Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec *Secession Reference* and Beyond

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Introduction

With the 1982 introduction of the Charter of Rights and Freedoms, the prominence of the Supreme Court of Canada (SCC) has sharply grown. Studies suggest the charter has revolutionized Canadian political life, forced justices into a dialogical relationship with lawmakers and increased policy making at the SCC (for example, see Morton and Knopff, 2000; Hogg et al., 2007). Yet the Court has also managed to safeguard its institutional legitimacy as evident in the high degree of support it enjoys among the Canadian public (Hausegger and Riddell, 2004) which continues to trust the courts more than legislatures (Fletcher and Howe, 2000; Nanos, 2007). It appears that in spite of its increased entanglement with politics, the Court is succeeding where traditional political actors over the past few decades have consistently failed, namely, in safeguarding its public support. Indeed, how do the SCC, and courts everywhere, ensure the attainment and retention of institutional legitimacy? According to Gibson, Caldeira and Spence (2003: 556), "understanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions."

Acknowledgments: A version of this paper was presented at the 2009 CPSA meetings. The author gratefully acknowledges the support of the Social Sciences and Humanities Research Council of Canada in the form of a doctoral fellowship. I would like to thank Ran Hirschl, Peter Solomon, Joseph Fletcher, Lorne Sossin, Grace Skogstad, David Cameron, Donald Songer, Phil Triadafilopoulos Luc Turgeon and *CJPS"*s anonymous reviewers for helpful comments. None of these parties is responsible for the arguments of, or errors in, this paper.

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Canadian Journal of Political Science / Revue canadienne de science politique
43:4 (December/décembre 2010) 843–869 doi:10.1017/S0008423910000764

The paper answers this question by presenting a strategic theory of how courts establish and promote institutional legitimacy. The theory shows that courts cultivate legitimacy by exhibiting strategic sensitivities to factors operating in the external, political environment. In particular, legitimacy cultivation requires courts to devise decisions that are sensitive to the state of public opinion, that avoid overt clashes and entanglements with key political actors, that do not overextend the outreach of judicial activism, and that employ politically sensitive jurisprudence.

The theory is applied to the SCC's 1998 *Secession Reference* case. The reason for focusing on this case is twofold. First, the case merits attention because of its sheer importance. It is, after all, perhaps the most politically significant case the SCC has ever confronted, as well as the case for which the Court is most known around the world as its judgment is recognized as "a landmark decision for worldwide constitutionalism" (Russell, 2004: 245). Second, the case merits attention because it is indicative of a broader, astute, legitimacy-attentive behaviour by the SCC.

In addition, the paper extends the so-called strategic approach to Canadian judicial scholarship. While there have been considerable examinations of ideological divisions within the SCC associated with the attitudinal model of judicial decision making (see, for example, Heard, 1991; Ostberg and Wetstein, 2008; Songer and Johnson, 2007), the application of the strategic approach, as the other major comparative approach concerned with measuring the influence of political or external factors on judicial decision making, has been much less common (but see Flanagan, 2002; Hausegger and Haynie, 2003; Manfredi, 2002). Even as the question of the federal government's constitutional litigation strategies has received recent attention (Hennigar, 2007; see Hiebert, 2002; Kelly, 2005), the topic of strategic behaviour within the judicial branch remains an under-researched area of interest in Canadian politics.

The paper advances in three sections. The first section outlines a new, legitimacy cultivation theory of judicial decision making. The theory builds on comparative literatures on public support for the courts and strategic judicial decision making. The second section applies and tests the theory in the context of the *Secession Reference* case while the third section examines applicability of the theory beyond that case.

The Theory of Strategic Legitimacy Cultivation

Over the last two decades the literature on public support for the courts has identified several factors that exert effects on the levels of public support courts enjoy (Caldeira and Gibson, 1992; Fletcher and Howe, 2000; Gibson et al., 1998; Gibson et al. 2003; Hoekstra, 2003). At the same time, the literature on strategic judicial decision making has pointed

Abstract. While the last few decades have witnessed increased political significance of the Canadian Supreme Court, the Court has also managed to safeguard its institutional legitimacy as evident in the high degree of support it enjoys among the Canadian public. Indeed, how do the Supreme Court of Canada, and high courts everywhere, ensure the attainment and retention of institutional legitimacy? The paper develops an answer to this question by presenting a strategic theory of legitimacy cultivation. The theory is applied and tested in the context of the 1998 *Secession Reference* case. The paper sheds a new light on the case, shows that patterns of judicial strategic behaviour can provide important insights into how the Supreme Court acquires institutional legitimacy and points out the significance of extending the strategic approach to the study of the Canadian Supreme Court.

Résumé. L'importance politique de la Cour suprême du Canada s'est accrue de manière notable au cours des dernières décennies. Malgré tout, la Cour a réussi à maintenir sa légitimité institutionnelle, comme en fait foi le niveau de soutien élevé pour la Cour que manifeste la population canadienne. Mais comment la Cour suprême du Canada, ainsi que les cours suprêmes ailleurs dans le monde, s'assurent-elles de développer et de maintenir leur légitimité institutionnelle? Cet article propose une réponse à cette question en présentant une théorie stratégique du développement de la légitimité. La théorie est appliquée et testée dans le contexte du *Renvoi relatif à la sécession du Québec* de 1998. Cet article jette un regard différent sur cette décision en démontrant que certaines tendances dans le comportement judiciaire stratégique peuvent fournir des indices importants quant à l'acquisition de la légitimité institutionnelle. L'article souligne aussi l'importance d'étendre l'utilisation de l'approche stratégique à l'étude de la Cour suprême du Canada.

to the extent to which judges are sophisticated, rational actors whose actions are importantly constrained by factors operating in the external, political environment (see Spiller and Gely, 2008). Building on these two literatures, this section will outline the legitimacy cultivation theory of judicial decision making and ground it in a set of testable propositions.

There are several reasons why institutional legitimacy is considered of fundamental importance for the effective functioning of judicial institutions. The first has to do with the Hamilton's classic formulation in *Federalist* 78 of the judiciary as having influence over neither the sword nor the purse and having to rely on other branches of government for the enforcement of its judgments (1961: 465). This institutional limitation renders the courts particularly dependent on the goodwill of their constituents for compliance, and in the absence of "institutional legitimacy, courts find it difficult to serve as effective and consequential partners in governance" (Gibson et al., 1998: 343). Another reason why legitimacy is important has to do with the fact that, in contrast to political institutions, which can re-establish their legitimacy every few years via electoral processes, high courts are appointed bodies lacking recourse to such an automatic institutional refreshment. As the US Supreme Court stated in *Planned Parenthood vs. Casey* (1992: 868–69), "Supreme Court justices, unlike elected politicians, could not gain back legitimacy by winning at the polls. As a result, popular support, or legitimacy, once lost, would be very difficult to recover."

The comparative literature on public support for the courts is in agreement about what constitutes institutional legitimacy. Legitimacy is defined

https://doi.org/10.1017/S0008423910000764 Published online by Cambridge University Press

through the notion of diffuse support which refers to the presence of durable attachments to courts among the public that persist in spite of specific court decisions that may run counter to the preferences of members of the public (Gibson et al., 2003: 537). Also, much of the preoccupation of the public support for the courts literature has been with ascertaining what factors affect diffuse support for courts.

The first determinant of diffuse support is the so-called specific support for the courts defined as "satisfaction with the immediate policy outputs" (Gibson et al., 2003: 537). In contrast to the diffuse support, which refers to durable attachments, specific support is associated with levels of public satisfaction with judicial settlements of particular cases and policy dilemmas. Many studies have found that specific support has a direct bearing on the levels of diffuse support so that a single decision can alter the amount of support a court enjoys among the public (for example, Fletcher and Howe, 2000; Gibson et al., 2003; Hoekstra, 2003).

The second determinant of diffuse support is the capacity of courts to differentiate themselves from political institutions by relying on "non-political processes of decision making" and by associating "themselves with symbols of impartiality and insulation from ordinary political pressures" (Gibson, 2008: 61). The more successful the courts are in this regard, the more they are likely to succeed in establishing and maintaining higher levels of diffuse support (see Caldeira and Gibson, 1992: 648; Gibson, 2008). One can generalize, therefore, that legitimacy of judicial institutions is dependent on the *perception* on the part of the public that courts' work remains above the fray of regular politics and that, compared to legislatures and executives, courts are apolitical institutions whose decision making derives from principled and impartial reasoning devoid of ordinary political calculations.

The third determinant of diffuse support has to do with the level of judicial activism. As Caldeira and Gibson note in the US context, open embrace of activism may lead to the politicization of courts, which in turn risks undermining their reservoir of public support and makes them dependent for institutional support on those who directly profit from their policies (1992: 659). Judicial deference, on the other hand, renders the public less likely to view courts through the lens of their political preferences which is, legitimacy-wise, a more prudent position (Caldeira and Gibson, 1992: 659–60). Hausegger and Riddell's application (2004) of Caldeira and Gibson's framework to the SCC confirms these findings. One should emphasize that this argument linking judicial activism with diffuse support is again conditioned by public perception. If activist decisions go unnoticed by the public, no impact on diffuse support is expected.

If diffuse support is indeed important for the effectiveness of courts, what implications these findings have for decision making of high court

judges? The strategic approach provides one avenue for answering this question. The key premise of the approach is that judges are rational actors who are aware that their decision-making liberty is constrained by the political context in which they operate and by the preferences and anticipatory reactions of other actors within that context. The reason for justices to engage in strategic decision making has to do with a variety of costs that judges, and courts as institutions, can incur as a result of adverse reactions to their decisions, as well as with a variety of benefits that can be acquired through the rendering of strategically tailored decisions. Hence, to note just two examples, judges can engage in strategic decision making for the sake of increasing their policy-making influence (see Epstein and Knight, 1998) or the institutional position of courts vis-à-vis other major decision-making bodies (see Alter, 2001).

This paper suggests that judges can also engage in strategic behaviour for the sake of augmenting institutional legitimacy of courts. If the strategic literature is correct that much of judicial behaviour can be explained in terms of strategic choice making, and if it is true, as argued above, that institutional legitimacy is of fundamental importance for the proper functioning of courts, then one should expect judicial strategic calculations to be importantly informed by legitimacy considerations. As strategic, sophisticated actors with a distinct interest in maintaining or enhancing the institutional legitimacy of their court, justices can be expected to mould their decision making so as to ensure high levels of public support.

Towards an Empirical Account of Legitimacy Cultivation

Three premises regarding institutional legitimacy of courts emerge from the above discussion. First, institutional legitimacy is a fundamental judicial resource and in its absence the courts would find it difficult to function effectively. Second, institutional legitimacy can be defined through the notion of diffuse support, which refers to a relatively durable reservoir of favourable attitudes a court enjoys among the public. Third, three factors can exert effects on the level of diffuse support: (1) specific support; (2) a perception on the part of the public that courts are "different" kind of institutions whose work remains above the frame of regular politics; and (3) the character of judicial decision making. Overt judicial activism risks politicization of the courts and suggests to the public that courts are not different from other political institutions.

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

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

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

Second, given that institutional legitimacy is importantly linked to the capacity of courts to present themselves as a "different" kind of institution that acts in an apolitical and impartial manner, one can anticipate that judges will seek to cultivate that perception among the public at large. Hence:

Hypothesis 2: Judges will tend to avoid overt clashes and entanglements with political actors.

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

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

Interest groups are important because they often represent key social stakeholders that provide financial resources, sponsor cases, provide publicity and otherwise co-ordinate legal mobilization (Epp, 1998: 19). While they can serve as potential allies of courts in the aftermath of a favourable decision (Epp, 1998: 201), they can also function as potential enemies leading the backlash against the courts in the aftermath of an unfavourable decision (see Persily, 2008: 12). As Persily notes (2008:

12), group mobilization surrounding a case can have important effects on how the public ultimately evaluates and interprets judicial resolution of a case.

The third hypothesis has to do with the scale of judicial activism. In particular, Caldeira and Gibson's research shows that open embrace of activism by the judiciary can lead the citizenry to view the courts "in the same light as other political institutions" (1992: 652) with the consequence that the public's policy preferences become determinative of diffuse support. Somewhat ironically, therefore, when courts engage in greater deference to the existing policy regime, they are more likely to be seen as being less entangled with politics and will, therefore, be better able to preserve the perception of separated, different, apolitical bodies.

Hypothesis 3: Judges will tend to moderate judicial activism.

Combining insights from hypotheses 1 and 2 one can further hypothesize that judicial tendency towards moderation of judicial activism will tend to be less (more) pronounced when public opinion is supportive of an activist (deferential) outcome, and/or when dominant political actors tend to be supportive of an activist (deferential) outcome.

Judicial activism is here defined as *policy activism* referring to a "judicial vigour in enforcing constitutional limitations" which occurs whenever a court enforces constitutional limitations to change the policy status quo in the form of an existing statute, regulation or conduct of public officials (Russell et al., 1990: 19). As such, policy activism is distinguished from instances of judicial *policy restraint* in which a court decides to uphold the status quo.

This definition of judicial activism as policy activism needs to be distinguished from the concept of *jurisprudential activism*. Jurisprudential activism refers to judicial departures from well-established precedents and doctrines, and/or judicial formations of new doctrines. The distinction between policy activism and jurisprudential activism is important because the two often do not go hand in hand. In fact, courts often engage in jurisprudential activism while simultaneously ensuring policy restraint. Take the SCC's *R. v. Mills* (1999) decision as an example. In that decision, which dealt with procedures for accessing private records of complainants in sexual assault cases, the Court engaged in jurisprudential activism by reversing its 1995 *R. v. O'Connor* judgment (Choudhry, 2003: 380). However, the Court did so in order to *uphold*, and not challenge, the federal legislation that emerged in the aftermath of *O'Connor*. As this example shows, jurisprudential activism can be used not to challenge the policy status quo but to bring the Court's jurisprudence better in line with it.

Keeping the distinction between jurisprudential and policy activism in mind, the above insights also carry implications for the development of legal doctrine. In particular, if external factors in the form of public support concerns affect judicial disposition of cases, then one might also anticipate that jurisprudence itself will exhibit sensitivities to such concerns. Legitimacy cultivation, in other words, will push judges to seek reconciliation of their treatment of judicial doctrines with the external constellation of political and social forces.

Hypothesis 4: Jurisprudence will tend to be informed by the tenor of the extant political environment.

The opinion of the US Supreme Court in *Planned Parenthood v. Casey* (1992) is illustrative of how doctrines can be determined by tensions and values present within the larger political context and by judicial concerns about preserving institutional legitimacy. In that case, the Supreme Court stated that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation" (1992: 865). The clear implication, as Whittington notes, is that "although contemporary theory and politics can support a wide range of conflicting constitutional interpretations, there remain limits on what the Court plausibly can claim that the Constitution means before it raises substantial questions about its actions" (2001: 501). One can further imply that judges will be inclined to engage in jurisprudential activism to ensure that doctrinal categories they develop reflect features of the external, political environment.

Finally, since the above arguments linking the character of judicial decision making to the cultivation of diffuse support importantly depend on the visibility of judicial actions to the public at large, the above hypotheses are expected to be amplified in cases garnering high public visibility. In highly visible cases, the public is particularly attentive to the courts' behaviour, and judicial dispositions of such cases are expected to have disproportionate effects on diffuse support and on institutional legitimacy. This expectation corresponds with the Mondak and Smithey's finding that the key prerequisite for specific support to exert direct effects on diffuse support is the "availability of information" on the part of the public (1997: 1121; see also Fletcher and Howe, 2000: 49). Consequently, one can additionally hypothesize that in highly visible cases the courts will exhibit even greater sensitivities to the state of specific support, be extra keen to avoid clashes with political actors, be less likely to engage in activist decision making than in non-visible cases, and be particularly inclined to utilize and devise doctrines reflecting the tenor of the extant political environment.

The issue of visibility or transparency of the political environment is emphasized in the Vanberg's game-theoretic model of legislative–judicial relations which explores how public support concerns can induce strategic judicial calculations (2005; see also Staton, 2006). Starting from the above-described implementation problem courts everywhere face, Vanberg argues that a legislature's own electoral connections, and its fear of a potential public backlash for going against a popular Court or a decision, can serve as an effective enforcement mechanism for judicial decisions. For this mechanism to kick in, however, the public needs to be able to monitor legislative reactions to court decisions. Consequently, Vanberg argues that popular courts should be more likely to engage in activism when public awareness is high (2005: 39). In contrast to Vanberg, this paper suggests that high public awareness has more complex effects on judicial decision making. The courts' quest for maintaining relatively high levels of diffuse support implies that highly visible cases will heighten judicial sensitivity to all of the above-described strategic considerations, including the tendency to moderate (and not increase) judicial activism.

It is important, furthermore, to point out that judges are not expected to invariably follow the above hypotheses. Judicial decision making is a complex phenomenon driven by a variety of factors. Ideological and legal factors, for example, may overtake legitimacy considerations in some cases. Also, relevant information might be unavailable or imperfect, leading even strategic judges to misread the political moment. Nevertheless, assuming that judges are strategic decision makers and given the importance of institutional legitimacy for the overall effectiveness of courts, one can expect the evolution of judicial decision making to reflect the hypotheses outlined above, particularly in cases garnering a high degree of visibility.

Finally, in order to assess their impacts on judicial decision making, relevant variables have to be examined in their pre-decision political environment because of the assumption that it is judicial awareness of these factors that exerts effects on the consequent disposition of cases. The following section, therefore, starts with a discussion of the pre-decision political environment of the *Secession Reference* case, before proceeding to analyze judicial outcomes reached in the case.

Strategic Legitimacy Cultivation at Work: Explaining the Quebec *Secession Reference*

The Canadian government's reference of the issue of Quebec secession to the SCC was part of a new strategy for dealing with the separatist threat the government implemented in the wake of the nerve-racking 1995

https://doi.org/10.1017/S0008423910000764 Published online by Cambridge University Press

Quebec referendum. The reference included three questions. Does constitutional law allow for a unilateral secession of Quebec? Does international law provide for such a right? And, if there is a conflict between domestic and international law, which one would take precedence?

Pre-Decision Visibility

From the outset, Canadians expressed an enormous amount of interest in the case which was billed as "The Case of the Century" by the media (Chambers, 1998). In their study of the media coverage of the SCC, Sauvageau, Schneiderman and Taras note that "in terms of the numbers of stories alone, coverage of the hearing and decision dwarfed all the other cases" (2006: 91). Even the Canadian dollar fell in advance of the decision (Little, 1998). In short, justices could not ignore the extreme amount of attention the case was garnering among the Canadian public.

Political Actors in Pre-Decision Environment

The two key political stakeholders involved in the case were the federal government and the Quebec separatist movement, at the time represented by the Quebec government. In the aftermath of the 1995 referendum, the federal government reasoned it would be beneficial to let the courts draw some rules regarding the secession process, rather than letting the process play itself out solely in the political arena (Russell, 2004: 241). For its part, the Quebec government abhorred any meddling that threatened the ability of the people of Quebec to determine their own political future. Quebec Premier Lucien Bouchard was adamant in proclaiming that Quebecers have a "sacred right to determine their own destiny" (Bryden, 1998). His government formally boycotted the case, focusing its energies on provoking "a mounting wave of public indignation against the Supreme Court for taking on the case and the federal government for initiating it" (Bauch, 1998).

The Quebec political class was particularly outraged by the process which, as Premier Bouchard suggested, allowed "federally appointed justices, based on a constitution Quebec has never accepted, to put a padlock on Quebecers' right to self-determination" (Bryden, 1998). Leaders of all major Quebec parties, as well as Jean Charest, leader of the Progressive Conservative party, joined the Quebec government in condemning the reference. The longstanding charge that, when dealing with federal–provincial relations, the SCC is like the Leaning Tower of Pisa (always leaning in the federal government's direction) was resurrected and used by the Parti Québécois in newspaper advertisements (Young, 1998: 15). The Court's intention to appoint an *amicus curiae* to argue the secessionist case in the absence of the Quebec government was also

fiercely opposed. The eventual appointment of André Joli-Coeur, a well-known sovereignist, was greeted with "deep disappointment" by the Quebec government (Bienvenu, 1999–2000: 22).

Pre-Decision Specific Support

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

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

Decision Summary

The SCC delivered a unanimous decision. It decided that Quebec does not have a right to unilaterally secede from Canada either under Canadian or international law (questions 1 and 2). The Court proclaimed no need to consider the third question as it found no conflict between domestic and international law regarding unilateral secession. The most analyzed and reported aspect of the decision, however, dealt with issues beyond the question of unilateral secession. As Monahan notes, "rather than focus on whether Quebec had a unilateral right to secede form Canada, [the Court] turned the reference into an extended analysis of the federal government's constitutional obligations in the event that the Quebec government is able to obtain a clear mandate in favour of a secession in a future referendum" (1999: 66). Following this path, the Court arrived at the crux of its decision, the so-called duty to negotiate. In the Court's words, "a decision of a clear majority of the population of Que-

bec on a clear question to pursue secession" establishes, on the part of federal and other provincial governments, a duty to negotiate requisite "constitutional changes to respond to that desire" (268, 265). The Court extrapolated this duty to negotiate from its extensive analysis of four "fundamental and organizing principles" of the Canadian constitutional order: democracy, federalism, the rule of law and minority rights. The Court rejected two absolutist views, that secession is "an absolute legal entitlement" and that a clear "expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government" (267, emphasis in original). It ruled instead that requisite constitutional changes are to be arrived at through a good faith negotiation process informed by the four fundamental principles.

The Court made a number of other pronouncements. It ruled itself out of having any sort of "supervisory role over the political aspects of constitutional negotiations" that may ensue pursuant to the duty to negotiate (271). Justices specified that political and, therefore, non-justiciable aspects of negotiations cover practically the entirety of the potential negotiating process, including the triggering mechanism (what constitutes "a clear majority" and "a clear question"), the sensibility of "the different negotiating positions of the parties," what parties have a right to participate in negotiations, what would happen should negotiations reach a stalemate or should one of the parties breach the duty to negotiate (271–72).

So, how helpful is the legitimacy cultivation theory in shedding light on the Court's reasoning? As it turns out, the theory is rather dramatically substantiated in the highly visible context of the *Secession Reference*.

Duty to Negotiate

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

This was recently argued by Penney (2005) in his application of Bruce Ackerman's theory of constitutional moments to the *Secession Reference* case. Penney argues that as a part of a larger constitutional moment, the *Reference* "involved a 'switch in time' by the Supreme Court of Canada, wherein the Court began a reconstruction of doctrine to accommodate a

new constitutional commitment largely defined by political parties and popular forces" (2005: 220–21). Of particular interest here is Penney's empirical finding that a "definable consensus" regarding a commitment to negotiations had crystallized in the pre-decision environment of the *Secession Reference* (2005: 245).

The separatists insisted on engaging in negotiations with Canada following a successful referendum since the emergence of their movement. The key separatist policy ideas, such as the early "sovereignty association" notion and the more recent "economic and political partnership" concept, all assumed negotiations with Canada (Penney, 2005: 232). The question on the 1980 referendum, in fact, referred to negotiations three times, while Bill 1 (1995), the primary legislative vehicle through which the Quebec government sought to achieve separation, "expressly required negotiations prior to a declaration of sovereignty" (Monahan, 1999: 82).

While the federal government historically had not been open to negotiating with separatists, its position changed rather dramatically in the aftermath of the hard-fought 1995 referendum. Consider the statement made by federal Minister of Justice Allan Rock as he announced in September of 1996 that a reference dealing with the secession issue would be forwarded to the SCC:

> I firmly believe that we shall never reach the point of having to deal with the reality of Quebec's separation. But should such a day ever come, there is no doubt that it could only be achieved through negotiation and agreement. (Penney, 2005: 236–37)

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

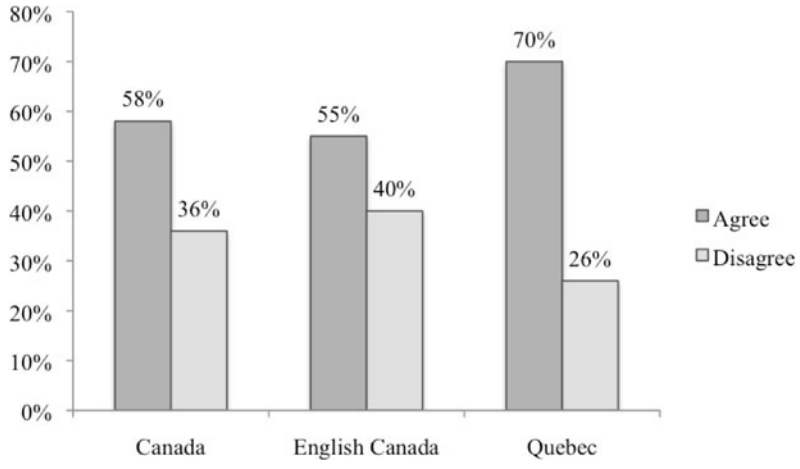
In addition to political actors, the Canadian public also preferred to see the issue resolved through negotiations. According to a poll released one day after the conclusion of the hearings, 67 per cent of Quebecers expressed the view that "if the Yes side wins a future referendum, Quebec should negotiate the terms of its departure from Canada before leaving" (Penney, 2005: 240). While no comparable national poll was conducted at the time, one can gauge the Canadian public's attitudes from an earlier Ipsos-Reid poll conducted in the aftermath of the 1995 referendum. According to that poll, the plurality of Canadians (39%) and a majority Quebecers (52%) preferred seeing the federal government "head to the bargaining table to try to get an agreement on changing the constitution that all provinces, including Quebec, can agree upon" (Penney, 2005: 239). While this poll result does not directly measure Canadian attitudes towards negotiating secession but perhaps attitudes towards negotiating a new constitutional deal, the findings do indicate that, "at least

at this stage ... Canadians contemplated negotiations as an essential tool in the broader project of dealing with the Quebec question" (Penney, 2005: 239). Therefore, there were explicit indications within the pre-decision political environment that centring the ruling on the concept of negotiations would probably not be seen as unpopular among the Canadian public. This conjecture is confirmed by the polls conducted in the aftermath of the decision which showed Canadians in fundamental agreement with the Court's formulation of the duty to negotiate. As Figure 1 shows, duty to negotiate garnered majority public support in Quebec (70%), in English Canada (55%), as well as in Canada as a whole (58%).

The Court's Non-Decisions

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

FIGURE 1
Public Reaction to the Duty to Negotiate



Source: Fletcher and Howe (2000: 44).

https://doi.org/10.1017/S0008423910000764 Published online by Cambridge University Press

What constitutes a clear referendum question has been a point of longstanding and bitter disagreement between the two sides. The federal government has often denounced the separatist strategies of formulating unclear questions, such as the ones used in previous two referendums premised on the idea of "economic association" and "economic and political partnership" between Quebec and Canada. One day after announcing the case to the SCC, for example, federal Justice Minister Rock stated that the question on any future referendum "will be separation or not, nothing in between, not partnership or any such thing" (Bryden, 1996). For their part, the separatists have consistently claimed the right to formulate referendum questions, stressing that previous questions were clear. In the immediate aftermath of the decision, the leader of the Bloc Québécois, for example, expressed strong satisfaction with the requirement for a clear question stating: "No problem with that—we had clear questions both times" (Wills, 1998).

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

The Court also chose not to decide the question of whether Aboriginal people would have a seat at the negotiating table. Aboriginal people of Quebec, in fact, were strong supporters of the federal government. Some of their representatives intervened in the case by challenging Quebec government's claims that the *uti possidetis* principle of international law would protect the territorial integrity of the province of Quebec in the event of secession (Bienvenu, 1999–2000: 39).

The legitimacy cultivation theory presented above sheds considerable light on why the SCC opted for silence on these controversial matters, even going as far as to rule itself out of any potential future role in determining these issues. While in the build-up to the case the key parties shared commitment to negotiations, a similar degree of consensus on these matters did not exist. Determining what a clear question looks like, or what a clear majority is, would have almost certainly generated a storm of criticism directed at the Court. As Young notes, while "the sovereignists were prepared for a full scale attack on the Court and were ready to undermine its authority," a similar barrage could have been

expected from English Canada had the Court returned a decision "favourable to some aspects of the sovereignist position—such as that the required majority was 50 per cent plus one" (1998: 15–16). Instead, the Court's silence on these matters ensured an overwhelmingly positive reaction, as governments of both Quebec and Canada claimed victory in the aftermath of the decision, while the media praised the "balanced" and "common sense" approach of the Court (Sauvageau et al., 2006: 116–21). Given the highly visible nature of the case, ensuring such positive reactions was essential for the cultivation of the Court's institutional legitimacy.

This analysis shows that outcomes the Court reached in the *Secession Reference* are in accordance with the four hypotheses specified above. First, the centrepiece of the decision conformed with the state of specific support having garnered majority support across the country. Second, by emphasizing areas of agreement and by remaining silent on more controversial matters, the judgment was carefully tailored so as to avoid clashes and entanglements with key political actors. Given the importance of institutional legitimacy for the effective functioning of the Court, and given the visibility of the case, the Court was prudent not to rule on more controversial aspects of the negotiation process, even though legal scholars stress that there were no legal reasons preventing the Court from "adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations" (Choudhry and Howse, 2000: 160).

Third, justices exhibited a strong proclivity towards moderation of judicial activism. The Court's inclination towards restraint is seen in the fact it chose to adjudicate those matters on which there was widespread agreement among the public and among political actors, and in such a way so as to reinforce the status quo, while the more controversial and contestable issues were largely left unaddressed. According to a Bouchard's statement made in a speech some six months *before* the decision was delivered, "the ultimate question of substance [on the issue of secession is] what happens if the negotiations fail? Who has the last word?" (Macpherson, 1998). While the Court confirmed Bouchard's intimation that negotiations would follow a successful referendum in Quebec, by remaining silent on the issues surrounding the onset, process and outcome of negotiations the Court has left largely unaddressed his "ultimate question of substance." This ensured that the decision had a highly limited effect on the status quo.

Finally, according to hypothesis 4, judges are expected to use and develop jurisprudence that is sensitive to the extant political environment. The Court's formulation of the duty to negotiate amounted precisely to such an act of politically sensitive jurisprudence that did not undermine but instead reflected and reinforced basic features of the status quo. As Penney notes (2005: 220), "key aspects of the constitutional doctrine introduced in the decision—in particular the much heralded 'duty

to negotiate'—were shaped more by political and popular forces than by the Court itself." While neither the federal government nor the Quebec sovereignists saw the full realization of their interests, neither of the two sides was defeated. An explanation for this lies in the fact that the duty to negotiate embodied the lowest common denominator of agreement that existed between the two sides in the pre-decision political environment; namely, that they were both willing to engage in negotiations following a successful referendum in Quebec. Doctrinal formulation of the duty to negotiate, therefore, amounted to an act of jurisprudential activism that reinforced rather than undermined the external status quo. Facing a highly charged political environment characterized by high stakes politics and intense disagreement (as well as some agreement) about how the process of secession should be played out, the Court's sensitivity to legitimacy cultivation ensured its doctrinal formulations, as well as the scope of the rules it identified, internalized much of the external political realities.

Legitimacy Cultivation beyond the *Secession Reference*

While the above discussion suggests that the strategic legitimacy cultivation was at work in the *Secession Reference* case, an obvious question to consider is how widespread such behaviour is at the SCC. A quick glance at a number of other high-profile cases shows that the *Secession Reference* case is in fact indicative of a much broader, astute, legitimacy-attentive behaviour on the part of SCC justices.

Judicial sensitivity to legitimacy considerations can be seen in the Court's handling of the *Marshall* (1999) case on Aboriginal rights in which the Supreme Court delivered two decisions (i.e. *Marshall 1* and *Marshall 2*) and effectively contradicted itself in what has been described as a "precipitous" manner (Barsh and Henderson, 1999: 15) in the space of two months. As Radmilovic (2010) shows, while in the context of low visibility the Court initially delivered a very activist decision affirming Aboriginal commercial fishing rights, once the decision attained much negative attention from the public, organized groups and the media, the Court revisited its judgment and adjusted its reasoning in line with predictions of the legitimacy cultivation theory. Furthermore, given that the changes between the two *Marshall* decisions were produced by the same set of judges dealing with the same case and the same factual record, other potential explanations of differences between the two decisions, such as those associated with legal or attitudinal factors, can be effectively ruled out (Radmilovic, 2010).

For other instances of legitimacy-attentive behaviour by the SCC one can turn to the work of Peter Russell (1985), for example, who has long

argued that the SCC is often willing to sacrifice proper interpretation of legal principles in order to reach "politically balanced" outcomes. One such occasion was the 1981 *Patriation Reference*, another landmark constitutional case which also happens to be the first SCC decision delivered on national television (Russell, 2004: 118). At the heart of this case was the issue of whether provincial consent was required before the federal government could request the UK Parliament to enact an amendment to the Canadian Constitution. As in the *Secession Reference*, the SCC delivered a decidedly prudent ruling which succeeded in avoiding political backlash by crafting a compromise position between federal government and dissenting provincial governments (see Knopff et al., 2009). The crux of the decision involved the assertion that as a matter of "black-letter law" no provincial consent was required, but that as a matter of constitutional convention there was a requirement of a "substantial degree" of provincial consent before the federal government can seek an amendment (Russell, 2004: 118–19). According to Russell, the Court spoke "with a forked tongue," gave "half a loaf to each side" and provided a "legal green light but a political red light" (2004: 118–19) to the Trudeau government bent on patriating the Constitution.

The 2001 *R. v. Sharpe* case is another highly visible and controversial case in which the SCC exhibited similar sensitivities. The case dealt with Criminal Code prohibitions of possession of child pornography. Lower courts in BC acquitted Sharpe which "unleashed sustained nationwide outrage" and ensured that by the time the case reached the SCC the media coverage was relentless (Sauvageau et al., 2006: 171, 175). In addition to enormous public scrutiny, the Court was also confronted with seven governments intervening in support of the challenged legislation (six provincial governments in addition to the federal government), while intervening organized groups also supported upholding the legislation with a ratio of ten to three. The federal government was in fact so mobilized around the issue that prior to the decision being released a spokesperson for Justice Minister Anne McLellan said the government "will act quickly to protect children" and is already working on legislative responses to whatever the Court may rule (MacCharles, 2001). The federal response, however, was not needed. The Court's decision unanimously upheld the prohibitions with six of the nine justices reading-down two "peripheral" sections of the law that "were not at issue in the case except as hypothetical examples" (Hogg, 2007: 43–10). According to Sauvageau and colleagues (2006: 180), the Court's decision amounted to "a salvage operation so as to avoid a declaration of constitutional invalidity." The outcome ensured that the decision garnered positive reviews from the media, that actors on both sides of the issue were able to claim some victory, and that the Court ultimately "emerged unscathed from this challenge to its symbolic authority" (182, 190).

These examples are not to suggest the SCC never delivers activist decisions in highly visible cases. As noted above, determinants of judicial behaviour are varied, and other considerations, such as ideological preferences or concerns about proper interpretations of the legal precedent, may compete with legitimacy considerations. What the analysis suggests, however, is that judicial activism in visible cases will be more likely when public opinion and important political actors are relatively supportive of such decisions. In visible cases in which such conditions do not exist, it will be harder for justices to deliver bold declarations of judicial activism.

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

In addition to public opinion, important political actors were also supportive of an activist outcome in *Vriend*. The federal government intervened on the side of activism while Ontario was the only province supporting deference. This constellation of public opinion and political actors was clearly receptive of an activist decision and one can wonder whether the Court would remain so unified and opt for such a bold assertion of power had the political context been different.

This is precisely the argument Manfredi develops in his comparison of *R. v. Vriend* and *R. v. Morgentaler* (1988) decisions. *Morgentaler* dealt with abortion provisions contained in the Canadian Criminal Code. Seven justices present in this case rendered four separate opinions ranging from upholding the status quo to formulating a new interpretation of liberty that included a right to reproductive freedom. The deciding plurality ultimately struck down the provisions on the grounds of administrative deficiencies, as the existing committee approval process for obtaining abortion was found to cause unjustified delays. The plurality found it also "neither necessary nor wise" to "explore the broadest implications" of lib-

erty in relation to the impugned abortion provisions (Manfredi, 2002: 148–49). Compared to *Vriend*, the decision's focus on administrative deficiencies amounted to a much weaker exercise of activism that imposed fewer constraints on legislative actors. According to Manfredi, less unity within the *Morgentaler* court and the lower level activism reached are in part explained by the state of specific support and the preferences of dominant actors. Specifically, in the build-up to the decision there was no evidence that majority of Canadians supported unrestricted access to abortion,[1] while the Court faced a conservative government inclined to support stricter regulation of abortion (Manfredi 2002: 160).

There are reasons to believe similar factors were at work even in the 2005 *Chaoulli v. Québec* case in which the Court also delivered an activist decision operating in a highly visible environment. At issue in *Chaoulli* was whether a denial of timely access to publicly funded health care and a denial of the right to purchase such care privately amounted to a breach of the Charter. The plaintiff emerged victorious from the case as the Court struck down Quebec's prohibition of private insurance. According to one interpretation, the decision amounted to "tearing down a central pillar of Canada's Medicare system" and it "dealt a serious blow to the legitimacy of the single-payer model of health insurance, and the values of collective responsibility and social equality that it seeks to uphold" (Petter, 2005: 120, 131).

A closer look at the decision, however, exposes a different reality. As in *Morgentaler*, the Court was once more deeply divided with seven justices delivering three opinions. The majority of justices (four to three) agreed that Quebec statutes prohibiting private insurance for services available in the public health system violate the *Quebec Charter of Human Rights and Freedoms*. This outcome, however, is applicable only in Quebec since the Court did not decide whether the prohibitions amount to a breach of the Canadian Charter. Justices were evenly split on this issue (three to three) with justice Deschamps restricting her opinion to the Quebec Charter.

That legitimacy considerations played upon the minds of justices in the *Chaoulli* case is evident from the reasoning of the three justices that found no breach of rights in the case. In their discussion of the principles of fundamental justice, which is an essential component of the s. 7 analysis of the Canadian Charter, these justices evoked the following quote from the 2003 *R. v. Malmo-Levine* decision:

> The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder *only*." ... In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be *a legal principle* about which there is *significant societal consensus*. (Chaoulli, 882–3)

The justices went on to uphold Quebec prohibitions in part because "the aim that health care of a reasonable standard within a reasonable time" is not a legal principle and because "there is no 'societal consensus' about what it means or how to achieve it" (Chaoulli, 883). Just how cautious these three justices were is also evident from their conclusion which, similarly to the *Morgentaler* plurality opinion, claims that under the circumstances "shifting the design of the health system to the courts is not a wise choice" (Chaoulli, 910).

Also, public opinion polls in the aftermath of the decision showed that even the majority decision invalidating Quebec prohibitions on the grounds of Quebec Charter was not fundamentally at odds with the popular opinion in both Quebec and Canada. Two polls in Quebec showed that 54 per cent and 62 per cent of respondents were supportive of the majority's conclusions (Gaudreault-Desbiens and Panaccio, 2005: 46), while 55 per cent of Canadians agreed "with the Supreme Court decision that they should have the right to buy private health insurance if the public system cannot provide medical services in a timely fashion" (Caulfield and Ries, 2005: 428). Newspaper editorial boards were similarly supportive of the Court's ruling with *Globe and Mail* (2005) and *National Post* (2005) both expressing agreement with the result reached by the Court alongside the Vancouver's *Province* (2005), Montreal's *Gazette* (2005), *Calgary Herald* (2005), *Edmonton Journal* (2005), and *Windsor Star* (2005).[2]

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

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

The Court was, therefore, highly restrained in its disposition of the *Chaoulli* case and it exhibited apparent sensitivities to the external political environment as suggested by the legitimacy cultivation theory. One half of the bench expressed great reservations about delivering a change in the status quo regarding such a controversial and visible policy dilemma as privatization of Canadian health care. These justices evoked concerns over "the legitimacy of judicial review of state action," linked this concern to the lack of "societal consensus," and stated that judicial incursion into the policy area would not be "a wise choice." While the other half of the bench was prepared to deliver an activist outcome, it went out

of its way to ensure that the application of the ruling was restricted to the province of Quebec which cushioned the political impact of the decision on other members of the federation. For one legal scholar "the Court divided strategically in a way that opened the guarantee's frontiers up but left its future uncertain at the same time" (Cameron, 2006: 140). One newspaper editorial commented that "the Court deftly limited itself to Quebec's jurisdiction" (*Victoria Times Colonist*, 2005).

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

While it is admittedly difficult in a few paragraphs to give justice to complex decisions delivered in complex political environments, the discussion shows that strategic sensitivity to legitimacy cultivation that justices exhibited in the *Secession Reference* case is emblematic of wider patterns of behaviour of the SCC. One further piece of evidence for this claim could be seen in the growing utilization of suspended declarations of invalidity which blunt the impact that activist decisions have on the policy status quo and tend to pacify Court's interactions with governmental actors. As Kelly's analysis of the SCC's decision making under the Charter shows, suspended declarations of invalidity have jumped from 6 per cent during the first decade of Charter review to 33 per cent during the second decade (2005: 175). According to Kelly, this signifies greater policy restraint on the part of the Court as policy responses to activist decisions are increasingly designed and implemented by the political branch of government (2005: 175–76).[3]

Conclusion

The above analysis shows that justices of the SCC often engage in strategic behaviour for the sake of cultivating their institutional legitimacy. Such behaviour is clearly evident in the *Secession Reference* decision

which is arguably one of the most politically significant judgments in Canadian constitutional history. Between pronouncing that Quebec does not have a unilateral right to secede, that the rest of Canada has a duty to negotiate, that what constitutes a clear question and a clear majority are non-justiciable matters, and that much of the other controversial issues "defy" legal analysis (*Secession Reference*, 1998: 271), the Court went a long way towards meeting the legitimacy challenge it faced in the *Secession Reference* and strengthening its position as an unbiased arbiter of Quebec–Canada relations. Consider the views of Justice Louis LeBel who was appointed to the SCC soon after the case:

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

The analysis also shows that the *Secession Reference* case is indicative of a broader pattern of legitimacy-attentive behaviour on the part of the SCC. There are a number of avenues for future research to test the Court's strategic sensitivity to factors operating in the external, political environment. One involves employing quantitative analyses of judicial decision making that test the extent to which patterns of case disposition are reflective of contrasting constellations of external factors, such as the preferences of important political actors or media coverage (see, for example, Helmke, 2005; Staton, 2006). Another method is to analyze two or more areas of jurisprudence where the SCC tends to confront similar legal issues but in different political environments (for example, Garrett et al., 1998). While these avenues are proliferating in the comparative literature on judicial politics, their relative dormancy in Canada comes at a cost to our understanding of the Court.

The importance of legitimacy cultivation compels courts to keep a very attentive eye on political and social realities from which cases arise. Consequently, what are ostensibly political and external factors serve to importantly delineate the boundaries of constitutional protection, and understanding judicial decision making necessitates taking close accounts of the external context and how it affects judicial disposition of individual cases. Extending the strategic approach to the decision making of the SCC can shed important lights onto these processes.

Notes

1 Manfredi (2002: 160) cites three polls in this regard which show that public opinion on the issue of unrestricted access to abortion hovered within the range of 16 to 28 per cent in the build-up and immediate aftermath of the decision.

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

3 In the *Chaoulli* case, for example, the Court suspended its judgment for a period of 12 months upon the request of the Quebec government.

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