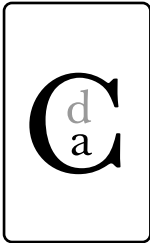


THE COURTS



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THE COURTS

Ian Greene



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FOREWORD

This volume is part of the Canadian Democratic Audit series. The objective of this series is to consider how well Canadian democracy is performing at the outset of the twenty-first century. In recent years, political and opinion leaders, government commissions, academics, citizen groups, and the popular press have all identified a “democratic deficit” and “democratic malaise” in Canada. These characterizations often are portrayed as the result of a substantial decline in Canadians’ confidence in their democratic practices and institutions. Indeed, Canadians are voting in record low numbers, many are turning away from the traditional political institutions, and a large number are expressing declining confidence in both their elected politicians and the electoral process.

Nonetheless, Canadian democracy continues to be the envy of much of the rest of the world. Living in a relatively wealthy and peaceful society, Canadians hold regular elections in which millions cast ballots. These elections are largely fair, efficient, and orderly events. They routinely result in the selection of a government with no question about its legitimate right to govern. Developing democracies from around the globe continue to look to Canadian experts for guidance in establishing electoral practices and democratic institutions. Without a doubt, Canada is widely seen as a leading example of successful democratic practice.

Given these apparently competing views, the time is right for a comprehensive examination of the state of Canadian democracy. Our purposes are to conduct a systematic review of the operations of Canadian democracy, to listen to what others have to say about Canadian democracy, to assess its strengths and weaknesses, to consider where there are opportunities for advancement, and to evaluate popular reform proposals.

A democratic audit requires the setting of benchmarks for evaluation of the practices and institutions to be considered. This necessarily involves substantial consideration of the meaning of democracy.

“Democracy” is a contested term and we are not interested here in striking a definitive definition. Nor are we interested in a theoretical model applicable to all parts of the world. Rather, we are interested in identifying democratic benchmarks relevant to Canada in the twenty-first century. In selecting these we were guided by the issues raised in the current literature on Canadian democratic practice and by the concerns commonly raised by opinion leaders and found in public opinion data. We have settled on three benchmarks: public participation, inclusiveness, and responsiveness. We believe that any contemporary definition of Canadian democracy must include institutions and decision-making practices that are defined by public participation, that this participation must include all Canadians, and that government outcomes must respond to the views of Canadians.

While settling on these guiding principles, we have not imposed a strict set of democratic criteria on all of the evaluations that together constitute the Audit. Rather, our approach allows the auditors wide latitude in their evaluations. While all auditors keep the benchmarks of participation, inclusiveness, and responsiveness central to their examinations, each adds additional criteria of particular importance to the subject he or she is considering. We believe this approach of identifying unifying themes, while allowing for divergent perspectives, enhances the project by capturing the robustness of the debate surrounding democratic norms and practices.

We decided at the outset to cover substantial ground and to do so in a relatively short period. These two considerations, coupled with a desire to respond to the most commonly raised criticisms of the contemporary practice of Canadian democracy, result in a series that focuses on public institutions, electoral practices, and new phenomena that are likely to affect democratic life significantly. The series includes volumes that examine key public decision-making bodies: legislatures, the courts, and cabinets and government. The structures of our democratic system are considered in volumes devoted to questions of federalism and the electoral system. The ways in which citizens participate in electoral politics and policy making are a crucial component of the project, and thus we include studies of advocacy groups and political

parties. The desire and capacity of Canadians for meaningful participation in public life is the subject of a volume. Finally, the challenges and opportunities raised by new communication technologies are also considered. The Audit does not include studies devoted to the status of particular groups of Canadians. Rather than separate out Aboriginals, women, new Canadians, and others, these groups are treated together with all Canadians throughout the Audit.

In all, this series includes nine volumes examining specific areas of Canadian democratic life. A tenth, synthetic volume provides an overall assessment and makes sense out of the different approaches and findings found in the rest of the series. Our examination is not exhaustive. Canadian democracy is a vibrant force, the status of which can never be fully captured at one time. Nonetheless the areas we consider involve many of the pressing issues currently facing democracy in Canada. We do not expect to have the final word on this subject. Rather, we hope to encourage others to pursue similar avenues of inquiry.

A project of this scope cannot be accomplished without the support of many individuals. At the top of the list of those deserving credit are the members of the Canadian Democratic Audit team. From the very beginning, the Audit has been a team effort. This outstanding group of academics has spent many hours together, defining the scope of the project, prodding each other on questions of Canadian democracy, and most important, supporting one another throughout the endeavour, all with good humour. To Darin Barney, André Blais, Kenneth Carty, John Courtney, David Docherty, Joanna Everitt, Elisabeth Gidengil, Ian Greene, Richard Nadeau, Neil Nevitte, Richard Sigurdson, Jennifer Smith, Frank Strain, Michael Tucker, Graham White, and Lisa Young I am forever grateful.

The Centre for Canadian Studies at Mount Allison University has been my intellectual home for several years. The Centre, along with the Harold Crabtree Foundation, has provided the necessary funding and other assistance necessary to see this project through to fruition. At Mount Allison University, Peter Ennals provided important support to this project when others were skeptical; Wayne MacKay and Michael Fox have continued this support since their respective arrivals on campus;

and Joanne Goodrich and Peter Loewen have provided important technical and administrative help.

The University of British Columbia Press, particularly its senior acquisitions editor, Emily Andrew, has been a partner in this project from the very beginning. Emily has been involved in every important decision and has done much to improve the result. Camilla Blakeley has overseen the copyediting and production process and in doing so has made these books better. Scores of Canadian and international political scientists have participated in the project as commentators at our public conferences, as critics at our private meetings, as providers of quiet advice, and as referees of the volumes. The list is too long to name them all, but David Cameron, Sid Noel, Leslie Seidle, Jim Bickerton, Alexandra Dobrowolsky, Livianna Tossutti, Janice Gross Stein, and Frances Abele all deserve special recognition for their contributions. We are also grateful to the Canadian Study of Parliament Group, which partnered with us for our inaugural conference in Ottawa in November 2001.

Finally, this series is dedicated to all of the men and women who contribute to the practice of Canadian democracy. Whether as active participants in parties, groups, courts, or legislatures, or in the media and the universities, without them Canadian democracy would not survive.

William Cross

Director, The Canadian Democratic Audit

INTRODUCTION

This book presents an audit of the current state of Canada's courts as the third branch of our democracy. This is not an audit in the sense of a financial audit of a corporation by a chartered accounting firm, or an accountability audit of a government department by the auditor general. Rather, it is an attempt to evaluate the adequacy of the Canadian court system in relation to the basic tenets of democracy.

But what, you may well ask, do the courts have to do with democracy? Our judges are appointed rather than elected, and they are drawn from an elite group in society. The judges are not accountable for their decisions, and yet from time to time they seem to meddle with the policies of elected governments. Some might even argue that the courts function as a bulwark against democracy. In fact, some prominent academics both on the right and the left are deeply troubled by what they consider to be the increasingly antidemocratic role assumed by our courts, especially since the Charter of Rights and Freedoms came into effect in 1982.

Democracy requires an independent judiciary. Our political system can function fairly only with courts staffed by judges who are not accountable for their decisions - not accountable so that they can be independent and impartial. Only judges who are in a position to be independent and impartial can settle disputes justly about the application and interpretation of laws enacted by elected legislatures, even in cases when interpretation overlaps with policy making. This audit of the performance of courts in Canada's democracy is conducted in the context of this paradox.

When thinking about the courts and democracy, the debate about judicial policy making can become so absorbing that other important aspects of the link between courts and democracy may be overlooked. The judicial policy-making issue aside, courts in a democracy need to provide a fair, expeditious, and effective dispute-resolution service that is as open as practically possible to public participation and the inclusion of all relevant groups. Courts also need to be responsive to legitimate

public needs and demands. These aspects of the relationship between courts and democracy are front and centre in this audit, and the judicial policy-making issue will be treated as just one element of the link, albeit an important one. There is therefore less concern in the pages that follow about judicial activism than “Charterphobes” would prefer (Sigurdson 1993), and more attention is paid to whether judicial decisions are likely to promote democratic principles.

Canadian courts provide a publicly funded and sponsored adjudication service for settling legal disputes. A system of courts is an essential part of any democratic regime, and without courts no democracy could function. This audit will provide one person’s assessment of the extent to which the courts are achieving their essential purpose: to resolve the kinds of disputes that elected legislatures have given them responsibility for in a fair, effective, and efficient manner and according to standards derived from democratic norms. Three benchmarks of democracy guide the analysis presented here: participation, inclusiveness, and responsiveness. The Canadian Democratic Audit has chosen these three standards as tools to help assess the current state of Canadian democracy with respect to several key institutions and processes including legislatures, cabinets, elections, parties, and interest groups, in addition to the courts.

We live in a representative democracy. But there is the ever-present danger that representative assemblies, if disproportionately made up by the socially or economically powerful, can become elitist, thus discouraging optimal public participation. Another peril is that some representatives will inevitably be more focused on self-interest than the public interest (Stein 2002). These inherent weaknesses of representative democracy might be compounded by courts. Courts that serve democracy faithfully, however, will act as a counterweight to the tendency toward the elitist and self-interested exercise of power by members of the legislative and executive branches.

Ironically, the courts themselves have always been an elite institution. Because of the expertise required of judges, the judiciary will always be recruited from the lawyers who have demonstrated the highest levels of success in law school and their legal careers. But there are

legitimate ways to promote the recruitment of judges from groups that have tended not to enjoy a privileged position in society. The independence that we provide to judges by insulating them from political pressures and providing them with salaries so high that financial gain ought to be of no concern, moreover, means that judges ought to be in a position to decide issues based on the public interest, and not self-interest.

Courts had their origins centuries before the democratic era. When democratic institutions began to be introduced into what is now Canada, the courts were not the object of democratic reforms, and they still retain many of their predemocratic trappings. Democracy was introduced with the establishment of elected legislatures in the colonies, and democratic reforms continued with the acceptance of responsible government, and with the expansion of the franchise to include men without property, then women, then Asian Canadians, and then Aboriginal Canadians. The “rights revolution” (Ignatieff 2000) of the latter half of the twentieth century and the concurrent development of more stringent rules to promote higher ethical standards among elected politicians (Greene and Shugarman 1997), along with the interest of some academics and politicians in the promotion of greater public participation in policy making (Albo, Langille, and Panitch 1993), are all examples of the continued evolution of Canadian democracy.

Until recently, the courts remained unaffected by most of the democratic reforms going on around them. Until judicial selection procedures changed in the late twentieth century (Chapter 1), judicial appointment was based primarily on party patronage considerations. As well, the courts tended to be administered as semi-independent fiefdoms, under the general direction of judges, or politically appointed court officials, or Crown attorneys, depending on who had the strongest personality in a given court district. There was precious little supervision from head office officials and almost no consultation with nonlawyer court “users” - litigants, witnesses, and jurors - about administrative issues that affected them (Greene 1983). The situation has improved a little during the past two decades but the public still has very little opportunity to participate, directly or indirectly, in the administration of courts.

Given that the courts clearly are not leading examples of democratically run organizations, it is nevertheless true that the courts have come to be used as vehicles to promote progressive policy changes by groups claiming to promote democratic reform. In fact, public interest litigation was unusual before the 1970s. One of the first such cases developed in 1927, when five women who were leading proponents of women's equality spearheaded litigation that eventually led to a decision by the Judicial Committee of the Privy Council (at that time the ultimate court of appeal for Canada) that henceforth women were to be considered as legal "persons," and therefore eligible for appointment to the Senate (*Edwards v. Canada (A.G.)* 1930). Aside from rare cases like this one, there was relatively little public interest litigation until the 1960s, when groups began to form to further human rights by taking cases to court under the 1960 Canadian Bill of Rights and nascent provincial human rights legislation. The Canadian Civil Liberties Association (CCLA), now one of the most active public interest litigators, was formed in 1964 by people concerned about the potential abuse of police powers in Ontario. The federal Court Challenges Program, dating from 1977, has encouraged public interest groups to use the courts to pursue their language rights, and after the advent of the Charter, groups such as the Women's Legal Education and Action Fund (LEAF) have sought broader equality rights through the courts.

The Approach of the Book

This book provides an "insider's perspective" on Canada's courts. I have been fortunate during my academic career to have conducted formal interviews with about a hundred judges at all levels of court, as well as with dozens of trial lawyers, Crown attorneys, administrative staff in the courts, litigants, and witnesses. As well, I have had countless informal discussions with members of these groups. In 1979 and 1980, as part of my doctoral research, I conducted interviews in Ontario with a representative sample of forty judges at all levels, and with at least thirty people from each of the following groups: trial lawyers, court

administrators, and Crown attorneys. The research centred on the causes of unreasonable delays in the courts (Greene 1983). During the early 1980s, Peter McCormick and I interviewed members of these same groups in Alberta (using a sample about the same size as the Ontario study) as part of a research project that focused on the judicial decision-making process (McCormick and Greene 1990). We also interviewed witnesses and litigants to gain a sense of their satisfaction with the courts. During the early 1990s, I interviewed more than fifty appeal court judges from across Canada, including eight judges of the Supreme Court of Canada, and colleagues of mine interviewed another fifty appellate court judges. The purpose of that study was to compare administrative and decision-making processes among the ten provincial appeal courts, the Federal Court (Appeal Division), and the Supreme Court of Canada (Greene et al. 1998).

In addition to spending much of my career studying courts, I have also participated in litigation. I have served as an expert witness in four cases (three dealing with judicial independence, and one concerning the refugee determination process). In two of these, I was subjected to intense cross-examination. What I learned from these experiences is that it is one thing to defend social science research findings in academic journals and books, and quite another to defend these findings in court. In some senses, the standard of proof is higher, but in other senses, so much depends on strategies of counsel and the discretion of the judges that the search for truth sometimes gets lost in the legal exercise. And like many Canadians, in my younger years I once went to court to fight what I thought was an unfair traffic ticket. The justice of the peace was aghast at my elaborately prepared defence and dismissed the case because he didn't have time to hear it.

What I offer in this book is my own perspective, based on these experiences, on the state of Canada's courts. This perspective is both enlightened and limited by my personal adventures in the courts. These have taught me that administrative issues are as important to evaluating the democratic impact of courts as judicial decisions that impact major policy issues. The question of judicial activism, which is central to the analysis of Canada's courts by many contemporary academics

and politicians, is clearly salient, but it is neither the only issue nor even the most important one. What is central is the extent to which the courts and those who populate them - including the judges but not forgetting court staff, lawyers, prosecutors, litigants, and witnesses - reflect three key indicators of democracy: participation, inclusiveness, and responsiveness.

The Plan of the Book

In order to understand the nature of the entity being audited, Chapter 1 provides an overview of the Canadian court system and some of the current debates about the courts and democracy. Chapter 2 reviews the nature of, and opportunities for, public participation in Canada's courts. Chapter 3 deals with inclusiveness issues, such as the extent to which the major actors in the courts - judges, lawyers, court staff, and litigants - are representative of Canadian society. Chapters 4 and 5 address the responsiveness benchmark. The focus of Chapter 4 is on the courts' sensitivity to public demands for a fair and effective dispute-resolution service, while Chapter 5 assesses the impact of public interest litigation, especially under the Charter of Rights. The final chapter provides my own recommendations for improvements that, I hope, will result in a court system that can more effectively serve Canadian democracy.

Democracy is an ideal toward which our society has been evolving for centuries. The democratic ideal is based on the principle of mutual respect, that is, recognition of the intrinsic worth of every human being. From this principle, it logically follows that a democracy must include safeguards for individual dignity and equality, legislatures composed of accountable representatives selected through free and fair elections with limited terms, active public participation in the development of public policy, and the rule of law enforced by independent and impartial courts (Greene and Shugarman 1997). These principles can be summed up in the three touchstones of the Canadian Democratic Audit: participation, inclusiveness, and responsiveness. True

democracy will never be fully realized because of human frailties, but it is a goal worth striving for because of its emphasis on the equal dignity of every human being.

The courts, as the state's officially sanctioned institutions for dispute resolution, existed for centuries before democratic times, and thus they have inherited a tendency to be hierarchical and elitist. Peter Russell (1975, 88), the father of the political science study of the law, has noted that "for too many lawyers and judges, judging is still not regarded as the provision of a basic social service but the exercise of a private professional craft." To what extent have we built a court system that truly serves democracy, and what are some of the goals that the courts might aim for during this new century in order to serve democracy better? These are the basic questions tackled in the pages that follow.

THE COURTS

In order to evaluate courts, we need to understand their purpose and objectives. Although courts - the institutions where judges practice their trade - have a history rooted in predemocratic traditions, the advent of democracy has changed the nature of, and public expectations for, courts. This chapter describes the history, role, and constitutional context of the Canadian court system.

The Function of Courts in Historical Context

In complex societies, three features are common to governments: leaders, laws, and judges. Once a society reaches a certain degree of complexity, it needs an institutional means for resolving the kinds of disputes that might otherwise threaten the stability of the social order. For example, Canadian Aboriginal societies prior to European contact had sophisticated dispute-resolution procedures based on the authority of elders and consensual decision making by male or female councils (Boldt, Long, and Little Bear 1985). And references in the Old Testament to the administration of justice indicate that at the time of Moses, rulers were preoccupied with issues of adjudication similar to those of today: the quest for fairness in settling disputes under the

law, and the question of how to eliminate unacceptable backlogs of cases (Exodus 18:13-27).

As Rome expanded beginning in the third century BC, formal legal actions could be initiated before patrician priests - the earliest Roman judges. Then as now, many legal proceedings resulted from disagreements over business and property interests. Because commerce requires a stable and predictable system of enforceable rules, the judge-made law that had developed was eventually codified to clarify it. After the fall of the Roman Empire, these codes were gradually incorporated into the laws of many European countries over the next four centuries. In England of the thirteenth to eighteenth centuries, however, there was skepticism about codifying judge-made law, possibly because judges had assumed a very high status in society, drawn as they were from the ranks of senior lawyers. Therefore English “common law,” or judge-made law common to the whole land, remained an important ingredient of the law, in contrast to the “civil law” tradition on the Continent, where judicial precedent played a less central role. Quebec has inherited the French civil law approach with regard to its private law system, but is a common law jurisdiction regarding public law (constitutional, administrative, and criminal law). The other provinces are situated entirely within the common law realm (Gall 2004). Thus, Canada has inherited both of the great European legal traditions.

The structure of Canadian courts is rooted in the English court system. After the Norman conquest in 1066, disputes about the application of the king’s law in Norman England were settled by the king himself to begin with, or by king and council. The central royal courts and the circuit courts (with names such as King’s Bench and Common Pleas) were established beginning in the twelfth century as a response to the ever-increasing caseload (Holdsworth 1903). These central and circuit courts created by the monarch became known as “superior” courts, while local courts were referred to as “inferior” courts. The Canadian superior courts (such as the Alberta Court of Queen’s Bench and the Ontario Superior Court) and inferior courts (such as the Provincial Court of British Columbia and the Court of Quebec) are the descendants of these early English institutions.

In Norman times the superior court judges were clerics, but allegations of bribery, followed by a royal commission inquiry, led to the firing of many of them in the late thirteenth century. To fill the vacated judicial seats, the king began to appoint men from the newly developing legal profession. By the middle of the fourteenth century, it had become the established tradition for the English king to select the superior court judges from the ranks of experienced lawyers (Dawson 1968). This system of judicial recruitment contrasted with the approach on the European continent, where separate training schools for judges were established. The most successful graduates were appointed to the minor courts, and the ablest were eventually promoted to higher judicial offices (Abraham 1998). Canada has inherited the English method of judicial recruitment.

The year 1688 is central to the evolution of courts in democracies with the British parliamentary system. In that year in England and Wales, the Glorious Revolution ended the absolute power of the monarchy and created a constitutional, or limited, monarchy. One important element of the new regime was the recognition of Parliament as the supreme law-making body. Another change was the recognition of the rule of law: citizens were subject only to laws approved by Parliament, and not to arbitrary decrees of powerful members of the executive or public service. The rule of law also required “indifferent” judges to settle disputes under the law, something that could happen only if judges were independent (Locke [1690] 1980). After the Glorious Revolution, it was accepted that the superior courts had to be independent in their decision-making capacity, free from interference either from the executive and the public service, or from Parliament.

The resolution of serious disputes according to law as expeditiously and impartially as possible is the central purpose of courts in a democracy. The courts, however, cannot avoid a law-clarification function in some cases, and this role is often referred to as the “law-making” or “policy-making” role of courts. The law is composed of words, and many words and phrases are open to two or more equally legitimate interpretations. Judges must use their discretion to choose the interpretation that to them appears to be the most just. In a democratic

context, it is naturally expected that judicial discretion will be exercised in accordance with democratic values. Thus, one secondary purpose of courts is to create rules to fill in the gaps left by legislation.

Does the law-making function of the courts, in the sense described above, contradict the principle of the rule of law by elected legislatures, and thus compromise democracy? The position taken here is that there is no reason judicial discretion must necessarily undermine democracy. Rather, the appropriate use of judicial discretion might actually strengthen democracy. It all depends on the context surrounding the use of discretion, and the impact of discretionary decisions, as will be demonstrated in the examples in Chapter 5. Martin Shapiro (1981) has shown that one common result of the use of judicial discretion is the enforcement of prevailing social norms. Some of these judicially enforced norms are the result of a popular consensus; others may represent elite values displaced onto more vulnerable parts of the population. The former application of judicial discretion is more democratic than the latter.

With the evolution of democracy, the judicial branch of government has become an institution that serves as a check on the legislative and executive branches of government. Representative legislatures, and the cabinets that control them, are always in danger of abrogating the liberal democratic principles of equality and freedom. This danger stems from the temptation of those with political power to act in self-interest rather than the public interest, from the tendency of majorities to overlook the legitimate equality rights of minorities that they have little in common with, and from the fact that a great deal of legislation is enacted on the recommendation of professional bureaucrats who have their own particular needs and interests. Another secondary purpose of courts, therefore, is to function as part of a system of checks and balances designed to prevent abuses of power.

In sum, representative democracy requires a complex set of compensating mechanisms to prevent abuse of power and to ensure fairness, and the judiciary is intended to play a key role in helping to ensure that these rules are applied fairly and effectively - even to the judiciary itself.

The Canadian Court System

There are two basic kinds of courts: trial and appellate. The trial courts are the courts of first instance, where judges settle the criminal, civil, constitutional, or administrative law disputes brought to them that they have jurisdiction over. Trial courts constitute the basic workhorse of the court system, and they often specialize in settling either criminal law or private law matters. In most cases, a litigant who disagrees with the trial judge's decision can appeal it. Every province in Canada has a Court of Appeal established as an institution separate from the trial courts, and these courts hear the most difficult appeals. As well, the Federal Court, the court that hears federal administrative law cases, has an Appeal Division. Appeals from trial courts in Yukon are heard by the British Columbia Court of Appeal, and from the trial courts in the Northwest Territories and Nunavut by the Alberta Court of Appeal. (Appeals from very minor cases are sometimes heard by judges in higher trial courts.) Very rarely, cases are appealed from the provincial courts of appeal or the Federal Court (Appeal Division) to the Supreme Court of Canada. Litigants unhappy with the outcome of an appeal from a provincial court of appeal or the Federal Court (Appeal Division) can apply to the Supreme Court for permission to appeal, and every year there are about 600 of these applications. The Supreme Court hears only cases that it considers of national legal importance, however, and these amount to about eighty annually. As well, there is a right of appeal to the Supreme Court in serious criminal cases where the trial and appeal courts have rendered different decisions, or where there has been a dissenting judgment in the provincial court of appeal, and there are a few dozen of these annually.

In the Canadian system, trial judges always sit alone, except in the relatively infrequent cases in which they are assisted by a jury. This contrasts with Europe and many other parts of the world, where trial judges in criminal cases often sit in panels of three, or preside along with two lay (non-judge) assessors. Judges in the separate Courts of Appeal almost always hear appeals in panels. The provincial and federal appellate courts usually sit in panels of three but occasionally in

panels of five for cases raising high profile issues of law. The Supreme Court of Canada, with its nine judges, often sits in panels of seven, although sometimes in panels of five or nine, depending on the chief justice's allocation of judicial resources.

In Canada, the authority for the administration of adjudicative matters is split between the federal and provincial governments, but it is not split along the lines of their division of powers, as in the United States. The fathers of the Canadian Confederation had observed the difficulties encountered by Americans as a result of their separate system of courts for cases arising out of federal laws, which operated parallel to the state and municipal courts. Canada opted for a court system that would be primarily unitary, capable of settling disputes arising out of federal, provincial, and municipal laws. Therefore, the 1867 Constitution allocated specific responsibilities for maintaining the primarily unitary court system to each order of government. Although this is an ingenious approach to the need for a relatively simple court structure in a federal system, it means that federal-provincial cooperation is needed to resolve many administrative issues in the courts, and that cooperation is not always there.

The federal government was assigned responsibility for the appointment of superior court judges (provincial superior court trial judges with jurisdiction similar to the superior courts in the UK) and provincial appellate judges. The superior court judges travel around their province or provincial region holding hearings or "assizes" like the English judges of old, visiting smaller centres twice a year. The provinces retained control over the appointment of all inferior judges, such as the judges of the magistrate's courts, which generally became known as Provincial Courts beginning in the late 1960s. Parliament was also given power to establish a Supreme Court of Canada - which it did in 1875 - and other courts to adjudicate disputes arising out of a limited set of federal laws. There are two of these latter courts: the Federal Court, established in 1971 as a continuance of the Exchequer Court of 1875, and the Tax Court, set up in 1983.

In 2004, there were 2,038 judges in Canada, including 240 supernumerary (partly retired) judges. Fifty-two percent of the judges were

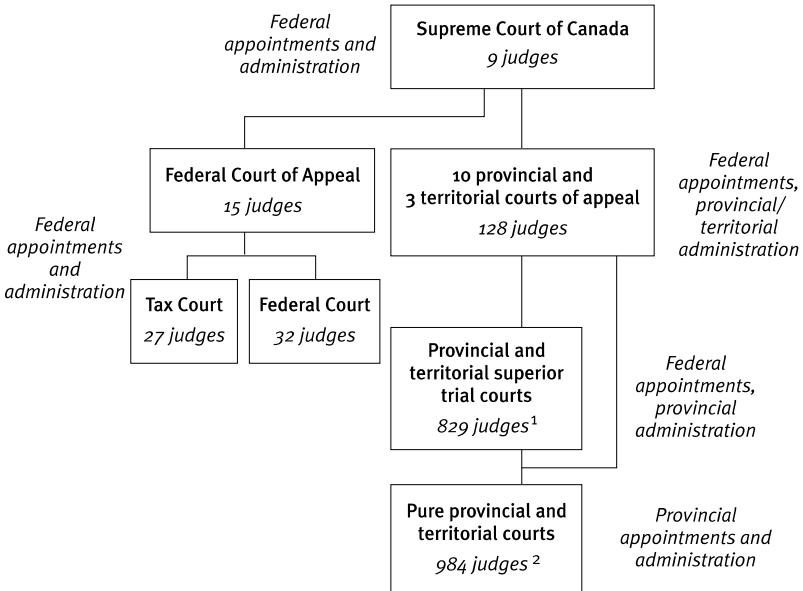
federal judicial appointments, and the remainder were appointed by the provinces or territories. During the fiscal year 2000-1, the total expenditure on judicial salaries at all levels was \$382,170,000, or \$12.42 per capita, which is about two-fifths of the total expenditure on court operations (Snowball 2002). In 2004, superior court trial and appellate judges earned \$221,400 annually, while Supreme Court judges and the chief justices in all the superior courts earned somewhat more.

The Constitution gave the federal government the responsibility for the criminal law, while the provinces retained control over most private law matters. The provinces kept their pre-Confederation responsibility for prosecuting criminal offences in all courts, and also for providing court facilities and staff for all courts in the unitary system below the level of the Supreme Court. In the late 1960s, however, the federal government assumed responsibility for the prosecution of federal offences that are not part of the criminal law (such as drug offences). The only courts that are exceptions to the unitary court system are the Federal Court and Federal Court of Appeal, whose forty-seven judges hear cases dealing primarily with federal administrative law issues, and the Tax Court, whose twenty-seven judges hear cases arising out of federal taxation laws (see Figure 1.1). The division of powers over the justice system is set out in sections 96 to 101, 91 (27), and 92 (14 and 15) of the Constitution Act, 1867.

Very serious criminal offences, such as murder, aggravated sexual assault, and armed robbery are referred to as “indictable” offences. The Canadian Criminal Code stipulates that these cases must be heard by a superior court judge, and the Charter of Rights guarantees that in any case where an accused person is liable to receive a prison sentence of five years or more if convicted, the accused has a right to a trial by jury. Minor offences, such as shoplifting or petty theft, are known as “summary conviction” offences, and are tried by a provincially appointed judge. A great many offences in the Criminal Code are known as “hybrid” offences, less serious than the purely indictable offences, but more serious than the purely summary conviction offences. This means that the Crown attorney prosecuting the offence may opt to proceed by way of indictment, meaning that the possible penalty is

Figure 1.1

Canadian Court System, 2004



Notes: In 2003, the Federal Court (Appeal Division) became a separate court – the Federal Court of Appeal. With the Tax Court, these three courts are now known collectively as the federal courts. Numbers in the diagram include supernumerary, or partly retired, judges but not vacancies. There were 193 supernumerary judges in the provincial superior courts, four each on the Federal Court of Appeal and Federal Court, and five on the Tax Court. There were twelve vacancies on the provincial superior trial courts, three on the provincial appellate courts, five on the Federal Court, and two on the Federal Court of Appeal. Family judges on the Superior Courts are included.

- 1 In addition, there are 22 traditional and case management masters in Ontario and 54 masters in British Columbia.
- 2 In addition, there are 274 justices of the peace, 134 Municipal Court judges in Ontario, and 104 Municipal Court judges in Quebec. Other provinces also employ justices of the peace.

Source: Snowball (2002), updated by the author from data supplied by the Office of the Commissioner for Federal Judicial Affairs, Ottawa, and the *Canada Law List* (2004).

potentially more severe, or by way of summary conviction, meaning that the possible penalty will be less severe. In cases where the Crown has opted to proceed by way of indictment, or where the Criminal Code defines an offence as indictable, the accused often has the right to opt for a trial by jury in a superior court, or a trial by judge alone in a superior court or a court with a provincially appointed judge (sometimes the consent of the Crown is required), depending on the nature of the offence.

In civil cases, a defendant may opt for a jury trial in cases where the plaintiff is suing for substantial amounts, except in cases involving libel, slander, seduction, malicious arrest or prosecution, or false imprisonment. Even in these cases, however, the jury can be waived with the agreement of both sides. Jury trials are now very uncommon in civil cases: less than 6 percent of civil trials involve juries. And in the criminal field, less than 2 percent of cases involving indictable offences (and none involving summary conviction offences) end in jury trials (Russell 1987).

It is worthwhile visiting the courts at different levels to compare their general atmospheres. Most of the cases heard in the superior courts are civil or private law cases, and so most litigants are relatively well-to-do, including many corporate litigants. Most of the cases heard in the inferior courts relate to criminal or provincial offences, and most litigants appear to be at the lower end of the socio-economic status scale. Superior court proceedings, whether criminal or civil, tend to be conducted with solemnity and dignity, while the inferior courts are more frequently overcrowded and unpleasant.

It should be noted that most civil and criminal cases are settled without going to a full adversary trial. Settlement occurs either because the judge's decision in a particular case is so predictable that there is no sense wasting time in a trial, or because the decision is so unpredictable due to discretionary factors that a settlement between the parties in advance of a trial eliminates uncertainty. On the civil side, more than 95 percent of cases filed do not go to trial, but are settled out of court or abandoned by the plaintiff. On the criminal side, more than 90 percent of cases are settled as a result of a simple guilty plea, or a plea bargain that results in a guilty plea (Greene et al. 1998, 44).

In order for the adjudicative process to be credible and to serve the needs of democracy, several conditions have to be met. Judges must be competent and must attempt to decide as impartially as possible. They also need to appear to be in a position to be impartial. In cases involving jury trials, the selected jurors should be impartial and competent, and they should be treated with respect. Litigants must be treated fairly, meaning that due process is followed so that both sides in a dispute

have the opportunity to present their cases fully. Finally, cases must be settled in a timely fashion. In criminal cases, this means that after taking into account the reasonable time needed by criminal accused persons or their lawyers and the Crown to prepare their cases, cases ought to be tried with minimal delay. Accused persons should not have to suffer long waits during which their fate is uncertain, and during which time they might be incarcerated. As well, the longer the delay, the less reliable is the memory of witnesses, and the less chance there is that witnesses will still be available to testify. In civil cases, unnecessary delays not only lead to suffering because of unknown outcomes, but where large sums of money are involved, delays in paying settlements can lead to additional injustices.

Judicial Impartiality, Appointment, and Education

Perfect impartiality, for judges or for anyone else, is impossible. The impossibility of total impartiality is no reason to become cynical about the quest for justice, however, just as the fact that no professor is perfectly impartial is not a good enough reason to give up on examinations and graded essays as a teaching tool. What we expect of judges is for them to be educated, selected, and situated so as to be as impartial as humanly possible in the context of democratic values.

Judicial education in Canada consists of completing a law degree, and having at least ten years of experience in legal practice or as a law school professor. Until thirty years ago, there were no formal training courses for judges; life experience and experience in legal practice were considered sufficient. In 1971 the Canadian Judicial Council was established with both an education and a discipline mandate for federally appointed judges. It sponsored several educational seminars for judges each year, including one in judgment writing. From 1974, the Canadian Institute for the Administration of Justice has run educational seminars for judges at all levels, including a one-week seminar for new judges. In 1987 the National Judicial Institute was established in Ottawa to develop and deliver educational programs for judges at all levels and

across Canada. Judicial attendance at these educational seminars is not required, and depends on the interest of individual judges, availability of a budget to cover costs, and the willingness of chief judges and justices to allow *puisne* (ordinary) judges to attend.

Interviews with superior court judges conducted in the mid-1990s revealed that most judges thought that they did not have adequate time for judicial education (Greene et al. 1998). Given that the European civil law tradition has created compulsory academic training programs for aspiring judges that are separate from the training programs for lawyers, and given the spate of wrongful convictions brought to light by DNA testing (Manitoba 2001), it is natural to wonder whether the Canadian system for judicial training could be improved. As well, judges would probably be more effective in contributing to solutions to the administrative problems in courts if they had some training in courts administration. For example, newly appointed judges might be required to attend a comprehensive judicial training program of several months' duration before taking up their positions, or universities could provide postgraduate programs in adjudication for aspiring judges or tribunal members. Some of the training programs currently offered by the National Judicial Institute deal with strategies for reducing bias related to such factors as gender. In order to promote impartial decision making, it would be useful to ensure that such strategies are known and available for use by all judges, not just those who choose to and are able to take such courses. Whatever enhancements are made to judicial training must necessarily be set up so as to avoid interference with judicial independence. Once they've taken up their positions, that is, judges cannot be required to take specific courses, as this mechanism might be used to tamper with judicial independence.

The procedures for making judicial appointments in Canada have improved greatly during the past three decades. Up to the 1960s, political patronage was a major factor in judicial appointments at both the federal and provincial levels. The first cracks in the patronage system began to appear in 1967, when Pierre Trudeau was minister of justice. He set up a system of consultation in which a committee of the Canadian Bar Association reviewed candidates for federal judicial

appointments being considered by the office of the minister of justice, and rated them as to whether they were “qualified” for a judicial appointment. As well, the recruitment of candidates for federal judicial appointments became more systematic when an official in the minister’s office was designated to prescreen candidates who had expressed interest in a judicial position, and to look for additional names to put on the list through an informal system of contacts. The cabinet rarely appointed anyone deemed “unqualified” by the Bar Association screening committee. Patronage still played an important role, however, because those who got on the list in the first place were those acceptable to the justice minister and the prime minister.

In 1968 Ontario’s Royal Commission into Civil Rights, led by former chief justice James McRuer, pointed out the problems of bias and unfairness created by magistrates appointed by the provincial cabinet for their political connections rather than their competence (McRuer 1968). As a result of McRuer’s scathing critique of the provincial justice system, the magistrate’s courts were replaced by a provincial court with better facilities and higher qualifications for judges. Judicial appointments were screened by a judicial council, which, like the Trudeau system at the federal level, at least weeded out potentially bad appointments. The other provinces followed suit with revised judicial appointments systems, and for a while they seemed to compete to develop the best system for making quality appointments. Patronage as a factor in judicial appointments nearly disappeared completely in some of the Western provinces, although it remained an important factor in some of the Atlantic provinces (Canadian Bar Association 1985).

Extensive reforms were made to the Ontario provincial judges appointment system in the late 1980s by Attorney General Ian Scott. The thirteen-member committee that eventually resulted from Scott’s reforms was initially chaired by one of Canada’s leading academic authorities on the judiciary, Peter Russell (1992). The appointments committee is composed of a nearly equal number of lawyers and nonlawyers, and of men and women. The key feature of this committee is that it actively recruits potential candidates, rather than simply reacting to names provided by the government. It advertises extensively

for qualified persons to apply for judicial positions and has been particularly proactive in encouraging women and members of minority groups to apply. Applicants must complete a comprehensive application form, and references are checked. Those who appear to be best qualified are interviewed and ranked. The committee forwards its ranked recommendations to the Ontario Judicial Council, which forwards them to the attorney general. Until the Conservative government under Mike Harris took office in 1995, the cabinet nearly always appointed the candidates recommended by the committee. For a time, the Conservative attorney general was of the opinion that the appointments committee tended to recommend candidates who were not tough enough on crime, and asked the committee for a longer list of potential appointees. Eventually, however, the Harris cabinet was persuaded by supporters of the new system that the judicial appointments committee system was fair after all, and resulted in higher-quality appointments than had previously been the case. All the other provinces and territories have judicial appointments advisory committees of some sort (see Chapter 2).

The improvements at the provincial level encouraged the federal government to enhance the system for federal judicial appointments. The Mulroney government replaced the system of consultation with the Canadian Bar Association with provincially based screening committees, and the responsibility for creating the list of potential candidates was transferred from the justice minister's office to the commissioner for federal judicial affairs. This new system, however, represented only a small improvement. The committees were not given responsibility for recruiting candidates. All they could do was to attempt to screen out unqualified candidates presented by the commissioner - a very limited function. The Liberal election platform of 1993 included a promise to improve this system, and there have in fact been some enhancements since then, using the Ontario system as a model. The committees advertise to encourage a broader range of applicants, applicants must fill out application forms similar to those used in Ontario, and the committees may interview applicants. But although the federal government has promised since 1993 to make public the names

of committee members, this has still not occurred, and attempts to encourage qualified applicants to apply for a federal judgeship are still not as extensive as the Ontario procedures.

There is no committee system in place to assist with the recruitment of candidates for the Supreme Court of Canada, or for elevations from trial courts to appellate courts. Decisions about appointments to the Supreme Court have always been made by the prime minister in consultation with the minister of justice, taking into account the need for a balanced representation of regions, and background factors such as religion and ethnicity. (By law, three of the nine judges must be appointed from Quebec.) Beginning in the Trudeau period, attempts were made to take political partisanship out of the appointment process, and to appoint persons to the Supreme Court who were generally considered to be the best potential judges in the country – still taking into account, of course, factors such as regional representation and, after 1982, the approach the candidate might take to the interpretation of the Charter. Very little is known about how decisions are made by the federal cabinet to elevate trial court judges to provincial appellate courts. Decisions about the chief justiceships of the superior courts are made by the prime minister, and the chief judges of the provincial courts have traditionally been appointed by the premier and the attorney general, although in some provinces the regular judges now have a role in selecting the chief judge.

The Democratic Role of Courts

Courts are the state's officially sanctioned institutions for conflict resolution. Their primary purpose is the authoritative resolution of disputes that elected legislatures have determined should come within their purview. They also have secondary purposes: to create rules that fill in the gaps left by legislation, to protect the principles of limited government stemming from equality and freedom, and to enforce the rules designed to prevent the opportunities for abuse of power inherent in representative democracy. Even where statute law is as clear as

possible, it is rarely completely unambiguous, and so the exercise of judicial discretion is unavoidable. In a democracy, judges are expected to use this discretion in accord with democratic values.

When Canada was established in 1867, this country was on the road to democracy because of the Constitution's provision for a representative Parliament and provincial legislatures, and the tradition of responsible government that promoted cabinet accountability to the elected legislature. After the franchise became universal in the first half of the twentieth century, some of the vestiges of the predemocratic era of courts - patronage appointments, and a system built to allow lawyers and judges more to practise their craft than to serve the public - began to give way to merit-based systems of appointment and reorganized court services that placed greater emphasis on service to the public.

After the Charter of Rights came into being in 1982, many Canadians began to realize what has always been the case - that courts have an unavoidable policy-making role whenever the law is unclear. Some laws, such as constitutions, are at high levels of abstraction, and therefore are unavoidably vague. Although some academics and politicians have been critical of the activism of Canadian courts since 1982, and although most Canadians think that their courts need to be more sensitive and compassionate, most of us are considerably more trusting of the courts than of elected legislatures. (This is not to imply that this imbalance is acceptable; clearly, reforms are needed that will generate a significantly higher level of trust in elected legislatures.) The controversy over the law-making role of judges is based in part on the assumption that democracy is simply government by a majority of elected legislators. Thinking about democracy more broadly as government by consent, with consequent implications of equality, liberty, and representative government, leaves open the consideration of aspects of democracy to which the courts can and should contribute. Chapter 2 turns to the issue of public participation in the court system.

CHAPTER 1

Strengths

- ♣ Canada's court system is integrated, meaning that with just a few exceptions, cases arising out of both federal and provincial laws are tried in the same court system, and both the federal and provincial governments have important roles in administering and staffing the courts.
- ♣ Canada's court system builds on the strengths of the English common law system of courts and of adjudication, and incorporates some features of the French civil law system of adjudication in Quebec and in the federally established courts.
- ♣ Canada's judges have at least ten years' experience as lawyers before appointment to the courts.

Weaknesses

- ♣ Because both the federal and provincial governments have responsibilities for the court system, federal-provincial cooperation is required to ensure excellence in court administration, and that cooperation is not always evident.
- ♣ Canadian judges have very little specific training in adjudication or court administration.
- ♣ The hierarchy of courts results in lower-income Canadians forming the majority of litigants before the lower-income judges of the inferior courts, and higher-income Canadians and large corporations making up the majority of litigants before the higher-income judges of the superior courts.