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# Changing Expectations

## 1963–1974

One of the most significant developments of the decade following the adoption of the Bill of Rights was the change in public expectations regarding the role of the Supreme Court within the nation. Canadians began to look to the Supreme Court for leadership after John Diefenbaker's boast that their rights and freedoms were now judicially enforceable. The much-publicized climate of judicial activism in the United States was beginning to make Canadians think about their own Supreme Court. Prior to this time most people were barely aware of the Court's existence; it had truly been a quiet court in a quiet country. The Court itself, however, had difficulty living up to these new expectations. Most of the justices had been on the bench for many years and were clearly unsympathetic with or ignorant of the public's changing expectations. The Diefenbaker government took an early, if in some ways tentative, lead in giving substance to this new role for the court by the passage of the Canadian Bill of Rights in 1960. But the Conservative government went no further. In four appointments to the Supreme Court, the government gave no indication of leadership or new direction. Both the Diefenbaker government and its 1963 successor, led by Lester Pearson, continued to name to the Court justices who fitted into the traditional mould. In 1963 Pearson named Wishart Flett Spence to replace Justice Locke, who had retired. Pearson not only upheld the traditional character of the Supreme Court but also redressed the regional balance, reverting to the earlier distribution of seats at the Court: one from the maritimes, three from Ontario, three from Quebec, and two from the west.

Spence had been called to the bar in 1928. He completed graduate studies at Harvard Law School before taking up private practice in Toronto. In 1950 he was named to the Ontario Supreme Court and while there served as chairman of the Royal Commission on Coastal Trade (1955). After thirteen years' judicial experience he joined the Supreme Court at age fifty-nine.

From the time of Patrick Kerwin's death early in 1963 until the appointment of Bora Laskin to the chief justiceship late in 1973, the Supreme Court of Canada experienced an instability in leadership. In those eleven years there were five chief justices. The three intervening chief justices averaged just three years and six months at the post before retiring. The best leader of the three, John Cartwright, had the shortest term (two and a half years).

Robert Taschereau had joined the Supreme Court of Canada in 1940. Twenty-three years later (and eleven weeks after Kerwin's death had left the Court without a chief justice) he was named to head the institution. Aged sixty-six at the time, Taschereau could reasonably look forward to almost a decade at the Court's helm. But within just a few years it became apparent, at least to observers inside the Court, that such an expectation was no longer realistic. The chief justice's struggle with alcoholism became pronounced. His conduct on the bench was affected and, presumably, his ability to act as a positive force in leading the Supreme Court declined. Taschereau talked about resigning for several months, thus adding to the instability, before finally resigning in August 1967.[1]

The Pearson government could have been faced with a minor dilemma in selecting a replacement, although there is in fact no evidence that the government even perceived the dilemma. The senior puisne justice, to whom the chief justiceship would normally go, was John Cartwright. He was already seventy-two years of age and would be required to retire from the Court in less than three years. Given the short time in which he would be able to exercise his influence in the post, and given the inevitable confusion that would occur in the turnover of the chief justiceship two and a half years hence, it would certainly have been possible and perhaps even advisable to pass over Cartwright for a younger man. But Pearson seems to have seen the chief justiceship simply as a post to be filled. To violate tradition would be to attract attention and debate to the Court, something Pearson wanted to avoid. Thus, when one Québecois recommended the selection of Gérald Fauteux for the office, Pearson replied that although Cartwright had already been appointed, the post would soon be vacant again, at which time Fauteux would surely be considered.[2]

John Cartwright became the twelfth chief justice of Canada on 1 Sep-

tember 1967. As it turned out, he was an excellent choice. He was able in a short time to make a significant impact on the Court owing to his attractive personality. He was an effective administrator, and he was able to succeed where several other chief justices had failed in establishing a firm pattern of judicial conferences at the Court.[3]

The vacancy at the puisne level was, of course, filled from the province of Quebec, the first of six openings among the Quebec seats at the Court in the period 1967–81. The new minister of justice, P.E. Trudeau, chose Louis-Philippe Pigeon. The son of a lawyer in southwestern Quebec, Pigeon studied law at Laval University. He was called to the bar in 1928 and practised with various Quebec City law firms, developing an expertise in civil law and at various times working with Louis St Laurent and Jean Lesage. If such ties left any doubt, Pigeon's sympathy with the Liberal party was confirmed by his appointment as law clerk of the Quebec legislature from 1940 to 1944. In 1942 his scholarly interest in the law was manifested in his acceptance of a professorship in constitutional law at Laval, a post he retained until 1967. Returning from the provincial legislature to private practice in 1944, Pigeon's ties to the political sphere were not broken. From 1960 to 1966 he was legal adviser to the Liberal premier of Quebec. Pigeon's national stature was growing. He was chairman of the National Council on the Administration of Justice from 1963 to 1967, and a leader in the provincial and national bar associations. He was sixty-two years of age when he joined the Supreme Court.[4]

Pigeon's appointment to the Supreme Court of Canada in 1967 was a good one. Though known for his connections with the Liberal party, his reputation as a legislative draftsman and as a constitutional expert reflected a growing desire for a more scholarly Court role to meet the constitutional cases that seemed inevitable in the coming years. Pigeon's was the first appointment by the then justice minister, Pierre Trudeau, to the Supreme Court. It was the first indication of the type of person who would be sent to the Court over the next fifteen or more years. Pigeon was a legal scholar and a constitutional expert with extensive experience as a legislative draftsman. The constitutional conflicts of the 1960s and Pierre Trudeau's ambitions for constitutional change made it reasonable to expect a series of major constitutional cases before the Court in the near future. Pigeon's pragmatic and incisive mind would be a major asset to the Supreme Court over the next thirteen years, during which time he was the dominant civil-law jurist. His years on the high bench confirmed his reputation as a lawyer's lawyer; he was painstaking and meticulous in his work if somewhat ponderous.

In March 1970 Chief Justice Cartwright retired, and the third in a series

of short-term chief justices took office. There is no indication as to how much Prime Minister Trudeau or his cabinet debated this appointment, but it is obvious that the tradition of promoting the senior puisne justice was maintained. Even though Gérald Fauteux would have to retire in less than four years, he was named chief justice immediately on Cartwright's departure. The selection was not a strong one and clashed with the sense of Trudeau's design to make the Court more scholarly and to give it a sense of legal direction. However, in the context of the prime minister's desire to give French Canadians a more prominent role in Ottawa, Fauteux's elevation was logical.

The vacancy on the Supreme Court was filled so as to compensate for whatever was staid or traditional in Fauteux's selection. Indeed, this might be a further explanation of the choice of Fauteux: a means of balancing the novelty of the appointment of Bora Laskin to the Court. Born in Fort William, Ontario, Laskin was the son of Russian Jewish immigrants. He studied at the University of Toronto and Osgoode Hall Law School, and then moved on to Harvard Law School for graduate studies. Laskin was called to the bar in 1937. Instead of entering private practice, he chose to teach law. He was a full-time professor of law at the University of Toronto (1940–5), at Osgoode Hall Law School (1945–9), and again at the University of Toronto (1949–65). His legal interests were many. He was associate editor of the Dominion Law Reports and Canadian Criminal Cases from 1943 to 1965. In 1951 he published the first casebook on Canadian constitutional law, a formal and comprehensive statement of the centralist principle for Canada. His centralist leaning was apparent in his 1954 article concerning civil liberties, in which Laskin predicted that when the constitutional issue of control of civil liberties was reconsidered, 'the absence of affirmative Dominion legislation should not militate against making it perfectly clear that civil liberties lie beyond provincial control.'[5] Laskin was known as a leading expert in labour law and had been active as a labour conciliator and arbitrator. He had also taken a considerable interest in the Supreme Court of Canada, demonstrating his own independent frame of mind when, in 1951, he called for the Court to take advantage of its new supremacy to dissociate itself from stare decisis and to develop its own personality: 'What is required is the same free range of inquiry which animated the Court in the early days of its existence, especially in constitutional cases where it took its inspiration from Canadian sources. Empiricism not dogmatism, imagination rather than literalness, are the qualities through which the judges can give their Court the stamp of personality.'[6]

In 1965, Laskin accepted an appointment to the Ontario Court of Appeal.

There he became known for his often penetrating dissenting judgments. When he moved to Ottawa in 1970 he was fifty-seven years old.[7]

Bora-Laskin's elevation to the Supreme Court of Canada was remarkable in several respects. First, he was the first justice not to represent one of the two charter groups. As well, he was the first non-Christian to be named to the court. Second, he was one of Canada's foremost legal scholars and his accession to the Court emphasized Pierre Trudeau's design for the institution. Third, both as a constitutional expert and as someone who was clearly sympathetic to civil liberties and to a strong central government, Laskin had been influential in the formation of the prime minister's philosophical concerns and attitudes in those areas.[8] Fourth, the new justice lacked major experience in private practice. In this he failed to meet an assumed essential requirement for a position in the senior judiciary, and his appointment was greeted with criticism in some quarters. Perhaps partly for this reason and partly out of envy at his national reputation for scholarship, Laskin allegedly received a chilly reception from his new colleagues.[9]

The most important new demand placed on the Court during this period arose out of the Canadian Bill of Rights, which was passed by Parliament in 1960.[10] The climate of expectations regarding the role of the Court anticipated a degree of initiative on the part of Canadian judges. Rather than applying the Bill to Canadian law, the new statute imposed upon the Court an ambiguous obligation to 'construe and apply' all laws of Canada as to ensure that they did not abrogate, abridge, or infringe any of the rights and freedoms declared in the Bill. The Supreme Court quickly showed that it was ill-prepared by disposition and training to meet either the changing expectations or this new function, which many members of the legal profession viewed as American intrusions.

In the light of the record of the justices in civil liberties cases throughout the 1950s, some Canadian civil libertarians anticipated a continuation of that trend into the 1960s with the formal adoption of the Bill of Rights. But the members of the Court shied away from further activism. However, the mere enactment of the Canadian Bill of Rights did not occasion the flood of litigation that some observers had predicted. Indeed, it was several years before the Supreme Court had an opportunity to pronounce on the force of its provisions.

The first occasion on which the Supreme Court gave explicit attention to the Bill of Rights occurred in the case of *Robertson and Rosetanni* v *The Queen* (1963).[11] That attention was of no consequence, however. Justice Cartwright, in dissent, was the only member of the Court to relate the

issues to the Bill of Rights. The case involved the operation of a bowling alley on Sunday in contravention of the Lord's Day Act. The defendants appealed their conviction on the ground that the Canadian Bill of Rights had in effect repealed or rendered the act inoperative.

In a 4–1 judgment the Supreme Court ruled that the appeal should be dismissed. The majority held that the Canadian Bill of Rights was not concerned with human rights and fundamental freedoms in any abstract sense, but rather with such rights and freedoms as they existed in Canada immediately before the Bill of Rights was enacted. Since legislation such as the Lord's Day Act had been in existence in Canada from the earliest times and had not been considered a violation of that kind of freedom of religion guaranteed by the Bill of Rights, it was not to be considered as violating the terms of the Bill; the Bill of Rights did not create new rights but merely affirmed existing ones. In the opinion of the majority the effect of the act was 'purely secular,' not in any way affecting the liberty of religious practice. In their reasoning the majority retreated to a traditional conservatism and refused the invitation to judicial activism implied by the Bill of Rights.

Justice Cartwright dissented with a strong endorsement of the Bill of Rights. To his mind the Lord's Day Act was a clear and unambiguous infringement of the Bill of Rights. He claimed in his judgment that where there was an irreconcilable conflict between an act of Parliament and the Bill of Rights, the latter must prevail. Given a clear statutory authority, Cartwright rose to the occasion and wrote an aggressive judgment in defence of civil liberties. It was the first time that a justice of the highest court in the land had given such a ringing endorsement of the Bill of Rights (albeit in a dissenting judgment). Cartwright's dissent in *Robertson and Rosetanni* encouraged civil libertarians throughout Canada. Many saw it as the thin edge of the wedge; given time, they hoped, the entire Bill of Rights would one day win approval from the Supreme Court.

Not until almost ten years after the enactment of the Canadian Bill of Rights did the Supreme Court of Canada successfully apply the Bill of Rights to federal legislation. In *The Queen* v *Drybones* (1970),[12] the Supreme Court ruled section 94 of the 1947 Indian Act inoperative on the ground that it conflicted with section 5 of the Canadian Bill of Rights, which guarantee equality before the law.

The *Drybones* case contained all the elements destined to capture the attention of the Canadian public. Joseph Drybones, a Canadian Indian, had been arrested for drunkenness in Yellowknife. He was charged with violating section 94(b) of the Indian Act, that is, 'being an Indian ...

unlawfully intoxicated off a reserve.' Drybones pleaded guilty; he was convicted and fined the minimum of ten dollars plus costs.

The central dispute in the case arose out of the difference in treatment accorded Indians under the Indian Act and others under the North West Territories Liquor Ordinance. The Indian Act provided for a minimum fine, whereas the ordinance did not; the maximum term of imprisonment under the Indian Act was three months, and under the ordinance it was thirty days; and, most important, because there are no reserves in the Northwest Territories, an Indian living in the territories could be convicted for being intoxicated in the privacy of his own home, whereas others, non-Indians, could be convicted under the liquor ordinance only for being intoxicated 'in a public place.'

The issue was clear: there were two laws in Canada – one for Indians and one for all others. The Supreme Court in a 6–3 decision (Cartwright, Abbott, and Pigeon dissenting) ruled that a sensible interpretation of the terms of the Bill of Rights led them to the conclusion that any federal law that conflicted with the Bill of Rights was inoperative to the extent of the conflict.

Many newspapers throughout the country applauded the Court and greeted the *Drybones* decision as the harbinger of greater things to come. To many editorial writers and civil libertarians, the decision removed any lingering doubts: the Bill of Rights had force and the Court was prepared to invoke it. But rather than resolving once and for all the authority of the Supreme Court to strike down or to declare inoperative federal legislation that violated the Bill of Rights, the *Drybones* decision revealed that the Court was just as deeply divided as ever over the nature of the new judicial activism.

By far the most surprising judgment came from Chief Justice Cartwright. In the most astonishing and most open reversal in the history of the Supreme Court, the chief justice repudiated his dissent in *Robertson and Rosetanni* with the confession that he had erred in his reasoning in that case. After having thought about the implications of his *Robertson and Rosetanni* judgment, Cartwright drew back in horror. It became clear to him, he wrote, that the implications of his judgment in *Robertson and Rosetanni* would be to impose an enormous new burden upon 'every justice of the peace, magistrate and judge of any court in the country' to render all federal statutes inoperative on the basis of a normal act of Parliament which imposed that task under the vague instruction to 'construe and apply.' Those implications could not be what Parliament intended. The judgment said little for a judge of Cartwright's stature. His

dissent in *Drybones* was an open admission that he had not thought through his judgment in *Robertson and Rosetanni* in 1963. In the light of Ritchie's majority judgment in that case, which made the same basic points Cartwright was now making in *Drybones* and which he must have read, Cartwright's dissent was more than a little puzzling. It gave the clear impression that members of the Supreme Court were not communicating with one another on the most important judicial matters. Ironically, Cartwright was the one who had introduced regular judicial conferences. The purpose of those conferences was to permit the justices to exchange opinions and make themselves aware of the views of other members of the Court. Perhaps Cartwright would not have written as he did in *Robertson and Rosetanni* if he had had the advantage of Ritchie's views in judicial conference. Small wonder that Cartwright took steps to formalize the judicial conference shortly after becoming chief justice.

The excitement the *Drybones* decision engendered was to be short-lived. What many hoped would be the beginning of a trend in the direction of judicial activism turned out to be an aberration, more remarkable for its uniqueness than for its application of the Bill of Rights.[13]

The Supreme Court revealed more about its hesitancy to use the Canadian Bill of Rights in the breathalyser reference of 1970.[14] Shortly after *Drybones* the Court was required to pass on the legality of an order-in-council that proclaimed only parts of section 16 of the Criminal Law Amendment Act, 1968–69. The order-in-council refrained from promulgating that portion of the act which required the police to provide in an approved container a sample of the breath of an accused taken by a qualified police technician for purposes of self-defence. The Supreme Court of Canada ruled (Ritchie and Martland dissenting) that the order-in-council was intra vires even though it excluded a major provision of the act.

This decision disappointed many Canadians because it obscured the fact that a judgment on the validity of the order-in-council had been handed down in the Supreme Court of British Columbia. This case would probably have come on appeal to the Supreme Court, but the normal process was circumvented because the attorney-general of Canada, John Turner, aborted the process by interposing a reference to the Supreme Court. Civil libertarians were annoyed by Turner's failure to ask the Supreme Court of Canada to apply the terms of the Bill of Rights relating to self-defence to the order-in-council. This was no incidental or accidental oversight; Turner wanted the order-in-council sustained, for he was primarily responsible for its promulgation. The importance of

this overt manipulation of the Court emerges when it is recalled that the Bill of Rights was the basis for declaring the breathalyser law inoperative in British Columbia.

But even the failure of the attorney-general to put the question to the Supreme Court did not exonerate the Court itself from assessing the order-in-council against the terms of the Bill of Rights. The Bill of Rights directly instructs the courts to apply the Bill in all cases that come before it. As Professor Bora Laskin, as he then was, had written, the Canadian Bill of Rights 'is addressed to parliament itself and to the Courts, admonishing the former not to enact, and the latter not to construe, federal legislation in the derogation of the declared rights.'[15] Section 3 of the Bill of Rights specifically enjoins the minister of justice to 'examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part.' Professor Laskin predicted that that section would turn out to be 'the strongest feature of the Canadian Bill of Rights.' A reasonable extension of this injunction seems to suggest that the minister of justice was obliged to ask the Court whether the Criminal Law Amendment Act as proclaimed did in fact constitute in its application an abridgement or infringement of the rights declared in the Canadian Bill of Rights. This the minister of justice failed to do, even though Justice Monroe of the British Columbia Supreme Court had agreed that the act as proclaimed denied an accused adequate counsel as assured by the Bill of Rights.

Nevertheless, the majority chose to ignore the Bill of Rights. Justice Laskin concurred with the majority in his first Supreme Court judgment and dismissed the Bill of Rights with the laconic comment that it 'had been insufficiently elaborated.' Curiously, even the leading civil libertarian on the bench, Emmett Hall, avoided applying the Bill of Rights. Concurring with the majority, Justice Hall said: 'Notwithstanding that in my view the Order-in-Council proclaiming parts only of section 1(6) of the Criminal Law Amendment Act, 1968–69, c. 38, may indicate on the part of the executive a failure to live up to the spirit of what was intended by Parliament, I am nevertheless bound to hold that the remedy does not lie with the Courts.' A mere slap on the wrist for an 'executive failure' was truly uncharacteristic of Emmett Hall.

Despite the fact that Justice Laskin joined the Court majority in the breathalyser reference, he believed that the Bill of Rights was designed to give judges a special basis for judicial activism. Indeed, he viewed the Bill of Rights as a 'quasi-constitutional document,' qualitatively different from

other acts of Parliament. But Laskin was unable to nudge a Court majority into a more activist role even after he became chief justice. The majority of justices held firmly to the tradition of legislative deference; they wanted a more explicit invitation to judicial activism than the Bill of Rights contained.[16] In this respect the hesitancy and uncertainty were shared with those outside the Court. If expectations, both among the public and the political leaders, were changing in the direction of broader responsibility and a more prominent role for the Court, those expectations were at no time clearly stated or defined. In such an environment the justices' response was typically cautious; the Court would feel its way very slowly as it coped with change.

Only in one area could the government be said to be taking any initiative in encouraging the Court, and that was in the area of personnel. There were signs that a new kind of justice was being appointed to the highest court in the land. Justices Laskin and Pigeon, for example, were intellectually inclined; both men had written extensively on a variety of major issues in the law journals. The public was beginning to demand that the Supreme Court provide a measure of leadership – how much is not clear – and this required a more innovative membership on the Court.

The desirability of a more intellectual Court was also reflected in the government's decision to appoint law clerks to the justices. This idea had been put forward by Justice Locke in 1948 and in 1953. Locke proposed that several law graduates, one for each justice, be hired to carry out background research on cases being considered. Other justices, such as Ivan Rand, added their support to the scheme, arguing that many cases 'are quite inadequately argued' before the Court and that law clerks could be used to provide the judges with additional material on points the justices felt to be important. But the St Laurent government's response was negative. In the mid-1960s the proposal surfaced again, this time as a labour-saving device in the face of the enormous workload now facing the justices. The scheme was adopted and nine law clerks began work at the Court in 1968. Clerks are appointed for one year; at present each justice is assigned two clerks. That law clerks would be rejected as a means of improving the quality of the Court's work but accepted as a means of dealing with the quantity of work is not only ironic but in keeping with the general history of the institution. The rationale for this change has not lessened the positive impact of the clerks' presence, however.

According to one of the justices, a conference procedure now began to develop:

... following discussions, the Chief Justice usually inquires as to who wishes to write, if he had not announced his own intention to write. He sometimes indicates that it would be desirable for a particular judge to write the first reasons, but he does not direct any judge to write. The usual format is: 'Would you be willing to write reasons in this case?'

I would say that conferences changed in character when Chief Justice Cartwright took over. The conferences, which I recall, all involved a discussion of the issues and the proper disposition of an appeal. The judges presented their opinions and the reasons for such opinions, and, if there were differences of view, there would be a debate about the matter.[17]

This procedure, initiated by the justices themselves, addressed the nation's changing expectations for the institution.

In 1973, after a decade at the Court, Emmett Hall retired. He was replaced by another westerner, Robert George Brian Dickson. Born in Yorkton, Saskatchewan, Dickson was raised in that province before leaving for Winnipeg to further his education. He attended the University of Manitoba and the Manitoba Law School and was called to the bar in 1940. His entrance into private practice was delayed by wartime service in the Royal Canadian Artillery, but in 1945 he returned to Winnipeg, where he specialized in corporate law. In 1963 he joined the Manitoba Court of Queen's Bench, and in 1967 was elevated to the provincial Court of Appeal. At age fifty-six, he brought to the Supreme Court extensive experience before the bar and as both a trial and an appellate judge.[18]

Before 1973 was finished, there was three more changes in the personnel of the Supreme Court. In December both Gérald Fauteux and Douglas Abbott retired early, by five months and twenty-two months respectively. What induced these early departures is unknown. The prime minister, however, took advantage of the opportunity to move the Supreme Court further in the direction of an intellectually rigorous bench.

Most dramatic was the selection of Bora Laskin as chief justice. He was the second most junior puisne justice, outranked in seniority by five other members of the Court, led by Ronald Martland. On only two other occasions (1906 and 1924) in the history of the Supreme Court had the senior puisne justice been passed over for the chief justiceship; the tradition of automatic promotion had seemed to be well in place. But it was typical of Trudeau, an activist prime minister (at least in areas of personal interest or concern) to challenge that tradition directly. Laskin would provide the Supreme Court, it was hoped, with a much-needed

intellectual vigour and with a philosophical position in constitutional law and civil liberties much akin to the prime minister's.

The surprise elevation of Laskin created a good deal of reaction. Much of the commentary in the press was favourable, reflecting the public's enhanced expectations for the Court. But at the same time there were unconfirmed reports of discontent. Laskin was described as an 'academic lawyer' by some members of the bar. The other justices were allegedly annoyed at not being consulted about the appointment. Justice Martland reportedly was given very little warning that he would be passed over, and was upset. The finance minister, John Turner, was said to be furious at the break with tradition, and sensitive Albertans were reported to be taking the rejection of Martland as a slight against the west.[19]

Amid the controversy two new justices were also appointed, both from the province of Quebec as required. Douglas Abbott had an interview with the minister of justice, Otto Lang, in an attempt to persuade the government (again) that one of the Quebec seats on the Court should be given to a representative of the English-speaking community.[20] The idea had already been rejected in 1949, and it was even less likely to be adopted in 1973.

Jean-Marie Philémon Joseph Beetz was born and educated in Montreal. He studied at the University of Montreal before going to Oxford University on a Rhodes scholarship. Called to the Quebec bar in 1950, he remained in private practice only for a short time. In 1953 he joined the faculty of law at the University of Montreal, where he taught for the next twenty years; from 1968 to 1970 he was doyen du droit. A one-time colleague and close friend of Pierre Trudeau, Beetz supplemented his teaching responsibilities by becoming assistant secretary to the federal cabinet (1966–68) and special counsel to the prime minister on constitutional matters (1968–71). In 1973 he was appointed to the Quebec Court of Queen's Bench. With less than a year's judicial experience, Beetz, another 'academic lawyer,' joined the Supreme Court of Canada at age forty-six.[21]

The second vacancy went to Louis-Philippe de Grandpré. Born and educated in Montreal, he was called to the bar in 1938 and practised law in his native city until the end of 1973. De Grandpré was fifty-six years of age when he joined the Supreme Court.[22] His solid thirty-five years' experience before the bar helped to compensate for the absence of such experience in both Beetz and the new chief justice.

The two appointments were greeted with a good deal of support in Quebec. An editorial in *Le Devoir* headlined the news: 'Une présence québecoise plus forte à la Cour suprême.'[23] But the truth of that claim

is not so clear a decade later. Beetz was an academic and a constitutional expert, and his selection fitted the Laskin pattern. Moreover, Beetz was a known supporter of provincial rights; his appointment balanced Laskin's promotion and helped to deflect any charges that the prime minister was 'packing the court.' But his lack of experience at the bar might be taken as a weakness; there were now two members of the Supreme Court who had had virtually no training as counsel. Beetz quickly began to develop a reputation for indecisiveness.[24] De Grandpré soon evinced a dislike of his new position. Like J.-T. Taschereau, Nesbitt, and Hughes before him, he resigned from the Court less than four years after joining it.[25]

The selection of Beetz and de Grandpré was a disappointment to those who had hoped for more provincial participation in Supreme Court appointments. At the Victoria constitutional conference in 1971 the federal government had agreed that appointments to that Court would be subject to provincial consultation. No method for this consultation was laid down, and since no general agreement on constitutional reform was reached, agreement on individual points was not binding. With the selection of Beetz and de Grandpré the Trudeau government missed an opportunity to create an atmosphere of co-operation and a sense that the composition of the Supreme Court of Canada was the proper concern of more than just one level of government.[26]

In the 1960s Canadians were inundated with accounts of how the Supreme Court of the United States was applying the terms of the American Bill of Rights in dramatic ways.[27] In contrast, the Canadian Bill of Rights and Supreme Court appeared weak and ineffective. As Walter Tarnopolsky observed, 'by 1967 there appeared to be a considerable waning of public interest in the Bill of Rights and some considerable cynicism amongst the legal profession as to its effectiveness.'[28]

At the height of the euphoria surrounding the celebration of the Confederation centennial and the success of Expo '67, the liberal press of Canada focused critical attention on the Supreme Court. The *Toronto Daily Star*, for example, published a series of lead editorials entitled 'The Troubled Bench.'[29] In answer to its first question, 'what's wrong with our Supreme Court?' the newspaper held up the activist example of the United States Supreme Court and lamented 'the weakness and timidity of our highest court.' The second editorial emphasized the same themes, and the final editorial urged that reforms be undertaken 'to make our Supreme Court a stronger and more constructive force in our national life.' The editorial concluded, 'The weakness in the Supreme Court of Canada has

aggravated many problems of our national life.' The *Star* urged the Court to become an important and influential element in Confederation's second century. The *Star's* concern was to some extent (though by no means exclusively) the alleged failure of the Court in prominent criminal cases.

The public outrage over the Court had reached a new high a year before the *Star* editorials. The ruling in the highly publicized Truscott case unleashed a fresh onslaught of criticism upon the Court. This case had all the potential for a dramatic decision. Canadians had been reading accounts of how during the early 1960s the Supreme Court in the United States had decisively upheld individual rights. Many hoped that their own Supreme Court would prove to be as effective in a comparably dramatic way in the Truscott case. But such was not to be.

In the fall of 1959 Steven Truscott, aged fourteen, had been tried, convicted, and sentenced to death for the rape-murder of a young girl. An appeal to the Ontario Court of Appeal was dismissed, and an application for leave to appeal to the Supreme Court of Canada was rejected. Truscott's sentence was commuted to life imprisonment. There the matter seemed to rest until the publication in March 1966 of Isobel LeBourdais's book, *The Trial of Steven Truscott*, which argued strongly that a miscarriage of justice had occurred. The book quickly appeared on national bestseller lists and created considerable public doubt regarding Truscott's guilt. Many members of Parliament took an interest in the case; one suggested that the original trial might have been 'a community lynching bee.'[30] By the end of April public doubts had become so vocal and strong that the governor-in-council sent the case on reference to the Supreme Court. The reference conferred on the court the ability to hear new evidence, something heretofore not possible. New, direct testimony, including that of Truscott himself, was presented to a full panel of the Court, which effectively was being asked to overrule itself. After four days of hearings the Court held 8–1 that the conviction should stand unaltered.

That opinion did little to allay public doubts about the fairness of the initial trial. Citing Justice Hall's lengthy dissenting opinion, which claimed that the original trial had been a 'bad trial' and that the only remedy was a new trial, many observers suggested that enough questions remained concerning Truscott's innocence that further government action was called for. It seemed that considerable uncertainty now existed regarding the quality of justice administered by the Supreme Court. The *Toronto Daily Star*, for example, lionized Emmett Hall and found it difficult to believe that the original verdict had been confirmed by the other justices, given the alleged weaknesses in the first trial and the import of

most of the new evidence. 'One thing is clear enough,' the paper concluded. 'This case has done damage to public confidence in the administration of justice.'[31] Most editorial comments on the Court's ruling on the Truscott case were unfair and unfounded. A Court majority composed of men as sensitive in criminal matters as John Cartwright and Wishart Spence, to single out two, simply cannot be categorized as heartless. The general public, never versed in the fine points of the law, saw the Truscott judgment as a failure to meet the expectations of the times. Many people could not help wondering how Truscott would have fared in another jurisdiction, such as the United States. Others, principally from the legal community, said that the public expectations were unrealistic. The force of the Hall dissent, however, tended to add to the general sense of disappointment.

Throughout the decade an unofficial agreement emerged throughout the Quebec bar to decide civil-law cases within the provincial court structure. This could never become a firm and official rule of practice, because a dissatisfied client could always insist that his case be appealed to the Supreme Court of Canada. Nevertheless, the growing tide of nationalism in Quebec during the post-Duplessis years prompted the move to resolve civil-law disputes in Quebec by Quebec judges.

Few Quebec lawyers believed more firmly than Louis-Phillipe Pigeon that civil-law cases were properly to be resolved in the Quebec courts. When he joined the Supreme Court in 1967 he brought with him the reputation as a staunch defender of the Civil Code. If and when civil-law cases came before the Court, the Quebec bar could be certain that it had a sympathetic and knowledgeable defender among the justices. Pigeon was present for almost every civil-law case that came to the Court during his tenure on the bench; he often wrote the sole judgment of the Court, but occasionally dissented from his civil-law colleagues. A review of the reported judgments reveals an alliance and compatibility between Pigeon and Laskin; Laskin was almost always in agreement with Pigeon when Pigeon wrote for the Court or the majority. On several occasions Laskin dissented with Pigeon. Only rarely was Laskin in the majority while Pigeon was in dissent; one of the few occasions was in *City of Lachine* v *Industrial Glass* (1978),[32] where both dissenters – Pigeon and de Grandpré – were civil-law members of the Court; the common-law members combined to dismiss the appeal from the Quebec Court of Appeal. The result was ironic because the majority, led by Judson, ruled that there was no good reason to overturn the unanimous judgment of the Quebec Court

of Appeal; in this case the common-law justices seemed more willing to give a greater deference to the Quebec Court of Appeal than the two Quebec justices on the Court. What is curious about de Grandpré's dissenting opinion is that it was based firmly on past precedents of the Supreme Court; it has the appearance of a common-law judgment rather than a civil-law judgment.

Justice Pigeon emerged during his tenure as a strong voice in defense of the Civil Code tradition. He was prepared and willing to speak out in matters touching that tradition without being sympathetic to the strong nationalist voices raised in Quebec throughout his term on the bench. He was both a passionate champion of Quebec and a committed Canadian. His contribution to the development of Canadian law, however, went well beyond the Civil Code; he played an especially important role in constitutional cases throughout those years.

The Supreme Court justices continued to serve the state extrajudicially. Justice Fauteux, a specialist in criminal law, was a member of the royal commission charged with revision of the Criminal Code from 1949 to 1952. In 1953 he was chosen to head a committee of inquiry into the methods and principles under which the remissions branch of the Justice Department operated; when the committee reported in 1956 it urged both the creation of a national parole board and general reform in the corrections field. In 1952 Roy Kellock was named chairman of a federal conciliation board involving disputes between management and the non-operating railway unions; in 1957 he was appointed chairman of the royal commission investigating employment of firemen on diesel locomotives on the Canadian Pacific Railway, an assignment involving the impact of new technology on job security. Emmett Hall was already chairman of the Royal Commission on Health Services when he was elevated to the Supreme Court in 1962. Shortly after completing that task in 1964, the Ontario government appointed him chairman of the provincial Committee on the Aims and Objectives of Education in the Schools of Ontario, which produced the controversial Hall-Dennis Report in 1968. Members of the Court frowned on Hall's role in this commission; many justices felt that it distracted him from his judicial responsibilities. There can be no question that Hall wrote fewer judgments during his involvement with the Ontario education commission.[33] One can sympathize with the other members of the Court, for almost six of Hall's ten years on the Court had been spent serving on two royal commissions, neither of which had any relation to law or judicial problems.

The federal government made use of retired Supreme Court justices along similar lines. Ivan Rand headed a one-man Royal Commission on Coal from 1959 to 1960. More important and certainly more appropriate to his experience was Rand's appointment in 1966 as the sole commissioner to inquire into the alleged misconduct of Judge Leo Landreville of the Ontario Supreme Court. Here was a particularly sensitive problem for the government and especially for the Canadian judiciary. It was both sensible and politically attractive to have Judge Landreville's actions investigated by a highly respected jurist who, being retired, was not beholden to any interested party, even indirectly. (Rand's report was very critical of Landreville and facilitated government action to impeach him.) Finally, in 1967, eight years after his retirement, Ivan Rand led a provincial royal commission studying Ontario's labour laws, an area of his special expertise.

If that use of Rand's services can be argued to be particularly (or at least relatively) appropriate after his compulsory retirement, the same cannot be said for the selection in 1966 of Justice Spence to lead a one-man inquiry into the Gerda Munsinger affair. This appointment had all of the worst possible elements of judicial involvement in political commissions. From the fall of 1964 to the spring of 1966 the Liberal government of Lester Pearson had been wracked by a 'procession of grubby revelations and scandalous allegations that clouded the Ottawa scene for ... many months.'[34] A number of political careers were harmed by the scandal, including that of the senior cabinet minister, Guy Favreau. By early 1966 the partisan animosity created by the Munsinger controversy and its results was intense. In retaliation against the Conservatives – one writer called it 'a willful act of political vengeance' – leading Liberals disclosed details of what was known as the Munsinger affair. Members of the Conservative cabinet were accused of having had liaisons with Gerda Munsinger, who was alleged to be a prostitute and a known security risk; it was alleged that the cabinet ministers had jeopardized the security of Canada and its allies, and that the Diefenbaker government had known of the ministers' conduct yet had not removed them.

The public and the media had a field day with titillating stories and headlines, and the affair blossomed into a major and potentially destructive issue politically. Several days of riotous and often vicious debate in the House seemed to threaten the parliamentary system. To solve the problem and to dampen the volatile political atmosphere, the Liberal government decided to appoint a commission of inquiry to examine the Conservative government's handling of the issue. An official inquiry into

a past government's political decisions and actions had never before occurred in Canadian history; in a democracy such matters are judged by the electorate. Against the vehement objections of Conservatives, the Liberal government drew up restricted terms of reference and chose Wishart Spence, the most recent Liberal appointee to the Supreme Court of Canada and a man with long-time Liberal credentials, to head the inquiry.

Thus, a Supreme Court justice, whose political neutrality could be questioned, was asked to conduct an investigation of past political decisions. Nothing could have been more inappropriate. Spence at first refused the assignment, and acquiesced only after considerable pressure was applied. As distressing as the involvement of the Supreme Court in partisan conflict was Spence's actual handling of the inquiry. One legal expert commented:

> Mr. Justice Spence has accepted the most flimsy, uncorroborated hearsay evidence, which no respectable court of law would accept for more than one moment, as pointing to existence of wide-scale espionage activity in which prominent people in public life might be involved. Guilt by association, however indirect or far-fetched the association may be, is also not excluded from the ambit of the report.[35]

This incident was as disturbing in its way as the 1946 espionage inquiry had been. Among the losers in the affair was the reputation of the Supreme Court of Canada.

It is clear that by the end of the decade the federal government had begun to take a different view of the Court and its membership. Lester Pearson's appointments at the beginning of the decade departed very little from previous practice. The Trudeau appointments, while continuing to accord consideration to regional interests, were of a different character and quality. After 1968, the academic credentials of potential appointees became important. Both the prime minister and at least one of his ministers of justice, Otto Lang, were academic lawyers. The intellectual kinship between Pierre Trudeau and Chief Justice Laskin can be seen clearly in their shared views of a statutory charter of rights. The new Court members in general tended to have impressive scholarly credentials. This fact alone accounts for the greater willingness of the Court to assume a more creative role toward the end of the decade. The perception of the judicial function in the highest court was destined to change appreciably.

Finally, after 1966 the government began to put a greater distance between itself and the Court. The public outcry over the Spence inquiry began to strike home. The Supreme Court justices were at last being accorded a greater institutional independence. The process was far from complete by 1974, but a solid beginning had been made.