# Morton/Knopff’s *Charter Revolution* (and Miriam Smith’s critique)

**Morton & Knopff. *The Charter Revolution and the Court Party*. 2000**

**Miriam Smith “Ghosts of the JCPC” *CJPS* 35:1, 2002.**

**Morton & Knopff “Ghosts and Straw Men” *CJPS* 35:1, 2002.**

**Miriam Smith “Partisanship as Political Science” *CJPS* 35:1, 2002.**

**Robin Elliot “A Legal Critique” in *Insiders and Outsiders,* 2005.**

***Theses and Summaries:***

Morton and Knopff’s *The Charter Revolution and the Court Party* combines an empirical account of the “Charter revolution” in Canada with a normative critique of that revolution. On the normative side, Morton and Knopff are generally seen as right-wing; they are largely critical of feminists, gay rights advocates, and so on. It is perhaps more precise to say that Morton and Knopff are normatively conservative, in the sense that they prefer parliamentary supremacy, persuasion, and democratic debate to constitutional (or, in their minds, court) supremacy, rights talk, and the win-lose debates of the courtroom.

The more important and interesting aspect of Morton and Knopff’s argument is the empirical story they tell about the Charter revolution in Canada. Their central claim is that institutions are important but must be understood in light of the constituencies which benefit from those institutions; the Charter, for example, is supported by a “Court Party” (comprised of judges, academics, and a variety of groups who benefit from legal rather than legislative activism). The “Court Party” would have been important in Canadian life even in the absence of the Charter, but the Charter has given that party an institutional point of entry into Canadian policy-making, leading to a strength and prominence which it would not have gained otherwise.

If the Charter is a means through which the Court Party gains power, rather than the cause of the Court Party, how did the Court Party arise in the first place? Here Morton and Knopff turn to three kinds of explanation. First, they draw from Inglehart and Lipset, arguing that the Court Party is a reflection of the values of postmaterialist elites. Second, they draw (implicitly) on neo-institutionalism, arguing that the Canadian state fostered the Court Party through a variety of incentives (including multiculturalism policy, women’s commissions, and so on). Finally, they suggest that postmodern political thought has led to an emphasis on identity and knowledge-power which is in keeping with the general goals of the Court Party.

In her critique of Morton and Knopff’s book, Miriam Smith outlines what she sees as the five most serious mistakes of the book, all of which are listed under “detailed notes” below. The general thrust of her critique is twofold: (1) Morton and Knopff confuse normative criticism with empirical analysis, leading to a muddy version of both, and (2) Morton and Knopff rely on an outdated empirical framework – pluralism – when they should be drawing on the more sophisticated approaches of those (led by Tarrow) who study social movements. Smith’s second critique is more powerful than the first – Morton and Knopff would certainly have done well to more clearly identify the empirical arguments they are making in the book – though I would say that methodological confusion, rather than a rigid commitment to pluralism, is to blame for Morton and Knopff’s empirical weaknesses.

In their response to Smith, Morton and Knopff implicitly grant at least one of her criticisms (that they do not adequately prove that Charter groups are winning in court when they would otherwise be losing in the legislature), but they insist that Smith agrees with the two central claims of the book: that there has been a Charter revolution, and that the revolution can be explained only in terms of a supporting constituency. If nothing else, this article is a helpful quick summary of the overall theses contained in the book.

Smith closes out the debate with a brief rejoinder, in which she repeats her accusation about M&K’s lack of solid and original empirical research (she’s on firm ground here) as well as her argument that M&K ought to separate their normative concerns from those of the social scientist (M&K don’t do a stellar job of blending normative and empirical concerns in their book, but Smith’s critique here is very clearly self-contradictory). Smith then clarifies the (very limited) extent of her agreement with M&K: although everyone agrees that the Charter revolution is supported by a constituency, Smith examines this constituency using the rigorous analytical tools supplied by sociology and political economy.

In her more recent response to Morton and Knopff, Robin Elliot presents a thoroughgoing legal critique of the second chapter of *The Charter Revolution*. Elliot suggests that M&K’s argument is based on a flawed understanding of constitutional interpretation (and she presents a good critique of the “originalist” or “traditionalist” school to which, she claims, M&K belong). She also argues that the major factual claims of the chapter (concerning standing and mootness, intervenor status, and issue-stretching) are in many cases wrong or inaccurate. Elliot does not deny that some of the SCC’s decisions have been mistaken and/or self-contradictory, but she argues that M&K’s book is severely distorted by flawed legal understanding, inadequate research, and over-commitment to what she calls a “neoconservative political agenda”.

***Methodology and Theoretical Perspective***

In general, Morton and Knopff seek to downplay the role of the Charter as an institution which *creates* “Charter Canadians” and seek instead to understand institutional success or power in terms of the constituencies which support those institutions. To explain the rise of the Court party in the first place, Morton and Knopff draw on institutionalism, political economy, political theory, and the history of ideas. For Morton and Knopff, one must use an approach in which the causal arrow moves in both directions, from state institutions to society and from society to state institutions.

Smith argues that Morton and Knopff employ an unsophisticated empirical theory to explain their results and defends social movement theory (as it derives from sociology and political economy) as an appropriate alternative. She also claims that Morton and Knopff fail to distinguish between normative and empirical analysis as the social scientist ought to (focusing, of course, only on empirical analysis).

***Comparison with Other Readings and Contribution to the Literature***

The common tale here is to say that Morton and Knopff offer the standard right-wing critique of the Charter, the “Court Party”, and the rise of judicial power (and the standard left-wing critique is supplied by Mandel). For a centrist critique of both positions, see Ian Greene’s book for the Democratic Audit Series and Janet Hiebert’s *Charter Conflicts*.

What Morton and Knopff contribute to the literature (in addition to being the conservative standard-bearers in the debate about judicial activism) is a focus on the relationship between the Charter and “Charter Canadians”. They help us to understand that the causal arrow points in both directions: without the Charter, Charter Canadians would not have gained prominence, but without the pre-existence of the Charter Canadians, the so-called Charter revolution would never have occurred.

***Relevant Exam Questions***

These readings will be relevant for any questions about the relationships among the Charter, the judiciary, “Charter Canadians”, and the legislative/executive branches of government. It will also be relevant for questions about identity politics.

***Detailed Notes:***

*Preface*

9 How did an institution – the Supreme Court – which played a secondary role in Canada suddenly become so important? Most attribute it to the Charter, which is true but overly legalistic, since it’s not parchment that creates revolutions: leaders, elite cadres, and their supporters do

Judges themselves are the most prominent leaders of the revolution; they are promoted and supported by a coalition of interests that straddle the state-society divide

*Chapter One: Introduction*

13 Since the 1980s and 1990s, a regime of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy; judges have abandoned deference and many interest groups have turned to the courts; judicial arguments are increasingly shaping discourse and policy formation

15 A key change has been the shift from negative to positive remedies: whereas the court once declared laws invalid or unconstitutional, they now tell policymakers what they must spend money on: the courts have become more **activist** (opposing other branches) and more **innovative** in their interpretations

18-20 One approach is to explain judicial activism in terms of other factors, either the language of the Charter itself (à la Lorraine Weinrib) or the unwillingness of the legislature to make decisions (à la Justice McLachlin); the other approach is to deny activism, but this claim falls apart upon examination (especially in area of criminal law)

21 At the heart of the Charter revolution is “extensive recourse to the courtroom as a policymaking arena, not necessarily the particular outcomes of litigation” – policymaking is judicialized and legalized and conducted in the vernacular of rights talk: “therein lies the Charter revolution”

21-24 **The role of judges:** The Charter is not so much the cause as the means through which the Charter revolution is carried out; a revolution can’t occur without leaders and the support of interested classes (evidence: Declaration of Independence didn’t cause the American Revolution); in fact, judges are more important in explaining the revolution than is the Charter itself; one might have expected things to remain the same after the Charter, but a new generation of lawyers had entered the profession; the judges maintain that the activism is required by the Charter itself; the key point is that an explicit Bill is not necessary for activism, nor does a Bill automatically lead to activism

24-32 **The Court Party**: Judges are not alone; they too are being pushed by the constituency, the court party; the infrastructure is a necessary precondition of the surge in judicial power since the adoption of the Charter; these “Charter Canadians” (who emerged in the Charter debates or sprang up after them) seek to “constitutionalize policy preferences that could not easily be achieved through the legislative process”

- Examples: Canadian Civil Liberties Association (CCLA); Women’s Legal Education and Action Fund (LEAF), EGALE, etc. – these groups generally don’t care about the particular case; they care about the policy consequences

Institutions are not neutral arenas for policy battles: different institutions privilege different types of resources which are not equally distributed; the courts help those with legal resources but less electoral clout; partisans will gravitate to institutions most open to their policy preferences

The current debate about judicial power is a reprise of the similar debate in the 1930s with the partisan positions reversed; today the political interests are national unity advocates, civil libertarians, equality-seekers, social engineers, and postmaterialists

Ideas drive the Charter because in postmaterialist societies, knowledge is power

*Chapter Two: Judges and the Charter Revolution*

33-34 Judges often present themselves (e.g. *Vriend*) as “trustees” of the Charter, but in fact the level of disagreement on Charter cases indicates that this is a legal fiction; the Charter is largely indeterminate about the questions that arise under it; the Supreme Court has transformed itself from an adjudicator of disputes into a “constitutional oracle”

34-53 Three main ways judges deny the claim that the Charter revolution is caused by judicial discretion, all of which turn out to be false:

1. The Charter gives effect to certain core values which judges cannot transform: the fact is that the core values were established long before the Charter (and the core values don’t arise as issues precisely *because* they are core values); what judges have to deal with are the peripheral meanings of Charter rights; precisely where dissensus prevails is where the judicial discretion emerges (and in fact judges have little power when core values are actually threatened)
2. Some parts of the Charter revolution are clearly required by the text: in some cases, the Charter does have implications (such as the exclusionary rule); outside these examples, the Charter revolution is more judicial than legal (e.g. no right to remain silent); the exclusionary rule is the most egregious example here’
3. Where the text is unclear, judges are guided by tradition and original intent: no, the judges reject traditionalist understandings; e.g. in the 1990 *Sparrow* decision, judges essentially removed the explicit limitation of aboriginal rights to “existing” treaties; in 1995 *Egan* ruling, sexual orientation is inserted (despite explicit rejections of this by Trudeau and others when the Charter was created); furthermore in *BC Motor Vehicle Reference*, Justice Lamer explicitly rejected original intent, calling the Charter a “living tree”

54-57 **Judicial oracularism**; the traditional understanding was that courts were dispute adjudicators; the dispute came first, and the constitutional issue second (which meant that the court might never address some constitutional issues); SCC has abandoned this view; the constitutional policy comes first; removed standing (requiring existence of real-world legal dispute) and mootness (requiring that legal dispute be a “live” dispute)

57-58 Charter provides the occasion for judicial policymaking, but the document itself is not the most important explanation; Judges have decided to treat the charter as granting them open-ended policymaking discretion; changed rules of evidence, mootness, standing, etc; SCC now functions more like a third chamber of the legislature than a court; SC justices have more power than all non-cabinet parliamentarians

*Chapter Three: The Court Party*

59 Judges are important, but an even more significant cause is the Court Party; these movements would have grown even without the Charter, but not so far so fast, because the Charter gave them a new venue to pursue their agendas; but without the Court Party, the Charter would never have gained its prominence (the underdevelopment of the Court Party explains the stuntedness of Diefenbaker’s Bill of Rights)

59-80 Five main strands of the Court Party coalition:

1. Unifiers: see the Charter as the solution to Canada’s national unity crisis (Trudeau is in fact the best example here. It’s a counterweight to regionalism and provincialism, lead citizens to define themselves in terms of rights; Canadians are just as divided about Charter issues as regional ones, but these divisions cut across regions and are a counterweight to regionalism; regional critics have always complained that the Supreme Court is a kind of “disallowance in disguise”
2. Civil libertarians: in an earlier era, libertarians focused on economic liberty; today they’re concerned with freedom of religion, expression, etc. Canadian Civil Liberties Association (CCLA) is the best example, second only to LEAF in interventions before the Supreme Court of Canada
3. Equality seekers: left-leaning egalitarians concerned with social equality and identity: feminists, gay rights activists, environmentalists, etc. LEAF is the model here, though there are others; they aim to conflate state and society, though the SCC has been resistant to this move, restricting the Charter to governments;
4. Social engineers; not a physically identifiable group or organization; informs most of the groups above; take the view that social evils are caused by defective institutions; can lead to populism (when corruption is seen as only effecting the elite) or democratic elitism (when the people are corrupted and must be educated by a vanguard elite); most social engineers today opt for the latter
5. Postmaterialists: the modern court party is rooted in the postmaterialist class; with higher education, more wealth, etc. concerns shift to quality of life issues; postmaterialist concerns are more prevalent outside the working classes; thus these people are attracted to the nonmajoritarian power of the courts; to the extent that they can move their policy agenda into the courts, they can avoid the tensions of postmaterialism in electoral policits

80-84 The elitism of the court party: those who are supposed to be helped by the Court Party must first be led away from their false consciousness; the power of the knowledge elite is best articulated through an institution that emphasizes elite rationality: the judiciary

84-85 Note that corporate litigants can’t be included int eh Court Party – most corporate involvement is reactive and defensive and not aimed at the government; the court party has breathed life into the Charter, making its oracle, the judiciary, a powerful new player in Canadian politics

*Chapter Four: The State Connection*

87-89 As many people (including Cairns) have pointed out, the state plays a key role in developing and fostering social groups; language groups did not arise until *after* the passage of the Official Languages Act; multicultural associations began *after* the announcement of multiculturalism in 1971; these did not have grassroots support

90 Other examples: creation of the NAC on the status of women in 1971 (with funding for Status of Women Councils in 1974); public funding for National Indian Brotherhood

92-95 Secretary of State Funding: SOS funding is important for “Charter groups”; feminist, multicultural, and official language minority groups depend on government grants for 50 to 80 percent of their budgets; nearly all Charter interveners receive SOS funding

95-99 Court Challenges Program: funding OLMGs (anglophones in Quebec, francophones outside Quebec); the CCP then funded groups that shared the equality-seeking goals of the left, and has become a key funder for LEAF which is the leading recipient of CCP intervener funding

99-100 Funding for Aboriginal Rights litigation: one-time grant of $3 million to pay for legal costs from Bill C-31; also the test case funding program

100 Academic research funding: SSHRC grants and others

101-2 Legal aid: provincial programs to all who qualify; not specifically for the Charter, but since 75% of Charter cases involve criminal prosecutions, so still important

102-4 Provincial Law Foundations: some of these (especially BC) have been generous to court party interests, funding LEAF, environmentalists, and so on

104-5 Without the funding offered by the state, the Court Party groups could not operate at their current levels of influence; it provides office space, staff, research dollars, and so on; the Charter launched a new era of judicial power, but it was the culmination of a decade of state building (thanks to Trudeau’s SOS citizenship policies)

*Chapter Five: The Jurocracy*

107 Court Party enjoys what is called “positional support” – access to information and decision-makers and even a formal or quasi-formal role in decision making

108-13 Courts: Judges are obviously the most important, and are very privileged, but we shouldn’t ignore the role of clerks, many of whom have a great influence on the judges (some nice gossip here about Joel Bakan writing the *Oakes* test); the clerks provide a conduit to the leading law schools

114-16 Administrative tribunals: these can also have an important limiting effect on legislatures

117-23 Government legal departments: sometimes crown counsels are too ready to admit that a right has been violated; sometimes they choose not to appeal

128 Conclusion: Court Party enjoys significant positional support at both levels of government; the Court Party is not only heavily funded by the state, but is to a large extent *part* of the state through a set of alliances and policy networks that connect its interests to various state bureaucracies

*Chapter Six: Power Knowledge: The Supreme Court as the Vanguard of the Intelligentsia*

129-33 Begins with a description of the rise of law schools in Canada, and the more recent ascendance of postmodern theory and critical legal studies; all of which, they claim, is very much in tune with the Court Party. Canadian academic institutions also support the Court Party in a variety of other ways:

1. Administrative support: host a variety of Court Party organizations such as the Human Rights Research Centre at the University of Ottawa, *Canadian Journal of Women and the Law*, and Charter litigation projects within some schools.
2. Rights experts: Begins with Russell’s claim that a generation of lawyers were exposed to the idea that Canada’s restrained treatment was inferior to the USA; law schools now produce a steady stream of rights experts, uses Walter Tarnopolsky as an example of the “symbiotic relationship” between Court Party and academy
3. Advocacy scholarship: scholarly commentary is extremely prominent now that the Supreme Court makes extensive use of academic material (includes a lengthy critique of the logic behind battered women’s syndrome)

147 Intellectuals based at universities are at the heart of the postmaterialist left; they now pursue their agendas through the courts, and through active participation in law schools and universities

*Chapter Seven: What’s Wrong with the Charter Revolution and the Court Party?*

149 The primary objection to the Court Party: deeply undemocratic, eroding the habits and temperament of representative democracy

155 The real effect of the Court Party project is not to protect rights but to encourage rights claiming and to encourage the judicial creation of new rights; this change unduly lowers the “threshold at which citizens feel justified in abandoning the democratic process, be it through civil disobedience, appeal to the courts, or (in the extreme case) revolt and secession”

166 “To transfer the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise policies with the intensely held policy preferences of minorities…as the morality of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion. The result is to embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens – that is, as members of a sovereign people.”

*Miriam Smith: Ghosts of the Judicial Committee of the Privy Council*

5-6 Morton and Knopff’s examination of the courts is “mired in a series of fundamental problems” – it is dominated by normative questions, its empirical claims lack systematic evidence, and its theoretical approach is pluralist; the pluralist approach ignores the more complex issues related to group politics in Canada

8-17 Morton and Knopff make five main contentions, each of which is flawed:

1. Groups have obtained victories from the courts with the Charter that they would not have achieved through the regular parliamentary channels; there are all kinds of difficulties with this claim, not the least of which is identifying the actual goals of the groups and imagining the policy process in the absence of the Charter; Morton/Knopff are not clear enough even about what they mean when they say that a group has achieved a victory
2. Litigating groups represent minorities (points of view or groups); but in fact Charter groups are broadly supported by most Canadians
3. Claim that their approach is a form of institutionalist analysis because they emphasize the role of institutions in privileging some claims while weakening others; but they leave key empirical questions out (which groups have more “electoral clout” and why? etc.); plus, their approach is pluralist and ignore the fact that many groups which are “privileged” in the courts are far from privileged in ordinary life; they ignore structured social relationships of Canadian society
4. Legislature is a centre of democracy and courts are elitist institutions; this is simply untrue, given party discipline, centralized political leadership, and so on; look at Savoie’s work on the “court party” in Canadian politics
5. Charter’s influence reflects a postmaterialist value change, engineered by Charter-obsessed intellectuals; this is contradictory. Sometimes they claim that society is becoming increasingly postmaterialist (and Charter simply reflectsi this); sometimes they say that the postmaterialist approach is in the minority in order to show that Charter decisions are illegitimate.

17-21 Morton and Knopff should have looked at Mallory, who showed that the JCPC followed Canadian society, though lagged behind at times; the courts, according to Mallory, are slow to adapt to social change; Cairns follows up on this by arguing that the decisions fairly reflected the society at the time; Simeon and Robinson follow in these footsteps; even excluding Quebec, the ROC was not united behind a centralist social-democratic approach (particularly in the West); the moral of the story is that court decisions must be placed within a broader sociological context

21 What are the implications for the charter debate? we need to ground our understanding in patterns of power relationships in society:

1. Structure-based analysis: to what extent are Charter decisions driving social change or reflecting it? The sociological argument suggests that courts will not defend unpopular minorities over the long run; they’ll follow the mores of the society
2. Agent-based analysis: A complementary approach which explores the role of organized interests in litigation; don’t assume that the goal is to influence public policy; instead, try to figure out what the litigation means to the social movement; understand the movements in more complex terms, and why groups are acting in seemingly irrational ways; groups may consistently win in court but lose when the court decisions are not enforced by other branches of government

28-29 Charter critics are wrong to focus on the Charter; important dimensions of litigation are simply ignored in Morton/Knopff (and in the normative debate in which they’re engaged); we’re still dominated by the same old debate about the legitimacy of the Charter’s entrenchment, and “it’s time to move on”.

*Morton and Knopff: Ghosts and Straw Men (Reply to Smith)*

31-32 Smith does not challenge the two central claims of the book: (1) there has been a Charter revolution, and (2) this revolution can be explained only in terms of a supporting constituency; she accepts these claims

33 M&K do not believe that all is right with Canada’s institutions, nor that Canadian parliament is functioning particularly well, but they deny that judicial power is the best cure for the ills

33-34 A clarification of the society-institutions debate: reject both legal and sociological determinism and argue for a more subtle interaction; in fact, Smith takes a more uni-directional approach, arguing that society affects courts, and that’s it – the question is why the languor of Parliament isn’t just as praiseworthy as the relative languor of the courts during the JCPC era

37-38 The legitimacy of policy flux is built into parliamentary institutions; rulings on the constitution often imply the permanent victory of one side: this is at the heart of the objection to judicial power – not the view that some victories are won in court that would not be won in the legislature

38-39 The central claim of the book is *not* that the Charter revolution is driven by law but rather by societal influences, especially interest groups and social movements; the interest of the book is not how judicial power has benefited the Court Party, it’s with how the Court Party has sustained judicial power; concerned “to chronicle those parts of the social landscape that come together in a systematic defense of judicial power”

*Miriam Smith: Partisanship as Political Science*

43-44 Once again, Morton and Knopff return to a tired debate and reveal that they are primarily concerned with normative – rather than empirical – questions.

44-45 As for their claim that they conducted serious empirical research, it’s just false: they rely on secondary scholarship and limited uses of new and interesting data (most empirical research derives from the work of Leslie Pal and Ian Brodie)

46-47 Although everyone agrees that there’s a supporting constituency, her understanding is rooted in political economy and sociology; their Court Party is cut off from society and political economy

48 The real debate here concerns facts and values, and the proper conduct of the political scientists – Canadian political science must become true social science, and take its place within comparative politics

*Robin Elliott: Morton and Knopff’s* The Charter Revolution*: A Legal Critique*

117-18 M&K’s argument can be distilled into two claims, one descriptive and one normative:

1. The descriptive claim: The SCC, aided by a coalition of social movements called the court party, has taken advantage of the discretionary nature of judicial review to convert the courtroom into a policy-making arena which is like a *de facto* third chamber of the legislature
2. The normative claim: the Charter revolution is deeply undemocratic, not only anti-majoritarian but also eroding the habits and temperaments of representative democracy

Elliot will focus her critique on the descriptive claim that the SCC played a role in fashioning the Charter Revolution, the argument for which is laid out in the chapter “Judges and the Charter Revolution”

118-23 The core argument here is that the policy-making role of the SCC is less a function of the Charter itself than of the choices made by the judges (though M&K also seem to think that the choices that have led the courts here were wrongly made)

It’s perfectly clear that the Charter leaves judges with considerable discretion, and no one would dispute this claim; it’s perfectly true that the judges have been inconsistent in their interpretation of the Charter, not only on the matter of original intent but on other features as well; the problem is that the theory of interpretation upon which M&K’s argument rests is flawed; first, though, two specific criticisms:

1. M&K argue that judges used to consider original intent; in fact, common law courts strenuously resisted lawyers’ attempts to get them to study the legislative history of ambiguous texts; this has only become more common in the last couple decades; by ignoring legislative history and intent, they would be true to past practice
2. The living tree metaphor, first used in the *Persons* case; the JCPC invoked the living tree to allow women appointment to the senate; M&K’s argument, that the living tree metaphor was supposed to liberate legislatures from courts, is dead wrong

What is the underlying theory in M&K? It holds (a) that courts should be governed first by the text of the Charter and (b) that if the text is unclear, it should be interpreted in accordance with the intentions of those who drafted it or, if that too is unclear, in accordance with “traditional understanding”

The problems with this theory: (a) basically never happens; the Charter is almost never self-evidently obvious or clear and (b) original intent is terribly difficult, not only because different framers have different intents and the constitution is about deep agreements not settling disagreements; and it may well be that the framers *intended* for the courts to interpret the document (which is called “general intent” – and is quite plausible as an interpretation of the Charter)

123-28 The other key claim is that the courts deliberately modified rules of standing and mootness, intervener status in order to enhance its authority as a constitutional oracle; but standing and mootness have not been eliminated (the SCC has denied standing in two of four cases)

1. Standing: What M&K should have said is that standing is a less significant barrier today; but this change occurred in the decade *preceding* the Charter
2. Mootness: the same: the SCC considered technically moot issues before the advent fo the Charter; furthermore, M&K’s evidence hardly proves that mootness is dead
3. Intervenor status: Yes, the Court is much more willing to allow intervenors, but the question is why that happened. There was significant debate about the rules in the early years of the Charter; ultimately the policy changed because the Court decided that it was more likely to make informed decisions if it heard from a broader range of perspectives when making their decisions (especially in very difficult early years)
4. Willingness to consider unrelated issues: their interpretation of the relevant cases (*R v. Big M. Drug Mart*, *Andrews v. Law Society of British Columbia*, *R. v. Smith*) is simply mistaken; the oracularism component is the weakest part of the book