THOUGHTS ON REFORM OF THE SUPREME COURT OF CANADA

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In this essay, Professor Lederman expresses some personal views on the reform of the Supreme Court of Canada. He would favour a more sociological approach by the Court to constitutional questions before it, rather than the literal or grammatical approach which has usually been followed, and in such cases would allow the Court to range more widely in the admission of expert and factual evidence. Also favoured is more flexibility in the use of precedent. Dealing with the composition and status of the Court, Professor Lederman disputes the contention that the Court's status gives an unfair advantage to the Federal Government, but nevertheless favours constitutional entrenchment of the Court's position. He opposes the use of the Court for constitutional questions only; rather he believes that it should remain a complete court of appeal for the country. He would slightly increase the number of judges, and alter the proportional regional make-up of the court to give more weight to the West and the Atlantic Provinces. Essentially apolitical nominating commissions are proposed for judicial appointments from the four main regions of Canada. Finally, Professor Lederman proposes some alteration in the rules governing cases to come before the Court, with the judges of the Supreme Court of Canada themselves determining, for the most part, which cases deserve their attention because they raise issues of national importance.

An important part of the current constitutional review in our country is consideration of the extent to which changes are needed in the status, structure and functions of the Supreme Court of Canada. This is a large and complex subject, and, in attempting within the limits of an essay of moderate length to survey the whole field, I can only identify and comment briefly on the main issues. In doing this, I write in the first person to emphasize that I am simply expressing my own views, as a student of things constitutional, for what they may be worth.

In the first place, I believe I can take it for granted that everyone accepts the proposition that a supreme interpretative tribunal—a judicial tribunal—is necessary to the working of a federal constitution. Such a tribunal must have the last word on whether provincial or federal statutes are within or beyond the powers listed in the constitution for the enacting legislative body. We are used to this in Canada in relation to distribution of legislative powers but now we are also talking of the possibility of a specially entrenched Bill of Rights like that of the Americans. Such a Bill of Rights means that some undesirable types of laws are forbidden to legislative bodies, being things they cannot do by ordinary statute, and again a supreme judicial tribunal would be needed to make *this* work.

The main matters for comment seem to fall into two groups.

(1) What should be the principles and doctrines of interpretation that are the operating rules of the supreme interpretative tribunal for a federal country?

(2) What should be the composition, status and jurisdiction of this supreme tribunal? These two questions are interdependent to a degree,

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of course, because how an institution functions depends very considerably on how it is composed, on the background and training of its members and on the terms on which they hold their offices.

Let me speak first then of doctrines and methods of interpretation in the courts, with particular concern for interpretation of the distribution of legislative powers by the *B.N.A. Act* between the Federal Parliament on the one hand and the Provincial Legislatures on the other. To my mind there are principally two types of interpretation—literal or grammatical interpretation emphasizing the words found in statutes and constitutional documents—and, sociological interpretation which insists that constitutional words and statutory words must be carefully linked by judicially noticed knowledge and by evidence to the ongoing life of the country.

In my view, both the Judicial Committee of The Privy Council and later the Supreme Court of Canada have been too much devoted to literal or grammatical interpretation and have not employed sociological methods enough. I think this is the central issue concerning interpretation of our federal constitution and its development by interpretation. I am not much interested in the old controversy about whether the Judicial Committee of the Privy Council perverted the *B.N.A. Act* by giving too much power to the provinces at the expense of the Federal Parliament and Government. The O'Connor Report to the Senate maintained this was so,[1] but Mr. O'Connor made his points by arguments dependent on literal or grammatical interpretation. This type of interpretation gives an appearance of reliability and consistency, but this is only appearance.

As Hans Kelsen has said:[2]

> Since the law is formulated in words and words have frequently more than one meaning, interpretation of the law, that is determination of its meaning, becomes necessary. Traditional jurisprudence distinguishes various methods of interpretation: the historical, in contrast to the grammatical, an interpretation according to the "spirit," in opposition to a literal interpretation keeping to the words. None of these methods can claim preference unless the law itself prescribes the one or the other. The different methods of interpretation may establish different meanings of one and the same provision. Sometimes, even one and the same method, especially the so-called grammatical interpretation, leads to contradictory results. It is incumbent upon the law-maker to avoid as far as possible ambiguities in the text of the law; but the nature of language makes the fulfilment of this task possible only to a certain degree.

A very interesting book has recently been published on the Privy Council's interpretation of the B.N.A. Act.[3] Its author is Professor G. P. Browne of Carleton University, and in my view Professor Browne has beaten Mr. O'Connor at his own game. Professor Browne, using methods of grammatical or literal interpretation, shows that one can find much justification *at this level* for the interpretations placed on the B.N.A. Act by the Judicial Committee. So, in my view, Browne and O'Connor simply cancel one another out. The truth is that the B.N.A. Act was simply ambiguous or incomplete in many respects as originally drafted and the answers just were not in the Act as to how these ambiguities were to be resolved and the gaps filled.

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1 The Senate of Canada, Report on the B.N.A. Act, by W. F. O'Connor, Queen's Printer, Ottawa, 1939.
2 *The Law of the United Nations* (1951) at xiii.
3 *The Judicial Committee and the B.N.A. Act,* (1967) University of Toronto Press.

The much-abused Viscount Haldane knew this.[4]

> The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies . . . that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

To Viscount Haldane's political obscurities of language we should add the degree of obscurity that is inherent in language itself. This arises from the truth that words are not perfect vehicles of meaning, so that no matter how skilfully they are chosen and used, uncertainties about their meaning to some extent remain. This philosophically deeper type of obscurity is what Professor Kelsen was referring to as giving rise to the need for authoritative interpretation to choose between the alternatives that will frequently appear when even the most carefully drafted constitution, statute or legal document is to be applied to the institutions, persons and circumstances the words are alleged to contemplate. In any event, the Judicial Committee did resolve ambiguities and fill gaps, as indeed it was their constitutonal duty to do. I am not happy with certain of their decisions on the merits, but nevertheless I do not think the Judicial Committee should now be disparaged for having failed to find answers in *the text* of the B.N.A. Act that just were not there to be found.

Also, to be fair to the Judicial Committee of the Privy Council they did not just employ grammatical interpretation in their cases from Canada. They knew that interpretation had to pay some attention to the social, political, cultural and economic facts of life in Canada. I remember listening to the argument concerning the Alberta Debt Adjustment Act before the Privy Council in 1943. The Honourable J. W. Estey, then Attorney-General of Saskatchewan, was arguing for the validity of the Alberta statute because his province had a similar statute that would fall if the Alberta Act fell. Before Mr. Estey started his legal argument, the Lord Chancellor asked him to explain why such drastic anti-creditor legislation was necessary at all. Mr. Estey then took some time to tell the story of the double disaster of drought and market collapse in the 1930's that had brought agriculture on the Canadian Prairies to its knees, so that some such measures as these were needed just to keep the farmers on the land so that they might try again. At this point, Lord MacMillan remarked, "Very well, Mr. Estey, the malady is admitted. Now, who is to be the physician?"

The Law Lords of the Privy Council then were often very astute about Canada, but, nevertheless, my complaint against them is that they did not seek often enough or systematically enough to relate interpretation to the facts of life in Canadian Society. Their interpretation was too much literal and not enough sociological. And also, since the judges of the Privy Council were not Canadians living under our federal constitution, there were a great many things they simply did not know as

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4 *John Deere Plow Co. Ltd. v. Wharton* [1915] A.C. 330 at 338.

background knowledge of Canada. In more technical language, the scope of their relevant judicial notice was much narrower than that of Canadian judges. Many outstanding British judges sat on the Judicial Committee, but the handicap just mentioned is one that ability and integrity alone cannot overcome. Canadian judges also have been too literal and grammatical in their interpretations of the constitution, though operating as they did for so long in the shadow of the Judicial Committee, they had little choice about this. Nevertheless, I think Canadian judges should now combine the advantage of their superior native judicial notice of Canadian conditions with systematic and thorough sociological interpretation of the constitutional distribution of powers. The real prospect for improvement in interpretation lies in more intensive and extensive judicial appreciation of social, political, economic and cultural facts that give the various aspects of challenged statutes their relative importance in relation to the categories of federal and provincial legislative powers. The rules of evidence for constitutional cases should permit wide-ranging enquiry, expert opinion and gathering of facts to aid in the decisions to be taken. In my view, this is the only way to get meaningful, consistent interpretation of the federal distribution of legislative powers. It is an illusion to think that security and certainty in the interpretation of a federal constitution can be obtained by literal or grammatical methods of construing meaning. I am convinced that many of those who advocate extensive re-writing of the constitution for Canada do so because they have too much faith in what can be accomplished by words in documents, that is, too much faith in the value of literal interpretation.

But I do not want to press this point too far. Words are, within limits, reasonably objective means of communication and of thought, otherwise social organization and legal institutions would be impossible. The main thrust of my argument here is to emphasize that good constitutions are characteristically rather succinct documents that achieve a beneficial brevity by employing quite general and abstract phrases. For example, in the B.N.A. Act, the following are examples of such words and phrases used to distribute primary legislative powers and responsibilities: 'Trade and Commerce,' 'Property and Civil Rights,' 'Defence,' 'Municipal Institutions,' 'Criminal Law,' 'Banking' and so on. These phrases are clear enough in some of their implications and not so clear in others. In any event they often overlap one another and conflict to some extent in their logical relevance to particular legislative schemes to be found in federal or provincial statutes the validity of which is under challenge in the courts. It is between the alternatives thus arising that the judicial interpretative tribunal must choose. The nature of this task can perhaps best be explained by refining and expanding Lord MacMillan's question—Who is to be the physician? The full question the judges must put to themselves is—Who is the better physician, Federal Parliament or Provincial Legislature, given the type of legislative scheme under consideration and all the relevant circumstances? Issues of relative constitutional values are involved here for the judges, and such issues can best be assessed and decided in the light of all that can reasonably be ascertained of the effects of the challenged statute as operating law for the persons and social conditions contemplated by the terms of the statute.

Professor B. L. Strayer has shown that both the Judicial Committee in London and the Supreme Court of Canada have at times in the past accepted various rules of practice and evidence that collectively would permit the thorough ascertainment of crucial facts concerning the effects and social context of a challenged statute—rules concerning judicial notice, admissions, agreed statements of facts, direct evidence and opinion evidence from experts.[5] Professor Strayer complains that, though there are adequate procedures available as indicated, they are just not yet being used regularly enough or systematically enough by counsel or by judges in constitutional cases (including reference cases). Too often this is because the truly complex nature of federal power-distribution issues is simply not appreciated and accepted by Canadian lawyers and judges. Professor Strayer's conclusion is as follows:[6]

> It has been demonstrated that many elements, both factual and non-factual, enter into the determination of these questions. Once these elements are identified their relative importance can be better assessed. It submitted that the factual elements have yet to receive the attention they deserve, largely because of the confusion over the purpose of fact-introduction in constitutional cases. The importance of facts has been demonstrated, and the means of introduction suggested. A more general recourse to facts, particularly those pertaining to legislative effect, would diminish the importance of other elements in the adjudicative process and yield a more realistic jurisprudence.

Finally, in considering principles and doctrines of interpretation in the final court for federal power-distribution issues, there is the matter of adherence by the court to precedents embodied in its own previous decisions. The Judicial Committee of the Privy Council had the power to depart explicitly from its own previous decisions, including those in Canadian constitutional cases. But no counsel ever persuaded it to do so, or at least to admit it was doing so, in Canadian constitutional cases. On the whole, the Judicial Committee was careful to follow its own previous decisions where they were found to be applicable because of sufficient similarity in the type of statute or issue concerned as between a previous case and a new one. We will return presently to the question of what is 'sufficient similarity' in federal power-distribution cases.

Meanwhile, it should be noted that the Supreme Court of Canada has taken the conservative and orthodox position that it is bound to follow its own previous decisions when sufficiently similar cases recur.[7] This contrasts with the position of the Supreme Court of the United States which explicitly claims and not infrequently exercises the power explicitly to depart from its own previous decisions. Until quite recently, the highest appellate court of the United Kingdom, the House of Lords, considered itself fully bound to follow its own previous decisions. But a short time ago, on behalf of the Law Lords composing the court, the Lord Chancellor announced that, while normally they would treat their own previous decisions as binding, they would henceforth "depart from a previous decision when it appears right to do so."[8]

It is not surprising then that we find the Government of Canada proposing to the Constitutional Conference of February, 1969, that "The Constitution should authorize the Supreme Court of Canada to depart

5 *Judicial Review of Legislation in Canada*, (1968) University of Toronto Press, chapter 6.
6 *Supra*, n. 5 at 181.
7 *See* Mark R. MacGuigan, *Precedent and Policy in The Supreme Court*, (1967) 45 Can. Bar Rev. 627-665.
8 [1966] 1 W.L.R. 1234.

from a previous decision when it appears right to do so."[9] It was made clear in the comment accompanying the proposal that this was to be a permissive provision leaving it entirely to the court itself to determine when it was 'right' to depart from precedent because 'circumstances demand it.'

I would offer three comments on this proposal. It is indeed wise and proper to ensure that the Supreme Court of Canada has this power and knows that it has it. But, in federal power-distribution cases, how is the court to determine, when it is 'right' to depart from precedent because 'circumstances demand it'? It can make this judgment rationally and with appropriate social sensitivity only if the relevant facts of legislative effects concerning the challenged statute are before it. This simply adds emphasis to the general points made earlier about the need for more socially sensitive interpretation—that the rules of practice and evidence for constitutional cases should permit wide-ranging enquiry, expert opinions, liberal judicial notice and direct evidence of critical facts, to aid and illuminate the value choices that have to be made. Perhaps the Constitution or the Supreme Court Act should contain a liberal permissive provision on *this* subject too, so that Supreme Court judges will not in future be able to say that they are bound by narrow exclusionary rules of practice or evidence in constitutional cases.

Nevertheless—and this is my second comment on precedent—even if the Supreme Court is given power to depart from its own previous decisions and adopts more liberal rules of practice and evidence, adherence to precedents is the normal thing and indeed is the normal expectation of the people as a matter of justice. Reasonable consistency over time is one of the normal basic elements of justice. Certainly there should not be a slavish or mechanical following of precedents, though it should indeed be the normal thing in sufficiently similar circumstances. But this leads to the most fundamental of all questions about adherence to precedent—What is a precedent anyway? There are always some differences between past and present circumstances when one is comparing previous cases with a new case. When are the previous circumstances *sufficiently* similar to the new ones to make the previous case a precedent for the new one? When are the differences significant enough that the previous case can be dismissed as *not* amounting to a precedent?[10] This is the third matter for comment.

The philosophy and logic of precedent is the subject of an extensive literature that cannot be recapitulated here. Nevertheless, we can review briefly the special case of federal power-distribution issues in this respect. Typically, the final court is asked in this kind of case to decide whether a specific legislative scheme that has been passed as a statute by the Federal Parliament or a Provincial Legislature is within or beyond the powers of the enacting body. To do this the Court must assess the full meaning and main feature or features of the challenged statute, as manifest in the words of the statute and the effects it will have as operating law in the current social context. Its main theme or purpose

9 Right Honourable P. E. Trudeau, *The Constitution and The People of Canada*, 1969, Queen's Printer, Ottawa, at 82.

10 See "The Common Law System in Canada" by W. R. Lederman, in *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (editor E. McWhinney) 1958, University of Toronto Press, at 34-70.

then has to be classified in relation to the general categories of federal and provincial powers respectively, in the B.N.A. Act, to which reference was made earlier. So the basic subject of a federal power-distribution case is the challenged regulatory scheme designed to deal in a certain way with certain of society's problems and needs. As social problems and needs shift and develop, somewhat new statutory schemes are devised to deal with them. At times the new regulatory schemes in their social context will be sufficiently similar to those involved in previous power-distribution cases to be governed by the decisions in those previous cases as precedents. But when the social need for regulation and the regulatory scheme proposed are sufficiently new, then there is no precedent *just a matter of the logic and philosophy of the theory of precedent itself.* Then, without the aid of binding precedent, the Court must boldly face Lord MacMillan's question in the refined and expanded form I suggested for it. In the *John East Case*,[11] for example, the Privy Council did essentially ask themselves this question. They were, in 1944, considering a rather new scheme for the regulation of the relations of management and labour in industry, as enacted by a Provincial Legislature. They said in effect—If the Fathers of Confederation were in our position today and knew current social and industrial conditions as we know them, would they as reasonable men consider this scheme of regulation a proper one to be assigned to Provincial Legislatures? They answered the question in the affirmative and held the provincial statute valid.

In other words, the doctrine of precedent itself is a realistically flexible instrument of adjustment, if controlled by imaginative use of history and full fact-finding about legislative effects and relevant social context. There is nothing in logic or philosophy, properly conceived, that precludes this flexibility. Indeed, logic frequently displays two or more alternatives for a final federal court but logic alone in such circumstances does not dictate the choice between them. We may conclude then that if the judges of the Supreme Court of Canada are moved by a flexible and imaginative conception of the doctrine of precedent, the need for them to use a power explicitly to depart from their own previous decisions would be rather rare.

I have expressed these views of the nature of precedent and federal power-distribution decisions in other places.[12] Some who disagree hold that this is too Olympian a view of the position of the final court interpreting a federal constitution. My answer is twofold. I have conceded that frequently the Court will find that there are sufficiently similar cases in the past, so that the doctrine of precedent should operate. But, not infrequently, the Court will also be confronted with a case where the elements of novelty are great enough to preclude the direct relevance of any precedents. Then indeed the judges inevitably find themselves high up on Mount Olympus, whether they like it or not, with a very broad discretion to be exercised about the proper situs of primary legislative power in our federal country. They must then proceed as wisely

11 [1948] 2 W.W.R. 1055.
12 See W. R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in *The Future of Canadian Federalism* (editors Crepéau and Macpherson) 1965, University of Toronto Press at 91-112.

as they can by considering the original words of the constitutional distribution of powers in the B.N.A. Act, in relation to the new legislative scheme and all that can be reasonably ascertained of its effects and the circumstances in which it would be operative. We are back then to the importance of rules of practice and evidence for fact-introduction about legislative effects and social conditions. I conclude with what I said of the interpretative process in an earlier essay.[13]

> In summary then, we can now see that the classification process joins logic with social fact, value decisions and the authority of precedents, to define the distribution of law-making powers. The reasoning involved is not automatic or mechanical; rather it makes the highest demands on learning, intellect, and conscience. It permits expression to the real issues of public policy in the country, and indeed brings such issues into focus in many particular ways, thus facilitating their resolution. The point is that, so long as we have a federal constitution, we must be prepared to contend with the real complexity of the interpretative process. In other words, what has been described above is the inevitable operating jurisprudence of the federal form of social order. If we understand the process, we will expect neither too much nor too little of the constitutional distribution of legislative powers as it stands now, or as it may be if certain changes are made. There is much more room for reasonable differences of interpretation than most people realize. These differences then should not be regarded as evidence of bad faith or ignorance; rather, they should be taken as a challenge calling for support of the working of our system of interpretation at its best level.

There we must leave the subject of doctrines of interpretation in federal power-distribution cases and move on to the second set of questions that should be discussed, namely those concerned with the composition, status and jurisdiction of the Supreme Court of Canada.

Concerning this second group of matters, let me first repudiate, for myself at least, a view that seems to have some currency at present. I do not accept the view that the Supreme Court of Canada judges are somehow under unfair or undue influence by the Federal Parliament and Government because the Federal Parliament enacted the Supreme Court Act and the Federal Cabinet appoints the judges. The Supreme Court of Canada is an impartial and objective judicial tribunal in the fullest sense. As such it is an important part of our great English constitutional inheritance—the typical English Superior Court as it stood after the Act of Settlement in 1701. It is a serious misunderstanding of the independence of our courts and judges to think of the judges of the Supreme Court of Canada as somehow delegates of the Federal Government. I reject this delegate theory. Nevertheless, I would agree that the Supreme Court of Canada should appear to be as impartial as in truth it has been and is. Justice must not only be done, it must be seen to be done. To this end, some changes could be made in the manner of appointing the judges and in the constitutional status of the court, changes that will be discussed presently.

Also, there is a very general proposal to alter the nature of our final federal court that should be carefully assessed at this point. It is proposed that the Supreme Court of Canada should be a final court for constitutional questions only, rather than what it is at present, namely a general court of appeal for Canada on the full range of justiciable issues under the laws of Canada and the Provinces—which includes, but

13 *Supra*, n. 12 at 108-9.

is by no means confined to, federal power-distribution issues under the B.N.A. Act.[14]

I consider that the status of the Supreme Court of Canada should be maintained as a general court of appeal for Canada and as the final interpretative tribunal to determine the meaning of the federal constitution. In this connection the all-pervasive character of constitutional questions should be appreciated. A citizen may need to raise a constitutional issue at any time in connection with any type of matter at any level in our judicial system. The citizen charged with the provincial offence of careless driving should be able to plead in the Magistrates' court that the provincial statute concerned is *ultra vires* of the Province under the B.N.A. Act. Then the route of appeals should be open all the way to the Supreme Court of Canada if either party seeks to go that far. Moreover, the Supreme Court of Canada must be able itself to control what appeals are allowed to go through to it because they raise significant constitutional issues. The Court itself must have the final power to give leave for any appeal in the foregoing category.

Furthermore, constitutional issues arise in connection with other legal issues; they usually come as part of a complex package. The Supreme Court of Canada should then remain a general court of appeal on all legal issues. To appreciate and do justice concerning the constitutional issue itself, the Court must also be able to appreciate and do justice concerning the *other* legal issues that are inextricably a part of the complex in which the constitutional issue occurs. For example, the Quebec Padlock Law was challenged in connection with the breaking of a lease of an apartment in the City of Montreal. Did breach of this law justify the landlord in repudiating the lease?[15]

The complex and all pervasive nature of federal power-distribution issues may be better appreciated if we recall the nature of these issues. The federal constitution distributes law-making powers between the Federal Parliament on the one hand and the Provincial Legislatures on the other by two lists of classes or types of laws, one federal and the other provincial. These two lists together give a classification system for all the laws of Canada and the Provinces, laws disposing of the rights, duties, powers and liberties of Canadians. When some of these laws, existing or proposed, are challenged as beyond the powers of the Federal Parliament or a Provincial Legislature, judges who appreciate the whole system of law are needed to assess the theme, purpose and effects of the particular challenged law in its living context. There are competing issues of classification and competing precedents, so that any type of law may be challenged at one time or another in our history. This all-round appreciation of the total legal system then is necessary background and competence for the proper disposition of any federal power-distribution issues that may come up. Such a constitutional issue cannot be separated from the nature and effect of the

14 See Jacques-Yvan Morin, *A Constitutional Court for Canada*, (1965) 43 Can. Bar Rev. 545-552.

15 For an excellent exposition of the interdependence of laws and issues, with particular reference to the inter-action of Civil Law and Common Law concepts in Quebec cases, *see* Gerald E. Le Dain, Q.C. "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level", la Revue Juridique Thémis (1967), University of Montreal, 107-126. Dean Le Dain makes a very convincing case for maintaining the general appellate jurisdiction of the Supreme Court of Canada, covering non-constitutional as well as constitutional cases.

statute the validity of which is being challenged. The plain implication here is that the more learned a judge is in all the main departments of the law—family law, criminal law, property law, commercial law and so on—the better qualified he is to decide wisely federal issues concerning the situs of the powers to pass these various types of laws.

It also follows that the best federal constitutional court is one that has a general as well as a constitutional appellate jurisdiction, because the appellate judges, in their non-constitutional cases, are ranging over many issues in all the principal departments of the total legal system. Thus they 'keep their hands in', so to speak, as reasonably expert and knowledgeable professional persons concerning all the main types of laws and current social problems. Moreover, as the French Civil Law obtains in many respects in Quebec and the English Common Law obtains in corresponding respects in the other Provinces, the judges of the Supreme Court of Canada have to educate one another in the essentials of these two systems, as often this will be necessary to full appreciation of the implications and merits of federal power-distribution decisions. The record of the Supreme Court of Canada is good in the field of English-French comparative jurisprudence.[16]

Nor should we think only of constitutional issues in the Supreme Court of Canada, as has already been mentioned. If the constitution belongs to the people, then the citizen with a reason to do so is entitled to raise a constitutional issue of invalidity, to avoid the application of a law to himself, in any court of original jurisdiction in the land. Provincial courts of original jurisdiction and Provincial courts of appeal will frequently have to rule on such issues. At times the litigants will be satisfied with the answers they get in the Provincial courts, particularly in a Provincial court of appeal. Or, if they are not, the Supreme Court of Canada will have the assistance of the judgments in the lower courts. Also, if the suggestions made later in this essay are followed, the Supreme Court of Canada would be able to refuse to hear a further appeal to itself, if the disposition of the case in the Provincial court of appeal is deemed satisfactory by the Supreme Court of Canada judges who hear an application for leave to appeal. The Supreme Court of Canada is at present seriously over-loaded with work, and, as we shall see presently, there is a grave need for better screening of cases on appeal so that only those of true national importance are permitted to engage the attention of the final tribunal.

Let us now consider this and certain other changes in the composition, status and jurisdiction of the Supreme Court of Canada that would better enable the Court to discharge its vital functions in our society. First I list these proposed changes briefly and then discuss them in some detail in the order given.

(a) The number of judges might be modestly increased, to improve the national character of the Court and its capacity to function in panels for its non-constitutional cases.

(b) The device of the official nominating commission might be used to suggest names of suitable prospective judicial appointees to the Federal Government. The Provinces could be represented on

[16] *Supra*, n. 15.

these nominating commissions and thus have some influence in the selection of judges for the Supreme Court of Canada.

(c) The essential provisions concerning the structure and powers of the Supreme Court of Canada should be specially entrenched in the Constitution, thus avoiding even the appearance of the possibility of any undue influence by the Federal Government or Federal Parliament on the Court.

(d) The rules governing appeals to the Supreme Court of Canada should be changed so as to limit the total work-load of the Court to cases, both constitutional and non-constitutional, that raise issues of true national importance, the Supreme Court judges themselves having the last word on whether a nationally significant issue of this character is involved.

The questions of a modest increase in the number of Supreme Court judges and the use of official nominating commissions may be considered together. At present, the requirement that three of the nine judges should come from Quebec is statutory, but it is also just about as firmly established by convention that, of the remaining six, three should come from Ontario, one from the four Atlantic Provinces and two from the four Western Provinces. I believe the principal defect here to be the under-representation of the Atlantic region and the Western region. I would increase the Court to a total strength of eleven, giving an additional judge to the Atlantic region and the Western region. The result would then be as follows:

Atlantic Provinces	2
Quebec	3
Ontario	3
Western Provinces	3
	11

In this event, the quorum for a federal constitutional case could be nine of the eleven (instead of seven of the nine at present). Thus a collegiate approach of the court to federal power-distribution issues would be preserved. Non-constitutional cases could be dealt with by smaller panels, and the presence of more judges would facilitate this. Civil Law judges could be appointed ad hoc, as needed, from the superior courts of Quebec to ensure a majority of judges trained in the French Civil Law for non-constitutional cases from Quebec. In a panel of five, three or four could be Civil Law judges, or in a panel of seven, five could be Civil Law judges.

In any event, appropriate regional quotas for the membership of the Supreme Court of Canada might as well be expressed in the Constitution, as they seem to be permanent and necessary features of the structure of the Court. In this respect, though, it is important to remember a point emphasized by the Federal Government in its White Paper of February, 1969, entitled "The Constitution and the People of Canada". They stress that the Court must exercise a truly judicial and not merely an arbitral function.[17] The soundness of this statement deserves a rather full explanation. The judges of the Supreme Court are

17 *Supra*, n. 9 at 42.

there to respond as men of learning, moral sensitivity and social knowledge to the legal issues and related social problems of Canada as a federal country. They are not on the Court as representatives or delegates. Rather they are there as highly placed official persons enjoying secure and permanent tenure in office, so that they need respond only to the call of reason and conscience.[18]

But, if this is so, why the regional quotas just suggested? The quotas are necessary and proper because Canada is a vast country differing in some critical ways region by region. There are common factors, but there are unique ones too. If we ensure that the judges are drawn from the various regions as indicated, we ensure that there is available within the Court collective experience and background knowledge of all parts of Canada. In judicial conferences and other contacts within the Court membership, the judges are able to inform and educate one another on essential facts and background from their respective parts of Canada. This is the vital factor of relevant native judicially-noticed knowledge that, as mentioned earlier, was missing in the judges of the Judicial Committee of the Privy Council. Here then is the rationale of regional quotas for the membership of the Supreme Court of Canada, and to observe the quotas *for this reason* does not turn the Court into an arbitral body of special pleaders or a miniature national parliament. The professional qualifications of the judges and their independence on the basis of secure tenure for life (or until age 75) means that they will behave judicially, and not as special pleaders or delegates, though they are systematically chosen from different parts of Canada. On this footing—the need for judicial notice of conditions in all parts of the country—it becomes obvious that the present Supreme Court of Canada has too few judges from the Atlantic Provinces and the Western Provinces; it has enough from each of Ontario and Quebec.

The Federal Government proposes to leave the membership of the Supreme Court at nine, with the regional quotas presumably remaining as they are. It also proposes to change the method of appointment so as to give the Provinces a share in the process of selecting Supreme Court judges. In the White Paper previously mentioned, this proposal is put as follows:[19]

> In considering the manner of selection of the members of the Court, the Government of Canada has been concerned that this body must exercise a judicial, not an arbitral, function. Judges should not be regarded as representatives of several different governments which could conceivably be allowed to appoint them. For this reason, a single system of appointment is to be preferred. It is recognized, however, that to ensure continued confidence in the Court it would be preferable that there be some form of participation on behalf of the provinces in the appointing process. It is therefore proposed that nominations of potential appointees be submitted by the federal government to the Senate for approval. If the proposals for the revision of the Senate are adopted, provincial viewpoints could be effectively expressed by this means. This system would not, of course, apply to those who were already members of the Court at such time as it might be reconstituted under the Constitution and with a new system of appointment.

The merit of this proposal, if any, depends entirely on what Senate reform would amount to, and that remains very obscure. Unfortunately

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18 *See generally* on this subject: W. R. Lederman, *The Independence of the Judiciary*, (1956) 34 Can. Bar Rev. 769 and 1139.

19 *Supra*, n. 9 at 42.

the Canadian Senate has been and is the least successful of our governmental bodies. The main difficulty is that the Senators are appointed for life (or until age 75) by the Government of the day, and Governments have invariably used these appointments to reward faithful adherents of their own political party. The result has been a mediocre second chamber for the Federal Parliament that enjoys a poor reputation in the country, and on the whole it deserves this reputation, in spite of the best efforts of a small minority of able and dedicated Senators who, from time to time, do useful things. The only change the Federal Government is presently proposing for the Canadian Senate is to arrange that the Provincial Governments should appoint some of the Senators.[20] This could well mean that the new Senate would be more partisan and mediocre than is the present Senate. The necessity for ratification of judicial apointments by such a Senate could discourage good prospective candidates, even among adherents of the party in power, from coming forward.

This idea of Senate ratification seems to have been borrowed from the United States. There the federal judiciary, including the judges of the Supreme Court of the United States, are appointed by the President for life, subject to ratification by the Senate. The results of this in the United States have been of quite dubious merit, in spite of the fact that the United States Senate is an elected body of great prestige. The problem in the United States, as in Canada, is to seek out and appoint the best qualified persons as judges, regardless of political party affiliation. This may be done through the device of the official, non-partisan *nominating* commission. Partisan *ratification* requirements simply miss the whole point of what needs to be done.

I agree with what was said on this subject by Mr. Glenn R. Winters, Executive Director of the American Judicature Society, speaking in 1966 to the Association of Canadian Law Teachers.
He said:[21]

> A governor is a political officer, and he gets to be governor by playing the game of politics and winning. The same is true of our national president. It is too much to expect of any human being in that position that he will always be able to resist the pressures of politics and keep his judicial appointments non-political.
> Statistics confirm what is common knowledge—that all federal judicial appointments are strongly influenced by partisan politics and in too many instances this results in appointments that are poor or mediocre. The highest percentage of appointments from the opposite party by any president has been eight per cent, and it has been as low as one or two percent.
> A sincere effort has been made over the past 15 or more years by the American Bar Association to make available the professional opinion of knowledgeable lawyers on the qualifications of candidates and to urge the appointment only of those who meet its standards. A great deal of good has been done on this by a very devoted and dedicated ABA committee, and I think there is no doubt that the federal judiciary today is of substantially higher quality than it would have been if the committee had not been at work. It is not, however, a complete or fully satisfactory answer to the problem, for several reasons. The judgment of the lawyers is not infallible, and their weakness is to place too great a value on legal proficiency, to favor what we speak of as the lawyers' lawyer. The bar committee has never affirmatively submitted names, but has limited itself to passing on names submitted to it, and this is undoubtedly right, for it would be too much power to put in the hands of a non-governmental agency if the bar were given the job of nominating the judges. In fact, some people

20 *Supra*, n. 9.
21 *American Appointments, Proposals and Problems*, (1967) 1 Canadian Legal Studies, 252 at 253-4.

feel that the present situation is going too far, in which a small, widely scattered committee which mostly depends upon the word of one of its members, has for most of the time and would like to have for all the time a virtual veto power over judicial appointments.

Albert Kales' answer to this was the judicial nominating commission—the real heart of the merit plan. I will take just a minute to list briefly the important features of the nominating commission as envisioned by Kales and as actually adopted in a dozen or more of the states:

1. It is a nominating rather than a confirming body, rendering affirmative assistance in going out and finding the right man rather than passively approving or disapproving of names submitted to it.
2. It contains lawyer members, in order that the vitally important viewpoint of the bar may have a voice in evaluating and choosing the nominees.
3. It contains at least one judge, in order that the interests of the bench itself may find appropriate expression.
4. It contains laymen, in order that technical legal qualifications may be kept in proper proportion to the equally or more important considerations of general education, integrity, and sensitivity to human problems.
5. The commission does not itself make the precise and final choice, but only makes a preliminary selection, leaving it to the governor or other appointing authority to make the final selection.
6. The governor is required to appoint from the commission's nominations, and may not accept them when they please him and disregard them when he feels like it.
7. In the membership of the commission, politics is minimized by making it either non-partisan or bi-partisan, and its nominations are non-partisan, with an effort to draw on the judicial talent of both parties.

It is desirable to learn from American experience and to adopt their procedures if and when they are better than our own. The American Senatorial ratification procedure has nothing to offer us by way of improvement, whereas the device of the judicial nominating commission has.

As applied to the Supreme Court of Canada, such commissions could improve the quality of judicial appointments and at the same time give the Provinces an effective part in the choice of judges. For instance, there might be a judicial nominating commission for each of the four Supreme Court quota regions mentioned earlier. Such a commission could be composed of both ex officio and appointed members, including ministers and senior officials of both the Federal and Provincial Governments, as well as the official provincial law societies, the judiciary and the lay public. Appointments of judges would still be made by the Governor General in Council (the Federal Government), but it would be mandatory for the appointees to be selected only from those persons listed as eligible by the appropriate judicial nominating commission. In these commissions, political party loyalties would be varied and would tend to cancel out, and some members would be genuinely non-partisan in this sense anyway. Such a commission would have no other rational way of proceeding except to seek to identify the persons in the region best qualified on the merits for high judicial office. This would continue the single system of appointment to the Supreme Court which the Federal Government is very properly concerned to preserve, but would at the same time give the Provinces an effective voice in the choice of the judges *and promote high quality appointments.* This is the way to improvement, both from the point of view of federalism and the quality of the judiciary. The sooner the proposals for ratification of judicial appointments by the Canadian Senate are completely abandoned and rejected, the better. They are both unwise and unfortunate.

This, however, is the only important respect in which I take strong exception to the Federal Government's proposals for reform concerning the Supreme Court of Canada. On the other points yet to be mentioned, the status of the court and its jurisdiction, I agree with the Federal proposals.

As to the status of the Court, the Federal proposals are in the following terms: [22]

> The first question that naturally arises relates to the means for providing the sructure of the Court. At prtsent the Constitution makes no provision for a Supreme Court other than to give to Parliament a power to establish one and to define its jurisdiction. The structure and jurisdiction of the Court are therefore provided by legislative act of the central government. The Government of Canada feels that it would now be more appropriate that the Constitution itself provide for the existence, the appointment and tenure of judges, and the major powers of the Supreme Court. This would be more consistent with the Court's role as the final interpreter of the Constitution of a federal state.

While it is now desirable to express the essential provisions concerning the structure and powers of the Supreme Court of Canada as superior constitutional law, it must be remembered that this would be a change in form and not in substance. The Supreme Court of Canada is truly independent now and always has been. Nevertheless, special entrenchment of its essential structure and powers in the Constitution would give it a better image in the eyes of those who do not understand, or who choose to ignore, the present truth about the substantial independence of the Court. I favour special entrenchment to the extent indicated in the Federal proposals for the sake of proper appearances, not because there is any truth in the allegations that the Supreme Court of Canada is now under undue influence by the Federal Government or Parliament or ever has been.

Finally, there is the problem of the total work-load of the Supreme Court of Canada, which is at present too great. The Federal White Paper deals with the problem of the total work-load only indirectly. It states.[23]

> If provision is to be made in the Constitution for the Court, it would also be necessary to consider how far its jurisdiction should be defined by that document. It is typical of several federal states that their final appellate tribunal has certain powers guaranteed to it by the Constitution, and the remainder are provided by enactment of the national legislature. We would propose a similar system for the Supreme Court of Canada. The Constitution could provide that the Court would enjoy ultimate appellate jurisdiction in any proceeding in which a constitutional issue is raised. This would preserve, free from legislative interference, the most essential function of a final court in a federal state—the power to review the validity of legislative or other acts of all governments. With this function preserved by the Constitution, the Court's other appellate and advisory jurisdiction could be defined by Parliament.

Except for federal power-distribution issues, this leaves open and unexamined many questions about what the rules for hearing appeals should actually be. At present a great many non-constitutional cases engage the time of the Supreme Court because they are appeals as of right under a variety of out-dated and illogical rules, rules that favour to an undue extent the hearing of property, commercial or taxation issues involving large sums of money for wealthy litigants who are not willing to accept the results of their days in court at the provincial

22 *Supra*, n. 9 at 40.
23 *Supra*, n. 9 at 42.

trial and appeal court levels. The position respecting appeals in criminal cases is not entirely satisfactory either. Professor Peter Russell has recently published an exhaustive and perceptive study of the jurisdiction of the Supreme Court which makes these and other points in very telling fashion.[24] He has illuminated an area for reform of the Supreme Court of Canada that has been hitherto much neglected. His main conclusion about the past is given in the following passage.[25]

> 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, [i.e. since 1949], 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.

Professor Russell recommends that most appeals reaching the Supreme Court of Canada should do so because a reasonable quorum of Supreme Court judges have given leave to appeal on the footing that a preliminary examination by them of the case shows that an issue of national importance is involved, an issue that has not been or cannot be satisfactorily settled in the lower courts. Where federal power-distribution issues are involved, as identified by the Supreme Court itself, the presumption would certainly be in favour of leave to appeal and perhaps the appeal would be a matter of right.

Professor Russell would be stricter in excluding appeals on non-constitutional issues arising under provincial laws than I would. The point made early in this essay about the all-pervasive nature of constitutional issues has real force also in non-constitutional cases. Federal and provincial laws interact and interpenetrate in many and complex ways within a single province. To take a simple example, a mortgage transaction involves provincial land law, but the federal laws governing interest and bills of exchange are also involved. The complete judicial settlement of a disputed mortgage transaction may require decisions on several points, some arising under provincial laws and some under federal laws. Moreover, this interaction and interpenetration is growing as the Federal Parliament and the Provincial Legislatures pass more and more statutes to meet modern social problems like consumer protection, pollution control and urban renewal. The point is valid for the areas of both private and public law. Because the Canadian Constitution provides us with a single system of courts with this comprehensive jurisdiction, it is much superior in this respect to the Constitution of the United States, with its separate systems of State and Federal courts. Canadians are thus saved the wasteful 'forum-shopping' that goes on in the United States between their two court systems.

At the apex of the single Canadian System is the Supreme Court of Canada. Obviously its jurisdiction should be as comprehensive respecting federal and provincial laws as is that of the lower courts, subject

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[24] Peter H. Russell, *The Jurisdiction of The Supreme Court of Canada: Present Policies and a Programme for Reform*, (1968) 6 Osgoode L.J. 1-38.
[25] *Supra*, n. 24 at 28.

to the screening of cases for their national importance as indicated. Speaking of power-distribution cases in the Supreme Court, the Government of Canada has said:[26] ". . . a body of integral jurisdiction would be more in keeping with our traditions and with a sound appreciation of how our law works in practice. Artificial divisions in the interpretative process would not assist in the sound development of constitutional law". I agree and would generalize the argument to include non-constitutional cases in our federal country as well.[27]

26 *Supra*, n. 9 at 40.
27 *Supra*, n. 15.