Preface

Given the relatively lengthy life of the Supreme Court of Canada and given the emphasis of Canadian historians on political history and constitutional development, it is surprising that no basic history of the Court has been written. This volume is an attempt to fill that gap.

Rather than examine in depth one theme or one specific problem, we have tried to write a chronological history of the institution. This has been accomplished by examining the personnel of the Supreme Court, its position in the Canadian polity, its relationship with its political masters, the intellectual environment and representative aspects of the jurisprudence of the Court, and the way in which the institution has been perceived by the public and the legal profession. In short, this is a history of an institution.

Some basic themes emerge throughout the study. A judicial conservatism has long dominated the Supreme Court of Canada. Judicial conservatism is defined here as 'a tendency literally to conserve or maintain existing law by strictly, even mechanistically, applying established rules and precedents. The conservative judge is unwilling to modify rules and thus little interested in policy arguments about the effect of his decision or the social function of a rule.' Justices of the Supreme Court of Canada actively and knowingly adopted strict construction because they believed 'in the principle that changing the law is the province of the legislature, not the judge,' a sentiment in keeping with Canadian judicial and political culture.[1]

There has traditionally been a lack of consistent government support for the Court. Initially, Canadian political leaders intended the Supreme Court of Canada to occupy a significant position within the national political structure, providing a unified system of law and jurisprudence that would help to unite a country of disparate regions and needs. But very quickly and for a variety of reasons, government support in meeting those institutional goals weakened. Over the succeeding decades government interest in the Court was sporadic and often half-hearted. At the same time, however, the government was more than happy to make use of the Supreme Court and its members. The Court and the justices, together or individually, have fulfilled functions that ranged well beyond their normal judicial duties.

In general, the Supreme Court of Canada has not been highly regarded for the quality of its judicial work; this book confirms the accuracy of that assessment. But it is only fair to point out that such a court can only be as good as the environment in which it exists. A strong and effective court, wrote A.C. Cairns, is dependent on a variety of supporters.

> It must be part of a larger system which includes first class law schools, quality legal journals, and an able and sensitive legal fraternity – both teaching and practising. These are the minimum necessary conditions for a sophisticated jurisprudence without which a distinguished judicial performance is impossible. Unless judges can be made aware of the complexities of their role as judicial policy-makers, and sensitively cognizant of the societal effects of their decisions, a first-rate judicial performance will only occur intermittently and fortuitously. In brief, unless judges exist in a context which informs their understanding in the above manner they are deprived of the guidance necessary for effective decision-making.[2]

Such conditions have not existed throughout the history of the Supreme Court of Canada.

Until the 1950s legal training in Canada was dominated by an overwhelming emphasis on practical training, largely in law offices where aspiring students observed and participated in the daily activities of lawyers and learned the mechanics of legal practice. The philosophy of such an education was expressed by one commentator in 1923: 'There is a tendency in many, in this utilitarian age in which we live, even amongst those aspiring to practise one or other of the learned professions, to despise all learning that does not appear directly to be of assistance in making money.'[3] This attitude was not unique to the legal profession.

Training in all professions in Canada emphasized the mastery of practical matters rather than an understanding of ideas and principles. An English doctor arriving in Canada in 1908 was struck by the intellectual atmosphere: 'It was not merely that I found myself back in the Biblical and Victorian atmosphere of my boyhood – that would have been bad enough to someone bent on emancipation – but it was the dead uniformity that I found so tedious: one knew beforehand everyone's opinion on every subject, so there was a complete absence of mental stimulation or exchange of thought.'[4] But if Canadians were not truly anti-intellectual, our culture certainly stressed the practical, everyday aspects of life. The country's long-standing colonial status, climatic and geographical characteristics, and emphasis on material development all tended to discourage intellectualism.

This has certainly been an important influence on the character of the legal profession in Canada. The move toward university-based education in the 1950s was not in itself a guarantee of a more intellectually rigorous training. Today, Canadian legal education, though undoubtedly improved, is still dominated by an interest in practical training.[5] This in turn has a direct impact on the Supreme Court. The training of justices, the quality of decisions and reasoning, the amount of good scholarly analysis by academics, and the character of arguments put before the Court are all affected by the way in which our lawyers are trained. In the past decade two Supreme Court justices have criticized the quality of counsel and their argument. Justice Pigeon, while pointing out that the problem was not a general one, nevertheless argued that the number of poorly prepared cases was increasing, particularly among counsel representing governments or large corporations.[6]

Our objective is not to single out different elements of the legal profession for criticism. But it is important to emphasize Cairns's point that a court is dependent upon its supporting systems. If the Supreme Court of Canada has been subject to considerable criticism over the century of its existence – and it has – the responsibility for its weaknesses ought not to be laid solely at the feet of the justices. The Court and its members are the products and reflections of the character and quality of the Canadian legal culture and profession.

Implicit in much of our discussion of the Court and in much of the public debate about the institution over the years is an evolving definition of the judicial function. Expectations and perceptions of the proper and desired role of the justices and the Court have changed markedly during the history of the Court. As a result of the pressures exerted by those

expectations and perceptions, the role of the Supreme Court in the judicial and national structure, and indeed in Canadian society, has altered considerably. At present, the independent Court is separated from the political executive, and is expected to play a major role as constitutional arbiter and defender of individual civil liberties. But for much of its history the Court was neither prepared for nor expected to play any such major role. Much of the Court's history, in fact, has been an extended prologue to its present position of significance.

We hope that this book will be of use and interest to lawyers, political scientists, historians, and the general public. Because of the wide range of potential readership we have deliberately eschewed the use of academic and legal jargon so common in law books and journals.

One major omission must be explained. No quantitative analysis of cases or judges is presented in this book. We originally set out to include such information; Sidney Peck and Peter Russell very generously made available to us their machine-readable material on the reported judgments of the Supreme Court from 1875 to 1968. However, we found that the information had not been recorded in such a way as to answer effectively the sorts of questions we wanted to pose. Lacking the funds to cope with this situation (and with a manuscript already very lengthy), we opted to leave it to someone else to apply this approach.

At a very early point we divided our responsibilities. Snell, a historian, examined the personnel, government policy, and public attitudes; Vaughan, a political scientist, studied the case law, the judgments of the Judicial Committee of the Privy Council, and other historical material relating to jurisprudential issues.

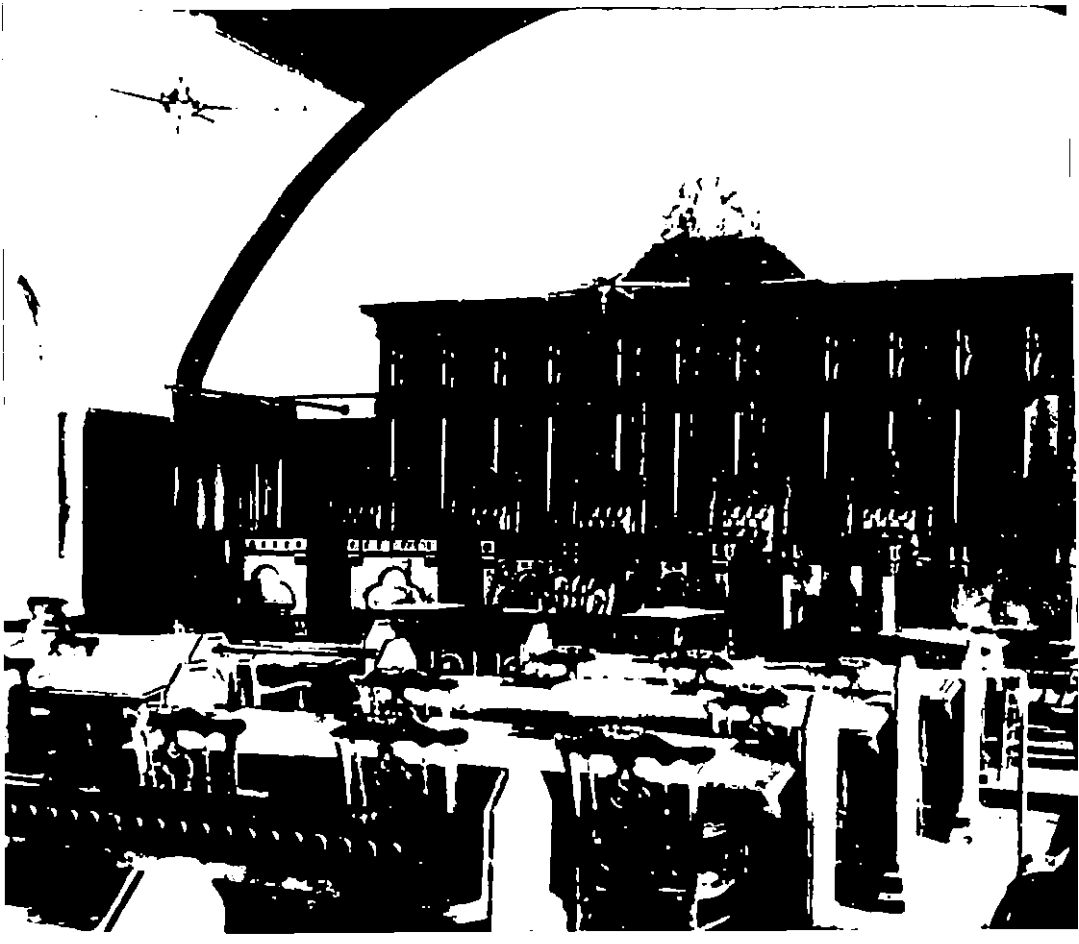
In carrying out our work we have enjoyed much support. The Social Sciences and Humanities Research Council funded most of our research. As usual, the staff of the Public Archives of Canada were very supportive. The registrar of the Supreme Court of Canada, Bernard Hofley, and his staff aided our research substantially and responded to a number of specific queries. After the intervention of Chief Justice Laskin on our behalf, the minister of justice granted access to some of the records held by the Department of Justice. J.W. Pickersgill and G. Pearson allowed limited access to the Louis St Laurent papers and the Lester Pearson papers respectively. The staff of the Judicial Committee of the Privy Council made us very welcome and placed their facilities and records at our disposal. The Barristers' Society of New Brunswick granted access to its records. We are grateful to Gordon A. Goldrich, the registrar of the Wellington County Court, and Joseph Berry of the Wellington County bar for their generous assistance. A number of individuals, particularly

former Justice Douglas Abbott, were liberal with their time and their knowledge.

Richard Gosse shared his research notes on Supreme Court justices sitting on the Judicial Committee, and David Williams allowed us to quote excerpts from his biography of Lyman Duff, then in draft manuscript. Gerry Stortz provided significant research assistance.

The Osgoode Society was of great help in the later stages of this project. After a first draft of the manuscript was written, the society's editor-in-chief, Peter N. Oliver, arranged a very useful conference at Osgoode Hall in 1983, which gave us an opportunity to discuss the work in progress with members of the Osgoode Society and others. John Cavarzan, Brian Crane, John English, Martin Friedland, Peter Russell, and Kathy Swinton were present and contributed many valuable ideas; and we are well aware of our intellectual debt to these scholars. This book is undoubtedly much the better for their efforts.

We are grateful to Kathy Johnson, who did her best to improve the quality of our prose.



Interior of the old Supreme Court building

The Supreme Court of Canada:

History of the Institution