Confederation with Canada in 1949 marked a drastic change in Newfoundland's identity as it moved from Dominion to province. The impact reverberated throughout all aspects of life in Newfoundland, including the legal system. Studying the case law pre- and post-Confederation in its historical context illustrates the development of the use of precedent by the Newfoundland judiciary and emerging patterns where Canadian law was more likely to be considered. Paying particular attention to cases heard by the Newfoundland Supreme Court, which stemmed from or were influenced by the legal difficulties arising from the Confederation, as well as the evolution of the bench itself, reveals when the shift occurred from the dominance of British law over the Court’s decisions to the infiltration and ultimate acceptance of Canadian law.

The author examines the case law from 1932-1958, dividing it into three distinct periods, which move from a strong adherence to British authority, to the recognition that non-British precedent was gaining influence, to finally surrendering to the newfound supremacy of Canadian law. In conclusion, although Newfoundland’s own legal precedents that were made prior to Confederation appeared insignificant once the province was subsumed under Canadian jurisdiction, the Justices of the Newfoundland Supreme Court were committed to applying the law in a practical manner that remained faithful to the needs and values of the Newfoundland people.

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INTRODUCTION

The events surrounding Newfoundland’s turbulent decision to join Canada are recent enough that they are still pervasive in the memory of some Newfoundlanders and Canadians. The reasons for and effects of Confederation are documented from every perspective: that of the historian, the nationalist, the anti-Confederate, the conspiracy theorist, and the man at the centre of the movement, Joseph Smallwood. Yet despite these various portrayals of the social, economic, political, and cultural consequences of Confederation, one area has remained largely unexplored – the impact of Confederation on Newfoundland’s legal system, and more particularly, how and when Canadian common law infiltrated a system that was based almost exclusively on the use of British precedent. The speed with which Canadian precedent was accepted into Newfoundland common law and the attitude of the Newfoundland Supreme Court towards its inclusion has previously remained unexplored in a meaningful way.

To gain an understanding of how complete a stronghold British case law held over the Newfoundland judiciary, research for this paper began with Newfoundland Supreme Court decisions from 1932. This year was chosen because Newfoundland was in dire straits financially, being almost $100 million dollars in debt. It also marked the beginning of Newfoundland’s loss of control over its own governmental affairs, the climax of which was a riot in February 1932 triggered by allegations made by the Minister of Finance that the Prime Minister

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4 Bren Walsh, More than a Poor Majority: The Story of Newfoundland’s Confederation with Canada (St. John’s NL: Breakwater Books, 1985).
of Newfoundland had misappropriated funds. The novel solution to the “reckless extravagance” that had played a part in Newfoundland’s fiscal difficulties, in combination with the Great Depression, was that Newfoundland would be administered by a Commission of Government, composed of Newfoundland and British members, until the time when Newfoundland, both politically and financially, could be “reconstructed”. This form of interim assistance began in 1934, resulting in strict control over Newfoundland affairs by the British. The case law from 1932 onward covers a period that saw financial and political crises, the country’s involvement in World War II, political unrest, and the evolution from a Dominion into a province.

To discover what jurisdictions Newfoundland judges most often cited in their decisions before Confederation, and whether this pattern changed after Newfoundland joined Canada, decisions of the Newfoundland Supreme Court, the Newfoundland Supreme Court in Admiralty, and the Newfoundland Court of Appeal spanning from 1932 to 1958 are examined. This span concludes nearly ten years after Confederation, and is a year that marked the end of an era in the judiciary.

THREE PERIODS OF JUDICIAL EVOLUTION

Between the years 1932-1958, turnover within the court manifested three distinct judicial eras, resulting in a change of perspective regarding the use of non-British precedents. The first, 1932–1944, is the period where little commentary on Canadian or international precedents was made, except for quick references by primarily Justice William Higgins. The Newfoundland Supreme Court at that time consisted of Justice Higgins

7 Ibid. at 14.
8 Ibid. at 25.
(died 1943), Chief Justice William Horwood (retired 1944), Justice James Kent (died 1939), and Justice Brian Dunfield (appointed 1939).  

The second period runs from 1944–1949. Although brief, this stage accounts for a flurry of change, both legally and politically. Justice Dunfield sat on the bench for the duration of this period. Sir Lewis Emerson was appointed Chief Justice in 1944, holding the honour of being the first Chief Justice of the Province of Newfoundland, until his death a mere two months after Confederation in 1949. Cyril J. Fox filled the spot formerly held by Justice Higgins in 1944; unfortunately, Justice Fox himself passed away in 1946, and was succeeded by H.A. Winter, appointed in 1947. It was during this period that the court made several pronouncements on its attitude towards the introduction of non-British precedents by counsel who hoped to influence the decisions of the Newfoundland Supreme Court. This stage also coincided with the tumultuous political environment at the time, and the growing movement towards Confederation.

The tenure of Albert J. Walsh as Chief Justice, from 1949–1958, signifies the beginning and the end of the third period in the judiciary. Justices Dunfield and Winter both sat on the bench with Chief Justice Walsh for the entire length of his term, which ended upon his death. This final stage is where the effects of Confederation were felt by the Court, and ultimately accepted.

Despite the apparent separation between each period, because the Newfoundland legal community was not a large one, the paths of these Justices had crossed on numerous occasions. Justice Higgins and Justice Fox were political running-mates for the Liberal-Progressive party in the 1919 election. Chief Justice Horwood articulated with Justice Winter’s father, and Justice Winter acted as counsel in cases before Horwood, Higgins, and Dunfield. Some reports claim that Justice Dunfield and Chief Justice

11 Ibid. vol. 1 at 776.
12 Ibid. vol. 5 at 589.
13 Ibid. vol. 5 at 500.
Emerson were called to the bar on the same day. As well, most of the Supreme Court Judges had political careers along with private practices before appointment to the judiciary. Higgins, Winter, and Walsh all held the position of Speaker of the House of Assembly at different times. Moreover, several were members of the Commission of Government; Emerson was Commissioner for Justice and Attorney General, Walsh was Commissioner of Home Affairs and Education, a title previously held by Winter, which he abdicated in favour of the Commissioner for Justice position vacant upon Emerson’s appointment to the Court. Chief Justice Emerson swore in Albert Walsh as Newfoundland’s first Lieutenant-Governor.

Although confusing, these are just some of the more obvious examples of situations exemplifying the inter-relatedness of the Justices throughout this time frame. It is likely that they were well aware of the viewpoints held by their brothers on the bench, even before working together on the Newfoundland Supreme Court.

1932–1944: Focus on British Precedent

It is not surprising that British influence remained so strongly felt in a country with such a strong tie to its heritage. Additionally, the degree of control exerted by the British over the administration in Newfoundland through the Commission of Government only served to further enhance the country’s reliance upon traditional British methods. It is from this mindset of dependence and respect for the British convention that the case law in the 1930s developed.

1935: An Initial Surge of Non-British Precedent

Although research on cases for this paper began in 1932, Canadian cases used as precedents in Newfoundland Supreme Court decisions were not found until 1935. In total, four cases from 1935 mentioned Canadian case law in some way. The first example was the case of Sullivan v. Baldwin, heard by Justice Higgins in February 1935, concerning the division of a joint bank

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14 Judge’s Biography, 16 Nfld. L.R. xvii.
15 Supra note 10, vol. 2 & 5.
account upon the testator’s death. In his judgment, Justice Higgins quoted from a Canadian decision that provided a summary of the law on gifts, joint title, and the right of survivorship,\(^{17}\) and then commented, “The language used by a learned trial judge in a Canadian case seems to me to be apt in the present instance.”\(^{18}\) Although brief, this remark serves as the first direct recognition of the proper use of Canadian precedent in a Newfoundland Supreme Court decision. It is interesting to note that H.A. Winter, a future Newfoundland Supreme Court Justice, was counsel for the plaintiff, and successfully represented his client.

It is reasonable to conclude that it was H.A. Winter who directed the Court to that Canadian case referred to by Justice Higgins when he entered judgment for the plaintiff. Even acting as counsel, before Confederation was really at the forefront of anyone's thoughts, Winter showed an openness to the decisions of Canadian courts, and, through the favorable outcome he obtained in this case, he witnessed the potential benefits of non-British precedent. Winter’s successful use of this Canadian precedent foreshadows the situation in the Newfoundland Supreme Court in 1949, of which he was a part, and helps account for the shift in attitude that became noticeable in the next judicial period.

Returning to 1935 case law, the next case that referred to a Canadian precedent was heard by Justice Higgins, with the decision rendered in June of that year. *Humphries v. Macpherson*,\(^{19}\) which was about the construction of a structure on land owned by someone else, quoted several sentences from the Canadian case offered by counsel,\(^{20}\) with Justice Higgins ultimately concluding that it was in line with the leading British case on the subject, and therefore would be followed. The combined citations of the Canadian and British cases resulted in a decision for the plaintiff, although the discussion mainly centered on the British case law, with the Canadian case merely mentioned as being in accord.

\(^{17}\) *In Re Reid* (1922), 64 D.L.R. 589 (Ont Sup. Ct.) at 598.
\(^{18}\) Supra note 16 at 295.
The third 1935 decision that referred to Canadian law was *Mackey v. Newfoundland Railway*.\(^21\) Heard by Justice Higgins in November 1935, the litigation was started by the owner of a horse that wandered onto the railroad tracks and was subsequently struck and killed by a train. Although the case did not refer to Canadian case law, it did take into consideration Canadian legislation, specifically, the 1906 *Canadian Railway Act*. Justice Higgins noted that it seemed as if the sections requiring interpretation in this case, from the 1934 *Newfoundland Railway Act*, were themselves taken from the Canadian Act. He distills the intention of the Newfoundland Act with the help of referring to the intention of the more heavily litigated Canadian Act, resulting in more judicial interpretation of the various clauses.

The fourth and final 1935 case was heard by Chief Justice Horwood: *Marshall v. City of St. John’s*.\(^22\) The plaintiff was suing the city because despite his wishes to install his own separate septic tank, the city had connected his house to the municipal sewage system. When a flood occurred, the municipal sewage system backed up into his house, and the plaintiff sought damages. Chief Justice Horwood made direct reference to a Canadian decision,\(^23\) including a lengthy quotation from the case, asserting that it “succinctly stated”\(^24\) the principle of law applicable to this case. However, the portion of the Canadian decision used was, itself, a quotation from *Gould on Waters 2nd ed.*, a source of law used frequently in American decisions. Thus, even though Horwood quotes from a Canadian decision at length, the passage quoted was used most often in relation to American disputes. It is noteworthy that H.A. Winter was counsel for the defendant, and was again behind the introduction of non-British law to the Court.

Even though these four cases refer to non-British court decisions merely in passing, the cases share some characteristics. Three of the cases where reference was made to Canadian law were heard by Justice Higgins. Two of them directly involved property disputes (through interpretation of a will, and determining possession of land), and the other two cases certainly


\(^{23}\) *Scrimger v. Town of Galt* (1914), 16 D.L.R. 867.

\(^{24}\) *Supra* note 22 at 407.
contained elements of property law. Even at this early stage, patterns have emerged that should be recalled upon examination of subsequent case law.

1938-1940: The Continued Intermittent Use of Non-British Precedent

After this initial splurge of reference to Canadian cases in 1935, the next examples do not arise until 1938. Starting with *In Re Lowe; Lowe & Baggs v. Lowe*, a case about the interpretation of a will, Justice Higgins returns as the force behind the majority of the inclusions of Canadian decisions in Newfoundland cases of this period. He briefly referred to an Ontario case that was cited by the plaintiff, but he quickly disposed of it, stating that the wording of the will was different from the case at hand, and therefore inapplicable.

May 1940 brought the first example where the newest judge, Justice Dunfield, uses a Canadian precedent in his decision. *Vere-Holloway v. Fifield* involved a car that hit a child who was in clear view on the street. Justice Dunfield explained that a Canadian case had dealt with a very similar situation to the one encountered here, and the Canadian court rejected an argument that the child contributed to the negligence. That argument was also rejected in the current case, and the driver of the car was found entirely liable.

In June 1940, Chief Justice Horwood, Justice Higgins, and Justice Dunfield referred to a Canadian case to help decide *Genge v. Government of Newfoundland and Whelan*. Again, the issue involved land, specifically conflicting leases of Crown land. The Canadian case approved of a principle from British case law regarding what constituted delivery and when it can be inferred, and the Supreme Court of Newfoundland used this principle of inferred delivery to decide in favour of the plaintiff, who was represented by Mr. P.J. Lewis. The role of Mr. Lewis will be elaborated upon in a later

26 *In re Johnson* (1913), 27 O.L.R. 472.
discussion of some significant cases from 1946 onward, where he continued to introduce Canadian precedent in an attempt to replicate the success he achieved in this case.

By reading Newfoundland Supreme Court decisions from 1932-1944, it was hoped some comments would be encountered on the relevance of Canadian or international case law to Newfoundland judges when making their decisions. It was disappointing to find only a few references to the case law of other jurisdictions in comparison to the wealth of discussion on British cases. However, the reason for this lack of commentary soon became clear: if counsel did not present cases from other jurisdictions, the Court did not have access to them, thus only British or Newfoundland cases would be considered. In the event that a British case could not be found to apply to the facts at hand, or where a similar case had already been decided in this jurisdiction, the clear preference was to follow precedents established by the Newfoundland Supreme Court. However, due to the small size of the population, and the relative novelty of litigation in Newfoundland compared to the British Isles, it was a rare occasion when litigation based on a set of facts arose that had already been decided upon by the Newfoundland Supreme Court.

Despite the lack of widespread use of precedents from outside Britain or the Dominion of Newfoundland, when cases from Canada were presented, they were viewed as potential viable sources of law, and were taken into consideration. However, in this period it was rare when a Canadian case itself was not inherently based upon British precedents, thus including a Canadian case was usually not as much of a departure from British common law as it would seem.

**1944–1949: The Court Warms to Non-British Precedent**

The cases from 1941–1944 were heard at a time when the Supreme Court was on the verge of a change of hands, thus these cases continued to use non-British precedent in much the same way as it was used in the 1930s-- sporadically, and without much depth of analysis. 1944 marked the beginning of a shift in mentality due to the appointment of several new
Justices. In 1943, Cyril J. Fox replaced Justice Higgins after his death, and in 1944, Sir Lewis E. Emerson succeeded Sir William Horwood as Chief Justice upon his retirement. In 1947, H.A. Winter was appointed to the Court in Justice Fox’s place, who suddenly passed away. For the important period of 1947–1949, the court consisted of Chief Justice Emerson, Justice Dunfield, and Justice Winter.

After 1946, the decisions of the Newfoundland Supreme Court mention Canadian cases more frequently. Compared to the 1930s, when a total of seven Canadian cases were included in Newfoundland Supreme Court decisions, from 1941-1949, at least twenty-two Canadian precedents were used.\(^\text{31}\) Furthermore, American case law was mentioned ten times (albeit seven of these references occurred in the same case in admiralty), and even a South African precedent was used.

**1946: modification of The Attitude Toward Non-British Precedent**

*Dillon v. Canning and the St. John’s Housing Corporation*\(^\text{32}\) was a case heard by Justice Fox involving the expropriation of land in accordance with a newly passed act, *The St. John’s Housing Corporation Lands Act, 1944*. The plaintiff questioned its constitutionality via a claim of trespass against a surveyor who was granted access in accord with the act in question. In deciding the constitutional question, Justice Fox examined the law itself, as well as British common law. However, he also included a quotation from a South African court regarding the constitutionality of expropriation,\(^\text{33}\) commenting afterward that, “These judgments, though not binding on this Court, are entitled to the greatest respect.”\(^\text{34}\) Compared to Justice Higgins’ description in 1935 of the Canadian law as “apt”,\(^\text{35}\) Justice Fox’s remark seems much more deferential. It is unexpected that a case from a jurisdiction so far removed from Newfoundland would find its way into a Supreme Court decision. Furthermore, even though regard to other levels of court is commonplace,

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\(^\text{31}\) Due to the irregular and informal methods used to cite cases, it is possible that this number could vary slightly.

\(^\text{32}\) *Dillon v. Canning and the St. John’s Housing Corporation* (1946), 15 Nfld. L.R. 386.

\(^\text{33}\) *R. v. McChlery* (1912), App. D. 199 (S. Af.).

\(^\text{34}\) Supra note 32 at 406.

\(^\text{35}\) Supra note 16.
that this decision should be accorded “the greatest respect” goes a step further than the usual general recognition of the validity of a decision to that particular jurisdiction. The impact of Justice Fox’s decision that the act was constitutional, and therefore no trespass, pales in comparison to the impression left by the high esteem with which he looked upon the case law from international jurisdictions.

This sentiment of respect for decisions from other jurisdictions is continued with *In re Williams and Parmiter: Guzzwell v. Guzzwell*,\(^\text{36}\) which is a case about the interpretation of a will. Chief Justice Emerson hears the case, with counsel for the plaintiff (Mr. P.J. Lewis) introducing a Canadian case in support of his client’s position. The Chief Justice feels inclined to comment on the suitability of the case to the facts at hand, and in doing so, demonstrates his attitude, and likely the attitude of the Court, to the usefulness of Canadian precedents when deciding Newfoundland Supreme Court cases. Chief Justice Emerson asserts:

> One other case was quoted by Mr. Lewis: In Re *Johnston and Smith*.\(^\text{37}\) This is a case tried in the Ontario Chancery Division which appears strongly to favour Mr. Lewis’s case. The judgment of Boyd, C. is very short and does not appear to me to be in accordance with the English decisions. Whilst one pays considerable respect to judgments of Canadian Courts they are not binding upon this Court, and where there is conflict between their views and the views of United Kingdom Courts those of the latter prevail.\(^\text{38}\)

This excerpt explicitly states the judicial attitude towards Canadian case law, one of “considerable respect”, yet still emphasizing the dominance of British law in Newfoundland. At a time when Newfoundland did not influence Canadian laws, was not subject to their laws, and was not bound by Canadian courts, Canadian judgments were respected in the Newfoundland Supreme

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\(^{37}\) *In Re Johnston and Smith* (1906), 12 O.L.R. 102.

\(^{38}\) *Supra* note 36 at 421. Emphasis added.
Court. This quotation admits that Canadian judgments served a purpose, and had a unique role to play in the development of Newfoundland case law, while at the same time affirming that the United Kingdom decisions were still supreme in Newfoundland. Despite the respect Chief Justice Emerson seemingly accorded to Canadian Courts, in this case he did not accept the proposed precedent, choosing instead to fall in line with the British case law.

Again, these two cases are examples of the recurring theme of using non-British precedent when resolving property disputes. The use of the South African precedent, although unexpected, makes perfect sense given that country’s own history of expropriation of land. The language of “considerable respect” and “greatest respect” seems to echo each other, indicating that the Justices of the Court were of similar mindsets regarding the applicability of non-British precedent to decisions of the Court in Newfoundland.

**The Influence of Mr. P.J. Lewis, K.C.**

While investigating the use of Canadian and international legal precedent, the names of some counsel kept re-appearing. H.A Winter is one such lawyer (later a Justice of the Court) who was adventurous enough to submit to the Court non-British case law for its consideration. Another is Mr. P.J. Lewis, K.C., who was pointed out earlier in the discussion of *Genge v. Government of Newfoundland and Whelan*, and was explicitly named by Chief Justice Emerson in the preceding case of *Guzzwell v. Guzzwell* as the source of an Ontario case provided to the Court. Mr. Lewis again branched outside the British norm in the Newfoundland Court of Appeal case *O’Flaherty v. Kenny & Kenny*, where he submitted an American case from the Supreme Court of Indiana in the hopes of swaying the Court. He was unsuccessful, with Chief Justice Emerson, speaking for the court,

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39 The counsel for the plaintiffs and defendants were usually, but not always, named at the end of each decision.
40 Supra note 16 & note 22.
41 Supra note 30.
42 Supra note 36.
stating that a decision of “higher authority”\textsuperscript{45} was needed for the court to be persuaded of the existence of a doctrine which had not been recognized by the British Empire.

*American Aerated Water Co. Ltd. v. Gaden’s Limited* \textsuperscript{46} was one of the last Newfoundland cases to be granted leave to the Privy Council, but due to its timing and Newfoundland’s entry into Confederation, it never reached that level of adjudication. This case marked the fourth attempt made by Mr. P.J. Lewis to persuade the Court to follow a non-British precedent. The case was brought by a soft-drink producer (Coca-Cola) and dealt with bailment in the context of trading empty bottles. It was heard in April 1948, with the appeal being heard in August of that same year. The Court relied on British and Irish cases exclusively as precedents, and distinguished the case at hand from a recent Canadian decision, introduced to the Court by Mr. Lewis, that had been decided in reference to an Ontarian provincial law, for which there was no comparable Newfoundland law.\textsuperscript{47} Despite the fact that his only success occurred at the first instance in 1940, Mr. Lewis apparently remained undeterred by the Court’s consistent reluctance to rely on cases from other jurisdictions, unless they were entirely the most appropriate route.

**1947 to March 1949: The Expanding Role of Non-British Precedent**

The next overt proclamation regarding the use of Canadian precedents in the Newfoundland Court comes from a decision of the Court of Appeal, *White v. Lewis*,\textsuperscript{48} which revolved around what constituted possession of land, a determination of which would establish whether the land had been trespassed upon. This was an appeal of a Justice Dunfield decision, and the result was that Chief Justice Emerson and Justice Winter overturned him, finding that there was no trespass because there was no visible, continual possession. Justice Winter’s decision addressed the difficulty of applying English laws to Newfoundland in this case, due to the nature of the geographical differences between the two jurisdictions. He explained:

\textsuperscript{45} *Supra* note 43 at 15.


\textsuperscript{48} *White v. Lewis* (1947), 16 Nfld. L.R. 95.
For legal precedents and authority on what amounts to possession in such cases it is not very helpful to consult English decisions where the nature and tenure of land is so different from our own; but *conditions in Canada are very similar* and Mr. Higgins counsel for the appellant cites a number of Canadian cases which seem *most pertinent.*

The trouble with actual application of British law to an area that has little in common is simply that, in certain situations, it is not practical. Chief Justice Emerson agreed, and in his decision, further elaborated on this sentiment:

> I find that in our neighbouring Dominion, where conditions exists which closely resemble those in this country the overwhelming weight of judicial authority adheres to the general principle that in order to establish a title to possession there must be a well defined area, and an actual and visible occupation. *Whilst these authorities are not binding on our Courts, their persuasive value in a case of this nature cannot be ignored.*

These statements help clarify the historical reliance upon Canadian law in the development of Newfoundland law when it comes to issues concerning land. The fact that Canadian property law was heavily rooted in British law until it evolved to accommodate for its geographical disparity lends itself to acceptance by Newfoundland, who was faced with a similar predicament. The Court thus based its decision mainly upon two Canadian cases which were factually alike.

1948 saw the commencement of the first major contested divorce case to occur in Newfoundland, *Hounsell v. Hounsell.* The wife sought maintenance from her husband, and in his defence, counsel for the husband raised fundamental constitutional questions, claiming that the Supreme Court did not have jurisdiction to award maintenance because the English Ecclesiastical Courts

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administered the law of marital relations, and they held jurisdiction at the
time that the Court received its charter. Justice Dunfield presided over the
trial, which lasted several days, given the complexity of the arguments. Justice
Dunfield's judgment was lengthy and detailed, examining the inception of
the Supreme Court through historical documents, case law and statutes.
He referred to five Canadian cases in his decision, thoroughly examining
some. Justice Dunfield compared the gradual handing over of power from
England to Canadian provinces upon their Confederation to Newfoundland
becoming its own Dominion. He looked to several Privy Council judgments
from appeals of Canadian decisions in the provinces of British Colombia,
Alberta, and Manitoba, pronouncing on what he felt the Privy Council
should have explicitly stated in the Board v. Board decision:

[W]hatever the original inherent powers of the Court
of a colony may have been, once that colony attains to
Dominion status, i.e. to a position where it is absolute
in its own internal affairs, and where Constitutional
Convention forbids the Imperial Parliament to intervene
therein, then in all matters of inherent or judge-
made-law... where the Courts are controlled by the
immemorial framework of precedent, it must be assumed
that the jurisdiction has ripened into universality....

In coming to his conclusion that the Newfoundland Supreme Court had the
requisite jurisdiction to order maintenance from January 1, 1833 onward
(the date that Newfoundland established its own legislature), Justice Dunfield
commented on the evolving nature of the law. His sentiments are in accord
with constitutional principles that maintain a stronghold in Canadian legal
convention to this day:

53 Board v. Board (1919) A.C. 956 (P.C.); Lawless v. Chamberlain (1889), 18 O.R. 296; M.
A.C. 947 (P.C.); Watts v. Watts (1908) A.C. 573 (P.C.).

54 Supra note 52 at 334.
Since the common law and the equity practice are living, not fossil things, and since we are bound by the decisions of the Privy Council and guided by the decisions of the House of Lords and the English Courts, as well as the Superior Courts of the Dominions, we share in any growth which the common law and the equity practice may have made since 1832.\textsuperscript{55}

Justice Dunfield ended his decision by stating that it was unfortunate that the Court was forced to find its jurisdiction in this matter by looking to historical practice, urging the legislature to take steps to outline the legal position of women in divorce proceedings. He concluded by admitting that the Newfoundland law was out of date in several respects.\textsuperscript{56}

This case illustrates the parallels between the development of Canadian and Newfoundland law. Until \textit{Hounsell v. Hounsell}, Newfoundland courts had never made a clear pronouncement on the legalities of divorce in the province. Granted, nor had counsel ever raised such arguments which went to the core of the court’s jurisdiction before. Newfoundland was entering a period where litigation was increasing and counsel were becoming more creative with their arguments, perhaps influenced by the development of the law in Canada and the United States. In response, the judiciary had no choice but to familiarize themselves with Canadian and American cases, where applicable, and become open to the possibility of following the precedents put forward, where they were most appropriate for the given circumstances.

**Cases Directly Resulting from Issues Around Confederation**

The effects of the inquiry into Confederation, and the legal impact once it was finalized, not only reverberated throughout aspects of everyday life in Newfoundland, but also influenced the direction of Newfoundland case law. Even the judiciary of the Supreme Court was not exempt from being drawn into the politics surrounding the debate over Confederation. This became

\textsuperscript{55} Supra note 52 at 335. Emphasis added.

\textsuperscript{56} Supra note 52 at 338.
obvious in the 1947 case of *Emerson et al v. Cashin*. The plaintiffs were none other than Chief Justice Sir Edward Emerson and Justice H.A. Winter, both presiding on the Supreme Court of Newfoundland. A third plaintiff was Justice Winter’s brother, who was the acting Registrar of the Supreme Court. They sued Major Peter Cashin, a prominent anti-Confederate, for defamation of character based on statements made during the National Convention, where delegates discussed the pros and cons of Newfoundland joining Canada. Major Cashin was a persuasive orator who was widely regarded as irrepressible. Cashin questioned the circumstances under which Chief Justice Emerson and Justice Winter rose in the ranks from Commissioner for Justice to Justices of the Supreme Court. He claimed that the appointments for Commissioner for Justice, a position held by Emerson until he was appointed Chief Justice in 1944, with Winter then replacing him in that role until his own appointment to the Supreme Court in 1947, were brought about by “bribery and corruption indirectly”.

Given that Emerson and Winter were both parties to the proceeding, only Justice Dunfield remained uninvolved, and could hear the case. This was a jury trial, a rare occurrence for Newfoundland in that period. The case drew the attention of public gossips and political pundits alike, and Major Cashin’s dramatic address to the jury, which he delivered himself as a self-represented defendant, did nothing to ease the tense political atmosphere that loomed over the proceedings. The effectiveness of his address cannot be denied, as the case resulted in a hung jury, and the charges against him were dismissed. The Justices wisely decided against appealing the decision, for there were rumors that given the harm rendered to their popularity by the trial, they would have been forced to resign had they chose to continue litigation.

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59 *Supra* note 57 at 39.
60 *Forward*, 16 Nfld. L.R. xiv.
61 *Supra* note 4 at 146.
The case of Currie et al v. MacDonald\(^63\) was an action for a declaration that the National Convention Act 1946 and the Referendum Act 1946 were ultra vires the Commission of Government and void, additionally asking for injunctions to prevent discussing terms of the union of Newfoundland with Canada. Justice Dunfield heard the case in November 1948 in Chambers, and on appeal in January 1949 he was joined by Justice Winter and Chief Justice Emerson, who confirmed his decision that the action was frivolous and vexatious, and there was no reasonable cause of action disclosed in the statement of claim. They stated that all the acts alleged in the statement of claim were clearly within the orbit of the governor’s power, including holding a referendum. There was no question arising requiring evidence or proof of law. Currie appealed to the Privy Council, but the union of Canada and Newfoundland took place before the case was heard. They withdrew their appeal on May 6, 1949, terminating the proceedings\(^64\)

Although admiralty falls within federal jurisdiction, prior to Confederation and the division of powers, the only judge of the Newfoundland Supreme Court in Admiralty was Justice Dunfield. Given his use of international case law in the past, it is not surprising that he continued this trend into his decisions on admiralty issues. One case which stands out is that of The S.S. Oglethorpe Victory\(^65\), a ship that collided with another ship in foggy weather. When deciding the division of liability in June 1948, Justice Dunfield referred to seven American cases dealing with shipping collisions, as well as seven British cases. Additionally, he commented that there were few American reports available to the court, referencing Marsden on Collisions at Sea\(^66\) and the cases listed within for the claim that American doctrine was at least as strict as British when it came to determining the appropriate speed of a ship in fog. He also remarked that counsel for the Oglethorpe Victory produced a “photostatic copy” of an American case, to which he referred.\(^67\) These seemingly offhand observations go to reinforce that unless counsel

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\(^{63}\) Currie et al v. MacDonald (1948), 16 Nfld. L.R. 365.


\(^{65}\) The S.S. Oglethorpe Victory (1948), 16 Nfld. L.R. 276.


\(^{67}\) The Ernest H. Meyer (1936), 84 F.2d. 496.
provided the Court with authorities outside the jurisdiction, the Court did not have the means to obtain them, and may not have even been aware of their existence.

However, what makes *The S.S. Oglethorpe Victory* unique, is not the discussion of American case law, but the fact that it was the first case where the trial occurred before Confederation, although proceedings continued after Newfoundland joined the union. In 1948, Justice Dunfield only decided the liability issue, and made no order for costs after deciding that liability was shared. The parties applied for costs in 1950 and in March, almost a full year after Confederation, Justice Dunfield gave his verdict. He studied the statutes that gave the Admiralty Court its power and those which transferred it to the Exchequer Court of Canada. Justice Dunfield concluded that he had jurisdiction to continue and complete proceedings that started before the Admiralty Court was replaced. He commented that a common Canadian practice was not applicable to this case, which was under English law and had differing practices from that of Canada.

*Browne v. Smallwood*[^71] was a case dealing with the legal uncertainties that resulted in the aftermath of Confederation. This case marked one of the first times that Canadian precedents were relied upon more than British ones. Granted, the nature of the case dealt with the effect of the *Canadian Criminal Code* on the new province of Newfoundland, so British cases were not as relevant as the Canadian ones. Justice Winter heard the case on appeal from a Magistrate, who was unsure of the applicability of the Criminal Code to Newfoundlanders. Justice Winter directly commented on the new position that Newfoundland found itself in at that time, and the uncertainty that had arisen due to legislative gaps. He explained the situation as follows:

> Newfoundland became a Canadian province on April 1st, 1949. Since a Dominion election was to be held soon afterwards, it became necessary to bring into effect the

[^68]: *The Oglethorpe Victory* (1950), 25 M.P.R. 22.
The Federal Election Act of 1938 so that the election might be governed by it. Doubtless little or no thought was given to its criminal provisions, and for reasons of their own the two Governments concerned agreed to postpone until some convenient future date the application to Newfoundland of the Canadian Criminal Code. As a result we have this situation, that a party has been charged with committing an offence under the Election Act, the full investigation and trial of which are, or seem to be, impossible without resort to the Code in, it may be, many places. 72

Winter decided that the Election Act prescribed two alternative forms of trial – trial by summary conviction and trial by indictment. Although Newfoundland law had a system of summary proceedings before magistrates that broadly corresponded to the Canadian summary conviction, Justice Winter did not think the Election Act could be stretched to cover and allow for the use of the broadly analogous Newfoundland summary procedure. 73

Regarding the charges against Mr. Browne, the Election Act specifically made the offence with which he was charged an indictable one, which was not a substantially different procedure from the indictable offence laws in Newfoundland. Since one of the options under the Election Act was inapplicable in this jurisdiction, the other must be used – which, luckily, was the option necessitated in the Act in any case. Justice Winter expostulates, “In the peculiar circumstances in which this Province for the moment finds itself, it might well be that a person was in fact guilty of some offence but could not be punished simply because the Act creating the offence could not be enforced.” 74 It would be auspicious, indeed, if such a situation did not arise in the period between Confederation and the enactment of the Canadian Criminal Code. The judges of the Supreme Court of Newfoundland were not to be so lucky.

72 Ibid. at 234.
73 Ibid. at 234-235.
74 Ibid. at 235.
Saunders v. Sergeant Thomas Hollett et al 75 involved an appeal Magistrate’s decision, sitting as a court of summary jurisdiction, to convict the plaintiff for drunk driving under the Newfoundland Highway Traffic Act, 1941 (amended in 1945, 1948, and 1949). The plaintiff argued that amendments made to this Act in 1949 (after Confederation) that increased the penalties for a conviction were ultra vires the province given the division of powers incorporated within the British North America Act, which was adopted by Newfoundland upon agreeing to the Terms of the Union and joining Canada. This constitutional challenge marked the first time that the Supreme Court of Newfoundland had to explore and interpret the division of powers in ss. 91 and 92 of the British North America Act, 1867. As Justice Dunfield articulated,

We have herein to deal with one of those important yet ephemeral constitutional questions arising out of the transitional condition of Newfoundland law since our entry into the Dominion of Canada on March 31st, 1949…. Could our provincial legislature, after Confederation, but before the Canadian Criminal Code has been made by proclamation to apply in Newfoundland, alter the penalty in respect of drunken driving; or is the subject one reserved to the Dominion Parliament? 76

The appeal was heard in June 1950, and marks the first case of importance heard by the new Chief Justice, Albert Walsh. All three justices heard the appeal, as was customary for constitutional questions, and they each wrote lengthy decisions that relied largely upon Privy Council decisions of Canadian cases. They all ultimately agreed that the 1949 amendments were ultra vires the province, and that the applicable law was the 1948 version of the Highway Traffic Act, therefore the plaintiff was not subject to the stricter penalties added by the 1949 amendments. They did not overturn his conviction, as there was sufficient proof for a conviction under the 1948 or the 1949 Act, and the main difference between the two Acts was the appropriate penalties available for the magistrate to impose.

76 Ibid. at 98.
The case was sent back to the magistrate to impose a penalty permitted under the 1948 Act.

It is noteworthy that various Justices played direct roles in the ultimate decision to join Canada, perhaps accounting for their respect of Canadian law. H.A. Winter was part of the Newfoundland delegation of the St. John’s Conference which discussed Canadian proposals regarding defence of the Island. Cyril Fox had been Chairman of the National Convention. Albert Walsh had been the leader of the Newfoundland delegation that negotiated the final Terms of the Union.

April 1949–1958: The Aftermath of Confederation

Once Confederation had occurred, Newfoundlanders quickly began to adjust to the new reality of a legal and constitutional change in status, even though psychologically, adapting to a newfound Canadian identity was a slower process. Administratively, Newfoundland was successfully integrated into Canadian Confederation in a relatively short period of time. People received baby bonuses and old age pensions, as promised, soon after the deal was done. However, not all parties reaped the benefits of Confederation.

1950: In Re Bowater’s Newfoundland Pulp and Paper Mills, Ltd.

Changes to the manufacturing sector brought on by Confederation greatly affected Bowater’s Pulp and Paper Mill. Namely, Newfoundland did not uphold agreements it had entered into between 1915 and 1947 with Bowater’s regarding tax exemptions for exported goods once Newfoundland became a province. This was a point of contention for Albert Walsh when he was

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79 *Supra* note 4 at 295.
80 *Supra* note 4 at 297-8.
82 *Supra* note 4 at 297.
negotiating the Terms of the Union, but he was told by the Prime Minister of Canada, St. Laurent, that Newfoundland companies would not be granted any special concessions, regardless of any privileges they might have enjoyed before the Union.\(^\text{83}\) Bowater’s still held out hope that their agreements might be upheld, and sought a reference from the Supreme Court of Canada.\(^\text{84}\) An important aside is that Canada was careful not to seek a reference on this matter from the Supreme Court of Canada before the amendments to the *Supreme Court Act* took effect, which eliminated the right of appeal to the Privy Council.\(^\text{85}\)

The proceedings commenced in February 1950, and the decision was released in June. The province did not uphold the tax exemptions. Canadian law clearly prevailed over matters that were now in federal jurisdiction, regardless of their legality upon inception. Thus Bowater’s was treated the same as every other Canadian company, a treatment it found wholly undesirable.

**Reaction to Confederation from the Supreme Court of Newfoundland**

Immediately following Confederation, there was a lag before further incorporation of Canadian precedents became common in Newfoundland Supreme Court decisions. A few reasons for this are possible. First, that there was uncertainty in how to proceed. Despite their silence on the matter, the Justices of the Court were recognized as pro-union,\(^\text{86}\) but approval of the direction Newfoundland had chosen did not render it an easy task to apply the new laws that were now pertinent to Newfoundland legal development. It was an entirely new situation for the judiciary, and there is no indication that they were given direction regarding what laws were applicable to the new province, and to what degree. One would think Canadian laws now held much more weight, but based on the continued judicial use of the British and Newfoundland precedents so heavily relied upon in the past this did not seem to be the case. Second, due to the passing of Chief Justice Emerson so

\(^{83}\) *Supra* note 81 at 115.


\(^{85}\) *Supra* note 81 at 119.

\(^{86}\) *Supra* note 78 at 12 & 65.
soon after Confederation was finalized, his position on the Court remained vacant for several months. Without a Chief Justice no new appeals could be heard, and it certainly affected the workload, possibly even the morale, of the remaining Justices. Adjusting to the appointment of Albert Walsh as the new Chief Justice would also require some time.

A problem that stands in the way of an accurate analysis of the jurisprudence from Newfoundland in the period following Confederation is the lack of thorough reporting of cases by a legal reporter. The *Newfoundland Law Reports* ended upon Newfoundland becoming a province, with the *Maritime Provinces Reports* first including Newfoundland cases in Volume 23, which reported cases from 1948-1949. The major Newfoundland judgments were documented, but lost in the exchange were the cases which constituted the “bread and butter” of the Newfoundland Supreme Court, such as interpretation of wills, landlord and tenant agreements, and small business contracts. Although the reported cases indicate a rapid increase in the Court’s use of Canadian precedent after 1950, it is questionable how representative this is without knowing the number of cases remaining unreported that may not have followed this pattern of Canadian law breaking into Newfoundland Supreme Court decisions.

When Newfoundland judges first began mentioning Canadian precedent, they would often frame their decision by stating whether it was in line with British case law or not. This practice was diminishing by 1953, when the *Maritime Provinces Reports* began consistently reporting a breadth of Newfoundland Supreme Court decisions. By 1955, on average, more Canadian precedents were being used in cases than British ones, and by 1956 Canadian decisions were accepted as the primary source of the law.

The first case to be dealt with entirely post Confederation was *The Newfoundland Hotel v. Lucy Amminson*, in which negligence was claimed. The trial was heard and decided in April 1949, and the appellate judgment was given in June 1949 by Justice Dunfield and Justice Winter (Chief Justice Emerson having heard the case at trial). The Justices referred to three

Canadian cases,\textsuperscript{88} compared to the two British cases used. Regarding the Canadian cases, Justice Dunfield commented that the court did not have the actual reports, but only the headnotes in the Canadian Abridgment.\textsuperscript{89} This statement again reinforces the lack of resources available to the Supreme Court, yet in the face of this disadvantage, they still attempted to follow the current, Canadian state of the law. This statement also suggests a delay in getting the appropriate sources of law into the hands of the judges of the Newfoundland Supreme Court, and could account for why the use of Canadian precedent did not immediately increase in the year directly after Confederation, even though the transition from Dominion to province was supposed to be seamless, given the preparation for it in the months prior.

Unfortunately, short of the dramatic cases that involved the major players in the Confederation debate, or Constitutional questions that emerged in the aftermath, the judges said nothing regarding the effects of Confederation in the decisions on cases of a more common nature. However, some striking commentary was delivered in the appellate case of \textit{Power v. Winter},\textsuperscript{90} where Justices Dunfield and Winter overturned the trial decision of Chief Justice Walsh. The case involved a collision on a dirt road that only had one lane – not an unusual set of circumstances for the outskirts of St. John's at the time. The question to be determined was which car had the right-of-way? In an unusual move, Justices Dunfield and Winter met the involved parties at the site of the accident to determine the width of the road for themselves. In a rare moment of absolute frankness, Justice Dunfield provided some insight into what considerations he included when attempting to render a decision based on the facts in front of him. Although a lengthy quotation, the candor with which Justice Dunfield explained himself must be appreciated in its entirety. He says:

\begin{quote}
I am not sure that on this American Continent we are not in danger of becoming too technical in Court. That is perhaps the feeling of a Newfoundland judge only recently Canadian,
\end{quote}


\textsuperscript{89} \textit{Supra} note 87 at 201.

\textsuperscript{90} \textit{Power v. Winter} (1952), 30 M.P.R. 131.
and brought up to the British way of doing things. A judge can take one of two attitudes. He can set himself to search the precedents, assemble a jig-saw puzzle out of them, say, “This is what the others have done” and do the same. Or he can say “Here I seem to see justice; this seems to me to be commonsense procedure; I will search the precedents and see how others have approached the matter, but unless I find myself barred by authority binding upon me I insist on approaching this matter by the commonsense route”. I believe that this would be the attitude of the English Bench, from which we have heretofore taken our law. We are not here to administer the law according to precedent; we are here to do practical justice, guided in essentials by precedent. The two attitudes are quite different. If precedent hinders practical justice, precedent should be stretched. If a court of equal status with ourselves has once, or even twice, uttered, as we all do at times, a generality which is rather wide, must we all follow that generality? I think not. Of course, a long chain of decisions would be a different matter.⁹¹

This profound acknowledgment of the driving force behind his judicial decisions, a desire to achieve practical or commonsense justice, serves to remove the importance of precedent from the discussion entirely. In a case that, at a glance, seemed to be no different from the many others heard before it, came an articulation from a Supreme Court Justice that accordance with the law was not his primary concern, but ensuring that the law was used in such a way so that actual justice, not just the law on paper, resulted. This case serves as a reminder that even though Newfoundland is now a province of Canada, it has not forgotten its identity, a sense of distinctiveness that remained central to the Justices themselves.

Conclusion

The circumstances surrounding Newfoundland’s joining Confederation are

⁹¹ Ibid. at 148. Emphasis added.
incomparable to those which faced the “founding fathers” in 1867, when Newfoundland was joining a nation that already existed. There was little room for negotiation in 1949.\footnote{David MacKenzie, “The Terms of Union in Historical Perspective” (1998) 14:2 Newfoundland Studies 220 at 233.} This difficulty was reflected in the judiciary as well, who were faced with the dilemma of whether to jump on the Canadian bandwagon, where the law was already going in a direction that may or may not have been the same way that the Newfoundland Supreme Court had been headed. From 1932-1958, the Court went from dubiously including non-British precedent to being bound by Canadian law. Regardless of potential discrepancies, Canadian law was now supreme.

The fact that a law must be practical in a given jurisdiction for it to be applied was first discussed in relation to the usefulness of Canadian property law to Newfoundland, and was reintroduced by Justice Dunfield in \textit{Power v. Winter}. It was the responsibility of the Justices of the Newfoundland Supreme Court to mould Canadian precedent in a way that corresponded with Newfoundland common law, which reflected the Island’s values. Justice Dunfield’s pronouncement that practical justice must be served first indicated that Newfoundland law need not be abdicated in favor of Canadian law; for the law to be realistically applied, Newfoundland and Canadian law must influence each other to achieve a result that is sensible for the province. Despite Newfoundland’s sudden change in status, there were no legal uprisings or controversies surrounding the Court’s integration of Canadian precedent into its decisions, exemplifying the subtlety and balance used to achieve the ultimate goal of practicality.
JURISPRUDENCE


*Bentley v. Peppard* (1903), 33 S.C.R. 44.


*Dillon v. Canning and the St. John's Housing Corporation* (1946), 15 Nfld. L.R. 386.


*The Ernest H. Meyer* (1936) 84 F.2d. 496.


*In Re Johnson* (1913), 27 O.L.R. 472.

*In Re Johnston and Smith* (1906), 12 O.L.R. 102.


*Lindsay v. Glass* (1889), 21 N.E. 897.


*R. v. McChlery* (1912), App. D. 199 (S. Af.).


*The Oglethorpe Victory* (1950), 25 M.P.R. 22.

*Piper v. Stevenson* (1913), 12 D.L.R. 280.


*In Re Reid* (1922), 64 D.L.R. 589 (Ont Sup. Ct.).
Scrimger v. Town of Galt (1914), 16 D.L.R. 867.
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