

# The Last Word

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# The Last Word

Media Coverage of the Supreme Court of Canada

By Florian Sauvageau,  
David Schneiderman,  
David Taras

with Ruth Klinkhammer and Pierre Trudel



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# Judgment Day: A Vignette

FOR CHRISTINE ST-PIERRE, a television reporter in the parliamentary bureau of Radio-Canada, CBC's French-language network, judgment day promised to be nerve-racking and chaotic. The case of John Robin Sharpe, an older man caught in possession of child pornography, had stirred a great deal of publicity and controversy. The decisions rendered by the lower courts had made headlines across the country. Police associations, parental groups, civil libertarians, feminists, and clerics had staked out their positions on the case. What made St-Pierre's job so difficult was that she would have to go on air at noon – almost the same time the judgment was being handed down. She had done as much preparation as she could prior to the decision. She had read a resumé of the *Sharpe* case that had been prepared by the Supreme Court of Canada, she had reviewed press clippings about lower court decisions, and attended briefings given by the Department of Justice and by the court's executive legal officer, James O'Reilly. Although she sometimes speaks to experts, she hadn't had time to phone or consult with anyone beforehand.<sup>1</sup>

The court handed down three decisions on Friday, 26 January 2001. Two of the judgments, a case in administrative law from Ontario (whether principles that had guided a particular set of labour relations board consultations had violated the rules of natural justice) and a criminal case from Newfoundland (whether a mentally challenged complainant had to be called as a witness), received no media coverage, evaporating from public view as soon as they were released. From a media perspective, these cases were dead on arrival. But the *Sharpe* case, which dealt with the possession of child pornography, had all the ingredients of a major news story. Sharpe, a retired city planner who lived in Vancouver and who had won some recognition as a writer, fit the popular conception of what a sex deviant might look like: old and dishevelled, and a bit decrepit. Far from being embarrassed by his perverse behaviour, Sharpe seemed to revel in it. For most Canadians, the case was primarily about ensuring that children are protected from the exploitation of pornographers. Emotions ran deep.

For others, the *Sharpe* case was about freedom of expression. Of particular concern was whether creating diaries or drawings or visual materials for one's own use constituted criminal behaviour. However repugnant Sharpe's behaviour might be, his rights had to be protected. There was also the overhang of partisan politics. The Alliance Party had made the *Sharpe* case into a *cause célèbre*. Pressure had mounted on the Liberal government to react strongly if the court ruled in

[1]

Sharpe's favour and struck down the pornography law. In fact, 150,000 people had signed a petition asking the government to overturn the lower court judgments that had found the sections of the pornography law dealing with possession to be too broad, too sweeping.

### The Briefing

For the court's executive legal officer (ELO), James O'Reilly, who was responsible for briefing journalists and announcing the decision, judgment day had really begun at 10 p.m. the night before, when he received the final version of the judgment. Although he had seen previous drafts of the decision and had conducted a "day before" briefing attended by approximately fifteen journalists, care had to be taken to ensure that there were no major errors in the text. Translators had worked feverishly through the previous weekend and there had been concern that the decision would not be ready for Friday. As it was, the schedule was pushed back so that the decision would be released at noon instead of at the usual time of 9:45 a.m. This upset some of the radio and TV reporters, including St-Pierre, who would have almost no time to read or digest the judgment before having to go on air with their stories.

O'Reilly, who had come to the court from private practice in 1997, had briefed the press countless times before. But the *Sharpe* case would not be routine. He felt that coverage of the lower court cases had been marred by suggestions that the entire pornography law could be struck down – not just the prohibitions concerning possession – because of concerns over freedom of expression. He now wanted to ensure that journalists understood the details – the subtleties of the case – and to hammer home the point that "no matter what the court did a large part of the child pornography law was going to be completely untouched and a lot of protections would still be available" (O'Reilly 2001).

By the time St-Pierre arrived at the Supreme Court Building for the briefing at about 10:45 a.m., the west side of the building was jammed with TV trucks. Thick, brightly coloured TV cables lay like dead snakes in the solemn and majestic lobby. Ten to fifteen camera crews had jostled with each other for the best positions and were setting up behind a red velvet security rope. Journalists were connecting their feeds to a single unidirectional mic, behind which those who wished to make statements or be interviewed could stand. A small army of legal experts and spokespeople for interested parties such as Focus on the Family and Victims of Violence mingled in the lobby.

Approximately forty journalists were in the Media and Barristers Room when O'Reilly arrived at 11:30 a.m. All the chairs were occupied; some journalists were standing and a number were sitting on a window ledge. Tape recorders were neatly aligned on the table in front of where O'Reilly sat. The room was noisy and tense.

Cellphones rang constantly and the door opened and closed frequently as journalists came and went. The room was also awash with rumours and predictions. St-Pierre overheard another journalist tell a colleague that “they’re supposed to strike down and amend the law.”

Adding to the tension was that the Department of Justice was also worried about how to control the story. One department spokesperson was described by a newspaper journalist as having “freaked out.” The spokesperson had warned reporters that “speculating in the media is really not in our best interest. I’d really prefer it if you did not write stories until the decision comes out.”

O’Reilly’s briefing, as was the case with all his briefings, was strictly off the record. He began by distributing copies of the relevant sections of the Criminal Code in both French and English. He reviewed the definitions of pornography and the history of the case. He then described the options that were available to the judges. St-Pierre listened intently. Others were scribbling. A number were repeating O’Reilly’s words into cellphones. But even as he briefed reporters, cellphones continued to clamour and the door continued to swing open as reporters came in and out of the room.

As noon approached, the scramble began. One female TV reporter put on her makeup much like a warrior putting on war paint before a battle. The door finally opened and a trolley with a hundred copies of the decision was wheeled in. O’Reilly announced the decision at exactly twelve o’clock. The court had unanimously upheld the sections of the Criminal Code that dealt with possession of child pornography, but had carved out two narrow exceptions. Although he encouraged journalists to take time to read the decision, he provided a shortcut for those who were under severe deadline pressure by noting the key paragraphs in the judgment. He pointed out, for instance, that a particular paragraph was a very good summary of the decision. Again, some journalists were repeating his words into cellphones. Although O’Reilly would spend the next twenty minutes reviewing the judgment and its reasons, St-Pierre had to leave immediately. While she found the briefing helpful, that it was only in English was a problem. Now she had only a minute or so to read the decision before going on air.

### Constructing the Story

Amid the frenzy, an English-language reporter fell down the stairs while rushing to the lobby. To make matters worse, she had audio trouble and would soon be forced to conduct interviews in a silent void – that is, without instructions or prompting from the main studio. Even while she was reporting, she seemed unclear about the details of the decision.

After her live hit, St-Pierre stayed in the lobby for another ten minutes to listen to interviews with the experts and interveners. She then had to leave to prepare

a more complete story for the news at 5 p.m. A producer and a researcher from her bureau stayed behind to tape statements and interviews so that St-Pierre could view them later.

It is interesting to note that for all the talk about pack journalism and pressures on journalists to conform to the prevailing mood of the pack, journalists had little time to talk to each other amid the chaos. There was no opportunity for any group dynamic or consensus to develop. Most reporters were under severe deadline pressure, they were all involved in negotiations of some kind or another with their desks or bureaus, and they pursued their own sources and angles, making individual choices about which perspectives were important and what constituted balance. One can argue that the breakup of the pack enhanced the ability of O'Reilly and the court to set the agenda and establish a particular angle.

Much of St-Pierre's story would be built around reactions to the decision first by Sharpe himself and then by government leaders, opposition politicians, and spokespeople for various interest groups. Her job was to keep track from Ottawa of what amounted to a patchwork quilt of statements that were being made across the country at different times. Vic Toews, the Alliance Party justice critic, held a news conference in Ottawa at 1:30 p.m. Sharpe's lawyer, Richard Peck, spoke to the press from Vancouver at 2:45. His remarks were transmitted to newsrooms directly via the Internet. The government's response came at 3:15 when Justice Minister Anne McLellan appeared at a news conference in Edmonton.

Most of these events were carried live on CBC *Newsworld*, which had begun broadcasting soon after the decision was handed down. The cable channel joined what amounted to a series of rolling news conferences that were occurring across the country, and also had a panel of legal experts providing instant analysis. *News-world* had the capacity to set the agenda for other news organizations and for groups that wished to react to what others were saying. *Newsworld* both reported the news and helped in making it.

Kirk Makin, the *Globe and Mail's* legal affairs reporter who had been assigned the front-page story, decided to avoid the Ottawa maelstrom entirely. Makin believed that he had all the tools he needed in Toronto. At his desk he had a small TV, which was tuned to *Newsworld*, a copy of the decision was on his desk within minutes of its release, and he could phone O'Reilly or anyone else that he had to if he had questions. Most importantly, he could remain at a comfortable and dispassionate distance from the "sense of electricity" that pervaded the court and the swirl of events and players. As Makin reasoned, "It's counterproductive to go, I can do a better job reading the judgment calmly and coolly in my office and then using the phones. I think that the people who cover Ottawa probably feel compelled to go. You know it's a block away, so you sort of gravitate there and you become part of the TV scrum scenario. I mean it's rare that I've gotten quotes I needed or

even used at those scrums. But it's one-stop shopping for some people. If you've got short deadlines, you just take your mic around and record five interviews and then go back and get your quote" (Makin 2002). Another *Globe* reporter had been assigned to cover the Ottawa angle, and there would be another story filed from Vancouver.

The *Globe's* game plan was finalized at a 10 a.m. editorial meeting presided over by editor-in-chief Richard Addis. Angus Frame, the paper's webmaster, told those at the meeting that Sharpe would be the main story on the website. In fact, a story about the decision, written by Makin, was posted soon after its release. There would be even heavier coverage on Monday, with three opinion pieces – two by regular *Globe* columnists and one by a guest contributor who would analyze the *Sharpe* decision from a Christian perspective.

### Two Minutes and Two Seconds

Not surprisingly, Robin Sharpe was at the centre of the media storm. Much of the coverage seemed to hinge on whether Sharpe would be available to the press. If he did make an appearance, that would provide the main visual material – the backbone – around which the story might be constructed. Sharpe, however, feared for his safety. He had changed his appearance and had moved to a new address. The last thing he wanted was the glare and exposure of TV cameras. Nonetheless, camera crews from VTV, CTV, CBC, and BCTV were soon camped in the hallway outside his apartment. In the rush to get the story, the issue of whether journalists might be endangering Sharpe's safety seemed to be of little concern.

Sharpe was living in a windowless room in a dingy walk-up across the street from a fish market. Used condoms and needles were strewn in front of the building. The hallway where the journalists were assembled was cramped, dirty, and had a noxious stench. One person who was there described the hallway as smelling like a combination of old sweat, dirty socks, and desperation. Although Sharpe refused to come out, he spoke to reporters over the phone, in effect conducting a news conference from behind his apartment door. When it became clear after several hours that there would be no visuals of Sharpe, the camera crews departed. There would be no opportunity for what scholar K.T. Erikson might describe as the parading of the deviant (cited in Ericson, Baranek, and Chan 1987, 7).

At her office in the National Press Building, St-Pierre, her producer, and two technicians were frantically trying to patch together a report for the five o'clock news on Réseau de l'information (RDI). They had been told that the Sharpe story would be the lead item but that they had only two minutes and two seconds. All the day's activities and complexities had to fit inside a very small box. Parts of the piece had been easy to assemble. The story began with an image of the Supreme Court, there was stock footage of Sharpe, a graphic with the salient parts of the

decision had been prepared, and St-Pierre had taped a sign off from the Supreme Court Building lobby. The story also included clips or sound bites from Sharpe's lawyer, Richard Peck; Mark Hecht from the child advocacy group Beyond Borders; and Justice Minister Anne McLellan.

But there were problems. Sharpe's reluctance to come on camera meant they had to improvise quickly. One of the technicians had created a visual depicting Sharpe as he was speaking on the phone. The producer tried to create another visual of a man leafing through a private journal. St-Pierre warned him that the police had not seized such a journal and that the images they used had to correspond exactly with what Sharpe was arrested for. Compounding the problem was that although a research assistant had been able to conduct a phone interview with Sharpe just before 4 p.m., St-Pierre had not had time to listen to the tape. It was too late to use the Sharpe interview for the five o'clock show. Finally, the story was sent from Ottawa at 5 p.m. St-Pierre had not had time to see the complete report before it was broadcast.

St-Pierre now had a short time to catch her breath before the six o'clock news broadcast. She finally had a chance to listen to the Sharpe interview. She decided to insert a clip from the interview and drop the sound bites from Sharpe's lawyer. She did a voice-over paraphrasing in French Sharpe's words. Again, the story had to be exactly two minutes and two seconds long.

Although the Sharpe story was one of the lead items on most of Radio-Canada's 6 p.m. local news shows, other news stations made different decisions. At some of them, the court's decision to uphold the pornography law, Sharpe's reluctance to appear on camera, and a large earthquake in India knocked the story from the lead position in the newscast. Had the child pornography law been struck down and Sharpe been allowed to avoid the "justice" that much of the public thought he deserved, their decisions might have been different. The political fallout from the judgment might have lasted for days if not weeks. The brewing political tempest had been stilled by the court's decision.

But it was also the case that earthquakes make good television and dramatic pictures were available. As John Gibb, a producer for CBC's *Canada Now* show in Vancouver, explained, "I felt conflicted about what to lead with. On almost any other day, it would have been a no-brainer for sure and we would have led with Sharpe. But things like earthquakes trump other kinds of stories and we have a large Indian community involved. The lead should be the story that is most likely to stop people from turning the channel. So we went with the pictures that we had of the earthquake." In Winnipeg, local Shriners had been caught with prostitutes. The earthquake had not been the lead story.

After a frantic day, St-Pierre could finally go home. The story that aired at 6 p.m. was broadcast on *Le Téléjournal* at 10 p.m. On Monday, she would be back

covering Parliament Hill with its daily diet of question period, scrums, news conferences, and partisan political attacks. She would remember covering the *Sharpe* decision as being an exciting but gruelling experience.

### Note

- 1 This vignette was compiled from direct observations and interviews conducted on 26 January 2001 by Ruth Klinkhammer (Ottawa), Melissa Kruger (Ottawa), Valérie Langlois (Ottawa), Shannon Sampert (Vancouver), and David Schneiderman (Toronto).

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# Introduction: The Supreme Court under the Media Lens

*The Last Word* is about the relationship between arguably two of the most important institutions in Canadian life: the Supreme Court of Canada and the Canadian news media. The relationship is critical for the court, for journalists, and for the public. While Supreme Court justices operate within a seemingly self-enclosed world of legal procedures and precedents, they exercise extraordinary political, social, and moral authority. Yet the court cannot function unless its decisions, and the reasons and spirit behind them, are conveyed to the public and to elected officials in an accurate manner. For this, the court relies on journalists. As Peter Russell (2002) observes, “Journalists are the managers of the political life of judicial decisions.”

The adoption of the Charter of Rights and Freedoms in 1982 transformed Canadian political life. It placed the Supreme Court at the nexus of societal power and change. Judges had to give life to the Charter, and in doing so it can be argued that they redefined and reordered much of the Canadian social contract. Their increased role, however, brought both increased scrutiny and controversy. Judges often find themselves in what some describe as a “dialogue” with Parliament, and they are sometimes the subject of intense criticism in the news media.

News organizations have their own motivations and agendas and their own institutional logics. Most important, they play a gate-keeping role. Journalists have the power to decide which Supreme Court rulings will be covered and which will not, whether stories will appear at the beginning or end of the newscast or the front or back of the newspaper, which parts of decisions will be highlighted and which will be downplayed, and which sources they will look to for comments. Journalists write the editorials and choose who will write the op-ed pieces. Simply put, once judges hand down rulings, they lose control of the message. They are dependent on and at the mercy of the journalists who report on, interpret, and place their own meanings on judicial rulings. Thus, journalists, it can be argued, have the last word.

Media coverage has emerged as a critical factor not only in how the public but how the other institutions view the court. It is true that Parliament will sometimes respond to judicial decisions by enacting new laws, but without the questions, criticisms, and controversies generated by an attentive press, Parliament might not

be galvanized into action. Journalists and news organizations maintain a vigil at the key crossroads of political power – where the key decisions of a society are made. Journalists must explain, probe, ask questions, provide meaning, and be the eyes and ears of the public. “Good journalism,” write Leonard Downie Jr. and Robert Kaiser (2002, 4), “makes possible the cooperation among citizens that is critical to a civilized society. Citizens cannot function together as a community unless they share a common body of information ... The best journalism digs into it, makes sense of it and makes it accessible to everyone.”

Not surprisingly, judges are not always satisfied with how the court and its decisions are portrayed. Judgments are sometimes misinterpreted, sensationalized, and even lampooned. On more than a few occasions, judges have been both surprised and stung by the sharpness of media criticism. Antonio Lamer, former chief justice of the Supreme Court of Canada, expressed concern about attacks that he believed went “beyond acceptable criticism” and threatened “to undermine public confidence in the judicial system” (Stewart 1998, A1). Yves Boisvert of *La Presse* advised us that part of the problem may be that judges have been sheltered from criticism for too long and have had a difficult time adjusting to the new world in which they now find themselves. According to Boisvert (2002b), judges have been the subject of legitimate criticism but “in ways that were hard, unexpected and surprising for judges because it hadn’t been done before.”

Not only have Supreme Court of Canada justices felt the sharp end of the stick of media criticism, but there has been a sizable increase in media attention since the early 1990s. The glare of the media spotlight has meant increased scrutiny of their public and private lives. The authority of judges, their views and convictions as expressed through their rulings, even disputes among judges, are now exposed to public view in a way that was inconceivable just a short time ago. The “monastic view of the judiciary is no longer acceptable,” notes Stephen Bindman, a former reporter and now an advisor to the Department of Justice (Canadian Judicial Council 1999, 5).

Frustrating, perhaps, for some judges is the fact that they are expected to refrain from commenting on the cases that they have decided. This code of silence sometimes has left judges feeling vulnerable and without the means to respond when media and academic critics attack their decisions. Yet at the same time, this new world requires judges to reach out, be visible, explain their points of view, and convince the public that their decisions are fair and independent. The justices of the Supreme Court cannot hide behind a protective wall of distant and dignified authority. They must, in their own way, campaign for public favour.

Former justice Frank Iacobucci (2001) acknowledges that the legitimacy of the court, and indeed of the democratic process, is dependent, at least to some degree, on the court’s ability to get its message out. “The danger,” he warns, “is

that if the media are inaccurate in conveying the information to the public, you are dealing with a misinformed public. What is worse: a misinformed public or an uninformed public? I don't know. They can both lead to the same results and that is an inadequate way of understanding, of dealing with problems, and that is not good." According to Iacobucci, "Decisions are enforced because people accept the decisions as the law. If confidence is eroded, then we worry about the legitimacy of the court and the role of the court to settle disputes through the rule of law in our country and that's an absolutely priceless commodity in a constitutional democracy. So those are the stakes."

*The Last Word* has two major tasks. The first is to describe a genre of news reporting that has seldom before been examined in any detail in Canada. To our knowledge, there have been only three studies of media coverage of Supreme Courts: two of the American Supreme Court and one on the Canadian court (Davis 1994; Slotnick and Segal 1998; Miljan and Cooper 2003). Ours is the most comprehensive study yet undertaken of media coverage of the Canadian Supreme Court. There are many unanswered questions: Is there a difference between coverage in Quebec and English Canada? Does reporting vary among news organizations or is there a single flavour that can be found in all the reporting? Is the court depicted in a positive or negative light? What are the contingencies that determine how a decision or event will be framed? Do certain kinds of judgments receive the lion's share of coverage while other kinds of cases are underreported or missing in action?

One of the most contentious debates in media studies is whether media coverage reinforces the power of the powerful by celebrating and sanctifying the established interests and values in society. The notion is that the news media are inherently conservative and are a part of the governing structure of authority (Gans 1980; Gitlin 1980; McChesney 2000). Other scholars argue that media coverage can undermine and subvert governing elites and values and that reporting is contingent on the factors at play in a given event (Cook 1998; Page 1996; Wolfsfeld 1997). News is a contested ground where a variety of forces and factors can determine the nature of reporting. In this regard, the Supreme Court of Canada constitutes an ideal case. If there is any institution that upholds and symbolizes the hard crust of tradition and hierarchy, it is the Supreme Court. The court stands at the apex of societal and political power and has enjoyed an almost automatic authority and deference. How the court is depicted by the news media will tell us a great deal about the nature of media power generally.

The relationship between the Supreme Court and the journalists who cover it constitutes a distinct world of Canadian journalism. Our second task is to examine this relationship. Many of the operating assumptions that apply to general political reporting operate less successfully in this milieu. Our goal is to explore this world,

to peer inside for the first time, and to describe how it operates. To this end we have interviewed most of the journalists who are covering or have covered the court, former and current justices of the Supreme Court, and former and the current executive legal officers (see Appendix A for a list of the interview questions). We are grateful to them for their cooperation and their candour. As part of this effort we also had members of our team present at the Supreme Court and in newsrooms across Canada when a particularly controversial judgment was handed down – the *Sharpe* decision on child pornography.

In order to examine how the Supreme Court has appeared under the media spotlight, we have analyzed the English- and French-language media's portrayal of the court using two probes. We evaluated news coverage for the period from 1 September 2000 to 31 August 2001 to identify the major trends in how the Supreme Court and its judgments were covered (see Appendix B). Reporting in *La Presse*, *Le Devoir*, *Le Journal de Montréal*, the *Globe and Mail*, *National Post*, and the *Toronto Sun*, as well as broadcasts on Radio-Canada, TVA, CBC, and CTV, were scrutinized. The second probe took a more in-depth approach. Media reporting of four significant cases – *Vriend*, the *Quebec Secession Reference*, *Marshall*, and *Sharpe* – were investigated in detail. These cases were selected because they dealt with issues that were critical for society and in which the legitimacy and integrity of the court were at stake. We do not pretend that these cases were the only important cases or that they were typical in any way. We believe, however, that they each provide unique vantage points from which to view the media's coverage of the court.

*Vriend* pitted the Alberta government against a gay teacher who had been fired from his job and was seeking protection under Alberta's human rights legislation. This was a case in which the legitimacy of the court was at stake. On one level, the judgment was about human rights. On another level, however, it was about federal and provincial powers and applying the values of the Charter to a resistant Alberta. Alberta's popular premier, Ralph Klein, had been a forceful critic of the power of the judges and was under pressure from his caucus to use the notwithstanding clause to override court decisions. Our study found that coverage in the national media differed considerably from coverage in Alberta. Albertans saw the case through an entirely different media lens.

The *Quebec Secession Reference* dealt with the rules and obligations that would govern any attempt by Quebec to pursue political independence unilaterally. Indeed, the *Secession Reference* may have been the most important case ever decided by the court. The judges had to walk a dangerous political path knowing that their own credibility was at stake. All the major political parties in Quebec had opposed the decision by the federal government to refer the issue to the court and had been stoking the fires of doubt for months about whether the court could make a fair decision. All the old ghosts about a one-sided federalist court blind to Quebec's

needs and to basic fairness were dragged out before Quebec public opinion.

The contentious *Marshall* case dealt with Aboriginal treaty rights in Atlantic Canada and the resulting outbreak of violence over access to the Atlantic fisheries. Following in the wake of several landmark decisions on Aboriginal rights, including *Delgamuukw v. British Columbia*, the judgment both refined and limited Aboriginal rights. Our study suggests that poor and inaccurate media coverage of the decision may have contributed to the outbreak of violence.

The *Sharpe* case concerned the child pornography law and called on the Supreme Court to weigh issues of freedom of speech and privacy against the dangers of child pornography. Lower court decisions in British Columbia that had found the existing law to be too broad had ignited a brushfire of controversy and media criticism. The case was hotly debated in Parliament, and interest groups, particularly those who wanted tougher laws against pedophiles, had moved into high gear. While the news media largely framed the story in terms of whether the pornography laws would protect children from predators, others tended to see *Sharpe* as a freedom of expression case. Again, the legitimacy of the court was at stake.

### Lifting the Curtain

The decision to enter the world of public and media relations was made incrementally and in slow, hesitating steps. When Chief Justice Bora Laskin gave his first interview to the press in the mid-1970s, he was beginning a process that would evolve considerably over time. Some credit Brian Dickson, who was chief justice between 1984 and 1990, with doing the most to create a new relationship between the court and the news media. It was under Chief Justice Dickson that the position of executive legal officer (ELO), the person who has the job of briefing and dealing with journalists, was established. Dickson also began the practice of meeting with newspaper editorial boards, conducting interviews, and releasing texts of speeches in advance. In a bold step, he invited a documentary camera crew into the court's inner sanctum: the hallways, offices, and conference rooms from which the public had previously been denied access.

Chief Justice Dickson's colleague, John Sopinka, undoubtedly played a critical role in breaking some of the old taboos and lifting the curtain that had hidden judges from public view for so long. Justice Sopinka saw judges as public figures who should be free to comment in public about their work. He believed that the best way of dispelling the mystery around the judiciary was "to loosen the restraints that many judges feel bind them in their public statements ... A judge can and ought to speak on the work of the court. It is absolutely essential that the workings of the court be demystified. Otherwise how can the public have confidence in it?" Sopinka was of the view that there should be no "absolute rule that prevents a judge from explaining his or her decision to the public if failure to do so has led

or may lead to confusion or misunderstanding” (Canadian Judicial Council 1999, 11).

Chief Justice Antonio Lamer opened the court up to even greater scrutiny. Under Lamer’s tenure, cameras were invited into the courtroom and oral arguments were televised live on the Canadian Parliamentary Affairs Channel (CPAC), the public affairs cable channel. In addition, broadcasters were allowed to use short clips or sound bites for their newscasts. The court, under Chief Justice Lamer, also decided that, when a nest of decisions was scheduled to be handed down during a particular week, judgments would be released over a two-day period so that journalists would not be overwhelmed.

Today, Supreme Court judges speak out frequently in public forums and to a variety of audiences. When Beverley McLachlin was named chief justice in January 2000, she conducted what amounted to a media tour, giving interviews and accepting a host of speaking invitations. “I did it more than any other chief justice has,” she admitted to us. “These are the people’s courts and the people are entitled to know who’s been named to that court and who is chief justice responsible for the administration of that court” (McLachlin 2002).

There is now a conscious effort by the court to better organize, and some would argue orchestrate, its relationship with the press. The ELO briefs reporters before sessions begin and before important rulings are issued. The court floods subscribers with e-mails containing press releases about leaves to appeal, hearings, and upcoming or just-released judgments. More recently, the court has agreed to allow lock-ups, which prohibit reporters from leaving the room to contact their newsrooms, so that journalists can have time to read important judgments before their release to the parties and the public. While the court does not engage in image management to nearly the same degree as other institutions, it has developed its own communications system with its own rules and special understandings. There is no doubt that the decision to enter the world of media relations, to explain and consciously promote its public role, has altered the nature and role of the court (Canadian Judicial Council 1999, 7).

Reporting from the court is also a vital test for journalists. Journalists must enter a world with which they are largely unfamiliar. Judgments are highly complex, containing abstract and subtle arguments that often are difficult to explain in a few paragraphs or seconds. Dry legal reasoning does not translate easily into the stories that journalists most covet. Moreover, the assumptions that normally govern political reporting don’t readily apply to legal judgments. There are few exciting visuals, and judges don’t leak stories, appear at news conferences, or attack their critics. It is also sometimes difficult to find heroes and villains in the carefully crafted judgments that often give something to both sides in a dispute.

As vital societal decisions are being made at the Supreme Court, journalists

and the news organizations that they work for have had to face new challenges. Some would argue that the frames used by journalists, the narratives that journalists invariably depend on, are unsuited to reporting on the court and its rulings. Others contend that judicial reporting will always take a back seat to the acrimony, accusations, and compelling visuals provided by party politics and parliamentary debates. In addition, while the court has come a long way in opening itself up to journalists, it can be argued that there are few settings that erect as many barriers and pose as many challenges to good reporting as does the Supreme Court. As this study demonstrates, the rules that govern the relationship between the court and the journalists who cover it are decidedly different from those found in other milieus. This sometimes makes it difficult for journalists to do the job expected of them. There is also the question of whether news organizations have acquired the expertise and devoted the resources needed to explain court rulings and the realities of judicial power to the public. As Frank Iacobucci noted, the stakes are high.

### **Judicial Authority and Media Power**

Among the most important developments of the past few decades in Canadian society has been the growth of judicial authority, the extraordinary and enhanced power of the mass media to shape societal values, and the advent of a new societal consciousness of rights and freedoms. Each of these forces has roots in social and technological change and has emerged, to some degree, independently of the other. Yet, together, they have shaped and altered much of the landscape of Canadian society.

The origins of the rights revolution are complex and multidimensional. The horrors of the Holocaust, the fight for civil rights in the American South, the growth of the women's movement, and the emergence of post-materialist values that have spawned demands for more and greater rights are all part of a vast tapestry. There is, in Charles Epp's view, "a cultural-centred explanation" for why the courts have become a locus of power (Epp 1998, 15). The courts have had to respond to the changing nature of society – in this regard, they have been followers rather than leaders.<sup>1</sup>

Some observers believe that the relationship between at least some social groups and the Supreme Court has been mutually reinforcing. They contend that while social groups may have used the court to gain political ground, the court needed these groups to enhance its own legitimacy. This is because the case for enhanced judicial authority rests to some degree on the proposition that there are important constituencies that cannot be served by legislatures and cabinets. While the proverbial upper dogs, those with financial clout and electoral muscle, have always enjoyed access to the cabinet, top bureaucrats, and parliamentarians, the underdogs have had to depend on the courts. Hence, the role of the judges and

their claim to power are implicitly linked to the existence of these groups (Brodie 2002, 123).

Most interesting, perhaps, has been the role the media have played in reflecting and inspiring rights consciousness. According to Justice Ian Binnie, it is the media that have “been responsible for this so-called rights revolution” (Schmitz 2001). People can read about, see, hear, and correspond with those who are fighting similar battles in other jurisdictions. The battles for enhanced rights for women, Aboriginal peoples, and gays and lesbians are played out on the television screens and in the newspapers as much as in the courtrooms.

The expanded authority of judges must be seen against the backdrop of another major development, a new kind of activism with regard to the court by reporters and news organizations. During the 1970s and 1980s, the Supreme Court of Canada was at the periphery, at the outer edges, of political reporting in Ottawa. Today, the court has moved closer to centre stage. Court proceedings are broadcast live on CPAC, important judgments are covered extensively on CBC *Newsworld* and on Réseau de l’information (RDI), and reporting, particularly by national newspapers such as the *National Post*, *Le Devoir*, and the *Globe and Mail*, has increased substantially. In 1999, *Time* Canada had chosen the Supreme Court as the most important newsmaker of the year (Tibbetts 1999).

In an attempt to measure the quantity of reporting over time, we conducted a simple, though impressionistic, exercise. We counted all stories about the court reported in *Le Devoir* and the *Globe and Mail* during the first year of each decade since 1970. We tabulated all stories that ran from 1 September 1970 to 31 August 1971, including features, editorials, and commentaries, as well as regular news stories. The results are startling. In 1970-71, there were a total of 33 stories reported in *Le Devoir*. The number increased to 55 stories in 1980-81 and then to 79 in 1990-91. By 2000-01 the number of stories in *Le Devoir* had increased to 90 articles. The rise in the number of stories appearing in the *Globe and Mail* was even more dramatic. There were 40 in 1970-71, 102 in 1980-81, 113 in 1990-91, and 145 in 2000-01. By this admittedly primitive measure, coverage of the Supreme Court has at least tripled since the early 1970s.

This seems to be part of a wider trend. In the United States, newspapers such as the *New York Times* and the *Washington Post*, as well as broadcasters such as NBC, have legal reporters who are permanently stationed at the US court. Important decisions receive extensive coverage and the *Washington Post* even maintains an extensive archive on its website chronicling all the decisions of the US Supreme Court during each session and the articles that have been written about each decision.

Another important factor in the placing of a larger and more glaring media spotlight on the court was the creation by Conrad Black of the *National Post* in

1998. In its early years, particularly from 1998 to 2000 when the paper was owned by Black, the *Post* waged a fierce ideological crusade against what it saw as the power of unelected judges. The paper attacked judgments with relish and questioned the assumptions upon which the authority of the court rests. It also gave the court more coverage than any other single news organization. In a striking departure, it assigned Luiza Chwialkowska, a young journalist, to cover the court. She was allowed to write long articles on individual cases and multipage spreads such as the one commemorating the 125th anniversary of the court. In our study of newspaper and TV coverage of the court during 2000-01, the *Post* accounted for over 27 percent of the articles in a sample of six newspapers.

The following editorial is typical of the salvos against judicial supremacy launched by the *National Post* (2000):

There is a battle afoot between the people and the judiciary over who makes the laws in this country ... Canadians have been outraged as the courts have used the Charter to tweak or abolish dozens of laws, the Lord's Day Act, restrictions on pornography and voluntary school prayer, and laws that kept incompetents from fighting fires ... When challenged on slapping down legislators in this manner, the judges have bristled, and claimed simply to be engaged in a "dialogue" with Parliament ... Apart from having no authority to legislate in this manner, judges are ill-equipped to do so. Since they address policy questions only as they happen to arise in litigation, judges often have little feeling for the broader issues at stake. After all, they are not politicians.

The extraordinary attention given to the court by the *Post* stemmed from a number of factors. The then editor-in-chief Kenneth Whyte was a Charter skeptic who wanted the paper to be different from what he saw as the "grey and bland" *Globe and Mail*. Crusading against the power of judges was one way in which the *Post* could make its mark. The editorial board included John O'Sullivan, a British-born conservative who believed in parliamentary supremacy. O'Sullivan had also worked in Washington for William F. Buckley's *National Review* and so brought with him the more aggressive and critical stance that American journalists have toward the US Supreme Court. Other members of the board included Ezra Levant, now the publisher of the *Western Standard* magazine, and Neil Seeman, now with the right-wing Fraser Institute. According to Levant (2002), the members of the board shared the conviction that "Canadian public policy is no longer made in our legislatures but rather by the courts. We were unwilling to accept the law as if it would be handed down from Mount Sinai or Mount Olympus. But rather we would treat it as if it was just as politically charged as a parliamentary bill and we

would treat the judges as human beings with all of the flaws, frailties, and biases of politicians.”

Chwialkowska (2003) believes that the *Post*'s critique rested on three propositions: the need to sound an alarm about the enhanced power of the court, the use of the court by liberal and left-leaning interest groups, and the unchecked power of the prime minister to appoint judges. These were themes that would be repeated, indeed pounded on, regularly in the *Post*'s early years. Again, as our study will show, the paper devoted considerable space to exposing and dissecting judgments that offended or violated its moral and political code.

There is little doubt that the *Post*'s coverage sent shock waves through the journalistic community and set a new tone in coverage of the court. Kirk Makin (2002c), the principal legal reporter for the *Globe and Mail*, described the reaction the *Globe* had to the *Post*'s coverage:

I do remember that I was quite taken aback at their early approach of basically bashing the court. They seemed to set out from the premise that these were bad people who had to be thrashed because they had the temerity to make decisions. There was a period, I have to admit, where I felt some pressure, subtle pressure, to sort of be on board with the bashing brigade. But you know I had a number of talks with editors that just went: “As far as I’m concerned, they’re making a mistake. I don’t want to make the same one. We should continue covering the court the way that we have been.”

Some would argue that since the sale of the *National Post* to CanWest Global in 2000, the departure from the editorial board of anti-court crusaders, and recent financial cutbacks, the high tide of court reporting at the *Post* has receded at least to some degree. Chwialkowska left the *Post* in 2003.

In recent years, there has been no equivalent in Quebec to the campaign against judicial activism waged by the *National Post* in English Canada. In fact, our review of coverage of the court in *La Presse* and *Le Devoir* found little concern over judicial activism. Yves Boisvert (2002a) perhaps best summed up attitudes in Quebec generally when he wrote on the twentieth anniversary of the Charter that “There is no doubt that justices are political actors. They make decisions that have a profound effect on public life. At first, this created astonishment and seemed almost scandalous. Now it seems to be accepted.”<sup>2</sup> Judicial activism does have vehement critics, however. For instance, Marc Chevrier (1999) condemned what he called “le papisme légal” in the journal *Argument*. But such attacks have not been given prominence in the Quebec media.

Another reason for the increase in media attention to the courts may be the extent to which films, TV programs, and novels about law and justice have become

a mainstay of popular culture. From *To Kill a Mockingbird* to *CSI*, from *Law and Order* to the Michael Jackson trial, from *Judge Judy* to Court TV, a twenty-four-hour cable channel in the United States (now available in Canada) devoted exclusively to showing ongoing trials, crime and its punishment are deeply embedded in the public imagination. As Richard Sherwin (2000, 17) has observed, “Just a flip of the channel: another case, another cast, another reality, another outcome.” One can watch justice being rendered in TV dramas, reality shows, or TV movies from early morning to late at night practically without interruption.

As Elayne Rapping (2003, 51) points out, “Crime drama has an important social function: it is the nightly ritual through which we collectively experience the dread of the chaos that violence symbolizes, and the reassurance that comes when the violent are captured and restrained.” Indeed, Rapping has argued that while early TV dramas such as *Perry Mason* and *Owen Marshall* emphasized crusading attorneys who fought on behalf of the innocent, today’s programs stress crime control, with lawyers and police battling to keep the streets safe from the alien and depraved.

In the fall of 2002, CBS and ABC even aired prime-time dramas about the US Supreme Court: *First Monday* and *The Court*. And this is not just an American phenomenon. *Street Legal* dominated English-Canadian TV screens in the 1980s, as has our peculiar obsession with heroic coroners as seen on *Wojek* and *Da Vinci’s Inquest*.

In Quebec, there is a long tradition of public affairs programs on the law. In the 1950s, *C’est la loi* was hosted by the popular TV personality Alban Flamand. Produced with the cooperation of the Montreal bar, the show explained and dramatized legal issues. Fifty years later, the tradition continues. Radio-Canada is still programming a weekly show called *Justice*, explaining court decisions and legal issues. Most recently, Canal D, a specialty channel, broadcast *Dossiers Justice*, hosted by *La Presse* journalist Yves Boisvert, and Télévision Quatre Saisons (TQS) aired *Auger enquête*, an inquiry into organized crime in Canada featuring journalist Michel Auger, the target of a murder attempt by the Hell’s Angels – a program that attracted large audiences. Indeed, the trials of the Hell’s Angels have become a staple of Quebec reporting and public fascination – some would even say obsession – for almost a decade. Canadian public affairs programming also stresses legal issues. *The Docket*, which aired on *CBC Newsworld*, took an in-depth look at controversial cases and issues. *History’s Courtroom* hosted by Kirk Makin of the *Globe and Mail* revisited Canada’s great trials for History TV.

Another aspect of popular culture is that crime reporting has become the steady diet of evening newscasts and tabloid newspapers, a process that sometimes has had the perverse effect of turning criminals into celebrities. Notorious trials have always held a certain fascination. The parading and bringing to justice of the villains, the pain and suffering of the victims, the grizzly nature of the crime itself, all are part of public spectacle and, arguably, public catharsis. Grotesque personalities

such as Paul Bernardo, Maurice (“Mom”) Boucher, and, of course, O.J. Simpson have become inscribed in the general culture. One study of local television in the United States conducted by the Project for Excellence in Journalism, affiliated with Columbia University’s School of Journalism, found that crime was the most popular news topic in 2002, accounting for a quarter of all reporting. Close to 40 percent of news stations maintained a full-time crime and courts reporter (Dean and Brady 2002, 94-95).

While it may be argued that coverage of the Canadian Supreme Court hardly ranks with the reporting of shocking murders, the court has had its share of riveting and even spectacular cases. In a study that we conducted of media reporting of the Supreme Court for the year from 1 September 2000 to 31 August 2001, celebrity villains such as Robin Sharpe and celebrity “victims” such as Robert Latimer dominated the headlines.

Aside from the public’s seemingly insatiable appetite for the human drama of crime and punishment, a number of other factors have led to an increase in coverage of the court. The cable and digital revolutions and the emergence of what has been called the perpetual news cycle have changed the landscape considerably. The proliferation of twenty-four-hour news channels and a torrent of local breakfast, noon-hour, and supper-hour newscasts have created an insatiable appetite for news. Stories that once may have been given only passing coverage, relegated to a minute and thirty seconds on the main evening newscasts, are now recycled throughout the day. So, depending on the other news stories that are breaking, court stories may receive extensive coverage. It is no coincidence that cameras were allowed in the foyer of the Supreme Court of Canada soon after CBC *Newsworld* started broadcasting.

### The Supreme Court and Its Publics

Most Canadians have never been to the Supreme Court. The court is housed in a formidable and majestic building that sits on a high bluff overlooking the Ottawa River. It lies just to the west of the Parliament buildings. The building, designed by the eminent Montreal architect Ernest Cormier, was completed in 1941. The façade is a mass of cut stone. A copper roof sits atop a towering entrance that probably makes most people who enter the building feel small and insignificant. Statues stand on either side of the entrance: a statue symbolizing Truth is to the west; Justice is to the east. The main hall is cast in marble, there are cascading stairways, and shards of light pour in from seven giant windows. It is a breathtaking sight. The main courtroom is simple but imposing. The judges sit in high-backed burgundy leather chairs that resemble thrones, and the courtroom is embossed in walnut panelling. The Great Seal of Canada hangs above the judges. The setting radiates splendour, decorum, and a sense of dignified order.

One can argue that the grand physical setting, the symbolic rituals, and the particular styles that are used to communicate with the public are part of a larger message (Davis 1994, 12-13). Everything is done to convey a sense of continuity and established order and, above all, deference to authority. When the court is in session, the chief justice, Beverley McLachlin, sits at the centre, while the other justices are seated around her according to their seniority on the court. They wear black robes; on special ceremonial occasions they wear archaic tri-cornered hats and scarlet robes trimmed with Canadian mink. Court procedure is encased in formality and lawyers plead their cases from a point below where the judges are sitting: they have to look up at the judges. Though oral arguments and questions are televised live on CPAC, after they have been made, the judges retire to a conference room that is, in effect, an intimate but ornate library. Their deliberations are private, and their decisions are kept private until they are handed down.

The late sociologist Pierre Bourdieu (1987) argues that the power of courts lies in their ability to name winners and losers. “Control of the legal text is the prize to be won in interpretive struggles,” writes Bourdieu, in which the judges are the “authorized interpreters” (818). Their judgments “consecrate the established order” through the symbolic power of “naming” reality (838). What is at stake in legal disputes, then, is a struggle over the power to certify that reality.

The symbolic power of the courts in Canada, their ability to name and constitute reality, has been under threat. As Bourdieu notes, symbolic power “can be exercised only through the complicity of those who are dominated by it” (844). If the act of “faith” that attends the exercise of symbolic power is questioned – if the belief in the neutrality and autonomy of law and judges is shaken – then presumably the authority of the courts is at risk.

Richard Davis (1994, 111) in his study of the US Supreme Court has argued that the American court is involved in an elaborate but deceptive game, a ruse meant to conceal the real nature and extent of its power. The justices participate in what Davis has called a “sweet fabrication.” The basis of the deception is that the court presents itself as being above and removed from politics. The entire ambience of the court – its language, procedures, and demeanour – convey the impression that the judges are nonpartisan, independent, and exercise a wise and disinterested counsel. Their expertise and their decisions are presumably grounded only in the law and in the precedents established by a long line of previous cases. Above all, they claim not to pay attention to the press, to the pleadings of interest groups, to the reactions of politicians, or to the tides and currents of public opinion.

There is no shortage of Canadian observers who believe that the “sweet fabrication” applies here as well. There can be little doubt, however, that the justices see their power as highly circumscribed and that they exercise only limited discretion. Justice John C. Major, for instance, believes that the Supreme Court operates

under significant constraints. He expressed what is almost certainly an opinion shared by a majority of justices: “This notion of power has always escaped me. We are not gunslingers with no restraint. If we reach a certain decision on a certain law, Parliament can fix it. We don’t have the freedom to act on whim. We have to be careful in the extreme; we have to think about what courts have done previously. The only power we have taken away from Parliament is the power not to act contrary to the Charter of Rights” (Makin 2002a).

The picture, admittedly, is complex. Undoubtedly, the justices are bound by rules of the game that constrain them in ways that politicians are not constrained. Judges, for one, do not seek out problems for legal resolution; rather, they resolve only those disputes brought to them by particular parties. Justices are expected to lay down the law in accordance with statutory or constitutional texts and judicial precedent. Judges, moreover, must provide convincing and defensible reasons justifying a legal decision addressed to the parties and to the world at large (Hart 1994, 272-75). So, in some significant ways, the Supreme Court of Canada is not, as some would have it, engaged merely in partisan political decision making. Nevertheless, the judiciary has a great deal of room to manoeuvre around these constraints. Certainly, the court’s “purposive” approach to constitutional interpretation entitles judges to fill in the vague and indeterminate language of the Charter using a variety of sources and techniques (Lajoie 1997).

But the Supreme Court is by any standard an intensely political institution. Through its power of judicial review, the court can invalidate laws that have been passed by the federal Parliament or provincial legislatures. Supreme Court justices have the power to declare the winners and losers in important societal conflicts and to redistribute resources (legal, fiscal, or political) accordingly. Their judgments uphold and celebrate some societal values and practices while downplaying or denigrating others. The court has the power to construct both a real and a symbolic universe and to impose that universe on the wider society. While Alexis de Tocqueville (1969, 270) could observe in mid-nineteenth-century America that there “is hardly a political question . . . which does not sooner or later turn into a judicial one,” Chief Justice Beverley McLachlin could observe in early-twenty-first-century Canada that, increasingly, “the headlines of our newspapers are concerned with judicial decisions. More and more, courts are being called upon to decide questions of central importance to great numbers of people in our society.” Like de Tocqueville, she sees an “increasing tendency” to transform social and political issues into legal questions, “thus placing the task of their resolution on the shoulders of the courts” (Gall and Sober 2000, 28).

Unlike other institutions in the Canadian political constellation, though, the Supreme Court is largely unaccountable. Its members are appointed by the prime minister, sometimes without any consultation with provincial premiers even

though the federal government and the provinces share legislative authority in many areas of Canadian life over which the court has jurisdiction. Moreover, appointments to the Supreme Court do not have to be approved by Parliament nor are nominees made to appear before a parliamentary committee. They do not have to undergo the intense scrutiny, the ordeal of public exhibition, which is required of judges in the United States. A new and controversial procedure, however, was adopted in August 2004 with the nominations of Louise Charron and Rosalie Abella to the Supreme Court of Canada. An ad hoc Committee of the House of Commons, together with a representative from the Canadian Bar Association and from the Canadian Judicial Council, were given the opportunity to question Justice Minister Irwin Cotler about the prime minister's appointments. The proceedings were broadcast live on CPAC (Lunman and Laghi 2004).

On the occasion of the tenth anniversary of the Canadian Charter of Rights and Freedoms, Chief Justice Antonio Lamer observed that the Charter had produced "a revolution on the scale of the introduction of the metric system, the great discoveries of Louis Pasteur, and the invention of penicillin and the laser" (Morton and Knopff 2000, 13). While not everyone would agree with Lamer's exuberant description, there is little doubt that there has been a significant shift of authority from Parliament and legislatures to the Supreme Court. After all, prior to 1982, Canada had no entrenched constitutional regime for the general protection of rights and freedoms. But it is critical to note that Canada has a long tradition of judges reviewing laws for their conformity to constitutional text under the division of legislative powers. In this context, the Supreme Court of Canada had been developing a new rights-oriented jurisprudence (Dickson 1994, 4-5). Judges now exercise supervisory authority over a vastly expanded number of rights (Strauss 1985). The volume of rights litigation really has been turned up considerably in the Charter era. As Chief Justice Lamer admitted to *Time* magazine, "Our decisions hit harder because they hit wider" (Handelman 1999).

This transformation in Canadian public life is the product of a number of factors. Some observers argue that politicians have abdicated their responsibility by passing "hot potato" issues to the courts. Wary of offending powerful interests and alienating key constituencies, political leaders know that making tough, painful decisions and unsatisfying compromises, especially on issues where feelings run deep and essential rights are at stake, can shorten political careers. They have often been more than happy to hand difficult "no win" political issues to the court. Everything from the rules governing Quebec secession to abortion, from Aboriginal rights to gay marriage, and from a parent's right to spank his or her children to the extent of freedom of expression in cases involving pornography, hate, and advertising have been bounced to and ultimately decided by the Supreme Court.

Former justice Charles Gonthier is among those who have charged politicians

with ducking their responsibilities. He told a conference in October 2002, “We can often notice a lack of will on the part of political power to tackle certain issues that are raised. The effect of this reticence is often to push toward the courts certain fundamental questions that members of Parliament could have better resolved themselves through a large debate ... The result, definitely, is to avoid this often necessary public debate and provoke accusations of judicial activism on the part of the media and the public” (Gambrill 2002).

Some believe that this abdication of political responsibility helps to tear the fabric of the civic culture that is the basis for a healthy society. In particular, there is concern that the sharp decline in voting and in involvement in all forms of political activity that occurred during the 1980s and 1990s – some would say with the establishment of the Charter – was due at least in part to the realization by the public that judges rather than politicians had the stronger voice. While citizens may be increasingly conscious of their rights, their lack of involvement in civic life is corrosive to democracy (Hutchinson 1995).

Others, such as Kent Roach, believe that elected officials haven’t been the ineffective and helpless bystanders they are sometimes made out to be. Instead, there is a dialogue of sorts between the Supreme Court and elected officials (Roach 2001, 14-15; also Hiebert 2002). First, Parliament and the provincial legislatures have the ability to nullify the court’s decisions by using section 33 of the Charter, the notwithstanding clause. While the clause has come to be seen in some circles as “the equivalent of dropping a nuclear bomb in a war,” it does provide legislatures with a potent weapon if their interests are really being threatened or ignored (Leeson 2001, 321). Second, Parliament has on more than a few occasions delivered what Roach calls an “in your face” response to court decisions (277). Parliament was not only able to answer the court with stronger and more focused legislation but it can be argued that the court’s decisions pressured Parliament into producing better laws – hence the notion of a dialogue.

Admittedly, court rulings have long shaped Canada’s political history (Saywell 2002; McCormick 2000). The decisions of the Judicial Committee of the Privy Council (JCPC) sitting in London, Canada’s final court of appeal until 1949, structured Canada’s constitutional order in a direction that favoured provincial rights and disfavoured centralized political authority (Vipond 1991). This prompted those who adhered to a highly centralized vision of the federation, such as Bora Laskin, later chief justice of the Supreme Court of Canada, to accuse the JCPC of practising a jurisprudence based on “rigid abstractions” having “a sense of unreality” (Laskin 1964, 73).

If the decisions of the JCPC created some suspicion and bitterness, the Supreme Court of Canada has stirred similar controversy within Quebec. Governments and nationalists within Quebec have traditionally viewed the court as a leaning Tower

of Pisa that always leans in the same direction, a centralist one (Lajoie, Mulazzi, and Gamache 1986). The court has been viewed as distant and threatening, with the primary mission of preserving and enhancing Ottawa's power. For instance, André Laurendeau (1973, 132), one of Quebec's great public intellectuals of the postwar period, wrote in 1949 when the power over final appeals was finally transferred from the JCPC to the Supreme Court, that the court would be Ottawa's "bird in the hand." He noted simply that "since the Supreme Court, a tribunal, will be our ultimate judicial resort – even in constitutional matters – Ottawa has been provided with a powerful means of action against the provincial state, perhaps even of weighting the constitution in its favour" (130).

This suspicion was reinforced by rulings issued after the patriation of the constitution in 1982, particularly those judgments striking down parts of Quebec's controversial language law, Bill 101. For these reasons, Guy Laforest (1995, 180–81) saw the creation of the Charter of Rights and Freedoms in 1982 as nothing less than "an updating of the Conquest" and an attempt "to break the spine of the Quebecois community." He argued that the "primary condition for a genuine partnership between Quebec and Canada" was that primacy be given to Quebec's own Charter of Human Rights and Freedoms and that the Supreme Court exercise no authority whatsoever in Quebec (191).

Laforest's account reflects the profound sense of betrayal that was felt throughout Quebec society when the constitution was patriated in 1982 without Quebec's consent. Premier René Lévesque ordered flags to be flown at half-mast – even the federalist Liberal Party of Quebec joined the Parti québécois in opposing patriation in Quebec's National Assembly. To some degree, the wound remains unhealed. On the twentieth anniversary of the patriation of the constitution, in April 2002, both *Le Devoir* and *La Presse* published special sections of eight and ten pages respectively. The main article in *Le Devoir's* supplement was entitled "The day Canada repudiated Quebec" (Cornellier 2002). Henri Brun, a professor of constitutional law at Laval University, was quoted by *La Presse* as saying that Canada's Charter of Rights was born with a "congenital defect" (Côté 2002).

A critique of the Supreme Court has emerged from western Canada, as well. The populist movements that were produced by the frontier and egalitarian spirit of western Canada – the Progressives, the Cooperative Commonwealth Federation (CCF), the Social Credit, and the Reform/Alliance Party – shared certain assumptions about "the West as a victimized region." A hotbed of civic boosterism, republican individualism, evangelical fervour, and radical social experiments, the West feared Ottawa's encroachments on its natural resources and autonomy. It is a fear that is deeply embedded – part of the DNA of the western Canadian experience. Roger Gibbins (1980, 168), president and CEO of the Canada West Foundation, observed that "On the prairies an almost conspiratorial view of national

politics has existed ... The West consistently [sees itself as getting] shortchanged, exploited and ripped off.”

To western populists, the Supreme Court remains a symbol of the entrenched power of the East. Among the long litany of complaints against the high court that has festered in the consciousness of western Canadians was the blocking of attempts by Alberta's Social Credit government to control the banks and monetary system during the Dirty Thirties. Decisions that limited Alberta's control over natural resources during the energy wars of the early 1980s are also part of this legacy of distrust. This skepticism was reflected in the policies of the Reform and Alliance parties and in the positions taken by the Klein government in Alberta. Conservative leader Stephen Harper has also been a vigorous opponent of judicial activism and at one point even accused the Chrétien government of “stacking” the court so that it could get the decisions that it wanted. During the 2004 federal election he charged the court with acting “unconstitutionally” and suggested that a Conservative government might use the notwithstanding clause to override court decisions.

Limiting the power of the court and the Charter has become a major objective of a phalanx of right-wing politicians, journalists, and thinkers. Although the chorus has been led by the *National Post*, the *Sun* chain, and editorial opinion in western Canada, they are hardly alone. Right-wing critics have vented their anger against the “robed dictators,” “the imperial arrogance of judges,” and the dangers of “an aristocratic jurocracy” (Roach 2001, 99). A former federal minister of justice, John Crosbie went so far as to attack the “Godzilla” judges, whom he contrasted with the “Mickey Mouses” of government, the legislatures, and cabinets (Bindman 1998). Alliance activist and political scientist Ted Morton described the *Vriend* decision, a case that will be discussed in some detail in this book, as a “naked power grab which culminates a decade and a half of ever-bolder assertions of judicial policymaking” (Makin 2002b).

The court has faced the energetic critique of academic commentators. These broadsides come from a variety of sources. First, the legitimacy of the Canadian Supreme Court has been challenged by academic commentators from Quebec who, as we noted above, argue that the court's decisions lean in favour of the federal government (Lajoie, Mulazzi, and Gamache 1986). Second, following the entrenchment of the Charter, there was an early and vigorous assault on the Charter from the academic left in English Canada. Their concern was that the constitutionalizing of rights would deflate the power of the state and simultaneously shield private power from public scrutiny (Mandel 1994; Hutchinson 1995).

A third phalanx in the academic assault emanates from conservative scholars. The “Court Party” thesis articulated principally by University of Calgary political scientists F.L. (Ted) Morton and Rainer Knopff (2000, 113) contends that a co-

hort of liberal post-materialist groups has been able to secure political advantages through the courts rather than in legislatures. They have bypassed legitimate political processes and formed an alliance with the judiciary. In supporting these groups the judges have ventured into the unfamiliar terrain of public policy. As there is little in the text of Canada's constitution that would produce results favourable to these social movements, the Canadian judiciary is simply putting into effect the preferences of well-organized cadres of professional litigants and legal academics.

If judges have succumbed, as Morton and Knopff (2000, 22) claim, "to the seduction of power," it is also difficult to resist the notion that the Charter is by its nature a transformative document. The Charter created a new symbolic universe. It sparked and sustained a new rights consciousness and made the courts the centre of gravity in determining and awarding rights. This was, some would argue, Pierre Trudeau's most enduring legacy. His grand political design was to create countervailing forces that would challenge and ultimately break down the old loyalties and identities that were rooted in the provinces and regions. With the Charter, citizens would have to turn to the courts and hence to Ottawa to secure their rights. Lorraine Weinrib (2001) makes precisely this claim when she writes that the Charter "was designed to transform the Canadian legal system." Hence, judges have been required to put flesh on the bones of the Charter, elaborating, interpreting, refining, and embellishing what is a vague and amorphous legal text. At times, they have been required to make law as much as interpret it.

To some degree, the court sits precariously on top of a volcano of political distrust and conflict. Although there have been long periods during which the volcano has remained dormant, there are times when the volcano threatens to erupt. During the political and constitutional battles over the Meech Lake and Charlottetown accords, the court's role as a centralizing institution came under fierce attack. Provincial governments made a concerted effort to change the method by which judges were appointed, to in effect change the face of the court. Although both accords were defeated because of widespread suspicion about the elitist nature of the process and discontent over other parts of both deals, reforming the Supreme Court had been high on the agenda.

Despite these challenges to its authority, the Supreme Court has dominated the Canadian political landscape in terms of credibility and prestige. Surveys indicate that while the faith that Canadians place in political institutions has plummeted since the mid-1980s, the Supreme Court and, in particular, the Charter of Rights and Freedoms over which it is the guardian have become pillars of trust and identity. According to a Gallup poll released in 2001, Canadians 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 fed-

eral government, the House of Commons, and provincial governments (Mazzuca 2001). Most crucial, perhaps, is that Canadians appear to trust the courts far more than legislatures. When asked whether courts or legislatures should have the final say on the key questions in public life, Canadians supported the courts by a margin of two to one. Support for the courts was slightly higher among francophones (Fletcher and Howe 2001, 260-64).

Some of the results of surveys, however, must also be disturbing to judges. Despite efforts to appear independent and nonpartisan, the public views the Supreme Court as being deeply enmeshed in politics. In a poll conducted by Ipsos-Reid in 2001, seven out of ten of those surveyed believed that the court was influenced by partisan politics (Makin 2001). A similar poll taken by the same firm in 2003 asked a harsher and more straightforward question: whether respondents felt that “party politics” played a role in judicial decisions. An astonishing two-thirds of those surveyed believed that party politics either always or sometimes played a role (Tibbetts 2003).

There may be cause for worry on yet another front. While nine out of ten of those interviewed in a 2001 survey approved of the court’s performance, that number had slipped to just 65 percent in 2003. Indeed, less than 20 percent of those who were surveyed in 2003 expressed strong confidence in the court.

There are at least two schools of thought about the popularity and prestige of the Supreme Court. One position is that approval for the court rests on solid and unshakable ground. Fletcher and Howe (2001, 287) found in their study that there was “a considerable reservoir of diffuse support” even among those who were consistently opposed to the Supreme Court’s rulings. Peter Russell (2002) described the diffuse support argument to us:

No matter how rough a ride a judicial decision gets, and they get real rough rides all over the place, public support, what we call diffuse support for the courts, is still very high. It is way higher than it is for Parliament or political leaders or journalists. They’re doing real well despite the judge bashing that goes on and there’s a kind of disconnect to some extent between what we talk about as specific support for a specific decision or specific opposition and diffuse general support for the court. If you ask people about whether there should be a Supreme Court interpreting the Charter; they say oh, yeah, yeah, yeah. But that *Vriend* decision was a real bummer.

But others would suggest that public support is far more fragile and precarious than adherents of the “solid ground” or “diffuse” position would have us believe. The public’s support for the court, and the Charter over which it is the trustee, rests on slippery footing, footing that can easily give way under pressure. Paul

Sniderman and his colleagues (Sniderman et al. 1996) found that while there was broad and even deep support for Charter values, opinion can be volatile and shift dramatically depending on the issue or situation. Citizens often hold more than one opinion on a particular question. The drama and publicity that surround a high-profile decision can give prominence to one perspective over another and the public can be persuaded to rethink its position. “Sudden gusts of political passion” can overturn what was thought to be deep popular support for particular rights and freedoms (Sniderman et al. 1996, 28). Sniderman and his colleagues were disturbed by the degree to which majorities could be made and unmade.<sup>3</sup>

Some scholars believe that support for the court is predicated on the “good behaviour” of the judges. The court cannot be on the wrong side of public opinion or offend public sensibilities too often without risking the goodwill that it enjoys and which is both the key to and the great limitation on its power. For instance, Fletcher and Howe (2001, 268) asked respondents whether the Supreme Court should be abolished if it “started making a lot of decisions that most people disagreed with.” They found that while in Canada as a whole 53 percent of respondents strongly disagreed, the results in Quebec were reversed – 53 percent would support the abolition of the court.

There is more volatility here than might be expected. Two out of three people surveyed in a 2002 Environics poll were opposed to the current method of appointing judges to the court and wanted Supreme Court judges to be elected. The figure in western Canada was, not surprisingly, even higher – 71 percent (Cobb 2002). It would seem that many westerners would like to see elected judges checking elected politicians.

One can argue that much of the court’s success has rested on the judges’ ability to gauge the public mood. The judges are, with the exception of reference cases, able to pick and choose the cases that they will hear from among a small avalanche of appeals. The judges have known which fights to pick, when to tread gingerly, and when to speak loudly. Of course, there is only so much room to manoeuvre, and not all the difficult cases can be avoided or delayed.

It might be said that the court has been saved by the integrity, talent, and ingenuity of the judges who have been appointed to the bench. Despite charges by its critics, prime ministers have generally not used the highest court to reward friends or pursue party politics by other means. The court was not allowed to become a political football. Judges such as Brian Dickson, Antonio Lamer, Bertha Wilson, Gérard La Forest, Peter Cory, and Frank Iacobucci, among others, have created a standard of excellence that has brought great distinction to the court. Had the standard of appointment or conduct been lower, had the court not developed the aura that it now has, the political volcano on which it rests might have erupted.

### Media Agenda Setting

The place reserved for reporters by the court has none of the splendour of the judges' chambers, conference rooms, or the courtroom itself. The Media and Barristers Room is on the second floor, next to the female barristers' change room. When we visited the room, the floor was covered by an ordinary reddish carpet, it held two long tables and about fifteen chairs. The window overlooked the parking lot. A large garbage can had been placed against one of the walls. A coat rack built into a cabinet jutted up against another wall. There was also a TV set. The atmosphere was informal as reporters mingled, came and went, bantered with each other and with the executive legal officer.

Despite their informal and less than majestic surroundings, these reporters exercise considerable power. First, as we've mentioned, they, together with editors and producers, decide which cases will be covered and which will not. Lydia Miljan and Barry Cooper (2003) have gone so far as to argue that media coverage supports the court's judicial activism. They contend that by covering only the most sensational cases and giving the court little regular coverage, media organizations signal that there is little reason to be concerned about the decisions that are being made. The relative absence of coverage serves as an endorsement of the court's power.

Second, and just as importantly, reporters choose the "frames" or angles that will be used in reporting those cases. Journalistic repertoires typically highlight some themes and downplay others. Stories that feature sharp conflict, can be easily explained and condensed, involve people in positions of authority or who are compelling in some way either as villains or victims, and have eye-catching visuals are the stories that contain the ingredients most sought after by journalists. Media frames are imposed on almost every event journalists cover. Critics contend that the stories that fit media frames tend to be given a great deal of play regardless of how trivial they might be for society. Similarly, stories that do not fit a frame are relegated to the sidelines, regardless of how important they might be. In addition, as Doris Graber has observed, journalists "select the sources through whose eyes the public views the world" (Lawrence 2000, 5).

Again, the news values that are the lifeblood of journalism often conflict with the operating principles used by judges and the legal community. Judgments often are complex and involve abstract points of principle and cannot easily be reduced to five paragraphs or ten-second sound bites. Important cases rarely lend themselves to the "hot" visuals that TV producers require. The reasoning behind decisions is sometimes ignored or misunderstood and spokespersons for various interest groups dominate the headlines. As we found from our interviews, Supreme Court justices are sometimes frustrated when their judgments come off the news assembly line looking far different from what they thought had gone in.

Moreover, most television reporting is episodic rather than thematic (Iyengar 1991). News stories tend to focus on a single case or decision rather than on broader themes such as whether judges have too much power or whether the ability of the police to catch criminals has been hampered by the courts. According to Shanto Iyengar, episodic framing leads viewers to blame societal problems on the individuals depicted in the story rather than on larger political or legal issues and patterns. Iyengar argues that television's basic format distorts the way viewers see the courts and criminals.

Much media reporting deals with what can be described as "morality tales." James Carey believes that journalism often involves the construction of common identities and the maintenance of societal and ideological boundaries. Order itself is often on trial, and those who violate societal norms often endure "rituals of shame, degradation and excommunication" (Carey 1998, 42). Media reporting concentrates to a large extent on the exposure of crimes and scandals or is about people who violate moral and societal boundaries in some way. Disgraced politicians, notorious criminals, and people with shocking or controversial views are chased, hounded, and held up to public ridicule. As K.T. Erikson observed, "Newspapers (and now radio and television) offer their readers the same kind of entertainment once supplied by public hangings or the use of the stocks and pillories" (cited in Ericson, Baranek, and Chan 1987, 7-8). Both Michel Foucault (1995) and Roland Barthes (1992) claimed that the notion of spectacle always played a role in the punishment of crime. Today, as Carey (1998) and others have argued, journalists "police" society by producing their own spectacles of reward and punishment.

Todd Gitlin (1980, 2) once wrote that the media have the power to "name the world's parts" and "to certify reality as reality." Gitlin uses the same language to describe the power of the media that Bourdieu uses to describe the power of the judiciary. They both have the power of "naming." That is the capacity to set social parameters, to declare what is acceptable and unacceptable in society, and to inflict penalties on those who violate these norms. The fundamental problem for the justices is that their messages cannot get through to society without being altered by the journalistic lens. In a sense, journalists have the last word. The problem for journalists and news organizations is that their routines and priorities do not always accurately reflect the court and its judgments. Both judges and journalists have begun to realize that a great deal is at stake in this most essential of relationships.

### Outline of the Book

Having laid down the foundation for the research study that follows, we will describe in the next chapter the results of our study of a year in the life of the court. Differences in reporting by French- and English-language news organizations, newspapers and television, broadsheet and tabloid papers, public and private broadcasters, and individual news outlets are analyzed. The chapter also describes the types of cases that received extensive coverage and those that received little or no attention. The chapter presents a broad canvas with many vivid and not so vivid colours. Among our findings is that relatively few cases attracted the lion's share of coverage. These cases invariably involved highly charged moral issues, morality tales, which had the ingredients that journalists need for their news stories.

The next four chapters deal with the controversial cases of *Vriend*, the *Quebec Secession Reference*, *Marshall*, and *Sharpe*. Here we undertake an in-depth analysis stressing how the court is portrayed; which aspects of each decision are highlighted and which are downplayed; the frames used by journalists in covering the judgments; differences between local, regional, and national coverage; and the sources relied on in news stories. We also ask whether the court was successful in having its "message," namely, the rationale that lay behind its decisions, conveyed to the public. Not all these cases fall neatly into a single pattern. In some instances, the court was successful in setting the agenda – the reasoning behind its decisions got through loud and clear via the news media. In other instances, the court's message did not penetrate through the media's own logic or was contested by journalists.

Chapter 6 describes the relationship between the court and the journalists who cover it. We argue that the court has carefully constructed a system which ensures that not only are its points of view clearly communicated to the public but that it can play a role in setting the agenda and enhancing its prestige. While the court is engaged in what is clearly an important public service, it is also a political institution that is attempting to ensure that its judgments are understood by journalists. We will examine the ways in which Supreme Court reporting differs from political reporting and the special pressures on and concerns of the journalists who cover the court. Again, our study will examine the degree to which the relationship between the court and the journalists who cover it constitutes a unique political world.

*The Last Word* also sheds light on what ordinary Canadians learn about the court and its decisions, and hence about their rights as citizens, from the mass media. To this extent, we maintain, the book tells us a great deal about the nature of the society in which we live.

## Notes

- 1 This fits well Antonio Lamer's view of the court. The court did not ask for this expanded judicial role; rather, the edict "came from the elected (Parliament). We're heeding the command of the elected ... That's their doing, that's not ours." See Morton and Knopff (2000, 23) and Bertha Wilson, "We Didn't Volunteer" (Howe and Russell 2001, 73-79).
- 2 Author's translation. In French it was: "Il ne fait plus de doute que les juges sont des acteurs politiques. C'est-à-dire qu'ils prennent des décisions qui affectent la vie dans la cité, et profondément. Après l'étonnement – et le scandale, même – que cette découverte a provoqué dans les premières années, la chose semble acceptée."
- 3 It is interesting to note that a survey conducted by Ipsos-Reid in 2003 found that 71 percent of Canadians thought that Parliament and not the courts should make the laws. This was a complete reversal from the results of polls taken just two years earlier (Salot 2003).

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