

OXFORD



# CANADIAN COURTS

Law, Politics, and Process

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nature of law and judicial process, it does focus on legal rules, judicial structure and process (the organization of the Canadian courts, rules for selecting judges, rules of accountability, and the civil and criminal law processes), and the behaviour of actors in the system (judges, lawyers, interest groups, and government officials) and it sees them (rules, structures, processes and behaviours) as interrelated. Thus, there is an underlying new-institutionalist strain running throughout the text. This theoretical orientation is particularly evident in the next chapter, which provides an overview of the structure of the Canadian judiciary and discusses how the structure has shaped and been shaped by legal and political forces.

## Chapter 2

### The Structure of Canadian Courts

On 24 August 1993, in the coastal waters north of Nova Scotia, two men landed 463 pounds of eels, which they sold for \$787.10. They were promptly arrested for violating several federal fisheries regulations, including fishing without a licence, fishing with a prohibited net, fishing eels out of season, and selling eels without a licence. At trial before a judge of the Nova Scotia Provincial Court, the men conceded all of these facts. However, the two—both Mi'kmaq Indians—argued that they were exempt from the Canadian government's regulations, citing a clause in the Treaties of Peace and Friendship between the Mi'kmaq and the British Crown, signed between 1760 and 1761, which bound the Mi'kmaq not to 'traffic, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck-houses as shall be appointed or Established by His Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.' They contended that this phrase entitled the Mi'kmaq of Nova Scotia to fish and trade eels, an activity their people had engaged in since their initial contact with Europeans. One of the men, Donald John Marshall, Jr, was already well-known in Canadian legal circles for his wrongful murder conviction in 1971 and subsequent acquittal twelve years later, which had led to a Royal Commission that found widespread racism in the Nova Scotia justice system. The case regarding eel fishing came to bear his name, and ultimately it reached the highest court in Canada.

The only issue at Marshall's trial was whether he actually possessed a treaty right to catch and sell fish. The treaties of 1760–1 were not worded generously and were in fact designed to prevent the Mi'kmaq from trading with anyone other than the British—namely, the French, with whom the Mi'kmaq had been allied continuously during the frequent struggles between the two European powers to control North America. The Treaties of Peace and Friendship, which had been signed shortly after the British conquest of Quebec, were as the Canadian government's expert witness testified, intended to consolidate the peace and reduce Mi'kmaq dependence on Britain by ensuring that the native inhabitants could sustain themselves economically. Viewed from the perspective of the 1990s, however, there was an obvious legal problem: the Treaties limited Mi'kmaq trade to exchanges with 'Truckhouses' (a barter-based trading post), but truckhouses disappeared from Nova Scotia shortly after the treaties were signed. A replacement system of government-licensed traders had also disappeared by 1780. This fact led the trial judge to conclude that, although Marshall and his fellow Mi'kmaq had a



right to take fish to the truckhouse to trade, that right had effectively expired along with the truckhouses and subsequent special arrangements. Moreover, the trial judge ruled that the Mi'kmaq did not have a treaty right to fish or to hunt, because the 1760–1 treaties did not specify any rights to obtain the *means* to trade. Without a treaty exemption from the various fisheries regulations, Marshall was convicted on all counts. Notably, however, the judge granted a sentence of 'absolute discharge'—not only would Marshall serve no jail time or pay any fine, but the conviction would not appear on his record.

Yet the case did not end there. Marshall's primary concern was the court's interpretation of the treaties, and he appealed the ruling to the Nova Scotia Court of Appeal—the highest court in the province—where it was reviewed by three judges. He did not fare any better than at trial. In fact, the appellate judges not only upheld his conviction, but denied that the 1760–1 treaties granted any rights *whatsoever*. The Court of Appeal concluded unanimously that, rather than granting rights, the trade clause was a limit imposed upon the Mi'kmaq to help keep the peace with the British. Echoing his earlier determination when struggling against the Canadian justice system, Marshall persisted and appealed to the Supreme Court of Canada, the highest court in the land.

Like most appellants, Marshall needed 'leave to appeal', that is, the Supreme Court's permission to bring his case, which it granted. The Court has increasingly chosen to focus on constitutional law cases over the past thirty years, and since the adoption of the 1982 Constitution, this includes treaties with Canada's First Nations. The only issue at this stage was whether the lower-court judges had interpreted the treaties correctly. By a vote of 5–2<sup>1</sup> the Court found that they had committed 'errors of law' by ignoring other historical sources—including other treaties and the Mi'kmaq's own oral history—and it overturned the decisions of the lower courts (*Marshall v. The Queen* 1999a). The Court acquitted Marshall and also found an aboriginal treaty right to obtain a moderate livelihood through hunting, fishing, and trading the products of those traditional activities.

*Marshall v. The Queen* had an unusual and striking epilogue: shortly after the Supreme Court's decision, Mi'kmaq began fishing without licences or regard for conservation regulations in the lucrative lobster trade, not only in Nova Scotia but in neighbouring provinces as well. Non-native fishermen reacted violently to this threat to their livelihood, destroying the cars and boats of Mi'kmaq fishermen, who were equally determined to continue fishing. While rejecting the request of a coalition of non-native fishermen, who wanted Marshall's acquittal suspended until the government could establish fisheries regulations for the Mi'kmaq, the Supreme Court issued an extremely rare clarification of its earlier ruling (*Marshall v. The Queen* 1999b). The Court unanimously denied that its first *Marshall* ruling 'had established a treaty right "to gather" anything and everything physically capable of being gathered'. Although Donald Marshall's acquittal would remain, unregulated fishing (not to mention hunting, logging, and mining) by natives would not.

The saga of Donald Marshall, Jr's case illustrates several fundamental features of Canada's judicial system:

1. *Federal but unified court system.* By *federal*, we mean that the judicial system reflects the official division of governmental authority in Canada between two levels, the provinces and the national (or 'federal') government. Each province in Canada (as well as the Yukon, Northwest, and Nunavut Territories) has its own system of courts, and as we will see shortly, there is also a system of federal courts, including the Supreme Court of Canada. By *unified*, we mean that there are features of Canada's judicial system which operate so as to break down the strict divisions of federalism. Two features are particularly important in this respect. First, provincial courts can rule on federal laws, as seen in *Marshall* when the Nova Scotia courts enforced the Canadian government's fisheries regulations (and, of course, provincial courts can also rule on provincial laws). Second, the Supreme Court of Canada has unlimited jurisdiction over both provincial and federal law; for example, even a fairly routine case about a speeding ticket can end up before Canada's highest court (see Box 2.3). This is unlike the United States Supreme Court, which, as a federal court, can rule on a state law only when it raises an issue under the United States Constitution. We will examine some additional unifying features of the Canadian judicial system later in this chapter.
2. *Hierarchies of courts.* Canada's courts are arranged in a system of increasing authority, such that a court higher up the ladder has the power to review the ruling of a lower court, and lower courts are bound by the decisions of the higher courts. Trial courts, where virtually all cases begin, occupy the lowest level of the hierarchy, and there are multiple levels of courts of appeal, also called 'appellate courts'; the number of levels depends on the legal issue. Cases therefore proceed on a predetermined path through the levels of the judicial system. In Marshall's case, his trial took place in the Nova Scotia Provincial Court, with subsequent appeals to the Nova Scotia Court of Appeal and the Supreme Court of Canada. However, most cases that begin in a province's court system end in it without reaching Canada's highest court. In fact, although more than 10,000 cases are appealed every year (Greene et al. 1998, 44), this represents only a small fraction of the number of potential appeals.
3. *Different courts perform primarily different but overlapping functions.* Recall from Chapter 1 our distinction between disputes of *fact* and disputes of *law*. The first requires courts to engage in fact-finding: What happened? Did the accused commit the crime he is charged with? Disputes of law,



however, require judges to engage in legal interpretation, that is, clarifying (or sometimes defining) the 'rules of the game' for law enforcement officials, other judges, and the public. Fact-finding is the primary responsibility of trial courts—it is typical, for example, for the appeal court simply to accept the trial court's factual findings.<sup>2</sup> Nevertheless, legal interpretation is the main role of appeal courts, in two senses. First, as we saw in *Marshall*, appeal courts are expected to correct 'errors of law' committed by lower-court judges. Second, even if the lower-court judge has not technically made an 'error', appellate judges may re-interpret the law on the basis of new information or changes in society or because they disagree philosophically with the lower court. However, Canadian trial courts are also empowered to interpret the law. We saw this in *Marshall*, where the trial judge tried to determine what the 1760–1 treaties meant in the context of the contemporary eel fishery. Indeed, *Marshall* was unusual in that the accused conceded the facts of the case at trial and rested his defence entirely on an interpretation of treaty law. This illustrates that the functions of trial and appeal courts can overlap, although appeal courts have the final say.

4. *Multiple legal systems and bodies of law.* A natural consequence of federalism is that each provincial and national unit of government creates its own body of law. We also make a distinction between *statutes* and *regulations*. Statutes are laws passed by the legislative branch, such as Parliament or a provincial legislature. Regulations are rules created by the executive branch, such as government departments or agencies (Fisheries and Oceans, for example), which are designed to clarify and implement statutes. In addition, Canada has a body of constitutional law, which establishes the basic features of our legal and political systems, including the federal division of powers itself, the rights of citizens and other residents of Canada, and since 1982, the unique rights of First Nations. A case can involve more than one of these bodies of law at the same time. *Marshall*, for example, concerned fisheries regulations passed by the federal government as well as constitutional law in the form of native treaties. Unlike *Marshall*, a case may also simultaneously involve both federal and provincial laws. For example, people caught driving while intoxicated are routinely charged under both the federal *Criminal Code* and the province's traffic regulations (in Ontario, the *Highway Traffic Act*).
5. *High degree of judicial discretion in system.* The Canadian legal system is designed to give judges control over a great number of issues that come before them. This feature of the system will be a recurring theme of this text, but we can already observe from the most recent journey by Donald Marshall, Jr through the judicial system that judges have flexibility regard-

ing legal interpretation, sentencing, granting leave to appeal, and even determining how many judges on a court of appeal will hear a case.

Overall, to paraphrase Russell (1987, 333), we can think of the Canadian judicial system as a pyramid-shaped filter, with the Supreme Court at the tip: many cases pass through the wide layer of trial courts, but access and capacity narrow sharply as one moves further, through the appellate courts, so that the system receives progressively fewer cases.

With these basic principles of the Canadian judicial system in mind, we next take a closer look at the different trial and appeal courts that make up the system.

## The Canadian Judicial System—Provincial, Federal, and Integrated Courts

Figure 2.1 provides a general overview of the structure of the Canadian judicial system, which is composed of three general categories of courts, known by the sections of the 1867 Constitution that authorized their creation: the 'purely provincial' section 92 courts; the 'purely federal' section 101 courts, and the section 96 'provincial' courts, which are actually the shared responsibility of the provincial and federal governments. Section 92 courts are 'purely provincial' in the sense that they are created, organized, administered, appointed, and paid by their provincial government; each province has its own set of s. 92 courts. The federal government performs all of these functions for the s. 101 courts. The s. 96 courts, however, represent a type of unified, or integrated, judicial federalism that is unique among the federations of the world. As with the s. 92 courts, each province has its own set of s. 96 courts, which it administers and may reorganize. However, the judges of these courts are appointed and paid by the federal government (we examine the appointment systems of each type of court in greater detail in Chapter 5). For a brief period after Confederation in 1867, s. 96 courts were the *only* significant category of courts in the country, but this quickly changed with the creation and growth of both the 'purely' provincial and the 'purely' federal courts. The following sections detail the historical background and current jurisdiction, structure, and size of all three categories of courts. The workloads of the various courts are also discussed.

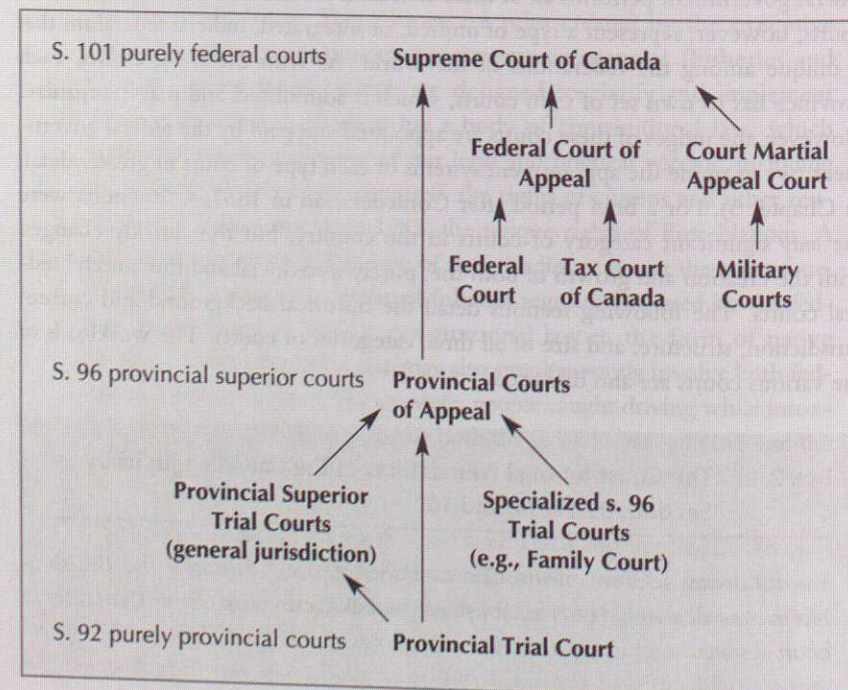
### Box 2.1 The Constitutional Foundations of the Canadian Judiciary: Sections 92.14, 96, and 101

The following sections of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*) established the basic contours of the Canadian court system:



- s. 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,—
- ...14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- s. 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
- s. 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Figure 2.1 The Structure of the Canadian Court System



Before beginning to review the various courts, however, it is important to discuss briefly the meaning and relevance of the term 'jurisdiction' since it is central to understanding the structure of Canada's courts. 'Jurisdiction' here refers to the responsibilities of the court, or what matters it is authorized to hear. We will examine three dimensions of jurisdiction: territorial, hierarchical, and subject matter. *Territorial jurisdiction* refers to the geographic area over which the court has authority. When we say that s. 92 courts are 'provincial' courts, it is primarily because they may only hear cases arising within their own province. *Hierarchical jurisdiction* refers to the court's rank in the judicial system, that is, whether it is a trial or appeal court (or both). A trial court has 'original jurisdiction', which, as noted above, means that it is the first court to hear the case, whereas courts with 'appellate jurisdiction' may review the rulings of lower courts (the specific standards of review used by appeal courts are elaborated in Chapter 4). Of our three categories of courts, s. 92 courts are unique in having *only* original jurisdiction—there are no s. 92 appeal courts. Finally, *subject-matter jurisdiction* is the set of legal issues heard in that court, for example, criminal law, civil law, administrative law, family law, and so forth. Within subject-matter jurisdiction, we can make a distinction between whether a court has 'exclusive' jurisdiction over an issue or 'concurrent' (shared) jurisdiction with another court.

This chapter will demonstrate that since the early days of Confederation there have been questions, struggles, and negotiations over jurisdiction (particularly surrounding the jurisdiction of the s. 96 courts compared to the s. 92 courts or the s. 101 federal courts). Why are there disputes over jurisdiction—a seemingly arcane matter of legal process? Sometimes litigants challenge the jurisdictional authority of a court as a legal tactic to win their cases (at least temporarily). More important, for the purposes of this text, disputes and negotiations over court jurisdiction between the federal and provincial governments are driven in no small measure by political considerations. Recall from Chapter 1 that politics, among other things, is concerned with the process of decision making and influence over decision making. Since courts are important decision makers within a system of governance, it is not surprising that governments may try to maximize the influence of the courts that they administer and to which they appoint judges (and judges tend to favour expansions of their court's influence as well.) For example, as noted in the opening chapter, in the twelfth century, Henry II used his system of 'King's courts' to undermine the power and authority of the nobles and their courts. That said, governments will sometimes accept a reduction in the jurisdiction of their courts for certain purposes, such as cost savings (judges do not come cheap, after all) or recognizing the need for more efficient and effective justice given constitutional constraints. Whether it is expanding or contracting, the jurisdiction of courts is intimately connected to larger political issues.

Finally, it must be stressed that although disputes over court jurisdiction are usually between the federal and provincial governments, they are frequently played out within the judicial system itself, particularly in the highest courts of appeal. As will be demonstrated repeatedly throughout this chapter, the institu-



tional structure and processes of the Canadian judiciary have been shaped significantly by decisions of the Supreme Court of Canada (and, before 1949, the Judicial Committee of the Privy Council in Britain) in the course of resolving jurisdictional disputes—a process which has necessarily entailed interpreting the Constitution and the various statutes governing the courts.

## The Section 92 Provincial Trial Courts

Trial courts are the front line of a judicial system in that they handle the most cases. They are the first court (as distinct from an *administrative tribunal*,<sup>3</sup> discussed in Chapter 3) to hear a case, and so are also known as 'courts of first instance' or 'courts of original jurisdiction'. As Figure 2.1 shows, there are s. 92, s. 96, and s. 101 trial courts (in contrast, there are no s. 92 appeal courts). Within these categories, Canadian trial courts usually include a mixture of specific-jurisdiction courts—that is, those created to deal with only a given area of law, such as family law—and general-jurisdiction courts. We shall look at each category in turn.

### Historical Background

Soon after Confederation, provincial and municipal governments began creating local courts for minor civil and criminal cases. These were initially known as 'magistrates' courts' or 'police courts' (the latter because they were often located in the same building as the police department). Later, in the first half of the twentieth century, magistrates were also empowered to hear cases involving child protection, deserted wives, and spousal abuse, which became the body of family law. Early criminal and family courts were often staffed by 'lay-benchers', that is, people without legal training and who were not judges. An exception was in Quebec, where, in addition to lay magistrates' courts, there was a Court of Sessions of the Peace staffed by judges with legal qualifications and tenure, to hear criminal cases. In English Canada, as late as 1968 an Ontario Royal Commission chaired by Chief Justice James McRuer found that patronage appointments (for example, the appointment of former politicians) to the magistracy were the norm for governments of all political parties. This, in turn, raised concerns about the quality of justice being rendered by magistrates, concerns that were compounded by the magistrates' close connections to the police, inadequate facilities, and lack of institutional independence. Partly in response to McRuer's findings, magistrates' courts were 'judicialized' in Ontario and later in all provinces (except Alberta) between the 1960s and early 1980s, with the requirement that provincial court judges have legal training and experience.<sup>4</sup> (This had already occurred in 1962 for Quebec's Magistrates' Court.) Although this has improved the technical skill on the provincial benches, the degree to which patronage still plays a major role in appointment to these courts is an open question.

The constitutionality of these provincially-appointed courts was challenged early and often after their creation, usually by litigants who had lost their case in such a court, but also by the federal government. The grounds for these challenges were that the only explicit mention of the power to appoint judges in the 1867 Constitution appears in section 96, which assigned this power to the *federal* government (see Box 2.1). The provinces' position, however, was based on s. 92(14), which, while not mentioning appointment, grants provincial governments wide authority over the creation and administration of provincial courts. The dispute over the validity of provincially appointed courts was ended in 1892 by the ruling of the Judicial Committee of the Privy Council (JCPC)<sup>5</sup> in the *Maritime Bank Case*. The case was not specifically about judicial appointment but rather about the general nature of Canadian federalism. The JCPC enforced what it argued was the essence of a federal system of government: the equal constitutional status of the national and regional governments, or 'dual sovereignty'. It followed that if the federal government had the power to appoint judges to courts it created (under s. 101), then the provincial governments must have the same power for their courts.<sup>6</sup> However, the JCPC's ruling did not end litigation over the *jurisdiction* of provincially appointed courts, which continues to this day.

### Jurisdiction

S. 92 courts have extensive and diverse subject-matter jurisdiction, which they have accumulated slowly but continuously since Confederation. Although the specific details vary from province to province, the legal issues heard in these courts today usually fall into the following five categories:

#### Provincial Offences

In every province, the s. 92 court has original exclusive jurisdiction over all provincial and municipal offences. Examples include traffic infractions (driving without a licence, speeding, and so on), littering, underage drinking, and literally thousands of other 'summary' offences (less serious offences, similar to misdemeanours in the US).

#### Federal Offences

As Box 2.2 shows, federal offences may be found not only in the *Criminal Code*, but also in many other statutes and regulations. The *Marshall* case provides three non-Code examples: fishing without a licence, fishing out of season, and fishing with an illegal net. Every province's s. 92 court has original exclusive jurisdiction over all summary offences created by Parliament. Parliament (but not the provinces) can also create 'indictable', or more serious offences that carry heavier punishment.

Jurisdiction over indictable offences is more complicated. There are three categories of indictable offences, and legislation determines where each is heard. The



least serious (illegal betting for example) are assigned exclusively to s. 92 courts, whereas the most serious (murder, treason, sedition, war crimes, and 'alarming the monarch') must be heard in a s. 96 trial court, usually before a judge and jury.<sup>7</sup> For all other indictable offences, the accused can choose between trial before a s. 92 court judge alone, a s. 96 court judge alone, or a judge and jury in a s. 96 court (there are no jury trials in s. 92 courts). Even for cases tried in a s. 96 court, the case may begin with a 'preliminary inquiry' to determine if there is enough evidence against the accused to proceed with a trial; these inquiries are usually heard before a s. 92 court judge or justice of the peace (see below).

To complicate matters further, there are a large number of 'hybrid' or dual-procedure offences, such as theft under \$5,000, where the Crown (prosecution) decides whether to charge the accused with a summary or indictable offence. Summary, indictable, and hybrid offences are discussed more fully in Chapter 9.

In all, s. 92 courts hear the overwhelming majority—over 95 per cent—of trials involving federal offences. It must be stressed that this trend has been actively driven by the federal government, which for several decades has willingly shifted judicial jurisdiction over federal offences to the s. 92 courts. As this suggests, the federal government overcame its initial opposition to these courts and has in fact been the actor most responsible for their growth. The reasons for this, and other factors behind the growth of s. 92 courts, are discussed below.

### Box 2.2 What's an 'Offence'?

In Canada, 'offence' is the technical term for a law or regulation that, if broken, is punishable by fine or imprisonment. Although people often associate offences with 'crimes', in Canada crimes are only those offences contained in the federal *Criminal Code*. Provincial governments can also create offences, for example, speeding while driving, and the federal government can create non-*Criminal Code* offences, such as fishing without a licence (*Fisheries Act*) or drug possession (*Controlled Drugs and Substances Act*). A useful way to think of it is this: all crimes are offences, but not all offences are crimes.

### Young Offenders

Under Canada's *Youth Criminal Justice Act* (YCJA), which replaced the *Young Offenders Act*, persons aged 12 to 17 who are charged with committing a crime are usually treated differently than adults. This reflects the view that young people, by virtue of their relative immaturity and level of development, require greater procedural protections during trials. By the same token, the sentencing of people aged 12 to 17 is usually aimed less at punishment than at rehabilitation and reintegration into society. The YCJA designates 'youth justice courts' to apply these spe-

cial rules; all provinces have classified their s. 92 trial courts as such courts, and some have even created special courts to deal with young people exclusively.

### Family Law

Most s. 92 trial courts have been given jurisdiction over a range of legal issues related to families, which may include marriage, adoption, child custody (in cases of neglect, endangerment, abuse, or separation of the parents), and child support payments ('maintenance'). Notably, however, proceedings related to divorce may be heard only in s. 96 courts. This exception is discussed further in the section below on s. 96 courts.

### Civil Law

Except in Manitoba, Nova Scotia, Ontario, and Prince Edward Island, s. 92 courts have been empowered to hear civil cases involving relatively small monetary claims, ranging from less than \$5,000 (in Newfoundland and Labrador and Saskatchewan) to less than \$25,000 (in Alberta). In addition to small claims, the Civil Division of Quebec's s. 92 court also has jurisdiction over more formal cases in which the amount in dispute is up to \$70,000, except cases for spousal support and those cases against the federal government (which are reserved for the s. 96 and s. 101 courts respectively).

### Structure

The subject-matter jurisdiction of s. 92 courts is a striking example of integrated judicial federalism in Canada. As we saw, the federal government can assign federal offences, most notably under the *Criminal Code*, to provincial s. 92 courts. In fact, the only area of criminal law that has been kept from these courts is jury trials, and even they often begin in s. 92 courts with the preliminary inquiry (see Chapter 9). On the other hand, the provinces determine how their courts will deal with these issues, organizationally speaking—for example, in specialized divisions or general courts.

Twenty-five years ago, the most notable structural feature of s. 92 courts was their tremendous size, for there were far more judges in this than any other category after a sustained period of jurisdictional expansion, particularly in criminal law. According to Russell (2007b), in 1982 there were 1,013 s. 92 judges in Canada, compared to only 657 s. 96 trial and appellate judges. The expansion of s. 92 courts had been caused by several factors in the preceding decades, including, as noted above, the federal government's eagerness to transfer jurisdiction over federal offences to these provincially appointed courts. The federal government's behaviour in this respect seems illogical, since vigorous competition between the federal and provincial levels of government for jurisdiction is perhaps the defining feature of Canada's constitutional history. The rapid growth of s. 92 courts may itself provide a clue, however, for unlike s. 96 court judges, s. 92 judges are not



paid by the federal government. This fiscal reality certainly explains the more recent trend, discussed below, of the provinces 'downloading' routine administrative matters to lower-paid justices of the peace and part-time judges. The expansion of s. 92 courts also reflected larger political trends, especially the phenomenon of 'province building': that is, the growth of provincial welfare states and bureaucracies after the Second World War, in large part as a result of the growth of regionalism and Quebec nationalism. Provincial governments were wary of having their new laws and programs enforced (and possibly undermined) by federally appointed s. 96 judges. As well, judicial appointment provided an enticing opportunity for political patronage.

As Table 2.1 illustrates, the numerical imbalance between the s. 92 and s. 96 courts has shrunk, defying earlier expectations that the growth of s. 92 courts would continue to outpace that of the other courts, especially the s. 96 courts.<sup>8</sup> In fact, there are now *fewer* s. 92 court judges, especially in Ontario and Quebec, than there were in the 1980s, whereas the s. 96 courts have grown (see Table 2.1). The full reasons for this development are not yet clear, but Peter Russell (2007b) identifies at least one part of the explanation: massive off-loading of what were s. 92 court responsibilities (for example, search and arrest warrant applications) to justices of the peace (JPs) in criminal law and prothonotaries in civil law. In Ontario at the end of 2006, for example, there were 309 full-time and 19 part-time JPs, outnumbering the 289 full-time and 37 part-time s. 92 judges. Another factor, given the s. 92 courts' wide criminal law jurisdiction, may be the steady decline in crime rates over the past three decades. It is less clear why there has been a resurgence of s. 96 judges, since it cannot be explained by crime rates (especially since those judges' criminal law caseload has been shrinking (Webster and Doob 2003)). Some possibilities, however, could be an increase in private litigation, family law, or judicial review of provincial tribunals, since, as we shall see below, s. 96 courts have jurisdiction over these issues.

The provinces also vary in the degree to which they have specialized s. 92 courts. Perhaps not surprisingly given its small number of judges, Prince Edward Island has the least specialization. Its three judges each hear all matters within the jurisdiction of the PEI Provincial Court (notably, this includes only criminal and provincial offences by adults and youths), and they sit in only four locations. At the other end of the spectrum, the Alberta Provincial Court contains five specialized divisions: Civil Court (civil claims under \$25,000); Criminal Court (bail hearings, preliminary inquiries, trials and sentencing of all summary and most indictable offences); Family Court (spousal and child support, child custody and access, and child welfare and protection); Traffic Court; and Youth Court (cases under the YCJA). The Court of Québec has a similar level of specialization, with Civil, Criminal and Penal, and Youth (child protection and YCJA cases) Divisions, as well as a unit called Tribunal des professions, which can review the decisions of professional conduct committees, such as those for doctors and lawyers.<sup>9</sup> In addi-

**Table 2.1** Number of Full-Time Canadian Judges, 2006

Section 101 Courts		Province	Court of Appeal	Section 96 Lower Courts	Section 92 Courts
Supreme Court of Canada	9	Alberta	15	75	114
Federal Court of Appeal	11	BC	15	102	135
Federal Court	33	Manitoba	7	33	40
Tax Court of Canada	21	New Brunswick	7	21	26
(The Court Martial Appeal Court draws its judges from other s. 101 courts)		Newf. & Lab.	6	20	23
		Nova Scotia	8	33	34
		Ontario	24	289	283
		PEI	3	5	3
		Quebec	20	144	270
		Saskatchewan	9	32	46
		Nunavut	— <sup>a</sup>	3	— <sup>a</sup>
		N.W.T.	— <sup>b</sup>	3	3
		Yukon	— <sup>c</sup>	2	3
<b>Total Number of Judges</b>	<b>74</b>		<b>114</b>	<b>762</b>	<b>980</b>

**Notes:**

- Figures are based on statutory guidelines where possible, and otherwise most recent information from the court.
- Figures do not include supernumerary judges.

<sup>a</sup> The Nunavut Court of Appeal is composed of justices from the Courts of Appeal of Alberta and Saskatchewan and the judges and ex officio judges of the s. 96 lower courts of the Northwest Territories, Yukon, and Nunavut.

<sup>b</sup> The NWT Court of Appeal, like the Nunavut Court of Appeal, is composed of justices from the Courts of Appeal of Alberta and Saskatchewan and the judges and ex officio judges of the s. 96 lower courts of the Northwest Territories, Yukon, and Nunavut.

<sup>c</sup> The Yukon Court of Appeal is made up of justices of the British Columbia Court of Appeal and justices from the s. 96 lower courts of Yukon Territory and Northwest Territories.

<sup>d</sup> The Nunavut Court of Justice is Canada's first unified, single-tier court.

tion, a municipality in Quebec can choose, either individually or in collaboration with other municipalities, to establish Municipal Courts for cases involving local by-laws, taxes, and less serious provincial and federal offences, such as shoplifting and contraventions of traffic rules. All provinces mix permanent court locations with travelling (or 'circuit') courts, with judges travelling periodically to the latter to administer justice for small communities in more remote areas.<sup>10</sup>

A final issue regarding the structure of s. 92 courts worth elaborating is the existence of *justices of the peace*, as noted above. Historically, even before



Confederation, JPs were members of the local elite who performed many of the same functions as magistrates. Today, JPs hear a surprisingly large number of matters, particularly under the *Criminal Code*, which assigns them the same jurisdiction as provincial court judges. Their precise role differs from province to province, but in Ontario, for example, a part-time 'non-presiding' justice of the peace issues search warrants, presides over bail hearings, and issues subpoenas, while full-time 'presiding' justices of the peace, in addition to these duties, hear cases involving provincial offences. Despite these judicial functions, JPs do not usually require a background in law (practising lawyers are actually precluded from becoming JPs in some provinces<sup>11</sup> to counter-balance the influence of the legal profession), although they receive special training and usually work with legally trained clerks. Writing in 1987, Peter Russell predicted that the 'judicialization of magistracy' might actually increase the use of lay JPs, because they offered a cheaper and more flexible solution than appointing tenured, full-time judges to deal with the heavy workload of administering criminal justice. Although exact figures are not available nationally, it is certainly the case that JPs vastly outnumber s. 92 court judges in some provinces, as indicated for Ontario above. The situation is even more extreme in Saskatchewan, where in 2006 there were 175 JPs, many working in remote communities, compared to only 46 provincial court judges. The same features that make JPs administratively and economically attractive to government, however, prompt concerns about their independence. Beginning in the late 1990s, some provinces introduced reforms to address both issues, including independent councils of judges and laypersons to make recommendations to the government regarding JP appointments, salaries, and alleged misconduct; these reforms mirror measures taken since 1997 to enhance judicial independence (see Chapter 6). In 2005, the Supreme Court's ruling in *Bodner v. Alberta* (2005) confirmed that JPs must enjoy the same independence as judges, even though it ultimately allowed the Alberta government to reject a salary recommendation by that province's JP compensation commission.

### Workload

Unfortunately for students of Canada's provincial courts (both s. 92 and s. 96), public reporting on the workload of these courts is poor or relatively inaccessible (especially to non-residents). Only British Columbia, Manitoba, New Brunswick, Newfoundland, and Ontario publish data on-line, and of these only Ontario provides the more useful information about number of cases actually heard, decisions issued, and size of backlog. (British Columbia, New Brunswick, and Newfoundland and Labrador report only cases 'received' or 'filed', and Manitoba only hourly courtroom use statistics.) The remaining provinces issue no information of any kind, and inquiries to their courts and governments proved unsuccessful.

The Canadian Legal Information Institute (CanLII) maintains an excellent website ([www.canlii.org](http://www.canlii.org)), which contains the published decisions of most courts in Canada, going back several years. However, most decisions by trial courts—and recall, all s. 92 courts are trial courts—are not published. Given the social and political importance of administering justice—not to mention the public expense of the judicial system—this lack of transparency is troubling. While it is true that the number of cases in these courts is very large and potentially difficult to track, the fact that two of the largest provinces are able to do so suggests it is possible. Indeed, it is hard to imagine that such statistics are not kept, since they are necessary for assessing the performance and resource needs of the judicial system. This suggests that the problem is rather one of public access.

A full accounting of these courts' workload is therefore impossible, but the data from British Columbia, New Brunswick, and Ontario provide some useful insights that are likely representative of the other provinces. The first is the sheer number of s. 92 trials compared to those in s. 96 courts: in Ontario in 2004/5, for example, judges in the Ontario Court of Justice heard over 4.7 million 'events',<sup>12</sup> compared to only 284,667 in Ontario's (s. 96) Superior Court of Justice (Ministry of the Attorney General 2006, App. B). This discrepancy is astonishing in light of the fact, reported in Table 2.1, that there are actually *fewer* s. 92 judges than s. 96 judges in Ontario. In British Columbia, 3.5 times as many cases are filed in the s. 92 court as in the s. 96 trial court, yet the former has only a third more judges. This would seem to imply that the types of cases handled in s. 92 courts are less complicated and therefore take less time to resolve.

The second insight provided by the data for these provinces is the predominance of 'criminal' cases (those involving either federal or provincial offences) on the s. 92 court docket—over 99 per cent in Ontario, where most civil, family, and small-claims cases are heard in the Superior Court of Justice. The s. 92 docket is slightly more balanced in New Brunswick and considerably more so in British Columbia, where criminal cases filed constituted roughly 93.5 per cent and 68 per cent of the respective totals in 2004/5; of these, a significant proportion (roughly 37 per cent in British Columbia) are traffic offences. The big difference in British Columbia is that 22 per cent of the cases filed were related to family law or small claims, a percentage that is probably more representative of most provinces.<sup>13</sup> The large proportion of criminal (and small-claims) cases in the s. 92 workload also helps explain those courts' disproportionately higher output given their number of judges, since criminal matters are usually less complicated than the civil (and often family) litigation and criminal jury trials that predominate in the s. 96 courts. Before we move on to the next category of courts, it must be stressed that when we speak of administering criminal justice in later chapters, we are referring almost entirely to s. 92 courts—not only are they the workhorses of the criminal justice system, but 99 per cent of criminal cases which begin in these courts also end there.



## The Section 96 'Provincial' Courts

### Historical Background

The distinguishing feature of s. 96 courts, among Canadian courts as well as the judicial systems of other federations, is their blend of provincial administration and federal appointment. As appointment has the most direct influence on the ideological (or more problematically, partisan) orientation of the judiciary, this arrangement reflected the dominant view among the Fathers of Confederation, most notably Sir John A. Macdonald, that Canada should be a quasi-federation dominated by the national government. As Peter Russell (1987) observes, Macdonald wanted the federal-provincial relationship to mirror that between the Imperial government in London and her colonies. In this sense, s. 96 is consistent with other centralizing provisions of the 1867 Constitution, such as federal disallowance, reservation, and the 'Peace, Order, and Good Government' (POGG) clause.<sup>14</sup> Like those provisions, s. 96 has been eroded since 1867 as Canada has been transformed from Macdonald's vision into a more classical federation, with greater equality between the national and regional governments.

The 'Superior, District, and County Courts in each Province' identified in s. 96 of the *Constitution Act, 1867* (formerly the *British North America Act*) were the new country's primary courts. It is therefore striking how little s. 96 actually says about the composition of these courts. Ss. 97–100 establish the foundations of judicial independence for these courts: tenure of office (s. 99, but only for 'Superior' courts); 'fixed' salaries (s. 100); and the requirement that these judges be members of their respective provincial bar (that is, that they have legal training). Otherwise, the 1867 Constitution is silent about the actual functions and organization of these courts. However, as Russell (1987, 47) observes, 'the Canadian Constitution did not purport to be a comprehensive plan for a new and ideal system of government', unlike its US counterpart. This is because Canada's founders were content to adopt the main features of the British state—responsible parliamentary government, the British monarch as the head of state, and the English court system (including the JCPC as the highest court of appeal)—while trying to blend them with the federal division of power and the specific legal and cultural needs of French Quebec. Indeed, the courts listed in s. 96 already existed (sometimes by other names) at the time of Confederation and, particularly the superior courts, had been functioning as colonial courts for many years. S. 129 of the 1867 Constitution makes this judicial continuity explicit, with its provision that '... all Courts of Civil and Criminal Jurisdiction, ... and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made.'

The 'Superior' courts were already British North America's oldest judicial institutions in 1867, existing in every province and largely mirroring the structure

of their English counterparts. They were assigned to deal with the most serious issues in criminal and civil law. This helps explain why s. 99 of the *Constitution Act, 1867* provided them with greater independence than any other court, guaranteeing only their judges security of tenure. Superior courts have also long possessed appellate jurisdiction, for panels of trial judges could review rulings of a fellow superior court trial judge, or of an 'inferior' county or district court judge (see below). In 1874, Ontario was the first to create an appeal court staffed with its own judges, and all provinces have since followed suit.

In contrast, the 'inferior' s. 96 county and district courts handled less serious criminal and civil trials, in more remote areas. Except in Upper Canada/Ontario, they were also less extensively developed than superior courts, and they did not exist at all in Quebec. In Quebec, the functions of county and district courts were performed by the provincially appointed Court of Sessions of the Peace and magistrates' courts, which later became the Court of Québec. As the other provinces witnessed the massive shift of less serious criminal cases into s. 92 courts, they all began folding their county and district courts and judges into the superior courts, beginning with British Columbia in 1969. There was also support for this merger movement from county and district court judges themselves, because the functions of these and the superior courts had become somewhat blurred. County and district courts no longer exist in any province today, Nova Scotia being the last to merge its s. 96 courts in 1992.

### Jurisdiction

Recall our three dimensions of jurisdiction introduced above, *territorial*, *hierarchical*, and *subject matter*. As provincial courts, s. 96 courts have territorial jurisdiction only within their province, although some provinces have developed procedures for superior courts to hear cases arising outside that province to prevent duplication or if the case otherwise could not be heard. S. 96 courts have thicker hierarchical jurisdiction than s. 92 courts, for this category contains both trial and appeal courts. In some cases, the same court has both original and appellate jurisdiction, depending on the issue. For example, the Ontario Superior Court of Justice has trial jurisdiction over the most serious criminal cases, but it hears appeals from the s. 92 trial court in cases involving less serious offences; a similar structure exists in all provinces (see Box 2.3). On the other hand, the Courts of Appeal have original jurisdiction over 'references' by their respective provincial governments, which occur when the cabinet asks the Court for an 'advisory opinion' (technically non-binding, but usually respected as a formal ruling) on the legality of proposed or existing legislation. The subject matter jurisdiction of s. 96 courts is constitutionally unlimited, reflecting the fact that they were intended to be the primary type of court. In other words, s. 96 courts can hear virtually any legal issue, criminal or civil, public or private, federal or provincial.



### Box 2.3 'Speeding' through the Canadian Judicial System

On 11 July 1991, while driving in New Brunswick, Réjean Richard was stopped and given a ticket for speeding. He failed to pay the fine or appear in the New Brunswick Provincial Court at the time stated on the ticket and was convicted without a trial, as required by s. 16 of New Brunswick's *Provincial Offences Procedure Act*. (As in other provinces, speeding is a provincial traffic offence and is prosecuted in a s. 92 provincial trial court.)

Richard appealed his conviction to the (s. 96) New Brunswick Court of Queen's Bench (CQB) on the grounds that his conviction without trial violated s. 11(d) of the Canadian Charter of Rights and Freedoms, which guarantees any person charged with an offence the 'right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal' (notably, and confusingly, the meaning of 'tribunal' here is the more general traditional one, which includes 'courts', and not the specialized one cited earlier.) The CQB agreed, but found that s. 16 was a 'reasonable limit' on Richard's rights, given the importance of 'establishing a more expeditious and efficient and less costly scheme for minor provincial offences'.

Richard then appealed to the (s. 96) New Brunswick Court of Appeal (NBCA), which reversed the Court of Queen's Bench by a vote of 2–1. The majority of the NBCA concluded that the violation of Richard's rights could not be justified, since s. 16 violates the independence of the judiciary by requiring judges to convict people who fail to appear for their trial date or pay their fine.

The government of New Brunswick appealed this decision to the Supreme Court of Canada, which unanimously reversed the NBCA and threw out Richard's Charter-based challenge to s. 16. Stressing that this was a regulatory offence without the possibility of imprisonment, the Supreme Court ruled that under New Brunswick's ticketing system, Richard was fully aware of the consequences of failing to pay or appear in court, and therefore he had waived his right to a trial when he failed to appear. Moreover, the law allows convictions to be set aside if the person applies to the court within forty-five days of the conviction and can satisfy a judge that their failure to appear was not their fault. (See *R. v. Richard* 1996.)

All that for a speeding ticket!

This is an accurate description of the subject matter dealt with by the highest s. 96 appeal courts in each province, but there is a large gap between the unfettered constitutional jurisdiction of s. 96 trial courts and what they actually hear. We have already seen one major example—the s. 92 courts' near-monopoly over trials involving offences. It is not that s. 96 *could* not hear these cases, but that the provincial and federal governments have chosen to assign them to 'purely provincial' courts instead. This and other jurisdictional transfers have not been without controversy, often leading to litigation (ironically, sometimes in the very courts whose jurisdiction is at stake). We will examine three areas that have been particularly contentious: the creation and review of administrative tribunals, criminal trials, and family law.

#### *Creation and Review of Administrative Tribunals*

Aside from the criminal cases shifted to s. 92 courts, the greatest threat to s. 96 jurisdiction has been the creation of many provincial and federal administrative tribunals to settle legal disputes that used to be heard in the superior courts. Perhaps because federal tribunals and s. 96 courts are appointed by the same authority and because s. 101 empowers the 'Establishment of any additional Courts for the better Administration of the Laws of Canada', litigation has typically focused on the creation of provincially appointed tribunals. In a 1938 case on the matter, the JCPC tried to sharply restrict further erosion of s. 96 court jurisdiction, in effect 'freezing' it at its 1867 levels (*Toronto v. York* 1938). The JCPC's rationale was that, unlike provincially appointed judges at that time, s. 96 judges were protected by 'the three principal pillars in the temple of justice, and they are not to be undermined': appointment by the Governor General (in reality, the federal cabinet or Prime Minister), tenure, and 'fixed' salaries.

This restrictive approach was significantly liberalized over several cases in the following decades.<sup>15</sup> The changes were synthesized in the Supreme Court's 1981 ruling in the *Residential Tenancies Act Reference*, which produced a three-part test for determining when superior court jurisdiction could be removed to a provincially appointed court or tribunal. This test, with minor subsequent revisions, is as follows:

- (1) *Historical Inquiry*: Was the subject matter assigned to the tribunal one that was decided exclusively by a superior, district, or county court at Confederation?<sup>16</sup>

This is roughly the same standard as that proposed by the JCPC in 1938, although there is judicial flexibility at this stage since 'subject matter' is usually a matter of interpretation.<sup>17</sup> However, even if a tribunal fails at this stage, there are two more chances for it to survive constitutional review:



- (2) *Judicial Function Test*: Is the tribunal's assigned task 'judicial', which is defined as the adjudication of a dispute through the application of a recognized body of rules in a fair and impartial manner? If so, the task cannot be transferred to a tribunal.

A body designed to settle disputes between landlords and residential tenants by applying an existing statute is a good example of a 'judicial'-type tribunal that would fail this part of the test.<sup>18</sup> That said, there are many examples of tribunals that would pass. Take, for one, the Canadian Radio-television and Telecommunications Commission (CRTC), a federal administrative tribunal charged with regulating Canada's airwaves and telecommunications network and promoting Canadian culture. To begin with, the CRTC is responsible for creating many of the regulations and standards that it then enforces through its power to grant (and deny) broadcast licences and to issue fines. Therefore, it cannot be said to resolve disputes through the impartial application of a recognized body of rules. Furthermore, in its role as a promoter of Canadian culture, it cannot be said to be 'impartial' when granting licences; it is, by definition, biased toward broadcasters that promote Canadian content, and against those that do not. For these reasons, the CRTC would be considered an 'administrative' (and, in part, 'legislative') rather than a 'judicial' tribunal.

Failing the above tests, however, a 'judicial' tribunal could still pass constitutional muster if it prevailed at the third stage of the test.

- (3) *Institutional Setting Test*: Is the tribunal a crucial part of a wider regulatory system, so long as the 'sole and central function' of the tribunal is not adjudicating disputes? If so, a jurisdictional transfer is allowed.

A positive example was the Ontario Municipal Board in the late 1970s. Although the Board had been given the authority to resolve certain disputes over assets between amalgamating municipalities, this adjudicatory role was, according to the Supreme Court, merely one part of 'the overall picture of the general restructuring of the municipalities in which the Municipal Board is given an important part to play' (*The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al.* 1979).

As the reader may have already guessed, this three-part test is actually a fairly easy hurdle to clear. Only the most overt incursions into s. 96 court jurisdiction would fail by this measure, and thus, there have been few constitutional impediments to the growth of administrative tribunals. Possibly in response, the Supreme Court raised the hurdle in 1995 by adding an additional step to the *Residential Tenancies Act Reference* test. In *MacMillan Bloedel v. Simpson* (1995), a slim majority of the justices ruled that the superior courts' 'core jurisdiction' could not be transferred away without a formal constitutional amendment. Unfortunately, they provided very little guidance about what 'core jurisdiction' means, beyond the

vaguely worded phrase 'those powers which are essential to the administration of justice and the maintenance of the rule of law [without which] s. 96 of the Constitution Act could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary.' As Peter Hogg (2003) has argued, this shift creates a great deal of uncertainty about the constitutionality of existing tribunals.

Another restriction the Supreme Court has imposed concerns judicial review of (that is, appeals to a court from) tribunal decisions. Some provinces, most notably Quebec, have attempted to prevent such appeals to s. 96 courts, but have been blocked by the Supreme Court from doing so completely (*A.G. Quebec v. Farrah* 1978; *Crevier v. A.G. Quebec* 1981). As it currently stands, superior courts cannot be prevented by the provincial legislatures from reviewing provincial tribunal decisions to determine whether they are within that tribunal's assigned jurisdiction, or whether the tribunal's powers violate the Constitution (most notably, the federal-provincial division of powers). Parliament is less constrained in this regard—the only judicial review of federal tribunals it cannot remove is that done on constitutional grounds (*A.G. Canada v. Canard* 1976; *CLRB v. Paul L'Anglais* 1983).

### Criminal Trials

A second contentious area for s. 96 jurisdiction revolves around criminal trials. Given the extremely high percentage of criminal trials ('criminal' here referring to all federal and provincial offences) heard in s. 92 courts, one might ask why a complete transfer has not occurred. There was in fact an initiative by the provinces in the early 1980s to create a s. 92 unified criminal trial court. This move was linked to provincial dissatisfaction at the time with the federal government's unfettered power to appoint s. 96 court judges, a power that it exercised with no provincial input (as we shall see in Chapter 5, this was changed in the late 1980s). It also reflected the combative relationship between Prime Minister Trudeau and the provincial premiers during this extended period of constitutional negotiations that culminated in the 1982 Constitution, including the Charter of Rights and Freedoms. Shortly thereafter, the provinces proposed major jurisdictional transfers from the s. 96 courts at a constitutional conference in 1983, but the negotiations focused on aboriginal rights and the judicial reform proposals were never discussed (Russell 1984a, 248).

The issue came to a head in the 1983 reference case *McEvoy* (1983), in which the Supreme Court considered the constitutionality of a hypothetical scenario where the federal Parliament and the New Brunswick Legislature agreed to shift all trials of indictable offences to s. 92 courts. The Court surprised many observers by ruling that 'Parliament can no more give away federal constitutional powers than a province can usurp them', even if only to create concurrent jurisdiction. The decision turned on the Court's finding that s. 96 courts cannot be stripped of their 'core or inherent' jurisdiction and 'essential character' as those existed at



Confederation. These standards parallel the 'historical inquiry' in the *Residential Tenancies Act Reference* test; the second and third parts of that test could not save a s. 92 'unified' criminal court, however, as it would clearly be a 'judicial' body whose only function was to adjudicate (criminal) disputes.

The finding in *McEvoy* is problematic, in light of how much of the s. 96 courts' 1867 jurisdiction had *already* been transferred away to purely provincial courts. The Supreme Court recognized this tension but drew a distinction between 'one or a few transfers of criminal law power' (which was understating the matter considerably) and 'a complete obliteration of Superior Court criminal law jurisdiction', which would have the effect of transforming the 'inferior' s. 92 court into a superior court in criminal cases. The *McEvoy* ruling was buttressed by the Court's subsequent decision in *MacMillan Bloedel* (see above), where the Supreme Court explicitly indicated for the first time that they would use the *Residential Tenancies Act Reference* test, along with the 'core jurisdiction' standard, for deciding jurisdictional transfers to 'inferior' courts as well as administrative tribunals. A bigger problem remains, however, in that *McEvoy* and subsequent Supreme Court rulings failed to define precisely the 'inherent jurisdiction' or 'essential character' of the superior courts.

As it currently stands, while the s. 96 superior courts have unlimited criminal law jurisdiction under the Constitution, Parliament and the provinces have assigned jurisdiction over many offences exclusively to the s. 92 trial courts and have created a system where either the Crown (the prosecution) or the accused can 'elect', or choose, their venue for most other offences. Sections 469 and 473 of the *Criminal Code* list only a handful of serious offences that must be tried in the s. 96 courts; those offences include murder, various forms of treason, intimidating government officials, and piracy, all of which must be tried with a jury unless both the Crown and accused choose otherwise. Section 553 further provides that s. 96 courts must hear any case where the accused elects for trial by judge and jury. The exception is in Nunavut, which has the only unified s. 96 trial court in Canada (the Nunavut Court of Justice).<sup>19</sup> While there are therefore no jury trials in s. 92 courts, this prohibition has not been explicitly challenged on constitutional grounds in the Supreme Court of Canada, and constitutional scholar Patrick Healy (2003) argues compellingly that nothing in *McEvoy* or subsequent cases precludes jury trials from being heard in s. 92 courts.<sup>20</sup>

Although several scholars have recently advocated consolidating criminal trials in the provincial s. 92 courts,<sup>21</sup> most provinces do not appear to have much interest in this option. In 1990, the provincial Attorneys General unanimously proposed assigning all criminal trials to the superior, federally appointed courts. As Baar (1996, 293) observes, 'this proposal was supported by the Canadian Association of Provincial Court Judges, whose membership—provincially appointed judges—[stood] to gain more prestige and higher salaries from the change', since most of them would have been assigned to the s. 96 courts as part of the process. Although the provinces

altered their court unification strategy partly in light of *McEvoy*, ballooning judicial salaries were at least as influential, if not more so. The economic situation for the provinces in the early 1990s was fairly bleak as Canada experienced a major economic recession, and the federal government made deep cuts in its transfer payments to the provinces. The federal government, not surprisingly, was not interested in taking on the cost of funding about 1,000 new judges, and it rejected the proposal. Baar (1996, 294) observes that the failure of the s. 96 unification efforts led directly to the decision by most provinces to cut their number of s. 92 judges and download routine criminal work to lower-paid justices of the peace.

Notably, the federal government's decision in 1990 was supported by the superior court judges themselves, 'who feared they would be inundated by high volumes of routine criminal work' (Baar 1996, 294). Similarly, in 2000 the Ontario Superior Court of Justice issued a scathing report rejecting the suggestion by the then Ontario Attorney General James Flaherty that unification would improve the efficiency of the criminal justice system. These events illustrate that the politics surrounding judicial administration are not simply federal-provincial struggles, but include the judges themselves as represented through their various professional associations. The federal government appeared to recognize this in the mid-1990s, when it rejected the New Brunswick government's proposal to create a s. 96 unified criminal trial with the surprising explanation that it would not amend the federal *Judges Act* without the support of both the superior court and provincial bar (Baar 1998, 117).

### Family Law

The third area of s. 96 jurisdictional contention is family law. As noted above, s. 92 courts in many provinces have significant jurisdiction over family law, including adoption, child custody, and support payments, but some matters related to divorce must be heard in a s. 96 court. The result is that families undergoing divorces may find themselves bounced back and forth among a confusing, time-consuming, and (given lawyers' and court fees) expensive array of s. 92 and s. 96 courts. Why is this the case?

To begin with, Canadian family law is a bewildering hodgepodge of federal and provincial laws. Under the *Constitutional Act, 1867*, Parliament has jurisdiction over 'marriage and divorce' (s. 91(26)). Parliament accordingly makes rules for child support, custody, alimony, and so forth when associated with divorce, but provincial legislatures make the rules if these things are associated with separations short of or outside of divorce (the latter arises with 'common-law' relationships). By virtue of provincial authority over 'the solemnization of marriage in the province' (s. 92(12)) and 'property and civil rights in the province' (s. 92(13)), the province can make laws regarding adoption, the division of matrimonial assets, the civil obligations of husbands and wives, and the guardianship and protection of children (Russell 1987, 226). To further complicate matters, the federal criminal



law power (s. 91(27)) covers certain family disputes (domestic assault, for example) and offences committed by youths.

How, then, does all of this affect the family law jurisdiction of courts? The provincial and federal governments can assign adjudicative jurisdiction over their laws, with the caveat that they cannot remove such jurisdiction from a s. 96 court if doing so runs afoul of the rules laid down in the *Residential Tenancies Act Reference*, *McEvoy*, and *MacMillan Bloedel*. The real complication is that the Supreme Court allowed some aspects of family law to be moved to s. 92 courts—most notably, adoption and maintenance for children and deserted wives (*Reference re Adoption Act and Other Acts* 1938), and guardianship, child custody, and access to children (*Reference re B.C. Family Relations Act* 1982)—on the grounds that these issues were either 'novel' or, before 1867, were heard by provincially appointed JPs or magistrates. Although there has not been any litigation specifically about the jurisdiction to hear divorce cases, it is widely accepted that this is within the 'core jurisdiction' of s. 96 courts and cannot be transferred. Thus, closely related issues involving a family—such as divorce, allegations of abuse, child support, and custody—might result in more than one court case proceeding simultaneously before different judges, creating inefficiencies and frustration for family members and the legal officials involved.

Prompted by the problems created by a fragmented system of family courts, a movement began in the 1960s to create a 'unified' family court (UFC), with the provinces urging that such bodies be provincially appointed s. 92 courts. The federal government was not receptive to this argument, and at the time, neither were leading members of the legal profession, who held the 'purely' provincial courts in lower esteem than the superior courts (Russell 1987, 226). An innovative attempt by British Columbia to blend s. 96 and s. 92 courts into a single provincial family court was frustrated by the Supreme Court's decision in the *Reference re B.C. Family Relations Act* (1982), which restricted the authority of the provincially appointed judges (specifically, they could not make orders regarding the occupying or entering of the family home in divorce cases). This ruling, with the others cited earlier, made it clear that the creation of a provincially appointed unified family court would require an amendment to s. 96 of the Constitution. However, a UFC at the s. 96 level would not, because there are no constitutional limits on the jurisdiction that can be exercised by a superior court. Many provinces have developed such courts on a limited scale, usually in their largest urban centres; at present, only New Brunswick and Prince Edward Island have province-wide UFCs (and in Prince Edward Island they are simply incorporated into the regular s. 96 trial courts rather than as a separate division), although Ontario is committed to expanding its current network of UFCs to the entire province.

To summarize, s. 96 trial courts usually possess the following exclusive jurisdictions: civil cases involving large sums of money, where they are the main courts (except in certain cases involving the claims against the Government of Canada,

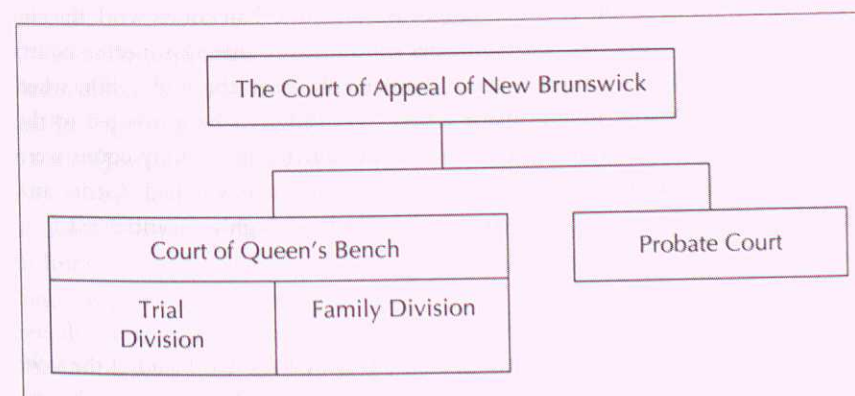
discussed in the section below on s. 101 courts); the most serious criminal trials, usually involving a jury (murder cases being the most common); review of provincial administrative tribunals (except in Quebec); cases related to divorce, and all family law in selected UFCs; and appeals from s. 92 provincial courts regarding summary offences, civil cases, and family law.

### Structure

We can distinguish at least two structural dimensions of provincial superior courts. The first is the hierarchical or vertical structure, that is, how many levels of trial and appeal courts make up the s. 96 courts within the province. The various provincial superior courts are quite similar in this respect, in that every province except Ontario has a single appeal court (the highest court within the province) and, below it, a layer of superior trial courts (which, confusingly, also often serve as courts of appeal for the s. 92 courts, as noted above). As detailed in Box 2.3 and Figure 2.2, New Brunswick's system provides an example: the Court of Queen's Bench is the superior 'trial' court, and the Court of Appeal is what its name implies. Ontario is unique for retaining an additional intermediate-level s. 96 appeal court, called the Divisional Court, which hears appeals from the lower s. 96 Superior Court of Justice in civil cases when less than \$50,000 (raised from \$25,000 in 2006) is at stake. In most provinces, there used to be more than one level of s. 96 trial courts in the form of the district and county courts, but this ended when these courts were merged with the superior courts.

The second dimension is the lateral or horizontal structure, which may include issue-specialized courts at each level, and the geographical centralization or decentralization of the court. The courts of appeal are the simplest in both regards, since (with the exception of Ontario's Divisional Court) there is only a single court in

Figure 2.2 Chart of Section 96 Courts in New Brunswick





each province and territory dedicated to hearing appeals, and it usually sits in the provincial capital, although some divide their time between major centres.<sup>22</sup> Judges in these courts usually sit in panels of three or, less frequently, five to review decisions by lower courts.<sup>23</sup>

Things are more varied at the trial level. In terms of issue specialization, some provinces, including Alberta, British Columbia, Quebec, Prince Edward Island, and all three territories have only a single superior trial court, which hears all matters falling within its subject matter jurisdiction. In Manitoba, the Court of Queen's Bench is a single court but has a family division with its own judges and a general division for all matters not relating to family law; in Winnipeg, the family division is effectively a unified family court. In Saskatchewan and Newfoundland and Labrador, there is a single general-jurisdiction s. 96 trial court but with separate UFCs in certain urban centres. In the remaining provinces, there are multiple specialized courts although with overlapping judicial membership. Ontario and Nova Scotia have specialized s. 96 small claims courts (nominally, at least<sup>24</sup>) for cases involving less than \$10,000 and \$15,000 respectively, and Nova Scotia and New Brunswick have probate courts to deal with wills and to supervise the administration and distribution of estates. New Brunswick has the country's only province-wide UFC system, although Ontario is committed to such a system and currently has UFCs in 17 centres; Nova Scotia's UFCs are limited to the Halifax region and Cape Breton. Even in New Brunswick, Nova Scotia, and Ontario, however, the bulk of s. 96 court trials *not* dealing with family law, including both criminal and civil cases, are heard in a court of general jurisdiction (see Table 2.2).

With respect to the degree of geographic centralization, all provinces' s. 96 trial courts are fairly decentralized. Judges, who are usually assigned to a particular region of the province, preside over a 'circuit' of courts in smaller communities within that region, travelling throughout the year. Prince Edward Island, which is the exception to this model, has three permanent superior trial courts. In most other provinces, the largest urban centres constitute their own region or district, and their judges would therefore travel less. Saskatchewan is somewhat different in this regard, for even the 'resident' judges assigned to urban courts work the circuit to help clear backlogs. Notably, decentralization among superior courts (except in Quebec) has increased quite dramatically since the mid-1980s, when they were concentrated in the major cities. The shift can be attributed to the 'merger movement' mentioned earlier, when the district and county courts were converted wholesale into superior courts. As Quebec never had district and county courts, its superior court system has always been highly decentralized.

### Workload

As with the s. 92 courts, there is little published data on the workload of the s. 96 courts, with the exception of those in British Columbia, New Brunswick, and

**Table 2.2** Names of Section 96 Trial Courts

Province or Territory	General Jurisdiction Trial Court	Unified Family Court?
Alberta	Court of Queen's Bench	No
British Columbia	Supreme Court	No
Manitoba	Court of Queen's Bench (General Division)	Winnipeg (and Family Div. outside capital resemble UFCs)
New Brunswick	Court of Queen's Bench (Trial Division)	Province-wide: Court of Queen's Bench (Family Division)
Newfoundland & Labrador	Supreme Court	St John's
Nova Scotia	Supreme Court	Halifax and Cape Breton
Ontario	Superior Court of Justice	17 locations
Prince Edward Island	Supreme Court (Trial Division)	Effectively, in Supreme Court (Trial Div.)
Quebec	Superior Court	No <sup>a</sup>
Saskatchewan	Court of Queen's Bench	Regina, Saskatoon, Prince Albert <sup>b</sup>
NWT	Supreme Court	No
Nunavut	Nunavut Court of Justice	No
Yukon	Supreme Court	No

<sup>a</sup> However, Quebec excludes only child protection and adoption from the Superior Court. These matters are heard in the Quebec Court, Youth Division.

<sup>b</sup> Outside these cities, the Court of Queen's Bench hears all family law matters except child protection.

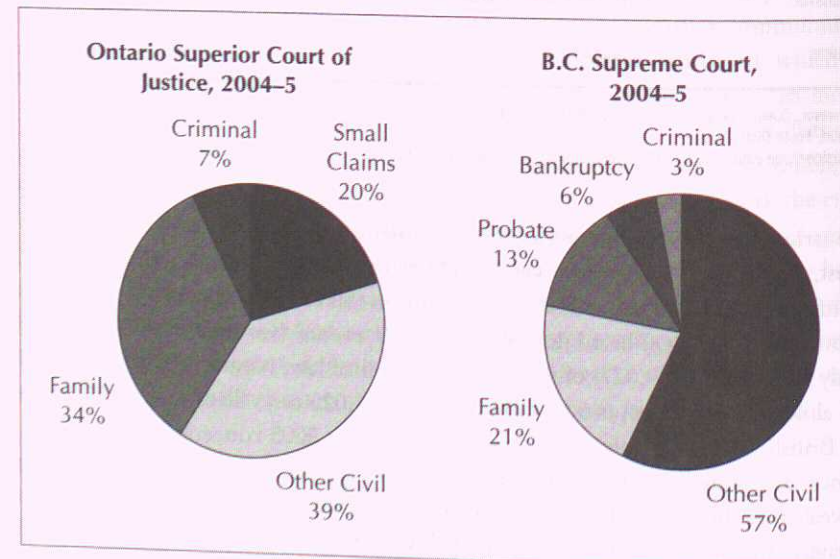
Ontario. These provinces reveal some consistent patterns for the s. 96 trial courts. First, criminal law makes up a very small fraction of the s. 96 trial court workload, confirming the dominance of the s. 92 courts in this field. In Ontario, the Superior Court of Justice (SCJ) heard just under 285,000 'events' (see above) in 2004/5, and only 6.7 per cent (19,027) of these were in criminal law. New Brunswick reported an almost identical proportion (6.8 per cent of 11,023 cases filed) in 2004/5, while in British Columbia only 3 per cent of new trials in 2005 concerned criminal law. Since, as pointed out above, jury trials must be held in s. 96 courts, the evidence reveals that the continuing presence of s. 96 courts in the criminal-law field relies heavily on such trials, as they make up just over half of all criminal trials in the Ontario SCJ (*Report of the Ontario Superior Court of Justice*, in Russell 2007b). The



judges of the Ontario SCJ stressed in a 2000 report that they remain an important part of the criminal justice system—especially since they hear jury trials for the most serious crimes, and appeals from the s. 92 courts—but there is no denying that a relatively small share of criminal cases is heard in these courts. Moreover, this proportion is shrinking rapidly, at least in Ontario. As Webster and Doob (2003) observe, the SCJ's criminal caseload fell 26 per cent from 1998 to 2000/1, while the s. 92 caseload fell only 3 per cent. From 2000 to 2005, the number of criminal cases heard in the Superior Court remained almost unchanged (19,000 a year), despite large increases in Ontario's population. In part, this can be explained by a troubling situation concerning the Superior Court of Justice (SCJ), which was flagged recently by its Chief Justice (Smith 2007): the number of judges in this court has remained static at 289 during a period when Ontario's population has grown by over five million. This also helps explain why the SCJ's criminal case backlog has grown by 22 per cent in five years. In short, the court is under-staffed.

With the relatively small criminal caseload, it is no surprise that s. 96 trial courts are preoccupied with civil and family law. These make up 60 per cent and 34 per cent respectively of the events heard in the Ontario SCJ, and a third of the civil proceedings are in the small claims court. Unlike criminal law, some of these areas have seen large increases in the number of cases over the past five years in Ontario: 40 per cent in small claims, and 14 per cent for family law (Ministry of the Attorney General 2006). The exception is larger civil suits, where the number of new proceedings has remained stable for five years, perhaps reflecting a shift to

Figure 2.3 Selected S. 96 Trial Court Workloads



Source: Based on figures from Ministry of the Attorney General (2006) and Supreme Court of British Columbia (2006). Percentages are of 'events heard' in Ontario and new filings in British Columbia.

small claims court or alternative dispute resolution. Despite this, the number of civil law events heard annually has actually dropped by 8 per cent in five years, providing further evidence that the SCJ is understaffed (Ministry of the Attorney General 2006, B7, note 3). In British Columbia, where small claims are heard in a s. 92 court, the workload distribution is a bit different than in Ontario, but the dominance of civil matters is clear: 56 per cent of the cases are civil suits, 21 per cent family, 13.5 per cent probate (estates and wills), and 6.5 per cent bankruptcy (see Figure 2.3). Although civil and family law cases are increasingly the focus of s. 96 courts at the expense of criminal law, we should be careful not to overstate this trend, in light of the number of courtroom hours dedicated to each in Ontario. In 2004/5, civil cases occupied 62,643 courtroom hours, family law 49,008 hours, and small claims 30,336 hours; criminal cases, at only 7 per cent of the docket, nevertheless took up 49,706 hours, or more than family law. This measure is imprecise because it does not include the many hours of judicial work in chambers (as opposed to open court), but it does suggest that the actual workload of the s. 96 courts may be more balanced than the number of 'events' or cases suggests.

The most notable feature of the workload of the s. 96 appeal courts is how small it is, compared to the massive number of potential appeals from the lower s. 96 and

Table 2.3 Number of Appeals Filed in S. 96 Courts of Appeal, 1995-7

Province	Civil Appeals		Criminal Appeals	
	1995	1997	1995	1997
BC	1,284	1,122	590	580
Alberta	669	613	759	580
Saskatchewan	314	269	269	279
Manitoba	289	215	184	204
Ontario	1,321	1,229	1,543	1,225
Quebec	2,556	n.a.	667	n.a.
New Brunswick	210	n.a.	119	n.a.
Nova Scotia	163	203	132	92
NF & Lab.	n.a.	122	n.a.	81
PEI	33	31	n.a.	20
<b>Totals</b>	<b>6,839</b>	<b>3,804</b>	<b>4,263</b>	<b>3,061</b>

Source: Adapted from Greene et al. (1998).



s. 92 courts. Table 2.3 provides an overview of the appeals filed in the highest s. 96 courts of appeal in each province roughly a decade ago; unfortunately, comprehensive data are not available after this point. More recent information from the Ontario Court of Appeal reveals that in 2004/5 that court decided 1,765 cases (with a roughly even split between criminal and civil matters), while the lower courts of Ontario together received roughly half a million new cases (Ministry of the Attorney General 2006). This demonstrates how rare appeals really are. As McCormick (1994) notes, our legal system assumes that one receives a fair and just verdict from the trial judge, and as Greene et al. (1998) observe, the financial cost of appealing (especially since legal aid is often unavailable) and the prospect of losing prevent many potential appeals.<sup>25</sup> Furthermore, almost all court of appeal decisions are final, that is, are not appealed in turn to the Supreme Court of Canada—in Ontario, the figure is 98 per cent. This fact has a very practical significance, given the workload figures cited above: most civil law cases are heard in provincial courts and even if appealed are ultimately resolved in the provincial Court of Appeal. The result has been the ‘checkerboard’ or decentralized development of civil law across the provinces, in spite of the ‘unified’ Canadian court system. This has also occurred to some degree in criminal law, but since the *Criminal Code* is a federal statute, Parliament, the federal Attorney General, and the Supreme Court have all endeavoured to eliminate provincial disparities in the criminal process. (As we will see in Chapters 8 and 9, however, there are major limitations to such efforts, because law enforcement and prosecution usually fall to provincial police and Crown attorneys, and trials and sentencing to s. 92 provincial court judges.)

## The Section 101 Federal Courts

### Historical Background

Unlike s. 96, s. 101 does not establish or recognize existing courts but rather empowers the federal government to create two distinct kinds of courts: a ‘general court of appeal for Canada’ and ‘any additional courts for the better administration of the laws of Canada.’ Parliament created both in 1875 with, respectively, the Supreme Court of Canada and the Exchequer Court of Canada. Many Canadians are surprised to learn that the Supreme Court was not created until eight years after Confederation, and then by a simple statute (in contrast, the Supreme Court of the United States was established and its powers clearly defined by the US Constitution). In Canada, however, there was no pressing need for such a court, because there was already a ‘general court of appeal’ that sat at the top of the judicial hierarchy: the Judicial Committee of the Privy Council (JCPC), in London. Since the JCPC was Canada’s highest court of appeal from 1867 to 1949, during this ‘long adolescence’ (Russell 1987, 335) the Supreme Court of Canada was supreme in name only. Moreover, before 1875, any legal question could be

addressed by a province’s s. 96 Court of Appeal. Even after 1875, it was possible to bypass the Supreme Court and appeal directly from a s. 96 Court of Appeal to the JCPC in what was known as a *per saltum* appeal. In part, this reflected provincial suspicion of the new court, which was seen by some as an attempt by the federal government to create a court that would be favourable to central authority. Jennifer Smith’s research reveals that some proponents of the Supreme Court openly admitted that they had political motives for the creation of the Court. They hoped that the Supreme Court would become ‘a substitute for the failing remedy of disallowance’ since the latter—which gives the federal government the remarkable authority to ‘veto’ provincial laws—was politically risky to use because it was often unpopular and provoked provincial resistance (Smith 1983). This factor, along with the federal government’s ability to ‘refer’ legal questions directly to the Court (see below) and an early pattern of patronage-based appointments of low-calibre judges to the Supreme Court, help explain why the Court was widely viewed as a second-rate institution until the mid-twentieth century. Since becoming Canada’s highest court and expanding from seven to nine judges in 1949, however, the Supreme Court has shed this image and become a highly respected judicial institution. In the chapters that follow, we will return to the Supreme Court to examine its roles and internal processes in greater detail.

The Exchequer Court of 1875 had very limited jurisdiction: cases against the federal government involving revenue it collected. This was gradually expanded to include virtually all civil cases against the federal government, all federal tax cases, citizenship and immigration matters, and admiralty law. The Exchequer Court was replaced and greatly expanded in 1971 with the creation of the Federal Court of Canada (FCC), which included a trial and appeal division; these were formally divided into the Federal Court of Appeal and the trial-level Federal Court in 2003. A major responsibility of the new FCC was judicial oversight of the growing body of federal administrative tribunals, which paralleled the growth of similar institutions in the provinces. The growth of both was driven by the massive expansion of welfare state programs and state regulation of the economy in general, beginning in earnest during the 1960s. This trend has also led to the creation of other s. 101 courts, whose structure and jurisdiction are detailed below.

### Jurisdiction

Unlike the provincial courts, the s. 101 courts have unlimited *territorial* jurisdiction, reflecting the fact that these are national courts. With respect to *hierarchical* jurisdiction, the s. 101 courts include courts of both original (that is, trial) and appellate jurisdiction. Unlike the lower s. 96 courts, the purely federal courts are, with a few exceptions, *either* trial or appeal courts. One notable exception is that the Supreme Court of Canada has original jurisdiction over references by the federal government, as exemplified by the recent reference on same-sex marriage.



Another important exception is that the Federal Court of Appeal has original jurisdiction to review the actions and authority of a large number of federal tribunals listed in s. 28 of the *Federal Courts Act*. On *subject matter*, the Supreme Court has unlimited jurisdiction, which distinguishes it from high courts in most federations, which are often restricted to hearing cases related only to national laws (in the United States) or regional laws (in Switzerland), though most have jurisdiction over constitutional law, which may involve either. As well, the Supreme Court's jurisdiction over both constitutional and non-constitutional cases, while consistent with other common law high courts in, for example, the United States, Australia, and Israel, is quite different from most civil law countries, which usually have a specific 'constitutional court' to resolve matters related to constitutional interpretation.<sup>26</sup> With the exception of the Supreme Court, however, the distinguishing feature of the s. 101 courts is their narrow authority, which has been the result of often surprising decisions by the Supreme Court.

As Peter Hogg explains, the wording of the phrase 'for the better administration of the laws of Canada' in s. 101 itself imposes some limits on the federal courts (other than the Supreme Court; see Hogg, 2003, section 7.2(b)). First, it means that these courts have only the jurisdiction explicitly given to them by Parliament, unlike the s. 96 courts, which have virtually unlimited jurisdiction by default, and even the s. 92 courts, which possess inherent jurisdiction over matters handled by provincially appointed courts and magistrates before Confederation. Second, these courts can be given jurisdiction only over matters arising under 'the laws of Canada', a simple phrase that has spawned a considerable amount of litigation. An early argument by the federal government that it meant *all* laws in Canada, regardless of which level of government had passed them, was rejected by the Supreme Court. Today, it is well established that it can, at most, refer to *existing* (and not 'potential') federal legislation and regulations. In several cases at the end of the 1970s (in particular *Quebec North Shore Paper Co. v. Canadian Pacific* 1977, *McNamara Construction v. The Queen* 1977, and *R. v. Thomas Fuller Construction* 1980), the Supreme Court also rejected the argument that the federal courts could preside over cases where the federal government had constitutional jurisdiction over the legal issue but no actual legislation, even when the statute creating the federal courts granted them general authority over such issues. For example, in *McNamara*, the federal government attempted to sue a company it had hired to build a penitentiary for breach of contract. Penitentiaries are a federal responsibility under the *Constitution Act 1867*, but because the case turned on common law rather than a federal statute, the Supreme Court denied the s. 101 court jurisdiction over the case.<sup>27</sup>

These rulings have had the result of severely constraining the subject matter jurisdiction of the federal courts and fragmenting civil law cases. The *McNamara* ruling removed the federal government's ability to initiate a civil suit in the s. 101 courts unless Parliament has enacted a law allowing it to do so in that specific

matter; a general grant of authority in the legislation that establishes the federal courts was deemed insufficient by the Supreme Court. However, the federal Crown can be sued in the s. 101 courts, a jurisdiction they have shared with the s. 96 courts since Parliament amended the law in 1992. (Before 1992, this was exclusively the jurisdiction of the s. 101 courts, so the Supreme Court is not solely responsible for narrowing the jurisdiction of the federal courts.) What this means is that if someone sues the federal Crown in a s. 101 court, the government can almost never counter-sue or sue a third party involved in the dispute—as is frequently done in civil cases—in the same court. Similarly, and unlike their American counterparts, Canadian federal trial courts have been denied 'ancillary' and 'pendent' jurisdiction, which, as Peter Russell (1987, 69) puts it, 'make it possible for courts exercising a constitutionally limited federal jurisdiction to deal with issues of state [provincial] law if these are closely associated with the main action concerning federal law.' In other words, these doctrines allow courts to hear legal issues they normally could not if they arise from a common set of facts (for example, the building of a federal penitentiary), in order to consolidate all the diverse but related claims in a civil law matter. As a result, a single situation can give rise to multiple cases spread across different courts, not unlike the fragmentation described above in the field of family law.

An obvious question is *why* the Supreme Court has adopted such a rigidly restrictive attitude toward the federal courts, particularly since it has produced so much wasteful and confusing fragmentation of civil cases. Leading court observers, such as Hogg and Russell, are quite critical of the Supreme Court's approach to this issue, and attribute it to the Court's desire to protect the jurisdiction of the s. 96 superior courts and limit the emergence of a 'dual' system. As we saw with family law, the Supreme Court's approach means that any consolidation of civil cases involving both provincial and federal law must take place in the s. 96 superior courts. Thus, some (again, including Hogg and Russell) advocate eliminating the federal courts altogether in order to streamline the civil justice system, particularly since the federal government appoints the judges of both the s. 96 and s. 101 courts. There is merit to this argument, but it overlooks at least one advantage of having a system of national courts for adjudicating national laws: cross-regional consistency. A decision by a s. 101 court applies equally anywhere in Canada, regardless of where the case originated. In contrast, a decision by a provincial court, *even if it involves federal law*, applies only in that province. This can produce a checkerboard effect of inconsistent interpretation and application of national laws, as it has already done with criminal law and, because of the s. 96 courts' concurrent jurisdiction, federal civil law.

Thus far, we have not addressed a question often asked about s. 101 courts: what about criminal law? After all, since criminal law is a federal responsibility under the Constitution and the *Criminal Code* is a federal law, it would seem to fall within the scope of the 'laws of Canada'. Section 4 of the *Federal Courts Act* does,



in fact, designate the Federal Court 'as a superior court of record having civil and criminal jurisdiction', and the federal courts have some criminal jurisdiction, most notably over the recently added anti-terrorism provisions. The explanation therefore seems to be more a matter of choice by Parliament than a constitutional barrier, and this choice is certainly consistent with the federal government's willingness to shift these cases to the provincially appointed s. 92 courts. However, given the political stakes that the federal government has in the anti-terrorism laws, it will be interesting to see if the new political context since September 11 produces some shift of authority towards the Federal Court.

The preceding discussion has focused on what the s. 101 courts below the Supreme Court do *not* hear, but what *do* they have jurisdiction over? As noted, they have concurrent jurisdiction with the s. 96 courts in civil suits against the federal Crown. However, they have exclusive jurisdiction for judicial review of a wide range of federal administrative tribunals, commissions, and agencies, such as the Immigration and Refugee Board, Employment Insurance umpires, the National Parole Board, and the Canada Revenue Agency. The s. 101 courts also hear interprovincial and federal-provincial disputes and many cases arising from federal legislation, including cases pertaining to taxation, immigration and citizenship, labour relations, intellectual property, admiralty law, parole and penitentiaries, national defence, and telecommunications, to name just a few. That said, recall that Parliament has opted to have many federal laws and regulations enforced through the provincial courts, as we saw in the *Marshall* case at the outset of this chapter. The result is that the lion's share of cases in s. 101 courts are brought by individuals or companies that are challenging the legality (often the constitutionality) of a federal law or administrative tribunal, or a decision of a specific tribunal.

### Structure

As mentioned above, there are both s. 101 trial and appeal courts. The Supreme Court of Canada is, of course, the most well-known appeal court in the country, but below it, there are the Federal Court of Appeal (FCA), which hears appeals from the trial-level Federal Court (FC) and the Tax Court of Canada (TCC); and the Court Martial Appeal Court of Canada, which hears appeals from courts martial. As the court names suggest, there is some issue specialization at both the trial and appeal level. The Tax Court was established in 1983 to hear cases pursuant to (not surprisingly) federal taxes, and since 1991 it has had exclusive jurisdiction in this regard.<sup>28</sup> The TCC's original exclusive jurisdiction has been expanded since its creation to include cases arising from aspects of Employment Insurance, the Canada Pension Plan, veterans' affairs, Old Age Security, and cultural property. Courts martial, which are disciplinary bodies for military personnel, are essentially criminal law courts. There are four types of courts martial within the Canadian Forces: the General Court Martial (GCM), the Disciplinary Court Martial (DCM),

the Standing Court Martial (SCM), and the Special General Court Martial (SGCM). Their jurisdictions largely overlap in that they try individuals for 'service offences', which are offences under the *National Defence Act*, the *Criminal Code*, or any other Act of Parliament committed by a person while subject to the military Code of Service Discipline. The Special General Court Martial is exceptional in that it can try only civilians (for example, non-military personnel in war zones where regular courts are not available), and it issues punishments of fines and imprisonment, whereas the most severe punishment issued by the DCM and SCM is 'dismissal with disgrace'. The courts martial also differ in their membership—the GCM and DCM use a mix of military judges and officers, the SCM a single military judge in a less formal and expedited hearing, and the SGCM a single military judge but in a formal hearing. At the appellate level, the CMAC, created in 1959 to help 'civilianize' military courts, hears appeals only from these courts martial; since 1991 it also has the power to review the severity of sentences and to substitute new sentences. Notably, this 'civilianizing' extends to the CMAC's membership, which is drawn from the civilian judges of other s. 101 courts. The Federal Court and Federal Court of Appeal, which have more general-issue jurisdiction, hear federal law cases that have not been explicitly assigned to the other s. 101 courts. Until 2003, these last two courts were technically two divisions (trial and appeal) of the Federal Court of Canada, and judicial membership did overlap, especially early in the Federal Court's history (see Bushnell 1997). Although the 2003 change formally divided the personnel of the two courts, it was otherwise an administrative reform with little jurisdictional impact.

Geographically, the federal courts are headquartered in Ottawa, but with the exception of the Supreme Court of Canada, they are actually fairly decentralized to enhance their accessibility. All lower s. 101 courts (even the FCA and CMAC) are circuit courts that hear cases in several locations across the country throughout the year. In addition to its sixteen local offices, the FCA has also adopted a network of tele-conference and video conference facilities in Canada's ten largest cities to reduce the need for travel by litigants and judges.

A final note on structure concerns the number of judges who preside over each case. Like their provincial counterparts, the FCA and CMAC usually hear appeals in panels of three judges, and five in extraordinary cases, whereas trial court cases (except some courts martial) have a single judge. As discussed in more detail in Chapter 4, the Supreme Court has only nine members but has historically heard a large share of its docket with smaller panels of five or seven justices, full-court hearings being reserved for its most important cases. The quorum of justices for a case is only five, but four is permitted with the permission of the parties to the case.<sup>29</sup> In more recent years, Chief Justices have increased the number of cases heard by a full court, but panels of seven are still used frequently. The rationale for regularly assigning fewer than nine justices is ostensibly to alleviate the heavy workload of the individual justices so that the Court may hear more cases (and is

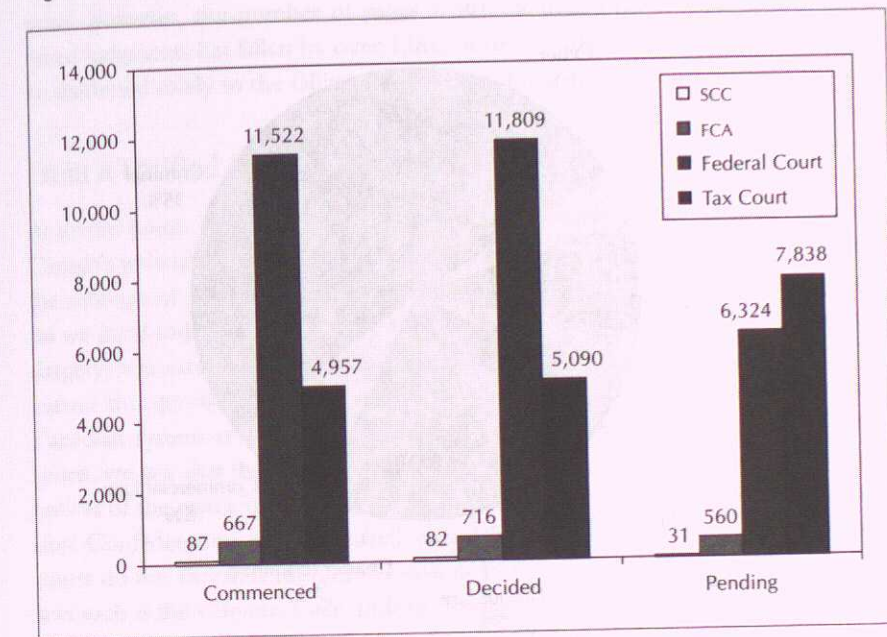


sometimes done because of illness or judicial vacancies caused by retirements. Given the finality and importance of the Supreme Court's rulings and the fact that closely divided decisions are not unusual, the use of incomplete panels troubles many Court observers. Moreover, the workload rationale for incomplete panels is not particularly compelling in light of evidence from the US Supreme Court (although, to be fair, the Canadian justices seem to write more opinions per case—that is, concurring and dissenting—than their American counterparts). All nine justices of the US Supreme Court must preside over every case and participate in every petition for *certiorari* (request to appeal to the Court), which today number over 8,000 per year. The Canadian Supreme Court, with the same amount of help from law clerks, hears only about 600 leave-to-appeal requests per year (see below), and these are dealt with in panels of only three justices (see Flemming 2004). Yet, the US Court renders roughly the same number of judgments each year as its Canadian counterpart. The Supreme Court has been endeavouring in recent years to hear more cases as a full court, particularly in contentious or high-profile matters, although frequent departures of justices have made this difficult.

### Workload

In stark contrast to the other categories of courts, the federal courts regularly publish detailed workload reports (four times a year for the Federal Court) on the Internet. Given their relatively narrow jurisdiction, it should come as no surprise that the s. 101 courts collectively have the lightest workload of the three categories of courts. Russell (1987, 317) reports that the average number of cases initiated per year in the Federal Court (trial division) between 1971 and 1985 was only 2,957. As we can see in Figure 2.4, that number had almost quadrupled to over 11,522 by 2003–6, with almost another 5,000 initiated in the Tax Court of Canada. The Federal Court's docket includes cases involving aboriginal treaties, admiralty law, intellectual property, patented medicines, civil suits against the federal Crown, and review of federal tribunal decisions (most notably, regarding immigration and Employment Insurance). The FC's workload, however, consists primarily of immigration-related cases, which are the only category of its docket that has increased significantly since the mid-1990s. Immigration cases make up between 75 per cent and 80 per cent of all proceedings begun in the FC, and 50 per cent to 60 per cent of its annual backlog ('Pending' in Figure 2.4). Judicial review of decisions by visa officers alone jumped so much—from 149 in 1995 to 890 in 2000—that in 2002 Parliament made such review by leave of the court instead of automatic upon the claimant's request.<sup>30</sup> Notably, this and other changes to the immigration and refugee process contributed to a 27 per cent drop in new cases in the Federal Court from 2002 to 2006, allowing the court to cut its backlog in immigration cases by over 40 per cent (4,380 to 2,491). This progress notwithstanding, the lower s. 101 courts continue to struggle with heavy backlogs (see Figure 2.4). In all three courts with available data, the annual backlog is close to the number of new proceedings,

Figure 2.4 Average Annual Workload of S.101 Courts, 2003–6



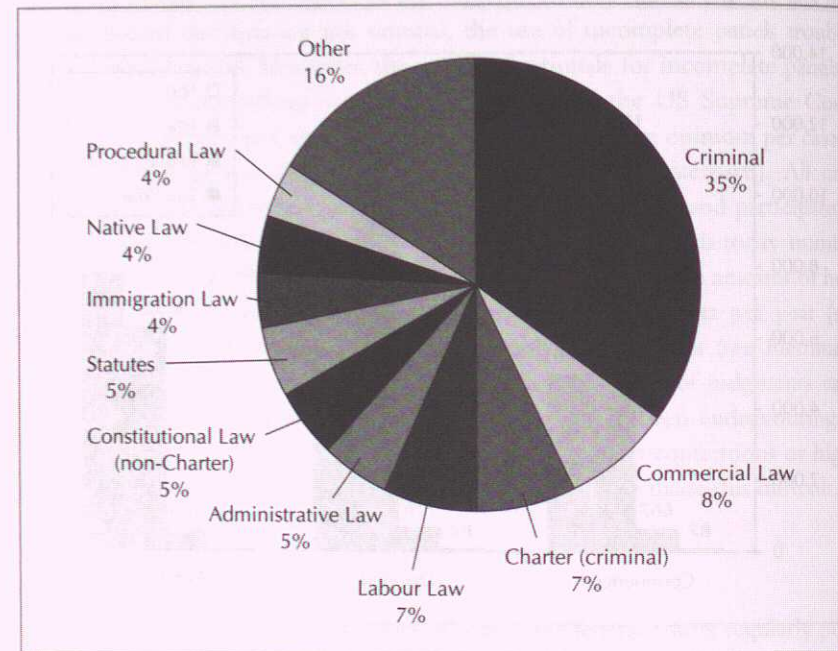
Source: Calculated from data in Court Administration Service (2006) and Supreme Court of Canada (2006).

and it is actually significantly larger in the TCC. As well, the TCC backlog is even larger than the number of cases resolved annually, suggesting that that court does not have the institutional resources it requires.

Unlike the lower s. 101 courts, which have fairly limited docket control (although the FCA has more than the trial divisions), since 1974 the Supreme Court of Canada has enjoyed almost complete control over which cases it will hear. In that year, Parliament amended the *Supreme Court Act* to eliminate the right of appeal to the Supreme Court in civil law cases involving claims over \$10,000. Instead, those seeking access to the Supreme Court must apply for 'leave' to appeal from the Court's Justices. Although accused persons and the Crown still have a limited right to appeal in serious criminal matters (see Chapter 9), 80 per cent to 90 per cent of the Supreme Court's docket is now determined by the Court itself (Supreme Court of Canada 2006, 4). On the basis of the 'elastically worded and vaguely defined' (Flemming and Krutz 2002b, 233) guidelines in s. 40(1) of the *Supreme Court Act*, the case must raise an issue of 'public importance' (see the discussion in Chapter 4).

Docket control has clearly permitted the Court to shift its focus to public law matters, such as criminal law, administrative law, and constitutional law (see Figure 2.5). For example, in 2005, despite the fact that applications for leave to appeal in private law were three times the number in public law, over 60 per cent of the cases heard by the Supreme Court concerned public law (Supreme Court of Canada 2006, 6). Notably, 70 per cent of these, or 42 per cent of the total docket, were



**Figure 2.5** Supreme Court of Canada, Appeals Heard by Issue Area, 2005

Source: Adapted from Supreme Court of Canada (2006).

criminal matters. While cases involving the Charter of Rights and Freedoms continue to occupy a significant portion of the Supreme Court docket—roughly 15 per cent—this is down from 25 per cent to 30 per cent a decade ago.<sup>31</sup>

Another major development in the Supreme Court's workload has been its declining output over several years. In 1990 the Court issued 144 decisions, which dropped to about 100 a year in the mid-1990s and hit a new annual low in 2006 with only 59. The explanation for this trend has not been determined, but there are several possibilities, including the increasing complexity of cases; high turnover for several years among the Court's justices, including the departure of two of the most frequent decision writers, Justices Iacobucci and L'Heureux-Dubé; efforts to craft more consensual decisions, which take longer; and greater deference to lower-court rulings (Makin 2006b, A4). In the US, where their Supreme Court has exhibited a similar trend, commentators suggest that the aging justices prefer a lighter workload and are spending more of their time travelling to academic and non-bench professional events. Another possibility is the steep drop in appeals 'as of right' from fifty-seven in 1995 to the low teens in the early 2000s, despite the fact that leave-to-appeal applications have consistently numbered between 550 and 650 since 1995 (Supreme Court of Canada 2006, 4). Since appeals as of right are usually disposed of in a paragraph with a single opinion for the Court, the number

of significant cases being ruled on may not actually be dropping much. As Makin notes, however, the number of pages written annually by the Court in its published judgments has fallen by over 1,000 in the past decade, a trend which cannot be attributed solely to the falling number of appeals by right.

### From a Unified to Dual Court System?

At several points in this chapter, we have made reference to the 'unified' nature of Canada's judicial system, at least as laid out in s. 96 of the 1867 Constitution, and the subsequent development of 'purely' provincial and federal courts. So where do we stand today? How far has Canada moved toward the 'dual' court system of (largely) separate national and regional courts seen in the United States? To answer this question, it is important to be accurate about just how unified the Canadian system really was in 1867. Although there were no 'purely' federal courts, we saw that there were already provincially appointed local magistrates and justices of the peace in most provinces, or they were created almost immediately after Confederation. Peter Russell correctly observes that the s. 92 provincial courts do not threaten the unified system to the extent that they enforce federal laws such as the *Criminal Code*. Indeed, having provincially appointed judges apply federal laws is even *more* 'unified' in terms of federalism than having these cases heard by the federally appointed judges of the s. 96 courts. The same cannot be said, however, when provincially appointed judges adjudicate cases arising from provincial offences, family law, and civil law. The Supreme Court of Canada seems to have recognized this, as indicated by its refusal to allow the consolidation of family law in s. 92 courts. The emergence of s. 96 united family courts in some provinces is, in fact, a move toward a more unified court system in general. As Healy (2003) argues, a consistent approach by the Supreme Court to the matter of unification would see it allow all federal indictable offences to be heard in s. 92 courts, especially since s. 92 courts now hear criminal trials as complex as those heard in s. 96 courts (Webster and Doob 2003). Unification of the criminal trial courts has not occurred, however, nor does there seem to be any interest within the federal government for such a reform, especially since some contend that it would require a constitutional amendment to s. 96.

In any case, the effect of s. 92 courts on unification seems to be mixed, and we do not have separate 'purely' provincial court systems for provincial law. It should be noted that some provinces—especially Alberta, British Columbia, and Quebec—are closer to such a system than other provinces. Even in these provinces, though, the effect is limited to the trial courts since appeals from the s. 92 courts are heard by s. 96 courts. In other words, the appellate courts in Canada continue to exercise a strong unifying influence on the judicial system. The provincial courts of appeal have wide jurisdiction over disputes arising from both provincial and federal law. The Supreme Court of Canada, which has



broader jurisdiction than its American counterpart, is the ultimate symbol of a unified system, although this image is somewhat undermined by the fact that it hears a very small number of cases and is entirely a creature of Parliament, in contrast to the s. 96 Courts of Appeal. Greater provincial involvement in Supreme Court appointments, as proposed in the failed Meech Lake Accord (1987–90) and Charlottetown Accord (1992), would counteract the latter of these shortcomings, although it could generate other criticisms, which are discussed in Chapter 5.

What about the lower s. 101 courts? Russell and Hogg both contend that these pose the greatest threat to the unified system, first, because s. 96 courts used to review federal administrative bodies, and second, because there is no provincial influence at any point as cases pass from federal trial to appeal courts, while the reverse is not true for the provincial courts. It is likely for these reasons that the Supreme Court has been so hostile to the lower s. 101 courts, and why it has precipitated the fragmentation of civil cases involving the federal government, which encourages litigants to consolidate cases in the s. 96 courts. As late as 1987, however, Russell (1987, 53) could only call the Federal Court of Canada 'the thin edge of the wedge', and it does not appear to have thickened much since. Though there are certainly more cases in the Federal Court now than in 1987, they remain a small percentage of the total number of cases in the judicial system. It should be noted that the Canadian system is 'federal' or dualistic in the sense of how cases move up the judicial hierarchy, in that the provincial and federal systems are like parallel train tracks (albeit leading to the same 'station', the Supreme Court): once a case begins in a provincial trial court (either s. 92 or s. 96), it must be appealed to that province's (s. 96) appeal court(s) and federal trial rulings must proceed to the Federal Court of Appeal. In short, one cannot 'switch tracks' halfway through the journey.

### Conclusion

Even to those familiar with Canada's legal system, the structure of the judiciary is complex and frequently confusing. Part of the problem is the misleading labels: 'Supreme' and 'Superior' courts in some provinces are actually lower- or intermediate-level trial courts (see Table 2.2). 'Federal' laws and regulations are frequently enforced by 'provincial' courts, and some 'provincial' courts are actually appointed by the federal government in Ottawa. Furthermore, responsibilities and authority within the Canadian judicial system often overlap, and the courts in which a case is ultimately heard involves a considerable amount of choice by the parties to a case and, at the higher levels of the judicial hierarchy, the judges themselves. We hope that this chapter has helped dispel some of this confusion while illustrating that court workloads and structural features are inherently tied up in the larger political context. With this foundation, we can proceed with our examination of the actors and internal processes of these courts.

## Chapter 3

### Judicial Process and Alternative Dispute Resolution

A couple in Alberta was planning a divorce after a five-year separation and had some divergence of opinion about child custody and visitation. Twin sisters in Manitoba disagreed with the decision by the Manitoba High School Athletics Association to prevent them from playing on the boy's hockey team. Marcel was charged with drug possession in Vancouver and therefore was in conflict with the state. A lesbian woman who had broken up with her partner sued the government of Ontario because its *Family Law Act* created legal obligations for support payments when opposite-sex couples broke up but not same-sex couples. Doctors in Newfoundland went on strike for higher salaries from the government.<sup>1</sup>

What do all these seemingly different disputes have in common? All of them featured dispute-resolution processes by third parties that differed slightly or significantly from the traditional adjudicative model of courts. In the adjudicative model, a neutral and passive judge, who is not chosen by the parties, makes a binding decision by applying established legal principles to a set of facts that are presented by opposing parties in conformity with strict and formal procedural rules. Trials shown on television—real or fictional—are often representative of the adjudicative model. In the example of the divorce, however, the couple did not go to court. They used a variation of mediation called 'collaborative law', which differs from adjudication in a court in all important respects: the couple chose their third-party mediators; the process was informal; the agreement they reached was based on their expressed desires and interests, not the law; and the agreement was not forced upon them. The doctors in Newfoundland and the government resolved their dispute through arbitration, which sits somewhere between adjudication by a court and mediation. The doctors and government together chose an arbitrator to hear their submissions, the process for presenting arguments and evidence was semi-formal, the decision was based largely on the principles of labour law, and the decision was binding on the parties. The twin sisters who wanted to play hockey made a human rights complaint before an administrative tribunal, the Manitoba Human Rights Commission. They made their presentations, as did the athletics association, in a somewhat formal process, and the Commission ruled in the girls' favour on the basis of Manitoba's human rights legislation.

In these first three examples, the dispute-resolution processes were outside of the judicial process. The last two examples show ways in which the judicial



## Chapter 4

### Judicial Decision Making

In 1989, Jean Tremblay applied for an injunction from a Quebec Superior Court to prevent his former girlfriend, Chantal Daigle, from obtaining an abortion. As the father, Tremblay was deemed to have the proper 'interest' to apply for the injunction. His injunction was granted after a judge interpreted the term 'human being' in the Quebec Charter of Human Rights and Freedoms as applying to the fetus—thus granting it the right to life. The injunction was appealed, and less than three weeks later, the Quebec Court of Appeal upheld the lower court's decision. Thirteen days later, the Supreme Court of Canada interrupted its summer vacation to hear arguments in the case—making *Tremblay v. Daigle* the speediest case in Canadian history (Morton 1992).

Chantal Daigle was twenty-two weeks pregnant when her case was heard by the Supreme Court. She was not the perfect test case for supporters of abortion rights. She had deliberately tried to get pregnant while with Tremblay and had sought an abortion only after they broke up (Morton 1992). However, she did make allegations of abuse by Tremblay.<sup>1</sup> Daigle was supported by intervenor briefs from the Women's Legal Education and Action Fund (LEAF), the Canadian Abortion Rights Action League (CARAL), and the Canadian Civil Liberties Association (CCLA), while Tremblay's position was supported by Campaign Life, REAL Women, and Physicians for Life. Midway through the first day of oral arguments, it was announced that Daigle had defied the injunction and obtained her abortion in the United States. This effectively made the case moot and the case could have ended there. The Supreme Court, however, decided to continue hearing the case; it announced its decision at the end of oral arguments—another unusual event for such a high-profile case.

The Court's decision struck down the injunction against Daigle, and three months later, the Court added its reasoning to this outcome in a unanimous 'judgment of the Court'. According to the Court, nothing in Quebec legislation supported Tremblay's claim that his interest in the fetus gave him 'the right to veto a woman's decisions in respect of the foetus she is carrying' (*Tremblay v. Daigle* 1989). The Court went on to rule that a fetus was not a 'human being' and, therefore, did not have the right to life under the Quebec Charter of Human Rights and Freedoms. The Court stated that nothing in the Charter or Civil Code 'display[ed] any clear intention on the part of its framers to consider the status of a foetus' (*Tremblay v. Daigle* 1989, 555) and it seemed unlikely that if they had intended this, they would have left it to chance.

Why did the Supreme Court continue to hear this case once it became moot even though it had refused to decide another case in the abortion area (*Borowski v. Canada (Attorney General)* 1989) on this basis? What influenced the justices' decision? Were the legal arguments particularly compelling? Did the interveners before the Court have an influence? Did the justices merely decide according to their own policy preferences?

The Court's opinion makes reference to legal factors such as the framers' intent when drafting the legislation. But do the opinion's justifications for the decision tell the whole story? According to Sharpe and Roach, Chief Justice Dickson was furious upon learning that Daigle had obtained an abortion in defiance of the injunction and was inclined to end the case right then. Beverley McLachlin, however, apparently changed the Chief Justice's mind, and perhaps others on the Court, when she suggested that 'the Court put themselves in Daigle's shoes' (2003, 393). McLachlin pointed out that Daigle's pregnancy was already well advanced, making her 'a desperate young woman' determined not to bear the child of the man who had beaten her. Added to that, there was no way to know how long the Court would take to make its decision. Thus 'could she really be blamed for going to the United States to have her abortion?' (Sharpe and Roach 2003, 393). These behind the scenes events, and the implication that Justice McLachlin changed minds with her arguments, suggest that more than legal factors may be at work in judicial decisions. Justices, and their arguments, may influence the vote of their colleagues. McLachlin suggests that gender may also play a role: 'that you need a different variety of perspectives on the Court . . . maybe you need to look at it . . . in this case [from] a woman's point of view. Not that a man couldn't have seen it that way—ultimately they did, but it wasn't the way it immediately hit them' (as quoted in Sharpe and Roach 2003, 394).

Was *Tremblay v. Daigle* unique? Or do factors other than legal considerations regularly influence judicial decisions? This chapter will concentrate on judicial decision making and, in particular, the influences on judges' decisions. After a brief consideration of the differences between trial and appellate courts, the first part of the chapter discusses the process of accepting and deciding cases at the appellate courts. The remaining parts of the chapter focus on the factors that may determine the path judges take in their decisions. Traditional approaches to decision making emphasize the importance of legal factors. However, more recent scholarship has suggested that other factors may play a prominent role, including the judges' own policy preferences, their personal attributes, and the external environment (for example, the likely response of the media, public opinion, and political institutions). We will consider several influences in turn and the evidence that has been put forward to support them. Although we will make reference to trial courts where appropriate,<sup>2</sup> the focus of this chapter will be primarily on appellate courts, particularly the Supreme Court. More information is available on appellate courts since these courts regularly publish written opinions



that help explain their decisions, and scholars have spent more time attempting to identify the influences on them.

### Distinguishing Trial and Appeal Court Decisions

Although a lot of a trial judge's job involves activity outside the courtroom—for example, helping to negotiate settlements in civil cases—their decision making, wherever it occurs, is concentrated primarily on resolving disputes (see Chapters 9 and 10 for a more detailed discussion of trial courts in criminal and civil cases). McCormick identifies three important steps in a trial judge's decision making: identifying the relevant facts in the case, identifying the relevant law, and combining the facts and the law to produce the right result (1994, 44). For trial courts, the emphasis is on the first step, determining the facts of the case, which judges do by listening to the testimony of the parties and witnesses in the case. Trial judges use the information given to them to make the best decision they can, although this information is often incomplete or even inaccurate (Baum 2008a, 176). Witnesses may not exist, may fail to show up to court, or may have inaccurate recollections. Where differing accounts exist, choosing the proper interpretation of the facts may also be difficult. The adversarial nature of the common law system ensures that lawyers have an incentive to 'obscure the facts, rather than illuminate them' if it helps build a stronger case (Baum 2008a, 177). The difficulty judges have in determining the relevant facts means that mistakes are common: in fact one judge and legal scholar suggests that 'facts are guesses' (Jerome Frank as quoted in Baum 2008a, 177).<sup>3</sup>

Appeal courts are responsible for reviewing lower-court decisions. They read briefs and listen to oral arguments by the lawyers in the case rather than listening to witnesses. Therefore, the emphasis at the appellate level is generally on applying the law to the facts already determined at trial. On questions of law, appellate judges review *de novo*<sup>4</sup>—'as if it were new'—and do not need to defer to the trial judge in the case (Solum 2003). However, on findings of fact, appellate judges are supposed to defer to the trial judge unless those findings are 'clearly erroneous'. Since trial judges are the ones actually hearing the testimony of the parties and witnesses, their decisions on such matters as the credibility of witnesses and the proper weight to give conflicting pieces of evidence are accepted. Appellate judges are also supposed to abide by discretionary decisions of trial judges unless there was an 'abuse of discretion' (Solum 2003). Thus, decisions by trial judges on issues such as discovery, or the admission of evidence, are more difficult to challenge on appeal. Of course, distinctions between law, facts, and discretion are not always clear, and clever lawyers may frame questions to invoke the law and make deference to the trial judge less likely.

The trial judge's emphasis on the facts is the main distinction between this level of judge and that of the appellate courts. Justices Iacobucci and Bastarache sum up this distinction in their opinion in *Housen v. Nikolaisen* (2002): 'While the primary role of

trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application' (as quoted in MacIvor 2006, 100). Whereas trial judges are responsible for applying settled law, appellate judges are there primarily to correct errors in law and to clarify the law (though sometimes trial judges complain that an appellate court has retried the facts of their case when rendering a decision). They generally face more complex legal questions (Tarr 2006). This is particularly true of the Supreme Court of Canada. The lower level courts of appeal (such as the Alberta Court of Appeal or the Federal Court of Appeal) are the first level of appeal for most cases, and so these courts spend much of their time on the necessary correction of errors (for example, problems with a trial judge's instruction to a jury). Indeed, by one judge's account, at least 80 per cent of a provincial appellate judge's time is spent on the correction of errors (Greene et al. 1998, 106). High-level courts of appeal, such as the Canadian Supreme Court, by contrast, direct their attention more to clarifying the law and developing it (Baum 2008a).

Appellate decision making also differs from decision making at the trial level, in the number of participants. Since cases before appellate courts are heard by panels of at least three judges, decisions require consultation—and outcomes are determined—by a group. This stands in stark contrast to trial judges, who have sole influence over how things are handled and decided in their courtroom. Yet appellate judges are often described as being more isolated than trial court judges. This refers generally to the number of case participants the judge sees from day to day. In the course of their work, trial judges are in contact with the parties in the case, witnesses, opposing counsel, and—occasionally—jury members. Particularly in criminal cases, where the same prosecutors and defence lawyers are frequently before the court, trial judges may develop a 'working group' of sorts. The judge and lawyers may 'socialize' during their workday, aiding in the smooth processing of the large number of cases they see (Tarr 2006). Appellate judges, by contrast, are in contact mostly with written briefs and court records, and they spend most of their time researching and writing their opinions in their own chambers, enjoying only limited contact with others (primarily their own law clerks). Since their focus is generally on the law, rather than the facts of the case, 'life on the court of appeal is a highly cerebral one. One addresses issues and arguments without being subject to many of the human pressures and the unpredictables with which a trial judge must cope' (Dickson 2000, 380).

### Deciding to Take a Case: The Appellate Court's First Decision

As a general rule, the higher the level of appeal court, the more discretion judges have in deciding which cases they want to hear. In many countries around the world, including Canada and the United States, 'it is considered a matter of fundamental fairness . . . that the party who loses at trial . . . is entitled to an appeal'



(Greene et al. 1998, 43). As a result, the provincial appeals courts and the appeal division of the Federal Court hear cases primarily 'as of right' rather than 'by leave' (Greene et al. 1998, 43). Appeals 'as of right' are cases that courts must hear; appeals 'by leave' are cases that require the court's approval to be heard.

In 1974, Parliament gave the Supreme Court much more control over its docket by amending the *Supreme Court Act* to eliminate most 'appeals as of right' (these changes took effect in 1975). Appeals as of right are still allowed in a few circumstances in criminal cases, such as when a lower appeals court overturns an acquittal,<sup>5</sup> but the Court now exercises discretionary jurisdiction over the majority of its cases.<sup>6</sup> Table 4.1 illustrates the decreasing number of cases heard 'as of right' over the past decade. Indeed, in 2007, these cases made up only 18.9 per cent of the Court's docket. [The fact that most Supreme Court cases today are accepted 'by leave' rather than 'as of right' sets it apart from the lower appellate courts.]

**Table 4.1** Supreme Court of Canada Caseload by Year

	Applications for Leave Granted <sup>a</sup> (%)	Cases Heard as of Right (%)	Judgments Allowing Appeal	Unanimous Judgments (%)
1996	12.1	41.5	45.2	78.2
1997	11.2	35.6	49.5	70.1
1998	12.3	28.3	51.1	76.1
1999	13.4	25.3	50.7	72.6
2000	13.2	17.9	45.8	72.2
2001	12.0	17.7	30.8	82.4
2002	10.9	22.2	53.4	69.3
2003	12.5	19.5	43.2	76.5
2004	15.1	15.7	55.8	73.1
2005	11.7	14.0	52.8	73.0
2006	11.9	16.3	62.0	79.7
2007	11.9 <sup>b</sup>	18.9	51.7	62.1

<sup>a</sup> These percentages may be slightly high because the numbers do not include applications for leave that were quashed, adjourned, discontinued, or remanded to a lower court.

<sup>b</sup> The 2007 percentage does not include 83 cases that were still pending at the end of 2007.

Source: Supreme Court of Canada 2008a.

So how does the Supreme Court set its agenda and decide which cases to hear? The next section outlines the process used by the Court for granting review, and considers the factors that may influence the decision to accept a case.

### Supreme Court 'by Leave'

Each year the Canadian Supreme Court receives hundreds of applications for leave to appeal. In the past decade, the number of applications has generally been between 500 and 600, with a high of 642 applications in the year 2000, and a low of 506 applications in 2006 ([www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)). As Table 4.1 demonstrates, however, the Court grants very few of these applications. The highest proportion of applications for leave granted in a year since 1996 has been 15 per cent, and in most years it has been closer to 12 per cent. While low, this is actually a much better success rate than that found in the US Supreme Court. That Court receives a much greater number of appeals (over 7,000 a year since the late 1990s) but accepts a much lower percentage of them (fewer than 1 per cent in recent years) (Baum 2007). Thus, while the Canadian Supreme Court has fewer applications for leave to consider, it places a higher proportion of these applications on its docket, 'which means that their agenda is much more accessible to litigants than that of the US Supreme Court' (Flemming 2004, 12).

The Canadian Supreme Court's leave-to-appeal process has been studied extensively by Roy Fleming (2004). Fleming has detailed the necessary steps in the process, beginning with the first step: the decision to appeal.<sup>7</sup> Once that decision is made, an application for leave to appeal must be filed with the process clerk of the Court's Registrar's Office. If the application meets the strict formatting and presentation rules, it is forwarded on to the Law Branch of the office. The lawyers in this branch review the application and prepare a summary of its contents, generally including the history of the case, the facts, and legal issues (Fleming 2004, 14–15). They also make a recommendation as to whether the application should be granted or denied. Thus, there is a permanent specialized unit within the Supreme Court responsible for the preliminary screening of appeals. This unit performs a function roughly equivalent to that done by law clerks at the United States Supreme Court.<sup>8</sup> The use of staff lawyers in Canada not only frees the law clerks for other business, but also ensures that more experience is brought to the summaries and recommendations.<sup>9</sup>

In the next step of the process, the summary and recommendation for an appeal application are forwarded to a panel of three justices. The Chief Justice of the Court assigns the nine justices to panels of three at the start of the Court's fall term and reshuffles them each year (or more frequently as required by illness and retirements) (Fleming 2000, 50). The decision as to which three justices should sit on a panel has not been widely studied, but at least in one instance, it is not completely random: one panel of three is usually made up of at least two justices from Quebec (Fleming 2004, 73). When the summaries and recommendations



of the staff lawyers are forwarded to the panels of justices, applications for leave coming out of Quebec are usually given to the panel made up of the Quebec justices. This panel's composition and application assignment is understandable given Quebec's different civil law tradition, but it does ensure there is very little anglophone participation in the Quebec appeals (Flemming 2004). Other applications for leave are distributed amongst the panels with an effort to equalize the workload. However, an application dealing with a specialized issue may be assigned to a panel with a justice whose expertise is in that area (Flemming 2004).

Since the 1980s, oral arguments have been a rare event in the leave-to-appeal process, and the three justices on the panel do not usually meet to discuss the applications for appeal they are assigned (Flemming 2004). Instead decisions are reached through memorandum, with two votes needed for an appeal to be granted. Decisions at the leave-to-appeal stage tend to be unanimous. Indeed, in his study of over 1,200 applications for leave, Flemming found only thirty with a dissenting justice (2004, 15).<sup>10</sup> Justices can use the conference (a meeting of all nine justices) to try to change the panel's decision on an application; however, the panels do appear to have the final say on whether an application is granted or denied leave (this discussion relies on Flemming 2004 and Bastarache 2007).

The use of panels of justices to decide applications for leave to appeal sets the Canadian Supreme Court apart from its US counterpart, where all nine justices hear appeals and four justices must agree before leave can be granted. The result in Canada is a more decentralized process, where the potential exists for the appeal decision to depend on which panel hears the application.<sup>11</sup> This potential is furthered by the widespread discretion justices have as to which applications to accept. As shown in Box 4.1, the *Supreme Court Act* provides only limited guidance on what cases the Supreme Court will accept on appeal.

#### Box 4.1 Applications for Leave to Appeal to the Supreme Court

An appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province . . . where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Source: *Supreme Court Act*, s. 40 (1)

The *Supreme Court Act* does suggest that the Court will accept applications for leave if they raise issues of 'public importance'; however, what causes an issue to be of 'public importance' is not defined. The late John Sopinka offered some guidance on what might qualify when he was sitting on the Supreme Court (see also Bastarache 2007). According to Sopinka, the public importance criterion is triggered by constitutional challenges, appeals raising issues on which there is conflict among the provincial courts of appeal, appeals raising a new point of law, appeals requiring interpretation of 'important' federal or provincial laws (if the law exists in more than one province), and appeals requiring the definition of aboriginal rights (Crane and Brown 2004). Sopinka also said that factors other than public importance could lead the Court to grant leave to appeal. In criminal cases, for example, the Court was likely to grant leave to cases not meeting the public importance threshold if they involved the possibility of a defendant's being unfairly convicted (Crane and Brown 2004; Flemming 2004).

Flemming tested several jurisprudential factors in his models of the appeal decision. He found that applications suggesting there was lower-court conflict on the issue (between two provincial courts of appeal) were more likely to be granted leave to appeal, as were applications where a judge on the lower-court panel had dissented from the panel's decision (2004, 68–70). Appeals linking the lower court's decision to provincial or federal government interests were also more likely to be granted leave, as were appeals asking the Supreme Court to 'revisit' its previous decisions (Flemming 2004, 70). Thus, jurisprudential factors appear to have an influence on the leave-to-appeal decision.

It appears that in Canada, in contrast to the US, jurisprudential factors play a greater role in the decision to grant an appeal than more litigant-centred factors (such as the status and resources of the parties) (Flemming 2004, 99–100; for descriptions of the influence of these and other factors in the United States, see McGuire 1993; Galanter 1974; Salokar 1992; Caldeira and Wright 1988). This finding is complicated, however, by institutional features—in particular, the Canadian Supreme Court's use of panels for the leave-to-appeal decision. In his 2004 study, Flemming examined variations in the decisions of different panels. His results show that while panels may not differ greatly in the number of applications they grant, they do differ significantly in the criteria they use to reach their decisions (Flemming 2004, 75). Different panels emphasize different rules in making their decisions.

The institutional feature of panels makes strategic manoeuvring (a justice voting on leave on the basis of the expected outcome of the case if accepted) unlikely in Canada. Since panels are often used to decide the merits of a case, it becomes extremely difficult for a justice to predict how the Court will vote if the panel grants leave to an application. Flemming suggests that strategic considerations may play a different role in Canada than in the US. Since the Chief Justice may not assign justices to panels to hear cases in which they voted to deny leave, Flemming



suggests there is an incentive for a justice who does not agree with his two colleagues to vote with them anyway (2004, 87) so that he will at least have a chance to take part in the decision on the merits. And since Canadian Supreme Court justices often volunteer to write opinions (rather than having them assigned to them), this might be extensive input indeed. Thus, the practice of using panels to hear cases may contribute to the high rate of unanimous decisions at the leave-to-appeal stage.

Table 4.2 demonstrates some characteristics of the cases accepted by the Supreme Court and heard during the 2007 term (see Chapter 2 for a more detailed description of the workload of the Supreme Court, as well as that of the lower appellate and trial courts). Cases arising in British Columbia, Quebec, and Ontario dominated the Supreme Court's docket, and the single highest category of cases involved criminal law (although when all the civil issue categories are added together, they outweigh criminal issues).

**Table 4.2** Supreme Court of Canada Characteristics of Cases, 2007

Origin of Case	Appeals Heard (no.)	Type of Case	Appeals Heard (%)
British Columbia	13	Criminal Law	45
Ontario	11	Torts	9
Quebec	11	Charter (Criminal)	9
Federal Court of Appeal	7	Administrative Law	4
Alberta	5	Charter (Civil)	4
Manitoba	2	Procedural Law	4
Saskatchewan	2	International Law	4
New Brunswick	1	Commercial Law	4
Nova Scotia	1	Constitutional Law	4
Newfoundland & Labrador	0	Taxation	4
Northwest Territories	0	Others	9
Nunavut	0		
Prince Edward Island	0		
Yukon	0		

Source: Supreme Court of Canada 2008a.

## The Process of Hearing and Deciding Cases

Once a case is appealed (and once leave is granted by the Supreme Court), the parties must make their written submissions<sup>12</sup> to the court. For each case, an appeal court judge must wade through trial transcripts, factums<sup>13</sup> from both the appellant and respondent, and lists of authorities. As discussed in Chapter 7, the judges may also have several intervenor factums to read as well. Once all the documents are filed, a date is set for oral argument. The *Supreme Court Act* dictates that the Supreme Court must sit in three sessions each year: fall (October through December), winter (late January through March), and spring (late April to the end of June). During its sessions, the Court alternates between two weeks of hearings and two weeks of writing decisions and preparing for hearings ([www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)). The provincial courts of appeal differ widely in their schedules. British Columbia, Alberta, and Newfoundland also alternate between two weeks of hearings and two weeks of writing decisions, but Nova Scotia hears cases during five six-week terms every year ([www.courts.ns.ca/dockets\\_on\\_line](http://www.courts.ns.ca/dockets_on_line)).

### The Use of Panels

At the appeal-court level, each case is heard by more than one judge. Provincial courts of appeal typically use panels of three judges to hear and decide a case.<sup>14</sup> In all provinces except Prince Edward Island (which has only three judges sitting on its appeals court), the Chief Judge of the court must select which three judges will hear the case. The procedure for doing this varies to some extent from province to province, but usually, the clerk of the court creates lists of all the possible combinations of judges<sup>15</sup> (Greene et al. 1998, 65).

One difference between the provinces that may influence case decisions is the timing of the notification of counsel as to which judges will hear a case. In Alberta and Quebec, this notification is done ahead of time, whereas in the other provinces counsel find out the makeup of the bench only when they walk into the courtroom. This difference is significant because lawyers who know in advance which judges will be hearing their case may invent reasons to reschedule a hearing in the hopes of being assigned to a different panel (Greene et al. 1998, 66). Advance notification of the makeup of the panel may also influence the content of briefs, because lawyers will tailor their arguments to the judges sitting on the bench (Revesz 2000).

At the Supreme Court level, cases may be heard by five, seven, or nine justices. The number of justices assigned to hear a case is always odd in order to prevent the possibility of a tie vote on the outcome of the case. Very occasionally, cases have been heard by six or eight justices when a situation—such as a justice's illness—that prevents one of the panel from hearing the case has arisen late in the process. (If a tie were to result from such a situation, the lower court's decision



would stand.) Although more recent Chief Justices have expressed a preference for having cases heard by the full Court of nine (Ostberg and Wetstein 2007; McCormick 2000), the most frequent size of a panel is seven.<sup>16</sup> As the Court's prominence and power have increased in the years since the passage of the Charter, so has the preference for larger panels. At least for cases judged to be of high public importance, there is now unease with a panel of only seven, since it is possible for four justices—a minority of the Court—to determine the outcome of a case and it is possible that the presence of the two non-participating justices would have produced a different decision. An example is the controversial *Chaoulli v. Quebec* case, which struck down Quebec's ban on private health insurance, particularly since only six of seven justices hearing the case addressed the Charter of Rights and Freedoms and those six divided 3–3 on the issue.<sup>17</sup>

The Chief Justice is responsible for deciding both the size of a panel and who will be on it. The decision to have a case heard by a panel of justices rather than by the Court *en banc* (that is, all nine justices) is sometimes forced on a Chief Justice by the absence of justices due to illness or other commitments. Models controlling the potential influences on the decision to sit as a panel suggest that Chief Justices are more likely to assign all nine justices to hear a case when the Charter is at issue or when an intervener is present (indicating an issue of widespread interest), and are more likely to assign only a panel of justices when the case is coming to the Court as an 'appeal as of right' (cases forced on the Court that are often disposed of in short, one-page decisions) (Hausegger 2000).

The decision as to who will sit on a panel is usually made several weeks before oral arguments are heard in a case, but it is not made public. Lawyers do not discover which justices will be hearing their arguments until the day of the hearing. If the Chief Justice wished to, he or she could exercise some influence on the outcome of the case by assigning justices strategically: assigning those that are likely to decide in a particular way while leaving others off the bench. In their study of panel-assignment decisions from 1986 to 1997, Hausegger and Haynie suggest that for cases involving salient civil rights and liberties issues, Chief Justices Dickson and Lamer were more likely to assign justices with similar policy preferences to themselves (2003, 651). Other factors found to play a role in the choice of a panel include the expertise of the justice, their home province, and their gender (Hausegger 2000). Justices with expertise in a particular issue area were more likely to sit on a panel hearing a case dealing with that issue, and justices were also more likely to sit on cases appealed from their home province (this, of course, was particularly true for the Quebec justices in cases originating in Quebec that involved civil law). Interestingly, both Chief Justice Dickson and Lamer appear to have been more likely to assign female justices to panels (Hausegger 2000). Perhaps this was an effort on their part to increase the representativeness of the panels hearing cases.<sup>18</sup>

### Oral Arguments and Preliminary Votes

After the panels are constituted, the next step for all levels of appellate court is oral arguments. Whereas trial court judges listen both to the arguments of opposing lawyers and to the testimony of witnesses, in appellate courts only the parties' lawyers attend and make arguments (with the exception of intervener lawyers if they are given permission to briefly present their arguments to the court). Lawyers are given a specified amount of time to present their arguments. At the provincial Courts of Appeal, time limits vary by province and by type of appeal. In the Ontario Court of Appeal, for example, sentencing appeals have time limits of thirty minutes for the appellant, twenty minutes for the respondent, and ten minutes for an appellant's rebuttal. However, in appeals such as conviction appeals on indictable offences, these limits do not apply ([www.ontariocourts.on.ca/coa/en](http://www.ontariocourts.on.ca/coa/en)). Lawyers in these appeals are asked to give the court a time estimate before a judge of the court decides the time to be allowed for each side.

Unlike judges in trial courts, appellate court judges are very active during the oral arguments, frequently interrupting and asking questions. Although Supreme Court justices often ask questions during oral argument, they have tended to be not as expansive as judges on lower courts of appeal, owing to the stricter time limits that are placed on the parties arguing the case before them (Greene et al. 1998, 118).<sup>19</sup> The justices' questions are intended to clarify issues from the factums and perhaps to bring attention to particular aspects of the law. Justice Bastarache points out that oral argument can be particularly important in areas of law where the justices do not have as much expertise, such as admiralty law and Internet crime. He also notes that while oral arguments may not often change the justices' minds on the outcome of a case, it can have an influence on the reasoning they use in their opinions (2007).

After oral argument, appeal court judges meet in conference to discuss the case. Since they make their decisions in groups, (unlike trial court judges, who have only themselves to satisfy) they need to find out their colleagues' positions on the cases. At the provincial appeal courts, the three judges sitting on the panel will meet quickly, vote on how the case should be decided, and determine whether judgment should be reserved (in which case a written decision will be released at a later date instead of an oral decision being announced immediately).<sup>20</sup>

Although at the Supreme Court, decisions are less likely to be announced immediately, it does occur, as in the *Tremblay* case described in the introduction to this chapter. However, even if the judgment is announced immediately from the bench, an opinion may follow at a later date, as it did in *Tremblay*. According to the Supreme Court's own statistics, the number of decisions delivered from the bench has decreased significantly since the mid-1990s. In recent years, roughly 20 per cent of judgments have been delivered from the bench ([www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)).



As might be expected, many of the cases decided in this manner have come to the Court 'as of right' rather than 'by leave'.

Supreme Court justices also have a conference after hearing a case. In that conference, the justices go around the table from most junior to most senior, each describing his or her view on how the case should be disposed. The votes indicate who will make up the majority on the case, and one of that number will often volunteer to write the opinion. If someone does not volunteer then the presiding justice—the Chief Justice if he or she is on the panel hearing the case—will assign the task. In the United States, there is an extensive literature on the opinion-assignment decision by Chief Justices and the potential influences on it. Several of these studies suggest that Chief Justices are more likely to assign tasks to justices with similar ideological preferences—particularly in important cases (see for example, Maltzman, Spriggs, and Wahlbeck 2000; Davis 1990). However, Supreme Court conferences are not public, so the only information we have on them comes from the justices' own writings. Whereas in the United States, Supreme Court justices have released their papers containing detailed notes on conferences, not much is known about the votes and discussions of conferences of the Canadian Supreme Court.<sup>21</sup> Thus, there are no detailed statistics on the number of times an opinion is assigned by the Chief Justice (rather than being written by a volunteer) and we do not yet know whether Canadian Supreme Court Chief Justices have taken advantage of their power to influence the direction of the reasoning in a case through their opinion assignment.

### Crafting Opinions in a Case

Since appellate courts are involved in collegial decision making, opinion assignment is not the final step in the process. Rather the author of the majority opinion will circulate the draft of his opinion to all the justices in an effort to get as many justices as possible to sign it. Justices may send memoranda around discussing the opinion, and majority-opinion authors may rewrite their opinions in response to those comments.<sup>22</sup> In the *Tremblay* case described at the beginning of the chapter, Chief Justice Dickson originally circulated a draft that argued the fetus did not have legal status under s. 7 of the Charter. However, Justice LaForest objected to the Court's discussing the issue of fetal rights under the Charter, and said that he would write separately on narrower grounds. Preferring a unanimous decision from the Court for such a controversial issue, Chief Justice Dickson rewrote his opinion leaving out any discussion of fetal rights under s. 7 (Sharpe and Roach 2003).

In each of the last ten years, the Supreme Court has rendered unanimous opinions on the disposition of the case over 70 per cent of the time (except in 2002 when it was 69 per cent). (See Table 4.1.) Though high, this number shows that

there are a significant number of cases in which the majority-opinion author was unable to get everyone to sign on. If a justice does not agree with the majority on the outcome of the case, he or she will cast a vote in dissent and will likely write (or join) a dissenting opinion that outlines the problems with the majority opinion and the reasons why the dissenting position is superior.<sup>23</sup> These opinions will also be circulated amongst the members of the Court for them to consider signing. Dissenting opinions are rarer in the provincial courts of appeal. For example, the Ontario Court of Appeal has recently reached unanimity in 93 per cent of all sexual assault cases and 99 per cent of all narcotics cases (with an average of 95 per cent for all cases; Stribopoulos and Yahya 2007).

Former Justice Iacobucci argues that dissenting opinions are valuable because they make the majority opinion stronger: '[C]larity of thought, in short, is not improved by agreement but by disagreement' (2002, 14). Dissents are also championed for the guidance they can provide to future courts, as well as to legislatures that are intent on overturning the Court's decision. This was the case in the aftermath of *R. v. O'Connor*, a case that Parliament felt struck the wrong balance between defendants' and victims' rights by setting too low a threshold for the disclosure of a victim's medical and therapeutic records. In drafting legislation intended to correct the balance and still comply with the Charter, the government relied on Justice L'Heureux Dube's dissenting opinion in *R. v. O'Connor* (Iacobucci 2002, 14). This legislation was later upheld by the Court in *R. v. Mills*.

Of course, if there are no dissenting opinions and the Court votes unanimously on the disposition of the case, this does not imply complete agreement. Justices voting in the majority also have the option of writing a concurring opinion. Usually a concurring opinion is written by a justice who agrees with the outcome of the case but not with the reasoning used by the majority to reach that outcome.<sup>24</sup> The existence of these opinions is significant, because the Supreme Court's reasoning is often thought to be more important than the actual outcome of the case. The outcome directly affects the immediate parties before the Court, but the reasoning has much broader implications for future court decisions (McCormick 2004a, 103). The 'right' outcome is not nearly as valuable without the 'right' reasoning to support it. Arguing that concurring opinions are as much an example of judicial disagreement as are dissenting opinions and that they are just as important to study, McCormick quotes US Justice Antonin Scalia, who says, 'An opinion that gets the reasons wrong gets everything wrong which it is the function of an opinion to produce' (2004a, 104).

Concurring opinions are more frequent at the Supreme Court than at lower courts of appeal. In the current period under Chief Justice McLachlin, however, concurrences occur on average only about ten times a year. This is significantly lower than the rate under Chief Justice Dickson and Chief Justice Lamer (1984 to 2000), when the average was over thirty times a year (McCormick 2005b).



### Outcome of the Case

Appellate courts can vote to uphold the lower court's decision (in effect dismissing the appeal) or to overturn it (allowing the appeal). The provincial courts of appeal usually dismiss more appeals than they allow. The British Columbia Court of Appeal, for example, has allowed only 37 per cent to 41 per cent of appeals over the last six years (British Columbia, Court of Appeal 2007). The Supreme Court has split relatively equally between allowing and dismissing appeals in the past decade (see Table 4.1). The number of appeals allowed has been slightly higher in recent years, but even during this period the highest proportion has been 62 per cent in 2006. The low rate of appeals allowed in most of the years (for example, 31 per cent in 2001 and 43 per cent in 2003) is interesting given the Supreme Court's discretion over its docket. One might expect the Court to accept cases because it disagreed with the outcome of the court below. Indeed, the United States Supreme Court votes to allow an appeal (reversing the lower court's decision) in over two-thirds of its cases (Baum 2007, 94).

### The Determinants of Judicial Decision Making

The first part of this chapter discussed the process of decision making. The chapter now changes direction to focus on the decisions themselves and the possible influences on the judges making the decisions.<sup>25</sup> As mentioned earlier, most of the discussion concerns the Supreme Court level (see Chapters 9 and 10 for more in-depth analysis of trial court behaviour in the criminal and civil areas).<sup>26</sup> With no higher court overseeing their decisions and no chance of promotion to a higher court, Supreme Court justices face fewer restrictions when they decide cases, and different factors may play a greater role in their decisions compared to those of trial judges (and even provincial appeal-court judges). Thus, whereas the justices' legal training and experience may ensure legal factors are emphasized in their decisions, the cases heard by the Supreme Court are likely to be more complex and to have no clear solution.

#### Legal Factors

Judges at all levels of courts are responsible for settling questions of law. They are called on to interpret the meaning of statutes, precedents, and constitutional provisions and to apply that meaning to settle the case before them. Judges themselves often suggest that the law is the sole basis of their decisions—that they merely apply the proper interpretation of the law to the question before them. John Roberts, the Chief Justice of the United States Supreme Court, suggested just this at his confirmation hearing, when he compared judges to umpires:<sup>27</sup> 'Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them' (as quoted in Baum 2007, 114).

The suggestion that justices base their decisions entirely upon legal factors has been subject to criticism. The law is often ambiguous and open to different interpretations. Judges, particularly at the Supreme Court, are often faced with choices, and these choices may be influenced—consciously or unconsciously—by factors other than the law. However, if not definitive, the law is surely important to judges and their decision making, given that the parties in court cases make their arguments with reference to legal principles, and court decisions are framed in the language of the law. Justices are also part of the legal community, a community that often produces written evaluations of the justice's treatment of the law (Baum 2007).<sup>28</sup> But the fact that law matters might be best illustrated by the justices' own words. In some cases, the justices will say that though they are deciding the case as they 'have to', in order to honour the proper interpretation of the law, the result is unfortunate, and something that should be altered by those in a proper position to do so (usually Parliament).<sup>29</sup> As discussed below, the willingness of judges to follow the law, rather than to change it, may be related to how they see their role as a judge.

A variety of approaches are adopted by judges in interpreting statutes and constitutional provisions, and these approaches can give insight into the role that law plays in judicial decision making (Baum 2007). This section discusses some of these approaches.

#### Precedent

The Supreme Court's decisions create precedents to be followed by it and other courts. The doctrine of *stare decisis* ('let the decision stand') suggests that like cases should be decided alike. Under this doctrine, lower courts are expected to follow the rulings of higher courts, and the Supreme Court is expected to follow its own precedents when making decisions.<sup>30</sup> The provincial courts of appeal, however, are not bound to follow one another's opinions. Thus, in similar cases dealing with hate speech, the Alberta Court of Appeal struck down the section of the Criminal Code preventing the distribution of hate literature as an unconstitutional infringement on freedom of expression (*R. v. Keegstra*), whereas later that same year, the Ontario Court of Appeal ruled the section was constitutional (*R. v. Andrews*).<sup>31</sup> Decisions by provincial appellate courts on other courts at this level are considered merely 'persuasive'. Decisions by the Ontario Court of Appeal would also not be binding on the lower Alberta courts, although they might be considered 'strongly persuasive' (Gall 2004, 433–7).

Precedent generally refers to the legal reasoning necessary to decide the case: the *ratio decidendi*. Court decisions also contain discussions of law that are not the basis of the court's decisions. These statements are considered *obiter dictum*, and judges are not bound by this in future decisions.<sup>32</sup>

Most judges champion precedent and the doctrine of *stare decisis*. Even Chief Justice Dickson, who believed the Charter required justices to 'go beyond abstract logic and disembodied precedent' in their decision making, argued that 'change



need not, and should not, take place at breakneck speed' (Sharpe and Roach 2003, 311). Dickson's comments suggest one of the values of following precedent: stability in law. There can be an advantage to making only incremental changes in the law. The consistency in result allows litigants and governments alike to predict the courts' responses as they contemplate bringing cases or writing legislation. The courts' predictability may prevent fruitless appeals and litigation (Gall 2004). Courts that are seen to follow precedent closely can also enhance perceptions of their legitimacy since they appear to apply neutral principles to their decision making and to decide cases without personal bias. Therefore, following precedent is believed to further the fairness of the law in that similar parties undertaking similar litigation are expected to be treated the same.

Supreme Court precedent is particularly important to lower courts, which are expected to follow the Court's decisions. Several Supreme Court justices interviewed by Greene et al. (1998) suggested that the influence of precedent is one of the main differences between the Supreme Court and lower appellate courts. According to these justices, there was far less pressure to follow precedent at the Supreme Court and far more pressure to 'get it right' (Greene et al. 1998, 104–5). However, since the Supreme Court decides fewer than 100 cases each year, some of the influence of precedent on lower courts may be weakened as well. Lower-court judges can feel relatively assured that their decisions will not be overturned, given the low number of cases actually accepted (and then reversed) by the Court each year. Even if lower-court decisions are reviewed, the courts have little power to ensure their precedent is followed. Thus, a provincial court of appeal may overturn a trial court judge's decision if he does not follow a precedent established previously by the higher court. But there is nothing the appeal court can do to ensure that he follows that precedent in his next case. The appeal court must wait for cases to be brought to it in order to correct their outcome, and it is powerless to punish the trial judge for ignoring its decisions. In fact, as McCormick suggests, trial judges who feel they are correct in their decisions may respond to any rebuke from the higher court with a sense of 'martyrdom' that they wear 'with pride rather than shame' (1994, 57).

Of course, following precedent is not always preferable or even possible. While there is a 'hard core' group within the Canadian judiciary who believes they 'must slavishly adhere to precedent and *stare decisis*', most justices recognize that the practice of following *stare decisis* 'when pushed to doctrinaire limits becomes utter nonsense' (Gall 2004, 456). Many argue that a single-minded pursuit of precedent would keep the courts out of step with the times and might even lead to problematic results. They suggest that precedent should be modified if it is leading to unjust results.<sup>33</sup>

If a justice believes that that some aspect of the case before the Court is different from that seen previously, he or she can 'distinguish' the precedent and argue that it does not apply. Justices distinguish precedent far more frequently than they

overturn it. In some instances justices appear to 'distinguish' cases simply to avoid following a precedent. The legitimacy that the use of precedent is thought to convey on courts makes justices much more reluctant to overturn it than to ignore it on occasion.

Some scholars suggest that precedent is not a real factor in judicial decisions, arguing that justices merely reach the decision they want, and then use precedent to 'justify' their result. (See, for example, American champions of the 'attitudinal model' discussed in the next section, such as Segal and Spaeth 2002.) Others suggest justices cite precedent because they feel the need to appeal to others who value precedent in order to maintain the legitimacy of the court. (This is suggested by some who argue that justices undertake a strategic approach to decision making—see the discussion in Baum 2008b.) Stier and Brenner argue, however, that scholars advocating these viewpoints are suggesting an unrealistic amount of cognitive effort on the part of the justices to work on both planes—to determine their own policy preferences and then identify the relevant legal arguments to justify their decision (Stier and Brenner 2008). Instead, Stier and Brenner suggest that 'the culture of law [with its emphasis on legal reasoning and precedent] shapes the decision making of Supreme Court justices' (2008, 5).

As noted in Chapter 1, precedents play an important role in the common law system in developing judge-made law, because legal principles are developed on a case-by-case basis over time. However, with more and more legal rules being found in written constitutions and legislation in common law countries, how do judges decide how to apply these rules? Eventually, the interpretations given by appellate courts will provide guidance (and will be considered precedents), but how do judges decide initially how a constitutional or legislative provision should be interpreted and applied?

#### Framers' Intent

One approach that justices may adopt for interpreting the provisions that are brought before them is the inferred intent of the framers. When faced with interpreting provisions within the Constitution, justices could ask what the framers intended when writing the 'supreme law of the land'. Similarly, in statutory interpretation, justices could ask what the legislators intended in drafting legislation as they did. This factor has received a lot of attention in the United States, where it is referred to as 'original intent'. American scholars argue that the framers' and legislators' intent can be discovered by looking at records surrounding the drafting of the Constitution and at legislative history (committee reports, debate, speeches, and the like). Supporters of original intent argue it allows for the neutral interpretation of legal principles (Bork 1971). Justices determine what the framers intended by the constitutional section, or piece of legislation, and apply that intent to resolve the case in front of them without reference to their own beliefs or preferences. Original intent is also attractive to its supporters since it implies the Court



is following the intent of drafters that were elected by a majority, rather than substituting the judgment of the non-elected justices (Manfredi 2001; Bork 1971). And, like the arguments surrounding precedent, original intent is thought to promote stability in law, allowing for greater predictability over time for litigants and other players in the legal system.

Opponents of original intent, however, argue that the interpretation of the Constitution should not be restricted to the time it was passed. Rather, its meaning should be kept current and in touch with today's societal values. Opponents also point to the difficulty of using the original-intent approach. To determine the framers' intent, one first has to decide who the framers were, not an easy task considering the dozens—or even hundreds—of people that may be involved in drafting a constitution, or drafting and passing legislation. And even if one is successful in deciding which participants should be at the forefront and labelled 'framers', it is still necessary to narrow down the intent of the group, which may vary by individual. A further difficulty, of course, is trying to identify intent decades, or even centuries, after the fact (Hogg 1987). Even if the information is available, the reliance placed on records may steer one astray if they reflect those writing them (for example, legislative staff), more than the framers themselves (Baum 2007). Thus opponents suggest there is room for subjective judgment in the pursuit of original intent.

Historically, the framers' intent has not been a dominant factor in Canadian constitutional jurisprudence. The Judicial Committee of the Privy Council (JCPC), which acted as Canada's final court of appeal until 1949, seemed to ignore the intent of the framers of the *British North America Act* (the *BNA Act*, which is now referred to as the *Constitution Act 1867*). Their dismissal of intent was consistent with the British courts' reluctance to consider legislative history (reports, testimony, speeches, and the like) when determining the meaning of statutes, and the *BNA Act* was, after all, a statute of British Parliament and treated as such by the JCPC (Hogg 2006b; Walton 2001). Refusing to look at evidence such as legislative debates at the time the document was written, the JCPC would have been unable to determine the framers' intent even if it had wanted to use it. The approach taken by the JCPC had profound effects on the interpretation of the document. Critics have argued that the British justices, none of whom had ever been to Canada, were 'quite ignorant of the history, geography and society' of the country, and interpreted the Constitution according to their own 'preconceived notion of what a federal system should look like, a notion that would have been contradicted by much of the legislative history' (Hogg 2006b, 75).<sup>34</sup>

The JCPC did speak of the division of powers laid out in sections 91 and 92 of the *BNA Act 1867*, as being 'watertight compartments'—sections whose meaning was set at the time of Confederation. However, scholars point out that the Court was not greatly concerned with what that meaning was intended to be, mentioning intent instead only 'in cases where it sought to prove what Parliament could not have intended' (Walton 2001, 318). Indeed, by 1929, the JCPC appeared to

take a very broad approach to interpreting the Act—and one very much removed from original intent. In that year, the JCPC interpreted the 'Person's Case'. This case was instigated by five Alberta women who wanted the Prime Minister to appoint a woman to the Canadian Senate. The Prime Minister refused, citing s. 24 of the *BNA Act*, which required the appointment of 'qualified persons'. The Prime Minister argued that women were not persons in the legal sense of the word. When the question was brought before the Canadian Supreme Court, the Court sided with the Prime Minister, ruling that women were not persons, because they had not been considered such when the Act was drafted (MacIvor 2006). The five women appealed their case to the JCPC, which in 1929, ruled in their favour. In that decision, the JCPC suggested the proper approach to interpreting the Constitution was not 'narrow and technical,' arguing instead that 'the British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits' (*Henrietta Muir Edwards v. Attorney General for Canada* 1930). Thus, the Constitution should be interpreted in 'tune with the times,' responsive to changing beliefs in society. (For a detailed discussion of the Person's Case see Sharpe and McMahon 2007.)

In the decades since its ascension to final court of appeal for Canada, the Supreme Court has essentially rejected the idea of original intent in its constitutional interpretation in favour of the 'living-tree' doctrine.<sup>35</sup> Thus, the justices have rejected the notion that the meaning of the Constitution is 'frozen'—set at the meaning the framers would have intended. Instead, the Court has taken a 'progressive' approach to constitutional interpretation, which involves adjusting the meaning of the documents' provisions to keep up with changes in society and its values. Whereas adherents of framers' intent argue that the original understanding should guide justices and only be changed through amendments to the document, adherents of the 'progressive' (or living tree) approach give the courts the power to adapt the meaning as needed (Hogg 2006b).

The idea of framers' intent hit a new difficulty with the passage of the Charter of Rights and Freedoms in 1982. The recent enactment meant that the framers of the Constitution were still present on the scene when the courts started making decisions in the early 1980s, and their intent might well be knowable. Right from the start, however, there were indications that the Supreme Court would not adopt an approach of 'framers' intent'. In 1984, Justice Dickson, for example, argued that while statutes are focused on the present, the Constitution was written with 'an eye to the future . . . [and] must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers' (*Hunter v. Southam* 1984, 155). A year later, Justice Lamer wrote a decision for the Court which rejected the notion that the Court should interpret s. 7 of the Charter narrowly (as a purely procedural guarantee), to comply with the intent of government officials writing the Charter. Lamer argued that the passage of the Charter had been a complex affair, carried out by such a



wide variety of individuals and institutions that 'the comments of a few federal civil servants' could not be determinative' (Sharpe and Roach 2003, 319). Since the Charter was meant to last for generations to come, the meaning of its provisions and values should not 'become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs' (*Re B.C. Motor Vehicle Act* 1985). Thus, the living tree doctrine is alive and well in the Charter era.

Justice Lamer's opinion in the reference case described above makes the Court's preference for the progressive approach clear, but also suggests there are difficulties in following the framers' intent, even for a recent enactment. This difficulty is demonstrated by the issue of sexual orientation. The Charter of Rights and Freedoms does not explicitly mention sexual orientation in s. 15, the section guaranteeing equality rights. However, in 1995, the Supreme Court added sexual orientation to the list of grounds protected against discrimination by s. 15 (*Egan v. Canada* 1995). Critics argue this decision was a direct violation of the framers' intent. They suggest that the federal government deliberately left sexual orientation out of the Charter, despite repeated requests by the gay community to include it<sup>36</sup> (Morton and Knopff 2000, 43). Other scholars argue that the framers intended to leave the list open-ended so that the courts could add grounds of discrimination, such as sexual orientation, over time. Kelly, for example, quotes then Justice Minister Jean Chrétien, who suggested, 'If legislatures do not act, there should be room for the courts to move in. . . . Because of the difficulty of identifying legitimate new grounds for discrimination in a rapidly evolving area of the law, I prefer to be open-ended rather than adding some new categories with the risk of excluding others' (2005, 98).

Despite their critique of the framers' intent approach, however, the Supreme Court—unlike the JCPC—has made use of legislative history in its constitutional decisions over the last few decades. When interpreting the *BNA Act 1867*, for example, the Supreme Court has consulted the confederation debates (*A.G. (Can.) v. Can. Nat. Transportation Ltd.* 1983), among other records (Hogg 2006b). Of course, the *Constitution Act 1982* has an extensive legislative history because of its recent enactment, including various drafts of the document, testimony before committees, and legislative debate, and the Supreme Court has made use of these records as it has interpreted the Constitution. For example, in *Reference re Public Service Employee Relations Act (Alta.)*, Justice McIntyre looked to evidence from the Special Joint Committee hearings on the Constitution to help determine whether the right of association in s. 2(d) of the Charter should be interpreted as a protection for the right to strike. In his concurring opinion, McIntyre argued:

[I]t is apparent from the deliberations of the committee that the right to strike was understood to be separate and distinct from the right to bargain collectively. And, while a resolution was proposed for the inclusion

of a specific right to bargain collectively, no resolution was proposed for the inclusion of the right to strike. This affords strong support for the proposition that the inclusion of a right to strike was not intended' (*Reference re Public Service Employee Relations Act (Alta.)* 1987).<sup>37</sup>

However, in general, the majority of the Court has used legislative history only as 'part of the context', as a 'starting point', and does not necessarily feel 'bound by even a clear indication of what the framers intended' (Hogg 2006b, 79).

#### Statutory Interpretation: Legislative Intent and Textualism

In Canada, judges interpreting ambiguous statutes follow the 'cardinal principle in statutory interpretation. . . . [A] legislative provision should be construed in a way that best furthers its objects . . . a judge must ascertain the intent of the legislature in enacting the statute' (Gall 2004, 479–80). However, that opens the question of how a justice should determine the object of a statutory provision. As mentioned above, while serving as Canada's final court of appeal, the JCPC refused to look at legislative history, concentrating instead on the text of legislation. The 'textualism' approach suggests that the text of the provision is authoritative—that 'the only reliable indicator of legislative intention is the meaning of the legislative text. Therefore, to the extent this meaning is discernable, it should govern outcomes' (Sullivan 1998). When using this approach, justices may examine the 'plain meaning' of the text and interpret the words in their 'ordinary sense.' The late Chief Justice Antonio Lamer stated:

[T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention. (*Ontario v. Canadian Pacific Ltd.* 1995)

When the meaning of the text is clear, it must be taken as the intent of the legislature without any reference to outside evidence. However, if following the plain meaning of the text produces an absurd or unjust result, the 'golden rule' allows justices to modify the meaning but only to the extent necessary to avoid the absurdity (Gall 2004, 481). If the meaning of the text is ambiguous, 'the mischief rule' allows outside material to be introduced to guide the choice of the proper meaning. This rule directs justices to look at the common law before the passage of the disputed provision, and determine what 'mischief' or defect existed that the provision was meant to remedy. They must then interpret the provision so as to best resolve the mischief and further the remedy (Gall 2004, 481).<sup>38</sup> In looking to external sources in the statutory area, however, Canadian courts do not



make extensive use of legislative history. It is considered inappropriate to study legislative debates, speeches, or committee reports (Gall 2004)—any of the material that might be used to determine particular legislators' intent. This stands in stark contrast to the United States, where any aspect of legislative history, including Congressional committee reports and floor debates, can be used.<sup>39</sup>

Textualism, and the plain meaning approach in particular, have been subject to criticism. Ruth Sullivan, for example, argues that 'one of the most frustrating aspects of the plain meaning rule is trying to understand what sort of meaning interpreters have in mind when they label a meaning plain' (1998, 192). Is it literal meaning or dictionary meaning, audience-based meaning or some other form? In the 1990s, plain meaning was interpreted as literal meaning by Chief Justice Lamer, who suggested that 'the best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what it says, when this can be clearly ascertained' (*Ontario v. Canadian Pacific Ltd.*; Sullivan 1998–9, 181). For Justice LaForest plain meaning was dictionary meaning, and he referred to definitions of words within legislation he was interpreting. However, during that same period, Justice L'Heureux-Dubé conceived of plain meaning as 'audience-based meaning' and wrote, for example, about language having 'a well-defined 'plain meaning' within the business community' (*Manulife Bank of Canada v. Conlin*; Sullivan 1998–9, 195).<sup>40</sup>

Thus, critics point out that different types of meaning can lead to different results by justices who are all applying the 'plain meaning' approach (see the *Ontario Mushroom Co.* case described at the beginning of Chapter 11 for a good example of this as the justices attempt to interpret the words of a minimum wage law and determine its application to mushroom workers). The approach also assumes that those drafting the statute chose each word carefully—and that the words chosen have a clear meaning. Things become more difficult when words with more than one meaning are placed in a text, or when phrases with no readily apparent meaning (such as 'due process of law' in the constitutional realm) are used. Some argue that plain meaning is not as objective as its supporters suggest, but often requires interpretation and choices by the justices (Segal and Spaeth 2002).<sup>41</sup>

### Policy Preferences

The concept that judicial decisions are based entirely on legal rules—whatever the approach—was prevalent in the early literature on the courts and is still championed by many judges themselves, who often suggest their job consists of merely 'following the law'. However, the existence of dissenting and concurring opinions suggests that there is no one 'knowable' legal rule for a case situation: different interpretations of the same set of facts, words, and precedents are possible. What, then, accounts for these different interpretations? Since the mid-twentieth century,

the dominant answer in the American judicial literature has been the justice's own policy preferences (at least at the Supreme Court). Indeed, some scholars argue that the justices' policy preferences are the only explanation for their decisions and that legal factors are used merely to justify a decision they wish to take. (See, for example, the discussion of the attitudinal model in Segal and Spaeth 2002.)

Even court scholars who do not go to that extreme will usually agree that policy preferences play some role in the justices' decisions. These preferences are usually measured in terms of ideology, liberal versus conservative. Thus, a justice supporting the rights of criminal defendants would be described as voting liberally, while justices voting against rights claimants would be described as voting conservatively.<sup>42</sup> Those suggesting that a justice's preferences (ideology) matter often point to the consistency that exists between the positions justices take in cases and the attitudes they convey in their speeches and articles off the bench (Baum 2007). Ideology is also a good predictor of the outcome of cases. American scholars who have studied the ideology of US Supreme Court justices for decades have found that knowing the relative ideological makeup of the Court has allowed them to predict fairly accurately how the Court will rule in a case. Perhaps the best example of this is *Bush v. Gore* (2000), where the five justices who were considered conservative (Justices Scalia, Thomas, Rehnquist, Kennedy, and O'Connor) lined up against the four justices considered liberal (Justices Stevens, Ginsburg, Souter, and Breyer) in allowing the appeal by the conservative (Republican) candidate, George W. Bush.

In Canada, at least until the late 1980s, a more traditional view of the courts was prevalent, for the 'role of the judiciary [was] perceived as being essentially technical and non-political . . . there to apply the laws made by the political branches of government' (Russell 1987, 3). In the past, the ideology of Supreme Court justices has not been widely discussed, and Canadian scholars have suggested that ideological leanings have been neither obvious nor consistent—even at the Supreme Court (see for example, Morton, Russell and Riddell 1994). In addition, traditionally, ideology was not thought to play a large role in judicial appointments and was believed to be overshadowed by influences such as region and patronage. This viewpoint may be changing, however, as evidenced by the increased interest in how justices are selected in Canada (see the discussion in Chapter 5). As calls are heard for a more open process, there appears to be at least an implicit understanding that the various potential appointees will behave differently on the Court. Interest groups have now joined the process, lobbying for judges holding particular values (a commitment to equality rights, for example) to be appointed to the bench (Morton and Knopff 2000). This increased activity by interest groups indicates that they, at least, believe judicial ideology matters. Scholars have also started examining the Supreme Court in terms of the justices' policy preferences and ideology (see, for example, Ostberg and Wetstein 2007; Songer and Johnson 2002; Manfredi 2001). There is more agreement today that the policy preferences of Canadian justices may influence their decisions.



Adherents to the 'attitudinal model' suggest that 'judicial outcomes [are] the product of the ideology of individual justices [as well as] the result of attitudinal responses to specific case facts that can be triggered in different areas of law' (Ostberg and Wetstein 2007; Segal and Spaeth 2002). However, a difficulty exists with the preferences approach: how does one determine the policy preferences, or ideology, of a justice? Indeed, justices are loath to speak of themselves in ideological terms, and they often argue that ideology is irrelevant since they focus on legal factors when deciding cases. For example, Justice Binnie from the Supreme Court said, 'I don't know that I can pigeonhole myself as a conservative or liberal or activist' (*Ottawa Citizen* 1998), and former Justice LeDain suggested that 'judges don't come to each case with a predisposition or general tendency or drift' (*Ottawa Citizen* 1984).<sup>43</sup>

Scholars usually turn to outside measures of ideology as they build models to test its influence on judges' decisions. A recent approach, one that has been used on both sides of the border, looks to newspaper editorials at the time of a justice's appointment, and codes the language used to describe the justices to come up with an ideological score (Segal and Cover 1989; Ostberg and Wetstein 2007). However, scholars are constantly searching for a better measure of judicial preferences (see, for example, the discussion of the 'personal attribute model' below).

A further difficulty with determining the policy preferences of justices is that they may change over time, or by issue. Thus, Justice L'Heureux-Dubé can be categorized as conservative in the area of criminal law but liberal in the civil rights and liberties area (Morton, Russell, and Riddell 1994; Ostberg and Wetstein 2007). The Court's decisions themselves can also be divided on an ideological scale (Epstein and Walker 2007). Cases such as *Egan v. Canada* (1995), which challenged the denial of old age security benefits to a same-sex couple, are difficult to classify. Though the Court ruled against the rights claimant (a conservative outcome), they did recognize sexual orientation as a protected ground under the equality section (s. 15) of the Charter (a liberal outcome).

#### Testing Policy Preferences in Canada

Ostberg and Wetstein (2007) tested the attitudinal model on the Canadian Supreme Court for decisions made between 1984 and 2003. They constructed an ideological score for each justice on the basis of a content analysis of newspaper articles at the time of each justice's appointment to the Supreme Court.<sup>44</sup> Comments on the justices were placed on an ideological continuum ranging from liberal to conservative, with comments such as 'strong believer in the Charter', 'champion of the rights of the criminally accused', and 'liberal judge', placed at the far liberal end of the scale (Ostberg and Wetstein 2007, 50). The authors then used their measure to try to predict liberal votes on the bench. Their results suggest that ideology played a significant role in criminal and economic cases. For example, an extremely liberal justice was 40 per cent more likely to cast a liberal vote in a right to counsel case (in favour of the criminal

defendant) than an extremely conservative justice (2007, 86). However, surprisingly—given findings in the United States—judicial ideology did not play a significant role in voting on civil rights and liberties cases. Instead, measures such as the gender of the justice and the presence of government and interveners before the Court had more of an influence on the outcome of the case (133). Ostberg and Wetstein conclude that the importance of the attitudinal model in Canada 'is more complex and less pronounced than found in the United States' (2007, 216).

Ostberg and Wetstein (2007) also studied the interplay between case facts and the attitudinal model. Even the strictest adherent to the attitudinal model in the United States will acknowledge that the facts of the case matter as well. In a right-to-counsel case, for example, the fact that the police had failed to inform the defendant that he had a right to counsel will make judges of all ideological predilections more likely to rule in favour of the defendant (Ostberg and Wetstein 2007, 87). However, Ostberg and Wetstein discovered that liberal and conservative justices respond to different factual cues before the Court. They also found that conservative justices respond to fewer factual cues, a finding that led them to conclude that 'conservative justices are more prone than their liberal colleagues to base their votes on their ideological predispositions' (2007, 223).

#### Strategic Model of Decision Making

Although the study of judicial decisions in terms of policy preferences is a much more recent phenomenon in Canada than in the United States, most judicial scholars today, on both sides of the border, argue that a judge's policy preferences do matter. However, there is not complete agreement on how those policy preferences influence decision making. Recently, another model of decision making has gained prominence—the strategic model—which answers this question differently than the attitudinal model (see, for example, Eskridge and Frickey 1994; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). Like the attitudinal model, the strategic model believes justices have goals they are pursuing.<sup>45</sup> However, this model argues that the justices, in their pursuit of their goals, face constraints, which cause them to 'adjust their positions where doing so might advance the policies they favor' (Baum 2007, 121). Put differently, this model suggests that justices actually vote strategically. Thus, a justice may move slightly away from their preferred position in order to get other justices to sign on to their opinions. Strategic justices will write decisions that are as close to their ideal point as possible without provoking the executive and legislature to overturn the result. They may also modify their position slightly if it increases the likelihood their decision will be enforced by the government.

Scholars have not yet done extensive work on the strategic model of decision making in Canada. However, anecdotal evidence suggests that such behaviour probably exists. Remember, for example, how Chief Justice Dickson tried to get agreement on his opinion in *Tremblay v. Daigle*.



### Role Orientations

Judicial decisions may also be influenced by the justices' 'role orientation'. This role orientation, which may act as a constraint on justices, is their conception of what is 'appropriate behavior' for a judge, how they believe they should act (Baum 2007, 131). There are various ways to think of role orientation—the previous chapter, for example, discussed the 'adjudicative' role and the 'policy-making' role. Judges who adopt the latter role are more comfortable with the idea of shaping law and balancing interests than judges closer to the adjudicative side of the continuum, who prefer to base their decisions on established legal principles and to shape law only incrementally as a by-product of adjudication. In the area of constitutional law, especially if constitutional rights are involved, a justice's role orientation is usually discussed in terms of activism and restraint. A justice is labelled activist if he or she believes it is proper for the Court 'to assert independent positions in deciding cases, to review the actions of the other branches vigorously, to strike down unconstitutional acts willingly, and to impose far-reaching remedies for legal wrongs whenever necessary' (Epstein and Walker 2007, 36). A justice is considered 'restraint-oriented', by contrast, if he or she prefers to defer to the legislature when interpreting the legislature's actions and would reject broad remedies, correcting only that which is absolutely necessary (Epstein and Walker 2007, 36). A justice who considers him- or herself to be more of an 'adjudicator of disputes' will tend to be more restrained in Charter of Rights cases, whereas a justice with a more policy-making orientation will tend to be more activist in Charter cases. The role-orientation approach suggests that a justice's view of the appropriateness of judicial activism may shape their decisions as illustrated in Box 4.2, which briefly outlines the Supreme Court's decision in *Chaoulli v. Quebec (Attorney General)* (2005). The justices' opinions in *Chaoulli* provide examples of both activism and restraint in the same case.

#### Box 4.2 Role Orientation in Terms of Activism and Restraint: The *Chaoulli* Example

*Chaoulli v. Quebec (Attorney General)* (2005) involved a challenge to Quebec legislation banning private health insurance in the province. The challenge was brought by George Zeliotis, a 61-year-old man who had waited a year to have hip surgery, and Dr Jacques Chaoulli, a Quebec physician who had been refused a licence to operate an independent private hospital. (Chaoulli had once gone on a three-week hunger strike to protest the decision of the health board not to grant recognition to his 'home delivered' medical services; Manfredi and Maioni 2006.) The Supreme Court was asked to consider the constitutionality of the Quebec ban. One year after hearing oral arguments,

the Court released its decision. The seven justices hearing the case voted four to three to strike down the ban as unconstitutional. The case provoked widespread controversy over both the ruling and its reasoning. Critics forecast the end of Canada's health-care system and spoke angrily about the Court's poor treatment of health-care research and government debates.

Three opinions were written in *Chaoulli*, each suggesting a different role orientation. The 'majority' opinion was written by Justice Deschamps, who had cast the deciding vote on the divided court. This opinion based its decision on a section of the *Quebec Charter of Human Rights and Freedoms*, arguing that long waiting times violated the rights to life and personal inviolability. Both the majority and concurring opinions interpreted rights broadly in striking down the law, but the majority opinion confined itself to the Quebec Charter, while the concurrence brought in the Canadian Charter of Rights and Freedoms. In voting to strike down the law, Justice Deschamps argued that when 'social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them' (at para. 89). She went on to argue that the Court had heard ample evidence about health-care policy to inform its decision and that the government had failed to act on reforming health-care waiting times. Government 'inertia' could not be used to justify judicial deference, according to Deschamps, who also noted that courts were the 'last line of defence for citizens'.

In dissent, Justices Binnie, Lebel, and Fish argued the ban was not unconstitutional and suggested the Court should defer to the provincial legislature. These justices suggested the health-care questions at issue in the case had been a matter of extensive debate throughout Canada and that this debate was not something the justices could resolve 'as a matter of constitutional law'. No constitutional standard existed that could tell judges what was 'reasonable' access to health care. The issue was one of social policy, which was best left to the legislature to decide.

Source: *Chaoulli v. Quebec (Attorney General)* (2005); Manfredi and Maioni 2006.

Judicial activism has been highly criticized by many scholars, and it tends to be vilified in the media—the Court is seen as overstepping its bounds and usurping the elected legislature. In recent years, judicial activism has been equated with liberal justices' running amok with the Court's new-found power under the Charter. However, it should be noted that activism is a judicial philosophy, rather



than a political one, and can thus be associated with either liberal or conservative justices. Indeed, in their study of judicial decisions from 1984 to 2003, Ostberg and Wetstein found that 'when it comes to some of the most high-profile legal controversies, conservative justices are just as likely as their liberal colleagues to be activists' (2007, 213). The *Chaoulli* decision provides an example of this as well, for one of the most conservative justices on the Supreme Court, Justice John Major, voted to strike down the Quebec legislation banning private health insurance programs—joining the opinion that has been characterized as activist.

Whether one is speaking in terms of adjudicative versus policy-making, or activism versus restraint, the question remains whether these different 'role orientations' actually matter. Are justices' decisions influenced by their perception of what is proper for a justice to do? The American literature is skeptical that a strong connection exists (see the discussion in Baum 2007). It is difficult, of course, to determine a separate influence for these orientations. Does a justice vote to uphold a piece of legislation because he is a restraint-oriented judge who believes the right behaviour of the court is to defer to the legislature? Or does he vote to uphold the legislation because he has conservative or liberal policy preferences and this outcome would best fulfill his goals?

### Personal Attributes

According to Judge Rosalie Abella, '[e]very decisionmaker who walks into a courtroom to hear a case is armed not only with the relevant legal texts but with a set of values, experiences and assumptions that are thoroughly embedded' (as quoted in Wilson 1990, 507). The personal attribute model argues that a judge's career experience, education, partisan affiliation, social background (for example, religion), and other related factors shape a justice's attitudes, and those attitudes—the embedded factors—can influence that justice's decisions (Tate and Handberg 1991). Social scientists advocating this model 'contend that pre-court life experiences play a prominent role in shaping the personal values and policy preferences of judges, and that such biographical factors can be useful in predicting judicial decisions' (Brudney, Schiavoni, and Merritt 1999, 1682).

Tate and Sittiwong (1989) tested the personal attribute model on the Canadian Supreme Court for its non-unanimous decisions between 1949 and 1985. They discovered that for cases dealing with both economic and civil liberties issues, justices that were Catholic, were from outside Quebec, had been appointed by Liberal Prime Ministers (other than Mackenzie King), had political experience, and had extensive judicial experience voted more liberally than their judicial colleagues. Songer and Johnson (2007), testing the same factors in the more recent era, found some of these measures worked only in the time period in which they were originally tested. However, their updated model found that a broader measure of region (Quebec, Ontario, the West, and the Atlantic provinces—rather

than just Quebec and non-Quebec)—and party affiliation had a significant influence on the justices' decisions, particularly in the criminal and economic areas. In criminal cases, for example, justices from Ontario and the West voted more liberally than those from the east (Songer and Johnson 2007, 927). Party and region had an interactive effect on these decisions: among justices appointed by a Progressive Conservative Prime Minister, those from Quebec were more likely to vote conservatively than those from other regions.

### Gender

In the United States several studies have examined the influence of gender on voting behaviour. Though there have been some contradictory findings,<sup>46</sup> much of the literature suggests that female judges vote differently in certain issue areas. Songer, Davis, and Haire (1994), for example, found that female judges on the federal courts of appeal voted liberally in civil rights cases more often than their male colleagues.<sup>47</sup> Similarly, Davis, Haire, and Songer (1993) found that female appellate court judges voted for the rights claimant in employment discrimination cases more often than their male colleagues, but they did not find a difference between the genders in obscenity cases. The American literature has also discovered some indirect effects of gender on decision making. In particular, having female judges on the panel hearing cases at the federal appellate courts has been found to affect the voting behaviour of the male judges on the panel. Thus, male judges on panels with one or more females were more likely than judges on all-male panels to support rights claimants in employment discrimination cases (Farhang and Wawro 2004). This held true for sexual harassment and sex discrimination cases as well (Peresie 2005).<sup>48</sup>

In Canada, a recent study of the Ontario Court of Appeal found that differences did exist in the voting behaviour of male and female judges (Stribopoulos and Yahya 2007), although an earlier study by McCormick and Job (1993), found no such differences for the Alberta Court of Appeal. According to Stribopoulos and Yahya (2007), female judges were more likely than their male counterparts to support the complainant in sexual and domestic violence cases and more likely to support mothers in family law cases. At the Supreme Court, the first female justice to be appointed to the Court, Bertha Wilson, suggested that the values, experiences, and assumptions a justice brings to the Court may vary with gender. While she acknowledged that there are some areas of law where it is very difficult to find a 'uniquely feminine perspective'—such as contracts or laws affecting corporations—she suggested that other areas exhibit a 'distinctly male perspective' (Wilson 1990). Interestingly, when the Supreme Court struck down s. 251 of the Criminal Code, Canada's 'abortion law', Wilson stood alone in suggesting women had a constitutional right to abortion (*R. v. Morgentaler* 1988). Her male colleagues focused instead on procedural-fairness guarantees under s. 7 of the Charter (in particular, the problem of unequal access and delay). The *Tremblay*



case cited at the start of this chapter also suggests gender may matter. It has been reported that Justice Beverley McLachlin's arguments to her colleagues ensured the case was decided (after Chantal Daigle's abortion was revealed), instead of being declared moot, and McLachlin has suggested it was her viewpoint as a woman that allowed her to see things differently (Sharpe and Roach 2003, 394).

A few studies have tested the influence of gender on judicial decisions at the Supreme Court level. Songer and Johnson (2007) discovered that gender did have an effect in one of the issue areas they studied: civil rights and liberties. Female justices tended to vote more liberally than their male colleagues in cases involving civil rights and liberties. However, there was not a significant difference between the votes of male and female justices in either criminal or economic cases (Songer and Johnson 2007, 928).

In their study of Supreme Court decisions, Ostberg and Wetstein (2007) also found that gender had an influence on the outcome of cases in the civil rights and liberties area. Examining cases decided by the Supreme Court from 1984 to 2003, the authors found that controlling for factors such as ideology and party background, female justices were more supportive of rights claimants in equality cases and contentious (that is, non-unanimous cases) free speech cases than their male colleagues. In fact, female justices were 27 per cent more likely to rule in favour of discrimination claims in all equality cases, and 54 per cent more likely to rule in favour in models including only non-unanimous cases (2007, 134–9).

### The Courts and Inside Influences

In the appellate courts, of course, a decision is not rendered by a single judge, and thus, judges must work with their colleagues in resolving the cases before them. These colleagues may influence a judge's ultimate vote in a case, or at least persuade him to join an opinion he might not have otherwise chosen. The *Tremblay* case described at the beginning of this chapter provides a good example of the influence of colleagues. The Supreme Court might not have gone on to decide the case, after learning of Daigle's abortion, if Justice McLachlin had not asked her colleagues to put themselves in her shoes, and Chief Justice Dickson's opinion in the case might have been very different (or at least more expansive) had he not been pursuing Justice LaForest's vote.

Chief Justice Dickson's decision to alter his opinion to attract Justice LaForest's support reflects institutional rules and norms. At the Supreme Court level, majority rules. Therefore, a justice needs four other justices (if the full Court has heard the case) to sign on to his or her opinion for it to be adopted as the Court's outcome and reasoning.<sup>49</sup> This requirement may induce justices to tailor their decision in a way that will appeal to at least four other justices. However, in *Tremblay*, Chief Justice Dickson wanted to write more than a majority opinion: he wanted to achieve unanimity on the Court, and he modified his opinion to that end.

Unanimous decisions are believed to have more legitimacy and to carry more force than divided results. As a result, appellate court justices are thought to pursue larger winning coalitions than the simple majority needed to decide the case. This implies a need for justices to work together, to negotiate, and to make concessions.<sup>50</sup>

Some scholars have attempted to measure the influence of justices on their colleagues by examining the number of times a justice is cited and the number of times a justice is specifically named in subsequent Supreme Court decisions (McCormick 2000); others have looked at opinion authorship rates (Ostberg and Wetstein 2007).<sup>51</sup> Ostberg and Wetstein argue that the pattern of shifting leadership they found (according to justices' areas of expertise) shows that the Supreme Court 'is a collegial institution that is willing to work as a coordinated team when resolving cases, and that individual justices may be willing to sacrifice the overt expression of their own attitudes and values more readily than their U.S. counterparts, for the good of the team' (2007, 211). Thus there appears to be support for the influence of colleagues on judicial decision making at the Supreme Court of Canada.

### The Courts and Outside Influences

Do groups from outside the courts influence the decisions of judges? This might be expected to be less of an influence at the Supreme Court level than at lower courts. Although lower-court judges in Canada are appointed for long terms (usually until age 70 or 75), other courts stand above them. Ambitious judges, interested in promotion, may be concerned with their portrayal in the media and the response of government officials to their opinions. They may be anxious to make a favourable impression on those reporting about, or involved in, the judicial selection process. Appointed until age 75 and with no chance of promotion to a higher court, Supreme Court justices should feel relatively secure in ignoring outside forces when making their decisions—they are difficult to remove no matter how much the public or the government dislikes their opinions. However, this section suggests that one cannot rule out the potential influence of outside forces on Supreme Court decisions. As they are 'possessed of neither the purse nor the sword', the Supreme Court may be concerned with the external environment to ensure enforcement of their decisions and to further their policy goals. Of course, justices may well value the approval of external audiences for its own sake and may be influenced in their decisions by their perception of what will win the approval of outside audiences that are important to them (Baum 2006, 163).

#### Public Opinion

For many court decisions, such as those dealing with patent law or trucking regulations, the public may not hold a strong opinion. Many court decisions—even Supreme Court decisions—fly under the average Canadian's radar. In these types of cases, it seems unlikely that public opinion would have any influence on judicial



decision making. There is very little opinion for the Court to consider and very few consequences for not considering it. However, for more high-profile cases, like those involving the Charter, the public may have a very strong opinion, and media coverage may keep them well informed of the courts' behaviour. Does the court then consider public opinion in making its decisions—at least in controversial cases?

American scholars have studied extensively the influence of public opinion on judicial decisions. Many studies (among them, Mishler and Sheehan 1993; Stimson, MacKuen, and Erikson 1995; Flemming and Wood 1997) suggest that justices should pursue positive public opinion to their decisions because it leads to better implementation of [their] decisions, reduces the chances that the other branches will limit or reverse those decisions, and deters action by the legislature and executive against the Court itself (Baum 2006, 63). Justices influenced by public opinion might avoid making controversial decisions that divide public opinion (although Canada's Supreme Court has made many of these types of decisions, for example, the *Morgentaler* abortion case and the *Chaoulli* health-care case). They may try to match the ideology of the Court's decisions to that of the general public, or they may avoid controversial decision practices—such as striking down precedents (Baum 2006, 64). There has not been a definitive answer on whether public opinion is, in fact, influencing any of this behaviour. Part of the difficulty is to determine causality: did the Court's decision mirror the public's ideology because the Court was following public opinion, or did it mirror the public's ideology because the 'same social forces' moving the ideology of the public were also moving the ideology of the court (Baum 2007, 144)?

Would the effect of public opinion on judicial decisions be more readily apparent if judges were elected? Since many state court judges in the United States face retention elections, research has been directed at this question. It appears that elections do influence judicial behaviour, but the nature and extent of that influence are dependent upon various factors, such as whether a judge has had an electoral loss before, how knowledgeable the voters are, how competitive the elections are, and how soon the next election is (Hall 1992, Huber and Gordon 2004).

Studies of public opinion and the courts in Canada have tended to focus on the public attitude towards the Supreme Court, and not its potential influence on it (Sniderman et al. 1996; Fletcher and Howe 2001). However, former Chief Justice Antonio Lamer suggested in an interview that public and media attention in controversial cases may influence decisions: 'It is in these cases I am concerned that as a result of virulent or harsh comments by the press or the public, the most popular thing to do might become the outcome' (Makin 1999).

#### The Media

Bridging the gap between the Court and the public is the media. The courts, and particularly the Supreme Court, have seen a significant increase in coverage by the media in the Charter era. As the Supreme Court has made more controversial

decisions on subjects such as abortion, gay rights, pornography, and language rights, the media has increased its coverage and its critiques of the decisions. Although not all Supreme Court justices are favourably disposed towards the media,<sup>52</sup> many do realize its importance to them. It is from the media that most Canadians learn about both the Court and its decisions. Justices recognize that public attitudes towards the Court may depend, in part, on how it is portrayed in the media, and they recognize the truth behind Peter Russell's observation that 'journalists are the managers of the political life of judicial decisions' (Sauvageau, Schneiderman, and Taras 2006, 8). As the above comment by Chief Justice Lamer suggests, this fills some justices with concern, because they worry that 'inaccurate or sensationalist handling of judicial decisions by the media . . . [puts] pressure on them to make decisions that [will] result in 'good press' (Greene et al. 1998, 184).

Justices may have different incentives for cultivating the media. They may want to ensure favourable attitudes to increase the likelihood that their decisions will be enforced. However, like other citizens, the justices may also get satisfaction from being portrayed positively in the media (Baum 2007, 145). Whatever the incentive, there is evidence that the justices notice their media coverage. In the United States, Justice Clarence Thomas is said to be able to remember the 'dates of unflattering articles written about him, and the names of the reporters who wrote them . . . with near photographic memory' (cited in Baum 2007, 145).

When Brian Dickson became Canada's Chief Justice in 1984, he worked to better the relationship between the Court and the media. He established a press room, altered the procedure for releasing decisions (the Court now gives advance warning to the press and avoids releasing more than a couple of decisions at a time), and assigned the Court's executive legal officer to deal with 'media relations' (among other things, the ELO generally 'walks' the media through a decision's legal reasoning at its release) (Sharpe and Roach 2003, 293). The current Chief Justice, Beverley McLachlin, has regularly interacted with the media, and enjoys a friendlier relationship with them than many of her predecessors.

#### The Legal Community

Justices are more likely to care about the opinion of those who are close to them. The legal community may be of particular importance to justices because it is *their* community. Made up of lawyers, judges, and law professors, this group is not only composed of many of the people with whom the justices will regularly associate, but it is also the group that will most closely evaluate the justices' decisions. Appellate court judges frequently attend conferences and give speeches attended by members of the legal community. Visits to law schools are particularly common. These events are opportunities for discussion of legal principles that may later influence a judge's decision. Through publications in law reviews and other academic writing, the legal community may provide information to the judges and may even persuade them to an interpretation (particularly if it is the obviously dominant approach) (Baum 2007,



144). Baum (2006) suggests that law professors may be an important audience to judges who care about how they are perceived and evaluated (2006, 101).

In Canada, decisions by the provincial courts of appeal tend to be short—on average six pages—and most do not contain any reference to academic writing (Greene et al. 1998, 131–7). Although some provincial courts, such as Quebec, do use such references,<sup>53</sup> it is not a common practice anywhere, and there is reason to doubt this factor influences decisions to any large degree. In its early decades, the Canadian Supreme Court also did not make widespread use of academic writing; on the contrary, the citing of living scholars was particularly discouraged (Sharpe and Roach 2003, 213). The Court's opinions used very technical language and were directed more towards practising lawyers (McCormick 2000, 143). This began to change when Bora Laskin—himself a former legal scholar—became Chief Justice, and under Chief Justices Dickson and Lamer, citation of legal academics became much more the norm. Scholars studying the area have found that nearly half of all the Lamer Court's decisions contained citations of academic sources, totalling about 400 citations a year (McCormick 1998a). This openness to academic sources was accompanied by an effort on the part of the justices to make their decisions less technical and more accessible, thereby broadening the targeted audience to include academics and the 'educated public' (McCormick 2000, 143).

More recent Supreme Court justices have likely been influenced by the writing of legal academics. Chief Justice Dickson regularly read both legal periodicals and academic writing. There is evidence that when Dickson wrote decisions dealing with the equitable distribution of property in divorce, for example, he was heavily influenced by this academic writing. His working notes were peppered with sections taken from academic sources published in Canada, the United States, and England (Sharpe and Roach 2003, 184). Of course, Dickson is not alone in his attention to scholarly work. Most other recent Supreme Court justices have frequently made use of academic writing. Marc Gold has suggested that it sometimes appeared as if the Court was 'writing for the academy' (1985: 460). Whatever the motivation—the desire to achieve their policy goals or to get the law 'right', in order to earn respect amongst the legal community—justices do appear to consider academic analysis in their decisions.

#### *Interest Groups*

Chapter 7 discusses in detail the activity and influence of interest groups on court decisions. In the lower courts, interest groups participate by sponsoring a case (in effect providing a lawyer and other resources to a potential litigant, support that allows them to become a party in the case) or by intervening in the case (submitting a brief as an interested third party). At the Supreme Court, however, most groups are present as interveners. Even the Women's Legal Education and Action Fund (LEAF), which is the most frequent litigator before the Supreme Court, has only rarely sponsored a case before it. In the great majority of cases, groups

participate before the Supreme Court by submitting a brief on behalf of themselves in an attempt to further their goals. But do the justices listen?

The American literature has produced mixed results. As detailed in Chapter 7, some studies have found that litigants that have an interest group on their side are more successful (Songer and Kuersten 1995; Wolpert 1991), while others have not found the same effect (Songer and Sheehan 1993; Tauber 1998). The debate over interest-group influence continues to be waged. There is some agreement, however, that interest groups are influential in setting the agenda. Particularly in the United States, 'many cases would not get into any court, much less the U.S. Supreme Court, without the help of an interest group' (Epstein and Walker 2007, 43). Furthermore, studies have found that interest-group participation at the leave-to-appeal stage increases the likelihood that the US Supreme Court will accept a case—regardless of whether the group is arguing for leave to be granted or against it (Caldeira and Wright 1988).

As mentioned earlier, this potential influence is less available to Canadian interest groups, because the Supreme Court does not allow groups to participate at the leave-to-appeal stage. Epp (1998), however, has argued that interest groups are influential in setting the agenda in Canada. He argues that the 'rights revolution' that has occurred in Canada is largely a result of interest-group mobilization, suggesting that these groups have brought cases to the courts that have shaped the state of Canadian law.

Some studies have suggested that interest groups have also influenced the Canadian justices' decisions. Manfredi (2004), for example, suggests that LEAF has made a difference through the type of evidence the group brings to Court—evidence that the Supreme Court frequently cites. Ostberg and Wetstein have found that, controlling for other factors such as judicial ideology and case characteristics, LEAF appears to have exerted some influence on Supreme Court decisions in the equality area from 1984 to 2003 (2007, 133, 136). These authors found similar results for the Canadian Labour Congress in union cases decided by the Court (2007, 169, 173). Ostberg and Wetstein suggest that interest groups may affect the importance of other influences as well. They argue that 'attitudinal responses by the justices are partially a byproduct of the types of claims advanced by some interest groups' (2007, 219–20). The Charter era has brought new areas of law before the Court, as well as increased litigation by interest groups that 'push the rights envelope' before the Court. In this scenario, Ostberg and Wetstein argue justices will be more likely to fall back on their own attitudinal predispositions when deciding cases, and they believe that the increased rights-based litigation has increased the attitudinal disagreement amongst the justices (2007, 33).

#### *Parliament and the Executive*

The government of the day may influence judicial decisions in a variety of ways. Governments are responsible for appointing judges at all levels of court—provin-



cial governments appoint s. 92 judges, and the federal government appoints s. 96 and s. 101 judges. This appointment power provides the means for governments to shape the courts' approaches and decisions over the long term. By placing judges on the federal bench with viewpoints similar to that of the government of the day (or at least to the Prime Minister and his cabinet), that government could influence policy for years to come (given the judicial retirement age of 75). As discussed in Chapter 5, governments, historically, have not taken advantage of their appointment power to select only judges with ideologies similar to their own. Even at the Supreme Court, other factors—such as region—have generally been of more importance in Canada. However, in the current era of high-profile judicial decisions, this could change—and the government's power of appointment creates the potential for significant influence.

Although judicial independence is explicitly intended to limit government influence on judicial decisions, Chapter 6 discusses another possible means by which governments might influence those decisions: through their role as 'administrators of courts' and, in particular, their control over judicial salaries and administrative support. Appellate judges interviewed by Greene et al. expressed concern about this power, and 'more than one judge reported an impression that provincial governments had cut back on administrative support services to the appellate courts because they were unhappy about the direction of appellate court decisions' (1998, 184–5). One example noted by the judges was the reduction of secretarial support. And Chapter 6 examines the sometimes contentious discussions between judges and governments about salaries. Certainly, judges have seen the connections between their decisions and the use of government power. Whether these connections are deliberate or not, the perception that they are might influence the decisions of the judges.

Government positions might also be considered by judges concerned about the enforcement of their decisions. The courts rely on the other branches of government to implement their rulings. Chapter 11 discusses the relationship between courts and legislatures, and the aftermath of decisions. It is possible that justices try to anticipate the reaction of the government to their decisions and tailor their decisions to achieve the greatest probability that it will be enforced.

Governments may also try to influence the outcome of particular cases. Although considered improper, direct attempts by members of government to influence cases pending before the courts, have occasionally been made throughout history. In 1976, for example, it was brought to the public's attention that three Liberal ministers had contacted members of the judiciary about cases before them. Marc Lalonde, principal secretary in the Prime Minister's Office, called a judge at home on a Sunday morning to discuss the trial of a number of Trinidad citizens charged with destroying a university computer. Lalonde informed the judge of a message from Canada's High Commission to Trinidad that 'expressed concern that violent riots might occur in Trinidad if a guilty verdict was rendered at that time' (Russell 1987, 79). When the judge said he was going to proceed

with jury instructions the next day and would not take steps to delay the verdict, Lalonde replied that 'the situation was one of grave concern' (Russell 1987, 79). This, and other 1976 contacts between cabinet ministers and members of the judiciary resulted in Prime Minister Trudeau drafting guidelines prohibiting Cabinet ministers from contacting the judiciary. Two years later, Trudeau accepted the resignation of the Minister of Labour, John Munro, after it was discovered that Munro had contacted a judge to argue on behalf of a constituent the judge was due to sentence the next day (Russell 1987, 80).

However, this type of direct attempt to influence the judiciary is rare. Governments more commonly try to influence judicial decisions through litigation. Governments at both federal and provincial levels are in court frequently, and this frequency is thought to build up an expertise, and—at the lower court level, at least—a working-group relationship, which may increase their success rate (see the discussion in Chapter 8 of governments as litigators). The federal government, for example, has an enviable success rate before the Supreme Court (McCormick 1994), and this success rate appears to hold true at the leave-to-appeal stage as well (Flemming 2004). In Charter cases, the federal government has a high success rate in defending its legislation and actions from challenge at the Supreme Court (Kelly 2005; Hennigar 2007), and at lower courts as well (Hennigar 2007).

## Conclusions

Of course, to really understand judicial decision making and the influences on it we need to ask the justices. We would want to interview all the justices sitting on a panel and probe the factors that went into their decision (Epstein and Walker 2007). One difficulty with this approach, of course, is that justices are not particularly accessible and would likely refuse a request to detail the reasons behind their decisions. However, a second difficulty is that, as social scientists, we would probably not believe what they told us anyway. Individuals may not be very self-aware or they may want to paint themselves in the most positive light. Thus, the influences they reported would have to be viewed with caution.

A traditional view of judicial decision making, which would emphasize the importance of legal factors, would suggest that justices merely interpret the law as they attempt to 'get it right'. For several decades, however, the dominant models of judicial decision making have emphasized that courts, like legislatures, are part of the political system and that justices do care about policy. Today, it is recognized that justices do not make their decisions in a vacuum, and scholars have suggested many factors that may influence judicial decisions; those include not only legal factors and policy preferences, but also other factors such as interest groups, the legal community, and the gender of the judge.

Gibson suggests that 'judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they



perceive is feasible to do' (1983, 9). Like many judicial scholars, Gibson's theory is premised on the idea that judges pursue policy goals. Pursuing these goals is what they 'prefer to do' (Segal and Spaeth 2002). The facts of the case, however, act as a constraint—setting the boundaries (Segal 1984). Role orientation, conceptualized in terms of activism and restraint, describes what the judge feels he or she 'ought to do'. The actions and expectations of colleagues, the rules and norms of the institution and the external environment, all put restraints on judicial decision making. They help to determine what is 'feasible to do'.

This suggests a complicated picture of decision making, one where many factors can play a role. In the courts, as in other areas of society, 'individuals make decisions, but they do so within the context of group, institutional and environmental constraints' (Gibson 1983, 32). As the Canadian courts have become more prominent players in the political system, the way in which they make decisions has attracted increased interest. However, much more work needs to be done and better measures need to be derived before we can reach a more complete understanding of the decision-making process.

## Chapter 5

### Judicial Selection

In Canada, judicial appointments, at both the provincial and federal levels, are executive appointments. As noted in Chapter 2, the provincial governments are responsible for staffing the 'purely provincial' s. 92 courts, whereas the federal government is responsible for staffing all federal courts and each province's s.96 superior trial and appellate courts. As courts, and particularly the Canadian Supreme Court, come to be perceived more as 'policy-makers', in addition to 'adjudicators', more and more interest (and controversy) surrounds these court appointments. Virtually every major newspaper in the country has commented on the growing political influence of Canadian judges and has criticized the secretive, in-house method of appointing them.

When the election of the new Conservative federal government in 2006 coincided with a vacancy on the Supreme Court, changes were sure to occur. The new Prime Minister, Stephen Harper, had been very vocal in his criticism of the Supreme Court's power and the selection process. So, in March 2006, we saw for the first time in Canadian history, a Supreme Court nominee required to submit to a public hearing, where he faced questions from representatives of the four political parties in the House of Commons—a televised confirmation hearing of sorts.

This change generated a widespread outcry against the move towards an American system of judicial selection. Canadians have watched the US Senate battle over nominees in recent decades, and many remember how the 1991 Clarence Thomas nomination had played out, with almost soap-opera-like drama, on their television sets.<sup>1</sup> Indeed, in the fall of 2005, only a few months before the Canadian hearing, the United States had filled two vacancies on its Supreme Court, and the controversy surrounding the Roberts and Alito confirmation battles (with Justice Alito confirmed by only a 58 to 42 vote) was still fresh in people's minds. Many feared the kind of overt 'politicization' of the judiciary they felt accompanied the US method of appointment. Judges (including the Chief Justice of the Canadian Supreme Court) expressed concern that good candidates would be scared away by the prospect of being exposed to this kind of political process. (For more on the controversy see the section in this chapter on Supreme Court appointments.)

However, the event itself was very tame—particularly compared to its American counterpart. In the United States, the Roberts hearings, for example, lasted for nearly a week before the Senate Judiciary Committee. On the Monday, the nominee gave an opening statement, and the Committee senators also gave opening



## Chapter 7

# Interest Group Litigants

In 1983, 18-year-old Nigel Gayme was arrested for sexually assaulting a 15-year-old girl in the basement of his school. At his preliminary inquiry, Gayme suggested a defence of consent and honest but mistaken belief in consent. The accused sought to cross-examine the complainant about her prior sexual conduct. Gayme argued that the complainant had frequently come to his school to participate in sexual acts with students and had freely given out sexual favours. However, two sections of the *Criminal Code*, s. 276 and s. 277, limited the admissibility of evidence about a complainant's past sexual conduct. Gayme's lawyer asked the provincial court judge to declare ss. 276 and 277 unconstitutional and allow the cross-examination to proceed. The judge refused the defence's motion (arguing he lacked jurisdiction to make such a declaration), and Gayme was committed for trial.

In 1984, Steven Seaboyer was arrested and charged with sexually assaulting a woman he had been drinking with at a Toronto bar. At the preliminary inquiry for his case, Seaboyer sought to cross-examine the complainant about her previous sexual conduct. Seaboyer and his lawyer argued that the complainant's bruises and other aspects of her physical condition could have been caused by 'other acts of sexual intercourse' (*R. v. Seaboyer* 1991). However, Seaboyer came up against those same two sections of the *Criminal Code*, s. 276 and 277, which limited the use of evidence of a complainant's past sexual conduct. Accordingly, the judge at the inquiry refused to allow the cross-examination and Seaboyer was committed for trial.

Seaboyer and Gayme next turned to the Supreme Court of Ontario to request that their committal for trial be quashed. The judge granted the requests on the grounds that ss. 276 and 277 of the *Criminal Code* did violate the fair-trial guarantees of the Charter of Rights and Freedoms. The Attorney General of Ontario appealed this decision to the Ontario Court of Appeal, which unanimously reversed the lower-court decision in 1987. Seaboyer and Gayme then appealed to the Supreme Court of Canada, and the cases—bundled together because of their similar issues—were heard in 1991.

Arguing before the Supreme Court of Canada were the lawyers for the parties of the case—the two appellants, Seaboyer and Gayme, and the respondent, the Attorney General of Ontario. However, like many other Supreme Court cases since the late 1980s, the parties were not alone. Also submitting briefs<sup>1</sup> to the Court were lawyers for the Attorneys General of Canada, Quebec, and Saskatchewan, as well as lawyers for the two most frequent interest-group participants before the Court: the Canadian Civil Liberties Association (CCLA) and the

Women's Legal Education and Action Fund (LEAF).<sup>2</sup> Did the three governments and two public-interest groups participate because they felt strongly about Seaboyer and Gayme's guilt or innocence on the sexual assault charges? On the contrary, the briefs they submitted to the Court suggest that they had little interest in Seaboyer and Gayme as individuals. Rather these participants were deeply concerned about the Court's decision regarding s. 276 and s. 277 of the *Criminal Code*—Canada's 'rape-shield' provisions. The groups participated in the case in an effort to influence the Court's decision in an area of interest to them.

Subsections 276 and 277 were designed to prevent the cross-examination or the introduction of evidence of a complainant's sexual history during a sexual-assault trial. Specifically, s. 276 placed restrictions on the use of evidence of a complainant's previous sexual activity and s. 277 prevented a complainant's sexual reputation from being used to challenge her credibility. The provisions had been introduced in response to modern-day criticisms of the assumptions behind the traditional common law approach that allowed the admission of such evidence: the belief that a woman who had engaged in sexual activity in the past was more likely to consent to sexual activity and was less likely to speak the truth under oath (*Seaboyer and the Queen* 1987).

Seaboyer and Gayme, supported by the brief of the CCLA for s. 276<sup>3</sup>, argued that the provisions were unconstitutional violations of the Charter's protection of fundamental justice and the right to a fair trial as guaranteed in ss. 7 and 11(d) of the Charter.<sup>4</sup> Why would a public-interest group like the CCLA participate in a case in support of two men accused of sexual assault? The CCLA sees itself as a 'watchdog' guarding against threats to fundamental freedoms, and the group has drawn considerable attention to the rights of the criminally accused. In this case the CCLA argued that s. 276 'arbitrarily and unconditionally excludes evidence which might be relevant to the issue of the guilt or innocence of the accused' (CCLA 1991, 7).

LEAF, by contrast, is an interest group more narrowly focused on the rights of women, and *R. v. Seaboyer* touched on one of LEAF's major concerns: violence against women. As with all of their cases, the group felt the need to participate in order to support the interests of women—something it believes it is in a better position to do than government participants. In *Seaboyer*, LEAF intervened to argue that the rape-shield provisions were necessary to prevent the introduction of evidence that was irrelevant as well as prejudicial to the victim. Their brief suggested that the introduction of such evidence made the complainant rather than the accused appear to be on trial and led to embarrassment that would discourage the reporting of sexual assaults. The group also suggested that 'empirical evidence supports the conclusion that the admission of sexual history in sexual assault trials independently reduces the possibility of conviction and lowers sentences' (LEAF 1991, 11). LEAF and the government participants took the position that a woman's past engagement in sexual activity does not mean she has consented to the activity under investigation.



The Supreme Court thus faced a difficult question that pitted the rights of the accused against the protection of the complainant in one of the most charged areas of criminal law, sexual assault. What did they decide? All four governments and a public-interest group had lined up on one side against the two criminal defendants and another public-interest group. Studies have demonstrated the high rate of success of governments before the Supreme Court (see, for example, McCormick 1993; Haynie et al. 2001);<sup>5</sup> so one might expect their interests to be on the winning side here as well. However, while the Supreme Court did rule that s. 277 did not infringe the Charter (holding there was no connection between a complainant's reputation and her credibility as a witness), it struck down s. 276 as an unconstitutional infringement on the Charter. The Court argued that in excluding evidence of sexual activity s. 276 had gone too far by preventing the use of evidence that might be 'essential to the presentation of legitimate defences. . . . In exchange for the elimination of the possibility that the judge and jury might draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted' (*R. v. Seaboyer* 1991). In the majority's view it was not the evidence that was the problem but rather the misuse of that evidence. Thus s. 276 had excluded evidence that was necessary to a fair trial as guaranteed under ss. 7 and 11(d) of the Charter.

Was *R. v. Seaboyer* unusual for having interest-group participants before the Supreme Court? Since the passage of the Charter in 1982, interest groups have increasingly turned to litigation to pursue their interests. Although LEAF and the CCLA are the two most frequent group participants before the Court, groups of all types and sizes have appeared. Interest-group participation has not been limited to conservative or liberal groups, small or large groups or groups interested in a particular kind of issue. Both corporations and unions litigate, as do environmental groups, civil liberties groups, and social conservatives. Box 7.1 presents a brief description of a sample of organized interests that have participated in trials before the Canadian courts.

#### Box 7.1 A Sample of Organized Interests That Have Appeared before the Courts

**Women's Legal and Action Fund (LEAF)**<sup>6</sup>—Formed in 1985 after the passage of the Charter specifically to protect and further women's equality rights, LEAF litigates in the areas of equality and discrimination, family law, sexual assault, and abortion.

**Canadian Civil Liberties Association (CCLA)**—Formed in 1964 to protect fundamental freedoms, the CCLA litigates in a wide range of issue areas,

including the rights of criminal defendants, minority rights, and freedom of expression.

**Equality for Gays and Lesbians Everywhere (EGALE)**<sup>7</sup>—Formed in 1986 to pursue equality rights for lesbians and gays, EGAL has been involved in nearly all of the major sexual orientation cases before the courts.

**REAL Women**—Founded in 1983, REAL is a socially conservative group with an emphasis on the family. The group has participated in court primarily in cases involving abortion and fetal rights and the rights of same-sex couples (they oppose LEAF in these cases).

**Evangelical Fellowship of Canada**—Formed in 1964, this group is a national association of evangelical Christians. It has appeared in court cases involving religious freedom, genetic and reproductive technology, family law, and the rights of abortion protesters.

**Congress of Aboriginal Peoples**—Founded in 1971 as the Native Council of Canada, CAP represents the interests of Metis and non-status Indians. It has participated in court cases involving a variety of Aboriginal issues.

**Canadian Bankers Association**—Established in 1891, the CBA is the representative body for banks doing business in Canada. The group has been involved in cases dealing with such issues as interest rates, contracts, income tax, banking operations, and the power of banks.

**Canadian Labour Congress (CLC)**—Founded in 1956, the CLC is a national organization of labour unions; the majority of Canadian unions are affiliated with it. The CLC has undertaken litigation in such areas as labour law, collective agreements, freedom of association, and freedom of expression.

**Canadian Medical Association (CMA)**—Formed in 1867, the CMA is the national organization of physicians and medical students. The group participates in court cases dealing with health-care issues.

**Canadian Cancer Society**—Formed in 1938, the Cancer Society is dedicated to fighting the disease and improving the quality of life of the victims of cancer. The group's most high-profile litigation involves the tobacco industry. For example, it has participated in cases dealing with the retail display and commercial advertising of tobacco products.



In *R. v. Seaboyer* both LEAF and the CCLA had participated before a lower court (the Ontario Court of Appeal). It should be noted, however, that most of our information on interest-group participation comes from their appearances before the Supreme Court. Indeed, interest-group participation before lower courts is still much less common in Canada—making *Seaboyer* more of the exception than the rule.

This chapter explores what we know of interest-group participation before the Canadian courts, with frequent comparisons to the United States, where interest-group litigation has been used and studied more extensively. The chapter begins by asking *why* groups would turn to the courts and then examines the various methods they have used in their efforts to influence judges. These methods include both indirect strategies for influencing the courts—such as writing articles for law reviews—and the more common direct strategies: sponsorship of cases and intervention in cases. The bulk of the chapter concerns interest groups as interveners before the Canadian Supreme Court. We focus on this form of participation and on this Court, because up to this point, Canadian interest groups have undertaken intervention more than any other form of litigation, and their intervention has been concentrated more in the Supreme Court of Canada. The chapter concludes with an examination of the success and influence of groups before the courts. There has been widespread criticism of this use of the courts by interest groups in Canada (see for example Brodie 2002 and Morton and Knopff 2000). Have groups achieved what they hoped to before the courts, or has their effect been exaggerated?

### Why Groups Turn to the Courts

Why would interest groups undertake costly and time-consuming litigation?<sup>8</sup> Since all interest groups seek to achieve the collective goals of their group, the most straightforward answer is that the 'primary purpose of litigation is to seek a policy change or to stop a change from taking place' (Berry 1989, 155). But why turn to the courts instead of the executive or legislature? The choice of litigation suggests that the courts are considered to be policy-making bodies. Indeed, as we have emphasized throughout this book, the courts are political institutions that are frequently asked to decide on matters of such national concern as private health care, abortion, same-sex marriage, and the treaty rights of aboriginals. This has been particularly true for the Canadian Supreme Court since the adoption of the Charter of Rights and Freedoms. As Roy Flemming reflects in his study of the Supreme Court's case selection, 'which cases are heard mould the development of the law, but equally important, . . . the choice of cases and the Court's emphasis on particular areas of the law can lead to major public policy changes' (Flemming 2004, 2). American interest groups recognized the power of the courts and began litigating extensively decades earlier, and Canadian groups have been quick to recognize the increased power of the courts in the Charter era and have increased their rate of litigation in response. But even if we acknowledge the policy-making

potential of the courts, why would groups choose this avenue over the more direct (and less-time consuming) access they can have to legislators?

Early on, the American literature suggested a 'political disadvantage theory' for interest-group litigation (see, in particular, Cortner 1968). According to this theory, interest groups litigate because they are unable to penetrate other branches of government. Thus groups look to litigation when 'all else fails' and they are unable to achieve their policy objectives through the more traditional routes such as the legislature (Epstein 1985).

The political disadvantage theory gained a wide following during the civil-rights era and beyond because it did appear to explain much of the early American interest-group litigation. The National Association for the Advancement of Colored People (NAACP) was often the model for this theory. Determined to end segregation and achieve equality for African Americans in the United States, this group was unable to achieve significant gains through the state legislatures or even Congress. Faced with unreceptive audiences in the traditional forums of policy making, the NAACP formed a Legal Defense Fund, the NAACP LDF, to pursue its interests through the courts. Kent Roach believes that a similar situation may have driven Canadian interest groups to the courts at various times. He argues that before the 1980s 'linguistic, religious and racial minorities, women and First Nations all made selective use of litigation . . . when they were faced with prejudice and exclusion in the legislative process' (Roach 1993, 165).

For several years, the political disadvantage theory was the dominant theory in the literature. However, scholars began increasingly to question the accuracy of this theory. In more recent years some authors have suggested it is only a partial explanation and applies only to the experience of groups such as the NAACP LDF,<sup>9</sup> and to the era in which it was litigating (Olson 1990). In 1985, Kim Lane Scheppelle and Jack Walker, Jr attempted to test the political disadvantage theory by using their survey of 892 American interest groups. The authors examined whether groups that were considered political 'outsiders' used the courts more than political 'insiders'. They concluded that although they could not declare the political disadvantage theory wrong, 'it captures only a fraction of the interest group litigation activity' (Scheppelle and Walker 1991, 182). Instead, they found that the groups in their survey that were 'most likely to use the courts [were] the wealthy and established groups that seek court favor for conservative purposes' (Scheppelle and Walker 1991, 182). These were groups the authors considered political 'insiders' because of their success in using the legislative branch to achieve their goals. Lee Epstein also found that the political disadvantage theory provided a poor description of the litigation motivation of conservative groups using the courts in the 1980s (Epstein 1985).

In Canada, after the passage of the Charter of Rights and Freedoms in 1982, many groups that had traditionally been considered politically disadvantaged did turn to the courts in the hopes of achieving gains they had not won through the



legislature. Several authors have written about the Charter era as one where disadvantaged groups have another point of access from which to pursue their goals (Sigurdson 1993; Hein 2000). However, groups that are more often considered politically advantaged (for example, business interests) also litigate frequently (Hein 2000), and there has been increasing notice of the need for resources in order to litigate (Roach 1993). Thus, in Canada many commentators have also suggested that the political disadvantage theory does not provide a completely accurate description of interest-group litigation. (See, for example, Brodie 2002, which provides a lengthy argument against the political disadvantage theory.)

Why else then do groups litigate? Several different answers have been suggested, each likely describing some group's experience. Groups that have traditionally been considered advantaged may litigate in response to successful litigation by those they consider opponents of their causes (Epstein and Kobylka 1992). Particularly if litigation brings constitutional wins for opponent groups, advantaged groups may find their legislative gains erased. Some suggest this helps explain the increase in litigation in the United States by corporations, trade associations, and other like groups in the 1970s (Epstein and Kobylka 1992). Litigating interest groups may even be created by other groups to pursue litigation in response to success by litigating interest groups whose views are contrary to the original groups' interests. In the United States, for example, Pat Robertson's Christian Coalition formed the American Center for Law and Justice to counteract the activities of the American Civil Liberties Union (ACLU) before the courts, and the Pacific Legal Foundation was formed in response to the litigation of liberal environmental organizations (Baum 2001; Lowery and Brasher 2004). Similarly, a substantial pro-life counter-movement was promoted in the courts as well as in the state and national legislatures in the aftermath of *Roe v. Wade*.

Groups that have been able to achieve some gains in the legislature may also litigate in order to protect those gains, since court victories are not as likely as legislation to change with the next election (Scheppelle and Walker 1991). In fact, the lengthy terms served by judges and their attention to precedent suggest that most court decisions will have a long-lasting impact on a policy issue. Groups may want to participate in cases in the issue areas of interest to them to influence the direction of those long-lasting decisions. The groups may also be drawn into litigation to defend previous wins—either in the legislature or the courts—or to protect a policy that is favourable to their cause and that is being challenged. LEAF, for example, was drawn into the *Conway v. Canada* case (also known as *Weatherall v. Canada* 1993) when a male inmate challenged the constitutionality of a policy allowing female guards in male prisons but not male guards in female prisons. LEAF participated to protect the employment opportunities of the female guards (given that the number of male prisoners is several times that of female prisoners) while arguing that allowing male guards in female prisons would 'exacerbate social disadvantage' (LEAF 1993, 10) since women are more threatened by the power

imbalance and fear of sexual violence. Thus, the group went to court to protect a policy that favoured its interests.<sup>10</sup>

Whether they litigate primarily for offensive or defensive reasons, the underlying motivation of an interest group's decision to litigate is the belief that the court is considering an issue important to its members. It may be that they participate primarily to receive publicity for their group and its position on the issue or to demonstrate to their members their activity in the area (Epstein and Rowland 1991). However, for most groups, influencing policy that is important to their members is probably at the forefront of their goals. Lee Epstein argues that groups go to court 'because they view the courts as just another political battlefield, which they must enter to fight for their goals' (Epstein 1985, 148).

### Indirect Strategies for Influencing the Courts

Interest groups' efforts to 'fight for their goals' and influence policy take a different form before the courts than before legislatures. Direct lobbying of individual judges is not possible because personal contact between judges and the participants in the cases before them is highly improper. This means that the more common lobbying routes of persuading decision makers through close and regular contact and by 'winning and dining', granting favours, and making campaign contributions are impossible in Canada's courts (although campaign contributions to judges are possible in the United States since several states have elected courts). Interest groups are instead confined primarily to submitting legal briefs to the courts and making oral arguments before them.

However, there are a few indirect strategies that interest groups can use. The Canadian women's interest group, LEAF, was formed in response to a study commissioned by the Canadian Advisory Council on the Status of Women. This study, *Women and Legal Action: Precedents, Resources and Strategies for the Future*, recommended the formation of a legal action fund to litigate systematically on behalf of equality, but it also argued the group should make efforts to inform the media and 'educate' lawyers and the judiciary (Atcheson, Eberts and Symes 1984, 171). This suggests one form of indirect strategy for an interest group: attempting to influence judges by shaping their perspective on the law. One way interest groups do this is by writing articles for law reviews in which they evaluate the work of the courts and present arguments for the 'correct' legal interpretation for their issue areas. Judges are part of the legal community, and law reviews—particularly their evaluations of judicial decisions—are thought to be noticed by the judges<sup>11</sup> (Baum 2006, 100). There is also evidence that judges use law reviews 'to provide themselves with the legal reasoning to move in a new direction and to bolster their position on a case' (Schlozman and Tierney 1986, 363). This may have been particularly attractive to Canadian judges facing cases under the new Charter of Rights and Freedoms in the 1980s. Greene et al. (1998, 150) note a dramatic



increase in Supreme Court citations to academic articles and legal periodicals between the late 1960s and the 1990s. The leaders of the Supreme Court in the early Charter years may have been predisposed to view legal articles favourably. Bora Laskin, who was Chief Justice in the early years of the Charter (until 1984), had been a law professor before becoming a judge, and this type of legal background became increasingly common during and after his tenure.<sup>12</sup> Of course, even justices who were not previously law professors may have viewed legal articles favourably in those early Charter years. For example, Brian Dickson, Chief Justice from 1984 to 1990, 'admired legal academics and was always interested in any assistance that their writings could provide' (Sharpe and Roach 2003, 203).

'Law review lobbying', where legal experts affiliated with (or sympathetic to) particular groups publish articles in law reviews arguing in favour of particular legal interpretations, has been practised by groups in the United States for decades (Schlozman and Tierney 1986, 363). As suggested above, interest groups use this strategy to build credibility and support for their positions. One American group that has been credited with using law reviews successfully to help achieve its goals is the NAACP. Beginning primarily in the 1940s, that group made an effort to get large numbers of favourable law-review articles published in the time leading up to its litigation in an area. The group hoped that judges would see an increase in support for its position and be persuaded to change existing unfavourable precedents (O'Connor 1980; Vose 1972). The Women's Rights Project (WRP) has also made extensive use of legal writing to advance its positions on legal issues. When the future US Supreme Court Justice Ruth Bader Ginsburg was a co-director of the WRP she frequently wrote legal articles about sex discrimination, in addition to making presentations to law students, professors, and lawyers (Cowan 1976). Again the hope was to influence the viewpoint of judges who would later hear these kinds of cases in their courts.

In Canada, LEAF in particular has attempted to 'influence the influencers' through legal writing, including law reviews, other articles, and books. The importance of this strategy to this group was emphasized from the start (Razack 1991), and its annual reports outline the legal writing undertaken by its members that year. The amount of material published by women associated with LEAF is extensive and covers a wide range of issues with an emphasis on equality. Their efforts have not gone unnoticed. In the *Seaboyer* case discussed above, the dissent cites the work of a legal academic (Elizabeth Sheehy) who has consulted for LEAF on cases, and through the years, the Supreme Court has in its majority opinions cited other academics associated with LEAF (for example, Shelagh Day, Gwen Brodsky, and Marilou McPhedran). LEAF is not alone in its use of this strategy, however, for law professors and lawyers affiliated with various other interest groups appear to have recognized the potential for legal writing in furthering their views (see for example, work by Alan Borovoy of the Canadian Civil Liberties Association).

Interest groups may also try to influence judges by participating in judicial education seminars (see Chapter 6). In Canada, an independent and non-profit organization, the National Judicial Institute (NJI) was formed in 1988 to provide judicial education. The NJI offers courses in the craft of judging, education in substantive law, and social-context education. Particularly in the social-context area, the NJI consults with legal academics who teach and do research in the area of interest (for example gender) and with groups that are part of the relevant community (Swinton 1996). Several people have both participated in interest groups and served as speakers at the National Judicial Institute.<sup>13</sup> This suggests another avenue by which interest groups can present their perspective to judges.

In the United States, interest groups have also devoted significant attention to an additional indirect strategy for influencing the federal courts. Particularly at the Supreme Court, groups have become increasingly active in the judicial selection process. Federal judges in the United States are nominated by the President and confirmed by the Senate. Although the emphasis tends to be on the confirmation stage, groups that are important to the President are thought to be active in the first step of the process, lobbying the executive for the 'correct' selection. Some argue that socially conservative groups were particularly active in the Supreme Court nominations of 2005 and 2006 (Baum 2007, 31). For the position of Chief Justice, the groups started early criticizing one potential candidate, Attorney General Alberto Gonzales, for his moderate views. In the end, President Bush nominated John Roberts—a candidate the administration had worked hard to sell to conservative groups over the previous year (Baum 2007; Kirkpatrick 2005).

Interest-group involvement at the confirmation stage has increased significantly since the 1960s with many groups dedicating significant time and money to influencing the ultimate vote on a candidate. Groups lobby senators by giving them information about the preferences of their constituency or the possible policy consequences of having the nominee on the bench. They run advertisements for or against the nominee and organize grassroots campaigns that send out special mailings and leaflets and organizing letters (Caldeira, Hojnacki, and Wright 2000). Several groups also testify at the confirmation hearings held by the Senate Judiciary Committee. Interest-group activity can make a significant difference in the outcome of a nominee (Caldeira and Wright 1998). For example, group activity is thought to have helped prevent the confirmation of Robert Bork in 1987 and to have mobilized significant opposition to Clarence Thomas and Samuel Alito (48 out of 100 Senators voted against Thomas and 42 against Alito) (Baum 2007).

In Canada, interest groups have not participated in the judicial selection process in the same way. The process itself is significantly different, and there have not been the access points to encourage groups to build the necessary resources for such a campaign. However, with changes to the selection process expected in the future (including perhaps a more American-style confirmation process—see Chapter 5), this may become another avenue that Canadian groups follow in



order to influence the courts. F.L. Morton and Rainer Knopff (2000) suggest that some groups may already be doing this. Morton and Knopff point to a memo written by EGALÉ to its supporters in 1997 listing potential candidates<sup>14</sup> for a Supreme Court vacancy and asking supporters for any information they had about them. The memo emphasized how 'vitally important' it was for GLB (gay-lesbian-bisexual) communities 'that LaForest be replaced by someone more committed to equality issues' (Morton and Knopff 2000, 107). This implies, at least, that EGALÉ intended to attempt to influence the selection process—efforts that will no doubt increase with future vacancies.

### Direct Strategies for Influencing the Courts— Sponsorship of Cases

Of course, the most common way that interest groups try to influence the courts is through litigation in actual cases. Litigation by interest groups differs from that by individuals in that groups are rarely the parties in a case. The ability to bring a case before the courts is governed by the rules of standing, which although liberalized by the Canadian Supreme Court in recent decades, still present significant hurdles to group activity. As noted in Chapter 3, the current rules were established in three cases (*Thorson*, *McNeil*, and *Borowski*) in the late 1970s and early 1980s. These rules enable a public-interest group to bring a case if three criteria are met: a serious issue is at stake, the group attempting to bring the case has a genuine interest in the issue and, finally, there is no other 'reasonable and effective' method for bringing the issue before the courts. In 1981, the liberalized rules allowed Joseph Borowski (who was neither a doctor nor a pregnant woman) to proceed with his challenge to Canada's abortion law as a violation of the 'right to life' (since it allowed some abortions to proceed). However, the Court still prefers parties that are more directly affected by an issue, and interest groups have had some difficulty meeting the third requirement, that is, that there be no other reasonable and effective method of bringing the issue before the courts (see for example *Canadian Council of Churches v. Canada* 1992 and *R. v. Morgentaler*).<sup>15</sup>

Therefore, instead of acting as a party in a case, groups generally pursue litigation by either sponsoring cases or intervening in existing cases. An interest group sponsors a case by providing the financial backing and legal representation for a party bringing a case; a group intervenes when it obtains the court's permission to submit a brief in a case where it is not a direct party, and thereby presents the group's arguments on the legal issues before the court.

The Canadian women's group LEAF, one of the most frequent interest-group litigators before the courts, was created to pursue litigation through case sponsorship. The group wanted to 'assist women with important test cases and to ensure that equality rights litigation is undertaken in a planned, responsible and expert manner' (Fudge 1987, 487). Case sponsorship allows groups more control over the

arguments presented to the court and, ideally, over the order in which issues are brought before the court—ensuring that the court sees only the issues it is ready to decide in a favourable way. The American NAACP LDF has been the model for many groups in its pursuit of sponsorship. Particularly in its education litigation, this group chose cases carefully to allow for a step-by-step dismantling of the 'separate but equal' doctrine. Cases with desirable characteristics were chosen in order to build up favourable precedents and force the US Supreme Court to confront the group's ultimate goal—the overruling of the separate-but-equal precedent and the end of segregation. Inspired by the success of the NAACP LDF, American women's groups tried to emulate the group's strategy. LEAF, arriving on the scene much later than the American groups, deliberately patterned its strategy after that of the NAACP LDF and what was probably the most successful American women's group of the time, the Women's Rights Project (Atcheson, Eberts and Symes 1984).

Although the advantages of sponsorship have made it a preferred litigation strategy for many groups, few groups actually undertake it, and women's groups in both the United States and Canada have had difficulty doing so. Sponsorship is a long-term strategy, and the planning and litigation required by this strategy requires extensive resources and time. The successful campaign launched by the NAACP LDF, as described above, took fifteen years and over \$500,000 before the group achieved its ultimate goal in 1954 with *Brown v. Board of Education* (Lowery and Brasher 2004, 237; Schlozman and Tierney 1986). In addition, since the goal of sponsorship is usually to build a favourable precedent in an issue area, the success of this strategy is affected by the ability of the group to control the litigation field. The NAACP LDF was able to bring before the courts favourable-fact cases that gradually chipped away at the separate-but-equal doctrine. With offices in many of the places that had a high African-American population, the group was able to hear of potential lawsuits, offer its assistance, and control the timing of cases. Individual African Americans in the early period were also less likely to have the financial means to bring cases on their own. This meant that, although the process was impossible to fully control, the NAACP LDF had a relatively high success rate in controlling which cases went before the courts in its issue areas of interest (Wasby 1988).

Other groups, however, have not enjoyed that same success. These groups often find themselves surprised by cases brought by litigants in their issue area, cases that either have less than favourable facts—making a favourable court decision less sure—or have been brought too early, before the courts are ready to take a step in that direction. For example, women's groups interested in liberalizing a country's abortion law would probably prefer the party in the case they sponsor to be pregnant as a result of rape or incest, rather than to be surprised by a case brought by a pregnant woman who is litigating because she does not want to have another child for economic reasons.<sup>16</sup>

The difficulty of having other litigants in the field and the extraordinary resources needed to sponsor cases has meant that this strategy has not been



extensively used by Canadian interest groups. EGALÉ, for example, found it very difficult to control the litigation area in its pursuit of equality rights for gays and lesbians. EGALÉ was often surprised by cases brought by individual litigants (see the discussion in Miriam Smith 2005, 340). And the National Citizens Coalition discovered how costly sponsorship could be in the 1991 case, *Lavigne v. Ontario Public Service Employees Union*, when it sponsored Lavigne's challenge to mandatory union dues (Lavigne disapproved of how some of the union dues were used). Sponsoring Lavigne, the NCC not only lost the case, but was also required to pay the costs of the union it had challenged, and—more unusually—the costs of unions acting as interveners in the case (for example, the Canadian Labour Congress). Even LEAF, which was formed with sponsorship as a litigation objective, recognized very early the difficulties of litigation and the need to be open to alternatives (Eberts 1986; Atcheson, Eberts, and Symes 1984). Indeed, though the group has sponsored cases in the lower courts,<sup>17</sup> it has sponsored only one (*Schachter v. Canada* 1992) of the forty cases it has participated in before the Supreme Court of Canada.

### Direct Strategies for Influencing the Courts— Intervention in Cases

Most interest groups that litigate before the courts do so as interveners—a less costly alternative to sponsoring a case.<sup>18</sup> As mentioned above, intervention requires an interest group to obtain the court's permission to submit a brief in an existing case. Thus, this form of interest-group litigation requires less direct involvement by the groups but still allows groups to alert the justices to particular legal interpretations in their issues of interest. Although interveners have long been recognized in Canada<sup>19</sup>—they are even mentioned in the Supreme Court's 1878 rules—interest groups made only infrequent use of intervention in the years before the Charter (Brodie 2002). Though this is no longer the case (the history and frequency of interventions are discussed below), the practice is still much more recent here than in the United States. Much of what we know about such interest-group activity comes from studies of American groups. *Amicus curiae* is the term used in the United States for interested third parties that intervene in a case. Literally meaning 'friend of the court' *amicus curiae* were originally intended to aid judges with their decisions. Today amici in the US tend to be friends of one of the parties. The vast majority of amici write briefs that state their support for either the appellant or respondent right on the front page of the brief.

In Canada, interveners are also more likely to support a party than to be neutral. Some Canadian judges have expressed concern about this position taking by interveners in the briefs they submit to the court. For example, former Supreme Court Justice John Major publicly lamented the tendency of interveners to support one party or the other. Major argued that interveners should take a more 'objective approach'. He suggested that 'those interventions that . . . align their argument to

support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. . . . The anticipation of the Court is that the intervenor remains neutral in the result, but introduces points different from the parties and helpful to the Court' (as quoted in Crane and Brown 2004, 276).

### History of Intervenors before the Courts

As mentioned above, third-party intervention has been common in the United States. Indeed today well over 90 per cent of cases before the American Supreme Court have *amicus curiae* participation (Epstein et al. 2006). Other countries' courts have been slower to allow these interventions. Most Commonwealth countries have 'a relatively undeveloped system of public interest intervention' (Clark 2005, 72). In Britain it is only in the past six or seven years that third-party interventions have become common (Arshi and O'Cinneide 2004, 69–70). In New Zealand this form of participation is just beginning (Clark 2005, 74) and in Australia the policies regarding third-party intervention are still more restrictive (Clark 2005, 74, 83).

The rules of intervention in Canada were left nearly unchanged in the 100 years following their first enactment in 1878 (Rule 60 of the *Supreme Court Rules*) (Welch 1985). According to those original rules, interested parties could intervene by leave of the Court or a judge 'upon such terms and conditions and with such rights and privileges as the Court or Judge may determine' (Welch 1985, 215). However, it was primarily governments that were granted the right to intervene before the courts under Rule 60; interest groups were confined to participation in an occasional reference case (Welch 1985). In the 1970s the Supreme Court attracted attention when it allowed interest groups to intervene in two non-reference cases: one dealing with the right to equality, *Attorney General of Canada v. Lavell* (1974), and a second involving the abortion issue, *Morgentaler v. the Queen* (1976). This increased openness to interest-group interveners, which continued into the early 1980s, was primarily due to the attitudes and influence of Chief Justice Bora Laskin.

In 1983, the Supreme Court changed its rules of intervention. The new Rule 32 gave governments the 'right to intervene' in cases where a constitutional question had been stated. Governments merely had to file a notice stating their intention to participate in such a case. The new Rule 18 also gave an automatic right to intervene to any group that had participated as an intervenor before a lower court (see Welch 1985 for a detailed description of these rule changes). However, these rules were short-lived, and by December 1983, the Court had rescinded the automatic right to intervene for interest groups participating at lower courts and suggested that group participation in 'purely criminal appeals' would not be allowed (Welch 1985, 219). Thus despite the promise of the rule changes in 1983, and the passage of the Charter, interest-group access to the Canadian Supreme Court actually became more restricted in the early to mid-1980s.<sup>20</sup>



In 1984, Supreme Court Justice Bertha Wilson argued for allowing more interventions before the Supreme Court. She argued that this would 'assist in legitimizing the Court's new role through a more open and accessible court process, and it would go part way to solving the counter-majoritarian problem which some see as inherent in judicial power' (Sharpe and Roach 2003, 385). However, Wilson's colleagues on the bench were less favourable to the idea. Some were concerned about the Court's new role under the Charter and felt participation by interest groups and other non-parties would distract the Court from following legal principles when deciding cases (Sharpe and Roach 2003, 384). Others were concerned about the time such interventions cost the Court and the complexity they added to the case. In 1985, Justice William Estey argued that 'this Court no longer has the time to fritter away sitting and listening to repetition, irrelevancies, axe-grinding, cause advancement, and all the rest of the output of the typical intervenant' (Sharpe and Roach 2003, 385).

After the gains they had made in the 1970s, interest groups were dismayed with the more restricted access they again faced in the early 1980s. In response, they launched a campaign to lobby the Court to allow more interventions. For example, Alan Borovoy of the CCLA submitted a brief to the Court asking it to rethink its decision to prevent his group from intervening in an early Charter case. Borovoy argued that 'the entire community will be increasingly affected ... by decisions of the Court [and thus] larger sections of the community should be able to participate in the process which produces those decisions. [He suggested] a more inclusive process was required to ensure public respect for both the Charter and the Court' (Sharpe and Roach 2003, 386). Articles also appeared in law reviews and other academic outlets criticizing the Court's closed-door approach to interveners (see for example Welch 1985 and Bryden 1987).

After a *Globe and Mail* article reported the criticism of the Court's approach to non-government intervention, Chief Justice Brian Dickson scheduled the issue for discussion at the Court's next conference (Sharpe and Roach 2003, 388). Presumably as a result of this discussion, the justices asked the Supreme Court's Liaison Committee to the Canadian Bar Association to study the issue and make recommendations. The committee received submissions from various interest groups, including the CCLA and LEAF, which argued for a more open-door policy to interest-group interveners (Brodie 2002). These groups were disappointed with the committee's recommendation, which would have required interest groups to demonstrate that the parties in the case would not adequately represent a group's interests and legal arguments. However, the new rule on intervention adopted by the Court in 1987 was more permissive, allowing interest-group intervention as long as groups could demonstrate their 'submissions would be useful to the Court and different from those of the other parties' (Sharpe and Roach 2003, 389). This new rule also reaffirmed the right of Attorneys General to intervene in constitutional cases. After 1987, interest groups were granted permission to intervene at a

much higher rate—several groups, such as the CCLA and LEAF, achieved routine acceptance by the Court.

In a 1999 case, *Lovelace v. Ontario*, the Supreme Court appeared to qualify slightly its acceptance of interveners. In that case the Court denied intervener status to several groups and denied others the right to make oral arguments before the Court. This case created a two-step process that was codified into law in 2002. Interest groups must first obtain the Court's permission to intervene in a case. The Court later decides whether oral arguments will be allowed and, if so, how long they may be (Crane and Brown 2004, 274–5).

These modest rule changes may reflect further changes in judicial attitudes. In interviews with Canadian judges, Greene et al. discovered that for Quebec Court of Appeal judges at least, opinion was divided about the appropriateness of 'the use of the courts by social and public-interest groups to achieve social change' (1998, 97). Judges who expressed support for such activity by groups argued that judges could keep it in check by denying standing to groups without real interest in a case. Judges who were less in favour of such activity tended to distinguish between public and private law cases. These judges saw fewer problems with allowing such intervention in public law cases (involving governments) than they did in private law cases.<sup>21</sup> Since private law cases involve parties that are individuals or corporations, these judges expressed reservations about allowing groups to participate since such participation could increase the length of the trial and thus the costs (Greene et al. 1998, 97).

The Supreme Court justices interviewed by Greene et al. were asked to rate the appropriateness of the use of the court by social and public-interest groups. On a scale of 1 to 5 (with 5 being 'extremely appropriate'), the responding justices gave an average response of 3.5 (Greene et al. 1998, 127). In the interviews, a few of the justices suggested that these groups could be helpful for the information they provide the court and another justice thought the participation was appropriate since the court was 'part of the democratic process' (Greene et al. 1998, 127).

In a 2000 interview with the *National Post*, Chief Justice Beverley McLachlin stated that 'many times the cases that come before us ask us to make rulings that affect not only the parties but a wide range of other people. So it's only just and fair that we allow those other people to present their viewpoints' (Chwialkowska 2000). However, in that same interview with the *National Post*, Justice Bastarache took a less favourable position toward group intervention. He suggested that the information provided by interveners may not be as necessary today as it may have been when the Charter was enacted in 1982. Indeed, Bastarache argued that 'there is some reason for us to reconsider our general policy on interveners simply because of the fact that we have lived with the Charter for 18 years and we have a lot of experience in interpreting the Charter' (Chwialkowska 2000). Justice Major, who appeared to agree with Bastarache in the interview, suggested that 'what has probably been a mistake is that we've opened the door probably too widely to interveners' (Chwialkowska 2000).



### Debate on Intervener Participation

These differing judicial attitudes towards interveners are mirrored in the academic literature. There is a debate as to whether the participation of interest-group litigants is problematic for democratic governance. Morton and Knopff, two leading critics of interest-group litigation before the courts, argue that Canadian courts have been 'pushed' by a 'Court Party' towards a rights revolution (2000, 24). This 'Court Party' is a political minority made up of networks of individuals and groups (of which the CCLA and LEAF are two prominent members) that want to 'constitutionalize policy preferences that could not easily be achieved through the legislative process' (Morton and Knopff 2000, 25). Work by Morton and Knopff and Ian Brodie among others argues that the Supreme Court in the Charter era has used interest groups for cover when pursuing judicial activism—to portray itself 'as the defender of disadvantaged groups . . . [a move] that insulates the Court from criticisms of its activism . . . [since] criticizing the courts would be criticizing the disadvantaged' (Brodie 2002, xvii). Through this the Court has used judicial review to extend the power of the state and promote social reform. Critics of interest-group litigation argue that the groups litigating most often in Canada are anything but disadvantaged.<sup>22</sup> These groups have circumvented the legislature to achieve tremendous policy gains and in doing so have helped courts elevate themselves far above their traditional role in a liberal democracy.

Supporters of interest-group litigation counter that litigation by groups such as aboriginal peoples, civil libertarians, LEAF, and EGALE—what Gregory Hein (2000) calls 'judicial democrats'—can actually enhance democracy. Judicial democrats believe that litigation and court action are necessary to ensure the protection of minorities—particularly unpopular minorities—from action by unrepresentative legislatures whose majorities are 'more apparent than real' (given plurality elections) and that have a history of not being equally accessible to everyone (Hein 2000, 20). Indeed, these groups suggest that 'litigation has the potential to make our public institutions more accessible, transparent and responsive, if courts hear from a diverse range of interests, guard fundamental social values and protect disadvantaged minorities' (Hein 2000, 19).

### Intervener Participation before the Supreme Court in the Charter Era

Since most research on the practice of intervention in Canada has been directed at the Supreme Court, less is known about such activity in the lower courts. But what we do know points to less interest-group activity in the lower courts, particularly at the trial level. Although groups like the CCLA and LEAF have been interveners before lower courts, as a rule, interest groups pay more attention to appellate courts, especially the Supreme Court, because it sits at the top of the judicial hierarchy. Our discussion of interveners has also concentrated on their

participation at the 'merits stage' of a case (once the Court has agreed to hear a case) rather than at the earlier leave-to-appeal stage (where a party asks the Court to hear a case on appeal). Though it is theoretically possible for a group to be granted the right to intervene at the application-for-leave stage, this is a very rare occurrence. Supreme Court justices have discouraged this type of participation, and group involvement has come almost exclusively after this stage (Flemming 2004; Crane and Brown 2004).

Table 7.1 presents the percentage of cases actually accepted by the Supreme Court that had intervener participation in the year preceding and the ten years following the Supreme Court's changes to the rules on intervention. One can see that in the early years of the Charter, cases with government interveners were far more common than those with non-government interveners. However, as time went on, the percentage of cases with non-government interveners increased steadily, and for some parts of the 1990s these participants were present in a higher percentage of cases than governments. While this ten-year snapshot is meant to demonstrate the patterns of intervention after the rule changes, the actual number

**Table 7.1 Percentage of Supreme Court Cases with Interveners by Type, 1986–97**

	Non-Government (%)	Provincial Governments (%)	Federal Government (%)
1986	5.4	13.5	12.2
1987	2.2	17.6	11.0
1988	6.8	17.5	16.5
1989	8.7	20.5	12.6
1990	8.4	32.1	23.7
1991	16.0	17.0	11.0
1992	19.6	15.7	15.7
1993	13.0	16.0	11.5
1994	17.0	10.4	10.4
1995	18.4	18.4	11.7
1996	17.4	15.7	9.1
1997	17.3	7.1	5.4

**Note:**

All cases are included with the exception of reference cases, motions, and rehearings.



of interventions by non-government interveners has increased in the years since 1997. For example, of the fifty-nine cases decided in 2006, over 40 per cent had non-government interveners (government interveners remained relatively constant with percentages in the mid-teens).<sup>23</sup>

Table 7.2 examines the rate of participation of non-government interveners in more detail. This table illustrates the increase in the number of briefs submitted by non-government interveners in the ten years after the 1987 rule change. It also presents the total number of non-government interveners participating in cases each year. This latter number suggests that most briefs were signed by more than one intervener. The numbers have remained relatively consistent in the years since 1997. In the cases decided in 2006, for example, sixty-five non-government intervener briefs were filed and eighty-eight interveners appeared before the Court. These numbers are comparable to the higher numbers seen in 1996 and 1997.

**Table 7.2 Non-government Intervener Participation in Cases before the Supreme Court, 1986–97**

	# of Cases with Non-govt. Interveners	# of Briefs with Non-govt. Interveners	Total # of Non-govt. Interveners
1986	4	8	10
1987	2	2	2
1988	7	9	19
1989	11	26	29
1990	11	34	55
1991	16	28	37
1992	20	38	66
1993	17	44	60
1994	18	32	50
1995	19	43	69
1996	21	65	95
1997	17	49	84

**Notes:**

1. All cases decided each year are included, with the exception of reference cases, motions, and rehearings.
2. The government label is used only for interveners represented by a provincial or federal Attorney General or the corresponding justice department. Thus, some entities, such as Canada Post, that operate—and litigate—more at arm's length from the government may be included in the non-government numbers.

The vast majority of these non-government interveners are individuals or corporations. However, these participants usually appear before the Court only once; they do not undertake systematic litigation. Public-interest groups, by contrast, participate in many cases as they try to advance their interests. The non-government intervener with the highest rate of intervention from 1986 to 1997 was LEAF, followed by the CCLA. Other interest groups that participated relatively frequently in these years included such wide-ranging organizations as the Coalition of Provincial Organizations of the Handicapped, REAL Women, the Fisheries Council of British Columbia, the Canadian Jewish Congress, the League for Human Rights of B'Nai Brith, and Alliance Quebec.

Of course litigation in any form is expensive. Though intervention is a less costly alternative to sponsoring a case, it still requires a substantial amount of money. In his study of the 'rights revolution' in countries such as the United States, Britain, India, and Canada, Charles Epp points out that rights advocacy groups in Canada have benefited from government funding (1998). Through avenues such as the Court Challenges Program, groups like LEAF have received financial support for their litigation. Box 7.2 outlines the time line of the Court Challenges Program—a program that has been the focus of controversy for its funding of interest groups.

**Box 7.2 The Court Challenges Program**

**1978**—Court Challenges Program established by Prime Minister Trudeau to provide funding to those wanting to challenge Quebec language legislation in court.

**1985**—Prime Minister Brian Mulroney extends the mission of the program to include funding of litigation challenging federal legislation on the basis of equal rights.

**1992**—The program falls victim to budget cuts by the Mulroney Conservative government.

**1994**—The Liberal government re-establishes the Court Challenges Program as a 'national non-profit organization . . . set up . . . to provide financial assistance for important court cases that advance language and equality rights guaranteed under Canada's Constitution' ([www.ccppcj.ca](http://www.ccppcj.ca)).

Funding is provided for case development and for case funding. To qualify for funding, a case must test equality rights under the Charter and must



'improve the way the law works for people who have suffered discrimination' (www.ccppcj.ca).

**1994–2006**—The Court Challenges Program comes under increasing criticism primarily from social conservatives who argue the program has been 'captured' by rights advocacy groups. Conservative groups such as REAL Women point out the difference in funding levels between themselves and groups like LEAF.

**2006**—The new Conservative government cancels the Court Challenges Program.

As noted in Box 7.2, the Court Challenges Program was set up by the federal government to fund groups challenging legislation (either on the basis of language or equality rights). Official-language minority groups and public-interest groups such as LEAF benefited tremendously from the program and lobbied hard for its continued survival. Some argue the program was captured by these groups, noting that—at least in its post-1994 form—its board of directors included some language-rights activists and some equality-rights activists (Morton and Knopff 2000; Brodie 2002). Indeed Ian Brodie argues that the program became more autonomous from government over the years and was instead controlled by its beneficiaries (2002, 116). Brodie and other critics have suggested that the funding decisions of the Court Challenges Program have tended to favour rights claimant groups over conservative groups, noting cases where LEAF was funded but REAL Women (LEAF's conservative counterpart) was not. Using arguments similar to those used to question the participation of interest groups before the courts, these critics question the propriety of government funding for groups that are challenging government legislation—particularly when that support does not extend to all groups. The Court Challenges Program was cancelled by Stephen Harper's Conservative government in 2006. Interestingly, Ian Brodie had left academia and was serving as Harper's Chief of Staff when the program was cancelled.

### Success and Influence of Interest Groups at Court

As we have pointed out, the direct strategy of intervention has been the most common route by which interest groups pursue their interests in court. Two questions remain: have groups been successful in achieving their goals before the courts, and is any success they have enjoyed a result of their influencing the justices and their decision making? These questions are probably more complicated than they appear. First, one must ask what constitutes a group's success? Some groups may

litigate in order to achieve publicity for their issue area of interest or to satisfy their members that they are active in that issue area. However, researchers usually focus on a more common definition of litigation success: winning a case.

Of course, what constitutes winning a case is also a matter of debate. In the 1988 *R. v. Morgentaler* case, the Supreme Court struck down Canada's abortion law. The outcome of this decision was considered a victory for pro-choice groups. However, the case doctrine left less room for celebration by these groups. Four of the five justices making up the majority in the case struck down the law on procedural grounds, and at least two of these justices explicitly suggested a remedied law would pass constitutional scrutiny. Only one justice, Justice Bertha Wilson, argued that women have the right to an abortion. Thus a win on outcome was not equalled by a clear win on reasoning, with the result that future decisions in the area were more uncertain; the 'right' outcome does not ensure the 'right' result in the future if the 'right' reasoning is not there to support it.

Most studies of interest-group litigation focus on case outcome in their analysis. However, studies that distinguish between outcome and doctrine often discover a different level of success for each. For example, a study of LEAF's success before the Supreme Court discovered that the group was more successful in achieving favourable case outcomes than it was in achieving favourable case doctrine (Hausegger 1999). The case presented at the beginning of this chapter is an example. In *R. v. Seaboyer*, the Supreme Court dismissed the appeal of the men accused of sexual assault—a win for LEAF in terms of case outcome. However, in their decision, the Court struck down s. 276 of the Criminal Code (one of Canada's rape shield laws) as a violation of the Charter. This reasoning was directly contrary to LEAF's interests. Nevertheless, LEAF has been quite successful in terms of doctrine—enjoying a 78 per cent success rate in cases it participated in during the 1980s and 1990s (Hausegger 1999; see Manfredi 2004 for similar findings).

Morton and Allen (2001) argue that even when LEAF and other feminist organizations have lost before the Supreme Court, most of those losses have not resulted in an unfavourable policy change. These authors argue that feminist groups have been successful in instigating changes by governments towards the groups' favoured policy. For example, after their 'loss' on doctrine in *R. v. Seaboyer*, LEAF turned to Parliament for a remedy. The group was able to have some input in a new sexual-assault law—a law that so pleased women's groups that feminists suggested *Seaboyer* may have been a 'blessing in disguise' (Morton and Allen 2001). Miriam Smith makes a similar observation in her study of lesbian and gay rights in Canada. She suggests that some litigation losses might actually help groups by raising awareness of an issue and mobilizing the community to pursue political action (1999, 46–55).

Though LEAF has been the focus of several studies, it may not be the most representative group in terms of success. Scholars have long noted the influence of different resources on the success of parties before the courts, and studies have



shown that repeated appearances before a court allow parties to build up experience, creating 'repeat players' that are advantaged in their litigation (Galanter 1974). As the most frequent interest-group litigator before the Supreme Court, LEAF should enjoy more success than some of its counterparts. Individuals and groups that appear before the Court only once are unlikely to have the expertise or relationship with the Court that benefit repeat players. However, even LEAF probably does not enjoy as much success as the ultimate repeat players before the courts: governments. As noted in the next chapter, several studies have found the American federal government to be particularly advantaged before the courts (see for example, Songer, Sheehan and Haire 1999; Salokar 1992), and the Canadian governments also appear to enjoy high levels of success (McCormick 1993; Haynie et al. 2001). In a study of cases heard by the Canadian Supreme Court from 1949 to 1992, Peter McCormick discovered that the Crown<sup>24</sup> was the most successful litigant, followed by the federal government, big business, and provincial governments (1993, 532). As LEAF has usually intervened on the side of government parties (Manfredi 2004), the group may also be benefiting from the repeat-player status of the governments.

### Influence

As the last statement suggests, success does not equal influence, and 'being on the winning side may have more to do with the type of litigants amici [interveners] choose to support than any effect of amicus [intervener] participation' (Songer and Kuersten 1995, 36). How might interest groups achieve influence over the justices' decisions? The groups are thought to gain influence by providing information to the justices. This information may be data and arguments unique to the groups' briefs that enable the courts to decide cases involving new issues such as those involving the Charter in the 1980s. Jerry DeMarco (2005), for example, partly substantiates his arguments that interveners have played a 'substantial role' in shaping environment-law decisions before the Canadian Supreme Court by pointing to the fact that the Court has referred to authorities that were cited only in intervener factums. Box 7.3 describes one of the most prominent examples of this type of influence which occurred in a US case, *Mapp v. Ohio*.

#### Box 7.3 *Mapp v. Ohio* (1961)

In 1957, Ohio police officers attempted to enter Dollree Mapp's home to search for a fugitive accused of bombing the house of Don King (who later became a high-profile boxing promoter). Mapp refused them entry, and the police left, only to return three hours later with more officers. When Mapp

did not answer the door, the officers opened it 'forcibly'. When Mapp demanded to see the search warrant, the police waved a piece of paper at her. A scuffle then broke out between Mapp and the police, Mapp grabbing the paper and shoving it down her blouse and the police retrieving it and restraining her. At the same time Mapp's lawyer arrived at the house but was refused entry by the police. The police proceeded to conduct a thorough search, which included looking in dresser drawers and photo albums. In the process the police discovered obscene material the possession of which was illegal under Ohio law. At trial, the search warrant was not produced, and the trial court stated there was 'considerable doubt as to whether there ever was any warrant for the search of [the] defendant's home'. Nevertheless, Mapp was convicted of possession of obscene material.

Mapp then appealed her conviction to the Supreme Court. In their briefs to the court, both Mapp's lawyer and the lawyer for Ohio based their arguments on the First Amendment and the possession of obscene material in one's home. By contrast, a brief submitted by an amicus curiae, the American Civil Liberties Union, argued that Mapp's conviction should be overturned on the basis of the Fourth Amendment which protects against unreasonable search and seizure. The ACLU argued that since the evidence had been obtained illegally, it should have been excluded from the trial. In *Mapp v. Ohio* (1961), the Supreme Court picked up the arguments of the ACLU and reversed Mapp's conviction on the basis of the Fourth Amendment. The justices applied the exclusionary rule for illegally obtained evidence to the states for the first time.

Sources: *Mapp v. Ohio* (1961); Epstein and Walker (2007).

Interest groups may also act as 'signals' to the courts by letting them know that important issues are before them—issues of interest to a broader community. They can indicate to the justices 'the array of social forces at play in the litigation' (Caldeira and Wright 1988, 1111). They also provide information about public opinion—or at least their own constituency's opinion—on an issue area before the court. These signals may influence the justices' approach to the case. It is also thought that groups may exert some influence over the justices because of their ability to turn to the legislature for a remedy of a court's decision. Since justices are thought to prefer their decisions be left standing, this implicit threat may cause the justices to listen more closely to a group's arguments.

Are interest groups actually influential? Charles Epp (1998) has argued that through their litigation, organized interest groups have contributed to a 'rights revolution' in several countries, including Canada. According to Epp, the



combination of organized interest groups that bring cases to courts and supportive judges has ensured the far-reaching influence of the Charter of Rights and Freedoms in the policy arena. Without the mobilizing by such groups, the Charter might have been merely a series of 'empty promises'.

However, at the individual-case level, much of the American literature has cast doubt on the influence of interest groups, focusing instead on the importance of the justices' own policy preferences when they decide cases. The few studies that have tried to test interest-group influence directly have produced mixed results. Songer and Sheehan (1993), for example, examined amici participation before the US Supreme Court, and found that litigants who were supported by amicus briefs were no more successful than those that were not. However, Songer and Kuersten (1995) found that litigants were more successful when supported by amici at state supreme courts. Robin Wolpert (1991), who examined gender discrimination cases, found that, controlling for other possible influences, the number of amicus curiae briefs supporting a particular litigant increased the probability of the court's deciding in favour of that litigant. By contrast, Steven Tauber (1998) found that the NAACP LDF did not exert influence in the capital punishment cases in which it participated.

The influence of groups before the Canadian Supreme Court has not received much systematic testing. Manfredi argues that the most frequent interest-group litigator, LEAF, has 'made a difference through the type of evidence it brought to the Court's attention', noting that from 1988 to 2000 'the Court made 108 references to extralegal material cited in LEAF factums' (2004, 150, 153). One quantitative study of LEAF discovered that, controlling for other possible influences—such as judicial preferences and the facts of the case—LEAF did influence the outcome of cases. LEAF's presence made an outcome favourable to the group's interests more likely. However, that same study discovered that LEAF's presence did not make favourable doctrine in the court's ruling more likely (Hausegger 1999). Since interest groups are probably more interested in their long term impact on an issue area, this finding suggests groups may have less influence on courts than their detractors have feared.

Whether groups do manage to influence Canadian courts is still a matter of debate and in need of more systematic study. However, some Supreme Court justices have given reasons to doubt the impact of interest-group participation. As detailed earlier, Justice Bastarache, at least, has suggested that the information provided by the groups is less useful today than it was when the Charter was first enacted—when the justices had had less experience dealing with the issues raised by the document.

## Conclusions

This chapter began with *R. v. Seaboyer*, the case of two men charged with sexual assault. By the time the case reached the appellate-court level, Seaboyer and

Gayme were no longer alone before the court. Instead, governments and interest groups had joined them, each making arguments about the 'proper' disposition of the case. Why might interest groups participate in a criminal case, taking sides for and against the accused? This book suggests that courts, and particularly the Supreme Court, are political institutions that make policies with far-reaching implications. Interest groups turn to litigation to achieve their policy goals. Thus LEAF joined *R. v. Seaboyer* in an effort to support legislation that protected victims in sexual assault cases—something they believed to be vital in their campaign to end violence towards women—and the CCLA joined to further its fight for fundamental freedoms and the rights of the criminally accused.

As we pointed out, LEAF and the CCLA are not alone in their litigation—a great variety of interest groups use the courts. In *Seaboyer*, both LEAF and the CCLA adopted a direct strategy for achieving their goals: they intervened in the case. The difficulties of sponsoring a case and the almost Herculean task of controlling the litigation field mean that groups are pushed into intervention more often—forced to jump into a case already underway rather than undertake a carefully planned campaign. It is in this role as intervener that interest groups are probably most objectionable to their critics. Some scholars argue that there is a litigating 'Court Party', which is pushing the Court towards judicial activism. They worry that groups are not only increasing the time and costs involved in court cases but are also making an 'end run' around the elected legislature in the pursuit of their goals. Supporters of interest-group litigation, by contrast, suggest that group participation, even as interveners, can be advantageous to democracy. They argue that this litigation makes political institutions more accessible and ensures the protection of minorities.

Each of these views rests, to some extent, on the assumption that interest groups achieve their goals before the courts. However, as *R. v. Seaboyer* illustrates, we must be careful when measuring the success of a group. Achieving the right outcome in a case is not enough to further a group's goals—the right doctrine needs to accompany it. In addition, a careful determination of success does not end the larger debate of whether interest-group litigation is actually effective, that is, whether group participation influences the justices' decisions. The high rate of group participation before the courts suggests that groups believe they do have influence. However, this belief has not been settled definitively in the literature. In addition, *R. v. Seaboyer* suggests the need to consider the fate of a group's policy goals more broadly since groups may fail before the court and yet still achieve long-term success by exerting influence on the legislature. Thus interest-group litigation is an area in need of further study—not only to provide answers about the success and influence of interest groups, but also, perhaps more important, to facilitate a more informed debate about whether interest-group litigation itself damages or enhances democracy.



## Chapter 8

### Governments in Court<sup>1</sup>

In 2001, eight gay and lesbian couples applied to the British Columbia Director of Vital Statistics for marriage licences but were denied on the grounds that the statutory and common-law definitions of 'marriage' included only opposite-sex couples. Accompanied by the advocacy group EGALE Canada (see Chapter 7), the couples sued the governments of British Columbia—which, like all the provinces, issues marriage licences—and of Canada—which has jurisdiction over the definition of marriage—on the grounds that the laws violated their equality rights under the Charter of Rights and Freedoms. Both governments maintained that the definition of marriage was constitutional. After the claimants lost at trial, they appealed successfully to the British Columbia Court of Appeal in the spring of 2003 (*EGALE Canada v. Canada* 2003). A similar ruling was made in Ontario shortly afterwards (*Halpern v. Canada* 2003).

The federal government led by Prime Minister Jean Chrétien now had to make a decision: should it accept the losses in court, and thus have to immediately recognize same-sex marriages (but only in those courts' provinces), or appeal to the Supreme Court of Canada, where it would most likely lose again given that Court's recent record of supporting equality rights for sexual orientation (and risk setting a national precedent)? The federal government chose a third option: it drafted a bill that would recognize same-sex marriages but protect the religious freedom of churches to refuse to perform them, and before allowing Parliament to debate the bill, referred it to the Supreme Court to assess its constitutionality under the Charter and the federal division of powers.<sup>2</sup> The Court's opinion, released in December 2004, was that the bill would be constitutional, but it refused to answer the key question of whether the government *must* recognize same-sex marriage, on the grounds that it was unnecessary to answer since the government had already said it planned to do so (*Reference re Same-Sex Marriage* 2004). Paul Martin's Liberal minority government tabled the bill in Parliament, where it was narrowly passed in June 2005 and received Royal Assent a month later. Same-sex marriages were now legally recognized in Canadian law.

The saga of same-sex marriage hints at the complexities governments face as litigants in the courts. The cases illustrate two ways Canadian governments can appear in court—by being sued, and through the reference procedure—and some of the important strategic decisions they must make in the course of litigation. For example, should they concede the claims of plaintiffs, appeal losses to higher

courts, or use the reference procedure to receive the court's advice quickly on legal questions? This chapter examines the role of the government as a litigant, that is, as a party before the courts. After discussing the various ways in which governments can become litigants, the chapter describes the government's lawyer: the Attorney General (AG). The chapter then focuses on the decisions a government has to make about litigation, such as whether to prosecute, initiate a reference, intervene, appeal, or concede, and whether AGs should be 'independent' of the government's leadership when handling litigation. We then examine the success rate of governments in court, which is very high. The concluding section examines the implications of these strategies for the relationship between courts and governments, and for the way we view the impact of courts on public policy and democracy itself.

### Governments as Litigants: Why Do Governments Appear in Court?

Governments are the most frequently appearing class of litigants, ahead of businesses, unions, professional associations, and public-interest advocacy groups like EGALE or LEAF. There are five ways in which the government can appear in court, four of them as a 'direct party' to the case, and the fifth as a 'third-party' intervener. These are as follows:

#### Prosecution of Offences

The most common reason governments appear in court is to prosecute offences and enforce municipal by-laws. In Chapter 1, where we explored the different types of legal disputes, 'criminal' disputes—or more accurately, enforcement of offences—were distinguished by the fact that the case involves the accused individual and the *state*; the state represents the victim of the offence and the broader society's interest in punishing and deterring similar behaviour that undermines public peace and safety. In criminal law, the prosecuting state is usually called the 'Crown' or 'Crown Attorney', reflecting the fact that Canada's head of state is the Queen (or King).<sup>3</sup> As noted in Chapter 2, both the provincial and federal governments can create offences, although only the latter can create the more serious indictable offences.

A unique feature of Canadian law is that the prosecution of *criminal* offences—which, recall, are created by the federal Parliament—are usually enforced by provincial governments. This is because s. 92(14) of the 1867 Constitution gives the provinces jurisdiction over the administration of justice, as does the *Criminal Code*. This division of responsibility reflects Canada's federal nature and creates an interesting dynamic: criminal offences are created at the national level but enforced 'locally', thus allowing national standards to be influenced by the values



of the smaller community in which the crime took place. Thus it is unlikely that, for example, the crime of distributing pornography is enforced to the same degree in Montreal as it is in small-town Saskatchewan. A more concrete example arose when the federal government created its gun registry, which was deeply unpopular in rural areas, where guns and hunting are common. The several provincial governments that opposed the registry, such as Alberta, Newfoundland, and Ontario, stated that they would not prosecute anyone who committed the offence of refusing to register their guns (Lindgren and Naumetz 2003, A1). This 'federalism' dynamic in criminal law has only been reinforced by the trend toward making the provincially appointed s. 92 courts primarily responsible for trials of criminal (and many other federal) offences.

Although the federal government can choose to prosecute some crimes if the province refuses—as Ottawa threatened to do with the gun registry<sup>4</sup>—some offences, most notably narcotics, income tax fraud, illegal fishing, and since 2001, terrorism, are usually enforced by the federal government. Another exception is that the federal government retained the power to prosecute criminal offences in territories that are administered federally, that is, the Northwest Territories, Nunavut and the Yukon, and on Indian reserves.<sup>5</sup> Federal authority to prosecute offences is asserted in s. 2 of the *Criminal Code*,<sup>6</sup> which provoked disputes between the federal and provincial governments, climaxing in a series of cases in the late 1970s and early 1980s.<sup>7</sup> The crux of the provinces' argument was that many federal non-Code offences—most notably, narcotics offences—were criminal law in 'pith and substance', regardless of their exclusion from the Code, and their prosecution was therefore within provincial jurisdiction over 'the administration of justice' in section 92(14). The Supreme Court of Canada resolved this dispute in favour of the federal government in three key cases, *R. v. Hauser* (1979), *A.G. (Canada) v. Canadian National Transportation, Ltd.* (1983), and *R. v. Wetmore* (1983). In *Hauser*, the first to be decided, the majority of the Court agreed with the provinces that criminal prosecutions are properly conducted by provinces, but it also found that Ottawa can prosecute offences arising under any federal jurisdiction other than the criminal law, such as fisheries (s. 91(12)), trade and commerce (s. 91(2)), and the 'residual power' in the s. 91 'POGG' (Peace, Order and Good Government) clause (which included the regulation and prohibition of narcotics).<sup>8</sup> Whereas *Hauser* appeared to work around the province's jurisdiction in s. 92(14) by preserving provincial prosecution of 'criminal' matters, the *C.N. Transportation* and *Wetmore* decisions only four years later rejected this restrictive approach. In a striking rejection of long-standing practice, the Court stated that s. 92(14) does not give provinces a monopoly over criminal prosecution, observing that this had simply been an arrangement authorized by the statutory *Criminal Code* rather than the Constitution; if the federal government wanted to change this arrangement, it could do so by simply amending the *Criminal Code* or any other quasi-criminal legislation to give itself the power to prosecute. As pointed out in notes 6 and 8,

Ottawa has done so with a number of offences, including terrorism, war crimes, crimes against humanity, membership in a gang, firearms offences, and a wide range of offences committed against international diplomats and their property. Even with these, however, provincial governments may still choose to prosecute, so the jurisdiction is effectively shared.

All of this said, the lion's share of offences are currently prosecuted by provincial governments, the major exception being drug-related offences.

### Defendant in Civil Suits

It is fairly common for individuals and groups in society to sue governments for damages or unfair treatment just as they might sue another person or institution. As the state has grown, through expanded social programs, business regulation, and taxation systems, the potential for conflict between the state and society has also increased. Some examples should be familiar: Natives have been engaged in protracted suits against the federal government for abuse they sustained in the old residential schools. This system took aboriginal children from their families and communities in order to 'westernize' and Christianize them, forcibly erasing their own languages, cultures, and religious beliefs. Refugees and immigrants who are refused entry to Canada commonly challenge the decisions of government officials in court on the grounds that proper procedures were not followed or important factors in their cases were overlooked. Similarly, people who are denied government benefits (such as Employment Insurance or social assistance) or licences (whether for marriages or to run a television station) often challenge the decision in court, as we saw with same-sex marriage. Although most Charter cases (over 70 per cent) arise when someone claims his or her rights in the course of being prosecuted for a crime (for example, 'free expression' (s. 2(b)) as a defence for possessing child pornography, or protection against 'unreasonable search and seizure' (s. 8) to contest a successful drug raid), many Charter cases begin as civil suits against the government, where someone claims a government decision or law has violated his or her rights. Besides same-sex marriage, we have witnessed this with Quebec's ban on private health insurance (*Chaoulli* 2005), the denial of government-paid parental leave to biological fathers (*Schachter* 1992), and the use of 'security certificates' to indeterminately detain immigrants suspected of terrorism (*Charkaoui* 2007), amongst many other issues.

### Plaintiff in Civil Suits

Just as the government can be sued, it can sue others like any other plaintiff. This occurs fairly rarely, and usually in one of two situations. The first is when the government sues a business, usually in a dispute related to some service the business was contracted to provide. In Chapter 2 we cited the example of *McNamara*



*Construction v. The Queen* (1977), where the federal government attempted to sue a company it had hired to build a penitentiary for breach of contract. The second situation is when one government sues another. This is very rare, because inter-governmental disputes in court are more commonly handled through the reference procedure (see next section). An example of a 'regular' civil suit between governments occurred when the Peel Regional Municipality sued the federal and provincial governments for the cost of housing juvenile delinquents in group homes as part of a young offenders' program which those governments had forced the municipality to implement; Peel sued for compensation after the Supreme Court of Canada ruled that it was illegal to offload these costs onto municipalities (*Peel v. Canada and Ontario* 1992). Another example, this one involving the Constitution, arose in 1994 when British Columbia unsuccessfully sued the Government of Canada over the latter's decision to end passenger rail service on Vancouver Island, on the grounds that this service was guaranteed in the articles of British Columbia's entry into Confederation in 1871 (*British Columbia (A.G.) v. Canada (A.G.)* 1994).<sup>9</sup>

Recent developments in British Columbia point to a third scenario, where the government pursues civil litigation explicitly to influence public policy. In 2005, the Supreme Court of Canada upheld British Columbia's 1998 legislation (the *Tobacco Damages and Health Care Costs Recovery Act*), which allows the government to sue tobacco companies for financial damages in order to compensate the province for smoking-related health-care costs (*British Columbia v. Imperial Tobacco Canada Ltd.* 2005). The law permits not only retroactive damages, but also litigation to recover the costs of future illnesses linked to 'tobacco-related wrongs'.

### Reference Cases

Reference cases have been alluded to several times in this book already, but to recap, they occur when the federal government asks the Supreme Court of Canada—or a province asks its highest court of appeal—for an 'advisory opinion' on any 'question of law or fact'. As Russell (1987, 91) observes, the reference procedure thus gives the executive branch of government 'privileged access' to those courts. It is important to note that the reference power is not found in the Constitution but is something governments have given themselves through regular legislation and is therefore vulnerable to a court ruling that it violates judicial independence under the Charter or the Constitution's 'unwritten principles' (see Chapter 6). The first power to refer appeared in the 1875 statute creating the Supreme Court of Canada (currently s. 53 of the *Supreme Court Act*), and was first enacted in the provinces soon after by Manitoba, Nova Scotia, and Ontario in 1890 (Strayer 1988, 315–16).

A noteworthy feature of these provisions is that they are clearly designed to encourage the courts to resolve jurisdictional disputes between the various units of

Canada's federal system of government (Smith 1983; Strayer 1988, 314–15), for s. 53 explicitly allows the federal government to refer questions about provincial legislation or jurisdiction.<sup>10</sup> Provinces can reciprocate under their reference legislation;<sup>11</sup> for example, Ontario's Lieutenant Governor in Council may refer 'any question' to the Ontario Court of Appeal (*Courts of Justice Act*, s. 8(1)). As well, the *Supreme Court Act* (s. 53(5)) gives provinces the right to appear in any federally initiated reference case involving provincial legislation, and provincial reference legislation grants the reciprocal right to the federal government. Provincial references may be appealed to the Supreme Court of Canada, but there is not a 'right' to have the appeal heard; rather, they are handled like any other application for leave to appeal to that court, although there are no examples of such applications being denied.<sup>12</sup>

Although no one has conducted a comprehensive study of federal or provincial reference cases, about 170 references appear to have been either initiated or appealed to the Supreme Court of Canada (or, before 1949, the JCPC) since 1875, and Strayer (1988) reports that references represented over a third of constitutional law cases during the century after Confederation, but they declined to only 15 per cent between 1967 and 1986. Nonetheless, references are heavily over-represented in the most high-profile and contentious constitutional law cases in Canada's history. Besides same-sex marriage, the Supreme Court of Canada has heard references on such heated issues as the introduction of the GST (1992), the patriation of the Constitution (1981), the abolition of appeals to the JCPC (1940), whether Quebec can secede unilaterally (1998), whether Manitoba's entire body of statutes must be bilingual (1985), whether Ottawa can impose wage and price controls to fight inflation (1976), whether women are 'persons' under the Constitution (1928), and even whether references themselves violate judicial independence (1912; see Chapter 6). As discussed later in this chapter under 'Government Litigation Strategies', there are good political reasons why governments have shifted such issues to the courts.

### Third-party Intervention

The previous chapter explained that interest groups have often opted to 'intervene' in court cases, a procedure that requires them to obtain the court's permission to present a legal argument (in writing, orally, or both) in a case where they are not a direct party. What makes intervention attractive to interest groups applies equally to governments: it is a cost-effective way to lobby the courts (usually the highest appellate courts) to adopt a particular legal interpretation. Specifically in the case of governments, intervention allows them to have input where the court is ruling on a policy very similar to the government's own, or on a legal provision—such as a Charter right—that may affect a number of its own laws. The federal and provincial governments together were actually the most frequent category of interveners until fairly recently (see Chapter 7, Table 7.1),



although the federal government is the most frequent intervener in almost any year, followed closely by the AG Ontario (Brodie 2002, 38). There is a good reason for Ottawa's frequent appearances, which is related to the federal division of power over the administration of criminal justice noted earlier: whereas provinces prosecute the offences, the federal government is responsible for criminal law, including the creation of offences and defences, and for establishing the criminal process (rules regarding police procedure, evidence, appeals, sentencing, and so forth). The federal government therefore has a deeply vested interest in how the courts enforce and interpret these provisions. Particularly since the adoption of a wide range of 'due-process rights' (right to counsel, right against unreasonable search and seizure, and so on) with the 1982 Charter, the federal government has frequently been in a position to make arguments before the courts about potential changes to criminal law. To do so in the vast majority of cases where the prosecution is conducted by the province, the federal government must intervene.

Notably, however, it does not have a *right* to intervene unless the case involves a question of constitutional law. In non-constitutional cases, governments must obtain the permission or 'leave' of the court in which they wish to intervene. The guidelines that courts use when deciding whether to allow an intervener are laid out in the statutes establishing each court or their associated regulations. Since these guidelines are worded very loosely, the decision whether to admit an intervener is entirely up to the court. As a consequence, the courts have not always adhered closely to their own requirement that interveners bring distinct or novel perspectives. The Supreme Court ostensibly tightened up its criteria for government interveners in *R. v. Osolin* (1993), at least in criminal cases, by turning down Ontario's application to intervene in a case prosecuted by British Columbia on the grounds that Ontario would not add anything that would not be raised by the prosecution. This appeared to set the bar fairly high for future provincial applicants to demonstrate their 'distinct' contribution. In the same case, the Court noted that the federal government brings a 'national perspective', which prosecuting provinces cannot, giving Ottawa an advantage in its applications to intervene.

The numbers do not suggest, however, that *Osolin* had much effect. According to a senior federal government lawyer, the federal government intervenes very rarely in lower-court criminal cases that do not involve the Constitution,<sup>13</sup> and even at the Supreme Court, it intervened in only about forty-eight non-constitutional criminal cases from 1982 to 2008; indeed, it intervened in only sixty-three non-constitutional cases total in that period.<sup>14</sup> By comparison, Ontario, the largest province, intervened in non-constitutional cases forty-four times. More interesting, and contrary to the signal sent in *Osolin*, Ontario intervened in non-constitutional criminal cases fairly frequently, about two-thirds as often as Ottawa (thirty-three times).<sup>15</sup> Unfortunately, little is known about interventions by other provinces at the Supreme Court, and virtually nothing about interventions below the Supreme Court by any provincial government, even in constitutional law.

Governments *do* have a right to intervene in constitutional law cases at several points in the judicial hierarchy, but this right is a statutory or regulatory one, and not in the Constitution.<sup>16</sup> With a few exceptions (Ho 1994; Hennigar 1996; Morton, Hennigar and Ho 1996; Clarke 2006), virtually nothing has been written about governmental intervention strategies and arguments in constitutional cases, and what there is deals exclusively with cases in the Supreme Court of Canada.

### Who Is the Government's Lawyer?

At both the provincial and federal level in Canada, each government is almost always represented in court by an Attorney General. Federally, according to s. 5(d) of the *Department of Justice Act*, the Attorney General of Canada 'shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada.' Identical language is found in s. 5(h) of Ontario's *Ministry of the Attorney General Act*, and similar provisions exist in all provinces. The Glassco Commission on Government Organization in the early 1960s found a significant gap, however, between statute and reality at the federal level. Various departments and agencies of the federal government had gradually set up their own legal services, such that by the early 1960s, 'it was estimated that more than 85 per cent of the government's lawyers . . . did not come under the responsibility of the Department of Justice' (Brunet 2000, 67). The Glassco Commission's report in 1963 recommended the integration of all federal government legal services under the direction of the Justice Department; that was begun with the 1966 *Government Organization Act*. By 1970, after extensive negotiations between Justice and other departments and agencies and the transfer of nearly 200 federal government lawyers to the Justice Department, 'the revamped Department more closely reflected the organization mandated by the *Department of Justice Act*' (Brunet 2000, 67). Today, with few exceptions,<sup>17</sup> the AG Canada exercises the monopoly over litigation authorized by s. 5(d).

As Hennigar (2002) details, however, AGs do not usually conduct their government's litigation themselves; this task falls primarily to lawyers under the supervision of the AG, who are either permanent members of the public service or 'agents' contracted from private practice. In some cases, the government hires a well-known lawyer or legal scholar to handle its case, as it did with Peter Hogg for the *Same-Sex Marriage Reference*. In the case of the AG Canada, the number of permanent staff litigators is staggeringly large: over 2,500, of whom roughly half are located in Ottawa and the other half in seventeen regional offices across the country (Canada, Department of Justice 2006), where the lion's share of day-to-day litigation is handled.<sup>18</sup> This explains the description of the AG as 'Canada's largest law firm' (Rosenberg 2003). Although comparable data are not available for the provinces, the fact that they are primarily responsible for enforcing the *Criminal Code* suggests that these offices are also very large. In Ontario for



example, 900 Crown attorneys prosecute some 500,000 charges each year (Ontario, Ministry of the Attorney General 2006c).

A noteworthy feature of government litigation is which counsel represents the government before the Supreme Court. In the United States, the national government has a specialized elite corps of lawyers, the Office of the Solicitor General, who take over the handling of Supreme Court appeals from the Department of Justice lawyers who appear in the lower courts (see for example Salokar 1992, Zorn 2002, Pacelle 2003). There is no analogous body at the federal level in Canada. In Charter cases from 1982 to 2000, the original counsel from the lower-court case were replaced less than 25 per cent of the time (Hennigar 2002, 96). In recent years, however, the AG Canada has adopted a policy of having Supreme Court appeals handled by one of a dozen or so senior litigators drawn from the regional offices or the national headquarters in Ottawa, although original counsel often remain on the case to gain experience before that court. Little is known about the structure of AG offices in the provinces, but the same counsel often appear before the Supreme Court. This is particularly true of the smaller provinces, most likely because of a mixture of area specialization and the limited number of government counsel.

Attorneys General in Canada are somewhat unusual compared to government lawyers in other Anglo-American democracies, in that the AG is simultaneously a sitting member of the cabinet with wide-ranging policy responsibilities, including the criminal law and maintaining the justice system (at the federal level, this latter position is formally known as the 'Minister of Justice', but the Minister and the Attorney General are the same person<sup>19</sup>). Thus, AGs are appointed to their posts by their Prime Minister or provincial Premier, like any other cabinet minister. What is even more unusual, however, is that AGs are also elected members of Parliament (or the provincial legislature). In fact, some Prime Ministers and Premiers have simultaneously been the AG; among them were Sir John A. Macdonald immediately after Confederation (when the AG was considered a part-time position) and the autocratic Premier of Quebec, Maurice Duplessis (who used that position to persecute Jehovah's Witnesses: see *Roncarelli v. Duplessis* 1959<sup>20</sup>). The broad range of issues currently administered by AGs makes it very impractical for any First Minister today to hold both portfolios concurrently. Indeed, in light of the AG's duty to serve as the government's senior legal adviser and representative, it would likely be seen as a rather alarming concentration of power.

Concern about the Attorney General's political role (see, for example Law Reform Commission of Canada 1990; Edwards 1995) led some provinces—British Columbia, Nova Scotia, and Quebec—and recently the federal government to create the position of Director of Public Prosecutions (DPP) to handle the prosecution of offences at arm's-length from the AG/Minister of Justice. This is consistent with the practice in England, Wales, Northern Ireland, the Republic of Ireland, Australia, and South Africa. In all cases, the DPP reports to the Attorney General, who is publicly responsible for its activities (for example, in Question

Period in the House). Nova Scotia was the first province, in 1990, to create a statutorily independent DPP, following a recommendation of the Royal Commission investigating the wrongful conviction of Donald Marshall that found extensive politicization and systemic racism in that province's justice system. How much independence will be enjoyed by the new federal DPP remains to be seen since the AG may take over conduct of a case (or an intervention) from the DPP (*Director of Public Prosecutions Act*, ss. 13–15); in a review of Nova Scotia's DPP in 1998, similar provisions in the province's *Public Prosecutions Act* raised concerns about the DPP's independence (Nova Scotia, Department of Justice 1998). The issue of an Attorney General's independence when conducting litigation or prosecutions is discussed further below.

### Government Litigation Strategies

This chapter opened by noting that governments can appear in court for a number of reasons, including prosecutions, civil litigation, references, and interventions. But why do they engage in these activities, and why do they appeal in some cases and not others? With specific reference to constitutional cases, why does the government sometimes concede that its own laws are unconstitutional? The following section considers the state of the literature on these questions, with an emphasis on the complex relationship between courts and governments in litigation and how it blurs the lines of accountability for policy changes stemming from court rulings.

#### Why Prosecute?

At first glance, the answer to this question seems obvious: governments prosecute offences when people or organizations break the law. This is not always the case in practice, however, for Crowns may decline to prosecute even though the police have made an arrest. This is usually because the Crown feels it does not have enough evidence to prove guilt beyond a reasonable doubt. MacNair (2002, 257) cites the well-established principle that 'the prosecutor's duty is not to seek a conviction, but to see that justice is done': 'As representatives of the Crown, they are expected to be advocates on behalf of the state and obtain convictions of the accused who are guilty; they must also ensure that innocent persons are not convicted' (258).<sup>21</sup>

The Crown might also decline to prosecute because it does not believe that the law can or should be enforced. For example, after juries in Montreal repeatedly acquitted Henry Morgentaler of violating the *Criminal Code's* ban on abortions performed outside hospitals and without hospital approval,<sup>22</sup> the Crown announced it would no longer attempt to prosecute him. Another more recent example concerns the Mormon splinter community in Bountiful, British Columbia, which practices polygamy in violation of s. 293 of the *Criminal Code*. The AG of British Columbia has refrained from prosecuting community members



for years on the grounds that its own lawyers believe the law may violate the Charter's freedom of religion. (In August 2007, British Columbia's Special Prosecutor, appointed to investigate Bountiful, recommended the use of the reference procedure to ascertain the constitutionality of the law.)

The Crown is also guided by its belief in what the 'public interest requires' although this should not be influenced by considerations of partisan advantage for the Crown's government. An example of prosecuting in the public interest would be when the Crown tries someone with whom many sympathize in order to deter others from similar actions. This was arguably the case with the Crown's decision to prosecute Robert Latimer for second-degree murder (rather than the lesser charge of manslaughter) for the 'mercy-killing' of his severely disabled and chronically pain-inflicted daughter Tracy. As prosecutor Randy Kirkham stated at Latimer's first trial in 1994, condoning such an act would be tantamount to declaring 'open season on the disabled'.<sup>23</sup>

This principle of prosecutorial independence was given its classic exposition by British parliamentarian Lord Shawcross in 1951, and has been adopted by Canadian Crowns (in Scott 1989, 120):

The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. . . . The responsibility for the eventual decision rests with the Attorney General, and he is not to be put . . . under pressure by his colleagues in the matter.

The main reason for such independence (or 'discretion') is, of course, to prevent miscarriages of justice which may result from politically motivated prosecutions or poor police work. Examples of the former are prosecutions against critics of the government and high-profile cases where there is political pressure to 'convict someone, anyone' because of public demand (such as when there is a serial killer, rapist, or child murderer on the loose). Although Crowns and the police both represent the state and wider public in the administration of criminal justice, it is important to recognize that they serve quite different functions. One of the Crown's functions is to serve as a check on weak evidence or improper investigations by the police by refusing to prosecute such cases. This 'weeding out' also serves the interests of the court system by preventing further backlogs and delays. Finally, prosecutorial discretion allows for flexibility when dealing with accused individuals where prosecution to the fullest extent of the law would not serve the 'broader public interest' and might ruin the individual's life—for example, with first-time offenders, or when there are significant extenuating circumstances.

In 2002 the Supreme Court strongly endorsed prosecutorial discretion in the handling of cases but allowed professional lawyers' associations (in that case, the Law Society of Alberta) to discipline prosecutors (who by law must belong to such associations) for flagrant ethical violations, such as failing to disclose evidence as required by law (*Krieger v. Law Society of Alberta* 2002). This reflected a small expansion of prosecutorial accountability, which traditionally flowed to the AG to whom Crowns report and to the courts, which could check Crown bias or abuses of authority through the power of judicial review, although judicial oversight has been exercised rarely, even since the adoption of the Charter's legal rights (Roach 2000).<sup>24</sup> Crowns in Canada are also potentially accountable through civil litigation because, since the Supreme Court's decision in *Nelles* (1989), they can be sued for malicious prosecution. That case ended the absolute immunity of Crowns and AGs outside Quebec from civil liability for prosecutorial decisions. (Suits in Quebec have been allowed since 1986.) This check has not, however, proved particularly effective to date, in part because there are 'considerable hurdles to such actions' (Stuart 1995, 341): only persons who have been convicted (rather than just prosecuted unsuccessfully) can sue; such cases are expensive for individuals; and, as Justice Lamer himself noted in *Nelles*, it is inherently difficult to prove malicious prosecution.<sup>25</sup> The situation today is thus not much different from that in the mid-1990s, when Stuart observed that 'there is little effective legal, political, or administrative accountability for prosecutors' (1995, 353).

It should be noted that, beginning in the 1990s, AGs at both the federal and provincial level have attempted to check abuses of Crown discretion—and so enhance prosecutorial accountability—by giving their Crowns guidelines for prosecutorial decisions, such as the *Federal Prosecution Service Deskbook* (Canada, Federal Prosecution Service 2005) and Ontario's *Crown Policy Manual* (Ontario, Attorney General 2006). These documents lay out the general principles above but also enumerate a variety of factors that pertain to the public interest (see for example Box 8.1) and provide guidelines for specific offences. The *Crown Policy Manual*, for example, encourages vigorous prosecution of spousal abuse (in contrast to the practice in Canada for many years, when it was treated as a 'private' matter) and warns Crowns against 'long-entrenched myths and stereotypes' (for example, that 'no really means yes') when dealing with cases of sexual assault.

#### Box 8.1 Deciding to Prosecute

##### The Public Interest Criteria

Where the alleged offence is not so serious as plainly to require criminal proceedings, Crown counsel should always consider whether the public interest



requires a prosecution. Public interest factors which may arise on the facts of a particular case include:

- a) the seriousness or triviality of the alleged offence;
- b) significant mitigating or aggravating circumstances;
- c) the age, intelligence, physical or mental health or infirmity of the accused;
- d) the accused's background;
- e) the degree of staleness of the alleged offence;
- f) the accused's alleged degree of responsibility for the offence;
- g) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- h) whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- i) the availability and appropriateness of alternatives to prosecution;
- j) the prevalence of the alleged offence in the community and the need for general and specific deterrence;
- k) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- l) whether the alleged offence is of considerable public concern;
- m) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;
- n) the attitude of the victim of the alleged offence to a prosecution;
- o) the likely length and expense of a trial, and the resources available to conduct the proceedings;
- p) whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;
- q) the likely sentence in the event of a conviction; and
- r) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Source: *Federal Prosecution Service Deskbook* (Canada, Federal Prosecution Service 2005, Part V, Chap. 15). Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2008.

Such guidelines do not remove prosecutorial discretion, however, and where there is discretion there is also room for personal bias. It is well-known, for example, that Crowns were historically reluctant to prosecute domestic abuse against women (especially sexual abuse by husbands against their wives), and it was for this reason that Crown guidelines encouraging vigorous prosecution in such cases were adopted. Some have also complained that Crowns are more likely to prosecute—and to seek harsher punishments for—members of some societal groups more than others. This has been alleged with respect to aboriginals and black males in particular, and it is true that those groups are over-represented as defendants and prisoners in the criminal justice system. Whether this is due to prosecutorial (and/or police or judicial) bias, however, or because individuals from those social groups might be statistically more involved in criminal activity—or a combination of both—is notoriously difficult to determine empirically (Free 2002).<sup>26</sup> More to the point, there have been few rigorous studies of this contentious issue in Canada. Whereas the report of the Commission on Systemic Racism in the Ontario Criminal Justice System found that Crown lawyers, judges, and defence counsel did not believe Crown discretion resulted in systemic racism (Ontario, Commission 1995, 191), the Royal Commission into the wrongful conviction of Donald Marshall (see Chapter 2) concluded that 'the fact that Marshall was a Native was a factor' in why 'the criminal justice system failed [him] at virtually every turn' (Nova Scotia, Royal Commission 1989, 15). Though we do not intend to impugn the integrity of individual Crown attorneys with the suggestion, the existing and conflicting evidence suggests that greater and more sophisticated study of this issue is needed.

### Why Launch a Civil Suit?

As explained earlier, there are three reasons a government may pursue civil litigation: to resolve a contractual dispute with a private business; to resolve a jurisdictional dispute with another government, usually regarding the federal division of powers; and to influence public policy, as with British Columbia's litigation against tobacco companies. Such litigation has not, however, been the subject of sustained academic study.

### Why Use the Reference Procedure?

As noted earlier, references have a long history in Canada, and they have been politically motivated from the outset. As Jennifer Smith (1983) points out, when the federal government created the Supreme Court in 1875, it also created the reference procedure, and the hope of people like Sir John A. Macdonald was that the procedure could be used to 'police' the federal division of powers more efficiently—in short, to stop incursions by the provincial governments into federal jurisdiction. However, the provinces soon gave themselves the reference power as



well, and ever since, the two levels of government have used references on highly politically charged issues, including matters unrelated to the federal division of powers.

Strayer (1988, 318–33) provides the best summary of the advantages of the reference procedure, any of which could prompt a government to launch a reference. In keeping with their originally intended function, references provide a ‘flexible means for each level of Government to challenge the constitutional authority of the other level of Government’, a procedure which, at least for the federal government, has replaced the now-defunct constitutional powers of disallowance and reservation (322).<sup>27</sup> This option is particularly attractive when one level is politically weak and cannot obtain what it wants through regular negotiation or constitutional amendment (Riddell and Morton 2004). This has occurred on several occasions, such as when Alberta objected to Trudeau’s attempt to tax natural gas exports under the National Energy Plan (*Reference re Proposed Federal Tax on Exported Natural Gas* 1982; see Riddell and Morton 2004), and when several provinces opposed Trudeau’s plan to amend the Constitution unilaterally in 1980 (*Patriation Reference* 1981). The reference procedure can also be used by one province against another, as evidenced by one of the most creative reference cases on record. In the so-called *Chicken and Egg Reference* (*Attorney General of Manitoba v. Manitoba Egg and Poultry Association et al.* 1971), Manitoba—a major egg exporter—attacked Quebec’s egg marketing scheme that protected Quebec egg producers by restricting imports from other provinces. Whereas other provinces retaliated by restricting chicken imports from Quebec (a major chicken supplier), Manitoba took a more innovative approach: it adopted, at least on paper, a (completely unnecessary) egg marketing scheme identical to Quebec’s and referred it to its own Court of Appeal in the hopes that it would be ruled an unconstitutional infringement of interprovincial trade (only the federal government can regulate interprovincial trade). Manitoba got the ‘loss’ it wanted and appealed it to the Supreme Court, which also found the scheme—and by extension, Quebec’s—unconstitutional. The *Chicken and Egg Reference* suggests another advantage of the reference procedure—it allows governments a measure of control over the factual basis on which the case is decided. As noted in Chapter 7, one of the chief hurdles for interest groups trying to conduct strategic litigation is to find and manage ‘test cases’ that provide the factual context best-suited to the desired legal outcome. The reference procedure allows governments to overcome this difficulty by giving them the power to frame the issues sent to the court as they wish.

Strayer cites several other advantages of references, including that it allows a government to bring before the courts an issue that might not arise through regular litigation, either because of the expense to individual litigants or because the issue is regarded as ‘non-justiciable’. The *Patriation Reference* mentioned above is a good example of the latter, because the provinces asked the court whether there was a ‘constitutional convention’ or tradition—by definition, not a law—requiring

provincial consent to any constitutional amendment that affected their jurisdiction. The main additional advantage he notes, however, is *speed*, for it quickly gives governments the benefit of a legal opinion that might take several years to acquire through regular litigation. This is especially valuable if there are conflicting decisions in the lower courts; or if the government in question wishes to set up a complex, large-scale program, as witnessed in the *Anti-Inflation Reference* (1976) regarding federal wage and price controls; or to clarify which order of government has regulatory authority over a pressing issue (such as natural resources, as in *Reference re Proposed Federal Tax on Exported Natural Gas* 1982 and *Reference re Newfoundland Continental Shelf* 1984). In British Columbia’s potential reference regarding polygamy, we can see an additional dynamic related to federalism when a province seeks clarification of a federal law that the province has the responsibility to enforce but cannot amend.

References also offer governments some political advantages not mentioned by Strayer, all of which are exemplified (if not fully realized) by the same-sex marriage reference. The first of these is ‘agenda management’, or the need to deal with a political issue. Although references are often lauded for their speed compared to regular litigation, they can also be used to delay government action on a potentially explosive issue, much like a Royal Commission. When the federal government amended the terms of its reference on same-sex marriage six months after the initial reference (see note 2), it was in part to postpone the expected date of the Supreme Court’s decision so that it would not fall in the middle of an election campaign (a tactic that proved unsuccessful, as it turned out) (Huscroft 2004, 258).

The second political advantage of reference cases is position legitimization. As mentioned in Chapter 6, because courts enjoy greater public support than elected governments, politicians seek the court’s approval of their preferred policies or legal position to enhance their perceived legitimacy and to weaken political opposition. Although this happens with any court victory, some references seem designed primarily to elicit this support in a timely fashion. This was certainly Ottawa’s goal when initiating the *Reference re Quebec Secession* (1998) on whether Quebec could unilaterally separate on the basis of a referendum question designed solely by the government of Quebec. The Supreme Court’s decision endorsed Ottawa’s position that the federal government would not be bound to recognize any future vote in favour of separation if the referendum question were not sufficiently clear, and that Ottawa should have a say in the wording of future questions. These principles were later enshrined in the federal government’s *Clarity Act*. The first version of the same-sex marriage reference questions is another example. If all the federal government wanted was to obtain the Supreme Court’s position on the issue, it could have simply appealed the *Halpern* or *EGALE* cases. Instead, it drafted a bill legalizing same-sex marriage and asked the Court what was essentially a rigged question: would recognizing same-sex marriage violate equality rights? The short answer is that it would not, and the government knew this—the question



was designed to elicit a specific response from the judges: 'same-sex marriage is consistent with the Constitution.' It should be noted that the government's critics, both within the opposition parties and its own caucus, saw through this tactic, and the government was pressured to ask the more pertinent question of whether the traditional definition of marriage was unconstitutional.

The third additional advantage of references, closely tied to the second, is 'buck-passing' or transferring political responsibility. By eliciting a judicial ruling, a reference case can create a situation where the government can claim that it 'has' to pursue a course of action which it already prefers ('the court made me do it'), but which is politically divisive or unpopular. Turning again to the same-sex marriage issue, Ottawa could have simply passed legislation recognizing such couples; its use of the reference procedure was clearly intended to give it political cover. Once again, however, its attempts were frustrated when the Supreme Court declined to say whether the Charter requires the recognition of same-sex marriage.

This points to a problem for governments with the reference procedure: the court may not co-operate, either by ruling against them, or by refusing to answer the question. s. 53(4) of the *Supreme Court Act* states unequivocally that the Court must answer any question put to it, yet the justices have carved out exceptions where the questions are overly abstract or 'would throw the law into confusion' by contradicting the (legally binding) rulings of lower courts (*Reference re Same-Sex Marriage* 2004). This latter exception would appear to defeat one of the purported benefits of references, that they quickly resolve contradictions in the lower courts, and might indicate the Court's growing resentment of being thrown such politically hot potatoes. As well, as noted in Chapter 6, references on politically contentious issues may ultimately undermine their value by hurting the Court's legitimacy. This risk is exacerbated by the highly abstract (or hypothetical) nature of most references, which occur in the absence of disputes involving facts or real people. Strayer (1988, 334) makes this point: 'Where there are few, if any, genuinely legal criteria to which courts can resort for a rationale for their decision, they may be perceived as making a political judgment which may impair their long-term credibility.'<sup>28</sup>

### Why Intervene?

The government's motivation to intervene in a case as a third party was touched upon earlier. Like interest groups, governments intervene in an attempt to influence judicial decision making, in particular how the judges interpret the law. It is not known for sure why governments choose to intervene when they do, but their own guidelines on the matter probably provide a good idea. To begin with, governments do not intervene routinely, and their lawyers must obtain approval to do so from fairly high up the bureaucratic hierarchy (the Assistant Deputy Attorney General of Canada and the National Litigation Committee in Ottawa). According to the *Federal Prosecution Service Deskbook* (Canada, Federal Prosecution

Service 2005) and the *Civil Litigation Deskbook* (Canada, Department of Justice 2003, A-2.6),<sup>29</sup> 'There is no single principle which guides decisions in this area,' and different factors will weigh more heavily depending on the circumstances. The federal government is more likely to favour intervention if the issue has been raised in an appeal court, especially to the Supreme Court, and if the constitutional validity of federal legislation has been challenged (this is most likely to occur in criminal matters, where the provincial Crown is prosecuting the case). If the case involves a constitutional challenge in a court below the Supreme Court, the government is less likely to intervene, but it may if:

- the legislation is part of an important policy initiative (such as the GST or firearms registry);
- no direct party to the litigation (usually the provincial Crown) intends to defend the legislation adequately; or
- the federal government has evidence that makes it more able to defend the law than another litigant.

Federal and provincial statutes require that AGs must be informed of constitutional challenges to their legislation, in recognition of the fact that they may wish to intervene in such cases. Ottawa has also flagged as worthy of intervention cases involving aboriginal rights, language rights, provincial laws that are similar to federal laws, 'legal issues of broad importance' to federal interests, and exceptionally important social issues (abortion is cited as an example).

Intervention can also be used in a more strategic sense that is related to inter-governmental relations, because it is a way for one order of government to try to influence the laws of the other. The leading example is the federal government's recurring interventions over the past three decades to support language-rights claims against provincial governments (for example *Société des Acadiens v. Association of Parents* 1986, *Mahe v. Alberta* 1990, *Doucet-Boudeau v. Nova Scotia* 2003, and *Solski v. Quebec* 2005), which began as part of Prime Minister Pierre Trudeau's efforts to promote official bilingualism across Canada, often in the face of provincial resistance, especially in Quebec. This strategy is particularly evident with respect to minority-language education for anglophones in Quebec and francophones outside Quebec (*Mahe, Doucet-Boudreau, Solski*), because such programs are crucial to maintaining one's mother tongue but education is entirely within the constitutional jurisdiction of the provinces. To overcome this difficulty, Trudeau funded the creation of official language (that is, French and English) minority groups (OLMGs), created the Court Challenges Program in 1978 to fund OLMG litigation against provinces, and intervened in such litigation to support the claimants. The capstone to this strategy was the inclusion in the Charter (s. 23), at Trudeau's insistence, of minority-language education rights, which are exempt from the s. 33 'notwithstanding' clause and which provide a strong foundation for



OLMG litigation (see Riddell 2004). Provinces may also intervene strategically in cases involving another province to encourage a judicial ruling that will legitimize their own policy initiatives. Manfredi (1994) gives the example of interventions by Ontario and New Brunswick in support of an Alberta francophone OLMG in *Mahe*, at a time when their own pro-bilingualism policies were meeting with stiff political opposition. A Supreme Court ruling endorsing minority-language education 'could be mobilized by both provinces to dilute this opposition by allowing them to argue that their new policies were required by their constitutional obligations' (Manfredi 1994, 111).

### Why Appeal?

To understand why the government might appeal in any given case, one needs to ask what the government's goals are when appealing—what does it seek to achieve? Most fundamentally, we can assume that—like any appellant—the government seeks to minimize or reverse the loss it suffered in the lower courts. All losses in litigation entail some cost to the losing party, and when governments lose in court, their costs can be sorted into two categories: financial and policy costs. Like private litigants, governments may have financial expenses if found liable in civil suits, as well as the expense of preparing and presenting the case. In addition, however, the state may bear fiscal costs associated with a policy change, for example, being ordered by a court decision to provide minority-language education. Policy costs include the loss of a particular statute to judicial invalidation or significant reinterpretation, as was the case with the abortion law in *Morgentaler*. A related policy cost is the opportunity cost (in time, personnel, and political capital) of attempting to draft replacement legislation, as the Mulroney government learned in its two unsuccessful attempts to pass a new abortion law.

There has been little rigorous examination of governmental decisions to appeal, even in the US (but see Salokar 1992; Waltenburg and Swinford 1999a, 1999b; Zorn 2002; Pacelle 2003), but recent work (Hennigar 2007) sheds some light on appeals by the federal government to the Supreme Court of Canada in Charter cases. The evidence from Canada and the US is that governments appeal—as with intervening—only selectively and on the basis of a variety of factors. In the Canadian case, the federal government seeks to appeal in only about 30 per cent of the cases where it could.<sup>30</sup> Its decisions to appeal are the product of calculated decisions based on costs, case importance (or 'salience'), the prospect of winning on appeal, and, in certain circumstances, the chance that the Supreme Court will grant leave to appeal ('reviewability'). Specifically, an appeal is much more likely if there was dissent among the judges of the lower appeal court; if the lower court crafted a novel interpretation of the Constitution that limits the government's power (but only, curiously, if there were interveners present in the case); and if the court 'rewrote' ('judicially amended') the government's law being

challenged.<sup>31</sup> Appeals in civil cases are more common than in criminal cases, not surprisingly since the former tend to involve greater financial and policy costs. What is equally interesting is what does *not* influence the decision to appeal: the ideology of the Supreme Court, which party is in power, or if the lower court simply strikes down ('nullifies' or 'invalidates') a law and leaves it to Parliament to fix. This surprising finding about nullification shows that the simple fact of judicial activism is less important to government decision makers than the form this activism takes, for the government challenges only the greatest incursions on its policy authority. The evidence permits the conclusion that the AG Canada actively defends the authority of the government and, correspondingly, challenges attempts by the lower appellate courts to expand judicial power, *regardless* of the party in power. As well, government decision makers appear to actively consider strategic factors, such as minimizing or avoiding losses on appeal.

As the evidence from Canada and the US confirms, governments do not, as a general rule, waste resources or risk their credibility with the Supreme Court by litigating 'lost causes'. Winning is also important for jurisprudential reasons, namely, that losing before the country's highest court of appeal may establish an unfavourable legal rule with the widest possible application or, as Waltenburg and Swinford (1999a, 254) find, governments 'will not put good precedent at risk.' The risks of appealing are even greater for the Canadian federal government, in that its losses are limited when they occur in provincial courts of appeal, whereas a loss before the Supreme Court has consequences for the application of federal law at the national level. This is because rulings by provincial courts of appeal apply only in the jurisdiction of that court (for example, Ontario for the Ontario Court of Appeal), but the Supreme Court's decisions apply in all jurisdictions. In view of this risk, governments have an extra incentive to avoid losing in the Supreme Court.

All of these findings more or less confirm the AG Canada's own views on appealing. Departmental documents and interviews with government lawyers (see Hennigar 2002; 2007) suggest that they do not appeal routinely and that there is a thorough, centralized approval process for appeals to the Supreme Court. In particularly high-profile cases, such as that on same-sex marriage, the decision to appeal may even be debated at the highest levels of the political executive, by the cabinet and the Prime Minister, and could include calculations about the impact of the issue in an anticipated election (MacCharles 2004, H1, H4; Hennigar 2008). Moreover, department officials are cognizant of the Court's limited capacity to hear appeals and their office's institutional credibility with the Court's justices. Consequently, departmental guidelines (Canada, Federal Prosecution Service 2005) recommend seeking an appeal only when the 'public interest' requires it, as when:

- the issue raised by the case is of widespread importance, or its impact is not confined largely to the immediate case;
- the lower courts differed in interpreting the issue raised;



- the decision could impair the enforcement or administration of a significant government policy initiative if left unchallenged;
- the resources required to prepare and present the appeal do not significantly outweigh the value of pursuing the case further; and
- there are public expressions of concern about the lower-court ruling (but only where the arguments for and against appealing are evenly matched).

As with many other areas of government litigation in Canada, more research is needed to gain a fuller understanding of the decision to appeal.

Before proceeding, it is important to recognize the broader political significance of the government's appeal decisions, in particular how the government's selectivity has important implications for judicial agenda setting. A large body of recent work on judicial activism through the 'rights revolution', led by Charles Epp's (1998) comparative analysis and by Morton and Knopff (2000) in Canada, emphasizes the courts' passive nature, or the fact that judges require other actors to bring cases for adjudication. Scholars identify the crucial role of interest groups in this regard. Epp (1998, 3), for example, concludes that Canada's 'rights revolution' is explained primarily by a 'support structure for legal mobilization, consisting of rights-advocacy organizations', or what Morton and Knopff term the 'Court Party' (see also Smith 1999; Brodie 2001; Hein 2001). This conclusion ignores the fact that *governments* are by far the most frequent appellant in rights litigation. By definition, most Charter-rights claims are directed at government institutions, officials, or legislation, and, as 'the ultimate repeat player', the national government has a vested interest in broad, long-term jurisprudential development that provides an incentive to bring cases to the highest court in the land. Thus, the rise of the judiciary in Canada has, ironically, been made possible to a large extent by the very institution that stands to lose authority because of judicial activism. On the other hand, a decision by the government *not* to appeal losses in rights litigation means that important constitutional questions are kept from being heard in the highest court in the land, or at least delayed. A notable example is whether the Charter's equality rights provisions protected sexual orientation, and accordingly whether statutory human rights codes must as well. The federal government did not appeal from its loss on this issue in the Ontario Court of Appeal in 1992 (*Haig v. Canada*), and the Supreme Court of Canada was not able to address this question fully for another six years (in *Vriend v. Alberta* 1998).

### Why Concede?

Any time a government is sued, it must decide whether it is willing to defend itself or whether it will concede. In typical civil litigation (see Chapter 10), conceding usually means settling out of court or seeking a resolution through alternative dispute resolution. Both strategies were employed in recent years by the

federal government in response to claims by Aboriginals about abuse (both physical and cultural) resulting from state-ordered or -sanctioned residential schooling. That set of cases, though exceptional for their number and the amount of financial damages claimed—the May 2006 settlement will cost over \$2 billion, in addition to the over \$250 million already paid through litigation and ADR—point to several factors the government (like any litigant) would consider: financial costs, time, personnel required, and the consequences in terms of public relations of appearing to 'fight'.

Litigation under the Charter of Rights raises a special issue for the government with respect to concession, however, and it is the scenario that has received the most scholarly attention (Edwards 1987; Scott 1989; Huscroft 1996; Jai 1998; McAllister 2002; Roach 2000, 2006): should the government concede in court that its own legislation is unconstitutional? Most of the treatment of this issue arises in the debate over whether the AG should be able to make such concessions 'independently' over the objections of his or her own cabinet and/or Parliament. That debate is surveyed in the next section. For now, let us consider the various options government lawyers have when presented with a Charter-based challenge to a statute, as outlined by Huscroft (1996). The first is a 'full Charter defence', which sees the government arguing that the law does not violate the claimant's rights, and, should the court disagree, that the law is a 'reasonable limit' under section 1 of the Charter. (Section 1 permits the government to limit the Charter's rights so long as the limits are 'reasonable', explicit in the statute, and 'demonstrably justified'.<sup>132</sup>) Governments usually offer a full defence.

A second option is to give a 'limited Charter defence', which could mean either conceding the rights violation but not s. 1 or to contest the rights violation but offer no s. 1 defence. In the *Sauvé* (2002) case, the federal government conceded that the law—which denied the vote to prisoners sentenced to at least two years—violated the Charter's s. 3 right to vote, but offered a vigorous s. 1 defence based on political philosophy (social-contract theory), the importance of citizenship and voting, and the fact that the prohibition ended when the prisoner was released. An example of a case where no s. 1 defence was offered is *Chaoulli*, mentioned already several times in this volume, which concerned whether Quebec's ban on private health insurance violates the Charter's s. 7 right to 'life, liberty, and security of the person'. As co-defendant with Quebec, the federal government in *Chaoulli* denied that the ban violated s. 7 but did not address s. 1, possibly because the AG Quebec offered a full Charter defence of its law. Whereas some violations, if found, would be difficult to justify as 'reasonable', as a general rule failing to argue s. 1 is a questionable tactic because it gives the court no choice but to find the law unconstitutional if it does find a Charter violation—which occurs much more often than a finding of unreasonableness (Hiebert 1996; Kelly 2005).

The third option is a 'full concession', which entails conceding both that the law violates a Charter right and that it is unreasonable. A government might choose this strategy if the law was passed a long time ago (especially before the



adoption of the Charter), or if it was passed by a previous government of a different party. An example of full concession is *Schachter v. Canada*, where the federal government accepted that its law denying parental-leave benefits to new biological (but not adoptive) fathers unjustifiably violated the Charter's equality rights. Indeed, the only reason the government even appealed the case was to challenge (successfully) the lower court's remedy of 'reading in' natural fathers; though Ottawa had already extended such benefits to all parents, it had cut the amount significantly to maintain the overall cost of the program. While this example suggests the government's full concession was motivated by the fact that it had a replacement program in place, it remains unclear why the government opts for a particular one of these three strategies at a given time.

### Should the Attorney General Be 'Independent'?

It was explained earlier that the principle of prosecutorial independence is well-established in our legal tradition to prevent politically motivated prosecutions and miscarriages of justice. Our focus here, however, is on civil litigation, particularly when it involves constitutional challenges to government policies. Writing in 1987, John Edwards, the foremost scholar of Attorneys General in Canada, concluded that '[t]here appears to be considerable confusion as to whose interpretation of the law, whose assessment of the policy implications of the legal conflict should prevail' when 'a conflict of opinion arises by virtue of the Attorney General's assessment of the legal and policy issues' (51). Two decades later, this confusion persists. Edwards's widely cited argument was that the AG has a special duty to 'protect the Constitution' and to represent the 'public interest', even if this requires that he or she advance a legal position in court at odds with the wishes of the government.

His concern is understandable. Liberal democratic regimes contain an inherent tension between the government's partisan incentive to appease the voting majority (or at least a plurality, given our electoral system) and the responsibility to respect the rights and freedoms of individuals and minorities. This tension is particularly acute when the minority is an unpopular one. Edwards went so far as to advocate the creation of a separate, independent litigation office which would represent the government in all criminal and civil proceedings and whose head would report to the AG but sit outside cabinet, like the Office of the Solicitor General of the United States.<sup>33</sup> Edwards's position that the AG should refuse to defend laws which he or she believes are unconstitutional has been echoed by former Ontario Attorney General Ian Scott (1989) and, more recently, by Department of Justice Canada senior counsel Debra McAllister (2002), Ontario Deputy Attorney General Mark Freiman (2002), and law professor Kent Roach (2000, 2006). In the most recent contribution to this debate, however, Roach (2006) contends that AGs should concede that legislation is unconstitutional only

after all attempts to resolve potential violations through other legislative means (including invoking the s. 33 'notwithstanding' clause) have been exhausted.

Edwards's position has not gone unchallenged, however. Huscroft (1996) argues that the AG should be independent from the political executive but only to the extent necessary for the AG to adhere to the will of the legislature. As a member of Parliament, a government minister, and the chief Law Officer of the Crown, the AG has a duty to represent the legislature, a duty that requires him or her to defend the impugned legislation and to prosecute existing laws. Huscroft criticizes Scott's argument for its 'presumption that the public interest lies only in vindicating the Charter rights of individuals' and for 'overlook[ing] the constitutional interest inherent in defence of the legislative process', in particular 'the effect of denying the legislative branch a voice in the judicial process' (1996, 154–5). Put simply, legislatures should repeal or amend 'obviously unconstitutional' laws, not leave it to the AG to orchestrate their judicial nullification. Huscroft is especially concerned about AGs' conceding that legislation is unconstitutional when the legislature has clearly rejected the government's attempt to amend the challenged legislation or where the law was adopted through a free vote; concessions by AGs in such circumstances, in Huscroft's opinion, undermine respect for the legislature.<sup>34</sup> Whether one agrees with Huscroft that the AG should serve the legislature rather than the executive (or herself) depends on what policy tools one believes the political executive can use legitimately. Elections clearly empower governments to pursue their policy goals, but can governments use only parliamentary mechanisms or litigation as well? The authors of this volume do not seek to answer this question, only to raise it.

Another criticism of Edwards's argument is that the AG's conception of the 'public interest' may be excessively legalistic. Julie Jai, herself a government lawyer, observes (1998, 18) that litigation decisions made within the AG's office usually ignore non-legal factors such as policy design, political consequences, and financial costs. Given that litigation positions—and court rulings—in Charter cases can have all of these non-legal implications, Jai concludes that questions such as whether a government action is a 'reasonable limit' on Charter rights is 'an issue involving as much policy as law, and might be most appropriately decided by Cabinet' (18).

More fundamentally, one could challenge the authority of the AG to independently ascertain and represent the public interest at all. In a society as complex and pluralistic as Canada, 'the very notion of a single public interest . . . is hotly contested' (Roach 2000, 26–7). On the one hand, the pluralistic public interest can be represented by the public in litigation, through the participation of citizens and interest groups. After all, why does the public interest need to be guarded by a state official—a full, partisan member of the political executive, no less—if the 'public' can appear in court to speak for itself? Over the past thirty years, the public have been encouraged in a variety of ways to do so, including by the relaxation of traditional standing rules by the Supreme Court of Canada, government funding of interest-



group litigation, and the opening of the courts to third-party interveners. Take, for example, the same-sex marriage cases: in *Halpern* alone, seven same-sex couples challenged the legal status quo with the support of three interest groups (EGALE Canada, the Metropolitan Community Church of Toronto, and the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage), and the Canadian Human Rights Commission. This is not to deny the importance of courts' hearing a variety of viewpoints, but there are other measures the courts can employ to this effect that do not require the AG to oppose his or her own government.

On the other hand, the AG's responsibility to serve the public interest is not unique among government officials. Carney (1997, 6) correctly observes that AGs 'are not *the* guardians of the public interest. That responsibility is shared by all who are vested, directly or indirectly, with the sovereign power of the people: parliament, the executive and the judiciary.' If the AG cannot legitimately claim a monopoly on representing the public interest, then his or her monopoly over the conduct of government litigation presents a problem when it is used to concede a law's unconstitutionality, over the objections of cabinet, on the basis of the public interest. As the government's sole legal representative before the court, the AG's assessment of the public interest is the only one presented to the court on behalf of the government, even if it is not the only assessment *within* the government. In a recent speech, Andrew Petter (2007b), the former Attorney General of British Columbia, criticized the influence government lawyers have on their lay colleagues in cabinet. He stressed that non-lawyers are risk-averse and are deferential to lawyers with respect to litigation, admitting that he had used this fact to his advantage when advancing his own policy preferences. Thus, the AG's office has a strong capacity, not only to shape the legal position taken in court on behalf of other departments, but also to secure changes to proposed legislation in the name of preventing litigation (see also Kelly 2005 on the latter scenario).

Despite its numerous advocates within the legal academic community, concrete examples of AGs' exercising independence in litigation are rare. One that we know of involved Ian Scott when he was AG of Ontario, when he conceded in the *Blainey* (1985) case, against the wishes of his government, that rules barring girls from playing in boys' hockey leagues and from challenging this under the Ontario Human Rights Code violated the Charter's equality rights (see Scott 1989, 124–5). Ironically, the Ontario High Court of Justice rejected Scott's concession and upheld the ban, although it was overturned by the Court of Appeal.<sup>35</sup> Although AGs Canada have conceded Charter violations in several cases, there is no evidence that they did so over the objections of their Prime Minister or the cabinet.

### Governments in Court: A 'Success' Story

In large measure because of the prosecution of offences, governments appear in court more often than any other litigant. Governments are also, however, the most successful class of litigants. This section provides evidence to this effect and

explores possible explanations for the government's high success rate in court, including the idea that experience as a litigant breeds success.

There are no comprehensive statistics on the success rate of litigants for every level of court in Canada in all types of cases, and the most thorough figures in existence are somewhat out of date (McCormick 1994). Nonetheless, the available data indicate that governments in Canada are extremely successful in court. McCormick's (1994) study of the provincial courts of appeals from 1920 to 1990 and of the Supreme Court of Canada from 1949 to 1992 examined the success rate of different categories of litigants in all types of cases.<sup>36</sup> His two main conclusions were that governments are more successful than other categories of litigants—including big business, unions, other businesses, individuals, and other interest groups—but that the *type* of government or governmental role matters. Specifically, the government was most successful in appeals from the prosecution of offences (as 'Crown'), winning roughly two-thirds of the time. In non-criminal cases, the federal government was noticeably more successful than the provinces (as a group—individual provincial figures were not given), and that municipal governments were the least successful. Indeed, provincial and municipal governments were slightly less successful than big businesses. Nonetheless, these governments still win over half the time.

McCormick also calculated a more nuanced measure of success developed by Wheeler et al. (1987) called 'net advantage', which refers to the phenomena that 'appeal courts tend to affirm rather than to reverse the lower court' and that governments appeal much less often than they are appealed against (McCormick 1994, 159). Net advantage is calculated by subtracting a litigant's *loss* rate when respondent from that litigant's *success* rate when appellant. McCormick discovered that the Crown was the most successful litigant (with a net advantage of 26.9 per cent), followed by the federal government (20.4 per cent), big business (15.0 per cent), and provincial governments (3.7 per cent) (1993, 532).

Not surprisingly given the high profile of Charter of Rights cases, especially in the Supreme Court of Canada, there is more information on success rates in those cases, although it is still woefully incomplete. In the Supreme Court, governments (taken together) have been successful at defending their laws and the actions of their officials, especially the police, against roughly two-thirds of Charter-based challenges since 1982, and they have become more successful over the last decade (Kelly 2005). The reason for the upward trend (or downward, for rights claimants) is most likely that laws drafted before the Charter, and therefore most likely to violate rights, have already been struck down, or repealed by governments, and government officials have become used to working with the Charter. Chapter 11 examines in greater detail how the threat of Charter litigation has influenced government policy-making. When it comes to defending statutes (as opposed to the conduct of government officials), the federal government is slightly more successful (65 per cent) than the provinces (60 per cent) (Kelly 2005, 148). Information on Charter cases in the lower courts is rare, but the evidence suggests governments



are even more able to defend their statutes there (Kelly 2005; Hennigar 2007). The federal government, in particular, posted a remarkable 73.2 per cent Charter-case success rate (+46.5 per cent net advantage) in the provincial courts of appeal and the Federal Court of Appeal between 1982 and 2000 (Hennigar 2007). Ottawa was only slightly less successful in Charter cases involving civil litigation (168 wins of 237 cases, or 70.9 per cent) than criminal prosecutions (268 wins of 356 cases, or 75.3 per cent), with respective net advantages of 44.3 and 47.8. In the Charter cases before the Supreme Court of Canada between 1986 and 1997, the federal government enjoyed a net advantage of +38 per cent, while the provinces enjoyed a lower net advantage of 31 per cent (Hausegger 2002). Unfortunately, we have no figures for Canada's trial-level courts.

The federal success rates are comparable to that of the US national government, which has a net advantage of 45.1 per cent in the US courts of appeal (Songer and Sheehan 1992) and 35.9 per cent in the US Supreme Court (Sheehan, Mishler, and Songer 1992). On the other hand, Canadian provinces as a group are less successful than American state governments as a group, which have net advantages of 30 per cent in the courts of appeal (Songer and Sheehan 1992), 11.2 per cent in the US Supreme Court (Sheehan, Mishler, and Songer 1992), and 11.8 per cent (with large city governments) in the state supreme courts (Wheeler et al. 1987; see also Farole 1999).<sup>37</sup> It must be noted that there is much, much more academic study of government litigation in the US than in Canada (or really anywhere else in the world). Governments in Canada are generally more successful than those in other countries, apart from the US, although governments are usually the most privileged litigants in their own countries. This was confirmed by Haynie et al. (2001), who undertook a similar study to McCormick's in Canada, Australia, Great Britain, India, the Philippines, South Africa, and Tanzania (see also Kritzer (2003b) for a review of the existing comparative literature). The exception to this pattern is Australia, whose national, state, and local governments are all remarkably unsuccessful in that country's High Court. Though they all win about half of their appeals, they frequently lose when they are the respondent, resulting in a low net advantage for the national government (11.8 per cent) and *negative* scores for the states (-2.5 per cent), municipalities (-16.5 per cent), and governments as the Crown in criminal matters (-2.0 per cent) (Smyth 2000).

Another form of litigant success is getting leave to appeal to the highest courts, and here again governments fare better than other litigants (Flemming and Krutz 2002a; Flemming 2004). Who is able to secure leave to appeal has broader importance for the legal system beyond simply the chance to win a particular case. Because appeal courts routinely shape the law through interpretation (and increasingly, make policy), those parties that get their cases heard 'will have a hand in directing the path of the law' (Flemming and Krutz 2002a, 811). Parties that are disproportionately successful in securing leave to appeal, such as governments, therefore possess more power and influence over agenda setting than others. It is important to note, however, that 'setting the agenda' is quite distinct from winning

the case once the court hears it. The Supreme Court of Canada, for instance, reverses lower appeal-court rulings only about half the time, and the US Supreme Court reverses about two-thirds of its decisions (Flemming 2004, 53; Supreme Court of Canada 2008a, 8). In other words, securing leave to appeal to the Supreme Court means that one is as likely to lose one's case as win, statistically speaking, although governments are still more successful in this regard than others.

Still another measure of success is how the government fares when intervening as a third party in support of another litigant. In the simplest terms, is a party more likely to win when it has the support of a government? As Table 8.1 shows for Charter cases in the Supreme Court between 1986 and 1997, the answer is clearly yes, regardless of whether the party is the appellant or the respondent. A more nuanced analysis reveals the interesting result, however, that the federal government influences the outcome of Charter cases only when it intervenes to *oppose* the rights claimant. That is, the Court is less likely to find in favour of the rights claimant when the federal government opposes the claim. In contrast, provincial government interveners have influence when either opposing or supporting the claimant.<sup>38</sup>

Besides case disposition and leave to appeal, there are other, more substantive ways of measuring litigant success, such as the creation of favourable or unfavourable legal interpretations as precedents (Morton and Allen 2001). Legal interpretation is especially prevalent in appeal courts and is closely tied to law-making. Moreover, it is possible to win a dispute for the wrong legal reasons, or conversely to lose on disposition but obtain a favourable interpretation. For example, in *Egan v. Canada* (1995), a same-sex couple was unsuccessful in its claim for a spousal pension under Old Age Security, but it secured the important ruling from the Supreme Court of Canada that sexual orientation was protected under the Charter's section 15 equality rights.<sup>39</sup> Manfredi (1997) terms the phenomenon of judges interpreting the Constitution 'micro-constitutional politics', and likens it to amending the Constitution without going through the formal amending formula.<sup>40</sup> Most studies of the success of litigants regarding legal interpretation focus on interest groups (Riddell and Morton 1998; Manfredi 1994; Hausegger 2000; Morton and Allen 2001; Manfredi 2004; Riddell 2004), but Hennigar's (1996) analysis of the federal government's first decade of Charter cases is an exception. That study found that Ottawa was far more successful on case disposition (74 per cent) than at persuading the Supreme Court of Canada to

Table 8.1 Government Success as Third Party Before the Supreme Court, Charter Cases Heard 1986–97

Intervening Government	Success Rate When Supporting Appellant (%)	Success Rate When Supporting Respondent (%)
Federal	75	83
Provincial, as a whole	80	82



adopt the government's interpretations of the Charter (49 per cent). The gap was widest when the federal government intervened in criminal law cases, where the side it supported won on case disposition three-quarters of the time yet only one-quarter of its legal interpretations were adopted by the Court. This points to the need for further, more nuanced study of government success rates in court, and in particular of whether 'success' translates into 'influence' over legal interpretation by the courts (see Chapter 7 for a discussion of this distinction).

Why are governments so successful in court, at least on case disposition? Several explanations have been offered (mostly generated in the US), but the dominant one is 'party capability theory' (Galanter 1974). According to party capability theory, the judicial system favours 'repeat players' (RPs) or well-resourced 'haves' who litigate frequently. RPs develop expertise, long-term legal strategies, and institutional credibility with judges and court staff, and they have 'economies of scale', which translate into low start-up costs for any individual case (as they already have lawyers on staff), and access to legal specialists (Kritzer and Silbey 2003, 4–5). Repeat players can be businesses or organizations (for example, an interest group like LEAF), but the ultimate repeat player is a large government. At the other end of the spectrum are 'one-shot' (OS) litigants—usually individuals, small businesses, or interest groups—that appear in court only rarely. One of Galanter's key findings is that when RPs meet OS litigants in court, RPs tend to win. This is the scenario most individuals face when they sue, or are prosecuted by, the government. The party capability theory has been tested and confirmed in Canada's highest appeal courts (McCormick 1993), as well as in England (Atkins 1991), Israel (Dotan 1999), and several other countries (Haynie et al. 2001), but it has a mixed record in the US, where Sheehan, Mishler, and Songer (1992) did not confirm it, in contrast to Wheeler et al. (1987), Songer and Sheehan (1992), and Farole (1999), and it was not confirmed in Australia (Smyth 2000).<sup>41</sup>

Party capability theory is not without its challengers, or at least refiners. McGuire (1995; 1998) argues that the key factor determining litigant success in the US is the experience of one's counsel. Though governments tend to have more experienced counsel than other litigants, he finds that any government 'advantage' evaporates if the either side's counsel has an equal or greater amount of experience. In other words, government success rates are inflated by the large number of RP-OS cases. This is not the case in Canada. Although a recent test (Szmer, Johnson, and Sarver 2007) of McGuire's 'lawyer capability' theory in the Canadian context confirmed that lawyers' experience influences outcomes in the Supreme Court of Canada, governments are *still* disproportionately successful after taking this factor into account. Other explanations in the literature include the previous success (rather than just 'experience') of the lawyer (Haynie and Sill 2007), the ideology of the courts (Sheehan, Mishler, and Songer 1992), and the fact that most judges have conservative backgrounds that favour business, the political establishment, and the social status quo (Wheeler et al. 1987; Mandel 1994).

Kritzer (2003b), who offers the most developed challenge to McGuire and the party capability theory, however, points to several factors that favour governments. Governments make the rules by which litigation is conducted, including laws regulating the liability of government officials and the creation of tribunals that filter cases out of the regular court system. He also points to the government's selectivity about which cases it appeals (see also Zorn 2002), although this would not explain why the Government of Canada is as successful as a respondent as when it appeals (Hennigar 2002). Finally, Kritzer stresses that courts are part of the broader state, and there is a 'norm of deference' to other state agencies, in no small measure because judges rely on these other government actors to enforce their rulings (see Rosenberg 1991 for more on this relationship).

Regardless of the ultimate explanation, the high success rate of governments in court has important political ramifications. At the very least, it is a dash of cold water on those who think of the courts as a welcoming forum for citizens wishing to challenge their governments. Though some challengers do prevail, the statistical reality is that the deck is heavily stacked against those individuals, even in cases involving constitutional rights. This also implies that the prospect of fundamentally reforming public policy or the government itself through litigation must be viewed with some skepticism. Galanter's (1974) seminal article on repeat players was subtitled 'speculations on the limits of social change' for good reason.

## Conclusions

As the 'ultimate repeat player' litigant, governments exercise a significant influence on the flow of cases and issues to the court system, and their success as litigants has important consequences for the prospect of policy and social change via the courts. That said, it is also important to recognize that there is a complex political relationship between governments and courts and that sometimes 'losing is winning' from the government's perspective. There are at least five situations in which the government might prefer to 'lose' in court (or at least not mind losing):

1. The government wants to change a law or policy but wants to avoid political responsibility—in short, it wants the court to do it. This might be because the issue in question is so polarizing for the public that any action the government takes will provoke considerable opposition, as with abortion. US scholar Mark Graber (1993) calls this scenario the 'nonmajoritarian difficulty'. Or, it might be an issue that would expose the government to damaging questions by opposition parties if dealt with in Parliament. Or it would save time and 'political capital', since changing a policy through the courts means that it might not be necessary to do so through Parliament. This is especially useful if the policy in question was adopted by a previous government of a different party.



2. Government leadership or some part thereof wants to silence dissent or criticisms within cabinet, caucus, or society. A good example is the same-sex marriage case, as noted earlier.
3. The government wants to mobilize its supporters. There is ample evidence that interest groups litigate in the face of almost certain failure to highlight their grievances and to foster a sense of political-group identity (Smith 1999). Similarly, governments may reap political gains with clientele or partisan supporters by appearing to 'go down fighting'. For example, the Parti Québécois appealed the invalidation of part of its mandatory French education regime ('Bill 101'; *Attorney General of Quebec v. Association of Quebec Protestant School Boards* 1984),<sup>42</sup> even though there was virtually no chance the federally-appointed Supreme Court would reverse a nullification under the new Charter's language rights (which had been drafted specifically to counter Bill 101).
4. The government wants to challenge the legitimacy of the judiciary or the larger political system. This was a secondary objective of the Parti Québécois when it pursued the 'lost cause' of Bill 101 in the Supreme Court. The court's decision allowed the separatist PQ to argue that the Québécois goal of preserving the French language and culture could not be realized within the legal and political framework of Canada and that the Supreme Court—which is entirely appointed by the federal government—could not be trusted. (This would also help the government of Quebec argue later that provinces should have more influence over Supreme Court appointments.)
5. Finally, in some lower-court cases, the government may not have preferred to lose, but having done so it decides to 'cut its losses' and not appeal. This can prevent or delay the issue from reaching a higher court (such as the Supreme Court), whose decisions get more media coverage and have wider application.

Refusing to appeal is just one of the tactics discussed in this chapter that the government has at its disposal to shift the issue—and, hopefully, responsibility—to the judiciary. It can also concede to challenges against its laws or actions or use the reference procedure, but all of these strategies raise serious questions about who is *really* responsible if the court rules against the government. This should be borne in mind when one is evaluating the effect of the court on policy-making and on debates about 'judicial activism' and the 'dialogue' between governments and courts; those issues are explored in Chapter 11.

## PART III

# Courts at Work



the Canadian Forum on Civil Justice as a permanent body to study and recommend changes to the civil justice system in Canada. Its 2006 national conference, for example, collected research papers under the theme 'Into the Future: The Agenda for Civil Justice Reform'. Suggested reforms in all of these initiatives include either scrapping or limiting civil juries even more, implementing province-wide case management and mandatory mediation (beyond the existing pilot projects), changing the way in which lawyers bill clients, putting strict time limits on cases, limiting the number of expert witnesses, streamlining the discovery process, and increasing the use of ADR generally. These efforts should not be dismissed lightly, because previous reform movements in the mid-1990s resulted in many changes to the civil justice system, including the expansion of simplified small claims courts, the introduction of contingency fees in Ontario, and the pilot projects on mandatory mediation and case management mentioned above. And in the past ten years, laws permitting or expanding class-action suits have been passed in all provinces except Prince Edward Island (where a proposal was considered and withdrawn). Unfortunately for such an important aspect of public policy, these discussions tend to be quite insular and politically low-profile: although the input of the judiciary and legal community is obviously crucial, theirs should not be the only contribution to this debate.

## Chapter 11

# Courts, Policy-Making, and Judicial Impact

Public policy involves developing objectives to address issues or problems and selecting means to achieve those objectives. Political choices need to be made amongst competing objectives and the means used to achieve them—choices that involve value considerations as well as considerations of efficiency and effectiveness. The government of Ontario, for example, decided that a minimum wage law was a useful mechanism to help reach the goal of social equality in society, even though some economists argued that such laws undermine economic efficiency and could actually harm lower-income workers by forcing businesses to eliminate jobs. In creating its minimum wage law, the Ontario government also sought to protect the agricultural sector from any negative economic effects of the law. Therefore, the law exempted employers from having to pay minimum wage to any 'person employed on a farm whose employment is directly related to primary production of eggs, milk, grain . . . vegetables . . . honey, pigs' (see Waddams 1987, 120–1).

This was not the end of the policy-making story though, for the issue wound up in court when some mushroom workers argued that they should still get minimum wage. When students are asked in class about how they would decide this dispute if they were a judge in the case, some respond that they would declare the law unfair and discriminatory. However, when the dispute was before the courts in the 1970s, the judges had no legal authority to decree the law null and void or to include agricultural workers in the law because there were no constitutionally entrenched rights and no corresponding powers to remedy constitutional wrongs. Judges could only declare laws unconstitutional on federalism grounds and Ontario was clearly within its jurisdiction to pass such a law. Hence, the judges' task in this case was limited to interpreting and applying the law. The Ontario Divisional Court panel that heard the case were split in their interpretations (*Ontario Mushroom Co. v. Learie* 1977). One judge, using the 'literal' rule of statutory interpretation, declared that mushrooms were fungi and that judges could not make them vegetables; therefore, mushroom workers were not agricultural workers, and they should receive minimum wage like most other workers in the province. The other two judges looked more to the context of the law and decided that because mushrooms were similar to the other agricultural products listed in the legislation, it was to be assumed that the government would want mushroom workers to be exempt from receiving minimum wage (see Waddams 1987, 120–1).



The *Ontario Mushroom Co.* case illustrates that when judges are asked to adjudicate disputes, it is often unavoidable that they shape law and policy as a by-product of interpreting how the law applies to a particular situation (sometimes referred to as 'interstitial' rule making). In this instance, the minimum-wage rules were clarified by extending the exemptions to include mushroom workers. In other cases, judges have adapted rules incrementally to suit new situations created by social, economic, or technological change. Judges can also go beyond internal clarification or incremental changes to law and policy when making their decisions and engage more fully in creating rules or policy. This is true in non-constitutional law (tort law, contract law, criminal law, administrative law, and so on), but the potential for creating rules is greater in constitutional cases, when judges are asked to rule whether ordinary laws conform to the constitution. Imagine, for example, if the case were to take place in the Charter era. The mushroom workers (and maybe all agricultural workers) would very likely challenge the law for violating their rights to equality (s. 15 of the Charter) and perhaps also for threatening their 'security of the person' (s. 7 of the Charter). Because the case had the potential to shape labour policy, it is likely that other governments and organized groups (such as labour unions and business associations) would ask for permission to intervene in the case. Both sides of the case would probably supply social-fact evidence to the court about such matters as the socio-economic realities of farm workers and what impact minimum wage laws would have on farms, especially family farms. With various groups appearing before the court presenting social facts, the court would resemble more a legislative committee meeting (used in provincial legislatures or the federal Parliament to make recommendations about policy objectives and the best way of achieving those objectives) than a traditional adjudicative court that hears concrete legal disputes between two parties on the basis of historical facts.

However, even if the court took more of a policy-making approach by allowing interveners and using social facts (and perhaps allowing the case to be brought by a party not directly affected by the law), the judges hearing the case would still have choices about how to interpret the Charter rights and whether the rights claimant or the government would win. If the court decided in favour of the rights claimant, it would have to decide on a remedy, such as striking down the law or reading into the law a minimum wage for agricultural workers. This kind of decision would see the judges actively shaping public policy.

It turns out that a Charter of Rights case similar to the one just described was launched by agricultural workers in Ontario after the newly elected Conservative government in 1995 repealed a piece of legislation that had extended trade union and collective bargaining rights to agricultural workers in the province. Some individual workers, including Tom Dunmore, on behalf of themselves and the United Food and Commercial Workers International Union, argued in court that the policy violated their right to freedom of association (found in s. 2(d) of the Charter) and their right to equality (found in s. 15 of the Charter). When the

*Dunmore* case reached the Supreme Court, the Canadian Labour Congress and the provinces of Quebec and Alberta were allowed to intervene. Numerous studies containing social facts were referred to by the Court, such as a 'Profile on Ontario Farm Labour' and reports from Ontario's Task Force on Agricultural Labour Relations. The majority decided that the s. 2(d) rights of Dunmore and others were violated. In support of this conclusion, Justice Bastarache argued that in the absence of protective legislation, no agricultural workers' union could be formed in Ontario and, moreover, 'agricultural workers had suffered repeated attacks on their attempts to unionize' (at para. 42). According to Justice Bastarache, statistics from other provinces showed higher rates of unionization amongst agricultural workers in provinces that included agricultural workers in a regime of labour-relations rights (at para. 42).

After finding that s. 2(d) was violated, Justice Bastarache discussed whether the law could be justified under the s. 1 'reasonable limits' clause of the Charter. In this case, he found that the government did have important objectives behind the law, mainly to protect family farms in Ontario and more generally to protect the economic viability of the agricultural industry in Ontario—an industry that was volatile and competitive. However, Justice Bastarache found that the means used to achieve those objectives—removing agricultural workers from the protection of the *Labour Relations Act*—were not proportional to meeting those objectives. He argued that it seemed arbitrary to exclude one group of workers from labour-law protection for economic purposes given that many other industries also faced competitive markets, especially in a globalized economy. He also maintained that in denying every aspect of the right of association in every sector of agriculture, the government had not tried sufficiently to tailor the means to achieve their objectives while limiting the right to association as little as reasonably possible. Among other things, the government failed, in Justice Bastarache's view, to consider adequately that the agricultural industry was changing rapidly in Ontario with more corporate farming and more complex agri-businesses—even the 'family farm' was becoming a sophisticated and rather large business enterprise.

As for the remedy, Justice Bastarache decided to strike down the clause of the law that excluded agricultural workers from all aspects of labour-relations protection. However he noted that the government did not necessarily have to extend all collective bargaining rights to agricultural workers. At a minimum the statutory freedom to organize ought to be extended to agricultural workers, 'along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms' (at para. 67). He gave the government eighteen months to change the law. This decision would be characterized as an *activist* one in that it required the government to alter its policy, even though the new policy did not necessarily have to give agricultural workers as many rights as they would



have desired. The decision added to the debate about the degree to which courts should be deferential to government policy when making Charter decisions. In this case the government of Ontario had urged the Court to be sensitive to the fact that excluding a given occupation from the *Labour Relations Act* 'involves a weighing of complex values and policy considerations that are often difficult to balance' and that how the value and policy considerations are balanced 'will in large part depend upon the particular perspective, priorities, views, and assumptions of the policy-makers, as well as the political and economic theory to which they subscribe' (quoted by Bastarache at para. 57). Although Justice Bastarache generally agreed with this observation, he concluded nevertheless that judicial deference to government policy was not justified in this case. Critics of judicial activism have mentioned the decision as an example of policy-making by unaccountable judges (Seeman 2003).

The Conservative government responded to the *Dunmore* decision by introducing the *Agricultural Employees Protection Act* (AEPA) in 2002. The legislation allowed agricultural workers in Ontario to form associations, but not unions, and they were not given collective-bargaining rights. Agricultural workers' associations could take their complaints to their employer, but the employer was not required to reply. Not satisfied with the legislative response, the United Food and Commercial Workers (UFCW) Canada union argued that the new legislation did not fulfill the changes to the law required by the Supreme Court in *Dunmore*. It launched a Charter challenge against the new law. In January 2006, an Ontario trial judge ruled against the union, stating that the law fulfilled the minimal requirements of the Charter (*Fraser v. Ontario* 2006). The UFCW Canada has appealed the decision to the Ontario Court of Appeal and is hopeful that it will succeed in light of a 2007 Supreme Court judgment that interpreted s. 2(d) of the Charter to include a procedural right (at least for public sector employees) to bargain collectively (see *Health Services and Support — Facilities Subsector Bargaining Assn v. British Columbia* 2007). After this most recent Supreme Court decision, the president of the UFCW Canada (Local 175) called on the Liberal government of Dalton McGuinty to change the law restricting agricultural workers from unionizing and bargaining collectively.<sup>1</sup>

The *Dunmore* case and its aftermath illustrate various dimensions of the courts and policy-making that will be explored in the chapter. The case is an example of the propensity of courts, especially the Supreme Court, to adopt a policy-making model. As discussed in Chapter 3, this includes a greater willingness to relax the rules concerning standing, mootness, and political questions; to allow interveners; to use social facts; and to shape the law. The next section of the chapter focuses on the judicial law-making aspect of the policy-making model by asking two questions: how much do courts shape laws when making decisions, and should courts actively shape law and policy? The chapter examines these empirical and normative issues in both non-constitutional and constitutional contexts. Particular

attention is paid, however, to the relationship between courts and legislatures in the era of the Charter of Rights. Has the Charter resulted in 'judicial supremacy' whereby 'activist' courts determine the meaning of the Charter and make policy, or has the Charter resulted in a healthy system of institutional checks and balances by facilitating a 'dialogue' between courts and elected officials over the meaning and application of rights?

The *Dunmore* decision and its aftermath also underscore how the policy and longer-term social impact of legal mobilization and judicial decisions depends on numerous factors and can be difficult to predict. The third section of the chapter discusses various factors that have been found to help explain how judicial decisions affect policy; those factors include the attitudes of government officials that are responsible for implementing the decision and the reactions of interest groups, the media, the public, and lower courts to decisions. This section of the chapter also notes that the long-term influence of the law and judicial decisions on social, economic, and political activists is very difficult to predict but may not matter as much as is popularly believed. For example, it may be that the socio-economic conditions of agricultural workers will be influenced far more by long-term changes in the agricultural sector, including the trends toward corporate farming and globalization, than by changes to labour laws.

The concluding section of the chapter begins by exploring some of the theories that have been advanced for explaining the rise of judicial policy-making in Canada and elsewhere. The chapter ends with a discussion of how the changing role of the judiciary, towards more of a policy-making model, poses challenges for the judicial and political systems and their relationship to one another. This is done with specific reference to issues and concepts covered earlier in the book, such as judicial selection and independence.

## Courts and Policy-Making

Answering the question about *what judges do*—do they simply declare what the law is, do they incrementally create law in interpreting and applying the law, or do they play a relatively greater role in law-making—is extremely difficult given the sheer number of decisions that are made and the fact that the results may depend on the type of court (trial, appeal, or highest court), the historical time period, the type of law, and individual judges. Although some systematic attempts have been made to get at this question through surveys of judges or statistical analyses of case outcomes, these studies are limited by court, time frame, type of law, and so on, so we often need to resort to looking at broad trends and various individual cases to get some sense of what judges do.

Assessing the question of *what judges should do* is perhaps even more vexing. This is because the question involves various value judgments and assessments about the theory and practice of liberal-democratic governance. Whereas the



adjudicative model of courts emphasizes that the judicial development of law should be limited and incremental and be based on existing legal principles in order to be legitimate, the policy-making model of courts is more comfortable with judges basing their decisions on promoting fairness, balancing interests, and keeping the law 'in tune with the times' (perhaps with aid of social facts) with less emphasis on the application of existing legal principles. Therefore, the policy-making model envisions a more prominent role for the courts in shaping policy with less deference to the legislative and executive branches. Which of these models is considered more appropriate may depend somewhat on what level or type of court is being discussed and how judges are appointed or held accountable. It may also depend on the type of case at issue. In looking at what judges do and what they should do in this section, we separate the discussion by non-constitutional and constitutional cases. We begin with the former.

### Non-constitutional Cases

In order to explore questions about judicial policy-making in non-constitutional cases, it is helpful to put them in historical perspective. As explained in Chapter 1, common law courts in England had an important role in creating rules—the common law—that governed various aspects of life beginning in about the twelfth century. The notion that the common law was found in judicial decisions was not terribly controversial at first. Early in the history of the common law, judges were said to be simply applying the rules contained in local customs, so they were not 'creating' law per se. When judges started applying common law precedents across Britain, thereby centralizing law-making in the King's courts and relying less on local customs as a source of law, the rationale behind development of the common law changed. Lord Blackstone, in his famous *Commentaries* on the common law, claimed that judges only acted as 'oracles' who declared pre-existing rules grounded in reason about such things as the nature of marriage, contractual obligations, and the power of sheriffs to search citizens—they did not create common law principles. The notion that common law rules existed 'in the sky' to be 'discovered' by judges, rather than being fashioned by judges based on experience and social contexts, was rejected by some, however (Posner 1976).<sup>2</sup>

One of Blackstone's fiercest critics, Jeremy Bentham, favoured Parliament as the chief law-maker. He argued that laws should be 'codified' in legislation rather than found in various common law precedents (Posner 1976). Advocates for codification suggested that judges who made decisions on a case-by-case basis could easily avoid following established precedent by distinguishing the present case from past ones (see Chapter 4); in other words, they could not only usurp legislative power but could also make their decisions according to their personal biases. It was claimed that legislatures were better positioned to represent the views of the population and to create general rules (Scalia 1997). Blackstone, though, was skeptical

about the ability of legislatures to develop a comprehensive set of rules. While he acknowledged that laws in statute form would trump common law if the two conflicted, he thought it would be better if Parliament were to develop statutes to fill in the gaps in the common law rather than create an exhaustive set of laws (Posner 1976). Other opponents of codification suggested that law-making by judges trained in the law was an important bulwark against legislative bodies that might respond to the whims of the masses when making decisions (Scalia 1997).

Over time, and especially since the early twentieth century, legislation has become the most important source of legal rules in Canada and other advanced democracies (Bogart 2002, 28–9; Yates et al. 2000, 35–40). Recall from Chapter 9, for instance, that crimes in Canada are no longer defined by the common law but are found in federal statutes like the *Criminal Code* and the *Controlled Drugs and Substances Act*. The accelerated growth of legislation and regulations coincided with the rise of the administrative state, in which legislatures delegated rule-making and adjudicative powers to various administrative agencies, such as the Immigration and Refugee Board, the Canadian Radio-Telecommunications Commission (CRTC), the Nova Scotia Labour Relations Board, and the Alberta Utilities Commission. Although outside of Quebec common law rules remain a significant source of law (especially in private law matters such as family law, contract law, and tort law), does the prominence of legislation and regulations in forming law and policy mean that courts have relatively less policy-making influence than in the past (setting aside for now the power of courts to strike down laws under the constitution)? Possibly, but courts still shape law and policy in four important ways in non-constitutional cases.

First, courts perform a policy-making function in overseeing decisions made by administrative tribunals. As noted in Chapter 3, courts review the procedural aspects of administrative tribunal decision making (such as whether the tribunal followed the requirements of procedural fairness and so on) and assess the substantive decisions that tribunals make. Chapter 3 also noted, however, that the scope of this review and how carefully the courts scrutinize decisions by administrative tribunal depends on a host of factors. These include whether the administrative tribunal's enabling statute (the law that created the agency and set out its authority) contains a privative clause (which prohibits judicial review of the board's procedures) or allows for appeals of the tribunal's substantive decisions to a court; the expertise of the tribunal relative to the courts; and the nature of the dispute.<sup>3</sup> The recent trend has been for courts to be somewhat deferential to decisions made by administrative tribunals, and this trend continued in the *Council of Canadians with Disabilities* (2007) ruling in which the Supreme Court narrowly (5–4) upheld an order by the Canadian Transportation Agency that required VIA Rail to modify more of its rail cars to accommodate passengers with disabilities, particularly those in wheelchairs.<sup>4</sup>

Despite this trend, though, courts still play a meaningful policy-making role in reviewing decisions by administrative agencies. Even some decisions that uphold



administrative decisions contain seeds of judicial policy-making. For example, in its 2001 *Hudson* decision all nine Supreme Court judges said that the town of Hudson, Quebec, was within its authority to create a by-law banning the use of pesticides for aesthetic purposes; however, the majority based its decision in part on international agreements and statements that promoted the 'precautionary principle', which states that governments must anticipate and prevent environmental degradation. A lawyer specializing in administrative law argued that the decision would stoke the debate about judicial activism because the majority endorsed a particular view of environmental policy and seemingly set a precedent that principles of international law should be incorporated into Canadian administrative law (Bantey 2001).<sup>5</sup> And, of course, courts do not always accept the substantive decisions of administrative actors. Recently, for instance, the Federal Court of Appeal set aside a decision of the Immigration Appeal Division of the Immigration and Refugee Board that had denied an application by Sukhvir Singh Khosa to remain in Canada on humanitarian and compassionate grounds (*Khosa* 2007). Finally, even if judges review only the procedural aspects of administrative tribunal decision making rather than the substance, this can still have important policy implications (Tarr 2006, 286–7). An example of this was provided in Chapter 3, which described how the Supreme Court's *Singh* (1985) decision required the federal government to overhaul its refugee determination system, a decision that proved very costly and contributed to a growing backlog of refugee claimants.

The second way that courts have a policy-making role in non-constitutional cases is cumulatively. The decisions that judges make in 'routine' cases when applying legislative or common law rules, which often leave room for discretion, can forge policy in the aggregate (Tarr 2006, 289). In criminal law, for example, owing to the sentencing discretion that judges have (see Chapter 9), the sentences that judges hand out over time will establish a certain range of punishment that will usually be given for particular crimes. Changes in those patterns can signal a change in judicial policy. In British Columbia, for instance, the number of people going to jail after being convicted for growing marijuana declined from 19 to 10 per cent from 1997 to 2003 (Skelton 2005).<sup>6</sup> In family law, judges are often instructed in legislation to make decisions about child custody and other issues based on 'the best interests of the child'. It is mostly up to judges to fill in what the 'best interests of the child' are over successive decisions.<sup>7</sup> For instance, court-ordered child custody awards still tend to support the mother's claims in a majority of cases, but the number of joint-custody awards has been growing over the last couple of decades. Appellate courts help to set general guidelines for criminal sentences, child custody arrangements, and a host of other issues, but the sheer number of cases decided by trial court judges, combined with the relative infrequency of appeals, means that trial court judges also have an important part in making policy in the aggregate.

A third and related way in which judges shape policies is through clarifying the law or filling in the gaps of law when applying common law precedents or

legislation to specific cases. This task is necessitated by poorly drafted legislation or because rules (in legislation or common law) cannot be written so precisely as to cover every possible situation that may give rise to a legal dispute. In such cases where the law is not clear, judges must make the rules, at least interstitially, no matter what method of statutory interpretation they use or how they use precedents (see Chapter 4). The case of the mushroom workers wanting minimum wage was an example of this kind of policy-making. Many others abound. Here are a few recent examples from the Supreme Court:

a) In *Childs v. Desormeaux* (2006), the Court had to decide whether, under common law rules of tort, persons who hosted a party are liable for damages caused by one of their guests who drove away from the party impaired. A unanimous Court declared that, unlike commercial bar owners, social hosts generally did not owe a duty of care to a person injured by one of their guests who had drunk alcohol.

b) In *Amateur Youth Soccer Association* (2007), the Court had to determine if a regional youth soccer association qualified as a 'charitable organization' for the purposes of the *Income Tax Act*. The Court decided that it did not because its purpose and activities were not centrally 'charitable' in nature.

c) In *Lumbermens Mutual Casualty Co.* (2007), the Court was asked to rule on whether automobile insurance policies that provide coverage for damage 'directly or indirectly' related to the operation of a motor vehicle would cover injuries in the following circumstance: a person was shot in the woods by a hunter who stopped his truck on the way to a hunting party and shot at what he thought was a deer that appeared in the headlights (ironically, the 'deer' turned out to be a fellow member of the hunting party). The Court ruled that the term 'indirectly' in the *Ontario Insurance Act* did not stretch so far as to cover incidents in which the use of a vehicle was only incidental to the real cause of the damages—in this case, negligently firing a gun at a target that was not clearly seen.

Each of these decisions could have important policy consequences. The *Lumbermens* decision, for instance, will likely help insurance companies avoid paying out more auto insurance claims, a decision which may save auto insurance customers money. However, it may leave victims in these kinds of cases unable to pay for all of their medical expenses. It is assumed that appellate courts, in their capacity of providing leadership on unsettled questions of law, will generally have a larger part than trial courts in this kind of policy-making.

The final way in which judges can make policy is to deviate from applying legal rules that are laid out fairly clearly in common law precedents or legislation. This is the most controversial method of judicial policy-making. The Supreme Court's decision in *Harrison v. Carswell* (1976) featured a famous debate between Chief Justice Laskin and Justice Dickson about whether it was appropriate for judges to engage in this kind of law-making (see Sharpe and Roach 2003, 148–52). Sophie Carswell had appealed a \$40 fine that she received under the *Manitoba Trespass Act*, which essentially enshrined well-established common law rules about trespass into a



piece of legislation. Carswell had been fined under the Act for picketing a Dominion grocery store in a mall in Winnipeg as part of a strike action. Chief Justice Bora Laskin argued that the case raised two important questions: 'whether this Court must pay mechanical deference to *stare decisis* [ruling according to precedent] and, second, whether this Court has a balancing role to play, without yielding place to the Legislature, where an ancient doctrine, in this case trespass, is invoked in a setting to suppress a lawful activity [picketing] supported by both legislation and by a well-understood legislative policy [labour legislation and policy]. . . .' Laskin answered those questions from a policy-making perspective. He suggested that the Court should recognize the new social reality of shopping malls that issued an open invitation to the public. He argued that allowing labour picketing at a mall, an otherwise lawful activity, while still allowing removal of people for misbehaviour would best reconcile the interests of the shopping mall owner and the public (including labour interests). Laskin urged his colleagues not to mechanically apply a precedent that upheld a trespass conviction for a consumer who was picketing a Safeway store in a shopping centre in an effort to boycott California grapes, because the present case involved a labour strike.

Justice Dickson, who would later become Chief Justice, disagreed with Laskin and wrote for the majority to uphold the conviction. Dickson argued from the adjudicatory perspective:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It also raises fundamental questions as to the role of this Court under the Canadian constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts.

Dickson acknowledged that judges 'do and must legislate' but must only do so interstitially and on the basis of existing legal principles. In this case, Dickson argued that the *Manitoba Trespass Act* clearly gave the shopping centre manager the legal right to ask Carswell to leave. Any change in the rules, to balance differently the interests of shopping centre management, the public, and labour should be made by 'the Legislature, which is representative of the people and designed to manifest the political will, and not by the Court'.<sup>8</sup>

The debate over the proper role of courts, even in non-constitutional cases, remains a passionate one. A recent example of this comes from a case revolving around the question of whether a child can have more than two legally recognized parents. The controversy is outlined in Box 11.1

### Box 11.1 Can a child have more than two parents?

In 1999, two lesbian women, A.A. and C.C., who wanted to start a family, did so with the help of a male friend, B.B. B.B. and C.C. were recognized as the biological parents of a little boy (D.D.). In 2003, with the support of the biological mother and father, A.A. filed an application under Ontario's *Children's Law Reform Act (CLRA)* to be declared a legal parent of D.D. (The two women could not file a request to adopt D.D. without eliminating the father as one of the parents, something that they did not want to do.) Legal recognition under the *CLRA* would entitle A.A. to the full rights and obligations of parents under the law, including the right to apply for legal documents for the child (such as a passport) and to register the child in schools. The trial judge expressed sympathy for the application, noting that A.A. was already fully committed to the parental role and that the child, who appeared to be 'thriving in a loving family', referred to A.A. as one of his mothers (A.A. v. B.B. 2003 at para. 5). However, the trial judge argued that the *CLRA* was very clear that a child could have only two legal parents. He asked, 'If a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect?' (at para. 41). In a nod to the adjudicatory approach to decision making, he added: 'Polarized views exist concerning the definition of the modern family. Court decisions may sometimes necessarily impact on that debate. . . . However, when it comes to creating or shaping social policy, political considerations belong to the legislature' (at para. 42).

The case was appealed to the Ontario Court of Appeal. Intervener groups were allowed to argue for and against the application given its potential policy repercussions. In a unanimous (3-0) decision, the Ontario Court of Appeal overturned the trial judge's decision and decided to grant the application, thereby effectively allowing a child in Ontario to have (at least) three legal parents. The Court argued that there was a 'gap' in the legislation. The judges observed that the *CLRA* was progressive legislation, but it was 'a product of its time'. According to the Court, the law was intended to improve the equality of status of children who had suffered the stigma of being born 'illegitimately', but 'the possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar screen. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer' (at para. 21). Because of this gap that it identified in the law, the court argued



that it was justified in using its *parens patriae* jurisdiction to make an order that would further the 'best interests of the child'.

Reactions to the decision were quite polarized. Joseph Ben-Ami, the executive director of the Institute for Canadian Values, described the decision as 'naked judicial activism'. He argued that '[a]ll areas of social policy that the court are not competent to rule on belong in the hands of legislatures and legislators who are responsible and fully accountable to the people who are electing them' (quoted in Hanes 2007). Conversely, Kaj Hasselriis, executive director of the same-sex rights group EGale, applauded the ruling for recognizing the legal rights and obligations of various types of modern-day family structures, including those involving gays and lesbians. 'This [decision] just demonstrates that the courts are catching up with reality in Canada,' he said (quoted in Hanes 2007).

Of course, there is not always a clear line separating an appropriate incremental change to the law to keep it abreast of new social or technological developments, and more wholesale creation of rules by judges, which is often considered to be outside the boundaries of the judicial function. Court watchers and judges themselves will sometimes disagree over this question even in the context of the same case.<sup>9</sup> Distinguishing between what is an incremental or more significant change to the law is part of the larger difficulty in assessing how much judges mostly interpret and apply the law as opposed to making it. Although systematic empirical studies are lacking, those who have carefully observed judicial decision making in Canada over time claim that Canadian courts tended to be closer to the adjudicatory model—interpreting and applying the law with only incremental changes—before Bora Laskin's appointment of Chief Justice of the Canadian Supreme Court in the 1970s (see his opinion in *Harrison v. Carswell* above, for example) and the introduction of the Charter of Rights and Freedoms in 1982 (Russell 1987, Chap. 14). As pointed out below, most commentators agree that the Charter has moved the courts at least somewhat closer to the policy-making model. One appellate court judge claims that his colleagues are now also more prone to changing the common law since the introduction of the Charter (Greene et al. 1998, 186).

However, for a couple of reasons, non-constitutional decisions often do not generate the same sustained intense debate over legitimacy as do constitutional decisions, especially Charter ones. First, in some areas of non-constitutional law legislators appear to deliberately leave room for copious amounts of judicial discretion and policy-making, such as in criminal sentencing and family law. Second, if a legislative body does not agree with a policy created by judges in a

non-constitutional decision, then it has the option of passing a law to usher in its preferred rules. Parliament or provincial legislatures do not necessarily have the same ability simply to override the courts in federalism or Charter cases given that the courts are making a decision based on the supreme law of the land.

### Constitutional Cases

From 1867 onward, courts were empowered to strike down laws for violating the federal-provincial division of powers set out principally in sections 91 and 92 of the *Constitution Act, 1867* (formerly the *British North America (BNA) Act, 1867*).<sup>10</sup> However, it was not until the Charter of Rights was added to the constitution in 1982 that judges were given clear legal authority to declare laws to be in violation of the constitution or to provide other remedies for violations of rights. Before that, judges generally did not believe that the 1960 Bill of Rights—an ordinary piece of legislation that applied only to the federal government—gave them the power to strike down laws. The notion that there was an 'implied Bill of Rights' in the *Constitution Act, 1867* that allowed judges to strike down laws did not obtain the support of a majority of Supreme Court justices until the 1997 *Remuneration Reference* (see Chapter 6).

Charter of Rights decisions tend to have more potential to influence policy because, under the Charter, courts have the ability to declare that laws are unconstitutional even if those laws were passed within the proper jurisdiction according to the federal-provincial division of powers. In federalism cases, if a court rules that a law passed by a provincial legislature or the federal Parliament is outside of the jurisdiction allotted by the *Constitution Act, 1867*, then in theory the government that does have jurisdiction (federal or provincial) could legally pass the identical law.

However, as noted in the next section of this chapter, federalism decisions can influence policy indirectly by constraining government options and distributing power between the federal and provincial governments. And, when the Supreme Court has decided questions involving federalism and constitutional change, it has rather directly implicated itself in constitutional policy-making. For example, in its 1998 *Quebec Secession Reference* decision the Court argued that, although Quebec does not have the legal authority under the Canadian constitution or international law to secede unilaterally, the federal government would be obligated to negotiate with Quebec if a clear majority voted in favour of secession on the basis of a clear question. The Court based its reasoning on the key 'principles' of Canadian constitutionalism: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Some commentators were surprised that the Court decided to rule on the case, because it raised such political questions and that it did so based significantly on its own estimation of key constitutional 'principles' rather than 'law'.<sup>11</sup> Similar reactions were given to the Court's famous 1981 *Patriation Reference* decision. The Court claimed that the federal government



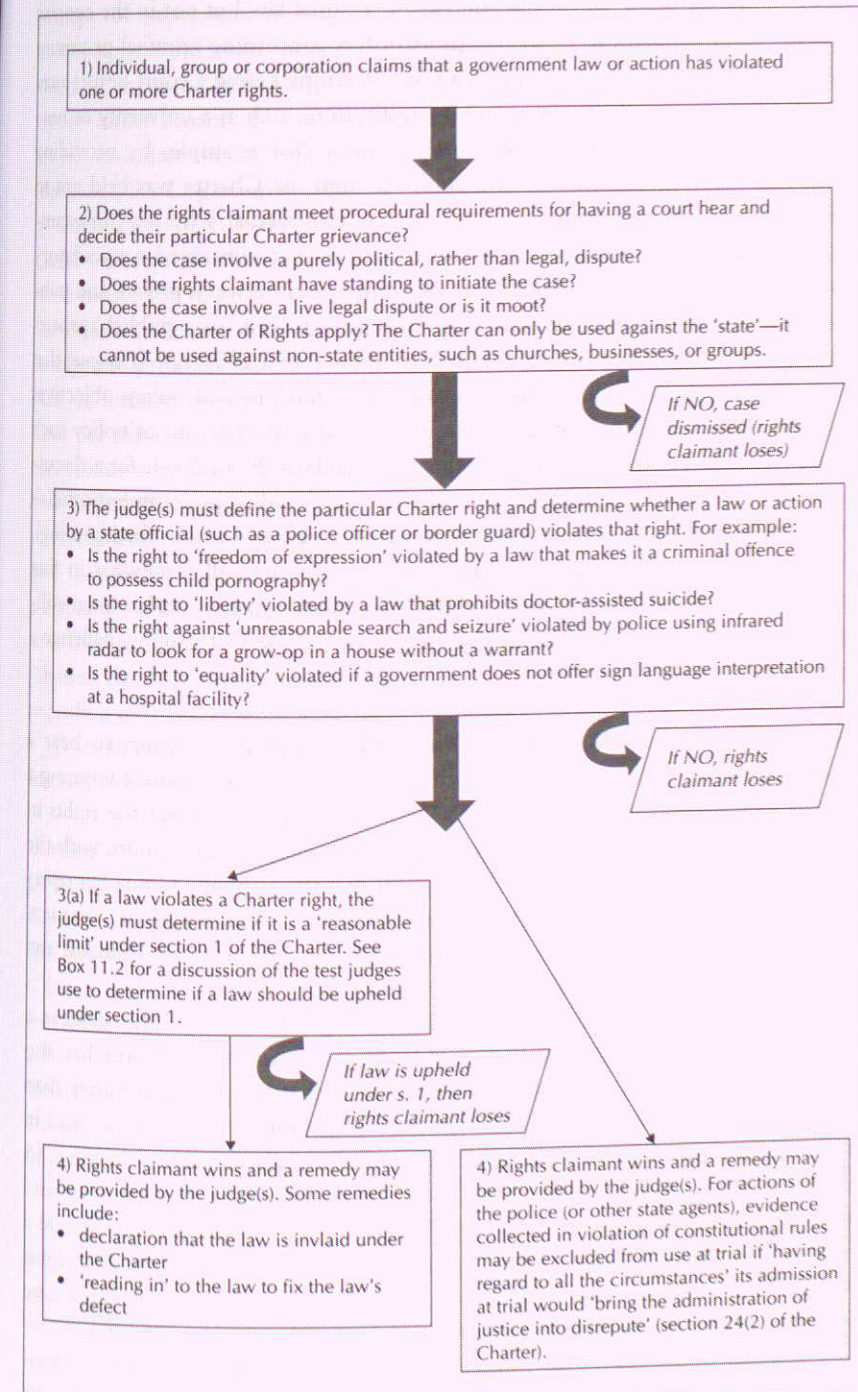
legally could patriate the Constitution unilaterally (without provincial consent); to do so, however, without majority support from the provinces would violate constitutional conventions. Peter Russell (1983) described the decision as 'bold statescraft, questionable jurisprudence'. He called it 'questionable jurisprudence' because the judges gave legal weight to a particular interpretation of contested constitutional conventions (about how much, if any, provincial consent was needed) and was not logically consistent as a whole, but 'bold statescraft' because it did provide an impetus for the provinces and federal government to go back to the negotiating table—the result was a series of constitutional changes made in the early 1980s that resulted in the entrenchment of the Charter of Rights.

### The Charter of Rights

Commentators believed that the Charter of Rights would allow for a greater policy-making role for judges because it empowered them to review the constitutionality of provincial or federal government laws even if those laws were in accordance with the federal-provincial division of powers. How actively involved the Supreme Court and lower courts would be in shaping policy, though, depended on a number of factors: how easy would it be for individuals and organizations to make a Charter claim in court, how broadly would the courts define the rights contained in the Charter, which side (the rights claimant or the government) would have the bulk of the burden of proof in Charter cases, would the Charter apply to common law as well as legislation, and what kind of remedies would the courts provide for rights claimants whose rights have been violated? In looking at these factors more closely we concentrate on the Supreme Court, because its decisions are legally binding on lower courts across Canada and its Charter decisions have been analyzed much more thoroughly than other courts. Figure 11.1 illustrates the Charter process.

**Making a Charter Claim** As shown in Figure 11.1 the first step in the Charter process is to claim that a law (such as the Criminal Code) or action by a state official (such as the actions of the police during an investigation) violates one or more of the rights in the Charter. As noted in Chapters 3 and 7, the Supreme Court has relaxed the rules of standing and mootness so that there are lower procedural barriers to getting into court. Chapter 3 also pointed out that the Supreme Court largely has rejected the doctrine that some issues are so inherently 'political' that they cannot be adjudicated under the Charter (*Operation Dismantle* 1985). The Court has also interpreted s. 32 of the Charter—the section that states that the Charter applies to the Parliament and government of Canada (and the territories) and the legislature and government of each province—somewhat flexibly (if not entirely clearly and consistently), thereby expanding somewhat the scope for judicial review under the Charter. In addition to laws and regulations, the decisions of an individual or organization operating under statutory authority, such as a school

Figure 11.1 Charter of Rights Process





board or a labour arbitrator, will be subject to Charter scrutiny.<sup>12</sup> The Charter applies to the common law in the context of criminal law but not in the context of purely private litigation; however, court orders concerning criminal or private litigation (such as an order preventing a union from picketing a court house) may incur Charter scrutiny.<sup>13</sup> If a 'para-public' institution, such as a university or hospital, is acting to implement government policy (for example, by providing health-care services) the Charter will apply, though the Charter was held not to apply when such organizations were engaged in contractual activities (for example, creating employment contracts with doctors that contained a mandatory retirement clause).<sup>14</sup> This potentially murky distinction between private and public activity on the part of government or quasi-government (para-public) agencies was blurred further when Justice LaForest contended in a 1991 case (*Lavigne*) that the contemporary reality was that governments often pursued policy objectives through commercial or private transactions and that as expressions of policy such activities should be subject to the Charter (see MacIvor 2006, 20–4, for a discussion). The degree to which the Charter applies to Canadian government officials operating outside of Canada also remains a grey area (see Roach, forthcoming). Although the boundaries of the Charter's application are still somewhat in flux and some would prefer an expansion of these boundaries, the Court has been willing to hear Charter cases involving disputes beyond those that simply challenge a law or the actions of the police.

**Defining Charter Rights** Even if the hurdles of getting a court to hear a Charter claim are overcome, however, the chances of a rights claimant winning a Charter case depend on how broadly courts are willing to interpret the rights in the Charter and whether the burden of proof in Charter cases rests more with the rights claimant or the government. It turns out that the Supreme Court has operationalized the Charter in ways that favour rights claimants. This, in turn, increases the possibility that courts will find in favour of the rights claimant and require changes to government policy.

Early its Charter jurisprudence, the Court said that Charter rights deserve a 'broad and purposive' or 'large and liberal' interpretation.<sup>15</sup> The Court has also tended to emphasize a 'living tree' approach to rights interpretation rather than relying on 'framers' intent' (see Chapter 4). For example, the Court has read in 'sexual orientation' to the list of prohibited grounds of discrimination in the s. 15 equality-rights provision. The right to 'liberty' in s. 7 of the Charter has been read relatively broadly to go beyond just freedom from physical restraint to include a certain degree of autonomy in making life choices. Furthermore, when a rights claimant invokes s. 7 to attack a law, the Court is willing to look at the substantive fairness and justice of the law rather than just whether the law has sufficient procedural safeguards (such as the ability to defend oneself in an impartial court for violating the law). In free speech cases like *Keegstra* (1990) and *Sharpe* (2001), the

Court argued that the right to free expression should include all expression (except for expression through violent actions), even hate speech and child pornography. And even though the aboriginal rights in s. 35 of the *Constitution Act, 1982* are technically not part of the Charter of Rights, the Court has read that section rather broadly and purposively such that historical government practices are not considered to have extinguished aboriginal fishing, hunting, or land rights (*Sparrow* 1990; *Delgamuukw* 1997).

There have been some exceptions, however, to the trend of the Supreme Court reading rights broadly. In the *Auton* (2004) decision, the Court took what some considered to be an overly narrow view of equality rights when it ruled that the British Columbia government did not violate s. 15 when declining to fund a therapeutic program for autistic children. The Court has also taken some of the built-in limitations on rights seriously. For instance, s. 7 allows government to limit the rights to 'life, liberty and security of the person' if those limits are 'in accordance with the principles of fundamental justice'. The Court has been hesitant to find that governments are acting outside the boundaries of 'the principles of fundamental justice' if they do not provide a certain level social welfare benefits (see *Gosselin* 2002).<sup>16</sup> In a s. 8 case involving the police taking infrared pictures of a home without a warrant to determine if there was a 'grow op' inside, the Court said that this was not an 'unreasonable' search and seizure under s. 8 of the Charter, because the homeowner did not have a reasonable expectation of privacy regarding heat waves emanating off of his home (*Tessling* 2004).

Overall, though, the Court has been much more willing to give expansive definitions to rights under the Charter than it did under the 1960 Bill of Rights.

**Burden of Proof in Charter Cases and the s. 1 'Reasonable Limits' Clause** In addition to reading rights relatively broadly, the second way in which the Court has made it easier for rights claimants is by shifting the burden of proof to the government to justify that limits on rights are reasonable under s. 1 of the Charter, which states that the rights and freedoms set out in the Charter are subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Furthermore, in its *Oakes* (1986) decision, the Court set out a test that—on its face at least—made it relatively difficult for governments to justify limits on rights under s. 1. The *Oakes* test and the case that led to its creation are described in Box 11.2.

#### Box 11.2 The s. 1 'Oakes' test

The 'Oakes' test was created in a case where David Edwin Oakes argued that the *Narcotics Control Act* violated the right to be presumed innocent in s.



11(d) of the Charter. The law stated that individuals who have been found to be possessing narcotics are presumed to have those drugs for the purposes of trafficking unless they could convince a judge otherwise. The Court found that the law violated s. 11(d) of the Charter. In doing so, the Court disagreed with the Court of Appeal's approach of using the s. 1 'reasonable limits' clause as a guide to interpreting s. 11(d). The Court maintained that the definition of rights should be analytically distinct from the reasonableness test under s. 1. Once the rights claimant has shown that a right is violated (a task made easier by not having built-in limitations), the Court maintained that the next step is for the government (or agency acting with government authority) to prove, on a balance of probabilities, that the law, including regulations and rules made under statutory authority, is reasonable under s. 1.

In *Oakes*, the Court established the test that would be used to determine whether the impugned 'law' was a reasonable limit demonstrably justified in a free and democratic society:

- 1) Does the law have a 'pressing and substantial' objective in a free and democratic society?
- 2) Does the law have means that are 'proportional' to meet that objective?
  - a) are the means 'rationally connected' to the end?
  - b) do the means impair the right as little as possible?
  - c) are the effects of the measure (means) proportional to the objective (that is, are the costs to the individual rights claimants outweighed by the collective benefits of the legislation)?

In this case, the Court found that the law did have a pressing and substantial objective—to protect society against the 'grave ills' associated with drug trafficking. However, the Court argued that the means—assuming a person found in possession of illegal drugs is guilty of trafficking—were not proportional to the objective. In particular, the Court argued that under the law as written, even someone possessing a very small amount of drugs would be assumed to be a trafficker, and that was not a rational way to curb trafficking.

If applied strictly, the *Oakes* test makes it very difficult for government actors to justify limitations on rights. That the Court struck down the 'reverse onus' clause of the *Narcotics Control Act* challenged in *Oakes* is suggestive of its stringency. The test has not always been applied strictly, however. The 'minimal impairment' test was changed soon after *Oakes* such that the means would have to impair the rights

'as little as reasonably possible' (Edwards Books 1986). The test has been applied such that context has been taken into account in some cases, such as when the Court gave some latitude to the Quebec government by upholding a law under s. 1 that purported to protect children by prohibiting commercial advertising aimed at children under thirteen years of age (*Inwin Toy* 1989). The Court, though, has not been consistent in application of s. 1 (Manfredi 2001, 42). The *Oakes* test has been applied differently in different cases and by different judges in the same case.

Regardless of the inconsistencies in its use, the *Oakes* test, by requiring judges to evaluate the objectives and means of public policy, embroils judges in a 'quintessentially legislative task' (Monahan 1987, 53; see also Knopff and Morton 1992, 152–61). Even former Chief Justice Antonio Lamer acknowledged that under s. 1 judges are making 'essentially what used to be a political call' (quoted in Morton 2002, 368). This policy-making potential is fuelled by the need to examine and analyze social-fact data to some degree in the s. 1 analysis.<sup>17</sup>

**An Example of a Charter Claim: The *Chaoulli* (2005) Decision** The policy-making potential given to courts by decisions that made it reasonably easy to get into court to argue a Charter claim, that defined rights broadly, and that called for analysis of the means and ends of policy under s. 1 was vividly displayed in the Supreme Court's *Chaoulli* (2005) decision. As discussed in Chapter 4, this decision also illustrates the discretion that judges have in deciding how to use this policy-making potential. The case arose from an appeal primarily concerning whether Quebec's policy of prohibiting private health-care insurance violated the right to 'life, liberty and security' in s. 7 of the Charter. The rights claimants were a man who had experienced delays receiving medical procedures, particularly hip operations, in the public health-care system (George Zeliotis) and a doctor who was not allowed to establish a private medical clinic (Jacques Chaoulli). Even though Zeliotis had already received the hip replacement surgery he was seeking, his action was not declared moot (Manfredi and Maioni, 2005). Moreover, all of the judges rejected suggestions that they should not hear the case because the claimants did not have standing (since they were no more personally affected by Quebec's policy than anyone else) and that the case involved such inherently political issues that it was not justiciable. In addition to allowing Zeliotis and Chaoulli to challenge the policy in the judicial arena, the Court allowed numerous interveners, including provincial governments, Senators, medical associations, anti-poverty groups, and private medical clinics.

By a 4–3 decision, the Court declared that Quebec's prohibition of private medical insurance violated rights. The three judges who voted to strike the law down under the Charter (one judge referred only to Quebec's human rights legislation to justify her decision to strike down the policy) argued that s. 7 allowed judges to look at the substantive fairness of the law (taking a 'living tree' approach to rights interpretation).<sup>18</sup> These judges argued that to deny at least some access to



private health-care insurance in view of the waiting lists in the public health-care system was 'arbitrary', thereby restricting rights to 'security of the person' in ways that were not compatible with the 'principles of fundamental justice'. According to these judges, the violation of s. 7 could not be justified under the Oakes test. The judges argued that although preserving the public health-care system may be an important objective, a prohibition on private health-care insurance was not proportional in meeting those objectives. With reference to research reports on health care in countries with 'mixed' public and private health systems, these judges argued that some allowance for private medical care would not destroy the public system but would protect better the rights of citizens to 'security of the person'. The judges in the majority argued that courts must protect rights if governments failed to act.

Though the dissenting judges had agreed that the case should be heard, they were much more cautious about intervening in the complex field of health-care policy. According to the dissent, 'Designing, financing and operating the public health system of a modern democratic society remains a challenging task and calls for difficult choices. Shifting the design of the health system to the courts is not a wise outcome.' They argued that it was not possible to devise a legal standard for 'reasonable' access to health care that would be considered 'in accordance with the principles of fundamental justice' in s. 7 of the Charter. Moreover, the dissent pointed to the findings of the trial judge and the Romanow Report on health care that the public system could be gravely jeopardized by the addition of a private health-care sector.

The Quebec government requested an 18-month stay of the decision so that it could formulate and implement a health-care policy that responded to the Court's ruling. A 12-month stay was granted.

#### *Remedies under the Charter*

A 'declaration' that a law (or regulation or administrative order) violates the Constitution is only one of various remedies that courts can provide to successful rights claimants.<sup>19</sup> In certain circumstances judges may choose to 'read in' to the law or 'sever' part of a law rather than declare the entire law unconstitutional (see *Schachter*, 1992 and the discussion below on *Vriend*, 1998). More individualized remedies can be granted under s. 24(1) of the Charter, which gives courts the power to provide remedies that are 'appropriate and just in the circumstances'. Subsection 2 of s. 24 of the Charter gives judges the power to exclude evidence gathered unconstitutionally by the police and other state officials if allowing the evidence would 'bring the administration of justice into disrepute' (see Chapter 9).

The issue of remedies is important when one is analyzing how much courts do or should make policy because, even if a court rules in favour of the rights claimant, the remedy that is provided can involve courts more or less in creating

policy. Take the controversy sparked by the Court's *Vriend* (1998) decision, for example. In *Vriend*, the Court found that because the Alberta government had not included sexual orientation as a prohibited grounds of discrimination in its human rights law, the law violated the Charter's guarantee of equality (in s. 15); instead of declaring the law invalid, however, the Court decided to 'read in' sexual orientation as a prohibited ground of discrimination to Alberta's *Individual's Rights Protection Act* (IRPA). Critics accused the Court of being overly activist in *Vriend*. Not only did the Court find that the omission of government action (which had been deliberate) was unconstitutional, but it reformulated the law itself (Manfredi 2001). Justice Major dissented on the remedial aspect in *Vriend*, saying that it should be up to government to craft its response, which might even include a decision to scrap the entire law rather than include sexual orientation.

Clearly decisions about remedies raise larger questions about the role of the courts in the governance process and the relationship between the judicial, legislative, and executive branches of government. Over time the Court has tried to provide some guidance on their use in Charter cases. For example, the Court has said that judges should exercise particular caution before 'reading in' or otherwise altering legislation involving social welfare distribution. That does not preclude this kind of remedy, though, as demonstrated in *Tétreault-Gadoury* (1991), where the Court changed the *Unemployment Insurance Act* (as it was then called) to include workers over 65 who had qualified for benefits.<sup>20</sup> In *Doucet-Boudreau* (2003) the Court was very divided (5–4) about whether it was appropriate for the trial judge, after deciding that the claimants' Charter rights had been violated by the lack of progress on francophone schools that had been promised by the government and the school board, to order that government and school officials meet with him periodically to provide updates about the construction of francophone schools in the area. The majority supported the trial judge's decision to retain jurisdiction over the case and to require reporting. In doing so, the majority emphasized that the remedial powers in s. 24(1) require judges to be flexible and responsive in order to vindicate Charter rights. The majority argued that the rights in question—the official minority language education rights in s. 23—were remedial in nature and designed to address linguistic assimilation and a history of delay in providing francophone education. In this context the trial judge's order was appropriate and did not overstep the boundaries of judicial authority. The dissent, in contrast, argued that the trial judge's order violated the separation of powers between the judiciary, legislative, and executive branch. By undertaking to supervise the construction schedule for the French schools, the judge was performing the executive's function of public administration. Alternatives, such as relying on contempt-of-court proceedings if the schools were not built, would have been procedurally more fair to both parties and would be more in keeping with the role of courts in the system of governance.



### Debates about Judicial Policy-Making under the Charter

The *Doucet-Boudreau* decision is one among many examples that highlights how Canadian courts are more prone to be activist than before the Charter. Statistical analyses confirm this trend. Under the statutory 1960 Bill of Rights, the rights claimant won, in the Supreme Court, 15 per cent of the time, which is less than half of the victory rate of approximately 33 per cent for rights claimants in Supreme Court Charter decisions. The Supreme Court struck down only one law under the 1960 Bill of Rights but had already invalidated over sixty laws under the Charter by 2003 (Kelly 2005). Half of all appellate court judges (and four of five Supreme Court judges) surveyed by Greene et al. believed that the Charter had moved them closer to the 'law-making' side of the continuum (the other side being 'law-interpreter') (Greene et al. 1998, 187–8).

While it is clear that judges have increased their policy-making in the Charter era, there is little consensus as to whether the rate of activism is proper and, more generally, whether the increased judicial policy-making under the Charter has been beneficial. Critics offered the following arguments for being skeptical about judicial policy-making under the Charter:

- The Charter and the way it has been operationalized (that is, by a broad definition of rights followed by the application of the Oakes test to legislation being challenged) encourages unelected and unaccountable judges to make decisions about policy matters more rightly reserved for elected politicians. Greater use of the s. 33 notwithstanding clause is encouraged.<sup>21</sup>
- Critics on the right argue that the Charter and judicial decisions have allowed post-materialist interest groups (such as feminists and 'equality'-seeking groups) to circumvent the regular political process to achieve their policy goals (Morton and Knopff 2000). Critics on the left argue that the Charter is most beneficial to those with existing socio-economic power (see Chapter 7 for a fuller treatment of these arguments) (Mandel 1994; Hutchinson 1995).
- Critics on both the left and right argue that the Charter and its expansive interpretation has 'politicized the judiciary' and 'legalized politics'. A related effect is the increased use of rights discourse, which has enervated the willingness and ability of citizens to engage in democratic discussion and compromise.
- Concerns have been raised about the 'institutional capacity' of courts, especially compared to other branches of government, to decide policy questions. Unlike the executive or legislative branches, which can rely on bureaucrats to study policy options or can invite parties to legislative hearings, judges mostly rely on legal arguments and any accompanying social-science evidence presented by the parties (and possibly interveners).

Policy analysis and the interpretation of social science generally are not a part of judicial expertise (see Box 3.1 in Chapter 3 for an example of how this lack of expertise had disastrous results in the *Askov* decision). And, even though courts have become more creative in creating remedies, they still lack the flexible powers accorded to the executive—courts cannot, for example, create a new administrative agency to help solve a social problem. Nor are courts well-equipped to monitor or follow the effects of their decisions. They must wait to hear subsequent cases that may or may not be representative of social or economic reality (Knopff and Morton 1992; Manfredi 2001).<sup>22</sup>

Supporters of a more active form of judicial review under the Charter have responded to these criticisms with a variety of arguments:

- The Charter was entrenched by elected politicians, and besides, litigation to protect rights and judicial policy-making existed before the Charter (Roach 2001). Some go farther to argue that the Charter was meant to upset the social status quo (Wienrib 1999) and have wished that the Supreme Court had gone further in some cases, especially those involving funding for social programs. There are misgivings about the s. 33 override clause in the Charter.
- Because judges do not have to worry about votes and make decisions on the basis of constitutional law, Charter review can inject an element of principled and reasoned decision making that may be lacking in the legislative and executive branches. A corollary of this observation is that Charter review can enhance liberal democracy by advancing the goals of protection of minority rights and social equality, especially for disadvantaged groups that may be marginalized in the traditional political process because they lack political power or popularity (Sigurdson 1993; Greene 2006).
- Critics of Charter review tend to have an overly simplistic or idealized view of democratic policy-making (Smith 2002a). The Canadian parliamentary system is dominated by the executive and is not very democratic. Governments often fail to act, thereby necessitating judicial action (Roach 2001); or politicians themselves sometimes use the courts to achieve policy goals (see Chapter 8). Furthermore, opinion polls suggest that the public prefers courts rather than politicians to make final decisions about rights (for data see Fletcher and Howe 2001).
- Similarly, when skeptics are critical of the policy-making capabilities of courts they may be comparing it to an idealized view of policy-making by other branches. There have been numerous examples of ill-conceived or poorly implemented policies that did not involve courts. And in modern states policy-making is already diffused (administrative



tribunals, public-private entities, and other organizations make policy).<sup>23</sup> Furthermore, changes to the judicial process, such as allowing more interveners and properly introducing social-fact evidence (including allowing it to be examined by both sides), can improve the policy-making capacity of courts.

Critics and others who were at least uneasy about the courts' exercise of power under the Charter were not persuaded, however. They argued that judges have ignored the limits on judicial power envisioned by the politicians who entrenched the Charter by downplaying the importance of the framers' intent.<sup>24</sup> A related argument is that while some judicial policy-making is inevitable, judicial policy-making under the Charter is quantitatively and qualitatively different from that in past eras. In response to the claim that Charter decisions are more principled, critics argue that most Charter cases are not about 'core' rights (such as whether individuals or groups should be allowed to distribute political pamphlets), but involve complex issues that require the balancing of various rights and social interests (such as whether individuals or groups should be allowed to distribute pamphlets that contain hate speech directed at certain groups) (Knopff and Morton 1992; Hiebert 2002). Reasonable people will disagree over how policy balances should be achieved owing to different policy assessments and political philosophies—this is why the Supreme Court is often so divided on controversial cases like the *Keegstra* case involving hate speech (where the vote was 4–3), the *Chaoulli* case involving private health care (4–3 vote) and others. Finally, Charter skeptics argue that if the political process is flawed, the solution should be to improve democratic input and strengthen the checks and balances within Parliament (such as by the reduction of party discipline or the introduction of an elected Senate) (Knopff 1998).

#### *Relationship between Courts and Legislatures*

The focus of the debate, which tended to be centred on the Court, shifted somewhat after an influential article by Peter Hogg and Allison Bushell (later Thornton) in 1997 that emphasized the relationship between the courts and other branches of government under the Charter. Hogg and Bushell argued that concerns over the undemocratic power of judicial review downplayed the capacity of elected officials 'to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded' (1997, 79–80). The s. 1 'reasonable limits' clause, built-in limitations on other rights, and the s. 33 'notwithstanding' clause were identified as particularly important in facilitating dialogue. For example, Hogg and Thornton found that judges usually accepted the policy objectives of a law under the s. 1 Oakes test—most laws that failed the test did so because the judges concluded that there were other means available to achieve the objective that better respected rights. They also argued that if the leg-

islature does not use the s. 33 notwithstanding clause after a controversial decision, such as *Vriend* (1998), then this suggests that there was strong support for the decision within the political community (Hogg, Thornton, and Wright 2007).

James Kelly (2005) also tried to assuage concerns that judges were dictating policy through Charter review by taking a more holistic view of the governance process. He argued that bureaucratic vetting of rights issues in the policy-development phase gave the executive branch an important role in defining rights and balancing rights with other social interests and objectives. More recently, Jeremy Clarke (2006) has drawn attention to a 'federalist dialogue' in which the Supreme Court is responding to provincial arguments in Charter cases that they deserve some policy latitude owing to the principle of federalism.

Though it has been accepted that the legislative and, particularly, the executive branches of government have an opportunity to influence the balancing of rights and interests by considering rights in the policy-development stage or by reversing, modifying, or avoiding the interpretation given to the Charter in a court decision (for examples, see below), serious disagreement has arisen as to how often and how much influence is really exerted by other branches and how desirable it is for them to do so (see Petter 2007a). One of the central complaints about Hogg and Thornton's model is that their definition of dialogue makes it appear as if elected branches have more influence over defining rights and shaping the balance between rights and other interests than they actually do. For instance, Hogg and Thornton's analysis has been criticized for counting virtually any response to a judicial decision as 'dialogue' even if the legislative branch simply enacted a law that incorporated judicial decisions almost verbatim. According to Manfredi and Kelly (1999), this is more like 'ventriloquism' than a genuine 'dialogue'. When counting only legislative responses that meaningfully differed from a judicial decision, such as the law that Parliament passed that eliminated the 'too drunk' defence created by the Supreme Court's reading of the Charter's legal rights in its *Daviault* decision (see Box 9.3 in Chapter 9), the number of cases considered to be dialogue under Hogg and Thornton's definition dropped considerably.<sup>25</sup> Commentators have also pointed out that the unpopularity of the s. 33 override clause, because of a misunderstanding amongst the public (and some elites) about its utility in Canada's constitutional scheme, diminishes greatly its potential for facilitating dialogue. It has also been asked whether Kelly's research demonstrates an independent role for government in shaping policy in the context of the Charter or whether it shows bureaucrats trying to anticipate how courts will rule on the law in a Charter case (Hennigar 2004, 16–17).

A related critique of the 'dialogue' model proposed by Hogg and Thornton was that it did not properly account for the possibility of 'policy distortion', whereby elected officials would refrain from introducing or passing legislation that might be constitutionally valid for fear of its being invalidated by the courts (Manfredi and Kelly 1999). Furthermore, from a policy-making perspective, it is



not always easy to separate objectives from means in policy formation, nor is it as easy to find less restrictive means of achieving a policy goal as Hogg and Thornton and others suggest (Manfredi 2001). In the *Sharpe* (2001) case, for example, Justice L'Heureux-Dubé criticized her colleagues for reading in an exception to the child pornography law for works of the imagination created for personal use. Whereas the majority claimed that this exception would allow the government to achieve its goal of protecting children while impairing free expression rights to a lesser degree, L'Heureux-Dubé argued that Parliament's policy goals might be undermined since materials kept for personal use could fuel the fantasies of pedophiles.

Despite criticisms of the 'dialogue' metaphor, the Supreme Court and lower courts have referred to the concept in a number of decisions. Interestingly, sometimes the metaphor has been used to justify activism (on the premise that legislatures can respond to change a decision) and sometimes deference to legislative choices (Hogg, Thornton, and Wright 2007; Haigh and Sobkin 2007). An example of the latter is the Supreme Court's decision in *Mills* (1999) to uphold Parliament's legislation that strictly limited defence counsel's access to third-party medical and therapeutic records in sexual assault cases—the legislation closely followed the *dissenting* opinion in a previous Supreme Court decision on the subject (O'Connor 1995). The Supreme Court, however, is not always willing to be deferential to government in 'second-look' cases.<sup>26</sup> In *Sauvé II* (2002), a sharply divided Court struck down a federal law disenfranchising certain inmates even though the law disenfranchised only inmates convicted of an indictable offence whereas the previous law, which was struck down by the Court in 1993 (*Sauvé I*), had disqualified all prisoners from voting in federal elections. Not surprisingly, debates about the empirical and normative questions surrounding judicial policy-making, especially under the Charter, remain rather intractable (see the special 2007 edition of the *Osgoode Hall Law Journal* on the tenth anniversary of the dialogue model). Think back to the description of the *Dunmore* decision about the collective-bargaining rights of agricultural workers in Ontario in the introduction to the chapter. Is it an example of effective dialogue between the Ontario government and the courts that allowed the government to meet its objectives in a somewhat flexible manner while better respecting the right to freedom of assembly—a right that had been defined on the basis of an unbiased interpretation of the Charter by the Supreme Court? Or does it exemplify a legislature implementing what the Supreme Court asked for in a split decision in a complex policy area that depended on the political and economic perspectives of the judges—legislation that was upheld by a trial court because it conformed to what the Supreme Court wanted?

### Policy Impact and Aftermath of Judicial Decisions

As indicated in the introduction, the labour union that supported *Dunmore's* case appealed the trial court's decision that upheld the new Ontario law giving minimal

collective bargaining rights to agricultural workers; the union has also lobbied the government to improve the law. A recent decision by the Supreme Court favouring labour rights is being relied upon both in the legal and political arenas. What might happen as a result of this legal and political mobilization? Much of the literature on judicial policy-making in Canada, such as the dialogue literature, is less concerned with trying to explain or predict the effect on policy of legal mobilization and judicial decisions than with trying to determine how much power courts do have or should have vis-à-vis the other branches in making policy decisions.

Scholars in the US have been much more interested in studying the question of what actually happens after a judicial decision or series of decisions. Some of the literature in the US is concerned with legal decisions in private law, such as whether punitive awards for damages in tort litigation offer better protection for consumers or whether such awards inhibit innovation and unduly increase business costs. Other work has been done on the effects of litigation involving human rights legislation, as exemplified by McCann's study on legal mobilization by women's groups for pay equity (McCann 1994). However, constitutional rights decisions get the bulk of attention from scholars. We look at the debates in the US literature before reviewing briefly some of the few Canadian studies that have addressed these questions.

One of the most influential studies on judicial impact in the US remains Gerald Rosenberg's book *The Hollow Hope* (1991). As the title of the book suggests, Rosenberg was pessimistic about the ability of litigation and the courts to achieve policy and social change. For example, he noted that ten years after the US Supreme Court's famous *Brown v. Board of Education* (1954) decision that declared segregated schools to be unconstitutional, only 2.3 per cent of African American children were attending schools with whites (1991, 50). Rosenberg (1991, Chap. 1) proposed that because courts are 'constrained' by a variety of institutional limitations, particularly their lack of enforcement tools, they can produce social change only when the following conditions are met: (1) there is ample legal precedent for change; (2) there is support for change from Congress and the executive branch; and (3) there is support or little opposition in the public, and incentives are offered to implementers to induce them to comply (or administrators are willing to hide behind the court decisions in order to implement reforms). In his case studies, he also allows for the fact that judicial decisions, especially by the Supreme Court, may influence policy indirectly by generating media attention or mobilizing interest groups. His framework rests on several assumptions that were previously established in the literature (Wasby 1970; Levine 1970; Johnson and Canon 1984), though Rosenberg omits certain factors that previous studies have shown to be significant, including the clarity and forcefulness of a judicial decision.

While Rosenberg can be criticized for leaving out some potential explanatory factors, more fundamental critiques have been levelled against his theoretical model. Feeley and Rubin suggest that Rosenberg sets up a straw man to make his



point. They note that many attempts to create significant social change have been disappointing to some degree, no matter which agency of government initiated the process; furthermore, they argue that policy implementation often involves the support of multiple organizations within a modern administrative state (1998, 316–23). In their study of prison reform litigation, Feeley and Rubin (1998, Chap. 9) conclude that federal court trial judges used many common administrative practices, such as meeting and negotiating with interested parties, to effect some changes in prison conditions in conjunction with other actors and more general social trends.

A somewhat related critique comes from a group of scholars, particularly Michael McCann (1992, 1994, 1996), who argue that Rosenberg's model assumes a 'top-down' and 'scientific' perspective that seeks to explain or predict the effects of Supreme Court decisions according to whether certain conditions are met (such as whether the decision is supported by public opinion). An alternative approach to evaluating judicial impact analyzes legal and political disputes more contextually and with the assumption that law, judicial decisions, and institutions more generally are 'constitutive' in that they can shape norms and goals that guide behaviour. This 'bottom-up' approach seeks to analyze how legal claims and judicial decisions are received, interpreted, utilized, or circumvented by bureaucrats, lower court judges, interest groups, and the media (see Wasby 1970; Scheingold 1974; McCann 1992, 1994; Mertz 1994). Although scholars in this camp tend to be skeptical about how much legal mobilization and courts can alter the existing social and political power dynamics, many argue that disadvantaged groups can use legal mobilization and courts as part of a broader strategy to further their causes, at least incrementally. Such tactics may have such interrelated benefits as bestowing legitimacy on a group's demands; raising the political and social profile of an issue; altering the perceptions of adversaries and the public; and, more instrumentally, providing bargaining leverage (Scheingold 1974; McCann 1992, 1994; Simon 1992). Though McCann (1994, 291 n. 12) concedes that Rosenberg's consideration of the 'indirect' effects of judicial decisions (such as examining the number of newspaper articles or public opinion before and after a decision) is a step forward, he argues that the model still focuses primarily on judicial capacity to initiate behavioral changes rather than on relational dynamics generated over time by legal mobilization and judicial decisions.<sup>27</sup>

Conversely, Rosenberg (1996) argues that bottom-up research is difficult to replicate and the results are difficult to generalize or validate. McCann's study of the pay-equity struggle, according to Rosenberg, seems to suggest that union organization and mobilization contribute more than legal mobilization to pay-equity policy change and the way that women view their role and identity in the job market. Yet, because McCann's study lacked an appropriate mixture of cases—most of McCann's examples, for instance, featured union organization—

there is no way to separate out the influence of legal mobilization on the results (Rosenberg 1996, 450–1).

As noted above, there have not been as many impact studies in Canada that try to analyze and explain impact rather than describe what happened after judicial decisions were made. One such study, however, found that elements of both the 'top-down' approach and the 'bottom-up' approach are useful in explaining policy outcomes. Riddell (2004) investigated the effect of legal mobilization under s. 23 of the Charter—the official minority language education provision—on francophone education outside of Quebec. He tried to explain why every province outside Quebec had established more homogenous French schools and created francophone school boards despite initial opposition from many provincial governments and even disagreements within francophone communities about the desirability of policy change. In keeping with the 'top-down' model he found two factors that were critical to policy success. First, the Supreme Court read s. 23 broadly and contrary to the original intent by finding that it included the right to 'management and control' of French-language instruction and francophone schools by the students' parents (*Mahé* 1990). Second, federal government funding was crucial. The federal Court Challenges Program helped pay for s. 23 litigation, and the federal government gave the provinces hundreds of millions of dollars to help provide French-language instruction and francophone schools and school governance. To look only at these factors, however, would paint a misleading and incomplete picture of the reasons for policy change. In the wake of government delays in implementing *Mahé* (for reasons identified by Rosenberg and others, such as financial considerations, fear of a public backlash and some lack of forcefulness in the decision), francophone groups outside Quebec had to lobby bureaucrats and politicians, generate favourable media coverage, initiate follow-up litigation, and try to convince more francophones that separate schools and school boards were a good idea and the best fit with their collective identity under the Charter. The use of rights discourse by advocates of separate francophone schools and school boards to win over their opponents was important. Over time, as provincial and local policies began to change, francophone groups started launching, and winning, s. 23 cases that featured more specific remedies to fill in the policy gaps. The *Doucet-Boudreau* case discussed above, where the trial judge kept jurisdiction of the case to monitor the construction of francophone schools, was the most extreme example of this phenomenon.

In an initial study of the effect on policy of the *Auton* and *Chaoulli* decisions on health-care issues (see above), Manfredi and Maioni (2005) also found that both top-down and bottom-up approaches were useful in explaining subsequent events and policy dynamics. In a study of the reaction of two Ontario police agencies to a couple of Supreme Court decisions, Moore (1992) concluded that the clarity of the decision and the organizational support system available to each police agency



helped to explain the timing and degree of implementation. McCormick (1994, 180–7), using a model of impact from the US, very briefly illustrated the effect on policy of three Charter decisions.<sup>28</sup>

Despite the scarcity of formal impact studies in Canada, there is some useful research that can help us gain insight into the effects of judicial decisions even if they are not necessarily full-fledged 'judicial impact' studies. In his study of the Women's Legal Education and Action Fund (LEAF) in the Supreme Court, Manfredi (2004) looked at whether any policy or social change resulted from cases in which LEAF was involved. Miriam Smith's (1999, 2002b) work on gay and lesbian social movements is replete with analysis of the effects of rights discourse and institutional rules, including the Charter and judicial decisions, on social movements and public policy. Flanagan (1997) explained that there was no legislative response to the Supreme Court's 1988 *Morgentaler* decision because it removed the status-quo policy option (by striking down the law that prohibited abortion unless excused by a Therapeutic Abortion Committee to save the life or health of the mother) and then Parliament was unable to agree on a new abortion law because a compromise between pro-life and pro-choice viewpoints proved very difficult. Flanagan's more general argument is that when courts strike down existing policies, this leaves a policy void that may be difficult to fill since the policy process cycles through various options that do not attract enough support from politicians and organized interests to become the new policy. The Alberta government's attempts to limit access to abortion services after the Supreme Court's *Morgentaler* decision can be explained, according to Urquhart (1989), by two factors: first, Alberta and other provinces are responsible for health care under the constitutional division of powers; and, second, the Alberta government was trying to satisfy the ideological preferences of its supporters.<sup>29</sup> The analysis by Sauvageau, Schneiderman, and Taras (2006) of media coverage of Supreme Court decisions can help us to understand the effects of judicial decisions. For example, the chaos and violence that ensued on the east coast after the Supreme Court's *Marshall* decision (see the introduction to Chapter 2) can be traced in large part to some ambiguity in the Supreme Court's decision and media reporting of the decision that emphasized conflict and downplayed the fact that the Court had said in the decision that the aboriginal right to fish could still be regulated by the government (Sauvageau, Schneiderman, and Taras 2006, Chap. 4).

In reference to federalism decisions, Monahan (1987) has argued that even if one level of government (federal or provincial) loses a federalism case, there are often other options available to them to reach its policy goals, even if the means are less efficient. For example, after Saskatchewan was told by the Supreme Court that under the federal division of powers it could not tax each individual barrel of oil created in the province (*Canadian Industrial Gas and Oil Limited* 1978), the province introduced a general oil well income tax on oil companies. However, such a scheme was more difficult to administer and it made it somewhat easier for

companies to avoid taxation. Meanwhile, Russell (1985) and others have pointed out that Supreme Court federalism decisions, by setting the limits of jurisdictional power, can influence federal–provincial negotiations in various policy areas.

As suggested by the Rosenberg and McCann debates and subsequent Canadian studies, it is difficult to assess the effects on policy of legal mobilization and court decisions, but it is even more difficult to evaluate the long-term socio-economic and political effects (Bogart 2002). For example, to what degree will French-language instruction and francophone schools contribute to the preservation and promotion of francophone language and culture outside Quebec in the face of an English-dominated culture and media in North America? What will the long-term effects on the environment be of the Supreme Court's decision to give the federal government some authority to legislate on environmental issues under its Peace, Order and Good Government (POGG) power (see *Crown Zellerbach* 1988) and its criminal law power (see *Hydro-Quebec* 1997)? Answering such questions is extremely challenging because there are numerous and often related factors that could affect long-term outcomes.

Nevertheless, some scholars have tried to ascertain the longer-term socio-economic and political impacts of laws and judicial decisions. In a provocatively titled article, 'Does the Charter Matter?' Harry Arthurs and Brent Arnold (2005) investigated whether the Charter and judicial decisions have led to socio-economic and political progress for women, aboriginals, and visible minorities. In the case of women, Arthurs and Arnold argue that the Charter has had little long-term effect. They argue that more liberal access to abortion after *Morgentaler* did 'matter' but it mattered 'more in some parts of the country than in others' depending on how provincial governments, hospitals, and doctors reacted. Arthurs and Arnold argue that women's socio-economic status and opportunities are explained more by labour markets, social welfare policy, and child-care policy than by the Charter and that the Charter has had little influence over these factors, because courts have been reluctant to read social and economic rights into the Charter. Turning to women's participation in the political arena, Arthurs and Arnold (2005, 77) argue that the Charter's significance has been 'marginal at best': 'The Charter has no doubt symbolically reinforced the political mobilization of Canadian women. However, judging by the greater electoral progress in other countries that have no constitutional charter—for example, the Scandinavian countries and the Netherlands—it may have done less than is assumed.'

Although the conclusions of impact studies are necessarily tentative and are often disputed, they are valuable for highlighting the need to study law and courts within a larger political context. As noted in the conclusion, the shift to a more policy-making role by Canadian courts needs to be explained with reference to the political process, and the implications for this new role need to be connected to the larger governing process.



## Conclusion

The increased policy-making role of courts is not unique to Canada. Around the world there has been a growth of judicial power (Tate and Vallinder 1995; Ginsburg 2003; Goldstein 2004). Different political explanations have been offered for this phenomenon in Canada and elsewhere. Charles Epp (1998) argues that a necessary but not sufficient condition for 'rights revolutions' that feature significant judicial policy-making is a set of well-organized rights advocates with resources and the support of skilled lawyers. The presence of a constitutionally entrenched rights document, judicial independence, and popular support for rights also are factors that explain why a country has a rights revolution. According to Epp, these conditions were satisfied more in Canada than they were in the United Kingdom. In Canada, lobbying by organized interest groups (with help from the federal government) was necessary to entrench the Charter of Rights, and then groups used the Charter to press rights claims (see Chapter 7). An independent judiciary and a Supreme Court that was willing to engage in activism along with a supportive public undergirded the rights revolution in Canada.

A somewhat different explanation is offered by Ran Hirschl (2004). He traces the rise in judicial power in some countries to hegemonic elites who react to significant threats to their power and the political regime by placing authority in the courts. For example, in Israel the threat came from religious elements in society that were demanding a more or less theocratic state, whereas in Canada the threat came from Quebec separatists. In both countries the elites ceded some power to the courts under an entrenched constitutional document to preserve the political system and their place in it. Morton and Knopff (2000), however, attribute the rise of judicial power in Canada, not to socio-economic and political elites that wanted to preserve their power, but to an interconnected 'Court Party' of law professors, 'post-materialist' interest groups, and sympathetic federal bureaucrats. According to Morton and Knopff, the Court Party lobbied vigorously for the entrenchment of the Charter and then urged the courts to make decisions that would not preserve existing social and political structures, but would refashion policies (involving abortion, same-sex marriage, aboriginal self-government, and so on) along the lines they preferred.

A greater understanding of the debate over the Court Party thesis and, more generally, of the use of the Charter and the courts by organized interests to defend or advance certain policy positions comes from Chapter 7 of this book. Likewise, Chapter 8 helps us to understand better the strategies employed by governments or particular individual within governments, such as the Attorney General, to defend their policies or perhaps to achieve their policy goals by hiding behind judicial decisions or legal opinions about what the Charter requires. Those strategies include government decisions about whether to appeal Charter losses (see Hennigar 2004).<sup>30</sup>

Whatever the explanation for the greater policy-making role of Canada's courts, it increases pressure for more transparent appointment systems and greater accountability for judges, perhaps even direct democratic input into who sits on the bench (see Chapter 5). However, such options could jeopardize judicial independence and thereby undermine one of the reasons for having a judicial branch at arm's length from the other branches of government (see Chapter 6). One of the difficulties in finding a way out of this conundrum is that Canadian courts at all levels make decisions involving both constitutional and non-constitutional law (see Chapter 2). Hence, if one tries to make a court more accountable for taking more of a policy-making approach in Charter cases where the results seem to depend more on policy considerations (backed by social facts and interveners) than on 'law', that same court might be less able to make an impartial and legally informed decision involving a more technical aspect of law. Perhaps one solution is to create a separate constitutional court, as a number of European countries have. The appointment systems used for those constitutional courts reflects their special nature—legislators play an important role in choosing the judges and there are often term limits on appointments. Meanwhile, if a 'regular' court adopts a policy-making approach to reading ordinary legislation or the common law (or the Civil Code in Quebec) involving torts, family law, criminal law, or other non-constitutional law, governments would have the option of passing legislation to override a court decision.

Of course, one should not only look at potential changes to judicial processes when thinking about solutions to challenges raised by the policy-making role of courts, particularly under the Charter. Janet Hiebert (2002), for example, has suggested a greater role for legislative committees in debating rights issues before the passage of a law. This would have two salutary effects. First, it would make the legislative process less executive-centred and more democratic. Second, it would signal to the courts that a legislative body has thought seriously about defining rights and reconciling them with other social interests, thereby leading to greater deference by the courts to legislative choices. While Hiebert's proposal has much to recommend it, it faces a couple of serious hurdles. Prime Ministers and Premiers and their cabinets are very reluctant to give up their power to the legislative branch. There is also some concern that law-makers who focus on individual rights will do so to the detriment of the collective good (Glendon 1991). And there are those who argue strongly against the notion that the legislative and executive branches deserve equal (or co-ordinate) status with the courts in defining constitutional rights (Hogg, Thornton, and Wright 2007).

Whether one agrees or not with Hiebert's suggestion, it is clear that we cannot look at courts in isolation from the rest of the political system. A more holistic perspective not only helps us to understand both the judicial and political processes better, but also helps to restrain us from concentrating on the courts too much and exaggerating their influence. Although courts are important institutions



to study (hence the time and effort we put into writing this book), we remind our readers of two things: how much judicial decisions actually make a difference in shaping policy and broader socio-economic and political trends depends on a host of factors; and, as noted in Chapter 3, much dispute resolution and associated rule-making takes place outside of the judicial system in administrative tribunals and in alternative dispute resolution (ADR).

## Notes

### Chapter 1

1. It is not unheard of for an expectant mother who is clinically depressed to carry a child to full term without being aware that she is pregnant. David Paciocco (1999, 96–7), however, argues that it is difficult to accept that Brenda Drummond would have fired a pellet gun into her vagina if she had not known that she was pregnant—it would have been the most bizarre suicide attempt in history.
2. Since the Supreme Court had struck down Canada's abortion law in its 1988 *Morgentaler* decision, Brenda Drummond could not be charged with trying to obtain an abortion illegally.
3. Brenda Drummond spent seven months in a psychiatric facility. She pled guilty to 'failing to provide the necessities of life' by not telling the doctors about the pellet and thus endangering the baby's life; she received a suspended sentence and thirty months of probation.
4. Some reaction was supportive. For instance, the Pro-Choice Action Network of British Columbia expressed sympathy for the injured child but had strong reservations about altering the policy balance as it existed, and it therefore, favoured the decision: 'How do we prevent women from harming their late-term fetuses, yet at the same time, ensure they have full rights to terminate their pregnancies? Where do we draw the line? Do we prosecute only if the woman uses a lethal weapon like a gun, or do we extend the law to encompass anything that might harm the fetus, including cigarettes or alcohol?' The group concluded that there are 'serious and unwanted implications' to changing policy on fetal rights. (<http://www.prochoiceactionnetwork-canada.org/prochoicepress/9697win.shtml#drummond>). Other reaction was more negative. The LifeSite website (which is closely affiliated with the Campaign Life Coalition), for example, maintained that 'pro-life observers across the country are united in the belief that the current election campaign is a good opportunity to build on the increased awareness of the plight of the unborn which has come about as result of these tragedies [including the Drummond case]' ([www.lifesite.net/election\\_97/issues.html](http://www.lifesite.net/election_97/issues.html)).
5. See, for example, Andrew Coyne (1996).
6. The *Chaoulli v. Quebec* case was heard by seven judges. Three judges argued that laws which limit access to private health care do violate the Canadian Charter of Rights; three judges argued that such laws were not unconstitutional under the Charter. One judge preferred not to decide the case using the Charter of Rights and instead based her decision solely on Quebec's human rights law. Justice Deschamps argued that Quebec's limits on access to private health care violated the province's human rights law; therefore, a total of four judges argued that the current law in Quebec violated rights.
7. This popular definition of politics was first put forth by Harold Laswell (1936).
8. A.V. Dicey (2002) argued that the system of law, based on the legal system developed in England, reflected this notion of the 'rule of law' much more than the civil law system developed in Continental Europe, because the system applied the general