Between Activism and Restraint: Institutional Legitimacy, Strategic Decision Making and the Supreme Court of Canada

by

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ABSTRACT:

Over the last couple of decades or so, comparative public law scholars have been reporting a dramatic increase in the power and influence of judicial institutions worldwide. One obvious effect of this "judicialization of politics" is to highlight legitimacy concerns associated with the exercise of judicial power. Indeed, how do courts attain and retain their legitimacy particularly in the context of their increasing political relevance? To answer this question I develop a novel theory of *strategic legitimacy cultivation.* The theory is developed through an application of the institutionalist branch of the rational choice theory which suggests that institutional structures, rules, and imperatives provide behavioural incentives and disincentives for relevant actors who respond by acting strategically in order to attain favourable outcomes. The theory shows that courts cultivate legitimacy by exhibiting strategic sensitivities to factors operating in the external, political environment. In particular, legitimacy cultivation requires courts to devise decisions that are sensitive to the state of public opinion, that avoid overt clashes and entanglements with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence. The theory is tested in the context of the Supreme Court of Canada through a mixed-method research design that combines a quantitative analysis of a large number of cases, case-study approaches, and cross-policy comparisons. One of the central findings of the dissertation is that understanding judicial institutions and judicial policymaking influence requires taking close accounts of external contexts within which courts operate.

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For Vedrana and my parents

CONTENTS

LIST OF TABLES:

LIST OF FIGURES

PART I:
LEGITIMACY AND STRATEGIC JUDICIAL DECISION MAKING

CHAPTER 1:
INTRODUCTION

Research conducted for this dissertation is driven by two main questions. The first question springs from recent findings of the comparative literature on law and courts which suggest that judicial institutions worldwide are experiencing a growth in their power and influence. Comparative scholars report that we are witnessing a "Global Expansion of Judicial Power" (Tate and Vallinder, 1995), moving "Towards Juristocracy" (Hirschl, 2004), and living in an "Age of Judicial Power" (Malleson and Russell, 2006). One obvious consequence of this apparent growth in judicial influence is to highlight legitimacy concerns associated with the exercise of judicial power for it remains "ultimately unclear what makes courts" appropriate bodies for determining questions of a largely political nature (Hirschl, 2008: 99). This dissertation will therefore address the question of *how courts attain and retain their legitimacy* particularly in the context of their increasing political relevance? According to Gibson et al. (2003: 556), "[u]nderstanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions."

While this question applies to courts everywhere, it has particular relevance in the context of the Supreme Court of Canada. With the 1982 introduction of the Charter of Rights and Freedoms, the prominence of the Canadian Supreme Court has sharply grown. It is often asserted, in fact, that the Charter has had a profound effect on the Canadian body politic with some going as far as to claim that the country has weathered a "Charter revolution" (Morton and Knopff, 2000). The apparent judicialization of Canadian politics is evident by such things as the general growth of judicial power, the establishment of the courtroom as "a more pervasive and visible arena of politics," and the greater imposition of legal contestation on Canadian political life (Knopff and Morton, 1992). Others suggest the Charter has forced justices into a dialogical relationship with lawmakers (Hogg et al., 2007). Even chief justices of the Supreme Court sometimes do not mince words: "[T]he introduction of the Charter has been nothing less than a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser" (quoted from Hirschl, 2004: 18).

Yet, in spite of the fact that the Supreme Court has been thrust into the political limelight and has become a much more consequential political actor on the

national scene, the Court has also managed to effectively safeguard its institutional legitimacy. Successive surveys show that the Court enjoys a high degree of public support among Canadian citizens (Hausegger and Riddell 2004: 27-30), while majorities of Canadians continue to view the courts as highly reliable institutions that ought to have the final word when legislative outputs conflict with Charter provisions (Russell 1988: 398; Fletcher and Howe 2000: 12-13; Nanos 2007: 52). According to a poll released in 2001, for example, Canadians at the time "had greater respect for and confidence in the Supreme Court than they did in almost all other Canadian institutions, including churches, newspapers, banks, large corporations, the federal government, the House of Commons and provincial governments" (Sauvageau et al. 2006: 26-7). It appears that in spite of its increased entanglement with politics, the Court is succeeding where traditional political actors over the past few decades have consistently failed, namely, in safeguarding its public support.

That the Supreme Court has been successful in maintaining its legitimacy in the wake of the Charter is intriguing. It is intriguing in view of its emergence as an important policymaking institution, in view of the amount of scrutiny and criticism the Court has amassed, and in view of the overall judicialization of politics and politicization of judiciary that is reported to have occurred since the Charter was introduced. As Hirschl suggests (2004: 73-4), the excursion of judicial authority into the political arena via constitutionalization of individual rights and freedoms is expected to seriously challenge the capacities of judicial actors to preserve their public support and their reputation as neutral arbiters of legal disputes. Yet, given that "[i]n Canada, as in other liberal democracies, it is the elected politicians, not the judges, who are experiencing a legitimacy crisis" (Russell, 1994b: 172), it appears that Canadian judges are generally succeeding to maintain their public support even as they have assumed greater powers and have become much more consequential political actors.

The question of how courts promote legitimacy attains even further significance in light of the fact that recent decades have seen the notion of a "living constitution," or constitution as a "living tree," become the dominant method for interpreting constitutions worldwide (Hirschl, 2010: 79). According to this notion, "a constitution is organic and must be read in broad and progressive manner so as to adapt it to changing times" (Hirschl, 2010: 79). In Canada, for example, the idea of living tree constitutionalism has been popular ever since the so-called 'Persons' case

in 1930 famously proclaimed that Canadian constitution is "a living tree capable of growth within its natural limits" (*Edwards v. A.G. Canada*, 1930: 136). As recently as 2004, for example, the Supreme Court of Canada has "squarely rejected" originalist or textualist approaches to constitutional interpretation in its *Same Sex Reference* decision (Hogg, 2007: 60-8). The Court ruled that "'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life" (*Same Sex Reference,* 2004: para. 22).

Rejection of originalist or textualist approaches to constitutional interpretation, and the espousal of living-tree constitutionalism, however, significantly heightens legitimacy concerns surrounding the exercise of judicial review for it opens judges to the criticism that they are free to shape constitutional evolution according to their personal whims. If constitutional interpretation is not firmly grounded in original intent of constitutional founders, or in the text of constitutional documents, then what is to say that nothing but mere judicial discretion explains how constitutions evolve? In describing the worldwide use of living-tree constitutionalism, Hirschl, for example, notes that the doctrine "lends itself more easily than most other interpretive approaches to an injection of the personal values of those who interpret the constitution" (2010: 79). For critics of the Supreme Court of Canada, the doctrine "has been transformed into a bulwark of judicial discretion" (Morton and Knopff, 2000: 48).

The second question that this dissertation addresses is *what is the magnitude and character of the Supreme Court of Canada's policymaking influence*? The interest in this question stems from the fact that much of the existing literature is characterized by contradictory findings. For some, the Charter-empowered Supreme Court has seen a tremendous growth in its power and influence and has helped "revolutionize" Canadian politics (Knopf and Morton, 1992: 3; Morton and Knopff, 2000). According to these analyses, the Supreme Court is held to enjoy an "open-ended policymaking discretion" (Morton and Knopff, 2000: 57), and to have helped push the Canadian system of government away from "constitutional supremacy" and into "judicial supremacy" (e.g. Manfredi, 2001; Martin, 2005).

In contrast to these sweeping assessments, several other studies are careful to qualify the amount of policymaking power the Supreme Court is enjoying in the wake

of the Charter. An early analysis by Russell (1994), for example, suggests that the Charter has largely failed to modify the basic power relations in Canada, to redistribute wealth, or to significantly alter the Canadian version of welfare capitalism. Similarly, authors of the so-called dialogue theory claim that the policy-making influence of the Supreme Court is importantly constrained by governmental actors who reverse and modify unfavourable decisions through enactment of new legislation (Hogg and Bushell, 1997; Hogg et al., 2007). A recent analysis by Songer (2008: 248) similarly concludes that overall patterns of Supreme Court decision making suggest that "the Supreme Court has been moderately active in its exercise of judicial review."

Disagreement also exists as to the ideological character of the Supreme Court's policymaking influence with studies arriving at contrasting conclusions on the question of whether the Supreme Court tends to promote the interests of the ideological left or right. According to Morton and Knopff (2000) and Brodie (2002), for example, the Supreme Court exhibits a decisive leftist bias, and uses its powers primarily to promote the interests of progressive minority groups, academics and media elites. As evidence of such bias, these authors point to the Court's record in such policy areas as abortion, sexual orientation and Aboriginal rights. Authors such as Mandel (1994), Bakan (1997), and Hutchinson (2005), in contrast, point to the Court's record on such issues as union rights, Sunday shopping, and healthcare to argue that the Supreme Court uses its powers primarily to advance the interests of privileged groups such as private corporations, professionals and the wealthy.

In light of these divergent findings one might be justified in expressing a degree of perturbation for it appears that decision making of the Supreme Court of Canada can lend itself towards supporting almost any contention. Claims that the Court exhibits a decisive leftist bias, are countered by those that the Court promotes right-wing goals; claims that it enjoys an "open-ended policymaking discretion" and has helped transform a system of "constitutional supremacy" into one of "judicial supremacy," are countered by those suggesting the Court has adopted "a highly deferential, even submissive posture towards the other two branches of government" (Beatty, 1997: 494). For a social scientist, however, these divergent findings provide for an exciting opportunity to shed new lights on the Court's policymaking influence through the employment of rigorous empirical methodologies.

This dissertation addresses the above questions by first developing and then

testing a novel theory of how high courts attain and maintain their institutional legitimacy – a theory of *strategic legitimacy cultivation*. The theory is general in character and therefore applicable to high courts everywhere but will be tested in this dissertation primarily in the context of the Supreme Court of Canada.[1] The theory provides a new explanation of how courts attain and retain their legitimacy, expounds how living tree constitutionalism and the idea of a 'living constitution' are compatible with promoting the legitimacy of judicial review, and sheds new lights on the question of how much policymaking influence the Supreme Court of Canada enjoys in the wake of the Charter.

In developing the theory I adopt an institutionalist branch of the rational choice theory which assumes that institutional structures, rules and imperatives provide behavioural incentives and disincentives for relevant actors who respond by acting strategically in order to attain favourable outcomes (e.g. Hall and Taylor, 1996; Immergut, 1998). The fruitfulness of applying this approach to the study of judicial institutions has perhaps most prominently been indicated by Walter Murphy's influential *The Elements of Judicial Strategy* published in 1964. It was not until a couple of decades ago, however, that the approach – under its more popular label of 'strategic approach' – has attained considerable distinction among students of judicial institutions, leading some to conclude that there has been nothing short of a "strategic revolution in judicial politics" (Epstein and Knight, 2000). In fact, in addition to the so-called attitudinal model of judicial decision making which postulates that judicial decisions are primarily determined by ideological predilections of individual justices (e.g. Segal and Spaeth, 2002), the strategic approach has emerged as the other major comparative approach for assessing the influence that political or external factors exert on judicial decisions.

The reason for justices to engage in strategic decision making has to do with a variety of costs that judges, and courts as institutions, can incur as a result of adverse reactions to their decisions, as well as with a variety of benefits that can be acquired through the rendering of strategically tailored decisions and opinions. The existing literature suggests that different incentive structures affect judicial calculations. For some, the main benefit to be acquired through strategic behaviour is the achievement of judicial policy-making influence. Many argue that justices, "as single-minded

[1] See the concluding chapter for a discussion of the extent to which the theory is applicable cross nationally.

seekers of legal policy," act strategically in order to see their policy preference realized and implemented (e.g. Epstein and Walker 1995: 323; Epstein and Knight 1998; Epstein et al. 2001; Epstein et al. 2004; Maltzman et al., 2000). On these accounts, strategic behaviour is *complementary to the attitudinal approach*. Justices, in other words, are viewed as being primarily driven by their attitudinal preferences but since they are also sophisticated actors aware of the constraints imposed by their surroundings, they do not merely act on their attitudes but add a layer of strategic behaviour so as to optimize the attainment of attitudinal goals. Acting on one's untempered attitudes may lead to extreme outcomes that end up not attaining support of other justices on the bench (e.g. Maltzman et al., 2000) or being reversed or otherwise hampered by external factors (e.g. Epstein and Knight, 1998). As Posner notes, "the strategic theory is compatible with the attitudinal, as it is a theory of means and the attitudinal theory is one of ends" (2008: 30).

It is important to point out, however, that "the strategic theory is compatible with any other goal-oriented theory of judicial motivations as well" (Posner, 2008: 30). Justices, therefore, may engage in strategic behaviour not just to promote their attitudinal preferences but in order to achieve other pertinent goals. According to Alter's (2001) theory of European legal integration, for example, national high court judges take the surrounding institutional constellations into account as they go about promoting their three primary goals: judicial independence, judicial influence and judicial authority. As she notes, "[c]ourts act strategically *vis-à-vis* other courts, and *vis-à-vis* political bodies, calculating the political context in which they operate so as to avoid provoking a response which will close access, remove jurisdictional authority, or reverse their decisions" (2001: 46).

A variety of so-called separation-of-powers models emphasize strategic behaviour of judges by focusing more specifically on the interactions between legislative actors and courts (e.g. Marks 1989; Ferejohn and Weingast 1992; Ferejohn et al. 2007; Helmke 2005). The key insight of this literature is that courts act strategically in order to avoid conflicts with government officials particularly as the salience those officials assign to individual policies rises. Judges do so for a variety of reasons including to ensure that their decisions get implemented, that their jurisdictional authority remains in tact, or that their institutional integrity is protected.

One branch of this literature emphasizes the role of the public as a fundamental source of power for courts in their interactions with elected officials (e.g.

Stephenson 2004; Vanberg 2005; Staton 2010; Carrubba 2009). There are several reasons why the public might be willing to support courts vis-à-vis elected officials. According to Weingast (1997), the public can do so because it values the rule of law. Stephenson (2004) suggests that the public is likely to extend support to a court when it believes that compared to elected politicians, the public's policy preferences are better represented by judicial institutions. According to Carrubba's (2009) public enforcement model of judicial-legislative relations, judges can induce the public to extend its support to courts vis-à-vis democratically elected representatives because of the public's beliefs such actions can over time result in more efficient regulatory regimes.

Vanberg (2005) argues that public support can play a key role in resolving the courts' fundamental problem of not having control over the implementation of their decisions. In particular, in the context of the German Constitutional Court, Vanberg argues that given the political branches' own electoral connections, and their fear of a potential public backlash for going against a popular court, the public can serve to expand the scope of judicial power and instil respect for judicial decisions among governmental actors. In order for this public enforcement mechanism to kick in, however, courts must enjoy high levels of public support and their actions must be visible to the public (Vanberg 2005: 21). Staton (2010) extends Vanberg's approach to Mexico and shows that judges may even engage in selective promotion of individual case resolutions in order to secure the implementation of their rulings.

In Canada, strategic theories of judicial decision-making are almost non-existent (but see Radmilovic, 2010a; 2010b), while explorations of the extent to which individual cases are suggestive of strategic judicial calculations are largely confined to a handful of case studies (see Manfredi, 2002; Flanagan, 2002; Knopff et al., 2009). Manfredi's analysis of two controversial Supreme Court of Canada decisions (the 1988 *Morgentaler 2* decision on abortion, and the 1998 *Vriend* decision on sexual orientation), for example, suggests that the more aggressive outcome reached in *Vriend* can be explained in terms of the Supreme Court's "strategic reaction to different sets of institutional constraints" (2002: 149). In particular, the *Morgentaler* decision was made in a much more uncertain environment in which the risk of the legislative override was higher and the public expressed low levels of support for changing the policy status quo (2002: 149).

In contrast, application of the attitudinal approach to the Canadian Supreme Court has been much more prevalent (see, for example, Heard, 1991; Ostberg and Wetstein, 2007; Songer and Johnson, 2007). The most recent findings suggest, however, that attitudinal factors do not seem to be affecting Supreme Court of Canada justices as much as they affect their American counterparts. Ostberg and Wetstein's recent analysis suggests that personal attitudes and values of justices matter in areas of criminal law, have less of an impact in economic cases, while in areas of civil rights and liberties their "influence is negligible, even counterintuitive" (2007: 216). Research conducted by Alarie and Green finds that voting patterns at the Supreme Court are weakly correlated with two key measures of attitudinal policy preferences: newspaper descriptions of justices' policy preferences at the time of the appointment, and the party of the appointing Prime Minister (2007; 2008; 2009a; 2009b).

Perhaps in light of some of these findings, the current Chief Justice of the Canadian Supreme Court, Beverly McLachlin, made a following statement in a rare television appearance in December of 2009:

> Most people who know the Supreme Court of Canada well would agree that we don't have a marked right-left syndrome. We don't have judges on the Court who are identified by political stances. We are much less political in that sense than some people suggest the American courts are. And I think that's a good thing.

Attitudinal preferences, however, are just one set of 'political' factors that can exert effects on judicial decision making, and this dissertation will show how justices of the Supreme Court of Canada exhibit keen sensitivities to a different set of external or political factors. It will be argued that cultivation of institutional legitimacy, as a fundamental goal of high courts, provides strong incentives for judges to engage in a set of distinct behavioural patterns. To foresee, legitimacy cultivation requires courts to devise decisions that are sensitive to the state of public opinion, that avoid overt clashes and entanglements with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence. In short, and reading the title of this dissertation 'in reverse', the central thesis of this dissertation is that high court justices, including those sitting at the Supreme Court of Canada, engage in strategic decision making to cultivate their institutional legitimacy by threading carefully between activism and restraint.

As Epstein and Knight explain (2000: 642), there is a variety of ways in which strategic analyses could be conducted. These include: "(1) incorporating the logic of strategic action into interpretive-historical research, (2) invoking the strategic account

to construct conceptions of judicial decision making; (3) using microeconomic theories to reason by analogy; and (4) undertaking formal equilibrium analysis." The analysis conducted in this study falls firmly under the second category: invoking the strategic account to construct conceptions of judicial decision making. The study will therefore "attempt to develop a general picture of judicial choices"; "outline a conception of the mechanisms of strategic behavior that characterize decision making on courts"; "analyze the basic logic of strategic action"; and provide "an understanding of the mechanisms through which strategic action influences collective outcomes." As Epstein and Knight note, "such an understanding … does not require formal equilibrium analysis [and] can be generated by using the strategic assumption as a starting point for the research" (2000: 644).

The study will show that in addition to legal and attitudinal factors, legitimacy cultivation is an additional goal that high court justices pursue and that affects disposition of individual cases. Legitimacy cultivation, in fact, can be in a complex relationship with other judicial goals. Sometimes goals associated with legitimacy cultivation will *compete* with legal and attitudinal factors so that judges will be required to sacrifice their attitudinal preferences, or what they may consider to be proper interpretations of legal precedent, in order to bring about legitimacy-attentive outcomes. At other times, legitimacy cultivation will *infuse* jurisprudence so that the evolution of judicial doctrines will go hand in hand with legitimacy cultivation.

Defining Legitimacy and Judicial Activism

Before proceeding with the analysis, it is important to define concepts of legitimacy and judicial activism that will feature prominently in the upcoming chapters. Turning to legitimacy, existing research shows that there is more than one way of conceptualizing judicial legitimacy. Fallon's (2005) recent summary, for example, distinguishes between legal legitimacy, sociological or institutional legitimacy, and moral legitimacy. This study is focused solely on the second variant – institutional legitimacy. According to this conceptualization, a court or a judicial decision possesses institutional legitimacy "insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support" (Fallon, 2005: 1795). As such, institutional legitimacy is distinguished from a purely legal legitimacy (whether a particular decision is in accordance with the existing body of law and doctrine

regardless of its relation to public support) and from a purely moral legitimacy (whether a particular decision is justified on moral grounds) (2005: 1794-1797).

Defining judicial activism is arguably a more arduous task in light of the general slipperiness of the term. In common parlance, judicial activism has a pejorative meaning suggesting that judicial decisions are not grounded in faithful interpretations of constitutional texts or result from unduly influence of personal policy preferences of individual judges (see for example Friedman 2009: 344-5; Choudhry and Hunter 2003: 531). The problem with this definition, however, is that it hinders any kind of an astute empirical analysis because it is distinctly subjective in character ultimately suggesting that "one person's judicial activist is another person's faithful interpreter" (Friedman 2009: 345). In order to avoid problems associated with this definition, judicial activism in this dissertation is defined as *policy activism* referring to a "judicial vigour in enforcing constitutional limitations" which occurs whenever a court enforces constitutional limitations to change the policy status quo in the form of an existing statute, regulation or conduct of public officials (Russell 1990: 19). As such, policy activism is distinguished from instances of judicial *policy restraint* in which a court decides to uphold the policy status quo. Simply put, the more a court is willing change the policy status quo, the more activist is its decision. In light of the slipperiness of the common meaning of the term judicial activism, this definition is becoming increasingly utilized in analyses of judicial decision making (see for example Garrett et al. 1998; Choudhry and Hunter 2003).

This definition of judicial activism as policy activism also needs to be distinguished from the concept of *jurisprudential activism.* Jurisprudential activism refers to judicial departures from well-established precedents and doctrines, and/or judicial formations of new doctrines. The distinction between policy activism and jurisprudential activism is important because the two often do not go hand-in-hand. In fact, courts often engage in jurisprudential activism while simultaneously ensuring policy restraint. Take the Supreme Court of Canada's *R. v. Mills* (1999) decision as an example. In that decision, which dealt with procedures for accessing private records of complainants in sexual assault cases, the Court engaged in jurisprudential activism and reversed its 1995 *R. v. O'Connor* judgment (Choudhry, 2003: 380). However, the Court did so in order to *uphold* the federal legislation that emerged in the aftermath of *O'Connor*. Similar pattern occurred in *R. v. Hape* (2007), a case dealing with investigative powers of Canadian officials when on foreign soil. In

Hape, the Supreme Court again reversed its own recent precedent established in *R. v. Cook* (1998), which held that the Charter would apply to the actions of Canadian officials operating outside of the country (Roach, 2007: 89). As in *Mills*, by doing so the Court upheld the existing conduct of public officials. These cases show, therefore, that jurisprudential activism can be used not to challenge the policy status quo but to bring the Court's jurisprudence better in line with it. In fact, one of the most important findings of this dissertation is that the Supreme Court of Canada often engages in acts of jurisprudential activism in order to ensure that its jurisprudence is reflective of external realities.

Methodology

Before outlining the methodology that will be used in subsequent chapters, it is important to point out that this study is not concerned with addressing normative questions of how judges *should* go about developing their jurisprudence or deciding particular cases. These tasks are typically associated with legal analyses of judicial decision making. Rather, the study is *positive* in its orientation and concerned with ascertaining actual decision-making practices of high courts. As Vanberg notes, however, normative prescriptions on how judges should go about deciding cases and shaping jurisprudence can hardly have merit unless they are grounded in a solid appreciation of how institutions actually work in practice (2005: 13; see also Ferejohn, 1995: 192).

In order to assess the extent to which legitimacy considerations affect decision making of the Supreme Court of Canada, the study employs a multi-method research design that incorporates a statistical analysis of a large number of cases, a qualitative analysis of two carefully selected case studies, and a comparative, cross-policy approach examining several policy areas of the Supreme Court of Canada's decision making. Utilization of the mixed-method research design captures the key epistemological assumptions that no single method can optimally analyze judicial decision making. Different methods, however, can provide complementary comparative advantages so that limitations inherent to each can at least partially be addressed through careful use of alternative methods (George and Bennett, 2005: 6).

The key drawback of applying statistical procedures to test judicial decision making has to do with the difficulty, and often impossibility, of using precise measures across a large number of cases. This limitation was recognized in one of the

first and classic quantitative studies of judicial decision making conducted by Dahl in 1957. In his attempt to measure the extent to which the U.S. Supreme Court acts in a countermajoritarian fashion by striking down majoritarian policies, Dahl relied on the so-called lawmaking majority (i.e. the president and the majority in Congress) as a proxy for the actual national majority (Dahl 1957: 284). The reason had to do with inherent difficulties involved with accurately measuring American public opinion on issues appearing before the U.S. Supreme Court. As Dahl recognized (1957: 283), relevant public opinion polls simply do not exist, and any rigorous empirical analysis of the question of whether the U.S. Supreme Court acts as a guardian for minorities against national majorities has to start from the realization that "it is probably impossible to demonstrate that any particular Court decisions have or have not been at odds with the preferences of a 'national majority'."

In addition, statistical analysis requires that complex decisions, delivered in complex political environments, be reduced to a set of relatively simple categorizations with the consequence that much of the substance may be lost in the process. In the Dahl's case, as he acknowledged, his indirect measure of national majorities came at the expense of more precise accounts of public opinion (Dahl 1957: 284). Similar problems arise in the quantitative research on attitudinal decision making. As Cross notes, the existing methods for measuring ideology of judges and decisions are "rough and imperfect" in part because "[t]ranslating something so amorphous as ideology into a numerical measure for quantitative analysis will inevitably be imperfect" (2007: 20).

Quantitative analyses of judicial activism, as the one that will be employed in Chapter 3 of this dissertation, are not impervious to these problems. Judicial activism, for example, is typically defined in terms of whether the government wins or loses. This 'bottom line' classification, however, may importantly mischaracterize or simplify a judicial decision (see e.g. Morton et al. 1994; Choudhry & Hunter 2003: 533). Take the Supreme Court of Canada's 1995 *Egan* decision as an example. In that decision the Court arguably delivered an important win for the gay and lesbian community by finding sexual orientation to be an analogous ground of discrimination protected under the equality clause of the Canadian Charter of Rights and Freedoms. At the same time, however, the Court stopped short of invalidating the Old Age Security Act which included an "opposite-sex" definition of "spouse" for the purposes of attaining spousal allowances. Hence, while the gay and lesbian community saw

some of their interests recognized by the Court, the claimants in the case at hand left the courtroom empty-handed as judges failed to impose any changes to the policy status quo. A similar, but perhaps more profound, example is provided by the U.S. Supreme Court's watershed *Madison v. Marbury* (1803) decision in which the Court famously went out of its way to endorse and institute the institution of judicial review all the while ensuring that Marbury did not receive commission contrary to the preferences of the Jefferson administration. Neither of these two decisions lends itself to a straightforward categorization.

None of this is to suggest, of course, that statistical analyses provide no meaningful insights into judicial decision making. Such analyses can be fruitful and in fact essential in discerning regularities in broad patterns of judicial decision making, and in giving researchers confidence that their theoretical propositions are borne out in the real world. It *is* to suggest, however, that statistical analyses can rarely provide a complete picture of intricacies of judicial decision making. In fact, one of the main findings of this dissertation is that Canadian Supreme Court justices regularly deliver highly complex and intricate decisions that offer partial and ambiguous victories and loses to the parties appearing before them. While traditional statistical approaches tend to portray judges as being akin to baseball hitters who either hit or miss the ball (and thereby either strike or preserve the policy status quo, or deliver a liberal or a conservative policy outcome), much of the evidence mounted by this dissertation shows that judges are better thought of as high-end hairstylists well-versed in the art of delivering sophisticated outcomes.

Application of case-study methods can compensate for some of the drawbacks associated with statistical approaches. In particular, one advantage of case studies is that they "allow a researcher to achieve high levels of conceptual validity, or to identify and measure the indicators that best represent theoretical concepts the researcher intends to measure" (George and Bennett 2005: 19). In other words, a detailed analysis of selected case studies, while not allowing for implementation of statistical controls, does allow for a more precise delineation of indicators of relevant variables through researcher's immersion into the details of the case and acquisition of intimate understandings of relevant political and social contexts. Furthermore, while estimating causal effects or causal weights of individual variables is generally considered not to come within the purview of case-study analyses, under certain conditions carefully selected case studies can be useful even in that regard. As

George and Bennett note (2005: 25), case studies can be used to estimate causal effects of specific variables under the conditions of "a well-controlled before-after case comparison in which only one independent variable changes, or more generally when extremely similar cases differ only in one independent variable." In light of this, statistical analyses undertaken in this study will be complemented by application of case study analyses.

Application of statistical and case-study methods are furthermore complemented with an in depth analysis of Supreme Court of Canada's decision making in a single area of its jurisprudence: section 7 of the Charter of Rights and Freedoms. The reason behind this methodological choice is twofold. First, it allows for testing the extent to which key predictions of the theory hold across a number of diverse policy areas coming within the purview of section 7. Some of these include: constitutionalization of *mens rea*, reproductive rights and freedoms, access to health care, immigration and refugee status determination, doctor-assisted suicide, deportation of non-citizens, repatriation of citizens held abroad, marihuana possession, fingerprinting, parental prerogative to 'spank' children, etc. Second, given that the theory developed in this dissertation has implications for the evolution of jurisprudence, an in-depth focus on one section of the Charter of Rights and Freedoms can allow for assessing the extent to which Supreme Court of Canada's jurisprudence evolves in accordance with the predictions of the theory. In light of the variety of methods utilized by the study, and in light of the fact that each method provides a set of distinct advantages and disadvantages, the reader is urged to be patient and reserve the final evaluative judgment for after reading the concluding pages of the dissertation.

Organization of the Study

Chapter 2 will round off Part I of the dissertation by first suggesting why institutional legitimacy is of fundamental importance for proper functioning of judicial institutions and by outlining the theory of strategic legitimacy cultivation. The theory builds on insights of comparative literatures on public support for the courts and strategic judicial decision making, and postulates a set of testable propositions. Chapter 2 also addresses main existing explanations of how judicial institutions attain and retain their institutional legitimacy and points to some of their weaknesses.

The rest of the study is primarily concerned with testing the theory of strategic legitimacy cultivation developed in Chapter 2. In particular, Part II of the dissertation is composed of Chapter 3 which subjects the theory to a statistical test. In particular, Chapter 3 tests the extent to which patterns of Supreme Court of Canada's statutory invalidation and suspension correspond with basic expectations of the theory outlined in Chapter 2. Part III of the dissertation engages in case-study analyses of Supreme Court of Canada's decision making. Chapter 4 engages in a before-after case comparison of the *Marshall* case on Aboriginal rights, while Chapter 5 engages in an in-depth analysis of the *Secession Reference* case which is one of the most important cases that the Supreme Court of Canada has ever confronted. Part IV of the dissertation turns the focus on the Supreme Court's decision making pursuant to section 7 of the Charter of Rights and Freedoms. In particular, Chapter 6 explores general doctrinal approaches and methodologies that the Supreme Court developed pursuant to section 7 and assesses the extent to which they correspond with expectations of the theory. Chapter 7, on the other hand, engages in a cross-policy analysis of section 7 jurisprudence. The following policy areas are examined in Chapter 7: immigration, refugee status determination, extradition, deportation, security certificates, repatriation, and reproductive freedom and fetal rights.

CHAPTER 2:
THE THEORY OF STRATEGIC LEGITIMACY CULTIVATION

The aim of this chapter is to outline the theory of strategic legitimacy cultivation that will be at the centre of subsequent analyses. The chapter starts by discussing why institutional legitimacy is important for the effective functioning of judicial institutions. From this backdrop the chapter will outline the theory of strategic legitimacy cultivation predicting how courts will go about ensuring that their decision-making outcomes are conducive to attainment and retention of legitimacy. The theory will be grounded in a set of testable hypotheses. Final two sections of the chapter will discuss how the theory developed in this dissertation departs from the existing literature on strategic judicial decision making as well as from existing explanations of how courts go about attaining and maintaining their institutional legitimacy.

Importance of Institutional Legitimacy

It is often recognized by both judges and legal scholars that institutional legitimacy is an important resource of judicial institutions. In the U.S. context, for example, Justice Frankfurter proclaimed that "[t]he Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction" (369 U.S. 186, 267). His words have more recently been echoed by the U.S. Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) where the Court stated that "[t]he Court's power lies … in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands" (505 U.S. 833, 865). Legal scholars also recognize the importance of institutional legitimacy. In the Canadian context, for example, Choudhry and Howse argue that "the question of legitimacy" and "the respect of citizens for the Court" is of critical importance for the Supreme Court especially as it confronts controversial cases that garner high levels of interest and passion (2000: 145).

In addition to judges and legal scholars, both strategic and interpretative approaches to judicial decision making are also in agreement that preservation of institutional legitimacy is an important goal that justices pursue. From the perspective of interpretative institutionalism, Gillman (1999: 81), for example, argues that key to understanding courts as distinctive institutions has to do with identifying their specific

missions, and that in this context justices "are expected to deliberate about protecting their institution's legitimacy and adapting their institution's mission to the changing contexts and the actions of other institutions" (1999: 81). The importance of institutional legitimacy is also becoming increasingly emphasized by the growing literature espousing strategic approaches to judicial decision making. This is evident in the research of Epstein, Knight and Martin (2004: 177, emphasis added) who note that legitimacy concerns precede individual justices' policy-making preferences for "the justices' ability to achieve their policy goals *hinges* on their legitimacy [and] any erosion of it is of nontrivial concern to them." Therefore, whether judicial decision making is driven by proper interpretations of internal strictures of the law, by institutional missions of particular high courts, by individual judges' ideological preferences, or by sophisticated calculations conducted in a complex and interdependent environment, there are reasons to believe that judges will be concerned about preserving the legitimacy of their institutions.

There are several reasons for this. The first reason has to do with Hamilton's classic formulation in *Federalist 78* of judiciary as having influence over neither the sword nor the purse, and having to ultimately rely on other branches of government, and on the public, for the implementation of its rulings. As Gibson et al. note (1998: 343), the fact that courts have "limited institutional resources" renders them "uncommonly dependent upon the goodwill of their constituents for both support and compliance," and "[w]ithout institutional legitimacy, courts find it difficult to serve as effective and consequential partners in governance." That legitimacy encourages compliance is also often emphasized by judges themselves. As a former Supreme Court of Canada justice Frank Iacobucci states, "no judiciary can expect to obtain the acceptance of and obedience to its judgments if certain badges of legitimacy are not present" (2006: x).

The second reason legitimacy is important for judicial institutions has to do with the fact that in contrast to political institutions, which can re-establish their legitimacy every few years or so via electoral processes, high courts are appointed bodies that do not have recourse to such an automatic institutional refreshment. As the opinion of the U.S. Supreme Court in *Planned Parenthood vs. Casey* states (1992: 868-69, "Supreme Court justices, unlike elected politicians, could not gain back legitimacy by winning at the polls. As a result, popular support, or legitimacy, once lost, would be very difficult to recover." This concern is particularly pertinent given

the contemporary environment characterized by a worldwide expansion of judicial power and influence (e.g. Tate and Vallinder, 1995; Hirschl, 2004). If we are indeed living in an "age of judicial power" (Malleson and Russell 2006) we should not be surprised to see the legitimacy of judicial power becoming increasingly questioned and the courts, in turn, becoming increasingly concerned about cultivating it. Institutional legitimacy is a *sine qua non* for appointed judicial institutions to be able to stand up to political actors who wield executive power and are backed by electoral processes.

In Canada, for example, the question of legitimacy of judicial review has been at the heart of recent debates surrounding the Canadian Supreme Court. As Bakan notes, while in the latter part of the 19th and the first part of the 20th century the issue of legitimacy of judicial review failed to attain much prominence, in more recent decades, and particularly since the introduction of the Charter, the issue has preoccupied the minds of constitutional scholars (2003: 30-31). The Canadian case clearly illustrates that the growth in judicial power appears to place the question of institutional legitimacy into sharp focus.

If institutional legitimacy is indeed of paramount importance for effective functioning of judicial institutions, the next logical question to consider is what can judges do to ensure its sustainment. The next section will outline a theory of strategic legitimacy cultivation suggesting that judges attain and retain their legitimacy primarily by exhibiting strategic sensitivities to factors operating in the external political environment. The section starts with an analysis of the so-called public support for the courts literature and of insights this literature has generated regarding the determinants of public support for judicial institutions. From this backdrop, implications for strategic judicial behaviour will be drawn out.

The Theory of Strategic Legitimacy Cultivation

The comparative literature on public support for the courts is in agreement about what constitutes institutional legitimacy. Legitimacy is defined through the notion of diffuse support which refers to the presence of durable attachments to courts among the public that persist in spite of specific court decisions that may run counter to the preferences of members of the public (Gibson et al., 2003: 537). One could generalize therefore that the fundamental resource that courts possess, which allows them to surmount their institutional predicament outlined by Hamilton, is institutional

legitimacy in the form of a robust "reservoir of favourable attitudes." Also, much of the preoccupation of the public support for the courts literature has been with ascertaining what factors affect diffuse support for courts.

The first determinant of diffuse support is the so-called specific support for the courts which is defined as "satisfaction with immediate outputs of the institution" (Gibson, 2006). In contrast to diffuse support, which is identified by measuring durable attachments, specific support is associated with public satisfaction with judicial settlements of particular cases and policy dilemmas. A large number of studies have found that specific support has direct bearings on the levels of diffuse support for a court. For example, Mondak's (1991; 1992) experimental studies have demonstrated that levels of diffuse support for the U.S. Supreme Court have increased among respondents who were exposed to hypothetical decisions consistent with their preferences. Also, Grosskopf and Mondak's (1998) analysis of the Impact of *Webster* and *Texas vs. Johnson* on public confidence in the U.S. Supreme Court suggests that evaluations of individual court decisions can exert direct effects on diffuse support. The study by Gibson et al. (1998) also reports close linkages between specific support and diffuse support in Greece, West Germany, the Netherlands, and the former East Germany. The key implication of these studies is that "one decision can alter *confidence in*, or *support for*" judicial institutions (Hoekstra 2003: 146, original emphasis).

In the Canadian context, the main study of public support for the Supreme Court of Canada, conducted by Fletcher and Howe (2000), has also found linkages between specific support and diffuse support. As the authors note (2000: 31), "our investigation corroborates the view that support for the courts and the constitutional arrangements that empower them does relate to issues of the day, as reflected in the rulings of the Supreme Court." More recently, Hausegger and Riddell (2004: 43) have argued that following the 1988 *Morgentaler 2* decision, diffuse support for the Court became significantly determined by specific support, including the outcome of that decision.[2] In sum, therefore, judicial resolution of specific cases and policy issues, while not necessarily resulting in a direct and immediate impact on the diffuse support in every case, can over a longer period of time have important effects on the levels of diffuse support. As Vanberg notes, "judges are likely to be aware that the

[2] See Chapter 7 for an in-depth analysis of the *Morgentaler 2* case.

support they enjoy is a valuable resource that can be 'spent' quickly if too many unpopular decisions convince too many citizens that the court exercises an undesirable influence on the direction of policy" (2005: 51; see also Epstein et al. 2001: 130f).

A second factor that exerts effects on diffuse support has to do with the capacity of courts to differentiate themselves from other political institutions (e.g. Gibson, 2008: 61). Courts achieve this feat by relying on "non-political processes of decision-making," by associating "themselves with symbols of impartiality and insulation from ordinary political pressures" (Gibson 2008: 61), or by ensuring that their decisions are anchored in legal as opposed to overtly political "values and symbols" (Caldeira and Gibson 1992: 659). The more successful the courts are in this regard, the more they are likely to succeed in establishing and maintaining favourable levels of diffuse support (see Caldeira and Gibson, 1992: 648; Gibson, 2006: 23; Gibson, 2008). One can generalize, therefore, that institutional legitimacy or diffuse support of judicial institutions is dependent on the perception on the part of the public that courts' work remains above the fray of regular politics and that compared to legislatures and executives courts are apolitical institutions whose decision making derives from principled and impartial reasoning that is devoid of ordinary political calculations.

The third determinant of diffuse support or institutional legitimacy has to do with the level of judicial activism employed by courts. As Caldeira and Gibson note in the context of the U.S. Supreme Court, open embrace of judicial activism may lead to the politicization of judicial institutions, which in turn risks undermining the Court's reservoir of public support by making the Court dependent for institutional support on those who directly profit from its policies (1992: 659). Judicial deference, on the other hand, renders the public less likely to view the Court through the lens of their political preferences which is legitimacy-wise a more prudent position for the institution to adopt (Caldeira and Gibson, 1992: 659-660). Hausegger and Riddell's (2004) application of Caldeira and Gibson's framework to the Supreme Court of Canada confirms these findings.

It is important to emphasize that Caldeira and Gibson's arguments linking changes in the character of judicial decision making to changes in diffuse support are importantly conditioned by public perception. If changes in the character of judicial

decision making go without notice among the public at large (if they are, so to speak, conducted 'in stealth'), no impact on diffuse support is expected.

The question that follows from the above analysis is what implications these findings can have for the actual decision making of high court justices. One important avenue for answering this question is suggested by the recent 'strategic revolution in judicial politics' (Epstein and Knight, 2000; see Vanberg, 2005). As discussed in Chapter 1, the key premise of the strategic approach is that justices are sophisticated, rational actors whose decision-making liberty is importantly constrained by the political context in which they operate, and by the preferences and anticipatory reactions of other important players within that context. Sophisticated, strategic outcomes can allow judges to avoid incurring needless costs as a result of adverse reactions to their decisions and to attain a variety of benefits that can be acquired through the rendering of carefully tailored decisions.

If the revolution in strategic decision making is correct in postulating that much of judicial behaviour can be explained in terms of sophisticated strategic choice making, and if it is true, as argued above, that institutional legitimacy is of fundamental importance for the proper functioning of courts, then one should expect judicial strategic calculations to be importantly informed by public support considerations. In other words, given the importance of institutional legitimacy for the effectiveness of courts, a significant component of the overall strategic behaviour of high court justices should have to do with acquiring and retaining respectable levels of public support. As strategic, sophisticated actors interested in maintaining or enhancing the institutional legitimacy of the court, justices are expected to mould their decision making so as to ensure high levels of public support.

Towards an Empirical Account of Strategic Legitimacy Cultivation

The above analysis suggests three specific premises regarding institutional legitimacy of high courts. First, institutional legitimacy is a fundamental resource of high courts and in its absence the courts would find it extremely difficult, if not impossible, to function in an effective and consequential way. Second, the empirical findings from the literature on public support for the courts suggest that three factors exert effects on the level and character of diffuse support: (1) specific support (i.e. satisfaction of the public with judicial settlement of particular cases); (2) perception on the part of the public that courts are "different" kind of institutions whose decision making is driven

by principled, apolitical legal analysis, and that as such the courts have an important role to play in the overall system of government; and (3) character of judicial decision making: overt judicial activism risks politicization of courts which in turn undermines their reservoir of diffuse support.

Assuming that judges are strategic actors concerned about cultivating diffuse support as their crucial institutional resource, a number of hypotheses can be extracted from the above discussion. According to hypothesis 1, judges are expected to exhibit general sensitivity towards the state of specific support:

> *Hypothesis 1:* Judicial disposition of individual cases will tend to accord with the state of specific support.

The reason for this, as discussed above, is that public satisfaction with specific decisions can have a direct bearing on the levels of diffuse support a court enjoys.

It is important to recognize, however, that the judicial task of ensuring that decision-making outcomes remain in accordance with the state of specific support is not straightforward. In particular, while public opinion polls on some, typically very prominent issues arriving before high courts may exist, in the vast majority of cases judges will not have an opportunity to ascertain the precise state of public opinion on the issues they confront. For this reason, the judicial task of ensuring that disposition of individual cases accords with the state of specific support is often confined to making efforts to ensure that decision-making outcomes do not abrogate from whatever appears to be the prevailing tenor of the public mood. Also, even in cases where specific support data are available, there does not exist a natural threshold of public opinion beyond which courts will make sure to rule in line with the majority public opinion. A relatively modest majority support for an activist ruling, for example, could very well suggest to the Court that public opinion is highly divided on the issue at hand, particularly if the issue is highly controversial. One should note, therefore, that judicial proclivity towards ruling in accordance with the majority of public opinion will be heightened as public opinion becomes less vague and more decisive.

Second, given that institutional legitimacy is importantly linked to the capacity of courts to present themselves as "different" kinds of institutions that act in an apolitical and impartial manner, one can anticipate that judges will seek to cultivate such perception among the public. Hence:

Hypothesis 2: Judges will tend towards avoidance of clashes with political actors.

The courts will seek to sustain the perception that their work remains above the fray of regular politics, and their success in this regard can be importantly undermined by political actors who are capable and willing to effectively attack or otherwise undermine the court in the aftermath of an unfavourable decision. A variety of actors can perform this role, including governments and their representatives, organized groups, social movements or even prominent individuals associated with a particular cause, organization or viewpoint. Different cases will attract different actors and part of the judicial strategic challenge, as well as that of a researcher, is to survey the political environment surrounding a case for the presence of the most important political actors, their constellation, and intensity of their interests.

In general, one can expect governments and organized groups to be particularly important in this regard. Governments are important because they help determine the implementation of judicial decisions but also because they tend to be highly attentive observers of judicial decisions, hold a variety of powers over the institutional structure of courts and can directly affect functioning of courts through such things as court-packing plans or less drastic fiddling with judicial appointment procedures (for example, see Baum, 2006: 72). So-called separation of powers models build on these assumptions and argue that courts will strategically avoid conflicts with governmental officials, particularly as the salience officials assign to individual policies rises (for example, see Helmke, 2005; Vanberg, 2005; Staton, 2010).

Another relevant set of political actors are organized groups. As Epp (1998) shows, legal cases do not just 'pop up' at high courts as if by magic, but tend to be brought forward by social stakeholders who seek realization of their interests through litigation. Organized groups often play a key role in this process by providing financial resources, sponsoring cases, providing publicity, and otherwise coordinating legal mobilization (Epp 1998: 19). However, just as organized interests can serve as allies of courts in the aftermath of favourable decisions (Epp 1998: 201), they can also function as potential enemies leading the backlash against the courts in the aftermath of unfavourable rulings (see Persily 2008: 12; Klarman 2005; Friedman, 2009: 383). As Persily notes (2008: 12), group mobilization surrounding a case can have important effects on how the public ultimately evaluates and interprets judicial

resolution of a case. For this reason, judges are expected to avoid clashes with organized groups.

The third hypothesis has to do with the scale of judicial activism. In particular, Caldeira and Gibson's research shows that open embrace of activism by the judiciary can lead the citizenry to view the courts "in the same light as other political institutions" (1992: 652) with the consequence that the public's policy preferences become determinative of diffuse support. Hence:

> *Hypothesis 3*: Judges will tend towards moderation of judicial activism.

Somewhat ironically, therefore, when courts engage in greater deference to the existing policy regime, they are more likely to be seen as being less entangled with politics and will, therefore, be better able to preserve the perception of separated, different, apolitical bodies.

The prediction contained in hypothesis 3 has broad support in the literature on judicial politics which often emphasizes that by engaging in excessive activism the courts risk politicization and ultimate curtailment of their power and institutional clout. Weiler's analysis of the European Court of Justice, for example, shows that counter-majoritarian critiques tend to accompany judicial activism (1999: 203), while McCloskey (2005: 30) asserts that one of the most important lessons of the history of the American Supreme Court is that "paradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance."

On the basis of these hypotheses it is possible to extract further theoretical implications that lend themselves to empirical testing. In particular, one can expect that judicial tendency towards moderation of activism (Hypothesis 1) is likely to be affected by the variables associated with Hypotheses 2 and 3; namely, the state of public opinion and the preferences and mobilization of dominant political actors. In particular:

> *Hypothesis 3a:* Judicial tendency towards moderation of judicial activism will be less (more) pronounced when public opinion is supportive of an activist (deferential) outcome, and/or when dominant political actors tend to be supportive of an activist (deferential) outcome.

Simply put, the more the external political environment (in the form of public opinion and mobilized preferences of relevant political actors) is receptive to an activist decision, the more judges will be willing to deliver such outcomes (and vice-versa).

Insights contained within Hypotheses 1-3 lend themselves to inferring further observational implications regarding the development and utilization of legal doctrine. Simply put, if external factors in the form of public support concerns affect judicial disposition of cases, then one might also anticipate that jurisprudence itself will exhibit sensitivities to such concerns. Legitimacy cultivation, in other words, will push judges to seek reconciliation of their treatment of judicial doctrines with the external constellation of political and social forces.

> Hypothesis 4: Judges will tend towards utilization and development of politically sensitive jurisprudence.

The opinion of the U.S. Supreme Court in *Planned Parenthood vs. Casey* is particularly illustrative of how doctrines can be determined by tensions and values present within the larger political context and by judicial concerns about preserving institutional legitimacy. In that case, the U.S. Supreme Court stated that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation" (*Planned Parenthood v. Casey,* 1992: 865). The clear implication, as Whittington notes, is that "[a]lthough contemporary theory and politics can support a wide range of conflicting constitutional interpretations, there remain limits on what the Court plausibly can claim that the Constitution means before it raises substantial questions about its actions" (2001: 501).

Utilization and development of politically sensitive jurisprudence can allow courts to ensure that they do not run roughshod over governmental policy and public preferences and, perhaps equally important, to not be *perceived* as doing so. As the next section of this chapter will explore in greater detail, politically sensitive jurisprudence can take a variety of forms.

Finally, since the above arguments linking the character of judicial decision making to the cultivation of diffuse support importantly depend on the visibility of judicial actions to the public at large, the above hypotheses are expected to be amplified in cases garnering high public visibility. In highly visible cases, the public is particularly attentive to judicial behaviour, and judicial dispositions of such cases are expected to have disproportionate effects on diffuse support and on institutional legitimacy. This expectation corresponds with the Mondak and Smithey's finding that the key prerequisite for specific support to exert direct effects on diffuse support is the

"availability of information" on the part of the public (1997: 1121; see also Fletcher and Howe, 2001: 49). Hence:

> *Hypothesis 5*: Hypotheses 1-4 will tend to be amplified in cases garnering high public visibility.

High levels of public visibility are therefore expected to enhance courts' proclivities towards utilizing politically sensitive jurisprudence (Hypothesis 4), towards moderation of judicial activism (Hypothesis 3), towards avoidance of clashes with political actors (Hypothesis 2), and towards ruling in line with the state of specific support (Hypothesis 1). The theory therefore attains strongest predictions for those situations in which public opinion and key political actors coalesce to oppose an activist decision in highly visible environments. In such contexts, courts are expected to be highly unlikely to deliver activist decisions that inflict profound changes to the existing status quo because such decisions would produce a very high likelihood that the courts would undergo excessive politicization that could induce significant and potentially long-lasting depletions of institutional legitimacy. While courts will exhibit general apprehensiveness about delivering policy-activist decisions in visible environments, such decisions will be more likely when specific support and mobilization of political actors are supportive of judicial activism. In visible cases in which such conditions do not exist, it will be harder for justices to deliver bold declarations of policy activism.

It is furthermore important to point out that this is not to suggest that courts will never deliver activist decisions on highly visible policy dilemmas on which public opinion and key political actors favour upholding the status quo. Such decisions can occur due to several reasons. First, ideological and legal factors, for example, may overtake legitimacy considerations in some cases leading judges to deliver highly activist decisions in unfavourable political environments. Second, relevant information from the external political environment might be unavailable or imperfect, leading judges to misread the political moment. Third, and perhaps most importantly, one should expect judges to 'learn on the job' so to speak, and perfect their legitimacy-cultivation strategies with time. Decisions in which courts fail at cultivating their institutional legitimacy can play a crucial role in heightening judicial sensitivities towards the importance of legitimacy cultivation and in causing judges to learn strategies of legitimacy-attentive behaviour. While sporadic instances of

legitimacy failure are, therefore, expected to occur, assuming that judges are strategic decision makers and given the importance of institutional legitimacy for the overall effectiveness of courts, one can also expect the general evolution of judicial decision making to reflect the hypotheses outlined above. While the theory, therefore, does not suggest that unpopular, policy activist decisions that invite conflicts with political actors will never occur, it does suggest that such decisions are expected to result in unfavourable politicizations of the judiciary and accompanying losses of public support from which judges may learn important lessons about the importance of institutional legitimacy and how to go about cultivating it.

It is also important to note that in order to assess their impacts on judicial decision making, the relevant variables have to be examined in their *pre-decision* political environment. The pre-decision focus is of critical importance because of the study's assumption that it is judicial awareness of these variables that exerts impacts on the consequent disposition of cases.

Politically Sensitive Jurisprudence

A key implication of the above analysis is that what are largely political or external factors often exert direct effects on judicial decision making. It was also hypothesized above (Hypothesis 4) that jurisprudence would not remain autonomous from these influences. Rather, the judicial impulse towards legitimacy cultivation is expected to lead towards development of politically sensitive jurisprudence that allows judges to dispose individual cases in such a way that tends not to alienate the public nor consistently abrogate the preferences of mobilized political actors. As this section illustrates, politically sensitive jurisprudence can take a variety of forms.

First, courts can devise doctrines that are tailored to the specificities of individual cases and that embody sensitivities to the preferences of the public and mobilized political actors. One such example is the Supreme Court of Canada's introduction of the so-called "duty to negotiate" doctrine in the 1998 Quebec *Secession Reference* (Radmilovic, 2010a). As discussed in Chapter 5 of this dissertation, confronting a momentous question in a highly charged political environment the Court's key doctrinal innovation in *Secession Reference* – the duty on the part of federal and provincial governments to engage the province of Quebec in negotiations following a successful referendum – reflected the consensus opinion among both the public and key political actors all of whom believed that negotiations

should play a central role in any process dealing with the potential secession of Quebec. Devising such a politically sensitive jurisprudence was an important component of the Court's success in meeting the legitimacy challenge it faced in that case.

A similar instance of politically sensitive jurisprudence was reached by the Supreme Court of Canada in its 1999 *Marshall 2* decision dealing with fishing rights of Mi'kmaq Aboriginals in Atlantic Canada. After delivering a highly activist ruling in the low-visibility environment of *Marshall 1*, and after founding itself in a highly charged and visible political environment, the Court reconciled the intense conflicts between Aboriginal and non-Aboriginal fishers in part by proclaiming that Aboriginal fishing rights could be exercised only in the context of an "equitable access to resources" for both Aboriginal and non-Aboriginal communities (Radmilovic, 2010b). As discussed in Chapter 4, this formulation of rights as ensuring an "equitable access to resources" was clearly designed to avoid further clashes with political actors by devising a compromise position. As the duty to negotiate doctrine from *Secession Reference* ruling, the "equitable access to resources" formulation reflected much of external realities. In both of these cases the Supreme Court of Canada engaged in acts of jurisprudential activism (i.e. formation of new doctrines) so as to ensure that its jurisprudence better reflects external political realities.

In addition to devising doctrinal solutions tailored to the specifics of individual cases, the second way in which courts can engage in politically sensitive jurisprudence is by devising and utilizing tests for determining the constitutionality of state action that engage in balancing of interests involved in a dispute. By being explicitly sensitive to external factors, such balancing tests can help ensure that the evolution of judicial decision making exhibits systemic sensitivities to such factors as public opinion or preferences and mobilization of important political actors.

As an example of such jurisprudence, consider the so-called *Collins* test governing the exclusion of evidence under section 24(2) of the Canadian Charter. The *Collins* test includes the analysis of the effects that exclusion of evidence might have on the reputation of justice, and in this context "the Court has indicated that the reputation of justice can be undermined by admitting evidence produced by Charter violations but also by excluding evidence in cases that would shock the public" (Kelly 2005: 111). The effect of this doctrinal formulation is that a purely legal analysis of facts of the case can by itself ensure that the progression of judicial outcomes does not

exhibit hostility to the dominant strains of public opinion. In *R. v. McIntyre* (1994: 480), for example, the Court held that the accused's statements should not be rendered inadmissible in part because "the tricks used by the police were not likely to shock the community."

Balancing approach is suitable for ensuring politically sensitive jurisprudence primarily because it allows courts to engage in contextualist, case-by-case analyses that resolve individual cases in light of their particularities. As the Canadian Supreme Court noted in *United States v. Burns*, "[i]t is inherent in the … balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (2001: para. 65). Given that "the mix of contextual factors put into the balance" often has to do with such things as preferences of important governmental/state actors and perceived public or communal attitudes, the employment of the balancing approach can help legitimacy cultivation by ensuring that broad patterns of case disposition exhibit sensitivities to contrasting constellations of external factors. Application of the balancing approach also sends a clear signal to external political actors that the Court is sensitive to their interests as it goes about its decision making. In contrast to doctrines that instruct judges to balance the variety of contextual factors surrounding the issue under review, development of rigid, categorical and inflexible rules and doctrines, which instruct judges to resolve cases not in light of contextual factors but in accordance with a pre-determined standard that would ensure almost identical application in every circumstance, are distinctly less helpful in ensuring legitimacy cultivation.

Courts can also develop various forms of so-called *political questions* doctrines which declare particular questions (usually of a highly sensitive and political nature) to be beyond the purview of judicial competence to decide. In the *Secession Reference* case, for example, the Court declared that the most controversial and divisive questions involved in the case, which had to do with the onset, process and outcome of constitutional negotiations that were to follow a successful referendum in Quebec, were such political questions to which no answers were provided. Avoidance of these controversial question was part of the Court's apparent strategy to avoid clashes and entanglements with dominant political actors, to secure the overwhelming acquiescence to its decision, and to re-establish its legitimacy as an unbiased arbiter of Quebec-Canada relations in what was a highly visible case of enormous political significance (Radmilovic, 2010a).

Courts can also rely on *remedial discretion* to help bring about legitimacy cultivating outcomes. A common practice of the Canadian Supreme Court, for example, is to suspend declarations of invalidity for a period of time which allows the Court to blunt the impact of its policy activist decisions and pacify its relations with governmental actors. Suspended declarations of invalidity have these effects primarily because they designate governmental actors, and not judges, responsible for designing and implementing policy responses to what are otherwise activist decisions. For this reason it is difficult to overestimate the extent to which suspensions can reduce lawmakers' policy costs vis-à-vis statutes in question. According to Ryder, for example, suspended declarations of invalidity suggest "that the costs to lawmakers of risking Charter violations may no longer be apparent" and their routine use may even imply that lawmakers "take no significant risks if they pass laws without serious regard for Charter rights and freedoms" (2003: 288). As Chapter 3 of this dissertation will show, as a percentage of all invalidations delivered by the Supreme Court of Canada, suspended declarations of invalidity have jumped from 11 percent during the 1980s, to 28 percent during the 1990s, to 60 percent during the 2000s (inclusive of 2008).

Another way in which judges can rely on remedial discretion to bring about politically sensitive outcomes is by (re)interpreting constitutional provisions so as to avoid declarations of constitutional invalidity. For example, in *Canadian Foundation for Children, Youth and the Law v. Canada* (2004) – see Chapter 6 – the Supreme Court of Canada faced a challenge to section 43 of the *Criminal Code* which provides a defence to a charge of assault for parents who use reasonable force over children in their custody. A declaration of constitutional invalidity on such a popular issue as the parental prerogative to 'spank' children would have almost certainly thrust the Court into a political minefield. As Cameron notes (2006: 128), "[r]ather than invite controversy" by delivering an unpopular and controversial declaration of invalidity, the Court "adopted the unusual but increasingly familiar strategy of re-interpreting the provision aggressively to cure elements of residual unconstitutionality." Pinard (2006) finds similar remedial manoeuvring at work in the Court's ruling in *Montréal (City) v. 2952-1366 Québec Inc.* (2005). According to her, such actions of the Supreme Court are fundamentally linked to issues of legitimacy preservation because "judicial interpretation of statutes and the granting of constitutional remedies do not

raise the same concerns about legitimacy" (2006: 115). Pinard goes on to explain (2006: 115-116):

> Although democratic values can make room for judicial interpretation of statutes, they may require some justification for their modification or striking down by a non-elected judiciary, a much more debatable and politically controversial aspects of judging. Judges are therefore watched, scrutinized, analyzed and criticized when they grant constitutional remedies. An attempt to sidestep this inconvenient scrutiny may underlie the … statutory interpretation that one finds in the majority judgments in *Canadian Foundation* and in *Montreal (Ville)*.

Remedial discretion is an invaluable judicial tool of legitimacy cultivation because it can allow courts to deliver rulings that ensure that neither of the two sides in the dispute experiences a total loss (or total victory). A careful use of remedial discretion, in fact, often brings about delicate outcomes that satisfy interests of *all* actors involved in the dispute. While a declaration of invalidity typically implies a loss for governmental actors, suspending the onset of statutory invalidations for a period of time can serve to significantly soften their policy impact. For example, the primary reason why the otherwise-activist *Charkaoui v. Canada* (2007) decision failed to antagonize the Court's key audiences, including the federal government, had to do with the fact that the Court suspended the onset of its invalidation. As discussed in Chapter 7, this ensured that the government retained the control over the policy regime which allowed it to bring about minimal changes to the policy status quo. The reinterpretation of the impugned statute in *Canadian Foundation*, discussed in Chapter 6, ultimately had the same effect. In the aftermath of the decision both pro- and anti-spanking supporters claimed victory. This dissertation will show that the Supreme Court of Canada regularly relies on a variety of remedial tools to control the political fallout from its decisions.

It is hard to provide an all-inclusive account of forms of politically sensitive jurisprudence. They seem to arise through the interaction between the specifics of legal and political environments from which cases arise and judicial ingenuity in responding to such contexts. As such, they can take a variety of forms. It is suggested here, however, that at the heart of this endeavour are judicial concerns about legitimacy cultivation.

Strategic Literature on Judicial Decision Making

The theory of strategic legitimacy cultivation outlined in this chapter springs from the wealth of knowledge and understanding accumulated by a number of classic treatises

which show that majoritarian forces hold significant sway over high courts. In a classic study of high-court decision making, Robert Dahl (1957) showed that judicial review forms an integral part of national governing and policymaking structures. Dahl's key finding was that the U.S. Supreme Court's policy-making influence is typically put in service of supporting rather than undermining interests of dominant lawmaking majorities. His explanation for why the US Supreme Court exhibits such responsiveness emphasizes the fact that President, who is popularly elected, is in charge of appointing the justices with the advice and consent of another popularly elected institution, the Senate. Dahl's argument, therefore, espouses the assumptions of the attitudinal model: Judicial decision-making is regarded as being importantly determined by individual justices' personal preferences which, as a result of the appointment process, happen to largely coincide with those of the public.

Another stream of research on the US Supreme Court, however, postulates that public attitudes exert direct effects on judicial decisions. After holding judicial preferences constant and after controlling for the effects of the President and the Congress, Mishler and Sheehan's early study in this mould (1993: 96) finds that "there is evidence of a reciprocal relationship … between the ideology of the public mood in the United States and the broad ideological tenor of Supreme Court decisions." According to Mishler and Sheehan, therefore, public preferences exert direct impacts on judicial decision making. Other scholars have extended Mishler and Sheehan's approach and have found further evidence of direct links between public attitudes and judicial decisions (see for example Link 1995; McGuire and Stimson 2004). However, since these studies measure how broad trends in the public mood affect the general tenor of judicial decision-making, their findings stress that impacts occur gradually over time and tend to be imperceptible at any one moment or in any one specific decision (Mishler and Sheehan, 1993: 89).

As the above studies, the strategic theory of legitimacy cultivation developed in this dissertation shares the fundamental assumption that majoritarian forces hold significant sway over high courts. However, the theory furthermore suggests that public preferences and attitudes exert direct, and more immediate, impacts on judicial decision-making. Judges can tailor their decisions to public preferences not only as a function of their attitudinal preferences (as Dahl suggests), but also in order to cultivate their institutional legitimacy.

The theory also builds on other seminal studies of high-court decision making

which emphasize the extent to which governments exert control over judicial policymaking influence. Walter Murphy's *Elements of Judicial Strategy* (1964: 27-8), for example, suggests that legislators possess "an impressive array of weapons," ranging from court-packing plans to altering administrative structures of courts, with which they can curb judicial policymaking influence and induce self-restraining behaviour among judges who seek avoidance of adverse reactions to their rulings. McCloskey's historical treatise on the American Supreme Court similarly suggests that judges often seem "pitiful rivals to state legislatures, congresses and presidents who command the machinery of government and are backed by the mighty force of the electoral process" (McCloskey, 2005: 46). While developing a novel theoretical framework and explanatory mechanism, the theory espoused in this dissertation is in agreement with Murphy and McCloskey that judicial alertness to governmental and societal pressures means that the institution of judicial review is permeated by significant majoritarian impulses (see also Rosenberg 2008).

Most immediately, the theory of strategic legitimacy cultivation builds on contemporary strategic approaches to judicial decision making associated with the so-called separation of powers literature which focuses on interactions between legislative and judicial actors (e.g. Marks 1989; Ferejohn and Weingast 1992; Ferejohn et al. 2007; Helmke 2005). According to this literature, exhibiting strategic sensitivities to the preferences of governmental actors allows courts to increase the likelihood that their decisions will be implemented and that their jurisdictional authority will remain in tact and not become subject of governmental threats.

Due to its focus on the issue of visibility of individual decisions, the approach developed in this dissertation is most closely related to those of Georg Vanberg (2005) and Jeffrey Staton (2010). Vanberg's game-theoretic model of legislative-judicial relations starts from the above-described implementation problem courts everywhere face and suggests that legislatures' own electoral connections, and their fear of a potential public backlash for going against a popular court or a decision, can serve as an effective enforcement mechanism for judicial decisions. The effectiveness of this mechanism, however, depends on the public capacity to monitor legislative reactions to judicial rulings. Consequently, Vanberg argues that popular courts should be more likely to engage in activism when public awareness is high. High levels transparency or visibility, therefore, are expected to produce higher likelihoods that courts will render policy-activist outcomes. Staton (2010) extends Vanberg's

framework that high levels of public awareness can help courts solve the implementation problem by pressuring governmental towards implementation of activist rulings. Staton's key addition to Vanberg's theoretical framework is the argument judges can enjoy a "measure of control" over how much publicity their decision receive by themselves issuing press releases and thereby increasing visibility of their decisions. He finds that judges on the Mexican Supreme Court selectively promote decisions striking down the policy status quo in order to increase their visibility and ensure better implementation prospects.

In contrast to Vanberg and Staton, the theory presented in this dissertation suggests that visibility can have different effects on judicial decision making. Judicial quests for maintaining high levels of diffuse support implies that highly visible cases will heighten judicial sensitivity to all of the strategic considerations described above, including the tendency to moderate (and not increase) the levels of judicial activism. The prediction that judicial activism will tend to be more prevalent when public awareness of individual cases is higher makes sense in light of the problem Vanberg and Staton are primarily concerned with: implementation of judicial decisions. Surely, to the extent that relatively popular courts are primarily or solely concerned with ensuring that governmental actors implement their decisions, they may indeed tend to be more activist when public awareness of governmental reactions to court decisions is likely to be higher. There are reasons to believe, however, that other concerns might play upon the minds of judges that can interfere with this prediction. As discussed above, according to a body of empirical work associated with the public support for the courts literature, legitimacy of judicial institutions importantly derives from their *insulation* from ordinary political pressures. An *open* and *visible* embrace of activism, on this account, risks politicization of the judiciary and, ultimately, weakening of its institutional legitimacy and power. To the extent that judges are primarily concerned about *preserving* or *augmenting* their public support, therefore, they may be *less* and not more likely to deliver activist decisions in highly visible cases. As much of the analyses conducted in this dissertation will show, this is one of the key lessons that emerges from broad patters of the Supreme Court of Canada's decision making.

This dissertation will not address the Staton's (2010) argument that high courts might engage in selective promotion of case results in order to help ensure implementation of their decisions. The Supreme Court of Canada's relationship with

the media has undergone a dramatic change since the Charter was introduced and the Court consequently became a more policy-salient institution. The Court instituted a number of initiatives designed to deepen its rapport with the media including the formation of the office of Executive Legal Officer in charge of Court-media relations in 1985. The Court also allowed television cameras to be brought inside the courtroom in the 1990s (see Sauvageau et al., 2006; Macfarlane, 2009). In spite of these changes, however, there is no evidence that the Supreme Court of Canada engages in selective promotion of case results. The Supreme Court, in fact, accompanies all of its decisions with a press release, and allows for indiscriminate broadcast of its hearings on the Canadian Parliamentary Affairs Channel (CPAC).[3]

There are several ways in which the theory presented in this dissertation departs from the existing literature on strategic decision making and develops novel predictions about judicial behaviour. First, as suggested above, the theory makes novel predictions regarding the role that public awareness, or visibility, has on judicial behaviour. Second, the theory suggests that in addition to governmental actors, organized groups can also exert significant constraints on judicial decision making. This is not well recognized in the existing separation-of-powers literature which almost exclusively focuses on relations between courts and governments. One exception to this is Vanberg's (2005: 47) argument that "the presence of large, well-organized interest groups that favour implementation of a specific judicial decision increases transparency surrounding that decision, thereby making it more difficult for legislative majorities to resist or evade a ruling." This argument, however, still emphasizes the primacy of legislative-judicial relations so that organized groups exert effects on judicial decision making only in terms of how they may affect the conduct of legislative actors. The results of this study show that judges are directly responsive to the preferences and mobilization of organized groups and that existing theoretical models of legislative-judicial relations should take better account of that fact. While governmental actors can significantly affect decision making of high court judges, organized groups matter too.

Third, the dissertation develops novel predictions about how judicial strategic sensitivities to external political factors can imbue the development and evolution of

[3] According to Staton (2010), selective promotion of case outcomes is measured on the basis of whether or not a court announces a decision by issuing a press release in only a selective number of cases. Information on Supreme Court of Canada press releases is available at: http://scc.lexum.umontreal.ca/en/ndn/2010.html.

constitutional jurisprudence. Chapters that follow will provide evidence for the claim that judicial strategic calculations infiltrate doctrinal formulations so that consequent sincere application of doctrines can bring about legitimacy-attentive outcomes that exhibit sensitivities to external, political factors.

Therefore, there are several ways in which the theory outlined in this dissertation advances the existing literature on strategic judicial decision making. As the next section of this chapter will show, the theory also significantly departs from existing theoretical accounts of how courts attain institutional legitimacy.

Existing Theories of Legitimacy Attainment

This section considers main existing theories of how courts attain and retain legitimacy. Two of these theories are distinctly Canadian and have been developed in light of the workings of the Canadian Supreme Court, and two are drawn from the comparative literature on judicial decision making. As the discussion shows, while these theories provide some insights into the question of how judicial institutions attain and retain legitimacy, each is also characterized by some important difficulties.

Dialogue Theory

The first 'Canadian' theory of how courts attain institutional legitimacy is the so-called dialogue theory put forward by Hogg and Bushell to describe the character of judicial-legislative relations under the Charter (Hogg and Bushell, 1997; Hogg et al., 2007; see also Roach, 2001). According to this theory, specific features of the Charter allow legislative actors to reverse, modify or otherwise avoid unfavourable judicial decisions by introducing new legislation. In this manner, the Charter is said not to provide courts with a final word on constitutional interpretation but instead to encourage a dialogue between courts and legislatures – a dialogue that serves to augment the democratic legitimacy of judicial review. As Hogg and Bushell note, "[w]here a judicial decision striking down a law on Charter grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished" (1997: 80). Specific sections of the Charter that facilitate the dialogue between courts and legislatures are: (1) section 33—the so-called notwithstanding clause which allows federal and provincial legislatures to override specific Charter rights for a specific period of time; (2) section 1—the so-called "reasonable limits" clause which allows reasonable limits to be placed on

Charter rights; (3) sections 7, 8, 9 and 12—which are framed in qualified terms and therefore allow for the possibility of corrective legislative action following a judicial pronouncement of unconstitutionality; and (4) section 15—the equality clause which allows legislative flexibility in complying with a judicial decision (Hogg and Bushell, 1997: 82-91).

The dialogue theory, therefore, provides a potential answer to the question of how and why the Supreme Court of Canada remains successful in maintaining its legitimacy since the Charter was introduced. Given that judicial pronouncements in Charter cases "almost always leave room for a legislative response," the dialogue between legislatures and courts ensures that democratic will does not get usurped by a judicial fiat and that Canadians retain relatively high levels of support for the judiciary (Hogg and Bushell, 1997: 105). This explanation, however, leaves some very important questions unanswered.

First, the theory is silent on the question of how the Canadian Supreme Court ensures its legitimacy in areas of law that fall beyond the specific Charter sections specified above that supposedly facilitate the capacity of the legislative branch to reverse, modify or avoid a judicial decision. For example, legitimacy of the judicial function often comes into play in non-Charter cases, such as the 1998 *Secession Reference* case (see Chapter 5), in which dialogue between courts and legislatures, as described above, is simply not possible. To note another example, how does the Supreme Court ensure legitimacy of its judicial review concerning the section 35 Aboriginal rights jurisprudence, which is beyond the purview of the sections 1 and 33 of the *Charter*? As Hogg and Bushell suggest (1997: 92), "where section 1 of the *Charter* does not apply" the dialogue will not occur as "the court will, by necessity, have the last word."

Second, the dialogue theory fails to capture the complexity of legislative-judicial interactions. According to the theory, dialogue between courts and legislatures commences with a judicial decision that leaves open a possibility on the part of the legislative actors to enact a new legislation in response (Hogge and Bushell, 1997: 80). By assuming that the judicial branch is free from external constraints in how it interprets constitutional provisions, the theory ignores the extent to which justices engage in strategic adjustment of their decision making *in anticipation* of potentially unfavourable legislative reactions (Radmilovic, 2010b). This could be a particularly weighty oversight given that a large and growing

comparative literature on judicial decision making shows that judges commonly adjust their decision making so as to avoid unfavourable governmental reactions (see e.g. Epstein and Knight, 1998; Garrett et al., 1998; Helmke, 2005; Vanberg, 2005). While in the Canadian context not much similar research has been conducted (but see Radmilovic, 2010a; 2010b), it remains very much an open question, and a potentially fruitful research agenda, whether or not Canadian justices exhibit such sensitivities.

Third, the dialogue theory also ignores the Court's linkages with other, non-governmental actors. As much of the existing literature on Charter litigation shows, organized groups play important roles in influencing the Supreme Court of Canada (e.g. Epp, 1998; Morton and Knopff, 2000; Brodie, 2002).

The dialogue theory certainly provides some insights into the question of how judicial review in Canada attains democratic legitimacy. Perhaps its key strength is the realization that judicial decisions can be significantly modified by legislative actors. However, there are important reasons to question the extent to which the theory provides a comprehensive account of legislative-judicial relations, and a comprehensive explanation of how the Supreme Court of Canada ensures the attainment and retention of its legitimacy.

Privileging of Interest Groups

The second theory of how the Supreme Court of Canada ensures its legitimacy is developed by Brodie (2002) who argues that legitimacy of the Canadian Supreme Court is importantly linked to the Court's "privileging of interest group litigants." According to this theory, the Court uses interest-group support in order to legitimize its activist decision making by relying on the concept of the so-called "disadvantaged group." As Brodie notes (2002: xiv), "[t]he idea that because the other institutions of government cannot treat certain groups justly, the courts must step in and use their powers to vindicate the rights of these groups neatly legitimizes activist judicial review if the courts work with politically disadvantaged groups." Brodie (2002: 123) finds evidence of the privileging of interest group litigants in the Supreme Court of Canada's treatment of interest-group applications for leave to intervene in constitutional cases, as well as in the Court's patterns of equality rights jurisprudence.

There are several problems with this explanation, however. Perhaps most importantly, Brodie's account of how the Supreme Court of Canada attains legitimacy ignores other important political actors such as governments. This omission is

particularly glaring in light of the fact that federal and provincial governments are more frequent interveners before the Supreme Court than interest groups and that the federal government, in particular, is generally recognized as the most frequent and most successful litigant before the Supreme Court (see Hennigar, 2007; McCormick, 1993). As much of the data presented in this dissertation will show, governmental actors are some of the most consistently successful litigants before the Supreme Court of Canada and the Court systematically exhibits sensitivities to their mobilized preferences. These facts are very difficult to reconcile with the claim that it is judicial sensitivity to interest groups that primarily serves to secure the legitimacy of the Supreme Court of Canada. In other words, just as the dialogue theory fails to take into careful account the role and influence that interest groups exert before the Supreme Court of Canada, so does the Brodie's theory largely ignore the role played by governmental actors. For this reason, the theory struggles in providing a complete explanation of how the Supreme Court of Canada attains and retains its institutional legitimacy.

The theory of strategic legitimacy cultivation developed above addresses these concerns associated with the dialogue theory and the privileging of interest groups explanation of how courts attain and maintain their legitimacy. The theory provides a new explanation for how the Supreme Court of Canada cultivates its legitimacy across the full spectrum of its jurisprudence. It takes better account of the complexity of legislative-judicial relations by including in its theoretical and empirical ambit the tendency of judges to engage in strategic adjustment of their decision making in anticipation of potentially unfavourable legislative reactions. Finally, the theory shows how governmental and organized-group actors *combine* to affect judicial legitimacy cultivation.

Principled-Reasoning Theory

According to the principled-reasoning theory of how courts attain and maintain legitimacy, it is the judicial disposition of cases in accordance with internal strictures of the law, such as the principle of *stare decisis* for example, that fosters the institutional legitimacy of courts as well as the legitimacy of individual court decisions (see e.g. Friedman et al., 1981; Knight and Epstein, 1996; 1998; Hansford and Spriggs II, 2006). According to this argument, principled reasoning augments institutional legitimacy because it lives up to the public's expectation that courts are

procedurally fair and neutral decision-making bodies that decide cases according to legal principles (Hansford and Spriggs, 2006: 20-21). By not living up to these expectations, judges risk that the public might reject their decisions as illegitimate because they depart from the public expectation of what legitimate judicial function involves (Knight and Epstein, 1996: 1022). In fact, As Hansford and Spriggs note, some legal historians in the U.S. context argue that it was a crisis in the legitimacy of the federal judiciary that led to the emergence of the norm of *stare decisis* (2006: 19).

In the Canadian context this theory is espoused by Choudhry and Howse (2000), for example, who argue that the legitimacy of courts is dependent upon legally principled decision making. As they note, the legitimacy of the Canadian Supreme Court importantly depends on the citizens' view of the Court "as a forum of principle and of reason" and the legitimacy of individual decisions is determined by conceptually valid interpretations of relevant constitutional principles and provisions (2000: 163).

There are several problems with this explanation, however. Given that citizens tend to be largely unaware of the subtleties of judicial reasoning in almost any given case, it is hard to see how principled reasoning can by itself secure legitimacy among the public. In fact, one of the difficulties with ascertaining that individual decisions exert *any* effects on public attitudes is the relative lack of awareness of specific decisions among the public (see e.g. Mondak and Smithey, 1997; Fletcher and Howe, 2000: 4). It is simply hard to expect the public to have enough information and expertise to be able to assess whether or not a court's reasoning in any given case is in line with the precedent, or amounts to a proper interpretation of the relevant text, and therefore deserves public respect.

Furthermore, legal scholars and judges themselves are known for often being at odds about what constitutes a proper application of *stare decisis* and a proper interpretation of relevant statutory and constitutional texts. Given this habitual lack of clarity as to what constitutes a proper application of legal principles in the first place, it is hard to see how properly applying these principles can serve to secure public support for courts. Also, courts often succeed in promoting their legitimacy even in light of apparent errors or anomalies in their reasoning. For example, Choudhry and Howse (2000) argue that the Canadian Supreme Court has succeeded in retaining and promoting its institutional legitimacy with its 1998 *Secession Reference* decision in spite of several fundamental "anomalies" in its reasoning which they characterize as

rejections of the conventional, positivist account of constitutional interpretation (154) and "radical departure[s] from normal constitutional practice" (2000: 144, 158).[4]

This is not to suggest that judicial reliance on the legal method, in terms of seeking out proper applications of *stare decisis* and proper interpretations of relevant constitutional and statutory texts, plays *no* role in securing the legitimacy of courts. It is to suggest, however, that it cannot be the sole determinant of institutional legitimacy. A more complete account of how courts ensure the attainment and retention of their legitimacy has to include a look at other factors.

Positivity Bias Theory

The final conventional account of how courts attain institutional legitimacy is the so-called positivity bias theory which postulates that particular features of the legal process secure high levels of legitimacy for courts (e.g. Gibson et al. 2003; Gibson and Caldeira 2008; Hibbing and Theiss-Morse 1995). According to this theory, *mere exposure* to courts has inherently positive effects on judicial public support. As courts become more visible to the public, the public becomes exposed to symbols of impartiality, insulation, fairness and non-political decision making that are associated with the judicial branch of government, and this exposure exerts positive effects on the public support for courts. On this account, in order to secure institutional legitimacy judges do not need to do much apart from behaving in line with the procedural rules of the judiciary. As Gibson and Caldeira note, "almost anything that causes people to pay attention to courts – even highly controversial events – enhances institutional legitimacy because citizens are simultaneously exposed to legal symbols that portray the judiciary as a unique institution and that therefore impart and reinforce institutional legitimacy" (2008: 96).

Much of the empirical support for the positivity bias theory is based on relatively high aggregate measures of support that courts tend to enjoy vis-à-vis the political branches of government (see Hoekstra 2003: 13). Also, the theory is supported by a considerable amount of empirical research which shows that increases in public exposure to judicial processes are related to higher levels of diffuse support (e.g. Caldeira 1986; Gibson and Caldeira 1992; Gibson et al. 1998). Given the strong empirical foundations, the theory provides important insights into how judicial

[4] For an in depth analysis of the *Secession Reference* case, as well as the Choudhry and Howse's argument, see Chapter 5.

institutions maintain high levels of public support, especially vis-à-vis the political branches of government. However, there are reasons to doubt that the positivity bias theory provides a complete explanation of how courts ensure the attainment and retention of their legitimacy.

First, the positivity bias theory does not control for a possibility that substantive decision making is at least partially responsible for how judicial institutions attain and retain legitimacy. As suggested by the theory presented in the previous section of this chapter, it could very well be the case that judges are inclined to behave in a strategic, legitimacy-attentive manner in cases that are likely to attain high levels of public awareness so that substantive judicial behaviour, as opposed to *mere exposure* to courts, is at least partially responsible for findings that increases in public exposure to courts are related to higher levels of diffuse support. Second, the theory also cannot easily explain how could different decisions delivered by the same institution and through the same process result in contrasting levels of support among the public, or, alternatively, how could one group's public support for a court vary across cases and across time. There is a large body of empirical work that shows that public reactions to individual court decisions do indeed fluctuate, and that public *satisfaction* with judicial resolution of individual policy dilemmas can have a direct bearing on institutional legitimacy or diffuse support (see for example Fletcher and Howe 2000; Grosskopf and Mondak 1998; Hoekstra 2003; Mondak and Smithey 1997). The implication of this research is that exposure to courts does not always have positive effects on public support. Rather, in some cases the effect of exposure can be to augment public support, while in other cases the effect is in the opposite direction. As noted above, "one decision can alter *confidence in*, or *support for*" judicial institutions (Hoekstra, 2003: 146, original emphasis).

Staton's (2010) recent analysis attempts to address some of these problems associated with the positivity bias theory. Staton starts by distinguishing between sincere (principled) and insincere (strategic) judicial behaviour and goes on to postulate that whether courts act in a principled or in a strategic fashion can be a key mediating factor controlling the relationship between public awareness and judicial legitimacy. According to Staton, strategically deferential behaviour designed to avoid conflicts with governmental actors can serve to *undermine* the legitimacy of judicial institutions by sending a message to the public that courts are not impartial institutions. The public, therefore, is held to be able to read through judicial strategic

behaviour and associate such behaviour with a lack of judicial impartiality which undercuts the Court's reservoir public support. Consequently, Staton argues that public awareness of "strategically deferential" behaviour results in a depletion of a court's reservoir of public support while awareness of "non-strategic," "impartial," "sincere" behaviour results in an augmentation of public support.

Staton's argument will be further addressed in the concluding chapter of this dissertation where some of the assumptions of his explanation will be evaluated against the full brunt of evidence mounted by this dissertation. It will suffice here to suggest that his argument that the public reads through strategic behaviour to deduce a lack of judicial impartiality rests on a potentially questionable assumption regarding the amount of information and expertise that the public can reasonably be expected to possess. It was already suggested above that one of the difficulties with ascertaining that individual decisions exert *any* effects on public attitudes is the relative lack of awareness of specific decisions among the public at large (see e.g. Mondak and Smithey, 1997; Fletcher and Howe, 2000: 4). As argued above, this relative lack of information and expertise on the part of the public can make it highly difficult for the public to assess whether or not a court's reasoning in any given case amounts to a principled or unprincipled interpretation of a constitutional document, let alone whether it amounts to an instance of strategic or non-strategic judicial behaviour.

Conclusion

In contrast to Staton, and in contrast to other existing explanations of how courts attain and maintain their legitimacy, the central argument of this dissertation is that strategic decision making is one of the primary ways in which courts can ensure cultivation of their institutional legitimacy. As discussed above, the theory starts from the assumption that legitimacy is a fundamental resource of judicial institutions that augments the power and influence of courts by helping to ensure compliance with judicial pronouncements and by preventing adverse reactions that might threaten jurisdictional authority. Also, institutional legitimacy is a valuable judicial commodity given that high courts are appointed bodies that cannot straightforwardly refresh their legitimacy through electoral processes inherent in political branches of government. Finally, legitimacy is of particular concern to judicial institutions in light of the recent growth of judicial power worldwide. Without a hefty dose of institutional legitimacy in the form of public support it is hard to see how high courts

could exercise their powers and strike at policy outputs of legislatures and executives who, as McCloskey points out, "command the machinery of government and are backed by the mighty force of the electoral process" (2005: 42).

The aim of the rest of this dissertation is to test the theory of strategic legitimacy cultivation developed in this chapter. The Part 2 of the dissertation subjects the theory to statistical tests through an analysis of constitutional cases the Canadian Supreme Court has decided in the period from 1982 to 2008. This analysis tests the extent to which broad decision-making patterns of the Supreme Court accord with the predictions of the theory. Part 3 of the dissertation analyzes judicial strategic sensitivities to legitimacy cultivation in the context of two case studies: 1999 *Marshall* case on Aboriginal Rights (Chapter 4) and the 1998 *Secession Reference* case dealing with the issue of potential secession of Quebec from the rest of Canada (Chapter 5). Finally, Part 4 of the dissertation is composed of Chapters 6 and 7 which examine the extent to which the Supreme Court of Canada's jurisprudence pursuant to section 7 of the Charter of Rights and Freedoms corresponds with the expectations of the theory. Combining attributes of case study and cross policy research designs, these two chapters track the evolution of the section 7 jurisprudence since the first section 7 case, *Motor Vehicle Reference,* was decided in 1985 until the Court's *Khadr 2* ruling delivered in 2010. Along the way, a broad range of policy areas are explored and analyzed against the backdrop of the theory of strategic legitimacy cultivation.

PART II:
STATISTICAL APPRAISAL OF STRATEGIC LEGITIMACY CULTIVATION

CHAPTER 3:
STATUTORY INVALIDATIONS AND SUSPENSIONS AT THE SUPREME COURT OF CANADA

According to the main argument developed in this dissertation and outlined in Chapter 2, judicial cultivation of institutional legitimacy requires judges to exhibit strategic sensitivities to factors operating in the external, political environment such as the state of public opinion and mobilized preferences of political actors on a given issue. One of the central implications of the theory is that judicial decision making does not occur in vacuum and that understanding the workings of high courts requires taking close accounts of the larger political environment from which individual cases arise and to which justices often exhibit acute sensitivities.

The aim of this chapter is to subject the theory to a statistical test, which is one of the key methodological approaches that social scientists can rely upon to ensure that particular theoretical propositions have empirical merit. In particular, the chapter undertakes a quantitative analysis of Supreme Court of Canada's constitutional decision making. The chapter is divided into four parts. The first part provides an overview of the data, and of the hypotheses to be tested. The second and third parts of the Chapter respectively provide a frequency and a logistic regression analysis of the data. Final section of the chapter is reserved for concluding remarks.

Data and Hypotheses

The statistical analysis in this chapter relies on a dataset that includes all constitutional rights cases involving judicial review of legislative or regulatory acts decided by the Supreme Court of Canada in the post-Charter period (1982-2008). The dataset includes 250 cases. In order to generate a comprehensive list of cases in which the Supreme Court had an opportunity to invalidate a federal or provincial statute or regulatory act I consulted the database originally created by Morton et al. (1992; 1994), which was updated to be inclusive of the year 2008. My original contribution to the database includes information and relevant codings pertaining to third-party interveners (what in the U.S. context are known as *amicus curiae*)[5] in all

[5] In Canada and United States, the terms third-party intervener and *amicus curiae* have different meanings. In the US federal courts, the term intervener (or intervenor) refers to absentee parties authorized to participate in absentee-preclusion cases. These interveners enjoy standing to appeal and can offer evidence. *Amicus curiae,* in contrast, do not have standing to appeal and cannot offer evidence during proceedings but are provided with an opportunity, upon application, to provide legal opinion before courts in the form of a brief. In Canada, third-party interveners have the same status as

of the cases. These are extensively relied upon in the analysis that follows. Earlier versions of the database did not include information pertaining to interveners and this amounts to a unique and, as far as I am aware, first opportunity to employ a large N, quantitative analysis to assess the impact that interveners have on Supreme Court's decision making in all constitutional cases since the Charter was introduced.

As per Chapter 2, if judges indeed engage in strategic calculations so as to ensure cultivation of their legitimacy their decision-making behaviour should conform to the expectations contained within these five hypotheses:

> *Hypothesis 1:* Judicial disposition of cases will tend to accord with the state of specific support.
>
> *Hypothesis 2:* Judges will tend to avoid overt clashes with political actors.
>
> *Hypothesis 3:* Judges will tend towards moderation of judicial activism.
>
> *Hypothesis 3a:* Judicial tendency towards moderation of judicial activism (H3) will be less (more) pronounced when public opinion is supportive of an activist (deferential) outcome (H1), and/or when dominant political actors tend to be supportive of an activist (deferential) outcome (H2).
>
> *Hypothesis 4:* Judges will tend to engage in politically sensitive jurisprudence.
>
> *Hypothesis 5:* Hypotheses 1-4 will tend to be amplified in cases garnering high public visibility.

It is important to note that this chapter will not test Hypothesis 1 according to which judicial decisions will tend to accord with the state of specific support. As argued in Chapter 2, the primary reason for this has to do with the fact that public opinion polls on issues appearing before high courts rarely exist so that today, as in 1957 when Dahl conducted his analysis, it still remains largely impossible to conduct a statistical appraisal of the extent to which broad patterns of judicial outcomes accord or discord with the state of pre-decision public opinion. Hypothesis 1, however, *will* be explored in Parts 3 and 4 of this dissertation where a focus on specific decisions or on specific policy areas of the Supreme Court jurisprudence will allow for taking into account a measure of specific support.

Hypotheses 2-5 are all concerned with factors that affect judicial disposition of individual cases. For this reason, the dependent variable refers to case outcomes. In

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American *amicus curiae* while the term *amicus curiae* in Canada is reserved for parties contracted by courts to provide a viewpoint or serve a particular function (mostly in exceptional circumstances). During the landmark Quebec *Secession Reference* case, for example, the Supreme Court of Canada commissioned an *amicus curiae* to argue the separatist cause before it because the Quebec government refused to take part in the proceedings (see Chapter 5).

particular, since in each of the cases in the dataset the Supreme Court had an opportunity to invalidate a statute, case outcomes are classified into two categories: *Invalidations* and *Non Invalidations*. This classification clearly corresponds with the definition of activism as *policy activism* provided in the introductory chapter. Delivery of statutory invalidations implies that the Supreme Court has changed the policy status quo, while deliver of non-invalidations implies that the policy status quo was affirmed.

Only those cases in which the Court has delivered an unambiguous declaration of invalidity, and thereby imposed policy costs on the government in question, are treated as invalidations. As suggested in the introductory chapter, occasionally the Supreme Court of Canada reinterprets individual statutes thereby changing some of the meaning of the words contained in them. One such occasion occurred in the 2003 *Canadian Foundation for Children, Youth and the Law v. Canada* in which the Court ruled that section 43 of the Criminal Code allowing parents to 'spank' children was constitutionally valid. The Court did, however, reinterpret the provision so as to prohibit particular kinds of corporal punishment to be used against children. Given that the primary purpose behind such reinterpretations of individual provisions is to "cure elements of residual unconstitutionality" and therefore ensure the validity of the legislation under review (Cameron, 2006: 128), they are not considered as invalidations for the purposes of this analysis.

Table 3.1 summarizes the distribution of invalidations and non-invalidations. Out of 250 constitutional rights cases in which the Supreme Court had an opportunity to invalidate a statute, it did so in 74 cases (29.6 percent) while policy status quo was upheld in 176 cases (or 70.4 percent). According to Table 3.2, the Court's rate of suspended declarations of invalidity is just below 30 percent (22 out of 74) while immediate invalidations were delivered in just over 70 percent of the cases (52 out of 74). These overall rates of statutory invalidations and suspensions will be used as baselines for comparison in some of the analyses that follow.

Table 3.1 Invalidations, 1982-2008

	Number of Cases	Percent
Invalidations	74	29.6
Non Invalidations	176	70.4
Total	250	100

In order to provide for a measure of politically sensitive jurisprudence, all cases in which the Supreme Court rendered a declaration of invalidity are classified into two additional categories: *Suspended Invalidations* and *Immediate Invalidations*. As discussed in Chapter 2, suspending a declaration of invalidity can go a long way in softening the political impact of an invalidation by ensuring that no immediate costs are imposed on governmental actors and that governments remain in charge of devising and implementing any future changes to the status quo.

Table 3.2 Suspended and Immediate Invalidations, 1982-2008

	Number of Cases	Percent
Suspended Invalidations	22	29.7
Immediate Invalidations	52	70.3
Total	74	100

There are two independent variables associated with Hypothesis 2-5: *mobilized preferences of political actors* and *pre-decision visibility*. As noted in Chapter 2, since it is hypothesized that these variables exhibit effects on how judges consequently decide constitutional cases, measures of these variables have to be taken in their pre-decision political environment.

In order to obtain a measure of *mobilized preferences of political actors* the study relies on third-party interveners appearing before the Supreme Court of Canada. Third-party intervention is a key institutional mechanism through which actors that are interested but not directly involved in a case (such as governments and organized groups) can affect the Court's decision making by submitting written briefs and by making oral arguments. From the Court's perspective, such submissions present an opportunity to take account of the range of social and political interests surrounding a legal and policy issue and to "transcend the limitations of the immediate parties" (McCormick, 1994: 52).

More specifically, third-party intervention provides an opportunity to test the Court's sensitivity to mobilized preferences of two sets of actors: governments and organized groups. As discussed in Chapter 2, these actors are very relevant for the Court's task of strategic legitimacy cultivation. Governmental actors control implementation of judicial decisions, hold important powers over the institutional structure of the Court, and can engage the Court in open confrontations by rejecting, reversing or otherwise challenging particular decisions. While organized groups lack

some of these governmental powers, they are key social stakeholders that can act as allies or enemies of the Court in the aftermath of a decision and therefore exert significant effects on how the public eventually evaluates a decision.

There are several reasons why third-party intervention provides a good measure of mobilized preferences of governmental and organized-group actors. First, during the time period under study both governmental and organized-group interveners have had a largely open access to the Supreme Court. Since the Charter was introduced in 1982, governmental interveners have had a right to intervene before the Supreme Court in all cases raising a constitutional issue (Hausegger et al., 2009: 225-226). The rules governing organized-group interventions, on the other hand, have evolved somewhat since 1982. Prior to 1987, and facing only sporadic interest from organized groups, the Court's approach towards accepting organized-group submissions was somewhat restrictive (see Hausegger et al., 2009: 225). As larger numbers of organized-group applications poured in, however, the Court in 1987 introduced a more permissive rule according to which organized groups would be allowed to intervene so long as they could demonstrate that their "submissions would be useful to the Court and different from those of the other parties" (Sharpe and Roach 2003: 389). Brodie (2002: 38-39) reports that since that time "many interest groups have applied for leave to intervene each year, and they have generally succeeded," with a 90 percent aggregate success rate.

The second reason why third-party intervention can provide for a good measure of mobilized preferences of governmental and organized-group actors has to do with the fact that third-party interveners appear and make their arguments directly before the Court. This ensures that justices cannot help but be highly aware of their positions. Third, given that different cases attract varying numbers of governments and organized groups, third-party intervention can provide for a measure of both *direction* and *magnitude* of governmental and organized-group mobilized preferences. While in some cases governments and organized groups crowd the courtroom by intervening in very large numbers, at other times their participation is modest or non-existent.

Table 3.3 summarizes participation of governmental and organized-group interveners for all cases in the dataset. A governmental intervention occurs whenever a federal or provincial government intervenes in the case. An intervention is coded as an organized-group intervention if the intervening party is representing a non-

governmental organized interest such as those associated with corporate interests (e.g. Canadian Bankers Association, Canadian Manufacturer's Association), labour (e.g. Canadian Labour Congress, International Longshoremen's and Warehousemen's Union), libertarian interests (e.g. Canadian Civil Liberties Association), Aboriginal interests (e.g. Assembly of First Nations), women's groups (Women's Legal Education and Action Fund), etc. Cumulatively, since the introduction of the Charter, governmental actors have made a slightly higher number of interventions (627) than organized groups (585). As Table 3.3 shows, all interventions are furthermore classified as demanding a change in the policy status quo (*For Invalidation*), as being opposed to a change in the status quo (*Against Invalidation*), or as being uncommitted. Governmental actors overwhelmingly intervene to protect the policy status quo. Only 34 governmental interventions are classified as policy activist compared to 588 interventions classified as policy deferential. While organized groups tend to more regularly appear on both sides of the policy activism/policy deference divide, they more often support activist rather than deferential causes (369 to 206).

Table 3.3 Interveners at the Supreme Court in Constitutional Cases, 1982-2008

	For Invalidation	Against Invalidation	Uncommitted	Total
Governmental Interventions	34	588	5	627
Organized-Group Interventions	369	206	10	585
Total	403	794	15	1215

Table 3.3 also shows that governments and organized groups made a total of 15 uncommitted interventions. An intervention is classified as uncommitted if nothing in the intervener's submission suggests either support for or opposition to a change in the status quo. This typically occurs when an intervener is solely concerned with a side issue that is unrelated to the rights claim under dispute.

The second independent variable – *pre-decision visibility* – requires a measure of pre-decision public exposure that a case received. Given that media is the primary means by which the public learns about political and legal events (e.g. Baum 2006: 136; Sauvageau et al. 2006), the measure of visibility is developed through media coverage. In particular, the *Globe and Mail,* as the only nationally oriented newspaper aimed at general readership in Canada in existence since the introduction of the Charter, was searched for its coverage of Supreme Court of Canada cases. Searches were focused on fourteen-day time intervals surrounding the onset of the

hearing for each of the 250 cases in the dataset (seven days before the first day of the hearing, and seven days following the first day of the hearing).[6] Decision to focus on the hearing was made in light of the fact that media coverage of Supreme Court decisions tends to cluster around the hearing and around the decision (Sauvageau et al. 2006: 97, 175). Hearing dates, therefore, provide a straightforward time reference for measuring pre-decision media coverage of constitutional cases.

The search for individual stories was conducted electronically through the *Factiva* database which includes all *Globe and Mail* editions and stories published since the introduction of the Charter. For each individual case in the dataset several searches were conducted based on a number of different search terms including (1) names of parties, (2) main issues at stake in each of the cases, and (3) general terms such as 'court', 'supreme court', 'charter', 'heard', 'hear', and 'hearing'. For each of the cases in the dataset, the number of stories that directly discussed, mentioned, or otherwise referred to the case being heard before the Supreme Court was recorded. Hence, the *pre-decision visibility* variable is measured through the number of stories published by the *Globe and Mail* that discussed the case being heard at the Supreme Court.

Figure 3.1 Pre-Decision Visibility in Constitutional Cases, 1982-2008

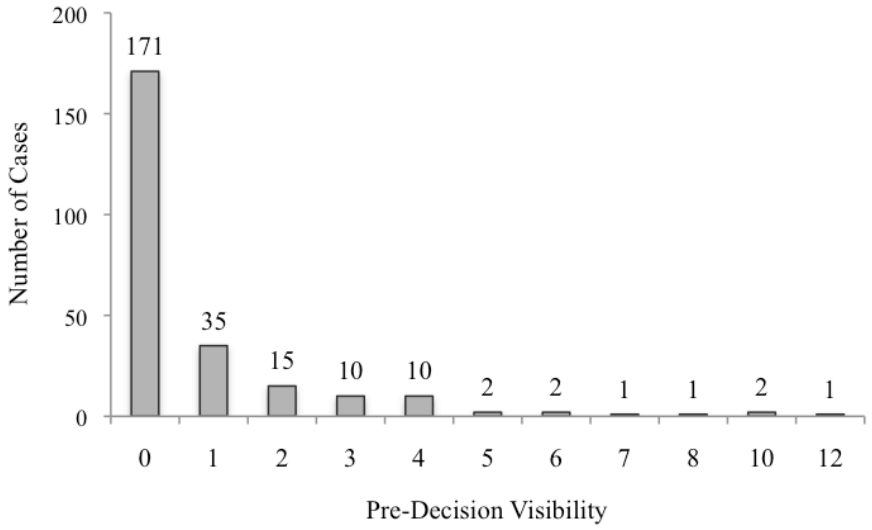


Figure 3.1 summarizes this variable. The figure shows that a strong majority of constitutional cases (171, or around 67 percent) received no pre-decision media

[6] Supreme Court hearings for individual cases are typically conducted during a single day, while some cases may require an extra day or two to be heard. Also, on rare occasions, the Supreme Court renders its decision during or just after the completion of the hearing. In such cases, only the seven day period up to and including the first day of the hearing was searched for stories.

coverage by the *Globe and Mail*, while a significant minority of cases (79, just over 30 percent) received at least some coverage. These findings largely accord with those obtained by Sauvageau et al. (2006: 43) and Macfarlane (2008: 308) who found that relatively few cases tend to dominate media coverage of the Canadian Supreme Court.

Frequency Analysis

This section will test Hypotheses 2-5 through simple frequency analyses of rates at which the Supreme Court delivers invalidations and suspended declarations of invalidity. Frequency analysis is appropriate because no sampling was used in the study. As noted above, the dataset includes every constitutional case in which the Supreme Court had an opportunity to invalidate a statute decided since the Charter was introduced. Hence, all of the results reported in this section can be considered statistically significant because they are based on the entire population of cases.

It is also important to point out that much of the analysis in this section will be done by comparing activism rates of particular subsets of the entire population of cases. Because interveners' participation and pre-decision visibility differ greatly across cases, subsets will vary in terms of their size which can have ramifications for the strength of the reported results. In particular, results based on small subsets of data will tend to be less robust because they are more likely to be affected by potential outliers. With this in mind, and to ensure clear assessment of the reported results, sizes of all of the relevant population subsets will be reported.

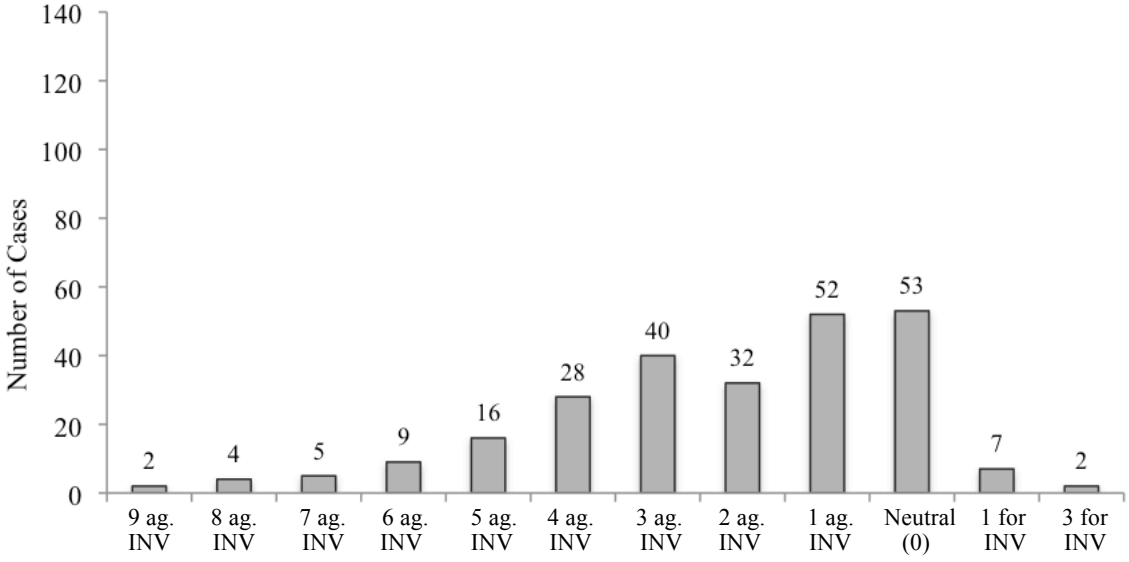
Hypothesis 2: Avoidance of Clashes with Political Actors

Hypothesis 2 predicts that judges will tend towards avoidance of clashes with important political actors whose interests are involved in the case at hand. Mobilized preferences of political actors are measured through governmental and organized-group interventions before the Supreme Court. As discussed above, all interventions made by governments and organized groups were coded as calling for a policy activist or policy deferential outcome. In order to assess the extent to which the Court exhibits sensitivities to governments and organized groups, a *preponderance value* is also calculated for all of the cases in the dataset. This is a simple concept that summarizes the direction in which the majority of governments and organized groups intervened in each of the cases, as well as the magnitude of the direction (i.e. how big was the majority). For example, if four organized groups intervened to uphold the

policy status quo then the organized-group preponderance value for that case is *four against invalidation.* If, however, three organized groups demanded for the status quo to be upheld and one sought an invalidation and therefore a change in the status quo, then the preponderance value for that case is *two against invalidation* (three for invalidation minus one against invalidation). If the Supreme Court indeed tends towards avoidance of clashes with important political actors, the obvious implication is that judicial decision making will reflect the size of intervening majorities. Simply put, as governments and organized groups increase their mobilization in support of (opposition to) a declaration of invalidity, the more is the Court expected to change (preserve) the impugned policy status quo.

Figures 3.2 and 3.3 present the basic overview of governmental and organized-group preponderance values for all cases in the dataset. As Figure 3.2 shows, governmental preponderance values range from 9 against invalidation to 3 for invalidation. The figure also confirms that governments much more commonly intervene in support of deferential outcomes. There are only 9 cases in which a majority of governments who appeared before the Court intervened in support of a declaration of invalidity. This compares to 188 cases in which a majority of governmental interveners demanded that the policy status quo be upheld.

Figure 3.2 Governmental Interventions in Constitutional Cases, 1982-2006 (Preponderance Values)



The neutral column in Figure 3.2 contains cases in which the governmental preponderance value is equal to zero indicating that there were either no governmental interveners present, or that there was an equal number of governmental interveners on

each side of the policy activism/policy deference divide. In fact, out of 53 cases contained in the neutral column, 49 (or 92 percent) are cases in which neither federal government nor any of the provincial governments appeared as interveners before the Court.

Figure 3.3 Organized-Group Interventions in Constitutional Cases, 1982-2006 (Preponderance Values)

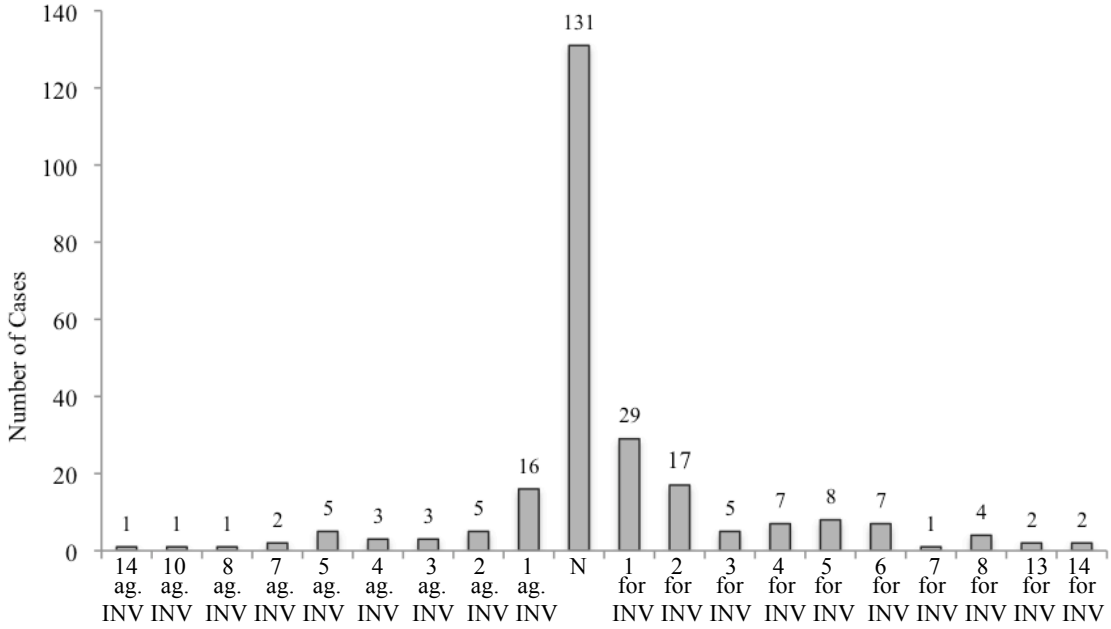
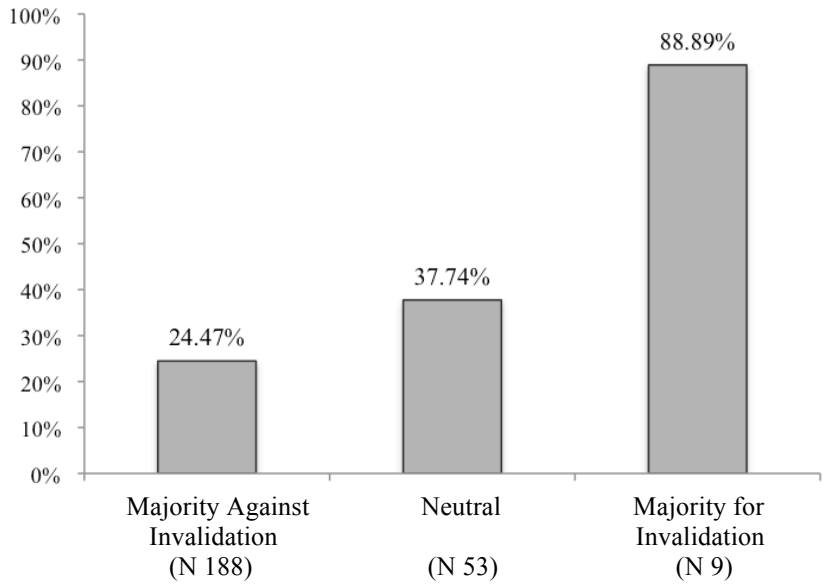


Figure 3.3 presents the basic overview of organized-group preponderance values. As the figure shows, the values range from majorities of 14 organized groups seeking policy deference to majorities of 14 seeking policy activism. Also, in contrast to governmental interveners which tend to overwhelmingly support deferential causes, organized groups appear more regularly on both sides of the activism-deference divide. There are altogether 82 cases in which a majority of organized groups sought an invalidation (right side of the figure) compared to 37 cases in which the preponderance of organized groups was on the side of policy deference (left side of the figure).

The neutral column (N) in Figure 3.7 again contains cases in which preponderance value is equal to zero meaning that there were either no organized-group interveners present in a case, or that there was an equal number of interveners on each side of the policy activism/policy deference divide. As with governmental interveners, the overwhelming majority of cases contained in this column (126, or 96 percent) are cases in which no organized-group interveners appeared before the Court.

Comparison of figures 3.2 and 3.3 shows that while governmental interveners appear more regularly before the Court, a relatively small number of cases tend to attract large numbers of organized groups. Hence, there is a relatively small number of cases in which organized groups intervened before the Court in very large numbers (tail ends of Figure 3.3), and many cases in which no organized-group interveners appeared (middle of Figure 3.3).

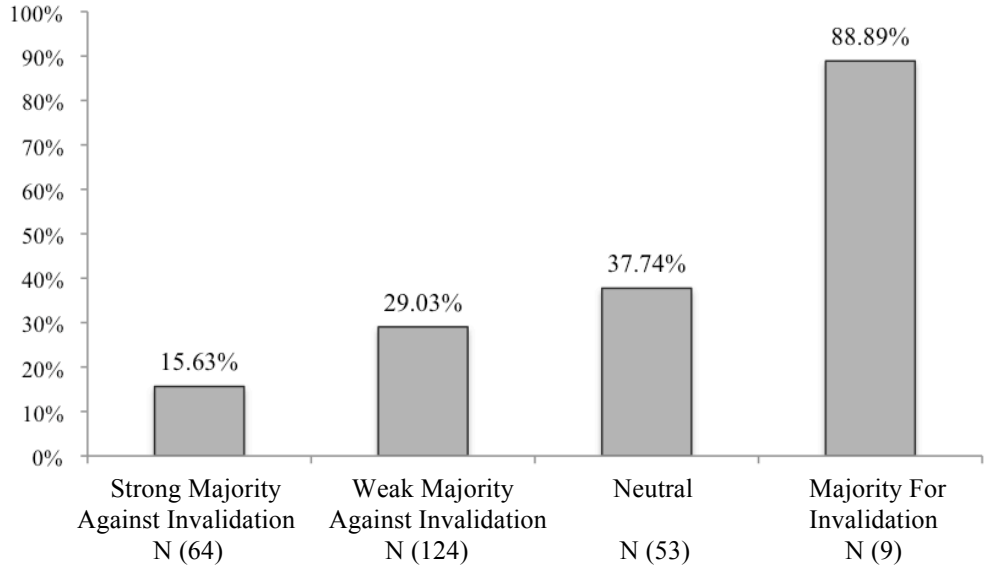
Figure 3.4 Invalidations by Governmental Preponderance I (N 250)



One obvious way of testing judicial sensitivity to the preferences and mobilization of governmental actors is to compare the invalidation rate in cases in which a majority of governments intervened in opposition to a declaration of invalidity, to cases in which a majority of governments intervened to support such an outcome. These findings are reported in Figure 3.4. Looking at the middle column first, the figure shows that in cases where governmental preponderance value is at zero (i.e. governmental interventions are neutral), the invalidation rate stands at 37.7 percent. Comparing this result to the above-reported baseline nullification rate of 29.6 percent suggests that the Court is much more likely to invalidate statutes in the absence of governmental mobilization. In contrast, when a majority of governmental actors intervene in opposition to a declaration of invalidity, the invalidation rate drops by more than 13 percentage points to 24.5 percent. The figure also shows that when a majority of governments intervene in support of a declaration of invalidity, the Court is much more likely to deliver such a ruling as its rate in such cases stands at a high 88.9 percent. As noted above, Canadian governments do not often intervene in

support of policy-activist decisions and this last finding is admittedly based on only 9 cases.

Figure 3.5 Invalidations by Governmental Preponderance II (N 250)



While these findings are clearly suggestive of judicial sensitivities to the preferences and mobilization of governmental actors, one can make additional tests by further subdividing the cases in accordance with the expectation that larger majorities of governmental actors will exert stronger effects on the Court's likelihood to deliver a declaration of invalidity. To this end, Figure 3.5 subdivides the cases in which a majority of governments intervened in opposition to invalidation into two groups: Weak Majority Against Invalidation (i.e. a majority of 1 or 2 governments opposed an invalidation), and Strong Majority Against Invalidation (i.e. a majority of 3 or more governments opposed an invalidation).[7] The figure, again, confirms the expected trend. Supreme Court's rates of invalidation get increasingly lower as increasing numbers of governments mobilize to protect the policy status quo. Hence, when a strong majority of governments intervene in opposition to a declaration of invalidity the Court's invalidation rate drops further down to 15.6 percent. These results provide confidence that the results reported in the "Majority for Invalidation" column are not skewed by a potential presence of outliers. Results in this column are very much in line with the general trend exhibited by Figure 3.5 which suggests that

[7] It is not very useful to make further subdivisions of those cases where a majority of governments intervened in support of declarations of invalidity as there are only 9 such cases. However, see Appendix 1 for Supreme Court rates of nullification for every interval of governmental preponderance.

judicial propensity to change a policy status quo be delivering a declaration of invalidity is importantly affected by mobilized preferences of governmental actors.

Figures 3.6 and 3.7 present the same results for organized group interveners. Figure 3.6 compares the Supreme Court's invalidation rates in cases where a majority of organized groups supported such an outcome to those where a majority of organized groups intervened in support of the policy status quo. The figure clearly exhibits the expected trend. In those cases where a majority of organized groups intervened in opposition to a declaration of invalidity, the activism rate stands at a low 8.1 percent. In contrast, when a majority of organized groups intervene in support of invalidations, the Court is evidently more willing to render activist decisions and does so in 36.6 percent of the cases. In cases where the preponderance of organized-group interventions is neutral the activism rate is 31.3 percent, which slightly above the Court's overall nullification rate of 29.6 percent. These findings suggest that in addition to governmental actors, mobilization of organized groups also succeeds in affecting the likelihood that the Court will deliver a declaration of invalidity.

As with governmental interveners, additional tests can be made by further subdividing the cases to test the prediction that larger majorities of organized-group actors will exert stronger effects on the Court's propensity for delivering declaration of invalidity. These results are reported in Figure 3.9 and they are somewhat less clear than the results reported for governmental actors. In particular, the expected pattern holds on the right side of the figure indicating that as increasing majorities of organized groups intervene in favour of invalidations, the Court appears more likely to follow suit. This expectation does not appear to be holding on the left side of the figure that measures whether increasing majorities of organized groups intervening in opposition to invalidations exert effects on the Court.[8] Looking at Figure 3.7 as whole, however, it is clear that the Court is much less likely to deliver an invalidation when organized groups intervene to protect the policy status quo (left side of the figure) than when they are either immobilized or intervene in support of a policy activist outcome (middle and right side of the figure).

[8] This result will be further tested in the next section of this Chapter which engages in a logistic regression analysis of the data. Also, see Appendix 1 for rates of activism for every interval of the interest-group preponderance.

Figure 3.6 Invalidations by Organized-Group Preponderance I (N 250)

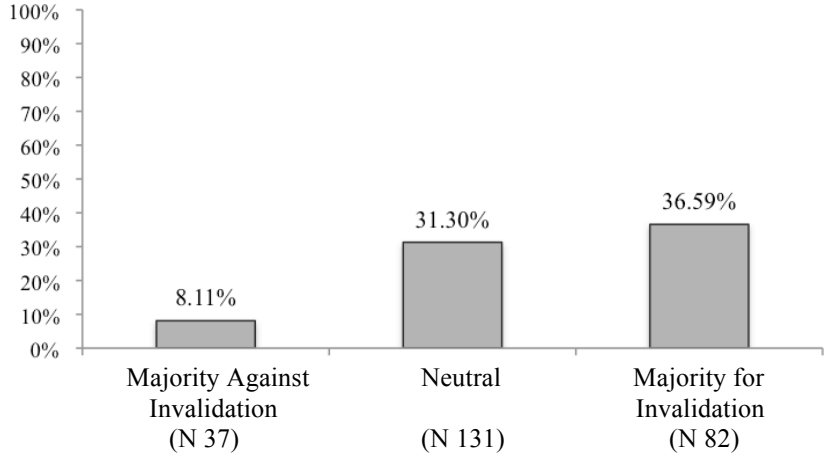
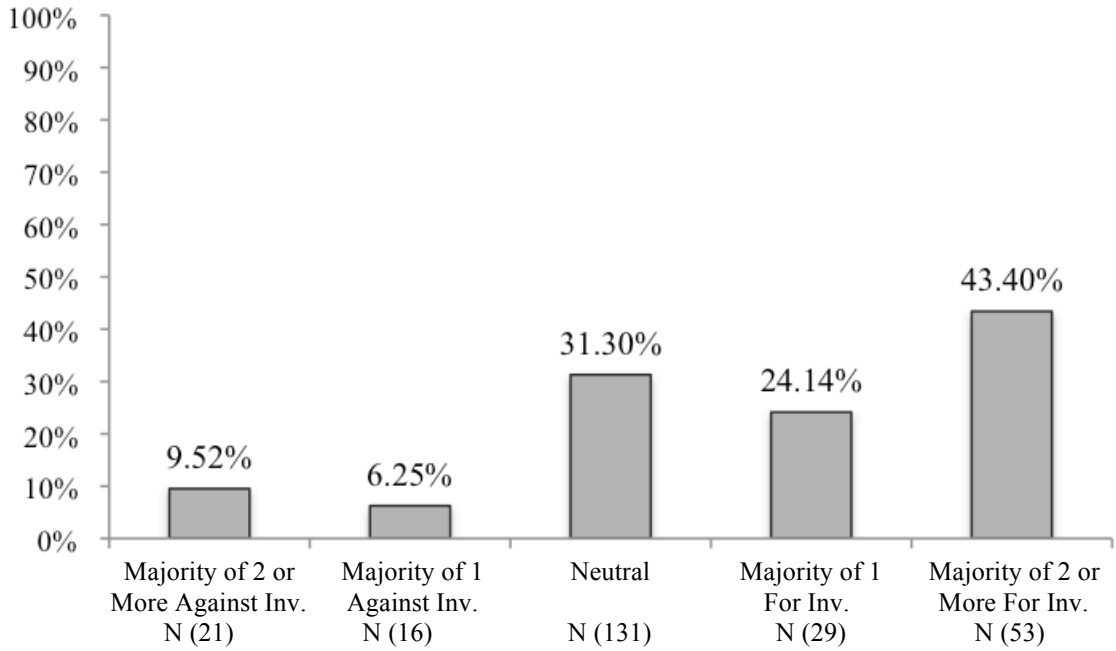


Figure 3.7 Invalidations by Organized-Group Preponderance I (N 250)



Overall, these results provide clear empirical support for Hypothesis 2. Patterns of statutory invalidation by the Supreme Court of Canada clearly suggest that the Court is more likely to render policy activist outcomes when such outcomes are not likely to clash with mobilized preferences of governmental and organized-group actors.

Hypothesis 3: Moderation of Policy Activism

Hypothesis 3 predicts that judges will tend to moderate their levels of policy activism. There is an inherent difficulty, however, in statistically testing this hypothesis because there does not exist a natural threshold beyond which behaviour of any one court can

be labelled as immoderate. It is unclear, for example, whether the above reported rate of 29.6 percent at which the Supreme Court of Canada invalidates statutes is suggestive of a moderate or an immoderate court. While one *could* suggest that an invalidation rate of 29.6 percent bespeaks a moderate court because it suggests that statutory invalidations occur in less than half of cases, this benchmark would still be discretionary. As Choudhry and Hunter note "determining whether the rate of government wins or losses is too high is much like assessing whether the rates of unemployment or inflation are too high: it is a matter of highly contextualized judgment, that may change with political circumstances" (2003: 532).

While it is therefore difficult to statistically test Hypothesis 3, some indirect empirical support for the hypothesis could be provided by exploring other implications of the theory. For example, Hypothesis 3a suggests that the Court's tendency towards moderation of judicial activism will tend to be more pronounced when political actors mobilize to protect the policy status quo. In particular, when majorities of both governments and organized groups intervene in the direction of policy deference, one can expect the Court to be particularly unlikely to deliver policy activist outcomes. Under this scenario, following a release of a policy activist decision judges can expect to confront a political environment containing few allies and many enemies. As mobilized preferences of one set of these actors shift in the direction of policy activism, however, one can expect that the external tolerance for an activist decision will higher and that the Court's tendency to moderate judicial activism will therefore attenuate.

To test these predictions Figure 3.8 displays the Court's rates of invalidations for all cases in which a majority of governmental actors intervened to protect the policy status quo, while mobilized preferences of organized groups change from (i) also being in the direction of policy deference, (ii) being neutral, and (iii) being in the direction of policy activism. As suggested by Figure 3.2 above, the bulk of governmental interventions occur on the side of policy deference, and there are altogether 188 cases in which a majority of governmental actors intervened to protect the policy status quo.[9]

[9] The same analysis is not provided on the policy activism side due to an exceedingly small number of cases in which majorities of governmental actors intervened in that direction. As exhibited by Figure 3.5 above, the data show that when majorities of governmental actors intervene in support of a declaration of invalidity the Court's rates of statute invalidations are very high.

Figure 3.8 Invalidations by Governmental and Organized-Group Preponderance (N 188)

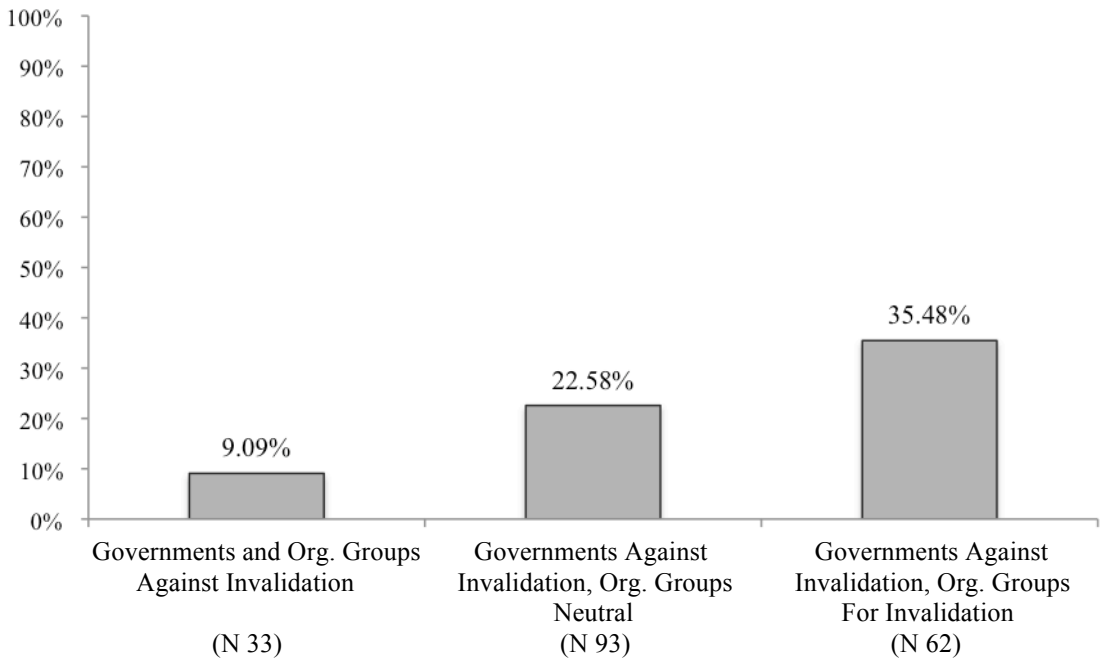


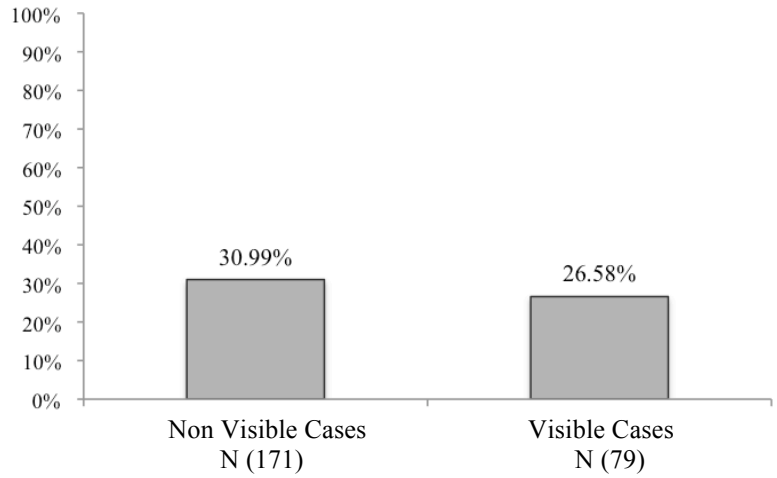
Figure 3.8 clearly exhibits the expected trend. The leftmost column in the figure shows that when both governments and organized groups intervene to protect the constitutionality of the impugned policy status quo, the Court's rate of rendering an invalidation stands at a low 9.1 percent. When organized groups are neutral and governments are sole actors mobilizing to protect the status quo, the Court's rate of statute invalidation improves considerably to 22.6 percent, but still remains below the Court's baseline invalidation rate of 29.6 percent. As the rightmost column of Figure 3.8 shows, when majorities of organized groups intervene in support of declarations of invalidity, thereby opposing governmental actors and indicating to the Court that preferences of some mobilized actors support a policy activist outcome, the invalidation rate jumps by another 13 percentage points to 35.5 percent.

These results provide clear evidence that by intervening before the Supreme Court of Canada organized groups can significantly affect the effectiveness of governmental actors in protecting the policy status quo. The results also show that the Court's tendency towards moderation of judicial activism is particularly high when governments and organized groups coalesce to protect the policy status quo. As some of these actors mobilize in favour of a change in the status quo, thereby suggesting to the Court that the political environment has greater tolerance for policy activist

outcomes, the Court responds by attenuating its tendency to moderate judicial activism.

Indirect empirical support for Hypothesis 3 could also be provided by testing implications of Hypothesis 5, according to which the Court's tendency to moderate policy activism is expected to be amplified in cases garnering pre-decision visibility. Pre-decision visibility, in other words, can be used as a standard for evaluating whether the Supreme Court engages in moderation of its policy activism. To this end, Figures 3.9 and 3.10 report rates of statutory invalidation across different values of the pre-decision visibility variable. As Figure 3.9 shows, in 171 cases that received no pre-decision media coverage (i.e. non-visible cases) the Court's rate of statutory invalidation is 30.9 percent. In 79 cases that received at least some pre-decision media coverage, on the other hand, the nullification rate drops to 26.6 percent. The Figure 3.9, therefore, provides support for the hypothesis that in visible cases the Court's tendency toward moderation of policy activism will be heightened.

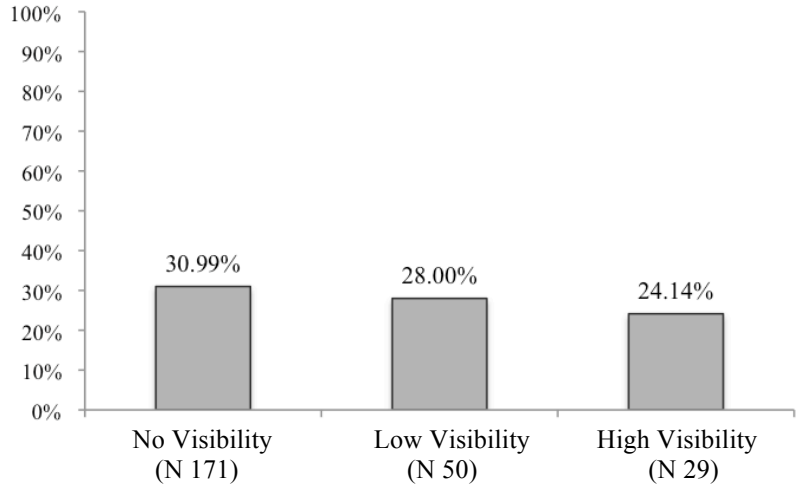
Figure 3.9 Invalidations by Pre-Decision Visibility I (N 250)



To further test the hypothesis, Figure 3.10 subdivides all visible cases into two groups: low visibility (1-2 stories published), and high visibility (3 or more stories published).[10] The figure again confirms the expected trend: the rate of policy invalidation of the Supreme Court gets increasingly lower as pre-decision visibility of individual cases rises. These findings are in accordance with the expectation that the judicial tendency for moderation of policy activism is amplified in cases garnering higher levels of pre-decision visibility.

[10] Appendix 1 reports invalidation rates for every interval of the pre-decision visibility variable.

Figure 3.10 Invalidations by Pre-Decision Visibility II (N 250)



Hypothesis 4: Politically Sensitive Jurisprudence

According to Hypothesis 4 courts are expected to engage in a variety of forms of politically sensitive jurisprudence. One form of politically sensitive jurisprudence that lends itself to statistical analysis is judicial reliance on suspended declarations of invalidity. As discussed in Chapter 2, suspended declarations of invalidity are useful because they can help the Court blunt the impact of otherwise activist decisions, and pacify its relations with governmental actors.

The Supreme Court utilized a suspended declaration of invalidity for the first time in the 1985 *Manitoba Reference* case where it confronted a rather unique situation created by the over-nine-decades-long failure of the Manitoba legislature to live up to its constitutional obligation of passing bilingual statutes. In that case, the Court was concerned that an immediate declaration of invalidity could potentially create a sweeping "legal vacuum" and "legal chaos" in the province (*Manitoba Reference,* para. 55). Since then, however, the Court has rather commonly resorted to this remedial tool even in less momentous contexts. Table 3.2 above clearly illustrates that a very significant component of all declarations of invalidity delivered by the Supreme Court of Canada are suspended (22 out of 74, or 29.7 percent). In fact, when one excludes suspended declarations of invalidity from the pool of policy activist decisions, and focus therefore only immediate invalidations, the rate at which the Supreme Court of Canada renders policy activist outcomes undergoes a significant drop from 29.6 percent to 20.8 percent (see Figure 3.11 below). In fact, Figure 3.12 shows that as a percentage of all invalidations, suspended declarations of invalidity

have jumped from 10.5 percent during the 1980s, to 27.5 percent during the 1990s, to 60 percent during the first decade of the 21st century (inclusive of 2008).

Figure 3.11 Immediate Invalidations as Percentage of Overall Cases (N 250)

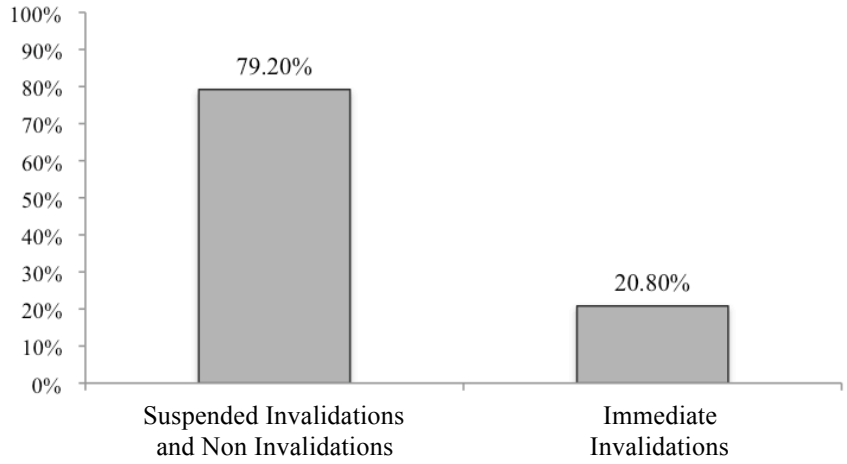
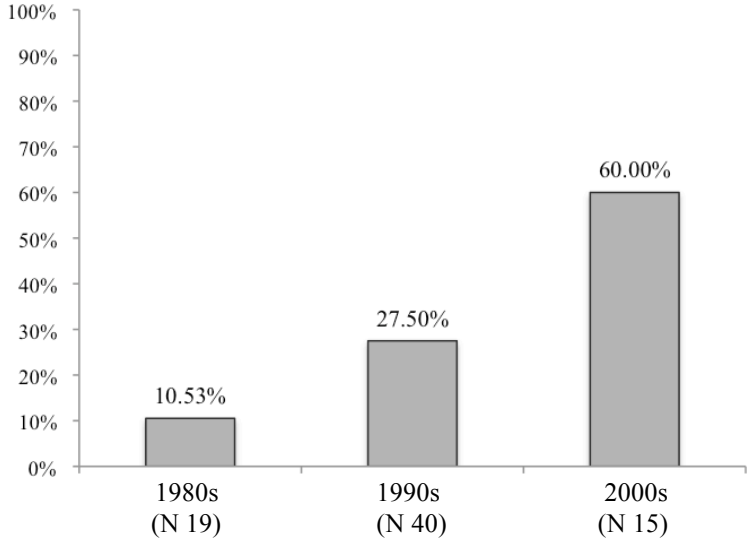


Figure 3.12 Suspended Invalidations as Percentage of All Invalidations (N 74)

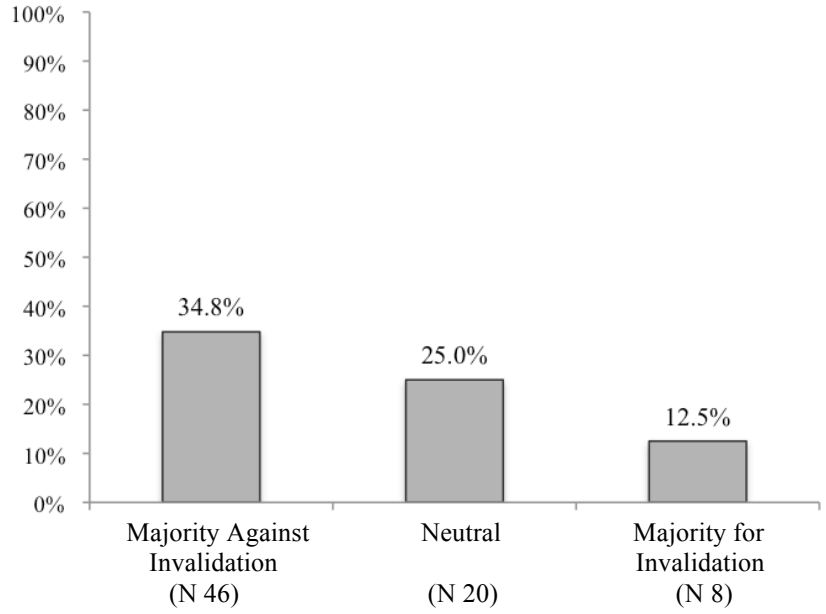


The Court's systematic utilization of suspended declarations of invalidity is clearly suggestive of a proclivity to utilize politically sensitive jurisprudence.

If the Court indeed strategically utilizes suspended declarations of invalidity to pacify its relations with governmental actors, then one can furthermore hypothesize that suspensions will be more pronounced when governmental actors mobilize in opposition to a declaration of invalidity and less pronounced when governmental actors mobilize in support of such a declaration. That is, while governmental mobilization in opposition to a declaration of invalidity is expected to exert negative effects on the likelihood that the Court will invalidate a statute (as Figures 3.4 and 3.5 above showed), it is expected to exert a *positive* effect on the likelihood that should

the Court deliver an invalidation it will suspend its onset for a period of time. Figure 3.13 tests for this possibility by focusing on the 74 cases in which the Supreme Court delivered a declaration of invalidity and by comparing rates of suspended declarations in cases where a majority of governments intervened in opposition to a declaration of invalidity to cases in which a majority of governments intervened to support such an outcome. The figure clearly confirms the expected trend. The Court appears to be much more likely to suspend a declaration of invalidity when governments mobilize in opposition to such a declaration (suspension rate of 35 percent) than when governments intervene in support of invalidations (suspension rate of 13 percent).

Figure 3.13 Suspension by Governmental Mobilization I (N 74)

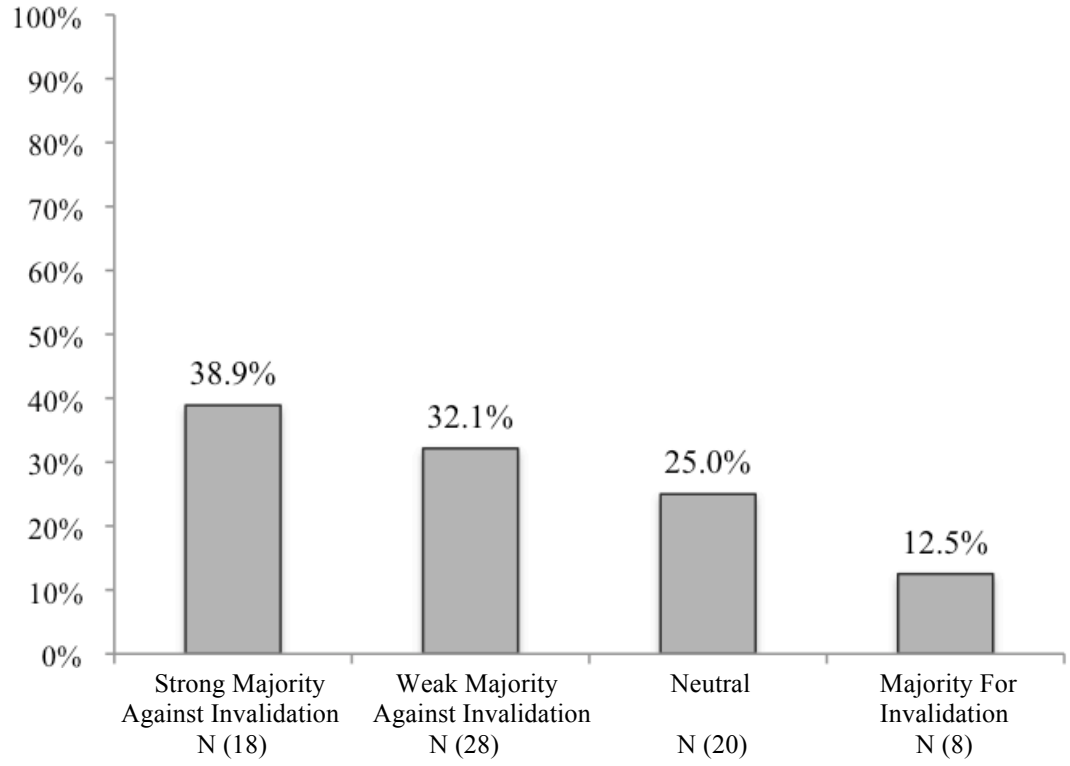


As above, one can again make additional tests by further subdividing cases in which a majority of governmental actors intervened to protect the policy status quo. Accordingly, Figure 3.14 subdivides the cases in which a majority of governments intervened in opposition to invalidation into two groups: Weak Majority Against Invalidation (i.e. a majority of 1 or 2 governments intervened in opposition to a invalidation), and Strong Majority Against Invalidation (i.e. a majority of 3 or more governments intervened in opposition to a invalidation).[11] Again, the figure exhibits the expected trend. The Supreme Court's tendency to suspend a declaration of invalidity is systematically more pronounced in the face of stronger governmental mobilization to protect the policy status quo and systematically less pronounced when

[11] Consult Appendix 1 for rates of suspended declarations of invalidity for every interval of governmental mobilization.

governments remain immobilized or when they mobilize to support policy activist outcomes. Hence, when a majority of 3 or more governments intervene in opposition to a declaration of invalidity and the Supreme Court delivers such a declaration, the suspension rate stands at a high 40 percent. [12] These results provide considerable evidence for the claim that decision-making patterns of the Supreme Court of Canada indicate strong proclivity on the part of justices to engage in politically sensitive jurisprudence.

Figure 3.14 Suspension by Governmental Mobilization II (N 74)



Hypothesis 5: Visibility

As already suggested, Hypothesis 5 predicts that effects of Hypotheses 2-4 will be exaggerated in cases garnering pre-decision visibility. In particular, as political actors augment their opposition to a declaration of invalidity and pre-decision visibility of cases increases, judges are expected to exhibit additional inclinations towards moderating their activist propensities and developing and utilizing politically sensitive jurisprudence. Some evidence for Hypothesis 5 has already been presented above by

[12] Similar analysis is not provided for organized-group actors because judicial decisions on whether to suspend a declaration of invalidity are made in light of the preferences of governmental actors who are directly concerned with implementing those decisions (see Radmilovic, 2010a; Kommers, 1997: 53). In fact, undertaking such an analysis shows that organized-group actors do not exert similar effects on the likelihood that the Court will suspend a declaration of invalidity.

Figures 3.9 and 3.10 which show that the tendency of Supreme Court judges to moderate policy activism (Hypothesis 3) is amplified in cases garnering higher levels of pre-decision visibility. To further test Hypothesis 5 Figures 3.15 and 3.16 below compare judicial sensitivities to the preferences of political actors in cases that received at least some pre-decision media coverage to those that did not.

Figure 3.15 Invalidations by Governmental Preponderance and Visibility (N 250)

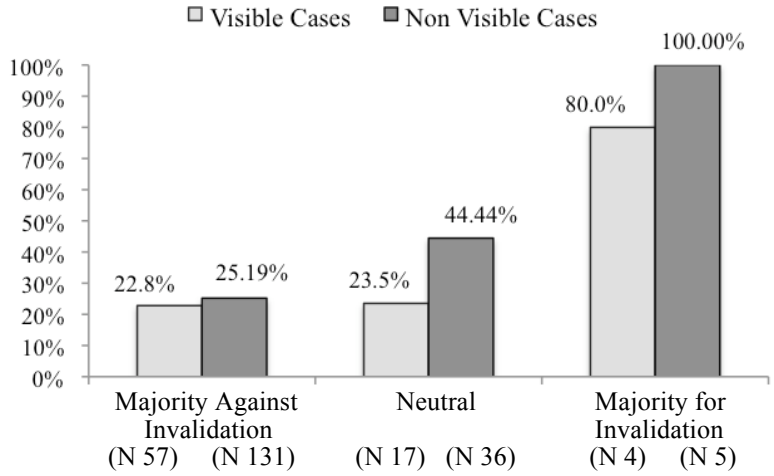
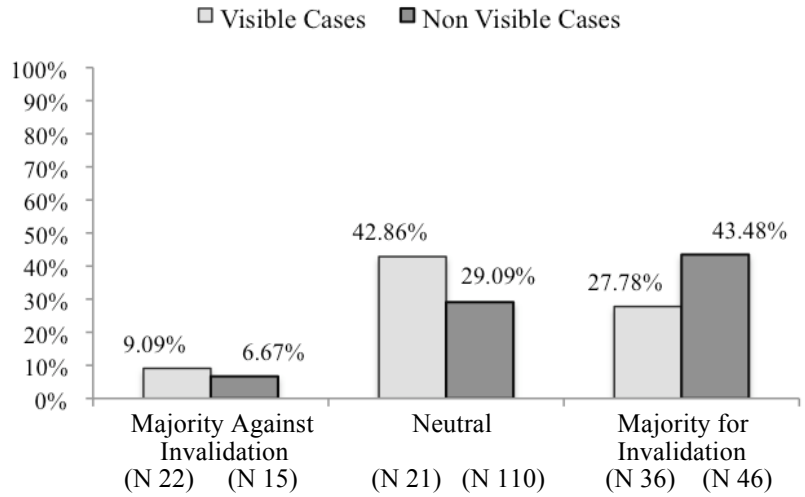


Figure 3.15 provides such an analysis for governmental actors. As the figure shows, in both visible and non-visible cases the Supreme Court exhibits sensitivity towards mobilized preferences of governmental actors. In visible cases, however, the Court appears to be consistently more likely to moderate its activist propensities. Hence, the lowest rate of invalidations is found in cases that are visible *and* in which governmental actors intervened to protect the constitutionality of the status quo (22.8 percent, leftmost column in the figure). The highest rate of invalidations, in contrast, is found in non-visible cases in which governmental actors intervene to support a declaration of invalidity (100 percent, rightmost column in the figure). The middle columns in Figure 3.14 suggests that visibility also has a dampening effect on the likelihood that the Court will engage in policy activism in cases in which governmental actors are not mobilized. Hence, in low profile cases characterized by non-mobilization of governments and a lack of pre-decision visibility, the Court's rate of invalidations stands at a relatively high 44.4 percent. This compares to a relatively low nullification rate of 23.5 percent for cases that do not attract governmental actors but that do attain a degree of pre-decision visibility.

Figure 3.16 Invalidations by Organized-Group Preponderance and Visibility (N 250)

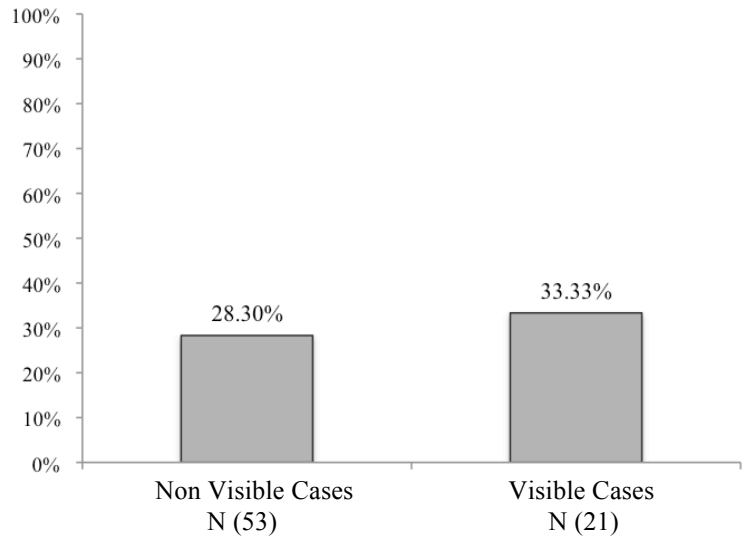


Comparing judicial sensitivities to mobilized preferences of organized groups in visible and non-visible cases produces results that are less clear. As Figure 3.16 shows, looking only at non-visible cases (darker columns) the Supreme Court's decision-making patters appear to conform to the expectation that the Court will be more likely to deliver policy activist (deferential) outcomes when organized group mobilize in support of activism (deference). Pre-decision visibility, however, does not appear to have a uniformly dampening effect on the Court's proclivity to render invalidations. The middle columns are very much reversed from what was observed in Figure 3.15 suggesting that visibility does not appear to have a dampening effect on the likelihood that the Court will engage in policy activism in cases in which organized groups are not mobilized. Also, the left side of Figure 3.16 similarly suggests that when organized groups mobilize in opposition to a declaration of invalidity *and* cases receive at least some media coverage, the Court does not appear to be less inclined to deliver activist outcomes than in cases in which organized groups mobilize in the same direction and no pre-decision visibility is attained. One should note, however, that invalidation rates in both of these situations are admittedly low (9.1 percent and 6.7 percent).

Hypothesis 5 also predicts that the Supreme Court will be more likely to engage in politically sensitive jurisprudence in the context of high as opposed to low pre-decision visibility. One can test this hypothesis by comparing the rates of immediate and suspended declarations of invalidity across visible and non-visible cases. If the Court is indeed more likely to engage in politically sensitive

jurisprudence when pre-decision visibility is high, then one can expect suspensions to be more pronounced in visible than in non-visible cases. In other words, while pre-decision visibility is expected to have a negative effect on the likelihood that the Court will deliver a declaration of invalidity (as shown in Figure 3.10 above), it is expected to have an opposite (positive) effect on the likelihood that the Court will deliver a suspended invalidation.

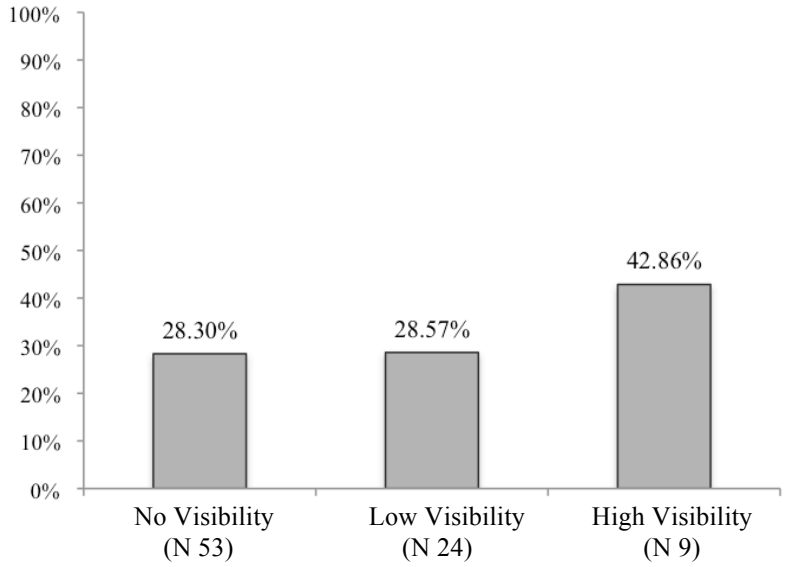
Figure 3.17 Suspensions by Pre-Decision Visibility I (N 74)



Figures 3.17 and 3.18 test these expectations by reporting rates of suspended invalidations, as a percentage of all invalidations, across different values of the visibility variable. Figure 3.17 compares rates of suspended invalidations across visible and non-visible cases, and clearly confirms the expected trend. In 53 cases that received no pre-decision media coverage the Court's rate of suspended invalidations is 28.3 percent. This compares to a suspension rate of 33.3 percent in cases that received some pre-decision visibility. Figure 3.18 provides an additional test of the prediction that visibility exerts positive effects on the likelihood that the Court will suspend its declaration of invalidity by subdividing visible cases into two groups: low visibility (1-2 stories published), and high visibility (3 or more stories published).[13] The figure also confirms the expected trend: the rates of suspended declarations of invalidity get higher as pre-decision visibility of individual cases rises. The data clearly show, therefore, that the Court is more likely to suspend declarations of invalidity as the pre-decision visibility of cases increases.

[13] Appendix 1 reports suspension rates for every interval of the pre-decision visibility variable.

Figure 3.18 Suspensions by Pre-Decision Visibility II (N 74)



Overall, the data provide considerable support for Hypothesis 5. In particular, the results show that pre-decision visibility heightens judicial tendencies to both moderate of policy activism (as shown by Figures 3.9 and 3.10) and utilize politically sensitive jurisprudence (as shown by Figures 3.17 and 3.18). The data also provide some support for the claim that as political actors mobilize in opposition to a declaration of invalidity, and as pre-decision visibility increases, judges exhibit additional inclinations towards moderating their activism. While this claim is supported in the case of governmental actors, it does not appear to be supported in the case of organized groups.

Logistic Regression Analysis

While the evidence mounted by the frequency analysis provides considerable support for Hypotheses 2-5, subjecting the data to more stringent tests can provide additional benefits. In particular, one important drawback of frequency analyses, even when based on the entire population of cases, is that they cannot assess whether a particular explanatory variable exerts significant effects on the dependent variable while controlling for the effects of other explanatory factors. For example, frequency analysis conducted above does not show whether visibility has a negative impact on the likelihood that the Court will deliver an activist decision *while controlling for* the impacts of governmental and organized-group actors. Another drawback of simple frequency analyses is that they cannot show whether impacts of independent variables

are robust to the inclusion of other control factors. For these reasons, this section of the chapter undertakes a logistic regression analysis of the data.

As suggested above, in each of the cases contained in the dataset the Supreme Court had an opportunity to invalidate a statute. This provides a measure of the dependent variable (*Invalidation*) which is binary in character and coded 1 for cases in which the Court invalidated the impugned legislation, and 0 for cases in which the legislation was upheld. The above discussion also noted that there are two key independent variables associated with Hypotheses 2-5: mobilized preferences of political actors, and pre-decision visibility. In order to assess judicial sensitivities to governmental actors two variables are included in the analysis: *Govs for Activism* and *Govs for Deference*. Both variables are measured through above-described governmental preponderance values (see Figure 3.4 above). *Govs for Activism* is a continuous variable whose values range from 0 (mobilized preferences are neutral) to 3 (a majority of three governments intervened in the activist direction). *Govs for Deference* captures cases in which a majority of governments intervened in the direction of deference. It is also a continuous variable whose values range from 0 to 9 (a majority of nine governments intervened in the direction of deference).

Mobilized preferences of organized-group actors are similarly measured through organized-group preponderance values discussed in the previous section. Hence, *OGs for Activism* captures cases in which a majority of organized groups intervened in the direction of activism and it ranges from 0 to 14 (see Figure 3.3 above). *OGs for Deference*, on the other hand, captures cases in which a majority of organized groups sought a deferential outcome and this variable also ranges from 0 to 14 as described by Figure 3.3 above. All four of these variables have clear expectations about the direction of logit coefficients. *Govs for Activism* and *OGs for Activism* are expected to have positive coefficients indicating that as bigger majorities of governments and organized groups intervene in support of invalidations, one can expect the Court to be increasingly more likely to deliver such an outcome. *Govs for Deference* and *OGs for Deference* are expected to obtain negative coefficients indicating that as governments and organized groups mobilize to protect the policy status quo, one can expect the Court to be progressively less likely to deliver policy activist outcomes.

As discussed in the previous section of this chapter, pre-decision visibility is measured by the number of stories published in the *Globe and Mail* during the

fourteen-day time interval surrounding the hearing. The *Visibility* variable is therefore also a continuous variable whose values range from 0 to 12 (see Figure 3.1 above). *Visibility* is expected to obtain a negative coefficient indicating that as pre-decision visibility of cases increases the Court becomes less likely to deliver statute invalidations.

In order to examine whether mobilized preferences of political actors and pre-decision visibility interact in affecting judicial decision making, four interaction terms are also included in the model: *Govs for Deference* × *OGs for Deference; Govs for Deference* × *Visibility; OGs for Deference* × *Visibility;* and *Govs for Deference* × *OGs for Deference* × *Visibility.* These interaction terms capture expectations of the legitimacy cultivation theory that when governments and organized groups coalesce to protect the status quo in visible environments, the Court should be particularly unlikely to render policy activist outcomes. All four of the interaction terms are therefore expected to obtain a negative coefficient.

In order to capture potential effects of other influences on judicial decision making, several control variables are also included in the analysis. First, the analysis controls for the age of statutes under review. According to Kelly (2005: 144), the age of statutes under review has to be taken into account when assessing Supreme Court of Canada's proclivities to render policy-activist invalidations. The reason is that the Charter has fundamentally altered the policymaking process so that by 1990 legislative actors have been much more vigorous in ensuring that prospective legislation does not abrogate constitutional rights and freedoms (Kelly, 2005: 149). Therefore, *Post-1990 Statute* variable is included in the analysis and coded 1 if the impugned statute was enacted after 1990 and 0 if otherwise. The variable is expected to have a negative sign indicating that the Supreme Court will be less likely to invalidate statutes enacted in the post-1990 policy environment when legislators were vigorous in Charter-proofing their legislative enactments.

A variable is also included to control for the tendency of Supreme Court justices to uphold decisions reached by the lower court. As Songer argues, the Supreme Court of Canada is known for exhibiting low levels of lower court reversals (2008: 148). The reason for this has to do with the fact that Canadian justices tend to be less concerned with selecting cases for review so as to rectify apparent lower court errors than with resolving important legal questions and cross-provincial

discrepancies in interpretation (Songer, 2008: 148-9). Hence, *Lower Court Invalidation* is coded 1 if lower court affirmed constitutionality of the impugned statute and 0 if otherwise. If Supreme Court justices indeed tend to affirm lower court rulings then this variable is expected to obtain a positive coefficient.

Table 3.4 Descriptive Statistics

Variable	Mean	Std. Deviation	Minimum	Maximum
Dependent Variable				
Invalidation	.30	.457	0	1
Independent Variables				
Govs for Activism	.05	.313	0	3
Govs for Deference	2.27	2.091	0	9
OGs for Activism	1.12	2.392	0	14
OGs for Deference	.47	1.601	0	14
Visibility	.82	1.744	0	12
Post-1990 Statute	.20	.404	0	1
Lower Court Invalidation	.33	.470	0	1
AGC Crown	.33	.470	0	1
AGC for Activism	.04	.205	0	1
AGC for Deference	.41	.493	0	1
Individual Claimant	.70	.459	0	1

Note: N = 250.

Control variables are also included to account for litigant activities of the Attorney General of Canada (AGC). At the Supreme Court, the AGC represents interests of the federal government, and it is described as "Canada's largest law firm" and the most frequent and successful Charter litigant (McCormick, 1993; Hennigar, 2007). Three variables are included in the analysis that control for the influence of the Attorney General's office. First, a variable called *AGC Crown* is coded 1 if the AGC was defending the status quo as one of the parties in the dispute (0 if otherwise). This variable is expected to have a negative sign indicating that the Court will be less likely to deliver an invalidation when the AGC opposes such an outcome as one of the parties in the dispute. Two other variables are included to account for the AGC's role as an intervener. *AGC For Activism* is coded 1 if the AGC intervened in favour of an invalidation and 0 if otherwise. The expected sign of this variable is positive suggesting that the Court will be more likely to invalidate a statute when the AGC supports such an outcome. *AGC For Deference,* in contrast, is scored 1 if the AGC intervened to protect the constitutionality of the impugned statute and 0 if otherwise. This variable is expected to obtain a negative sign indicating that the Court will be less likely to strike at statutes when the AGC intervenes to protect their constitutionality.

The final variable controls for the identity of the plaintiff seeking invalidation and it is premised on the idea that plaintiffs with lower resources will have less litigation success. Plaintiffs seeking invalidations before the Supreme Court fall into two groups: individuals and organizations. Compared to organizations, individual plaintiffs are generally recognized of having fewer resources, which tends to adversely affect their litigation prospects (see for example Wheeler et al., 1987; Songer, 2008). Hence, *Individual Claimant* variable is coded 1 if an individual (i.e. natural person), as opposed to an organization, was the party seeking invalidation. The expected sign of this variable is negative indicating that individuals will tend to be less successful than organizations at bringing about statute invalidations. Table 3.4 above presents descriptive statistics for the variables used in the analysis.

Results

The results are presented in Table 3.5. The table shows that coefficients associated with variables capturing the impact of pre-decision visibility and mobilized preferences of governmental and organized-group actors are all in the expected direction. The data show, therefore, that the probability of invalidation increases as governments and organized groups mobilize in support of such an outcome. This is clearly evidenced by positive coefficients obtained by *Govs for Activism* and *OGs for Activism* variables. In contrast, negative coefficients obtained by variables *Govs for Deference, OGs for Deference,* and *Visibility* show that as governments and organized groups mobilize to oppose a declaration of invalidity, and as pre-decision visibility increases, the Supreme Court becomes less likely to render declarations of invalidity. Of these five variables only those measuring mobilization of governmental actors (*Govs for Activism* and *Govs for Deference*) attain statistical significance. However, since the analysis relies on the population of cases rather than sample data, measures of statistical significance are technically irrelevant.

Coefficients associated with interaction terms, which were designed to capture whether visibility and mobilization of political actors in the direction of policy deference combine to additionally affect the likelihood that the Court will invalidate statutes, also provide support for the theory. The only interaction term whose coefficient is not in the expected negative direction is *OGs for Deference* × *Visibility*. This appears to confirm the analysis from the previous section of this chapter which suggested that visibility does not appear to have an additional dampening effect on the

likelihood that the Court will invalidate a statute in cases in which organized groups mobilize in opposition to such an outcome. As expected, however, all other interaction terms obtain negative coefficients including the term that captures combined effects of governments, organized groups, and pre-decision visibility (*Govs for Deference* × *OGs for Deference* × *Visibility*). These findings provide support for the claim that when governments and organized groups coalesce to protect the constitutionality of the status quo in visible cases, the Supreme Court becomes particularly unlikely to deliver policy activist outcomes.

Table 3.5 Predictors of Supreme Court of Canada Invalidations

Variables	Coefficients (St. Errors)	Predicted Probability Effect[a]
Govs for Activism	1.995 (1.158)*	+ .73
Govs for Deference	– .402 (.125)**	– .25
OGs for Activism	.073 (.071)	+ .24
OGs for Deference	– .437 (.394)	– .26
Visibility	– .071 (.172)	– .13
Govs for Deference × OGs for Deference	– .006 (.199)	
Govs for Deference × Visibility	– .044 (.098)	
OGs for Deference × Visibility	.097 (.111)	
Govs for Deference × OGs for Deference × Visibility	– .004 (.027)	
Post-1990 Statute	.668 (.401)*	– .14
Lower Court Invalidation	.804 (.332)**	+ .18
AGC Crown	.280 (.426)	+ .06
AGC for Activism	– .192 (.868)	+ .04
AGC for Deference	.804 (.501)	+ .18
Individual Claimant	– .426 (.355)	– .09
Constant	– .601 (.449)	
– 2 Log Likelihood	257.165	
Percent Correctly Predicted	73.6	
Proportional Reduction in Error	10.8%	
Pseudo R^2 (Nagelkerke)	.242	
Number of Cases	250	

Note: Estimation conducted by maximum likelihood using binary logistic regression.
**p*<0.10, ***p*<*0.05*. Since the analysis relies on the population of cases rather than sample data, *p* values are technically irrelevant.
[a] Predicted effect on probability that that the Court invalidates a statute (y=1) of changing each explanatory factor from its minimum to maximum when all other variables are held constant at their modes.

Coefficients of two control variables are also in the expected direction. *Lower Court Invalidation* obtains a negative coefficient suggesting that the Supreme Court tends to uphold, as opposed to reverse, lower court decisions. As noted above, this accords with findings of other studies of the Supreme Court of Canada (e.g. Songer,

2008). *Individual Claimant* variable also obtains a coefficient that is in the expected, negative direction suggesting that in comparison to organizations individuals tend to obtain less success before the Supreme Court.

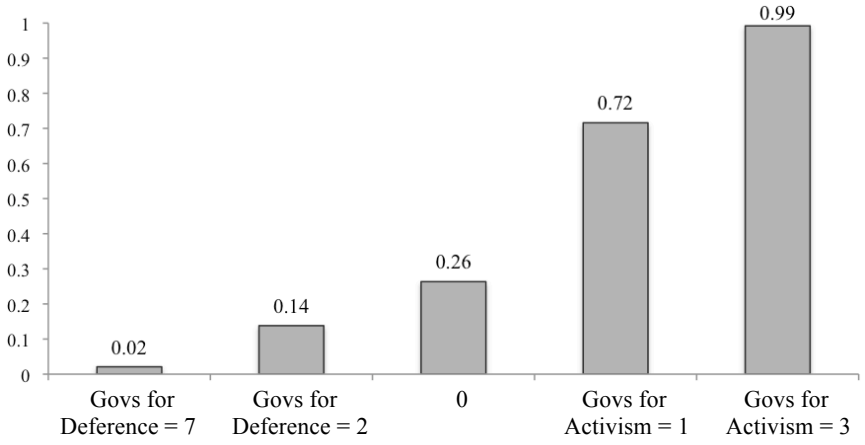
Variable controlling for the age of statutes under review (*Post-1990 Statute*) obtains an unexpected positive coefficient. The data suggest that the Court, therefore, is not less but *more* likely to invalidate statutes enacted in the post-1990 policy environment when legislative actors were apparently more vigorous in vetting the prospective legislation for potential Charter breaches (Kelly, 2005: 149). In raw numbers, out of 199 pre-1990 statutes that appeared for review before the Supreme Court, the Court rendered declarations of invalidity in 27.6 percent of cases, which compares to its invalidation rate of 37.3 percent (19/51) for statutes enacted in the post-1990 period. In light of the general success that governmental mobilization has before the Supreme Court, these findings suggest that governments ensure the constitutionality of their legislative acts not just through Charter-vetting practices but also by mobilizing directly before the Court. The data show that while the Court is not wary of striking at recent statutes, it is clearly apprehensive about delivering declarations of invalidity in the face of highly mobilized governmental opposition.

Variables controlling for the influence of the AGC also do not obtain coefficients that are in the expected direction. This suggests that the Supreme Court is more sensitive to the overall preponderance of governmental mobilization as evidenced by *Govs for Activism* and *Govs for Deference* variables instead of being concerned with mobilized preferences of the most powerful governmental actor (i.e. federal government).

Given that many of the variables used in the model are continuous and have relatively large ranges between their minimum to maximum values, it is very difficult to discern their relative influence just by looking at the magnitude of their coefficients. For example, while the absolute value of the *OGs for Deference* coefficient may appear small (at .073), it is measured on a very large scale that ranges from 0 to 14 so that the coefficient is associated with a single-unit increase in the variable. In order to facilitate better grasp of the relative influence of different variables, Table 3.5 calculates predicted effect on probability that the Court will invalidate a statute of changing each variable from its minimum to maximum while

all other variables are held constant at their modes.[14] This shows that variables capturing mobilization of governmental and organized-group actors exert the most influence on the likelihood that the Court will invalidate a statute, followed by *Lower Court Invalidation* and *Visibility*.

Figure 3.19 The Impact of Governmental Mobilization on Supreme Court Invalidations (N 250)



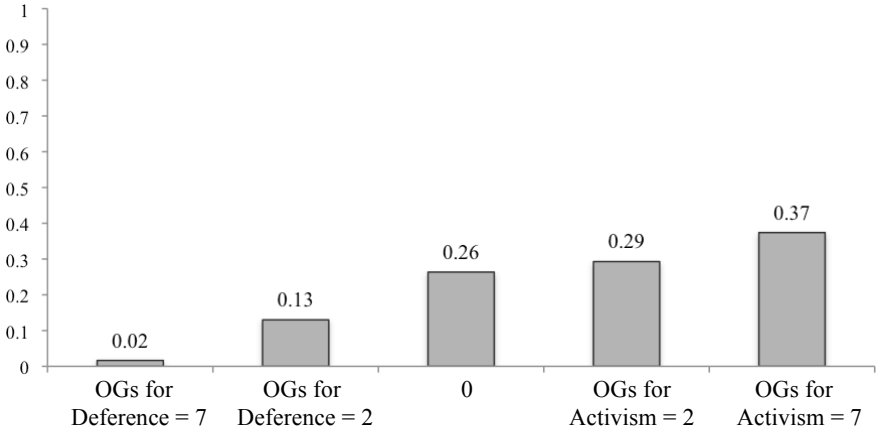
Note: This figure plots the predicted probability that the Court will render a declaration of invalidity at different values of *Govs for Deference* and *Govs for Activism* variables. Each column represents the predicted probability of invalidation while all other variables except the one referred to under the column are held constant at their modes. The middle column represents the predicted probability of invalidation while all variables are held at their modes.

This measure shows that by far the strongest effect (+.73) is exerted by the *Govs for Activism* variable suggesting that governmental interventions in support of policy activist outcomes provide particularly strong inducements for the Court to act in a policy activist fashion. While the effect that the *OGs for Activism* variable produces on the probability that the Court will invalidate a statute is noteworthy (+.24), it is clearly less commanding than the effect exerted by governmental mobilization. The predicted probability effect column in Table 3.5 also shows that the impact of organized-group mobilization in support of preserving the policy status quo tends to approximate the impact of governmental mobilization in the same direction (–.25 and –.26 respectively). Overall however, organized groups attain this influence by crowding the courtroom in much larger numbers than governmental actors. One could say, therefore, that when it comes to governmental and organized-group constitutional litigation before the Supreme Court of Canada, what organized groups lack in power they try to make up in numbers.

[14] All other variables could alternatively be held at their means which would essentially produce the same results.

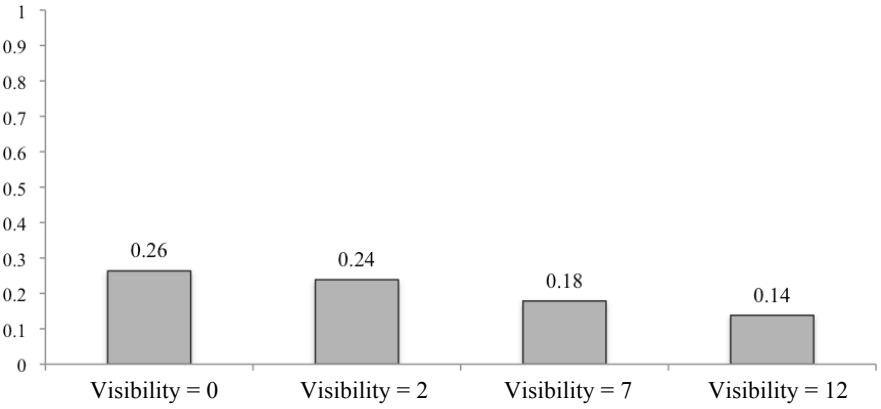
Compared to the mobilization of political actors, the data show that pre-decision visibility has more modest effects on the likelihood that the Court will invalidate a statute. Holding all other variables constant, a change in the *Visibility* variable from 0 to 12 results in .13 reduction in the predicted probability that the Court will invalidate a statute.

Figure 3.20 The Impact of Organized-Group Mobilization on Supreme Court Invalidations (N 250)



Note: This figure plots the predicted probability that the Court will render a declaration of invalidity at different values of *OGs for Deference* and *OGs for Activism* variables. Each column represents the predicted probability of invalidation while all other variables except the one referred to under the column are held constant at their modes. The middle column represents the predicted probability of invalidation when all variables are held at their modes.

Figure 3.21 The Impact of Visibility on Supreme Court Invalidations (N 250)



Note: This figure plots the predicted probability that the Court will render a declaration of invalidity at different values of the *Visibility* variables while all other variables are held constant at their modes. The leftmost column represents the predicted probability of invalidation when all variables are held at their modes.

In order to better evaluate the substantive impact of these variables Figures 3.19, 3.20, and 3.21 graph the predicted probability that the Court will invalidate a statute at different values of key theoretical variables. The figures clearly show that mobilization of political actors and pre-decision visibility of individual cases, exert notable effects on the likelihood that the Court will render a declaration of invalidity.

They also corroborate much of the frequency analyses conducted in the previous section of this chapter.

Conclusion

According to the legitimacy cultivation theory developed in Chapter 2, an important component of the courts' quest towards cultivation of institutional legitimacy has to do with exhibiting strategic sensitivities to factors operating in the external, political environment. Overall, the analyses conducted in this chapter provide considerable support for key predictions of the legitimacy cultivation theory. Broad patterns of statutory invalidations and suspended declarations of invalidity provide clear support for key hypotheses of the legitimacy cultivation theory.

In particular, clear evidence is provided for Hypothesis 2 according to which judges are expected to avoid clashes with important political actors. As argued in Chapter 2, governments and organized groups are two of the most important actors in this regard and Supreme Court's decision-making patterns expose keen judicial sensitivities to the preferences of both governmental actors and organized groups. Results show that governmental and organized-group mobilization in the direction of protecting the policy status quo exerts negative effects on the likelihood that the Court will deliver policy activist outcomes. Conversely, as these actors mobilize in support of policy activist outcomes, the Court becomes more likely to render policy-activist invalidations. Furthermore, when these actors coalesce to protect the constitutionality of the policy status quo, suggesting to the Court that the external environment has particularly low tolerance for an activist ruling, the Court's tendency to moderate its activism is particularly pronounced.

Hypothesis 3 could not be directly tested through a statistical analysis since there is no objective standard for distinguishing between moderate or immoderate levels of policy activism. However, evidence is accrued for associated theoretical claims that the Court's propensity towards moderation of judicial activism increases in the context of higher pre-decision visibility (Hypohesis 5) and that the Court's tendency towards moderation of judicial activism is more pronounced when political actors mobilize to protect the policy status quo.

Much support is also provided for Hypothesis 4 which suggests that courts will tend towards utilizing politically sensitive jurisprudence. The Court's utilization of suspended declarations of invalidity, as one form of politically sensitive

jurisprudence, is pervasive at the Supreme Court of Canada. Furthermore, the evidence shows that the Court is more likely to suspend its declarations of invalidity when it finds itself operating in a visible as opposed to non-visible political environment, as well as when governmental actors mobilize in opposition to a change in the policy status quo.

Overall, the analyses presented in this chapter provide considerable initial support for the theory of strategic legitimacy cultivation developed in Chapter 2. Parts III and IV of the dissertation continue the empirical evaluation of the theory by relying of different methodological approaches. In particular, Part III proceeds by engaging in case-study analysis of Supreme Court of Canada's decision making.

APPENDIX 1:

In order to ensure better evaluation of the data this appendix presents rates of statute invalidation by the Canadian Supreme Court for each interval of some of the key variables used in the analysis.

Figure 3.22 Invalidations by Pre-Decision Visibility for Each Visibility Interval (N 250)

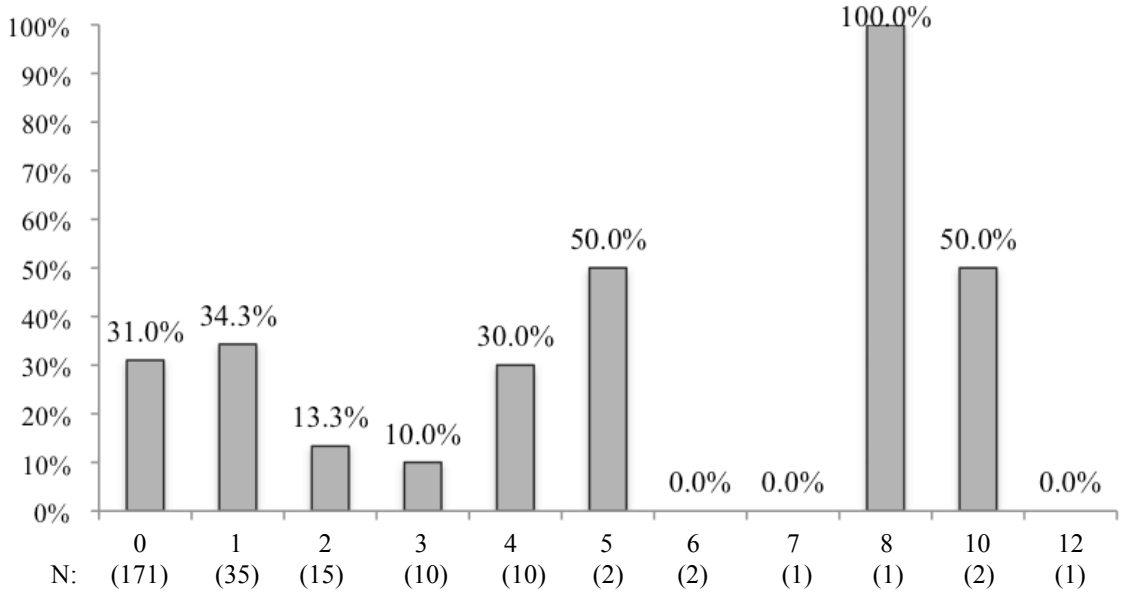


Figure 3.23 Invalidations by Governmental Preponderance for Each Interval of Governmental Preponderance (N 250)

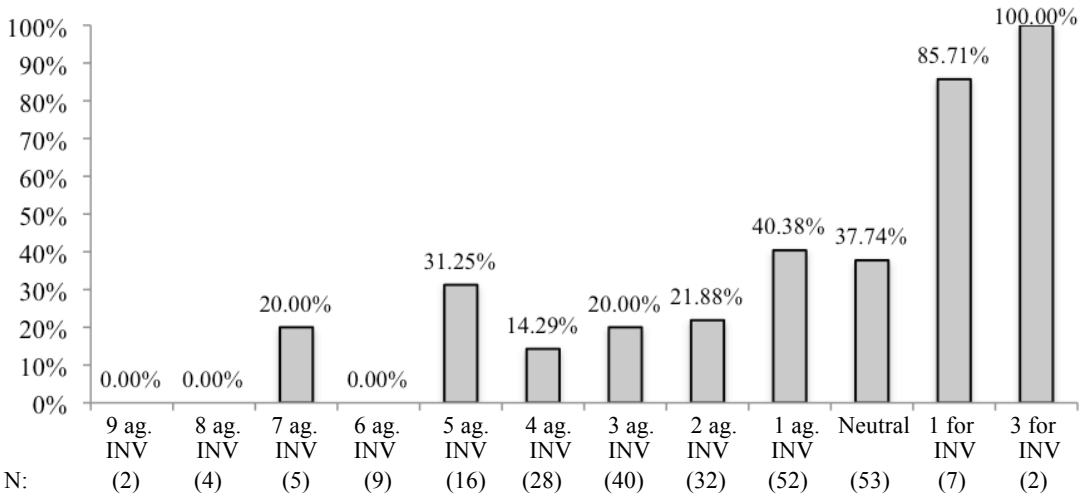


Figure 3.24 Invalidations by Organized-Group Preponderance for Each Interval of Organized-Group Preponderance (N 250)

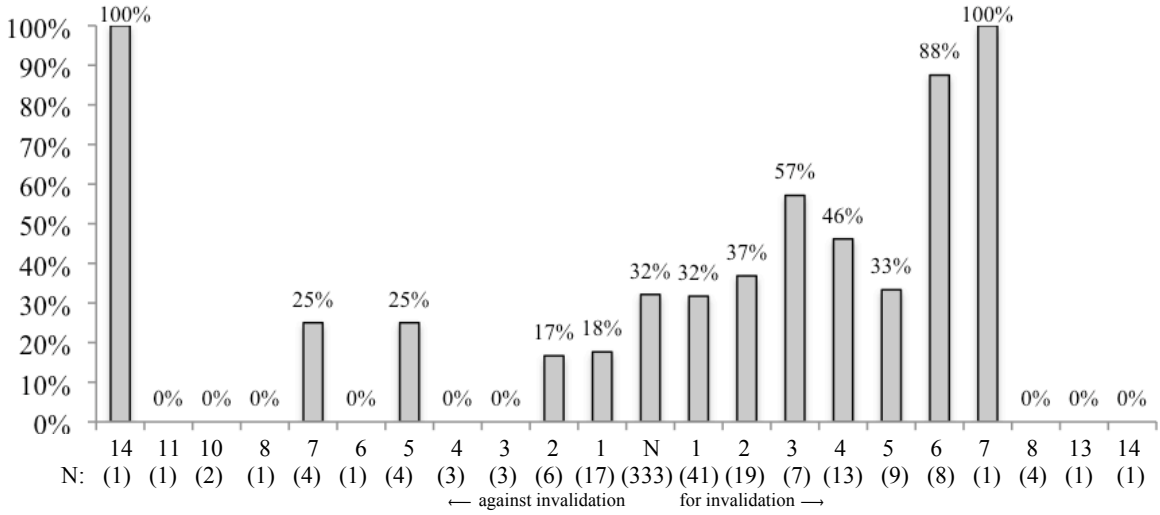


Figure 3.25 Suspensions by Governmental Preponderance for Each Interval of Governmental Preponderance (N 74)

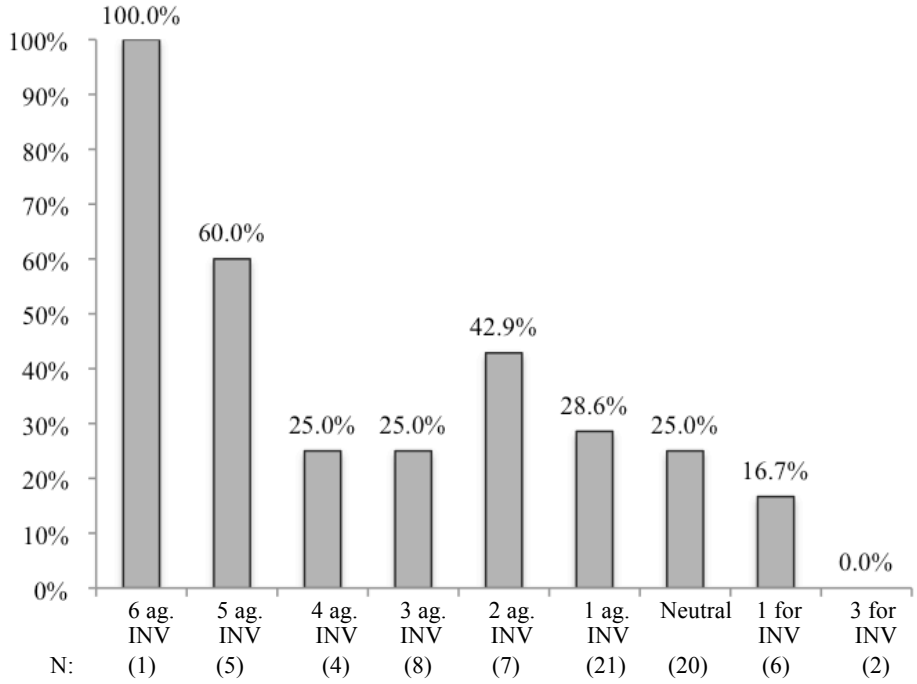
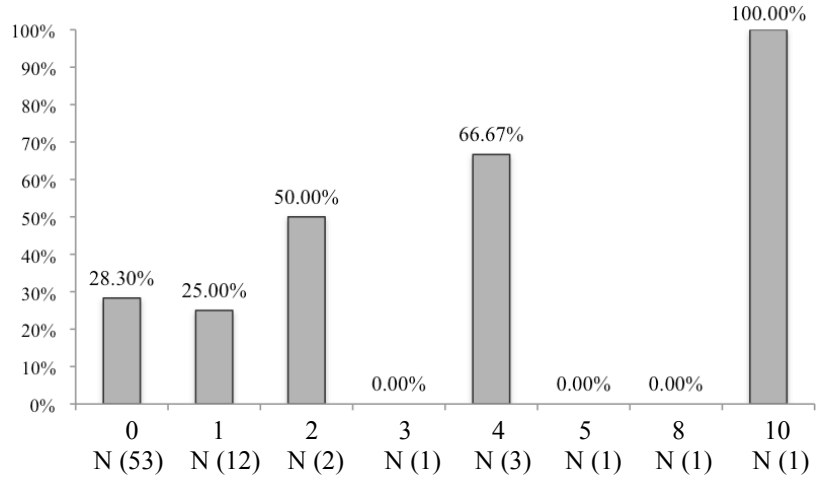


Figure 3.26 Suspensions by Pre-Decision Visibility for Each Visibility Interval (N 74)



PART III:
CASE STUDY APPRAISALS OF STRATEGIC LEGITIMACY CULTIVATION

CHAPTER 4:
SUPREME COURT OF CANADA AND THE *MARSHALL* CASE ON ABORIGINAL RIGHTS

The aim of Part II was to assess the extent to which broad decision-making patterns of the Canadian Supreme Court correspond to predictions of the legitimacy cultivation theory outlined in Chapter 2. Chapters 4 and 5 continue the empirical evaluation of the theory by engaging in qualitative analyses of individual cases. As discussed in the introductory chapter of this dissertation, while statistical tests can provide some of the most rigorous evaluations of a theory, employing case-study methods can enrich theoretical explorations by providing significant benefits and even compensating for some of the problems associated with statistical approaches. While bringing about in-depth analyses of particular historical contexts and allowing for high levels of conceptual validity are some of the key benefits of case study research, carefully constructed case studies can even be used to estimate causal effects of individual variables under the conditions of "a well-controlled before-after case comparison in which only one independent variable changes, or more generally when extremely similar cases differ only in one independent variable" (George and Bennett, 2005: 25). The aim of this chapter is to undertake such a before-after case comparison by engaging in a detailed analysis of the Supreme Court of Canada's 1999 *Marshall* case on Aboriginal rights.

In the space of two months, the Supreme Court of Canada went out of its way to deliver two decisions in the *Marshall* case, the so-called *Marshall 1* and *Marshall 2*. Both were released by the same set of judges, working on the same court, dealing with the same case and with the same factual record. The only difference in the context of the two decisions had to do with the highly divergent political environments surrounding them. In particular, while the *Marshall 1* decision was produced and delivered in relative obscurity and without much media or political attention, the *Marshall 2* decision was produced and delivered in the face of extreme media attention and political interest as much of the country grappled with the reaction that the first decision generated.

This set of factors surrounding the *Marshall* case are particularly suitable for testing the theoretical implications of the legitimacy cultivation theory. Given the change in the visibility surrounding the two decisions one can expect that compared to *Marshall 1*, judicial concerns towards legitimacy cultivation would be much more

pronounced in *Marshall 2*. In fact, a close analysis of the two decisions shows that in its *Marshall 2* decision, the Supreme Court of Canada departed from much of what it decided in *Marshall 1* and that these departures correspond to the predictions of the legitimacy cultivation theory. Furthermore, given that these changes between the two decisions were produced by the same set of judges dealing with the same case and same factual record, other potential explanations of differences between the two decisions, such as those associated with attitudinal or legal factors, can be effectively ruled out.

The chapter advances in three sections. The first section discusses the Supreme Court's first decision in the *Marshall* case. This section introduces basic facts of the case, discusses relevant features of the *Marshall 1* pre-decision political environment and describes the Court's *Marshall 1* ruling. The second section discusses the political environment that developed in the aftermath of *Marshall 1* which simultaneously amounts to an analysis of the pre-decision political environment of the *Marshall 2* decision the Supreme Court delivered two months later. The third section of the chapter analyzes the extent to which the discrepancies between the two decisions can be traced to judicial sensitivities to legitimacy cultivation.

Marshall 1

In 1999 *Marshall* case the Supreme Court of Canada faced the question of whether Mi'kmaq Aboriginals had a treaty right to catch and sell fish. At the centre of the case was Donald Marshall Jr., a member of the Membertou Mi'kmaq Aboriginal community, whose previous encounter with the Canadian justice system resulted in an 11-year prison sentence based on a wrongful conviction. This time around he was facing three separate charges: fishing without a licence, fishing during closed season with prohibited nets, and selling eels without a licence.

Legally, much of the importance of the case had to do with exploring commercial aspects of Aboriginal treaties in Canada which is an issue the Supreme Court has addressed on previous occasions. In 1996 *Van der Peet* case the Supreme Court confronted the question of whether members of the Sto:lo Nation had an Aboriginal right to sell or trade fish. In that case the majority found that while the Sto:lo people did engage in exchange of fish before their contact with Europeans, this practice was incidental and not integral to the Sto:lo culture. For this reason, the

Aboriginal defendant in the case was convicted and the right to sell or trade fish was not established. Another relevant precedent was the 1996 *Gladstone* case which dealt with the question of whether members of the Heiltsuk band had an Aboriginal right to trade herring spawn on kelp on a commercial level. In *Gladstone* the majority ruled that prior to the contact with Europeans the practice of selling large quantities of herring spawn on kelp to other Aboriginal tribes was a an integral part of the culture of the Heiltsuk people, and thereby recognized the commercial rights of the Heiltsuk people with respect to the herring spawn on kelp.

According to Bruce Wildsmith, who defended Marshall at the Supreme Court, the *Marshall* case was particularly suitable for exploring treaty-based, commercial rights of the Mi'kmaq people. As he notes (2001: 216), there was a clear evidence of commercial activity as the sale of eels was observed by fisheries officers, the Mi'kmaq people have traditionally harvested for eels, and conservation issues did not come into play in the case. In fact, given the notoriety and public personality status of Donald Marshall Jr. some people wondered whether the whole case was manufactured as a test case for exploring commercial treaty rights of the Mi'kmaq people. Wildsmith underscores that this is not the case and that Marshall was fishing for therapeutic reasons having to do with getting back to his roots as well as to ensure the subsistence for himself and his family (2001: 216). At the Supreme Court, Marshall's defence team did not dispute that Marshall was fishing and selling fish contrary to federal regulations but contended instead that he had a right to catch and sell fish pursuant to the 1760-61 treaties concluded between the British and the Mi'kmaq.

There were four interveners appearing at the Supreme Court. The Attorney General of New Brunswick and the West Nova Fishermen's Coalition intervened in support of the federal government and argued against the establishment of Mi'kmaq treaty rights to catch and sell fish. The Union of New Brunswick Indians and the Native Council of Nova Scotia, on the other hand, intervened in support of the Marshall's cause.

The Supreme Court of Canada delivered its first decision in the *Marshall* case on September 17, 1999. A five-member majority upheld Marshall's contention and rendered an acquittal. Much of the Court's attention was centred on this critical passage from the treaties involving Mi'kmaq pledges to the British:

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck

> houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Acadia (*Marshall 1* 1999: 90).

This clause was interpreted to give the Mi'kmaq a *right to bring* goods to trade at the specified truckhouses, as well as a corresponding or incidental *right to obtain* goods for the purposes of such trading through their traditional hunting, fishing, and gathering activities (*Marshall 1:* 494). These rights were held to have survived the eventual termination of the truckhouse regime.

The Supreme Court of Canada is usually careful of potential distributional implications that recognition of Aboriginal commercial harvesting rights may have on the industry in question and on other economic actors vying for the same resource. In *Gladstone* (1996), for example, the Court ruled that providing Aboriginal people with a preferential and unlimited fishing right could have the potential of absorbing the whole fishery and completely displacing non-Aboriginal access to resources. In order to avoid such an outcome, the Court in *Gladstone* proclaimed that any right granting Aboriginal fishers a preferential access to a resource would have to be internally limited. In light of similar concerns, the majority in *Marshall 1* imposed two limitations on the Mi'kmaq rights. First, an internal limitation was incorporated into the rights so that the rights "do not extend to the open-ended accumulation of wealth," but are limited to securing "necessaries," or "moderate livelihood," for Aboriginal families (*Marshall 1:* 470). Second, the Court specified that rights are also susceptible to governmental regulation which can be justified under the justificatory test the Court first developed in the *Sparrow* (1990) decision and expanded upon in subsequent cases such as *Gladstone* (1996). It is important to note that the Court ruled that neither of these two types of limitations applied to Marshall. He was pursuing a small scale commercial activity to support his family that clearly fell within the 'moderate livelihood' threshold (*Marshall 1:* 470), while the government did not seek to justify any of the prohibitions on which he was charged. The government's focus has been on disputing the existence of rights in the first place (*Marshall 1:* 467).

A two-member minority of the Supreme Court, on the other hand, argued that the so-called truckhouse clause established "neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime" (*Marshall 1:* 507). Rather, the clause obliged the Mi'kmaq to trade only with the British, and in that sense it established a limited "right to bring"

trade goods to the truckhouses (*Marshall 1:* 528). Once those truckhouses ceased to exist, the minority held, so did the Mi'kmaq limited right to bring goods to trade.

Marshall 1 amounted to a considerable victory for Aboriginal peoples. It was, in fact, the first time that the Supreme Court affirmed Aboriginal treaty rights to fish for commercial purposes (Sauvageau et al. 2006: 140). According to Wildsmith, the Mi'kmaq came away from the Court's decision with "an immediate right to harvest and sell fish and wildlife in sufficient quantities to support a moderate livelihood" that "was not contingent on a new trial or any other event" (2001: 226).

It is important to stress that the pre-decision environment surrounding the *Marshall 1* decision was characterized by a very low degree of visibility. In fact, none of the major media organizations (television or newspaper) covered the 1998 hearing (Sauvageau et al. 2006: 145) which ensured that the Canadian public remained very much unaware of the case the Supreme Court was confronting. Recalling the briefing that preceded the decision, James O'Reilly, the Court's executive legal officer at the time responsible for media relations, noted the following:

> There were only three or four people in the room for *Marshall*. There was only one person that actually knew what that case was about … The other people in the room came over because they saw Donald Marshall's name on something and they wanted to know what it was about. They had no idea what the case was about. And you know, when I said it was a case about catching eels, I think they turned around and left the room (Sauvageau et al. 2006: 145).

Reaction to *Marshall 1* (or Pre-Decision Political Environment of *Marshall 2*)

The Mi'kmaq's reaction to the decision was exuberant. Recognition of fishing rights for the purposes of attaining a moderate livelihood amounted to a prospect of reaching the long-sought financial and economic independence for many Aboriginal families whose economic fortunes were tied to the state's welfare system. Across Nova Scotia and New Brunswick, Aboriginal fishers rushed to deliver on that prospect by putting lobster traps into the sea even though in some of the areas lobster season was still officially closed.

Non-Aboriginal fishers, for their part, emphasized that the existing resources cannot accommodate the infusion of Aboriginal fishers. Dealing with a vulnerable industry that has already seen depletion of the profitable cod fishery, they expressed bitter resentment towards Native actions. As one of them proclaimed: "We're regulated to death and by not regulating natives on the same basis as we are is

complete racism" (Coates 2000: 134). Non-Aboriginal fishers braced themselves for a fierce protection of their interests which would soon involve taking it to the streets and to the sea.

The federal government was slow to react to the situation that was fast developing. The eventual crisis became responsibility of fisheries minister Herb Dhaliwal whose initial response included a call for patience and restraint followed by a seclusion aimed at further analyzing the issue (Coates 2000: 131). When he finally spoke out, Dhaliwal said that he cannot order the Mi'kmaq off the water because the rights affirmed by the Supreme Court are immediately applicable, though he expressed a "resolve that fishing be conducted in an orderly and regulated manner" (Sauvageau et al. 2006: 153).

Other options were also considered. In order to evade a "potentially explosive situation," Premier John Hamm of Nova Scotia called on Prime Minister Chrétien to suspend the newly proclaimed Aboriginal rights (Coates 2000: 135). Leader of Official Opposition Preston Manning joined in the request for an immediate suspension of the Court's ruling emphasizing that "what you want is one set of laws and one set of regulations that everybody can live with" and not a "special status" designation for one set of Canadians (Leblanc 1999). In response, the federal government seriously considered the option of suspending the decision and engaged in "studying the legalities of the issue" (Mofina 1999). In fact, in one of his only public statements on the whole *Marshall* affair, Prime Minister Jean Chrétien stated that "[t]he Justice Department and the minister of fisheries is looking into [the issue of suspension]" (Mofina 1999).

In the meantime, the conflicts escalated. The most dramatic confrontation occurred on 3 October when, in a pre-dawn attack, a 150-boat armada of non-Aboriginal fishers destroyed some 3,000 Aboriginal lobster traps in Miramichi Bay, New Brunswick, vandalizing the fishing gear in the process (Coates 2000: 139). Upon the return of non-Aboriginal fishers to the shore, the RCMP had to step in to separate the warring parties amidst Aboriginal pledges of revenge. Violence then spread throughout the local area. The Burnt Church reserve school was broken into and the principal's office was vandalized (Coates 2000: 140). "Angry mobs" of unruly non-Aboriginal fishers also attacked local fish processing plants, ransacking the buildings, destroying computers, and overturning vending machines (Coates 2000: 140). Aboriginals retaliated by torching trucks of non-Aboriginal owners, which

resulted in some of their own vehicles being torched in return (Coates 2000: 140). The intensity of the situation is perhaps best illustrated by the following statement of one of non-Aboriginal fishers: "Nobody wants [violence] but we've all got guns" (Coates 2000: 136).

Dhaliwal responded to the escalation by holding meetings with both Aboriginal and non-Aboriginal groups which served to ease the tensions somewhat. It was not until mid-October, however, that the federal government set about with a concrete plan to deal with the situation. The plan entailed conducting negotiations with individual Aboriginal bands on separate fishing allocations (Coates 2000: 133).

While the media expressed relatively little interest in the case when the *Marshall 1* decision was initially released, the coverage exploded as violence and conflict intensified. As Figure 4.1 shows, compared to the week in which the decision was released, media interest in the case grew considerably in the subsequent two weeks. The media placed particular emphasis on portrayals of violence such as that of burned buildings, shoving matches, vandalism, boat confrontations, and Mi'kmaq men dressed in army fatigues (Sauvageau et al. 2006: 155). The Court and the decision itself were also placed "under a magnifying lens" (Sauvageau et al. 2006: 158). Excerpts from the decision were published, while columnists devoted considerable energies towards scrutinizing the Court's reasoning. Sauvageau et al.'s analysis of media coverage of the decision shows that "most commentary was critical of the court" (2006: 158). In fact, major newspapers published a total of 30 articles that were negative of the Court and the decision, and only one article that was positive (see Figure 4.2). Also, a "third of the headlines about the court were negative and tore into the institution with phrases such as 'Supreme Court ignites the fire', 'Supreme anarchy', 'The Supreme Court as battering ram', 'Supreme Blindness' and 'Supreme Court, supreme arrogance'" (Sauvageau et al. 2006: 158).

The pressure on the Supreme Court continued to pile up. Even the Crown's principal witness on the history of the treaties who appeared before the Court, Dr. Patterson, lambasted the Court by accusing it of misconstruing his testimony and engaging in "a selective use of evidence" (Fife 1999). By October 25, the governments of Alberta and Ontario questioned the Supreme Court appointment process and demanded a greater provincial input for the sake of curbing the Court's tendencies towards judicial activism (Ibbitson and Chase 1999).

Figure 4.1
Newspaper and TV Coverage in the Aftermath of *Marshall 1*

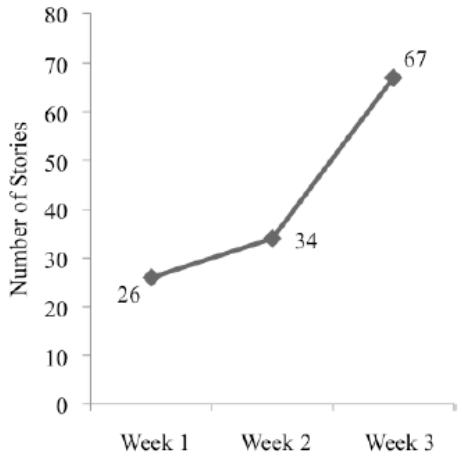
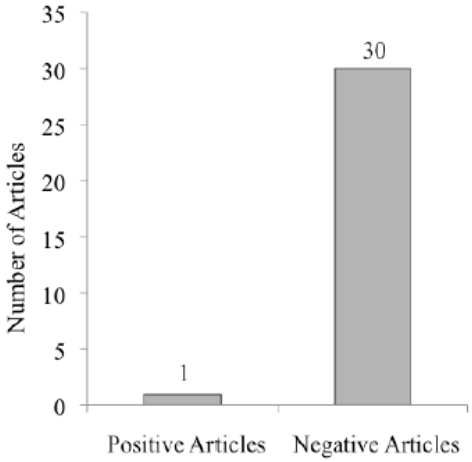


Figure 4.2
Character of Newspaper Coverage in the Aftermath of *Marshall 1*



In sum, in three short weeks following the release of *Marshall 1* the political environment surrounding the *Marshall* case has undergone a profound change. From the relative obscurity in which it was litigated, and the *Marshall 1* decision delivered, the case advanced into the limelight, garnering an extraordinary amount of public attention and interest. And, it is in this context of high visibility that the Supreme Court of Canada decided to deliver a 'reprise', or a 'clarification', to its *Marshall 1* decision.

Marshall 2: Legitimacy Cultivation at Work

One of the interveners in the case, West Nova Fishermen's Coalition, applied to the Supreme Court for a rehearing of the *Marshall* appeal and for a stay of the existing judgement pending such rehearing. Instead of responding to the Coalition's request by writing a one- or two-line decision which is the standard practice on such motions, on November 17, 1999 the Court returned a thirty-two-page, 48 paragraphs long decision that came to be known as the *Marshall 2*. Rendering such a long reprise shocked the Canadian legal community and amounted to an unprecedented and unusual step for the Court to take (Wildsmith 2001: 228; Sauvageau et al. 2006: 138; Rotman 2000a: 629). It is also important to stress that in sharp contrast to *Marshall 1,* the second decision was produced and delivered in the context of enormous visibility and public interest that ensued in the aftermath of *Marshall 1*. Sauvageau et al.'s statement is to the point: "While *Marshall 1* arrived to relatively little fanfare, the same cannot be said of *Marshall 2"* (2006: 162).

The Court dismissed the Coalition's motion which sought more detail on the power of federal government to regulate the treaty rights recognized in *Marshall 1*. The Court stated that "[t]he Coalition's application is based on a misconception of the scope of the Court's majority judgment" and that the responses to all of the Coalition's queries "are already evident in the majority judgment and prior decisions of this Court referred to therein" (*Marshall 2:* 535). What remains unclear, however, is why the Court rendered such a long reprise if answers to all of the Coalition's queries were clearly presented in *Marshall 1*. Furthermore, while the Coalition's motion was focused on the issue of governmental regulation, in its response the Court went much beyond that issue and extensively revisited the definition of the right itself.

Another interesting aspect of *Marshall 2* is that the two dissenting justices from *Marshall 1* joined the majority so that the *Marshall 2* decision was signed collectively by "The Court." This is not the first time the Court signed one of its decisions in this collective manner. According to Bienvenu (1999-2000: 41), Supreme Court judges have a tendency to come together in this manner when dealing with cases of a "politically sensitive" character, and they have done so a year earlier in the landmark *Secession Reference* case. Furthermore, this practice could be directly linked to legitimacy concerns given that, as Friedman et al. argue, "[s]eparate opinions tend to sap the legitimacy of a court" because they imply that there does not exist a single conclusive settlement of a legal issue (1981: 785).

This is to suggest that in rendering *Marshall 2* the Court was exhibiting apparent sensitivities to the political environment developing outside the courtroom. It is hard to escape the conclusion, in fact, that it was the change in the political environment surrounding the *Marshall* case that compelled the Court to come together and deliver a new, unprecedented, follow-up to the *Marshall 1* decision. As the rest of this section illustrates, a close analysis of the discrepancies between the two decisions provides strong support for the claim that it was the Court's sensitivity to legitimacy cultivation that weighed heavily on the minds of the justices.

In spite of the Court's claim that the *Marshall 2* decision amounts to nothing but an explication of what was stated in *Marshall 1,* several scholars have pointed out that the second decision covers new ground and departs significantly from what the Court stated in *Marshall 1* (for example Rotman 2000a: 619; Saunders 2000: 85; Sauvageau et al. 2006: 138; Wildsmith 2001: 229; Barsh and Henderson 1999: 16-18). According to Saunders (2000: 67), the discrepancies between the two decisions

could be classified under four categories: 1) *geographic scope of the right*; 2) *beneficiaries of the right*; 3) *resources included under the right*; and 4) *character of the right itself*. Each will be considered below.

With respect to the *geographic scope of the right* the *Marshall 2* decision specifies a clear restriction. The Court notes that the treaties in question "were local and the reciprocal benefits were local," and that, therefore, "the exercise of the treaty rights will be limited to the area traditionally used by the local community" (*Marshall 2*: 547). The onus is on the Aboriginal claimant of the right to demonstrate that he or she was exercising "the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds" (*Marshall 2:* 546). Yet, this geographic restriction on the exercise of the right is simply absent from the *Marshall 1* decision. *Marshall 1* decision mentions neither that the right is local, nor that the reciprocal benefits are local, nor that the claimant has to show he was exercising rights in traditional grounds (Saunders 2000: 73). As discussed above, the only restriction the Court includes in its definition of the right in *Marshall 1* has to do with the attainment of moderate livelihood.

That the Court was not concerned with the geographic restriction in *Marshall 1* is further evidenced by the fact that Marshall himself was fishing well outside of his community's local grounds. Marshall is a member of the Membertou Indian Band located on the north side of Cape Breton Island and he was fishing in Pomquet Harbour located on the mainland of Nova Scotia and, therefore, well outside the territory of his band. Yet, these facts did not come to play in the *Marshall 1* decision. The *Marshall 2* decision, in this sense, directly contradicts the Court's acquittal of Marshall in the first decision (Wildsmith 2001: 231; Rotman 2000b: 26-27; Saunders 2000: 73). As Saunders concludes, "if what the Court said about this issue in *Marshall #2* is true, then what the majority concluded in *Marshall #1* cannot be correct" (2000: 75).

In terms of the *beneficiaries of the right,* the Court again outlines a restriction in *Marshall 2* that is absent from *Marshall 1*. The *Marshall 2* decision specifies that "the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs" (547). This amounts to an important restriction on the rights because it implies that beneficiaries of the rights are not individual members of Aboriginal communities, but the communities themselves. Individual fishers, by implication, can exercise rights only "by authority of the local

community." The Court, however, makes no mention of the "collective" right or of the exercise of communal authority over individual members in *Marshall 1* (Saunders 2000: 70; Rotman 2000b: 27; Wildsmith 2001: 231). At one point, the Court's actual formulation in this regard refers to the "*appellant's* treaty right to fish for trading purposes" and to "*his* right to trade" (*Marshall 1:* 506, emphasis added; Saunders 2000: 70). What is more, this restriction again cannot be squared with the facts of the case. As Wildsmith notes, there was no evidence that Marshall possessed a communal permission to exercise rights nor did any of the courts that dealt with the case, including the Supreme Court, considered any evidence or argument in this regard (2001: 231).

On the issue of the *resources included under the right*, there are two ways in which *Marshall 2* is again more restrictive than *Marshall 1.* The first issue deals with the definition of the word "gathering." While in *Marshall 1* the Court uses only the word "traditional" to refer to the type of activities and resources that could be gathered by Aboriginal rights claimants, in *Marshall 2* the definition of the word "gathering" becomes much more elaborate (Saunders 2000: 76-77). According to the Court:

> The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed.
> …
> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower (*Marshal 2:* 548).

By introducing new components to the definition of the word "gathering" – i.e. inclusion in traditional Aboriginal economies and presence in the contemplative perspective of the parties at the time – the Court significantly reduced the evolutionary potential of the rights in question and therefore constricted the scope of rights protection.

The second issue deals with the range of species included under the categories of hunting and fishing. In *Marshal 1*, the Court spoke of fishing and hunting activities "generically," as encompassing the full range of wildlife and fish (Wildsmith 2001: 224). Hence, the majority stated that the 1760 treaty affirms "the right of the Mi'kmaq people to continue to provide for their own sustenance by taking

the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed 'necessaries'" (*Marshall 1:* 466-467). The flavor of the *Marshall 2* decision, however, is of a species-to-species approach, and of a right that is restricted to the particular species (eels) Marshall fished for (see for example Wildsmith, 2001: 224; Barsh and Henderson, 1999: 17). According to the Court:

> The *Marshall* appeal … related to fishing eel out of season contrary to federal fishery regulations. In its judgment of September 17, 1999, a majority of the Court concluded that Marshall had established the existence and infringement of a local Mi'kmaq treaty right to carry on small scale commercial eel fishery (*Marshall 2:* 534).

While this could be seen as a point of emphasis rather than a manifest inconsistency between the two decisions (Marshall, after all, did fish for eels), it is worth noting that the change in emphasis is again in the direction of further restriction of the right.

Finally, in terms of the *character of the right itself* there are important differences between *Marshall 1* and *Marshall 2*. As noted above, the *Marshall 1* decision defined the right in rather straightforward terms as including the *right to bring* goods to trade and the corresponding *right to obtain* such goods for the purposes of attaining moderate livelihood. In *Marshall 2*, however, the Court goes well beyond this formulation:

> the Mi'kmaq treaty right to hunt and trade in game is not now, any more than it was in 1760, a commercial hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes. The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq *equitable access* to identified resources for the purpose of earning a moderate living (561, emphasis added).

This addition of the emphasis on assuring "equitable access" amounts to an important redefinition of the right proclaimed in *Marshall 1* (Saunders 2000: 80; Barsh and Henderson, 1999: 16). According to Saunders, "[t]he fact that the words 'equitable access' did not appear in the [first] decision, let alone in the paragraphs which defined the treaty right, gives some cause for doubt about the centrality of this concept to the majority's reasoning" (2000: 80).

So, how helpful is the theory of strategic legitimacy cultivation in explaining the Court's rather unusual step to deliver the *Marshall 2* decision? As the following discussion illustrates, the Court's actions fall very much in line with predictions of the legitimacy cultivation theory outlined in Chapter 2.

Hypothesis 1: Specific Support

It is evident from the above discussion that the *Marshall 1* decision provoked a rather negative reaction from the Canadian public in general and from the Eastern Canadian public in particular. According to Coates, there was much "public anger" and "discontent swirling around" the *Marshall 1* decision (2000: 80). This public discontent is particularly evident in media accounts of *Marshall 1* which, as argued above, were largely negative towards the Court (see for example Figure 4.1). As Sauvageau et al. note, the implication of much of this coverage "was that justices were emotionally, physically, and intellectually removed from mainstream society" (2006: 159).

There is also direct evidence that the *Marshall 1* decision resulted in the loss of public support for the Court. While the Atlantic region generally manifests the highest levels of support for the courts in Canada (Fletcher and Howe 2001: 292), an Angus Reid poll conducted on November 4th and 14th of 1999, and therefore right during the interlude between the two *Marshall* decisions, shows Atlantic Canadians (56%) together with Albertans (57%) as being the most unhappy with the power of the Canadian judiciary (Makin 1999). According to Fletcher and Howe, this "apparent upswing" in public opposition to courts in Atlantic Canada is most likely due to the general dissatisfaction with the *Marshall 1* decision (2001: 292). This suggests that the outcry from the *Marshall 1* decision might have started to pluck away at the court's diffuse support, at least in the Atlantic region.

On the basis of these factors one can speculate that the state of specific support was at least in part responsible for the Court's unprecedented decision to deliver a reprise to *Marshall 1*. As the legitimacy cultivation theory of judicial decision making specifies, high visibility exaggerates judicial sensitivities for producing decisions that accord with the state of specific support. In fact, numerous commentators have concluded that much of the purpose behind the *Marshall 2* decision was to dampen the public anger that resulted from *Marshall 1* and to redeem the Court in the eyes of the public (for example Coates 2000: 18; Sauvageau et al. 2006: 165; Wildsmith 2001: 234-235; Barsh and Henderson 1999: 17). The primary method through which the Court sought redemption in the eyes of the public involved blunting the activist edges of the *Marhsall 1* decision and bringing the decision better in line with public preferences.

Hypothesis 2: Avoidance of Clashes with Political Actors

According to the second component of the legitimacy cultivation hypothesis, judges are expected to avoid overt clashes and entanglements with political actors over what are ostensibly political issues. There were three key political stakeholders involved in the *Marhall* case: Aboriginal fishers and their communities, non-Aboriginal fishers and their communities, and the federal and provincial governments. While the *Marshall 1* decision received enthusiastic endorsement from the Aboriginal community, the reaction from the other two actors was quite the opposite. Non-Aboriginal fishers engaged in violent demonstrations, while the federal government, on the advice of the Nova Scotia provincial government, seriously contemplated suspending the decision. In *Marshall 2*, however, the Court took significant steps to placate these two groups of actors, which, as it turned out, had much of public support behind them.

Non-Aboriginal fishers were troubled by the *Marshall 1* decision for two reasons. They feared that the Aboriginal rights proclaimed were too broad and would result in a depletion of the fishing resources, and they felt that the decision accorded favourable or "special" status and rights to Aboriginal fishers. The Court eased both of these concerns. The first concern was alleviated by the Court's significant narrowing of the Aboriginal rights in *Marshall 2*. The rights were narrowed in terms of their geographic scope, in terms of the types of resources to which they applied, and in terms of the number of people who could exercise the rights (i.e. only those with a communal authorization). The second concern was lessened by the Court's definition of the rights in "equitable access" terms. The clear implication of the equitable access formulation is that the exercise and fulfilment of Aboriginal rights takes no precedence over non-native commercial or recreational usage of the resources. In light of this rather extensive recognition of non-Aboriginal fishing interests, it is no surprise that the *Marshall 2* decision "was applauded by non-Aboriginal fishers and their supporters" (Sauvageau et al. 2006: 138). This, of course, stands in sharp contrast to their reaction to the first decision.

The Court also took steps to placate the governmental actors. In fact, some components of the *Marshall 2* decision were directly helpful to the federal government in facilitating negotiations with Aboriginal peoples. For example, one of the problems that emerged at the early stages of negotiations was whether agreements

reached with band authorities could be enforced against those band members who refused to accept the agreement and wished to pursue their rights individually. The Court's proclamation that the rights are exercisable "by authority of the local community" resolved this concern. As Saunders notes, "[w]what was missing from the majority decision in *Marshall #1,* but provided in *Marshall #2*, was the identification of a limited number of parties with whom agreements could be concluded, as opposed to a large number of independent actors, each with their own interests to negotiate" (2000: 70). While, as argued above, the facts of the case and the *Marshall 1* decision do not address the issue of communal versus individual authority, taking account of the developments occurring outside the courtroom provides important insights into why the Court went out of its way to introduce the communal restriction in the *Marshall 2* decision. In fact, within two weeks of the release of *Marshall 1,* fisheries minister Dhaliwal publicly stated that his department was "studying whether the ruling … gives fishing rights to individuals who can apply it across the country, or whether it is a communal right to which only residents of native reserves are entitled" (Cox and Andersen 1999).

The Court was also directly helpful to the federal government through its introduction of the geographic restriction on the scope of the right in *Marshall 2*. This restriction served to strengthen the governmental negotiating hand by decreasing Aboriginal prospects for demanding entitlement to resources outside traditional communities (Saunders 2000: 72-73). It is no wonder then that in addition to non-Aboriginal fishers, federal politicians (in and out of opposition) also expressed jubilation at the release of the *Marshall 2* decision (Sauvageau et al. 2006: 162).

Aboriginal people, for their part, expressed criticism towards the Court and its *Marshall 2* decision. This reaction was primarily due to the impression that the Court was backtracking and taking away what it seemed to have already granted (Barsh and Henderson 1999: 16-18; Saunders 2000: 87-88). From the Court's perspective, however, it was probably more important to appease non-Aboriginal fishers, governmental actors even if that appeasement came at the cost of some backlash from the Aboriginal constituency. In fact, it is difficult to avoid the conclusion that once it found itself in a highly visible context the Court rebalanced its decision in such a way so as to give something to each of the key political stakeholders involved in the dispute and, therefore, ensure better acquiescence to its decision.

Hypothesis 3: Moderation of Judicial Activism

It is clear from the above discussion that the Court considerably moderated its activism by rendering the *Marshall 2* decision. In fact, all four of the above discussed changes between the two decisions are in the direction of less activism and more deference. Compared to *Marshall 1,* the *Marshall 2* decision, therefore, reduced the geographic scope of the Aboriginal right, decreased the number of right beneficiaries who can exercise the right, narrowed down the types of resources to which the right can be applied, and defined the right in narrower terms and in such a way so as to incorporate the status-quo interests of non-Aboriginal fishers. The *Marshall* case, therefore, falls clearly in line with the hypothesis that when operating in highly visible political environments, as opposed to environments characterized by relative obscurity, the courts will exhibit proclivities towards moderation of judicial activism.

Hypothesis 4: Politically Sensitive Jurisprudence

According to the final component of the legitimacy cultivation hypothesis, when operating in highly visible environments courts are expected to devise and utilize doctrines that are sensitive to the extant political environment. Such politically sensitive jurisprudence is evident in two elements of the *Marshall 2* decision: in the redefinition of the Aboriginal right in "equitable access" terms, and in the Court's discussion of justificatory standards the federal government must meet if it wants to limit the right through regulation.

The policy area the Court tackled in the *Marshall* case was complex and contentious. Two sets of economically vulnerable actors (Aboriginal communities stricken with poverty and largely dependent on the welfare system and non-Aboriginal fishing communities that have already experienced several shocks to their economic well-being such as the collapse of the North Atlantic cod fishery) were vying for the industry characterized by strong apprehensions about resource sustainability. Having received considerable backlash and having placed the Court at the centre of a highly visible controversy, it was apparent that the *Marshall 1* decision did not reflect well the complexity of the political environment on the ground. The distributional effects of the decision proved to be exorbitant even though the Court did exhibit some sensitivities towards distributional concerns through its formulation of the moderate livelihood restriction. In this context, further redefining the

Aboriginal right in "equitable access" terms was an apparent attempt to develop a more prudent doctrine that better addresses the complexity of the political environment on the ground. As such, the redefinition of the right in terms of an equitable access to resources for both Aboriginal and non-Aboriginal stakeholders amounted to an act of jurisprudential activism as the Court obviously altered its *Marshall 1* interpretation of the right. As discussed in Chapter 2, judges can engage in jurisprudential activism in order to bring the Court's jurisprudence better in line with the extant political environment which is what the Court has apparently done with its formulation of the right subjected to an equitable access. Given the increase in the visibility of the case, this formulation was also more sensible in terms of ensuring legitimacy cultivation.

The extent to which the Supreme Court goes about developing politically sensitive jurisprudence can also be assessed by examining its discussion of justificatory standards the federal government must meet if it wants to infringe upon Aboriginal rights. While these standards did not come directly into play in the case because government did not seek to justify any of the prohibitions on which Marshall was charged, in *Marshall 2* the Court discussed these standards at considerable length.

Since Aboriginal and treaty rights were recognized and affirmed by section 35(1) of the Constitutional Act 1982, the Court has developed a series of conditions the federal government must meet if it wants to infringe on these rights. The initial *Sparrow* (1990) test outlined two conditions the Crown must meet: (i) there must be a "valid legislative objective" for the infringement, and (ii) the measures taken to meet the objective must be consistent with the fiduciary duty the federal government has towards Aboriginal peoples (McNeil 1997: 33-34). In consequent decisions the Court elaborated on the issue of justification. In *Gladstone* (1996), the Court developed a less stringent version of the test that incorporated public interest concerns as a legitimate justification for limiting Aboriginal rights. In particular, the Court proclaimed that a variety of considerations, including "conservation goals, … objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups," are all the type of objectives that can satisfy the justificatory standard (*Gladstone:* 775). The Court also made a general claim that "aboriginal societies exist within, and are a part of, a broader social, political and economic community" and that limits placed on Aboriginal rights are justified "where the objectives

furthered by those limits are of sufficient importance to the broader community as a whole" (*Gladstone:* 774). According to McNeil, this justificatory standard basically amounts to a "public interest justification" as it suggests that the protection of Aboriginal rights is delimited by what the Canadian public as a whole is willing to allow (1997: 35).

In its *Marshall 2* discussion of the scope of the federal government's regulatory authority over treaty rights, the Court prominently invoked and discussed the public interest justification. "Economic and regional fairness" and "participation in the fishery by non-aboriginal groups" were listed as potentially compelling grounds for governmental limitations of Aboriginal rights (*Marshall 2:* 562). This amounts to politically sensitive jurisprudence because it allows the Court to ensure that its resolution of individual cases remains within the boundaries of what the larger political environment can tolerate. By assessing the impact that any proclamation of rights may have on other actors and interests judges can ensure that rights protection remains sensitive to divergent political conditions. In the *Marshall 2* decision, for example, the Court suggested that Aboriginal rights can be more restrictively defined, and more stringently regulated, with respect to the highly lucrative, congested and controversial lobster fishery than with respect to the much less profitable and mobilized eel fishery. Indeed, the fact that much of the uproar following the release of *Marshall 1* had to do with implications of the ruling for the lobster fishery is most likely the reason why the Court made sure to specify in *Marshall 2* that regulatory regimes of the two fisheries are to be independently assessed (*Marshall 2:* 545-546).

In light of the theory of strategic legitimacy cultivation it is of particular significance to note that the Court emphasized this public interest justification in the *Marshall 2* decision even though no mention of such jurisprudence was made in the *Marshall 1* decision. In fact, as Rotman argues, the *Marshall 1* decision does not contemplate the relaxed *Gladstone* test for assessing governmental regulation but only more stringent *Sparrow* and *Badger* tests which do not incorporate the public interest justification (2000b: 24-25). As with its formulation of the right in "equitable access" terms, the Court resorted to such politically sensitive jurisprudence in the context of high visibility.

Conclusion

The *Marshall* case shows that cultivating institutional legitimacy leads courts to engage in strategic decision making. In particular, with the dramatic increase in the visibility of the case and the widespread voicing of public discontent towards the Court, the Court went out of its way to bring the decision better in line with the state of specific support, to avoid further clashes with dominant political actors, to qualify the level of judicial activism, and to utilize and develop jurisprudence that is more sensitive to the extant political environment. What is particularly interesting about the *Marshall* case is that it was the same set of judges, working on the same court, dealing with the same case and with the same factual record, that delivered such a conspicuous reversal. Given that there are no other differences in the context of the two decisions, it is indeed difficult, if not impossible, to ascribe the Court's turnaround to anything but the developments occurring outside of the courtroom.

The *Marshall* case also illustrates the limits of the legalist theory of how courts attain institutional legitimacy which holds that courts obtain legitimacy through principled reasoning and through application of legal principles such as that of *stare decisis.* Facing a legitimacy crisis in the form of a mounting wave of public criticism, the Supreme Court's tendency was not to make sure to reinforce its *Marshall 1* ruling, but to alter it in line with the four legitimacy cultivation hypotheses outlined in Chapter 2. As a tool of legitimacy attainment, *stare decisis* is simply not helpful in the context of the *Marshall* case for the Court in *Marshall 2* was obviously contradicting some of what it stated just two months prior in *Marshall 1*. According to one legal scholar, the discrepancies between the two *Marshall* decisions are "rather disconcerting" (Rotman 2000a: 619). Others make more forceful assessments: "Never has the US or Canadian Supreme Court reversed itself so precipitously in the face of public criticism" (Barsh and Henderson 1999: 15).

The *Marshall* case clearly shows that the legitimacy cultivation compels the courts to keep a very attentive eye on political and social realities from which the cases arise. Consequently, external factors serve to importantly delineate the boundaries of rights protection, and understanding judicial decision making necessitates taking close accounts of the external context and how it affects judicial disposition of individual cases. This view that courts are sensitive to the larger political environment as they go about their decision making has in recent times been

advanced by none other than the current Chief Justice of the Supreme Court of Canada. According to her:

> The idea that there is some law out there that has nothing to do with consequences and how it plays out in the real world is an abstract and inaccurate representation of what the law is. I think it is essential to good judging that the rule be sensitive to consequences, and judges, when they make rulings, give some thought to how their rulings are going to fit into the institutional matrix of society (Alberts 1999).

What is particularly interesting about this statement is that it was made in a rare media interview conducted on November 5, 1999, which was some month and a half after the *Marshall 1* decision was delivered and 12 days *before* the Court released its unprecedented clarification in the form of *Marshall 2*. Given the timing, one cannot help but speculate that the comments were at least partially inspired by the Chief Justice's contemplation of the Court's majority decision in *Marshall 1,* of the public reaction to that decision, and of the Court's soon-to-be-released, unprecedented *Marshall 2* reprise. In her dissent in *Marshall 1*, the Chief Justice did note that the Court was risking "functioning illegitimately" by creating "an unintended right of broad and undefined scope" (*Marshall 1:* 530).

A Look Beyond the *Marshall* Case

While the above discussion suggests that legitimacy concerns appear to have played upon the minds of justices in the *Marshall* case, keeping in mind the findings of the statistical analysis conducted in Chapter 3 one can assume that similar behaviour will be discernible in other high-profile and well-known Supreme Court decisions. As this section shows, a quick glance at a number of other high profile cases suggests that the *Marshall* case is in fact indicative of a much broader, astute, legitimacy-attentive behaviour on the part of Supreme Court justices.

A good way of commencing this discussion is with the long-standing argument made by Peter Russell according to which the Supreme Court of Canada is often willing to sacrifice proper interpretation of legal principles in order to reach outcomes that are "politically balanced" (1985; see also Morton 2002: 430). According to Russell, apparent examples of this practice are the 1981 *Patriation Reference* and the 1998 *Secession Reference* decisions, both of which are characterized as crafting compromise solutions by giving "half a loaf" to each of the sides the dispute (Russell 2004: 245).[15] The *Patriation Reference* dealt with the issue

[15] For an in depth examination of the *Secession Reference* case see Chapter 5 of this dissertation.

of repatriation of the Canadian constitution, and it also happened to be the first Supreme Court decision delivered on national television (Russell 2004: 118). At the heart of the case was the issue of whether provincial consent was required before the federal government could request the U.K. Parliament to enact an amendment to the Canadian Constitution. The Supreme Court ultimately delivered a decidedly prudent ruling which succeeded in avoiding political backlash by crafting a compromise position between federal government and dissenting provincial governments (see Knopff et al. 2009). The crux of the decision involved the assertion that as a matter of "black-letter law" no provincial consent was required, but that as a matter of constitutional convention there was a requirement of a "substantial degree" of provincial consent before the federal government can seek an amendment (Russell, 2004: 118-119). According to Russell (2004: 118-9), facing a controversial issue in a highly visible political environment the Court in *Patriation Reference* spoke "with a forked tongue," gave "half a loaf to each side," and provided a "legal green light but a political red light" to the Trudeau government bent on patriating the Constitution (Russell 2004: 118-119).

As discussed in Chapter 3, the 2001 *Sharpe* case is another highly visible and controversial case in which the Supreme Court exhibited apparent sensitivities to the external political environment as suggested by the legitimacy cultivation theory. Facing a highly unpopular issue of possession of child pornography and highly-mobilized interest-group and governmental actors, the Court ensured that its decision had only limited effects on the status quo. In fact, the Court unanimously upheld the Criminal Code prohibitions on the possession of child pornography with six of the nine justices reading-down two "peripheral" sections of the law that "were not at issue in the case except as hypothetical examples" (Hogg 2007: 43-10). According to Sauvageau et al. (2006: 180), the Court's decision amounted to "a salvage operation so as to avoid a declaration of constitutional invalidity." Their analysis also shows that this decidedly prudent outcome ensured that the decision garnered positive reviews from the media, that actors on both sides of the issue were able to claim some victory, and that the Court ultimately "emerged unscathed from this challenge to its symbolic authority" (Sauvageau et al. 2006: 182, 190).

These examples are not to suggest that the Supreme Court never delivers activist decisions in highly visible cases. As noted above, determinants of judicial behaviour are varied and other considerations, such as ideological preferences or

concerns about proper interpretations of the legal precedent, may compete with, and sometimes overtake, legitimacy considerations. What the analysis suggests, however, is that judicial activism in highly visible cases will be more likely when public opinion and important political actors are relatively supportive of such decisions. In visible cases in which such conditions do not exist, it will be harder for justices to deliver bold declarations of judicial activism.

Consider the 1998 *Vriend* case in which the Supreme Court reviewed whether an omission of sexual orientation from the Alberta's Individual Rights Protection Act amounted to a denial of equality rights under the Charter. A unanimous Supreme Court rendered a "bold assertion of judicial power" in this case, with seven out of eight justices going so far as to read-in sexual orientation into the Alberta's Individual Rights Protection Act (Manfredi 2002: 162). This decision, however, had a strong grounding in the pre-decision specific support. As Manfredi notes (2002: 162), a poll conducted in 1996 showed that 59 per cent of Canadians were supportive of an amendment to the Canadian Human Rights Act to protect gays and lesbians from discrimination on the basis of sexual orientation. Manfredi goes on to show that "[r]ather than alienating Canadians, the Court's decision in *Vriend* had a positive impact, with 75 per cent of those surveyed shortly after the decision supporting the inclusion of sexual orientation in human rights legislation" (2002: 162-63; see also Fletcher and Howe, 2000). The extent to which the public was supportive of the Vriend's cause could also be indirectly seen from the fact that Alberta, Newfoundland and Prince Edward Island were the only three provinces that at the time of the case have not yet amended provincial human rights codes to include protection for gays and lesbians – a fact justices were aware of as Justice L'Heureux-Dubé evoked it while questioning Alberta's lawyer during the hearing (*Vriend,* November 4, 1997).

In addition to public opinion, important political actors were also supportive of an activist outcome in *Vriend*. Most importantly in this regard, the federal government intervened in the case on the side of activism and the government of Ontario was the only provincial government intervening in support of the Alberta's cause. This constellation of public opinion and political actors was clearly receptive of an activist decision and one can wonder whether the Court would remain so unified and opt for such a bold assertion of judicial activism had the political context been different.

This is precisely the argument Manfredi develops in his comparison of *R. v.*

Vriend and *R. v. Morgentaler 2* (1988) decisions. *Morgentaler 2* dealt with abortion provisions contained in the Canadian Criminal Code which were struck down on the grounds of administrative deficiencies as the existing committee approval process for obtaining abortions was found to cause unjustified delays. As Manfredi argues, compared to *Vriend,* the decision's focus on administrative deficiencies amounted to a much weaker exercise of activism that imposed fewer constraints on legislative actors (2002: 148-49). Manfredi explains these divergent outcomes in part by referring to contrasting levels of pre-decision specific support and preferences of dominant political actors (2002: 148-49). In particular, in the build-up to the *Morgentaler 2* decision there was no evidence that majority of Canadians supported unrestricted access to abortion,[16] while the Court faced a conservative government inclined to support stricter regulation of abortion (Manfredi 2002: 160).[17]

It is admittedly difficult in few paragraphs to give justice to complex decisions delivered in complex political environments. This discussion illustrates, however, that strategic sensitivity to legitimacy cultivation that justices exhibited in the *Marshall* case is emblematic of wider patterns of behaviour of the Canadian Supreme Court which corroborates the findings of the statistical analysis conducted in Chapter 3. The following chapter extends the case-study approach by providing an in-depth analysis of the landmark *Secession Reference* ruling the Supreme Court of Canada delivered in 1998.

[16] Manfredi (2002: 160) cites three polls in this regard which show that public opinion on the issue of unrestricted access to abortion hovered within the range of 16 to 28 per cent in the build-up and immediate aftermath of the decision.
[17] See Chapter 7 for an analysis of the Court's treatment of abortion and fetal rights issues, including the *Morgentaler 2* ruling.

CHAPTER 5:
SUPREME COURT OF CANADA AND THE QUEBEC *SECESSION REFERENCE*

The aim of this chapter is to continue the empirical evaluation of the strategic legitimacy cultivation theory outlined in Chapter 2 by engaging in a qualitative, case-study analysis of the *Secession Reference* case which the Supreme Court of Canada decided in 1998. The reason for focusing on this case is twofold. First, the case merits attention because of its sheer importance. It is, after all, perhaps the most politically significant case the Supreme Court has ever confronted, as well as the case for which the Court is most known around the world as its judgment is recognized as "a landmark decision for worldwide constitutionalism" (Russell 2004: 245). The second reason why the focus on the *Secession Reference* case is justified has to do with the large amount of scholarly literature the case has generated. In particular, the extensive literature surrounding the case has generated relatively precise data on variables that are relevant to the analysis, including the attitudes of the public, and the preferences of key political actors involved in the case.

This chapter advances in four sections. The first section analyzes the pre-decision political environment surrounding the *Secession Reference* case. This section specifically focuses on assessing the amount of pre-decision visibility the case has garnered, on describing the attitudes and preferences of key political actors that were mobilized around the case, and on suggesting the state of pre-decision specific support. The second section summarizes key aspects of the decision the Court eventually delivered while the third section, in turn, discerns the extent to which the legitimacy cultivation theory outlined in Chapter 2 is helpful in shedding light on the Court's reasoning. This analysis suggests that it is, in fact, difficult to properly understand the Supreme Court's reasoning in the *Secession Reference* case without taking into account the extent to which the Court acted in a strategic fashion to ensure the cultivation of its institutional legitimacy. The fourth section of the chapter tests this explanation against a competing account of the Court's reasoning in the *Secession Reference* provided by Choudhry and Howse (2000).

Pre-Decision Political Environment: Building up to the *Secession Reference*

The Canadian government's reference of the issue of Quebec secession to the Supreme Court was part of a new strategy for dealing with the separatist threat the

government implemented in the wake of the nerve-racking 1995 Quebec referendum. At the referendum, which had a 94 percent turnout, the federalist forces prevailed by a slim margin of 50.6 percent to 49.4 percent, or a mere 31,000 votes within the pool of 5,086,980 Quebecers who cast their ballots (Russell 2004: 235). Following this close encounter with the potential break-up of the country, the federal government decided to change its approach to national unity issues. In particular, the government decided to accompany its traditional approach, known as Plan A (or "good cop") approach and which basically involved appeasement of the secessionist cause through "the old game of accommodation and readjustment of the federal system, " with a new, Plan B (or "tough cop") approach, which involved "setting out the rules and conditions that would govern any attempt of a province to secede from the federation" (Russell 2004: 240). As it turned out, the centrepiece of Plan B was the *Secession Reference.* On September 26th, 1996 federal Justice Minister Allan Rock announced that the government would use the reference procedure of the Canadian constitution which allows the federal government to refer abstract constitutional questions to the Supreme Court for an advisory ruling on their constitutionality. The federal government referred the following three questions to the Supreme Court of Canada:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Visibility

From the outset, Canadians expressed enormous amount of interest in the *Secession Reference* which turned out to be "among the most closely watched cases in the Supreme Court's history" (Sauvageau et al. 2006: 91). In fact, in their study of the media coverage of the Supreme Court of Canada, Sauvageau et al. (2006: 91) note that "[i]n terms of the numbers of stories alone, coverage of the hearing and decision dwarfed all the other cases [they] have examined." They add that the media had interviewed "[e]xperts beyond number" to provide insight on the case and that "columnists penned innumerable opinion pieces" (2006: 91). *La Presse* even billed the case as "The Case of the Century" (Chambers 1998: B3). The gravity of the case

is perhaps most dramatically illustrated by the fact that even the Canadian dollar fell in advance of the decision (Little 1998).

The Supreme Court of Canada and its justices could not have possibly been insulated from the gravity of the political and juridical moment they were facing. During the hearing, which took place from February 16th to 19th, 1998, successive protests of over 1,000 demonstrators were organized on the steps of the Supreme Court building (Wills 1998b). Also, on the first day of the hearing, Bloc Quebecois MP Stephane Tremblay, a former bush pilot, flew his plane over the Supreme Court building dragging a banner with the old Quebec nationalist slogan *le Québec aux québécois* in defiance of the audacity of the Supreme Court to hear the case considering the future of Quebec (Séguin 1998c). The enormity of the moment is also well illustrated by the fact that prior to the onset of the hearings the Supreme Court justices posed for a group photo, something they have not done since 1981 when the Court considered another landmark reference dealing with the patriation of the Canadian constitution (Thompson et al. 1998). In short, as the justices grappled with the bundle of legal and political issues contained in the *Secession Reference,* they could not ignore the extreme amount of attention the case was garnering among the Canadian public and among political actors.

Political Actors

The two key political stakeholders involved in the case were the federal government and the Quebec separatist movement which, at the time, was most prominently represented by the Quebec government. As noted above, in the aftermath of the 1995 referendum, the federal government reasoned that since the constitution is silent on the question of secession it would be beneficial to let the courts draw out some rules regarding the process of secession, rather than letting the process play itself out solely in the political arena (Russell 2004: 241). Facing the Bouchard government in Quebec bent on calling another referendum as soon as the 'winning conditions' for the 'Yes' side have materialized, Ottawa preferred that the aftermath of a possible 'Yes' side victory "be governed by the rule of law rather than force" (Russell 2004: 241).

The Quebec government, for its part, abhorred any meddling by the federal government, and by the Supreme Court, with the will of the people of Quebec to determine their future for themselves. Quebec Premier Lucien Bouchard was

adamant in proclaiming that Quebecers have a "sacred right to determine their own destiny" (Bryden 1998), while his Minister of Intergovernmental Affairs, Jacques Brassard, stated that "no decree, no federal law, no decision from any court whatsoever can call into question or discredit this right of Quebecers to decide their future" (Young 1998: 14-15). The Quebec government, in fact, formally boycotted the case and refused an opportunity to defend the secessionist cause during the proceedings, focusing its energies instead on provoking "a mounting wave of public indignation against the Supreme Court for taking on the case and the federal government for initiating it" (Bauch 1998). This strategy peaked during the hearings, with the Bloc Quebecois leader Gilles Duceppe organizing daily protests at the Supreme Court building (Bryden 1998), and culminated with the organization of "the biggest sovereignist rally since 1995 referendum" in their immediate aftermath (Séguin 1998b).

The Quebec political class was particularly outraged with the process which, as Premier Bouchard suggested, allowed "federally appointed justices, based on a constitution Quebec has never accepted, to put a padlock on Quebecers' right to self-determination" (Bryden 1998). The longstanding charge that when dealing with federal-provincial relations the Supreme Court of Canada is like the Leaning Tower of Pisa (always leaning in the direction of the federal government) was resurrected. This depiction was used by the Parti Québécois in newspaper advertisements (Young 1998: 15), as well as by the organizers of the protests at the Supreme Court building who distributed pins portraying the famous tower (Authier 1998a).

The Court's intention to appoint an *amicus curiae* (a friend of the Court) to argue the secessionist case in the absence of the Quebec government was also fiercely opposed. As Bienvenu notes, representatives of the Quebec government branded "in advance any member of the Quebec bar who would dare to accept the mandate to act as amicus as an 'imposter', a 'false spokesman' who would be embarking on a 'risky venture'" (1999-2000: 22). The eventual appointment of André Joli-Coeur, a well known sovereignist and a member of the Quebec bar, was greeted with "deep disappointment" by the Quebec government (Bienvenu 1999-2000: 22).

It is also important to stress that the whole political class of Quebec, federalists and separatists alike, supported the position of the Quebec government. Leaders of all major Quebec parties, as well as Jean Charest, leader of the Conservative Party of Canada, joined the Quebec government in condemning the

reference. One journalist assessed that "Quebec's French-speaking political class is probably as close to unanimous as it will ever get in opposing the federal initiative" (Macpherson 1998a), while former PQ premier Parizeau proclaimed: "What's happening is extraordinary… It's so rare to see everyone rallying around" (Ha 1998).

Specific Support

The population of Quebec was in agreement with its political class. A poll conducted a week prior to the onset of hearings showed that 88.3 per cent of Quebecers believed that "a democratically cast vote should have precedence over a Supreme Court ruling" (Authier 1998b). In case they were not reading newspapers or following newscasts, the justices were made directly aware of the state of public opinion. The *amicus curiae* filed an opinion by Claude Ryan, a former leader of the Quebec Liberal Party, who warned the Court that the consensus opinion in Quebec was that the future of the province should be decided by the will of the Quebec people (Bienvenu 1999-2000: 27-28).

With pundits outside and interveners inside the Court proclaiming that nothing less than "the life or death of a nation is at stake" (Coyne 1998), the Court was bracing itself to deliver one of the most important decisions in its history. This ensured that its judicial sensitivities for legitimacy cultivation would be in a state of heightened alert. It should also be noted that in light of the claims made against the Court by the Quebec political class, and in light of the attitudes of the Quebec public, much of the legitimacy challenge the Court faced in the *Secession Reference* had to do with avoiding the perception that it is simply an arm of the national government. Attaining legitimacy for the Court meant establishing itself as an unbiased arbiter of Quebec-Canada relations.

Case Disposition

That justices were aware of the importance of the case was made plain in the first sentence of the decision (*Secession Reference* 1998: 227): "This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government." Their sensitivity to the political moment was also illustrated by the fact that the opinion was signed collectively by "The Court," and by the fact that the Court nowhere provided simple 'yes' or 'no' answers to the questions posed suggesting the justices wanted to avoid quick and superficial assessments of the decision (Bienvenu

1999-2000: 41). The Court ultimately decided that Quebec does not have a right to unilaterally secede from Canada either under Canadian constitutional law (question 1) or under international law (question 2). The Court proclaimed there was no need to consider the third question, as it found no conflict between domestic and international law regarding unilateral secession.

The most important, analyzed, and reported aspect of the decision, however, dealt with issues beyond the question of unilateral secession. As Monahan notes, "rather than focus on whether Quebec had a unilateral right to secede form Canada, [the Court] turned the Reference into an extended analysis of the federal government's constitutional obligations in the event that the Quebec government is able to obtain a clear mandate in favour of a secession in a future referendum" (1999: 66). Following this analytical path, the Court arrived at the crux of its decision, the so called duty to negotiate. In the Court's words, "a decision of a clear majority of the population of Quebec on a clear question to pursue secession" establishes, on the part of federal and other provincial governments, a duty to negotiate requisite "constitutional changes to respond to that desire" (*Secession Reference* 1998: 268, 265). The Court extrapolated this duty to negotiate from its extensive analysis of four "fundamental and organizing principles" of the Canadian constitutional order: democracy, federalism, the rule of law, and minority rights. The Court rejected two absolutist views, that secession is "an absolute legal entitlement" and that a clear "expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government" (*Secession Reference* 1998: 267, emphasis in the original). It ruled instead that requisite constitutional changes are to be arrived at through a good faith negotiation process informed by the four fundamental principles.

The Court garnished the duty to negotiate, the centerpiece of its judgment, with a number of other pronouncements. Perhaps most importantly in this regard, the Court ruled itself out of having any sort of "supervisory role over the political aspects of constitutional negotiations" that may ensue pursuant to the duty to negotiate (*Secession Reference* 1998: 271). The justices specified that the political and, therefore, non-justiciable aspects of negotiations cover practically the entirety of the negotiating process, including the triggering mechanism (what constitutes "a clear majority" and "a clear question"), the sensibility of "the different negotiating positions of the parties," what would happen should negotiations reach a stalemate,

what would occur should one of the parties breach the duty to negotiate, or what parties have a right to participate in negotiations (*Secession Reference* 1998: 271-272).

Legitimacy Cultivation at Work:

So, how helpful is the legitimacy cultivation theory of judicial decision making, explicated in Chapter 2, in shedding light on the Supreme Court's reasoning in the *Quebec Secession Reference?* According to the theory, judicial decision making is expected to fall in line with four distinct hypotheses: (1) judges will tend towards moderation of judicial activism; (2) judges are expected to avoid overt clashes and entanglements with political actors; (3) decisions are expected to accord with the pre-decision specific support; and (4), jurisprudence is expected to be informed by the tenor of the extant political environment. As it turns out, all four of these hypotheses are rather dramatically substantiated in the highly visible context of the *Secession Reference* case.

Duty to Negotiate

By focusing their judgment on the duty to negotiate, which had no precursor in the Canadian constitutional law, the justices surprised many close observers of the Court who did not expect it to go beyond assessing the question of unilateral declaration of independence (Cairns 1998; Monahan 1999). The Court's extensive reliance on the duty to negotiate was particularly surprising since the concept was not argued by any of the parties before the Court (Monahan 1999: 103). Nevertheless, in the pre-decision political environment the government of Canada, the Quebec separatist movement, and the Canadian public both inside and outside of Quebec, were all in agreement that negotiations should be a central part of any process effecting the secession of Quebec from Canada.

This was recently argued by Penney (2005) in his application of Bruce Ackerman's theory of constitutional moments to the *Secession Reference* case. Penney argues that as a part of a larger constitutional moment, the *Secession Reference* "involved a 'switch in time' by the Supreme Court of Canada, wherein the Court began a reconstruction of doctrine to accommodate a new constitutional commitment largely defined by political parties and popular forces" (2005: 220-221). Of particular interest is Penney's empirical finding that a "definable consensus"

regarding a commitment to negotiations had crystallized in the pre-decision environment of the *Secession Reference* (2005: 245).

The separatists insisted on engaging in negotiations with Canada following a successful referendum since the emergence of their movement. The key separatist policy ideas, such as the early "sovereignty association" notion and the more recent "economic and political partnership" concept, assumed negotiations with Canada (Penney 2005: 232). The question on the 1980 referendum on secession, in fact, referred to the notion of negotiations three times. Also, Bill 1, *An Act Respecting the Future of Quebec* (1995), which was the primary legislative vehicle through which the Quebec government sought to achieve separation, "expressly required negotiations prior to a declaration of sovereignty" (Monahan 1999: 82). Even journalistic accounts some six months prior to the release of the decision were declaring that "[n]o sovereignist party has ever wanted to proclaim sovereignty before going through negotiations" (Chambers 1998), while in the aftermath of the decision Quebec Deputy Premier Bernard Landry said that imposing an obligation to negotiate "is what we have wanted to do for the past 30 years" (Séguin 1998a).

While historically the federal government has not been open to negotiations with separatists about the potential break up of the country, its position has changed dramatically in the aftermath of the 1995 referendum. Having seen the country come within a whisker of being "plunged into a period of great confusion, chaos, and conflict" (Russell 2004: 236), the federal government started seriously contemplating the possibility of a successful 'Yes' vote in Quebec. And, it is in this context that the federal government also started asserting that the country would not be held together against the will of Quebecers should such a will be expressed in a clear and unambiguous manner, and that the government would in fact be prepared to engage in negotiations with the separatists. Consider the statement made by federal Minister of Justice Allan Rock as he announced in September of 1996 that a reference dealing with the secession issue would be forwarded to the Supreme Court:

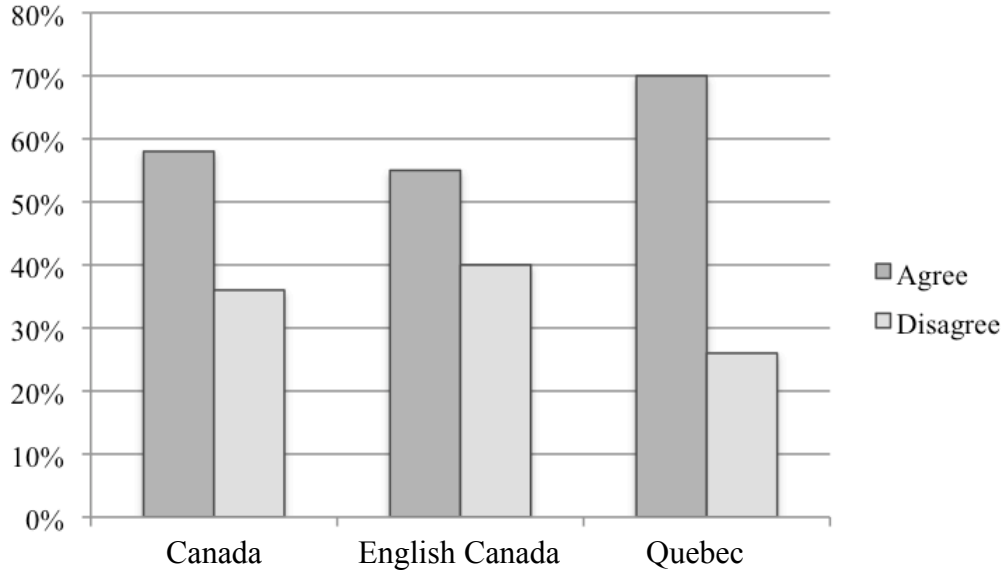
> I firmly believe that we shall never reach the point of having to deal with the reality of Quebec's separation. But should such a day ever come, there is no doubt that it could only be achieved through negotiation and agreement. …
> In this respect, we share a commitment to using negotiations and orderly processes to work out differences – something that Canadian individuals and businesses do every day. This commitment is what the international community has come to expect of Canada and to admire. (Penney 2005: 236-237)

PM Jean Chrétien reiterated this position in December of 1997 stating that following a clear referendum result the separatists could expect that "there will be negotiation with the federal government. No doubt about it. No doubt about it" (Clark 1997).

In addition to the political actors, the Canadian public also preferred to see the issue resolved through negotiations. According to a poll released one day after the conclusion of the hearings, and therefore six months prior to the release of the decision, 67 per cent of Quebecers expressed the view that "if the Yes side wins a future referendum, Quebec should negotiate the terms of its departure from Canada before leaving" (Penney 2005: 240). While no comparable national poll was conducted at the time, one can gauge the Canadian public's attitudes from an earlier Ipsos-Reid poll conducted in the aftermath of the 1995 referendum. According to that poll, the plurality of Canadians (39%) and a majority Quebecers (52%) preferred seeing the federal government "head to the bargaining table to try to get an agreement on changing the constitution that all provinces, including Quebec, can agree upon" (Penney 2005: 239). While this poll result does not directly measure Canadian attitudes towards negotiating secession but perhaps attitudes towards negotiating a new constitutional deal, the findings do indicate that, "at least at this stage … Canadians contemplated negotiations as an essential tool in the broader project of dealing with the Quebec question" (Penney 2005: 239). Therefore, there were explicit indications within the pre-decision political environment that centering the ruling on the concept of negotiations would probably not be seen as unpopular among the Canadian public. This conjecture is not disconfirmed by the polls conducted in the aftermath of the decision which showed Canadians in fundamental agreement with the Court's formulation of the duty to negotiate. As Figure 5.1 shows, duty to negotiate garnered majority public support in Quebec (70%), in English Canada (55%), as well as in Canada as a whole (58%).

Therefore, there are reasons to believe that the duty to negotiate, as the centerpiece of the Court's decision, was clearly in line with the pre-decision specific support. Also, it was placed firmly within the area of agreement among governments of Quebec and Canada which ensured avoidance clashes and entanglements with these actors in the aftermath of the decision. By reinforcing the areas of consensus among the key political actors, the Supreme Court also ensured the ruling had a limited impact on the existing status quo, and that its propensities for judicial activism were, therefore, significantly restrained.

Figure 5.1 Public Reaction to the Duty to Negotiate



Source: Fletcher and Howe (2000: 44).

The Court's Non Decisions

The Court's inclination to avoid entanglements with political actors and to qualify judicial activism is also evident from the matters the Court chose *not* to decide. Most importantly in this regard, the Court proclaimed that it had no role determining what constitutes a clear referendum question and a clear referendum majority, what rules are to govern the conduct and outcome of negotiations, and whether Aboriginal peoples would have any guaranteed rights to participate in negotiations. What is interesting about all of these issues is that in contrast to the general commitment to negotiations, they were characterized by intense disagreements between the governments of Quebec and Canada. On these issues the middle ground simply did not exist.

What constitutes a clear referendum question has been a point of longstanding and bitter disagreement between the federal government and the separatists. The federal government has often denounced the separatist strategies of formulating unclear and muddied questions in order to woo hesitant nationalist voters, such as the ones used in the previous two referendums. The 1980 question emphasized the notion of an "economic association" between Quebec Canada while the 1995 question referred to an "economic and political partnership." One day after announcing the reference case to the Supreme Court, for example, federal Justice Minister Rock stated in the House of Commons that the question on any future referendum "will be

separation or not, nothing in between, not partnership or any such thing" (Bryden 1996).

Perhaps knowing that the prospect of forming an association or partnership with the rest of Canada generates a substantial increase in the number of Quebecers who are inclined to vote 'Yes' (Young 1999: 74), the separatist leaders have consistently claimed the right to formulate referendum questions. In contrast to the federal government, however, the separatists stress that both the 1980 and 1995 referendum questions were clear. In the immediate aftermath of the decision the leader of the Bloc Québécois, for example, expressed strong satisfaction with the requirement for a clear question stating: "No problem with that – we had clear questions both times" (Wills 1998a). Quebec Premier Bouchard likewise stated that the sovereignist "position on this is known: the 1995 referendum was so clear that 94% of Quebecers, a record of participation, went to the polls to vote on this capital issue" (Bouchard 1999: 99).

The question of what constitutes a clear referendum majority has also been a bone of contention between the two sides. For separatists the 50-percent-plus-one majority has long been considered sufficient for effecting negotiations and potentially even the secession, and they have often pointed to the case Newfoundland which joined Canada with a 52 per cent referendum vote (Bouchard 1999: 100). Federalists, on the other hand, have consistently rejected this claim. For example, in August of 1997 federal National Unity Minister Dion labelled the 50-percent-plus-one rule as a "narrow" or "soft" majority (Dion 1999: 191), while within a week of the ruling, PM Chrétien reiterated the claim he made during the 1997 election campaign that separatists would require a two-thirds (66.7%) majority to initiate the process of negotiation (Walker 1998). Separatists, on the other hand, laughed those claims off by insisting that 50-percent-plus-one is enough (Wills 1998a).

The Court also chose not to decide the question of whether Aboriginal people, whose secession-related interests were radicalized in the aftermath of the 1995 referendum and in the run-up to the case (Young 1999: 74), would have a seat at the negotiating table. Aboriginal people living in Quebec were strong supporters of the federal government's case arguing that in the event of secession Quebec should be partitioned to allow them and their territories to remain in Canada. In October 1995, the Aboriginal people living in Quebec conducted their own referendum in which they "overwhelmingly rejected being separated from Canada" (Bienvenu 1999-2000: 39).

Representatives of Aboriginal people also intervened in the case by, among other things, challenging Quebec government's claims that the *uti possidetis* principle of international law would protect the territorial integrity of the province of Quebec in the event of secession (Bienvenu 1999-2000: 39).

The legitimacy cultivation theory presented above sheds considerable light on why the Supreme Court opted for silence on these controversial matters, even going as far as to rule itself out of any potential future role in determining these issues (Russell 2004: 245). While in the build-up to the case the key parties shared the commitment to negotiations, a similar degree of consensus on these matters was not present. Determining, for example, what a clear question looks like, or what a clear majority is, would have almost certainly generated a storm of criticism directed at the Court. As Young notes, while "the sovereignists were prepared for a full scale attack on the Court and were ready to undermine its authority," a similar barrage on the Court could have been expected from English Canada had the Court returned a decision "favourable to some aspects of the sovereignist position – such as that the required majority was 50 per cent plus one" (1998: 15-16). Instead, the Court's silence on these matters ensured it received an overwhelmingly positive reaction as governments of both Quebec and Canada claimed victory in the aftermath of the decision, while the media praised the "balanced" and "common sense" approach of the Court (Sauvageau et al. 2006: 116-121). Given the highly visible nature of the case, ensuring such positive reactions was essential for the cultivation of the Court's institutional legitimacy.

This analysis shows, therefore, that outcomes the Court reached in the *Secession Reference* are in accordance with the four hypotheses associated with the legitimacy cultivation theory outlined in Chapter 2. First, justices exhibited a strong proclivity towards moderation of judicial activism. The Court's inclination towards restraint is seen in the fact it chose to adjudicate those matters on which there was widespread agreement among the public and among political actors, and in such a way so as to reinforce the status quo, while the more controversial and contestable issues were largely left unaddressed. According to a Bouchard's statement made in a speech some six months *before* the Court's decision was delivered, "the ultimate question of substance [on the issue of secession is] what happens if the negotiations fail? Who has the last word?" (Macpherson 1998b) While the Court confirmed Bouchard's intimation that negotiations would follow a successful referendum in

Quebec, by remaining silent on the issues surrounding the onset, process and outcome of negotiations the Court has left largely unaddressed his "ultimate question of substance." This ensured that the decision had a highly limited effect on the status quo.

Second, by emphasizing areas of agreement and by remaining silent on more controversial matters, the judgment was carefully tailored so as to avoid clashes and entanglements with key political actors. Given the importance of institutional legitimacy for the effective functioning of the Court, and given the visibility of the case, the Court was prudent to place the centerpiece of its decision within the area of agreement of key political actors. Third, the centerpiece of the decision clearly conformed with the state of specific support having garnered majority support across the country.

Finally, according to the Hypothesis 4, judges are expected to use and develop jurisprudence that is sensitive to the extant political environment. The Court's formulation of the duty to negotiate amounted precisely to such an act of politically sensitive jurisprudence that did not undermine, but instead reflected and reinforced basic features of the status quo. As Penney notes (2005: 220), "key aspects of the constitutional doctrine introduced in the decision – in particular the much heralded 'duty to negotiate' – were shaped more by political and popular forces than by the Court itself." While neither the federal government nor the Quebec sovereignists saw the full realization of their interests, neither of the two sides was defeated. An explanation for this lies in the fact that the duty to negotiate embodied the lowest common denominator of agreement that existed between the two sides in the pre-decision political environment; namely, that they were both willing to engage in negotiations following a successful referendum in Quebec. Doctrinal formulation of the duty to negotiate, therefore, amounted to an act of jurisprudential activism by which the Court introduced a new doctrine into its jurisprudence. This doctrine, however, reinforced rather than undermined the external status quo. Facing a highly charged political environment characterized by high stakes politics and intense disagreement (as well as some agreement) about how the process of secession should be played out, the Court's strategic sensitivity to legitimacy cultivation ensured its doctrinal formulations, as well as the scope of the rules it identified, internalized much of the external political realities.

All of this is to suggest that the legitimacy cultivation theory explicated in Chapter 2 is consistent with the judicial outcomes the Court reached in the *Quebec Secession Reference.* In fact, the decision can be properly understood only by taking into account the extent to which the Supreme Court acted in a strategic fashion to ensure the cultivation of its institutional legitimacy. Facing an extremely difficult issue in a highly charged, hostile, and visible political environment, the Court took great care to temper its judicial activism, to avoid clashes with political actors, and to compose a decision that is in accordance with specific support. Between pronouncing that Quebec does not have a unilateral right to secede, that the ROC has a duty to negotiate, that what constitutes a clear question and a clear majority are non-justiciable matters, and that much of the other controversial issues "defy legal analysis," the Court went a long way towards meeting the legitimacy challenge it faced in the *Secession Reference* and strengthening its position as an unbiased arbiter of Quebec-Canada relations. Consider the views of Justice Louis LeBel who was appointed to the Supreme Court soon after the case:

> The highest court in the land rehabilitated itself in the eyes of Quebecers when it gave its opinion on the Chrétien government's reference on the secession of Quebec.… Quebecers were able to see the justices' open-mindedness, and their concern to develop solutions able to take into account the interests of all groups. (Sauvageau et al. 2006: 124).

A Look at a Competing Account of the Court's Reasoning in Secession Reference

The aim of this section is to test this legitimacy-cultivation explanation against a competing account of the Court's reasoning in the *Secession Reference* case. In their article entitled "Constitutional Theory and the *Quebec Secession Reference*" Choudhry and Howse's (2000) identify anomalies of the Court's reasoning in the case, and point to specific justifications the Supreme Court used in developing the key aspects of the decision with an overall aim to "weave those justifications into a coherent" constitutional theory (2000: 145-6). By doing so they provide a competing theoretical account of the Court's reasoning in the *Secession Reference* case to the one provided above. While Choudhry and Howse are correct to note that "some of the crucial elements of the judgment beg for adequate theorization" (2000: 145), it will be argued below that their account requires some important qualifications and that the legitimacy cultivation theory provides a more parsimonious theoretical explanation of the choices the Court made in deciding the case.

Choudhry and Howse identify two apparent anomalies associated with the Court's reasoning in the *Secession Reference.* First, they argue that the Court strayed away from the conventional interpretive practice in its heavy reliance on unwritten principles of the Canadian system of government and in its rejection of "the notion that the text of the *Constitution Acts* were exhaustive of Canadian constitutional law" (2000: 154). As they note, the Court needed to provide a justification for such a deviation from the conventional interpretive account particularly in light of its own recent statements "that written constitutions ground the legitimacy of judicial review in liberal democracies, and promote legal certainty and predictability" (2000: 154).[18] Second, Choudhry and Howse claim the Court made a "radical departure from normal constitutional practice" when it ruled that it has "no supervisory role" over interpreting constitutional rules governing the triggering mechanism as well as the conduct of negotiations; the rules that the Supreme Court itself outlined earlier in the decision (2000: 159). According to Choudhry and Howse, this placed the Court in an awkward position of proclaiming "that the rules governing secession are at once legally binding and non-justiciable" (2000: 159). In each of these two cases of apparent anomalous reasoning, Choudhry and Howse provide a theory that they believe "best justifies the Court's judgment" (2000: 156). Each, in turn, will be considered.

The Court provided two justifications for its heavy reliance on unwritten principles of the Constitution, both of which Choudhry and Howse reject as unsatisfactory. First, the Court argued that unwritten principles form a part of the Constitutional text in a sense that they "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based" (para. 49). Choudhry and Howse reject this justification arguing that "it cannot explain the Court's judgment," because "in contrast to the generality or abstractness of the unwritten norms of federalism, the rule of law, etc., the rules governing secession laid down by the Court are rather specific" (2000: 155).[19] Second justification the Court utilized for its heavy reliance on unwritten principles was a "functional" one and had to do with ensuring that that the constitution could deal with "problems or situations [that] may

[18] The Court made these statements in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3.

[19] They also note (155) that "[w]hat must be acknowledged is that the Court engaged in a style of constitutional interpretation which on any positivist account would be characterized as making constitutional rules, as opposed to merely applying them."

arise which are not expressly dealt with by the text" and that, therefore, the constitution would amount to "an exhaustive legal framework for our system of government" (para 32). The problem with this justification, according to Choudhry and Howse, is that if there are indeed gaps in the constitutional text then the Court should not try to fill them but should "turn responsibility over to the political actors to effect an amendment of the Constitution" as the conventional account of constitutional interpretation suggests (2000: 156).

Given the inadequacy of the Court's justification, Choudhry and Howse provide a theory that they claim best justifies the Court's recourse to unwritten constitutional norms and which they call a theory of "dualist interpretation." According to this theory, the Supreme Court has two different tasks. The first is the task of "ordinary interpretation" in which the Court is concerned with interpreting the written constitutional text and which covers "day-to-day matters in the life-cycle of modern constitutions – specifically, the resolution of concrete legal disputes before courts of law where the parties do not challenge the very legitimacy of the constitutional order itself" (2000: 156). The second task is the task of "extra-ordinary interpretation, in which the text assumes secondary importance" and in which the emphasis is on unwritten constitutional norms which are seen as "providing an exhaustive legal framework for our system of government" (2000: 156-7).

Choudhry and Howse argue that since the very legitimacy of the Canadian constitutional order was at stake in the *Secession Reference*, the Court made an "ascent to abstract normativity" in the form of discussing the four fundamental principles of the Canadian constitutional order for the sake of ensuring the legitimacy of the judgment in "the eyes of Canadians on both sides of the secession debate" (2000: 167). As Choudhry and Howse explain, "[i]n the perspective of the divide between federalists and secessionists, these principles could enjoy the reasonable assent of everyone, whereas at the core of the debate over secession is in fact the moral bindingness of the constitutional *text* on Quebec, given the secessionist historical narrative of Quebec's 'exclusion' in the creation of a self-standing written constitution in 1982, and the failure to remedy this exclusion in subsequent rounds of constitutional negotiations (Meech Lake, Charlottetown)" (2000: 167, original emphasis). Following this line of thought Choudhry and Howse conclude that "it may be that one of the most important lessons of the *Reference* for debates in constitutional theory about the role of abstract argument in the presence of normative controversy, is

that there are some situations where the problem of agreement under conditions of normative dissensus actually points to a solution at a higher rather than lower level of abstraction" (2000: 150).

Given that the solution to the agreement problem was reached at a higher rather than lower level of abstraction, Choudhry and Howse also argue that *Secession Reference* represents an exception to the Sunstein's rule according to which "the ordinary work of common law decision and statutory interpretation calls for low-level principles on which agreements are possible" (1996: 46). According to Sunstein, low-level principles include "most of the ordinary material of legal doctrine" and they are key judicial tools for ensuring a measure of social stability, mutual respect and reciprocity particularly in areas of pervasive disagreement (1996: 37, 39). Sunstein argues that agreements at a high level of abstraction are reserved for "those rare occasions when more ambitious thinking becomes necessary to resolve a case or when the case for the ambitious theory is so insistent that a range of judges converge on it" (1996: 46). According to Choudhry and Howse, the *Secession Reference* amounts to one of "those rare occasions" when agreement is secured through high-level abstraction (2000: 150).

Choudhry and Howse's argument that it was the Court's "ascent to abstract normativity" and "a solution at a higher rather than lower level of abstraction" that ensured the overwhelming assent to the decision among Canadians on both sides of the linguistic divide requires some modification. At a minimum, a solution at a higher level of abstraction certainly did not ensure the overwhelming assent to the decision all on its own. As argued in the previous section of this chapter, it was the Court's prudence to focus its decision on the subject for which there was already widespread agreement in and out of Quebec (negotiations), and its similarly prudent unwillingness to decide those matters that were characterized by profound disagreements between separatists and federalists (i.e. conduct of negotiations, clear question, clear majority, Aboriginal rights), that ensured the overwhelming assent to the decision. All of these issues amounted to solutions at a low level of abstraction.

Choudhry and Howse *are* correct to note that the Court's reliance the four constitutional principles derived from the liberal democratic tradition (higher level of abstraction), as opposed to a constitutional text disputed by one side in the dispute, could have been one of the strategies the Court employed to ensure that both federalists and secessionists accepted the decision as legitimate. This, however, could

not have been the primary or most important reason for the decision's success for had the Court not shown extreme care in its treatment of matters at a lower level of abstraction any consensus at the higher level of abstraction would certainly have disintegrated. As the above analysis suggests, in the aftermath of the decision it was judicial treatment of matters at the lower level of abstraction that attracted the most attention from political actors on both sides of the divide. Ultimately, it was the Court's sensitivity to and awareness of the complexity of the political moment, as evident in formulation of the duty to negotiate doctrine, and its treatment of other questions at the lower level of abstraction, that carried the day in terms of ensuring the acceptance of the decision as legitimate.

There are reasons to believe, therefore, that the decision does not abrogate from the Sunstein's (1996) theory that low-level principles, in the form of particular doctrinal formulations, are the primary vehicle for courts to ensure a measure of healthy consensus when dealing with issues that generate pervasive disagreement. Doctrinal formulation of the duty to negotiate appeared to have served this specific purpose. It is interesting to note in this context that the Court did under-theorize at the most concrete level by being silent on the more specific issues of how negotiations are to be conducted, what parties have a right of participation, what would happen if negotiations failed, and what constitutes a clear referendum question and a clear referendum majority. It is at this lowest-level of abstraction that the Court resorted to what Sunstein (1996: 39) labels "the constructive use of silence." According to Sunstein, the constructive use of silence is "an exceedingly important social and legal phenomenon" which "can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense." Being silent on these critical issues characterized by profound disagreement has certainly helped the Court to avert criticism, ensure the legitimacy of its decision, and affect the political moment in a stability-promoting way.

Turning to the second anomaly, Choudhry and Howse also reject justifications that the Court provided for proclaiming that it has no supervisory role over interpreting what constitutes a clear referendum question and a clear referendum majority, and over interpreting the conduct and outcome of negotiations. The first justification the Court provided was based on the distinction between "workings of the political process" and the law of the constitution, and it suggested that these are inherently political questions that defy legal analysis (paras. 100, 101). Choudhry and

Howse reject this justification by pointing out "that it does not yield the Court's innovative holding that the rules governing secession are at once legally binding and non-justiciable" (2000: 159). Choudhry and Howse also reject the second justification provided by the Court, according to which political actors should decide these matters because they possess the relevant information and expertise that the Court lacks (para. 100). As Choudhry and Howse note, "judicially enforceable standards can always be developed" and the Court is far from "incapable of adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations" (2000: 160).

In light of the Court's failure to provide an adequate justification of its reasoning, Choudhry and Howse again provide an account they believe best explains the Court's reasoning and they call it "the model of joint constitutional responsibility." Here, they rely on the Lawrence Sager's (1978) theory of the under-enforced constitutional norm.

According to Sager, judges may sometimes under-enforce constitutional provisions for reasons of purely institutional and non-legal character, such as the question of the propriety and competence of unelected judges to displace judgments of elected officials (1978: 1214, 1217). Under-enforced provisions, however, remain "legally valid to their full conceptual limits" (1978: 1221). As Choudhry and Howse note (2000: 160-1):

> Beyond the boundaries of judicial competence, then, it is for the political organs of the Constitution to frame their own interpretations of those norms and assess their own compliance with them. Thus, interpretive responsibility for particular constitutional norms is both shared and divided. It is shared to the extent that courts are responsible for articulating constitutional norms in their conceptually abstract form. But interpretive responsibility is divided because beyond the limits of doctrine, constitutional interpretation is left to the political organs.

Applied to the *Secession Reference*, this suggests that constitutional rules extend to cover the triggering mechanism, the process, and outcome of negotiations even though the Supreme Court has left these rules unspecified and has proclaimed that it has no supervisory role over their enforcement. The relevant political actors are left to "frame their own interpretations" of these rules and "assess their own compliance with them."

It is interesting to note that in line with the legitimacy cultivation theory presented in this paper, this argument by Choudhry and Howse recognizes that there are purely institutional concerns that play upon judges and affect their decision-

making. The argument also seeks to explain judicial tendencies to defer important matters to the political branches of government. There are important problems with this formulation, however.

For one, it is distinctly unrealistic about the character of the political process. It is hard to imagine separatists and federalists, both of whom are engaged in a struggle over the birth and death of a nation, being authentically concerned about framing their own interpretations of under-enforced constitutional norms and assessing their own compliance with such interpretations. It is much more sensible to assume that these political actors are primarily driven by their self-interested calculations in the arena of 'the art of the possible'. Their stubborn and conflicting reactions to what constitutes a clear question and a clear majority in the aftermath of the decision confirm this view.

Choudhry and Howse's argument also muddies the question of who has the authority to enforce constitutional norms beyond the limits of judicial enforcement. Choudhry and Howse argue that courts may sometimes step in and strike down political interpretations of under-enforced provisions if such interpretations are conceptually invalid and, therefore, lack legitimacy (2000: 163). However, if conceptual validity is indeed determinative of a decision's legitimacy, it is hard to see how beyond the limits of judicial competence the courts could have authority to declare interpretations reached by political actors and institutions as conceptually flawed, and therefore lacking in legitimacy. After all, Choudhry and Howse claim that beyond the limits of judicial enforcement the task of constitutional interpretation is left to political organs (2000: 161).

The legitimacy cultivation theory, in contrast, provides a much more parsimonious and realistic explanation of the outcomes the Court reached in the *Secession Reference*. Given the importance of institutional legitimacy for the effective functioning of the Supreme Court, that the Court restrained its decision making to the areas of consensus and refused to venture into the areas of disagreement is a testament to its strategic sensitivity to legitimacy cultivation. Doing otherwise would have invited deep controversy, entangled the Court in political matters, and provoked political actors to launch attacks on the Court. In light of the visibility of the decision, the Court was prudent to avoid such outcomes, even though, as Choudhry and Howse note, there were no legal reasons preventing the Court from

"adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations" (2000: 160).

In light of the legitimacy cultivation theory the anomalies of the Court's reasoning that Choudhry and Howse discuss are much easier to account for. First, as Choudhry and Howse clam, the Court might as well have relied of abstract principles because of their uncontroversial status as fundamental facets of the liberal democratic tradition with which few Canadians disagree. But, the extent to which the judicial reliance on these highly abstract principles was the primary factor ensuring the assent to the decision has to be qualified by a recognition that the Court's treatment of matters at lower levels of abstraction played a crucial role in ensuring favourable reception of the ruling. Second, the Court placed the responsibility for interpreting the constitutional rules governing the triggering mechanism, the process, and outcome of negotiations in the hands of political actors because doing otherwise would have invited deep controversy, entangled the Court in political matters, and provoked political attacks on the Court. It is these pressures that help us best understand why the Court made the curious pronouncement that "the rules governing secession are at once legally binding and non-justiciable." In fact, given the political environment of the *Secession Reference,* the Court went as far as it could in outlining the rules that are to govern secession without inflicting serious costs to its institutional legitimacy.

The *Secession Reference* case, therefore, clearly illustrates that courts may often succeed in promoting their legitimacy even as they reject conventional accounts of interpretation and as they formulate apparent 'anomalies' in their reasoning. In spite of the Court's rejection of the conventional, positivist account of constitutional interpretation, and in spite of several 'anomalies' in its reasoning, the Court succeeded in attaining institutional legitimacy and, as Choudhry and Howse note, in shaping "the terms of debate in a stability-promoting way" (2000: 144).

PART IV:
STRATEGIC LEGITIMACY CULTIVATION AND SECTION 7 OF THE CHARTER OF RIGHTS AND FREEDOMS

Introduction

Preceding chapters have amassed considerable empirical support for the main argument developed in this dissertation which suggests that cultivation of institutional legitimacy requires judges to exhibit important sensitivities to factors operating in the external, political environment and that these sensitivities are heightened in cases garnering high public visibility. The statistical analysis conducted in Chapter 3, and case study analyses conducted in Chapters 4 and 5, suggest that legitimacy cultivation clearly encourages strategic calculations on the part of justices of the Supreme Court of Canada.

Part IV continues the empirical examination of the theory by exploring Supreme Court's jurisprudence pursuant to section 7 of the Canadian Charter of Rights and Freedoms. As discussed in the introductory chapter, judicial decision making does not lend itself perfectly to examination by any one method of analysis. While statistical analyses tend to almost by design oversimplify judicial outcomes, relying on single case studies means that it is difficult to ascertain the extent to which theoretical propositions are borne out by broader patterns of judicial decision making. In light of this, an in depth analysis of a single area of Court's jurisprudence can provide additional advantages in terms of theory testing. In particular, it can provide a relatively detailed yet thematically anchored account of broad patterns of decision making. It can also allow for assessing the extent to which the evolution of the Supreme Court's jurisprudence reflects the constellation of external, political factors as prescribed by the theory of strategic legitimacy cultivation.

The primary reason for focusing on section 7 of the Charter is because it is one of the most extensively utilized sections of the Canadian constitution as several criminal and noncriminal areas of law come under its purview, including such diverse issues such as fingerprinting, constitutionality of criminal punishments, constitutionality of criminal defences, immigration, refugee status determination, extradition, deportation, security certificates, repatriation, abortion and fetal rights, health care, parental prerogative to 'spank' children, euthanasia, marihuana possession, etc.

Section 7 of the Charter reads as follows:

> Everyone has the 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 first part of the section identifies three broad entitlements including "the right to life, liberty and security of the person." The second part qualifies these entitlements by specifying that they can be infringed as long as infringements occur "in accordance with the principles of fundamental justice." This ensures that all deprivations of the rights to life, liberty and security of the person deemed to be in accordance with the principles of fundamental justice are constitutional. As Hogg notes (2007: 47-3), for a breach of s. 7 rights to occur, the Court must recognize that there has been a failure to comply with the principles of fundamental justice. In light of this structure of the section, and in light of the fact that entitlements included in the first part of the section are very broad and difficult to delimit, much of the review under section 7 is conducted under the second, qualificatory component of the section exploring whether a particular form of deprivation of the life, liberty and security of the person accords with the principles of fundamental justice. As Cameron notes (2006: 150), it is the principles of fundamental justice that are the "section 7's workhorse."

The analysis of the Supreme Court's section 7 jurisprudence will proceed in two parts. Chapter 6 will first provide an analysis of doctrinal approaches that the Supreme Court developed in interpreting section 7. As discussed in great detail in Chapter 6, while Supreme Court's section 7 jurisprudence is varied, the Court has developed two general approaches to its interpretation of section 7, the so-called *basic tenets* approach and the so-called *balancing approach* (see e.g. Cameron, 2006; Younge, 2002; 2008). Both of these approaches are designed to give meaning to the very broadly worded "principles of fundamental justice" and Chapter 6 assesses the extent to which the Court's utilization of those approaches accords with the expectations of the legitimacy cultivation theory. While Chapter 6 focuses on general doctrinal approaches that the Supreme Court applies across different policy areas, Chapter 7 undertakes a cross-policy analysis of the Court's section 7 jurisprudence.

Finally, one has to note that due to space confines and the breadth of section 7 jurisprudence, not all of section 7 cases and policy dilemmas will be discussed. Instead, the discussion will focus on what are generally recognized as the most important and representative cases and issues. Also, while many of the cases discussed could very well deserve a case-study analysis of their own, as the section 7 itself could receive a dissertation-long treatment, the analysis of individual cases provided in this part of the dissertation will not be akin to the detailed analyses provided in chapters 4 and 5 that examined *Marshall* and *Secession Reference* cases.

Still, the analyses will provide sufficient detail to show that the theory of strategic legitimacy cultivation is very helpful in illuminating broad patterns of the Court's section 7 jurisprudence.

CHAPTER 6:
DOCTRINAL APPROACHES TO SUPREME COURT OF CANADA'S SECTION 7 JURISPRUDENCE

This chapter continues the empirical assessment of the legitimacy cultivation theory by exploring the extent to which the Supreme Court's section 7 jurisprudence is emblematic of strategic behaviour as specified by the legitimacy cultivation theory developed in Chapter 2. In particular, the chapter explores general approaches and methodologies that the Supreme Court of Canada developed in its section 7 jurisprudence and assesses their suitability to the Court's goal of legitimacy cultivation. As suggested in the above introduction to Part 4 of the dissertation, the Supreme Court has developed two general approaches or methodologies for interpreting section 7: the so-called *basic tenets* approach and the so-called *balancing* approach (see Cameron, 2005; Young, 2002; 2008). Each of these two approaches is designed to give meaning to the very broadly worded, qualificatory component of section 7 which instructs that no breach of section 7 rights can occur as long as the breach is deemed to be in accordance with "the principles of fundamental justice." The chapter proceeds by discussing the basic tenets approach, which was initiated in the first Supreme Court decision addressing a section 7 claim (*Motor Vehicle Reference,* 1985). While this approach was dominant early on in the Court's interpretation of the Charter, it soon became largely displaced by the balancing approach to ascertaining the principles of fundamental justice.

Basic Tenets Approach to the Principles of Fundamental Justice

The basic tenets approach was introduced in the 1985 *Motor Vehicle Reference* ruling in which the Court declared that the principles of fundamental justice are found in the basic tenets of the Canadian legal system (para. 64):

> the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

According to the Court, the general logic behind this approach to section 7 is that principles of fundamental justice are basically equivalent to basic tenets of the justice system so that in order for somebody's "right to life, liberty and security of the person" to be breached the accused has to show that impugned legislation also abrogates a basic tenet of the justice system. If no abrogation of a basic tenet is

established, then by implication no breach of principles of fundamental justice occurred and the section 7 claim must be rendered unsuccessful.

In the *Motor Vehicle Reference* the Court outlined the first such principle – *the principle of moral innocence* – and the Court's jurisprudence regarding this principle "set the standard" for the basic tenets approach to the principles of fundamental justice (Cameron, 2006: 152). *Motor Vehicle Reference* involved a reference of the provincial government of British Columbia pertaining to the validity of the "absolute liability" provision of its Motor Vehicle Act – section 92(2) – which proscribed driving a car in the absence of a valid driving licence. The provision stipulated mandatory imprisonment for anyone found guilty of driving without a valid licence regardless of whether or not they were aware of the prohibition or that their licence was suspended.[20] The government of British Columbia referred the question of the law's constitutionality to its highest court which ruled that the "absolute liability" provision breached section 7 of the Charter. By the time the decision was appealed to the Supreme Court of Canada, the case did not garner much media attention as evidenced by the fact that major Canadian newspapers, including the *Globe and Mail*, published no stories at the time of the hearing. Federal government and three provincial governments (Ontario, Saskatchewan and Alberta) intervened to protect the constitutionality of the statute while the only non-governmental intervener (British Columbia Branch of the Canadian Bar Association) supported a declaration of unconstitutionality and a change in the policy status quo.

The Supreme Court's ruling in the *Motor Vehicle Reference* is often described as one of its most activist, post-Charter decisions because of the Court's failure to follow the apparent legislative intent of Charter drafters to confine the scope of section 7 to matters of the so-called procedural review. Procedural review pertains to questions about whether the *procedures* enacted for a deprivation of life, liberty or security of the person are appropriate and fair, and this from of judicial review is generally contrasted to the so-called substantive review which involves questioning whether the *purposes* or *merits* of legislation are appropriate and fair. As several studies show, legislative history surrounding section 7 suggests that Charter drafters did not intend for judges to enjoy powers of substantive review so that importation of

[20] *Motor Vehicle Act,* R.S.B.C. 1979, c. 288, s. 94, as amended by the Motor Vehicle Amendment Act, 1982, 1982 (B.C.), c. 36, s. 19. Section 94(2) explicitly specified that "guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension."

the highly-interventionist substantive due process doctrine, developed by the U.S. Supreme Court during the *Lochner* era, would be avoided (see e.g. Hogg, 2007: 47-20; Stephens, 2002; Kelly, 2005; Morton and Knopff, 2000). In an apparent act of defiance of the drafters' intent, the Supreme Court in *Motor Vehicle Reference* espoused the powers of substantive review by declaring that fundamental justice was breached by the imposition of a penalty of mandatory incarceration for an offence that lacked the element of *mens rea* (a guilty mind). No attempt was made by chief justice Lamer, who wrote for the majority, to characterize the absence of *mens rea* as a procedural defect in the law. Rather, the absolute liability provision contained in section 94(2) of the Act was rendered unconstitutional because it amounted to "a substantive injustice" (Hogg, 2007: 47-21).

The Supreme Court also prescribed a very minimal role for the application of section 1, reasonable-limits clause, to claims made pursuant to the section 7. Writing for the majority justice Lamer stated that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like" (para. 85). In a concurring opinion, justice Wilson (para. 105) was even more restrictive of the application of section 1 arguing that no breach of section 7 could be justified through the application of section 1:

> I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either 'reasonable' or 'democratically justified in a free and democratic society'.

According to a *Globe and Mail* report some two months after the decision was released, the decision was "laudable … to most of the legal community" (Makin, 1986a). The same report noted, however, that many commentators also expressed concern over what appeared to be an unjustified expansion of judicial powers (Makin, 1986a). For Allan Hutchinson of the Osgoode Hall law school, for example, the decision had "momentous" implications, while Robert Martin of the University of Western Ontario said that justices have "laid it all out and said 'Bang – we've got a hell of a lot of power here and if we don't like statutes we're going to strike them down'." John White who represented the province of Saskatchewan in constitutional negotiations leading to the entrenchment of the Charter said that "[w]e are now

positioned for a very, very interventionist court. For those who worried about judicial intervention, their worries have been vindicated" (Makin, 1986a).

The effect of the ruling for the Court's development of the basic tenets approach to section 7 was to declare the principle of moral innocence – i.e. one can not be deprived of liberty for an offence lacking the *mens rea* requirement – as one of the basic tenets of the justice system and, by implication, one of the principles of fundamental justice deserving constitutional protection. The implications for criminal law were potentially sweeping as almost all criminal statutes could now be reviewed to determine whether they contained an appropriate level of fault. As Stephens notes (2002: 190), the Supreme Court's invalidation of the B.C. Motor Vehicle Act had the consequence of "catching in its grasp, at minimum, the content of pretty much every offence in the *Criminal Code.*"

Indeed, a rush of cases followed in the aftermath of *Motor Vehicle Reference* challenging whether specific statutory provisions contained an acceptable level of fault. At stake in *R. v. Vaillancourt* (1987) was the constructive murder provision of the Criminal Code (s. 213(d)). Vaillancourt committed murder as an accomplice to a poolroom robbery and argued before the Supreme Court that he did not foresee that the robbery would result in a death and that, consequently, he could not be at fault for causing death. The case again received no pre-decision media coverage and the only intervention was that of the Attorney General of Ontario who intervened to help protect the constitutionality of the provision. Writing for the majority of the Court, justice Lamer applied the basic tenets approach devised in the *Motor Vehicle Reference* and ruled that due to an absence of the *mens rea* requirement with respect to death, the constructive murder provision was unconstitutional. While the impugned constructive murder provision did not even require an *objective* foresight of death (i.e. whether the accused, as a reasonable person, ought to have foreseen the death), the Court declared its preference for a higher degree of *mens rea* standard involving *subjective* foresight (i.e. whether the accused herself or himself foresaw the likelihood of causing death). According to the Court, "[i]t may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the 'morally innocent'" (para., 27).

While the *Vaillancourt* case failed to attain any pre-decision media coverage, once the ruling was released it became subject of extensive media commentary.

Much of the reason for this coverage had to do with fears that the decision would have sweeping ramifications for the Canadian criminal justice system. A *Globe and Mail* (1987) editorial, for example, noted that "[t]he Supreme Court of Canada has just struck down section 213(d) as unconstitutional, and has hinted in its judgment that other parts may follow." The same newspaper also reported an interview with criminal lawyer Alan Gold who described the ruling as "a real bombshell" with "mind-boggling" ramifications (Makin, 1987a). Gold stated that most significant ramifications pertained to convicts serving life sentences for the same offence who would probably have to be retried or have their convictions reduced by the Crown (Makin, 1987a). According to Gold, this could ultimately result in "dramatic drop in penitentiary populations" across the country (Makin, 1987a). Ramifications of the decision were also assessed in light of statistics which showed that anywhere between "50 to 100 people are convicted each year of murder in the killing of someone during the commission of another crime" (*Windsor Star,* 1987). University of Toronto law professor Alan Mewett was also reported as saying that the decision could put in question a range of criminal offences including "dangerous driving, damage to private property, having sexual intercourse with a minor, and any offence involving criminal negligence" (Makin, 1987b). The decision provoked particular ire from British Columbia Attorney General Brian Smith who stated that with this "burst of judicial activism" the Supreme Court "has embarked on a new course in which it is weakening Canada's tougher criminal laws" (Still, 1987). Smith expressed concern that "[t]he public is going to be increasingly alarmed if we continue to have our criminal law struck down by an unelected forum," and he suggested three potential ways of attenuating the Court's activism: (1) enactment of new legislation, (2) provincial cooperation during interventions before the Court, and (3) the use of the notwithstanding clause (Still, 1987).

In *R. v. Martineau* (1990) the Court confronted a case that sprung directly from the *Vaillancourt* precedent. The case concerned a different category of constructive murder which allowed for convicting of murder anyone involved in a serious crime, such as kidnapping or sexual assault, whether or not they committed or intended to commit the murder which accompanied the intended criminal activity. Roderick Martineau was an accomplice to a robbery during which his partner killed their victims. The case again did not attain any pre-decision media coverage, but this time around five governmental interveners intervened to protect the constitutionality

of the impugned provision of the Criminal Code (Canada, Ontario, Quebec, Manitoba and B.C.). As in *Vaillancourt,* the Supreme Court applied the basic tenets approach and delivered another policy-activist outcome. The principle of moral innocence was found to require subjective *mens rea* for the offence of second-degree murder as well as a degree of symmetry between punishment and the accused's moral blameworthiness. According to the Court (*Martineau,* para. 11), the requirement of a subjective foresight of death was found to follow from the "general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result."

The release of the decision again attained considerable media attention. In an article entitled "Ruling Receives Mixed Response" *Calgary Herald* reported that the decision "pleased civil libertarians but annoyed victims' rights advocates" (Tait, 1990). The son of the couple that was murdered by the Martineau's accomplice was particularly angered by the decision and stated that if this "keeps going the way it's going, we're going to end up with a vigilante situation" where people decide not to go to courts but "take care" of an accused themselves (Mullen, 1990). Attorney General of Alberta Dick Fowler also expressed outrage after the Supreme Court dismissed the Alberta's appeal. He accused the Supreme Court of being composed of "[a] group of old fogies" accountable only to itself, which he found to be "outrageous in a free and democratic country" (*The Gazette,* 1990).

This succession of case outcomes appeared to have confirmed initial suggestions that the *Motor Vehicle Reference* has indeed ushered in an empowered and interventionist court ready to revamp the Canadian Criminal Code. As Cameron notes (2006: 116), however,

> when next asked to extend the principle of moral innocence [the Court] blinked. Rather than impose symmetry between the wrongful act and the accused's subjective fault across the spectrum, *R. v. DeSousa* (1992) and *R. v. Creighton* (1993) decided that the constitutionalization of *mens rea* would effectively begin and end with felony murder.

While neither *DeSousa* nor *Creighton* attained any pre-decision or post-decision media coverage, governmental actors were mobilized in both cases. In *DeSousa* three governments intervened to protect the policy status quo (Canada, Quebec and Alberta) while in *Creighton* this number grew to four (Canada, Quebec, Manitoba and Saskatchewan). The accused in the *DeSousa* was charged with the offence of unlawfully causing bodily harm and faced a penalty of 10 years of imprisonment. While involved in a fight, he threw a glass bottle which, after smashing against the

wall, injured an innocent bystander. At the heart of the case was the question of whether the principle of moral innocence, as a basic tenet of the Canadian justice system and a principle of fundamental justice as established in the *Motor Vehicle Reference, Vaillancourt* and *Martineau,* required subjective *mens rea* before one can be convicted of the offence of causing bodily harm. The Supreme Court's unanimous answer to this question was negative. In what many legal scholars interpreted as a "wholesale retreat, if not an about-face" vis-à-vis the existing precedent (Cameron 2006: 116), the Court also proclaimed that there was "no constitutional requirement that intention, either on an objective or subjective basis, extend to the consequences of unlawful acts in general" (*Desousa:* 965). According to Cameron (2006: 116), the effect of the ruling was to effectively bring "the concept of a minimum *mens rea* to a standstill." The Court distinguished *DeSousa* from *Vaillancourt* and *Martineau* which dealt with murder and attempted murder offences by noting that in contrast to murder, the offence of unlawfully causing bodily harm does not carry sufficient "stigma and penalty" so as to require the same degree of *mens rea* in order to ensure that section 7 principles of fundamental justice are satisfied (*DeSousa,* 1992: 962).

In *Creighton* (1993) the Supreme Court extended this logic to the offence of manslaughter by unlawful act which was similarly ruled *not* to require a foresight of death to ensure that principles of fundamental justice are satisfied. As in *DeSousa*, penalty and stigma associated with manslaughter were not considered to be sufficiently high to require a subjective *mens rea* even though the maximum penalty for manslaughter is life imprisonment. In this manner, the Supreme Court appeared to have firmly halted the potentially sweeping implications of the *Motor Vehicle Reference*. As Young notes (2008: 483), "[i]f manslaughter is not a stigmatizing classification with a high penalty (maximum life) then it is unlikely that any other criminal offence will ever trigger the constitutional requirement of subjective fault."

The next case in which the Court applied and extended the logic of moral innocence in an activist fashion was *R. v. Daviault* (1994) and the reaction that this decision generated from the external political environment provided a very strong indication to the Court of potential legitimacy hazards associated with the application of the basic tenet approach. The case dealt with a charge of sexual assault perpetrated against a wheelchair-confined woman by an accused who invoked a defence of self-induced intoxication. The key issue before the Court was whether very high levels of intoxication could negate the *mens rea* required for the offence of sexual assault and

therefore make the defence of self-induced intoxication available to the accused. The existing common law specified that such defence was not available "on the pragmatic ground that self-induced drunkenness was sufficiently blameworthy to substitute for the intention to perform the forbidden act" (Hogg 2007: 47-49). In *Daviault,* the Supreme Court acquitted the accused by a six-to-three margin, overturning the decision of the Quebec Court of Appeal and striking down this common law rule on the grounds that substituting the intent to become drunk with the intent to commit sexual assault was a breach of fundamental justice under section 7 of the Charter.[21]

By the time it reached the Supreme Court the case did not garner any media attention. In fact, major Canadian newspapers did not publish a single story on the *Daviault* case at the time of the hearing or at any time before the Court delivered its decision on September 30, 1994. Also, no interveners appeared before the Court in *Daviault*. According to Manfredi (2004: 32), this can be explained by the fact that the case arrived before the Court as-of-right. Such cases rarely raise novel legal issues that require extensive attention, are usually decided in a summary fashion following the hearing, and "generally result in the Court's affirmation of the appellate court ruling" (Manfredi, 2004: 32). The *release* of the decision, however, attracted considerable media attention and the Court found itself on a receiving end of extensive criticism. Opposition parties were highly critical of the ruling and demanded governmental reaction (Vienneau, 1994). Scathing newspaper headlines also mushroomed across the country: "Criminal defence of drunkenness an offence to reason" (*Vancouver Sun,* 1994; editorial), "Impaired Justice" (*Ottawa Citizen,* 1994; editorial), "Has the highest court lost touch with reality: when protecting the rights of the accused may not serve the public good" (*The Globe and Mail,* 1994), "Public needs protection from the drunks" (*The Gazette,* 1994; editorial), "A licence to rape" (*Toronto Star,* 1994), "Drunken defence cuts no ice" (*Toronto Star*, 1994; editorial), "Drunk-as-a-skunk defence is indefensible" (*Edmonton Journal,* 1994; editorial).

It appeared that similarly to the 1999 *Marshall* case on Aboriginal rights analyzed in Chapter 4, the Court delivered an activist decision in an environment characterized by low public visibility and a low level of political mobilization only to find itself on the receiving end of considerable and unforeseen public backlash. Women's groups were particularly perturbed by the decision and they organized "a

[21] The Court ruled that section 11(d) of the Charter was also infringed by the denial of the defence of self-induced intoxication.

national day of action" with an aim of putting pressure on the government to address the decision (Hiebert, 2002: 102). Justice Minister Allan Rock responded by stating that the government is doing "everything possible to accelerate the preparation of a new provision in the Criminal Code" (Vienneau, 1994). Within a year's time, and with an "unusual display of cooperation among all parties" (Ha, 1995), the government pushed through Bill C-72 which amended the Code and effectively reversed the Court's ruling by "excluding the intoxication defence for the purposes of both the physical and mental elements of an offence" (Hiebert, 2002: 103). The preamble of the Bill stated that "Parliament shares with other Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it" (Ha, 1995).

Following this course of events it was difficult to avoid the conclusion that *Daviault* decision amounted to a "public relations disaster" for the Court (Cameron, 2006: 125). Seeking a historical parallel, journalists compared it to the 1990 *Askov* decision in which the Court introduced tough guidelines on reasonable trial delay only to reverse itself 17 months later in *R. v. Morin* (1992) after *Askov* had incurred similar backlash and resulted in more than 40,000 charges being stayed in the province of Ontario alone (Fine, 1994). In the immediate aftermath of *Daviault* Peter Russell commented that "there's going to be more of a backlash now, and there's going to be more interest in who are these judges and what can be done about how they are appointed" (Fine, 1994). For Carl Baar, the case spoke directly to the issue of legitimacy:

> The key issue underlying all of this is the legitimacy of the Court. Legitimacy requires a 'reservoir of support' so that when something controversial happens, the institution can withstand the pressures and criticisms (Fine, 1994).

So, what implications does the basic tenets approach have for legitimacy cultivation? Has moral innocence, as a principle of fundamental justice, helped or hindered the Court's quest towards legitimacy cultivation? It appears that constitutionalization of the principle of moral innocence, which basically specified that penal consequences ought to be proportional to the accused's degree of fault, certainly had the potential of setting the Court on the course of extensive policy activism that could have seriously jeopardized its legitimacy. The primary reason for this had to do with the fact that the doctrine is largely categorical and rigid in nature

and does not provide the Court with much opportunity to tailor its decision making to external political conditions such as changing governmental or public concerns. Initial cases, such as *Motor Vehicle Reference, Vaillancourt* and *Martineau*, suggested that the Court was indeed on its way to reformulate much of the Canadian criminal law. Perhaps fearing dangers of excessive activism, however, the Court halted further progress in this area by relying on the notion of social stigma, which was a component of the doctrinal apparatus surrounding the principle of moral innocence. The Court proclaimed that in contrast to the offences of felony murder (*Vaillancourt*) and second-degree murder (*Martineau*), the social stigma associated with the offences of unlawfully causing bodily harm (*DeSousa*) and manslaughter by unlawful act (*Creighton*) was not high enough to trigger the requirement of subjective *mens rea*.

In substantive terms, therefore, as the Court's activist posture began to carry more extensive policy implications and attract growing public and political pressure, the Court aborted further developments in the area. In his analysis of the Court's jurisprudence surrounding the principle of moral innocence, Young (2002: 130) concludes that the Court's work may very well "have been full of sound and fury, signifying nothing." Young (2002: 130) goes on to note:

> After the flurry of *mens rea* cases, it is clear that Parliament will never be able to combine absolute liability with imprisonment in the future, nor will it be able to create a crime of negligent murder. These were significant developments in the short history of Charter adjudication in Canada, but in a practical sense the substantive principle of fault-based criminality has been restricted to invalidating an archaic relic (constructive murder) and prohibiting a form of legislation which rarely occurs (combining absolute liability with imprisonment).

One explanation for why the Court halted the progress of its jurisprudence in such an abrupt fashion can be found in the fact that it became too risky for the Court, in legitimacy terms, to bear the costs of extensive policy activism and of further conflicts with key political actors and the public. Throughout its work in this area the Court faced steadfast opposition from governmental actors as evident by their continuing interventions before the Court. Also, while none of the decisions garnered much pre-decision media visibility, the release of activist decisions were almost invariably accompanied by significant media coverage which tended to emphasize the expansive potential of the Court's jurisprudence and dangers associated with the Court's activist posture. The *Daviault* decision, in which the Court delivered an activist ruling on what turned out to be a highly unpopular issue, appears to have brought this process to a head. As Cameron notes (2006: 127), "the Court emerged from *Daviault's*

highwater mark somewhat chastened by the experience" refusing "to entertain the Charter claim in newsworthy cases such as *R. v. Latimer, R. v. Malmo-Levine,* and *Canadian Foundation for Children, Youth and the Law v. Canada.*" Overall, therefore, the constitutionalization of the principle of moral innocence, as an example of the basic tenets approach to the principles of fundamental justice, has not been a very legitimacy-savvy jurisprudence as it has led the Court to flirt with excessive policy activism and to turn a blind eye to the preferences of the public and key political actors. As the next section will show, the other major approach to section 7 that the Court developed, and that has consequently overtaken the basic tenets approach as the dominant section 7 methodology, turned out to be much better suited to the tasks of legitimacy cultivation.

Balancing Approach to the Principles of Fundamental Justice

At the heart of the balancing approach to section 7 is the idea that principles of fundamental justice are found through a process of balancing individual interests against those of the larger community which the Court variously refers to as 'societal interests', 'state interests', 'communal interests', or 'public interests'. In a minority of section 7 cases the Court has approached this balancing act by means of the section 1, reasonable-limits analysis (e.g. *Singh v. Minister of Employment and Immigration,* 1985; *R. v. Morgentaler,* 1988). The favoured approach of the Court, however, is to incorporate societal interests directly into the section 7 analysis so that the task of ascertaining the principles of fundamental justice becomes a direct function of balancing individual and public interests. As Cameron notes (2006: 150), early in its interpretation of section 7 the Supreme Court outlined a very minimal role to the application of section 1 so that "the balancing of interests reverted to section 7, where it is expressed in the language of fundamental justice." As this section will show, the balancing approach has quickly become an alternative to the basic tenets approach discussed in the previous section and, in fact, a more dominant section 7 methodology. Facing issues as diverse as fingerprinting, assisted suicide, marihuana possession or access to health care, the Court has approached the key section 7 question – i.e. what are the principles of fundamental justice and where are they found? – by explicitly weighing individual interests against those of the society.

The first case in which the Court engaged in the balancing of individual and societal interests under section 7 is *R. v. Jones* (1986). The case involved a pastor of a

fundamentalist church who educated his children through a school program he operated from the basement of his home. He refused to send the children to public school, or to alternatively certify that the children were receiving efficient instruction at home, as required by the Alberta School Act. Facing truancy charges, he argued that these requirements breached his freedom of religion (as per section 2(a) of the Charter) and deprived him of the freedom to educate his children as he pleased contrary to the principles of fundamental justice (as per section 7). At the time of the hearing, the case did not attract much media attention as major newspapers published only one story covering the hearing (*Ottawa Citizen*, 1985). Two provinces also intervened in the case (Ontario and Nova Scotia) urging the Court to uphold the constitutionality of the School Act "out of apparent concern that the Supreme Court ruling … may affect their educational systems" (*Ottawa Citizen,* 1985). Writing for the majority of the Court Justice La Forest's analysis weighed the accused's interests in procedural fairness against the state's interests in administrative efficiency. The Court concluded that no breach of section 7 rights occurred in the case because the administrative structure of the Alberta School Act was not "manifestly unfair." According to the Court (para. 41):

> Some pragmatism is involved in balancing between fairness and efficiency. The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice.

The next two cases in which the Court employed the balancing approach within section 7 were *R. v. Lyons* (1987) and *R. v. Beare* (1988). At issue in *Lyons* was whether the Crown's application for designating the accused as a "dangerous offender," and the resulting imposition of an indeterminate sentence, amounted to a breach of section 7 rights given that the accused was not provided with a notice that the Crown would seek such a sentence and that the designation occurred after he entered a plea of guilty. Patrick Lyons was 16 years old when he was designated as a dangerous offender after "forcing his sister-in-law at gunpoint to have sex with him" (McNeil, 1987). The case attracted more pre-decision media coverage than *Jones* and the *Globe and Mail* published 2 stories covering the hearing. Also, three governments intervened to protect the constitutionality of the dangerous offender designation (Canada, Ontario, and British Columbia). Lawyer for the government of British Columbia, for example, argued that "the protection of society demands that if there is

chance" that dangerous offenders would commit another serious crime "they must be incarcerated until they are no longer dangerous" (*Toronto Star,* 1987). The Court's majority opinion engaged in a balancing act between the broader Parliamentary interests having to do with "protecting the public" and the accused's right not to have his liberty deprived unless the deprivation occurs in accordance with the principles of fundamental justice (para. 26). The Court decided on the side of societal interests and ruled that principles of fundamental justice were not abrogated by the Crown's actions.

In *R. v. Beare* (1987) the Supreme Court faced the question of whether fingerprinting a person charged with, but not yet convicted of, an indictable offence amounted to a breach of section 7 rights. Saskatchewan Court of Appeal ruled that such police powers allowed for excessive arbitrariness and were, therefore, contrary to the principles of fundamental justice. While the case did not attain any pre-decision media coverage at the time of its hearing, five governments and the Canadian Association of Chiefs of Police intervened in support of reversing the Saskatchewan Court of Appeal's decision. No interveners appeared in support of the defendants. The Supreme Court's unanimous decision weighed individual rights of the defendants "against the applicable principles and policies that have animated legislative and judicial practice in the field" (para. 30) which included an appreciation of "the felt need in the community to arm the police with adequate and reasonable powers for the investigation of crime" (para. 34). The Court concluded that the practice does not amount to a breach of principles of fundamental justice.

Following *Lyons* and *Beare,* the balancing approach was further advanced in *Thomson Newspapers v. Canada* (1990) where the Court faced the question of whether compulsory testimony in investigatory proceedings under the Combines Investigations Act amounts to a breach of section 7 rights. At the time of the hearing the case did not garner much media attention and, as in *R. v. Jones* (1986) discussed above, the *Ottawa Citizen* (1988) was the only newspaper that published a story covering the hearing. Also, four governments intervened to support the constitutionality of the impugned act (Ontario, Quebec, New Brunswick and Alberta). The majority ruling was written by justices La Forest and L'Heureux-Dubé who wrote separate opinions, but both of whom engaged in explicit balancing of the individual right not to give an incriminating answer during a compulsory testimony and the state's interest in obtaining information about the commission of an offence. Building

on the Court's rulings in *Lyons* and *Beare,* Justice La Forest stated that the key to section 7 analysis is to seek "a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice" (para. 176). To answer the question of "what scope of testimonial immunity is required by the principles of fundamental justice," Justice La Forest proclaimed that "[w]e must remember that in defining the scope of the immunity required by the Charter, we are called upon to balance the individual's right against self-incrimination against the state's legitimate need for information about the commission of an offence" (*Thomson Newspapers:* 556). Justice L'Heureux-Dubé stated more boldly that "[f]undamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens" (583). Based on such argumentation the Court concluded that fundamental justice does not provide individuals with an "inflexible immunity" (583) when it comes to compulsory testimony and that Combines Investigations Act is, therefore, constitutional.

In *Cunningham v. Canada* (1993) similar reasoning was applied to the issue of whether an amendment to the federal Parole Act that denied a release of prisoners on mandatory supervision during the last third of their sentence amounted to a breach of fundamental justice. This case did not attain any pre-decision media coverage and no interveners appeared before the Court. The Court's ruling embraced the balancing approach: "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests" (*Cunningham,* 1993: 146). The Court declared that the federal government's amendment did not breach section 7 as it succeeded in striking the right balance between societal interests in being protected against violence and prisoners' interests in an early conditional release.

Following this run of largely low-profile cases that attracted some but not much media attention, in *Rodriguez* (1993) the Supreme Court applied the balancing approach to the highly contentious and visible issue of euthanasia. At the heart of the case was Sue Rodriguez, a 42-year-old mother suffering from the incurable Amyotrophic Lateral Sclerosis (commonly known as Lou Gehrig's Disease). At the time of her trial she was wheelchair-bound, had a life expectancy between two and 14

months, and faced imminent loss of abilities to swallow, speak, move and breathe without assistance. She wished to remain alive for as long as she had some capacity to enjoy life. Past this point her wish was to terminate her life and die in dignity, but since she would require assistance to execute this wish she challenged the constitutionality of section 241(b) of the Criminal Code which prohibits physicians from providing aid in the commission of suicide.

Rodriguez's claim arrived before the Supreme Court amid a media blitz. As Cohen-Almagor notes (2001: 93), the case exemplified "the kind of story that the media seek: It involved a human drama of a person who became a public figure whose story had ethical and societal implications." The Supreme Court responded to the considerable public and media interest by allowing cameras in the courtroom for only the second time in its history,[22] while the CBC Newsworld joined the Parliamentary Chanel in providing "gavel-to-gavel" coverage of the proceedings along with expert commentary (Cuff, 1993). *Globe and Mail* published four stories covering the case at the time of the hearing. While no governmental interveners appeared before the Court, two organized groups intervened to support the Rodriguez's argument (Dying with Dignity and the Right to Die Society of Canada) while seven other groups (representing the handicapped, pro-life interests, Catholics and Evangelicals) intervened to protect the constitutionality of the prohibition on assisted-suicide.

In deciding the case, the majority of the Supreme Court evoked the balancing approach as developed in earlier cases such *Jones, Lyons, Beare, Thomson Newspapers,* and *Cunningham*. In particular, societal interests in protecting the vulnerable who in moments of personal distress or weakness might be induced to commit a suicide were balanced against the right of the individual to exercise autonomy over one's person and control the timing and manner of one's death. Following a balancing analysis of these two sets of interests the Court concluded that while section 241(b) of the Criminal Code deprives Sue Rodriguez of personal autonomy and causes her physical pain and psychological stress in a way that impinges on the security of her person, this deprivation is in accordance with the principles of fundamental justice. In making this finding, the Court introduced a major new factor into the balancing equation having to do with the state of a "societal

[22] The first time being the 1981 *Patriation Reference* case discussed in Chapter 4.

consensus" surrounding an issue. In particular, the Court proclaimed that the principles of fundamental justice must be " 'fundamental' in the sense that they would have general acceptance among reasonable people" (*Rodriguez*, 1993: 607). And, since the Court did not find anything akin to "a consensus" in Canada on the issue of assisted suicide, it concluded that section 241(b) amounts to a constitutionally valid infringement of one's security of the person. The Court noted that "[n]o new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives" and "[t]o the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it" (*Rodriguez*, 1993: 607).

Justice McLachlin wrote the main dissenting opinion with the agreement of justices L'Heureux-Dubé and Cory. According to them, section 241(b) of the Criminal Code was deemed arbitrary and unfair, and therefore unconstitutional, because it effectively prevented disabled persons from committing suicide while not having the same effect on the non-disabled. Justice Lamer wrote a separate opinion that decided the issue on the basis of the section 15(1) of the Charter (i.e. equality clause) without addressing section 7 arguments.

Much of the reaction that the decision generated in the media and among legal observers focused on the factor of societal consensus upon which the Court's finding ultimately hinged. In a piece entitled "Rodriguez Lost to Public Opinion," *Globe and Mail's* justice reporter, for example, concluded that Rodriguez's loss was due to the fact that "nine judges of the Supreme Court of Canada failed to detect a consensus among Canadians in support of an individual's right to control the manner and timing of his or her death" (Fine, 1993). In the same piece, political scientist Andrew Heard was quoted as stating that "[t]he judges' role is to defend values held dearly by society at large" and that judges "can't simply step outside of the consensus and say, 'We as individual judges believe this is the value' " (Fine, 1993). It is interesting to point out that some public opinion polls conducted a couple of months before the Rodriguez's claim was heard suggested that around 70% of the public supported the Rodriguez's claim to allow physician-assisted suicide (Bindman, 1993). This amount of consensus among the Canadian public was apparently not high enough for the Court to deliver an activist decision on such a controversial and visible public policy issue. Due to the heavy mobilization on both sides of the policy divide, a policy

activist decision would have made the Court a target of much resentment among the losers who could have been expected to attack the Court for undermining the value of life. That was not something the Court was willing to accept especially as it found itself operating in the context of heightened visibility and an almost unprecedented number of cameras in the courtroom. Instead, the Court introduced a majoritarian dimension to the section 7 balancing formula all the while arguing that not enough societal consensus existed for the Court to strike at the policy status quo.

Some legal scholars were clearly unhappy with this development. Lorraine Weinrib (1993-1994: 620), for example, argued that "the reliance the majority places on social and political consensus … represents a marked departure from the role of the courts as legal guardians of the Constitution." According to her (1993-1994: 629-30), the Court's decision threatened "the operation of rights guarantees as protection against majoritarian malevolence, ignorance or indifference," imposed "no appreciable constraint on government policy formation," and generally weakened "the language of section 7." Florencio and Keller (1999: 247) also found problems with the Court's introduction of the "societal consensus" as "the 'additional weight' capable of tipping the balancing scale in favour of either the individual right or the state interest depending on whose side of the scale it happens to fall." For them, as for Weinrib, "[t]his approach is problematic in that it weakens the ability of the *Charter* to operate as a rights-based, counter-majoritarian instrument" (1999: 247).

The *Rodriguez* formula for balancing individual and state interests in the process of discovering what counts as principles of fundamental justice was consequently applied to a number of other "issues of burning social importance" (Cameron 2006: 160): whether possession of marihuana should be criminalized, whether parents should be able to assert corporal punishment over children, and whether a denial of timely access to publicly-funded health care is a breach of section 7 rights. The Supreme Court confronted the first of these issues in *R. v. Malmo-Levine* (2003) which challenged the constitutionality of section 3(1) of the Narcotic Control Act prohibiting the possession of marihuana for personal use. The appellants in the case brought forward an argument that the so-called "harm principle" was a principle of fundamental justice according to which criminal sanctions cannot be used to deter conduct that either causes no harm at all, or that causes no harm to others. Recreational consumption of marihuana was argued to be such an activity so that its criminalization amounted to a breach of section 7 rights. The case arrived before the

Court amid much media interest, including headlines such as "Canada's marijuana control is going up in smoke" (White, 2003) and "Stoned pot activist takes fight to Supreme Court" (Tibbets, 2003). The *Globe and Mail* published 3 stories covering the hearing. The crux of the federal government's argument was that the appellants were unjustifiably seeking to transform what is largely a recreational pursuit into a constitutional right, and the government's written submission to the Court stated that "[t]here is no free-standing right to get stoned" (MacCharles, 2003). The province of Ontario intervened in support of the federal government, while Canadian and British Columbia civil liberty associations intervened to support the appellants. Public opinion was deeply divided on the issue with 50 percent of Canadians supporting decriminalization of marijuana and 47 percent opposing it (Tibbetts, 2003a).

The Supreme Court's decision relied heavily on the *Rodriguez* formula for determining principles of fundamental justice. Directly linking the key factor introduced in the *Rodriguez* decision (i.e. the notion of "general acceptance among reasonable people") with the issue of the legitimacy of judicial review, the Court outlined the following process for determining what constitutes a principle of fundamental justice (para. 113):

> The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder *only*": Rodriguez, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

From this backdrop the Court went on to determine that "even if the harm principle could be characterized as a legal principle," it does not satisfy other requirements (para. 114). In particular, the Court declared that "there is no sufficient consensus that that the harm principle is vital or fundamental to our societal notion of criminal justice" (para. 114), "nor is there any consensus that the distinction between harm to others and harm to self is of controlling importance" (para. 122). To substantiate these claims the Court pointed to a number of offences in the Criminal Code that are not rooted in the harm principle (such as cannibalism, bestiality and cruelty to animals) as well as to those that protect people from inflicting harm onto themselves (such as the requirement to wear motorcycle helmets). The Court emphasized that

"[t]here is no consensus that this sort of legislation offends our societal notions of justice" (para. 124).

After finding that the harm principle is not a principle of fundamental justice, the Court turned to two other questions raised by the appellants: (i) whether criminalization of marihuana possession is arbitrary or irrational vis-à-vis the state interest in question, and (ii) even if it is found not to be arbitrary or irrational, whether it is disproportionate to the state interest. On the first question the Court concluded that "[t]he prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm" so that the law pursues a "legitimate state interest" (para. 136, 143). On the latter question, the Court imported the so-called gross disproportionality standard developed under the section 12 jurisprudence concluding that criminalization of marihuana possession is not grossly disproportionate to the state interest. The Court stated that "the effects on an accused person of the criminalization of marijuana possession are serious [and] the legitimate subject of public controversy," but that they should more appropriately be raised in the context of "parliamentary debate" (para. 175). Much of the media coverage in the aftermath of the decision praised the Court bringing about a deferential outcome that left the issue in the hands of legislative actors (e.g. *National Post,* 2003a; *Gazette,* 2003).

The issue of whether parents and teachers have 'spanking' prerogatives over children in their custody arrived before the Supreme Court in the form of *Canadian Foundation for Children, Youth and the Law v. Canada* (2004). The case challenged section 43 of the Criminal Code which states that "[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances." By the time it reached the Supreme Court, the case attained considerable public attention, and was billed by the media as "[t]he case which has the potential to reach deep into the lives of Canadian families" (Tibbetts, 2003b). The *Globe and Mail* published 2 stories covering the hearing including the one entitled "Spare the rod – or face jail?" (Philp, 2003). In the courtroom, four organized groups intervened in support of the federal government and argued that the claimant "seeks to drive the enforcement mechanisms of the criminal

law deep into the day-to-day activities of Canadian families" (Tibbetts, 2003b).[23] Five other groups intervened in support of rendering the law unconstitutional.[24] No governmental interveners appeared before the Court.

As it contemplated constitutionality of the spanking legislation, the Court faced the public whose mind was largely made up on the issue. As *National Post* reported three days after the conclusion of the hearing, "polls consistently show anywhere from 75% to 85% of Canadians favour permitting parents the option of spanking" (2003b), while on the day of the hearing *Windsor Star* reported results of a pool that showed that 75 percent of parents admitted that they have engaged in spanking their children (*Windsor Star,* 2003). Furthermore, many newspapers across the country, including the *National Post* (2003b), *Ottawa Citizen* (2003), *Calgary Herald* (2003), and the *Windsor Star* (2003), published editorials urging the Court to uphold the constitutionality of the spanking legislation.

Six-member majority decision written by the Chief Justice McLachlin upheld the constitutionality of the legislation. The Court rejected the claimant's argument that the notion of the "best interests of the child" amounts to a principle of fundamental justice according to which corporal punishment is not in children's best interests. In doing so, the Court first affirmed the three requirements that a principle of fundamental justice must fulfill as outlined in *R. v. Malmo-Levine* (2003): (i) that "it must be a legal principle," (ii) that "there must be sufficient consensus that the alleged principle is 'vital or fundamental to our societal notion of justice'," and (iii) that "the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results" (para. 8). The Court found that while the "best interests of the child" satisfies the first requirement of being a legal principle, there is no sufficient consensus that the principle is fundamental to Canadian notions of justice and that it cannot be identified with precision (paras. 9-11).

Following this finding the majority turned its attention to the argument that section 43 is unconstitutional because it is overbroad and vague. In this regard the Court was particularly concerned with the "by way of correction" and "reasonable

[23] The four organized groups include Focus on the Family (Canada) Association, Canada Family Action Coalition, Home School Legal Defence Association of Canada, and REAL Women of Canada.
[24] The five groups include Canadian Teachers' Federation, Ontario Association of Children's Aid Societies, Commission des droits de la personne et des droits de la jeunesse, Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunes, and Child Welfare League of Canada.

under the circumstances" components of section 43 and queried "whether, taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement" (para. 22). The Court concluded that "properly construed" section 43 is neither overbroad nor vague, but it arrived at this conclusion only after delimiting conditions under which the use of force is justified. The Court stated that the section covers only "the mildest forms of assault" (para. 30) and made several additional pronouncements: that corporal punishment of "children under two years" is unjustified because it "is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age"; that corporal punishment of teenagers is unjustified "because it can induce aggressive or antisocial behaviour"; and that "corporal punishment using objects, such as rulers and belts," or that involving "slaps or blows to the head," is also prohibited (para. 37). The Court also ruled that these directions do not extend to teachers who can use force only for the purposes of removing a child from classroom or so as to secure compliance with instructions. As the Court noted, "[c]ontemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable" (para. 38). With these new limits, the Court concluded that section 43 is constitutional as "[i]t sets real boundaries and delineates a risk zone for criminal sanction" (para. 42).

Many legal scholars found the Court's approach to section 43 curious. Cameron (2006: 128), for example, writes that "re-interpreting the provision aggressively to cure elements of residual unconstitutionality" amounts to an "unusual but increasingly familiar strategy" of the Court. Pinard suggested that it "would have been more straightforward" for the Court to render some applications of the impugned section invalid by invoking the powers of section 52(1) of the Constitution Act, 1982 (2004: 239). Doing so, however, would have required the Court to deliver a declaration of invalidity that would have almost certainly invited criticism from displeased political actors and potentially place the Court at the centre of a highly charged controversy. The remedial manoeuvre of reinterpreting the provision while preserving its constitutionality, in other words, allowed the Court an opportunity to defuse the tensions by delivering a more balanced outcome that did not outright reject the position of any one of the parties in the dispute. Such an act of politically

sensitive jurisprudence helped the Court's quest of legitimacy cultivation. Consider Pinard's explanation of the Court's reinterpretation of the statute in the *Canadian Foundation* (2004: 239):

> The path chosen by the Court may have something to do with the debate about the legitimacy of judicial review. … Judicial interpretation of statutes attracts much less attention, concern, or interest than judicial declaration of unconstitutionality of Parliament's will. If the Court, as a general approach, wished to opt for an attitude of restraint, or at least give the appearance of such an attitude, while still exercising some power, the statutory interpretation technique might prove quite useful. The judgment of the Court in *Canadian Foundation* certainly appears to reflect an attitude of restraint. The statutory provision is held to be consistent with Charter rights. At a formal level, the Court is telling the Parliament that it was correct, that it acted within its constitutional jurisdiction. (Pinard 2004: 239).

The reaction that the decision generated suggests that the Court succeeded in defusing the issue. The media very positively received the decision perhaps primarily because it amounted to a compromise position between the sides in the dispute. As the *Globe and Mail* reported, "[t]he judgment went a long way toward meeting the concerns of critics of spanking, while at the same time leaving intact a Criminal Code defence that can be used by parents or teachers charged with assault who establish they used 'reasonable force' on a child" (Makin, 2004). A spokesman for Focus on the Family, a group that intervened on the federal government's side, was reported as stating that the organization was "extremely encouraged" that corporal punishment remained legal (*Ottawa Citizen,* 2004). The representative of the Canadian Foundation for Children, Youth and the Law, on the other hand, stated that while the organization preferred to see spanking outlawed, the cause of children's rights still "gained some ground" (*Ottawa Citizen,* 2004). The favourable reception of the decision was also evident in newspaper editorials that soon appeared across the country: *National Post* (2004) declared that the Supreme Court "delivered a mostly sensible, non-activist ruling"; *Ottawa Citizen* (2004) stated that the Court "struck a compromise" and "was right not to criminalize spanking"; the *Gazette's* (2004) editorial was entitled "Common sense in spanking rule"; *Calgary Herald* (2004a) and *Vancouver Sun* (2004) respectively described the decision as "eminently sensible" and "useful and reasonable"; the *StarPhoenix* (2004) of Saskatoon wrote that the Court "struck right balance." Looking back at the spanking issue and how it was resolved by the Supreme Court, it appears that the Supreme Court lived-up to the prediction made by *National Post* commentator Colby Cosh (2004) who one day before the decision was released wrote the following:

> It's not hard to guess what kind of decision the Court will hand down. There is no compelling reason for the court to criminalize what is still deemed part of ordinary child-rearing by most parents. A total spanking ban would make the "judicial activism" controversy all too immediate for casual moderate voters, create a controversy the approximate size of the *Morgentaler* decision cubed, and hand the Conservative party 50 or so new seats in the spring election. You think the Supreme *Court* wants all that? No - it has the same survival instinct as any other vicious animal. It knows about how far it can go politically, and about how often it can go too far.

If in *Canadian Foundation* the Court was obviously careful not to go too far in changing the policy status quo in a highly visible case, *Chaoulli v. Quebec* (2005) is arguably a case in which the Court acted in an opposite fashion by delivering an activist ruling in the context of a highly contentious and visible policy dilemma. At issue in *Chaoulli* was whether a denial of timely access to publicly funded health care, and a denial of the right to purchase such care privately, amounted to a breach of the Charter. The case involved Montreal businessman George Zeliotis who was in his 70s and who endured much pain by waiting for more than a year for a hip replacement. After realizing that Quebec legislation prohibited him from attaining private care to fasten his recovery, Zeliotis teamed-up with his doctor, Jacques Chaoulli, to challenge the constitutionality of the prohibition. Lower courts in Quebec rejected their arguments holding that private insurance would threaten the overall system of medicare in Canada.

By the time the case arrived before the Supreme Court it attracted considerable political interest and over 20 parties attained the intervener status. The Quebec government's task to protect the private insurance prohibition was supported by the federal government, three provincial governments (Ontario, New Brunswick and Saskatchewan), Canadian medical and orthopaedic associations, and groups representing unions and the poor. Chaoulli and Zeliotis, on the other hand, received support from representatives of private health clinics, but also from a group of senators who took part in the committee that produced the 2002 Kirby Report on health care and who argued for a "third option" according to which the government would be forced to meet "reasonable service standards" set by an independent group (Carey, 2004). Michael Kirby stated in an interview at the time of the hearing that "[g]overnments can't have it both ways - they can't say they're going to assume responsibility for essential health services and then not meet reasonable service standards" (Carey, 2004).

In terms of public opinion, the issue of health care has consistently topped

public opinion polls on the question of what is the important issue for Canadians, as *Calgary Herald* (2004b) reported one day before the scheduled hearing. On the more specific issue of private sector's involvement in delivering health care, public opinion suggested a divided public. A 2002 Gallup poll, for example, showed that "51% [of Canadians] said they strongly or somewhat favour offering two levels of service, while 48% said they were strongly or somewhat opposed" (Greenaway, 2002). The same poll showed that "those strongly opposed registered at 33%, compared with only 20% who strongly favoured a two-tiered system" (Greenaway, 2002). A different, Environics poll from around the same time asked "should the private sector's involvement in delivering health care to Canadians be larger, smaller or about the same as it is now?" and found that 46 percent of Canadians believed the private sector should be more involved, 39 percent believed the involvement should stay the same, and 13 percent believed the involvement should be smaller (Kennedy, 2002). Newspaper editorial boards were also divided on the issue. *Toronto Star* (2004) urged the Court to uphold the legislation, while the *National Post* (2005a)*, Ottawa Citizen* (2004b) and *Windsor Star* (2004) expressed support for the claimants.

Once the Supreme Court finally delivered its decision in on June 9, 2005 Chaoulli and Zeliotis emerged victorious as the Court struck down Quebec's prohibition on private insurance. For many observers the decision was seen as having tremendous repercussions on the Canadian health care system. *National Post* (2005b), for example, described the decision as "momentous in its legal and bureaucratic implications" that "could prove to be revolutionary as an economic turning point in Canadian history." According to another interpretation, the decision amounted to "tearing down a central pillar of Canada's Medicare system" and it "dealt a serious blow to the legitimacy of the single-payer model of health insurance, and the values of collective responsibility and social equality that it seeks to uphold" (Petter, 2005: 120, 131).

A closer look at the decision, however, exposes a different reality. The Court was deeply divided in *Chaoulli* with seven justices delivering three opinions.[25] The majority of justices (four to three) agreed that Quebec prohibitions of private insurance for services available in the public health system violate the *Quebec Charter of Human Rights and Freedoms.* This outcome, however, is applicable only

[25] Due to the retirements of justices Louise Arbour and Frank Iacobucci, a seven-justice bench heard and decided the *Chaoulli* case.

in Quebec since the Court did not decide whether the prohibitions amount to a breach of the Canadian Charter. Justices were evenly split on this issue (three to three) with justice Deschamps restricting her opinion to the Quebec Charter.

That legitimacy considerations played upon the minds of justices in the *Chaoulli* case is evident from the reasoning of the three dissenting justices who found no breach of rights in the case and who helped prevent the decision from having national application. In their discussion of the principles of fundamental justice these justices evoked the 2003 *Malmo-Levine* decision arguing that "[t]he requirement of 'general acceptance among reasonable people' enhances the legitimacy of judicial review of state action," and repeated the above-outlined three conditions that need to be met for a principle of fundamental justice to be established (para. 208). Following this analytical path the justices concluded that Quebec prohibitions on private insurance are not unconstitutional because "the aim of 'health care of a reasonable standard within a reasonable time'" is not a legal principle and because "[t]here is no 'societal consensus' about what it means or how to achieve it" (para. 209). Just how cautious these three justices were is also evident from their conclusion that under the circumstances "[s]hifting the design of the health system to the courts is not a wise choice" (para. 276).

Also, public opinion polls in the aftermath of the decision showed that even the majority decision invalidating Quebec prohibitions on the grounds of Quebec Charter was not fundamentally at odds with the popular opinion in both Quebec and Canada. Two polls conducted in Quebec after the release of the decision showed that 54 per cent and 62 per cent of Quebecers were supportive of the majority's conclusions (Gaudreault-Desbiens and Panaccio, 2005: 46), while 55 per cent of Canadians agreed "with the Supreme Court decision that they should have the right to buy private health insurance if the public system cannot provide medical services in a timely fashion" (Caulfield and Ries, 2005: 428). Newspaper editorial boards were similarly supportive of the Court's ruling with *Globe and Mail* (2005) and *National Post* (2005a) both expressing agreement with the result reached by the Court alongside the Vancouver's *Province* (2005), Montreal's *Gazette* (2005), *Calgary Herald* (2005), *Edmonton Journal* (2005), *Windsor Star* (2005), and *Sudbury Star*

(2005).[26]

This shows that there are reasons to question the extent to which the *Chaoulli* decision can be seen as mounting a significant blow to the national policy status quo and as running against the Canadian public opinion. Consider Peter Russell's assessment of the ruling:

> … when I had read and re-read the three opinions offered by the judges and began to ruminate on them, I was struck by just how narrow the decision really was. In its own terms, it neither changed the face of medicare nor established a Charter right to timely health care – nor ushered in a two-tier system of health care. As Bernard Dickens suggests…'there is less than meets the eye' in the decision, and I might add 'less than meets the ear' (2005: 6).

The Court was, therefore, highly restrained in its disposition of the *Chaoulli* case and it exhibited apparent sensitivities to the external political environment as suggested by the legitimacy cultivation theory. One half of the bench expressed great reservations about delivering a change in the status quo regarding such a controversial and visible policy dilemma as privatization of Canadian health care. These justices evoked concerns over "the legitimacy of judicial review of state action," linked this concern to the lack of "societal consensus," and stated that judicial incursion into the policy area would not be "a wise choice." While the other half of the bench was prepared to deliver an activist outcome, it went out of its way to ensure that the application of the ruling was restricted to the province of Quebec which cushioned the political impact of the decision on other members of the federation. For one legal scholar "the Court divided strategically in a way that opened the guarantee's frontiers up but left its future uncertain at the same time" (Cameron, 2006: 140). One newspaper editorial similarly observed that "the Court deftly limited itself to Quebec's jurisdiction" (*Victoria Times Colonist*, 2005). It is also important to note that the majority judgment completely "ignored the issue of remedy even though it was discussed in the factums and during the hearing" (Roach, 2005: 195). After the Quebec government had consequently applied for a suspension of the judgment the Court responded by granting a yearlong suspension on August 4th that was retroactive to the date of the original judgment. While limiting the decision's impact to Quebec

[26] While *Globe and Mail* (2005) lambasted the Court for delivering a "blatantly political ruling," it also proclaimed that "[t]he court was right to conclude that it is unfair to prevent an ailing person from paying for private treatment if the public health system won't treat him or her in a timely fashion." *Toronto Star* (2005) opposed the Court's decision arguing that the ruling "is a wake-up call to defenders of medicare" and that "the majority effectively told politicians that if they don't fix the problem soon, courts will do it for them by allowing two-tier medicine."

was a gesture of rapprochement to other provinces, these actions significantly softened the impact of the decision in that province.

Finally, polling data show that justices who struck down private insurance prohibitions in Quebec had support among both Canadian and Quebec publics. In fact, some polls published around the time of the hearing suggest that the strongest support for a parallel healthcare system that would allow patients private access to faster service was in the province of Quebec. A Leger Marketing poll, conducted some 10 days before the onset of the hearing, asked Canadians whether it was acceptable for government to "allow those who wish to pay for health care in the private sector to have speedier access to this type of care, while still maintaining the current free and universal system" (*Calgary Herald*, 2004b). In a front-page story entitled "Canadians want two-tier Health" *National Post* published results of the poll seven days before the *Chaoulli* hearing (Blackwell, 2004). The results showed 51 percent of Canadians favouring access to private care for speedier service, with support highest in Quebec (68%), Manitoba (57%), and Saskatchewan (57%) (Blackwell, 2004).

Conclusion

The above analysis shows that expectations of the legitimacy cultivation theory are generally borne out by broad patterns of the Supreme Court's section 7 jurisprudence. This is particularly true with respect to the more dominant, balancing approach that the Court developed to address the key question of what qualifies as a principle of fundamental justice. Application of this approach allows the Court to exhibit direct sensitivities to factors operating in the external political environment, such as those having to do with preferences of the public and governmental actors. The approach not only suggests that protection of individual rights is subject to important limits that are prescribed by governmental and/or societal interests, but it also enables the Court to ensure that its outcomes are *systematically reflective* of the tenor of the external political environment. In cases where societal and state interests are forceful, the application of the balancing approach will not be likely to result in an expansion of individual rights protection. In contrast, where such interests are less compelling the doctrine will be more likely to occasion an expansion of rights protection. In either case, the application of the doctrine is designed to help the Court ensure that boundaries of constitutional protection do not systematically abrogate from what the

external political environment is prepared to tolerate. The balancing approach is highly suited to the tasks of legitimacy cultivation.

The above analysis also suggests that public awareness or visibility plays an important role in this process. In fact, the Supreme Court has introduced the "societal consensus" component of the balancing formula in a case that garnered an extraordinary amount of public attention (*Rodriguez*) and it has consequently invoked it in other highly visible cases dealing with controversial issues of marihuana possession (*Malmo-Levine*), parental prerogative to spank children (*Canadian Foundation*), and access to privately funded health care (*Chaoulli*).[27] These developments clearly accord with the expectation that when operating in visible political environments courts will be particularly inclined to ensure that their outcomes do not contradict the general tenor of public opinion and to send a signal to external audiences that their decision making exhibits apparent sensitivities to general societal attitudes. The Court's handling of the four most controversial policy dilemmas discussed in this chapter clearly accords with the predictions of the legitimacy cultivation theory. In *Rodriguez,* the Court faced a public that exhibited significant support for decriminalizing assisted suicide provisions. However, the highly contested and visible nature of the issue ensured that the relative public support for decriminalization of doctor-assisted suicide was not enough to push the highly reluctant Court towards rendering a policy-activist outcome. In *Malmo-Levine* the Court faced public that was divided on the controversial issue of marihuana possession and the Court resolved the case by exhibiting evident reluctance to deliver an activist outcome, going as far as to link the lack of societal consensus with the legitimacy of its judicial review function. In *Canadian Foundation* the Court faced the public that exhibited broad support for the impugned legislation authorizing parents to exert corporal punishment over children. The Court upheld the legislation all the while ensuring that children-rights activists also attained some policy gains which resulted in a general lack of disaffection on either side of the policy divide. Finally, in *Chaoulli* the Court faced a largely divided public that exhibited some support for introducing the private option to the Canadian health care system. While the Court delivered an activist ruling, it did so very prudently by restricting the decision's impact to the province Quebec and by suspending the onset of the decision

[27] As the next chapter illustrates, the balancing approach is regularly invoked in many other highly visible and controversial section 7 policy dilemmas.

for one year so and thereby allowing the government of Quebec time to itself re-enact a legislative response. The Court's decision turned out to receive much support from the media and the public.

These cases are also well illustrative of the Court's tendency to utilize its discretion at the remedial level in order to ensure that political impacts of decisions are softened. This is most evident by the suspended declaration of invalidity in *Chaoulli*, and by the Court's avoidance to deliver invalidation in *Canadian Foundation* even though the Court found problematic some aspects of the impugned provision. In the latter case the Court prudently opted for reinterpreting and not invalidating the provision so as to bring about a more balanced outcome that ultimately satisfied some interests of actors on both sides of the policy divide. *Chaoulli* and *Canadian Foundation*, therefore, are clearly indicative of the tendency of the Supreme Court of Canada to ensure that policy activist outcomes in visible political environments are softened through remedial discretion as a form of politically sensitive jurisprudence. As Chapter 7 will show, similar remedial maneuvering that helps the Court ensure favourable reception of its rulings permeate other areas of the Court's section 7 jurisprudence.

Much of the Court's legitimacy cultivation successes were brought about through the application of the balancing approach and reliance on remedial discretion. The Court's utilization of the basic tenets approach, on the other hand, proved to be much less productive. In contrast to the balancing approach, the basic tenets approach was not designed to incorporate governmental and/or societal concerns as key contextual factors to be taken into consideration as the Court addressed different policy dilemmas on a case-by-case basis. Rather, the Court's jurisprudence surrounding the principle of moral innocence was much more rigid and categorical in character, and set the Court on the path of excessive and imprudent policy activism. It should be hardly surprising that the Court largely abandoned this approach as policy consequences of its decision making intensified and as it experienced the "public relations disaster" of the *Daviault* decision. By 2005, legal scholars would therefore observe that "[t]he Supreme Court of Canada has exhibited little interest in establishing a rigid definition of 'the principles of fundamental justice' that would be applied in an identical fashion in every circumstance" (Bryden, 2005: 531).

According to Young (2002: 139), "the movement from ascertaining substantive principles of fundamental justice [through the basic tenets approach] to

open-ended balancing was in all likelihood predicated on the fear that creating/discovering substantive principles of fundamental justice would expose the courts to accusations of appropriating political power." While some may object to the fact that the balancing approach is characterized by judicial considerations of what are obviously political factors such as public and governmental preferences (see e.g. Weinrib, 1993; Florencio and Keller, 1999), this embeddedness of external factors in the legal doctrine ensures that Court's decision making exhibits systematic sensitivities to external political environments. The Court's rejection of the basic tenets approach in favour of the balancing methodology, therefore, corresponds with basic expectations of the legitimacy cultivation theory that strategic sensitivity to external factors will imbue doctrinal developments.

The next chapter continues empirical assessment of the legitimacy cultivation theory by engaging in an analysis of Supreme Court's decision making in several policy areas falling under the purview of section 7. As the analysis will show, the Court's tendency to engage in strategic legitimacy cultivation is pervasive across the full spectrum of its section 7 jurisprudence.

CHAPTER 7:
CROSS-POLICY ANALYSIS OF SECTION 7 DECISION MAKING

As suggested at the outset of Part 4 of the dissertation, section 7 of the Canadian Charter is very loosely formulated and includes sweeping provisions such as "life, liberty and security of the person" and "the principles of fundamental justice." In terms of the practice of constitutional litigation this ensures that section 7 claims will be raised in a variety of policy contexts. Chapter 6 explored key methodological approaches that the Supreme Court developed in its section 7 jurisprudence and showed that the prevailing methodology (i.e. the so-called balancing approach) is extremely well tailored to the task of ensuring the cultivation of institutional legitimacy as prescribed by the theory of strategic legitimacy cultivation outlined in Chapter 2. In order to provide a more comprehensive analysis of the Court's section 7 jurisprudence, this chapter analyzes the Supreme Court's treatment of section 7 claims raised in a variety of additional policy areas. The policy areas analyzed in this chapter include: immigration, refugee status determination, extradition, deportation, security certificates, repatriation, and reproductive freedom and fetal rights. These policy areas were chosen because they encompass much of the Supreme Court's section 7 jurisprudence that was not explored in the previous chapter, and because they provide sufficient variability along the key dimensions of interest including the character of the external political environment regarding pre-decision visibility and public opinion, mobilization of governmental and non-governmental actors, and policy-salience of issues in question to key political actors. The general logic behind the chapter is to capitalize on the best attributes of case study and cross policy research designs in assessing broad patterns of the Supreme Court's decision making.

In light of the fact that the Supreme Court's section 7 jurisprudence is not neatly confined to individual policy areas (i.e. issues and approaches sometimes overlap), the chapter proceeds by a combination of chronological and thematic structure. The first section of the chapter deals with issues of immigration and refugee status determination while following sections analyze the areas of extradition, deportation, security certificates and repatriation. These disparate issues are thematically united by the governmental stake in exercising control over membership in the Canadian community and over who should be subject to the Canadian justice system. The final section of the chapter deals with the issue of reproductive freedom and fetal rights. At the heart of this section is the Court's handling of the abortion

issue, including the *Morgentaler 2* (1988) decision which is one of the most controversial decisions that the Supreme Court ever delivered.

Immigration and Refugee Status Determination

This section deals with the treatment of immigrants, permanent residents, and refugee-seekers before the Supreme Court of Canada. More specifically, it addresses how section 7 of the Charter of Rights and freedoms, as interpreted by the Supreme Court, has affected the powers and policies of Canadian governments "in controlling community membership against the rights of non-citizens in Canada" (Kelley, 2004: 254). One of the most important cases the Supreme Court delivered in this policy area, and that produced some of the most enduring policy consequences, is *Singh v. Minister of Employment and Immigration* (1985). The issue in *Singh* was whether procedures governing the adjudication of refugee status claims, as set out in the Immigration Act, violated section 7 rights by not allowing for an oral hearing as a part of the process. Together with six other foreign nationals, Harbhajan Singh sought to attain a refugee status in order to avoid potential persecution in his country of origin. The case arrived before the Supreme Court without attaining any pre-decision visibility as *Globe and Mail* and other major Canadian newspapers published no stories covering the hearing. The case attracted two interveners (Federation of Canadian Sikh Societies and Canadian Council of Churches) both of which supported the rights claimants.

Six judges that heard the case split halfway, each half delivering one opinion. While one half of the bench decided the case on section 7 grounds, the other half was unsure whether section 7 entitlements involving rights to life, liberty and security of the person were implicated and decided the case solely under section 2(e) of the Canadian Bill of Rights.[28] Both sides ultimately reached the same conclusion that procedures for the adjudication of refugee status claims are invalid. According to the three judges that engaged in a section 7 analysis, the existing procedures undermined section 7 principles of fundamental justice because they did not provide enough opportunity "for the refugee claimant to be heard" or for the claimant "to comment on the advice the Refugee Status Advisory Committee has given to the Minister"

[28] Section 2(e) of the Canadian Bill of Rights guarantees "the right to a fair hearing in accordance with the principles of fundamental justice." The Bill of Rights has been in force in Canada since 1960. This is a legislative document, however, enacted by the federal government that does not assign powers of constitutional review to the judiciary.

regarding the refugee status claim (para. 25). Following this conclusion, the justices engaged in a section 1 analysis to determine whether these procedural defects could still be justified in light of broader state interests to expeditiously deal with thousands of refugee claimants who enter Canada each year. This analysis showed that the Court was not impressed with governmental submissions that a declaration of invalidity would cause significant costs and delays (para. 70):

> Certainly, the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.

While *Singh* did not attain much media coverage at the time it was heard and decided, as policy consequences of the decision became more apparent, the case started attracting extensive attention from the media. Writing for *Financial Post* in 1990*,* Morton described the policy fallout from the case in the following manner:

> [I]n all of 1989 [the Refugee Board] processed only 13,500 claims out of the current backlog of 124,000 claimants. This backlog is largely the result of a little-noticed Supreme Court Charter decision in 1985 - *Singh vs Minister of Immigration*. …
> In addition to the seven litigants in the Singh case, the Court's decision affected 13,000 other refugee claimants and 7,000 unexecuted deportation orders. The government's initial response was simply to hire more personnel to conduct more oral hearings. But this quickly led to a growing backlog of refugee claimants. Realizing the government could not possibly cope with this backlog, illegal immigrants already in Canada (encouraged by their lawyers and activist immigrant support groups) also began applying for refugee status to buy time, thus further clogging the system. Within 18 months of the Singh decision, Canada faced a mini-crisis in its immigration policy – a backlog of more than 20,000 refugee claimants that was growing daily.

In February of 1991, the *Globe and Mail* ran a series of reports on the Canadian refugee system. The first of these, printed on the front-page, reported that the government's multimillion-dollar plan to clear the backlog of more than 100,000 would-be-refugees is "in a mess" (Mclaren, 1991). The report also put much responsibility for the plan's failure on the *Singh* decision claiming that the ruling meant that "[o]vernight, no one could be turned away from Canada without a full – and time-consuming – oral hearing" (McLaren, 1991). According to Eliadis (1995: 130), the *Singh* decision "sparked a decade-long public debate about who is entitled to share in the rights – and wealth – Canada offers." This debate continued well into the 2000s. In 2003 the *Globe and Mail* reported that in spite of considerable resources

devoted to the refugee-determination process (276 members of the Immigration and Refugee Board and 773 civil servants), the refugee backlog was still in excess of 50,000 cases, while by 2005, two decades after the ruling, the same newspaper reported that the original litigant in the case Harbhajan Singh "was still in Canada fighting his deportation to India" (Hogg 2007: 47-6). The overall fallout from the *Singh* decision is perhaps best summarized by a 2010 *Globe and Mail* editorial which stated that "[i]t has long been a truism that the Supreme Court's 1985 decision in the *Singh* case – that claimants are entitled to a hearing, and to know the government's case against them – forever yoked this country to a costly and unworkable system" (2010b).

In light of these policy consequences, critics of the Court have often pointed to the *Singh* decision as an example of the Supreme Court exercising undue policy influence in the wake of the Charter (see e.g. Morton and Knopff 2000: 101; but see Kelly 2005: 157). At the time of its release, and during its immediate aftermath, the *Singh* decision appeared to suggest that the Court was not afraid to use section 7 and improve the lot of non-citizens even in the face of potentially significant financial and administrative costs to the Canadian state.

Opportunities for the Court to address issues of immigration and refugee status in the context of its section 7 jurisprudence came in the form of *Canada v. Chiarelli* (1992) and *Dehghani v. Canada* (1993). While neither of these two cases attained pre-decision visibility, it is fair to say that the general environment surrounding the policy area has undergone significant changes in light of the reverberating repercussions of the *Singh* ruling. The Court faced two issues in *Chiarelli*. The first was whether the requirement of mandatory deportation of a permanent resident convicted of an offence punishable by more than five years of imprisonment, regardless of the circumstances of the offence or the offender, violated section 7. The second issue was whether the CSIS Act, which permitted *in camera* hearings during which permanent residents facing deportation could not cross-examine witnesses testifying against them, violated section 7. The only intervener in the case (The Security Intelligence Review Committee) intervened against the claimant Chiarelli and in support of preserving the policy status quo. A unanimous Supreme Court rejected claimants' arguments on both counts. The Court basically applied the balancing approach discussed in Chapter 6 arguing that "in assessing whether a

procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual" (para. 47). The Court concluded that:

> The CSIS Act and Review Committee Rules recognize the competing individual and state interests and attempt to find a reasonable balance between them. The Rules expressly direct that the Committee's discretion be exercised with regard to this balancing of interests (*Chiarelli,* 1993: 745).

In coming to this conclusion the Court considered individual interests in having "a fair procedure" but emphasized that "the state also has a considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources" (*Chiarelli*, 1993: 744).

The Court arrived at the conclusion that existing procedural requirements are not constitutionally deficient by placing particular importance on assumptions underlying the legislation in question. As the Court noted,

> in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country (733).

According to Kelley (2004: 266), the fact that the Court referred "to the underlying common law principles of the Immigration Act to determine the content of a Charter right, rather than using the values underlying the Charter to determine the constitutionality of the provisions of the Act, … accorded almost complete deference to the legislature." It also amounted to a starkly weaker policy outlook than the one assumed by the Court in the *Singh* decision where governmental concerns received minimal attention compared to the breach of Charter rights.

For some legal scholars the *Chiarelli* decision amounted to a significant blow for the protection of rights of non-citizens in Canada. According to Cohen (1994: 461), the *Chiarelli* decision amounted to "an unfortunate setback" vis-à-vis *Singh*, while for Poulton (2007: 3) "*Chiarelli* had over-ruled *Singh* and set a course upon which fundamental human rights principles embodied in the Charter had different applications for the citizen and the non-citizen." In spite of these concerns, however, there are reasons to believe that the Court's decision in *Chiarelli* was very much in accordance with the general public mood. As Eliadis notes (1995: 142),

> the result in *Chiarelli* hardly outraged public opinion. Mr. Chiarelli had been convicted for uttering threats and trafficking narcotics. To the extent that the courts used the legal reasoning in *Chiarelli* as a vehicle to deport permanent residents who are convicted criminals, few Canadians were in a mood to argue. Anyone observing the Supreme Court's hearing of *Chiarelli* could not help but have been struck by the impact of Mr. Chiarelli's criminal past on the Court.

One year after *Chiarelli,* the Court faced the issue of whether statutory procedures in the Immigration Act that govern the questioning of non-citizens entering Canada are constitutional. An Iranian citizen, Abdul Dehghani, entered Canada without documentation and immediately claimed refugee status. At the airport, immigration officials interviewed Dehghani without providing him with a counsel. While his refugee claim was rejected at a subsequent hearing where he did enjoy counsel representation, Dehghani argued that his section 7 rights not to be deprived of life, liberty and the security of person were infringed by the fact that during his initial interview he did not have an opportunity to retain and instruct a counsel. At the time of its arrival before the Supreme Court, *Dehghani v. Canada* (1993) attained some media attention as the *Globe and Mail* published one story in the build-up to the hearing. Only one intervener was presented in the case (The Canadian Council of Refugees) and it expressed support for Dehghani. The government argued before the Court that providing non-citizens with counsel representation at the points of entry into the country would significantly complicate and prolong the process. According to its submission before the Court, "a procedure whereby an immigration officer could not question the appellant as to the merits of his refugee claim before advising him of his right to retain and instruct counsel is both impractical and unnecessary" (Oziewicz, 1992).

The Supreme Court delivered a unanimous judgment that "paralleled its analysis in *Chiarelli"* (Kelley, 2004: 270), and it ruled that Dehghani's section 7 rights have not been infringed. The Court first invoked its *Chiarelli* finding that "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" (para. 33) and then went on to emphasize that providing legal counsel at ports of entry would complicate and prolong the process of refugee determination in a way that "would constitute unnecessary duplication" (para. 50). In this way, and in sharp contrast to *Singh*, the Court expressed keen sensitivity to governmental concerns regarding the effective administration of the system.

Looking at the policy area as a whole, it is evident that patterns of Supreme Court's decision making correspond with expectations of the legitimacy cultivation theory. Operating in a low-visibility environment of the *Singh* case, the Court was willing to deliver a very bold assertion of policy activism declaring that neither

"time," "money," nor "balance of administrative convenience" are significant enough to override the need to adhere to the principles of fundamental justice (para. 70). The decision clearly prioritized Charter rights over governmental concerns and suggested that the Court was prepared to deploy judicial activism in the face of potentially costly consequences. In consequent decisions, and facing much criticism from the media regarding the policy fallout from the *Singh* decision, the Court retreated from this activist posture by utilizing a balancing doctrinal approach that was more deferential towards the policy status quo and that exhibited acute sensitivities to the preferences of governmental actors. As Eliadis (1995: 147) argues in his article entitled "The Swing from Singh," *Chiarelli* and *Dehghani* decisions have served to significantly narrow application of the Charter in immigration law and have helped ensure that the "interests of state and national security now seem to be firmly in the foreground in immigration and refugee matters before appellate courts."

Extradition

Extradition refers to "the surrender from one state to another, on request, of persons accused or convicted of committing a serious crime in jurisdiction of the state requesting the extradition" (Harrington, 2005: 45). Since the introduction of the Charter, extradition cases have regularly appeared before the Supreme Court as claimants sought to halt governmental extradition orders on the basis that their execution would result in infringements of Charter rights. Claimants' arguments typically involved the claim that conditions they would face in the recipient country, such as exposure to excessive and unreasonable punishments, would amount to deprivations of the section 7 rights to life, liberty and security of the person. In dealing with these issues the Court would often confront controversial cases amassing significant amount of public attention.

The first extradition cases the Supreme Court considered in the Charter are the trilogy of *Canada v. Schmidt*, *Argentina v. Mellino,* and *United States of America v. Allard* released on the same day in 1987. None of the three cases attracted media attention at the time of the hearing and also no interveners appeared before the Court. In terms of the long-term impact on the Court's jurisprudence in this policy area *Schmidt* is probably the most important of the three. The defendant in *Schmidt* was charged with child stealing contrary to the law of the State of Ohio. She resisted extradition on the grounds that she was already acquitted of the kidnapping charge for

the same activity under the U.S. federal law and that extradition would amount to a breach of her section 11 and section 7 Charter rights. Majority of the Supreme Court ruled that extradition of Schmidt to the U.S. would not violate her Charter rights. In its section 7 analysis, the Court emphasized the primacy of executive authorities regarding extraditions. The Court stated that "the decision to surrender is that of the executive authorities, not the courts, and it should not be lightly assumed that they will overlook their duty to obey constitutional norms by surrendering an individual to a foreign country under circumstances where doing so would be fundamentally unjust" (para. 47). The Court did suggest, however, that under certain circumstances an executive decision to extradite an individual could violate section 7 principles of fundamental justice. The Court explicitly noted that extraditing an individual to a country where prosecution "might involve the infliction of torture" would be one such circumstance (para. 47). The Court also made the following observation:

> "Situations falling far short of this [i.e. torture] may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7" (para. 47).

With this shocking-the-conscience formulation, the Court incorporated societal interests directly into its evaluation of whether an individual's section 7 rights were violated and this doctrinal manoeuvre set the stage for how the Court would approach future cases in this policy area.

Claimants were also unsuccessful in the other two cases of the 1987 trilogy. In *Mellino*, the Court rejected the argument that a 17-month delay between a discharge from the first extradition hearing and the initiation of the second hearing amounted to an abuse of process in contravention of section 7 rights. The Court stressed that "extradition is not a trial" and that "new proceedings may be initiated on the same or new evidence" (para. 22). In *Allard* the Court also rejected an unreasonable delay argument made by two former members of the Front de liberation du Québec (FLQ) charged with hijacking an American plane in 1969. The claimants were in Canada since 1979 and the U.S. authorities failed to make the extradition request until 1984. While the Supreme Court recognized that there was some unreasonable delay attributable to U.S. authorities, it concluded that the principles of fundamental justice are not violated by the extradition since the claimants would not "face a situation that is simply unacceptable" (para. 22).

The next time the Court confronted the issue of extradition in the context of section 7 rights, it was faced with a much more controversial question: whether extradition of fugitives to the U.S. where they could face death penalty amounts to a violation of fundamental principles of justice? In both *Kindler v. Canada* (1991) and *Reference re Ng Extradition* (1991), which were heard in conjunction with one another on February 21, 1991, the Minister of Justice declined to exercise the option, provided by Article 6 of the Canada-U.S. Extradition Treaty, of seeking an assurance from U.S. authorities that death penalty would not be imposed. The cases arrived before the Supreme Court amid much public interest. In fact, media outlets provided comprehensive coverage of the proceedings, including summaries of arguments made before the Court at the time of the hearing, while the consequent decision itself underwent close media scrutiny. *Globe and Mail* published three stories covering *Ng,* and two stories covering the *Kindler* case. It was the controversial nature of the question before the Court, but also the high profile of the two right claimants, that triggered the media blitz. While Kindler was a convicted murderer who fled to Canada following his U.S. verdict, Ng committed some of the grizzliest crimes imaginable. He faced 13 counts of first-degree murder for running a camp in the hills of Calaveras County in California described as a "sex-slave survivalist fantasy" into which victims were lured through the use of classified ads (Mofina, 1991). Upon busting into the camp, the police discovered "the remains of 13 to 19 people," evidence of cannibalism, "a concrete bunker that served as a torture chamber," a "studio for the videos," and several "horrific" tapes documenting the abuse (Mofina, 1991). The initial discovery of the camp was reported all around the world, while the consequent escape of Ng triggered a "worldwide manhunt" (Mofina, 1991). Ng was eventually arrested in Calgary following a failed shoplifting attempt (Bindman, 1991a).

Due to the gruesomeness of crimes, cases garnered much public interest and even instigated protests during the hearing as supporters of Victims of Violence, a national organization promoting victims' rights, converged onto the steps of the Supreme Court building (Owens, 1991). Also, more than 100,000 Canadians, mostly from the West where Ng was caught, "signed a petition … protesting the five-year delay in getting Ng out of the country" (Owens, 1991). The hearing also attracted demonstrators from the U.S., including victims' relatives who carried placards with photos of some of the slain victims (Owens, 1991). Victims' relatives also attended a

news conference organized one day before the hearing. One of them claimed that should the Court refuse the extradition of Ng, judges "will send the message out loud and clear: 'Hey everybody, commit murder and come to Canada. We accept the sleazeballs of the world'" (Vienneau, 1991).

Inside the fully-packed courtroom Amnesty International joined Kindler's and Ng's defence teams in arguing that deportation would constitute a breach of the Charter. The federal government was joined by the state of California who found the Ng case "so important" that it sent "three key prosecutors to observe" (Bindman, 1991b). In its written submission, the Ng's defence team argued that extradition of fugitives without ensuring that death penalty would not be imposed would abrogate section 7 as it "would transgress standards of decency" (Bindman, 1991b). Ng's lawyers also emphasized that the way death penalty was applied in the Californian justice system, including the use of gas chambers, is particularly troublesome (Bindman, 1991b). The federal government, on the other hand, argued that halting the extradition would risk Canada becoming a haven for fugitives and undermine domestic security. As its submission to the Court read: "Common sense and an appreciation of human nature warn that if Canada cannot return fugitive murderers to the United States to face the possible imposition of the death penalty, Canada will be seen as a haven by such fugitives, who may certainly be expected to resort to illegal and even violent means in order to avoid apprehension in this country" (Bindman, 1991c).

The Supreme Court delivered a very close, 4-3 decision in which it dismissed both Kindler's and Ng's challenges to extradition.[29] La Forest and McLachlin wrote for the majority, while Sopinka and Cory wrote dissenting opinions. Invoking *Schmidt,* La Forest placed particular emphasis on the brutality of crimes committed and found that there was no violation of section 7 rights as "extradition of an individual who has been accused of the worst form of murder, to face capital prosecution in the United States, could not be said to shock the conscience of the Canadian people" (*Kindler*: 839). In arriving at this conclusion La Forest referred to a four-year-old Parliamentary vote on reinstating death penalty which failed by an unconvincing margin of 148 to 127. For La Forest this "suggests that capital punishment is not viewed as an outrage to the public conscience" (832).

[29] The Court's main reasoning was contained in the *Kindler* decision. The *Ng* decision was much shorter as reasoning developed and outlined in *Kinder* was applied to the facts of Ng.

McLachlin also invoked *Schmidt* and *Allard* cases (*Kindler:* 850, emphasis added):

> In determining whether … the extradition in question is "simply unacceptable", the judge must avoid imposing his or her own subjective views on the matter, and seek rather to *objectively assess the attitudes of Canadian*s on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.

In her attempt to provide an objective assessment of Canadian attitudes, McLachlin importantly relied on the state of public opinion. According to her (*Kindler:* 852),

> public opinion polls continue to show considerable support among Canadians for the return of the death penalty for certain offences. Can it be said, in light of such indications as these, that the possibility that a fugitive might face the death penalty in California or Pennsylvania "shocks" the Canadian conscience or leads Canadians to conclude that the situation the fugitive faces is "simply unacceptable"? The case is far from plain.

The majority also stressed that no blanket approval was given to extraditions that failed to attain the assurance that death penalty will not be imposed. The majority emphasized that the proper approach would involve a case-by-case analysis.

Both La Forest and McLachlin also concurred with the government's argument that failing to surrender the fugitives to the United States would risk Canada becoming a safe haven for death-row fugitives. Dissenting justices, on the other hand, emphasized that extradition to death penalty would amount to "an indefensible abdication of moral responsibility" (*Kindler*: 824), and claimed that the argument that Canada would risk becoming a safe haven for fugitives is not founded on evidence (*Kindler:* 825). Justice Sopinka also criticized the majority's overt reliance on public opinion in the section 7 analysis arguing that "[p]rinciples of fundamental justice are not limited by public opinion of the day" (791).

The government was very pleased with the decision and upon hearing the news members of the government in the House of Commons erupted into applause while both Kindler and Ng were extradited to the U.S. "within hours of the Court's judgment" (Harrington, 2005: 70). Protestors and victims' rights groups were similarly happy with the ruling, while the Amnesty International was disappointed with the decision and with the swiftness with which Kindler and Ng were returned to the U.S. (*Windsor Star*, 1991a). Among newspaper editorial boards, the reaction was mixed. The *Globe and Mail* (1991) agreed with the Court stressing that "Canada cannot allow itself to become the final court of appeal for the United States criminal justice system," while the *Windsor Star* (1991b) opined that "[t]he ruling will put many minds at ease." Both *Toronto Star* (1991) and Vancouver's *Province* (1991)

expressed disappointment over the decision, however. So did the *Vancouver Sun* (1991) whose editorial was entitled "A Popular Decision but Was It Right?"

Ten years after the *Kindler* and *Ng* rulings, the Supreme revisited the question of whether extradition to a potential death penalty amounts to a violation of fundamental principles of justice in *United States of America v. Burns* (2001). Claimants in *Burns* were Glen Burns and Atif Rafay who were accused of killing Mr. Rafay's parents and his mentally disabled sister in Washington in order to benefit from their insurance policies. At the time of the murders claimants were 18 years old. They were also Canadian citizens so that the Court was asked to rule on whether Canadian nationals have rights not to be handed-over to U.S. authorities unless assurance is acquired that death penalties will not be rendered. As with *Kindler* and *Ng*, *Burns* garnered much media attention and the *Globe and Mail* published two stories covering the hearing. This time around, however, no public protests were organized before the Supreme Court and no public petitions were collected demanding the extradition. Also, five organized groups intervened in *Burns*, all in support of the claimants.[30]

Arguments presented before the Court covered similar ground as during the *Kindler/Ng* hearing. Federal government stressed the risk of Canada becoming a "safe haven" for criminals fleeing United States for Canada (Tibbetts, 1999), while defence teams argued that "death penalty is a dead issue" and that "[i]t should be unconscionable for any Canadian minister of justice in the year 2000 or for the rest of humanity to send any Canadian citizen back to face the death penalty" (Tibbetts, 2000). Intervening in support of rights claimants, Criminal Lawyer's Association put forward some novel evidence from the American justice system. It was suggested to the Court that advancements made in DNA research since *Kindler*/*Ng* decisions show that innocent people get regularly executed in the U.S. and that death penalties are mired in racism as black defendants are more likely to get on the death row than white defendants (Tibbetts, 2001c).

In a unanimous decision signed collectively by "The Court," the Supreme Court effectively reversed the *Kindler* decision and concluded that an unconditional surrender of the claimants in the face of death penalty would violate their section 7

[30] These groups included: Amnesty International, International Centre for Criminal Law & Human Rights, Criminal Lawyers' Association, Washington Association of Criminal Defence Lawyers, and Senate of the Republic of Italy.

rights. The Court first endorsed its *Kindler* approach stressing that the proper approach to section 7 jurisprudence is one of balancing between general context and the specificities of the case at hand. According to the Court, "[i]t is inherent in the … balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (2001: para. 65). This time around, however, a new set of factors appeared to exert decisive influence. First, the Court stressed that abolition of the death penalty "has emerged as a major Canadian initiative at the international level and reflects a concern increasingly shared by most of the world's democracies" (para. 78); that new evidence has emerged since *Kindler* and *Ng* showing that wrongful convictions in the U.S. have grown to "unanticipated and unprecedented proportions" (para. 95); and that new evidence has also emerged showing that death row experience results in the so-called "death row phenomenon" associated with additional psychological trauma among convicts (paras. 118-23). The Court also stressed that "the phrase 'shocks the conscience' and equivalent expressions" used in *Kindler* and previous cases are not to be "equated to opinion polls" (para. 67). The Court favourably quoted the Constitutional Court of South Africa that "[p]ublic opinion may have some relevance to the inquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and uphold its provisions without fear or favour" (para. 67).

Comparing *Burns* to *Kindler*/*Ng* it is clear that the Court effectively "overruled" itself on the issue of extradition to death penalty (see e.g. Hogg, 2007: 47-26; Haigh, 2001). As Young notes, "the rapid *volte-face* in [the Court's] balancing act under section 7 cries out for an explanation" (2002: 143). One potential explanation to consider is whether the reversal of *Kindler* was brought about through a change in the composition of the Court as only three justices that helped decide *Kindler* also took part in writing the *Burns* decision (McLachlin, L'Heureux-Dubé and Gonthier). However, given that all three of these justices supported the constitutionality of Kindler and Ng extraditions and, therefore, *changed* their positions on the issue in *Burns*, the changes in the bench composition and ideological predilections of justices can hardly be suggestive of the explanation for the reversal.

There are several reasons to believe that external tolerance for an activist decision in 2001 was greater than it was in 1991 and that strategic legitimacy considerations could have played a role. First, there is some evidence that public opinion was changing on the issue of death penalty. As *Globe and Mail* (2001)

reported in its editorial on the *Burns* decision, after capital punishment had been "abolished by Parliament in 1976 over public opposition, support for bringing it back has dropped from 73 per cent in 1987 to 69 per cent in 1995 to 52 per cent today." One should stress that these polls tap into public attitudes on the reinstatement of death penalty and *not* into public attitudes on extraditing fugitives to the U.S. where they committed crimes and where they may face death penalties.[31] Nevertheless, the polls clearly suggest that during the period between *Kindler/Ng* and *Burns* decisions the Canadian public was growing more antipathetic to the use of the death penalty.

Second, while the federal Liberal Party was in power when *Burns* was delivered, at the time of *Kindler* and *Ng* the executive branch of government was controlled by the Conservative Party which could have been expected to react much more aggressively to an activist Court ruling. Reactions that the two decisions generated among political actors support this contention. While conservative members of Parliament loudly cheered and applauded the release of *Kindler* and *Ng*, in the aftermath of *Burns* they heavily criticized the Court. Justice critic of the Canadian Alliance, an Official Opposition at the time, criticized the Court for opening up a "door to allowing terrorists and murderers from other jurisdictions to come to Canada" and demanded to know what the Liberal government will "do to ensure that Canadians are protected from these kinds of criminals" (Tibbetts, 2001c). Justice critic of the opposition Progressive Conservative party was similarly displeased with the decision and attacked the Court for "effectively rewriting" extradition laws "without one word of debate from elected officials" (Chwialkowska and Dube, 2001). Liberal Justice Minister, on the other hand, *defended* the *Burns* decision by dismissing these attacks as an "appalling misrepresentation" of the ruling and by stating that "the Supreme Court has upheld the right of the Minister to extradite" while still allowing for ministerial discretion in "exceptional cases" (Chwialkowska and Dube, 2001a). The Liberal government has also promptly complied with the Court's ruling and sought assurances from U.S. authorities that Burns and Rafay would not face death penalties upon extradition. This suggests that the Supreme Court would have been very much correct in anticipating that the Liberal Party of 2001 would be more welcoming of an activist ruling on the issue of extradition to death penalty than the Conservative Party of 1991.

[31] Polls on this more specific and relevant question were not published by the media.

The third factor which suggests that strategic considerations played upon the minds of justices in *Burns* is the Court's use of remedial discretion in order to avoid a declaration of constitutional invalidity. As the above reaction of the Liberal Justice Minister clearly suggests, the support of the Liberal government towards the *Burns* decision came as a result of the fact that the Supreme Court did not rule that Article 6 of the Canada-U.S. Extradition Treaty, which provides that Canadian officials may extradite fugitives without seeking death penalty assurances, is unconstitutional. As it did in the *Canadian Foundation* (2004) case discussed in Chapter 6, the Supreme Court failed to deliver a declaration of invalidity but reinterpreted the impugned provision by reading into it additional requirements which are to be assessed by courts on a case-by-case basis. The consequence was that the political impact of the decision was significantly softened as evident by the reaction of the government in power. As in *Canadian Foundation*, this remedial maneuver has allowed the Court to deliver a more balanced outcome that failed to impose a total loss on the government and that helped safeguard the Court's legitimacy. The manoeuvre, in fact, turned the federal government into a defender of its decision in the aftermath of the decision.

Finally, at the time of their respective hearings *Kindler* and *Ng* generated much more outrage and mobilization among Canadians than did *Burns.* In the build up to *Kindler* and *Ng*, some Canadians demonstrated before the Court and over 100,000 signatures were collected demanding that fugitives be extradited to the United States. In light of these factors it appears almost certain that an activist decision in those cases, and particularly in *Ng,* would have been more likely to instigate public backlash than an activist *Burns* decision which was greeted positively by much of the media. *Globe and Mail* (2001)*, National Post* (2001)*, Toronto Star* (2001), and *Vancouver Sun* (2001) all agreed with the Court's disposition of the Burns' appeal.[32] In fact, in spite of the contradictory outcomes reached in *Kindler*/*Ng* and *Burns,* what unites these decisions is that neither was accompanied by much public outcry and both were ultimately supported by the government of the day.

[32] While National Post (2001) supported the end result of the Court's decision, the newspaper did argue that the Court should have left it to the government to resolve the policy dilemma arguing that "[j]udicial activism is undemocratic, no matter that we may support the cause it happens to serve." The *Ottawa Citizan* (2001) and the *Gazzette* (2001) had mixed assessments of the Court's decision while *Edmonton Journal* (2001) argued that the Court got "the balance wrong."

Supreme Court and 9/11 (Round 1): Deportation to Torture

The first two section 7 cases dealing with rights of non-citizens in the context of September 11, 2001 terrorist attacks on the World Trade Centre and Pentagon attracted extensive media attention because rights claimants had well-documented histories of terrorist activity. Manickavasagam Suresh was a high-ranking leader of Tamil Tigers, a group accused by the federal government of "using rampant terrorism" to secure Tamil homeland in Sri Lanka, "including causing the deaths of 50,000 people and the displacement of 1.5 million Sri Lankans" (Makin, 2001). Mansour Ahani was "an Iranian secret agent, trained in the macabre art of political assassination" (Bell, 2001). *Suresh v. Canada* (2002) and *Ahani v. Canada* (2002) involved several questions: Whether deporting a Convention refugee back to the country in which he or she was likely to face torture constitutes a breach of section 7? Whether existing procedures for determining whether a potential deportee is a risk contained in s. 53(1) of the Immigration Act are fair? And, what standard of review should the Court use in reviewing governmental decisions on deportation?

Hearing for both cases was held on May 22, 2001 more than three months before the 9/11 attacks. At the time of the hearing the cases were described by the media as "two closely watched test cases" on the "vexing question of whether suspected terrorists can be deported to face possible torture in their homelands" (Makin, 2001). The *Globe and Mail* published two stories covering the hearing, while *National Post* reported that the cases have "grown into a full-fledged showdown of ideologies in which lawyers and eight intervening groups have filed briefs so heavy they are wheeled around the Court's marble halls on a cart" (Chwialkowska, 2001b).[33]

In its submission federal government urged that outcomes of these cases "will determine whether Canada will become a haven for terrorists" (Tibbetts, 2001a). The government also emphasized that "[t]errorism and terrorist fund-raising are serious threats to Canada's security, particularly as this country is seen as a venue of opportunity for terrorist groups to raise funds, purchase arms and conduct other activities" (Tibbetts, 2001a). Lawyers for the two claimants argued that the Immigration Act infringes their right to life, liberty and security of the person and that

[33] Following groups intervened in the case and all supported the rights claimants: The United Nations High Commissioner for Refugees, the Amnesty International, the Canadian Arab Federation, the Canadian Council for Refugees, the Federation of Associations of Canadian Tamils, the Centre for Constitutional Rights, the Canadian Bar Association, and the Canadian Council of Churches.

it vests too much power and discretion in the Minister of citizenship and immigration to decide whether a person is a danger to Canada. The claimants could have been encouraged by the fact that in its earlier jurisprudence the Supreme Court has on several occasions referred to extradition to torture as an example of "situations where the punishment imposed following surrender would be so outrageous to the values of the Canadian community that the surrender would be unacceptable" (*Kindler,* 1991: 832; see also *Schmidt,* 1987: para. 47; *Burns,* 2001: para. 60). Media reports suggested that during the hearing several justices "appeared sceptical" of the federal government's arguments and "bombarded" government's lawyers with questions (Tibbetts, 2001b). Justice Iacobucci was reported as stating that deporting people to countries where they would face torture would "blow out of the water" international conventions on human rights, while justice Gonthier emphasized that the "absolute prohibition" against torture should prevail over the traditional Canadian approach of balancing the domestic security and the rights of individual suspects (Tibbetts, 2001b).

If the Court was not well sensitized to the importance of the issue it was considering, its' sensitivity was certainly heightened by 9/11 terrorist attacks that occurred some three months after the conclusion of the hearing and exactly four months before the decisions was released. As in a number of other decisions attaining high levels of public visibility, such as the *Marshall 2* decision discussed in Chapter 4 and the *Secession Reference* ruling analyzed in Chapter 5, both *Suresh* and *Ahani* were singed collectively by "The Court." In another similarity to *Marshall 2* and *Secession Reference*, it is plain from the *Suresh* ruling that the Court harboured apprehensions about legitimacy of its judicial review function. The Court quoted with approval the opinion of Lord Hoffman in *Secretary of State for the Home Department v. Rehman* (2001):

> [T]he recent events in New York and Washington … are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove (para. 33).

The *Suresh* ruling first recognized that deportation to torture amounts to a deprivation of rights to life, liberty and security of the person, and then turned to the question of whether the deprivation was in accordance with principles of fundamental justice. In this part of the analysis, the Court noted that "[t]he approach is essentially one of balancing" (para. 45) and went on to balance governmental interests in fighting terrorism with individual interests in not being subjected to torture. As a part of its balancing analysis the Court considered that "Canadians do not accept torture as fair or compatible with justice" and that "[t]he Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture" (para. 50). The Court also noted that a number of international declarations, covenants and judicial decisions are also suggestive of a prohibition against torture (paras. 59-75). On the basis of these factors the Court concluded that risk of torture would almost always preclude deportations and that "the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture" (para. 77). Crucially, however, the Court also ruled that "in exceptional circumstances deportation to face torture might be justified" (para. 78) which allowed the Court to conclude that the impugned section of the Immigration Act does not violate section 7 of the Charter.

Following this determination, the Court considered whether procedures used by the Minister in *Suresh* were constitutional. In particular, Suresh complained that his deportation order was unfair because he did not know the details of the case made against him and therefore had no opportunity to respond to it. In analyzing procedural requirements stipulated by section 7 the Court ruled that full judicial process or even an oral hearing were not necessary to satisfy claimant's section 7 rights. The Court did rule, however, that "procedural protections required by s. 7 … require more than the procedure required by the Act under s. 53(1)(b) – that is none" (para. 121). The Court specified that a person facing deportation to torture must: "be informed of the case to be met;" have access to "the material on which the Minister is basing her decision;" and, have an "opportunity … to respond to the case presented by the Minister" and "challenge the information of the Minister where issues as to its validity arise" (paras. 122-3). The Court found that these procedural requirements were not met in *Suresh*.

In the much shorter *Ahani* decision, the Court applied its reasoning from *Suresh* to conclude that Ahani failed to show he was facing a substantial risk of

torture upon deportation. Justices also said that while "the procedures followed may not have precisely complied with those we suggest in *Suresh*, we are satisfied that this did not prejudice [the claimant]" (para. 26). The Court therefore rejected the Ahani's appeal as the process accorded to him "was consistent with the principles of fundamental justice" (para. 26).

The Court's decisions were very well received by the external political environment. One newspaper report, entitled "Supreme Court seeks 'balance' in first terror ruling since Sept. 11," stated that "[b]oth Amnesty International Canada and the federal government declared victory … even though they were on opposite sides in the case" (Tibbetts, 2002). Federal immigration Minister Elenor Caplan applauded the Court's decision as "one more success in the government's war on terrorism," and confirmed the Court's suggestion that "[t]hese situations require a delicate balance between the safety and security of Canadians and our commitment to human rights" (Chwialkowska, 2002). The *Globe and Mail* (2002) editorial praised the Supreme Court for being "sure-footed in this minefield" and for "wisely ordering judges in future cases to defer to the minister's judgment." Referring to Ahani's fortunes, the same editorial stated that after the Iranian assassin spent 10 years of fighting the system "Canadians have an uncontested right to say: good riddance." The decision received praise from legal scholars as well. University of Ottawa law professor Errol Mendes described the decision as "your classic Canadian compromise," and as a potential "model for other jurisdictions around the world for how to handle this new reality" (*Sudbury Star*, 2002). Jamie Cameron of the Osgoode Law School described the Court as politically "very savvy," and said that the decision was "shrewd because the Court did not state clearly that it is unconstitutional to deport an individual to torture" (Tibbetts, 2002). The lawyer who represented both Suresh and Ahani was understandably disappointed by Ahani's fortunes, describing the decision as a "political saw-off" and saying that the Court "copped out on the *Ahani* case" (MacCharles, 2002).

This outcome is clearly in accordance with the legitimacy cultivation theory. The reason for the positive reception of the decision can be found in the fact that the Court employed the same remedial manoeuvre as utilized in *Burns* (2001) and *Canadian Foundation* (2004). The Court changed the existing policy status quo not by delivering a potentially highly controversial declaration of invalidity that would elevate the stakes for all actors involved in the dispute and place the Court at the

centre of a controversy, but by reading additional requirements into the impugned provision and thereby creating a balanced outcome that satisfied some interests of actors on both sides of the issue. As in *Canadian Foundation* and *Burns,* this amounted to a politically sensitive outcome that defused the controversy and helped the Court ensure the cultivation of its legitimacy in a highly visible and controversial policy area. It is also important to note that the Supreme Court was careful not to read overly burdensome requirements into the provision. In fact, the procedural requirements read into section 53(1)(b) were much less demanding than those prescribed by the *Singh* (1985) decision which compelled the government to organize what turned out to be highly expensive and time consuming oral hearings for refugee claimants. According to one legal scholar, the *Suresh* decision "effectively diluted the Court's earlier position in *Singh*" all the while "no explanation" was provided "for the apparent abandonment of the principles in *Singh*" (Kelley, 2004: 279). Finally, in the context of the highly visible and controversial *Suresh* decision the Court made sure to exhibit sensitivities to the preferences of political actors on both sides of the issue, as well as to those of the Canadian public. In its discussion of the principles of fundamental justice the Court made direct overtures to the importance of public opinion (para. 50):

> While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.

As it did in the landmark *Secession Reference* case discussed in Chapter 5, it is clear that the Court successfully met the legitimacy challenge it faced in *Suresh*. The winning formula in both cases had much the same components: judicial mindfulness toward the preferences of political actors on both sides of the issue, sensitivity and explicit overture to the state of public opinion, careful threading between activist and deferential pronouncements, and utilization of politically sensitive jurisprudence.

Supreme Court and 9/11 (Round 2): Security Certificates and Guantanamo North

In the aftermath of 9/11, the federal government adopted a range of measures to allow it to use criminal law to deal with the burning issue of international terrorism. The most important of these was the 2001 Anti-Terrorism Act enacted mere three months after the attacks. Yet, as Hudson notes (2010: 129), "despite the availability of these

measures, counter-terrorism policy has since been pursued primary through immigration law." One of the primary reasons for this had to do with the fact that "evidentiary burdens and standards of proof are far lower in deportation proceedings than in criminal proceedings, making it easier to reduce the threats that some non-citizens may pose to Canadian national security" (Hudson, 2010: 129). In fact, one of its principal tools for fighting terrorism the government found in the so-called security certificates regime prescribed by the Immigration and Refugee Protection Act (IRPA) that was first-instituted in 1976. The regime allows the government to deport suspected terrorists while denying them an opportunity to access the evidence presented against them or to be present at the relevant hearings. Following the issuance of the certificate, the suspect is detained while a Federal Court judge reviews whether the certificate is "reasonable" so that deportation can be executed. Crucially, the judge is exposed only to the evidence presented by governmental lawyers (in private), while detainees remain largely in the dark and are provided only with a brief summary of the nature of evidence which is stripped of whatever government considers to be sensitive information. The IRPA does allow detainees to apply for release at any time on the condition they are prepared to subject themselves to voluntary deportation.

Charkaoui 1 (*Charkaoui v. Canada*, 2007) was the most important decision delivered by the Supreme Court of Canada on security certificates. The case challenged constitutionality of the whole securities certificate regime which was held to infringe section 7 and 15 rights of detainees by allowing the government to hold them in an indefinite detention, and to eventually deport them on the basis of evidence that remained largely secret and which detainees had no means of challenging. While lower courts upheld the constitutionality of the regime, by the time the case reached the Supreme Court it was reported that security certificates "have been widely described as one of the most draconian measures implemented by the federal government" (Tibbetts, 2006a). The lead appellant in the case, Adil Charkaoui, was a Maroccan-born permanent resident accused by the government of being "an al-Qaeda sleeper agent" (Tibbetts, 2006a).

The case attracted enormous public and media attention. In its coverage of the hearing the *Globe and Mail* published 10 stories, one of which described the upcoming hearing as "[a] momentous, impending clash in the Supreme Court of Canada between national security and the rights of terrorism detainees" (Makin,

2006a). Also, 15 interveners participated in the case. Attorney General of Ontario was the only governmental intervener present and it sided with the federal government. In contrast, 14 organized-group interveners mostly representing "international and domestic human rights and civil liberties movements" (Tibbetts, 2006b) opposed the constitutionality of security certificates. Appellants also had support from what was described as "a parade of supporters" that camped before the Supreme Court during the hearing and carried signs that read: "Stop secret trials in Canada" (Tibbetts, 2006b). While no polls were conducted on the specific and intricate issues surrounding the regime of security certificates, a survey by Innovative Research Group conducted days after the conclusion of the hearing showed that Canadians were "divided" on the more general question of "whether the federal government has struck the right balance between national security and civil liberties" (Butler, 2006). According to this survey, 37 percent of respondents felt the "balance is about right," 23 percent thought "the government has gone too far in protecting national security," while 18 percent felt the balance "has tilted excessively in the direction of safeguarding civil liberties" (Butler, 2006).

Much of federal government's argument submitted to the Court hinged on the idea that Canadian citizens would not find it "abhorrent or intolerable" for their government to detain foreign nationals suspected of links to al-Qaeda (Tibbetts, 2006b). The government's submission also stated that "Parliament's decision as to what is necessary to combat the manifest evil of terrorism is … entitled to a high degree of deference" (Tibbetts, 2006b). The appellants, on the other hand, stressed that the certificates regime provides insufficient protection and therefore does not meet the principles of fundamental justice. Charkaoui's lawyer, for example, argued that the system provides governmental officials with "undue influence" given that they are unconstrained in inundating the judge with national security concerns (Tibbetts, 2006c). Referring to the summaries that are eventually provided to the detainees, the lawyer said to the Court that they "are too much of a summary. They are a general outline and they don't communicate enough information to the defence" (Tibbetts, 2006c). The appellants also stressed the supposedly horrid conditions detainees faced at a special facility near Kingston, Ontario, popularly dubbed as "Guantanamo North" (Tibbetts, 2006c). In newspaper reports the facility was described as "a glorified classroom portable" lacking air-conditioning and room to move around (Makin, 2006a).

Some newspaper reports also suggested that by the halfway mark of the hearing it became apparent that judges were inclined to strike at the Act. *Toronto Star,* for example, reported that during the hearing "many Supreme Court judges seemed intrigued by arguments favouring a middle ground – either a 'friend of the court' or third-party advocate who would be allowed to hear and challenge the secret evidence on behalf of the public interest" (MacCharles and Shephard, 2007). Kirk Makin of the *Globe and Mail* similarly noted that almost all observes felt the IRPA would not escape unscathed. According to his report following the conclusion of the hearings, "the looming question now appears to be whether the court will take hammer and tongs to the Immigration and Refugee Protection Act provisions or strike them down and ship them back to Parliament for a full reformulation" (Makin, 2006b). For its part, federal government submitted during the hearing that if the certificates regime was to indeed be struck down it preferred the Court to deliver a suspended declaration of invalidity and therefore leave the government in charge of re-crafting the legislation (Tibbetts, 2006d).

The Court delivered a unanimous decision written by the Chief Justice McLachlin on February 23, 2007. The decision concluded that "[t]he procedure under the IRPA for determining whether a certificate is reasonable and the detention review procedures infringe s. 7 of the Charter" (*Charkaoui 1,* headnotes). As the first paragraph of the decision reads, the Court adopted a balancing approach that weighed security concerns against the protection of individual rights:

> One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

Paying careful attention to dangers of terrorism, the Court proclaimed that "in the interest of security, it may be necessary to detain persons deemed to pose a threat" and that "security concerns may preclude disclosure of the evidence on which the detention is based" (para. 69). The Court concluded, however, that in light of availability of alternative measures that are "less intrusive" but still provide "a measure of protection," the IRPA security certificate regimes "does not minimally impair the rights of non-citizens" and is therefore unconstitutional (para. 69). The Court specifically discussed several less intrusive measures the government could use

to ensure security concerns are met while detainees experience less intrusive violations of their rights. These included: the role of the Security Intelligence Review Committee that used to review security certificates until 1988; balancing the interests of secrecy and disclosure as done by judges pursuant to section 38 of the Canada Evidence Act; procedures used in the Air India trial; the so-called "special advocate" system used in Britain; and the procedures used during the Arar Commission. Even though it specified these less intrusive measures, the Court stopped short of amending the controversial provisions itself. Rather, it followed the suggestion of the federal government and declared the provisions unconstitutional while suspending the onset of the ruling for a period of one year to "give Parliament time to amend the law" (para. 140). The ruling, therefore, had no immediate effect on legislation or on the claimants who remained either on strict bail or imprisoned in the Kingston facility. The Court in fact "sidestepped the issue" of apparently harsh conditions at the Kingston facility arguing that "lengthy incarceration may be acceptable provided it is actively reviewed by judges as time goes on" (Makin, 2007).

In the wake of the decision's release, it quickly became evident that it did not antagonize the Court's key audiences. Public Safety Minister Stockwell Day said he is "pleased that the basic principle of security certificates has been maintained" (Shephard, 2007), and that the government will "respond in a timely and decisive fashion to address the Court's decision" (Tibbetts, 2007a). A few days later he also suggested that his government "has no intention of closing the $3.2-million 'immigration holding centre' near Kingston" (Mayeda, 2007). Leader of the opposition Liberal Party, Stephane Dion, "applauded" the ruling with somewhat greater enthusiasm saying he "never liked these certificates" (Panetta, 2007). Defence teams were also happy with the decision, with Charkaoui himself describing it "as a great victory for justice in Canada" (Tibbetts, 2007b).

It is clear that the outcome reached by the Court clearly provided something to both sides in the dispute. As editorials published by the *Globe and Mail* and the *National Post* suggest, many observers of the Court emphasized the pragmatism and the sensibility of the decision. The *Globe and Mail* (2007) stressed that the Supreme Court "has found a fair and pragmatic way to resolve the moral dilemma of the age of terror." At the heart of this formula, according to the *Globe* editorial, is the recognition that "indefinite jailing of non-citizens suspected of being terrorists is legitimate, as long as their detention is subject to meaningful and regular review."

For *National Post* (2007), "the court had reviewed every aspect of the system, found that most of it was justified by national security, and asked only for minimal changes designed to protect the rights of the arrestees." This suggested to the editorial board that the Court was "careful to show that it is conscious of the same dilemmas that our lawmakers face in protecting us from terrorism" (*National Post,* 2007). Perhaps the most apt assessment of the decision, however, was provided by *Globe and Mail's* senior justice reporter, Kirk Makin, who described the Court "[a]s savvy as ever about how much activism will be tolerated" (Makin, 2007). According to Makin (2007):

> Coming just weeks before the 25th anniversary of the Charter of Rights and Freedoms, yesterday's ruling offers a clear view into the soul of the current Supreme Court bench. Strategically measured, and deferential to the difficult job parliamentarians face in balancing individual rights with the collective, it went far enough for the court to live up to its image of itself as being the protector of constitutional rights.

Within the year's time, the federal government used the opportunity to re-craft the IRPA so as to ensure the constitutionality of the security certificate regime. The key amendment – Bill C-3 – provided detainees with representation during secret proceedings in the form of "special advocates" who had undergone a security clearance. These advocates could access the classified evidence and challenge government's applications for non-disclosure (Hudson, 2010: 131). The principle of information disclosure is only "partially realized," however, as Bill C-3 provides that detainees and their counsel are prohibited from accessing sensitive evidence or even conversing with special advocates once the latter have seen it (Hudson, 2010: 131).

According to Roach (2008: 285), this governmental reaction to *Charkaoui 1* amounted to "a disappointment" for many rights activists and legal scholars who held hopes for a more robust revision of the securities certificate regime. As he specifies (2008: 282), much of this disappointment is associated with the "substance of the government's response to *Charkaoui*." Roach specifically notes that

> Bill C-3 has been criticized for selecting the least robust form of adversarial challenge outlined by the Court, namely, the British system of security-cleared special advocates. Special advocates under Bill C-3 will be able to challenge the government's claims that evidence must be kept secret and the relevance and reliability of the secret evidence. They will not, however, be able to consult the detainee or other persons after they have seen the secret evidence, demand further disclosure from the government or call their own witnesses without prior judicial approval. … Bill C-3 also does not follow section 38 of the *Canada Evidence Act* ("CEA"), which allows a Federal Court to balance the public interest in disclosure against the public interest in secrecy and to order the disclosure of information that may harm national security (2008: 284).

In spite of these limitations Roach (2008: 281) notes that *Charkaoui 1* still amounts to "an important example of the anti-majoritarian role of courts in protecting rights of

the unpopular that were ignored in the legislative process."

Roach's assertion that *Charkaoui 1* is "an important example of the anti-majoritarian role of courts" is fair because the Court did effect a change in an important policy area and in such a way that improved the position of suspected terrorists. It must also be pointed out, however, that any fair assessment of *Charkaoui 1* must also recognize the extent to which the ruling amounts to an example of limitations that courts have in protecting individual rights and freedoms especially when judges are confronted with governmental actors determined to oppose a significant change to the policy status quo and when they operate in a highly visible political environment. The above analysis clearly shows that while the Court improved the legal position of detainees held on security certificates, it did so very cautiously and in a way that (i) recognized constitutionality of the general regime, (ii) imposed no specific remedy on governmental actors, and (iii) followed the governmental request of suspending the declaration of invalidity thereby leaving the government in charge of designing and implementing any changes to the policy status quo. With this outcome in hand, the government retained the control over the policy regime and could ensure that any changes to it would indeed be minimal. The same outcome allowed the Court to ensure that its legitimacy emerged unscathed as the Court's key audiences on both sides of the issue saw some of their interests satisfied. While the Court clearly had an opportunity to deliver a more robust change to the policy status quo, striking the legislation down without providing a suspended declaration of invalidity, or reading into the legislation a more extensive system of protection, would have been much more likely to instigate extensive criticism and controversy and consequently threaten the Court's institutional legitimacy.

At the time Bill C-3 was before Parliament, the Court had another opportunity to address security certificates in *Charkaoui 2* (*Charkaoui v. Canada*, 2008). Adil Charkaoui was again before the Court and this time his claim focused on governmental obligations pertaining to the preservation and disclosure of evidence collected by the Canadian Security Intelligence Service (CSIS). In particular, after Charkaoui had requested to obtain notes and recordings of interviews that CSIS conducted with him in 2002, he was informed that disclosure was impossible due to the CSIS's internal policy of destroying evidence following the completion of analytical reports. Charkaoui claimed that in light of his section 7 rights, CSIS had a constitutional duty to retain all of the relevant evidence and that he was consequently

entitled to a stay of proceedings and to a release. These facts brought several questions before the Court: Does government have a duty to retain evidence? What kind of evidence should be disclosed and to whom? What are appropriate remedies for failures to retain or disclose evidence?

While at the time of its hearing *Charkaoui 2* attained much less media and political interest than *Charkaoui 1*, the case did register on the media radar with the *Globe and Mail* publishing one story covering the hearing. Seven interveners also appeared in the case. Attorney General of Ontario again sided with the federal government while six organized groups supported Charkaoui.[34] Charkaoui's lawyer argued before the Court that CSIS manipulated the information it collected on Charkaoui, destroying parts that could have been used to exonerate him (Foot, 2008). Focus of much of the organized-group interveners was to link the IRPA security certificate regime with the more rigorous disclosure requirements present in criminal law proceedings. The Criminal Lawyers Association of Ontario (CLAO) argued that all information collected by CSIS should be preserved in light of potential future criminal proceedings that could spring from it, while the Canadian Bar Association (CBA) asserted that in light of the severity of accusations laid on the claimant (i.e. that he is a terrorist), there would have to be full, criminal law rights of disclosure as developed by the Court in the 1995 *R. v. Stinchcombe* ruling (*Charkaoui 2,* January 31, 2008). The justices expressed much hesitancy toward these arguments. Justice Charron, for example, responded to the CLAO by noting that she is unsure of this "spillover effect" between immigration and criminal law contexts. She also suggested to the CBA's lawyer that "we should be careful" because "there is a danger of incorporating wholesale concepts, such as *Stinchcombe,* … developed in the criminal law context" to the security certificates regime (*Charkaoui 2,* January 31, 2008).

For its part, the federal government argued that CSIS is not a police agency and that its employees do not collect information for the purpose of presenting it before courts as evidence. The government emphasized that destruction is mandated in light of potential injuries to the national interest or to the privacy of individuals on whom information is collected (*Charkaoui 2,* January 31, 2008). Justice Rothstein, for example, questioned this argument by pointing out the variety of protections

[34] Organized groups that intervened in support of Charkaoui are: Criminal Lawyers' Association (Ontario), Canadian Bar Association, Barreau du Québec, Amnesty International, Association des avocats de la défense de Montréal, and Québec Immigration Lawyers Association.

against disclosure in the IRPA. He suggested that keeping information "in a secure place," like the government does "for all other sensitive information," should ensure that it is not compromised and that it does not have to be destroyed (*Charkaoui 2,* January 31, 2008).

The Court's unanimous decision allowed the Charkaoui's appeal "in part" (*Charkaoui 2,* 2008). The Court adopted a "nuanced approach" to the distinction between policing and security intelligence work (Roach, 2009: 177). The Court asserted that while "CSIS is not a police force, … activities of the RCMP and those of CSIS have in some respects been converging as they, and the country, have become increasingly concerned about domestic and international terrorism" (para. 26). In light of this convergence, the Court ruled that it is impractical and unrealistic for CSIS to ensure full secrecy of the information it collects and that the agency has a duty to retain information so that some of it could consequently be subjected to the duty of disclosure (*Charkaoui 2*, para. 38-39). This duty to disclose, however, remains "far from absolute" as the IRPA would still prevent judges from disclosing "any material that if disclosed could harm national security or endanger any person" (Roach, 2009: 188). This practically means that "much of the intelligence in security certificate cases that is subject to disclosure under *Charkaoui 2* will be disclosed to the security-cleared special advocates created in the wake of *Charkaoui 1* and not to the actual detainees and their lawyers" (Roach, 2009: 188). This falls far short of criminal law disclosure requirements demanded by some of the interveners before the Court. Also, even though the Court ruled that destruction of information was unconstitutional, it stopped short of stopping deportation proceedings as sought by Charkaoui's defence team. Rather, the appropriate remedy was to let the proceedings carry on with whatever information was left in the Charkaoui's file made subject to the duty to disclose (para. 77).

The decision again failed to antagonize its key political audiences. Charkaoui's reaction to the decision clearly suggested that he considered it to be an important victory: "I'm really satisfied that for the first time in 20 years, the Supreme Court of Canada is asking CSIS to act fairly in national security matters" (Montpetit, 2008). Newspaper reports also suggested that a "variety of civil-liberties groups and bar associations that had supported Mr. Charkaoui's appeal declared themselves generally satisfied" (Ravensbergen, 2008). The government also did not protest much against the ruling. A spokesperson for Stockwell Day made a brief statement that

"[t]he government is committed to ensuring its policies and practices abide by the Supreme Court's decision on this matter" (Montpetit, 2008).

Much like *Charkaoui 1*, the *Charkaoui 2* decision contained important elements of judicial restraint. These most importantly include the Court's rejection of the criminal law disclosure requirements and the Court's refusal to stop deportation proceedings held against Charkaoui. As in *Charkaoui 1*, the Court appeared to be very cognizant and strategically alert to how much activism would be tolerated by the external political environment. It appears that the impact of *Charkaoui 1* and *Charkaoui 2* on the policy area of security certificates as a whole is decisively restrained. Consider Hudson's analysis of the policy fallout from the two decisions:

> The executive has not been subordinated to criminal law principles, nor have the governing legislative provisions of the security certificate system been ruled altogether unconstitutional. Instead, courts have used a bare minimum of procedural safeguards to better level the playing field, leaving it up to the government, special advocates, and persons facing deportation to work within an otherwise unaltered system (2010: 130).

Charkaoui 1 and *2* clearly suggest that dealing with the highly visible issue of terrorism, and facing a government bent on maintaining security certificates as one of its key tools in fighting terrorism, the Court exhibited much prudence in threading the fine line between activism and restraint. Policy ramifications of both decisions were tailored to ensure the acquiescence of key political actors and to avert the potential of a legitimacy-costly backlash with the public or governmental actors. While disagreement may persist as to whether the Court has failed to meaningfully protect the rights of detainees held on security certificates, or alternatively, whether it has hampered the government's ability to protect the security of Canadians, it is clear that its prudent, balanced decision making has allowed the Court to emerge from this policy area with its legitimacy intact. As with much of the other cases discussed in this chapter, the boundaries of constitutional protection in the area of security certificates were to a very important extent defined by external conditions.

Supreme Court and 9/11 – Round 3: Guantanamo Bay

Supreme Court's high-profile encounters with the issue of terrorism did not end with security certificates. In *Canada v. Khadr* (2008) and *Canada v. Khadr* (2010) – i.e. *Khadr 1* and *Khadr 2* – the Court's attention turned to activities of CSIS officers at Guantanamo Bay, Cuba where American government set up a detention camp to hold detainees from its post-9/11 wars in Afghanistan and Iraq. One of the detainees was

Canadian citizen Omar Khadr who was captured in July 2002 and accused by U.S. authorities of committing five war crimes, including the murder of Delta Force soldier Christopher Speer "in violation of the laws of war" (Shephard, 2008a). Since other countries, such as United Kingdom and Australia, repatriated their nationals from Guantanamo in order to have them tried at home, Khadr was the only citizen of a western country still at Guantanamo by 2008 (*Globe and Mail,* 2010). With his appeals to the Supreme Court of Canada, Khadr hoped to achieve the same outcome.

Several factors appeared to work in Khadr's favour. First, by the time the cases were heard and decided, the detention centre at Guantanamo attained much worldwide notoriety for being "a legal black hole" to which rules of international law did not apply, and this certainly was part of the reason why other western countries decided to repatriate their citizens (*Globe and Mail*, 2010b). Throughout 2008, for example, Barack Obama campaigned on the promise to shut down the Guantanamo facility, and once in office in early 2009, one of his first executive orders instructed the closure of the facility so that America could regain its "moral high ground" (Shane, Mazzetti and Cooper, 2009). Second, before *Khadr 1* and *2* reached the Supreme Court of Canada, the U.S. Supreme Court has already ruled that components of the Guantanamo process infringed domestic law and international human rights obligations (e.g. *Hamdan v. Rumsfeld*, 2006). Third, Khadr was 15 years old at the time of his capture and during his detention at Guantanamo he underwent a variety of aggressive 'coercion techniques', such as sleep deprivation, that attained much notoriety post-9/11.

Other factors, however, militated against Khadr's success at the Supreme Court. First, Khadr was widely reported to "infamously hail from a family that many Canadians consider synonymous with terrorism" (Edwards, 2008). His father served as financier to Osama bin Laden so that Omar met the upper echelons of al-Queda leadership by the time he was 10. Also, only one of his three brothers, self-described "black sheep of the family," was reported to have openly renounced terrorism (Edwards, 2008). Second, even though Khadr found early support among the opposition Liberal Party (Clark and Freeze, 2007), the federal government of Canada was insistent on not repatriating Khadr and on letting the Guantanamo process work itself out. Finally, it was apparent during both *Khadr 1* and *Khadr 2* cases that Khadr did not enjoy anything akin to a decisive support among the Canadian public which was divided on the issue of whether he should stay in the U.S. or face due process in

Canada. An Angus Reid poll conducted around the time of the *Khadr 1* hearing (April, 2008) showed that 38 percent of Canadians "said he should be left to face trial in Guantanamo Bay, 43 per cent said he should be brought home to face trial here, and 19 per cent were undecided" (Shepherd, 2008). By July of 2008, however, an Ipsos Reid poll showed that 60 percent of Canadians felt Khadr should remain in U.S. custody, while 40 percent thought he should be repatriated (Cowan, 2008). Another Angus Reid poll from September 2009, and therefore a couple of months before *Khadr 2* hearing, showed the Canadian public again divided with 42 percent of Canadians believing Khadr should face "due process under Canadian law" and 40 percent thinking he "should be left to face trial by military commission at Guantanamo Bay" (MacCharles, 2009). The same poll found that 52 percent of Canadians expressed no general "sympathy" with Khadr, while only 38 percent sympathized with his circumstances (MacCharles, 2009).

Khadr 1 was heard on March 26, 2008. At issue was whether CSIS, whose agents had interviewed Khadr during his detention at Guantanamo and subsequently shared some of their interview records with American authorities, is obliged to disclose information it has on Khadr in order to satisfy his section 7 rights. It is important to point out that Khadr's lawyers did not seek the disclosure of only the information that arose out of CSIS interviews with Khadr. Rather, they sought disclosure of *all* information in CSIS's possession that is relevant to the Khadr's prosecution in the United States (*Khadr 1*, March 26, 2008). This broad request was upheld by the Federal Court of Appeal which applied the *Stinchcombe* standard for disclosure and ordered that "all relevant documents in the possession of the Crown be produced" (*Khadr 1,* headnotes). This issue of what information should be disclosed was subject of an exchange between several Supreme Court justices and Khadr's lawyer Nathan Whitling right at the outset of his oral argument before the Court. At that time Whitling expressed particular interest in obtaining disclosure for one document:

> It is essentially an inquiry to the RCMP liaison office in Islamabad respecting information pertaining to the 27th of July. So this is the big day which is the subject of the murder charge. … We don't know what is actually in there. But … we assume … that this is an early account of the events of July 27th, 2002 when the respondent is alleged to have thrown the grenade which killed an American Special Forces officer (*Khadr 1*, March 26, 2008).

With respect to the desired remedy, Whitling went on to say:

> The standard that we adopted is the *Stinchcombe* standard. … Anything that might be relevant is what we have requested and what the Court of Appeal granted. Full and complete disclosure is an appropriate remedy. It is proportionate to that Charter violation even if it is material that has not been shared with the United States. If it has *been* shared with the United States, certainly with the prosecution, it may not be of any use to us (*Khadr 1*, March 26, 2008, verbal emphasis in original).

The federal government, on the other hand, argued that the Court of Appeal was wrong to order for thousands of pages of files to be disclosed. In its submission to the Court, the government argued that "the disclosure request was a thinly disguised 'fishing' expedition by defence lawyers seeking sensitive information, and that complying would jeopardize sensitive relationships between Canada and its allies in the war against terrorism" (Makin, 2008a). It was also reported that the case "captured the intense interest of human-rights activists, criminal-law organizations and legal academics" (Makin, 2008a). While no interveners sided with the federal government, four organized groups intervened in support of Khadr: British Columbia Civil Liberties Association, Criminal Lawyers' Association of Ontario, International Human Rights Clinic of the University of Toronto law faculty, and Human Rights Watch. As suggested above, the case attained considerable pre-decision visibility with *Globe and Mail* publishing four stories at the time of the hearing. Much of the media coverage billed the case as putting the Guantanamo detention centre on trial as evidenced by a *Toronto Star* story headlined "Top court tackles Gitmo" (Shephard, 2008a).

The Court delivered the *Khadr 1* decision on May 23, 2008. As in many other cases dealing with matters of high controversy discussed in this dissertation, the decision was written and signed collectively by "The Court." In terms of its content, it delivered a decisively partial victory for Khadr. On the one hand, the Court agreed with Federal Court of Appeal that Khadr is entitled to disclosure of documents from CSIS. In making this finding the Court relied on earlier decisions of the U.S. Supreme Court that found features of the Guantanamo process in abrogation of Geneva Conventions and international rights of *habeas corpus.*[35] From this the Court concluded that Canadian participation in the process meant that the government breached its own international obligations (by participating in the process deemed to be in abrogation of international law) and it ordered the government to disclose documents so as to "mitigate" the effects of such participation (paras. 32-34). The

[35] The Court referred to two U.S. decisions to this effect: *Rasul v. Bush,* 542 U.S. 466 (2004); *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006).

Court also ruled, however, that the Court of Appeal's "order should be varied as it relates to the scope of disclosure to which Khadr is entitled as a remedy under s. 7 of the Canadian Charter of Rights and Freedoms" (*Khadr 1,* headnotes). The Court ruled that not *all* documents and material are subject to disclosure, but only (i) records of "interviews conducted by Canadian officials with Mr. Khadr," and (ii) "records of any information given to U.S. authorities as a direct consequence of Canada's having interviewed him" (para. 37). This meant that the record detailing the events of July 27, 2002 when Khadr allegedly threw a grenade that killed the U.S. special forces officer, which was of particular interest to Khadr's lawyers, would remain beyond the scope of allowed disclosure. So would all other information in the possession of CSIS that did not arise out of interviews with Khadr.

In some circles the decision was received as a clear victory for human rights and as a clear defeat for the government. Former Liberal justice minister Irwin Cotler stated that "[t]here can be no clearer indictment of the Guantanamo Bay process and Canada's acquiescence in it. It is a clearly unfair, illegal, and ultimately politicized process masking itself under the cover of the rule of law (Shephard, 2008b). President of the Criminal Lawyer's Association of Ontario was similarly quoted as saying that "[h]ere you have a situation where the Canadian government is not setting an example in favour of human rights, and the court said that to them, and I think they ought to pay attention" (Shephard, 2008b). Khadr's lawyer Nathan Whitling, however, was much "less enthused" about the decision (Makin, 2008b). He complained that the ruling "will not give the Khadr's defence what it most needs: a U.S. military report of the firefight that preceded Mr. Khadr's arrest, and was later shared with Canadian authorities" (Makin, 2008b). Whitling went on to say that

> The U.S. government claims to have somehow misplaced it. The only way to get that report was to get it from Canada. We requested everything, but unfortunately, the Supreme Court has not gone far enough today (Makin, 2008b).

Whitling also said that he has already seen, "on a confidential basis," the material opened up to disclosure by the ruling and said that "it will be of limited use" (Makin, 2008b). The federal government's first reaction was to say that it would review the decision (Tibbetts, 2008). Subsequently, the government remained steadfast in rejecting opposition calls for Khadr's repatriation (Morgan, 2008).

Legal scholars were also quick to point out just how restrained the Court was in its disposition of *Khadr 1*. In an article entitled "Khadr's Shallow Victory"

published in the *National Post,* Ed Morgan (2008) of the University of Toronto law school found the Court particularly tentative on two counts. First was the fact that the Court stopped short of declaring that the Guantanamo process abrogates international law. Rather than making such a pronouncement itself, the Court "deferred to the U.S. Supreme Court" on this matter so that its decision "does little more than piggyback on the bold stance already taken by a more conservative bench in Washington." Second, Morgan notes that while "Khadr was handed a victory," the Court "moved mere inches" from where the law formerly stood which Morgan found particularly demoralizing in light of the fact that Khadr was not provided with the much sought-after "report about the circumstances of his capture." Morgan concluded his assessment of the ruling by asking "is there a set of principles reflected by the nine justices in their Khadr ruling, or is there nothing more here than 18 intellectually weak knees?"

If in *Khadr 1* the Supreme Court did not do much to help Khadr's quest for repatriation, the Court soon faced another opportunity to tackle this question head-on. This time around, in *Khadr 2,* even more interveners would pack the courtroom as the case of Omar Khadr reached "a crescendo" before the Supreme Court of Canada (Makin, 2009). In *Khadr 2* the Court faced the questions of whether the fact that Canadian officials interviewed Khadr knowing he had been subjected to a sleep deprivation regimen (notoriously known as the "frequent flyer program") amounted to a breach of his section 7 rights, and whether an appropriate remedy would be to order his repatriation from Guantanamo. A Federal Court judge had ruled that Khadr's rights were violated by the failure to obtain his repatriation and that the Canadian government has a "duty to protect" him (MacCharles, 2010a). This order was upheld at the Federal Court of Appeal and the government appealed that decision.

The federal government remained steadfast in its opposition to Khadr's repatriation. In what was described as a "scathing" written submission (Makin, 2009), the government warned the Court not to become "the first court in the western world to declare that a government has a legal duty to protect its citizens detained abroad" (Tibbetts, 2009a). The submission also noted that "Canadian courts should not be used to lobby the government to exercise its discretion in a particular way" (Tibbetts, 2009b). Government officials outside the courtroom reinforced this message. Prime Minister's parliamentary secretary, for example, publicly suggested that "[a]ny decision to ask for Mr. Khadr's return to Canada is a decision for the

democratically elected government of Canada, and not for the courts" (Koring, 2009). Much of the government's argument before the Court also focused on the issue of remedy. The government described lower courts' deportation order as "an unprecedented and unprincipled remedy" (Makin, 2009), and suggested that even if Khadr were to remain at Guantanamo he "is not without possible remedy" in light of the fact that he brought a civil suit against the government (Tibbetts, 2009b). In an apparent attempt to make it easier for the Court to uphold the deportation order, Khadr's lawyers were quick to reply that they were not after "a broad declaration that Canada is legally bound, under international law, to protect Canadians abroad" (Tibbets, 2009b). Rather, they emphasized that they were "seeking a one-off order for repatriation, taking into account the special circumstances of the Khadr case, including the torture and arbitrary detention of a child, who has been unlawfully conscripted as a child soldier and the Crown's complicity in these egregious violations" (Tibbetts, 2009b).

While in *Khadr 1* only four organized groups intervened in Khadr's support, in *Khadr 2* a much larger coalition of 13 organizations, including domestic and international human rights organizations, groups representing the interests of children, civil liberty organizations, academic organizations, bar associations and criminal lawyers' associations, intervened on his behalf.[36] Again, no interveners appeared on the side of the federal government. Khadr also received support from some 250 protesters who rallied in Edmonton demanding that the federal government obey lower courts and issue a repatriation order (Cooper, 2009). As noted above, at the time of the hearing the Canadian public was evenly divided on the issue of whether Khadr should be repatriated while a majority of Canadians expressed no sympathy with Khadr's circumstances. The case again attained considerable visibility as the *Globe and Mail* published 3 stories covering the hearing.

The Supreme Court's *Khadr 2* decision was delivered on January 29, 2010 and it was again delivered collectively by "The Court." In another similarity with *Khadr 1*, the decision provided a decisively partial and equivocal victory for Omar Khadr.

[36] These groups intervened in the case: Amnesty International, Human Rights Watch, the University of Toronto - International Human Rights Program, the David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children and Justice for Children and Youth, British Columbia Civil Liberties Association, the Criminal Lawyers' Association (Ontario), the Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, the Canadian Civil Liberties Association, and the National Council for the Protection of Canadians Abroad.

As the first two sentences of the decision's concluding paragraph note, the government's appeal "is allowed in part" while "Mr. Khadr's application for judicial review is" also "allowed in part" (para. 48). The Court first relied on its decision in *Khadr 1* to rule that Charter applied to Khadr (para. 16), and that "Canada's active participation in what was at the time an illegal regime" at Guantanamo deprived Khadr of his section 7 rights (para. 21). The Court then went on to consider whether deprivations accord with principles of fundamental justice. The Court first rehearsed its criteria for identifying new principles of fundamental justice which include that

> (1) It must be a legal principle. (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate. (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person (para. 23).

The Court then concluded that Canadian participation in the Guantanamo Bay process violated the principles of fundamental justice. The Court specifically noted that "[i]nterrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects" (para. 25).

The Court then considered the critical question of remedy. Here, the Court first found that "the breach of Mr. Khadr's s. 7 Charter rights remains ongoing and that the remedy sought [i.e. deportation] could potentially vindicate those rights" (para. 30). The Court also found that in spite of the fact that "Charter breaches" occurred in the past, "the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings" (paras. 31-2). Despite these conclusions, the Court nevertheless went on to proclaim that in light of "evidentiary uncertainties,[37] the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive" (para. 46), the "proper remedy is to grant Mr. Khadr a declaration that his Charter rights have been infringed, while leaving the government a measure of

[37] In this regard the Court pointed to "the inadequacy of the record" which "gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request." The Court particularly stressed it does not know "what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr." The Court went on to note that "in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's Charter rights."

discretion in deciding how best to respond" (para. 2). The Court described this remedy as "[t]he prudent course" (para. 47).

According to newspaper reports, "within hours" of the decision's release "it was clear the Conservative government is unlikely to reverse its longstanding position to let the U.S. military justice system prosecute Khadr" (MacCharles, 2010b). While Prime Minister Harper made no comments on the decision, a written release from Justice Minister Rob Nicholson stated that "[t]he government is pleased that the Supreme Court has recognized the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader interests" (MacCharles, 2010b). Nicholson reiterated the government's often-made talking point that Khadr faces "very serious charges including murder, attempted murder, conspiracy, material support for terrorism, and spying," and added that government will undergo a careful "review" of the decision to "determine what further action is required" (MacCharles, 2010b). The ruling also found positive reception among some civil libertarians and human rights activists who intervened before the Court. A representative of the Canadian Civil Liberties Association said the decision "was not a setback" but a "victory for human rights," while a representative of Amnesty International was reported as stating that the Court's declaration "is a powerful statement that the government cannot now ignore" (MacCharles, 2010b). Leader of the Liberal Party, Michael Ignatieff, reiterated the latter claim saying it would be "unconscionable" for the government not to seek repatriation (MacCharles, 2010b).

Khadr's lawyer Nathan Whitling, however, again had a more sober assessment of the ruling. He said that while the "declaration" issued by the Court "should have" some influence on the government, he was "not holding out hope" (MacCharles, 2010b):

> Realistically we don't think that this judgment is going to have any effect upon the government's position. It's clear they do have a moral duty, I think they always have. But practically speaking, I don't think Prime Minister Stephen Harper is going to change his mind given the degree to which he's dug in on this particular issue. We're realists and we told Omar this was probably going to be the result (MacCharles, 2010b).

Whitling concluded by stating that "[e]ssentially, the Supreme Court decided that this very serious Charter breach is not going to be remedied at all" (Tibbetts, 2010).

As with *Khadr 1*, Court observers were quick pick up on the shallowness of Khadr's victory. Writing for the *Ottawa Citizen,* Gar Pardy (2010) described the

decision as "[t]he biggest 'but' in Canadian judicial history" and argued that the Court engaged in "judicial gerrymandering" by failing to order repatriation while simultaneously recognizing that Khadr's Charter rights were violated. Kent Roach of the University of Toronto described the decision as "so fuzzy and equivocal that Mr. Khadr will be hard-pressed to show that the government has flouted it" (Makin, 2010). The *Globe and Mail* (2010b) saw the decision as a "moral victory" for Khadr noting that the Court "refrained, wisely, from ordering Ottawa" to bring Khadr home.

Overall, the decision clearly evidences the Supreme Court's strategic sensitivities toward legitimacy cultivation. Facing a highly visible and controversial issue about which public opinion was divided, the Court delivered a ruling that effectively split the difference between the two sides. Consequently, it is near impossible to describe the decision as having either a positive or a negative impact on the Canadian regime of rights protection. Any such positive assessment has to confront the fact that the decision amounted to a decisive loss for Omar Khadr who remained in the U.S. custody and was ultimately tried by a Guantanamo military commission tribunal in October 2010.[38] Any negative assessment, on the other had, has to confront the fact that the Court did rule that activities of CSIS officials in foreign countries are subject to the Charter of Rights of Freedoms. Making sense of this judicial outcome requires appreciating the extent to which it amounted to a carefully crafted judicial response to a very controversial and visible policy issue in which judges exhibited keen sensitivities to the character of the external political environment in order to ensure the continued legitimacy of their judicial review function. As Allan Hutchinson of York University noted in reference to the *Khadr 2* ruling, "the judges are too politically canny to walk into an obvious political trap that could cost the Court its credibility. They are smart enough to know that they won't ultimately be the winner in that kind of shootout" (Makin, 2010). In both *Khadr 1* and *Khadr 2* the Court exercised remedial discretion so as to soften the political impact of its decision. In both cases, the character of the external political environment played a significant role in delineating the boundaries of constitutional protection.

[38] Following a guilty plea, Khadr was sentenced to eight additional years in custody only one of which would have to be served in Guantanamo.

Reproductive Freedoms and Fetal Rights

The final policy area that falls under the purview of section 7, and that will be considered in this Chapter deals with issues of reproductive freedoms and fetal rights. As noted at the outset of this chapter, the most important decision delivered by the Supreme Court of Canada pertaining to this policy area is its 1988 *Morgantaler 2* ruling in which the Court Supreme Court invalidated abortion provisions contained in the Criminal Code while operating in a highly visible political environment.

At the time of the Charter's entrenchment in 1982, abortion was governed by section 251 of the Criminal Code which was enacted in 1969. While this section somewhat broadened the grounds under which abortion could be legally obtained, it also imposed significant restrictions. In particular, the section specified that abortions could be legally performed only following an approval of abortion committees of an accredited hospital, and it furthermore instructed abortion committees to issue approvals only for the so-called therapeutic abortions when the continuation of pregnancy would threaten the life or health of the woman. Obtaining an abortion through a breach of section 251 constituted an indictable offence with the maximum penalty of two years' imprisonment for women seeking abortions and life imprisonment for individuals conducting abortions.

Soon after the entrenchment of the Charter both pro-choice and pro-life actors were seeking to alter this policy status quo. As it turned out, most important challenges to section 251 came from Dr. Henry Morgentaler, a controversial pro-choice enthusiast who operated private abortion clinics in open defiance to the provision. Following the enactment of section 251, Morgentaler sent letters to politicians claiming to have performed more than 5,000 illegal abortions in Canada, and he also garnered notoriety for performing a televised abortion on Mother's Day in 1973 (Sharpe and Roach, 2003: 6). Morgentaler's actions were at issue before the Supreme Court of Canada on two separate occasions. The Supreme Court of Canada decided *Morgentaler 1* in 1976 rejecting Morgentaler's claim that section 251 should be nullified on the basis of the 1960 Bill of Rights. Declining to change the status quo on such a controversial policy area, the Supreme Court prudently proclaimed that it preferred to stay outside of "the loud and continuous debate on abortion" (see Manfredi, 2004: 65). Soon after the Charter was enacted, however, Morgentaler filed a separate claim under the new constitutional document which arrived before the Court in 1986. According to Manfredi (2004: 65), "maintaining its Charter-based

institutional authority to participate in controversial policy debates meant that [the Court] could not simply avoid the abortion issue, as it had in 1976." As it turned out, the Court did not avoid the issue in *Morgentaller 2* (1988) but delivered one of the most controversial decisions in its history.

The Supreme Court of Canada heard the *Morgentaller 2* case during October 7-10, 1986 amid a tremendous amount of interest from the media and the public. The *Globe and Mail* published 8 stories covering the hearing. A significant component of the media attention focused on problems women faced in obtaining abortions under the existing system. *Globe and Mail* reported that only 27 percent of hospitals across the country instituted relevant abortion committees, most of which were in large urban centres and minimum 18 percent of which still did not perform any abortions (Platiel, 1986). The data also showed variation in geographical application of the legislation. Around 74 percent of all abortions in the country were performed by 15 percent of the hospitals with accredited abortion committees, while the only hospital abortion committee that existed in Prince Edward Island, for example, was disbanded having not approved a single abortion in three years of its existence (Platiel, 1986). Morgentaler himself was quoted as saying that in 1984 around 1,200 women left Canada for upstate New York to obtain an abortion (Platiel, 1986). Difficulties women faced in accessing abortion in Canada were perhaps best evidenced by the fact that 75 percent of Canadian abortions were performed after eight weeks of pregnancy compared to 49 percent in the United States (Platiel, 1986).

Morgentaler's lawyers argued that section 251 of the Criminal Code infringed section 7 rights to life, liberty and the security of the person. They presented evidence regarding the unequal geographical application of section 251 including that in some parts of the country no committees existed to provide for legal abortions (Sharpe and Roach, 2003: 15). This evidence resonated with some of the justices. During the hearing justice Willard Estey, for example, commented that one would "have to be afflicted with legislative blindness" not to see that many hospitals failed to institute abortion committees in order to avoid controversy (Makin, 1986b). He went on to note: "So you've got zones in the country where there is no access. You've got whole provinces that are carved out of the process. Is this some kind of local option which has slid into the Criminal Code?" (Makin, 1986b). Morgentaler's lawyers also argued that "[s]ociety's shifting attitudes – indicated by the half-million women who have had abortions since 1969 – indicate that abortion is a fundamental value of Canadian

society and deserves protection under the Charter of Rights and Freedoms" (*The Gazzette,* 1986). The government's argument, on the other hand, was mostly based on the claim that "abortion was still a matter for Parliament not the courts" (Sharpe and Roach, 2003: 15). As Attorney General of Ontario argued before the Court, justices should not threaten section 251 which was product of a "balancing act" between the pro-choice and pro-life positions in the Canadian society and which was "achieved by Parliament through the democratic process" (Walker, 1986).

According to Roach and Sharpe (2003: 16), Canadian attitudes toward women have changed much in the time between *Morgentaler 1* was decided in 1976 and *Morgentaler 2* was heard in 1986. As they note (2003: 16), "[d]uring the week of the Court's hearing in October 1986, the federal government announced a policy to allow women to assume combat support positions in the military while not ruling out actual combat positions." They contrast this with debates from October 1974, the time of the Court *Morgentaler 1* hearing, "when the stories of the day included discussions in the 'women's section' of the *Globe and Mail* about whether children should receive sex education and a controversy over the fact that officials had awarded the crown in the Miss Seaway Valley beauty contest to the wrong eighteen-year-old girl" (Sharpe and Roach, 2003: 16). Public opinion polls, however, showed that the Canadian public was deeply divided on the abortion issue. In the build-up to the *Morgentaler 2* decision, polls measured public opinion along two dimensions: support for therapeutic abortions only (i.e. when physical or mental health of women is endangered), and support for abortion under all circumstances. They showed that the majority of Canadians were supportive of therapeutic abortions, with roughly equally-sized minorities supporting and opposing abortion under all circumstances (see Tamburri, 1988). A 1983 Gallup poll, for example, found that 59 percent of Canadians supported therapeutic abortions, 23 percent supported abortions under all circumstances and 17 percent opposed abortions under all circumstances (Tamburri, 1988). Two other polls conducted in 1975 and 1978 similarly found that 23 and 16 percent of Canadians (respectively) expressed support for abortions under all circumstances (Manfredi, 2004: 66). As Manfredi notes, these results suggest that in the build-up to the *Morgentaler 2* case "the Court was functioning in a climate of public opinion that supported some degree of legislative regulation of abortion" (2004: 66).

Release of the *Morgentaler 2* decision showed a deeply divided bench with seven justices present in the case rendering four separate opinions. Justices William McIntyre and Gérard La Forest upheld the constitutionality of section 251 arguing that "[t]he proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society" (*Morgentaler 2*, 1988: 39). These justices also stated that "there is no evidence or indication of general acceptance of the concept of abortion at will in our society" (39). Justice Bertha Wilson arrived at an opposite conclusion that reproductive freedom is "an integral part of modern woman's struggle to assert her dignity and worth as a human being" (172) and therefore protected by section 7 of the Charter. The deciding opinions in *Morgentaler 2*, however, were written by Jean Beetz (agreed to by William Estey) and by Chief Justice Brian Dickson (agreed to by Antonio Lamer). These judges invalidated section 251 on the grounds of administrative deficiencies as the existing committee approval process for obtaining abortions was found to cause unjustified delays and, therefore, deprive women of their security of the person. As Hogg notes (2007: 47-12), "[t]his was the lowest common denominator of the majority reasoning."

There are reasons to believe that the majority's choice to invalidate section 251 on procedural as opposed to substantive grounds had to do with justices' concerns about not delivering an overly activist ruling. As Jamie Cameron notes, the plurality focused on procedural defects because "a decision invalidating the *Code* provision was less confrontational, *vis-à-vis* Parliament, if based on procedural grounds than if grounded in a substantive right to an abortion" (2006: 119-120). Chief Justice Dickson's opinion confirms this claim. The opinion states that it is unnecessary "for the Court to tread the fine line between substantive review and the adjudication of public policy" (53), and that it is "neither necessary nor wise in this appeal to explore the broadest implications of s. 7" (51). According to Sharpe and Roach's analysis of Dickson's conference notes and his reasoning in *Morgentaler 2*, Chief Justice "tried to avoid making sweeping pronouncements" because "he knew that he would never persuade his more cautious colleagues to accept an obviously 'pro-choice' judgment based on a woman's freedom of conscience or her liberty interests [i.e. justice Wilson's position]" *and* because "he also knew that a pronouncement of that nature

would engulf the Court in controversy" (2003: 21). Sharpe and Roach stress that Chief Justice's opinion characteristically came right "down the middle" (2003: 19).

It is evident, therefore, that the deciding plurality was cautious not to deliver a highly activist ruling that would exceedingly narrow down Parliament's options. As Manfredi notes (2004: 67), "the combined plurality judgments excluded only two choices from Parliament's set of alternatives: the existing law and recriminalization of all abortions." While the ruling therefore failed to mount significant constraints on future Parliamentary actions, it did strike down section 251 of the Criminal Code. And, as it turned out, it is primarily because of this that political actors and the public that awaited the release of the decision would miss much of the subtlety in the Court's reasoning.

Reporters described the decision as "one of the most dramatic and controversial in recent memory" that "stunned dozens of pro and anti-abortion supporters who had crowded into the courtroom" to witness its release (MacQueen, 1988). They also claimed that "[w]hether anti-abortion or pro-choice, the people at the forefront of the 20-year-old battle said they were amazed by the unequivocal language of the Supreme Court decision" (Doelen and Danese, 1988). While they might have shared the amazement, the two warring sides had very different reactions to the ruling. One the one hand, the pro-choice movement was jubilant. After popping champagne corks at his abortion clinic (*Toronto Star,* 1988a), Dr. Morgentaler declared: "[The outcome] is beyond my wildest dreams. I keep needing reassurance it is really there" (Makin, 1988). Lynne Lathrop of the Ontario Coalition of Abortion Clinics similarly declared that the decision "seems like a total victory for the pro-choice movement" and that it is "going to have a profound effect on the lives of millions of Canadian women who have fought for equality and reproductive freedom" (*Vancouver Sun,* 1988). In contrast, the decision induced much agony among the pro-life forces. Roman Catholic Archbishop of Toronto called the ruling "a disaster" and "uncivilized" (*Toronto Star,* 1988b). President of the Right-to-Life Association of Toronto, Laura McArthur, stated that the decision has dealt a "dastardly blow" to unborn children and that she will defend the old legislation "with every breath" in her body (*Toronto Star*, 1988b). A pro-life activist Joe Borowski, whose own case on fetal rights was going through the courts system at the time, stated: "I was just driving in to work when I heard [of the decision] and I thought I was going to have an accident" (*Vancouver Sun,* 1988). The pro-life movement

quickly organized anti-abortion rallies urging participants to "deluge their politicians with calls and letters of protest against allowing abortion in Canada" (*Globe and Mail*, 1988).

As far as politicians were concerned, *Ottawa Citizen's* headline entitled "Supreme Court ruling throws a hot potato into the laps of politicians" provided perhaps the most apt description of their reaction (Lee and Taber, 1988). According to the press, leaders of the Liberal and Conservative parties "reacted gingerly and carefully … after the Supreme Court struck down the tenuous compromise over abortion that had held for 20 years" (Fraser, 1988). Prompted by reporters to comment on the decision, Conservative Justice Minister Ramon Hnatyshyn admitted that the effect of the decision "has been to declare the abortion prohibitions and constraints under the Criminal Code unconstitutional" but he was adamant about not getting "involved in anything further" (Fraser, 1988). Liberal leader John Turner was described as "equally cautious" focusing his comments on the provision rendered unconstitutional by the Court: "I had the responsibility (as justice minister) of introducing the law that has been struck down by the Court. At the time we presented that law to Parliament in 1968, it was the best accommodation we could find, after thorough consultation with the country, between two radically opposed views" (Fraser, 1988). Even the New Democratic Party, whose platform explicitly supported freer access to abortion, was described as "cautious in placing the issue at the fore of the NDP's campaign strategy" (Lee and Taber, 1988).

The above analysis suggests that *Morgentaler 2* decision appears to fail to correspond with the expectations of the legitimacy cultivation theory outlined in Chapter 2. Faced with a highly visible and charged policy issue of abortion the Supreme Court responded with an activist decision that in its wake left no restrictions on obtaining abortions, an outcome that failed to correspond with the pre-decision specific support and that placed the Court at the centre of much controversy. In obvious contrast to many other visible decisions discussed in this chapter, in *Morgentaler 2* the Court failed to find the middle ground between the two sides. Instead, it produced jubilant winners and dismayed losers and changed the policy status quo in such a way that ignored the preferences of the government of the day.

A close analysis of *Morgentaler 2*, however, suggests that the case is far from constituting an exception to the legitimacy cultivation theory developed in Chapter 2. In fact, the *Morgentaler 2* decision provides stark *support* for some of the key

assumptions of the theory. First, the Court exhibited important tendencies in *Morgentaler 2* that were in accordance with how the theory expects judges to behave under conditions of high visibility. In upholding the constitutionality the abortion provision, the minority opinion written by justices McIntyre and La Forest came close explicitly referring to the state of public opinion when it stated that "there is no evidence or indication of general acceptance of the concept of abortion at will in our society" (39). Even the justices writing for the winning majority were careful to confine their activism to procedural matters anticipating that such a decision would be less confrontational vis-à-vis Parliament and because doing otherwise would risk engulfing the Court in public controversy. This suggests that the majority has *miscalculated* (and not ignored or considered irrelevant) the reaction that the decision would generate from the external political environment as its reliance on the distinction between procedural and substantive activism was lost on much of the audience in the midst of the controversy that ensued. Relying on procedural as opposed to substantive review of legislation, in other words, was not enough to soften the impact of the decision. To this end the Court probably would have been better off relying on a form of remedial discretion, such reinterpreting the impugned statute while avoiding a declaration of invalidity, as done in *Canadian Foundation, Burns,* or *Suresh*. In contrast to *Morgentaler 2*, in all of these cases the Court attained a much more favourable reaction from the public, the media, and key political actors.

Second, and perhaps more importantly, the reaction that the *Morgentaler 2* decision generated among the Canadian public provides a telling example why it is of paramount importance for the Court to keep its decision making in line with the expectations of the legitimacy cultivation theory and stay away from frequently delivering outcomes such as *Morgentaler 2*. As the above discussion clearly suggests, following the release of the decision the Court underwent significant politicization, an outcome that, as discussed in Chapter 2, risks the Court's reservoir of diffuse support. In fact, according to Hausegger and Riddell's (2004) analysis of the "changing nature of public support for the Supreme Court of Canada," in the aftermath of the *Morgentaler 2* decision the abortion issue became directly linked with the Court's diffuse support. As they note (2004: 43), while attitudes toward abortion were not statistically significant predictors of diffuse support in 1987 (one year before *Morgentaler 2* was released), they became statistically significant in 1997. This means that in the aftermath of *Morgentaler 2*, those Canadians that supported

(opposed) abortions were also more likely to express higher levels of institutional support (opposition) for the Supreme Court of Canada. These findings show that the character of the Supreme Court's diffuse support underwent significant politicization in the aftermath of the *Morgentaler 2* decision. As argued in Chapter 2, legitimacy-wise this is an imprudent position for the Court to be in because it undermines the overall reservoir of public support and makes the Court dependent for institutional support on those members of the public who directly profit from its policies. The Court's activism in the highly visible context of the *Morgentaler 2* case, therefore, produced precisely those repercussions that legitimacy cultivation theory suggests justices should steer clear of if they want to cultivate institutional legitimacy.

In light of these developments, it should not be surprising that the Court sided with the preferences of the government and failed to inflict further changes to the national policy status quo in the two post-*Morgentaler 2* cases dealing with issues of reproductive freedoms or fetal rights. In the highly visible case of *Borowski v. Canada* (1989)[39] the Court faced the claim that section 251 of the Criminal Code infringed a fetus's right to life under section 7 and discriminated against a fetus on the basis of age and physical/mental ability contrary to section 15. Since the Court decided *Morgentaler 2* nine months before it considered *Borowski*, the Court ruled solely on the doctrine of mootness proclaiming that Borowski had lost the standing to make the constitutional challenge and leaving unaddressed his section 7 arguments. According to Sharpe and Roach's analysis of Chief Justice Dickson's conference notes, the Court arrived at this conclusion after it became "apparent that the judges wanted to avoid the issue of foetal rights at all costs" (2003: 391). In particular, while the two female justices (Wilson and L'Heureux-Dubé) were prepared to rule that the Charter provides no rights for the fetus, "the other judges were determined to avoid the thorny and loaded abortion issue" (Sharpe and Roach, 2003: 391-2). Ultimately, the Court's unanimous judgment declared that it would not be in the public interest to rule on fetal rights without an abortion law in place as such a ruling would "pre-empt a possible decision of Parliament by dictating the form of legislation it should enact" (*Borowski:* 365). In this manner, the Supreme Court "sidestepped the constitutional issue of whether the fetus has a right to life under the Charter" (Tatalovich, 1997: 80). The *Globe and Mail* (1989) reported that the Court "lobbed the hot potato back into

[39] *Globe and Mail* published 5 stories at the time of the *Borowski* hearing.

the hands of Parliament where it properly belongs," while *Ottawa Citizen* suggested that the Court "gingerly skirted the emotion-charged abortion debate" (MacCharles, 1989). *Vancouver Sun's* (1989) editorial included the following assessment:

> Those who feared that the Charter of Rights and Freedoms would result in judges making all the important law should be reassured. The unanimous *Borowski* decision leaves the issue to the federal politicians. The court isn't there to decide issues in the abstract, and the fact that it did not seize unwarranted political authority reflects well on the judges.

Tremblay v. Daigle (1989) was the next case dealing with fetal rights that the Court addressed soon after it deliver the *Borowski* ruling. The case involved several questions: Whether prospective father can use a court injunction to veto woman's decision to have an abortion? Whether the fetus has rights under the Quebec civil code? And, whether the fetus can be considered a "human being" under the Quebec Charter of Human Rights and Freedoms or under the Canadian Charter of Rights and Freedoms? Jean-Guy Tremblay, who had been accused of physically abusing his former girlfriend Chantal Daigle, won a temporary injunction preventing her from undergoing an abortion. The Quebec Superior Court as well as the Quebec Court of Appeal upheld the injunction leading Daigle to appeal to the Supreme Court of Canada. Given the urgency of the situation (i.e. Daigle was approaching twenty-second week of her pregnancy as the case arrived before the Supreme Court), justices interrupted their summer vacations to hear the case.[40] The drama also ensured that the case attained high amount of pre-decision visibility as evident by 11 stories published by the *Globe and Mail* at the time of the hearing. The federal government intervened in the case on the side of Daigle, while a number of organized groups associated with pro-life and pro-choice positions largely split their support between the two parties.[41] Halfway through the hearing, Daigle's attorney informed the Court that Daigle aborted her pregnancy at a clinic in the U.S. thereby underplaying somewhat the significance of the expected decision of the Supreme Court. Even though the case became moot, the Supreme Court issued a decision that was signed collectively by "The Court" and which ruled that prospective fathers do not have a right to veto women's decisions to abort. As in *Borowski,* the Court stayed clear of addressing the

[40] As Sharpe and Roach note, justice Lamer was reached "on his yacht at the foot of the Statute of Liberty" while "McLachlin rushed back from a European vacation" (2003: 392).
[41] The following groups intervened on the side of Daigle: the Canadian Abortion Rights Action League (CARAL), the Women's Legal Education and Action Fund (LEAF), and the Canadian Civil Liberties Association. The following groups intervened in support of Tremblay: The Campaign Life Coalition, the Canadian Physicians for Life, the Association des médecins du Québec pour le respect de la vie, and the REAL Women of Canada.

issue of fetal rights under the Charter. As Sharpe and Roach note, "[t]he Charter was mentioned but avoided on the ground that, since the suit was one between private parties, it did not apply" (2003: 395). Justices noted that "[t]he Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood" (552). The Court answered the latter question in the negative. In arriving at this conclusion the Court emphasized that "ascribing personhood to a foetus in law is a fundamentally normative task," and assumed a highly deferential posture by declaring that "decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature" (552). As Sharpe and Roach conclude, the Court acted "prudently, avoiding sweeping pronouncements that would later tie its hands or the hands of Parliament" (2003: 396).

In sum, it is clear that the Supreme Court has used section 7 of the Charter to significantly change the policy status quo in the area of reproductive freedoms and fetal rights. This is clearly evident by its landmark *Morgentaler 2* decision. In fact, the decision's ultimate outcome (i.e. elimination of any restrictions on abortion) still stands as the policy status quo as Canadian legislators failed to enact a replacement legislation. The key attempt in this regard was Bill C-43 which would have reinstated therapeutic abortions but under a more inclusive definition of health and a more liberalized process for obtaining abortion approvals. While Bill C-43 passed the House of Commons in May 1990 it was defeated in the Senate in February 1991. As argued above, however, this instance of controversial policy activism delivered in a highly visible political environment has resulted in the Supreme Court of Canada incurring significant costs in terms of the politicization of its reservoir of public support as predicted by the legitimacy cultivation theory. It also resulted in the Court staying clear from making further activist proclamations on the issue of reproductive freedoms and fetal rights.

Conclusion

Chapters 6 and 7 provide unambiguous support for the claim that Supreme Court justices act as strategic actors concerned with cultivation of their institutional legitimacy as prescribed by the theory outlined in Chapter 2. Policy activist decisions delivered in visible environments and in the face of public and political opposition tend to incur negative repercussions for the Court's legitimacy and the Court is well

advised to moderate its activist tendencies in order to ensure legitimacy cultivation. Ignoring, misreading, or remaining unaware of potentially ardent governmental and public preferences may lead to "public relations disasters" (as in *Daviault*) or produce enduring negative publicity in a particular policy area (as in *Singh*). Delivering such decisions in highly visible cases and on highly sensitive matters, may also lead to potentially long-lasting and risky politicization of the Court's legitimacy (as in *Morgentaler 2*). Were Supreme Court justices to regularly act in such a politically injudicious manner, particularly in cases garnering high levels of public attention, the Court's institutional legitimacy would be quickly depleted. Broad patterns of the Supreme Court's section 7 jurisprudence, however, suggest that the outcome the Court reached in *Morgentaler 2* amounts to a deviation from the general trend. Again and again, the Supreme Court's handling of cases in areas as diverse as immigration, refugee status determination, extradition, deportation, security certificates, repatriation, abortion/fetal rights, marihuana possession, parental 'spanking' prerogative and access to health care correspond with expectations of the theory. Taken in conjunction with the main findings of Chapter 6, the analysis conducted in Chapter 7 paints a picture of a Court that is unambiguously and systematically engaged in strategically cultivating its legitimacy through its decision making pursuant to section 7 of the Charter of Rights and Freedoms. It also paints a picture of a Court in possession of powerful sensors for detecting the character of the external political environment as well as a set of sophisticated tools for delivering outcomes that are attuned to external political conditions.

Evidence amassed in Chapters 6 and 7 shows that two of the most important such tools are the balancing approach to the interpretation of the principles of fundamental justice (and therefore to the discovery of limits to section 7 rights), and remedial discretion. As discussed in Chapter 6, one of the key implications of the balancing approach is that it ensures that judicial decision making does not proceed without careful attention devoted to factors such as public and governmental attitudes and preferences. A survey of section 7 jurisprudence suggests that the Supreme Court consistently invokes the relevance of such governmental concerns as "administrative efficiency" (*Jones*), "avoidance of unnecessary duplication" (*Dehghani*), governmental concerns over the protection of public (*Lyons*), protection of police forces and effective conduct of intelligence investigations (*Chiarelli*), adequate investigative powers (*Beare*), or protection of the state's need for information

regarding the commission of an offence (*Thomson Newspapers*). The Court has also ensured that its balancing formulas consistently include explicit sensitivities public preferences. In this regard the Court has queried into the state of the Canadian "societal consensus" (e.g. *Rodriguez, Malmo-Levine, Canadian Foundation, Khadr 2*), asked what kinds of actions would serve to "shock the conscience" of the Canadian people (e.g. *Schmidt, Burns*), suggested the need for objective assessments of Canadian attitudes (*Kindler*), and referred to public opinion as having direct relevance in ascertaining the limits of section 7 rights (e.g. *Kindler, Burns, Suresh*). It is crucial to stress that the balancing approach does not only ensure that the Court takes into account these governmental and public preferences as it goes about its decision making. It also ensures that the *relative weight* of these preferences is taken into account. In other words, where such preferences are particularly strong and directed towards the preservation of the policy status quo, balancing formulas will by design be more likely to produce non-activist outcomes (and vice versa). As administrative costs grow more daunting, and/or as public and political opposition increases, the Court becomes increasingly less likely to deliver activist outcomes by employing balancing jurisprudence. Balancing doctrines, therefore, amount to particularly powerful judicial tools for ensuring that evolution of judicial decision making stays within the range of what the external political environment is prepared to tolerate. By implication, they are also a very powerful tool of legitimacy cultivation for they allow the Court to ensure that individual cases are resolved in light of changing external conditions. As the Court noted in *Burns*, "[i]t is inherent in the … balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (2001: para. 65). It should not be surprising, therefore, that as Charter claimants started bringing forward more visible and controversial section 7 arguments, the Supreme Court established the balancing approach as its main doctrinal methodology for assessing the principles of fundamental justice and stayed away from the rigid and categorical basic tenets approach.

The analyses show that remedial discretion is another tool of legitimacy cultivation extensively utilized by the Supreme Court. Remedial discretion can take a variety of forms including: delivery of suspended declarations of invalidity that inflict no immediate changes to the policy status quo and preserve governmental control over the policy (e.g. *Chaoulli, Charkaoui I*); provision of some relief to rights

claimants all the while maintaining the constitutionality of legislation through reinterpretation (e.g. *Canadian Foundation, Burns, Suresh*); or, delivery of decisively limited remedies that only partially address claimant's concerns (e.g. *Charkaoui 2, Khadr 1*, *Khadr 2*). While diverse in form, these strategies of remedial discretion are used largely to the same end: to soften the political impact of decisions by ensuring that neither of the two sides in the dispute experiences a total loss. As such, they are extremely useful to the Court as it confronts highly visible and controversial cases and delivers policy-laden decisions to highly attentive and mobilized audiences. In fact, the only highly visible case considered in Chapters 6 and 7 in which the Court failed to rely on a form of remedial discretion to soften the impact of an otherwise activist ruling is *Morgentaler 2*. As analysis of that case in Chapter 6 showed, the Court accrued significant legitimacy costs for this omission as much of its public support was politicized in the aftermath of the decision.[42] The Court also appeared to have learned from its *Morgentaler 2* experience as it exhibited much caution in its treatment of subsequent cases in the policy area of reproductive freedoms and fetal rights. In every other highly visible case, the Court made sure to soften the impact of its activist pronouncements by tailoring the remedy to the demands of the political environment. This clearly suggests that the Supreme Court's section 7 decision making is replete with politically sensitive jurisprudence.

The fact that the focus of Chapters 6 and 7 was on section 7 of the Canadian Charter of Rights and Freedoms should not suggest that in its interpretation of other areas of the constitution the Supreme Court does not exhibit similar sensitivities. As discussed in Chapter 3, statistical analysis of broad patterns of Supreme Court decision making suggests that legitimacy cultivation concerns are pervasive throughout the Court's work. While space confines of this dissertation prevent further case-study or cross-policy examinations, it *is* possible to quickly point to other areas of the Court's jurisprudence that exhibit similar tendencies.

Perhaps the most obvious candidate in this regard is the so-called reasonable limits clause (section 1) of the Charter which specifies that rights outlined in the Charter are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Early in its interpretation of

[42] As argued above, with an aim to soften the impact of the ruling the Court did rely on procedural as opposed substantive grounds to invalidate the abortion legislation. This, however, turned out not to be enough to soften the impact of the decision.

the reasonable limits clause the Court specified that judgments as to whether governmental actions amount to unwarranted violations of rights would involve "a form of proportionality test" (*R. v. Oakes,* 1986: para. 70). As the Court specified, the nature of the proportionality test will "vary depending on the circumstances" but "in each case courts will be required to balance the interests of society with those of individuals and groups" (*Oakes,* 1986: para. 70). Two principles are at the heart of the Court's section 1 jurisprudence: the so-called principle of rationality which suggests that a policy or a conduct must impair rights as little as possible, and the principle of proportionality suggesting that the effects of a policy or a conduct must be proportional with governmental objectives (see e.g. Beatty, 1997).

As with balancing doctrines characterizing the section 7 jurisprudence, balancing doctrines associated with the Court's section 1 jurisprudence clearly lend themselves to the tasks of legitimacy cultivation by minimizing the likelihood that individual cases will be disposed according to a rigid jurisprudential formula that exhibits no or minimal sensitivities to external conditions and popular demands. As Beatty notes (1997: 486):

> Rationality and proportionality are both purely formal principles or criteria of evaluation. Their substance depends entirely on the aims and objectives that underlie whatever rule or regulation is being reviewed. Both test the policy instruments devised by governments against standards and benchmarks of their own making. There is no second guessing or reordering the priorities that governments establish for themselves.
> …
> In the result, the principles of rationality and proportionality establish an analytical framework for the courts to follow that is acutely sensitive to ideas of popular sovereignty and the principle of majority rule. Both allow 'the people' and their elected representatives to pursue almost any public interest or political objective. Neither authorises the judges to override the decisions of the elected representatives of the people simply because they believe that the interests and activities affected by a law should be balanced in a different way.

Application of the proportionality doctrine also allows for rights analyses that are *fundamentally contextual* in character so that content of individual rights and freedoms is defined not in terms of a pre-determined and potentially rigid standard, but in terms of external conditions and priorities within which rights are exercised. As balancing doctrines associated with section 7, section 1 jurisprudence enables a contextual, case-by-case analysis that allows for exhibiting acute sensitivities to changing political conditions and for minimizing the likelihood that evolution of the Court's decision making will tend towards abrogation of popular demands or pivotal governmental and societal interests.

While the Court's section 1 doctrinal methodologies suggest that politically sensitive jurisprudence permeates the Court's treatment of Charter rights, this is *not* to suggest that such jurisprudence is confined to the purview of section 1. Similar balancing doctrines characterize the Court's treatment of section 35 of the Constitution Act, 1982, for example, which delineates rights of the Aboriginal Peoples of Canada and which is beyond the purview of section 1. As discussed in Chapter 4, the Supreme Court has developed a series of balancing tests for determining whether governmental infringements of Aboriginal rights are justified. In *Gladstone* (para. 75), for example, the Court ruled that governmental objectives having to do with conservation goals, issues of economic and regional fairness, or interests of non-Aboriginal groups could all be used to limit the content and scope of Aboriginal rights. According to the Court: "*In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment" (para. 75, original emphasis). Contextual and politically sensitive balancing approaches that optimize the likelihood of delivering legitimacy-attentive outcomes are, therefore, characteristic of broad patterns of Supreme Court of Canada jurisprudence. Therefore, *regardless of what section the Court invokes* in dealing with a rights claim (s. 1, solely s. 7, or s. 35), doctrinal formulations tend to take the form of politically sensitive jurisprudence that is conducive to legitimacy cultivation by allowing the Court to exhibit direct sensitivities to changing external conditions associated with societal interests and governmental mobilization. Whether in the area of equality rights where section 1 has been heavily invoked, or in those areas where section 1 is either unavailable or used infrequently (i.e. Aboriginal rights and national security issues under section 7), the Court's jurisprudence is characterized by politically-sensitive doctrines well suited to the tasks of legitimacy cultivation.

CONCLUSIONS:

Writing in the immediate aftermath of the Supreme Court of Canada's *Khadr 2* (2010) decision in which the Court held that Canadian interrogation of Omar Khadr at Guantanamo Bay amounted to a breach of his section 7 rights but failed to order his repatriation, Gary Pardy of the *Ottawa Citizen* described the decision as "The biggest 'but' in Canadian judicial history" (2010). Preceding chapters of this dissertation show that Pardy's assessment of the *Khadr 2* ruling is hardly correct for almost an innumerable number of prominent Supreme Court decisions involve similarly forceful 'buts'. In the *Secession Reference* case discussed in Chapter 5, for example, the Court proclaimed that Quebec does not have a right to unilaterally secede from Canada, *but* that the rest of the Country has a constitutional duty to negotiate requisite constitutional changes should the Quebec populace express a legitimate desire to secede. In the landmark *Patriation Reference* (1981) the Court ruled that as a matter of "black-letter law" no provincial consent is required before the federal government can request the U.K. Parliament to amend the Canadian constitution, *but* that constitutional conventions do require a "substantial degree" of provincial consent before such a request can be sought. In the *Marshall 2* decision discussed in Chapter 4, the Court affirmed Aboriginal commercial fishing rights pursuant to treaties dating back to 1760s, *but* held that these rights can be exercised only as long as "equitable access to resources" is assured for non-Aboriginal interests. In *Suresh* the Court recognized that torture abrogates international conventions and that Canadians believe it to be neither "fair" nor "compatible with justice," *but* ruled that "in exceptional circumstances" deporting an individual to torture is justified. In *Canadian Foundation* the Court found section 43 of the Criminal Code allowing for parental 'spanking' of children neither overbroad nor vague, *but* read into it specific criteria delineating "a risk zone for criminal sanction" so that corporal punishment cannot be delivered through the use of objects, or directed at teenagers and children under two years of age. In *Same Sex Marriage Reference* of 2004 the Court ruled that extending the capacity to marry to persons of the same sex is consistent with the Charter of Rights and Freedoms, *but* failed to pronounce on the most charged question of whether exclusively heterosexual definition of marriage is no longer tolerable under the Charter. Examples could go on and on.

Consider also the Court's proclivity to deliver middle-of-the-road outcomes by utilizing remedial discretion to qualify otherwise activist decisions. As discussed in Chapter 7, the Court's *Khadr 1* ruling declared that Khadr was entitled to a disclosure of documents that CSIS collected, but the Court "varied" the scope of the Court of Appeal's remedy ultimately preventing Khadr's defence team from obtaining the most sought-after documents. The Court also regularly suspends its declarations of invalidity for a period of time so as to ensure that no immediate change to the policy status quo is inflicted and that the political impact of a decision is softened. The Court engaged in such politically sensitive acts in what are often considered as two of its most controversial and activist decisions of the first decade of the 21st century: *Chaoulli* (2005) and *Charkaoui 1* (2007). As discussed in Chapter 2, it is difficult to overestimate the extent to which suspended declarations of invalidity can blunt the impact of otherwise activist decisions. In *Charkaoui 1*, for example, the suspension has allowed the federal government to implement the most minimal changes to its controversial security certificates regime used for fighting terrorism. From the Court's perspective, it has also ensured that the federal government smoothly acquiesced to what otherwise would have been a bold and controversial act of judicial activism.

The Court's reliance on remedial discretion in politically sensitive environments is also evident in *Gosselin v. Quebec* (2002), another high-profile case challenging Quebec regulations that dramatically reduced social assistance entitlements of persons under 30 years of age. The claimants in the case were requesting the Quebec government to pay in excess of $400 million in lost benefits. While the majority of the Court failed to declare Quebec regulations invalid and was therefore not required to consider the issue of remedy, the minority found regulations unconstitutional but declared that "suspension of the declaration would have been appropriate in this case" in part because of "the large sums of money spent by legislatures on social assistance programs such as this" (para. 293). As Ryder notes (2003: 269), while majority and minority opinions in *Gosselin* "fashioned very different responses to the Charter challenge, there was very little difference in the practical results. Neither opinion delivered any remedy to the claimant, and neither imposed any costs on the Quebec government." Ryder goes on to note that "[f]rom the legislature's point of view, suspended declarations can make it possible to achieve a seamless, costless transition to a Charter-compliant legal regime" (2003: 270).

Cases discussed in the preceding paragraphs can hardly be described as aberrations from the general tenor of Supreme Court of Canada decision making. Rather, they provide illustrations of the pervasive proclivity on the part of the Court to deliver outcomes that are highly attuned to sensitivities of political moments the Court is facing. Evidence mounted by this dissertation suggests that at the heart of this proclivity lie judicial concerns about legitimacy cultivation which compel judges to devise decisions that exhibit sensitivities to the state of public opinion, that avoid overt clashes and entanglements with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence. Whether one relies on statistical appraisals of the Court's decision making (Part 2), detailed examinations of carefully constructed case studies (Part 3), or in depth analysis of broad patterns of constitutional jurisprudence across different policy areas (Part 4), it is difficult to escape the conclusion that strategic legitimacy cultivation abounds at the Supreme Court. Judges systematically alter their decision making in order to cultivate their legitimacy and avoid costs associated with not having their rulings implemented, with instigating controversial and legitimacy-threatening backlashes, or with having their decisions undergo societal disdain.

Decision-making patterns of the Canadian Supreme Court also suggest that much of the judicial aptitude for legitimacy cultivation is *learned* on the job. Instances of legitimacy failure appear to play a crucial role in increasing judicial appreciation of the importance of institutional legitimacy and in heightening judicial awareness of how to successfully bring about legitimacy cultivating outcomes. Supreme Court of Canada decision making provides several examples of apparent legitimacy failure that have led the Court to fine-tune its jurisprudence in line with predictions of the legitimacy cultivation theory. In fact, almost every case of abject failure is followed by a more prudent, legitimacy-attentive behaviour. Perhaps most dramatic example of this is the Court's experience with the *Marshall* (1999) case on Aboriginal rights in which the Court contradicted itself in what has been described as a "precipitous" manner in the space of two months (Barsh and Henderson, 1999: 15). As discussed in Chapter 4, while the Court's initial, *Marshall 1* ruling incurred much disdain from the public, organized groups and the media, and even resulted in depletion of some of the Court's diffuse support in Eastern Canada, the second ruling redeemed the Court's standing in the eyes of these audiences by bringing the decision better in line with the predictions of the legitimacy cultivation theory.

Discussions in Chapters 6 and 7 suggest that similar moderation of the Court's activist proclivity occurred in the aftermath of *Singh* (1985) and *Askov* (1990) decisions. While the Court did not have an opportunity to modify its *Daviault* (1994) reasoning since it was promptly reversed by the Parliament, the public relations disaster that the decision instigated sent a clear message to the Court about the perils of exercising undue policy activism on a potentially visible and unpopular issue. As Cameron notes (2006: 127), it was the experience of *Daviault* that led the Court to exercise restraint in subsequent "newsworthy cases" such as *Canadian Foundation* and *Malmo-Levine*.

It appears that the Court also learned from its *Morgentaler 2* (1988) experience. As discussed in Chapter 7, in that decision the Court struck down abortion provisions contained in the Canadian Criminal Code only to see the decision instigate much public controversy and place the Court at the centre of an emotional debate. Consequent surveys of public opinion found that the Court's diffuse support experienced significant politicization in the aftermath of the decision (Hausegger and Riddell, 2004). And, as with *Singh, Marshall 1,* and *Askov,* following *Morgentaler 2* the Court again exhibited strong inklings towards restraint as evident by the fact that by the time it heard *Borowski v. Canada* (1989) some nine months later, "judges wanted to avoid the issue of foetal rights at all costs" (Roach and Sharpe, 2003: 391).

Operating at the back of almost three decades of experience in interpreting the Charter of Rights and Freedoms and addressing a variety of thorny policy dilemmas, decision making of the present-day Supreme Court of Canada bespeaks a court that is well versed in detecting the subtleties of external political moments and that possesses a sophisticated set of tools for delivering politically-attuned outcomes. Whether one looks at its doctrines designed to balance societal and governmental considerations against those of the individual, its delicate decision-making outcomes in specific highly-charged and visible cases, or its utilization of a variety of remedial tools tailored to softening the impact of otherwise activist pronouncements, it is evident that the Supreme Court of Canada is extremely well-situated for the tasks of legitimacy cultivation. In fact, failing to take account of the pervasiveness of legitimacy cultivation at the Supreme Court comes at a considerable cost to one's understanding of the Court's jurisprudence and the Canadian constitutional law.

Findings of this dissertation also have significant implications for understanding the development and evolution of high-court jurisprudence. Perhaps

most obviously, the analysis suggests that tasks of constitutional interpretation cannot be meaningfully separated from external, political conditions. The importance of legitimacy cultivation compels courts to keep a highly attentive eye on political and social realities from which individual cases arise. Consequently, external factors serve to importantly delineate the boundaries of rights protection, while understanding judicial decision-making necessitates taking close accounts of the external context and how it affects the formation and evolution of jurisprudence and judicial disposition of individual cases. Taking rights or constitutional jurisprudence seriously, in other words, can hardly occur by turning a blind eye to politics. Judicial institutions are fundamentally embedded in their socio-political environments.

Consider the so-called living tree (or living constitution) conception of constitutional jurisprudence that has been prominent in Canada ever since the 1930 'Persons' case descried the Canadian constitution as "a living tree capable of growth within its natural limits" (*Edwards v. A.G. Canada*, 1930: 136). The Supreme Court affirmed this conception of Canadian constitutionalism as recently as in 2004 *Same Sex Marriage Reference* when it ruled that "our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life" (para. 22). If courts deal with living trees, and if those trees continually evolve in particular directions, how do we explain the shape of those trees and why some branches grow bigger and stronger at particular historical moments? The theory of legitimacy cultivation can help answer these questions.

As Chapter 4 illustrates, the fact that Supreme Court of Canada's jurisprudence in the area of Aboriginal rights in 1999 branched in the direction of the "equitable access to resources" formulation had much to do with the fact that the external political environment at that time was not prepared to tolerate a more liberal formulation. Contrast, in fact, the Court's treatment of the 1999 *Marshall* case with *R. v. Syliboy* ruling of the Cape Breton County Court in 1928, both of which dealt with the same question of Mi'kmaqs' rights to access resources. In *Syliboy* the county court faced a claim of the Grand Chief of the Grand Council of Mi'kmaqs, Gabriel Syliboy, that a treaty from 1752 provided Mi'kmaq people with rights to engage in hunting, fishing and gathering. The court dismissed the claim arguing that Mi'kmaqs had no proper status or capacity to sign treaties. The court's language was unequivocal: "the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country

as its own… The savages' rights of sovereignty even ownership were never recognized" (*R. v. Syliboy,* 1928: 313-314). The *Syliboy* ruling "represented the law applied to Mi'kmaq people hunting, fishing and gathering" for 57 years (1928-1985) until *The Queen v. Simon* arrived before the Supreme Court in 1985 (Wildsmith, 2001: 209). In *Simon* the Supreme Court unanimously held that the Mi'kmaq had both the authority and the capacity to sign treaties with the British. The Supreme Court offered a strong repudiation of *Syliboy* stating that it reflected "biases and prejudices of another era in our history," and that "[s]uch language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada" (*Simon,* para. 21). However, just as *Syliboy* was reflective of "biases and prejudices" of its own historical era that by 1985 could be deemed "no longer acceptable in Canadian law," so did the Court's 1999 definition of Aboriginal rights in *Marshall 2* fundamentally reflect limitations of the late 20th century external political environment. While what could be described as overt racism no longer helps define Canadian law, it is far less clear that making the exercise of Aboriginal rights conditional upon provision of an "equitable access to resources" to non-Aboriginal communities does not greatly deplete the content of those rights.

Developments in other areas of the Supreme Court jurisprudence can be explained in similar terms. As Chapter 5 shows, the primary reason for the Canadian constitutional jurisprudence on the thorny question of Quebec-Canada relations to branch in the new direction of a "duty to negotiate" in Summer of 1998 had to do with the fact that a fundamental consensus existed among the government of Canada, the Quebec separatist movement and the Canadian public both inside and outside of Quebec that negotiations should be a central part of any process effecting the secession of Quebec. The Court's partial constriction of the parental prerogative to spank children in *Canadian Foundation* (i.e. spanking allowed in general, but not to be applied to teenagers, to children under two years of age, through the use of objects, or by teachers etc.) was also decidedly reflective of the existing societal and political consensus. As discussed in Chapter 6, the Court's decision recognized as much by relying on doctrines designed to take account of the current "societal consensus."

Similarly, is it surprising that the gay and lesbian movement's success before the Supreme Court occurred during the latter stages of the 20th century, the time when the Canadian public started exhibiting support for ending discrimination against gays and lesbians? More specifically, is it surprising that some of the most fearlessly

activist Supreme Court decisions in this policy area, such as *R. v. Vriend* (1998) as discussed in Chapter 5, occurred after the federal government had *switched sides* and started intervening on behalf of the gay and lesbian movement, and as provincial legislatures were in the process of amending their human rights codes to include protections for gays and lesbians *en masse*? Is it furthermore surprising that in its most visible and controversial decision in this policy area (*Same Sex Reference,* 2004), in which the Court invoked the notion of living tree constitutionalism, "the Court accomplished the tricky task of giving all sides of the volatile debate something positive, yet making it unmistakably clear that same-sex marriage is a concept whose time has come" (Makin, 2004). As the *Globe and Mail's* senior Supreme Court correspondent reported, the Court's success in the *Same Sex Reference* was primarily due to the fact that it answered "only the questions it absolutely had to answer, and no more" and that "[i]t did so with the undeniable force of unanimity, allowing it to add the symbolism of attributing its opinion to 'the Court'" (Makin, 2004).[43]

Turning to the issues of terrorism, is it surprising, as argued in Chapter 7, that the Supreme Court announced that deportation to torture is justified in December of 2001 when World Trade Center towers were still smouldering (*Suresh,* 2001)? In the aftermath of the 2007 *Charkaoui 1* decision, some rights activists professed to return back to the top Court to reverse the *Suresh* precedent which newspapers described as being "stuck in the craw of civil libertarians" (Makin, 2007). As Sujit Choudhry, who represented Human Rights Watch in *Charkaoui 1,* commented in the aftermath of that decision: "*Suresh* is still open, and we'll be back" (Makin, 2007). Given that *Suresh* was delivered on the heels of 9/11 one could postulate that the Court might indeed be inclined to reverse that ruling if it were soon to face a similar question. Compared to December of 2001, the external political environment would after all probably be far less intimidating. In the *long* term, however, this would legitimacy-wise not be a prudent course of action as sometime in the future the Court might very well encounter a political environment (including a federal government) that would find it simply intolerable not to extradite a terrorist even to torture. The Court's current doctrine, involving a balancing approach that proceeds on the basis of contextual case-by-case assessments so that "the outcome may well vary from case to case

[43] In substantive terms the Court upheld the Parliament's proposed legislation on same sex marriage, supported arguments of religious officials that they should not be compelled to officiate over same-sex unions, and failed to pronounce on the most charged question of whether exclusively heterosexual definition of marriage is no longer tolerable under the Charter.

depending on the mix of contextual factors put into the balance" (*Burns* 2001: para. 65), is in fact *most* suitable to the tasks of legitimacy cultivation.

All of this is to suggest that the evolution of Canadian constitutionalism, as captured by the living tree metaphor, is underpinned by judicial concerns over legitimacy cultivation. Furthermore, evidence suggests that the Canadian Supreme Court is far from being an outlier from the worldwide trend in this regard and that similar developments characterize the development and evolution of constitutional jurisprudence worldwide. In fact, most recent findings from comparative constitutional law suggest that the power and influence of judicial institutions worldwide has been accompanied by two distinct developments: (i) the spread of the living-tree constitutionalism and (ii) "the emergence of *proportionality* as the prevalent interpretive method in comparative constitutional jurisprudence" (Hirschl, 2010: 79-80, original emphasis).[44] Faced with an increase in their political relevance, high courts worldwide appear to exhibit keen tendencies towards ensuring that evolution of their constitutional jurisprudence, and the evolution of the documents they are interpreting, proceed in a balanced manner that exhibits sensitivities to external political conditions, that avoids clashes with key political actors, and attains broad public support. As Hirschl notes (2010: 80-81):

> By its very nature proportionality epitomizes moderation and conciliation, and favors middle-of-the-road, balanced, or pragmatic solutions to contested issues. It also allows judges to consider nearly any factor, principled or practical, real or hypothetical, in weighing and balancing competing claims. This is a consequentialist, compromise-oriented interpretive method. Extreme or radical positions are not likely to fare well under proportionality. … Thus, much like the "median voter" or catchall party logic in electoral politics, proportionality enjoys an a priori broader appeal base than more principled or overtly ideological interpretive approaches.

This study also suggests that living tree constitutionalism is to a significant extent of fundamentally *political* character. Public opinion and mobilization of political actors, such as governments, organized groups and social movements, *matter* in affecting the evolution constitutional jurisprudence, as does subjecting judicial institutions to well-organized political pressures. Those interested in using courts to sustain or change a policy status quo are therefore wise to adopt a range of distinctly political advices: remain immobilized at your peril; offset counter-mobilization; marshal public opinion; enlist political activists prepared to demonstrate or otherwise

[44] According to Ginsburg, constitutions are by nature "living, growing documents" that "do not exist in some 'pure' realm, ready for exposition by expert judges," and the process of judicial review is used to 'develop' a constitution (2003: 71).

pressure courts on your behalf; attract favourable media coverage; wreck the public credibility of your rivals; ensure that your carefully constructed test cases arrive before courts during favourable 'political moments'; ruin the 'political moments' of your adversaries; make allies with groups ready to expend considerable resources to crowd the courtroom and muster sophisticated legal and/or social-scientific arguments; and, perhaps above all, enlist governmental support for your causes or prevent governmental counter-mobilization. Of course, burgeoning support structures of legal mobilization that tend to accompany rights revolutions, such as those that occurred in Canada and the United States, suggest that those most directly involved in the business of shaping the boundaries of constitutionalism and rights protection have already adopted much of this advice (see e.g. Epp, 1998; Klarman, 2005).

The evidence mounted by this dissertation suggests that there are distinct limits to how much policy change can judicial institutions in general, and the Supreme Court of Canada in particular, deliver (e.g. Rosenberg, 2008). The analysis should therefore serve to alleviate the concerns of those who fear that judges can run roughshod over governmental policy, and perhaps somewhat heighten the concerns of those who look at courts with a hope of bringing about transformational societal change. It is crucial to point out, however, that nothing in this dissertation suggests that courts are irrelevant. In fact, the introduction of the Charter of Rights and Freedoms has had a significant impact on Canadian politics by providing a new channel of policy contestation and many changes induced through this channel have been significant and often unlikely to otherwise be reached at the same historical moments. This dissertation *does* suggest, however, that policy changes induced by judicial institutions, as those in other walks of human endeavour, are rarely brought about free from the vagaries of politics. Hence, to the extent that one hopes to rely on judicial institutions to induce a transformational change by *sidestepping politics,* the evidence suggests that one may indeed be likely to harbour a hollow hope. While courts can induce transformative and unpopular changes, such changes will tend to be relatively rare. Most of the time, judicial decisions will reflect politics of their time (see e.g. Dahl, 1957; McCloskey, 1960).

Recent findings from the U.S. context arrive at similar conclusions (see Friedman 2009). According to Friedman, American history since the declaration of independence teaches that people, their representatives, and social movements have time and time again succeeded in profoundly shaping the content of the American

constitutional law ultimately ensuring that "[j]udicial power exists at popular dispensation" (370). Friedman also suggests that the dialogue between the public and the Supreme Court is of fundamentally political character in which social actors play a crucial role by organizing backlashes against unfavourable rulings, mounting popular opposition and ultimately "shaping public constitutional understandings" (383).

> This give-and-take between the courts and the people is of the utmost consequence, for through it the substance of constitutional law itself is forged. Supreme Court justice Ruth Bader Ginsburg noted this phenomenon, explaining that judges "do not alone shape legal doctrine." Rather, she observed from experience, "they participate in a dialogue with other organs of government, and with the people as well." Justice O'Connor made much this same point: "Real change, when it comes," she said, "stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory – in court or legislature – that is not a careful by-product of an emerging social consensus." As we have seen, Owen Roberts, the swing vote on the Court Franklin Roosevelt attacked, conceded years later, once he was off the bench, that "it is difficult to see how the Court could have resisted the popular urge" for change in the Court's doctrine. As judicial rulings respond to social forces, and vice versa, constitutional law is made (Friedman, 2009: 384).

Implications for the Study of the Supreme Court of Canada

Perhaps the most significant contribution of this dissertation to the study of Canadian law and politics is in addressing the question of "what are the implications of judicial power for other actors in the political system and for society as a whole" which has been recognized as inadequately addressed by existing research (Smith, 2002: 8). As discussed above, the dissertation shows that in order to understand the power and influence of the Canadian Supreme Court it is of paramount importance to consider it in its broader political and societal context. The dissertation also shows that application of the strategic approach can be very useful in this regard. While there have been considerable examinations of ideological divisions within the Supreme Court associated with the attitudinal model of judicial decision making (see, for example, Heard, 1991; Ostberg and Wetstein, 2007; Songer and Johnson, 2007), the application of the strategic approach, as the other major comparative approach concerned with measuring the influence of political or external factors on judicial decision making, has been much less common (but see Flanagan, 2002; Hausegger and Haynie, 2003; Manfredi, 2002; Radmilovic, 2010a; Radmilovic 2010b). One of the main findings of this study is that strategic judicial behaviour is widespread at the Supreme Court of Canada and that failing to take this into account comes at a significant cost to our understanding of the Supreme Court and of the character and

evolution of Canadian constitutionalism.

The dissertation also makes a direct contribution to the contentious question of what is the magnitude and character of the Supreme Court of Canada's influence in the wake of the Charter. As discussed in the introductory chapter, the existing literature provides a plethora of answers to this question and much disagreement persists about just how influential the Supreme Court is. On the one hand are arguments suggesting the Charter has revolutionized Canadian politics (Morton and Knopff, 2000) and helped push the Canadian system of government away from one characterized by "constitutional supremacy," to one characterized by "judicial supremacy" (e.g. Manfredi, 2001; Martin, 2005). These arguments are contrasted by research arriving at considerably more restrained conclusions: the Charter has largely failed to modify the basic power relations in Canada (Russell, 1994); governmental actors retain significant capacity to curb judicial influence by enacting legislative sequels (Hogg and Bushell, 1997; Hogg et al., 2007); the Supreme Court generally struggles in redressing rights violations that lack broad consensus, but can help encourage or compel reexamination and reform of existing practices and make them adhere to normative values that do enjoy broad support (Hiebert, 2002); the entrenchment of the Charter has not led to judicial supremacy or to the empowerment of the Supreme Court at the expense of the executive (Kelly, 2005); broad patterns of Supreme Court decision making are suggestive of a "moderately active" court (Songer, 2008). The study presented in this dissertation directly informs these debates by providing a novel theoretical perspective and by mustering a novel set of empirical evidence. Perhaps its key contribution is to specify and test a set of conditions under which the Supreme Court acts as a decisive and consequential policymaker and those under which its policymaking influence is feeble. The study demonstrates that the Supreme Court's policymaking influence is contextual and that it fluctuates vis-à-vis factors operating in the external, political environment. Factors such as mobilization of governmental and organized-group actors, public opinion and pre-decision visibility critically affect the Court's policymaking influence.

The study also directly informs two of the most prominent analyses of the Supreme Court of Canada that have emerged since the Charter was entrenched in 1982: the so-called Charter revolution thesis and the so-called dialogue theory. According to the Charter-revolution thesis, the growth of interest-group litigation in the wake of the Charter, sparked and sustained by the so-called Court Party coalition

of societal interests, has brought about an undemocratic revolution in Canadian politics whereby "[a] long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy" (Morton and Knopff, 2000: 13; see also Brodie, 2002). A key feature of the revolution is judicial constitutionalization of minority policy preferences that otherwise would not receive recognition through the operation of traditional legislative processes (Morton and Knopff, 2000: 25). Morton and Knopff (2000: 34) also claim that judges play a key role in this revolutionizing process and label the Charter revolution as being "caused chiefly by judicial discretion." In making this argument, they examine what they note are

> three main ways in which judges might deny the claim that the Charter revolution is caused chiefly by judicial discretion: (1) that the Charter gives effect to certain obvious or core values that are beyond the discretion of judges to transform; (2) that some parts of the Charter revolution are clearly required by the charter's text; and (3) that where the text is unclear, judges can find objective guidance for their decisions in such non-textual sources as the original intent, traditional understanding, or essential purpose of Charter rights (Morton and Knopff, 2000: 34).

Following such an analysis, Morton and Knopff (2000: 57) conclude that "[j]udges themselves have chosen to treat the *Charter* as granting them open-ended policymaking discretion."

The Charter revolution thesis provides a significant contribution to understanding how the Charter has affected Canadian politics and the performance of the Supreme Court of Canada. Perhaps most importantly, the thesis suggests that the exercise of judicial power is in part defined by societal mobilization. At the same time, however, the argument significantly *overestimates* the amount of policymaking discretion exercised by Supreme Court justices. Instead of Charter-empowered justices enjoying an "open-ended policymaking discretion," the data suggest that the Supreme Court's policymaking discretion is significantly constrained by such factors as mobilization of governmental actors and pre-decision visibility of individual cases. The data show that authors of the Charter revolution thesis do not pay enough attention to the extent to which forms of *majoritarian* mobilization, perhaps most importantly undertaken by governmental actors, can help define the evolution of constitutional jurisprudence and constrain the policymaking influence of the Supreme Court of Canada.

The study also carries important implications for the dialogue theory whose key tenet is that Supreme Court rulings rarely amount to a last word as legislators regularly re-establish their preferences by enacting sequel legislation (Hogg et al., 2007). As the Charter revolution thesis, the dialogue theory provides important insights into the relationship between judicial review and democratic governance in Canada. Perhaps most importantly, the theory recognizes limits of the anti-majoritarian objection to the legitimacy of *Charter*-based judicial review by suggesting that judicial pronouncements are rarely final and that they can be, and often are, significantly modified through the introduction of legislative sequels. However, the theory's sole focus on the analysis of legislative sequels suggests that that it fails in providing a comprehensive account of legislative-judicial relations as well as in mounting a comprehensive explication of the limits of the anti-majoritarian objection to judicial review.

The evidence mounted by preceding chapters clearly shows that the Supreme Court of Canada engages in adjustment of its decision making *in anticipation* of unfavourable governmental reactions. Governments, therefore, curb judicial influence not just by enacting sequel legislation in the aftermath of an unfavourable ruling, as the dialogue theory suggests, but also by mobilizing during the pre-decision stage of the process and by directly affecting the likelihood that a Supreme Court's decision will result in an unfavourable change of the policy status quo in the first place. For these reasons, the dialogue theory *underestimates* the extent to which governmental actors are successful in curbing the policymaking influence of the Court. Relatively low numbers of positive replies to judicial declarations of invalidity (see Manfredi and Kelly, 1999), therefore, may be suggesting not that governmental actors are relatively powerless in the face of judicial policymaking influence, but that governmental policy preferences are largely satisfied at an earlier stage of legislative-judicial relations. For these reasons, a comprehensive account of legislative-judicial relations necessitates taking account of judicial strategic sensitivities to mobilized preferences of governmental actors.

The results show that the dialogue theory also ignores the Court's linkages with other important actors such as organized groups. Just as authors of the Charter revolution thesis emphasize the role of organized groups in constitutional litigation but tend to devote insufficient attention to the role and influence of governmental actors, so is the dialogue theory silent on the question of how non-governmental

actors (i.e. organized groups, the public) affect the influence of the Supreme Court. The theory of strategic legitimacy cultivation developed in this dissertation addresses this imbalance in the existing literature by providing a more comprehensive theoretical framework that demonstrates how these factors *combine* to affect judicial policymaking influence and the evolution of Canadian constitutionalism.

Implications for the Comparative Study of Judicial Institutions

The dissertation also has significant implications for comparative study of judicial institutions. The study shows that in addition to goals associated with ensuring proper application of legal principles or with attaining judicial attitudinal preferences, judges pursue additional goals associated with legitimacy cultivation. The study shows, in fact, that legitimacy cultivation can sometimes compete with ideological and legal factors. For example, the fact that the majority of the Canadian Supreme Court reversed itself in the space of two months in the *Marshall* case suggests that some of the justices clearly sacrificed either their policy preferences, or what they earlier considered to be a proper interpretation of rights, in order to ensure that a legitimacy-attentive outcome was ultimately reached in the case. Similarly, Chief Justice Dickson's conference notes on the *Borwoski* case suggest that the two female justices on the Court were prepared "to decide the case on the merits and hold that the foetus was not protected under the Charter" (Sharpe and Roach, 2003: 391-2). However, in light of the fact that "other justices were determined to avoid the thorny and loaded abortion issues" in the aftermath of *Morgentaler 2*, the Court's unanimous decision deciding the case solely on the doctrine of mootness suggests that the two female justices sacrificed either their policy preferences or what they considered to be a principled application of law in order to bring about a legitimacy-attentive outcome.

If there is one finding that emerges out of the recent burgeoning literature on determinants of judicial decision making, it is that judicial behaviour is a complex phenomenon driven by a variety of factors and influences. To note just a few examples: in systems characterized by judicial insulation and independence, it is ideological values of individual justices that can be strong predictors of judicial behaviour (Segal and Spaeth 2002); in political settings characterized by a lack of institutional independence and insecurity of tenure, it is strategic defection to the dominant governmental actor that importantly determines judicial disposition of individual cases (Helmke 2005); where appointments and career paths of individual

judges are supervised by centrally controlled government agencies, one can also expect considerable judicial deference to the government (Ramseyer and Rasmusen 2001). These "externalist" accounts of judicial decision-making are usually contrasted with "internalist" explanations that have a traditional foothold in law school teaching and that emphasize internal strictures of law, such as the principle of *stare decisis*, as determinants of judicial decision-making. As Segal reports (2008: 22), some empirical analyses corroborate the internalist argument and there is evidence that U.S. courts follow the principle of *stare decisis* both vertically (when precedent is established by higher courts) and horizontally (when precedent is established by the same court or by a court at the same level), and particularly so in cases that do not garner a high degree of salience.

In light of these findings it is difficult to credibly claim that a single factor or paradigm, either internalist or externalist, is solely or even primarily responsible for decision-making outcomes of any one court. For this reason it is important to stress that the argument developed in this dissertation does not suggest that all high-court decision making is strategic, nor that legal and/or attitudinal factors are *prima facie* assigned a secondary role and/or lesser influence. Rather, it is suggested that under specific conditions strategic factors can *matter more.* For example, the evidence suggests that strategic considerations over legitimacy cultivation played a minor role in *Singh, Marshall 1,* and *Daviault* decisions which failed to attract pre-decision media coverage or significant mobilization of governmental and organized-group interests. However, in more visible cases such as *Canadian Foundation, Malmo-Levine, Chaoulli, Charkaoui 1, Khadr 1* and *2* (etc.)*,* and as the Court went about writing the *Marshall 2* decision in the context of high visibility and considerable governmental and organized-group mobilization, strategic legitimacy considerations assumed a much more prominent, even decisive, position.

Also, this study explores judicial strategic sensitivities to external factors and, therefore, does not consider the extent to which internal, within-bench dynamics are suggestive of strategic judicial calculations (see e.g. Maltzman et al., 2000). This is not to suggest, however, that collegial decision making is *not* characterized by strategic calculations. In fact, one implication of the theory presented in this dissertation is that strategic calculations pertaining to legitimacy cultivation are expected to imbue within-bench interactions among justices during the opinion-writing process. One can expect, therefore, that pre-decision interactions between

justices during the *Borowski* case, or in the aftermath of *Marshall 1*, were importantly informed by legitimacy considerations. These implications are not tested in this work because there is only so many ways in which one researcher can test implications of a theory. They do, however, amount to a potentially fruitful area of future research.

The study also provides an alternative explanation to the so-called positivity bias theory discussed in Chapter 2 for how judicial institutions can attain and retain institutional legitimacy. In addition to the operation of purely procedural factors (i.e. symbols of impartiality, insulation, fairness and apolitical behaviour associated with judicial institutions), Chapters 3-7 provide considerable evidence for the claim that the Supreme Court of Canada cultivates its legitimacy by relying on strategic behaviour. Courts, therefore, exhibit strategic sensitivities to external political conditions so as to devise substantive outcomes that promote institutional legitimacy.

The study also has significant implications for the literature on strategic decision making that explores judicial sensitivities to external factors. As discussed in Chapter 2, the study is most closely related to the work of Vanberg (2005) and Staton (2010) who argue that legislatures' fear of a potential public backlash for going against a popular Court or a decision can serve as an effective enforcement mechanism for judicial decisions. For this mechanism to kick in, however, Vanberg and Staton argue that the public needs to be able to monitor legislative reactions to judicial decisions; the key empirical implication being that popular courts should be more likely to engage in activism when public awareness is high.[45] Evidence from the Supreme Court of Canada does not suggest that pre-decision public awareness, or visibility has this effect on judicial decision making. As illustrated by statistical analyses conducted in Chapter 3, even after controlling for such factors as mobilized preferences of governmental and organized-group actors, the data suggest that pre-decision visibility does not have a positive effect on the likelihood of policy activism. Rather, the evidence is inclined to suggest that visibility tends to moderate judicial tendencies towards policy activism. Case study and comparative analyses conducted in Chapters 4-7 arrive at similar conclusions. The evidence from the Supreme Court of Canada suggests that visibility has more complex effects on judicial decision

[45] As discussed in Chapter 2, Staton additionally argued that judges can enjoy a "measure of control" over how much publicity their decision receive by themselves issuing press releases and thereby increasing visibility of their decisions. He finds that judges on the Mexican Supreme Court selectively promote decisions striking down the policy status quo in order to increase their visibility and ensure better prospects for their implementation.

making. In particular, high levels of visibility tend to exaggerate judicial tendencies to devise decisions that do not abrogate from the state of public opinion, that avoid overt clashes and entanglements with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence.

The findings also directly inform Staton's recent argument that strategic judicial behaviour can serve to *undermine* the legitimacy of courts by sending a message to the public that courts are not impartial institutions (2010). The public, according to Staton (2010), reads through judicial strategic behaviour, either by itself or through media assistance, the key implication being that public awareness of strategically deferential behaviour results in a depletion of institutional legitimacy while awareness of what Staton labels as non-strategic, "impartial," and "sincere" behaviour results in an augmentation of institutional legitimacy. Evidence mounted by this dissertation suggests several qualifications to the Staton's argument. As suggested in Chapter 2, this argument rests on a questionable assumption about how much information and expertise members of the general public can be expected to possess so as to distinguish between "sincere" and "insincere" judicial behaviour and therefore strategic and non-strategic decision making. The extensive research of post-decision media coverage conducted for this dissertation suggests that Canadian media does not have a tendency of reporting whether particular decisions are delivered in accordance with 'sincere' or 'insincere' judicial preferences, or amount to strategically-delivered outcomes. Rather, and as Sauvageau, Schneiderman and Taras conclude in their analysis of the Supreme Court of Canada media coverage (2006), media tend to focus on political implications of individual rulings, on who won and who lost, and on reactions of key political actors. Their findings show that the dominant frame of media coverage of Supreme Court decisions involves stories that "highlight conflict between the parties, often involving sports, battle or war metaphors," and that "[w]inners and losers are the focus of [such] stories" (2006: 76). While media reports emphasizing 'insincere' or strategic character of Supreme Court rulings do sporadically occur, they are rare. Furthermore, when such reports do occur, they tend to *favourably* characterize the Court as exhibiting well-founded prudence and as being reasonable in the face of often strenuous and thorny political questions. In fact, my research for this dissertation has uncovered only one reference by the media to the effect that the Supreme Court was acting in a "strategic" fashion. As reported in Chapter 7, this reference was made by Kirk Makin, a senior *Globe and*

Mail Supreme Court reporter, in the aftermath of the *Charkaoui 1* decision. The general tenor of Makin's report was to praise the Court for being "[a]s savvy as ever about how much activism will be tolerated" by the external political environment (Makin, 2007).

Evidence from the workings of the Supreme Court of Canada suggests that contrary to Staton's contention, public awareness of strategically-induced case outcomes does not translate into a loss of support for the Court. Rather, broad swaths of the public learn about individual decisions through their political implications and accompanying media coverage – through the often messy and unpredictable *politics of post-decision media coverage* if you will. However 'sincere' or 'insincere', cases that stray from public opinion, inflame the fires of the controversy and instigate revolt and disdain among some political actors (e.g. *Marshall 1, Morgentaler 2, Daviault*) tend to have snowballing effects on the media coverage so that as the controversy grows the unfavourable information gets filtered down to broader and broader swaths of the public. Strategically tailored decisions that do not stray from public preferences and that are designed to nip the controversy in the bud (e.g. *Canadian Foundation, Suresh, Secession Reference, Marshall 2, Charkauoi 1* and *2, Khadr*) tend to pre-empt such snowballing effects and optimize the likelihood that the general public will be exposed to favourable coverage. It is also crucial to point out that the tendency to avoid clashes and entanglements with key political actors often leads judges to deliver mixed outcomes and partial victories so that neither side leaves the dispute empty-handed and both have something to cheer about. Such delicately tailored decisions are at once both policy activist and policy deferential creating few fervent enemies in their wake and plenty of potential allies. The effect, again, is optimization of the likelihood that the public will end up on the receiving end of favourable information about the Court and its decision, including that judges are sensibly living up to their image and obligation of protecting the rule of law often in the face of thorny political demands.

There is one particular audience of the Supreme Court of Canada that *could* be expected to systematically read through the Court's strategic behaviour so as to conclude for itself that the Court exhibits a fundamental lack of resolve in the face of external pressures: academic community. Often, in fact, legal scholars publish scathing analyses upon a release of individual decisions in which they suggest that judges exhibited a distinct lack of resolve. In the aftermath of *Khadr 1,* for example,

Ed Morgan (2008) of the University of Toronto law school wrote for the *National Post* that the Supreme Court of Canada is composed of "18 intellectually weak knees." Still, as argued above, it is unrealistic to expect that such sporadic assessments could trickle down to the general public so as to affect public evaluations of judicial institutions.[46] Rather, it is more likely that judicial strategic decisions satisfy one set of courts' audiences (the public, key political actors, etc.) all the while they may irritate other audiences such as members of the legal academy, for example, who may feel disappointment in light of delicate and timid outcomes that may revoke or ignore existing precedent. As per strategic literature in general, and as per Baum's recent work on "judges and their audiences" in particular (2006), future research should therefore focus on how judges strategically reconcile pressures from different audiences as they go about their decision making.

The analysis presented in this dissertation departs from Staton's work, and from much of the general strategic literature on judicial decision making, in one other important way. Staton's analysis of how strategic behaviour can affect the development of judicial legitimacy is premised on a distinction between (i) "sincere" judicial behaviour free from external pressures and (ii) "insincere" judicial behaviour that is subject to external pressures. Staton, in fact, designates "a constitutional court as impartial *if it renders decisions according to its sincere evaluation of the policy's constitutionality"* that is "invariant to changing litigant identities, partisan or otherwise, or changing extra-judicial pressures" (Staton, 2010: 132, original emphasis). Evidence from the Supreme Court of Canada suggests that making such distinctions between 'sincere' and 'insincere' judicial behaviour can be fundamentally problematic. In fact, exhibiting sensitivities to external political factors is a fundamental component of what courts 'sincerely' do and what they consider to be part of their proper tasks when evaluating constitutionality of legislation. While justices of the Supreme Court of Canada may not publicly announce that they engage in 'strategic' calculations so as ensure that their decisions are compatible with public opinion or that exuberant costs are not imposed on key political actors, consideration of these for-all-intents-and-purposes *external* factors is a fundamental component of what the Court considers to be its proper function of judicial review. In fact, and as

[46] Furthermore, and as noted above, while some analysts will tend to place the Court's deferential behaviour in negative light, others will interpret the same behaviour in favourable terms emphasizing the Court's prudence and sensibility.

shown throughout the dissertation, decision-making patterns of the Supreme Court of Canada are replete with instances of external factors imbuing the Court's jurisprudence and thereby becoming part and parcel of the evolving constitutional law. The Court's balancing formulas, therefore, include queries into the state of Canadian "societal consensus" (e.g. *Rodriguez, Malmo-Levine, Canadian Foundation, Khadr 2*), into what would "shock the conscience" of the Canadian people (e.g. *Schmidt, Burns*), and into whether police tricks would "shock" the Canadian community (*McIntyre*). The Court also refers to the state of public opinion as having a direct relevance in ascertaining the principles of fundamental justice (e.g. *Kindler, Burns, Suresh*), and it considers suspending declarations of invalidity in light of such factors as "whether large sums of money" are expended pursuant to the legislation under review (e.g. *Gosselin,* para. 293).

Describing jurisprudential outcomes reached on the back of strategic legitimacy cultivation, such as the "duty to negotiate" doctrine in *Secession Reference* or "equitable access to resources" doctrine in *Marshall 2*, as instances of 'insincere' behaviour would be to fundamentally mischaracterize these decisions. Instead of being 'insincere', these decisions are illustrative of how constitutional law undergoes changes through its interaction with politics and evolving societal demands. As Chief Justice of the Supreme Court of Canada stated in a media interview conducted days before the Court was to release its *Marshall 2* ruling:

> The idea that there is some law out there that has nothing to do with consequences and how it plays out in the real world is an abstract and inaccurate representation of what the law is. I think it is essential to good judging that the rule be sensitive to consequences, and judges, when they make rulings, give some thought to how their rulings are going to fit into the institutional matrix of society (Alberts, 1999).

In the face of apparent deferential behaviour that is careful not to abrogate from societal and political pressures of the time, disappointed court observers would therefore be mistaken to conclude that courts are acting 'insincerely' or abrogating from their proper role. In fact, to the extent that there is something akin to 'insincerity' in the fact that Aboriginal commercial fishing rights as defined in *Marshall 1* underwent significant depletion in *Marshall 2*, or that deportation to torture was deemed justified in December of 2001 even though the Court considered it an apparent breach of Charter rights in its earlier jurisprudence, that insincerity should be placed squarely at the feet of the public and mobilized political actors

springing from it. It is these actors that ultimately struggle to live up to the normative ideals of constitutionalism in the face of real or potential distress, deprivation, or insecurity. As far as high courts are concerned, it is part of their fundamental *institutional predicament* to reconcile changing societal and political moods with existing bodies of constitutional law. While the public may often think of its high court as being entrusted with the noble task of ensuring rights protection while remaining impervious to political pressures, it is ultimately the public itself that finds the undertaking too arduous to live up to.

The evidence presented in this dissertation also speaks directly to our understandings of the role of courts during a transition to a constitutional democracy. In their analysis of the Russian Constitutional Court, Epstein et al. (2001: 156) suggested that in the early stages of such a transition (at a time when a court is in its institutional infancy) relatively low levels of legitimacy of recently empowered courts can ensure that their primary role "will be to reinforce those features of the constitutional system about which there is already substantial agreement." Similar argument is presented in the works of Ginsburg (2003) and Moustafa (2007) who suggest that young courts will tend to thread carefully before they institutionally mature and start delivering more courageous and policy costly outcomes.

An initial look at patterns of Supreme Court of Canada decision making appears to support these claims. What is interesting about the Canadian case, however, is that this strategic sensitivity of the Supreme Court occurs in spite of the fact that since Charter was introduced in 1982, the Court has been enjoying relatively high levels of support among the Canadian public (Fletcher and Howe, 2000) which consistently exhibits more trust in the Supreme Court than in federal or provincial legislatures (Russell, 1988; Fletcher and Howe, 2000; Nanos, 2007). The Supreme Court of Canada, after all, is not a *new* institution but has been part of the Canadian institutional landscape for over 100 years before the Charter was introduced in 1982. Throughout this time the Court has exercised powers of federal judicial review, confronted a range of controversial issues and questions, and even developed a doctrine of an implied bill of rights which relied on the division of powers logic of federal judicial review to promote basic rights such as free speech (see e.g. Bushnell, 1992; 1977).

What the Canadian case suggests, therefore, is that even well-established courts may exhibit acute sensitivities to external factors in order to maintain relatively

high levels of public support or legitimacy. In fact, Russell (1985) shows that the Supreme Court's approach to its pre-Charter federalism jurisprudence has been characterized by a keen tendency towards delivering "politically balanced" outcomes that tread carefully between the interests of the two orders of government. The Court's Charter jurisprudence, therefore, is very much a continuation of a pre-existing trend. Barry Friedman's recent analysis of American constitutionalism from the declaration of independence until the end of the Rehnquist court in 2005 similarly suggests that the U.S. Supreme Court has exhibited sensitivities to external political factors throughout its history (2009). Pressures to cultivate high levels of institutional legitimacy appear to significantly affect both mature and immature judicial institutions.

According to Keith Whittington, a lingering gap persists in the study of judicial institutions (2001). The so-called internalist perspectives which assume that factors internal to the law are key drivers of judicial decision making stand in opposition to externalist approaches emphasizing the primacy of external factors. Whittington stresses that it is unfortunate that these perspectives "are often posited as offering competing explanations of judicial behavior," and he suggests that to bridge the gap between them in part means to understand "how the legal process internalizes the 'external' stuff of politics" (2001: 484). This study shows that understanding how judicial institutions cultivate legitimacy can go a long way towards helping us identify how legal processes absorb "the external stuff of politics."

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