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Administration at the Supreme Court of Canada: Challenges and change in the Charter era

Abstract: This article presents a descriptive account of administration at the Supreme Court of Canada. Since 1975, the Court has gained considerable control over its docket, attained administrative independence from the federal Department of Justice and seen its role transformed following the enactment of the Charter of Rights. This new context has brought a host of challenges, requiring procedural reforms and adaptation to technological developments to ensure institutional efficiency. The institution's role under the Charter has also enhanced its public prominence, placing normative pressure on the Court to enact measures to increase transparency, particularly with regards to its relationship with the media. Drawing on interviews with former justices and Court staff members, as well as secondary material, this article examines these changes and their implications.

Sommaire : Cet article décrit l'administration de la Cour Suprême du Canada. Depuis 1975, la Cour a considérablement augmenté le contrôle de son registre, a acquis une indépendance administrative par rapport au ministère fédéral de la Justice et a vu son rôle se transformer suite à l'adoption de la Charte des droits et libertés. Ce nouveau contexte a apporté pléthore de défis, exigeant à la fois des réformes procédurales et une adaptation aux changements technologiques afin d'assurer son efficacité institutionnelle. L'adoption de la Charte a aussi augmenté le profil de la Cour auprès de la population, en exerçant une pression normative et en l'obligeant à adopter des mesures supplémentaires pour accroître sa transparence, en particulier en ce qui concerne son rapport avec les médias. En s'appuyant sur des entrevues avec d'anciens juges et membres du personnel de la Cour et d'autres documents, cet article examine ces changements et leurs implications.

Despite the prodigious amount of attention devoted to the work of the Supreme Court of Canada since the adoption of the Canadian Charter of Rights and Freedoms in 1982, there has been scant discussion of what the "Charter era" has meant for the administration of the Court. This article presents the first comprehensive description in existing academic scholarship of the

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administrative environment at this important governing institution.¹ Specifically, it examines important administrative changes that have occurred at the Court during the last three decades. Drawing in part on interviews with former Supreme Court justices, as well as current and former Court staff members, I explore these changes in light of the context described below.

Two changes that occurred not long before the implementation of the Charter had important ramifications for the Court's administrative context. The first, through a series of amendments to the Supreme Court Act (R.S.C. 1985, c. S-26) that were finalized in 1975, gave the Court near complete control over its docket. This considerably reduced the number of private law cases and placed "public importance" as the primary criterion for case selection. The second change, through legislation in 1977, conferred on the Court administrative independence from the Department of Justice. Five years later, the Charter empowered the Court to exercise judicial review over virtually any government action that might implicate the new constitutional document's provisions. Although the justices had occasionally dealt with public policy issues through judicial review of federalism disputes, rights-based review granted the Court a more explicit policy-making function.

Over the past twenty-five years, this new context has created two broad sources of pressure on the administrative side of the Court's work. The first pertains to efficiency. One of the impetuses for giving the judges more control over the docket was the overwhelming workload that hit the Court in the early 1970s. With the elimination of appeals as of right (outside of certain criminal appeals), the judges managed to reduce the number of cases heard between 1975 and 1980 by thirty per cent (Snell and Vaughan 1985: 240). Yet by the mid-1980s the judges were struggling with "an alarming backlog of reserve judgments just when the Court was meeting the onslaught of difficult Charter cases" (Sharpe and Roach 2003: 371). This problem, as will be examined below, resulted from several different issues, ranging from procedural difficulties to diverging work habits among the justices. In different forms and for different reasons, challenges to the Court's efficiency have cropped up on several occasions since then. To ensure cases are heard and decisions are rendered in a timely manner, key administrative and procedural changes have often been implemented in response.

The second main source of pressure stems from a new impetus for higher levels of transparency. Given the high visibility of the contemporary Court and the often controversial nature of the issues put before it, the institution has gradually enacted measures designed to ensure increased accessibility, improved public knowledge of its role, and expanded media access. As the following exploration will show, certain changes made to accommodate enhanced transparency can themselves place further tension on the Court's efficiency.

Scholars of judicial behaviour have stated that more research is needed to shed light on the inner workings of the Court (Ostberg and Wetstein 2007:

209). To that end, this article, while highly descriptive, serves to enhance our understanding of an important governmental institution. As will be explored more fully below, the Court's efficiency also has direct effects on judicial decisions. Finally, the extent to which the Court implements reforms to increase transparency and accessibility has significant implications for both its legitimacy in the public eye and its institutional independence.

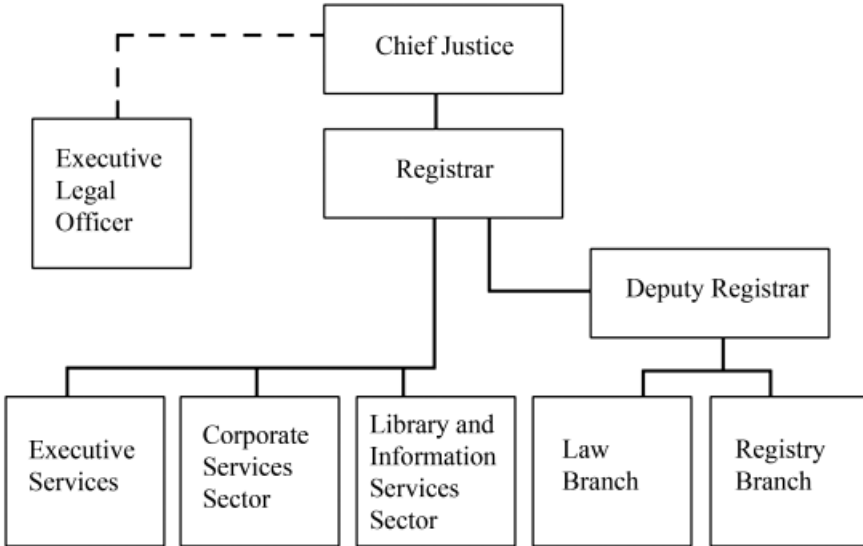
Efficiency as an evolving process

Independence in the 1970s

The Supreme Court gained administrative independence when its Office of the Registrar was given the same status as other federal administrative agencies in 1977. The Judges Act (R.S.C. 1985, c. J-1) created the position of commissioner for federal judicial affairs, which has administrative responsibility for all federally appointed judges and federally constituted courts. According to James Snell, "because of the paramount position of the Supreme Court of Canada," it was decided that its registrar be given parallel administrative responsibilities and the status of a deputy head. Snell writes that one motivation for the change stemmed from "a desire to remove the anomaly of the Department of Justice being both the administrator of the Supreme Court and the chief litigant before the Court" (1981: 308). Although less visible than other important changes that occurred around the same time period, this move was fundamental to the Court's administrative autonomy. Prior to this change, the registrar was effectively a "manager" of the Court, subordinate to the minister of justice (Goulard 1989: 224).

The clerks' research function is fundamental to the justices' ability to perform their duties in a timely manner

Now under the sole supervision of the chief justice, the registrar is ultimately responsible for all administrative activities at the Court (see Figure 1). Those functions include servicing and providing operational support for the nine justices and the Court staff, such as security, financial management, procurement, human resources management, telecommunications, and strategic planning (through the Corporate Services Sector); management support for the judges' chambers and dining room, the Law Clerk Program, and visits by dignitaries (through the Executive Services Branch); and information management to support the Court's judicial functions and maintenance of the Court's 350,000-volume library, which also services the Federal Court of Appeal, the Federal Court, lawyers appearing before the Court and members of the Canadian Bar (through the Library and Information Services Sector).

Figure 1. *Organization of the Supreme Court of Canada*

Adapted from the Court's planning and performance documents (Supreme Court of Canada 2007b: 17).

The deputy registrar heads the Court Operations Sector, which includes the Registry Branch and the Law Branch. The Registry is the "hub of all procedural and documentary activities at the Court," responsible for registering and scheduling cases, filing and recording documentation, assisting in courtroom operation, maintaining Court records and registers, and facilitating the registrar's case-related correspondence (Goulard 1989: 227). The Law Branch provides legal support to the judges of the Court and publishes the Court's judgments in both official languages.

With the bulk of cases suddenly carrying more weight, it is little wonder that the Court was confronted with a backlog not long after it gained substantial control of the docket

The Office of the Registrar is also responsible for planning and reviewing budgets; overseeing the production of various reports (particularly planning documents and performance reports) to central agencies of the federal government, such as the Treasury Board and Public Service Commission; organizing conferences; managing special projects; maintaining Court

statistics; and the preparation of the rules of practice. The registrar, who can act as judge in chambers under the Supreme Court Act, also has some judicial duties, such as hearing motions concerning late filing. In addition, she is a member of the Group of Heads of Federal Agencies, which meets to exchange ideas and raise awareness of new trends and issues among those supervising small agencies. Most of the registrar's time, however, is absorbed by the day-to-day management of the Court and its staff.

Backlog and frustration in the 1980s

In the late 1970s, the Court had approximately fifty to sixty employees; they now number nearly 200. Each judge has a judicial assistant, a court attendant, and three law clerks attached to their chambers. The Law Clerk Program, which began in 1968, initially allowed the justices to each hire a single clerk for a one-year term (McInnes, Bolton, and Derzko 1994: 61). The program was expanded to two clerks per judge in 1983 and to three clerks per judge just a few years later, reforms that reflect the growing complexity of the Court's workload under the Charter. Law clerks are hired immediately out of law school and the program has grown increasingly competitive over the years. One of the clerks' main duties is to provide the justices with bench memoranda, which synthesize the facts of the case, the decisions of the lower courts, and the litigants' factums (legal arguments). Bench memos typically include the clerk's assessment of the case and an analysis of the arguments on both sides. The clerks' research function is fundamental to the justices' ability to perform their duties in a timely manner. Although the judges review all of the material relevant to each case, the Court's overall caseload makes it impossible for them to check all of the counsel's citations or go to the Court's library to research all of the pertinent case law.

Beyond careful attempts at persuasion, the chief justice has little authority over his or her colleagues in these matters, as the position is really one of a "first among equals"

Most of the justices also have their clerks work on the drafting or editing of written reasons. Some of the justices will write an outline for their clerk, others will simply provide detailed oral instructions. This process varies not only from judge to judge, but from case to case. Certain judges will often write substantial portions of the first draft themselves, and, in some instances, the clerks will do little to no writing. It is important to underscore that all of this work is done under the close supervision of the clerk's justice. Although several former law clerks I interviewed (from August 2007 to March 2008, on a not-for-attribution basis) indicated they were surprised at

how much responsibility and power they exercised, they all stressed that even when they drafted the bulk of the reasons, the work was always edited by, and reflected the carefully considered views of, their justice. One former justice described the relationship between clerk and judge as both professional and educational; for this justice, there was thus a pedagogical incentive to get the clerks involved in every aspect of handling a case.

The expansion of the clerk program during the 1980s was likely one factor that helped alleviate a considerable case backlog that had developed at that time. The backlog had several causes. First, the 1975 changes eliminating most automatic appeals (appeals by right) dramatically changed the type of cases heard by the Court. Appeals by right were limited to criminal appeals where a provincial court of appeal judge dissents on a question of law or whenever acquittals were overturned on appeal. Prior to 1975, eighty-five per cent of cases were appeals by right and fifteen per cent were by leave; after the reforms, these percentages were almost completely reversed (McCormick 2000: 87). Because cases granted by leave are done so on the basis of their public importance, they are generally "harder" or more complex. As former Justice Claire L'Heureux-Dubé writes, the judicial decision-making process compels the justices to elaborate on their reasoning in such cases: "[W]hen a particular case presents the Court with an opportunity to give definite direction on a particular point of law, the natural inclination is to explore each facet of the particular legal problem, recount history and account for each theory or precedent" (1990: 585). In particularly important cases, there is some degree of pressure on the justices to speak with one voice, a consensus-building process that further extends the length of time it takes to produce a decision.

With the bulk of cases suddenly carrying more weight, it is little wonder that the Court was confronted with a backlog not long after it gained substantial control of the docket. The influx of Charter cases that hit the Court beginning in 1984 only compounded this difficulty. With less case law to draw on, fewer legal rules and a more "contextual" and policy-oriented approach to Charter rulings, it is commonly asserted by scholars that Charter cases are more difficult to decide than other types of cases (Muttart 2007: 102). Expansion of the Law Clerk Program through the 1980s seems to have been essential for the justices to cope with the intensified demands on the research and drafting that went into most cases. Yet, some commentators have speculated that the involvement of clerks in the drafting phase since the 1970s has had a considerable impact on the Court's policy-making process, particularly in the more challenging cases, for example, by increasing the use of citations to scholarly sources in the Court's decisions (Sossin 1996; Morton and Knopff 2000: 146–47). The clerks' involvement, then, has likely contributed to longer and more wide-ranging decisions. Nevertheless, I would assert that the justices' ability to delegate so much of their research

and writing responsibilities to a dedicated staff has, overall, been beneficial to the Court's efficiency.²

The escalating difficulty of the cases was not the only cause of the backlog, however, nor was increasing the number of law clerks the only change made to address it. Diverging attitudes and work habits among the judges created tension over the speed with which comments on drafts were returned to colleagues and reasons completed. Justices Jean Beetz and Gerald Le Dain, described by former Chief Justice Brian Dickson's biographers rather generously as "perfectionists," took exceptionally long to complete their work during this time period. The differences produced such a strain that former Justice Bertha Wilson implicitly threatened in a memo to Dickson that she might resign if the delays continued (Sharpe and Roach 2003: 370–5). The illnesses of some judges further worsened the problem.

Beyond careful attempts at persuasion, the chief justice has little authority over his or her colleagues in these matters, as the position is really one of a "first among equals" Justice Gerald La Forest worried that a push to expedite matters might lessen the quality of the Court's work. He suggested one remedy might be to take on fewer cases, but that idea was rejected by his colleagues (Sharpe and Roach 2003: 374). Turnover among the judges helped alleviate some of the personnel issues that played a part in the backlog. Nonetheless, Dickson did initiate several important procedural reforms to address the structural factors that he felt also contributed to delays. The 1980s witnessed the computerization of the Court's scheduling procedures to facilitate docketing and case tracking. The Court altered the rules for oral argument in 1989, going from holding fairly open-ended oral hearings to imposing time limits; each side now normally receives one hour for arguments (fifteen to twenty minutes for interveners). These changes allowed the Court to transition from scheduling one case for argument each day to two (Baar 1998: 316).

The Court also implemented the use of satellite video transmission of oral presentations by counsel, which was first tested for leave to appeal applications under Chief Justice Bora Laskin in 1983. The innovation was thought to increase accessibility to the Court and reduce the length of the hearings, as counsel were said to be more concise than when they were in the courtroom (Canadian Press 1983). The novelty of satellite transmission did not last long, however, particularly because, by 1988, the Court eliminated oral hearings for leave to appeal applications, replacing them with a written application process. Counsel have generally refrained from using the satellite tool during oral hearing of the actual appeal (Baar 1998: 312).

As a result of turnover among the judges and the procedural changes implemented under Dickson, the backlog with which the Court struggled in the mid-1980s was eliminated by the end of 1990. In 1988, the average time it took a case to work its way through the Court – from the filing of an appli-

cation for leave to the rendering of judgment on the appeal – was well over thirty-three months; in 1991, this average time frame had been cut to almost twenty-two months. Table 1 provides the number of reported judgments and the average case time lapses for the years 1987–2007.

Adjustment and transition in the 1990s

The switch from oral to written appeal applications had unforeseen consequences for the Court's efficiency. Applications for leave used to be conducted orally before panels of three justices. When the Court transitioned to written applications in 1988, preparing summaries and recommendations for the judges (who continue to make decisions on leave in panels of three) were for a time the purview of the law clerks (for a comprehensive examination of the leave to appeal process, see Flemming 2004). Unfortunately, the applications for leave were often placed on the back-burner, as overburdened clerks focused on bench memoranda and judgment work. According to one senior staff member, leave applications would accumulate, and, depending on how organized certain judges were, a bad backlog could ensue. By the mid-1990s, Chief Justice Antonio Lamer, concerned about timeliness, decided that handing the job to staff lawyers would help streamline the process. One former justice notes that the law clerks were not completely removed from the leave process – as the judges are always free to ask their clerk to review an application for more depth or to examine a particular aspect – but adds that the change was conducive to better use of the clerks, giving them more time to prepare cases for hearing and to research and work on judgments. The salutary benefits of this change, in terms of a reduction in the time it took for decisions on leave applications, appears to be offset by a rise in the number of applications for leave beginning in 1996 (see Table 1).

Since 1994, staff lawyers at the Law Branch have been responsible for preparing summaries and recommendations regarding leave to appeal applications. Another benefit of removing the clerks from this process is that it is easier for the staff lawyers to ensure there are no overlapping applications or conflicts between appeal issues. Given that the clerks worked in a decentralized structure, each being attached to an individual judge's chambers, it was more difficult for them to make sure that no application for leave conflicted with another appeal on the same topic that might already be in the system.

The mid-1990s also saw a new push by the Court for even further control over its docket. Appeals by right still constituted a significant portion of the Court's total workload during the 1990s. In 1997, the Court won the support of the Canadian Bar Association for changes to the Supreme Court Act that eliminated appeals as of right in instances where criminal acquittals were overturned on appeal. This cut the number of automatic appeals heard each

Table 1. Average Case Lapse Times, 1987–2006³

Year	Total number of reported judgments	Total appeals by right	Total applications submitted	Months for decision on leave application	Months between leave decision and hearing	Months from hearing to judgment	Total case lapse time from app. to judgment	Appeals standing for judgment at year's end
1987	90	n.a.	n.a.	n.a.	21	7.1	-	n.a.
1988	101	n.a.	n.a.	n.a.	26	7.2	-	n.a.
1989	133	n.a.	n.a.	3.6	18.5	6.4	28.5	n.a.
1990	140	n.a.	n.a.	4.7	17.0	6.2	27.9	n.a.
1991	112	60	480	3.5	15.0	3.6	22.1	39
1992	119	63	460	3.6	12.4	3.6	19.6	48
1993	150	47	513	4.0	13.1	4.1	21.2	32
1994	120	54	496	3.4	10.5	3.0	16.9	31
1995	103	57	445	3.8	9.9	3.8	17.5	32
1996	124	43	573	4.4	11.8	3.0	19.2	26
1997	107	34	615	3.5	10.9	2.8	17.2	20
1998	92	30	572	3.9	12.0	2.8	18.7	34
1999	73	15	458	5.2	11.1	5.4	21.7	33
2000	72	17	640	5.4	12.5	5.8	23.7	39
2001	91	21	668	4.3	11.4	5.6	21.3	44
2002	88	13	498	5.7	12.2	5.6	23.5	25
2003	81	12	609	3.9	10.5	5.1	19.5	25
2004	78	12	559	3.7	9.4	4.0	17.1	32
2005	89	16	575	3.7	9.1	5.2	18	35
2006	79	7	477	3.4	7.7	5.9	17	35
2007	58	16	629	3.5	9.0	6.6	19.1	30

year by roughly half (see Table 1), as they are now limited to instances where an appellate court judge dissents on a question of law.

New challenges in the 21st century

In 2001, Chief Justice Beverley McLachlin publicly declared that the Court's resources were "stretched to the limit" and felt two changes could help prevent a newly developed backlog from worsening (Schmitz 2001). First, she advocated the total abolishment of appeals by right. To date, the move to give the Court absolute control of its docket has not been made. The second concern McLachlin addressed pertains to severe space limitations at the Supreme Court building. This constraint makes it difficult to hire more editors and translators, contributing to delays in the rendering of decisions (Schmitz 2002). This is in spite of the fact that Supreme Court staff have taken over much of the space that used to be for the Federal Court. The Federal Court and Federal Court of Appeal still retain space at the Supreme Court building, as plans for a new federal court building – announced in 2003, named in honour of former Prime Minister Pierre Elliott Trudeau and intended to house those courts as well as the Court Martial Appeal Court of Canada, the Tax Court of Canada and the Courts Administration Service (Canadian Press 2003) – have been cancelled (Canada, Courts Administration Service 2007: 20). One senior staff member at the Court notes that another difficulty relating to the space constraints is that few structural changes can be made to accommodate increases in staff, due to the Supreme Court building's status as a historical site and its management by the Department of Public Works and Government Services.

According to former Justice Bertha Wilson, the tendency for judges struggling under a heavy caseload will be to focus on the cases assigned to them and spend less time carefully scrutinizing cases being prepared by their colleagues.

With the cancellation of a new federal court building and no movement on the part of the federal government to eliminate the final category of appeals by right, these two issues are essentially out of the hands of the registrar or chief justice. Despite this, McLachlin managed not only to eliminate the slight backlog that developed at the turn of the century but also to helm the Court to its fastest productivity level in a decade (Supreme Court of Canada 2007a: 4). She is credited with having been "innovative" and "aggressive" in setting dates for appeals and for "cracking the whip" on counsel and stimulating the Court staff (Schmitz 2005).

One of the processes that made this possible was the first major re-write of the Court's rules since 1983. Although minor changes are made to the rules with some regularity, a complete overhaul is occasionally deemed necessary to streamline and simplify procedures. It is a considerable undertaking; the process started in 2000 (in line with the Court's 125th anniversary) and took two years to complete. The main objectives in re-writing the rules were to make timelines for filing and scheduling as tightly as possible, to improve the efficiency of case management, and to make the rules themselves easier to understand and follow. The Department of Justice, following detailed instructions from the Court, produces drafts of the revised rules, which are sent to members of the Committee of Ottawa Agents on Practice and Procedures (COAPP) and the CBA/Supreme Court Liaison Committee for review. The COAPP was first established in 1977 to study the rules. Its members include Court legal staff, external legal agents in Ottawa, and a representative of the federal Department of Justice. It meets four times a year and in addition to examining rule changes, discusses ongoing issues relating to the needs of the Court and its clients. The Court's institutionalized consultation with the CBA through the Liaison Committee proves fruitful in a similar regard. One staff member notes that the outcome of the re-write generally reflects a balance between what the judges would like to see in terms of procedure and deadlines and what the Court's clients – that is, the legal community – see as possible. Further amendments to the rules came into force in October 2006.

The current decade has also seen important changes in the “invisible” side of administrative work at the Court. A new document management system was implemented to facilitate increased use of electronic copies of documents (although paper copies of items remain and likely will for several years to come). The Court developed its first case management and tracking system in 1988–89. This was a difficult task given that no one had developed the requisite computer software outside of that used by some trial court systems in the United States. For an appellate court with a much smaller caseload, these systems made little sense, and staff at the Court quickly learned they needed a system with a substantial level of flexibility given the high degree of variability among the Court's cases. The system was thus the first of its kind in Canada. It was re-built for the year 2000 and is now being adapted to incorporate Internet-based applications.

For 2008, the Court released instructions mandating electronic filing of notices of appeal, factums, records and books of authorities. This reform coincides with the introduction of new technological changes in the courtroom. In 2006–07, the Treasury Board approved \$5.1 million in funding for the project (Supreme Court of Canada 2007b: 6). Over the summer of 2007, the courtroom was heavily renovated: audio-visual equipment, including four new fifty-inch plasma screens, cameras, microphones and lighting were

mounted in the courtroom. New computers, installed on the bench for each judge, will allow features that “push” documents onto their screens as counsel presents oral arguments.

The increased use of digital technology has introduced new security concerns, including the threat of data loss, viruses and hacking. Such projects are also a significant amount of work for Court staff, who must deal with the Public Works department and contractors about physical changes to the building. Staff must also tackle issues relating to risk management and have contingency plans in place in case of missed deadlines or unforeseen events. This process saw the establishment of a Project Management Office at the Court in 2007 (Supreme Court of Canada 2007b: 7). The changes are anticipated to not only improve efficiency by enhancing ease of use and simplifying information retrieval but also prevent “operational issues” – equipment problems that had occasionally arisen due to older equipment (Supreme Court of Canada 2007c: 8).

Three decades of the fight for efficiency

The Supreme Court has engaged an increasingly complex mandate in the contemporary era, and the multifaceted pressures on its administrative efficiency have been met with considerable versatility during the last twenty-five years. It is evident that the most perilous state of affairs for the institution’s effectiveness came as the judges dealt with the first wave of Charter cases in the mid-1980s. Nevertheless, as the Court’s bureaucratic environment has grown and the judges have gained increasing control over the docket, continual adaptation in administrative procedure and bureaucratic structure has been necessary. This evolution has witnessed the expansion of staff and resources, re-organization and simplification of rules and process, and modernization of programs and equipment. Potential difficulties persist, particularly the physical space constraints at the Court. Unforeseen challenges may arise as a result of some of the more recent changes, such as what occurred following the move from oral to written applications for leave. The movement towards electronic provision of services and digital filing may present new privacy, security and data integrity issues.

The Court’s output in the last decade has also seen a notable drop in the number of cases heard. For most of the 1990s, the Court heard well over a hundred appeals. Since then, it more typically hears eighty to one hundred cases a year. The fifty-eight judgments reported in 2007 appear to be a short-term anomaly, largely due to a sharp drop in the number of applications for leave to appeal in 2006 (which rebounded the following year). However, the Court’s 2007 performance report to the Treasury Board also asserts that “in general, cases have become more complex” (Supreme Court of Canada 2007c: 5) Given that case complexity is unlikely to diminish in the near future, it is probable the Court’s output will remain near eighty judgments

per year. Whether or not the Court made the decision consciously, Justice La Forest's preference in the 1980s for a reduction in caseload seems to have won out twenty years later.

One important issue, fundamental to scholars and researchers of the Court and for the history of Canadian law more broadly, is the preservation of important documents and historical records

Efficiency has an important impact on the substance of the Court's work. According to former Justice Bertha Wilson, the tendency for judges struggling under a heavy caseload will be to focus on the cases assigned to them and spend less time carefully scrutinizing cases being prepared by their colleagues. When backlogs develop, she argues, there is an institutional preference by judges to support the majority result. Wilson writes, "Under the pressure of a heavy caseload the delicate balance which should exist between judicial independence and collegiality may be displaced and collegiality may give way to expediency. This is an extremely serious matter for an appellate tribunal because the integrity of the process itself is threatened" (Wilson 1986: 237). Efficiency, therefore, is more than a simple bureaucratic virtue. The reforms over the last three decades have served to ensure that the justices of the Court have been able to devote the time necessary to explore the issues before them at a time when those decisions have become arguably more pertinent to the broader public than ever before.

Emerging from seclusion: transparency and the Court in the Charter era

The developments described thus far occurred at a time when the subject of the Court's accessibility and transparency has come to the fore. The Charter era bestowed a new prominence upon the Court; the magnitude of its decision-making authority and the nature of the issues it now confronts have fuelled debates about the institution's role in the broader political system. The judges and other personnel at the Court have not been oblivious to this new scrutiny. The three chief justices who have sat during the Charter era have each recognized the virtue of enriching public knowledge about the Court, its role and the judges themselves.⁴ Thus the Court has slowly broadened access to certain services (such as records and historical documents) and increasingly opened itself to the public, particularly through the media.

Unrepresented litigants

In some instances, changes made to promote further accessibility and transparency impose burdens on administrative efficiency. One area in which this

potential difficulty is especially evident pertains to a trend towards a higher percentage of litigants who seek to come before the Court without effective legal representation. In 2007, the Court created a new portal on its web site for unrepresented litigants to help resolve the extra problems they invariably confront due to their unfamiliarity with rules and procedure. One concern among staff in the Registrar's Office is that facilitating unrepresented litigants in this manner may only serve to exacerbate the problem by encouraging more individuals to represent themselves. The proportion of unrepresented litigants climbed to twenty-two per cent in 2006. These litigants ultimately consume an inordinate amount of staff time; further, they often seek legal advice, something staff members are not allowed to provide.⁵

Records and access

Aside from the Court's litigants, many changes have been made to open the institution to the public itself. According to Carl Baar, Dickson was the first to introduce a traditional stenomask court reporter; until the mid-1980s, no verbatim record of the Court's oral hearings had been made (1998: 316). Audio recording became the standard in 1990. Lamer opened up oral hearings even further in the 1990s, allowing broadcasts on the Cable Public Affairs Channel (CPAC) and permitting news agencies to use short clips (Sauvageau, Schneiderman, and Taras 2006: 13). One staffer points out that the Supreme Court remains the only court of last resort in the world that broadcasts hearings. In contrast, for example, U.S. Supreme Court Justice David Souter has been quoted saying, "I can tell you the day you see a camera coming into our courtroom, it is going to be rolled over my dead body" (cited in Markham 2006: 923).

Since the beginning of McLachlin's tenure as chief, the prospect of live broadcasting of hearings over the Internet has also been examined, although Court staff members are still investigating the technological aspects (Schmitz 2002; Saunders 2007). The Court has also recently developed a policy with the aim of making more items publicly available on-line, such as litigants' factums. Staff members are, however, still considering technological issues. Further, matters of confidentiality, privacy and publication bans pose challenges to this endeavour. While factums could be written in a manner that respects privacy, for instance, litigants often do not think of these issues when writing them. Editing the documents to ensure private information is not released, such as names and addresses, could consume a lot of staff time.

Nevertheless, the Court has been a world leader in web-based availability of its decisions, which began in 1994 as a joint project with the LexUM laboratory at the Université de Montréal. The LexUM site also includes the Court's press releases and the Bulletin of Proceedings. The Court's official web site, developed in 1996-97, provides comprehensive information about the institution, judges and building and, for several years, has posted Court

statistics and copies of the planning and performance documents. Much of the Court's library catalogue is also electronically available to the public, and special arrangements can be made to go to the court building to make use of its resources. For visitors not making use of the Court's resources, an ongoing public outreach program is another feature offered by staff. There are more than 40,000 visitors (people not on official business) to the building every year, many of whom are part of school groups taking advantage of the tour program and exhibits in the building's foyer. Staff members have developed material for students, and kits are sent to classes for students who are unable to come to Ottawa. The kits include a mock trial activity and a DVD on the Court, its history and the building.

One important issue, fundamental to scholars and researchers of the Court and for the history of Canadian law more broadly, is the preservation of important documents and historical records. Former Chief Justice Dickson writes that, unlike the U.S. Supreme Court, the Canadian institution has unfortunately been negligent in safeguarding and maintaining such records:

Canada has had far less judicial history because we have been less judicious in preserving our records. About a dozen of the more than seventy persons who have served on the Supreme Court of Canada since 1875 have donated papers to the National Archives or other public repositories. None of these collections, not even the large ones of Chief Justices Fitzpatrick and Duff, offer a substantive documentation about court judgments A large and vital dimension to Canada's judicial heritage has thus been lost forever (Dickson and Guth 1998: 323).

As a corrective, Dickson created the office of the curator for the Court in 1987. While it has not survived, it laid the groundwork for policies for the donation of judicial papers to the National Archives and microfilming all of the Court's case files, which began in 1990 (Baar 1998: 316). The microfilming process has gone back to the Court's first case and continues to this day; it is still considered the "safest" and most stable medium, although staff members are examining the implications of moving to electronic storage. Actual paper records are kept in a vault at the Archives.

Engaging the media

The Court's relationship with the media has changed dramatically over the last three decades. Chief Justice Bora Laskin gave the first media interview in the mid-1970s and created the Court-Media Liaison Committee in 1981, which consists of three judges, and meets several times a year to discuss ideas and complaints from media representatives (Sauvageau, Schneiderman, and Taras 2006: 12, 199). Since the committee's inception, the Court has persistently deepened its rapport with the press through various initiatives, the most significant of which might have been the creation of an executive legal officer (ELO) by Dickson in 1985.

The ELO was originally envisioned as another clerk for the chief justice, but Dickson decided it was preferential to have someone with more experience and a broader job description. The position typically lasts three years, and never more than five. The ELO serves as the chief of staff to the chief justice, sits as a member of the board of governors of the National Judicial Institute (which is chaired by the chief justice), and provides a support role for the chief justice's work with the Canadian Judicial Council. A great deal of the ELO's work, however, is as the Court's media relations officer. In that capacity, the ELO provides not-for-attribution briefings to the press on judgments of the Court. Such briefings had been "categorically rejected" by Laskin in the 1970s and were viewed with some suspicion by several of the other judges when Dickson instituted it (Calamai 1998: 292).

Concerns for their independence, worries about politicization of the Court, and a distrust of the media among some judges all contributed to a generally cautious attitude towards reforms

Dickson's openness stemmed from his concern that the Court not be accused of inaccessibility, or worse, threatened with lawsuits for better media access, even though some justices distrusted the media. According to his biographers, "it was inevitable that the media would shape public opinion about the Court and its work. In these circumstances, Dickson concluded that the Court should be open and as helpful as possible with the media" (Sharpe and Roach 2003: 292). In practising what he preached, Dickson was the first chief justice to grant regular media interviews, to release advance text of all of his speeches, and to debate on a public stage with his British and American counterparts (Calamai 1998: 293). He even permitted cameras into the Court's conference room, judges' chambers and private dining room in 1985 for a documentary by the CTV network's current affairs show *W5*.

While Dickson's successor Antonio Lamer had opened up oral hearings to CPAC broadcasts in the 1990s, he was reluctant to go much further in the expansion of media access. When the Parliamentary Press Gallery first proposed in 1995 that the Court hold lockups to brief the media in advance of the release of a judgment, Lamer rejected the idea (Schmitz 2003). Upon being named chief in 1999, Beverley McLachlin took another look at the concept. She held a wide-ranging press conference on 5 November 1999, itself an "unprecedented" event, shortly after being named chief, at which she stated that improved communication would be one of her key priorities for the Court (Schmitz 1999).

When the Press Gallery reiterated its request for lockups, some judges still had significant concerns about the process. They generally felt that no one

should know the outcome of a case before the litigants. In response, the Gallery argued in letters to McLachlin that “inaccuracies that result from the media reporting on judgments within seconds or minutes, without having the opportunity to read or understand the court’s lengthy and complex reasons, can hurt both litigants and the public and can be minimized by a lockup procedure” (Schmitz 2003). McLachlin was apparently convinced. A memorandum of understanding was negotiated with the Gallery, and a format for the lockups was created that roughly matched those that occur prior to release of the federal budget. Because some of the justices were still resistant to the idea, the process was first initiated as a pilot project to show that it could be executed in a manner that would prevent leaks. Further, the parties to the case must give consent and be given access to the judgment at the same time as the press, in a separate lockup. On 30 January 2004, twenty-three reporters from Canadian and international media outlets were participants in the first media lockup in the world by a high court (Schmitz 2004). The process has now become entrenched, and lockups are typically held for controversial or widely covered cases, assuming the parties provide consent.

The extent of the ELO’s briefings with the media has also evolved; initially there were only post-decision briefings, but they are now commonly held before the start of a Court session, the day before a judgment is released, and the day before important hearings (Sauvageau, Schneiderman, and Taras 2006: 201). Several of the former law clerks I interviewed who served prior to the establishment of lockups said they felt the media typically performed poorly in its coverage of the Court and its decisions, but they believe the institution of lockups appears to have improved matters significantly. Clerks who have served since contend the role of the ELO has been extremely important in helping the media “get it right.” Yet in their book on media and the Court, Florian Sauvageau and his colleagues point out that some critics believe the institutionalized relationship with the media can be problematic:

The trust that most journalists place in the ELO gives the [C]ourt enormous leverage. First, the executive legal officer reinforces the image of professional detachment that the Court wishes to present to the public. Just as the [C]ourt wishes to be seen as being above the rancour and partisanship of the political world, the ELO is above the blatant spin doctoring that is found elsewhere in Ottawa. Second, the ELO’s main job is to point journalists to what the judges have written. The message that underlies all the ELO’s briefings is that the “reasons” behind a judgment, the arguments and the logic of the judges, are the story. Lastly, some would contend that by directing journalists to one part of a judgment and not another, the ELO has the capacity to set the media agenda (Sauvageau, Schneiderman, and Taras 2006: 202).

At least one former clerk feels that the media was at least partially guided by this process but felt, as did others, that, while the ELO’s briefings have aided accuracy in reporting, they have not been able to counteract a tendency among the press towards sensationalistic coverage.

Open enough?

For an institution rarely in the public spotlight before the 1970s, the Court's ascent to prominence during the Charter era has had many of its judges trepidatious at the thought of intentionally promoting more exposure to the media, researchers and the broader public. Concerns for their independence, worries about politicization of the Court, and a distrust of the media among some judges all contributed to a generally cautious attitude towards reforms. It is clear, however, that one of the sources of the considerable growth of the Court's staff is the initiatives that have been implemented to open the Court to public scrutiny. The Canadian Court has become a world leader in terms of the procedures it has established for exhibiting oral hearings and for dealing with the media.

Nevertheless, despite embracing the Internet and other new technologies in many areas, there remain obvious opportunities for the Court to extend this process. Public availability of transcripts of oral hearings, case factums and other documents over the Internet should not be exceptionally difficult to accommodate despite privacy concerns, given that researchers can already obtain hard copies of these documents at the Court itself (although some court records come at the considerable cost of \$1 per page). While digitizing documents from older cases would no doubt be a substantial task, it is a development that appears inevitable. Since 2007–08, the Court has been in the process of developing a new policy for access to such records (Supreme Court of Canada 2007b: 13).

While many judges now donate their private papers to the National Archives upon retirement, severe restrictions on public access mean that, with few exceptions, these documents will not be available to researchers until decades after the retirement date. Researchers of the U.S. Supreme Court have been able to take advantage of these types of records for some time and have used them to explore all facets of decision-making at that institution. However, behind-the-scenes accounts of the American Court have also revealed blatantly political, ideological and strategic behaviour on the part of the justices (Woodward and Armstrong 1979; Lazarus 1998; Greenhouse 2005), and it may be that the Canadian justices wish to avoid similar treatment. Yet a handful of excellent judicial biographies have been written about Canadian Supreme Court justices in which the authors had special access to such records. While they invariably show the very human element of the judicial role, these biographies provide a rich history of the internal workings of the Court and do little to tarnish the reputation of the justices (Sharpe and Roach 2003; Anderson 2001).

Nevertheless, the reason for precluding immediate public access to sensitive case records is obvious: protection of the integrity of the judicial decision-making process. Details of specific case deliberations, for example,

must remain behind closed doors to safeguard the Court's independence. The desirability, even right, of the public to know how important decisions are arrived at must be balanced with ensuring that judges can make difficult choices without fear of external pressure. For this reason, reasonable time limits on the release of archived documents are imperative.

Preservation of judicial independence is another reason the Court must be cautious in implementing any further changes to its relationship with the media. The desire to correct the public record when judges feel that the press has erred in its coverage must be tremendous. Yet, if the Court were to publicly respond to every criticism or error in the media, or if the judges were to hold regular press conferences, its ability to remain genuinely neutral or to at least *appear* "above" the political fray would be lost. The Court's legitimacy and authority rests on its reputation as an independent body whose decisions are based in law and reason. Nonetheless, as described above, the institution has developed formal mechanisms to facilitate an open dialogue with members of the press so that new initiatives, such as media lockups, can be discussed and considered. This relationship, in turn, has significant implications for public discourse surrounding the important issues confronted by the Court, given the media's role in facilitating such debate (Macfarlane 2008).

Conclusion

The Charter era produced a host of demands on a newly independent Supreme Court administration. Successive chief justices and a committed staff have managed to confront ever-evolving challenges wrought by modern pressures on the institution's efficiency. Although certain changes have produced unforeseen problems, the Court's administration has typically been able to react with the flexibility necessary to resolve them. The institution has also adapted to the age of twenty-four-hour "instant" news, most visibly through the institution of practical and constructive initiatives like media lockups.

Some of the changes implemented have been obligatory: it is difficult to imagine the Court refusing to yield to the normative demands for more transparency, given its heightened public prominence following the Charter. The institution also has little choice but to embrace technological developments, despite concerns about related data integrity and electronic security issues. Even the decision to introduce media lockups was not without considerable hesitation. This caution is understandable. The quality and care with which the judges decide fundamental societal and legal issues cannot be abandoned in order to continually improve administrative efficiency. Nor can the Court, with its unique place within the broader political system, allow itself to forfeit its independence as a result of demands for transparency and accessibility. Instead, the main administrative goal must be to

balance these factors. Thus far, the Court has struggled effectively with these formidable managerial challenges.

Notes

- 1 Perhaps the most significant look at the Court's administration to date is Carl Baar's examination of Chief Justice Brian Dickson's tenure (Baar 1998).
- 2 A discussion on the normative desirability of such significant tasks being left to the clerks, while important, is beyond the scope of this article.
- 3 The Court statistics include unreported judgments, but since I was unable to find data for years prior to 1991, for consistency I use the number of reported judgments as shown by LexUM. The remainder of the data was compiled using the Court's statistics and estimates documents (Supreme Court of Canada 1997, 2007a).
- 4 Bora Laskin sat for a couple of the first Charter cases but did not participate in any of the judgments. He died in 1984.
- 5 The problem is not limited to the Supreme Court level – lack of representation is a growing problem throughout Canada's judicial system.

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