Copyright is owned by the Author of the thesis. Permission is given for a copy to be downloaded by an individual for the purpose of research and private study only. The thesis may not be reproduced elsewhere without the permission of the Author.
Patriating Appeals:

New Zealand’s withdrawal from the Judicial Committee of the Privy Council

A thesis presented in partial fulfilment of the requirements for the degree of

Master of Arts in History

Massey University, Palmerston North
New Zealand

Patrick Gerard McCabe

2016
Abstract

In 1900, the Judicial Committee of the Privy Council was the final court of appeal for one-quarter of the world’s people residing in the British Empire, with the notable exception of those who lived in the British Isles. Despite the major exodus from the Judicial Committee’s jurisdiction in the two decades following the end of the Second World War, it was not until the late 1960s before the possibility of New Zealand’s departure was raised. A sporadic debate then ensued.

In 1986, the Government initiated the first of three formal attempts to end New Zealand appeals to the Judicial Committee. Each attempt was very contentious, and it was not until 2003 when this objective was achieved. This thesis examines the ending of New Zealand appeals to the Judicial Committee. It identifies a series of debates, involving common themes and contrasting political positions, over more than 35 years. It also identifies changing legal features, which provide an important backdrop to the debates. It concludes with an assessment of why this process took so long.
Preface

During my public service career, I was fortunate to work with a great team of colleagues from several Government Departments, on the final proposal for ending appeals to the Judicial Committee of the Privy Council, and for developing the legislation which founded the Supreme Court of New Zealand. The Attorney-General, Hon. Margaret Wilson, was responsible for the project, while the Solicitor-General, Terence Arnold, QC, led the officials. The team's role brought us into contact with a wide range of New Zealanders, many of whom had strong views as to whether appeals should continue to London or be redirected to a new Supreme Court in Wellington. We were conscious that this was an historic event.

In preparing for a new phase of life, I decided to undertake post-graduate studies in history, and New Zealand’s efforts to end appeals to the Judicial Committee became an obvious topic for my thesis. This study only briefly touches on the period when I was directly involved. Many of the ‘hard yards’ in developing the nature of the change had been done by others during earlier Administrations: ministers, judicial leaders, officials, and community leaders including from Maori and the legal profession; and by Margaret Wilson with her first proposal as Attorney-General.

Ferreting in the archives and studying various legal articles, I became aware that there is a bigger story to tell, both of the efforts of those who sought to adapt and enhance New Zealand's access arrangements to the Judicial Committee, and of the efforts of those who worked to find a New Zealand-based alternative. Legally trained historians may offer further insights, but there is also very useful information sufficient for the general historian. I trust this thesis contributes towards the development of that bigger story.
Naturally, I was excited to be involved in the Supreme Court project. It accorded with my own perspectives. R.G. Collingwood asks can historians be impartial? In his answer, he observes: ‘it is the historian’s judgments of value that select from the infinite welter of things that have happened the things that are worth thinking about.’¹ This thesis presents my judgments, informed by my fortunate vantage point as one of the policy advisers who worked on the final proposal, of the efforts that resulted in the patriation of appeals to New Zealand.

Table of Contents

Abstract ................................................................................................................................. i
Preface ................................................................................................................................. ii
Table of Contents ................................................................................................................. iv
List of Figures ....................................................................................................................... vi
Abbreviations ..................................................................................................................... vii
Acknowledgements ........................................................................................................... viii
Chapter One - Introduction ................................................................................................ 1

Chapter Two – British to the Core ..................................................................................... 12
  Introduction ......................................................................................................................... 12
  Origins ................................................................................................................................. 12
  The Final Appellate Court ................................................................................................. 18
  New Zealand Appeals ......................................................................................................... 22
  The Early Twentieth Century ........................................................................................... 27
  The Post-Second World War Period ................................................................................ 33
  Broader Influential Developments .................................................................................. 41
  Commonwealth Judges Join the Judicial Committee ..................................................... 46
  A New Commonwealth Court of Appeal? ....................................................................... 55
  The Future of New Zealand Appeals ............................................................................... 56
  The Beginnings of the Public Debate .............................................................................. 66
  Conclusion .......................................................................................................................... 72

Chapter Three – Who Wants Juristocracy? ..................................................................... 74
  Introduction ......................................................................................................................... 74
  Reforming the Constitution .............................................................................................. 74
  The Court of Appeal Speaks ............................................................................................. 83
  National Legal Identity Revealed .................................................................................... 87
  A new Chief Justice .......................................................................................................... 92
  The Law Commission reports ......................................................................................... 95
  The Government responds ............................................................................................... 96
  Conclusion .......................................................................................................................... 98
Chapter Four – The New Zealand Courts Structure Bill

Introduction .................................................................................................................. 101
Initial position ............................................................................................................... 101
Rumblings ..................................................................................................................... 104
Law Leaders visit London .......................................................................................... 110
The Solicitor-General reports ...................................................................................... 114
Reactions to the report ................................................................................................. 118
The views of Maori ....................................................................................................... 125
Personnel Changes at the Court of Appeal ................................................................. 128
The Government Decides to end Appeal Rights to the Judicial Committee .......... 132
After the 1996 election ................................................................................................. 136
Conclusion .................................................................................................................... 140

Chapter Five – Finally, a new Supreme Court ......................................................... 142
Introduction .................................................................................................................. 142
Opening proposal ......................................................................................................... 142
Developments in the United Kingdom ....................................................................... 148
Lord Cooke .................................................................................................................... 150
Criminal appeals .......................................................................................................... 152
The Ministerial Advisory Group .................................................................................. 153
Cabinet decides ............................................................................................................. 161
Subsequent developments ............................................................................................ 161
Conclusion .................................................................................................................... 169

CONCLUSION ............................................................................................................... 171
Source of Figures ........................................................................................................... 177
Appendix One: Judicial Committee Judgments on NZ Appeals .............................. 178
Appendix Two: A Statistical Overview of New Zealand Appeals ............................ 207
Appendix Three: New Zealand Judicial Privy Counsellors ..................................... 211
Appendix Four: New Zealand Privy Counsellors ...................................................... 212
Bibliography ................................................................................................................ 215
Primary Sources ......................................................................................................... 215
Secondary Sources .................................................................................................... 220

Patrick McCabe Patriating Appeals
List of Figures

Figure 1: Sir Joshua Williams.................................................................21
Figure 2: Sir Michael Myers.................................................................36
Figure 3: Judges and the law profession greet Lord Chancellor Jowitt........38
Figure 4: Sir Richard Wild.................................................................54
Figure 5: New Zealand Herald’s front page editorial, 9 October 2003 ..........166
Abbreviations

AC – Appellate Committee of the House of Lords in the United Kingdom.
BAILII – British and Irish Legal Information Institute.
CJ – Chief Justice.
CRNZ – Criminal Reports of New Zealand.
J – Justice
NZAR – New Zealand Administrative Reports.
NZLII – New Zealand Legal Information Institute.
NZLJ – New Zealand Law Journal
NZLR – New Zealand Law Reports.
NZPCC – New Zealand Privy Council Cases.
NZPD – New Zealand Parliamentary Debates.
NZTC – New Zealand Tax Cases.
P – President (of the New Zealand Court of Appeal).
PRNZ – Procedural Reports of New Zealand.
QC/KC – Queen’s/King’s Counsel.
Rt. Hon. – The Right Honourable, it denotes that the person has been appointed to the Privy Council, and includes both judicial and political Privy Counsellors.
TVNZ – Television New Zealand.
VUWLR – Victoria University of Wellington Law Review.
Acknowledgements

There is a wide range of people to whom I am indebted, and offer my heartfelt appreciation.

Massey University has a fantastic distance learning service. In particular, I wish to thank:

- My supervisor, Professor Michael Belgrave who brings insights not only as an academic historian teaching the craft, but also as a professional historian having encountered some of the same events and personalities from a different vantage point. His encouragement to check their relevance, has saved me from overlooking significant, related events, and consequently has strengthened this thesis. He attempted to persuade me to reduce the size of the thesis, while suggesting the addition of one or two more points to provide background clarification.

- Dr Geoff Watson who has readily ensured I am kept up to date with relevant post-graduate student programmes and information, as well as assisting with the administrative arrangements, and providing helpful tips on the presentation of this thesis.

- The members of the History Group of the School of Humanities, both at the Palmerston North and at the Albany campuses.

- The librarians: I have greatly availed myself of the library services especially at the Palmerston North and the Wellington campuses. Books, journal articles and on-line resources were easily delivered. Advice was readily given by the librarians. I also appreciated the Bonus scheme, which enabled me, through Massey, to borrow books from Australian universities.

- Ashley McGrillen of the Information Technology Services group assisted with formatting of this thesis.

Through the University Libraries of Australia and New Zealand scheme (ULANZ) I accessed books and journals at Victoria University of Wellington, both for general history at the Kelburn campus and for legal history at the Pipitea campus. Further
library resources were readily available at the National Library and the Alexander Turnbull Library. My thanks, too, to the librarians at these libraries for their assistance.

I also acknowledge the assistance of staff at Alexander Turnbull Library in securing copies of photographs to illustrate this thesis.

Government Ministers – especially Hon Christopher Finlayson, QC, Attorney-General, and Hon Amy Adams, Minister of Justice - and officials allowed liberal access to relevant Cabinet papers, principally of the National Government’s proposal 1994-1996, and I express my gratitude them, and to Rachel Hayward and Anna Fleming of the Cabinet Office for making these arrangements. Anna readily chased down additional papers, whenever we found an additional reference.

I thank the Chief Archivist and the staff at Archives New Zealand for facilitating my access to the various files of different Government Agencies as well as the relevant personal papers of Rt. Hon. Sir Robert Muldoon, Hon. Dr Martyn Finlay, QC, and Rt. Hon. David Lange.

I also thank the Rt. Hon. Paul East, QC, for access to his papers when, as Attorney-General, he appeared as an amicus curiae before the Judicial Committee in Richard Prebble v Television New Zealand. My thanks, too, to the Rt. Hon. Sir Donald McKinnon for access to his file containing his exchange of correspondence with Hon. Sir John White, QC. Mr Francis Cooke, QC, provided helpful clarification about his father, the late Lord Cooke of Thorndon.

The Ministry of Foreign Affairs and Trade permitted me to view certain files which have yet to become openly available at Archives New Zealand. Similarly, the Ministry of Justice permitted me to view certain files which have yet to become openly available at Archives New Zealand. My special thanks to Judith Forman and Ruth Fairhall for facilitating this access. [Both Ministries and the Cabinet Office required me to submit draft extracts, using these relevant official documents, for their review: no changes to my text were required by these Government
Judith Forman also assisted me in borrowing books from the Ministry of Justice library.

There are also many friends, colleagues, and family members whom I must thank for their interest and encouragement.

My wife, Veronique Vervoort, has lived with my interest in this project for a very long time. To her, my heartfelt gratitude and love.

I, alone, am responsible for the opinions and errors in this study.

Patrick McCabe
31 July 2016