

Emmett Macfarlane

Governing from the Bench
The Supreme Court of Canada
and the Judicial Role



UBCPress · Vancouver · Toronto

Sample Material © 2012 UBC Press



Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

A list of titles in the series appears at the end of the book.

Contents

Acknowledgments / ix

Introduction / 1

- 1** Studying Judicial Behaviour / 15
- 2** The Evolution of the Court and Its Justices / 39
- 3** Setting the Stage: Exploring Court Processes Leading to Decisions / 70
- 4** The Decision: Collegiality, Conflict, and Consensus / 101
- 5** A Question of Competence: Examining Judicial Policy Making / 133
- 6** The Court in Government and Society: Dialogue, Public Opinion, and the Media / 160

Conclusion / 182

Notes / 191

Bibliography / 221

Index / 235

Acknowledgments

This book is the culmination of research and thinking conducted over many years and was influenced, in various ways, by the contributions of many people. An earlier form of this project took the shape of my doctoral dissertation, which was completed at Queen's University under the supervision of Janet Hiebert. I owe an incalculable debt of gratitude to Janet, whose friendship, mentorship, and support has helped ensure whatever success I have had in the first stages of my career. Janet's own work on the *Canadian Charter of Rights and Freedoms* and the institutional relationships surrounding judicial review serves as a great inspiration, particularly for the way in which it engages with important questions with nuance and sophistication. Furthermore, as a supervisor, she was everything a graduate student could hope for.

I am especially indebted to Keith Banting and Scott Matthews for serving as members of my dissertation committee and for their support throughout the last several years. Being able to count on their support has been immensely rewarding, and I have learned much from both of them. I would also like to thank Christopher Manfredi and Mark Walters for serving as examiners on my committee and for their helpful comments.

One of the most important contributions this book makes is a result of the twenty-eight not-for-attribution research interviews conducted with current and former justices, former law clerks, and other staff members of the Supreme Court of Canada. I would like to thank those who participated for their willingness to do so and for being so generous with their time. I would also like to thank the anonymous reviewers of this book. Elements of previously published articles in the journals *Canadian Public Administration* (2009) and *Supreme Court Law Review* (2010) appear in this book, and I am grateful for the use of this material and to the anonymous reviewers of those articles. Finally, I would like to thank Megan Brand and Randy Schmidt of UBC Press for so expertly guiding me through the publication

process. They made what could have been an intimidating process an extremely smooth one.

I have benefited from the advice and wisdom of several teachers and mentors without whom this book may never have seen the light of day. My thanks to Ian Brodie, Laura Janara, and Bob Young for getting an undergraduate – who spent many more hours invested in student journalism than his coursework – interested in political science. Thanks to Kathy Brock, Grant Amyot, and Jonathan Rose for furthering this interest during my time as a graduate student. I would also like to acknowledge Dennis Baker, Matt Hennigar, Grant Huscroft, Jim Kelly, Rainer Knopff, Peter McCormick, and Jeremy Webber for their support in various endeavours or for their fruitful discussions over the past few years. Finally, I would especially like to thank Mark Tushnet for his advice and support during my time as a post-doctoral fellow at Harvard University. The institutional support of Harvard Law School and the Weatherhead Center for International Affairs and the financial support of the Social Sciences and Humanities Research Council are also acknowledged.

I was fortunate to meet many friends and graduate school colleagues while working on this project. My thanks to Mira Bachvarova, Siobhan Byrne, Jordan DeCoste, Megan Gaucher, Holly Grinvalds, Nick Hardy, Rachael Johnstone, Laura Kelly, Hayden King, Simon Kiss, Robert Lawson, Rémi Léger, Allison McCulloch, Marcel Nelson, Sean O'Meara, Dimitri Panagos, Lucia Salazar, Dave Thomas, Erin Tolley, and George Wootten. A special note of thanks to Jeremy Clarke, my comrade-in-arms in studying the *Charter* at Queen's, for many great discussions and debates.

This book would not have been possible without my parents, Don and Eileen Macfarlane, and my sister Aingeal. I am grateful for being able to rely on an encouraging and supportive family.

I am also thankful for the love and support of the most wonderful partner in the world, Anna Drake. Having Anna in my life makes good days great and bad days bearable. I could not have completed this book without her.

Governing from the Bench

Introduction

The Supreme Court of Canada is one of Canada's most important – and least understood – governing institutions. This book describes, analyzes, and explains how it works. In doing so, it considers the dominant explanations of judicial behaviour in political science and legal scholarship. Although the book challenges fundamental methodological aspects of these leading approaches, it aims to integrate their key theoretical insights. Through a focus on how the Supreme Court of Canada's justices conceive of their role, this study explores the institution's internal environment, the different stages of its decision-making process, and the rules, conventions, and norms that shape and constrain the justices' behaviour. At the same time, the book situates the Court in its broader governmental and societal context by examining the institution's role as it relates to the elected branches of government, the media, and the public.

Created in 1875, the Court has spent most of its history in relative obscurity. Only in the last thirty years has the institution garnered regular media coverage or sustained attention by political scientists. Much of this interest was generated by the advent of the *Canadian Charter of Rights and Freedoms* in 1982, which transformed the institution's role and thrust its work into the national spotlight.¹ The Court has evolved from a largely legal, dispute-resolving body into a policy-making institution whose decisions have far-reaching implications for virtually all areas of Canada's political, social, cultural, and economic life. As the country's final court of appeal, the Supreme Court of Canada is the authority for all areas of law. As the chief arbiter of Canadian federalism disputes, it has answered questions relating to the patriation of the Constitution from Great Britain and the constitutionality of the unilateral secession of Quebec from the rest of Canada. Under the *Charter*, the Court makes decisions affecting vital government programs such as health care and welfare, controversial social policies such as abortion and assisted suicide, the rights of women, gays, and lesbians, and the criminally accused.

The nature and extent of the Court's involvement in public policy matters has been the subject of extensive criticism and debate. Conservative critics lament rulings that implicate social policies such as abortion or expand the rights of gays and lesbians,² while commentators on the left criticize the Court for pro-business outcomes or decisions that prioritize individual rights over group ones.³ These detractors share the view that judicial decisions are merely discretionary choices rooted in legalistic camouflage. They question the legitimacy of unelected judges overruling the legislative choices of the public's representatives. In many respects, such criticism mirrors American debates about the supposed undemocratic nature of judicial review, something Alexander Bickel famously termed the "counter-majoritarian difficulty."⁴ The Canadian Constitution allows courts to invalidate legislation that is inconsistent with the *Charter's* provisions, but critics maintain that the Court has taken an unduly "activist" attitude in using its power.⁵ They claim that rather than taking on a restrained role that reflects Canada's shift from parliamentary sovereignty to constitutional supremacy, the Court has used its powers of judicial review to expand its policy-making authority, effectively transforming Canada into a system of judicial supremacy.⁶ Defenders of the Court have responded, arguing that judges are constrained by the law and guided by factors such as the text of the *Charter* and precedent.⁷ More recently, supporters of the Court's role under the *Charter* have refuted the notion that judicial rulings reign supreme by contending that the *Charter* promotes an inter-branch "dialogue" that allows legislatures to respond to the Court's decisions.⁸ The normative questions provoking these debates have spurred other scholars to explore more fully the respective institutional roles surrounding constitutional interpretation and the enforcement of rights.⁹

The Supreme Court of Canada's importance can be measured not only by its rulings' effects on the country's law and the immediate policy issues that come before it but also by the influence its decisions have on governance, political culture, and public discourse. A fundamental aspect of the "judicialization of politics,"¹⁰ which is enacted by the *Charter* in Canada – in which the Court is a central actor – is not only the transfer of power to the courts but also, in Peter Russell's words, "a general transformation of the nature of political life."¹¹ The decision to entrench the *Charter* has had significant consequences. Ran Hirschl argues that the *Charter* has encouraged legislatures to abrogate political responsibility for the resolution of contentious national questions. He contends that the transformation of controversial and complex political issues into legal questions deprives most of the citizenry of the opportunity to address these issues through public deliberation and other forms of participation.¹²

The shift toward constitutionalism and its emphasis on rights has transformed the legislative process itself. The rights culture shapes not only

legislative responses to Court rulings but also legislative initiatives from their inception. The “vetting” of legislation by governmental lawyers for consistency with the *Charter* is now a central component of the legislative process.¹³ As Janet Hiebert notes, the Supreme Court of Canada has a powerful influence on this process. First, the Court’s two-stage approach to *Charter* analysis, in which it first examines whether a particular right has been infringed and then investigates whether the restriction is reasonable, has meant that bureaucratic risk assessment occurs largely within a consideration of “reasonable limits.” Second, because the Court has not shied away from exercising its power to invalidate laws under the *Charter*, its jurisprudence has encouraged governments to be more vigilant in their internal scrutiny of legislative development. While the development of a legislative rights-conscious culture might be viewed in a positive light, the potential downside is the risk that policy objectives are confined “to those which legal advisers can confidently predict legal ‘success’” – that is, those that will pass muster before the Court – which, in turn, “may lead to risk-aversion that distorts policy objectives and undermines Parliament’s ability to pursue legislative objectives effectively.”¹⁴

In addition to its impact on governance and the legislative process, the Court’s public prominence also affects political discourse. As the central player in determining the meaning of the *Charter*, courts are the primary avenues for individuals and groups pursuing rights claims. As a result, judicial pronouncements on *Charter* rights, particularly those put forward by the Supreme Court of Canada, play a prominent role in shaping discourse around rights. The positive and negative consequences of a rights-infused political culture and public discourse are the subject of considerable scrutiny. On the one hand, scholars hail the empowering effects that rights review has on citizens, particularly for historically disadvantaged groups and individuals.¹⁵ On the other hand, some view as problematic the capacity for rights claiming to harm political discourse by rendering it absolutist, divisive, and uncompromising. Writing in the American context, Mary Ann Glendon contends that “rights talk” subjugates other considerations, values, and policy initiatives to the unbending demands of those invoking a right, which is hardly a straightforward proposition when there is no consensus of what values, interests, or needs should be classified as rights.¹⁶ A number of critics have echoed Glendon’s concerns in the Canadian context.¹⁷ Empirical study of the impact that the Court’s rulings have had on political discourse is limited, but it generally supports these assertions.¹⁸

Despite the institution’s significance for Canadian society, and the many direct and indirect ways it influences the country’s governance, less is known about how the Supreme Court of Canada actually works than one might think. There are surprisingly few studies that focus specifically on the Court’s decision-making processes and the behaviour of its justices. This fact is

noteworthy because a better understanding of how the Court actually works would not only clarify the impact the institution has on specific policies or on the broader governance of the country, but it would also inform normative debates about the Court's role and how the other branches of government should engage the *Charter* or respond to the Court's rulings.

The historic lack of empirical attention on the Court cannot be overstated. As recently as 1987, Russell, arguably the country's foremost scholar of constitutional politics, wrote:

Judicial institutions are not regarded as an important item in the agenda of political science. The role of the judiciary is perceived as being essentially technical and non-political: it is there to apply the laws made by the political branches of government. Indeed, the most important normative expectations of judges and courts would seem to be a thorough-going impartiality requiring total independence of the political process.¹⁹

As the level of interest in research on judicial politics has mushroomed over the last two to three decades, this view has changed considerably. As the vast scholarship addressing questions of the Court's activism and the role of the various branches in dealing with *Charter* issues makes clear, the Supreme Court of Canada has come to be viewed as a pivotal governing actor. Yet, despite this recognition, empirical investigation of the institution itself has been comparatively sparse. Studies relating to the Court's operation and decision-making processes were for some time limited to single chapters or sections of monographs on the broader judicial system.²⁰ Other studies have explored broader trends in the Court's jurisprudence by presenting statistical information on judicial voting patterns or by examining the written reasons.²¹

More recent studies have drawn explicitly on the theoretical and methodological approaches of the American judicial behaviour literature, examining individual voting patterns based on the justices' ideologies or other characteristics.²² The behaviouralist "attitudinal model" regards the ideological policy preferences of the individual judge as the main determinant in decision making. Attitudinal scholars seek to measure the justices' attitudes and, taking account of case facts, examine voting records to determine how consistent the justices' decisions are with these attitudes. Like attitudinalists, adherents of the "strategic model" or rational choice understanding of judicial decision making generally consider judges' policy preferences to be the main consideration in decisions, but they believe that judges must make strategic calculations about their choices given the institutional rules of the game and the preferences of other actors and branches of government. To enact the decisions most consonant with their preferences, strategic judges

must make compromises to garner support from their colleagues on the bench and to avoid a backlash from legislatures.

Canadian judicial politics scholarship, like many of the other subfields in Canadian political science, has for some time been relatively descriptive and atheoretical.²³ Given that the long tradition of judicial review in the United States has resulted in extensive study on the workings of American courts and judicial behaviour, it makes sense that Canadian scholars looking for more theoretically rich explanations would look to the leading theories and methodologies south of the border. In fact, much of the new Canadian scholarship is actually the application of American approaches to the Canadian Court by American scholars. As explored in Chapter 1, these approaches have much to offer – and much to warn against – for the empirical study of courts in the Canadian context.

Approach of the Book

This book proceeds from the premise that the Supreme Court of Canada is a political institution and that its justices are important political actors. This is not to equate the institution with elected legislatures or its justices with politicians. Indeed, one of the main objectives of this study is to examine the multitude of ways in which the judges of the Court are bound by their conceptions of their appropriate role and that of the institution in which they work. Nevertheless, the analysis that follows supports the argument put forward by many political scientists that judicial policy making is not an accidental by-product of the Court's adjudicative function. Rather, it is a result of the justices' determination that one set of legal rules is more socially beneficial than another.²⁴

This book's approach is consistent with historical institutionalism, a perspective that requires an analysis of organizational and institutional configurations, with specific attention to long-term processes and the "critical junctures" that help shape them. As Paul Pierson and Theda Skocpol write, "[r]esearching important issues in this way, historical institutionalists make visible and understandable the overarching contexts and interacting processes that shape and reshape states, politics, and public policymaking."²⁵ Drawing on historical institutionalism and American political development scholarship, a recent study by Miriam Smith examines the evolution of lesbian and gay rights and policy differences in Canada and the United States. Smith writes that "historical institutionalists start with state structures, with the field of political institutions and the legacies of previous policies, to explain divergent policy outcomes." Critical to the approach is that the state is treated "as an independent player" in the analysis.²⁶

Where Smith's work – and much historical institutionalist work generally – centres on a comparative analysis of policy outcomes, this study focuses

on understanding and explaining the work of a single institution. Nevertheless, the logic of analysis remains the same. The approach is premised on the belief that studies of the Supreme Court of Canada that focus solely on broad statistical trends in jurisprudence or those that seek to explain judicial decision making solely by analyzing the votes of individual justices are limited in their ability to further our understanding of the Court because they treat the institution as a “black box.” As Chapter 1 explores, the behavioural and rational choice approaches described earlier lead to incomplete accounts of decision making that almost always treat the justices’ personal policy preferences as their primary, if not only, motivation. Such studies stress the “outputs” of the black box (judicial votes) and draw questionable inferences about the “inputs” (judicial ideologies). Aside from the strategic model’s consideration of the effect some of the Court’s procedural rules have on judicial choices, these approaches generally fail to devote attention to the institutional environment or the broader structural forces that have implications for the Court’s decisions. As Smith contends, in contrast to the attitudinal and strategic approaches of judicial behaviour, “historical institutionalism ... allows us to embed judicial behaviour within the larger structure of political institutions.”²⁷

The aim of this book is to open the black box. Even before the *Charter* was created, Paul Weiler cautioned against seeing the Court as just a group of nine people because “this picture leaves out one important dimension to the social reality of the [C]ourt. The Supreme Court of Canada is an *institution*, something more than the immediate preferences and actions of its members at any one time.”²⁸ Only by describing and analyzing the Court’s decision-making processes and gaining an appreciation of how the justices conceive of their proper function both within the Court and in the context of the broader political system can we truly understand how the institution works. This approach does not discount the importance of judicial policy preferences. Rather, the objective is to place the justices’ behaviour in the full context necessary for an accurate appreciation of the Court’s work and its impact on the rest of the governing system.

This is not an easy task. Some commentators seem to dismiss the prospect of exploring the inner workings of the institution altogether. Heather MacIvor notes that the secret nature of decision making “makes it impossible to gauge the relative influence of legal principle and personal policy preference on policy outcomes.”²⁹ David Muttart writes that “[w]hatever the decision-making processes a justice employs, they are almost entirely beyond direct study inasmuch as they occur almost exclusively within the private confines of the judicial cranium.”³⁰ Despite changes during the *Charter* era to make the Court more transparent with regard to the media and the public, in several important ways the institution is less open than its American counterpart.³¹ Where journalistic and other insider accounts of the Supreme Court

of the United States have become commonplace,³² Canada has not had the same tradition.³³ Based on interviews with the justices and law clerks, these accounts have caused considerable controversy within the American legal profession by revealing bargaining, lobbying, and outright political manoeuvring on the part of the US court's justices. The Canadian justices have no doubt been trepidatious at the prospect of similar books being written about their institution.

Another contributing factor to the lack of studies exploring the Supreme Court of Canada's internal operation stems from the historic failure of the Court to preserve its records. Few justices have donated private papers to the national archives, and those that did so prior to the *Charter* failed to include substantive documentation about judgments. *Charter*-era justices have been more careful to preserve their records, but the documents remain unavailable to the public for twenty-five years following their donation to the archives.³⁴ As a result, the assertions of those individuals skeptical of scholarly investigation into the Court's inner workings are likely true to the extent that they refer to direct observation or scientific precision.

The approach of this study, however, is grounded in an understanding of decision making at the Court as inherently complex, with a myriad of motivating factors and a host of structural conditions that both influence, and are influenced by, the justices' behaviour. Making sense of this complexity requires the historical institutionalist approach adopted in this book. It emphasizes the centrality of the justices' role conceptions in order to gauge the relative impact of factors such as ideology, strategic behaviour, and institutionally derived norms and values at different stages of the Court's decision-making process. The book does not aim to develop a new "model" of judicial behaviour or even refute the leading theories of judicial behaviour. Instead, my more modest aim is to develop a new perspective from which to consider how the Supreme Court of Canada and its justices operate. The goal is to demonstrate that judicial role conceptions can shed light on when and how particular factors – including those factors that are central to the other approaches – influence the justices' decisions while attending to the full complexity of the Court's processes.

In examining the role conceptions of Supreme Court of Canada justices, this book draws on several different sources of data. Twenty-eight not-for-attribution interviews were conducted from July 2007 to August 2008, including five with current and former justices of the Court, twenty-one with former law clerks, and two with senior staff members. It is worth noting that this is the only existing study of the Court that gains insights from interviews with a substantial number of former law clerks. The law clerks interviewed served on the Court from 1979 to 2005, for thirteen different judges, providing snapshots of the Court's working environment throughout its modern history.³⁵ The Court's law clerks are said to be "sworn to lifelong silence"

about their year-long tenure with the institution.³⁶ The stringency of these confidentiality agreements and the great concern the institution has in enforcing them came to light in June 2009 when the Court's executive legal officer issued a warning to all former clerks that participation in a survey sent to them by an American political scientist would place them in breach of their agreements. In an e-mail to the clerks, the Court maintained that confidentiality obligations "are not limited to information about cases, but also extend to internal processes of each Justice's chambers."³⁷ As a result, until or unless the Court reassesses questions of access, this book is the first and last to take advantage of access to so many former law clerks.³⁸ Most of the interviews with former law clerks were from thirty minutes to an hour in length. The interviews with the justices and other staff members ranged from one hour to two-and-a-half hours.

Few empirical studies benefit from interviews with the justices.³⁹ A recent book by Donald Songer incorporates research interviews with former justices into a broad, quantitative analysis of trends in the Supreme Court of Canada's decision making.⁴⁰ He examines the type of litigants at the Court, which participants tend to win or lose, and how the Court's policy making (that is, the type of cases the Court hears) has evolved. Similarly to a recent study applying the attitudinal model to the Court, Songer also engages in analyses of the justices' behaviour based on their ideologies and personal attributes.⁴¹ He finds these ideological factors are important but that the Court is politically moderate. Importantly, he also explains how the justices' views on Court process may help explain certain elements of the institution's behaviour, such as an ability to achieve unanimous outcomes.

This book takes such analysis further by focusing explicitly on such judicial role conceptions. Where Songer's largely quantitative analysis sheds light on broad trends in the Court's modern history, this study provides an in-depth qualitative examination of the judicial role. This approach allows for an explanation of judicial behaviour that not only identifies the various factors that influence the Court's decisions but also accounts for when and under what conditions certain variables come to dominate a particular part of the process. It also allows for the identification and analysis of variables that are not conducive to quantitative measurement. Understanding Court decision making by way of judicial role conceptions requires placing a focus on the *ideas* and *norms* that shape a justice's approach to her work. This focus permits insight into behaviour related to, but distinct from, personal values, such as collegiality, consensual norms, and personality.

The broad conception of the judicial role developed throughout this book has three components. The first relates to the justices' views of the proper role of the *institution* itself. These include a consideration of how the Supreme Court of Canada ought to address the political and policy-laden questions

it often confronts, particularly under the *Charter*. Issues relating to the law of justiciability, the involvement of third party interveners in cases, and the type of evidence justices are willing to consider in the course of making decisions are all implicated by these normative perceptions of the Court's proper role.

The second component of the judicial role pertains to how the justices view their *individual* role within the institution. Although this perspective includes addressing relatively simple notions sometimes considered in the extant literature – such as whether the judges consider themselves “law interpreters” or “law makers” or even how much they may allow their personal values to intrude on decision making – it extends much further. A host of considerations play into the justices' individual roles when making decisions, including the extent to which they strive to achieve consensus (or unanimity) with their colleagues, the style or approach they take to collaboration, and the leadership style of the chief justice. Examining these individual role perceptions can demonstrate how role theory is also useful for identifying which stages of the decision-making process and under what conditions sites of activity for attitudinal or strategic behaviour are likely to emerge. The process of deliberation and negotiation on the Court is closely intertwined with norms of collegiality and rules of convention. This book will show that where attitudinal or strategic behaviour materializes, it usually coincides with those areas where consensus regarding such norms or conventions breaks down.

The third component of the judicial role involves a consideration of both the Court and the individual justice in relation to broader government and society. As is explored in Chapter 1, many studies of judicial behaviour emphasize the degree to which justices must consider the preferences and actions of the other branches of government. Often overlooked is judicial concern for the quality of the jurisprudence, media and public criticism tied to the legitimacy of the Court itself, personal reputation, esteem of the legal and wider community, and the relationship of the Court with the other branches of government. A role-centric approach shows how justices' normative understandings of the appropriate place of legislatures in making policy choices shapes not only the degree of deference they give to those institutional roles but also the reasons for, and the type of, action they choose to take. Further, by examining judicial considerations of the Court's institutional capacity or competence for dealing with complex matters of public policy, this book sheds light on understanding how the justices perceive of the limits or boundaries of judicial review. In Chapter 5, I examine the Court's *Charter* cases that implicate health policy in order to contrast these normative views with how questions of institutional capacity are ultimately addressed in the Court's jurisprudence. This section of the book finds that

when the justices fail to explicitly consider the question of institutional roles in their reasoning, opportunities are created for them to impose their personal policy preferences on case outcomes on an issue-by-issue basis.

The major argument advanced in adopting this approach is that not only do the judges' policy preferences, values, or ideologies matter but also that judicial behaviour is governed by what the judges think about how they *ought* to approach their work. To obtain a sufficient understanding of these normative conceptions, the book incorporates, in addition to interview data, an analysis of the justices' speeches and writings, many of which provide insight into their approach to adjudication or their perceptions of their proper role. Other secondary sources provide insight into the operation of the Court. Particularly illuminating among these documents are several judicial biographies, the authors of which were given rare access to the private papers of the justices.⁴² Although such biographies have been criticized as hagiographical, my analysis seeks to place those works as well as the interviews and judicial speeches into a broader context.⁴³

Finally, any analysis of the Court's work is incomplete without an examination of its primary product – the case decisions. The most ardent behavioural scholars have dismissed written reasons as mere rationalizations of the justices' preferred policy outcomes.⁴⁴ Yet, the institution's legitimacy rests on the justifications for the outcomes it determines. As Russell writes,

[t]he judicial decision is apt to find its strongest basis of public support in its capacity to persuade those whose rights and interests it affects that it is the correct decision – indeed, the legally required decision. In this sense the reasons which judges give for their decisions, although such reasons may be quite different from the psychological process through which they actually reach their conclusion, are, in our society, the prime basis of the judicial decision's moral authority.⁴⁵

The written decisions also have a genuine impact on the citizenry as they carve out the scope of particular rights, issues, or policies at stake and set the guidelines for lower courts to settle the same issues in similar cases. Moreover, as a product of a distinctly collegial process, the reasons do much more than merely establish winners or losers. The internal procedures of the Court influence the character and quality of the final judgments.⁴⁶ Even if the language of reasons distorts or hides political or value-based motivations, they cannot be seen as mere proxies of individual votes because they are a product of deliberation and negotiation among a group of actors. Indeed, it would make little sense for the justices to expend so much of their time producing careful judgments if that is all they were. At a minimum, even if reasons are nothing more than sites of activity for the justices' attitudinally

based or strategically minded behaviour, no study of the Court would be complete absent some inquiry into the content of these decisions. Nevertheless, this book is not intended to be a comprehensive analysis of legal doctrine or even of *Charter* jurisprudence. As such, it emphasizes decision-making processes rather than wide-ranging case analysis. Cases are used as illustrations of the Court's approach to particular institutional policies or those that reflect judicial considerations of the Court's appropriate role in matters of substantive policy under the *Charter*. The selection of cases hinged on their applicability to the specific themes examined throughout this book and follow a consideration of their relevance as reflected in existing political science and legal scholarship.

Emphasizing the *Charter*

Although *Charter* cases represent only one part of the Supreme Court of Canada's total caseload, much of this analysis focuses on *Charter* jurisprudence as well as on that document's impact on the institution's role. There are several reasons for this focus. First, the Court itself has determined that "*Charter* values" permeate decisions in all areas of the law.⁴⁷ Second, the arrival of the *Charter* is often described in revolutionary terms, not only in having transformed the judicial and legal system but also in having a significant impact on Canadian political culture.⁴⁸ As Allan Hutchinson writes, "not only has the Charter taken discrete issues out of the political forums of democratic debate and into the legal arenas of judicial pronouncement, but the whole ethos of rights-talk has saturated Canadian politics and society."⁴⁹ Thus, the *Charter* embodies the most prominent instrument of the "judicialization of politics" in Canada.

The Court's justices have themselves acknowledged the *Charter's* significance for the judicial role. Several years after the first *Charter* cases reached the Court, former Chief Justice Antonio Lamer noted: "I've been a judge for 20 years. And all my professional life I've been used to not sitting in judgment of laws. And I've been chastised whenever I did. Suddenly we're told that every law can be measured to the Charter."⁵⁰ Prior to her appointment to the Supreme Court of Canada, current Chief Justice Beverley McLachlin wrote:

The Charter means that judges are called upon to answer questions they never dreamed they would have to face, such as the right to abortion, the right to work after sixty-five and the right to practice one's profession as one wishes. To make matters more difficult, the Charter has deprived judges of their traditional methods of answering the questions that are put before them. Rules of construction, *stare decisis* and the doctrine of precedent are of limited value when one is not only confronted by new issues, but required to make fundamental value choices in deciding them.⁵¹

In a very real sense, particularly among members of the Canadian legal community, this understanding of the subjective or value-laden nature of judicial decision making was not fully appreciated until after the *Charter* was created.⁵² In fact, Lamer CJ and McLachlin CJ ascribe it directly to the *Charter* itself.

The Supreme Court of Canada has always had the power of judicial review in its adjudication of federalism disputes. Yet, as Robert Sharpe and Kent Roach point out, issues under the *Charter* “are not only more open-ended and apparently less constrained by strict legal principles, but also of greater significance to the average citizen than those relating to federalism.”⁵³ Further, although the 1960 statutory *Canadian Bill of Rights* gave the Court the authority to review federal legislation inconsistent with its provisions, the success of pre-*Charter* rights litigation was extremely limited.⁵⁴

Outline of the Book

The book consists of six chapters. The three leading explanations of judicial decision making – the legal, attitudinal, and strategic approaches – are examined in Chapter 1. Each approach is marked by particular assumptions about the law. The most fundamental divide in this respect is, for the most part, between legal scholars and political scientists. The former tend to view law as being autonomous from politics and consider judges as generally impartial or objective arbiters, while the latter generally see law and legal interpretation as inherently political. Within political science, however, there is a considerable range of views as to what motivates judges, the extent to which legal rules and processes are considered influential, and the nature of judging more broadly. On their own, each of these approaches to explaining judicial behaviour is somewhat narrow and in some instances suffers from serious methodological problems. The chapter concludes by exploring how attention to judicial role conceptions can build bridges between the various understandings of judicial behaviour and account for the myriad of factors that come into play at the Court.

Chapter 2 provides a brief overview of the Supreme Court of Canada’s history and its emergence from a relatively obscure component of government to one of the country’s most prominent policy-making institutions. It explores this evolution by examining key trends and changes in the justices’ conception of their role and the role of the Court. The Court has been altered not only by external political forces (the entrenchment of the *Charter*, for example) but also by decisions made by the justices themselves. Among these decisions are the loosening of the rules of justiciability (the set of legal doctrines that govern whether a matter is suitable for the courts to decide), the increased role of third party interveners, and an expansion of the type of evidence considered in settling cases. These changes have made the Court a distinctly more policy-driven and political institution. Chapter 2 then

examines how the contemporary judge has also evolved. It explores how the justices conceive of their role, the law, and impartiality. These views are contrasted with how judicial scholars conceive of ideology. I argue that integrating an analysis of judicial role conceptions allows for a more robust and realistic consideration of the role ideology plays in the justices' decisions. Finally, certain factors have become prominent in the composition of the modern Court, particularly given gender diversity and the appointment of judges with academic backgrounds. The chapter explores how these factors might shape or interact with a justice's personal ideology and how they influence a justice's conception of her role more generally.

The book then provides a picture of the contemporary Court by detailing the role of the chief justice, law clerks, and executive legal officer in Chapter 3. It explores how pressures relating to institutional efficiency impact the Court's decisions and serve as a fundamental constraint on judicial discretion, something rarely explored in the scholarly literature. The third chapter then examines the "front end" of the Court's decision-making process. It analyzes changes in rules and institutional procedure governing the leave-to-appeal process (how the justices choose which cases to hear). It explores the factors that shape the "inputs" for the Court's decisions, including what the justices consider important when it comes to the written arguments put forward by the parties to the case (known as factums) and the work of the law clerks and the support they offer. Finally, this chapter examines the oral hearing and assesses its significance for the final outcome of cases. Placed in this institutional context, the chapter assesses how these various stages of decision making on the Court might be influenced by the justices' role perceptions as opposed to their ideological preferences and how and when certain aspects of these processes might permit strategic behaviour. It concludes that these processes are dictated largely by norms of collegiality, consensus, and legal rules.

The process of deliberation and collaboration that generate the Court's decisions is examined in Chapter 4. The analysis highlights the extent to which judicial conceptions of collegiality – to what extent a justice should work individually or in concert with colleagues, how to utilize law clerks, and what the proper limits of negotiation are – vary significantly among individual justices. These differences explain how the level of consensus on the Court can vary over time as well as the different degrees to which individual justices might pursue attitudinal or strategic behaviour. The chapter provides an in-depth, original analysis of the post-hearing conference negotiations, the drafting of reasons, the circulation of drafts and comments, and the acceptance or refusal of revisions and how these culminate to form the final reasons. It also examines the nature of one of the most controversial aspects of the collegial process – lobbying between justices. The chapter concludes with an exploration of the impact the goal of consensus – and,

more specifically, of unanimity – has on the quality and meaning of the final judgments. Where other studies examine the development of unanimous cases on the Court, this chapter explores the effect a goal of unanimity has on decisions, a process virtually ignored in the extant scholarly literature.

Where the fourth chapter explores the justices' consideration of their role within the Court, Chapter 5 examines the justices' views on the role of the Court as a policy-making institution. Central to these considerations is their view on whether the Court is equipped to deal with the moral and policy-laden issues often entailed in judicial review of the *Charter*. The chapter explores how the justices' considerations of their appropriate role in relation to the elected branches of government become particularly pertinent when they must consider the Court's capacity or competence to deal with complex social policy matters. Specifically, it examines the Court's *Charter* cases involving health policy, finding that in practice the justices give surprisingly little consideration to the capacity issue, which in turn gives them wide latitude to decide such cases according to their personal policy preferences.

Chapter 6 explores the Court in relation to the rest of government and society. First, it examines the justices' views on the most prominent account of the inter-institutional relationship involved in *Charter* review – one of a “dialogue” between the Court and the legislatures. Turning to the Court's relationship with broader society, Chapter 6 assesses how justices respond to public opinion and what role it plays in decisions. Finally, it looks at the Court's evolving relationship with the media.

The concluding chapter explores the implications that the book's findings have for the dominant explanations of judicial decision making. It finds that attention to the justices' role perceptions permits a broader and deeper understanding of the sources of the Court's decisions. Where much existing empirical scholarship attempts to identify trends and patterns associated with ideological voting on the part of justices, this book identifies how and in what context such voting may be more or less likely to occur. The conclusion also explores the implications the book's findings have for normative debates about the appointments process, the response legislatures should take to Court rulings, and the role of the Court more broadly.

© UBC Press 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright, www.accesscopyright.ca.

21 20 19 18 17 16 15 14 13 5 4 3 2 1

Printed in Canada on FSC-certified ancient-forest-free paper
(100% post-consumer recycled) that is processed chlorine- and acid-free.

Library and Archives Canada Cataloguing in Publication

Macfarlane, Emmett

Governing from the bench [electronic resource] : the Supreme Court of Canada and the judicial role / Emmett Macfarlane.

(Law and society, ISSN 1925-0215)

Includes bibliographical references and index.

Electronic monograph.

Issued also in print format.

ISBN 978-0-7748-2352-4 (PDF); ISBN 978-0-7748-2353-1 (EPUB)

1. Canada. Supreme Court – Decision making. 2. Judicial process – Canada.
3. Law – Political aspects. I. Title. II. Series: Law and society series (Vancouver, B.C.: Online)

KE8259.M33 2013

347.71'035

C2012-906951-5

KF8764.ZA2M33 2013

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca