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The Transformation of the Supreme Court of Canada

An Empirical Examination

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1 Introduction: The Changing Role of the Supreme Court in Canadian Politics

On 28 June 1971, the Supreme Court of Canada handed down decisions in four separate cases, all by unanimous vote of the five justices participating in each case. In *Schwartz v. Schwartz*¹ the Court settled an inheritance dispute among five children arising from ambiguous language in their deceased father's will. In *City of Victoria v. University of Victoria*² the city appealed from a decision by the Court of Appeal denying its tax claim against the university for taxes levied against a commercial building situated half on land left to the university in a will and half on property privately owned. The Court dismissed the university's appeal. In *Canadian General Insurance Company v. Western Pile and Foundation, Ltd.*,³ the Court wrestled with complex factual issues over liability for damages caused by the collapse of a dam. And in *Phillips v. Samilo*,⁴ the Court had been asked to decide which of several heirs was responsible for the tax liability of the deceased father, who had defrauded the government out of \$300,000 in taxes owed from his various business schemes. It is probable that no reader of this book has ever heard of any of these cases, and the decisions of the Court were widely ignored even in 1971. These decisions do not appear in any history of Canadian politics or society, and even the leading newspapers of the day ignored them. For example, none of the decisions was even reported by the *Globe and Mail* the next morning.

In contrast, many of the Supreme Court's decisions over the past two decades have generated extended media coverage and heated political controversy. The Court began the new century by announcing, on 26 January 2001, a controversial decision that upheld in part a constitutional challenge to provincial law prohibiting child pornography. In *R. v. Sharpe*,⁵ the accused was charged with two counts of possession of

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child pornography under s. 163.1(4) of the Criminal Code. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of the act, contending that it violated his constitutional guarantee of freedom of expression. The Crown conceded that the prohibition of possession of child pornography infringed s. 2(b) of the Canadian Charter of Rights and Freedoms but argued that the infringement was justifiable under s. 1 of the Charter. Both the trial judge and the majority on the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child pornography as defined under s. 163.1 of the Code was not justifiable in a free and democratic society.

In a divided decision (L'Heureux-Dubé, Gonthier, and Bastarache dissenting), the Court upheld the constitutionality of the prohibition of child pornography but limited its reach, allowing some private possession of child pornography. Specifically, the Court said that the law should be read as though it contained an exception for the following: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. The public reaction was swift, and the media coverage was extensive. The decision attracted the attention of all the major television news broadcasts and was a major focus of leading newspapers throughout Canada. The *Globe and Mail* alone ran six separate stories highlighting different aspects of the case. A page one article was headlined: 'Top Court Rules 9-0: Child Porn Law Stays.' The same day, other stories were featured on page one of the *Globe* and on pages A4 and A5 under headings such as these: 'Activist Days Long Gone for Deferential Court'; 'Both Sides Claim Victory'; 'BC Defendant Unrepentant after Court Ruling'; and 'McLellan⁶ Welcomes Balanced Judgment.' In all, the *Globe and Mail* devoted more than 120 column inches to the decision and to political and personal reactions to it, and that was just the first day after the decision was announced.

Other cases besides that one have elicited fierce public reaction and extensive media coverage. When the Court reversed a pre-Charter precedent to legalize abortion,⁷ the reaction from the public was intense and heavily chronicled in the media. Once again, the Court's decision was literally front page news. The day after the *Morgentaler* decision

was announced, the headline covering the entire top of page one of the *Globe and Mail* declared 'Abortion Law Scrapped, Women Get Free Choice.' Front page coverage in the *Globe and Mail* also featured passionate responses from both supporters and opponents of the decision. Under the heading 'Jubilant,' the paper reported that 'feminists across the country rejoiced yesterday, calling the Supreme Court's rejection of Canada's abortion law the most important for women since they won the vote.'⁸ In a parallel story headed 'Defiant,' a Roman Catholic cardinal was quoted as saying, 'The Supreme Court decision is a disaster ... It is uncivilized.'⁹ The political reaction to the decision was covered in great detail – for example, in a long feature headed 'Pro-Choice Supporters Celebrate as Anti-Abortionists Mourn.'¹⁰ The text of the decision also received detailed coverage.¹¹ Follow-up stories focused on the reaction of women's groups around the country, on the personal life of the doctor at the centre of the case, on the legal history of the battle over abortion, and on the responses of government officials to questions about how they were going to implement the decision.

More recently, the Court again created political controversy when it provided official sanction for advocates of gay rights. In *Vriend v. Alberta*¹² the Court ruled that the Charter of Rights and Freedoms prohibited discrimination on the basis of sexual orientation. In 1990, in response to an inquiry by the president of the college at which he worked, Vriend disclosed that he was homosexual. Shortly thereafter, the college president requested his resignation. When Vriend refused to resign, the college terminated his employment. The sole reason given was his non-compliance with the college's policy on homosexual practices. When Vriend attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation, the commission advised him that he could not make a complaint under the Individual's Rights Protection Act (IRPA), because that act did not include sexual orientation as a protected ground. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the Charter of Rights. She ordered that the words 'sexual orientation' be read into the IRPA as a prohibited ground of discrimination. The majority on the Court of Appeal allowed the Alberta government's appeal; then, in a split decision, the Supreme Court overturned the Court of Appeal, insisting that protection against discrimination on the grounds of sexual

orientation was protected by the Charter even though it was not explicitly mentioned in the Charter. The media reaction was again extensive. For example, the *Globe and Mail* ran half a dozen articles on the decision, supplemented by an editorial and lengthy quotes from the actual opinions of the justices. One article noted that radio talk shows throughout Canada were being swamped by people calling in to express both support and outrage over the decision.¹³

These cases from 1971 and the Charter period illustrate that for much of its history the Supreme Court of Canada toiled in obscurity, well out of the limelight of political controversy. As recently as 1966 the Court was described as the quiet court in the unquiet country' (McCormick 2000, 1). But with the advent of the Charter of Rights and Freedoms, that all changed. Indeed, a major national newspaper recently asserted that the Supreme Court was of profound importance in the Canadian political system because 'the court's rulings have far-reaching effects, particularly in the age of the Charter of Rights and Freedoms.'¹⁴ Another writer asserted that Canadian politics as a whole had been 'transformed' by the Charter (Morton and Knopff 2000, 13). Few now doubt that the Charter has placed the Court at centre stage in some of Canada's most dramatic policy debates. Given this transformation, it is increasingly important to examine how the Court rose to its current prominence. Many commentaries, both scholarly and popular, have critiqued the normative implications of the Court's recent role (see Morton and Knopff 2000; Mandel 1989 1994; Manfredi 1993; Russell 1983). Much less, however, is known about how the Court actually operates and about the empirical realities of its decision-making trends. This book attempts to fill those gaps by providing the most comprehensive empirical analysis to date of continuity and change on the Court in terms of its shifting agenda, the litigants appearing before it, and its patterns of decisions. The focus of the analysis is the period 1970 to 2003.

Over the past half century, the Supreme Court of Canada has undergone two institutional changes. Both have had a profound impact on its role in national life. In 1975 the Court gained substantial control over its docket. Specifically, cases coming before it as appeals 'as of right' were sharply limited; and an expansion of the 'leave to appeal' process provided it with greater control over which cases it would hear. The second change came in 1982 with the adoption of the Charter of Rights and Freedoms, which transformed the nature of the questions coming to the Court, thereby greatly increasing the Court's role

in politically important issues. The time period examined in this study has been chosen to permit an analysis of the impact of these two significant institutional changes. The analysis begins five years before the Court acquired its enhanced agenda control. This is so that the Court *before* the changes can be compared with the Court *after* the changes. The analysis then continues until close to the present time.

Understanding the Transformation of the Supreme Court: Four Themes

Four themes emerge from the detailed analysis that follows. First, the Supreme Court's role in Canadian law and politics has been transformed, largely as a result of the *Charter*. Second, while it is still fashionable to think of the work of courts as divorced from the often disdained world of politics, to properly understand the current Court one must understand it as a court of law *and* a political court. Third, Canada's Supreme Court is clearly a political court, yet compared to many courts in the common law world (including the Supreme Court of its southern neighbour), it is politically moderate. Fourth and finally, almost by definition, courts in a country that has a strong attachment to the rule of law are staffed by people who may fairly be categorized as among the elite of the nation. Nevertheless, compared to many top appellate courts, the Supreme Court of Canada appears to be a rather 'democratic' court, one that largely reflects Canada's diversity.

Regarding the first theme, Canada adopted the Charter in 1982, yet the first case involving it did not reach the Supreme Court until 1984; hence evidence of the effects of the Charter on the Court do not begin to appear until 1984. Since that year, the Court's agenda has undergone a radical revision. As the examples at the beginning of this chapter illustrate, in the early 1970s the Court was still focusing largely on resolving disputes in private law. Since 1984, however, there has been a dramatic increase in the number of criminal appeals and a proportionately large increase in attention to challenges brought by rights claimants (see chapter 3). In addition, the agenda is now dominated by questions of constitutional and statutory interpretation – questions that have potentially widespread effects on society as a whole. This agenda change has taken place at roughly the same time that there has been a significant change in the composition of the Court, most notably with the addition of female justices. Since 1982 more women have served on the Supreme Court of Canada than on the highest courts of

Australia, the United Kingdom, and the United States combined. Also, decision-making processes have changed: the rapid increase in the number of cases has drawn the participation of interveners and resulted in a larger proportion of cases being decided by the full Court or by panels of seven justices (i.e., instead of five).

Regarding the second theme, the Supreme Court is of course the institution tasked with resolving the most perplexing legal issues facing the country. Law and precedent therefore loom large in the justices' deliberations. But the Court cannot be adequately appreciated unless it is understood as both a political and a legal institution. To begin with, the Court has played a major role in the resolution of many of the politically most controversial issues of public policy, especially since the adoption of the Charter (see chapter 6). Thus the Court produces politically important outputs regardless of the justices' preferences. The Court's agenda – in particular, the nature of the issues brought to it by politically motivated individuals and groups – guarantees that no matter who is on the Court, it will be intimately involved in the political process. Moreover, the Court is political in another sense (see chapter 7). The evidence is strong that in a substantial number of politically significant cases, the justices' private political attitudes and preferences influence their decisions. In this respect, the role played by the Supreme Court of Canada does not appear to be fundamentally different from the political role played by the top appellate courts in other common law countries such as the United States, the United Kingdom, Australia, and India, or from the role played by top civil law courts in most of modern Europe. Nevertheless, the evidence suggests that the *magnitude* of the influence of the justices' political attitudes may be more modest than in the United States and Australia.

Regarding the third theme, once one concludes that politics plays a role in judicial decision making, it is important to ask what the political consequences of that role are. It is not possible to give a completely objective answer to this question,¹⁵ and a series of normative analyses of the Supreme Court of Canada have arrived at diverse conclusions, but to an outside observer with no attachments to any faction in Canadian politics, it appears that a good case can be made that overall, the Supreme Court has generally been politically moderate. The evidence for this is drawn from several of the chapters below. First, there have been relatively modest swings over time in the proportion of decisions favouring liberal versus conservative outcomes as a function of changes in the political composition of the Court (as measured by the party of

the appointing prime minister; see chapters 6 and 7). For example, changes brought about by changes in party control have been much smaller than in the United States. Journalists writing for Canada's national newspapers concur that most Supreme Court justices have been moderate (see chapter 2). Indeed, the justices themselves sense that most of their colleagues are not interested in pushing ideological agendas and that they are largely willing to compromise (see chapter 5). Finally, over the past third of a century the Court has reached a unanimous decision in the large majority of its cases. Chapter 8 of this book will suggest that political ideology plays little if any role when the Court is unanimous.

Finally, regarding the fourth theme, the Supreme Court of Canada can be understood as relatively 'democratic' compared to many other courts around the world. The justices in the courts of all industrially advanced modern nations are of course more highly educated and tend to be recruited from national elites. But compared to courts in many countries, the Canadian justices appear to be less elite. As noted, Canada has been appointing female justices for decades. Its justices are regionally diverse and have been drawn from a variety of Canadian universities and law schools. Both of Canada's main religious groups have always been represented. Moreover, the Court has long been open to a broad spectrum of the population. And finally, compared to most other common law courts, individuals win relatively often compared to the representatives of entrenched institutionalized power.

Evidence in support of each of these four themes is presented throughout the analysis that follows. However, to provide a descriptive account of the Court that flows more logically, the remainder of this book is organized according to more traditional notions of the functions of courts. The account starts in chapter 2, with a look at the justices who have served on the Court since 1970: how they are selected, what criteria are used in selection, and what types of men and women have been selected. Next, chapter 3 examines the Court's agenda. The process of determining which cases reach its docket is examined; the focus then turns to the nature of those cases. For both questions, a central concern is changes over time in processes and results. Chapter 4 examines the litigants. The first orienting question relates to who participates. That is, who brings cases to the Court? And who is defending their gains in the courts below? In the second half of the chapter, the focus shifts to who wins and who loses in the Supreme Court. Once again, both the overall pattern and changes over time are

examined. In chapter 5 attention turns to the Court's internal processes. Much of this chapter is derived from a set of interviews with the justices and some of their former clerks. In chapter 6, trends in policy making are examined. That is, the Court's decisions are examined in aggregate. Instead of asking which individuals (or litigants) win and lose, the analysis explores which policy positions have been favoured and how those trends have changed over time. In chapter 7 the focus remains on the Court's decision making, but the focus shifts to an individual level of analysis. Evidence of attitudinal decision making is explored, and so is the nature of the cleavages on the Court. Most of the analysis in that chapter focuses on the Court's divided decisions. The final substantive chapter, chapter 8, shifts attention from the divided decisions of the Court to the decisions in which it was unanimous. Particular attention is devoted to whether the justices' policy preferences have driven these unanimous decisions. Chapter 9 then summarizes and discusses this study's major findings in terms of the four themes outlined above.

An Outsider's Perspective and an Empirical Analysis

Two things stand out about the analysis that makes this book different from most writing on the Supreme Court of Canada. First, it is written from the perspective of an 'outsider'; second, it presents an empirical rather than a doctrinal or normative analysis of the Court. The author is an outsider in at least three senses. First, I have no special insider connection to the Supreme Court or to any of the present or former justices. Nor have I participated in any of the legal or political battles in which the Court has been involved. Second, I am a social scientist rather than a lawyer or law professor. I am not primarily concerned with the evolution of legal doctrine or even in the precise nature of the precedents spelled out in key decisions of the Court. This book is not in any sense an examination of Canadian law. Rather, my interest is in the role of the Court in Canada's political and legal system and in the similarities and differences in that Court's role compared to the roles played by appellate courts in other countries. Finally, I am an outsider in the sense that I am not a Canadian. I am a political science professor at a university in the United States who embarked on a study of the Supreme Court of Canada out of a broad interest in the comparative analysis of courts in the common law world. I hope that my status as an

outsider has enabled me to gain a perspective that may be somewhat different from those of 'insiders' and thus help to cast new light on some recurring themes in discussions of the Supreme Court of Canada.

There is by now a fairly large literature on the Supreme Court of Canada. In part, that is the result of increased public interest in the Court since the Charter of Rights was adopted. But most of that literature does one of two things. A number of scholarly works present a doctrinal account that carefully examines the legal doctrines enunciated by the Court and that traces the evolution of those doctrines over time. Other works provide a normative critique of the Court and its decisions. Many of the Supreme Court's decisions, especially since the adoption of the Charter, have evoked intense political passions. Out of those passions, both defenders and detractors of the Court have provided searing accounts that either justify or attack the Court from a variety of political perspectives. The current account does neither. Instead, it attempts to provide an empirical account that examines as objectively as possible both continuity and change on the Court since 1970. Wherever possible, quantitative and statistical analyses are employed both to provide a descriptive account and to test empirical hypotheses about the Court.

The analyses presented below are the first to combine the insights gained from in-depth interviews with the justices with a series of quantitative analyses of judicial decisions. No other studies of decision making in the top courts of Canada, the United States, or Britain contain such a rich combination of quantitative analysis and insights from judicial interviews. The study utilizes two main sources of data: a set of in-depth interviews with the Supreme Court justices, and the most comprehensive database of Canadian decisions spanning more than three decades, paying particular attention to decisions handed down by the Court in three pivotal issue areas: criminal law, Charter rights and liberties, and economic disputes.

Much of the research was made possible by a pair of grants from the National Science Foundation of the United States and Canadian Studies Grant program of the Canadian Embassy in Washington.¹⁶ This support enabled the author to code all of the published decisions of the Supreme Court from 1970 through 2003. All decisions published in the *Supreme Court Reporter* have been coded. For each case, detailed information has been recorded regarding the nature of the issues, the litigants, the interveners, the votes of the justices, and the outcome of the

Court's decision, along with the history of the case before it reached the Supreme Court. In all, detailed information on more than seventy variables has been collected for each case.

The author also interviewed ten of the current or recent justices of the Supreme Court and four former law clerks to the justices. All of the interviews with the justices were held in the offices of the justices in the Supreme Court building in Ottawa on one of several trips the author made to Ottawa between 2001 and 2007. All interviews were conducted under the following ground rules: the comments of the justices would not be attributed to any justice, nor would any descriptive information about the justices be linked to the comments that would allow anyone familiar with the justices to make such attributions. Thus, accounts of the interviews refer to the justices only as 'Justice A,' 'Justice B, and so on. All justices are referred to using a male pronoun regardless of the actual gender of the justice. The interviews were opened ended, and the justices were encouraged to elaborate on their answers to all questions. Most interviews lasted between an hour and an hour and fifteen minutes. A copy of the interview schedule is provided in the Appendix.

An Overview of the Analysis

There have been plenty of studies defending or attacking Canada's Supreme Court on normative grounds. Less is known about how it operates. Indeed, one prominent scholar maintains that the 'internal decision making process of the Supreme Court of Canada has been shrouded in secrecy' (Baar 1988, 70). In this book an attempt is made to lift that veil and cast some light on the main features of the Supreme Court's decision-making process over the last third of a century. Interviews with the justices and with some former clerks on the Supreme Court explore how cases get to the Court, who determines which judges will hear the appeal, how the justices prepare for the hearing, what happens in conference, and why the negotiations surrounding the actual writing of the opinion are so crucial.

These interviews are supplemented with a quantitative analysis of all of the published decisions of the Court since 1970. Besides tracing changes in the characteristics of the lawyers appointed to the Supreme Court, trends in the agenda of the Court, variations in who participates, and variations in who wins appeals to the Court, the book devotes four chapters to the justices' decision making. First, interviews

with the justices are used to provide new insights into that process. Then the Court's decisions are analysed in aggregate so as to explain changes in trends in the Court's decisions. The focus then shifts to the individual voting decisions of the justices and the bases of divisions in the Court. Finally, the analysis focuses on the unanimous decisions of the Court, in order to integrate the perspectives of the justices with an empirical analysis that probes whether those unanimous decisions are consistent with an attitudinal explanation of judicial behaviour or, rather, reflect collegiality and compromise.

Court observers' perceptions of new justices provide no direct evidence of the motives of the prime ministers doing the appointing. That said, most new justices have been perceived as moderates, whichever party has appointed them, and there has been no increase in the appointment of more sharply ideological justices since the adoption of the Charter. All of these findings provide at least some additional indirect evidence that prime ministers have generally not pursued overtly ideological agendas when naming new justices to the Supreme Court.

When one steps back from the specifics of the justices' backgrounds, the overall picture is one of considerable diversity, especially when compared to the backgrounds of American and British justices. The Canadian justices are certainly part of the national elite in terms of education and class background, yet there is a sense in which they may be characterized as quite representative of the nation. In broad terms, the justices appear to represent Canada's diversity in terms of party, gender, religion, and geographic origins. And while they are of course all university educated, they obtained that education from a broad cross-section of undergrad schools and law schools. Given this diversity, the Canadian court can be categorized as one of the more 'democratic' courts in the common law world.

In the chapters that follow, the Supreme Court of Canada will be described as a court whose role has become much more political over the past third of a century. For the moment it is significant to note that despite all the controversy generated by that increasingly political role, the justices appointed to the Court – even in the Charter era – are still perceived at least by journalists covering the Court and its rulings as politically moderate. And despite the controversy over the selection system and concerns that the process for selecting justices is too political, there seem to be only moderate differences between the Liberal and Conservative parties in terms of the political orientation of the justices they choose.

3 Setting the Agenda

The impact of the procedures that set a court's agenda can be far reaching. Which cases do the courts hear? The answer to that question tells us a lot about how the law evolves. It also explains much about how society creates winners and losers (Flemming 2000, 40). By its nature, agenda control 'focuses attention on particular issues or concerns to the exclusion of others. At a minimum, the decision to place issues before decision makers means that other issues go unattended' (Flemming 2004, 6). So it is significant that for most of its history, the justices on the Supreme Court of Canada had little control over their agenda. Their docket was controlled by the decisions of litigants.

The Supreme Court was not established by the BNA Act of 1867 (Canada's original constitution); rather, it came into being in 1875 through the Supreme Court Act, an ordinary act of Parliament. Under the terms of that act, the Supreme Court had appellate jurisdiction over matters of both provincial and national law, but little control over which lower court decisions it actually reviewed. The Court was initially required to hear all appeals brought to it. Also, litigants who lost in the provincial courts could bypass the Supreme Court by appealing directly to the Judicial Committee of the Privy Council in Britain. In the words of one of its future chief justices, Bora Laskin, it would be a 'captive court' until well into the twentieth century (McCormick 1994).

In 1931 the Statute of Westminster granted the Canadian government control over the nation's external affairs and other matters that had always been under British control (Snell and Vaughn 1985). Having obtained this authority, the Canadian Parliament moved quickly to prohibit the continuation of criminal appeals to the Privy Council. In 1935, in *British Coal Corporation v. The King*, the Judicial Committee of

the Privy Council upheld the validity of this action, making the Supreme Court of Canada finally 'supreme' in practice in the resolution of criminal cases.

With the end of criminal appeals to the Privy Council in 1933, the push for the complete abolition of such appeals continued into the 1940s (Snell and Vaughn 1985; Bushnell 1992). A backlog of cases during the Second World War from Canada to the Privy Council had generated concerns about the practicality of the appeal system; also by then, a series of Privy Council decisions on the validity of Canadian New Deal legislation had greatly eroded public support for the Privy Council (Snell and Vaughn 1985). In early 1947 the Privy Council ruled that Canada did have the power to end all appeals to it (Bushnell 1992). Shortly thereafter, a bill was introduced in the Canadian Parliament to end all such appeals. There was little debate by this point, and the measure passed easily (Snell and Vaughn 1985). When the bill became law in December 1949, the Supreme Court became 'supreme' in fact as the final arbiter of Canadian legal disputes (Bushnell 1992; Snell and Vaughn 1985).

Yet even after appeals to the Privy Council were abolished, the Supreme Court lacked control of its own docket; losing litigants in the intermediate appellate courts could still bring an appeal 'as of right.' The Supreme Court was thus required to hear all cases appealed to it except for civil appeals involving disputes over less than \$10,000. These civil suits involving small sums could only come before the Court through the grant of a petition for 'leave to appeal.' The inevitable result as the country grew in size and complexity was that the Court's caseload continued to increase.

By the 1970s, both government officials and members of the bar were growing concerned over the Court's ever expanding workload (Bushnell 1992). To address that concern, Parliament in 1975 granted the Supreme Court nearly complete discretionary control of its docket. When the bill came to the floor in Parliament, there was virtually no debate; all agreed that steps had to be taken to bring the Court's workload under control (Bushnell 1982). The 1975 law gave the Court discretion in deciding which civil cases of 'public importance' it would accept for review (*Statutes of Canada 1974-75-76*). Some criminal cases would still have to be heard if dissent existed in the court below; but the 1975 Act ended the automatic right to appeal in writs of mandamus or habeas corpus when dissent was not present in the decision below (*Statutes of Canada 1974-75-76*). Since 1975, then, most cases must be granted leave to appeal before the Supreme Court will hear them.

The effect of the 1975 law was immediate and dramatic. In 1974-5, about seventy cases came before the Court as of right; the following year, only thirty-two; and after 1978, an average of twenty per year (Bushnell 1982, 497). The number of appeals as of right remained relatively static early in the Charter period but then began to track upwards again, reaching thirty-six in 1987 and remaining at that level or higher for all but one year over the next decade. In 1997, however, the Criminal Code was amended so as to substantially narrow the circumstances in which an appeal as of right would be permitted, and this has reduced appeals to the Court to 'just a handful' each year (Monahan 2000, 4).¹

Review of some criminal cases remains mandatory, however. Also, every year the Court decides a small number of 'reference questions,' which are brought to it by the federal government. Reference cases are essentially requests by the government for an advisory opinion, usually on the constitutionality of some course of action it is contemplating.² The Court has usually felt itself obligated to answer reference questions, though there is some question as to whether this is a legal obligation (McCormick and Greene 1990). In any event, reference questions are a negligible part of the Court's docket, averaging less than one case per year during the Charter period. Until 1997, criminal appeals to the Supreme Court as of right included cases in which an acquittal had been overturned by a provincial appellate court and those in which there had been a dissent on a point of law by the appeal court. Similarly, the Crown has a right of appeal when an appellate court overturns a conviction. Finally, leave to appeal in civil cases may be granted by the appeal courts; however, the most detailed study of this practice concluded that such grants were rare (Bushnell 1982, 499).

There has been a steady increase in the number of leave-to-appeal petitions coming to the Court. Between 1970 and 1990 the Supreme Court typically received fewer than 300 leave petitions per year and granted leave to 25 to 35 per cent of them. Between 1990 and 2000 the number of petitions rose steadily, from 424 in 1990 to 642 in 2000. However, the Court did not decide to increase the number of cases it decides on the merits each year; as a result, the success rate of petitions (i.e., the percentage granted the right of a hearing) dropped from 22 per cent at the beginning of the decade to only 13 per cent by 2000 (Flemming 2004, 30). In contrast, by the year 2000 the U.S. Supreme Court was receiving upwards of 6,000 petitions asking for review.

The Criteria for Granting Leave to Appeal

As the result of the Supreme Court Act of 1975 and the 1997 amendments, the Supreme Court now largely controls its own agenda. With the exceptions noted earlier, no case is heard by the Supreme Court unless the appellant is granted leave to appeal. The power granted to the Court to determine which cases it will hear is both broad and vague. Section 40(1) of the act states that leave is to be granted if

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 such 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.

The statute does not define 'public importance,' and the court has not published any clarifying guidelines. Most commentators have interpreted this criterion to mean *national* importance, but there has been widespread agreement that the Court has left the standard deliberately vague (Flemming 2000, 2004; Greene et al. 1998; Baar 1988). One former clerk for the Supreme Court confirms that the justices focus on issues of national importance – that is, those on which the provincial appeal courts have split and in which the law itself is uncertain (Sossin 1996, 289). More recently, several other clerks have offered a similar perspective. They note that when clerks are asked to write memoranda on leave petitions to help the justices reach decisions, they are specifically asked to indicate whether the case involves a question of national importance, whether the rule of law is subject to any current uncertainty, and whether the central legal issues in the case have been decided differently by different provincial appeal courts. The clerks note that they are not asked to offer an opinion or analysis as to whether the case was decided correctly in the lower court (McInnes et al. 1994). Similarly, Bushnell (1982) reports that leave is most likely to be granted when there is either a question of national scope, a conflict among provincial appeal courts regarding the interpretation of some point of law, or a question about the proper interpretation of some new provision of a federal statute. Leave is unlikely to be granted simply because the petitioner asserts that the decision was decided incorrectly in the lower court (1982, 515–16).

Interviews with several of the justices on the Lamer Court provided only minor additions to our understanding of what the justices are

looking for in leave petitions. These justices confirmed that it was only questions of general importance to the whole country that were granted leave; also, they preferred that the issue not go to the Supreme Court until several appeal courts had had a chance to rule on it. They also suggested that leave is most likely to be granted when the lawyers filing the petition are able to describe the central issue clearly and succinctly (Greene et al. 1998, 109–12).

As noted earlier, the leave-to-appeal amendment was introduced in 1975 solely as a caseload control procedure and was uncontroversial for that reason. There was clear evidence of a growing need for the Court to get its docket under control. Some, however, including Justice Wilson, were more concerned about the amendment's substantive effects. From the beginning of her tenure, Justice Wilson was certain that it would transform the role of the Court so that it focused on the law's development rather than on the correction of errors (Anderson 2001, 240–1). She maintained that the decision to grant leave in a private law case should indicate that the Court recognized that the law required modification; whereas denial of leave should indicate that the Court was not prepared to open up or reconsider a given area of the law.

There have been few empirical analyses of the reasons why leave petitions are granted or denied. Only one study has tried to unearth the reasons why leave to appeal has been granted by examining the actual cases accepted and denied leave. Fleming (2004) concludes that neither the nature of the litigants nor of the lawyers preparing leave petitions has had a major impact on decisions to accept a petition. There is a small community of lawyers whose expertise is drafting leave petitions to the Court, but they do not dominate the process; indeed, they have not been any more successful than lawyers with little or no experience in filing such petitions. Nor have lawyers from large, prestigious law firms been more successful than other petitioners. In this respect, the Canadian process is substantially different from the certiorari process in the United States, where a 'litigant-centred' account largely explains variance in the success of petitions for review. As in the United States, petitions by the federal government have had significantly better chances to be granted leave. Business litigants do not fare better than individuals in the leave process.

Instead, the chances that leave will be granted seem to depend more on a 'jurisprudential model.' In this respect, the results of the analysis of Canadian leave petitions look very similar to those for the United States (see Perry 1991). In the latter country, the likelihood that leave will be granted increases when the appeal is from a divided appeal

court or when the circuit courts are divided regarding their answers to the issues raised in the appeal. Also, petitions that raise issues never before litigated by the Supreme Court or that may have a strong impact on federal interests are more likely to be accepted for review. Petitions that are mainly seeking correction of errors in the lower courts are less likely to be reviewed, as are fact-intensive issues.

The Process for Reviewing Leave Petitions

Leave applications are sent to the Law Branch (called Registrar's Legal Services before 1999), where they are read first by staff lawyers. Those lawyers prepare objective summaries of the applications that outline the facts of the case, describe the legal history, and describe the legal issues raised by the case. These summaries are then sent to all nine justices.

Each leave petition is sent to one of three panels. Each panel has three justices and is appointed by the chief justice. Membership on these panels rotates each year. It is these panels that make the formal decision whether to grant leave. Majority vote is sufficient; in practice, though, the votes are almost always unanimous. Of almost 1,200 petitions, only 30 resulted in a divided vote by the leave panel (Flemming 2004, 15).

Before the justices vote on leave petitions, the petition is assigned to a law clerk. For the purpose of considering leave petitions, the clerks of all the justices are assigned to a single pool and each petition is assigned to only one clerk. That clerk then writes a memorandum of law, which is sent to all the justices on the Court, including the three-judge panel charged with making the formal decision on the leave. The clerk's memorandum typically runs about fifteen pages; it summarizes the case's facts and procedural history as well as all related lower-court decisions. The clerk is then expected to describe the essential issues in the case and to make and justify a decision as to whether leave should be granted.

From a political perspective, one of the most interesting questions is the extent to which the Court's docket is influenced by political interest groups. Since the adoption of the Charter of Rights, there has been a substantial increase in the number of interest groups seeking to participate during the merits stage of Supreme Court cases, as well as in the Court's willingness to allow their participation as interveners (see chapter 5). However, the justices discourage participation by interveners at the leave-petition stage; as a result, such participation is quite rare. The result is a major difference in the agenda-setting process

between the Supreme Court of Canada and the U.S. Supreme Court. In the latter, interest groups often file petitions in support of or in opposition to petitions for certiorari (which are very similar to a Canadian petition for leave to appeal). Several studies have found that in the United States, the support of an interest group greatly increases the probability that a cert petition will be granted.

Granting Leave to Appeal: The Perspective of the Justices

Justices on the McLachlin Court were asked what they looked for when evaluating petitions for review.³ Though no specific mention was made of 'official' criteria, every single justice agreed with the succinct summary of Justice G: 'National importance is the key.' Justice E admitted the truth of the widespread complaint about the absence of specific guidance on leave criteria: 'Essentially there are no formal guidelines – it is just a matter of what is a major issue.' He added: 'It is a lot like what your justices [i.e., on the U.S. Supreme Court] say about obscenity – we know it when we see it.' Justice E argued that despite the absence of specific guidelines, in 'the vast majority of the cases' the decision to deny leave is easy. All the justices agreed that in most petitions, the Court's decision is unanimous. When asked what constituted an important versus a non-important issue, he said that all the justices were interested in law development, especially in new areas of law where there are few precedents to guide lawyers and lower-court judges. 'We won't take cases on which the law is well settled,' he said, 'and we are generally not interested in cases that are "fact driven" – "who done it" is a question for the lower courts.'⁴ He said that generally the Supreme Court was not interested in error correction – that is a job for appeal courts. Put another way, the justices were not primarily concerned with whether the court below 'got it right or wrong [pause] – unless something went *really* wrong and you just have to fix it' (emphasis of the justice).

This ambivalence about error correction was expressed in almost all the interviews. The justices first indicated that they didn't see their job as correcting the lower courts' mistakes, but they almost always qualified that initial remark by indicating that on relatively rare occasions, the errors were so egregious that they just had to step in to fix the problem. With slightly varying language, all of the justices seemed to agree with the assessment of Justice C – that 'in theory just because the case was wrongly decided below you won't necessarily hear it. Instead

there must be some indication of national importance – that is, some point of law that has national significance. But sometimes the decision is so far off track that you just can't let it stand.'

These comments echo a number of others made by U.S. Supreme Court justices and their clerks. Time and again, they insisted that the U.S. Supreme Court 'was not there to ensure justice' (Perry 1991, 36). One clerk noted that all the U.S. justices insisted that they do not engage in 'error correction'; but then that same clerk added that nevertheless, there appeared to be something like 'the Zorro concept, where they strike like lightning to do justice' when the result below was so egregious that the justices could not let it pass (*ibid.*, 100). While none of the Canadian justices explicitly referred to a 'Zorro concept,' it seems that a similar response occurs in Canada in those relatively rare instances when a lower-court decision is so clearly in error that to let it stand would be to bring the whole system of justice into disrespect.

The issue of the law's uniformity does loom large for Canadian justices. Unanimously, they thought it important for federal laws to mean the same thing throughout a highly diverse country. This strong concern about maintaining national uniformity in the law as a key role of the Court was strikingly parallel to the views of the U.S. justices as expressed to Perry, and to the views of the Law Lords as expressed in recent interviews with the present author.⁵ It is interesting that the importance of national uniformity applied both to the common law and to the statutory laws of the provinces. That is, this concern was not reserved exclusively for cases raising questions of national law or constitutional interpretation. Justice A went so far as to assert that national uniformity was 'especially' important with regard to the common law. Since it is judge-made law, the judges have an obligation to speak with one voice so that there is no perception that justice depends on the 'luck of the draw,' with the rules varying from case to case depending on which judge hears it. As a consequence, conflict among the provincial appeal courts over the interpretation of some question of law is usually taken as a strong indicator of the 'national importance' of the issues a case raises. However, like their colleagues on the U.S. Supreme Court, the justices also indicated a clear preference for waiting until an issue was ripe for review. That is, when a new issue arises, if it is perceived to be an issue that is likely to arise in many contexts, the Court is likely to deny leave on the first petition raising the issue and to wait until the issue has been vetted more extensively in the lower courts.

In studies of case selection in the United States, there has been speculation that the identity of the petitioner's lawyer may affect the chances

for review (either positively or negatively) as the reputation of a given lawyer in the small 'Supreme Court bar' serves as a cue for the justices. The Canadian justices agreed that a lawyer's skill at framing the issues for appeal was likely to affect the chances for review, but they also doubted whether a lawyer's reputation had any impact on decisions to grant leave. As Justice D pointed out, there is not a small, identifiable 'Supreme Court bar' in Canada that might lead the justices to become familiar with the reputations of individual justices; besides, the names of counsel are not included in summaries of leave petitions provided to the justices by staff lawyers. Consequently, most justices do not know at the leave stage who the lawyers on each side are. Similarly, the justices denied that the standing or reputation of the judge who wrote the lower-court opinion had a measurable effect on the leave decision. Several justices did indicate, though, that the presence of dissent in the appeal court was often an important signal that there was an unresolved question of law and that if the dissent was by an especially well respected judge, that would carry some weight in their minds.

Finally, in stark contrast to the practice in the United States, the justices do not perceive any pressure to deny petitions for leave to appeal. Participants in the United States often assert that when they examine cert petitions they are looking for reasons to deny a petition (see Perry 1991); justices evaluating leave petitions in Canada are looking for reasons to grant leave. Justice F was most emphatic, asserting that his Court had never turned away a case just because its docket was full. When asked about the cross-border difference, several Canadian justices suggested that it was probably simply a function of numbers. The Supreme Courts in the two countries hear roughly the same number of cases each year, but in the United States the number of petitions for review is around ten times as great as in Canada.

The formal process for evaluating leave petitions seems straightforward at first glance and was outlined earlier in this chapter. A petition is sent to the Law Branch,⁶ where a staff lawyer prepares an objective summary, which is sent to all nine justices. Each full petition, with supporting materials,⁷ is sent to a panel, which decides whether to grant or deny leave.

The formal process is thus quite decentralized. The justices maintain, though, that in practice any justice on the Court can get involved in the decision on any petition in which she or he has a particular interest. Also in practice, before a panel makes a formal decision to grant or deny leave, it circulates a memo to the rest of the Supreme Court bench stating that it will deny or grant leave unless it hears an objection from

another justice. If a single justice objects to this tentative decision, the petition is placed on the agenda of the next Court conference. At the conference, all of the justices have an opportunity to discuss whether to grant leave to appeal. The justices stressed that conference considerations are literally 'discussions' during which no formal decisions are made, though at the end of discussion someone will sometimes ask for a show of hands as to how many favour granting leave. But there is no rule on the number of raised hands in conference that are required in order to grant leave. Justice G: 'There is no absolute rule on the number required to grant leave ... nor is it a matter of deference [to a colleague who wants to hear the case] - it is a matter of persuasion.' When asked about similarities to the 'rule of four' in the United States,⁸ there seemed to be agreement with the assessment of Justice G that though a case will not automatically be granted leave to appeal if leave is favoured by four justices, in such a case 'there would be a much better than even chance that the panel would grant leave.' The final decision is made by the panel, but there seems to be a general expectation that the panel members will give great weight to their colleagues' sentiments. According to Justice D, the panel 'almost always' follows the sentiment of the conference, but there will be 'possibly two or three times a year when the panel does not follow the recommendation of the conference.'

A panel's recommendations tend to carry significant weight in conference discussions of leave petitions because all the justices recognize that the panel members are usually the ones who have examined the petition most closely. Moreover, as noted in other aspects of the Court's work, the McLachlin Court appears to be highly collegial. While the justices do not extend automatic deference to colleagues' decisions, there is a widely held conviction that they all share a general conception of what 'national importance' means and that colleagues can be trusted to make decisions according to professional standards. For example, it seems that no justice worries that some faction will use its majority status on a leave panel to advance private policy goals. Thus the unanimous initial decisions of a panel are not often challenged at a conference. Several justices admitted that they usually gave only cursory attention to objective summaries of the leave petitions going to other panels unless the issue raised was of particular interest to them or unless one of the other non-panel members had already asked for a conference discussion.

Before 1988, arguments were held on leave petitions before three-judge panels. Each side was usually limited to fifteen minutes for oral

argument. After 1988, however, Chief Justice Dickson succeeded in having the statute changed to allow leave decisions to be made on the basis of written arguments. Before the panel met to decide the leave petition, lists of the petitions and the memorandum from a clerk were circulated to all nine justices so that every justice had a chance to comment on the petition before the panel met (Sharpe and Roach 2003, 195-6).

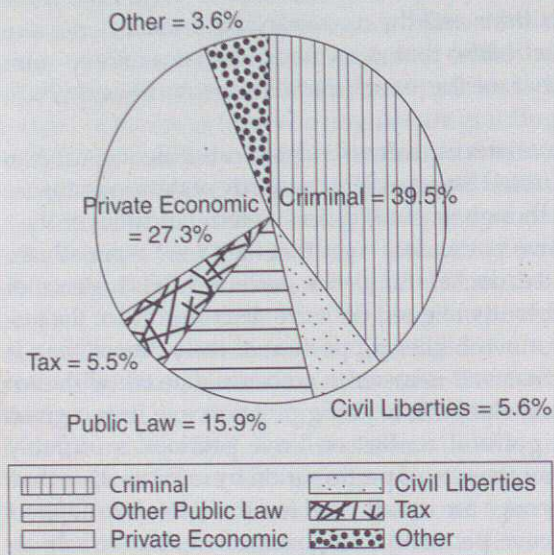
On the whole, the leave process seems less political or ideological than the cert process in the United States. A large majority of decisions appear to be unanimous, and though several justices noted that some of their colleagues had one or two particular issues that they were especially interested in getting on the docket, no justice perceived the existence of stable 'blocs' that consistently aligned on leave decisions. Since the justices are able to hear a much higher proportion of the petitions than is possible in the United States, it is easier to accommodate the wishes of even one or two justices who have a strong preference to hear a given case. The potential for political conflict on leave petitions is probably also lessened by the near absence of participation by anyone other than direct parties. Interest groups are not allowed to submit briefs in support of or in opposition to leave petitions, and government actors rarely attempt to intervene at the leave stage. Provincial governments often appear as interveners, especially in cases involving other provinces, but such participation is almost always confined to the merits stage; briefs filed in support of leave petitions by other provinces are rare. Finally, there is no office in the Canadian federal government directly analogous to that of the U.S. Solicitor General; thus no national official regularly monitors leave petitions. Indeed, Justice G indicated that the federal government did not appear to be very selective regarding which cases it sought leave to appeal. He speculated that there was no centralized process within the government to coordinate leave decisions.

The Agenda of the Supreme Court: The Big Picture

An initial assessment of the broad issue areas addressed by the Supreme Court at the end of the twentieth century is provided in figure 3.1. All categories reflect the percentage of total decisions issued during the years 1970 to 2003. A more detailed breakdown of the agenda is provided in table 3.1.

Looking first at the broad categories of issues, it is clear that a large portion (approximately two-fifths) of the Supreme Court's business involves criminal appeals. As one might expect, serious crimes account

Figure 3.1
Issues decided by the Supreme Court 1970–2003



for the bulk of criminal appeals; crimes of violence by themselves account for about one-fifth of the Court's total docket. Perhaps surprisingly, considering the attention the media give to drug-related crimes, drug offences account for only one-tenth of the criminal appeals heard by the Supreme Court.

The next-biggest category of issues heard by the Court, accounting for more than one-quarter of its caseload, might be referred to as private economic disputes. Chief among these are tort actions, typically brought by private individuals against either corporations or other individuals. The remaining cases in this category are divided among conflicts over contracts, insurance disputes, debt collection actions, private employment disputes, and miscellaneous matters relating to corporate law.

Civil public law cases occupy approximately half as much of the Court's time as criminal appeals (21 per cent of cases). Disputes over government taxation are the largest single category of public law cases, followed by a host of cases dealing with agriculture, land use, labour/management relations, health and environmental regulations, and government regulation of business.

Table 3.1
Overview of issues decided by the Supreme Court of Canada, 1970–2003

Issue	Number of cases	% of docket
Criminal	1379	39.5
Murder	320	9.2
Other violence	321	9.2
Property crimes	171	4.9
Drugs	140	4.0
Other criminal	427	12.3
Civil liberties	194	5.6
Prisoner petitions	24	0.7
Equality	49	1.4
Religion & indigenous	24	0.7
Privacy	13	0.4
Other civ. lib.	84	2.4
Public law	556	15.9
Health, environ. regs.	48	1.4
Business reg.	96	2.8
Land use, agriculture	105	3.0
Labour regulation	52	1.5
Govt. benefits	37	1.1
Public employment	68	2.0
Immigration/citizenship	43	1.2
Federalism	25	0.7
Other public law	75	2.2
Tax	191	5.5
Private economic	954	27.3
Creditor/debtor	108	3.1
Insurance	101	2.9
Corporate/contracts	182	5.2
Labor vs business	86	2.5
Motor vehicle tort	88	2.5
Other tort	252	7.2
Other private economic	182	5.2
Family	125	3.6
Other	92	2.6
	3491	100

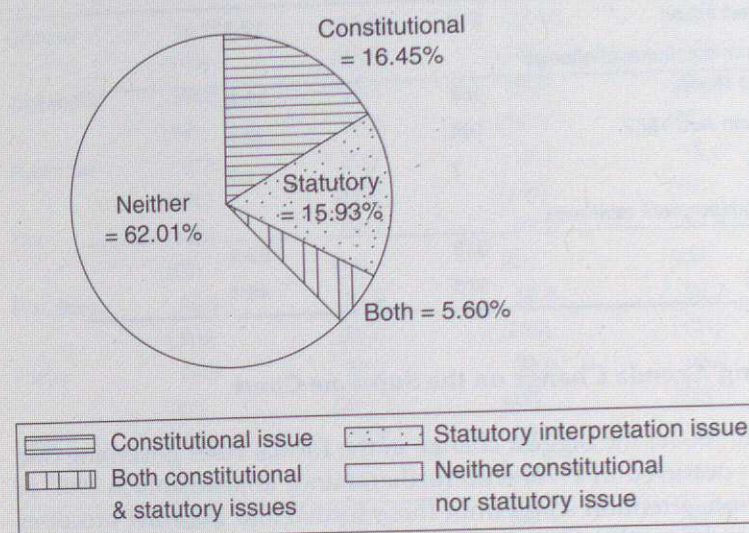
The rest of the docket comprises less than 12 per cent of all cases. While civil liberties cases often generate both media attention and political controversy, such disputes take up less than 6 per cent of the cases on the Court's docket. Family law matters have an even less prominent place, generating fewer than 4 per cent of all cases heard by the Court.

Understanding the Court's political role requires an understanding of the hand it takes in resolving disputes that involve conflicting interpretations of statutes and the constitution. In modern democracies, political conflict over the direction of public policy often does not end in Parliament. Those who lose the parliamentary battle often look to the courts to regain all or part of what they lost in the legislative struggle. Litigation, especially in the Supreme Court, may therefore represent a continuation of a political struggle begun in the legislature. Moreover, the complexity of modern policy making sometimes makes it either technically difficult to anticipate all the problems involved in implementing policy or politically difficult to devise a clear compromise that can command the necessary legislative support. The result is often ambiguity regarding the precise terms of statutes and constitutional provisions – ambiguity that in effect leaves the details of policy making to the courts. These conflicts often are expressed in cases that demand that the justices engage in either statutory construction or constitutional interpretation. The extent of the activity of the Supreme Court in these acts of policy making is shown in figure 3.2.

Figure 3.2 indicates that over the past third of a century, the Court has often been called on to engage in both these significant types of policy making. In roughly one-fifth of the cases it hears, the Court has engaged in statutory construction; in another one-fifth, the resolution of the case has involved constitutional interpretation. These figures suggest that the Court has played a powerful role in resolving political controversies, but it is important to note that these activities do not represent the Court's primary role. Nearly two-thirds of the cases decided by the Supreme Court have *not* involved statutory construction or constitutional interpretation. That is, much of what the Court does involves resolving disputes that, while very important to the litigants involved, do not have much national political or policy-making significance.

The most significant and often the most controversial policy-making role of the Supreme Court relates to its power of judicial review.

Figure 3.2
Issues decided by the Supreme Court 1970–2003,
frequency of constitutional and statutory interpretation



Throughout its history the Court has had the power to examine the conformity of both statutory law and the actions of executive officials with constitutional provisions and to declare null and void any law or action it finds incompatible with those provisions. While a non-trivial number of actions have been challenged under the nation's original constitution, more than three-quarters of the requests for judicial review since 1970 have arisen under the Charter of Rights and Freedoms (see table 3.2). The Court has been called on to exercise its power of judicial review in 579 cases over the past third of a century. The actions and laws of both the national government and the provinces may be challenged under either the Constitution Act of 1867 or the Charter of Rights. Table 3.2 indicates that the two levels of government have been subject to roughly the same number of constitutional challenges. The consequences of these challenges for governmental power are explored in chapter 6 in the context of the Court's role in policy making. For now it is sufficient to note that the Court has had many opportunities to delineate powers of the provincial and national governments under the constitution.

Table 3.2
The exercise of judicial review in the Supreme Court of Canada, 1970–2003

Court action	Number of cases	% of cases
Challenged action	579	17.8
Basis of constitutional challenge		
Charter of Rights	462	73.8
Constitution Act, 1867	164	26.2
Unknown	7	1.2
Level of government reviewed		
Federal	316	53.9
Provincial	270	46.1

Assessing Agenda Change on the Supreme Court

As noted above, the biggest change in the formal rules governing case selection occurred in 1975, with further, minor adjustments in 1997. In this section, attention shifts from these formal and informal processes for determining the Court's docket to an empirical examination of changes in that docket. As one might expect, the Charter of Rights has had a strong impact on the types of cases reaching the Court. Thus the focus of analysis is on four periods of time: the years before the Court gained substantial discretionary control of its docket (1970 to 1975), the initial, pre-Charter period of docket (1976 to 1983),⁹ the post-Charter period until the additional changes in procedure adopted in 1997 (1984 to 1996), and the current period (1998 to 2003). An overview of the changes in the agenda over time is presented in Table 3.3.

Just a glance at Table 3.3 indicates that the Supreme Court's agenda has changed profoundly over the past third of a century. In the most general terms, the Court has been transformed from a Court primarily concerned with resolving private disputes between individuals and businesses into a court of public law. Private economic disputes took up half the Court's agenda in the early 1970s. But as soon as the Court gained control of its docket in 1975, the proportion of private economic cases fell dramatically. Even fewer private economic cases have been heard by the Court since the adoption of the Charter of Rights, and the main cause of this decline has been the elimination of the right of automatic appeal. After the Charter of Rights, private economic disputes

Table 3.3
Change over time in the issues decided by Supreme Court of Canada, 1970–2003

Issue	1970–75	1976–83	1984–97	1998–2003
Criminal	16.2% (102)	33.2% (279)	52.5% (765)	42.7% (228)
Civil liberty	02.2 (14)	02.4 (20)	07.8 (114)	08.4 (45)
Public law	16.3 (103)	20.7 (174)	13.5 (196)	15.0 (80)
Tax	09.2 (58)	06.1 (51)	03.5 (51)	04.9 (26)
Priv. Econ.	50.5 (319)	31.2 (262)	16.4 (239)	22.7 (121)
Family	04.3 (27)	03.7 (31)	03.4 (49)	03.0 (16)
Other	01.3 (8)	02.7 (23)	02.9 (42)	03.4 (18)
	100% (584)	100% (680)	100% (1343)	100% (533)

continued to occupy about one-fifth of the Court's agenda – an indication that the justices continue to believe they still play an important role in defining the legal rules for resolving contract disputes, torts, property law issues, and so on. However, such issues are no longer their top priority when they consider leave-to-appeal petitions.

The proportion of tax cases heard by the Supreme Court has followed a trajectory similar to the one noted for private economic cases. After 1975, once tax cases could no longer come to the Court as appeals as of right, the number of cases actually *heard* by the Court declined substantially. The number of tax cases further declined after the Charter was adopted, and it has remained below 5 per cent of the Court's docket in the Charter period.

In sharp contrast, the proportion of the Court's docket devoted to criminal appeals has risen dramatically since the 1970s. The number of such appeals heard by the Court doubled once most automatic appeals were ended, indicating that criminal law issues were becoming an important priority for the Court even before the Charter was adopted.

Figure 3.3
Agenda change on the Supreme Court
Criminal cases vs private economic disputes 1970 to 2003

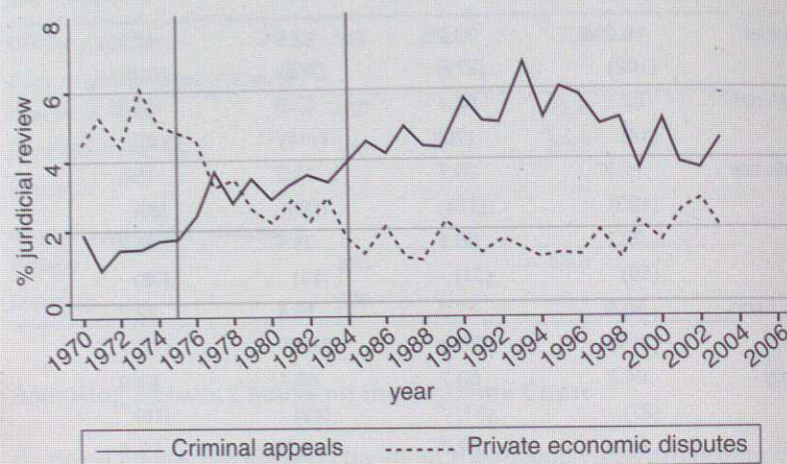


Figure 3.3 illustrates how the decline in private economic disputes closely mirrored the increase in criminal cases. After the Court gained greater docket control in 1975, the percentage of criminal cases it heard rose sharply, surpassing the number of private economic cases even before the Charter was adopted. Then, after the Charter, the proportion of criminal appeals again increased dramatically, to the point that such cases took up most of the docket during the first fourteen years of the Charter period. This increase seems directly related to the large number of Charter issues raised in criminal appeals. Since the Charter's adoption, 60 percent of all cases in which a provision of the Charter of Rights was litigated in the Supreme Court have involved a criminal appeal. Many of the Court's most controversial Charter decisions have involved abortion, child pornography, and language rights; that said, the bread and butter of the Court's work of Charter interpretation has related to the rights of criminal defendants.

As already noted, an amendment to the Criminal Code in 1997 narrowed the grounds for automatic appeals to the Supreme Court in criminal cases. Figure 3.3 indicates that, as might be expected, these jurisdictional changes have reduced the number of criminal appeals heard by the court since 1998. Yet even in this most recent time frame, criminal appeals still account for more than two-fifths of all cases

heard by the Court. Thus, criminal appeals continue to account for more of the Court's docket than any of the other major categories of cases, and they continue to be heard at a rate far above the rate at which criminal appeals were heard before the adoption of the Charter.

That said, the most dramatic change in the Court's docket has involved civil liberties cases.¹⁰ Non-criminal civil liberties claims have never been a large proportion of the Court's docket. However, that category's share of the docket has nearly quadrupled since the 1970s. After the Court gained control of its civil docket in 1975, the proportion of civil liberties cases remained low and essentially unchanged. With the adoption of the Charter, this changed instantly. In 1984, the year that Charter cases began reaching the Court, the Supreme Court decided six civil liberties cases – more than the total from the previous two years combined. This increased prominence of civil liberties cases has remained essentially the same ever since, averaging about 8 per cent of the Court's docket since 1984 compared to 2 per cent between 1970 and 1983.

Other categories of cases have remained essentially unchanged on the Court's agenda over time. The proportion of family law cases dipped slightly after 1975 and then remained static after the Charter was adopted. Other public law cases (i.e., other than criminal, tax, and civil liberties) have fluctuated slightly on the docket; for those, no clear trend is evident over the thirty-four years examined.

This broad profile is helpful in sorting out general trends. To examine more carefully changes in issue agendas, we need to profile case categories within each of these broadly defined areas and the changing proportion of the docket occupied by each of these subcategories. We begin this analysis with changing patterns of criminal appeals over time (see table 3.4).

As noted, the proportion of criminal appeals heard by the Supreme Court has increased dramatically over time. Increasing docket control (since 1975) and the Charter of Rights (since 1982) have helped raise the prominence of criminal appeals. However, this greater focus on criminal appeals varies strongly with the *type* of crime. The agenda space devoted to crimes of violence increased fourfold between the mid-1970s and the end of the century. The number of appeals involving murder and other acts of violence also increased after 1975, especially after the Charter was adopted. Similarly, more and more drug cases appeared on the Court's agenda after 1975, though the rate of increase began to taper off in 1997. In contrast, there have been only marginal increases in the number of property crime appeals heard by the

Table 3.4
Change over time in issues decided by Supreme Court of Canada, 1970–2003:
Proportion of criminal appeals on the docket

Issue	1970–75 (n)	1976–83 (n)	1984–97 (n)	1998–2003 (n)
Murder	3.97% (25)	7.99% (67)	10.81% (157)	13.1% (70)
Other Violence	2.54 (16)	4.53 (38)	12.39 (180)	16.1 (86)
Property crimes	3.82 (24)	5.96 (50)	5.16 (75)	4.1 (22)
Drugs	0.95 (6)	4.17 (35)	5.57 (81)	3.4 (18)
Other criminal	4.93 (31)	10.61 (89)	18.72 (272)	06.0 (32)

Note: Percentages are column percentages, representing the percentage of all cases decided by the Supreme Court in the indicated years that fell in the specific category. The actual number of cases is displayed in parentheses beneath the percentage.

Court. It was noted earlier that the somewhat vague concept of 'public importance' has guided the Court's decisions on petitions for leave to appeal. These data suggest that when it comes to criminal appeals, importance is defined in part by the gravity of the offence.

As noted earlier, from the early 1970s to the end of the century there was also a dramatic increase in the proportion of civil liberties cases on the Supreme Court's docket. Table 3.5 indicates that for every specific aspect of civil liberties, the Charter seems to have been responsible for the Court's heightened attention. Cases revolving around equality, religion, indigenous people, privacy, and the rights of prisoners all began to reach the Court in substantially greater numbers after the adoption of the Charter. The Court's greater power to control its agenda had little effect on the number of rights claims reaching the Court until the Charter became a reality.

Other public law issues were much less affected by the Charter and by the Court's new agenda control powers. Moreover, it seems that the effects of both these institutional changes varied across subcategories of this general category. There are no consistent changes over time in the proportion of cases raising issues related to most forms of

Table 3.5
Change over time in issues decided by Supreme Court of Canada, 1970–2003: Proportion
of civil liberties cases on the docket

Issue	1970–75 (n)	1976–83 (n)	1984–97 (n)	1998–2003 (n)
Prisoner petitions	0.16% (1)	0.60% (5)	1.03% (15)	0.6% (3)
Equality	0.32 (2)	0.24 (2)	2.27 (33)	2.2 (12)
Religion & indigenous	0 (0)	0 (0)	1.10 (16)	1.5 (8)
Privacy	0.17 (1)	0.24 (2)	0.48 (7)	0.6 (3)
Other civ. lib.	1.75 (11)	1.31 (11)	2.89 (42)	3.6 (19)

Note: Percentages are column percentages, representing the percentage of all cases decided by the Supreme Court in the indicated years that fell in the specific category. The actual number of cases is displayed in parentheses beneath the proportion.

government regulation, including general business regulations, relations with labour unions, and more specific regulations related to health, safety, and the environment. Such regulatory regimes have been generally unaffected by most of the Charter's provisions. Table 3.6 indicates that as soon as the Court began using its new docket control powers to reduce the number of private law disputes it heard, it began filling to resulting docket 'holes' with criminal rights cases and other civil liberties claims rather than with regulatory cases.

Other areas of public law were affected by these institutional changes. After the Court gained more docket control in 1975, tax cases, land use litigation, and immigration and citizenship disputes all declined in frequency as a proportion of the Court's caseload; after the Charter was adopted, such cases never regained their prominence on the docket. It seems to be a hard sell to convince the Court that issues such as these raise concerns of 'public importance' – the threshold criterion that a leave petition must meet.

Finally, some issues gained agenda space once the Court gained more control of its docket, only to lose those gains after the adoption of the Charter. Claims to public benefits, disputes over public employment,

Table 3.6
Change over time in the issues decided by Supreme Court of Canada, 1970–2003:
Proportion of public law cases on the docket

Issue	1970–75 (n)	1976–83 (n)	1984–97 (n)	1998–2003 (n)
Health, environmental regulation	1.27% (8)	1.19% (10)	1.31% (19)	2.1% (11)
Business regulation	2.38 (15)	2.62 (22)	3.23 (47)	2.2 (12)
Land use, agriculture	5.72 (36)	4.29 (36)	1.72 (25)	1.3 (7)
Labour regulation	1.59 (10)	2.74 (23)	0.83 (12)	1.3 (7)
Government benefits	0.32 (2)	1.55 (13)	1.24 (18)	0.8 (4)
Public employment	0.64 (4)	3.22 (27)	1.38 (20)	3.0 (16)
Immigration/citizenship	1.91 (12)	1.07 (9)	1.03 (15)	1.3 (7)
Federalism	0.48 (3)	1.43 (12)	0.48 (7)	0.6 (3)
Tax	9.22 (58)	6.08 (51)	3.51 (51)	4.9 (26)
Other public law	1.59 (10)	2.62 (22)	2.13 (31)	2.1 (11)

Note: Percentages are column percentages, representing the percentage of all cases decided by the Supreme Court in the indicated years that fell in the specific category. The actual number of cases is displayed in parentheses beneath the proportion.

and federalism disputes all fall into this category. In other words, when the Court first obtained greater docket control, these issues gained in priority. There is no specific indication that the Court lost interest in these issues in later years. It does, though, seem that once the Charter was adopted, a large number of new issues began competing for the Court's attention, and older public law issues fell to a lower priority as a result.

Table 3.7
Change over time in the issues decided by the Supreme Court of Canada, 1970–2003:
Proportion of private economic cases on the docket

Issue	1970–75 (n)	1976–83 (n)	1984–97 (n)	1998–2003 (n)
Creditor/debtor	4.61% (29)	3.93% (33)	1.86% (27)	3.4% (18)
Insurance	3.50 (22)	3.22 (27)	2.34 (34)	3.2 (17)
Corporate/contracts	10.97 (69)	6.67 (56)	2.62 (38)	2.8 (15)
Labour vs business	3.34 (21)	2.62 (22)	2.06 (30)	2.4 (13)
Motor vehicle tort	7.95 (50)	2.03 (17)	0.89 (13)	1.1 (6)
Other tort	12.72 (80)	6.91 (58)	5.02 (73)	6.9 (37)
Other private economic	7.63 (48)	5.84 (49)	1.65 (24)	2.8 (15)

Note: Percentages are column percentages, representing the percentage of all cases decided by the Supreme Court in the indicated years that fell in the specific category. The actual number of cases is displayed in parentheses beneath the proportion.

The docket space the Court devotes to private economic disputes has declined dramatically since the early 1970s. However, that decline has not been evenly spread across specific issue areas (see Table 3.7). The proportion of the docket devoted to creditor/debtor cases, insurance claims, and labour/management conflict was small throughout the period examined, but it was also relatively constant, with only small declines evident when one compares the post-1997 period to the early 1970s. On the other hand, the areas of contract law, torts, and remaining private economic disputes all experienced sharp declines as soon as the Court obtained a substantial degree of docket control in 1975. Their share of the docket then declined even further once Charter cases began to compete for the justices' attention. The result has been that each of these areas now commands only one-half to one-third of the docket space they were receiving before 1975.

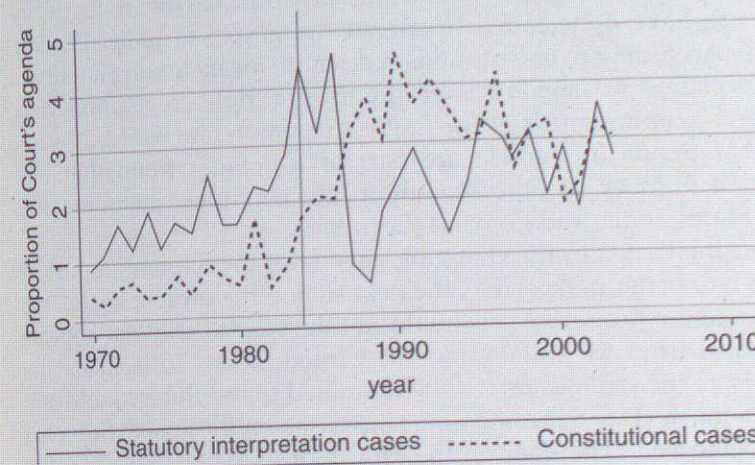
Switching from specific issues to a more general consideration of the Court's policy-making role, one can see that its involvement in both statutory construction and constitutional adjudication has grown substantially over the past third of a century (see figure 3.4).

Figure 3.4 supports what one might expect: once the Court gained the power to fashion its own agenda through its leave-to-appeal decisions, it focused increasingly on cases involving questions of statutory construction and constitutional interpretation rather than on cases involving 'mere' disputes between private litigants of the sort that have little significance for those not directly involved. The proportion of the docket devoted to statutory interpretation increased by over 40 per cent once the Court gained control of its civil docket; the same years, the proportion devoted to constitutional adjudication increased by over 80 per cent. Clearly, then, even before the Charter the Supreme Court was beginning to perceive itself as a policy maker rather than an adjudicator of private disputes.

The data show – perhaps surprisingly – that the Court has become increasingly involved in statutory as well as constitutional interpretation since the adoption of the Charter. By the beginning of the twenty-first century, the Supreme Court was engaged in statutory construction in more than one-quarter of its cases – more than double the rate of the early 1970s. A subjective analysis of the Court's decisions suggests that the frequency of statutory construction increased during the Charter period because constitutional challenges to legislation forced the justices to take a hard look at the *language* of statutes; thus, they often searched for plausible constructions of statutes for the purpose of rendering judicial review unnecessary. Empirically, this much can be observed: in the early 1970s, less than 7 per cent of statutory cases also involved constitutional interpretation; after the adoption of the Charter, 30 per cent of statutory cases also involved a constitutional interpretation.

Less surprising is the finding (see figure 3.4) that the proportion of cases on the Court's docket involving constitutional interpretation increased dramatically after the Charter was adopted. Even with docket control, before 1984 only 7 per cent of the Court's decisions turned on constitutional interpretation. But in the twenty post-Charter years, more than one-quarter of all cases decided by the Supreme Court have involved constitutional interpretation. This increase is due almost entirely to litigation directly involving the Charter. About 84 per cent of the constitutional cases since 1984 have involved interpreting the

Figure 3.4
The changing agenda of the Supreme Court
Constitutional and statutory interpretation before
and after the Charter



Charter rather than the Constitution Act of 1867. Since the adoption of the Charter, the Court has continued to decide roughly six cases a year involving the Constitution Act of 1867 – roughly the same number decided by the Court after it gained docket control in 1975 but before the Charter was adopted. The resolution of constitutional disputes has long been part of the Supreme Court's role. However, since the adoption of the Charter, a number of new constitutional issues have emerged. These have not displaced the earlier constitutional issues from the Court's agenda; they have simply taken their place on that agenda beside the older issues.

Agenda Change from an International Perspective

The increased policy-making role of the Supreme Court of Canada and its increasing attention to rights claims noted earlier appear to be part of a worldwide phenomenon: courts are becoming more active in the politics of both well-established and emerging democracies. Scholars in many countries have been devoting more attention to this phenomenon, which has been dubbed by some as the 'judicialization of politics.' In more and more countries across the world, 'judges are making

public policies that previously had been made or that, in the opinion of most, ought to be made by legislative and executive officials' (Tate and Vallinder 1995, 2) In many countries this increased role of the courts has been part of a growing awareness of rights. In Europe, for example, the European Convention and the Court of Human Rights in Strasbourg have done much to spread the gospel of judicialization (ibid., 3). According to one prominent account, the increasing attention to rights claims in Canada has been part of a 'rights revolution' that has been sweeping much of the English common law world. It is argued that trends in Canada are part of a broader trend that has touched a number of other common law countries, including the United States, India, and England (Epp 1998).

To put the trends in the changing agenda of the Supreme Court of Canada into better perspective, the next step in the present analysis is to compute the proportion of the docket devoted to criminal appeals and civil liberties for Britain and the United States. To facilitate the comparison, the same years will be examined for all three countries.¹¹ The data for the U.S. Supreme Court are based on the Spaeth Supreme Court Database.¹² The data on the House of Lords are based on the Comparative Courts Database Project. The comparisons are displayed in Table 3.8.

When comparing the agenda space devoted to criminal appeals and civil liberties disputes in Canada, the United States, and Britain, it should be remembered that the dates chosen to compare change over time are based solely on a significant institutional change in Canada (i.e., the adoption of the Charter). No similar major institutional changes took place in either Britain or the United States during this period. Throughout the period examined, the high courts of both countries enjoyed essentially complete docket control. Also, the United States had constitutional protection for rights similar to the provisions of the Charter of Rights and Freedoms throughout the period studied. Britain, in contrast, still does not have constitutional rights protections that can be enforced through judicial review.

The first point worth noting is that all three high courts allotted very similar portions of their dockets to criminal appeals between 1970 and 1983. However, after the adoption of the Charter, the proportion of criminal appeals heard by the Supreme Court of Canada increased dramatically while the proportion of the docket devoted to criminal appeals in Britain and the United States remained essentially unchanged. The data do not permit a definitive conclusion as to why this is so; that

Table 3.8
Change over time in the proportion of criminal appeals and civil liberties issues decided by the U.S. Supreme Court and the Judicial Committee of the House of Lords, 1970–2003

Issue	U.S. Supreme Court		British House of Lords	
	1970–75 (n)	1976–83 (n)	1984–97 (n)	1998–2003 (n)
Criminal	20.33% (535)	23.69% (556)	24.06% (153)	22.2% (205)
Civil lib.	30.55 (804)	27.78 (652)	03.62 (23)	07.7 (71)
Other	49.12 (1293)	48.43 (1139)	72.32 (460)	70.2 (649)
	100% (2632)	100% (2347)	100% (636)	100% (925)

said, several institutional differences among the countries seem to be contributing factors. First, most criminal cases in the United States heard by the lower courts are not within the Supreme Court's jurisdiction, which means that appeals to that Court are not possible. Contrast this with Canada, which has a unified judicial system so that losing litigants in all criminal cases may petition for leave to appeal. Also, differences in the legal definition of double jeopardy mean that the Canadian government may appeal a number of adverse criminal decisions that cannot be appealed by the U.S. government. Given the very high rate of success that the U.S. government has in its petitions for review by the Supreme Court, these constitutional limitations perhaps explain certain non-trivial differences between Canada and the United States. Finally, it may simply be that Canadian and American justices define 'public importance' differently in the context of petitions for review of criminal cases. Unfortunately, this topic was not explored in the interviews with the justices and must await future research.

A different picture emerges from the comparison of civil liberties cases on the dockets of each Court. Between 1970 and 1983, in the absence of any constitutional basis for rights claims, the high courts of Canada and Britain heard very few civil rights and liberties cases. In the United States, which has constitutional protections for rights, civil liberties cases made up over 30 per cent of the Supreme Court's docket.

As might be expected, the proportion of rights cases heard by the U.S. Supreme Court did not change much after 1984, reflecting the absence of any structural, political, or cultural change that might affect civil rights litigation. At the same time, as noted earlier, the proportion of rights claims heard by the Supreme Court of Canada more than tripled after the adoption of the Charter of Rights. It is interesting that the proportion of rights cases heard by the House of Lords in England also rose dramatically without a change in the constitutional status of rights. In other words, rights cases continued to claim a similar share of high court dockets in Canada and Britain despite the constitutional change in Canada and the absence of corresponding change in England. This raises two questions: Why did the number of rights cases on the docket in Britain increase as much as it did in Canada after 1984? And why has the proportion of the Canadian Court's docket devoted to rights claims remained so much lower (less than one-third) than the docket space devoted to rights cases in the United States even now that Canada has adopted a level of constitutional protection of rights similar to what is enjoyed by Americans?

Epp (1996 and 1998) suggests that the number of rights cases gaining access to a top court's docket has very little to do with whether those rights have constitutional protection; in his view, the number is influenced more by the nature and extent of the resources available for the legal mobilization of rights claims. He suggests that in both Canada and Britain these resources grew significantly during the 1980s and 1990s, which led to the increased attention to rights claims in the respective high courts. However, Epp fails to provide any convincing evidence that the resources available for rights mobilization in the United States are so much greater than those in Canada in the late 1980s and 1990s that one should expect that there will be three or four times as many rights cases heard in the United States. Moreover, as the analysis in the following section suggests, Epp may have misjudged the importance of formal constitutional protection for the likelihood that rights cases will become part of the agenda of national top courts. But if Epp's thesis leaves much to be desired, the data in table 3.8 leave unresolved the question of why the U.S. Supreme Court devotes so much more of its docket than the Canadian Supreme Court to rights claims.

Do Constitutions Matter?

The analysis to this point leaves little doubt that since the early 1970s the agenda of the Supreme Court of Canada has been profoundly

transformed. The aspect of that transformation that has received the most attention in the media and in scholarly analyses has been the increasing attention to constitutional conflicts in general and especially to civil rights and liberties. The ramifications of this increasingly political role of the Court has been noted by many observers, and the normative effects of this new involvement in critical aspects of public policy have been subject to heated debate. Virtually all scholars who have joined the debate over this new policy-making role of the Court seem to have assumed (at least implicitly) that the Charter of Rights was the critical event that enabled the Court (or in the eyes of some, *required* the Court) to adopt a more overtly political role (see, for example, Mandel 1989; Greene et al. 1998; Morton and Knopff 2000; Manfredi 2001, 2004). In stark contrast, Epp (1996, 775) argues that 'the Charter's influence is overrated.' Epp (1998, 194) admits that a 'dramatic rights revolution has occurred in Canada in the last several decades' and that the Charter served as a useful legal foundation for rights advocates. But he also contends that the Charter was not the primary event that made this 'rights revolution' possible. Instead, he argues that the agenda changes on the Court 'appear to have resulted from the combined influence of two developments, the shift to a discretionary docket in 1975 and the development of a support structure for legal mobilization' (1996, 775).

To bolster his arguments, Epp presents a series of line graphs that trace developments in the Supreme Court's agenda from 1960 to 1990. Unfortunately, several of his methodological choices raise serious questions about the validity of his conclusions. Most significantly, he examines the Court's agenda every five years (e.g., in 1960, 1965, 1970) and for that reason cannot establish precisely when agenda changes took place. Furthermore, his examination of trends includes only two data points (1985 and 1990) after the adoption of the Charter. Moreover, his definition of 'civil rights and liberties' combines all criminal appeals – whether or not the appellant raised a specific rights claim – with traditional categories of civil liberties such as religious liberty, privacy, equality rights, and freedom of expression. Finally, when focusing on constitutional decision making, Epp concerns himself solely with constitutional challenges to statutes and ignores constitutional challenges to administrative action. When one examines the changing agenda of the Court on a year-by-year basis, disaggregates criminal and other civil liberties issues, and takes a more comprehensive view of constitutional lawmaking, a picture emerges that is somewhat different from the one Epp describes. This examination is undertaken below.

Table 3.3 indicated that there were dramatic increases in the proportion of both criminal appeals and other traditional categories of civil liberties on the docket of the Supreme Court following the adoption of the Charter of Rights. But table 3.3 is inadequate as a test of Epp's argument because the data on agenda change are presented only for broad time periods rather than for individual years. To better test Epp's claim that the Charter's influence was quite modest, the earlier analysis is broken down into figures for the agenda of the Court in each calendar year between 1970 and 2003 (see figure 3.5).

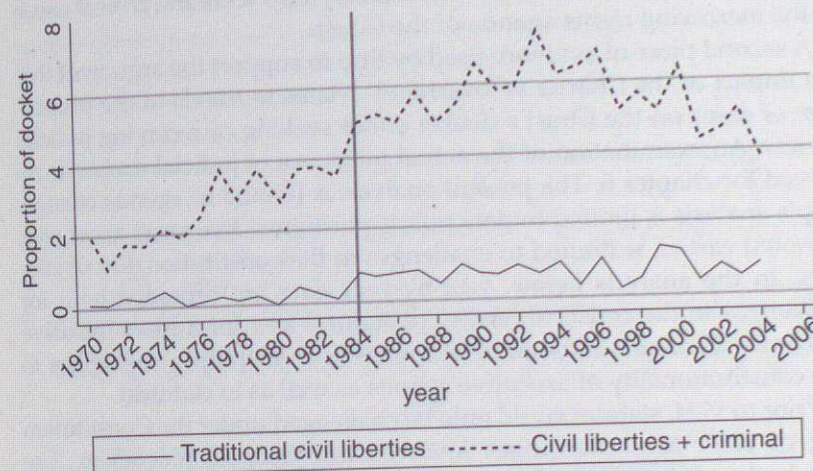
As in the previous analysis, the Charter period is defined as starting in 1984, the year the first case raising a Charter issue reached the Court (represented by the vertical line in figure 3.5). Two data trends are presented. The solid line indicates the proportion of all of the cases in which a civil rights or liberties issue was raised during a non-criminal appeal. The broken line reflects Epp's definition of civil rights; this is, it combines criminal appeals with more traditional concepts of civil liberties.

Looking first at the more limited, traditional concept of civil rights, it is obvious that before 1984, civil liberties issues rarely appeared on the Court's agenda. The highest number of cases heard by the Court in any of these fourteen pre-Charter years was six, and there were only two years during which five or more civil liberties cases were on the agenda. As a proportion of the docket, those two years were the only two years during which civil liberties cases made up 5 per cent of the docket. Perhaps even more devastating to Epp's thesis is that there was no trend toward increasing attention to civil liberties as the 'support structure' for civil liberties (which Epp saw as the crucial influence on the rights agenda) gradually increased.

In sharp contrast, the number and proportion of rights cases increased dramatically after the Charter was adopted. For every one of the first eleven years of the post-Charter period, the number of rights cases on the Court's agenda equalled or exceeded the highest number of rights cases heard in any pre-Charter year. In ten of these same eleven years, the proportion of the docket devoted to rights cases exceeded the highest proportion of rights cases in all fourteen pre-Charter years examined.¹³

Turning to the combined total of criminal appeals with other rights issues, there does seem to be some support for Epp's argument that docket control had a significant impact on the Court's rights agenda. From 1970 to 1975, there were fewer than thirty rights cases on the docket every year and the proportion of the docket devoted to his

Figure 3.5
Do Constitutions matter?
Change over time on the Supreme Court:
Civil liberties cases before and after the Charter



definition of rights cases stayed below 30 per cent every year. There was no noticeable change in the first year after the Court gained docket control; but starting in 1977, there were forty or more cases involving rights in five of the seven years. Also, the proportion of the docket devoted to criminal appeals and other rights cases fluctuated between 30 and 40 per cent in six of the seven years.

Nevertheless, even using Epp's own measure of 'rights' cases, the Charter seems to have had immediate and persistent effects. Prior to the Charter, there had not been a single year in which criminal and other rights cases made up as much as 40 per cent of the Court's docket. Yet in the single year between 1983 and 1984, the proportion of rights cases jumped 15 per cent, becoming more than 50 per cent of the docket for the first time. Moreover, the proportion of the docket devoted to this expanded definition of rights cases did not dip below 50 per cent for seventeen consecutive years and has never dropped to the level of the pre-Charter high point.

In summary, there seem to have been two sharp break points in the increasing tendency of the Court to hear rights cases using Epp's expanded definition of rights cases and only one sharp break point using a more limited, traditional understanding of what constitutes a rights

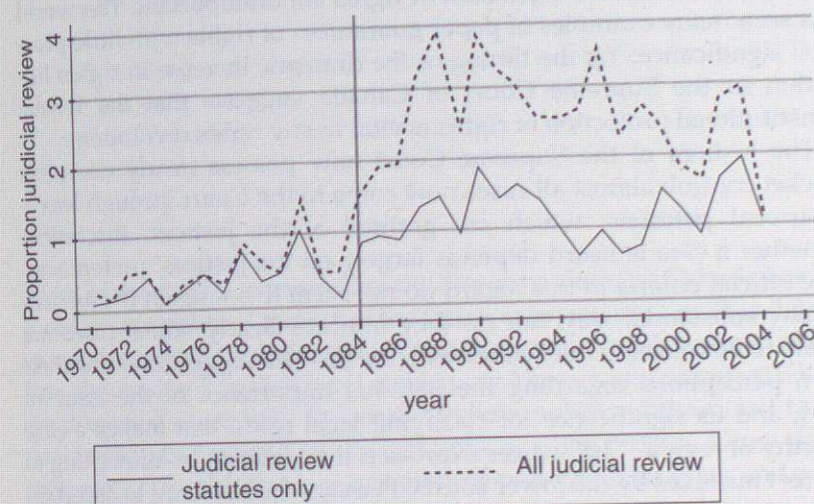
case. The Charter's adoption was a crucial turning point for both agenda changes. The trends in agenda change do not reveal the more gradual or linear increase in the attention to rights cases that would be expected if the gradual increase in 'the development of a support structure for legal mobilization' posited by Epp were the critical cause of the increasing rights agenda of the Court.

A second piece of evidence used by Epp to support the argument that the impact of the Charter is 'overrated' relates to trends in the proportion of cases on the Court's docket either seeking or receiving judicial review. An examination of the actual incidence of judicial review is reserved for chapter 6. The present analysis is limited to agenda change. Epp's analysis is limited to data points positioned five years apart and, as noted earlier, is limited to challenges to the constitutionality of statutes. In the analysis below, year-by-year data are provided both for challenges to the constitutionality of statutes and for a more inclusive category: all requests for judicial review (i.e., including challenges to the constitutionality of executive actions as well as to statutes).

Prior to 1984, statutes could only be challenged under the Constitution Act of 1867. Most challenges involved questions of federalism. The trends shown in figure 3.6 suggest that in this pre-Charter period there was considerable fluctuation in the number of such constitutional challenges, from a high of twelve cases in 1981 to a low of just one in 1970 and 1983. Significantly for Epp's thesis, there was no linear trend toward increasing use of judicial review over time as the support structure for rights litigation grew. Perhaps even more damaging to Epp's thesis, few of these cases involved civil liberties. Only 9 per cent of the pre-Charter challenges to statutes involved traditional questions of civil liberties, and another 9 per cent involved challenges to criminal statutes. In contrast, more than half the constitutional challenges were raised against the exercise of economic regulation by federal or provincial governments.

Even a casual examination of the trend data in Figure 3.6 suggests that the Charter has had a dramatic effect on the Supreme Court's exercise of judicial review. In the final two pre-Charter years, the Court considered only five cases raising constitutional challenges to statutes; that number then tripled during the first two years of Charter litigation. Pre-Charter, there had been only three years during which the Court considered six or more requests for judicial review; post-Charter, the Court has considered at least that many constitutional challenges in every year,¹⁴ and the median number of constitutional challenges considered by the Court in a year has been twelve (i.e., the post-Charter median has equalled the pre-Charter maximum). Moreover,

Figure 3.6
Do Constitutions matter?
Change over time on the Supreme Court: Judicial review before
and after the Charter



while most pre-Charter constitutional challenges involved government economic regulation, 64 per cent of post-Charter challenges have involved civil liberties issues.

The effect of the Charter on judicial review is even more dramatic when one considers *all* constitutional challenges rather than just challenges to the constitutionality of statutes. Figure 3.6 indicates that prior to the Charter, the number of constitutional challenges to either legislative or executive actions fluctuated widely over the years without any clear trend. The year 1981 was the high point for constitutional litigation, with 15 per cent of the Court's docket involving constitutional challenges. Yet in each of the next two years, constitutional challenges made up less than 5 per cent of the Court's docket.

There was a dramatic increase in constitutional litigation as soon as the first Charter cases reached the Court. In the very first year of Charter litigation, the proportion of the docket devoted to constitutional challenges was three times as great as in the previous two years, and in every year after that the docket space devoted to constitutional challenges was greater than the proportion of litigation asking for judicial review in any of the fourteen years of pre-Charter litigation examined in the current study.

In summary, the answer to the question posed at the beginning of this section is 'yes' – at least in the Canadian experience, constitutions *do* matter. This is not to suggest that constitutional protection of rights is self-executing or that the actions of well-resourced groups determined to push for the expansion of rights are unimportant. The world has seen many examples of paper guarantees of rights with little practical significance. Yet the timing of the dramatic increase in rights litigation in the Supreme Court of Canada suggests that the formal constitutional protection of rights is vital to any rights revolution.

The justices of the Supreme Court now possess nearly complete docket control; almost all cases now come to the Court through leave-to-appeal petitions, which are granted at the justices' discretion. Whether a case is heard depends largely on the justices' preferences. The official criteria in this regard do not seem to constrain the justices in any substantial way, nor do they indicate clearly which cases are likely to be selected. Interviews with the justices suggest that it is their own perceptions regarding the national importance of the issue in play, and its significance for clarifying legal rules, that makes a case worthy of review. The justices expressed little interest in attempting to correct mistakes by the lower courts. Perhaps the best way to ascertain what the justices mean by 'national importance' is to examine the patterns of the choices they have made. An analysis of agenda changes on the Court indicates that cases requiring constitutional and statutory interpretation have increasingly occupied the justices. They continue to explicate the rules governing private disputes, but those disputes now occupy a much smaller portion of the Court's docket, for the justices no longer see themselves as the final arbiters of conflicting facts. Instead, the justices have become a court of *public* law; they continue to define the limits of government policy making, but they are also increasingly concerned with procedural justice and with substantive rights claims made under the Charter.

The justices are now essentially free to pick and choose from among the more than six hundred petitions for review they receive each year. Yet their power remains limited: they can resolve only those disputes that have been brought to them by litigants who have lost in the lower courts. Who, then, are those litigants? And what resources do they possess to pursue either individual gain or broader policy concerns? The answers to those questions go a long way toward defining the Court's agenda. The next chapter discusses the role of litigants.

4 A Look at the Players: Who Participates and Who Wins?

Much of the debate surrounding the Supreme Court of Canada has focused on the political impact of the Court as an institution. This debate on what role the Court plays has often been mixed with normative debate about what role the Court *should* play. These commentaries (which are discussed more fully in chapter 6) have subjected the Court to attack from both the left and the right of Canadian politics. Often these commentaries raise the key question of politics: Who wins and who loses in the Court?

The Court's political impact has come under increasing scrutiny from the media, political interests, and scholars since the adoption of the Charter of Rights and Freedoms brought the Court's political role into the full glare of public attention. But as McCormick (1993a) reminds us, it is not that the courts suddenly came to possess political power with the adoption of the Charter, but rather that many have only become aware of that power since 1984.

Decisions of the Supreme Court can be viewed as a valuable resource for which a variety of parties compete. Those decisions resolve concrete conflicts, some of which involve millions of dollars or the basic liberties of individuals or groups; they also often involve the development of precedents – that is, they guide future applications of statutes and of the constitution itself. But like other political conflicts, the competition for the Court's resources is not waged on a level playing field: 'Some parties, some classes of litigants, enjoy substantial and continuing advantages over others, and these advantages affect the general pattern of decisions that flow from the courts' (ibid., 523).

Scholars in many countries have sought to understand the political consequences of appellate court decisions by conducting empirical,

6 Policy-Making Trends on the Supreme Court

The previous chapter focused on process and the central question was how do the justices go about making their decisions? In the next three chapters we turn to the decisions they actually make. This chapter focuses on the Court as an institution and its political impact. After exploring recent accounts of the actual legal policies that have been supported by the Court as well as the debate over the Court's proper role in the political system, we present a new analysis of the decisional trends of the Court for the period 1970 to 2003. In chapter 7 the focus will shift to the decision-making patterns of individual justices. A key concern will be the cleavages within the Court on those occasions when the Court is divided. Then in chapter 8 we will turn to the Court's unanimous decisions and reasons for the high rate of unanimity.

The Political Impact of the Supreme Court in Canada

According to traditional Canadian legal and political thought, 'judges do not, and should not, "make law" ... "The Law" has been portrayed as something that already exists "out there," and the role of the judge is merely to find or "discover" its meaning and to declare it' (Morton 2002b, 31). However, writing four decades ago, Weiler suggested two possible models of judicial behaviour, an 'adjudication model' and a 'policy-maker model,' and concluded that at that time, neither model fit Canada perfectly. He then speculated that the policy-making model might become dominant with the passage of some form of a bill of rights (1968). Yet even before the Charter, the Court was being forced to deal with constitutional issues of federalism that inevitably thrust it into the middle of some of the hottest political issues of the day. Thus

there has been a growing recognition that the Court has been moving away from solely adjudicating disputes towards a greater policy-making role. The adoption of the Charter of Rights and Freedoms accelerated this shift towards a policy-making role, and one consequence has been to stimulate greater scholarly concern about the nature and consequences of that new role. Some scholars maintain that besides directly affecting how politically divisive issues are resolved, the courts may have a long-term impact on policy by the very manner in which they shape the public's perceptions of political values (Russell 1995).

A substantial literature now exists that has established beyond doubt that the Court's decisions have sometime had powerful political consequences. A few examples will serve to illustrate. Some would say that the most important and overtly political decision ever made by the Court was the Patriation Reference,¹ which helped pave the way for the Charter of Rights. Regarding the significance of that case, Chief Justice Lamer was quoted as saying, 'I think we saved the ruddy country' (McConnell 2000, 70). In *Vriend v. Alberta* (1998)² the Court ruled that the omission of sexual orientation from Alberta's human rights act violated Section 15(1) of the Charter. As Manfredi (2001) notes, reading sexual orientation into the protected categories of the act was important because it imposed a specific policy choice on the legislature. Moreover, it was a policy choice that the legislature had explicitly rejected and one that was clearly opposed by the province's majority. Considerable controversy also surrounded the Court's two *Morgentaler* decisions.³ Henry Morgentaler, a Montreal physician, was charged with the crime (at that time) of performing an abortion on a seventeen-year-old girl. Even though the doctor admitted performing the abortion, the jury acquitted him. Unfortunately for Dr Morgentaler, the Quebec Court of Appeal set aside the jury verdict and, instead of ordering a new trial, entered a conviction. On appeal, the 1976 Supreme Court by a 6-3 vote upheld the conviction imposed by the appellate court (see Snell and Vaughan 1985, 242-43). While the Court's decision was based on quite technical grounds of statutory interpretation, for most Canadians it was a highly charged political decision on a 'hot button' issue. Twelve years later, in 1988, with several of the same justices still on the Court, Dr Morgentaler was back before the Supreme Court appealing a second conviction for performing an illegal abortion. In the interim, however, the Charter of Rights had taken effect. This time, the Court by a 5-2 vote ruled that the prohibition on abortion violated Section 7 of the Charter. Moreover, (now) Chief Justice

Dickson had switched sides from his 1976 vote for conviction; indeed, this time he wrote the majority opinion to overturn it. The two *Morgentaler* decisions demonstrate that Charter or not, the Court has long been willing to hear legal challenges in highly controversial matters and to make policy with strong political overtones. The Charter has not in itself created a political role for the Court but, as this example shows, it has had the potential to change political outcomes when the Court made policy.

Perhaps less controversial but certainly as powerful was *Askov* (1990).⁴ At first glance, many would have seen this case as revolving around an arcane question of criminal procedure – namely, whether Section 11(b) of the Charter, which guarantees accused persons ‘trial within a reasonable time,’ meant that unreasonable delay, even if not attributable to the Crown, should result in a dismissal of charges against the accused. The Court interpreted the Charter to mean that it should; it then announced a standard of reasonableness that had the practical effect of releasing about 40,000 prisoners (Baar 2002).

A number of scholarly works trace the evolution of doctrine in the Court. Many of these works focus on the development of legal doctrine per se, but a number include at least some commentary on the political or social significance of the decisions. In perhaps the most comprehensive such effort, Bushnell (1992) traces the succession of what he considers the most consequential of these decisions from the very beginning of the Court until the date of his writing. The account is replete with cases in which the justices involved themselves in important political controversies of their time. In 1950, in *Canadian Wheat Board v. Hallet & Carey Ltd. and Nolan*,⁵ the Court ruled on the federal government’s controversial application of the National Emergency Transitional Powers Act (NETP). Bushnell describes the context of the decision: ‘Battle lines were forming; critics were appearing and speaking out. There was a very clear message that times were changing both socially and in the legal system’ (1992, 287). The Court’s decision to strike down the government regulations (later overturned by the Privy Council) helped energize a heated political debate over the exercise of government price controls in the postwar years. Perhaps more surprising to those who have come of age in the Charter period, the Court showed a willingness to grapple with controversial civil rights issues three decades before the Charter provided an express constitutional basis for such activism. Similarly, in a series of cases involving attempts by Quebec to impose sanctions on Jehovah’s Witnesses in the

province, the Court indicated that it ‘was prepared to stake a claim for the judicial protection of civil liberties despite inadequate statutory provisions’ (Snell and Vaughan 1985, 207).

Bushnell (1992) catalogues the ongoing political impact of the Court over the following decade, noting that ‘with the arrival of the 1960s it did not take long for the non-creative, conservative nature of the bench to display its continuing domination of the institution’ (1992, 331). This conservative impact was spelled out in Bushnell’s analysis of the failure of judicial interpretation of the 1960 Canadian Bill of Rights to live up to the hopes of civil rights groups. In the following decade, Justice Laskin’s dissent in *Murdoch v. Murdoch*⁶ (1973), which addressed the proper standards for distributing matrimonial property, generated so much support among Canadians that ‘Laskin was to become a “folk hero” in the eyes of many Canadians’ (1992, 385). Within a few years, ‘pressure on the provincial governments ... had created radical new reform legislation’ (ibid., 391). Such examples could easily be multiplied; taken together, they make it clear that even before the Charter, Canadians were aware that the Court often involved itself in important political controversies (see also Snell and Vaughan 1985; Balcome et al. 1990; Bevilacqua 1990).

There is little doubt that the Court has played an important role in the politics of federalism. Manfredi (2001) notes that the perceived distortion of federal power by the Privy Council led directly to the abolition of appeals to the Privy Council in 1949. As well, advocates of stronger federal powers (i.e., relative to the provinces) were not disappointed when in 1952 the Supreme Court adopted the ‘inherent national importance test,’ which expanded Ottawa’s power when disputes over federalism arose (2001, 14). Monahan contends that by the mid-1980s the ‘Canadian judiciary had assumed centre stage in the politics of Canadian federalism’ (1984, 142). That the Court plays a role in the politics of federalism is perhaps inevitable, given that a constitutional division of power between competing levels of government needs an umpire. The point is that this role has thrust the Court into the heart of many highly controversial conflicts, with its decisions almost certain to generate heated responses from the losing litigants. In the 1970s the Court often found itself accused of bias against the provinces (Swinton 1990). Tremblay (1986) maintains that if the Court was more favourable towards the federal government, it was not because of such bias but rather ‘because of its conception of what Canadian sovereignty requires at the international level’ (1986, 182). The Court

was determined to give the federal government the legal capacity to fulfil all of its obligations under international law. Monahan (1986) stresses that the Court's decisions have been crucial to balancing competition in the domestic economy and to preventing predatory behaviour by corporations – behaviour that in practical terms the provinces would not be able to police. Swinton (1990) notes that many of the cases that came before the Court in the 1970s and 1980s raised issues with important implications for the scope of government power, and that this affected the dynamics of federal-provincial relations as well as the policy instruments resorted to by governments. She cautions that while the Court's role is important, it does not unilaterally set policy; it is best viewed, rather, as one of several major players in this critical area of politics (1990, 19–20). Monahan (2002) agrees, noting that the outcomes of constitutional cases are 'much less determinative of public policy than is often supposed' (2002, 476). The Court's decisions are more likely to affect the bargaining strategies of future participants when policy is being made, advantaging some and limiting the options of others.

Observers agree that Supreme Court decisions have become more ideological since the Charter. The more obviously ideological nature of the issues decided under the Charter has led to increased debate and commentary on what the Court has done and what it should do. Much of this commentary has strong normative overtones. As one scholar put it, 'the study of law and politics in Canadian political science is dominated by normative claims about the Charter's impact ... at the expense of empirical explorations' (Smith 2002, 8). The Court's role in the Charter era has been attacked from both the right and the left. Mandell (1989) argues that there has been a profound shift in the role of the Court and that the Charter has led to the 'legalization' of politics, with the consequence that judicial policy making has been biased towards the rich. Yet Knopff and Morton (1992) assert that the Charter has contributed to the transfer of political power to left-wing social activists.

Morton and Knopff (2000) are the best-known critics of the Charter from what might be characterized as the political 'centre right' (Greene et al. 1998). They argue that since the 'charter revolution ... a long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy' (Morton and Knopff 2000, 13). As a result, the courtroom has become a political arena in ways it never used to be. In brief, the Charter has led to the 'legalization or judicialization of politics' (Knopff and Morton 1992, 34).

Their concern is that in the Charter era, justices, who are neither elected nor required to undergo the intense scrutiny of something like the U.S. confirmation process, have abandoned the canons of self-restraint that properly guided the judiciary in Canada for its entire pre-Charter history. They consider this increase in judicial power unfortunate because the power to influence the Court has become concentrated in a 'Court Party' of left-wing social activists. Interest groups have received a new point of access to decision making, one that has advantaged – among others – environmentalists, feminists, minority-language rights groups, and social liberals, all of whom aim to overcome majority preferences on lifestyle issues such as abortion and gay rights. As a consequence, policy making has taken on a somewhat insidious character because it is now 'covered by a legalistic veil' (ibid., ix). They decry the capacity of justices to engage in the social engineering advocated by members of the Court Party, arguing that elitist groups should not be allowed to use the courts to impose their policy preferences on the rest of society without the normal give and take of electoral and legislative processes. They fear that an activist Court will use the Charter to in effect rewrite the constitution without democratic restraint.

Mandell (1989) is also concerned that the Charter has resulted in the 'legalization' of politics. However, he does not seem to share Morton and Knopff's perspective on who the winners have been in the new politics. In his view, the Charter has increased the power of privileged social elites, which have used their power to advance their own class interests. The result is that society's 'have nots' are worse off than before. The Charter, he asserts, has not transferred 'power to the people'; rather, it has transferred it to 'the people in the legal profession,' who disproportionately come from the wealthier segments of society and whose livelihood depends on satisfying wealthy clients (1989, 3). The elites gain from Charter politics because the judicial process is inherently biased towards the rich and powerful. The best lawyers are expensive, so there is a sense in which people get only as much justice as they can afford. Other forms of politics, including legislative lobbying and protest activities, have few rules for filtering out which points can be articulated and which evidence can be argued; in contrast, the elaborate and complicated rules of court procedure filter out many potentially relevant considerations, and this filtering process often works to the disadvantage of the poor and the oppressed. As a result, the more politics becomes 'legalized,' the greater the advantages to the rich and well connected. Mandell opposes the 'legalization' of politics, asserting

that it is fundamentally dishonest in that its political nature is deliberately hidden within a maze of complicated legal rules.

An Empirical Account of Outcomes of the Supreme Court

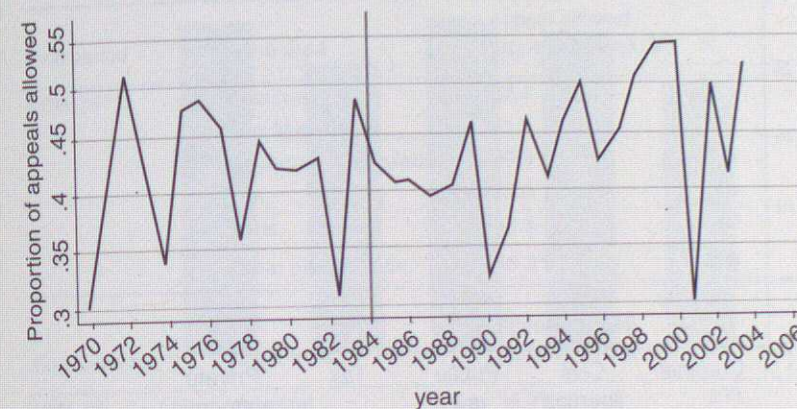
It would perhaps be inappropriate for an outsider to join the normative battle that continues to rage in both popular and scholarly outlets over the proper role of the Supreme Court in the Charter era. Thus the analysis below confines itself to an empirical exploration of outcomes in the Court between 1970 and 2003. For most of the analysis, trends in outcomes are examined across the same five periods as were used for the analysis of agenda change in chapter 3. The pre-Charter era is divided into two time periods: between 1970 and 1975, the Court lacked substantial control over its docket; then in 1976, it gained docket control though it still had no constitutional basis for resolving rights controversies. The Charter period is then divided into three periods that roughly correspond to the terms of the three chief justices who have served since the Charter was adopted.

We begin the analysis by examining the most basic question in politics: 'Who wins?' There are a number of ways to think about winning and losing in court. One of those ways was the focus of chapter 4, which described trends in the success of different categories of litigants. Several alternative ways to think about winning and losing are explored in this chapter.

We focus first on the most basic decision that an appellate court must make: whether to allow an appeal and overturn the decision of a lower court.⁷ Outcomes for the litigants are presented in two graphs, divided first by time period (figure 6.1) and then by the primary nature of the dispute before the Court (figure 6.2).

Overall, slightly less than half of all appeals are successful: petitioners have won just over 44 per cent of the time in the past thirty-four years. There is extensive year-to-year fluctuation but no clear trend in the proportion of appeals allowed. This is in marked contrast to the pattern in the U.S. Supreme Court, where petitioners have won two-thirds of the time in many recent terms. When the justices were asked how leave-to-appeal decisions were decided, several said that they do not see their job primarily as correcting errors in the lower courts. They are more concerned about making judicial policy on new and important questions and about resolving conflicts in the interpretation of the law when courts in different provinces have decided the same question

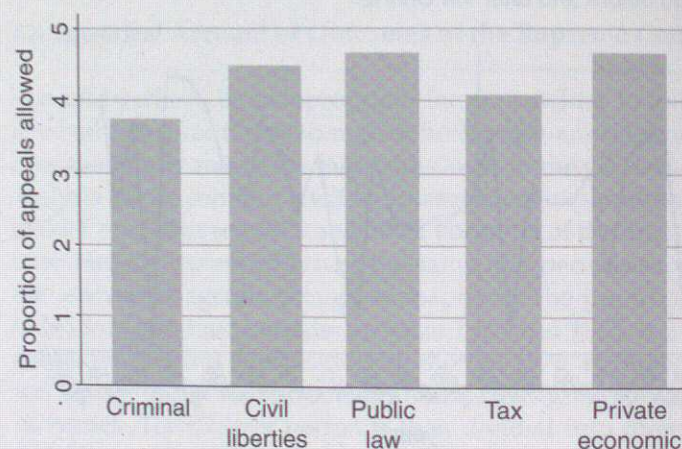
Figure 6.1
Changing decisions on the Supreme Court:
Appeals allowed before and after the Charter



differently (see chapter 3 for an elaboration of the justices' views on accepting leave petitions). The relatively low rate of disturbing lower-court decisions is consistent with how the justices view their role. If they were principally concerned with correcting all possible lower-court errors, one would expect them to grant leave to decisions that initially seemed wrongly decided, and as a result a large percentage of appeals would be allowed.

One might have expected the percentage of successful appeals to increase after 1975, when the Court gained greater control of its docket. After all, during the time when many appeals came to the Court 'as of right,' losing litigants would have tended to appeal regardless of the merits of their position. This in turn would have led to a substantial number of appeals without merit, which the Court would then summarily dismiss. Yet there is no indication in the data that this is what happened. Indeed, it seems that the proportion of successful appeals actually declined after 1975. These results must be interpreted with some caution, however, since they are based only on the decisions published with opinion in the *Supreme Court Reporter*. Before 1975 a number of appeals were disposed of without a published opinion, whereas the recent practice has been to publish at least a very brief opinion in all cases (including those with a disposition announced from the bench). A reasonable guess is that most of the pre-1975 decisions without a published opinion were those in which the appeal was

Figure 6.2
Appeals allowed, by issue



dismissed. If that is true, the proportion of appeals allowed must be lower than indicated by the data in figure 6.1.

When we shift attention to who wins by the types of cases coming to the Court, we find that differences across issues are modest (see figure 6.2). Appellants in criminal cases have the lowest success rate, but only marginally lower than the success of appellants in tax cases. However, when one examines changes in the success rates over time, the extent of variation across issues is more substantial.

Criminal appeals are least likely to succeed, and as table 6.1 shows, the rate of success in criminal appeals is low in all five of the time periods examined. Most criminal appeals are brought by the defendant, and appeals to the Supreme Court are especially likely in more serious cases of the sort that presumably draw lengthy sentences (see chapter 4). Conversely, when the stakes are economic, it can be presumed that litigants often make rational calculations about the expected utility of the appeal, factoring in both the cost of the appeal and the potential economic gain if successful. Clearly, it is irrational to appeal such cases when the probability of success is low. Someone who is facing many years in prison may calculate utilities very differently and decide that even an appeal with a very low probability of success is rational if the alternative is spending, say, twenty years in prison. Adding to the possibility that cases with little objective merit will come

Table 6.1
Who wins? Changes over time in proportion of appellants who win in the Supreme Court of Canada, by issue area

Time period	Issue area	Appeal allowed (appellant wins) (%)	N
1970-75	Criminal	37.4	91
	Civil liberties	41.7	12
	Government regulation	49.5	95
	Tax	28.6	56
	Torts	58.5	118
	Other private econ.	48.3	176

Time period	Issue area	Appeal allowed (appellant wins) (%)	N
1976-83	Criminal	34.3%	233
	Civil liberties	15.3	13
	Government regulation	45.3	139
	Tax	35.6	45
	Torts	44.1	59
	Other private econ.	50.7	144

Time period	Issue area	Appeal allowed (appellant wins) (%)	N
1984-90	Criminal	33.7%	293
	Civil liberties	44.8	49
	Government regulation	48.4	84
	Tax	56.2	16
	Torts	58.3	36
	Other private econ.	43.7	71

Time period	Issue area	Appeal allowed (appellant wins) (%)	N
1991-99	Criminal	41.1	492
	Civil liberties	52.9	70
	Government regulation	51.4	109
	Tax	59.1	44
	Torts	54.5	55
	Other private econ.	56.3	87

Table 6.1 (continued)

Who wins? Changes over time in proportion of appellants who win in the Supreme Court of Canada, by issue area

Time period	Issue area	Appeal allowed (appellant wins) (%)	N
2000–2003	Criminal	44.9	118
	Civil liberties	50.0	24
	Government regulation	46.5	43
	Tax	40.0	10
	Torts	52.0	25
	Other private econ.	31.0	42

before the Court is the fact that even after 1975, some criminal appeals continued to reach the Court as of right. Some justices indicated during the interviews that they were particularly sensitive to the seriousness of a person losing his or her liberty. When the stakes were more than 'only money,' they were more willing to entertain the possibility that an appeal had merit.

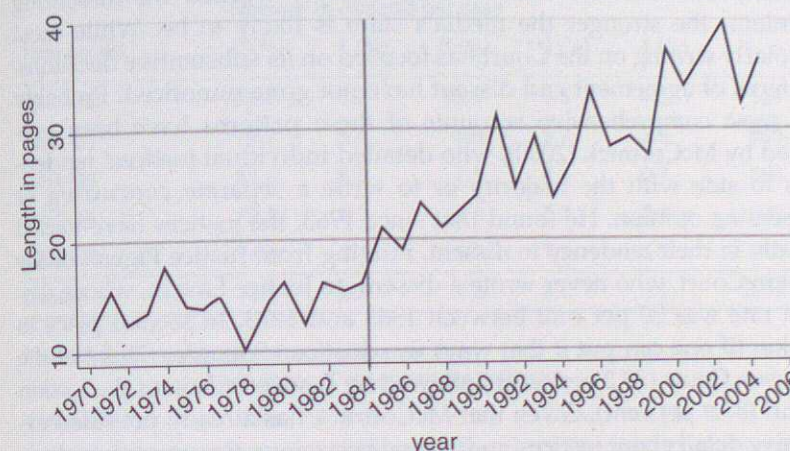
At the other end of the distribution, petitioners in tort cases have the highest rate of success; indeed, they are the only appellants who win more than half the time. Their success has not varied much over time; tort petitioners won more than half the time in all but one of the time periods examined. There is no obvious explanation for this; perhaps it is because tort law is the area most dominated by purely financial calculations about the expected gain from an appeal.

Civil liberties is the area in which there has been the greatest change in success rates over time. The most obvious explanation is that the Charter 'changed the rules' in the middle of the time frame being examined. The significance of these changes is explored later in the chapter, when the specific impact of the Charter is examined.

Given the justices' interest in deciding new and important questions of law in order to give guidance to the lower courts, the nature of the opinion that explains the reasons for judgment and that interprets the law is arguably more important than who won and who lost (except, of course, to the litigants themselves). The elements of opinions that are important tend to be idiosyncratic and are not easily summarized empirically. One characteristic of opinions does, however, lend itself to

Figure 6.3

Changing decisions on the Supreme Court:
Opinion length before and after the Charter



empirical description: the length. Figure 6.3 presents the average length of the Court's total output, including dissenting and concurring opinions. Page lengths were determined from the *Supreme Court Reports*, which provide parallel English and French translations of the opinions.

The most obvious finding is that the Court has been writing a lot more in recent years than it did in the 1970s. The significant break point appears to be the adoption of the Charter. The total length of opinions in all six categories of issues increased beginning in 1984 (when the first Charter cases were decided by the Court). The greatest increases in opinion length have been in civil liberties cases, most of which have involved resolving a Charter issue. But even issues such as torts, which have been relatively little affected by the Charter, have become characterized by longer opinions. One speculates that the increasing volume of writing put out by the Court may be related to the increase in the number of law clerks available to assist the justices, to a greater volume of material coming into the Court as the proportion of cases with interveners has increased (see Chapter 4), and perhaps to a feeling among the justices that they must justify their decisions in greater detail now that the Charter has heightened media and public attention to Court decisions.

It is a maxim among the media that conflict sells papers (or garners higher TV ratings). The interviews with the justices indicated that they are aware that the Court tends to receive the most scrutiny when it is publicly divided, and that the more sharply worded the dissenting opinions, the stronger the media's stare is likely to be. While most scholarly writing on the Court has focused on its substantive decisions, patterns of agreement and dissent have not gone unnoticed. Probably the most comprehensive accounts of these patterns have been provided by McCormick (2000), who detailed individual justices' tendencies to side with the majority or to write a separate concurring or dissenting opinion. He found that since 1963, the justices have varied greatly in their tendency to dissent, ranging from Justice Pigeon of the Laskin Court, who never wrote a dissent, to Justice Laskin, whose dissent rate was 50 per cent between 1963 and 1973. In second place to Laskin (if one can put it that way) was Justice L'Heureux-Dubé of the Dickson Court (39.2 per cent), followed by Justice Wilson of the Laskin Court (37.9 per cent). Given that McCormick has already provided extensive detail about justices' individual behaviour, the present analysis concentrates on providing a 'big picture' account of overall rates of dissent and concurrences on the Court as a whole.

Overall, what is most striking about the data in table 6.2 is the high level of consensus on the Supreme Court across the thirty-four years examined. There was no dissent in three-quarters of all cases, and there were no concurring opinions in five-sixths of decisions. When the Court failed to reach consensus, the level of disagreement was generally modest, with most divided decisions involving one or two dissents. Separate concurring opinions were even less frequent: only 4 per cent of all cases had more than one concurrence. There was some variation over time in the frequency of both dissents and concurrences but no clear temporal pattern. The last four years under study had the fewest concurrences; the lowest rates of dissent were between 1984 and 1990. One might have expected the number of both dissents and concurrences to increase after the Charter as the perceived political stakes increased, yet the trends in table 6.2 provide no support for that conjecture.

Further insight into justices' tendencies to write separately is provided by the simultaneous occurrence of dissents and concurrences. Table 6.3 further emphasizes how strongly the justices tend to agree. When a decision is unanimous, there is a strong tendency for the justices to unite behind a single opinion. In fact, in almost seven out of

Table 6.2
Number of dissents and concurrences on the Supreme Court of Canada, 1970–2003

Time period	Frequency of number of dissents over time Number of dissents per case					N
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	
1970–75	66.7	8.7	15.4	5.5	4.6	584
1976–83	79.7	5.0	6.0	5.7	3.5	680
1984–90	81.8	6.0	7.1	4.4	0.7	588
1991–99	73.6	8.7	9.3	5.3	3.1	923
2000–03	74.8	7.4	5.0	7.1	5.7	282
Overall	75.1	6.3	7.8	4.7	2.9	3057

Time period	Frequency of number of concurrences over time Number of concurrences per case					N
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	
1970–75	84.1	13.1	2.8	0	0	458
1976–83	89.4	9.1	1.2	0.4	0	577
1984–90	85.6	10.0	2.7	1.3	0.4	521
1991–99	78.4	14.7	5.0	1.5	0.5	804
2000–03	90.6	7.3	1.2	0.4	0.4	246
Overall	84.4	11.5	3.0	0.8	0.3	2,606

Table 6.3
Number of concurrences for decisions with varying numbers of dissents on the Supreme Court of Canada, 1970–2003

Number of dissents	Frequency of number of dissents over time Number of concurrences per case					N
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	
0	86.9	9.8	2.1	0.9	0.4	1943
1	79.6	13.1	6.8	0.5	0	191
2	80.5	14.3	4.8	0.4	0	251
3	69.2	23.1	7.0	0.6	0	156
4	76.1	20.4	1.1	2.3	0	88
Overall	84.3	11.6	3.0	0.8	0.3	2,629

eight cases with unanimous outcomes, there has been a single opinion. The other notable finding is that dissents and concurrences tend to go together. When the Court is split on a case, it is more likely that the majority has been unable to agree on a single majority opinion. When there have been at least three dissents, the majority has been split, with multiple opinions 28 per cent of the time – more than twice the rate of concurrences for cases with unanimous decisions.

Table 6.4 presents the number of dissents and concurrences for six major categories of issues. There is a low rate of dissent and a low rate of concurrence in all issue categories; that said, civil liberties cases stand out from the rest. The rate of dissent in those cases is over 40 per cent higher than the rate in the next most contentious area. The civil liberties category is also distinctive in that far more such cases generate multiple dissents. Over 18 per cent of civil liberties cases have at least three dissents – almost double the rate for criminal cases. Similar differences are evident for concurrences. Almost twice as many civil liberties cases as any other category of cases have at least one concurring opinion, and the proportion of cases with three or more concurrences is three times higher for civil liberties cases than for any other category of cases. These data suggest that civil liberties cases evoke the most controversy on the Court and perhaps produce the greatest passion among the justices.

During the interviews, the justices indicated that they saw it as the Court's role to 'balance' the federal judicial system – that is, to watch over the top appellate courts in each province and to ensure national uniformity in interpretations of the law and the constitution. In this regard, McCormick (1992) compared the success of appeals coming from different provincial courts beginning in 1949, when Privy Council appeals were abolished and the Supreme Court of Canada was firmly established as the ultimate arbiter of conflicting legal interpretations. He found a rather strong variation in terms of provinces, ranging from a low of 36.4 per cent for appeals from Prince Edward Island to a high of 59.8 per cent for appeals from New Brunswick. Below, this analysis is extended to the present (McCormick had taken it only to 1990), and trends over time are examined.

To say that appellants from a given province have a low success rate is the same as saying that that province's appellate court is more often upheld. When we extend McCormick's analysis to 2003, we find that little has changed: the Court of Appeal of New Brunswick remains the court whose judgments are most often overturned by the Supreme Court; Prince Edward Island, as before, is still the least often overturned.

Table 6.4

Number of dissents and concurrences by issue areas, Supreme Court of Canada, 1970–2003

Frequency of number of dissents by issue area						
Issue	Number of dissents per case					N
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	
Criminal	73.4	7.5	9.4	6.2	3.6	1,235
Civil liberties	61.8	7.6	12.4	11.8	6.5	170
Government regulation	75.6	7.7	8.5	5.0	3.1	480
Tax	81.4	6.2	6.8	4.5	1.1	177
Torts	73.2	6.4	13.0	4.4	3.0	299
Private economic	78.4	7.0	7.6	3.8	3.2	527

Frequency of number of concurrences by issue area						
Issue	Number of concurrences per case					N
	0 (%)	1 (%)	2 (%)	3 (%)	4 (%)	
Criminal	82.8	12.2	3.5	1.1	0.4	1218
Civil liberties	65.9	22.2	8.4	3.0	0.6	167
Government regulation	87.6	9.7	2.0	0.4	0.2	444
Tax	89.3	9.5	0.6	0.6	0	168
Torts	86.7	10.0	2.9	0.4	0	279
Private economic	89.8	9.3	0.9	0	0	344

However, for the entire period studied in the current analysis (1970 to 2003), the Court of Appeal of Ontario reaps the honour as the court whose judgments are most consistently sustained by the Supreme Court. Overall, though, the differences between provinces in success rates for litigants are relatively modest. No provincial court has been overturned as much as three out of five times, and every court has been overturned in more than one-third of its judgments. Remember here that in every province, a large majority of appellate court judgments are never reviewed by the Supreme Court.

A detailed breakdown by period (not displayed in table 6.5) highlights several interesting features. First, from 1970 to 1975 the Supreme Court overturned the courts from almost every province fairly frequently. Alberta, with a 40 per cent rate of decisions overturned, did the worst among courts with any substantial number of decisions

Table 6.5
Proportion of appeals allowed from different Canadian provinces
by the Supreme Court of Canada, 1970–2003

Province	Appellant wins (%)	N
Alberta	40.8	262
British Columbia	43.2	442
Manitoba	48.5	171
New Brunswick	56.8	95
Nova Scotia	50.9	114
Ontario	36.0	739
Quebec	48.5	588
PEI	38.1	31
Saskatchewan	50.4	121
Nfld & Lab.	49.1	57

reviewed. All other provinces were overturned at least 45 per cent of the time. New Brunswick suffered the highest rate of reversal of any province for any of the time periods examined, with appeals allowed from its decisions in nearly 71 per cent of the cases accepted for review. After 1975, the Court of Appeal of Ontario was consistently sustained by the Supreme Court. Petitioners were never successful more than 36 per cent of the time between 1976 and 2003, and the petitioners' success rate of only 25.8 per cent between 1984 and 1990 stands as the lowest rate of success in our data. In contrast, petitioners from British Columbia seem to be enjoying increasing rates of success over time. Between 1976 and 1990, their appeals were allowed in only 35 per cent of cases accepted for review. However, BC's success rate increased to almost 49 per cent between 1991 and 1999, then climbed again to over 55 per cent between 2000 and 2003.

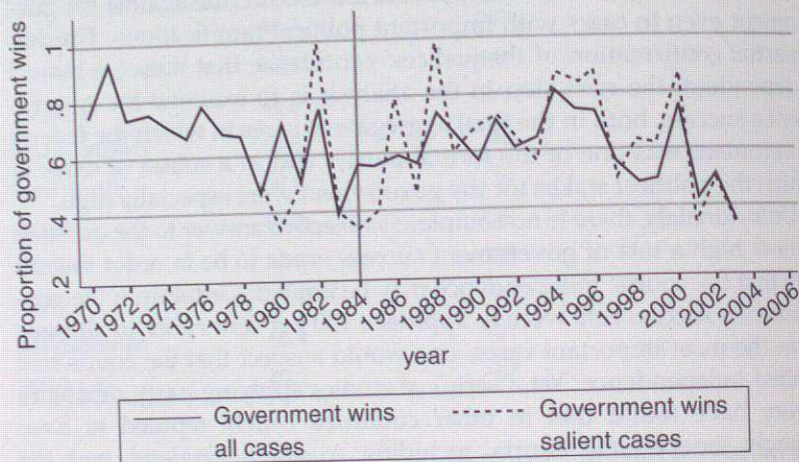
New democracies have been springing up around the world for the past quarter-century, and this has renewed interest in judicial independence. Without substantial freedom from government interference and public opinion, the rule of law is impossible. During the interviews, all of the justices expressed confidence that the appellate courts had a very substantial degree of independence in practice and that legal safeguards to prevent political interference were strong. In subsequent interviews that the author conducted with judges on four of the

provincial appellate courts, the same confidence in Canadian courts' independence was always expressed. There is no completely satisfactory way to test empirically whether this confidence is warranted. One indicator, perhaps, that a court is sufficiently independent to make the ideal of the rule of law a reality is that it is free to rule against the government even in cases with important political ramifications. Thus, as a partial confirmation of the justices' confidence that they are indeed independent, the next step in the analysis is to examine the government's success, both in the total aggregate of cases in which the federal government was one of the formal parties and in a subset of cases in which the political stakes for the government were especially high.

Unfortunately, there is no completely objective answer to the question of how high a rate of government success needs to be in order to indicate that the courts' independence may be limited. Certainly, if the government's success rate were to approach 100 per cent either in all cases or in the most important cases, one would suspect that the courts had limited independence. Yet a series of studies applying party capability theory have found that in other countries widely reputed to have strongly independent courts, including Australia, England, and the United States, the government often wins more than 60 per cent of the cases it litigates in appellate courts. Governments win much of the time in part because they often have better lawyers than their litigation opponents and in part because as the ultimate 'repeat player,' they are skilled at managing their dockets, appealing only decisions in which they have a better than even chance of success (see Galanter 1974; McCormick 1993a; Songer, Sheehan, and Haire 1999; Atkins 1991; Kritzer 2003).

Given this ambiguity, what can one say about the trends in government success displayed in figure 6.4? Certainly the government wins more often than it loses – overall, about five-eighths of all cases. In the absence of a readily available measure of how much the government cares about the outcome of each case, two indicators of political salience were employed. It seems reasonable to suppose that the government is generally more concerned with constitutional challenges to its authority than to many non-constitutional cases. Also, one can assume that cases that attract the participation of one or more interveners (usually either interest groups or other governments) are more politically salient than cases without interveners. Using these indicators of 'importance,' it seems that the government has a slightly higher success rate in 'important' cases than in all cases. Should we be concerned that these rates of success point to limits on judicial independence? While

Figure 6.4
Change over time on the Supreme Court:
Government wins in all cases and salient cases before
and after the Charter



the author's evaluation admittedly is somewhat subjective, my answer would be a resounding 'no.' Given the findings of party capability studies, one would expect the government to win significantly more than half of decisions even if the courts were completely independent. Thus the success rates displayed in figure 6.4 do not seem to indicate a lack of independence. One can argue that if the government consistently loses from 30 to 40 per cent of its cases – including the cases it cares the most about – then judges must feel free to rule against the government. And in some periods, the government wins barely half its cases. Thus the confidence expressed by the justices in their independence to follow the law without government interference seems justified by the actual outcomes.

Trends in Policy Making on the Supreme Court

While much of the discussion of the Court's policy output has had a doctrinal focus, some empirical accounts also exist. Most of those focus on the Charter's impact rather than on more general policy trends. Russell (1992) demonstrated that in the first two years of the Charter, those asserting that their Charter rights had been violated won an

astounding two out of three cases. But those initial success rates quickly dropped, and by the late 1980s Charter claimants were winning slightly less than 30 per cent of their appeals.

Similar figures are supplied by Morton, Russell, and Walker (1992), who report the initial high success rate of Charter claimants but then note that overall, in the first hundred Charter decisions, rights claimants won only 35 per cent of the time. This success rate is more than double that of rights claimants in the thirty-two cases adjudicated by the Court under the Canadian Bill of Rights and is almost identical to the success of rights claimants in the U.S. Supreme Court for the same period.

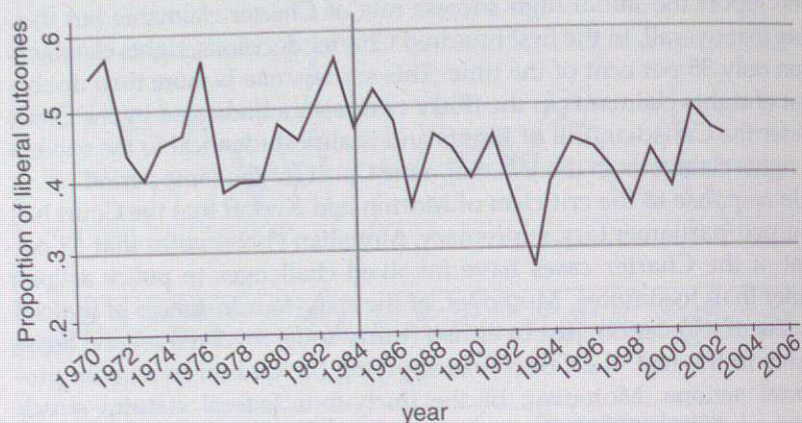
In response to the criticism of Morton and Knopff that the Court has usurped parliamentary supremacy, Monahan (1999) notes that 55 per cent of the Charter cases have involved challenges to police actions rather than to statutes. Moreover, of the sixty-four instances of judicial review of legislation, just over half (thirty-four) involved federal legislation; in the rest, the Court was applying the Charter to restrain provincial actions. Moreover, of the thirty-four federal statutes struck down under the Charter, twenty involved only procedural rules.

Before examining Charter outcomes, we next examine the more general trends in the policy outcomes of Court decisions over the entire period studied. As a summary indicator of the output of the Court in policy terms, figure 6.5 charts the change over time in the percentage of decisions that could be considered 'liberal.' Here, *liberal* is defined as a pro-defendant outcome in criminal appeals; as support for an expanded concept of rights in civil liberties issues; as the position of the federal government in the application of other public law; and as support for the government in tax cases, for the plaintiff in tort cases, and for the economic underdog in private economic disputes.

Overall, there has been a slightly conservative tendency in Supreme Court decisions over the past third of a century. These moderately conservative outcomes have characterized the Court throughout the period examined. Figure 6.5 indicates that there has been only a modest degree of change over time. Furthermore, there is no linear trend in the data, though in general the Court has given more support to conservative outcomes in the post-Charter era. In most years, support for liberal outcomes has fluctuated between 40 and 60 percent, which is consistent with the general theme that the Supreme Court of Canada has been politically moderate.

There is greater variation when one examines outcomes in different issue areas (see figure 6.6). Decisions are most conservative for crimi-

Figure 6.5
Changing decisions on the Supreme Court:
Support for liberal outcomes before and after the Charter

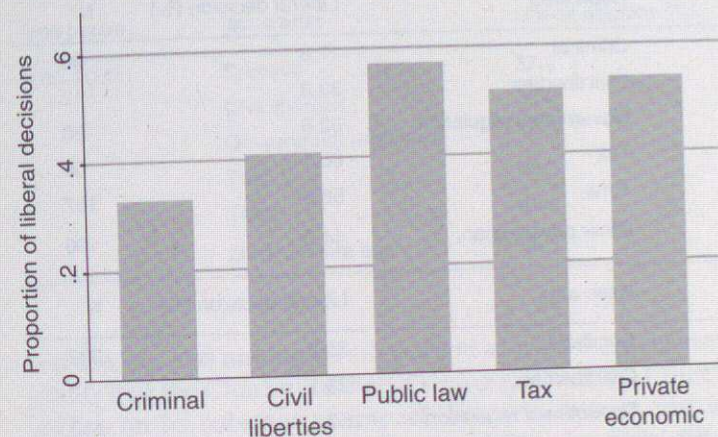


nal appeals, with fewer than one-third of all outcomes favouring the accused. Support for civil liberties claimants is higher, but overall only 41 per cent of the decisions have supported a liberal outcome. The Court appears to be modestly liberal in all other areas, each of which has a substantial economic component. The Court's record is most liberal in public law cases involving economic regulation and welfare state benefits; nearly three-fifths of all decisions have supported liberal outcomes. Outcomes have been almost as liberal in tort cases, where the Court has supported the claims of the plaintiff 57 per cent of the time. Given these differences, it appears that any overall categorization of the Court as liberal or conservative is misleading; rather, the direction of policy support depends on the issue area.

Perhaps more revealing than the aggregate support for liberal versus conservative outcomes has been the trends over time. In the early 1970s the Supreme Court had a strongly conservative record for criminal appeals, with fewer than one-fifth of decisions favouring criminal defendants. Then in late 1970s and early 1980s, support for the accused nearly doubled, to over 35 per cent. In each of the three periods after the adoption of the Charter, this new, less conservative pattern was basically maintained.

Trends in the resolution of civil liberties cases appear to be strongly related to the Charter. One could easily argue that the purpose of those

Figure 6.6
Proportion of liberal decisions
by the Supreme Court of Canada 1970–2003 by issue



who urged the adoption of the Charter was to provide greater support for civil liberties claims. This seems to be borne out by the dramatic change in support for civil liberties claimants since the Charter came into effect. Before the Charter, the Court heard few civil liberties cases and supported liberal outcomes in only one-fourth of decisions. In the first seven years of Charter litigation, support for civil liberties claimants jumped to nearly 48 per cent – more than double the Court's level of support in the previous eight years. The proportion of liberal decisions dipped somewhat in the next time period; even so, it remained substantially above the highest pre-Charter level. Then in the most recent period examined, support for civil liberties rose to 50 per cent.

As might be expected, other issue areas were much less affected by the Charter's provisions; thus trends in the level of liberalism of the Court in those areas showed less change. Yet even without a direct Charter effect, increasing liberalism was apparent in the disposition of private economic disputes. Support for the economic underdog averaged only 44 per cent in the early 1970s, then increased to 50 per cent in the next time period, remained relatively constant at 48 per cent in the first Charter period, and increased to nearly 66 per cent over the two most recent periods.

One recent study appears to contradict nearly all previous analyses of Charter politics. Among the critics of the Charter from both the right

Table 6.6

Trends over time in support for liberal policy outcomes in decisions of the Supreme Court of Canada, 1970–2003

Time period	Issue area	Liberal decision (%)	N
1970–75	Criminal	17.8	90
	Civil liberties	33.3	12
	Government regulation	62.8	86
	Tax	66.1	56
	Torts	58.9	107
	Other private econ.	44.3	106
Time period	Issue area	Liberal decision (%)	N
1976–83	Criminal	35.2	233
	Civil liberties	23.1	13
	Government regulation	57.1	133
	Tax	52.4	42
	Torts	62.1	58
	Other private econ.	50.5	97
Time period	Issue area	Liberal decision (%)	N
1984–90	Criminal	34.8	290
	Civil liberties	47.9	48
	Government regulation	52.5	80
	Tax	56.2	16
	Torts	54.3	35
	Other private econ.	48.1	52
Time period	Issue area	Liberal decision (%)	N
1991–99	Criminal	31.6	484
	Civil liberties	39.4	71
	Government regulation	60.6	104
	Tax	38.5	39
	Torts	55.1	49
	Other private econ.	58.9	56

Table 6.6 (continued)

Trends over time in support for liberal policy outcomes in decisions of the Supreme Court of Canada, 1970–2003

Time period	Issue area	Liberal decision (%)	N
2000–2003	Criminal	37.6	117
	Civil liberties	50.0	22
	Government regulation	55.0	40
	Tax	20.0	10
	Torts	45.8	24
	Other private econ.	65.5	29

and the left, and among its supporters as well, there seems to be a consensus that the Charter has had a strong effect on the Court's agenda as well as on its substantive impact. In stark contrast, one scholar suggests that the Charter has actually made very little difference. Epp (1996, 1998) argues that the Charter has not had a major impact on either the Court's agenda or on its level of support for civil liberties. Using data on Court decisions at five-year intervals, he notes (1998) that the proportion of the Court's agenda devoted to 'civil liberties and civil rights' increased dramatically between 1960 and 1990; but then he argues that this trend began well before the Charter and that it seemed to be related more to increases in the support structure for rights litigation than to the Charter itself. He concludes that 'contrary to expectations, the Charter had no sustained effect on the Court's level of support for the rights claims on its agenda' (1996, 773). Perhaps even more surprising, he finds no increase in the proportion of cases decided on constitutional grounds since the adoption of the Charter. These surprising conclusions seem to contradict most previous empirical and more doctrinal analyses of the Charter's effects, yet Epp's results have yet to be seriously challenged. Though his findings were published in one of the most prestigious journals of political science, there are some potentially serious flaws in the methods he applied to reach his surprising conclusions. First, he doesn't explain how he coded 'civil rights and liberties,' and the number of cases produced by his coding seems to be at odds with the numbers of cases arrived at in other studies of Court decisions for the same period. Second and more

seriously, he only examines the cases in one year in each five (i.e., 1960, 1965, 1970) and thus runs the risk that his data are not representative. Finally, his analysis of Charter outcomes ends in 1990.

Remember here that chapter 3 raised serious questions about the validity of Epp's claims regarding agenda change. It was shown that there was a dramatic increase in the proportion of the Court's docket devoted to civil liberties cases after the adoption of the Charter. The proportion of cases raising constitutional challenges also increased rapidly. In the following analysis, Epp's claims about outcomes in civil rights and liberties cases and his conclusions about the exercise of judicial review are subjected to a more extensive analysis, one that involves all cases decided by the Court (instead of just those decided every five years). Also, the analysis will be carried forward to 2003 in order to obtain a fuller account of Charter adjudication.

Refer again to table 6.6. As noted earlier, when all of the Court's civil liberties decisions from 1970 to 2003 are considered, Epp's claim that the Charter had no sustained effect on the Court's support for rights claims appears to be contradicted. In the eight years immediately before the first Charter cases came to the Court, rights claimants won only 23 per cent of the cases decided by the Court. Over the next eight years, the success of rights claimants more than doubled. Those figures are as far as Epp extends his analysis. His conclusion that the Charter's effect was not 'sustained' was based on an analysis of just two years' worth of data after the adoption of the Charter (1985 and 1990). He did not look at any outcomes after 1990. Yet table 6.6 indicates that besides dramatically increasing its support for rights claims in the first eight years after the Charter, the Court continued to provide much higher rates of support for rights claimants for the thirteen post-Charter years that Epp did not examine than in the pre-Charter years.

Perhaps even more surprising was Epp's claim that the proportion of constitutional cases did not increase after the Charter was adopted. Instead, he suggests that there may simply have been a substitution – that is, the Charter was used as a basis for decisions instead of an alternative constitutional argument. Table 6.7 presents a computation of the proportion of cases in each of five periods with no constitutional issue versus those with constitutional challenges to laws and executive decisions.

The data show unambiguously that before 1984, the Supreme Court considered constitutional challenges in only a very small percentage of cases (fewer than 7 per cent in both pre-Charter periods). But after the adoption of the Charter, the proportion of cases raising constitutional

Table 6.7
Changes over time in frequency of judicial review by the Supreme Court of Canada, 1970–2003

Time period	No const. issue (%)	Law challenged		Executive action challenged		N
		Struck (%)	Upheld (%)	Struck (%)	Upheld (%)	
1970–75	96.8	0.3	1.7	0.5	0.7	584
1976–83	93.7	1.8	2.5	1.2	0.9	679
1984–90	75.3	2.7	8.9	5.1	8.0	587
1991–99	72.0	3.9	7.1	6.3	10.8	920
2000–03	78.8	4.0	9.0	4.0	4.3	278
Overall	82.8	2.5	5.5	3.6	5.5	3048

issues exploded, contributing more than three times the proportion of constitutional issues in each of our three post-Charter periods than in either of the two pre-Charter periods. Moreover, the rate at which the Court struck down both challenged laws and challenged actions of the executive branch also increased after the Charter. These same trends hold both for the period immediately after the Charter that Epps examined (in part) and for the thirteen subsequent years not included in Epp's analysis.

Besides refuting Epp's claims, table 6.7 shows that though the frequency of constitutional issues increased dramatically after the Charter, they still comprise less than one-third of the Court's agenda. Moreover, while many of the cases in which federal and provincial laws and actions have been struck down as violations of the Charter have received extensive media coverage, they remain a small proportion of the Court's output. Since the Charter, fewer than 4 per cent of all Supreme Court decisions have struck down either a federal or a provincial law, and decisions striking down executive actions have been only slightly more frequent.

In the next table, consideration of the impact of the Charter on the output of the Court is continued with a comparison of the basis of decisions in constitutional cases. Before 1984, of course, all constitutional challenges were based on the Constitution Act of 1867. After the Charter, constitutional challenges under that earlier act continued to be within the jurisdiction of the Court and continued to be brought to the Court along with Charter cases. Tables 6.7 and 6.8 indicate that the

Table 6.8
Basis of constitutional challenges resolved by
the Supreme Court of Canada, 1970–2003

Time period	Basis of constitutional challenge		N
	BNA Act (%)	Charter (%)	
1970–75	100	0	17
1976–83	100	0	40
1984–90	16.9	83.1	142
1991–99	14.1	85.9	256
2000–03	18.0	82.0	61
Overall	23.8	76.2	516

number of cases raising constitutional questions increased dramatically after 1984 and that the basis of the challenge changed dramatically as well. After 1984, more than four-fifths of all constitutional cases raised claims under the Charter rather than the Constitution Act. This proportion has remained nearly constant across the three post-Charter periods.

The Charter of Rights has thirty-four sections, and both the frequency of litigation and the success of Charter claimants have varied dramatically according to which sections of the Charter are being 'called out.' Also, appellants sometimes raise issues relating to multiple provisions of the Charter and scholars disagree over which of the several provisions litigated is really the 'most important' issue in the case at hand. Usually there is no completely objective way to determine which of the Charter issues raised in the case is the most important. The analysis below of the success of Charter claimants relies on the judgment of the Court's professional staff. For each case, those people prepare a series of 'tag lines' – which appear at the top of each opinion – that abstract the key legal issues from their perspective. These tag lines are widely used by lawyers and legal scholars to search for cases of interest. For the analysis below, the first two Charter provisions that were mentioned in the tag lines were used and the case outcome was coded as to whether the opinion supported or opposed the position of the Charter claimant on each of these two Charter issues.⁸

The tag lines for the cases indicate that just eleven Charter sections have accounted for the bulk of claims resolved by the Supreme

Table 6.9
Support for Charter claimants by the Supreme Court of Canada for selected sections
of the Charter of Rights

Charter section	Pro-rights claimant (%)	N
1 Reasonable limits to rights	62.5	164
2 Fundamental freedoms	35.5	62
6 Enter and leave Canada	38.5	13
7 Life, liberty, and security of person	35.1	151
8 Search and seizure	37.7	69
9 No arbitrary detention	42.9	14
10 Right to counsel and habeas corpus	57.5	40
11 Criminal procedure rights	33.3	81
12 No cruel and unusual punishment	27.3	11
15 Equality rights	28.6	42
24 Exclusion of evidence	50.8	65
— Other rights	46.5	43
Total	39.5	607

Court. Table 6.9 displays the results for all sections of the Charter with decisions by the Court in at least ten cases. Overall, through the end of 2003, Charter claimants have been successful in just under 40 percent of the challenges that have reached the Court. Whether one takes this as evidence that the Court is 'liberal' or 'conservative' depends on one's frame of reference. By a conventional calculus, one could say that the Court has made a conservative decision in a substantial proportion of its decisions; thus the Court is 'conservative' and the Charter has advanced a conservative rather than a liberal agenda. Alternatively, one might take the pre-Charter status quo as the point of reference. From that reference point, one would conclude that on 240 occasions, litigants have challenged the status quo, been able to take their rights claim all the way to the Supreme Court, and achieved the validation of a right previously not recognized.

Moreover, the Charter's impact has been much greater than the simple success rate might suggest, because presumably there has been a ripple effect, with both the lower courts and the executive taking account of each successive rights decision of the Court and altering their subsequent behaviour accordingly. There is, then, a multiplier effect

from each rights decision by the Supreme Court that affects many more people than the litigants in the Court. The nature of the ripple effect can be guessed by noting the pattern over time. As noted above (see Morton, Russell, and Withey 1992), in its first two years of Charter litigation, close to two-thirds of Charter rights claimants were successful, but subsequently the success of rights claimants dropped significantly. Table 6.9 indicates that the success of those claimants continued at near these lower rates through 2003. One might interpret these findings as indicating that there was an initial period in which challenges were brought to practices and laws whose origin was prior to the Charter and that the Court sought to bring these prior practices into conformity with the Charter's new requirements. In these initial challenges, rights claimants were often successful. These early Charter decisions were presumably watched carefully both by lower-court judges and by government administrators, who then tried to adjust their own behaviour to conform to the Supreme Court's initial interpretations of the Charter. Subsequently, interest groups and other rights claimants sought to expand their initial gains by bringing 'second generation' rights claims, which sought to push the interpretation of the Charter towards even greater protection of rights. It is likely that the second- and third-generation issues brought to the Court typically asked either that the Court extend the protection of the Charter into new areas or that the Court give a more expansive reading of the rights guarantees than had been provided in earlier cases. As Justice J noted in an interview with the author, litigants (especially those supported by organized groups) tend to 'flex their muscles' after being encouraged by a previous pro-rights decision with the result that the 'Charter is pled in everything' that comes to the Court over the following few years. In such a scenario, it would be likely that the proportion of cases in which rights claimants were successful would be relatively modest even if the Court was steadily expanding rights (i.e., moving policy in a liberal direction) at the margins.

For example, in *R v. Brydges*⁹ a unanimous court ruled that the Charter required police to notify suspects of their right to retain counsel and that police must refrain from eliciting information from the detainee until he or she had had a reasonable opportunity to exercise that right. This was an easy win for rights claimants because the result seemed mandated in a fairly straightforward manner by the words of the Charter itself. Then, four years later, in *R v. Prosper*,¹⁰ the courts faced a more difficult 'second generation' question: Did the Charter require the government to provide free and immediate counsel to indigent detainees?

Here it was possible to make a reasoned argument in favour of the position advocated by the rights claimants, but a pro-claimant outcome was certainly not mandated in an unambiguous manner by the Charter's text (see Kelly 2005, 116).

Similarly, a recent analysis indicates that most of the statutes struck down before 1990 had been passed before the Charter's adoption. In the 1990s and the twenty-first century, however, most statutes challenged on Charter grounds have been passed *since* the Charter, and these statutes have undergone extensive Charter screening by Cabinet before passage (and thus the rights protected in these 1990s decisions have been more expansive than many of the rights in the decisions in the 1980s). The pre-1982 legislation 'was designed in a policy context that placed less emphasis on protected rights' (ibid., 144). Thus, though the percentage of pro-rights decisions made by the Supreme Court in the late 1990s and the early part of the twenty-first century is lower than the analogous percentage of decisions in the period immediately after the Charter, it is plausible that the Court may now be supporting an even more expansive interpretation of rights because the recent laws struck down have been the ones that have undergone extensive vetting by Cabinet to ensure that they protect Charter rights. This vetting process includes consideration of past Charter decisions by the appellate courts.

Table 6.9 also indicates that rights claimants have had different degrees of success litigating different provisions of the Charter. The lowest rates of success for rights claimants have come in cases raising a series of criminal procedure rights listed in Sections 11 and 12, which include a prohibition of unreasonable delay in being brought to trial, protection against self-incrimination, prohibition of unreasonable bail, and prohibitions against double jeopardy and cruel and unusual punishment. Rights claimants have also had low success rates litigating under Section 7, which is similar to the 'due process' clause of the U.S. Bill of Rights. Section 7 states: 'Everyone has a right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' The relatively broad and vague language of this section perhaps invites rights claimants to challenge a wide variety of well-established practices, with the low success rate indicating that these claims often ask the Court to depart from the status quo to a greater extent than the justices are willing to permit. Finally, given the nature of the criticism of Charter politics offered by critics such as Morton and Knopff, one might expect that claimants under the equality rights provisions of Section 15 would

have a high rate of success. Instead, table 6.9 indicates that claims of denial of equal rights succeeded less than one-third of the time.

Conclusions

While the proportion of the Supreme Court's docket devoted to criminal appeals and civil liberties claims has increased substantially over the past third of a century, the success of criminal defendants and rights claimants remains relatively low. Yet there appears to be little support for Epp's controversial claim that bills of rights do not have any appreciable impact on the policy outcomes of high courts. Since the Charter, in percentage terms, there has been a substantial increase in constitutional challenges – an increase driven by rights claims. Moreover, while the overall success rate of rights claimants remains below 50 per cent, that rate has increased substantially since the Charter. It may also be inferred that changes in policy brought about by litigation under the Charter have been quite substantial in the aggregate if one focuses not on the percentage of successful appeals but rather on the number of changes in the status quo that have been brought about both directly and indirectly by the Charter of Rights.

7 Decision-Making Models of Individual Voting

The previous chapter focused on the patterns of decisions by the Supreme Court as a whole and on how the patterns of decisions changed over time. In this chapter the focus shifts from that aggregate level of analysis to the level of individual justices. The particular concern is to explain differences among the justices that may reflect differences in backgrounds and experiences. Thus, instead of examining all decisions as in chapter 6, the following analysis limits itself to the decisions of the justices in non-unanimous decisions. To understand the patterns of decisions that will be explored, it may first be helpful to think about *why* justices make the decisions they do. What factors influence their decisions? This question has been the central interest of social scientists who have studied the courts for most of the past half century. This chapter begins by exploring the most prominent theories of judicial decision making suggested by legal scholars. After that, evidence in support of those theories in Canada and in other appellate courts will be assessed. Following this overview of previous studies, the chapter will begin analysing the actual patterns of votes on the Supreme Court of Canada.

Explanations of Judicial Decision Making

In most traditional accounts of courts, judges are viewed as skilled scholars who apply well-settled legal rules to settle concrete disputes. This way of thinking about courts and judges has been described by scholars as the 'legal model' of judicial decision making. However, one of the central concerns of both social scientists and journalists is the role of politics in those decisions. Scholars are concerned both with the