The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform

Peter H. Russell

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I INTRODUCTION

There is a good deal of talk these days about the Supreme Court of Canada. This is a change. After a rather stormy beginning in 1875, public interest in the Court waned. The court did come into the limelight briefly in 1949 when appeals to the Privy Council were abolished and the Court became supreme in fact as well as name. But for the most part public interest then focussed on the symbolic significance of this development for the achievement of national autonomy rather than on the functions and performance of the Court itself. Now Quebec's agitation for constitutional reform and the federal responses it has elicited have placed the Court well up on the agenda of reform of our public institutions.

This renewal of interest in the Supreme Court should be welcomed. The nature and role of a nation's highest judicial tribunal is undoubtedly a question which merits wide public attention. Lack of such consideration in the past is regrettable, but is only one aspect of the general indifference Canadians have shown to the improvement of
their judicial institutions. On the whole, Canadians, professionals and non-professionals alike, have been inclined to regard their courts as one of the unqualified benefits of Canada's British heritage—to be praised rather than examined. Still, it would be a shame if current discussions about the Court were to become side-tracked on symbolic or emotional issues such as, how many French-speaking and how many English-speaking justices the Court should have? or, who should appoint its members? or, should it sit in two panels—one for Quebec civil law and one for common law? or, should there be a separate Constitutional Court? Questions such as these are of secondary importance: the way we answer them must depend on our answer to the primary question—why do we have a national court of appeals at all? Surely it is premature to consider how the members of an institution should be selected or how it should be organized before we have decided what functions we wish the institution to serve.

To tackle this primary question concerning the Court's function we must deal with what is possibly among the driest of legal topics—jurisdiction. For policy decisions about the Court's role find their most direct and effective expression in the jurisdictional rules governing the cases it hears. Not that jurisdictional rules can be the sole determinant of a court's business. They are unlikely to be even the main determinant. What they do represent is the effort of formal law-making bodies to pre-determine which disputes a court will adjudicate or who will decide which cases are heard. Once established, they act as a screen through which disputes must pass before gaining access to the court, making it easier for some kinds of disputes and more difficult for others to find a place on the court's docket. But broad social factors outside of the formal judicial structures—the sources of conflict between private citizens and the activities of public authorities—will condition the interests that are pushed through that screen. And within the legal culture itself, such factors as the availability of legal remedies, the prevailing habits of litigation, and, for a senior appeal court, the flow of cases upwards through the lower courts, will sharply affect the volume and content of a court's business. So, while the force of jurisdictional rules should not be over-emphasized, they do provide the one instrument through which deliberate public control of the court's function can be attempted.

What has just been said in a general way about the importance of jurisdictional rules is especially applicable to a national appeal court such as Canada's Supreme Court. Because such a court sits at the apex of a substantial judicial system and yet has an authority which, territorially, is limited only by the nation's boundaries, clearly some attempt must be made through jurisdictional devices to filter out of the great mass of legal disputes which may arise in our society, those which are most appropriate for adjudication by the nation's most authoritative and comprehensive judicial tribunal. Of the great multitude of legal controversies in which Canadians may become embroiled in the course of a year, it is unlikely that the nation's final
court of appeals, no matter how large it is nor how quickly it des-
patches its business, can adjudicate more than a handful—a hundred
or two at most. Which handful should it be?

This is a question which ought to be taken up regardless of
Quebec's constitutional demands. Our failure to give sufficient atten-
tion to this question in the past has produced a most illogical pattern
of Supreme Court jurisdiction, resulting in a gross misuse of the
nation's highest judicial energies, an unnecessary burden on many
Canadian litigants, unreasonable discrimination against the rights
of others, and an increasingly unjustifiable distortion of Canadian
federalism. To see why this is so we must examine the rules by
which the Supreme Court's jurisdiction has been determined in the
past. A critical examination of these rules, as they have been constitutionally prescribed, legislatively defined and judicially applied, will
point the way to the policies which should now be adopted if the
Supreme Court is to serve Canada's present and future needs more
effectively.

II THE CONSTITUTIONAL FOUNDATION

The most salient feature of the Supreme Court's present jurisdic-
tion stems directly from the Constitution. The only clause in the
B.N.A. Act which provides for national or federal courts is section
101, and that section simply states that, notwithstanding anything
else in the Act, the federal parliament is empowered to establish a
"General Court of Appeal for Canada," and "any additional Courts
for the better Administration of the Laws of Canada." It is from the
first of these phrases that the federal legislature has derived the
power to establish the Supreme Court as a national court of appeals.
The critically important word in that phrase is "General"—nothing
is specifically included or excluded. Thus, Canada's written Constitu-
tion, unlike that of virtually every other federal state, has provided
no explicit formulation, positive or negative, of the scope of the
national supreme Court's appellate jurisdiction.1 And, what is more,
it has authorized the national parliament, in exercising this unspeci-
ified judicial power, to override, if it wishes, every other provision of
the Constitution.

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1 The constitutions of the other "classical" federations, the United States,
Australia and Switzerland specify the jurisdiction of their highest national
appeal court or impose restrictions on it, as does West Germany's. See
in Federalism, (Boston, 1954). The same can be said of the new federations
in the Commonwealth; India, Pakistan, Nigeria and Malaysia. See R. L. WATTS,
New Federations, (Oxford, 1969). Of the three possible examples of federalism
in Latin America, Argentina, Mexico and Brazil, the former two seem to lack
constitutional stipulations of the appellate jurisdiction of their Supreme
Courts. But in Argentina the Supreme Court itself has derived constitutional
limitations on its appellate jurisdiction, and there may be considerable doubt
as to whether Mexico qualifies as a federal state. See W. J. Wagner, The
Federal States and Their Judiciary, (Gravenhage, 1959).
1. THE SOURCE OF APPELLATE JURISDICTION.

When the Canadian Parliament came to exercise this power eight years after confederation, there were some who argued that the phrase "Laws of Canada" at the end of section 101 refers to laws which the federal legislature has enacted or is empowered to enact, and further, that this phrase sets the outside limit to the jurisdiction which Parliament could bestow on both the "General Court of Appeal" and the "additional courts" authorized by section 101. This argument was supported by references to the general scheme of federalism provided for in the B.N.A. Act and specifically to the power given to the provincial legislatures over the "Administration of Justice in the Province... including Procedure in Civil Courts," and "Property and Civil Rights in the Province." If these contentions had prevailed, cases governed by provincial laws would have been excluded from the scope of the appellate jurisdiction which Parliament could confer on the Supreme Court. But they did not prevail. In the face of strenuous opposition, particularly from Quebec M.P.'s, the federal government insisted that under section 101 it could, and indeed it would authorize the Supreme Court to review the decisions of provincial courts in all legal matters, regardless of the legislative source of the law at issue. The constitutional validity of this position was subsequently confirmed by both the Supreme Court and the Privy Council. Their decisions have held that section 101 vests in the federal legislature the exclusive right to control appeals in all legal matters from the provincial courts.

Thus by virtue of both constitutional prescription and legislative enactment the Supreme Court of Canada has been a general and not a federal court of appeals. Its appellate jurisdiction has been uninfluenced by considerations of federalism. On the contrary, the statutory regulation of its jurisdiction has in some instances gone quite counter to the division of legislative powers in Canadian federalism. Appeals in criminal cases, where federal law is primarily involved, have from the outset been more restricted than appeals in civil cases, which usually involve matters assigned by the Constitution to the provincial legislatures; or, to take another example, from 1875 to

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2 See, in particular, the arguments of two prominent supporters of the government, H. T. Taschereau (whose father and cousin served on the Supreme Court's bench in its early years), and David Mills (who became a Supreme Court judge in 1902 after serving as federal Minister of Justice). CANADA, HOUSE OF COMMONS DEBATES, 1875, at 740-1, 741-4.

3 In three early cases the courts denied the provinces any power to restrict appeals from their courts to the Supreme Court of Canada, Clarkson v. Ryan, 17 S.C.R. 251; City of Halifax v. McLaughlin Carriage Co., 39 S.C.R. 175; Day v. The Crown Grain Co., 39 S.C.R. 258, aff'd in [1908] A.C. 594. In the 1940's the Supreme Court, [1940] S.C.R. 49, and the Judicial Committee, [1947] A.C. 127, upheld the federal parliament's power to abolish appeals in all legal matters from the provincial courts (and the Supreme Court) to the Privy Council. An additional legal issue in these cases was the extraterritorial power asserted by Parliament. Here the general consequences of Dominion autonomy and the Statute of Westminster were invoked along with section 101 as a basis for federal power.
1920 appeals involving the quashing of municipal by-laws, a legislative responsibility (except for its constitutional dimensions) assigned to the provinces, had a privileged place in the Supreme Court's jurisdictional scheme.\(^4\)

For the moment I am not concerned with the merits of this situation. What I do wish to emphasize is the implications it has had for Canadian federalism. It has, unquestionably, had a centralizing and integrating influence on the country's legal culture. Just how much uniformity it has introduced into otherwise diverse provincial practices is difficult to determine. In recent years a number of Quebec Civil Law scholars have been concerned with disclosing how Supreme Court (and Privy Council) review assimilated certain substantive and procedural aspects of Quebec's Civil Code to common law precepts.\(^5\) English-speaking scholars, on the other hand, have done little by way of demonstrating the Supreme Court's contribution to legal uniformity in provincial law matters.\(^6\) It is, I think, precisely the largely unsung nature of judicial power, as power, that has done much to shield the Supreme Court's position from the centrifugal forces which have so decisively affected other parts of the Constitution and the federal system. Nothing exhibits this tendency better than the Privy Council decision of 1947 authorizing the abolition of Privy Council appeals. There, the Judicial Committee, which for decades had superintended with such tender care over the division of legislative powers in Canadian federalism, rationalized its finding that the words of section 101 “vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction” with the following statement:

\[...\] It is, in fact, a prime element in the self-government of the Dominion, that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens.\(^7\)

Courts administer justice — legislatures exercise power — federalism has to do with dividing power, not justice— ergo, the Supreme Court's jurisdiction need not be federalized. Any re-examination of the Supreme Court's role will have to deal with the cogency of this logic to-day.

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\(^4\) This was provided for in section 23 of the original Supreme Court Act, 38 Vic., c. 11.


\(^6\) The only writing, which I know of, specifically devoted to this aspect of the Supreme Court is Professor John Willis' *Securing Uniformity in a Federal System*, (1944) 5 *University of Toronto Law Journal* 352.

2. THE SOURCE OF ORIGINAL JURISDICTION.

While the present Constitution gives the federal legislature a blank cheque in so far as the Supreme Court's appellate jurisdiction is concerned, it does restrict the Supreme Court's original jurisdiction. The "Laws of Canada" phrase in section 101 has been taken as restricting the original jurisdiction of any federally created courts to those legal matters which are subject to federal legislative authority.\(^8\) Thus federal considerations would apply to any legislation empowering the Supreme Court to act as a trial court. Also, "the Constitution of Courts of Criminal Jurisdiction" is specifically excluded from the central legislature's power to enact criminal law. But federal legislators have had further qualms about the constitutionality of giving the Supreme Court any original jurisdiction—even though it might be confined to cases arising under federal laws. Section 101 has apparently been read as embodying two entirely distinct and unmixable powers; one to establish a national appeal court, the other to establish courts of original jurisdiction to administer federal laws. According to this view, the Supreme Court has been established under the first of these powers and consequently cannot be the recipient of jurisdiction conferred under the second.\(^9\)

Whatever the merits of these constitutional qualms, they have prompted the adoption of some anomalous devices to circumvent them. Whenever the federal legislature has given original jurisdiction to the Supreme Court, it has given it to the Court in disguise. In 1875 the federal government did want a federal trial court to hear suits involving the federal Crown as a party and the enforcement of federal revenue laws. But it appeared at the time that there would be too little business, appellate or original, to justify the expense of maintaining more than one federal court. Hence the expedient was adopted of empowering each of the Supreme Court judges to act as the Exchequer Court exercising the desired original jurisdiction.\(^10\) This arrangement was terminated in 1887 when an entirely separate Exchequer Court was established with its own judge. More enduring has been the jurisdiction to hear petitions for habeas corpus in the case of confinement under federal criminal laws.\(^11\) Again this jurisdiction was vested not in the Supreme Court as such but in each

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\(^8\) Federal legislation establishing courts of original jurisdiction has consistently recognized this precept and the courts have construed such legislation so as to be "confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion." Consolidated Distilleries Ltd. v. The King, [1933] A.C. 508, at 522. See also The King v. Hume, [1930] 3 D.L.R. 704 and In re Roberts, [1923] S.C.R. 152.

\(^9\) Fournier, The Minister of Justice in 1875 (and later a member of the first Supreme Court bench) specifically advanced this view as his reason for establishing the Exchequer Court as nominally distinct from the Supreme Court, Canada, House of Commons Debates, 1875, at 286-7.

\(^10\) 38 Vic., c. 11, ss. 58-59.

\(^11\) Now section 57 of the Supreme Court Act, 1952 R.S.C., c. 259. The original section covered extradition cases, but this part of the jurisdiction was removed in 1876, 39 Vic., c. 26, s. 31.
member of the Court as an individual judge. The Supreme Court judge exercises this jurisdiction concurrently with the provincial courts or judges. Presumably this feature of the jurisdiction puts it on a par with the original jurisdiction in federal matters which the federal parliament has from time to time explicitly vested in provincial courts and judges. But some members of the Supreme Court have expressed doubts about the constitutional validity of this provision,\(^\text{12}\) and the fact that on occasion habeas corpus petitions have been referred to the full court seems to undermine the supposed constitutional underpinning of the jurisdiction.\(^\text{13}\)

However, constitutional difficulties have been of much greater consequence in the one area where, from the outset, federal authorities and perhaps most Canadians have wanted the Supreme Court to play a very special and primary role — that of umpiring the federal system. In 1875 the federal government wished to give the Supreme Court an original jurisdiction to hear constitutional controversies. No one seriously contested that goal, nor did anyone question the government’s view that the constitution prevented Parliament from carrying it out.\(^\text{14}\) To overcome this difficulty a “Special Jurisdiction” was provided for in the Supreme Court Act.\(^\text{15}\) Under this Special Jurisdiction it was contemplated that whenever a question of the constitutional validity of federal or provincial legislation arose in a case, the provincial trial judge would, if he thought the question was “material,” separate that issue out and send it up for determination by the Supreme Court. After the Supreme Court’s decision on the constitutional issue, the case would be proceeded with by the provincial courts. When the case had been disposed of by the highest provincial court, it might return on appeal to the Supreme Court where the non-constitutional aspects of the provincial court’s decision would be reviewed.\(^\text{16}\) None of this machinery was to be brought into play for a province until it was sanctioned by its legislature. Similarly, disputes among the provinces or between the Dominion and a province were to be tried by the Exchequer Court (with an appeal to the Supreme Court) for any provinces which passed legislation authorizing such a jurisdiction.

This was, to be sure, a cumbersome and most improbable arrangement. Nevertheless, at the time it was enacted it was regarded as extremely important. In fact this was the only jurisdictional part of


\(^{13}\) See, for instance, In re George Edwin Gray, 57 S.C.R. 150. This is, of course, different from an appeal to the full court from a decision of a single judge refusing the writ, which is provided by statute, 1952 R.S.C., c. 259, s. 62(3).

\(^{14}\) Sir John A. Macdonald had taken this view, CANADA, HOUSE OF COMMONS DEBATES, 1870, at 525, and the Liberal Administration followed his opinion in 1875, id. at 286.

\(^{15}\) 38 Vic., c. 11, ss. 54-57.

\(^{16}\) There was, and still is, a requirement that $500 must be involved in a case to qualify for this return trip to the Supreme Court, 1952 R.S.C., c. 259, s. 62(3).
the 1875 Act that was carefully spelled out, explained and adjusted as the Supreme Court legislation proceeded through Parliament.\textsuperscript{17} Use of this removal device on a substantial scale would have had important implications for both the Supreme Court's role and Canadian constitutional law. Constitutional adjudications, instead of constituting a tiny percentage of the Supreme Court's work-load, might have become very prominent on the Court's docket. And, by the same token, provincial courts, instead of becoming the primary tribunals for hearing constitutional cases, might have played a much less significant role in this area. Constitutional issues would have been dealt with by the Supreme Court whether or not the Court regarded their determination as necessary for settling the case in which they arose,\textsuperscript{18} and the question of whether legislation was \textit{ultra vires} frequently would have been decided in the abstract, isolated from the other questions of law and fact involved in the case.\textsuperscript{19}

That none of this occurred and that these elaborately contrived provisions have been almost completely ignored since the day they were enacted,\textsuperscript{20} cannot be attributed to any overt change in policy by the "political" branches of government. The jurisdiction to try inter-governmental disputes was carved out of the Supreme Court Act and reassigned to the separate Exchequer Court in 1887.\textsuperscript{21} But the provisions for removing constitutional questions from the provincial courts have remained in the Act to the present day.\textsuperscript{22} Nor can the disuse of the removal device be attributed to the provinces' refusal to pass the required enabling legislation.\textsuperscript{23} The real explanation lies, surely, in the virtually total, yet unheralded, rejection of the device by provincial trial judges. It is understandable, too, that provincial judges have largely ignored a procedure which requires them to delay all proceedings in a trial while one legal issue is siphoned off and removed for determination by a distant appeal court. The disuse of this device illustrates how futile it may be for the political arm of government to concoct procedures for the administration of justice which are alien to traditional judicial practice, unless it is able and prepared to follow through and insist on their use.

\textsuperscript{17} See especially Justice Minister Fournier's explanation of these provisions, \textit{Canada, House of Commons Debates, 1875}, at 286-7.

\textsuperscript{18} Canadian courts have frequently stated their preference for the opposite policy of judicial restraint. See B. Laskin, \textit{Canadian Constitutional Law}, (2nd ed., Toronto, 1960) 144.

\textsuperscript{19} For an analysis of the way in which Canadian constitutional law has been affected by the opposite practice of deciding constitutional issues in the context of the entire web of issues involved in a case, see LeDain, \textit{Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level}, (1967) 2 \textit{La Revue Juridique Thémis} 107.

\textsuperscript{20} I know of no cases which have actually reached the Supreme Court through the use of this machinery.

\textsuperscript{21} 1906 R.S.C., c. 140, s. 32.

\textsuperscript{22} In 1876 it was provided that the parties could request that a constitutional issue be removed to the Supreme Court, 39 Vic., c. 26, s. 17. The jurisdiction is now contained in section 62 of the Supreme Court Act.

\textsuperscript{23} In 1924 E. R. Cameron reported that 5 provinces, Ontario, Nova Scotia, New Brunswick, British Columbia and Manitoba, had passed the necessary statutes. E. R. Cameron, \textit{The Supreme Court of Canada: Practice and Rules}, (3rd ed., Toronto, 1924) 247.
This is also borne out, although in the converse sense, by the history of the other device designed to give the Supreme Court a central role in interpreting the Constitution. This was the provision, adopted in 1875 and retained in the Supreme Court Act ever since, which requires the Supreme Court to answer questions referred to it by the Governor in Council. The primary purpose of these "References" was to obtain the Court's opinion on constitutional issues, especially the validity of provincial statutes, although a reference question could (and can) refer to "any other matter." This part of the Court's functions was thought to be free of constitutional difficulties on the theory that it was not part of the Court's jurisdiction at all. In answering reference questions, the Court, theoretically, was not acting as a judicial tribunal making adjudications binding on the parties and authoritative for the lower courts. Rather it was deemed to be acting as a legal advisor to the federal government, giving advisory opinions designed essentially to guide the federal executive in exercising its power of veto over provincial legislation, and, when followed, to add a kind of moral authority to the federal government's decisions. It was the allegedly non-judicial quality of the Supreme Court's decisions in Reference cases which, when the question was eventually referred to the courts, served as the prime basis for dismissing constitutional challenges to the Reference case provisions of the Supreme Court Act. The logic of this holding prompted some consideration of another possible constitutional objection to the Reference case—namely whether the assignment of non-judicial, quasi-executive functions to the Supreme Court violated an implicit separation of powers precept. But a majority of the Court, on this occasion, refused to read division of powers principles into the judicial sections of the B.N.A. Act. They held, in effect, that just as the Constitution imposes no federal limitations on the cases which the Supreme Court can be empowered to review, neither does it impose any functional limitations on the work which might be assigned to the Court.

24 Section 52 of the 1875 Act, now section 55. Another section required the Court to "examine and report upon" private bills referred to it by the Senate, or House of Commons. This is section 56 of the present Act. I know of only three References (all in the 19th century) made under this section.

25 See Fournier's statement, CANADA, HOUSE OF COMMONS DEBATES, 1875, at 755. A more extensive exposition of this function of Reference cases was given by Sir John Thompson, Minister of Justice, in 1891, when the Reference case clause was being expanded to require the Court to give opinions and to provide for the representation of parties. CANADA, HOUSE OF COMMONS DEBATES, 1891, at 3885-6.

26 In Re References by the Governor-General in Council, 43 S.C.R. 536, aff'd [1912] A.C. 571.

27 See especially Iddington J.'s dissenting opinion, id. at 580-2.

28 Later on both the Supreme Court and the Privy Council through their application of section 96 of the B.N.A. Act (which gives the federal executive the power of appointing the judges of the senior provincial courts) showed some inclination to impose a separation of powers principle on provincial administrative devices. See Shumilatcher, Section 96 of the British North America Act Re-examined, (1949) 27 CAN. B. REV. 131.
Now when we dig beneath the legal veneer in all this, we discover, of course, that in reality the Supreme Court's answers to Reference questions have come to possess all the authority of judicial decisions. The truth of the matter is that federal politicians, despite the very prickly reservations of both the Supreme Court and the Privy Council, have been eager to use the Reference case device. And, in the modern era, they have wanted the Supreme Court's answers to Reference questions not as advice as to whether or not to use their power of disallowance (which for all practical purposes is an obsolete instrument), but as authoritative determinations of constitutional issues. These decisions have been sought for a variety of political purposes. For MacKenzie King in 1936 they were a means of obviating a policy commitment on the substance of Bennett's New Deal legislation, in the 1950's they served federal and provincial administrators (and major agricultural lobbies) as an aid in drafting marketing legislation capable of meeting constitutional challenges in the courts, more recently Lester Pearson's government resorted to the device in order to obtain a judicial determination of the off-shore mineral rights dispute before entering into political negotiations with the provinces — negotiations in which a favourable judicial decision (which was obtained) was likely to be the federal government's strongest suit. No doubt there are other uses to which Reference cases can be put, but the point is that the Reference case decision would serve few if any of these purposes, if in practice it was regarded as "merely advisory" and not binding or authoritative.

So, despite its somewhat tenuous constitutional basis, the Reference case has emerged as the only important component of the Supreme Court's original jurisdiction. And it has been very important indeed—not quantitatively but qualitatively—generating many of the

29 See Rubin, The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law, (1959-60) 6 McGill Law Journal 168. Rubin reports that he could find only one case since 1891 in which a court regarded itself as not bound by an opinion because it had been given in a Reference case. In 1945 Chief Justice Rinfret said of Reference case decisions that the Supreme Court "... should regard an opinion of that kind as binding on this Court..." [1945] S.C.R. 385, at 403.

30 The legislative history of this clause demonstrates Parliament's determination to overcome judicial reluctance to answer Reference questions, especially when they were highly speculative. In 1891 the Court was required to give reasons for its answers, and certain constitutional issues were specified as examples of possible Reference questions, 54-55 Vic., c. 25, s. 4. In 1906 questions concerning legislative proposals were specifically authorized, and it was made clear that the phrase "any other matters" was not to be restricted by the enumerated examples, 6 Ed. VII, c. 50, s. 2.


leading decisions on the B.N.A. Act.\textsuperscript{34} The Reference to the Court last
year of the Truscott case should remind us that constitutional law
is not the only area in which the device can be called into play. The
Truscott Reference\textsuperscript{35} suggests an even wider usage of the Reference
case: where there is public clamour for review of a lower court
decision and no appeal is possible under the legal rules defining the
Supreme Court's jurisdiction, the Reference case may be used to
by-pass those rules. While this may seem like a happy possibility for
those who personally benefit from it, it does introduce a rather
arbitrary element into the administration of federal justice. The
Reference procedure makes the court accessible to the federal govern-
ment at its bidding and on its terms, in a way in which it is not
available to private citizens (unless, like Truscott, they are fortunate
enough to have their case publicized by a best-seller, and several
widely-read columnists). Indeed, given the very hypothetical form
which Reference questions may take, it is somewhat ironic that the
Court has read a 'case of controversy' principle into the statutory
rules governing its appellate jurisdiction, and has refused to entertain
an appeal on the grounds that no genuine controversy or \textit{lis} was
involved in the case.\textsuperscript{36} It is true that the federal government does
not have such a complete advantage in this regard over the provinces,
for a number of provinces have passed legislation requiring their
provincial appeal courts to answer questions referred to them by
provincial administrations, and since 1922 there has been a right to
appeal from these provincial Reference decisions to the Supreme
Court.\textsuperscript{37} Still, if we wish the Supreme Court to function effectively
as the neutral arbiter of the federal system, we might well reconsider
the merits of an arrangement which appears to give the central
government so much leeway in determining the situations in which
the Court can be called upon to adjudicate constitutional questions.
Such an arrangement may seem to point too crudely to the fact that
under our current constitutional system the Supreme Court is a
branch of the federal level of government rather than an instrument
of the Canadian federation.

This consideration brings us back to the most important feature
of the constitutional provisions governing the Supreme Court—the
fact that section 101 calls for a general and not a federal court of
appeals. Here the B.N.A. Act has been more important for what it
does not say than for what it says. By failing to specify, positively
or negatively, the classes of cases which the Supreme Court should
review, it has left it to the federal parliament to work out a more

\textsuperscript{34} For a discussion of the quantitative and qualitative importance of
Reference cases, see P. H. Russell, \textit{Leading Constitutional Decisions}, (To-
ronto, 1965) at xxiv-xxv.

2d 543.

\textsuperscript{36} See, for instance, Coca Cola Co. of Canada Ltd. v. Mathews [1945]
S.C.R. 252.

\textsuperscript{37} Now section 37 of the Supreme Court Act.
precise determination of the Court's appellate jurisdiction. We must now see how Parliament has fulfilled this responsibility.

III STATUTORY DEVELOPMENT OF APPELLATE JURISDICTION.

The development of the statutory provisions governing the Supreme Courts' jurisdiction is an extremely complicated story which cannot be traced in detail here.\(^3\) It will suffice for our present purpose to set out the existing provisions and refer to their historical antecedents only where they throw light on the policies (or lack of policies) upon which the present system is based.

1. THE TWO MODES OF ACCESS TO THE COURT.

In approaching this system it is essential to distinguish between the two basic ways in which an appeal might be brought to the Court—as of right (or *de plano*) or with leave. In the first case the statute defines the circumstances in which the litigant can demand that the Supreme Court review the lower court's judgment. In the latter the statute defines the circumstances in which the litigant can request a court's permission to have a lower court's judgment reviewed, leaving it to the leave-granting court's discretion to decide whether Supreme Court review is merited. The difference between these two kinds of appeal should not be overdrawn. The statutory right to appeal is not granted in absolute and unambiguous terms. Statutory rights never are. In adjudicating claims to this right, the Supreme Court has found ample opportunity to introduce qualifications to the right which sometimes reflect the judges' own view of the Court's proper function. Even though all the statutory requirements for a *de plano* appeal may appear to have been met, nevertheless the Court has frequently quashed an appeal on the grounds, for instance, that the case turns on a question of provincial procedure.\(^3\)\(^9\) There are many other instances in which the Supreme Court's decision to give the Supreme Court Act a broad or narrow construction has, in effect, determined the appellant's right to appeal.\(^4\)\(^0\) But even when due allowance is made for this element of judicial rule-making in administering *de plano* appeals, the distinction between the appeal as of right and appeals with leave must still be regarded as fundamental: in

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\(^3\) The writings of E. R. Cameron, a Registrar of the Court, provide the most thorough (and heroic) account of these developments up to the 1920's. He gave a very succinct summary of the main developments in *The Supplement to Vol. II of his The Supreme Court Act: Practice and Rules*, (Toronto, 1920) 5.

EDITOR'S NOTE: Professor Russell has prepared a chart showing the main developments in the Court's jurisdiction from 1875 to the present. The chart is published as an appendix to this article.

\(^9\) For an early example see Williams v. Leonard, 26 S.C.R. 406. On other occasions the Court has reviewed cases involving procedure in the provincial courts because "substantial rights were involved," Eastern Township Bank v. Swan, 29 S.C.R. 193.

\(^0\) The most recent collection of these cases on the interpretation of the Supreme Court Act is the 3rd edition of E. R. Cameron's *The Supreme Court: Practice and Rules*. 
providing for appeals as of right, the legislature itself attempts to determine the classes of litigation which the court will hear, whereas by providing for an appeal with leave, the legislature delegates to the court (or courts) the responsibility for selecting the court's business. Thus, the most significant fact about the statutory basis of the Supreme Court of Canada's jurisdiction is that throughout the Court's history the appeal as of right has been the predominant mode of appeal. When the Supreme Court was founded, the appeal as of right was the exclusive means of bringing an appeal before the Court. Gradually provision was made for appeals with leave, but de plano appeals have remained quantitatively more important. They continue to account for well over half of the cases on the Court's docket.

2. THE RIGHT TO APPEAL IN CRIMINAL CASES.

At present the right to appeal in criminal cases is governed exclusively by the federal Criminal Code. The Code gives a person convicted of an indictable offence the right to appeal from a provincial appeal court's decision confirming his conviction, providing there has been at least one dissent in the provincial appeal court. In capital cases an appeal lies even from an unanimous judgment of a provincial court of appeals. Where a person has been acquitted of an indictable offence, he (or his co-accused) can appeal from a provincial appeal court's decision setting the acquittal aside, even though the court of appeal may have been unanimous. The Attorney-General has a right of appeal in the converse circumstances. Except for capital cases, these appeals cannot raise disputes about facts; they are confined to questions of law.

If we look for the thread of policy running through these provisions for an appeal as of right in criminal cases, it would appear that

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41 The only exception was the provision for per saltum appeals, whereby the parties could agree to take their case directly to the Supreme Court from the judgment of the court of original jurisdiction, 38 Vic. c. 11, s. 27.

42 This is based on data gathered by the author in his report on Biculturalism and Bilingualism in the Supreme Court of Canada, prepared for the Royal Commission on Bilingualism and Biculturalism. This study of the Court is to be published in due course.

Unfortunately no official statistics on the work of the Supreme Court have ever been systematically compiled. Hence the Federal Department of Justice and Parliament have no accurate way of gauging the effect of jurisdictional rules on the Supreme Court's docket. For a discussion of the use of statistical information in judicial administration see William H. Speck "Statistics for the United States Courts," 38 American Bar Association Journal (1952) 436, 970.

Professor Sydney Peck of Osgoode Hall Law School and this writer have recently received a Canada Council grant to finance the compilation of basic data concerning the Supreme Court's work since 1875.

43 The Supreme Court Act specifically excludes judgments in criminal cases from the right to appeal provided for in the Act, R.S.C. 1952, c. 259, s. 40. This exclusion has been construed by the Supreme Court to apply to provincial as well as federal criminal law, In re McNutt, 47 S.C.R. 259, The King v. Bell, [1925] S.C.R. 59. For one view of the implications of these decisions see How, The Too Limited Jurisdiction of the Supreme Court of Canada, (1947) 25 CAN. B. Rev. 573.
their principal object is to rectify legal errors committed by the lower courts in the trial of serious offences. A difference of opinion among the members of the provincial appeal court or between the provincial court of appeals and the trial court (as where the appeal court sets aside the trial court's decision to acquit) is considered to constitute prima facie evidence of the possibility of such error, and hence as sufficient grounds for Supreme Court review. Such a policy must proceed on the twin assumptions that a person accused of an indictible offence ought by right to have two opportunities to correct legal errors in the decisions determining his guilt, and that the Supreme Court is in a better position than the provincial appeal courts to identify these errors. Both of these assumptions are at odds with what we shall later argue ought to be the central postulates in shaping the Supreme Court's jurisdiction.

3. THE RIGHT TO APPEAL IN CIVIL CASES.

Turning now to appeals as of right in civil cases, it is more difficult to discern any trace of intelligible policy. From 1875 to 1920 the basic right of appeal from the judgments of the highest provincial courts was frequently adjusted to meet the varying needs of the different provinces. The larger and older provinces, Quebec and Ontario, with well-developed appeal systems of their own were anxious to curtail appeals to the Supreme Court, while the smaller and newer provinces with no specialized appeal courts of their own wished to expand their litigants' opportunities for taking cases to the Supreme Court. But in 1920 uniformity was introduced, and the basic right to appeal in civil cases from the final judgment of the highest court in all provinces was established, subject to the single condition that the matter in controversy amount to at least $2,000. In 1956 the monetary requirement was raised to $10,000. There are two kinds of proceedings in which an appeal to the Supreme Court lies even though the monetary requirement cannot be met—proceedings for or upon a writ of habeas corpus (but not in criminal cases) or mandamus.

This right to appeal from the final judgment of a provincial appeal court, which the Supreme Court Act gives to a litigant whenever his case involves at least $10,000, produces by far the largest number of Supreme Court adjudications. Thus it is unquestionably the most consequential rule in determining how the Supreme Court spends

44 From the very beginning the right to appeal from Quebec was more restricted than were appeals from the other provinces: a $2,000 monetary requirement applied to Quebec appeals alone, 38 Vic., c. 11, s. 17. In 1897 a $1,000 monetary requirement (with some exceptions) was applied to Ontario appeals, 60-61 Vic., c. 34, s. 1. The Ontario Legislature had enacted this restriction as early as 1881 (44 Vic., c. 5, s. 43), but this legislation was considered ultra vires in Clarkson v. Ryan, supra, footnote 3.

45 The main concession to these provinces was allowing appeals in cases originating in some of their minor courts, see 1906 R.S.C., c. 139, s. 37.

46 11-12 Geo. V, c. 32.

47 4-5 Eliz. II, c. 48, s. 2.

48 1952 R.S.C., c. 259, s. 36.
its time. Viewed from this perspective it is difficult to discover any rational basis for the rule. Unlike criminal appeals, civil appeals which come to the Court under this jurisdiction carry with them no presumption of error in the courts below: even though all the provincial judges who heard the case may have been unanimous, the appeal still lies. There is evidence which suggests that in a disproportionately large number of these appeals there is no merit to the appeal at all, and the Supreme Court simply rubber-stamps the provincial appeal court’s decision. In one term during which I observed the Court at work, I found that in one out of every eight cases entered for hearing on the merits in the Court’s minute book, the Court, after spending the best part of a morning listening patiently to the appellant’s counsel, dismissed the appeal without hearing counsel for the respondent. Statistical evidence based upon a much longer period has shown that the frequency with which the Supreme Court affirms the lower court’s decision is significantly higher in de plano appeals than in appeals with leave.49

The $10,000 rule is certainly not well calculated to single out cases of great consequence to the nation or to the individual litigant. The rule may have the single virtue of reducing the likelihood of the costs of an appeal exceeding the amount at issue in the case. But avoiding the ridiculous is surely an inadequate justification for a rule which is so determinative of the Court’s function. Besides, it is likely to permit as many inconsequential and trivial cases as it excludes. Furthermore, given the preponderance of private suits for damages in this class of appeals and the preponderant importance of provincial legislative jurisdiction in the private law field, it produces many Supreme Court cases which are concerned solely with provincial law. As far as the litigants’ interests are concerned, even if we accept the bourgeois notion that a person’s interest in having his rights correctly determined could be measured in dollars and cents, we should still recognize the vast differences in the marginal utility of money to suitors of different circumstances. And, of course, there must be many Canadians who, like myself, find this particularly transparent application of the bourgeois ethic abhorrent, and cannot understand why a person’s interest in appealing from a unanimous appeal court decision which commits him to prison for life should be given less weight than an insurance company’s interest in reversing a unanimous judgment favouring a person injured in an automobile accident.

But it is obvious that we are only playing games when we look for the rational basis of a rule such as this. It would be fairer to those responsible for it, and probably more accurate, to attribute the survival of the monetary requirement to the weight of tradition and the attractiveness of an apparently objective standard. It would certainly not be the first time that the machinery of justice has been influenced by these factors. Even so, it represents an odd variant of

49 This evidence is presented in the report referred to in footnote 42, supra.
the traditional use of monetary standards in determining the jurisdiction of courts. In Great Britain, the United States and Canada, a monetary measure has consistently been used to define the jurisdiction of inferior courts. Its use in this context as a means of working out a division of labour between the superior trial courts and the more numerous, more accessible inferior courts makes some sense. But it is a very different matter to use the monetary requirement as a necessary and sufficient condition for bringing an appeal from the final judgment of a provincial appeal court to the nation's highest court. It is certainly not used that way in either the United States or Great Britain. It is true that under provincial legislation and orders-in-council the right to appeal to the Privy Council was based, among other things, on a monetary requirement. But even there, the Privy Council always retained the “prerogative” right to grant or refuse leave on its own terms. The advantage of a monetary rule in creating an objective standard for rationing access to the Court is not without doubt either. The Supreme Court at one time found it necessary to give the monetary requirement quite a different meaning when applied to different provinces, holding that “the matter in dispute” referred to the amount claimed if the case was from Quebec, whereas it meant the amount actually awarded if the appeal came from Ontario. There are also situations in which it is by no means clear whether or how the judgment from which appeal is sought is related to the monetary interests at stake in the litigation.

The other conditions for an appeal as of right from provincial courts are not quite so difficult to comprehend. Providing an appeal as of right in civil cases arising under habeas corpus and mandamus proceedings represents some recognition of the non-monetary interests of litigants. But the obvious question is—why these two exceptions? The exclusion from the very beginning of appeals from provincial court refusals of habeas corpus in criminal cases may, I suppose, have had something to do with the fact that the Supreme Court judges exercise an original jurisdiction to hear petitions for habeas corpus which is concurrent with provincial courts. But this original juris-


51 See City of Ottawa v. Hunter 31 S.C.R. 7. This result was reached despite the fact that the Supreme Court Act stipulated that in both cases the amount in dispute “shall be understood to be that demanded,” 1906 R.S.C., c. 139, ss. 46(2), 48(2).


53 Nor have the Supreme Court judges been inclined to exercise their jurisdiction to grant habeas corpus in a way which might compensate for their lack of jurisdiction to review lower court refusals of habeas corpus in criminal cases. See, for instance, Re Patrick White, 31 S.C.R. 383. In its early years the Court’s majority also rejected attempts of some of its more robust libertarians (notably Mr. Justice Henry) to use habeas corpus as an alternative basis for reviewing the merits of judgments in criminal cases. See In re Sproule, 12 S.C.R. 140, and In re Trepanier, 12 S.C.R. 111.
diction has always been strictly limited to confinements under federal
criminal law, whereas the exclusion of criminal appeals from the
Supreme Court's jurisdiction under the Supreme Court Act extends
to Criminal cases under both federal and provincial law. At other
times Parliament has granted other prerogative writs, such as
certiorari and prohibition, a privileged place in the Supreme Court's
appellate jurisdiction.\textsuperscript{54} No explanation was advanced for retaining
only mandamus and non-criminal habeas corpus in 1920. Special
recognition of the prerogative writs reflects the importance assigned
to them in the "lawyer's ideology" as vehicles for the protection of
the citizen's liberty against abuses of public authority. Whatever one
may think of the quality of liberty embodied in this ideology, a more
appropriate way of ensuring Supreme Court review of cases involving
administrative malpractice adverse to the citizen's liberty would be to
provide a right of appeal from provincial court denials of claims
made under the Canadian Bill of Rights. The latter statute, after all,
 purports to impose a schedule of libertarian values on "every law
of Canada."

One further pair of qualifying conditions is attached to the right
of appeal from provincial courts. An appeal lies only from the final
judgment (including judgments granting a motion for a non-suit or
directing a new trial) of the highest court of last resort in a province.
Both these conditions have been fairly stringently construed by the
Supreme Court. The final judgment rule at one time was taken to
exclude the review of a judgment in cases where the trial judge had
reserved any question for further consideration. The restrictive
nature of the final judgment requirement was considerably lessened
in 1913 when the statutory definition of final judgment was broadened
to include the determination "in whole or in part" of "any substantive
right of any of the parties."\textsuperscript{55} But this provision can still be construed
narrowly by the Court so as to exclude appeals which it is reluctant
to hear.\textsuperscript{56}

The stipulation that the appeal must come from the province's
highest court raises more serious issues. If, together with the final
judgment requirement, it is designed to ensure that litigants exhaust
all the remedies available in the provincial courts before bringing an
appeal to the Supreme Court, it clearly goes too far. For the phrase
"highest court of last resort in a province" has been consistently
interpreted to refer not to the court which happens to be the court

\textsuperscript{54} 38 Vic., c. 11, s. 23, and 54-55 Vic., c. 25, s. 2.
\textsuperscript{55} 3-4 Geo. V, c. 51, s. 2(e), now section 2(b) of the Supreme Court Act.
\textsuperscript{56} The word "judgment" as well as "final" might be narrowly construed.
In United States v. Link and Green [1955] S.C.R. 183, involving an application
for leave to appeal, where an appeal lies from "any final or other judgment," the
Court ruled that a superior court judge's refusal to issue a warrant for
the committal of respondents under the Extradition Act was not a "judg-
ment." For a discussion of this and other cases in which the interpretation
of jurisdictional clauses in the Supreme Court Act affect civil liberty issues
see Cavarzan, \textit{Civil Liberties and the Supreme Court: The Image and the
of last resort for a particular action but to the court which is generally the highest court of appeal in the province. But there are numerous instances in which the litigant has no right to appeal from a lower court of a province to the provincial appeal court, or where the provincial appeal court may refuse to grant leave to appeal. In these situations which could involve matters of federal or even constitutional law, or certainly $10,000, no appeal could be taken to the Supreme Court even though the litigant had exhausted all his provincial remedies.

This raises the general question of how far access to the national Supreme Court should be governed by judicial procedure in the provinces. On this issue we can see again some trace of the Anglo-Canadian blindness to "judicial power" at work. For, while the Privy Council and the Supreme Court categorically rejected any claims of the provincial legislatures to directly curtail appeals to the Supreme Court, they have been quite willing to allow the provincial legislatures to refuse an appeal to the highest court of last resort in the province, a measure which indirectly results in blocking Supreme Court review. Perhaps one need not worry about this so long as only legal matters under provincial jurisdiction are affected (although it ought to be of some concern to those who agree with Lord Jowitt that the Dominion ought to possess a "plenary authority to legislate in regard to appellate jurisdiction"). There can be no doubt that under the existing constitution the federal parliament can empower the Supreme Court to review the decisions of provincial courts below the appeal courts in the provincial judicial hierarchies. The question is should this power have been exercised more deliberately?

The Supreme Court Act now contains two clauses which appear to make possible appeals from provincial courts other than the provincial appeal court. One of these is the provision for appeals per saltum. This enables the litigants, providing certain conditions are met, to literally jump over the provincial appeal court and appeal directly to the Supreme Court from the final judgment of the trial court. But the conditions now attached to per saltum appeals are so demanding that they render this clause virtually a dead letter. Not only is there a monetary requirement of $2,000, but the case must also be appealable to the provincial appeal court, that court must


58 See, for example, Furlan v. City of Montreal, [1947] S.C.R. 216 and comment by How, supra, footnote 43.


60 Supra., footnote 7.

61 Although in one case where it was alleged that Ontario legislation designating the Divisional Court's judgment as final conflicted with the provision for per saltum appeals in the Supreme Court Act, the Court split 2-to-2 as to which legislation was controlling, Farquharson v. Imperial Oil Co., 30 S.C.R. 183. It is interesting that this aspect of the Farquharson case has been ignored in subsequent citations of the case.
grant leave and both parties must consent. Thus this provision still makes a litigant's right to Supreme Court review of his case depend on the appeal system within the province and the discretion of the province's highest court. It seems designed to meet the rare circumstance where the parties have agreed in advance that they will appeal from any provincial appeal court determination of their suit, and so they may as well appeal directly from the trial court.

The more effective device for facilitating Supreme Court review of a case in which the litigant may have exhausted all his provincial remedies without reaching the provincial appeal court is section 41 of the Supreme Court Act. This section contains the expanded leave granting powers conferred on the Court in 1949. According to that section, the Supreme Court can grant leave to appeal from "any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case . . ." The words which I have italicized appear to enable the Court to entertain appeals from whatever provincial court was the court of last resort for the case at hand. But the Supreme Court has not seen fit to give these words their broadest scope. There would seem to be no doubt about a situation in which a statute (federal or provincial) designates a court other than the provincial appeal court as the final court for a particular cause of action. But the situation is less clear where the statute grants an appeal to the provincial court of appeal with leave of that court and leave is refused. In Paul v. The Queen, the leading case on this issue, a majority of the Supreme Court took the position that the phrase "highest court . . . in which judgment can be had in the particular case" means the court which generally, for the class of cases involved, is the highest court in the province. Thus in this case, where there was an appeal from the county court to the provincial appeal court with the latter's leave and leave was denied, the would-be appellant could not be heard by the Supreme Court even though he had exhausted his provincial appeal rights at the county court level. Cartwright J. (as he then was) in a dissenting opinion took issue with this narrow construction of section 41. He suggested that,

... The intention of Parliament in enacting the section in its present form was to give the Court the widest possible power in every case, . . . to permit a litigant, who has exhausted all rights of appeal which are open to him in the provincial courts, to obtain the decision of this Court. No doubt this is a discretion to be exercised with great care but, in my opinion, it ought not to be cut down by judicial decision.

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62 R.S.C. 1952, c. 259, s. 39. Note also that per saltum appeals are limited to cases originating in section 96 courts.
63 In a recent judgment refusing leave to appeal per saltum, Tremblay C.J.Q. said that "The interests of the parties is no longer of prime importance . . ." and that here, where an important constitutional question was involved, " . . . I cannot convince myself that our Court's dealing with the matter would not contribute something of use to the Supreme Court of Canada in its attempt to solve the important questions." Readers' Digest Association (Canada) Ltd. v. A.-G. Canada, [1964] 43 D.L.R. 2d 474, at 476-77.
65 Id. at 460.
Cartwright considered that the Supreme Court could grant leave to appeal from the county court judgment. The dissenting judgment of Ritchie J. in the same case points to a more moderate approach which seems better calculated to win majority support. Ritchie held that the provincial appeal court's refusal of leave to appeal from the county court, in this instance, dealt with the merits; therefore that decision could be considered a "final judgment" of the provincial appeal court and hence eligible for Supreme Court review. In *Queen v. Bamsey*, 66 decided during the same term, the Court was willing to take Ritchie's approach and granted leave to appeal from a decision of the British Columbia Court of Appeal refusing leave to appeal from a county court judgment. Still, this approach fails to give section 41 the full force which Chief Justice Cartwright has suggested it was intended to have, 67 and civil libertarians will scarcely be heartened by an approach which enabled the Court to grant to the Crown in the *Bamsey* case what it had refused the convicted man in *Paul*.

The central question of policy in all of this is the extent to which it should be possible for provincial authorities, judicial or legislative, to block access to the nation's highest court. The Supreme Court, throughout its history, has been anything but aggressive in asserting its supervisory powers over provincial courts; it has always shown great respect for provincial procedures. Shortly after the 1949 amendment to the Supreme Court Act conferred on it wide discretionary power to grant leave to appeal from provincial courts, the Court indicated that it would insist on the exhaustion of provincial remedies before granting leave. 68 But this policy of self-restraint, so much in keeping with a spirit of federal comity and traditional judicial practice, should not blind us to the possibility that the action of provincial authorities may be deliberately contrived, on occasions, to frustrate the exercise of federal rights. If the Supreme Court is to play a special and decisive role in adjudicating disputes arising under federal or constitutional law (as I shall argue it should), more careful attention should be given to the ways in which its jurisdiction is subjected to local determination. At the very least immediate steps should be taken to clarify the scope of section 41 so that the policy attributed to that section by Chief Justice Cartwright can be realized. Conversely, those who think the provinces ought to exercise a plenary power to control the appellate system in their own courts as it


67 Although Chief Justice Cartwright's interpretation of Parliament's intentions seems reasonable, there is no positive expression of that purpose in the parliamentary discussions of the 1949 amendment to the Supreme Court Act. Changes in the jurisdictional sections of the Act, however, have frequently been prepared by the Court itself. (This is occasionally acknowledged, as in Canada, House of Commons Debates, 1913, at 8574; 1920, at 2317. It may be that Chief Justice Cartwright was aware of reasons advanced by the Court itself for expanding the scope of section 41.)

relates to actions arising under their own laws, may be equally concerned to ensure that any federal legislation, enabling provincial litigants to appeal to the Supreme Court even though further litigation has been foreclosed by provincial authority, should not apply to actions governed by local law. But this raises another, and larger range of issues which I shall turn to shortly.

While the great bulk of the Supreme Court's appellate business has always come from the "provincial courts" (about four-fifths of its reported decisions in appeal cases from 1950 to 1964), a small but growing number of appeals come to it from the few "federal courts" which the federal parliament has established under section 101. "for the better administration of the Laws of Canada."\(^6\) The most important of these is the Exchequer Court of Canada. But appeals can also be brought to the Supreme Court from the Board of Transport Commissioners, the Court Martial Appeal Board, the Air Transport Board and the special Tribunal called into being to settle disputes between the C.N.R. and the C.P.R.\(^7\) However from these latter tribunals there is no appeal as of right; leave must be granted by a Supreme Court judge, or, in the case of the Court Martial Appeal Board, by the Attorney-General of Canada. There is a right to appeal from the Exchequer Court if the dispute involves at least $500.\(^1\) An appeal also lies from the judgments of provincial judges or barristers acting as District Judges in Admiralty of the Exchequer Court.\(^2\) To complete this survey of de plano appeals to the Supreme Court, we should note that there is also a right to an appeal on any question of law or fact from the decision of any provincial court acting under federal legislation as an election court for the trial of election petitions.\(^3\)

In all of these situations where an appeal as of right lies from a "federal court" to the Supreme Court there is no intermediate appeal court. Consequently it seems reasonable that the appeal provisions

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\(^6\) In the Canadian context "provincial courts" and "federal courts" are ambiguous terms. Normally "provincial courts" refers to the courts which the provinces are empowered to establish under section 92(14) of the B.N.A. Act. But the judges of some of these courts (superior, county and district courts) are appointed by the federal government and the provincial courts administer federal laws even when jurisdiction has not been explicitly vested in them by federal legislation. Board v. Board [1919] A.C. 956. Here "federal courts" refers to courts or judicial tribunals created by federal legislation. This is similar to the way in which Mr. Justice W. R. Jackett, President of the Exchequer Court used the term in his speech on Federal Courts to the Federal Lawyers' Club, Ottawa, Nov. 24, 1964. Besides the tribunals to which I refer, Mr. Jackett included the Income Tax Appeal Board (from which there is no direct appeal to the Supreme Court). But in 1955, for purposes relating to retirement annuities for federal judges, federal courts were identified as the Supreme Court, the Exchequer Court and the Territorial Courts of the Yukon and the Northwest Territories, 34 Eliz. II, c. 48. (Appeals from the territorial courts now go to the appeal courts of adjacent provinces and not to the Supreme Court, 2 Geo. V, c. 56 and 1952 R.S.C., c. 33, s. 28.)

\(^7\) 1952 R.S.C., c. 234, s. 53; c. 184, s. 196; c. 2, s. 19; c. 39, ss. 26-27.

\(^1\) 1952 R.S.C., c. 98, s. 82.

\(^2\) 1952 R.S.C., c. 1, s. 32. This appeal is subject to the provisions of the Exchequer Court Act regarding appeals.

\(^3\) 1952 R.S.C., c. 87, s. 63.
should be more liberal than they are for appeals from provincial appeal courts. Although the question still remains as to whether the Supreme Court is the appropriate review tribunal. There is no alternative for appeals from the Exchequer Court proper, but the Exchequer Court itself is an alternative court of appeal for District Judges in Admiralty. Election appeals have been heard by the Supreme Court since its founding in 1875, and if Sir John A. Macdonald had had his way, the Supreme Court would have had the exclusive jurisdiction to try controverted federal elections. So long as election petitions are to be heard by courts, it does seem wise to make the procedures involved as “quick and conclusive as possible,” and, at the very least, eliminate any intermediate appeal court.

4. APPEALS WITH LEAVE

When a litigant does not have an appeal as of right to the Supreme Court, in most circumstances he can still seek leave to appeal. Under the Supreme Court Act, leave to appeal in civil cases from the judgments of provincial appeal courts can be granted by the Supreme Court or by the provincial appeal court itself. The Supreme Court’s capacity to grant leave is slightly larger than the provincial appeal courts’: it extends to judgments other than final judgments; to judgments of courts below the provincial appeal court if they are the final provincial court for a particular case (although, as we have seen, this provision has been narrowly construed); and, since 1956, to discretionary judgments or orders. In criminal cases only the Supreme Court may grant leave. Under the Criminal Code the Supreme Court may grant permission to appeal on a question of law to a person convicted of an indictable offence whose conviction is confirmed by the provincial appeal court (or to the Attorney-General in converse situations). Under the Supreme Court Act leave to appeal can be granted by the Court to persons convicted of non-indictable offences. There is an appeal with leave from the quasi-judicial federal tribunals mentioned above, and from the Exchequer Court. Although, in the case of the Exchequer Court, the Supreme Court’s power to grant leave, oddly enough, is more narrowly circumscribed than is the case with the Court’s power to grant leave from provincial courts; here, where matters of federal import are always involved, leave can only be granted in a number of specific kinds of cases. Finally, there is an appeal with leave from the provincial appeal courts in

74 38 Vic., c. 11, s. 48.
75 CANADA, HOUSE OF COMMONS DEBATES, 1875, at 288.
76 This was the phrase used in Théberge v. Landry, 2 App. Cas. 102, where the Privy Council refused to entertain an appeal from the Supreme Court in an election case.
77 1952 R.S.C., c. 259, ss. 38 and 41.
78 4-5 Eliz. II, c. 48, s. 4.
79 Sections 597(1) (b) and 598(1) (b).
80 1952 R.S.C., c. 259, s. 41(1) & (3).
81 1952 R.S.C., c. 98, ss. 83-84.
cases arising under the Winding-Up Act, the Bankruptcy Act and the Companies Creditor Arrangements Act. Under the Winding-Up Act a two thousand dollar monetary requirement must be met. Under all three leave is granted by a judge of the Supreme Court.82

The retention of these disparate statutory provisions for leave to appeal from provincial courts is largely a hang-over from the pre-1949 era when there was no across-the-board provision for an appeal with leave of the Supreme Court. Appeals with leave were introduced after the Court was founded on an ad hoc basis to meet particular circumstances. When a generalized leave to appeal was introduced in the 1920 revision of the Supreme Court Act, the broad power to grant leave was given to the provincial appeal courts, the Supreme Court's leave-granting power being confined to certain categories of cases in which leave was refused by the provincial appeal court.83 But in 1949, in the major jurisdictional change designed to equate the scope of the Supreme Court's appellate jurisdiction with that formerly exercised in Canadian cases by the Privy Council, the inferior position of the Supreme Court in granting leave was terminated and the present arrangement introduced. It is high time that the provisions for appeals with leave in these other statutes either be eliminated or brought into line with the leave-granting system now contained in the Supreme Court Act.

The appeal with leave represents a fundamentally different conception of the Supreme Court's function than that embodied in de plano appeals. From the litigant's point of view it is both broader and narrower than the appeal as of right. It is broader in the sense that it is available in situations where there is no right to appeal; but it is narrower in that whether or not it is granted depends in the final analysis on the court's discretion and not on the litigant's right. This suggests that the basic rationale for appeals with leave has to do not with the rights or interests of private litigants but with the public interest in the authoritative resolution of difficult and important legal problems. The generic purpose of Supreme Court adjudications in appeals with leave was succinctly stated by a member of Newfoundland's Supreme Court in the course of explaining why leave should not be granted in a case involving nothing more than a dispute concerning liability for damages to a vessel. "An appeal," he said, "should it be allowed and succeed, can alter only the position of the parties; it will not leave the legal community of Canada in any better position to know the law, except in so far as every decision adds its infinitesimal bit to the pile of decided cases. There is nothing of general interest."84 Here the Supreme Court is seen as sitting at the apex of a national judicial system; the individual litigant's interest in having an appeal court review of the trial court's determination of his

82 1952 R.S.C.: c. 296, s. 108; c. 14, s. 151; c. 54, s. 14. For a survey of these and other provisions see Sutherland, Report on Federal Legislation Providing for Appeals to the Supreme Court of Canada, (1959) CANADIAN BAR ASSOCIATION 74.

83 10-11 Geo. V, c. 32, s. 2.

rights has already been satisfied at the provincial appeal court level; the only point in now bringing the Supreme Court's energies to bear upon the case would be to render assistance to private citizens and law enforcement agencies throughout the country by clarifying their legal rights and resolving doubtful points of law. It seems fitting that the occasions upon which the Court should perform this function should depend not solely on the will (or wealth) of the parties to a particular case but on the discretion of the judges themselves.

Although the underlying purpose of appeals with leave will be readily acknowledged, the way they are now administered may well raise some serious questions of policy. There is, first of all, the question of the grounds upon which leave is granted. Since the power to grant leave is by its very nature a discretionary power, its exercise is not subject to precise rules. Still, discretionary powers, as the courts have never hesitated to point out to other public authorities, are not to be exercised in an arbitrary fashion; their exercise is to be directed to the objects for which they were granted. The courts have received no specific direction from either the Constitution or the federal legislature as to the purposes which should govern their decisions to grant leave. What purposes have they prescribed for themselves? While there are numerous decisions indicating various factors which might be taken into account, the most complete statement and the one to which reference is most frequently made is that given by Nesbit, J. over 60 years ago in Lake Erie and Detroit River Co. v. Marsh. After the expected caveat about the impossibility of giving an exhaustive definition of the principles to be followed in granting leave, Nesbit stated the following principles:

... If a case is of great public interest and raises important questions of law and yet, the judgment is plainly right, no leave should be granted...

Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted. Such cases, as we understand, come peculiarly within the purview of this court which was established to be a guide to provincial courts in questions likely to arise throughout the Dominion. We think it was the intention of the framers of the Act creating this court that a tribunal should be established to speak with authority for the Dominion as a whole and, as far as possible, to establish a uniform jurisprudence, especially within the matters falling within section 91 of the B.N.A. Act, where the legislation is for the Dominion as a whole, or, as I have said, where purely provincial legislation may be of general interest throughout the Dominion.85

Several aspects of this statement call for some comment. The first proposition suggests that a necessary, although not sufficient, condition for granting leave is that there must be some indication of possible error in the judgment from which appeal is sought. Clearly this principle is unlikely to be of much relevance when the provincial

85 35 S.C.R. 197, at 200.
appeal court is asked to grant leave to appeal from its own judgment. Nor does it seem an entirely sound policy for the Supreme Court to follow. The application of this principle involves a consideration of the merits, and if the point at issue in the case is truly “of great public interest and raises important questions of law,” then, if the Court has not pronounced upon the issue before, its approval of the lower court’s determination of the issue should be recorded as a decision on the merits. The reference in the next paragraph to cases raising issues of importance to the whole Dominion, upon which the Supreme Court can usefully provide guidance for the provincial courts, is very much in keeping with the basic rationale of appeals with leave. Yet it is remarkable that one of the most objective marks of such a case — the existence of conflicting provincial appeal court decisions — is not mentioned. Here it is relevant to recall that when appeals with leave in criminal cases were first introduced in 1920, the Criminal Code stipulated that leave could be granted (by a Supreme Court judge) only when the judgment appealed from conflicted with that of another provincial court of appeal in a like case. That condition was removed from the Code in 1948, although it has continued to influence the Supreme Court and the provincial courts of appeal in granting leave in civil cases as well as in criminal cases. And there could be little argument about its being an appropriate consideration in so far as it relates to federal or constitutional law. But what about conflicting provincial appeal court decisions on matters of provincial law? Nesbit’s answer to this is quite explicit: “Where purely provincial legislation may be of general interest throughout the Dominion,” leave should be granted. Occasionally, members of the provincial appeal courts have expressed concern about the propriety of granting leave in important cases concerned solely with local laws. But this

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86 This has been acknowledged by provincial appeal courts as in Siebel v. Dwyer Elevator Co., [1923] 3 W.W.R. 909, and Hepting v. Schaaf, 41 W.W.R. 319.
87 Similarly the Courts’ recent decision to grant leave in Swan et al. v. Dennison, [1967] S.C.R. 7, solely because in a similar case a litigant was mistakenly allowed a de plano appeal, seems to go too far in the direction of treating the purpose of Supreme Court adjudications as the correction of errors in individual cases. This is surely a case of two wrongs not making a right.
88 10-11 Geo. V, c. 43, s. 16. This became section 1024a of the Criminal Code.
89 11-12 Geo. VI, c. 39, s. 42.
90 A difference of opinion among appeal court judges or between the provincial appeal court and the trial court are generally not given the same weight as differences between different provincial appeal courts. This point is discussed by Culliton J. in Kozak v. Beatty, [1957] 21 W.W.R. 496.
has been exceptional. Nor should this surprise us, for, as we emphasized earlier, there is no recognition of federalism in either the constitutional or statutory prescriptions of the Supreme Court's appellate jurisdiction.

Besides the question of grounds, there is the question of who should grant leave. It is not anomalous, I suppose, that in civil cases both the provincial appeal courts and the Supreme Court can grant leave. A similar arrangement exists in Great Britain with the Court of Appeals and the House of Lords, and the Ontario Court of Appeal has possessed the power to grant leave to appeal to the Supreme Court ever since 1897. For some Canadians these facts alone may be sufficient to justify retention of the present system. There may also be some who enjoy the convenience of being able to apply for leave locally without going all the way to Ottawa. However it should be possible to evolve a system in which applications for leave do not involve a formal hearing and could be handled by an Ottawa agent. Nor does the provincial appeal court's decision necessarily settle the issue. Certainly the Supreme Court has granted leave after it has been refused by a provincial court, and, indeed this is explicitly provided for in the Supreme Court Act. However, in the opposite situation, where the provincial court of appeal has granted leave, I know of no instance in which the Supreme Court has refused to hear the case because it disagreed with the way in which the provincial court had chosen to exercise its discretion. The Supreme Court has no explicit power to refuse leave once it has been granted by the provincial court.

There will always be those for whom 'two bites at the apple' are better than one. The present system does give them a 'second bite,' but it also dilutes the Supreme Court's control over the selection of the cases it should hear. So long as the Court plays such a decisive role in the development of provincial law, it is hardly possible to object to this. However, if the Court's functions were redefined, and its energies more deliberately focused on those legal problems

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92 Although where the provincial law issue involved in a case has no significance for other provinces, Supreme Court judges have considered this as grounds for refusing leave. See Anglin C.J.'s opinion in Hand v. Hampstead Land & Construction Co., [1928] S.C.R. 428, and Mignault J.'s in La Corporation du Comité d'Arthabaska v. La Corporation de Chester Est, 63 S.C.R. 49.


94 Section 41(1) states that the Supreme Court may grant leave "whether or not leave to appeal to the Supreme Court has been refused by any other court."

95 However the Supreme Court may refuse to hear an appeal where leave has been granted, for want of jurisdiction. For instance, on a number of occasions it has refused to hear an appeal even though the provincial appeal court had granted leave, on the grounds that there was no "lus (genuine legal controversy) between the parties, Coca Cola Co. of Canada Ltd. v. Mathews, supra, footnote 36. Kerwin C.J.'s dictum in Switzman v. Ebling and A.-G. Que, indicated that the Court would continue to follow that rule.
which are constitutionally defined as of common concern to all Canadians, the question would appear in a different light. There would then be a much stronger case for assigning leave-granting powers exclusively to the Supreme Court.

Even if the Supreme Court were to exercise an exclusive power in screening applications for leave, there would still be the question of how many members of the Court should be required for decisions granting or refusing leave. Until 1956 both the law and practice in this regard varied widely and unreasonably. At one extreme, as with applications for leave in criminal cases involving an indictable offence, a single Supreme Court judge made the decision, and there was no right to appeal from his refusal to the full court; while, elsewhere, as with leave to appeal from the provincial courts in civil cases or in criminal cases involving non-indictable offences, a full quorum (a minimum of five judges) heard the applications. The controversy aroused by Mr. Justice Abbott's refusal of leave in the Coffin murder case led to an amendment to the Supreme Court Act aimed at removing these disparities. The amendment stipulated that "where any act authorizes an appeal to the Supreme Court with leave of that court," a minimum of three judges must hear the application; in capital cases the quorum was set at five.

Even with this amendment, the present system of leave granting in the Supreme Court fails to give adequate recognition to the importance of this function. For a court such as the Supreme Court at the apex of authority in the Canadian judicial system, but with a capacity to adjudicate but a tiny fraction of the country's legal disputes, the selection of the cases it does hear is very nearly as important as the Court's decisions on the merits. For this gatekeeping activity will be a prime factor in determining the usefulness of the Court's substantive work. So there is still good reason for objecting to a procedure that enables two members of a nine judge court to decide whether a case should be heard. It is not simply that this might unfairly jeopardize an applicant's chances for an appeal. The more important objection is that it mitigates against a collegiate approach to the articulation of leave-granting policies. Since 1949, when the Supreme Court assumed a greatly expanded role in granting leave to appeal, the Court has done very little by way of formulating the policies to be followed in the selection of cases. The few reported decisions on motions for leave to appeal deal mostly with questions of statutory construction concerning the circumstances in which leave may be requested, but not with leave-granting policy per se. The Court should accept its inescapable policy-making role in this area in

96 Although the Court has granted leave to appeal after a single judge had refused it, but always on the basis of some legal error in the first judge's refusal of leave. See In re Smith & Hogan Ltd. [1931] S.C.R. 652.
98 4-5 Eliz. II, c. 48, s. 6, now section 44a of the Supreme Court Act.
a more responsible manner. This need not require the formal publication of leave-granting principles analogous to the United States Supreme Court's certiorari rules, but it should at least entail the collective consideration of leave-granting problems and the reporting of those of its decisions on motions for leave which provide the most instructive illustrations.

Finally, the most fundamental question of policy raised by both appeals as of right and appeals with leave is whether the present system represents the most appropriate mixture of the two modes of appeal. It is extremely difficult to discover any reasonable basis for the provisions which now give the litigant a right to appeal from the provincial appeal courts. The most striking result of the present system is that, in marked contrast to the highest courts of both Great Britain and the United States, the Supreme Court of Canada has relatively little control over its own docket: in its first fifteen years as Canada's ultimate court of appeals, fewer than one out of five of its reported decisions were in cases that the Court itself selected for review. Under this system the Court still functions in the main as a court of last resort for disgruntled but well-heeled litigants.

IV A BASIS FOR REFORM

This review of the rules which now govern the Supreme Court's jurisdiction has left little space in which to put forward my own proposals for reform. No doubt the principles which I think ought to govern the Court's jurisdiction have been implied in the criticisms advanced and the questions raised in the course of examining the present system. But in this concluding section I would like to make these principles more explicit and indicate, briefly, how they might be implemented.

My starting point must be the central function of the nation's highest court of appeal. Here, the fundamental factor to keep in mind is that most of the disputes which reach the Supreme Court have first been adjudicated by a trial court and a provincial appeal court. The litigant has had his "day in court." It is not the function of the Supreme Court to give him yet another day. "Review by the Supreme Court," to quote Chief Justice Hughes of the United States Supreme Court, "is thus in the interests of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." The Canadian Supreme Court, too, should be designed and operated to serve not the private interests of dissatisfied litigants

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99 Appeals lie to the House of Lords only with leave. A few cases reach the United States Supreme Court as of right, but these have not exceeded 10% in recent years and they usually deal with important constitutional issues. For a useful examination of these appellate systems see D. Karlen, Appellate Courts in the United States and England, (New York, 1963).

but the community's interest in obtaining an authoritative settlement of questions of law of importance to the whole nation.

There may have been some justification for holding a different conception of the Supreme Court's central purpose in the past. The growth of the province's judicial systems, particularly at the appellate level, has been more uneven and hesitant than the development of the other branches of provincial government. When the Supreme Court of Canada was first established, whereas Ontario and Quebec possessed reasonably well-developed judicial structures, neither the Maritimes nor the emergent Western provinces had their own courts of appeal. This unevenness persisted for some decades and, as was pointed out above, was reflected in the variegated conditions attached to appeals from the different provinces. During this period, for the litigant who sought a review of the judgment at trial in the superior courts of the judicially less-developed provinces or territories, the Supreme Court was often the only alternative to the Privy Council. For these provinces it made some sense to think of the Supreme Court as a General Court of Appeal and provide the litigant with relatively easy access to it. But such a policy, even then, did not make much sense for Ontario or Quebec, as members of the legal profession in those provinces frequently pointed out.

But all this is now history. The judicial systems of the provinces have matured. Each province now has its own court of appeal to cover all classes of important litigation. Yet no adjustment has been made in the Supreme Court's jurisdiction to meet this decisive change in the judicial environment in which the Court operates. Failure to recognize the need for such an adjustment in 1949 when Privy Council appeals were abolished was, I think, largely the result of the nationalist euphoria which coloured that event. At that time it may have seemed that to give the Supreme Court anything less than the full scope of the Privy Council's jurisdiction would have robbed Canada of the full fruits of its newly won judicial autonomy. But now

101 Ontario had established a specialized Court of Appeals in 1874. See W. R. Riddell, The Bar and Courts of the Province of Upper Canada or Ontario, (Toronto, 1928). Besides a court of appeal (the Court of Queen's Bench), Quebec had an intermediate appeal court, established in 1864. See Pelland, Aperçu historique de notre organisation judiciaire depuis 1760, (1933) 12 Rev. du B. 14.

102 Although their superior courts had jurisdiction to review the decisions of inferior courts and in certain proceedings, the judges of the provincial Supreme Court would sit ex banc to review trial court judgments of their individual colleagues. For an account of the judicial systems of these provinces at this time see J. E. C. Munro, The Constitution of Canada, (Cambridge, 1889) Chapter X.

103 Quebec M.P.'s introduced motions to restrict the Supreme Court's appellate jurisdiction on numerous occasions in the first few decades after 1875. This movement is described in the Report referred to in footnote 40 above. A similar agitation of the Ontario bar is discussed in Cameron, Appellate Jurisdiction, (1899) 29 Canadian Law Times 29.

104 Newfoundland and Prince Edward Island do not yet have specialized appeal courts, but since 1963 and 1960 respectfully they have had four superior court judges, so that three judges are now available to review superior court trial judgments.
we should be sure enough of the reality of our own judicial self-government that we can afford to consider how best to distribute that power in our judicial system.

I am sure that there will be many who will not readily accept the proposition that a citizen's "day in court" need not include more than a trial by judge or jury and a review of the trial judgment by a provincial court of appeal. Canada has never lacked public leaders who will deplore any measure which threatens to deprive the Canadian citizen of his right to appeal to the "highest court in the land" or, in the pre-1949 era, to the "foot of the throne." But these laments should be recognized for the harmful expressions of sentimentality that they are. For one litigant's "right" to appeal to the Supreme Court is another's obligation to go there — and if the person who is obliged to go to the Supreme Court has already obtained two judgments in his favour, he may regard the "right to appeal to the highest court in the land" as one which he could well do without. And, what is more important, for any Canadian who is contemplating litigation, the right to appeal ultimately to the Supreme Court of Canada means the possibility of an extra year or so before his case will be settled and an extra outlay of several thousand dollars, not all of which he can recover even if he finally wins. A "right" which increases the advantage of the financially stronger party in legal negotiations may, perhaps, be attractive to some Canadians, but it is one which the great majority should happily forsake. Even if that right were to be treated as reverently as its more misty-eyed defenders suggest it should be, then it would be difficult to understand why that right is now made available on such unreasonable conditions. Nor can it be seriously maintained that the Supreme Court of Canada is staffed by judges, who, in terms of technical legal ability, are generally more competent than the members of provincial courts of appeal. It is worth recalling Ulpian's sardonic comment in Justinian's Digests that "It does not follow that because a judgment is the last it is also the best."

I am not, of course, calling for the abolition of the right to appeal to the Supreme Court of Canada. But rather I am urging the adoption of a perspective on Supreme Court reform which will treat that right not as an absolute good for every Canadian citizen, but as a right which should be thoroughly conditioned by the collective interest in having the country's highest court illuminate points of law in a manner which is helpful to the whole community. Too often in the past, adjustments in the Supreme Court's jurisdiction have been based on nothing more than consideration of the size of the Supreme Court's docket. But these quantitative considerations should not be a primary concern: whether or not the Court can hear a few more cases or should hear a few less is in itself not an important question. Here

105 There is a revealing discussion of this cliché in the Report of a panel discussion among such Canadian legal luminaries as John Diefenbaker, Arthur Maloney, Arthur Martin and Joseph Sedgewick in (1956) 34 CAN. B. Rev. 245.
what Professor Hart has said of the United States Supreme Court is equally apt for the Canadian Supreme Court:

... The hard fact must be faced that the Justices of the Supreme Court... can at best put their full minds to no more than a tiny handful of the trouble cases which year by year are tossed up to them out of the great sea of millions and even billions of concrete situations to which their opinions relate. When this fact is fully apprehended, it will be seen that... what matters about Supreme Court opinions is not their quantity but their quality. And it will be seen that the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.106

Eventually, no doubt, quantitative pressures alone will force some further changes in the Supreme Court's jurisdiction, and, if the present method of rationing appeals is continued, the monetary requirement will be raised again, and again—and, who knows, we might some day have the questionable distinction of operating a national court of appeals specializing in disputes among our more litigious millionaires. I hope that long before that point is reached we have seized upon a more rational basis for Supreme Court reform.

But how precisely should the perspective set out here be translated into concrete changes in the Supreme Court's jurisdiction. On this point reasonable men may differ, for there is more at stake here than general considerations about a national appeal court's purpose. The central issue here turns on how one chooses to identify what I have designated as the proper business of the Supreme Court—i.e., "questions of law of importance to the whole nation." My own inclination is to adopt a constitutional approach to that question. Specifically, I would propose that the Supreme Court now be established by the Constitution as the final court of appeal for questions concerning the Constitution and laws subject to federal legislative jurisdiction, and as the court for trying disputes among the provinces or between the provinces and the federal government.

My main reason for proposing both the constitutionalization and the federalization of the Supreme Court has to do with the recognition of judicial power. The B.N.A. Act, as we have seen, did not provide for a division of judicial power: by conferring on the federal parliament an unlimited power over the Supreme Court's appellate jurisdiction it gave the national legislature a plenary power to control the distribution of judicial power in the Canadian federation. This arrangement does not square with the primary purpose of our fundamental law, which is to establish the norms for regulating the distribution and exercise of power in Canadian government. This argument should not be taken to imply that judicial power is no different from legislative or executive power. Of course it is different—usually. But judges do make decisions; they are not automata. Their decisions,

their choices, may well be conditioned, in most instances, by influences different from those that condition the choices of administrators or legislators, but, still, their choices authoritatively determine the rights and obligations of private citizens and governmental agencies—and that is the essence of public power. The most hardened positivist will acknowledge the impact of the Privy Council's constitutional decisions on the development of Canadian federalism. Even if he accounts for those decisions as the necessary outcome of a "correct" reading of the B.N.A. Act, he must concede that this in no way lessens the practical consequences of those decisions for government policy in Canada. Thus, to this minimal degree, we must all be judicial realists today. This decisive change in the jurisprudential environment in which the Supreme Court operates makes it incumbent on us today, as it was not for the fathers of Confederation, to recognize the reality of judicial power and provide for its proper distribution in our constitution.

Now it should be noted that, while my proposal calls for the constitutionalization of the Supreme Court, it does not, in itself, require a division of judicial authority exactly paralleling the division of legislative power. It would simply have the positive constitutional statement of the Supreme Court's prime purpose exclude any reference to appeals concerning matters of local law. The main purposes of such a clause would be to give the existence of the Supreme Court a constitutional status, and to establish the constitutional norms, so sadly lacking now, for the guidance of both the federal legislature and the Supreme Court in developing the Court's jurisdiction.

Legislative power to regulate the Supreme Court's jurisdiction should be provided for separately in the division of legislative powers. The federal legislature should have the power to regulate Supreme Court appeals as well as the Court's original jurisdiction. But this federal power should be subject to an overriding power vested in the provincial legislature to make the province's highest court the final court of appeal for litigation concerned solely with provincial law. In a sense, such a judicial opting-out clause would be an appropriate way of replacing section 94 of the B.N.A. Act: whereas that clause, which has been a dead-letter since Confederation, provided an opting-in device whereby provincial legislatures in the common law provinces could have the federal legislature assimilate their civil laws, my proposal would enable provincial legislatures to avoid, if they wished to, any further assimilation of their laws by the federal judiciary.


108 For a discussion of this clause see Scott, Section 94 of the British North America Act, (1942) 20 Can. B. Rev. 525.
Under a constitution which is to be both federal and flexible the possibility of judicial self-government for the provinces in matters constitutionally assigned to them should be neither mandatory nor impossible. At first, perhaps, only Quebec would be interested in exercising this right to a limited degree of judicial autonomy, but the common law provinces might also wish to have provincial judges, who are sensitive to local needs and circumstances, act as the final authorities in interpreting some provincial laws, particularly statutory programmes which call for a great deal of interstitial judicial legislation. Quebec is not the only province where local circumstances warrant the development of distinctive legal precepts. As Professor Abel has argued:

... The geography or the sociology of British Columbia and of Nova Scotia are not, for example, so featureless that it is inadmissible for those communities to regard differently the position of one hazarding himself to the driving of a drunken companion. The incidence of urbanism, patterns of informal communication—these are some of the many circumstantial elements relevant to a different, but equally valid, development within the general framework of the common law.1

I would agree with Professor Abel that the advantages of judicial self-government in matters of local concern justify limiting Supreme Court appeals, even under the existing Constitution, to cases in which federal or constitutional law are decisive. But the constitutional changes suggested here would mean that the availability of these advantages to the provinces would not depend on the good sense of the federal parliament or the self-restraint of the Supreme Court. It should also be noted that these constitutional changes, while restricting the federal judicial power in one direction, would, by removing the existing constitutional inhibitions pertaining to the Supreme Court's original jurisdiction, expand it in another. The Supreme Court would be constitutionally designated as the tribunal for adjudicating disputes among the provinces or between the federal government and two or more provinces—a much more suitable arrangement than the present one, under which the Exchequer Court acts as the court of first instance for inter-governmental controversies and this federal jurisdiction is made to depend on enabling legislation of the individual provinces.

Two principle objections to these proposals can be anticipated. First, there will be those who are loathe to give up the potentiality for legal uniformity which the present system entails. Those who take this view should now be urged to come forward and make their case. In particular they should be asked to explain where and why the federal division of legislative power needs to be modified by a centralized judicial authority for the interpretation of provincial law.

109 Abel, The Role of the Supreme Court in Private Law Matters, (1965) 4 Alberta Law Review 39, at 47. Professor Abel also points out that section 97 of the B.N.A. Act which stipulates that, until the laws of the common law provinces are legislatively assimilated, the judges of those provinces appointed by the federal government must be selected from the respective bars of those provinces, recognizes the advantages of having provincial laws administered by judges familiar with local conditions.
The advantages, in terms of jurisprudential uniformity, which are reputed to flow from the present system have not been sufficiently demonstrated. It may well be, for instance, that in certain branches of commercial law which have an important bearing on inter-provincial economic activity, the Supreme Court's final authority in private law disputes has partially compensated for the judicial emasculation of the federal legislature's Trade and Commerce power. Or, in cases dealing with the powers of provincial and municipal officials, Supreme Court review, to some extent, may have made up for the absence of a Bill of Rights binding on the provinces. But what these and other examples may really point to are readjustments which should be made in the Constitution. If there is a broad consensus among Canadians that their economic well-being requires uniform commercial laws, then the national legislature should be given greater and more specific power in this field, or, if most Canadians are now prepared to accept a common codification of their basic civil rights, they should consider the adoption of a Constitutional Bill of Rights. These are questions which, in a mature democracy, should be settled openly at the political level and not left to be determined surreptitiously by the workings of our judicial system.

I have no illusions that the federalization of the Supreme Court's jurisdiction—even to the modest degree which I have proposed—can be a simple process. Federal authority under our constitution, in contrast to the American, is not, and is unlikely to become, a system of delegated powers. There is a body of common law and general jurisprudence within which the demarcation line between federal and provincial jurisdiction is ill defined. The difficulties involved in applying the constitutional division of powers to the Supreme Court's jurisdiction would be just as great, and probably arise more frequently, than the difficulties now involved in the judicial review of legislation. One important problem area, for example, which might be anticipated, concerns conflicts of law, and in particular the determination of the controlling provincial law where there is a choice of law situation. American experience since the *Erie* case in 1938 suggests that this is one branch of private international law in which an independent federal judicial authority may be most appropriate. Here the issues which arise concern the reach of a province's law over transactions and obligations formed in other provinces, and

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110 The Supreme Court's decision in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, is a particularly apt example of this tendency.

111 Some of the implications of a federal common law for the jurisdiction of Canadian courts under the existing Constitution are discussed by Bora Laskin in his *Canadian Constitutional Law*, (2nd edition, Toronto, 1960) at 803-809.

112 In particular I have in mind the Supreme Court's decision in *Klaxon v. Stentor Electric Manufacturing Co. Inc.*, 313 U.S. 487 (1941), which held that the Supreme Court must follow the law of the forum state even on conflict of laws questions in diversity cases. For a discussion of the implications of that decision for a federal state (with or without a federal diversity jurisdiction) see H. M. Hart Jr. and H. Wechsler, *The Federal Courts and the Federal System*, (Brooklyn, 1953) at 633-36.
these are precisely the kinds of question which require final adjudication by a trans-provincial tribunal. It would be wise for the constitution to specifically authorize final Supreme Court determination of these private international law matters.

There are, no doubt, many other problems which cannot be anticipated, and it cannot be denied that these would frequently involve the Supreme Court in the settlement of jurisdictional disputes. This is likely to be the heart of the other principal attack which might be made on the proposals outlined above. But jurisdictional disputes will be relatively frequent under whatever system is employed to regulate access to the Supreme Court. The existing arrangements do not avoid them. In our legal system, as in the American, the jurisdiction of the Supreme Court is regarded as deliberately and explicitly defined—a product of convention rather than nature, of statute rather than common law. Whereas it can be assumed that a primary court (i.e. a provincial superior court in Canada) has jurisdiction unless it can be shown to be explicitly denied by statute, with the Supreme Court there is no jurisdiction, unless it can be shown that the statutory law explicitly confers it.\(^{113}\) In practical terms, this means that it will always be easier and more natural for counsel to contest the Supreme Court's jurisdiction than to challenge that of a superior provincial court: jurisdictional issues are likely to be a threshold question in almost every Supreme Court case. With a court such as the Supreme Court the aim cannot be to eliminate jurisdictional disputes, but to ensure, so far as is possible, that in dealing with these issues the Court is performing a reasonably meaningful task. Up to now the bulk of the Supreme Court's work in defining its own jurisdiction has been absorbed in some rather pedestrian problems of statutory construction, many of which have been generated by sloppy draughtsmanship.\(^{114}\) But applying jurisdictional rules which are related to the basic constitutional precepts of our federal state could be a far more significant undertaking. The assumption of this responsibility would call upon the Supreme Court to gradually prick out the proper boundaries between federal and provincial legal interests — an eminently suitable assignment for the Supreme Court of a federal state.

Under my scheme the exclusion of provincial law matters from the Supreme Court's jurisdiction would arise as a formal constitutional issue only when a province has by a positive legislative act exercised its right to make the provincial appeal court's judgment final. Otherwise these issues need arise only in the context of the Supreme Courts' exercise of its discretionary leave-granting powers, where

\(^{113}\) For assertions of this precept, see In re Trepanier, 12 S.C.R. 111; Mitchell v. Tracey and Fielding, 58 S.C.R. 640, at 647.

\(^{114}\) The worst period for this was the two or three decades prior to the 1920 amendment of the Supreme Court Act which removed the many layers of diverse jurisdictional rules which had been tacked on to the Supreme Court Act since 1875. For an account of this jurisdictional turmoil at its peak see Cameron, \textit{Proposed Amendments to the Supreme Court Act}, (1904) 3 CAN. B. Rev. 377, 403.
they can be dealt with in a less formal manner than is required for hearing motions to quash an appeal for want of jurisdiction. For certainly the least troublesome way of federalizing the Supreme Court’s function would be to eliminate the statutory right of appeal from the final judgment of provincial appeal courts in cases involving $10,000 or more. This is the source of Supreme Court jurisdiction which continues to generate the largest proportion of cases turning exclusively on provincial law. The elimination of this jurisdiction would, in one stroke, put the Supreme Court in a position where it could select nearly all of the cases which it hears. This development would go far towards enabling the Court to apply itself deliberately to its appropriate work as the nation’s highest court. It is also the general direction which a number of Canadian jurists have urged Supreme Court reform should take. Professor Laskin, for one, more than a decade ago, summed up the case for a drastic reduction of appeals as of right in these words:

... the preferable position would be that appeals should be mainly by leave. After a case has been through two courts at the provincial level, there is little that a third court can add in the run of cases. A final court, such as the Supreme Court which has the responsibility for constitutional interpretation, for appellate adjudication in federal matters originating in the Exchequer Court, and for uniformity of law in those areas where several provinces have a common interest, ought to be left in the last class of cases to determine for itself what cases are worth its further consideration.115

My own approach differs from this only in that I would not leave the identification of those areas of law “where several provinces have a common interest” solely to the Supreme Court’s discretion. I think that a province, if it wishes, should be able to determine for itself which of its laws are to be developed by the Supreme Court in concert with those of other provinces.116

While a much greater reliance on appeals with leave is unquestionably the correct general prescription for reform of the statutory rules governing the Court’s jurisdiction, there are some provisions for a right to appeal which ought to be retained and perhaps some others which should be added. Where cases originate in federal courts, such as the Exchequer Court (or a single judge of the Supreme Court hearing habeas corpus petitions), for which the Supreme Court is the only court of review, there is a strong case for a de plano appeal. The right of appeal from the Exchequer Court might even be broadened: the $500 monetary requirement is a rather fruitless and arbitrary way of rationing appeals, and the circumstances in which the Supreme Court can grant leave to appeal from the Exchequer Court should be redefined so that they are as wide as those in which an appeal with leave lies from the provincial courts. Appeals from the more administrative federal tribunals such as the Board of

115 Laskin, The Supreme Court of Canada—The Coffin Case and Amendments to Appellate Jurisdiction, (1956) 34 CAN. B. Rsv. 966.
116 The Supreme Court would of course, have the final say in passing on the constitutional validity of any such action by a province.
Transport Commissioners and the Air Transport Board raise different considerations. The deliberations of these bodies are so thoroughly wrapped up in complex questions of policy and technology that it is questionable whether review by the Supreme Court, even when it is confined to so-called questions of law or jurisdiction, is appropriate at all. In the case of the Board of Transport Commissioners, the federal government simply by order-in-council can override a Supreme Court decision affirming an order of the Board, and the government has actually exercised this power.\textsuperscript{7} It is rather damaging to the Court’s prestige to be put in a position where its judgments can be so easily swept aside by the federal executive.

There may be some federal statutes or constitutional provisions which have such a vital bearing on the quality of Canadian citizenship or the implementation of national policies, that cases arising under them ought to be made subject to final determination by the senior federal court. For example, if the charter of language rights recently brought forward by the federal government were adopted, it might be wise to give any individual or group, whose claims under the charter were rejected by a provincial court of appeal, the right to appeal to the Supreme Court. Similarly, a right of appeal might be tied to the Bill of Rights, to some sections of the Criminal Code, and to proceedings raising particular kinds of constitutional claims. Great care should be taken in identifying and defining those circumstances in which a citizen is given the right to appeal from the provincial courts to the Supreme Court, but where it is deemed essential to grant such a right, the legislation establishing it should be drafted so that the enjoyment of the right is not made to depend on provincial appellate procedures or the discretion of provincial judges. I think, myself, that the area in which, at least for a time, there is the strongest case for a right to appeal is in connection with litigation concerning newly created federal or constitutional rights. Past experience with the Bill of Rights suggests that here the Supreme Court may be unduly cautious in granting leave to appeal at a time when lower courts and the national community generally are anxious to have authoritative determinations of particularly important and ambiguous points.\textsuperscript{8}

I have only been able to indicate the main lines along which reform of the Supreme Court’s jurisdiction should proceed. There are a number of other anomalies and shortcomings in the existing system which ought to be remedied, but space does not permit me to deal with them here. However, my main concern is not that the parti-

\textsuperscript{7} Such a case is discussed by K. C. M. Spence in “The Board of Transport Commissioners,” in ELEVEN LECTURES ON ADMINISTRATIVE BOARDS AND COMMISSIONS, ed. by J. E. C. Brierley, (McGill University, 1961) 27.

\textsuperscript{8} In Beattie v. The Queen, [1967] S.C.R. 474, for instance, the Court refused leave in a case involving claims under the Bill of Rights on the grounds that “There is no evidence that the applicant was deprived of the right to retain and instruct counsel without delay or was deprived of the right to a fair hearing in accordance with the principles of fundamental justice.” But there is no guarantee that the Court would probe these questions any more deeply if legislation compelled it to deal with them on the merits.
cular proposals I have made should win acceptance, but that greater attention might be given to the need for adjusting the Supreme Court's jurisdiction, not simply to meet the most pressing political demands of the moment, but so that for a much longer run the Court is able to carry out the functions appropriate for a national appeal court in a federal state.
| APPEAL FROM RULES OF ORIGINAL COURT | APPEAL FROM RULES OF SECOND COURT | APPEAL FROM RULES OF THIRD COURT | APPEAL FROM RULES OF FOURTH COURT | APPEAL FROM RULES OF FIFTH COURT | APPEAL FROM RULES OF SIXTH COURT | APPEAL FROM RULES OF SEVENTH COURT | APPEAL FROM RULES OF EIGHTH COURT | APPEAL FROM RULES OF NINTH COURT | APPEAL FROM RULES OF TENTH COURT | APPEAL FROM RULES OF ELEVENTH COURT | APPEAL FROM RULES OF TWELFTH COURT | APPEAL FROM RULES OF THIRTEENTH COURT | APPEAL FROM RULES OF FOURTEENTH COURT | APPEAL FROM RULES OF FIFTEENTH COURT | APPEAL FROM RULES OF SIXTEENTH COURT | APPEAL FROM RULES OF SEVENTEENTH COURT | APPEAL FROM RULES OF EIGHTEENTH COURT | APPEAL FROM RULES OF NINETEENTH COURT | APPEAL FROM RULES OF TWENTIETH COURT | APPEAL FROM RULES OF TWENTIETH COURT |
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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<th>Year</th>
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<th>1897</th>
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<tr>
<td>RAILWAY COMMITTEE</td>
<td>QUESTIONS TO BE ASKED IN REFERENCE CASES SPECIFIED — TO INCLUDE, INTER ALIA, CONSTITUTIONAL QUESTIONS AS WELL AS &quot;ANY OTHER MATTERS.&quot; COURSE REQUIRED TO GIVE REASONS</td>
<td>BOARD OF RAILWAY COMMISSIONERS (REPLACING RAILWAY COMMITTEE) AUTHORIZED TO STATE QUESTION OF LAW TO SUPREME COURT</td>
<td>REFERENCES CAN REFER TO LEGISLATIVE PROPOSALS</td>
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<td>RIGHT OF APPEAL EXTENDED FOR BRITISH COLUMBIA BY APPLYING 1887 MARTYN AMEND-</td>
<td>RIGHT OF APPEAL EXTENDED FOR ALL PROVINCES EXCEPT QUEBEC, BY INCLUDING CASES ORIGINATING IN PROBATE COURTS</td>
<td>RIGHT OF APPEAL EXTENDED FOR ALL PROVINCES BY ALLOWING APPEALS FROM PROVINCIALLY APPOINTED ASSESSMENT TRIBUNALS, IN CASES INVOLVING AT LEAST $10,000</td>
<td>ASSESSMENT APPEALS EXTENDED TO COVER DECISIONS OF FEDERALLY APPOINTED COURTS</td>
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<td>APPEAL FROM SUPERIOR COURT OF NORTHWEST TERRITORIES IN CASES ORIGINATING IN INFERIOR COURTS, WITH LEAVE OF JUDGE OF SUPERIOR COURT OF CANADA APPEALS TO S.A.G., A. &amp; A., FROM 1906 TO 1920</td>
<td>APPEAL FROM EXCHEQUER COURT WITH LEAVE OF SUPREME COURT JUDGE IN CASES INVOLVING PATENT, COPYRIGHT OR TRADE-MARK</td>
<td>APPEAL FROM LOCAL JUDGE IN ADVISORY QUESTION TO SUPERHIGH COURT APPEALS</td>
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<td>APPEAL DIRECTLY FROM QUEBEC SUPERIOR COURT OF REVIVAL IN ALL CASES APPEALABLE FROM THAT COURT TO PRIVY COUNCIL</td>
<td>APPEAL FROM ANY FINAL JUDGMENT OF ONTARIO COURT OF APPEALS OR SUPREME COURT OF CANADA</td>
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<td>RIGHT TO APPEAL FOR CROWN WHERE LESS THAN $500 INVOLVED, IF LIKELY TO AFFECT CLASS OF CASES INVOLVING $500, AND A.G., CAN DEEMS IT OF PUBLIC IMPORTANCE</td>
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<td>APPEAL FROM COURT OF QUEEN'S B'G., ON QUESTIONS OF JURISDICTION, WITH LEAVE OF SUPREME COURT JUDGE, OR</td>
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### STATUTORY DEVELOPMENT OF THE SUPREME COURT’S JURISDICTION

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<thead>
<tr>
<th>Year</th>
<th>1912</th>
<th>1913</th>
<th>1918</th>
<th>1919</th>
<th>1920</th>
<th>1921</th>
<th>1922</th>
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<td><strong>Appeals from Yukon Territorial Court eliminated.</strong></td>
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<td><strong>Yukon appeals must go first to British Columbia Court of Appeals</strong></td>
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<td><strong>Right of Appeal</strong></td>
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<td><strong>Restricted by appealing limitations imposed on Ontario appeals in 1897 to all provinces except Quebec.</strong></td>
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<td><strong>Appeal from final judgment of highest court of last resort in all provinces except Quebec.</strong></td>
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<td><strong>Previous provisions replaced by:</strong></td>
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<td><strong>Appeal from final judgment of Provincial Court of Last Resort, A) with leave of that court,</strong></td>
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<td><strong>B) if leave denied by Provincial Appeal Court, with leave of Supreme Court,</strong></td>
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<td><strong>Providing case originated in Section 96 court, involves at least $2000 and,</strong></td>
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<td><strong>Condition 1) or 2) governing Quebec appeal as of 1879, or</strong></td>
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<td><strong>Condition 2), 3) or 4) governing Ontario appeal as of 1897.</strong></td>
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<td><strong>Appeal from B’D of Commerce involving questions of:</strong></td>
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<td><strong>Jurisdiction, with leave of a Supreme Court judge,</strong></td>
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<td><strong>Law, jurisdiction or both with leave of the Board.</strong></td>
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<td><strong>Bankruptcy Act: Appeal from Provincial Court with leave of Supreme Court judge.</strong></td>
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<td><strong>Right of Appeal from Prov. Appeal Ct’ decision setting aside acquittal of person convicted of an indictable offence.</strong></td>
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<td><strong>Appeal with leave of Supreme Court judge for Provincial Attorney-Gen. or person accused of an indictable offence if judgment appealed from conflicts with that of any other court of appeal in a like case.</strong></td>
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**Appendix:**

- Right of appeal extended to decisions of provincial courts made in provincial reference cases.
- Right of appeal extended to decisions of provincial courts made in provincial reference cases.
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<th>Year</th>
<th>1921</th>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Final Judgment of High Est Ct of Last Resort in Prov., With That Court's Leave</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Final Judgment of Prov. Ct of Last Resort in That Case, With Leave of Supreme Court</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Final Judgment of Provincial Court Other Than High Est in Cases Meeting All Following Conditions</td>
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<td>2) Leave Given By Prov. Appeal Ct</td>
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<td>3) Parties Consent</td>
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<td>4) Case Appealable to Prov. Appeal Ct</td>
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<td>5) Appeal Would Lie from Prov. Appeal Ct</td>
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<td>6) Ct Appeared From Sec. 96 Court</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal on Questions on Law or Jurisdiction From Triumvir Estd to Settle Disputes Between Cntl and C.P.R.</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Arp. Transport Board on Question of Law on Jurisdiction, With Leave of Supreme Court Judge</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Court Martial Appeal Board Where There Has Been a Dissent in Decision Dismissing Appeal With Leave of A.G. Canada</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal From Provincial. A-G.</td>
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<td>Previous Provisions Replaced By</td>
<td>Appeal With Leave of Supreme Court in Cases Concerning Non Indictable Offences From Provincial Courts of Last Resort on That Case</td>
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### Notes
- Previous provisions replaced by appeal from final judgment of high est ct of last resort in prov., with that court's leave.
- Previous provisions replaced by appeal from final judgment of prov. ct of last resort in that case, with leave of supreme court.
- Previous provisions replaced by appeal from final judgment of provincial court other than high est in cases meeting all following conditions:
  1. $2000 involved
  2. Leave given by prov. appeal ct
  3. Parties consent
  4. Case appealable to prov. appeal ct
  5. Appeal would lie from prov. appeal ct
  6. Ct appeared from sec. 96 court
- Appeal on questions on law or jurisdiction from triumvir estd to settle disputes between cntl and c.p.r.
- Appeal from arp. transport board on question of law on jurisdiction, with leave of supreme court judge.
- Appeal from court martial appeal board where there has been a dissent in decision dismissing appeal with leave of a.g. canada.
- Appeal with leave of supreme court in cases concerning non indictable offences from provincial courts of last resort on that case.
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