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Abstract

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Keywords

Canada. Supreme Court; Constitutional law; Appellate courts; Canada

DIAGNOSTIC ADJUDICATION IN APPELLATE COURTS: THE SUPREME COURT OF CANADA AND THE CHARTER OF RIGHTS©

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Three distinct adjudicatory processes are found in appellate courts: decisional adjudication (applying principles), procedural adjudication (choosing among principles), and diagnostic adjudication (defining and developing principles). The Supreme Court of Canada has traditionally used procedural adjudication, in which the adversary process frames issues and generates supporting material. However, the Court's decreased caseload, its increased discretion to select cases, and the arrival of a new wave of issues under the *Charter of Rights* has shifted the Court's work to diagnostic adjudication. As judgment becomes less a choice problem and more a creative exercise, both the degree and kind of judicial involvement changes. Thusfar, however, the Court's administrative responses to the pressure of its work have had limited success. To be effective, reforms in the way the Court organizes and processes its work must derive from an analysis of the requirements of diagnostic adjudication. The paper concludes by suggesting an overall approach and making specific proposals.

I. INTRODUCTION

The *Canadian Charter of Rights and Freedoms* has transformed the role of the country's judiciary. Since the constitutional entrenchment of a wide variety of legal, political, and egalitarian civil liberties in April 1982, Canadian courts have litigated

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 Helpful comments on an earlier draft were made by Professors Peter Russell and Alan Tarr, and Judges Francis Kovacs and Patricia Wald.

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thousands of *Charter* claims,[1] and important new law has been made in a wide variety of fields. Unresolved issues have come in increasing number before the Supreme Court of Canada and the court has shown its leadership by setting aside old precedents and carving out new ones. At the same time, however, the Supreme Court has found it increasingly difficult to do its work. Backlog and delay have increased while dispositions have decreased.

This paper will argue that the new role of the Supreme Court of Canada has transformed the nature of the adjudicatory process that dominates the Court. The shift in emphasis from its review function to its law development function has been accompanied by a shift from procedural adjudication to diagnostic adjudication. These shifts have created severe pressures on the Court, and led to efforts to enhance its capacity. Thus far, however, administrative efforts have been too narrowly conceived; they have focused on freeing up more of the judges' time rather than focusing on how the Court's organization and processes can be designed to meet the demands of diagnostic adjudication. American reforms in appellate court administration, usually designed for coping with high-volume appellate review, may deflect our thinking away from the challenge of increasing the quality of law development in a court of last resort.

II. THREE TYPES OF ADJUDICATION

The concepts on which this paper is based derive from an analysis of trial courts in the United States. That analysis emerged from comparative field research directed by Thomas A. Henderson,[2] and is most fully explicated in an article in *Judicature* under the

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[1] For quantitative data on reported cases, see F.L. Morton, "Charting the Charter – Year One: A Statistical Analysis" (1984-85) 2 Can. Hum. Rts. Y.B. 239; and P.J. Monahan, "A Critics' Guide to the Charter" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 383.

[2] See T.A. Henderson *et al.*, *The Significance of Judicial Structure: The Effect of Unification on Trial Court Operations* (Washington, D.C.: National Institute of Justice, 1984) c. 5.

principal authorship of Cornelius M. Kerwin.[3] The analysis applies organization theory to court operations. The theory of organizations is not limited to how organizations are managed. It also looks at how they are designed, and how they perform their essential functions – that is, how they process the work that makes up their day-to-day tasks. These essential work processes have been termed the organization's core technology. The core technology of a court, for example, would be its adjudicatory process.[4] Henderson found that the trial courts he researched were characterized by three distinct adjudicatory processes: decisional adjudication, procedural adjudication, and diagnostic adjudication.

An appellate court uses all three adjudicatory processes. Decisional adjudication occurs when an appellate court applies principles. Procedural adjudication takes place when an appellate court chooses among principles. Diagnostic adjudication takes place when an appellate court defines, develops, or designs principles. Given the increased diversity of appellate courts, especially the distinction between intermediate courts of appeal and courts of last resort, certain tasks – and hence certain adjudicatory processes – tend to be more important in some appellate courts than in others. Within a given court, the relative importance of certain tasks and hence the mix of adjudicatory processes vary over time.

Decisional adjudication occurs in those appeals where rules are well established and can be applied in a more mechanical fashion. Thus decisional adjudication would be more common in a court that handles appeals as of right, where the error-correction or appellate review function takes up a larger proportion of court business than the law development function. Provincial courts of appeal, for example, frequently dismiss an appeal without calling upon the respondent; the panel members confer briefly after the

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[3] C.M. Kerwin, T. Henderson and C. Baar, "Adjudicatory Processes and the Organization of Trial Courts" (1986-1987) 70 Judicature 99.

[4] A Court has other components: its management structure (the registry, with its files and schedules and statistical reports) and its institutional aspect (bench and bar committees, opening of court ceremonies), but these function to service and buffer the court's core technology (its adjudicatory process). See T.A. Henderson, R. Guynes, and C. Baar, "Organizational Design for Courts" in J.A. Cramer, ed., *Courts and Judges* (Beverly Hills: Sage Publications, 1981) at 19.

appellant's argument, and conclude that a case has not been made out. Since the courts do not have to choose among competing principles, they can apply an existing rule.

Decisional adjudication emphasizes the expeditious dispatch of appeals. Timeliness is particularly important in the numerous sentence appeals that constitute a substantial part of the work of provincial courts of appeal. Arguments emphasize the applicability of established decision rules used by the Court. More elaborate citation of precedent or attempts to distinguish precedent would require more preparation time for counsel and could leave the Court in the unenviable but not unknown position of ordering a sentence reduced after the accused had served it.

Decisional adjudication would presumably be extremely rare in courts of last resort where the review or error correction function tends to give way to the law development function. Furthermore, courts of last resort in more populous jurisdictions tend not to handle the first appeal — the appeal as of right — and usually are in a position to exercise discretion over which cases they choose to review.[5] However, while the judgments of courts of last resort are unlikely to reflect a decisional adjudicatory process, one important part of those courts' work does use decisional adjudication: the process of deciding whether to exercise discretionary jurisdiction. When the Supreme Court of Canada hears applications for leave to appeal, arguments are brief. Decisions are either made from the bench or without giving reasons. They most commonly reflect the use of a mental check list: is there an important question of law? was there a split decision in the court below? The role of the lawyer who argues a leave petition changes from the production of elaborate argument to the use of compelling assertion. The very fact that applications for leave need not be argued in open court indicates that decisions to grant or refuse leave are assumed to be rule-application tasks appropriate for decisional adjudication.

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[5] Thus the Supreme Court of Canada, the Supreme Court of the United States, the High Court of Australia, and three-fourths of American state supreme courts generally receive appeals from appeals; the courts of appeal in Canadian provinces and Australian states, along with the New Zealand Court of Appeal and the courts of last resort in one-fourth of the American states, would draw a large proportion of their caseload from first appeals.

Procedural adjudication centres on choosing among competing principles. Which rule should govern and which should be distinguished? In procedural adjudication, the choice is sufficiently difficult or deemed to be sufficiently important that cases are fully argued and documented before the court makes its decision. Contending lawyers thus play the dominant role, reflecting the expectation that the adversary system is most suitable for spelling out and supporting alternatives from which a panel of judges is asked to choose. The court assumes that it cannot decide the case simply by applying a known rule; thus the need for fully developed adversary proceedings. The court also assumes that it can decide the case simply by choosing between adversaries; therefore, procedural adjudication does not require extensive staff research support or long deliberation before judgment is reached. Courts usually use procedural adjudication in carrying out their appellate review (error correction) function. They can engage in procedural adjudication in carrying out their law development function when that function is performed incrementally — by the gradual accretion of new precedents.

Procedural adjudication appears to be the dominant technology in English appellate courts, in part because an English court faces a narrower "range of available case authorities" than Canadian or American courts. As a result,

> English judges can be confident that counsel in a case compelling a depth of research into precedents will have at their convenient command those upon which the courts are accustomed to base their judgments, and that no pertinent recent case will be overlooked.[6]

Following from this confidence, an English court is likely to choose between existing precedents immediately after the completion of oral argument. A recent description of practices in the Judicial Committee of the Privy Council (which hears appeals from those Commonwealth jurisdictions that still retain it as a court of last resort) provides a glimpse of procedural adjudication at work:

> In the Privy Council, although judgment is more often than not reserved, the actual decision is arrived at very soon after the argument ends, in that the Counsel retire

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[6] B.M. Dickens, "A Canadian Development: Non-Party Intervention" (1977) 40 Mod. L. Rev. 666 at 674.

> from the Chamber [and t]hen in turn each of the members of the Board, commonly a Board of five, gives his opinion, starting with the junior; the numbers are added up and that is the decision except in the very rarest of cases. Somebody is fastened on then to write the judgment, and the writing may take some time..., but basically in the overwhelmingly majority of cases the decision is taken I suppose within three-quarters of an hour or so of the actual conclusion of the argument. The argument may have taken some days, often it does, so one has had plenty of opportunity to reflect during the course of the case. At the end, immediately the argument is finished one is expected to give one's opinion, not with the formality of an oral judgment but with reasons, so that whoever is ultimately given the task of actually writing the judgment can collate the various views.[7]

Canadian appellate courts typically spend less time hearing oral argument, and require more extensive documentation than their English, Australian, or New Zealand counterparts. But they still essentially rely on the adversary process to spell out alternative arguments from which a choice can be made. Historically, the Supreme Court of Canada often used *seriatim* opinions; each justice worked independently composing reasons for judgment and regular conferences were not held. Since judgment fundamentally involved a choice problem rather than a creative exercise, judges could work in relative isolation, and collegial interaction was not essential to solve an intellectual problem at the root of an appeal. In addition, the court's legal research capacity did not require enhancement by law clerks. While there "certainly ... were exchanges of draft judgments and of opinion thereon, some of these exchanges occurred surprisingly close – sometimes less than a week – to the actual handing-down of the judgment."[8] Thus the Supreme Court of Canada worked on its own variant of procedural adjudication; since the Judicial Committee of the Privy Council was, prior to 1949, the final court of appeal for Canada, the Supreme Court of Canada apparently did not see a need to synthesize individual views in a single set of reasons for the Court.

While appellate judges are more active in the course of court proceedings than their trial counterparts and less likely to feel

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[7] "Court of Appeal President: An Interview with Rt. Hon. Sir Robin Cooke" (1986) New Zealand L.J. 170 at 179 [hereinafter *Cooke Interview*]. Cooke sat on the Privy Council on a number of occasions.

[8] J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985) at 164. See also 162, 224, and 240. Regular conferences were not established until 1967.

compelled to take on the referee's stance that a jury trial demands, they remain more reactive than proactive. The issues on which they rest their decisions are based largely on the parties' factums. Even the unprecedented arguments of Duff C.J. and Cannon J. in the 1938 *Alberta Press Bill Reference* that a right of free public discussion is contained by implication in the Preamble of the *British North America Act* can be traced to the factum of the federal government's lawyer.[9]

Furthermore, appellate judges engaged in procedural adjudication are expected to maintain their objectivity when listening to oral argument, using questions as a form of devil's advocacy to inform their choice among principles. This expectation of objectivity is one of the reasons some appellate judges to this day feel it is inappropriate to read an appellant's brief or factum prior to hearing the oral argument. On the United States Supreme Court, the late Justice Felix Frankfurter would reach his decision on the basis of oral argument, and only afterward consult the briefs for support; Justice Hugo Black would always read the briefs before oral argument and often would be the first to pepper counsel with questions. Some appellate courts in Australia and New Zealand have only recently asked for any supporting documentation from counsel. The current President of the New Zealand Court of Appeal recalled when as a practitioner he would write out "in longhand ... a very brief sketch or summary of the sort of things I was going to say, and I would occasionally hand this into the Court."[10] The current consensus in common law countries seems to be that while appellate judges in procedural adjudication should retain an open mind on a case prior to oral argument, their objectivity is not compromised if the court operates a "hot bench" rather than a "cold bench."[11]

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[9] *Reference re Alberta Statutes*, [1938] S.C.R. 100, [1938] D.L.R. 81. Discussion of the arguments may be found in C. Baar, "Using Process Theory to Explain Judicial Decision-Making" (1986) 1 Can. J. of Law & Soc. 57.

[10] *Cooke Interview, supra*, note 7 at 172. Counsel before the Full Court of the Supreme Court of Victoria (Melbourne, Australia) may even today submit only the briefest sketch of their arguments.

[11] These terms are used by P.M. Saeta, "Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making" (1981) 20(3) The Judges' Journal 20 at 50.

Diagnostic adjudication moves a step beyond procedural adjudication in the complexity of its task. Diagnostic adjudication in appellate courts must define a principle for a case in which a choice between existing principles is not sufficient. It is used primarily in an appellate court's law development function, particularly when that function is conducted on a comprehensive rather than an incremental basis. Courts must give greater emphasis to crafting reasons for judgment, as those reasons may have implications for a wider area of the law and a wider range of litigants. Thus, diagnostic adjudication requires wider search, often beyond existing precedents to larger governing principles.[12] Collegiality becomes increasingly important, because panel members must not simply choose between contending interpretations and precedents, but must debate among themselves the underlying issues and the consequences of alternative solutions. Joint deliberation and exchange of ideas extend the oral argument of adversaries in the courtroom.

Diagnostic adjudication requires a broader range and a greater depth of information, because it occurs when principles are sufficiently unclear that contending counsel cannot be expected to frame the choice adequately. Thus courts using diagnostic adjudication are more likely to develop a pattern of allowing non-party intervention, as in the use of *amicus curiae* briefs in the United States and intervenors during oral argument in Canada, so that a wider range of legal issues has been canvassed prior to judgment. Preparation of full briefs and factums, and their review by members of the panel prior to oral argument, becomes the norm. Both more judge time (individually and collectively) and more staff time (particularly of law clerks) are devoted to preparing reasons and reaching judgment.

Diagnostic adjudication differs from the other two adjudicatory processes in its potential impact on the body of the law. The legal impact of decisional adjudication is minimal. Courts use it when a decision is either not governed by precedent and therefore the decision (for example, a grantor refuses leave to appeal) is not

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[12] A relevant analogy is the generic hearing used in some regulatory proceedings. See L. Vandervorst, *Political Control of Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1979) at 15-22, 46-52; and D. Fox, *Public Participation in the Administrative Process* (Ottawa: Law Reform Commission of Canada, 1979) at 9-55.

binding in the future,[13] or governed so closely by an existing rule that the decision to dismiss the appeal will not alter the existing body of law. The potential impact of procedural adjudication is greater, but still confined to elaboration of criteria by which a given set of facts may be included or excluded from the coverage of contending legal principles. The potential impact of diagnostic adjudication is greatest, because by developing a principle that applies to the case, a court changes the relationship among legal principles; it alters the ordering of the principles rather than merely the location of the boundaries between them.

In practice, an appellate court could still treat a case requiring the definition or development of a principle as if it were a problem requiring the choice among contending principles. But courts would be engaging in elaboration of distinctions too precious to support a coherent jurisprudence, and they would not be responsive to novel fact situations.

III. DIAGNOSTIC ADJUDICATION AND DELAY IN THE SUPREME COURT OF CANADA

The Supreme Court of Canada is becoming increasingly involved in tasks requiring diagnostic adjudication. As the mandatory jurisdiction of the Supreme Court declines to the point where its caseload comes largely from petitions for leave to appeal, the cases that come before the Court are more likely to be those in which the principles at issue are the least clearly defined. As fewer cases are dealt with in certain areas of law, pressure builds to move beyond the issues put forward by the parties in those cases. "[I]f we are

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[13] The refusal to grant leave to appeal may still be very significant (for example, in allowing a lower court decision to stand or declining to resolve an issue on which there is an interprovincial difference in interpretation), but the absence of binding reasons means the Court can use a technology that reduces the need to deliberate and emphasizes expeditious (even intuitive) application of decision rules. Procedures could also be developed to ensure that decisional adjudication is properly conducted, especially as an increasing proportion of leave applications are denied. Denials of leave are becoming sufficiently newsworthy that *The [Toronto] Globe and Mail* reported two of them on 21 May 1986: "Top Court Agrees Public not Entitled to See Land Offers" *The [Toronto] Globe and Mail* (21 May 1986) A5; "Sex Sentence Will Stand, Supreme Court tell Inuk" *The [Toronto] Globe and Mail* (21 May 1986) A10.

only going to bring up one or two tort cases or one or two property cases in a year," argues a member of the Court, "then we should make the most of the opportunity by adopting a more expansive approach to our decision-making role."[14]

The *Charter of Rights & Freedoms* has accentuated the trend toward diagnostic adjudication. The Supreme Court of Canada has treated most *Charter* cases as exercises in defining and developing new principles. Even when the narrow issue in a case seems to be clear to the Court, the impact of its decision is not. Will a particular decision rejecting a *Charter* claim adequately reflect the constitutional status of the rights it contains? Will the acceptance of a *Charter* claim create expectations about future cases that the Court is hesitant or unwilling to convey? *Charter* cases have taken the Court beyond the procedural adjudication that it historically adopted for its work. There are two reasons for the shift: first, the nature of *Charter* adjudication calls for interpretation of broad constitutional statements and wider assessment of the consequences of the interpretation selected; and second, the number of non-*Charter* cases accepted for hearing has been reduced.

Before the *Charter* was enacted on 17 April 1982, the Supreme Court of Canada had averaged a half dozen constitutional decisions per year since 1975,[15] and three or four per year during the 1949-74 period following abolition of appeals to the Judicial Committee of the Privy Council.[16] While the balance of its work traditionally covered all areas of the law, public law (principally criminal and administrative law) has gradually squeezed out private law on the Court's docket.[17] Since 1982, *Charter* cases have emerged as one of the major areas of litigation. Within twenty-four

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[14] Quoting from the David B. Goodman Memorial Lectures delivered by Madame Justice Bertha Wilson at the University of Toronto, 26-27 November 1985, lecture one at 16 [hereinafter *Goodman Lectures*].

[15] P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" 11 Can. Pub. Pol. 161 at 161-62.

[16] C. Baar, "Judicial Behavior and Comparative Rights Policy" in R.P. Claude, ed., *Comparative Human Rights* (Baltimore: Johns Hopkins University Press, 1976) 353 at 361-62.

[17] See the symposium on "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation" (1983) 7 Can. Bus. L.J. 389.

months of the *Charter's* enactment, over twenty cases raising *Charter* arguments had been accepted for appeal.

Therefore, diagnostic adjudication is likely to become the Court's dominant technology. As this new adjudicatory process emerges, strains are already evident as the Court attempts to cope with a workload that requires a different degree and kind of involvement on the part of the individual justices. Thus, for example, the total number of written judgments has declined, and is now well below the average of ninety new cases granted leave to appeal each year.

Table 1
Total Number of Written Judgments,
Supreme Court of Canada, 1976-85

Year	Number of Written Judgments
1976	95
1977	96
1978	93
1979	110
1980	81
1981	94
1982	103
1983	77
1984	54
1985	75

Source: *Supreme Court Reports*

The Court's output from 1983-85 is running consistently behind cases coming on for argument. Table One confirms that the Court's work has been subject to increasingly serious delays. The elapsed time from completion of oral argument to issuance of judgment has almost doubled, from a mean time of 4.55 months in 1976 to 8.7 months in 1985. During that period, the number of completed judgments reserved for over twelve months has gone from zero to 23. *Charter* cases illustrate the trend and are quite likely to

be one of the major factors exacerbating it. Thus while over 20 cases raising *Charter* issues were before the Court by the summer of 1984, only 16 such cases had been decided by the summer of 1986.

Table 2
Elapsed Time from Oral Argument to Written Judgment, Supreme Court of Canada, 1976-85

Year	Mean Time (months)	< 6 Months No.	%	6-12 Months No.	%	> 12 Months No.	%	Total Judgments
1976	4.55	66	69.5	29	30.5	0	0.0	95
1977	4.94	60	62.5	30	31.3	6	6.3	96
1978	4.98	55	59.1	37	39.8	1	1.1	93
1979	6.16	49	44.5	56	50.9	5	4.5	110
1980	3.80	63	77.8	18	22.2	0	0.0	81
1981	4.13	69	73.4	23	24.5	2	2.1	94
1982	5.79	51	49.5	44	42.7	8	7.8	103
1983	6.97	36	46.8	32	41.6	9	11.7	77
1984	8.17	24	44.4	20	37.0	10	18.5	54
1985	8.70	25	33.3	27	36.0	23	30.7	75

Source: *Supreme Court Reports*

The poor condition of the Court's caseload suggests real limits on the Court's capacity to conduct diagnostic adjudication in an expeditious manner. At the same time, the quality of the Court's current work on the *Charter* is high enough to suggest that it has devoted considerable time and effort to its new principle-defining task. For example, the sixteen initial cases have shown a surprising degree of consensus. Dissents have been infrequent and even concurrences relatively less common than in past constitutional cases. At the same time, many of the Court's *Charter* judgments have broken new legal ground. In four cases, well-established precedents have been superceded by the Court's interpretation of *Charter*

language.[18] In all, judgments have favoured the *Charter* claims in eleven of the sixteen cases,[19] and in two other cases in which government action was upheld, *Charter* claimants could find partial support for their position in the Court's reasons.[20]

The Court's decisions have not only broken new ground, but in keeping with the use of diagnostic adjudication, the Court has supported its judgments with original reasoning rather than applying the established principles enunciated by the United States Supreme Court in analogous cases. This approach was exemplified in the case of *Operation Dismantle* v. *The Queen*, in which a national antiwar coalition brought suit to prevent testing of the American cruise missile in Canada on the ground that it would increase the likelihood of war and would therefore threaten the lives of Canadians in a manner violating the guarantees of fundamental justice in section 7 of the *Charter*. Critics of the *Charter* saw the suit as an example of how established powers of cabinet and parliament could be subject to review of the courts; judges and lawyers saw it as involving the courts in political issues. Those familiar with the long line of American cases which precluded judicial review of foreign and military policy quickly began invoking the political question doctrine (while remaining ignorant of the 1952 *Steel Seizure* case).[21] There could have been little doubt that the

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[18] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422; *The Queen* v. *Big M. Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321; *The Queen* v. *Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655; *Dubois* v. *The Queen*, [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503.

[19] The four in footnote 18 above plus two companion cases to *Therens* and the following 5 cases: *Attorney General of Québec* v. *Québec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; *Lawson Hunter* v. *Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641; *Reference re Section 94(2) of the British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536; *The Queen* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 206; *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383, 26 D.L.R. (4th) 493.

[20] *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481; and *Valenté* v. *The Queen*, [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161. The *Charter* claim was also rejected in *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161. In two cases the *Charter* claim was not reached: *Krug* v. *The Queen*, [1985] 2 S.C.R. 255, 21 D.L.R. (4th) 161; and *Jack and Charlie* v. *The Queen*, [1985] 2 S.C.R. 332, 21 D.L.R. (4th) 641.

[21] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

Supreme Court of Canada would uphold the authority of the federal government to allow testing of the cruise missile. Yet the Court's reasons accomplished two other results: (1) Cabinet decisions were held to be subject to judicial review under the *Charter*, an unprecedented assertion of judicial power in Canada, and (2) the political question doctrine — whose difficulties were pointed out to the Court — was carefully avoided in relatively terse reasons by Chief Justice Brian Dickson, speaking for the majority. Dickson based the Court's logic on the hypothetical nature of the link between the proposed tests and the harm (deprivation of life) proscribed by the *Charter*. The Supreme Court outcome contrasted with that of the Federal Court of Appeal, in which all five members of the panel wrote their own opinions.[22] The collegial deliberation associated with diagnostic adjudication had replaced the procedural adjudication reflected in the use of *seriatim* opinions.

A similar process and result characterized the case of *The Queen* v. *Oakes*, in which a reverse onus provision of the federal *Narcotics Control Act* was held to violate the *Charter* right to be presumed innocent until proven guilty. The provision had been invalidated in all four cases brought to provincial courts of appeal. The Ontario Court of Appeal, which decided *Oakes*, developed an elaborate test derived from American precedents. The Supreme Court's unanimous reasons avoided direct application of the American case law, building instead on a proportionality test enunciated in a *Charter* decision the year before. Thus in both cases, the Court avoided choosing available though non-binding principles to justify its decisions; instead it developed principles it felt were appropriate, building on and refining the reasons of the courts below.

The absence of public opposition to the principles enunciated in individual Supreme Court decisions suggests that the time consumed crafting shared reasons may have enhanced the legitimacy of the Court's controversial new role. For example, a decision

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[22] *The Queen* v. *Operation Dismantle*, [1983] 1 F.C. 745, 3 D.L.R. (4th) 193 (F.C.A.D.). One of the results of the Supreme Court's collegial process was evidently the brevity of its reasons, since Justice Wilson produced an elaborate set of concurring reasons that did not secure the votes of her colleagues, suggesting that consensus could emerge on a new principle only if it was more narrowly circumscribed.

invalidating the federal *Lord's Day Act*[23] has not seen a mounting of attacks from religious groups. The requirement that drivers believed to be impaired must be notified of their right to counsel before being required to give a sample of their breath[24] has not been attacked by law enforcement authorities, even though the breathalyser evidence in that case was excluded under section 24(2) of the *Charter*. Similarly, elimination of the reverse onus provision of the *Narcotics Control Act* produced no cries of concern from politicians or law enforcement authorities. This is not to say that the Court has been free from the informed criticism of scholars and practitioners on both the left and right of the political spectrum.[25] However, on a variety of measures of the quality of its results, the Supreme Court of Canada has scored well in its initial *Charter* decisions: degree of consensus, willingness to innovate, care in crafting reasons, and public acceptance/legitimacy.

The Court's current performance suggests that it has traded away the expeditious processing of cases in an effort to increase the quality of its judgments and reasons. Rather than reduce the time that members of the Court spend on *Charter* judgments (and presumably on other cases as well), the court has taken longer to complete its decisions. Because this trade-off, however unplanned it may have been, has facilitated diagnostic adjudication, it seems preferable to sacrificing the effort to develop principles in order to

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[23] *The Queen* v. *Big M Drug Mart*, *supra*, note 18.

[24] *The Queen* v. *Therens*, *supra*, note 18.

[25] Academics and practising lawyers remain sceptical of the Supreme Court's effectiveness in playing the broader role required by the *Charter*. (See the remarks of S. Kujawa at the 1986 annual convention of the Canadian Bar Association, "Top Court Judges Out of Their Depth in Charter Decisions, Lawyer Says" *The [Toronto] Globe and Mail* (22 August, 1986) A1). Critics on the left fear that the traditionally conservative Canadian judiciary will adapt the *Charter* to serve commercial interests. Their fears have centred on the possibility that the broad requirement of "fundamental justice" in section 7 will be used to import concepts of substantive due process that were used in American courts before 1937 to overrule public regulation of the economy. Thus the Supreme Court's most controversial *Charter* judgment of its first sixteen was in the *B.C. Motor Vehicle Reference*, *supra*, note 19; the Court, invalidating an apparently minor section of a provincial highway traffic statute, concluded that "fundamental justice" had a substantive as well as procedural meaning. While that decision could easily be restricted in future cases, it could also be expanded; given the Court's broad application of other *Charter* provisions to corporations (see the search and seizure case, *Hunter* v. *Southam*, *supra*, note 19), expansion is quite possible.

meet elapsed time standards. At the same time, however, the consistent failure of the Court to produce decisions at the same rate it agrees to hear cases cannot continue without still greater increases in backlogs and delay, and the inevitable strains that accompany those increases.

IV. ADMINISTRATIVE RESPONSES TO SUPREME COURT DELAY

The Court, under the leadership of Chief Justice Dickson, has proposed and implemented a number of organizational responses to its failure to decide cases expeditiously. For example, Chief Justice Dickson's first well-publicized administrative change was to enable lawyers outside Ottawa to argue leave applications via television. This change reduces the litigant's expenses, but focuses not on the diagnostic activities of the Court but on its decisional adjudication. The Chief Justice has publicly pleaded with the practising bar to present more fully-developed and effective arguments on *Charter* issues; he is thus using moral persuasion to encourage improvements in the quality of procedural adjudication. Neither reform addresses diagnostic adjudication. However, these responses have been inadequate because they have not focused on structural changes to improve the Court's ability to effectively use diagnostic adjudication. In fact, the Court's responses have often not been directed at diagnostic adjudication or have undermined the process.

A number of administrative changes proposed by and for the Court do focus on increasing the one commodity deemed essential for diagnostic adjudication: judicial time. Thus, the Minister of Justice, with support of the Supreme Court, introduced Bill C-105 in April 1986, which would allow the Court to rule on leave petitions without hearing oral argument and would allow Court judgments to be deposited with the Registrar rather than delivered in open court. These reforms would save judge time currently devoted to decisional adjudication or court formalities; the former proposal would allow more involvement in screening by the justices' personal law clerks.

Another way to increase the time available for individual cases is to reduce the number of cases accepted for review. This has already been done, and the logic is made explicit by Madame Justice Wilson:

> 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. The only answer, we concluded, is to grant fewer leaves and make sure that the balance between the Court's sitting time and its nonsitting time is appropriate and correct, one that allows adequate time for research and reflection, for conferring with one's colleagues, for the drafting and redrafting of reasons for judgment.[26]

Justice Wilson makes an articulate statement of certain conditions which are necessary for diagnostic adjudication in a court of last resort, but hearing fewer cases may be a self-defeating means to achieve those conditions. As the Court further rations its time by taking fewer cases, the need to develop more comprehensive principles increases, procedural adjudication becomes even less appropriate, and the Court in turn requires even more time per case for the diagnostic adjudication necessary for the matters remaining on its reduced docket.

One way out of this dilemma would be to specialize, accepting cases only in particular areas of the law, in the hope that a larger number of cases in specialized areas would allow more incremental development of the law, and hence a return to the viable use of procedural adjudication. Currently, specialization is occurring on a *de facto* basis — for example, in certain areas of public law — without substituting any other forum or process for dealing with private law matters on a national level. No proposals are pending for creating specialized national courts of last resort. But if that effort is premised on the hope of retarding the current shift to diagnostic adjudication, it may be unproductive because the conditions that have undermined the utility of procedural adjudication in the Supreme Court of Canada are largely external to the Court (the proliferation of legislation, administrative decisions and lower court judgments, the instability of previously-established legal principles).

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[26] *Goodman Lectures*, *supra*, note 14, lecture one at 23.

The Court still retains a small amount of non-discretionary jurisdiction (for example, in criminal appeals when there is a dissenting opinion in a provincial appeal court panel), and Bill C-105 would convert these remaining areas to the Court's discretionary jurisdiction. If enacted, this change would allow the Court to decrease marginally the number of cases it hears each year without decreasing the number of cases in which it defines and develops principles. Yet this change will once again decrease the utility of procedural adjudication and increase further the dominance of diagnostic adjudication in the Supreme Court.

The most misconceived step to increase the time available for the judges is the limitation of non-party intervenors in *Charter* cases. A decade ago, the increased presence of non-party intervenors in the Supreme Court of Canada was hailed as an important shift away from English procedure,[27] and a recognition of the role intervenors could play in broadening the range of relevant issues before the Court. Now, with the *Charter* demanding the development of new legal principles, the Court has established a pattern of denying applications by intervenors – even when those intervenors had appeared in the court below and seen their arguments incorporated in that court's reasons.[28] If current delays in the Supreme Court of Canada stem from efforts to develop principles beyond the choice problem posed by the parties to an appeal, the use of intervenors should increase the ability of the Court to do so, by increasing the diversity of arguments presented to the Court prior to judgment. To limit intervenors is to erode one of the major supports for diagnostic adjudication developed by the Supreme Court prior to the *Charter* and to do so at a time when it is most needed. By creating the illusion that *Charter* litigation can be conducted with procedural adjudication, the Court may be making its own problem worse.

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[27] See B.M. Dickens, *supra*, note 6.

[28] See J. Welch, "No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada" (1985) 43 U.T. Fac. L. Rev. 204; and K.P. Swan, "Intervention and *Amicus Curiae* Status in Charter Litigation" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 27.

V. A NEW APPROACH TO DIAGNOSTIC ADJUDICATION

How can the Supreme Court of Canada approach its administrative difficulties in a manner consistent with its emerging adjudicative responsibilities? Research and reflection, conferring with one's colleagues, drafting and redrafting of reasons for judgment are some of the requirements for diagnostic adjudication in a court of last resort. But it is wrong to assume that increasing the amount of off-the-bench time per case is the way to meet these requirements.[29] Time is important: effective use of time, however, is more important.

Increasing the number of courtrooms and judges is not the best answer to trial court delay, because in too many cases, existing courtrooms and judges are not used effectively. Thus trial court delay reduction programs consistently emphasize improvements in resource utilization – reducing downtime by increasing the certainty that parties are ready for trial, using pretrial conferences to encourage settlement when appropriate and to focus issues at trial (reducing the length of trials that do proceed), and monitoring the flow of cases through the court to allow rapid reallocation of personnel. While these particular techniques focus on procedural adjudication, the effective use of resources can also improve diagnostic adjudication. Trial courts need to use their resources more effectively or else they could grow inordinately large. Courts of last resort need to use their resources more effectively or else their caseloads will become so small that their essential unifying role in the legal system will be compromised.

To use its time effectively, the Supreme Court of Canada must use information effectively. The effective use of information for legal development has two elements. First, the amplification of information; the Court must have a sufficient breadth and depth of information to do its job. Second, the attenuation of information;

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[29] A generation ago, similar issues were debated about the Supreme Court of the United States following the publication of H.M. Hart's famous essay, "The Time Chart of the Justices" (1959) 73 Harv. L. Rev. 84. See especially the acerbic response of legal realist T. Arnold, "Professor Hart's Theology" (1960) 73 Harv. L. Rev. 1298, which suggests that giving U.S. Supreme Court justices the time to reach a consensus would be the equivalent of a sentence of life imprisonment.

the Court must be able to organize the wide range of information it receives so that it can focus on the most critical pieces of information.[30] Positive results can only be achieved if the court possesses all relevant information and is able to sift through and synthesize that information.

When a case first comes before the Court, it may be difficult to know what information will become essential for the ultimate decision and its reasoning. In most cases, a court of last resort has some guidance from the intermediate appellate court; the court below often sorts through a great number of grounds for appeal so that the Supreme Court is steered towards certain major and/or disputed issues. But the Court should hesitate to place limits on the parties at the initial state of an appeal, lest the parties be asked to direct themselves to a particular issue that, upon review of the factums and appeal book and presentation of oral argument, may not have been the best issue on which the appeal should turn. At the initial stage, therefore, information should be amplified.

Amplification requires not only that counsel address in their written submissions the full range of relevant questions in dispute, but that intervenors be allowed to make written and oral submissions as well, and not be restricted by the false economy of the Court's recent practice. The Court will also need to be open to empirical evidence necessary for the development of *Charter* principles. For example, when Chief Justice Jules Deschênes of the Cour supérieure du Québec had to decide whether restrictions on minority language educational rights under section 23 were reasonable limits under section 1, he required the evidence of demographers to assess the validity of the provincial government's justification.[31] Madame Justice Wilson also recommended amplifying information available to the Court by "generous interpretation [of] the Court's rules governing interventions" and "broaden[ing] the base of admissible

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[30] The framework used here is taken from the work of S. Beer in the field of cybernetics and information processing. See his 1973 CBC Massey Lectures, *Designing Freedom* (Toronto: Canadian Broadcasting Corp., 1974).

[31] *Québec Association of Protestant School Boards* v. *A.G. Québec* (1982), 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Que. Sup. Ct.).

evidence."[32] She saw these recommendations as "fairly straightforward procedural accommodations that we can make to our new role." She also argued that liberalized intervention "would assist in legitimizing the Court's new role through a more open and accessible court process."

Once information has been amplified, in order to define and develop legal principles the court must then attenuate – the court must organize, focus, sort out, and apply the information. To guarantee that the Court makes effective use of its time, the attenuation process should also be efficient; however, the techniques used to achieve efficiency must reinforce rather than undermine the conditions for diagnostic adjudication. One way this is possible is to attenuate information at an early stage in the process. For example, since members of the Court normally read written submissions in advance of oral argument, attenuation has already begun, as panel members focus on particular issues and then probe for more information on those issues during oral argument. Perhaps this process could be made more effective if all counsel were notified by a brief memorandum prior to oral argument that members of the Court would especially welcome attention to certain issues. This prior notification should enhance the quality and relevance of oral argument, making the time spent in Court more helpful for the subsequent drafting and redrafting stage. It should reduce the necessity for a rehearing, which occurred in one of the early *Charter* cases.[33] It should serve a function analogous to the pretrial conferences that attempt to narrow issues so that trials are not unnecessarily long and diffuse. Trial courts that have used pretrial procedures to narrow and focus issues find that the resulting trials are conducted more effectively. The same objective could be achieved through the use of advance memoranda. To the extent that the Court uses a technique such as this, oral argument could not only be more focused, but also more brief.[34]

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[32] *Goodman Lectures, supra*, note 14, lecture two at 11-15.

[33] *Singh* v. *Minister of Employment and Immigration, supra*, note 18.

[34] For a recent illustration of existing Supreme Court efforts to focus oral argument, see J. Batten, *Judges* (Toronto: Macmillan of Canada, 1986) at 281.

At least three United States Courts of Appeal use a similar procedure. The District of Columbia Court of Appeal very often sends a notice to counsel that "we want to hear" certain issues addressed in oral argument.[35] A similar practice is used in the Ninth Circuit (based in San Francisco)[36] and by certain panels in the Fifth Circuit (based in New Orleans).[37] Thus the use of an advance memorandum to focus oral argument is well established in high-volume appellate courts that must also handle complex litigation unlikely to be reviewed by a higher court.[38]

Canadian lawyers and appellate judges would resist the strict time limits on oral argument so common in the United States, and justifiably so. If the presentations of counsel are excessively attenuated, the Court may have inadequate information on which to develop its decision. On the other hand, techniques that reduce the length of oral argument without preventing counsel from making relevant arguments should be welcome. Consider the comments by the President of the New Zealand Court of Appeal:

> I'm a firm believer in the value of oral argument. I can think of numbers of cases in which a few careful and concise but forceful submissions from Counsel have changed my thinking on the subject and sometimes altered the result of a case.... I hope we will never lose the benefit of ... it through people putting in a whole lot of written material and then tending to read it to the Court. And what I would like to see, without imposing time limits on Counsel, is some better system of putting an argument, or more thought being given to concise presentation.... The weight of an argument is definitely not what it actually weighs.[39]

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[35] Discussion by Chief Judge Patricia M. Wald, District of Columbia Court of Appeal, in a panel at the American Political Science Association Annual Meeting, Washington, D.C., August 30, 1986.

[36] Reported by S.L. Wasby in discussion with one of the authors, based upon his research in the Ninth Circuit.

[37] In those panels in which Judge Alvin Rubin sits, as reported to one of the authors by Donna Stienstra of the Federal Judicial Center.

[38] A related practice, the issuance of tentative rulings on appeals in the Los Angeles Superior Court, is described by Judge P.M. Saeta, *supra*, note 11. The system, originated by Judge S.M. Hufstedler, has focused and shortened oral argument and has, according to Saeta, "met with unqualified approval by the bench and bar," *supra*, note 11 at 20.

[39] *Cooke Interview*, *supra*, note 7 at 173. "[S]omething will have to be done to restrain it [the "tendency to be prolix"] unless addicts at the Bar reform voluntarily," added the Court of Appeal President.

And consider these comments by an American appellate judge in 1942, summarizing an American Bar Association committee study:

> A mere oration about the case cannot aid the court very much in deciding it. Real information about the facts and the issues is very helpful. Only the judges can know the matters about which they are in doubt, and they do know this much better if they have made a study of the case prior to the argument. If, by prior study, they can think of and ask questions about matters which the attorneys might not present, then the attorneys are given an opportunity to state their views on propositions which the judges would otherwise decide solely from their own research after the argument has ended.[40]

In practice, advance memoranda could increase the quality as well as reduce the length of oral argument, because counsel could be more confident that panel members were familiar with the case. Furthermore, advance memoranda would ensure a continued effective role for counsel even as procedural adjudication gives way to diagnostic adjudication. While some members of the Court might see the production of advance memoranda as using even more of their already scarce time resources, early attention to a case – as with early attention to any task – can reduce time and effort spent later on.

Diagnostic adjudication also creates new tasks and roles for court staff. When a court defines and develops new principles, its impact is potentially very wide. Therefore it needs to understand the possible consequences of its decisions. The greater use of intervenors and the more intensive use of oral argument are designed to obtain a wider and more thoughtful range of forecasts about those consequences. Once those forecasts have been canvassed by the court, it needs to assess their validity – to attenuate information about consequences. When the Supreme Court focuses on legal consequences, the judges are usually able to assess the forecasts of counsel. Law clerks are available to reinforce judicial efforts, but this is a new role for these professional staff personnel. Traditionally, the law clerk's role has been to amplify rather than attenuate information, to dig for lines of precedents that their judges believe have not been adequately canvassed. In effective diagnostic adjudication, information from counsel will be amplified, requiring the law clerk to contribute to the process of organizing information

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[40] L.M. Hyde, "Appellate Court Decisions" (1942) 28 A.B.A.J. 808-12.

and assessing legal consequences. This expanded role should not mean that the judges' intellectual work will shift to the staff; the early involvement of the judges in the cases (through use of advance memoranda) will allow them to define and structure the law clerk's tasks more fully.

The Court's decisions will also have non-legal consequences, and counsel are likely to present forecasts of those consequences as well. These non-legal forecasts are particularly important in *Charter* cases, since some of the most critical interpretations of the limits in section 1 rest on those forecasts. For example, the current debate on the constitutionality of mandatory retirement rests not so much in the meaning of the section 15 equality rights guarantees, but on whether the consequences of its abolition will be sufficiently serious to justify retaining it as a reasonable limit on section 15 rights. Should section 1 be invoked when counsel can make a plausible argument regarding those consequences, or should available empirical data be considered as well? It is likely that counsel in this and other cases will submit non-legal, data-based forecasts of consequences. It is also likely that contradictory data and conflicting forecasts will be presented. How can the Court assess these? It would be irresponsible simply to say that given the apparent conflict, the data are inconclusive. No judge would say that when faced with conflicting interpretations of a legal principle. If the justices lack the expertise to assess forecasts, the Court will need to acquire it.

Given the wide range of non-legal forecasts likely to require assessment by the Court in the course of *Charter* litigation, retaining specialized staff experts is not feasible. A more effective model may be the use of qualified experts in a temporary consultative capacity (perhaps with the status of special masters), charged with collating and criticizing the diverse and possibly conflicting findings. Any reports from these experts would need to be made available to counsel, since a report's conclusions would remain in varying degrees tentative and subject to debate. However, such a report would provide a disinterested evaluation – an important step in attenuating non-legal information for the Court. The function of Court staff would be to locate the necessary expertise, based on the Court's understanding of what forecasts of consequences it must assess in order to develop appropriate legal principles.

As the Supreme Court's diagnostic adjudication evolves over time, the staff functions associated with assessing forecasts of consequences should take on an additional dimension. The Court should examine its previous decisions to see what their consequences (both legal and non-legal) have been, and to see whether forecasts proved to be accurate.

This type of post-audit of decisions has been done in trial courts that use diagnostic adjudication. For example, trial judges who sentence offenders based on individualized pre-sentence reports make certain assumptions about the consequences of their decisions. One American trial judge hired a researcher to see what happened to defendants the judge had sentenced in previous years, so that she could assess whether her forecasts about the characteristics of individuals and the viability of particular sentence options were valid. An analogous post-audit of the consequences of Supreme Court decisions would be more complex and difficult, but could still be useful as a form of feedback that would help the Court orient itself toward its future work.

However the Court responds to the specific proposals put forward in this section – increased use of intervenors, introduction of memoranda to counsel prior to oral argument, a research and analysis role for Court staff – the Court must focus on the effective use of its time in the context of its diagnostic tasks. One aspect of the effective use of time, the development and refinement of information, has been the basis for proposals made here. Other aspects of the question deserve examination as well. The ability of the Supreme Court of Canada to handle diagnostic adjudication expeditiously and effectively is at stake.