchequer Court statute was passed in 1887.¹⁸

Initially the Court was a six-judge tribunal,¹⁹ but it was expanded to seven in 1927²⁰ and finally to nine in 1949.²¹ Also, from the beginning, five judges constituted a quorum²² for the hearing of cases and this is still the rule,²³ although it later became possible to have four-judge courts.²⁴ The rules respecting quorums on the hearing of applications for leave to appeal now provide for a five-judge court on applications in criminal capital cases, and a three-judge court on applications in all other cases.²⁵ Certain matters, such as an application for leave to intervene, may be dealt with by a single judge.²⁶

The Court's original jurisdiction in constitutional reference cases and matters of *habeas corpus* has existed from the beginning.²⁷ The greater part of the Court's jurisdiction is, however, its appellate jurisdiction. The early provisions respecting appeals from the provincial courts were such that these courts had a broader power than the Court itself, to determine which cases would go to the Court on appeal.²⁸ Often the Court could be by-passed entirely by the taking of appeals directly to the Privy Council.

The significant change respecting the Court's appellate jurisdiction came first in criminal appeals. Following a short-lived early attempt to cut off criminal appeals to the Privy Council, valid legislation was passed in 1933 making the Supreme Court the court of last

¹⁶ *Supra*, footnote 8.

¹⁷ Appendix A.

¹⁸ Exchequer Court Act, 1887 (Can.) c. 16.

¹⁹ *Supra*, footnote 9, s. 3.

²⁰ 1927 (Can.) c. 38, s. 1.

²¹ *Supra*, footnote 3, s. 1.

²² *Supra*, footnote 19, s. 12.

²³ R.S.C., 1952, c. 259, s. 25.

²⁴ Supreme Court Act amended by 1889 (Can.) c. 37, s. 1 provided for a four-judge court if the fifth judge had taken part in earlier proceedings in the case; 1896 (Can.) c. 14, s. 2. provided for the first time for a four-judge court on consent of all parties; R.S.C., 1952, ss. 28(2) and 29 are the current provisions embodying these amendments.

²⁵ 1956 (Can.) c. 48, s. 6; Laskin, *Comment, The Coffin Case and Amendments to Appellate Jurisdiction*, (1956) 34 Can. Bar Rev. 966.

²⁶ Supreme Court of Canada Rules, Rule 60.

²⁷ *Supra*, footnote 22, ss. 51-53.

²⁸ See Laskin, *The Supreme Court of Canada*, (1951) 29 Can. Bar. Rev. 1038.

resort for all criminal matters.²⁹ The year 1949 brought an end to appeals to the Privy Council in civil cases.³⁰

The Act of 1875 imposed a two thousand dollar monetary restriction on civil actions appealable to the Court without leave from Quebec Courts only.³¹ By 1920, the amount or value of the matter in controversy in the appeal was required to exceed two thousand dollars in order that an appeal be taken to the Court without leave from all jurisdictions in Canada.³² In 1956 this amount was increased to the present minimum of ten thousand dollars.³³ Although this monetary limit has, no doubt, reduced the number of petty appeals, the amount in controversy cannot always guarantee that the appeal involves an important legal issue.

It is the issues arising, not the amount of money or form of procedure, that renders a case of sufficient moment to be determined by the highest tribunal.³⁴ . . . To make the jurisdiction of the Supreme Court depend on financial questions alone is unsound. Many of the most vital issues of civil liberty and human relations arise from cases of small or no monetary value.³⁵

In addition to the Court's jurisdiction under the Supreme Court Act and the Criminal Code, certain federal statutes specifically confer a right of appeal.³⁶ The jurisdiction of the Court will be examined more fully later.

2. What it does.

It has already been indicated that the Court hears and disposes of cases involving a great variety of issues. In civil cases where the amount in controversy in the appeal does not exceed ten thousand dollars, an appeal can be taken only by leave. If leave is sought from the provincial court, it will be granted only if the question involved in the appeal is considered to be one that *ought* to be submitted to the to the Supreme Court for decision.³⁷ If the provincial court refuses to grant leave, and even if no leave is sought from the provincial court, application for leave may be made to the Court itself.³⁸ Criminal

²⁹ Livingston, *Abolition of Appeals from Canadian Courts to the Privy Council*, (1950-51) 64 Harv. Law Rev. 104, traces the steps by which appeal to the Privy Council in all cases was abolished.

³⁰ *Supra*, footnote 3, s. 3.

³¹ 1875 (Can.) c. 11, s. 17.

³² 1920 (Can.) c. 32, s. 2.

³³ 1956 (Can.) c. 48, s. 2.

³⁴ How, *The Too Limited Jurisdiction of the Supreme Court of Canada*, (1947) 25 Can. Bar Rev. 573, at p. 575.

³⁵ *Id.*, pp. 582-3.

³⁶ *The Canadian Bar Association Papers*, (1959), contains an outline of statutory provisions in R.S.C. 1952, giving the right to appeal to the Court: Admiralty Act, c. 1, ss. 32(1)(2), 33; Aeronautics Act, c. 2, s. 19; Bankruptcy Act, c. 14, ss. 140, 151-4; Canadian National-Pacific Act, c. 39, ss. 26, 27; Canadian National Railways Act, c. 29, s. 44; Companies' Creditors Arrangement Act, c. 54, ss. 12-14; Dominion Controverted Elections Act, c. 87, ss. 63-68; Exchequer Court Act, c. 98, ss. 23, 30, 82-86; Excise Tax Act, c. 100, s. 58; National Defence Act, c. 184, s. 196; Northwest Territories Act, c. 331, s. 28; and the Railway Act, c. 234, s. 53.

³⁷ *Supra*, footnote 23, s. 38.

³⁸ *Id.*, s. 41(1).

appeals may be taken to the Court in summary conviction offences only after the Court has granted leave.³⁹ An accused person who is convicted and is sentenced to death and whose conviction has been affirmed by the provincial court of appeal, has an appeal as of right to the Court.⁴⁰ The Governor in Council may refer certain important questions of law or fact to the Court for its opinion.⁴¹ These reference cases usually involve basic constitutional issues. The Court or any two of the judges thereof may be called upon by the Senate or the House of Commons to examine and report upon any private bill or petition.⁴²

In short, the foregoing provisions and others,⁴³ indicate that the Court was created to deal with cases involving important issues and calling for examination, deliberation and final adjudication by the most august judicial body in the country. The answer to the question, "What does the Court do?" is, it is submitted, that it decides the most important legal controversies in Canada.

3. The relative importance of controversies

What then of cases involving issues of civil liberty? It is submitted that such cases are among the most important, if not *the* most important, type of controversy which can arise for adjudication. But the situation in Canada in this area of the law is unclear. If it can be determined with some certainty which civil liberties exist in Canada,⁴⁴ it is more difficult to state definitely which level of government has the power to legislate to grant or deny any or all civil liberties.⁴⁵ This much is clear; the issues in civil liberties controversies are of such moment that they should receive the attention of the Court. If any such issue is barred access to the Court, it must not be for any formalistic reason. When this is clearly recognized, it will be seen that it is important that procedures for getting before the Court be more clearly defined and that conditions precedent to acquiring a right to a hearing in these cases be kept to a minimum or eliminated. There is danger, of course, that removal of such conditions precedent may result in a flood of litigation initially. The result may not be unlike that in the United States where,

The solicitude of the Supreme Court for civil liberties has resulted in a striking increase in the number of cases involving them which have been heard by that tribunal.⁴⁶

The question then would be whether such a result is bad. This can hardly be a bad result if there are many *bona fide* civil liberties issues

³⁹ *Id.*, s. 41(3).

⁴⁰ 1960-61 (Can.) c. 44, s. 11, enacting s. 597A Cr. Code.

⁴¹ *Supra*, footnote 39, s. 55.

⁴² *Id.*, s. 56.

⁴³ R.S.C., 1952, c. 259, s. 57 (*habeas corpus*), s. 61 (*certiorari*), and s. 62 (removal of cases from provincial courts).

⁴⁴ Schmeiser, *Civil Liberties in Canada*, Preface.

⁴⁵ Laskin, *Canadian Constitutional Law* (2nd ed.), p. 942.

⁴⁶ Schwartz, *The Changing Role of the United States Supreme Court*, (1950), 28 Can. Bar Rev. 48, at p. 60.

which would be litigated but for the procedural hurdles and, perhaps more important, the inhospitable attitude of the Court. Courts have always been adept at weeding out unworthy causes and if such causes were to threaten to overwork the Court, it is probable that the threat would be, at worst, temporary.

A. The Court's image: a civil liberties tribunal.

There is only token recognition of civil liberties as an independent value in Canada's Constitution, the *British North America Act*. Protection is given to denominational schools by section 93. The term "civil rights" is used in sections 92(13) and 97, but this expression is generally considered to relate to property rights in the provinces.⁴⁷ By way of contrast, the Constitution of the United States contains a Bill of Rights to which all laws and legal processes are subject.⁴⁸ Theoretically, the Canadian Constitution divides all possible legislative power between the federal government on the one hand and the various provincial governments on the other. But none of the enumerated powers in sections 91 and 92 grants the power to legislate in relation to civil liberties as such. It has been reasoned, applying the known rules of Canadian constitutional interpretation, that what is not expressly given to the provinces to legislate by section 92 falls to the federal government by virtue of the residuary power of the "peace, order, and good government" clause in section 91. Professor Laskin defines the issue in this manner:

. . . the main question for determination is whether invasion of civil liberties is prohibited to the Dominion or to the provinces, and, correspondingly, whether responsibility for their protection is in the Dominion or in the provinces.

This question, like any other question of the scope of legislative power or the constitutionality of legislation, falls for decision to the courts, and, ultimately, to the Supreme Court of Canada.⁴⁹

Thus, in some leading civil liberties cases such as *S.M.T. (Eastern) Ltd. v. Winner*⁵⁰ and *Saumur v. Quebec and A.G. Quebec*,⁵¹ the Court has come down in favour of the federal power, and declared unconstitutional the provincial legislation.

Professor Laskin concludes that:

. . . the absence of affirmative Dominion legislation should not militate against making it perfectly clear that civil liberties lie beyond provincial control.⁵²

This is too simple an answer, for it depends upon the giving of a very narrow meaning to the term "civil liberties" (as Professor Laskin pointed out prior to his conclusion). The recent decision in *Oil, Chemi-*

⁴⁷ *Supra*, footnote 44.

⁴⁸ U.S. Const. Amendments 1-10.

⁴⁹ Laskin, *supra*, footnote 45, at p. 457.

⁵⁰ [1951] S.C.R. 887.

⁵¹ [1953] S.C.R. 299.

⁵² *Supra*, footnote 48, at p. 471. *Cf.*, the "citizenship" doctrine of *Rand J.* in the *Winner* case, reiterated in *Switzman v. Elbling and A.G. Quebec*, [1957] S.C.R. 285.

cal, and *Atomic Workers' International Union v. Imperial Oil Ltd.*,⁵³ illustrates the complexity of this problem and underlines the importance of the Court's role in assigning civil liberties a provincial or federal value. In that case, a union questioned the validity of provincial legislation which had the effect of forbidding the use of union funds to support any political party. The union viewed the issue as one of free speech or political liberty (they saw the provincial legislation as an attempt by the party in power to stifle support for any opposition). The Court, however, upheld the finding of the provincial appeal court that the legislation was valid provincial legislation in the field of labour relations.

Parliament and some legislatures have enacted civil liberties legislation which is for the most part declaratory.⁵⁴ What significant law there is today in this field is to be found in the decisions of the Court. Indeed, so long as the constitution remains unchanged, the enforcement and development of civil liberties law in Canada is bound to rest with the Court. In order to perform this increasingly important function efficiently, appropriate procedures and techniques of adjudication are essential.

The comments of Professor Scott, regarding civil liberties in Quebec, are apt in a discussion of the Court:

There seems little point in calling attention to the safeguards for civil liberties inherent in the Civil Code if in fact the Quebec courts refuse to apply them in concrete cases. The law at any given time is what the judges say it is, not what is written down in the books.⁵⁵

It is submitted, then, that the real impact of civil liberties law in Canada is to be determined largely by the operation of, and the attitudes of, the Supreme Court.

PART II

A STATISTICAL EXAMINATION OF THE WORK OF THE COURT FROM 1950 TO 1964

1. Source of Information

Just as an assessment of a person may be made by observing such characteristics as appearance, speech and habits, so also may an assessment be made of an institution. The Supreme Court of Canada

⁵³ [1963] S.C.R. 584.

⁵⁴ Parliament has enacted the Canadian Bill of Rights, 1960 (Can.) c. 44; see also the Ontario Human Rights Code, 1961-62 (Ont.) c. 93; the Saskatchewan Bill of Rights Act, R.S.S. 1953, c. 345; legislation by certain provinces aimed at specific grievances has been enacted, e.g., Fair Employment Practices Act, Stats. N.S., 1955, c. 5; same, Stats. N.B., 1956, c. 9.

⁵⁵ Scott, *The Bill of Rights and Quebec Law*, (1959) 37 Can. Bar Rev. 135, at p. 140.

has many observable characteristics, among them its "public image", and the formal rules which govern its operations. More important, however, in attempting an assessment of this Court, are the basic facts of what it says and what it does.

A review was made of the Court's work covering an interval roughly from the time of the abolition of appeals to the Privy Council until the end of 1964. All available reported decisions in the Supreme Court Reports from and including the volume [1950] S.C.R. to and including all available parts of the volume [1964] S.C.R. as of December 31, 1964, were canvassed. The object was to observe and assess the Court in its role as Canada's highest judicial tribunal.

2. A Statistical Study

Every lawyer and every scholar, who essays to appraise or to criticize the administration of justice or some phase thereof, feels the need of accurate and authoritative statistics both as the basis of criticism and as the foundation of assured recommendations for improvement.⁵⁶

The term "statistical" when used with reference to this review of the Court's work, connotes simply the counting and sorting of information according to a predetermined classification. Although some attempt has been made later to draw general conclusions from the results, this was done bearing in mind the shortcomings of statistical studies in general and of this study in particular.⁵⁷

(a) The background (the statistical sample).

Ideally every decision of the Court in the interval studied should be available in the law reports, but it appears that the number of decisions reported represents only about one-half of the Court's case load. In the fifteen year period from 1950 to 1964, there are some 1032 reported decisions or, to borrow the dichotomy of the Supreme Court Reports, "judgments" and "motions". Some 415 unreported judgments are listed in that same period and approximately 300 unreported motions for the last seven years of that period are listed. Prior to 1957 no list was included in the law reports of the Court's motion work. The motions granted and motions denied were listed from 1957 to 1960, inclusive, following which date only the motions denied are reported.

⁵⁶ Pound, *What Use Can Be Made Of Judicial Statistics*, (1933) 12 Ore. L. Rev. 89 at p. 89. The Osgoode Hall Law School has announced its intention to review annually the work of the Supreme Court and to compile statistics; see, *Supreme Court Review*, (1963) 3 Osgoode Hall L. J. 163. See also, Jacoby, *Some Realism About Judicial Statistics*, (1939) 25 Va. L. Rev. 523, at p. 530; "A great many of the common beliefs as to the nature of law and litigation and in particular as to the place occupied in society by the phenomenon of legal proceedings may not survive the experiment of testing them by factual studies." The value of statistics has been emphasized in Kilgour, *The Work of the Supreme Court of Canada, 1950-1954*, (1955) 13 U. of T. Fac. L. Rev. 17.

⁵⁷ Pound, *supra*, footnote 56, at p. 91: "Very little of importance can be drawn from statistical tables in and of themselves. Much that lies outside of the tables is required to give them point and application."

The basis on which the editors of the official reports select decisions to be reported is not known; however, a review of all available material reveals what may be some of the criteria:

- (i) all reference cases are reported;
- (ii) most criminal appeals are reported;
- (iii) most cases on which the Court is divided in opinion are reported;
- (iv) the great majority of the unreported judgements are in cases where the appeal is dismissed;
- (v) the great majority of the unreported motions are in cases where leave to appeal was refused (this is unfortunate because it obscures the Court's attitude towards granting leave to appeal under section 41 of the Supreme Court Act);
- (vi) common sense dictates that if a selection must be made from the cases because all will not or cannot be reported, those selected will involve important questions of law or issues having application throughout Canada.

The remaining sample is further adulterated because certain cases arising from proceedings instituted prior to the abolition of Privy Council appeals (and therefore technically eligible for consideration by the Privy Council) could not, from lack of sufficient information in the reports, be excluded. Appeals to the Privy Council petered out quickly after 1950, although the last one was not disposed of until 1959.⁵⁸ The number of such appeals in any one year would probably not be statistically significant and this flaw in the statistical sample is probably inconsequential.

How may the statistical sample be described? It comprises about one-half of the number of cases heard by the Court in the fifteen year period reviewed (not necessarily one-half of the Court's work), which cases presented the most difficulty to the Court, or which were of general interest throughout Canada because of the principles in issue, or which involved important questions of law.

Where a complete sampling is not possible, the results of a statistical study are valid only if the technique of random sampling is used. Here, the source material for the study has been presented by the authors of the reports according to some criteria, and to this extent any results would be biased. This is the most telling criticism which can be made of this study, but the defect is not fatal. So long as one is aware of the short-comings, appropriate allowances can be made in formulating conclusions.

(b) The method.

A series of questions were applied to each reported decision and the answers recorded. When all the cases had been so processed, a tabulation was made of the three most significant questions for present purposes. The tabulated findings are as follows:

⁵⁸ *Wakefield Co. v. Oil City Petroleum*, [1958] S.C.R. 361.

Q. 1 Origin and Disposition of Case on the Merits	No. of Cases
(i) Supreme Court's Original Jurisdiction:	5
(ii) Supreme Court Reference Case:	7
(iii) Appeal from Federal Courts:	
Decision Affirmed	96
Decision Reversed	77
(iva) Appeal from Provincial Court on leave granted by Supreme Court:	
Decision Affirmed	88
Decision Reversed	85
(ivb) Appeal from Provincial Court on leave granted by Provincial Court:	
Decision Affirmed	55
Decision Reversed	46
(ivc) Appeal as of right from Provincial Court:	
Decision Affirmed	330
Decision Reversed	206
(ivd) Appeal <i>in forma pauperis</i>	6

Q. 2 Motions for Leave to Appeal Before Supreme Court

(i) From Federal Court:	Motions Granted: 2	Denied: 5
(ii) From Provincial Court:	Motions Granted: 5	Denied: 16
(iii) Leave for Rehearing:	Motions Granted: 1	Denied: 2

Q. 3 Subject Matter of Appeals—Private or Public Law,⁵⁹

Appeal from:	Cases	Cases	
Newfoundland	3	Private Law	668
Prince Edward Island	4	Public Law:	
Nova Scotia	15	Constitutional	30
New Brunswick	28	Non-Constitutional	163
Quebec	248	Criminal	149
Ontario	248	Decisions Affirmed	571
Manitoba	38	In Part	37
Saskatchewan	50	Reversed	393
Alberta	72		
British Columbia	126		
Federal Court	178		

⁵⁹ Jowitt, *The Dictionary of English Law*, at p. 1064 defines the terms "public law" and "private law": "With reference to its subject-matter, law is either public or private. Public law is that part of the law which deals with the State, either by itself or in its relations with individuals, and is called constitutional, when it regulates the relations between the various divisions of the sovereign power; and administrative, when it regulates the business which the state has to do; the most important branches of the latter class are the criminal law and the law for the prevention of crimes; the law relating to education, public health, the poor, etc.; ecclesiastical law; and the law of judicial procedure (courts of law, evidence, etc.)."

Private or civil law deals with those relations between individuals with which the state is not directly concerned: as in the relations between husband

[Footnote Continued Next Page.]

(c) The Results.

Tabulation of the results brings to light certain relationships. Thus, the contrast in case load between the Court's appellate jurisdiction (1014 cases) and the Court's original jurisdiction (18 cases) is brought into bold relief.

The total number of appeals as of right or *de plano* is 709 and the total number taken with the leave of some court is 274. Appeals with leave resulted in reversals by the Court in 47.8 per cent of the cases, whereas *de plano* appeals resulted in reversals in only 40 per cent of the cases. This 40 per cent figure would be even lower, it is submitted, since it is probable that most of the unreported decisions of the Court dismissing the appeal, are in cases of appeals taken as of right.⁶⁰

The group of cases comprising the appeals taken with leave is divisible into appeals by leave of the Supreme Court (173) and appeals by leave of a provincial court (101). When the Court itself gave leave, it reversed the decision in 48 per cent of the cases as contrasted with reversal in 45.5 per cent of the cases where the provincial court gave leave. It must be remembered, however, that the former group includes the large number of criminal appeals heard by the Court and that only the Supreme Court is competent to grant leave to appeal in these matters.

There were 668 private law appeals against only 342 public law appeals. Thus, only 34 per cent of the Court's appellate work (and therefore of virtually all of the Court's work) was in the area of public law. Almost one-half of the public law work in turn is made up of criminal appeals. The Court's work in the field of constitutional law in the period of fifteen years amounts to 30 cases or 2 cases per year on the average (a more realistic figure is 50 cases, or, slightly more than 3 per year).⁶¹

Public law cases (other than criminal) which were appealed by leave of the Court were 18 in number and were reversed in 28 per cent of the cases. Those which were appealed by leave of the provincial courts numbered 26 and were reversed in 42.3 per cent of the cases. With respect to these public law cases, we are dealing with very small numbers and, statistically speaking, no significant conclu-

and wife, parent and child, and the various kinds of property, contracts, torts, trusts, legacies, the rights recognized by the rules of admiralty law, etc. Even here, however, the courts take cognizance, to a certain extent, of the indirect effects of private conduct on the community in general; they accordingly refuse to sanction contracts which are immoral, or in restraint of trade or marriage, or are otherwise against public policy.

⁶⁰ Some 328 of 415 unreported decisions (or 80%) are cases where the appeal was dismissed. If 300 of the 415 are *de plano* appeals, then the 40% figure would be estimated at 34%.

⁶¹ In many cases there was a constitutional law issue amongst others, and for purposes of the questionnaire, a choice of classification had to be made. Thus, it is probable that in the period reviewed, there are as many as 50 constitutional law cases, or slightly more than 3 per year on the average.

sions can be drawn from such results (since a minor variation produces a disproportionate effect in the conclusions based on those results).

(d) Conclusions.

While the work done by the Court in the exercise of its original jurisdiction is qualitatively important, it would seem from the number of cases, that the Court may fairly be described as essentially an appellate tribunal. This being the case, it is the area of the Court's appellate jurisdiction which requires review and evaluation.

In spending much time and energy reviewing and *confirming* decisions of lower courts, the Court must be said to be performing the role of a rubber stamp. Review and confirmation by the Court of a decision is, of course, valuable, and in individual cases may be no less jurisprudentially significant than reversal accompanied by an authoritative statement of the law. But surely the value of the service performed by the Court diminishes in direct proportion to the number of occasions on which it feels obliged to agree with and confirm the decision under appeal.

It has already been seen that 60 per cent (and probably more) of the *de plano* appeals are dismissed by the Court. Decisions appealed by leave of a court, on the other hand, are dismissed in 52 per cent of the cases, an appreciably lower percentage. It must be conceded, then, that the Court's time is more usefully occupied in considering a decision that has first undergone the scrutiny of some court on an application for leave to appeal. Also, the fact that there are generally more affirmations than reversals would indicate that too many cases which should not be taken up, are appealed to the Court.⁶² No doubt this is largely due to the fact that many *de plano* appeals are taken and the Court has virtually no say in the matter. The same is substantially true in the case of the large number of appeals taken with the leave of provincial courts. Such a result suggests, it is submitted, that the jurisdictional requirements should be amended, requiring perhaps that *every* case submit first to the Court's scrutiny in a leave application.

But there are implications more far-reaching than the mere problem of too many non-meritorious appeals (which, after all, is really a problem of numbers). Can the Court be said to be fulfilling its proper function as the nation's ultimate appellate court when it is so preoccupied (albeit not by choice) with property rights? Is there a cumulative effect from the many years of performing these required tasks, which might impair the jurisprudential outlook, rendering it ill-suited to adjudicate important public law issues? The erratic behaviour of the Court in recent civil liberties cases would suggest that the Court is not as well prepared as it might be, to adjudicate these vital issues. Individual judges seem not to have been affected, but this is not true of the Court as a whole. Is it then perhaps the

⁶² See Kilgour, *supra*, footnote 56, at p. 19.

short-comings of the judges and not of the system which are reflected in the decisions? There is no easy answer, but this much seems clear: the Court is burdened by jurisdictional rules which do not permit it to confine its energies to meritorious appeals.

APPENDIX A

Thirty-three Acts of Parliament, including the original which created the Court, have shaped and changed the Supreme Court of Canada. The following is a list of the Acts together with an indication of their content:

- 1875 (Can.) c. 11—the original Act.
- 1876 (Can.) c. 26—evidence—appeal in controverted election cases.
- 1877 (Can.) c. 22—witnesses—Carleton County Sheriff ex officio officer of the Court.
- 1879 (Can.) c. 39—equity appeals except Quebec—appeals generally—election cases—Judge's oath—appeal lists—3 sessions yearly—which judges to deliver judgments.
- 1880 (Can.) c. 34—amendments during appeal—new trial may be ordered.
- 1887 (Can.) c. 16—Separate Exchequer Court.
- 1888 (Can.) c. 37—quorum—control of library.
- 1889 (Can.) c. 37—appeals—death of parties—judges not to sit on certain cases—quorum 4 judges—lists.
- 1891 (Can.) c. 25—habeas corpus and prohibition—references by Governor in Council—Court's opinion.
- 1893 (Can.) c. 29.
- 1896 (Can.) c. 14—four judges quorum on consent.
- 1903 (Can.) c. 29—judges' pensions.
c. 69—registrar of Court.
- 1905 (Can.) c. 47—judges' salaries—restricting judges to judicial duties.
- 1906 (Can.) c. 50—federal references.
- 1908 (Can.) c. 70—appeal lists—order of hearing.
- 1913 (Can.) c. 51—final judgments defined—admiralty appeals—annual decisions—affidavit proof of amount in controversy.
- 1914 (Can.) c. 15—final judgments—costs.
- 1917 (Can.) c. 23—Crown entitled to costs though solicitor salaried.
- 1918 (Can.) c. 7—appointment of ad hoc judges—Quebec appeals—assessment appeals—courts of final resort.
c. 44—provisions not to apply in pending cases.
- 1920 (Can.) c. 32—jurisdiction—\$2000 requirement—special leave—definitions.
- 1922 (Can.) c. 48—appeals from provincial references.

- 1925 (Can.) c. 27—appeals—leave by provincial court of last resort—limiting appeals—procedures—dates of sessions.
- 1927 (Can.) c. 38—Court expanded to seven judges—compulsory retirement at 75.
- 1928 (Can.) c. 9—stated case—sessions of Court—notice of adjournment.
- 1929 (Can.) c. 58—opinion of retired judge.
- 1930 (Can.) c. 44—\$2000 limit.
- 1937 (Can.) c. 42—appeal from Court of final resort.
- 1949 (Can. 2nd sess.) c. 37—Court expanded to nine judges (3 from Quebec, minimum)—appeals of right, with leave, special leave, under other Acts, references—abolition of Privy Council appeals—*in forma pauperis*—lists and order of hearing.
- 1951 (Can.) c. 61—*in forma pauperis* appeals.
- 1952 (Can.) c. 12—dates of sessions.
- 1956 (Can.) c. 48—appeals—registrar and deputy—minimum limit raised to \$10,000—quorum on applications for leave procedure on appeal—etc. (This Act involved simultaneous amendment of the Supreme Court Act and the Criminal Code).

The Supreme Court Act is consolidated in four issues of the Revised Statutes of Canada:

- R.S.C., 1886, c. 135.
R.S.C., 1906, c. 139.
R.S.C., 1927, c. 35.
R.S.C., 1952, c. 259.

1875 (Can.) c. 11, s. 3: The Supreme Court shall be composed of a Chief Justice and five Puisne Judges, and five of whom, in the absence of the other of them, may lawfully hold the said Court in Term.

During the debates in the House of Commons, it was indicated that six was considered an appropriate number, because at the time when the Supreme Court of the United States came into being, the population of the country was about the same as that of Canada in 1875, and they settled on six judges (and increased the number with time).