# Greene, Ian. *The Courts*. Vancouver: UBC Press, 2006.

***Thesis and Summary:***

Ian Greene’s book attempts to evaluate the courts along the lines of three democratic “benchmarks” (the standard benchmarks of the Canadian Democratic Audit Series). His story is one of progress: although the courts originated in pre-democratic times, they are slowly becoming more democratic. Democracy for Greene is an ideal to which we must aspire (and which we will never fully achieve), and although the Canadian court system is far from perfect (Aboriginals, for example, are seriously underrepresented in the legal profession), it has consistently improved throughout Canada’s history.

Greene clearly wishes to discuss more than the classic “judicial activism” debate, though he does address that debate directly in his fifth chapter. He claims that the courts simply cannot avoid some amount of “law-making” or “activism”, and supports his claim with six brief arguments of varying quality (see notes on pp.147-9 below). Generally, though, it is clear that Greene sees recent court decisions on same-sex issues, gender equality, etc. as a good thing.

Against those (on the right and the left) who criticize the courts for post-Charter activism, Greene argues that the Canadian legislature has been all too willing to avoid difficult decisions. If the Canadian Parliament was performing its democratic function more adequately, he suggests, judges would feel less compelled to take up a “policy-making” role.

***Methodology and Theoretical Perspective***

Greene’s arguments are based on a careful and thorough reading of the secondary literature as well as over one hundred interviews with Canadian judges (the interviews were conducted for earlier research, but Greene draws on them in the book).

Theoretically, Greene is less interested in examining the courts within the framework of the judicial activism debate; he is more interested in examining the democratic performance of the courts (and the professions which relate so closely to the courts: lawyers, judges, etc.) as *institutions*: how inclusive are courtrooms? how many judges are women? etc.

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

Greene deliberately attempts to navigate between the extremes of Mandel (on the left) and Morton/Knopff (on the right), claiming that both have to some extent “missed the point”. His argument is that courts are primarily dispute-resolvers but cannot avoid “law-making”; given this assumption, the question is the democratic performance of the courts in both functions.

Greene is an admirer of Peter Russell’s scholarship and cites virtually all of the major “names” within Canadian legal scholarship approvingly.

Greene’s contribution to the literature is threefold: (1) He has attempted to provide a basic and accessible account of the relationship between the Canadian courts (understood broadly) and the development and health of Canadian democracy; (2) he has argued that the “judical activism” debate is only one means for examining the democratic performance of the courts, and it is a highly limited means at that; and (3) he has claimed that judges simply cannot avoid “law-making” functions, particularly when Canadian legislatures today are so hesitant to pronounce on difficult and controversial policy issues.

***Relevant Exam Questions***

This book will be relevant for exam questions about the democratic deficit, the development of “Charter Canadians”, the relationship between Parliament and the Courts, and the impact of the Charter on Parliament.

***Detailed Notes:***

*Introduction*

xi Democracy requires an independent judiciary (*a basic assumption of the work*); democracy requires a judiciary which is *not* accountable so that it can settle disputes about laws enacted by elected legislatures

xvi The focus of the work is not judicial activism, which is less important than the question of “the extent to which the courts and those who populate them – including the judges but not forgetting court staff, lawyers, prosecutors, litigants, and witnesses – reflect three key indicators of democracy: participation, inclusiveness, and responsiveness”.

*Chapter One: Canada’s Courts in Context*

3-7 Courts in historical context: Canada has inherited both of the great European legal

traditions (common law and civil law); Canada has also inherited the structure and judicial recruitment process of the English court system; Because a law-clarification function can’t be avoided, the courts inevitably take on a “law-making” or “policy-making” role

7-12 Canadian court system: An overview of the Canadian court system, including areas of

jurisdiction, the basically unitary nature of the court system, the distinction between indictable, hybrid, and summary conviction offenses

12-16 Impartiality, appointment, and education: judicial appointments largely based on

patronage until 1967 when Trudeau (as Justice Min.) sets up review by Canadian Bar Assoc. Gradually committee appointment systems have emerged (though none exists for Supreme Court choices or promotions to provincial appellate courts)

16-17 Courts’ primary role is to resolve conflicts; secondary roles include checking the other

branches of government, filling in gaps in legislation

*Chapter Two: Public Participation in the Justice System*

20-27 Public participation in judicial selection: originally no participation; now many

provinces provide for lay participation in selection and/or screening of appointments; same with federal appointments (though there’s more room for patronage left at the Federal level); explores some possibilities for participation in Supreme Court appointments; laments lack of public participation and excessive deference to lawyers

27-29 Citizen monitoring and the “open court”: most courts are open, but as a tool for

accountability this is limited; few courts are really scrutinized by the public (or even by the media)

29-32 Participation in court administration: few laypeople involve themselves in court

administration (most don’t even know who’s responsible for the courts); but legal associations are involved and their opinions are taken seriously; some arguments have been made for administration by judges themselves (with citizen advisory committees) but judges still mostly regarded as practicing a “private professional craft” rather than a public service

32-38 Participation in court proceedings: The jury system should be reformed so as to actually

allow for representative participation or it should be abolished

38-39 Public input into adjudication has become easier because (1) the rules of standing have

been broadened since the 1970s and (2) intervenors are more frequently allowed; these are often prov. or fed. governments or public interest groups (CCLA, LEAF, NCC, etc.)

39 The problem with intervenors as enhancing democracy is that it’s hard to obtain

intervenor status (knowledge, money, etc.) and they often represent a narrow area of specialized interests (cites Morton and Knopff here); studies show that the majority of intervenors are corporate interests (more than half) and “Charter Canadians”

41-46 Expert witnesses; often “hired guns” for the litigant. *Ford v. Quebec 1988* in which

social science was critical of public opinion that ban was needed and social science won; *R v. Askov (1990)* shows the power of social science evidence (and the inability of judges to easily understand social science research)

*Chapter Three: Inclusiveness*

51-52 Judges can’t be expected to be representative (demographically speaking) of the entire population, since they’ll be older and richer than the average simply by virtue of their careers. But they should be as representative as possible.

55-58 Women are underrepresented among lawyers but overrepresented in the legal field

(they’re often paralegals and secretaries); Aboriginal peoples are seriously underrepresented; visible minorities are underrepresented, often indicating difficulties for new immigrants to get into law school

62-65 Among judges, women are underrepresented, as are Aboriginals and minorities

74 The courts are gradually becoming more representative of the population; if present

trends continue, they will be by around 2025; the only concern is that the court will continue to be dominated by “high achievers” (who typically come from wealthier backgrounds); more lay participation is needed

*Chapter Four: Responsiveness to Expectations*

76 In order to be responsive to the public, the most important thing is for judges to be

independent of outside influence

93 There is some debate about whether judges should take greater responsibility for

administration; there have been some innovative recommendations

93-103 Discussion of judicial discipline including provincial and federal examples; Canadian

Judicial Council (and provincial versions) discipline judicial misbehaviour

106 Still need more public participation in judicial discipline, though they’ve come a long

way; there are serious backlogs in courts which indicates changes are needed in administration (recommends that the courts have greater role in administration)

*Chapter Five: Responsiveness to Canadian Democracy*

109 The debate today is wide-ranging; critics on the left (such as Michael Mandel) say that

the court is making the rich richer and the disadvantaged worse off; critics on the right (such as Morton/Knopff) say that Charter litigation has been “captured” by left-leaning interests. Greene’s view: in a sense, both perspectives are correct, but in another sense, both miss the point

111-46 Lists a large number of court cases along with basic descriptions of the cases; the goal is

to allow the reader to make up his or her mind about whether the courts have encouraged democracy and adequately represented the Canadian public: general conclusions on each topic: (1) Inclusiveness: courts have been stricter about inclusion than legislatures; legislatures have dragged their feet on provisions for birth fathers, deaf people, prisoners, etc.

147-49 Have the courts gone too far? There are a number of weaknesses with the argument that

the courts have been too activist in dealing with policy issues: (1) If the courts interpret the Charter conservatively, future policy changes will become more difficult; (2) Courts cannot easily refuse to decide on issues that come before them, and Canadian rules of justiciability are broad; (3) Canadian debate leading up to the establishment of the Charter generally favoured an activist role of the judiciary; (4) the legislature seems quite content to let the judges decide on some issues; (5) various groups have chosen to take certain issues to the court rather than the legislature; (6) the court has generally shown itself to be open to reasoned argument

149 Concludes by saying that it’s disturbing that more citizens would want issues to be

decided by the courts rather than elected legislatures; judges would welcome more involvement from the legislatures and many judges are activist because legislatures are reticent to tackle difficult rights issues

*Chapter Six: The Courts and Democracy*

155 An important summary of the basic approach of the book: “Interesting though the

judicial activism debate is, let’s not forget the primary purpose of courts: to resolve legal disputes according to law, fairly, impartially, and expeditiously.

155-7 Conclusions on participation: although progress has been made, public involvement in

judicial selection and court administration is more limited than it ought to be

157-60 Conclusions on inclusiveness: most Canadian law schools are trying to recruit women,

Aboriginals, and the disadvantaged; they’re underrepresented but situation is improving

160-2 Conclusions on institutional responsiveness: Canadians expect impartiality and

responsiveness; delay continues to be a problem, though procedures for selecting judges and disciplining judges have improved (more work needs to be done on promotions)

162-3 Conclusions on decision-making responsiveness: Charter has led to greater inclusion of

visible minorities, mentally and physically handicapped, gays and lesbians, and Aboriginal Canadians