Epilogue

The year 1982 ended a period of change and development that had been underway at the Supreme Court of Canada at least since 1949. Freed from binding colonial influences, the Court slowly came to be regarded as an institution of national significance. Well aware of the stature and influence of the United States Supreme Court, particularly under Chief Justice Earl Warren, Canadians became more comfortable with the idea of an activist court defending various rights and liberties while not actually having to live in the unsettling environment produced by such activism. This period of acclimatization at a distance paved the way for two major adjustments in the Canadian Supreme Court. In 1975, the Court gained control over its own docket, allowing it to focus attention on more important legal issues. In 1982, the Charter of Rights and Freedoms was enacted, holding out to Canadians the promise that the Supreme Court would provide greater judicial protection of fundamental rights and liberties. The ambiguity and confusion concerning the role of the Supreme Court of Canada had finally been resolved.

By 1984 it had become clear that the Charter was having an important impact on the work and the decisions of the Canadian judicial system. During the two years after the adoption of the Charter of Rights and Freedoms, the lower courts of Canada had heard more than 1,000 cases involving the Charter. The result has been a diversity of interpretation in important matters; this diversity will eventually have to be resolved by the Supreme Court of Canada. At present both lawyers and lower-court

judges are free to test their understanding of the Charter provisions. In this environment it is incumbent on the Supreme Court of Canada to provide the leadership and guidance so badly needed by the Canadian judicial and legal systems.

To the end of 1984, the Supreme Court had handed down only two decisions relating to the Charter. In *Skapinker* v *Law Society of Upper Canada* (1984),[1] the first Charter case, a unanimous Supreme Court declined to use the Charter to strike down the section of the Law Society Act requiring that a lawyer be a Canadian citizen before being admitted to practice in Ontario. Skapinker had argued that the mobility provision of the Charter negated the citizenship requirement of the Ontario act. The Supreme Court refused to interpret the mobility provisions of the Charter as guaranteeing the 'right to work,' as Skapinker had argued. While prepared to adopt the 'living tree' approach of the Judicial Committee, the justices revealed a cautious disposition toward the Charter; they explicitly affirmed the need to balance 'flexibility ... with certainty'[2] in its interpretation. In *Hunter* v *Southam* (1984)[3] a unanimous Court struck down the search-and-seizure provisions of the Combines Investigation Act. The Court ruled that searches conducted without a warrant are prima facie unreasonable under the Charter of Rights. Chief Justice Dickson seemed to serve notice that the Court was assigning the Charter a major place in the law of the land. 'The Constitution of Canada, which includes the Canadian Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.'

As the Court faced the initial influx of Charter cases, the chief justiceship became vacant following the death of Bora Laskin in March 1984. Laskin, who had not been well for some time, had been unable to provide the sort of administrative leadership he might have wished. In his place, Prime Minister Pierre Trudeau named Brian Dickson, who had been a prominent and positive influence on the Court for the past decade. Highly regarded by the bar for his sensitively reasoned, articulate judgments, Dickson was well qualified to lead the Court through its first decade of Charter law.

In May 1984, shortly before leaving office, the Trudeau government filled the remaining vacancy by appointing Gerald LeDain of the Federal Court of Canada a puisne justice of the Supreme Court. LeDain was born and educated in Montreal; he graduated from McGill University Law School in 1949. After graduate studies at the University of Lyon, LeDain returned to Montreal, where he spent several years in private practice and

as professor of law at McGill University. In 1967 he became dean of law at Osgoode Hall Law School in Toronto. During this time he served as chairman of the Federal Commission of Inquiry into the Non-medical Use of Drugs. He was appointed to the Federal Court of Appeal in 1975. LeDain brought to the Ottawa bench nine years of court experience and a solid reputation in constitutional and administrative-law scholarship.[4]

In November 1984, after twenty-five years on the bench, Justice Ritchie retired from the Court owing to poor health. The new Conservative government of Brian Mulroney named Gérard Vincent LaForest to fill this vacancy. Born and raised in New Brunswick, LaForest brought to the Supreme Court a wide experience in the law. Several years as counsel were complemented by considerable scholarly work, both as a member of university law faculties and as author of a number of highly regarded publications, particularly in constitutional and administrative law. He was an official of the federal Department of Justice (1952–5 and 1970–4) and a member of the Law Reform Commission of Canada (1974–9). In June 1981 he was appointed to the New Brunswick Court of Appeal.[5]

Justice LaForest was executive vice-chairman and director of research for a Canadian Bar Foundation study entitled *Towards a New Canada*. In the section of that study dealing with the judicial power, the authors recommended that all appointments to the Supreme Court of Canada should be made 'with the consent of a Judiciary Committee of a reconstituted Upper House working in camera.'[6] As well, the study urged that formal consultation with the provinces be undertaken before anyone was appointed to the Supreme Court. The report goes into detail about the kinds of cases the Court ought to hear and counsels strongly against its moving in the direction of becoming a constitutional court. In short, few new members of the Court have had the benefit of prior reflection on as many issues relating to the work of the Supreme Court as Justice LaForest.

Although the opportunity of appointing the first Newfoundlander to the Supreme Court was missed, LaForest's appointment maintained the traditional regional balance on the Court and provided the sort of expertise thought to be needed in the face of the wave of Charter cases. The rising intellectual quality of the appointments made by the Trudeau government was maintained.

It is hoped that the reinvigorated bench will assist in dealing more efficiently with the Supreme Court's increasing workload. Motions for leave to appeal have been growing in number. In the decade from 1970–1 to 1980–1, the number rose from 158 motions to 431, largely under the

impact of the amendments to the Supreme Court Act in 1975. But that number continues to increase; there were 501 motions for leave to appeal in 1983.[7] In 1983 the Court heard and rendered judgment in just eighty-nine cases, a 25 per cent decrease from the average over the previous five years.[8] Reduced efficiency, the rising number of motions for leave, the additional impact of the large number of Charter-related cases, and the recent trend toward a system that relies heavily on a full panel of judges together create an important administrative problem for the Supreme Court. As Peter Russell has commented:

> As the Supreme Court of Canada enters the new era of the Charter it appears to be an institution under stress. The significance of its work is approaching that of the United States Supreme Court. As Canadians observe a decline in its decision-making capacity they may well question its modus operandi and ask why it has so much difficulty handling the demands placed upon it when the same number of Supreme Court justices in the United States can process over 4,000 applications to be heard, decide well over 100 cases a year and follow a decision-making system in which all nine judges participate in every case.[9]

For many decades the Canadian public and political leaders neither expected nor allowed the Supreme Court of Canada to become a conspicuous and influential institution. Viewed in our political and legal culture as a body subsidiary to the legislature and the political executive, the Court occupied an ambiguous place in the judicial hierarchy and was used as a minor political instrument at the disposal of the federal government. Gradually, the Canadian public and bar came to demand greater independence for the judiciary and to expect a more important contribution to the character and quality of society by a more capable group of judges. These changing expectations have had an influence on all judges and courts, but nowhere more than on the Supreme Court of Canada. That institution is now in a position not just to meet those expectations, but to make itself a truly significant participant in the Canadian polity.