The Supreme Court of Canada: The Quiet Court in an Unquiet Country

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The title of this brief commentary on the Supreme Court of Canada in 1965 was not casually chosen. The definition, or at least one of the definitions offered for the word “quiet” in the Winston dictionary is “subdued and modest”. The word “unquiet” in the same dictionary is defined as “restless, disturbed, agitated”. These words seem to describe to me the peculiar position of the Supreme Court of Canada in a very restless country, undergoing substantial political, social and legal change. In my view the Court is playing a relatively moderate role, particularly in the last two or three years, with relation to these very important changes. It appears as if the Court is being by-passed as an important arena for the making of vital constitutional decisions. I propose to examine in this article, which constitutes a foreword to a series of case comments on decisions handed down by the Court, the reason for the relatively subdued role it has played, or has been permitted to play, in the area of exercising power with respect to the country’s constitutional future. Furthermore, I will endeavour to comment on two recent articles in law journals criticising, respectively, the jurisdiction and organization of the Court. It is important, in my view, that someone speak on behalf of the existing judicial structure and jurisdiction. If there are to be substantial changes in our constitutional system it should not come about by default. This is an era in which it is not particularly fashionable to be a conservative, in the sense of defending existing institutions, but it is my firm belief that merely because an institution exists does not mean that it must automatically be changed. Conversely, this is not to say that mere existence should guarantee permanence. The proper stance, in my view, is that before changing an existing institution one should understand clearly the reasons for the existing arrangement. It is only when these are no longer valid that the task of finding a new form to replace the already functioning structure should begin. The proponents of change must not only demonstrate, by specific example, where the Court has failed to serve Canada, but must show that any proposed new system will probably be a substantial improvement on the existing system. As just indicated, the various criticisms of the present organization and functioning of the Court will be examined in more detail later in this article. Before temporarily leaving this subject, however, I am not in any way suggesting that the Supreme Court of Canada has necessarily been an ideal Court, and that its structure should be accepted without question. One of the chief handicaps under which the Court has laboured is that it has functioned with such a high degree of anony-

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mity. The fact that it has not been more of a focal point in our constitutional system has, in my view, weakened rather than strengthened the Court. Therefore, the writer welcomes these questions raised about the Court if, for no other reason, than that they focus our attention upon it, and allow its position in our constitutional system to be examined, questioned and even defended.

It is significant that the task of doing an annual review of the decisions of the Supreme Court of Canada was begun only two years ago by a Canadian law journal. Contrast this with the innumerable reviews done in the United States by lawyers and political scientists every year on the work of their own Supreme Court. For example, in the one week preceding the writing of these words I received two off-prints of articles, one by a political scientist and the other by a leading law teacher, commenting on the work of the United States Supreme Court. Americans, of course, have always been intrigued by their Supreme Court, because it has given them innumerable occasions for comment, debate, and often anger. They, or at least large numbers of them, have a peculiar love-hate relationship with their Supreme Court. Very few politically aware Americans are indifferent to its functioning. During the early 1930's, that group of American opinion, usually identified as liberal, vehemently attacked the Court for its role in declaring unconstitutional a substantial portion of congressional legislation passed by the New Deal Congress of that period. This group of liberal opinion was very bitter about the Supreme Court, labelling it as "nine old men" and similar such epithets of derision. At the same time, that group of persons, usually in the United States collectively referred to as conservatives, defended the active role being played by the Court, arguing that it was a bastion protecting traditional American values and American methods of economic and business operation. In the sixties the cycle has come full-circle in that the liberals now regard the Court as a bulwark against infringement on civil liberties by legislatures of the states and the National Congress, whereas traditional conservative opinion often regards the Court as being too ready to intervene in the constitutional system by striking down congressional legislation or by intruding upon such traditional American practices as the right to have a school prayer in the public schools. Certain right-wing extremists have even gone so far as to consider the Court as the instrument of a leftist conspiracy and have from time to time formed movements devoted to the impeachment of the Chief Justice, Mr. Earl Warren. Could one for a moment imagine a movement being formed in Canada to "impeach Taschereau"? First of all, it is doubtful whether, leaving aside lawyers and law students, one person in Canada out of fifty thousand could name the Chief Justice of Canada. Furthermore, it would be interesting to know how many first-year law students, even

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after three or four months of legal studies, could name all nine members of the Supreme Court of Canada.

In an earlier article I advanced the theme that the power and aggressiveness of the United States Supreme Court had had a very important and beneficial influence on American legal education. It was maintained that:

Every American law student is imbued from his first week at law school with the view that the United States Supreme Court is second to no other institution in the country in prestige and importance. Canadian law students, however, do not have the same feeling about their courts. The Supreme Court of Canada is much less a focal point of interest for the average Canadian lawyer or law student because of its more conservative role in the governmental system of Canada.  

The provocative and intellectually stimulating opinions written by many United States Supreme Court judges have made American law schools in many respects more exciting places than their Canadian counterparts. The opinions of Holmes, Brandeis, Frankfurter, Douglas, Black and many other members of this Court are brilliant pieces of intellectual writing, which cannot help but stimulate classroom as well as public discussion. The United States Supreme Court has done more than that, it has underlined the important role which the lawyer and the judiciary play in the main-stream of American life. The United States Supreme Court has shown that a court can be more than a mere mechanical interpreter of words contained in a statute; it can be the ultimate decision-maker in deciding which values are to be protected and enhanced within a national constitutional system. Many of the judgments written by Justices of the American Supreme Court are essays on the theory of the state, and of the relationship between the citizens and the state. Now this is not to say that everything the United States Supreme Court has done or is doing is laudatory or should necessarily be emulated by the judiciary in Canada. A strong argument can be made out that the courts in the United States, particularly the United States Supreme Court have been too militant in their activity, and have perhaps moved beyond the proper role of the judiciary. There is still much to be said for the argument that members of the judiciary are essentially the nominees of one or two men and that they should not usurp the role of decision-makers who have a mandate from the electorate. Nevertheless, irrespective of how one decides this debate, the role taken by the United States Supreme Court has proved to be a source of great stimulus to American law teachers and students. For example, one seminar at Yale Law School, conducted by Professor Fred Rodell, consists of each student in the seminar being asked to read all the particular judgments, or as many as possible, written by a certain judge. Every other member of the seminar is similarly assigned another member of the Supreme Court whose life and judgments he also studies. Professor Rodell then submits to the seminar

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a problem in constitutional law. In the light of what the student has learned about his particular judge, he is asked to write the kind of judgment which he thinks that particular judge would render if faced with the assigned problem as a case before the court. The purpose of this type of seminar is to teach students about the Constitution and its interpretation by the courts, but more than that it illustrates the fact that judges often are rather consistent in their approach to particular legal problems. In other words, it emphasizes the fact that judges are human, that they bring to bear on every legal problem certain human predilections and prejudices. The result of a Rodell seminar is that a student not only learns a good deal about American constitutional law but also a good deal about the American legal realist approach to a legal system. It is also a very stimulating method of studying the subject. To the best of my knowledge no similar style of approach has ever been adopted with respect to the Canadian Supreme Court. Admittedly it would be much more difficult to follow the system used by Professor Rodell, though it is my contention that it would not be impossible to do so. Furthermore, to be more specific, it is my view that one can see within certain Canadian judges a tendency to follow a relatively predictable approach to certain types of legal problems. For example, in the field of criminal law the tendency of Mr. Justice Fauteux is to render judgments which in areas of doubt tend to restrict the liberty of the accused, whereas Mr. Justice Cartwright is much more prone to resolve any legal doubt in favour of the accused. In the area of administrative law it is of interest to note that a good many of the leading opinions in this field are written by Mr. Justice Judson. Furthermore, it is my conclusion that he usually takes an opinion which would restrict the right of the courts to control administrative action. In other words, he is not particularly sympathetic to a line of argument that would excessively judicialize the administrative process. In this respect it is my view that he, along with most of the Supreme Court judges, is rather more conservative in his approach to administrative law problems than are many of the judges of the provincial Courts of Appeal, many of whom are much more easily persuaded to strike down administrative action on the grounds that certain procedures were not observed.3 These remarks should not necessarily be construed as a criticism of Mr. Justice Judson, because there is much to be said for the view that the Court should not force all administrative tribunals and administrative authorities into following patterns of procedure which are replicas of those followed by the courts. It would be interesting to analyse various areas of Canadian law, and determine whether certain judges tend to follow certain lines of approach in rendering decisions in various areas of law. The fact that really so little is known, or at least commented upon, about the behaviour of our Supreme Court judges in specific fields is indica-

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3 Typical of this trend is the decision handed down last year in Guay v. Lafleur, [1965] S.C.R. 12.
tive of my general thesis that the Court, particularly as compared to its American counterpart, works in relative anonymity.

There are a variety of reasons why the Court plays a rather quiet role in the Canadian legal system. The Court exercises judicial restraint largely because of its acceptance of the concept of the supremacy of Parliament; the notion that, as long as the federal and provincial legislatures are acting within their assigned legislative spheres their enactments cannot be rendered invalid by the courts. This, of course, can be compared with the American concept which allows the courts to declare invalid any legislation which transgresses those entrenched portions of state and federal constitutions protecting human rights. This, in effect, has meant that there is no Act of either the United States Congress or a state legislature which cannot be overruled as being unconstitutional by at least some part of the American judiciary. Through their role as ultimate interpreters of the constitutions of the states and of the United States generally, American judges always have the effective last word in deciding whether a statute violates the fundamental guarantees of either a state or the National Constitution. No serious student of the United States Constitution has in recent years argued that the ultimate weapon of judicial review should not be in the hands of the courts, yet there has been considerable debate over the extent to which it should be used. Much of American constitutional law debate centres around whether the United States Supreme Court should be so quick and ready to intervene in the matters brought before it. One line of opinion, which was reflected in the judgments of Mr. Justice Frankfurter, was that Congress and the state legislatures should be the fundamental decision-makers within the nation and that the courts should intervene to declare Acts of Congress unconstitutional only in rare and relatively clear circumstances. Certainly the present trend of the Court has been more towards judicial activism, in the sense that the Court has shown little reluctance to interfere in what certainly would in Canada be considered an area of decision-making that should be left for legislative competence. This is not to imply that the Supreme Court of Canada has been totally passive and submissive in the exercise of its responsibilities. Through the use of the principles of statutory interpretation and, more particularly, in exercising its right of declaring whether a statute was passed by a legislative body having jurisdiction under the British North America Act, the Supreme Court of Canada has been able to render ultra vires some undesirable legislation. Particularly notable in this respect were the decisions rendered in the case of Switzman v. Elbling (the Padlock case) and in the Alberta Press Bill case. In both those cases the Supreme Court of Canada was able to declare that these provincial legislative enactments were dealing with subjects beyond those allowed the provinces by the British North America Act. Nevertheless, by and large, the Supreme Court of Canada has acknowledged

the doctrine of the supremacy of the legislature, and has refused to strike down as unconstitutional legislative action, except on the ground that it was outside the defined boundaries of legislative power as delineated by the British North America Act. It is my view that this doctrine of the Supremacy of Parliament has been the most important concept in defining the role of our courts. Once again this is not necessarily to imply that this is altogether bad, because certainly a strong argument can be made that the basic political decisions should be made by the legislature, rather than by an appointed body. It is arguable that the United States Supreme Court has established in recent years extreme precedents with respect to the role which the highest Court in the land should play. At the same time, the United States would be a much less happy place today, if it had not been for the vigorous and vital role the Court has assumed in protecting certain civil liberties.

There are, however, other factors besides the doctrine of the supremacy of Parliament which have militated against a more aggressive role for the Supreme Court of Canada. The first of these limitations is one that was self-imposed, namely, that the Court is bound by its own previous decisions. This basic proposition was a self-imposed restraint emanating from a decision of the Court in 1909, namely Stuart v. Bank of Montreal. Andrew Joanes, in an analysis of the decisions since the Stuart case, argues that the Court is probably still bound "by its own previous decisions, subject to the meaningless 'exceptional circumstances' qualification". Furthermore, he contends that the Court is bound by the pre-1949 Privy Council decisions in cases which emanated from Canada, and that it is possible that the Court is also bound by the House of Lords. These are limitations which, as already mentioned, are self-imposed by the Court and are not legal restraints emanating from a statutory or other constitutional source. It certainly is unfortunate that the Court should adopt this position, though it can perhaps be defended in constitutional cases on the ground that vast administrative empires were created and have operated for many years on the basis of previous decisions, and that a capricious overruling of these decisions would tend to destroy well entrenched governmental structures and practices. This is certainly a sound argument, at least with respect to certain constitutional decisions, however, with respect to certain areas of private law, and particularly criminal law, the doctrine that the Court is bound by itself is most unfortunate. To argue that the Court can always distinguish a decision that it finds undesirable is, in my view, an unsatisfactory answer. The proper position is that a court should be reluctant to overrule a previous decision, but should

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6 (1909), 41 S.C.R. 516.
be quite willing to do so clearly, cleanly and decisively if it feels that the previous decision is no longer legally or socially valid.8

Many of the problems surrounding the creation and functioning of the Supreme Court of Canada stem from the fact that the Court was not created by the British North America Act, in the sense that the structure, organization and jurisdiction of the Court are not defined by that Statute. The general tendency of the men responsible for the British North America Act was to put into that document only those details which were fundamentally necessary to the immediate functioning of the new nation. It was necessary, for example, to create new legislative bodies for Ontario and Quebec, as prior to union both these areas of the country were part of one legal area, namely the Province of Canada. Similarly it was necessary to set up a Federal Parliament, and to define the method of appointing and electing its members, so that it could begin immediately to exercise its responsibilities. Again it was fundamental immediately to try to define in the Act the basic division of legislative power. With respect, however, to the Supreme Court of Canada, it must have obviously been felt that the Court's creation was a long term goal, and that the details of its establishment, function and organization did not require immediate action, but could be dealt with later, once the new nation became more firmly established. This attitude was probably furthered by the fact that the various provincial courts of appeal would continue to function after the creation of the nation, and that there always remained as an ultimate source of judicial power the Judicial Committee of the Privy Council.

The constitutions of both Australia and the United States guarantee that there shall be a national constitutional court guaranteed by the fundamental law of the constitution.9 In Canada, on the other hand, the B.N.A. Act, section 101, merely states that, “The Parliament of Canada may . . . provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, . . .” Thus, if and when the Court was to be constituted, it would be merely by an act of the Federal Parliament, rather than by inclusion in the basic constitutional document.

Shortly after Confederation at least two attempts were made to pass legislation to establish the Supreme Court of Canada. It was, however, not until 1875 that the Supreme Court of Canada was

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8 In a very interesting article, Dr. Horace Read commented extensively on the effects on Canadian judicial decision-making of the adherence to stare decisis and legislative supremacy. He is not suggesting that the courts should replace the legislatures as ultimate law makers, but that, within the area of freedom which the courts have in our system, they must use their creative powers to a maximum extent. As he points out, this has not always been the case. H. Read, The Judicial Process in Common Law Canada (1959), 37 Can. Bar Rev. 265.

9 See U.S. Constitution, article 3, secs. 1 and 2 and Commonwealth of Australia Constitution Act, 1900 (Imp.) c. 12, ss. 71 and 73.
created by Federal statute. From the beginning of its existence, and even before, tremendous controversy raged as to whether the Supreme Court of Canada should have final jurisdiction on appeals brought to it. In rather typical Canadian style the phrase in the statute dealing with the subject of appeals was extremely ambiguous; on the one hand seeming to render the Supreme Court of Canada the final court for all potential Canadian appeals, yet in the latter part of the relevant section there was retained “the right which Her Majesty may be graciously pleased to exercise as her royal prerogative”, with respect to judicial matters. It was on the basis of this latter phrase that continued appeals to the Judicial Committee of the Privy Council were justified. Particularly significant, however, and perhaps almost as important as the retention of appeals was the fact that there was legal recourse direct from the provincial courts to the Privy Council. This meant that the Supreme Court of Canada could be by-passed entirely by a litigant, and accordingly there were few, if any, valid reasons why litigants should bother going through the time consuming and expensive process of going to the Supreme Court before proceeding to the Judicial Committee. Thus it must be kept in mind that many of the important decisions which affected the division of power in Canada were never heard by the Supreme Court of Canada at all. Even after establishment, the Court was not readily accepted as a necessary addition to the Canadian constitutional structure. In 1879 and 1880 Bills were introduced into the House of Commons urging the abolition of the Court, though both were defeated after lively debate. Evidently the critics had a number of salient and valid points to make about the quality of the decisions already rendered by the Court and the time taken in handing them down. The Court, however, gradually overcame its initial problems of administration and rather weak personnel to become an effectively functioning judicial body.

Mr. Justice Laskin (then Professor Laskin) points out that initially the Court, in constitutional matters, took the position that national problems should be dealt with by the Federal Parliament, and that provincial legislative authority should be held within rather narrow limits. He argues that, largely as a result of the binding effect of Privy Council decisions, the Court began to shift its ground and render decisions which largely tended to uphold the validity of provincial legislation. He points out, for example, the significant difference in the judgments of the Supreme Court judges in the Insurance Reference case as compared with judgments of their

10 For an interesting summary of the steps preceding, and the events which followed immediately after the establishment of the Supreme Court of Canada see the article by Frank MacKinnon, The Establishment of the Supreme Court of Canada (1946), 27 Canadian Historical Review 258.
11 Ibid., p. 262.
12 For example, the leading constitutional decision in Toronto Electric Commissioners v. Snider, [1925] A.C. 396.
judicial predecessors in the *Parsons* case.\(^{15}\) It will always remain the great unanswered question of Canadian constitutional law just what effect the Privy Council decisions had on the later judgments rendered by the Supreme Court of Canada. It is, however, quite possible that even if there had not been an ultimate appeal to the Privy Council, the general tendency of the Supreme Court of Canada would have been to cut down, at least to some extent, the very clearly delineated powers of the Federal Parliament as defined by the British North America Act. It could be argued that the type of strong federal government envisaged by the political founders of the Canadian nation was impractical and not realizable in a country as large geographically and as culturally diverse as Canada. It could also be argued that the Judicial Committee was recognizing the realities of the social and political life of the nation in upholding the validity of provincial statutes. On the other hand it could be maintained that if the Privy Council had not ruled the way it did, then the provincial governments would never have assumed the importance which they did, and thus their position would not have to be continually sustained by judicial decisions. Nevertheless the essential point made by Mr. Justice Laskin is that, for the most part, the majority of Supreme Court of Canada judgments in constitutional cases tended to render provincial legislation valid, and that of the Federal Parliament *ultra vires*.

The details of the political and legal steps leading to abolition of appeals to the Privy Council have already been well documented and it is unnecessary to repeat them here.\(^{16}\) The end of appeals to the Privy Council was greeted by most English speaking Canadians interested in constitutional matters with considerable satisfaction. As will be shown later, some French speaking Canadians viewed this event with mixed feelings. The satisfaction over the abolition of appeals to the Privy Council was based on two major grounds: first, the purely nationalistic feeling that it was not fitting for an independent nation to have to go outside its borders for ultimate judicial decision-making, and secondly, the feeling that perhaps the Supreme Court of Canada would develop a case law, particularly in the constitutional field, which would be considerably more favourable to the position of the Federal Parliament. In the ten years following abolition of appeals to the Privy Council, there was a particularly exciting period in our legal history. During this time the Supreme Court of Canada had before it a number of especially interesting cases, which raised important questions of civil liberties. The Court was given the

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\(^{15}\) *Citizens Insurance Co. v. Parsons* (1880), 4 S.C.R. 215.

opportunity to exercise considerable imagination and scope in render-
ing its decisions in these matters.\textsuperscript{17}

The Quebec provincial election of 1960, which brought to power a new government headed by Mr. Jean Lesage, was to prove of great significance in terms of Canadian political life, and in particular with respect to the future role of the Supreme Court. It is impossible to outline at this time the tremendous changes in Canada's political and constitutional structure since 1960, however one effect of these events, in my opinion, has been a decline of the Supreme Court of Canada as a decision-maker with respect to the allocation of Federal-Provincial legislative power. The frequency of Federal-Provincial conferences on a whole variety of subjects has, in my view, tended to keep litigation out of the courts on the question of the division of legislative power. It seems to me that there has been a decline in the use of the reference case as a means of putting before the courts questions of constitutional importance. There seems little doubt that Mr. Lesage would prefer that Federal-Provincial jurisdictional problems be resolved in the political arena rather than having them become disputes or references before the courts. This attitude is certainly reflected in his hostility to the reference by the Federal Cabinet to the Supreme Court of Canada of the question of off-shore mineral rights. Mr. Lesage even hinted that Quebec might not recognize the validity of the judgment rendered by that Court on this question. Since it seems that fewer references are now being brought to the Court on constitutional questions, the opportunity for the Court to exercise a leading constitutional role is considerably diminished. Furthermore, many of the leading decisions on questions of civil liberties originated in the Province of Quebec. Since the coming to power of the Lesage government there has been considerably less persecution of groups such as the Jehovah's Witnesses and the Communist Party, therefore, this has also meant that some of the very stimulating cases of the Fifties no longer arise. In addition, the Bill of Rights, which was potentially a source of considerable litigation, and originally seemed to offer the Supreme Court of Canada an opportunity to enhance its role, has not produced the expected flow of cases before the courts. For example, looking over the cases decided by the Supreme Court in 1965 one notes that the largest number of legal problems faced by the Court were in the areas of criminal law, contract, wills, municipal law and, to a somewhat lesser degree, administrative law. It is particularly interesting to note the relative paucity of constitutional law issues dealt with by the Court. Only

three cases dealt with by the Supreme Court of Canada in 1965 deal with the question of the division of legislative powers.\textsuperscript{18}

The fact that the Court does not have as many interesting issues to deal with as it had in the Fifties is, of course, no reflection whatsoever on the Court itself. In fact, one might argue that the absence of civil liberties cases indicates a widespread recognition of human rights within the nation, so that it is not necessary to seek legal redress to protect one’s personal liberties. Certainly the type of flagrant disregard for personal freedom which characterized the Province of Quebec in the era of Premier Duplessis seems, at least temporarily, to have ceased. This factor, combined with my view that there has been a decline in the use of the reference, as a method of bringing issues before the Court, makes it therefore not surprising that the issues which the Court has to resolve are perhaps not so dramatic as those which faced it in the Fifties, and those which had to be decided by the Privy Council. The salient point being made, however, is that in a country torn with political dispute, the Court seems almost isolated from the mainstream of decision-making. Whether this state of affairs will continue is difficult to predict but the indications are that, at least for the next few years, most important Federal-Provincial problems will probably be settled in non-judicial arenas.

Any discussion of the present and future roles of the Supreme Court would, as has already been partially pointed out, be meaningless without recognition of the social context in which the Court functions. Due to political upheaval, there has been a shift away from using the Court as the major vehicle for the resolution of disputes over areas of provincial and federal legislative power. The recent push by Quebec for increased autonomy, which has, in many instances, had the backing of other provinces, has raised questions with respect to the Court. It, like many other federal institutions, has come under considerable scrutiny by Quebec political and legal circles, the result being a demand for substantial change in our political and constitutional systems. These demands have ranged all the way from a desire for a wholly new constitution, through to re-adjustments in taxing and legislative power. There has not been, to my knowledge, any suggestion that the personnel of the Supreme Court of Canada are incompetent or that the Court has been derelict in its duty, or even wrong in any of its lines of decision-making. The criticism has instead centered on the much more fundamental questions of the organization, jurisdiction and role of the Court in the Canadian constitutional system. First, it is appropriate to analyse the views of Professor Albert Abel, a well known and well respected professor of law at the University of Toronto, who recommends a major limitation on the jurisdiction of the Supreme Court.

In his article entitled "The Role of the Supreme Court in Private Law Cases", Professor Abel advances the thesis that "the law of the several provinces ought to be left for the provinces to determine judicially, as it is legislatively". He argues that the Supreme Court ought to refrain from "reviewing any case which falls within the range of matters of provincial concern—which, by and large, means one with respect to property and civil rights". Professor Abel then goes on to develop a very well argued case for this proposition. He suggests that perhaps it was intended at the time of Confederation that the power to establish a general Court of Appeal for Canada under Section 101 of the British North America Act did not envisage the establishment of a court which would have overall appeal jurisdiction on matters of purely private concern. He argues that social life varies from one province to another and that the provincial courts are more aware of the social contexts of their regions, and therefore they are the most appropriate bodies for ultimate judicial authority on private law matters. Professor Abel makes it clear that he is not in any way criticising the qualifications or the performance of the judges of the Supreme Court of Canada, but rather, that the chief reason for his proposed change is "the greater responsiveness of the law to the differing needs and sentiments of the provinces", if this proposed change were brought about. There are a number of questions which can be raised with respect to Professor Abel's proposition. First, what about problems arising from the interpretation of federal statutes? Is it part of Professor Abel's proposal that there should be a system of federal courts, starting with trial courts, intermediate courts and ultimately appeal to the Supreme Court of Canada to deal with these matters? In my view the implementation of his suggestion would lead to the adoption in Canada of a dual system of courts, such as exists in the United States. Surely, if appeals in the area of property and civil rights are to be withdrawn from the Supreme Court, all questions revolving around the interpretation of federal statutes and federal areas of jurisdiction should be originally litigated in a federal court. It has always been my view that we have been rather blessed in not having the American dual hierarchy of courts. This complicated and complex American system has perhaps been financially beneficial to some lawyers in that considerable legal time is spent debating which hierarchy of courts has jurisdiction in a particular case. Furthermore, it allows law teachers to devote whole courses to this particular subject, but why should we attempt to emulate this complex, time-consuming and expensive dual system of courts? Surely it is desirable to promote a reasonable degree of uniformity in the area of private law. We are in an era of population and economic mobility, in which it is in the interests of the national community that the law be relatively uniform, rather

19 A. Abel, The Role of the Supreme Court in Private Law Cases (1965), 4 Alta. Law Rev. 39.
20 Ibid., p. 39.
21 Ibid., p. 40.
22 Ibid., p. 47.
than chopped up into ten separate watertight private law compartments. Furthermore, the overwhelming majority of private law cases are finally disposed of by the provincial courts. Even though a relatively small proportion of private law cases are appealed to the Supreme Court of Canada, this brings some moderate and desirable degree of uniformity and certainty in the law. This, in my view, is particularly desirable in the area of commercial law where commercial practices do not differ greatly from province to province. Furthermore, in order to develop effectively the national economy, and to promote the smooth working of our commercial system, the law should be as uniform as possible.

If Professor Abel's proposal were adopted who would determine what type of case could be appealed to the Supreme Court of Canada, and what type of case should remain for sole determination within the province? It is suggested that this could be done by restraint on the part of the Supreme Court of Canada. Surely some definite legislative statement would be needed on this particular subject? Assume that the legislation did state that all legal disputes covered by the term "property and civil rights" were not appealable to the Supreme Court of Canada, which court or courts would have jurisdiction for determining whether a subject came within the term "property and civil rights"? Furthermore, many of our most treasured fundamental liberties are protected by decisions in the area of so-called private law. Does this mean that there is to be dramatic diversity in the kind of civil liberties which a citizen enjoys in one province as compared to another? As already pointed out, during the Fifties most of our great civil liberties cases arose out of litigation in the area of what would usually be considered property and civil rights. To strip the Court of this responsibility would be most damaging, not only to the prestige of the Court but to the national welfare of Canada. Admittedly there will always be some diversity in the civil liberties enjoyed in one province as against another, but surely we should fight to diminish this tendency rather than to increase it.

Professor Abel's suggestion is by no means a new one. As far back as the House of Commons debate on the subject of the establishment of the Supreme Court of Canada in 1875, a member of the House of Commons, Mr. David Mills, objected to the fact that the Bill setting up the Supreme Court of Canada gave appellate jurisdiction to the Supreme Court of Canada over matters of private law. The Minister of Justice, the Honourable Telesphore Fournier, answered that, "the whole spirit of the Confederation Act was to give the Court of Appeal jurisdiction over provincial as well as Dominion law." Since Mr. Fournier was in verbal communication with the men who had brought about the union of Canada, his suggestion that

24 Ibid., p. 261.
the intention of the Act was to provide a general court of appeal for Canada, including control over provincial matters, tends to answer the proposition put forward by Professor Abel that the Fathers of Confederation may have had in mind the kind of limited jurisdiction which he recommends.

In its report to the Quebec Government in 1956, a Quebec Provincial Royal Commission on constitutional matters also expressed concern, similar to that of Professor Abel, about the jurisdiction of the Supreme Court.25 The Commissioners pointed out that, as early as 1903, a member of the House of Commons, Mr. Philip Demers, had objected to the Supreme Court having jurisdiction in private law matters. The Commission saw in the Supreme Court's ultimate authority over civil law a dangerous possibility of legal centralisation. A number of other views expressed by the Commission are reflected in an article by Professor Morin and these will be analysed below in discussing his views. The essential point is that Professor Abel's argument is not entirely novel in the Canadian context, though his is the most elaborate exposition of this point of view. For the reasons outlined, it is my view that this change in the Court's jurisdiction is unnecessary, particularly as regards appeals from the English-speaking common law provinces. The claims of Quebec to some special consideration with respect to private law matters is obviously greater than that of the English-speaking common law provinces, but even here the Supreme Court of Canada usually functions so as to allow decisions with respect to Quebec private law to be essentially controlled by the Civilian members of the Court. However, it is Professor Abel's argument that though Quebec is not a province like the others, this is true of all the other provinces, and they are entitled to the same degree of private law variation as is Quebec. Though there may be some justification in some degree of diversity in the common law of the English-speaking provinces, it is my view that the possible benefits accruing from this diversity are well outweighed by the dangers of further legal fragmentation.

The criticisms and proposed changes in the jurisdiction and the organization of the Supreme Court of Canada by Professor Jacques-Yvan Morin are of a much more drastic nature than those of Professor Abel.26 Professor Morin begins by quoting both the Tremblay Commission and Premier Jean Lesage to the effect that most of French Canada has lost confidence in the Supreme Court of Canada, on the ground that it is essentially a Court created by the Federal Parliament, with its members appointed by the Federal Government. It is his argument that French Canada cannot have confidence in a Court of this kind which is not, in his view, independent of the Provincial and Federal Governments. He argues that the Court should be established as part of the fundamental law of the Constitution

rather than by federal statute. Earlier in this article the writer agreed that this would have been a desirable inclusion in the British North America Act, and certainly by itself is not an objectionable change in our constitutional system. Professor Morin, however, implies that since the judges are nominated by the Federal Government this makes them prone to favour the federal authority in constitutional cases dealing with the division of legislative power. On the contrary, the Court has tended to render decisions on matters of legislative power which, if anything, favoured provincial legislative claims.

Professor Morin suggests, as a minimal change, that the Supreme Court of Canada be split into separate common law and civil law chambers for the purpose of hearing private law cases, and that with respect to constitutional matters the bench should be composed of an equal number of common lawyers and civilians drawn from the two aforementioned chambers. He feels, however, that a more preferable solution would be to create a separate and distinct constitutional law tribunal somewhat similar to that existing in Germany. He argues that this constitutional court should be given a bi-national structure in that the judges should be equally selected from English Canada and French Canada. He proposes that these judges be selected by a totally reformed Senate. This new Senate should be a bi-national chamber with equal representation from English speaking Canada and from French speaking Canada. In order for a person to receive appointment to this new constitutional court he would have to obtain a two-thirds majority from this newly created upper house. It is not possible in this short paper to fully analyse all the implications of Professor Morin's suggestions. It is sufficient, however, for the moment, to raise one or two questions with respect to these suggested changes. Since there are an even number of members on the proposed constitutional court, what would happen if there were a deadlock? Professor Morin does not suggest how this deadlock would be broken. Furthermore, though the present method of appointment to the Court is imperfect, his suggestion that appointees should receive a two-thirds majority of the new bi-national upper house is, in my opinion, considerably more frightening. Is the appointment of judges to become the subject of a national political wrangle? It is my suspicion that the quality of men appointed would be inferior to those presently serving on the Court. It is quite possible that only men of relatively timid personality, with a lack of strong views, would ever receive the approval of two-thirds of such a newly constituted upper house. Perhaps, however, this is exactly what Professor Morin would like to see, as towards the end of his article he decries the tendency of judges to adapt the law of the Constitution to changing social and economic circumstances.\[27\] He is very disturbed about the type of discretion which many judges have exercised in interpreting constitutional documents and statutes. He is particularly disturbed by the type of judicial interpretation and judicial role assumed by the United States

\[27\] Ibid., p. 551.
Supreme Court. It is his view that a court should never fill the role of the legislature. This is very difficult to implement in practice. Cases come before courts because the constitution or statute is ambiguous, or because the situation is not covered by existing law. It would create great confusion if the courts decided to withhold a decision because the constitution or a statute was unclear. Is it Professor Morin's view that, in this event, the court should refer the matter to the legislative branch of government for a decision? Furthermore, Professor Morin seems to assume that if the courts interpret the Constitution in the light of social and economic circumstances there will be an inevitable tendency to interpret in a way favourable to the central government. Is this an admission that the realities of social life in the twentieth century require strong central government? Certainly the experience in Canada has shown that what he calls the "instrumentalist attitude" of the courts has led towards stronger provincial legislative authority despite the wording of the British North America Act. Why does he necessarily assume that the existing Supreme Court of Canada will deviate from this past trend? Professor Morin objects to the use by the Court of "a principle of growth". Would he object to this type of approach if the growth were that of provincial legislative powers? What, in my view, is particularly disturbing, is the assumption, both by Professor Morin and the members of the Tremblay Commission, that a judge will almost automatically tend to favour the government which appointed him. If this is true of judicial behaviour, then the courts should be scrapped in favour of arbitration boards. Furthermore, if this point of view is correct, no person would ever be acquitted of a crime, since all judges are appointed and paid by the state.

The recommendations of change put forward by Professor Morin are just part of a much larger constitutional debate and struggle now being waged in Canada. The assumptions upon which our constitutional system has been based are now being questioned and criticized, particularly by persons from French speaking Canada. No part of our constitutional process seems immune from criticism and proposed change. There are always instances in which the criticisms are sound and change is desirable. It is still, however, my assumption that the onus is on the proponents of change to show that the new scheme would be a substantial improvement on present arrangements. Furthermore, it is my contention that the changes proposed by both Professor Abel and Professor Morin would perhaps create more problems than they solve. Furthermore, it is significant to note that neither of these gentlemen is willing to criticise the actual work done by the Supreme Court of Canada. In fact Professor Abel specifically mentions that the Supreme Court of Canada has done its work well. In the case of Professor Morin, he does not give us any concrete examples of where the Court has been biased against Quebec or has shown any radical trend, since the abolition of appeals to the Privy Council, in the direction of destroying provincial legislative authority. As has been already pointed out, large areas of decision-making have already shifted from the Court to other political arenas. It is, there-
before, difficult to see that the present functioning of the Court has seriously jeopardised the political or legal status of the provinces. Irrespective of one's views about the future structure of the Supreme Court of Canada, all of these criticisms and questions with respect to the Court's role, and to that of our political institutions, should be welcomed. It forces us to examine, understand, appreciate and, if necessary, change the defective parts of our constitutional system.