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Edward McWhinney

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THE POLITICAL IMPACT OF THE CANADIAN SUPREME COURT

*Edward McWhinney**

I. Canadian Judicial Nationalism

When I was in law school the Canadian Supreme Court was a subordinate, strictly intermediate judicial decision-making body. Canadians had not yet become, in juridical terms—and in the phrase later to become celebrated, in quite a different context by French-Canadian nationalists seeking politically to separate Québec from English-speaking Canada—"maître chez nous." The dominant theme in the writings of the Canadian legal *honoratiors* of that era¹—all of them English-speaking since the *renaissance* of French-Canadian legal and general social studies of the Québec "Quiet Revolution" epoch was still more than a decade ahead in the future—was the need to "emancipate" Canadian law in general and the Canadian Supreme Court in particular from their enslavement to the juridical authority of an "alien" tribunal, the Privy Council,² which sat in London as the then highest appellate tribunal of the British Colonial Empire and also of that self-governing British Commonwealth of Nations that had begun to succeed to the old Empire, with the progressive devolution of British Imperial authority in the era of self-determination ushered in by the Statute of Westminster of 1931.

The reasons for the strong juridical nationalism of the English-Canadian legal pundits of that era were partly to be found in more long-range and more general impulses in English-Canadian culture that were to come to a head in the 1960's and early 1970's in the various, not wholly rational, pressures in English-Canada of an economic nationalist character aimed at ridding Canadian commerce and industry of an allegedly "foreign" (read American) dominance. But the juridical nationalism of the late 1940's and early 1950's was also prompted by more immediate and more strictly scientific-legal factors: many of the jurists sponsoring the demands for abolition of the appeal existing from Canadian courts to the Privy Council as court of last resort were products of post-graduate scholarships in law at the prestige universities of the Northeastern United States where their predecessors had tended, almost uniformly, to be schooled in England in the English law faculties' more strictly English Common Law legal traditions.³ The shift in the 1930's and 1940's in the locus of post-graduate legal education for English-Canadian law teachers from England itself to the United States brought a corresponding shift in the special legal-institutional and legal-

* Professor of Law, Simon Fraser University.

1 For Max Weber's thesis that the character of a legal system is determined by special institutional or skill group, (whether priestly interpreters, judges, attorneys, or professors), who control it—the legal *honoratiors*—see M. WEBER, *LAW IN ECONOMY AND SOCIETY* (E. Shils transl., M. Rheinstein ed. 1954).

2 See, e.g., F.R. Scott, *The Consequences of the Privy Council Decisions*, 15 CAN. B. REV. 485, 494 (1937): "To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court [as the Privy Council] is merely silly." See also *The Privy Council as Final Appellate Tribunal for the Overseas Empire* in E. McWHINNEY, *JUDICIAL REVIEW* 49 *et seq.* (4th ed. 1969).

3 See generally *Legal Theory and Philosophy of Law in Canada*, in *CANADIAN JURISPRUDENCE: THE CIVIL LAW AND COMMON LAW IN CANADA* 10-12 (E. McWhinney ed. 1958).

instrumental biases and, ultimately, in the legal value preferences "received" by the graduate students concerned and carried back with them to their home country. The great "national" law schools of the United States of that era, under the influence of the teachings of the Legal Realists and of the Sociological Jurisprudence school, were all preaching the dynamic, creative, law-making role inherent in any Supreme Court exercising final appellate jurisdiction. As the working tools of any such judicial activism, these law schools uniformly commended a pragmatic, empirical, instrumental, judicial philosophy which led to a conscious and avowed form of judicial legislation; this transcended the original modest mandate to "legislate interstitially" adumbrated by Cardozo in his celebrated essay and led to what we today characterize as judicial policy-making.

However axiomatic such a conception of the judicial office may sound to North American students, it is not the only possible judicial approach nor even necessarily a judicial approach good for all seasons, in all countries, or in all circumstances. The important point in the present context is that *qua* judicial technique it was not, and had not been, the approach of the Privy Council. This put the Privy Council, in its role as final interpreter of Canadian law, on something of a collision course with Canadian legal commentators⁴ because of this basic difference as to legal techniques and over-all legal philosophy involved.

The political conflict was exacerbated further by a more general intellectual conflict. The American "national" law schools' faculties of the 1930's and 1940's, having been so largely availed of by President Franklin Roosevelt in building his "Brain Trust" and the supporting bureaucratic infra-structure, were imbued with a general "New Deal" political ethos, which, without any conscious attempt at indoctrination on the part of the professors concerned, tended to be absorbed by their students, including their foreign graduate students. In terms of constitutional law doctrine, the "New Deal" thinking postulated the need for a strong executive authority at the centre, and for corresponding attenuation of "States' Rights," local autonomy claims where these seemed to stand in the way of urgent community interventions in social and economic questions: in a word, a centripetally oriented Federalism that meant a marked accretion of law-making powers to the federal government at the expense of the member-states of the federal system. As noted earlier in regard to conceptions of the judicial office, this is not the only possible approach to federal government, nor even necessarily an approach to federalism good for all seasons, in all countries, or in all circumstances. Once again, however, the important thing for us is that it was not, and over the long haul had not been, the approach of the Privy Council to the Canadian Constitution. Perhaps that, more than anything, was the real reason for the ire on the part of the English-Canadian academic critics of the Privy Council⁵, for they were generally supporters of social democratic or social reform-

⁴ See, e.g., WHITNEY, *The Canadian Constitution Under the Impact of Judicial Review*, JUDICIAL REVIEW 61 *et seq.*, (4th ed. 1969); LASKIN, "Peace, Order and Good Government" *Re-examined*, 25 CAN. B. REV. 1054 (1947); LASKIN, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 CAN. B. REV. 1038 (1951).

⁵ See KENNEDY, *The British North America Act: Past and Future*, 15 CAN. B. REV. 393 (1937); KENNEDY, *THE CONSTITUTION OF CANADA* (2nd ed. 1938); KENNEDY, *The Interpretation of the British North America Act*, 8 C.A.M.B. L.J. 146 (1942); MacDonald, *The Canadian Constitution Seventy Years After*, 15 CAN. B. REV. 401 (1937); MacDonald, *The*

ist political programmes and took it for granted that these ideas could never expect legislative implementation from the generally right-of-centre Provincial (state) administrations within the Canadian federal system; but they would have to come to political fruition, perforce, through the central, federal government, especially strengthened for that purpose by beneficial judicial interpretation of its legislative competence under the Canadian federal constitution and corresponding judicial cutting down of the Provincial legislative competence which otherwise operated to define and limit the federal powers.

What we may here call the "conspiracy theory" of the Privy Council's historical role in the interpretation of the Canadian constitution rests on the argument that the Privy Council reached a result that "the historian knows to be untrue":⁶ That a constitution consciously intended by its drafters of the middle 1860's, after their direct observation of the stresses and strains in United States federalism immediately before and during the American Civil War of 1861-1865, to be highly centralized and to be endowed with a strong federal government was consistently and deliberately re-written by its Imperial (British) authoritative judicial interpreters to produce a federal system weighted in favour of the local Provincial governments at the expense of the federal government⁷ — a federal system that was dangerously weak in terms of its practical possibilities of responding to the urgent needs of nation-building for a new country spread over a vast, empty continent and facing such challenges of the two World Wars and the world economic depression of the late 1920's and early 1930's.

What does the empirical record of the Privy Council's work on the Canadian constitution establish? First, we have to separate and disengage, in accord with one of the basic tenets of the school of sociological jurisprudence, what the judges do from what they say they do. This is the difference, in essence, between the actual judicial decision of a case in terms of the concrete judicial preference or choice between the conflicting social interests present in the case, and the subsequent judicial rationalization of the policy selection so made in terms of the written judicial opinion or opinions filed in support of the decision. In the context of contemporary United States "policy-oriented" judicial decision-making, the gap between what the judges do and what they say they do may not, as a result of several generations of American Legal Realist teaching, be too great. In British and Commonwealth jurisprudence, however, and especially in that of its historically most authoritative tribunal, the Privy Council, the gap will normally be substantial, stemming from the long-sustained English judicial euphemism — what Judge Jerome Frank, in an American context, once called the Basic Myth — that judges never make law but simply apply it. The Privy Council developed this particular legislative self-denying ordinance on the part of the judges to a special level of political sophistication and literary elegance. Nevertheless, viewed in terms of what the judges do, as law-in-action, in terms of

Constitution in a Changing World, 26 CAN. B. REV. 21 (1948); Tuck, *Canada and the Judicial Committee of the Privy Council*, 4 U. TORONTO L.J. 33 (1941); Scott, *Centralisation and Decentralisation in Canadian Federalism*, 29 CAN. B. REV. 1095 (1951); Laskin, *supra* note 4.

6 Smith, 9 J. COMP. LEG. & INT. L. 160 (1927).

7 MacDonald, 26 CAN. B. REV. 21, 44 (1948).

particular resolutions of concrete interests-conflicts coming before them, the Privy Council clearly did make law as much or more than the United States Supreme Court over the same time period. The record is not as uniform or monolithic in terms of development and implementation of a particular socio-economic philosophy on the part of the judges as the Privy Council's critics might have us believe. There is sufficient change in the personnel of the Privy Council, and indeed in the composition of the professional elite from which its members stemmed, to ensure against any one rigid, unvarying line in the Privy Council's approach to the Canadian constitution over the years from the adoption of the constitution in 1867 to the final abolition of the appeal to the Privy Council from Canadian courts in 1949. We can discern quite clearly an early period of Privy Council interpretation,⁸ during the formative years of Canadian federalism from 1867 until 1896 when the Privy Council clearly responded to the imperatives of Canada's moving frontiers and the advance of the economic developers and the settlers across the continent to the Pacific Coast, in interpreting the grant of federal governmental powers under the constitutional charter beneficially, so as to authorize very broad assertions of federal law-making competence in the interests of nation-building. However, it is also clear that during the greater part of its period of legal hegemony *vis-à-vis* the Canadian constitution—from 1896 onwards, certainly, until World War II, with the exception of a very brief interlude in the early 1930's⁹—the Privy Council developed and applied a highly decentralized, pluralistic conception of the nature of Canadian federalism under which, as a practical consequence, the constitution was tilted very decisively in favour of local or regional policy-making under the rubric of Provincial rights. It is clear that this Provincial rights oriented, essentially centrifugal, interpretation was neither a necessary nor an inevitable judicial shaping of the development of the Canadian constitution over the half century or so in which it was dominant; but then again the preceding, *pre-1896*, federal government oriented, essentially centripetal, judicial interpretation had been, for its own part, neither necessary nor inevitable even if it could be convincingly demonstrated that it had been historically intended by the Founding Fathers who originally approved the constitutional charter of 1867, which is at least open to question. The more interesting question today is why this Imperial, London-based, Privy Council-administered restructuring of the Canadian federal system in favour of local autonomy and local policy-making occurred; the answers to the question are complex and manifold.

First, there is a simplistic explanation—in line with some explanations of the role of the “Old Court” in the interpretation of the United States Constitution between the Civil War and the Court Revolution of 1937—that essentially reactionary judges attempted to defeat the will of popular legislative majorities by consistently invalidating incipient social and economic planning legislation. There are, it is true, some fascinating parallels between the American political-

8 JUDICIAL REVIEW, *supra* note 4, at 64-67.

9 *Id.*

economic doctrine of "liberty of contract," as judicially implemented in the United States in the interstices of substantive due process under the 5th and 14th amendments, and the interdiction in Canada of essentially federal government-originating socio-economic planning initiatives through the technical legal instrument of a highly restrictive judicial interpretation of federal government legislative powers under the Canadian constitution.

The more basic explanations for the particular historical twist given to the judicial interpretation of the Canadian constitution seem to be elsewhere. It was Canada's fortune, for better or for worse, that under the relatively casual system employed by the British Lord Chancellor in composing, *ad hoc*, the special *benches* of judges of the Privy Council to hear cases arising under the Canadian constitution, two very remarkable judicial intellectuals tended to recur and, through their very repetition and the weight of their own personalities, to dominate the Privy Council's work in regard to Canada; they were the Scottish Law Lord, Lord Watson, and his intellectual disciple and protege, Lord Haldane. Watson, a lawyer's lawyer, is the historically earlier and more remote figure; and since he did not stray into political life, his general philosophy must be discerned largely from his judicial opinions and from his associations with Haldane. Haldane, by comparison, had parallel brilliant political and legal careers and so his general intellectual formation and attitudes are a matter of public record: he had been a student of philosophy in both Scotland and Germany where he was strongly influenced by neo-Kantian teachings, and he had later been Asquith's reform-minded Minister of War and, as such, the founder of the modern British Army celebrated in Haldane's own brilliant maxim that he would create "an Hegelian Army." The fortuitous conjunction of Scottish philosophical pluralism as developed by Figgis and his associates and German neo-Kantian idealism was certainly favourable to the application in constitutional doctrine of liberal pluralist conceptions of government and to a conscious favouring of local autonomy and determination of community policy by the constituent units of a federal system rather than by any all-powerful and all-pervasive central authority. To this we may add the generally tolerant and gracious Imperial governmental attitudes of the mellow, golden years of an Empire at its apogee just before its final decline—attitudes shared as much or more by the judicial agents and instruments of Empire as by its military and administrative pro-consuls overseas—that accepted a politically magnanimous attitude in all official dealings with minority racial and religious groups within what was, after all, a multi-national Imperial state. In the case of the two Boer (Dutch) farmer-republics that had been militarily defeated in the hardly morally defensible South African War of 1899-1902 and then summarily incorporated into the British Colonial Empire, the politically enlightened liberalism of latter-day British Imperialism required an almost immediate return of self-government and thus majority, Boer, rule in a united British South Africa. In the case of Canada at the end of the 19th century and the early years of the 20th century, it meant full respect for the spirit of the Québec military capitulations of 1759; for the Treaty of Paris of 1763 whereby France ceded French Québec to Britain; and for the Québec Act of 1774. The sum of all these 18th century British Imperial undertakings and

understandings was the guarantee of the special position of French-Canadians—their language and culture, their civil law, and their religion—within the new united British realm in Canada. For the Privy Council expressly to recognize, through the Watson and Haldane opinions, the claim of Provincial right and thus of Québec Rights, was to act with proper deference to and respect for historically long-sanctioned constitutional principles—what we might call the ground rules (*grundnorm*) of Canadian political society from its first creation. The subsequent departure from this bi-national or bi-cultural *grundnorm* during Sankey's brief Lord Chancellorship under the second Labour Government in the early 1930's and then again in the late 1940's as the appeal from Canadian courts to the Privy Council was on the verge of abolition by the Canadian Parliament represents, rather, a divergent or aberrant judicial interpretation, in response to other countervailing political and economic exigencies that were thought to base a new, centripetal, centralist imperative.

II. Influence of Privy Council

The Canadian Supreme Court, for so long a purely subordinate, intermediate tribunal and then, after the legislative changes of 1949, the final appellate tribunal for Canada in place of the Privy Council, is governed as to its basic jurisdiction and internal organization and practice by its historical inheritance from the Privy Council; these elements set it aside from other non-British tribunals. The Privy Council, as the highest appellate tribunal of the old British Empire, heard all appeals without any restriction as to subject matter, transcending the conventional specialist divisions as to subject matter. The Canadian Supreme Court, as final appellate tribunal for Canada, is in no sense a special constitutional court on the model, for example, of the West German *Bundesverfassungsgericht*.¹⁰ Its jurisdiction certainly includes constitutional law, but it also comprises all the other branches of public law, and all of the private law, with the added complication, in the case of the private law, that this means both the "received" English Common Law of the nine English-speaking provinces of Canada and the French *droit civil* of the Civil Code of the Province of Québec. It is thus, perforce, a generalist and not a specialist court, with all the strains of general, comprehensive, or all-embracing, professional knowledge, as distinct from specialist expertise, that that implies on the part of its member-judges. This immensely complicates the judicial appointing-process, assuming that the question of the search for judges whose intellectual qualifications correspond to the court's jurisdictional needs is to be a rational, scientific exercise.

Again, as successor to the Privy Council, the Canadian Supreme Court inherits some part at least of the Privy Council's governing principles as to working operation—in particular those going to its collegiality and to its basic political anonymity. The Privy Council, until the very last few years when, almost as an

10 Discussed more fully in McWHINNEY, *COMPARATIVE FEDERALISM, STATES' RIGHTS AND NATIONAL POWER* 21 *et seq.* (2nd ed. 1965).

absent-minded political afterthought, its ground rules were changed after its erstwhile Imperial jurisdiction had, for all practical purposes, disappeared, always functioned as a collectivity: its panels, normally composed of seven judges, operated as a team, rendering its judgment in any case with a single opinion prepared by one judge as, in effect, *rapporteur* for the whole group, and without any separate, concurring, or dissenting opinions and without indeed any indication of dissonance or division within the court in arriving at the final decision in the case: for the record, at least, the Privy Council was always unanimous in its decisions and always agreed on its reasons in support of its decisions. While the high political character of the normal presiding officer of the Privy Council—the Lord Chancellor, who was, *ex officio*, a member of the British Cabinet of the day, and always selected, as such, from among the professional legal dignitaries of the reigning government political party—was always clear, the Lord Chancellor would be, himself, remote from the day-by-day party political conflicts of the individual Empire countries on whose legal controversies he would be ruling, and the individual judges sitting with him in any case would be strictly professional lawyers recruited from outside political life and quite unknown to the general public, whether British or colonial.

The Canadian Supreme Court has never seemed to possess either the strong internal organisational leadership given by its presiding officer, the Chief Justice, or the individual self-discipline on the part of its individual judges to maintain the external cohesiveness and unity that were so characteristic of the Privy Council in its heyday. The Canadian Supreme Court does not limit itself to a single opinion per case unless its members happen both to be unanimous and also to choose to restrict themselves to a single opinion through reasons of prudence or sheer inertia. Its members do exercise the right to dissent, and to file separate opinions, whether specially concurring or dissenting opinions; and sometimes they seem to do this a little too frequently or too loosely without the needs or the importance of the case involved necessarily seeming to warrant that. Nevertheless, the Canadian Supreme Court has so far managed to avoid the noisy public quarrels and the consequent newspaper headlines and political attention and pressures accompanying the United States Supreme Court. For all practical purposes, even if it be neither so collegial nor so anonymous as the Privy Council, it has still been up to date a largely grey and silent tribunal whose members are unknown to the public at large or even to most political decision-makers. It is certainly not a Byzantine court on the pattern of the U.S. Supreme Court since the Court Revolution of 1937.

There is one further important fact that differentiates the Canadian Supreme Court both from the U.S. Supreme Court and also from the recent crop of Continental European special constitutional courts and that lies in the process and practice of appointment of judges to the Court. Although it is, by definition, a *federal* Supreme Court—the final appellate tribunal for all matters of Canadian law—the central, federal government of Canada exercises a complete monopoly of the appointing power as to judges—a monopoly that is largely uncontrolled as to the actual exercise of the federal government's political judgment in that area either in terms of the constitutional law as written or the constitutional

practice. There is, here, none of the sophisticated, federal institutional arrangements and constitutional checks and balances, designed to ensure an infusion of local, regional political thinking and preferences, such as one sees in the case of the indirect, parliamentary elections-based, appointing process for the West German *Bundesverfassungsgericht*. One misses, also, both the indirect intrusion of local and state political interests and also the sustained public canvassing and probing of professional qualifications and intellectual capacity of nominees to federal judicial office found in the express U.S. constitutional requirement of Senate majority confirmation of any presidential nominees to the federal Supreme Court. There is, it is true, a statutory requirement that one-third of the Canadian Supreme Court (three judges out of nine, now) must come from the Province of Québec, a statutory requirement that is related to the fact of the Canadian Supreme Court's having a mixed (private law as well as public law) jurisdiction, with the Québec private law being French civil law and not English Common Law; and there is a concomitant unwritten constitutional custom (designed to balance traditional Québec-Ontario political rivalry) that three of the remaining six judges should come from Ontario; the remaining three judges are appropriately dispersed and chosen from the other main regions of the country (the economically depressed Atlantic Provinces, the prairie Western Provinces, and the Far West). Beyond this, there is nothing to stop the federal government from using Supreme Court appointment as, for example, a political sinecure for defeated or unwanted federal Cabinet Ministers drawn from the reigning federal government party; or indeed, in principle, nothing to stop the federal Prime Minister of the day from being Caligula and appointing his horse as Consul. Though the Canadian Supreme Court has historically been free from too many instances of outrightly cynical political appointments of this nature, the reigning federal government's supporters do tend to recur with a predictable degree of regularity in the judicial appointments actually made though they will usually also be persons of professional competence or standing. There is little, however, to promote any great feeling of enthusiasm at the present day on the part of the member-Provinces of the Canadian federal system for having their own increasing number of great political-economic conflicts with the central, federal government turned over to the federal Supreme Court for political arbitrament. The Provincial political leaders, including, perhaps most of all, French-Canadian political leaders from Québec, tend in fact to look back now with some nostalgia to the (Imperial) Privy Council's final appellate jurisdiction in relation to the Canadian constitution, finding there a respect for the principle of local policy-making or ethnic-cultural self-determination that they do not expect from the wholly Canadian final appellate tribunal. Perhaps, for these reasons in part, but I think principally because of its more modest and restrained, inherited British judicial conceptions of the permissible political limits of judicial legislation or judicially based policy-making, the Canadian Supreme Court has shown an increasing tendency to judicial self-restraint, and, in any case, to be in no great hurry to ape the United States Supreme Court's confidently asserted policy-making role with which, of course, it has some at least hearsay acquaintance; or even to assume the quieter legislative posture

of, say, the West German *Bundesverfassungsgericht* with which, of course, it is certainly not acquainted.

III. Future of Canadian Supreme Court

The discussion and projection of the future role of the Canadian Supreme Court in comparison to the U.S. Supreme Court or to Continental European analogues must take into account future federal government responses in Canada to the pressures for general constitutional change so far as they bear, in particular, upon the federal court system and jurisdiction. The rise of French-Canadian political nationalism in Canada, culminating in the "Quiet Revolution" in Québec in the early 1960's, was accompanied by some quite specific constitutional-institutional reform proposals from French-Canadian political leaders. These were designed in part to give federal institutions, including the federal courts, a more truly "representative" character that would more nearly reflect the special bi-national or bi-cultural character of Canadian federalism. Under the rubric of such general constitutional conceptions as "Associate State" status or "special constitutional status" or even "particular constitutional status" for Québec, proposals were advanced that would in very concrete constitutional-institutional ways alter the existing *post*-World War II centralist orientation of the Canadian federal system in favour of the Provinces in general if a consensus of all, or at least the main Provinces should emerge on this point, but certainly in favour of Québec if the nine English-speaking provinces should not choose to move in the same general direction. Among the institutional reform proposals advanced at that time were suggestions that the federal Senate—at present a purely nominee body appointed by the federal government at its unfettered discretion and, according to essentially unbroken practice in modern times, appointed at a fairly low level of party political patronage—be converted into a States' Rights house probably along the lines of the West German *Bundesrat*, but with the key difference for the future that its members would be nominated or elected by the Provinces and not, as now, appointed on wholly federal government initiative. In the area of the federal Supreme Court, the proposals for reform envisaged a Provincial participation in the appointing process for the judges, and preferably a Provincial right to make and control at least some of the judicial appointments: in the case of Québec. This would imply that the Québec Provincial government should participate in or control the choices of the judges, in place of the present federal government monopoly in both the law as written and in actual long-sustained constitutional practice.

The future of proposals such as these is obviously bound up in measure in larger questions of the future of Canadian federalism, going to the redefinition of its fundamental premises, or *grundnorm*, as the old Imperial British root for Canadian juridical authority recedes ever more into the distant historical past. If the American "melting pot" model of full assimilation, with corresponding loss of distinct cultural identity on the part of ethnic components, is to be avoided for Canada, as there seems now to be a general consensus that it should be, is the new *grundnorm* to be *bicultural* (French and English) or something more;

and if it is to be bicultural, what are to be the modalities of its institutional unfolding and concretisation in Canadian law?¹¹ Some limiting principles are available in this area to guide us in our present projection of the future role of the Canadian Supreme Court.

First, while the Canadian Supreme Court remains a wholly federally nominated and federally appointed institution, without any Provincial participation in either law or practice, in the recruitment of its members, it can hardly with political realism expect to assume an arbitral, determinative role as between the federal government and the Provinces in the great political *causes célèbres* of our age, exacerbated, as these have so often been in Canada, by the French-English bicultural question. Indeed, there is no evidence that the members of the Canadian Supreme Court presently aspire to becoming an American-style, policy-making, politically legislating tribunal, or that they even aspire to the more modest, federal umpire (*Hüter der Verfassung*) role of the *Bundesverfassungsgericht*. The one major instance in recent years where the Canadian Supreme Court has intruded in a great Federal-Provincial battle—the *Off-Shore Mineral Rights* reference of 1967¹²—is more an example of the extreme political dangers inherent in an Advisory Opinion jurisdiction for a Supreme Court than of any current desire on the part of the Court to “rush in where angels fear to tread.” As rendered, however, the Supreme Court’s Advisory Opinion of 1967 not merely failed to solve the political problem but undoubtedly exacerbated it in the immediate aftermath of the Court’s ruling by angering Provincial political leaders and encouraging the federal government to assume an air of constitutional self-righteousness. This led to rigidity and absolutism in the federal negotiating position and delayed the necessary processes of political compromise between the federal government and the Provinces. The *Off-Shore Mineral Rights* issue remains politically unresolved to this day; and the Court’s Advisory Opinion of 1967 remains, for its part, what Charles Evans Hughes, in a United States Supreme Court context, called one of the Court’s “great, self-inflicted wounds.” The Canadian Supreme Court, heeding the warning, perhaps, has not been tempted again to venture on such dangerous political terrain of its own initiative; and the federal government, for its part, has begun now to show a welcome degree of political self-restraint, or at least political prudence, by eschewing the more obvious, noisy, short-run, tactical political gains to be obtained by anticipated politically advantageous federal Supreme Court rulings, in favour of the quieter and certainly more arduous and demanding methods of political bargaining and give-and-take in federal-Provincial direct negotiations. The *locus* of federal problem-solving in the great Canadian political *causes célèbres* of our times thus seems to have shifted irrevocably from the courts to the formal

11 For an early discussion of the constitutional implications of French-English biculturalism in Canada, see the plea for “provincial autonomy” by the French-Canadian jurist, Pigeon, *The Meaning of Provincial Autonomy*, 29 CAN. B. REV. 1126 (1951). Most recently, see the ROYAL COMMISSION REPORT, *THE POSITION OF THE FRENCH LANGUAGE IN QUÉBEC* (Government of Québec, Québec), (3 vols. 1973), and in particular volume 2, *LANGUAGE RIGHTS*. See also McWhinney, *The New, Pluralistic Federalism in Canada*, [1967] REVUE JURIDIQUE THÉMIS 139; Morin, *A Constitutional Court for Canada*, 43 CAN. B. REV. 545 (1965).

12 *Reference re Off-Shore Mineral Rights* [1967] S.C.R. 792; examined in 1968 REVUE JURIDIQUE THÉMIS 278-80.

Dominion-Provincial Conferences—a distinctly Canadian contribution to federal constitutional institutions, whose use has expanded rapidly as its immense practical utility has become apparent to all parties.¹³ The shift from the notion of a judicial arena to a political negotiation arena for the major federal problem-solving of our times may perhaps displease some academic pundits who yearn for an American-style, ego-building, judicial legislative “trip”; but it accords very well with the rather more modest, British-style judicial self-restraint to which Canadian judges are more accustomed. It is also much more in line with Canadian political realities today—both the in-built institutional limitations on a federal tribunal that is wholly federally appointed seeking to interpose itself and its own preferred solutions in great federal-Provincial conflicts; and also the very real practical limitations (going to issues of degree and kind) to any court’s being tempted to take upon its own shoulders all the burdens of human salvation.

We are into a more general theoretical discussion, now, as to the nature and character of judicial decision-making. All legal interpretation is, in a technical sense, law-making, as Kelsen insisted in pointing to the dynamic character of the concretization of the legal norm.¹⁴ Yet while all judicial decision-making is in some measure “political,” as we would all in the post-Legal Realist era admit, some judicial decision-making is more patently “political” than others. The drawing of its own pragmatic line between permissible and impermissible “political” decision-making is clearly part of the arts of statecraft of any federal Supreme Court. The Canadian Supreme Court, for its part, is likely in the foreseeable future to try to limit its ventures in judicial legislation in degree and in kind—very much to what Cardozo identified and characterised as legislating “interstitially.” This may be a concept hard to define in advance in precise and rigid form, but its outer limits are at least clear; and most cases are likely, in the particular background community circumstances of their immediate origins, to fall rather definitely one side of the line or the other. In the Canadian context it will mean a very considerable area of public law available for judicial innovation or for imaginative judicial extension or reworking of old case-law precedents, particularly in the area of statutory construction (including the legislative Bill of Rights of 1960). There remains, also, the private law with the extra interest and intellectual richness provided in the case of Canada by the dual traditions of Common Law and (Québec) Civil Law. The complexities of this general, or more exactly multiple, jurisdiction are likely to lead the Canadian Supreme Court into some experimentation in the future with the Continental European multi-Senate system of organization of separate *bancs* within the Court itself that are specialized in terms of subject matter. It will also lead—as it has, indeed, begun to already—to a far greater element of discretionary control on the court’s part of its own work load as to quantity, certainly, but also as to intrinsic “quality” or importance. This will enable a more efficient and reflective performance of the court’s role, even on the somewhat restricted “legislative” basis already indi-

13 See MALLORY, *THE STRUCTURE OF CANADIAN GOVERNMENT* 386 (1971); SMILEY, *CANADA IN QUESTION* 25-26 (1972).

14 See the eloquent reminder on this point by Kelsen’s student, Leo Gross, in his *post-mortem* tribute, *Hans Kelsen, October 11, 1886-April 15, 1973*, 67 A.J.I.L. 491 (1973).

cated. This should lead, in turn, to some increase in Supreme Court membership from the present number of nine perhaps with some greater deference even than before to "regional" (geographical or ethnic-cultural) factors in the making of appointments to the court and also with some greater tendency to self-examination as to the intellectual and professional qualifications desirable in nominees to the court. Beyond the statutory stipulation that the members of the court must be attorneys (barristers or solicitors) of standing (which has not excluded politicians who have never actively practiced law), there is certainly very little in the way of scientific studies or comparative law researches in Canada to influence or limit the federal executive's at present largely unfettered discretion as to judicial nominations. This remains one of the more serious constitutional gaps, both for the present and also for the future.