

# **Legislation and Court Decisions: Dissonance and Harmony The Role of the Department of Justice\***

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\* The French version of this presentation is available on CIAJ's site at [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca) under Publications.

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Before I begin, I would like to thank Ruth Sullivan for inviting me to give this presentation. There are many in the Department of Justice who would be well placed to talk to this matter, and I am very pleased to be here.

I have been asked to describe the role of the Department of Justice in monitoring court decisions and integrating them into legislation.

I will begin by describing “who” at Justice does this, and then give an overview of our activity at three different points of the court process—when the case is before the court, when we are waiting for the judgement, and after the court renders its decision.

## **Creating the Music, Choosing the Tune**

Legislation is like a symphony—there must be harmony among its parts if it is going to sound good. Like players in an orchestra who pull the music together, there are many groups who play the notes that make legislation work. The Department of Justice is one part of the orchestra that contributes to creating harmonious legislation.

### **I. CREATING THE MUSIC, CHOOSING THE TUNE**

When I began writing this, I was trying to visualize the place of the Department of Justice in the “dialogue” metaphor. Somehow, the dialogue image didn’t seem to work, but the image of an orchestra playing together captured it nicely.

Like musicians in an orchestra who pull the music together, there are many groups who play the notes that make legislation work. Parliamentarians, the public, the courts, and the bureaucracy are some of the most familiar.

Legislation might be working just fine, until different notes creep in that make the rest of the music sound off-key. The source of these changes might lie in evolving public values that make current laws seem inappropriate. This is currently happening with respect to the debate on decriminalizing marijuana. Or, an unexpected event will cry out for a legislative response, such as we experienced with the terrorist attacks of September 11, 2001. Other times, the dissonance might originate in a court decision that finds government legislation to be invalid: the focus of our discussion today. Whatever the source, these new notes are here to stay, and the orchestra has to adjust if legislative harmony is to prevail. The players must complement each other's role.

So, what is the role of the Department of Justice in this legislative orchestra? Who are the players and how do they monitor court decisions and help integrate the new notes into legislation?



## II. WHO ARE THE JUSTICE PLAYERS?

There are four main groups of musicians in the Justice section of the orchestra: litigators, legal counsel for Justice policy, legal advisors, and legal services units who advise other government departments. I will give a quick overview of each:

### *Litigators*

The department's more public face—litigators are out there defending government legislation before the courts. They will often be the first ones to know of the legal challenge, will identify possible policy implications, and bring in other groups of the Department.

### *Legal Counsel for Justice Policy*

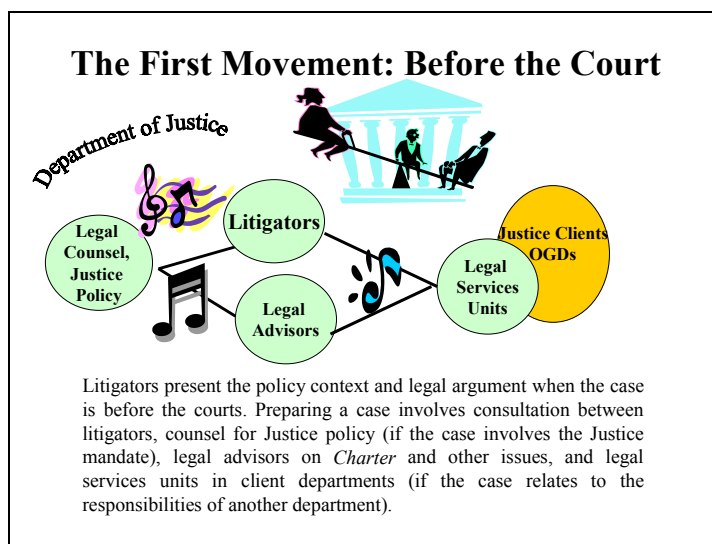
The Justice Department has policy responsibility for legislation relating to criminal law, family law, and public law. When court cases affect legislation in these areas, counsel in Justice policy will take the lead on developing a legislative response.

### *Legal Advisors*

Legal advisors have primary responsibility for assisting in the legal analysis of constitutional and *Charter* issues. When policy is being developed in the Department of Justice or other federal departments, these lawyers will be consulted along the way to ensure that the policy is consistent with the *Charter* and other constitutional principles.

### *Legal Services Unit*

Other government departments are clients of the Department of Justice, and each has a legal services unit staffed by Justice lawyers. In court cases affecting the policy responsibilities of these departments, legal services lawyers work with litigators, analyse and explain the implications of court decisions to their clients, help develop appropriate legislative responses, bring *Charter* and other constitutional issues to the attention of their client, and work closely with the legislative drafters in crafting the legislation.

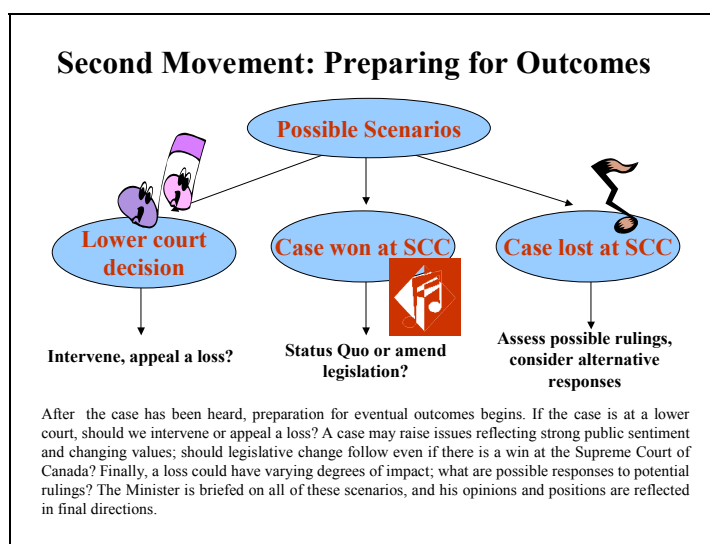


### III. THE FIRST MOVEMENT: BEFORE THE COURT

That's who we are. Now how do we monitor the court decision?

A court case is a clear sign that some of the music notes might be changing. It is also the opportunity for litigators to convince the court that the tune shouldn't change. Litigators present the policy context and legal argument to the court to explain the virtues of the present legislation—why the policy was developed, its legal validity, and the implications of change.

This involves consultation between litigators, counsel for Justice policy (if the case involves the Justice mandate), legal advisors on *Charter* and other constitutional issues, and legal services units in client departments (if the case relates to the responsibilities of another department). Together they work to present the government's position on the case.



#### IV. SECOND MOVEMENT: PREPARING FOR OUTCOMES

How do we wait out the time between final argument before the court, and the decision? By trying to anticipate the decision the court will hand down, and mapping out possible responses to various outcomes.

If the case is in a lower court and the federal government is not a party, preliminary advice is prepared on the value of joining as an intervener if the case is appealed. If the federal government is a party, advice will focus on whether or not to appeal if it loses the case.

An appeal is not always a foregone conclusion. An assessment will be undertaken to establish the likelihood of winning on appeal and to gauge the public position on the issue. Sometimes the better course of action will be to amend the legislation rather than to appeal the case.

When the case is at the Supreme Court of Canada, we have two stark scenarios—what if we win, what if we lose?

A win for the government does not always mean the status quo. A case may have raised issues reflecting strong public sentiment and changing values, and the government may feel compelled to respond to them. Preliminary consideration is given to options beyond maintaining the status quo.

An example of a case where a “win” did not necessarily mean maintaining the status quo was *Thibaudeau v. Canada*.<sup>1</sup> This case challenged provisions of the *Income Tax Act*<sup>2</sup> that required a separated or divorced custodial parent to include child support payments as income, and permitted the parent paying to deduct the amount. The Supreme Court of Canada found that these provisions did not offend the *Charter* and upheld the legislation.

However, the case itself reflected a prevalent rejection of this tax policy, and the “winning” case that upheld the legislation was, in fact, the catalyst for change. Rather than maintain the status quo, the government investigated the issues further, and in 1997 amended the Act such that the custodial spouse was no longer required to include child support payments as part of his or her income.

Finally, there is the eventuality of a loss. It is important that the government be as ready as possible to fill any gap or uncertainty in the law that a court decision might precipitate. The court’s decision could vary from a complete striking down of the legislation to more minor adjustments, and preliminary analysis focuses on all possible rulings the court could make and corresponding policy responses that could be further pursued.

The recent case of *R. v. Sharpe*<sup>3</sup> is a good illustration of this exercise. The provision respecting the possession of child pornography in the *Criminal Code*<sup>4</sup> was challenged on the basis that it infringed the guarantee of freedom of expression in section 2(b) of the *Charter*. There was very strong public opinion on the issue of child pornography, and the government had to be ready to respond to the court decision. Justice players had anticipated the possibility of the Court either striking down the legislation, striking down part of the legislation, or a reading-in, and prepared possible policy responses for each scenario.

In the end, the Supreme Court of Canada found that the law was justified under section 1 of the *Charter*, except for two categories of material: material created and held by the accused alone, for exclusive personal use, and visual recordings created by or depicting the accused, for exclusive use of the accused, that did not depict unlawful sexual

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<sup>1</sup> [1995] 2 S.C.R. 627.

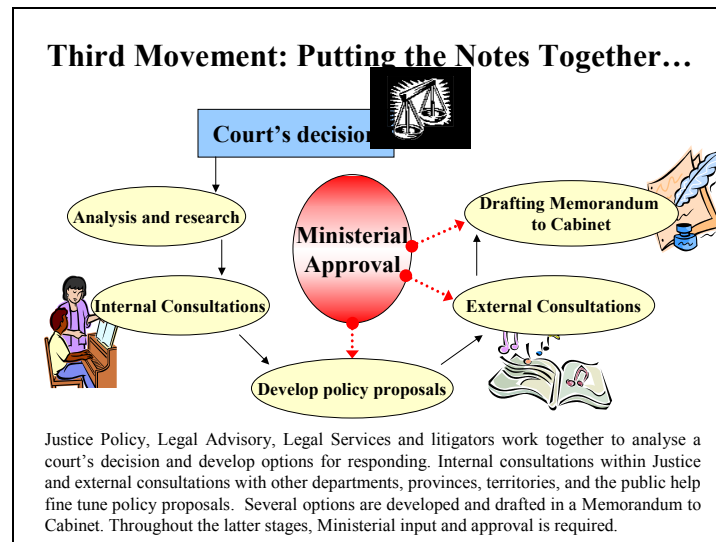
<sup>2</sup> R.S.C. 1985 (5th Supp.), c. 1, ss. 56(1)(b) and 60(b).

<sup>3</sup> [2001] 1 S.C.R. 45.

<sup>4</sup> R.S.C. 1985, c. C-46, s. 163.1(4).



activity. The Court chose not to strike down the legislation, and read into the law an exclusion of the two categories. Consequently, this did not require an immediate policy response from the government, though continuing public sentiment aroused by the case has kept child pornography reform on its agenda.



## V. THE THIRD MOVEMENT: PUTTING THE NOTES TOGETHER

So, quite a bit of anticipatory work takes place prior to the release of a court decision. What happens when we have the reality of a ruling that finds the law unconstitutional?

In responding to such a court decision, the ultimate aim is to address the concerns raised by the Court in a way that will meet the objectives of the government.

A good example of this is the 1997 case of *R. v. Feeney*.<sup>5</sup> In order to protect the privacy rights of Canadians under the *Charter*, the Supreme Court of Canada read a provision into the *Criminal Code* requiring the police to obtain a warrant before entering a private dwelling to arrest or apprehend someone. This overturned existing case law that did not require a warrant if the arresting officer had reasonable grounds to arrest someone and if, prior to entering, indicated his or her presence, authority and

<sup>5</sup> [1997] 2 S.C.R. 13.

reason for entry. The ruling caused concern among police and victims' organizations that the delay required to obtain a warrant might put public safety at risk in certain circumstances.

The ultimate amendments required peace officers to obtain a warrant authorizing entry before entering a private home to arrest or apprehend someone, and provided clear and simple procedures to obtain such a warrant, including obtaining a warrant by telephone or any other means of telecommunication.

Furthermore, police were allowed to enter a private dwelling without a warrant in certain "exigent" or pressing circumstances, which included situations where entry was necessary to prevent bodily harm or death or to prevent the loss or destruction of evidence. This legislative response was described by the Minister of Justice as striking "a reasonable balance between the powers available to police to protect our safety and the privacy rights of Canadians."

What stands out is that within only six months, the Department of Justice was able to come up with a legislative solution that both met the government's objectives and the court's *Charter* requirements.

#### *Analysis and Research*

But how do we get to that legislative solution? The first step is an analysis of the decision. What are the underlying objectives of the Court's ruling? Has it created areas of uncertainty in the law or gaps that must be addressed quickly? How does it affect the government's objectives? What options does it leave open for a response? Academic articles, approaches of other jurisdictions and public opinion on the issue are studied, and groups and individuals who should be consulted are identified. In many cases, this will be a more in-depth continuation of work that was undertaken in anticipation of the Court's decision.

#### *Internal Consultations*

Internal consultations among sections of the lead department take place to discuss various options and recommendations for legislative reform, and to develop a consultation plan. Officials at Privy Council Office are kept advised, and if the policy is going to have financial implications for the Government, the Treasury Board Secretariat and the Department of Finance are brought in at an early stage. There is a very practical side to legislation that must be taken into account.

### *Develop Policy Proposals*

Several draft policy proposals are developed and the strengths and weaknesses assessed. The Minister is advised of the issues and possible responses, and recommended options are suggested. These options will be modified at his or her instigation. It is critical that the Minister is part of the process at this point, as any further external consultation can not be undertaken without ministerial approval.

### *External Consultations*

External consultations include discussions with other federal departments, provincial and territorial governments, stakeholders who have a particular interest or expertise in the matter, and the Canadian public at large. They are undertaken to ensure that the options developed will be harmonious, not just with the court's decision, but with broader elements of Canadian society.

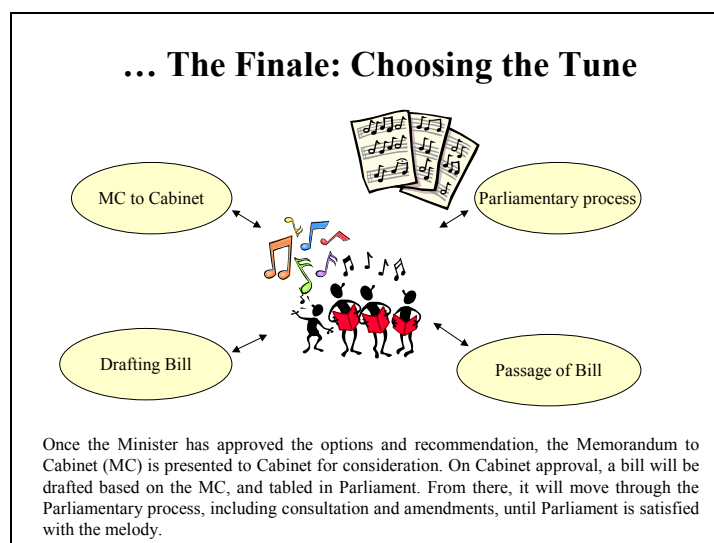
Discussions among federal government departments focus on the impact of the policy options of their mandates. Meetings with officials of the provincial and territorial government take place to examine proposals that are likely to affect the regulatory activities of these governments, or the services that they provide. Cooperation and support at this level is very important. Public consultations may take the form of cross-country consultations with interested individuals or groups, a request for comments on a public discussion paper, or meetings with particular groups that have expertise on the issue.

The insight obtained through these consultations is integrated into the policy development work, and options for reform may be revised in light of them. The revised options are presented to the Minister for his or her opinion and input, with the objective of getting the go-ahead to draft a Memorandum to Cabinet.

### *Drafting a Memorandum to Cabinet*

A Memorandum to Cabinet (MC) is the tool used by ministers to seek their colleagues' support for a proposed course of action. It describes the policy context of the issue, sets out recommended options, outlines the factors taken into account when arriving at them, and includes an assessment of the strengths and weaknesses of each. When an MC involves new legislation, legislative drafting instructions will also be annexed.

Drafting an MC is an art that requires integrating knowledge and input from many sources into a cohesive whole. While a few key people may hold the pen, no notes are written down that haven't been discussed and agreed upon by policy advisors, legal advisors, legislative drafters, communications officers, other experts in the field, the minister of the lead department, and ministers of other departments that may have an interest in the policy.



## THE FINALE: CHOOSING THE TUNE

### *Cabinet Committee*

Once drafted and finalized, the Memorandum to Cabinet is signed by the sponsoring minister, submitted to the Privy Council Office, and placed on the agenda of a Cabinet Committee. It is the music book from which Cabinet and then Parliament will choose the legislative tune.

The Cabinet Committee is composed of ten to twenty Cabinet ministers, who discuss and debate the issue set out in the MC. The decision of the Cabinet Committee is referred to full Cabinet for ratification. Once a consensus has been reached by the ministers, a Record of Decision is issued and the matter is referred back to the lead department for action.

*Drafting the Bill*

Cabinet has chosen a legislative tune, and now the legislative drafters ensure that the music is properly written. They work very closely with legal advisors on the *Charter*, counsel for legal policy, and legal services and policy officers of other departments involved. When the final draft of the bill has been prepared, it is sent back to Cabinet for approval so that it can be introduced in Parliament.

*Parliamentary Process and Passage of Bill*

The Bill, once tabled, will move through the parliamentary process, often being amended along the way. Once both Houses of Parliament are satisfied with the sound of the legislation, the Bill will be passed and a new symphony will be ready for the orchestra to play.

