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A New Beginning

1975–1982

No previous statutory enactments had greater impact on the institutional development of the Supreme Court than the two that occurred during the years between 1975 and 1982. The first, in 1975, was the culmination of a long series of amendments to the Supreme Court Act eliminating appeals as of right and granting the Court almost complete control over its docket. The second was the historic adoption in 1982 of a new constitution in which the Court was virtually entrenched and given a vital new mandate. The first development had been sought eagerly by the Court for many years; the second event was thrust upon the justices by federal and provincial politicians.

Throughout these years the Supreme Court was caught in the crossfires of federal-provincial disputes more frequently than in any previous period. As well, the composition of the Court changed with the departure of several justices. Between the summer of 1977 and the winter of 1980 five members of the Court retired or resigned. Prime Minister Trudeau gave little indication in the selection of the replacements that he was particularly sensitive to the Court's emerging new public-law mandate. The appointments followed traditional regional considerations. Wilfred Judson, an Ontario representative, was replaced by Willard Z. Estey from Toronto;[1] and Yves Pratte of Quebec City replaced Louis-Philippe de Grandpré. Estey was born and educated in Saskatchewan; after completing graduate studies at Harvard, he practised law in Toronto. He quickly achieved prominence in corporate litigation, but left the practice in 1973

for a position on the Ontario Court of Appeal. He became chief justice of the High Court (Supreme Court of Ontario) in 1975. One year later he was named chief justice of Ontario. In this capacity he attracted considerable attention throughout the Ontario bar with his wide-ranging proposals for the reform of the judicial process. To the surprise of many members of the bar, Estey abandoned this high position and his reform program for a puisne judgeship on the Supreme Court of Canada barely one year after becoming chief justice of Ontario. Only the second provincial chief justice to accept a transfer to Ottawa since A.C. Killam in 1903, Estey, aged fifty-seven, brought to the Supreme Court of Canada added prestige and energy.

Yves Pratte was called to the Quebec bar in 1947 after legal studies at Laval University and graduate studies at the University of Toronto. After becoming well ensconced in his legal career, he began to take on additional and more public tasks. In the fall of 1977, in the midst of a varied career in private practice and public service, he decided, at the age of fifty-two, to leave the practice of law and accept an appointment to the Supreme Court.[2]

Both of these 1977 appointments broke with the apparent pattern of earlier Trudeau selections. Estey's and Pratte's academic credentials are impressive, but their careers as law professors were limited and their legal expertise was in the field of corporate law. Estey not only enhanced the prestige of the Court but soon became an important popularizer, speaking more openly and more frequently than other justices about the Court's work. But Pratte's was not a propitious appointment. The press hinted at patronage, and the government exhibited questionable judgment in placing him on the same bench with Estey, who, just two years earlier had been so critical of Pratte's management of Air Canada. After less than two years Pratte resigned from the Court for health reasons and returned to the corporate world, accepting directorships in such major companies as Domtar and Power Corporation. His resignation and Wishart Spence's retirement in the winter of 1978 created two further vacancies.

In replacing Justice Spence the Trudeau government reportedly sought a specialist in criminal law. Perhaps concerned as well about the declining popularity of the Liberal party in the west, the government chose William Rogers McIntyre to fill the post. McIntyre, a native of Quebec, attended the University of Saskatchewan and then served in the Canadian Army in Europe until 1946. He was called to the bars of Saskatchewan and British Columbia in 1947 and entered private practice in Victoria, specializing in criminal law. In 1967 he was named to the Supreme Court of British

Columbia; he moved to the Court of Appeal in 1973. McIntyre came to Ottawa in 1979 at age sixty with over eleven years' judicial experience.[3]

It fell to the short-lived Conservative government of Joe Clark to fill the Quebec seat vacated by Yves Pratte. The opening offered a welcome opportunity for the young government to establish its political credentials in a region where the Conservative party had long been weak. Not surprisingly, the government selected a known party supporter, but fortunately one with strong legal experience. Julien Chouinard was born in Quebec City and graduated in law from Laval. As a Rhodes scholar he continued his studies at Oxford University before being called to the bar in 1953. From 1965 to 1968 Chouinard served two Quebec governments as deputy minister of justice before resigning to run for the Conservative party in the federal election. After his defeat he returned to the provincial government and served as secretary-general of the executive council from 1968 to 1975. In 1975 he was appointed by the Trudeau government to the Quebec Court of Appeal, and in the following year agreed to head a federal commission of inquiry into the Gens de l'air controversy.[4] In its search for meaningful representation from the province of Quebec, the Clark government reportedly tried hard to entice Chouinard into the federal cabinet during the summer of 1979. Failing that, he was named to the Supreme Court at the relatively young age of fifty.[5]

Early in 1980 Justice Pigeon, who had provided such strength and stability among the civil-law justices throughout the 1970s, reached the age of compulsory retirement. The newly re-elected Trudeau government named Antonio Lamer in his place. Born in Montreal, Lamer graduated from the University of Montreal and entered private practice in his native city. A criminal defence lawyer, he was also active in the Liberal party. In 1969 Lamer was appointed to the Quebec Superior Court. He joined the Law Reform Commission of Canada in 1971 as vice-chairman, and in 1975 was appointed chairman. Lamer was named to the Quebec Court of Appeal in 1978. Along with his varied experience and his concern for the law, Lamer at age forty-seven brought a youthful vigour to the Supreme Court of Canada.[6]

Ronald Martland retired from the Court early in 1982 after a distinguished career of twenty-four years. Sandra Day O'Connor had recently been appointed to the Supreme Court of the United States, and the media exerted pressure on the government to appoint a woman as Martland's replacement. Newspapers profiled female judges across the country, discussing their strengths and weaknesses. More interest and speculation regarding this vacancy was exhibited in the country than ever before

in the history of the Supreme Court of Canada – perhaps partly because, after the constitutional decision of 1981, Canadians were aware of how important and influential the justices of the Court could be.[7]

The Trudeau government acknowledged this pressure by naming Justice Bertha Wilson of the Ontario Court of Appeal. In doing so, the government demonstrated that public opinion could have some influence on judicial appointments. Born and educated in Scotland, Bertha Wilson emigrated to Canada after the Second World War. She graduated from Dalhousie Law School in 1958 and practised law in Toronto until her appointment to the Ontario Court of Appeal in 1975. Wilson had an incisive legal mind and brought to the Supreme Court of Canada a reputation for meticulous research in the law. Her appointment also redressed the regional distribution of seats, altered in 1979 by the elevation of William McIntyre.

What can be said of the general trend in appointments to the Supreme Court over the past decade? First, one is struck by the extent of Pierre Trudeau's influence. Including Pigeon, chosen when Trudeau was minister of justice, he or his government appointed ten justices and two chief justices, equalling the record of Sir Wilfrid Laurier and exceeded only by Mackenzie King. Second, the eleven recently appointed justices tend to share several characteristics. Five justices did graduate study in law, and seven of eleven justices (including five of six from Quebec) taught law at the university level; judging by these criteria, this was the most learned and scholarly group of justices ever to join the Supreme Court. Eight of the appointees came to Ottawa with prior judicial experience, including all of the common-law justices; of the three civil-law justices who came directly from private practice, two resigned within a short time. This was a group of justices with judicial training and a healthy respect for the courts below. Although none of the justices had held elected office, a proliferation of non-elected government experience was reflected in the careers of five of the six civil-law appointees. The average age of the new justices was just over fifty-four (higher for the common-law members).

Speaking generally, the criteria for selection in this period were an improvement over the past. A better-educated, more experienced judiciary is a pleasing prospect, but with an average of twenty years ahead of each member at the Supreme Court there is a danger in the potential lack of rejuvenation and diversity. While the regional balance has been maintained, there have been some welcome signs of flexibility. The nominations of Laskin and Wilson make it apparent that the pool from

which selections can be made has been broadened to include new groups, creating the potential for better appointments. Finally, there has been no apparent move to try to 'pack' the Supreme Court in any one identifiable direction. At the same time, the process of judicial selection has been improved. Under a series of justice ministers – Trudeau, Turner, and Lang – a system was established of submitting names to the Committee on the Judiciary of the Canadian Bar Association to obtain its views on prospective appointees prior to appointment. This procedure has been maintained by succeeding ministers and further improvements have been made.[8] This system has likely helped to raise the quality of the judiciary and to reassure the often critical legal profession.

Changes in the salary structure and pension benefits over the years enabled justices to be paid at a level consistent with their responsibilities and their earning power elsewhere. In the early 1950s, the chief justice received $25,000 and puisne justices $20,000; the salaries rose steadily, to $27,500 and $22,500 in 1955, $40,000 and $35,000 in 1967, and to $81,000 and $74,000 by 1980, when they were indexed to provide for annual increases.[9] Nevertheless, the increased salary and pension benefits (including survivor benefits) have not been sufficient to attract many leading lawyers to high judicial office. A top lawyer in any of the major metropolitan centres of Canada can today command an annual income of $300,000.[10] If such a lawyer wished to accept a puisne judgeship on the Supreme Court of Canada, he or she would have to take a 66 per cent reduction in salary. Most lawyers are not inclined to do so. One group of lawyers, however, would not be required to make such an enormous sacrifice. Full-time law professors, who emerged as a sizeable group beginning in the 1950s with the transfer of legal education to the universities, could not expect to make the income of a leading corporate lawyer. But an appointment to the bench with tenure to age seventy (superior courts) or seventy-five (the Supreme Court) and a good pension at a salary close to academic levels is attractive to academics. In addition, academic lawyers tend by profession to be drawn to the kind of work done in appeal courts. Law professors are constantly reading court judgments and critically seeking ways to improve the quality of the search for principles and the development of the law; hence the number of academics who accept appointments to the courts. The fact that Prime Minister Trudeau, Justice Minister Otto Lang, and Justice Minister Mark MacGuigan were law professors before entering politics made them amenable to appointing academics. Nevertheless, the appointment of academic lawyers to high judicial office is sometimes viewed critically by

some members of the provincial bars because professors often lack practical legal experience.

Important changes were made to the Supreme Court Act and to the Court's jurisdiction under the Trudeau government. The previous Liberal government had declined to introduce such legislation for fear of opening the door to widespread attacks on the Court; as justice minister, Pierre Trudeau had accepted that decision. As soon as he became prime minister, however, the proposed amendments were brought forward.[11] In an atmosphere in which changes were positively considered, one of the most significant developments in the history of the Court's jurisdiction occurred.

By the early 1970s the workload at the Court had become overwhelming. In 1970 judgments were handed down in 137 cases (compared with 62 in 1950), and the increase was continuing. In the fall of 1971 it was announced that a record-breaking 115 cases were on the Supreme Court docket, many of which would have to be postponed until the following year for hearing. A number of these cases were arriving at the Court as a matter of right, involving no important issue of law but meeting the basic monetary requirement. Under the old act, any civil case involving more than $10,000 could be appealed to the Supreme Court as of right. The justices were required to spend much of their time (one estimate was over 70 per cent) on unimportant issues, and the large number of cases deprived the justices of much-needed time to give due consideration to the issues arising in the few major appeals. As well, the workload pressures forced the justices to deal summarily with many minor cases; in 1973, for example, one-third of all cases were disposed of orally from the bench at the conclusion of argument.[12]

The effort to find ways of limiting appeals was hampered by the Supreme Court's duty to supervise the provincial courts of appeal; that responsibility cannot be restricted to cases of public importance. The Court also has a duty to grant leave to appeal in civil-law cases that are not of general importance throughout Canada. Finally, there are areas of law (such as tort, damages, contract, and wills and trusts) that are rarely touched by legislation and in which review by the Supreme Court is especially important. In short, the Court could not function as a general court of appeal for Canada if access to it was limited drastically.

Various proposals were put forward to deal with the problem. The government chose to begin to limit access to the Court for less important cases judged from the point of view of the law. In 1970 an amendment

ended appeals by right in cases involving questions of fact alone, but broadened access otherwise.[13] This did not have a major impact.

The justice minister, John Turner, began to mention publicly the possibility of ending all appeals as of right. As in the case of the 1970 changes, Turner consulted leading members of the Canadian Bar Association. By the end of 1974 a new minister of justice was ready to pilot through the House legislation ending appeal to the Supreme Court as of right (except in criminal cases where there was a dissent in the Court of Appeal)[14] and withdrawing all monetary criteria for access to the Supreme Court. Instead, the justices were given authority to grant leave to appeal on the basis of whether in their judgment the case involved an issue of public importance or of legal significance. Section 55 of the Supreme Court Act obliging the justices to hear reference cases remained intact. While aimed at solving the workload problem, such changes in the Supreme Court's jurisdiction had great potential for the quality and import of the judgments handed down. The most noticeable result of the revised act is a dramatic decrease in private-law appeals; there has been scarcely any change in public-law cases. One characteristic of this development has been a reduction of Civil Code appeals from Quebec, since such cases are private-law disputes.[15]

In response to this new freedom to determine its own docket, the Court has adopted a set of informal guidelines. Criminal appeals, even of cases in which there was no dissent in the Court of Appeal, are deemed to be of public importance. This practice, coupled with the introduction of legal aid throughout Canada, has caused the number of criminal cases to rise over the past few years. In 1977, for example, the Court heard thirty-two criminal appeals; in 1975 only two were heard.

If the appeal involves constitutional law, leave is granted almost automatically. If the Court has not had an opportunity to consider the point of law at issue, it grants leave. In civil matters the justices tend to require that the statute in dispute exist in more than one province or be of such importance that it is likely to have implications for other provinces.

Finally, the Court is especially vigilant in cases involving House of Lords precedents. If the House of Lords reverses itself on a case that has been relied upon in the lower courts or in the Supreme Court, then the justices grant leave in order to give themselves an opportunity to bring Canadian law into line with the new development.[16] The Supreme Court justices continue to grant special deference to the senior appellate tribunal in the common-law world.

Unfortunately, the evidence so far is that this control over appeals has

not substantially altered the number of cases being considered by the judges. Apart from the fact that motions for leave have naturally increased in number,[17] the total number of cases heard has declined by more than 30 per cent between 1975 and 1980. However, it appears that the number of cases is now beginning to rise once again.[18] This raises the question as to whether the justices are being firm enough in insisting on the presence of significant issues; are their standards of importance high enough? The statistics of recent years indicate that the Court grants between 25 and 30 per cent of the applications for leave.[19]

The first sign that the justices of the Supreme Court were taking some advantage of these developments came with changes in the internal decision-making process. Although the idea of regular judicial conferences had been put forward over the years by several chief justices, their influence and powers of persuasion were insufficient to overcome the strong sense of individualism among many of the justices. Under the leadership of John Cartwright this changed. Ever since his brief term as chief justice, a system of regular judicial conferences has become the practice. At the end of argument in a case, the justices usually retire to consider the appeal. The issues are discussed briefly – the most junior justice speaking first – and a straw vote taken; one justice volunteers to write the initial reasons for judgment; where there is no obvious choice the chief justice designates the writer. The draft judgment is circulated for comments and possible alterations, by which time other members of the Court are able to decide with some certainty whether a separate judgment (either concurring or dissenting) is necessary.[20]

Another positive sign was the justices' increasing awareness and thoughtfulness regarding the judicial function and their role as judges. This is evident, for example, in the writings of Emmett Hall, L.-P. Pigeon, Bora Laskin, and Brian Dickson.[21]

On the whole, the judgments written during the 1970s were simply of higher quality than earlier judgments. The justices have demonstrated a greater (though by no means complete) willingness to come to grips with the basic issues and principles involved in cases, rather than limiting themselves to technicalities or to superficial issues. Paul Weiler, who was so critical of the Court's judicial craftsmanship during the 1960s, was far more positive about the Supreme Court by 1979, pointing particularly to the improvement in 'the entire intellectual tone of the court.' Weiler attributed this largely to Chief Justice Laskin, but the source was broader than that.[22] Without denying the chief justice's important influence, several of the other new justices also have impressive academic backgrounds and are sensitive to the search for principles rather than the

mechanical application of rules. As a result, some justices (Dickson, Estey, and Lamer, for example), have given every indication that they are aware of the creative role of the judicial function in the Supreme Court. There is a greater sense of intellectual self-confidence among the justices. Stare decisis is no longer the crutch it once was; the justices are willing to acknowledge that previous decisions of their own or of others should no longer be followed.[23] In *McNamara Construction* (1977)[24] for example, the Court explicitly overruled an 1894 judgment it had relied upon during the intervening years.

This is not to imply that the Court as a whole had jettisoned its past conservatism. A basic deep-seated judicial conservatism remains. Chief Justice Laskin, for example, because of his propensity for bolder jurisprudence, was frequently in dissent. His creative efforts often came into conflict with the Court majority in cases such as in *Murdoch* v *Murdoch* (1975)[25] before he became chief justice. In that case an Alberta rancher's wife claimed a half-interest in the real property (not just the homestead) acquired through the work of both spouses over twenty-five years of marriage. Justice Martland, writing for the 4–1 majority, held that the wife had failed to prove a financial contribution to the growth of her husband's assets and that her claims on the basis of a contribution of physical labour were unacceptable. To the lay person the Court seemed to be saying that twenty-five years' work as a rancher's wife was of no value in law. What the majority actually said was that such work did not alter the conception of marriage as a simple legal contract.

Justice Laskin, in dissent, showed a genuinely imaginative approach to the issues which at this time were on the minds of many women throughout Canada. In a clear and crisp tone readily picked up by the media, Laskin argued that the common-law tradition urged courts to be innovative in such circumstances:

> No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the Courts can conduce to equitable sharing, it should not be withheld merely because difficulties in particular cases and the making of distinctions may result in a slower and perhaps more painful evolution of principle.[26]

This was the kind of logic the average person could understand. One CBC radio reporter hailed Laskin as a 'jurisprudential folk hero.'[27]

The Murdoch decision brought the Supreme Court under the full

scrutiny of public opinion. Laskin fared well, but the Court as a whole was widely assailed as being out of step with the times. Unable to appreciate the legal complexities of Martland's majority judgment, the general public – especially women – disapproved of the decision; several feminists compared it to the famous *Persons* case decided a half-century earlier. Once again, the Court had 'failed' to live up to public expectations. The public was unable to understand fine legal distinctions, and the Supreme Court was made to appear reactionary and anti-feminist. One magazine headlined its story about the decision, 'The Law as Male Chauvinist Pig.'[28] The justices were blamed for the weaknesses of provincial legislation in the area of family law and for their own traditional unwillingness to give leadership in solving legislative problems.

Not many months after *Murdoch*, Laskin again found himself in dissent on the important question of admissible evidence. In *Hogan* v *The Queen* (1975)[29] the Court majority, led by Ritchie, ruled that evidence obtained in contravention of the terms of the Canadian Bill of Rights was admissible in court. Laskin, in dissent with Spence, argued for the absolute exclusionary rule.[30] 'The American exclusionary rule, in enforcement of constitutional guarantees, is as much a judicial creation,' Laskin argued, 'as the common law of admissibility.' As in *Murdoch*, Laskin was inviting his colleagues to adopt a more activist understanding of the judicial function. But the majority was too firmly entrenched in the older common-law view that all relevant evidence, no matter how obtained, was to be admitted against an accused.

In criminal law the conservatism of the mid-1970s was also manifest. It was apparent in several cases,[31] but nowhere was it more evident to the public than in the highly publicized case of *Morgentaler* v *The Queen* (1976).[32] Henry Morgentaler, a Montreal physician, had been charged with performing an illegal abortion on a seventeen-year old female in violation of section 251 of the Criminal Code. The doctor freely admitted performing the operation, but cited the common-law defence of necessity and the statutory defence of section 45 of the Criminal Code. A jury acquitted Morgentaler, but the Quebec Court of Appeal unanimously set aside the verdict; instead of ordering a retrial, the Court entered a conviction of the doctor and ordered that sentence be passed. In the Supreme Court of Canada, three dissenting justices (led once again by Chief Justice Bora Laskin) held that there was evidence the jury could interpret to support Morgentaler's defence and that the verdict should properly be left to the jury. The six-person majority, however, denied that the two basic grounds of defence were available to him in this instance;

the justices also found the entry of a verdict of guilty by an appeal court to have been permitted by statute, though this was 'obviously a power to be used with great circumspection.' The Supreme Court majority found that Parliament had explicitly provided by statute for both issues, that of abortion and that of substitution of a verdict by jury. Given the past history of the Court and the strength of the statutory terms, it is not surprising that most of the justices could not find a way to interpret the statute in a manner more favourable to Morgentaler. In a typically perceptive majority judgment, Justice Dickson made it clear that the Court was not called upon 'to decide, or even to enter, the loud and continuous public debate on abortion.' The case before the Court revolved around the technical provisions of the Criminal Code relating to necessity as a defence for a medical practitioner.

For the public, however, the issue was far less technical. Abortion was a sensitive issue and emotions ran high. For those supporting more permissive abortion laws, Dr Morgentaler was a martyr to the cause; feminists in this group could see a link between this decision and others, such as *Lavell*, *Bédard*,[33] and *Murdoch*. Some observers saw Morgentaler as a victim of an aggressive and persecuting state; he was perceived as 'the little guy,' harassed in jail, driven to a heart attack and bankruptcy, and hounded with further criminal charges. One headline read: 'Condamné aujourd'hui par la Cour suprême, le Dr. Morgentaler sera demain un héros.'[34] In this scenario the Supreme Court was clearly viewed as one of several state instruments being used to persecute the doctor and to preserve a sexist and illiberal law.

Justice Brian Dickson's majority judgment in *Morgentaler* was carefully crafted, and described what the Court was and was not being asked to do. This and other judgments have earned for Dickson respect and admiration from the Canadian bench and bar. Although he frequently joined in dissent with Laskin and Spence, Dickson demonstrated an independence of judgment in the important areas of constitutional and criminal law. His dissenting judgment in *Canadian Industrial Gas and Oil Limited*[35] showed him at his best in tough constitutional matters. His judgment there, as elsewhere, was meticulously researched, cogently reasoned, and written with a clarity and economy of style rarely found in the Supreme Court Reports.

Justice Dickson stands out as the best criminal-law mind on the Ottawa bench. His contribution to criminal jurisprudence has been nothing short of outstanding. It was Dickson who in *The Queen* v *Sault Ste Marie* (1978)[36] untangled the many knots in the law of mens rea.[37] Writing for a full nine-man Court, Dickson charted a new course in the difficult matter of

liability in public-welfare offences such as pollution. After acknowledging that public-welfare offences were the product of judicial creation and now firmly imbedded in Canadian jurisprudence, Dickson reviewed the arguments for and against absolute liability. The past tendency was for courts to adopt a requirement of mens rea in every instance (which was most difficult to substantiate) or to impose absolute liability on the defendant and convict simply upon proof of the offence without regard to intention to commit the actus reus. Dickson felt that these 'two stark alternatives' were unfair. A half-way house must accommodate a valid public effort to prohibit public-welfare offences. And since the category of public-welfare offence as well as the concept of absolute liability were products of the judiciary, the courts need not wait for legislative remedies. Between mens rea offences and absolute liability offences, Dickson inserted a third category: 'Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.' This new category permits consideration of what a reasonable man would do in the circumstances. The Court settled a nagging problem for governments, who were attempting to impose strict environmental standards, and for the lower courts in their effort to apply the law. Dickson was widely applauded for his leadership in this important issue.[38]

The Supreme Court as a whole emerges in *Sault Ste Marie* as a mature and sophisticated institution, and demonstrates that it has the capacity to respond when there is effective leadership. Justice Dickson represents the cautious transition from the older conservatism to a bolder jurisprudence. He is not as bold as Laskin, yet he is prepared to strike out in new directions when required to do so. It is not an exaggeration to say that Brian Dickson, not Bora Laskin, was the most influential justice on the Ottawa bench during Laskin's stewardship. Chief Justice Laskin appeared to go too far too fast for most members of the Court. It is too early, however, to say how influential over time his dissenting judgments will prove to be. There can be no doubt that his influence on other justices has not been as strong as many in 1973 expected it would be.

The Supreme Court was caught in the crossfires of intense federal-provincial rivalry many times throughout the late 1970s, especially in matters relating to natural resources and trade. Several contentious cases arose out of private litigation, and a few were the result of federal or provincial references to the Court. In the 1976 *Anti-Inflation* case,[39] the

federal government asked the Supreme Court whether the Anti-Inflation Act was in whole or in part ultra vires the power of Parliament. Chief Justice Laskin led a majority of seven in finding the act intra vires, although the reasons of the majority differed. (Laskin found the act intra vires on the ground that the crisis was temporary. Three members of the majority – Ritchie, Martland, and Pigeon – sided with Beetz and de Grandpré in dissent on the legal point that the federal government could legislate under the head of peace, order, and good government in times of emergency. The three in majority found that an emergency existed, while the two dissenting justices held that double-digit inflation did not constitute an emergency.)

The federal government won the day in that judgment, but the Court's restriction of the power of Parliament under the head of peace, order, and good government in times of emergency was hailed as a victory by the provinces. Provinces such as Quebec, British Columbia, and Saskatchewan welcomed the decision. They applauded wage and price controls, but they did not want the federal government to enter such areas of activity easily. The victory for the federal government, however, cannot be underestimated. It was the first time the Court had held valid the exercise of broad federal economic regulation in peacetime. The Court placed the burden on those who challenged the federal government in this instance and in the future to prove that the conditions did not require emergency legislation.

The Laskin majority pointedly set aside the testimony of thirty-nine leading Canadian economists who argued in facta (written submissions to the Court) that a 10 per cent inflation rate did not call for an emergency response. The economists also rejected wage and price controls as an ineffective and economically unwise measure, but Chief Justice Laskin dismissed this assessment as irrelevant to the legal and constitutional issues of the case. The fact that the government had resolutely refused to call the measure emergency legislation had no impact on the seven justices in the majority.

The Court suffered in the press accounts of this judgment. Some economists charged that the justices had substituted their views of economic policy for that of Canadian economists.[40] In addition, several provinces expressed fears that the decision gave Parliament too-easy access to emergency legislation. In sum, the case did much to confirm Laskin in the minds of many as being pro-centralist.

Two years after the *Anti-Inflation* decision, the Supreme Court found itself in a heated dispute between the federal government and the

province of Saskatchewan. The New Democratic government of Alan Blakeney attempted to reap the benefit of the windfall profits destined for oil-company coffers following the OPEC increase in oil prices in 1973. The Saskatchewan legislature imposed a 'royalty surcharge' on oil and gas production equal to the difference between the old price and the new world price set by the international oil cartel. Several provincial governments intervened in the Supreme Court on behalf of Saskatchewan; the federal government intervened on behalf of the Canadian Industrial Gas and Oil Company. What started out as a private dispute between one provincial government and a small oil and natural gas company became a battleground of major proportions involving important constitutional matters.

In a 7–2 decision, the Court ruled against Saskatchewan. All nine justices agreed that the surcharge was in fact a tax. Seven of the justices led by Justice Martland concluded that the tax was indirect and hence ultra vires the legislature. The majority held that since 98 per cent of the oil was exported abroad or to other parts of Canada, the taxes constituted an invasion of the federal authority over international and interprovincial trade.

Justice Dickson, in a typically systematic judgment, argued in dissent that the province had plenary power over natural resources 'subject to limits imposed by the Canadian constitution.' He reasoned that the flow of gas and oil in interprovincial and international trade was not impeded by the surcharge; the tax does not set the price, 'price sets the tax.' He concluded that the surcharge and minimal income tax imposed by Saskatchewan were actually direct taxes and hence within the competence of the provincial legislature.

Dickson's dissenting judgment in this case was imaginative and cogent. To many observers his arguments were more persuasive than the majority's, but they were of small comfort to Premier Blakeney. Both Saskatchewan and Alberta called for changes in the Supreme Court and for new constitutional concessions in regulating non-renewable natural resources. Subsequent events in Parliament, however, brought partial consolation to the provinces. In order to secure the support of the federal NDP, the Liberal government consented to incorporate into the new constitutional resolution an amendment empowering the provinces to impose 'any mode or system of taxation' on non-renewable natural resources.

Scarcely a year after this decision the province of Saskatchewan was back in the Supreme Court, but this time the federal government joined

the suit as a co-plaintiff along with the Central Potash Company. In *Central Potash Co. and The Attorney-General of Canada* v *The Government of Saskatchewan* (1979),[41] the Supreme Court ruled unanimously that the province of Saskatchewan's potash prorationing scheme was unconstitutional. Five other provinces – Quebec, New Brunswick, Manitoba, Alberta, and Newfoundland – intervened on behalf of Saskatchewan. The Supreme Court ruled that the scheme constituted an invasion of the federal legislative authority over interprovincial and international trade in part on the basis of the *Canadian Industrial Gas and Oil* precedent. The judgment was a culmination of a line of Supreme Court judgments going back to 1957 and the *Ontario Farm Products Reference*[42] in which the Court resolutely refused the provinces access into international and interprovincial trade.

Not surprisingly, the public reaction to this judgment of the central government's strong position, coming so fast upon the heels of the *Canadian Industrial Gas and Oil* judgment, was one of censure. The Court once again was perceived as incapable of altering its pro-Ottawa stance. Charges of bias were openly levelled against the Court after it ruled against the provinces in two broadcasting cases the same year as the *Canadian Industrial Gas and Oil* case. The criticisms became so strident that the chief justice took the unusual course of responding through the *Law Society of Upper Canada Gazette*.[43] Professor Peter W. Hogg explored the charges in the *Canadian Bar Review*. He concluded after a review of the cases that 'the Supreme Court has generally adhered to the doctrine laid down by the Privy Council precedents ... the choices between competing lines of reasoning have favoured the provincial interest at least as often as they have the federal interest.'[44]

Two judgments in 1980 favouring the provinces tend to support Hogg's review of the issue.[45] Peter Russell, after discussing the most recent cases and those cases in which the Supreme Court upheld provincial incursions into the domain of criminal law, concluded that the Court had demonstrated 'a considerable balance in [its] approach to the division of powers.'[46]

The public perception of the Court as an instrument of central power persisted and was reinforced by the federal government's use of the reference procedure in such contentious matters as offshore resources ownership. The government of Newfoundland, for example, in an effort to ascertain its legal rights over offshore minerals, referred its claim to the Newfoundland Supreme Court in 1982. The Ottawa government attempted to short-circuit this process by referring essentially the same issues directly to the Supreme Court of Canada. This created the impression of a

provincial appellate court being played off against the central court of appeal. An inappropriate sense of conflict within the judicial structure was perceived, and the impression was given that the courts at each level were the instruments of the governments at that level. This compounded an existing feeling among the provinces that the Supreme Court of Canada was a federal political instrument to be used against the provinces.[47] Such a perception could seriously inhibit the Supreme Court's effective pursuit of its role as constitutional umpire. The Court, fully aware of these potential problems, adopted ways of meeting them. For example, the Court has declined to hear a reference or has delayed a judgment until the provincial court of appeal has ruled on an issue. In short, it has devised internal procedures to reduce the possibility of political manipulation. Unfortunately, the justices cannot refuse to hear reference cases; the best they can do is delay or rephrase the questions put to them in order to minimize their involvement in political issues.

As if the cases involving trade and commerce were not sufficient to draw the Supreme Court into the vortex of federal-provincial conflict, worse was yet to come. The acrimonious debate in Parliament over the newly returned Trudeau government's determination to pursue unilateral amendment of the constitution eventually shifted to the Court. The prime minister resolutely refused to send the 'patriation resolution' on reference to the Supreme Court. Trudeau consistently claimed that there was no need to test its constitutionality. The Conservative opposition just as stubbornly insisted that it ought to be tested. The opposition charged that the intention to proceed without the consent of the provinces was a violation of Canadian constitutional practice.

A variety of political groups, from native peoples to provincial governments, all espousing different causes, turned to the Court to put an end to a political impasse. The justices were soon thrust into the midst of political controversy. Manitoba,[48] Quebec,[49] and Newfoundland [50] initiated reference procedures in provincial Courts of Appeal. The results of those judgments were split: the Manitoba court (3–2) and the Quebec court (4–1) ruled that provincial consent was not required, while the Newfoundland court ruled unanimously that provincial consent was required. A total of seven provincial appeal court judges had ruled the unilateral patriation route valid, and six members of the same provincial courts had ruled the process invalid. The narrow division of opinion prompted the Conservatives to increase their pressure on the government to postpone patriation until the Supreme Court of Canada heard the three appeals. This the Trudeau government reluctantly agreed to do. The

public pressure through the Conservatives and the press was simply too strong for the government to resist. As well, reports from London indicated that some members of the British government were disposed to balk at the request for patriation if Trudeau proceeded unilaterally. These reports added weight to the domestic opposition . At length the Trudeau government bowed to the pressures and referred the patriation resolution to the Supreme Court.[51]

The case came to the Supreme Court as of right in the spring of 1981. No fewer than thirty-eight lawyers representing the federal and provincial governments and interested parties (such as the Four Nations Confederacy) marshalled arguments for and against the essential point of the case: was consent of the provinces required before the federal government could seek an amendment to the constitution in matters touching provincial powers? For five days the eyes and ears of the country were focused on the Supreme Court. Never before in its history – not even during the Bennett New Deal cases or the Truscott trial – had the Court received such concentrated public attention; newspapers and television cameras reported at length the arguments for and against unilateral patriation. A parade of experts appeared on television and in the press, all attempting to second-guess the outcome. Most observers confidently predicted a 'win' for the federal government. Some experts drew attention to the chief justice's alleged tendency to support the federal course in most disputes with the provinces, and almost all noted that six of the nine justices owed their places on the Court to Prime Minister Trudeau. No one was more aware of the views of the press and the commentators than the justices themselves. The issue of patriation had been debated heatedly in public and private for many months. Members of the Court were conscious of the invidious position in which they had been placed, and their judgment was a reflection of the clarity of that understanding.

After taking the entire summer to consider the arguments, the judgment was handed down at the end of September 1981. The Court showed that it would not be hurried by expressions of impatience on the part of a few politicians and members of the media. The results were not nearly as unequivocal as either side would have wished, but they were sufficiently acceptable to both that each claimed the ruling a victory for its cause. In an effort to reduce any possibility of partisanship, the individual authorship of the various judgments was deliberately unstated.

The Supreme Court ruled unanimously that the patriation resolution affected federal-provincial relations and the powers of the provincial legislatures. On the central issue of whether constitutional practice or

convention imposed the requirement of provincial consent, the Court's ruling was mixed and confusing. Six of the justices held that a constitutional convention existed requiring 'a substantial degree of provincial consent' for federal requests to amend the British North America Act. The justices refused to say how many provinces constituted 'a substantial degree.' A larger majority (7–2) ruled that constitutional conventions were enforceable in the political forum, not in the courts. The six justices reached this conclusion after a lengthy discussion of what constituted a constitutional convention. The majority – consisting of Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer – reasoned that the federal character of the Canadian constitution militated against unilateral modification of provincial powers. Yet they drew back from legally enforcing this federal principle.

The minority, consisting of Chief Justice Laskin, Justice Estey, and Justice McIntyre, said that they were required to answer whether unanimous consent of the provinces was required. They found that there was no basis for unanimous consent. They implied that the majority's finding that a 'substantial degree of provincial consent' was required amounted to an agreement that unanimous consent was not required. The dissenters also disagreed with the federal principle emphasized by the majority. They found that the overriding power of the federal government under the British North America Act was too strong to permit a restraint of provincial prior consent.

The results of this judgment were relayed to the general public in such headlines as, 'PM's bid "offends" but is legal'.[52] How, many wondered, could something be legal and yet unconstitutional? There can be no denying that the judgment was difficult for the average citizen to understand, especially when many anti-Trudeau politicians insisted that the Court had ruled against the patriation proposal. What the Court actually said was that the unilateral request for amendment was legal (no law was being violated) but unconstitutional in the conventional sense (the government was violating a rule of constitutional practice). The Court held that such practices or rules of behaviour in constitutional matters are not enforceable in law.

The reaction of the academic commentators to the judgment was severe. Peter Russell, for example, acknowledged the boldness of the statecraft in the judgment but questioned the quality of the jurisprudence.[53] Russell and others also questioned the propriety of a court providing a judicial determination of a subject that had just been pronounced non-judicial. As well, the Court's absolute divorce between law and convention was, at

best, strained. It was not an impressive collective effort. For a case that was hailed as the most momentous in the Court's history and the most important opinion in one hundred years, it was a great disappointment jurisprudentially.

The judgment sent the federal and provincial constitutional experts back to the drawing-board five weeks after it was rendered. The renewed negotiations resulted in several significant modifications and the eventual endorsement of nine of the ten provinces. To that vital extent the Supreme Court played an important role in solving a highly contentious public issue. In 1972 Richard Simeon had criticized the Court for its weakness as a federal-provincial arbitrator or mediator.[54] The Supreme Court's role in the constitutional crisis of 1981 and the increasing frequency with which politicians of all parties and governments were referring political problems to the courts seemed to indicate that the Supreme Court of Canada was beginning to play a major role in the Canadian federal system. The question remains, however, whether it was proper for the Court to play such a role, at least in this instance. The Court is saved future embarrassment over this judgment for the simple reason that the issues it dealt with will never arise again. The new constitution incorporates an amendment formula, taking the matter out of the realm of convention and placing it in the category of law.

The constitutional reference ended one era and ushered in a new one: the era of the Charter of Rights and Freedoms. It is no exaggeration to say that the Constitution Act, 1982, will prove to be the most significant development in the history of the Supreme Court of Canada. There can be no doubt that this act constitutes a major change in the way Canadians will be governed in the future. Not only does the new constitution retreat from the traditional reliance on the political process and politicians, it imposes on the Canadian courts – and especially on the Supreme Court – a policy-making role in the areas of social justice and minority-language rights. Under the new Charter of Rights and Freedoms the Supreme Court is required to supervise any action on the part of the federal and provincial governments to restrict basic rights and freedoms.[55] Any restrictions must be 'reasonable' and 'demonstrably justified in a free and democratic society.' Since the written constitution (including the old British North America Act as amended) now encompasses so much of the fundamental law of the land, the Supreme Court faces a greater responsibility in seeing that that law is maintained. No previous constitutional act relating to Canada has transferred such sweeping powers to the judiciary as the Constitution Act, 1982.

The Charter of Rights and Freedoms provision (in section 24) encourages private citizens to seek redress of grievances in the courts, and will inevitably result in an increase in litigation in the lower courts. Many of these cases will eventually reach the Supreme Court.[56] In the first fifteen months of the Charter's existence, more than six hundred lower-court cases involved Charter provisions. Several of the more important of those cases are on their way to the Supreme Court. In effect, the Constitution Act, 1982, comes as close as possible, without explicitly doing so, to entrenching the Supreme Court of Canada because so wide a range of issues has now become justiciable. The Court is now called upon to determine the limits of the constitutionally enshrined values in the Charter of Rights and Freedoms.

As a result of this new judicial power, there will undoubtedly be calls for changes to the method of appointment to the Supreme Court in order to provide provincial input. The amendment formula specifically provides that the composition of the Supreme Court can be altered only with the unanimous consent of the federal Parliament and the ten provincial legislative assemblies.[57] The general jurisdiction of the Court can be altered with the consent of the federal Parliament and two-thirds of the legislatures constituting 50 per cent of the population of the country. Formerly, Parliament could alter the size and jurisdiction without consulting the provinces.

This is not to ignore the constitutional provision for legislative override. Under section 33 the federal Parliament and the provincial legislatures may expressly exempt a legislative provision from the terms of the Charter relating to fundamental political freedoms and legal and equality rights. (The override expires after five years but can be renewed.) Some commentators feel that this process is too uncertain and cumbersome to serve as a way of avoiding judicial power. The Quebec government of René Lévesque has attached the 'notwithstanding' clause to every piece of provincial legislation since the adoption of the new constitution (which Quebec refused to endorse). It remains to be seen whether the Supreme Court will allow such a general application of the override provision. Under the terms of the Charter's general grant of standing to sue (section 24) a private citizen could challenge this Quebec procedure.[58]

The Supreme Court has been catapulted into a prominence unsurpassed in its previous history. Under the new constitution the Court is implicitly mandated to impose uniform national rights and liberties. Grave reservations arise as to the capacity or desirability of judges to play this important role. The history of the Canadian Supreme Court reveals a

deeply conservative judiciary; only the rare justice – such as Chief Justice Bora Laskin – falls easily into the category of judicial innovator. This invitation to judicial change has been viewed as politicizing the courts. Russell calls the Charter 'a tendency to judicialize politics and politicize the judiciary.' The essential problem posed by the new Charter, according to Russell, is the potential for over-judicializing. 'The danger here is not so much that non-elected judges will impose their own will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.'[59]

It is clear that the new Charter makes many more issues litigious and increases the pressure on Canadian courts to provide judicially enforceable judgments in matters that are not easily amenable to such enforcement. The Charter increases the need for litigation at a time when governments are attempting to use privative clauses and conciliation forums to avoid the courts in disputes involving social issues such as labor relations and human-rights conflicts. It is conceivable that the new Charter will negate much of this effort to bypass the courts. Canadians, in short, run the risk under the new constitution of becoming as litigious as Americans.

A closer scrutiny of appointments to the Court and a fuller understanding of its judgments will be required in future years. The Court has been forced by the Constitution Act to become more active in supervising the content of public policy. Many issues that were private now become public. And since many of the contentious issues of the Charter of Rights and Freedoms already have been litigated in the United States Supreme Court, Canadians can expect American civil liberties jurisprudence to enter Canadian law.

The justices on the present Court will constitute the high bench in the crucial first decades of the new Charter. Are they prepared by training and disposition to assume the new responsibilities given them? Perhaps more important, are the politicians who redefined the judicial function so radically in the Charter of Rights and Freedoms prepared to accept the restraints these non-elected public officials will surely impose? Only one thing is certain: the prologue is over. The Supreme Court has achieved a degree of institutional independence and a broad mandate unequalled by any other judicial body in the Western world. In every sense of the term, the post-Charter years will be a new era for the Supreme Court of Canada and the Canadian political system.