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The Puzzle of Jurisdiction

*Richard C. Risk**

INTRODUCTION

This Paper is about nineteenth century decisions about Canadian court structure and jurisdiction that led to a tension between different visions of federalism. While these decisions tended toward unity, the dominant political and constitutional events of this period tended toward diversity. I shall seek to describe this tension and to explain its fate.

To give some perspective for my story, I offer a breathless survey of Canadian court structure and jurisdiction, on the assumption that Americans know little about Canada, and less about Canadian legal arcana. I begin in 1867, when four of the British colonies north of the United States were “federally united” by the British North America Act (B.N.A. Act).¹ Each of the provinces already had courts with comprehensive jurisdiction, and they were continued. For the next eight years, these provincial courts were the only courts in the new nation.

In 1875, the Dominion created two courts: the Supreme Court of Canada and the Exchequer Court. The Supreme Court was given comprehensive appellate jurisdiction, that is, appellate jurisdiction over subjects within both Dominion and provincial legislative jurisdiction.² The Exchequer Court was given original jurisdiction over some minor subjects within Dominion jurisdiction, especially its revenue and the Crown.

This structure continued substantially unaltered until 1971, almost a century later, when the Dominion made a major change by creating the Federal Court. This court, composed of trial and appeal divisions, was given the jurisdiction of the Exchequer Court and was given jurisdiction over more subjects, especially review of all administrative agencies within Dominion legislative jurisdiction.³ Because the Dominion’s power under the B.N.A. Act was to create courts for administering “the laws of Canada,” the creation of the court made a dual court system, where jurisdiction was separated by the division of legislative jurisdiction, leading to a significant increase in the complexities of litigation over jurisdiction.

* I wish to thank the colleagues and friends who read drafts of this paper, especially Gail Morrison, Kent Roach, Paul Romney, and Katherine Swinton. I wish also to thank my son, Jim Risk, who discovered Mills’s letter for me, showing me that this topic could be more interesting than I had imagined.

1. The British North America Act, 1867, 30 & 31 Vict., ch. 3 (U.K.).

2. The Supreme and Exchequer Court Act, Can. Stat., ch. 11, (1875) (Can.).

3. Federal Court Act, ch. 1, 1970-1972 S.C. 1 (Can.).F-7 (1985) (Can.).

CONFEDERATION

As I said at the outset, I shall explore the late nineteenth century, and again, I begin with Confederation. Although historians have debated Confederation at great length, only a few generalizations are needed. The major objectives were to make a defensive alignment against the United States, to enable expansion to the West, and to resolve a deadlock between the English and the French, who had been combined in the large province of Canada since 1841, and who were divided by Confederation between provinces of Ontario and Quebec. The aim was to create a powerful Dominion, especially for developing the economy, and, at the same time, to permit the provinces to determine their local affairs. In the division of powers, Section 91 gave the Dominion power to legislate for the “Peace, Order and good Government of Canada,” and it also detailed a set of more specific subjects, such as “[t]he Regulation of Trade and Commerce.”⁴ Section 92 gave the provinces powers over a set of specified local matters, especially a power over “Property and Civil Rights.”⁵ As well, section 58 gave the Dominion power to appoint the provincial lieutenant-governors, and Section 90 gave it power to disallow provincial legislation (the power Madison failed to establish in the United States).⁶

The B.N.A. Act contained relatively little about courts and jurisdiction. Section 129 continued the existing courts of the provinces (and the courts of provinces that later were admitted to the federation), and Section 92(14) gave the provinces power to create additional “Provincial Courts, both of Civil and Criminal Jurisdiction.”⁷ Section 96, however, gave the Dominion power to appoint the judges of the “Superior, District, and County Courts in each province.” Last, Section 101 gave the Dominion power to create “a General Court of Appeal for Canada, and . . . any additional Courts for the better Administration of the Laws of Canada.” In addition to these sparse provisions in the B.N.A. Act, an appeal could be taken from the provincial courts to the Judicial Committee of the Privy Council.⁸ Unlike the United States and Australian constitutions, the B.N.A. Act did not create any courts and did not contain any grant of judicial jurisdiction, except for the second branch of

4. The British North American Act, 1867, 30 & 31 Vict., ch. 3, § 91(2) (U.K.).

5. *Id.* at § 92(13).

6. Political practice has made disallowance a dead letter, but this fate must not obscure the expectation that it would be a robust power.

7. The Dominion had legislative jurisdiction over criminal law, “except the Constitution of Courts of Criminal Jurisdiction.” The British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91(27) (U.K.).

8. This appeal was not mentioned in the B.N.A. Act. It was a function of Canada’s colonial status, but it was not abolished until 1949—long after the status had vanished.

Section 101. The result has been that jurisdictions of the courts have depended largely upon the inherent jurisdictions of the provincial courts and upon statutes.

The decision to continue the existing courts was a step that must have seemed straightforward and sensible, if not inescapable, because they had existed for many decades⁹ and performed familiar and necessary functions. It is the decisions to continue their comprehensive original jurisdiction and not create Dominion courts that need to be explained, especially considering the objective of creating a strong Dominion. The explanation is that Dominion was given extensive control over the provincial courts through its power to create a general court of appeal and its power to appoint the provincial judges. This control was not only an alternative to creating Dominion courts; it also was control over the provincial domain. It was paralleled by the Dominion's powers to disallow provincial legislation and to appoint the provincial lieutenant governors, and together these powers tended toward unity and a federalism supervised by the Dominion.

Why was the general court of appeal left as a possibility, and not created at Confederation? The major reason probably was Quebec's fear that Dominion courts would threaten its civil-law system. In 1865, in a debate in the Canadian legislature about the proposals that were the basis of the B.N.A. Act, Joseph-Edouard Cauchon said that in such a court, Quebec's laws "would be explained by men who would not understand them and who would, involuntarily perhaps, graft English jurisprudence upon a French code of laws."¹⁰

Apart from expressions of this fear, little was said about a general court of appeal. In the same debate, Sir John A. Macdonald, one of the major architects of Confederation and a strong Dominion, expressed the belief that the "great principles" of the common law were the same in all common-law provinces. He may have believed or hoped that this uniformity would support his grand design of a unified Dominion and a national economy, even without the assistance of a comprehensive court of appeal.¹¹ This belief may have been reinforced by the existence of the appeal to the Privy Council.¹²

9. The courts of Quebec and Ontario were substantially restructured in the mid-nineteenth century, but this step did not significantly diminish the sense of continuity.

10. PARLIAMENTARY DEBATES UPON THE SUBJECT OF THE CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES 575 (1865) [hereinafter THE CONFEDERATION DEBATES].

11. *Id.* at 41. In the same speech, Macdonald spoke of the prospect of uniformity being achieved through § 94, which gave the Dominion power to legislate about property and civil rights in all the provinces. The terms of this power, though, required the consent of the provinces.

12. Contrary to what one might expect, there was no significant belief that a court was needed for judicial review, the power to determine the limits of the legislative powers. The availability of an appeal to the Privy Council does not explain the absence of this belief because an awareness of this appeal would not necessarily include an understanding of review. The novelty of judicial

THE STRUGGLE FOR PROVINCIAL RIGHTS

After Confederation, a struggle for power began between the Dominion and the provinces, especially Ontario, which has come to be known as the story of “provincial rights.” By 1900, the provinces were triumphant, and the outcome created one element of any tension: the tendency toward diversity.

Throughout most of the period, the Conservatives, led by Macdonald, held power in the Dominion, and Ontario was governed by the Liberals, led by Oliver Mowat, the Premier from 1871 to 1896. The reasons for their struggle have, like Confederation, been debated at great length. Some historians, perhaps most, argue that it was a product of political opportunism by the provinces and inconsistent with the agreement at Confederation. Others, understanding Confederation differently, see it as a continuation of a long tradition of local autonomy. Whatever the motivations, a wide range of issues were involved in this struggle, including the following: the financial terms of Confederation, the location of the boundary between Ontario and Manitoba, the nature of the provincial legislatures, the powers of the provincial executives, the use of the disallowance power, and the division of legislative powers. These issues were contested in newspapers, election platforms, legislatures, and courts, but I shall postpone an account of dates and the constitutional results.

EARLY THOUGHTS ABOUT A SUPREME COURT: 1869-1870

A few years after Confederation, in 1869, Macdonald introduced a bill in the Dominion Parliament to create a Supreme Court having substantial original jurisdiction and comprehensive appellate jurisdiction.¹³ The original jurisdiction was modelled on Article III of the United States Constitution, and included cases involving the Crown, diversity of citizenship, foreign states, and admiralty.¹⁴ It did not, however, include jurisdiction over all cases involving Dominion laws. Instead, it included only a small part—the Dominion revenue.¹⁵ The government allowed this bill, which seems to have

review also fails to explain its absence because the example of the United States was widely known. The most likely explanation, remembering the vision of a dominant Dominion, is that the powers of disallowance and appointment of provincial judges were perceived to be adequate, and, perhaps, even more efficient than judicial review.

13. The most accessible source for this bill is 5 CAN. L.J. 143 (1869).

14. The bill was drafted by Henry Strong, a lawyer in Toronto, soon to be appointed a Vice-Chancellor (by Macdonald) and later a member of the Court and its Chief Justice. His letters to Macdonald, see *infra* note 16 and accompanying text, show his use of the American model. For example, in one letter written on December 30, 1868, he regretted that the texts he had at hand did not tell him enough.

15. All of this original jurisdiction was exclusive, except the cases involving diversity of citizenship.

been a trial balloon, to lapse without discussion, and more than a hundred years passed before the creation of a Dominion court with substantial original jurisdiction—the Federal Court.

When Macdonald was considering this first bill, he solicited opinions from a wide range of judges and lawyers.¹⁶ Most of the responses were limited to questions and suggestions about the court's composition, convenience, and cost. For example, a suggestion was made that the court should be composed of members of provincial courts of appeal, perhaps the chief justices, and arguments were made that the original jurisdiction would weaken the provincial courts. Correspondents from Ontario and Quebec argued that the appeal would add another layer of delay and expense. However, in the Atlantic provinces, New Brunswick and Nova Scotia, which did not have their own courts of appeal, the court seemed to be a useful addition. As well, a couple of judges from Ontario asserted that the phrase "a General Court of Appeal for Canada" in Section 101 did not give power to establish an appeal for issues within provincial legislative jurisdiction.¹⁷

In the midst of this lack of discussion about the principles of federalism, one letter stands out; it was written by David Mills, a Liberal member of Parliament who probably was not among the lawyers and judges whom Macdonald asked for comments, but who offered his advice nonetheless. He claimed that the jurisdiction of Macdonald's court of appeal was "unwarranted by the provisions of the B.N.A. Act as it certainly is forbidden by the nature of our system of government."¹⁸ This claim was based on a powerful vision of federalism in which the provinces were "coordinate, not subordinate" and the government's responsibilities, functions, and powers were sharply divided between the Dominion and the provinces. This vision shaped his interpretation of Section 101: The term "general" denoted only an "extent of territory" to enable a court to make the law of the Dominion uniform throughout the country. In contrast, there was no reason

a law of Ontario must have the same construction as a similar law in New Brunswick. There is no reason for interpreting two such laws alike when they do not operate on the same community. The local legislature can

16. This correspondence is collected in Volume 159 of the Papers of Sir John A. Macdonald in the National Archives of Canada [hereinafter CORRESPONDENCE]. The file also contains some bills and drafts of bills, but they are not organized in any way that makes the relationship among them clear. Also, these documents are not numbered in any way that makes internal references useful.

17. William Richards and Adam Wilson both gave this opinion, and John Spragge can be read as suggesting the same conclusion. William Meredith, from Quebec, also agreed. Parts of the provisions for the original jurisdiction were pretty clearly *ultra vires*, but only Spragge made a clear comment about this problem.

18. CORRESPONDENCE, *supra* note 16.

amend the law if the construction of the provincial courts makes the law what they think the law ought not to be.¹⁹

This vision of federalism, which I shall call the “model of autonomy,” clearly was not the model of Confederation. However, it became the dominant vision of federalism by the mid-1880s, and it was the model of the provinces’ triumph. Because Mills is the first to articulate it in Canada, his education is important. After teaching school in southwestern Ontario, he went to law school at the University of Michigan where he studied under Thomas Cooley and recorded the model in his notes in 1862. Cooley’s text, which appeared in 1868, expressed the model more elegantly, and it also appeared in English writing in the same decade.²⁰

The distinctiveness of Mills’s letter is made dramatic by contrasting it to a letter from Oliver Mowat, who protested against giving the court its original jurisdiction. He claimed that it would be inconvenient to permit cases to be taken out of provincial courts whenever constitutional issues were raised. More importantly, he argued that the jurisdiction was unnecessary because the Dominion already had adequate control through disallowance and the appointment of provincial judges and lieutenant governors. During the 1880s, Mowat fought fiercely against this control, and his argument here demonstrates a sensitivity to provincial independence. His fear might, though, have been better directed to the appellate jurisdiction, for jurisdiction over matters within the Dominion’s jurisdiction could hardly be equated with control over the provinces. Throughout, Mowat seemed confused, and his analysis did not seem to be founded on any rigorous, comprehensive theory of federalism. I do not mean to give Mowat low marks as a political philosopher, for he was not one and never pretended to be. Instead, my argument is much more modest. It is that around 1870 the model of autonomy, the model that was to become dominant in the 1880s, was not firmly in the minds of even the leaders of the provincial rights movement.²¹

19. *Id.*

20. There has been little written about Mills, much less than he deserves. There is no biography on him, except for a short note in XI DICTIONARY OF CANADIAN BIOGRAPHY (1993), and a thesis, D. McMurchy, David Mills: Nineteenth Century Canadian Liberal (1969) (unpublished, Ph.D. Thesis, University of Rochester). The best account of his constitutional thought is in ROBERT C. VIPOND, LIBERTY AND COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF THE CONSTITUTION (1991). His notes are in his papers at the Regional Collection of the Weldon Library, University of Western Ontario. Cooley’s text was a TREATISE ON THE CONSTITUTIONAL LIMITATIONS: WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (8th ed. 1927); the English text is EDWARD A. FREEMAN, HISTORY OF FEDERAL GOVERNMENT IN GREECE AND ITALY 1-4 (1863).

21. Mowat was at this time a judge, but his position does not seem to have restrained him. A few years before, he had been a politician and a member of a government headed by Sir John A. Macdonald in the Province of Canada, and he did not return to politics for another two years.

A year later, Macdonald's government introduced another bill to create a Supreme Court that repeated the appellate jurisdiction but drastically reduced its original jurisdiction—only the Dominion's revenues remained.²² This bill also perished with no significant debate, and the topic disappeared for five years. Many years later, Macdonald asserted that it was sensitivity to the concerns of Quebec that had caused him not to proceed.²³

THE CREATION OF THE SUPREME COURT: 1875

The Liberals won the Dominion general election in 1873 and held power until 1878, the only period between Confederation and 1896 in which the Conservatives did not form the government. In 1875, the Minister of Justice, Telesphore Fournier, proposed a Supreme Court having comprehensive appellate jurisdiction and an exchequer court having original jurisdiction over Dominion revenue and the Crown. He said little to justify his proposal except that the Dominion should have "an institution of its own in order to secure the due execution of its laws" and not be "at the mercy of the tribunals of the provinces," a justification that did not encompass appeals from subjects within provincial jurisdiction. He was warmly supported by Macdonald, who was concerned only about Fournier's cheerful prediction that appeals to the Privy Council would disappear.²⁴ After a debate that took much of four days, the bill was enacted, and the court was created.²⁵

He made two other interesting comments in this letter. First, he said, "I had, as you know, given the subject some thought while I was a member of the government, and the views I am about to express were in substance formed then." See CORRESPONDENCE, *supra* note 16. This reference could only have been to being a member of Macdonald's government, but there is no record of these considerations. Second, he suggested strongly that permitting constitutional issues to be raised in private litigation was inefficient and that challenges should be restricted to the Dominion government and the provinces. *Id.*

Two other letters illuminate the Mowat letter, one by Adam Crooks, one of Mowat's principal lieutenants, and the other by Spragge. Neither of them protested against the appellate jurisdiction; Crooks limited himself to technical suggestions, and Spragge proposed a different composition for the court. *Id.* A few years later, Spragge made one of the first judicial statements of the model of autonomy, as a member of the Ontario Court of Appeal in *Hodge v. The Queen*, 7 O.A.R. 246 (1882), *aff'd*, 9 App. Cas. 117 (P.C. 1883).

22. The most accessible source for this bill is 6 CAN. L.J. 201 (1870).

23. H.C., *Debates*, at 239-40 (26 February 1880); *id.* at 1302 (9 March 1881).

24. H.C., *Debates*, at 288-89 (22 February 1875). Fournier later referred to the provinces as "subordinate." *Id.* at 753 (16 March 1875).

25. Since the legal journals took very little notice of the court's creation, the debates in Parliament are the best source of ideas and discussion. There is a small collection of secondary writing, but much of it emphasizes the fuss about appeals to the Privy Council. Representative items include: P. RUSSELL, *THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION* (1969); JAMES G. SNELL AND FREDERICK VAUGHAN, *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION* at 1-12 (1985); Michael Herman, *The*

For most of the debate, the principle of having a Supreme Court, especially one to determine constitutional issues, was accepted. The dominant issue was the one Mills had posed in 1869: whether the court should hear appeals involving subjects within the jurisdiction of the provinces. A preliminary question was whether Section 101 gave the Dominion power to create such a court. Mills and Henri Taschereau argued that it did not. Taschereau claimed that the Civil Code of Quebec was not part of the “laws of Canada,” and that the provincial jurisdiction given by Section 92(13) over “Property and Civil Rights” excluded the comprehensive jurisdiction. Mills argued the word “Canada,” used three times in the section, had a constant meaning. In reply, Fournier relied on the word “notwithstanding,” and much more effectively, on the discussions and drafts that preceded Confederation (which would have been inadmissible in court) and the juxtaposition of “General Court of Appeal for Canada” with “additional Courts for the better Administration of the Laws of Canada.”²⁶ This issue reappeared a few times over the next few years, and then it disappeared. Eventually, the Supreme Court and the Privy Council both held, without any careful analysis, that the power did exist.²⁷

Apart from this question of interpretation, the dominant arguments against giving jurisdiction over provincial matters to the court were that Quebec’s distinctive laws, especially its Civil Code, should be protected. Taschereau, supported by Joseph Mousseau and Joseph Ouimet, made arguments that would be made again and again during the next few years. The jurisdiction was a “grave danger” to Quebec. It was inconsistent with the spirit and terms of Confederation, because they guaranteed Quebec protection and gave the provinces jurisdiction over property and civil rights. Moreover, the court would contain, at best, only two judges from Quebec, and the remainder of the court, all common-law lawyers, would be ignorant of the Code and its ways of reasoning. Although an appeal could be taken to the Privy Council, this was no justification for adding one more danger.²⁸

Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council, 8 OTTAWA L. REV. 7 (1976); F. MacKinnon, *The Establishment of the Supreme Court of Canada*, 27 CAN. HIST. REV. 258 (1946); F.H. Underhill, *Edward Blake, The Supreme Court Act, and the Appeal to the Privy Council*, 19 CAN. HIST. REV. 245 (1938).

26. The British North American Act, 1867, 30 & 31 Vict., ch. 3, § 101 (U.K.). Fournier was also supported by A.L. Palmer and by Thomas Moss, who dwelt on the word “general,” saying little at great length. Mills also dealt with this question, although not as well as in his letter to Macdonald. H.C., *Debates*, at 738, 741, 746, 753 (16 March 1875); *id.* at 926 (25 March 1875).

27. *See* *Crown Grain Co. v. Day*, [1908] App. Cas. 504 (P.C.) (Can.); *Union Colliery Co. v. Attorney-General of British Columbia*, 27 S.C.R. 637 (1875); *Clarkson v. Ryan*, 17 S.C.R. 251 (1890).

28. H.C., *Debates*, at 738 (25 March 1875); *id.* at 923 (26 March 1875); *id.* at 939 (27 March 1875). Mousseau added the argument that the Dominion’s power to appoint provincial

Mills was the only speaker from a common-law province to oppose the bill, and he made the same argument that he had made in his letter to Macdonald. The bill was opposed to the fundamental principles of federalism. Saying that he had been accused of being influenced too much by American writing, he invoked E.A. Freeman, an English historian, as an authority for these principles, particularly the division of the government's functions and the autonomy of the Dominion and the provinces. Uniformity in matters of general concern was necessary, but diversity must be permitted for matters of local concern. Again, there was no reason why New Brunswick should manage its affairs in the same way as Ontario did.²⁹ A few members from Ontario made brief responses about the values of uniformity, and they confused uniformity among subjects within provincial jurisdiction with uniformity of decisions about the limits of jurisdiction.

Two motions, one to reject the bill entirely because it interfered with provincial rights, especially Quebec's rights, and another to exclude appeals from provincial jurisdiction, failed by wide margins, but a motion passed requiring that two of the six justices be from Quebec. Near the end of the fourth day, Aemelius Irving, a Liberal back-bencher from Ontario, proposed abolishing appeals to the Privy Council. This proposal began a different story, one that has tended to dominate discussions of the court's creation.³⁰

DEBATES ABOUT THE JURISDICTION OF THE SUPREME COURT: 1879-1895

For the first few years after its creation, there was little discussion of the Supreme Court or its jurisdiction. In 1879, a series of debates began in Parliament about proposals from Quebec members to exclude appeals about provincial questions. These debates came to an end six years later, with no effect.³¹ At the same time, there were some proposals to abolish the court because of its expense, but only a few members took these proposals seriously. Members from Quebec, however, often put forth abolition as a solution to the problem of jurisdiction. There were continual complaints, in Parliament and

judges made the jurisdiction unnecessary.

29. H.C., *Debates*, at 741 (16 March 1875); Mousseau argued briefly that the court was contrary to the basic principles of Confederation: federalism and provincial autonomy.

30. H.C., *Debates*, at 976 (30 March 1875). Throughout, both in 1875 and from 1879 to 1885, the attitudes towards the appeal to the Privy Council did not shape the debate about the existence of the Court or the extent of its jurisdiction. The dominant opinion among the Quebecers was that the Privy Council was preferable because of its alleged superior knowledge of Roman and civil law, but they would have preferred to have no appeals at all from the provincial courts. Most common-law lawyers praised the Privy Council, and only a few, especially Edward Blake, spoke passionately about Canadian independence.

31. Again, the legal journals virtually ignored this issue, and the debates in Parliament are the best source of ideas and discussion.

in the legal journals, about the court's delay, its rudeness, and the quality of its reasoning. Nevertheless, there was little doubt, especially among the lawyers, of the need for a court to settle constitutional questions. The government openly acknowledged the problems and promised responses, but it avoided any issues of principle. It introduced a bill to add Quebec judges to the court for cases involving Quebec law, which perished with little discussion.³² Although there were proposals to except Quebec from the appeal, they were met with protests about equality.

The major argument for change continued to be the need to respect Quebec's Civil Code and its distinctive legal culture. This argument was, though, blunted by some contrary opinion from Quebec, especially a resolution from the Montreal bar upholding the Court and its jurisdiction. This kind of argument was only occasionally coupled with arguments about the basic principles of federalism. A good illustration of these arguments is a speech made by Désiré Girouard in 1881 introducing a bill to exclude jurisdiction over provincial matters. The heart of the speech was a passionate account of the long story of Quebec's distinctive civil laws, especially its Code. He was outraged that only two members of the court came from Quebec and that most of the others were unable to understand French, let alone the civil law. He believed that Quebec's laws "are not safe in the hands of men who not only did not understand them, but who are not even in a position to learn them." Although he acknowledged the need for a federal court, especially for constitutional matters, he claimed that the jurisdiction over provincial matters was "not only an injustice to my province, but also to other provinces. . . . It places all provincial rights at the mercy of creatures of the central government." Further, he claimed the resolution of the Montreal bar was an expression of party politics and of the dissatisfaction with the quality of many of the Quebec judges. He preferred to have no appeal at all, but if one was to be imposed, he preferred continuing the appeal to the Privy Council, expressing admiration for some of its work.³³

Members from common-law provinces made a wide range of responses. The most common responses denied that the Court was as unsatisfactory as the claims suggested, or promised that it would mature and become more responsive. Members from the Atlantic provinces continued to support the Court as a useful supplement to their own limited court structure.³⁴ More

32. For the terms of the bill, see the speech of Alex Campbell, in the Senate: *Debates of the Senate*, at 231 (31 March 1882). For a survey of these years, see Auguste Landry, H.C., *Debates*, at 151 (19 February 1885). H.C., *Debates*, at 1297 (9 March 1881); H.C., *Debates*, at 1302 (9 March 1881). For the argument about equality, see Hector Cameron, H.C., *Debates*, 9 March 1881 at 1297; and Sir John A Macdonald, H.C., *Debates*, at 1302 (9 March 1881).

33. H.C., *Debates*, at 1290 (9 March 1881).

34. For examples of the above arguments, see speeches by Charles Weldon, H.C., *Debates*, at 258 (26 February 1880), and at 920 (10 February 1881); Sir Charles Tupper, *id.*, *Debates*,

importantly, a few members argued that the court was an important, even necessary part of the structure of Canadian nationhood—"the crown of the edifice of our constitution" and "a bond of a greater and closer union"—although most of these arguments emphasized the need for a court to deal with Dominion subjects or constitutional issues, functions that did not require jurisdiction over provincial subjects and that none of the Quebec speakers had ever denied.³⁵ Only a very few members argued that uniformity of subjects within provincial jurisdiction was desirable.³⁶

Only two common-law lawyers invoked basic principles of federalism and provincial autonomy. Mills valiantly repeated his arguments of 1880 and 1881,³⁷ and in 1885 he was joined by Edward Blake,, one of the leading counsel of the generation, the leader of the Liberal opposition, and the great lion of Canadian independence and provincial rights. Echoing Mills, Blake argued that

the judicial and legislative power ought to be coordinate, and the authority which makes, ought to interpret, the law . . . so that if the local judges go wrong, it is the local legislatures that can correct them. . . . There may be divergence and there may be assimilation, but it must be voluntary divergence and voluntary assimilation.³⁸

This was, though, he continued, the "theoretic" view, which was denied by the constitution in two ways—by Section 96 and by an appeal to the Privy Council. So long as this appeal existed, he argued, the comprehensive appellate jurisdiction of the Supreme Court should also exist because it was at least within Canadian control.³⁹ Putting his nationalism ahead of provincial rights, Blake voted against the bill. Mills also voted against it, after having spoken and voted for it for so many years. Although I am not sure how to explain this reversal, Mills may have persuaded himself to follow Blake, his leader.

at 156 (19 February 1885); and Louis Davies, *id.*, *Debates*, at 162 (19 February 1885).

35. *See, e.g.*, speeches by James McDonald, H.C., *Debates*, at 913 (9 March 1881); George Foster, *id.*, *Debates*, at 164 (19 February 1885); William MacDougall, *id.*, *Debates*, at 918 (10 February 1881); Hector Cameron, *id.*, *Debates*, at 1297 (9 March 1881); and Frederick Brecken, *id.*, *Debates*, at 1300 (9 March 1881).

36. *See, e.g.*, James Beaty, H.C., *Debates*, at 156 (19 February 1885).

37. H.C., *Debates*, at 262 (26 February 1880); *id.* at 920 (10 February 1881).

38. H.C., *Debates*, at 157 (19 February 1885). Mills was present during this debate, but said nothing.

39. *Id.*

THE SUPREME COURT AND UNITY

By the end of the 1880s, the Supreme Court was firmly established, and its existence and jurisdiction would never again be seriously challenged, although complaints about its manners and ability continued for a few more years. The most distinctive element of its jurisdiction was the inclusion of provincial subjects, and it, together with the Dominion's power to appoint provincial judges, tended toward unity.

This claim about unity needs to be expanded. The very existence of the jurisdiction gave a power to control, even if it was not exercised. The effect on unity, though, would depend greatly upon how the jurisdiction was used. Respect for decisions of the provincial courts would permit diversity, but the lawyers in the late nineteenth century did not even imagine this possibility (and throughout the twentieth century the court has not taken this path). Instead, they assumed that the Supreme Court would simply decide cases according to its own best lights. This assumption made conferring the comprehensive jurisdiction an expression of a preference for unity—a unity determined by the Dominion. True, this preference was not often expressed, and true, throughout the story many of the lawyers and members of Parliament were confused or supported the court and its jurisdiction for different reasons. Nonetheless, the entire story from Confederation through Macdonald's proposals in 1869 and the creation of the court in 1875 to the rejection of Quebec's protests and Mills's arguments about the nature of federalism, was an expression of the preference for unity—at least as much unity as decisions about jurisdiction of courts might create.

Two other justifications might occur to contemporary readers, even though they were not expressed: the model of the Privy Council and the dominant general understandings of law and courts. Because it could hear appeals from the provinces as well as the Dominion, the Privy Council might have seemed to be an attractive model. At its foundation, this model would have depended upon a vision of unified federalism; just as the Dominion was a colony of Great Britain, the model would make the provinces colonies of the Dominion.⁴⁰ Regardless of its implications, perhaps the model was appealing simply because of the Privy Council's prestige, although this appeal was hardly so subtle or obscure that it might not have been mentioned. Moreover, the explanation may exaggerate the prestige that the Privy Council enjoyed in the 1860s and 1870s.⁴¹

40. The model of Empire was often used to illuminate Canadian federalism during this period. See VÍPOND, *supra* note 20, at 83-112.

41. See ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976* (1978).

The second of these possible explanations was that the dominant understandings of law and courts made the comprehensive appeal attractive, or at least not threatening. This reasoning might take this form: During this period, lawyers believed that law was a set of general principles that were applied to individual cases by courts in an apolitical way or that statutes had meanings that were determined by courts in an apolitical way. Therefore, the appeal would not have seemed threatening. A milder form of the argument might begin with Macdonald's belief that the "great principles" of the common law were the same in all common-law provinces.⁴² In either form, the argument cannot explain why the Dominion would want to give the court the jurisdiction. Much more importantly, though, it was not an accurate account of the dominant beliefs. Although lawyers did believe in general principles and apolitical legal reasoning, the very terms of the debate deny the reasoning I have suggested. Even apart from Quebec's claims, lawyers clearly believed that results might differ in different courts, and they also believed that the power to appoint judges given by Section 96 mattered. I am not certain how to accommodate these observations and the dominant beliefs, but the best explanation I can make is that lawyers separated the ideal of legal reasoning from its reality, which often did not conform to the ideal.

THE TENSION EXPLAINED

The tension I posed in my introduction was between the comprehensive jurisdiction of the Supreme Court and the outcome of the provincial rights movement. Having described both, dates become important to understanding its nature and fate. The dates for the Supreme Court and its jurisdiction are simple: It was created in 1875 under the power given at Confederation; it was challenged during the first half of the 1880s; and was firmly established by the late 1880s.

The dates for the provincial rights movement are more complex. The early decisions of the Supreme Court about the division of powers and the nature of the provincial governments tended to favor the Dominion. More generally, the provinces and their legislatures were said to be subordinate, "even by a few judges."⁴³ The claims of the provinces were staked out in

42. The possibility may be weakened a bit by the remainder of the remark, "although there may be a divergence in details."

43. The power to regulate trade and commerce was interpreted generously in *City of Fredericton v. The Queen*, 3 S.C.R. 505 (1880), and *Severn v. The Queen*, 2 S.C.R. 70 (1878). The arguments about the executives began with § 58 of the B.N.A. Act, which provided that the provincial lieutenant-governors were to be appointed by the Dominion's Governor-General. In *Lenoir v. Ritchie*, 3 S.C.R. 575 (1879), some members of the court suggested that officers appointed in this way were not representatives of the Queen and that they had only the powers given to them in their patents and by statute. From these premises, the argument was made that

the early 1870s, especially by Mills and Blake, but Mowat's campaign did not begin in earnest until the late 1870s, and even then the arguments were not yet fully developed and widely shared.⁴⁴ The turning point came in the early 1880s.

The first major challenge to the disallowance power came in 1882,⁴⁵ and in 1883 the Privy Council declared in *Hodge v. The Queen*⁴⁶ that the provincial legislatures were "supreme within their spheres," putting a firm end to the argument that they were "subordinate." By the mid-1880s the provincial victories were accumulating, and in the 1890s, the triumph was settled. In 1894, the Privy Council declared in *Maritime Bank of Canada v. New Brunswick*⁴⁷ that the provincial executives had the same nature and capacity as the Dominion executive. Finally, in 1896 in the *Local Prohibition Reference*⁴⁸ the Privy Council restricted the Dominion's power to regulate trade and commerce and seemed to threaten its power to legislate for peace, order, and good government.

During these years, the model of autonomy became the dominant understanding of federalism. Although Mills was alone in the late 1860s and early 1870s, others in the provincial rights movement began to express it in

the provincial executives did not have any inherent powers. In the courts, the best-known version of the claim that the provincial legislatures were subordinate was made in the Supreme Court by Justice John Gwynne in *City of Fredericton*, at 564.

44. In *Severn*, Adam Crooks, arguing for the Province, claimed that the Dominion and the province were "two sovereign bodies . . . [t]here is no question of one being subordinate to the other . . . the jurisdiction [of the provinces] must be absolute and complete." 2 S.C.R. at 84-85. (*Severn* was in effect an appeal from *The Queen v. Taylor*, 36 U.C.Q.B. 183 (1875), where Judge Wilson said that the provincial powers must be "exercised subject and subordinate to the power and authority of the Dominion Parliament."). Crooks's argument made little impression on the Supreme Court, but from 1878 onward the Ontario Court of Appeal adopted the model enthusiastically, beginning with *Leprohon*, 2 O.A.R. 522 (1878), in which Justice Burton said that the Dominion and the provinces derived power from the same sovereign and that each was independent within the limits of its powers. He returned to the same ideas in *Citizens Insurance Co. v. Parsons*, 4 O.A.R. 96 (1879), *aff'd*, 4 S.C.R. 215 (1880), *aff'd*, 7 App. Cas. 96 (P.C. 1881) (Appeal taken from Can.): "Within their respective limits, each Legislature is supreme and free from any control by the other." On the appeal to the Supreme Court, Ontario's brief made the same claim, and this time, there was a sympathetic response from the Court. Chief Justice Ritchie said, "the [provincial] legislatures are sovereign (if that is a proper expression to use) and independent," and Justice Fournier, spoke of "autonomy."

45. This challenge came in a dispute over the disallowance of an Ontario statute giving loggers extensive rights to use streams, including streams made navigable by others. This episode was rich and complex, but for the purpose of understanding its significance for disallowance, the most useful account is VIPOND, *supra* note 20 at 125-31.

46. [1883] 9 App. Cas. 117 (P.C.) (appeal taken from Ont.). The Privy Council seems to have relied heavily on the judgments in the Ontario Court of Appeal. See 7 O.A.R. 246 (1882).

47. [1892] App. Cas. 437 (P.C.) (appeal taken from Can.).

48. Attorney-General for Ontario v. Attorney-General for the Dominion (The Local Prohibition Reference), [1896] App. Cas. 348 (P.C.) (appeal taken from Can.).

the late 1870s. Mowat, for example, used parts of this model in arguing before the Supreme Court of Canada in 1877.⁴⁹ Again, the crucial period was the early 1880s. In 1882, T.J.J. Loranger, a Quebec judge, wrote a series of public letters, using the model in arguing passionately for the protection of Quebec's autonomy,⁵⁰ and by the mid 1880s the model was the stuff of texts. In the second edition of his *Manual of Government in Canada*, published in 1887, Dennis O'Sullivan declared:

A federal union then means two perfectly independent co-ordinate powers in the same state. The powers of each are equally sovereign and neither are derived from the other. The state governments are not subordinate to the general government, not the general government to the state governments. They are co-ordinate governments standing on the same level and deriving their powers from the same sovereign authority. In their respective spheres neither yields to the other. Each is independent in its own work; incomplete and dependent on the other for the complete work of government.⁵¹

The model was not only a political manifesto, but a principle for legal reasoning, and it contributed greatly to the decisions of the Privy Council in *Hodge*, *Maritime Bank*, and the *Local Prohibition Reference*.

Given these dates, when the Supreme Court was created in 1875, the tension between the two visions of federalism was not yet at the heart of politics. Mills and Blake were essentially alone among common-law lawyers, and the campaign and the widely shared ideas that might have made a challenge, one that might unite with Quebec's protests, lay in the future. Moreover, jurisdiction was not the sort of issue that was likely to be a lightning rod that attracted them. The autonomy model was a particularly powerful argument, although not the only possible one; until it was established, the language of the provincial rights campaign supplied none.

Nonetheless, the campaign of the provinces expanded a few years later. Why, then, was the challenge to the comprehensive jurisdiction not made more strongly from 1880 to 1885 and afterward? Why was Mills left alone to give his lectures on federalism? One reason is that all the reasons for conferring the jurisdiction, whatever their strength, continued, and once conferred, the

49. *Severn v. The Queen*, 2 S.C.R. 70 (1878).

50. T.J.J. LORANGER, LETTERS UPON THE INTERPRETATION OF THE FEDERAL CONSTITUTION (1883).

51. DENNIS O'SULLIVAN, A MANUAL OF GOVERNMENT IN CANADA 7 (2d ed. 1887). In 1885, the model was declared in its authoritative form for English and Canadian lawyers by Albert V. Dicey in his great text, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1960). As I said in describing Mills's education, this vision of federalism became dominant throughout the United States and Great Britain, but I believe that the Canadian arguments for provincial rights expressed it in an extreme form.

jurisdiction was protected by inertia and an understandable reluctance to tinker with an institution so recently established. This explanation alone, though, is not enough. Mowat never shrank from attacking Dominion institutions that blocked his way; why did he not seriously challenge this one?

The answer is, I think, that the court, and this jurisdiction in particular, were not perceived as substantial threats to the provinces. The main issues in the courts were about division of powers and the nature of the provincial governments, not issues within provincial jurisdiction. Although the Supreme Court's early decisions about these issues had tended to favor the Dominion, the provinces could easily appeal to the Privy Council.

The only reward Mowat might have gained from a challenge was an authoritative declaration of the general principle at stake—a vision of federalism. This reward was immense, but the battleground was unfavorable. The change of the jurisdiction would have to be made by Parliament, where the chances of success obviously were small. The same reward was much more likely to be gained in fighting other issues on other battlegrounds, especially in the courts, which had no relevant political parties, debts, or incentives. Moreover, the model of autonomy probably was much more firmly established in the minds of lawyers and judges than in the minds of other groups.⁵² *Hodge*, *Maritime Bank*, and the constitutional texts declared the same principle that would have been at stake in a battle over the comprehensive jurisdiction.

CONCLUSION

The comprehensive jurisdiction of the Supreme Court is one of the few unifying institutions to survive the late-nineteenth-century onslaught of provincial rights, and it is one of Macdonald's few triumphs on the battlegrounds of the law and the constitution. Although his government did not make it, it expressed his vision of Confederation. The power to confer it was given at Confederation, and his first proposals introduced and encouraged it. Even though it was a modest and confused achievement, it was one that has had immense consequences in the twentieth century.

52. One illustration of this difference is the texts. The model of autonomy was firmly established in the constitutional texts written by lawyers, but not in texts written by nonlawyers. The three leading texts written by lawyers were O'SULLIVAN, *supra* note 51; W.H.P. CLEMENT, *THE LAW OF THE CANADIAN CONSTITUTION* (1st ed. 1892); A.F.N. LEFROY, *THE LAW OF LEGISLATIVE POWER IN CANADA* (1897). Among the nonlawyers, the leading writer was the prolific John G. Bourinot. For making comparisons, his most useful text is *A MANUAL OF THE CONSTITUTIONAL HISTORY OF CANADA* (1888).